

Dear ALRC

I am a consumer not a lawyer nor someone who has previously made a submission to the ALRC.

ALRC is seeking submissions for simplification of laws that regulate financial services in relation to the Corporations Act and Corporations Regulations. AFCA is a not-for-profit company and, therefore, subject to the Corporations Act. And due to elements within those two Acts the simplification of laws includes the ASIC Act.

The new financial services legislation should have a section that governs the handling of complaints by AFCA, its Independent Assessor, ASIC's oversight on AFCA, and a proposed change to the jurisdiction of Commonwealth Ombudsman from complaints about ASIC to AFCA's Independent Assessor (refer section #4).

The proposed section that will govern the handling of complaints, or reports of misconduct to ASIC, will supersede:

- Operational Guidelines and AFCA's Rules (Operational Guidelines);
- ASIC Regulatory Guide 267 "Oversight of the Australian Financial Complaints Authority" (RG 267);
- ASIC Information Sheets 151 and 153 when considering financial services complaints; and
- any other law, rules, procedure or principle relating to AFCA's handling of complaints.

The reason being the above current mix of directions and requirements has caused confusion with people who have been involved with my report of misconduct on AFCA (refer section #1 below), but my concerns are more widespread. For example, by June 2022 the ASIC Analyst, Misconduct & Breach Reporting, had referred my report of misconduct on AFCA for consultation to an ASIC specialist team, and stated they may discuss my feedback with AFCA. Over twelve months later I have not seen change to any areas where I have suggested improvement.

Apart from having only one piece of legislation governing complaints about Financial Firms I also recommend the following:

- 2) the new financial services legislation should have a comprehensive introduction;
- 3) how will AFCA assess the information provided by complaint parties;
- 4) internal and external review of decisions to also have avenues for rulings for compliance with the new financial services legislation;
- 5) a glossary of defined terms that draws on meanings in the Commonwealth Ombudsman "Key terms and principles" (attached to my online submission to you); and
- 6) mandatory requirements being made defined terms.

Significant amounts of money have been spent to improve complaint handling—internal dispute response by financial firms (IDR) and the external dispute resolution schemes (EDR)—through various inquiries, investigations, changes to legislation, etc. Nevertheless, many complainants continue to be treated unfairly, and which is the reason why I have continued to follow up matters raised by me:

1. up to but not including issuing a Preliminary Assessment because its conclusions and recommendations can be accepted or rejected; and
2. up to but not including a "jurisdictional assessment" or an Operational Guideline A.8.3 decision to discontinue considering a complaint because in both cases an objection may be lodged if the Complainant is told about that decision review mechanism (I was not informed).

As for evidence that many complainants continue to be treated unfairly my complaints to ASIC and the Office of the Commonwealth Ombudsman (Ombudsman Office) referred to AFCA's complaint handling for Stage 1 Registration & Referral:

- 1 April 2022 AFCA media release quoted AFCA CEO and Chief Ombudsman David Locke as stating "The updated guide [RG 271] will not only improve the quality of internal complaint resolution but will enable financial firms to deliver better outcomes for consumers and reduce the need to escalate complaints to external dispute resolution [AFCA]".

(ASIC Regulation Guide 271 "Internal dispute resolution" being a guide for Financial Firms)

- Page 102 of AFCA's 2021/22 Annual Review had: "With the introduction of RG271 in October 2021, financial firms have enforceable obligations to manage systemic issues identified through consumer complaints. AFCA's role sits alongside this and assists member firms to identify possible systemic issues, so they can quickly put in place a program to rectify the issue and remediate consumer harm; thereby, reducing consumer complaints flowing through to external dispute resolution."

However, in the three financial years to 30 June 2022 complaints resolved at Registration & Referral were 36,564 (45%) for 2019/20; 37,049 (53%) for 2020/21; and 36,568 (51%) for 2021/22.

- And for the six-month period to 31 December 2022 there were 20,926 (48%) complaints resolved at Registration & Referral. It indicates that for 2022/23 complaints closed at Registration & Referral will for the first time increase to over 40,000.

The above data and quotes—David Locke and the 2021/ 22 Annual Review—showed there is a systemic issue with Registration & Referral. AFCA's Operational Guideline A.17 states:

- "A systemic issue is one that has been raised in a complaint or several complaints, or is otherwise identified by information obtained by, or provided to, us that is likely to affect a class of persons beyond any person who lodged a complaint or raised a concern.

Several complaints of the same type or a single complaint may raise a systemic issue, provided that the effect of the issue may clearly extend beyond a single Complainant."

On 1 September 2022 to an ASIC Escalated Matters & Government officer, who conducted a decision review, I stated a possible reason why complaints received by AFCA have not declined is Financial Firms have continued to reject complaints to test whether Complainants will seek assistance from AFCA, and when that occurred a resolution is reached for around 50% of complaints received by AFCA.

- Those Financial Firms are not complying with RG 271.166 that states "We expect firms to develop processes that ensure each complaint is managed fairly, objectively and without actual or perceived bias."

In that regard, webpage at <https://www.afca.org.au/about-afca/systemic-issues> states "AFCA's role in identifying and reporting systemic issues benefits consumers who have not lodged a complaint with AFCA but who may, nonetheless, have been impacted by a systemic issue."

Furthermore, resolving the systemic issue with Registration & Referral will also improve the quality of Financial Firms' internal dispute resolution scheme so that a very large number—36,568 for 2021/22—of Complainants no longer have to lodge a complaint with AFCA to enable their Financial Firm to resolve the issue.

Another reason to address this systemic issue is it diverts AFCA's resources from handling other complaints:

- AFCA's webpage "Complaints update January 2023" states receiving 53,118 complaints since 1 July 2022, which means up to 100,000 complaints by 30 June 2023. It also stated the complaints influx is

putting pressure on AFCA's complaints handling operations, and that they have increased the capacity of the Registration & Referral team.

## 1) ONE PIECE OF LEGISLATION GOVERNING COMPLAINT HANDLING INVOLVING AFCA

Whether a complaint is being handled by AFCA, its Independent Assessor, ASIC or the Ombudsman Office they all will be directed by the same legislation rather than current laws that contradict each other:

- i. ASIC Act Section 13 that the Ombudsman Office Senior Complaints Officer's decision stated "ASIC may 'make such investigation as it thinks expedient for the due administration of the corporations legislation'".

He also referred to Corporations Act Sections 1052A-1052D but not Section 1052 (refer bullet ii below).

However, ASIC webpage at <https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/> states regulatory guides provide guidance to regulated entities, and the following two of four items were relevant to my report of misconduct on AFCA:

- "explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)"
- "explaining how ASIC interprets the law"

AFCA staff are required to comply with RG 267 that is covered on pages 4 to 6 in this submission.

- ii. Corporations Act Section 1052 states "AFCA must ensure that the mandatory requirements of the AFCA scheme under section 1051 are complied with."

Section 1051 covers mandatory requirements and the following two items in subsection (4) were applicable to my report of misconduct on AFCA:

- (b) "complaints against members of the scheme are resolved (including by making determinations relating to such complaints) in a way that is fair, efficient, timely and independent; and
- (c) appropriate expertise is available to deal with complaints"

However, AFCA's Rules and its Operational Guidelines does not refer to the above as being mandatory requirements (refer pages 22 and 23 of this submission).

And without first stating what the individual mandatory requirements are RG 267 has numerous references to Corporations Act Section 1051: RG 267.8, RG 267.9, above RG 267.24 (a), RG 267.29 (a) (i), RG 267.34, RG 267.35 (a), and RG 267.114. Finally, individual mandatory requirements are covered in RG 267.115 that has "fair, efficient, timely and independent: s1052(4)(b)". However, the correct Section is 1051, and RG 267.115 should include subsection (4) (c) that "appropriate expertise is available to deal with complaints".

