DEMYSTIFYING THE AUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY

What you need to know



Bartier Perry LAWYERS

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Overview and complaint fundamentals

The Australian Financial Complaints Authority (AFCA) is an independent and external complaint resolution scheme which considers complaints from consumers against entities operating in the credit, financial services, superannuation, and insurance industries.

OVERVIEW OF AFCA

The AFCA scheme was introduced by the *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Act 2018*. AFCA was authorised by the Minister for Revenue and Financial Services in 2018 and is a consolidation of a number of previous external dispute resolution schemes including the financial ombudsman service, the credit and investments ombudsman, and the superannuation complaints tribunal.

In the Explanatory Memorandum to the Treasury Laws Amendment Bill, it is explained that the purpose of establishing AFCA was to create a "one stop shop" to resolve all financial complaints.

The AFCA scheme is governed by a set of rules which are approved by ASIC. The most recent version being the 'AFCA: Complaint Resolution Scheme Rules' published on 13 January 2021 (Rules). The Rules are explained in more detail by AFCA's Operational Guidelines. The most recent version of the guidelines is the 'AFCA: Operational Guidelines to the Rules published on 1 April 2022' (Guidelines).

As a "one stop shop" AFCA determines complaints about:

- credit, finance and loans
- insurance
- banking deposits and payments; investments and financial advice.

WHO CAN MAKE COMPLAINTS AND AGAINST WHOM?

Complaints can only be made by an *Eligible Person* against a *Financial Firm* that is an AFCA member.

An *Eligible Person* is set out in section E.1 of the Rules and includes, but is not limited to:

- an individual
- a registered charity
- a partnership, incorporated trustee, or not-for-profit organisation – however, if it carries on a business, then it must meet the small business requirement
- the corporate trustee of a self-managed superannuation fund or a family trust, carrying on a small business only
- an incorporated small business with less than 100 employees.

The Rules include a number of types of eligible person so that those persons eligible to make a complaint are clearly ascertainable by reviewing the Rules. AFCA is very quick to ensure that the person making a complaint is eligible to do so. Being a consumer dispute resolution service, AFCA seeks to ensure that they are only deciding on complaints that are eligible and not those which ought rather be determined by a court or tribunal.

For example, the Rules allow the corporate trustee of a 'family trust' to file a complaint against a financial firm. Presumably, the reference to a 'family trust' is to a standard discretionary trust that identifies family members as beneficiaries, either specifically or by class. This said, AFCA will look at the structure of the relevant trust to ensure it is a genuine family trust. A trust which was established as a unit trust but with only family members as beneficiaries and therefore considers itself, by virtue of its structure, as a 'family trust', will in our experience still be considered by AFCA as a unit trust, not a family trust. AFCA will strictly apply the meaning of family trust to the eligibility criteria.

This means that you need to carefully consider your structure if you are looking to borrow money from a lender and want to be able to fall back on AFCA as a means of resolving any future issues with them.

Legislation requires various entities to be AFCA members. Banks, credit providers, insurance firms, and fund management companies are amongst those financial firms which must be members. More broadly, any firm that is legally obliged to hold an Australian Financial Services Licence **(AFSL)**, or Credit Licence, needs to be an AFCA member. It is these entities that are considered to be Financial Firms.

AFCA provides a helpful search function on its website to assist consumers with searching for the financial firm or superannuation fund they are looking to make a complaint about.

TYPES OF COMPLAINTS CONSIDERED

Amongst others, some common complaints that AFCA has jurisdiction to determine include:

- financial hardship and inability to make loan repayments – including mortgages
- misleading or incorrect information relating to financial products
- compliance with responsible lending obligations
- denial of an insurance claim.

EXCLUDED COMPLAINTS

There are some complaints which AFCA will not deal with. The Rules deal with excluded complaints. For example, AFCA will not hear complaints:

- about a lender's refusal to provide a loan based on a borrower's credit risk
- concerning professional accountancy services (unless the accountancy services were provided in connection with a financial service)
- about the general performance of an investment
- where in AFCA's discretion, the matter might be better dealt with by the Courts, or the complaint is vexatious, or has been previously dealt with.

