

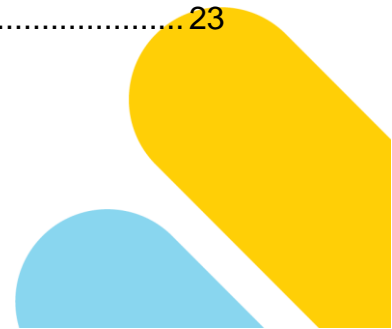
AFCA Rules and Operational Guidelines – Proposed amendments

Consultation paper

March 2023

Contents

1	Introduction	1
1.1	About AFCA	1
1.2	The 2021 Treasury Independent Review of the AFCA scheme	1
1.3	Implementing the Review Report Recommendations	1
1.4	The proposed changes	2
1.5	The consultation process	3
1.6	How you can consult with us	3
1.7	What will happen next?	4
2	Managing conduct within the scheme	5
2.1	Proposal 1: Paid Representatives	5
2.2	Proposal 2: Complainants	10
3	Appropriate offers of settlement or previously settled matters	13
3.1	Proposal 3: Appropriate settlement offers	13
3.2	Proposal 4: Previous settlement agreements	14
4	How we deal with complaints lodged by sophisticated or professional investors	16
4.1	Proposal 5: Sophisticated investor and professional investor complaints	16
5	Forward Looking Review mechanism	17
5.1	Proposal 6: Forward Looking Review mechanism	17
6	Effect of Determinations and slip rule	17
6.1	Proposal 7: Complainant non-acceptance of Determination	17
6.2	Proposal 8: Accidental error in a Determination – slip rule	18
7	Other changes	19
7.1	Proposal 9: Consistency of language about AFCA's monetary limits	19
7.2	Proposal 10: Clarifying the objection process for Rule A.8.3	20
7.3	Proposal 11: AFCA Banking and Finance Panels	21
7.4	Proposal 12: Definition changes	22
7.5	Proposal 13: Annual reporting	23



1 Introduction

1.1 About AFCA

The Australian Financial Complaints Authority (AFCA) commenced operation on 1 November 2018, replacing two predecessor external dispute resolution schemes and the Superannuation Complaints Tribunal (SCT). AFCA is governed by a set of [Rules](#), which are approved by the Australian Securities and Investments Commission (ASIC) and which are explained in more detail in our Operational Guidelines. AFCA's Rules and Operational Guidelines are published to provide transparency in how we operate. Read more about AFCA's [Rules and Operational Guidelines](#) here.

AFCA resolves complaints made by consumers, small business owners and primary producers about Financial Firms in accordance with our Rules and Operational Guidelines.

At the end of 2022, AFCA had 42,488 Financial Firm members. During 2021-22, AFCA resolved 71,152 complaints.

1.2 The 2021 Treasury Independent Review of the AFCA scheme

As required by the legislation that established AFCA, in 2021, the responsible Minister caused a review to be undertaken of the AFCA scheme. The Commonwealth Treasury Department of the Australian Government undertook the Independent Review. The Independent Review Report (Review Report) stated that AFCA was performing well in a difficult operating environment and changing regulatory landscape, but needed to continue to develop and improve its procedures as it consolidates its place in the financial system.

The Review Report was published in November 2021 and set out 13 recommendations for AFCA and one recommendation to Government. A number of these require changes to AFCA's Rules and Operational Guidelines.¹

1.3 Implementing the Review Report Recommendations

AFCA has a significant three-year program of work underway to fully implement all the Review's recommendations directed to AFCA. This involves amongst other things, enhancements to AFCA's processes and systems, further clarifying and explaining the operation of AFCA's fairness jurisdiction, IT, reporting and technology upgrades, improved fee structures, enhanced staff capability and capacity, consultation, and communications frameworks.

Our proposed Rules and Operational Guidelines changes are an important component of this three-year program. We have been clear and transparent with all

¹ The Review Report made 14 recommendations in total, however 1 was directed to Government for consideration.

stakeholders about which Independent Review recommendations require Rule and Operational Guideline changes via AFCA's [Independent Review Response Program Dashboard](#) on the AFCA website and other communications.

This is the most significant review of AFCA's Rules and Operational Guidelines since AFCA was established. The proposed Rules and Operational Guidelines outlined in this consultation paper are designed to implement the Review's recommendations and ensure AFCA continues to provide efficient, timely operations so we can deliver fair, independent and effective solutions for financial disputes. This is consistent with the key themes in the Review Report. These changes also help us to provide a world-class ombudsman service – improving practices, minimising disputes and meeting diverse community needs.

