

AFCA Independent Review

AFCA Submission

March 2021

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Executive Summary

The *Treasury Laws Amendment (Putting Consumers First - Establishment of the Australian Financial Complaints Authority Act 2018)* (the AFCA Act) requires the Minister to establish an independent review of the operation of the Australian Financial Complaints Authority Limited (AFCA).

AFCA's submission

AFCA welcomes this opportunity to make a submission to the independent review.

This submission highlights how AFCA has met its statutory objectives in its first two years of operation¹, responds to the questions posed by the review's Terms of Reference², identifies gaps in the current framework and proposes changes to enhance AFCA's jurisdiction and improve the efficiency and effectiveness of our service³.

In its first two years of operation AFCA has established itself as a highly effective external dispute resolution scheme for financial services, including the provision of systemic issues investigations and reporting and code monitoring administration services to the financial services sector.

Despite the significant impact of the COVID-19 pandemic, AFCA has continued to deliver services effectively during our second year of operation and we have worked flexibly with scheme users to support them through this very challenging period.

AFCA's 'Two-year report' (for the period 1 November 2018 – 31 October 2020) has been released and it sets out a range of information on AFCA's achievements in this time. The report is attached as Appendix 3 to this submission. Information on AFCA's structure and how we operate is set out in Appendix 2.

AFCA is now transitioning from its establishment phase, into its next phase of becoming a world class ombudsman service. AFCA aims to be a leader in service excellence and innovation and recognised as a global leader in dispute resolution.

AFCA is using data analysis and information and feedback gathered from stakeholders in its first two years to improve and streamline our processes and services to support all users of the scheme.

AFCA has achieved a lot in a short period of time. However, we understand that there is more to be done to improve our vital services for AFCA members, consumers, small businesses and the broader community.

Is AFCA meeting its statutory objective of resolving complaints in a way that is fair, efficient, timely and independent?

The data clearly demonstrates that in our first two years of operation AFCA has delivered on our statutory objectives. Section 2 of our submission generally addresses how AFCA is meeting its statutory objectives and resolving complaints in a fair, efficient, timely and independent way.

¹ See section 2.

² See sections 3, 4 and 5.

³ See section 6.

Importantly, this section outlines the outcomes of independent reviews of determinations AFCA has made, as well as feedback we have received from consumers, small businesses and AFCA members on our performance and handling of complaints.

It has been a large and complex start-up operation, employing 780 staff across offices in Melbourne and Sydney and building its operations, infrastructure and IT systems. AFCA has brought together two of the predecessor bodies and it has incorporated the jurisdiction of the Superannuation Complaints Tribunal. On 1 November 2018, a new single EDR scheme was established with a significantly increased jurisdiction and 40,000 members.

AFCA has seen a very high uptake of its services, receiving more than 153,000 complaints and finalising over 146,000 complaints in this period.⁴ Almost half of the complaints AFCA has dealt with during this time have been resolved with an average time of 31 days. The overall average time it took to finalise all complaints in our first two years was 74 days.

In addition, AFCA has established and administered a legacy jurisdiction covering historical complaints going back to 1 January 2008.

AFCA has also resolved over 10,000 complaints it inherited from the predecessor schemes.

We have delivered access to justice to many thousands of Australians, with \$477 million in compensation or refunds in our first two years.⁵

AFCA is still a relatively new organisation and as would be expected, further work is underway to enhance the scheme's operations and improve the experience for all users. This work includes:

- initiatives to address queues of open complaints and further reduce timeframes to resolve complaints
- proposals to enhance AFCA's jurisdiction and scheme efficiencies
- initiatives to strengthen understanding of AFCA's fairness jurisdiction and ensure fair process and fair outcomes
- transformational projects to enhance AFCA's systemic issues function, unlock the power of AFCA's data to improve industry and dispute resolution practices and use technology to streamline and simplify processes.

Is AFCA's dispute resolution approach and capability producing consistent, predictable and quality outcomes?

Section 3 of our submission addresses the specific questions asked by the Terms of Reference, namely:

- Is AFCA's dispute resolution approach and capability producing consistent, predictable and quality outcomes?

⁴ Finalised complaints include more than 10,000 predecessor scheme complaints dealt with by AFCA since 1 November 2018.

⁵ This figure includes a small amount relating to death distribution claims in superannuation. In these cases, superannuation fund trustees would have made payment/s to a dependent/s, although they may not have been the complainant who brought the matter to AFCA.

- Are AFCA's processes for the identification and appropriate response to systemic issues arising from complaints effective?
- Do AFCA's funding and fee structures impact competition? Are there enhancements to the funding model that should be considered by AFCA to alleviate any impacts on competition while balancing the need for a sustainable fee-for-service model?

AFCA's dispute resolution approach and capability are producing consistent, predictable and quality outcomes. AFCA firmly believes that resolving complaints in a way that is fair, independent, timely and efficient provides quality outcomes that are consistent and predictable.

As noted above:

- this is supported by the outcomes of independent reviews of AFCA determinations, customer survey results, other stakeholder feedback and data from the AFCA Independent Assessor⁶
- specific activities and initiatives are underway to further support consistent, predictable and quality outcomes (as detailed throughout this submission). These activities include revised decision templates, the introduction of investigation reasoning tables, the development of an AFCA Approach library, enhanced quality assurance frameworks and a comprehensive continuous development program for case managers and decision makers⁷.

Are AFCA's processes for the identification and appropriate response to systemic issues arising from complaints effective?

AFCA inherited its systemic issues processes from the predecessor schemes. In AFCA's first two years:

- 2,287 possible systemic issues and 107 possible serious contraventions of the law were assessed
- 508 detailed investigations were conducted into possible systemic issues and serious contraventions of the law
- 193 definite systemic issues investigations and 40 definite serious contraventions were dealt with by AFCA⁸
- more than \$202 million has been refunded to consumers and small businesses following direct involvement from AFCA through its systemic issues work
- over 3.9 million consumers were identified by financial firms as being affected by systemic issues investigated by AFCA.

AFCA has worked closely with ASIC and other regulators on our identification, investigation, remediation and reporting of systemic issues and possible serious contraventions. AFCA's work has led to, or assisted, a range of enforcement and regulatory action taken (in particular) by ASIC, including through the courts.

⁶ For further detail, see section 2 of this submission.

⁷ For further detail, see section 3 of this submission.

⁸ Whilst it is ultimately up to the relevant regulator to assess whether conduct we report as a serious contravention of law is a definite serious contravention, this terminology reflects AFCA's assessment that relevant conduct definitely appears to be a possible serious contravention of the law and takes into account relevant regulatory guidance including ASIC RG 267.

AFCA has already commenced work with an external consultant to transform its systemic issues function with a greater focus on data and trends analysis to better and more proactively inform real-time identification, investigation, remediation and reporting of systemic issues activity to regulators.

Do AFCA's funding and fee structures impact competition? Are there enhancements to the funding model that should be considered by AFCA to alleviate any impacts on competition while balancing the need for a sustainable fee-for-service model?

AFCA's current funding model and fee structure have served the scheme well during our establishment phase. However, it is now timely that the funding model and fee structure are reviewed to ensure they are fit for purpose.

AFCA is undertaking a funding review in 2021 to establish a robust, flexible and sustainable long-term funding model. AFCA will ensure the funding model developed is commercial, proportionate and equitable across its member base. AFCA will take into account feedback provided by stakeholders to this Independent Review and will carefully consider any findings from this Review as part of our funding review this year.

AFCA's current funding model has been in place since 1 November 2018. It is a hybrid model, based on aspects of the CIO and FOS scheme funding arrangements and the previous APRA SCT levy model for superannuation trustees. It was established in accordance with:

- the funding and accountability principles set out in the Ramsay Review for a single EDR scheme
- the funding matters and design principles set out in the Government's 2017 Consultation Paper on the establishment of AFCA
- AFCA's operational and organisational requirements under section 1051 of the Corporations Act, and
- the EDR benchmarks under ASIC's RG 267.

AFCA's current funding model is focused on providing a fair allocation of annual membership levies to AFCA members according to their size. It incorporates incentives to resolve complaints early, and as appropriate, is based on a user-pays approach.

AFCA is not aware of any reliable evidence or information showing that AFCA's current funding model impacts competition in any area of financial services. More than 80% of AFCA's licensee members pay a minimum membership annual levy of \$370. Around 80% of licensee members also do not receive complaints or pay complaint fees. Authorised credit representatives, which represent over 34,000 (85%) of AFCA members only pay an annual levy of \$65.

AFCA is concerned about the challenges associated with non-payment of AFCA fees by insolvent financial firms. This places an unfair burden on other members and the scheme and may impact the sustainability of AFCA's fee model if not addressed.

AFCA has taken steps to reduce the cost of insolvent financial firm complaints, and it has been absorbing this unpaid complaint fee cost to minimise or prevent the cost being passed on to other AFCA members. This will be a key consideration in AFCA's funding review.

AFCA has a robust triage framework that segments complaints based on their complexity into fast track, standard and complex streams. AFCA's fee schedule reflects the different processes adapted to handle these complaints.

However, AFCA has identified that fees incurred for handling some very low value complaints, such as credit reporting complaints, can be higher than the value of the claim itself or the service provided. This leads to some distorted resolution practices which can be exploited by fee-for-service representatives who pursue their pecuniary interests ahead of their clients' best interests. AFCA has also taken into account feedback from some members that there are opportunities to improve processes involving such low value complaints.

AFCA is considering options to further streamline our triage processes and more quickly and efficiently deal with such complaints, at a lower complaint fee cost for AFCA members.

AFCA will also be proposing amendments to our Rules, so we can more effectively deal with recurring inappropriate conduct by some fee-for-service representatives.

Monetary jurisdiction in relation to primary production businesses – do the monetary limits for claims and remedies remain adequate?

Section 4 of our submission addresses this matter with reference to data for primary production business complaints we have received during our first two years.

AFCA's data shows that the monetary limits and remedies for primary production complaints are adequate and do not currently need to be changed.

AFCA's complaints data for our first two years shows that 99 complaints were received in relation to a primary production credit facility. Of these complaints, only four were closed because the credit facility exceeded \$5 million and the complaint was therefore outside our jurisdiction. No complaints were closed as being outside of AFCA's jurisdiction because the compensation claimed exceeded \$2 million. No complainant was awarded compensation between \$1 million and \$2 million.

Internal review mechanism: is the scope, remit and operation of the Independent Assessor function appropriate and effective?

Section 5 of our submission addresses this question.

AFCA is accountable for delivering on the service standards it has set. The annual reports of the Independent Assessor demonstrate the function and value of this role in assessing complaints about AFCA's service, and in providing recommendations to AFCA for process and business improvements.

The role of the Independent Assessor, to deal with complaints about AFCA's service, is operating effectively and with appropriate remit and scope.

AFCA does not support extending the remit of the Independent Assessor to review the merits of determinations made by decision makers. AFCA does not believe that this should be the role of an independent assessor, nor is it feasible.

AFCA is not a court. It is not bound by rules of evidence and it does not determine the legal rights of the parties. AFCA is designed to be an informal and low-cost complaint resolution

scheme. Finality and certainty of outcomes are vital for parties' trust and confidence in the scheme.

When a party to a complaint does not agree with a preliminary assessment made by AFCA, they can already seek an independent review of the complaint by an AFCA decision maker. Each year AFCA's specialist decision makers and panel members make thousands of independent decisions on matters requiring technical legal knowledge and skills, and in relation to a wide range of financial products.

We do not believe that a proposal that the Independent Assessor conducts reviews of the substance or merits of determinations will add sufficient value, in circumstances where there are already internal and external rights of appeal and review from AFCA's general and superannuation jurisdictions. In addition, a further stage for merits reviews of determinations would substantially increase the cost of the service and the length of time it takes to resolve a complaint. We are concerned that the efficiency and accessibility of the scheme will be undermined by an additional appeal right for parties.

Internal review mechanism: is there a need for AFCA to have an internal mechanism where the substance of its decision can be reviewed?

Section 5 of our submission addresses this question.

As noted above, AFCA's complaints process already provides for an internal mechanism 'where the substance of its decision can be reviewed'. The substance and merits of a complaint are comprehensively assessed at the preliminary assessment stage. A party to a complaint can seek a final review of the merits of a complaint by a decision maker. This is followed post determination by the ability of the parties to seek review of a determination under AFCA's 'slip rule'.

It is unlikely that a further internal merits review stage will add sufficient value, given a further internal merits review stage for a complaint would:

- significantly increase the cost of AFCA's services for members
- increase the time it takes to resolve complaints
- lead to a more formal, legalistic approach to dealing with complaints, and
- compromise AFCA's ability to provide an efficient service.

Proposals for AFCA's jurisdiction and processes

AFCA's proposals for further scheme enhancements are set out in section 6 of our submission and include the following.

AFCA's test case procedure

In 2020, the test case procedure under AFCA's Rules was used for the first time. AFCA has now approved two test cases in relation to small business interruption insurance. While AFCA is not a party to the proceedings, we actively engaged with key stakeholders, including the industry and regulators, during the approval process. We recognise the importance of issues arising from large scale events and complaints with significant legal effect. Following the outcome of these test cases, we invite further discussion with stakeholders on the role of

AFCA and regulators in initiating or approving test cases about issues which have large scale system-wide or consumer impact.

AFCA's 'slip rule'

AFCA proposes that the section in our Operational Guidelines that deals with the process for remedying errors or accidental omissions in a determination be reviewed and articulated, either in a specific AFCA Guideline, or as a provision in AFCA's Rules. AFCA will consult with stakeholders on any proposed amendments.

AFCA's compensation cap for non-financial loss

It is important that AFCA's compensation cap for non-financial loss is adequate and enables AFCA to compensate a complainant for more significant and extreme harm, stress and inconvenience caused by the conduct of a financial firm. AFCA proposes to consult on an amendment to our Rules to increase the compensation cap for non-financial loss, commensurate with the jurisdictions of other consumer redress schemes⁹.

Dealing more efficiently with certain complaints

AFCA is reviewing options to improve processes involving some low value complaints, for instance, complaints that are lodged by consumers about their credit reports.

Dealing with systemic and recurring inappropriate conduct of fee-for-service representatives

AFCA proposes amendments to our Rules, so we can more effectively deal with recurring and inappropriate conduct by some fee-for-service representatives. AFCA will consult with stakeholders on proposed amendments.

AFCA's small business insurance jurisdiction

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) conducted an inquiry into small business insurance in 2020. The final report¹⁰ for this inquiry included a recommendation that AFCA's jurisdiction for small business insurance complaints be expanded to cover all insurance products purchased by small businesses for claims assessed at \$1 million or less.

AFCA recognises this is an important policy matter. As a matter of fairness and to ensure access to justice, AFCA supports this recommendation and would be pleased to consult with stakeholders accordingly. However, we note that certain commercial, industrial and liability insurance claims can be very complex. The expansion of the AFCA scheme in this way would therefore require a comprehensive feasibility or capability analysis.

⁹ For example, the UK Financial Ombudsman Service, the Office of the Australian Information Commissioner (OAIC) and the Queensland Civil and Administrative Tribunal (QCAT).

¹⁰ ASBFEO report [Insurance Inquiry](#), December 2020 – on www.asbfeo.gov.au

Glossary

Term or abbreviation	Meaning
AFCA Act	<i>Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018 (Cth)</i>
AFCA's Rules	Rules that govern AFCA's operations, approved by ASIC in accordance with requirements in the Corporations Act
APRA	Australian Prudential Regulation Authority
ASBFEO	Australian Small Business and Family Enterprise Ombudsman
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
CIO	Credit and Investments Ombudsman – a predecessor of AFCA
Corporations Act	<i>Corporations Act 2001 (Cth)</i>
Datacube	Detailed complaint data published by AFCA every six months
Determination	Formal decision about a complaint made in accordance with AFCA Rule A.14
EDR	External dispute resolution
Financial firm	AFCA member or other entity within the definition of 'Financial Firm' in Section E of AFCA's Rules
FOS	Financial Ombudsman Service - a predecessor of AFCA
Government	Federal Government
Independent Assessor	A person independent of AFCA appointed by AFCA's Board to review complaints about the standard of service provided by AFCA in complaint resolution
IDR	Internal dispute resolution
Legacy jurisdiction	Expansion to AFCA's jurisdiction in 2019-20 enabling AFCA to consider complaints regarding conduct of financial firms that occurred as long ago as 1 January 2008
OAIC	Office of the Australian Information Commissioner
Operational Guidelines	Guidance to explain, in detail, how AFCA's Rules apply in practice

Preliminary assessment	Assessment of a complaint that sets out reasons for any conclusions made about its merits and provides a recommendation as to how the complaint should be resolved
Primary production business complaint	Complaint against a financial firm made by a 'Primary Producer' as defined in Section E of AFCA's Rules
Ramsay Review	Review of the financial system external dispute resolution and complaints framework - conducted in 2016 and 2017 by an expert panel chaired by Professor Ian Ramsay
RG 267	ASIC's Regulatory Guide 267, <i>Oversight of the Australian Financial Complaints Authority</i> , June 2018
Rules	AFCA's Rules
SCT	Superannuation Complaints Tribunal – a predecessor of AFCA

1 Introduction

AFCA's establishment

- 1.1 The Government established the [Ramsay Review](#)¹¹ in 2016 to conduct a comprehensive review of the financial system's external dispute resolution (EDR) framework. The review was led by an independent expert panel chaired by Professor Ian Ramsay.
- 1.2 The [Final Report of the Ramsay Review](#), completed in April 2017, recommended a suite of reforms designed to 'withstand the challenges of a rapidly changing financial system'. The central recommendation was to establish a new single EDR body to replace the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT). The panel concluded that an industry ombudsman scheme was the appropriate model to deal with complaints in all areas of the financial system, including superannuation.
- 1.3 The Final Report set out 11 recommendations for the new single EDR body.¹² The Government accepted all recommendations in May 2017 and took steps to establish AFCA.
- 1.4 The AFCA Act implemented recommendations of the Ramsay Review for:
 - the establishment of AFCA as the single EDR scheme for financial services complaints
 - an enhanced internal dispute resolution (IDR) framework to deal with all consumer complaints about financial services.
- 1.5 The AFCA Act specified the process for authorisation of the AFCA scheme. This process imposes mandatory operating and compliance requirements and takes into account the following general considerations:
 - [accessibility](#)
 - [independence](#)
 - [fairness](#)
 - [accountability](#)
 - [efficiency](#)
 - [effectiveness](#)
- 1.6 The AFCA Act also:
 - required AFCA to report on certain matters to the Australian Securities & Investments Commission (ASIC), the Australian Prudential Regulation Authority (APRA) and the Australian Tax Authority (ATO) and gave ASIC the power to issue directions to AFCA, and
 - repealed the *Superannuation (Resolution of Complaints) Act 1993* (Cth) and established AFCA's jurisdiction for superannuation complaints.

