

Appealing AFCA: what rights do financial firms have?

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The financial services industry's new external dispute resolution scheme, the Australian Financial Complaints Authority (AFCA), commenced operations on 1 November 2018 to address financial service conflicts between individuals and financial firms that are unable to be resolved through internal dispute resolution methods. AFCA intends to resolve disputes through informal settlement processes and if not resolved, ultimately AFCA will make a final determination (Determination). Despite the finality of Determinations, AFCA does not provide financial firms an avenue of appeal. This article discusses the formation and operation of AFCA, the governing AFCA Rules and accompanying guidelines and the lack of appeal options regarding a final Determination.

AFCA

AFCA was formed by the Treasury Laws Amendment (Putting Consumers First — Establishment of the Australian Financial Complaints Authority) Act 2018 (Cth) (AFCA Act). AFCA is a not-for-profit company limited by guarantee. AFCA is governed by a Board of Directors, abides by a constitution and operates in accordance with scheme rules and operational guidelines. The Board of Directors governing AFCA includes equal numbers of industry and consumer representatives. Although untested by the courts, it is likely that AFCA's functions will be viewed consistent with previous judicial review of Financial Ombudsman Service (FOS), being that AFCA is a private body exercising private rights.¹

In the post-Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Banking Royal Commission) light, AFCA is intended to address some of the systematic gaps identified in the Final Report.² Being a non-government affiliated, impartial and independent dispute resolution scheme, AFCA is required to consider each complaint objectively. The dispute resolution scheme was formed to consider com-

plaints previously handled by its predecessors, the FOS, the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT).

With the introduction of the new AFCA scheme comes the obligation for all Australian credit licence (ACL) and Australian financial services licence (AFSL) holders to obtain an AFCA membership in accordance with their licence conduct obligations.³ To ensure that AFSL and ACL holders are complying with their licence as per their membership to AFCA, the Australian Securities and Investments Commission (ASIC) will proactively monitor licensees through its regulatory oversight powers.⁴

Since commencing operations at the end of 2018, AFCA has received a greater number of complaints than originally anticipated, having received over 60,000 complaints in its first 10 months.⁵ The high number of complaints can be attributed to AFCA's higher monetary limits and compensations caps than its predecessors⁶ and the Banking Royal Commission, which raised greater awareness concerning fairness for consumers and their financial products. AFCA's travelling Roadshow offering people free Financial Fairness Checks around Australia will also impact the quantity of complaints received.⁷

Furthermore, as per the recommendation made during the Banking Royal Commission, a Compensation Scheme of Last Resort was formed to allow consumers who have been the victim of misconduct to be properly compensated.⁸ This is to assist complainants where the financial firm may have become insolvent and is unable to compensate the complainant.

The complaint process

There are a number of guidelines for AFCA to consider whether a complaint falls within its jurisdiction, including:⁹

- a) The complaint must arise from a customer relationship or other *circumstance that brings the complaint within AFCA's jurisdiction*.
- b) There must be a sufficient connection with Australia.

- c) Generally, there is a time limit within which the complaint must be submitted to AFCA.
- d) If the complaint is about a Traditional Trustee Company Service that involve Other Affected Parties, the Complainant must get the consent of all Other Affected Parties.

The Operational Guidelines also outline exclusionary categories of complaints that AFCA cannot consider, including a complaint that refers to a decision by a financial firm as to how to allocate the benefit of a financial service between competing claims of potential beneficiaries, unless it relates to a “Superannuation Complaint” or a “Traditional Trustee Company Service”.¹⁰

If a complaint falls within AFCA’s jurisdiction and the parties to a complaint are unable to resolve the dispute between themselves, AFCA will intervene. AFCA will generally aim to utilise informal methods such as a negotiated settlement or a conciliation conference.¹¹ If these prove unsuccessful AFCA will decide the complaint and make a binding Determination.¹²

