REGULATORY GUIDE 267

Oversight of the Australian Financial Complaints Authority

September 2021

About this guide

This regulatory guidance sets out how we will perform our oversight role in relation to the Australian Financial Complaints Authority (AFCA). It also includes the financial firms' AFCA membership obligations.

This guide should be read in conjunction with Regulatory Guide 271 *Internal dispute resolution* (RG 271).

> Note 1: Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG 165) applies to complaints received by financial firms before 5 October 2021, when RG 271 comes into effect. We will withdraw RG 165 on 5 October 2022.

Note 2: From 27 July 2020, applications for relief should be submitted through the ASIC Regulatory Portal. For more information, see how you apply for relief.

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
- 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.

Document history

This guide was issued in September 2021 and is based on legislation and regulations as the date of issue. Note 2 on the front page was inserted on 27 July 2020.

Previous versions:

- Superseded Regulatory Guide 267, issued June 2018
- Consultation draft of Regulatory Guide 139 *Oversight of the Australian Financial Complaints Authority*, released with Consultation Paper 298 *Oversight of the Australian Financial Complaints Authority: Update to RG 139*

Disclaimer

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

Examples in this guidance are purely for illustration, they are not exhaustive and are not intended to impose or imply particular terms of reference or requirements.

Contents

A Overview

Key points

Financial firms must have a dispute resolution system that consists of:

- internal dispute resolution (IDR) procedures that meet the standards or requirements made or approved by ASIC; and
- membership of the Australian Financial Complaints Authority (AFCA).

Each year, the IDR and external dispute resolution (EDR) framework provides access to redress for hundreds of thousands of Australian consumers, small businesses and superannuation fund members who have a complaint against a financial firm.

Our dispute resolution guidance includes:

- Regulatory Guide 271 *Internal dispute resolution* (RG 271), which updates and replaces Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG 165) for complaints received after 5 October 2021. RG 271 sets out how financial firms that are required to comply with IDR requirements can meet their obligations; and
- this guide, which sets out how we will administer ASIC's powers and perform our oversight role over AFCA.

This guidance updates our previous policy on financial services EDR to reflect the reforms introduced by the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* (AFCA Act).

The AFCA Act implemented the Australian Government's response to the Review of the financial system external dispute resolution and complaints framework, which commenced in October 2016 (Ramsay Review).

Financial services dispute resolution framework

RG 267.1 Financial firms must have in place a dispute resolution system that consists of:

(a) an IDR procedure that complies with standards and requirements made or approved by ASIC (see RG 271); and

Note: The standards, requirements and guidance in RG 271 apply to complaints received by financial firms on or after 5 October 2021. For complaints received by financial firms before 5 October 2021, RG 165 applies. We will withdraw RG 165 on 5 October 2022.

(b) membership of AFCA, the EDR scheme for financial complaints in Australia.

Note: See s912A(1)(g) and 1017G(1) of the *Corporations Act 2001* (Corporations Act), s47(1) of the *National Consumer Credit Protection Act 2009* (National Credit Act), s101(1) and (1A) *Superannuation Industry (Supervision) Act 1993* (SIS Act), and s47(10) and (2) of the *Retirement Savings Accounts Act 1997*.

RG 267.2 Certain financial firms, including most credit representatives and exempt special purpose funding entities (exempt SPFEs), do not have IDR requirements but must be a member of AFCA: see s64 and 65 of the National Credit Act and regs 23B and 23C of the *National Consumer Credit Protection Regulations 2010* (National Credit Regulations).

> Note: Table **2** sets out the dispute resolution requirements by type of financial firm.

RG 267.3 The *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* (AFCA Act) significantly reshaped the Australian financial services dispute resolution framework. The AFCA Act amended the Corporations Act and other financial services and credit laws and repeals the *Superannuation (Resolution of Complaints) Act 1993.*

RG 267.4 The AFCA Act implemented the Australian Government's response to the Ramsay Review, which was a comprehensive and independent review of the financial services dispute resolution framework. The Ramsay Review made 11 recommendations, including:

(a) the creation of a single EDR scheme for all financial complaints based on an industry ombudsman model and including specific legislative provisions to support the effective resolution of superannuation complaints;

(b) increased access for individual and small business consumers through higher monetary limits and compensation caps;

(c) enhanced accountability and reporting arrangements, as well as new ASIC oversight powers; and

(d) improved transparency of IDR performance.

RG 267.5 The Explanatory Memorandum to the Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017 (Explanatory Memorandum) states at paragraph 1.4:

> The new EDR framework will ensure that consumers and small businesses are able to access an EDR scheme that provides fast and fair resolution of financial complaints in a way that is binding on financial firms.

RG 267.6 The operator of AFCA was authorised by the Hon. Kelly O'Dwyer MP, Minister for Revenue and Financial Services on 23 April 2018. AFCA replaces the predecessor EDR schemes—the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and the statutory Superannuation Complaints Tribunal (SCT).

> Note: AFCA will begin accepting complaints on 1 November 2018. FOS, CIO and the SCT will continue to accept complaints until AFCA commences. Complaints made to the predecessor schemes will continue to be dealt with under the terms of reference and rules of those schemes. The SCT will continue to resolve open complaints for a period of time after the commencement of AFCA.

RG 267.7 AFCA will also apply for recognition by the Information Commissioner, to enable it to handle privacy-related complaints, in accordance with s35A of the *Privacy Act 1988*.

Note: See the AFCA Scheme Authorisation 2018.

AFCA authorisation criteria

RG 267.8 In authorising an EDR scheme, the Minister must be satisfied that the mandatory requirements under s1051 will be met. The Minister must then take into account the general considerations (in s1051A) and any other matters the Minister considers relevant: see s1050. Only one EDR scheme can be authorised by the Minister at any time.

Note: Table 1 sets out the key definitions we apply in this guidance.

RG 267.9 The authorisation criteria require AFCA to meet the mandatory requirements under s1051, which are:

(a) organisational requirements;

(b) operator requirements;

(c) operational requirements; and

(d) compliance requirements.

RG 267.10 In taking into account the general considerations for the AFCA scheme under s1051A, the Minister will consider the:

(a) accessibility of the scheme;

(b) independence of the scheme;

(c) fairness of the scheme;

(d) accountability of the scheme;

(e) efficiency of the scheme; and

(f) effectiveness of the scheme.

RG 267.11 The general considerations are based on the principles in the Benchmarks for Industry-Based Customer Dispute Resolution (EDR Benchmarks), first published by the then Department of Industry, Science and Tourism in 1997 and updated and reissued by Treasury in 2015.

Note: See the appendix for further information on the EDR Benchmarks.

RG 267.12 The EDR Benchmarks formed the basis of our previous approach to approving the industry-based EDR schemes.

RG 267.13 We have provided guidance on industry-based EDR schemes for many years: see Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes* (RG 139). This guide retains our previous guidance where it is now reflected in the legislation or consistent with the Ramsay Review recommendations that were accepted by the Australian Government.

ASIC's role

RG 267.14 The objectives of Ch 7 of the Corporations Act are to promote:

(a) confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services;

(b) fairness, honesty and professionalism by those who provide financial services;

(c) fair, orderly and transparent markets for financial products; and

(d) the reduction of systemic risks.

Note: See s760A of the Corporations Act.

RG 267.15 Within this framework, we are responsible for overseeing the effective operation of the dispute resolution system, which includes setting the standards and requirements for financial firms' IDR processes and providing oversight of AFCA. Consumer and small business access to fair, timely and effective dispute resolution is a central part of the financial services consumer protection framework.

RG 267.16 ASIC's oversight role and specific powers in relation to AFCA are dealt with in Section C.

Terminology

RG 267.17 Table 1 sets out the key definitions we apply in this guidance.

Table 1: Terminology

Term	Meaning in this document
AFCA	Australian Financial Complaints Authority—The EDR scheme for which an authorisation under Pt 7.10A of the Corporations Act is in force.
consumer or complainant	A person or small business eligible to make a complaint to AFCA. It includes, at a minimum: • an individual consumer or guarantor; • a superannuation fund member or third-party beneficiary eligible to make a complaint under s1053, or taken to be a member of a regulated superannuation fund or approved deposit fund, or a holder of a retirement savings account (RSA), as provided for by s1053A; • a small business with less than 100 employees, including a primary production business (as defined in the *Income Tax Assessment Act 1997*).

Term	Meaning in this document
financial firms	Firms covered by s1051(2)(a), which includes: • Australian financial services (AFS) licensees; • unlicensed product issuers; • unlicensed secondary sellers; • Australian credit licensees (credit licensees); • credit representatives; • exempt SPFEs; • regulated superannuation funds (other than self-managed superannuation funds (SMSFs); • approved deposit funds; • RSA providers; • annuity providers; • life policy funds; and • insurers. This may also include financial firms that the AFCA board has accepted as eligible members to the scheme in accordance with its constitution.
s1051 (for example)	A section of the Corporations Act (in this example numbered 1051), unless otherwise specified.

Note: For a full list of the terms used in this guide, see the key terms.

B AFCA membership

Key points

This section sets out:

- who can join AFCA; and
- financial firms' EDR requirements.

Who can join AFCA

RG 267.18 Under s1051(2)(a) it is an organisational requirement that membership of AFCA is open to every entity that is required to be a member of an EDR scheme under:

(a) a law of the Commonwealth;

(b) an instrument made under such a law; or

(c) the conditions of a licence or permission issued under such a law.

Note: See Table **2** for a list of financial firms covered by s1051(2)(a).

RG 267.19 The AFCA board may accept eligible members to the scheme in accordance with the scheme's constitution.

RG 267.20 In addition to the financial firms set out in Table **2**, AFCA is also able to accept other categories of members, including firms operating under an exemption (e.g. the fintech licensing exemption provided by ASIC's regulatory sandbox framework). Other firms may also elect to join AFCA (e.g. exempt public-sector superannuation schemes).

RG 267.21 With some exceptions (e.g. credit representatives and exempt SPFEs), financial firms must also have IDR procedures that comply with the standards and requirements made or approved by ASIC: see RG 271.

Financial firms' EDR requirements

RG 267.22 Table 2 sets out in detail financial firms' dispute resolution requirements and their requirements to be members of AFCA.

