

The AFCA Approach to excluding complaints

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We have created a series of AFCA Approach documents, such as this one, to help consumers and financial firms better understand how we reach decisions about key issues.

These documents explain the way we approach some common issues and complaint types that we see at AFCA. However, it is important to understand that each complaint that comes to us is unique, so this information is a guide only. No determination (decision) can be seen as a precedent for future cases, and no AFCA Approach document can cover everything you might want to know about key issues.

1 At a glance

1.1 Scope

The AFCA Rules set out the jurisdiction and powers of the AFCA scheme. We must exclude certain complaints, and we can refuse to consider other complaints if we decide it is appropriate in the circumstances.

This document sets out the approach we take in assessing our jurisdiction to consider or otherwise exclude a complaint.

1.2 Summary

We will determine our jurisdiction to consider a complaint. We can refuse to consider or otherwise exclude a complaint whether or not we have been asked to do so by a financial firm.

We will make sure that we have enough information about the facts of a complaint and the issues involved, before making a decision about whether to exclude the complaint. All decisions to exclude complaints are made by experienced AFCA staff at the earliest opportunity, to avoid unnecessary costs and delays.

There are four main reasons why we would not consider or further consider a complaint:

- 1 A complainant does not satisfy the eligibility requirements set out in section B of the Rules.

We have decided to exclude a complaint under the:

- a) mandatory exclusions set out in rule C.1
- b) discretionary exclusions set out in rule C.2

- 2 We can decline to consider a complaint any further under rule A.8.3.

- 3 The remedy sought exceeds the limits set out in section D of the Rules.

If we decide to not consider a complaint, we will follow a process which affords the complainant procedural fairness to respond to our jurisdictional assessment.

2 In detail

2.1 The complainant must satisfy eligibility requirements

A complainant must be an eligible person as defined in section E, and the complaint must be against a financial firm that is an AFCA Member at the time that the complaint is submitted. Section B of the Rules sets out additional requirements that must be met in order for AFCA to be able to consider a complaint, such as time limits for submitting a complaint.

The complaint (other than a superannuation complaint) must arise from or relate to:	For example:
<ul style="list-style-type: none"> the provision of a financial service by the financial firm 	<ul style="list-style-type: none"> a failure or refusal to provide loan documents to which the complainant is entitled an extended warranty product issued by a financial firm
<ul style="list-style-type: none"> the provision of a guarantee or security by the complainant 	<ul style="list-style-type: none"> the guarantor was not adequately aware of the legal effect of, or the financial exposure under, a guarantee the financial firm was required to but did not take adequate steps to ensure that a guarantor made an independent and informed decision about giving a guarantee
<ul style="list-style-type: none"> an entitlement or benefit under a life insurance policy 	<ul style="list-style-type: none"> the policy holder dies and his or her spouse makes a claim under life insurance death cover an employee making a claim under a group life insurance policy, for example for a disability benefit, where the policy holder is the employer or superannuation trustee
<ul style="list-style-type: none"> an entitlement or benefit under a general insurance policy 	<p>a sporting club participant who is entitled to make a claim under the sporting club's group personal accident policy</p> <p>a credit card holder entitled to make a travel insurance claim under their bank's policy for credit card holders</p>
<ul style="list-style-type: none"> a legal or beneficial interest arising from financial investments and financial risk products 	<ul style="list-style-type: none"> we can consider a complaint where the Financial Firm deals with securities in a way that is inconsistent with the Complainant's legal or beneficial interest (even though the financial firm is not providing a Financial Service to the complainant)
<ul style="list-style-type: none"> an uninsured third-party claim 	<ul style="list-style-type: none"> a claim for damage to an uninsured car that is made under the insurance policy of the driver who caused the damage and who has made a valid claim with their insurer
<ul style="list-style-type: none"> an investment made under a foreign recognition scheme 	<ul style="list-style-type: none"> We cannot consider the complaint if the investment offer document expressly excludes access to AFCA or a predecessor scheme
<ul style="list-style-type: none"> a Traditional Trustee Company Service 	<ul style="list-style-type: none"> acting as guardian of the estate of an individual acting as executor or administrator of a deceased estate

The complaint (other than a superannuation complaint) must arise from or relate to:	For example:
<ul style="list-style-type: none"> a privacy breach by a Privacy Act Participant 	<ul style="list-style-type: none"> some utilities companies are AFCA members, not because they provide a financial service, but because they are a Privacy Act Participant. We are limited to considering complaints about a breach of privacy obligations by these Privacy Act Participants.

