

Governance at AFCA

Introduction

In November 2018, the Australian Financial Complaints Authority commenced as the single external dispute resolution scheme for the financial services industry.

This article will explain how it has been established and what mechanisms are in place for the exercise of its authority.

Establishment

What is the Australian Financial Complaints Authority?

“Australian Financial Complaints Authority” (AFCA) technically refers to the external dispute resolution scheme described in the *Corporations Act 2001* (the Act).

Australian Financial Complaints Authority Limited (AFCAL) is the public company limited by guarantee that holds the government’s approval to operate the AFCA scheme.

So AFCAL is not part of government?

No – AFCAL is a not-for-profit public company and is not a government agency.

Aside from normal tax concessions received by being a not-for-profit company, and two specific grants provided by the Commonwealth to give effect to federal government policy, AFCAL is self-sufficient and does not receive any ongoing funding from tax payers.

Is AFCAL paid for and owned by the banks?

No – like other public companies limited by guarantee, AFCAL does not have shareholders, but it does have members. Anyone with an Australian Financial Services Licence, an Australian Credit Licence, or who is a Credit Representative of an Australian Credit Licensee must be a member of AFCAL as a condition of holding that position under the relevant law.

Members come from all areas of the financial services sector, from small businesses with sole practitioners to the large banks and insurers.

Members have limited rights set out in the AFCAL Constitution, but cannot veto AFCA's Board, nor can they affect the outcome of any complaint except through their proper participation in the AFCA scheme – how they can do this is set out in the AFCA Rules.

To keep AFCA free for consumers, members are required to pay for AFCAL's operations. This is done through three avenues:

- An annual membership fee
- A fee for each complaint handled

Isn't AFCA biased towards its members if the members are paying their wages?

Members have to pay each of these fees and charges regardless of whether a complaint is resolved in their favour or not.

The AFCAL Constitution and AFCA Rules set out the protections that are in place to protect the integrity of the process and preserve the independence of the Ombudsmen, Panels and Adjudicators who make the final decisions.

AFCA is also required to comply with the scheme authorisation requirements in the Corporations Act 2001 and ASIC Regulatory Guide 267, which include that the scheme must operate as an independent dispute resolution scheme.

AFCAL also has a Code of Conduct and a Conflicts of Interest Policy which guide staff in avoiding bias, or the appearance of bias, when resolving complaints. AFCAL staff who have worked in the sector previously are not permitted to handle complaints involving former employers for at least 2 years after the staff member joins AFCAL.

Authority

If AFCA is not government, how can it control its members?

By joining AFCAL as a member, each organisation enters into a contract with AFCAL to comply with the AFCAL Constitution and the AFCA Rules. These documents set out the rights and obligations of members. In addition, when dealing with superannuation complaints, AFCAL has additional powers in the Act which we can use to help us resolve complaints.

Failure to comply with the Constitution or Rules can result in:

- Reporting a serious contravention to the Australian Securities and Investments Commission
- Expulsion from membership

- Legal proceedings for breach of contract

As most members have to maintain membership of AFCAL to comply with their legal and licencing obligations, a serious contravention or expulsion can result in their licence or authority being removed by the regulator, preventing them from operating their business.

Interpreting and applying laws is the role of the courts – how can AFCA do it?

AFCA's role in resolving complaints is administrative rather than judicial. In the majority of complaints, we help the parties agree the outcome between themselves in a fair manner.

When we do have to make a decision, our primary duty is to do what is fair, having regards to various factors, which includes relevant law and legal principles.

Our determinations create new rights and obligations designed to achieve fairness between the parties rather than amounting to the performance of the traditional task of a court, namely the enforcement of existing legal rights.

If we direct a payment, then it creates a new obligation which can only be enforced by judicial proceedings. Only a court, in the constitutional sense, can impose penalties or order compensatory payments for breach of the resultant award. This is why EDR schemes have sometimes had to go to court seeking specific performance of the EDR contract to enforce determinations.

Oversight and accountability

Who oversees AFCA?

AFCAL has a board of directors which is comprised of an independent chair and equal numbers of directors with experience and expertise in industry and consumer matters. There are currently five industry directors and five consumer directors.

The AFCA Board sets the strategic direction of AFCAL and ensures that AFCAL operates in such a way that we comply with the conditions put on us as part of our approval to operate the AFCA scheme.

Externally, the Australian Securities and Investments Commission is responsible for monitoring whether AFCAL complies with our approval conditions. If it believes that we are not doing so, it can direct us to make necessary changes, or ultimately recommend to the responsible Minister that the approval is removed.

How does the Board know what is going on?

AFCAL is committed to maintaining its independence and to conducting its business according to the highest ethical, legal and professional standards in dealings with stakeholders, employees and the general community.

To ensure we maintain and continually enhance the quality of our service, we have a range of controls: an outsourced internal audit function, a comprehensive quality and continuous improvement framework, a complaints and feedback process and an Independent Assessor function.

The Independent Assessor is able to review service complaints made about AFCAL and the manner in which it provides the AFCA dispute resolution service. This role reports directly to the board and is accountable only to the directors.

Every five years, the AFCA Board of Directors will commission an independent review of our operations, but the first independent review of AFCA will be conducted in mid-2020 by a government appointed independent reviewer.

What approach is taken to how AFCA is run?

We have published our strategic plan showing our purpose and strategic goals and we apply, to the extent that we can, the ASX Corporate Governance Council's Principles and Recommendations. Each year in our Annual Review, we provide details of not only the performance of the AFCA scheme, but also details about the activities and focus of the directors.

We are committed to open and transparent communications on all of our operations and regularly communicate with the broader community as well as consumer organisations, members, industry associations, regulators, government and other interest groups.

Further questions

If you have any other questions about the governance of AFCAL, the way the AFCA scheme works, or how we go about assisting the community to resolve issues with their financial firm, contact our helpful staff by phone, email or in writing and we will do our best to answer your queries.