



**Stockbrokers
And Financial Advisers
Association Limited**

12 April, 2019

Australian Financial Complaints Authority
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MELBOURNE VIC 3001

By email: submissions@afca.org.au

AFCA RULE CHANGE CONSULTATION - LEGACY COMPLAINTS SCHEME COMMENTS BY STOCKBROKERS AND FINANCIAL ADVISERS ASSOCIATION (SAFAA)

We refer to the Consultation Paper dated 18 March 2019 on the proposed Rule Changes establishing the new Section F of the AFCA Rules to give effect to the legacy complaints scheme adopted by the Government (“the Consultation Paper”).

SAFAA sets out below some comments on the proposed Rule Changes, following feedback we have received from our members.

Preliminary comments

Before addressing the specific Questions in the Consultation Paper, SAFAA makes some preliminary comments about the legacy complaints scheme.

There is a serious potential for such a scheme, depending on how it is administered, to cause grave injustice, and denials of natural justice, to licensees. Whilst SAFAA appreciates that the Government has adopted the framework as a matter of policy, and

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has directed AFCA to make provision for it in its Rules, it is imperative that the Rules, and the way in which AFCA handles such claims, operate fairly to all parties.

In particular, the Guidelines and policies adopted by AFCA need to spell out clearly key questions relating to the handling and adjudication of legacy claims. Because of the particular circumstances and issues that arise in legacy claims, AFCA's Guidelines and policies may need to be drafted with a greater degree of precision and certainty than might otherwise suffice for its adjudication of claims generally.

There is an additional question of fairness that has not, as far as we can ascertain, been addressed either by the Government or under the Proposed Changes, and that relates to the question of payment of any legacy awards that are made. Presumably if the AFS Licensee is still in existence, then the award will be made against the Licensee. Where however the Licensee is no longer in existence, the question that has not been broached is who will pay for the amount awarded to the Claimant.

The question of payment of awards is one that must be clarified further.

Consultation Questions

1. Does the proposed change satisfy the requirements of the new authorisation conditions?

Yes.

2. Do the Guidelines adequately explain how Section F will apply?

The Guidelines explain how Section F of the amended Rules will apply, however our members consider that there are a number of areas where more detail and specificity are needed in order for them to be considered to be adequate.

We acknowledge that the proposed amendments to the Guidelines consider the issue of document retention by a financial firm. In our view, this issue is of such potential importance that clearer and more specific provision needs to be made in the Guidelines regarding:

- (a) circumstances where AFCA would consider that an adverse inference would likely be drawn as a result of a lack of documentation; and
- (b) circumstances where AFCA would consider excluding a Legacy Complaint on the basis of a lack of documentation.

Document retention requirements

It is commonly understood that the legal and regulatory requirements for a financial firm in relation to document retention stipulate a retention period of seven years following the creation a document (**Document Retention Period**). These requirements are found in a number of sources, including:

- (a) section 912G of the *Corporations Act 2001* (Cth) (**Corporations Act**), as regards records relating to personal advice ;
- (b) Part 10 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth);
- (c) section 286 of the *Corporations Act*, relating to financial records being required to be retained for seven years after the transactions covered by the records are completed (as quoted in the proposed amendment to the Guidelines).

We note that these document retention requirements do not ordinarily apply to a client of an AFS Licensee. Clients will generally not retain documents for this length of time, and it is the common experience of firms that clients seek copies of documentation from the financial firm to support a claim.

Drawing of adverse inferences

We note that under the proposed amendments to the Guidelines, AFCA may draw adverse inferences as a result of a failure to provide relevant documentation pursuant to rule A.9.5 of the Rules, but *'will not generally draw an adverse inference if a party is unable to provide information that is no longer required to be held.'*

This is an important principle, which SAFAA supports, but in our view, the wording is insufficient on its own.

It will be highly likely, in our view, that many of the legacy cases that may be brought as a result of the Proposed Changes will confront the issue of either (a) absence of documentation; or (b) incomplete documentation.

In many cases, firms will not have kept documentation beyond the requirements of the Document Retention period referred to above. Document retention is very costly, and it is commonly accepted practice, and regarded as prudent, to not keep them for any longer than the required seven years.

It is therefore more likely than not that many financial firms will be unable to provide sufficient documentation relevant to a Legacy Complaint created prior to

1 July 2012 – seven years’ before the commencement of AFCA’s consideration of Legacy Complaints.

For Legacy Complaints where the Complainant ceased being a client of the financial firm prior to 30 June 2012, it is likely that no documentation will be able to be provided.

For these reasons, we submit that the Guidelines should contain a statement that for Legacy Complaints concerning conduct occurring between 1 January 2008 and 30 June 2012, **no** adverse inference will be drawn for a bona fide failure to provide relevant documentation by either party to the Legacy Complaint. It should not be left, as the proposed wording currently states, that it will be *generally* considered that an adverse inference should not be drawn.

If AFCA considers that there are circumstances where an adverse inference was appropriate in these circumstances, than AFCA should spell out the situation(s) when such an adverse opinion could fairly be drawn.

