

AFCA Rules Change Consultation

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Overview

Since 1 November 2018, superannuation complaints, that are not resolved internally, have been made to the Australian Financial Complaints Authority (AFCA) rather than the Superannuation Complaints Tribunal (SCT). The SCT remains responsible for finalising superannuation complaints received by the SCT before that date.

As announced by the Government in the 2019-20 Budget, the SCT will cease operations by 31 December 2020. The *Superannuation (Resolution of Complaints) Act 1993* is to be repealed following a proclamation by the Treasurer, or the day after four years of the commencement of the AFCA Act. This latter date is the 5 March 2022.

Transition arrangements

As part of the SCT ceasing operations, certain transition arrangements involving AFCA are also required.

The requirements are intended to ensure that there are appropriate arrangements in place to address the following possible events:

- any remaining complaints currently with the SCT are unable to be finalised prior to the SCT ceasing operations, or
- any matters that are before the Federal Court on appeal from the SCT are not finalised prior to the SCT ceasing operations and require remittal back to be determined again or finalised in accordance with the Court's directions.

Rules changes

In order for AFCA to deal with these complaints or remittals, if required, we are proposing to amend our Rules in several areas. No other complaints or existing AFCA jurisdiction provisions are affected by these changes.

In addition, AFCA proposes to make two minor technical changes to the Rules to:

- clarify which Australian Bureau of Statistics reports are used to index AFCA's monetary limits, and
- to correct a reference to legislation.

Background

Transfer of complaints from the SCT to AFCA

AFCA Limited operates the AFCA scheme. It is authorised to do this by the responsible Minister, and must meet the requirements of the Corporations Act, the authorisation conditions laid down by the Minister, and regulatory requirements issued by ASIC.

Under section 1050 of the Corporations Act, AFCA is required to be:

- open to membership for any firm required to be a member of an authorised external dispute resolution scheme (including superannuation trustees), and
- appropriately accessible to complaints about those firms.

Once the SCT ceases operating at the end of December 2020, AFCA may need to be available as a forum for any outstanding SCT complaints that are transferred to AFCA from the SCT, appeals to the Federal Court if the court remits the complaint back to be determined again, and any Federal Court opinion on questions of law referred to it by the SCT.

AFCA's current Rules set out time limits for complaints to be submitted to AFCA and prevent AFCA from considering complaints that have been 'dealt with' by a court, tribunal or one of AFCA's predecessor schemes. Any superannuation complaints that AFCA may be required to receive from the SCT or the Federal Court may fall outside the time limits in the existing AFCA Rules, or be excluded on the basis that the SCT or the Federal Court had 'dealt with' them.

To facilitate AFCA's consideration of these complaints, we propose to change the Rules to ensure any such matters are not excluded.

The Rules changes

Transfer of SCT complaints to AFCA: modification of time limits

Currently, the AFCA Rules countenance AFCA receiving complaints by either of two means:

- where a person submits a complaint to AFCA, under Rule A.3.
- the transfer to AFCA of complaints originally received by a predecessor scheme, under Rule B.4.5.1.

Superannuation complaints must be received by AFCA within the time limits set out in Rule B.4.1. These reflect the time limits of the SCT in respect of similar complaints.

There is a possibility that some complaints currently with the SCT that were within time when received by the SCT, would fall outside those time limits if transferred to AFCA.

The referral framework under the current Rule B.4.5.1 addressed this issue, as it related to complaints transferred from the SCT to AFCA after AFCA commenced operations in November 2018.

However, this framework in its current form would not cover the transfer of complaints received by the SCT *before* 1 November 2018, or the resolution of complaints that have been the subject of:

- a) A Federal Court opinion on a question of law referred by the SCT
- b) An appeal from an SCT decision that is remitted back to the SCT for reconsideration.

For this reason, it is necessary to amend Rule B.4.5.1 to ensure AFCA can consider such complaints if required.

A draft of the change to Rule B.4.5.1 is set out in the Appendix at the end of this consultation paper.

Transfer of SCT complaints to AFCA: ensuring non-finalised SCT complaints are not excluded

Rule C.1.2d) prevents AFCA from considering complaints that have been ‘dealt with’ by a court, statutory tribunal or one of AFCA’s predecessor schemes.

