AFCA response to Royal Commission's Interim Report

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afca
Australian Financial Complaints Authority

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Introduction

1. The Australian Financial Complaints Authority (AFCA) welcomes the opportunity to provide a submission in response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry's Interim Report.

2. The Interim Report has highlighted multiple problems across the financial services industry and lessons for all of those who operate within it. There have been examples of failures in meeting community standards and expectations at the one end and significant breaches of the law at the other. The work of the Royal Commission has also highlighted the significant impact that financial firms' practices have had on consumers and small businesses.

3. We are acutely aware that there is an individual story behind every complaint that is raised. In many cases, it is a story of not just financial loss but also of the human toll of stress, anxiety and ill health, which has flow-on effects beyond the people involved in disputes to the community more generally.

4. The impact of the issues raised in the Interim Report on vulnerable or disadvantaged consumers is even more pronounced. It is the responsibility of all participants in the financial sector, including regulators and others, to work harder to identify and address system failures and to ensure they do not reoccur in future. AFCA will play a key role in ensuring that fair, independent and effective solutions are delivered to consumers and small businesses with financial disputes. Further, AFCA will be working with consumers, small businesses and industry participants to resolve and reduce disputes. AFCA will contribute to raising standards, meeting diverse community needs and providing a trusted service to all.

Establishment of the Australian Financial Complaints Authority

5. AFCA was authorised on 1 May 2018 pursuant to the Corporations Act 2001. AFCA's Rules were approved by ASIC in September 2018. It will begin receiving complaints under the new Rules on 1 November 2018. Going forward, AFCA will be the only financial services external complaints handling scheme, replacing the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT). The change to a single scheme implements the recommendations to government made by the 2017 Ramsay Review.[1] The integrated changes recommended by Professor Ramsay build on tested attributes of the industry ombudsman model. These are the most fundamental reforms to external dispute resolution (EDR) since the mandatory membership of an ASIC-approved EDR scheme was implemented in 2001.

[1] See Review of the financial system external dispute resolution and complaints framework, 3 April 2017; Professor Ian Ramsay

6. AFCA's Board is chaired by the Honourable Helen Coonan (since 4 May 2018) and its Chief Executive Officer/Chief Ombudsman is David Locke (since 25 June 2018). Whilst FOS and CIO staff have transferred their employment to AFCA, new ombudsmen and highly skilled staff have also been recruited to ensure AFCA is fully resourced to accept disputes on 1 November 2018. This includes recruitment of staff with superannuation experience enabling AFCA to deal with these disputes on its commencement.

7. Under transitional arrangements that have been put in place with ASIC's approval, AFCA is currently resolving complaints made under the FOS and CIO schemes and will continue to do so until these are resolved. These complaints will be handled in accordance with the FOS Terms of Reference or CIO Rules, as applicable and in force when the relevant complaint was lodged.

8. For further information about AFCA's complaints resolution process please refer to Appendix 1.

Submission scope

9. AFCA is not a regulator and does not set the regulatory framework. However, we do have a specific and important role in the provision of redress to consumers and small businesses for wrongs that arise in the financial services industry. Our perspective is informed by the dispute resolution experience of the predecessor schemes.

10. AFCA is built upon the work of FOS, CIO and the SCT.[2] However, in time, AFCA will develop new approaches informed, but not bound, by those predecessor schemes' approaches to resolving disputes. AFCA's approach will incorporate the lessons from the Royal Commission, as well as changes to industry practice and to the legislative and regulatory regime. Further, AFCA's operations will be reviewed after 18 months of operation. AFCA's approaches and effectiveness will be independently assessed, providing another opportunity to ensure that it is operating an effective mechanism of redress.

11. In this submission, we have limited our response to the issues directed to AFCA and that go to the effectiveness of EDR as a mechanism of redress for consumers and small businesses. These are summarised as follows:

Part A - Remedy

The Interim Report asks whether AFCA should adopt FOS's approach of putting the borrower back in the position they would be in if the loan had not

[2] A joint working group headed by Dr Malcom Eady was established and the schemes collaborated to develop AFCA and integrate the superannuation jurisdiction. The references in this submission to the approaches we take in certain circumstances are references to the approaches taken by AFCA's predecessor schemes (given that AFCA's dispute resolution role does not start until 1 November 2018). We anticipate that AFCA's approach in these circumstances at the outset will reflect previous practices employed by these predecessor schemes.

been made, but not awarding compensation for losses or harm caused. It also asks whether there are circumstances in which AFCA should waive a customer's debt.

