

From the Desk of Director Marija Pajeska



19 May 2023

Executive General Manager Jurisdiction  
Australian Financial Complaints Authority  
GPO Box 3  
Melbourne VIC 3001

By email: [consultation@afca.org.au](mailto:consultation@afca.org.au)

**Response to AFCA Consultation Paper titled 'AFCA Rules and Operational Guidelines – Proposed amendments'**

The Association of Securities and Derivatives Advisers of Australia (ASDAA) appreciates the opportunity to provide these comments to AFCA in respect of the Consultation Paper titled 'AFCA Rules and Operational Guidelines – Proposed amendments'.

ASDAA represents the interests of its members, who are from the Securities and Derivatives advisory profession. Its members are comprised of individuals who are either directors, or employees, of small to medium sized firms which hold an Australian Financial Services Licence (AFSL), but are not a Participant Member of the Australian Stock Exchange.

Our specific comments to the questions outlined in the consultation paper are detailed in Annexure A.

We would like to take this opportunity to raise some additional issues which we have generally observed from our interactions with AFCA Staff and that we feel industry as a whole would benefit from (including the AFCA Complaints resolution process) if changes were made to the Rules and/ or clarification provided in the Operating Guidelines:

- Definition of Eligible Person should be subject to the Complainant demonstrating that they had a relationship with the Financial Firm where the Financial Firm agreed to provide financial services to them. In the past AFCA has accepted complaints from people who have alleged that a financial service has been provided to them without the need of that person to demonstrate and/ or prove that the Financial

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**ASDAA**

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Firm has agreed to provide such financial service to them. For the complaints resolution service to be taken seriously and to be fit for purpose the first step in the process is for the person making the complaint to demonstrate that a financial service has been provided to them by a Financial Firm as agreed to between them and the Financial Firm.

Just by going to a Financial Firms website or going to a conference where a Financial Firm is represented does not mean that a financial service has been provided to a person by the Financial Firm, nor that the person is a client of the Financial Firm.

This is a critical point and would increase efficiency in the AFCA complaints resolution process.

Another scenario arises where the person claims to have dealt with a financial service provider that is authorised by multiple AFS Licensees and as part of the complaints resolution process AFCA initiates a complaint against all the authorising AFS Licensees.

To avoid this additional step, AFCA should work with the client to establish who the authorising licensee is and which Financial Firm the complaint is against. Simply asking a person to provide a copy of an FSG they had received at the time or the contractual agreement they entered into at the time is not unreasonable in order to establish the correct Financial Firm the complaint should be lodged against.

We understand that this may not be possible in all circumstances but AFCA should be encouraging clients via the consumer advocacy groups to maintain good records themselves. This would naturally expedite the process.

We are of the view that the first place to start would be in the AFCA Complaint form (copy attached as Annexure B). We note that section 4 requests the complainant to provide the Financial Firms details however does not require the Complainant to provide any information about the nature of the relationship between them and the Financial Firm.

Rule A.4.3 states the following:

There are some additional requirements that must be met in order for AFCA to be able to consider a complaint. In summary:

- a) The complaint must arise from a customer relationship or other circumstance that brings the complaint within AFCA's jurisdiction.
- b) There must be a sufficient connection with Australia.
- c) Generally, there is a time limit within which the complaint must be submitted to AFCA.
- d) If the complaint is about a Traditional Trustee Company Service that involve Other Affected Parties, the Complainant must get the consent of all Other Affected Parties.

We are of the view that the AFCA Complaint Form needs to be updated to address points (a) to (c) and in relation to complaints about a Traditional Trustee Company Service points (a) to (d). This can be addressed in one of the following ways:

- require the client to provide evidence of the client relationship with the Financial Firm;
- require the client to provide an acknowledgement that a client relationship with the Financial Firm exists and/ or existed at the time and if required they can provide evidence of the existence of the client relationship with the Financial Firm; or
- asking clients to provide evidence that they paid the Financial Firm for a Financial Service, reality is that no service is for free, not even AFCA as Financial Firms pay.

It should be important that complainant's understand that they need to evidence that a client relationship existed with the Financial Firm.