- iii. The two ASIC staff who dealt with my report of misconduct on AFCA, and the Ombudsman Office Senior Complaints Officer, as well as its Review Officer, should have only relied on RG 267 as well as:
  - ASIC Information Sheet 151 "ASIC's approach to enforcement"
  - ASIC Information Sheet 153 "How ASIC deals with reports of misconduct"

ASIC webpage at <https://asic.gov.au/regulatory-resources/find-a-document/information-sheets/> states information sheets "provide concise guidance on a specific process or compliance issue or an overview of detailed guidance".

Commonwealth Ombudsman webpage "Our role in dealing with ASIC's regulatory decisions" acknowledges that ASIC is not obliged to investigate every report it receives, and that the law permits ASIC to be selective about the matters it decides to take action into. In that regard ASIC Information Sheet 151 states ASIC is "more likely to select matters that involve significant public interest or concern, or where enforcement action will benefit the public (refer RG 267.29 (b) below).

The systemic issue with Registration & Referral is one reason where enforcement action will benefit the public, and others were provided in my communications to ASIC and the Ombudsman Office.

Information Sheets will no longer be a source of guidance for reports of misconduct on AFCA:

- To ascertain how I could have ASIC investigate my concerns about AFCA I rang them on 1300 300 630 and was told to send a report of misconduct.
- After lodging a report of misconduct the first communication from ASIC referred to Information Sheet 176 "What to do if you are dissatisfied with a decision by the Australian Financial Complaints Authority". In response I referred to RG 267 and cited the clauses applicable to my report of misconduct on AFCA.
- Being dissatisfied with the decision on my report of misconduct I requested a decision review and as covered in this submission the response again did not comply with RG 267 or meet guidance provided by Information Sheets 151 and 153.

Below are RG 267 clauses applicable to my report of misconduct on AFCA and most cite Corporations Act Sections:

- RG 267.24 (a) requires ASIC staff to ensure compliance with mandatory requirements but I could not find that obligation in Corporations Act Sections 1052A-1052D, which were referred to by the Ombudsman Office Senior Complaints Officer.

Unlike most of the other RG 267 clauses below RG 267.24 does not cite any Corporations Act Sections: the exceptions being RG 267.30 and RG 267.32.

- RG 267.29 (a) states "issue regulatory requirements, including by legislative instrument, relating to compliance with" mandatory requirements under Section 1051, or any general considerations for the AFCA scheme under Section 1051A.
  - Refer item ii above for Section 1051 mandatory requirements; and
  - Section 1051A general considerations are accessibility, independence, fairness, accountability, efficiency and effectiveness.

The related Corporations Act Section to RG 267.29 (a) is 1052A that states "ASIC may, by legislative instrument, issue to AFCA regulatory requirements relating to:

- (a) compliance with the mandatory requirements for the AFCA scheme under section 1051; or
- (b) any of the general considerations for the AFCA scheme under section 1051A."

Unlike Section 1052A RG 267.29 (a) does not have "may" and that is consistent with RG 267.24 (a) that has "ensures compliance with mandatory requirements".

- RG 267.29 (b) states "issue directions to AFCA if we consider that AFCA has not done all things reasonably practicable to ensure compliance with the relevant legislative requirements (s1052C)".
  - *References to Corporations Act Sections jump from 1052A to 1052C - refer RG 267.31 for Section 1052B.*

*RG 267 has a different sequence of requirements plus additional ones than the Corporations Act: the former determines required actions by ASIC staff - refer comments after RG 267.32.*

Corporations Act Section 1052C (1) has "If ASIC considers that AFCA has not done all things reasonably practicable to ensure compliance with"—Sections 1051, 1050(5)(b) and 1052A—"ASIC may give AFCA written notice that it intends to give AFCA a specified directions under this section".

Section 1052C has "may" but not RG 267.29 (b), and "may give AFCA written notice" has been moved to RG 267.32 but its wording has been changed.

As for "AFCA has not done all things reasonably practicable to ensure compliance" it is covered by ASIC Information Sheet 151 "ASIC's approach to enforcement". It states receiving thousands of reports about misconduct, that ASIC carefully considers how to respond to all potential contraventions of the law, and one factor to consider taking action is being in the broader public interest with two of four examples being:

- "misconduct that is likely to continue or escalate unless we [ASIC] intervene"
- "enforcement action that will maintain public trust and confidence in our financial system and markets"

Consequently, and due to not having "may", RG 267.29 (b) requires ASIC staff to engage with AFCA to ascertain if all things reasonably practicable have been done by AFCA, but in the case of non-compliance of mandatory requirements ASIC staff must ensure they will be complied with.

ASIC Information Sheet 151 also should no longer apply to ASIC oversight on AFCA with its approach to enforcement being covered in the new financial services legislation.

- RG 267.30 states "The Explanatory Memorandum confirms that while ASIC has an enhanced oversight role over AFCA, the scheme remains independent and responsible for its own internal processes and the management of complaints. ASIC has no role in individual complaints handling and will not intervene in the decision-making processes of AFCA."

The "August 2021 Independent Review of AFCA"—paragraph 2.7—stated "Under the Corporations Act, ASIC has an oversight role in relation to the AFCA scheme. This provides a level of assurance that AFCA will continue to comply with its mandatory requirements and general considerations of the Corporations Act."

A concern in my report of misconduct on AFCA was its staff not always complying with its Operational Guidelines, and why that is a breach of mandatory requirements was explained in pages 4 and 5 of my online submission attachment "AAT Reviewable Decision". And on pages 14 and 15 of that attachment had my response to the Ombudsman Office Review Officer's statement that "AFCA remains an independent scheme and that ASIC has no role in individual complaints handling and will not intervene in the decision-making process of AFCA".

Please also refer to "AFCA remains responsible for its own internal processes and management of complaints" section in my other attachment a second internal review by the Ombudsman Office.

- RG 267.31 states "If AFCA fails to comply with any regulatory requirement, ASIC may issue specific directions (under s1052B or s1052BA) or a general direction (under s1052C) to AFCA requiring it to comply".
  - Section 1052B concerns value of claims limits, Section 1052BA is about ensuring sufficient funding and Section 1052C is general directions.

RG 267.31 is the only one that has "may" that indicates it is at the discretion of ASIC staff subject to observing ASIC Information Sheet 151 that was covered above.

- RG 267.32 states ASIC "will use these directions powers as a last resort, and give AFCA adequate notice of any intention to issue a direction (as required by the Corporations Act)".

RG 267 has different requirements to the below Corporations Act Sections referred to by the Ombudsman Office Senior Complaints Officer:

- 1052A - may issue regulatory instrument to comply with mandatory requirements or general considerations - covered in RG 267.29 (a);
- 1052B and 1052BA are not applicable to my report of misconduct on AFCA as they cover value of claims limits and sufficient funding;
- 1052C (1) - "AFCA has not done all things reasonably practicable to ensure compliance with" — Sections 1051, 1050(5)(b) and 1052A—and "may give AFCA written notice that it intends to give AFCA a specified direction under this section"; and
- 1052D - also was not applicable because it covers approval of material changes to the AFCA scheme.

Corporations Act Section 1052C (1) has been separated in RG 267: RG 267.29 (b) has "AFCA has not done all things reasonably practicable to ensure compliance", and "ASIC may give written notice" has been moved to RG 267.32 but it states "give AFCA adequate notice of any intention to issue a direction (as required by the Corporations Act)."

And RG 267.32 also states ASIC "will use these directions powers as a last resort" but that requirement for ASIC staff is not in Corporations Act Sections 1052A to 1052D. The Oxford Dictionaries meaning of last resort is "a final course of action, used only when all else has failed".

The review decision by an ASIC Escalated Matters & Government officer stated:

- "ASIC will engage with AFCA in relation to the matters reported in whatever manner it considers appropriate".

The Ombudsman Office Senior Complaints Manager referred to RG 267 as well as the ASIC Act and Corporations Act Sections but the latter two did not apply (refer item i on page 3 of this submission).

The Ombudsman Office Review Officer stated "RG267.32 indicates that ASIC's powers to take any regulatory action are discretionary only and that if used, it would only be done as a last resort." She actually was referring to RG 267.31 and RG 267.32.

