To Be (Successful) or Not To Be (Successful): Appealing AFCA Determinations

The Australian Financial Complaints Authority (**AFCA**) is tasked with reviewing the internal dispute resolution outcomes of financial services providers for unreasonableness or unfairness. The volume of AFCA determinations continues to increase, particularly in the banking, superannuation and insurance sectors – and with this, there has been an increase in discourse across the financial services sector on whether it is appropriate to challenge an AFCA determination and if so, what the legal mechanism is to do so.

Unlike traditional dispute resolution bodies, the avenues to appeal an AFCA determination are extremely limited. In particular, AFCA determinations are, as a general rule, <u>not</u> subject to judicial review – subject to limited exceptions as discussed below. While the avenues for appeal are limited, it is worthwhile for licensees to be familiar with the available avenues, so that legitimate appeals can be made effectively and in a timely manner.

AFCA determinations can be challenged via the courts on 3 grounds – breach of contract, lack of jurisdiction and question of law (superannuation only).

Through a review of the case law to date and particular attention to successful AFCA appeals, we seek to set out the principles applied by courts in overturning AFCA determinations or assessing whether they are reviewable.

Recap: AFCA's role

AFCA is an external dispute resolution body which handles complaints brought by consumers and small businesses regarding financial services and products. Where an individual is dissatisfied with an internal review outcome for their complaint, the relevant financial services provider must advise them of their ability to lodge the complaint with AFCA for external review. In this role, AFCA can affirm a financial services provider's decision if it is satisfied that it is "fair and reasonable in all the circumstances".[1] Alternatively, AFCA can vary, set aside or substitute decisions such that the complainant assumes a position where the unfairness or unreasonableness does not exist.[2] This includes requiring a party to repay money and/or cancel memberships/products if complainants are unfairly or unreasonably admitted into or sold financial products.

ASIC requires all AFS licensees to be members of AFCA under their licence conditions.[3] All member firms are contractually bound to comply with the AFCA Rules and Guidelines, which detail AFCA's complaints handling process, and to cooperate with AFCA in the resolution of complaints.[4] Prima facie, AFCA determinations are binding under contract law on the basis that the financial services provider has joined the AFCA scheme.[5] If a financial services provider does not comply with a determination, AFCA can seek damages against them or, alternatively, expel them from the Scheme.[6] This would entail

[1] *Corporations Act 2001* (Cth) s 1055(2) (**Corporations Act**).

[2] Corporations Act 2001 ss 1055(4), 1055(6).

[3] Corporations Act ss 912A(1)(g), 912A(2); See ASIC Regulatory Guide 271 *Internal Dispute Resolution*.

[4] Corporations Regulations reg 7.6.03C.

[5] *QSuper Board v Australian Financial Complaints Authority Ltd* (2020) 276 FCR 97 at [182]–[183].

[6] See AFCA Rules, r A.15.3; AFCA Constitution cl 3.4(a); Corporations Act ss 912A(2)(c), 915C(1)(a).

the provider being in breach of its AFSL obligations, and the potential subject of ASIC enforcement action.

AFCA's operation is governed by the Corporations Act.[7] It must determine disputes independently, impartially and fairly, and handle complaints in an efficient, effective and timely manner.

If a complainant is dissatisfied with AFCA's determination, it can be referred to an independent assessor.[8] However, the assessor cannot review the decision's merits. This is the exclusive remit of the courts, to which an AFCA determination can be appealed on grounds of breach of contract, lack of jurisdiction or error of law. Case law findings against AFCA on these grounds provide guidance on challenging their determinations.

Avenues for appeal

Appeal for breach of contract (i.e. breach of the AFCA Rules)

The NSW Court of Appeal considered the scope of challenging AFCA's determinations in *Australia Capital Financial Management Pty Ltd v Australian Financial Complaints Authority Ltd*.[9] It noted that AFCA's jurisdiction and conduct is governed exclusively by the AFCA Rules contract between AFCA, AFCA members and complainants.[10] A complainant may challenge on the basis of breach of contract where AFCA breaches one or more of the AFCA Rules in the course of decision-making.[11] This case is considered in further detail below.

Further, the case confirmed the position in *Mickovski v Financial Ombudsman Service Ltd* that, even where parties agree that a determination is final, it can be subject to review if AFCA's decision-making:[12]

- involved fraud, dishonesty or a lack of good faith;
- involved jurisdictional error; or
- resulted in a decision which no reasonable tribunal could properly come to on the evidence (in effect, a standard of *Wednesbury* unreasonableness).[13]

Appeal on the basis of jurisdiction

AFCA can make determinations in its general and superannuation jurisdictions. The scope of each is prescribed by the Corporations Act and the AFCA Rules. Notably, AFCA's general jurisdiction is wide, extending to complaints against AFCA members brought by an "eligible person"[14] and which arise from a customer relationship, are sufficiently connected to Australia, brought within the time limit, and accompanied by consents, where applicable.[15]

[7] See Part 7.10A.

[8] Corporations Act s 1051(2)(c); AFCA Rules r A16.

[9] [2022] NSWCA 204.

[10] AFCA Rules r A.1.2.

