

Independent Review of AFCA

Report summary

Overview

The legislation establishing AFCA required an Independent Review after 18 months to consider whether it had been effective in resolving complaints in a fair, efficient, timely and independent way. The Review was conducted by Federal Treasury, which reported to the Minister for Superannuation, Financial Services and the Digital Economy, and Minister for Women's Economic Security, Senator Jane Hume. The Review, available [here](#), concluded AFCA is “performing well”. Here is our summary of the report:

“The overall finding of the Review is that AFCA is performing well in a difficult operating environment and a changing regulatory landscape. It has successfully brought together the three predecessor schemes ... to produce an effective dispute resolution service for consumers and small businesses. While this is an endorsement of its performance in its establishment phase, AFCA will need to continue to develop and improve its processes as it consolidates its place in the financial system.” [Page ix]

The Review considered submissions from current and former complainants, financial firms, consumer advocates, industry bodies and others, as well as data on AFCA's operations. In addition, former Federal Court judge Julie Dodds-Streeton QC assessed 20 complaints selected from those mentioned in submissions.

Independent Expert's Overview of Case Assessment

“We were, overall, favourably impressed by the apparently orderly process, the consistent concern to provide procedural fairness and the respectful communication with all parties, including unsophisticated and demanding participants. We did not find in the 20 cases we examined a single instance of apparent bias or lack of independence. We considered that the written preliminary assessments and determinations were of a consistently high quality, clearly written and logically reasoned.” [Page 95]

The Review makes 14 recommendations under 8 categories

AFCA agrees with the 14 recommendations in principle. It will continue to engage with government, regulators, industry and consumers to ensure it is doing all it can to deliver fair outcomes in the most cost-effective, efficient and transparent way for all participants.

Fairness

Recommendation 1

AFCA should provide clearer guidance on the circumstances under which a further issue identified during the complaint process would revert to firms for consideration through internal dispute resolution. Where the issue is combined with an existing complaint, both parties should be provided with procedural fairness by having the opportunity to comment on changes to the scope of the complaint. However, in instances where AFCA finds parties inappropriately seeking to add new issues, it should act to dismiss or curtail such behaviour.

Recommendation 2

In making its decisions, AFCA should consider what is ‘fair in all the circumstances’ having primary regard to the four factors identified in its Rules: legal principles, industry codes, good industry practice and previous decisions.

Analysis from the Review

“While concerns have been raised regarding procedural fairness in AFCA’s handling of cases, the evidence provided to the Review, including the findings of the independent expert, has not substantiated that there is a systemic issue in regard to procedural fairness.” [Page 34]

“AFCA’s ‘fair in all the circumstances’ jurisdiction for making decisions is broadly consistent with the jurisdiction of FOS and CIO. It is a jurisdiction that has existed in EDR [external dispute resolution] for more than twenty years.” [Page 39]

“Importantly, the fairness jurisdiction is what differentiates AFCA from courts and tribunals. It enables AFCA to make decisions outside of a strict legalistic approach and facilitates a more expedient decision-making process.” [Page 39]

Independence

Recommendation 3

AFCA should not advocate for, nor act in a manner that otherwise advantages, one party such that the impartiality of the complaints resolution process is compromised.

Analysis from the Review

“The independent expert assessed every case example for conformity to the requirements of independence and impartiality. The expert did not come across any material that would suggest that AFCA failed to demonstrate independence and impartiality in its handling of any of the complaints in the sample.” [Page 44]

“In relation to the concerns expressed by some complainants that AFCA is not and can not be impartial since it is entirely funded by its members, which are financial firms, the Review has not seen any evidence to support these concerns.” [Page 45]

Efficiency

Recommendation 4

AFCA should address poor conduct by paid advocates affecting the efficiency of the scheme, such as by amending its Rules to allow it to exclude certain paid advocates from involvement in the complaints process. The Government could also consider an amendment to AFCA’s authorisation conditions to support such changes.

