Association of Financial Advisers Ltd
ACN: 008 619 921
ABN: 29 008 921
PO Box Q279
Queen Victoria Building NSW 1230
T 02 9267 4003 F 02 9267 5003
Member Freecall: 1800 656 009
www.afa.asn.au

Clare McCarthy
Behavioural Research & Policy Unit
Australian Securities and Investments Commission
GPO Box 9827
Melbourne VIC 3001

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

12 April 2018

Dear Ms McCarthy,

AFA Submission – Consultation Paper 298 - Oversight of the Australian Financial Complaints Authority

The Association of Financial Advisers Limited (**AFA**) has served the financial advice industry for over 70 years. Our objective is to achieve *Great Advice for More Australians* and we do this through:

- advocating for appropriate policy settings for financial advice
- enforcing a Code of Ethical Conduct
- investing in consumer-based research
- developing professional development pathways for financial advisers
- connecting key stakeholders within the financial advice community
- educating consumers around the importance of financial advice

The Board of the AFA is elected by the Membership and all Directors are practicing financial advisers. This ensures that the policy positions taken by the AFA are framed with practical, workable outcomes in mind, but are also aligned to achieving our vision of having the quality of relationships shared between advisers and their clients understood and valued throughout society. This will play a vital role in helping Australians reach their potential through building, managing and protecting wealth.

Introduction

We note the point made in the paper that this consultation is very focussed and that long standing policy positions have been retained. The AFA has publicly stated concerns about the establishment of AFCA and most specifically with respect to the increases in the monetary limit and the compensation cap. The current EDR model is designed in a manner that supports consumer outcomes and we agree that consumers deserve protection. However, we represent small businesses who provide financial advice services to clients who are individuals and small businesses and these financial advice businesses are

now inequitably exposed as a result of these higher limits and the lack of an appeals process. We have questioned the EDR model applying at these higher limits given the fact that complainants cannot be cross-examined and decisions are not appealable. The potential impact is higher determinations with no access to recourse for financial firms, with consequential significant implications for the availability and cost of professional indemnity insurance.

We note the reference to a Regulation Impact Statement in paragraph 41 of Consultation Paper 298, however we highlight the fact that the Explanatory Memorandum specifically states that Treasury has certified that the Ramsay review and subsequent consultation and analysis was equivalent to a Regulation Impact Statement. From our perspective, this means that a Regulation Impact Statement was not undertaken and specifically, there is no reference to the impact on Professional Indemnity Insurance in the Explanatory Memorandum.

Response to Consultation Paper Questions

Referring Matters to Appropriate Authorities

B1Q1. Do you agree with our proposed timeframe for AFCA to report serious contraventions or systemic issues? If not, why not?

We agree that 30 days is a reasonable time for AFCA to report to the appropriate authority, once they have been able to confirm that there is a serious contravention or a systemic issue.

We note that this obligation will apply from the time that AFCA became aware of a serious contravention or identification of a systemic issue. There is a need for greater clarity as to the point at which AFCA makes this determination. RG 139.48 refers to not necessarily waiting until a complaint has been finalised to report a matter. This does not provide sufficient clarity, as often complaints can take a long time to be finalised. It is also important to address whether it is a matter of a confirmed or only likely serious contravention that needs to be reported. We recommend more clarity be provided on the assessment requirements, however we would strongly favour provision for a higher level of certainty before reporting takes place.

B2Q1. Do you agree with our broad approach to AFCA reporting? If not, why not?

We do not believe that there is enough certainty or clarity on the determination of whether a contravention is serious. It is also appropriate to consider that there are other tests of significance such as the significant breach reporting obligations under Section 912D of the Corporations Act. Wherever there are different criteria used across the marketplace, there is a greater risk of confusion and suboptimal outcomes. As an example, if AFCA applies a lower threshold to this assessment than licensees apply to their determination of significant breaches (Section 912D), then ASIC might receive notifications for matters from AFCA, when they have not been notified by the licensee. For this reason, we believe that the AFCA test should be above the level for a Section 912D breach, and that AFCA should communicate with a licensee before reporting a serious contravention matter to ASIC.

It would seem that in the receipt of a serious complaint, AFCA may have information that if confirmed would suggest a serious contravention. However, such a complaint could be misguided or simply inaccurate or incorrect. AFCA needs to raise the complaint with the relevant financial firm before they can conclude that they have the necessary information to form this judgement. We would not like to see such a referral to ASIC lead to a wasted investigation by ASIC or the reputation of the impacted party being unnecessarily impacted. For this reason, we recommend that AFCA be required to discuss the

matter with the licensee and that they have a concluded view, rather than a preliminary view before reporting.