AFCA has engaged an external consultant to draft proposed changes to both the Rules and Operational Guidelines for consultation. This has helped to ensure the proposed changes respond to the recommendations and are clearly worded and unambiguous.

This paper explains the proposed changes and seeks stakeholder comment.

Responses are requested by **22 May 2023**.

Any material changes to AFCA's Rules require approval by both the AFCA Board and by ASIC. This governance framework has been built into our consultation timeline.

1.4 The proposed changes

AFCA proposes changes to its Rules and Operational Guidelines in the following general areas, to address the [Independent Review Report recommendations](#):²

1. The management of unreasonable and inappropriate conduct within the scheme, to strengthen AFCA's ability to deliver procedural fairness under Recommendation 2, to manage the conduct of fee Paid Representatives who engage with the scheme under Recommendation 4, and to build greater efficiency and timeliness in complaint handling in response to Recommendation 5.
2. Dealing with complaints where an appropriate offer of settlement has been made or where issues in dispute have been previously settled. These changes respond to Recommendations 1, 2, 5 and 7 to ensure only unresolved issues in dispute are progressed and that matters do not progress to case management or decision status where appropriate offers of settlement have already been made.
3. Excluding complaints lodged by professional or sophisticated investors unless exceptions apply, as required by Recommendation 6.
4. To enhance the visibility, accessibility and performance of the Forward Looking Review mechanism, under Recommendation 9.

² See Attachment 1 List of Independent Review Recommendations.

5. Clarity about the effect of AFCA determinations and how the slip rule works to ensure greater transparency and understanding of AFCA's decision making under Recommendation 2. This is designed to ensure that complaints are finalised in a more timely and efficient manner under Recommendation 5.
6. Minor changes to definitions and language to update certain areas of the Rules arising from legislative change, to give greater clarity and transparency of the scheme's operation overall.
7. Minor changes to clarify AFCA's reporting and transparency obligations.

The Review Report did not recommend that AFCA increase its jurisdiction or monetary limits. The Recommendations were directed at improvements within AFCA's current jurisdiction. The proposed changes do not increase our jurisdiction or change the scope of the dispute resolution scheme or its jurisdiction.

1.5 The consultation process

AFCA is required by legislation and ASIC Regulatory Guide 267 to operate in a way that is accessible, independent, fair, accountable, efficient and effective. This includes undertaking stakeholder consultation on any proposed material changes to our Rules.

Blue boxes show proposed new text to be included in the Rules/Operational Guidelines.

The following attachments form part of this consultation paper:

- [Attachment 1 List of Independent Review Recommendations](#)
- [Attachment 2 Summary list of questions for stakeholders](#)
- [Attachment 3 List of changes](#)
- [Attachment 4 Proposed Rules \(in Markup\)](#)
- [Attachment 5 Proposed Operational Guidelines \(in Markup\)](#)

1.6 How you can consult with us

You are invited to comment on the proposals in this paper. These proposals are an indication of the approach we may take, but we are keen to hear from you and your comments will help us in the further evolution of AFCA's Rules and Operational Guidelines which will enhance the AFCA scheme.

Our consultation program has been designed with the needs of our stakeholders in mind, so our approach will be flexible and accessible. There are many ways to provide comment, including through webinars, meetings, our online submission form or written submissions.

You may choose to remain anonymous when making a written submission. However, if you do remain anonymous, we will not be able to contact you to discuss your submission should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it as confidential. Your submission will be published on AFCA's website. Please refer to our privacy policy at <https://www.afca.org.au/about-afca/policies/privacy-policy> for more information about how we handle personal information.

Written submissions should be sent by **22 May 2023** to:

Executive General Manager Jurisdiction
Australian Financial Complaints Authority
GPO Box 3
Melbourne Vic 3001
Email: consultation@afca.org.au
Online: www.afca.org.au/rulesandOGconsultation

We look forward to the consultation process and keeping stakeholders informed as we progress this important work. We will provide regular updates on the consultation and the proposed changes during the next six months.

1.7 What will happen next?

- Stage 1: 27 March 2023 – AFCA consultation paper released
- Stage 2: 22 May 2023 – Comments due on the consultation paper
- Stage 3: May – September 2023 – AFCA to consider and respond to consultation feedback and submissions
- Stage 4: September 2023 – AFCA Board submit proposed changes for ASIC approval
- Stage 5: 31 December 2023 – Approval process completed (subject to ASIC approval)
- Stage 6: 1 July 2024 – New Rules and Operational Guidelines to commence

2 Managing conduct within the scheme

AFCA has developed and published an Engagement Charter as part of its framework to deliver procedural fairness to all parties. The Charter shares AFCA's values and outlines the conduct it expects from Financial Firms, Complainants and AFCA employees when resolving complaints. It also outlines AFCA's obligations to be fair, independent and impartial, as stated in AFCA's Rules.

