Australian Financial Complaints Authority (AFCA)

Operational Guidelines to the Rules

April 2020

afca
Australian Financial Complaints Authority

These Operational Guidelines to the Rules of the Australian Financial Complaints Authority (the scheme) have been prepared by Australian Financial Complaints Authority Limited (ACN 620 494 340), a company limited by guarantee which has been authorised by the responsible Minister to establish, maintain and promote the scheme.

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Section A – Complaint Resolution Processes

A.1 Introduction to AFCA complaint resolution scheme

A.1.1

AFCA is an external complaint resolution scheme established to resolve complaints by Complainants about Financial Firms. AFCA is operated by an independent not-for-profit company that has been authorised to do so by the responsible Minister under the Corporations Act.

What is AFCA's role and how is it structured?

The Australian Financial Complaints Authority (AFCA) operates a single external complaints resolution scheme (the 'AFCA scheme') for consumers and small businesses that have a complaint about a Financial Firm, as an alternative to tribunals and courts. AFCA considers complaints that previously would have been handled by the Financial Ombudsman Service, the Credit and Investments Ombudsman and the Superannuation Complaints Tribunal.

Our role is to assist parties to reach agreement about how to resolve the complaint. We are impartial and do not act for either party to advocate their position. If the complaint is not resolved between the parties, we will decide an appropriate outcome. We can award compensation for losses suffered because of a Financial Firm's error, but do not award compensation to punish the firm or impose a fine.

We are not a government department or agency, and we are not a regulator of the financial services industry. AFCA is a not-for-profit company, limited by guarantee that is governed by a Board of Directors, which includes equal numbers of industry and consumer representatives. AFCA has an independent Chair. AFCA's Chief Ombudsman is responsible for the management of the organisation.

A.1.2

These rules form part of a contract between AFCA and Financial Firms and Complainants. AFCA may develop Operational Guidelines setting out how AFCA interprets and applies these rules.

What are the rules that bind AFCA and how are they applied?

The *Corporations Act 2001* (Cth) gives ASIC powers to oversee AFCA. ASIC approved AFCA's Rules on 6 September 2018. AFCA's Rules set out the jurisdiction and powers of the AFCA scheme. The Rules can be found in a separate document on our website, but are also reproduced in these Operational Guidelines.

These Operational Guidelines are designed to assist users of the AFCA scheme to understand the Rules and how we operate in practice. This document is produced to

promote clarity and understanding about our processes, and our approach to considering and resolving complaints so that consumers, small businesses and Financial Firms can use the AFCA scheme with confidence.

This a living document that we may amend and expand from time to time to address points that emerge with the Rules in operation. We will also take account of industry developments and other changes, including legislative amendments and new case law. In these guidelines, we use the terms 'we', 'us', and 'our' to refer to AFCA or the AFCA scheme as the context suggests. We have also cited the applicable statutory provision in a footnote where it is relevant. Certain capitalised terms in these guidelines have the same meaning as defined in Section E of the Rules.

If you have suggestions about matters that need more clarification, please contact us at publications@afca.org.au.

A.1.3	AFCA's complaint resolution scheme is free of charge for Complainants. Complainants do not generally need legal or other paid representation to submit or pursue a complaint through AFCA.

Is there a cost for using AFCA's service?

Financial Firms cover the cost of funding the AFCA scheme. There is no charge for Complainants who choose to use our service to resolve their complaints about Financial Firms. A Financial Firm is not permitted to recover its costs from a Complainant in connection with our consideration of a complaint. This is consistent with the legislative and regulatory requirements.

A Financial Firm will not be entitled, at any time, to recover legal costs in connection with:

- staying, adjourning or discontinuing legal proceedings or setting aside a default judgment in order to meet the Financial Firm's obligations under rule A.7.1(b)
- an application for leave by a Complainant to file a defence, or defence and counterclaim, where the time limit for filing these court documents is after the date on which the Complainant submitted the complaint.

These costs are a consequence of the complaint lodged with us. Because we are a free service for consumers and small businesses, a Financial Firm must not seek to recover these from a Complainant, whether pursuant to a contractual right, a court order or otherwise.

For example, a Financial Firm cannot recover, whether pursuant to a contractual right or otherwise, costs such as:

- legal or other costs incurred in making a submission that a complaint is outside our jurisdiction
- legal or other costs associated with our consideration of a complaint
- costs associated with an expert report provided to us in connection with a complaint
- legal costs incurred to meet a Financial Firm's obligations under rule A.7.1(b) in relation to previously commenced court proceedings.

Can a representative be used?

Our process is intended to be user-friendly and we can provide some assistance so that most people can use our service without outside help or representation. We do not, however, prevent a Complainant or Financial Firm from using a representative.

We recognise the value of good representation, particularly where a Complainant is vulnerable or requires special assistance (e.g. by reason of English language issues, physical or mental disabilities, social and economic barriers). In particular, we acknowledge the value of the assistance provided to Complainants by financial counsellors, community legal centres and legal aid services.

If a Complainant pays someone to help or represent them, this would normally be at their own cost – see rule D.5 for more detail.

We expect a fee-charging representative to be familiar with the information and documentation that will be required to support their client's complaint, and to ensure this is provided when the complaint is submitted. We also expect a feecharging representative to respond promptly to any further information we request. We have the power to refuse to continue considering a complaint if the Complainant is using the services of a representative whose conduct is inappropriate – see rule C.2.2 (g) and (h).

A.1.4 A person is not obliged to use the AFCA complaint resolution scheme to pursue a complaint against a Financial Firm and instead may institute court proceedings, or use any other available dispute resolution forum. A Complainant who submits a complaint to AFCA may withdraw their complaint at any time.

Is a Complainant obliged to use the AFCA scheme?

A Complainant is not obliged to use AFCA. Because we operate the AFCA scheme as an alternative to the tribunals and courts, a Complainant is free to pursue their concerns elsewhere if they wish. A Complainant should be aware that this will often involve costs and so they should seek independent advice about their options.

Complainants are not able to use documents and information obtained through us elsewhere, unless required by a compulsive process such as a subpoena – see rule A.11.1.

Complainants who withdraw their complaint will be required to meet certain requirements if they seek to reopen their complaint after prolonged inaction – see rules A.8.1 and A.9.5.

We expect complainants who wish to use our service do so in an appropriate manner. Our staff are trained to deal with circumstances empathetically, and assess problems and issues in a professional and respectful manner. We have an obligation to be respectful to the parties and provide our staff with a safe workplace. This means swearing, threatening or other abusive behaviour by any party is unacceptable.

- Where a Complainant behaves inappropriately, we may take steps to no longer consider or otherwise exclude the complaint – see rules A.8.3 and C.2.1.
- Where a Financial Firm behaves inappropriately, we may take steps to refer such conduct for review by an appropriate body – see rules A.17 and A.18.
- Where an AFCA staff member behaves inappropriately, the aggrieved party may refer the matter through our feedback process or to the Independent Assessor – see rule A.16.

By working together cooperatively and respectfully, we can more quickly and effectively understand the issues, get to the bottom of a complaint and give our assessment. We need the complaint parties' cooperation to consider a complaint efficiently, and effectively assess the merits of the complaint. The complaint parties can help by replying to requests for information as soon as possible.

A.1.5	These rules apply to complaints submitted to AFCA from 1 November 2018, and complaints treated as being submitted to AFCA under rule B.4.5.1.

When does AFCA begin considering complaints under these Rules?

If a person submits a complaint to AFCA before 1 November 2018 that should have been submitted to either the Credit and Investments Ombudsman or the Superannuation Complaints Tribunal, we will arrange, as appropriate, to:

- forward the complaint to the relevant Predecessor Scheme to consider
- hold the complaint and commence considering the complaint under the AFCA Rules from 1 November 2018.

From 1 November 2018, if a person submits a complaint to a Predecessor Scheme, that service will ask the person if they would like the complaint to be forwarded to AFCA, so that AFCA can begin considering the complaint.

In either case, for the purposes of any time limits, the complaint will be treated as if it were submitted to the intended recipient scheme on the day it was received by the initial recipient scheme – see rule B.4.5.1.

A.2 Principles that underpin the scheme

A.2.1

AFCA will:

a) promote awareness of the scheme, including by undertaking outreach to vulnerable and disadvantaged communities;

b) make the scheme appropriately accessible to a person dissatisfied with a Financial Firm's response to their complaint including by: (i) providing a range of ways by which to submit a complaint

   (i) helping Complainants submit a complaint

   (ii) using translation services and providing information in alternative formats, as appropriate

c) consider complaints submitted to it in a way that is:

   (i) independent, impartial, fair

   (ii) in a manner that provides procedural fairness to the parties

   (iii) efficient, effective, timely

   (iv) cooperative, with the minimum of formality

d) support consistency of decision making, subject to its obligations both under section 1055 of the Corporations Act and to do what is fair in all the circumstances;

e) have appropriate expertise and resources to consider complaints submitted to it;

f) be as transparent as possible while also acting in accordance with its confidentiality, privacy and secrecy obligations;

g) support regulators of Financial Firms by:

   (i) reporting matters to them in accordance with the Corporations Act, the Privacy Act and any other relevant legislation; and

   (ii) complying with any ASIC regulatory requirements and directions

h) account for its operations by publishing Determinations and information about complaints and reporting systemic issues;

i) consult regularly with AFCA's stakeholders; and

j) promote continuous improvement of its service, including by commissioning regular independent reviews of its complains handling operations, and meet the benchmarks for Industry-Based Customer Dispute Resolution.

What are AFCA's responsibilities and the principles that underpin them?

Our responsibilities include:

- promoting awareness of the AFCA scheme
- resolving complaints submitted to the scheme
- identifying systemic issues and working with Financial Firms to resolve them
- supporting regulators by reporting certain matters to them.

We are required by legislation to operate in a way that is accessible, independent, fair, accountable, efficient and effective.

Accessibility requires us to work to increase awareness of the AFCA scheme so that Complainants know about us and can bring their complaints to the AFCA scheme. Financial Firms also have an obligation to tell their customers about us.

Being accessible also requires us to make the service easy to use for Complainants, including those who have special needs. Our processes aim for a minimum of formality, with regular phone contact with Complainants and Financial Firms, and appropriate flexibility to take into account individual circumstances that arise.

Our governance and management structure ensure organisational **independence**. The Rules explicitly require complaints to be considered in an independent and impartial way. Our Decision Makers who make decisions on complaints are independently appointed by the AFCA Board.

Fairness requires complaints to be considered without bias and by staff and Decision Makers with appropriate expertise. The Rules also explicitly require procedural fairness to be provided to the parties to a complaint. This means that before we decide a complaint, the Complainant and the Financial Firm must be provided with relevant information, and have an opportunity to provide their views and response. Our decisions must fairly reflect the information provided to us and apply the decision making criteria in the Rules. While recognising that in each complaint we must take into account its particular facts, we are expected to achieve consistency in our decision making.

Accountability requires us to operate as transparently as possible, while maintaining confidentiality for parties to a complaint. Accordingly, we publish our determinations on our website on an anonymised basis. We also report publicly about our performance every year. We must report more frequently to ASIC.

The **efficiency** requirement recognises the importance of complaints being resolved in a timely way. We have designed a flexible complaints resolution process to cater for the range of complaints that we consider.

To maximise our **effectiveness**, we consult with stakeholders including consumer representatives and Financial Firms, and we aim to continuously improve our performance.

We consult and engage with stakeholders in a range of ways including through industry forums and liaison meetings, our consumer liaison group meetings, other meetings with individual Financial Firms and consumer groups, and through regular publications that we release. We recognise repeat complaint issues and work with Financial Firms to resolve the underlying causes of these issues. We also support regulators by providing information to them.

A.3 How a complaint may be submitted to AFCA

A.3.1 A person may submit a complaint by using AFCA's online form, writing to AFCA, or by contacting AFCA by telephone. By submitting a complaint, the Complainant is deemed to have agreed to having the complaint considered under AFCA rules.

How can a complaint be submitted?

We prefer a Complainant to express their concerns in their own words and submit a complaint online by using our online complaint form, available on our website www.afca.org.au. This is because complaints submitted online can be provided to the Financial Firm faster once 'registered' – see guideline to rule A.5.1. The online form guides the Complainant through the process and prompts for necessary information.

Alternatively, Complainants can submit a complaint by email, fax, letter, or by phoning us.

To enable us to progress a complaint promptly, a Complainant needs to provide information at the time of submitting the complaint, or as soon as possible afterwards. This information should include: • the name and contact details of the Complainant

- details of the Complainant's representative if they would like another person to be the contact point for us, (such as a family member, friend or adviser) and whether or not that person will receive remuneration for their services, along with any additional information about the representative we may request
- the name of the Financial Firm being complained about
- details of the Financial Service provided by the Financial Firm (for example, a policy or account number)
- the key issues being complained about.

For example:

- In a Superannuation Complaint – the decision or conduct complained about, the reasons for dissatisfaction with the decision or conduct and why the Complainant is unfairly or unreasonably affected by that decision or conduct
- In any other complaint – identify the alleged error or poor practice of the Financial Firm and the effect this has had on the Complainant

- the outcome sought and any loss or detriment suffered
- the date of any complaint the Complainant has previously made to the Financial Firm about the issues raised with us.

If a Financial Firm wants to refer a complaint to us by itself, the Financial Firm must first obtain the Complainant's written consent to this, and provide a copy of this consent to us at the time of submitting the complaint.

A.3.2

AFCA may assist Complainants to submit a complaint.

What assistance does AFCA provide to Complainants?

We explain the complaint lodgment process on our website and in printed brochures that are available from us on request. Our staff who handle telephone enquiries are trained to explain how complaints can be submitted and how we deal with complaints. If the need arises, we can help Complainants who are only able to submit a complaint by telephone, or who have any difficulties in outlining and submitting their complaint.

Although we are impartial and do not act as an advocate for any party, we can provide assistance to Complainants to ensure the following:

- Complainants understand whether they are eligible to submit a complaint.
- Complainants' assertions are clearly articulated.
- Complainants know what documents and information to provide to support their application.
- The complaint process operates efficiently and in a timely way.

We can also provide specific assistance with any part of our process to Complainants who may be disadvantaged if they do not receive that assistance. For example, we can arrange to register complaints in languages other than English, and arrange for them to be translated at no cost to the Complainant.

We can also refer disadvantaged Complainants to community legal centres, legal aid offices, financial counsellors or other services for assistance before, or after, they have submitted their complaint.

A.4 Complaints that AFCA considers

A.4.1	The Complainant must be an Eligible Person.

Who can complain to AFCA?

The Rules specify who is able to submit a complaint for us to resolve. The definitions of 'Eligible Person' and 'Small Business' are relevant here. They provide that our complaint resolution service is available to:

- an individual or registered charity, whether or not they carry on a business
- a partnership or incorporated trustee – however, if it carries on a business, we can only consider the complaint if it has less than 100 employees
- a not-for-profit organisation or club that is not a registered charity – however, if it carries on a business, we can only consider the complaint if it has less than 100 employees
- an incorporated business, whether a primary production business or otherwise, if it has less than 100 employees.

For a business that is a part of a group of related companies, there is an important exclusion. Rule C.1.2 (f) provides that AFCA must exclude the complaint if the group has 100 employees or more.

For most businesses, it will be clear whether the number of employees is above or below the 100-employee threshold. For a business with employee numbers that fluctuate around that threshold, we will require substantiation (such as wage records) of the number of employees at the time of the events giving rise to the claim against the Financial Firm.

In the case of a business under external administration, or an individual who is bankrupt, we are generally only able to consider the complaint if the consent of the insolvency practitioner (such as liquidator or trustee in bankruptcy) is obtained. This will not, however, be the case for a Superannuation Complaint that relates to a bankrupt superannuation fund member's benefit that has not vested in the member's trustee in bankruptcy.

Superannuation Complaints can only be made by the individuals set out in rule B.1.

A.4.2

A complaint must be about a Financial Firm that is an AFCA Member at the time that the complaint is submitted to AFCA (even if not an AFCA Member at the time of the events giving rise to the complaint).

Who can a complaint be about?

A complaint must be about a Financial Firm that is an AFCA Member at the time a complaint is submitted to us. This is defined so as to include all AFCA Members. Banks and other credit providers, financial planning firms, general insurers, insurance broking firms, life insurers, superannuation fund trustees, RSA providers, stock broking firms and fund management companies are some of the organisations that are required by legislation to be AFCA Members, thereby becoming bound by our Rules. We will not consider a complaint against a subsidiary of a Financial Firm unless that subsidiary is an AFCA Member in its own right.

A Financial Firm must be a member of AFCA as at the time a complaint involving the Financial Firm is submitted to us. If a Financial Firm ceases to provide Financial Services, it may also cease its membership of AFCA, subject to any legislative or regulatory requirements it is required to comply with. If a Financial Firm is no longer an AFCA Member, we will not be able to consider a complaint involving the Financial Firm, even if the conduct occurred at a time when the Financial Firm was an AFCA Member.

Where the conduct of an AFCA Member's employee or representative is at issue, typically AFCA deals with the complaint as a complaint against the AFCA Member. For Superannuation Complaints, a complaint about a superannuation trustee, RSA provider, life company or other superannuation provider can encompass the decisions or conduct of those who act on their behalf. This is explained in the guideline to rule B.1.

Where a complaint relates to an insurance policy obtained through an insurance broker, the Complainant may not be sure whether their complaint is against their insurance broker or their insurer. Usually a complaint about whether an insurance claim has been improperly denied will be against the insurer and a complaint about arranging the insurance cover (for example, the broker failed to follow instructions or failed to arrange adequate insurance) will be against the broker.

A.4.3

There are some additional requirements that must be met in order for AFCA to be able to consider a complaint.

Section B sets out these requirements.

In summary:

a) The complaint must arise from a customer relationship or other circumstance that brings the complaint within AFCA's jurisdiction.

b) There must be a sufficient connection with Australia.

c) Generally, there is a time limit within which the complaint must be submitted to AFCA.

d) If the complaint is about a Traditional Trustee Company Service that involves Other Affected Parties, the Complainant must get the consent of all Other Affected Parties.

