SUBMISSION

Submission to AFCA — Consultation on proposed amendments to AFCA Rules and Operational Guidelines

22 May 2023

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Executive General Manager Jurisdiction
Australian Financial Complaints Authority
GPO Box 3
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Via email: consultation@afca.org.au

22 May 2023

Dear Sir/Madam

Consultation on proposed amendments to AFCA Rules and Operational Guidelines

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to proposed amendments to AFCA's Rules and Operational Guidelines.

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 $3.3 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.

ASFA welcomes the proposed amendments to its Rules and Operational Guidelines, which form a considered response to the recommendations from the independent statutory review undertaken in 2021.

While the proposed amendments are not targeted specifically at superannuation, ASFA members have identified some aspects where additional clarification would be appreciated. These are outlined overleaf.

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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

Julian Cabarrus
Director – Policy Operations, Member Engagement & External Relations

1. Response to consultation questions

1.1 Managing conduct within the Scheme

Question 1: Do the proposed Rules amendments in relation to Paid Representatives appropriately respond to Recommendation 4?

ASFA superannuation fund members advise that while they observe problematic behaviour from some paid representatives, this typically occurs during the IDR stage for a complaint or even earlier, often before the fund has finalised its decision in relation to a member or beneficiary's claim. ASFA members have not, to date, observed significant involvement of paid representatives once a complaint reaches AFCA.

That said, the proposed amendments appear to ASFA to appropriately respond to Recommendation 4 and should improve conduct by paid advocates.

Question 2: Are the proposed new provisions in relation to Complainant conduct appropriately drafted and do they achieve the right balance in their application?

The proposed amended Rule protects AFCA staff from unreasonable conduct by complainants, and ASFA supports this change.

It appears from proposed Rules A.8.4(b) and B.6 that a complainant will be well informed by AFCA about the exercise of either its discretion to:

- not consider a particular complaint due to the complainant's conduct; or
- exclude the complainant due to their conduct.

We anticipate that AFCA will also, as a matter of administrative process, promptly notify the relevant financial firm(s) where either of those discretions have been exercised. We recommend that this is clarified in the Operational Guidelines, to provide certainty to financial firms.

In addition, we note that financial firms regrettably also experience unreasonable conduct from complainants. We have three questions regarding proposed new Rules A.8.4 and B.6.1 in this respect:

- We seek clarification about the implications for a financial firm in cases where it becomes necessary for the firm to cease consideration of a complaint because of unreasonable complainant conduct, directed toward the firm's representatives, during the IDR process. In particular, we seek clarification as to whether adverse inferences will be drawn against the financial firm if the complaint is escalated to AFCA.
- On occasion, the materials compiled by a financial firm either as part of its submission to AFCA in relation to a complaint or in response to a request from AFCA might include material that demonstrates inappropriate or unreasonable conduct by the complainant to the financial firm – for example, highly objectionable language in correspondence. We seek clarification as to how firms should proceed in those cases. In particular, will there be any implications for the financial firm where this material is provided to AFCA, and is there any recommended method for a firm to highlight to AFCA the inclusion of such material, for example through the use of 'trigger' warnings.

- Will AFCA allow a financial firm to request that it consider exclusion of a complaint or a complainant under the proposed new Rules, or at a minimum to flag concerns regarding a complainant's conduct? It may be enlightening for AFCA, when considering whether a complainant's conduct toward its own staff is of a magnitude that warrants the exercise of either of the proposed new discretions, to be aware if the complainant has also exhibited unreasonable or inappropriate conduct toward representatives of the financial firm.

1.2 Forward looking review mechanism

Question 6: Are the proposed changes to the Operational Guidelines appropriately drafted and in keeping with Recommendation 9 of the Review Report?

ASFA welcomes the proposal to remove from the Operational Guidelines the requirement that external legal advice showing an error of law must be provided when an applicant requests that AFCA review its approach to a particular issue or complaint type, on a forward-looking basis. We consider this will improve and simplify access to the review process.

We note that the review process is forward-looking, and the current version of the Operational Guidelines discusses the process under the heading 'is it possible to ask that AFCA's approach in its Determinations be reviewed **for future complaints**?' (our emphasis). Some ASFA members have requested that, for the avoidance of doubt, AFCA includes in the underlying commentary a more explicit statement confirming that where AFCA makes amendments to its approach to a particular issue or complaint type following a review, this will not result in AFCA revisiting or changing previous decisions in which it had applied an earlier version of the approach.