For superannuation complaints, the complainant must be either a superannuation product holder, a person with an interest in a death benefit, or a party (including an intended party) to a family law agreement or order affecting superannuation as set out in rule B.1.1 and B.1.2. The time limits to lodge a superannuation complaint are different to non-superannuation complaints, and are summarised at rule B.4.5.2.

2.2 AFCA must exclude complaints about certain matters

Rules C.1.2 to C.1.6 of the Rules set out the types of complaints which we must exclude, but there are certain exceptions.

We cannot consider a complaint:	Unless:
<ul style="list-style-type: none"> about the level of a fee, premium, or charge 	<ul style="list-style-type: none"> the fee, premium, charge was not disclosed, misrepresented, or incorrectly applied the financial firm has breached a legal obligation or duty the complaint is about a medical indemnity insurance premium or application of a risk surcharge
<ul style="list-style-type: none"> about how to allocate the benefit of a financial service between the competing claims of potential beneficiaries 	<ul style="list-style-type: none"> it is a superannuation complaint it is a complaint about traditional trustee company services
<ul style="list-style-type: none"> about the same events and facts as a complaint previously dealt with by AFCA 	<ul style="list-style-type: none"> the earlier complaint was discontinued the new complaint is that the financial firm has not complied with the terms of the settlement agreed in the earlier complaint
<ul style="list-style-type: none"> that has already been dealt with by a court, tribunal or predecessor scheme 	<ul style="list-style-type: none"> a complaint was assessed as outside the jurisdiction of a predecessor scheme but now comes within AFCA's increased jurisdiction a complaint was withdrawn by the SCT because a complainant did not respond to attempts by the SCT to contact the complainant, we may in exceptional circumstances treat the complaint as a new AFCA complaint farm debt mediation has been conducted and no agreement is reached

We cannot consider a complaint:	Unless:
<ul style="list-style-type: none"> where the value of the claim exceeds \$1 million 	<ul style="list-style-type: none"> it is a superannuation complaint it is a complaint about a primary producer credit facility it is a complaint to set aside a guarantee supported by security over the guarantor's primary place of residence
<ul style="list-style-type: none"> where the complainant is a member of a group with 100 employees or more 	<ul style="list-style-type: none"> the group of companies are not related bodies corporate as defined in the <i>Corporations Act</i>
<ul style="list-style-type: none"> that would require review of a trustee's exercise of discretion 	<ul style="list-style-type: none"> it is a superannuation complaint the complaint alleged bad faith, failure to give fair and proper consideration to the exercise of the discretion, or failure to exercise the discretion in accordance with the purpose for which it was conferred
<ul style="list-style-type: none"> about professional accountancy services provided by an accountant 	<ul style="list-style-type: none"> the service is provided in connection with a financial service, a credit activity or tax (financial) advice services
<ul style="list-style-type: none"> about a privacy act participant if the complaint is about something other than privacy 	<ul style="list-style-type: none"> a privacy-related complaint is a complaint that relates to a right or obligation arising under the <i>Privacy Act 1988</i>
<ul style="list-style-type: none"> about the financial firm's assessment of credit risk 	<ul style="list-style-type: none"> it is about irresponsible lending it is about financial difficulty in repaying credit obligations
<ul style="list-style-type: none"> about a small business credit facility of more than \$5 million 	<ul style="list-style-type: none"> the facility made available credit of up to \$5 million (even if more than \$5 million is owing at the time of submitting the AFCA complaint) the facility that was originally for more than \$5 million but that was varied to \$5 million or less there are two or more credit contracts (none of which provide credit of more than \$5 million), even if the aggregated credit is greater than \$5 million
<ul style="list-style-type: none"> about underwriting, actuarial factors leading to an offer of a life insurance policy on non-standard terms. 	<ul style="list-style-type: none"> we are not satisfied that such factors relied upon in the decision and led to the non-standard term being imposed
<ul style="list-style-type: none"> about rating factors and weightings under a general insurance policy 	<ul style="list-style-type: none"> unless information such as postcode, address of the insured property, gender or age of the insured driver, is incorrectly recorded
<ul style="list-style-type: none"> about a decision to refuse to provide insurance cover 	<ul style="list-style-type: none"> the refusal decision was made arbitrarily or without sound reason the complainant was misinformed about the cover a refusal to provide medical indemnity insurance

