

# SUBMISSION

## Submission to AFCA — AFCA Rules Change Consultation

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12 April 2019

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Mr Mike D'Argaville

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12 April 2019

Dear Mr D'Argaville

**AFCA Rules Change Consultation – AFCA Scheme amendment authorisation**

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to AFCA's consultation on amendments to its Rules arising from the *AFCA Scheme (Additional Condition) Amendment Authorisation 2019*.

**About ASFA**

ASFA is a non-profit, non-political national organisation whose mission is to continuously improve the superannuation system, so all Australians can enjoy a comfortable and dignified retirement. We focus on the issues that affect the entire Australian superannuation system and its \$2.7 trillion in retirement savings. Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing over 90 per cent of the 15.6 million Australians with superannuation.

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If you have any queries or comments in relation to the content of our submission, please Julia Stannard, Senior Policy Advisor, on [REDACTED] or by email [REDACTED]

Yours sincerely

Glen McCrea

Deputy CEO and Chief Policy Officer

## 1. General comments

ASFA's submission focuses on the potential impacts arising from the consideration of superannuation complaints as 'legacy complaints', as a result of the amendments made to AFCA's authorisation by the *AFCA Scheme (Additional Condition) Amendment Authorisation 2019* (the Amendment Authorisation).

## 2. Amendment of the AFCA Rules

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### Consultation question 1

Does the proposed change satisfy the requirements of the new authorisation conditions?

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ASFA is of the view that the proposed change to the AFCA rules satisfies the requirements of the new authorisation conditions stated in the Amendment Authorisation.

## 3. Amendment of the Operational Guidelines and other guidance

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### Consultation question 2

Do the Operational Guidelines adequately explain how Section F will apply?

### Consultation question 3

Do you have any other comments about the proposed changes?

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### Unavailability of documentation to support a legacy complaint

ASFA's major concern in relation to the proposed changes relates to the challenges of considering legacy complaints where relevant documents are not available. This will be particularly problematic — for superannuation trustees and for AFCA itself — for superannuation complaints relating to a complainant's eligibility for disability benefits.

Given the lapse of time, it is not unreasonable to expect that in many cases superannuation trustees and medical practitioners will no longer hold contemporaneous medical records to support or dispute the complainant's eligibility. Retrospective assessments of the complainant's medical condition at the time relevant to their claim are likely to be difficult to obtain and will inevitably be of questionable reliability. It is likely that, in considering legacy disability complaints, much of the documentary evidence brought forward will be presented by the complainant and it may not be possible to obtain direct verification of that evidence from another source.

ASFA acknowledges that AFCA is required, under the Amendment Authorisation, to consider these complaints. We welcome AFCA's recognition — expressed in discussions between ASFA and AFCA as well as in the proposed insertions to the Operational Guidelines — of the evidentiary challenges that legacy complaints present to its member firms and the outline of its proposed approach to dealing with cases where relevant documents are not available. We strongly encourage AFCA to adopt a flexible approach to resolving legacy disability complaints in a way that utilises such information and documentation as is available but avoids placing total reliance on material that is not able to be independently verified.

We note that the proposed insertion to the Operational Guidelines in relation to access to documents supporting legacy complaints focusses primarily on situations where documents are unavailable because they have been destroyed following the expiry of relevant statutory retention periods. ASFA considers that there would be benefit in expanding the discussion in this section of the Operational Guidelines to consider other scenarios in which access to relevant documents may be impeded.

Of specific relevance to superannuation complaints, we note that this may potentially involve situations where funds have merged (including through use of the 'successor fund transfer' mechanism) and it becomes evident that full records relevant to a legacy complaint were not transferred to the trustee of the destination fund as part of the merger process. We recommend that AFCA provide additional guidance on its proposed approach to handling legacy superannuation complaints involving merged superannuation funds.

## Recommendation

### Unavailability of documentation in relation to a legacy complaint

ASFA encourages AFCA to adopt a flexible approach to resolving legacy disability complaints in a way that utilises such information and documentation as is available but avoids placing total reliance on material that — given the lapse of time — is not able to be independently verified.

ASFA recommends that AFCA provide additional guidance on its proposed approach to handling legacy superannuation complaints involving merged superannuation funds.

