



FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

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Re. **Establishment of Australian Financial Complaints Authority**

To Whom It May Concern,

The FPA welcomes the opportunity to respond to your consultation paper about moving to the new EDR arrangements for financial services. We congratulate the transition team on the work they've already done, including consulting with stakeholders.

We do have concerns about the cost of change, especially given that, in addition to changes to EDR arrangements, there's a range of additional costs of regulation that the financial services industry – and especially financial planners – are facing. Considering these concerns and that the EDR reforms are being made by government, we urge the government to contribute to the cost of setup of AFCA and closure of the existing schemes; these costs will otherwise be passed onto, and likely absorbed, by providers.

We have provided brief answers to the questions you raised in the associated paper, below.

PART 1 - TERMS OF REFERENCE

GUIDING PRINCIPLES FOR AFCA'S ESTABLISHMENT

Question 1

Are there any other principles that should be included in the guiding principles for AFCA's establishment?

FPA response

We recommend adding, under 'Efficient and effective transitional arrangements', a requirement that changes should be implemented in a way that minimises the cost and inconvenience to all parties (including providers and consumers).

ISSUE 1: MONETARY LIMITS

Specific monetary limits

Question 2

As AFCA will be a new EDR scheme, is it appropriate to maintain specific limits for:

- income stream risk disputes;
- general insurance broking disputes; and
- third-party motor vehicle insurance?

FPA response

We note that there may be challenges in applying a lump sum limit to an income stream dispute. We recommend that either an income limit applies to these disputes or that AFCA issue a clear methodology for calculating the lump sum equivalent of an income stream.

Question 3

If these specific limits are to be retained, should there be an increase in the limits?

FPA response

We're concerned that increasing these limits would increase the potential liability of FSPs, which would flow onto increased costs for advisers. Given that determinations can't be appealed by the FSP, any limit increases should be incremental to allow the industry time to adjust. As discussed below, increasing limits will increase professional indemnity insurance premiums at a time when adviser costs are sharply increasing. Further increases will be acutely felt and will be passed onto consumers or, more likely, absorbed by business at an already challenging time..

Impact on Professional Indemnity Insurance

Question 4

Are there any anticipated effects on firms that will be disproportionate to any increase in specific increased monetary limits?

FPA response

We're concerned about the effect that increasing limits will have on professional indemnity insurance. Increased premiums will be passed onto advisers at a time when a large number of additional costs of regulation, each substantial, are being, or proposed to be, imposed on advisers. For example,

- ASIC Supervisory Cost Recovery model – approximately \$4,000 to \$5,000 per adviser in 2018 for small licensees
- ASIC fee-for-service costs – currently unknown; significant increases previously proposed
- Funding the new Financial Advice Standards and Ethics Authority (FASEA) - unknown
- Financial advice registration exam - unknown
- Adviser Code Monitoring Scheme - unknown
- Compensation Scheme of Last Resort - unknown
- Tax Practitioners Board (TPB) - \$400 per business plus \$400 per adviser
- ASIC Financial Adviser Register – currently \$0 to \$46 per adviser
- Cost of meeting new education requirements – varies depending on current qualifications

It seems likely that industry will need to absorb at least substantial part of these costs, which given the scale of increases will make running a business particularly challenging. This challenge is especially large for small providers.

ISSUE 2: ENHANCED DECISION MAKING

Question 5

What measures may assist in ensuring AFCA's decision making processes promote consistency, while:

- deciding each case on its merits based on the facts and circumstances of the complaint; and
- maintaining the objective of achieving fairness and flexibility to adapt to changed circumstances?

FPA response

Our position is as follows:

- Decision-makers should be bound by previous decisions
 - Different factors might indicate that a case is within or outside the relevant rule or principle
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- Flexibility is achieved by assessing the factors of the particular case
- An established approach can be changed if there is a change in the law, professional codes or even good practice
- However, given the difficulty in identifying good practice, a cautious approach to reform based on changes in good practice should apply

Question 6

Are there any other principles that may assist in ensuring AFCA provides fair, efficient, timely and independent decisions?

FPA response

We recommend the following additional guiding principle:

- AFCA's decision-making should promote economic efficiency

The ultimate ground for AFCA's decisions is likely to be 'fairness in all the circumstances' of the case. It is especially important now that there will be only one EDR, of which all FSPs must be members and from which there is no right for members to pursue the matter in court, that this principle is used to minimise harm as understood by the community, rather than to displace that understanding. Further, EDR shouldn't undermine private bargaining.