This is part of the AFCA rules and AFCA taking the side of the client and ignoring the Financial Firm when they state that it did not have a relationship with the client does not demonstrate AFCA as complying with its own rules, ie. AFCA Rule A.2.1(c) which states:

AFCA will:

consider complaints submitted to it in a way that is:

- (i) independent, impartial, fair,
- (ii) in a manner which provides procedural fairness to the parties
- (iii) efficient, effective, timely, and
- (iv) cooperative, with the minimum of formality;

AFCA should not be putting themselves in a position where they are promoting and condoning complainant's to use the AFCA Complaints Resolution service where the client assumed they were receiving a Financial Service when there is no evidence that the Financial Firm was providing a Financial Service.

- We note that AFCA uses the term Paid Representative in its Rules and Operating Guidelines.

We also note that under the Corporations Act, the term Representative generally means someone who is authorised under an AFSL or an Australian Credit Licence (ACL).

This can be a little confusing and AFCA may want to consider using a different term.

- Regarding AFCA Rule A.7.6 which is the rule concerning defamation. This rule must be broadened to include the Complainant and their Paid Representative (especially if the Paid Representative is a Lawyer). Limiting this rule to only Financial Firms is unfair and inequitable.

An ASDAA Member was actually issued a letter that threatened defamation by the Complainants Lawyer right in the middle of the AFCA Complaints Process.

At the time when the letter was received, AFCA did not raise any objection with the Complainant's Paid Representative about them threatening the AFCA member with defamation. AFCA's inaction caused undue stress to the AFCA member in what was already a very stressful and drawn out complaints process dealing with multiple identical complaints from complainants who were never clients of the member to begin with.

- We would like to draw AFCA's attention to the Organisational Requirements which are set out in Section 1051(2) of the Corporations Act 2001 (Cth) which form part of the Mandatory requirements. In particular, Section 1051(2)(d) of the Corporations Act 2001 (Cth) which states:

Organisational requirements

(2) The organisational requirements are that:

(d) complainants are exempt from payment of any fee or charge, to the operator of the scheme or to any other entity, in relation to a complaint.

We are of the view that AFCA needs to assess whether a complainant can actually use a Paid Representative when having a complaint assessed via AFCA as one could infer that a Paid a Representative is captured by the wording 'any other entity' which would mean that they should not be paid.

It gives rise to the question of whether AFCA Rules comply with Section 1051(2)(d) of the Corporations Act 2001 (Cth) by allowing for Paid Representatives and whether AFCA has a duty to exclude complaints where a Paid Representative is used.

ASDAA appreciates the opportunity to provide this Submission to AFCA on these significant proposals. We would be happy to discuss any issues arising from our submissions on this issue, or to provide any further material that may assist. Should you require any further information, please contact Brad Smoling, Director of Communications, on (07) 5532 3930 or email [brad@asdaa.com.au](mailto:brad@asdaa.com.au).

Yours Sincerely

Marija Pajeska  
Compliance Director

## Annexure A: Questions

### Proposal 1: Paid Representatives

#### **Do you think that the proposed Rules amendments in relation to Paid Representatives appropriately address Recommendation 4?**

No we do not agree that Accountants and lawyers should be excluded from the definition of Paid Representative as it is unreasonable to assume that they will act appropriately at all times (we refer to our previous example where a law firm, a Paid Representative, commenced defamation proceedings against the Financial Firm).

We understand that they are subject to ethical standards and codes of conduct as a result of being members of various Associations with which they hold accreditation but those codes do not necessarily extend to their interactions with AFCA and members of AFCA or Financial Firms.

If they do not act appropriately they should be treated in the same manner as any other Paid Representatives. Bullying tactics should not be allowed to be used by any professional, AFCA staff member, client or Paid Representative. AFCA should have the power to exclude a person from the complaints process and in the case of a Paid Representative, it should be anyone regardless of their profession.

The objective is to ensure that AFCA is a neutral and independent body that exists to help resolve complaints without being pressured to do things differently to the detriment of clients or its members.

In addition to the above we refer to the proposed changes relating to Paid Representatives who should hold an AFSL or ACL. We believe that in such circumstances AFCA has a duty to report those individuals that should be holding an AFSL or ACL to ASIC and it would be appropriate to include in the AFCA Rules and Operational Guidelines an obligation for AFCA to report those individuals or entities to ASIC.

