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Mr Mike Dargaville  
Australian Financial Complaints Authority  
GPO Box 3  
MELBOURNE VIC 3001, Australia

By email: **[submissions@afca.org.au](mailto:submissions@afca.org.au)**

Dear Mr Dargaville

### **AFCA RULES CHANGE CONSULTATION**

I refer to AFCA's Rules Change Consultation paper released 18 March 2019 and thank you for the opportunity to make submissions on behalf of AMP Limited and its subsidiaries (**AMP**).

#### **General**

As you would be aware, on 31 October 2017, AMP announced the establishment of a Customer Advocate function to help and support retail and small business customers of the AMP Group who believe their complaints have not been appropriately resolved through AMP's complaint resolution processes. Through Terms of Reference approved by the AMP CEO, the AMP Customer Advocate has a mandate to ensure customers receive fair and reasonable outcomes in the circumstances and that AMP's customer complaint processes are accessible, robust and transparent. In addition, the AMP Customer Advocate is responsible for working closely with senior leaders and teams across AMP to improve outcomes for customers.

Key to the ongoing delivery of this mandate is a well-articulated and proactive approach, along with appropriate resourcing, to resolving disputes to ensure customers are treated fairly. AMP is committed to working with AFCA as it facilitates the resolution of customer disputes, including within the extension of AFCA's remit to consider 'legacy complaints'.

AMP supports the key components of that remit, namely:

- legacy complaints to be accepted by AFCA for a period of 12 months between 1 July 2019 and 30 June 2020;
- eligible complaints involve conduct that occurred after 1 January 2008;
- matters must not have been subject to a decision or determination by a court, tribunal, EDR predecessor scheme or AFCA, nor previously have been settled by the parties.

These components provide the ability for customers to seek a resolution within appropriate parameters, whilst providing certainty for industry.

AMP supports the submission made to this consultation by the Australian Banking Association (ABA) and The Association of Superannuation Funds Australia (ASFA), in particular the specific issues they raises in relation to process, resourcing, reporting, documentation and remediation approach.

While there will inevitably be an increase in the volume of disputes to be resolved, AMP considers that despite the potential volume, the priority should be the quality of decision making, to ensure fairness of procedure and fairness of outcome for customers.

To that end, AMP makes a number of specific comments and suggestions regarding the proposed rule change, as AMP believes that a level of specificity on these issues will assist in ensuring a customer-focussed approach.

## **Rules Change Consultation**

In relation to the three broad consultation questions set out on page 2 of the Rules Change Consultation paper, AMP makes the following comments:

### **1. Does the proposed change satisfy the requirements of the new authorisation conditions?**

AMP is satisfied that the proposed new section of the AFCA Rules, Section F – Legacy Complaints, meets the requirements of the new authorisation conditions.

### **2. Do the Operational Guidelines adequately explain how Section F will apply?**

AMP makes the following specific comments about the proposed Section F of the AFCA Operational Guidelines:

#### ***Section F.1.3 -What complaint resolution processes will AFCA apply for legacy complaints?***

##### *General observations*

AMP welcomes AFCA's acknowledgement that the unique nature of legacy complaints may necessitate the development of particular approaches and modified processes that, it is inferred, will differ from those applicable to non-legacy complaints. It is appreciated that because AFCA is entering new territory with legacy complaints, it is not necessarily possible for AFCA to be in a position, at this stage, to give either complainants or Financial Firms certainty in this regard.

Whilst on the one hand AMP, and no doubt other Financial Firms, would appreciate an early indication of what the "particular approaches" referred to are likely to comprise, and also what process modifications are under consideration, on the other hand AMP acknowledges that the individual circumstances surrounding specific legacy complaints may mandate a less prescriptive approach at times in order for AFCA to be able to address complaints in accordance with its obligations under Section A.2.1.C of the Rules.