Our recommendation would promote greater fidelity to legal standards, professional codes and to custom, rather than to less structured concepts.

Question 7

To what extent should these principles be reflected in the Terms of Reference, while allowing for operational flexibility?

FPA response

The principles should be included in the Terms of Reference and more detailed rules can be included outside.

ISSUE 3: USE OF PANELS

Question 8

How should AFCA balance the advantages of using panels in certain circumstances against efficiency and service implications including cost and timeliness of its decision making?

FPA response

Panels should only be used where the relevant professional or community norms governing a case aren't readily apparent to AFCA without a panel. Typically, this would be the case for disputes involving novel issues or those involving the overturning of previous decisions.

Where AFCA, whether independently or with the help of expert evidence, can already identify the relevant professional and community norms, a panel should not be used. In other circumstances, a panel should generally be used.

Question 9

Are there other factors that should be taken into account when considering whether a panel should be used?

FPA response

In addition to the factors already mentioned in the consultation paper, panels should be used in resolving dispute raising novel issues or where previous decisions may be overturned.

Question 10

How best can AFCA provide clear guidance about to users about when a panel should be used?

FPA response

In deciding whether to appoint a panel, AFCA should include the reasons for its determination. Where AFCA determines the relevant norms for a case are not readily apparent, a panel should be appointed unless AFCA identifies an alternative and more convenient source of evidence of those norms.

ISSUE 4: INDEPENDENT REVIEWS

Question 11

Apart from the review of the impact of the higher compensation cap, are there other aspects of AFCA's operations that should be subject to independent review within the first three years of its commencement?

FPA response

The following should also be reviewed:

- the quality of reasoning for decisions
 - the timeliness of decisions and settlements
 - the cost of AFCA operations
 - statistics about the type and, where applicable, dollar value of remedies
 - statistics about the extent to which determinations have been complied with, including time between issue and compliance with determination
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ISSUE 5: INDEPENDENT ASSESSOR

Question 12

How and where should the charter of the independent assessor be defined? Who should be able to make a complaint to the independent assessor?

FPA response

The charter should probably be defined by government and set out in a legal instrument. We recommend that consumers or FSPs who are the parties to a previous or existing dispute lodged with AFCA should be able to make a complaint.

Question 13

What safeguards should be put in place to ensure the assessor remains 'independent' (for example, should there be restrictions on early termination of the independent assessor)?

FPA response

We recommend the following:

- restrictions on early termination of the assessor
- restrictions on fee structures that would conflict with a requirement to provide an assessment that an independent assessor would provide

Question 14

Should the independent assessor have guaranteed direct access to the AFCA Board?

FPA response

Yes, direct access is required to ensure that issues will be resolved. Knowing that the independent assessor can go directly to the Board will mean that issues are more likely to be resolved quickly and satisfactorily at lower levels in AFCA's organisational structure.

Question 15

What other reporting arrangements should be in place (for example, if there is serious misconduct or a systemic issue)?

FPA response

We recommend that these issues should be reported to the relevant regulators, professional associations and the relevant Minister.

Question 16

Should the independent assessor publish their findings in each case on an anonymised basis?

FPA response

The independent assessor should publish their findings on an anonymised basis. We also recommend that statistical patterns in the data should be highlighted in the published findings.

Question 17

What should happen if AFCA disagrees with the independent assessor's decision?

FPA response

If AFCA disagrees with the independent assessor's decision, it should be able to present its arguments to the assessor. However, ultimately AFCA should have to comply with the assessor's decision unless the decision fails to comply with the requirements of the assessor's charter.

Question 18

When should a review of the functions and operation of the independent assessor be undertaken?

FPA response

We suggest that a review of the independent assessor be undertaken at least every three years.

ISSUE 6: EXCLUSIONS FROM AFCA'S JURISDICTION

Question 19

Do existing exclusions from FOS and CIO jurisdictions present any unreasonable barriers to accessing the schemes?

FPA response

We do not believe that the existing exclusions present any unreasonable barriers to accessing the schemes.

Question 20

Is there more that could be done so that complaints lacking substance are excluded from being dealt with by AFCA?

FPA response

We recommend that AFCA publish a summary of examples of claims that it has held to be frivolous, vexatious or otherwise lacking in substance, and a summary of the reasons for the decision.