## Proposal 2: Complainants

**Do you think that the proposed new provisions in relation to Complainant conduct are appropriately drafted and achieve the right balance in their application?**

Yes in relation to a Complainants conduct to AFCA staff. However, we feel that the proposed new provisions do not address a Complainants conduct towards AFCA Members and their staff (ie. Financial Firms and their staff).

We have spoken to a number of people over the years from Financial Firms that have dealt with Complainants that have raised complaints with AFCA and have themselves faced abuse, bullying, received threats, etc.

This type of behaviour is not acceptable and should not be condoned by AFCA on the basis that its Rules and Operational Guidelines stay silent on the matter and only address such behaviour as it relates to AFCA staff.

AFCA should consider an approach whereby all persons, ie. Complainants, Paid Representatives (including Accountants and Lawyers), AFCA Staff and any Ombudsman or person acting on behalf of AFCA, and Staff of Financial Firms or any person acting on behalf of a Financial Firm are required to sign and adhere to a Code of Conduct upon engaging with AFCA.

Where the person breaches the Code of Conduct, the Rules should give the Ombudsman or Senior representative within AFCA the power to exclude the person from the Complaint Process or exclude the Complaint from AFCA consideration, depending on the circumstances.

All persons involved in the process have a right to be treated fairly and AFCA has a duty to ensure that no person that is part of the process is abused or mistreated.

## Proposal 3: Appropriate Settlement Offers

**Do you think that the proposed change to Rule A.8.3 is appropriately drafted and will assist in delivering early and fair resolution of complaints?**

Reality is that clients have an incentive to try for more as they know if they threaten to take a complaint to AFCA it will cost the Financial Firm money (ie. AFCA Fees). If the Financial Firm has acted fairly and the compensation offer was fair and equitable then that incentive should be removed.

So we do agree with the proposed changes, however believe that it is important to ensure that Financial Firms do not get penalised by being charged AFCA fees as a result of a client escalating a complaint to AFCA in an attempt to get more.

In circumstances where AFCA determines that an appropriate settlement offer has been given to the client, AFCA should consider waiving any fees that the Financial Firm would otherwise be charged. That way AFCA is recognising that the Financial Firm has acted reasonably and telling complainants that they will not get more (ie. an equivalent amount to AFCA fees) just because they raised it with AFCA.

## Proposal 4: Previous Settlement Agreements

**Do you think that the proposed new Rule C.2.2g) and the Operational Guidelines discussion of settlement agreements is appropriately drafted?**

We agree with the proposed changes.

## Proposal 5: Sophisticated investor or professional investor complaints

### Do you think that the proposed amendment to the Operational Guidelines appropriately responds to the Review Recommendation 6?

We agree with the proposed changes, however we note that our experience and the experience of our colleagues has demonstrated that part of the problem is AFCA staff themselves as they do not understand the definition of wholesale clients which includes a sophisticated investor and professional investor.

A number of issues have arisen in the past where AFCA staff have not properly reviewed the information before them and have accepted a complaint when it was clearly evidenced by the Financial Firm that the client had provided relevant documentation at the time to be classified as a wholesale client.

If AFCA staff are scrutinising documentation provided by a client to a Financial Firm at the time of engagement or during the period of engagement to determine whether such documentation adequately demonstrates that a person meets the wholesale customer test and as a result the AFCA staff member determines that the client was not wholesale, then AFCA has a duty to consider all relevant issues. AFCA needs to understand that the duty lies with the client to demonstrate that they meet the wholesale customer test. A Financial Firm can make this determination based on publicly available financial information about the client or based on information that the client has provided.

If AFCA determines that a client is retail and should benefit from the complaints resolution process offered by AFCA then AFCA has a duty to determine whether at the time of engagement or during the engagement the client themselves provided fraudulent information to the Financial Firm which led to the Financial Firm forming the opinion that the client was wholesale.

To date, what is clearly evident is that AFCA staff do not have the skills or knowledge to assess whether or not the client meets the wholesale customer test and therefore until AFCA has staff that are competent to make this assessment and make a judgement call on whether or not the client acted fraudulently when they provided information to the Financial Firm the information provided should be judged at face value rather than AFCA siding with the client and disregarding the information provided by the Financial Firm and making a determination which is inconsistent with the law.

Changing the rules and operating guidelines is one thing but AFCA has a duty of care to the financial industry to ensure that its staff have the skill and knowledge to apply those rules and operational guidelines consistently with the laws set out in the Corporations Act and regulations.