We note that the current practice with EDR disclosure of systemic issues to ASIC does not include the specifics of the impacted parties and that ASIC needs to issue notices in order to obtain this information. We support the proposal that this information is provided as part of the report. We note that where there is a specific individual responsible that the content of the report might be obvious, however where the issue relates to a problem in a process or product, the name of an individual may be less obvious or necessarily appropriate. We recommend that there is clearer guidance with respect to the circumstances where the name of an individual should be provided.

We also agree that AFCA should consult with ASIC in circumstances where they are unsure. It would be necessary for this to be possible in a timely manner, so key contacts for different types of complaints would need to be shared between AFCA and ASIC. We would expect this consultation to be on the basis of the core issues of the matter and not the entities or names of those involved.

Role of the Independent Assessor

B3Q1. Do you agree with our proposed guidance on the primary role of the independent assessor? If not, why not?

We support the guidance on the primary role of the independent assessor, except that we believe that it should be extended to include undertaking a merits based review of decisions at the request of either the complainant or the financial firm. We would expect that such a mechanism would have sensible controls around it and that there would need to be clear threshold grounds for a review of a decision to be established up front.

B4Q1. Do you agree with our proposed guidance on what is outside the role of the independent assessor? If not, why not?

We strongly disagree with the proposed guidance as we believe that it is essential that the independent assessor has the ability to do a merits review of a case and to re-open a case where the outcome is clearly wrong. Experience tells us that EDR schemes make mistakes from time to time. When these mistakes are discovered by the entity specifically established to undertake this independent review, then they should be given the powers and opportunity to fix the issue. Otherwise it would be a waste of time and effort and the quality and impact of the learnings would be seriously jeopardised.

We also make the point that it is essential that seeking a review is an option that is available to both the client and the financial firm.

B5Q1. Do you agree with our proposed requirements for the independent assessor? If not, why not?

We support the proposed requirements of the independent assessor, however we make the following two points:

- In terms of part (d), "users" must include both complainants and financial firms.
- We believe that part (i)(iii) requires clarification. What does public reports on outcomes achieved as a result of a recommendation made actually involve? Does this need to be at the individual complaint level or is it at a summarised level? We recommend that it should be at the summary level.

EDR Disclosure Obligations

B6Q1. Is this 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.

The practical reality of the transition to AFCA is that there is no definitive transition date. The announcement by the Minister states that it will be by 1 November 2018, so the industry has an end date and not a specific date. It is very difficult for financial services entities to plan in the context of this level of uncertainty. Financial services entities will typically operate on a program for updating core documents that potentially aligns with pre-planned product changes or other key business changes. This is best done on a longer-term planning cycle.

In the past, ASIC has enabled a facilitative compliance period for such transitions and we would recommend that this be applied in this case. It might be that a six months facilitative compliance period will address this issue and reduce unnecessary wasted effort and expenditure.

In the case of financial advisers, the key impacted document for most financial advisers is the Financial Services Guide (FSG). Many advisers will provide updated FSGs to clients by electronic copy, however others are still providing them in hard copy form. Where they are provided in softcopy, there will be less issues in ensuring that clients get the updated version. Issues will however be present where they are using a hard copy version. It should be noted that most licensees seek to do FSG updates on a consolidated basis across all authorised representatives and representatives and therefore a significant amount of planning and preparation is required. More flexibility will be very beneficial for AFSLs and authorised representatives.

B6Q2. Should we provide transitional relief from external dispute resolution disclosure obligations in the lead up to AFCA commencement? If so, please provide reasons.

Given the uncertainty with the start date it makes absolute sense that there be some transitional relief. It is always possible that some disclosure documents will be available and need to be used early, whilst other documents might not be ready on time. It is important to avoid underestimating the scale and cost of such a change and therefore additional flexibility would be appropriate. Arrangements can be put in place in terms of the management of complaints in order to ensure that there is no consumer detriment.

Concluding Remarks

The AFA welcomes the opportunity to provide feedback on ASIC Oversight of the Australian Financial Complaints Authority.

Should ASIC require any further clarification on anything in this submission then, please contact us on 02 9267 4003.

Yours sincerely,

Phil Anderson
General Manager Policy and Professionalism
Association of Financial Advisers Ltd