

Australian Financial Complaints Authority (AFCA)

Transitional Superannuation Guide



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About this guide

The Australian Financial Complaints Authority (AFCA) is the complaints resolution scheme for Superannuation Complaints made on or after 1 November 2018. Superannuation providers are required by law to become members of AFCA so that complaints against them can be resolved under the AFCA Rules.¹

This Transitional Superannuation Guide (SG) is designed to assist superannuation providers, and consumers with complaints about superannuation providers, to understand the AFCA Rules and how AFCA operates its superannuation jurisdiction. The SG will be particularly relevant during the initial period of AFCA's operations when the Superannuation Complaints Tribunal (SCT) will also be dealing with its existing Superannuation Complaints.

Because AFCA also has statutory powers for Superannuation Complaints, in addition to its powers under the Rules, this SG also refer to those statutory powers where they are relevant. These are highlighted in yellow shaded boxes. There is also a glossary of superannuation terminology in [chapter 27](#) of this guide.

AFCA also has Operational Guidelines to assist all users of the AFCA scheme to understand the Rules and how AFCA operates more generally. This SG is consistent with the Operational Guidelines, but if there is any inconsistency, the AFCA Rules and the Operational Guidelines will prevail.

If you have suggestions about superannuation matters that need more clarification in this SG, please contact AFCA at publications@afca.org.au.

¹ Members of AFCA are referred to in the Rules as 'Financial Firms'.

1: Introduction to AFCA's complaints resolution scheme

What is the AFCA scheme?

The AFCA scheme is the single external complaints resolution scheme for the financial services industry as an alternative to the courts. The AFCA scheme is operated by a not-for-profit company, limited by guarantee and governed by a Board of Directors, which includes equal numbers of industry and consumer representatives and an independent Chair.

From 1 November 2018, the AFCA scheme replaces the Superannuation Complaints Tribunal (SCT) as the external dispute resolution scheme for Superannuation Complaints. The SCT will continue to handle Superannuation Complaints that were lodged with it before 1 November 2018. There is no capacity for a complaint that is being handled by the SCT to be transferred to AFCA.

The AFCA scheme is a membership-based ombudsman scheme, with a focus on impartially assisting parties to reach agreement about how to resolve a complaint. AFCA must also comply with statutory provisions under Part 7.10A of the *Corporations Act 2001* (Cth) and the conditions of its authorisation from the responsible Minister. AFCA is overseen by the Australian Securities & Investments Commission (ASIC). ASIC issues regulatory guidance about how it will exercise its oversight function and other powers given to it under the *Corporations Act*.²

What are the AFCA Rules?

As a membership-based scheme, each AFCA Member is contractually bound by the AFCA Rules, which set out how AFCA will handle complaints and fulfil its obligations under the Act.³ Failure to comply with AFCA's Rules may constitute a serious breach reportable to ASIC under rule A.18.2, and may also entitle the AFCA Board to expel an AFCA Member under clause 3.4 of the AFCA Constitution.

A person who makes a complaint to AFCA (Complainant) also agrees to be bound by the AFCA Rules as a condition of submitting their complaint.

² See ASIC's Regulatory Guide 267

³ AFCA's Constitution also contains provisions that govern AFCA membership

Are there special provisions for Superannuation Complaints?

For Superannuation Complaints there are statutory provisions replicating most of the legal framework that applies to superannuation complaints under the legislation that governs the SCT.⁴

The aspects of the SCT's framework that apply to the resolution of Superannuation Complaints by AFCA are:

- when complaints relating to superannuation can be made under the AFCA scheme.⁵
- power for AFCA to join other parties⁶
- power for AFCA to obtain information and documents⁷
- powers for AFCA to compel attendance at conciliation conferences and to give directions about who may be present at meetings, or restricting disclosure of documents or information relating to a Superannuation Complaint⁸
- power for AFCA to refer questions of law to the Federal Court⁹
- provisions replicating the determination-making powers of the SCT, including the requirement to affirm fair and reasonable decisions and to limit AFCA's determination powers to the remedy of any unfairness or unreasonableness found to exist¹⁰
- a requirement for AFCA to give reasons for its Determinations¹¹
- provisions dealing with the immediate operation of a Determination and requiring compliance with a Determination¹²
- provisions restricting death benefit complaints to those persons with an interest in the death benefit¹³
- provisions requiring a trustee to notify AFCA of persons who may have an interest in the death benefit¹⁴
- provisions dealing with appeals to the Federal Court on questions of law arising from AFCA's Determination of a Superannuation Complaint¹⁵
- secrecy provisions.¹⁶

⁴ *Superannuation (Resolution of Complaints) Act 1993* (Cth)

⁵ Corporations Act, s 1053

⁶ Corporations Act, s 1054

⁷ Corporations Act, s 1054A

⁸ Corporations Act, ss 1054B and 1054BA

⁹ Corporations Act, s 1054C

¹⁰ Corporations Act, s 1055

¹¹ Corporations Act, s 1055A

¹² Corporations Act, ss 1055B–1055D

¹³ Corporations Act, s 1056

¹⁴ Corporations Act, s 1056A

¹⁵ Corporations Act, ss 1057–1057B

¹⁶ Corporations Act, s 1058

The AFCA Rules do not contain a special section for Superannuation Complaints, but the Rules are consistent with the statutory provisions and refer to them where relevant.

The AFCA Rules also include:

- similar time limits for when certain kinds of complaints must be submitted to AFCA (that is, complaints about the payment of a death benefit, complaints about disability benefits and complaints about contribution statements provided to the Australian Taxation Office (ATO))
- similar exclusions for when AFCA either cannot consider a complaint or can decide not to consider a complaint, plus express exclusions for complaints about the level of fees and charges and complaints that are solely about investment performance. There are also some exclusions that relate to life insurance cover that apply equally to life insurance cover within superannuation.

What is different about AFCA compared with the SCT?

There will be many aspects of the AFCA Rules that will be new for superannuation providers and Complainants, because they are features of a membership-based scheme overseen by ASIC, rather than a statutory tribunal such as the SCT.

Many of these differences relate to the processes that a membership-based scheme can use in handling complaints:

- **‘Refer-back’ process:** AFCA will register a complaint, but will not usually commence considering a complaint unless it has been first considered by the superannuation provider under its internal dispute resolution (**IDR**) procedures.¹⁷ This means that, initially, Complainants must usually raise their complaint with the superannuation provider. If the superannuation provider’s IDR process has not resolved the complaint, AFCA will usually give the superannuation provider a further opportunity to resolve the complaint within a short timeframe. This will not apply to complaints about the payment of a death benefit – where AFCA will begin considering the complaint as soon as it establishes that the two prescribed 28-day timeframes for objecting to the superannuation provider and complaining to AFCA have been met (see [chapter 5](#) of this SG).

¹⁷ By comparison, the SCT must refuse to handle a complaint unless it has first been considered under the superannuation provider’s IDR procedures.

- **Jurisdictional review:** If a superannuation provider believes a complaint should be excluded because it is outside AFCA's superannuation jurisdiction, or that AFCA should exercise its discretion not to consider the complaint, the superannuation provider can inform AFCA and provide reasons and relevant documents to support its view. It need not wait for AFCA to make its own assessment. AFCA has a formal process for considering jurisdictional objections, which can involve an initial assessment and, if the initial assessment is contested, review by a senior AFCA staff member or an AFCA Decision Maker. AFCA is, however, able to consider complaints (other than death benefit complaints) by agreement, even if the complaint would otherwise be outside its jurisdiction under the AFCA Rules (see chapter 4 of this SG).
- **Active engagement:** AFCA encourages cooperation and collaboration in the resolution of complaints. Superannuation providers and Complainants will be able to engage proactively with AFCA, including by telephone and electronically. Superannuation providers can expect to receive automated email communications when a complaint is registered and will also be able to submit information and track the progress of a complaint through a secure portal.
- **Requests for information:** While AFCA has statutory powers for superannuation, AFCA will primarily use its powers and processes under the AFCA Rules to request information, which allow for the parties to constructively interact with AFCA. AFCA expects parties to bring matters to its attention that may assist it in handling a complaint. AFCA also has power under its Rules to require the parties to do things that may assist in the resolution of a complaint, such as obtaining independent expert advice (see chapter 9 of this SG).
- **Flexible complaint model:** AFCA has more flexibility under its Rules to resolve complaints using a variety of tools and will engage with the parties to find the most effective way of reaching resolution. Not all complaints will necessarily end up being formally determined by an AFCA Decision Maker, such as an Adjudicator, Ombudsman or Panel. For example, after investigating a complaint, AFCA may make a preliminary assessment about how the complaint could be resolved, based on the case manager's evaluation of the information AFCA has obtained. While there is no obligation on the parties to accept a preliminary assessment, AFCA finds that many complaints do resolve in this way (see chapters 8 and 12 of this SG).

Other new features arise because of statutory requirements that apply to AFCA itself, such as the requirement to identify and report systemic issues (see chapter 17 of this SG), and the requirement for AFCA to have an Independent Assessor to consider service complaints that are made about AFCA (see chapter 16 of this SG).

What will happen if a complaint is submitted to the wrong place while both AFCA and the SCT are operating?

AFCA is able to consider Superannuation Complaints submitted on or after 1 November 2018.

From 1 November 2018, if a person submits a Superannuation Complaint to the SCT, the SCT will direct the person to AFCA, so that AFCA can begin considering the complaint. For the purposes of any time limits, the complaint will be treated as if it were submitted to AFCA on the day it was received by the SCT (see rule B.4.5.1).

If a person submits a complaint to AFCA before 1 November 2018 that should have been submitted to the SCT, AFCA will either:

- forward the complaint to the SCT (if it is received before 27 October 2018); or
- hold the complaint and commence consideration of the complaint under the AFCA Rules from 1 November 2018.

For the purposes of any time limit, a complaint that is held over by AFCA will be treated as submitted to AFCA on the date it is actually received by AFCA.

2: Principles that underpin the scheme

What are AFCA's statutory responsibilities?

AFCA's statutory responsibilities include:

- promoting awareness of the AFCA scheme
- resolving complaints submitted to the scheme
- identifying systemic issues and working with Financial Firms (including superannuation providers) to resolve them
- supporting regulators by reporting certain matters to them.

What are the principles that underpin AFCA's responsibilities?

AFCA is required by legislation to operate in a way that is accessible, independent, fair, accountable, efficient and effective. These are similar principles to those that govern the SCT.¹⁸

¹⁸ Fair, economical, informal and quick

3: How a complaint may be submitted to AFCA

How can a complaint be submitted?

AFCA prefers a Complainant to express a complaint using their own words and to submit it online so that it can be 'registered' and forwarded to the superannuation provider more quickly. This can be done by using AFCA's online complaint form, available on the AFCA website www.afca.org.au, which guides the Complainant through the process.

Alternatively Complainants can submit a complaint by email, fax, letter or by phoning AFCA.

To enable AFCA to progress the complaint promptly, the Complainant should provide the following information at the time of submitting a Superannuation Complaint, or as soon as possible after that:

- name and contact details of the Complainant
- details of the Complainant's representative if the Complainant would like another person to be the contact point for AFCA, (such as a family member, friend or adviser) and whether or not that person will receive remuneration for their services, along with any additional information about the representative that AFCA requests
- the name of the superannuation provider being complained about
- details of the Complainant's relationship with the superannuation provider (for example, a membership, policy or account number)
- the decision or conduct complained about, the reasons for dissatisfaction with the decision or conduct and why the Complainant is unfairly or unreasonably affected by that decision or conduct
- the outcome sought and any loss or detriment suffered
- the date of any complaint that the Complainant has previously made to the superannuation provider about the issues raised with AFCA.

For certain types of complaints, it may help AFCA if certain information is provided with the Complainant's complaint, rather than waiting for AFCA to request it.

Death benefit complaints

For complaints about the distribution of a death benefit among beneficiaries, it is helpful for Complainants to provide:

- a copy of the superannuation provider's letter notifying the Complainant of how it proposes to pay the death benefit
- a copy of the Complainant's letter to the superannuation provider objecting to the proposed distribution
- a copy of the superannuation provider's letter notifying the Complainant of its final decision
- an explanation of why the Complainant is disputing the proposed distribution.

If submitting a complaint as the legal personal representative of a deceased fund member's estate, the legal personal representative should also provide a copy of the will and grant of probate or, if the deceased fund member died without a will, a copy of the letters of administration issued by the court.

Disability benefit complaints

For complaints about a refusal to pay a disability benefit (such as a Total and Permanent Disablement (TPD) benefit or a Total and Temporary Disablement (TTD) benefit, sometimes also called an income protection or salary continuance benefit), it is helpful for Complainants to provide:

- the date when the Complainant permanently ceased employment because of your disability (if applicable)
- the date when the Complainant first lodged a claim for a disability benefit with the superannuation provider
- a copy of the superannuation provider's letter notifying its decision to deny the claim
- a copy of any complaint made to the superannuation provider about the denial of the claim and any final response received from the superannuation provider to the complaint
- an explanation of why the Complainant believes that they are entitled to a disability benefit.

Complaints about a contributions statement provided to the ATO

For complaints about contribution amounts provided by a superannuation provider in a statement to the ATO (and which may have resulted in the Complainant receiving an ATO assessment for higher tax), it is helpful for Complainants to provide:

- a copy of the notice received from your superannuation provider with a copy of the statement it provided to the ATO
- a copy of any complaint the Complainant has made to the superannuation provider about the contribution amounts in the statement and any final response received from the superannuation provider to the complaint
- an explanation of why the Complainant believes the statement is wrong.

Can a superannuation provider refer a complaint to AFCA?

If a superannuation provider wants to refer a complaint to AFCA, it must first obtain the Complainant's written consent and provide a copy of this consent to AFCA at the time of submitting the complaint.

Is there a cost for using AFCA's service?

The cost of funding AFCA is borne by AFCA Members. For superannuation providers there is currently a levy-style membership fee that will apply for the first three years of AFCA's operation.

There is no charge for Complainants who elect to use AFCA's service to resolve their Superannuation Complaints. In addition, a superannuation provider is not permitted to recover its costs from a Complainant in connection with AFCA's consideration of the complaint, including any costs incurred in staying, adjourning or discontinuing legal proceedings that may have already been commenced (see [Chapter 7](#) of this SG, explaining rule A.7.1 (a)).

Can a representative be used?

Although the AFCA process is intended to be user-friendly so that most people can use the AFCA service without outside help, AFCA recognises the value of good representation and does not prevent a superannuation provider or a Complainant from using a representative.

However, if a Complainant pays someone to help or represent them, this will normally be at their own cost.

AFCA expects a fee-charging representative to be familiar with the information and documentation required to support their client's complaint and to ensure that relevant information and supporting documents are provided when the complaint is submitted. AFCA also expects a fee-charging representative to respond promptly to any further AFCA information requests.

AFCA has the power to refuse to continue handling a complaint if the Complainant is using the services of a representative whose conduct is inappropriate (see [chapter 25](#) of this SG, explaining rule C.2.2 (g)).

What assistance does AFCA provide to Complainants?

AFCA explains the complaint lodgment process on its website and in printed brochures that are available on request. AFCA staff who handle telephone enquiries are trained to explain how complaints can be submitted and how AFCA deals with complaints.

If the need arises, AFCA can help Complainants who are only able to submit a Superannuation Complaint by telephone, or who have difficulty expressing and submitting their complaint.

Although AFCA is impartial and does not act as an advocate for any party, AFCA can provide help to Complainants to ensure:

- they understand whether they are eligible to submit a Superannuation Complaint to AFCA
- their assertions are clearly articulated
- they know what documents and information to provide to AFCA to support their complaint
- the complaint process operates efficiently and in a timely way.

AFCA can also provide specific assistance to Complainants who may be disadvantaged if they do not receive assistance. For example, we can arrange to register complaints in languages other than English and arrange for them to be translated at no cost to the Complainant.

AFCA can also refer disadvantaged Complainants to community legal centres, legal aid offices, financial counsellors or other services for assistance – before or after they have submitted their complaint.

4: Superannuation Complaints that AFCA considers

Who can make a Superannuation Complaint to AFCA?

Rule B1 of the AFCA Rules specifies who is able to submit a Superannuation Complaint for AFCA to resolve.

In brief, the people who can make a Superannuation Complaint are:

1. Superannuation product holders

- members or former members of a regulated superannuation fund¹⁹ (but not a self-managed superannuation fund)
- beneficiaries or former beneficiaries of an approved deposit fund
- people with an interest in a superannuation annuity policy issued by a life company
- holders or former holders of a Retirement Savings Account (RSA)
- people with an interest in an insurance contract where the premiums are paid from an RSA.

This includes someone acting for the estate of any of these people. Employers are not able to make Superannuation Complaints on behalf of their employee members.

Exempt public sector superannuation schemes

Some exempt public sector superannuation schemes (EPSSS) can elect to join AFCA and be treated as a regulated superannuation fund for the purposes of AFCA's superannuation jurisdiction. If an EPSSS has elected to join AFCA, its members and former members can make a Superannuation Complaint to AFCA.

Bankruptcy

Generally a bankrupt's superannuation interests are excluded from property available to creditors. A bankrupt superannuation product holder can, therefore, make a Superannuation Complaint.

¹⁹ A covered ADF Member within the meaning of the *Australian Defence Force Cover Act 2015* (Cth) is taken to be a member of a regulated superannuation fund.

2. Beneficiaries with an interest in a death benefit

If the complaint is about payment of a death benefit, a person with an interest in the death benefit can complain that the decision (or related conduct) about the payment of the death benefit was unfair or unreasonable.

3. Parties (and intending parties) to a Family Law agreement or order affecting superannuation

For Family Law purposes, the following are treated as product holders and can complain that a decision, or related conduct about the agreement, order or information request was unfair or unreasonable:

- a member, beneficiary or RSA holder’s spouse or former spouse who is party to an agreement, or subject to an order relating to that person’s superannuation interest
- someone eligible to request information about that superannuation interest.²⁰

What can the Superannuation Complaint be about?

Complaints about decisions

A Superannuation Complaint can be made about unfair or unreasonable decisions (and related conduct) of:

- the trustee of a regulated superannuation fund (but not a self-managed superannuation fund), including an insurer for decisions about insured benefits provided through superannuation
- the trustee of a life policy fund to admit the member to the fund²¹
- the trustee of an approved deposit fund
- a life company that issued a superannuation annuity policy
- an RSA provider (usually a bank or credit union).

They are all called ‘superannuation providers’ in this SG. Superannuation providers are required to become AFCA Members and are, therefore, ‘Financial Firms’ as defined under the AFCA Rules.

²⁰ These individuals are the member, beneficiary or RSA holder or their legal personal representative; the member, beneficiary or RSA holder’s spouse or their legal personal representative and a person intending to enter into a superannuation agreement (for Family Law Act purposes) with the member, beneficiary or RSA holder.

²¹ A life policy fund is a type of regulated superannuation fund, usually established through a life insurance company (see the glossary in [chapter 27](#) of this SG).

Complaints about sales conduct

A Superannuation Complaint can also be made about certain types of ‘mis-selling’ conduct. These complaints can be made against:

- a life company in selling a superannuation annuity policy
- an RSA provider in opening an RSA
- an insurer in selling an insurance contract where the premiums are paid from an RSA.

Complaints about agents

A complaint about a superannuation provider can include the decisions or conduct of people who act on their behalf. Where a complaint about the conduct of a superannuation provider’s employee or representative is made, typically AFCA deals with the complaint as a complaint against the superannuation provider.

Are there time limits to make a Superannuation Complaint?

There are strict time limits within which certain types of Superannuation Complaints must be submitted to AFCA. These are set out in rule B.4.1 of the AFCA Rules and explained in [chapter 23](#) of this SG.

Briefly, the types of Superannuation Complaints for which strict time limits apply are:

- complaints about death benefits
- complaints about disability benefits provided through superannuation
- complaints about contribution statements provided by a superannuation provider to the ATO for the purpose of assessing whether higher tax applies.

For other types of Superannuation Complaint, AFCA generally requires the complaint to be submitted within two years of the date the superannuation provider gave its final response after the complaint was considered through the provider’s internal dispute resolution (IDR) process. However, AFCA can extend this two-year timeframe and would generally do so if there is a good reason why the complaint was not submitted within two years, and AFCA is satisfied that it can effectively resolve the complaint despite the delay.

What types of Superannuation Complaints are excluded?

Even if the time limits set out in rule B.4.1 are met, a Superannuation Complaint may be within a category of exclusion.

- Rule C.1.2 of the AFCA Rules sets out some mandatory exclusions: AFCA is not able to consider a complaint that is within one of these exclusions.

For example, Superannuation Complaints that have already been dealt with by a court or the SCT, and complaints about the management of the fund, RSA provider or insurer as a whole.

- Rule C.2 gives AFCA a discretion to decide that it is appropriate to exclude a complaint.

For example, if the complaint is frivolous, vexatious, misconceived or lacking in substance, if the Complainant has commenced legal proceedings in relation to the subject matter of the complaint or there is a more appropriate place to deal with the complaint, such as a court or the Office of the Australian Information Commissioner.

These Rules are explained more fully in [chapters 24](#) and [25](#) of this SG.

What should a superannuation provider do if it believes a Superannuation Complaint is outside AFCA's jurisdiction?

A superannuation provider may believe that a Superannuation Complaint falls within a mandatory exclusion, or that AFCA should exercise its discretion to exclude the complaint. If so, the superannuation provider should request AFCA in writing to exclude the complaint. A superannuation provider can make a request at any time after being notified of the complaint and does not need to wait for AFCA to make its own assessment. In some cases, for example, if a complaint has already been dealt with by the SCT, AFCA will not necessarily know of that fact unless the superannuation provider informs us.

The request should refer to the relevant AFCA rule and give reasons in support of the request. Any relevant documents, or other information held by the superannuation provider should be provided to AFCA as part of the exclusion request.

We will then consider whether an exclusion applies or whether the complaint comes within our jurisdiction and should be considered on its merits.

While AFCA is considering its exclusion request, the superannuation provider should continue to try and resolve the complaint with the Complainant, as appropriate.

What process does AFCA follow to decide whether a Superannuation Complaint is within its jurisdiction?

AFCA's aim is to identify as soon as possible whether a complaint is properly within its jurisdiction.

