



ASIC

Australian Securities & Investments Commission

REPORT 577

Response to submissions on CP 298 Oversight of the Australian Financial Complaints Authority

June 2018

About this report

This report highlights the key issues that arose out of the submissions received on [Consultation Paper 298](#) *Oversight of the Australian Financial Complaints Authority: Update to RG 139* (CP 298) and details our responses to those issues.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy. Please see [Regulatory Guide 267](#) *Oversight of the Australian Financial Complaints Authority* (RG 267).

Contents

A	Overview/Consultation process	4
	Transition to AFCA commencement.....	4
	Release of new AFCA policy	5
	Responses to consultation.....	5
B	Referring matters to appropriate authorities	7
	Reporting requirements	7
	Proposed approach to AFCA reporting	7
C	Role of the independent assessor	11
	Requirement to have an independent assessor.....	11
	Approach to the independent assessor role	11
D	EDR disclosure obligations	14
	Mandatory disclosure requirements	14
	Appendix: List of non-confidential respondents	16

A Overview/Consultation process

- 1 In [Consultation Paper 298 Oversight of the Australian Financial Complaints Authority: Update to RG 139 \(CP 298\)](#), we consulted on our approach to ASIC's oversight role of the new single external dispute resolution (EDR) scheme, the Australian Financial Complaints Authority (AFCA).
- 2 This report highlights the key issues that arose out of the submissions received on CP 298 and our responses to those issues.
- 3 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 298. We have limited this report to the key issues.
- 4 We received three confidential and 25 non-confidential submissions (one of which was provided over the phone) to CP 298 from industry groups and associations, consumer groups, financial firms, and ombudsman schemes. We are grateful to respondents for taking the time to send us their comments.
- 5 For a list of the non-confidential respondents to CP 298, see the appendix. Copies of these submissions are currently on the ASIC website at www.asic.gov.au/cp under CP 298.

Transition to AFCA commencement

- 6 Since ASIC issued CP 298 on 5 March 2018, a number of transition milestones necessary for the commencement of AFCA have been met, including the Minister's:
 - (a) authorisation of a company as the operator of the scheme (Australian Financial Complaints Authority Limited); and
 - (b) announcement (by notifiable instrument) confirming that:
 - (i) AFCA will commence accepting complaints on 1 November 2018; and
 - (ii) financial firms required to be members of AFCA must be members by 21 September 2018.
- 7 The transition to the commencement of AFCA is progressing on a very tight timeline. On 1 June 2018, AFCA commenced public consultation on the proposed [Rules of Complaint Resolution Scheme](#) (AFCA Rules). After this consultation is completed the AFCA board will submit the AFCA Rules to ASIC for approval against our final AFCA policy.

Release of new AFCA policy

- 8 In our consultation, we proposed that we would issue AFCA guidance as an update to [Regulatory Guide 139](#) *Approval and oversight of external dispute resolution schemes* (RG 139) after AFCA commenced operations. This would replace our existing policy on 1 November 2018.
- 9 However, complaints that are made to the Financial Ombudsman Service (FOS) and to the Credit and Investments Ombudsman (CIO) schemes before 1 November 2018 will continue to be dealt with under the relevant scheme's terms of reference and rules that applied when the complaint was made.
- 10 As ASIC's EDR settings in RG 139 provide the framework for those versions of the terms of reference and rules, we consider it necessary to retain RG 139 in its current form until all those complaints are closed.
- 11 We therefore have decided to:
- (a) issue the guidance consulted on as draft RG 139 as [Regulatory Guide 267](#) *Oversight of the Australian Financial Complaints Authority* (RG 267); and
 - (b) retain the current RG 139 until all the complaints made to FOS and the CIO have been closed. At that time, we will repeal RG 139.
- Note: A reference to 'draft RG 139' is a reference to the consultation draft attached to CP 298 and a reference to 'RG 267' is a reference to our final policy.
- 12 We are releasing RG 267 now to support the AFCA Rules consultation and to provide policy certainty for stakeholders and to support an efficient transition to AFCA commencement.

Responses to consultation

- 13 [CP 298](#) consulted on three aspects of our AFCA oversight role:
- (a) reporting by AFCA to regulators under s1052E;
 - (b) the role of the independent assessor; and
 - (c) whether the transition period to the commencement of AFCA allowed sufficient time for firms to comply with their EDR disclosure obligations.
- 14 Sections B–D of this report set out the issues respondents raised during consultation and our response to those issues.
- 15 While most submissions commented on the three consultation issues, a few submissions raised other issues. Some of these issues will be addressed by AFCA in its consultation on the AFCA Rules and in AFCA's operational policy and guidance.

