

19 May 2023

Australian Financial Complaints Authority (AFCA)

Email: consultation@afca.org.au

AFCA Consultation on proposed amendments to AFCA Rules and Operational Guidelines

Brief

AIST supports the important work undertaken by AFCA and understands the intent of the proposed amendments to the AFCA Rules and Operational Guidelines.

Superannuation is Australia's compulsory retirement scheme and can be a complex legislative area. Levels of understanding regarding superannuation can vary greatly in the community and superannuation is generally described as sector with a relatively low level of consumer engagement. It is for these reasons that AIST member funds take an educative approach when conducting dispute resolution processes.

This is so particularly in relation to death benefits. There is a common misconception that intestacy rules apply to the distribution of superannuation death benefits. This misconception combined with increased sensitivities during the death benefits process may result in heightened emotions and additional conciliation in resolution of a complaint. That is why AIST member funds welcome any changes that will ensure a reduction in wait times to resolve disputes and to exclude complainants that are vexatious or complaints that have no merit or are not in the best interests of the complainant.

AIST sought feedback from member funds on the proposed changes to the AFCA Rules and Operational Guidelines. Member funds that participated in the feedback provided both general and specific recommendations in relation to the proposed changes. Specific comments and recommendations related to individual proposals are set out in detail below. General recommendations AIST would like AFCA to consider are:

- **Comprehensive written advice from AFCA to the financial firm as to why a matter is not being considered or discontinued under all applicable Rules.**
- **Greater clarity on specific terms used in the Rules and Operational Guidelines, including either definitions or examples.**

About AIST

Australian Institute of Superannuation Trustees is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public sector superannuation funds. As the principal advocate and peak representative body for the \$1.7 trillion profit-to-members superannuation sector, AIST plays a key role in policy development and is a leading provider of research. AIST advocates for financial wellbeing in retirement for all Australians regardless of gender, culture, education, or socio-economic background. Through leadership and excellence, AIST supports profit-to-member funds to achieve member-first outcomes and fairness across the retirement system.

Submission

AIST would like to thank AFCA for the opportunity to provide feedback to this submission. AIST member funds have requested the following points be considered in the consultation:

Proposal 1: Paid representatives and AFCA's ability to not continue to consider a complaint.

- 1. Recommendation: AIST requests that AFCA include examples of when a paid representative is not acting in the best interests of a complainant as per 8.4 (a)(2) (i) AIST proposes that this should include examples where the paid representative is unaware of the application of superannuation law.**

AIST welcomes the proposal by AFCA to not continue with a complaint made by a paid representative on behalf of a complainant in certain circumstances. Under new rule A.8.4 (a)(2) (i) it states:

A.8.4 AFCA may also decide at its discretion that it is not appropriate to continue to consider a complaint because:

a) the Complainant is dealing with AFCA through a Paid Representative and AFCA is satisfied that:

(i) the Paid Representative does not hold an Australian credit licence or Australian financial services licence where this is required by law; or

(ii) the Paid Representative:

- 1. *is either not acting in the Complainant's best interests or, acting in a way that prevents AFCA from achieving a cooperative, fair, efficient and timely resolution of the Complainant's complaint; and***

2. *fails to promptly remedy the matters of concern to AFCA despite AFCA informing the Paid Representative of its concern.*

AIST considers that a paid representative who is representing complainant in relation to a death benefit should understand superannuation law in relation to this issue. Some member funds have raised concerns with AIST that they have been involved in complaints processes where the legal representative may not be acting in the complainant's best interests. The best example of this is where the legal representative is unfamiliar with the application of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) in the payment of death benefit claims. Should on the facts of the case the complainant not meet the definition of a dependant under the SIS Act, the use of a legal representative through the complaints process may result in vexatious complaints that unnecessarily draw out the complaints process. Further consequences include unnecessary stress to parties involved in the death benefits process including true dependents of the deceased, and unnecessary use of resources for both the complainant and AFCA.

Although it is the prerogative of a person to seek legal advice, AIST suggest that AFCA's Operational Guidelines include superannuation specific examples of when a legal representative does not have the best interests of the complainant as their sole focus. Reference to legal representatives understanding the operation of the superannuation law prior to escalating matters to AFCA may assist in that process and reduce the risks associated with vexatious complainants and paid representatives.

