

28 November 2023

Mr Shail Singh
Lead Ombudsman—Investments and Advice
Australian Financial Complaints Authority
GPO Box 3
Melbourne VIC 3001

By email: consultation@afca.org.au

Dear Mr Singh

The AFCA Approach to determining compensation in complaints involving Financial Advisers and Managed Investment Schemes

1. The Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committee**) makes this submission to the Australian Financial Complaints Authority (**AFCA**) in response to the consultation paper titled “The AFCA Approach to determining compensation in complaints involving Financial Advisers and Managed Investment Schemes” which was released by AFCA on Monday 6 November 2023 (the **Consultation Paper**).
2. The Committee thanks AFCA for the opportunity to comment on the Consultation Paper, the purpose of which is to document AFCA’s approach to determining compensation in complaints involving financial advisers and managed investment schemes (the **Approach**).
3. The Committee acknowledges that the proposed document is new, but the Approach itself is not. In principle, the Committee agrees that it is appropriate for AFCA to document the Approach in a publicly available document—to support complainants and guide financial firms to better understand how AFCA considers investment and advice complaints involving financial advisers and managed investment schemes, and also to ensure that AFCA case managers and decision managers adopt a consistent approach.
4. The Committee has set out some brief observations on the Approach document below.

Distinction between managed investment scheme (MIS) and responsible entity (RE)

5. The Committee has observed inconsistency between the following parts of the draft Approach document:
 - (a) section 1.2, which states that the Approach is intended to assist the reader to understand how AFCA considers liability and compensation in relation to financial advice firms and the RE of an MIS on which an advice firm has given advice, and that this includes “where the MIS has subsequently failed or become insolvent”; and
 - (b) section 3.1, case study 2, which is headed “Claim against a financial advice firm and an insolvent MIS”, but refers to a situation where a complainant cannot submit a complaint against an RE “because the RE of the MIS is insolvency [sic] and is no longer an AFCA member”.
6. To improve clarity and avoid confusion, the Committee recommends that references in the Approach document to the MIS being insolvent should be amended to refer to the RE of the MIS (rather than the MIS) being insolvent.
7. The Committee also notes this statement made in section 2.5 of the Approach document:

“Even though breach of the best interests duty is a non-apportionable claim, where a MIS is solvent and is joined to the complaint, AFCA may, if it is fair in the circumstances, apportion loss between the RE and the financial advice firm.”
8. The Committee submits that the above statement should refer to the RE (rather than the MIS) being solvent and joined to the complaint.

When an RE can be held responsible for a consumer’s financial loss

9. The Committee notes that section 2.1 of the Approach document makes the following statement:

“If a consumer suffers loss arising from advice to invest in a MIS, they can bring a claim against the RE of the MIS or the financial advice firm, or both parties.”
10. With respect, this statement does *not* accurately reflect the law. The Committee considers that it is important to recognise that the RE will only be liable to the consumer if the consumer’s loss arises from a breach of the RE’s obligations to the consumer. If the RE has complied with all of its obligations, the RE will not be liable to the consumer for financial loss that has arisen as a consequence of the financial advice firm’s conduct.
11. The Committee therefore recommends that AFCA revisit the above statement to ensure that it does not inadvertently misrepresent the extent of consumers’ recourse to the RE.

Definitions and use of terminology

12. The Committee considers that it would be helpful and clearer for users of the Approach document if section 4.1 defined “Managed Investment Scheme (MIS)” as a managed investment scheme that is registered with the Australian Securities and Investments Commission under Chapter 5C of the *Corporations Act 2001* (Cth).
13. This is because the statutory definition of “managed investment scheme” in the Corporations Act is broad and covers unregistered schemes, whereas the Approach only covers registered schemes operated by licensed REs who are AFCA members.
14. The Committee also notes that the terms “financial advice firm” and “financial firm” have both been used, and considers that it would be preferable to have internal consistency within the Approach document.

Typographical errors

15. The Committee believes that:
 - (a) the use of “(AFSL)” as an abbreviation for Australian Financial Services Licensee in Case study 1 is unnecessary, as the term “AFSL” has not been re-used in the Approach document; and
 - (b) the second “also” should be removed from the following sentence under Option 6 for Case study 1 in section 3.1:

“However, it is important to note that in such circumstances it could also be open also to the decision maker to hold the financial firm 100% liable for the loss, because the breach of the appropriate advice and best interests duty is a non-apportionable claim.”

Issues with links in the Approach document

16. Section 4.2 of the Approach document provides “Useful links”, and the Committee notes that this link cross-refers to a superseded (2017) electronic version of the Corporations Act:

Corporations Act 2001 (Cth)

This Commonwealth statute can be found here:
[legislation.gov.au/Details/C2017C00328](https://www.legislation.gov.au/Details/C2017C00328)

The Committee suggests that AFCA should avoid providing website links in the Approach document which are, or may become, obsolete. Ultimately, it is not helpful to direct consumers to a document which may fail to fully reflect the current state of the law. Alternatively, <https://www.legislation.gov.au/Latest/C2023C00426> would point users to the latest version of the Corporations Act.

Limits on compensation

17. The Committee considers that it would also be helpful for users of the Approach document if the document could direct them to the specific part of the AFCA Rules that covers the limits on amounts of compensation which AFCA can award to a complainant for these types of matters. The Committee notes that these amounts are indexed and therefore are subject to change from year to year.
18. If AFCA has any questions or would like to further discuss with any matters raised in this submission with the Committee, please do not hesitate to contact the Committee's Chair, Pip Bell (committeechairfsc@gmail.com).

Yours faithfully

A handwritten signature in black ink, appearing to read 'P. Argy', with a long, sweeping flourish extending to the right.

**Philip Argy
Chairman
Business Law Section**