RG 267.31 states ASIC may issue a general direction under Corporations Act Section 1052C:

- Section 1052C has "ASIC may give AFCA written notice that it intends to give AFCA a specified direction under this section"; whereas
- that provision has been moved from RG 267.31 to RG 267.32, which states "give AFCA adequate notice of any intention to issue a direction", and RG 267.32 also states ASIC will use these directions powers as a last resort but that is not included in Section 1052C.

RG 267.32 provides AFCA an opportunity to address a matter rather than receive a direction from ASIC. One reason for ASIC staff to provide a notice to issue a direction is a report of misconduct that concerned non-compliance with mandatory requirements. And due to RG 267.24 (a) ASIC staff should engage with AFCA, and if warranted issue a notice of intention to issue a direction.

However, and upon receiving a notice, AFCA should never receive a direction from ASIC due to Corporations Act Section 1052 requirement that AFCA must ensure it complies with mandatory requirements.

## #2 THE NEW FINANCIAL SERVICES LEGISLATION SHOULD HAVE AN INTRODUCTION

AFCA's Operational Guidelines does not have a "Quick Guide" like the one on page 3 of AFCA's Rules that has the following:

"The AFCA Rules set out the rules and processes that apply to all complaints submitted to the AFCA scheme, including superannuation complaints. The aim of this 'quick guide' is to assist understanding of some key features of the AFCA Rules and should be read in the context of the whole document.

- A. Complaint Resolution Process
- B. Requirements
- C. Exclusions
- D. Remedies
- E. Defined Terms
- F. Legacy Complaints
- G. Complaints about SMEG Loans and COVID-19 related repayment deferrals

A complaint is within AFCA's jurisdiction provided it meets the requirements (as set out in section B) unless it is outside jurisdiction (as set out in section C). Remedies that AFCA can award are set out in section D. All definitions are set out in section E.

Section F allows AFCA to deal with certain 'legacy complaints' which would otherwise fall outside AFCA's time limits. Section G deals with complaints about certain loan decisions and repayment deferral decisions affected by measures taken in response to the COVID- 19 pandemic."

The new financial services legislation should clearly communicate complaint handling rules, procedures and principles than currently is the case:

- Operational Guidelines does not have a glossary of defined terms or identify which ones are mandatory (refer sections #5 and #6 below);
- Operational Guidelines explanation for "procedural fairness" should be more comprehensive like the one in Commonwealth Ombudsman's "Part 8 - Key terms and principles" ("Part 8"), it is a mandatory requirement for the reason on pages 21 and 22 of this submission, and for its meaning refer page 24;
- "accessibility" and "impartial" being identified as mandatory (refer page 23 of this submission) because Part 8 for a fair system includes those two requirements; and
- Operational Guideline A.8.1 covering AFCA's complaint resolution approach should lead with informing complaint parties of the proposed approach to ensure they understand what is involved: such as the below draft introduction for the new financial services legislation.

There also are the following requirements in RG 267 not being complied with by AFCA.

RG 267.137 states "In determining whether AFCA is meeting the efficiency and effectiveness requirements, we will consider factors such as:", and item (d) has "effectiveness of scheme communications and processes."

AFCA is not complying with RG 267.137 or RG 267 requirements for clear communications in RG 267.82, 267.94, 267.95, 267.96 or 267.97 and provide the following examples.

To comply with RG 267 communication requirements there should only be the link [Operational Guidelines](#) that opens the current version of that document and not to another webpage:

- Rule A.1.2 states "These rules form part of a contract between AFCA and Financial Firms and Complainants. AFCA may develop Operational Guidelines setting out how AFCA interprets and applies these rules." AFCA communications to Complainants and its webpages has [Rules](#) or

Operational Guidelines, which are links to a webpage that has both current and superseded Rules, but that is unnecessary because:

- each Operational Guideline begins with and quotes the Rule it relates to with that text background shaded yellow; and
- on the odd occasion when a superseded Operational Guideline(s) applies to a complaint the Complainant will have the opportunity to either withdraw their complaint or address the former Rule, complaint handling procedure or principle.

RG 267.82 states to meet the accessibility requirements AFCA must, and item (e) has:

- "communicate in a clear, timely and relevant way to consumers, financial firms and other stakeholders and ensure scheme processes are easy to use and understand, and simple to navigate".

For the reason on page 21 of this submission Accessibility is a mandatory requirement, its meaning is on page 23 that is not being complied with by AFCA because:

- the current version of Operational Guidelines comprises 179 pages and to find relevant information is not an easy task for someone who has no prior experience with such a document;
- Operational Guidelines refers to "preliminary assessment" seven times before being explained on page 61;
- there also are people who have difficulty comprehending and/or remembering verbal explanations, and for those reasons or other ones may also be reluctant to seek clarification; and
- an explanation provided by an AFCA staff member can be influenced by work pressures, or they may provide their memory or version of an Operational Guideline rather than a full explanation.

To comply with the Accessibility mandatory requirement, it should be assumed that all people have capability limitations being the reason for the proposed introduction to the new financial services legislation. It is a roadmap as to how a complaint will be handled by an AFCA staff member, it will also assist users become familiar with Operational Guidelines (new financial services legislation) as well as being a reference to refer back to should they have a concern about how their complaint is being handled.

Additionally, RG 267.94 states AFCA should adopt appropriate communication strategies with:

- "a focus on promoting understanding of AFCA's role, processes and decision making".

The only full explanation I found was in the webpage "About AFCA" or Operational Guideline A.1.1. Consequently, for a user of AFCA's scheme to have a precise and complete explanation they are required to search Operational Guidelines for "AFCA's role, processes and decision making" but RG 267.96 states "When developing communications strategies, AFCA should ensure that information is:

- (a) easy to access;
- (b) user friendly (taking into account plain language principles);
- (c) practically relevant; and
- (d) provided at key stages of the complaint resolution process."

**The following is a draft Introduction with references to Operational Guidelines that will be replaced by citing relevant sections in the new financial services legislation.**

AFCA's role is to assist a Complainant to reach agreement with their Financial Firm about how to resolve



their complaint, and if not resolved between the parties AFCA will decide an appropriate outcome (called a Determination).

The requirements in this document govern how complaints about Financial Firms will be handled by AFCA, and the glossary section has the meaning of defined terms: identified by having capital letters such as Fair rather than fair. The glossary also is divided into the following three sections:

- the first section has the meaning of common defined terms such as AFCA, Complainant, Financial Firm;
- the second not only has the meaning but also provides an overview of the complaint handling function of that defined term with reference to the new financial services legislation to have a precise and complete explanation; and
- the third lists defined terms that are mandatory requirements, and provides an overview of its complaint handling function with reference to the new financial services legislation to have a precise and complete explanation.

AFCA has published resource materials that are available at [Publications](#). Factsheets provide guidance on a specific process; AFCA approach documents outline its approach for certain types of complaints; etc.

One of the factsheets is titled [How AFCA will access the information you give us](#) that explains how to best support a complaint with strong and relevant information. It explains possible types of information and how it may or may not be taken into consideration.

There also are [codes of practice](#) that set standards of good industry practice for Financial Firms in areas such as the provision of its service, standards of professional conduct, practice standards and ethical behaviour.

Should a party to a complaint have a concern with how it is being handled by an AFCA staff member it should be discussed with them, and if it is not fully resolved refer to ..... (*cite the new financial services legislation covering the relevant section #4 of this submission*).

The handling of complaints whether by AFCA, its Independent Assessor, ASIC or the Commonwealth Ombudsman they all must be Transparent, and to also comply with the below obligations:

- advise who is handling the complaint and be given a point of contact;
- how the complaint process works including what information a Complainant should provide;
- when to expect further contact or a final decision, and if not met be provided with a revised indicated contact or final decision date that includes the reason for the delay;
- be provided reasons for decisions, which includes why evidence or information has not been taken into consideration; and
- advise how to seek an internal review of a decision or how to escalate a matter (refer to .... in the new financial services legislation).

A Complainant may tell AFCA that they do not want to continue with their complaint, or that may be inferred should a Complainant not respond to provide information or comply with any other AFCA request. The complaint will be closed and is unlikely to be re-opened unless there are special circumstances that are covered in (the new financial services legislation .....).