What requirements must be met for AFCA to consider the complaint?

See operational guidelines to Section B for more detail.

A.4.4

There are some types of complaints that AFCA must exclude and some situations in which AFCA can decide to exclude a complaint.

Section C sets these out.

What types of complaints are excluded?

Even if the requirements set out in Section B of the Rules are met, the complaint may be within a category of exclusion.

- Rule C.1.2 sets out some mandatory exclusions; we are not able to consider a complaint that is within one of these exclusions.
- Rule C.2 allows us discretion to decide that it is appropriate to exclude a complaint, and gives examples of where we may do this.

See operational guidelines to Section C for more detail. Even if a complaint is not excluded on a jurisdictional basis, we may decide not to consider the complaint any further if we consider it appropriate to do so – see rule A.8.3.

What should a Financial Firm do if it believes that a complaint should be outside AFCA's jurisdiction?

A Financial Firm may believe that a complaint falls within a mandatory exclusion or that we should exercise our discretion to exclude the complaint. If so, the Financial Firm should request us in writing to exclude the complaint. This request should refer to a specific rule and give reasons in support of the request. We will then consider whether an exclusion applies or, alternatively, whether the complaint comes within our jurisdiction and should be considered on its merits.

Any relevant documents, or other information held by the Financial Firm, should be provided to us as part of an exclusion request. While we are considering that request, the Financial Firm should continue to try to resolve the complaint with the Complainant.

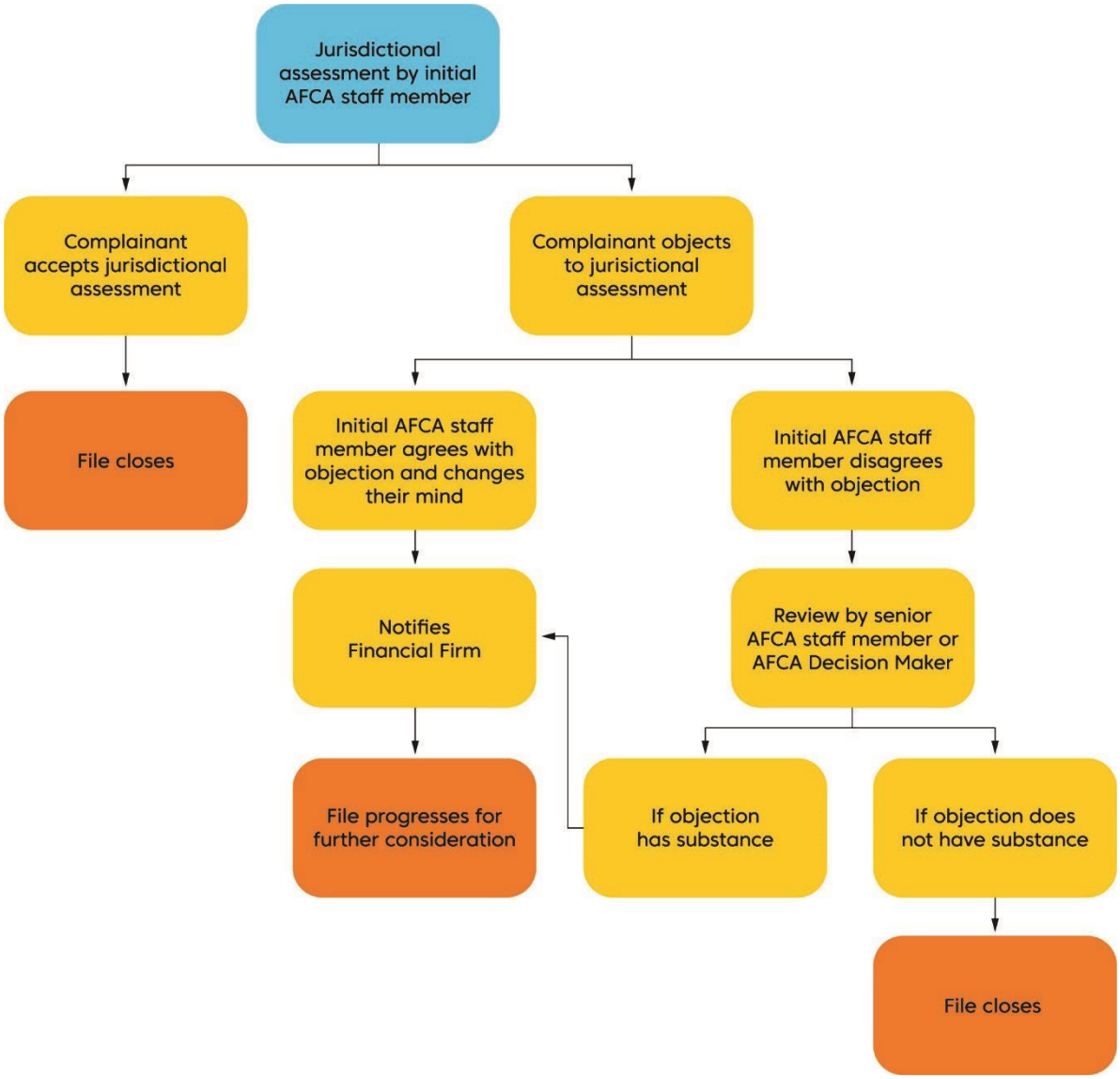
A.4.5	If AFCA excludes a complaint, AFCA will give written reasons to the Complainant and specify the timeframe within which the Complainant may object to this decision.

What process does AFCA follow to decide whether a complaint is within its jurisdiction?

We will try to identify as soon as possible whether a complaint is properly within our jurisdiction. This issue is first considered at the time of referring the complaint to the Financial Firm. It may be reconsidered as new information emerges. In complex matters, we may seek advice from senior AFCA staff including an AFCA Decision Maker before reaching a view on whether the complaint is properly within our jurisdiction. We may also need to request further information from the parties in order to reach a view.

The process of excluding a complaint can involve:

1. a jurisdictional assessment by an initial AFCA staff member
2. a jurisdictional review by a senior AFCA staff member or, in complex cases, by an AFCA Decision Maker.



This process will apply to complaints:

- that we refuse to consider any further under rule A.8.3
- where the Complainant does not meet the requirements set out in Section B
- that we exclude under Section C
- where the remedy sought exceeds the limits set out in Section D.

Jurisdictional assessment by initial AFCA staff member

If we decide to exclude a complaint, the initial AFCA staff member will notify the Complainant in writing explaining why and the timeframe within which the Complainant may object to our assessment. We may also call the Complainant and advise of our assessment.

If a Complainant wishes to object to the assessment, they should either make their objection within the timeframe we specify for this purpose, or seek an extension if there are reasons why that timeframe is not sufficient.

The standard objection timeframe will be:

1. 7 days: Where the Financial Firm obtained a court judgment that covers the subject matter of the complaint and the judgment was obtained before the complaint was submitted to us.

2. 14 days: Where the reason we cannot consider the complaint is clear and straightforward and further information is unlikely to alter the assessment.

For example:

- The Financial Firm is not responsible for the conduct that the complaint is about.
- The complaint is about an excluded insurance product – see rule C.1.4.
- The Complainant carries out a business and is clearly not a Small Business.
- The complaint was submitted out of time and the Complainant has not given any reason why they could not have submitted the complaint earlier.
- For certain types of Superannuation Complaints, the complaint was submitted out of time and AFCA cannot extend the deadline – see rule B.4.1.[1]
- The subject matter of the complaint is the same as a previous AFCA complaint brought by the same Complainant against the same Financial Firm, and the Complainant has not raised any new facts or provided any new information.
- For complaints about investments, including superannuation, the complaint is solely about the performance of the investment.

3. 30 days: In all other cases.

The Complainant should read our letter carefully and decide whether to object to our assessment. Some Complainants might like to call us to better understand our decision to exclude the complaint and the type of information that may change the assessment. It is not necessary to provide information that has already been provided. The right to object should be exercised, in particular, if our decision is based on a misunderstanding of the complaint or the documents already provided.

If the Complainant accepts the jurisdictional assessment, the file will close.

[1] If AFCA cannot accept the complaint as a Superannuation Complaint, AFCA may accept the complaint under its non-superannuation jurisdiction. An example is where the complaint relates to the payment of a disability benefit and the complaint could be accepted against the insurer but not the superannuation trustee.

A.4.6	If the Complainant objects within the specified timeframe, AFCA will review the decision if AFCA is satisfied that the objection may have substance. If this is the case, AFCA will inform the Financial Firms involved in the complaint and provide them with an opportunity to make submissions before AFCA makes a final decision as to whether to consider the complaint.

How does a Complainant object to a decision by AFCA to exclude a complaint?

To object to a decision to exclude a complaint, the Complainant should contact us to:

- say they object to the decision to exclude the complaint
- explain the reason for the objection
- provide information and raise arguments to support the objection.

An objection will normally be referred to the initial AFCA staff member who made the original assessment. They will consider whether the objection has substance. Relevant factors include whether the Complainant has:

- provided new and relevant information
- identified an error in our assessment • raised a new and relevant argument.

If the initial AFCA staff member agrees with the Complainant's objection, it is open for the initial AFCA staff member to progress the complaint for consideration on the merits of the complaint.

Review by senior AFCA staff member or Decision Maker

If the initial AFCA staff member disagrees with the Complainant's objection, the matter will be reviewed by a more senior AFCA staff member. The senior AFCA staff member will consider if the objection has substance and will decide whether to exclude the complaint after considering all the information before us. We may ask the parties for their views and for any other information we need to reach a decision. In more complex cases, an AFCA Decision Maker may make the review decision.

If the senior AFCA staff member or AFCA Decision Maker decides the Complainant's objection has substance, the complaint will be progressed for further consideration by us.

If the senior AFCA staff member or AFCA Decision Maker decides the Complainant's objection does not have substance, the file will be closed.

A.4.7	Despite other rules, AFCA may consider a complaint if all parties to the complaint consent in writing and AFCA agrees to this. This does not apply to complaints about payment of a death benefit excluded under the time limits in rule B.4.1.3.

How can the parties request AFCA consider a complaint that is outside its jurisdiction?

Where one of the parties to a complaint requests that we consider a complaint by agreement, we will consider whether the nature of the complaint, and reasons for the request, might make it appropriate for us to consider the complaint if the other party agrees. If this is the case, we will discuss the matter with the other party.

If the parties to the complaint agree to us considering the complaint, we will decide whether we also agree. The issue for us would be whether our procedures and resources position us to resolve the complaint fairly and efficiently, and consistent with the principles set out in rule A.2. We will tell the parties what we decide.

If we consider a complaint by agreement under rule A.4.7, our normal procedures under the Rules apply. A party cannot make their agreement for us to consider a complaint conditional on different procedures applying. However, we may require the parties to agree to certain conditions if we accept the complaint – for example, by waiving any objection to jurisdictional grounds for exclusion.

We may agree to act as a point of escalation for a large-scale remediation program established by the Financial Firm to resolve complaints arising from a systemic issue or an enforceable undertaking. If a relevant customer of the Financial Firm is then unhappy with the result of the Financial Firm's remediation process, and the Financial Firm has provided its standing consent for us to consider such complaints, the person can submit a complaint to us and no further consent steps are necessary. In this situation, we use rule A.4.7 to make awards in excess of our usual monetary limits.

Outside this situation, the parties can request us to consider the complaint under rule A.4.7. A request should be in writing and include the reasons for the request, information about the complaint and relevant documents.

Even if a request has not been received from the parties, we can, ourselves, initiate the process of seeking the parties' agreement under rule A.4.7 for us to consider the complaint.

Examples of where we might consider the complaint with the consent of all parties, include the following:

- The complaint involves an amount of money that exceeds our monetary limits (including compensation caps and credit facility limits).
- The complaint has been lodged beyond the time limits in our Rules. We cannot, however, agree to extend time limits that apply to certain Superannuation
- Complaints about death benefit payments because of legislative requirements and because the effect it would have on interested parties who are not involved in the complaint – see rule B.4.4.1. However, we can consider complaints about disability benefit payments and ATO contribution statements under our superannuation jurisdiction, even if lodged out of time with the consent of all parties.

A.5 Notifying the Financial Firm of the complaint

A.5.1	When AFCA receives a complaint, AFCA will notify the relevant Financial Firm in writing of the complaint.

What does AFCA do where a complaint is submitted that appears to be within AFCA's jurisdiction?

We 'register' a submitted complaint and forward the details to the Financial Firm's nominated contact. Usually this will happen on the business day, or next business day after a complaint is submitted online or by phone, and within two to three business days if the complaint is submitted by email or letter.

We will usually notify the Financial Firm of the complaint by electronic means (normally by email), as this minimises delay. To assist the Financial Firm, we send the Financial Firm where possible:

- the name and contact details for the Complainant (including details of the Complainant's representative where one has been authorised)
- a short summary of the issues raised in the complaint and remedy sought
- the Financial Firm's reference number (such as the account or policy number if it has been provided).

What does AFCA do if the Complainant raises new issues after AFCA begins considering the complaint?

If a Complainant raises new issues after we have begun considering their complaint, we will incorporate those new issues into our consideration of the complaint, if we consider that this approach would be efficient and would not unduly compromise the time required to resolve the other issues. If, however, the new issues are raised late in our process and have limited connection with the existing complaint, we will normally advise the Complainant to submit a new complaint.

We will provide the Financial Firm with an opportunity to respond to the new issues as part of its consideration of the complaint.

A.5.2

AFCA will refer the complaint back to the Financial Firm and set a timeframe for the Financial Firm to either resolve the complaint or to provide its position in relation to the complaint.

This opportunity will not normally be provided:

a) if AFCA considers it appropriate to commence investigating or otherwise progressing the complaint immediately; or

b) for a Superannuation Complaint relating to the payment of a death benefit.

What is a refer-back period?

When a complainant submits a complaint, we will normally give the Financial Firm an opportunity to resolve the complaint directly with the complainant before we begin considering the complaint. This is known as the refer back period.

The length of the refer back period will depend on the type of complaint and whether it has already been through a Financial Firm's IDR process. In particular circumstances, we may give the Financial Firm no refer-back period before we begin considering the complaint.

These refer-back periods are set out below.

When does AFCA proceed immediately without giving the Financial Firm a refer-back period?

There are a few situations in which we would not allow a Financial Firm a referback period.

1) Request that AFCA exclude the complaint

If a Financial Firm makes a written request that we exclude the complaint, we will immediately proceed to consider and assess this request rather than providing a refer-back period. Even if we decide not to exclude the complaint, we will not further delay our process by providing the Financial Firm a refer-back period. In this instance we will begin considering the complaint and collecting any relevant information.

2) Urgency

If we consider a complaint is urgent, we may start to deal with the complaint without giving the Financial Firm a refer-back period. Despite any urgency, we would be obliged to abide by the IDR timeframes set out in RG 165 or, if shorter, any applicable industry code, in the case of a Superannuation Complaint – see rule A.5.3.

If a Complainant requests that we proceed to consider the complaint immediately, the Complainant should do so as early as possible and provide reasons for the request. Supporting documents (e.g. medical reports, legal proceedings, default and rescission notices) should be provided.

We will discuss the complaint and the urgent circumstances with the Financial Firm before deciding to immediately begin considering it in accordance with this provision. We will then advise both parties of our decision.

Examples of urgent situations:

- Any delay in considering and resolving the complaint would compromise the basic living conditions experienced by the Complainant.
- The Complainant or a third party is experiencing family violence or financial abuse and delay could potentially place them at greater risk or prolong the abuse.
- The Financial Firm's situation poses a risk that the Complainant may not be able to obtain compensation. For example, because the Financial Firm is in administration or has otherwise ceased trading or, in the case of a superannuation fund, because it is about to merge with another fund.
- The Complainant has a serious medical condition that could imminently prevent or seriously hamper their participation in our process.
- We have granted consent to the Financial Firm to freeze or preserve assets of the Complainant or enforce a default judgment obtained in court.
- A party to the complaint has exhibited violent or threatening behaviour that is likely to continue or be exacerbated by delay.
- There are two related complaints involving the same parties and to bring these together efficiently and effectively would require the second complaint to be expedited.

3) Superannuation Complaint about payment of a death benefit

We will proceed immediately to consider a Superannuation Complaint made to us within time about a superannuation provider's final decision in response to an objection about the provider's death benefit payment decision. We will not provide the superannuation provider with a refer-back period because the superannuation provider has already revisited its original decision.

If, however, the superannuation provider is still considering the Complainant's objection to the provider's original death benefit payment decision, we will not consider the complaint while the objection process is in train.

Superannuation Complaint about payment of a disability benefit

In the case of Superannuation Complaints about disability benefit claim decision, we will give the superannuation provider a refer-back period. We expect the superannuation provider to use this further opportunity to review the claim and request the insurer that has underwritten the disability benefit to reconsider its decision to decline the claim.

If, however, the superannuation provider has already made this request to no avail, it need not do so again and can inform us that it is unable to take any further steps to resolve the complaint and request us to proceed with the complaint.

A.5.3 AFCA will specify the time provided for a Financial Firm to resolve the complaint, having regard to any applicable regulatory guidance.

Temporary arrangements during the COVID-19 pandemic

To assist in dealing with some of the challenges arising from the current COVID-19 pandemic, we are making the following temporary changes to our Registration and Referral 'refer back' timeframes:

1. For complaints that have already been through IDR when they are lodged with AFCA – change the current 21 day post IDR refer back timeframe to 30 days.
2. For financial hardship complaints lodged with AFCA change the current 21 day refer back timeframe to 30 days.

This will be a short term temporary change that will be in place during the current COVID-19 pandemic. This temporary change will apply to complaints received from 16 April 2020 and will remain in force for up to six months.

Within this framework, we will maintain our existing approach on expediting any matters where a consumer may be in a particularly vulnerable situation or requires their matter to be expedited.