We cannot consider a complaint:	Unless:
<ul style="list-style-type: none"> about investment performance 	<ul style="list-style-type: none"> the complaint is about non-disclosure or misrepresentation. We are not prevented from considering a complaint about an act or omission by the financial firm merely because it relates to an investment that happens to be performing poorly.
<ul style="list-style-type: none"> management of a fund or scheme as a whole 	<ul style="list-style-type: none"> complaints that the trustee did not allocate earnings to the member in the manner required by the trust deed complaints that the trustee applied a policy in a way that was unfair or unreasonable to the complainant in the particular circumstances failure to redeem an investment within the timeframes specified in the scheme constitution (provided the scheme is liquid at the time) failure to satisfy the mandatory pre-conditions for a fee increase where ASIC has granted relief to allow some redemptions from an illiquid fund - a failure to consider a redemption request consistently with the terms of ASIC's relief
<ul style="list-style-type: none"> about certain Traditional Trustee Company Service complaints 	See rule C.1.6

2.3 AFCA has discretion to exclude complaints about other matters

Rule C.2.1 of the Rules gives us the discretion to refuse to consider a complaint that is otherwise within our jurisdiction, if we decide that this is appropriate in the circumstances. Our discretion to exclude a complaint is generally unrestricted. It is for us alone to decide whether it is appropriate to exclude a complaint. We can use our discretion to exclude a complaint at any time, whether or not we have been asked to do so by a financial firm.

We recognise that by deciding not to consider a complaint, we may permanently deprive a complainant of the opportunity to have their concerns fully considered by an independent body. Therefore, we will not exercise our discretion to exclude lightly. The discretion will only be used in cases where there are compelling reasons for deciding that we should not consider the complaint.

Rule C.2.2 of the Rules sets out some examples of the types of complaints that we may exclude on a discretionary basis. We do not have to exclude every complaint of the kinds set out in the examples. At the same time, the examples do not limit the possible reasons why we may decide to exclude a complaint.

We may exercise our discretion to exclude a complaint if:	For example:
<ul style="list-style-type: none"> • there is a more appropriate place to deal with the complaint 	<ul style="list-style-type: none"> • where we consider that the only way to determine the issues raised by the complaint would be for a third party to give evidence subject to cross examination, • where a complaint contains multiple interrelated claims, some of which are within our jurisdiction and some of which are not, and we consider that it would be more appropriate for all the claims to be dealt with together in another forum with jurisdiction to consider them all, • where the superannuation trustee is seeking judicial advice from the court about the validity of a trust deed amendment which would affect all fund members (or a class that includes the complainant).
<ul style="list-style-type: none"> • the subject matter of the complaint has already been adequately dealt with by AFCA or a Predecessor Scheme 	<ul style="list-style-type: none"> • where a complaint is made about a decision of a superannuation trustee not to allow a member to make a late election to preserve benefits in the scheme, and an earlier complaint raising the same issue was resolved in favour of the trustee.
<ul style="list-style-type: none"> • the complaint relates to a Financial Firm's practice or policy 	<ul style="list-style-type: none"> • a complaint that the financial firm provides emailed account statements rather than paper account statements • it is not appropriate for the financial firm to change its practice or policy because to do so would adversely affect other customers (albeit be of advantage to the complainant) • the financial firm cannot change its practice or policy because of system (e.g. it cannot print paper statements) or regulatory (e.g. AML/CTF) constraints
<ul style="list-style-type: none"> • the complaint is frivolous, vexatious, misconceived or lacking in substance 	<ul style="list-style-type: none"> • it is so obviously untenable that it cannot possibly succeed, manifestly groundless, or discloses a case which the court is satisfied cannot succeed • it is made against the wrong party or if there is no remedy that can lawfully be provided • it is a claim which presents no more than a remote possibility of merit and which does no more than hint at a just claim
<ul style="list-style-type: none"> • the complainant has commenced legal proceedings in court 	<ul style="list-style-type: none"> • the complainant has submitted to the jurisdiction of the court about the same subject matter against the financial firm
<ul style="list-style-type: none"> • the complaint is treated as a test case 	<ul style="list-style-type: none"> • we may allow a financial firm to treat a complaint as a test case to be decided in court proceedings rather than by AFCA, subject to certain conditions
<ul style="list-style-type: none"> • a paid agent is not acting in the best interests of the complainant 	<ul style="list-style-type: none"> • the paid agent is obstructing the fair resolution of a complaint by agreement or on its merits • the paid agent has not provided the necessary information