This issue is first considered at the time of referring the Superannuation Complaint to the superannuation provider for a further opportunity to resolve the complaint. It may be reconsidered as new information emerges. In complex matters, AFCA may seek advice from a senior AFCA staff member, including an AFCA Decision Maker, before reaching a view as to whether a Superannuation Complaint is properly within AFCA's jurisdiction. We may also need to request further information from the parties in order to reach a view.

The process of excluding a complaint can involve:

- a jurisdictional assessment by an initial AFCA staff member
- a jurisdictional review by a senior AFCA staff member or, in complex cases, by an AFCA Decision Maker.

This process applies to complaints that AFCA refuses to consider under rule A.8.3. It also applies to complaints that are outside the requirements of rule B (either because the Complainant is not eligible to make the complaint or because the complaint is submitted outside of the time limits) or because the complaint is excluded under rules C1 or C2.

Jurisdictional assessment by initial AFCA staff member

If AFCA decides to exclude a Superannuation Complaint, the initial AFCA staff member will notify the Complainant in writing explaining why and the timeframe within which the Complainant may object to this assessment. AFCA may also call the Complainant and explain its assessment.

If the Complainant wishes to object, the Complainant should either make an objection within the timeframe AFCA specifies for this purpose, or seek an extension if there are reasons why that timeframe is not sufficient.

The standard objection timeframe will be:

1. **14 days:** Where the reason AFCA cannot consider the complaint is clear and straightforward and further information is unlikely to alter the assessment.

Examples

- For certain types of Superannuation Complaint, the complaint was submitted out of time and AFCA cannot extend the deadline (see rule B4.1).²²
- The subject matter of the complaint is the same as a previous complaint brought by the same Complainant against the same superannuation provider, and the Complainant has not raised any new facts or provided any new information.
- The complaint is solely about investment performance.

2. 30 days: In all other cases.

The Complainant should read AFCA's letter carefully and decide whether to object to AFCA's assessment. Some Complainants might like to phone AFCA to better understand AFCA's decision to exclude the complaint and the type of information that might change the assessment. In particular, the right to object should be exercised if AFCA's decision is based on a misunderstanding of the complaint or the information already provided.

Can an objection be made to a decision by AFCA to exclude a complaint?

Unlike the SCT²³, there are very limited rights to ask a court to review a decision of AFCA to exclude a complaint.²⁴ However, AFCA has an internal process for reviewing exclusion decisions.

To object to a decision to exclude a complaint, a Complainant should contact AFCA to:

- state they object to the decision to exclude the complaint
- explain the reason for the objection
- provide information and raise arguments to support the objection.

An objection will normally be referred to the initial AFCA staff member who made the original assessment, who will consider whether the objection has substance. Relevant factors include whether the Complainant has:

- provided new and relevant information
- identified an error in AFCA's assessment
- raised a new and relevant argument.

²² If AFCA cannot accept the complaint as a Superannuation Complaint, AFCA may accept the complaint under its non-superannuation jurisdiction. An example is where the complaint relates to the payment of an insured disability benefit and the complaint could be accepted against the insurer, but not the superannuation trustee.

²³ As a statutory tribunal, decisions of the SCT to exclude jurisdiction are reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

²⁴ Courts have held that the decision must be so unreasonable that no reasonable decision maker could have made it: *Cromwell Property Securities Pty Ltd v Financial Services Ombudsman* [2014] VSCA 179

If the initial AFCA staff member agrees with the Complainant's objection, the initial AFCA staff member may change their mind and progress the complaint for consideration on the merits.

Jurisdictional review by senior AFCA staff member or Decision Maker

If the initial AFCA staff member disagrees with the Complainant's objection, the matter will be reviewed by a more senior AFCA staff member. The senior AFCA staff member will consider whether the objection has substance and will decide whether to exclude the complaint after considering all the information before us. We may ask the parties for their views and for any other information that we need to reach a decision. In more complex cases, an AFCA Decision Maker may make the review decision.

If the senior AFCA staff member or AFCA Decision Maker decides the Complainant's objection has substance, the complaint will be progressed for further consideration by AFCA.

If the senior AFCA staff member or AFCA Decision Maker decides the Complainant's objection does not have substance, the file will be closed.

Can AFCA consider a complaint that is outside its jurisdiction if the parties agree?

Rule A.4.7 of the AFCA Rules allows AFCA to consider a complaint that it could not otherwise consider, if AFCA and the parties agree to it.

Where a party to a complaint requests AFCA to consider a complaint by agreement, we will consider whether the nature of the complaint and reasons for the request might make it appropriate for us to consider the complaint. If this is the case, we will discuss the matter with the other party.

Where the parties agree to AFCA considering the complaint, we will make a decision as to whether we also agree. The issue for AFCA will be whether our procedures and resources position us to resolve the complaint fairly and efficiently, consistent with the principles set out in rule A.2. We will tell the parties what we decide.

If AFCA considers a complaint by agreement under rule A.4.7, AFCA's normal procedures apply. A party cannot make their agreement for AFCA to handle a complaint conditional on different AFCA procedures applying. However, AFCA may require the parties to agree to certain conditions if it accepts the complaint, for example, by waiving any objection to jurisdictional grounds for exclusion.

How can a request be made?

The parties can request AFCA to consider the complaint under rule A.4.7. A request should be in writing and include the reasons for the request, information about the complaint and relevant documents.

Even if a request has not been received from the parties, AFCA can initiate the process of seeking the parties' agreement under rule A.4.7 to AFCA considering the complaint.

Examples of where AFCA might consider a Superannuation Complaint with the consent of all parties

- Complaints about disability benefit payments that are submitted out of time
- Complaints about ATO contribution statements that are submitted out of time

AFCA cannot, however, agree to consider Superannuation Complaints about death benefit payments that are out of time, even if the parties consent, because of the statutory requirements under section 1056 of the Corporations Act and the effect it may have on interested parties who are not involved in the complaint.

5: Notifying the superannuation provider of the complaint

What does AFCA do when a Superannuation Complaint is submitted that appears to be within AFCA's jurisdiction?

AFCA 'registers' a complaint when it is first submitted to AFCA and forwards the details to the superannuation provider's nominated contact. Usually this will happen automatically on the same business day or the next business day after a complaint is submitted online or by telephone – and within two to three business days if the complaint is submitted by email or letter.

AFCA will usually notify the superannuation provider of the complaint by electronic means (usually by email) to minimise delay. To assist the superannuation provider, AFCA sends the superannuation provider where possible:

- the name and contact details for the Complainant (including details of the Complainant's representative where one has been authorised)
- a short summary of the issues raised in the complaint and the remedy sought
- the superannuation provider's reference number (such as the Complainant's membership number if it has been provided).

What does AFCA do if the Complainant raises new issues after AFCA begins considering the complaint?

If the Complainant raises new issues after AFCA has begun considering a complaint, AFCA will incorporate those new issues into its consideration of the complaint – if AFCA considers this approach would be efficient and would not unduly compromise the timeliness of resolution of the other issues. If, however, the new issues are raised late in AFCA's process and have limited connection with the existing complaint, AFCA will tell the Complainant to submit a new complaint.

AFCA will provide the superannuation provider with an opportunity to respond to the new issues as part of its normal consideration of the complaint.

What do the 'refer-back' arrangements involve?

When a Complainant submits a complaint, AFCA will normally give the superannuation provider an opportunity to resolve the complaint through its internal dispute resolution (IDR) process before AFCA begins considering the complaint. This opportunity can be up to 90 days, but will depend on whether the complaint has already been through the superannuation provider's IDR process.

In some circumstances, we may give the superannuation provider no additional opportunity to resolve the complaint directly with the Complainant before we begin considering the complaint:

1. Request that AFCA exclude the complaint

If a superannuation provider makes a written request that AFCA exclude the complaint, AFCA will immediately proceed to assess this request, rather than providing a further opportunity to resolve the complaint. If AFCA decides not to exclude the complaint, AFCA will not further delay its process by providing the superannuation provider a further opportunity to resolve the complaint directly with the Complainant. Rather AFCA will begin considering the complaint and collecting relevant information.

2. Urgency

If AFCA considers the complaint is urgent, AFCA may start to deal with a complaint without giving the superannuation provider a further opportunity to resolve the complaint. However, for a Superannuation Complaint, this would not curtail the initial 90-day IDR period prescribed by legislation.

If the Complainant requests that AFCA proceed immediately, the Complainant should do so as early as possible giving reasons for the request. Supporting documents (such as medical reports, if relevant) should be provided.

AFCA will discuss the complaint and the urgent circumstances with the superannuation provider before making a decision to immediately begin considering it. We will then advise both parties of our decision.

Examples of urgent situations

- The superannuation provider's situation poses a risk that the Complainant may not be able to receive redress. For example, because a superannuation fund is about to merge with another fund or about to wind up
- Any delay in consideration and resolution of the complaint would compromise the Complainant's basic living conditions (for example, because the Complainant is under severe financial hardship)
- The Complainant has a serious medical condition that could imminently prevent or seriously hamper their participation in AFCA's process
- There are two related complaints involving the same parties and to bring these complaints together efficiently and effectively would require the second complaint to be expedited

3. Superannuation Complaint about payment of a death benefit

AFCA will proceed immediately to consider a Superannuation Complaint made to it within time about a superannuation provider's final decision in response to an objection about the provider's death benefit payment decision. AFCA will not provide the superannuation provider with a further opportunity to resolve a complaint of this type directly with the Complainant because the superannuation provider has already revisited its original decision through the objection process.

If, however, the superannuation provider is still considering the Complainant's objection to its original death benefit payment decision, we will not consider the complaint while the objection process is in train.

If the Complainant attempts to submit a complaint to AFCA before a final payment decision is made and within the 28-day period for objecting to a superannuation provider's proposed decision, AFCA will tell the Complainant to lodge an objection with the superannuation provider. AFCA will also forward the complaint to the superannuation provider and ask the superannuation provider to treat the early complaint to AFCA as an objection, so that the Complainant does not inadvertently lose the right to complain.

What initial timeframe will a superannuation provider have to resolve the complaint?

The timeframe AFCA gives a superannuation provider depends on whether the Complainant has previously complained to the superannuation provider. There are four possibilities:

1. The Complainant has previously complained to the superannuation provider **and** the legislatively specified period for internal dispute resolution (IDR) has expired without the superannuation provider providing its response.
2. The superannuation provider's IDR response to the Complainant's complaint has not resolved the complaint to the Complainant's satisfaction.

3. The Complainant has not previously complained to the superannuation provider or has raised additional issues with AFCA not previously raised with the superannuation provider.
4. The Complainant has previously complained to the superannuation provider, but has not received the superannuation provider's response **and** the legislatively specified period for internal resolution is yet to expire.

In the first two situations, AFCA will usually provide the superannuation provider with a 21-day refer-back period by way of further opportunity to resolve the complaint (except for a Superannuation Complaint about a death benefit). AFCA finds that many complaints are resolved through this process, particularly if the complaint is reviewed with fresh eyes.

In the third and fourth situations, AFCA will specify a refer-back period for the superannuation provider to resolve the complaint that takes account of the legislatively specified IDR timeframe (or any shorter timeframe set out in an applicable industry code).

Timeframe for refer-back periods in Scenarios 3 and 4 above

Type of complaint	Usual refer-back period	Comments
A Superannuation Complaint other than an objection to a proposed death benefit payment	45 days from the date the Complainant first requested the superannuation provider to remedy the matter	
A Superannuation Complaint that is an objection to a proposed death benefit payment	90 days from the date an objection to the proposed payment is received by the superannuation provider	A superannuation provider will usually notify all potential beneficiaries of its proposed payment of a death benefit and give them 28 days to object if they are not satisfied with the proposal. If an objection is made within 28 days, the superannuation provider then has 90 days to reconsider its proposal and either notify the potential beneficiaries of a new proposal or confirm the original proposal as its final decision.

Type of complaint	Usual refer-back period	Comments
		<p>A potential beneficiary who objected to the proposed payment and is still dissatisfied with the final decision must complain to AFCA within 28 days of being notified of the final decision.</p> <p>AFCA is not able to consider the complaint if the two 28-day periods are not met.</p>

If the complaint is resolved during the ‘refer-back’ period, the superannuation provider must tell AFCA. If the complaint is **not** resolved, the superannuation provider must provide its response to the complaint to both AFCA and the Complainant. If possible, the superannuation provider should also provide relevant supporting information with its response (see AFCA’s EDR Response Guide). A superannuation provider does not need to wait until the ‘refer-back’ period given by AFCA has expired if it becomes apparent that the complaint is not going to be resolved. In such a case, the superannuation provider can request AFCA to proceed with its consideration of the complaint.

What further opportunity will be provided to a superannuation provider to resolve a Superannuation Complaint about a claim for a disability benefit?

In the case of a Superannuation Complaint about a claim for a disability benefit, AFCA will give the superannuation provider a further opportunity to resolve the complaint. AFCA expects the superannuation provider to use this further opportunity to review the claim and, if it disagrees with the insurer’s decision, request the insurer to reconsider its decision to decline the claim. However, if the superannuation provider has already made this request to no avail, it need not do so again and can inform AFCA that it is unable to take any further steps to resolve the complaint and request AFCA to proceed with its consideration of the complaint.

Can the parties request an extension of time to resolve a complaint?

AFCA may extend the period available to the parties to try and resolve a complaint if AFCA considers special circumstances exist.

Examples of special circumstances

- Where settlement negotiations are progressing, but taking longer than the legislatively specified period for internal complaint resolution, and both parties agree to continue negotiations without AFCA's involvement
- Where a superannuation provider is waiting for a report by an expert or external consultant before providing its response to the complaint and AFCA considers the resulting delay reasonable
- Where records needed by a superannuation provider in order to respond to a complaint are old and difficult to retrieve

Any party may ask for an extension to the period for the superannuation provider to try and resolve a complaint. A request by a superannuation provider must:

- be in writing;
- be made as early as possible and before the period for complaint resolution expires;
- state the period of the extension sought;
- explain the special circumstances considered to warrant the extension; and
- provide copies of supporting documents.

When deciding whether there are special circumstances, as well as considering the circumstances of the relevant complaint and general principles of fairness, AFCA will consider:

- whether the parties to the complaint agree to the extension of time;
- whether the Complainant had previously contacted the superannuation provider about the complaint;
- whether any settlement negotiations are progressing and, if so, how long they are taking;
- whether the superannuation provider is waiting for information to help it provide its response to the complaint; and
- whether the length of the requested extension is reasonable.

If AFCA decides to extend the period for a superannuation provider to try and resolve a complaint, AFCA will advise both parties of the decision, the reasons for it and confirm the new timeframe.

What does a superannuation provider need to do after AFCA notifies it of a Superannuation Complaint about payment of a death benefit?

When a superannuation trustee, an RSA provider or life company (death benefit decision maker) is notified by AFCA that a Superannuation Complaint has been made about the payment of the death benefit, the death benefit decision maker must:

- make reasonable enquiries as to who may have an interest in the death benefit; and
- give written notice to all those people (other than the Complainant) within 28 days of being notified by AFCA of the complaint.²⁵

This is similar to the obligation that applies for death benefit complaints made to the SCT.

In practice, the people who may have an interest in the death benefit are likely to be the same people previously notified by the death benefit decision maker of the decision to pay the death benefit.

The notice must state that a complaint has been made to AFCA, provide details of the complaint and state that the person can apply to be joined as a party to the complaint by giving notice to AFCA within 28 days (or any further period that AFCA allows).²⁶

Under rule A.5.4 of the AFCA Rules, the death benefit decision maker must tell AFCA when it has given the notice, and provide to AFCA the contact details for all those who have been given the notice.

²⁵ Corporations Act, s 1056A(1)

²⁶ Corporations Act, s 1056A(2)

6: Joining other parties to a Superannuation Complaint

When can AFCA join another person to a Superannuation Complaint?

AFCA will usually register a Superannuation Complaint as being against the superannuation provider. This is the case even if the complaint is about the decision or conduct of a person acting on behalf of the superannuation provider (including a group insurer).

To ensure that a Superannuation Complaint is efficiently resolved, section 1054 of the Corporations Act gives AFCA the power to join other parties to the complaint.

Examples of when AFCA will usually join another person to a Superannuation Complaint

- The insurer where the complaint is about the payment of a benefit that includes an insured component
- Any other person, if AFCA decides that the person is responsible for determining the existence or extent of the Complainant's disability
- The insurer that issued the life policy where the complaint is about a trustee decision to admit the Complainant to a life policy fund

AFCA can also join any eligible person who applies to become a party to a Superannuation Complaint.

What is the process for a person to ask to be joined for a Superannuation Complaint about a death benefit?

Similar to the SCT requirement, a death benefit decision maker is required to notify all interested persons that a death benefit complaint has been made to AFCA (see rule A.5.4) so they have an opportunity to apply to be joined to the complaint. An interested person can apply to be joined by giving notice to AFCA within 28 days (or any further period that AFCA allows).

However, AFCA will not exclusively rely on information from the death benefit decision maker about the potential beneficiaries to a death benefit since, just like the SCT, AFCA can consider joining any eligible person.

A request to join the complaint can be made by writing or phoning AFCA. To assist AFCA, it would be helpful if the person clearly identifies:

- the relevant complaint by specifying the name of the superannuation provider or other death benefit decision maker as per the notice they received
- the name of the deceased
- the person's relationship to the deceased
- how the person thinks the death benefit should be distributed
- AFCA's reference number if this appears on the notice received from the superannuation provider or other death benefit decision maker.

AFCA will then assess the person's eligibility to join the complaint.

AFCA can only join a person to a death benefit Superannuation Complaint if:

- the person applies to AFCA in the timeframe specified in the notice from the superannuation trustee or other death benefit decision maker; or
- AFCA is satisfied that the person should be joined in all the circumstances, despite not applying.²⁷

If AFCA decides to join a party to a Superannuation Complaint, it gives written notice to the joined party and all other parties of its decision to join, and its reasons for joining the party. Similarly, if AFCA declines to join a person who has applied to become a party to a Superannuation Complaint, it will give written notice to the person of its decision and reasons for not joining the person.

A joined party will have the opportunity to provide information to AFCA to support its position and will also be given copies of the information AFCA has received from other parties with a chance to respond.

²⁷ Corporations Act, s 1056A(3)

7: Restrictions during a complaint

When is a superannuation provider prevented from beginning legal proceedings against a party to an AFCA complaint?

Rule A.7.1 of the AFCA Rules generally prevents a superannuation provider from beginning legal proceedings to pursue issues that are the subject of an AFCA complaint.

The restriction applies from the time the complaint is submitted to AFCA, not from the time that AFCA notifies the superannuation provider of the complaint. Therefore, if a Complainant tells a superannuation provider that they intend to take their complaint to AFCA, the superannuation provider needs to be careful that pre-emptive legal proceedings do not contravene AFCA's Rules.

If a superannuation provider inadvertently contravenes rule A7.1 because it is unaware that a complaint is being submitted to AFCA, AFCA does not treat this situation as a serious breach of the AFCA Rules reportable to ASIC under rule A.18.2 (see [chapter 18](#) of this SG).

What exceptions are there to the general rule that a superannuation provider must not begin legal proceedings against a party to an AFCA complaint?

With AFCA's agreement, a superannuation provider may begin legal proceedings if the statutory limitation period is about to expire and a delay may deprive the superannuation provider of access to enforcement if the complaint is not resolved through AFCA.

Example of when AFCA may agree to legal proceedings due to imminent expiry of limitations period

The complaint relates to a superannuation trustee's decision to recover an overpaid benefit from the Complainant and the limitation period to recover the overpaid benefit is about to expire.

The superannuation provider must not actively pursue the legal proceedings and may only take the minimum steps required to keep those proceedings alive. AFCA may impose conditions where it agrees to a superannuation provider instituting legal proceedings.

Can a superannuation provider pursue legal proceedings as a test case?

A superannuation provider may also institute legal proceedings if AFCA agrees to allow the superannuation provider to treat the complaint as a test case. This is explained in [chapter 25](#) of this SG.²⁸

What must a superannuation provider do if it has already instituted legal proceedings before a complaint has been submitted to AFCA?

When a complaint is initially submitted, AFCA seeks to ascertain whether any legal proceedings relating to the complaint have been commenced. Its complaint form asks the Complainant whether any legal proceedings have been issued, and it also reviews any information provided with the complaint to see whether any legal proceedings appear to have been issued.

When AFCA notifies a superannuation provider of a complaint lodged against them, the superannuation provider should tell AFCA if it has commenced legal proceedings (if not otherwise mentioned with the complaint information).

If the complaint is within AFCA's jurisdiction and AFCA has not consented to the legal proceedings, the superannuation provider must then stay the proceedings without cost to the Complainant. The stay must apply until AFCA's file is closed.

Is there an alternative to formally staying the proceedings?

Unless required by the relevant court rules, AFCA will not require the superannuation provider to obtain a formal order staying the proceedings if the superannuation provider provides a written undertaking to take no further steps in the proceedings until AFCA's file is closed. The written undertaking should be provided to AFCA within 14 days of being notified of the complaint.

If a hearing date has been set down, the superannuation provider must adjourn the hearing date from time to time until our file is closed.

If a stay, adjournment or undertaking is not possible due to relevant court rules, the proceedings must be discontinued at no cost to the Complainant.

²⁸ See 'In what circumstances might AFCA agree to a complaint being decided as a test case in the courts?'

What are the Complainant's obligations?

The Complainant must consent to a stay, adjournment or discontinuance of legal proceedings. If the Complainant does not consent, then AFCA will refuse to consider the complaint and will close its file.

Some court rules provide that when a Notice of Discontinuance is filed, the defendant can apply for costs. Where AFCA requires a superannuation provider to discontinue the proceedings and the superannuation provider must file a Notice of Discontinuance, the Complainant must first agree that they will not seek costs from the court. (This does not, however, prevent the Complainant from seeking reimbursement of costs incurred in the legal proceedings as part of the complaint lodged with us.) If the Complainant does not agree to this requirement, then AFCA will decline to consider the complaint and will close its file.

How are interlocutory steps handled?

Rule A.7.1 does not prevent a superannuation provider from complying with a court order requiring an interlocutory step to be taken (for example, filing an affidavit of documents) as long as that step does not require the Complainant to take another step in the proceedings.