In considering what particular approaches and modified processes may apply, AMP suggests that the following be taken into account:

##### *Referral back timeframe*

Again, AMP welcomes AFCA's acknowledgement that the referral back timeframe may need to be varied to ensure a high quality of decision making. We anticipate that for many if not most legacy complaints, the standard 21 day period will be inadequate and instead propose that a minimum 45 day period is more appropriate for the following reasons:

1. For legacy complaints, it is much less likely that the Financial Firm will be aware of the complaint in advance, as these complaints by their very nature are those that will

probably not have recently been the subject of Internal Dispute Resolution and/or Customer Advocate Review. It will not be a simple matter of providing material that is readily accessible and “front of mind.”

Relevant documents will need to be retrieved from historical data retention systems, such as off-site hard-copy archiving and/or less readily accessible on line storage programs.

In addition, to provide all documents relevant to complaints arising from conduct occurring on or after 1 January 2008, it may still be necessary to retrieve documents that pre-date this time period (for example, insurance proposals completed before 1 January 2008 for policies incepting after 1 January 2008), even though the conduct complained of occurred subsequently. In AMP’s case some of this historical material is held on microfiche, and retrieval is both time consuming and highly labour intensive.

2. An additional reason for extending the referral back period is that AMP anticipates that Financial Firms will in effect be conducting their own preliminary AFCA Rules Review once each legacy complaint is notified by AFCA, on the basis that it is expected that AFCA will have neither the resources nor indeed, at that stage, the available information, to properly assess each legacy complaint for jurisdiction and scope.

Further, it is our view, based on our experiences with our work through the Office AMP Customer Advocate, that a very robust assessment will be required by AFCA to properly assess each legacy complaint for eligibility under the AFCA Rules, in particular in respect of legacy complaints where matters relating to the complaint have already been addressed by a Court, tribunal or predecessor scheme, or have been settled between the complainant and Financial Firm. Specifically, in the interests of fairness, before a legacy complaint is deemed outside terms of reference on the basis that it has already been addressed by a Court, tribunal or predecessor scheme, or have been settled between the complainant and Financial Firm, AMP considers that some form of substantive review will need to be undertaken by AFCA in order to consider whether the issues now raised in fact align with the issues which were previously dealt with. Incorporation of a preliminary review of this nature, will be crucial to strike a balance between the spirit and intent of the new arrangements, and maintaining the integrity of previous outcomes.

3. In this context, key issues will be:
  - the need for the Financial Firm to determine whether the complainant in fact has unresolved issues following the finalisation of his/her complaint to a predecessor scheme (as opposed to simply taking the opportunity to have AFCA revisit the resolution felt to be less than satisfactory in hindsight); and
  - whether the complaint involves entities within the Financial Firm other than those identified in the original complaint. For example, a resolved SCT complaint may have addressed the complainant’s issues with the relevant Trustee but conceivably, and relevantly for the business entities within AMP, may simultaneously have unresolved issues with that Firm’s insurer and/or an aligned adviser.

From AMP’s perspective, being allowed the time and opportunity to undertake a thorough assessment upfront will ultimately result in time savings for all parties,

including AFCA, and fairer outcomes for complainants, as the parameters of the complaint can be articulated at an early stage of the process.

#### *Case management*

AMP appreciates that AFCA no doubt will, consistent with usual practice, wish to apply a case management framework to legacy complaints in a similar way to its process with non-legacy complaints.

Whilst of course AMP has no wish to see investigations and resolution of legacy complaints unnecessarily prolonged, to assist in fairness of outcome and treatment for customers, factors to be taken into account in agreeing timeframes need to include:

1. The difficulty that Financial Firms may experience in locating documents (which is addressed in “*What if relevant documents relating to a legacy complaint are not available?*”);
2. The likely complexity of many legacy complaints;
3. The advantages of conciliation at an appropriate stage, but with recognition that not all Financial Firms will necessarily be fully resourced for additional conciliations; and
4. The need for AFCA to manage workflow, bearing in mind that there is likely to be a significant influx of legacy complaints on or shortly after 1 July 2019 with numbers potentially stabilising thereafter until an expected further increase just before 30 June 2020.

