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3 things you need to know about AFCA and ASIC post-Royal Commission

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Since the Financial Services Royal Commission, there have been a number of changes to the regulation of the financial services sector. The Australian Financial Complaints Authority (**AFCA**) and the Australian Securities and Investments Commission (**ASIC**) have not been immune and have been awarded some additional powers which they will be able to start exercising later this year.

1. Publication of financial service providers' names

AFCA will shortly be permitted to name financial institutions in its published determinations. Until now, AFCA, which in September 2018 replaced the Financial Ombudsman Service, the Credit and Investment Ombudsman and the Superannuation Complaints Tribunal, has anonymised financial institutions in its determinations.

This change follows AFCA's public consultation on the issue, and allows consumer complainants to remain anonymised in all determinations. ASIC

has stated that it approved the change to enhance transparency and accountability and help identify problematic conduct within the market, or products or services which are not performing as expected. In addition, ASIC says that financial service providers or products which are not causing problems should also benefit because they will be identified and recognised publicly. The changes are aimed at enhancing public confidence in the resolution of complaints.

AFCA will reportedly be shortly identifying exceptions to these rules where financial institutions would not be identified. A start date for the naming of financial institutions has not yet been set.

2. Product intervention

ASIC has recently been granted product intervention power, which allows ASIC to intervene and take temporary action where financial and credit products have or may cause significant consumer detriment. ASIC is not yet using this new power, and is presently finalising a consultation process regarding how to best administer the power. As part of that process, AFCA

offered to assist ASIC administer the new power by acting as a 'facilitator' in informing ASIC of products of concern identified by AFCA in its complaint handling process.

The new power enables ASIC to ban or restrict a financial product or amend the product information. ASIC sees this power as empowering it to proactively reduce damage to consumers before it happens, rather than responding once the damage has occurred.

3. The complaints to AFCA – the first six months

AFCA reports that in its first six months since its commencement in November 2018, it received over 35,000 complaints. In that time, the awards to consumers and small businesses as a result of financial complaints resolved by AFCA totalled over \$83 million. Reportedly around 74% of complaints were resolved in favour of the complainant or by consent.

Banks received the most complaints of all financial institutions (12,305), followed by general insurers (6,839) and credit providers (5,447). The most complained about financial products were credit cards (5,191), followed by home loans (2,921) and personal loans (2,704).

The rise in complaints can likely be explained by the increased awareness of issues arising out of financial services as a result of the Financial Services Royal Commission. In addition, ASIC has extended AFCA's jurisdiction by allowing AFCA to consider certain complaints of matters dating back to 1 January 2008. AFCA has acknowledged that these legacy matters can often be highly complex, and further complicated by the number of years that have passed since the issue occurred. Once such complaints are received by AFCA, they are referred back to the financial institutions for resolution. If a resolution is not reached, AFCA will start investigating these matters from 1 October 2019.

AFCA has detailed rules regarding its jurisdiction. Broadly, for general financial products it will consider a claim for less than \$1 million, and can award compensation up to \$500,000. For a credit facility claim by a small business or primary producer of up to \$5 million, AFCA can award compensation up to \$1 million or in some circumstances, \$2 million. In a consumer credit claim for up to \$1 million, AFCA can award up to \$500,000, or an unlimited amount where a guarantee by a guarantor using their principal place of residence has been set aside. There are also general insurance broking awards of up to \$250,000 and income stream insurance awards of up to \$13,400 per month.

Conclusion

In an era of heightened public awareness of poor corporate behaviour, financial institutions and their insurers would be well served to take AFCA, with its broader powers, bigger remit and enhanced resources more seriously than its predecessors. This is particularly the case now that reputational damage via the publication of a financial institution's name in an adverse finding is a new and important consideration for AFCA's members.

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