

SUBMISSION

Submission to AFCA — AFCA Rules Change Consultation

16 October 2020

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Mr Mike D'Argaville
Legal Counsel
Australian Financial Complaints Authority
Via email: submissions@afca.org.au

16 October 2020

Dear Mr D'Argaville

AFCA Rules change consultation: transfer of remaining SCT complaints to AFCA

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to proposed changes to AFCA's Rules in relation to the transfer of complaints from the Superannuation Complaints Tribunal (SCT) and the remittal of matters from the Federal Court.

ASFA is a non-profit, non-political national organisation whose mission is to continuously improve the superannuation system, so all Australians can enjoy a comfortable and dignified retirement. We focus on the issues that affect the entire Australian superannuation system and its \$2.7 trillion in retirement savings. Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing almost 90 per cent of the 16 million Australians with superannuation.

ASFA welcomes the proposed amendments to AFCA's Rules to allow AFCA to deal with:

- any remaining complaints that the SCT is unable to finalise prior to it ceasing operations by 31 December 2020
- any matters before the Federal Court on appeal or referral from the SCT that require remittal back, after the SCT has ceased operations, to be determined again or finalised in accordance with the Court's opinion or directions.

Our comments in relation to these amendments are set out in the attached submission.

We note that AFCA is also consulting on minor technical changes to its Rules to clarify which Australian Bureau of Statistics reports are used to index AFCA's monetary limits and to correct a reference to legislation. These technical amendments have no impact on the resolution of superannuation complaints and accordingly we have not considered them as part of our submission.

If you have any queries or comments in relation to the content of our submission, please contact Julia Stannard, Senior Policy Advisor, on (03) 9225 4027 or by email jstannard@superannuation.asn.au.

Yours sincerely

Glen McCrea

Deputy Chief Executive Officer and Chief Policy Officer

Proposed changes to AFCA's Rules:

Cessation of the Superannuation Complaints Tribunal – transfer of remaining complaints and remittals from the Federal Court

1. General comments

Since the commencement of AFCA on 1 November 2018, the superannuation industry has been funding two external dispute resolution (EDR) bodies, with member levies paid directly to AFCA and a portion of the superannuation supervisory levy directed to ASIC for disbursement on behalf of the SCT.

While costly, this was, in ASFA's view, necessary. The transfer to AFCA of all complaints that were already before the SCT on 1 November 2018 would have involved immense duplication of effort. It would also have meant AFCA commenced operation with a significant backlog of cases, impeding its ability to implement the more agile and responsive processes that were intended to be a hallmark of its ombudsman model. The transfer of a significant volume of unresolved complaints from a statutory tribunal to an ombudsman model would also have involved complex legal issues. As a result, during the lead-up to the commencement of AFCA and the early part of the transition period, ASFA advocated strongly to ensure that the SCT received adequate funding and resources to enable it to clear its caseload as quickly as possible.

While the SCT has made strong progress in finalising its remaining caseload and continues to work toward that aim, we understand a small number of complaints — likely to be up to 20 — will not have been finalised when the SCT is due to cease operation on 31 December. While the transfer of these complaints to AFCA will inevitably involve some disruption for all parties involved, it is in our view an appropriate course of action at this time.

Similarly, ASFA agrees that it is neither practicable nor reasonable for the SCT to be maintained in operation, for an indeterminate period, to deal with the potential remittal back of Federal Court matters relating to SCT determinations. We understand there are around eight matters currently before the Court that relate to SCT determinations and may potentially require remittal back for redetermination or finalisation in accordance with the Court's directions. This number may yet increase (given appeals may be lodged within 28 days after an SCT determination is given to the parties) or decrease (if matters before the Court are resolved or discontinued). However, given the current low volume of actual and potential Federal Court matters we would not expect any significant change.

Given the small number of matters — both SCT and Federal Court — likely to be outstanding at 31 December, we do not consider it reasonable to expect industry to continue funding the operation of the SCT and we support the transfer of matters to AFCA. The following section of our submission highlights several considerations that should, in our view, be addressed to ensure the process flows as smoothly as possible for all stakeholders.

2. Matters requiring clarification

ASFA supports the amendments proposed to allow AFCA to deal with complaints that remain unresolved by the SCT, and remittals from the Federal Court, after 31 December 2020.

We consider that the amendments will be effective to achieve that objective. In ASFA's view, however, it is important that several matters not addressed in the consultation material are clarified, to provide certainty for superannuation trustees and consumers who may be impacted by the change.

