File Name: 2018/20

29 June 2018

Mr Mike D'Argaville

Australian Financial Complaints Authority

GPO Box 3

Melbourne VIC 3001

via email: submissions@afc.org.au

Dear Mr D'Argaville

Response to Consultation on Proposed AFCA Rules

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide the attached response to the consultation on proposed AFCA rules, launched on 1 June 2018.

If you have any queries or comments in relation to the content of our submission, please contact me on (02) 8079 0808 or by email gmccrea@superannuation.asn.au, or Julia Stannard, senior policy advisor, on (03) 9225 4027 or by email jstannard@superannuation.asn.au.

Yours sincerely

Glen McCrea
Deputy CEO and Chief Policy Officer

The Association of Superannuation Funds of Australia
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Contents

A. ABOUT ASFA

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 $2.6 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 over 90 per cent of the 14.8 million Australians with superannuation.

B. GENERAL COMMENTS

ASFA acknowledges the significant workload involved in establishing the Australian Financial Complaints Authority (AFCA) and preparing it to receive complaints from 1 November. We welcome the efforts made by AFCA staff (and, previously, FOS staff working on the transition) to engage with ASFA and our members as it prepares to bring the APRA-regulated superannuation sector into an ombudsman-style regime for external dispute resolution (EDR).

We note, however, that throughout the Ramsay Review, the development of what is now the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* ("AFCA Act"), and the establishment of AFCA, stakeholders have faced the challenge of trying to assess the full scope of the new EDR arrangements without access to complete information about those arrangements.

As noted in our submissions throughout this process, the magnitude of these changes for the superannuation industry should not be under-estimated. For many financial firms, the transition to AFCA involves the replacement of their existing EDR scheme's terms of reference with a new set of EDR rules. However, for superannuation providers the transition involves a quantum shift from a purely legislative regime to one that is a hybrid of legislation, regulations, contractually based rules, operational guidelines, and ASIC regulatory requirements.

Some of these materials are in place (primary legislation and regulations). However, some have only just been released (ASIC regulatory guidance on oversight of AFCA, finalised on 20 June), some are only in draft form (additional legislative amendments, Rules, independent assessor Terms of Reference), and others have not yet been made available even in draft (transitional arrangements, operational guidelines and interim funding model). AFCA's engagement process for superannuation remains in its early stages—so much so that while all financial firms are required to become members of AFCA by 21 September, there is as yet no membership process in place for superannuation trustees.

In particular, we expect the AFCA's Operational Guidelines to provide a significant level of additional detail on how the Rules will operate in practice. We understand that the release of the Guidelines was delayed to avoid the need to amend them should the consultation process lead to amendments in the Rules. While this logic is certainly sound, we anticipate that many of the questions raised during this consultation will relate to matters that have already been addressed in the Guidelines.

ASFA considers it critical that AFCA finalises its Rules and releases its Operational Guidelines as quickly as possible, to provide member firms with a complete picture of their EDR obligations. While these are currently scheduled for finalisation in September, this leaves member firms with little time to assess the implications of any changes, and operationalise the requirements, prior to AFCA commencing to take complaints from 1 November.

We welcome AFCA's indication that it is also developing a set of superannuation-specific guidelines to provide additional assistance to trustees. In ASFA's view, these should bring together in one place all requirements (whether based in legislation, rules, operational guidelines or ASIC regulatory requirements) relevant to the handling of superannuation complaints, and should be maintained for at least the first two years of AFCA's operation. We would encourage AFCA to release these at the same time as the final Rules and the broader Operational Guidelines.

Further, we note that AFCA recently held a webcast in relation to its draft Rules. This was, in ASFA's view, an extremely effective forum. We would strongly encourage AFCA to consider holding a superannuation-focussed webcast, within the next six weeks, highlighting key changes between the current SCT process and the process to be adopted by AFCA.

ASFA strongly encourages AFCA to expedite efforts to engage with superannuation providers, and to address their understandable concerns about the impact of the new EDR arrangements. In particular, **ASFA recommends** that AFCA:

- settles its membership process for superannuation providers, and commences accepting membership applications, as soon as possible
- finalises and releases its Rules and Operational Guidelines as soon as possible, including the proposed superannuation-specific guidelines
- holds, within the next six weeks, a superannuation-specific webcast session, addressing key issues in relation to superannuation complaints and highlighting key changes between the current SCT process and the process to be adopted by AFCA.

The remainder of our submission addresses the questions raised in the Consultation Paper and highlights concerns with some aspects of the draft Rules, including where we consider there should be greater clarity and/or specificity in the draft Rules and draft Terms of Reference (ToR) for the Independent Assessor.

C. Matters raised in the consultation paper

C.1 Structure and ordering of the AFCA Rules

Q1: Do the AFCA Rules achieve a good balance between user-friendliness and detail?

Q2. Is the "quick guide", summarising the key aspects of the Rules and their location, helpful?

Q3: Are the tables (for example, summary tables of the time limits to submit a complaint to AFCA and of the monetary restrictions on AFCA's jurisdiction and compensation powers) helpful in explaining these areas? How could they be improved?

ASFA acknowledges that the draft Rules have been written with a view to accessibility — in particular, the adoption of plain language that should enable them to be understood by consumers and not merely finance professionals such as the AFCA member firms.

We consider that the draft Rules achieve a good level of user-friendliness. We have previously stated a preference that superannuation complaints be addressed separately from other complaints. However, we accept that the boxed sections at the beginning of each section, which outline specific rules relevant to superannuation complaints, go a long way toward providing clarity in most cases (we have noted, throughout this submission, areas where we consider additional clarification is needed).

In ASFA's view, however, the draft Rules do *not* contain sufficient detail for superannuation trustees to fully understand the obligations they become subject to as members of AFCA.

We acknowledge that AFCA is currently developing Operational Guidelines to support the Rules. These will be based on those in place for the Financial Ombudsman Scheme (FOS) and will set out additional clarification in relation to AFCA's processes. We have been advised that the release of the Guidelines was consciously delayed until after this consultation, to ensure they reflect the Rules in their final form. While this approach avoids rework, it has, in ASFA's view, made the process of reviewing the draft Rules more difficult and somewhat inefficient for stakeholders. It would, in ASFA's view, have been preferable for a draft of the Guidelines to be made available alongside the draft Rules.

ASFA agrees that the 'quick guide' is a useful addition to the draft Rules, however we are concerned that its placement is not optimal and that many readers will pass over it, with their attention drawn to the table of contents. This is especially so if the draft Rules are viewed in printed (rather than electronic) form, as the 'quick guide' effectively appears on the inside front cover of the Rules document — a location which typically receives little attention. We consider that the 'quick guide' might be more effective if placed *after* the table of contents, prior to the detailed rules.

The summary tables have the potential to be extremely useful tools, however in ASFA's view they would benefit from the application of some design tools to aid their readability, including greater use of colour, shading and boxing out. At present, they incorporate a large amount of detail and may be overwhelming for some readers. At a minimum, we recommend clearer delineation between the different types of complaints, so the reader is better able to focus on the information that is of concern to them, and filter out what is not (immediately) relevant.

