



FINANCIAL
SERVICES
COUNCIL

PROPOSED AFCA RULE CHANGE NAMING FINANCIAL FIRMS IN PUBLISHED DETERMINATIONS

Submission to AFCA

19 June 2019



About the Financial Services Council

The FSC is a leading peak body which sets mandatory Standards and develops policy for more than 100 member companies in Australia's largest industry sector, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses.

The financial services industry is responsible for investing almost \$3 trillion on behalf of more than 14.8 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is the fourth largest pool of managed funds in the world.

Background

On 31 May 2019, the Australian Financial Complaints Authority ("**AFCA**") released a paper titled "AFCA Rules Change Consultation" incorporating proposed changes to AFCA Rule A 14.5 ("**Proposal**"). The Proposal outlines AFCA's proposed change to the above Rule to enable AFCA to identify the identity of financial firms in published determinations and invited feedback by way of submission by 20 June 2019.

FSC submission to AFCA

We thank you for the opportunity for the FSC to make a submission to AFCA in relation to the Proposal. This document includes FSC's feedback on the Proposal with the recommendation that the implementation of the Proposal be deferred until certain matters referred to are clarified and resolved. Also, we note the need to address an identified possible source of unintended identification or unfair and/or incorrect inferences being drawn by the public in relation to the identification of a party to an AFCA determination other than a financial firm.

We would welcome the opportunity to discuss further any queries AFCA may have in connection with FSC's submissions.

Dated: 19 June 2019



David McGlynn
Senior Legal Counsel

FSC Submission on the Proposal

This submission incorporates general feedback on the Proposal for consideration by AFCA in response to the third consultation question only, that is:

“Do you have any other comments about the proposed changes?”

Need for further consideration of equal treatment of parties and reporting of complaint data by other regulators

The FSC notes that the Proposal involves a significant departure from the pre-existing practice of AFCA of not identifying any party involved in an AFCA determination and in doing so not treating parties equally. While AFCA is not a court, the FSC notes that courts operate generally on the principle of open justice which includes naming all parties to a proceeding or judgment, save in the exceptional circumstances where a suppression order is warranted. It is a significant departure from this principle enshrined in the Australian legal system that AFCA proposes to identify only financial firms.

While this increases transparency in AFCA’s determinations, it does so by privileging the complainant over the financial firm. AFCA’s consultation paper highlights the increased transparency of the Proposal but is silent as to whether AFCA has reached a view on whether it is fair and reasonable to both the financial firm and the complainant for the difference in this treatment.

The FSC submits it would be appropriate for AFCA to provide further guidance on this so that the industry may better understand the potential consequences of the rule change and assist AFCA by way of a further submission on this important issue.

The FSC further notes that APRA publishes some complaints and disputes data identifying individual financial firms and ASIC, as foreshadowed in CP311, will be similarly doing so in the near future. In particular, ASIC’s data reporting may be more granular than that published by APRA. This substantially increases transparency by publicising complaint and dispute rates across the industry and on a comparative basis. AFCA is also moving to increased comparative reporting across financial firms and the FSC is working with AFCA on the proposed changes to such reporting by our recent submission on 3 May 2019.

Accordingly, the FSC queries whether publication by AFCA of the identity of financial firms in individual determinations is warranted when balanced against the increased transparency

resulting from comparative reporting by the regulators and by AFCA when weighed against the unfairness of differential treatment between financial firms and complainants where only financial firms are identified in Determinations.

Again, the FSC recommends that AFCA provide more detail on its thoughts on this balance of competing issues so that the FSC is in a position to provide a more considered submission to assist AFCA with its decision on this issue. Further, the FSC submits that it would be prudent for AFCA to defer this pending greater clarity as to the level of detail to be published by ASIC in the future, and how this will increase transparency in relation to complaints and disputes across financial firms.

Possible identification of Parties in relation to AFCA Determinations if there is related Litigation

The FSC notes that under the AFCA scheme, complaints and disputes involving superannuation trustees retain a right of appeal to the Federal Court. This has ramifications for the anonymity of individual complainants, as it is possible that such anonymity may be lost because it will be easier for the public to compare the details of each AFCA Determination against similar court proceedings with the intention of identifying the complainant in the Determination.

For example, a published determination on X's complaint against the decision of a superannuation fund Y and its insurer Z, may become identifiable from the documents in relation to an appeal lodged by any of those parties, which is on the public record and identifies all the parties involved.

There is also the risk that Determinations on similar sets of facts may lead to the inference that a person was the complainant based on the Federal Court appeal, when it may be a different person. This may lead to unfair inferences given that the complainant will not be identified in the Determination allowing incorrect inferences to be drawn by the public.

Apart from superannuation related scenarios, the same issue may arise in relation to any AFCA determination, as any complainant is entitled to not accept the Determination and to commence new proceedings in any court.

The risk of incorrect inferences being drawn as to the identity of the complainant to a Determination is small but not negligible and the risk of such inferences to the privacy of the individuals involved cause significant concern and upset to those involved.

The FSC recommends that AFCA consider this issue and provide its views on how this impacts transparency across the financial services industry and fairness to the parties to a complaint or dispute, and allow the FSC to make more detailed submissions, before taking any irrevocable steps.