- 16 We have also modified our policy in [RG 267](#) to:
- (a) respond to suggestions that we retain existing guidance from RG 139 on how AFCA can meet the benchmark for accessibility in [Benchmarks for Industry-Based Customer Dispute Resolution](#) (EDR Benchmarks)—for example, guidance on the process for conducting systemic issues investigations; and
 - (b) clarify the drafting in certain areas.

B Referring matters to appropriate authorities

Key points

This section outlines the feedback we received on our proposed approach to the reporting of serious contraventions or systemic issues to regulators under s1052E. This includes the:

- broad approach to the reporting obligation; and
- threshold for and timing of reports under s1052E.

Reporting requirements

- 17 Under s 1052E, *Referring matters to appropriate authorities*, AFCA is required, among other matters, to report the particulars of:
- (a) serious contraventions of any law;
 - (b) a contravention of the governing terms of reference of a regulated super fund;
 - (c) failure or refusal to give effect to determinations;
 - (d) settlements that *may require investigation*; and
 - (e) systemic issues.
- 18 These matters must be reported to one or more of the Australian Prudential Regulation Authority (APRA), ASIC or the Commissioner of Taxation, as appropriate.

Proposed approach to AFCA reporting

- 19 In draft RG 139 we proposed that:
- (a) reports must be made within a reasonable time, but no later than 30 days of AFCA becoming aware that a serious contravention has occurred or may have occurred or a systemic issue is identified;
 - (b) the test for whether a contravention will be serious and therefore reportable should be an objective test; and
 - (c) the particulars of a report to a regulator will include the identity of the firm—including the Australian financial services (AFS) licensee or Australian credit licensee (credit licensee), representative or employee (as appropriate).
- 20 After ASIC issued CP 298, the [ASIC Enforcement Review taskforce report](#), December 2017 (taskforce report) and the Australian Government's response

were published. The taskforce report proposed amendments to the AFS licensee self-reporting regime for significant breach reports

Note: See the Hon. Scott Morrison MP, Treasurer, and the Hon. Kelly O'Dwyer MP, Minister for Revenue and Financial Services, [Boosting penalties to protect Australian consumers from corporate and financial misconduct](#), joint media release, 20 April 2018. See also [Regulatory Guide 78](#) *Breach reporting by AFS licensees* (RG 78).

Stakeholder feedback

21 Many industry respondents suggested that there should be greater clarity about:

- (a) the threshold for reporting to regulators; and
- (b) when the timeframe for reporting commences.

Threshold for reporting

22 Some submissions suggested that AFCA should only report to a regulator when AFCA has definitively established that a serious contravention has (or may have) occurred or a systemic issue is identified.

23 Respondents also suggested that the three-step process adopted by the predecessor schemes for dealing with systemic issues (identify, refer, report) should apply to the reporting of serious contraventions, and that financial firms should be given a 'right of reply' before AFCA makes a report to a regulator under s1052E.

24 Some respondents suggested that the reporting requirements take into account the AFS licensee self-reporting regime in s912D of the *Corporations Act 2001* (Corporations Act) and that ASIC should give additional guidance and examples of reportable contraventions.

ASIC's response

In response to feedback, we have clarified that the primary purpose of the reporting requirement in s1052E is to require AFCA to give information to a regulator so that it may consider whether regulatory action—beyond the resolution of any underlying complaints—is necessary.

We have clarified that there is no requirement that AFCA notify a firm before reporting a serious contravention under s1052E.

In response to submissions, we have also updated [RG 267](#) to:

- include examples of the type of matters we consider reportable by AFCA to regulators, both for serious contraventions and systemic issues;
- acknowledge the potential overlap with the AFS licensee self-reporting regime, including our view that the overlap is

beneficial in supporting timely and effective identification and reporting of issues to ASIC;

- acknowledge that reports made to regulators under s1052E are subject to each agency's confidentiality requirements (so generally cannot be published); and
- include a list of factors that may be relevant to an AFCA decision to refer settled complaints to a regulator.

We have also updated RG 267 to retain our existing guidance (in RG 139) on the process for identifying, referring and reporting systemic issues.

RG 267 does not currently provide detail about the form and detail of reporting to ASIC. We will seek to harmonise and streamline data collection and reporting with other relevant data sets, such as firm-level IDR data. We are planning to start consulting on IDR reporting approaches in November 2018. We have also consulted with APRA and the Australian Taxation Office (ATO) in developing our approach and will work with the regulators and AFCA to harmonise the reporting requirements as far as practicable.

