From the Desk of Director Marija Pajeska

29 June 2018

Australian Financial Complaints Authority

By email: submissions@afc.org.au

Response to AFCA Consultation on Proposed AFCA Rules

The Association of Securities and Derivatives Advisers of Australia (ASDAA) appreciates the opportunity to provide these comments to AFCA in respect of the Consultation on Proposed AFCA Rules.

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

We wish to advise that in our response we refer to Financial Service Providers (FSPs) which are entities that hold a Australian Financial Services Licence, in particular those that provide advisory and dealing services in financial products that do not have a cooling off period. We understand that a reference to a Financial Firm in the AFCA Act includes an FSP.

We provide the following general comments:

- We note that one of the reform objectives was

  '*The establishment of AFCA is an important reform that will enhance access for consumers and small businesses to fair, efficient, timely and effective free dispute resolution*.'

  One of the main issues with FOS was its inability to deal with complaints in an efficient and timely manner and the fact that FOS lacked staff with the appropriate skills, knowledge and understanding to deal with complaints lodged against FSPs (for example, complaints in relation to the provision of advisory and dealing services and investment advice to clients under an AFS Licence).

  It is our understanding that FOS will essentially be rebranded as AFCA and the services provided by AFCA will be provided by the same staff that provided the services under FOS, except under a different set of rules.

  We have serious concerns about the current staff of FOS being able to meet the requirements under AFCA Rule 2.1(e) (i.e. AFCA will have appropriate

expertise and resources to handle complaints submitted to it).

We fail to see how a new set of rules and re-branding an organisation will make the organisation more fair, equitable and efficient.

- A dispute resolution body is there to facilitate the resolution of a complaint and stating constantly that our preferred option is for you to settle the complaint indicates that they would rather that the complaint be resolved, inadvertently in the clients favour (i.e. for this to happen the Financial Firm will most likely need to pay the Complainant a gesture of goodwill) than the allegations and issues be reviewed and assessed.

- Although the number of accepted disputes from our industry is exceptionally low, the amount of monetary compensation sought by the consumer is often a significant amount of money. It seems to be far too easy for a consumer to make a complaint that the value of their equity portfolio has declined due to "inappropriate advice", and not because of the general market volatility, and FOS seems only too keen to accept this as a legitimate complaint.

  (Refer to the enclosed Case Study found at Appendix One for an example of how one frivolous complaint nearly cost an FSP $90,000 in monetary compensation, all because a client wanted compensation because the value of a their share portfolio had declined.)

- ASDAA conducted an analysis of the FOS 2015/2016 Board and notes the following:

  - of the 8 FOS Board members - none have any experience working in the Securities/Stockbroking industry;

  - of the 7 FOS Senior Leadership Group - none have any experience working in the Securities/Stockbroking industry;

  - only two individuals are named on FOS' Stockbroking Panel[1]:

    Mr Matthew Wigzell: Head of Wealth Management, Private Clients at ASX Participant Paterson's;

    Mr Alex Knipping: Portfolio Manager with fund manager Intrinsic Investment Management.

  It is ASDAA's opinion (from our member experience) that FOS is dysfunctional in that inexperienced and unqualified Case Managers form opinions on what experienced and qualified Securities and Derivatives professionals should have done with the added benefit of hindsight. Just because the FOS Case Manager has a Law degree doesn't equip them to make judgements on what a qualified Securities and Derivatives professional standard of advice and care should be.

  Just imagine the outcry if this happened in other professions say Medicine or Accounting?

[1] Page 18 of FOS annual Review 2015 2016

Law degrees do not include training in Medicine, Accounting or Securities and Derivatives Advisory.

Given the importance of FOS' dispute function, as an example, ASDAA expects them to be leading the way with a team of Case Managers who actually have had practical hands on experience in the Securities/Stockbroking industry. Sadly FOS, in ASDAA's opinion, is not leading the way. Only one person at FOS appears to possess the qualification - FOS' Stockbroking Panel member Mr Matthew Wigzell.

ASDAA also notes that half the new AFCA board are former and current FOS board members - Mr Robert Belleville, Ms Jennifer Darbyshire, Ms Johanna Turner, Ms Elissa Freeman and Ms Erin Turner.

AFCA, just like the FOS board it replaces, not one of the board members has any experience working in the Securities/Stockbroking industry which greatly concerns ASDAA and the general Securities/Stockbroking industry.

FOS's many short comings in the area of capable assessment are repeated with the new EDR body.

Those who do not learn from history are doomed to repeat it. It seems AFCA are just a newly polished version of FOS.

It is ASDAA's position that AFCA should ensure that the Case Managers who are assigned to assess a Securities/Stockbroking disputes hold a relevant University degree and have also had at least three years relevant work experience in the Securities/Stockbroking industry.