Analysis from the Review

“While the evidence does not necessarily suggest large differences between case outcomes with and without the involvement of paid advocates, the Review considers that current differences and trends are a cause for concern, and that paid advocates may not always act in the best interests of the complainant ... The Review notes that AFCA is well placed to recognise inappropriate conduct in the first instance and supports AFCA’s consideration of initiatives to deal with such behaviour such as excluding certain paid advocates.” [Page 47]

Timeliness

Recommendation 5

AFCA should:

- continue to publish data on its timeliness and start publishing data on the full range of complaints it resolves, including those that extend beyond 12 months
- better manage expectations around timeframes
- focus on improving the timeliness of complaints that remain unresolved beyond 12 months.

Analysis from the Review

“The Review identified some shortcomings in the timeliness of AFCA’s resolution of complaints and recommends AFCA better manage users’ expectations around timeframes, as well as focusing on improving the timeliness of complaints that remain

unresolved beyond 12 months. In making this recommendation, the Review noted the challenges faced by AFCA in its first two years of operation, including the COVID-19 pandemic and initial complaint volumes exceeding expectations, and also the fact that there are often instances where the nature of the complaint and parties contribute to the time taken. (Executive Summary Page x)

“The overall average time it takes to resolve a dispute was 74 days in its first two years of operation. These statistics compare favourably to AFCA’s equivalent in the United Kingdom.” (Page 50)

“However, AFCA has some outlier cases, with 2 per cent of total AFCA complaints taking beyond 12 months” (Page 50)

“AFCA said in its submission to the Review that it has several initiatives in place to try and improve timeliness going forward. These include:

- supporting and uplifting employee capabilities
- enhancing its workforce planning capabilities
- accelerating sector engagement practices
- continuing to enhance quality and consistency in complaint-handling
- renewing its focus on proven resolution techniques, such as conciliations.”

(Page 52)

“Time, quality and cost are all important and need to be carefully balanced by AFCA to provide an effective dispute resolution service ... From the assessment of cases relevant to timeliness, the independent expert suggested a protocol for standard improved communications as to the stage matters have reached, and whether and when progress could be expected.” [Page 52]

Jurisdiction

Recommendation 6

AFCA should exclude complaints from sophisticated or professional investors, unless there is evidence that they have been incorrectly or inappropriately classified.

Analysis from the Review

“The Review does not consider it appropriate that AFCA be required to exclude all wholesale investors. Where possible, AFCA should look to more actively exercise its existing discretion to exclude wholesale complaints in appropriate circumstances. As they stand, the Operational Guidelines are more restrictive of AFCA’s discretion than they should be.” [Page 60]

Funding

Recommendation 7

AFCA's funding model should not disincentivise firms from defending complaints they consider do not have merit and should better take into account the circumstances of small financial firms.

Recommendation 8

AFCA should improve the transparency of its fees for financial firms and how the fees are being used to support AFCA's activities.

Analysis from the Review

"Ensuring a fair and sustainable fee structure is an important objective going forward ... The Review considers that the structure of AFCA's membership levy sufficiently takes into account firm size and impact on competition across financial firms." [Page 65]

"Even for those financial firms that are subject to AFCA's complaint fees and the user charge, it is likely that AFCA's dispute resolution service offers a more efficient and cost-effective outcome than the alternative if those complaints went through a court or tribunal process." [Page 65]

Transparency and Accountability

Recommendation 9

AFCA determinations should continue to not be subject to merits review, but the substance of a determination should be reviewable with respect to its application to future cases. AFCA should enhance the visibility, accessibility and independence of its forward-looking review mechanism.

AFCA should amend its Operational Guidelines to remove the requirement for an applicant to demonstrate an error of law to access the formal forward-looking review mechanism. Applicants should be able to access it if they are able to demonstrate that the AFCA determination adopts an approach that could have a significant impact across a class of consumers, businesses or transactions.

Recommendation 10

Complaints about AFCA's service should remain the responsibility of the Independent Assessor. AFCA should improve the Independent Assessor's visibility as part of its communications with parties to a complaint.