The Charter makes the roles, responsibilities and expectations of each party more explicit so that AFCA's stakeholders have a shared understanding of good conduct.

Key to the Charter is AFCA's expectation that all parties cooperate reasonably with the common goal of bringing finality to a complaint. It says all parties should engage with each other and AFCA in a way that is transparent and honest, respectful and fair, in good faith, and efficient and cooperative.

Under our current Rules, AFCA has the ability to report a Financial Firm's failure to reasonably co-operate with AFCA to the regulator. AFCA currently has limited capacity, however, to manage unreasonable conduct of Complainants and Paid Representatives within the scheme.

2.1 Proposal 1: Paid Representatives

2.1.1 Background

Rule C.2.2 currently gives AFCA the discretion to exclude a complaint where the Complainant is represented by a paid agent whose conduct is inappropriate.

Recommendation 4 of the Review Report provided that poor conduct by paid advocates (or Paid Representatives) affecting the efficiency of the scheme should be addressed, including by amendments to AFCA's Rules to exclude certain paid advocates from involvement in the complaints process.

In response to the Independent Review Recommendation, AFCA has improved transparency of our jurisdiction for Paid Representatives by providing guidance on AFCA's requirements for complaint lodgement and submission, and by clearly outlining our expectations of the engagement required of all parties. We have done this so that AFCA can deliver procedural fairness and work towards resolution of a complaint. The proposed Rules changes strengthen our ability to manage conduct by all parties who engage with the scheme and they enable AFCA to fully implement Recommendation 4 of the Review Report.

2.1.2 Proposed change

To implement fully Recommendation 4, AFCA proposes to amend its Rules to define the term “Paid Representative” following recent law reform, and to allow AFCA the discretion not to entertain a complaint or to exclude a Paid Representative from participation in the scheme in certain circumstances where there is inappropriate conduct. The proposed amendments would give AFCA discretion to exclude a Paid Representative where there is inappropriate conduct for a continuous period of up to 12 months.

Additional amendments will be made to the Operational Guidelines to explain how the discretion will be exercised and to provide examples of its use.

AFCA proposes the following amendments:

- Schedule E to include new defined terms

Paid Representative means a person or service (other than a lawyer with a current practising certificate or an Accountant) who may receive financial remuneration for acting for a Complainant in relation to their complaint lodged with AFCA.

Excluded Paid Representative means a Paid Representative who is subject to a current exclusion by AFCA under rule B.6.

- Replace C.2.2g) with a new discretion to cease considering a complaint because of inappropriate conduct by a Paid Representative:

A.8.4 AFCA may also decide at its discretion that it is not appropriate to continue to consider a complaint because:

- a) the Complainant is dealing with AFCA through a Paid Representative and AFCA is satisfied that:
 1. the Paid Representative does not hold an Australian credit licence or Australian financial services licence where this is required by law; or
 2. the Paid Representative:
 - (i) is either not acting in the Complainant's best interests or, acting in a way that prevents AFCA from achieving a cooperative, fair, efficient and timely resolution of the Complainant's complaint; and
 - (ii) fails to promptly remedy the matters of concern to AFCA despite AFCA informing the Paid Representative of its concerns

AFCA's Operational Guidelines will explain the use of this discretion, including that AFCA will not lightly exclude a complaint because of a Paid Representative's conduct.

For example, where AFCA becomes aware that a Paid Representative does not hold an Australian Credit Licence or Australian Financial Services Licence where this is required by law, AFCA considers that it should not continue to deal with the Paid Representative. AFCA recognises that in 2021, the law was amended to require providers of debt management services to hold an Australian credit licence and providers of a claims handling and settling service to hold an Australian financial services licence.³ These reforms were designed to protect consumers who use their services.

AFCA's Operational Guidelines will also explain that Paid Representatives are expected to be familiar with AFCA processes and requirements, to follow AFCA published guidance and to conduct themselves professionally. Where AFCA has concerns about a Paid Representative's conduct, AFCA will set out these concerns in writing to the Paid Representative. If the Paid Representative fails to properly and promptly address AFCA's concerns, AFCA

³ [National Consumer Credit Protection Amendment \(Debt Management Services\) Regulations 2021](#) and [Financial Sector Reform \(Hayne Royal Commission Response\) \(Claimant Intermediaries\) Regulations 2021](#).

may at its discretion cease to deal with the complaint or with the Paid Representative.