We may exercise our discretion to exclude a complaint if:	For example:
<ul style="list-style-type: none"> where we cannot effectively investigate the circumstances without the involvement of others who are not complaint parties 	<ul style="list-style-type: none"> we cannot investigate an allegation that a co-borrower forged home loan redraws from a jointly held account without their handwriting samples we cannot investigate whether a financial firm's delay in property settlement allowed a third party to lodge a caveat, without the third party's involvement
<ul style="list-style-type: none"> the complainant is a wholesale client 	<ul style="list-style-type: none"> we will not exercise our discretion to exclude a complaint merely because it is submitted by a wholesale client

2.4 AFCA may decline to consider a complaint under rule A.8.3

Rule A.8.3 allows us to decline to consider a complaint any further if we decide that it is appropriate to do so. This means in some circumstances a complaint may be within jurisdiction and have proceeded through the complaint resolution process but after considering the background, nature of complaint and supporting information we decide it is not appropriate to consider the complaint further.

We will only decline to consider a complaint in this manner in limited circumstances and where there are compelling reasons. We will make sure that there is enough information about the facts of a complaint and the issues involved, before deciding whether to decline to consider the complaint any further.

We may refuse to consider a complaint any further if the:	For example:
Complaint clearly does not have merit	The complainant seeks to discharge a debt by use of a promissory note or similar instrument without value.
Complainant has suffered no loss	The complainant complains about a \$30 late fee but has not incurred the late fee.
Complainant has been adequately compensated	The complainant complains about an establishment fee that has already been refunded.
Complainant cannot establish a loss was suffered as a result of an alleged error	The complainant alleges their stockbroker misrepresented he would sell a stock if it reached a certain value. The complainant states that as a result of the investment they have lost money, as the stock should have been sold. The financial firm states there was no such advice by the stockbroker, and in any event the stock price never dropped to the level which the complainant alleged they were told would trigger a sale. The complainant suffered no loss in reliance on the alleged misrepresentation.

2.5 The remedy sought must be within our jurisdictional limits

The monetary limits for claim amounts and jurisdiction are summarised at rule D.4.

While there is no monetary limit for superannuation, our powers to provide a remedy can only be used for the purpose of placing the complainant as nearly as practicable in a position that any unfairness or unreasonableness no longer exists

2.6 The process to exclude a complaint allows procedural fairness

We provide the parties to a complaint the relevant information and an opportunity to provide their views and response before we make a final decision to exclude a dispute.