To provide a basis for the Commission's consideration of these questions, Part A of our submission explains the current approach to remedy where we find that misconduct (failure to meet a legal obligation, an industry requirement or good industry practice) has occurred. In particular, we set out the approach that is taken to providing remedy for a borrower in relation to a loan that AFCA finds a diligent and prudent lender would not have made.

Part B – Unpaid determinations

The Interim Report asks whether EDR mechanisms are satisfactory and whether there should be a mechanism for compensation of last resort. Part B of our submission addresses this and updates information provided previously to the Commission about FOS and CIO determinations that have not been complied with by the financial firm and our limited options in this situation.

Part C – Fairness

The Interim Report asks about measures to combat the danger of conduct risk and about the duties that should apply to intermediaries. The Commission has raised a question about whether or not the regulation of financial services could be simpler. Part C of our submission explains our focus on fairness when remediating financial firm conduct and why we often rely on this rather than the licensee obligation to act "efficiently, honestly and fairly". We contrast our licensee legal framework with the fairness framework which applies in the United Kingdom.

12. Our interest in the Royal Commission's work is, of course, much broader than these issues. In particular, we have found the Commission's exploration of responsible lending has been helpful in elucidating the law and current banking practice. This is being considered in developing new AFCA guidance about our approach to responsible lending complaints. This guidance will be revisited after the Royal Commission's Final Report is issued.

Part A – Remedy

13. The Commissioner has posed two questions:

- Should AFCA adopt FOS's approach of putting the borrower back in the position they would be in if the loan had not been made, but not awarding compensation for losses or harm caused?
- Are there circumstances in which AFCA should waive a customer's debt?

General approach

14. AFCA's Rules do not give AFCA the power to provide punitive, exemplary or aggravated damages where a financial firm has engaged in misconduct. This is consistent with the ombudsman model, as an alternative to the courts, and is a continuation of the situation that currently applies under the FOS Terms of Reference and the CIO Rules.

15. Rather, the focus is on remediating the complainant's direct financial loss that was caused by the misconduct. In addition to this compensation, minor awards can be, and are, regularly made for indirect financial loss and for non-financial loss (under the new AFCA Rules there is a cap of $5,000 for both types of loss per claim, an increase from the current $3,000 per claim).

16. Given this framing of our remediation powers, our emphasis is on calculating what compensation is appropriate to restore the complainant's situation. To do this, we will assess the losses that have been suffered by the complainant, as well as considering whether the complainant obtained any benefits.

17. For example, where a complainant acted in reliance on inappropriate financial advice provided by a financial planner, we work out whether the complainant suffered a loss and if so how much. This is done by comparing the complainant's actual financial position as a result of the inappropriate financial advice, with the financial position the complainant would have been in, if they had received appropriate financial advice.

Remedy where credit provider failed to meet responsible lending obligations

18. Where a credit provider has lent irresponsibly, we will consider what losses the borrower has suffered as a result of the lending, whether the borrower has received any benefits, and accordingly what compensation is appropriate. Where compensation is appropriate, this will typically be done by adjusting the loan amount outstanding and adjusting the credit provider's entitlement to interest and fees during the remainder of the loan period.

19. We consider that the credit provider should not benefit from an irresponsible loan. Equally, a borrower who has had the use of principal funds loaned to them should usually be required to repay those funds.[3] In order to balance those interests, we will usually adjust the amount owing to the credit provider by refunding interest and fees charged to the borrower. Other adjustments to the balance outstanding may also be made. Whether we adjust the balance outstanding and, if so, to what extent will depend on the circumstances, as the following three examples demonstrate.

[3] This is particularly the case if the borrower has retained the asset purchased.

Re-financing

20. Re-financing could involve either a change of product (for example, a credit card balance re-financed as a personal loan) or a change of credit provider.

21. If the re-financing was on more favourable terms than the original credit, we will usually find that no loss was incurred by the borrower and so we make no adjustment to either the balance outstanding or to future interest and fee charges.

