

Consultation on Proposed AFCA Rules

1 June 2018

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Overview

The Australian Financial Complaints Authority (AFCA) will commence on 1 November 2018, providing consumers and small businesses with easy access to a single scheme to resolve complaints about products and services provided by financial firms. AFCA will replace the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT) (predecessor schemes).

AFCA has been established following a review of financial system external dispute resolution by a panel chaired by Professor Ramsay (the Ramsay Review). The Corporations Act 2001 has been amended to establish a comprehensive legislative framework for AFCA.

The establishment of AFCA is an important reform that will enhance access for consumers and small businesses to fair, efficient, timely and effective free dispute resolution. AFCA will have greater powers of redress, primarily in relation to increased monetary limits and small business jurisdiction, compared with its predecessor ombudsman schemes. The new framework incorporates the key elements of the industry ombudsman model, as well as statutory powers for superannuation complaints.

Working closely with Treasury Transition Team headed by Dr Malcolm Edey, ASIC and the SCT, AFCA has drafted Rules that specify its jurisdiction and complaint resolution approach. Those Rules reflect mandatory requirements in:

- the Corporations Act 2001 as amended by the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* [the “AFCA Act”]: [AFCA Act](#)
- the Minister for Revenue and Financial Services’ media release on 14 February 2018, announcing the definition of small business for the purposes of determining who may make a complaint to AFCA and the monetary limits for the purposes of compensation awarded by AFCA: [Media Release 14 February 2018](#)
- conditions of authorisation for AFCA issued by the Minister in April 2018
- draft updated ASIC Regulatory Guide 139 (RG 139) released 5 March 2018: [CP 298 and Update to RG 139](#).

The proposed AFCA Rules are available on AFCA’s website with this paper. These are being released for public comment.

AFCA's approach to drafting the Rules

As well as focusing on the mandatory requirements, AFCA has sought to draft Rules that will enable highly effective dispute resolution as espoused in the Ramsay Review Report. The drafting utilises plain language and a structure that aims to assist accessibility. Important strengths of the predecessor schemes are retained, with provisions that have worked well in those schemes replicated in AFCA's Rules.

The draft AFCA Rules have been progressively developed over a number of months. In addition to consultation with the Treasury Transition Team and ASIC, external expertise in the superannuation and broader financial services sector has been utilised, including:

- Pamela McAlister, a member of SCT Advisory Council and a financial services lawyer specialising in Superannuation Law.
- Debra Russell, a legal and regulatory compliance Consultant who has been involved in the drafting of the FOS's first Terms of Reference and independent reviews of industry ombudsman schemes including FOS and CIO.

Some limited high level consultation with industry and consumer advocates has been undertaken in the development period. Consultation on some key issues was also undertaken by the AFCA Transition Team in November 2017: [Establishment of the Australian Financial Complaints Authority](#).

Mapping to existing provisions

The draft AFCA Rules have been mapped against the FOS Terms of Reference and CIO Rules to compare and reconcile any differences. In the handful of cases where there were differences in coverage between FOS and CIO, the draft AFCA Rules incorporate the higher standard.

The substantive provisions of the Superannuation (Resolution of Complaints) Act were also mapped against the draft AFCA Rules and the AFCA legislation for comparative purposes and this informed the drafting of the superannuation provisions.

The outcomes of these mapping exercises are available on the AFCA website.

The draft AFCA Rules have also been mapped against the eleven recommendations made by the Ramsay Review Panel and which were accepted by Government.

The Rules also seek to reflect proposed changes to RG 139 which ASIC has recently consulted on.

Scope of consultation

This consultation is a focused consultation covering a limited number of issues.

AFCA is not seeking comment about provisions of the AFCA Rules that meet mandatory requirements. Accordingly AFCA is not consulting about matters such as the definition of small business or the monetary limits for compensation.

Nor does this consultation encompass any further extension or change to AFCA's jurisdiction beyond the Government's reform program. As a result, the jurisdictional exclusions are outside the scope of this consultation. Changes to these would require detailed consideration and extensive consultation after the new scheme has commenced.

Rather this paper summarises significant changes in the AFCA Rules compared with those of predecessor schemes, and invites comment in particular on several areas, including the following:

- whether the Superannuation Complaints Tribunal's jurisdiction has been adequately incorporated into the AFCA Rules, and
- reporting obligations.

A number of consultation questions have been set out in this paper. Feedback is invited on the issues raised in those questions.

The consultation process

AFCA will meet with stakeholders, including industry, consumer groups and regulators to discuss the proposed Rules. It also invites individual written submissions (see below for how to make a submission).