C.2 Superannuation complaints

Q4: Are there aspects of the SCT's jurisdiction that have not been incorporated into the AFCA Rules?

Other than as noted in section D of this submission, it appears that the SCT's jurisdiction has been incorporated into the AFCA rules. In this respect, we commend AFCA for making available the document 'mapping' the provisions of the *Superannuation (Resolution of Complaints) Act 1993* (S(ROC) Act) to the draft Rules.

However, we note that the Operational Guidelines are expected to contain significant detail clarifying aspects of the Rules and how AFCA will apply them. This is likely to include jurisdictional matters such as how AFCA will:

- exercise the very broad powers given to it under the Rules
- approach its discretions to handle, or not handle, particular complaints.

Without the ability to review the Operational Guidelines alongside the draft Rules, it is not possible to categorically respond to this question.

C.3 Reporting obligations

Q5: Do the AFCA Rules adequately provide for AFCA to meet its reporting obligations under the Corporations Act?

AFCA's reporting obligations under the *Corporations Act 2001* are primarily contained in new section 1052E, which requires AFCA to refer to appropriate authorities (ASIC, APRA and/or the Commissioner of Taxation) certain matters it has identified — including systemic issues, serious contraventions, the refusal or failure by a member firm to implement an AFCA determination, or a settlement that, in AFCA's view, warrants investigation.

These legislative obligations are relatively high level in nature, with the intention that they are expanded upon by ASIC regulatory guidance. ASIC recently consulted on a proposed update to its Regulatory Guide RG 139, *Oversight of the Australian Financial Complaints Authority*, which sought to provide significantly more detail in relation to ASIC's expectations as to how AFCA will comply with the reporting obligations set out in section 1052E.

ASIC initially indicated that it did not expect to publish RG 139 in its final form until the date AFCA commences to hear complaints (1 November). Without access to the full and final reporting requirements for AFCA, it would have been virtually impossible for stakeholders to meaningfully assess whether the draft Rules adequately provide for AFCA to comply with those requirements.

Accordingly, ASFA appreciates the effort made by ASIC to finalise its regulatory requirements for oversight of AFCA ahead of its original schedule, in the form of new Regulatory Guide RG 267 *Oversight of the Australian Financial Complaints Authority* (RG 267).

The draft Rules broadly address the reporting requirements outlined in section 1052 and RG 267. However, as noted in section D.11 of this submission, ASFA is of the view that the draft Rules are lacking in detail in many respects, and recommends that AFCA provides additional clarification about how it will discharge its reporting obligations.

C.4 General

Q6. Are there any other issues that require consideration?

Section D of this submission sets out a number of additional matters that in ASFA's view require consideration in relation to the draft Rules. Many of these relate to uncertainty about how AFCA's processes — which we expect to be based heavily on those currently utilised by FOS — will apply in relation to the handling of superannuation complaints. It is likely that AFCA intends to cover these issues in its Operational Guidelines, however some are of such significance that they should in ASFA's view be addressed in the Rules.

D. Other matters

D.1 Greater clarity needed re transitional issues

A number of potential transitional issues are likely to arise around the cusp of 1 November, which are not adequately addressed in the draft Rules. ASFA understands there is an intention for AFCA to document a set of transitional arrangements to address these issues, and would encourage AFCA to ensure these are published as soon as possible.

In particular, ASFA considers it critical that the transitional arrangements clearly address the following scenarios:

(i) Complaints that are 'in the post' and received by the SCT on or after 1 November

We understand that the anticipated process is that such complaints will need to be redirected to AFCA. It is unclear whether this will involve the SCT effectively 'rejecting' the complaint and informing the complainant that they will need to lodge it with AFCA, or whether there is an expectation that the SCT will forward the complaint directly to AFCA.

(ii) Death benefit complaints 'split' between AFCA and the SCT

This could occur where a trustee's final death benefit decision was notified to potential beneficiaries in October, with one or more individuals lodging their complaint with the SCT on or before 31 October and one or more others lodging their complaint with AFCA on or after 1 November (but still within the prescribed 28 day period).

This scenario can only occur within a narrow time period (October-November 2018), and should involve only a small number of cases. However, a clear mechanism will be necessary to ensure these can be readily identified and addressed, and none is provided in the draft Rules. ASFA understands, from discussions with AFCA representatives, that a transitional process is contemplated, as follows:

- where a trustee becomes aware a complaint has become 'split' it should immediately notify AFCA
- AFCA will effectively stay the complaint and leave the matter to proceed before the SCT
- if the complaint before the SCT is dealt with on its merits, the AFCA complaint will be closed
- in the event that the complaint before the SCT is not dealt with on its merits — for example, it is withdrawn — the stayed AFCA complaint could be revived.

ASFA accepts that this appears to be a workable process in principle. However, its effectiveness will rely on prompt communication between the trustee, AFCA and the SCT. We note also the degree of communication likely to be necessary between the SCT and AFCA is not presently permitted by the legislative framework and is reliant on the passage of amendments currently before the Parliament[1].

A further significant transitional issue may arise where an individual attempts to lodge a complaint with SCT after 1 November and, by the time the complaint has been properly lodged with AFCA, it is outside any prescribed time limits.

We note that draft Rule B.4.5.1 attempts to address this by providing that, for the purposes of AFCA's time limits, a complaint submitted to the SCT that was "**referred to AFCA** wil be treated as submitted to AFCA on the date it was received by" the SCT (our emphasis). The use of the words "referred to AFCA" is, in ASFA's view problematic. Section 63 of the S(ROC) Act, which permits the SCT to refer matters to another EDR body, necessarily contemplates that the complaint has first been accepted by the SCT. As such, the formal concept of 'referral' will not be available for complaints received by the SCT on or after 1 November.

We anticipate that the intention of the draft Rule B.4.5.1 is that the words "referred to AFCA" should not be interpreted in a formal/legal manner. We suggest that in order to avoid unnecessary doubt and confusion, alternate phrasing would be preferable — for example, "forwarded to AFCA".

ASFA recommends that:

- AFCA finalises and publishes its transitional arrangements document as soon as possible
- Rule B.4.5.1 is redrafted to refer to the SCT (and other predecessor schemes) 'forwarding', rather than 'referring', to AFCA complaints received on or after 1 November 2018.

[1] *Treasury Laws Amendment (2018 Measures No 4) Bill 2018*, schedule 8

D.2 Definitional issues

D.2.1 Definition of 'complainant'

ASFA is concerned that the definition of 'complainant' in draft Rule E.1 of the draft Rules may inadvertently expand that concept beyond the definition currently applicable under the S(ROC) Act.

The definition in the draft Rules states that a 'complainant' "means a person who has submitted, **or has applied to join**, a complaint to AFCA" (our emphasis). As a result, the definition of 'complainant', for AFCA purposes, appears to encompass joined parties. This is problematic as, under the current SCT framework and the draft AFCA Rules, the person lodging the complaint may have some different rights to a party joined to that complaint. For example, if a complainant in a death benefit withdraws their complaint, the complaint is closed and the agreement of the joined parties is not required.