1.3 Effect of Determinations and slip rule

Question 7: Is the proposed new Rule A.15.3b) appropriately worded and will it provide clarity about the effect of a determination not being accepted by a Complainant?

Question 8: Is the Rules wording appropriately drafted and does it provide clearer guidance and transparency about the existing slip rule?

The wording for proposed new Rule A.14.6 indicates that if an AFCA Decision Maker is satisfied that there is "a clerical mistake or error in a Determination arising from an accidental slip or omission, they **may** correct and re-issue the Determination" (our emphasis).

ASFA considers that use of the word 'may' could be taken to indicate that AFCA has discretion to amend. We acknowledge that this may be sensible if the identified change is immaterial, however it may create inconsistency and a lack of clarity for stakeholders.

ASFA members have also requested that AFCA provide additional guidance -beyond the examples mentioned in the proposed wording to the new Rule – on the scope of the rule and when it would be applied, in particular what would be considered to be an 'accidental slip or omission'.

1.4 Other changes

Question 9: Are there other areas in the AFCA Rules that require similar administrative or minor changes?

Existing Rule D.1.4 makes it clear that the remedies provided for in Rules D.2 to D.5 do not apply to superannuation complaints, however, the wording of the headings and/or content of Rules D.2, D.3 and D.5 are somewhat inconsistent in terms of whether this is made clear:

- D.2, D3 and D.5 - the heading to each Rule makes it clear it does not apply to superannuation complaints, however sub-rules D.2.1, D.3.1 - D.3.4 and D.5.1 - D.5.3 are silent
- D.4 – the heading to the Rule makes it clear it does not apply to superannuation complaints and this is also emphasised in sub-rule D.4.1, to which sub-rules D.4.2 and 4.3 explicitly or implicitly refer

To minimise any potential ambiguity, ASFA recommends that a consistent drafting style is adopted for the headings and content of Rules D.2 – D.5. That is, each of those Rules should either state in the heading, and/or the text, that they apply to complaints other than superannuation complaints.

Question 10 (objection process for Rule A.8.3): Are the proposed Rules A.8.5 and A.8.6 appropriately drafted and do they replicate the existing provisions under A.4.5 and A.4.6?

ASFA welcomes the intention to more clearly spell out the full objection process for Rule A.8.3. We understand that AFCA recently enhanced its internal processes to ensure Rule A.8.3 is more actively used to facilitate the early close out of unmeritorious complaints.

Despite this, our members are still experiencing a wide variation in how – and how early – the A.8.3 process is currently applied in practice. ASFA member funds report:

- Some case managers actively apply the Rule and look to close out unmeritorious complaints early, while others seemingly lack confidence utilising Rule A.8.3 and only consider it if specifically requested by the fund – that is, they are not proactively considering themselves whether, based on the evidence provided, the Rule could be applied.
- In some cases, unmeritorious complaints are still proceeding through the complaint management process even though the fund has supplied all materials necessary to support their submission – and the application of Rule A.8.3 – at a much earlier stage.

  ASFA fund members report frequently being told by AFCA case managers, when raising Rule A.8.3, that going through the complaint management process helps complainants to "feel that they have been heard".

  While that may be true, we submit that it may also create and/or magnify unreasonable expectations if a complainant assumes, because their complaint is progressing, that the outcome will be in their favour. Where the complaint is ultimately resolved in favour of the financial firm, this is often met with surprise and a sense that they were given 'false hope', particularly where some months have elapsed since the complaint was lodged with AFCA. One ASFA member provided us with an example where the dispute was eventually resolved in the trustee's favour, on the basis the trustee had made no error, but it took six months to obtain that outcome.

  Further, this approach is evidently being applied even though it should, in our view, be clear that neither the complainant nor the financial firm is likely to change their position. In an example provided to us, an ASFA member fund was requested to engage in conciliation in a case where the trustee had made no error and could not legally provide the remedy sought.