Following the consultation, the AFCA Board will consider all submissions and make any appropriate changes to the draft Rules. The Rules will then be submitted to ASIC in August 2018 for final review and approval, which may result in further changes prior to the Rules being settled and released. We anticipate that the final AFCA Rules will be released by early September 2018.

Once finalised, the Rules will govern AFCA's jurisdiction and complaint handling processes.

How to make a submission

If you would like to comment on the proposed AFCA Rules, please email your submission to submissions@afc.org.au by Friday 29 June 2018.

We will publish submissions on our website. If you do not want your submission published, please mark both the submission and the covering email as "confidential".

For more information please refer to the AFCA website at www.afc.org.au or contact Mike D'Argaville on 03 8623 2004 or at submissions@afc.org.au

Background

The AFCA Act does not set out AFCA's jurisdiction or powers (except for superannuation complaints) or the procedures it should use to resolve complaints.

AFCA's Rules set out what complaints AFCA can consider, the procedures it can use to resolve those complaints, and related matters. The Rules will act as a contract between AFCA, financial firms that belong to the AFCA scheme, and consumers and small businesses that submit complaints to AFCA about those firms.

Design principles

The Rules have been drafted with the following guiding principles in mind:

- **Consistent with legislation** – The Rules must meet the requirements of the legislation governing AFCA.
- **Meet Minister's and ASIC's requirements** – The Rules must satisfy any requirements of the Minister and ASIC. This includes any guidance the Minister has issued as part of the scheme's authorisation and ASIC requirements, including existing/new RG 139 and RG165 (insofar as it relates to EDR) requirements.
- **Best practice** – The Rules aim for best practice in achieving benchmarks for external dispute resolution schemes (fairness, independence, accessibility, efficiency, effectiveness, accountability). These benchmarks are also enshrined in the legislation (s.1051A).
- **No material reduction in scope** – There must be no material reduction in the scope of the Rules, when compared with coverage under the Terms of Reference/Rules/legislative provisions of the existing three schemes. Where there is a difference in existing coverage, the higher standard should prevail.
- **Balance between consistency and speciality** – The Rules aim to strike an appropriate balance between having, where appropriate, common provisions and application across financial complaint types, while also taking account of the differences in products and services across the financial industry.
- **Plain English and accessible** – The Rules must be structured and worded in line with plain English principles and aim to be an accessible document.
- **'Tried and tested' principle** – Provisions of predecessor scheme Terms of Reference/Rules/legislation that are well established, work effectively and efficiently and reflect good dispute resolution practice should be incorporated in the AFCA Rules.

Structure of the AFCA Rules

The AFCA Rules have been structured to make them user friendly, and to make it as easy as possible to find the relevant provisions, while setting out AFCA's jurisdiction and processes in enough detail to provide complainants and financial firms with certainty.

The overall structure is made up of five sections

- A. The complaint resolution process
- B. Requirements for a complaint
- C. What types of complaint are excluded
- D. What remedies AFCA can award
- E. Definitions

Consistent with the established practice of both FOS and CIO, AFCA will produce Guidelines which will set out the detail and further guidance on how AFCA will interpret and apply the Rules. These will be publicly available on AFCA's website and will be released prior to AFCA commencing on 1 November 2018.

Consultation questions

1. Do the AFCA Rules achieve a reasonable balance between user-friendliness and detail?
2. Before the Table of Contents is a "quick guide" summarising the key aspects of the Rules and their location. Is this helpful?
3. The Rules contain a number of 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). Are the tables helpful in explaining these areas? How could they be improved?

Principles governing AFCA

Sections 1051(4) and 1051A of the Corporations Act 2001 set out principles and general considerations which AFCA must follow. ASIC's current RG 139 and the proposed changes to be made to it by ASIC also set out principles which will apply to AFCA's resolution of complaints.

Rule A.2 sets out the principles that will underpin the AFCA scheme. Rule A.14 sets out AFCA's decision-making approach, including the principles it should apply¹.

AFCA must comply with the principles and general considerations set out in the AFCA Act and RG 139. Rule A.2 incorporates these requirements, along with other existing principles which underpin the predecessor Ombudsman schemes.

Superannuation complaints

The AFCA Act inserts a new Part 7.10A (sections 1050-1058) in the Corporations Act 2001 with three Divisions. Division 3 (comprising sections 1053-1058) applies only to superannuation complaints and sets out:

- What is a superannuation complaint
- AFCA's additional powers to resolve superannuation complaints
- Criteria for deciding superannuation complaints
- Claim staking provisions for death benefit complaints
- The parties' rights of appeal and confidentiality in respect of superannuation complaints.