We will also be providing fair and flexible timeframe extensions to consumers as required during this period.

What refer-back period will the Financial Firm have to resolve the complaint?

The duration of the refer-back period we give a Financial Firm depends upon whether the Complainant has previously complained to the Financial Firm. Here there are four possibilities:

1. The Complainant has previously complained to the Financial Firm and the maximum IDR timeframe or other specified period has expired without the Financial Firm providing its response.

2. The Financial Firm's IDR response to the Complainant's complaint has not resolved the complaint to the Complainant's satisfaction.

3. The Complainant has not previously complained to the Financial Firm or has raised additional issues with us that have not been previously raised with the Financial Firm.

4. The Complainant has previously complained to the Financial Firm but has not received the Financial Firm's response and the maximum IDR timeframe or other specified period is yet to expire.

In the first two situations, we will usually provide the Financial Firm with a 30 day refer-back period. We do this because we find that many complaints resolve through this process, which can have the additional benefit of preserving the relationship between the Financial Firm and the customer. To maximise the effectiveness of the refer-back period, we encourage Financial Firms to review a complaint with fresh eyes when we refer it to them.

In the third and fourth situations, we will specify a refer-back period that reflects the maximum IDR timeframes set out in RG 165 or a shorter timeframe if set out in an applicable industry code.

Timeframe for refer-back periods in Scenarios 3 and 4 above

Type of complaint	Usual refer-back period	Comments
A complaint involving a request to vary a Credit Contract as a result of financial hardship, or to postpone enforcement proceedings where the credit provider does not agree to the request	30 days from the date of the request	If the credit provider requests further information from the borrower, the legislation provides the credit provider with additional time
A complaint involving a request to vary a Credit Contract as a result of financial hardship, or to postpone enforcement proceedings where the credit provider has agreed to the request	The credit provider has 30 days to confirm the agreement in writing – no further time is available after this for the credit provider to resolve the complaint	
A complaint involving a default notice under the National Credit Code	30 days from the date when the Complainant first requested the Financial Firm to remedy the matter	If, however, the default notice was issued as a consequence of the credit provider's refusal of a hardship request or a request for postponement of enforcement proceedings, the legislation does not provide the credit provider with further time to resolve the complaint

Type of complaint	Usual refer-back period	Comments
A complaint about a Traditional Trustee Company Service	90 days	There are two qualifications that apply: • If during the 90-day period, a person applies to the court to be added as a beneficiary, or the trustee applies to court for an opinion, advice or direction, time ceases to run until after the court proceedings have concluded and any time allowed for an appeal • If an Other Affected Party complained to the trustee about the same issues (and the Complainant did not complain to the trustee), the IDR period begins from the date of that Other Affected Party's complaint and, if that process ends without satisfying the Complainant (even if the Other Affected Party is satisfied by the outcome), a second IDR process will not be required in relation to the Complainant's complaint
A Superannuation Complaint other than an objection to a proposed death benefit payment	90 days from the date when the Complainant first requested the superannuation provider to remedy the matter	

Type of complaint	Usual refer-back period	Comments
A Superannuation Complaint that is an objection to a proposed death benefit payment	90 days from the date when an objection to the proposed payment is received by the superannuation provider	A superannuation provider will usually notify all potential beneficiaries of its proposed payment of a death benefit and give them 28 days to object if they are not satisfied with the proposal. If an objection is made within 28 days, the superannuation provider then has 90 days to reconsider its proposal and either notify the potential beneficiaries of a new proposal or confirm the original proposal as its final decision A potential beneficiary who objected to the proposed payment and is still dissatisfied with the final decision must complain to us within 28 days of being notified of the final decision We are not able to consider the complaint if this process is not followed
Any other complaint	45 days from the date when the Complainant first requested the Financial Firm to remedy the matter	

Can the parties request an extension of time to resolve the complaint?

We may extend the refer-back period if we consider special circumstances exist, such as:

- Where settlement negotiations are progressing, but taking longer than the maximum IDR timeframe, and both parties agree to continue negotiations without our involvement
- where a Financial Firm is waiting for a report by an expert or external consultant before providing its response to the complaint and we consider the resulting delay reasonable
- where records that a Financial Firm needs, in order to respond to a complaint are old and difficult to retrieve.

Any party may ask for an extension to the refer-back period. A request by a Financial Firm must:

- be in writing
- be made as early as possible and before the specified period for complaint resolution expires
- state the period of the extension sought
- explain the special circumstances considered to warrant the extension
- provide copies of supporting documents.

When deciding whether there are special circumstances, as well as considering the circumstances of the relevant complaint and general principles of fairness, we will take into account:

- whether the parties to the complaint agree to the extension of time
- whether the Complainant had previously contacted the Financial Firm about the complaint
- whether any settlement negotiations are progressing and, if so, how long they are taking
- whether the Financial Firm is waiting for information to help it to provide its response to the complaint
- whether the length of the requested extension is reasonable
- whether the complaint involves financial hardship or postponement of enforcement proceedings.

If we decide to extend the refer-back period, we will advise both parties of the decision and the reasons for it and confirm the new timeframe.

If a complaint is resolved, the Financial Firm must tell us. If the complaint is not resolved during the refer-back period specified by us, the Financial Firm must provide its response to the complaint to both AFCA and the Complainant. The Financial Firm should also provide relevant supporting information with its response.

A.5.4

If a Superannuation Complaint is about payment of a death benefit, the Financial Firm must inform AFCA:

a) when it has complied with the obligation in section 1056A of the Corporations Act to notify each person believed to have an interest in the death benefit; and

b) of the names and contact details of those persons.

What does a Financial Firm need to do after AFCA notifies it of a Superannuation Complaint about payment of a death benefit?

When we notify a superannuation trustee, an RSA provider or life company (death benefit decision maker) that a Superannuation Complaint has been made about the payment of the death benefit, the death benefit decision maker must:

- make reasonable enquiries as to who may have an interest in the death benefit
- give written notice to all those people (other than the Complainant) within 28 days of being notified by us of the complaint.[2]

In practice, these people are likely to be the same people as those previously notified by the death benefit decision maker of the decision to pay the death benefit.

The notice must state that a complaint has been made to us, provide details of the complaint and state that the person can apply to be joined as a party to the complaint by giving notice to us within 28 days (or any further period that we allow).[3]

The death benefit decision maker must tell us when it has given the notice and provide to us the contact details for all those who have been given a notice.

[2] Corporations Act, s 1056A(1)
[3] Corporations Act, s 1056A(2)

A.5.5

If the complaint is about Traditional Trustee Company Services that involve Other Affected Parties, AFCA will ask the Financial Firm to provide the following information within the timeframe set by AFCA:

a) the names of all Other Affected Parties and their contact details to the extent possible; and

b) if any of this information cannot be provided, an explanation as to why this is the case.

What steps must be taken by a Financial Firm that provides Traditional Trustee Company Services if AFCA notifies it of a complaint that affects multiple parties?

A complaint relating to Traditional Trustee Company Services (see rule B.2 for the meaning of this term) may affect people other than the Complainant and the Financial Firm. If so, it would only be appropriate for us to consider the complaint if those other people are also given the opportunity to take part in our process.

We can ask the Financial Firm providing Traditional Trustee Company Services for the names and contact details of Other Affected Parties. This places responsibility on the Financial Firm to identify the relevant people.

Rule E.1 defines an Other Affected Party as a person who is entitled to receive an

Annual Information Return under the Corporations Regulations. An Annual Information Return is a report containing information about a trust, including income earned on its assets, expenses and the net value of the trust's assets.

Examples of who can request an Annual Information Return:

Deceased estates:

- A beneficiary under the deceased person's will
- If the person died intestate – a person who claims to be entitled to an interest in the deceased person's estate
- A person who has commenced a proceeding in a court, under a law of a State or Territory, to seek to be included as a beneficiary of the deceased person's estate

Trusts

- A settlor of the trust
- A person who, under the terms of the trust, has power to appoint or remove a trustee of the trust or to vary (or cause to be varied) any of the terms of the trust
- If the trust is a charitable trust – a person, or a person's appointed successor, who is named in the instrument establishing the trust as a person who must, or may, be consulted by the trustee or trustees before distributing or applying money or other property for the purposes of the trust
- If the trust is not a charitable trust – a beneficiary of the trust

Rule B.5 explains requirements that are specific to Traditional Trustee Company Services complaints, including the consequences if a Financial Firm cannot identify all Other Affected Parties.

A.6 Joining other parties

A.6.1

For a Superannuation Complaint, AFCA may join another person:

a) who applies to become a party to the complaint in accordance with section1056A(2) of the Corporations Act after receiving a notice under section1056A(1) of the Corporations Act; or

b) as permitted or required by section 1054 and section 1056A(3)(b) of the Corporations Act.

When can AFCA join another person to a Superannuation Complaint?

We will usually register a Superannuation Complaint as being against the superannuation trustee, RSA provider, life company or other superannuation provider. This is the case even if the complaint is about the decision or conduct of a person acting on behalf of the Financial Firm.

To ensure that a Superannuation Complaint is efficiently resolved, section 1054 of the Corporations Act gives us the power to join other parties to the complaint.

Examples of when we will usually join another party to a Superannuation Complaint:

- The insurer, if the complaint is about the payment of a benefit that includes an insured component
- Any other person, if we decide that the person is responsible for determining the existence or extent of the Complainant's disability
- The insurer that issued the life policy, if the complaint is about a trustee decision to admit the Complainant to a life policy fund.

What is the process for a person to ask to be joined to a Superannuation Complaint about a death benefit?

A superannuation trustee, or other death benefit decision maker, is required to notify all interested persons that a death benefit complaint has been made to us – see rule A.5.4. The purpose of the notice is to give them opportunity to apply to be joined as a party to the complaint by giving notice to us within 28 days (or any further period that we allow).

We will not exclusively rely on information from the Financial Firm about potential beneficiaries to a death benefit. We can also consider joining any person who applies to become a party to a Superannuation Complaint.

A request to join the complaint can be made by writing or phoning us. To assist us, it would be helpful if the person clearly identifies:

- the relevant complaint by specifying the name of the superannuation trustee or other death benefit decision maker, as per the notice they received

- the name of the deceased
- the person's relationship to the deceased
- how the person seeking to be joined thinks the death benefit should be distributed
- our reference number if this appears on the notice received from the superannuation trustee or other death benefit decision maker.

We will then assess the person's eligibility to join the complaint. We can only join a person to a death benefit Superannuation Complaint if:

- the person applies to us in the timeframe specified in the notice from the superannuation trustee or other death benefit decision maker
- we are satisfied that the person should be joined in all the circumstances, despite that person not applying to be joined.[4]

If we decide to join a party to a Superannuation Complaint, we give written notice to the joined party and all other parties of our decision to join, and our reasons for joining the party. Similarly, if we decline to join a person who has applied to become a party to a Superannuation Complaint, we will give written notice to the person of our decision and reasons for not joining the person.

A joined party will have the opportunity to provide information to us to support their position and will also be given copies of the information we have received from other parties, with a chance to respond.

A.6.2	For other complaints, AFCA may at any time decide that it is appropriate to join another Financial Firm as a party to the complaint. A joined Financial Firm has all the rights and duties under these rules as if they were the original Financial Firm under the complaint.

When can AFCA join another Financial Firm to a complaint that is not a Superannuation Complaint?

If the complaint is not a Superannuation Complaint, we will only join an additional Financial Firm if:

1. the Financial Firm is a current member of the AFCA scheme at the time it is joined
2. the issues arising in the complaint involving the Financial Firm are within our jurisdiction under the Rules
3. we consider the complaint would be resolved more efficiently and effectively if the additional Financial Firm was joined as a party. For example, this might be the case

[4] Corporations Act, s 1056A(3)

where another Financial Firm may have contributed to the Complainant's loss and so contribution by that other Financial Firm may be fair.

If the Complainant or Financial Firm would like us to join another Financial Firm as a party to a complaint, they should address these factors in their request. We can join another Financial Firm to a complaint either in response to a request from a party to the complaint, or where we consider joining would be appropriate.

If we decide to join a Financial Firm to a complaint (whether at the request of a party to a complaint or as initiated by us), we will notify all parties to the complaint that the Financial Firm has been joined. If the joined Financial Firm objects, the Financial Firm should set out in writing to us why it objects and should provide all relevant information and documents. We will consider the objection and, where appropriate, consult with the other parties to the complaint. We will inform all parties of our decision as to whether we have removed the Financial Firm from the complaint or whether the Financial Firm remains joined.

Examples of instances where joining an additional party may be appropriate:

- A complaint is made that a lender's lending was irresponsible and the lender relied on information provided by a broker that may not have been correct.
- A person obtained an insurance policy through a broker and there is a dispute about whether relevant information was disclosed.

What are the rights and obligations of a Financial Firm that is joined to a complaint that is not a Superannuation Complaint?

If we join a Financial Firm as a party to a complaint, the Financial Firm will have the same rights and obligations as if the Complainant had lodged a complaint against them.

In particular, once the Financial Firm is joined, we will provide it with the information we have received to date (subject to rule A.10.2), and give the Financial Firm time to respond to the complaint. The time that we allow for this will depend on whether the complaint has already been well progressed before the additional Financial Firm is joined. The Financial Firm may respond by offering to settle the complaint.

A preliminary assessment would only resolve a complaint if accepted by all parties to the complaint, including the joined Financial Firm. A Determination would bind all parties including the joined Financial Firm, if accepted by the Complainant.

A.7 Restrictions on Financial Firms during a complaint

A.7.1

While AFCA is considering a complaint, the Financial Firm is subject to the following restrictions.

a) The Financial Firm must not begin legal proceedings against the Complainant, anyone else joined as a party to the complaint or Other Affected Party about any aspect of the subject matter of the complaint.

b) The Financial Firm must not seek judgment or take other action to pursue debt recovery legal proceedings that the Financial Firm began before the Complainant submitted the complaint to AFCA, other than to the minimum extent necessary to preserve the Financial Firm's legal rights.

c) The Financial Firm must not take any action to:

(i) recover a debt the subject of the complaint, including enforcement of a default judgment obtained in court;

(ii) protect any assets securing that debt;

(iii) assign any right to recover that debt; or

(iv) list a default on a Complainant's credit file.

The table below summarises some of the things a Financial Firm can and cannot do once the Complainant submits an AFCA complaint. This table is only a summary and further guidance is set out below.

	The Financial Firm cannot:	**The Financial Firm can:**
In all cases	• litigate about matters inconsistent with the agreed resolution or the Determination – see rule A.7.5	• with our consent, exercise rights to freeze, preserve or sell assets the subject of the complaint – see rule A.7.2(c)

The Financial Firm wants to begin legal proceedings against the Complainant	• begin legal proceedings about issues that are the subject of an AFCA complaint – see rule A.7.1(a)	• with our consent, begin legal proceedings if:
		  • the limitation period is about to expire – see rule A.7.2(a)
		  • it is a test case – see rules A.7.2(b) and C.2.2
		  • the Small Business credit facility is for more than $5 million – see rule A.7.2(e)

	The Financial Firm cannot:	The Financial Firm can:

The Financial Firm has legal proceedings on foot against the Complainant	• continue legal proceedings about any aspect of the subject matter of the complaint; – see rule A.7.1(a)	• write to the Court asking it not to process its application for default judgment because an AFCA complaint has been submitted – see rule A.7.1(a)
		• comply with a court order requiring an interlocutory step, as long as it does not require the Complainant to take another substantive step in the proceedings.
		• continue with legal proceedings:
		  • if the Complainant takes a substantive step beyond lodging a defence – see rule A.7.2(d)
		  • the Small Business credit facility is for more than $5 million –see rule A.7.2(e)
		• adjourn the legal proceedings; if a stay is not possible, then the legal proceedings must be discontinued without cost to the Complainant

The Financial Firm obtained judgment against the Complainant while the AFCA complaint was open	• execute a default judgment – see rule A.7.1(b)	• set aside a default judgment – see rule A.7.1(b)
The Financial Firm wants to pursue debt recovery against the Complainant	• pursue debt recovery, whether through its employees or agents – see rule A.7.1(c)	• pursue a Small Business credit facility over $5 million – see rule A.7.2(e)
The Financial Firm wants to execute a default judgment obtained before the AFCA complaint	• execute a default judgment – see rules A.7.1(c)(i) and C.1.2(d)	• with our consent, execute a default judgment – see rules A.7.2(f) and C.1.2(d)

	The Financial Firm cannot:	The Financial Firm can:
The Financial Firm has taken possession of the Complainant's property	• continue as mortgagee in possession without firstly seeking our consent to sell assets the subject of the dispute – see rule A.7.2(c)	• with our consent, continue with marketing and sale of the property as mortgagee in possession – see guidance to rule A.7.2(f)
The superannuation provider wants to recover an overpaid benefit from the Complainant	• recover an overpaid benefit that is the subject of an AFCA complaint – see rule A.7.1(c)	• begin legal proceedings if the limitation period is about to expire – see rule A.7.2(a).

When is a Financial Firm prevented from beginning legal proceedings against a party to an AFCA complaint?

A Financial Firm is prevented from beginning legal proceedings about issues that are the subject of an AFCA complaint, unless they obtain our consent in certain situations explained below in the guidance to rule A.7.2.

For complaints about Traditional Trustee Company Services (see the guideline to rule B.2 for the meaning of this term), the Rules also prevent Financial Firms from taking legal proceedings against Other Affected Parties about matters arising under an AFCA complaint. If, however, all Other Affected Parties do not consent to be part of the AFCA complaint, the AFCA complaint will not proceed and the Financial Firm will no longer be restricted as to the legal proceedings that they can institute.

What must a Financial Firm do if legal proceedings are already on foot?

When a complaint is initially lodged with us, we seek to identify whether legal proceedings relating to debt recovery have been commenced prior to the complaint being lodged. Accordingly, our complaint form asks the Complainant if the Financial Firm has issued court legal proceedings. We also review the information provided with a complaint to identify whether legal proceedings appear to have been issued.