We note that AFCA has the power to assess complaints lodged against one of its members, however AFCA has a duty to ensure that its rules are consistent with the laws that its members are obliged to comply with including the following requirements:

- to be a member of AFCA if financial services are provided to retail clients; and
- hold PI Insurance if the AFSL allows financial services to be provided to retail clients.

Giving free access and/ or access at all to wholesale clients to the complaints resolution process offered by AFCA where the Financial Firm is a member of AFCA is contradictory to the laws that AFS Licensees are required to comply with. We also note that most PI Insurance policies do not cover services provided to wholesale clients as it is not required by law.

AFCA should only be permitted to review a complaint raised by a wholesale client if the AFS Licensee agrees and at the wholesale clients expense, it should not be a free service offered to wholesale clients. Generally, they can afford to cover their own legal costs and should not be encouraged to use a service designed to provide affordable complaint resolution to retail clients.

### **Proposal 6: Forward looking review mechanism**

**Are the proposed changes to the Operational Guidelines appropriately drafted and in keeping with Recommendation 9 of the Review Report?**

The proposed changes appear to be reasonable.

### **Proposal 7: Complainant non-acceptance of Determination**

**Do you think that proposed new Rule A.15.3b) is appropriately worded and provides clarity about the effect of a determination not being accepted by a Complainant?**

We agree with the wording but believe AFCA should consider whether it would be appropriate to include an exclusion whereby a Complainant can not raise the complaint with AFCA again once a Determination by AFCA has been made.

### **Proposal 8: Accidental error in a Determination – slip rule**

**Do you think the Rules wording is appropriately drafted and provides clearer guidance and transparency about the existing slip rule?**

We have no issues with the proposed changes.

### **Proposal 9: Consistency of language about AFCA’s monetary limits**

**Are there other areas in the AFCA Rules that you consider require similar administrative or minor changes?**

No comment

### **Proposal 10: Clarifying the objection process for Rule A.8.3**

**Do you think that the proposed Rule A.8.5 and A.8.6 are appropriately drafted and replicate the existing provisions under A.4.5 and A.4.6?**

In terms of rule A.8.6(b) we note that it focuses on a Complainants behaviour towards AFCA staff and are of the view that it would be reasonable to extend this to the Complainants behaviour towards a Financial Firm’s staff as well.

As mentioned in response to Proposal 2 all persons involved in the AFCA Complaints process should respect each other and no person should be allowed to continue to be part of the process if they show disrespect or act poorly towards another person.

The AFCA complaint process should not allow or condone bad behaviour towards anyone and at the moment the rules and operational guidelines propose to eliminate bad behaviour towards a Complainant, a Paid Representatives and AFCA Staff.

The fact that the rules are silent on bad behaviour to staff of Financial Firms does not demonstrate AFCA as promoting a fair and equitable complaints resolution process.



### **Proposal 11: AFCA Banking and Finance Panels**

#### **Are there additional assessment criteria that AFCA should consider adopting to meet the stated objective?**

Rule A.13.1 assigns responsibility to AFCA's Chief Ombudsman to assign complaints to an Ombudsman, Adjudicator or an AFCA Panel based on various criteria. We note that one of the criteria that is missing from the assessment process is whether or not the Ombudsman or Adjudicator have the relevant skills, experience and knowledge to assess the complaint.

We do not question that an Ombudsman or Adjudicator has the relevant skills or knowledge relating to the complaints resolution process. What our concern is whether or not the Ombudsman or Adjudicator has relevant, knowledge, skills and experience relating to the financial product or financial service which is the subject of the complaint.

For example, non-cash payment products have been around for a while however new digital platforms have added an additional dynamic to the process. So, if none of the Ombudsman or Adjudicators have a clear understanding of how these products function and operate then it would be reasonable to escalate the matter to an AFCA Panel as the AFCA Panel would ensure that the appropriate information and product knowledge is considered and debated as part of the Determination process. However, it would be unreasonable to charge a Financial Firm extra fees for putting the matter before an AFCA Panel as a penalty for AFCA's lack of knowledge.

If AFCA has another means to ensure that its Ombudsman & Adjudicators have the product skills and knowledge then this will not be an issue.

