



Law Council
OF AUSTRALIA

Review of the Australian Financial Complaints Authority

The Treasury

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Telephone +61 2 6246 3788 • Fax +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council of Australia is grateful for the contribution of the Queensland Law Society, in addition to input from the following committees:

- the Financial Services Committee of the Business Law Section;
- the Superannuation Committee of the Legal Practice Section;
- the Australian Consumer Law Committee of the Legal Practice Section; and
- the Alternative Dispute Resolution Committee of the Federal Litigation and Dispute Resolution Section.

Executive Summary

1. The Law Council of Australia welcomes the opportunity to provide this submission to the Department of Treasury in relation to its review of the Australian Financial Complaints Authority (**AFCA**).
2. The Law Council supports AFCA as the primary means of resolving most financial services disputes, particularly low value claims, and believes that a properly funded AFCA has the potential to result in improved outcomes for consumers by reducing the time associated with resolving financial complaints.
3. This submission has regard to the Terms of Reference established by the Treasury and has been prepared with the view to contributing to the continuing improvement of AFCA. To this end, the Law Council has made the following recommendations:
 - activities of debt and credit repairers should be subject to AFCA processes;
 - AFCA's referral powers and practices should be expanded, including clear authority to refer matters to a wider range of regulators such as the Legal Services Commissioner or equivalent in each jurisdiction;
 - consideration should be given to a clearer distinction between compulsory membership and voluntary membership categories of activities subject to AFCA jurisdiction;
 - an independent review of AFCA monetary limits, including for claims for indirect financial loss or non-financial loss and the amount which may be awarded, should be undertaken;
 - consideration should be given to having an Independent Assessor with previous judicial (and for superannuation matters relevant trust law, equitable jurisdiction) expertise to regularly review the merits and substance of a representative sample of Preliminary Assessments and possibly even Determinations;
 - clarification regarding the two-step decision making process is required to ensure a Determination is not treated as an appeal of a Recommendation;
 - consideration should be given to a more rigorous internal review or peer review conducted before Preliminary Assessments are issued to promote consistency, timeliness and sound application of relevant legal principles and statutory rules to the particular case; and
 - AFCA could do more to utilise and promote the power to ask the Financial Firm to contribute up to \$5,000 towards the costs for obtaining expert evidence incurred by the complainant in non-superannuation complaints, particularly in circumstances where consumers are unaware of the importance of the evidence to their case.

Introduction

4. AFCA was established to take the place of the Financial Ombudsman Service, the Credit and Investments Ombudsman, and the Superannuation Complaints Tribunal. The Law Council has previously expressed general support for the establishment of AFCA, including detailed commentary in earlier submissions to:
 - the Treasury regarding its Consultation Paper on Improving Dispute Resolution in the Financial System;¹
 - the Senate Standing Committee on Economics regarding the Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017;² and
 - the Treasury regarding its Consultation Paper of the Establishment of the Australian Financial Complaints Authority (November 2017).³
5. Industry-supported dispute resolution schemes play a vital role in assisting consumers to resolve complaints or disputes in a forum that is generally faster and cheaper than the formal legal system. However, the Law Council also stresses that the role of the private legal profession remains critical and complementary to the successful operation of AFCA.
6. Further, there remains an important role for the courts in establishing precedent for others, and processes such as class actions remain important in obtaining consumer redress in instances of widespread misconduct.
7. The Law Council provides support for the role of AFCA and calls for it to be adequately resourced to undertake whatever measures it considers necessary to ensure that it can effectively, efficiently and fairly deal with a potentially larger volume of complaints.

The jurisdiction of AFCA

Debt and credit repair providers

8. The Law Council submits that consideration should be given to expanding AFCA's jurisdiction and membership base to include paid representatives or claims agents (specifically, 'credit repair' or 'debt solution' providers).
9. Businesses participating in the debt and credit repair sector offer a service to consumers which purports to obtain amendments and/or deletions of entries on their credit records to improve the credit rating of the consumer and, consequently, their prospects of obtaining further credit.
10. The Senate Standing Committee on Economics released its *Credit and financial services targeted at Australians at risk of financial hardship* report in February 2019, which examined the behaviours of this sector. The majority report identified that the

¹ Law Council of Australia, Submission to the Treasury, *Consultation Paper on Improving Dispute Resolution in the Financial System* (14 June 2017), <www.lawcouncil.asn.au/resources/submissions/improving-dispute-resolution-in-the-financial-system>.