When we notify a Financial Firm of a complaint lodged against them, the Financial Firm should tell us if they have commenced legal proceedings and the complaint information does not mention this. This will permit us to expedite the complaint.

If the complaint is within our jurisdiction, the Financial Firm must stay the proceedings without cost to the Complainant. The stay must apply until our file is closed. A Financial Firm may comply with a court order requiring an interlocutory step to be taken by the Financial Firm (for example, filing an affidavit of documents), as long as that step does not require the Complainant to take another substantive step in the proceedings. If a hearing date has been

set down, the Financial Firm must adjourn the hearing date from time to time, as appropriate, until our file is closed.

A formal order staying the proceedings, where this is not required by the relevant court rules, is not necessary if the Financial Firm provides an undertaking to us to take no further steps in the proceedings. Within 14 days of the referral of the complaint, the Financial Firm must provide to us an undertaking in writing not to take a further step in the proceedings until our file is closed.

If a stay, adjournment or undertaking is not possible due to relevant court rules, the proceedings must be discontinued at no cost to the Complainant.

The Complainant must consent to a stay, adjournment or discontinuance of legal proceedings. If the Complainant does not consent, then we will decline to consider the complaint and will close our file.

Some court rules provide that when a Notice of Discontinuance is filed, the defendant can apply for costs. Where we require the Financial Firm to discontinue the proceedings and the Financial Firm must file a Notice of Discontinuance, the Complainant must first agree that they will not seek costs from the court. This does not, however, prevent the Complainant from claiming costs incurred in the legal proceedings as part of the complaint lodged with us. If the Complainant does not agree to this requirement, then we will decline to consider the complaint and will close our file.

It is not enough that the Financial Firm takes no active steps to pursue debt recovery proceedings. Where a Financial Firm has applied to Court for default judgment, but the Court has not yet made its final orders, we expect the Financial Firm to write to the Court asking it not to process its application because the Complainant has submitted a complaint to us in the meantime. If the Court is unable to withhold processing the application for default judgment, a Financial Firm will be expected to apply to set the judgment aside.

What must a Financial Firm do if it obtains a court judgment after a complaint has been submitted to AFCA?

The restriction against pursuing judgment or debt recovery applies from the time the complaint is submitted to us, not from the time that we notify the Financial Firm of the complaint.

The term ‘debt recovery legal proceedings’ means a proceeding commenced in a court by a Financial Firm against a Complainant to obtain judgment for a debt, or for possession of an asset provided by a borrower or guarantor as security for a credit facility. If the parties to the legal proceedings are different to the parties to the AFCA complaint, we will have no jurisdiction to prevent the Financial Firm from pursuing debt recovery legal proceedings.

The following are examples that would not be considered ‘debt recovery legal proceedings’:

- The Financial Firm issues court proceedings against the Complainant seeking a declaration that assets are held on constructive trust for the Financial Firm.
- An insured driver (even one whose rights are subrogated by the Financial Firm) issues court proceedings against the Complainant for damage caused by the Complainant as driver of an uninsured car before the AFCA complaint is submitted.
- Reporting repayment history information to a credit reporting agency.

It is possible that a Financial Firm may obtain a court judgment after the debtor has submitted the complaint to AFCA, but before the Financial Firm becomes aware of the complaint. If this happens, the Financial Firm must apply to the court to set aside the judgment within 14 days of the referral of the complaint to the Financial Firm. This must be without cost to the Complainant.

It is appropriate that the court judgment is set aside even if the complaint is subsequently considered to be outside of our jurisdiction under the Rules. This is because a Complainant may not have entered an appearance at court or filed a defence because of the complaint submitted to us. If the court judgment is set aside and then proceedings are re-instituted after our file is closed, this would give the Complainant the opportunity to take those steps.

Where the Financial Firm is required to set aside a default judgment, the Financial Firm must confirm with us that it has made this application. We may ask the Financial Firm to provide a copy of the application and any subsequent order setting aside the judgment.

If a Financial Firm contravenes rule A.7.1(b) inadvertently because it is unaware that a complaint has been submitted to us, this will not, of itself, constitute a serious breach of the Rules reportable to ASIC under rule A.18.2.

What additional restrictions apply to Financial Firm debt recovery proceedings?

While we are considering a complaint, the Financial Firm must not pursue debt recovery proceedings, whether through its employees or agents. This restriction applies from the time the complaint is submitted to us, not from the time that we notify the Financial Firm of the complaint.

The following are examples of activities that cannot be done while we are considering the complaint (subject to some exceptions in relation to legal proceedings set out below):

- Informal collection activities such as telephone calls
- Issuing a letter of demand
- Reporting of default information (credit listing) to a credit reporting agency
- Non-court debt recovery processes
- Pursuing previously commenced legal proceedings (those commenced by the Financial Firm before the Complainant submitted to the complaint to us), except to the minimum required to preserve the Financial Firm's legal rights
- Seeking judgment in previously commenced legal proceedings
- Enforcing a default judgment obtained in court
- Taking action to seize, or otherwise protect, assets securing the debt
- Assigning the right to recover the debt
- Appointing a receiver, agent for mortgagee in possession, or investigative Accountant
- Immobilising a vehicle
- Threatening to do any of the above

This rule is consistent with section 24 of the Debt Collection Guideline issued by ASIC and the Australian Consumer and Competition Commission (see ASIC Regulatory Guide 96), which states that while a complaint is being considered by an external complaint resolution scheme:

- collection activity must be suspended
- the debt must not be sold or passed on to an external agent for collection
- if the debt is inadvertently sold, the assignor/creditor should seek to unwind this and ensure the assignee does not undertake collection activity, or start legal proceedings until the scheme has resolved the complaint.

A.7.2

Despite rule A.7.1, the Financial Firm may with AFCA's consent:

a) begin legal proceedings if the legal limitation period for the proceedings is about to expire – but the Financial Firm may not pursue those legal proceedings other than to the minimum extent necessary to preserve the Financial Firm's legal rights;

b) begin legal proceedings if AFCA agrees to allow the Financial Firm to treat the complaint as a test case and the Financial Firm meets the requirements set out in rule C.2.2(f);

c) exercise any rights it might have to freeze, preserve or sell assets the subject of the complaint;

d) continue with legal proceedings if the Complainant, anyone else joined as a party to the complaint or Other Affected Party took a step in defending those legal proceedings that went beyond lodging a defence or a defence and counterclaim;

e) continue with legal proceedings about a Small Business (including Primary Producer) credit facility of more than $5 million; or

f) enforce a default judgment obtained in court.

In each case, the Financial Firm must comply with any conditions that AFCA imposes.

Can a Financial Firm pursue debt recovery legal proceedings if the limitation period is about to expire?

With our agreement, the Financial Firm may begin legal proceedings if the limitation period is about to expire and any delay may deprive the Financial Firm of its cause of action if the complaint fails to resolve through the AFCA process. The Financial Firm must not actively pursue those proceedings, but rather only take the minimum steps required to keep those proceedings alive. This includes serving a Statement of Claim that is about to go stale.

We may impose conditions where we agree to a Financial Firm instituting proceedings. Conditions include that the Financial Firm inform the Complainant that:

- the Financial Firm considers that service of the proceedings is a necessary step to preserve its legal position
- despite the legal proceedings, the complaint will continue to be considered by us
- the Financial Firm will not enter default judgment while we are considering the complaint, and the Complainant will not be required to take any substantive steps in response to the legal proceedings
- if we cease to consider the complaint before it is resolved, the Financial Firm will allow the Complainant the full amount of time to lodge a defence available under the court rules, and consent to any application to the court for an extension of time that is required to give effect to this commitment.

This information will avoid confusion for Complainants as to whether they need to take any action in response to the proceedings, or seek legal advice.

Can a Financial Firm pursue legal proceedings as a test case?

A Financial Firm may institute legal proceedings if we agree to allow the Financial Firm to treat the complaint as a test case.

This is explained in the guideline to rule C.2.2.

Can a Financial Firm exercise rights to preserve its asset?

If we consent, a Financial Firm is able to exercise rights to freeze, preserve or sell assets that are the subject of the complaint.

We will not give our consent lightly. Each application will be considered on its merits. Factors that we may take into account include:

- whether the property is at risk of being lost or damaged
- whether the Financial Firm is already in possession of the property
- if the value of the asset, or the asset itself, is likely to deteriorate • if the holding costs make it uneconomic for the asset to be retained.

If the asset is the principal place of residence, or the sole family car, we would not permit their sale unless overwhelming reasons were provided in support.

Examples where we may consent to the sale of the asset:

- A car that has been seized by the Financial Firm and would be unavailable to the Complainant during the course of the complaint that is depreciating daily and is incurring daily storage costs. We would consider allowing the sale to reduce the potential debt that is the subject of the complaint.
- If the Financial Firm is already in possession of a property, we will not prevent the Financial Firm from continuing to sell the property as mortgagee in possession, unless there are special circumstances. However, where a sheriff has been instructed to execute a warrant for possession, such enforcement action must be stayed if the Complainant submits a complaint about the default judgment upon which the warrant is based – see rule A.7.2(f).

Where a Financial Firm wants to freeze, preserve or sell its asset while we are considering the complaint, they should firstly contact us to discuss their request. We would expect the Financial Firm to:

- Set out what action it wishes to take. The Financial Firm should set out specifically what it wants us to consent to it doing, in order that we can consider if the terms and conditions of the product allow them to do so.

For example, does the Financial Firm want to appoint receivers over a company, or gain possession of an asset such as leased equipment or a car?

- Explain why it considers it is necessary to take that action and why the asset is at imminent risk of loss, damage or disposal. The Financial Firm needs to explain why it is necessary to preserve the asset immediately. It is not enough that loan arrears are increasing, or that equity is decreasing.

For example, the borrower may be disposing of, or selling, its assets or equipment without the Financial Firm's consent, or the asset may be uninsured or unregistered.

- Provide any information or supporting documents that might assist us.

The Financial Firm must provide primary documents to support its request to freeze, preserve or sell its asset, because we often make such decisions without consulting the Complainant, given the nature of these requests. We would look at the loan and security documents to see if the terms and conditions allow the security asset to be repossessed, and any other independent information to support the position that the asset is at risk of loss, damage or disposal.

What happens if the Complainant takes a step beyond filing a Defence?

If we consent, a Financial Firm can pursue debt recovery legal proceedings if the Complainant actively defends those proceedings by taking action beyond simply lodging a defence, or a defence and counterclaim. Further action signals the Complainant's willingness to resolve the complaint in the court in which case we take the view that the court is a more appropriate place to resolve the matter – see rule C.2.2(a). A Complainant will not be regarded as having taken a step in the legal proceedings if they attend a directions hearing, or agree to consent orders of a procedural nature being filed in those proceedings.

If a Complainant lodges a defence and counterclaim before submitting a complaint with us, we will require the Complainant to provide an undertaking to stay any counterclaim they have filed. If this is not possible, then the Complainant will need to discontinue the counterclaim at their own cost.

Can a Financial Firm pursue debt recovery legal proceedings for a Small Business credit facility for more than $5 million?

We must exclude a complaint about a Small Business (including Primary Producer) credit facility of more than $5 million – see rule C.1.3(b). If this occurs, the Complainant will be given an opportunity to object, in accordance with rule A.4.5. During this objection period, we are likely to consent to a Financial Firm pursuing debt recovery legal proceedings in relation to a credit facility (including related guarantee or security), where the facility is provided to a Small Business (a business with less than 100 employees) and is for more than $5 million.

However, there are examples of where we will usually not give consent for legal proceedings to continue while we are considering the complaint. These are:

- where there are two documented credit contracts both of which are for amounts less than $5 million even if the combined balance owing is greater than $5 million
- where the credit facility is secured by a mortgage over a guarantor's principal place of residence
- where the proceedings include a guarantor who is asserting that the guarantee is not enforceable, or the guarantor's liability should be reduced for some reason.

Can a Financial Firm execute a default judgment while a complaint is open with AFCA?

Unless we consent, a Financial Firm must stay execution of a default judgment for a period of time, in order to allow the parties an opportunity to discuss the Complainant's request for a stay. This only applies to a default judgment, and not a judgment given after a Court has considered the merits of the case.

A Complainant who seeks a stay of execution should firstly request the Financial

Firm to stay the execution and explain the reasons for their request. For example:

a) The Complainant may wish to sell the security property themself within a reasonable time. We are unlikely to assist a Complainant who has taken insufficient steps to prepare the property for sale or appoint a selling agent.

b) The Complainant may wish to imminently refinance the loan that is the subject of the default judgment. The Complainant must show they have already taken steps to refinance the loan by providing a copy of the loan approval and correspondence with another lender.

c) The Complainant may wish to show that they are suffering from personal (as distinct from financial) hardship and need a reasonable time to organise their affairs. The Complainant must explain the personal hardship and how it is likely to be temporary, together with supporting documents (such as a doctor's certificate).

d) The Complainant may wish to apply to the Court have the default judgment set aside. The Complainant must have an arguable basis for their application and must have taken material steps to make the application to Court, and demonstrate a prima facie case that the judgment was irregular or was obtained in contravention of a legal requirement, and that they have a substantive defence to the Financial Firm's claim.

The Complainant must support their request with appropriate documents and demonstrate good faith towards achieving the outcome sought. It is only appropriate to require the Financial Firm to suspend the exercise of its rights if the Complainant is able to present a genuine and specific practical alternative. We also expect that the proposed alternative be realistic and able to be implemented and completed within an acceptable timeframe, and to be capable of achieving its intended result. We will determine the appropriate stay period

taking into account the circumstances of each case and the interests of both the Complainant and the Financial Firm.

We cannot set aside or interfere with default judgments. We will not require a Financial Firm to:

a) take action that would require the Financial Firm to act in any way contrary to an order made by the Court, unless there are special circumstances that warrant requiring the Financial Firm to so act

For example, the default judgment might require that the Financial Firm act within certain timeframes, and there are reasonable grounds for expecting that the Complainant could successfully apply to the Court to vary its orders to permit the Financial Firm to comply with our direction.

b) suspend the sale of the security property to a third party if the Financial Firm has entered into a binding contract of sale before the complaint was submitted

c) suspend the marketing of the security property if the Financial Firm has already taken possession before the complaint was submitted.

What if a Financial Firm has already executed a default judgment and taken possession of property?

Where the Financial Firm has already executed the default judgment or warrant for possession and taken possession of the property, we consider that the enforcement action has ceased and the Financial Firm's obligations as mortgagee in possession begin. Because there is no longer any enforcement action on foot, the Complainant is too late to request a stay of orders that have already been executed.

What if a Financial Firm has taken possession of property without a court order?

In cases where a Financial Firm has taken possession of an asset with a court order, we expect that the Financial Firm seek our consent before continuing to sell the asset – see rule A.7.2(c).

For example, our consent for the continued sale of the asset is:

- likely to be granted where the Complainant has voluntarily surrendered the asset to the FSP or its agents
- unlikely to be granted where the secured property is the Complainant's primary residence, and the Financial Firm took possession of it without a court order and without the Complainant's consent.

In all cases, where a Complainant re-enters a property while it is in the possession of the Financial Firm, and attempts to re-take possession of the property, we consider such conduct to be an act of trespass. The Complainant's attempt to regain possession does not affect the rights of the mortgagee in possession under the mortgage and does not change our approach as outlined previously.

A.7.3

For a Superannuation Complaint, AFCA may decide that a Financial Firm may not implement a decision that is the subject of a complaint submitted to AFCA, while AFCA is considering the complaint. AFCA must not make a decision of this type unless:

a) AFCA has received a request by the Complainant to halt the operation of the Financial Firm's decision; and

b) AFCA has provided the Financial Firm with a reasonable opportunity to make submissions and taken any submissions into account.

Does a Superannuation Complaint prevent the operation of a superannuation trustee's decision?

Generally, a Superannuation Complaint does not affect the operation of the Financial Firm's decision and does not prevent the Financial Firm from implementing its decision while we are considering the complaint.

However, we can decide to stop the Financial Firm from implementing its decision if the Complainant requests it. Before deciding to do this, we must give the Financial Firm a reasonable opportunity to make a submission and must take any submission into account. Generally, we would not exercise the right to stop a Financial Firm's decision if the Financial Firm's decision affects other people who are not party to the complaint.

A.7.4

Apart from the restrictions in rules A.7.1 and A.7.3, a Superannuation Complaint neither:

a) affects the operation of the decision of the Financial Firm; nor

b) prevents the Financial Firm from implementing the decision, while AFCA is considering the complaint.

Can a superannuation provider recover from the Complainant a benefit overpayment while AFCA is considering the complaint?

The restriction against commencing legal proceedings extends to the recovery of an overpaid benefit if the Complainant has complained to AFCA about the superannuation provider's decision to recover the overpayment. Where the complaint relates to a superannuation trustee's decision to recover from the Complainant an overpaid benefit, the trustee will not be entitled to pursue recovery of that benefit, which is the subject of the complaint.

A.7.5

If a complaint submitted to AFCA is resolved by agreement between the parties, or is determined by an AFCA Decision Maker and the Determination becomes binding upon the Financial Firm, the Financial Firm must not begin or continue with legal proceedings against the Complainant, anyone else joined as a party to the complaint, or Other Affected Party that are inconsistent with the agreed resolution or the Determination. This does not prevent a Financial Firm from pursuing any appeal rights available to it under the Corporations Act in respect of Determinations about Superannuation Complaints.

What restrictions are there on legal proceedings in relation to complaints resolved or determined?

Where a complaint submitted to us is resolved by agreement between the parties or determined by us, the Financial Firm must not take any action inconsistent with that agreement or Determination. This is because matters that have been resolved or determined have been addressed with finality, and so no further action can be taken in respect of finalised matters.

For example, if the agreement between the parties, or the Determination, dealt with a debt, the Financial Firm would not be able to issue proceedings to deal with the debt in a court or tribunal contrary to that agreement or Determination (although it could take proceedings to enforce the agreement if there was a breach).