### **Proposal 12: Definition changes**

No question – No comment

### **Proposal 13: Annual Reporting**

#### **Do you think that the proposed new Rule C.2.2g) and the Operational Guidelines discussion of settlement agreements is appropriately drafted?**

No question – No comment

# Complaint form



## 1. Personal details: Complainant

Please tick here if one or more of the complainants identifies as being of Aboriginal or Torres Strait Islander origin (optional)

By ticking this box you give AFCA permission to consider your complaint according to our policy on enhancing access for Aboriginal and Torres Strait Islander peoples.

	Complainant 1	Complainant 2
Title		
First name		
Family name		
Date of birth		
Postal address		
State		
Postcode		
Mobile phone		
Daytime phone		
Email		

Please complete the details of the Complainant(s).  
 The **complainant** is the person who has the complaint with the financial firm.  
 If the complainant is a company or association, the form must be completed by someone who is authorised to act on behalf of the company or association.  
 If you are working with a representative, record their personal details on page 2.

## 2. Business details

Are you lodging the complaint on behalf of a business?

Yes       No (go to question 3)

What is your relationship to the business? e.g. owner, employee

Business name: \_\_\_\_\_

ABN: \_\_\_\_\_

Number of employees the business had at the time of the event(s) giving rise to the complaint: \_\_\_\_\_

Is the business a primary producer?

Yes       No

AFCA can consider complaints on behalf of small businesses.  
 A **small business** is defined as having less than 100 employees.

To help us protect your privacy, please do not provide us with any reference number assigned to you by government agencies that can uniquely identify you. For example, do not provide your tax file number (TFN), Medicare or driver's licence number.

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## AFCA Complaint form

### 3. Personal details: Authorised representative

Only complete this section if you choose someone to act on your behalf in dealing with us.

First name		Title	
Family name			
Organisation name <i>(if applicable)</i>			
Relationship to you			
Postal address		Postcode	
State			
Daytime phone			
Email			

If you choose a **representative**, the representative and any organisation they work for will be our point of contact for you and we will send them all correspondence related to your complaint.

AFCA provides a **free service**. You do not need to be represented, but you can ask someone to help you. This might be someone from your family or a free financial counselling service. If your representative charges you a fee, you will usually have to pay this cost yourself.

### 4. Financial firm details

Name the financial firm you have a complaint with:

Have you made a complaint to this financial firm?

Yes  No (go to question 6)

If so, when\* did you complain to the financial firm?

\* If you do not know the exact date, please make an estimate

If you have not previously complained to your financial firm, in most cases they will have 30 days to respond to you.

### 5. How did you make your complaint?

For example: I called and spoke to someone in the call centre.

Briefly state how you complained. Include how you made your complaint, who you spoke to, the phone number you rang, or the email address you used.

Since you made a complaint, have you received a final response in writing?

Yes  No

If you have received a final response in writing from your financial firm, attach a copy, if available.

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## AFCA Complaint form

### 6. Complaint details

What sort of product or service is the complaint about?

Describe the product type(s) (e.g. home loan, life or home insurance policy, investment product, superannuation account).

Financial firm reference number(s) if available:

This will help your financial firm to locate the correct policy/account/complaint etc. Provide only the last four digits of any credit card.

What is your complaint about?

If you need more space, enclose additional pages with this form.

When\* did the events you are complaining about happen?

*\* If you do not know the exact date, please make an estimate*

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## AFCA Complaint form

### 7. How can we help?

What do you think is a fair and reasonable resolution to the complaint?

If you are seeking payment of a sum of money, provide any calculations of your claim(s).

### 8. Legal/court proceedings

Has your financial firm commenced legal proceedings against you in a court?

Yes  No

There are limits on a financial firm's ability to take enforcement action or any further steps in current legal proceedings where a complaint has been lodged with AFCA.

### 9. Additional assistance

Yes  No Language: \_\_\_\_\_

AFCA provides a telephone interpreter service free of charge.

Is there any additional assistance we can provide?

- |  |   |
|--|---|
| <input type="checkbox"/> Cognitive condition | <input type="checkbox"/> Physical impairment    |
| <input type="checkbox"/> Family violence     | <input type="checkbox"/> Sight/vision           |
| <input type="checkbox"/> Hearing             | <input type="checkbox"/> Text telephone         |
| <input type="checkbox"/> Literacy            | <input type="checkbox"/> Other (describe below) |
| <input type="checkbox"/> Mental health       |   |

This is an opportunity for you to tell us about how we can help you communicate with us.