² Law Council of Australia, Submission to Senate Standing Committee on Economics, *Treasury Laws Amendment (Putting Consumers First Establishment of the Australian Financial Complaints Authority) Bill 2017 (Cth)* (29 September 2017), <www.lawcouncil.asn.au/resources/submissions/treasury-laws-amendment-putting-consumers-first-establishment-of-the-australian-financial-complaints-authority-bill-2017>.

³ Law Council of Australia, Submission to the Treasury, *Australian Financial Complaints Authority* (24 November 2017), <www.lawcouncil.asn.au/resources/submissions/australian-financial-complaints-authority>.

unregulated provision of debt and credit repair services poses significant risks to vulnerable Australians.⁴

11. The majority report of the Senate Standing Committee on Economics therefore recommended that the credit repair sector be subject to 'compulsory membership of the AFCA, giving clients access to an external dispute resolution scheme'.⁵
12. Membership of an external dispute resolution scheme is already required under the *Privacy Act 1988* (Cth) for all credit reporting bodies and for all credit providers wishing to access and notify credit information to a credit reporting body, although for those providers of credit who do not have Australian Credit Licences, such as the providers of utilities and telecommunication services, there are a number of other external dispute resolution schemes.
13. While this requirement may be sufficient to provide consumers with access to a costs-free dispute resolution mechanism, it will not be helpful to creditors, be they credit, utilities or telecommunications service providers, unless AFCA changes its Rules to accommodate such complaints.
14. A number of systemic issues have been identified within the credit repair sector, including:
 - fees charged by providers are often not transparent and are disproportionate to the service delivered and can leave consumers worse off;⁶
 - providers tend to charge fees for obtaining credit reports and using dispute resolution services (such as those offered by AFCA) that are free for consumers to access directly;⁷
 - providers often fail to advise consumers of free alternatives such as AFCA, legal aid, or community financial counselling and also fail to inform consumers that they may themselves, free of charge, obtain a copy of their credit reports and object and complain about entries which they believe are not justified;⁸ and
 - consumers are often referred to inappropriate remedies which may be expensive and cause lasting damage.⁹
15. The consumers targeted by credit repairers tend to be low income and vulnerable and are particularly susceptible to misleading and unscrupulous behaviour. The inequalities of power between consumers and credit repairers and the damage such does to the integrity of the credit reporting system justifies systemic intervention, which should include requiring membership of AFCA as one element of that reform.

Recommendation:

- **Activities of debt and credit repairers should be subject to AFCA processes.**

⁴ Senate Economics References Committee, *Credit and financial services targeted at Australians at risk of financial hardship* (22 February 2019), 9.

⁵ *Ibid*, Recommendation 8.

⁶ *Ibid*, 57.

⁷ *Ibid*, 60.

⁸ *Ibid*, 57.

⁹ *Ibid* 56-58.

Referral of debt and credit repair providers to other regulators

16. The Law Council notes that some of the behaviours of unlicensed credit repairers may potentially fall within the ambit of the prohibition on engaging in legal practice when not entitled to do so.¹⁰
17. Currently, AFCA does not have the power to refer specific matters to regulatory authorities such as the Legal Services Commissioner or equivalent in each jurisdiction, rather, it is only authorised to refer serious contraventions of law¹¹ and systemic issues to the Australian Securities and Investments Commission (**ASIC**), the Australian Prudential Regulation Authority or the Commissioner of Taxation.¹²
18. Consideration should be given to whether AFCA's referral powers and practices should be expanded, including clear authority to refer to a wider range of regulators such as the Legal Services Commissioner or equivalent in each jurisdiction. The capacity to refer to other regulators should be enlivened if AFCA determines that the complaint before it gives rise to a concern that a company or individual has inappropriately engaged in legal practice or other regulated behaviour.

Recommendation:

- **AFCA's referral powers and practices should be expanded, including clear authority to refer matters to a wider range of regulators such as the Legal Services Commissioner or equivalent in each jurisdiction.**

Compulsory and voluntary membership for AFSL holders

19. With respect to the categories of activities undertaken by Australian Financial Services Licence (**AFSL**) holders, the regulatory framework provides for two classes of membership with AFCA, namely:
 - compulsory – for the categories of activities that an AFSL holder is required to be a member of AFCA for; and
 - voluntary – with respect to other categories of activities that an AFSL holder undertakes but are not mandatorily required to be a member of AFCA for.
20. The Law Council understands that AFCA membership does not distinguish between those categories for which membership is compulsory and those categories of activity which do not require membership. Once an AFSL holder is a member of AFCA (for the compulsory issues), AFCA assumes jurisdiction across all of their activities, even those categories for which membership was not required.
21. Noting this approach, the Law Council queries whether AFCA should only have jurisdiction over categories of activities for which it has an ability to compel membership, and/or those categories of activity that an AFSL holder voluntarily seeks membership for. Having a clear distinction between compulsory membership and voluntary membership categories could assist to clarify this issue.