It seems only fair that under the Governments, *Raising Professional Standards of Financial Advisers* draft legislation that the very people who will make the serious decisions regarding a Securities/Stockbroking dispute are on the same qualified level as Securities and Derivative advisers/Stockbrokers.

Compulsory FSP members need to have the faith that the EDR individuals assigned to case manage a Securities/Stockbroking dispute also have relevant practical experience in the area they will be assessing.

If the single EDR body needs to hire such expertise then they should be made to hire in the expertise (using FOS's revenue data, they received $46.5 million in revenue the year ended 30 June 2015, ASDAA is of the opinion that they can fund the employment of at least two or three individuals who have the required Securities/Derivatives experience).

ASDAA is aware of many well qualified semi-retired Securities and Derivative Advisers/Stockbrokers who would appreciate the opportunity to be employed full-time or even part-time in such a role.

ASDAA also would like to see the new EDR appoint at a minimum three suitably qualified individuals to sit on the Securities/Stockbroking Panel.

- As per ASIC's recommendation for governing bodies of compliance schemes, in its Consultation Paper 300: Approval and oversight of compliance schemes for financial advisers (refer to CP300.139), we consider that AFCA, as a governing body, should apply principles consistent with procedural fairness in their decision-making process. In particular, we propose that AFCA adopt the principles set out in the following table:

Principle	Explanation
The opportunity to be heard	Generally, the complainant and financial firm should have the opportunity to be heard before the governing body makes a decision that may be adverse to their interests (this includes decisions which are adverse to the financial firm). The opportunity should include a right for them to appear before the governing body and present: • submissions, either in writing or verbally; and • material that addresses the issues of significance or concern to the governing body.
The entitlement to a notice	The complainant and financial firm should be entitled to: • know the subject matter of the hearing and, in particular, the issues that are of concern to the governing body and for which there is a risk of an adverse finding; • know the circumstances that may cause the governing body to make a decision against them; and • have reasonable time to prepare their response.
The right to an impartial decision maker	The complainant and financial firm should have the right to have the decision made by a person who has an open mind on the matter, which includes: • having an independent governing body; and • ensuring that persons who sit on the governing body do not have responsibility for investigating and gathering information and evidence about their possible failure to comply, the role of the Decision Maker should be independent of the Case Manager.
Findings of fact to be made on a sound basis	Any findings of fact that the governing body is required to make in a hearing must be based on material that is relevant, credible and probative.

  ASIC expects the governing body of a compliance scheme to have an appeals process in place to address circumstances where a financial adviser disagrees with the findings on the basis that a decision by the governing body can have adverse effects on the financial adviser.

  Similarly, AFCA, as a governing body should have an appeals process in place to address circumstances where a complainant or a Financial Firm disagrees with the findings of AFCA on the basis that a decision of the governing body can have adverse effects on the complainant or the Financial Firm. We note that AFCA does not have an appeals process however it does afford the complainant the right not to accept the findings, that in itself does not promote the operation of a fair, efficient and equitable market.

Our comments to the Consultation questions are detailed below:

- **Do the AFCA Rules achieve a reasonable balance between user-friendliness and detail?**

In most cases yes, however there are some instances that are subjective and require further detail or clarification to ensure that:

- it is clear what AFCA's jurisdiction is; and
- the defined time limits are fair and equitable.

- **Before the Table of Contents is a "quick guide" summarising the key aspects of the Rules and their location. Is this helpful?**

  We can see that this would be helpful to clients/ complainants; however most clients/ complainants would not use it and would benefit from an interactive online process which would guide them through the rules and determine whether or not there complaint qualifies.

- **The Rules contain a number of tables (for example, summary tables of the time limits to submit a complaint to AFCA and of the monetary restrictions on AFCA's jurisdiction and compensation powers). Are the tables helpful in explaining these areas? How could they be improved?**

  We can see the benefits of the tables however think that if this information is included into the logic/ decision trees which form part of the online lodgement of a complaint it would be more beneficial and interactive for clients.

- **Are there aspects of the Superannuation Complaints Tribunal's jurisdiction that have not been incorporated into the AFCA Rules?**

  We have no comment.

- **Do the AFCA Rules adequately provide for AFCA to meet its reporting obligations under the Corporations Act?**

  This section of the AFCA Rules appears to be appropriate.