3. **Recommendation: AIST seeks clarity on the wording under rule A.8.4(b) on what 'reasonable opinion' means and examples of unreasonable conduct.**

AIST understands the importance of the addition of A.8.4 (b) allowing AFCA to desist with a complaint when, in AFCA's 'reasonable opinion' that:

- (i) *the Complainant's conduct to AFCA staff is threatening, intimidating, abusive, bullying, discriminatory or otherwise unreasonable;*
- (ii) *the conduct denies AFCA staff a safe working environment, and*
- (iii) *the Complainant has failed to respond to substantively cooperate with or respond to attempts (if any) by AFCA to manage the conduct.*

AIST seeks clarity on several terms used in A.8.4 (b), either by way of definition or the use of examples.

The purpose of defining these terms or providing examples is not to strictly limit their application but to set expectations for all parties involved in a complaint. These terms are:

- AFCA's 'reasonable opinion': AFCA may consider adopting a definition that considers the *reasonable person* test. The reasonable person test is often used when it is necessary for decision-makers to include an objective standard when determining an outcome.
- 'Otherwise unreasonable': AFCA may like to include an example of what may be considered otherwise unreasonable or consider the application of the reasonable person test.

Proposal 2: Complainants

4. Recommendation: Provide greater clarity on the process of exclusion and what advice, if any, will AFCA provide to complainants who have been excluded from making a complaint.

AIST requests greater clarity on how AFCA will manage the communication process with a complainant who has been excluded from the complaint's process under B.6 of the Rules.' Provision B.6.7 (a) states that AFCA must notify *'the person in writing that it is proposing to exclude them, the reasons for AFCA's concerns and the effect of exclusion.'*

AIST seeks clarity as to whether AFCA will include any additional advice to a complainant regarding support services or future complaint options if they have been excluded from making a complaint to AFCA under B.6. Member funds agree that all employees have the right to be protected from inappropriate behaviour in the workplace.

AIST seeks clarity on AFCA's communication strategy when it excludes a complainant, particularly when that complainant has exhausted all internal complaint avenues within a superannuation fund. The purpose of AFCA is to provide fair, independent and effective solutions for individuals and small businesses who have a complaint about a financial product or service. AIST seeks an assurance that AFCA's advice to an excluded complainant will offer some level of support services to assist in the resolution of their complainant rather than a referral back to the superannuation fund.

AIST considers that any advice that suggests returning to the super funds with their complaint would create additional frustration for a complainant already exhibiting escalated behaviours. This may result in superannuation fund complaints staff being exposed to complainants that have been excluded from the AFCA process.

Proposal 3: Complaint resolution where complainant has suffered no loss or appropriate compensation has been offered.

AIST welcomes AFCA's proposal to amend rule A.8.3 (b) to provide AFCA with the ability to discontinue with a complaint when the complainant has suffered no loss.

AIST also welcomes the inclusion of new rule A.8.3(d) which also considers appropriate restitution, irrespective of whether the complainant has accepted that restitution, as an additional reason to discontinue with a complaint. AIST agrees that this will assist in delivering earlier resolution of complaints.

Proposal 5: Complaints from professional investors

5. Recommendation: AIST seeks clarity as to whether the trustee of a self-managed super fund (SMSF) would be included within the definition of a professional investors.

AIST note that under proposal 5, the Operational Guidelines will include additional information regarding when AFCA will not proceed with a complaint from a wholesale client. Wholesale client

includes the category of professional investors as defined under section 9 of the Corporations Act. This includes the Trustee of a superannuation fund whose net assets exceed \$10 million. AIST seeks confirmation that this will include SMSFs that have net assets that exceed \$10 million. AIST also seeks clarity regarding whether AFCA intends to exercise any discretion in the decision to not proceed with a complaint should the complainant be the trustee of an SMSF but with net assets that are less than \$10 million. This may be due to the level of knowledge and experience exhibited by the Trustee in the investment process strategy.

Proposal 7: Complainant non-acceptance of determination.