¹⁰ In Queensland, engaging in legal practice is regulated under the *Legal Profession Act 2007* (Qld) (see particularly s 24) and other States have similar regulation, noting that some States operate under the Legal Profession Uniform Law.

¹¹ For examples of contraventions, see AFCA, *Operational Guidelines to the Rules* (January 2021), 87.

¹² *Corporations Act 2007* (Cth) s 1052E.

Recommendation:

- **Consideration should be given to a clearer distinction between compulsory membership and voluntary membership categories of activities subject to AFCA jurisdiction.**

Monetary jurisdiction for claims of indirect and non-financial loss and caps

22. Currently, AFCA's monetary limit for claims for indirect financial loss or non-financial loss is capped at \$5,400.¹³ The Law Council queries whether this limit is too low for any meaningful distinction to be made between the severities of the non-financial and indirect loss suffered as a result of poor conduct.
23. In addition, at present under the AFCA Operational Guidelines there is a disconnect between the value of a complaint that AFCA may consider, and the amount that AFCA may award in the event that the complaint is upheld. Currently, AFCA may consider a complaint in respect of, for example, a life insurance dispute where the value of the claim is up to \$1,000,000. However, if the complaint is upheld, a consumer may not be awarded more than \$500,000.
24. If a consumer has their complaint upheld, then the consumer should, as nearly as is practicable, be placed in the position that they otherwise would have been in. It is, in the Law Council's submission, unfair that a consumer would be placed into a position of being only entitled to half of the entitlement which they rightly have claimed. The Law Council is of the view that the question of caps on claims ought to be reviewed so as to ensure that the value of any claim, and the amount which may be awarded are aligned.
25. More broadly, it is noted that for a body that is not required to apply the law (but merely act fairly), AFCA has a considerable financial jurisdiction. It has a claim threshold of \$500,000 per claim, which when dealing with financial services, can be multiplied where a person operates different accounts. There are limitations on participants being able to compel the production of material in the possession of third parties that can be used to defend or pursue claims, which has the potential to adversely impact the fairness of the process, particularly in large claims.
26. In light of the above, the Law Council suggests that an independent review of AFCA monetary limits, including for claims for indirect financial loss or non-financial loss and the amount which may be awarded, should be undertaken.

Recommendation:

- **An independent review of AFCA monetary limits, including for claims for indirect financial loss or non-financial loss and the amount which may be awarded, should be undertaken.**

¹³ Australian Financial Complaints Authority, *Complaint Resolution Scheme Rules* (13 January 2021), Paragraph D4.1.

Appeal pathways for AFCA decisions

27. The Law Council acknowledges that there are differing views about the desirability of increased review pathways from decisions made by AFCA. Specifically, the Law Council notes that opinions are divided in the legal profession as to whether the AFCA Independent Assessor should have the ability to review the merits or substance of an AFCA decision, as well as whether there ought to be rights of appeal to a Court or Tribunal.
28. Those opposed to expanding rights of review suggest that this would lead to less timely decisions, negatively impacting the efficiency and effectiveness of the scheme. Further, financial firms already have the ability to run test cases, and consumers are not bound to accept decisions of AFCA.
29. It is also important to note that there are already existing avenues of appeal from decisions of AFCA if the decision is:
- a decision in respect of a Superannuation Complaint in which there is an error of law;
 - outside the AFCA Rules or otherwise beyond its jurisdiction;
 - not made according to AFCA's own Rules;
 - otherwise made in breach of the procedural principles of natural justice; and
 - so unreasonable as to be incapable of being made by a properly informed decision-maker in the position of AFCA as originally described in the decision of *Associated Provincial Picture Houses Limited v Wednesbury Corporation*.¹⁴
30. Further, it is noted that AFCA is not a court. It is a dispute resolution scheme and such schemes are, as described by O'Shea and Rickett in 'In Defence of Consumer Law' (2006) 28 (1) *Sydney Law Review* 141:
- ... less concerned with the articulation and determination of legal rights than with the simple resolution of disputes...Decisions under the schemes create new rights and obligations rather than declare existing ones. There is no power to order discovery of documents or to subpoena witnesses. Enforcement of scheme decisions is not directly sanctioned by the state. No bailiff will execute a warrant issued by an industry-based dispute resolution scheme.*
31. This passage has been cited with approval in *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service and Norris*,¹⁵ *Mickovski v FOS and Metlife*,¹⁶ *Utopia Financial Services Pty Ltd v FOS and Rees*¹⁷ and *Cromwell Property Services Ltd v FOS and Radford*.¹⁸
32. One of the necessary attributes of all such schemes is that they bring a degree of finality to disputes. Further avenues of appeal may therefore undermine AFCA as an effective dispute resolution scheme. Given the inequality of litigious resources for consumers as opposed to financial firms, even if the AFCA Rules provided that

