

# SUBMISSION

Submission to the  
Australian Financial  
Complaints Authority —  
Consultation on proposed  
new funding model

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22 April 2022

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Justin Untersteiner  
Chief Operating Officer  
Australian Financial Complaints Authority

Via email: [fundingmodel@afca.org.au](mailto:fundingmodel@afca.org.au)

22 April 2022

Dear Mr Untersteiner

**Australian Financial Complaints Authority: Consultation on proposed new funding model**

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission to the Australian Financial Complaints Authority (AFCA) in response to the consultation on AFCA's proposed new funding model.

**About ASFA**

ASFA is a non-profit, non-partisan 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 \$3.5 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 17 million Australians with superannuation.

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If you have any queries or comments in relation to the content of our submission, please contact Andrew Craston, Director – Economics, on (02) 8079 0817 or by email [acraston@superannuation.asn.au](mailto:acraston@superannuation.asn.au).

Yours sincerely

Glen McCrea  
Deputy Chief Executive Officer and Chief Policy Officer

## General comments

ASFA considers it is important that AFCA has a funding model that is sustainable and supports an adequate and appropriate level of resources. This is necessary to ensure that AFCA's external dispute resolution (EDR) service operates effectively and efficiently for all stakeholders. It also important to ensure that AFCA's funding model does not impact, in an inequitable manner, any particular sector of the financial industry or particular financial firms.

In broad terms, ASFA considers that for superannuation entities AFCA's proposed new funding model is an improvement on the interim funding model. The 'user-pays' fee structure that will now apply to superannuation entities addresses the significantly higher fees paid by superannuation entities relative to other types of financial firms under the interim funding model, which saw the superannuation sector subsidise other sectors of the financial industry.

That said, the tiered fee structure (that will now apply to superannuation entities), raises some concerns particular to superannuation entities. For a complaint that a superannuation trustee considers is vexatious or unmeritorious, the trustee's decision whether to incur escalating dispute fees (in expectation that the trustee position ultimately will be upheld as fair and reasonable), or alternatively to settle the complaint is challenging given the trustee's fiduciary duty to act in the best financial interests of all its members.

Further, the proposed transitional arrangements, where the new complaint fee schedule will apply to all open complaints from 1 July 2022, regardless of when complaints have been received by AFCA, will involve an effective double-billing of AFCA's EDR services for some superannuation entities.

ASFA considers that concerns with the proposed new funding should be addressed to prevent a superannuation trustee incurring unnecessary (or unnecessarily high) complaint fees, which would impact detrimentally on the retirement savings held on trust for all members of the fund.

## Specific comments

### Issues regarding the jurisdiction and merit of complaints

In previous submissions, ASFA noted that AFCA registers complaints that have not been previously made to a superannuation trustee, and 'refers' them back for the trustee to complete its IDR process (also the case for complaints in respect of other types of financial firms). This involves a cost to the trustee, and contrasts with the approach of the former Superannuation Complaints Tribunal (SCT) – which refused to accept complaints that a trustee had not already had an opportunity to resolve through its IDR process.

ASFA considers that the former SCT's approach is more equitable. Unlike the SCT, AFCA's current approach means that a trustee will pay a registration fee where a complaint is referred back to the trustee and the complaint is subsequently resolved through the trustee's IDR process. Ideally, ASFA considers that AFCA should adopt the former SCT's approach for superannuation entities (as well as for other types of financial firms). That said, ASFA acknowledges that the Registration and Referral fee in the new funding model has been reduced – which implies a lower cost to financial firms of AFCA's referral process.

With respect to determining whether a complaint is within AFCA's jurisdiction, ASFA understands that AFCA will be revising its approach. In previous submissions, ASFA noted that AFCA's dispute resolution process involved acceptance of virtually all complaints and did not (at the outset) consider whether complaints were outside AFCA's jurisdiction. This contrasts with the former SCT, which conducted a review to confirm whether a complaint was within its jurisdiction before it was accepted.

In this regard, ASFA welcomes AFCA's new Rules Review function as reflected in the proposed new funding model. ASFA understands that the Rules Review will apply where there is a relatively complex determination as to whether AFCA has the jurisdiction to resolve a complaint (at a cost of \$100). ASFA considers that this approach is likely to lead to disputes that are outside of AFCA's jurisdiction being closed earlier than has been the case. Separately, AFCA notes that where it receives a complaint that is clearly outside its jurisdiction this will be closed prior to registration and incur no cost to financial firms.

With respect to vexatious and unmeritorious complaints, AFCA has noted that it has updated its procedures to limit the extent to which such complaints will progress through AFCA's EDR process, and so reduce the negative impacts on financial firms. That said, AFCA has not released the details of these changes and how – in practical terms – the changes will limit vexatious and unmeritorious complaints progressing through EDR.