AFCA has three stages as to how it handles complaints: Stage 1 Registration & Referral, Stage 2 Case Management and Stage 3 Decision (called a Determination).

**Stage 1 Registration & Referral** involves sending a copy of a complaint to the Financial Firm who must handle the matter in accordance with ASIC Regulatory Guide 271 (RG 271) covering requirements for their "Internal Dispute Resolution" (IDR) scheme.

When a Financial Firm receives a complaint—whether verbally or in writing—RG 271.54 requires them to provide an IDR response in writing that must clearly set out reasons for rejecting or partially rejecting the complaint by:

1. identifying and addressing the issues raised in the complaint;
2. setting out the Financial Firm's findings on Material Questions Of Fact [make it a defined term or replace it with plain language] and referring to the information that supports those findings; and
3. providing enough detail to understand the basis of the decision and to be fully informed when deciding whether to escalate the matter to AFCA or to another forum.

Unless the Financial Firm requests a Jurisdictional Assessment they will review the matter and may again try to resolve the dispute rather than further involve AFCA, or they may ask AFCA to progress the complaint to Stage 2. A Complainant can also ask AFCA to progress the complaint should they be unhappy with the approach taken by the representative of their Financial Firm. For example, the representative may repeat the IDR response already provided rather than take a different view on a possible resolution to the complaint.

**Stage 2 Case Management** is where an AFCA Case Manager is assigned to the case, they will examine the merits of the complaint and:

- within 7 days contact the Complainant to ensure they fully understand the dispute, they may seek clarification as to why a resolution could not be reached with their Financial Firm, and may seek additional evidence or information;
- the AFCA Case Manager will try to resolve the complaint by Negotiation or arrange a Conciliation Conference; and
- should an agreement not be reached the AFCA Case Manager may make a Discontinue Complaint Decision or issue a Preliminary Assessment.

**Stage 3 Decision** is the final stage in AFCA's complaint handling process where an AFCA Decision Maker will make a Determination. Other than by reference to the Courts it is not possible to appeal a Determination.

#### **Other Information**

The following Operational Guidelines have some important principles that apply to all complaints.

- A.1.3 provides to have a representative such as a family member, a friend or a professional person.
- A.3.2 explains what assistance AFCA can provide such as a translator, or assist in outlining and submitting your complaint.
- A.5.1 advises a new issue may be raised after AFCA begins considering a complaint subject to being efficient and would not unduly compromise the time to resolve other issues.
- A.7 places restrictions on Financial Firms while AFCA is considering a complaint such as:
  - if your complaint is about a debt your Financial Firm must not begin debt recovery actions, and should that happen please immediately contact their Internal Dispute Resolution team (refer A.7.1); and
  - should any debt recovery action already has commenced it must be suspended but there are some actions a Financial Firm can take with consent by AFCA.
- A.8.2 covers instances for fast tracking complaints that will bypass Stage 2 Case Management and go directly to Stage 3 Decision due to:

- financial difficulty
  - where a Financial Firm has gone into Liquidation or Administration, ceased trading or failed to respond
  - the Complainant has suffered a natural disaster such as a flood or bushfire
  - a low-value claim where there is a terminal illness or a victim of domestic violence
  - a high-value claim where prolonged inaction may see the claim amount exceed monetary limits for AFCA
- A.9 explains information gathering by AFCA and A.9.5 warns of possible consequences should you fail to provide information or follow a directive by AFCA.

### #3 HOW AFCA WILL ASSESS THE INFORMATION PROVIDED BY COMPLAINT PARTIES

AFCA's "Fairness project" webpage states "In 2019, AFCA started the Fairness Jurisdiction Project to provide greater certainty about how AFCA assesses what is fair in a way that is clearly understood by AFCA staff, AFCA members and Complainants", and in May 2022 AFCA published its "Fairness Jurisdiction Project Outcomes report" (Outcomes Report), which it is an attachment to my online submission to you.

- Page 18 of the Outcomes Report stated "As part of the AFCA framework, AFCA has established some key considerations to ensure it delivers on procedural fairness while balancing the need to engage in informal, efficient, and flexible dispute resolution".

It listed six key considerations and the fifth was "Did AFCA undertake reasonable consideration and assessment of the material before it?"

- Page 15 refers to AFCA publishing 85 approach documents, factsheets and other guidance in a library (webpage titled Publications), and that all have been revised to ensure they are aligned to the framework.
- Page 4 states "The aim of the project was to create a framework for AFCA to ensure that we operated within our fairness jurisdiction, making decisions and providing our dispute resolution services in a fair, independent and consistent way."
- Page 3 states "We recognise that fairness as a concept means different things to different people. AFCA's project did not set out to define what is fair or unfair in the provision of financial services or create new standards of conduct for financial services firms. AFCA's role is to apply the law, codes of practice and regulatory guidance in place at the time the conduct complained about occurred."

One factsheet in Publications is "How will AFCA assess the information you give us", and failure to take into account relevant information in a Determination was one of the most common issues raised in service complaints in AFCA's three annual reviews to 30 June 2022. If a complaint party alleged relevant information was not taken into account for a Determination, that would also have been the case for a Preliminary Assessment which progresses a complaint from Stage 2 Case Management to Stage 3 Decision. As mentioned on page 1 of this submission my concerns are up to but not including the issue of a Preliminary Assessment.

Most of those allegations may not have been made if AFCA complied with RG 267.96 (quoted on page 8 above). In part it states AFCA should ensure that information is practically relevant and provided at key stages of the complaint resolution process.

As the factsheet "How will AFCA assess the information you give us" is relevant to all complaints it should be provided when AFCA first explains its complaint resolution process, which should be from the outset of receiving a complaint.

- That factsheet was not provided to me and my EDR complaint was re-opened due to disregarding evidence.

Refer pages 15 and 16 of this submission comments on Operational Guideline A.8.1 requirement to "inform [complaint] parties of our proposed approach to ensure they understand what is involved.

"How will AFCA assess the information you give us" should be incorporated into the new financial services legislation, but first review its content to determine whether to include the following explanations from Operational Guidelines:

- A.14.3 states "An AFCA Decision Maker is not bound by rules of evidence or previous AFCA or Predecessor Scheme decisions", and has possible types of information as expert opinion, documents, contemporaneous notes, information as a pattern of conduct and character information.

The second paragraph after that list has a statement about the reliability of information with a dot point comparison on each with two being:

- an independent source is more reliable than from a party that has an interest in the outcome
  - contemporaneous notes are more reliable than an oral recollection
- C.2.2 on page 145 refers to new evidence emerging but it is inconsequential, irrelevant or unpersuasive.
  - F.1.3 at the top of page 173 states "the complainant has the initial burden to present sufficient evidence and outline the issues in dispute with sufficient specificity. It is not enough to raise general and vague assertions. Once the complainant has established what is known as a prima facie claim, the responsibility then falls upon the financial firm to respond to the prima facie claim and establish their position."

Furthermore, the draft introduction document on pages 8 to 11 of this submission, and in the section covering Stage 1 Registration & Referral, draws attention to ASIC Regulatory Guide 271 covering requirements for Financial Firms' IDR schemes.

As quoted above "AFCA's role is to apply the law, codes of practice and regulatory guidance in place at the time the conduct complained about occurred."

Therefore, incorporation of the factsheet into the new financial services legislation should also include reference to ASIC Regulatory Guide 271.54 (RG 271.54). It covers ASIC enforceable requirements for a Financial Firm's IDR response, which for the below reason will assist complaints to be handled in a way that is more Efficient.

When a complaint progresses to Stage 2 Case Management one of the first tasks for a Case Manager, and before having a discussion about a complaint with the Complainant, should be to examine the Financial Firm's IDR response that must have "enough detail to understand the basis of the decision and to be fully informed when deciding whether to escalate the matter to AFCA or to another forum". If that is not the case, or if either of the other two requirements of RG 271.54 have not been complied with, it should be discussed with the Financial Firm to ascertain whether they are prepared to issue a revised IDR response, or perhaps those discussions may lead to them offering a settlement, or revised one, that is accepted by the Complainant.