A superannuation provider retains its rights to appeal Determinations about Superannuation Complaints – see rule A.15.1.

A.7.6

A Financial Firm must not instigate defamation action of any kind in relation to allegations about the Financial Firm made to AFCA by the Complainant, anyone else joined as a party to the complaint or Other Affected Party.

What defamation protection is available to the parties?

Our approach is to encourage each Complainant to provide information and express their views freely to us. The Rules support this by operating on a 'without prejudice' basis (see rule A.11.1) and prevent a Financial Firm from taking defamation action against a Complainant because of allegations made to us. A Complainant is not protected from defamation action in respect of allegations about a Financial Firm made to someone other than us, even if the same allegations were also made to us.

Examples of defamation action:

- Defamation proceedings through the court system
- Issuing a letter of demand in relation to defamatory comment
- Threatening to take defamation proceedings

A.8 Complaint resolution approach

A.8.1

AFCA will generally try to resolve a complaint by informal methods. This includes, for example, by:

a) facilitating negotiations between the parties; or

b) conciliating a complaint, for example, by conducting a conciliation conference.

If reasonable attempts to resolve a complaint by these methods do not succeed, AFCA may then:

c) provide a preliminary assessment in accordance with rule A.12; or

d) proceed to determine the complaint.

How does AFCA determine the approach to resolve complaints?

We have a range of methods to resolve complaints. For any particular complaint, we are able to select the method, or combination of methods, that we think is most likely to resolve the complaint efficiently and fairly.

1. Settlement

Typically, we will explore the possibility of a negotiated settlement with the parties. This may involve us relaying one party's settlement offer to the other. To assist negotiations, we may provide guidance about the type of outcome that might eventuate through AFCA if a settlement is not negotiated between the parties.

Sometimes we will hold a telephone conciliation conference with both parties. This is conducted informally. It provides the parties with a chance to hear the other's perspective in a conversation facilitated by us.

If negotiations or a conciliation conference do not achieve an agreed settlement, the complaint will be decided by us.

2. AFCA decision to close the complaint

Rule A.8.3 enables us to decide that it is not appropriate to continue considering the complaint. This could be because we consider that the complaint lacks merit, the Complainant has suffered no loss or has already been appropriately compensated, or the Financial Firm has committed no error.

If we decide to close the complaint, we must inform the parties in writing with reasons. The Complainant can object to this in which case the process is as set out in rule A.4.

3. Withdrawal or abandonment by Complainant

A Complainant may at any stage tell us that they do not want to continue with their complaint. Alternatively, we may infer that the Complainant wants to abandon the complaint if the Complainant fails to respond to us when we request the Complainant to contact us to provide information to us. In either case, we are unlikely to re-open the complaint unless special circumstances warrant further consideration of the complaint – see rule A.9.5.

4. Decision

Rule A.8.1 gives us the power to decide complaints. Sometimes we will provide the parties with a preliminary assessment before making a binding decision. Sometimes, however, we proceed very quickly to make a binding decision. Rules A.10 to A.15 explain preliminary assessments and binding decisions.

When considering the appropriate methods to resolve a particular complaint, we will take into account:

1. the nature of the issues raised by the complaint

2. the parties to the complaint, their circumstances and the nature of their relationship

3. the principles in rule A.2, which commit us to resolving complaints in a cooperative, efficient, timely and fair manner.

We will inform the parties of our proposed approach to ensure they understand what is involved.

A.8.2

Alternatively, AFCA may proceed immediately to determine a complaint, for example, if it thinks the complaint is unlikely to be resolved by other means.

When will AFCA proceed immediately to determine a complaint?

We may expedite the process for deciding a complaint by proceeding directly to Determination without first providing a preliminary assessment on the merits of the complaint. We will not invite parties to make submissions on whether to expedite a matter. However, a Financial Firm can provide its view that it would be unable to accept a preliminary assessment in certain cases. For example, a superannuation provider may be unable to do so where a formal decision of its board of directors is the subject of a complaint. We seek to make decisions in a way that promotes the most efficient, effective and fair resolution possible. We will take into account the circumstances of the complaint, including:

- urgency
- the type of product or service
- the size of the loss involved
- the age of the matter
- technical complexity.

Examples of complaints AFCA may refer directly to Determination include:

- complaints that need to be finalised urgently. For example, because the Complainant is experiencing financial hardship
- complaints involving a Financial Firm that has gone into liquidation or administration, ceased trading or failed to respond
- where the Complainant has suffered a natural disaster such as flood or bushfire
- a low-value claim where the Complainant suffers from a terminal illness or is a victim of domestic violence
- a high-value claim where prolonged inaction may see the claim amount exceed our monetary limits.

If we decide to expedite the process for deciding a complaint, we will tell the parties and give them a reasonable opportunity to make submissions and provide information about the matters in dispute before making a Determination.

What approach does AFCA take to financial difficulty credit complaints?

A streamlined process is used for complaints about financial difficulty in repaying credit obligations to ensure that these are dealt with in an efficient, timely and fair manner. Financial difficulty[5] credit complaints will be identified as soon as possible after we receive them.

After reviewing a Financial Firm's response to a Complainant's request for financial difficulty assistance in meeting their repayment of credit obligations, we will decide whether a conciliation conference is appropriate, which are mostly conducted by telephone. If AFCA requires more information from either the Financial Firm or the Complainant to make this decision, we will request the information.

If AFCA decides that a conciliation conference is appropriate, we will arrange the conference. Before a conciliation conference, we may ask the parties to provide information that has not previously been provided. This may, for example, include details of the debtor's financial position, details of the debt and arrears and the estimated value of any security.

Where a conciliation conference is conducted, it is compulsory for both the Financial Firm and the Complainant to attend. A representative of the Complainant may also attend. Each party must have authority to settle the complaint at the conference.

If a complaint is not resolved at a conciliation conference, or we decide that a conciliation conference is not appropriate for a complaint, then we can proceed to decide the complaint.

A.8.3

AFCA may decide that it is not appropriate to continue to consider a complaint, in circumstances such as:

a) the complaint is without merit;

b) the Complainant has suffered no loss (or has been appropriately compensated for such loss and AFCA would not award any further amount); or

c) the Financial Firm has committed no error.

If so, AFCA will follow the process for excluding a complaint set out in rules A.4.5 and A.4.6.

[5] In a superannuation context, 'severe financial hardship' is a condition for early release of up to $10,000 of a fund member's superannuation benefit. However, in order for a superannuation provider to pay out a part of the fund member's benefit in these circumstances, the provider must:

- have written evidence from Centrelink (or another relevant authority) that the fund member was receiving Commonwealth income support payments for a continuous period of 26 weeks and was still in receipt of those payments on the date of the written evidence
- be satisfied that the fund member is unable to meet reasonable and immediate family living expenses.

When will AFCA decide it is not appropriate to continue to consider a complaint?

In addition to the exclusions set out in Section C, we may also decline to consider a complaint any further if we decide that it is appropriate in the circumstances to do so. We can only do this if, after considering the background and nature of the complaint and any supporting information, we decide that:

- The Complaint does not have merit.
- The Complainant has suffered no loss.
- The Complainant has been adequately compensated.
- The Financial Firm has committed no error.
- The superannuation provider could not have made any other decision.

We will only decline to consider a complaint in this manner where there are compelling reasons. We will make sure that there is enough information about the facts of a complaint and the issues involved, before making a decision about whether to decline to consider the complaint further. All decisions to decline to consider complaints are made by experienced AFCA staff at the earliest opportunity to avoid unnecessary costs and delays.

Examples of complaints that we may decline to consider on this basis, include the following:

- The Complainant complains about an account closure, but the Financial Firm has complied with the terms of the account such as giving requisite notice.
- The Complainant seeks to discharge a debt by use of a promissory note or similar instrument without value.
- The Complainant complains about a $30 late fee, but has not incurred the late fee.
- The Complainant complains about an establishment fee that has already been refunded.
- The Complainant complains about a failure to process a chargeback beyond the period in which to dispute a credit card transaction under the rules of the credit card scheme. The Complainant's delay meant that the Financial Firm was no longer able to exercise its chargeback rights against the merchant.
- The Complainant alleges their stockbroker misrepresented he or she would sell a stock if it reached a certain value. The Complainant states that, as a result of the investment, they have lost money as the stock should have been sold. The Financial Firm states there was no such advice by the stockbroker and, in any event, the stock price never dropped to the level that the Complainant alleged they were told would trigger a sale. The Complainant suffered no loss in reliance on the alleged misrepresentation.
- The Complainant is not the spouse, child, or legal personal representative of the deceased superannuation fund member, and is unable to provide documents to support their assertion that they are financially dependent, or in an interdependency relationship with the deceased member.

A.9 Gathering relevant information

A.9.1

AFCA will often need to obtain information from the parties. A party to a complaint must comply with AFCA requirements to provide information within the timeframe specified by AFCA unless they satisfy AFCA that:

a) to provide information would breach a duty of confidentiality to a third party, other than an agent or contractor and, despite best endeavours, the third party's consent to the disclosure of the information has not been able to be obtained;

b) to provide the information would breach a court order or prejudice a current investigation by the police or other law enforcement agency; or

c) the information does not or no longer exists or cannot reasonably be obtained.

What can AFCA request of the parties?

We adopt an inquisitorial approach to our consideration of a complaint and will often request the parties to provide information, whether in hard copy, electronic form, audio, video or other recording. As well as requiring information already in the possession or control of a Complainant or Financial Firm, we may require them to obtain information from other sources, including where the Financial Firm's response to the complaint makes assertions capable of verification by information that is in the hands of third parties.

Types and sources of information we may request:

- Records or files held by the Financial Firm relating to the Complainant and the Financial Services provided to the Complainant
- Records kept by agents of the Financial Firm relevant to the complaint and the Financial Service provided to the Complainant
- Statements about the events in question from those involved in them
- Financial Firm policy documents relevant to the complaint, for example, lending procedures or underwriting guidelines
- Reports relevant to the complaint that were prepared by a third party for the Financial Firm
- For Superannuation Complaints, the governing rules of the superannuation fund

To help us to resolve complaints efficiently and fairly, Complainants and Financial Firms are encouraged to identify all information relevant to a complaint and to provide this to us at the first available opportunity, rather than waiting for a specific request from us for that information. We may provide examples about the types of information relevant to different types of complaints to assist parties in the early provision of information to us.

How should a party respond to an AFCA request for information?

A Complainant or Financial Firm must provide information if we request it. If a Complainant or Financial Firm is unsure as to what we are seeking, they should discuss this with us. While Financial Firms often have experience of our information requests, we understand that Complainants may need further guidance from us as to how best to meet our requests. Providing Complainants with this assistance is consistent with our obligation to operate an accessible scheme.

Requested information must be provided within the timeframe we specify. If this is not possible, we must be advised of this promptly, with an explanation of the reasons. We will decide whether an extension of time is appropriate to provide.

The Rules set out very limited circumstances in which our information request does not have to be met. If a Complainant or Financial Firm thinks that one of these exceptions applies, they should discuss this with us and provide supporting information, such as the court order that creates the impediment.

A.9.2

A party to a complaint relying upon rule A.9.1 to refuse an AFCA requirement for information must, if requested by AFCA, provide AFCA with a statutory declaration setting out the steps taken to try to comply with AFCA's request for the information and detailing the reasons they were unable to do so. AFCA may then decide if it is satisfied with those steps and reasons.

When is a statutory declaration required from the parties?

Where a Financial Firm or Complainant does not provide information requested by us, the Financial Firm or Complainant must, if requested by us, provide a statutory declaration setting out the steps they have taken to try and comply with our request for information and the reasons they were unable to do so. The statutory declaration must be sworn by a person who is familiar with, and has access to, the Financial Firm's records and is duly authorised by the Financial Firm to do so.

We will make this request where previously provided information has not established to our satisfaction that a reasonable impediment exists. We will respond to a statutory declaration by advising whether this satisfies us and, if not, how this may affect the process for resolution of the Complaint.

A.9.3

AFCA may require a party to a complaint to do anything else that AFCA considers may assist AFCA's consideration of the complaint. This may include requiring:

a) a party to a complaint to attend an interview; or

b) the Financial Firm to investigate the complaint further, or to appoint an independent expert to report back to AFCA on something relating to the complaint.

What are some of the things that AFCA may require a party to do to assist consideration of the complaint?

We have broad powers to require a party to take action to assist our consideration of a complaint. We will generally engage with a party about our proposed requirements before using these powers. When deciding whether to use these powers, we consider questions such as:

- What further information may assist AFCA's handling of the complaint?
- Could a party to the complaint provide the further information?
- If so, what would be the best way for AFCA to obtain the further information from the party?

AFCA will also take into account the costs a party may have to incur as a result of complying with our request for further information.

We ask questions of the parties to a complaint, obtain information from them, and reach a decision based on the available information. Because we primarily obtain information from the parties to a complaint, we rely on those parties to obtain any necessary information from third parties, except for a Superannuation Complaint where we have statutory powers – see rule A.9.4.

We may require a party to attend an interview or examination, but we do not have the power to cross-examine that party. We may also require a Complainant to provide all reasonable assistance to the Financial Firm.

For example, we may require the Complainant to:

- attend a medical examination organised by the Financial Firm
- allow the Financial Firm's assessor or agent access to property for inspection
- make their car available to the Financial Firm, or its agent, for assessment.

When does AFCA interview the parties?

Generally, we do not interview the parties, but in a minority of complaints, we use an interview as a way of gathering or clarifying information or discrepancies.

It is in the parties' interest to attend an interview and take the opportunity to explain any discrepancies. If a party refuses to accept our invitation to attend an interview, we may choose to decide the complaint on the available information, which may not be in their favour. Most commonly, we conduct an interview where a complaint is about a general insurer's handling of an insurance claim and the general insurer alleges the Complainant's claim is fraudulent. An Ombudsman will usually conduct the interview in these circumstances. Both parties are given the opportunity to be present, but cross-examination is not permitted. If one party objects to the presence of the other, the Ombudsman may exercise the discretion to exclude the other party. Where new information is provided in an

interview where the other party is not present, that other party will subsequently be given the opportunity to respond to that new information.

Less commonly, we exercise our power to require a party to a complaint to attend an interview to answer questions.

Examples of when we may require attendance at an interview:

- Where material provided in writing by the party is unclear or contradictory.
- Where the most efficient way for us to obtain the information required to consider the complaint is by asking the party to answer questions face-to-face.
- Where the party may not understand certain questions that we need to ask them, so an interview provides us with the best method for explaining our questions and ensuring these are understood and answered.

If we require a party to attend an interview, we will contact the party and arrange a time, date and venue for the interview and an interpreter where appropriate.

An interview (whether by invitation or required) may be conducted face-to-face, by telephone or using video conference or similar technology. An interview is conducted informally in a conversational manner. There are no special rules that govern interviews. The Complainant and Financial Firm can bring to the interview relevant materials to clarify issues arising from the complaint. Where appropriate, the parties can also bring with them another person for assistance, such as an interpreter or a support person.

When does AFCA require further investigative steps by the Financial Firm?

If we consider that a Financial Firm has not undertaken sufficient investigative steps to enable us to resolve the complaint, we may require the Financial Firm to further investigate either using the Financial Firm's own staff, or engaging an independent expert.

When deciding whether to require a Financial Firm to pay for an independent expert obtained by us, we will discuss this with the Financial Firm and consider what is reasonable in the circumstances. Relevant factors may include:

- the extent to which a report on a matter pertaining to the complaint would be expected to help us to consider the complaint
- the cost of obtaining the report
- likely delays if we require the report.

An AFCA Decision Maker is normally consulted when making a decision to obtain expert advice, unless such expert advice (for example, a handwriting expert) is commonly required in the circumstances.

Examples of when we may require a Financial Firm to obtain an expert report include the following.

- A complaint about the Financial Firm's response to an insurance claim where:
  - the complaint raises issues (such as medical or engineering issues) that require an expert opinion to resolve
  - it would be reasonable for the insurer to have obtained the opinion as part of assessing the claim
  - we consider it reasonable in the circumstances to require the insurer to obtain the opinion.
- A complaint about the calculation of a defined benefit where:
  - the complaint raises issues about the value of the factors that are used to calculate the benefit, which requires an actuarial opinion to resolve
  - it would be reasonable for the trustee to have obtained an independent actuarial opinion in considering the complaint
  - we consider it reasonable in the circumstances to require the trustee to obtain the opinion.

A.9.4

For a Superannuation Complaint, AFCA has additional powers to obtain information and require attendance at conciliation conferences as set out in sections 1054A and 1054B of the Corporations Act.

When will AFCA use its statutory information gathering powers for a Superannuation Complaint?

We may, by written notice, require any person we have reason to believe is capable of giving information or producing documents relevant to a Superannuation Complaint to give the information to us in writing or to produce the documents, or copies of the documents, as stated in the notice.[6]

We may give a statutory notice to the parties to a complaint, or to a person who is not a party to the complaint, if we have reason to believe the person has relevant information or documents.

It is an offence of strict liability not to comply with an AFCA notice without a reasonable excuse.[7]

We may keep documents produced under a statutory notice as long as necessary to deal with the complaint (subject to a right of inspection at reasonable times by any person who

[6] Corporations Act s 1054A(1)
[7] Corporations Act s 1054A(3) and (5)

would be entitled to inspect them if they were not in our possession) and may make copies of, or take extracts from, the documents.[8]

If a superannuation provider would prefer us to issue a notice using our statutory powers in order to obtain information or documents relevant to a Superannuation Complaint, the superannuation provider can request us to do so and provide reasons in support of the request. If we agree with those reasons, we will then use our statutory powers to obtain the information or documents.

Otherwise, we will generally use our statutory power to obtain information and documents:

- from the parties to a complaint (including joined parties) if they have not cooperated in the provision of information or documents to us
- from third parties who would not otherwise be required to provide information or documents to us if the superannuation provider has not been able to obtain them.

An unreasonable failure to cooperate with an AFCA information request may also have the consequences discussed in section A.9.5.