Question 21

What, if any, further practices should be adopted to ensure the correct balance between accessibility to the scheme and ensuring that complaints not appropriate for consideration by an EDR scheme are excluded?

FPA response

We recommend that consideration should be given to giving low priority to dealing with claims that are likely, as determined by an appropriately qualified person, to be determined to be lacking in substance.

ISSUE 7: OTHER ISSUES TO BE ADDRESSED IN THE TERMS OF REFERENCE**Question 22**

What requirements relating to accessibility should be included in AFCA's terms of reference?

FPA response

We recommend that the following be included in the terms of reference:

- jurisdiction
- disputes covered and those that are not
- time limits for lodging a dispute
- exclusion of frivolous or vexatious claims or claims otherwise lacking in substance

Question 23

Having regard to the current FOS terms of reference and CIO rules, what principles and topics are of sufficient ongoing significance that they should be addressed in the AFCA terms of reference?

FPA response

We are comfortable with the types of inclusions in FOS's current terms of reference, which is dated 1 January 2010 and amended 1 January 2015. We are not proposing that AFCA's terms of references cover any more or fewer matters.

Question 24

Are there any matters not currently included in the FOS terms of reference/CIO rules that warrant inclusion in AFCA's terms of reference?

FPA response

We're not proposing adding any matters not already covered in the existing the FOS terms of reference or CIO rules.

PART 2 - SUPERANNUATION

ISSUE 8: ADDITIONAL ELEMENTS OF THE SUPERANNUATION DISPUTE RESOLUTION PROCESS TO BE ADDRESSED IN TERMS OF REFERENCE

Question 25

What additional matters related to superannuation should be addressed in AFCA's terms of reference (as opposed to operational guidelines)?

FPA response

We don't have a view on this issue.

Question 26

What matters related to superannuation would benefit from the additional flexibility that comes from being addressed in operational guidelines?

FPA response

We don't have a view on this issue.

ISSUE 9: DISPUTES CURRENTLY BEFORE THE SCT

Question 27

What additional arrangements could be put in place to facilitate the transition of complaints that were lodged with the SCT prior to 1 July 2018, but are not yet 'dealt with', to be considered by AFCA? At what point could a complaint be considered to be 'dealt with' by the SCT?

FPA response

Our tentative view is that a matter should be considered 'dealt with' if the SCT has given some positive indication to the claimant that it will hear the dispute.

PART 3 - GOVERNANCE

ISSUE 10: ENSURING THAT DIRECTORS HAVE APPROPRIATE SKILLS AND EXPERIENCE WITHOUT BEING SIMPLY REPRESENTATIVE OF SECTIONAL INTERESTS

Question 28

What measures could be put in place to secure sufficient knowledge of how different parts of the industry operate, while avoiding the representative tag for directors?

FPA response

We recommend that AFCA:

- draw on the academic work of relevant specialists
- hear from industry participants
- hear from consumers

Question 29

What measures should be put in place to ensure the AFCA Board appropriately balances the considerations of currency of director knowledge of particular industry sectors, conflict of interests, and breadth of competencies required?

FPA response

Consideration should be given to appointing directors with recent industry (or current academic experience) who have no close financial interests in the industry. Appointing such directors would address the need for currency or knowledge while minimising conflicts of interest.

Breadth of competencies is a difficult issue to address given the vast number of specialist areas covered by AFCA. It would seem reasonable to ensure that between them, the directors have expertise in the sectors and specialisations that are most commonly subject to dispute and that the Board has ready access to expert advice on other sectors and specialisations from non-directors.

Question 30

What needs to be addressed at a Board/constitution level and what can be addressed through additional governance arrangements established by AFCA such as industry sector advisory panel(s) for transition?

FPA response

Key matters that must be addressed at the Board and constitution level include:

- monetary limits
 - membership fees
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- systemic factors in complaints

ISSUE 11: BOARD RESPONSIBILITIES

Question 31

Are there additional functions or responsibilities of the AFCA board that are not reflected in the constitutions of the existing schemes?

FPA response

We are not proposing any such additional functions or responsibilities.

Question 32

What benchmarks should AFCA have in relation to matters addressed in the ASX corporate governance principles, including:

- board renewal;
- diversity;
- procedures for assessing board performance;
- management of conflicts of interest or of duty on the part of directors and executive staff; and
- remuneration policy?