¹¹ Review of the financial system external dispute resolution and complaints framework.

¹² Appendix 1 to this submission sets out these recommendations.

- 1.7 On 23 April 2018, the Government authorised Australian Financial Complaints Limited to operate the AFCA scheme in accordance with the AFCA Act.

AFCA's role

- 1.8 AFCA commenced on 1 November 2018 as the single EDR scheme for the financial services sector. It successfully merged FOS, CIO and the jurisdiction of the SCT to form a single complaints resolution service with an increased jurisdiction, a larger membership and the capacity to award higher levels of financial compensation to consumers and small businesses. On 31 December 2020 the SCT ceased operations and the remaining small number of complaints from the SCT were transferred to AFCA.
- 1.9 AFCA has three primary functions - to resolve financial services complaints between member firms and Australian consumers and small businesses, investigate and report on systemic issues and possible serious contraventions of the law and to provide code monitoring and administration services to industry code compliance committees.
- 1.10 ASIC's Regulatory Guide 267 (RG 267) sets out AFCA's key complaint handling obligations. It provides guidance on the standards AFCA must meet to be accessible, independent, fair, accountable, efficient and effective. It also sets out a number of reporting obligations and requirements regarding our identification and reporting of systemic issues and serious contraventions arising in complaints we deal with.

The first two years of operation

- 1.11 In its first two years of operation, AFCA has established itself as an effective service for financial services complaints resolution while dealing with many of the same corporate and operational challenges faced by other Australian businesses during the COVID-19 pandemic.
- 1.12 AFCA has received 153,246 complaints from consumers and small businesses during this time. More than 146,000 complaints have been finalised,¹³ with more than \$477 million in compensation or refunds being provided to consumers and small businesses.¹⁴ Many other complaints have been resolved with variations to agreements, repayment programs, full or partial write-offs of debt, interest, or fees, apologies and other remedies.
- 1.13 During the same period AFCA assessed 2,287 possible systemic issues and 107 possible serious contraventions of the law. 508 detailed investigations were conducted into possible and definite systemic issues, and serious contraventions of the law. 193 definite systemic issues investigations and 40 definite serious contraventions were dealt with by AFCA.¹⁵
- 1.14 This systemic issues and serious contravention work led to a range of enforcement actions taken by regulators and it provided more than \$202 million in financial

¹³ Including predecessor scheme complaints finalised by AFCA from 1 November 2018.

¹⁴ This figure includes a small amount relating to death distribution claims in superannuation. In these cases, superannuation fund trustees would have made payment/s to a dependent/s, although they may not have been the complainant who brought the matter to AFCA.

¹⁵ Whilst it is ultimately up to the relevant regulator to assess whether conduct we report as a serious contravention of law is a definite serious contravention, this terminology reflects AFCA's assessment that relevant conduct definitely appears to be a possible serious contravention of the law and takes into account relevant regulatory guidance including ASIC RG 267.

remediation to consumers and small businesses. Around 3.9 million customers have been affected by these systemic issues.

- 1.15 AFCA has resolved more than 10,000 complaints that were carried over from FOS and CIO.
- 1.16 AFCA has experienced a significant increase in the number of complaints during its first two years when compared with predecessor schemes and initial complaint projections. In AFCA's first eight months we received a 36% increase in complaints compared with predecessor scheme complaint volumes in 2017-18. Initially this increase was due to awareness raised in the community by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission). More recently, natural disasters and events such as the 2019-20 bushfires and the COVID-19 pandemic have caused an increase in complaints.
- 1.17 AFCA has rapidly responded to these demands on our resources by adjusting our processes and working flexibly to support parties through these challenging periods. For example, AFCA's response to the bushfires included measures to help families and small businesses affected, such as establishing a dedicated online information hub to explain the support we could provide and running a support hotline to give people affected a priority service.
- 1.18 On 1 July 2019, AFCA implemented the legacy jurisdiction conferred by the Government. This extended AFCA's jurisdiction to cover complaints relating to conduct of a financial firm dating back to 1 January 2008. This aligned with the period that had been considered by the Royal Commission.
- 1.19 The complexity of this work was significant given the age of these complaints at lodgement, the entrenched nature of the relationship between the parties, previous unsuccessful attempts to resolve these complaints over many years and difficulties associated with the provision of documents, records and information. AFCA quickly adjusted to implement this extended jurisdiction and has worked effectively with complainants and members to finalise legacy complaints received. AFCA received 1,749 legacy complaints. By June 2020, these complaints had resulted in awards of compensation and refunds totalling over \$15.9 million.
- 1.20 In the wake of the Royal Commission, AFCA has played an important role in resolving these complaints and helping to restore trust in Australia's financial institutions. AFCA has worked pro-actively with regulators, financial firms and consumer groups to raise industry standards – with the aim of reducing the causes of consumer complaints.

Accessibility of our service

- 1.21 AFCA has taken steps to ensure that our services are accessible to all. This is outlined in more detail in Appendix 2. Clear materials, resources and factsheets have been developed in plain English, and in many community languages.
- 1.22 AFCA has visited metropolitan and regional communities across Australia to explain what we do and inform Australians how to make a complaint if they are unable to resolve a matter with their financial firm. In 2021-22 we will run 23 initiatives to improve our accessibility for First Nations people, migrant communities and groups living with disability, mental illness and family violence.

1.23 As AFCA transitions from its establishment phase, transformational projects are now underway to unlock the power of AFCA's data and use technology to streamline and simplify services for complainants and members.

2 Is AFCA meeting its fair, efficient, timely and independent statutory objectives?

AFCA's data clearly demonstrates that in our first two years of operation, we have delivered on our statutory objectives.

AFCA resolves complaints in a fair and independent way, in accordance with our legal and regulatory requirements and our fairness jurisdiction under our Rules.

AFCA resolves complaints in an efficient and timely way.

AFCA is still a relatively new organisation and work is underway to further support fairness and consistency in determinations, improve the timeliness for the resolution of complaints, enhance the efficiency of the scheme and improve the experience for all users.

AFCA's statutory and regulatory objectives

2.1 AFCA's objectives, obligations and operational requirements are set out in:

- Part 7.10A of the Corporations Act – External Dispute Resolution
- ASIC Regulatory Guide 267 – Oversight of AFCA (RG 267)
- AFCA's Constitution
- AFCA's Rules¹⁶ and Operational Guidelines.

2.2 AFCA is required to operate in a way that is accessible, independent, fair, accountable, efficient and effective.

2.3 These general considerations are set out in section 1051A of the Corporations Act. They are the guiding benchmarks for the scheme set out in RG 267.

2.4 The Terms of Reference ask the question whether AFCA is meeting its statutory objective of 'resolving complaints in a way that is fair, efficient, timely and independent.'

AFCA's fairness jurisdiction – are we resolving complaints in a fair and independent way?

2.5 In this section we explain the operation of our fairness jurisdiction and outline important steps we are taking to enhance the delivery of fair and independent processes and outcomes for parties to a complaint.

2.6 AFCA's fairness jurisdiction is not new. Our jurisdiction reflects long-standing and familiar principles of equity and the jurisdiction of AFCA's predecessor schemes and other domestic and international ombudsman schemes. It is a jurisdiction that has existed in external dispute resolution in Australia for more than 20 years.

2.7 AFCA's fairness jurisdiction has been acknowledged and clarified by superior courts that have found our decision makers do not exercise judicial power - as they do not

¹⁶ AFCA's Rules constitute a tripartite contract between AFCA and the parties to a complaint.

determine existing legal rights between the parties.¹⁷ Rather, the subject of the opinion of an AFCA decision maker is ‘what is fair in all the circumstances’.¹⁸

- 2.8 As noted, AFCA is legally required to operate in a way that is fair for parties to a complaint. AFCA’s fairness jurisdiction is also set out in AFCA’s Rules which constitute a tripartite contract between AFCA and the parties to a complaint.
- 2.9 AFCA resolves complaints in a fair and independent way, in accordance with our legal and regulatory requirements, and our fairness jurisdiction under our Rules.
- 2.10 Every stage of our complaints process supports procedural and substantive fairness. Our customer experience survey data, complaint data, quality assurance reviews and independent reviews of determinations indicate that we are generally meeting both internal and external benchmarks for complaints handling and decision-making.
- 2.11 Feedback from complainants and AFCA members (outlined below) and outcomes from our independent reviews of determinations provide important information on how we can continue to improve:
- stakeholder understanding of our fairness jurisdiction
 - the internal application of our Rules and Approaches to ensure consistent and predictable complaint handling and decision making.
- 2.12 A useful starting point for understanding AFCA’s jurisdiction is the 2016-2017 Ramsay Review. The recommendations of the Ramsay Review are set out in Appendix 1.

The Ramsay Review – the principle of equity

- 2.13 The findings of the Ramsay Review endorsed and re-emphasised the central importance of a fairness jurisdiction for an EDR/ombudsman scheme.
- 2.14 The principles guiding the Ramsay Review included ‘equity’. ‘Equity’ is described as meaning that complainants should be treated fairly, with adequate access to redress, easy access to the system and minimal cost barriers. Further, equity provides that users of the scheme should be provided with unbiased decision-making and fair treatment, including procedural fairness – as an essential feature of an ombudsman scheme.
- 2.15 The Ramsay Review provided that procedural fairness requires that:
- the parties to a complaint, or a party directly adversely affected by a decision or preliminary assessment be given an opportunity to respond before the investigation is concluded

¹⁷ In *QSuper Board v AFCA* [2020] FCAFC 55, the Federal Court of Australia found that AFCA does not exercise judicial power in determining the rights of the parties to a dispute. Rather, AFCA determines what the rights of the parties ought to be to arrive at an outcome that achieves ‘fairness in a broad sense’ (at para 156).

In *IEL v AFCA & Anor* [2020] QSC 74, the Supreme Court of Queensland confirmed that the subject of an opinion by a decision maker is not the existing legal rights, duties and liabilities of the parties. Rather, the subject of the opinion is ‘what is fair in all the circumstances’ (at para 33). The Court in this case makes it clear that the parties to a complaint with AFCA have, in accordance with a tripartite contract, agreed to have a dispute resolved according to an opinion as to what is fair in all the circumstances (at para 37).

¹⁸ AFCA decisions on superannuation complaints must be made in accordance with the requirements of section 1055 of the Corporations Act.

- the actions of the ombudsman and staff must not give rise to a reasonable apprehension of partiality, bias or prejudice
- the ombudsman scheme must provide reasons for any decision, finding or preliminary assessment to the parties to the complaint.¹⁹

Fairness and independence are set out in AFCA's Rules

2.16 Rule A.2.1(c) provides that AFCA will consider complaints submitted to it in a way that is:

- independent, impartial, fair
- in a manner which provides procedural fairness to the parties
- efficient, effective, timely and
- cooperative, with the minimum of formality.

2.17 Rule A.2.1(d) provides that AFCA will support consistency of decision-making, subject to its obligations both under section 1055 of the Corporations Act and to do what is fair in the circumstances.

Fairness in superannuation complaints

2.18 Rule A.14.1 provides that when determining a superannuation complaint, the decision maker must apply the approach specified in section 1055 of the Corporations Act - to determine whether a decision or conduct of the relevant financial firm was fair and reasonable in the circumstances.

2.19 AFCA must not make a determination for a superannuation complaint that would be contrary to law, the governing rules of a fund to which the complaint relates, or the terms and conditions of an annuity policy, contract of insurance or retirement savings account to which the complaint relates.

Fairness in all other complaints (non-superannuation)

2.20 Rule A.14.2 provides that when determining any other complaint, the decision maker must do what she or he considers is fair in all the circumstances having regard to:

- legal principles
- applicable industry codes or guidance
- good industry practice, and
- previous relevant determinations of AFCA or predecessor schemes.

AFCA's Rules provide for procedural fairness

2.21 As noted above, AFCA's Rules explicitly require that we provide procedural fairness to the parties to a complaint.

2.22 In accordance with the procedural fairness principles outlined in the Ramsay Review Report:

¹⁹ Ramsay Review – Final Report, *op cit*, p 30.

- AFCA will generally share information provided by a party to a complaint with the other parties to the complaint (Rule A.10.1), subject to confidentiality and other considerations
- before a complaint is determined by a decision maker, AFCA must provide the parties to the complaint with access to relevant information and an opportunity to make submissions on the issues to be determined (Rule A.10.2)
- decision makers and case managers assess complaints objectively and without bias, in accordance with AFCA's Conflict of Interest and Apprehended Bias policies and procedures
- preliminary assessments by AFCA case managers set out reasons for any findings about the merits of a complaint and provide a recommendation as to how a complaint should be resolved (Rule A.12.1)
- if a preliminary assessment has previously been provided, a decision maker must consider the party's reasons for disagreeing with the preliminary assessment (Rule A.12.5)
- determinations are written in plain English with reasons (Rule A.14.4)
- subject to some specific and limited exceptions, determinations are published on AFCA's website
- since October 2019, published determinations identify the financial firm against which the complaint is made, but they do not identify the other parties to the complaint (Rule A.14.5).

Understanding, explaining and applying our fairness jurisdiction

- 2.23 Since inception, AFCA has taken steps to explain how we make decisions and assess complaints within our fairness jurisdiction, in a way that is clearly and consistently understood by all stakeholders.
- 2.24 In 2019 and 2020, AFCA worked in partnership with the University of Melbourne on a review that established the extent of the fairness jurisdiction held by both AFCA and other ombudsman schemes, both within Australia and internationally. This review assisted AFCA to understand, articulate and apply the jurisdiction and the fairness tests outlined in the Rules for non-superannuation and superannuation complaints.
- 2.25 AFCA is using this review to further operationalise a clear approach to our fairness jurisdiction focused on the delivery of a fair process, achieving a fair outcome and fair and respectful engagement with all parties.
- 2.26 AFCA has developed a suite of tools and guidance for case managers and decision makers to support the application of the fairness requirements of our jurisdiction, and the logical, clear and concise articulation of a decision. These tools include the development of reasoning tables for investigation and assessment of complaints and plain English templates of preliminary assessments and determinations.
- 2.27 AFCA has engaged widely with stakeholders on our fairness jurisdiction and approach. Valuable feedback is now informing our key projects for 2021 to further operationalise and support our jurisdiction, namely:

- the development of an Engagement Charter – that will outline fair and reasonable standards for the conduct of parties to a complaint and the standards of conduct expected of AFCA employees
- the development and piloting of template settlement deeds and guidance to assist unrepresented complainants and smaller financial firms to fairly document resolution of a complaint
- a comprehensive review and update of our current suite of Approach documents and fact sheets, a list of which can be found on the AFCA website
- consideration and development of further Approach documents that may assist parties, particularly in areas where significant complaint volumes occur (such as scams and unauthorised transactions)
- the ongoing development of a knowledge management framework including a significant decisions library and a broader case handling library to support fair and consistent decision-making within AFCA
- ongoing training and coaching of staff in all aspects of our jurisdiction
- strengthening of our capability and quality assurance program for case managers and decision makers as outlined below.

How we support and monitor procedural and substantive fairness

2.28 In addition to meeting the specific requirements of our Rules and Operational Guidelines, AFCA supports and monitors procedural and substantive fairness and the quality and consistency of our decisions through a comprehensive range of mechanisms, including:

- provision of easily accessible online legal research materials
- regular updates from external sources on the law, regulatory updates, industry codes of practice and good industry practice
- plain English resources and training to improve our verbal and written communications and decisions
- ongoing development and review of our Approach documents in consultation with AFCA employees and stakeholders
- access to internal and external legal and technical, expert or specialist advice on issues in a dispute
- coaching and mentoring for AFCA case workers
- comprehensive induction and ongoing training²⁰ for AFCA case workers, including in conciliation and mediation
- the implementation of a leadership capability framework to support leaders to coach, supervise and train staff in a consistent way

²⁰ Training covers the following knowledge and skills: legal developments, industry Code obligations, investigation skills, conciliation and mediation, decision writing, working with vulnerable complainants.

- developing an agile approach to case management with support for specialisation and cross-skilling
- a comprehensive quality assurance process for open complaints and decision makers
- greater use of AFCA panels comprising an ombudsman and a consumer and industry representative, all appointed by the Board, to consider and determine complex and significant complaints and to bring a nuanced and deeper understanding of specialist areas of expertise or good industry practice
- internal audit, file and peer review of AFCA decision-making
- annual independent audit of a random sample of decisions
- key performance indicators for case workers and decision makers covering the timeliness and fairness of our decisions and process
- file reviews of closed cases by managers and our Quality team, and audits of communications with parties.
- customer experience surveys
- feedback and continuous improvement loops linked to the outcome and findings of post-determination engagement with parties to a complaint, use of AFCA's 'slip rule', and service complaints received and investigated by AFCA's service complaints team
- engagement, review and implementation of the findings of AFCA's Independent Assessor about the delivery of AFCA's service standards and complaint handling
- review of decisions and findings from superior courts about an AFCA decision or complaint handling.

How we ensure complaints are resolved in an independent way

2.29 As noted above, the Ramsay Review provided that procedural fairness requires that:

- the parties to a complaint must be given an opportunity to respond before the investigation is concluded
- the actions of the ombudsman and staff must not give rise to a reasonable apprehension of partiality, bias or prejudgment
- the ombudsman must provide reasons for any decision, finding or recommendation to the parties to the complaint.

2.30 As outlined above, AFCA's Rules reflect these procedural fairness requirements and provide that AFCA will consider complaints in an independent, impartial and fair way.

2.31 All AFCA employees must meet the requirements of AFCA's policies and procedures on Conflicts of Interest and Apprehended Bias.

2.32 Determinations are published on our website with clear reasons for the decision.

2.33 All decision makers, including panel members, are appointed by the AFCA Board, which has equal representation of consumer and industry directors, and an independent Chair.

- 2.34 Case workers are recruited from the public, private, industry and consumer sectors and they have diverse professional backgrounds.
- 2.35 AFCA's comprehensive quality assurance program provides for regular internal and external reviews and checks of decision making and complaint handling.