If the IDR response complied with RG 271.54 then the Case Manager will be well positioned to discuss with the Complainant why they have been unable to reach agreement with their Financial Firm, and to ascertain if there is a compromise that may resolve the dispute.

#### **#4 INTERNAL AND EXTERNAL REVIEW OF DECISIONS**

On 7 July 2023 I had a telephone interlocutory hearing with an AAT Senior Member who explained that the Tribunal may only review a matter where an Enactment provides for application for review of a decision by the AAT. And the only one currently in place for the subject agencies is ASIC Act Part 15 - Miscellaneous - Section 244 that does not include ASIC's oversight on AFCA.

This section is split into two: the first covers reviews on AFCA and its Independent Assessor compliance with the new financial services legislation, and the second recommends after a period to be decided an independent review be commissioned into compliance with the new financial services legislation.

### **Internal and External Review of Decisions**

AFCA's "Fairness Jurisdiction Project Outcomes report" last sentence on page 4 states "The framework we [AFCA] have developed is based on an exchange of ideas, which allows AFCA to learn, innovate and continue to grow towards being a world class ombudsman scheme". And page 5 has "This framework brings together 10 elements that operate to ensure that we deliver on our mandate of providing fair, efficient and consistent dispute resolution."

For the meaning of Procedural Fairness in section #6 below I have included an opportunity to request a review:

- by the AFCA Case Manager's supervisor should a complaint party have a concern on how their complaint is being handled, or they can ask their Case Manager to issue a Preliminary Assessment; and
- should the concern be about or include non-compliance with the new financial services legislation, which has not been satisfactorily resolved by the supervisor, they can request a ruling by the Executive Manager for that AFCA team.

Additionally, I have also recommended a change to the role of the Commonwealth Ombudsman from considering complaints about ASIC in relation to AFCA to a new role to provide oversight on AFCA's Independent Assessor.

- ASIC will still have oversight on AFCA that more clearly should be explained in the new financial services legislation than what currently exists with RG 267 and ASIC Information Sheets 151 and 153.

### **For the following reasons I have recommended the Commonwealth Ombudsman will not consider complaints about ASIC's handling of a report of misconduct on AFCA.**

The Commonwealth Ombudsman Senior Complaints Officer and its Review Officer had an erroneous understanding of RG 267, and the Review Officer completely agreed with the Senior Complaints Officer's assessment and stated:

- "We generally accept that ASIC is best placed to make assessments about the laws it administers, its resources and priorities. It is not appropriate for us to 'second guess' a decision that was made by a specialist regulator."

However, the Commonwealth Ombudsman webpage "Our role in dealing with ASIC's regulatory decisions" states:

- "Our role is to form a view about whether ASIC's decision was open to it to make under the laws it administers, including the *Australian Securities and Investments Commission Act 2001* and the *Corporations Act 2001*. We also consider whether, in handling the report of misconduct, ASIC treated the complainant fairly."

The Review Officer stated that they review complaints only once unless the person can present new evidence that would cause them to change their decision. Four days later—8 May 2023—I made a request for a second review that is attached to my online submission to you but received no response. As an aside, an initial inquiry to the AAT revealed a complaint to them is to be lodged within 28 days, and on 16 May 2023 the due date for response from the Ombudsman Office was changed from 8 Augusts 2023 to 31 May 2023.

Unless there is a policy change not to "second guess" a decision made by ASIC it is pointless to make a complaint to the Commonwealth Ombudsman. And if the new financial services legislation replaces the current mix of legislation and regulations for financial services complaints there should be no reason for ASIC staff to misunderstand what is required of them.

**The following is to give context as to why I have recommended the Commonwealth Ombudsman to have an oversight role on AFCA's Independent Assessor.**

The "August 2021 Independent Review of AFCA" recommendation 10 stated "complaints about AFCA's service should remain the responsibility of the Independent Assessor". The Government's response had "improving awareness of the Independent Assessor could enhance the effectiveness of AFCA's existing complaint handling processes", and relevant to that statement is RG 267.210 that states:

- "The Independent Assessor role and function plays an important part in AFCA's quality assurance and accountability frameworks".

Section #2 of this submission covers the new financial services legislation having an introduction that includes an overview of AFCA's complaint handling, and in combination with the proposed glossary of defined terms will:

- enable Complainants to make informed decisions; and
- if they have a concern know what alternatives are available to them.

For example, for the meaning of a Preliminary Assessment I have included that complaint parties, between themselves, may decide to reach an agreement before a Determination is made (refer page 19 of this submission).

As far as I can ascertain that is not conveyed to complaint parties but has always been possible due to Operational Guidelines A.12.1, and its commentary that is headed "How does AFCA decide whether a preliminary assessment is appropriate?" It states AFCA seeks to resolve complaints in a way that promotes the most efficient, effective and fair complaint resolution possible, and has the following factors that may suggest a Preliminary Assessment is appropriate:

- "whether the factual issues in relation to the complaint are complex or unclear
- where there is conflicting opinion, for example, a medical opinion
- where the loss calculation is complex
- where we consider that a preliminary assessment is likely to be helpful to the parties for the purpose of settling the complaint."

The last reason above to provide a Preliminary Assessment would have caused my EDR complaint to have settled sooner for the following reasons:

- The service provided by two Case Managers was reviewed by their Senior Manager.

He accepted that due to the information provided by the first Case Manager I understood that AFCA was unable to assist me further. My EDR complaint was re-opened because in my service complaint I asked if disregarding evidence—Product Reference Guide—provided cause to be an exception to what I thought was AFCA's normal policy not to review a decision. AFCA's complaint handling procedures were not explained to me and I wrongly presumed the first Case Manager would comply with his obligations in Operational Guidelines.

As for the second Case Manager the Senior Manager stated "I also accept the second caseworker

[second Case Manager] ought to have followed a more formal approach when outlining his view of the merits of the complaint. The second caseworker's intent was to try and assist both parties to resolve the matter between themselves, without the need for AFCA to provide a preliminary assessment."

The above could be an isolated instance but the attachment "AAT Reviewable Decision" to my online submission details the below requirements—some mandatory—that are not being complied with by AFCA:

- I. its staff must always comply with Operational Guidelines;
- II. its Operational Guideline A.17.5 that AFCA is obliged by legislation, ASIC Regulatory Guide 267 [RG 267.33] and its Rules to report systemic issues;
- III. its Operational Guideline A.8.1 requirement to "inform [complaint] parties of our proposed approach to ensure they understand what is involved"; and
- IV. communications not complying with RG 267.82, 267.94, 267.95, 267.96 and 267.97.

A mandatory requirement is to resolve complaints in a way that is Efficient but that did not occur with my complaint due to not complying with Operational Guideline A.8.1 (item III above):

- The first Case Manager who handled my complaint made an Operational Guideline A.8.3 decision to discontinue my complaint but failed to advise I could lodge an objection: and
- the second Case Manager who took over my re-opened EDR complaint treated it as a new case rather than undertake a decision review in terms of Operational Guideline A.4.6.

I was not informed of the complaint process and blindly followed the lead and what I was told by the Case Managers, and AFCA's Independent Assessor was not satisfied I should have been provided information about AFCA's process earlier in the handling of my complaint. However, there was a service failing in relation to be clearer in explaining why the Case Managers were providing their verbal opinions, what my alternatives were, and if a "rules assessment" was issued I would have a formal opportunity to object to it.

- ("rules assessment" was reference to an Operational Guideline A.4.5 "jurisdictional assessment" that I have recommended be a defined term - refer page 18 of this submission)

The Independent Assessor had not taken into consideration Operational Guideline A.8.1 to inform me of the proposed approach to ensure I understood what is involved, and which should have occurred before the communications that should have been clearer.

Had the first Case Manager advised me of the Discontinue Complaint Decision process that is explained on page 17 of this submission, and apart from knowing I could lodge an objection, I would have queried why the second Case Manager was going over matters investigated by the first Case Manager rather than progress my complaint for further consideration, and which is required by Operational Guideline A.4.6.

