

## Comments on ASIC CP 298: Oversight of the Australian Financial Complaints Authority: Update to RG 139

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### ***B1: That AFCA should report serious breaches to ASIC within 30 days***

Support retention of duty to report serious breaches but consider that duty should be expressed to encourage earlier reporting or flagging of serious breaches at the earliest stage, rather than “within a reasonable time”. Limit to remain 30 days from when AFCA became aware of breach. This reflects an underlying consumer protection objective, whereby if a firm or AFCA becomes aware of a serious breach, it can alert the regulator to it, thereby allowing for appropriate intervention and remediation.

***B2(a) a contravention will be ‘serious’ and therefore reportable 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.***

Query narrowing this to breaches of law, for several reasons:

- AFCA will consider and assess cases against the standard of “fair and reasonable” treatment. It will form a view as to what constitutes “fair and reasonable” by reference to law, regulatory guidance and applicable industry codes of conduct. Its frame of reference is therefore wider than what may be set out in current law.
- There will be instances where the law lags behind conduct which would reasonably be considered to be serious misconduct. For example, there will be instances of breaches of the ePayments Code which a reasonable person would expect AFCA to report to ASIC which would not necessarily meet a definition of “serious contravention” of law – simply because the law may not yet have caught up with the conduct in question. The reporting obligation should be drafted to ensure misconduct and breaches of regulatory guidance and codes which a reasonable person would consider to be serious, are required to be reported to ASIC within 30 days of AFCA becoming aware of them.

### ***B4 Independent Assessor***

***(a) The CP proposes at B4(a) that the Independent Assessor should not be able to “undertake a merits review of an AFCA decision, including a jurisdictional decision”.***

This proposal appears to arise out a flawed conflation of merits reviews and consideration of jurisdictional issues. Making an assessment of whether a matter is within AFCA’s jurisdiction is not a merits review. Other than for the very small minority of cases which may be deemed “vexatious and frivolous”, access is not determined by reference to merit. Access is rightly determined by reference to whether the circumstances of the complaint and complainant meet objective thresholds relating mainly to timeliness and quantum as set out in the scheme terms of reference.

Application of jurisdictional limits has the potential to cause considerable detriment if not properly administered, especially where discretion to allow a complaint is available (ie where the complainant has been unable to identify the cause of complaint for some time, or has been incapacitated to the extent he or she was physically prevented from bringing a complaint). It is important that review of decisions to exclude or include is available to an affected party. This review may be satisfied by ombudsman-level review, or by recourse to the Independent Assessor, depending on the basis of the complaint.

Failure to allow such recourse risks eroding confidence in the scheme as it raises the prospect of claims being disallowed without any opportunity for the complainant to challenge that decision.

***(b) The CP proposes that the Independent Assessor should not be able to re-open a complaint or the outcome of a complaint.***

This does not allow for proper remediation of the consequences of procedural unfairness which the Independent Assessor may uncover. This risks undermining trust and confidence in the Independent Assessor function.

The Independent Assessor will likely receive complaints that a service failure or procedural deficiency meant a decision-maker within AFCA failed to take proper account of material evidence, and that the outcome of an investigation was therefore compromised.

Where the Independent Assessor agrees with the complainant, it should be able to refer a complaint back to case management for re-consideration, eg in light of evidence not previously taken into proper account. This does not mean that the Independent Assessor considers or forms a view on the merits of the complaint or the impact of that evidence, simply that there was not appropriate attention paid to it, which needs to be remediated via a fresh investigation of the complaint.

***Other matters arising from the draft regulatory guide RG 139***

***RG 139.172 That AFCA should refer complaints back to IDR for “a final opportunity to resolve the complaint – within a defined timeframe – before it progresses at the EDR scheme”.***

The potential operation of this clause raises serious concerns, and appears to stem from a flawed understanding of why the previous ‘refer back’ regime produced benefits for complainants.

A large proportion of bank complaints originate at FOS – that is, they are first recorded as a complaint when they are received by FOS and then referred back to the bank. But in many of these complaints, the consumer will have tried to raise the complaint with the bank first, but will not have been able to have it identified and dealt with as a complaint and it will not have been recorded as a complaint.

In such cases, a number of consumers will take their complaint to FOS, whereupon it is recorded and referred appropriately. In this way, the customer has ‘benefited’ from the refer back arrangement, because the bank has had to address a complaint it had previously not dealt with appropriately.

But only a small proportion of consumers escalate their complaint to EDR from IDR. This is not reflective of satisfaction, as numerous investigations have revealed. Consumers often lack the time, energy and/or confidence to take their matter further.<sup>1</sup>

It is always open to the bank to resolve a complaint at EDR; a customer should not have to go through IDR again in order to make this happen. Sending a customer back to IDR when they have most likely have lost confidence in the firm’s ability and willingness to resolve it satisfactorily risks sapping their enthusiasm for continuing with the complaint, and increasing their dissatisfaction and frustration with the EDR process. Moreover, it is likely to make customers wait longer for resolution and remediation which they may be entitled to. Where redress is ordered at the end of the EDR process, it should ensure any interest component commences when the consumer was first denied the use of their funds, and includes the full IDR/EDR period.

The provision also risks creating incentives for IDR providers to ‘game’ the IDR-EDR pathway. The final response is intended to represent the firm’s final position on a complaint, after a genuine, honest, fair and efficient investigation of it. Introducing a process which ensures firms can have a ‘second go’ if the customer has enough staying power may erode the extent to which the final response is a genuine effort to resolve the complaint on a fair and honest basis.

There is a real risk that this provision will increase the proportion of complaints rejected at IDR without proper consideration of their merits, with firms reserving that proper consideration and effort to resolve for those customers who take their complaint to AFCA.

If the refer back provisions are to be retained, there may be merit in amending them to require the ‘refer back’ in this situation to be made to a Customer Advocate, or equivalent entity, if the firm has one. This allows for the matter to be reviewed afresh within the firm, from a more customer-centric and independent perspective which may be more likely to produce satisfactory resolution for the customer.

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<sup>1</sup> See Citizens Advice, Understanding Consumer Experiences of Complaint Handling, June 2016  
[https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Understanding%20consumer%20experiences%20of%20complaint%20handling\\_DJS%20report%20final\\_June2016%20\(2\)%20\(1\).pdf](https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Understanding%20consumer%20experiences%20of%20complaint%20handling_DJS%20report%20final_June2016%20(2)%20(1).pdf)