22. If, however, the loan is refinanced at a higher cost, the appropriate amount of compensation would be the difference between the cost of the original loan and the refinanced loan.

New business or investment credit

23. In the case of new business, or investment credit, consistent with the principle that a credit provider should not benefit from an irresponsible loan, an adjustment will usually be made for the sum of the interest and fees charged to the borrower. A partial adjustment (for example, 50% of the sum of past interest and fees charged) may be made if there were special circumstances that put the borrower on notice that the loan was unaffordable. Generally, the approach is that it is fair in these circumstances for the customer to accept some responsibility for their own failure to exercise reasonable care and skill in protecting their own financial position.

24. We will also generally require the credit provider to refrain from charging interest or fees during the period until the loan comes to an end. Again, this is consistent with the principle that the credit provider should not benefit from an irresponsible loan.

25. We will usually consider that the borrower (not the credit provider) is responsible for the decision as to how the loan money was used. Accordingly, the borrower is liable to repay the principal amount, even if the borrower's business venture or investment loses value. For example, if a loan is obtained to purchase shares and these decline in value, these losses do not reduce the borrower's obligation to repay the principal amount.

New loan to purchase a family home

26. In the case of a new home loan (where the credit did not constitute re-financing) that was made irresponsibly and that results in the complainant having to sell the house, we will generally adjust the amount owing to the credit provider to take account of the following:

    - costs: incidental purchase costs paid by the complainant (for example, conveyancing or legal costs, stamp duty, building inspection reports), property ownership costs during the period of ownership (for example, council rates, insurance) and sale costs (for example, agents' commission, advertising

expenses, legal costs) – as well as loan payments made to the credit provider; and

- benefits: allowance is made for rent that the borrower would have incurred if the borrower had not bought the house.

27. Sometimes the house will be sold before the complaint is determined. Sometimes the sale of the house occurs after the complaint is determined. In the latter case, we expect the credit provider to provide the complainant with a reasonable sale timeframe so as to achieve full market price for the house. What is reasonable will depend upon the circumstances including geographic location of the house and market conditions at the time.

28. If the sale of the house results in surplus funds, this surplus is retained by the borrower. Where, however, the sale of the house is not sufficient to pay the adjusted amount outstanding, we will generally expect the credit provider to write off the remaining balance of the home loan.

29. We understand that it is important that our determinations provide clarity for the parties in relation to these matters and are improving our communications to ensure this.

Remedy where finance broker failed to meet responsible lending obligations

30. Where a complainant's loan was arranged through a finance broker who failed to meet their responsible lending obligations, we will generally take the following approach to provide compensation to the complainant:

    - If the loan constituted re-financing on more favourable terms than the previous credit, we generally consider that the finance broker's misconduct has not caused loss and so no compensation is payable.
    - For a new loan (as compared with a re-financed loan), we consider that the finance broker should not benefit from their misconduct and so generally we consider that the finance broker should compensate the complainant the sum of the fees paid by the complainant to the finance broker and the commission paid by the credit provider to the broker.
    - Where the credit provider reasonably relied upon misinformation provided by the finance broker, we may increase the compensation payable by the finance broker to the complainant to include the amount that the complainant would have received from the credit provider by way of compensation if the borrower had a right of action against the credit provider.

31. In the above examples the approach is not to waive a customer's debt completely even if there is a finding of irresponsible lending on behalf of the credit provider. When AFCA makes its decisions, it will do what is fair in all of the circumstances having regard to the law, applicable codes of conduct and industry practice. With development to the applicable law or the circumstances of a particular complaint there may be a case where the debt is forgiven. AFCA's approach is flexible enough to deliver that outcome if appropriate.

Multi-party complaints

32. Where an irresponsible bank loan is arranged through a finance broker, the experience to date is that typically the bank was a member of FOS and the finance broker was a member of CIO. This has complicated remediation because it has not been possible in a single EDR process (whether through FOS or CIO) to determine the bank's and the broker's respective liability. Instead it has often been necessary for a complainant to have recourse to both FOS and CIO. Typically, this has meant that the complainant has had to take longer to fully resolve the matter and apportionment of liability and loss between the financial firms has not been possible.

