



12 April 2019

Mr David Locke
CEO and Chief Ombudsman
Australian Financial Complaints Authority Limited
GPO Box 3
Melbourne VIC 3001

Email: submissions@afca.org.au

Dear Sir / Madam

AFCA Rules Change – Legacy complaints

The Financial Planning Association of Australia¹ (FPA) welcomes the opportunity to provide feedback in response to the Australian Financial Complaints Authority's (AFCA) consultation on proposed changes to its rules to allow consideration of legacy complaints.

The FPA supports the intent of this measure as it is vital for consumers to have the ability to have their complaints heard and have the opportunity to seek redress.

However, we have the following concerns regarding the Rules change as proposed in the consultation paper.

Application of current Rules

The FPA notes that section 9(3) of the AFCA Scheme (Additional Condition) Amendment Authorisation 2019 Legislative Instrument states that legacy complaints must be determined in accordance with the scheme rules as in force at the date the instrument commences, being 30 June 2019.

AFCA Rules state:

A.14.2 When determining any other complaint, the AFCA Decision Maker must do what the AFCA Decision Maker considers is fair in all the circumstances having regard to:

- a) legal principles*
- b) applicable industry codes or guidance*

¹ The Financial Planning Association (FPA) has more than 14,000 members and affiliates of whom 11,000 are practising financial planners and 5,720 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of FOFA.
- We have an independent conduct review panel, Chaired by Graham McDonald, dealing with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 26 member countries and the more than 175,570 CFP practitioners that make up the FPSB globally.
- We have built a curriculum with 18 Australian Universities for degrees in financial planning. Since 1st July 2013 all new members of the FPA have been required to hold, or be working towards, as a minimum, an approved undergraduate degree.
- CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional bodies, eg CPA Australia.
- We are recognised as a professional body by the Tax Practitioners Board.



c) *good industry practice and*

d) *previous relevant Determinations of AFCA or Predecessor Schemes.*

However, it is unclear whether the consideration of the AFCA Decision Maker is based on the law, codes, guidance and good industry practice available at the time the conduct occurred.

The FPA is concerned and believe it is against natural justice, to consider a complaint about conduct which occurred under the laws and standards accepted potentially 12 years ago, under the lens of the legal requirements and standards that are in place today.

Between 2008 and 2019 there has been a global financial crisis (GFC) and significant changes in the laws governing financial advice, including the Future of Financial Advice (FOFA) Reforms and introduction of the Tax Agent Services Act 2009 Code to financial planners from 2014.

It is also important to note the new Code of Ethics for Financial Planners is to commence on 1 January 2020, during the period AFCA is required to accept legacy complaints.

It would be unreasonable and unfair to judge past conduct retrospectively against the new Code and the laws of today.

The FPA recommends Section F.1.1 make it clear that in applying Rule A.14.2 to its consideration of the facts of legacy complaints, AFCA will consider the relevant determinations of predecessor schemes, laws, industry codes, and good practice in place at the time the conduct occurred.

Relevant documents

In F.1.3, AFCA acknowledges that documents relevant to a legacy complaint may no longer be available due to the passage of time, stating that AFCA would not normally draw adverse inferences if a party cannot provide information because the legal timeframe to retain such records (usually seven years) has expired.

The FPA suggests that:


- AFCA apply a similar approach to the processes it applies when dealing with legacy complaints. For example, not drawing adverse inferences in relation to conciliation conferences and requiring statutory declarations, which rely on the ability of parties to remember discussions conducted potentially 12 year earlier.
- legacy complaints be dealt with in a fair and equitable manner considering complainants may have legacy documents that financial planners may no longer have due to the legal requirement to retain documents for only seven years.

F.2.1(b) Financial advice example

Draft Rule F.2.1(b) includes the following example in relation to when the conduct is considered to have occurred:

“AFCA cannot consider a complaint about a statement of advice given in 2007, unless the legacy complaint is about the Financial Firm’s conduct on or after 1 January 2008 by:

- *implementing a strategy contrary to the advice given*

- 
- *continuing a strategy recommended in the earlier advice in circumstances where the advice was, inappropriate*
 - *failing to provide ongoing advice or review as promised in the advice given”*

The new Authorisation requires AFCA to consider complaints dating back to 1 January 2008. The FPA supports the proposed jurisdiction requirement for legacy complaints that the Financial Firm’s conduct of the complaint must have occurred on or after 1 January 2008, in line with the cases considered by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

The FPA raises the following concerns about this example as currently drafted and suggest this is not in line with the requirements of the new Authorisation conditions placed on AFCA.

a) ...a complaint about a statement of advice given in 2007...