When will AFCA require parties to a Superannuation Complaint to attend a conciliation conference?

If a person makes a Superannuation Complaint about a decision to pay a death benefit in a particular way, and the complaint involves parties with competing claims to the benefit, we would normally hold a conciliation conference.

In a Superannuation Complaint relating to a claim for a disability benefit, which was declined on the basis that the Complainant was not disabled to the extent required by the governing rules, we may hold a conciliation conference.

Superannuation Complaints about issues relating to account errors, disclosure issues or failing to implement a member's instructions may also be appropriate for conciliation.

Sometimes a conciliation conference may be used to narrow the disputed issues or to clarify evidentiary matters that we have not been able to resolve otherwise.

We would usually invite the parties to attend a conciliation conference, but we may by written notice require the parties to a Superannuation Complaint to attend a conciliation conference.[9] We can also require other persons to attend the conciliation conference if the person is likely to be able to provide information relevant to the settlement of the complaint or the person's presence at a conciliation conference would, in our opinion, likely be conducive to settling the complaint.[10] The written notice must fix the date, time and place for the conference.[10]

[8] Corporations Act s 1054(1)(2)
[9] Corporations Act s 1054B(1)(a)
[10] Corporations Act s 1054B(1)(b)
[10] Corporations Act s 1054B(2)

If the Complainant does not attend the conference, we may treat the complaint as if it had been withdrawn (that is, abandoned or discontinued) by the Complainant.[11]

It is an offence if another party, or person, does not attend the conference.

We will generally use our statutory power to require attendance at a conciliation conference:

- if any party to the complaint (including a joined party) expresses reluctance to attend a conciliation conference and their attendance would facilitate the efficient resolution of a complaint
- if there are other persons who we believe will facilitate resolution of the complaint at a conciliation conference.

We may give an oral or written direction to the parties present at a conciliation conference (whether voluntary or compulsory) prohibiting the disclosure of documents or information relating to the complaint.[12] In giving such directions, we must have regard to the wishes of the parties and the need to protect their privacy.[13]

There is a statutory penalty if a person refuses or fails to comply with a confidentiality direction from us.[14]

We may give a confidentiality direction at the end of a conciliation conference if we consider that highly personal or sensitive information has been disclosed during the course of the conference that should not be disclosed outside the conference.

Example of when we may give a confidentiality direction:

- A conciliation conference about a death benefit distribution involving joined parties

[11] Corporations Act s 1054B(3)
[12] Corporations Act s 1054BA(1)(a) and (3)
[13] Corporations Act s 1054BA(2)
[14] Corporations Act s 1054BA(4)

A.9.5

If a party to a complaint without reasonable excuse fails to provide information, or to take any other step required by AFCA, within the AFCA specified timeframe, AFCA may take whatever steps it considers reasonable in the circumstances:

a) If the information requested by AFCA is of material importance, AFCA will proceed with the resolution of the complaint on the basis that an adverse inference will generally be drawn from that party's failure to comply with AFCA's requirement, unless special circumstances apply.

b) If the Complainant fails to comply with an AFCA requirement, AFCA may refuse to continue considering the complaint.

What are the consequences of non-compliance with AFCA requests?

If a party to a complaint fails to provide information or comply with any other AFCA request, we will assess whether a party has a reasonable excuse for non-compliance. The factors we take into account include:

- the adequacy of the reasons provided
- whether the party to the complaint has committed to rectify its failure to comply
- whether the party to the complaint has made a prompt request for an extension of timeframe if further time to comply is needed
- the impact of the failure to comply on the likely resolution of the complaint and other parties to the complaint
- any past history of failure to cooperate with AFCA.

If we conclude that there is not a reasonable excuse for a failure to provide materially important information, we will take appropriate steps, such as closing the complaint if it is the Complainant that has failed to comply, or proceed with the resolution of the complaint on the basis that the non-compliance gives rise to an adverse inference. This could mean that we will assume the requested information undermines the position of the party that failed to provide the information.

Where a Financial Firm without reasonable excuse fails to comply with our request that materially impacts the dispute resolution process, we may report a serious breach of the Rules under rule A.18. A breach of membership obligations may also be referred to the AFCA Board, with a view to expelling the Financial Firm under our Constitution.

If a Complainant fails to comply with our requirement, we may refuse to continue to consider the complaint. If this occurs and the Complainant owes money to the Financial Firm, the Financial Firm can begin or recommence stayed legal proceedings against the Complainant.

Where we close a complaint because the Complainant has not complied with our requests, we will only reopen the complaint in special circumstances. This will require the Complainant to establish that they had a reasonable excuse for the previous failure to comply with our request within our specified timeframe. To justify the re-opening of the complaint, the

Complainant would also have to be able to show that there are issues that continue to warrant consideration. In addition, all information originally requested by us must be provided.

When considering if there are special circumstances that warrant further consideration, the following factors are relevant:

- Whether the party applied for an extension of time to respond.
- The circumstances giving rise to the failure to comply with our request. It is not enough for the Complainant to say they did not receive our correspondence to explain their prolonged inaction. Personal reasons (such as a critical illness or death of a family member) are only one factor to be considered and must be weighed against competing factors.
- The impact of the failure to comply with our request on the other parties and the likely resolution of the complaint.
- A past history of failure to cooperate with us and our process

A.9.6	When considering a complaint, AFCA may consult with industry and consumer advisers as AFCA thinks appropriate.

When might AFCA consult industry and consumer representatives?

We have internal industry advisers with specialist experience in different fields of financial services. In most cases, we use this internal expertise to advise on what is standard industry practice. We keep up to date with changes in industry practice, the regulatory framework and the broader environment by holding industry and consumer forums. Our internal industry advisers can perform serviceability calculations and determine whether an assessment of affordability of a loan was within good industry practice.

In complaints about a medical indemnity insurer's decision to refuse cover or increase a surcharge based on practitioner conduct, AFCA may obtain advice about this issue from a panel of medical practitioners.

In addition, we may survey or consult with external industry and consumer representatives in our consideration and resolution of complaints. We might seek industry expertise to help us to better understand industry practice, procedures and products where we have not yet formed a view as to what standard industry practice might be.

Examples of issues where we may consult industry and consumer representatives:

- Where the effect or operation of new products or technology (such as RFID chips that allow tap-and-go payment) is not immediately known when it is introduced.
- How long should an agribusiness manager allow a farmer to remain on the land?
- When should a guardian cease to have access to a minor's trust account?
- When an insurance policy is cancelled appropriately, and in accordance with the Financial Firm's obligations under law, is the Financial Firm's only prejudice the outstanding premium?

A.9.7

AFCA may also seek expert advice including from an AFCA-appointed legal expert, industry expert, medical practitioner, building or other relevant expert. AFCA may require the Financial Firm to pay or contribute to the cost provided that:

a) the fees of the expert are reasonable, having regard to the complexity of the complaint and usual market rates; and

b) the person has the necessary expertise.

Unless special circumstances apply, AFCA will not require a Financial Firm to contribute more than $5,000 per complaint to the cost of expert advice obtained by AFCA.

When might AFCA seek expert advice?

We may obtain written expert advice after considering the issues in dispute, exchanging information and discussing the matter with the Financial Firm. We will only do this if we are unable to reach a decision based on what is fair in the circumstances. Factors we will take into account may include:

- the extent to which expert advice would be expected to help AFCA resolve the complaint
- the cost of obtaining the advice • likely delays if we obtain the advice.

An AFCA Decision Maker is normally consulted in making a decision to obtain expert advice.

When deciding whether to appoint a particular person to provide expert advice, we will consider whether that person is an expert in the matter on which advice is to be provided, taking into account, in particular:

- their training and experience, and whether it is recent and relevant
- their independence
- whether they are recognised as an expert in the matter.

Examples where we may be assisted by expert advice:

- A hydrologist in a general insurance complaint about flood damage
- A medical specialist in a life insurance or disability complaint
- A forensic document examiner in a complaint about a forged document
- A real property valuation in a complaint about a mortgagee sale
- An actuary in a complaint about the calculation of superannuation defined benefits (including defined benefit pensions or the commutation value of a pension)

We expect expert advice to set out:

- any assumptions on which the advice is based
- the reasons underpinning the advice
- any qualifications to the advice.

Payments or contributions by Financial Firms

We can require a Financial Firm to pay for, or contribute to, the cost of obtaining expert advice where the requirements of rule A.9.6 are met. Where we intend to do so, we will contact the Financial Firm before requiring the contribution to be made.

We will not require a Financial Firm to contribute more than $5,000 to the cost of obtaining expert advice for a complaint, unless there are special circumstances. This is independent of, and in addition to, any award of cost to a Complainant under rule D.5.2.

Special circumstances may exist where a complaint is particularly complex. A complaint may be particularly complex because it involves, for example:

- multiple products
- challenges to the authenticity of multiple documents
- substantial financial exposure for the parties having regard to our monetary jurisdictional limits.

In cases where we form the view that special circumstances exist, we will contact the Financial Firm as soon as reasonably practicable after making the decision.

A.10 Information sharing and opportunity to make submissions

A.10.1	AFCA will generally share information provided by a party to a complaint with the other parties to the complaint, including after the complaint has been closed, when appropriate.

What is AFCA's general approach to information sharing?

We are committed to affording procedural fairness by sharing information provided by one party with the other party, and by providing all parties with a fair opportunity to make submissions setting out their views.

Consistent with the principles that underpin the scheme, we must manage this process in an efficient way. Therefore, we only share relevant documents with the parties. Further, we try to minimise the number of 'back and forth' between parties sharing information. As a consequence:

- Where a party's submission merely repeats an earlier submission, we do not necessarily provide this to the other party.
- Where one party to the complaint provides some documents to us and we are aware that further documents will shortly be provided, we may wait to receive all documents before providing these to the other party.

What checking occurs before an AFCA decision is made, to ensure a fair opportunity has been provided to the parties to comment on relevant information?

Before an Ombudsman, Adjudicator or an AFCA Panel makes a Determination in relation to a complaint, the AFCA Decision Maker will:

- identify all information including documents and other material on which AFCA proposes to rely in the Determination
- check that all parties have been provided with that information.

When will AFCA provide a party to a complaint with documents after a complaint is closed?

We have in place a privacy policy to ensure that we:

- collect, use and disseminate personal information in a manner that is in accordance with the Privacy Act 1988 (Cth) and the Australian Privacy Principles (APPs) and any relevant other legislation
- respond appropriately to requests in relation to an individual's personal information
- respond appropriately to any breach of our privacy obligations.

Our privacy policy is available on our website. Any individual who wishes to gain access to the personal information we hold about them should initially contact the member of staff dealing with their dispute, but may instead contact the Privacy Manager directly. This can be done by contacting us using our online form or by writing to:

The Privacy Manager

of the Australian Financial Complaints Authority

GPO Box 3

MELBOURNE VIC 3001

We will, on request by the affected individual, provide access to personal information we hold, except where:

- we reasonably believe that giving access would pose a serious threat to the life, health or safety of any individual, or to public health or public safety
- giving access would have an unreasonable impact on the privacy of other individuals
- the request for access is frivolous or vexatious
- the information relates to existing or anticipated legal proceedings between AFCA and the individual, and would not be accessible by the process of discovery in those proceedings
- giving access would reveal the intentions of AFCA in relation to negotiations with the individual in such a way as to prejudice those negotiations;
- giving access would be unlawful
- denying access is required or authorised by, or under, an Australian law or a court/tribunal order
- AFCA has reason to suspect unlawful activity or misconduct of a serious nature has been, is being, or may be engaged in, and both of the following apply:
    - the activity or misconduct relates to AFCA's functions or activities; and
    - giving access would be likely to prejudice the taking of appropriate action in relation to the matter;

- giving access would reveal evaluative information generated within AFCA in connection with a commercially sensitive decision making process; or
- giving access would be likely to prejudice one or more enforcement-related activities conducted by, or on behalf of, an enforcement body.

If we refuse to give access to the personal information, we will usually give reasons why and provide the option to make a formal complaint about the refusal through our complaints and feedback procedure. There may be instances where, having regard to the grounds for the refusal, it would not be appropriate to provide reasons.

A.10.2

Before a complaint is determined by an AFCA Decision Maker, AFCA must provide the parties to the complaint:

a) with access to relevant information; and

b) an opportunity to make submissions.

When will AFCA decide not to provide information to a party?

We are able to decide to withhold relevant information from a party to the complaint if special circumstances apply. We take the approach that special circumstances exist in a very small minority of cases, as fairness is not generally served by reaching decisions adverse to a party based on information not available to that party.

Example of special circumstances that warrant relevant information to be withheld:

- Health and safety concerns, where release of information may harm or endanger a third party.

Rule A.10.4 provides the parties to a complaint with a right to object to their information being shared with the other party. This is discussed in the following guideline.

A.10.3	Despite Rules A.10.1 and A.10.2, AFCA need not provide the parties with any memoranda, analysis or other documents prepared by AFCA's employees or contractors unless required by law.

Will AFCA make available its internal documents to the parties?

Unless required by law, we do not provide the parties with our internal documents, for example, legal advices or draft decisions. These are intermediate steps that may not represent the final position we reach. They have no formal status or bearing on the complaint.

If requested through our Privacy Manager, we can provide the parties with file notes of telephone conversations with the parties where they record relevant information.

A.10.4	Despite rules A.10.1 and A.10.2, AFCA need not provide a party with access to relevant information, if the party that provided the information does not consent to the information being shared with the other party and tells AFCA this when they provide the information. However, if the information is not shared AFCA cannot rely upon it against the other party, unless special circumstances apply.

Can a Complainant or Financial Firm object to AFCA providing relevant information to the other party?

Where a party to a complaint does not want information they have provided to us to be shared with the other party, they may raise this with us at the time of providing the information. They will need to clearly set out:

- the document, or part of a document, that they are concerned about
- the reasons for their concern – supporting information should also be provided where possible
- why the information should be taken into account – the significance and reliability of the information might be relevant considerations here
- how the substance of the information can be provided to the other party to give them the chance to respond and thereby to address any unfairness that would otherwise arise.

A.10.5

A party claiming special circumstances should give reasons why the information should be taken into account without being shared with the other party, and should suggest how the other party can be given an opportunity to rebut the information to the extent it is relevant to the complaint.

We will then assess the matter and decide its course of action. The options for us are:

1. to provide the information in full to the other party notwithstanding the objection

2. to provide the information to the other party, but with some information excised or blacked out

This may be a possibility if the party providing the information is concerned about a small section of a document that can be removed or redacted without obscuring the meaning or importance of the document as a whole.

Examples of where removal or redaction of a small section of a document may be possible:

- A document contains a statement that is defamatory of the other party or someone else and the defamatory statement is not materially relevant to the issues in the complaint.
- A document contains commercially sensitive information that is not materially relevant to the issues in the complaint.

3. to refrain from providing the information to the other party.

If we make this decision, we will not be able to rely on the withheld information in reaching a decision about the merits of the complaint unless special circumstances apply. We are unlikely to find special circumstances exist unless an alternative method can be devised to convey the substance of the information to the other party, and thereby provide that other party with an opportunity to give their perspective in response.

A.11 Confidentiality

A.11.1

AFCA operates on a 'without prejudice' basis. This means that information obtained through AFCA may not be used in any subsequent court proceedings unless required by an appropriate court process.

A.11.2

The parties must maintain the confidentiality of all information provided to them throughout the course of a complaint except:

a) to the extent reasonably necessary to resolve the complaint;

b) to the extent reasonably necessary to discuss the complaint with their lawyer, adviser, Accountant or insurer;

c) with the consent of the part who provided the information;

d) as required or permitted by law; or

e) information that is already publicly available.

Why is it important that parties maintain confidentiality?

Our process relies on active participation by the parties and an open exchange of information, with an opportunity to put forward relevant information and arguments. It is not intended, or permitted, for disclosed information to be used for a purpose other than to resolve the complaint. In particular, complaint parties are not permitted to use the documents obtained through the AFCA complaint resolution process in subsequent court proceedings, unless a court requires documents to be produced. Further, complaint parties are subject to a confidentiality constraint.

We expect complaint parties to participate in the complaint resolution process in good faith, and not use the AFCA scheme for purposes other than resolving the complaint at AFCA.

If a party to the complaint provides confidential information to a lawyer, adviser or other third party for the purposes of AFCA's complaints resolution process, we expect that the third party will similarly treat such information confidentially.

There are a number of exceptions to the confidentiality obligations of complaint parties, which are set out in A.11.2.

A.11.3

For a Superannuation Complaint, AFCA has additional powers to give directions to parties prohibiting or restricting disclosure of documents or information relating to that complaint and affecting who may be present at any meeting relating to that complaint as set out in section 1054BA of the Corporations Act.

How will AFCA approach its confidentiality powers in relation to Superannuation Complaints?

We have a statutory power when dealing with Superannuation Complaints to give oral or written directions to any person prohibiting the disclosure of documents or information relating to the complaint.[15]

We can also give oral or written directions as to who may be present at any meeting held by us relating to the complaint.[16] This includes internal meetings attended by our staff or AFCA Decision Makers. In giving such directions, we must have regard to the wishes of the parties and the need to protect their privacy.[17] There is a statutory penalty if a person refuses or fails to comply with such a direction from us.[18]

We will generally give a confidentiality direction where we agree to hold a meeting following a request by a party (including a joined party).

A.11.4

AFCA must maintain the confidentiality of all information provided to it except:

a) to the extent reasonably necessary to carry out AFCA's responsibilities including under these rules or for any incidental purpose; or

b) as required or permitted by law.

Where AFCA receives protected information provided to it under statutory authority by a regulator or government agency, AFCA will take all reasonable steps to maintain the protected nature of that information.

What exceptions are there to maintaining confidentiality?

Our obligation to maintain the confidentiality of information implies that confidentiality need not be observed if the information is already in the public domain, or if the parties agree to the disclosure of the information.

Our confidentiality obligation does not override our other responsibilities, for example, to report matters to regulators – see rules A.17 to A.20 inclusive.