33. From 1 November 2018, this will change when AFCA becomes the single scheme responsible for all financial services complaints. AFCA anticipates that complainants who arrange a loan through a finance broker will often name both the finance broker and the credit provider in their irresponsible lending complaint. If a complainant brings the complaint against just one firm, AFCA will have the ability to join the other financial firm where it considers this appropriate. AFCA anticipates that this will improve complainants' experience of EDR and achieve better remedies for many complainants. In the past, consumers and small businesses have had to navigate the various forums themselves which was confusing and time consuming due to the complicated overlap of jurisdictions of FOS, CIO and SCT.

Financial difficulty

34. Even where AFCA adjusts the amount outstanding on a loan on the basis that the loan was made irresponsibly, the experience of FOS and CIO is that the complainant typically is not in a sufficient financial position to repay any arrears and meet future repayments. In these circumstances, the complainant can seek financial hardship assistance from the credit provider. In the case of consumer credit, this right exists under the National Credit Code. In the case of small business borrowing, this right typically exists under an industry code (the Banking Code of Practice or the Customer Owned Banking Code of Practice).

35. At the close of an irresponsible lending complaint, AFCA's practice will be to ensure that the complainant is aware of this right to seek financial hardship assistance. AFCA will refer the complainant to a consumer advocate so that the complainant is supported through the process of seeking financial hardship assistance from the credit provider. AFCA may inform the complainant that if the complainant is not able to negotiate a satisfactory financial hardship arrangement with the credit provider, the complainant is able to lodge a new complaint with AFCA. If the complainant does this, AFCA will be able to facilitate negotiations. Failing a negotiated outcome, AFCA will decide what is a fair hardship arrangement in the circumstances.

36. This practice recognises that the financial hardship issue is a different issue from the irresponsible lending issue. It provides the financial firm and the consumer or small business with an opportunity to try to reach a mutually satisfactory financial hardship arrangement. To do so is consistent with AFCA's role as a point of escalation that comes into operation after the parties have sought, but failed, to resolve matters themselves.

37. This approach also acknowledges the fact that often a consumer will need some time, after obtaining an outcome that there has been irresponsible lending, to make a decision about what to do next. This may also involve discussions with their advisors or family. For example, they may decide to sell their home, refinance or sell other assets. They may also be able to meet future payments if the debt has been reduced as a result of an outcome to their irresponsible lending claim. The independent agency of a consumer to make this decision is important in this context. We expect financial firms to properly work together with their customers to implement the outcome obtained from AFCA and ensure that they work co-operatively to manage any financial difficulty. Past experience shows most consumers do work this out directly with their financial firm and do not require further assistance. This also allows the parties to move forward with their relationship and rebuild trust. However, if this fails, AFCA will play a key role in delivering an outcome and bringing finality to the complaint.

38. For particularly vulnerable consumers such as those with disabilities or experiencing mental illness, domestic violence, homelessness etc., AFCA will be more proactive in assisting those consumers in financial difficulty to ensure that appropriate redress is obtained and implemented. As outlined above this can include assisting with negotiating a hardship arrangement.

Part B – Unpaid determinations

39. The Commissioner has posed the question:

    - Should there be a mechanism for compensation of last resort?

40. The Ramsay Review extensively considered whether a compensation scheme of last resort should be established and industry consultation occurred as part of that process. After the review, one of Professor Ramsay's recommendations was that a compensation scheme of last resort be established.[4]

41. AFCA strongly supports the establishment of a compensation scheme of last resort. There has been extensive consultation with government, industry and regulators and the issue of the design of the scheme was considered by the Ramsay Review Panel.

42. In our view, an EDR mechanism is clearly not satisfactory for a consumer or a small business, if the financial firm fails to comply with a scheme's binding determination in the complainant's favour. Consumers must have confidence that when things go wrong, they will be compensated when there is a decision made in their favour. What can often get lost in this discussion is the impact that losses and unpaid compensation awards have on the lives of individual consumers, their families and small businesses.

43. We consider that there needs to be a workable and acceptable compensation scheme of last resort to provide access to justice for consumers who do not receive awarded compensation for financial loss and fill the structural gap in the existing dispute resolution framework.

44. A compensation scheme of last resort should provide a material degree of protection for financial services consumers and small businesses who have not been paid an eligible AFCA determination or award owed to them by a financial firm.