Consequently, the second Case Manager had not complied with the mandatory requirement to handle my complaint in a way that was Efficient. His Senior Manager stated the second Case Manager's intent was to try and resolve the matter without the need to issue a "preliminary assessment" but had that happened my complaint would have been resolved sooner rather than be delayed by much unnecessary communication with myself and my Financial Firm. The second Case Manager also had not complied with Operational Guidelines A.12.1 in that:

- there were factual issues that were not addressed; namely my Financial Firm would not provide a specific response to why their Product Reference Guide was not relevant to my complaint; and

- the issue of a Preliminary Assessment would have been helpful to achieving a settlement - I indicated for one to be issued and within a few days my Financial Firm offered a settlement that was accepted by me.

In only having to assess service complaints the Independent Assessor's knowledge of AFCA's Operational Guidelines should be second to none.

However, with the assessment of my service complaint there were five service failings found but had Operational Guidelines been taken into account there would have been an additional eight service failings. Consequently, the quality assurance and accountability role of the Independent Assessor for my service complaint was not to the standard of service set by AFCA for its staff. And surely the approach taken by the Independent Assessor for my service complaint would not be different to assessments on other cases.

Another matter is the Government's response to recommendation 3 that included "AFCA's impartiality is essential for all parties to maintain confidence in the complaints resolution process".

Impartiality was one of the most common issues in AFCA's three annual reviews to 30 June 2022, and the 2021/22 review on page 131 had a comment that no allegations of bias in Determinations were upheld. There was no comment covering Negotiation and Conciliation Conference processes to try and resolve a complaint.

- In 2021/22 the most common service issue was alleged bias in AFCA's process, which represented 14% (131) of the 980 service complaints received. Of those 131 allegations I find it difficult to accept there were no substantiated complaints given how my complaint about the second Case Manager not being Impartial was erroneously assessed (refer below).

As there was no comment on allegations of bias with AFCA's Negotiation or Conciliation Conference processes it would appear not to have been an issue worth commenting on; yet prior to March 2021 AFCA had established a working group to "promote impartiality during the complaint process" and not just for Determinations (quote is from AFCA's dashboard that discloses work underway to respond to its review recommendations).

AFCA staff being Impartial is a mandatory requirement but that is not indicated in Operational Guidelines (refer pages 22 and 23 of this submission), and were allegations of bias in AFCA's process not substantiated because Operational Guideline A.1.1 commentary states:

- "We [AFCA] are impartial and do not act for either party to advocate their position. If the complaint is not resolved between the parties, we will decide an appropriate outcome."

For my service complaint the Independent Assessor stated "we [AFCA] will decide an appropriate outcome" but that statement is incomplete. The second Case Manager could not "decide an appropriate outcome" but in a Preliminary Assessment he could recommend an outcome. My EDR complaint did not proceed down that path because I accepted a significantly increased settlement offer (refer above comments that my complaint was not handled in a way that was Efficient).

Impartial being made a defined term along the lines of the one on page 23 of this submission will decrease instances of allegations of bias being made because a Complainant will have a precise and complete explanation. It will enable them, and at the time of having a concern about bias, to raise it with their Case Manager. Should the concern remain the Complainant can ask to speak to the Case Manager's supervisor.

**Should it be within the remit of ALRC I suggest to recommend the Government commission an independent review into compliance by AFCA and its Independent Assessor, which would be 18 months after the new financial services legislation commenced.**

For a Determination the Government's response to "August 2021 Independent Review of AFCA" recommendation 9 stated going forward an independent review should be conducted in 18 months to assess whether a merits review mechanism would be appropriate.



- The above is quoted also as a reminder that the new financial services legislation may need to include a merits review mechanism for Determinations.

As stated on page 1 of this submission, the new financial services legislation should include covering the handling of complaints by AFCA, ASIC, its Independent Assessor, or Commonwealth Ombudsman, which will remove confusion caused by the current mix of directions and requirements currently in place for each of those organisations.

The proposed independent review is to confirm whether AFCA is complying with the new financial services legislation so that any concerns are referred to the Government.

There also should be a review on a sample of assessments by AFCA's Independent Assessor. Should it reveal unfavourable findings, initially that will be a matter for AFCA's Board who sets the terms of reference as well as appoints its Independent Assessor, and on that basis they would consider what appropriate action is required.

For the purposes of being Transparent the findings of the independent review should be made public.

## #5 GLOSSARY OF DEFINED TERMS

AFCA's Rules has a glossary of defined terms but one is not included in the Operational Guidelines, and for the new financial services legislation the glossary should be divided into the following three segments:

- 1) acronyms such as AFCA, AFCA Decision Maker, Chief Ombudsman, etc;
- 2) defined terms that concern AFCA's complaint handling; and
- 3) mandatory defined terms covering compliance matters for AFCA, ASIC, its Independent Assessor, or Commonwealth Ombudsman and some are listed in section #6 below.

Segments 2) and 3) will include an overview on the rule and its complaint handling procedure. To obtain a precise and complete information the defined term will cite the applicable section in the new financial services legislation.

Both of those segments will also assist complaint parties become familiar with the new financial services legislation document because a significant portion will not be relevant to a particular complaint.

**Below are some suggestions for defined terms that have implications for complaint handling, and references to Operational Guidelines will be replaced with the applicable section in the new financial services legislation.**

|                                      |  |
|--------------------------------------|--|
| Conciliation Conference              | refer AFCA's factsheet <a href="#">Attending a conciliation conference</a>   |
| Determination                        | A final decision made by an AFCA Decision Maker, and other than reference to the courts it is not possible to appeal a Determination (refer Operational Guideline A.15).   |
| Discontinue Complaint Decision       | Operational Guideline A.8.3 decision that it is not appropriate for AFCA to continue to consider a complaint. The decision will be in writing and Operational Guidelines A.4.5 and A.4.6 explain the grounds to seek a decision review and the timeframe to make such a request. |
| Internal Dispute Resolution Response | Financial Firms are required by legislation to have a dispute resolution scheme for covering the handling of complaints that complies with standards and requirements  |

in ASIC Regulatory Guide 271 (RG 271).

When a Financial Firm rejects or partially rejects a complaint RG 271.54 requires a written response that must clearly set out the reasons for their decision by:

- (a) identifying and addressing the issues raised in the complaint;
- (b) setting out their findings on Material Questions Of Fact *[make it a defined term or replace it with plain language]* and refer to the information that supports those findings; and
- (c) providing enough detail for the Complainant to understand the basis of their decision, and to be fully informed when deciding whether to escalate the matter to AFCA or another forum.

Jurisdictional  
Assessment

Operational Guideline A.4.5 decision that AFCA cannot consider the complaint because the Complainant does not meet the requirements set out in Section B of Operational Guidelines, or the complaint is a mandatory exclusion under Section C of Operational Guidelines, or where the remedy sought exceeds the limits in Section D of Operational Guidelines.

Negotiation

refer AFCA's factsheet [Understanding our negotiation process](#)

*AFCA has published a factsheet for a Conciliation Conference but not one for its negotiation process. It should not be assumed that Complainants already understand AFCA's negotiation process whereas representatives of Financial Firms have extensive experience and resources.*

*Some examples for an explanation of AFCA's negotiation process would include the ability to request a Conciliation Conference; an AFCA Case Manager may provide information about alternatives to resolving the complaint but not legal advice; on a private basis they may also discuss any weaknesses of a complaint with a party to explore whether there is an acceptable compromise; or that a complaint party may request a Preliminary Assessment to be issued.*

*Being fully advised the complaint parties—in particular Complainants—will be able to make informed decisions before complaint handling moves from being informal to formal (refer Operational Guideline A.8.1). And by having a factsheet covering AFCA's negotiation process will overcome an AFCA Case Manager's verbal explanation not providing all information, requirements or that a complaint party may ask for one to be issued.*

*A factsheet for [Understanding our negotiation process](#) being provided at Stage 1 Registration & Referral is required by RG 267.96: "When developing communications strategies, AFCA should ensure that information is:*

- (a) easy to access;*
- (b) user friendly (taking into account plain language principles);*
- (c) practically relevant; and*
- (d) provided at key stages of the complaint resolution process."*

*AFCA has a publications library that has categories for various matters, and two are Factsheets and AFCA Approaches. However, none were provided to me and I have been unable to establish AFCA's policy for providing an applicable publication that is practically relevant and provided at a key stage of the complaint resolution process.*

Preliminary Assessment Operational Guideline A.12 covers the issue of a Preliminary Assessment that will be issued by an AFCA Case Manager should Negotiations or a Conciliation Conference not resolve the dispute.