2.1. Notifying impacted consumers

While the proposed changes are expected to affect only a small number of consumers, their potential impact on those consumers should not be underestimated.

Where a consumer's appeal from a determination of the SCT remains with the Federal Court, the decision or conduct to which it relates will quite likely have occurred several years ago. These consumers will need to be provided with certainty that AFCA can take any actions that may previously have fallen to the SCT, to ensure that the Court's judgment is given effect to.

Given the SCT ceased to accept new superannuation complaints after 31 October 2018, a consumer involved in a transferred complaint has already waited an unacceptably long time for resolution. They will, understandably, be concerned that they may face further delays, and may be apprehensive about how the transfer to AFCA may affect them practically. They will require reassurance and clear information about how they may personally be affected. Significantly, we anticipate that many of the complainants with unresolved SCT complaints will not have legal representation to help them navigate this important change.

The consultation material does not provide any information as to the measures that will be taken by the SCT and/or AFCA to communicate with impacted consumers.

The cessation of the SCT and the transfer of its remaining complaints is a significant legal development, one that is unprecedented for the superannuation industry. Given the magnitude of the change and its impact, ASFA considers it imperative that clear communication is provided to affected consumers. ASFA is of the view this communication should be provided by the SCT and AFCA. It is likely that a superannuation trustee involved in an unresolved complaint before the SCT will, in the course of any communication with the complainant, provide some notification. However, where a consumer is involved in a dispute with their superannuation provider that has progressed to EDR and remained unresolved for an extended period of time, we consider they are more likely to take note — and place trust in — information received from the EDR body (or bodies) considering their claim.

Recommendation

Notification of impacted consumers

ASFA encourages AFCA to clarify the steps that will be taken to notify impacted consumers about the transfer of unresolved SCT complaints and about AFCA's role in relation to remittals from the Federal Court for matters appealed from determinations by the SCT.

2.2. How will AFCA 'deal with' transferred complaints?

ASFA members have raised concerns about some practical and legal issues that will impact how AFCA deals with the complaints transferred from the SCT. In particular:

- Access to SCT case files

Given the SCT ceased to accept new complaints on 31 October 2018, it would be expected that it will have conducted at least some — and potentially a substantial amount of — work in relation to the complaints that will be transferred to AFCA.

It is unclear from the consultation material whether the records and outcomes of this work will be transferred to AFCA to enable it to effectively pick up and run with the complaint, or whether AFCA will be required to start its consideration of the complaint from a blank slate.

During the initial transition from the SCT to AFCA as EDR body for superannuation, the SCT's inability share with AFCA information in relation to active or resolved complaints was a substantial legal and practical issue. ASFA understands that there is an expectation that AFCA will be provided with access to the SCT case files for transferred complaints, however it is unclear how the privacy constraints that were previously considered so problematic have been (or will be) legally resolved. This is a matter of significant concern for trustees, given the potential administrative impacts, and for consumers, given the potential for further delay if a transferred complaint has to be considered afresh.

- The dispute resolution approach that will be applied

It is implicit from proposed new Rule B.4.5.1(c)(v) that AFCA will deal with transferred complaints following the EDR approach and process outlined in the AFCA Rules, rather than the approach and process prescribed for the SCT in the *Superannuation (Resolution of Complaints) Act 1993* ("Complaints Act").

This is different to the approach taken where AFCA assumed jurisdiction for complaints made prior to 1 November 2018 to its predecessor schemes the Financial Ombudsman Service and the Credit and Investments Ombudsman — those complaints were, as stated in the Operational Guidelines (at page 142 of the current version) "dealt with under the jurisdiction of the relevant Predecessor Scheme".

We acknowledge that the basic test to be applied to superannuation complaints is the same under section 1053 of the *Corporations Act 2001* and the AFCA Rules as under the Complaints Act — that is, whether the decision or conduct of the trustee (and or insurer) was fair and reasonable in all the circumstances. However, there are distinct differences in the dispute resolution approaches and processes adopted by the SCT, as a statutory tribunal, and AFCA, as an ombudsman.

To avoid confusion, ASFA recommends that AFCA states more clearly which EDR approach and process will apply to transferred complaints.

- AFCA funding/resourcing impacts and costs to trustees

Under the interim funding model that applies until the end of 2020-21, superannuation fund trustees are generally subject only to an annual AFCA membership levy and do not pay a user charge or specific complaint fees. An exception to this approach was applied recently in relation to superannuation 'legacy complaints' that were able to be lodged with AFCA during the 2019-20 financial year.