A unique situation may arise where an accounting firm, which does not hold an AFSL, provides information relating to financial products that a client may take issue with. On its face the complaint would be one which can be determined by AFCA – i.e., misleading advice about a financial product. However, in the absence of an AFSL, the accounting firm is unlikely to be a *Financial Firm*, who is also a member of AFCA, which means AFCA would have no jurisdiction to determine a complaint of this nature.

Even if, hypothetically, AFCA did have the requisite jurisdiction to determine the complaint, it might use its discretion to refuse a complaint on the basis that it would be more appropriately dealt with by the Courts or Tribunal. Often if a complaint is complex, involving a number of issues or alleged breaches of legislation, AFCA might decide the complaint would be more fairly dealt with in a different forum.

KEY TAKEAWAY

Entities operating in the industries covered by AFCA's terms of reference should be aware of the important implications that an AFCA complaint may have in respect of its operations.





The complaints process and restrictions on financial firms

There is no doubt the current economic climate is precarious. This coupled with increased mortgage stress caused by the RBA's rate increases has resulted in more complaints being lodged with AFCA against financial firms, particularly in the lending industry.

This makes it even more important for financial firms to understand the scope and power of AFCA and what steps need to be taken when a complaint is lodged with it.

THE COMPLAINTS PROCESS

Once an AFCA complaint has been lodged the details of it will be forwarded to the financial firm. This generally occurs within one to two business days of the complaint being lodged. The notification will include details of the complainant, a short summary of the issues raised, and the remedy sought.

Ordinarily, AFCA will give the financial firm a timeframe to either resolve the complaint with the complainant directly or provide its submissions. This is known as the 'refer-back period.' The refer-back period is typically between 21 to 90 days depending on the type of complaint.

In some rare circumstances, AFCA will proceed to immediately investigate a complaint without allowing for the refer-back period. This is typically only deployed when there is an immediate risk to a complainant i.e. where a lender has obtained judgment and is looking to immediately enforce its judgment by taking possession of or selling a security property.

If the complaint has not been resolved at the end of the refer-back period, then AFCA will encourage parties to resolve the matter by participating in a conciliation conference. If this fails, then the next stage of the complaints process will be enlivened. For example, AFCA may provide a preliminary assessment of the complaint. This may be accompanied by a recommendation as to how the parties should resolve the matter. In some limited circumstances AFCA may determine the complaint without the parties attending a conciliation conference.

It is important for complainants to understand that AFCA can assist with a broad range of financial problems and may be able to assist if there is an allegation a financial firm has acted unfairly in some circumstances. However, AFCA is not a legislative body and therefore cannot involve itself with matters than would be better dealt with by a Court or Tribunal or have already been dealt with by a Court or Tribunal but the outcome was not favourable to the complainant.

While AFCA can determine complaints where a financial firm has acted unfairly in breaching a law or relevant Code of Practice, it cannot make a finding against a financial firm which attracts any civil or criminal penalties as these can only be ordered by a Court or Tribunal.

INFORMATION GATHERING POWERS

AFCA has broad powers to gather information from the parties when trying to determine a complaint. For example, AFCA can request:

1. submissions from a financial firm once a complaint is lodged
2. that a financial firm provide files relating to the complainant, documents relevant to the complaint (including loan documents), statements from relevant people, policy documents, and documents relating to steps taken to resolve the dispute
3. a statutory declaration explaining why a party has failed to provide information requested in item 2 above
4. in some circumstances, that a party attend an interview to provide information.

If a financial firm fails to comply with the information gathering stage of AFCA's investigation, AFCA is entitled to draw an adverse inference against it in respect of the complaint. It is therefore essential that financial firms take the necessary and timely steps to address any complaints.

When providing information there are a range of issues a financial firm should consider including confidentiality, privacy, and legal professional privilege.

Further, while a financial firm is entitled to seek legal advice on any complaint or information gathering that AFCA is undertaking, the Rules strictly state that a lender cannot pass the legal costs of defending an AFCA complaint on to a borrower, regardless of any indemnity they might enjoy regarding costs of default in loan documents or other agreements.