Table 2: Dispute resolution requirements by type of financial firm

Firm type	Description	Dispute resolution requirements
AFS licensees	An AFS licensee is a business carrying on financial services. This includes businesses that: • provide financial product advice to clients; • deal in a financial product; • make a market for a financial product; • operate a registered scheme; • provide a custodial or depository service; or • provide traditional trustee company services.	Under s912A, AFS licensees must have a dispute resolution system that consists of: • IDR procedures that comply with the standards and requirements made or approved by ASIC (see RG 271) that cover complaints made by retail clients in relation to the financial services provided; and • membership of AFCA.
Unlicensed product issuers and unlicensed secondary sellers	An unlicensed product issuer is an issuer of a financial product who is not an AFS licensee. An unlicensed secondary seller is a person who offers the secondary sale of a financial product under s1012C(5)(b) or (8) and who is not an AFS licensee.	Under s1017G(2), unlicensed product issuers and unlicensed secondary sellers are required to have a dispute resolution system that consists of: • IDR procedures that comply with RG 271 that cover complaints made by retail clients in relation to the financial services provided; and • membership of AFCA.
Superannuation trustees	A trustee of a regulated superannuation fund or of an approved deposit fund, other than an SMSF.	Under s101(1)(a)–(c) of the SIS Act, each superannuation trustee must: • be a member of AFCA; and • have an IDR procedure that complies with the standards and requirements set out in s912A(2)(a)(i) of the Corporations Act. Note: However, s101(1)(a)–(c) of the SIS Act does not apply to a trustee if the trustee is required under the Corporations Act to have a dispute resolution system complying with s912A(2) or 1017G(2) of the Act.
Credit licensees	Credit providers and lessors, including those who are assigned the contractual rights of a credit provider or lessor (which can include debt collectors who purchase a debt from a credit provider or lessor). Credit service providers (such as brokers and other intermediaries), and others (such as debt collectors) who act on behalf of the credit provider or lessor.	Under s47 of the National Credit Act, credit licensees are required to have a dispute resolution system that consists of: • IDR procedures that comply with RG 271 that cover disputes relating to credit activities they and their credit representatives engage in; and • membership of AFCA.

Firm type	Description	Dispute resolution requirements
Credit representatives	A credit representative is a person authorised to engage in specified credit activities on behalf of a credit licensee under s64 or 65 of the National Credit Act. The employees and directors of a credit licensee do not need to be formally authorised—they act as representatives of the credit licensee without a specific authorisation. A person can also be authorised as a credit representative by more than one credit licensee.	Credit representatives do not need to have IDR procedures that meet the standards and requirements made or approved by ASIC. This is because a credit licensee's IDR procedures must cover disputes relating to its credit representatives. Under s64 and s65 of the National Credit Act, most credit representatives are required to be separate members of AFCA. However, a person who has been sub-authorised under s65(1) of the National Credit Act, and is an employee or director of the body corporate that gave the sub-authorisation, does not need to be a separate member of AFCA. Note: See reg 16 of the National Credit Regulations.

Firm type	Description	Dispute resolution requirements
Unlicensed carried over instrument (COI) lenders (including prescribed unlicensed COI lenders)	A 'carried over instrument' is a contract or other instrument that was made and in force, and to which an old Credit Code applied immediately before 1 July 2010: see s4(1) of the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*. Unlicensed carried over instrument lenders (unlicensed COI lenders) are credit providers or lessors who only have a closed pool of carried over instruments and have chosen not to obtain a credit licence (or to restrict their activities to their carried over instruments, and subsequently cancel their credit licence). Note: A 'prescribed unlicensed COI lender' is an unlicensed COI lender who fails to meet certain probity requirements and who has restrictions placed on their conduct in relation to their carried over instruments. A prescribed unlicensed COI lender must not engage in credit activities with respect to their carried over instruments (other than the activities engaged in solely by being the credit provider or lessor). They must instead appoint a credit licensee to act as a 'representative' to engage in credit activities on their behalf with respect to their carried over instruments.	Unlicensed COI lenders (including prescribed unlicensed COI lenders): • must have IDR procedures that comply with RG 271 and cover complaints in relation to the credit activities they engage in with respect to their carried over instruments; and • may choose to join AFCA. Note 1: Details of the obligations of unlicensed COI lenders are set out in Information Sheet 110 *Lenders with carried over instruments* (INFO 110), Regulatory Guide 205 *Credit licensing: General conduct obligations* (RG 205), Regulatory Guide 206 *Credit licensing: Competence and training* (RG 206) and Regulatory Guide 207 *Credit licensing: Financial requirements* (RG 207). Note 2: A prescribed unlicensed COI lender may arrange for their credit licensee's dispute resolution system to cover complaints in relation to their carried over instruments. However, the prescribed unlicensed COI lender remains responsible for ensuring that the dispute resolution system meets the requirements and standards set out in RG 271. Unlicensed COI lenders who choose not to join AFCA must keep a register of each of the following: • complaints relating to their carried over instruments; • hardship notices made under s72 of the National Credit Code (at Sch 1 to the National Credit Act); and • requests for postponement of enforcement proceedings under s94 of the National Credit Code. Note 1: Unlicensed COI lenders that are not members of AFCA must still meet these register requirements, even if they have arranged for another person's dispute resolution systems (including AFCA membership) to cover complaints relating to their carried over instruments. Note 2: See s47(1A) of the National Credit Act (inserted by Sch 2 of the National Credit Regulations) for details of the information the registers must include.

Firm type	Description	Dispute resolution requirements
Exempt SPFEs	Special purpose funding entities (SPFEs) include securitisation entities and fundraising special purpose entities that make (or buy) loans or leases and repackage them as investment products to sell to investors: Note: See the definition of 'special purpose funding entity' in s5 of the National Credit Act (inserted by Sch 3 to the National Credit Regulations). SPFEs can either operate under a credit licence or as exempt SPFEs: see the licensing exemption in regs 23B and 23C of the National Credit Regulations. Note: See the definition of 'exempt special purpose funding entity' in reg 3 of the National Credit Regulations.	These entities may rely on a licensing exemption: see regs 23B and 23C of the National Credit Regulations. If they do, they must: • enter into a servicing agreement with a credit licensee under which that licensee acts on their behalf; and • be a member of AFCA. Exempt SPFEs do not have any IDR requirements. We expect that the credit licensee's IDR process will cover complaints about both: • credit activities engaged in by the licensee under a servicing agreement; and • the conduct of the exempt SPFE (including where changes are sought to the terms of the contract—for example, on the basis of hardship or because the contract was unsuitable or unjust).
Credit licensees acting on behalf of exempt SPFEs under a servicing agreement	A credit licensee acting on behalf of an exempt SPFE, such as a securitisation entity that makes (or buys) loans or leases and repackages them as investment products to sell to investors.	When performing this role for an exempt SPFE, the credit licensee must: • notify ASIC when they enter into a servicing agreement with an exempt SPFE and provide details of its membership with AFCA; and • notify ASIC when they cease to be a party to the servicing agreement. The credit licensee should also ensure that their IDR procedures cover • the exempt SPFE's activities; and • complaints that arise when they act as the representative of the exempt SPFE and complaints about the conduct of the exempt SPFE. The credit licensee must inform a complainant of their right to complain to AFCA or directly refer them to AFCA.

C Oversight of AFCA

Key points

This section describes the broad AFCA governance framework and sets out ASIC's oversight role in relation to AFCA. This includes ASIC's powers to issue regulatory requirements, give directions and approve material changes to the scheme.

It also sets out how we will administer the reporting requirements in the AFCA Act, including AFCA's obligation to:

- refer matters to appropriate authorities;
- refer settled complaints;
- refer systemic issues; and
- report on scheme statistics.

Principles of the governance framework

RG 267.23 Stakeholder confidence in the independent and effective operation of AFCA is supported by a robust and transparent accountability and governance framework. This framework comprises Ministerial authorisation and ongoing AFCA board and ASIC oversight. It will also be supported by:

(a) a forward-looking, responsive and independent organisational culture;

(b) a public commitment to continuous learning and improvement; and

(c) systems and reporting arrangements that create trust and confidence in AFCA.

RG 267.24 We will approach our oversight responsibilities in a way that:

(a) ensures compliance with the mandatory requirements;

(b) is consistent with the Ministerial authorisation and conditions;

(c) respects the operational independence of AFCA; and

(d) supports AFCA to deliver independent, timely and fair decisions for consumers and financial firms.

RG 267.25 From time to time, we will review this guidance and any relevant legislative instruments in consultation with AFCA, financial firms, consumer representatives and other interested stakeholders.

The AFCA board

RG 267.26 The Minister authorised the operator of the scheme on 23 April 2018. Australian Financial Complaints Authority Limited is a company limited by guarantee that is operated on a not-for-profit basis.

RG 267.27 The AFCA board has an independent chair and an equal number of directors with industry and consumer representative experience. The board must ensure that the mandatory requirements are complied with: see s1052. It must also comply with any conditions that are specified by the Minister at the time of authorisation and with any ASIC regulatory requirements on an ongoing basis.

RG 267.28 The board is also responsible for appointing AFCA decision makers and the independent assessor, conducting independent reviews of the scheme, and reporting to ASIC and publicly.

ASIC's powers

RG 267.29 ASIC has a range of powers in relation to AFCA under the Corporations Act. These include powers to:

(a) issue regulatory requirements, including by legislative instrument, relating to compliance with:

  (i) the mandatory requirements under s1051; or

  (ii) any of the general considerations scheme under s1051A;

(b) issue directions to AFCA if we consider that AFCA has not done all things reasonably practicable to ensure compliance with the relevant legislative requirements (s1052C);

(c) issue directions to AFCA to:

  (i) increase limits on the value of claims that may be made or the value of remedies that may be determined (s1052B); and

  (ii) take measures to ensure that the operations of AFCA are sufficiently financed (s1052BA); and

(d) approve material changes to the AFCA scheme (s1052D).

RG 267.30 The Explanatory Memorandum confirms that while ASIC has an enhanced oversight role over AFCA, the scheme remains independent and responsible for its own internal processes and the management of complaints. ASIC has no role in individual complaints handling and will not intervene in the decision-making processes of AFCA.

RG 267.31 Our regulatory requirements form part of the compliance requirements for AFCA. If AFCA fails to comply with any regulatory requirement, we may issue specific directions (under s1052B or s1052BA) or a general direction (under s1052C) to AFCA requiring it to comply.

RG 267.32 We will use these directions powers as a last resort, and give AFCA adequate notice of any intention to issue a direction (as required by the Corporations Act).

RG 267.33 AFCA must also refer (or report) certain matters to one or more of ASIC, the Australian Prudential Regulation Authority (APRA) and the Commissioner of Taxation (referred to in this guide as 'the ATO'). These include referring:

(a) contraventions and breaches (s1052E(1) and (2));

(b) settled complaints (s1052E(3)); and

(c) systemic issues (s1052E(4)).

Material changes to the AFCA scheme

RG 267.34 It is a mandatory requirement under s1051(5)(b) that material changes to the scheme are not to be made without the approval of ASIC under s1052D.