ASFA recommends that the definition of 'complainant' in the draft Rules is reviewed to ensure it does not inappropriately encompass joined parties.

D.2.2 Definition of 'superannuation complaint"

D.2.2.1 Complaints about decisions of insurers

ASFA has previously highlighted the risk that a superannuation fund member might seek to bring a complaint to AFCA relating to a benefit insured under a group policy held by the fund trustee against the insurer, rather than the trustee. We noted that, given the significantly different outcomes that might flow depending on whether a complaint is handled as a 'superannuation complaint' or a non-superannuation complaint, it would be critical to ensure that such cases could be quickly identified and appropriately streamed.

We anticipate that the wording in paragraph (a) of the expanded definition of 'superannuation complaint' in draft Rule E.1.1 is intended to assist with this issue. That paragraph indicates that, where all relevant time limits have been met, a complaint about an insurer's decision under an insurance policy held by a superannuation trustee will be handled as a 'superannuation complaint' by joining the insurer to a complaint against the trustee's decision. Otherwise, the complaint will be handled as a non-superannuation complaint against the insurer. ASFA welcomes the clarification provided in relation to this issue.

D.2.2.2 Complaints about advice relating to superannuation

The AFCA Act represents a wholesale re-working of the EDR arrangements for financial services, particularly in relation to superannuation complaints. During consultations on the predecessor exposure draft ASFA noted that — given the very short time allowed for industry to review and comment on the draft — it was regrettably likely that some omissions and unforeseen consequences would only be identified after the legislation was in place, as industry worked to implement the new arrangements.

In this respect, we note that concerns have recently been expressed that the AFCA Act does not appear to allow AFCA to accept a complaint about advice related to superannuation made against a financial adviser who is not acting on behalf of a superannuation fund trustee[2]. We understand the intention is that such complaints can in fact be made to AFCA, but will fall under its non-superannuation jurisdiction — that is, they will not be 'superannuation complaints'. In particular, we understand from discussions with AFCA representatives that whether a complaint relating to advice is a 'superannuation complaint' or not is intended to turn on whether the advice was provided under an Australian Financial Services Licence (AFSL) held by the fund trustee, or another party.

[2] For example: Greenfields, *Gaping hole in the AFCA Act*, 5 June 2018

We further understand that AFCA has had some discussions with Treasury regarding potential legislative amendments to put this matter beyond doubt, and that clause (b) of the expanded definition of 'superannuation complaint' in the draft Rules is intended, at least in the short term, to address this issue.

As highlighted to AFCA representatives during this consultation, however, ASFA is concerned that the current drafting will not achieve that outcome in all cases.

Clause (b) confirms that only advice relating to superannuation provided by the trustee of a regulated superannuation fund or approved deposit fund, a retirement savings account provider or a life company as issuer of an annuity policy, *or an employee or representative of one of those parties*, can be the subject of a 'superannuation complaint' as defined in new section 1053 of the Corporations Act (our emphasis). Otherwise, "a complaint about financial product advice relating to superannuation will be handled as a non-superannuation complaint against the Financial Firm providing the advice".

A series of examples may be helpful to illustrate our concerns regarding the application of clause (b):

(a) XYZ Trustee, the trustee of XYZ Fund, holds an AFSL with an authorisation to provide general advice, and employs staff to provide general advice to members of XYZ Fund under that license.

    A complaint in relation to that advice would be a 'superannuation complaint'.

(b) XYZ Trustee may receive enquiries from members of XYZ Fund seeking personal advice, and might suggest that members locate a suitably licensed and authorised financial advisor.

    A complaint in relation to any advice provided by such an advisor would not be a 'superannuation complaint' but could be brought against the advisor under AFCA's non-superannuation jurisdiction.

(c) Alternatively, XYZ Trustee might have an arrangement with ABC Financial Advisor, which holds an AFSL with a personal advice authorisation. Employees of XYZ Trustee might provide financial advice to members of XYZ Fund under the AFSL held by ABC Financial Advisor.

    It is presently unclear whether a complaint about that advice would be a 'superannuation complaint' or not. The advice is not provided under XYZ Trustee's AFSL, which we understand to be the intended trigger for characterisation as a 'superannuation complaint'. However, as it is provided by "an employee or representative of the trustee" it would appear to be brought within the definition of 'superannuation complaint' by the wording of clause (b)(ii) in the draft Rules.

ASFA recommends that AFCA considers redrafting clause (b) so the trigger for determining whether a complaint about advice relating to superannuation is characterised as a 'superannuation complaint' is tied more directly to the question of whether the advice was provided under an AFSL held by the trustee.

ASFA would also support AFCA continuing to pursue the need for legislative clarification with Treasury.

D.3 Right to representation

Draft Rule A.1.3 notes that Complainants "do not generally need legal or other paid representation to submit or pursue a complaint through AFCA". While we anticipate that this will be the case for many — if not the majority of—complaints, ASFA is concerned that the Rules do not confirm that a right to representation exists where needed.

We note that S(ROC) Act provides that a party to a complaint that is "not a body corporate or unincorporated" has a specific right to representation where "the Tribunal is satisfied that the party cannot adequately act on his or her own behalf because of a disability". Aside from this, a party has an implied right to representation if "the Tribunal considers it necessary in all the circumstances".[3]

ASFA considers it important that the right to representation, where needed, is clearly confirmed in the AFCA Operational Guidelines.

ASFA recommends that the AFCA Operational Guidelines confirm that a party to a complaint has the right to representation where needed.

D.4 Referral back for IDR or further IDR

The concept of complaints being 'referred back' for further consideration under the provider's IDR processes, as recommended by the Ramsay Review, will be familiar to members of FOS but quite new for superannuation providers. ASFA considers it will be important that detailed guidance is provided, in the Operational Guidelines, as to how this process will work for superannuation complaints.

Currently, if an individual attempts to lodge a complaint with the SCT without going through the trustee's IDR process (or before all steps of that process are completed), the SCT is not permitted to accept the complaint. Instead, the SCT will inform the individual that they must complete the provider's IDR process as a threshold step. At that point in time, the SCT does not make any assessment regarding whether any complaint it may ultimately receive from the individual would be within its jurisdiction.

In contrast, it appears likely that the 'referral back' process will involve AFCA conducting some level of up-front jurisdictional assessment—at least in relation to whether the complaint is within any requisite time limits. This represents a significant process change.

Given it might be expected that many of the complaints 'referred back' will be resolved between the complainant and the member firm without further AFCA involvement, ASFA would be concerned if a financial firm incurs any more than a nominal fee at the initial lodgement and referral back stages of the process. We note that no information has yet been made available regarding AFCA's fee model, which we anticipate will (as is the case currently for FOS) include dispute fees that escalate as a complaint proceeds further through the EDR process.