¹⁴ [1948] 1 KB 223.

¹⁵ [2009] VSC 7.

¹⁶ [2011] VSC 257; [2012] VSCA 185.

¹⁷ [2012] WASC 279.

¹⁸ [2014] VSCA 179.

respondent-initiated appeals were funded solely by the respondents, this would still be disadvantageous to consumers.

33. Those in favour of additional pathways for review of AFCA decisions note that the monetary jurisdiction of AFCA is considerable and there is a need for judicial review, or at the very least review by a properly resourced, experienced and qualified Independent Assessor, in particular cases.
34. There have been concerns that in some situations AFCA has made determinations based upon an incorrect interpretation or application of the law. It is the view of some members of the legal profession that there ought to be a right of appeal from all AFCA decisions (not just limited to Superannuation Complaints) to a judicial body on points of law so that errors of law can be corrected and not perpetuated.
35. It is further argued that the current test case regime may be unsatisfactory as:
 - it requires AFCA to permit a test case to be run and also allows AFCA to impose conditions, at its own discretion, as a precursor to providing permission;
 - it is limited to 'test cases' which does not extend to or include one off poor decisions (the consequences of which can be significant given AFCA's monetary jurisdiction); and
 - the financial institution is required to pay the costs of both parties, which often makes the running of 'test cases' uneconomic and, in effect, an illusory right. Some members would respectfully suggest that the lack of test cases run under the current arrangements has been driven by this economic reality, rather than reflecting a high level of acceptance of AFCA's decisions.

Scope, remit and operation of AFCA's Independent Assessor function

36. Consideration ought to be given to an Independent Assessor with previous judicial (and for superannuation matters relevant trust law, equitable jurisdiction) expertise being engaged to regularly review the merits and substance of a representative sample of Preliminary Assessments and possibly even Determinations – in particular having regard to promoting sound application of legal principles and relevant statutory rules.
37. The Independent Assessor's review and report with any recommendations should be conducted at least annually with the findings summarised and provided to all AFCA members, with AFCA's response to any recommendations.

Recommendation:

- **Consideration should be given to having an Independent Assessor with previous judicial (and for superannuation matters relevant trust law, equitable jurisdiction) expertise to regularly review the merits and substance of a representative sample of Preliminary Assessments and possibly even Determinations.**

Two stage decision-making process

38. The decision-making process at AFCA involves a two-step decision making process. The first preliminary decision is called a Recommendation (or Preliminary Assessment) and is generally written by a Case Manager. A Recommendation may be rejected by either the consumer or the financial institution. If the Recommendation

is rejected, the matter then proceeds to a second and final decision called a Determination, which is generally written by an Ombudsman.

39. A concern in respect of the decision-making process that has been brought to the Law Council's attention is that the two-step decision making process may operate in such a way that the Determination stage appears as if it is an appeal of the Recommendation. This is not the case. The decision which is to be made at the Determination level is supposed to be a *de novo* decision, that is, a fresh set of eyes and a clear-minded decision, not affected by the decision made at the Recommendation stage.¹⁹
40. It is important that the Determination level decision does not operate as an appeal. Neither a financial institution, nor a consumer, ought to have the burden of attempting to 'overturn' a lower-level decision which has been rejected as incorrect at the Recommendation stage.