[11] *Mickovski v Financial Ombudsman Service Ltd* (2012) 36 VR 456 at [41] (***Mickovski***).

[12] *Mickovski* at [41].

[13] *Investors Exchange Ltd v Australian Financial Complaints Authority Ltd* [2020] QSC 74 at [27]; *Australian Capital Financial Management Pty Ltd v AFCA* [2021] NSWSC 1577 at [7].

[14] See AFCA Rules Pt E.1 (definition of "Eligible Person").

[15] AFCA Rules r A.4.

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A challenge to AFCA's superannuation jurisdiction was successfully made out before the Full Federal Court in the case of *MetLife Insurance Ltd v Australian Financial Complaints Authority Ltd* (on which the HSF team advised), which is considered in more detail below.[16] The Court held that, because the complaint did fall within the 10 designated types of "superannuation complaint" set out in section 1053(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**), AFCA had no jurisdiction to hear it. While this particular provision has since been amended to broaden AFCA's jurisdiction in respect of superannuation complaints, it remains the case that lack of jurisdiction is a viable avenue for appeal.

Appeal on a question of law (superannuation only)

AFCA determinations of superannuation complaints may be challenged on a question of law.[17] Note that this is a narrow ground for review, requiring it to be made out that, in making its decision, AFCA has:[18]

> failed to take into account a relevant consideration, had regard to an irrelevant consideration, adopted a wrong approach, or reached a decision so unreasonable that no reasonable decision-maker could have come to it.

Examples include where AFCA breaches the law or the rules or terms under which the relevant fund or policy operates.[19] AFCA will also commit an error of law where it provides a remedy not available to it under the Corporations Act, or denies a complainant procedural fairness. The Court found that AFCA made an "error of law" where it:

- misinterpreted sections 29 and 33 of the *Insurance Contracts Act 1984* (Cth) and therefore "materially misdirect[ed] itself as to the legal rights or obligations of the parties" in its assessment;[20] and
- failed to consider a relevant factor in determining whether a trustee received an election pursuant to section 68AAA of the *Superannuation Industry (Supervision) Act 1993* (Cth).[21]

Case law spotlight

MetLife Insurance Ltd v Australian Financial Complaints Authority Ltd [2022] FCAFC 173 (*MetLife*)

In *MetLife*, AFCA argued that it could consider a complaint brought against MetLife Insurance Ltd (**MetLife Insurance**) under its "general jurisdiction", where that complaint was otherwise time-barred as a superannuation complaint under the AFCA Rules.

In rejecting AFCA's position, Middleton, Jackson and Halley JJ held that AFCA's jurisdiction does not extend to hearing complaints made directly against life insurance companies where they relate to life insurance in superannuation. If the true nature of a complaint relates to superannuation, it only falls in AFCA's jurisdiction if it satisfies one of the categories of complaint set out in section 1053(1) of the Corporations Act. In this case, AFCA could not elect to consider a complaint against a life insurer issuing benefits under the superannuation fund of which the complainant was a member. Rather, that insurer would have needed to be joined in the complaint made against the superannuation trustee for the matter to fall in AFCA's jurisdiction.

[16] [2022] FCAFC 173.

[17] Corporations Act s 1057(1).

[18] *Sharp Corporation of Australia Pty Ltd v Collector of Customers* (1995) 59 FCR 6 at 12.

[19] *QSuper Board v Australian Financial Complaints Authority Ltd* (2020) 276 FCR 97 at [65].

[20] *Sharma v HEST Australia Ltd* [2022] FCA 536.

[21] *Nottingham v Australian Financial Complaints Authority* [2023] FCA 58.

It is important to note that after *MetLife* was decided, the Government amended the Corporations Act to add section 1053B, which provides that AFCA has jurisdiction to hear complaints that are "relat[ed] to superannuation" even if they do not fall under the categories set out in section 1053(1).[22] The note to section 1053B states that it was introduced as a response to the Federal Court's decision in *MetLife*, which the Government regarded as "contrary to the original policy intent" of the legislation.[23]

Accordingly, while *MetLife* can no longer strictly be regarded as good law, it serves as an example of the types of jurisdictional arguments that can be advanced, and the fact that Government can always enlarge AFCA's jurisdiction through legislative change, requiring member firms to adopt a flexible approach.

Australia Capital Financial Management Pty Ltd v Australian Financial Complaints Authority Ltd [2022] NSWCA 204 (*ACFM v AFCA*)

In *ACFM v AFCA*, the NSW Court of Appeal upheld the NSW Supreme Court's decision that AFCA had jurisdiction to determine that a lender acted unconscionably in taking a guarantee, where it had already commenced proceedings against the borrower. Mr Bai and Ms Yang had an export business which entered into a loan agreement for approximately AUD 2 million with the appellant (**ACFM**). Mr Bai and Ms Yang guaranteed that loan with a mortgage over 2 properties. When the business defaulted on the loan, ACFM took the guarantee (making it unenforceable) and commenced proceedings against Mr Bai and Ms Yang in the District Court. Mr Bai and Ms Yang complained to AFCA that ACFM had acted unconscionably, and AFCA decided in their favour.

