

SUPPLEMENTARY PROTOCOLS to the MEMORANDUM OF UNDERSTANDING
between
AUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY LIMITED
and
AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

1. Purpose

- 1.1 As referred to in paragraph 2.3 of the AFCA-ASIC Memorandum of Understanding (MoU) dated 1 December 2023, these supplementary protocols are intended to document agreed processes and business owners for the operation of certain aspects of the MoU.

2. Information sharing

Information provided under AFCA's governing documents

- 2.1 AFCA's sharing of certain information with ASIC (among other regulators) is provided for by the Corporations Act, AFCA's Rules and constitution. It involves, in summary:
- 2.1.1 AFCA reporting systemic issues to one or more of APRA, ASIC or the Commissioner of Taxation (Rule A.17 and required by s 1052E(4) of the Corporations Act).
- 2.1.2 AFCA reporting to one or more of APRA, ASIC or the Commissioner of Taxation if AFCA becomes aware that:
- a) a serious contravention of any law may have occurred (required by s1052E(1)(a) of the Corporations Act); or
 - b) a contravention of the governing rules of a regulated superannuation fund or an approved deposit fund may have occurred (required by s 1052E(1)(b) of the Corporations Act); or
 - c) a breach of the terms and conditions relating to an annuity policy, a life policy or an RSA may have occurred (required by s 1052E(1)(c) of the Corporations Act); or
 - d) a party may have refused or failed to give effect to an AFCA determination (required by s 1052E(1)(d) of the Corporations Act); or
 - e) particulars of a settlement by the parties to a complaint require investigation (required by s 1052E(3) and Rule 18.1).
- 2.1.3 Reporting other serious breaches including non-compliance with AFCA's Rules (permitted by Rule 18.2).
- 2.1.4 AFCA providing quarterly reports to ASIC in respect of AFCA's operations (Rule A.20.2). As explained in ASIC Regulatory Guide 267: *Oversight of the Australian Financial Complaints Authority* (at RG 267.74 – 77), these reports are to comprise statistical information on a quarterly basis about:
- a) the number of complaints received;
 - b) the demographics of consumers that lodge complaints;

- c) the number of complaints that fall outside AFCA's Rules (with reasons);
- d) AFCA's current caseload, including the age and status of open cases;
- e) the time taken to resolve complaints;
- f) the profile of complaints to enable identification of:
 - (i) the type of product or service involved;
 - (ii) the product or service provider;
 - (iii) the nature of the complaint; and
 - (iv) any systemic issues or other trends;
- g) the number of complaints closed, and an indication of the outcome of each closed complaint;
- h) the stage of AFCA's process where the complaint is closed;
- i) Financial Firms' (as defined in Rule E.1.1) performance in resolving complaints at the refer-back stage;
- j) all complaints received and dealt with about AFCA's complaints handling service, including those escalated to and dealt with by the independent assessor; and
- k) any additional reporting requirements as developed by ASIC in consultation with AFCA.

2.1.5 AFCA notifying ASIC of the cessation or receipt of notice of withdrawal of a Financial Firm from membership of AFCA, as soon as practicable after AFCA receives notice of the withdrawal from membership or the Directors' resolution for expulsion from membership (clause 3.4 d) of the constitution).

Information provided to assist ASIC regulatory action

- 2.2. The parties acknowledge that ASIC may issue statutory notices to AFCA to produce documents.
- 2.3 In producing documents in response to a statutory notice, if there are documents or information that is clearly subject to legal professional privilege (LPP), the parties acknowledge that AFCA may assert an LPP claim (as the privilege holder or on behalf of the privilege holder) in accordance with Information Sheet 165 *Claims of legal professional privilege*. AFCA may agree to provide the privileged information voluntarily, on a confidential basis, and ASIC may elect to accept the information on that basis (ASIC Information sheet 165, s5).
- 2.4 Where AFCA has a discretion to provide to ASIC information obtained from the parties to a complaint, AFCA will comply with its obligations under the *Privacy Act 1988* (Privacy Act) and any other relevant legislation in doing so (Rule A.11.5).
- 2.5 The parties acknowledge that ASIC may request that AFCA give reasonable assistance to ASIC in connection with regulatory actions.
- 2.6 If evidence is required to assist ASIC regulatory action which cannot be obtained from AFCA through ASIC's use of statutory notices or subpoenas, ASIC may request AFCA's reasonable assistance by seeking an affidavit or witness statement. Given its purpose and use, AFCA will consider its Rules and privacy obligations before disclosing information received by AFCA from Financial Firms or complainants or disclosing an individual's personal information.
- 2.7 Before issuing a statutory notice, subpoena or making a request for witness evidence, ASIC will make reasonable endeavours to contact and then liaise with the AFCA Notices Officer appointed for that purpose as specified in Appendix A.