RG 267.35 AFCA may ask ASIC to approve a material change to the AFCA scheme. In considering whether to approve the change, we must take into account:

(a) the mandatory requirements under s1051;

(b) the general considerations under s1051A;

(c) any conditions imposed by the Minister on the authorisation of the scheme under s1050(5)(b); and

(d) any regulatory requirements under s1052A.

RG 267.36 Examples of changes to AFCA that we would consider material include changes to:

(a) the scheme's jurisdiction, as set out in AFCA's Rules of Complaint Resolution Scheme (AFCA Rules);

(b) the terms of reference of the independent assessor; and

(c) relevant time limits, including time limits for accessing the scheme and for 'refer back' arrangements.

RG 267.37 Changes that may require ASIC approval are not limited to what is in the AFCA Rules; they could extend to matters dealt with in operational guidelines or other documents, if these have a material impact on the scheme or its users. AFCA will consult publicly about changes it is proposing to the scheme.

Reporting requirements

Referring matters to appropriate authorities

RG 267.38 Section 1052E(1) requires that AFCA must give particulars of a contravention, breach, refusal or failure to APRA, ASIC or the ATO (the regulators), as appropriate, if it becomes aware, in connection with a complaint under the AFCA scheme, that:

(a) a serious contravention of any law may have occurred;

(b) a contravention of the governing rules of a regulated superannuation fund or an approved deposit fund may have occurred;

(c) a breach of the terms and conditions relating to an annuity policy, a life policy or an RSA may have occurred; or

(d) a party to the complaint may have refused or failed to give effect to a determination made by AFCA (see s1052E(1)).

Note: Section 1052E(2) relates to the requirements for reporting serious contraventions where the complaint relates to the scheme provided for by the *Australian Defence Force Cover Act 2015*. This guidance does not address these requirements.

RG 267.39 Under the previous EDR framework, ASIC-approved schemes reported *serious misconduct* to ASIC in accordance with policy settings in RG 139. This test had been applied to include fraudulent conduct, grossly negligent or inefficient conduct, wilful or flagrant breaches of relevant laws, and non-compliance with scheme decisions or processes.

Serious contraventions

RG 267.40 AFCA must refer contraventions and breaches to appropriate authorities: s1052E.

RG 267.41 We consider that a contravention will be serious, and therefore reportable by AFCA to the regulators under s1052E, if:

(a) there are sufficient facts or information to found an objectively reasonable belief that it is serious; or

(b) AFCA in good faith forms the view that a serious contravention of the law may have occurred.

RG 267.42 A reasonable belief will be formed if a reasonable person would expect AFCA to report the matter to a regulator.

RG 267.43 In considering what constitutes a 'serious contravention of any law' reportable by AFCA to ASIC or the other regulators, AFCA should take into account the Explanatory Memorandum, which states at paragraph 1.87 that:

> In relation to serious contraventions of law, it is intended that this will generally relate to laws relevant to the subject matter and circumstances of a complaint made to AFCA and the complaint handling processes, rather than necessarily to a contravention of *any* law (emphasis added).

RG 267.44 We expect that serious contraventions reportable to ASIC under s1052E will include serious contraventions of financial services and credit laws. For the avoidance of doubt, this includes relevant superannuation legislation.

RG 267.45 It is likely that there will continue to be some 'grey areas' in which the need for referral is not straightforward. AFCA should consult with ASIC, the ATO or APRA (as appropriate) if it is unsure about whether or not to refer a particular matter.

RG 267.46 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.

RG 267.47 The obligation to report applies to serious contraventions of laws by financial firms, including by licensees and their representatives or employees.

RG 267.48 The particulars of the contravention (which are required to be provided under s1052E(1)) include the name of the financial firm, licensee, representative or employee, as appropriate. Where a serious contravention relates to the conduct of a specific and identified individual or individuals, the report will include the name of the individual(s).

RG 267.49 Reports made to regulators in accordance with s1052E are subject to each regulator's confidentiality requirements. For example, information obtained by ASIC under s1052E is protected information obtained by ASIC 'while exercising its powers or functions': see s127 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act). This means that we are generally precluded from publishing or releasing the name of the firm or individual identified in a report from AFCA.

> Note: The confidentiality requirements of the Australian Taxation Office (ATO) are contained in Div 355 of the *Taxation Administration Act 1953*, and s355-25 of that Act prohibits the ATO from disclosing protected information its receives. APRA's confidentiality requirements are found in s56 of the *Australian Prudential Regulation Authority Act 1998*. Section 56(2) prohibits APRA from disclosing protected information in its possession except in a limited range of circumstances, set out in s56.

RG 267.50 It is not a requirement that AFCA notify a firm before reporting a serious contravention to a regulator under s1052E.

Financial firm self-reporting requirements

RG 267.51 AFS licensees are required to report certain significant breaches (or likely breaches) of financial services laws to ASIC: s912D. Credit licensees must also lodge an annual compliance certificate with ASIC and certify that they are complying with their credit licence obligations.

RG 267.52 While there may be some overlap between the content of the self-reporting requirements and issues reportable by AFCA to ASIC under s1052E, we

consider that these requirements, operating together, will enhance the effective and timely identification and reporting of issues of regulatory concern to ASIC.

RG 267.53 AFCA and ASIC will liaise about matters that may be subject to dual reporting, particularly where they relate to the remediation of systemic issues identified in the handling of complaints.

RG 267.54 In its response to Treasury's *ASIC Enforcement Review taskforce report*, released in April 2018, the Australian Government announced that it would defer implementation of the recommendations on the self-reporting of contraventions by AFS licensees and credit licensees to take into account any findings arising out of the Royal Commission into misconduct in the banking, superannuation and financial services industry. Subject to the outcome of this process, we may update our regulatory guidance.

> 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).

Reporting to ASIC

RG 267.55 Table 3 sets out examples of the types of matters that we consider AFCA should report to ASIC, in accordance with s1052E, if AFCA becomes aware of the matter in connection with a complaint.

Table 3: Examples of serious contraventions reportable to ASIC

Area	Example
Mortgage broking	A mortgage broker has engaged in misleading and deceptive, and possibly fraudulent, conduct in the preparation of loan applications.
Credit	A lender may have contravened either s47(1)(e) or (1)(g) of the National Credit Act by continuing to rely on documents submitted by a broker after the lender identified that the broker had lodged loan applications supported by false documents.
General insurance	A firm may have engaged in unconscionable conduct when selling insurance products to consumers by selling them cover they do not need or would be unable to make a claim on.
Life insurance	An insurer may have engaged in misleading and deceptive conduct in the sale and promotion of life insurance policies.
Stock broking	A firm failed to ensure that client money was deposited into client trust accounts in accordance with the client money requirements in the Corporations Act.
Managed discretionary account (MDA)	A firm has serious compliance failures by acting outside the scope of its authorisation in providing MDA services to clients.

Reporting to the ATO

RG 267.56 Table 4 sets out are examples of matters the ATO considers AFCA should report to the ATO, in accordance with s1052E, if they become aware of these matters in connection with a complaint.

Table 4: Examples of serious contraventions reportable to the ATO

Area	Example
Aggressive tax planning	A financial firm is engaging in aggressive tax planning (e.g. promoting certain investment products solely for the purposes of reducing tax liabilities) in contravention of relevant tax rulings.
Illegal early release of superannuation	An authorised representative of a member firm is promoting or facilitating the illegal early release of superannuation benefits.

Timing and format of reports

RG 267.57 AFCA must make a report to a regulator as soon as practicable—but no later than 15 days—after becoming aware that a serious contravention has occurred or may have occurred.

RG 267.58 We expect that if the conduct suggests ongoing harm or a continuing risk of consumer losses, AFCA will report as soon as practicable on becoming aware that a serious contravention has occurred or may have occurred. This means that AFCA should not necessarily wait until a complaint has been finalised before reporting.

RG 267.59 ASIC may specify the required form of reports of serious contraventions. In specifying requirements, we will consult with APRA, the ATO and AFCA with a view to harmonising and streamlining reporting arrangements as far as practicable.

Referring settled complaints

RG 267.60 If the parties to a complaint made under the AFCA scheme agree to a settlement of the complaint and AFCA thinks the settlement may require investigation, AFCA may give particulars of the settlement to one or more of the regulators: see s1052E(3).

RG 267.61 To the extent it is practical to do so, we expect AFCA to oversee settlement arrangements to ensure that they are:

(a) limited to the subject matter of the complaint;

(b) not drafted so broadly that they preclude a consumer lodging a further complaint or taking other action in relation to matters that are not the subject of the complaint;

(c) not drafted to preclude a consumer referring a complaint to a regulator;

(d) not offered on onerous or unjust terms, or in circumstances designed to avoid the scrutiny of AFCA; and

(e) not being entered into as a result of duress or misrepresentation.

RG 267.62 The factors above may be relevant to AFCA when deciding whether a settlement agreement requires investigation. The particulars of the settlement under s1052E(3) may include the name of the financial firm, licensee, representative or employee involved (as appropriate).

RG 267.63 When AFCA identifies issues arising from settlements that warrant referral under s1052E(3), it should make a report within a reasonable time—but no later than 15 days—of forming the belief that a settlement may require investigation.

RG 267.64 We may revisit our guidance in light of the operational experience of the scheme.

Referring systemic issues

RG 267.65 If AFCA considers that there is a systemic issue arising from the consideration of complaints under the AFCA scheme, AFCA must give particulars of the issue to one or more of the regulators, as appropriate: see s1052E(4).

> Note: See RG 267.198–RG 267.209 for detailed guidance on AFCA's systemic issues role.

RG 267.66 The *particulars* of systemic issues reportable to the regulators under s1052E(4) include the name of the financial firm, licensee, representative or employee involved (as appropriate).

RG 267.67 Consistent with our guidance in RG 267.201, AFCA must have systems and processes in place to:

(a) *identify* systemic issues that arise from its consideration of complaints;

(b) *refer* these matters to the financial firm for response and action; and

(c) *report* systemic issues in accordance with s1052E(4).

RG 267.68 AFCA may identify a possible systemic issue in the course of resolving a complaint that, after investigation, AFCA decides is not systemic and therefore not reportable. AFCA may also identify systemic issues that relate to general industry practices or that involve multiple financial firms. AFCA should report the particulars of such issues or concerns to the regulators, as appropriate.

Reporting to ASIC

RG 267.69 Table 5 sets out some examples of the types of systemic issues that we consider AFCA should report to ASIC in accordance with s1052E(4).