Prior to excluding a complaint, AFCA will follow a procedurally fair process including providing the Complainant with the opportunity to pursue the complaint with a new representative or to act on their own behalf. AFCA will only decide whether or not to continue to consider the complaint if these steps do not resolve the situation.

The Operational Guidelines will explain that AFCA will not lightly take action to exclude a complaint, and that any exercise of the discretion to exclude will only occur after a procedurally fair process has been undertaken.

- Replace Rule C.2.2h) with the following:

A.4.1 The Complainant must be an Eligible Person who is ...no[t] represented by an Excluded Paid Representative.

B.6.1 AFCA may in its discretion decide to exclude:

....

- b) a Paid Representative.

B.6.2 An exclusion under rule B.6.1 must be in writing provided to the excluded person. An exclusion must specify the period for which it applies. This must not be for longer than 12 months.

.....

Excluded Paid Representative

B.6.5 AFCA may only exercise its discretion to exclude a Paid Representative under rule B.6.1b) if AFCA is satisfied that the Paid Representative, when dealing with AFCA in that capacity on behalf of a Complainant:

- a) did not hold an Australian credit licence or Australian financial services licence where this was required by law; or
- b) either:
 - (i) did not act in the Complainant's best interests; or

- (ii) acted in a way that prevented AFCA from achieving a cooperative, fair, efficient and timely resolution of the Complainant's complaint; and
- (i) despite AFCA informing the Paid Representative of this, the Paid Representative failed to remedy the matters of concern to AFCA.

B.6.6 Rule A.4.1 means that, for the duration of the exclusion, AFCA is not able to consider any new complaint submitted to AFCA by or on behalf of a Complainant who is represented by the Excluded Paid Representative or an officer, employee or agent of the Excluded Paid Representative.

Process

B.6.7 AFCA must not exercise its discretion to exclude a ... Paid Representative under rule B.6.1 without first:

- a) notifying the person in writing that it is proposing to exclude them, the reasons for the proposed exclusion and the effect of the proposed exclusion; and

giving the person a reasonable period in which to provide a written response to AFCA's concerns.

An exclusion of a Paid Representative will only operate for a continuous period of up to 12 months. During the exclusion period, an Excluded Paid Representative has the opportunity to put in place resources, processes and training so that its employees and agents are able to represent AFCA Complainants appropriately in the future.

Prior to excluding a Paid Representative, AFCA will provide any impacted Complainants with the opportunity to pursue their complaint with a new representative or to act on their own behalf.

The Operational Guidelines will explain that AFCA will not lightly take action to exclude a Paid Representative and that any exercise of the discretion to exclude will only occur after a procedurally fair process has been undertaken.

2.1.3 Question for stakeholders

- Q.1 Do you think that the proposed Rules amendments in relation to Paid Representatives appropriately address Recommendation 4?

2.2 Proposal 2: Complainants

2.2.1 Background

Rule C.2.2 currently gives AFCA some discretion to exclude a complaint where the Complainant is acting inappropriately.

AFCA will continue its significant program of work to ensure the scheme is accessible to people in vulnerable circumstances. AFCA's Rules, however, currently only provide limited ability to exclude or close a complaint where a Complainant's conduct towards AFCA staff is inappropriate and unreasonable and does not comply with AFCA's Engagement Charter.

This includes instances where a Complainant's conduct is threatening, intimidating, abusive, bullying, discriminatory or otherwise unreasonable. Unfortunately, in a small number of complaints, AFCA staff have been threatened with physical violence and highly abusive conduct.

AFCA has a legal duty to ensure a safe workplace. AFCA recognises that financial disputes can be difficult for people, but no one should have their health and wellbeing put at risk. These types of disruptive behaviours also lead to delay and prevent the efficient and timely resolution of complaints, which was the focus of Review Recommendation 5.

2.2.2 Proposed change

AFCA proposes that its Rules provide a more comprehensive ability to address unreasonable Complainant conduct.

- New discretion to stop at any time considering a complaint because of unreasonable Complainant conduct:

A.8.4 AFCA may also decide that it is not appropriate to continue to consider a complaint because:

....

b) in AFCA's reasonable opinion:

- (i) the Complainant's conduct to AFCA staff is threatening, intimidating, abusive, bullying, discriminatory or otherwise unreasonable; or
- (ii) the conduct denies AFCA staff a safe working environment, and
- (iii) the Complainant has failed to substantively cooperate with or respond to attempts (if any) by AFCA to manage the conduct.

The Operational Guidelines will be amended to explain that AFCA will not lightly exclude a complaint because of a Complainant's unreasonable conduct. AFCA will usually take steps under AFCA's Engagement Charter to manage the situation. This includes warning the Complainant that their conduct is unacceptable, limiting their avenues or methods of contact with AFCA or requiring them to appoint a representative with whom AFCA can deal. But in other cases, AFCA may exercise its discretion to cease handling a complaint.

