

The Australian Financial Complaints Authority – An Introductory Guide for Complainant’s Lawyers

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Introduction

An Australian Financial Complaints Authority (“AFCA”) Complaint offers very significant advantages over Court litigation. The following is an overview of how AFCA operates.

What is AFCA?

AFCA is a company limited by guarantee. It operates an external dispute resolution scheme under a framework created by the Corporations Act.

What sort of businesses are within AFCA’s jurisdiction?

Businesses that are within AFCA’s jurisdiction are known as Financial Firms. Financial Firms include insurance companies, banks and other types of credit providers, superannuation funds, mortgage brokers, financial planners, stockbrokers and operators of managed investment schemes. AFCA deals with complaints about Financial Services that have been provided by a Financial Firm. Financial Services is a very wide concept.

Any dispute about a product or service that has been provided by a Financial Firm is potentially within AFCA’s jurisdiction.

What is the source of AFCA’s procedures?

AFCA operates in accordance with its Rules. The Rules form a tripartite contract between the Complainant, AFCA and the Financial Firm.

The Rules are updated periodically. The version of the Rules that applies to a Complaint is the version in force on the day that the Complaint is made not the version that was in force on the day that the cause of action arose.

AFCA publishes Operational Guidelines that sets out detailed information how its Rules operate.

What is the value of Complaints that AFCA can consider?

The value of Complaints that AFCA can consider are set out in the Rules. The maximum value of a Complaint varies in accordance with the type of financial service or product at issue. AFCA’s jurisdiction is

capped in 2 ways. First, there is a cap on the maximum value of compensation that can be awarded and second there is a cap on the value of the Complaint. For example, with respect to a Complaint about poor financial advice, AFCA can award a maximum of \$542,500 (if AFCA finds that a loss of \$800K was suffered the maximum that it can award is \$542,500) and it can consider a complaint with a maximum value of \$1.085M (if the total value of the complaint is in excess of this amount, AFCA will not consider the complaint).

No caps apply to Complaints about guarantees over the guarantor’s principal place of residence.

AFCA can exclude a Complaint made by a wholesale client (as this concept is defined in the Corporations Act) but will often accept complaints made by wholesale clients. Jurisdiction is a very important issue as Financial Firms will argue that a complaint is outside of AFCA’s jurisdiction and AFCA also closely scrutinizes Complaints to determine if they are within jurisdiction.

AFCA does not permit the splitting or abandoning of claims so as to bring a Complaint within its jurisdiction or to increase the amount that it might otherwise award by way of compensation. For example:

- A person complains about 5 instances of poor financial advice where the total amount lost was \$1M. AFCA would, most likely, treat this as forming one complaint for the purposes of its Rules, so the maximum amount that it would award would be \$542,500.
- A person complains about 5 instances of poor financial advice where the total amount lost was \$1.2M. The person makes a complaint about 4 instances so as to bring the complaint within AFCA’s jurisdiction (the value of the Complaint must be less than \$1.085M). AFCA will take the view that the true value of the Complaint is in excess of \$1.085M and exclude it.

What time limits apply to AFCA complaints?

The time in which a Complaint can be made varies according to the service and product at issue. Some very limited time limits do apply (for example superannuation and some types of insurance related disputes) and it is, of course, important to confirm the time limit

that applies to a particular client.

With respect to many types of Complaints a time limit of 6 years applies from when the Complainant first became aware (or should reasonably have become aware) that they suffered the loss. This will probably be a point in time after the cause of action arose so Complaints can be made well after the time that a matter would be statute barred if proceedings were commenced in a Court.

AFCA can extend the time limit that applies to some types of Complaints. It is most likely to do so where the Complainant is under some form of disability.

In many cases, a Complainant will have made a complaint directly to the Financial Firm. In response, the Complainant will have received a written response which is known as an Internal Dispute Resolution Response (or an IDR Response). An AFCA Complaint must be made within 2 years of receipt of the IDR Response (but this period can be extended).

Is AFCA like a Court?

AFCA is not a Court. It is an external complaint resolution scheme and its operating philosophy and processes are fundamentally different to that which are adopted by a Court. The key issue being that AFCA exists to resolve a complaint made by a Complainant against a Financial Firm not to, as a Court does, decide disputes that have arisen between parties in accordance with the law. The fundamental difference between AFCA and a Court is summed up in AFCA Rules A14.2 and A14.3 which are as follows:

A14.2 When determining ... a complaint, the AFCA Decision Maker must do what the AFCA Decision Maker considers is fair in all the circumstances having regard to:

- a) legal principles,
- b) applicable industry codes or guidance,
- c) good industry practice and
- d) previous relevant Determinations of AFCA...

A14.3 An AFCA Decision Maker is not bound by the rules of evidence or previous AFCA.... Decisions.

What initial processes does AFCA use to resolve Complaints?

AFCA’s initial Complaint resolution processes involve the making of requests for documents to be provided and for written submissions to be made about issues that underlie the Complaint. AFCA does not receive oral evidence. Occasionally, AFCA will request that specified persons provide a written statement. These written statements are often used as a means to make submission and argument and to otherwise to set out extraordinary evidence about what a person can claim to remember about banal events that occurred many years previously. AFCA rarely places much weight on these statements. Instead, it is almost entirely focussed on documentary evidence and it is therefore very important to give close attention to what is disclosed by the available documents.