Recently, the ambit of AFCA’s jurisdiction was extended so that they can now hear complaints originating in the previous 6 to 12 years.¹³ This will allow consumers to make complaints about events dating back to 1 January 2008.¹⁴ This extension was in line with the recommendation in the Final Report of the Banking Royal Commission and will last until 30 June 2020 before it is reverted to the original 6-year limit.¹⁵

Appeal options

After a Determination is made for a non-superannuation related complaint, there are limited opportunities afforded to financial firms to dispute the decision. Under the AFCA scheme, express provisions for statutory appeal to the Federal Court are available to superannuation complaints if there has been an error of law.¹⁶ However, for non-superannuation complaints no such express provision is available.

Consequently, there are only three possible appeal options available for financial firms dissatisfied with the outcome of their non-superannuation related Determination, which are discussed below.

AFCA appeal

To request an internal review by AFCA, the dissatisfied party must first complain directly to AFCA by completing an informal online feedback form.¹⁷ However, as evident in the AFCA Operational Guidelines to the Rules, even if a service complaint is made against AFCA regarding a Determination, the Complaints and Feedback procedure cannot be used as a review mechanism.¹⁸ Only after AFCA has responded to the form can the dissatisfied party proceed with more formal mecha-

nisms by complaining to an Independent Assessor.¹⁹ The Terms of Reference require a party to make a complaint to the Independent Assessor within 3 months of AFCA considering and responding to the complaint through its Complaints and Feedback process, unless special circumstances apply.²⁰ When a complaint is being made to an Independent Assessor, the complaint must be framed in a general way and directed towards the process engaged in by AFCA.²¹

AFCA’s Independent Assessor is appointed by the AFCA Board as part of their quality assurance and accountability framework.²² The primary role of the Independent Assessor is to identify, address and respond to complaints received about AFCA’s complaints handling service and performance and make necessary recommendations about significant issues.²³ Consequently, an Independent Assessor does not have the ability to review the merits or substance of a Determination.²⁴ Rather, all the Independent Assessor considers is whether AFCA’s provided service was satisfactory and what they can recommend to address the issues found.²⁵

Beyond the Independent Assessor there is no further appeal against their findings.²⁶ The AFCA Chief Ombudsman will review the Independent Assessor’s recommendations and if they do not accept it, it will be referred to the Chair of the AFCA Board in accordance with the Independent Assessor’s Terms of Reference.²⁷ Although the Independent Assessor is able to review Determinations, it does not have the ability to reverse and re-make a decision. Instead, learnings from past Determinations are used when future Determinations are made.

Court option

In considering whether judicial review is available for the appeal of an AFCA Determination, a financial firm must consider whether public law remedies can be directed towards the exercise of public power by private bodies such as AFCA. The merits of this appellate option fall on two points.

Firstly, the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act) has been amended by the AFCA Act to expressly exclude AFCA Determinations statutory review.²⁸

Secondly, to argue that judicial review is in fact available for financial firms, it requires contending the principle found in the seminal case of *R v Panel on Take-Overs & Mergers; Ex parte Datafin plc*²⁹ (*Datafin*). The Panel of Take-Overs and Mergers was a private body regulating the mergers and acquisition industry in London and like many members of AFCA, panel members were unable to opt out of its regulation. *Datafin* had complained that a company had breached the Panel’s code of conduct however, the Panel did not take action.

It was found in this case that private bodies which perform public law functions are subject to judicial review. The judgment of *Datafin* focused on the nature of the power rather than the source of power, such as a body's statutory authority, in determining whether a body is exercising a public law function. However, whether the *Datafin* findings are applicable to Australian law is a contentious issue, making it difficult to assess whether the *Datafin* principle would apply to Australian cases.

The availability of judicial review in accordance with s 39B of the Judiciary Act 1903 (Cth) as an alternative to judicial review made available through the ADJR Act is dependent on whether the power to issue the Determination and award the particular remedies is being performed by an "Officer of the Commonwealth". This would raise concerns on the application of the *Datafin* principle and whether it would be considered to form a part of the law in Australia.