Finally we note that draft Rules A.5.2 and A.5.3 indicate that when referring a complaint back, AFCA will "set a timeframe for the Financial Firm to either resolve the complaint or provide its position in relation to the complaint". In ASFA's view, the timeframe should be specified in the Rules. We anticipate that there may be a need to specify different timeframes depending on the circumstances—for example:

(a) where an individual has not first raised their complaint with the financial firm and proceeded through the firm's IDR process, the timeframe should be aligned with the prescribed timeframe applicable to that IDR process[4]. We note that this is consistent with ASIC's recently published regulatory guidance, RG 267[5]

[3] *Superannuation (Resolution of Complaints) Act 1993* (S(ROC) Act), section 23

[4] This is currently prescribed in ASIC's Regulatory Guide RG 165 for non-superannuation complaints. For superannuation complaints, ASIC has indicated that—despite the modifications made to section 101 of the *Superannuation Industry (Supervision) Act 1993* by the AFCA Act, the IDR timeframe formerly specified in section 101 will continue to apply until ASIC has finalised its new regulatory requirements in relation to IDR.

[5] ASIC, Regulatory Guide RG267 *Oversight of the Australian Financial Complaints Authority* (RG 267), RG 267.194

(b) a shorter timeframe would be appropriate where the IDR process has been completed and AFCA is effectively referring the complaint back to the financial firm for a 'last chance' to resolve it without AFCA involvement.

We note the Consultation Paper indicates that the timeframe for complaints falling within para (b) above is likely to be 21 days, while RG 267 fails to indicate a timeframe for such complaints. ASFA considers that 21 days should generally be adequate, noting that RG 267 indicates an expectation that AFCA's refer back arrangements should provide for the circumstances where an extension of time for resolving a complaint is warranted, and where a complainant may challenge any extension of time granted by AFCA[6].

ASFA recommends that:

- AFCA provides detailed guidance about the 'referral back' process in the Operational Guidelines
- the Rules should specify the timeframe(s) within which a financial firm must action a complaint 'referred back' by AFCA.

D.5 Notifying AFCA about potential parties to a death benefit complaint

Draft Rule A.5.4, when read with new section 1056A of the Corporations Act, requires a financial firm to provide AFCA with notice of all parties who may have an interest in a death benefit, and are potential candidates to be joined to a complaint about payment of that death benefit. In combination, draft Rule A.5.4 and section 1056 have a very similar effect to subsection 24A(4) of the S(ROC) Act, however AFCA will receive notification *after* the financial firm has notified potential parties of their ability to be joined to the complaint whereas under the S(ROC) Act a trustee must notify the SCT and the potential parties *at the same time*.

It is our understanding, however, that in practice the SCT does not necessarily rely solely on the notification it receives from a trustee, but will on rare occasions undertake its own processes to ensure all potential parties to a death benefit complaint have been identified. This might be the case, for example, where the SCT has concerns regarding the extent or effectiveness of a trustee's due diligence process for ensuring all potential claimants of a death benefit have been identified.

It is not clear from the draft Rules whether AFCA will apply a similar approach or whether it will place total reliance on the notification received from a financial firm. We recommend that the Rules provide AFCA with sufficient flexibility to undertake its own identification process on an as needs basis, with additional clarification provided in the Operational Guidelines.

ASFA recommends that the Rules provide AFCA with sufficient scope to undertake, on an as needs basis, its own processes to ensure all potential claimants of a death benefit have been identified.

D.6 Embedded superannuation expertise needed at all stages of AFCA complaint resolution

Draft Rule A.8 sets out, at a very high level, AFCA's proposed approach to complaint resolution. We understand that additional detail will be provided in the Operational Guidelines.

The Consultation Paper indicates that: "Provisions in the Rules relating to the process and methods used to resolve complaints, including through negotiation, conciliation or case conferences or preliminary assessments, generally also apply to the resolution of superannuation complaints."[7]

[6] RG 267.197

[7] AFCA, Consultation on Proposed AFCA Rules, 1 June 2018, page 9

The process outlined in draft Rule A.8 appears to be based very strongly on the current FOS model and highlights, in ASFA's view, how critical it will be to have superannuation expertise and experience embedded throughout all stages of the AFCA complaint resolution process, not simply at the determination stage.

In particular, we note that some of the 'informal methods' that might be envisioned by draft Rule A.8 may not be as readily applicable to superannuation complaints as to other types of complaints. For example, 'negotiation' is a new mechanism for the resolution of superannuation complaints. It is a concept that may not sit neatly with a trustee's fiduciary duty to act in the best interests of its membership overall. In fact, the trust deeds governing some funds do not necessarily permit a trustee to pay compensation under a negotiated settlement.

While we would expect that at least some of AFCA's Chief Ombudsman and Ombudsmen will have the expertise necessary to resolve superannuation complaints, we wish to emphasise that it is critical that **all** AFCA staff members dealing with superannuation complaints have superannuation expertise. All such staff must understand the context within which superannuation trustees operate — with overarching trust law duties as well as specific duties imposed by the *Superannuation Industry (Supervision) Act 1993* (SIS Act) — and, in particular, what a superannuation trustee can and cannot do to resolve a complaint.

We note that this is particularly important given the AFCA process may involve a 'preliminary assessment', which (if this mirrors the current process for a FOS preliminary recommendation) may be made by a case manager. This raises the prospect of a situation where a superannuation trustee might be left with no alternative but to reject a preliminary assessment, because it does not reflect an outcome that the trustee is able to implement. While the complaint will then proceed to a full determination, this will involve significantly higher fees for the trustee than a complaint resolved at the preliminary assessment stage.

ASFA is concerned that case managers with limited superannuation experience and a background in resolution of non-superannuation complaints within the ombudsman model may effectively have an intrinsic bias toward achieving a negotiated/compensatory outcome that is inappropriate given the legal framing in which superannuation trustees operate.

To ensure this does not occur, it will be necessary to ensure that superannuation expertise is held by all staff who deal with superannuation complaints, no matter how preliminary that dealing, not merely at the Ombudsman level.

ASFA recommends that AFCA:

- releases further information regarding its complaints resolution processes as soon as possible
- ensures that superannuation expertise is held by all staff who deal with superannuation complaints, to ensure that outcomes from its flexible and informal complaint handling processes, and its preliminary assessment process, are appropriate, reflecting the trust and statute law context in which superannuation trustees operate.

D.7 AFCA's powers to require actions from parties to a complaint

Draft Rule A.9.3 provides that AFCA may "require a party to a complaint to do anything else that AFCA considers may assist AFCA's consideration of the complaint". The draft Rule provides two examples of actions that AFCA may require — to attend an interview, or (for a financial firm) to investigate the complaint further or appoint an independent expert to report back to AFCA on something relating to the complaint. Otherwise the power is completely unfettered.

While a similar power exists for FOS currently, it is quite unfamiliar for trustees used to the SCT model. ASFA understands, from discussions with AFCA representatives, that additional detail on the use of this power will be provided in the Operational Guidelines. AFCA representatives have indicated that this power might potentially be used in a superannuation context where there is conflicting medical evidence in relation to a complaint about a person's eligibility for a disability benefit, or there is a dispute about the calculation of a defined benefit. In essence, we understand the intention is that the power would only be exercised where circumstances are such that the ombudsman cannot decide the complaint on its merits without an expert report.

