



AUSTRALIAN INSTITUTE of
SUPERANNUATION TRUSTEES

Australian Financial Complaints Authority – Proposed Rules

4 July 2018

AIST Submission to AFCA

AIST

The Australian Institute of Superannuation Trustees is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public-sector funds.

As the principal advocate and peak representative body for the \$1.2 trillion profit-to-members superannuation sector, AIST plays a key role in policy development and is a leading provider of research.

AIST provides professional training and support for trustees and fund staff to help them meet the challenges of managing superannuation funds and advancing the interests of their fund members. Each year, AIST hosts the Conference of Major Superannuation Funds (CMSF), in addition to numerous other industry conferences and events.

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Executive summary and recommendations

We welcome the opportunity to comment on the proposed Australian Financial Complaints Authority (AFCA) Rules.

The AFCA Rules form an integral part of the external dispute resolution framework and it is essential that the proposed rules adequately replicate existing arrangements to ensure that consumers are not worse off overall because of the transition to AFCA.

There are several issues detailed in this submission that must be resolved to ensure AFCA will be an appropriate, efficient and effective dispute resolution system.

We have made several recommendations and observations, the basis for which we outline in our submission. In summary they are:

Recommendation	Details
<p>AFCA must have adequate expertise</p>	<p>AFCA must detail steps that they are taking to ensure that during the transition phase they have the required expertise and resources to resolve complaints.</p> <p>The AFCA rules should go further to state that AFCA will have expertise, appropriate for the resolution of <i>superannuation complaints</i>.</p> <p>We question why it would be necessary for AFCA to seek expert advice and to charge Financial Firms for that additional expert advice. AFCA must collect data on the reasons why the experts were relied on, the frequency by which experts were engaged, and the total cost. They should also review the need for the provision no later than three years after the scheme comes into effect.</p>
<p>Further clarification about how financial advisers are treated under the new dispute resolution framework is necessary</p>	<p>The lack of clarity around the treatment of financial advisers increases confusion and there is a risk that consumers will suffer detriment because of the uncertainty.</p>

<p>Complaint referral</p>	<p>The rules should outline the criteria that AFCA will apply in deciding whether a complaint will be referred to the trustee to promote clarity.</p> <p>The referral function should also be reviewed within three years of the scheme commencing operation to ensure that it is achieving its objectives, particularly regarding superannuation complaints as opposed to other financial complaints.</p>
<p>Clear objectives required for publication of information</p>	<p>To improve the effectiveness of publication of data the rules should clearly detail the objectives of the reporting measures.</p>
<p>Appeal rights are not adequate</p>	<p>The loss of appeal rights appears not to be in the best interests of scheme participants. We request additional information about the operation of AFCA’s internal complaints framework to determine if it sufficiently replicates the current appeal rights of complaints.</p>
<p>Professional costs</p>	<p>AFCA should explain the rationale for requiring Financial Firms to pay legal and professional costs.</p>
<p>Industry engagement</p>	<p>Meaningful industry engagement and consultation should continue to occur.</p>

Key issues

Expertise

Transition expertise

During the transition phase and until the closure of the Superannuation Complaints Tribunal (SCT) there will be an increased need for experienced and qualified dispute resolution staff with superannuation expertise. We are concerned that the schemes may not have the required staff to resolve complaints satisfactorily which may result in poor outcomes.

AFCA must detail steps that they are taking to ensure that during the transition phase they have the required expertise and resources to resolve complaints.

Ongoing expertise

It is essential that AFCA has the requisite expertise (on an ongoing basis) to satisfactorily manage and resolve superannuation complaints. One of the strengths of the SCT is that it has specialised superannuation expertise which is necessary for effective dispute resolution because of the complexity of superannuation products. The quality of the SCT's staff was recognised in the Ramsay Review final report.¹

We believe such expertise is essential to protect consumers and stress it is essential that AFCA have highly qualified staff with superannuation experience.

The draft rules state that:

AFCA will...have appropriate expertise and resources to handle complaints submitted to it.²

While we agree with the draft provision, we believe that the unique, and complex nature of superannuation products warrants the rules going further to state that AFCA will have expertise, appropriate for the resolution of *superannuation complaints*.

¹ Treasury (2017). *Final Report: Review of the financial system external dispute resolution and complaints framework*. [online] p.9. Available at: <https://tinyurl.com/yc37fkvn> [Accessed 20 Jun. 2018].

