



# Demystifying AFCA

## Overview and complaint fundamentals

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**T**he Australian Financial Complaints Authority (AFCA) is an independent and external complaint resolution scheme that considers complaints from consumers against entities operating in the credit, financial services, superannuation, and insurance industries.

This paper examines the role of AFCA, the complaints process, and the powers and remedies available to AFCA with a focus on consumer complaints against lenders. In this piece, we provide an overview of AFCA generally as well as a detailed analysis of who can make a complaint and who a complaint can be made against.

### Overview of AFCA

The AFCA scheme was introduced by the *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Act 2018*. AFCA was authorised by the Minister for Revenue and Financial Services in 2018 and is a consolidation of a number of previous external dispute resolution schemes including the financial ombudsman service, the credit and investments ombudsman, and the superannuation complaints tribunal.

In the *Explanatory Memorandum to the Treasury Laws Amendment Bill*, it is explained that the purpose of establishing AFCA was to create a ‘one stop shop’ to resolve all financial complaints.

The AFCA scheme is governed by a set of rules which are approved by the Australian Securities and Investments Commission

(ASIC). The most recent version being the *AFCA: Complaint Resolution Scheme Rules* published on 13 January 2021 (Rules). The Rules are explained in more detail by AFCA’s Operational Guidelines. The most recent version of the guidelines is the *AFCA: Operational Guidelines to the Rules* published on 1 April 2022 (Guidelines).

As a ‘one stop shop’ AFCA determines complaints about:

- credit, finance and loans
- insurance
- banking deposits and payments; investments and financial advice.

### Who can make complaints and against whom?

Complaints can only be made by an *Eligible Person* against a *Financial Firm* that is an AFCA member.

An *Eligible Person* is set out in section E.1 of the Rules and includes, but is not limited to:

- an individual
- a registered charity
- a partnership, incorporated trustee, or not-for-profit organisation—however, if it carries on a business, then it must meet the small business requirement
- the corporate trustee of a self managed superannuation fund or a family trust, carrying on a small business only
- an incorporated small business with less than 100 employees.

The Rules include a number of types of eligible persons so that those persons eligible to make a complaint are clearly ascertainable

by reviewing the Rules. AFCA is very quick to ensure that the person making a complaint is eligible to do so. Being a consumer dispute resolution service, AFCA seeks to ensure that they are only deciding on complaints that are eligible and not those which ought rather be determined by a court or tribunal.

For example, the Rules allow the corporate trustee of a 'family trust' to file a complaint against a financial firm. Presumably, the reference to a 'family trust' is to a standard discretionary trust that identifies family members as beneficiaries, either specifically or by class. This said, AFCA will look at the structure of the relevant trust to ensure it is a genuine family trust.

A trust which was established as a unit trust but with only family members as beneficiaries may consider itself, by virtue of its structure, as a 'family trust'. However, in our experience, it will still be considered a unit trust by AFCA, not a family trust. AFCA will strictly apply the meaning of family trust to the eligibility criteria. This means that you need to carefully consider your structure if you are looking to borrow money from a lender and want to be able to fall back on AFCA as a means of resolving any future issues with them.

Legislation requires various entities to be AFCA members. Banks, credit providers, insurance firms, and fund management companies are among those financial firms which must be members. More broadly, any firm that is legally obliged to hold an Australian Financial Services (AFS) Licence or Credit Licence, needs to be an AFCA member. It is these entities that are considered to be *Financial Firms*.

AFCA provides a helpful search function on its website to assist consumers with searching for the financial firm or superannuation fund they are looking to make a complaint about.

## Types of complaints considered

Among others, some common complaints that AFCA has jurisdiction to determine include:

- financial hardship and inability to make loan repayments—including mortgages
- misleading or incorrect information relating to financial products
- compliance with responsible lending obligations
- denial of an insurance claim.

## Excluded complaints

There are some complaints which AFCA will not deal with. The Rules deal with excluded complaints. For example, AFCA will not hear complaints:

- about a lender's refusal to provide a loan based on a borrower's credit risk
- concerning professional accountancy services (unless the accountancy services were provided in connection with a financial service)
- about the general performance of an investment
- where in AFCA's discretion, the matter might be bet-

ter dealt with by the Courts, or the complaint is vexatious, or has been previously dealt with.

A unique situation may arise where an accounting firm, which does not hold an AFS licence, provides information relating to financial products that a client may take issue with. On its face, the complaint would be one which can be determined by AFCA—that is, misleading advice about a financial product. However, in the absence of an AFS licence, the accounting firm is unlikely to be a *Financial Firm*, that is also a member of AFCA, which means AFCA would have no jurisdiction to determine a complaint of this nature.

Even if, hypothetically, AFCA did have the requisite jurisdiction to determine the complaint, it might use its discretion to refuse a complaint on the basis that it would be more appropriately dealt with by the Courts or Tribunal. Often if a complaint is complex, involving a number of issues or alleged breaches of legislation, AFCA might decide the complaint would be more fairly dealt with in a different forum.

## Conclusion

Entities operating in the industries covered by AFCA's terms of reference should be aware of the important implications that an AFCA complaint may have in respect of its operations.

In the next part of this series, we will closely examine the complaints process and the restrictions that apply while a complaint is being investigated.

A financial firm facing a complaint or a consumer looking to make a complaint should seek professional advice for assistance in understanding their rights and responsibilities during the process. **FS**



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