What happens if the Complainant takes a step in the proceedings beyond filing a defence?

If AFCA consents, a superannuation provider can pursue legal proceedings if the Complainant actively defends those proceedings by taking action beyond simply lodging a defence or a defence and counterclaim. Further action signals the Complainant's willingness to resolve the complaint in the court, in which case we take the view that the court is a more appropriate place to resolve the matter (see rule C.2.2(a)). A Complainant will not be regarded as having taken a step in the legal proceedings if they attend a directions hearing, or agree to consent orders of a procedural nature being filed in those proceedings.

If a Complainant lodges a defence and counterclaim before submitting a complaint with AFCA, AFCA will require the Complainant to provide an undertaking to stay any counterclaim they have filed. If this is not possible, then the Complainant will need to discontinue the counterclaim at their own cost.

What if a default judgment is obtained after a complaint has been submitted to AFCA?

Where a superannuation provider has applied to the Court for default judgment (for example, to recover an overpaid benefit), but the Court has not yet made its final orders, AFCA expects the superannuation provider to write to the Court asking it not to process the application because the Complainant has submitted a complaint to AFCA in the meantime. If the Court is unable to withhold processing the application for default judgment, the superannuation provider will be expected to apply to set the judgment aside.

It is possible that a superannuation provider may obtain court judgment after the Complainant has submitted the complaint to AFCA, but before the superannuation provider becomes aware of the complaint. If this happens the superannuation provider must apply to the court to set aside the judgment within 14 days of the referral of the complaint to the superannuation provider. This must be without cost to the Complainant.

AFCA considers it appropriate that the court judgment is set aside even if the complaint is subsequently considered to be outside of its jurisdiction under the Rules. This is because a Complainant may not have entered an appearance at court or filed a defence because of the complaint submitted to AFCA. If the court judgment is set aside, and then proceedings are re-instituted after our file is closed, the Complainant would then have an opportunity to take those steps.

Where the superannuation provider is required to set aside a default judgment, the superannuation provider must confirm to AFCA that it has made this application. AFCA may ask the superannuation provider to provide a copy of the application and any subsequent order setting aside the judgment.

Is a superannuation provider entitled to recover legal costs incurred in meeting its rule A.7.1 obligations?

A superannuation provider will not be entitled at any time to recover legal costs in connection with:

- staying, adjourning or discontinuing legal proceedings in order to meet its obligations under rule A.7.1
- an application for leave by the Complainant to file a defence or defence and counterclaim where the time limit for filing these court documents is after the date on which the Complainant submitted the complaint.

AFCA treats these costs as a consequence of the complaint lodged with AFCA. Because AFCA is a free service for consumers, the superannuation provider must not seek to recover these costs from the Complainant whether pursuant to a contractual right, a court order or otherwise.

Does a Superannuation Complaint prevent the operation of a superannuation provider's decision?

Generally, a Superannuation Complaint does not affect the operation of the superannuation provider's decision and does not prevent the superannuation provider from implementing its decision while AFCA is handling the complaint. This is the same as for SCT complaints.

However, rule A.7.3 of the AFCA Rules allows AFCA to stop a superannuation provider from implementing its decision if the Complainant so requests. (The SCT has a similar power.) Before deciding to do this, AFCA must give the superannuation provider a reasonable opportunity to make a submission and must take any submission into account.

AFCA would not usually exercise the right to halt a superannuation provider's decision if the decision affects other people who are not party to the complaint.

What restrictions are there on legal proceedings in relation to resolved Superannuation Complaints?

Under rule A.7.5 of the AFCA Rules, where a Superannuation Complaint submitted to AFCA is resolved by agreement between the parties, the superannuation provider must not take any action inconsistent with that agreement.

Rule A.7.5 does not preclude a superannuation provider or a Complainant from exercising their statutory appeal rights in respect of an AFCA Determination, however.

What defamation protection is available to the parties?

AFCA's approach is to encourage each Complainant and joined party to provide information and express their views freely to AFCA. Rule A.7.6 of the AFCA Rules supports this approach by preventing a superannuation provider from taking defamation action against a Complainant or joined party because of allegations made to AFCA.

However, Complainants and joined parties need to be aware that rule A.7.6 does not provide protection from defamation action if they make allegations about the superannuation provider to someone other than AFCA, even if the same allegations were also made to AFCA.

8: Complaint resolution approach

How does AFCA determine its approach to resolving complaints?

Rule A.8.1 of the AFCA Rules gives AFCA a range of methods to resolve complaints. For any particular complaint, AFCA is able to select the method, or combination of methods, that it thinks is most likely to resolve the complaint efficiently and fairly.

1. Settlement

Typically, AFCA will explore the possibility of a negotiated settlement with the parties. This may involve AFCA relaying one party's settlement offer to the other. To assist negotiations, AFCA may provide some guidance to the parties as to the type of outcome that might eventuate through AFCA if a settlement is not reached.

Sometimes AFCA will hold a telephone conciliation conference with the parties. This is conducted informally. It provides the parties with a chance to hear each other's perspective in a conversation facilitated by AFCA.

If negotiations or a conciliation conference do not achieve an agreed settlement, the complaint will be decided by AFCA.

2. AFCA decision to close the complaint

Rule A.8.3 of the AFCA Rules enables AFCA to decide that it is not appropriate to continue considering the complaint.

If AFCA decides to close the complaint, it must inform the parties in writing with reasons. The Complainant can object to a decision to close the complaint, in which case the process is as set out in rule A.4.

3. Withdrawal or abandonment by Complainant

A Complainant may at any stage tell AFCA they do not want to continue with their complaint. Alternatively, AFCA may infer that the Complainant wants to abandon the complaint if the Complainant fails to respond to AFCA when AFCA requests the Complainant to contact AFCA to provide information to AFCA. In either case, AFCA is unlikely to reopen the complaint in the absence of special circumstances (see rule A.9.5).

If the Complainant withdraws the complaint, this will generally have the effect of discontinuing the complaint for all joined parties.

The main exception would be if a complaint about the same decision of a superannuation provider was made by two different Complainants and AFCA decided to consolidate the two complaints by joining one Complainant to the other complaint. In this case, if the Complainant decides to withdraw, the complaint could be continued by the joined party (because, in effect, the joined party's original complaint would be re-activated with the joined party as the Complainant).

4. Decision

Rule A.8.1 also gives AFCA the power to decide complaints. Sometimes AFCA will provide the parties with a preliminary assessment before making a binding decision. Sometimes, however, AFCA proceeds very quickly to make a binding decision. [Chapters 10–15](#) of this SG explain preliminary assessments and binding decisions.

When considering the appropriate methods to resolve a particular complaint, AFCA will take into account:

- the nature of the issues raised by the complaint
- the parties to the complaint, their circumstances and the nature of their relationship
- the principles in rule A.2, which commit AFCA to resolving complaints in a cooperative, efficient, timely and fair manner.

AFCA will inform the parties of its proposed approach to ensure they understand what is involved.

When will AFCA proceed to immediately decide a complaint?

AFCA may expedite the process for deciding a complaint by proceeding directly to Determination without first providing a preliminary assessment on the merits of the complaint. AFCA will not invite parties to make submissions on whether to expedite a matter. However, a superannuation provider can provide its view that it would be unable to accept a preliminary assessment in certain cases.

For example, a superannuation provider may be unable to accept a preliminary assessment where a formal decision of its board of directors is the subject of a complaint.

AFCA seeks to make decisions in a way that promotes the most efficient, effective and fair resolution possible. It will take into account the circumstances of the complaint, including:

- urgency
- the type of product or service
- the size of the loss involved
- the age of the matter
- technical complexity.

Examples of complaints AFCA may refer directly to Determination

- Complaints that need to be finalised urgently; for example, because the Complainant is experiencing severe financial hardship
- Complaints involving a superannuation provider that is about to merge, wind up or that has failed to respond
- A low-value complaint where the Complainant suffers from a terminal illness

If AFCA decides to expedite the process for deciding a complaint, we will tell the parties and give them a reasonable opportunity to make submissions and provide information about the matters in dispute before making a Determination.

When will AFCA decide that it is not appropriate to continue to consider a complaint?

In addition to the exclusions set out in Section C of the AFCA Rules, AFCA may also decline to consider a complaint any further if it decides that it is appropriate in the circumstances to do so. AFCA can only do this if, after considering the background and nature of the complaint and any supporting information, it decides that:

- the complaint does not have merit
- the Complainant has suffered no loss
- the Complainant has been adequately compensated
- the superannuation provider has committed no error
- the superannuation provider could not have made any other decision.

AFCA will only decline to consider a complaint in this manner where there are compelling reasons. AFCA will make sure there is enough information about the facts of a complaint and the issues involved, before making a decision about whether to decline to consider the complaint any further. All decisions to decline to consider complaints are made by experienced AFCA staff at the earliest opportunity to avoid unnecessary costs and delays.

Examples of complaints AFCA may decline to consider

- The Complainant complains about a fee, but has not incurred the fee
- The Complainant complains about a fee that has already been refunded
- The Complainant is not the spouse, child or legal personal representative of a deceased member, and is unable to provide documents to support their assertion that they are financially dependent or were in an interdependency relationship with the deceased member (in circumstances where another person is a dependant of the deceased member)

9: Gathering relevant information

What information may AFCA request?

AFCA adopts an inquisitorial approach to its consideration of a complaint and will often request the parties to provide information, whether in hard copy, electronic form, audio, video or other recording. As well as requiring information already in the possession of a Complainant or superannuation provider, AFCA may require them to obtain information from other sources, including where the superannuation provider's response to the complaint makes assertions capable of verification by information that is in the hands of third parties. (AFCA also has statutory powers to require third parties to provide information, but AFCA would generally ask the superannuation provider to obtain the information in the first instance.)

Types and sources of information AFCA may request

- Records or files held by the superannuation provider relating to the decision or conduct complained of
- Records or files kept by agents of the superannuation provider (such as an administrator) relevant to the decision or conduct complained of
- Statements about the events in question from those involved in them
- The relevant governing rules
- Any policy documents relevant to the complaint
- Reports relevant to the complaint that were prepared by a third party for the superannuation provider

To help AFCA to resolve complaints efficiently and fairly, **Complainants and superannuation providers are encouraged to identify all information relevant to a Complaint and to provide it to AFCA at the first available opportunity**, rather than waiting for a specific request from AFCA for that information. AFCA may provide examples about the types of information relevant to different types of complaints to assist parties in the early provision of information to AFCA.

How should a party respond to an AFCA request for information?

Under rule 9.1 of the AFCA Rules, a Complainant or superannuation provider must provide information if AFCA requests it. If a Complainant or superannuation provider is unsure about what AFCA is seeking, they should discuss the request with AFCA.

Requested information must be provided within the timeframe specified by AFCA. If this will not be possible, AFCA must be advised promptly with an explanation of the reasons. AFCA will decide whether an extension of time is appropriate.

There are very limited circumstances when an information request does not have to be met.

The exceptions under rule A.9.1 are:

- where providing the information would breach a duty of confidentiality owed to a third party (other than an agent or contractor) and, despite best endeavours, the third party's consent to disclosure cannot be obtained;
- where providing the information would breach a court order or prejudice a current investigation by a law enforcement agency; and
- where the information does not (or no longer) exist/s or cannot be reasonably obtained.

If a Complainant or superannuation provider thinks that one of these exceptions applies, they should discuss the situation with AFCA and provide supporting information, such as the court order that creates the impediment.

When is a statutory declaration required to substantiate an exception?

Where a superannuation provider or Complainant does not provide the information requested by AFCA, the superannuation provider or Complainant must, if AFCA requests, provide a statutory declaration setting out the steps they have taken to try and comply with AFCA's request and why they have not been able to comply. The statutory declaration must be sworn by a person familiar with and having access to the superannuation provider's records who is authorised by the superannuation provider to make the statutory declaration.

AFCA will make this request where previously provided information has not established to its satisfaction that a reasonable impediment exists. AFCA will respond to a statutory declaration by advising whether it is satisfied with the statutory declaration and, if not, how this may affect the process for resolution of the complaint.

What are some of the things that AFCA may require a party to do to assist consideration of the complaint?

Under rule A.9.3 of the AFCA Rules, AFCA has broad powers to require a party to take action to assist AFCA's consideration of a complaint. AFCA will generally engage with a party about its proposed requirements before using these powers.

When deciding whether to use these powers, AFCA considers questions such as:

- What further information may assist AFCA's handling of the complaint?
- Could a party to the complaint provide the further information?
- If so, what would be the best way for AFCA to obtain the further information from the party?

AFCA will also take into account the costs a party may need to incur as a result.

We ask questions of the parties to a complaint, obtain information from them and reach a decision based on the available information. Because we primarily obtain information from the parties to a complaint, we rely on those parties to obtain any necessary information from third parties, even though we also have statutory powers for a Superannuation Complaint (see rule A.9.4).

We may require a party to attend an interview or examination, but we do not have power to cross-examine that party. We may also require a Complainant to provide all reasonable assistance to the superannuation provider.

For example, we may require the Complainant to attend a medical examination organised by the superannuation provider or the insurer underwriting a disability benefit.

When does AFCA interview the parties?

Generally, AFCA does not interview the parties, but in a minority of complaints we use an interview as a way of gathering or clarifying information or discrepancies. It is in the parties' interests to attend an interview and take the opportunity to explain any discrepancies. If a party refuses to accept our invitation to attend an interview, we may choose to decide the complaint on the available information, which may not be in their favour.

Less commonly, AFCA may exercise its power to require a party to attend an interview to answer questions.

Examples of when AFCA may require attendance at an interview

- Where material provided in writing by the party is unclear or contradictory
- Where the most efficient way for AFCA to obtain the information required to resolve the Complaint is by asking the party to answer questions face-to-face
- Where the party may not understand certain questions that AFCA needs to ask them – so an interview provides AFCA with the best method for explaining its questions and ensuring they are understood and answered

If AFCA requires a party to attend an interview, AFCA will contact the party and arrange a time, date and venue for the interview (and an interpreter, where appropriate).

An interview (whether by invitation or compulsory) may be conducted face-to-face, by telephone, video-conferencing or a similar technology. It may be conducted either by an Ombudsman, Adjudicator or another member of AFCA's staff. An interview is conducted informally in a conversational manner. There are no special rules that govern interviews. The Complainant and superannuation provider can bring to the interview relevant materials to clarify issues arising from the complaint.

Where appropriate, AFCA permits the parties to bring another person with them for assistance, such as a support person.

When does AFCA require further investigative steps by the superannuation provider?

If AFCA considers that a superannuation provider or a joined Financial Firm, such as an insurer, has not undertaken sufficient investigative steps to enable AFCA to resolve the complaint, AFCA may require the superannuation provider or Financial Firm to further investigate either using its own staff or by engaging an independent expert.

When deciding whether to require a superannuation provider or Financial Firm to pay for an independent expert report obtained by AFCA, AFCA will engage with the party and consider what is reasonable in the circumstances. Relevant factors may include:

- the extent to which a report on a matter pertaining to the complaint would be expected to help AFCA to consider the complaint
- the cost of obtaining the report
- likely delays if AFCA requires the report.

An AFCA Decision Maker is consulted in making a decision requiring a party to obtain expert advice, unless expert advice of that kind (for example, a handwriting expert) is commonly required in the circumstances.

Examples of when AFCA may require an insurer provider to obtain an expert report

A complaint about an insurer's decision to decline a disability claim where:

- the complaint raises medical or occupational issues that require an expert opinion to resolve
- it would be reasonable for the insurer to have obtained the opinion as part of assessing the claim
- AFCA considers it reasonable in the circumstances to require the insurer to obtain the opinion.

Examples of when AFCA may require a superannuation trustee to obtain an expert report

A complaint about the calculation of a defined benefit where:

- the complaint raises issues about the value of the factors used to calculate the benefit that requires an actuarial opinion to resolve
- it would be reasonable for the trustee to have obtained an independent actuarial opinion in considering the complaint
- AFCA considers it reasonable in the circumstances to require the trustee to obtain the opinion.

When will AFCA use its statutory information-gathering powers for a Superannuation Complaint?

AFCA may, by written notice, require any person it has reason to believe is capable of giving information or producing documents relevant to a Superannuation Complaint to give the information to AFCA in writing, or produce the documents or copies of the documents as stated in the notice.²⁹

AFCA may give a statutory notice to the parties to a complaint, or to a person who is not a party to the complaint if it has reason to believe the person has relevant information or documents.

It is an offence of strict liability not to comply with an AFCA notice without a reasonable excuse.³⁰

AFCA may keep documents produced under a statutory notice as long as necessary to deal with the complaint (subject to a right of inspection at reasonable times by any person who would be entitled to inspect them if they were not in AFCA's possession) and may make copies of or take extracts from the documents.³¹

²⁹ Corporations Act s 1054A(1)

³⁰ Corporations Act s 1054A(3) and (5)

³¹ Corporations Act s 1054(1)(2)

AFCA will generally request information from the parties to a complaint under the Rules.

If a superannuation provider would prefer us to issue a notice using our statutory powers in order to obtain information or documents relevant to a Superannuation Complaint, the superannuation provider can request us to do so and provide reasons in support of the request. If we agree with those reasons, we will then use our statutory powers to obtain the information or documents.

Otherwise, AFCA may use its statutory power to obtain information and documents:

- from the parties to a complaint (including joined parties) if they have not cooperated in the provision of information or documents to AFCA
- from third parties who would not otherwise be required to provide information or documents to AFCA if the superannuation provider has not been able to obtain them.

An unreasonable failure to cooperate with an AFCA information request may also have the consequences discussed in ‘What are the consequences of non-compliance with AFCA requests for information or other assistance?’ below.

When will AFCA require parties to a Superannuation Complaint to attend a conciliation conference?

AFCA frequently uses a conciliation conference in attempting to settle a complaint.

If a person makes a Superannuation Complaint about a decision to pay a death benefit in a particular way and the complaint involves parties with competing claims to the benefit, AFCA would normally hold a conciliation conference.

In a Superannuation Complaint relating to a claim for a disability benefit that was declined on the basis that the Complainant was not disabled to the extent required by the governing rules, AFCA may hold a conciliation conference.

Superannuation Complaints about issues relating to account errors, disclosure issues or failing to implement a fund member’s instructions may also be appropriate for conciliation.

Sometimes a conciliation conference may be used to narrow the disputed issues, or to clarify evidentiary matters that AFCA has not been able to resolve otherwise.

AFCA will usually request the parties to attend a conciliation conference under the Rules.

AFCA may, by written notice, require the parties to a Superannuation Complaint to attend a conciliation conference.³² AFCA can also require other persons to attend the conciliation conference if the person is likely to be able to provide information relevant to the settlement of the complaint, or the person's presence at a conciliation conference would, in AFCA's opinion, likely be conducive to settling the complaint.³³ The written notice must fix the date, time and place for the conference.³⁴

If the Complainant does not attend the conference, AFCA may treat the complaint as if it had been withdrawn by the Complainant.³⁵

It is an offence if another party or person does not attend the conference.

AFCA may use its statutory power to require attendance at a conciliation conference:

- If any party to the complaint (including a joined party) expresses reluctance to attend a conciliation conference and their attendance would facilitate the efficient resolution of a complaint.
- If there are other persons that AFCA believes will facilitate settlement of the complaint at a conciliation conference.

AFCA may give an oral or written direction to the parties present at a conciliation conference prohibiting the disclosure of documents or information relating to the complaint.³⁶ In giving such directions, AFCA must have regard to the wishes of the parties and the need to protect their privacy.³⁷

There is a statutory penalty if a person refuses or fails to comply with a confidentiality direction from AFCA.³⁸

AFCA may give a confidentiality direction at the end of a conciliation conference if it considers that highly personal or sensitive information has been disclosed during the course of the conference that should not be disclosed outside the conference.

³² Corporations Act s 1054B(1)(a)

³³ Corporations Act s 1054B(1)(b)

³⁴ Corporations Act s 1054B(2)

³⁵ Corporations Act s 1054B(3)

³⁶ Corporations Act s 1054BA(1)(a) and (3)

³⁷ Corporations Act s 1054BA(2)

³⁸ Corporations Act s 1054BA(4)

Example of when AFCA may give a confidentiality direction

A conciliation conference about a death benefit distribution involving joined parties

What are the consequences of non-compliance with AFCA requests for information or other assistance?

AFCA has power under rule A.9.5 of the AFCA Rules to take whatever steps it considers reasonable if a party fails to provide information to AFCA, or comply with other AFCA requests without a reasonable excuse. For Superannuation Complaints, this power is additional to the consequences that may flow from failure to comply with a statutory notice given by AFCA.

If a party to a complaint fails to provide information or comply with an AFCA request made under the AFCA Rules, AFCA will assess whether the non-compliant party has a reasonable excuse. Factors relevant to this assessment include:

- the adequacy of the reasons provided
- whether the non-compliant party has committed to rectify its failure to comply
- whether the non-compliant party has made a prompt request for an extension of timeframe if further time to comply is needed
- the impact of the failure to comply on the likely resolution of the complaint and other parties to the complaint
- any past history of failure to cooperate with AFCA.

If AFCA concludes that there is not a reasonable excuse for a failure to provide materially important information AFCA will take appropriate steps, such as closing the complaint or proceeding with the resolution of the complaint on the basis that the non-compliance gives rise to an adverse inference. This could mean that AFCA will assume the requested information undermines the position of the non-compliant party.

If a superannuation provider, without a reasonable excuse, fails to comply with an AFCA request that materially impacts the dispute resolution process, AFCA may report a serious breach to ASIC under rule A18.2 of the AFCA Rules. A breach of membership obligations may also be reported to the AFCA Board with a view to expelling the superannuation provider under AFCA's Constitution.

If the Complainant fails to comply with an AFCA request, AFCA may refuse to continue handling the complaint. If this occurs and the Complainant owes money to the superannuation provider (for example, an overpaid benefit) the superannuation provider can begin or recommence stayed legal proceedings against the Complainant.