- **Are there any other issues that require consideration?**

  We provide our comments below:

Rule	Comments
A2.1 AFCA will: (e) have appropriate expertise and resources to handle complaints submitted to it	As stated previously we have concerns about AFCA's ability to meet these requirements as FOS has proven time and time again that it does not have the expertise to handle complaints purely as a result of officers not understanding the nature of the complaint, how the industry operates and using exuberant FOS fees (which are levied on the financial firm) as a means to encouraging firms to settle complaints rather than address the issues at hand. We suggest that Case Managers who are assigned to assess disputes relating to investment advice or the provision of advisory and dealing services: • should be suitably qualified to do so; and • should hold a relevant University degree and have at least 3 years relevant professional experience in the financial services industry. If no such personnel are currently employed then FOS/ AFCA should make it a priority to employ at least two or three suitably qualified individuals to meet these standard;
A5.2 AFCA will refer the complaint back to the FSP and set a timeframe for the FSP to either resolve the complaint or to provide its position in relation to the complaint. This opportunity will not normally be provided: (a) if AFCA considers it appropriate to commence investigating or otherwise progressing the complaint immediately, or (b) for a Superannuation Complaint relating to the payment of a death benefit.	AFCA should afford the FSP the opportunity to respond to every complaint. By commencing an investigation without giving the FSP an opportunity to state their position and provide relevant information gives rise to the question of whether or not procedural fairness has been applied.

Rule	Comments
A7.5 If a complaint submitted to AFCA is resolved by agreement between the parties or is determined by an AFCA Decision Maker and the Determination becomes binding upon the FSP, the FSP must not begin or continue with legal proceedings against the Complainant, anyone else joined as a party to the complaint or Other Affected Party that are inconsistent with the agreed resolution or the Determination. This does not prevent a FSP from pursuing any appeal rights available to it under the Corporations Act in respect of determinations about Superannuation Complaints.	This should be specifically limited to the Complaint lodged and to which the resolution or Determination relates. The rule should preclude the FSP from taking action against the Complainant or anyone else joined as a party to the complaint or Other Affected Party relating to matters not addressed in the Complaint. A FSP should have the right to appeal a decision where it is evident that the understanding of the facts formed by an AFCA officer are not true and correct or based on a misstatement of the facts by the Complainant where the evidence is clear. New evidence can come to light at various points in time and to preclude a FSP from taking action where new information has come to light is not fair and equitable.

Rule	Comments
A7.6 A FSP must not instigate defamation action of any kind in relation to allegations about the FSP made to AFCA by the Complainant, anyone else joined as a party to the complaint or Other Affected Party.	The clause strictly prohibits a FSP from instigating defamation action of any kind against a consumer in respect of allegations made by the consumer about an adviser or their FSP to the EDR. Again, this is why our members felt the FOS dice was so firmly loaded against them because the same prohibitions are not restricted to the consumer who instigated such action against the FOS member. The prohibitions even include any employee, agent or contractor of the Financial Firm. ASDAA believes this could have a significantly detrimental impact on the reputation, which is founded on trust and credibility, of an employee, agent or contractor of the Financial Firm and the Financial Firm. Whilst ASDAA agrees that certain information provided by a consumer to an EDR Scheme as part of their dispute should be subjected to qualified privilege so that the consumer can confidentially put their matter before the EDR, we strongly object to the fact that the complainant is freely able to make defamatory statements to the general public, the media, and especially on social media platforms against an employee, agent or contractor of the Financial Firm and their Financial Firm. Disputes should at all times be handled in a civil matter and its ASDAA's position that should it be found during the dispute process that an employee, agent or contractor of the Financial Firm and/ or their Financial Firm, are defamed either in or outside the EDR process then they should be allowed to take external legal matters to defend their professional reputations. Better still, the EDR should inform the complainant that unless they immediately cease and desist their defamatory remarks then their case against the Financial Firm will be closed without prejudice. If a Complainant defames an employee, agent or contractor of the Financial Firm and/ or the Financial Firm and the allegations raised are proven to be misleading and deceptive then the affected party should have the right to take action accordingly. All parties to a complaint should be bound by confidentiality and a Complainant should not have the right to defame the character of an employee, agent or contractor of the Financial Firm and/ or the Financial Firm before AFCA or in public. The AFCA rules should include consequences for a person who defames the character of another without just cause or breaches confidentiality.
A8.3(a) – At any stage, AFCA may decide that it is not appropriate to continue to handle a complaint, in circumstances such as the complaint is without merit	The merits of a complaint should be assessed and determined in the first instance. This ensures that only valid complaints with merit are being assessed by AFCA and that Financial Firms are only being charged for the services of AFCA when the complaint has merit.

