

## Article Information

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## AFCA: Paving the way for complaints in the financial system

**The Australian Financial Complaints Authority (AFCA) is a new external dispute resolution (EDR) scheme that has been formed to deal with complaints from consumers against an AFCA member. AFCA replaces the existing EDR schemes, being the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT).**

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Access to [AFCA](#) will be free to consumers and it has the following characteristics:

- it is a single forum for EDR services;
- it allows higher monetary limits on the amounts that may be awarded by AFCA for complaints other than superannuation complaints;
- it provides greater accountability to users, including the appointment by the AFCA Board of an independent assessor whose purpose will be to consider whether AFCA provides an appropriate standard of service; and
- it is governed by the AFCA Complaint Resolution Scheme Rules (**Rules**) which are the terms of reference outlining the rules and processes applicable to all complaints submitted to AFCA, to support its dispute resolution functions and legislation relating to superannuation disputes.

AFCA is an independent non-profit body and will receive funding from its members within the financial services industry. The AFCA Board comprises of industry and consumer directors and the inaugural chairperson is the Hon. Helen Coonan (a former Australian Government Cabinet Minister for Communications, Minister for Revenue and Assistant Treasurer).

In order for AFCA to consider a complaint there are [specific requirements](#) which include that the complaint:

- must be lodged by an 'Eligible Person'[\[1\]](#) against an AFCA member;
- must arise from a customer relationship between the Eligible Person and the AFCA member or other circumstance that brings the complaint within AFCA's jurisdiction;
- must have a sufficient connection with Australia;
- must be submitted within the required time limits; and
- if it relates to a Traditional Trustee Company Service (as defined in the *Corporations Act 2001* (Cth)), the complainant must obtain consent from all Other Affected Parties.[\[2\]](#)

The Rules also set out categories of complaints which AFCA must exclude, unless all parties to the complaint and AFCA agree to AFCA considering the complaint.

### ***Impact on consumers and small businesses***

AFCA's ability to deal with disputes out of court in a single forum is designed to benefit consumers and small businesses. With the expansion of the definition of small businesses to include businesses with fewer than 100 employees (as opposed to 20 employees under the existing EDR schemes), AFCA will be accessible to more businesses. The Hon. Kelly O'Dwyer, Minister for Revenue and Financial Services stated that, "AFCA will provide a one-stop shop to ensure consumers get a fair deal in resolving disputes with banks, insurers, super funds and small amount credit providers, without the expense, inconvenience and trauma associated with going to court."

It is important to note that consumers are not required to use the AFCA complaint resolution scheme to pursue a complaint against an AFCA member. Alternatively, they may institute court proceedings or use any other dispute resolution forum

that is available.

### **ASIC oversight**

ASIC has regulatory oversight of AFCA and has been given a range of specific powers in relation to AFCA under the *Corporations Act 2001* (Cth). These include powers to issue regulatory requirements by legislative instrument, give directions and approve material changes to the AFCA scheme. AFCA will also have obligations to refer certain matters to ASIC, APRA and/or the ATO, including contraventions and breaches, settled complaints and systemic issues.

ASIC has also approved the Rules, which govern AFCA's jurisdiction and processes, including the types of disputes that can be considered, the remedies that can be awarded and their limits, dispute resolution processes and reporting obligations. The Hon. Helen Coonan has characterised ASIC's approval of these Rules and the Independent Assessor's Terms of Reference as "an important milestone" prior to AFCA commencing operation. Operational Guidelines have also been developed to aid in the interpretation and application of these Rules. These Guidelines have been described as a "living document" and will be constantly updated in order to account for stakeholder feedback.

### **AFCA membership and commencement of operation**

Various legislative provisions and/or license conditions make it mandatory for certain entities to be an AFCA member, and to implement Internal Dispute Resolution (IDR) procedures approved by ASIC and to ensure that their respective requirements align. This includes Australian Financial Service Licensees who are authorised to provide financial services to retail clients,<sup>[3]</sup> unlicensed product issuers,<sup>[4]</sup> unlicensed secondary sellers,<sup>[5]</sup> credit licensees<sup>[6]</sup>, credit representatives<sup>[7]</sup>, trustees of regulated superannuation funds (excluding self managed super funds), trustees of approved deposit funds<sup>[8]</sup>. There are also other entities who may either choose to be an AFCA member (such as unlicensed carried over instrument lenders) or may be required to be an AFCA member depending on whether they fall within an exemption (such as exempt special purpose funding entities<sup>[9]</sup>).

Members of CIO and SCT should have applied to become an AFCA member by 21 September 2018 but applications for membership can still be made [online](#). CIO members are required to complete an Annual Assessment and Member Declaration. SCT members must pay a membership fee which is deducted from their superannuation levy invoice. All FOS memberships have been automatically transferred to AFCA.

AFCA will commence accepting complaints from 1 November 2018. Also, from 1 November 2018 members may use the AFCA name, contact details and logo solely for the purposes of advising their customers of their right to contact AFCA. Complaints lodged prior to 1 November 2018 under the CIO and FOS schemes will be handled by AFCA under the old Terms of Reference for these respective EDR schemes until they are resolved. Any complaints lodged with the SCT prior to 1 November 2018 will not be transferred to AFCA. The SCT will continue to operate beyond AFCA's commencement to resolve these existing disputes. Consequently, disputes that are withdrawn from the SCT will not be able to be lodged with AFCA.

AFCA members need to take steps to notify their customers that they can bring a complaint to AFCA and update their website, brochures, IDR letters, mandatory disclosure documents, periodic statement and exit statements to refer to AFCA's contact details. While most of these documents need to be updated by 1 November 2018, ASIC has granted disclosure relief until 1 July 2019 for AFCA members to update certain mandatory disclosure documents, periodic statements and exit statements.

If you wish to discuss these changes or you require assistance with reviewing and/or updating your website or documents please do not hesitate to contact Piper Alderman.

<sup>[1]</sup> An 'Eligible Person' is defined in the Rules to include individuals, partnerships, corporate trustee of a SMSF, a Small Business, a not-for-profit organisation or club, a body corporate of a strata title or company title building which is wholly occupied for residential or Small Business purposes; or the policy holder of a group life or group general insurance policy, where the complaint relates to payment of benefits under that policy.

<sup>[2]</sup> "Other Affected Parties" is defined in the Rules as a person who is entitled to receive an Annual Information Return under the Corporations Regulations. An Annual Information Return is defined as a report containing information about a trust, including income earned on its assets, expenses and the net value of the trust's assets.

<sup>[3]</sup> *Corporations Act 2001* (Cth) s 912A(1)(g); s912A(2).

<sup>[4]</sup> *Ibid* s 1017G(1)(c); s1017G(2).

<sup>[5]</sup> *Ibid*.

<sup>[6]</sup> *National Consumer Credit Protection Act 2009* (Cth) s 47(1)(i).

<sup>[7]</sup> *Ibid* s 64; s65.

<sup>[8]</sup> *Superannuation Industry (Supervision) Act 1993* (Cth) s 101(1)(a).

<sup>[9]</sup> *National Consumer Credit Protection Regulations 2009* (Cth) s 23B; 23C.