If AFCA closes a complaint because the Complainant has not complied with AFCA's requests, AFCA will only reopen the complaint in special circumstances. This will require the Complainant to establish that they had a reasonable excuse for the previous failure to comply with AFCA's request within AFCA's specified timeframe. To justify the reopening of the complaint, the Complainant would also have to show that the complaint continues to warrant consideration. In addition, the Complainant would need to provide all information originally requested by AFCA.

When might AFCA consult industry and consumer representatives?

AFCA has internal industry advisers with specialist experience in different fields of financial services. In most cases, we use this internal expertise to advise on what is standard industry practice. We keep up to date with changes in industry practice, regulatory frameworks and the broader environment by holding industry and consumer forums.

In addition, we may survey or consult with external industry and consumer representatives in our consideration and resolution of complaints. We might seek industry expertise to help us to better understand industry practice, procedures and products where we have not yet formed a view as to what standard industry practice might be.

Examples of issues where AFCA may consult industry and consumer representatives

- Whether the handling of a disability claim was in accordance with good industry practice
- When a guardian should cease to have access to a minor's trust account

When might AFCA seek expert advice?

Under rule A.9.6 of the AFCA Rules, AFCA has power to seek its own expert advice and to ask a superannuation provider to contribute to the cost (up to \$5,000 per complaint unless there are special circumstances).

Obtaining expert advice

In deciding whether to obtain expert advice, AFCA will engage with the superannuation provider and consider whether the issues arising from the complaint and the information exchanged are such that AFCA is unable to reach a decision about what is fair and reasonable in the circumstances. Factors AFCA will take into account may include:

- the extent to which expert advice would be expected to help AFCA to resolve the complaint
- the cost of obtaining the advice
- likely delays if AFCA obtains the advice.

An AFCA Decision Maker is normally consulted in making a decision to obtain expert advice.

When deciding whether to appoint a particular person to provide expert advice, AFCA will consider whether the person is an expert in the matter on which advice is to be provided, taking into account, in particular:

- their training and experience, and whether it is recent and relevant
- their independence
- whether they are recognised as an expert in that matter.

Examples where AFCA may be assisted by expert advice

- A medical specialist or occupational specialist in a disability complaint
- A forensic document examiner in a complaint about a forged document, such as a binding nomination
- An actuary in a complaint about the calculation of defined benefits (including defined benefit pensions or the commutation value of a pension)

AFCA expects expert advice to set out:

- any assumptions on which the advice is based;
- the reasons for the advice; and
- any qualifications to the advice.

Payments or contributions by superannuation providers

Where AFCA requires a superannuation provider to pay for, or contribute, to the cost of obtaining expert advice, AFCA will contact the superannuation provider before requiring the contribution to be made.

AFCA will not require a superannuation provider to contribute more than \$5,000 to the cost of obtaining expert advice for a complaint unless there are special circumstances.

Special circumstances may exist where a complaint is particularly complex. A complaint may be particularly complex because it involves, for example:

- multiple products
- challenges to the authenticity of multiple documents
- substantial financial exposure for the parties.

In cases where AFCA forms the view that special circumstances exist, AFCA will contact the superannuation provider as soon as reasonably practicable after making the decision.

10: Information sharing and opportunity to make submissions

What is AFCA's general approach to information sharing?

Like the SCT, AFCA is committed to affording procedural fairness by sharing information provided by one party with the other party and by providing all parties with a fair opportunity to make submissions setting out their views.

Consistent with the principles that underpin the scheme, AFCA seeks to manage this process in an efficient way. Therefore, AFCA only shares relevant documents with the parties. AFCA also tries to minimise the number of 'back and forths' between parties sharing information. As a consequence:

- Where a party's submission merely repeats an earlier submission, AFCA does not necessarily provide it to the other party.
- Where one party to the complaint provides some documents to AFCA and AFCA is aware that further documents will shortly be provided, AFCA may wait to receive all documents before providing them to the other party.

Will AFCA make its internal documents available to the parties?

Unless required by law, AFCA does not provide the parties with its internal documents, for example, legal advices or draft decisions. These are intermediate steps that may not represent AFCA's final position. They have no formal status or bearing on the complaint.

If requested through AFCA's Privacy Manager, AFCA can provide the parties with file notes of telephone conversations with the parties where they record relevant information.

When will AFCA decide not to provide information to a party?

Under rule A.10.2 of the AFCA Rules, AFCA is able to decide to withhold relevant information from a party to the complaint if special circumstances apply.

AFCA takes the approach that special circumstances exist in a very small minority of cases, as fairness is not generally served by reaching decisions adverse to a party based on information not available to that party.

Example of special circumstances warranting withholding of information

Health and safety concerns where release of information may harm or endanger a third party

Can a party object to AFCA providing relevant information to another party?

Where a party to a complaint does not want information they have provided to AFCA to be shared with another party, they may raise their concern with AFCA at the time of providing the information. They will need to clearly set out:

- the document or part of a document that they are concerned about
- the reasons for their concern – supporting information should also be provided where possible
- why the information should be taken into account; for example, the significance and reliability of the information
- how the substance of the information can be conveyed to the other party to give them the chance to respond and thereby address any unfairness that would otherwise arise.

AFCA will then assess the matter and decide its course of action. The options for AFCA are:

- 1. to provide the information in full to the other party notwithstanding the objection.**
- 2. to provide the information to the other party, but with some information excised or blacked out.**

This may be a possibility if the party providing the information is concerned about a small section of a document that is able to be removed or redacted without obscuring the meaning or importance of the document as a whole.

Examples of where removal or redaction of a small section of a document may be possible

- A document contains a statement that is defamatory of the other party, or someone else, and the defamatory statement is not materially relevant to the issues in the complaint.
- A document contains commercially sensitive information that is not materially relevant to the issues in the complaint.

3. To refrain from providing the information to the other party.

If AFCA makes this decision, AFCA will also need to decide whether it is appropriate for AFCA to rely on the withheld information in reaching a decision about the merits of the complaint, unless special circumstances apply. AFCA is unlikely to find special circumstances exist unless an alternative method can be devised to convey the substance of the information to the other party, and thereby provide that other party with an opportunity to give their perspective in response.

What checking occurs before an AFCA Determination to ensure a fair opportunity has been provided to the parties to comment on relevant information?

Before an Ombudsman, Adjudicator or an AFCA Panel makes a Determination in relation to a complaint, the AFCA Decision Maker will:

- identify all information, including documents and other material on which AFCA proposes to rely in the Determination; and
- check that all parties have been provided with that information.

When will AFCA provide a party to a complaint with documents after the complaint is closed?

Rule A.10.1 of the AFCA Rules envisages that AFCA may share information even after a complaint has been closed, consistent with AFCA's obligations under the *Privacy Act 1988* (Cth).

AFCA has in place a privacy policy to ensure that it:

- collects, uses and disseminates personal information in a manner that is in accordance with the Privacy Act, Australian Privacy Principles (APPs) and any relevant other legislation;
- responds appropriately to requests in relation to an individual's personal information; and
- responds appropriately to any breach of its privacy obligations.

AFCA's privacy policy is available on its website. Any individual who wishes to gain access to the personal information AFCA holds about them should initially contact the member of staff dealing with their dispute, but may instead contact the Privacy Manager directly. This can be done by using our online form or by writing to:

The Privacy Manager
 Australian Financial Complaints Authority
 GPO Box 3
 MELBOURNE VIC 3001

AFCA will, on request by the affected individual, provide access to personal information it holds, except where:

- it reasonably believes that giving access would pose a serious threat to the life, health or safety of any individual, or to public health or public safety
- giving access would have an unreasonable impact on the privacy of other individuals
- the request for access is frivolous or vexatious
- the information relates to existing or anticipated legal proceedings between AFCA and the individual, and would not be accessible by the process of discovery in those proceedings
- giving access would reveal the intentions of AFCA in relation to negotiations with the individual in such a way as to prejudice those negotiations
- giving access would be unlawful
- denying access is required or authorised by, or under, an Australian law or a court/tribunal order
- giving access would reveal evaluative information generated within AFCA in connection with a commercially sensitive decision making process
- AFCA has reason to suspect that unlawful activity or misconduct of a serious nature has been, is being, or may be engaged in and both of the following apply:
 - the activity or misconduct relates to AFCA's functions or activities; and
 - giving access would be likely to prejudice the taking of appropriate action in relation to the matter
- giving access would contravene AFCA's statutory secrecy provisions in relation to that information
- giving access would be likely to prejudice one or more enforcement-related activities conducted by, or on behalf of, an enforcement body.

If AFCA refuses to give access to the personal information, it will usually give reasons and provide the option to make a formal complaint about the refusal through AFCA's complaints and feedback procedure. There may be instances where, having regard to the grounds for the refusal, it would not be appropriate to provide reasons.

11: Confidentiality

Why is it important that parties maintain confidentiality?

AFCA's process relies on active participation by the parties and an open exchange of information, with an opportunity to put forward relevant information and arguments. We expect the parties to participate in the AFCA scheme in good faith and not to use the disclosed information for purposes other than seeking to resolve the complaint.

We encourage parties to be open and transparent in their dealings with AFCA, since the frank exchange of information will frequently assist in resolving a complaint.

In the course of handling Superannuation Complaints, Complainants and joined parties may, therefore, provide personal information about their physical or mental health, employment prospects, family situation, sexual relationships and other sensitive matters, particularly in relation to complaints about disability or death benefits. Similarly, settlement offers may often be made on a confidential basis having regard to the particular circumstances of a complaint.

Rule A.11 of the AFCA Rules provides confidentiality protections to the parties to a complaint, including that:

- information obtained through AFCA may not be used in any subsequent court proceedings (unless required by the court)
- the parties themselves must keep confidential all information provided to them through the course of a complaint, except in limited circumstances such as where reasonably necessary to obtain advice (for example, from a lawyer who must also maintain confidentiality)
- AFCA itself must keep confidential all information provided to it.

In addition, AFCA has statutory powers to impose confidentiality in relation to Superannuation Complaints.

How will AFCA approach its confidentiality powers in relation to Superannuation Complaints?

AFCA has a statutory power when dealing with Superannuation Complaints to give oral or written directions to any person prohibiting the disclosure of documents or information relating to the complaint.³⁹

AFCA can also give oral or written directions as to who may be present at any meeting held by AFCA relating to the complaint.⁴⁰

Meetings includes internal meetings attended by AFCA staff or AFCA Decision Makers.

In giving such directions, AFCA must have regard to the wishes of the parties and the need to protect their privacy.⁴¹

There is a statutory penalty if a person refuses or fails to comply with such a direction from AFCA.⁴²

As noted earlier, AFCA may give a confidentiality direction at the conclusion of a conciliation conference if sensitive information has been disclosed during the course of the conference.

AFCA may also give a confidentiality direction for internal meetings held by AFCA at a request of a party (including a joined party).

What exceptions are there to AFCA maintaining confidentiality?

AFCA's obligation to maintain the confidentiality of information implies that confidentiality need not be observed if the information is already in the public domain or if the parties agree to the disclosure of the information.

AFCA's confidentiality obligation does not override its other responsibilities, for example, to report matters to regulators.

³⁹ Corporations Act s 1054BA(1)(a) and (3)

⁴⁰ Corporations Act s 1054BA(1)(b) and (3)

⁴¹ Corporations Act s 1054BA(2)

⁴² Corporations Act s 1054BA(4)

12: Preliminary assessment

Under rule A.12 of the AFCA Rules, AFCA may provide all parties with a preliminary assessment, which the parties may choose to accept or not. If all the parties accept the preliminary assessment, the complaint is settled by agreement on that basis.

What is a preliminary assessment?

A preliminary assessment will set out:

- the relevant factual information
- the relevant issues arising in the complaint and AFCA's preliminary assessment in relation to those issues
- how AFCA thinks the complaint should be resolved and why
- the timeframe within which the parties must tell AFCA whether or not they are willing to settle the complaint in accordance with AFCA's preliminary assessment.

It is possible that a preliminary assessment could set out a preliminary view that the complaint has no merit. Alternatively, it may set out a view that the superannuation provider should provide the Complainant with a remedy, usually through making a different decision and what this different decision should be.

Where there is more than one Financial Firm involved in a Superannuation Complaint (for example, a superannuation provider and an insurer), a preliminary assessment may help to clarify the issues by, for example, providing a view that it would be fair and reasonable for the insurer to pay an insured benefit under a group insurance policy.

How is a preliminary assessment conveyed?

A preliminary assessment may be given verbally or in writing. For complaints that do not involve multiple issues, it is often more effective and efficient to provide the preliminary assessment verbally over the phone. Where a verbal preliminary assessment has been given, any written confirmation of that view will normally only be a summary of the points discussed.

AFCA may decide to provide a preliminary assessment in writing rather than verbally, after considering these factors:

- One of the parties asks for the view in writing or for time to consider our view.
- We cannot reach one of the parties, and the view is in the Complainant's favour.
- The Complainant has capacity or conduct issues.
- Multiple attempts to contact the Complainant by phone in the past have been unsuccessful.
- The Complainant is not contactable by phone, or requested all contact to be in writing.

How does AFCA decide whether a preliminary assessment is appropriate?

AFCA seeks to resolve complaints in a way that promotes the most efficient, effective and fair complaint resolution possible. Factors that may suggest a preliminary assessment is appropriate include:

- where the factual issues in relation to the complaint are complex or unclear
- where there is conflicting opinion, for example, medical opinion
- where AFCA considers that a preliminary assessment is likely to be helpful to the parties for the purpose of settling the complaint.

AFCA finds that preliminary assessments can be useful as a summary of the current position, taking into account all of the information obtained during its investigations. They can, therefore, help the parties focus on the issues in dispute. A preliminary assessment may also highlight missing information that a party considers may influence the outcome of the complaint, and may prompt the party to obtain or provide that information.

How long do the parties have to decide whether to accept the preliminary assessment?

Typically, AFCA will give the parties seven days (for fast track complaints) or 30 days (for standard or complex complaints) to tell AFCA whether or not they are willing to settle on the basis of the preliminary assessment or, alternatively, whether they want the complaint to proceed to a Determination.

If the parties accept the preliminary assessment, the complaint is resolved and finalised on the basis set out in the preliminary assessment.

If a party wants to proceed to a Determination, they should use this time as a final opportunity to provide necessary information and documents to support their position, and address matters that may be adverse to their case.

When does a complaint proceed to Determination?

AFCA takes into account the nature and background to each complaint and decides the most appropriate pathway to finalise it, including whether it is appropriate to proceed directly to a Determination.

In some instances, AFCA may decide to proceed directly to a Determination without giving a preliminary assessment (see rule A.8.2).

In other situations, AFCA may decide to not consider the dispute any further without the need for a Determination (see rule A.8.3).

AFCA will also proceed to a Determination and make a final decision if the superannuation provider, a joined Financial Firm (such as an insurer) or the Complainant rejects AFCA's preliminary assessment, giving reasons why they disagree.

Why must reasons be given for rejecting a preliminary assessment?

Once a preliminary assessment is given, AFCA gives the parties procedural fairness and an opportunity for them to address matters that may be adverse to their position. It is important for parties to explain why they disagree with the preliminary assessment in order that these concerns can be addressed in the Determination. It is not necessary to repeat submissions previously raised and addressed, unless the parties identify an error in fact or analysis of those prior submissions.

In the absence of providing such reasons, the AFCA Decision Maker could adopt the same approach and reach the same outcome as that expressed in the preliminary assessment.

What happens if a party does not respond or accept a preliminary assessment?

A preliminary assessment is only binding on the parties if all parties agree to settle the complaint on the basis of the preliminary assessment.

If the Complainant, the superannuation provider or a joined Financial Firm rejects the preliminary assessment within the timeframe AFCA specifies (or any agreed extended period) and provides reasons why, the complaint will proceed to a Determination by an AFCA Decision Maker.

If a superannuation provider is unable to accept a preliminary assessment because it believes the preliminary assessment does not reflect its obligations under its governing rules or superannuation law, the superannuation provider may request that the complaint proceed to a Determination.

Examples of where a preliminary assessment may be inconsistent with superannuation governing rules or superannuation law

- A preliminary assessment that a TPD benefit should be paid to the member where a medical practitioner has not expressed an opinion that the member is unlikely to engage in gainful employment for which the member is reasonably qualified by education training or experience
- A preliminary assessment that an insured TPD benefit should be paid by the trustee where the trustee has not received the insurance proceeds from the insurer

A superannuation provider can also provide its view that it is unable to accept a preliminary assessment in certain cases; for example, where a formal decision of its board of directors is the subject of a complaint and the superannuation provider would therefore prefer that an AFCA Decision Maker make a formal Determination to vary or substitute that decision.

What if the superannuation provider or joined Financial Firm does not respond?

If the preliminary assessment is in favour of the Complainant and the Complainant accepts it, but the superannuation provider or a joined Financial Firm does not respond, AFCA will proceed to Determination to bring about finality to the complaint.

What if the Complainant does not respond?

There are instances where finality of the complaint may be desirable, even if the Complainant does not respond to the preliminary assessment within time.

For example, trustee decisions about death benefits warrant a Determination even if the Complainant does not respond.

Otherwise, AFCA may consider a Determination is not warranted and close the file if the Complainant does not respond, regardless of whether the recommended outcome was in favour of the Complainant or the superannuation provider. If this occurs, the superannuation provider (and any joined Financial Firm) will not be obliged to follow the recommended outcome even if it was in favour of the Complainant. The Complainant remains free to bring their complaint elsewhere, such as the courts.

If the Complainant seeks to respond to the preliminary assessment after the file is closed, we will consider if special circumstances warrant reopening the complaint (see rule A.9.5).

The Operational Guideline for rule A.12.4 contains a useful table of the possible outcomes arising from a preliminary assessment.

Will the AFCA Decision Maker take a preliminary assessment into account when making a Determination?

When making a Determination, the AFCA Decision Maker will take into account the nature and circumstances of the complaint, the information and supporting documents provided by the parties, and the factors set out in rule A.14, as appropriate, from a fresh perspective.

This means that the AFCA Decision Maker will determine the outcome of the complaint without being bound by any preliminary assessment previously given. While the AFCA Decision Maker will consider a party's reasons for disagreeing with the preliminary assessment, the AFCA Decision Maker must also take into account all of the circumstances of the complaint.

When would a preliminary assessment be used for a Superannuation Complaint?

AFCA is aware that, for many Superannuation Complaints, it is reviewing a formal decision of the superannuation trustee made under its governing rules. However, in cases where, based on prior experience, the outcome is relatively certain once the facts are established, AFCA may make a preliminary assessment for a Superannuation Complaint. It would, therefore, be helpful for superannuation providers to consider what delegations they will put in place to enable preliminary assessments to be accepted in appropriate cases.

AFCA may make a preliminary assessment:

- Where the complaint is about payment of a death benefit and AFCA considers there are competing claims between a dependent spouse or partner and adult children who were not financially dependent on the deceased member
- Where the complaint is about payment of a death benefit, a party is challenging the dependency status of another party and AFCA's preliminary assessment may resolve that question
- Where the complaint is about the denial of a disability claim and AFCA's preliminary assessment may assist in reconciling medical and other relevant evidence
- Where there has been an administration error that has disadvantaged the Complainant and the recommendation is that the superannuation provider settle the complaint
- Where there has been a disclosure error that has disadvantaged the Complainant and the recommendation is that the superannuation provider settle the complaint.

AFCA will decide whether to make a preliminary assessment based on a consideration of all of the circumstances, including whether it would be efficient and effective to attempt to resolve a complaint in this way.

AFCA is unlikely to make a preliminary assessment of a Superannuation Complaint for certain exercises of trustee discretion where the outcome is not straightforward.

Examples of Superannuation Complaints where AFCA may proceed directly to a Determination

- Death benefit complaints involving the distribution of the benefit between dependants who were all financially dependent on the deceased member
- Complaints that involve technical or novel issues that should be considered by an AFCA Decision Maker

13: AFCA Decision Makers

Rule A.13 of the AFCA Rules provides for a Determination to be made by different kinds of AFCA Decision Makers appointed by AFCA's Board: an Adjudicator, an Ombudsman or an AFCA Panel. A complaint is allocated to an AFCA Decision Maker by AFCA's Chief Ombudsman (or their delegate) according to the person's expertise, experience and impartiality.

How does AFCA decide whether a Determination should be made by an Ombudsman, an Adjudicator or an AFCA Panel?

The Chief Ombudsman, or their delegate, decides whether a Determination should be made by a single Ombudsman or Adjudicator, or by a two- or three-person AFCA Panel. This decision is made after taking into account the factors set out in rule A.13.1: complexity, the amount of loss, whether the complaint raises a systemic issue, whether the complaint raises new issues for AFCA (whether of law or good industry practice) and efficiency. While efficiency considerations are a factor in selecting the AFCA Decision Maker, AFCA will not make the selection based entirely on resource considerations. The aim is to select the appropriate AFCA Decision Maker for the particular complaint.

To give an indication of the likely approach:

- An Adjudicator is likely to be the AFCA Decision Maker for a complaint that has a small number of well-defined issues and involves small amounts of money.
- If the complaint is complex or involves a significant amount of money, it is more likely to be determined by an Ombudsman than an Adjudicator because an Ombudsman typically has more expertise in relation to complex and large-value complaints. The selected Ombudsman would be expert in superannuation law and industry practice.
- If the complaint raises new issues for AFCA, it may be that a multi-person panel of AFCA Decision Makers will determine the complaint. The AFCA Panel would include relevant experts; for example, an industry expert if the complaint is about a new industry product, or a consumer expert if there are new issues pertaining to consumer behaviour or impact.

Whether an Ombudsman, Adjudicator or AFCA Panel decides a complaint, the AFCA Decision Maker must consider the adequacy of the information that has been gathered and whether procedural fairness has been provided to the parties. If satisfied about these matters, the AFCA Decision Maker must decide the complaint applying the relevant decision making criteria (see rule A.14.1).

When is it appropriate to refer a complaint to a Panel?

In most cases, it is anticipated that a single Ombudsman or Adjudicator will have expertise and access to any relevant industry or consumer advice that is required to decide a complaint, without the need to convene an AFCA Panel.