These requirements largely preserve the current decision-making framework at the Superannuation Complaints Tribunal.

Beyond defining what a superannuation complaint is, the AFCA Act does not prescribe AFCA's jurisdiction over these complaints. This has provided room for the AFCA Rules to largely adopt the jurisdiction of the current SCT as set out in the Superannuation (Resolution of Complaints) Act 1993 and Regulations.

¹ For superannuation complaints, those principles are mandated by section 1055 of the Corporations Act, as inserted by the AFCA Act.

This includes:

- the SCT's time limits (except for an alignment of the time limits for disability complaints as between superannuation trustees and RSA providers)²;
- the fact that, while there is no monetary limit on superannuation complaints, AFCA may only make a determination for the purpose of removing any unfairness or unreasonableness that is found to exist; and
- the circumstances where the SCT may currently 'withdraw' a complaint, which have been incorporated into the AFCA Rules via discretions available to AFCA to exclude complaints.

A minor exception to this principle of mirroring the current SCT jurisdiction relates to any complaint submitted more than 12 months after the decision or conduct complained of (other than a decision of a trustee, RSA provider, insurer or other decision maker to pay a disability benefit because of total and permanent disability). The SCT has an express discretion under section 22(3)(a) of the Superannuation (Resolution of Complaints Act) 1993 to exclude these complaints. AFCA will not have this specific discretion, but rather a general time limit of two years from the date of receiving the trustee's IDR response will apply. This change is consistent with the general time limit applicable in other predecessor schemes. In addition, AFCA will have a general discretion not to handle a complaint if it considers this course of action appropriate (see Rule C.2.1)³.

In line with the findings of the Ramsay Review relating to superannuation complaints, the AFCA Rules provide flexibility in the processes and methods applied to resolve superannuation complaints. 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.

² For complaints about a decision of an RSA provider relating to payment of a disability benefit the time limit of one year has been extended to reflect the same time limits applicable for superannuation trustees.

³ AFCA will not exercise its discretion to exclude a complaint lightly. The discretion will only be used in cases where there are compelling reasons for deciding that AFCA should not consider a complaint.

Sections in the Rules that are specific to superannuation complaints, which include the incorporation of provisions set out the Corporations Act, include the following:

Section	Detail
A5.2(b)	AFCA will not normally refer superannuation complaints relating to the payment of a death benefit back to a financial firm for further IDR
A.5.4	Notifying AFCA of persons with an interest in a death benefit
A.6.1	Joining other parties
A7.3 and A7.4	A superannuation complaint does not prevent the implementation of the trustee's decision unless AFCA decides otherwise after providing procedural fairness
A.9.4	Additional powers to obtain information and require attendance at conciliation conferences
A.11.3	Additional powers to require confidentiality for superannuation complaints
A.14.1	Decision making approach for superannuation complaints
A.15.1	Effect of superannuation determinations
B.1.1-1.2	Relationship giving rise to a superannuation complaint (pre-condition)
B.4.1	Time limits for superannuation complaints ⁴
C.1.4-1.5	Exclusions applying specifically to insurance and investment complaints including superannuation complaints
D.1-D1.3	Types of remedies for superannuation complaints
E.1	Definitions of Financial Firm (paragraph (b)) and Superannuation Complaint

Consultation question

4. Are there aspects of the Superannuation Complaints Tribunal's jurisdiction that have not been adequately incorporated into the AFCA Rules?

⁴ See also summary table in B.4.5.1

Monetary jurisdiction and powers to award compensation

The Ramsay Review recommended significant increases to the monetary jurisdiction of the new financial services dispute resolution scheme and the amount of compensation it could award compared with the predecessor schemes. These recommendations were accepted by the Commonwealth Government.⁵

Announcing the passage of the AFCA Act⁶, the Minister for Revenue and Financial Services also set out additional required increases for AFCA's jurisdiction in non-superannuation complaints and its power to award compensation, compared with the predecessor schemes. These include the following:

- small business primary production producers – defined in accordance with the Income Tax Assessment Act 1997 – will have access to compensation of up to \$2 million for disputes about credit facilities of up to \$5 million;
- the cap on income stream insurance product disputes will be increased from \$8,300 to \$13,400 per month;
- the cap on uninsured third party motor vehicle claims will increase from \$5,000 to \$15,000; and
- the compensation cap for general insurance broker disputes will be increased from \$174,000 to \$250,000.