Independent reviews of fairness outcomes in determinations

- 2.36 AFCA does not determine the legal rights or either party to a complaint. A determination made by a decision maker is not binding on the complainant. However, AFCA is required to ensure a fair process and a fair outcome in the resolution of complaints - in accordance with the fairness tests.
- 2.37 From 1 November 2018 to 31 October 2020 (the first two years of AFCA's operation), AFCA dealt with more than 146,000 complaints. The majority of these complaints (68%) were resolved by agreement between the parties.
- 2.38 During this period, 9,365 complaints were closed at the final determination stage.
- 2.39 Over 80% of these had a preliminary assessment of the merits provided to the parties before they progressed to a final determination. Neither a complainant nor a financial firm is bound to accept a preliminary assessment provided by AFCA. Parties to a complaint may reject a preliminary assessment and provide further information in support of their position, prior to a determination being issued.
- 2.40 Of the complaints finalised by determination, only a small proportion (9%) overturned a preliminary assessment provided to the parties. Of these, 4% of 'overturns' were due to new information being provided by the parties after the preliminary assessment was made. Only 5% of preliminary assessments were overturned in a determination due to a different interpretation of any relevant law or a difference of opinion of the basis of the facts. This percentage is to be expected and demonstrates that decision makers at AFCA independently review the issues in a complaint and the material provided by the parties to form their own view of the merits of a complaint.
- 2.41 These results provide significant confidence that our preliminary assessment process delivers fair and appropriate outcomes for parties to a complaint, while still providing parties with a further opportunity for a final assessment of the merits of the complaint. This internal review process (from preliminary assessment to determination stage) is a hallmark of how we deliver fair and independent outcomes for all parties.

Independent external review of AFCA decisions

- 2.42 AFCA has already commissioned two annual reviews to ensure it is meeting the high standards of quality and consistency of decision-making that stakeholders expect. In its first year of operation in 2019, AFCA commissioned an independent external review of a representative sample of 150 determinations against the statutory and other benchmarks that guide our scheme. The focus of the review was on the fairness and consistency of the determination process. In particular:
- was the determination outcome appropriate?
 - was the AFCA process fair?
 - was the determination written in a way that was credible and persuasive for the parties and a third-party reader?

- 2.43 In 2020, AFCA again engaged an independent consultant to undertake a follow up review of determinations by decision makers who were not included in the 2019 review.
- 2.44 A further independent review of determinations is scheduled for October 2021.
- 2.45 The 2019 and 2020 reviews found that determination outcomes were of a high standard, overwhelmingly fair and consistent with the factual information and they applied the law and good industry practice appropriately.
- 2.46 The 2020 report also noted that some areas for improvement identified in the 2019 review had been addressed and seemed less prevalent in the 2020 sample of determinations reviewed. This review found that timeliness of decision making had been affected by resourcing, complexity and other issues. Delay was a broader workflow management issue across AFCA's operations for consideration. This matter (and how AFCA is supporting timely outcomes) is further addressed below in the section of this submission addressing how AFCA is meeting its statutory objective of delivering outcomes in a timely and efficient way.
- 2.47 Both independent reviews of AFCA's decision-making made recommendations to further support fairness and consistency in determinations. AFCA has accepted all recommendations made in both reviews. A program of work to implement these recommendations is well underway. These steps include:
- the introduction of reasoning tables to assist case management in the identification, investigation and assessment of issues in dispute
 - refined determination and recommendation templates to ensure clear reasoning and plain English articulation of why an outcome is fair
 - enhancing AFCA's Approach documents and internal guidance notes in some areas such as the exchange of information between the parties and exercise of discretion to exclude a complaint in certain circumstances
 - the further development of our significant decisions library to ensure access to previous decisions and to promote consistency
 - further strengthening of the quality assurance program in some areas such as decisions in specialist financial product areas.

AFCA decisions – further actions available for parties to a complaint

- 2.48 As noted above, a determination is the final stage of AFCA's complaints resolution process. This follows the investigation of a complaint and the review of the merits of a complaint through the initial case management process, and the preliminary assessment stage (if a complaint is not able to be resolved at an earlier stage by negotiation or conciliation).
- 2.49 However, once a determination has been issued, there are several options for further actions that can be taken in certain circumstances.

AFCA may correct an accidental error in a determination

- 2.50 Section A.15 of AFCA's Operational Guidelines provides that a determination is the final stage of the complaint process, regardless of whether it is accepted by a

complainant. AFCA has internal review processes to ensure the quality of determinations before they are finalised and issued to parties. Occasionally, however, a determination may contain an arithmetical or other accidental error. This is known as the 'slip rule'. Accordingly, section A.15 of the Operational Guidelines provides that AFCA may correct a determination if it contains:

- a clerical mistake
- an error arising from an accidental slip or omission
- a material miscalculation of figures or a material mistake in the description of any person, thing or matter
- a defect of form.

2.51 Further, this section of the Operational Guidelines provides that AFCA has review mechanisms that financial firms, industry bodies or consumer organisations can use to raise any significant concerns about the underlying approach taken by us in one or more determinations.

A party can take legal action or seek judicial review once a determination is made (in certain circumstances)

2.52 Rule A.15.1 provides that a party to a superannuation complaint may appeal a determination to the Federal Court on a question of law under section 1057 of the Corporations Act. Since 1 November 2018, fewer than five superannuation determinations have been appealed, out of 713 superannuation determinations made by AFCA.²¹

2.53 Rule A.15.3 provides that for non-superannuation complaints, a determination is final, and it is binding upon the parties if accepted by the complainant within 30 days of the complainant's receipt of the determination.

2.54 Rule A.15.4 provides that if a complainant does not accept a determination, the complainant is not bound by the determination and may bring an action in the courts or take any other available action against the Financial Firm.

2.55 The courts have made it clear that AFCA determinations are not judicially reviewable under administrative law. Further, under the tripartite AFCA contract the parties agree that a determination is final, and judicial review may not be broadly available for breach of contract.

2.56 However, the AFCA contract may nevertheless provide for a limited scope of external review. In *IEL v AFCA* [2020] QSC 74, the Supreme Court of Queensland indicated that the power of a court to review a decision may be said to derive from a term implied into the contract by operation of law or as a matter of fact from the necessity to give business efficacy to the contract. The court in this case noted this will only be possible where there has been unreasonableness in the *Wednesbury*²² sense.

²¹ Determinations issued between 1 November 2018 and 31 October 2020.

²² An unreasonable decision is one that takes into account irrelevant considerations, or does not take into account relevant considerations, or that is so unreasonable that no reasonable authority could ever have come to it: *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

A party may make a service complaint to AFCA

- 2.57 While a determination is a final decision, any party to a complaint that is not satisfied with the service that they have experienced in their dealing with AFCA can make a service complaint to AFCA.
- 2.58 Service complaints that are only about the merits or outcome of a complaint do not come within the scope of our service complaints and feedback process. However, AFCA's service complaint function provides an important accountability and review mechanism for how we are providing our service and meeting our obligations.
- 2.59 As part of AFCA's commitment to transparency and accountability, we publish information every six months about service complaints received and a detailed report is also published in AFCA's Annual Review. Service complaint reports are also provided to AFCA's Board and ASIC every quarter.
- 2.60 Feedback about our service is important as it assists us continually review and improve the service we provide. If a party is dissatisfied with the response from AFCA on a service complaint, they can refer their concerns to the Independent Assessor. The Independent Assessor independently considers the service complaint and provide an independent assessment on the issues raised.
- 2.61 Information about complaints received by the Independent Assessor is also published every six months, with a detailed report also published in AFCA's Annual Review.
- 2.62 In AFCA's first two years, 280 complaints about AFCA's service were lodged with the Independent Assessor, representing 0.2% of financial firm complaints received by AFCA during that time. 56 service complaints had a service issue substantiated by the Independent Assessor. AFCA has accepted all recommendations made by the Independent Assessor on substantiated service complaints.
- 2.63 Further detail on the role and activity of the Independent Assessor is provided below in section 5 of this submission, in response to the specific question raised in the review's Terms of Reference on the role of the Independent Assessor.

Is AFCA resolving complaints in an efficient and timely way?

- 2.64 Evidence shows that AFCA meets its obligations to resolve complaints in an efficient and timely way.
- 2.65 In considering this matter, it is useful to consider the regulatory requirement under RG 267 for AFCA to be efficient and effective.
- 2.66 RG 267.136 provides that to meet the requirements for efficiency and effectiveness over time, AFCA will need to take into account and respond to:
- changes in financial services and credit markets and/or consumer behaviour
 - law reform or other changes to regulatory settings or standards adopted in industry codes
 - recommendations made by the independent assessor or arising from an independent scheme review

- exceptional circumstances or events (for example, leading to significant increases in complaint numbers).
- 2.67 In determining whether AFCA is meeting the efficiency and effectiveness requirements, RG 267.136 provides that ASIC will consider factors such as:
- the timeliness of scheme decision making
 - adequacy of AFCA's jurisdiction and remedies over time²³
 - AFCA's measures to ensure financial firms comply with scheme procedures, timeframes and decisions²⁴
 - effectiveness of scheme communications and processes²⁵
 - feedback from stakeholders, including financial firm members²⁶
 - implementation of recommendations made by the independent assessor or from an independent review.²⁷
- 2.68 A key matter for parties to a complaint is understandably the *timeliness* of AFCA's complaints resolution process. Formal feedback provided by complainants on this objective is outlined below. AFCA has also received feedback from stakeholders on this objective during the course of meetings with individual firms and industry and consumer organisations.

Complaint closure timeframes in AFCA's first two years

- 2.69 The average time for closure of 49% of complaints during our first two years was 31 days. These complaints were closed at the Registration and Referral stage. The overall average time for a complaint to be resolved was 74 days, with an increase in the average time to resolve in AFCA's second year (from 64 days in the first year to 81 days in the second year).
- 2.70 60% of complaints closed by AFCA during our first two years were closed within 60 days of receipt. 92% of complaints were closed within 180 days of receipt.
- 2.71 While AFCA has continued to resolve complaints quickly and efficiently during its first two years, the average timeframe to resolve complaints has increased in AFCA's second year. During our second year, the COVID-19 pandemic had significant impacts on AFCA and scheme users. In these challenging circumstances, it was expected that some complaints would take longer to finalise.
- 2.72 AFCA understands that general expectations of service delivery are changing, including for dispute resolution. Parties understandably expect complaints to be handled in a timely and efficient manner.
- 2.73 AFCA has set time lines for progression of complaints through its process. We acknowledge that there is more that can be done to improve efficiency and address delays.

²³ See section 6 of this submission in relation to AFCA's proposals to enhance our jurisdiction.

²⁴ See section 3 of this submission in relation to AFCA's Systemic Issues/Serious Contraventions processes.

²⁵ See Appendix 2 of this submission – 'who we are and what we do'.

²⁶ See further detail in section 2 of this submission.

²⁷ See section 5 of this submission on the role of the Independent Assessor.

- 2.74 It is also our experience, particularly during the COVID-19 pandemic that many financial firms and consumers experienced difficulty meeting our timeframes. Parties to complaints sought and were granted extensions of time to provide documents or submissions. We have received feedback that AFCA should in some instances be more flexible about granting quite significant extensions of time to parties. This has occurred in our legacy and lookback jurisdictions, particularly with aged responsible lending complaints and complaints involving a consumer who is vulnerable (for example, a complainant who is living with a mental illness or a physical disability).
- 2.75 In our experience some financial firms have also struggled during the pandemic and after the Financial Services Royal Commission, to fully and adequately resource their dispute resolution, call centre and claims management functions. This has caused some delays and additional workload for AFCA.
- 2.76 There is clearly a need for balance and discretion.
- 2.77 It is therefore important to understand:
- the key factors influencing the time it takes to resolve complaints
 - actions that AFCA is taking to improve our capacity to resolve complaints more quickly, reduce queues of open complaints and to close the gap between the number of complaints made and resolved.

Increase in average time to close complaints

- 2.78 While AFCA has continued to resolve complaints quickly and efficiently during its first two years, as noted above, the average timeframe to resolve complaints has increased in AFCA's second year. This change is due to various factors, namely:
- the COVID-19 pandemic shifted operational settings for AFCA and financial firms in a number of areas, including a transition to full remote working for all staff and operations
 - AFCA has received a significant number of COVID-19 related complaints, with more than 9,000 received by 31 October 2020. AFCA rapidly adapted its operations to meet the challenges of significant complaint issues such as travel insurance claims, loan payment deferral schemes and early access to superannuation
 - initial complaint inflows also exceeded expected volumes in AFCA's first year
 - AFCA's legacy jurisdiction changed the complexity and mix of complaints to be handled.

Complaint numbers in AFCA's first year exceeded initial expectations

- 2.79 Complaint volumes received by AFCA in its first eight months of operation were 36% higher than predecessor scheme complaint volumes in 2017-18. Community awareness of AFCA and our increased jurisdiction (compared with predecessor schemes) provided greater opportunity for more consumers to seek resolution of a complaint through the scheme. Further, the flow-on impact from the Financial Services Royal Commission was also a contributing factor to a higher volume of cases.
- 2.80 AFCA also carried open complaint inventories of more than 10,000 complaints from the predecessor schemes of FOS and CIO (but not the SCT). It was a key priority for

AFCA to resolve these complaints, some of which were aged and complex, in AFCA's first year. This work program contributed to increased timeframes to progress and resolve complaints in some operational areas.

- 2.81 AFCA responded by increasing case management and decision maker resourcing, implementing process improvements and other efficiency initiatives. Through these areas of focus AFCA increased closure capacity across its operations by 19% in our second year, including increasing decision-making capacity by 43%. This largely kept pace with complaints received, despite a further 8% increase in complaints received in AFCA's second year and meeting the challenges of the COVID-19 pandemic.
- 2.82 However, these initiatives (particularly resourcing increases) take time for full effect when complaint volumes are increasing. This is due to the time required to:
- source and appoint suitable talent to join AFCA
 - support new employees and equip them to be both trained and productive in their role in a remote working environment
 - commence the work required to resolve and close complaints.

Legacy jurisdiction changed the complexity mix

- 2.83 Following the introduction of the legacy jurisdiction in July 2019, a change to the complexity mix of complaints received by AFCA also contributed to an increase in complaint-handling timeframes. This jurisdiction provided an opportunity for consumers and small businesses to lodge complaints with AFCA about the conduct of financial firms dating back to 1 January 2008. AFCA had a 12-month window to accept these complaints.
- 2.84 Due to the nature of the complaints raised within this legacy jurisdiction and the anticipated challenges that consumers and financial firms often faced in locating information, standard dispute resolution timeframes were increased. This ultimately extended the complaint handling timeframes for some legacy complaints received by AFCA. The legacy jurisdiction concluded on 30 June 2020, with 1,749 legacy complaints received. AFCA is currently in the process of finalising the remaining small number of open legacy complaints.

The COVID-19 pandemic complicated the complaint resolution landscape

- 2.85 As discussed, during AFCA's second year, operations across the financial services sector had to rapidly adjust to the pandemic and lockdowns experienced across the country. This created greater operational complexity at AFCA and across the industry, including:
- suddenly operating remotely and in a virtual workplace
 - challenges contacting some consumers and financial firms and using a range of complaint resolution techniques (such as telephone conciliation conferences)
 - gathering information remotely from some parties to complaints
 - material impacts to some financial firm operations as a result of offshore facilities closing and being subject to different restriction settings compared with Australia

- challenges conducting telephone conciliation conferences and leveraging other complaint resolution techniques.
- 2.86 The uncertainties of the pandemic, including any impact on complaint volumes, also prompted AFCA to pause recruitment activities during the second half of 2020, resulting in a temporary increase in vacant roles.
- 2.87 AFCA also received a significant number of COVID-19 related complaints during 2020, with more than 9,000 complaints received up to 31 October 2020.
- 2.88 Over this time, AFCA worked with consumers and financial firms to align our response expectations with pandemic limitations by:
- increasing post IDR refer-back timeframes (and IDR refer-back timeframes for financial difficulty complaints) from 21 to 30 days. This change took place from April to September 2020 and increased the refer-back period by 9 days for complaints lodged with AFCA during this time
 - increasing information request timeframes and extension request approvals to provide greater support to parties operating within changed circumstances due to the pandemic.

Further steps being taken by AFCA

- 2.89 We continue to increase our complaint resolution capacity so that our operations are regaining ground lost due to the above factors. We are reducing queues of open complaints and reducing timeframes to resolve complaints by:
- supporting and uplifting employee capabilities
 - enhancing our workforce planning capabilities
 - accelerating sector engagement practices
 - continuing to enhance quality and consistency in complaint handling
 - renewing focus on proven resolution techniques, such as conciliations.

Supporting and uplifting employee capabilities

- 2.90 Due to the significant increase in new employees at AFCA during the last 12-18 months, considerable focus has been given to capability uplift techniques, such as:
- targeted recruitment programs to attract high quality individuals who have experience and skills to deal with complex disputes
 - developing and delivering training to provide technical expertise
 - identifying complaints where a case worker may require assistance in forming a view more quickly
 - introducing Technical Quality Support Managers – specialist roles to provide quality assurance reviews of written work, guidance in forming a view on a complaint and assistance with AFCA Approaches
 - developing tools to assist case workers to identify issues and articulate why a decision is fair

- training of case management staff in mediation skills so they can perform their own telephone conciliations
- greater cross-collaboration between teams to identify trends and training opportunities
- development of an enhanced quality assurance framework to ensure AFCA case reviews are targeted to our higher risk activities. This will allow our people to receive targeted quality assurance reviews, resulting in a reduction of time to resolution
- development of specialist teams to support expertise in particular areas with greater access to specialist decision makers
- a focus on grouping complaints with a single financial firm to case worker teams to support learning and increase efficiencies
- creating a sessional ombudsman pool for greater agility to handle complaint spikes, particularly in areas requiring specialist expertise like superannuation.

Enhancing workforce planning capability

2.91 We have enhanced our workforce planning capability to achieve greater resourcing agility across AFCA operations by:

- introducing a workforce planning team
- developing workforce planning tools and dashboards to assist leaders with their planning decisions
- stratifying work waiting and work-in-process measures to support leaders to better identify future needs and opportunities with their workforce planning
- recruitment planning with a fixed calendar intake timetable.

