



29 November 2023

By email: [consultation@afca.org.au](mailto:consultation@afca.org.au)

Shail Singh  
Lead Ombudsman – Investments and Advice  
Australian Financial Complaints Authority  
GPO Box 3  
Melbourne VIC 3001

Dear Shail

## **AFCA DRAFT APPROACH PAPER – DETERMINING COMPENSATION IN COMPLAINTS INVOLVING FINANCIAL ADVISERS AND MANAGED INVESTMENT SCHEMES**

The Stockbrokers and Investment Advisers Association (SIAA) is the professional body for the stockbroking and investment advice industry. Our members are Market Participants and Advisory firms that provide securities and investment advice, execution services and equity capital-raising for Australian investors, both retail and wholesale, and for businesses. Practitioner Members are suitably qualified professionals who are employed in the securities and derivatives industry.

The history of the stockbroking profession in Australia can be found [here](#).

Our members are a small but important group of AFCA members. They represent the full range of providers from online providers providing execution-only services to full-service stockbroking and investment advisers.

SIAA welcomes the opportunity to provide feedback on the draft approach paper on determining compensation in complaints involving Financial Advisers and Managed Investment Schemes (Approach Paper).

### **Proportionate liability statutes**

We agree that AFCA must have regard to the relevant State, Territory and Federal proportionate liability statutes which serve to limit the liability of concurrent wrongdoers in respect of apportionable claims when determining a complaint.

The Approach Paper states that if the claim is not apportionable at law, AFCA may hold the party that breached the non-apportionable claim entirely responsible for losses arising from the breach,

irrespective of any other actual or potential breach by another party. We note that in our discussions with you on 14 November 2023 we raised our concerns about this approach and the importance of the legal principle of causation. Clearly an AFCA member cannot be held legally liable for damage that it has not caused and AFCA should not be making decisions that are contrary to law.

We note that you agreed to update the Approach Paper to include references to the principles of causation to make this clear.

### **Apportionment of liability where a potential wrongdoer is not a party to the complaint**

The Approach Paper also states that if a third party, which may be wholly or partially liable for the complainant's loss, cannot be joined to the complaint, it will not usually be fair in all the circumstances to apportion liability to that third party due to the inability of AFCA and the complainant to receive information and submissions from the third party, and the risk of inconsistent findings and a duplication of process.

Our members have raised concerns about this approach, and we dispute that it would be fair in all the circumstances to refuse to apportion liability in these cases.

AFCA is a retail complaints resolution service that has a limited number of members. Unlike the court system, only AFCA members can be parties to a complaint. There is considerable potential for claims to be brought against an AFCA member where another non-AFCA member should be a party to the complaint but cannot be included due to AFCA's limited jurisdiction.

If a claim is apportionable, we consider that it is contrary to established legal principles to assign liability for the whole of the quantum of the complaint to one party (in effect ascribing joint and several liability for the whole of the quantum of the complaint on the AFCA member). The Approach Paper would be taking an approach contrary to established legal principles by effectively excluding a statutory defence available to AFCA members, in circumstances where, if court proceedings were to be commenced, the AFCA member would be entitled to rely on the defence.

Further, SIAA submits that a refusal to apportion liability can give rise to considerable unfairness for the AFCA member. For example, where an AFCA member is assigned liability for the whole of an apportionable claim, they may take steps to recover the apportioned amount from the third party, through court proceedings or otherwise, depending on the quantum. Evidence of the complainant would be required in those proceedings, and this may not be willingly provided if the AFCA proceedings are acrimonious. This would increase the costs of recovery for the AFCA member and may in fact impair their ability to bring the case at all.

By refusing to apportion liability between the AFCA member and the third party, AFCA is essentially shifting recovery costs to the AFCA member, even in cases where the primary cause of action is between the complainant and the third party and the evidence of the complainant is a crucial part of establishing the third party's liability.

## Conclusion

If you require additional information or wish to discuss this matter in greater detail, please do not hesitate to contact SIAA's policy manager, Michelle Huckel, whose contact details are in the covering email.

Yours sincerely

A handwritten signature in black ink, appearing to be 'JF' with a stylized flourish and the letters '6x' below it.

Judith Fox  
Chief Executive Officer