- New discretion to refuse to consider a new complaint that is substantively the same as a previously excluded complaint under Rule A.8.4b):

C.2.2. Examples where AFCA may consider excluding a complaint include:

.....

C.2.2h) The nature and subject matter of the complaint is substantively the same as a previous complaint that was discontinued by AFCA under rule A.8.4b).

The Operational Guidelines will provide examples of where AFCA is likely to exercise this discretion, including repeated recidivist conduct.

- New ability to exclude a Complainant for up to 12 months:

A.4.1 The Complainant must be an Eligible Person who is neither an Excluded Complainant

B.6.1 AFCA may in its discretion decide to exclude:

- a) a Complainant who has submitted one or more complaints that AFCA has decided under rule A.8.4b) to close or under rule C.2.2e) not to consider.

.....

B.6.2 An exclusion under rule B.6.1 must be in writing provided to the excluded person. An exclusion must specify the period for which it applies. This must not be for longer than 12 months.

Excluded Complainant

B.6.3 AFCA may only exercise its discretion to exclude a Complainant under rule B.6.1a) if AFCA is reasonably satisfied that this action is necessary in view of the person's misconduct or abuse of AFCA's process.

B.6.4 Rule A.4.1 means that, for the duration of the exclusion, AFCA will not consider any new complaint submitted to it by or on behalf of the Excluded Complainant.

.....

Process

B.6.7 AFCA must not exercise its power to exclude a Complainant ... under rule B.6.1 without first:

- a) notifying the person in writing that it is proposing to exclude them, the reasons for AFCA's concerns and the effect of exclusion; and
- b) giving the person a reasonable period in which to provide a written response to AFCA's concerns.

It should be noted that AFCA has undertaken a significant program of work to ensure that its service is accessible to complainants living in vulnerable circumstances. This includes in 2023, a strategic program of work to build skills and expertise in cultural and trauma informed practice. It should be noted that the above proposed provisions will operate taking into account these matters.

2.2.3 Question for stakeholders

Q.2 Do you think that the proposed new provisions in relation to Complainant conduct are appropriately drafted and achieve the right balance in their application?

3 Appropriate offers of settlement or previously settled matters

3.1 Proposal 3: Appropriate settlement offers

3.1.1 Background

Rule A.8.3 currently gives AFCA the ability to exclude a complaint where the Complainant has been appropriately compensated for their loss.

The Rules do not, however, include a specific provision which provides AFCA with discretion to exclude a complaint where a Complainant has failed to accept an appropriate settlement offer from the Financial Firm. We consider this conduct is not in keeping with fair, timely and efficient dispute resolution.

This change aims to encourage fair settlement of meritorious complaints at an early stage in AFCA's process. This will enhance the timeliness and efficiency of outcomes in accordance with Recommendation 5. These aims are consistent with key themes in the Review Report.

This proposal is not a unique concept to external dispute resolution. A number of other ombudsman schemes, including one of AFCA's predecessor schemes, have/had similar provisions in their jurisdictions.

3.1.2 Proposed change

AFCA proposes to amend Rule A.8.3b) and to introduce a new Rule A.8.3d):

A.8.3 AFCA may decide that it is not appropriate to continue to consider a complaint, in circumstances such as:

.....

b) the Complainant has suffered no loss;

....

d) the Financial Firm has appropriately compensated the Complainant for their loss, or has offered the Complainant an appropriate remedy or compensation, which has not been accepted.

The Operational Guidelines will explain that AFCA will consider whether a Financial Firm offer of settlement or compensation payment is appropriate in all of the circumstances of the complaint, and represents an appropriate outcome to the complaint should it proceed to a determination. (The Credit and Investment Ombudsman Limited previously had a similar Rule.) If this is the case, AFCA will work with the parties to resolve the matter at that point. It is only if the Complainant unreasonably refuses to accept the offer of settlement or compensation payment as resolution of the complaint, that AFCA will consider whether or not to continue to consider the complaint.

3.1.3 Question for stakeholders

Q.3 Do you think that the proposed change to Rule A.8.3 is appropriately drafted and will assist in delivering early and fair resolution of complaints?

3.2 Proposal 4: Previous settlement agreements

3.2.1 Background

Rule C.2.1 gives AFCA a discretion to exclude a complaint if AFCA considers appropriate. Rule C.2.2 provides examples of circumstances where this discretion might be exercised. Rule C.2.2 does not, however, currently list as an example a complaint that has been the subject of a full and final settlement between the parties.