FPA response

We recommend a focus on:

- staggered renewal of the Board (rather than renewing the entire Board at the same time) in order to strike a balance between continuity and innovation
 - diversity of views are represented on the Board
 - management of conflicts of interest
 - remuneration policy
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Question 33

Should the Constitution or governing rules provide that neither the board nor individual directors can direct a decision-maker with regard to the outcomes of a particular dispute or class of disputes?

FPA response

Yes, the Constitution of governing rules should make such a provision. Decision-makers should focus on the quality and independence of their decisions, rather than the operational and financial concerns of the body that administers the decision-making process.

PART 4 – FUNDING**ISSUE 12: FUNDING MATTERS FOR CONSIDERATION AS PART OF AUTHORISATION****Question 34**

In addition to matters identified in paragraphs 1-3 above, what other material should a company seeking authorisation to operate the AFCA scheme provide to demonstrate that it has satisfied the requirements of adequate funding and sufficient funding flexibility?

FPA response

We are not proposing that any additional material should be provided.

Question 35

Are there any principles beyond those identified in paragraph 2 above that should underpin AFCA's funding model?

FPA response

We are not proposing that any additional principles should apply.

Question 36

Should the funding arrangements for superannuation and non-superannuation disputes be separate and distinct, given the very different nature of these disputes?

FPA response

Our tentative view is no, they should not. The principle of minimising sector cross-subsidisation will promote care in setting a fee model. In our view, prescribing a particular fee model goes a step too far.

ISSUE 13: INTERIM FUNDING ARRANGEMENTS

Question 37

If an interim funding arrangement were put in place, what features should it have and when would it be appropriate to transition to a long-run funding model?

FPA response

We strongly recommend that, given the reforms are being made by government, government at least contribute to the cost of setup of AFCA and closure of the existing schemes. In relation to ongoing costs, an interim funding arrangement would seek to minimise cost increases (from the current levels) to any FSP, particularly those least able to afford them. Cost increases for those least able to cover them should be made gradually to achieve the ideal distribution across FSPs. We would tentatively suggest a transition period of at least two years.

Question 38

What special considerations might need to be factored into an interim funding model to balance the need for adequate resources (certainty) with the principles (accuracy)?

FPA response

We accept that there is a strong case for charging a larger-than-expected amount upfront to cover the heightened risk of greater-than-expected costs for a new scheme. This would sacrifice accuracy for certainty, however providers may prefer to budget upfront rather than having to pay a special levy of unknown amount at a future point in time.

ISSUE 14: TRANSPARENCY AND ACCOUNTABILITY

Question 39

Who are the key stakeholders AFCA is accountable to? What is the key objective and measure of importance to each stakeholder?

FPA response

AFCA is accountable to consumers, FSPs and government. They are also accountable to third-parties, such as financial planners, whose reputations may be affected by disputes.

We believe that all stakeholders want cheap and timely decisions that are consistent with relevant norms. Financial planners also want to ensure that their reputations aren't unjustifiably tarnished by disputes considered, or decisions made, by AFCA.

Question 40

In addition to the accountability measures in the Bill, are there additional measures that should be embedded in AFCA's Constitution and/or terms of reference or reflected in ASIC guidance to ensure accountability to stakeholders?

FPA response

In addition, the Board must consult with its membership base and take into account the views of its constituencies. The Board should demonstrate how it has taken into account these views and why it has settled on a particular view, all of which should be readily available to members.

Question 41

Are there other conditions that could be put in place to ensure the scheme is accountable to members in relation to fees?

FPA response

As already mentioned, a robust consultation process with members is essential. It is vitally important that the issue of fees is a key matter that is addressed through these consultation arrangements.

If you have any queries or comments, please do not hesitate to contact me at policy@fpa.com.au or on 02 9220 4500.

Yours sincerely

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Financial Planning Association of Australia¹

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The Financial Planning Association (FPA) has more than 12,000 members and affiliates of whom 10,000 are practising financial planners and 5,600 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
 - In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of FOFA.
 - We have an independent conduct review panel, Chaired by Mark Vincent, dealing with investigations and complaints against our members for breaches of our professional rules.
 - The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 24 member countries and the 150,000 CFP practitioners that make up the FPSB globally.
 - We have built a curriculum with 17 Australian Universities for degrees in financial planning. As at the 1st July 2013 all new members of the FPA will be required to hold, as a minimum, an approved undergraduate degree.
 - CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional bodies, eg CPA Australia.
 - We are recognised as a professional body by the Tax Practitioners Board.
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