Part of AFCA's revised strategy to reduce the impact of vexatious and unmeritorious complaints is the proposed introduction of five free complaints per year for each AFCA member. Given that the free complaints regime will apply to the first five complaints received in a financial year (for each AFCA member), the regime will be more effective as a buffer against vexatious and unmeritorious complaints for smaller financial firms – for whom the volume of vexatious and unmeritorious complaints, on average, is likely to be lower than for larger financial firms. In this regard, it is important that AFCA applies an ongoing review of the merit of complaints as they progress through EDR.

### Issues arising from the tiered fee structure

ASFA appreciates the difficulty in designing a funding model that strikes a balance between equity and simplicity, and that any model cannot fully account for nuances in respect of different types of financial firms.

Limiting cross-subsidisation in the funding model requires a user-pays fee structure where fees broadly match average regulatory effort – which necessitates a tiered fee structure. The replacement of the annual superannuation levy in the interim funding model (based in part on the quantum of funds under management), with the user-pays fee structure (based on intensity of use) will reduce cross-subsidisation within the superannuation sector, and between the superannuation sector and other sectors in the financial industry. AFCA acknowledges that under the interim funding model the superannuation sector has been cross-subsidising other sectors – and that the extent of this cross-subsidisation has been increasing over time.

However, as ASFA has noted in previous submissions, the introduction of a full user-pays model, with escalating fees, poses issues for superannuation that do not arise in respect of other financial products and services.

The tiered funding model means that superannuation trustees (and other types of financial firms) may need to incur escalating complaint fees in order to obtain appropriate resolution of complaints. Even if AFCA's preliminary assessment is in favour of a superannuation trustee, an individual superannuation member may still choose to progress the matter to an Ombudsman decision at any time. In this regard, the gap between fees applicable to case management (\$1,725) and an Ombudsman decision (\$7,550), though based on average regulatory effort, is significant.

- For a complaint that a superannuation trustee considers is vexatious or unmeritorious, the trustee's decision whether to incur escalating dispute fees (in expectation that the trustee position ultimately will be upheld as fair and reasonable), or alternatively to settle the complaint is challenging given the trustee's duty to its broader membership. In particular, all superannuation

trustees have a fiduciary duty to act in the best financial interests of all their superannuation members.

- Tiered fees are less suited to complaints regarding death benefit distributions, relative to other types of complaints. In combination, the lack of any EDR cost to consumers and the benefit amount that may be at stake, may act serve as a powerful incentive for a dissatisfied claimant to pursue a complaint through to determination – regardless of the strength of the claim.

As such, ASFA considers that where a preliminary assessment in favour of a complainant is overturned and replaced with a determination in favour of the financial firm, or where the Ombudsman upholds a preliminary assessment in favour of the financial firm, AFCA should rebate to the financial firm additional complaint fees associated with the determination (or at a minimum, AFCA should apply a discounted fee).

#### Recommendation 1

- Where a preliminary assessment in favour of a complainant is overturned and replaced with a determination in favour of the financial firm, or where the Ombudsman upholds a preliminary assessment in favour of the financial firm, AFCA should rebate to the financial firm additional complaint fees associated with the determination or (at a minimum) apply a discounted fee.

#### Transitional issues: open complaints as of 1 July 2022

For some superannuation entities, the proposed transitional arrangements to the new funding model will involve an effective double-billing of AFCA’s EDR services.

The new complaint fee schedule will apply to all open complaints from 1 July 2022, regardless of when complaints have been received by AFCA. ASFA has obtained feedback from member funds of lengthy delays for some open matters. This includes examples of death benefit cases, that are not particularly complex, which have been awaiting review by the Ombudsman for over 12 months.

As a whole, it can be reasonably argued that the superannuation sector has effectively paid for work associated with complaints received (but not closed) prior to 1 July 2022. As noted above, under the interim funding model the superannuation sector has been subsidising other sectors of the financial industry. This implies that the fees paid by the superannuation sector (as a whole) has exceeded the regulatory services provided to the superannuation sector via AFCA’s EDR services, and that this excess amount (as a whole) can be considered as payment in lieu of services in respect of complaints that have yet to be closed.

With respect to the proposed new funding model, ASFA’s preference is for AFCA to charge superannuation entities for complaints received from 1 July and not for the current open matters. At a minimum, AFCA should apply a discounted fee to any complaints in train as of 1 July 2022.

#### Recommendation 2

- For superannuation entities, AFCA should apply the new complaint fee schedule only to complaints received from 1 July and not for the current open matters. At a minimum, AFCA should apply a discounted fee to any complaints in train as of 1 July 2022.