

# Consultation Response Report

Changes to AFCA's Rules and Operational  
Guidelines effective 1 July 2024

March 2024

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## Executive Summary

AFCA undertook consultation in relation to proposed changes to the AFCA Rules and Operational Guidelines between March and May 2023. The proposed changes were drafted in response to some of the recommendations outlined in [Treasury's 2021 Independent Review](#) of AFCA (IR Recommendations). AFCA also took the opportunity to strengthen the operation of its fairness jurisdiction arising from its 5 years of operation.

The changes address key themes from the Independent Review, in particular the need to ensure an efficient process delivering procedural fairness; support for genuine and good faith engagement with our processes; balance in the exercise of our discretions and ensuring the safety and wellbeing of our staff and participants.

Under Rule A.23.3, AFCA is required to consult with stakeholders including Financial Firms and key consumer community and industry organisations, before seeking approval from the Australian Securities and Investments Commission (ASIC) to make amendments to the Rules or Operational Guidelines that would have a material impact on the AFCA scheme.

AFCA would like to thank all stakeholders who participated in the consultation process, whether via formal submissions, feedback in forums or otherwise. The feedback provided greatly helped AFCA to finalise the proposed changes.

In October 2023, AFCA requested ASIC consider and approve the finalised material changes to the Rules and Operational Guidelines following the consultation period. By written notice to AFCA, ASIC approved the material changes in January 2024, with the changes to take effect from 1 July 2024.

This report includes information on the consultation, the feedback received, how AFCA has addressed the feedback, and the changes that will be made to the Rules and Operational Guidelines. AFCA has undertaken additional work (beyond these Rules changes) to respond to the recommendations made in the Independent Review. For more information about this please see our [website](#). AFCA continually strives to improve our services to ensure that we meet the needs of our stakeholders and the community.

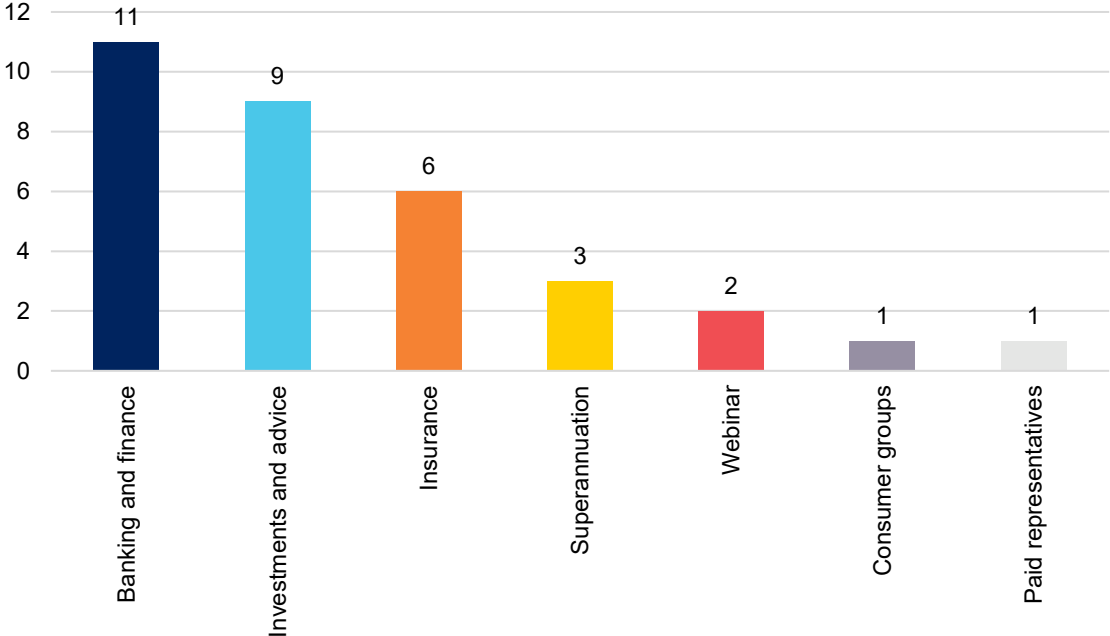
## Consultation process

On 27 March 2023 AFCA released a [Consultation Paper](#) to seek stakeholder views on the proposed changes to its Rules and Operational Guidelines. The consultation closed on 22 May 2023, after running for an eight-week period.