Table 5: Examples of systemic issues reportable to ASIC

Area	Example
Responsible lending	AFCA identifies a potential systemic issue involving a failure to meet responsible lending obligations, including failure to make reasonable inquiries about expenses in the provision of consumer credit. After investigation, AFCA considers the issue is systemic and reports the issue to ASIC.
Credit reporting errors	After investigation, AFCA identifies a systemic issue involving errors in credit reporting processes, leading to incorrect default listings being made to a credit reporting body. AFCA reports the issue to ASIC.
Poor IDR procedures	AFCA identifies a systemic issue involving significant delays in complaints handling at IDR, affecting a number of firms who outsource their IDR procedures to third-party providers.

RG 267.70 Reports should be made as soon as practicable, but no later than 15 days after AFCA considers that there is a systemic issue. AFCA should not necessarily wait until the underlying complaint or the systemic issue investigation has been finalised before reporting to the regulators, but generally the firm(s) involved will have an opportunity to respond to AFCA before a report is made.

Information sharing

RG 267.71 Officers and other staff members of APRA, ASIC and the ATO may disclose protected information to AFCA to assist it to perform its functions.

Note: See s56(5)(aa) of the *Australian Prudential Regulation Authority Act 1998*, s127(4)(aa)(i) of the ASIC Act, and s355-65(3) in Sch 1 to the *Taxation Administration Act 1953*.

RG 267.72 AFCA should ensure it has appropriate processes for the receipt and management of information shared by APRA, ASIC or the ATO in accordance with these provisions.

RG 267.73 The AFCA Rules may also provide for the release of information to other regulators—including the Office of the Australian Information Commissioner, a regulated securities exchange, or a disciplinary body where appropriate procedures are in place between AFCA and the body to provide for the release of such information.

Statistical reporting requirements

RG 267.74 AFCA will collect, record and report information to ASIC 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) the scheme'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 dispute;

(h) the stage of AFCA's process where the complaint closed; and

(i) firms' performance in resolving complaints at the refer back stage.

RG 267.75 A comprehensive summary and analysis of this information must also be contained in AFCA's annual report.

RG 267.76 AFCA will also report to ASIC on a quarterly basis about all complaints received about its complaints handling service (service complaints). This will include information about all complaints it has received and dealt with, including those that are escalated to and dealt with by the independent assessor.

RG 267.77 We may, in consultation with AFCA, develop additional reporting requirements—including for how information is to be provided to ASIC. We will seek to harmonise and streamline data collection and reporting with other relevant data sets, such as firm-level IDR data.

Public reporting of AFCA complaint data

RG 267.78 AFCA must publish information about complaints received and closed, with an indication of the outcome, against each scheme member on an annual basis. AFCA may exercise discretion not to publish information about members whose level of complaints fall below a certain threshold. AFCA must be transparent about its publication methodology. This data supports comparability between member firms that operate similar businesses.

RG 267.79 We expect AFCA to:

(a) ensure this information is accurate; and

(b) present the information in the appropriate context—for example, by categorising member information according to industry sector and/or size of business.

Further review and communication of our reporting guidance

RG 267.80 This reporting guidance provides a basic framework within which AFCA should operate. This framework will be subject to periodic review in consultation with AFCA, APRA, the ATO, industry, consumer representatives, and other interested stakeholders (as required). We may issue more detailed regulatory requirements about reporting from time to time: see s1052A.

RG 267.81 We will hold regular meetings with AFCA scheme staff to discuss the operation of the reporting guidelines and relevant operational issues.

D AFCA compliance requirements

Key points

We may issue regulatory requirements that form part of AFCA's compliance requirements. These relate to:

- compliance with the mandatory requirements under s1051; or
- any of the general considerations under s1051A.

This section sets out our guidance relating to the general considerations for an EDR scheme, which are the principles of:

- accessibility;
- independence;
- fairness;
- efficiency and effectiveness; and
- accountability.

These principles have been applied to the oversight of ASIC-approved industry-based EDR schemes for many years, and will continue to apply to AFCA.

Accessibility

RG 267.82 To meet the accessibility requirements, AFCA must:

(a) be free of charge for complainants;

(b) clearly communicate who is eligible to complain and the complaints it can and cannot deal with;

(c) provide clear reasons for excluding complaints that it determines to be outside jurisdiction;

(d) promote awareness of and access to the scheme;

(e) communicate in a clear, timely and relevant way to consumers, financial firms and other stakeholders and ensure scheme processes are easy to use and understand, and simple to navigate; and

(f) clearly set out in the AFCA Rules how and when legal proceedings may be brought in relation to a complaint that has already been lodged with the scheme (see RG 267.101–RG 267.112).

Cost to consumers

RG 267.83 It is a mandatory requirement that complainants are exempt from payment of any fee or charge in relation to a complaint: s1051(2)(d). This applies not only to a complainant accessing AFCA, but also to having their complaint dealt with in full by the scheme.

Complaints AFCA can and cannot deal with

RG 267.84 It is a mandatory requirement that membership of AFCA is open to every firm that is required to be a member of an authorised EDR scheme: s1051(2)(a). See RG 267.18 for more information.

RG 267.85 The AFCA Rules set out AFCA's jurisdiction—who is eligible to complain and what complaints it can and cannot deal with.

RG 267.86 The Corporations Act also includes specific provisions for the resolution of superannuation complaints, including:

(a) when complaints relating to superannuation can be made (s1053);

(b) AFCA's powers in relation to superannuation complaints (s1054–1054C); and

(c) the determination of superannuation complaints (s1055–1055D).

RG 267.87 Exclusions from AFCA's jurisdiction are based on statutory exclusions and the well-established exclusions from the jurisdictions of the predecessor schemes. The discretion to exclude complaints will only be used in cases where there are compelling reasons for deciding that AFCA should not consider the complaint.

RG 267.88 Examples of the types of complaints that may be excluded from AFCA, subject to specific drafting in the AFCA Rules, include complaints that:

(a) have been dealt with in another forum;

(b) are above the scheme's monetary limit at the time the complaint was made;

(c) are outside the scheme's time limits;

(d) relate to a firm's commercial policy;

(e) relate to the management of a fund as a whole;

(f) relate solely to the underlying performance of an investment; or

(g) are frivolous, vexatious, misconceived or lacking in substance.

RG 267.89 Where the financial firm and consumer consent, AFCA may accept complaints that are outside the scheme's jurisdiction. This may occur, for example, where a financial firm:

(a) agrees to extend access and to be bound by the AFCA Rules and AFCA's decisions for certain complaints that may have otherwise been excluded (e.g. out of time); or

(b) is running a remediation program and agrees to waive monetary or other limits to provide access to EDR for its affected customers.

RG 267.90 While a financial firm may agree to waive time or monetary limits to provide access to AFCA, the scheme itself retains its power to exclude certain

complaints if it forms the view that the complaint is frivolous, vexatious or that the complaint should more properly be dealt with in another forum (e.g. a court).

Promoting awareness of and access to AFCA

RG 267.91 AFCA should actively promote the scheme with timely, targeted communications and stakeholder engagement strategies.

RG 267.92 Demographic data about complainants should inform AFCA's promotional and outreach activities, to ensure that vulnerable or under-represented groups are identified and effectively targeted.

RG 267.93 Financial firms also have specific disclosure and regulatory obligations to make their customers aware of IDR and of their rights to complain to AFCA.

Clear communications and easy to use processes

RG 267.94 AFCA should adopt appropriate communication strategies for consumers, financial firms and other stakeholders, with a focus on promoting understanding of AFCA's role, processes and decision making.

RG 267.95 Communications should be clear, timely, and relevant to the audience. They should support the different access needs of different complainant types.

RG 267.96 When developing communications strategies, AFCA should ensure that information is:

(a) easy to access;

(b) user friendly (taking into account plain language principles);

(c) practically relevant; and

(d) provided at key stages of the complaint resolution process.

RG 267.97 AFCA should also consider behavioural principles when designing its communications, which include:

(a) making it easy to lodge a complaint;

(b) giving clear, timely and tailored communications to help consumers and member firms understand scheme processes and timeframes;

(c) making it simple to engage with AFCA staff; and

(d) making it easy to seek help at any stage of the process.

RG 267.98 AFCA should review the effectiveness of scheme communications in response to survey data or other information. This may include, for example, feedback from the independent assessor or other internal quality assurance processes that suggests there may be a problem in member or complainant understanding of scheme processes, decisions or jurisdiction.

Financial firm referrals to AFCA

RG 267.99 From time to time, a financial firm may wish to directly refer a complaint to AFCA for resolution. This may be necessary where a firm has given an IDR response to the complainant, but the complaint remains unresolved and the complainant has not escalated it to AFCA. Firms making such referrals will require the consent of the complainant to do so.

RG 267.100 For complaints involving hardship notices or requests for postponement of enforcement proceedings, there may be an increased need for financial firms to directly refer complaints to the AFCA, because interest and other default charges may continue to accrue.

Legal proceedings by financial firms

RG 267.101 The AFCA Rules must set out that legal proceedings should not be commenced by financial firms when a complaint has been lodged with AFCA, unless:

(a) the legal limitations period is about to expire; or

(b) the firm seeks to rely on the test case procedures.

RG 267.102 By 'test case procedures', we mean complaints involving a novel point of law or circumstances requiring clarification in accordance with the AFCA Rules.

RG 267.103 Commencing legal proceedings in relation to a complaint lodged with AFCA creates the potential for financial firms to undermine the EDR process. There is also the possibility that the same complaint will be dealt with in two competing forums, wasting time and resources.

RG 267.104 However, we recognise the importance of allowing financial firms to preserve their legal rights where the legal limitations period is about to expire, and in specific test case situations.

RG 267.105 The AFCA Rules set out the specific circumstances in which a financial firm may commence legal proceedings under test case procedures. This should include requiring that the firm:

(a) institute proceedings in a court or tribunal—with the ability to decide the issue or point of law—in a timely way;

(b) undertake to pay the complainant's costs and disbursements; and

(c) comply with any other AFCA requirements.

Debt recovery proceedings

RG 267.106 Where legal proceedings relating to debt recovery proceedings have already commenced and a complaint is lodged with AFCA, the AFCA Rules must require the firm not to pursue the legal proceedings beyond the minimum necessary to preserve its legal rights.

RG 267.107 Such complaints should be accepted by AFCA at least up until the point where the consumer has taken no step beyond lodging a defence or defence and counterclaim (however described), unless otherwise excluded from AFCA's jurisdiction under the AFCA Rules.

RG 267.108 For the avoidance of doubt, a complainant will not be considered to have taken a 'step' if they attend a directions hearing or agree to consent orders of a procedural nature only being made in those legal proceedings.

RG 267.109 AFCA should exclude small business lending complaints (including primary production complaints) from its debt recovery legal proceedings jurisdiction where the credit facility that is the subject of the complaint exceeds the scheme's monetary limit.