In *Mickovski v Financial Ombudsman Service Ltd*³⁰ (*Mickovski*), the Court of Appeal held that the *Datafin* principle did not apply to Determinations made by AFCA's predecessor FOS. In this case both a judicial review and a challenge in contract was brought. The court held that as the decision in question was determined by governing rules to be "final", the decision could only be reviewed as a matter of contract if it had been "affected by fraud or dishonesty or lack of good faith ... unless ... the determination has not been carried out in accordance with the agreement."³¹

While in the case, the Court of Appeal found that an error was made in construction of a rule going to jurisdiction — it was found that the error identified was not sufficient enough to vitiate the decision or take it outside the ambit of the contractual decision-making power. The court held that FOS was not exercising a public duty or a function involving a public element when the parties to the complaint were consensually subject to FOS's jurisdiction.³² A similar conclusion could be drawn about AFCA to argue that as they are not exercising a public duty, they should not be subject to judicial review.

Similarly, a year later *Bilaczenko v Financial Ombudsman Service Ltd*³³ was considered by the Federal Court in the context of considering an appeal from two decisions of the Federal Circuit Court relative to a challenge to the conduct of FOS in providing their dispute resolution services. Mansfield J found the Federal Circuit Court did not err in finding the decision of the FOS was not judicially reviewable at general law. Further, recently the *Mickovski* case was cited with approval in *BFJ Capital Pty Ltd v Financial Ombuds-*

*man Service Ltd (in liq)*³⁴ and the *Datafin* principle was distinguished from the FOS scheme. Evidently, recent case law has shown that the *Mickovski* principle has been favoured over the judgment of *Datafin* in arguing that FOS was not subject to judicial review and similarly, could be applied as such to the AFCA scheme.

Contract option

An alternative option may be for the financial firm to bring a claim in contract. The AFCA Rules provide that the Rules form a tripartite contract between AFCA, Financial Firms and Complainants. However, in order to bring such a claim, financial firms would need to argue that the Determination made was "affected by fraud or dishonesty or lack of good faith or (by analogy with jurisdictional error) ... that the determination has not been carried out in accordance with the agreement"³⁵ as per the judgment in *Mickovski*, requiring the financial firm to prove that AFCA misconstrued its function under the contract in determining the consumer's complaint.

However, in *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd (formerly TXU Networks (Gas) Pty Ltd)*,³⁶ the court referenced *Holt v Cox*³⁷ to identify that:

... a mistake may still be of such a nature that the resultant determination is beyond the realm of contractual contemplation — beyond anything which the parties may be supposed to have intended to be final and binding — and therefore susceptible to review.³⁸

This would lead financial firms to form the question of whether the Determination was not made in accordance with the terms of the contract as opposed to whether there was an error in the making of the Determination by AFCA. Consequently, a financial firm would need to prove that the Determination was not in accordance with the contract between the parties because of the approach taken.

Conclusion

AFCA was implemented as an external dispute resolution scheme facilitating and making fair and objective decisions. However, the inability by financial firms to appeal the Determinations made by AFCA is likely to cause significant concern.

As part of ASIC's oversight, on 26 August 2019, ASIC announced that it has approved AFCA to name financial firms in published Determinations.³⁹ Although financial firms will be named, consumers who are a party to the complaint will remain anonymous. ASIC believes the naming of firms will assist in identifying conduct or market problems within firms while also

highlighting firms who conduct themselves in a compliant manner. Furthermore, this will ensure AFCA's decision-making process is transparent and ensures AFCA can be held more greatly accountable for the Determinations they make. This decision forms part of a broader goal to be transparent and clear within the financial industry and follows international efforts such as the UK's Financial Ombudsman Service which has been able to name firms in published Determinations since 2013.