However, we may elect to decide a complaint by an AFCA Panel where:

- it would be more effective to involve the specialist expertise of an industry or consumer representative directly in the decision making
- the complexity or significance of the complaint warrants it
- it would be valuable to obtain differing views
- the complaint raises circumstances that are largely the same as those raised in a considerable number of other complaints we are considering, or expect to be submitted
- the complaint raises complex or new issues under legislation
- the issues in dispute are new to our jurisdiction, and until we have further experience in determining the issues a Panel may be a more appropriate means to deal with such complaints for a period.

Examples of Superannuation Complaints that might be decided by an AFCA Panel

- A complaint relating to the distribution of a death benefit where the benefit is of high value and there are competing claims
- A complaint involving complex or new financial products; for example, longevity products
- A complaint involving complex or difficult questions of statutory interpretation or interpretation of the governing rules or contract, including where AFCA refers an issue of law to the Federal Court
- A complaint that raises issues of principle that may have broader application for the fund

AFCA will regularly review and consider whether the criteria for complaints decided by Panels should be adjusted for Superannuation Complaints, as it gains further insight into the range of Superannuation Complaints lodged with AFCA.

What expertise and experience do AFCA Decision Makers have?

In appointing Ombudsmen and Adjudicators, AFCA's Board of Directors must consider the candidates' objectivity, qualifications, experience and personal qualities. Our Ombudsmen and Adjudicators come from a variety of backgrounds including legal practice, industry and consumer organisations.

Once appointed, AFCA's Chief Ombudsman (or delegate) must again consider the Decision Maker's expertise and experience when allocating complaints to be determined. This is particularly the case when an Ombudsman or Adjudicator works across different industries. The Ombudsmen and Adjudicators work closely as a group, with peer review of decisions before they are released and the Lead Ombudsman ensuring the quality of decision making.

14: Decision making approach

Rule A.14.1 of the AFCA Rules provides that, in determining a Superannuation Complaint, an AFCA Decision Maker:

- may refer a question of law to the Federal Court; and
- must apply the approach specified in the Corporations Act.

The approach specified in the Corporations Act reflects the SCT's determination-making powers.

When does AFCA refer questions of law to the Federal Court?

An AFCA Decision Maker may, on their own initiative or at the request of a party to a Superannuation Complaint, refer a question of law that arises in relation to the complaint to the Federal Court.⁴³

The SCT also has this power.

AFCA may refer a question of law to the Federal Court if the AFCA Decision Maker forms a view (or agrees with the view of a party to the complaint) that the law is unclear in its application to an issue that arises in relation to a complaint. Typically, a referral decision will be made by an AFCA Decision Maker.

While the Federal Court is considering the matter, the AFCA Decision Maker cannot make the relevant Determination and once the Federal Court has issued its ruling, the AFCA Decision Maker must not do anything inconsistent with the ruling.⁴⁴

⁴³ Corporations Act, s 1054C(1)

⁴⁴ Corporations Act, s 1054C(3)

What approach does AFCA take in determining Superannuation Complaints?

What are AFCA's remedial powers for Superannuation Complaints?

When an AFCA Decision Maker determines a Superannuation Complaint, it has all of the same powers, obligations and discretions of the trustee, insurer, RSA provider or other decision maker whose decision or conduct is being reviewed.⁴⁵

On reviewing a decision of a trustee, insurer, RSA provider or life company (or other decision maker joined to the complaint), the AFCA Decision Maker must:

- affirm the decision if it is satisfied that the decision was fair and reasonable in relation to the Complainant (and, in the case of a decision about payment of a death benefit, all joined parties) in the circumstances
- vary the decision
- set aside the decision and send it back to the decision maker to reconsider in accordance with the AFCA Decision Maker's directions or recommendations; or
- set aside the decision and substitute its own decision.⁴⁶

An AFCA Decision Maker can only make a Determination for the purpose of placing the Complainant (and, in the case of a decision about payment of a death benefit, all joined parties) as nearly as practicable in a position where the unfairness and/or unreasonableness no longer exists.⁴⁷

In addition, an AFCA Decision Maker must not do anything that would be contrary to law, the governing rules of the fund or, if a contract of insurance between the trustee and an insurer is involved, the terms of the insurance contract.⁴⁸

When an AFCA Decision Maker determines a Superannuation Complaint, the AFCA Decision Maker steps into the shoes of the superannuation provider, but with the benefit of all information that the AFCA Decision Maker has before it.

⁴⁵ Corporations Act, s 1055(1)

⁴⁶ Corporations Act, s 1055(2), (3) and (6)

⁴⁷ Corporations Act, s 1055 (4) and (5)

⁴⁸ Corporations Act, s 1055(7)

Reviewing decisions (and related conduct)

If, after considering all information, the AFCA Decision Maker is satisfied that the superannuation provider's decision (or related conduct) operated fairly and reasonably in relation to the Complainant (and in the case of a decision about payment of a death benefit, all joined parties) in the circumstances, the AFCA Decision Maker must affirm it. However, if the AFCA Decision Maker is not satisfied and considers there is some unfairness or unreasonableness in the operation of the superannuation provider's decision, then the AFCA Decision Maker can take one of the following remedial actions:

- vary the decision
- set aside the decision and substitute their own decision; or
- set aside the decision and send the matter back to the superannuation provider to make a new decision in accordance with the AFCA Decision Maker's directions.

The AFCA Decision Maker can only exercise these remedial powers to the extent necessary to remove any unfairness or unreasonableness.

In addition, the AFCA Decision Maker is bound by the governing rules of the superannuation fund and by superannuation law. Because of this limitation, there are some Determinations that AFCA cannot make.

Examples of Determinations that AFCA does not have the power to make

- An AFCA Decision Maker cannot change the definition of disablement in an insurance policy.
- An AFCA Decision Maker cannot change the eligibility conditions in an insurance policy.
- An AFCA Decision Maker cannot pay a death benefit to someone who is not a dependant under the governing rules of the fund (unless there are no dependants and no legal personal representative of the deceased member).
- An AFCA Decision Maker cannot increase the amount of a fund member's benefit beyond the member's entitlement under the governing rules of the fund.
- An AFCA Decision Maker cannot ignore a valid binding death benefit nomination.

Reviewing sales conduct

AFCA has some additional remedial powers for complaints about the admission of a member to a life policy fund and complaints about the sale of certain types of superannuation products.

If the complaint is about an unfair or unreasonable decision to admit the Complainant to a life policy fund, the AFCA Decision Maker can:

- cancel the Complainant's membership of the life policy fund (or any sub-plan of the fund)
- vary the governing rules of the life policy fund as they apply to the Complainant
- require the repayment of money received under the life policy; or
- set aside all or part of the terms or conditions of the life policy as they apply to the Complainant.⁴⁹

If the complaint is that the Complainant was unfairly or unreasonably sold an annuity policy, contract of insurance or RSA (product), the AFCA Decision Maker can:

- vary the terms and conditions of the product as they apply to the Complainant
- require the repayment of money received under the product; or
- set aside all or part of the terms or conditions of the product as they apply to the Complainant.⁵⁰

What does AFCA take into account in exercising its remedial powers?

In determining Superannuation Complaints, an AFCA Decision Maker will have regard to relevant decisions of the Federal Court about the nature and scope of the determination-making powers of the SCT (because AFCA's powers are based on the Tribunal's powers). An AFCA Decision Maker will also have regard to relevant Tribunal and AFCA Determinations, but will not be bound by those Determinations because each Complaint must be considered on its merits. AFCA will, however, try to achieve consistency where similar circumstances arise.

In determining whether a decision (or related conduct) is fair and reasonable, AFCA may also consider whether the superannuation provider has acted consistently with any relevant industry code or best practice guidelines.

Will AFCA give reasons?

An AFCA Decision Maker must give written reasons for its Determination of a Superannuation Complaint to each party.⁵¹

⁴⁹ Corporations Act, s 1055(6)(c)

⁵⁰ Corporations Act, s 1055(6)(d)

⁵¹ Corporations Act, s 1055A

To what extent are previous decisions followed?

AFCA does not treat previous decisions as precedents. There may be circumstances when a previous decision is not applicable because the facts are somewhat different, or the law has changed.

As a general approach, however, consistency of decision making is important (see rule A.2.1(d) of the AFCA Rules). To promote consistency, AFCA is committed to providing information about its decision making approach. This includes publishing case studies and anonymised Determinations.

How does AFCA assess information provided by the parties?

Like the SCT, AFCA is not a judicial body and does not require parties to give evidence under oath, or give parties the opportunity to cross-examine each other. AFCA does, however, investigate a complaint thoroughly before determining the merits of it.

Rule A.14.3 of the AFCA Rules states that AFCA is not bound by the rules of evidence that apply in court proceedings. This means AFCA does not use these rules to decide the admissibility of each document or piece of information.

Examples of possible rules of evidence that do not apply

- Expert opinion
- Documents
- Contemporaneous notes
- Hearsay
- Information as a pattern of conduct
- Character information

AFCA has an obligation to conduct its enquiries and carry out its consideration and resolution of complaints in a way that draws out the facts and is fair to the parties. Particularly where there is conflicting information provided by the parties, AFCA may need to consider the weight it gives to various information provided to it, whether in the form of assertions or documentary material. This also requires an assessment of the reliability of the information.

The reliability of information depends on the nature and source of the information and how it was obtained. Generally, in the absence of any other compelling factors:

- information from an independent source is more reliable than information from a party that has an interest in the outcome of the complaint
- opinion by an expert with specialised knowledge or experience is more reliable than opinion by a less qualified expert
- information that has controls over its creation and maintenance is more reliable than information without controls
- contemporaneous notes are more reliable than an oral recollection

- originals are more reliable than copies
- information from one source that is consistent with information from another source is more reliable.

What is set out in a Determination?

A Determination is a written assessment by one or more AFCA Decision Makers (each of whom has been appointed by AFCA's Board of Directors) that sets out:

- the relevant factual information available at the time of making the Determination
- the relevant issues arising in the complaint and AFCA's analysis of those issues
- AFCA's decision as to how the complaint should be resolved, usually by AFCA either affirming the superannuation provider's decision or making a different decision.

An AFCA Decision Maker will decide the complaint based on the information available at the time of making the Determination.

Why and how does AFCA publish de-identified Determinations?

Although previous Determinations should not be treated as precedents, they do provide users of the AFCA scheme with an idea of how similar fact scenarios might be viewed. For this reason, and to ensure consistency and accountability, AFCA generally publishes Determinations on its website on a de-identified basis.

It is open for the parties to request certain details be changed in the Determination, if those details can be used to identify them (as long as the substance of the Determination remains unaffected), or otherwise that the Determination not be published (provided there are compelling reasons). Similarly, a party can request a Determination that has already been published to be further de-identified or removed.

15: Effect of Determinations

What is the status of a Determination of a Superannuation Complaint?

AFCA's Determination of a Superannuation Complaint comes into effect immediately it is made, unless the AFCA Decision Maker states a later effective date in the Determination.⁵² If the Determination varies or substitutes the original decision of the superannuation provider (or other decision maker), it is taken to be the original decision and, therefore, has effect from the date of the original decision.⁵³ The Determination also binds third party decision makers that have been joined to a Superannuation Complaint about a disability benefit.⁵⁴

Each party to a Superannuation Complaint has a right of appeal to the Federal Court on a question of law within 28 days after the day when a copy of the Determination has been given to the party (unless the Federal Court allows a further period).⁵⁵

An appeal to the Federal Court does not affect the immediate operation of the Determination of a Superannuation Complaint, unless the Federal Court makes an order that defers the operation of the Determination or prevents its implementation.⁵⁶

In the same way as Determinations of the SCT have immediate effect (as if they were a decision of the superannuation provider), AFCA Determinations have immediate effect once made (unless AFCA provides for a later effective date).

When providing each party with a copy of an AFCA Determination, AFCA will also notify the party that they have a right to appeal to the Federal Court if they think the AFCA Decision Maker made an error of law in determining a Superannuation Complaint.

As applies to appeals from an SCT Determination, a party cannot appeal to the Federal Court because it thinks the AFCA Decision Maker should have made a different Determination unless an error of law has been made.

⁵² Corporations Act, s 1055B(1) and (2)

⁵³ Corporations Act, s 1055B(3)

⁵⁴ Corporations Act, s 1055D

⁵⁵ Corporations Act, s 1057(1) and (2)

⁵⁶ Corporations Act, s 1057A

Examples of an error of law

- AFCA did not provide procedural fairness in determining the Superannuation Complaint.
- The AFCA Decision Maker incorrectly applied the governing rules.
- The AFCA Decision Maker paid a death benefit to a person on the basis that the person was in an interdependency relationship with the deceased member when there was no evidence to support an interdependency relationship.
- The AFCA Decision Maker varied the terms of an insurance contract between a superannuation trustee and the insurer.

Unless the Federal Court determines otherwise, an AFCA Determination continues to have effect while the appeal is being determined.

Is it possible to ask AFCA to change a Determination?

A Determination is the final stage in AFCA's complaint resolution process. Other than by appeal to the court on a question of law, it is not possible to ask AFCA to change a Determination of the merits.

AFCA has internal review processes to ensure the quality of its Determinations before they are finalised and issued to the parties. AFCA recognises, however, that occasionally a Determination may contain an arithmetical error or other accidental error.

AFCA may correct a Determination if it contains:

- a clerical mistake
- an error arising from an accidental slip or omission
- a material miscalculation of figures or a material mistake in the description of any person, thing or matter
- a defect of form.

If a party to a complaint considers that a Determination requires a correction to address an issue listed above, they may write to AFCA to request the correction. The request should explain the issue to be addressed through the correction.

An Ombudsman or Adjudicator will decide whether AFCA should make any correction. AFCA may also correct a Determination whether or not a party to the complaint requests a correction.

Is it possible to ask that AFCA's approach be reviewed for future complaints?

AFCA has informal and formal review mechanisms that superannuation providers, industry bodies and consumer organisations can use to raise any significant concerns about the underlying approach taken by AFCA in one or more Determinations.

These review mechanisms are intended to enable review of AFCA's approach in its Determinations to assess whether it should continue to take that approach, or modify it for future complaints. Because of the final and binding nature of individual Determinations, these review mechanisms cannot be used to reopen an individual Determination or change its outcome.

Informal review

For an informal review about the approach AFCA has taken in its decisions, AFCA encourages stakeholders to raise the concern directly with a Lead Ombudsman or the Chief Ombudsman. AFCA will internally review whether it should change its approach for future complaints and explain (if necessary, in writing) the basis of its views to the stakeholder when the review is completed. If AFCA proposes to change its approach, as a result of the issues raised by the stakeholder, AFCA will explain the change in its regular publications and also in its regular meetings with interested stakeholders.

Formal review

A formal review is designed to be used primarily by an industry body on behalf of its members, or a consumer organisation on behalf of consumers. A request for a formal review must be accompanied by legal advice from external counsel that AFCA made an error of law. The request must also outline the adverse impact of the error, and (where an industry body seeks the review) an undertaking to enter a Costs Contribution Agreement with AFCA to, for example, cover reasonable costs incurred by a consumer organisation in commenting on the body's legal advice. Interested stakeholders should contact AFCA for further details.

These review mechanisms are additional to the ability to make complaints about AFCA's service, which are covered in [Chapter 16](#) of this SG.

16: Complaints about AFCA's service

How can a complaint be made about AFCA's service?

If a Complainant or a superannuation provider is dissatisfied with the standard of service AFCA provided when considering a complaint, they may call or write to AFCA to make a complaint about its service.

The complaint should be as specific as possible about the reasons for dissatisfaction and be initially directed to the AFCA staff member with whom they have been dealing, or their manager. Alternatively, it is possible to phone 1800 367 287 and ask to speak to someone who can look into the concerns.

A service complaint against AFCA can be lodged through AFCA's online feedback form at www.afca.org.au or emailed to info@afca.org.au or posted to:

The Service Complaints Manager
Australian Financial Complaints Authority
GPO Box 3
Melbourne Vic 3001

Can a complaint be made about an AFCA Determination?

A Determination is a final decision. It is not possible to use the AFCA process for addressing service complaints to seek to reopen a Determination.

If a service complaint against AFCA in effect relates to a concern that a Determination reached the wrong outcome, AFCA will respond that Determinations made by AFCA are final and that its Complaints and Feedback Policy and Procedure cannot be used as a review mechanism.

How does AFCA consider complaints about the service it provides?

AFCA has a Complaints and Feedback Policy and Procedure available on its website that explains how it responds to complaints about its service. A summary also appears as a webpage on AFCA's website.

In brief, AFCA aims to resolve most complaints in the first telephone call. Where this does not occur, an AFCA staff member who has not been involved in the matters raised in the complaint acknowledges, assesses and then provides a response to the complaint. Typically, an acknowledgement is provided within seven days and a full response is provided within 28 days of the acknowledgement.

What avenues are possible if AFCA's complaint response does not resolve the concern?

Any person or business directly affected by how AFCA deals with a complaint can complain to the Independent Assessor. Before a service complaint against AFCA can be made to the Independent Assessor, AFCA must have had a reasonable opportunity to respond through its own internal procedure for dealing with service complaints.

If a party who complains about AFCA's service remains dissatisfied about AFCA's response to their complaint, they can refer their concerns to the Independent Assessor, who will independently consider and respond to their complaint.

This can be done by using the Independent Assessor online form or by posting a written complaint to:

The Independent Assessor
Australian Financial Complaints Authority
GPO Box 3
MELBOURNE VIC 3001

The Independent Assessor does not review the merits or substance of an AFCA decision or the underlying complaint. Rather, the Independent Assessor considers whether the service AFCA provided was satisfactory and, if not, recommends what action AFCA should take to address the service issues raised. The Independent Assessor will provide findings in writing to AFCA and to the party who complains.

There is no further appeal against the Independent Assessor's findings and recommendation. The Independent Assessor's recommendation will be considered by the AFCA Chief Ombudsman. If the AFCA Chief Ombudsman does not accept the recommendation, it will be referred to the Chair of the AFCA Board, or the AFCA Board, in line with the process that is set out in the Independent Assessor's Terms of Reference.

The Independent Assessor's Terms of Reference set out the types of complaints that it can consider and what remedies it can offer. Information about the Independent Assessor's Terms of Reference and function is available on AFCA's website at www.afca.org.au.

17: Systemic issues

Rule A.17 of the AFCA Rules contains AFCA's powers and obligations in relation to systemic issues.

What is a systemic issue?

A systemic issue is one that has been raised in a complaint or several complaints, or otherwise identified by information obtained by AFCA, which will affect a class of persons beyond the person who lodged the complaint.

Several complaints of the same type, or a single complaint, may raise a systemic issue provided the effect of the issue clearly extends beyond a single Complainant.

Examples of systemic issues for Superannuation Complaints

- A disclosure document that is incorrect or inadequate
- A systems issue that produces benefit calculation errors
- A procedural weakness that is liable to recur
- A unit pricing error that incorrectly allocates investment earnings to fund members
- A documented procedure that does not comply with legal requirements; for example, because it permits privacy requirements to be breached
- An erroneous interpretation of a trust deed provision
- A group insurance administration error that does not record cover for eligible members

What is AFCA's role with systemic issues?

AFCA identifies systemic issues that have implications beyond the immediate actions and rights of the parties to a complaint. Where it does so, AFCA refers the issues to the superannuation provider for a response and reports the issues to relevant regulators.⁵⁷ However, AFCA is not a regulator of the financial services industry. Any regulatory action is appropriately addressed by the relevant regulator (or the Office of the Australian Information Commissioner).

⁵⁷ Corporations Act s1052E(4)

How does AFCA identify a systemic issue?

When AFCA receives a complaint, AFCA will consider whether it raises an issue that is possibly systemic. As AFCA learns more about the issues in a complaint, it will continue to revisit whether the complaint gives rise to a possible systemic issue. Therefore, identification can occur at any stage throughout the complaint resolution process.

Examples of characteristics that may assist in identifying a possible systemic issue

- Receipt of a number of new complaints about the same issue
- Where the issue that affected the particular parties to the complaint could have affected others in a similar way
- Where the Complainant claims the issue affected others in a similar way
- Where the superannuation provider indicates it has internally identified that the issue raised affected others in a similar way

What steps does AFCA take in relation to a possible systemic issue?

Potential systemic issues are investigated by a separate team within AFCA.

If AFCA considers a complaint raises a possible systemic issue for the superannuation provider, AFCA will write to the superannuation provider:

- detailing the possible systemic issue raised by the complaint;
- seeking further information; and
- inviting the superannuation provider to make submissions in response.

When it receives the superannuation provider's response, AFCA will consider the information provided and make a decision as to whether the issue is definitely systemic in nature. An AFCA Decision Maker is normally involved in making this decision.

If AFCA identifies a possible systemic issue that extends beyond the superannuation provider involved in a particular complaint (for example, affecting all superannuation funds with the same administrator), it may refer that issue to ASIC.

What happens once AFCA considers an issue is systemic?

Where AFCA determines an issue is definitely systemic in nature, AFCA works with the superannuation provider to ensure all affected fund members are identified and appropriately compensated for any financial loss and a strategy is put in place to prevent the problem from recurring. Under rule A.17.4 of the AFCA Rules, AFCA can require a superannuation provider to take or refrain from taking action for this purpose.

AFCA may request further information from the superannuation provider to identify the specific matter that caused the systemic issue and/or identify the affected fund member group (both past and existing).

Examples of steps that AFCA may require to be taken

- Agreeing on an approach to remediate the affected fund member group and a timeframe within which the identification and remediation process will be completed
- Superannuation provider sending a letter to affected fund members and former members explaining the issue and resolution that has been agreed with AFCA
- Superannuation provider posting updates about the issue and its resolution on its website
- Superannuation provider establishing a toll-free number to take calls about the systemic issue
- Ensuring rectification of the systemic issue so that it does not recur in the future

Throughout this process, AFCA expects the superannuation provider to respect AFCA's independence and ensure this is reflected in all its communications (and in any litigation that may arise between the superannuation provider and the affected fund member group). If a regulator is also overseeing the remediation of the systemic issue, AFCA will liaise with the regulator to facilitate a consistent approach.

AFCA will also operate as an avenue of redress for affected fund members who claim they have particular rights or circumstances that mean it is unfair or unreasonable for the superannuation provider to remediate them in the same way as other affected members. Such complaints will be treated as Superannuation Complaints and governed by the provisions of the AFCA Rules and legislation applicable to Superannuation Complaints.