Rule	Comments
A9.6 AFCA may seek expert advice including from an AFCA appointed legal expert, industry expert, medical practitioner or building expert. AFCA may require the Financial Firm to pay or contribute to the cost provided that: (a) the fees of the expert are reasonable, having regard to the complexity of the complaint and usual market rates (b) the person has the necessary expertise. Unless special circumstances apply, AFCA will not require a Financial Firm to contribute more than $5,000 per complaint to the cost of expert advice obtained by AFCA.	Financial Firms already compulsorily fund AFCA and as such there is an expectation that AFCA has the people with the relevant industry skills required to assess and resolve complaints within the financial services industry. It is unfair and unreasonable for AFCA to treat Financial Firms as an ATM and charge additional costs to a Financial Firm resulting from its lack of skills and knowledge. The whole point of an EDR Scheme is to make it accessible at a reasonable cost. Charging so many fees per complaint creates an environment whereby clients can complain about anything knowing that it won't cost them anything and that a Licensee will likely settle a complaint instead of pay fees to AFCA to assess the merit of the complaint as settling the complaint is cheaper. This is neither fair nor equitable nor creates an environment which supports the main objective of the law which is the fair, efficient and transparent operation of financial markets.
A10.3 Despite rule A.10.1, AFCA need not provide the parties with any memoranda, analysis or other documents prepared by AFCA's employees or contractors unless required by law.	This information should be made available to either party upon request so that industry can have the confidence that AFCA has suitably qualified persons working for them who are acting independently with the objective to resolve the complaint based on factual information. FOS and CIO are not judicial bodies and neither will AFCA be. They are all public companies limited by guarantee which derive their jurisdictional powers from ASIC (Regulatory Guide 139), and forms a contract with its compulsory Financial Firm members via their respective Terms of Reference. ASIC in effect controls CIO and FOS' Terms of References, and CIO and FOS are not independent of ASIC. ASDAA suspects the same regarding AFCA. As administrative bodies, CIO and FOS are not subject to the Freedom of Information (FOI) regime. There is no way for anyone to shine a light on its internal processes. (Being a private organisation, there has always been some question as to whether or not decisions by FOS and CIO should be subject to judicial review). AFCA as the sole EDR scheme SHOULD BE subject to an FOI regime.

Rule	Comments
A12.4 If the Financial Firm accepts AFCA's recommendation but the Complainant does not respond within the time specified by AFCA, the complaint may be closed. If the Complainant does not respond or does not accept the recommendation, it will not bind the parties.	There needs to be a time limit as to when a Complainant can respond and/or re-open the complaint. This shouldn't be left open ended as doing so is completely unfair to the Financial Firm.
A12.5 When determining a complaint at the request of a party, the AFCA Decision Maker must consider the party's reasons for disagreeing with the preliminary assessment, but is not limited to those reasons.	This rule implies that the Decision Maker takes the AFCA recommendation into account and the comments made by either party if they disagree with the AFCA recommendation and makes a decision based on this information. The Decision Maker should assess the complaint and form their own opinion based on a judgement of the facts not just based on the judgement of an AFCA officer.

Rule	Comments
A14.3 An AFCA Decision Maker is not bound by rules of evidence or previous AFCA or Predecessor Scheme decisions.	Inexperienced FOS Case Managers can presently award monetary compensation damages of up to $309,000. That is getting close to the sort of monetary damages awarded by Supreme Court judges. We note that AFCA will have the right to award monetary compensation damages of up to $500,000 Unlike FOS & AFCA, Supreme Court judges are bound by the law, the rules of evidence, contract law, and their prior decisions. Supreme Court judges just can't do whatever they like, and their decisions are subject to appeal. An adviser, or their FSP, or a Financial Firm affected by an adverse EDR Scheme decision in effect has no right of reply, and this is not fair. An EDR Scheme decision can ruin a Financial Firm, a FSP and adviser's reputation, the FSP may lose their ability to get PI insurance, and/ or lose their AFS licence, and/or a Financial Firm may be forced into administration or liquidation of the business. All of that may happen because the Financial Firm has no right of appeal or a review of an adverse EDR Scheme Determination. As unpalatable it is to say - Even murderers get the right to appeal their sentences. It is also the perfect opportunity for AFCA to introduce a means for a Financial Firm to have a right to appeal. The current system setup by the government (FOS & CIO) denies a Financial Firm to their constitutional right to a fair trial and fair hearing. See attached link for further details: https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Fairtrialandfairhearingrights.aspx Australia is a party to seven core international human rights treaties. Fair trial and fair hearing rights are contained in article 14 of the International Covenant on Civil and Political Rights (ICCPR). By adopting an EDR structure the government is effectively circumventing its obligation to ensure that everyone has a right to fair trial and fair hearing as this applies to cases before courts and tribunals.