Where a complaint has not been finalised by the SCT, it is unlikely but possible that it would count as having been ‘dealt with’ within the meaning of Rule C.1.2d). The same would be true where an appeal from the SCT to the Federal Court is remitted back to the SCT for determination in accordance with the Court’s directions, or where the Court gave an opinion on a question of law at the request of the SCT.

If Rule C.1.2d) prevented AFCA from considering and finalising these complaints, it would undermine the intent of the arrangements to finalise the SCT. To remove any possibility of this, we propose to amend this rule to make it clear such complaints are not treated as already ‘dealt with’.

A draft of the change to Rule C.1.2d) is set out in the Appendix at the end of this consultation paper.

Rule C.2.2b) gives AFCA the discretion to exclude a complaint that has been ‘adequately dealt with’ by another body. We do not consider this Rule needs to be amended as the exclusion is at AFCA’s discretion; it should be sufficient to make a change to the Operational Guidelines to confirm AFCA will not use its discretion to exclude these complaints.

Transfer of SCT complaints to AFCA: Operational Guidelines

AFCA's Operational Guidelines explain how AFCA interprets and applies its Rules. In the interests of transparency, AFCA has also drafted additional information to be included in the Operational Guidelines, explaining how AFCA intends to interpret and apply the proposed Rules changes. The new drafts of the affected sections can be found [here](#).

Indexation of monetary claims limits

The per-claim limits on AFCA's power to award compensation in non-superannuation complaints are set out in Rule D.4. Rule D.4.3 provides for these limits to be indexed every three years, with the first such indexation occurring on 1 January 2021.

Indexation is based on the higher of the increase to the Consumer Price Index (CPI) or the Average Male Weekly Earnings (AMWE) for the three years ending in the September quarter immediately before the increase. While CPI figures continue to be reported quarterly, the AMWE reports are now issued half yearly, for the six months ending 31 May and 30 November each year, and the release dates for those reports may be delayed by some months.

To ensure that any indexation increase is aligned with ABS reports available at the time the increase falls due, we propose to remove the references to reports for the September quarter and index by reference to CPI or AMWE increases for the three years ending with the most recent period for which reports are available.

For the upcoming indexation changes that will apply from 1 January 2021, following the indexation results being released and compensation limits amended, the updated amounts will be included in tabular format in the Rules, to apply from 1 January 2021 to complaints received on or after that date.

No changes are required to the Operational Guidelines to reflect this change.

Correcting a reference to legislation

A legislative cross reference to the definition of "CDR Participant" in Rule E.1.1 is incorrect and needs updating.

This will not change the extent of AFCA's jurisdiction to deal with complaints against CDR participants, or otherwise.

No changes are required to the Operational Guidelines to reflect this change.

The consultation

Scope of the consultation

AFCA seeks the views of stakeholders on the proposed Rules changes. The consultation is limited to these proposed changes and its implementation.

Consultation questions

- 1 Do the proposed changes enable AFCA to consider complaints transferred to it by the SCT, or remitted by the Federal Court after an appeal from an SCT decision?
- 2 Do the Operational Guidelines adequately explain how these changes will apply?
- 3 Do you have any other comments about the proposed changes, including the two minor proposed changes to the Rules concerning indexation of AFCA's monetary claims limits and correcting a legislative reference?

The consultation process

AFCA may be required to deal with any outstanding SCT complaints transferred to AFCA or remitted by the Federal Court to the SCT or to AFCA, from 1 January 2021 onwards. The consultation process must be completed well before this date to ensure that the proposed Rules change is finalised and approved by that time.

We invite individual written submissions on the proposed Rules changes (see below for how to make a submission).

Following the consultation, all submissions will be considered, and any further appropriate changes made. The proposed change to the Rules, as approved by the Board, will then be submitted to ASIC for review and approval, which may result in further changes.

Once finalised, the Rules as amended will apply to:

- Any complaints that may be referred to AFCA by the SCT,
- Any complaints remitted by the Federal Court to AFCA for reconsideration after the SCT ceases operations, and
- Cases where the Federal Court has provided an opinion on a question of law.