Accelerating sector engagement practices

2.92 AFCA increased its sector engagement activities in its second year to gain and provide insights into current and anticipated complaint patterns. This proved to be particularly helpful during the early months of the pandemic when operational uncertainty was at its highest. Such engagement activity supported the efficient handling of:

- COVID-19 travel insurance related complaints through the introduction of an Approach to give clarity to consumers and financial firms on how we would handle these complaints
- proactive case management practices for complaints about superannuation trustee delays in responding to 'early release of superannuation' requests. Rather than supporting the pooling of large numbers of trustee complaints for a 90-day IDR period, case management teams engaged directly with consumers and trustees to finalise and close complaints when early release payments were finalised
- complaints about general insurance claim handling delays due to challenges faced by repairers in accessing properties during lockdown periods, or sourcing materials due to supply constraints

- improvements of AFCA's dispute resolution guides to assist financial firms to provide appropriate responses on scam complaints.

Improving quality and consistency of our complaint handling conversations

2.93 We have identified that most parties to a complaint have a better experience and are more satisfied with our process if there is targeted and regular phone contact during the course of a complaint. Accordingly, we are supporting coaching and training for, and monitoring of effective phone conversations for complaints.

Increasing conciliations

2.94 We have a current focus on increasing telephone conciliations, which improve customer satisfaction and efficiency of outcome through:

- understanding that conciliations help the parties to feel heard and may help achieve a negotiated mutually beneficial outcome more efficiently
- a focus on reduction in drop-out rates of conciliations, with check in with parties before a conciliation is booked
- understanding that even those complaints that do not resolve during a conciliation, are likely to resolve more quickly in the following complaint stages.

Feedback from complainants and members

AFCA's complainant and member surveys

- 2.95 The Terms of Reference for the review state that, in considering whether AFCA has been effective in resolving complaints in a way that is fair, efficient, timely and independent, the review will take account of feedback provided by consumers and small businesses and by financial firms.
- 2.96 AFCA conducts surveys of complainants and AFCA members on our performance. This helps us to understand what is important for the users of the scheme and to identify areas for further development and improvement in delivering the scheme.
- 2.97 Once a complaint is closed, every complainant is asked to complete a survey on their experience of the complaint resolution process. An independent research firm collates and analyses the survey results and it prepares quarterly reports for AFCA. This enables AFCA to track our performance over time, and to identify key customer service indicators that are improving or deteriorating. The summary provided below is taken from AFCA's complainant satisfaction survey results covering the two-year period from 1 November 2018 to 31 October 2020.
- 2.98 AFCA has also commissioned another independent research firm to conduct an annual member survey. The most recent survey was conducted between November and December 2020. The key results of the 2020 survey are outlined below.

AFCA's complainant survey results: 1 November 2018 to 31 October 2020

- 2.99 The complainant feedback survey tracks the three main avenues of a complainant journey, namely:
- registration complaints

- closed complaints
 - discontinued complaints.
- 2.100 The survey results encompass the full spectrum of complaints, including complaints resolved at early stages, through to complaints that have required a thorough investigation and determination. The survey also covers complainants who have received favourable, partially favourable, and unfavourable outcomes (from the complainant's point of view). In this regard, it is important to note that in AFCA's first two years, the vast majority of AFCA's complaints were resolved by agreement between the parties.
- 2.101 The overall results for the five key measures are positive for the two-year period and are trending upwards.
- 2.102 For the two-year period, the overall results for the key satisfaction measures were:
- overall satisfaction with AFCA's service: **73%**
 - ease of dealing satisfaction: **73%**
 - complaint handling satisfaction: **73%**
 - complaint outcome satisfaction: **68%**
 - net promoter score: **+ 44**
- 2.103 In the closed complaint survey, complainants are asked to select from a list of options where they believe AFCA could most improve complaint handling. Just over a third of complainants do not find any fault with AFCA's handling of their complaint.
- 2.104 For those complainants who did identify areas for improvement, three key areas have remained the most commonly selected over time and across outcomes. These areas are:
- timeliness of the process
 - considering all the evidence
 - understanding personal circumstances.
- 2.105 These areas form a key focus in AFCA's quality framework and current service initiatives.

AFCA's member survey results: survey conducted in November-December 2020

- 2.106 AFCA's survey of AFCA members was principally concerned with understanding how well AFCA is meeting its member services goal to 'provide a valued member experience that helps members to improve internal practices to avoid or resolve disputes.'
- 2.107 76% of members who responded to the survey were satisfied overall with AFCA's member services.
- 2.108 The survey results showed that the needs of members are understandably focused primarily on fairness, consistency, independence and transparency. Specifically, the most valued services provided by AFCA to members help members to process

complaints and understand and be consistent with AFCA's approach to resolving complaints.

2.109 AFCA's member survey identified several areas for further improvements and enhancements in the service AFCA provides its members and the survey results have informed AFCA's member services strategy. Key areas identified in the survey were:

- while AFCA's member services are viewed positively, AFCA's general communications and consultations on policy and process changes since the 2019 survey conducted by AFCA will be reviewed
- a small decrease (since 2019) in members' satisfaction in relation to the perceived fairness of complaint outcomes.

How is AFCA responding to feedback from complainants and members?

2.110 The results of these surveys directly inform the development of AFCA's strategy, our quality assurance framework, our work processes and the design of our future projects to further enhance and support the fairness, timeliness and efficiency of the scheme.

2.111 AFCA acknowledges that the results of these surveys show that we must continue to develop and adapt how we deliver our service and enhance the experience for all users.

2.112 As noted above and outlined in other sections of this submission, various activities are underway to support our fairness jurisdiction and the delivery of timely and consistent outcomes for complaints.

3 Specific questions concerning how AFCA meets its statutory objectives

Is AFCA's dispute resolution approach and capability producing consistent, predictable and quality outcomes?

AFCA's dispute resolution approach and capability are producing consistent, predictable and quality outcomes.

AFCA firmly believes that resolving complaints in a way that is fair, independent, timely and efficient²⁸ produces quality outcomes that are consistent and predictable.

The consistency and quality of outcomes are being further supported by a range of activities underway at AFCA.

Transformational projects are being delivered to unlock the power of our data and use technology to streamline and simplify our processes.

- 3.1 AFCA firmly believes that resolving complaints in a way that is fair, independent, timely and efficient produces quality outcomes that are consistent and predictable.
- 3.2 Section 2 above outlines how AFCA is delivering outcomes that are fair and independent. Section 2 also outlines how complaints have been resolved by AFCA efficiently and in a timely way during its first two years, while acknowledging the need to continue our focus on improving some complaint resolution timeframes, particularly for some complaints that progress to determination.
- 3.3 Feedback we have received from independent reviews of determinations and complainant and member surveys is also explained in section 2. AFCA is using this information and our scheme data to support the ongoing development of our processes and service, so we can continue to provide consistent, predictable and quality outcomes in a more timely and efficient way.
- 3.4 As noted above, the fairness, consistency and quality of complaints outcomes are supported by:
 - AFCA's Rules and Operational Guidelines
 - a wide range of published complaint handling Approaches
 - the publication of determinations on our website
 - information and guidance about AFCA's processes and procedures that are published on AFAC's website and provided to complaint parties
 - member and consumer forums and meetings hosted by AFCA to discuss complaint issues and Approaches.
- 3.5 Specific developments and activities currently underway (some of which are outlined above) to further support *consistent, predictable and quality outcomes* include:
 - fairness jurisdiction training across the organisation

²⁸ As outlined in detail in section 2 of this submission.

- a new Apprehended Bias policy
- the development of an Engagement Charter for parties to a complaint
- a comprehensive review of AFCA's Approach documents and fact sheets
- accelerated sector engagement activities to gain insights into current and anticipated complaint patterns
- development of staff subject expertise and specialist teams to address certain matters (eg. travel insurance complaints, and business interruption insurance complaints linked to COVID-19)
- targeted teams with expertise to deal with more complex matters (eg. small business banking complaints)
- specific staff capability uplift and training – including further negotiation and dispute resolution training
- an improved Quality Assurance (QA) program and specialist QA managers
- increased collaboration between case managers and decision makers to support the quality of outcomes at the case management stage
- an increased focus on telephone conciliations – given the demonstrated benefits of this process for resolving complaints
- improving the quality of our communications (eg. phone conversations) with complainants and members
- technical improvements to our current case management system (eg. automation of simple filing tasks)
- targeted workforce planning and recruitment across the financial services, and dispute resolution sectors
- the development of a sessional ombudsman pool to assist with longer term and sustainable management of spikes in complaint numbers and queues
- a number of proposed services to develop a valued member experience, including ongoing enhancements to the Datacube and our member access portal (including online benchmarking and dashboards), education resources and professional development modules.

3.6 The next few years will be a critical time for AFCA as we design, deliver and operationalise projects that will use data and technology to transform how we deliver our service. Key strategic initiatives that we have recently commenced include the following.

- **Project Panorama** (data and analytics) has been established to use modern analysis, advanced data science and automated techniques to derive valuable insights to share with our members and other stakeholders to influence behavioural changes and drive reform.
- **Project Fusion** is our IT transformation framework that will drive our digital transformation, including the replacement of our core case management system and online portals. This project will support streamlined processes, self-service capabilities and collaborative platforms for the resolution of complaints.

Are AFCA's processes for the identification and appropriate response to systemic issues arising from complaints effective?

In AFCA's first two years, we assessed 2,287 possible systemic issues and 107 possible serious contraventions of the law. 508 detailed investigations have been conducted into possible systemic issues and serious contraventions of the law.

193 definite systemic issues investigations and 40 definite serious contraventions were dealt with by AFCA.²⁹

More than \$202 million has been refunded to consumers and small businesses due to AFCA's work in this area. Over 3.9 million consumers were identified by financial firms as being affected by systemic issues investigated by AFCA.

AFCA has worked closely with ASIC and other regulators on our identification, investigation, remediation and reporting of possible systemic issues and serious contraventions.

AFCA has commenced work with an external consultant to transform its systemic issues function with a greater focus on data and trends analysis to better and more proactively inform real-time identification, investigation, remediation and reporting of systemic issues activity to regulators.

Systemic issues and serious contraventions - improving industry practice and supporting remediation

- 3.7 AFCA is required under the Corporations Act and RG 267 to identify, refer and report systemic issues. Under RG 267.198, a 'systemic issue' means an issue that may:
- affect more than one complainant
 - involve many complaints that are similar in nature
 - affect all current or potential complainants at a particular firm
 - affect more than one firm.
- 3.8 We may identify possible systemic issues through our complaint work or by referral from a party or stakeholder. We undertake an investigation of those issues with the financial firm, before forming a view as to whether or not the issue is a definite systemic issue. Some matters are not systemic, but we may take the opportunity to discuss how the financial firm can improve its practice to reduce the risk of future complaints occurring.
- 3.9 We provide regular reports to regulators about our systemic issues work, including trends, patterns and other aggregated or de-identified data.
- 3.10 We report definite systemic issues as appropriate to ASIC, APRA or the ATO. When doing so, we identify the financial firm to the regulator. Prior to reporting definite systemic issues reported to regulators, the AFCA systemic issues team always seeks to work collaboratively with financial firms to resolve such issues. This often involves

²⁹ Whilst it is ultimately up to the relevant regulator to assess whether conduct we report as a serious contravention of law is a definite serious contravention, this terminology reflects AFCA's assessment that relevant conduct definitely appears to be a possible serious contravention of the law and takes into account relevant regulatory guidance including ASIC RG 267.

financial firms implementing changes to their systems and processes to avoid the recurrence of the issues identified. In doing so, our systemic issues work helps us achieve our vision of improving industry practice and minimising financial complaints.

- 3.11 The Corporations Act also requires AFCA to give particulars of a contravention, breach, refusal or failure to APRA, ASIC or the ATO, as appropriate, if it becomes aware, in connection with a complaint, that:
- a serious contravention of any law may have occurred
 - a contravention of the governing rules of a regulated superannuation fund or an approved deposit fund may have occurred
 - a breach of the terms and conditions relating to an annuity policy, a life policy or a retirement savings account may have occurred
 - a party to the complaint may have refused or failed to give effect to a determination made by AFCA.
- 3.12 AFCA is not a regulator. The conduct regulator of the financial services industry is ASIC and the prudential regulator is APRA. The primary purpose of AFCA's reporting requirements is to ensure that information is provided to regulators so that they may consider whether regulatory action is necessary.
- 3.13 Specific case studies of systemic issues investigations undertaken by AFCA are set out in our Annual Reviews for 2018-2019 and 2019-2020. These case studies illustrate the vital importance of our work in this area and the potential for a financial firm to provide fair remediation to many customers as a result of AFCA's identification of a possible systemic issue.
- 3.14 AFCA has worked closely with ASIC and other regulators in relation to systemic issues and serious contraventions identified. It seeks to ensure that systemic issues investigations are not duplicated and that our function and reporting are aligned with, and cognisant of regulatory priorities.
- 3.15 AFCA is currently reviewing the resourcing and operations of the systemic issues function. It hopes to transform this function with a greater focus on data and trends analysis to better and more proactively inform real time identification, investigation, remediation and reporting of systemic issue activity. In this regard, AFCA has commissioned an external consultant to review our systemic issues function and process and consider how we can better meet our statutory and regulatory objectives.

AFCA's role in remediation programs

- 3.16 AFCA also plays a very important role as an independent reviewer of remediation program outcomes in addition to the remediation it initiates during its systemic issues work. AFCA has recently been liaising with ASIC on its current consultation on consumer remediation³⁰ and the role currently played by AFCA. We will continue to engage with ASIC and other stakeholders as this work progresses.

³⁰ ASIC released a Consultation Paper on 3 December 2020: *Consultation Paper 335 Consumer Remediation Update to RG 256*, noting that ASIC is 'currently monitoring over 100 remediations that could see the return of at least another \$3.55 billion in total to over 3.6 million consumers upon finalisation.'

AFCA also plays a key consulting role in the establishment of some remediation programs

- 3.17 Some financial firms have historically sought guidance from AFCA about the methodology, framework and communications they will adopt when establishing a remediation program by themselves or following regulatory intervention. We welcome these discussions. We are happy to share our insights and understand the nature size and scope of the program and ensure the outcomes of remediation are aligned to the AFCA approach.
- 3.18 This engagement also ensures that, amongst other things, AFCA:
- understands the compensation methodology to be applied by the firm
 - is informed about, and is ready for, any complaints which might be lodged with AFCA about a remediation program
 - has sufficient resources to deal with any complaints arising from any remediation program
 - facilitates the effective interface between the financial firm and AFCA in handling these complaints
 - can co-ordinate communications for our case workers when responding to consumer queries about a program
 - can be satisfied consumers will receive effective and transparent communication about a consumer's right to lodge a complaint with AFCA if they are not satisfied with a remediation outcome or process.

Do AFCA's funding and fee structures impact competition? Are there enhancements to the funding model that should be considered by AFCA to alleviate any impacts on competition while balancing the need for a sustainable fee-for-service model?

AFCA's current funding model and fee structure have served the scheme well during the establishment phase. However, it is now timely that the funding model and fee structure are reviewed to ensure they are fit for purpose.

AFCA is undertaking a funding review in 2021 to establish a robust, flexible and sustainable long-term funding model. AFCA will ensure the funding model developed is commercial, proportionate and equitable across its member base. AFCA will take into account feedback provided by stakeholders to the Independent Review and will carefully consider and incorporate any findings from the Independent Review as part of its funding model considerations.

AFCA is not aware of any reliable evidence or information showing that AFCA's current funding model impacts competition in any area of financial services. The vast majority of AFCA's members pay a minimum annual membership levy only.

AFCA has identified that fees incurred for handling some very low value complaints, such as credit reporting complaints, can be higher than the value of the claim itself or the service provided. This leads to some distorted resolution practice which can be exploited by fee for service representatives who pursue their pecuniary interests ahead of their

clients' best interests. AFCA has also taken into account feedback from some members that there are opportunities to improve processes involving such low value complaints.

AFCA is considering options to further streamline our triage processes and more quickly and efficiently deal with such complaints, at a lower complaint fee cost for AFCA members.

AFCA will also be proposing amendments to our Rules, so we can more effectively deal with recurring inappropriate conduct by some fee-for-service representatives.

The Ramsay Review: EDR scheme funding principles and features

- 3.19 AFCA operates as a not-for-profit service on a user pays, cost recovery basis. The vast majority of AFCA's members pay a minimum membership annual levy and no other fees to AFCA. We acknowledge, however, that the fee for some lower value complaints that progress to Determination may create cost challenges for some of AFCA's smaller members, where the value of the claim is less than the fee charged.
- 3.20 This is not, however, an issue relating purely to AFCA's user pays based complaint fees, given that the cost of matters being pursued in an alternative jurisdiction to AFCA (such as a court), would in most instances be higher than AFCA's current complaint fees.
- 3.21 In considering AFCA's funding model, it is useful to consider the funding principles and features for AFCA, that were outlined in the 2017 Final Report of the Ramsay Review.
- 3.22 The Ramsay Review had regard to efficiency, equity, complexity, transparency, accountability, comparability of outcomes and regulatory costs. In outlining the principle of efficiency, the Ramsay Review noted that a complaints resolution framework requires (among other things) resources (funding and skilled staff) to enable disputes to be resolved quickly and with a minimum of resources.
- 3.23 The Ramsay Review supported and endorsed the governance of industry ombudsman schemes by terms of reference approved by a board (rather than statute) - providing schemes with the flexibility to change processes and funding arrangements without requiring changes to legislation or appropriation through the budget process.
- 3.24 The Ramsay Review noted that these factors have 'provided schemes with the administrative flexibility and responsiveness so that they can move quickly when circumstances require it; for example, by raising funds for additional staff if dispute numbers rise unexpectedly.'
- 3.25 In recommending the establishment of a single EDR body, the Ramsay Review recommended that it should be:
- free for consumers
 - funded by industry through a transparent process
 - subject to enhanced accountability, which would include ensuring it has sufficient funding and flexible processes to allow it to deal with unforeseen events, such as an increase in disputes following a financial crisis or natural disaster

- providing an appropriate level of financial transparency to ensure it remains accountable to users and the wider public
 - resourced for community engagement, including outreach activities to raise awareness amongst consumers (in particular vulnerable consumers) and financial firms.
- 3.26 The Ramsay Review considered industry funding to be a strength because, when properly designed, the funding mechanism creates incentives for firms to resolve disputes at the earliest possible stage.
- 3.27 The Ramsay Review also said that the scheme’s accountability to its users should be strengthened with:
- a stronger requirement for the single EDR body to demonstrate that it has adequate funding and flexibility to respond to unanticipated events
 - improved financial transparency so that users can understand how funding is collected and used.