What systemic issues reporting does AFCA make to ASIC?

AFCA is obliged by legislation,⁵⁸ ASIC guidance⁵⁹ and rule A.17.5 of the AFCA Rules to report confirmed systemic issues to regulatory and other bodies. The primary purpose of this reporting requirement is to enable the recipient body to consider whether regulatory action is necessary.

AFCA does not wait until the underlying complaint or the systemic issue investigation has been finalised before reporting to the relevant regulator. Once a definite systemic issue has been identified, AFCA will report it to the relevant regulator within the timeframe set out in relevant regulatory guidance or other requirements. Before AFCA determines that there is a definite systemic issue, however, a superannuation provider will have normally had the opportunity to respond to the issue and provide AFCA with relevant information.

Examples of systemic issues reportable to ASIC or another regulator

- Poor IDR procedures involving significant complaints-handling delay
- An administration error that affects multiple fund members

⁵⁸ Corporations Act, s 1052E(1)

⁵⁹ ASIC Regulatory Guide 267

18: Serious contraventions and other breaches

The SCT is required to notify regulators of breaches of the law or the governing rules if it becomes aware of them, and of any failure of a superannuation provider to comply with an SCT Determination.

AFCA has similar obligations under the Corporations Act in relation to the AFCA scheme.

Under rule A.18.1 of the AFCA Rules, AFCA may refer to the appropriate regulator any settlement it thinks may require investigation and must refer any serious contraventions of the law that may have occurred. Under rule A.18.2, AFCA may also report other serious breaches, such as non-compliance with the AFCA Rules, to ASIC.

What settlements might AFCA refer to a regulator?

Examples of settlements reportable to a relevant regulator, such as ASIC, include where the settlement:

- is so broad that it precludes a fund member lodging a further complaint, or taking other action in relation to matters that are not the subject of the complaint
- precludes a fund member referring a complaint to a regulator
- is offered on onerous or unjust terms or appears designed to avoid AFCA's scrutiny
- is entered into as a result of duress or misrepresentation.

What is a serious contravention reportable to a regulator?

AFCA must give particulars of a contravention, breach, refusal or failure to a regulator or other appropriate body if:

- a) there are sufficient facts or information to form an objectively reasonable belief that the contravention is serious
- b) in good faith AFCA forms the view that a serious contravention of the law (relevant to the subject matter and circumstances of the complaint and AFCA's complaint handling processes) may have occurred
- c) a contravention of the governing rules may have occurred
- d) a party to the complaint may have refused or failed to give effect to an AFCA Determination.

AFCA is not required to notify the superannuation provider before reporting a serious contravention or breach to a regulator but, where appropriate, AFCA will seek to do so at the time of, or before, reporting the breach.

Example of a serious contravention reportable to ASIC

A superannuation provider deducted fees it was not permitted to charge

What other serious breaches is AFCA able to refer to ASIC?

Under the AFCA Constitution, AFCA's Rules form a binding contract between each AFCA Member and AFCA. A superannuation provider is, therefore, bound to comply with its obligations under the AFCA Rules.

AFCA's response to an AFCA Member's non-compliance with its obligations under the Rules will depend on the circumstances of each individual case. The AFCA Board's powers include to expel an AFCA Member for non-compliance. The process for expulsion is set out in clause 3.4 of the AFCA Constitution.

If a superannuation provider has seriously breached its contractual obligations under the AFCA Rules, AFCA may report the superannuation provider to ASIC.

19: Collection and publication of information

Rules A.19 and A.20 of the AFCA Rules deal with AFCA's public reporting obligations.

What statistical information is AFCA obliged to collect and record?

AFCA is obliged under ASIC Regulatory Guide 267 and the AFCA Rules to collect, record and report certain statistical information to regulators and other bodies. Examples of this statistical information are set out in rule A.19.1.

AFCA may also collect other relevant information to assist it to effectively resolve complaints and to analyse and report on other relevant issues, including complaint trends and systemic issues. AFCA also collects and records information concerning feedback and complaints about its service and service complaints dealt with by the Independent Assessor.

AFCA classifies complaints according to the product or service they relate to, the issues they raise and the sales or service channel through which the consumer acquired the products or services in dispute. This information assists AFCA to select the most appropriate way to help the parties resolve complaints. It also enables AFCA to report accurately and thoroughly about the complaints it has considered. AFCA continues to update its complaint data and information as complaints progress and are resolved.

Where there is more than one product or service that has been complained about and more than one issue raised, there are different ways that AFCA can count and report on complaints. AFCA can count a complaint that involves multiple products and issues as a single complaint, because it comes from one consumer and it holds one case file on it. Alternatively, AFCA can count it as multiple complaints: one for each product or distinct issue in dispute. Which of these counting methods AFCA uses depends on what it is reporting.

AFCA explains its methodology when it publishes information in its annual report.

How does AFCA report data to ASIC?

AFCA must produce an annual public report that contains a comprehensive summary and analysis of the complaints it has received and considered and the data AFCA has collected during the year. This report must also include statistical complaint information on each superannuation provider on a fund-by-fund basis, except where the number of complaints for a particular fund is less than any minimum threshold AFCA may impose.

In meeting its reporting obligations, AFCA:

- ensures the information is accurate
- presents the information in the appropriate context, for example by categorising information according to industry sector, size of business and size of fund
- operates transparently as required by rule A.2.1(f) of the AFCA Rules.

The data will be collated from the information provided by the parties to AFCA and AFCA's analysis of complaints. AFCA will normally report publicly on a financial year basis.

As part of its annual reporting, AFCA may provide a separate comparative report detailing annual complaints statistics by superannuation provider (and fund).

AFCA is also required to report to ASIC about complaints it has received and closed on a quarterly basis.

20: How AFCA operates

Who is an AFCA Decision Maker?

An AFCA Decision Maker could be an Ombudsman, an Adjudicator or a Panel. Ombudsmen and Adjudicators are employees of AFCA, while Panel members normally provide services to AFCA on a sessional basis.

AFCA Decision Makers are appointed by the AFCA Board as independent decision makers. AFCA Decision Makers operate independently of other AFCA staff in making decisions.

What are the powers of an AFCA Decision Maker?

An AFCA Decision Maker has power to exercise all powers and discretions conferred by AFCA under the AFCA Rules, including to resolve complaints by making Determinations.

When determining Superannuation Complaints, an AFCA Decision Maker is also bound by section 1055 of the Corporations Act.

What are the powers of other AFCA staff members?

The Chief Ombudsman is also the Chief Executive Officer of the company that operates the AFCA scheme. The Chief Ombudsman is operationally responsible to the AFCA Board and is authorised to delegate responsibility (other than making a Determination) to other AFCA staff.

The extent of delegated authority will differ between AFCA staff depending on their role, function and seniority.

Can AFCA extend a timeframe specified in the Rules?

Rule A.21.3 of the AFCA Rules gives AFCA the right to extend a timeframe unless the Rules state otherwise.

Because of rule B.4.4.1 of the AFCA Rules, no extension is possible to the time limits that apply in relation to submitting a Superannuation Complaint about the payment of a death benefit or disability benefit, or about a contributions statement given to the ATO (see [chapter 23](#) of this SG).

What timeframes can AFCA extend?

AFCA usually imposes a specific timeframe for parties to a complaint to provide information or their views. AFCA specifies what it considers to be a reasonable timeframe, typically between one to two weeks, taking into account:

- the circumstances of the complaint
- the nature of the requested information
- what steps will need to be undertaken by the Complainant or the superannuation provider to obtain the requested information.

How can a party to a complaint apply for an extension of time?

A party to a complaint may request AFCA to agree to an extension of time. This can be done by phone or in writing by providing:

- details of the extension sought
- the reasons the extension is needed
- supporting information where it is available.

What approach does AFCA take to an application for an extension of time?

The AFCA Rules require AFCA to handle complaints in a timely manner. An extension of time can delay the resolution process. For this reason, AFCA only provides an extension where sound reasons are provided for an extension. To test whether this is the case, AFCA may ask the party seeking an extension to provide further material in support of their request.

Factors considered by AFCA when deciding whether to agree to an extension of time

- AFCA's obligation to resolve complaints in a cooperative, efficient, timely and fair manner
- The reasons for the delay
- Whether the party requesting the extension could take steps to avoid or reduce the delay
- Whether the party has acted promptly and diligently
- The impact of an extension on the other parties and the resolution of the complaint

Where AFCA decides to allow an extension of time, AFCA needs to decide what period of extension to grant. Typically, AFCA will not grant an extension that is longer than the original timeframe. AFCA will specify a shorter extension if AFCA considers that this would adequately address the party's reasons for the delay.

AFCA will inform the parties to the complaint where it agrees to an extension.

What does AFCA's immunity encompass?

Rule A.22.1 of the AFCA Rules operates as a contractual release of liability of AFCA, the Chief Ombudsman and his or her delegates, all AFCA Decision Makers and AFCA's staff, contractors and agents for any loss suffered by a party to a complaint as a result of AFCA carrying out its functions. The SCT has a similar statutory immunity.

21: Changes to AFCA's Rules

What process does AFCA follow to change its Rules?

Changes to AFCA's Rules may be required to adapt to the changing environment of the financial services industry, technological advances or to remedy consequences that were not intended or anticipated when the Rules were originally drafted.

Unless a change is the result of a regulatory requirement or direction given by ASIC, AFCA must consult with stakeholders before implementing any proposed changes. This will involve meeting with stakeholders, including industry and consumer groups and regulators, to discuss the proposed changes. AFCA will also release the proposed changes on its website for public comment and invite individual written submissions during the consultation period. AFCA will publish submissions on its website, unless they are marked as confidential.

Following any consultation, the AFCA Board will consider all submissions and make any further appropriate changes to the proposed changes. The changes to the Rules will then be submitted to ASIC for final review and approval, which may result in further changes before the finalised Rules being settled and released.

No formal consultation process is required to amend the Operational Guidelines. However, AFCA endeavours to take into account stakeholders' views about information that should be included in its guidelines. Depending on the nature and extent of the changes, AFCA may also need to obtain ASIC approval for any changes to the Operational Guidelines.

Which version of the Rules apply to complaints?

The first version of the Rules is effective from 1 November 2018.

When the first version of the Rules is superseded by a second version, complaints lodged before the second version takes effect will continue to be bound by the first version.

22: Relationship giving rise to Superannuation Complaints

What complaints can be made under AFCA's superannuation jurisdiction?

AFCA has different powers for, and must apply a different approach to, the resolution of Superannuation Complaints.⁶⁰

What is a Superannuation Complaint?

Under its superannuation jurisdiction, AFCA can consider complaints about:

- the decisions (and related conduct) of:
 - trustees of regulated superannuation funds⁶¹ (other than self-managed superannuation funds)
 - trustees of approved deposit funds
 - life companies as providers of superannuation annuity products
 - providers of Retirement Savings Accounts (RSAs)

These are all called 'superannuation providers'. Complaints about a superannuation provider can include complaints about people acting on behalf of the superannuation provider, including insurers for decisions (and related conduct) about insured benefits through superannuation.

- the conduct of:
 - a life company in selling a superannuation annuity product
 - an RSA provider in opening an RSA
 - an insurer in selling an insurance contract where the premiums are paid from an RSA

This includes complaints about people acting on their behalf.

- the decision (and related conduct) of the trustee of a type of regulated superannuation fund known as a life policy fund to admit a member to the fund and people acting on its behalf

⁶⁰ AFCA must decide whether the decision or conduct complained of was fair and reasonable in its practical operation and can only exercise its powers to remedy any demonstrated unfairness or unreasonableness: Corporations Act, s 1055.

⁶¹ An exempt public sector superannuation scheme can elect to join AFCA and be treated as a regulated superannuation fund for the purposes of AFCA's superannuation jurisdiction. The AFCA website contains a list of AFCA Members.

- the decision of a superannuation provider to include a person's contribution amounts in a statement provided to the Commissioner of Taxation for the purposes of determining the person's tax liability⁶²

What is a decision?

A decision includes making a decision and failing to make a decision.⁶³

What is conduct?

Conduct includes acts, omissions and representations.⁶⁴

When is a person acting on behalf of a superannuation provider?

AFCA will regard a person as acting on behalf of a superannuation provider if:

- the person is an officer, employee or agent of the superannuation provider
- where the entity holds an Australian Financial Services Licence (AFSL), the person is a representative of the AFSL holder.

Examples of Superannuation Complaints that are within AFCA's superannuation jurisdiction

- The death benefit is being paid to the wrong person or persons
- An unreasonable delay in processing an instruction to switch investment options
- An unreasonable delay in paying a benefit
- Miscalculation of a benefit
- Errors in insurance cover provided through the fund
- Errors in the deduction of fees or insurance premiums from an account
- Refusal to approve a claim for a disability benefit (including an insured disability benefit provided through superannuation)
- An unreasonable delay in making a decision about a disability claim
- Errors in a benefit statement or annual statement
- Errors on statements provided to the ATO about a member's contributions for surcharge or higher contributions tax purposes
- Errors or delay in splitting a superannuation benefit in accordance with a binding agreement or Family Court order
- Wrong advice provided by a superannuation trustee

⁶² Corporations Act, s 1053(1)

⁶³ Corporations Act, s 1053(5)(a)

⁶⁴ Corporations Act, s 1053(5)(b)

Examples of complaints that are outside AFCA's superannuation jurisdiction

- An employer's failure to pay superannuation contributions – however, such a complaint can be made to the ATO
- A life insurance product that is not a superannuation annuity policy – AFCA can, however, deal with these complaints under its general jurisdiction
- An annuity that is not issued by a life company, for example, an annuity issued by a friendly society – AFCA can, however, deal with these complaints under its general jurisdiction
- Financial advice relating to superannuation if the adviser was not acting under the trustee's AFSL when providing the advice – AFCA can, however, deal with these financial advice complaints (and other advice complaints) under its general jurisdiction

Who can submit a Superannuation Complaint?

There are three groups of people who can make a Superannuation Complaint:

1. Superannuation Product Holders

These are:

- members⁶⁵ and former members of a regulated superannuation fund
- beneficiaries and former beneficiaries of an approved deposit fund
- holders and former holders of an RSA
(including a person acting for the estate of the current or former member, beneficiary or holder)
- people with an interest in a superannuation annuity policy or relevant insurance contract

who think the decision (or related conduct) of the superannuation provider was unfair or unreasonable.

An employer cannot make a Superannuation Complaint on behalf of its employee members.

2. Persons with an interest in a death benefit

If the complaint is about payment of a death benefit, a person with an interest in the death benefit can complain that the superannuation provider's decision (or related conduct) about the payment of the death benefit was unfair or unreasonable.

⁶⁵ A covered ADF Member within the meaning of the *Australian Defence Force Cover Act 2015* (Cth) is taken to be a member of a regulated superannuation fund.

3. Parties (and intending parties) to a Family Law agreement or order affecting superannuation

If, for Family Law Act purposes:

- a member, beneficiary or RSA holder's spouse or former spouse is party to an agreement, or subject to an order relating to the product holder's superannuation interest; or
- a person is eligible to request information from the superannuation provider about the product holder's superannuation interest,⁶⁶

they can also complain that the superannuation provider's decision (or related conduct) about the agreement, order or information request was unfair or unreasonable.

When will AFCA regard a person as acting for the estate of a superannuation product holder?

AFCA will regard a person as acting for the estate of a member, beneficiary or RSA holder if the person is the legal personal representative of the member, beneficiary or RSA holder or – a family member where there is no legal personal representative.

When will AFCA regard a person as having an interest in a superannuation annuity policy or relevant insurance contract?

AFCA will regard a person as having an interest in a superannuation annuity policy or an insurance contract where the premiums are paid from an RSA if the person purchased the policy (i.e. the holder of the policy) or is a beneficiary under the policy.

When will AFCA regard a person as having an interest in a death benefit?

AFCA will regard a person as having an interest in a death benefit if the person is within the class of people eligible to receive all or part of the death benefit under the governing rules of the fund, policy or RSA.

⁶⁶ These individuals are the member, beneficiary RSA holder or their legal personal representative, the member, beneficiary or RSA holder's spouse or their legal personal representative and a person intending to enter into a superannuation agreement (for Family Law Act purposes) with the member, beneficiary or RSA holder.

What complaints about superannuation advice can AFCA consider?

AFCA will consider a complaint about superannuation-related advice as a Superannuation Complaint if the superannuation advice was provided by a superannuation provider (or its employees or representatives) under the superannuation provider's AFSL.

If the superannuation advice was provided under the AFSL of a Financial Firm that is not a superannuation provider, AFCA will handle the complaint under its general jurisdiction. This will be the case even if the advice was provided by the Financial Firm (or its employees or representatives) under an arrangement with a superannuation provider because, under the Corporations Act, the primary responsibility for the advice lies with the holder of the AFSL.

The main differences in jurisdiction for these complaints are:

- A Superannuation Complaint is not subject to monetary limits, but AFCA can only remedy any unfairness or unreasonableness found to exist in the superannuation provider's decision in relation to the complaint.
- A complaint under AFCA's general jurisdiction is subject to monetary limits and AFCA will have regard to what is fair in all the circumstances in deciding whether any compensation is payable.

23: Time limits for Superannuation Complaints

What time limits apply to Superannuation Complaints?

There are strict time limits for certain types of Superannuation Complaints. AFCA cannot unilaterally extend these time limits.

The types of Superannuation Complaints that have strict time limits are:

- death benefit complaints
- disability benefit complaints
- complaints about contribution statements provided to the ATO.

The death benefit time limits are prescribed under the Corporations Act. AFCA cannot extend these time limits even if the parties agree.

The disability and contribution statement time limits are part of the AFCA Rules and reflect the limits that apply to Superannuation Complaints under the legislation governing the SCT.⁶⁷ While AFCA cannot unilaterally extend these limits, if all of the parties make a request under rule A.4, AFCA could agree to accept these complaints by consent even if lodged out of time (see [chapter 4](#) of this SG).

What is the time limit for disability benefit complaints?

The time within which a Superannuation Complaint can be made to AFCA about the decision of a superannuation trustee⁶⁸ relating to the payment of a TPD benefit is governed by rule B.4.1.1. of the AFCA Rules and depends on:

- whether the disability that gives rise to a TPD claim caused the fund member to permanently cease employment
- the date when a complaint about the trustee's decision to deny the claim is made to AFCA.

⁶⁷ *Superannuation (Resolution of Complaints) Act 1993* (Cth)

⁶⁸ Most commonly, the decision maker will be a superannuation trustee, but the decision maker could also be an RSA Provider or an insurer (where premiums for an individual policy have been paid through an RSA).

AFCA can only deal with a Superannuation Complaint about the decision of a superannuation trustee relating to a TPD benefit in the following circumstances:

- If the fund member permanently ceased employment because of the physical or mental condition that gave rise to the TPD claim then:
 1. the fund member must have submitted a TPD claim to the trustee within two years of permanently ceasing employment; and
 2. the fund member must make a complaint to AFCA about the trustee's decision to deny the claim within four years of the trustee's decision being made.
- If the fund member did not permanently cease employment because of the physical or mental condition that gave rise to the TPD claim (that is, the fund member permanently ceased employment for reasons unrelated to their disability), the fund member must make a complaint to AFCA about the trustee's decision to deny the claim within six years of the trustee's decision being made.

What is the date when a fund member permanently ceased employment?

Sometimes, if an employee stops work due to a disabling condition, employers will maintain the employee's employment to see whether the employee recovers and is able to return to work. If the employee does not recover, employment may be formally terminated at a later date.

The two-year time limit for lodging a TPD claim with the superannuation trustee after permanently ceasing employment runs from the date the fund member's employment is formally terminated, not the date the fund member was last able to work.

What is the date the trustee made a decision?

Sometimes, after a superannuation trustee has denied a TPD claim, the member may ask the trustee to reconsider the claim, may provide new information in support of the claim or may simply complain to the trustee about the decision.

The date of the trustee's decision is the date of the trustee's first (or original) decision to deny the member's TPD claim. The four- and six-year time limits for complaining to AFCA run from the **date of the original trustee decision**, even if the trustee may later confirm or change its original decision (see rule B.4.1.2).

What if the disability benefit is insured through superannuation?

Sometimes a TPD claim is denied by a superannuation trustee (as the decision maker) because the group insurer declines payment of the insured benefit.

If the superannuation trustee has taken out insurance for a superannuation disability benefit and the member meets the time limits for a Superannuation Complaint, AFCA will generally join the insurer to the Superannuation Complaint so the complaint can be resolved against the trustee and the insurer at the same time.

If the member does not meet the time limits for a Superannuation Complaint, AFCA will not be able to accept a complaint against the superannuation trustee, but it may be able to accept a complaint against the insurer under its general jurisdiction.

Where an insured benefit is provided under an individual policy by an insurer but the premiums are paid from an RSA, a Superannuation Complaint can be made directly against the insurer as the decision maker in this situation.

What is the time limit for death benefit complaints?

The time limits for death benefit complaints are reflected in rule B4.1.3 of the AFCA Rules and in section 1056 of the Corporations Act.

The time within which a Superannuation Complaint can be made to AFCA about the decision of a superannuation provider about the payment of a death benefit depends on:

- whether an interested person has been given written notice about the superannuation provider's decisions relating to the payment of the death benefit
- the date when the person objected in writing to the superannuation provider's proposed payment of the death benefit
- the date when the person makes a complaint to AFCA about the superannuation provider's final decision to pay the death benefit.

There are two 28-day periods that must be met:

1. An interested person must object to the trustee within 28 days of being notified of the proposed decision to pay the death benefit.
2. The interested person must complain to AFCA within 28 days of being notified of the final decision to pay the death benefit.

Who is an interested person?

To complain about a superannuation provider's decision, a person must have an interest in the death benefit.⁶⁹ AFCA regards a person as having an interest in the death benefit (**interested person**) if the person is within the class of people eligible to receive all or part of the death benefit under the governing rules.

To be eligible to receive all or part of a superannuation death benefit, a person will usually need to be a dependant of the deceased fund member, or the legal personal representative of the deceased fund member.⁷⁰ A dependant includes a spouse, a child, any person who had an interdependency relationship with the deceased fund member and any person who was financially dependent on the deceased fund member. However, if there are no dependants or legal personal representatives, other individuals (e.g. family members) may be eligible.

