

Attachment 3 – List of changes

The below tables are a summary only.

Table 1. Proposed changes to AFCA’s Rules

Table 1 sets out the proposed changes to the AFCA Rules, for every proposed change there is an associated change in the Operational Guidelines relating to that Rule. Refer to Attachment 5 – Proposed Operational Guidelines (in Markup) for details of those changes.

Proposed changes to AFCA’s Rules	Rules	OGs
<p>Proposal 1: Paid Representatives</p> <p>Insert new defined terms at E.1.1:</p> <ul style="list-style-type: none"> • <i>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.</i> <p>And</p> <ul style="list-style-type: none"> • <i>Excluded Paid Representative means a Paid Representative who is subject to a current exclusion by AFCA under rule B.6.</i> 	Pages 49 and 51	
<p>Proposal 1: Paid Representatives</p> <p>Insert new rule at A.8.4a):</p> <p><i>AFCA may also decide at its discretion that it is not appropriate to continue to consider a complaint because:</i></p> <p><i>a) the Complainant is dealing with AFCA through a Paid Representative and AFCA is satisfied that:</i></p> <ol style="list-style-type: none"> 1. <i>the Paid Representative does not hold an Australian credit licence or Australian financial services licence where this is required by law; or</i> 2. <i>the Paid Representative:</i> <ul style="list-style-type: none"> <i>(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</i> <i>(ii) fails to promptly remedy the matters of concern to AFCA despite AFCA informing the Paid Representative of its concerns.</i> 	Page 14	
<p>Proposal 1: Paid Representatives</p> <p>Amend Rule A.4.1 to read:</p>	Page 10	

Proposed changes to AFCA's Rules	Rules	OGs
<p><i>The Complainant must be an Eligible Person who is neither an Excluded Complainant nor represented by an Excluded Paid Representative.</i></p>		
<p>Proposal 1: Paid Representatives</p> <p>Insert new rules at B.6.1, B.6.2, B.6.5, B.6.6 and B.6.7¹:</p> <p><i>B.6.1 AFCA may in its discretion decide to exclude:</i></p> <ul style="list-style-type: none"> <i>(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.2.2d) not to consider; or</i> <i>(b) a Paid Representative.</i> <p>....</p> <p><i>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.</i></p> <p>....</p> <p><i>B.6.5 AFCA may only exercise its power 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:</i></p> <ul style="list-style-type: none"> <i>a) did not hold an Australian credit licence or Australian financial services licence where this was required by law; or</i> <i>b) either:</i> <ul style="list-style-type: none"> <i>(i) did not act in the Complainant's best interests; or</i> <i>(ii) acted in a way that prevented AFCA from achieving a cooperative, fair, efficient and timely resolution of the Complainant's complaint; and</i> <i>(iii) despite AFCA informing the Paid Representative of this, the Paid Representative failed to remedy the matters of concern to AFCA.</i> <p>....</p> <p><i>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 Paid Representative.</i></p> <p>....</p> <p><i>B.6.7 AFCA must not exercise its power to exclude a Complainant or Paid Representative under rule B.6.1 without first:</i></p> <ul style="list-style-type: none"> <i>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</i> 	<p>Pages 33 - 34</p>	

¹ Proposed Rules B.6.1 and B.6.7 are also relevant to Proposal 2 below.

Proposed changes to AFCA's Rules	Rules	OGs
<p>b) <i>giving the person a reasonable period in which to provide a written response to AFCA's concerns.</i></p>		
<p>Proposal 1: Paid Representatives Delete Rules C.2.2g) and h)</p>	Pages 39 - 40	
<p>Proposal 2: Complainants Insert new rule at A.8.4b): <i>A.8.4 AFCA may also decide that it is not appropriate to continue to consider a complaint because:</i> <i>(b) in AFCA's reasonable opinion:</i></p> <ul style="list-style-type: none"> <i>(i) the Complainant's conduct to AFCA staff is threatening, intimidating, abusive, bullying, discriminatory or otherwise unreasonable;</i> <i>(ii) the conduct denies AFCA staff a safe working environment, and</i> <i>(iii) the Complainant has failed to respond to substantively cooperate with or respond to attempts (if any) by AFCA to manage the conduct.</i> 	Page 14	
<p>Proposal 2: Complainants Insert new rule at C.2.2h): <i>C.2.2 Examples where AFCA may consider excluding a complaint include:</i> <i>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)</i></p>	Page 40	
<p>Proposal 2: Complainants Insert new rules at B.6.1, B.6.2, B.6.3, B.6.4 and B.6.7): <i>B.6.1 AFCA may in its discretion decide to exclude:</i></p> <p>a) <i>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.</i></p> <p>.....</p> <p><i>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.</i></p> <p>.....</p>	Pages 33 - 34	