45. Unfortunately, a number of consumers who obtained a determination from FOS and CIO have not had compensation paid to them after a favourable outcome through EDR. This occurs typically when the financial firm has gone into liquidation or administration or when adequate compensation arrangements of the licensee fail to respond. For example, the financial firm's professional indemnity insurer may deny indemnity, if there are a large number of disputes about similar conduct, the conduct falls within a point exclusion or the excess carried by the firm is too high.

[4] https://treasury.gov.au/consultation/dispute-resolution-and-complaints-framework-supplementary-issues-paper/ Supplementary Review of External dispute resolution – compensation scheme of last resort 2017

46. Currently, an EDR scheme can respond to a financial firm's default by reporting the financial firm to ASIC and by expelling the financial firm from the scheme. However neither of these courses of action remedy the situation for the consumer.

47. The following table provides information about how frequently this has occurred, the extent of this problem and its significant financial impact, with close to $17 million owing to consumers.

Scheme	Number of financial firms	Number of consumers affected	Quantum
FOS	44 during the period 1 January 2010 until 30 September 2018 (52% of these were financial advisors/ planners, 11% were operators of managed investment schemes, 9% were credit providers, 28% were other financial firms)[5]	246 (177 determinations)	$16 million[6]
CIO	7 during the period from 1 December 2014 until 30 September 2018	9 (9 determinations)	$419,209.73

48. AFCA strongly supports FOS's submission to the Royal Commission of 2 February 2018 that the consumer protection framework needs an effective mechanism to deal with the issue of unpaid EDR scheme determinations.

49. The Ramsay Review noted that there is a strong case for the payment of legacy unpaid EDR determinations. However, it may not be either appropriate or desirable that current industry participants be required to contribute to compensation arising from determinations against former industry participants.[7]

[5] Of the "28% other financial firms" these include a growing default rate among derivatives, foreign exchange and contracts for difference traders. Our experience is these firms very rarely have adequate compensation arrangements that respond to consumer complaints.
[6] The amount is in excess of $16 million and both figures do not include interest.
[7] Review of the financial system external dispute resolution and complaints framework, Supplementary Final Report 6 September 2017

50. We acknowledge that the establishment of a compensation scheme of last resort for future unpaid determinations will not provide redress to the 255 consumers who have had favourable EDR determinations but have not been paid. Like the Ramsay Panel, we agree that there is a strong case for payment of these legacy unpaid EDR determinations and some consideration should be given as to how this could be achieved.

Part C – Conduct risk and fairness

51. The Commissioner has posed the question:

    - Should the financial services law be simplified?

52. The Commissioner concluded the Executive Summary with these observations:

    - *Should the existing law be administered or enforced differently? Is different enforcement what is needed to have entities apply basic standards of fairness and honesty: by obeying the law; not misleading or deceiving; acting fairly; providing services that are fit for purpose; delivering services with reasonable care and skill; and, when acting for another, acting in the best interests of that other? The basic ideas are very simple. Should the law be simplified to reflect those ideas better?*

53. AFCA submits that treating customers fairly should be made a standalone and enforceable standard for financial services entities and individuals working for them. Current regulation references fair treatment of customers (or specific aspects of that) in the following ways: the "efficient, honest and fair" obligation on the provision of services by financial services and credit licensees[8] and on the provider of personal financial product advice to retail clients, a duty to act in the "best interests of the client".[9]

54. AFCA Rule A.14.2 provides that an AFCA Decision Maker must do what is "fair in all the circumstances" when determining a complaint[10]. In doing so, the AFCA Decision Maker must have regard to legal principles, applicable industry codes or guidance, good industry practice and previous relevant scheme determinations. Importantly this means that an AFCA Decision Maker is not bound to simply apply the law.

[8] s.912A(1)(a) of the Corporations Act 2001 obliges financial services licensees to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly. This applies to the overall provision of financial services by the licensee. Section 47(1)(a) of the National Consumer Credit Protection Act 2009 puts the same obligation on credit licensees when engaging in authorised credit activities.
[9] See Part 7.7A of the Corporations Act 2001.
[10] This test applies in all disputes except for those in the superannuation jurisdiction.

55. Our experience is that reliance on what is "fair in all the circumstances" can found a remedy for poor conduct that may not necessarily be a breach of the licensee obligation in section 912A(1)(a) of the Corporations Act to act efficiently, honestly and fairly.