⁶⁹ Corporations Act, s 1056(1)

⁷⁰ In this context a fund member would also include a beneficiary of an approved deposit fund, a holder of an RSA and the holder of a superannuation annuity policy.

Interested person is properly notified of proposed decision and objects within 28 days

If an interested person has been notified in writing about the superannuation provider's proposed payment of the death benefit and disagrees with it, the interested person must **submit a written objection to the proposed payment to the superannuation provider within 28 days of the date the written notice of the proposed decision was given**. If an interested person does not make a written objection within the 28-day period, the person cannot later complain to AFCA about the decision.

If an interested person has been given written notice about the superannuation provider's proposed payment of the death benefit and makes a written objection to the superannuation provider within the 28-day period and then receives written notice of the superannuation provider's final decision, **the person must then make a complaint to AFCA within 28 days of the date the written notice of the final decision was given**.

Interested person is not properly notified

AFCA would generally consider it unreasonable for a superannuation provider not to notify an interested person of its decisions relating to the payment of a death benefit.

If an interested person has not been notified in writing about the superannuation provider's proposed payment of the death benefit, or if there is an error in the notice (i.e. the notice does not explain the 28-day objection period), then the 28-day period to object to the superannuation provider does not apply.

Similarly, if an interested person has not been notified in writing about the superannuation provider's final decision to pay the death benefit, or if there is an error in the notice (i.e. the notice does not explain the 28-day period to complain to AFCA), then the 28-day period to make a complaint to AFCA does not apply.

Where a 28-day period does not apply, an interested person can complain to AFCA about a superannuation provider's decision relating to the payment of a death benefit at any time, but should generally submit their complaint within two years of the superannuation provider's IDR Response (see following).

When is a death benefit notice 'given'?

AFCA will regard a death benefit notice as 'given' when it is received by the intended recipient. The 28-day period will commence to run from that date. The day a notice is 'given' may, therefore, be later than the actual date of the notice.

If all communications with the intended recipient have been by email, a notice may be given by email, because consent to communicate by email can be inferred in that case.

What if the superannuation provider changes the proposed payment of the death benefit after considering an objection?

The 28-day period for making a complaint to AFCA runs from the date when written notice of the **final** decision was given.

If the superannuation provider changes its original proposal for payment of the death benefit after considering one or more objections from interested persons, it will give all interested persons notice of the new proposal for payment of the death benefit. An interested person who disagrees with the new proposal must then submit a written objection to the superannuation provider within 28 days of the date written notice of the new proposal was given. If an interested person does not make a written objection to the new proposal within the 28-day period, the person cannot later complain to AFCA about the decision.

If an interested person has been given written notice about the superannuation provider's new proposed payment of the death benefit, submits an objection to the superannuation provider within the 28-day period and then receives written notice of the superannuation provider's final decision, the person must then make a complaint to AFCA within 28 days of the date notice of the final decision was given.

What is the time limit for contribution statement complaints?

If a superannuation provider has notified a fund member that it has given a contributions statement to the ATO (with a copy of the statement), the member must complain to AFCA within 12 months of being given the written notice (see rule B.4.1.4).

Notice is considered to be 'given' when it is received by the fund member.

Are there any time limits for other types of Superannuation Complaints?

There are no strict time limits for making other types of Superannuation Complaints to AFCA, including where an interested person has not been properly notified of the proposed payment of the death benefit. This could be because an interested person was not notified at all or because an interested person was not notified of a 28-day period.

However, Superannuation Complaints to AFCA should generally be made within two years of receiving an IDR Response to the person's complaint from the superannuation provider (see rule B.4.1.5). AFCA can extend this two-year timeframe; however, and would generally do so if there is a good reason why the complaint was not submitted within two years of the date of the superannuation provider's IDR Response and AFCA is satisfied that it can effectively resolve the complaint despite the delay.

Summary of Superannuation Complaint time limits

Type of complaint				Time limit within which an AFCA complaint must be submitted
Superannuation	TPD decision by trustee, RSA provider or insurer (see B.4.1.1)	Has the Complainant permanently ceased employment because of the condition that gave rise to the claim for the disability benefit?	Yes. Was the claim made with the superannuation provider within two years of permanently ceasing employment?	Yes Four years from TPD decision
				No Out of time
			No. The Complainant ceased employment for other reasons	Six years from TPD decision
	Payment of a death benefit (see B.4.1.3)	Has the Complainant objected to the superannuation provider within 28 days of being given notice of the proposed decision?	Yes	28 days from final decision
			No	Out of time
Statement given to the Commissioner of Taxation under s.1053(2) of the Corporations Act (see B.4.1.4)			12 months from notice	
Other Superannuation Complaints, including: <ul style="list-style-type: none"> where the Complainant has an interest in the death benefit, but was not properly notified of the proposed payment or the objection period (see B.4.1.5)			Two years from IDR Response	

No extension of time limits
(see B.4.4.1)

Special circumstances may extend time limits (see B.4.4.2)

How is a time limit construed where a Complainant submits a complaint after 31 October 2018 to the SCT rather than directly to AFCA?

From 1 November 2018, where a complaint is inadvertently submitted to the SCT instead of to AFCA, the SCT will direct the complainant to AFCA.

In these cases, for the purpose of any time limit that may apply, AFCA will treat the complaint as submitted to AFCA on the date the complaint was received by the SCT, but otherwise AFCA will apply the AFCA Rules from the date the complaint is received by AFCA.

What about Superannuation Complaints received by AFCA before 1 November 2018?

Generally, all Superannuation Complaints received by AFCA before 1 November 2018 will be referred to the SCT. However, where AFCA receives a Superannuation Complaint between 27 October 2018 and 31 October 2018, AFCA will hold the complaint and progress it through the AFCA complaint process from 1 November 2018. This takes into account the fact that the SCT will not be able to receive complaints from 1 November 2018, and it is possible that such complaints would not be able to be lodged with or transferred to the SCT by 1 November 2018.

Death benefit complaints – special approach

Any Superannuation Complaints lodged before 27 October 2018 about the distribution of a death benefit will be referred by AFCA to the SCT.

If AFCA receives complaints between 27 October 2018 and 31 October 2018 about a death benefit distribution and there has not been a final decision by the superannuation provider, we will contact the Complainant and advise that they need to firstly complain to the superannuation provider. This is because AFCA only has jurisdiction to consider such a complaint once a final decision is made. It is important that the Complainant understands there are mandated time periods to lodge an objection to the proposed decision and an objection must be made to the superannuation provider directly (see rule B.4.1.3).

Separately, AFCA will also forward the complaint to the superannuation provider and ask it to treat the complaint as an objection. This replicates the approach of the SCT and also reflects what AFCA will do from 1 November 2018 (see chapter 5 of this SG).

24: Mandatory exclusions of jurisdiction

AFCA has no discretion whether or not to exclude the types of complaints set out in rules C.1.2 to C1.6 of the AFCA Rules. These types of complaints must be excluded as outside AFCA's jurisdiction.

Parties can, however, request AFCA to consider a complaint by agreement under rule A.4.7, even if it would otherwise be outside of jurisdiction (see [chapter 4](#) of this SG).

Exclusions applying generally

To what extent are complaints about fees outside AFCA's jurisdiction?

Rule C.1.2(a) of the AFCA Rules means that AFCA cannot generally consider a complaint about the level of a fee, premium, charge or interest rate. Therefore AFCA will not consider a complaint where the Complainant is merely dissatisfied that a fee or charge has increased, unless the increase is disproportionate and without justification.

In addition, AFCA **does** have jurisdiction to consider a complaint about fees and charges in any of the following situations:

1. The complaint is about a misrepresentation, or failure, by the superannuation provider to properly disclose a fee, premium, charge or interest rate.
2. The complaint is that the superannuation provider calculated or applied the fee, premium, charge or interest rate incorrectly. This may be a general issue affecting other fund members, beneficiaries, or holders or it might be specific to the Complainant.
3. The complaint is about a fee, premium, charge or interest rate, but another breach by the superannuation provider of a legal obligation or duty is alleged.

Examples of fee complaints AFCA can handle

- A complaint that a superannuation provider disclosed that a fee would be a certain amount and then charged a higher fee without providing advance notice
- A complaint that a superannuation provider charged a fee that had not been disclosed despite a legal obligation to disclose it
- A complaint that a superannuation provider charged a fee that it was not legally permitted to charge
- A complaint that a superannuation provider incorrectly calculated or applied a fee
- A complaint that the Complainant paid a fee for service that was not provided such that the superannuation provider should make a total or partial refund of the fee

Where a complaint about a fee, premium, charge or interest rate raises some issues that are within AFCA's jurisdiction and some that are not, AFCA will confine its consideration to those issues within its jurisdiction.

What complaints are outside AFCA's jurisdiction on the basis that they have already been dealt with by AFCA?

Rule C.1.2(c) of the AFCA Rules means that AFCA cannot generally consider a complaint that raises the same events and facts and is brought by the same Complainant as a complaint previously dealt with by AFCA.

Factors that AFCA will consider to decide whether a complaint has been 'dealt with' previously

- Whether the nature and subject matter of the complaint is substantively the same as an earlier complaint
- Whether the parties were the same for the two complaints
- Whether the earlier complaint was resolved by a final decision or an agreed settlement

Examples of situations where the complaint has not been 'dealt with' previously

- The earlier complaint was discontinued
- The new complaint is that the superannuation trustee has not complied with the terms of the settlement agreed in an earlier complaint

Rule C.1.2(c) specifies that the exclusion does not apply if there are additional events and facts raised that are sufficient to warrant AFCA handling the complaint.

Factors AFCA will consider when additional events and facts are raised in the new complaint

- Whether the additional events and facts are so significant that it would not be fair to allow the outcome of the earlier complaint to stand
- The length of time since the earlier complaint – generally AFCA will consider it fair to leave in place the outcome of a complaint resolved at least two years ago

What complaints are outside AFCA's jurisdiction on the basis they have already been dealt with by another forum?

Rule C.1.2(d) of the AFCA Rules excludes from AFCA's jurisdiction a complaint that has already been dealt with by a court, dispute resolution tribunal or a Predecessor Scheme, which includes the SCT.

When considering whether another forum has previously 'dealt with' the complaint, AFCA applies the same factors as those for rule C.1.2(c).

If a complaint was previously withdrawn by the SCT, AFCA would generally exercise its discretion to exclude it under Rule C.2.2(a) on the basis that the SCT was the more appropriate forum to consider the complaint and, therefore, it is not appropriate for AFCA to revisit it. This is because the proper process for the Complainant to challenge the SCT's decision to treat a complaint as withdrawn was to commence proceedings in the Federal Court within the required timeframe.⁷¹ It is not appropriate for AFCA to circumvent this process, which is intended to provide certainty to the parties.

Where a complaint was withdrawn by the SCT because a Complainant did not respond to attempts by the SCT to contact the Complainant, AFCA may, in exceptional circumstances, treat the complaint as a new complaint, provided it is otherwise within its jurisdiction and has not been 'dealt with' previously.

Examples of exceptional circumstances

- The Complainant did not respond to the SCT because the Complainant changed address and did not receive the correspondence from the SCT
- The Complainant did not respond to the SCT because the Complainant was hospitalised

⁷¹ As a statutory tribunal, administrative decisions of the SCT can be challenged under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*.

Exclusions applying specifically to insurance complaints, including Superannuation Complaints

To what extent is AFCA precluded from considering a complaint about a life insurer's decision to impose non-standard policy terms?

Rule C.1.4(b) of the AFCA Rules excludes from AFCA's jurisdiction a complaint about an offer of a Life Insurance Policy (including for insurance cover within superannuation) if it contains exclusions or conditions that the life insurance company does not standardly impose for that type of policy.

Examples of non-standard terms in a life insurance policy

- Exclusion of cover for a specified medical condition
- Higher premium on the basis that the insured has a pre-existing medical condition

However, rule C.1.4 does not operate as a blanket exclusion of complaints merely because there are underwriting or actuarial factors involved.

AFCA must be satisfied that those underwriting or actuarial factors led to the (that is, were relied on in the decision to) offer a life insurance policy on non-standard terms. In the absence of showing that such underwriting, actuarial or statistical data exists and that the data was relied on in applying the exclusion or condition, AFCA cannot be satisfied that such factors led to the non-standard term being imposed and AFCA's jurisdictional exclusion would not apply.

To what extent is AFCA precluded from considering a complaint about the refusal of insurance cover?

Rule C.1.4(d) of the AFCA Rules means that AFCA cannot consider a complaint about a refusal, for commercial reasons, to provide insurance, including within superannuation.

However, there are two situations where AFCA can handle a complaint about refused insurance within superannuation:

1. A complaint that the decision to refuse insurance cover (whether an individual policy or as part of a group policy) was not made properly or was discriminatory.
2. A complaint that the Complainant was misinformed about the insurance cover.

For example, the Complainant was given a misleading statement showing that they did have cover, even though it was actually refused.

An insurer cannot usually discriminate on grounds such as mental illness, a disability or an impairment. However, the law provides for exemptions if the different treatment is reasonably based on actuarial or statistical data and any other relevant factors. There is also an exemption on the grounds of unjustifiable hardship.

When faced with an allegation that an exemption applied and, therefore, that a decision to refuse cover was not discriminatory, AFCA expects an insurer to:

1. provide it with the actuarial or statistical data that was relied on
2. provide reasons to show it was reasonable to have relied on that data
3. provide reasons why the discrimination is reasonable having regard to any other factors (in the event that no such actuarial or statistical data is available or cannot be reasonably obtained)
4. provide any evidence of unjustifiable hardship.

Exclusions applying specifically to investment complaints including Superannuation Complaints

What complaints about investment performance are outside AFCA's jurisdiction?

Rule C.1.5(a) of the AFCA Rules precludes AFCA from considering a complaint that is solely about the investment performance of a member's superannuation product, other than a complaint about non-disclosure or misrepresentation.

However, this does not prevent AFCA from considering a complaint that investment earnings were not calculated and credited in the manner required by the governing rules.

Example of complaint that would not be excluded by rule C.1.5(a)

A complaint that investment earnings were improperly allocated to a member's account.

What complaints are outside AFCA's jurisdiction on the basis that they relate to the management of a fund as a whole?

Rule C.1.5(b) of the AFCA Rules means that AFCA cannot consider a complaint about the management of the fund as a whole. Typically, a complaint of this type will concern management decisions about the fund that apply to, or affect, all members of the fund in the same way.

AFCA's general approach is that, if the nature of the complaint would require detailed analysis of the fund's trust deed or minutes of directors' meetings and board or committee papers, the complaint would be considered as one relating to the management of the fund as whole. However, if an alleged breach of a fund's trust deed gives rise to specific harm for the Complainant and an in-depth analysis of the superannuation provider's commercial judgments is not required, AFCA takes the view that the complaint does not relate to the management of the fund as a whole and will consider the complaint.

In applying this exclusion to Superannuation Complaints, AFCA will take into account Federal Court decisions about the application of this exclusion to the jurisdiction of the SCT. Therefore, if a complaint is about the adverse impact of a decision on the interests or entitlements of a particular member of a superannuation fund, it does not relate to the management of the fund as a whole. Similarly, a complaint involving a breach of a fund's trust deed does not relate to the management of the fund as a whole, even if the breach affects other members.

Examples of complaints that are about the management of a fund as a whole

- Complaints about the investment strategies of the fund
- Complaint about the design of the fund, including the design of the fund's insured benefits

Examples of complaints that are not about the management of a fund as a whole

- Complaints that the trustee did not allocate earnings to the member in the manner required by the trust deed
- Complaints that the trustee applied a policy in a way that was unfair or unreasonable to the Complainant in the particular circumstances

Sometimes a complaint may contain both allegations concerning the management of the fund as a whole, and other allegations such as non-disclosure or misrepresentation. Where it is possible to separate the allegations, AFCA will consider those aspects of the complaint that are within its jurisdiction.

AFCA will look to the substance of the complaint regardless of how it is framed. For example, if a Complainant is framed as a breach of disclosure (or other allegation within AFCA's jurisdiction) but the complaint fundamentally relates to the management of the fund as whole, AFCA must exclude the complaint. This could either be on the basis that the complaint concerns the management of the fund as a whole or, alternatively, AFCA could exercise its discretion under rule C.2 to refuse to consider the complaint (see [chapter 25](#) of this SG).

Rule C.1.5(d) of the AFCA Rules contains a similar exclusion for complaints about an RSA provider's or an insurer's business as a whole. AFCA interprets this rule in a similar manner to the 'management of the fund as a whole' exclusion.

25: AFCA's discretion not to consider complaints

What factors does AFCA take into account when exercising its discretion not to consider a complaint?

Rule C.2 of the AFCA Rules gives AFCA the discretion to decide that it is not appropriate for it to consider a complaint. AFCA will only exercise this discretion where there are compelling reasons to exclude a complaint. AFCA takes into account:

- the nature of the complaint
- any circumstances or factors relevant to the complaint
- the principles stated in rule A.2 of the AFCA Rules.

Sometimes AFCA will make the decision to exclude a complaint very quickly after the complaint is submitted. In other cases, AFCA will not be in a position to judge whether the complaint should be excluded until AFCA has collected and analysed relevant information and clarified the issues.

Rule C.2.2 lists examples where AFCA may exclude a complaint, some of which are similar to the situations where the SCT has power to 'withdraw' a complaint.

The list includes:

- a) If there is a more appropriate place to deal with the complaint such as a court, tribunal, another dispute resolution scheme or the Office of the Australian Information Commissioner.
- b) If the subject matter of the complaint has already been adequately dealt with by AFCA, or a Predecessor Scheme, such as the SCT.
- c) If the complaint relates to a superannuation provider's practice or policy and does not involve any allegation of either Maladministration or inappropriate application of the practice or policy.
- d) If the complaint being made is frivolous, vexatious, misconceived or lacking in substance.
- e) If the Complainant has commenced legal proceedings in relation to the subject matter of the complaint unless:
 - (i) the Complainant discontinues the legal proceedings; or
 - (ii) the relevant statute of limitation period will shortly expire and the Complainant undertakes in writing to AFCA not to take any further steps in the proceedings while AFCA is handling the complaint.
- f) If AFCA agrees to allow the superannuation provider to treat the complaint as a test case (subject to certain undertakings being given).

- g) If the Complainant is represented or assisted by an agent who may receive remuneration for this service and AFCA considers that:
- (i) the agent is engaging in inappropriate conduct that is not in the best interests of the Complainant, or
 - (ii) the complaint is not accompanied by information required by AFCA.
- h) If the Complainant is represented or assisted by an agent who may receive remuneration for this service and the agent has previously submitted complaints that have been excluded under rule C.2.2(g).

AFCA does not have to exclude a complaint in these circumstances. Nor is AFCA's discretion to exclude a complaint limited to these circumstances.

For example, AFCA may exclude a complaint on the basis of rule C.2.1 where the Complainant is seeking to reopen a dispute after entering into a settlement with the superannuation provider, and the settlement was clearly intended to be a full and final settlement of all the claims made in the AFCA complaint. In exercising its discretion, AFCA may also consider the overall fairness of the settlement and the conduct of the parties in arriving at the settlement, including whether the Complainant was represented or otherwise vulnerable during settlement discussions.

In what circumstances might AFCA decide that there is a more appropriate place to decide a complaint?

Rule C.2.2(a) of the AFCA Rules envisages that AFCA may exclude a complaint if it thinks that a court, tribunal, another dispute resolution scheme or the Office of the Australian Information Commissioner may be a more appropriate place than AFCA to deal with a complaint. This would include where the SCT is in the process of handling a complaint.

AFCA will take into account the following factors when considering if a complaint is more appropriately dealt with elsewhere:

- The potential advantages and disadvantages to each party of having the complaint determined by AFCA, or in another place. These may include the time and expense involved, as well as each party's ability to obtain or enforce a decision.
- Whether AFCA's process is appropriate to resolve the complaint, as compared to the process adopted in other places. In doing so, AFCA considers the consequences for each party of the alternative processes available.
- Issues that are partly within and partly outside AFCA's jurisdiction. If AFCA is unable to provide the remedy sought by the Complainant, AFCA is likely to exclude consideration of the complaint. However, AFCA may decide to consider a complaint that raises significant issues within its jurisdiction if those issues can be dealt with separately from the issues that are outside jurisdiction.
- Complexity is relevant, but is not a sufficient reason alone to exclude a complaint.

Examples where AFCA might exclude a complaint on the basis that another forum is more appropriate

- Where AFCA considers that the only way to determine the issues raised by the complaint would be for a third party to give evidence subject to cross-examination
- Where a complaint contains multiple interrelated claims, some of which are within AFCA's jurisdiction and some of which are not, and AFCA considers that it would be more appropriate for all the claims to be dealt with together in another forum with jurisdiction to consider them all
- A complaint was accepted by the SCT and the SCT has not yet made a Determination in relation to the complaint
- Where a superannuation trustee is seeking judicial advice from the court about the validity of a trust deed amendment, which would affect all fund members (or a class that includes the Complainant)

In what circumstances might AFCA decide that the subject matter of the complaint has already been adequately dealt with by AFCA or a Predecessor Scheme?

Under rule C2.2(b) of the AFCA Rules, AFCA can exclude a complaint if the subject matter of the complaint has already been adequately dealt with by AFCA or the SCT.

The subject matter of a complaint is the thing or matter complained of. In a superannuation context, it is not just the decision complained of, but the thing or matter that was the subject of that decision.⁷² This means that a complaint can be expressed in a different way, but if it is essentially about the same thing as something that has been previously resolved by AFCA or the SCT, AFCA may exclude it.

If a similar complaint has already been dealt with by AFCA or the SCT,⁷³ AFCA will compare the subject matter of each of the two complaints to see if the Complainant is essentially seeking the same outcome about the same matter. If so, AFCA will then consider whether the previous resolution adequately dealt with the complaint. AFCA can be satisfied that the previous resolution did adequately deal with a complaint even if new evidence has since emerged, particularly where the new evidence is inconsequential, irrelevant or unpersuasive.

⁷² *Ludowyk v SCT* [2013] FCA 692

⁷³ See Chapter 24 – 'What complaints are outside AFCA's jurisdiction on the basis that they have already been dealt with?' for AFCA's interpretation of when a complaint has been 'dealt with'.