AFCA adopted a new flexible consultation model sharing information in different formats, and a state-of-the-art website page, featuring an interactive online consultation paper ensuring a user-friendly and accessible experience for all stakeholders. Complementing this, AFCA hosted a significant number of engagement events, both online and in-person to engage in conversations with stakeholders about the proposed changes.

AFCA conducted 33 separate stakeholder engagement events. These events included sessions with member firms, peak bodies, associations, consumer groups, Paid Representatives and two public webinars with over 1100 attendees. During our engagements we were able to listen to stakeholder feedback about the proposed changes and directly answer questions and explain our approach.

Figure 1. Engagement events by industry.



**1,136** attendees to two public webinars



**2,200** sessions of the Rules consultation webpage



**90** comments and questions received at webinars



**1,700** users of the Rules consultation webpage

## Response to consultation

AFCA received submissions from a range of stakeholders including:

- Industry peak bodies and associations
- Member Financial Firms
- Consumer groups
- Paid Representatives
- Law firms

Of these, 33 submissions were provided on a non-confidential basis. All non-confidential submissions have been published on AFCA's [website](#).



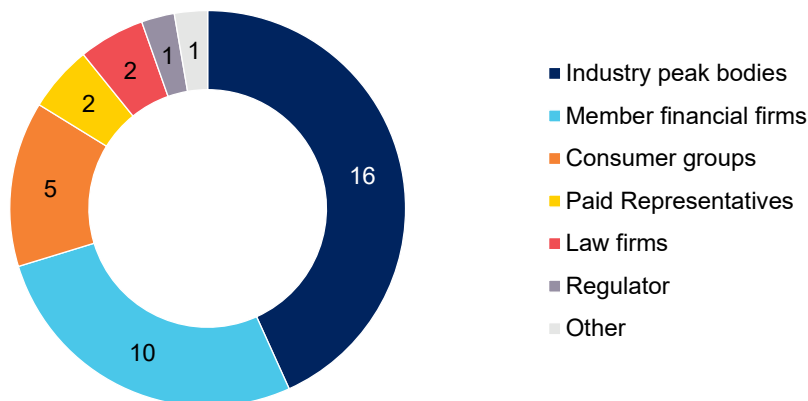
**37** formal submissions



**599** items of feedback received

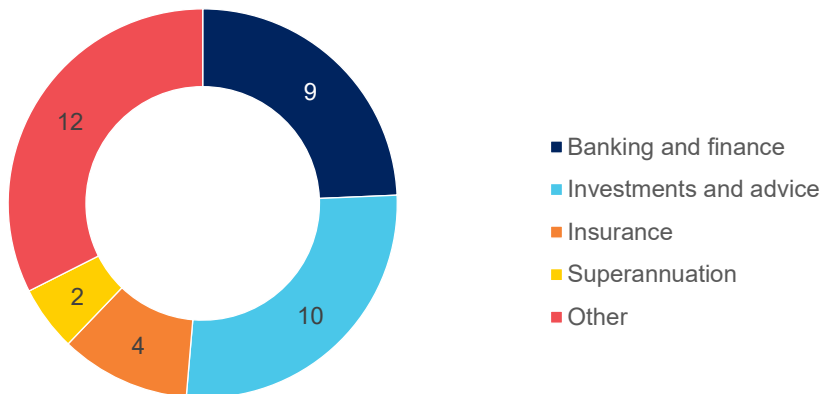
The below figures show the breakdown of submissions received by stakeholder type as well as product area:

*Figure 2. Submissions received by stakeholder.*



*AFCA received and considered feedback from a balanced and wide range of stakeholder groups. Figure 1 reflects the total number of submissions received, noting that many Consumer Groups provided group or joint submissions.*

Figure 3. Submissions received by product area.