This example specifically refers to a statement of advice (SOA) given in 2007, prior to the date set for legacy complaints of 1 January 2008. It is currently unclear as to whether:

- 2007 is just an example and therefore AFCA can consider a complaint about a SOA given prior to 2007 where the conduct may have occurred on or after 1 January 2008, or
- instances where the conduct relates to a SOA given prior to 1 January 2008, can only be considered by AFCA where the SOA was given between 1 January 2007 and 31 December 2007.

b) continuing a strategy recommended in the earlier advice in circumstances where the advice was, inappropriate

It is unclear whether the appropriateness of the advice is referring to:

- the earlier advice being inappropriate at the time the advice was given in the SOA provided in 2007, and therefore acting on that inappropriate advice on or after 1 January 2008 is potential misconduct that can be considered, or
- that the earlier advice was no longer appropriate when the strategy recommended was continued on or after 1 January 2008. That is, that the advice provided in December 2007 (for example) was appropriate based on the circumstances at that time but when it was being implemented on 1 February 2008, it may no longer have been appropriate.

The FPA recommends this example be redrafted to clearly state that:

- the SOA was given between 1 January 2007 and 31 December 2007. This will make it clear that complaints about a SOA given prior to 1 January 2007 cannot be considered by AFCA, even if the conduct occurred on or after 1 January 2008.
- if the advice provided in a SOA given between 1 January 2007 and 31 December 2007 was inappropriate, and in 2008 the financial planner continued a strategy recommended in this earlier inappropriate advice, such conduct would be a potential legacy claim AFCA could consider.

This would be in line with the Authorisation conditions placed on AFCA.



Rules for considering legacy complaints and professional indemnity insurance

As previously noted, s9(3) of the AFCA Scheme Amendment Authorisation requires legacy complaints *“to be determined in accordance with the scheme rules as in force at the date this instrument commences”*, which is 30 June 2019.

This means that complaints that would have passed the date of limitations and fallen outside AFCA’s date for jurisdiction, will now be considered under the current AFCA Rules, monetary limits and compensation amounts. The AFCA jurisdiction has been expanded in relation to small business, and its monetary limits have been significantly increased from its predecessor schemes under which legacy claims would have fallen.

Professional indemnity insurers based policy coverage and premiums on the laws of the day relevant to the duration of the risks. This would include the risk of complaints and damages based on the relevant EDR scheme’s Terms of Reference.

As legacy complaints would have passed the date of limitations and the AFCA jurisdiction date, and there have been significant changes in the financial advice laws since 1 January 2008, professional indemnity insurance policies may no longer cover the services provided to the consumer, or provide cover for potential claims and damages for services provided in 2008 based on the AFCA Rules and monetary limits in place on 30 June 2019.

The FPA is concerned about whether professional indemnity policies put in place around 2008, will cover a potential legacy complaint. If PI cover does not extend to legacy complaints under the conditions set in the proposed Rules change, particularly in relation to the application the 30 June 2019 Rules, jurisdiction and monetary limits to legacy complaints, this will have a significant impact on the ability of licensees to pay any determinations made by AFCA in relation to legacy complaints.

The FPA recommends this issue warrants urgent consideration and further investigation by AFCA with the insurance industry.


The FPA is also concerned about the impact of potential legacy claims on financial planners and the future professional indemnity insurance market. Initial feedback from the insurance industry indicates that PI cover may be more expensive in the future should there be an increase in claims arising in relation to legacy complaints. This may include complaints that may have fallen outside the jurisdiction of predecessor schemes as set in the Terms of Reference applicable at the time the conduct occurred, which may now be accepted under the AFCA Rules as at 30 June 2019.

Therefore the FPA also requests that data on legacy complaints accepted under Section F of the AFCA Rules is compiled and analysed separately from complaints received under the jurisdiction set in Section B of the AFCA Rules.

This issue is potentially exacerbated by the application of C.2.1 of the AFCA Rules to legacy complaints, which gives AFCA discretion to exclude complaints, as discussed below.

AFCA’s discretionary powers

C.2.1 of the AFCA Rules gives AFCA discretion to exclude complaints. As stated in the Rules, *“AFCA will not exercise its discretion to exclude a complaint lightly”*. The proposed Rules change includes the application of AFCA’s discretion powers under F.2.1(e) in relation to consideration of a legacy



complaint that has previously been finally settled by the complainant and the financial firm. We note AFCA's consideration to reopen such complaints, as detail in C.2.1 of the Operational Guidelines, includes:

- whether the settlement discharges any liability of the Financial Firm.
- whether the Financial Firm induced the Complainant to settle by providing false or misleading information or placing undue pressure on the Complainant to settle quickly
- the overall fairness of the terms of the settlement
- whether the Complainant was represented during the settlement discussions
- whether the Complainant had any medical or other issues that place them in a position of particular vulnerability at the time of the settlement discussions.

