

From the Desk of Director Marija Pajeska



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By email: policy.submissions@asic.gov.au

Response to ASIC Consultation Paper 298 – Oversight of the Australian Financial Complaints Authority: Update to RG 139

The Association of Securities and Derivatives Advisers of Australia (ASDAA) appreciates the opportunity to provide these comments to ASIC in respect of ASIC Consultation Paper 298 – Oversight of the Australian Financial Complaints Authority: Update to RG 139.

ASDAA's members are comprised of individuals who are either directors or employees of firms which hold Australian Financial Services Licences (AFSLs).

Our specific comments to each of ASIC's proposals in the Consultation Paper are detailed in Annexure A of this letter.

In addition we make the following comments:

- Further clarification would be useful in RG139.21, Table 2: Dispute resolution requirements by type of financial firm. The first scenario refers to Australian financial services (AFS) licensees. The information provided in the column titled 'Dispute resolution requirements' refers to Section 912A of the Corporations Act (Cth) 2001 and states that all AFS licensees must have a dispute resolution system in place that consists of IDR procedures and membership to AFCA. This is incorrect as Section 912A(1)(g) of the Corporations Act (Cth) 2001 states that an AFS Licensee must, if those financial services are provided to persons as retail clients, have a dispute resolution system complying with Section 912A(2) of the Corporations Act (Cth) 2001. It is important that the table specifies that this is only applicable to AFS Licensees that provide financial services to retail clients.

- We refer to RG139.101(a) where ASIC states that it is a mandatory requirement that the operations of the scheme are financed through contributions made by members of the scheme. We feel that ASIC is being misleading in this guidance as the Mandatory requirements set out in Section 1051(2)(d) actually state:

'The organisational requirements are that 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'

This does not mean that the scheme must be financed through contributions made by members, it means that AFCA must setup a funding model which does not include charging complainants a fee.

- We refer to RG139.151(a) which provides guidance on the time limits to lodge a complaint at AFCA and note that these time limits do not appear to be supported by any legal precedent or grounds. The time limits should be subject to the date of occurrence. The date of a person becoming aware of a matter is too subjective and creates an issue regarding jurisdiction as a financial firm will have to in the first instance argue why the complaint falls outside of AFCA's jurisdiction on the basis that it may have occurred many years ago even though the complainant argues that they just have become aware of the matter. Time limits should be subject to the same statute of limitations as provided for in law at the time the complaint is lodged or subject to the same time limits which are defined in law relating to record retention by a financial firm (which is always based on the point in time the event occurred).
- We refer to RG139.177 which provides guidance relating to 'Complaints that have not been through (or completed) IDR'. We feel that further clarity is warranted here because if a client chooses to lodge a complaint to AFCA before lodging a complaint to the financial firm to be assessed under its IDR procedure, any administrative costs incurred by AFCA to manage the IDR procedure and maintain records relating to the IDR procedure should be worn by AFCA. The financial firm should not be penalised with administrative costs as a result of a client not wishing to lodge a complaint under the financial firms IDR procedure.
- We refer to RG139.181 which provides guidance relating to 'Systemic issues'. We feel that ASIC needs to provide guidance on the interaction of identification of Systemic issues and matters that are subject to a review and remediation program (under ASIC Regulatory Guide RG256: Client review and remediation conducted by advice licensees).

ASDAA appreciates the opportunity to provide this Submission to ASIC 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.

Yours Sincerely

Marija Pajeska
Compliance Director

Annexure A: Response to ASIC Questions

Referring matters to appropriate authorities

B1 proposal: ASIC proposes to require that:

- (a) the obligation to report will apply to serious contraventions by a financial firm, including a licensee, a representative or an employee; and
- (b) AFCA must make reports within a reasonable time, but no later than 30 days, of:
 - (i) becoming aware that a serious contravention has occurred or may have occurred; or
 - (ii) identifying a systemic issue.

In specifying requirements, we will consult with APRA, the Australian Taxation Office (ATO) and AFCA, with a view to harmonising and streamlining reporting arrangements.

ASIC Question		Response
B1Q1	Do you agree with our proposed timeframe for AFCA to report serious contraventions or systemic issues? If not, why not?	We agree with the proposed timeframes and note that the reporting framework should incorporate a form of risk assessment which allows a regulator to differentiate between a serious contravention that has occurred versus one that may have occurred. The critical element is to allow the financial firm to concentrate on the resolution of the complaint rather than an investigation into a serious contravention that may have occurred.

B2 proposal: ASIC proposes to give guidance in draft RG 139 that:

- (a) a contravention will be 'serious' (and therefore reportable by AFCA to ASIC) if there are sufficient facts or information to found an objectively reasonable belief that it is serious. We consider that a reasonable belief will be formed if a reasonable person would expect AFCA to report the matter to ASIC, or if AFCA in good faith forms the view that a serious contravention of the law may have occurred;
- (b) the particulars of the contravention, for the purposes of s1052E, will include the identity of the financial firm, including the licensee, representative or employee; and
- (c) AFCA should consult with ASIC if they are unsure about whether they should refer a matter to ASIC.