RG 267.110 In determining whether the relevant limit is reached, AFCA must apply the limit to the small business credit facility that is the subject of the lending complaint. This means that the value of linked credit facilities cannot be taken into account when applying the limit.

Legal proceedings and traditional trustee complaints

RG 267.111 Where a person has commenced legal proceedings to be included as a beneficiary under an estate, AFCA must put on hold all related traditional services complaints that may depend on the outcome of the legal proceedings until the court hands down its decision.

RG 267.112 AFCA should also have processes in place by which financial firms who are trustee companies can notify the scheme as soon as they become aware that a person has commenced legal proceedings to be included as a beneficiary.

Independence

RG 267.113 The Corporations Act establishes AFCA's governance framework, including that the scheme is authorised by the Minister and that the operator of the scheme will have an independent chair and equal numbers of directors with experience in the kinds of businesses operated by scheme members and in representing consumers: s1051(3)(d) and (da).

RG 267.114 The mandatory requirements under s1051 relating to independence include requirements that the:

(a) operations of the scheme are financed through contributions made by members of the scheme (s1051(2)(b));

(b) scheme has an independent assessor (s1051(2)(c));

(c) operator of the scheme commissions the conducting of independent reviews of the scheme's operations and procedures (s1051(3)(a));

(d) operator of the scheme is a company limited by guarantee (s1051(3)(b)); and

(e) operator's constitution provides that the operator must not be operated for profit (s1051(3)(c));

RG 267.115 It is also a mandatory requirement that complaints against members of the scheme are resolved (including by making determinations relating to such complaints) in a way that is fair, efficient, timely and independent: s1052(4)(b).

Resources available to AFCA

RG 267.116 It is a mandatory requirement that the operations of the scheme are financed through contributions made by members of the scheme: s1051(2)(b).

RG 267.117 The Ramsay Review made the following findings in relation to scheme funding:

> First, there should be a stronger requirement for the single EDR body to demonstrate that it has adequate funding and flexibility to respond to unanticipated events.
>
> Secondly, financial transparency should be improved, so that users of EDR can understand how funding is collected and used. Transparency about funding arrangements, and levels of revenue and expenditure, provides an important form of accountability. It also has the potential to drive efficiencies, which reduces the costs imposed on users.
>
> Note: See Ramsay Review, *Final report: Review of the financial system external dispute resolution and complaints framework*, May 2017, p. 180.

RG 267.118 AFCA should adopt a funding model and funding arrangements that will ensure it is sufficiently financed. The model and arrangements should:

(a) be adequate, fair and efficient;

(b) be transparently developed, reviewed and amended by reference to the statutory criteria and external operating context;

(c) be capable of responding to external events such as unexpected volatility in caseload;

(d) minimise cross-sectoral subsidisation to the extent practicable; and

(e) be able to raise additional funds to support scheme operations, if required.

RG 267.119 AFCA should be adequately resourced to assist complainants to draft and lodge their complaints. This does not amount to scheme staff advocating for complainants, and should not compromise the impartiality of the complaints resolution process.

RG 267.120 AFCA must develop and consult appropriately with financial firms and other stakeholders on its funding arrangements, taking into account the statutory criteria and its current and forecast caseloads.

RG 267.121 AFCA must also report to the responsible Minister annually on any decisions to vary member levies or the scale of complaint fees payable by AFCA members within 30 days of the commencement of each financial year.

Note: See AFCA Scheme Authorisation 2018.

RG 267.122 If we become aware that AFCA has not done all things reasonably practicable to ensure that the operations of the AFCA scheme are sufficiently financed, we may issue a direction under s1052BA.

Fairness

RG 267.123 All stages of AFCA's complaints handling and decision-making processes must accord with the principle of procedural fairness.

RG 267.124 The AFCA Rules set out AFCA's decision-making approach.

RG 267.125 For superannuation complaints, AFCA must apply the decision-making test in s1055. This requires AFCA to be satisfied that the decision to which the complaint relates, or the conduct, was fair and reasonable in all the circumstances.

RG 267.126 In making a determination of a superannuation complaint, AFCA has all the powers, obligations and discretions conferred on the trustee, insurer, RSA provider or other decision maker who made the original decision: s1055(1). This is consistent with the powers of the SCT.

RG 267.127 For non-superannuation complaints, AFCA will apply the decision-making test set out in the AFCA Rules. This test will require AFCA to achieve the fair resolution of complaints in accordance with its statutory mandate, and includes criteria such as having regard to relevant laws, applicable industry codes of conduct and good industry practice.

RG 267.128 AFCA should provide written reasons for any decision made about the merits of a complaint and about a decision that a complaint is outside its jurisdiction.

Information sharing

RG 267.129 In making its decisions, AFCA should only rely on information that is made available to all parties.

RG 267.130 Effective and timely dispute resolution does not, however, necessarily require the physical exchange of all relevant documents or information between the parties. This is the case, for example, when:

(a) written reasons about a scheme's decisions clearly identify the documents or information relied on; and

(b) the identified documents or information can be provided to the parties on request.

RG 267.131 The AFCA Rules should reflect a general presumption that a financial firm does not have the discretion to withhold documents or information from a complainant.

RG 267.132 There may be some limited circumstances where a firm might request AFCA to withhold certain information. This may occur where the release of information would endanger a third party or where it would compromise a firm's general security measures.

RG 267.133 AFCA has specific statutory powers to obtain information from parties for the resolution of superannuation complaints. This includes powers to:

(a) obtain information and documents (s1054A);

(b) require attendance at conciliation conferences (s1054B); and

(c) give directions prohibiting or restricting the disclosure of documents or information relating to the complaint (s1054BA).

RG 267.134 If a party to a complaint fails to provide information, or comply with a specific AFCA request for additional information within the timeframe set by AFCA, AFCA may take whatever steps it considers reasonable in the circumstances.

RG 267.135 If AFCA requests information of material importance and a party to the complaint fails to comply with AFCA's request, then AFCA will generally draw an adverse inference from that party's failure to comply and proceed on that basis (unless special circumstances apply).

Efficiency and effectiveness

RG 267.136 To meet the requirements for efficiency and effectiveness over time, AFCA will need to take into account and respond to:

(a) changes in financial services and credit markets and/or consumer behaviour;

(b) law reform or other changes to regulatory settings or standards adopted in industry codes;

(c) recommendations made by the independent assessor or arising from an independent scheme review; and

(d) exceptional circumstances or events (e.g. leading to significant increases in complaint numbers).

RG 267.137 In determining whether AFCA is meeting the efficiency and effectiveness requirements, we will consider factors such as:

(a) the timeliness of scheme decision making;

(b) adequacy of AFCA's jurisdiction and remedies over time;

(c) AFCA's measures to ensure financial firms' comply with scheme procedures, timeframes and decisions;

(d) effectiveness of scheme communications and processes;

(e) feedback from stakeholders, including financial firm members; and

(f) implementation of recommendations made by the independent assessor or from an independent review.

RG 267.138 The Corporations Act also provides that AFCA may, on its own initiative or on the request of a party to a superannuation complaint, refer a question of law arising in relation to the making of a determination relating to the complaint to the Federal Court for decision: s1054C.

Coverage of the scheme

RG 267.139 AFCA's coverage must be sufficient to deal with:

(a) the vast majority of types of consumer complaints in the relevant industry (or industries); and

(b) consumer complaints up to the value of the applicable monetary limit and award compensation to the value of any applicable compensation cap amount.

RG 267.140 ASIC has an ongoing role to ensure that the scheme's jurisdiction remains appropriate over time.

Types of complaints

RG 267.141 The AFCA Rules should clearly describe AFCA's jurisdiction.

RG 267.142 AFCA should collect data about the type and numbers of complaints that it cannot deal with or has excluded. This data will help inform future reviews to determine whether certain limits on AFCA's jurisdiction should be retained, reviewed or extended.

RG 267.143 AFCA's operational experience, stakeholder feedback and developments in case law will inform any proposed changes to scheme jurisdiction, procedures or the AFCA Rules.

Monetary limits and compensation caps

Superannuation complaints

RG 267.144 For superannuation complaints (as defined in the Corporations Act), there are no limits on:

(a) the value of claims that may be made under the scheme; or

(b) the value of remedies that may be determined under the scheme (see s1051(4)(f)).

RG 267.145 This preserves the pre-existing access to external dispute resolution for superannuation fund members and beneficiaries under the SCT.

Non-superannuation complaints

RG 267.146 For all other complaints, AFCA applies monetary limits and compensation caps. These are set out in the AFCA Rules. The monetary limits and compensation caps were announced by the Australian Government on the passage of the AFCA legislation and formed part of the Minister's authorisation decision.

> Note: See the Hon. Kelly O'Dwyer MP, Minister for Revenue and Financial Services, and the Hon. Craig Laundy MP, Minister for Small and Family Business, the Workplace and Deregulation, *Consumers win as a one-stop-shop for financial complaints passes through parliament*, joint media release, 14 February 2018

RG 267.147 Compensation caps apply on a 'per claim' basis. This means that separate claims by the same complainant must not be aggregated by AFCA to determine a maximum claim.

RG 267.148 In operating compensation caps:

(a) AFCA should deal with the complaint and make an award up to its compensation cap (or higher if the financial firm agrees);

(b) consumers with a complaint involving an amount that is higher than the compensation cap may be required to waive the excess at the end of the AFCA process; and

(c) the AFCA outcome should not bind the consumer if they do not choose to accept it.

RG 267.149 If the consumer accepts the AFCA decision, AFCA or the firm may require the consumer to accept the AFCA outcome as full and final satisfaction of their claim and it will be binding on both parties (i.e. the balance of the claim cannot be pursued in court).

Changes to monetary limits and compensation caps

RG 267.150 AFCA will operate higher monetary limits and compensation caps than operated under the FOS and CIO schemes.

RG 267.151 The AFCA Act requires that an independent review of AFCA's operations must be undertaken as soon as practicable after 18 months from the commencement of operations. The review will examine the appropriateness of limits on the value of:

(a) claims that may be made under the AFCA scheme; and

(b) remedies that may be determined under that scheme.

Note: See s4 of the AFCA Act.

RG 267.152 The periodic independent reviews of AFCA will consider the continuing effectiveness of the monetary limits and compensation caps.

RG 267.153 When determining whether the monetary limits and compensation caps remain fit-for-purpose, the Ramsay Review considered the following principles to be relevant:

(a) the substantial majority of consumer disputes should be able to be resolved by the EDR body;

(b) the monetary limits and compensation caps should reflect general economic indicators and the current values of financial products held by consumers;

(c) the impact on competition of increasing the compensation cap (as a result of smaller financial firms being unable to obtain professional indemnity (PI) insurance and therefore being unable to enter or remain in the market) should be considered; and

(d) the monetary limits and compensation caps should be easy for consumers to understand and for the EDR body to apply.