² Australian Financial Complaints Authority (2018). *Rules of Complaint Resolution Scheme*. [online] p.6. Available at: <https://tinyurl.com/y6vnz9I7> [Accessed 20 Jun. 2018].

The rules should reflect the unique state of superannuation complaints because:

- AFCA can refer questions of law to the Federal Court, something that cannot be done for non-superannuation complaints.
- In relation to super complaints AFCA will be exercising legislative powers, rather than those set out in the rules. Examples of legislative powers exercisable by AFCA include:
 - Joining parties to a superannuation complaint.
 - Obtain additional information and documentation relevant to a superannuation complaint.
 - Requiring parties to attend conciliation conferences to assist in resolving a superannuation complaint.
 - Give directions.

We strongly support AFCA having these powers, because they are essential in ensuring superannuation complaints are resolved satisfactorily. Notwithstanding this, the legislative basis of these powers, and the consequences that flow following non-compliance, highlights the need for AFCA to have necessary superannuation expertise.

We also question the role of additional experts. The draft rules provide:³

AFCA may seek expert advice including from an AFCA appointed legal expert, industry expert, medical practitioner or building expert. AFCA may require the Financial Firm to pay or contribute to the cost provided that:

a) the fees of the expert are reasonable, having regard to the complexity of the complaint and usual market rates

b) the person has the necessary expertise.

Unless special circumstances apply, AFCA will not require a Financial Firm to contribute more than \$5,000 per complaint to the cost of expert advice obtained by AFCA.

It is unclear why it would be necessary for AFCA to seek expert advice and to charge Financial Firms for that additional expert advice. Financial Firms will already be paying AFCA for dispute resolution services, with the expectation that, in exchange for membership fees, AFCA will have suitably trained and expert individuals that can resolve the complaints.

³ Ibid 12-13.

AFCA Rules

We question the appropriateness of this provision however if the provision is deemed necessary, we request:

- AFCA collect data on the reasons why the experts were relied on, the frequency by which experts were engaged, and the total cost.
- AFCA review the need for the provision no later than three years after the scheme comes into effect. It would be expected that AFCA would be fully operational, with the full suite of expert staff three years after it opens.

We submit:

- AFCA detail the steps they are taking to ensure they have the required expertise and resources to resolve complaints during the transition phase.
- The AFCA rules should be amended to require AFCA to specifically have specialist superannuation expertise.
- AFCA clarify why the provision to allow the appointment of external experts is essential, given it is an operating principle for AFCA to have expertise to resolve complaints. AFCA should also collect data around the use of the provision and assess whether it is necessary within three years of commencing operations.

Financial advice

It is unclear how financial advisers are treated under the new dispute resolution framework.

Currently, fund members can complain about financial advice received by fund trustees (where those trustees are authorised to provide advice) and whether the complaint is heard at FOS or at the SCT will depend on the facts surrounding the advice.

Generally, if the advice was a 'decision of the trustee' it will be heard at the SCT whereas if it can be shown that the adviser was not acting as an agent of the trustee, the complaint can be heard at FOS.

We are concerned about the treatment of financial advice complaints at AFCA because it is unclear:

- Whether AFCA can hear a complaint about super related financial advice given by an entity that may be associated or related to the trustee, but is not the trustee.
- Whether financial advice complaints can be classified as a 'superannuation complaint' within in the meaning of the *Corporations Act 2001 (Cth)*, particularly when that advice is given by an agent of the trustee.

AFCA Rules

- How AFCA will resolve financial advice complaints without the additional legislative powers that attach to superannuation complaints (such as the power to join parties and request additional information and documentation).
- What the dispute resolution process for financial complaints will be.

It is critical that these issues are addressed and clarified because there is a real risk that consumers will suffer detriment because of the uncertainty.

AFCA must clarify how financial advice complaints will be treated.

Referral of complaints

The draft rules provide that:⁴

AFCA will refer the complaint back to the Financial Firm and set a timeframe for the Financial Firm to either resolve the complaint or to provide its position in relation to the complaint.

It is important for the trustee to have the opportunity to examine complaints in detail, however the rules should detail the criteria that AFCA applies when determining the appropriateness of investigating a complaint immediately and not referring that complaint to the fund. Outlining the criteria will assist trustees in allocating resources and developing processes to manage complaints.

The referral function should also be reviewed within three years of the scheme commencing operation to ensure that it is achieving its objectives, particularly regarding superannuation complaints as opposed to other financial complaints.