Information provided by ASIC under s 127 ASIC Act

- 2.8 The parties acknowledge that the ASIC Chairperson may disclose information to AFCA under s 127(4) of the ASIC Act, if the ASIC Chairperson is satisfied that particular information will enable or assist AFCA to perform any of its functions or powers and may impose conditions on that disclosure.
- 2.9 AFCA will, when appropriate, securely destroy information provided to it by the ASIC Chairperson under s 127 of the ASIC Act, in line with its Protected Information Policy and Procedure document and Data Ethics Framework Principles document.
- 2.10 AFCA acknowledges that in some circumstances the ASIC Chairperson may be required to afford procedural fairness or consider other issues prior to releasing information to AFCA or permitting AFCA to further disclose the information.
- 2.11 Before making an information request, AFCA will make reasonable endeavours to contact and then liaise with the ASIC officer appointed for that purpose as specified in Appendix A.
- 2.12 The parties acknowledge that to enable or assist AFCA to perform its function or powers, the ASIC Chairperson may disclose information to AFCA under s 127(4) of the ASIC Act relating to any concurrent activities and investigations and outcomes of AFCA's systemic issue reports.

3. Consultation by ASIC before changing the legal status of AFCA Members

- 3.1 To assist in the effective and efficient discharge of AFCA's complaints handling function, before cancelling an Australian Financial Services Licence or Australian Credit Licence held by an AFCA Member; or seeking court orders for winding up of an AFCA Member, ASIC will make reasonable endeavours to inform AFCA of its intentions.
- 3.2 In making the decision, ASIC may request information from AFCA about any open complaints against an AFCA Member (as defined by paragraph 1.1 of AFCA's constitution), including the number, status and any likely resolution of open complaints.
- 3.3 To inform AFCA about its intentions, and to seek information about open complaints, ASIC will make reasonable endeavours to contact and then liaise with the AFCA Information Officer appointed for that purpose as specified in Appendix A.

4. Information for requests to approve material changes to the AFCA Scheme

- 4.1 Under s1051(5)(b) of the Corporations Act, it is a mandatory compliance requirement that material changes to the AFCA scheme are not to be made without the approval of ASIC under s1052D.
- 4.2 It is AFCA's responsibility to identify changes to the AFCA scheme which are material and require ASIC's approval to be made. Under s1052D(1), AFCA may request ASIC to approve a material change to the AFCA scheme.
- 4.3 When seeking approval of a material change AFCA will provide:
 - 4.3.1 the wording of the proposed change;
 - 4.3.2 reasons the proposed change is a material change to the AFCA scheme;

- 4.3.3 reasons why ASIC should approve the material change, by reference to the criteria ASIC must consider under s1052D(3) including the mandatory requirements under s1051, the general considerations under s1051A, any authorisation conditions issued under s1050 and regulatory requirements issued under s1052A; and
- 4.3.4 supporting documentation that is relevant to the decision including consultation documentation and submissions, and any other related materials (e.g. relevant sections of operational guidelines, approach document, Constitution, or engagement charter).
- 4.4 ASIC may consult with AFCA or request further information from AFCA before making a decision about whether to approve a material change.
- 4.5 ASIC may, by written notice to AFCA, approve the change (s1052D(2)).

These Protocols are dated the 4th day of December 2023



.....
Kate Metz
Senior Executive Leader
Regulatory Reform and Implementation
ASIC



.....
Anna Campbell
General Counsel & Company Secretary
AFCA

APPENDIX A

Appointed officers for the purposes of these Protocols

Communications to ASIC:

Communications regarding the provision of:

- Statutory reports and other information shared with ASIC (other than responses to statutory notice, subpoena or witness evidence);
- AFCA information under clause 3.4 d) of AFCA's constitution (cessation of AFCA Members); and
- other AFCA information,

should be addressed to the relevant ASIC officer appointed for that purpose, and copy afca.notifications@asic.gov.au.

s 47G(1)(b)