An AFCA staff member will contact you if you indicate here that you may need assistance. We will discuss with you how you would prefer to communicate with us and any other help we can provide.

Description:

Have you received a **Statement of Claim** or need help to complete this form? Contact us on 1800 931 678 for assistance



## AFCA Complaint form

### 10. How did you hear about AFCA?

- |  |   |
|--|---|
| <input type="checkbox"/> I already knew about AFCA | <input type="checkbox"/> Financial firm                   |
| <input type="checkbox"/> Community organisation    | <input type="checkbox"/> Legal Aid/community legal centre |
| <input type="checkbox"/> Family/friend             | <input type="checkbox"/> Media/advertising                |
| <input type="checkbox"/> Financial counsellor      | <input type="checkbox"/> Online/Social media              |

### 11. Authority

AFCA collects personal information when investigating and determining a complaint. The type of personal information that AFCA may collect includes identity and contact information, financial information and sensitive information. AFCA requires this information to properly investigate a complaint about a financial firm.

By making a complaint to AFCA, you consent to AFCA considering your complaint against a financial firm/s in accordance with AFCA Rules. You authorise AFCA to:

- Exchange your information, including relevant sensitive information, to other parties or external organisations where reasonably necessary for the purpose of dealing with the complaint, and as required or permitted by law
- Refer the complaint to another financial firm or dispute resolution service where AFCA decides it is appropriate
- Exchange your information, including relevant sensitive information, between financial firms where there are multiple complaints against different financial firms
- If reasonably necessary, use your information collected for this complaint to resolve another complaint that may or may not be related to this complaint.

You also authorise your representative (or that representative's organisation), other complaint parties, or the financial firm to exchange your information, including relevant sensitive information, to other parties for the purpose of dealing with the complaint, and as required or permitted by law.

### 12. Working together to resolve the complaint

- I understand and agree to follow the behaviour expectations set out in the Engagement Charter during AFCA's dispute resolution process.

Visit [www.afca.org.au/engagement-charter](http://www.afca.org.au/engagement-charter) for more information.

Details about how we handle your personal information are set out in our Privacy Policy available at [afca.org.au/privacy](http://afca.org.au/privacy).

Our Privacy Policy includes information on how you can access or correct your personal information that AFCA holds. It also sets out how you can make a complaint about how AFCA has handled your personal information.

You may withdraw your consent for us to handle your personal information by contacting us, however we will be unable to resolve your complaint and we will continue to keep information that has been collected. Withdrawing your consent will not impact how we comply with our legal and regulatory obligations.

If you have any questions about how AFCA handles privacy, you can speak to an AFCA staff member or contact AFCA Privacy by email to [privacy@afca.org.au](mailto:privacy@afca.org.au).

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## AFCA Complaint form

### 13. Signatures

_____ Signature Complainant 1	_____ Signature Complainant 2	_____ Signature Representative
_____ Date	_____ Date	_____ Date

### 14. Survey - help us to improve our service

From time to time we (or someone on our behalf) might contact you for feedback (you do not have to give your name). If you do not want to be contacted, tick the box below.

Do not contact me for feedback

Your **feedback** about our services will help us understand how we can improve as an organisation.

### 15. Supporting documents

Once complete send this complaint form, together with all relevant details, documents and correspondence to:

Australian Financial Complaints Authority  
GPO Box 3, MELBOURNE VIC 3001  
Email: [info@afca.org.au](mailto:info@afca.org.au)

Please attach copies of all documents that are relevant to your complaint. If your financial firm has written to you about your complaint, please provide a copy of its response.

#### Document Checklist – this list is provided as a guide\*

- |  |  |
|--|--|
| <input type="checkbox"/> Completed and signed complaint form (including representative's signature, if applicable) | <input type="checkbox"/> Copy of written response from your financial firm (if applicable) |
| <input type="checkbox"/> Copy of Statement of Claim (where legal proceedings have commenced)                       | <input type="checkbox"/> Copy of any other documents relevant to your complaint            |

\* For a full Document Checklist, visit [www.afca.org.au/checklist](http://www.afca.org.au/checklist)

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