[15] Corporations Act s 1054BA(1)(a) and (3)
[16] Corporations Act s 1054BA(1)(b) and (3)
[17] Corporations Act s 1054BA(2)
[18] Corporations Act s 1054BA(4)

A.11.5

AFCA may provide information obtained from the parties to a complaint to:

a) any regulator such as ASIC, the Office of the Australian Information Commissioner, APRA, ATO, or a regulated securities exchange; or

b) a disciplinary or professional standards body, industry code compliance committee or other external dispute resolution scheme that AFCA has a written agreement with for the release of such information; or

c) any insolvency practitioner duly appointed to manage the insolvency of a Financial Firm; or

d) any compensation mechanism with jurisdiction over the types of complaints considered by AFCA.

In providing information to these third parties, AFCA will comply with its obligations under the Corporations Act, the Privacy Act and any other relevant legislation.

When is AFCA likely to provide information to a regulator or other body or insolvency practitioner?

We have obligations to provide information to various bodies as set out in rule A.11.5. These obligations arise from legislative requirements, statements of regulator expectations, and memoranda of understanding with bodies to provide information necessary for that body to perform its disciplinary or regulatory function.

A.12 Preliminary assessment

A.12.1

After collecting relevant information and obtaining submissions from the parties to a complaint, AFCA may choose to provide the parties with a preliminary assessment of the complaint. AFCA's preliminary assessment will set out reasons for any conclusions made about the merits of the complaint and will provide a recommendation as to how the complaint should be resolved.

What is a preliminary assessment?

A preliminary assessment will set out:

- the relevant factual information
- the relevant issues arising in the complaint and our preliminary assessment in relation to those issues
- how we think the complaint should be resolved and why
- the timeframe within which the parties must tell us whether they are willing to settle the complaint in accordance with our preliminary assessment.

Where there is more than one Financial Firm, a preliminary assessment would be appropriate if it clarifies the issues between the parties, even if it is clear that each Financial Firm holds the other Financial Firm liable for the loss.

A preliminary assessment may be delivered verbally or in writing. For complaints that do not involve multiple issues, it is often more effective and efficient to provide the preliminary assessment verbally over the phone. Where a verbal preliminary assessment has been given, any written confirmation of that view will normally only be a summary of the points discussed.

We may decide to provide a preliminary assessment in writing rather than verbally, after considering these factors:

- one of the parties asks for the view in writing, or for time to consider our view
- we cannot reach one of the parties, and the view is in the Complainant's favour
- the Complainant has capacity or conduct issues
- the Complainant's contact point is a credit representative
- multiple attempts to contact the Complainant by phone in the past have been unsuccessful
- the Complainant is not contactable by phone, or requested all contact to be in writing.

How does AFCA decide whether a preliminary assessment is appropriate?

We seek to resolve complaints in a way that promotes the most efficient, effective and fair complaint resolution possible. Factors that may suggest a preliminary assessment is appropriate include:

- whether the factual issues in relation to the complaint are complex or unclear
- where there is conflicting opinion, for example, a medical opinion
- where the loss calculation is complex
- where we consider that a preliminary assessment is likely to be helpful to the parties for the purpose of settling the complaint.

We find that preliminary assessments can be useful as a summary of the current position, taking into account all of the information obtained during our investigations. They can, therefore, help the parties focus on the issues in dispute. A preliminary assessment may also highlight missing information that a party considers may influence the outcome of the complaint, and may prompt the party to obtain or provide that information.

A.12.2	AFCA must inform the parties to the complaint that they can either accept the preliminary assessment, or request a Determination and the time they have to make a choice. If they all accept AFCA's preliminary assessment within that time, the complaint is settled on this basis.

How long do the parties have to decide whether to accept the preliminary assessment?

Typically, we will give the parties seven days (for fast track complaints) or 30 days (for other complaints) to tell us whether or not they are willing to settle on the basis of the preliminary assessment or, alternatively, whether they want the complaint to proceed to a Determination.

If the parties accept the preliminary assessment, the complaint is resolved and finalised on the basis set out in the preliminary assessment.

If the parties want to proceed to a Determination, they should use this time as a final opportunity to provide necessary information and documents to support their position, and address matters that may be adverse to their case.

A.12.3

The complaint must proceed to a Determination by an AFCA Decision Maker:

a) if the complaint is about Traditional Trustee Company Services that involve Other Affected Parties – unless all parties accept AFCA's preliminary assessment within the timeframe specified by AFCA

b) for all other complaints, if:

(i) the Financial Firm fails to accept AFCA's preliminary assessment within the timeframe specified by AFCA; or

(ii) either a Complainant or Financial Firm requests that the complaint proceeds to Determination, and provides reasons for disagreeing with the preliminary assessment within the time specified by AFCA.

When must a complaint proceed to Determination?

We take into account the nature and background of each complaint and decide the most appropriate pathway to finalise it, including whether and when it is appropriate to proceed to a Determination.

In some instances, we may decide to proceed directly to a Determination without giving a preliminary assessment – see rule A.8.2.

In other situations, we may decide to not consider the dispute any further without the need for a Determination – see rule A.8.3.

In all other cases, we will proceed to a Determination and make a final decision if any complaint party (including Other Affected Parties for complaints involving Traditional Trustee Company Services) rejects our preliminary assessment giving reasons why they disagree.

Why must the parties give reasons for rejecting a preliminary assessment?

When a Complainant or Financial Firm requests that the complaint proceed to Determination, they must give reasons why they disagree with the preliminary assessment.

Once a preliminary assessment is given, we afford the parties procedural fairness and an opportunity for them to address matters that may be adverse to their position. It is important for parties to explain why they disagree with the preliminary assessment in order that these concerns can be addressed in the Determination. It is not necessary to repeat submissions previously raised and addressed, unless the parties identify an error in fact, or analysis of those prior submissions.

In the absence of providing such reasons, the AFCA Decision Maker is likely to adopt the same approach and reach the same outcome as that expressed in the preliminary assessment.

A.12.4

If the Financial Firm accepts AFCA's preliminary assessment, but the Complainant does not respond within the timeframe specified by AFCA, the complaint may be closed. If the Complainant does not respond or does not accept the preliminary assessment, it will not bind the parties.

What happens when a Complainant does not respond or accept the preliminary assessment?

The preliminary assessment is only binding on the parties if they all accept it and agree to settle on the basis of the recommended outcome.

If any party rejects the preliminary assessment within the timeframe we specify, and provides reasons why, the complaint will proceed to Determination.

For example, if a superannuation provider is unable to accept a preliminary assessment because it believes the preliminary assessment does not reflect its obligations under its governing rules or superannuation law, the superannuation provider may request that the complaint proceed to a Determination.

If the preliminary assessment is that the Complainant has made their case and the Complainant accepts this, but the Financial Firm does not respond, we will proceed to Determination to bring about finality to the complaint.

There are other instances where finality of the complaint may be desirable, even if the Complainant does not respond to the preliminary assessment within time. The gravity of the consequences (such as the possibility of losing one's home to repossession) of certain types of complaints makes it appropriate for us to express a final decision.

For example, certain complaints such as financial difficulty, fast track, and trustee decisions about death benefits warrant a Determination even if the Complainant does not respond.

Otherwise, we may consider a Determination is not warranted and close the file if the Complainant does not respond, regardless of whether the recommended outcome was in favour of the Complainant or Financial Firm. If this occurs, the Financial Firm will not be obliged to follow the recommended outcome even if it was that the Complainant made their case. The Complainant remains free to bring their complaint elsewhere, such as the tribunals or courts.

If the seeks to respond to the preliminary assessment after the file is closed, we will consider if special circumstances warrant re-opening the complaint – see rule A.9.5.

	Financial Firm accepts preliminary assessment	**Financial Firm rejects preliminary assessment**	**Financial Firm does not respond to the preliminary**
Complainant accepts preliminary assessment	Preliminary assessment is **binding on the parties**	**Proceed to Determination**	Outcome – the Complainant made their case: **proceed to Determination** Outcome does not require the Financial Firm to take any action: **file closes**
Complainant rejects preliminary assessment with adequate reasons	Proceed to Determination		
Complainant does not provide adequate reasons or does not respond within time to preliminary assessment	For certain complaints where finality is desirable: **proceed to Determination**. For example, financial difficulty, fast track and trustee decisions about death benefits For all other matters: **File closes**, regardless of whether the recommended outcome is in favour of Complainant or Financial Firm. The Financial Firm is not bound by the preliminary assessment		
Complainant seeks to respond to preliminary assessment after the file is closed	We will only reopen the complaint in special circumstances – see rule A.9.5		

A.12.5

When determining a complaint at the request of a party, the AFCA Decision Maker must consider the party's reasons for disagreeing with the preliminary assessment, but is not limited to those reasons.

What will the AFCA Decision Maker take into account when making a Determination?

When making a Determination, the AFCA Decision Maker will take into account the nature and circumstances of the complaint, the information and supporting documents provided by the parties, and the factors set out in rule A.14 as appropriate, from a fresh perspective.

This means that the AFCA Decision Maker will determine the outcome of the complaint without being bound by any preliminary assessment previously given. While the AFCA Decision Maker will consider the reasons for disagreeing with the preliminary assessment, they must also take into account all the circumstances of the complaint.

A.13 Decision makers

A.13.1

A complaint may be determined by an Ombudsman, an Adjudicator or an AFCA Panel. AFCA's Chief Ombudsman or their delegate allocates complaints to AFCA Decision Makers as they consider appropriate, taking into account:

a) the complexity of the complaint;

b) the amount of loss as well as other potential consequences of the complaint;

c) whether the complaint raises a systemic issue;

d) whether the complaint raises new issues for AFCA of law or good industry practice; and

e) considerations of efficiency.

How does AFCA decide whether a Determination should be made by an Ombudsman, an Adjudicator or an AFCA Panel?

The Chief Ombudsman, or their delegate, decides whether a Determination should be made by a single Ombudsman or Adjudicator, or by a two- or three person AFCA Panel. This decision is made after taking into account the factors set out in rule A.13.1. While efficiency considerations are a factor that is taken into account in selecting the AFCA Decision Maker, we will not make the selection based entirely on resource considerations. The aim will be to select the appropriate AFCA Decision Maker for the particular complaint.

To give an indication of the likely approach:

- An Adjudicator is likely to be the AFCA Decision Maker for a complaint that has a small number of well-defined issues and a low claim amount relative to our monetary jurisdiction.
- If the complaint is complex or involves a significant amount of money, it is more likely to be determined by an Ombudsman than an Adjudicator, because an Ombudsman typically has more expertise in relation to complex and largevalue complaints. The selected Ombudsman would be expert in the law and industry practice relevant to the particular complaint.
- A general insurance complaint that involves an allegation by the insurance company of fraud on the part of the Complainant is likely to be decided by an Ombudsman – see rule A.9.
- A complaint that is about credit or deposit-taking is likely to be decided by an Ombudsman or Adjudicator, rather than an AFCA Panel. If, however, the complaint relates to a margin loan (unless about a break fee) or the complaint is primarily about investment advice and the credit facility issue is an ancillary issue, the complaint may be decided by an AFCA Panel instead.

- If the complaint raises new issues for us, it may be that a multi-person panel of AFCA Decision Makers will determine the complaint. The panel would probably include an industry expert if the complaint was about a new industry product or service. If there are new issues pertaining to consumer behaviour or consumer impact, the panel might include a person who has consumer expertise.

Whether an Ombudsman, Adjudicator or AFCA Panel decides a complaint, the AFCA Decision Maker must consider the adequacy of the information that has been gathered and whether procedural fairness has been provided to the parties. If satisfied as to these matters, the AFCA Decision Maker must decide the complaint applying the relevant decision making criteria – see rule A.14.

A.13.2	When forming an AFCA Panel to determine a complaint, AFCA's Chief Ombudsman or their delegate must consider the Panel Members' expertise and experience and whether, as a group, they will be able to determine the complaint fairly and impartially.

When is it appropriate to refer a complaint to a Panel?

In most cases, a single Ombudsman or Adjudicator will have expertise and access to any relevant industry or consumer advice that is required to decide a complaint, without the need to convene an AFCA Panel.

However, we may elect to decide a complaint by an AFCA Panel where:

- it would be more effective to involve the specialist expertise of an industry or consumer representative directly in the decision making
- the complexity or significance of the complaint warrants it
- it would be valuable to obtain differing views
- the complaint raises circumstances that are largely the same as those raised in a considerable number of other complaints that we are considering or expect to be submitted
- the complaint raises complex or new issues under legislation
- the issues in dispute are new to our jurisdiction, and until we have further experience in determining the issues a Panel may be a more appropriate means to deal with such complaints for a period.

Examples of **general insurance complaints** that might be decided by an AFCA Panel:

- Medical indemnity complaints
- A complaint relating to a claim arising from a significant flood, or other natural disaster, that addresses threshold questions, which affect other complaints
- A complaint raising complex factual questions about medical, engineering, alcohol-related, occupancy or earth movement matters

Examples of **life insurance complaints** that might be decided by an AFCA Panel:

- A complaint about a complex new life insurance product or that raises new issues of good industry practice
- A complaint raising complex factual questions about medical or alcohol or drug related matters
- A complaint where non-disclosure or misrepresentation by the insured has been alleged and that might involve complex underwriting issues or insurance practice issues (that is – cases involving a large volume of material, significant factual disputation or specialist skills)
- A complaint where the life insurer alleges fraud on the part of the Complainant
- A complaint where AFCA has obtained or required the life insurer to obtain an expert report

Examples of **investments complaints** that might be decided by an AFCA Panel:

- A complaint about a complex new investment product or a complaint that raises new issues of good industry practice
- A complaint where we have obtained or required the Financial Firm to obtain an expert report

Examples of **Superannuation Complaints** that might be decided by an AFCA Panel:

- A complaint relating to the distribution of a death benefit where the benefit is of high value
- A complaint involving complex or new financial products, for example, longevity products
- A complaint involving complex or difficult questions of statutory interpretation or interpretation of the governing rules or contract, including a complaint where we refer an issue of law to the Federal Court
- A complaint that raises issues of principles that may have broader application for the fund

We will regularly review and consider whether the criteria for complaints decided by Panels should be adjusted, particularly in relation to Superannuation Complaints, as we gain further insight into the range of Superannuation Complaints lodged with AFCA.

A.13.3

When allocating an Ombudsman or Adjudicator to determine a complaint, AFCA's Chief Ombudsman or their delegate must consider the Ombudsman's or Adjudicator's expertise and experience and whether they will be able to determine the complaint fairly and impartially.

What expertise and experience do AFCA Decision Makers have?

In appointing Ombudsmen and Adjudicators, AFCA's Board of Directors must consider the candidates' objective qualifications, experience and personal qualities. Our Ombudsmen and Adjudicators come from a variety of backgrounds including legal practice, industry and consumer organisations.

Once appointed, AFCA's Chief Ombudsman (or delegate) must again consider the Decision Maker's expertise and experience when allocating complaints to be determined. This is particularly the case when the Ombudsman or Adjudicator works across different product streams and industries. The Ombudsmen and Adjudicators work closely as a group, with peer review of decisions before they are released, and the Lead Ombudsman ensuring quality of decision making.

A.14 Decision-making approach

A.14.1

When determining a Superannuation Complaint, the AFCA Decision Maker:

a) may refer a question of law to the Federal Court in accordance with section 1054C of the Corporations Act; and

b) must apply the approach specified in section 1055 of the Corporations Act.

When does AFCA refer questions of law to the Federal Court?

We may, on our own initiative or if we agree to a request by a party to the Superannuation Complaint, refer a question of law that arises in relation to the complaint to the Federal Court.[19] Typically a referral decision will be made by an AFCA Decision Maker.

We may refer a question of law to the Federal Court if an AFCA Decision Maker forms a view (or agrees with the view of a party to the complaint) that the law is unclear in its application to an issue that arises in a complaint.

Examples of where we might refer a question of law to the Federal Court:

- If we are not certain whether a Determination we propose to make would be permitted by law.
- A Financial Firm may request us to refer the interpretation of governing rules to the Federal Court and we agree that there is sufficient ambiguity in the rules to warrant this course of action.

While the Federal Court is considering the matter, the AFCA Decision Maker cannot make the relevant Determination. Once the Federal Court has issued its ruling, the AFCA Decision Maker must not do anything inconsistent with the ruling.[20]

What approach does AFCA take in determining Superannuation Complaints?

When an AFCA Decision Maker determines a Superannuation Complaint, it has all of the same powers, obligations and discretions of the trustee, insurer, RSA provider or other decision maker whose decision or conduct is being reviewed.[21]

On reviewing a decision of a trustee, insurer, RSA provider or life company (or other decision maker joined to the complaint), the AFCA Decision Maker must do one of the following:

[19] Corporations Act, s 1054C(1)
[20] Corporations Act, s 1054C(3)
[21] Corporations Act, s 1055(1)

1. Affirm the decision if they are satisfied that the decision operated fairly and reasonably in relation to the Complainant (and, in the case of a decision about payment of a death benefit, all joined parties).

2. Vary the decision.

3. Set aside the decision and send it back to the decision maker to reconsider, in accordance with the AFCA Decision Maker's directions or recommendations.

4. Set aside the decision and substitute their own decision.[22]

An AFCA Decision Maker can only make a Determination for the purpose of placing the Complainant (and, in the case of a decision about payment of a death benefit, all joined parties) as nearly as practicable in a position where the unfairness and/or unreasonableness no longer exists.[23]

In addition, an AFCA Decision Maker must not do anything that would be contrary to law, the governing rules of the fund or, if a contract of insurance between the trustee and an insurer is involved, the terms of the insurance contract.[24]

Examples of superannuation Determinations that we do not have the power to make:

- An AFCA Decision Maker cannot change the definition of disablement in an insurance policy.
- An AFCA Decision Maker cannot change the eligibility conditions in an insurance policy.
- An AFCA Decision Maker cannot pay a death benefit to someone who is not a dependant under the governing rules of the fund.
- An AFCA Decision Maker cannot increase the amount of a member's benefit beyond the member's entitlement under the governing rules of the fund.
- An AFCA Decision Maker cannot ignore a valid binding death benefit nomination.