RESTRICTIONS ON FINANCIAL FIRMS ONCE A COMPLAINT IS LODGED

A broad range of restrictions apply to a financial firm from the date an AFCA complaint is lodged against it. It is very important for all financial firms to be aware of these restrictions and for complainants to be aware of the power of making a complaint. A failure to adhere to the restrictions can result in serious adverse determinations against the financial firm.

Once a complaint is lodged with AFCA, the financial firm cannot:

1. begin or continue legal proceedings about any aspect of the subject matter of the complaint
2. seek judgment against the complainant
3. take any other enforcement action to pursue an outstanding debt.

Unless special permission is given to the financial firm by AFCA, in writing, a failure to adhere to the restrictions can result in serious adverse determinations against the financial firm. Some special permission might include circumstances where a limitation period is about to expire or there is a need to freeze or preserve an asset.

If proceedings are already on foot, the financial firm is obliged to stay the proceedings and not incur any costs which are passed to the complainant until the complaint is finally determined or otherwise resolved by AFCA.

A recent AFCA determination, case no 884514, dated 15 March 2023, involved the obligations a lender has to a borrower in financial hardship. In this case the complainant had two facilities with the financial firm, one was a home loan secured against a residential property (Property 1) and the second was a business loan secured over Property 1 and a factory (Property 2). The complainant had been experiencing financial hardship as a result of COVID-19, causing it to go into material arrears. Over the course of two years, there were ongoing discussions between the borrower and the financial firm about how to resolve the issues. The borrower made proposals that it would sell one or both of the properties or use an ATO refund to pay down the arrears. None of these promises were fulfilled and it culminated in the financial firm commencing proceedings to take possession of Property 1 and Property 2. The borrower then lodged a complaint with AFCA against the financial firm. In its determination AFCA gave consideration to duties under the National Credit Code (NCC) and the Banking Code of Practice (BCP) that require mortgage providers to assist customers to overcome financial hardship.

The NCC and BCP require mortgage providers to give real and genuine consideration to a request for hardship assistance. AFCA considered the negotiations between the parties to assess whether appropriate hardship assistance was considered. Ultimately, in this case AFCA found that the lender had satisfied its obligations. However, the complaint halted the lender's enforcement action from the date the complaint was filed on 2 June 2022 to March 2023, presumably causing significant detriment to the lender.

THE IMPORTANCE OF COMPLIANCE

As we have seen above, the AFCA complaints process can have serious restrictions for financial firms. The purpose of AFCA is to provide a regulatory body which is available for all consumers when they feel a financial firm is acting unfairly or unconscionably. There is no way that eligible financial firms can completely avoid the possibility of AFCA complaints being made.

However, by always ensuring compliance with the appropriate guidelines, such as the NCC and BCP, and acting in a fair and conscionable way, financial firms can mitigate the risk that an AFCA complaint lodged against it will be determined in the complainant's favour.

KEY TAKEAWAY

If a complaint is lodged, being familiar with the restrictions imposed on a financial firm and knowing how to address the complaint within the timeframe stipulated will minimise the risk of adverse findings against the financial firm. Generally, all reasonable attempts should be made by parties to a complaint to resolve outstanding issues by agreement rather than requiring a final determination by AFCA.



Powers and remedies

AFCA complaints against financial firms in the banking and finance space rose 27% in FY23, bringing the total complaints in that field to 53,638. In a recent report from AFCA, Chief Ombudsman and CEO, David Locke, said that rising interest rates and the cost of living crisis largely contributed to that increase.

REMEDIES AVAILABLE TO AFCA DECISION MAKERS

Broadly speaking, AFCA decision makers can determine a complaint at their discretion by any of the following remedies:

- directing a party to pay a sum of money
- the forgiveness or variation of a debt
- the release of security for a debt
- repayment, waiver or variation of a fee or other amount paid to or owing to the financial firm (including the variation in the applicable interest rate on a loan)
- reinstatement, variation, rectification, or setting aside a contract
- requiring a party not to enforce a default judgment
- directing a party to give an apology.

The financial amounts involved are not insignificant, and AFCA recently reported that approximately $254 million in compensation was secured for complainants from financial firms in FY23.