Rule	Comments
A15.3 In the case of any other complaint, a Determination by an AFCA Decision Maker is binding on the Financial Firm if accepted by the Complainant within 30 days of the Complainant's receipt of the Determination. The Financial Firm may ask the Complainant to provide it with a binding release from liability in respect of the matters resolved by the Determination, provided the release: (a) is limited to the matters dealt with in the Determination, and (b) is consistent with the Determination.	A Financial Firm should have the right to appeal the decision if there is a question of law. This is fair and equitable and for a Financial Firm to be held liable as a result of the Decision Maker misinterpreting the law is not fair and equitable.
A16.3 If the Independent Assessor finds that AFCA has not provided an appropriate standard of complaints handling service, the Independent Assessor 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 incurred by the person who escalated the complaint to the Independent Assessor (capped at the maximum amount that may be awarded under these rules for non-financial loss). The Independent Assessor cannot make a recommendation that AFCA give consideration to re-opening, changing or correcting a determination or other finding issued by AFCA about the merits of a complaint, or AFCA's jurisdiction.	The liability of AFCA to a party who lodges a complaint to the Independent Assessor should be the greater of the fees paid to AFCA to assess the Complaint(s) and the cap for non-financial loss. The non-financial loss is capped at $5,000 and taking into consideration the fees that AFCA charges to deliver its services $5,000 does not serve as a deterrent for AFCA. It is not acceptable for a service provider, under its contractual term to limit their liability to an amount which is less than the cost of delivering its service in circumstances where AFCA failed to deliver under their contractual terms (i.e. the AFCA Rules).

Rule	Comments
A16.4 The Independent Assessor must provide a copy of their recommendation to the person who referred the matter to the Independent Assessor.	The Independent Assessor should have an obligation to provide its recommendation and report to ASIC, the body responsible for the oversight of AFCA, at the same time as the report is provided to AFCA's Board. If these reports are not provided to ASIC as and when they are issued then ASIC will not have transparency over the activities of AFCA.
A16.5 An Independent Assessor's recommendation is not binding on AFCA.	If the Independent Assessors determination is not binding on AFCA then what is the point of the Independent Assessor, especially if the report is not provided to ASIC at the time of issue. It creates a false sense of security for Financial Firms that they have an independent body to escalate matters to when in fact they really don't. The assessment should be referred to ASIC who should make an independent Determination.
A19.1 AFCA must collect and record comprehensive information about its complaint resolution, for example: (a) the number of complaints and enquiries, including the number of complaints referred to a Financial Firm to resolve through internal dispute resolution	The responsibility to monitor complaints received by FSP under an IDR is not within AFCA's jurisdiction. A FSP has a responsibility to report this information to ASIC and therefore this creates an unnecessary duplication of the requirements.
A20.1 To facilitate public reporting, AFCA must produce a report at least every twelve months and provide this to ASIC, the Financial Firm and the public via AFCA's website. This report must be a comprehensive summary and analysis of the data collected. Amongst other things, it must include statistical information about: (a) the number of complaints submitted to AFCA per Financial Firm; (b) the number of complaints closed per Financial Firm; (c) the outcome of those complaints.	FSPs would benefit from having information about complainants identities as they can risk assess whether a potential client presents a high risk as they tend to lodge malicious and vexatious claims. The obligation of all participants and gatekeepers of the financial services industry is to ensure the fair, efficient and transparent operation of financial markets. Therefore, if the reports released publicly by AFCA disclose the identity of FSP's they should also disclose the identity of complainants to ensure that everyone can work together towards ensuring the fair, efficient and transparent operation of financial markets. If AFCA is not prepared to include the identity of Complainants in its report then all publicly available reports should be de-identified.

Rule	Comments
A22.1 AFCA, the Chief Ombudsman, Ombudsmen, Adjudicators, Panel Members, someone authorised by the Chief Ombudsman to carry out any responsibilities or exercise any powers or discretions of AFCA and AFCA employees, contractors and agents shall not be liable to a party to a complaint for any loss or damage arising directly or indirectly in the course of carrying out AFCA functions.	We accept this rule to the extent that it excludes for negligence or a decision or recommendation made by the Independent Assessor.