The monetary limits to AFCA's jurisdiction are set out in Rules C.1.2(e) and C.1.3, and the jurisdictional limits and compensation caps are outlined in a table in Rule D.4. The limits and caps are all subject to indexation in accordance with Rule D.4.3. They are intended to give effect to the above requirements.

- This aspect of the draft AFCA Rules is not open for consultation and is provided by way of background and information only.

⁵ [Review of the financial system external dispute resolution and complaints framework, Final report, 3 April 2017](#) . See particularly Chapter 8 and Recommendation 4.

⁶ Kelly O'Dwyer, Minister for Revenue and Financial Services: [Media Release 14 February 2018](#)

Small business

In accordance with the Minister's announcement following the passage of the AFCA Act, the definition of a small business to be applied by AFCA has been redefined and expanded so that any business with fewer than 100 staff can access AFCA – including primary producers as defined in the Income Tax Assessment Act 1997. The Minister also issued guidance on the levels of AFCA's jurisdictional limits and powers to award redress (discussed above) for small businesses and primary producers.

Consistent with this:

- The Rules define Small Business as a business that had less than 100 employees at the time of the act or omission by the Financial Firm that gave rise to the complaint, including a Primary Producer.
- Primary Producer has the same meaning as under section 995(1) of the Income Tax Assessment Act 1997.
- This aspect of the draft AFCA Rules is not open for consultation and is provided by way of background and information only.

Other aspects of AFCA's jurisdiction and powers

Other than increasing AFCA's monetary limits and applying the small business definition as set out above, AFCA has taken the following approach to its jurisdiction for dealing with complaints:

- There should be no reduction in access to external dispute resolution compared with the existing EDR schemes and the Superannuation Complaints Tribunal.
- Where there are differences between the existing schemes, to avoid reducing access the Rules adopt the jurisdiction of the scheme with the more expansive jurisdiction.
- Other than as required by the legislation, the Minister or ASIC, there is no further increase to AFCA's jurisdiction compared with existing schemes, except any areas subsequently arising following consultation with stakeholders.

In relation to AFCA's general discretion to exclude a complaint, which is an existing provision of predecessor Ombudsman scheme's Terms of Reference and Rules, in accordance with the AFCA scheme authorisation requirements, additional guidance regarding how this discretion will be exercised has been included in the AFCA Rules in Rule C.2.1.

Rule C.2.1 provides that that AFCA will not exercise its discretion to exclude a complaint lightly, with the discretion to be used only where there are compelling reasons for deciding that AFCA should not consider a complaint.

AFCA's jurisdiction is set out in sections B and C of the Rules.

Procedures

In line with the findings of the Ramsay Review, the Rules provide for flexibility in the methods used by AFCA to resolve complaints. These are set out in Rules A.5 to A.15, and incorporate the existing processes of the predecessor schemes as appropriate.

The Rules provide for complaints received by AFCA to be initially referred to the financial firm for either an opportunity to complete IDR (if it has not been completed prior to a complaint being lodged with AFCA), or a final opportunity for the complaint to be resolved directly by the financial firm, before AFCA commences investigating the complaint⁷.

Timeframes provided by AFCA for IDR to be completed will be consistent with existing IDR timeframes in ASIC RG 165 and the existing 90 day IDR timeframe for superannuation complaints. The timeframe provided for a financial firm to resolve a complaint directly with the complainant when IDR has already been completed at the time a complaint is lodged with AFCA will normally be 21 days.

If the complaint does not resolve at this initial stage, AFCA will begin its process of assessing the complaint and collecting relevant information. Procedural fairness will be afforded to both parties.

If at a particular stage AFCA reaches the view that a complaint is without merit or no loss has been suffered by the complainant, AFCA may tell the parties that it intends to cease handling the complaint. An objection opportunity will be provided to the complainant⁸.

AFCA's enquiry and facilitation process may result in the parties agreeing to a resolution. If not, AFCA may provide a non-binding preliminary assessment of a complaint. If that is not accepted by the parties, AFCA will then proceed to decide the complaint through a Determination by an AFCA decision maker (an Ombudsman, Adjudicator or Panel).

⁷ This process will not normally apply to death benefit complaints.

⁸ AFCA will not exercise its discretion to exclude a complaint lightly. The discretion will only be used in cases where there are compelling reasons for deciding that AFCA should not consider or further consider a complaint.

AFCA may also proceed directly to a Determination by an AFCA decision maker if it considers a complaint is unlikely to resolve by other means.