The Complaint will initially be handled by a case manager. Case managers do not tend to have legal qualifications and they vary significantly in their level of experience and expertise. The case manager will consider what has been provided by the parties and prepare a document known as a Preliminary Assessment. This document purportedly sets out how AFCA is likely to decide the Complaint. If both parties accept the Preliminary Assessment, the Complaint will be resolved in accordance with that document. Otherwise, the matter will proceed to the Determination Stage.

The Preliminary Assessment needs to be assessed on its merits (that is, it is not necessarily a reliable indicator as to how the matter will be decided at the Determination Stage). If the reasoning that underlies the Preliminary Assessment is flawed there is a significant possibility that a different decision will be made at the Determination Stage.

What processes are adopted at the Determination Stage?

The Determination Stage is managed by an Ombudsman. Ombudsmen are often legally qualified and they have significant levels of experience and expertise. The Ombudsman will sometimes require the parties to provide further documents and written submissions and will then prepare a Determination (sometimes the Determination is prepared by a Panel of decision makers).

The Determination sets out AFCA’s final decision with respect to a Complaint. The outcome of the Determination is binding on the Financial Firm. The Financial Firm has no general right of appeal and can only have an AFCA Determination reviewed on narrow grounds (for example, that there has been a denial of procedural fairness). This type of litigation is rarely successful.

The Complainant can choose to accept or reject the Determination. If the Determination is rejected, the Complainant can commence proceedings in a Court so as to obtain

Compensation from the Financial Firm.

What processes does AFCA use to cause Complaints to settle?

Prior to the Preliminary Assessment being issued, AFCA will usually conduct a mediation conference. The conference is held by telephone. AFCA mediation conferences are entirely unlike a Court conducted mediation conference in that the case manager will attend and take notes as to what is said that can be relied upon by the case manager in preparing the Preliminary Assessment and by the Ombudsman in preparing the Determination. In addition, the case manager and/or the mediator will question the parties with a view to obtaining concessions about factual matters and will express opinions, in a very definite way, about how the matter will be resolved by AFCA.

Outside of a mediation conference it is not uncommon for the parties to be separately contacted by the case manager or an Ombudsman who will make statements about the way that AFCA will resolve a Complaint. This is done with a view to encouraging the parties to reach a settlement. Case managers and Ombudsmen will also actively facilitate settlement negotiations outside of a mediation conference.

How does AFCA calculate loss?

The calculation of loss can often be difficult as it requires an assessment of the effect of future hypothetical events. AFCA has a specialist unit that calculates loss in accordance with its internal procedures. Parties will rarely be able persuade AFCA to calculate loss on a different basis.

AFCA does not calculate loss on a cash basis. A simple example illustrates the point. On 1 January 2020 a client receives poor financial advice. On 1 January 2021 the client’s investment is lost. The client’s loss is not the amount that was invested. The client’s loss is the difference between the client’s actual position and what the client’s position would have been had the funds been properly invested from 1 January 2020 (the date when the investment was made). This is calculated using a proxy as to how the funds should have been invested. Depending upon the number of years at issue and how the proxy would have performed there can be a substantial divergence between the cash loss and the loss that is calculated by AFCA.

Where should I start to properly formulate an AFCA Complaint and do I need expert evidence?

All Financial Services are provided in a highly regulated environment. The starting point in formulating a Complaint is the source of that regulation (for example the ASIC Act and the Corporations Act with respect to financial

advice). The next lawyer of guidance can be found in ASIC Regulatory Guides, in fact sheets that are published by AFCA as to the principles that it applies in dealing with particular types of Complaints and in industry codes such as the Banking Code of Practice.

AFCA publishes all of its Determinations on its website. Because of deficiencies in the search function, it can be very difficult to locate relevant Determinations. Determinations do not operate as a precedent but they can, on occasions, provide some guidance as to how AFCA may decide a particular matter.

Expert evidence can be helpful in formulating a Complaint but it is not necessary. AFCA will calculate loss itself and it will form its own view about the merits of a matter (including consulting with external experts as required).

Is it better to commence Proceedings in a Court or make a Complaint to AFCA?

In a technical sense, a Court is a much better venue to litigate matters than AFCA in that the Court’s processes (such as discovery, cross examination and the receipt of oral submissions) better elucidate the true facts and the matter will be decided by a Judge (who is better able to consider legal issues and weight competing evidence).

In practice however, AFCA is a much better venue and in my view where it is available an AFCA Complaint should always be preferred over commencing proceedings in a Court (even if the amount at issue is substantially over the maximum amount that can be awarded by AFCA). The reason for this lies in costs, which has 2 aspects.

The first aspect is that AFCA is a much cheaper jurisdiction in which to operate than a Court. The amount of work required to prosecute a Complaint at AFCA is far less than is required to prosecute the same claim in a Court and there are no disbursements such as filing fees. In my experience, the maximum that it could conceivably cost to take a Complaint to a Determination is \$60,000 and the majority of Complaints can be resolved for far less. This relative certainty about costs gives clients a much clearer understanding of their overall level of risk and facilitates the entering into of conditional or hybrid fee arrangements which can confer significant benefits upon clients.

The second aspect is that AFCA is a no cost jurisdiction. A Complainant can never be responsible for any costs incurred by the Financial Firm. The effect of this being that worst possible outcome for a Complainant is that it will recover nothing and have to pay its own costs. This, of course, is in stark contrast to the disastrous outcomes that an unsuccessful plaintiff faces in Court proceedings. ■