Recommendation 11

AFCA should ensure consultation is undertaken on each Approach Document prior to final publication.

Analysis from the Review

“All models considered by the Review to add further review mechanisms would necessarily add costs and adversely affect timeliness of decisions, impacting accessibility and efficiency. Both supporting and opposing submissions highlighted these trade-offs. It would also risk AFCA’s processes becoming more legalistic.”
[Page 70]

Other

Recommendation 12

Where a systemic issue has been referred to ASIC or another regulator, AFCA should cease its investigation of the systemic issue. ASIC and other regulators should advise AFCA of the outcomes of the referrals they receive. However, AFCA should continue to resolve any relevant individual complaints.

Recommendation 13

AFCA should be more transparent in its public reporting of systemic issues, including on a de-identified basis as appropriate. This would encompass factors such as the industry to which the systemic issues relate, the nature of the complaints, the number of affected consumers, total value of remediation and reporting to the regulators.

Recommendation 14

The National Consumer Credit Protection Act 2009 should be amended to no longer require authorised credit representatives to be members of AFCA.

Analysis from the Review

“AFCA, through its dispute resolution function, may be in a position to identify potential systemic issues that firms may not have identified or where the issue has not been reported to the relevant regulator. However, submissions to the Review made clear that AFCA’s exact role in the identification, resolution and monitoring of systemic issues is not always well understood.” [Page 85]

“It is important that there is a clear and transparent separation between the role of AFCA and the role of regulators.”
[Page 86]

Full Report treasury.gov.au/review/review-australian-financial-complaints-authority

Key AFCA data – first two years of operation ¹

40,443 members

\$4,118 average compensation awarded

153,246 complaints received

193 definite systemic issues identified

Average time to close a complaint was **74 days**

\$202.2 million in refunds were made to consumers as a result of systemic issues investigations

68% of complaints were resolved by agreement between parties

755 full-time equivalent staff

69% of preliminary assessments/decisions were in the financial firm's favour

1.2% of complaints about AFCA were about service. 13% of these were substantiated

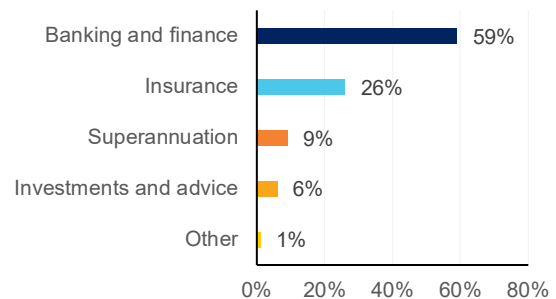
\$477.4 million² in compensation was provided to consumers through AFCA's dispute resolution processes

.2% complaints about AFCA were made to the Independent Assessor. 11% of these were substantiated

Average time taken to close complaints

Time	Total
Within 30 days	28%
Within 60 days	61%
Within 90 days	76%
Within 180 days	92%
More than 365 days	2%

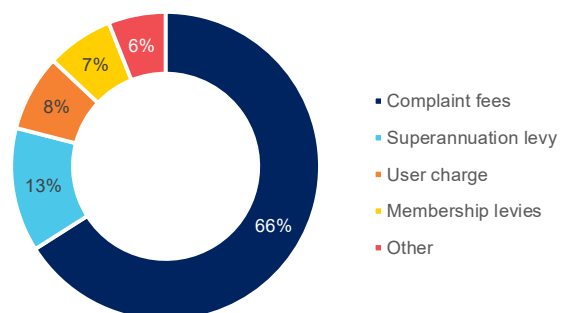
Complaints received by product line



Complaints resolved by outcome

Outcome	Total
By agreement	68%
After preliminary assessment	4%
Determination	6%
Discontinued/failure to respond by complainant	10%
Outside scheme rules	11%

Funding



¹ Source: Review of the Australian Financial Complaints Authority

² This includes matters previously received by AFCA's predecessor, Financial Ombudsman Service, and resolved by AFCA.