As referred to in the Operational Guidelines, AFCA's practice and the longstanding practice of AFCA's predecessor schemes and other ombudsman schemes is, however, to exclude such a complaint unless there are special circumstances that apply.

The change proposed supports the efficient and timely resolution of complaints which was the focus of Recommendation 5 of the Review and means only issues that continue to be in dispute between the parties will progress. In continuing to strengthen the operation of its fairness jurisdiction, AFCA has also published Approach to Terms of Settlement outlining its approach to reaching and documenting fair resolution of a complaint. The proposed Rules change is consistent with that guide.

3.2.2 Proposed change

AFCA proposes to amend Rule C.2.2 to include this additional example of when AFCA may exercise its discretion to exclude a complaint:

g) The Complainant has reached a full and final settlement with the Financial Firm about the subject matter of the complaint, unless the Complainant can show that the settlement was obtained by fraud, duress or misleading and deceptive or unconscionable conduct or that the issue the subject of the complaint was not part of the settlement terms.

The Operational Guidelines will explain that the previous settlement must be documented and clearly includes the subject matter of the complaint to AFCA.

AFCA will also consider whether the settlement was obtained by fraud, duress, misleading and deceptive or unconscionable conduct. The Operational Guidelines will specify relevant factors to determine this.

This change aims to enhance the transparency of AFCA's approach, consistent with a key theme in the Review Report, and is consistent with AFCA's published Approach to Terms of Settlement.

3.2.3 Question for stakeholders

Q.4 Do you think that the proposed new Rule C.2.2g) and the Operational Guidelines discussion of settlement agreements is appropriately drafted?

4 How we deal with complaints lodged by sophisticated or professional investors

4.1 Proposal 5: Sophisticated investor and professional investor complaints

4.1.1 Background

Rule C.2.2 provides examples where AFCA might exercise its discretion to exclude a complaint. Rule C.2.2j) refers to wholesale client complaints.

A sophisticated investor is defined in section 761GA of the Corporations Act as a client who has signed a sophisticated investor acknowledgement form and met other requirements. A professional investor is defined in section 9 of the Corporations Act to include a financial services licensee, trustee of a super fund with net assets exceeding \$10 million and listed entities and their subsidiaries.

Since AFCA commenced in November 2018 it has only received a small number of complaints lodged by these investors, and generally this discretion to exclude has been applied so as not to exclude retail clients who have been mis-classified.

4.1.2 Proposed change

Recommendation 6 of the Review Report requires AFCA to exclude complaints from sophisticated or professional investors from its jurisdiction, unless there is evidence that they had been incorrectly or inappropriately classified.

AFCA proposes to clarify its existing approach to the exercise of discretion under Rule C.2.2j), consistent with Recommendation 6 through amendments to its Operational Guidelines. The Rule does not require change in order to implement the Recommendation.

If a Complainant says that they were wrongly or mis-classified as a sophisticated investor or professional investor, AFCA will assess that claim with the parties, prior to deciding to exclude the complaint from its jurisdiction.

AFCA's Operational Guidelines will set out AFCA's approach. As stated above, this change is consistent with Recommendation 6 of the Review Report.

4.1.3 Question for stakeholders

Q.5 Do you think that the proposed amendment to the Operational Guidelines appropriately responds to the Review Recommendation 6?

5 Forward Looking Review mechanism

5.1 Proposal 6: Forward Looking Review mechanism

5.1.1 Background

Recommendation 9 of the Review Report required AFCA to enhance the visibility, accessibility and independence of AFCA's Forward Looking Review mechanism.

The AFCA Operational Guidelines currently describe the options available to stakeholders to apply to AFCA for review of its approach to particular complaint types or issues, on a forward looking basis.⁴ An applicant must be able to demonstrate that the AFCA Determination adopts an approach that could have a significant impact across a class of consumers, businesses or transactions.

5.1.2 Proposed change

The Operational Guidelines will be amended in accordance with Recommendation 9 to:

- Remove the requirement that external legal advice showing an error of law must accompany the review request
- Provide more guidance about how to apply for a review
- Outline the stakeholder consultation model AFCA will adopt to assess whether there are significant issues that warrant review
- Include publishing the outcome of a review.

5.1.3 Question for stakeholders

Q.6 Are the proposed changes to the Operational Guidelines appropriately drafted and in keeping with Recommendation 9 of the Review Report?

6 Effect of Determinations and slip rule

6.1 Proposal 7: Complainant non-acceptance of Determination

6.1.1 Background

Providing greater clarity about the operation of our Rules about AFCA's decision making supports the fair, efficient and timely resolution of complaints under Review Recommendation 5. It also supports AFCA's continued improvement of its fairness jurisdiction as discussed under Review Recommendation 2.