It is unclear whether AFCA will apply its discretion in relation to complaints settled under the ASIC Compensation Review and Remediation Program, to enable it to consider such complaints as legacy complaints under Section F. Settlements made under this regulatory activity was done so with the oversight of ASIC and, in many cases, an appointed independent expert to assess the implementation of the licence conditions of some licensees in relation to these complaints.

The FPA supports a legacy program being used to resolve complaints that have not been resolved, or have not been resolved appropriately, in the past as long as it does not undermine previously resolved complaints. However, we have concerns about the potential for the discretionary powers being used to open up matters that have been resolved properly and appropriately.

Our concerns relate to double jeopardy and re-assessing matters previously resolved satisfactorily, the potential drain on AFCA resources, raising potentially unrealistic expectations of consumers that more compensation may be available, whether PI would cover the re-assessment of a claim that has been previously settled, the implications for future PI, and funding of the re-assessment of claims previously settled to the satisfaction of both parties.


[Funding arrangements for legacy claims](#)

Under the consultation paper and appendices it is unclear how AFCA's consideration of legacy complaints will be funded. The FPA notes that AFCA's Funding model overview and consultation summary released on 28 September 2018 states:

"...the interim funding model will apply for the first three years of AFCA operations (FY2018/2019 – FY2020/2021), while AFCA establishes an evidence base of complaint volumes and complexity in an expanded jurisdiction."

The period during which AFCA will accept legacy complaints falls within this interim period. AFCA's interim funding model for financial advice providers includes three components.

1. A membership levy
2. User charge - for members who have complaints, their user charge is based on the number and complexity of the complaints the member had closed over the 12 months prior to the calculation of the charge.
3. Complaint fees - the complaint fee for a particular complaint is based on the stage in the process at which the complaint is resolved and the complexity of the complaint if it progresses beyond the initial investigation stage.



As stated in the AFCA policy, not all three components will apply to all members. Which component applies, how much is charged and when will depend on the type of business, the number of complaints received and at what stage of the process the complaints are closed.

It is currently unclear if and how legacy complaints, which were outside the original jurisdiction of AFCA on which the funding model is based, will either fit into this model or if an alternative model will be established for legacy complaints.

The FPA recommends transparency and clear guidelines should be released to ensure there are adequate and fair funding arrangements for AFCA's consideration of legacy complaints.

Establishing an evidence base for future funding model

As stated above, AFCA will establish an evidence base of complaint volumes and complexity during the first three years of its operations (FY2018/2019 – FY2020/2021), to determine its future funding model.² On 20 February 2019, after AFCA's interim funding model was finalised, the Government expanded AFCA's remit to consider financial complaints dating back to 1 January 2008, providing expanded access to redress for consumers and small businesses harmed by financial misconduct.³ Consideration of such legacy complaints will be based on AFCA's current Rules, monetary limits, and compensation amounts as at 30 June 2019.

As detailed in the AFCA consultation paper, this will allow consumers with eligible legacy complaints dating back over more than eleven years, to make a formal complaint between 1 July 2019 and 30 June 2020. This has the potential to significantly skew the complaints data of AFCA's first three years of operation, and therefore impact the future funding model of the scheme. This issue will be exacerbated if AFCA's discretionary powers are used to consider legacy complaints settled by both parties under the ASIC Compensation Review.

AFCA's ability to consider legacy complaints is a 'one-off' extension of its jurisdiction to receive such complaints during a set period of time only - that is, the 2019 financial year. AFCA cannot receive legacy complaints after 30 June 2020.

It is also important to note that the extension of AFCA's jurisdiction to legacy claims dating back to 1 January 2008, was to ensure consumer complaints relating to issues evidenced in the Royal Commission could be heard. Given the widespread political support for the Recommendations made in the Royal Commission Final Report, it is hopeful that consumers will not be faced with such issues in the future.


Therefore, claims data relating to legacy complaints may not be indicative of the complaints AFCA is likely to receive in the future.

The FPA recommends:

- AFCA develop separate claims data on legacy complaints
- Claims data on legacy complaints should not inform the development of AFCA's future funding model.

² AFCA Funding model overview and consultation summary, 28 September 2018

³ <http://jaf.ministers.treasury.gov.au/media-release/028-2019/>



The FPA would welcome the opportunity to discuss with AFCA the issues raised in our submission. If you have any questions, please contact me on [REDACTED] or [REDACTED]

Yours sincerely

Ben Marshan

Head of Policy and Professional Standards
Financial Planning Association of Australia