Recommendation:

- **Clarification regarding the two-step decision making process is required to ensure a Determination is not treated as an appeal of a Recommendation.**

Delivering against statutory objectives

Capability to produce consistent, predictable, quality and timely outcomes

41. It is perhaps too early to assess whether AFCA is meeting its statutory objectives consistently in practice. To assist in this assessment, independent review and sampling of AFCA Preliminary Assessments, Conciliations and Determinations should be undertaken in a systematic, open and transparent manner. This could be in addition to the proposed expanded scope of the Independent Assessor as noted above.
42. The Law Council is advised that from observation of some AFCA Preliminary Assessments, it is apparent that the standard and legal reasoning of assessments can vary significantly, depending on the Case Manager involved. There have also been instances in which Assessments or Determinations have been unduly delayed, sometimes but not always due to the parties involved. Such delays in the conclusion of matters can adversely affect both parties to different degrees. At times, delays in the system can assist the consumer, but it should be noted that not all bodies against which complaints are made are large financial institutions. Sometimes, those who suffer the largest financial impact from such delays are small business or small investors behind the financial institution.
43. The Law Council recommends that consideration be given to a more rigorous internal review or peer review conducted before Preliminary Assessments are issued to promote consistency in this area. Any assessment must demonstrably and expressly refer to and rely on relevant legal (including equitable) principles for any adverse 'assessment' of trustee conduct/decision.

¹⁹ For an example of such an issue, see Determination in Dispute No 530878 in which the Determination attached a copy of the Recommendation and confirmed that the reasoning in the Recommendation was adopted.

Recommendation:

- **Consideration should be given to a more rigorous internal review or peer review conducted before Preliminary Assessments are issued to promote consistency, timeliness and sound application of relevant legal principles and statutory rules to the particular case.**

AFCA's funding and fee structures

44. The Superannuation Committee, which forms part of the Law Council's Legal Practice Section notes that the current levy model provides no benefit to superannuation funds trustees with a better record of dealing with members and complaint issues. In the view of the Superannuation Committee, the 'user pay' model which will soon apply, in theory, can better align trustee behaviour to complaint handling costs incurred through the AFCA process.
45. However, the Superannuation Committee notes that in practice there appears to be no effective handbrake on costs that may be imposed by AFCA on trustees of participant funds. The 'user pay' costs associated with the legacy complaint reviews illustrates apparent excessive costs that may be imposed under a user fee model where no competitive tension in provider options exists.
46. A low-cost alternative dispute resolution forum needs to be pitched as and deliver an alternative (for both complainants and providers) to judicial process to be successful and in the best interests of all fund beneficiaries (and consumers generally). There may be a role for online dispute resolution processes in this regard, or other forms of negotiated outcomes leading to consensual resolution of disputes.

Treatment of evidence

47. The Australian Consumer Law Committee (**ACLCL**) of the Law Council's Legal Practice Section has highlighted some areas where it believes AFCA could improve the service currently provided to parties.
48. The ACLCL notes that at present there is little guidance for consumers as to how evidence is to be treated. For example, it is relatively common for a Recommendation or Determination of AFCA to express the view that there is 'no evidence' of a particular thing having occurred. From a consumer's perspective, when facing well-resourced Respondents, this presents significant problems.
49. For example, there are often disputes in general insurance matters about factual occurrences. The only person present during the event will often be a consumer. Yet, an insurer may obtain expert evidence from, for example, a hydrologist (in respect of a flood insurance dispute). A consumer is generally unlikely to have the financial resources to obtain their own expert evidence because of the prohibitive costs associated with obtaining such reports.
50. Currently, the Complaint Resolution Scheme Rules provide AFCA the power to require the Financial Firm to contribute up to \$5,000 for the costs of the complainant obtaining expert evidence in non-superannuation complaints.²⁰ The ACLCL suggests that AFCA could do more to utilise and promote this power, particularly in circumstances where consumers are unaware of the importance of the evidence to their case.

²⁰ Australian Financial Complaints Authority, *Complaint Resolution Scheme Rules* (13 January 2021), Rule A.9.7.

51. Accordingly, the ACLC notes it is critical that in forming its decision AFCA gives appropriate weight and consideration to the evidence given by the consumer about what was seen or witnessed. That is not to suggest that all consumer evidence must be strictly accepted, but rather must be considered and weighed as a part of the body of evidence being considered in respect of the complaint.
52. The ACLC notes that suggesting that there is 'no evidence' of a particular matter in circumstances where the consumer has given their version of events is problematic and causes consumers harm for two reasons - first, because a consumer's version of events has not been considered, and secondly, because the consumer does not have confidence in the fairness of the process.

Recommendation:

- **AFCA could do more to utilise and promote the power to ask the Financial Firm to contribute up to \$5,000 towards the costs for obtaining expert evidence incurred by the complainant in non-superannuation complaints, particularly in circumstances where consumers are unaware of the importance of the evidence to their case.**