AFCA’s funding model – an overview

- 3.28 AFCA is focused on providing an efficient, cost effective service for its members. AFCA’s funding model is underpinned by the following core principles:

Funding principles

- 1 AFCA’s funding model must ensure it can consistently raise the revenue necessary to meet the costs of its effective operation, and to cover any ongoing enhancements and investment required to meet the external dispute resolution benchmarks and the scheme requirements in accordance with the AFCA Act and ASIC’s Regulatory Guide 267.
- 2 The model is focused on providing a fair allocation of annual membership levies to AFCA members according to their size, incorporates incentives to resolve complaints early and, as appropriate, is based on a user-pays approach.
- 3 The model seeks to minimise direct sectoral cross-subsidisation to the extent practicable.
- 4 The model is aimed at supporting an efficient and reliable system for the collection of revenue.

Key AFCA funding/fee information

- 3.29 Relevant key information about AFCA’s current funding profile includes the following:
- More than 85% of AFCA’s licensee members only pay a minimum annual membership levy of less than \$400. The minimum AFCA membership levy for 2020-21 is \$370. This is less than the minimum membership levy of one of AFCA’s predecessor schemes (the Credit and Investments Ombudsman) and is at a comparable level to the minimum membership levy for the previous Financial Ombudsman Service scheme.

- AFCA’s credit representative members, of which there are currently approximately 34,000, only pay an annual membership fee of \$65.
 - Each year, around 80% of AFCA licensee members do not receive a complaint against them, and do not pay any fees to AFCA apart from their annual membership levy.
 - Since AFCA started in November 2018, almost 50% of all complaints lodged with AFCA have been resolved at the earliest stage of AFCA’s complaint process, incurring a complaint fee of less than \$100 for the member involved.
 - In 2019-20, the average complaint fee was \$971 for the more than 78,000 complaints finalised by AFCA, including more than 5,000 complaints that were closed at decision stage.
- 3.30 In July 2018, AFCA consulted broadly with AFCA members and other stakeholders on its proposed interim funding model to be implemented from 1 November 2018. AFCA’s current interim funding model is a hybrid model, based on aspects of the CIO and FOS scheme funding arrangements and the previous APRA SCT levy model for superannuation trustees.
- 3.31 AFCA’s interim funding model was implemented to meet:
- the funding and accountability principles set out in the Ramsay Review for a single EDR scheme
 - the funding matters and design principles set out in the Federal Government’s 2017 Consultation Paper on the establishment of AFCA
 - AFCA’s operational and organisational requirements under section 1051 of the Corporations Act
 - EDR benchmarks under ASIC’s RG 267.
- 3.32 The interim funding model was put in place for the first three years of AFCA’s operations while AFCA established an evidence base of complaint volumes and complexity in its expanded jurisdiction. Industry sectors have been broadly supportive of this approach, while noting that the future model should minimise any cross-subsidisation between or within sectors.
- 3.33 AFCA’s current interim funding model has three elements:
- **a membership levy:** the annual membership levy is the fee all financial firms pay to be a member of AFCA. The amount an individual member pays each year is determined by a range of factors, including the relative size of the member’s business compared with other AFCA members
 - **a user charge:** the AFCA user charge is a fixed annual amount which is calculated and proportionately allocated to members annually, based on a range of factors. Members who have only one, or no complaints closed in the relevant 12-month period do not incur a user charge. This approach rewards members who increase their IDR resolution rates and reduce the need for their customers to use AFCA. Only around 4% of AFCA’s licensee members pay a user charge amount

- **complaint fees:** the complaint fee for a particular complaint is based on the stage in the process at which a complaint is resolved and the complexity of a complaint if it progresses beyond the initial investigation stage.
- 3.34 For superannuation trustees, the interim funding model provides for an annual levy based on the APRA levy methodology previously applied for SCT funding.

Current funding profile and key areas of focus

- 3.35 The vast majority of complaints that AFCA has received in its first two years have been resolved at an early stage and by agreement between the parties.
- 3.36 While AFCA already triages complaints into fast track, standard and complex streams, we recognise that there are some complaints that may benefit from a more streamlined, lower cost and earlier resolution approach. These are low value complaints (for example, complaints about credit reports) that may involve fee-for-service representatives, and that do not require extensive investigation.
- 3.37 For example, we have experienced a significant increase in debt management firms lodging complaints with AFCA on behalf of consumers, particularly in relation to credit reporting issues, in circumstances where the consumer should be able to resolve the matter themselves. In our experience some of these matters are aggressively and unnecessarily pursued by the debt management firm, which can result in higher complaint costs for AFCA members.
- 3.38 As part of AFCA's program of initiatives in 2021, we have commenced a project to further streamline our approach to triage and develop options for a lower cost, and more efficient process for dealing with such complaints. For further details on this matter, please refer to section 6 below in this submission. This will also be considered as part of AFCA's funding model review.

Insolvent financial firm costs

- 3.39 Since AFCA commenced in November 2018, there has been a significant number of complaints received by AFCA against financial firms that have subsequently become insolvent. This has been a key funding challenge for AFCA, as complaint fees for complaints against insolvent firms are not paid, and a Compensation Scheme of Last Resort has not yet been established. Since AFCA's inception, more than \$8 million in accrued complaint fees and fees currently projected for open complaints, have arisen in relation to insolvent financial firm complaints.³¹
- 3.40 AFCA has taken steps to reduce the cost of insolvent financial firm complaints, and it has been absorbing this unpaid complaint fee cost to minimise or prevent the cost being passed on to other AFCA members.

Funding model profile

- 3.41 AFCA's current funding model is highly variable, with around 70% of AFCA's revenue based on complaint fees and volumes, while the majority of AFCA's costs are fixed

³¹ This includes complaint fees accrued to date on closed and open insolvent financial firm complaints received by AFCA since 1 November 2018 (\$2.1m), along with projected complaint fees for current open insolvent financial firm complaints if they subsequently progress to determination. It does not include unpaid fees accrued on predecessor scheme complaints involving insolvent financial firms that have been dealt with by AFCA since 1 November 2018.

costs. Ensuring AFCA has a sustainable and more stable funding model is an important part of AFCA's funding model review.

AFCA's 2021 funding review

- 3.42 AFCA is undertaking a funding review in 2021, in order to establish a robust, flexible and sustainable long-term funding model.
- 3.43 This funding review will carry forward the funding and design principles of the Ramsay Review, and it will seek to provide optimal funding outcomes for AFCA's members.
- 3.44 The key objective of the funding review will be to design a new, long-term sustainable funding model that will ensure that AFCA can consistently raise the revenue necessary to cover the costs of its service, and while also taking into account the variable nature of complaint volumes and types. As part of the funding review, AFCA will ensure the funding model developed is commercial, proportionate and equitable across its member base.
- 3.45 AFCA will take into account feedback provided by stakeholders to the Independent Review and will carefully consider any findings from the Independent Review as part of its funding model considerations. AFCA will be engaging with its members and other stakeholders during the course of its funding model review.

4 Monetary limits for primary production business complaints – do they remain adequate?

AFCA's data shows that the monetary limits for claims and remedies for complaints made by primary production businesses are adequate and do not currently need to be changed.

Primary production business complaints data

- 4.1 In accordance with the review requirements of the AFCA Act, the Terms of Reference ask the question: do the monetary limits on claims that may be made to, and remedies that may be determined by, AFCA in relation to disputes about credit facilities provided to primary production businesses remain adequate?
- 4.2 Since inception, AFCA has accepted credit facility complaints from primary production businesses if the compensation amount claimed does not exceed \$2 million and the credit facility does not exceed \$5 million. From 1 January 2021, these amounts have increased respectively to \$2.17 million and \$5.425 million through indexation required under AFCA's Rules.³²
- 4.3 AFCA has reviewed complaints made by primary production businesses received up to 31 October 2020. In our first two years of operation, we received 126 primary production business complaints across all product lines (banking and finance, insurance, investments and superannuation).
- 4.4 In AFCA's first two years, 99 complaints were received in relation to a primary production credit facility. Of these complaints, only four were closed because the credit facility exceeded \$5 million and the complaint was therefore outside our jurisdiction. No complaints were closed as being outside of AFCA's jurisdiction because the compensation claimed exceeded \$2 million.
- 4.5 For primary production business complaints closed with an award of compensation, 95% of complainants were awarded less than \$500,000.³³ Only 5% were awarded between \$500,000 and \$1 million. No complainant was awarded compensation between \$1 million and \$2 million.
- 4.6 AFCA's data shows that the monetary limits for claims and remedies for these complaints are adequate and do not need to be changed.

³² Rule D.4.

³³ This data reflects the compensation amount limit of \$500,000 (up to 31 December 2020) for all non-superannuation claims. The compensation limit of \$2 million is only available for primary producer loans/credit facilities.

5 Internal review mechanism

The Independent Assessor deals with complaints about AFCA's service. The Independent Assessor is operating effectively and with appropriate remit and scope.

We do not believe that a proposal that the Independent Assessor conducts reviews of the substance or merits of determinations will add sufficient value, in circumstances where there are already internal and external rights of appeal and review from AFCA's general and superannuation jurisdictions.

AFCA's complaints process already provides for an internal mechanism 'where the substance of its decision can be reviewed'. The substance and merits of a complaint are comprehensively assessed at the preliminary assessment stage. A party to a complaint can seek a final review of the merits of a complaint by a decision maker. A further internal merits review stage is neither necessary nor required.

AFCA is not a court. It is not bound by rules of evidence and it does not determine the legal rights of the parties. AFCA is designed to be an informal and low-cost complaint resolution scheme. Finality and certainty of outcomes are vital for parties' trust and confidence in the scheme.

Is the scope, remit and operation of the Independent Assessor function appropriate and effective?

- 5.1 AFCA is accountable and committed to external scrutiny of its services standards.
- 5.2 Our website provides a full explanation of the arrangements for reviews by the [Independent Assessor](#) of complaints made about the service AFCA provides. Key points are that the Independent Assessor:
 - works independently of AFCA's complaints process and considers service complaints on a case-by-case basis
 - is appointed by AFCA's Board in accordance with clause 11.4 of AFCA's Constitution, and the role is governed by Terms of Reference set by the Board
 - reports quarterly to AFCA's Board and liaises with AFCA employees and ASIC
 - can make recommendations to AFCA in response to individual service complaints and for business improvements for AFCA under clause 3 of the Independent Assessor's Terms of Reference.
- 5.3 The Terms of Reference for this review note that the Independent Assessor can review complaints about the standard of service provided by AFCA in resolving complaints - but does not have the power to review the merits or substance of an AFCA decision. The Terms of Reference ask whether the scope, remit and operation of AFCA's Independent Assessor are appropriate and effective.
- 5.4 In addressing this question, it is useful to note that the Independent Assessor has been established in accordance with Recommendations 2 and 6 of the Ramsay

Review.³⁴ Recommendation 2, when addressing accountability requirements, stated that the EDR scheme should have an 'independent assessor' to review how complaints are handled but not to review the outcome of individual complaints.

- 5.5 AFCA's Independent Assessor function is largely similar, both in terms of function and jurisdiction, to the Independent Assessor of the Financial Ombudsman Service in the United Kingdom, which has been a long-standing, effective accountability mechanism for this scheme. AFCA is not aware of any other industry ombudsman scheme in Australia that currently has a similar Independent Assessor function in place.
- 5.6 AFCA Rule A.16 provides for complaints about AFCA's service. Any user of AFCA's service may complain to us about the service we provide. If a party making such a complaint is dissatisfied with our response, they may refer their concerns to the Independent Assessor within the timeframe specified in the Independent Assessor's Terms of Reference.
- 5.7 If the Independent Assessor finds that AFCA has not provided an appropriate standard of complaint handling service, he or she must recommend in writing to AFCA the action that AFCA should take. This may include compensation if an unusual degree of distress or inconvenience has been suffered by the person who escalated the complaint. Compensation is capped at the maximum amount that may be awarded to a complainant under AFCA's Rules for non-financial loss.

Reports by the Independent Assessor

- 5.8 [AFCA's Annual Reviews](#) include the annual reports of the Independent Assessor. These reports provide information about accepted and substantiated service complaints and the recommendations for action by AFCA.
- 5.9 In 2019-20, the Office of the Independent Assessor received 163 complaints about the handling of complaints by AFCA and its predecessor schemes, representing 0.2% of all financial firm complaints lodged with AFCA in 2019-20. The office accepted complaints from individuals, small businesses and financial firms. Complaints received raised a wide range of service-related issues, including:
- process or staff being biased
 - delays
 - failure to take account of relevant information
 - breach of procedural fairness
 - discourtesy.
- 5.10 The Independent Assessor assessed 60 complaints. Just under half of these assessments found some element of a complaint was substantiated. In 2019-20, the Independent Assessor recommended that AFCA apologise to 29 complainants for service failings, many of which related to delays or communication failings, and pay a total of \$10,050 non-financial loss compensation. AFCA accepted and implemented all recommendations.

³⁴ See the [Final Report](#) of the Ramsay Review, pages 14 and 16.

- 5.11 The Independent Assessor has also made a number of business improvement recommendations to AFCA, all of which have been accepted.

AFCA's position on the role of the Independent Assessor

- 5.12 The role of the AFCA Independent Assessor was established as part of AFCA's inception on 1 November 2018. All recommendations made by the Independent Assessor have been accepted and have assisted AFCA to improve our services for all users.
- 5.13 AFCA is not aware of any compelling reason to depart from the recommendations of the Ramsay Review on the establishment, purpose and scope of this role to handle complaints about AFCA.
- 5.14 Decisions in relation to service complaints about AFCA, and decisions on the merits of a complaint about a financial firm, are very distinct processes, requiring different knowledge, training, skills and experience for those involved. The distinction between the handling of service complaints about a dispute resolution service and the resolution of consumer complaints by that service is a well understood framework in consumer dispute resolution schemes.³⁵
- 5.15 When a party to a complaint does not agree with a preliminary assessment made by AFCA, they can already seek an independent review of the complaint by an AFCA decision maker. Each year AFCA's specialist decision makers and panel members make thousands of independent decisions on matters requiring technical and legal knowledge and skills, and in relation to a wide range of financial products.
- 5.16 AFCA is not a court of law, it is not bound by the rules of evidence and it cannot compel the provision of testimony or documents. AFCA does not determine the legal rights of the parties to a complaint. AFCA is designed to be an informal and low-cost complaints resolution scheme. Finality and certainty of outcomes are vital for parties' trust and confidence in the scheme. Accordingly, it is unrealistic and unnecessary to propose that the Independent Assessor could conduct reviews of the substance or merits of determinations. The relevant test that would be applied is the *Wednesbury* test of reasonableness.
- 5.17 In addition, a further stage for merits reviews of determinations would substantially increase the cost of the service and the length of time it takes to resolve a complaint. We are concerned that the efficiency and accessibility of the scheme are not undermined by an additional appeal right for parties.
- 5.18 It is AFCA's position that the role of the Independent Assessor, in determining complaints about our service, should remain separate from the role of our decision makers in making a final decision on the merits of a complaint about a financial firm. Accordingly, the requirement that the Independent Assessor does not have power to consider the merits or substantive outcome of a complaint should remain.

³⁵ For example, the NSW Civil and Administrative Tribunal (NCAT) provides an opportunity for a party to make a complaint about the conduct of a Tribunal Member or Registry staff, or about NCAT's services or processes. NCAT states that the making of a complaint cannot change a Tribunal decision: <https://ncat.nsw.gov.au/ncat/about-ncat/feedback-and-complaints.html>

Is there a need for AFCA to have an internal mechanism where the substance of its decision can be reviewed?

5.19 The Terms of Reference ask:

- is there a need for AFCA to have an internal mechanism where the substance of its decision can be reviewed?
- how should any such mechanism operate to ensure that consumers and small businesses have access to timely decisions by AFCA?

5.20 The short answer to these questions is that AFCA has an internal mechanism where the substance of its decision or assessment of a complaint's merits can be reviewed. This is the mechanism enabling a complainant or financial firm to seek a final merits review of a complaint by an AFCA decision maker, after (in most cases)³⁶ receiving a preliminary assessment from a case manager. AFCA also has a limited ability to review decisions under the 'slip rule' in section A.15 of AFCA's Operational Guidelines.

5.21 Details of this mechanism, our fairness jurisdiction and our approach to resolving complaints in a timely and efficient way are set out in section 2 of this submission.

5.22 AFCA understands that some stakeholders may consider AFCA should have a *further stage* in its process for an additional review of the merits of a complaint after a final determination has been issued by AFCA.

5.23 AFCA's position is that a further opportunity for a merits review in either its superannuation or general divisions (even if limited to specific grounds of review) is neither appropriate nor necessary. This is because:

- it would require a significant level of further resources for AFCA
- parties would be more likely to seek representation by lawyers (including counsel) and other paid representatives
- costs for parties to a complaint could increase substantially, including for complainants if they seek advice on their complaint and/or choose to be represented
- AFCA's process could become more formal, legalistic and unnecessarily complicated
- the timeliness and efficiency of the resolution of complaints would be adversely impacted
- a complainant currently has a right to not accept a determination - and instead may pursue legal or other action against a financial firm if they choose to not accept a determination
- parties may seek external judicial review of a determination based on the tripartite contract in place under AFCA's Rules and on the ground of 'unreasonableness' in the general division

³⁶ A small number of complaints are expedited to the determination stage.

- determinations for superannuation complaints can already be appealed on questions of law
- AFCA can also correct a determination if it contains a clerical mistake, an error arising from an accidental slip or omission, a material miscalculation or mistake in a description or a defect in form and a party to a complaint may request such a correction³⁷
- AFCA regularly consults with consumer and industry representatives in relation to our published Approaches for specific types of complaints and our Approaches constantly develop to reflect legal, regulatory and industry best practice developments.

5.24 We draw attention to the strengths of our current process for complaints resolution, which include the following:

- the provision of an initial view of the merits of a complaint in a preliminary assessment (noting that many preliminary assessments are provided as written recommendations)
- the referral of complex and/or high value matters to an AFCA panel, and the application of significant subject matter expertise for these complaints
- AFCA's use of banking specialists for some banking and credit complaints to ensure decisions are made (where necessary) with the benefit of technical industry expertise and in accordance with industry best practice
- our quality assurance processes for case managers and decision makers, and peer reviews of preliminary assessments and determinations by experienced team managers and decision makers
- support and expertise provided by our Lead Ombudsmen for case managers and decision makers on the application of AFCA's Approaches
- AFCA's application of industry codes to support and reflect industry best practice
- the test case procedure under our Rules (discussed further below in section 6)
- AFCA's capacity under our Rules to refer a legal question to the Federal Court for superannuation complaints and for superannuation determinations to be appealed on questions of law.