#### ***Section F.1.3 - What if relevant documents relating to a legacy complaint are not available?***

AMP welcomes AFCA’s acknowledgement that documents relevant to legacy complaints may genuinely no longer be available, and that an adverse inference will not necessarily be drawn where they have been destroyed, over the passage of time, in accordance with proper document retention practices that are reflective of statutory timeframes.

It is assumed that, although no such statutory timeframes are likely to apply to complainants, AFCA will likewise apply a fair approach in determining whether a complainant, who after making reasonable efforts is unable to provide supportive documentation, can establish their case.

AMP would appreciate early clarity as to what is envisaged where the Operational Guidelines indicate that: “*Our Chief Ombudsman or his or her delegate may decide on further approaches as appropriate to decide a legacy complaint.*”

#### ***Section F2 – Requirements for Legacy Complaint***

*Can AFCA consider a legacy complaint that has been decided by a court or tribunal?*

The Operational Guidelines are not clear as to whether – where no verdict has been delivered by a court – the existence of consent orders filed with the court which have the effect of concluding the litigation, such a consent judgment dismissing the proceedings, will be regarded as bringing the legacy complaint within the exclusion provided by Rule C.1.2.d, or whether in the alternative rule F.2.1.e will apply.

It is AMP’s view that where final consent orders have been filed with the court, finalising by judgment, dismissal or discontinuation of the proceedings by agreement between the parties, the application of Rule C.1.2.d to exclude the complaint is triggered.

*Can AFCA consider a legacy complaint that has been decided by a predecessor scheme?*

As noted above, AMP believes it is likely that complaints that have previously been considered on their merits by predecessor schemes may in some circumstances still fall within AFCA's jurisdiction where - perhaps because of the limits of that predecessor scheme's terms of reference at the time – not all aspects of the original complaint when taken as a whole have been previously considered. For clarity, this should not apply where a legacy complaint has been determined on its merits or otherwise resolved, but where the financial figure awarded or agreed upon was reduced by reason of the applicable financial limits at that time. This needs to be clarified in the Operational Guidelines.

*Can AFCA consider a legacy complaint that has been settled between the parties?*

The 2019 amendment to the AFCA Scheme Rules specifically provides that settled complaints are “excluded complaints”:

*excluded complaint* means any of the following:

- (f) a complaint that has previously been finally settled by the person making the complaint and the compulsory member to whom the complaint relates (other than a complaint which can still be made under the scheme rules).

Notwithstanding this clarity, the focus in this part of the proposed revised Operational Guidelines seems to be on AFCA's “*discretion not to revisit issues settled in full and final satisfaction of the parties' obligations.*” Although this is certainly the case with non-legacy complaints, and in this regard the reference to Rule C.2.1 is appropriate, we question the emphasis on *discretionary* exclusion in the case of legacy complaints.

Since, based on the proposed revised Operational Guidelines, AFCA clearly takes a different view, it is our submission that AFCA's express default position – akin to a rebuttable presumption – ought to be that it will decline to review settled matters other than in exceptional circumstances.

AFCA's reference to the relevant factors listed in Rule C.2.1 is noted. However, it is submitted that with the passage of time, the potential lack of availability of contemporaneous records, and a “benefit of hindsight” view of events by complainants, it will be very difficult in any legacy complaint for AFCA to truly ascertain to what extent the list of “relevant factors” may fairly apply.

### **3. Do you have any other comments about the proposed change?**

One issue that is not specifically addressed by the proposed changes to the Operational Guidelines is how AFCA will factor into its approach the changes to the legislative landscape since 1 January 2008. There will need to be a very clear understanding at the outset in respect of each legacy complaint of the compliance obligations in place at the time of the conduct complained of, such that current regimes and standards are not applied retrospectively.

If you have any questions in relation to this submission or would like to discuss it further, please contact me directly.

Yours sincerely



Melanie Howard-McDonald  
**AMP Customer Advocate**