- In other cases, the complaint proceeds through the complaint management process despite it being clear from the materials submitted that the trustee has made no error and the outcome sought by the complainant is not permissible under law. For example:

- One ASFA member has a matter with AFCA currently in which a complainant is disputing the end-date of a term allocated pension - a non-commutable pension. The complainant herself has provided AFCA with a copy of her application to acquire the pension, which was signed by both the complainant and her adviser and sets out the terms and conditions of the pension. The matter has been progressed to case management even though it is not possible, under the relevant legislation and the product terms and conditions, for the fund to commute the pension prior to the end-date.

- In another case, a complainant disputed the trustee's non-acceptance of their notice of intent to claim a tax deduction for a superannuation contribution. The complainant's notice of intent was lodged with the fund outside the time limits imposed by the income tax legislation – a fact that was acknowledged by the complainant. Despite this, it took, in the fund's view, an overly long time for the complaint to be closed out.

ASFA supports the provision of a cost-free dispute resolution mechanism for consumers. However, it must always be remembered that this is possible only because the costs of EDR are borne by the AFCA members.

Where an unmeritorious complaint against a superannuation fund progresses unnecessarily far through the process, the fund incurs significant cost, both in terms of resources expended to respond to the complaint and the complaint management fees charged by AFCA. This cost is ultimately borne by all superannuation fund members. An ASFA fund member provided an example where a complainant refused to accept AFCA's original finding that no error had been made in relation to their account and demanded review by an ombudsman, which was progressed by AFCA. The final determination confirmed that the trustee had made no error, however this was at significant cost to the fund.

Accordingly, we welcome efforts by AFCA to enhance and clarify the terms of Rule A.8.3 and its associated processes and call on AFCA to continue to emphasise, with case management staff, the importance of early – and consistent – merits assessment.

2. Other matters, not specifically addressed by the consultation questions

2.1 The preliminary assessment process

AFCA's current process of providing a preliminary assessment prior to a matter proceeding to the determination stage is intended to provide procedural fairness and due process to all parties involved in a complaint under review.

Through this process, parties can address the evidence being relied upon by AFCA in making a determination. This enables them to provide further evidence and/or explanation in the interests of achieving an appropriate outcome and is based on the common and administrative law principle that an individual has a right to examine and answer the evidence against them. Given the finality of a determination issued by AFCA, and the limited scope for review, this opportunity is critically important. The process also has other advantages. In particular, it provides the parties an opportunity to review their approach to a complaint and consider alternatives for a settled outcome that can be voluntarily entered into – which is, in ASFA's view, a better outcome for all involved.

ASFA members have previously reported observing instances where a preliminary assessment has not been accepted and – as a result of additional evidence provided by the parties in response to the preliminary assessment – the view ultimately articulated by AFCA in a determination has differed materially from that outlined in the preliminary assessment.

Where it becomes clear that evidence submitted in response to a preliminary assessment is likely to materially alter the outcome, ASFA considers it would be beneficial for AFCA to issue a revised preliminary assessment rather than proceeding directly to the determination stage.

This would be consistent with the procedural fairness and due process associated with the current preliminary assessment process. Further, given the current time interval between the issue of a preliminary assessment and a final determination is issued, we do not anticipate this would add significantly to the length of the overall process and may in fact accelerate the conclusion of some complaints.

2.2 Use of AFCA's general jurisdiction

ASFA members have identified an aspect of the current Operational Guidelines, which is carried across unchanged in the draft marked-up Operational Guidelines, that we believe warrants reconsideration.

Footnote 1 on page 18 states: If AFCA cannot accept the complaint as a Superannuation Complaint, AFCA may accept the complaint under its non-superannuation jurisdiction. An example is where the complaint relates to the payment of a disability benefit and the complaint could be accepted against the insurer but not the superannuation trustee. Similarly, on page 115 it is stated that "If the fund member does not meet the time limits for a Superannuation Complaint, we will not be able to accept a complaint against the superannuation trustee, but we may be able to accept a complaint against the insurer under our general jurisdiction."

We note that these statements are inconsistent with the recent decision by the Full Court of the Federal Court decision in *MetLife Insurance Limited v Australian Financial Complaints Authority Limited* [2022] FCAFC 173. In that decision, the Full Court found that AFCA could not, under its general jurisdiction, hear a complaint in relation to life insurance held through superannuation where the matter was otherwise time barred under the AFCA Rules. We recommend that these statements are removed from the Operational Guidelines.