Publication of information

The draft rules provide that:⁵

To facilitate public reporting, AFCA must produce a report at least every twelve months and provide this to ASIC, the Financial Firms and the public via AFCA's website. This report must be a comprehensive summary and analysis of the data collected. Amongst other things, it must include statistical information about:

⁴ Ibid 8.

⁵ Ibid 20.

AFCA Rules

- a) the number of complaints submitted to AFCA per Financial Firm*
- b) the number of complaints closed per Financial Firm*
- c) the outcome of those complaints.*

We support AFCA having the ability to publish public reports detailing complaint numbers and outcomes. However, to improve the effectiveness of this measure we believe the rules should clearly detail the objectives of the reporting. We believe that the reporting could be used to:

- Improve the consumer protection framework – by providing the regulator insight into dispute resolution conduct and outcomes; and
- Provide insights to Financial Firms about dispute resolution, that can lead to the improvement of dispute resolution practices.

Any reporting of data submitted to AFCA should also avoid being misleading. There may be instances where a Financial Firm has an unusually large number of complaints submitted to AFCA however this may not be a consequence of poor internal dispute resolution handling, but rather due to factors such as:

- The Financial Firm making it clear to their customers that they can lodge a complaint at AFCA.
- The Financial Firm having many customers that can make complaints.

We believe that addressing these issues will help ensure that complaint reporting is meaningful.

Appeals

The *Corporations Act 2001 (Cth)* allows superannuation complainants to appeal a determination of AFCA to the Federal Court on questions of law.⁶ This provision does not allow complainants to appeal all decisions, including:

- Decisions that are not ‘determinations’ such as decisions about a complainant not meeting the standing requirements set out in the rules or otherwise being outside AFCA’s jurisdiction.

⁶ *The Corporations Act 2001 (Cth)* s1057.

AFCA Rules

- Decisions to exclude a complaint, if there is, in AFCA’s opinion, a more appropriate place to deal with the complaint (such as another resolution scheme, court or the Office of the Australian Information Commissioner).

While the rules provide an opportunity to complain to AFCA directly about its complaints handling service,⁷ we request clarity on whether this also allows a review of the merits of a decision.

It is important that complainants can ask for AFCA decisions to be reviewed because a decision of AFCA to exclude a complaint may have a significant impact on an individual’s ability to resolve a complaint. If AFCA does not hear the complaint, then an individual may be required to use the court system to resolve an issue, which can result in increased costs and delays.

The opportunity to appeal decisions that are not classified as determinations is important because superannuation disputes can be complex and impose legal liabilities. In an environment where Australians are compelled by legislation to contribute a substantial percentage of their income into superannuation accounts and decisions relating to those accounts have potentially life changing impacts; the importance of appeal rights are emphasised.

Therefore, we request additional information about the operation of AFCA’s internal appeals framework including:

- The process that complainants can use to have certain matters reconsidered; and
- How AFCA will ensure that any internal appeals are addressed by experienced staff that were not directly involved with the original decision in question.

It is essential that AFCA clearly demonstrates the appeals process for complainants because it appears that complainants have greater appeal rights under the current system, than they will have under the AFCA scheme. The loss of appeal rights is not in the best interests of scheme participants.

We believe that AFCA should have a clearly defined internal appeals framework and for this to be detailed in the rules. This would provide complainants with an avenue of recourse if AFCA decides not to hear their complaint.

⁷ Above n 2, 17.

AFCA Rules

Costs

The draft rules allow for AFCA to require Financial Firms to contribute to legal or other professional costs (including travel) incurred by the complainant.⁸

We request that AFCA explain the rationale for requiring Financial Firms to pay legal and professional costs because:

- Financial Firms would believe that their contributions under the membership fee model would be sufficient to meet basic costs such as these.
- It differs from current industry practice because the SCT does not have cost-recovery powers.

Furthermore, AFCA should classify the difference between this provision, and the one allowing for the appointment of an external expert to resolve a complaint, because they seem similar. It is also unclear whether the provisions would effectively increase the total contribution amount recoverable from financial firms to \$10,000.

Industry engagement

AFCA has engaged positively with industry to date under difficult circumstances however it is essential that meaningful industry engagement and consultation continues to occur. The transition to AFCA is a major change and there will likely be implementation issues as AFCA establishes itself and we invite AFCA to provide clarity on its proposed engagement approach.

⁸ Australian Financial Complaints Authority (2018). *Rules of Complaint Resolution Scheme*. [online] p.39. Available at: <https://tinyurl.com/y6vnz9I7> [Accessed 20 Jun. 2018].