

Appendix One - Proposed changes to Operational Guidelines for transfer of SCT complaints to AFCA

Proposed changes to Operational Guidelines to Rule B.4.5.1

Only the affected section of the Guideline is set out below. Proposed additions to the Operational Guidelines are highlighted. This change would take effect from the date the change to Rule B.4.5.1 takes effect.

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

From 1 November 2018, where a complaint is inadvertently submitted to a Predecessor Scheme (the Financial Ombudsman Service, the Credit and Investments Ombudsman or the Superannuation Complaints Tribunal (SCT)) instead of to AFCA, the Predecessor Scheme will ask the complainant whether they would like the Predecessor Scheme to forward the complaint to AFCA. In these cases, for the purpose of any time limit that may apply, we will treat the complaint as submitted to AFCA on the date the complaint was received by the Predecessor Scheme, but otherwise we will apply the AFCA Rules from the date the complaint is received by AFCA.

Superannuation Complaints received by AFCA before 1 November 2018

Prior to 1 November 2018, AFCA will be operating the FOS scheme and the CIO scheme. Where a complaint is received prior to 1 November 2018, it will be dealt with under the jurisdiction of the relevant Predecessor Scheme. For relevant Superannuation Complaints received by AFCA before 1 November 2018, they will be referred to the SCT. However, where AFCA receives a Superannuation Complaint between 27 October 2018 and 31 October 2018 that it does not yet have jurisdiction to consider, 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 complaints lodged prior to 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 Trustee, we will contact the Complainant and advise that they need to firstly complain to the Trustee. 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 timeframes to lodge an objection to the proposed decision and this must be done with the Trustee directly – [see rule B.4.1.3](#). Separately, AFCA will forward the complaint to the Trustee and ask it to

treat the complaint as an objection. This replicates the approach of SCT, and also reflects what AFCA will do from 1 November 2018.

AFCA will take this approach because we recognise there may be confusion as to which scheme to complain to and that rights to complain may be lost if AFCA does not take a proactive approach.

SCT Complaints transferred to AFCA by the SCT or remitted by the Federal Court

The SCT, which continued to resolve complaints it received before 1 November 2018, will cease to operate after 31 December 2020. Any complaints it has not finalised will be transferred to AFCA before that time.

Any appeals from the SCT to the Federal Court that are remitted for further consideration after 2020 will be remitted to AFCA rather than the SCT.

For the purposes of AFCA's time limits, these complaints will be treated as having been submitted to AFCA at the time they were originally made to the SCT.

Proposed changes to Operational Guidelines to Rule C.1.2d)

Only the affected section of the Guideline is set out below. Proposed changes are marked up. This change would take effect from the date the change to Rule C.1.2d) takes effect.

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

We cannot consider a complaint that has already been dealt with by a court, legislative dispute resolution tribunal or a Predecessor Scheme. However, where the Financial Firm has obtained a default judgment and the complaint is that the Financial Firm has failed to properly consider the Complainant's request for financial difficulty assistance, we have limited jurisdiction to stay the execution of a default judgment – [see rule A.7.2\(f\)](#).

The reference in rule C.1.2(d) to legislative tribunals and Predecessor Schemes includes the various State Civil and Administrative Appeals Tribunals, the Superannuation Complaints Tribunal, the Financial Ombudsman Service and the Credit and Investments Ombudsman.

When considering whether another place has previously dealt with the complaint, we apply the same factors as those for rule C.1.2(c).

Example of how rule C.1.2(d) applies:

- A complaint is made to AFCA about a Financial Firm's claim on the Complainant for legal costs incurred in previous legal proceedings instituted by the Financial Firm against the Complainant.

We would not generally be able to consider a complaint about legal costs that have been awarded by a court, unless the Complainant is able to demonstrate that the Financial Firm should not have instituted the legal proceedings (and so should not have incurred the legal costs), for example, because to do so was in breach of rule A.7.

We would, however, be able to consider whether the costs charged to the Complainant's account exceeded the costs awarded by the court, and were reasonably and properly incurred by the Financial Firm where these costs are added because of a contractual term.

Disputes previously dealt with by FOS, CIO or SCT

If we receive a complaint about the same facts and circumstances that were previously the subject of a complaint with a Predecessor Scheme, we will consider the complaint previously 'dealt with' if the parties:

- entered into a binding agreement, for example – a conciliated outcome or negotiated outcome
- received a recommendation, case assessment or preliminary view from FOS or CIO
- received a Determination or final decision from FOS, CIO or SCT.

What does 'dealt with' mean – complaints withdrawn by the SCT, but not dealt with

We will exercise our discretion to exclude a complaint that was not dealt with by the SCT, but was withdrawn by the SCT, on the basis that the SCT was the appropriate forum to consider the complaint previously and, therefore, it would not be appropriate for us to consider the complaint again. This is because the appropriate process for the Complainant to challenge the SCT's decision to treat a complaint as withdrawn was to lodge an appeal with the Federal Court within the required timeframe. 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 we may, in exceptional circumstances, treat the complaint as a new complaint, provided it is otherwise within our jurisdiction and has not been 'dealt with' previously.

An example of exceptional circumstances is where the Complainant can demonstrate that they did not receive relevant correspondence or contact from the SCT because they had changed address or been hospitalised.

SCT complaints appealed to the Federal Court

Decisions of the SCT can be appealed to the Federal Court on questions of law. The Federal Court may uphold the SCT's decision, change it or remit the complaint back to the SCT for further consideration in accordance with any directions given by the Federal Court.

Once the SCT ceases operating at the end of 2020, AFCA will be required to consider any appeals that may be remitted by the Federal Court for further consideration. The effect of the Court's decision is that the complaint remains unresolved until it is considered in accordance with the Court's directions. Therefore, it has not been "dealt with" by either the SCT or the Federal Court for the purpose of this exclusion.

Proposed changes to Operational Guidelines to Rule C.2.2b)

Only the affected section of the Guideline is set out below. Proposed changes are marked up. This change would take effect from the date the change to Rules B.4.5.1 and C.1.2d) takes effect.

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?

We may exclude a complaint if the subject matter of the complaint has already been adequately dealt with by AFCA or a Predecessor Scheme such as FOS, CIO 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. 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 FOS, CIO or the SCT, we may exclude it.

SCT complaints that are transferred to AFCA before a final determination is issued, or appealed to the Federal Court and remitted to either the SCT or AFCA for further consideration, have not been fully resolved and will not be considered to have been adequately dealt with.

If a similar complaint has already been dealt with by AFCA, or in another place, we 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, we will then consider whether the previous resolution adequately dealt with the complaint. We can be satisfied that the previous resolution did adequately deal with a complaint even if it appears new evidence has since emerged, particularly where the new evidence is inconsequential, irrelevant or unpersuasive.

Example where we 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.