The consultation material does not indicate how AFCA's costs in relation to transferred SCT complaints will be recouped — that is, whether the cost will be borne by all trustees via an increment to the annual AFCA membership levy or applied directly to those trustees involved with a transferred complaint (similar to the approach taken for legacy complaints).

While we understand, from discussions with senior AFCA personnel, that these matters have already been considered and addressed as part of the transition plan, we are of the view that public clarification from AFCA is warranted. This could be achieved through:

- clear explanation in the Operational Guidelines
- an update to the Superannuation Transitional Guidelines
- standalone explanatory material such as a factsheet or frequently asked questions.

We note that as well as ensuring trustees are provided with operational clarity, there is also a need to ensure consumers impacted by the cessation of the SCT are adequately informed about how their complaint will be finalised and the impact on any appeal to the Federal Court (or their right to appeal to the Federal Court). On this basis, we suggest a combination of the above communication methods would be most appropriate.

Recommendation

How AFCA will 'deal with' complaints transferred from the SCT

ASFA recommends that AFCA provides explanation of how it will 'deal with' transferred complaints, including clarification of matters such as access to SCT case files, the complaint resolution approach to be applied, and the cost implications for trustees.

2.3. Remittals from the Federal Court of matters on appeal from the SCT

An appeal to the Federal Court from a determination of the SCT must be instituted "not later than 28th day after the day on which copy of determination is given to the person or within such further period as the Federal Court (whether before or after the end of that day) allows" (Complaints Act, section 46).

Without knowing precisely when the SCT will cease to issue determinations, it is at least theoretically possible that a complainant could validly appeal to the Federal Court within the 28-day window but after the date the SCT ceases operation.

Page 1 of the consultation paper refers to the need for arrangements to be in place to address a situation where "any matters **that are before** the Federal Court on appeal from the SCT are not finalised prior to the SCT ceasing operations" (our emphasis). This wording may create confusion, as it conveys the impression that the transition arrangements would not cover an appeal from an SCT determination that was initiated with the Court *after* the cessation of the SCT.

In contrast, the proposed amendments to the Rules and the Operational Guidelines to set out when matters will not be treated as already 'dealt with' (and therefore outside AFCA's jurisdiction) are drafted without specific reference to the cessation of the SCT. Rather, AFCA's ability to deal with the remittal turns simply on the question of whether or not the SCT has already determined the complaint in accordance with the Court's opinion or directions. This drafting should, in ASFA's view, be adequate to cover all potential future remittals from SCT matters and should be adopted in any explanatory material published by AFCA, in preference to the wording used on page 1 of the consultation paper.

2.4. Complaints already 'dealt with' by the SCT

Leading up to the commencement of AFCA as the EDR body for superannuation, there were significant concerns raised about when AFCA would consider a complaint to have already been 'dealt with' by the SCT, for the purpose of determining whether it was excluded from jurisdiction under Rule C.1.2.

In particular, superannuation trustees were concerned that the AFCA Rules did not explicitly exclude complaints that had been lodged with the SCT but treated as withdrawn — for example, because they were considered to be lacking in substance or because the complainant did not respond to the SCT's attempts to contact them. Rather than mandatory exclusions from AFCA's jurisdiction, such complaints fall within AFCA's discretion to exclude a complaint.

We acknowledge that the Operational Guidelines contain some guidance around when AFCA will treat a complaint as having been 'dealt with' by the SCT (at page 153 of the current version). However, ASFA member trustees have continued to express a desire for further clarity, particularly around when AFCA will find there are 'exceptional circumstances' that warrant it treating the matter as a new complaint.

During the transition process, industry also highlighted that because the SCT was unable to share information with AFCA, it would be unable to identify — until notified by the impacted trustee — when a consumer whose matter had already been 'dealt with' by the SCT lodged a new complaint with AFCA, as a second attempt to achieve a favourable EDR outcome.

As outlined at point 2.1 above, ASFA considers it imperative that affected consumers receive clear communication about the cessation of the SCT and the transitional arrangements for unresolved SCT complaints and remittals from the Federal Court. However, we are equally concerned to ensure that any messaging from AFCA about the transitional arrangements makes it clear that the change to AFCA's jurisdiction:

- relates only to the small number of unresolved complaints specifically 'referred or forwarded' to AFCA by the SCT or the Federal Court
- does not create a general opportunity for consumers whose matters had already been 'dealt with' by the SCT to re-raise them with AFCA.

In addition, we consider that industry would greatly welcome the provision of further clarity, in both the AFCA Rules and Operational Guidelines, of when a matter will be considered to have been 'dealt with' and therefore falling within the exclusions from AFCA's jurisdiction.