### AFCA's response to feedback

AFCA is grateful to all respondents for taking the time to provide their feedback. It was considered carefully and helped shape the final drafting of the proposed Rules and Operational Guideline changes which were submitted to ASIC for approval. In granting approval of the material changes, ASIC noted the extensive consultation that AFCA had undertaken and the feedback provided by stakeholders. As an organisation dealing with large volumes of complaints AFCA is committed to improving our practices to ensure that we can deliver a service to parties that is fair, independent and efficient.

You can read AFCA's updated [Rules](#) and [Operational Guidelines](#), effective from 1 July 2024, in markup online.

### Summary of changes to AFCA Rules and Operational Guidelines

Material changes to AFCA's Rules and Operational Guidelines have been approved by ASIC to be amended with effect on 1 July 2024.

There are 13 changes in total. Throughout the consultation process these changes were referred to as 'change proposals'. For continuity AFCA has adopted the same numbering for the approved changes, i.e. change proposal 1 is referred to as change 1.

Table 1 below summarises the 13 changes and identifies where drafting changes were made in response to stakeholder feedback.

*Table 1 Summary of changes to AFCA's Rules and Operational Guidelines*

No	Description	Summary of changes made following consultation	Relevant section	IR Recommendation
1.	New Rules to enhance AFCA's ability to deal with Paid Representative's conduct	Wording changes to ensure consistency in language	Rules A.8.4a) and B.6	Recommendation 4
2.	New Rules to address Complainant conduct and balance AFCA's responsibility to provide a safe working environment for staff with its complaint handling mandate	Wording changes to ensure consistency in language and additional examples included in the Operational Guidelines	Rules A.8.4b), B.6 and C.2.2h)	Recommendation 5
3.	New Rule providing AFCA with a discretion to cease considering a complaint where the Financial Firm has offered the Complainant an appropriate remedy	Wording changes and additional explanation included in the Operational Guidelines	Rule A.8.3e)	Recommendations 1,2, 5 and 7
4.	New Rule to give AFCA discretion to close a complaint the subject of a previous full and final settlement between the parties	Wording changes to provide additional explanation	Rule C.2.2g)	Recommendations 1,2, 5 and 7
5.	Amendment of Operational Guidelines to clarify that AFCA will exclude investment-related complaints from sophisticated investors and professional investors unless special circumstances apply	Wording changes to better align with the Corporations Act provisions	Rule C.2.2j)	Recommendation 6
6.	Amendment of AFCA's Operational Guidelines to more fully explain the operation of AFCA's current forward looking formal review mechanism	Wording changes to provide additional explanation	Operational Guidelines to Rule A.15	Recommendation 9
7.	Amendment of Rules to make clearer the consequences for parties if Complainant does not accept a Determination (no substantive change effected by this)	The change proposal wording was retained	Rule A.15.3b)	Recommendation 5
8.	New Rule to give more transparency to AFCA's 'slip rule'	Wording changes to clarify process and	Rule A.14.6	Recommendations 2 and 5