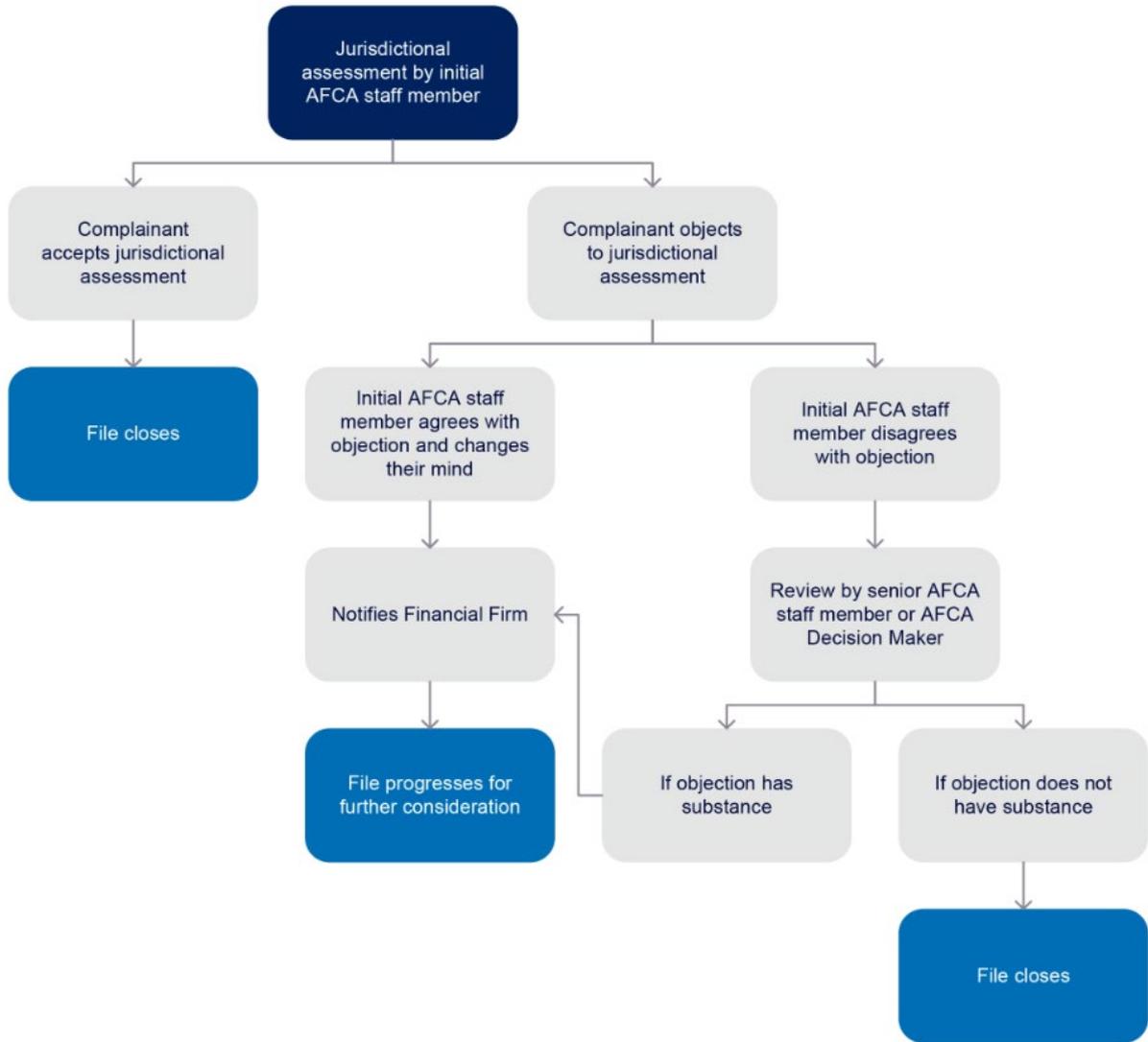
If we decide to exclude a complaint, the initial AFCA staff member will notify the complainant in writing explaining why and the timeframe within which the complainant may object to our assessment. The complainant should read our letter carefully and decide whether to object to our assessment.

If the complainant accepts the jurisdictional assessment, the file will close.

If the complaint objects to the jurisdictional assessment, and the initial AFCA staff member agrees with the complainant's objection, it is open for the initial AFCA staff member to change their mind and progress the complaint for consideration on the merits of the complaint.

If the initial AFCA staff member disagrees with the complainant's objection, the matter will be reviewed by a more senior AFCA staff member. In more complex cases, an AFCA Decision Maker may make the review decision. If the senior AFCA staff member or AFCA Decision Maker decides the complainant's objection does not have substance, the file will be closed.

Rules A.4.5 and A.4.6 set out this process:



3 Context

3.1 References

Definitions

Term	Definition
Complainant	individual or small business that has lodged a complaint with AFCA
Financial firm	financial firm, a business that has AFCA as its external dispute resolution scheme and provides a financial service
ASIC	Australian Securities and Investments Commission

Useful links

Document	Link
Rules	www.afca.org.au/rules