ASFA recommends that further clarity is provided in the Operational Guidelines in relation to how, and when, the power will be exercised by AFCA, along with superannuation-specific examples.

ASFA recommends that further clarity be provided regarding AFCA's power to require a party to a complaint to "do anything" to assist AFCA's consideration of a complaint.

D.8 Ability for AFCA to seek expert advice

ASFA is of the view AFCA's proposed power in draft Rule A.9.6 may have advantages and disadvantages in a superannuation context.

The SCT does not have a power comparable to draft Rule A.9.6. It is our understanding that, on occasion, when considering a complaint, the SCT has been unable to reach a determination because it has not been provided with access to material it considered critical to reaching a view — for example an occupational assessment (in relation to a complaint about a total and permanent disability claim) or an actuarial report (in relation to a complaint regarding a defined benefit). On these — admittedly rare — occasions, the SCT has been forced to remit a matter to the trustee with a direction that it obtain the relevant expert advice and give the complaint further consideration. This is an unsatisfactory outcome for the impacted complainant.

Should such situations arise in the future, the ability for AFCA to directly seek the necessary independent advice should result in a more efficient resolution of the complaint and a better experience for the consumer.

However, the power outlined in clause A.9.6 is very broad and ASFA is of the view its exercise should be subject to some additional conditions and should be supported by detailed guidelines.

In particular, we consider that before seeking its own expert advice, AFCA should be required to give the financial firm the opportunity to obtain an expert's report setting out the advice considered necessary and provide it to AFCA. ASFA is of the view that this is likely to lead to a more efficient and cost effective outcome in most circumstances, for example where:

- the trustee is able to obtain the relevant advice from an expert who is familiar with any specific complexities in the fund's governing rules (such as the calculation of particular defined benefits)
- some advice was already obtained by the trustee, and this could readily be supplemented by the expert who prepared the original advice to address additional issues identified by AFCA.

AFCA representatives have indicated that this is likely to occur in practice—and that draft Rule A.9.6 is intended to be a power of 'last resort' and (as is the case currently with FOS) exercisable only after consultation with the Lead Ombudsman and where it is not possible to reach a decision on the merits of the complaint without access to the expert advice. ASFA agrees that these are reasonable constraints but considers they should be clearly indicated in the Rules. We also consider that further clarity is required regarding:

- when an expert will be considered to be 'independent'
- when AFCA is able to require a financial firm to contribute to the cost of expert advice — in particular, what will constitute 'special circumstances' such that the contribution required from a financial firm might exceed $5,000.

While ASFA can see some benefits from AFCA being empowered to seek expert advice in relation to its resolution of a complaint, we consider that:

- the Rules should make it clear that the financial firm must first be given the opportunity to obtain the requested advice and provide it to AFCA
- further clarity is needed about when an expert will be considered to be 'independent' and the 'special circumstances' in which a financial firm would be required to contribute more than $5,000 toward the cost of expert advice obtained by AFCA.

D.9 Decision-making approach

Draft Rule A.14.3 provides that an AFCA decision maker is "not bound by rules of evidence or previous AFCA or Predecessor Scheme decisions". While this is consistent with the situation for FOS, the FOS ToR specifically recognise that, in making a decision, one of the matters that the FOS decision maker should have regard to is "previous relevant decisions of FOS or a Predecessor Scheme"[8].

It is important that users of the AFCA scheme have certainty, and in ASFA's view it is critical that AFCA decision makers consider the findings and decisions of its predecessor schemes. ASFA considers that draft Rule A.14.3 should be redrafted to reflect this.

ASFA recommends that the Rules specifically recognise that AFCA should have regard to relevant previous decisions of its predecessor schemes.

D.10 Effect of determinations

Draft Rule A. 15.3, which relates to complaints other than superannuation complaints and complaints about traditional trustee company services, states that a financial firm "***may*** ask a Complainant to provide it with a binding release from liability in respect of matters resolved by the determination" (our emphasis).

We note that this language differs from clause 8.8 of the FOS ToR, which currently provides that in order to accept a recommendation or determination, a complainant "***must*** provide the Financial Services Provider (if the Financial Services Provider so requests) with a binding release of the Financial Services Provider from liability in respect of the matters resolved by the Recommendation or Determination" (our emphasis).

In ASFA's view, the wording of draft Rule A.15.3 potentially creates some uncertainty — for both complainants and financial firms — regarding the right of a financial firm to request a release from liability and the consequences should a complainant not agree to provide such a release.

ASFA recommends that Rule A.15.3 is redrafted to provide certainty regarding the right of a financial firm to request a release from liability and the consequences should a complainant not agree to provide such a release.

[8] Financial Ombudsman Service, Terms of Reference 1 January 2010 (as amended 1 January 2018), clause 8.2(d)

D.11 Systemic issues, serious contraventions and other breaches

Under new subsection 1052E(4) of the Corporations Act, if AFCA "considers that there is a systemic issue arising from the consideration of complaints under the AFCA scheme, AFCA must give particulars of the issue to one or more of APRA, ASIC or the Commissioner of Taxation". Subsections 1052E(1)-(3) impose similar reporting obligations in relation to a serious contravention of the law, a contravention of a superannuation fund's governing rules, a breach of the terms and conditions relating to an annuity policy, life policy or RSA, a refusal or failure to give effect to an AFCA determination, and certain settlements of complaints.

While the Act does not define a 'systemic issue', the draft Rules indicate it is "an issue that is likely to have an effect on consumers or Small Businesses in addition to any Complainant". In ASFA's view, this definition is extremely broad and requires clarification. If interpreted broadly, this definition could encompass virtually all complaints made in relation to financial services.

ASIC's recently released regulatory guidance on oversight of AFCA, RG 267, provides some examples of potential systemic issues, none of which relate specifically to superannuation. Given the concept of reporting of systemic issues is a new feature of the EDR arrangements for superannuation, ASFA recommends that AFCA provides some additional clarification for trustees in the Operational Guidelines and potentially via Frequently Asked Questions or similar material. This should include examples of scenarios that AFCA might identify as systemic issues in a superannuation context.

We welcome the confirmation in RG 267 that AFCA should only report to the appropriate regulator(s) once it "considers that there is a systemic issue"[9], and the acknowledgement that AFCA may conclude that a potential systemic issue is *not* systemic, and therefore not reportable[10]. This is a significant clarification of AFCA's obligations as compared to the draft update circulated for consultation by ASIC. That draft referred to AFCA 'becoming aware' of a systemic issue and raised concerns that, in order to meet its reporting requirements, AFCA might be forced to lodge reports at a preliminary stage of its assessment, before it was satisfied that a systemic issue did in fact exist.