56. There are two limitations that particularly concern us about the "efficiently, honestly and fairly" obligation.

    - The "efficiently, honestly and fairly" obligation has been interpreted by the courts as a single composite concept. In Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (in liq) (2012) 88 ACSR 206, Foster J said that this meant "a person must go about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty". The result is that a process failure (an inefficiency that creates unfairness) will not necessarily be a breach of this obligation unless it was motivated by dishonesty.

    - The "efficiently, honestly and fairly" obligation operates at the licensee systems level. A single instance of misconduct by a licensee's representative (or even several such instances) does not necessarily represent a failure by the licensee to meet its "efficiently, honestly and fairly" obligation.

57. Whilst AFCA's fairness jurisdiction may enable AFCA to side step the current limitations, we think that the legal framework is weakened by the limitations of the "efficiently, honestly and fairly" obligation. In contrast, United Kingdom (UK) authorised financial services firms (even those with no direct contact with retail customers) are subject to Principles of Business that mandate fairness and good conduct. These are:

1. **Integrity**

A firm must conduct its business with integrity.

2. **Skill, care and diligence**

A firm must conduct its business with due skill, care and diligence.

3. **Management and control**

A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.

4. **Financial prudence**

A firm must maintain adequate financial resources.

5. **Market conduct**

A firm must observe proper standards of market conduct.

6. **Customers' interests**

A firm must pay due regard to the interests of its customers and treat them fairly.

7. Communications with clients

A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.

8. Conflicts of interest

A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client.

9. Customers: relationships of trust

A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment.

10. Clients' assets

A firm must arrange adequate protection for clients' assets when it is responsible for them.

11. Relations with regulators

A firm must deal with its regulators in an open and cooperative way, and must disclose to the appropriate regulator appropriately anything relating to the firm of which that regulator would reasonably expect notice.

58. A breach of these Principles of Business will make a firm liable to disciplinary action. The Financial Conduct Authority (FCA) can take enforcement action against a firm on the basis of the Principles alone. The FCA has stated:[11]

    "The Principles act as a general statement of the fundamental obligations of firms reflecting our operational objectives. The Principles are then amplified in more detailed rules and guidance ... to address particular circumstances. This combination of Principles, rules and guidance allows us to apply a range of tools and protections that are appropriate in different situations.

[11] https://www.fca.org.uk/news/press-releases/approach-consumers-paper-discussion-paper-duty-care - July 2018 pp 9-10

The overarching framework of the Principles is necessary because the detailed rules cannot constitute an all-embracing comprehensive code of regulation that covers all possible circumstances. Any code that tried to be exhaustive could be circumvented, could contain provisions which are unsuitable for the many and varied circumstances which arise in financial services and could also stifle innovation. So, even in areas where there are detailed rules, a firm must continue to comply with the Principles.

In this way, the Principles can deal with situations or issues that are not specifically envisaged by the detailed rules. However, the success of this approach depends on a number of factors.

- We must have the right Principles and detailed rules in place.
- Firms must understand what is expected of them.
- We must use our authorisation, supervision and enforcement tools effectively.
- Firms must have the right culture, particularly at senior management level, so that the standards of conduct set out in the Principles are at the heart of their approach."[12]

59. For Principle 6, the fairness principle, the FCA has set six consumer outcomes which the FCA expects firms to strive to achieve. These go under the name TCF (Treating Customers Fairly):

- Outcome 1: Consumers can be confident they are dealing with firms where the fair treatment of customers is central to the corporate culture.
- Outcome 2: Products and services marketed and sold in the retail market are designed to meet the needs of identified consumer groups and are targeted accordingly.
- Outcome 3: Consumers are provided with clear information and are kept appropriately informed before, during and after the point of sale.
- Outcome 4: Where consumers receive advice, the advice is suitable and takes account of their circumstances.
- Outcome 5: Consumers are provided with products that perform as firms have led them to expect, and the associated service is of an acceptable standard and as they have been led to expect.
- Outcome 6: Consumers do not face unreasonable post-sale barriers imposed by firms to change product, switch provider, submit a claim or make a complaint.