Rule	Comments
B4.3.1 In other situations, AFCA will generally not handle a complaint unless it was submitted to AFCA before the earlier of the following time limits: (a) within six years of the date when the Complainant first became aware (or should reasonably have become aware) that they suffered the loss, and (b) where, prior to submitting the complaint to AFCA, the Complainant was given an IDR Response in relation to the complaint from the Financial Firm – within two years of the date of that IDR Response.	What ASDAA members specifically would like from AFCA is fairness. Anyone who invests their money into listed equities or financial products which are not subject to a cooling off period, whether they received personal advice or general advice, needs to understand and accept that the value of their equity portfolio can not only go up in value but that it can decline in value. This point is highlighted in writing, and verbally, to the FSP's clients before commencing any market trading activity. Market risk obviously does exist, but the Predecessor Schemes did not seem to be able or willing to differentiate between "market risk" and "inappropriate advice" when accepting complaints from Complainants. AFCA encourages a consumer (a disgruntled investment client) to make a complaint of economic loss on the basis of "inappropriate advice" within 6 years of when the consumer first became "reasonably" aware of such "economic loss." This extended time period is grossly unfair to the adviser and their FSP, as it enables clients to "test" their adviser's recommendation over a significant length of time (6 years if not more), and if the investment falls in value it can be pursued as "inappropriate advice" by a client years after the advice has been received and acted upon. It is ASDAA's position that AFCA consider reducing the statute of limitations to make complaints of "inappropriate advice" from the Investments and Advice to **<u>expire 6 months after the date of purchase</u>** of the financial product listed on an exchange or traded over the counter (OTC) and is not subject to a cooling off period. It is extremely prejudicial that a consumer can have virtually an uncapped statute of limitations to make a complaint on the grounds of "inappropriate advice." It should also be acknowledged that there is no legislative "Cooling Off" period for anyone who buys and sells listed securities, or listed or OTC derivatives and foreign exchange contracts. ASDAA knows of no other profession that faces such a generous statute of limitations. It is unique to all FSP's. There is a saying in the broader Securities/Stockbroking industries that if a "*client wants a guarantee then they should buy a toaster*." Preservation of capital in the financial markets is not guaranteed and this is generally well understood and acknowledged by the vast majority of investors. By allowing consumers to lodge a complaint about economic loss on the pretence of receiving "incorrect or inappropriate advice" as determined by an EDR Case Manager is implying that such a guarantee does in fact exist. Keeping with the toaster analogy, even consumer products like toasters don't come with a 6 year money back guarantee should they breakdown. We note that pursuant to AFCA Rule C1.5(a) complaints solely about the investment performance are excluded and therefore ASDAA is of the view that have a statute of limitations as detailed above is reasonable.

Rule	Comments
B4.4.2 AFCA may handle a complaint submitted after the time limits set out in rules B.4.1.5, B.4.2 and B.4.3 if AFCA considers that special circumstances apply.	This should only be permitted if all parties to the complaint agree to the extension of time and involvement of AFCA. It is unreasonable for AFCA to have the authority to extend a time limit and thus allowing a potential complainant to have a time limit which is longer than the statute of limitations to lodge a complaint in special circumstances. If this rule is retained then 'special circumstances; should be defined.
C2.2 Examples where AFCA may consider excluding a complaint…	We would like to suggest that complaints lodged by a person without the written authorisation or consent of the client of the FSP should be excluded. The issue that arises is that a person who was not a party to the agreement with the FSP or present at the time the financial service was provided can lodge a complaint on behalf of a client (e.g. a child of a client). AFCA should only accept these complaints if the client themselves authorises or consents in writing.
Definition of Eligible Person	This definition should include that the complaint must be submitted by the client or a person that is legally authorised (by signed consent from the client) to act on behalf of the client.
Definition of Excluded Product	AFCA should consider whether a similar exclusion is warranted for credit activities

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 Andy Semple, Managing Director, on (07) 5657 3620 or email andy@andika.com.au

Yours Sincerely

Marija Pajeska
Compliance Director

APPENDIX ONE

CASE STUDY

The following Cast Study is based on an actual FOS Dispute. Only the identities of those involved have been supressed. ASDAA believes it to be important the Expert Panel gets an understanding of what unfolds during a FOS dispute involving our members.

The client met with their adviser on the afternoon of 12th September 2012 at the FSP offices, where the client proceeded downstairs to a coffee shop for the initial meeting. During this meeting the client declined to accept and complete the *FSP's Client Financial Information and Risk Profile Form*. The FSP's *FSG* was issued to them.

As the client elected not to complete the FSP *Client Financial Information and Risk Profile Form,* the adviser was only able to provide the client with the "*General Advice and Execution Only*" service level relating to listed ASX stocks.

The adviser explained at the meeting to the client exactly what the "*General Advice and Execution Only*" service level meant – that the adviser would provide the clients with stock recommendations but these recommendations would **not consider their personal financial circumstances**. The adviser also confirmed what execution only advice only meant – that the adviser would accept trade orders from the client directly and would not question their motive on why they wanted to trade in those stocks.

The adviser also recalls that the client came to the meeting with a pre-determined list of stocks that they wished to purchase, with their dividend amounts and franking percentages already noted next to them. The stocks list consisted of the four major listed Australian Banks. The adviser noted these stocks in his diary notes. The client and the adviser then settled what the agreed brokerage rate would be charged on stock transactions.

As the adviser was about to determine what understanding the client had of the *Risk vs Reward* equation, the client interjected and said they understood what risk meant, and again just wanted someone to buy and sell stocks for them. The client then advised that he had been employed as a risk adjuster in an insurance industry for many years, and that he did not need a lecture on risk management.