- 6. Recommendation: AIST advises that this new rule will provide some assurance that complaints will be closed in the event a complainant is non-responsive or unwilling to accept a determination. AIST would like further clarity regarding the effect and next steps involved in this new rule and the definition of 30 days.**

New rule A.15.3 (b) states that *if a complainant does not accept a determination [within 30 days] neither the complainant nor the financial firm is bound by the determination and the complainant may bring an action in the courts or take any other available action against the financial firm.*

AIST agrees that new rule A.15.3(b) outlines a timeframe for the complainant to accept an AFCA determination (30 days). AIST seeks confirmation that this is calendar days and that the communication to the complainant included with the determination will include a final date that the complainant must accept the determination. A date specified in the communication will avoid ambiguity of the 30-day calculation.

AIST also requests greater clarity in rule A.15.3(b) regarding the effect of the determination not being accepted and the next steps. This clarity may be reflected in the Operational Guidelines by way of example or amendment to the rule itself. Clarity regarding the effect of the determination not being accepted may be:

As the financial firm is not bound by the determination in this scenario, the financial firm may finalise the complainant in accordance with its own complaints process. This may result in the financial firm finalising the complaint in a manner that is contrary to the determination.

AIST seeks assurance that the communication to the complainant will include advice that the matter will be closed and not reopened by AFCA.

Proposal 8: Accidental error in a determination – slip rule.

- 7. Recommendation: AIST seeks clarity regarding the timeframes that the slip rule may be invoked, whether the slip rule could be applied in situations that change the outcome of a determination and superannuation specific examples as to when the slip rule may apply.**

New rule A.14.6 states: *if the AFCA Decision Maker is satisfied that there is a clerical mistake or error in a Determination arising from an accidental slip or omission, they may correct and re-issue the Determination.*

AIST requests that AFCA provide examples/case studies of when the slip rule may be applied by AFCA. This would provide clarity on whether the slip rule would ever be applied for matters that may impact the outcome of a determination. An example may be a typographical error that changes the remediation amount from a financial firm to a complainant.

AIST also seeks greater insight as to the AFCA process for how an error is identified. This will assist funds to better understand the timeframes for when a determination may be impacted by the slip rule. Examples would assist funds to recognise whether the slip rule would only be applied to errors that do not materially impact the determination.

AIST would also like visibility as to whether the slip rule is time limited. Visibility in the review process would assist funds understand if the slip rule would apply within a reasonable timeframe such as 12 months or less or if it is feasible that AFCA could apply this rule to any determination made since AFCA's inception.

Proposal 10: Clarifying the objection process for Rule A.8.3

8. Recommendation: AIST seeks clarification regarding the specified timeframe for complaint closures to be objected to under A.8.6.

AIST understands the requirement to provide complainants with the right to object to the closure of a complaint under A.8.6. AIST seeks clarity as to what the 'specified timeframe' for lodging an objection will be under this provision. This includes whether it will be a set timeframe consistently applied across all complaints, or a fluctuating timeframe that may be different on a case-by-case basis.

For example, the payment of death benefits is being a highly sensitive area of dispute resolution. AIST wants to ensure that the right for a complainant to object to a complaint being closed does not unnecessarily delay the payment of death benefits and cause undue stress to dependents who may be relying on the payment of a death benefit claim.

AIST believes consistency applied in the specified timeframe is an appropriate approach and for it to be of a reasonable duration, such as 30 days or less.

This will provide certainty to all parties of the resolution of the complaints process and for the speedy resolution of complaints related to the payment of death benefits.

9. Additional Recommendation: Comprehensive written advice to the financial firm as to why a complaint is not being considered or discontinued under all applicable Rules.

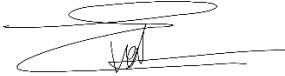
AFCA currently provides high-level written advice as to why a complaint may be excluded or discontinued. AIST seeks greater detail in this advice going forward, to include reasons to support the decision-making. Both complainants and financial firms need to understand why AFCA has made its decision. Transparency in decision making will assist superannuation funds to understand the facts that formed the basis of the decision. This will also assist funds:

- In being fully informed should the issue be raised again by the same complainant as a part of a new complaint.

- To understand consistency in decision-making in accordance with AFCA's policies and operational guidelines.
- To identify process improvements for dealing with complaints for both AFCA and the superannuation fund.

For further information regarding our submission, please contact Sonia Hunyadi, Government Relations and Policy Advisor via email at [REDACTED].

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Eva Scheerlinck', written over a horizontal line.

Eva Scheerlinck

Chief Executive Officer