No	Description	Summary of changes made following consultation	Relevant section	IR Recommendation
	(correction of a Determination where an accidental error occurs)	include the words 'typographical error'		
9.	Clarification of Rules to consistently refer to monetary restrictions and compensation amount limits as applying 'per claim' (no substantive change effected by this)	Wording changes to ensure clarity	Rule D.4	Recommendations 2 and 5
10.	New provisions in Rule A.8 to set out objection process (rather than reference back to Rule A.4 for this process)	Changes to ensure wording reflects Rule A.4.6 (as intended)	Rule A.8.5 and A.8.6	Recommendations 2 and 5
11.	Additional guidance to clarify when AFCA's panels may be convened to decide Banking and Finance and Small Business complaints.	The change proposal wording was retained	Operational Guidelines to Rule 13.2	Recommendations 2 and 5
12.	Amendment to definition of 'Financial Services' to explicitly include debt management assistance and credit reporting assistance as per NCCP Regulations	The change proposal wording was retained	Rule E.1	
13.	Amendment to Rules to better align reporting obligations with ASIC Regulatory Guide 267 requirements	The change proposal wording was retained	Rule A.20.1	

## Feedback received

This part of our report outlines the feedback received during our consultation process.

### Change 1: Paid Representatives – new Rules A.8.4a) and B.6

These Rule changes are required by IR Recommendation 4 in relation to Paid Representatives and have been designed to enhance AFCA's ability to deal with Paid Representative inappropriate conduct in the handling of complaints.

Specifically, the changes provide AFCA with the discretion to cease consideration of a complaint where the Complainant is represented by a Paid Representative whose conduct is inappropriate. Additionally, there is a discretion to exclude a Paid



Representative, whose conduct has been inappropriate, from the AFCA scheme for a period of up to 12 months.

These changes not only highlight the importance of appropriate conduct to AFCA's ability to deliver procedural fairness to all parties as outlined in AFCA's Engagement Charter, but they also help protect and support the safety and wellbeing of AFCA staff. AFCA acknowledges that the ability to exclude any party from the scheme is a discretion that must not be exercised lightly but the changes are ultimately designed to help strengthen AFCA's ability to deliver fair process and outcomes and efficient resolution of complaints.

### Consultation feedback

- Stakeholders generally supported these changes.
- Stakeholders requested additional detail about the definition of 'Paid Representative' AFCA would use to assess what may constitute 'inappropriate conduct' for the purposes of the rule.
- Others sought confirmation that Complainants were not disadvantaged when AFCA takes action to address Paid Representative conduct.
- Industry stakeholders expressed support for a longer exclusion period and to make this a mandatory feature of AFCA's Rules.
- Many stakeholders recommended that AFCA report inappropriate conduct to ASIC and publicly report the names of Excluded Paid Representatives.

### AFCA's response

In drafting the final changes to the Rules and Operational Guidelines, AFCA considered how to ensure greater transparency and guidance about how these provisions will operate in practice. AFCA has made several amendments to increase clarity, including updating the definition of Paid Representative.

AFCA appreciates the concerns raised about the potential impact these Rules may unintentionally have on vulnerable Complainants without additional guardrails. The Operational Guidelines give greater detail about how AFCA will work with Complainants who are represented by a Paid Representative who engages in inappropriate conduct.

AFCA also intends to develop and publish a new Discretions Framework which will outline the principles that guide AFCA's exercise of discretion under its Rules, promoting consistency at AFCA and a clear, shared understanding amongst stakeholders of how discretion principles are applied in case handling and decision-making.

At this stage AFCA does not intend to publish the names of Excluded Paid Representatives. We will however continue to monitor this and work closely with ASIC by reporting inappropriate conduct under our information sharing obligations.

## Change 2: Complainants – new Rules A.8.4b), B.6 and C.2.2h)

These changes provide AFCA with the discretion to cease consideration of a complaint where the Complainant is engaging in unreasonable conduct. Additionally, there is discretion to exclude a Complainant from the scheme for a period of time where the unreasonable conduct persists despite AFCA's requests to cease the conduct. The amendment will further enhance the operation of AFCA's Engagement Charter and AFCA's ability to deliver a fair, timely and efficient complaint handling service.

During the consultation, AFCA had proposed a maximum exclusion period of up to 12 months to mirror the requirements for Paid Representatives. Following discussion with ASIC, the exclusion period for Complainants has been reduced to a maximum of 6 months.