Further detail on the procedures AFCA will use to resolve complaints, including timeframes, will be set out in the Guidelines to the Rules. AFCA will also release other publications and material in due course to provide stakeholders with additional guidance on how it will resolve complaints.

Reporting obligations

Section 1052E of the Corporations Act sets out AFCA's obligation to report contraventions, breaches and systemic issues to the relevant regulators including ASIC, APRA and the Commissioner of Taxation.

ASIC has recently consulted on proposals for the reporting obligations it may require of AFCA⁹, and will be providing further guidance in due course on the reporting framework.

To the extent that AFCA's reporting obligations are dealt with in the Rules, these are set out in Rules A.17-A.20. Further amendment to these provisions may subsequently be required following any further direction and guidance from ASIC as to AFCA's reporting obligations under the revised RG 139. These requirements will also be reviewed from time to time and in accordance with requirements of ASIC and relevant regulators.

Further guidance will also be provided in the AFCA Operational Guidelines.

Consultation question

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

⁹ ASIC [CP 298 and Update to RG 139](#), "Oversight of the Australian Financial Complaints Authority"

Independent Assessor

It is a mandatory legislative requirement that AFCA have an independent assessor. As part of its recent consultation on RG 139 changes, ASIC also outlined proposed guidance to be included in RG 139 regarding the role and function of the independent assessor.

The independent assessor will play an important role in supporting AFCA's quality assurance and accountability in the service it provides.

The role of the independent assessor is to consider whether AFCA has provided an appropriate standard of complaints handling service, when a party to a complaint (complainant, financial firm or other user of the AFCA scheme) is dissatisfied with the service provided by AFCA.

AFCA will have a complaints and feedback process, which a user of the AFCA service will be able to utilise when they are dissatisfied with standard of the service provided by AFCA in dealing with a complaint. A user will be able to lodge a complaint or provide feedback about AFCA's service online, by phone, or in writing. Details of AFCA's complaints and feedback process will be publicly available on AFCA's website.

The independent assessor function provides an avenue of independent review, as part of AFCA's complaints and feedback process for dealing with complaints about its service.

When a user of the AFCA scheme is dissatisfied with AFCA's response to their complaint about AFCA's service, the user may escalate their complaint to the independent assessor.

The independent assessor may identify and, as appropriate, make recommendations or provide remedies to service issues identified in complaints made to the independent assessor. The independent assessor may also make recommendations to AFCA in response to service issues identified more generally in complaints made to AFCA about its service that are considered by AFCA through its complaints and feedback process, and are escalated to the independent assessor.

The function of the independent assessor will not be to review the merits of an AFCA decision, but to independently review complaints about service issues in AFCA's complaint handling. The role is not an appeal or review mechanism for AFCA's decision and judgments on the facts or merits of a dispute. Accordingly, the Independent Assessor does not consider the substantive outcome of a complaint, such as a determination or other finding issued by AFCA about the merits of a complaint or jurisdiction.

The independent assessor is appointed by the AFCA Board. Rules A.16.1-16.4 set out the role and function of the independent assessor.

The independent assessor will also operate pursuant to a Terms of Reference which are separate to the AFCA Rules and will also be subject to ASIC approval.

Further detail on the role and function of the independent assessor will also be outlined in the AFCA Operational Guidelines

The independent assessor will report directly to the AFCA Board and ASIC quarterly and will also publicly report in accordance with any requirements in RG 139.

The independent assessor draft Terms of Reference are available on the AFCA website for review, as part of this consultation.

We have sought to align the provisions of the Rules relating to the independent assessor, and the independent assessor Terms of Reference with the requirements in RG 139, following ASIC's recent consultation and feedback received. It is not intended that this consultation revisit the views and issues stakeholders have identified in their responses to RG 139 consultation or the previous consultation undertaken by the AFCA Transition Team in November 2017.

General

AFCA welcomes feedback from stakeholders in relation to any other general issues concerning the Rules that are not covered by the legislative or other mandatory requirements for the scheme's operation.

Consultation question

6. Are there any other issues that require consideration?

Summary of consultation questions

Structure and ordering of the AFCA Rules

1. Do the AFCA Rules achieve a good balance between user-friendliness and detail?
2. Before the Table of Contents is a “quick guide” summarising the key aspects of the Rules and their location. Is this helpful?
3. The Rules contain a number of 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). Are the tables helpful in explaining these areas? How could they be improved?

Superannuation complaints

4. Are there aspects of the Superannuation Complaints Tribunal’s jurisdiction that have not been incorporated into the AFCA Rules?

Reporting obligations

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

General

6. Are there any other issues that require consideration?