In our final guidance in RG 267, we note that the taskforce report recommendations relating to licensee self-reporting will be considered by Government alongside the final report of the Royal commission into misconduct in the banking, superannuation and financial services industry, and that we may revisit our guidance in light of the outcomes of that process.

Timeframe for reporting

- 25 Submissions generally supported—or did not oppose—the 30-day timeframe for reporting, although there was some confusion about when the 30-day timeframe would commence.
- 26 Some submissions argued that the 30-day reporting 'clock' should only commence once AFCA formed a view that there was a 'definite' contravention or systemic issue, and that firms should be entitled to a 'right of reply' before AFCA reports certain conduct to a regulator.

ASIC's response

The law sets out the threshold for reporting serious contraventions and systemic issues to regulators, and this is reflected in [RG 267](#). However, after consultation, we have reduced the timeframe for AFCA reporting from 30 days to 15 days after that threshold has been reached.

AFCA is likely to have had a complaint for a period of time before becoming aware that reportable conduct may have occurred. Before AFCA considers a complaint, the complaint would already have been through the financial firm's IDR process (and, in most cases, AFCA's refer back process). In the case of a systemic

issue investigation, the financial firm would generally be aware of the issue and engaging with AFCA on the steps necessary to resolve it.

Given the statutory threshold for AFCA reporting, and that it is not AFCA's role to determine that a serious contravention (for example) has definitively occurred, we considered that a period of 15 days from AFCA becoming aware of reportable conduct is now more appropriate.

C Role of the independent assessor

Key points

This section outlines the submissions received on our proposed guidance on the role of and requirements for the independent assessor and our response.

Requirement to have an independent assessor

- 27 The Review of the financial system external dispute resolution and complaints framework (Ramsay Review) recommended that the new single EDR scheme:
- establish an independent assessor to review the handling of complaints. The independent assessor should not be an avenue of appeal for individual disputes. Instead, the assessor's role should focus on reviewing the service provided to users in handling of the dispute.
- Note: See Ramsay Review, [Final report: Review of the financial system external dispute resolution and complaints framework](#), May 2017, p. 180.
- 28 The independent assessor is now a mandatory organisational requirement under s1051(2)(c) of the Corporations Act.

Approach to the independent assessor role

- 29 In [CP 298](#) we consulted on our proposed guidance on the primary role of the independent assessor, which is to:
- (a) respond to complaints about how AFCA dealt with an individual complaint or series of complaints (service complaints);
 - (b) identify, address and report on issues affecting 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.

Stakeholder feedback

- 30 Submissions strongly supported the independent assessor role, with an emphasis on the need to ensure proper independence, resourcing and transparency. A consistent theme from submissions was the expectation that the independent assessor should be empowered and independent, and that their findings, recommendations and outcomes should be transparent and public.

- 31 Submissions generally supported our high-level approach in draft RG 139, including that the independent assessor should only deal with service complaints and should not be an avenue of appeal (i.e. should not conduct merits review of decisions or re-open the outcome of complaints).
- 32 Nevertheless, a number of submissions argued that the independent assessor should be able to conduct merits review of an AFCA decision, particularly where a procedural failure may have led to substantively unfair outcome, or review a jurisdictional decision (e.g. a decision to exclude a complaint).
- 33 Others suggested that the independent assessor should accept complaints from industry groups or be able to review AFCA’s policy or approach to systemically important decisions, handling of a systemic issues investigation, or a decision to report to a regulator.
- 34 A number of submissions also argued that our guidance should
- (a) clarify that financial firms, as well as consumers (i.e. all parties to a complaint), should have access to the independent assessor;
 - (b) enhance the transparency and frequency of the independent assessor’s public reporting;
 - (c) clarify the range of remedies available to the independent assessor;
 - (d) clarify that the independent assessor will conduct their role taking into account the EDR Benchmarks—especially the principle of accessibility; and
 - (e) collect data to ensure the scheme meets its mandate to ensure vulnerable consumers have appropriate access to the scheme, and report on timeliness and decision making about systemic issues.

ASIC’s response

We consider it essential that the independent role and function of the independent assessor operates as an effective feedback loop for the scheme and for users. We have therefore clarified in [RG 267](#) that all the parties to a complaint—including the complainant, firm, representative or joined party—can access the independent assessor.