AFCA's proposal to enhance understanding and guidance about our 'slip rule'

5.25 It is AFCA's position that a *further internal merits review stage* for complaints is neither necessary nor appropriate.

5.26 However, AFCA accepts that occasionally errors or accidental omissions in determinations may need to be remedied, and that the process for doing so under section A.15 of our Operational Guidelines could be more clearly articulated.

5.27 Accordingly, AFCA proposes that the section in our Operational Guidelines that deals with this process be reviewed and articulated, either in a specific AFCA Guideline, or

³⁷ Our Operational Guidelines explain this 'slip rule' in the guidelines to Rule A.15.

as a provision in AFCA's Rules. Any work by AFCA on such an amendment would, at the earliest opportunity, include appropriate consultation with ASIC and stakeholders.

6 Proposals for AFCA's jurisdiction and processes

AFCA's test case procedure

In 2020, the test case procedure under AFCA's Rules was used for the first time. AFCA has now approved two test cases in relation to small business interruption insurance. AFCA is not a party to the proceedings but is actively engaged with key stakeholders, including the industry and regulators, during the approval process. We recognise the importance of issues arising from large scale events and complaints with significant legal effect. Following the outcome of these test cases, we invite further discussion with stakeholders on the role of AFCA and regulators in initiating or approving test cases about issues which have large scale system-wide or consumer impact.

AFCA's 'slip rule'

AFCA proposes that the section in our Operational Guidelines that deals with the process for remedying errors or accidental omissions in a determination be reviewed and articulated, either in a specific AFCA Guideline, or as a provision in AFCA's Rules. AFCA will consult with stakeholders on any proposed amendments.

AFCA's compensation cap for non-financial loss

It is important that AFCA's compensation cap for non-financial loss enables AFCA to compensate a complainant for more significant and extreme stress and inconvenience caused by the conduct of a financial firm. Commensurate with higher limits in other consumer redress schemes, AFCA proposes an increase to the compensation cap for non-financial loss.

Dealing more efficiently with certain complaints

AFCA is reviewing options to improve processes involving some low value complaints, for instance, complaints that are lodged by consumers about their credit reports.

AFCA also proposes amendments to our Rules, so we can more effectively deal with recurring and inappropriate conduct by some fee-for-service representatives. AFCA will consult with stakeholders on proposed amendments.

AFCA's small business insurance jurisdiction

As a matter of fairness and access to justice, AFCA supports the recommendation of the Australian Small Business and Family Enterprise Ombudsman to expand AFCA's small business insurance jurisdiction. We would be pleased to consult with stakeholders on this recommendation. However, AFCA notes that certain commercial/industrial and liability insurance claims can be very complex. The expansion of the AFCA scheme in this way would therefore require a comprehensive feasibility/capability analysis.

- 6.1 In responding to the Terms of Reference for this Review, AFCA has taken the opportunity to consider other aspects of the scheme and options to enhance its fair and effective operation. Our proposals for further scheme enhancements are set out in this section. AFCA welcomes stakeholders' views on these proposals.

AFCA's test case procedure

- 6.2 AFCA Rule C.2 provides that AFCA may in its discretion exclude a complaint, and it provides examples of circumstances in which this discretion may be exercised.
- 6.3 Rule C.2.2(f) provides for the exclusion of a complaint where AFCA agrees to the complaint being resolved as a test case. For this rule to apply, the firm must:
- undertake within 6 months to institute proceedings in a superior court or tribunal that can make a binding decision of the issue or point of law in the complaint
 - undertake to pay the complainant's costs and disbursements
 - undertake to meet any other requirements of AFCA
 - comply with these undertakings.
- 6.4 AFCA has the right under our Rules to set any protocols and conditions for a test case, in accordance with the principles that underpin the scheme. Before agreeing to a test case, AFCA consults with regulators of the financial firm and stakeholders including Treasury and industry associations – subject to any privacy requirements under the law and our rules.
- 6.5 AFCA monitors a test case but is not a party to the case. Once a test case is concluded, AFCA applies the decision of the court or tribunal in resolving complaints that raise the issues decided.³⁸
- 6.6 AFCA used the test case procedure for the first time in 2020 in relation to complaints made concerning business interruption insurance.

AFCA's proposal for complaints raising system-wide issues

- 6.7 The test case procedure in the AFCA Rules supports the efficiency and effectiveness of the AFCA scheme, for the benefit of members and complainants. We support retention of the existing test case procedure, to be applied for appropriate matters.
- 6.8 AFCA acknowledges the importance of issues arising from large scale events. If a complaint lodged with AFCA raises a significant legal issue that may have system-wide consequences for an industry sector and/or the issue impacts a large number of consumers, AFCA notes that in some cases regulators are more appropriately placed to institute a test case in the public interest, rather than AFCA's test case procedure being used.
- 6.9 Following the outcome of the business interruption insurance test cases, AFCA invites further discussion with stakeholders on the role of AFCA and regulators in dealing with complaints which have large scale system-wide impact.
- 6.10 In this regard, AFCA has considered the test case procedure of the UK Financial Conduct Authority (FCA). We propose that this model could be explored in Australia.
- 6.11 It has been useful to observe the application of the UK FCA procedure in May 2020 in relation to matters arising under business interruption insurance policies. At this time, the FCA announced that it intended to obtain a court declaration to resolve contractual

³⁸ For a more detailed explanation of the test case procedure, see the guideline to AFCA Rule C.2.2 in our Operational Guidelines.

uncertainty in business interruption insurance cover in the public interest to advance consumer protection and market integrity objectives. In the announcement, the UK FCA stated it would continue to work closely with the Financial Ombudsman Service throughout the process.

- 6.12 The UK FCA's business interruption cover test case was commenced under its Financial Markets Test Case Scheme - which was first piloted in 2015. This scheme is intended to facilitate the resolution of market issues in the public interest in relation to which relevant authoritative legal guidance is needed, without the need for a present cause of action between the parties.
- 6.13 If this model was considered for adoption in Australia, AFCA acknowledges that it would require significant consultations with the Government, regulators and other stakeholders to clarify the scope of a regulatory test case arrangement, and to ensure appropriate co-ordination between the regulator and AFCA.

AFCA's proposal to enhance understanding and guidance about our 'slip rule'

- 6.14 It is AFCA's position that a *further internal merits review stage* for complaints is neither necessary nor appropriate.
- 6.15 However, AFCA accepts that occasionally errors or accidental omissions in determinations may need to be remedied, and that the process for doing so under section A.15 of our Operational Guidelines could be more clearly articulated.
- 6.16 Accordingly, AFCA proposes that the section in our Operational Guidelines that deals with this process be reviewed and articulated, either in a specific AFCA Guideline, or as a provision in AFCA's Rules. Any work by AFCA on such an amendment would, at the earliest opportunity, include appropriate consultation with ASIC and stakeholders.

AFCA's compensation cap for non-financial loss

- 6.17 AFCA is aware that some stakeholders support increasing AFCA's compensation cap for non-financial loss, which is now \$5,400³⁹. The current limit does not always provide sufficient compensation for significant stress, inconvenience and pain and suffering caused to a complainant by a financial firm's error or misconduct.
- 6.18 In support of this position, attention is drawn to other consumer redress schemes or tribunals that have higher or no caps on non-financial loss compensation or general damages. For example:
- the Financial Ombudsman Service in the United Kingdom can award between £2000 to £5000 for 'severe' examples of distress and inconvenience, and £5000 or more for 'extreme' examples of distress and inconvenience
 - the Office of the Australian Information Commissioner (OAIC) can award compensation for any loss or damage suffered due to an interference with privacy. Such loss or damage includes injury to feelings or humiliation – referred to as 'non-economic loss'. While there is no specified limit on the amount of compensation the OAIC may award for non-economic loss, the OAIC has issued determinations with awards of between \$10,000 - \$20,000 for this form of loss

³⁹ The cap increased from \$5,000 to \$5,400 from 1 January 2021.

- under the *Privacy and Data Protection Act 2014 (Vic)*, the Victorian Civil and Administrative Tribunal can award compensation up to \$100,000 for loss or damage (including humiliation or injury to feelings) suffered by a complainant as a result of interference with privacy
- the Queensland Civil and Administrative Tribunal has made substantial awards (over \$100,000) for non-financial loss in sexual harassment and discrimination cases⁴⁰.

6.19 AFCA agrees that the current limit of \$5,400 in some instances is not sufficient. Two examples are provided below of AFCA complaints resolved at determination stage (a banking and a general insurance complaint) that demonstrate the inadequacy of the current limit in certain circumstances.

AFCA's proposal for the compensation cap

6.20 In certain limited circumstances it is important that AFCA's compensation cap can provide for appropriate non-financial loss to be awarded for significant and extreme stress and inconvenience caused by the conduct of a financial firm. AFCA therefore proposes that the cap for non-financial loss compensation under the Rules is increased.

6.21 In proposing an increase, we note that AFCA may only award compensation for non-financial loss in the restricted circumstances specified in AFCA Rule D.3.3. This compensation may be awarded in situations such as the following:

- in a privacy complaint - if the complainant has suffered humiliation or injury to their feelings
- in other non-superannuation complaints - where the complainant has suffered an unusual amount of physical inconvenience or stress or the financial firm's conduct has meant that the time taken to resolve a situation has been unusually excessive.

6.22 AFCA looks forward to further discussing this proposal with stakeholders.

Example 1: Banking complaint

Bank sold home in error and failed to respond to financial difficulty

A bank took possession of a mortgagor's home and sold it in 2018. The complainant (mortgagor) made a complaint with AFCA that the bank had acted in error in selling the home. AFCA's preliminary assessment decided the bank sold the home without the complainant's authority and failed to respond to the complainant's financial hardship. The preliminary assessment decided the bank should pay the complainant \$15,000 in total for non-financial loss compensation, being three amounts of compensation at the \$5,000 cap. This was because there were three separate actions of the bank that caused the complainant significant stress and inconvenience.

The facts of this complaint clearly showed that the complainant had suffered extreme stress and inconvenience because of the actions of the bank - for which a total of \$15,000 in non-financial loss compensation was manifestly inadequate. After further discussions at

⁴⁰ For example, see *Green v State of Queensland, Brooker and Keating* [2017] QCAT 008.

the determination stage, the bank reached a settlement with the complainant under which it agreed to pay the complainant \$40,000 for non-financial loss compensation.

Example 2: General insurance complaint

Insurer did not provide mould report to customer with significant health issues

A complainant made a claim for water damage to her home and advised the insurer she had health issues with mould exposure. The insurer assessed the damage and mould was detected. The complainant advised the insurer her health was being affected by the mould and she moved out of her home. The insurer then did an expert assessment of the mould, which found that mould contamination was all through the home, access to the home should be restricted, and workers there should follow PPE guidance. The insurer did not provide the expert report of mould assessment immediately to the complainant.

The complainant had moved out of her home but continued to access her home to collect contents. The insurer provided the expert report to the complainant about four months after it received the report. The complainant provided information to show her health had been significantly impacted due to exposure to high levels of mould in her home.

As soon as the insurer received the expert report on the extent of the mould contamination, it should have provided the report to the complainant. The complainant was awarded \$5,000 for non-financial loss for stress and inconvenience caused due to the delay in receiving the report.

Dealing more efficiently with certain complaints

- 6.23 As noted above in section 3, AFCA's funding principles provide that our funding model incorporates incentives to resolve complaints early and, as appropriate, is based on a user-pays approach.
- 6.24 AFCA is undertaking a funding review in 2021 to establish a robust, flexible and sustainable long-term funding model. At present, we are also considering how AFCA's funding model could be applied to promote the more efficient resolution of certain complaints.
- 6.25 AFCA has a robust triage framework that segments complaints based on their complexity into fast track, standard and complex streams. AFCA's fee schedule reflects the different processes adapted to handle these complaints.
- 6.26 AFCA has identified, however, that fees incurred for handling some very low value complaints, such as credit reporting complaints, can be higher than the value of the claim itself or the service provided. This leads to some distorted resolution practices which can be exploited by fee-for-service representatives who pursue their pecuniary interests ahead of their clients' best interests. AFCA has also taken into account feedback from some members that there are opportunities to improve processes involving such low value complaints.

6.27 AFCA is considering options to further streamline our triage processes and more quickly and efficiently deal with such complaints, at a lower complaint fee cost for AFCA members.

AFCA's proposal for amendments to deal with systemic and recurring inappropriate conduct

6.28 In its first two years, AFCA has seen an increase in complaints lodged by fee-for-service representatives. As noted above, it has also seen a range of inappropriate conduct by some of these representatives. While there are existing provisions in AFCA's Rules that enable AFCA to discontinue dealing with fee-for-service representatives when they are engaging in inappropriate conduct, these provisions are currently more limited to dealing with such conduct on a case-by-case basis. They do not currently effectively provide for AFCA to deal with systemic and ongoing inappropriate conduct by a fee-for-service representative that is lodging multiple complaints with AFCA.

6.29 AFCA will be proposing amendments to our Rules, so we can more effectively deal with recurring inappropriate conduct by some fee-for-service representatives.

6.30 AFCA will consult with stakeholders on any proposed enhancements to its complaints processes and Rules, while also ensuring that we maintain a fair approach for all parties when dealing with such complaints.

AFCA's small business insurance jurisdiction

6.31 The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) conducted an inquiry into small business insurance in 2020. Over 800 small businesses completed a survey for the inquiry. In December 2020, the ASBFEO released the [final report](#)⁴¹ on its inquiry, which includes 15 recommendations based on findings about the ability of small businesses to access appropriate and affordable insurance.

6.32 Two recommendations would, if implemented, alter AFCA's jurisdiction for small business insurance, namely:

- *Recommendation 1:* The definition of 'small business' as those businesses with (a) turnover of less than \$10 million per annum or (b) less than 100 employees should be standardised for all insurance legislation, regulations and codes.
- *Recommendation 2:* AFCA's Rules should be expanded to cover all insurance products (including wholesale insurance) purchased by small businesses for claims assessed at \$1 million or less.

AFCA's position on Recommendation 1

6.33 AFCA's Rules define 'small business' as 'a Primary Producer or other business that had less than 100 employees at the time of the act or omission by the financial firm that gave rise to the complaint.'⁴² The application of this definition is relatively straightforward, as it is solely concerned with the number of employees of a business at a point in time.

⁴¹ ASBFEO report [Insurance Inquiry](#), December 2020 – www.asbfeo.gov.au

⁴² AFCA Rules, Section E.1 – Defined terms.

- 6.34 We acknowledge the concerns raised in the ASBFEO inquiry about inconsistent definitions of 'small business' in relevant legislation, AFCA's Rules and the General Insurance Code of Practice.
- 6.35 AFCA's position, however, is that the definition of 'small business' in our Rules is practical and appropriate and clearly articulates our jurisdiction in this area. Accordingly, we do not propose an amendment to this definition in the AFCA Rules.

AFCA's position on Recommendation 2

- 6.36 Rule C.1.4(a) provides that AFCA must exclude a complaint about a General Insurance Policy other than (among other listed products) a 'small business insurance product'. Rule E.1 defines 'small business insurance product' to exclude cover in relation to:
- contractors all risks
 - fidelity guarantee
 - legal liability (including public liability and products liability)
 - professional indemnity
 - industrial special risks.
- 6.37 Through Recommendation 2, the ASBFEO is presumably seeking the removal of the exemption under our Rules for the types of insurance listed above.
- 6.38 As a matter of fairness and access to justice, AFCA supports Recommendation 2 and would be pleased to consult with stakeholders accordingly.
- 6.39 We note, however, that certain commercial/industrial and liability insurance claims can be very complex. Specific capabilities and processes may be required for complaints about this kind of cover to be resolved. For example, if a complaint were made about an insurer's denial of a public liability claim, the evidence required to establish a valid claim on the balance of probabilities could be complicated and would likely involve third party information (that is, from the party making a claim for damages against the insurer's policyholder).
- 6.40 We therefore submit that the expansion of the AFCA scheme in this way would require a comprehensive feasibility/capability analysis.
- 6.41 Given ongoing concerns about the affordability and accessibility of small business insurance (including liability insurance), we also acknowledge that this is an important policy matter for the Government.

Appendix 1: Ramsay Review recommendations

Final report: Review of the financial system external dispute resolution and complaints framework – 2017

Ramsay Review recommendations

Recommendation 1: A single EDR body for all financial disputes (see Chapter 5)

There should be a single EDR body for all financial disputes to replace FOS, CIO and SCT.

Recommendation 2: Features of the single EDR body (see Chapter 6)

The single EDR body must be formally approved and must have, at a minimum, the following features:

Governance, funding and membership

- It should be governed by an independent board (with an independent chair and equal numbers of directors with industry and consumer backgrounds).
- It should be funded by industry through a transparent process.
- Membership should be compulsory through a licensing condition (or equivalent requirement) for financial firms.

Features

- **Accessibility:** It should be free to consumers when they lodge a complaint.
- **Accountability:** It should be subject to strengthened accountability mechanisms, which include regular independent reviews (with the reports of reviews and the EDR body's response to recommendations reported publicly) and the appointment of an 'independent assessor' to review the handling of disputes by the body (but not to review the outcome of individual disputes).
- **Enforceability:** Firms should be required to comply with its determinations as a condition of membership, with the body required to report firms that fail to comply to the appropriate regulator. The body should have the power to expel firms that fail to comply.
- **Improving industry practice:** It should monitor, address and report systemic issues to the appropriate regulator.
- **Expertise:** It should use panels to resolve disputes in specific circumstances, such as complex disputes, and provide clear guidance and transparency to users on when a panel will be used by the body.
- **Community engagement:** It should engage in outreach activities to raise awareness amongst consumers (in particular vulnerable consumers) and financial firms.

Recommendation 3: Powers of the single EDR body (see Chapters 6 and 7)

The single EDR body should have appropriate powers within its terms of reference to support its dispute resolution functions and, in the case of superannuation disputes, appropriate statutory provisions where required.

Recommendation 4: Enhancing access to redress for consumers (see Chapter 8)

4.1 Higher monetary limits and compensation caps (other than for superannuation disputes)

The single EDR body should commence operations with a monetary limit of \$1 million and a compensation cap of no less than \$500,000.

4.2 Reviews of impacts of higher monetary limits and compensation caps

There should be two reviews of the body's monetary limits and compensation caps: an initial consultation prior to the commencement of the body and a second independent review following its implementation.

Pre-commencement consultation

During the process of transition and prior to commencement of the single EDR body, there should be consultation about:

- whether disputes in relation to certain products, including mortgages and general insurance products, should move immediately on commencement to a compensation cap of \$1 million; and
- whether there are compelling reasons to retain the current sub-limits applying to different insurance products.