Note: See Ramsay Review, *Final report: Review of the financial system external dispute resolution and complaints framework*, May 2017, p. 155.

RG 267.154 We will take these principles into account. We may also consider the:

(a) value of any complaints excluded from AFCA jurisdiction;

(b) need to ensure AFCA's small business jurisdiction remains appropriate;

(c) appropriateness of indexation arrangements;

(d) prevalence and value of any uncompensated AFCA determinations; and

(e) desirability of aligning the monetary limits and compensation caps, as reflected in the Ramsay Review recommendation.

RG 267.155 Section 1052B of the Corporations Act gives ASIC a power to issue a direction requiring an increase in the limits on the value of claims that may be made or the value of remedies that AFCA may determine under the scheme: see RG 267.29. The Explanatory Memorandum states at paragraphs 1.67–1.68 that:

> This power is intended to be used as a last resort to ensure that the claim and remedy limits can be increased if they become inadequate over time.
>
> Any increase in relation to the claim or remedy limits will be prospective and cannot apply in relation to complaints that the AFCA scheme receives prior to ASIC giving the direction.

Indexation of the compensation cap

RG 267.156 AFCA must adjust the compensation caps on 1 January 2021, and every three years after that, using the higher of the increase in the consumer price index (CPI) or the increase in Male Total Average Weekly Earnings (MTAWE).

Interest on awards

RG 267.157 To provide an outcome that is fair and reasonable in all the circumstances, AFCA may award interest or earnings in addition to the amount awarded by a compensation cap.

RG 267.158 In calculating any award of interest, AFCA may calculate interest from the date of the cause of action or matter giving rise to the claim. In doing so, AFCA may take into account any factors it considers relevant—such as:

(a) whether any legislation could be used as guidance on interest rates and periods;

(b) the extent to which the conduct of either party contributed to the delay;

(c) what would be fair in all the circumstances; and

(d) if a period of time has elapsed, how to maintain the real value of the compensation.

RG 267.159 In making a determination of a superannuation complaint, AFCA may take the actions set out in s1055, to place the complainant and any other associated person in such a position (or as nearly as practicable) that the unfairness, unreasonableness (or both) no longer exists. In some circumstances, this will involve the calculation of interest.

Where an AFCA member ceases to carry on business

RG 267.160 AFCA's constitution gives the scheme a discretion as to whether to cancel a firm's membership and/or to continue to handle complaints where the firm:

(a) ceases to carry on business (e.g. closes its doors to consumers but still has an AFS licence or credit licence, or where a financial service provider sells its business);

(b) ceases to have a licence; and/or

(c) becomes insolvent.

RG 267.161 In exercising this discretion, AFCA will consider complainants' interests. An example of where it may be in complainants' interests not to cancel a firm's AFCA membership, and/or to continue to deal with a complaint or complaints, is in insolvency situations, where an AFCA decision may assist in showing that a consumer is a creditor and has a 'proof of debt'.

RG 267.162 We recognise that this discretion will be exercised on a case-by-case basis, also taking into account the:

(a) likelihood that there will be funds available to meet any compensation awarded (e.g. whether underlying PI insurance is likely to respond to the claim); and

(b) availability of any other mechanism to achieve compensation.

Time limits for lodging complaints with AFCA

RG 267.163 The AFCA Rules should clearly set out the time limits for lodging complaints.

Superannuation complaints

RG 267.164 The Corporations Act and AFCA Rules set out certain mandatory time limits for superannuation complaints. This includes complaints relating to the payment of a:

(a) death benefit (s1056); and

(b) disability benefit because of total and permanent disability (TPD).

RG 267.165 Other than in limited circumstances (see s1056(3)), AFCA has no discretion to extend these mandatory time limits.

RG 267.166 The AFCA Rules will set out other applicable time limits for superannuation complaints.

Non-superannuation complaints

RG 267.167 For most non-superannuation complaints, the time limits to lodge a complaint with AFCA will be the earlier of either:

(a) six years from the date that the consumer first became aware (or should reasonably have become aware) that they suffered the loss; or

(b) two years from when an IDR response is given.

RG 267.168 The time limits set out at RG 267.167 apply unless AFCA considers that special circumstances apply, or the firm and AFCA agree to AFCA having jurisdiction.

Time limits for hardship and some credit complaints

RG 267.169 AFCA will apply appropriate time limits for those aspects of credit complaints that relate to hardship applications, unjust transactions and unconscionable interest and other charges under the National Credit Code. For such complaints, the time limits for bringing a complaint to AFCA are the later of either:

(a) two years from when the credit contract is rescinded, discharged or otherwise comes to an end (or, in the case of a consumer lease entered

into on or after 1 March 2013, two years from when the lease is terminated, discharged or otherwise comes to an end); or

(b) two years from when an IDR response is given.

RG 267.170 The standard time limits for hardship complaints (set out at RG 267.169) apply, unless AFCA considers that there are special circumstances or the firm and AFCA agree to AFCA having jurisdiction.

RG 267.171 Where a complainant seeks more than one, or several, changes to the terms of the credit contract or lease for hardship during the life of the contract or lease, each complaint relating to a hardship notice must be treated as a new complaint to allow the consumer access to AFCA.

Compliance with scheme decisions

RG 267.172 It is a mandatory requirement for AFCA under s1051(4)(b) and (d) that:

(a) complaints against members of the scheme are resolved (including by making determinations relating to such complaints) in a way that is fair, efficient, timely and independent; and

(b) reasonable steps are taken to ensure compliance by members of the scheme with those determinations.

RG 267.173 Non-compliance with a scheme decision—in particular, the non-payment of a determination—is reportable to ASIC under s1052E(1)(d): see RG 267.38.

RG 267.174 The AFCA constitution will set out the steps AFCA can take if a member refuses to comply with applicable AFCA Rules or with any scheme decision.

RG 267.175 As membership of AFCA is in most cases a statutory requirement, AFCA must inform ASIC as soon as practicable after any resolution to expel a member is passed by the AFCA board.

RG 267.176 We have a range of administrative responses available when a firm is in breach of its licence obligation to maintain AFCA membership. For example, subject to holding a hearing, we might:

(a) impose or vary licence conditions, including imposing a condition that requires ongoing compliance with its AFCA membership requirements;

(b) suspend or revoke the licence for the failure of the licensee to conduct business efficiently, honestly and fairly.

Note: See Regulatory Guide 8 *Hearings practice manual* (RG 8) for more information about hearing procedures.

Finality of AFCA decisions

RG 267.177 The determination of a superannuation complaint by AFCA comes into operation immediately on the making of the determination: s1055B. If

AFCA's determination is to vary or substitute a trustee decision, the AFCA determination is taken (unless otherwise ordered) to have had effect on and from the day on which the original decision (that was the subject of the complaint) has or had effect.

RG 267.178 The Corporations Act preserves certain legal rights that were available to the parties to a superannuation complaint under the SCT. It provides that a party to a superannuation complaint may appeal to the Federal Court on a question of law, from AFCA's determination of the complaint: s1057.

RG 267.179 For non-superannuation complaints, AFCA decisions are not binding unless the consumer accepts the scheme's decision at the end of the AFCA process and (when a compensation cap applies) waives the excess of their claim, if applicable.

RG 267.180 Consumers also retain their legal right to reject an AFCA decision and pursue their complaint in another forum.

RG 267.181 The AFCA Rules and supporting guidance will set out the circumstances and process by which a financial firm may use the scheme's test case procedure, or a consumer or financial firm may seek:

(a) the correction of an error in calculation of loss; or

(b) to access the independent assessor for review of AFCA's complaints handling process (which does not involve re-opening the underlying decision).

Available remedies

RG 267.182 For superannuation complaints, AFCA must determine a complaint (including providing any remedies) in accordance with s1055.

RG 267.183 For non-superannuation complaints, AFCA remedies must be consistent with the remedies available under the relevant laws that apply to financial firms, consumers, small business and superannuation fund members.

RG 267.184 AFCA must, at a minimum, compensate consumers for any direct loss or damage caused by a financial firm's breach of any obligation the firm owed the consumer when providing a financial or credit product or service. This excludes an award for punitive or exemplary damages. In determining the extent of loss or damage suffered by a complainant, AFCA should have regard not only to the relevant legal principles, but also the concept of fairness and relevant industry best practice.

RG 267.185 AFCA may also make appropriate non-monetary orders obliging a member to take (or not take) a particular course of action in order to effectively resolve a dispute. Examples of non-monetary orders that AFCA might make are:

(a) releasing the consumer from a contract and refunding any money paid plus interest;

(b) varying the terms of a contract, provided any third-party rights are not affected; and

(c) releasing documents and/or information relating to the complainant that are under the control of the financial or credit product or service provider.

RG 267.186 AFCA may consider claims for non-financial loss where appropriate. The AFCA Rules should set out the relevant criteria for any such claims.

Referring complaints back to the financial firm

RG 267.187 IDR is the first step to resolve consumer and small business complaints against financial firms. It gives the firm and the complainant the first opportunity to resolve the complaint.

RG 267.188 The Ramsay Review considered the interaction of IDR and EDR and found there were benefits of the EDR scheme referring complaints back to the financial firm for a final opportunity to resolve the complaint—within a defined timeframe—before it progresses at the EDR scheme.

RG 267.189 The Ramsay Review also recommended that the EDR scheme should register and track the progress of complaints referred back to firms in this way.

Note: See Ramsay Review, *Final report: Review of the financial system external dispute resolution and complaints framework*, May 2017, p. 193.

RG 267.190 In this guidance, we call these 'refer back' arrangements. We consider that there are two types of 'refer backs':

(a) complaints made to AFCA that have not previously been through IDR, or where the relevant IDR timeframe has not elapsed; and

(b) complaints that have been through IDR where a firm has given an IDR response to the complaint, or the relevant IDR timeframe has elapsed (see RG 271).

RG 267.191 The refer back arrangements will not apply to death benefit superannuation complaints, or to other complaints AFCA considers appropriate to progress immediately within EDR.

RG 267.192 AFCA's Rules and supporting guidance should set out its approach to refer back arrangements, including timeframes. AFCA should collect data, including resolution rates of complaints referred back to the financial firm that:

(a) had not previously been to IDR, including complaints lodged with AFCA before the IDR timeframe has elapsed; and

(b) had been through IDR, including complaints where the IDR timeframe has elapsed.

RG 267.193 AFCA should monitor and report to ASIC on firms' performance in resolving complaints at the refer back stage.