### Other matters

ASFA appreciates the recognition in proposed new section F.1.3 of the Operational Guidelines that AFCA may need to modify its existing processes when dealing with legacy complaints. ASFA anticipates that there will be a need to vary practical aspects of AFCA's processes, including the 'referral back' timeframe provided to member firms when AFCA registers a legacy complaint.

We are, however, of the opinion that additional explanation could be provided — in the Operational Guidelines and/or other guidance material — in relation to matters likely to be of particular relevance for legacy superannuation complaints.

### *Legacy complaints that AFCA cannot consider*

Proposed new sections F.2.1(c) – F.2.1(e) of the Operational Guidelines deal with situations where AFCA cannot consider a legacy complaint, consistent with the definition of 'excluded complaint' in the Amendment Authorisation. These sections address scenarios where:

- a decision or determination has been made by a court or tribunal — which could include the Superannuation Complaints Tribunal (SCT)

- a decision or determination about the merits of the complaint has been made by a predecessor scheme — which would include the SCT — or AFCA
- a legacy complaint has previously been finally settled by the Complainant and the financial firm.

ASFA understands that there is no intention to allow consumers to utilise the legacy complaint rules to circumvent the SCT's ongoing consideration of a superannuation complaint lodged before 1 November 2018, by raising the same matter as a legacy complaint before AFCA.

Proposed new section F.2.1(f) of the Operational Guidelines appears to confirm this understanding, however we recommend that AFCA provides more explicit confirmation, in both the Operational Guidelines and in any consumer-focussed guidance that AFCA produces. Both the definition of 'excluded complaint' in the Authorisation Amendment and paragraphs F.2.1(c) and (d) of the proposed amendments to the AFCA rules are phrased in terms of *past* decisions or determinations of a tribunal or predecessor scheme, and would not appear to exclude a complaint that is *currently* being considered by the SCT where no decision or determination has yet been made. As such, it is critical that AFCA's intended approach to complaints currently before the SCT is clearly outlined.

ASFA members would also welcome additional clarification of AFCA's approach to complaints that were lodged with the SCT but withdrawn prior to the making of a final decision or determination. In particular, ASFA considers that there would be benefit in providing certainty in the Operational Guidelines or other guidance material around these relatively common scenarios:

- a complaint was withdrawn under subsection 22(3)(b) of the *Superannuation (Resolution of Complaints) Act 1993* (Complaints Act) because the SCT concluded it lacked substance or was misconceived.  
ASFA anticipates that AFCA would accept registration of such a complaint before assessing it against the AFCA Rules and deciding whether to consider or reject it under existing rule C.2.2(d). However, given the limited timeframe AFCA will have to consider legacy complaints, it is clearly important to avoid a situation where volumes of complaints are lodged that have no genuine prospect of success. We encourage AFCA to clearly communicate, in its guidance to consumers, the types of situations when it is unlikely to consider complaints that were previously made to a predecessor scheme.
- a complaint was treated as withdrawn under subsection 22(1) of the Complaints Act, because the complainant positively indicated they did not wish to continue with the complaint, or the complaint was deemed to be withdrawn because the SCT's reasonable attempts to contact the complainant were unsuccessful.

ASFA anticipates that these complaints would be eligible to be considered by AFCA as legacy complaints but would welcome the clarification in the Operational Guidelines.

- a complaint was withdrawn because the complainant agreed to a resolution of the matter which prompted their complaint, prior to the SCT reaching a final decision.

While ASFA anticipates that this scenario would typically fall within new rule F.2.1(e) and the accompanying proposed insertion to the Operational Guidelines, it would be helpful if further clarification could be provided in relation to the extent of legal formality required to substantiate a 'final settlement' for this purpose.

We welcome the indication that AFCA will, prior to 1 July 2019, provide further guidance regarding its handling of legacy complaints and its approach to issues that these complaints may raise. We encourage AFCA to make this guidance widely available to consumers as well as to member firms, to ensure that consumers' expectations can be appropriately managed throughout this process. We also encourage AFCA to continue to provide additional information to member firms as it further develops its approach to the handling of legacy complaints.

#### Recommendation

##### **Additional clarification recommended for legacy superannuation complaints**

ASFA recommends that AFCA provides additional clarification, in the Operational Guidelines and/or other guidance material, in relation to the scenarios it will not consider legacy superannuation complaints.