How to make a submission

Submissions can be emailed to submissions@afca.org.au before close of business Friday 16 October 2020.

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

Appendix: The proposed Rules change

Additional text (compared with the current Rules) has been highlighted in yellow.

Rule B.4.5.1

- B.4.5.1 a) For the purposes of AFCA's time limits, a complaint submitted to:
- (i) a Predecessor Scheme on or after 1 November 2018 that is then referred to AFCA will be treated as submitted to AFCA on the date it was received by the Predecessor Scheme;
 - (ii) AFCA before 1 November 2018 will be treated as submitted to AFCA on the date it was first received by AFCA.
- b) For **the** purpose of the rest of AFCA's Rules, a complaint submitted to a Predecessor Scheme that is then referred or forwarded to AFCA, and a complaint submitted to AFCA before 1 November 2018, will be treated as received by AFCA when these rules become operational (or such later date when the complaint was referred to AFCA), and these rules will apply.
- c) **Where a complaint received by the Superannuation Complaints Tribunal before 1 November 2018 is referred or forwarded to AFCA**
- (i) by the Superannuation Complaints Tribunal,**
 - (ii) following a decision of the Federal Court on a question of law referred to it for determination, or**
 - (iii) because it has been remitted by the Federal Court for reconsideration,**
- then:**
- (iv) for the purposes of AFCA's time limits, it will be treated as submitted to AFCA on the date it was received by the Superannuation Complaints Tribunal;**
 - (v) For the purpose of the rest of AFCA's Rules, it will be treated as submitted to AFCA on the date it was referred or forwarded to AFCA.**

Rule C.1.2d)

C.1.2 AFCA must exclude: ...

- d) A complaint that has already been dealt with by a court, dispute resolution tribunal established by legislation or a Predecessor Scheme, unless the Complainant has requested a stay on the execution of a default judgment on the basis of financial difficulty, and the Financial Firm has declined the Complainant's financial difficulty assistance request, and the request has not previously been dealt with.

For the avoidance of doubt:

- (i) AFCA may consider a complaint by a Primary Producer about issues unresolved after a farm debt mediation;
- (ii) Where the SCT referred a question of law to the Federal Court for decision and the Court issues an opinion, the complaint is treated as not dealt with by the Superannuation Complaints Tribunal or the Federal Court unless the Superannuation Complaints Tribunal has subsequently determined the complaint in accordance with the court's opinion.
- (iii) Where a decision of the Superannuation Complaints Tribunal is the subject of an appeal to the Federal Court and the Court remits the appeal for reconsideration, the complaint is treated as not dealt with by the Superannuation Complaints Tribunal or the Federal Court unless the Superannuation Complaints Tribunal has subsequently determined the complaint in accordance with the court's directions.

Rule D.4.3

D.4.3 The amounts set out in the table are subject to change:

- a) AFCA must adjust those amounts on 1 January 2021, and every three years thereafter, by the higher of the percentage increase in:
 - (i) the Consumer Price Index, weighted average of eight capital cities, for the three-year period ending with the most recent report issued by the Australian Bureau of Statistics in the previous year
 - (ii) the Male Total Average Weekly Earnings for the three-year period ending with the most recent report issued by the Australian Bureau of Statistics in the previous year.

AFCA must round maximum compensation amounts to the nearest \$100 for rows 1, 3, 7 and 8; and to the nearest \$500 for rows 2, 4, 5 and 6.

AFCA must round monetary restriction amounts to the nearest \$1000, regardless of row.

- b) AFCA may change those amounts at any time to meet any regulatory requirements or directions given by ASIC under the Corporations Act.

Rule E.1.1

E.1.1 For the purposes of these rules, the terms below have the following meanings:

...

- CDR participant means a Financial Firm that:
- a) for particular Consumer Data Right data, is a data holder, or an accredited data recipient, for the Consumer Data Right data within the meaning of section 56AL of the Competition and Consumer Act; and
 - b) is not required to be a member of the AFCA scheme under the Corporations Act or the National Consumer Credit Protection Act 2009.