It is a longstanding principle of EDR that determinations are final on acceptance by the consumer and are not subject to review or appeal. This view was endorsed by the Ramsay Review and accepted by the Australian Government. For this reason, we considered it important to clarify that it is out of scope for the independent assessor role to re-open complaints or the outcome of a complaint. We have therefore set out in RG 267 that it is *not* the role of the independent assessor to:

- undertake a merits review of an AFCA decision;
- review an AFCA jurisdictional decision;

- re-open a complaint or the outcome of a complaint; or
- review an AFCA decision to report a systemic issue or serious contravention to a regulator under s1052E.

We have also updated our guidance to clarify our expectations of the AFCA board in establishing the independent assessor role and function. The AFCA board must

- take into account the principles expressed in the EDR Benchmarks;
- ensure it has oversight of all service complaints to the scheme, including complaints made, where and how they are resolved and any findings or recommendations made;
- ensure that the process for making a service complaint is clearly set out and accessible for all users; and
- require the independent assessor to report publicly every six months, rather than annually (as set out in [CP 298](#)), including on statistics for all service complaints, regardless of whether they were escalated to the independent assessor for decision or not.

We have also included examples of recommendations the independent assessor may make in response to a service complaint.

D EDR disclosure obligations

Key points

This sections outlines the submissions received on the timeframe for financial firms to update statutory disclosures and communications to consumers for the commencement of AFCA.

Mandatory disclosure requirements

- 35 In [CP 298](#), we consulted on whether there was sufficient time in the transition to the commencement of AFCA for financial firms to update all their legal disclosures and other consumer-facing communications in advance of the commencement of AFCA.
- 36 The following documents must include details of a firm’s EDR scheme:
- (a) Financial Services Guides;
 - (b) Product Disclosure Statements (PDSs);
 - (c) Credit Guides;
 - (d) Short-Form PDSs; and
 - (e) periodic and exit statements.
- 37 The transition to AFCA is also likely to trigger significant event notification requirements for issuers of financial products captured by s1017B of the Corporations Act.
- 38 [Regulatory Guide 165 Licensing: Internal and external dispute resolution](#) (RG 165) also requires firms to provide complainants with an IDR final response letter (after a maximum IDR timeframe) that includes details of the relevant EDR scheme they may access if they are not satisfied with the firm’s response. These details must also be provided if a firm is not able to provide a final response within the maximum IDR timeframe (delay letters).
- 39 At the time we consulted, key dates and information (such as AFCA’s start date and contact details and the date by which financial firms must be a member of AFCA) were unknown and this uncertainty was reflected in submissions.

Stakeholder feedback

- 40 Of the 28 submissions received on CP 298, 17 made specific submissions on the question of disclosure relief. While a small number of submissions did not support transitional relief, all industry submissions requested some form

of relief for updating mandatory financial services disclosure documents and periodic statements with AFCA's details. There was general consensus among industry that IDR final response letters should be updated in time for AFCA's commencement on 1 November 2018.

- 41 Industry submissions proposed a range of dates for the duration of the transitional relief period. A majority supported a transition period to 1 July 2019, with a minority suggesting 1 November 2019 or even 1 July 2020.

ASIC's response

We have granted transitional relief for mandatory disclosure documents, subject to certain conditions.

On 31 May 2018, we announced we would give financial firms, including superannuation trustees, transitional relief until 1 July 2019 to update their mandatory disclosure documents and periodic statements with the contact details of AFCA: see [Media Release \(18-158MR\)](#) *ASIC gives disclosure relief during transition to AFCA* (31 May 2018).

Financial firms must update their IDR final response letters by 21 September 2018, and other IDR related consumer communications by 1 November 2018.

We consider this approach addresses the key risks to consumers during the transition to AFCA and emphasises to firms the importance of updating communications that consumers are more likely to access if they are going through the IDR process, or contemplating lodging a complaint.

Appendix: List of non-confidential respondents

- Association of Superannuation Funds of Australia
 - Association of Financial Advisers
 - Australian Banking Association
 - Australian Collectors & Debt Buyers Association
 - Australian Institute of Superannuation Trustees
 - Australian Retail Credit Association
 - Australian Small Business and Family Enterprise Ombudsman
 - Australian Finance Industry Association
 - Association of Securities and Derivatives Advisers of Australia
 - Block Legal and Compliance
 - Catherine Wolthuizen
 - Corporate Superannuation Association
 - CPA Australia
 - Credit and Investments Ombudsman
 - Equifax
 - Finance Brokers Association of Australia
 - Financial Planning Association of Australia
 - Financial Services Council
 - Insurance Council of Australia
 - Joint Consumer Submission
 - Legal Aid NSW (by phone)
 - Legal Aid Queensland
 - MLC Ltd
 - Pioneer Credit Ltd
 - Stockbrokers and Financial Advisers Association Limited
-