ASIC Question		Response
B2Q1	Do you agree with our broad approach to AFCA reporting? If not, why not?	<p>In the first instance we believe ASIC should consider re-drafting the statement '...if there are sufficient facts or information to found an objectively reasonable belief that it is serious.'</p> <p>as it does not appear to be grammatically correct.</p> <p>We have concerns with ASIC's broad approach. We are of the view that the guidance on what is deemed a serious contravention should take into consideration the following:</p> <ul style="list-style-type: none"> • Lack of consistency with the guidance provided to AFS Licensees in ASIC Regulatory Guide RG78: Breach reporting by AFS licensees. The guidance in RG78 in relation to the meaning of a 'significant breach' and in particular factors outline in 'Table 2: Factors that determine whether a breach (or likely breach) is 'significant'' should be adopted in the guidance for what is deemed a serious breach. This ensures that there is consistency across the industry and the same basis is used to determine what is significant and/ or serious. • To determine whether a breach is serious the same guidance provided in RG139.57 AFCA should have systems and processes in place to: <ul style="list-style-type: none"> - identify serious contraventions - refer the matters to the financial firm for response and action; and - report serious contravention in accordance with s1052E

B3 proposal: ASIC proposes to clarify in its guidance that the primary role of the independent assessor is to:

- (a) respond to complaints about how AFCA dealt with an individual complaint or series of complaints; and
- (b) identify, address and report on issues affecting the AFCA's complaints handling operations and performance; and
- (c) as appropriate, make recommendations about or provide remedies for identified issues in complaints handling operations and performance.

ASIC Question		Response
B3Q1	Do you agree with our proposed guidance on the primary role of the independent assessor? If not, why not?	The independent assessor should also report on matters that have been reported to the Administrative Appeals Tribunal or like body in regards to the decisions made by AFCA.

B4 proposal: ASIC proposes to clarify in its guidance that it is not the role of the independent assessor to:

- (a) undertake a merits review of an AFCA decision, including a jurisdictional decision; or
- (b) re-open a complaint or the outcome of a complaint.

ASIC Question		Response
B4Q1	Do you agree with our proposed guidance on what is outside the role of the independent assessor? If not, why not?	We agree that the independent assessor should not undertake a merits review however it should conduct a review and report on jurisdictional decisions, decisions made to waive the time limits and decisions made to waive the monetary limits. This information is important to assess the effectiveness of AFCA and whether AFCA is performing its duties properly taking into consideration that financial firms are bearing all the costs and that based on the terms of reference decisions are binding on the financial firm and not on the client.

B5 proposal: ASIC proposes to require that the independent assessor must:

- (a) be appointed by the AFCA Board, with its role and functions set out in the AFCA terms of reference;
- (b) have sufficient powers and resources to perform its functions;
- (c) be independent, with appropriate qualifications and experience;
- (d) accept service complaints from all users of the scheme;
- (e) identify, address and report on issues affecting AFCA's complaints handling operations and performance;
- (f) make recommendations, as appropriate, to the Chief Ombudsman and to the AFCA Board;
- (g) identify any issues that may benefit from further review or analysis—for example, in an independent review;
- (h) make quarterly reports to the AFCA Board and ASIC; and
- (i) make annual public reports on:
 - (i) complaints received;
 - (ii) findings or recommendations made; and
 - (iii) outcomes achieved as a result of recommendations made.

ASIC Question		Response
B5Q1	Do you agree with our proposed requirements for the independent assessor? If not, why not?	We agree with ASIC's guidance

B6 proposal: ASIC proposed expectations for financial firms are that, by commencement (no later than 1 November 2018):

- (a) any final response or written reasons financial firms give to a consumer about a dispute at IDR will refer to AFCA;
- (b) financial firms will update online information and forms to refer to AFCA, as appropriate; and
- (c) personalised disclosures, including periodic and exit statements, will refer to AFCA.

ASIC Question		Response
B6Q1	Is this is a sufficient timeframe for financial firms to update all of their legal disclosures (as set out in paragraph 35) and other consumer communications? If not, why not? Please provide specific detail in your response.	No, this is not a sufficient timeframe as AFCA has not even released its Terms of Reference nor has provided any information to industry which would allow it to prepare for the changes required. There should be a transition period of six (6) months, commencing 1 Nov 2018 or earlier if AFCA is able to accept complaints from financial firms prior to this date, to ensure that financial firms have sufficient time to update their legal disclosures.
B6Q2	Should we provide transitional relief from external dispute resolution disclosure obligations in the lead up to AFCA commencement? If so, please provide reasons.	