We note that the reporting timeframe has been reduced from a proposed 30 days to 15 days, however given the reporting threshold is now clearly only triggered where AFCA "considers that there is a systemic issue"[11], as opposed to AFCA "becoming aware of a systemic issue"[12], we do not consider this inappropriate. We also welcome the confirmation that the financial firm involved will generally have an opportunity to respond to AFCA before a report of a systemic issue is made[13].

Draft Rule A.17.4 provides that in investigating and referring a systemic issue to a financial firm for remedial action, AFCA can require the firm to do or refrain from doing any action which AFCA considers necessary to achieve one or more of a number of stated objectives. This Rule is extremely broadly drafted and, in ASFA's view, requires some additional clarification and constraint. In particular, we note that:

- draft Rule A.17.4(c) refers to "remedying loss or disadvantage suffered by consumers", however 'disadvantage' is not defined and is capable of an expansive interpretation. All financial products have the potential for advantage and disadvantage, depending on a range of factors, many of which are outside the control of the financial firm

[9] RG 267.70
[10] RG 267.68
[11] RG 267.70
[12] Draft Regulatory Guide RG 139: *Oversight of the Australian Financial Complaints Authority*, March 2018, RG 139.59
[13] RG 267.70

- draft Rule A.17.4(d) refers to "preventing foreseeable loss or disadvantage to consumers", however it is unclear in this context how a financial firm is intended to assess, and act to prevent, foreseeable loss or disadvantage to consumers
- it is not clear that AFCA's ability, under draft Rule 17.4, to require a financial firm to refrain from doing something, is within the legislative power conferred by section 1052E.

ASFA members have also expressed some concern at the potential for overlap and duplication in terms of remedial action that may be required by AFCA and ASIC. We consider it important that this matter is clarified.

Similar concerns have been expressed about the lack of clarity in relation to the reporting obligations imposed by subsections 1052E(1)-(3), and addressed in draft Rule A.18. While we note that RG 267 has provided some regulatory guidance on these matters, we consider that there is a need for additional clarification from AFCA regarding its approach to these reporting obligations.

Finally, it would assist stakeholders if clarification was provided regarding the interaction of the *Privacy Act 1988* and the AFCA regime, in particular the circumstances in which AFCA is required to report information to the Office of the Australian Information Commissioner (OAIC). We note that in draft Rules A.17.5(d) (systemic events) the OAIC is specifically included in a list of bodies to whom AFCA may be required to report, whereas the OAIC is not included in the list of bodies to whom AFCA may be required to report under draft Rule A.18.1 (serious contraventions and other breaches of obligations).

ASFA recommends that AFCA provides additional clarification in relation to:

- its obligation to report systemic issues, serious contraventions and other breaches, including specific superannuation-related examples
- the potential actions that a financial firm might be required by AFCA to take, or refrain from, and how and the potential for overlap and/or duplication in terms of remedial actions that may be required by AFCA and ASIC.

D.12 AFCA service complaints and the Independent Assessor function

ASFA has a number of concerns and questions in relation to the operation of the Independent Assessor function for AFCA, as proposed in draft Rule A.16 and the separate draft Independent Assessor ToR.

D.12.1 Function based on FOS independent assessor model, about which little is known

The draft ToR for AFCA are virtually identical to those currently in place for FOS. ASFA considers this to be a reasonable approach — we previously submitted that the FOS independent assessor ToR would be an appropriate basis for drafting of the ToR for the AFCA independent assessor. However — as noted in our previous submissions — the independent assessor function was only established for FOS in late 2017 and its newness does, in our view, mean that some caution is warranted.

In particular, we note that the FOS Independent Assessor is only required to report to the FOS Board annually, with its report to be published with the FOS Annual Review. As the 2017-18 financial year is not yet concluded, no data has yet become available in relation to the operation of the FOS Independent Assessor arrangements. For example, it is unknown how many service complaints have been made, what actions the Independent Assessor may have recommended, whether those recommendations were accepted or rejected by the Chief Ombudsman, and the outcome of any escalation to the FOS Board. As a result, industry has not been able to draw any meaningful conclusions as to the effectiveness of the FOS Independent Assessor function, and it is not possible to draw any inferences and its appropriateness as a model for the AFCA Independent Assessor function.

We understand the independent assessor processor for FOS has been heavily based on the process that its UK counterpart has had in place for some years. We have briefly examined the level of public reporting provided by the FOS UK independent assessor — and by FOS UK in relation to the independent assessor function and outcomes — and are of the view this should represent a minimum baseline reporting level in relation to the AFCA independent assessor.

We also consider that, given the newness of the independent assessor function for handling of Australian financial services complaints, it would be appropriate for the independent assessor ToR function to be specifically reviewed as part of the statutory review of the AFCA scheme to be undertaken as soon as practicable after 1 May 2020[14].

D.12.2 Clarity over reporting obligations needed

Clause 18 of the ToR requires the Independent Assessor to report *quarterly* in writing to the AFCA Board. ASFA welcomes this increase over the annual reporting currently required of the FOS Independent Assessor — the AFCA scheme will be significantly larger and more complex than FOS, and it is critical its operations are closely monitored in its formative stages to ensure any issues can be promptly addressed.

However, we note that the reporting arrangements in relation to the Independent Assessor function lack clarity in a number of key aspects.

- Clause 19 requires the Independent Assessor's *annual* report to be published (as part of the AFCA Annual Review), but there is no underlying requirement in either clause 18 or 19 for the production of an annual report, only a requirement to produce *quarterly* reports.

  In addition, it would appear that the *annual* reporting requirement in clause 19 has been superseded by a requirement in RG 267 that the Independent Assessor must report "publicly every *six months* on all complaints received, findings or recommendations made and outcomes achieved[15] (our emphasis). ASFA had previously submitted that more frequent public reporting was required and therefore welcomes this change. Clause 19 will need to be updated to reflect the reporting frequency required by RG 267, and clause 18 should be updated to reflect all reports the Assessor is required to produce.

- RG 267 also requires the Independent Assessor to report to the AFCA Board *and to ASIC* on a quarterly basis[16]. It is unclear from RG 267 whether the Assessor is to report directly to ASIC or indirectly through the AFCA Board (noting that the draft Rules and ToR make no reference to the Assessor reporting directly to ASIC). ASFA considers that the Independent Assessor should be empowered to report directly to ASIC, rather than submitting its reports via the AFCA Board. This would enhance the independence of the Assessor's reporting function.

  RG 267 indicates that in assessing whether AFCA has met the requirements for efficiency and effectiveness over time, ASIC will consider factors including ASIC's implementation of recommendations made by the independent assessor[17]. This review process effectively represents the only potential for consequences to flow from AFCA's rejection of recommendations made by the Independent Assessor. As a result, it is critical that ASIC receives a sufficiently regular and detailed flow of information *directly* from the Independent Assessor.

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[14] Section 4 of the *Treasury Laws Amendment (Putting Consumers First — Establishment of the Australian Financial Complaints Authority) Act 2018* requires the Minister to cause an independent review of the operation of the amendments made by that Act to be undertaken as soon as practicable after 18 months after the day from which amendments made by Part 4 of Schedule 1 of the Act apply. The *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Commencement Instrument (No. 2 of 2018)* sets that date as 1 November 2018.