The adviser made diary notes of his 12th September 2012 meeting.

The adviser assisted the client in completing the ASX Participant new account paperwork.

The client's share trading account was opened on 14th September 2012 and the follow three bank stocks were purchased for the client:

Date of Trade	TXN	Consideration
14/09/2012	B 5,857 NAB @ $25.48	$150,057.16
14/09/2012	B 6,140 ANZ @ $24.30	$150,022.61
14/09/2012	B 6,180 WBC @ $24.15	$150,067.86
		$450,147.63

The adviser on 10th December 2012 received their first instruction to sell their entire share portfolio which consisted entirely of bank share holdings. The portfolio was sold down completely over a period of 37 days, not instantly as the client claimed in their FOS dispute.

The table below notes the sell transaction dates.

Date of Trade	TXN	Consideration	Profit/ Loss	Days Owned	Dividends Paid
10/12/2012	S 6,180 WBC @ $25.18	$158,628.52	$8,560.66	87	$5,191.20
21/12/2012	S 6,140 ANZ @ $25.00	$152,655.75	$2,633.14	98	$4,850.60
16/01/2013	S 5,857 NAB $25.88	$150,745.47	$688.31	124	$5,271.30
		$462,029.74	$11,882.11		$15,313.10

The client ended up making a capital gain of $11,882.11 while also receiving $15,313 in fully franked dividends.

21st of February 2013, the client instructs the adviser to action the following NCM buy trade:

Date of Trade	TXN	Consideration
21/02/2013	B 4,600 NCM @ $21.688	$100,313.65

27th of February 2013, the client instructs the adviser to action the following LYC buy trade:

Date of Trade	TXN	Consideration
27/02/2013	**B 80,000 LYC @ $0.63**	**$50,677.20**

In both instances, the adviser notes in his trading dairy that each buy trade action was a "*No Advice Given*" or what is referred to in the industry as a "NAG" trade.

28th of February 2013, the client instructs the adviser to action the following NCM sell trade to lock in a quick trade profit. It too was noted in the adviser's diary as a "NAG" trade.

Date of Trade	TXN	Consideration	Profit/ Loss	Days Owned
28/02/2013	S 4,600 NCM @ $22.40	$102,473.28	$2,159.63	7

The client went on to have the adviser action the following buy and sell trades which included the **purchase again** of equity NCM on 15th April 2013 at a price of $17.90, a price significantly lower when the client first bought NCM equities.

Date of Trade	TXN	Consideration	Profit/Loss	Days Owned	Dividends Paid
4/03/2013	B 11,300 FMG @ $4.41	$50,107.09			
5/09/2013	S 11,300 FMG @ $4.44	$49,896.05	-$211.04	185	$1,130.00
13/03/2013	B 1,620 NAB @ $30.80	$50,170.43			$1,506.60
5/03/2014	S 1,620 NAB @ $35.01	$56,404.35	$6,233.92	357	$1,571.40
15/04/2013	**B 4,190 NCM @ $17.90**	**$75,413.51**			

At the close of business 5th March 2014, the client's portfolio consisted only of the following two stocks, 80,000 LYC and 4,190 NCM shares.

On the 17th July 2014, the client writes to the adviser complaining that the value of their share portfolio is down approximately **$67,250** and demands the adviser immediately compensates them for the "paper loss." The client warns the adviser if they don't compensate them the requested amount they will be pursing the matter with FOS.

The complaint is received **505 days** after the purchase date of equity LYC and **458 days** after the purchase date of equity NCM.

Here is why ASDAA's Recommendation for a statute of limitations of 6 months is required

Now had FOS' TOR regarding the statute of limitations been what ASDAA has recommended, namely in order to lodge a complaint about "inappropriate advice" surrounding the purchase of listed equities, the complainant must have notified FOS within 6 months of the said equities/investment purchase date then this dispute should have been dismissed immediately because the dispute falls well outside the TOR statute of limitations. If the consumer was aggrieved by the "inappropriate advice," whether the advice was given or not, then the consumer should have lodged their dispute against the adviser regarding the LYC purchase by 27 August 2013 and 15 October 2013 regarding the NCM purchase.

The adviser follows the FSP's IDR process and advises the client on 29th July that the FSP will respond within 45 days of receipt of the client' complaint.

As required, the FSP conducts their internal investigation. Many sources of documents, including diary notes, emails, contract notes, trading ledgers and client account forms are gathered and examined. The FSP spends in excess of 50 professional hours conducting their internal investigation.

The FSP writes to the client on 27th August 2014 advising them of the outcome of their internal investigation which is the FSP finds no basis for their demand for compensation. The FSP lists the various reasons on why

they made that conclusion.