⁴ Described in the Operational Guidelines at Rule A.15.

AFCA Rule A.15.4 currently explains the consequences for both parties if a Complainant does not accept a Determination. AFCA's experience is that the current wording of Rule A.15.4 has led to confusion for some parties. AFCA proposes to amend the wording of A.15.4 to address any confusion.

6.1.2 Proposed change

AFCA proposes to replace Rule A.15.4 with A.15.3b), to clearly specify that, if a Complainant does not accept a Determination made by AFCA, neither the Complainant nor the Financial Firm is bound by the Determination.

A.15.3b) if a Complainant does not accept a Determination within that timeframe, neither the Complainant nor the Financial Firm is bound by the Determination and the Complainant may bring an action in the courts or take any other available action against the Financial Firm.

6.1.3 Question for stakeholders

Q.7 Do you think that proposed new Rule A.15.3b) is appropriately worded and provides clarity about the effect of a determination not being accepted by a Complainant?

6.2 Proposal 8: Accidental error in a Determination – slip rule

6.2.1 Background

Providing greater clarity about the operation of our Rules about AFCA's decision making supports the fair, efficient and timely resolution of complaints under Review Recommendation 5. It also supports AFCA's continued improvement of its fairness jurisdiction as discussed under Review Recommendation 2.

Whilst AFCA has quality assurance processes to ensure the quality of Determinations, occasionally a Determination may contain an accidental error. Where an error is promptly identified, AFCA's practice is to correct the error by re-issuing a Determination with the appropriate amendments regarding the error.

This correction process is currently outlined in the Operational Guidelines, but not in AFCA's Rules.

6.2.2 Proposed change

AFCA proposes to introduce a new Rule A14.6 to govern when a Determination may be re-issued because of an accidental slip or omission. This change mirrors the current wording with what is essentially already in AFCA's Operational Guidelines.

A.14.6 If the AFCA Decision Maker is satisfied that there is a clerical mistake or error in a Determination arising from an accidental slip or omission, they may correct and re-issue the Determination. This includes, for example, where there is a miscalculation of figures or mistake in the description of a person, thing or matter. This is not, however, a mechanism for AFCA (or the parties to request AFCA) to re-open a Determination for substantive revision.

The proposed wording draws upon Regulation 36.07 of the Supreme Court (General Civil Procedure) Rules 2015.

As is currently the case, the Operational Guidelines will state that a party to a complaint may write to AFCA if they consider that a Determination requires correction. Normally AFCA will expect a correction request to be made within 30 days of the issue of the Determination.

These changes are proposed to provide more transparency about the limited circumstances in which a Determination may be corrected. Consistent with the Review Report, the AFCA Rules and Operational Guidelines will not include a mechanism for substantive revision of a Determination.

6.2.3 Question for stakeholders

Q.8 Do you think the Rules wording is appropriately drafted and provides clearer guidance and transparency about the existing slip rule?

7 Other changes

7.1 Proposal 9: Consistency of language about AFCA's monetary limits

7.1.1 Background

Rule D.4 sets out the monetary limits (compensation caps and monetary restrictions on AFCA's jurisdiction) for complaints other than Superannuation Complaints.

Whilst the tables that follow Rule D.4 identify that the compensation amount limit applies 'per claim', the Rules do not consistently use this language.

7.1.2 Proposed change

The wording in Rule D.4.1 and the heading in the table are inconsistent in the language used. We propose to amend Rule D.4.1 to remove this inconsistency and align the table content with Rule D.4. This means that both the Rule and the table will state that compensation amount limits apply per claim. Providing clarity

about the operation of our Rules supports the fair, efficient and timely resolution of complaints by removing uncertainty.

This action supports the implementation of Recommendations 2 and 5 of the Review. This change does not alter AFCA's existing monetary limits nor how they are applied by AFCA.

D.4.1 This Section sets out:

- a) the maximum amount per claim that may be awarded by an AFCA Decision Maker for complaints other than Superannuation Complaints, not including costs awarded under rule D.5 or interest under rule D.6; and
- b) the monetary restriction per claim on AFCA's jurisdiction.

AFCA also proposes to amend the final column heading in the tables in Rule D.4.1 to specify that monetary restrictions are "per claim".

7.1.3 Question for stakeholders

Q.9 Are there other areas in the AFCA Rules that you consider require similar administrative or minor changes?