Declining to hear a legacy complaint

We note that in the proposed amendments to the Guidelines, AFCA will *generally* only decline to consider a Legacy Complaint due to lack of evidence if it is considered that it would not be possible to resolve the Legacy Complaint fairly in accordance with the legal obligations and principles as stated in rule A.2 of the Rules.

Pursuant to rule A.9.5(b) of the Rules, AFCA may refuse to continue considering a Legacy Complaint on the basis that a *Complainant* is unable to provide information sought by AFCA.

As mentioned under the previous discussion point, in the context of Legacy Complaints, it is more than likely that neither the financial firm, nor a Complainant, would have retained documents relating to a Legacy Complaint concerning conduct during the period of 1 January 2008 and 30 June 2012.

In those circumstances, it is difficult to see how a complaint can be heard and determined on its merits in a way that met the standards of fairness and natural justice, if the essential documentation is not available.

Therefore, SAFAA submits that the AFCA Guidelines should more clearly state the circumstances where a legacy complaint is to be excluded if there is a lack of

relevant documentation available (after bona fide efforts) to evidence the financial transaction(s) that have given rise to the claim, without which the claim cannot be truly assessed on its merits.

3. Do you have any other comments about the proposed changes?

SAFAA submits that the following matters should be dealt with either in the AFCA Rules or in the Guidelines, as appropriate:

a. Exclusion of Legacy Complaint – Wholesale Clients

We note that under the AFCA Rules generally, a wholesale client is an eligible claimant.

SAFAA has previously made submissions to AFCA about what we consider to be the unfairness of extending arrangements that were imposed on AFS Licensees as a condition of providing financial services **to retail clients**, to cover claims by wholesale clients as well.

Leaving that general issue aside, we note that the discussion of a scheme to provide redress for past disputes, both at the Ramsay Review Panel into External Dispute Resolution, and by the Financial Services Royal Commission, focussed on retail clients.

SAFAA submits that the legacy complaints framework provided by Section F should be limited to those who have been identified as the beneficiaries, namely retail clients and small businesses.

Accordingly, Rule F.2.1 should be amended so as to exclude a claim from a Wholesale client.

b. Monetary Limits

We note that the Government has determined that the legacy claims are to be dealt with under the new AFCA monetary limits, and not those under the previous FOS framework.

This raises issues of moral hazard, in that claimants are being rewarded for not having taken any action in respect of their claim, and are potentially put in a better position than those that did.

SAFAA questions the legality of awarding compensation for Legacy Complaints where the cause of action would be excluded under the rules or Terms of Reference of a predecessor scheme at the time the cause of action arose – but is within AFCA’s jurisdiction as at 30 June 2019 (with corresponding remedies). We note that these issues were raised by the Ramsay Review Panel in its *The Supplementary Final Report of the Review into dispute resolution and complaints framework*.

Bearing in mind our above concerns, SAFAA acknowledges the position that the Government has taken with respect to the new monetary limits. In our submission, there are grounds for AFCA to adopt a policy that the amount of a financial award that is ultimately made should pay some regard to whether the claimant can make out good grounds for why no claim was brought at the relevant time. Where a claimant cannot establish a plausible reason for their inaction, then this would be an appropriate basis on which, if an award is ultimately made by AFCA, to restrict the award for reasons of policy to an amount in accordance with the pre-existing FOS award limit.

c. Payment of AFCA Awards

As mentioned in the preceding point, SAFAA members question the legality, including constitutional questions, inherent in the legacy claims framework retrospectively removing the right of a Licensee to rely on a limitation period, to which it is entitled under statute, and conferring a benefit on other parties by enlivening a cause of action that had expired.

As mentioned at the outset, the question of who is required to pay the amount of any legacy award has not been addressed in the AFCA Consultation Paper or in the proposed Rule Changes. We are presuming that the starting point is that the AFS Licensee will be liable for any award made by AFCA.

Because of the questionable legality that we raise, SAFAA considers that the better approach to funding legacy claims should be by way of Government funding in the same way that the Government has agreed to allocate an amount to fund Legacy Unpaid awards (separately announced by Treasury).

In relation to any awards made by AFCA against Licensees that are no longer in existence, again, SAFAA submits that these should be funded by Government as if the amount were a Legacy Unpaid Award (which is exactly what they would now be if the client had proceeded to have their claim heard and determined against the defunct Licensee at the relevant time).

SAFAA would strongly oppose any proposal for legacy awards against Licensees that are no longer in existence to be industry-funded by way of a levy against existing Licensees, if that is in contemplation. This would be highly inequitable, as it would result in

Licensees who had done no wrong being required to pay for those that were at fault. This would further compound the inequity of the retrospective across the board expropriation of the right to rely on limitations.

Conclusion

We would be happy to discuss any issues arising from these comments, or to provide any further material that may assist. Should you require any further information, please contact Peter Stepek, Policy Executive, on [REDACTED] [REDACTED] [REDACTED] or email [REDACTED]

Yours sincerely,

A handwritten signature in black ink that reads "Andrew Green". The signature is written in a cursive style with a large initial "A" and "G".

Andrew Green
Chief Executive