Complaints that have not been through (or completed) IDR

RG 267.194 Where a complaint is made to AFCA but has not been through (or completed) a financial firm's IDR process, the relevant IDR timeframe as set out in RG 271 will apply to the refer back complaint.

> Note: For the avoidance of doubt, if a financial firm receives a complaint before RG 271 comes into effect on 5 October 2021, the IDR timeframes in RG 165 will apply to that complaint.

RG 267.195 We expect AFCA to:

(a) register and refer the complaint back to the firm;

(b) confirm with the complainant if the complaint is resolved; and

(c) close the complaint if it is resolved.

RG 267.196 If the complaint is not resolved, AFCA will progress the complaint in accordance with its complaint resolution processes.

Complaints that have been through IDR

RG 267.197 Where a complaint has been through IDR, or the IDR timeframe has elapsed without the complainant receiving an IDR response, AFCA's refer back arrangements should:

(a) set out the maximum timeframe for the firm to either resolve the complaint or give an IDR response;

(b) retain sufficient discretion to identify complaints that are not appropriate to refer back to the financial firm.

> Note: This may be appropriate for complaints about financial hardship—for example, in cases where there is a postponement of enforcement proceedings.

(c) provide for the circumstances where:

(i) an extension of time for resolving a complaint is warranted; and

(ii) a complainant may challenge any extension of time granted by AFCA.

Systemic issues

RG 267.198 In resolving an individual complaint, or series of complaints, AFCA may identify a systemic issue. This is an issue that may:

(a) affect more than one complainant—for example, where there is a mistake in how interest is calculated or in how a fee is applied;

(b) involve many complaints that are similar in nature;

(c) affect all current or potential complainants at a particular firm—for example, where a firm's IDR complaints handling processes are poor or inadequate; or

(d) affect more than one firm.

RG 267.199 The systemic issues role is a critical and proactive part of the complaints resolution process. A systemic approach to resolving complaints helps identify problems that are causing current complaints or that are likely to cause, or affect the resolution of, future complaints.

RG 267.200 Identifying and dealing with systemic issues has been a mandatory feature of the industry-based financial services dispute resolution framework for more than 15 years. The Ramsay Review endorsed the systemic issues role played by EDR schemes as key to improving industry practice.

Note: See Ramsay Review, *Final report: Review of the financial system external dispute resolution and complaints framework*, May 2017, p. 14.

RG 267.201 To perform its systemic issues role, AFCA must have systems and processes in place to:

(a) *identify* systemic issues that arise from its consideration of complaints;

(b) *refer* these matters to the financial firm for response and action; and

(c) *report* systemic issues to regulators in accordance with s1052E(4) (see RG 267.65).

RG 267.202 AFCA's systemic issues role can help to:

(a) efficiently deal with multiple complaints about a single issue or problem;

(b) remedy financial loss suffered by consumers (not all of whom may have complained about the conduct or problem);

(c) prevent foreseeable loss to consumers and, more generally, ensure that 'high-risk' issues might be effectively dealt with before problems develop;

(d) minimise the risk of the conduct or problem recurring;

(e) improve industry practice and communication; and

(f) send a signal to the market about what constitutes acceptable market behaviour.

Identifying reportable issues

RG 267.203 AFCA should have an appropriate 'systemic focus' to help it consider whether there are systemic issues arising from complaints. This includes collecting and recording information in a manner that enables the identification of trends and patterns in complaints. AFCA should have the infrastructure to support effective case management and information collection. AFCA must identify who is responsible for reporting systemic issues to the regulators.

RG 267.204 AFCA staff who deal with complaints should be alert to conduct or issues that should be referred to firms and possibly reported to the regulators. Staff should also be aware of the terms of any reporting guidelines that are agreed with the regulators.

RG 267.205 Some systemic issues will relate to the conduct of an individual financial firm. In these circumstances, AFCA should refer the matter to the firm for appropriate remedial action, in accordance with the procedures set out in the AFCA Rules.

RG 267.206 Within a reasonable period, the financial firm should provide a report or 'audit' to AFCA that details the firm's response to the referral.

RG 267.207 Some systemic issues will involve the conduct of multiple firms or relate to general industry practice. This may involve broader regulatory issues and require a wider response, such as a change in ASIC's regulatory oversight or guidance.

RG 267.208 AFCA should generally follow the same referral and reporting procedures described for systemic issues involving a single member at RG 267.201.

Accountability

Independent assessor

RG 267.209 It is a mandatory requirement that AFCA have an independent assessor. The Explanatory Memorandum states at paragraph 1.48 that:

> … the scheme must have an independent assessor to assess the handling of complaints, with a focus on reviewing the service provided to users in the handling of the disputes (if the assessor determines that the complaint was not handled satisfactorily, the assessor may recommend that AFCA take certain actions).

RG 267.210 The independent assessor role and function plays an important part in AFCA's quality assurance and accountability frameworks.

RG 267.211 In establishing the independent assessor role and function, the AFCA board should:

(a) take into account the principles expressed in the EDR Benchmarks; and

(b) ensure it has oversight of all service complaints to the scheme, including those referred to the independent assessor. This should include all complaints made, where and how they are resolved and any findings or recommendations made.

RG 267.212 The primary role of the independent assessor is to:

(a) respond to service complaints about AFCA;

(b) identify, address and report on issues affecting AFCA's complaint handling operations and performance; and

(c) as appropriate, make recommendations in response to identified issues.

RG 267.213 Examples of recommendations the independent assessor may make will be set out in the independent assessor's terms of reference and include:

(a) issuing an apology;

(b) recommending a change to a scheme process or procedure; and

(c) paying compensation to the affected user for distress or inconvenience caused by the poor service, up to the amount AFCA is able to award for non-financial loss.

RG 267.214 It is not the role of the independent assessor to:

(a) undertake a merits review of an AFCA decision;

(b) review an AFCA jurisdictional decision;

(c) re-open a complaint or the outcome of a complaint; or

(d) review an AFCA decision to report a systemic issues or serious contravention to a regulator under s1052E.

RG 267.215 The independent assessor must:

(a) be appointed by the AFCA board, with their role and functions set out in the independent assessor terms of reference and publicly available;

(b) have sufficient powers and resources to perform its functions;

(c) be independent with appropriate qualifications and experience;

(d) accept service complaints from all users of the scheme. This includes the parties to a complaint (e.g. the complainant, firm, representative or joined party);

(e) identify, address and report on issues affecting the AFCA's complaints handling operations and performance;

(f) make recommendations, as appropriate, to the Chief Ombudsman and to the AFCA board;

(g) ensure that the process for making a service complaint is clearly set out and accessible for users;

(h) identify any issues that may benefit from further review or analysis—for example, in an independent review;

(i) report to the AFCA board and to ASIC on a quarterly basis; and

(j) report publicly every six months on all complaints received, findings or recommendations made and outcomes achieved. This will include statistics about all service complaints, regardless of whether a particular complaint was escalated to the independent assessor for decision.

Independent reviews

Post-commencement review

RG 267.216 The AFCA Act requires the Minister to bring about an independent review as soon as practicable 18 months from commencement of operations. This review must consider the:

(a) operational requirement that complaints are resolved in a way that is fair, efficient, timely and independent (s1051(4)(b)); and

(b) appropriateness of limits on the value of claims that may be made and the value of remedies that may be determined (including the appropriateness of limits for credit facilities provided to primary production businesses, including agriculture, fisheries and forestry businesses).

RG 267.217 The Minister will require a written report about this review, which must be tabled in Parliament: see s4 of the AFCA Act.

Periodic reviews

RG 267.218 It is a mandatory requirement that AFCA commission periodic independent reviews of the scheme's operations and procedures: s1051(3)(a).

RG 267.219 Consistent with the Ramsay Review recommendations, AFCA must commission a comprehensive independent review at least every five years.

RG 267.220 Periodic independent reviews have been a feature of the industry-based dispute resolution framework and have been a primary driver of improvements to scheme operations and performance.

RG 267.221 Independent reviews have identified gaps and opportunities for improvement, and provided a road-map for the future development of financial services EDR schemes. They have led to:

(a) changes to scheme jurisdiction and complaints handling procedures, to improve the efficiency and timeliness of scheme decision making;

(b) improvements to the clarity, quality and timeliness of scheme decision making;

(c) re-allocation of scheme resources, increases in staff training and provision of additional expertise;

(d) improvements to scheme communications, member engagement and reporting;

(e) improvements to scheme oversight of firm performance at IDR; and

(f) innovation and quality assurance measures, designed to improve user experience and increase the efficiency of complaints handling.

RG 267.222 We may use ASIC's general directions power (under s1052C) to require AFCA to commission a comprehensive or more targeted independent review within the five-year period if we consider that AFCA has not done all things reasonably practicable to comply with:

(a) the mandatory requirements;

(b) any condition the Minister specifies in the authorisation for the AFCA scheme; and

(c) any regulatory requirements issued by ASIC for the AFCA scheme.

Note: See s1052C(1).

RG 267.223 In commissioning an independent review, the AFCA board must consult with ASIC and seek our approval on the:

(a) selection and appointment of the independent reviewer, taking into account their independence, qualifications and expertise;

(b) scope and terms of reference of the independent review; and

(c) timeframe for the independent review.

RG 267.224 The AFCA board must publish the final report of any independent review and publicly respond to each recommendation on an 'if not, why not' basis.

RG 267.225 AFCA's public response to an independent review should include its implementation response and timetable.

Appendix: EDR Benchmarks

Table 6: EDR Benchmarks and their underlying principles

Benchmark	Underlying principles
Accessibility	The office makes itself readily available to customers by promoting knowledge of its services, being easy to use and having no cost barriers.
Independence	The decision-making process and administration of the office are independent from participating organisations.
Fairness	The procedures and decision making of the office are fair and seen to be fair.
Accountability	The office publicly accounts for its operations by publishing its final determinations and information about complaints, and reporting any systemic problems to its participating organisations, policy agencies and regulators.
Efficiency	The office operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum, and regularly reviewing its performance.
Effectiveness	The office is effective by having an appropriate and comprehensive jurisdiction and periodic independent reviews of its performance.

Note: Excerpt from the Benchmarks for Industry-Based Customer Dispute Resolution, published by Treasury in 2015. First published by the then Department of Industry, Science and Tourism in 1997.