[15] RG 267.215(j)

[16] RG 267.215(i)

[17] RG 267.136 – RG 267.137

- As indicated in our response to ASIC's recent consultation on the draft version of what has become RG 267[18], ASFA is concerned that the publication of only high-level information about the Independent Assessor function will not provide sufficient detail about AFCA's performance. AFCA has been proposed as a body that will deliver improved outcomes in terms of efficiency and cost effectiveness, as compared to the existing EDR bodies. Further, AFCA will be entirely funded by its member financial firms. In this context ASFA considers it reasonable for those firms to have access to reporting from the independent assessor that is transparent and detailed.

D.12.3 No time limit for AFCA to consider a service complaint

The draft Rules provide that AFCA must respond to a person who has expressed dissatisfaction with AFCA's complaint handling service "within a reasonable time" [19]. No indicative timeframe is specified.

Financial firms are subject to extensive complaints handling obligations, imposed via the *Corporations Act 2001* and ASIC Regulatory Guide RG 165 (and, for the present time, section 101 of the SIS Act)[20]. It would be appropriate, in ASFA's view, for the body charged with resolving financial services complaints to also be held to some rigour when faced with a complaint regarding its own performance. ASFA considers that AFCA should be required to have in place procedures to respond to expressions of dissatisfaction with its complaints handling service within 45 days.

D.12.4 No criteria for appointment of the Independent Assessor

The draft Rules provide that an Independent Assessor is to be appointed by the AFCA Board, but do not specify any criteria in relation to such an appointment—for example, what qualifications and experience the Independent Assessor should possess, how any potential conflicts of interest will be managed, and whether the Assessor is to be appointed on a personal basis or whether a firm or company may be appointed. RG 267 provides no additional clarification, stating only that the independent assessor must "be independent with appropriate qualifications and experience"[21].

ASFA considers it important that all stakeholders can be confident that the Independent Assessor is appropriately qualified and experienced to undertake this important role and that their independence is protected. We recommend that additional material is inserted into the draft Rules and/or ToR to document the criteria that will be applied in appointing the Independent Assessor.

D.12.5 Recommendation of compensation by Independent Assessor

The draft Rules indicate that where the Independent Assessor upholds a service complaint against AFCA, it must make a written recommendation as to the action that AFCA should take. Rule A.16.3 further indicates that:

> This may include compensation if an unusual degree of distress or inconvenience has been incurred by the person who escalated the complaint to the Independent Assessor (capped at the maximum amount that may be awarded under these rules for non-financial loss). The Independent Assessor cannot make a recommendation that AFCA give consideration to re-opening, changing or correcting a determination or other finding issued by AFCA about the merits of a complaint, or AFCA's jurisdiction.

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[18] ASFA, Response to Consultation Paper 298: Oversight of the Australian Financial Complaints Authority – update to RG 139, 6 April 2018

[19] AFCA, *Rules of Complaint Resolution Scheme*, 1 June 2018 (Draft Rules), Draft Rule A.16.1

[20] The relevant aspects of section 101 have been repealed by the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* however ASIC is continuing to treat them as in effect until it has finalised new internal dispute resolution requirements.

[21] RG 267.215(c)

ASFA is of the view that cases in which an award of compensation may be considered should be extremely rare. We do, however, have a number of concerns in relation to Rule A.16.3. Firstly, it is implicit that any such compensation would be payable by the AFCA scheme — and thereby indirectly funded by member firms. There may be circumstances where it is appropriate for a complainant who has been disadvantaged due to improper handling of a complaint receive compensation, however it is equally important that there is transparency over the outcomes of service complaints and that AFCA is accountable to its member firms for its performance. These are matters that will need to be considered further in upcoming consultations on the AFCA funding model.

Secondly, Rule A.16.3 adopts as a threshold for compensation the maximum award for non-financial loss in relation to a dispute between a complainant and a member firm, yet the service complaint will relate only to AFCA's handling of the dispute and will be *wholly unrelated* to that underlying dispute. There does not appear, to ASFA, to be any logical basis for aligning these thresholds. We recommend that compensation guidelines more directly related to AFCA's complaints handling are developed and incorporated into the Rules. Should this recommendation not be accepted, we note that compensation for non-financial loss is specifically excluded for superannuation complaints[22]. To the extent that there is an intention that compensation is available in respect of a service complaint relating to AFCA's handling of a superannuation complaint, this should, in ASFA's view, be clarified in Rule A16.3.

D.12.6 Non-binding nature of Independent Assessor recommendations

While ASFA welcomes the embedding of an independent assessor function within AFCA, we are of the view that careful monitoring will be needed to ensure it represents an effective process for the consideration of service complaints, and not merely a process with no outcome.

We note that the Independent Assessor's recommendations are not binding on AFCA[23]. Where the Chief Ombudsman does not agree with the assessor's recommendation, the matter will be referred to the Chair of the AFCA Board, who will make a final decision or refer it to the Board for a final decision[24]. Acceptance or rejection of the recommendation will then be communicated to the complainant, the Independent Assessor and the Chief Ombudsman[25].

There is no recourse for the complainant if a recommendation is not accepted. Significantly, there is no requirement for either the Chief Ombudsman, or the AFCA Chair or Board, to provide reasons for their decision — in contrast, the process in place for the FOS UK independent assessor function requires reasons for a decision to reject a recommendation must be provided both to the independent assessor and the party making the complaint, and published in the annual director's report.

As indicated in our response to ASIC's recent consultation on an update to Regulatory Guide 139[26], ASFA considers that AFCA should be required to report on its implementation of recommendations by the independent assessor on an 'if not, why not' basis. These reports should be made available to all stakeholders, via the AFCA website, on at least an annual basis.

[22] Draft Rule D.3
[23] Draft Rule A.16.5
[24] AFCA, *Independent Assessor Terms of Reference*, 1 June 2018 (draft IA ToR), clause 16
[25] Draft IA ToR, clause 17
[26] ASFA, Response to Consultation Paper 298: Oversight of the Australian Financial Complaints Authority – update to RG 139, 6 April 2018

ASFA recommends that the draft Rules and Terms of Reference for the Independent Assessor function are amended to:

- ensure ASIC receives a sufficiently regular and detailed flow of information *directly* from the Independent Assessor to enable it to assess the effectiveness of the Independent Assessor function
- clarify the extent and frequency of reporting by the Independent Assessor to AFCA, and to the public
- set a timeframe (such as 45 days) for AFCA to respond to expressions of dissatisfaction with its complaints handling service
- require the AFCA Board to provide reasons for rejecting a recommendation by the Independent Assessor, and to publicly report on its implementation of recommendations on an 'if not, why not' basis
- document the criteria that will be applied in appointing the Independent Assessor.