[12] https://www.fca.org.uk/news/press-releases/approach-consumers-paper-discussion-paper-duty-care - July 2018 pp 9-10

60. The six consumer outcomes above are applied across the product life cycle. The FCA recommends, however, that to ensure these outcomes are achieved there should be extra checks in place at the stages of product design, financial promotion/marketing, the sales process, information and customer support after the point of sale, claims handling, handling client monies and complaint handling.

61. In practice this means identifying potential gaps in TCF practice and developing procedures and checks to plug these in the following areas:

    - Staff training/awareness of TCF
    - Sales and marketing material
    - Product understanding
    - Advice and sales process
    - Fact find and flow of information to the client (including after-sales)
    - Complaint handling
    - Remuneration/incentives
    - Risk assessment of TCF non-compliance
    - Record keeping and Management Information

62. Australian financial services regulation currently lacks but needs an overarching focus on fair treatment of customers. There is an opportunity to reframe the current approach to consumer protection regulation in the financial services industry. Instead of focusing on separate functional activities, conduct regulation should be more clearly based on the fair treatment of consumers at all stages of what is an increasingly integrated product design, origination and distribution system. This would help ensure the financial system better meets the needs of all users, including consumers and small businesses.

63. AFCA suggests that elements of the UK framework could assist in addressing the danger of conduct risk discussed in the Interim Report.

64. A new statutory obligation on licensees and representatives and credit intermediaries could be introduced and expressed as an obligation to treat customers fairly.[13] It could be elaborated by ASIC through guidelines and binding rules which could be tailored to particular market sectors, products, issues or parts of the product life cycle or consumer experience life cycle. It could apply to all of the licensee's activities and decisions which affected customers and all aspects of the product life cycle and customer experience life cycle. Board members and

[13] If the obligation were to apply to licensees and also to representatives and intermediaries in financial services and regulated credit (and also if all employees of these entities were to be covered) then a new Part could be created in Chapter 7 of the Corporations Act and in Division 5 of Part 2-2 of the NCCP Act.

senior management of financial firms could also be under a conduct obligation in respect of their duties to treat customers fairly.

65. In summary, AFCA considers that the laws governing financial services should be simplified and supports principles-based and outcomes-focused regulation with fair treatment of customers as a standalone key principle. The UK example provides an option that is worthy of consideration in any discussion of reform of the financial services law in Australia.

Appendix 1 – AFCA's complaint resolution process

As the single financial complaints handling scheme replacing FOS, CIO and the SCT, AFCA is expecting to deal with over 55,000 complaints per year. It will have a broader monetary jurisdiction than FOS and CIO. To manage its workload, AFCA anticipates it will need around 550 staff. This will include a dedicated small business ombudsman and a team with expertise and understanding of the financial firm issues that Australian small businesses face.

AFCA's complaint resolution process has been designed to ensure that it is easy to navigate and takes place quickly and efficiently. There is one case handler and an ombudsman who deal with each complaint.

AFCA encourages cooperation and collaboration by the parties in the resolution of complaints. Financial firms and complainants are able to engage proactively with AFCA, including by telephone and electronically.

Financial firms receive automated email communications when a complaint is registered and are given an opportunity to resolve the complaint in the first instance. AFCA is easily accessible with financial firms able to submit information and track the progress of a complaint through a secure portal and complainants able to lodge online and over the phone.

AFCA's Rules give it the ability to join another financial firm to a complaint. To date, this has not commonly occurred because of the division of firms between FOS and CIO. It is expected that from 1 November 2018 the joinder powers will enable a more streamlined and efficient ability to resolve complex complaints.

AFCA's investigation process involves AFCA assessing the issues and gathering relevant information from the parties. Information is exchanged to ensure that each party can respond to the other's material and that there are no surprises.

AFCA has flexibility under its Rules to resolve complaints using a variety of techniques including negotiation and conciliation and will engage with the parties to find the most effective method for the particular complaint. Not all complaints will be formally determined by an AFCA Decision Maker, such as an Adjudicator, Ombudsman or Panel. For example, after investigating a complaint, AFCA may make a preliminary assessment about how the complaint could be resolved, based on the case manager's evaluation of the information AFCA has obtained. While there is no obligation on the parties to accept a preliminary assessment, AFCA's experience of a similar mechanism under FOS's Terms of Reference is that many complaints do resolve in this way.