### Consultation feedback

- Stakeholders were broadly supportive of this change and understood the necessity for AFCA to ensure the physical and psychological safety of its staff and the impact unreasonable conduct can have on AFCA's ability to deliver procedural fairness and an efficient service.
- Industry stakeholders considered the new provision should be expanded to include unreasonable conduct aimed at Financial Firm employees.
- Consumer representatives were generally supportive, but sought to ensure that the provisions would take into account the position of vulnerable consumers and the barriers they may have to access other forums.
- Some stakeholders suggested AFCA should publish details of Excluded Complainants.
- Others requested additional clarity and guidance around how AFCA will operationalise these new Rules.

### AFCA's response

AFCA is strongly committed to providing an accessible, efficient and easy to use service for parties to a complaint. We will continue our existing work and programs to identify and support Complainants who may be experiencing vulnerability. AFCA will continue to work with parties to address unreasonable Complainant conduct, other than by ceasing to consider a complaint. As mentioned above, the development of AFCA's Discretion Framework will also assist in providing guidance as to the use of this new Rule. This will be a focus of our work in 2024 and beyond.

We have simplified the wording in Rule A.8.4b) to make it clearer that AFCA can only exclude a complaint under this Rule if the conduct is both unreasonable and denies AFCA (its officers, staff and contractors) a safe working environment. In addition, the Complainant must have failed to substantively cooperate with any AFCA attempts to address the conduct.

We have not expanded the provisions to include unreasonable conduct towards a Financial Firm. In addition to strengthening AFCA's procedural fairness and case handling efficiency the Rules change is intended to be about Complainant interaction with the AFCA scheme and AFCA's obligations to provide a safe work environment for its people.

AFCA has considered the feedback about publishing details of Excluded Complainants. AFCA is subject to strict confidentiality and privacy requirements. It is not minded at this stage to seek amendments to these requirements.

### **Change 3: Appropriate settlement offers – new Rule A.8.3e)**

This Rules change gives AFCA the discretion to cease consideration of a complaint where the Financial Firm has made the Complainant an appropriate settlement offer but the Complainant has not accepted or agreed to this. This Rule change strengthens AFCA's ability to:

- ensure procedural fairness;
- create efficiencies in the process;
- ensure parties are genuinely engaged in the resolution of the complaint; and
- ensure financial firms do not incur unnecessary fees

### **Consultation feedback**

- Industry stakeholders were largely supportive of this change with some seeking further guidance about its application and the decision-making process to be followed.
- Some stakeholders expressed concern about vulnerable Complainants who may have difficulty articulating their claim. There were suggestions that AFCA should refer a Complainant to a community legal centre or financial counselling agency before deciding not to continue with a complaint.

### **AFCA's response**

AFCA will exercise this new discretion where to do so is fair to the parties. This will be the case where the factual context is clear and largely undisputed; where the Complainant's loss is clear and easily quantified and where the continuation of the proceedings would otherwise be unnecessary to achieve a similar outcome. AFCA's Operational Guidelines have been expanded to specify relevant factors AFCA will take into account when exercising this discretion.

We have also amended the Operational Guidelines to state that AFCA will consider the Complainant's circumstances including where they are unrepresented and in vulnerable circumstances.

AFCA notes that current practice is that an objection to a decision to exclude or cease consideration of a complaint is considered by a senior AFCA staff member or AFCA Decision Maker (see guideline to Rule A.4.6). This practice will continue to apply to the incoming provisions.

#### **Change 4: Previous settlement agreements – new Rule C.2.2g)**

This Rule provides enhanced clarity and transparency to AFCA’s longstanding approach to exclude a complaint that has been the subject of a previous full and final settlement between the parties (except where special circumstances apply).

#### **Consultation feedback**

Stakeholders were generally supportive of this Rule but requested more details as to its operation.