The lower compensation cap of \$500,000 should only apply where there is evidence that moving immediately to a compensation cap of \$1 million is likely to result in a substantial lessening of competition (as a result of smaller firms being unable to obtain professional indemnity insurance and therefore being unable to enter or remain in the market).

Post-implementation review

Within 18 months of the single EDR body commencing its operations, an independent review should be undertaken to determine what impact (if any) the higher compensation cap has had on competition and consumer outcomes.

Where there is evidence that there has not been a substantial lessening of competition in the market, the compensation cap should be increased. This review process should continue in a staged manner until the compensation cap and monetary limits are aligned.

4.3 Guarantees

There should be no monetary limits and compensation caps for disputes about whether a guarantee should be set aside where it has been supported by a mortgage or other security over the guarantor's primary place of residence.

4.4 Ensuring monetary limits and compensation caps remain fit-for-purpose

The consumer monetary limits and compensation caps should be subject to regular indexation and review. Monetary limits and compensation caps should be set by the EDR body in consultation with ASIC and industry and consumer stakeholders to ensure they remain fit-for-purpose and that the substantial majority of disputes can be resolved through EDR.

4.5 Monetary jurisdiction for superannuation disputes

The monetary jurisdiction for superannuation disputes should continue to be unlimited, in line with current arrangements.

Recommendation 5: Enhancing access to redress for small business (see Chapter 8)

For small business disputes, other than credit facility disputes, the single EDR body should commence operations with a monetary limit of \$1 million and a compensation cap of no less than \$500,000.

For credit facility disputes, small businesses should be able to bring a claim where a small business credit facility is of an amount up to \$5 million and the single EDR body should be able to award compensation of up to \$1 million.

There should be no monetary limits and compensation caps for disputes about whether a guarantee should be set aside where it has been supported by a mortgage or other security over the guarantor's primary place of residence.

The small business monetary limits and compensation caps should be subject to regular indexation and review. Monetary limits and compensation caps should be set by the single EDR body in consultation with ASIC and small business, industry and consumer stakeholders to ensure they remain fit-for-purpose and that the substantial majority of disputes can be resolved through EDR.

Recommendation 6: Ensuring the single EDR body is accountable to users (see Chapter 9)

The single EDR body should be subject to enhanced accountability which would, at a minimum, include:

- ensuring it has sufficient funding and flexible processes to allow it to deal with unforeseen events, such as an increase in disputes following a financial crisis or natural disaster;
- providing an appropriate level of financial transparency to ensure it remains accountable to users and the wider public;
- being subject to regular independent reviews and publishing detailed responses in relation to recommendations of independent reviews; and
- an independent assessor to review complaints about the handling of disputes by the body.

Recommendation 7: Increased ASIC oversight of the single EDR body (see Chapter 9)

ASIC should be provided with a general directions power to allow it to compel performance from the single EDR body if it does not comply with legislative and regulatory requirements.

Recommendation 8: Transparency of internal dispute resolution (see Chapter 10)

To improve the transparency of IDR, financial firms should be required to report to ASIC in a standardised form on their IDR activity, including the outcomes for consumers in relation to complaints raised at IDR.

ASIC should have the power to:

- determine the content and format of IDR reporting (following consultation with industry and other stakeholders and having regard to the principles set out in Chapter 10 of the Final Report); and
- publish data on IDR both at aggregate level and, at its discretion, at firm level.

Recommendation 9: Referral of complaints back to financial firm (see Chapter 10)

Upon receipt, the single EDR body should refer all complaints back to the financial firm for a final opportunity to resolve the matter via IDR within a defined timeframe. It should register and track the progress of complaints referred back to IDR.

Recommendation 10: Debt management firms (see Chapter 11)

Debt management firms should be required to be members of the single EDR body. Further work should be undertaken to determine the most appropriate mechanism by which to impose this requirement.

Recommendation 11: Credit representatives (see Chapter 11)

In principle, there is no reason why credit representatives should continue to be required to hold EDR membership. However, further work should be undertaken before membership requirements are removed to confirm there would be no unintended consequences.

Appendix 2: AFCA - who we are and what we do

AFCA's [website](#) provides comprehensive information explaining our role and services, and includes the following:

- [Annual Reviews](#) for 2018-19 and 2019-20
- AFCA's [Strategic Plan](#)
- Details of our process for resolving complaints, including a flow chart covering every complaint stage from Registration and Referral to the final determination stage
- Published Approaches which explain how we deal with a range of complaint issues.
- Determinations that we issue
- Our Rules and Operational Guidelines.
- Member services information

The EDR scheme for the financial services sector

AFCA's dispute resolution service is offered as an alternative forum to tribunals and courts to resolve complaints that consumers and small businesses have with their financial firms.

Our role is to assist consumers and small businesses to reach agreements with financial firms about how to resolve their complaints. We are impartial and independent. We do not act for either party or advocate for the position of any party.

When a complaint is submitted, AFCA refers the complaint back to the financial firm and provides an opportunity for consumers and financial firms to directly resolve their complaint.

If an agreement cannot be reached, we investigate the complaint and try to resolve it using negotiation or conciliation. If this is unsuccessful, AFCA can make a formal decision (a determination) in accordance with the decision-making powers under our Rules.

The vast majority of complaints we deal with are resolved by agreement between the parties, whether through our initial referral back process, or through negotiation, conciliation or a preliminary assessment provided to the parties. Currently, only around seven per cent of complaints are closed at the final determination stage.

An industry ombudsman scheme with an independent board

AFCA is a not-for-profit company limited by guarantee. It is governed by an independent board of directors. AFCA's board comprises an independent chair and an equal number of directors with consumer and industry expertise.

AFCA's board exercises its powers under the Corporations Act and [AFCA's Constitution](#), and in accordance with [ASIC's RG 267](#), to ensure the independence, integrity and fairness of AFCA's case management and decision-making processes. AFCA's board ensures that AFCA is appropriately resourced to deliver our services in a timely, efficient and effective manner.

The board is responsible for appointing an independent Chief Ombudsman and CEO, who has delegated authority for the day-to-day management of AFCA. The board also appoints ombudsmen, adjudicators and panel members who make decisions on complaints made with AFCA.

Fair, independent and effective external dispute resolution

Details of AFCA's complaints resolution scheme are set out in [AFCA's Rules and Operational Guidelines](#). Rule A.2.1(c) provides that AFCA will consider complaints submitted to it in a way that is:

- independent, impartial, fair
- in a manner which provides procedural fairness to the parties
- efficient, effective, timely
- cooperative, with the minimum of formality.

Once a complaint is submitted, AFCA refers the complaint to the financial firm, which has a set timeframe to work directly with the complainant to try and resolve the complaint.

If the complaint is not resolved between the parties, it progresses to case management at AFCA. AFCA will first try to resolve a complaint and reach a settlement between a complainant and the financial firm through negotiation and (in some cases) conciliation. If the complaint is not resolved at this stage, the case manager may provide a preliminary assessment of the merits of the complaint.

Preliminary assessment of the merits of a complaint

A preliminary assessment is provided verbally or in writing to the parties, and it explains the likely outcome of a determination based on the facts of the case. Preliminary assessments are issued if the case manager considers this process will be effective to resolve the complaint.

A preliminary assessment includes:

- an overview of the facts of the complaint
- the issues raised in the complaint
- a preliminary assessment of how the complaint should be resolved and why
- notice of when the parties must advise AFCA if they are willing to settle the complaint in accordance with the preliminary assessment.

If a preliminary assessment is provided, and a party to the complaint rejects this assessment, the complaint will then be assessed by a decision maker who will issue a determination. A complaint may also be expedited to the determination stage if it is particularly complex and/or urgent.

Determination – the final stage

The final stage of the process for complaints resolution is the issue of a determination by a decision maker.

Complaints that involve a single issue or are of lower value are determined by an adjudicator as a 'Fast Track' matter. An ombudsman makes determinations for 'Standard or Complex' matters. More complex and/or high value matters can be referred to a panel of decision makers, comprising an ombudsman and two panel members with subject matter expertise.

For non-superannuation complaints, if a determination is in favour of a complainant and they accept it, the financial firm must comply with the determination and any remedy awarded. For these complaints, the decision maker must do what they consider is fair in all the circumstances having regard to:

- legal principles
- applicable industry codes or guidance
- good industry practice
- previous relevant determinations of AFCA or predecessor schemes.

For superannuation complaints, any determination made is binding on both parties. When determining a superannuation complaint, the decision maker:

- may refer a question of law to the Federal Court in accordance with section 1054C of the Corporations Act
- must apply the approach specified in section 1055 of the Corporations Act, that is, whether the decision or conduct of the financial firm was fair and reasonable in all the circumstances.

AFCA's people

As part of establishing AFCA in 2018, employees and the offices of the CIO and FOS were integrated into AFCA and staff resources were increased to deal with the significantly higher volume of complaints AFCA received from 1 November 2018.

AFCA has successfully managed this transition and our people are firmly engaged in the evolution of our service and focused on delivering fair and quality outcomes for consumers, small businesses and AFCA members.

AFCA has an office in Melbourne and an office in Sydney. We currently have approximately 780 employees across all areas, including complaint handling operations, decision makers, code compliance function and corporate services.

AFCA employees come from a wide range of professional backgrounds, with strong representation from legal and financial services, dispute resolution and consumer sectors. Our employees include lawyers, accountants, financial advisers, investigators, dispute resolution practitioners, industry specialists and data analysts.

AFCA's decision makers (ombudsmen, adjudicators and panel members) are appointed by the AFCA board in accordance with AFCA's Constitution.

AFCA's members

Australian financial services licensees, Australian credit licensees, authorised credit representatives and superannuation trustees are required to be members of AFCA under

financial services legislation and licence conditions and in accordance with ASIC's Regulatory Guide 165⁴³.

A number of organisations are voluntary members of AFCA, including some 'buy now pay later' firms and commercial credit providers.

AFCA has over 40,000 members, including banks, insurers, credit providers, financial advisers, debt collectors and buyers, superannuation trustees and other financial firms. While some of these are very large institutions, the majority of our members are small and medium enterprises. Most of our members do not have complaints made against them. Only 19% of our members had a complaint made about them in 2019-20.

AFCA can only accept complaints about financial firms that are members of AFCA. We provide a searchable register of our members on our website to help consumers check if we are able to consider a complaint about a particular financial firm.

Transparency in our decisions and data

AFCA is committed to being open, transparent and accountable to the public. Transparency in our decisions and data is essential to rebuilding trust in the financial sector.

From 1 October 2019, AFCA has named financial firms in published determinations. This decision to do so was made by AFCA's board to ensure that the public can access further information about the actions of financial firms.

In 2019-20, AFCA released its [Datacube](#), which provides comprehensive complaint data about AFCA members that have had four or more complaints during a financial year. This publicly available data provides consumers, small businesses, members and others with accessible and transparent information about complaints received and closed against identified scheme members.

Anyone can use this tool to review the performance of their financial firm and compare it to others in the market. This data, and the level of detail that consumers can see about each firm, will also support the work of policy makers and researchers. For financial firms themselves they can clearly see how they are tracking at handling complaints and how this compares to others in the market.

Updated Datacube results are published every six months. The most recent release covers complaint data for the period 1 July 2020 – 31 December 2020.

Ensuring AFCA is accessible

AFCA Rule A.2.1(a) provides that AFCA will promote awareness of the scheme, including by undertaking outreach to vulnerable and disadvantaged communities.

Rule A.2.1(b) provides that AFCA will make the scheme appropriately accessible to complainants, including by providing a range of ways to submit a complaint, helping complainants submit a complaint, and using translation services and providing information in alternative formats, as appropriate.

⁴³ [ASIC Regulatory Guide 165](#) *Internal Dispute Resolution*, reissued July 2020.

Since its inception on 1 November 2018, AFCA has engaged in a range of activities to raise awareness with communities across Australia and to ensure our service is accessible to all Australians.

In 2019, AFCA undertook an extensive national roadshow, visiting 30 rural, regional and metro locations across Tasmania, Victoria, ACT and New South Wales. Special regional forums for small business, consumer advocates and financial firms were hosted. Community members met AFCA staff and had an opportunity to learn about our service.

A broader accessibility strategy has just been developed comprising 23 initiatives that support AFCA's objectives to:

- promote awareness of AFCA, including by undertaking outreach to vulnerable and disadvantaged communities
- ensure our services are accessible to all
- ensure AFCA processes are influenced by consumer needs
- be aware of issues affecting consumers and support the work of consumer advocates
- remain a trusted source of information, sharing our expertise
- ensure a high level of support for staff working with vulnerable and disadvantaged complainants
- provide accessible resources, with materials available 'in my language' (or at a minimum, in Plain English)
- be ready for return of face-to-face outreach engagement.

The strategy adheres to AFCA's broader stakeholder engagement framework and complements AFCA's Corporate Plan initiatives.

AFCA's strategy includes the development of a Reconciliation Action Plan to support AFCA's engagement with, and commitment to, First Nations communities and to ensure staff are culturally aware and culturally sensitive in their engagement with First Nations people.

The strategy also includes a focus on access to our services for complainants living with mental illness or mental health issues, complainants living with disability, those experiencing family violence including elder abuse, and accessibility for migrant and other communities for whom English is not their first language.

AFCA provides online resources for diverse communities in 20 languages, including a series of videos featuring AFCA's own people speaking their first language. This important initiative uses the skills and diversity of our staff to reach communities that might not otherwise be aware of AFCA.

Engagement with stakeholders

Rule A.2.1(i) provides that AFCA will consult regularly with our stakeholders. Our key stakeholders include government, regulators, consumer advocates and representatives and industry/member associations.

In 2019-20, AFCA attended and participated in over 630 events and stakeholder engagements that included one-on-one meetings, forums, events and speaking

engagements. AFCA also conducted 18 forums for members, including 10 regional and 4 online events.

Member engagement

AFCA holds regular member forums that provide insights into complaint trends and issues and provide members access to AFCA's senior people, including ombudsmen. These forums can also assist financial firms to improve their services and complaint handling practices and discuss and put forward their views on complaints dealt with by AFCA and its Approaches.

AFCA also meets with industry peak bodies on a regular basis.

AFCA holds industry liaison group meetings several times a year to discuss issues relating to a specific industry sector. These groups cover banking and credit, general and life insurance, superannuation, investments and advice, professional indemnity and medical indemnity.

At an operational level, AFCA regularly meets with many large, medium and small members across industry areas to discuss complaints and issues.

Consumer engagement

AFCA regularly engages with consumer representatives, including financial counsellors, community lawyers and financial capability workers as part of our work to support access to our service.

AFCA's Consumer Advisory Panel comprises 10 consumer representatives who meet regularly with our senior leadership team. The panel provides insights and analysis on the consumer-facing elements of AFCA strategy, policy and projects. These meetings are important for AFCA to understand financial problems Australians are facing, including challenges accessing products and services. Panel members represent a broad range of communities, including Aboriginal and Torres Strait Islander peoples, culturally and linguistically diverse communities and people experiencing financial difficulty.

AFCA has also established a Consumer Advisory Liaison Group which meets quarterly to discuss operational issues in complaint handling, complementing our strategic consultation and focus with the AFCA Consumer Advisory Panel.

Two year report

1 November 2018 – 31 October 2020

Working with
consumers, small
businesses and industry
to resolve and reduce
financial disputes





Our role is to assist complainants and financial firms to reach agreements about how to resolve their complaints.

About AFCA

AFCA is Australia's financial industry ombudsman service which provides fair, free and independent solutions to financial disputes.

AFCA is a one-stop shop for individuals and small businesses that have a dispute with their financial firm over issues such as banking, credit, general insurance, financial advice, investments, life insurance or superannuation.

Our role is to assist complainants and financial firms to reach agreements about how to resolve their complaints. We are impartial and independent. We do not act for either party or advocate for their position.

When a complaint is lodged, AFCA refers that back to the financial firm and provides an opportunity for consumers and financial firms to resolve their financial complaint directly between themselves. If an agreement can't be reached, we can investigate the complaint and try to resolve it using negotiation or conciliation.

If this is unsuccessful, AFCA can make a decision in accordance with the decision-making powers under our Rules. This decision is binding on the financial firm.

However, the vast majority of complaints are resolved by complainants and financial firms through the referral back process, negotiation, conciliation and our early assessment. Only 6% of cases require AFCA to make a formal decision.

As well as helping with unresolved complaints, AFCA carries out systemic investigations into practices and recurring issues which could affect multiple consumers, as well as supporting independent committees to monitor compliance with industry codes of practice.

Establishing AFCA

AFCA was established by the Australian Government following the 2016 Ramsay Review, which looked at how Australia's external dispute resolution framework could be improved to deliver effective outcomes for individual consumers and small businesses.

On 1 November 2018, AFCA replaced the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT) as the one-stop shop for financial dispute resolution. All outstanding complaints with FOS and the CIO were transferred to AFCA and we have continued to finalise these matters.

AFCA also became the organisation to lodge new superannuation complaints with, but the SCT continued to work on existing complaints it received before November 2018. The SCT ceased operations on 31 December 2020 and the remaining cases before the SCT were transferred to AFCA.

AFCA is a not-for-profit and non-government organisation. AFCA is a company limited by guarantee and governed by an independent Board of Directors. The Board of Directors consists of an independent Chair and an equal number of Directors with consumer and industry expertise.

Two years at a glance

Between 1 November 2018
and 31 October 2020

Complaints received



153,246

complaints received



7,738

FOS complaints transferred to
AFCA on 1 November 2018
99% resolved with 12 months



2,490

CIO complaints transferred to
AFCA on 1 November 2018
96% resolved with 12 months



8,910

complaints from small
businesses

Products complained about



89,660

Banking
and finance



36,475

General
insurance



13,741

Superannuation



8,494

Investments
and advice



3,523

Life
insurance



15,256

complaints involved
financial difficulty

Complaints closed

143,723

complaints closed¹
61% resolved within 60 days



72%

resolved by agreement or
in favour of complainants



More than **\$477.4 million**¹ in
compensation and refunds was awarded or
obtained through AFCA's dispute resolution work

Members



40,493
members



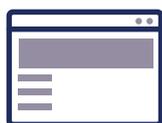
81% of license members did not receive a complaint about them in the last 12 months

Customer service

339,928 phone calls to our dedicated consumer, small business and member lines



14,187
online live chats



More than
1.9 million
website visits



27,000
newsletter subscribers



Over **1,000** stakeholder engagements including one-on-one meetings, forums, events and speaking engagements

Systemic issues

166

systemic issues successfully resolved with the financial firms



Over **3.9 million** consumers were identified by financial firms as having been affected by systemic issues investigated by AFCA

Progressed **508** systemic issue investigations and serious contravention and other reportable breach investigations



More than **\$202.2 million**² in refunds to consumers and small businesses following direct AFCA involvement in resolving systemic issues

² This includes matters previously received by AFCA's predecessor, Financial Ombudsman Service, and resolved by AFCA since 1 November 2018.