Examples where AFCA might exclude a complaint on the basis that the subject matter has already been dealt with

- Where a complaint is made about a decision of a superannuation trustee not to allow a member to make a late election to preserve benefits in the scheme, and an earlier complaint raising the same issue was resolved in favour of the trustee
- Where a complaint is made about a decision of a superannuation trustee not to reconsider its refusal to pay a TPD benefit; an earlier complaint about the non-payment of the TPD benefit was resolved in favour of the trustee, and the new evidence does not address the question of whether the member was TPD at the relevant time

How does rule C.2.2(b) differ from rule C.1.2(c)?

Rule C.2.2(b) of the AFCA Rules (AFCA's discretion to exclude) deals with the subject matter of the complaint, but rule C.1.2(c) (AFCA's requirement to exclude) deals with the complaint itself.

Under rule C.1.2(c), AFCA must exclude a complaint about the same set of facts and circumstances that has already been addressed. Under rule C.2.2(b), AFCA has a discretion to exclude a complaint about the same subject matter that has already been addressed. This means that AFCA's discretion to exclude is broader than the mandatory exclusion.

In what circumstances might AFCA decide that it should not consider a complaint because it relates to a superannuation provider's policy or practice?

Under rule C.2.2(c) of the AFCA Rules, AFCA can exclude a complaint relating to a superannuation provider's practice or policy that does not involve a breach of a legal or contractual obligation, or an inappropriate application of the practice or policy.

This does not mean that compliance by a superannuation provider with its practice or policy necessarily puts a complaint about that practice or policy outside AFCA's jurisdiction. AFCA's role is to consider whether the policy or practice achieved legal compliance with the superannuation provider's obligations and met good industry practice.

AFCA does not accept a blanket assertion that a superannuation provider followed its policy or practice. Rather, AFCA asks whether the superannuation provider was entitled to act in accordance with the policy or practice in the circumstances.

For example, it may have been unfair or unreasonable for the superannuation provider to have applied its policy to the Complainant because the Complainant was misled about the application of the policy. In such a case AFCA would not exercise its discretion to exclude the complaint.

In what circumstances might AFCA decide that a complaint is frivolous, vexatious, misconceived or lacking in substance?

Rule C.2.2(d) of the AFCA Rules envisages that AFCA may exclude a complaint that is frivolous, vexatious, misconceived or lacking in substance. A complaint of this type will clearly not warrant redress by the superannuation provider. Accordingly, it is efficient for all parties for AFCA to identify this at an early stage and thereby spare the parties the time and effort of responding to AFCA requests for information and making submissions.

Courts have considered the meaning of the terms ‘frivolous’, ‘vexatious’ and ‘lacking in substance’. Helpful points from court decisions are summarised below.

- **Frivolous** may mean ‘insupportable at law’, ‘disclosing no cause of action’ or ‘groundless’.
- Bringing an action is only **vexatious** if done with a particular motive, such as a malicious motive.
- An action is **frivolous** or **vexatious** if:
 - it is ‘so obviously untenable that it cannot possibly succeed’
 - it is ‘manifestly groundless’
 - it is ‘so manifestly faulty that it does not admit of argument’
 - ‘useless expense’ would be involved in allowing the action to proceed
 - the action ‘discloses a case that the court is satisfied cannot succeed’.

Lacking in substance has been said to mean:

- in relation to a claim, ‘a claim that presents no more than a remote possibility of merit and that does no more than hint at a just claim’
- in relation to a complaint, where ‘the Complainant has no arguable case that should be allowed to be resolved at a full hearing’
- in relation to a case, a case depending on ‘an untenable position of law or fact’.

Misconceived means mistaken or misunderstood. A complaint may be misconceived if it is made against the wrong party, or if there is no other decision that could lawfully be made.⁷⁴

If, on the available information, AFCA can conclude that a complaint is frivolous, vexatious, misconceived or lacking in substance, AFCA may exclude the complaint even if the Complainant argues that further enquiries through AFCA might elicit further information in support of the claim.

In what circumstances might AFCA decide that it should not consider a complaint because of Complainant-initiated legal proceedings?

Rule C.2.2(e) of the AFCA Rules envisages that AFCA may exclude a complaint if the Complainant has issued legal proceedings in a court about matters that are the subject of an AFCA complaint. This applies whether the legal proceedings are instituted before or after the complaint is submitted.

AFCA will not, however, exclude the complaint if the Complainant discontinues the legal proceedings. Nor will AFCA exclude the complaint if the limitation period for legal proceedings will shortly expire and the Complainant undertakes to AFCA not to take further steps in the court proceedings while AFCA is considering the complaint.

A Complainant who lodges a defence and counterclaim in legal proceedings instituted by a superannuation provider will not be considered by AFCA as commencing proceedings (see chapter 7 of this SG, explaining rule A.7.2).

In what circumstances might AFCA agree to a complaint being decided as a test case in the courts?

Rule C.2.2(f) of the AFCA Rules envisages that AFCA may allow a superannuation provider to treat a complaint as a test case to be decided in court proceedings, rather than by AFCA. Typically, this will be where a superannuation trustee considers that the complaint raises issues that would affect all or a significant group of fund members in the same way. One reason may be where a superannuation trustee believes that other similar complaints are likely to be made. Another may be where there is an important question of law to be resolved.

⁷⁴ *Australian Super v Burtaleea* [2006] FCA 521

If a superannuation trustee wants a complaint to be resolved in court proceedings as a test case, rather than by AFCA, the superannuation trustee must write to AFCA to request the exercise of AFCA's discretion. The request should explain the potential significance of the claim for the superannuation trustee and the fund. If the superannuation trustee has obtained legal advice about the reasons why the complaint is best resolved through court proceedings, this advice should be provided to AFCA.

AFCA does not have to agree to a request. Factors that AFCA is likely to take into account when considering a request include:

- the Complainant's views
- the urgency of the complaint from the Complainant's perspective
- whether the complaint raises a new issue for AFCA and whether AFCA considers it has the expertise to consider the complaint
- whether the complaint raises an important legal issue about which different judicial views have previously been expressed
- whether the superannuation trustee would be entitled to seek judicial advice about the issue
- the extent of the potential impact of the complaint for the fund
- whether other industry participants share the superannuation trustee's view that the complaint would best be resolved as a test case.

AFCA can only agree to a complaint being resolved through court proceedings as a test case if the superannuation trustee provides AFCA with undertakings as required by rule C.2.2(f). These undertakings include that the superannuation trustee will institute the court proceedings within six months and will pay the Complainant's legal costs and expenses. A superannuation trustee may have a right of indemnity against the fund assets that entitles it to recover these costs and expenses.

AFCA may also require other undertakings, for example, to address any unfairness that might flow to the Complainant as a consequence of delay in resolution of the complaint.

Examples of conditions that AFCA may impose before it agrees to a test case

- The superannuation trustee cannot pursue a technical point in the proceedings that prevents the substantive issue from being decided
- The superannuation trustee cannot prevent the Complainant from presenting a counterargument

If the superannuation trustee provides AFCA with the required undertakings in writing, AFCA will inform the Complainant that the complaint will be resolved through court proceedings as a test case and, therefore, AFCA will not consider the complaint. AFCA will also explain to the Complainant the implications for them, including their right to be represented in the proceedings and the superannuation trustee's obligation to bear the Complainant's legal costs and expenses.

If AFCA later becomes aware that the superannuation provider is not complying with one of its undertakings, AFCA may recommence its consideration of the complaint.

Example where AFCA might recommence handling a complaint

If a superannuation provider has not issued legal proceedings in relation to the complaint within six months of the superannuation provider's undertaking to AFCA

If a test case is being pursued by a superannuation provider with AFCA's agreement, AFCA may decide to defer consideration of complaints raising similar issues pending the outcome of the test case.

In what circumstances might AFCA decide not to consider a complaint because of inappropriate conduct by a paid representative?

Rules C.2.2(g) and (h) of the AFCA Rules give AFCA a discretion to decline to consider a complaint if the Complainant is represented by a paid agent who engages in inappropriate conduct, or has done so in the past for other clients. An example would be where the paid agent is obstructing the fair resolution of a complaint by agreement or on its merits.

If AFCA has concerns that a paid agent is not using AFCA's process in good faith, AFCA will contact the Complainant to discuss the issue. If the Complainant insists on using the representative, then AFCA may refuse to consider the complaint further.

Some paid agents may encourage Complainants to conceal their involvement to avoid AFCA exercising its discretion to refuse to consider a complaint. This is unacceptable conduct that could result in AFCA using its discretion under rule C.2.2(h) to decide not to consider future complaints for clients of the paid agent.

AFCA also expects that paid agents, even more than other representatives, should be familiar with the information and documentation that will be required to support their client's complaint, and should ensure the following information is provided at the time the complaint is submitted:

General information

- Name and contact details of the Complainant. While AFCA will request contact information for the paid agent, it also requires contact details of the Complainant should AFCA need to contact them directly. It is not acceptable that a paid agent only provide contact information for themselves.
- A complaint raised by a paid agent should be clearly articulated. Specific details of the key issues in dispute, along with supporting documentation, will be required when the complaint is submitted. It is not sufficient to use a generic template of allegations without providing specific details relating to the Complainant.
- A paid agent should identify all issues in dispute when the complaint is submitted, wherever practical. It is not acceptable that a paid agent introduce further complaint issues during the progression of the complaint, where it is clear that they were able to be identified earlier.
- Details of the outcome sought, including the reasoning for the request and any loss or detriment suffered.
- If available, the name of the superannuation provider against which the complaint is lodged, along with details of the Complainant's relationship with the superannuation provider (for example a membership, policy or account number).
- The date of any complaint made to the superannuation provider about the issues in dispute.

26: Types of remedies for a Superannuation Complaint

What remedies can AFCA provide for Superannuation Complaints?

AFCA's powers to determine Superannuation Complaints are set out in section 1055 of the Corporations Act and are summarised in rules D.1.1 and D.1.2 of the AFCA Rules.

- When AFCA determines a Superannuation Complaint, it has all of the same powers, obligations and discretions of the trustee, insurer or RSA provider who made the decision or engaged in the conduct complained of.⁷⁵
- If AFCA is satisfied that the decision or conduct was fair and reasonable in all the circumstances, AFCA must affirm it.⁷⁶
- If not, AFCA must decide if:
 - the decision is unfair or unreasonable in its operation in relation to the Complainant
 - the conduct is unfair or unreasonable.⁷⁷
- If the decision relates to the payment of a death benefit, AFCA must decide if the decision is unfair or unreasonable in its operation in relation to the Complainant and any other interested party who has been joined to the complaint.⁷⁸

What is fair and reasonable depends on the circumstances. There may be a range of decisions that could be considered fair and reasonable. If the trustee's decision falls within that range, it must be affirmed.⁷⁹

In determining Superannuation Complaints, AFCA Decision Makers consider all of the available information to see whether there are adverse practical outcomes or consequences of a decision for the Complainant (and joined parties, in the case of a death benefit payment decision).⁸⁰

⁷⁵ Corporations Act, s 1055(1)

⁷⁶ Corporations Act, s 1055(2) and (3)

⁷⁷ Corporations Act, s 1055(4)

⁷⁸ Corporations Act, s 1055(5)

⁷⁹ *National Mutual Life Association v Jevtovic* (1997) Sundberg J; *Briffa v Hay* (1997) Merkel J; *Adkins v Health Employees Superannuation Trust Australia* (1997) Heerey J

⁸⁰ This is consistent with the Federal Court's approach to the 'merits review' role of the Superannuation Complaints Tribunal, which allows the Tribunal to consider new evidence (not previously considered by the trustee) in deciding what it is fair and reasonable.

While there is no monetary limit for superannuation, AFCA's powers to provide a remedy for Superannuation Complaints can only be used for the purpose of placing the Complainant as nearly as practicable in a position that any unfairness or unreasonableness no longer exists.⁸¹

Examples of unfair or unreasonable decisions or conduct

- The trustee has not complied with the fund's governing rules.
- The trustee has exercised its discretion to pay a death benefit to a person who was not financially dependent on the deceased member when there were other people who were financially dependent on the deceased member.
- The trustee or the insurer has refused to pay a TPD benefit when the weight of relevant medical opinion indicates that the member was TPD when the member ceased employment.
- The trustee has failed to actively make its own decision (for example, because it simply 'rubber stamped' an insurer's decision to deny a TPD claim without reviewing it, and satisfying itself that the insurer's decision was fair and reasonable).
- The trustee or the insurer has not given a member a reasonable opportunity to respond to information adverse to the member's TPD claim, such as an adverse medical opinion that the member has not previously seen.
- The trustee (or its administrator) has given the member misleading disclosure about the member's benefits that the member relied on to the member's detriment.

Are there any remedies AFCA cannot provide for a Superannuation Complaint?

AFCA bound by governing rules and law

AFCA cannot make a Determination that is:

- contrary to law
- contrary to the governing rules of a superannuation fund or an approved deposit fund (except to the extent permitted to redress and unfair or unreasonable admission to a life policy fund)
- contrary to the terms and conditions of an annuity policy, a contract of insurance or RSA (except to the extent permitted to redress an unfair or unreasonable sale of the product).⁸²

⁸¹ Corporations Act, ss 1055(4) and (5); see also *Hannover Life v Membrey* [2004] FCA 1095

⁸² Corporations Act, s 1055(7)

This means that AFCA cannot provide a remedy that would:

- require a trustee, insurer or RSA provider to act contrary to other laws, such as superannuation or taxation legislation
- require a trustee, insurer or RSA provider to act contrary to the relevant trust deed, insurance policy or RSA contract.

An example would be where a particular decision was required under a fund trust deed – AFCA cannot substitute a different decision, unless the trustee could have lawfully made a different decision.

No compensation awards

AFCA cannot award compensation in relation to a Superannuation Complaint, but it can consider whether it was unfair or unreasonable for a trustee not to settle a claim, or take a different approach to the claim and make a different decision on that basis.⁸³

Showing financial loss or detriment

Just like the SCT, AFCA cannot provide a remedy in determining Superannuation Complaints if there has been no adverse practical outcome or consequences of a decision.

For example, poor customer service that has not resulted in any financial loss or detriment

Complainants, therefore, need to show why a decision has operated unfairly and unreasonably in the circumstances and any adverse practical outcomes or consequences of the decision for them.

For example, if the complaint is about an error in the member's annual statement, the Complainant should provide AFCA with information about:

- what the Complainant believes the true position to be and what this belief is based on
- how the Complainant relied on the error
- what financial loss the Complainant has suffered as a result of relying on the error
- what the Complainant would have done differently if the statement had been correct.

A similar approach is required if the complaint is about misleading disclosure.

⁸³ *Retail Employees Superannuation Pty Ltd v Crocker* [2001] FCA 1330; *Commonwealth Superannuation Scheme Board v Dexter* [2004] FCA 1434

When does AFCA decide a superannuation provider should pay interest?

If AFCA decides that it is fair and reasonable for a superannuation provider to pay an amount to a Complainant, AFCA can decide that the superannuation provider must also pay interest on that amount in order to remedy the unfair or unreasonable denial of an amount properly payable to the Complainant.

Examples of when AFCA may decide that interest is payable

- AFCA substitutes its decision that an insured benefit is payable under a superannuation group life policy. AFCA can decide that interest is payable on the insured benefit from the date when the claim ought to have been admitted.
- AFCA substitutes its decision that the superannuation trustee pay an additional amount to a Complainant to rectify an incorrect benefit payment. AFCA can decide that interest is payable on the additional amount from the date the correct benefit should have been paid.

How does AFCA determine the amount of interest to be paid?

AFCA will not impose a standard rate when making interest awards and will not have one rate for all cases. Rather, AFCA has discretion to apply a rate that best fits the circumstances.

In remedying unfairness or unreasonableness, AFCA may apply a rate that replicates what a court might do or may use a statutory rate where this exists. If AFCA decides that an insurer should pay interest to an insured person, AFCA will generally use the interest rate that applies under section 57 of the *Insurance Contracts Act 1984* (Cth).

In deciding what is fair and reasonable, AFCA may calculate the time period over which interest should be paid, taking into account when the Complainant lodged the complaint and the extent to which the conduct of either party contributed to a delay in resolving the complaint.

27: Glossary of Superannuation Terms

<p>What is an AFSL?</p>	<p>An AFSL is an Australian Financial Services Licence issued by the Australian Securities & Investments Commission (ASIC) authorising the holder of the AFSL to provide specific financial services, such as issuing superannuation products or providing advice about superannuation products.</p>
<p>What is a death benefit?</p>	<p>A death benefit is a benefit paid from a superannuation product (e.g. a superannuation fund) on the death of the product holder (e.g. the fund member). It may include an insured component.</p> <p>Under superannuation law, a death benefit can only be paid to the product holder's dependants or legal personal representative (LPR), if there are such persons. Only if there is no dependant or LPR is it permitted to pay a death benefit to another individual (such as a relative who is not a dependant).</p> <p>A death benefit is usually paid as a lump sum, but in limited circumstances can be paid as a pension.</p>
<p>What is a dependant?</p>	<p>The meaning of 'dependant' will depend on the governing rules of the relevant fund, policy or contract. Under superannuation law, a dependant includes:</p> <ul style="list-style-type: none"> • a spouse (whether legal or de facto, same sex or opposite sex) • a child (including an adopted child, an ex-nuptial child, a stepchild and a child of the fund member's spouse) • any person who had an interdependency relationship with the deceased member • any person who was financially dependent on the deceased member.
<p>What is an interdependency relationship?</p>	<p>There are two alternative tests for an interdependency relationship under superannuation law:</p> <p>1) Basic test</p> <p>Two people are in an interdependency relationship if:</p> <ul style="list-style-type: none"> • they have a close personal relationship • they live together • one or each of them provides the other with financial support • one or each of them provides the other with domestic support and personal care.

	<p>2) Disability test However, if two people have a close personal relationship and the reason they do not meet the other elements of the basic test is because either or both of them suffer from a physical intellectual or psychiatric disability, they are still considered to be in an interdependency relationship.</p>
What is a legal personal representative?	<p>A legal personal representative is the executor of a person's will or, if the person died without a will, the administrator of the person's deceased estate (i.e. someone who has been granted 'letters of administration' by the court).</p>
What is a life policy fund?	<p>A life policy fund is a type of regulated superannuation fund, usually established through a life insurance company, where the trustee maintains insurance policies to provide benefits for the fund's members.</p>
What is a RSA?	<p>An RSA is a capital guaranteed account or policy provided by a bank, building society, credit union, life insurance company or an approved RSA institution. The purpose of the account is to provide benefits to the RSA holder on retirement, or to the RSA holder's dependants on death. Currently, the only RSA providers are banks and credit unions.</p>
What is a regulated superannuation fund?	<p>A regulated superannuation fund is a superannuation fund where the trustee has made an election to be regulated under the <i>Superannuation Industry (Supervision) Act 1993</i> (Cth) (SIS Act), including an eligible rollover fund and a life policy fund. Some non-exempt public sector funds are also regulated superannuation funds.</p> <p>For the purposes of AFCA's superannuation jurisdiction, a regulated superannuation fund does not include a self-managed superannuation fund.</p>
What is an exempt public sector superannuation scheme?	<p>An exempt public sector superannuation scheme is a superannuation arrangement for public servants, usually established by a governmental body under legislation. Exempt public sector superannuation schemes are not regulated under the SIS Act, but they can elect to join AFCA and be treated as a regulated superannuation fund for the purposes of AFCA's superannuation jurisdiction.</p>
What is a superannuation annuity policy?	<p>A superannuation annuity policy is an annuity that is declared to be a superannuation policy for the purposes of the <i>Life Insurance Act 1995</i> (Cth).</p>

<p>What is superannuation law?</p>	<p>The main legislation that governs superannuation trustees is the <i>Superannuation Industry (Supervision) Act 1993</i> (Cth).</p> <p>RSA providers are primarily governed by the <i>Retirement Savings Accounts Act 1997</i> (Cth) and life companies are primarily governed by the <i>Life Insurance Act 1995</i>.</p> <p>Most superannuation providers are also financial service providers and, therefore, subject to licensing and disclosure requirements under chapter 7 of the <i>Corporations Act 2001</i>.</p> <p>Superannuation providers are also subject to the <i>Income Tax Assessment Act 1936</i> (Cth), the <i>Income Tax Assessment Act 1997</i> (Cth), the <i>Family Law Act 1975</i> (Cth), the <i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i> (Cth) and the <i>Privacy Act 1988</i> (Cth).</p>
<p>What is a superannuation provider?</p>	<p>A superannuation provider is the trustee of a regulated superannuation fund or approved deposit fund, an RSA provider or a life insurance company that issues superannuation annuity policies.</p>
<p>What is total and permanent disablement?</p>	<p>The definition of total and permanent disablement (or TPD) depends on the particular trust deed or insurance policy, but it usually requires the member to be permanently incapacitated from doing any paid work for which the member is reasonably suited by their education, training or experience. Many trust deeds will also require the member to cease employment because of TPD, in order for a TPD benefit to be payable.</p> <p>A TPD benefit is usually paid as a lump sum, although some trust deeds or insurance policies may pay a TPD benefit as regular income.</p> <p>In addition, for a trustee to pay a TPD benefit from a superannuation fund, the member's disability must amount to permanent incapacity under superannuation law. Permanent incapacity means ill-health (whether physical or mental) where the trustee is reasonably satisfied that the member is unlikely, due to ill-health, to engage in gainful employment for which the member is reasonably qualified by education training or experience.</p>

What is total and temporary disablement?

The definition of total and temporary disablement (or TTD) depends on the particular trust deed or insurance policy, but it usually requires the member to be temporarily incapacitated from doing the member's usual job. Sometimes a TTD benefit is referred to as an income protection benefit, or a salary continuance benefit, because it is paid as regular income.

In addition, for a trustee to pay a TTD benefit from a superannuation fund, the member's disability must amount to temporary incapacity under superannuation law. Temporary incapacity means ill health (whether physical or mental) that caused the member to cease being gainfully employed, but that does not constitute permanent incapacity. A temporary incapacity benefit can be paid for up to two years, unless the member returns to work earlier.