#### **AFCA’s response**

AFCA notes that this Rule will not change the current practice. The discretion is not exercised lightly and we have made it clearer that this Rule won’t be applied in circumstances where the prior settlement agreement was obtained via unfair conduct including duress and fraud.

In response to requests for further details about how AFCA will consider these complaints, we have expanded the information in the Operational Guidelines to incorporate more of the guidance in [The AFCA Approach to terms of settlement](#). We have also included some illustrative examples.

#### **Change 5: Sophisticated or professional investors – revised Rule C.2.2j) and guidance in Operational Guidelines**

This change to the Operational Guidelines to Rule C.2.2j) clarifies that AFCA will generally exclude complaints from sophisticated investors and professional investors (within the meaning of those terms for the purposes of Chapter 7 of the Corporations Act). This change was introduced to implement IR Recommendation 6 which required the exclusion of sophisticated and professional investors, unless there was evidence that they had been incorrectly or inappropriately classified.

#### **Consultation feedback**

- Some stakeholders submitted that the exclusion for wholesale investors should be mandatory as opposed to discretionary.
- A number of stakeholders submitted that AFCA should also have a default position of excluding an investment complaint made by a high net worth individual, that is, an individual whose qualified accountant has certified that the individual meets the Corporations Act section 761G(7)(c) net assets or gross income test.

## AFCA's response

The new Operational Guidelines text closely adheres to the legislation that sets out in some detail the various requirements that must be met for a client to be classified as a sophisticated or professional investor.

While AFCA appreciates the investment industry's appetite for broader mandatory exclusion of wholesale clients, this is not what the Independent Review Report recommended. AFCA notes that many of these suggestions have been raised previously, including prior to Treasury's Review.

We consider that the changes to the Operational Guidelines directly respond to the IR Recommendation 6 and that a discretionary exclusion is appropriate to ensure complainants who are misclassified do not lose the benefits of EDR associated with being a retail client.

We also note that the wholesale investor criteria is currently an area of regulatory review by the Government and future changes may become necessary but are currently beyond the scope of this Rules review process.

### **Change 6: Forward looking formal review mechanism – Operational Guidelines to Rule A.15**

This change to the Operational Guidelines is to enhance the visibility, accessibility and independence of AFCA's forward looking formal review mechanism in line with IR Recommendation 9.

## Consultation feedback

- Submissions about this change were largely supportive.
- Several submissions suggested that a Financial Firm should be able to request a formal review and others raised queries about the cost contribution model.

## AFCA's response

We understand the importance of the forward looking review process to our stakeholders. Whilst the Operational Guidelines provide important framing and detail as to the eligibility criteria to access the mechanism, we are committed to providing more information about the new process including as to cost contributions. We will be publishing further information including the key features of the new forward looking review mechanism in 2024.

### **Change 7: Complainants' non-acceptance of Determination – revised Rule A.15**

This Rules change clarifies the consequences for the parties if a Complainant does not accept a Determination (either rejects the Determination or fails to respond to AFCA).

### Consultation feedback

- There was widespread support from stakeholders for this change.
- Several submissions sought assurance that AFCA will not later re-open a complaint where the Complainant has not accepted the Determination.

### AFCA's Response

AFCA notes that there will be no change to current practice as a result of this Rule change. The changes are intended to provide additional clarity on AFCA's process.

Rule C.1.2c) provides for the mandatory exclusion of complaints that have been previously dealt with by AFCA, for example, by way of Determination.

### Change 8: Accidental error in a Determination – slip rule – new Rule A.14.6

This change gives greater transparency to AFCA's current processes to correct an accidental error in a Determination, by setting out those processes in AFCA's Rules, not just the Operational Guidelines.

### Consultation feedback

- This change was generally supported by stakeholders.
- Several stakeholders requested further detail around the process.

### AFCA's response

Again, AFCA notes that this change does not involve any change to AFCA's current approach, but rather increases transparency and clarity of process.