Proposed changes to AFCA's Rules	Rules	OGs
<p><i>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.</i></p> <p>.....</p> <p><i>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.</i></p> <p>.....</p> <p><i>B.6.7 AFCA must not exercise its power to exclude a Complainant or Paid Representative under rule B.6.1 without first:</i></p> <ul style="list-style-type: none"> <i>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</i> <i>b) giving the person a reasonable period in which to provide a written response to AFCA's concerns.</i> 		
<p>Proposal 3: Appropriate settlement offers</p> <p>Amend Rule A.8.3b) to read:</p> <p><i>the Complainant has suffered no loss</i></p>	Page 14	
<p>Proposal 3: Appropriate settlement offers</p> <p>Insert new rule at A.8.3d):</p> <p><i>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.</i></p>	Page 14	
<p>Proposal 4: Previous settlement agreements</p> <p>Insert new rule at C.2.2g):</p> <p><i>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.</i></p>	Page 40	
<p>Proposal 7: Complainant non-acceptance of Determination</p> <p>Insert new rule at A.15.3b):</p> <p><i>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.</i></p>	Page 21	

Proposed changes to AFCA's Rules	Rules	OGs
<p>Proposal 8: Accidental error in a Determination – slip rule</p> <p>Insert new rule at A.14.6:</p> <p><i>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.</i></p>	Page 20	
<p>Proposal 9: Consistency of language about AFCA's monetary limits</p> <p>Amend wording at D.4.1 to read:</p> <p><i>This Section sets out:</i></p> <p><i>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</i></p> <p><i>b) the monetary restriction per claim on AFCA's jurisdiction.</i></p>	Page 43	
<p>Proposal 9: Consistency of language about AFCA's monetary limits</p> <p>Insert 'per claim' into the fifth column in the table under the sub-heading 'Limits applying to complaints submitted to AFCA before 1 January 2021'</p>	Page 44	
<p>Proposal 9: Consistency of language about AFCA's monetary limits</p> <p>Insert 'per claim' into the fifth column in the table under the sub-heading 'Limits applying to complaints submitted to AFCA on or after 1 January 2021'</p>	Page 45 - 46	
<p>Proposal 10: Clarifying the objection process for Rule A.8.3</p> <p>Insert new rules at A.8.5 and A.8.6:</p> <p><i>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.</i></p> <p>....</p> <p><i>A.8.6 If the Complainant objects within 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.</i></p>	Page 15	
<p>Proposal 12: Definition changes</p> <p>Amend defined term 'Financial Service' at E.1.1 to include:</p>	Page 50	

Proposed changes to AFCA's Rules	Rules	OGs
<p><i>debt administration including debt management assistance or credit reporting assistance within the meaning of those terms in the National Consumer Credit Regulations 2010;</i></p>		
<p>Proposal 13: Annual reporting</p> <p>Amend wording at Rule A.20.1 to read:</p> <p><i>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.</i></p>	<p>Page 25</p>	

Table 2. Proposed changes to the Operational Guidelines

These are changes only being proposed to the Operational Guidelines and do not involve a Rules change.