In the case of a financial hardship complaint, AFCA may recommend that a credit contract be varied to extend the period of the contract, reduction of the amount of repayments, postponement of repayments, and reduction of the applicable loan interest rate for a period.

In deciding whether to grant a remedy, the decision maker can have regard to established legal principles. For example, the decision maker will consider causation, remoteness, and whether the complainant took steps to mitigate their loss.

ARE AFCA DETERMINATIONS BINDING?

In short, a preliminary assessment is not binding unless the parties agree to settle based on the recommended outcome set out in the preliminary assessment. If either party does not accept a preliminary assessment, then the complaint will progress to a final determination.

AFCA final determinations are binding on financial firms by reason of their membership with AFCA. In *Australia Capital Financial Management Pty Ltd v AFCA* [2022] NSWCA 204, the NSW Court of Appeal noted that, "once a complaint is made, the AFCA Rules form a binding tripartite contract between the complainant, AFCA and the member."

There are limited avenues of appeal to the Courts for a financial firm, such as where there has been a lack of procedural fairness (although this is difficult to establish). It should be noted that AFCA is required to report a financial firm to ASIC if it does not comply with a determination.

On the other hand, an AFCA determination is not binding on a complainant unless they choose to accept it as a binding resolution of their complaint. If a complainant does not accept the determination, then they retain their right to pursue the claim against the financial firm through the Courts. A complainant should seek legal advice before doing so.

CASE STUDY - COMPENSATION FOR NON-FINANCIAL LOSS

In this case, AFCA determined that a bank should reduce the balance of its loan and pay the complainant $13,000 in compensation for non-financial loss suffered by the complainant.

The complainant and her ex-partner held two loans with their bank. One loan was used to purchase a property. Amongst other things, the complainant argued that the bank:

- lent irresponsibility by not making reasonable inquiries as to the loan affordability
- failed to follow instructions not to contact the complainant's ex-partner
- allowed the ex-partner to access $51,700 from the complainant's account.

A preliminary assessment was released by AFCA that was accepted by the bank but was rejected by the complainant. Accordingly, the matter progressed to a determination.

AFCA was critical of the bank's conduct in contacting the complainant's ex-partner, despite the ex-partner being a co-borrower on at least one of the loans, and for failing to abide by responsible lending obligations. In the determination, AFCA noted that monetary compensation for non-financial loss was "appropriate compensation for the stress that the complainant has suffered from the bank's conduct."

This determination demonstrates the broad scope of remedies that can be ordered by AFCA.

COSTS OF A COMPLAINT

There is no fee for a consumer to lodge a complaint with AFCA. The scheme is funded by financial firms through membership fees, user charges, and complaint fees.

User charges are designed so that firms who receive a large number of complaints are required to pay higher annual fees. Complaint fees refer to a fee payable by the financial firm whenever a complaint is lodged against a financial firm. This system is designed to encourage firms to take reasonable steps to resolve disputes before a complaint is lodged against them.

AFCA also has the power to determine that a financial firm contribute up to $5,000 of a complainant's costs (including legal costs) during the course of the complaint. A complainant will not be required in any circumstance to pay a financial firm's costs.

AFCA DETERMINATIONS

AFCA has discretion to make a wide range of determinations and remedies. Its decisions are binding on financial firms with limited avenues of appeal. On the other hand, AFCA's determinations are not automatically binding on complainants.

AFCA fulfils its mandate to be accessible for consumers in a number of ways, including by having no fees to file a complaint. However, it does monitor lodged complaints for anything frivolous or vexatious and will take issue against the complainant if required.

As tight economic conditions persist in Australia, responsible lending obligations remain paramount and complaints to AFCA will likely continue to rise.



KEY TAKEAWAY

The key takeaway for financial firms is to have practices and procedures in place to deal with dissatisfied consumers and ensure that the right steps are being taken to store relevant documents and information, and manage customer complaints in a proactive, sensitive and timely manner.

For borrowers who may become complainants, it is important to remember that if you are dissatisfied with the actions being taken by your lender, you have an inexpensive avenue available to you to seek redress without needing to engage lawyers and incur unnecessary legal costs.

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09/26

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