Key terms

Term	Meaning in this document
AFCA	Australian Financial Complaints Authority—The EDR scheme for which an authorisation under Pt 7.10A of the Corporations Act is in force
AFCA Act	*The Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018*
AFCA Rules	Rules of Complaint Resolution Scheme—A document setting out AFCA's jurisdiction and procedures, to which financial firms are contractually bound
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A of the Corporations Act.
AFS licensee	A person who holds an Australian financial services licence under s913B of the Corporations Act Note: This is a definition contained in s761A of the Corporations Act.
ASIC Act	*Australian Securities and Investments Commission Act 2001*
ATO	Australian Taxation Office
Australian Financial Complaints Authority Limited	A company limited by guarantee, operated on a not-for-profit basis, authorised by the Minister as the operator of the AFCA scheme
beneficiary	Means: • a beneficiary under a deceased's will; • where a person has died without a will, a person who has an entitlement or interest in the deceased's estate under a state or territory law; • a person who has commenced a proceeding in a court under a state or territory law to be included as a beneficiary of a deceased's estate; and • a beneficiary of a trust (excluding charitable trusts) Note: See regs 7.1.28A and 5D.2.01 of the *Corporations Regulations 2001*.
carried over instrument	Has the meaning given in s4 of the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*

Term	Meaning in this document
COI lender	A credit provider or lessor who only has a closed pool of carried over instruments as at 1 July 2010 and will not offer new credit contracts or consumer leases from 1 July 2010
complaint	An expression of dissatisfaction made to or about an organisation—related to its products, services, staff or the handling of a complaint—where a response or resolution is explicitly or implicitly expected or legally required Note: This is the definition given in AS/NZS 10002:2014.
consumer or complainant	A person or small business eligible to make a complaint to AFCA. It includes, at a minimum: • an individual consumer or guarantor; • a superannuation fund member or third-party beneficiary eligible to make a complaint under s1053, or taken to be a member of a regulated superannuation fund or approved deposit fund, or a holder of a RSA, as provided for by s1053A; • a small business with less than 100 employees, including a primary production business (as defined in the *Income Tax Assessment Act 1997*).
Corporations Act	*Corporations Act 2001*, including regulations made for the purposes of that Act
credit	Credit to which the National Credit Code applies Note: See s3 and 5–6 of the National Credit Code.
credit activity (or credit activities)	Has the meaning given in s6 of the National Credit Act
credit contract	Has the meaning in s4 of the National Credit Code
credit licence	An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities
credit licensee	A person who holds an Australian credit licence under s35 of the National Credit Act
credit provider	Has the meaning given in s5 of the National Credit Act
credit representative	A person authorised to engage in specified credit activities on behalf of a credit licensee under s64(2) or 65(2) of the National Credit Act
credit service	Has the meaning given in s7 of the National Credit Act
credit service provider	A person who provides credit services
dispute	Has the same meaning as complaint
EDR	External dispute resolution

Term	Meaning in this document
EDR Benchmarks	The Benchmarks for Industry-Based Customer Dispute Resolution, updated and reissued by Treasury in 2015
exempt SPFEs	Exempt special purpose funding entities
Explanatory Memorandum	Explanatory Memorandum to the Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017
financial firms	Firms covered by s1051(2)(a), which includes: • AFS licensees; • unlicensed product issuers; • unlicensed secondary sellers; • credit licensees; • credit representatives; • exempt SPFEs; • regulated superannuation funds (other than SMSFs); • approved deposit funds; • RSA providers; • annuity providers; • life policy funds; and • insurers This may also include financial firms that the AFCA board has accepted as eligible members to the scheme in accordance with its constitution
financial service	Has the meaning given in Div 4 of Pt 7.1 of the Corporations Act
hardship notice	Means: • for credit contracts entered into before 1 March 2013, to which the National Credit Code applies, an application for a change to the terms of the contract for hardship; and • for credit contracts or leases entered into on or after 1 March 2013, to which the National Credit Code applies, a hardship notice under s72 or 177B (as modified by the *National Consumer Credit Protection Amendment (Enhancements) Act 2012*).
IDR procedures (or IDR processes)	The internal dispute resolution procedures that meet the requirements and standards made and approved by ASIC under RG 271 and *ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98*
IDR response	A written response to a complaint, which must be given to the complainant in accordance with RG 271.53–RG 271.54

Term	Meaning in this document
independent assessor	A person appointed by the AFCA board to identify, address and report on issues affecting AFCA's complaints handling service or performance
independent review	A periodic review of scheme operations and performance commissioned by the AFCA board
INFO 110 (for example)	An ASIC information sheet (in this example numbered 110)
licensee	An AFS licensee or a credit licensee
National Credit Act	*National Consumer Credit Protection Act 2009*
National Credit Code	National Credit Code at Sch 1 of the National Credit Act
National Credit Regulations	*National Consumer Credit Protection Regulations 2010*
PI insurance	Professional indemnity insurance
predecessor scheme (or schemes)	An EDR scheme approved by ASIC under the Corporations Act (see s912A(2)(b) and 1017G(2)(b)) or the National Credit Act (see s11(1)(a)), or the SCT.
prescribed unlicensed COI lender	Has the meaning given in modified s5A of the National Credit Act, as inserted by item 2.5 of Sch 2 of the National Credit Regulations Note: In general terms, a prescribed unlicensed COI lender is an unlicensed COI lender who fails to meet certain probity requirements and who has restrictions placed on their conduct in relation to their carried over instruments. A prescribed unlicensed COI lender must not engage in credit activities with respect to their carried over instruments. They must instead appoint a credit licensee as 'representative' to engage in credit activities on their behalf with respect to their carried over instruments.
primary production business	Has the meaning given by the *Income Tax Assessment Act 1997*
Ramsay Review	Review of the financial system external dispute resolution and complaints framework
reg 16 (for example)	A regulation of a set of regulations as specified (in this example numbered 16)
regulators	APRA, ASIC and the ATO
retail client	A client as defined in s761G of the Corporations Act and Ch 7, Pt 7.1, Div 2 of the *Corporations Regulations 2001*
refer back arrangements	A process set out in the AFCA Rules to refer complaints back to the financial firm for a final opportunity to resolve at IDR.
RG 271 (for example)	An ASIC regulatory guide (in this example numbered 271)

Term	Meaning in this document
RSA	A retirement savings account as defined in the *Retirement Savings Accounts Act 1997*
s1051 (for example)	A section of the Corporations Act (in this example numbered 1051), unless otherwise specified
SCT	Superannuation Complaints Tribunal, established under the *Superannuation (Resolution of Complaints) Act 1993*
securitisation body	Means a 'special purpose funding entity' (as defined in s5 of the National Credit Act), which includes both: • a securitisation entity; and • a fundraising special purpose entity Note: See the definition in s5 of the National Credit Act.
servicing agreement	An agreement between a securitisation body and a registered person or credit licensee, as defined in s5 of the National Credit Act (as modified by item 3.4 of Sch 3 to the National Credit Regulations)
SIS Act	*Superannuation (Industry Supervision) Act 1993*
small business	A small business with less than 100 employees, including a primary production business (as defined in the *Income Tax Assessment Act 1997*)
SMSF	A self-managed superannuation fund
SPFE	A special purpose funding entity
traditional services	Means traditional trustee company services, as defined by s601RAC of the Corporations Act
unlicensed COI lender	Has the meaning given in s5 of the National Credit Act, as modified by item 2.4 of Sch 2 of the National Credit Regulations
unlicensed product issuer	An issuer of a financial product who is not an AFS licensee
unlicensed secondary seller	A person who offers the secondary sale of a financial product under s1012C(5), (6) or (8) of the Corporations Act and who is not an AFS licensee

Related information

Headnotes

AFCA, AFS licensees, annuity providers, approved deposit funds, beneficiaries, carried over instrument, compensation caps, credit licensees, credit representatives, dispute resolution requirements, EDR Benchmarks, EDR scheme, external dispute resolution, exempt SPFEs, financial firms, financial services, IDR processes, internal dispute resolution, insurers, lenders, life policy funds, monetary limits, retirement savings accounts, RSA providers, securitisation body, servicing agreement, special purpose funding entities, superannuation funds, superannuation trustees, traditional services, trustee company, unlicensed COI lender, unlicensed product issuers, unlicensed secondary sellers

Regulatory guides

RG 8 *Hearings practice manual*

RG 78 *Breach reporting by AFS licensees*

RG 139 *Approval and oversight of external dispute resolution schemes*

RG 165 *Licensing: Internal and external dispute resolution*

> Note: RG 165 applies to complaints received by financial firms before 5 October 2021, when RG 271 comes into effect. We will withdraw RG 165 on 5 October 2022.

RG 205 *Credit licensing: General conduct obligations*

RG 206 *Credit licensing: Competence and training*

RG 207 *Credit licensing: Financial requirements*

RG 271 *Internal dispute resolution*

Legislation

AFCA Act, s4

Australian Prudential Regulation Authority Act 1998, s56

ASIC Act, s1, 127

Corporations Act, Ch 7, Pt 7.10A, s760A, 912A, 912D, 1012C, 1017G, 1050, 1051, 1051A, 1052, 1052A, 1052B, 1052BA, 1052C, 1052D, 1052E, 1053, 1053A, 1054–1054C, 1055–1055D, 1056, 1057

Income Tax Assessment Act 1997

National Credit Act, s5, 47, 64, 65; National Credit Code, s72, 94; *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*, s4

National Credit Regulations, regs 3, 16, 23B, 23C, Schs 2 and 3

Privacy Act 1988, s35A

Retirement Savings Accounts Act 1997, s47

SIS Act, s101

Superannuation (Resolution of Complaints) Act 1993

Taxation Administration Act 1953, Sch 1; s355–65

Consultation papers and reports

CP 298 *Oversight of the Australian Financial Complaints Authority: Update to RG 139*

REP 577 *Response to submissions on CP 298 Oversight of the Australian Financial Complaints Authority*

Information sheets

INFO 110 *Lenders with carried over instruments*

Media and information releases

18-041MR *ASIC welcomes establishment of the Australian Financial Complaints Authority* (14 February 2018)

18-123MR *ASIC welcomes AFCA authorisation* (2 May 2018)

18-158MR *ASIC gives disclosure relief during transition to AFCA* (31 May 2018)

Other documents

AFCA Scheme Authorisation 2018

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

The Hon. Kelly O'Dwyer MP, Minister for Revenue and Financial Services, *Putting consumers first—improving dispute resolution*, media release, 14 September 2017

The Hon. Kelly O'Dwyer MP, Minister for Revenue and Financial Services, and the Hon. Craig Laundy MP, Minister for Small and Family Business, the Workplace and Deregulation, *Consumers win as a one-stop-shop for financial complaints passes through parliament*, joint media release, 14 February 2018

Ramsay Review, *Final report: Review of the financial system external dispute resolution and complaints framework*, May 2017

Treasury, *ASIC Enforcement Review Position and Consultation Paper 1: Self-reporting of contraventions by financial services and credit licensees*, 11 April 2017

Treasury, *ASIC Enforcement Review taskforce report*, April 2018

Treasury, EDR Benchmarks, March 2015