7.2 Proposal 10: Clarifying the objection process for Rule A.8.3

7.2.1 Background

AFCA's Rules currently do not set out in full the objection process that is available to a Complainant where AFCA decides under Rule A.8 not to continue to consider their complaint. Instead, Rule A.8.3 makes an abridged reference to Rules A.4.5 and A.4.6. These Rules set out the process when a Complainant objects to an AFCA decision that the complaint is outside AFCA's jurisdiction.

7.2.2 Proposed change

AFCA proposes to amend Rule A.8 to set out the objection process in full:

A.8.5 If either rule A.8.3 or A.8.4 applies, AFCA will inform the Complainant in writing that it intends to close the complaint, setting out its reasons and the timeframe within which the Complainant may object to this decision.

A.8.6 If the Complainant objects with the specified timeframe, AFCA will review its decision under rule A.8.3 or A.8.4 if AFCA is satisfied that the Complainant's objection may provide reasonable grounds to change the decision. If rule A.8.3 applies, AFCA will inform the Financial Firms involved in the complaint and provide them with an opportunity to make submissions before AFCA makes a final decision as to whether to continue to consider the complaint.

AFCA's experience is that the current wording of Rule A.8 often causes confusion. The primary aim of the change is to clarify the effect of AFCA's Rules. This supports the fair, efficient and timely resolution of complaints by removing uncertainty and supports the implementation of Recommendation 5 of the Review.

Where AFCA decides not to consider a complaint because of Paid Representative or Complainant conduct and the Complainant objects to this decision however, AFCA will not provide the Financial Firm with an opportunity to make a submission. This recognises privacy considerations and that the focus is on the behavioural issues that impact AFCA's effectiveness and its staff's safety.

7.2.3 Question for stakeholders

Q.10 Do you think that the proposed Rules A.8.5 and A.8.6 are appropriately drafted and replicate the existing provisions under A.4.5 and A.4.6?

7.3 Proposal 11: AFCA Banking and Finance Panels

7.3.1 Background

Rule D.4 allows a complaint to be decided by an AFCA Panel, instead of an Ombudsman or Adjudicator, if AFCA considers this to be appropriate in all of the circumstances of the complaint. The Rule sets out guidance on the factors to be taken into account by AFCA when making this decision about the AFCA Decision Maker.

AFCA seeks to provide greater clarity about our decision making processes in our Operational Guidelines to:

- further support the fair, efficient and timely resolution of complaints and

- reduce uncertainty of process.

This proposal supports the implementation of Recommendations 2 and 5 of the Review. The Operational Guidelines provide examples of general insurance, life insurance, investments and superannuation complaints that might be decided by an AFCA Panel. Examples are not currently provided for banking and finance or small business complaints. In practice, however, a small percentage of Determinations about banking and finance and small business complaints are made by AFCA Panels (approx. 80 last financial year).

7.3.2 Proposed change

AFCA proposes to amend the Operational Guidelines to include examples of banking and finance complaints or small business complaints that might be decided by an AFCA Panel.

Examples of **banking and finance complaints** or **small business complaints** that might be decided by an AFCA Panel:

- A complaint about a complex new credit or other product or a complaint that raises new issues of good industry practice
- A complaint where there are complex legal and factual issues and specialist skills would assist
- A complaint involving new issues pertaining to consumer behaviour or consumer impact, including in relation to hardship or vulnerability, and the decision may impact the broader community.

7.3.3 Question for stakeholders

Q.11 Are there additional assessment criteria that AFCA should consider adopting to meet the stated objective?

7.4 Proposal 12: Definition changes

AFCA proposes to amend the Schedule E definition of “Financial Service” to include debt management assistance and credit reporting assistance.

Financial Service means:

....

- (i) debt administration including debt management assistance or credit reporting assistance within the meaning of those terms in the National Consumer Credit Regulations 2010;

7.5 Proposal 13: Annual reporting

7.5.1 Background

Rule A.20.1 currently specifies what must be included in AFCA's Annual Report.

7.5.2 Proposed change

ASIC's Regulatory Guide 267 currently contains more detail than AFCA Rule A.20.1 about the reporting requirements for AFCA's Annual Report.

AFCA proposes to amend Rule A.20.1 to specify that AFCA's Annual Report must meet AFCA's obligations to regulators.

A.20.1 To facilitate public reporting, AFCA must produce a report at least every twelve months and provide this to ASIC, the Financial Firms and the public via AFCA's website. This report must be comprehensive summary and analysis of data collected and must meet AFCA's obligations to regulators.

The proposed change better aligns the Rules with Regulator requirements. The Operational Guidelines will explain that in carrying out its reporting responsibilities, AFCA aims to provide information that is accurate and useful and to operate transparently as required by Rule A.2.