Proposed changes to the Operational Guidelines	Rules	OGs
<p>Proposal 5: Sophisticated investor or professional investor complaints</p> <p>Delete and replace commentary under the sub-heading ‘What if the Complainant is a wholesale client?’ to read:</p> <p><i>Financial Firms that are licensed to provide retail clients with financial services (within the meaning in the Corporations Act which is narrower than in the AFCA Rules) are required by the Corporations Act to belong to the AFCA scheme. This is part of the consumer protection regime provided by the legislation to retail clients. For those firms, membership of AFCA gives their wholesale clients (along with their retail clients) a right under AFCA’s Rules to submit a complaint with AFCA.</i></p> <p><i>Financial firms that are licensed under the Corporations Act but only have wholesale clients can voluntarily join AFCA. This provides their wholesale clients with a right to submit a complaint to AFCA.</i></p> <p><i>Recognising, however, that wholesale financial services clients are not a core legislative external dispute resolution obligation, AFCA’s Rules give AFCA a discretion to exclude a complaint by a wholesale client (as defined in the Corporations Act), even if that complaint would otherwise fall within AFCA’s jurisdiction.</i></p> <p><i>The legislative definitions of retail client and wholesale client are complex. A client is assumed to be a retail client unless they fall into one of the categories of the wholesale client. Those categories cover a wide range of different considerations.</i></p> <p><i>Sophisticated and professional investors</i></p> <p><i>Some categories of wholesale client can be assumed to know that they have foregone the retail client protections, and what this means. AFCA will assume these clients have chosen to do this in order to access wholesale-only products.</i></p> <p><i>Those categories are:</i></p> <ul style="list-style-type: none"> ● “sophisticated” investors as defined in section 761GA of the Corporations Act. These are clients who receive a service where: <ul style="list-style-type: none"> > <i>The service was not in relation to a general insurance, superannuation or RSA product, was not a traditional trustee company, crowd-funding or superannuation trustee service and was not provided for use in connection with a business</i> > <i>the Financial Firm concluded the client had enough past experience to assess the merits value and risks of the product and their own information needs compared to the information they were provided</i> > <i>the firm informed the client of this, and the firm’s reasons for the assessment</i> 		<p>Pages 163 - 166</p>

Proposed changes to the Operational Guidelines	Rules	OGs
<p>> <i>the client signs an acknowledgement of this.</i></p> <p><i>This should not be confused with a “sophisticated investor” as defined in section 708 (8) of the Corporations Act, which does not form part of the wholesale client definition.</i></p> <ul style="list-style-type: none"> ● <i>“professional” investors as defined in section 9 of the Corporations Act. This includes:</i> <ul style="list-style-type: none"> > <i>Most (but not all) financial services licensees</i> > <i>Trustee of a superannuation fund, approved deposit fund, pooled superannuation trust or public sector superannuation scheme whose net assets exceed \$10 million</i> > <i>Listed entities and their related bodies</i> <p><i>AFCA will normally apply its discretion to exclude a complaint by these types of wholesale clients, unless there are compelling reasons (specific to the individual case) not to exclude the complaint.</i></p> <p><i>This is subject to some exceptions. Where the complainant says they were wrongly classified as a sophisticated or professional investor, AFCA will consider a complaint about the alleged mis-classification.</i></p> <p><i>Other wholesale clients</i></p> <p><i>Other categories of wholesale client can’t be assumed to automatically know they have foregone the retail client protections.</i></p> <p><i>For these other categories, the mere fact they are a wholesale client won’t be enough of itself to justify excluding the complaint. There would need to be other factors to support the discretion to exclude it.</i></p> <p><i>What happens if AFCA does not exclude a wholesale client complaint?</i></p> <p><i>Where AFCA does not exercise the discretion but rather considers a complaint by a wholesale client, it will have regard to the legal obligations applying to that particular client relationship.</i></p>		
<p>Proposal 6: Forward Looking Review mechanism</p> <p>At A.15 under the sub-heading ‘Is it possible to ask that AFCA’s approach in its Determinations be reviewed for future complaints?’ delete the current wording and replace with the following so that it reads:</p> <p><i>A formal review is designed to be used primarily by an industry body on behalf of its members, or a consumer organisation on behalf of consumers, where they are concerned that an AFCA Determination has raised an issue that is likely to have a significant impact across a class of consumers, businesses or transactions.</i></p> <ul style="list-style-type: none"> ● <i>A request for a formal review must be in writing and clearly identify:</i> <ul style="list-style-type: none"> ● <i>the Determination of concern,</i> ● <i>the reasons for their concern,</i> 		Page 83

