

HUGGINS LEGAL

LITIGATION AND REGULATORY RISK UPDATE

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AFCA COMPLAINTS - ADVERSE PUBLICITY AND REPUTATIONAL DAMAGE

Welcome to the fifth edition of Litigation and Regulatory Risk Update – a newsletter for AFSL holders about developments in litigation risk (both in a Court and at AFCA) and regulatory risk.

1. **What has happened?**

As at 1 October 2019, AFCA publishes (on its website) the name of the Firm that is the subject of an AFCA Determination.

As at 7 November 2019, AFCA publishes information about complaints it has received (this is done by way of the AFCA Data Cube) including identifying Firms where 4 or more complaints have been made against the Firm in a financial year.

2. **What do I need to know about this?**

When AFCA first commenced operating, it was impossible to know if a Determination had been made against a particular Firm. Similarly, it was also impossible to ascertain the total number of complaints that had been made against a Firm. Since late 2019 this information has been available from AFCA's website.

The publication of this type of information by AFCA raises significant reputational risk, litigation risk (the risk of more AFCA complaints being made) and increased regulatory risk for Firms. Some scenarios as to the type of risk issues that could arise are as follows:

- (1) A journalist reviews the information that is available from the AFCA Data Cube and sees that there has been an unusual number of a complaints made against a particular Firm (in the case of smaller Firms it is obvious if an unusual number of complaints have been made). The journalist then searches the AFCA Determinations database by the Firm's name and sees that several Determinations have been issued by AFCA against the Firm. The journalist publishes an article to the effect that there is a systemic issue within the Firm. These types of articles can be very damaging in that:
 - (a) they are damaging to a Firm's reputation both generally and particularly because they appear in search engine results so their adverse effect can last for many years and they can be seen by many more people than those that saw the original article;
 - (b) they can alert disgruntled clients to the possibility that they should be making an AFCA complaint against the Firm; and
 - (c) they can motivate ASIC to take regulatory action against the Firm.
- (2) A journalist regularly monitors the Determinations that are available on the Determinations data base. The journalist sees a Determination of interest and publishes an article about what has happened. This type of article can have the same types of effects as those which are set out above.
- (3) A lawyer is acting for a client in relation to an AFCA complaint against a Firm. The lawyer searches the Determinations data base and discovers that AFCA has already issued a Determination about similar complaint concerning the same Firm. The Determination provides the lawyer with information that is very useful in prosecuting the complaint (for example advance notice of all of the arguments that will be made by Firm as to why the complaint should not be upheld).
- (4) A lawyer monitors the Determinations data base and uses Determinations to draft content for the lawyer's website. The material on the website is damaging to the reputation of the Firm that is referred to in the Determination but it might also cause other complaints to be made against the Firm.

I expect that the situation with respect to AFCA Determinations will eventually become like what it is today with respect to Court Judgments. There are many journalists who monitor Court Judgments and write articles about their contents. Over time, AFCA

Determinations will be the subject of many more news articles (particularly in financial services related publications) than they are today.

3. **What should I do?**

For some businesses, the risk of adverse publicity (even if they believe that they can win the case) is a significant driver as to why they choose to settle Court litigation rather than proceed to a trial. Over time, this issue (the risk of adverse publicity and reputational damage) will become more important (and a matter which must therefore be considered) in deciding whether an AFCA complaint should be settled rather than proceeding to the Determination stage.

If you would like to discuss any of the issues raised in this Update please, of course, don't hesitate to contact me.

Regards,

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HUGGINS LEGAL

CAPABILITY STATEMENT

Huggins Legal has expertise in the following areas:

1. AFCA complaints concerning financial planning, stockbroking, finance broking, irresponsible lending, insurance and superannuation.
2. Financial services related litigation including disputes with advisers and disputes concerning financial services related commercial transactions.
3. Management of issues concerning adviser misconduct including breach reporting.
4. Management of issues concerning client complaints including providing advice about internal dispute resolution, breach reporting and remediation.
5. ASIC investigations.
6. AFS licensing.
7. Financial services related compliance including issues concerning the ASIC Market Integrity Rules and drafting/reviewing SOAs, FSGs and PDS'.
8. Financial services related commercial work.
9. AML/TF advice and reviews.

Huggins Legal acts for clients across Australia.