However, AFCA's new ability to name financial firms in Determinations could have potential unfair reputational damage in light of the lack of appeal options, as financial firms are unable to question or contest the result. Currently, the AFCA Rules provides that AFCA's operations will be reviewed after 18 months. Although, the lack of appeal rights may be a significant enough issue that an earlier review is required.



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Footnotes

1. *Mickovski v Financial Ombudsman Service Ltd* (2012) 36 VR 456; 91 ACSR 106; [2012] VSCA 185; BC201206000 at [32].
2. Banking Royal Commission *Final Report* (4 February 2019) <https://financialservices.royalcommission.gov.au/Pages/reports.aspx>.
3. Previously, it was an obligation of licensees to be a member of an approved external dispute resolution scheme, allowing licensees to determine which scheme to be a member of. See also Australian Securities and Investments Commission (ASIC) "ASIC cancels the licences of firms that failed to join AFCA" media release (22 March 2019) <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-063mr-asic-cancels-the-licences-of-firms-that-failed-to-join-afca/>.
4. Above.
5. P Durkin "650 calls a day not enough for financial ombudsman" *Australian Financial Review* 12 September 2019 www.afr.com/companies/financial-services/650-calls-a-day-not-enough-for-financial-ombudsman-20190910-p52q0z.
6. AFCA, AFCA at a glance: statistics sheet, www.afca.org.au/public/download.jsp?id=7442.
7. AFCA, AFCA Roadshow, www.afca.org.au/news/afca-roadshow/.
8. AFCA "AFCA's statement on the Royal Commission's Final Report" media release (4 February 2019) www.afca.org.au/news/media-releases/afcas-statement-on-the-royal-commissions-final-report/.
9. AFCA *Complaint Resolution Scheme Rules* (1 October 2019) www.afca.org.au/about-afca/rules-and-guidelines/ para A.4.3.
10. Above, para A.4.4.
11. Above n 9, para A.8.1.
12. Above n 9, para A.8.1.
13. AFCA "AFCA to accept legacy financial complaints from 1 July 2019" media release (20 February 2019) www.afca.org.au/news/latest-news/afca-to-accept-legacy-financial-complaints-from-1-july-2019/.
14. Above.
15. Above n 13.
16. Above n 9, para A.15.1.
17. Above n 9, para A.16.1.
18. AFCA *Operational Guidelines to the Rules* (30 June 2019) www.afca.org.au/about-afca/rules-and-guidelines/ at 95.
19. Above n 9, para A.16.2.
20. AFCA, Independent Assessor Terms of Reference, Term 6.
21. Above, Terms 12–15.
22. Above n 9, para A.16.3.
23. Above n 9, para A.16.4.
24. Above n 18, at 97.
25. Above n 18, at 97.
26. Above n 18, at 97.
27. Above n 18, at 97.
28. Explanatory Memorandum, Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017 (Cth) https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s1093_ems_62a414b0-d544-4e19-9120-1fbbf42e985a/upload_pdf/646421em.pdf;fileType=application%2Fpdf paras 1.179–1.180.
29. *R v Panel on Take-Overs & Mergers; Ex parte Datafin plc* [1987] QB 815.
30. Above n 1.
31. Above n 1, at [41].
32. Above n 1, at [32].
33. *Bilaczenko v Financial Ombudsman Service Ltd* [2013] FCA 1268; BC201315389.
34. *BFJ Capital Pty Ltd v Financial Ombudsman Service Ltd (in liq)* [2019] VSC 71; BC201901742.
35. Above n 1, at [41].

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36. *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd (formerly TXU Networks (Gas) Pty Ltd* (2006) Aust Contract R 90-241; [2006] VSCA 173; BC200606803.
37. *Holt v Cox* (1997) 15 ASCR 313.
38. Above n 36, at [51].
39. ASIC “ASIC approves AFCA rule change enabling the naming of firms” media release (26 August 2019) <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-224mr-asic-approves-afca-rule-change-enabling-the-naming-of-firms/>.