ASFA further recommends that:

- public reporting by the AFCA independent assessor, and by AFCA in relation to the independent assessor function and outcomes, should be at least as detailed as that provided in relation to the FOS UK independent assessor
- the independent assessor function should be specifically reviewed as part of the statutory review of the AFCA scheme to be undertaken as soon as practicable after 1 May 2020.

D.13 The relationships giving rise to a superannuation complaint

Draft Rule B.1.1(d) states that a superannuation complaint about a death benefit payable from a regulated superannuation fund, annuity policy or RSA, must be submitted by "a person with an interest in the benefit".

This is more narrowly drafted than the current provisions of the S(ROC) Act. For example, the S(ROC) Act provides that a complaint that relates to payment of a death benefit may only be made by a person if:

(i) the person has an interest in the benefit; or

(ii) the person claims to be, or to be entitled to benefits through, a person referred to in subparagraph (i); or

(iii) the person is acting for a person referred to in subparagraph (i) or (ii)[27].

This drafting limits the extent of the jurisdictional analysis that the SCT must undertake prior to accepting a complaint —it is sufficient that the person is, *or claims to be*, entitled to the benefit.

We acknowledge that Rule B.1.1(d) reflects new subsection 1056(1) of the Corporations Act, which does not mirror the wording of the S(ROC) Act.

We note, however, the implied outcome is that AFCA will have to be satisfied that a person has an interest in a death benefit earlier than is currently the case. This is likely to represent a significant process change for trustees. We recommend that AFCA provides guidance, in its Operational Guidelines, on how it intends to approach assessment of a person's eligibility to lodge a complaint.

ASFA recommends that to the extent AFCA's process for assessing a person's eligibility to lodge a superannuation complaint will differ from the process currently applied by the SCT, clarification is provided in the Operational Guidelines.

[27] S(ROC) Act, subsection 15(1)(a)

D.14 When AFCA will exclude a complaint

D.14.1 Discretion to not accept certain complaints if not submitted within 2 years

Draft Rule B.4.1.5 proposes that AFCA will generally not handle certain types of superannuation complaints unless the complaint was submitted to AFCA within two years of the date of the IDR response. This is in contrast to the SCT's current discretion to treat a complaint as withdrawn if more than 12 months since the decision/conduct complained of[28].

ASFA understands this discretion has been used by the SCT only on very rare occasions, and typically in cases where the delay in bringing the complaint is such that relevant records are no longer available.

ASFA is comfortable with the extension of the discretion proposed by the draft Rules. However, we expect that it would only be exercised in cases where the delay prejudices AFCA's ability to effectively resolve the complaint. We recommend that this is clarified in the Operational Guidelines.

ASFA recommends that the circumstances in which AFCA may exercise the discretion provided in Rule B.4.1.5 are clarified in the Operational Guidelines.

D.14.2 Complaints before, or already dealt with by, another dispute resolution forum

In previous submissions, ASFA has highlighted the need to ensure AFCA is able to exclude complaints that have previously been dealt with in another forum — such as the SCT — and we welcome the mandatory exclusion for such complaints in draft Rule C.1.2(d).

We note however that this exclusion applies only to complaints that have "already been dealt with" and would not address complaints that are *currently* before another forum. This has caused some concern for superannuation trustees, given the SCT will continue to operate for a period of around two years to clear its existing caseload.

We understand from discussions with AFCA representatives that should a complainant seek to commence a complaint with AFCA in relation to the same subject matter and facts as a complaint currently before the SCT, AFCA would have recourse to its discretion not to handle the complaint, in draft Rule C.2.2(a). That Rule permits AFCA to consider excluding a complaint if there is a more appropriate place to deal with the complaint. We further understand that AFCA will consider a complaint to have been "dealt with" if it has been decided on its merits. In circumstances where a complaint was before the SCT but withdrawn, AFCA would retain the ability to consider whether it falls within AFCA's jurisdiction and Rules.

ASFA is of the view this is a workable approach, but considers it would be helpful for trustees and consumers alike if this was clarified in the Operational Guidelines and, potentially in other material such as a Frequently Asked Question.

ASFA recommends that AFCA provides clarification of when it will consider a complaint to have been "dealt with" by another forum, and how it will exercise its discretion not to handle complaints under Rule C.2.

D.15 Extension of time limits

Draft Rule B.4.4 .2 provides that AFCA "may handle a complaint after the time limits set out in rules B.4.1.5, B.4.2 and B.4.3 if AFCA considers that special circumstances apply", but provides no indication of what may constitute "special circumstances". ASFA considers that this should be clarified in the Operational Guidelines.

[28] S(ROC) Act, section 22(3)(a)

ASFA recommends that clarification is provided, in the Operational Guidelines, of what will constitute 'special circumstances' such that AFCA will consider a complaint outside the time limits set out in rules B.4.1.5, B.4.2 and B.4.3.

D.16 Types of remedies available — non-superannuation complaints

Draft Rule D. 2.1 provides that an AFCA decision maker may decide that the financial firm or the complainant must undertake a course of action to resolve a complaint. This may include "in relation to a default judgment, not enforcing the default judgment"[29].

Some ASFA members have raised a concern that denying a party to an AFCA complaint a legal right would appear to be outside AFCA's legislative power. A similar concern applies in relation to the restrictions contemplated in A7.1 and A7.2 of the Draft Rules.

ASFA recommends that AFCA clarifies the intended operation of Rules A.7.1, A.7.2 and D.2.1.

D.17 Timeframes for completion of actions by financial firms

The draft Rules do not specify timeframes for the provision of information and/or filing of submissions with AFCA, nor for objecting to decisions of AFCA. This is in contrast with the S(ROC) Act, which specifies 28 days for the provision of information[30] stipulates that "a reasonable period" must be allowed for parties to make written submissions[31].

ASFA appreciates the flexibility in the approach taken in the draft Rules and anticipates that there is an intention to specify timeframes in the Operational Guidelines. While we expect that AFCA will act reasonably when specifying these timeframe, we are of the view that certainty and efficacy would be improved if some timeframes were specified in the Rules.

For example:

- the timeframe for a complainant to object to a decision of AFCA should be specified in draft Rule A.4.5 — ASFA suggests that this should be no greater than 28 days
- the timeframe for the financial firm to resolve a complaint under the 'refer back' process should be nominated in draft Rule A.5.3 — this should be consistent with ASIC's regulatory guidance (and see section D.4 of this submission)
- the timeframe for providing information to AFCA should be specified in draft Rule A.9.1 — ASFA suggests this should be 28 days, consistent with the S(ROC) Act
- the timeframe for the parties to choose whether to accept a preliminary assessment should be specified in draft Rule A.12.2 — ASFA suggests this should be 28 days as there is a need to allow sufficient time for the financial firm (or its authorised delegate) to consider the assessment.

In the absence of specifying timeframes, ASFA recommends that the Rules should include an obligation for AFCA to act reasonably when setting timeframes, and clearer provisions regarding reasonable grounds for objections to timeframes by financial firms.

[29] Draft Rule D.2.1(h)
[30] S(ROC) Act, section 24
[31] S(ROC) Act, section 32