In terms of Operational Guideline A.8.2 a complaint can be fast tracked and immediately proceed to a Determination without issuing a Preliminary Assessment. However, the AFCA Case Manager may decide it is inappropriate to continue to consider a complaint and make a Discontinue Complaint Decision.

A Preliminary Assessment will be provided in writing and:

- will set out the reasons and conclusions made about the merits of a complaint;
- will provide a recommendation as to how the complaint should be resolved and why;
- if accepted by all complaint parties within the specified timeframe the complaint is settled as recommended by the AFCA Case Manager;
- if not responded to by the Complainant within the specified timeframe the complaint will be closed and can only be re-opened if AFCA accepts special circumstances exist; and
- if rejected by a complaint party the case will progress to a Determination, and a final opportunity is provided to respond to the AFCA Case Manager's conclusions and/ or recommendation in their Preliminary Assessment.

*As an aside, AFCA Team Manager response to my second service complaint stated there is a certain formal process to issue a verbal Preliminary Assessment but did not explain the process and Operational Guidelines does not have an explanation. I recommend that a Case Manager should not have an option to provide a verbal Preliminary Assessment for reasons provided after the below defined term for Superannuation Complaints.*

It is important for complaint parties to explain why they disagree with the Preliminary Assessment so that they can be addressed in the Determination. In the absence of providing their reasons the AFCA Decision Maker is likely to accept the same approach and reach the same outcome as that expressed in the Preliminary Assessment.

The issue of a Preliminary Assessment will end further involvement by the Case Manager but the complaint parties, between themselves, may decide to reach an agreement before a Determination is made. Should an agreement be reached each complaint party must immediately provide written confirmation to their Case Manager.

Where there be an impasse a complaint party can ask the AFCA Case Manager to issue a Preliminary Assessment because it can be useful as a summary of the current position taking into account all of the information obtained in trying to assist parties reach an agreement. Therefore, a Preliminary Assessment can help the parties focus on the issues in dispute that will be considered by AFCA because some may be considered inconsequential by the Case Manager to an appropriate complaint outcome. The Preliminary Assessment may also highlight missing information that a party considers may influence the outcome of the complaint, and prompt that party to obtain or provide that information. *(from last paragraph in Operational Guideline A.12.1)*

Registration & Referral Stage 1 of AFCA's complaint handling process where the complaint is forwarded to the Financial Firm asking them to review the matter.

An Internal Dispute Resolution Response in writing should have already been provided by the Financial Firm to the Complainant, and depending on the outcome of the review the Complainant may be contacted by a representative of their Financial Firm who is experienced in dealing with and resolving complaints.

If an agreement is not reached to resolve the complaint within the timeframe advised by AFCA an AFCA Case Manager will be assigned who will contact the Complainant in about five business days. They will seek clarification as to why the complaint has been escalated given the Financial Firm's Internal Dispute Resolution response, and reasons why an agreement could not be reached with the Financial Firm. Additional information or documentation may also be requested.

*RG 271.54 is a requirement that is enforceable by ASIC: therefore, it is a mandatory requirement for Financial Firms. AFCA has published a "Guideline to Registration and Referral" document that does not mention the above RG 271.54 requirements which should be addressed.*

Superannuation  
Complaints

AFCA's handling of complaints involving superannuation is subject to specific rules covered in Operational Guidelines Sections A.5.2 to A.5.4, A.6.1 and A.6.2, B.1 and B.4.1.1, plus D.1 to D.5.

By being required to use defined terms, which in turn provides reference to applicable new financial services regulation, it will enable users of the EDR scheme and AFCA staff to be on the same page that can:

- not only avert misunderstandings or miscommunications; but
- by being fully informed it will assist complaint parties to make an informed query on the handling of their complaint—the AFCA Case Manager may have overlooked a requirement or procedure in the new financial services legislation—or enable a complaint party to provide a more appropriate and relevant objection to a Jurisdictional Assessment or Discontinue Complaint Decision.

For a verbal Preliminary Assessment Operational Guideline 12.1 states "a preliminary assessment may be delivered verbally or in writing. For complaints that do not involve multiple issues, it is often more effective and efficient to provide the preliminary assessment over the phone. Where a verbal preliminary assessment has been provided, any written confirmation of that view will normally only be a summary of the points discussed."

However, something would have triggered providing a written confirmation and in any event:

- As with a written Preliminary Assessment a verbal one would not change and the complaint will proceed to a Determination unless the Preliminary Assessment:
  - is accepted by both complaint parties; or
  - it causes a compromise and the complaint is settled.

For the latter refer the above meaning for a Preliminary Assessment.

- It is imperative for the verbal Preliminary Assessment to be read from a script so that a verbatim record is on file should the complaint proceed to a Determination.

It would appear a verbal Preliminary Assessment is not read from a script because why would a requested written confirmation "normally only be a summary of the points discussed" rather than provide a copy of the script on file?

## #6 MANDATORY REQUIREMENTS BEING MADE DEFINED TERMS

ASIC Regulatory Guide 271 has enforceable requirements and the image below is another way of clearly showing legislative requirements that are mandatory.

### Definition of 'complaint'

Enforceable paragraphs: RG 271.27–RG 271.29 (including note)

The defined terms in this section apply to AFCA, its Independent Assessor, ASIC and the Commonwealth Ombudsman.

Accessibility, Impartial, Procedural Fairness and Transparent are included in the below list but RG 267.115 mandatory requirements only has fair, efficient, timely and independent.

They have been added because the Commonwealth Ombudsman's "Part 8 - Key terms and principles" for a fair system includes those defined terms and being fair is a mandatory requirement.

The following are explanations for Procedural Fairness provided by AFCA, ASIC and the Commonwealth Ombudsman.

AFCA's Operational Guideline A.2.1 states:

- **"Fairness** requires complaints to be considered without bias and by staff and Decision Makers with appropriate expertise. The Rules also explicitly require procedural fairness to be provided to the parties to a complaint. This means that before we decide a complaint, the Complainant and the Financial Firm must be provided with relevant information, and have an opportunity to provide their views and response. Our decisions must fairly reflect the information provided to us and apply the decision making criteria in the Rules. While recognising that in each complaint we must take into account its particular facts, we are expected to achieve consistency in our decision making."

RG 267 has one reference to procedural fairness—"All stages of AFCA's complaints handling and decision-making processes must accord with the principle of procedural fairness"—and does not include an explanation as to its meaning.

AFCA staff, ASIC staff and the Commonwealth Ombudsman staff should comply with the same requirements and, therefore, the proposed glossary should have the meaning of Procedural Fairness along the lines of the Commonwealth Ombudsman's "Part 8 - Key terms and principles":

- "Procedural fairness is about the fairness of the process used to reach a decision. It is not about the substantive or perceived fairness of the decision itself.

Administrative law sets minimum requirements for procedural fairness. Community expectations, and general principles of good administration require a higher standard of fairness in complaint handling processes. The Commonwealth Ombudsman expects agencies to adhere to this higher standard.

Complainants are likely to be more accepting of unfavourable outcomes when procedural fairness is high and conversely, relatively dissatisfied with favourable outcomes when procedural fairness is low. Complaint handlers are also more likely to reach a fair and correct decision if the procedure of reaching that decision is fair.