Here is why ASDAA's Recommendation that AFCA should be bound by the legal rules of evidence is required

As the IDR stage has now expired and the consumer still feels aggrieved, the consumer is advised by FOS that should they wish to advance their complaint through the FOS EDR process they now need to pay FOS the modest $250 + GST Complaint Registration fee.

As the consumer is seeking a monetary compensation amount greater than $10,000, the payment of such a Complaint Registration fee is reasonable.

In the event the consumer doesn't pay the Complaint Registration fee, then that could reasonably suggest their complaint is highly likely a frivolous one.

The FSP receives their first of many FOS correspondences on 18th September 2014.

It was verbally conveyed to the FSP by the FOS Case Manager that the FSP should consider making an **offer of compensation**. The FSP declined to do so on the basis that the adviser had not done anything wrong.

The FSP ends up writing to FOS **four times**, with the first correspondence being 7 pages on 16th October 2014.

Here is why ASDAA's Recommendation that AFCA/ FOS Case Managers are suitably qualified (refer to comments relating to AFCA Rule 2.1) is required

Case Manager's assigned to assess a Securities/Stockbroking Dispute need to be suitably qualified to do so, must hold a relevant University degree and have at least 3 years relevant professional experience in the Securities/Stockbroking industry.

The FSP concludes FOS isn't averse to moving the goal posts on behalf of the consumer. This supports why ASDAA members consider the FOS dice is firmly loaded against them.

The FSP supplied to FOS in its second correspondence - emails from the client **admitting** they got their "advice" from Channel 7 morning tabloid TV show host *Mr David Koch*, News Limited journalist *Mr Terry McCrann,* and Financial commentator *Mr Noel Whittaker*.

The client also admitted in an email the FSP presented to FOS that they did get the idea to buy the three banks from listening to "Koch on the TV."

The FSP asked FOS to immediately make a recommendation about this case, as it was becoming more apparent it was frivolous and the goal posts appeared to be continually moving. FOS never responded to the FSP request to go to the Recommendation stage.

At no stage did the client ever ask the adviser if they should consider selling their LYC and NCM shares.

The impression from the FSP was that FOS was only too keen to string along the dispute ensuring a higher FOS fee – a fee the FSP alone would be made to pay.

The FSP writes to FOS for a third time on 7th January 2015 in response to FOS' 5th January 2015 email which contained correspondence from the client dated 24th November 2014. The FSP's correspondence to FOS was 15 pages in length.

The client again wanted more monetary compensation – this time it was increased to $90,000. Again, when queried by the FSP why FOS has allowed the consumer to yet again increase the amount of monetary compensation sort, FOS declined to respond to the FSP.

Here is why ASDAA members consider FOS is an aggressive consumer advocate. They just seem to go out of their way to assist the consumer.

The complainant also admitted to FOS they had also sort the "advice" from two unnamed Financial Advisers. They admitted they sort advice about LYC and NCM around 7th June 2013, some 40 days **before** they lodged their official complaint.

It was verbally conveyed to the FSP for a **third time** now by the FOS Case Manager that the **FSP should consider making an offer of compensation**. This time the FOS Case Manager suggested an amount within the ball park of $10,000 be offered. The FSP instead counter offered with $1,000 which was flatly refused by the complainant.

It is quite obvious to the FSP that the FOS Case Managers are more interested in getting the FSP to make an offer of monetary compensation to the complainant in the very initial stages of the EDR process, than for the FOS Case Managers to discharge their duties and fairly adjudicate the dispute.

Again, for the second time, the FSP asked in their 7th January 2015 response to FOS to immediately make a recommendation about this case, as it was apparent it was completely frivolous.

On the 27th January 2015, FOS advises the FSP that they have made a Recommendation which was in favour of the FSP. It only took FOS 131 days to close this dispute.

As previously stated in this submission, winning this dispute still cost the FSP $5,665.00 in FOS fees and a significant amount of professional time.

Here is why ASDAA's Recommendation regarding defamation protection is required

It is completely unacceptable for anyone, let alone the FSP, that they

can be viciously defamed by a consumer with no legal recourse to protect their reputation. FOS' TOR clause 13.3 regarding Defamation protection must be deleted in its entirety.

The FSP ignores the complainant email and legal threat contained therein and to this day, no civil proceedings have yet been launched against the adviser or FSP but the threat still looms.

The complainant has the right to take such action against a FSP when they lose a FOS dispute, but should a FSP lose a FOS dispute they are prevented from taking similar legal action.

Had ASDAA's recommendations 1, 2, 3, 4, 6 and 8 already been implemented by FOS, ASDAA doubts very much this particular dispute would have been considered by FOS in the first place or if it had been accepted it would have reached the Recommendation stage significantly earlier than what it actually did, thus saving the FSP considerable time and money.