Proposed changes to the Operational Guidelines	Rules	OGs
<ul style="list-style-type: none"> ● <i>the class of consumers, businesses or transactions that they think the issue raised in the Determination is likely to significantly impact in the future and why;</i> ● <i>what the significant impact is likely to be on them, together with supporting information, and</i> ● <i>what approach would in the requester’s view have been more consistent with the scheme principles.</i> <p><i>AFCA will undertake a formal review if satisfied that the request raises a significant issue that warrants this. Stakeholder views will be sought as part of this process. The outcome will be made public.</i></p> <p><i>The organisation requesting the review may be asked to contribute to the cost for AFCA of undertaking the review.</i></p>		
<p>Proposal 11: AFCA Banking and Finance Panels</p> <p>Insert additional wording at A.13.2 under the sub-heading ‘When is it appropriate to refer a complaint to a Panel?’:</p> <p><i>Examples of banking and finance complaints or small business complaints that might be decided by an AFCA Panel:</i></p> <ul style="list-style-type: none"> ● <i>A complaint about a complex new credit or other product or a complaint that raises new issues of good industry practice</i> ● <i>A complaint where there are complex legal and factual issues and specialist skills would assist</i> <p><i>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.</i></p>		Page 72

Table 3. Incidental changes to the Rules

These are small necessary amendments to the Rules arising from the drafting.

Incidental changes to the Rules	Rules	OGs
Update date, replace '25 November 2020' with '[] 2023'	Page 1	
Replace wording, 'The AFCA rules' with 'AFCA's Rules'	Page 3	
Replace sub-heading wording, 'Sections of AFCA rules' with 'Sections of AFCA's Rules'	Page 3	
Update Contents Table	Pages 5-6	
Insert wording at A.9.5b), '(whether dealing with AFCA directly or through a representative)'	Page 16	
Insert new rule at A.14.5 using existing wording from A.14.4	Page 20	
Insert new rule at A.15.3a) using existing wording from A.15.2: <i>a Determination by an AFCA Decision Maker is final, and is binding upon the parties if accepted by the Complainant within 30 days of the Complainant's receipt of the Determination;</i>	Page 21	
Update numbering of Rule A.15.3 to A.15.4	Page 21	
Capitalise 'rule' at A.15.4 and replace reference to 'A.15.3' with 'A.15.3a)'	Page 21	
Delete A.15.4	Page 21	
Insert 'B.6' in table under heading 'Section B – Requirements'	Page 27	
Capitalise 'rule' at B.4.5.1b) and c)(v)	Page 31	
Capitalise 'a' and 'complainant' at C.2.2j)	Page 40	
Insert new rule at D.2.2, using existing wording from D.3.4: <i>Punitive, exemplary or aggravated damages cannot be awarded.</i>	Page 41	
Replace heading at D.3, 'Compensation for complaints other than Superannuation Complaints' with 'Financial loss and non-financial loss remediation for complaints other than Superannuation Complaints'	Page 42	

Incidental changes to the Rules	Rules	OGs
Replace 'compensate' with 'remediate' at D.3.1	Page 42	
Insert word 'Rule' at D.3.1, D.3.2 and D.3.4	Pages 42-43	
Delete D.3.4	Pages 42-43	
Replace 'the' with 'these' at D.4.3 and delete wording, 'set out in the table below'	Page 43	
Replace '12.3' with '11.3' at E.1.1, definition for 'Panel Member'	Page 52	
Replace 'AFCA rules' with 'AFCA's Rules' at section F	Page 56	
Capitalise 'rules' at F.1.1, F.1.3, F.2.1	Pages 57-58	
Replace 'AFCA rules' with 'AFCA's Rules' at section G	Page 59	
Capitalise 'rules' at G.1.1, G.1.2, G.1.3	Page 59	
Replace 'the AFCA scheme rules' with 'AFCA's Rules' at G.2.1(b) and G.3.1(d)	Pages 59 -60	
Replace 'SMEG' with 'SMEGs' at G.2.1b)(i)	Page 59	