On ACFM's appeal to the NSW Supreme Court, Ball J held that AFCA's jurisdictional powers will generally not be subject to judicial review unless their exercise is *Wednesbury* unreasonable or contrary to the AFCA Rules. That is, an AFCA decision may be subject to judicial review if no reasonable decision-maker could properly come to that conclusion on the evidence (e.g. due to fraud or dishonesty). Holding in AFCA's favour, his Honour:

- found that AFCA's determination was made in accordance with the AFCA Rules;
- rejected ACFM's argument that the value of Mr Bai and Ms Yang's claim exceeded AFCA's jurisdictional limit of AUD 1 million;
- held that AFCA did not deny ACFM procedural fairness, because it is not required to conduct a hearing and it provided the parties the opportunity to make submissions in any case; and
- held that AFCA's determination that the mortgages were provided to support the guarantees was not *Wednesbury* unreasonable.

This case highlights the difficulty of making out *Wednesbury* unreasonableness in the case of an AFCA decision made within jurisdiction.

[22] *Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Act 2024* (Cth) at Schedule 8, Part 1.

[23] Explanatory Memorandum, *Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023* (Cth) at [8.7].

Key principles for challenge

The case law to date provides insight into the avenues for challenging AFCA decisions made in its general and superannuation jurisdictions, as discussed above and summarised in the table below. Complainants can have regard to these identified avenues when strategically seeking to appeal a decision.

Ground	Jurisdiction	
	Superannuation	**General**
Breach of Contract	• Breach of AFCA Rules • Fraud, dishonesty or lack of good faith • Jurisdictional error • *Wednesbury* unreasonableness	
Jurisdiction	• Falls outside the types of "superannuation complaint" in Corporations Act, section 1053	• Does not relate to superannuation and does not satisfy the criteria in AFCA Rules, rule A.4
Question of Law	• Breach of law • Breach of terms of governing instrument, e.g. trust deed • Failure to take into account a relevant consideration or having regard to an irrelevant consideration • Failure to provide procedural fairness • *Wednesbury* unreasonableness	N/A

Test cases under the AFCA Rules

As set out above, a member firm seeking to challenge an AFCA determination must overcome numerous difficulties.

However, we consider that the "test case" provisions of the AFCA Rules may allow member firms to circumvent these difficulties by having the subject matter of particularly complex or important complaints heard in a forum that offers a broader range of appeal grounds if the initial decision is unfavourable, for instance a court of law.

While AFCA is considering a complaint, the AFCA Rules prevent member firms from commencing legal proceedings against the complainant regarding any aspect of the subject matter of that complaint.[24]

However, the member firm may, with AFCA's consent, commence legal proceedings if AFCA *agrees* to allow the member firm to treat the complaint as a "test case".[25] In this

[24] AFCA Rules, r A.7.1(a).

[25] AFCA Rules, r A.7.2(b).

circumstance, AFCA may consider *excluding* the complaint altogether if the member firm undertakes to institute the alternative legal proceedings within 6 months and pay the complainant's costs, both at first instance and on any appeal instituted by the member firm.[26] From this point, the subject matter of the complaint can be determined in a court of law or other tribunal, a prospect that may offer the member firm certain procedural advantages.

The term "test case" is not defined in the AFCA Rules but, consistent with its plain meaning and AFCA's previous decisions, we consider that it is likely to capture complaints that involve legal questions of general importance.[27]

For instance, AFCA previously agreed to allow 2 test cases concerning the interpretation of business interruption insurance policy wordings because it considered that an authoritative interpretation from a superior court would allow it to resolve many *other* complaints of a similar nature which were pending determination.[28] In coming to a view as to whether to allow a test case, AFCA may also consult with industry bodies, ASIC, APRA and the Treasury.[29]

When deciding whether to seek AFCA's agreement to treat a complaint as a test case, the member firm may wish to weigh the following factors:

- the general importance and wider implications of the legal issues raised by the complaint, for both AFCA and the member firm;
- the prospects of success before AFCA as compared to the alternative forum; and
- the desirability of paying the complainant's costs.

Conclusion

Challenging AFCA determinations is a difficult, but not impossible, exercise. Member firms should give careful consideration to both the standard of review, and how they might test technical legal positions taken by AFCA. As illustrated by the Government's response to *MetLife*, the pace of legislative change in this space poses additional challenges.

Finally, we suggest that for some complaints, the test case provisions in the AFCA Rules could be considered as a mechanism (albeit not an easy route) offering a way for member firms to advance their interests in a forum with wider grounds of appeal and other procedural advantages.

[26] AFCA Rules, r C.2.2(f).

[27] See AFCA, *AFCA and test cases* <https://www.afca.org.au/news/current-matters/business-interruption-insurance-test-cases>.

[28] See *Swiss Re International Se v LCA Marricville Pty Limited (Second COVID-19 insurance test cases)* [2021] FCA 1206 at [1] per Jagot J.

[29] See e.g. AFCA, *Insurance Council and AFCA agree to launch business interruption test case* <https://www.afca.org.au/news/media-releases/insurance-council-and-afca-agree-to-launch-business-interruption-test-case>.