Celebrating two years of success

1 November 2018

AFCA launches, becoming Australia's one-stop shop for financial complaints.



1 November 2019

AFCA celebrates 1 year with more than 70,000 complaints and \$185 million in compensation or refunds to consumers and small businesses.



1 July 2019

Royal Commission outcome: for one-year, AFCA's jurisdiction extended to accept complaints dating back to 2008.

7 November 2019

AFCA Datacube launches: offering a new interactive way to look at AFCA complaints data and compare the performance of financial firms.

12 July 2019

AFCA receives 50,000th complaint.

21 December 2018

Sydney hailstorms: AFCA activates its significant event response plan for the first time.

June 2019

AFCA milestone: total compensation awarded to individual and small businesses reaches \$100 million.



29 March 2019

AFCA Consumer Advisory Panel meets for the first time.

12 September 2019

AFCA launches AFCA Roadshow visiting 30 metro and regional locations to meet individual consumers, small businesses and members.

7 February 2019

AFCA appoints dedicated small business ombudsman.



26 August 2019

AFCA begins naming financial firms in its published determinations.

12 March 2020

AFCA launches COVID-19 online support hub and hotline for consumers and small businesses.

23 March 2020

All AFCA staff move to working from home due to COVID-19, with no downtime or impact on our service.



21 May 2020

AFCA launches CALD videos and updated language resources.



26 May 2020

AFCA hosts virtual Member Forums with over 400 members attending.



10 March 2020

AFCA receives 100,000th complaint.



19 May 2020

Lead ombudsman for insurance John Price speaks at the Bushfire Royal Commission consumer panel discussion.

1 November 2020

Two year anniversary.

3 August 2020

AFCA appoints new Head of Membership Services role.

23 January 2020

AFCA launches dedicated bushfire support hotline.

March 2020

AFCA finalises a significant remediation program, returning more than \$142 million in compensation amounts to around 73,169 banking consumers.



Banking and finance complaints

Between 1 November 2018 and 31 October 2020

Complaints received

89,660 complaints received

50% resolved at Registration and Referral stage

Top five banking and finance complaints received by product¹

Product	Total
Credit cards	22,411
Home loans	13,713
Personal loans	11,150
Personal transaction accounts	7,177
Business loans	2,959

Top five banking and finance complaints received by issue¹

Issue	Total
Unauthorised transactions	9,287
Credit reporting	8,680
Responsible lending	6,337
Financial firm failure to respond to request for assistance	5,899
Service quality	5,738

Complaints closed

85,278 complaints closed

More than **\$172.4 million²** in compensation and refunds was awarded or obtained through AFCA's dispute resolution work

75% of complaints resolved by agreement, or in favour of complainants

Average time to close a complaint
66 days

Stage at which banking and finance complaints closed

Stage	Total
At Registration	44,611
At Case Management	32,801
Preliminary Assessment	4,482
Decision	3,384

Average time taken to close banking and finance complaints

Time	Total
Closed 0–30 days	32.8%
Closed 31–60 days	33.9%
Closed 61–180 days	27.6%
Closed greater than 180 days	5.7%

¹ One complaint can have multiple products/issues.

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

What banking and finance complaints AFCA can consider

AFCA can consider complaints about a range of banking and finance products and services including:

- deposits to current accounts and savings accounts
- banking payment systems including over the counter payments, ATM transactions, internet and telephone banking, secure payment systems, direct debits and foreign currency transfers
- credit cards, overdrafts and lines of credit
- consumer leases and hire purchase arrangements
- short-term finance such as payday lending
- home loans, including reverse mortgages
- personal loans such as car loans, holiday loans and debt consolidation loans
- personal investment loans and small business loans
- guarantees.

The types of issues and problems AFCA resolves include:

- incorrect, dishonoured or unauthorised transactions, or mistaken payments
- fees or charges that were incorrectly applied or calculated
- incorrect, misleading or inadequate information about a product or service
- a financial firm's failure to respond appropriately to a customer in financial difficulty
- decisions made by a financial firm, including whether a decision to lend was made responsibly
- a financial firm's failure to follow instructions
- privacy and confidentiality breaches
- inadequate service, including unreasonable delays or failure to assist a vulnerable customer.



General insurance complaints

Between 1 November 2018 and 31 October 2020

Complaints received

36,475 complaints received

46% resolved at Registration and Referral stage

Top five general insurance complaints received by product¹

Product	Total
Motor vehicle – comprehensive	7,917
Home building	6,717
Travel	5,937
Motor vehicle – uninsured third party	2,328
Home contents	1,737

Top five general insurance complaints received by issue¹

Issue	Total
Delay in claim handling	6,805
Claim amount	6,377
Denial of claim – exclusion/ condition	6,110
Denial of claim	4,628
Service quality	2,475

Complaints closed

34,925 complaints closed

More than **\$128.6 million²** in compensation and refunds was awarded or obtained through AFCA's dispute resolution work

72% of complaints resolved by agreement, or in favour of complainants

Average time to close a complaint
75 days

Stage at which general insurance complaints closed

Stage	Total
At Registration	17,257
At Case Management	9,931
Preliminary Assessment	3,860
Decision	3,877

Average time taken to close general insurance complaints

Time	Total
Closed 0–30 days	23%
Closed 31–60 days	36%
Closed 61–180 days	33%
Closed greater than 180 days	8%

¹ One complaint can have multiple products/issues.

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

What general insurance complaints AFCA can consider

AFCA can consider complaints about the following general insurance products:

- consumer credit insurance
- home building
- home contents
- motor vehicle
- personal and domestic property (including pleasure crafts)
- residential strata title
- sickness and accident
- travel insurance
- business interruption.

The types of issues and problems AFCA resolves include:

- decisions a financial firm has made, such as denial of an insurance claim
- insurance premiums that were incorrectly applied or calculated
- information that wasn't disclosed about a product, or was misleading or incorrect
- if a complainant gave instructions and they weren't followed
- privacy and confidentiality breaches
- disputes over liability for a car accident or insurance excess
- denial of a travel insurance claim because of a pre-existing condition.



Superannuation complaints

Between 1 November 2018 and 31 October 2020

Complaints received

13,741 complaints received

31% resolved at Registration and Referral stage

Top five superannuation complaints received by product¹

Product	Total
Superannuation account	6,623
Total and permanent disability	2,236
Income protection	1,591
Death benefit	1,158
Pension	148

Top five superannuation complaints received by issue¹

Issue	Total
Delay in claim handling	2,122
Incorrect fees/costs	1,502
Account administration error	1,083
Service quality	1,044
Denial of claim	987

Complaints closed

11,697 complaints closed

More than **\$67.7 million²** in compensation and refunds was awarded or obtained through AFCA's dispute resolution work

71% of complaints resolved by agreement, or in favour of complainants

Average time to close a complaint
98 days

Stage at which superannuation complaints closed

Stage	Total
At Registration	4,453
At Case Management	5,176
Preliminary Assessment	1,301
Decision	767

Average time taken to close superannuation complaints

Time	Total
Closed 0–30 days	16%
Closed 31–60 days	22%
Closed 61–180 days	49%
Closed greater than 180 days	13%

¹ One complaint can have multiple products/issues.

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

What superannuation complaints AFCA can consider

AFCA can consider complaints about the following superannuation products:

- superannuation pensions and annuities
- corporate, industry and retail super funds
- some public sector schemes
- self-managed super funds (handled under our investments and advice jurisdiction)
- approved deposit funds
- retirement savings accounts
- small APRA funds.

The types of issues and problems AFCA resolves include:

- advice given about a superannuation product
- fees or costs that were incorrectly charged or calculated
- misleading or incorrect information – for example, if benefit statements are incorrect
- information not being provided about a product, including fees or costs
- decisions a superannuation provider has made, including decisions about an application for insurance held through superannuation
- decisions about a disability claim, including where the claim involves insurance cover held through the superannuation fund
- payment of a death benefit
- an unreasonable delay in paying a benefit
- if a complainant gave instructions and they weren't followed
- transactions that were incorrect or unauthorised.



Investments and advice complaints

Between 1 November 2018 and 31 October 2020

Complaints received

8,494 complaints received

22% resolved at Registration and Referral stage

Top five investments and advice complaints received by product ¹

Product	Total
Foreign exchange	1,763
Shares	1,039
Mixed asset fund/s	788
Superannuation fund	769
Self-managed superannuation fund	685

Top five investments and advice complaints received by issue ¹

Issue	Total
Failure to follow instructions/agreement	1,420
Inappropriate advice	1,107
Misleading product/service information	1,019
Failure to act in client's best interests	858
Incorrect fees/ costs	686

Complaints closed

7,147 complaints closed

More than **\$87.6 million** ² in compensation and refunds was awarded or obtained through AFCA's dispute resolution work

53% of complaints resolved by agreement, or in favour of complainants

Average time to close a complaint
113 days

Stage at which investments and advice complaints closed

Stage	Total
At Registration	1,987
At Case Management	3,668
Preliminary Assessment	608
Decision	884

Average time taken to close investments and advice complaints

Time	Total
Closed 0–30 days	17%
Closed 31–60 days	23%
Closed 61–180 days	37%
Closed greater than 180 days	22%

¹ One complaint can have multiple products/issues.

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

What investments and advice complaints AFCA can consider

AFCA can consider complaints about the following investment and advice products:

- derivatives
- financial product advice and services
- managed investment schemes
- securities
- self-managed superannuation funds.

The types of issues and problems AFCA resolves include:

- advice that wasn't in the complainant's best interests or was inappropriate
- fees or commissions that were incorrectly charged, applied or calculated
- information not provided to a complainant about the product, including fees or costs, or the information provided was misleading or not appropriate (including the risk of an investment product)
- decisions that a financial firm has made, including the suitability of an investment, an inappropriate margin call notice or the risk profile of a complainant
- if a complainant gave instructions (for example, to buy or sell stock) and they weren't followed or there was a delay in processing the instruction
- transactions that were not undertaken correctly or were unauthorised.



Life insurance complaints

Between 1 November 2018 and 31 October 2020

Complaints received

3,523 complaints received

29% resolved at Registration and Referral stage

Top five life insurance complaints received by product¹

Product	Total
Income protection	1,111
Term life	649
Total and permanent disability	362
Funeral plans	311
Trauma	278

Top five life insurance complaints received by issue¹

Issue	Total
Denial of claim	499
Incorrect premiums	363
Delay in claim handling	309
Claim amount	251
Misleading product/service information	237

Complaints closed

3,297 complaints closed

More than **\$21.6 million²** in compensation and refunds was awarded or obtained through AFCA's dispute resolution work

59% of complaints resolved by agreement, or in favour of complainants

Average time to close a complaint
116 days

Stage at which life insurance complaints closed

Stage	Total
At Registration	969
At Case Management	1,401
Preliminary Assessment	458
Decision	469

Average time taken to close life insurance complaints

Time	Total
Closed 0–30 days	11%
Closed 31–60 days	25%
Closed 61–180 days	45%
Closed greater than 180 days	20%

¹ One complaint can have multiple products/issues.

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

What life insurance complaints AFCA can consider

AFCA can consider complaints about the following life insurance products:

- consumer credit insurance
- income protection
- annuities
- endowments
- funeral plans
- scholarship funds
- term life policies
- total and permanent disability policies
- trauma policies
- accidental death
- whole of life policies.

The types of issues and problems AFCA resolves include:

- premium increases where there is an allegation of non-disclosure, misrepresentation or incorrect application of insurance premiums
- information about a product that wasn't disclosed, or was misleading or incorrect
- decisions a financial firm has made, such as denial of an insurance claim
- complaints about an insurer's decision to avoid or vary a policy on the basis of non-disclosure or misrepresentation
- complainants' instructions that weren't followed
- privacy and confidentiality breaches.



Complaints made by small businesses

Between 1 November 2018 and 31 October 2020

8,910 complaints received

24% resolved at Registration and Referral stage

Top five small business complaints received by product¹

Product	Total
Business loans	2,959
Hire purchase/lease	1,434
Business transaction accounts	1,031
Commercial property	470
Business credit card	419

Top five small business complaints received by issue¹

Issue	Total
Misleading product/service information	1,331
Unconscionable conduct	1,205
Appropriate lending	733
Financial firm failure to respond to request for assistance	696
Credit reporting	407

Complaints closed

8,218 complaints closed

More than **\$47.9 million²** in compensation and refunds was awarded or obtained through AFCA's dispute resolution work

61% of complaints resolved by agreement, or in favour of complainants

Average time to close a complaint
152 days

Stage at which small business complaints closed

Stage	Total
At Registration	2,182
At Case Management	4,570
Preliminary Assessment	691
Decision	775

Average time taken to close small business complaints

Time	Total
Closed 0–30 days	17%
Closed 31–60 days	25%
Closed 61–180 days	35%
Closed greater than 180 days	23%

¹ One complaint can have multiple products/issues.

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

What complaints from small businesses AFCA can consider

Small businesses with an unresolved complaint with a financial firm who is an AFCA member include:

- sole traders and partnerships
- small businesses with less than 100 employees (incorporated or unincorporated)
- not-for-profit organisations or clubs that are not registered charities if they carry on a business and have less than 100 employees
- registered charities regardless of how many people are employed and whether they carry on a business.

The types of issues and problems AFCA resolves include:

- errors in banking transactions and credit listings
- difficulty repaying loans, credit cards and short-term finance where your financial position has changed
- mistakes in guarantor arrangements
- errors in leasing contracts
- inappropriate provision of credit
- denial of an insurance claim (such as car, building and travel)
- mistaken internet payments
- inappropriate investment advice.

Threshold limits and compensation caps from 1 January 2021:

Type of claim	Compensation limit per claim	Monetary restriction on AFCA's jurisdiction
Credit facility	\$1,085,000 million for small businesses	Must not exceed \$5,425,000 million
	\$2,170,000 million for primary producers	Must not exceed \$5,425,000 million
Most other claims (excluding Superannuation)	\$542,500	Must not exceed \$1,085,000 million

Systemic issues

In addition to our dispute resolution function, AFCA has a systemic issues function.

Individual complaints can raise issues that we consider are systemic, that is, they are likely to effect a class of persons beyond any person who lodged a complaint or raised a concern.

AFCA's systemic issues obligations

AFCA is required under the *Corporations Act 2001* (Cth) and ASIC's *RG 267 Oversight of the Australian Financial Complaints Authority* to "Identify, refer and report systemic issues."

Under RG 267.198, a "systemic issue" means an issue that may:

- (a) affect more than one complainant
- (b) involve many complaints that are similar in nature
- (c) affect all current or potential complainants at a particular firm; or
- (d) affect more than one firm.

Source: ASIC June 2018. *RG 267.198: Oversight of the Australian Financial Complaints Authority*, p. 42.

We will conduct an investigation of a possible systemic issue through dealing with the financial firm. We will then form a view as to whether or not the issue is a definite systemic issue.

We report definite systemic issues to ASIC, APRA or the ATO. We identify the financial firm to the regulator.

Referring matters to appropriate authorities

Section 1052E(1) of the *Corporations Act* requires that AFCA must give particulars of a contravention, breach, refusal or failure to APRA, ASIC or the ATO, as appropriate, if it becomes aware, in connection with a complaint, that:

- (a) a serious contravention of any law may have occurred;
- (b) a contravention of the governing rules of a regulated superannuation fund or an approved deposit fund may have occurred;
- (c) a breach of the terms and conditions relating to an annuity policy, a life policy or an RSA may have occurred; or
- (d) a party to the complaint may have refused or failed to give effect to a determination made by AFCA.

Source: *Corporations Act 2001* (Cth), S1052E(1).

If the parties to a complaint agree to a settlement of the complaint and AFCA thinks the settlement may require investigation we may give particulars of the settlement to ASIC, APRA or the ATO. AFCA is not a regulator. The conduct regulator of the financial services industry is ASIC and the prudential regulator is APRA.

The primary purpose of AFCA's reporting requirements is to ensure that information is provided to the regulators so they may consider whether regulatory action is necessary.

In relation to definite systemic issues reported to regulators, the AFCA systemic issues team always seeks to work collaboratively with financial firms to resolve such issues. This often involves financial firms implementing changes to their systems and processes to avoid the recurrence of the issues identified. In doing so, our systemic issues work helps us achieve our vision of raising industry standards and minimising financial complaints.

166 systemic issues successfully resolved with the financial firms

Over **3.9 million** consumers were identified by financial firms as having been affected by systemic issues investigated by AFCA

Progressed **508** systemic issue investigations and serious contravention and other reportable breach investigations

More than **\$202.2 million**¹ in refunds to consumers and small businesses following direct AFCA involvement in resolving systemic issues

¹ This includes matters previously received by AFCA's predecessor, Financial Ombudsman Service, and resolved by AFCA.



Codes of practice

The Code Compliance and Monitoring Team (Code Team) is a separately operated and funded business unit of the AFCA.

The Code Team support independent committees to monitor compliance with codes of practice in the Australian financial services industry to achieve service standards people can trust.

We administer the:

- Banking Code of Practice
- General Insurance Code of Practice
- Insurance Brokers Code of Practice
- Customer Owned Banking Code of Practice
- Life Insurance Code of Practice

More than 600 financial firms voluntarily subscribe to one of the five codes we administer.

Code Compliance Committees

All five codes are monitored by independent Code Compliance Committees. On behalf of these committees we:

- conduct code monitoring activities
- investigate alleged code breaches
- share experiences of good industry practice
- Compliance investigations.

Each code sets out individual rights for consumers, including lodging a complaint that a financial firm may not have met its obligations under its industry's code.

Investigating these types of concerns helps us monitor financial firms' compliance, and support them to remedy breaches of the code.



AFCA provides fair, free and independent solutions to financial disputes.

Contact us

Australian Financial
Complaints Authority

1800 931 678 (Free call)
(9am to 5pm from Monday to Friday)

(03) 9613 6399 (Fax)

info@afca.org.au (Email)

afca.org.au/complaints (Complaint form)

GPO Box 3 Melbourne VIC 3001

www.afca.org.au