In response to feedback, we have amended the Operational Guidelines to state that where an AFCA Decision Maker makes an administrative or clerical correction to a Determination, the Determination will be re-issued to the parties with an explanation of the change and the reasons for this.

To provide more public transparency as to the Determinations where the slip rule is applied, we have amended the Operational Guidelines to state that a replacement Determination will clearly notate that it is a corrected Determination.

### Change 9: Consistency of language about AFCA's monetary limits – revised Rule D.4

This Rules change involves minor changes to Rule D.4 to consistently refer to the monetary restrictions and compensation amount limits as being 'per claim'.

### Consultation feedback

- Stakeholders supported this change and understood that it is not changing AFCA's monetary jurisdiction.

- Several stakeholders requested a definition of ‘claim’ be included in the Rules.

### AFCA’s response

AFCA again notes that there will be no change to current practice as a result of this Rules change. The monetary restrictions and compensation limits will continue to apply ‘per claim’ and Rules D.2 to D.5 will continue to not apply to Superannuation Complaints.

AFCA has chosen not to include a definition of ‘claim’ within the Rules as we do not consider this would enhance clarity. Rather we think that this concept is best explained in a discursive way (as is the case at the moment) in the guidelines to Rule D and our Approach document [Identifying a claim](#).

### Change 10: Clarifying the objection process for Rule A.8.3 – new Rules A.8.5 and A.8.6

Rule A.8 has been amended to specifically set out the objection process available to a Complainant where AFCA has ceased to consider their complaint in accordance with Rules A.8.3 or A.8.4 (rather than, as previously, incorporating the objection process set out in Rule A.4).

### Consultation feedback

- Stakeholders were generally supportive of this change. We received requests for clarification on the timeframe to object.

### AFCA’s response

We have set out the timeframe for objecting in the Operational Guidelines. We set this out in the Operational Guidelines as opposed to the Rules to ensure appropriate flexibility.

### Change 11: AFCA Banking and Finance Panels – revised Operational Guidelines to Rule A.13.2

This change expands the Operational Guidelines to include examples of banking and finance or small business complaints that might be decided by an AFCA panel.

### Consultation feedback

- This change did not receive any substantive feedback.

### Change 12: Definition changes – revisions to Rule E.1

This change amends the definition of ‘Financial Service’ to include debt management assistance and credit reporting assistance within the meaning of those terms in the National Consumer Credit Regulations 2010.

## Consultation feedback

- Minimal feedback was received in relation to this change.
- Several stakeholders submitted that AFCA should also be willing to accept complaints about non-financial services debt management and credit repair services.

## AFCA's response

The change to AFCA's definition of Financial Service is in direct response to recent legislative changes.

Whilst we understand that there could be benefits for consumers if they had access to an external dispute resolution scheme for a complaint about a service provider who helps them navigate any of their sources of debt (telecommunications, gas, electricity, car-related expenses, fines etc), this would involve a broader area of regulatory and industry reform that is beyond the remit of this proposed Rules change. Accordingly, this has not been adopted.

## Change 13: Annual reporting – revised Rule A.20.1

This change is to better align AFCA's annual reporting requirements under the Rules with AFCA's public reporting requirements under ASIC Regulatory Guide 267.

## Consultation feedback

- Minimal feedback was received in relation to this change, however the feedback that was received was supportive.

## Next steps

### What will happen next?

The updated Rules and Operational Guidelines will come into effect from 1 July 2024. In practice this means that the updated Rules and Operational Guidelines will apply to complaints lodged from 1 July 2024.

For complaints lodged prior to this date, please check our [website](#) to obtain the applicable version of the Rules and Operational Guidelines.

### Ongoing review of AFCA's Rules and Operational Guidelines

As part of its ongoing commitment to being a World Class Ombudsman scheme, AFCA will continue to undertake regular periodic reviews of its Rules and Operational Guidelines to ensure our jurisdictional framework remains relevant, clear and fit for purpose.