In a procedurally fair system:

- decisions are evidence based and free of bias
- reasons for decisions are provided to complainants, including the evidence on which the decision is based and reasons for not accepting complainant's assertions or evidence

- communication with complainants is clear, and preferably in a form that the particular complainant can best understand
- complainants are given an opportunity to respond to a decision, and if applicable provide further information to support their complaint, before a complaint is finalised
- there is a process for complainants to seek review of how their complaint was handled"

The explanations for Procedural Fairness provided by AFCA and ASIC are not as well defined, and a more comprehensive explanation may avert a complaint party requesting an internal review. Or if requested they will be able to focus on the reasoning for not accepting assertions and evidence provided by them, be informed of the applicable section in the new financial services legislation, all of which may lead to providing additional information, evidence or documentation.

With the decision for my complaint the ASIC Escalated Matters & Government officer stated:

- "ASIC will engage with AFCA in relation to the matters reported in whatever manner it considers appropriate".

The above statement was made without providing his reasoning why RG 267.24 (a)—"ASIC will approach its oversight responsibilities in a way that ensures compliance with mandatory requirements"—did not apply.

Consequently, when I lodged a complaint to the Ombudsman Office it again covered my concerns about AFCA.

I also repeated to the Ombudsman Office that ASIC had not complied with RG 267 that would not have been needed if the ASIC Escalated Matters & Government officer had advised why he disagreed with me advising applicable clauses in RG 267 that supported his above statement.

The following two examples are to show how the proposed glossary will remove any ambiguity as to whether or not a requirement is mandatory:

- Operational Guideline A.17.5 states "We are obliged by legislation [Corporations Act Section 1052E], ASIC Regulatory Guide 267 and our Rules to report systemic issues to regulatory and other bodies."

**Proposed Defined Term:**

Systemic Issue is where the effect of the issue may extend beyond a single Complainant.

A potential systemic Issue will be raised by AFCA with the relevant Financial Firm who must provide a response on the matter. Should AFCA confirm it is a systemic issue the Financial Firm must provide a report on remedial action taken, and AFCA will monitor the matter until satisfied a satisfactory resolution has been achieved.

It is mandatory requirement for AFCA to report a confirmed systemic issue to regulatory and other bodies.

- Operational Guideline A.2.1 c) is to "consider complaints submitted to it in a way that is:
  - (i) independent, impartial and fair
  - (ii) in a manner that provides procedural fairness to the parties
  - (iii) efficient, effective, timely
  - (iv) cooperative, with the minimum of formality"

Independent, fair, efficient and timely are mandatory requirements in Corporations Act Section 1051, subsection (4) (b), but the only reference to mandatory in Operational Guidelines is C.1 "Mandatory exclusions".

- Additionally, the Corporations Act Section 1051 (4) (c) has "appropriate expertise is available to deal with complaints".

And Corporations Act Section 1052 states "AFCA must ensure that the mandatory requirements for the AFCA scheme under section 1051 are complied with".

Some defined terms that should be made mandatory for AFCA, ASIC, its Independent Assessor, and the Commonwealth Ombudsman are:

**Accessibility** It is easy as possible for everyone in the diverse Australian community to find and use AFCA's complaint handling scheme, or to escalate a matter to ASIC or the Commonwealth Ombudsman. It reflects the preferences and needs of the community, including people who may otherwise experience difficulty due to age, disability, language, geographical, health, or cultural reasons. In design and delivery of our complaint resolution service we actively seek to reduce any access barriers.

**Efficient** AFCA strives to meet this mandatory requirement through developing a flexible complaints process in a way that has minimum formality. Simple complaints are resolved quickly and will assign more experienced AFCA staff members to complex and serious complaints.

AFCA, ASIC, or Commonwealth Ombudsman staff assigned to a complaint will have appropriate expertise for the complaint type—insurance, banking, superannuation, investments and providing financial advice— and also have complaint resolution skills such as acting as a mediator or conciliator.

AFCA, its Independent Assessor, ASIC and the Commonwealth Ombudsman have an on-going program for continuous improvement to their operations and performance. And prior to making any changes will consult with all parties.

**Fair** Complaint handling actions, decisions and process are respectful, confidential, transparent, and responsive.

Decisions must cite applicable sections of the new financial services legislation in place at the time the complaint occurred.

**Impartial** AFCA's role is to assist complaint parties reach agreement about how to resolve the complaint. An AFCA staff member cannot act for either party to advocate their position. They may provide information about alternatives to resolving the complaint but cannot provide legal advice. In a private discussion with a party to the complaint they may also provide guidance about the type of outcome that might eventuate should the complaint proceed to a Determination.

For ASIC or Commonwealth Ombudsman staff it means review a matter concerning AFCA with an open mind and without any preconceptions about the outcome, which is vital to maintaining confidence in AFCA's external dispute resolution scheme and/or its Independent Assessor.

**Independent** AFCA is a not-for-profit company, limited by guarantee, governed by a Board of Directors, and funded by the financial and insurance services industry.

If a person remains dissatisfied with a response to a complaint about the service provided by AFCA, but not a Determination, they may refer their concerns to the Independent Assessor.

ASIC has an oversight role on AFCA that provides a level of assurance as to its independence, and can issue regulatory requirements in relation to compliance with legislated requirements.

The Commonwealth Ombudsman

Procedural  
Fairness

It is about the fairness of the process used to reach a decision and not about changing a decision.

Reasons for decisions must be provided including the evidence on which the decision is based, and also reasons for not accepting assertions or evidence referred to. The decision letter or decision email must cite any applicable new financial services legislation.

For other than a Determination, complaint parties have an opportunity to request a review:

- of an AFCA Case Manager's request or a proposed direction, or to query they are not complying with the new financial services legislation
- by the Australian Securities and Investment Commission (ASIC) who has an oversight role on AFCA
- on the assessment of the service provided by AFCA by its Independent Assessor

The decision letter or decision email will advise the available avenue to request a review that is further explained below, and a request must be made within the stated timeframes.

After discussing concerns with the AFCA Case Manager if the complaint party still does not agree they may ask to speak to the AFCA Case Manager's supervisor. Alternatively, they can request the AFCA Case Manager to issue a Preliminary Assessment.

However, where a complaint party's concern is about non-compliance with the new financial services legislation that has not been resolved to their satisfaction, within 7 days they can request a ruling on the matter by the Executive Manager for that AFCA team. Meanwhile the handling of the complaint by the Case Manager is put on hold who will advise other complaint parties.

ASIC has an oversight role on AFCA that means it does not intervene in the handling of individual complaints. However, a report of misconduct can be made on AFCA that must be submitted to ASIC within 28 days that the complaint is closed by AFCA. ASIC will look for other similar reports to assist determine whether it should engage with AFCA to address a common issue or concern. For more information refer to section ..... in the new financial services legislation (replaces [How ASIC deals with reports of misconduct](#)).

The Commonwealth Ombudsman may review an assessment by AFCA's Independent Assessor that must be made within 28 days. The review is to consider whether the assessment has been completed fairly and in accordance with the new financial services legislation. For more information refer to <https://www.ombudsman.gov.au>.

Timely

AFCA's actions to complete an assessment and, if applicable, the investigation is proportionate to the particular complaint issue and in the shortest possible timeframe while ensuring a proper outcome is delivered.

The time to deliver a proper outcome will vary and for most complaints it may be within 60 days. Upon being assigned to a complaint the AFCA Case Manager will indicate a timeframe within which Stage 2 Case Management should be completed, and before the indicated time deadline has passed they will immediately provide the complaint parties with a revised timeframe and the reason(s) for the change.

ASIC and the Commonwealth Ombudsman will respond within 30 days to either provide the outcome of their review or will provide a timeframe to complete and advise the outcome of their investigation.



Transparent It involves being accountable that means complying with the obligations in the new financial services legislation.

AFCA will regular report publicly about its performance while maintaining appropriate privacy and confidentiality of complaint parties, and will report more frequently to ASIC and other regulators.

Furthermore, when appropriate a public statement, such as a media release, will be made on significant regulatory activities, outcomes or changes to operations by AFCA, ASIC or Commonwealth Ombudsman.