If, however, a complaint is about an unfair or unreasonable decision to admit the Complainant to a life policy fund, the AFCA Decision Maker can:

- cancel the Complainant's membership of the life policy fund (or any sub-plan of the fund)
- vary the governing rules of the life policy fund as they apply to the Complainant
- require the repayment of money received under the life policy
- set aside all of part of the terms or conditions of the life policy as they apply to the Complainant.[25]

[22] Corporations Act, s 1055(2), (3) and (6)
[23] Corporations Act, s 1055 (4) and (5)
[24] Corporations Act, s 1055(7)
[25] Corporations Act, s 1055(6)(c)

Similarly, if a complaint is that the was unfairly or unreasonably sold an annuity policy, contract of insurance or RSA (product), the AFCA Decision Maker can:

- vary the terms and conditions of the product as they apply to the Complainant
- require the repayment of money received under the product
- set aside all, or part of, the terms or conditions of the product as they apply to the Complainant.[26]

In determining Superannuation Complaints, an AFCA Decision Maker will have regard to relevant decisions of the Federal Court about the nature and jurisdiction of the Determination-making powers of the Superannuation Complaints Tribunal (because our powers are based on the Tribunal's powers).

An AFCA Decision Maker will also have regard to relevant Tribunal and AFCA Determinations, but will not be bound by those Determinations because each Complaint must be considered on its merits. We will, however, try to achieve consistency where similar circumstances arise. In determining whether a decision (or related conduct) is fair and reasonable, we may also consider whether the superannuation provider has acted consistently with any relevant industry code or best practice guidelines.

The AFCA Decision Maker must give written reasons for its Determination of a Superannuation Complaint to each party.[27]

A.14.2

When determining any other complaint, the AFCA Decision Maker must do what the AFCA Decision Maker considers is fair in all the circumstances having regard to:

a) legal principles;

b) applicable industry codes or guidance;

c) good industry practice; and

d) previous relevant Determinations of AFCA or Predecessor Schemes.

What is the effect of doing what is fair in all the circumstances?

AFCA is required to decide a complaint based on what is fair in all the circumstances, having regard to factors such as legal principles, good industry practice, codes of practice and previous decisions (which are not binding).

The effect of this is to move decisions away from relying strictly on a legal interpretation of the applicable legislation or the terms and conditions of the disputed financial product to a decision which also contemplates fairness. Setting out guidance as to how the principle of fairness can be applied is beyond the scope of these Operational Guidelines. Despite this, AFCA recognises that legal principles alone do not have the flexibility to allow a claim to be

[26] Corporations Act, s 1055(6)(d)
[27] Corporations Act, s 1055A

decided on other factors which are particular to a specific situation or which are subjective to a particular complainant.

AFCA is required to operate in a way that is accessible, independent, fair, accountable, efficient and effective. Fairness requires complaints to be considered objectively and without bias, and by staff and decision makers with appropriate expertise. If we consider the financial firm has acted fairly or there is simply a misunderstanding between the parties, we will explain our position without any further action. However, if we identify an inherent unfairness, we will seek to address it.

AFCA must deliver not just procedural fairness but also substantive fairness. It is this substantive fairness that some might say is intangible. Despite this, we can all recognise an unfair outcome because it offends our common set of basic values as to what is just and reasonable. As a first step, AFCA must identify the existence and nature of any inherent unfairness.

For example, there may be an improper imbalance in the relationship between a financial firm and complainant. All the circumstances of the case may make it inherently unfair to:

- sell a financial product to a consumer with a cognitive impairment because he did not understand the nature of effect of the contract.
- sell funeral insurance to children because they have low financial literacy and no need for the financial product.
- sell income protection insurance to recipients of welfare or student allowances because they could never claim upon the cover.
- apply fees for no service because no benefit is derived from payment.

An outcome that is disappointing to one of the parties does not mean it is unfair to that party. An essential feature of fairness is that it be applied equally to all the parties. That is, fairness is a two-way street and must be applied to both sides of the scale. AFCA must also take into account all the circumstances of the complaint. This means that applying fairness in circumstances that may look similar on the surface may result in different outcomes that favour the financial firm or complainant.

For example, all the circumstances of the case may make it inherently unfair to permit the situation to stand even though the terms of the financial product allow it.

- A travel insurance policy did not cover costs of returning a motorbike hired from England to the hire company in France, even though the policy would have covered the return costs if it was instead a hire car. It was inherently unfair to deny the claim because the claimed costs were analogous to those which were covered under the policy.
- A travel insurance policy did not cover the cost of alternative flights to avoid missing court proceedings at the destination, even though the policy would have covered the flight costs if instead the complainant was missing a pre-paid sporting event, concert, or conference. It was not inherently unfair to deny the claim because the court proceedings were of a preliminary nature and it was not necessary for the complainant to attend. The claimed event was not analogous to those which were covered under the policy.

What legal principles does AFCA take into account?

When considering a complaint, we identify the relevant legal principles and take these into account. Legal principles are drawn from relevant legislation (e.g. the *Corporations Act 2001* (Cth) or the *Insurance Contracts Act 1984* (Cth)) and case law. If there is a contract between a Financial Firm and a Complainant, we will take into account the terms of the contract.

We are not, however, required to strictly apply legal principles. Where we consider that it is fair in all the circumstances to depart from legal principles, we will explain in the Determination our reasons for doing so.

For example, it may be appropriate to apply a current approach to reach a fair outcome where the law that applied at the time of the disputed conduct is unclear, inconsistent with community expectations or non-existent, or where the interpretation of the law has changed over time and the current approach reflects this. Where it awards compensation, AFCA will normally apply its current approach to assessing what loss has been caused and how compensation should be calculated.

What industry codes, guidance or practices does AFCA take into account?

We will take into account industry codes, practice guides and good industry practice. Guidance may be developed by industry bodies or by regulators, such as the ASX listing or operating rules, Australian Banking Association Financial Abuse Prevention guideline, ASIC and ACCC debt collection guidelines.

When considering good industry practice, we may draw upon the expertise of AFCA's staff, Ombudsmen, Adjudicators or Panel Members. On occasions, we may obtain expert advice as to what is good industry practice – see rule A.9.6.

We will not, however, necessarily be bound by the minimum standard that may be set in a particular industry code. We may consider that it is fair in all the circumstances for the Financial Firm to meet a higher standard than this.

How will AFCA consider complaints where laws codes or standards have changed?

Is it fair to retrospectively apply today's approaches to yesterday's conduct?

AFCA will have regard to the relevant law, codes, and industry practice that were in place at the time of the disputed conduct. It would be unfair to apply contemporary views and approaches now taken to historical conduct for various reasons, including:

- Complainants who did not take any action in respect of their claim until now are potentially in a better position than those that pursued their interests at the time of the disputed conduct.
- It is unfair to retrospectively apply current legislative and regulatory frameworks when the past conduct was consistent with obligations and community expectations at the time.
- Applying a current approach to past conduct could lead to inconsistent outcomes (for example, a different outcome for an AFCA complaint versus a previous FOS or CIO complaint).

When considering past conduct where there is a difference between standards applicable then and now, AFCA will set out which standard is to be applied unless the context already makes it clear.

To what extent are previous decisions followed?

We do not treat previous decisions as precedents. There may be circumstances when a previous decision is not applicable because the facts are somewhat different, or we have changed our approach to a particular class of complaint.

As a general approach, however, consistency of decision-making is important – see rule A.2.1(d). To promote consistency, we are committed to providing information about our decision-making approach. This includes publishing case studies and Determinations.

A.14.3

An AFCA Decision Maker is not bound by rules of evidence or previous AFCA or Predecessor Scheme decisions.

How does AFCA assess information provided by the parties?

We are not a court. We do not require parties to give evidence under oath and do not give parties an opportunity to cross-examine each other. Notwithstanding this, we will investigate a complaint thoroughly before determining the merits of it.

Rule A.14.3 states that we are not bound by the rules of evidence that apply in court proceedings. This means we do not use these rules to decide the admissibility of each document or piece of information.

Examples of possible types of information:

- Expert opinion
- Documents
- Contemporaneous notes
- Information as a pattern of conduct
- Character information

We have an obligation to conduct our enquiries and resolve complaints in a way that draws out the facts and is fair to the parties. Particularly where there is conflicting information provided by the parties, we may need to consider the weight to give to various information provided to us, whether assertions or documentary material. This also depends on the reliability of the information.

The reliability of information depends on the nature and source of the information and how it was obtained. Generally, in the absence of any other compelling factors:

- Information from an independent source is more reliable than information from a party that has an interest in the outcome of the complaint.
- Opinion by an expert with specialised knowledge, or experience, is more reliable than opinion by a less-qualified expert.
- Information that has controls over its creation and maintenance is more reliable than information without these.
- Contemporaneous notes are more reliable than an oral recollection.
- Originals are more reliable than copies.
- Information from one source that is consistent with information from another source is more reliable.

A.14.4

A Determination must be in writing with reasons. Any remedy must be within AFCA's jurisdiction as set out in Section D.

What is set out in a Determination?

A Determination is a written assessment by one or more AFCA Decision Makers (each of whom has been appointed by our Board of Directors) that sets out:

- the relevant factual information available at the time of making the Determination
- the relevant issues arising in the complaint and our analysis of those issues
- our decision as to how the complaint should be resolved and why, including a particular remedy (if any) to be provided to the Complainant.

An AFCA Decision Maker will decide the complaint based on the information available at the time of making the Determination.

A.14.5

AFCA will publish its Determinations in a form which identifies the Financial Firm or Firms against which the complaint is made but does not identify the other parties to the complaint. A Determination will not be published if to do so would risk identifying any party other than the Financial Firm or Firms, or if there are other compelling reasons not to publish it.

Why and how does AFCA publish Determinations?

Although previous Determinations should not be treated as precedents, they do provide users of the AFCA scheme an idea of how similar fact scenarios might be viewed. For this reason, and to ensure consistency and accountability, we generally publish Determinations on our website.

With the exception of financial firms that complaints are made against, AFCA will not identify the parties in its published Determinations. While current or former AFCA members will be named in a determination where they are parties to the relevant complaint at the time the Determination is issued, AFCA will not name individual employees, agents or representatives of the AFCA member.

Parties to a complaint are able to request that:

- certain details be changed in the Determination, if those details can be used to identify a party other than the financial firm or firms (as long as the substance of the Determination remains unaffected), or
- the Determination not be published (provided there are compelling reasons). Similarly, a party can request a Determination that has already been published to be further de-identified or removed.

Determinations issued before 1 October 2019 do not identify any of the parties, including the financial firm.

Does AFCA publish every Determination?

AFCA's normal practice is to publish all Determinations. It will only withhold a Determination from publication if

- the content of the decision would be likely to identify parties other than the financial firm without such drastic editing that the reasons for the decision would not be clear; or
- there are other compelling reasons not to publish.

The mere fact that adverse findings within a Determination may be embarrassing to a financial firm will not be a compelling reason to not publish it. However, AFCA may decide a Determination should not be published if, for example

- its content would unavoidably identify third parties or reveal commercially confidential information to a significant extent, and this could not be overcome by editing the content of the Determination
- revealing the outcome or reasons could threaten the safety of an individual
- revealing the outcome or reasons could compromise legal or regulatory action by a regulatory agency, or could encourage or inform future criminal activity

Determinations are normally published 30 days after the complaint is finalised and AFCA closes its file. Financial firms that are named in a determination will be informed of this when they are provided a copy of the Determination and will be given 30 days to raise compelling reasons against being named in the published determination.

If a party to the complaint does not want the Determination published, they should contact AFCA with a request not to publish and the reasons, as soon as possible after receiving the Determination. AFCA will take such requests into account but is not bound by the wishes of a party.

A.15 The effect of Determinations

Is it possible to appeal a Determination?

A Determination is the final stage in our complaint resolution process, regardless of whether it is accepted by a Complainant. Other than by reference to the Courts, it is not possible to appeal a Determination. For Superannuation Complaints, an appeal can be made to the Federal Court if the Determination involves an error of law, but not to revisit the merits of the Determination. For other complaints, the grounds for challenging our Determination are limited and parties should seek their own advice.

We have internal review processes to ensure the quality of Determinations before they are finalised and issued to the parties. We recognise, however, that occasionally a Determination may contain an arithmetical error or other accidental error.

We may correct a Determination if it contains:

- a clerical mistake
- an error arising from an accidental slip or omission
- a material miscalculation of figures or a material mistake in the description of any person, thing or matter
- a defect of form.

If a party to a complaint considers that a Determination requires a correction to address an issue listed above, they may write to us to request the correction. The request should explain the issue to be addressed through the correction.

An Ombudsman or Adjudicator will decide whether we should make any correction. We may correct a Determination whether or not a party to the complaint requests a correction.

Is it possible to ask that AFCA's approach in its Determinations be reviewed for future complaints?

We have informal and formal review mechanisms that Financial Firms, industry bodies or consumer organisations can use to raise any significant concerns about the underlying approach taken by us in one or more Determinations.

These review mechanisms are intended to enable review of our approach in our Determinations to assess whether we should continue to take that approach, or modify it for future complaints. Because of the final and binding nature of individual Determinations, these review mechanisms are not available to be used by Complainants or Financial Firms to reopen an individual Determination or change its outcome.

For an informal review about the approach we have taken in our decisions, we encourage stakeholders to raise the concern directly with a Lead Ombudsman or the Chief Ombudsman. We will internally review whether we should change our approach for future complaints and explain (if necessary, in writing) the basis of our views to the stakeholder

when the review is completed. If we propose to change our approach as a result of the issues raised by the stakeholder, we will explain the change in our regular publications and also in our regular meetings with interested stakeholders.

A formal review is designed to be used primarily by an industry body on behalf of its members, or a consumer organisation on behalf of consumers. A request for a formal review must be accompanied by legal advice from external counsel that AFCA made an error of law. The request must also outline the adverse impact of the error, and (where an industry body seeks the review) an undertaking to enter a Costs Contribution Agreement with AFCA to, for example, cover reasonable costs incurred by a consumer organisation in commenting on the body's legal advice. Interested stakeholders should contact us for further details.

A.15.1	In the case of a Superannuation Complaint, a Determination by an AFCA Decision Maker has effect and comes into operation as prescribed by sections 1055B, 1055D and 1057A of the Corporations Act. AFCA must give each party a written notice informing the party that they may appeal its decision to the Federal Court on a question of law under section 1057 of the Corporations Act.

What is the status of a Determination of a Superannuation Complaint?

Our Determination of a Superannuation Complaint comes into effect immediately it is made, unless the AFCA Decision Maker states a later effective date in the Determination.[28] If the Determination varies or substitutes for the original decision of the trustee (or other decision maker), it is taken to be the original decision and, therefore, has effect from the date of the original decision.[29] The Determination also binds third-party decision makers that have been joined to a Superannuation Complaint about a disability benefit.[30]

Each party to a Superannuation Complaint has a right of appeal to the Federal Court on a question of law within 28 days after the day when a copy of the Determination has been given to the party (unless the Federal Court allows a further period).[31]

We will notify each party that they have a right to appeal to the Federal Court if they think the AFCA Decision Maker has made an error of law in determining a Superannuation Complaint. A party cannot appeal to the Federal Court because it thinks the AFCA Decision Maker should have made a different Determination, unless an error of law has been made.

[28] Corporations Act, s 1055B(1) and (2)
[29] Corporations Act, s 1055B(3)
[30] Corporations Act, s 1055D

[31] Corporations Act, s 1057(1) and (2)

Examples of an error of law:

- We did not provide procedural fairness in determining a Superannuation Complaint.
- The AFCA Decision Maker incorrectly applied the governing rules.
- The AFCA Decision Maker paid a death benefit to a person on the basis that the person was in an interdependency relationship with the deceased member, when there was no evidence to support an interdependency relationship.
- The AFCA Decision Maker varied the terms of an insurance contract between the trustee and the insurer.

An appeal to the Federal Court does not affect the immediate operation of the Determination of a Superannuation Complaint, unless the Federal Court makes an order that defers the operation of the Determination or prevents its implementation.[32]

A.15.2

In the case of a complaint about Traditional Trustee Company Services that involves Other Affected Parties, a Determination by an AFCA Decision Maker:

a) has effect and comes into operation on the date specified by the AFCA Decision Maker; and

b) is binding upon the Financial Firm from that date.

What is the process for a Determination about a multi-party Traditional Trustee Company Service coming into effect?

If a complaint about a Traditional Trustee involves one or more Other Affected Parties, the Complainant and the Other Affected Parties will have agreed in advance to be bound by the outcome under Rule B.5.1(d). As a result, a Determination will come into effect and is binding on all parties from the date specified by the AFCA Decision Maker.

[32] Corporations Act, s 1057A

A.15.3

In the case of any other complaint, a Determination by an AFCA Decision Maker is final, and is binding upon the parties if accepted by the Complainant within 30 days of the Complainant's receipt of the Determination.

If rule A.15.3 applies, the Financial Firm may ask the Complainant to provide it with a binding release from liability in respect of the matters resolved by the Determination, provided the release:

a) is limited to the matters dealt with in the Determination, and

b) is consistent with the Determination, and

c) is provided to the Complainant within a timeframe specified by AFCA.

If a Financial Firm asks a Complainant to provide it with a binding release in accordance with this rule, the Complainant must complete the release. The release shall be effective from the date on which the Financial Firm fulfils all of its obligations under the Determination.

What is the process for acceptance of a Determination about other complaints?

For other complaints (complaints that are neither a Superannuation Complaint nor a Traditional Trustee Company Services complaint that involves Other Affected Parties), the Complainant has 30 days to decide whether to accept the Determination. If the Complainant considers that this timeframe is inadequate, for example because extra time is needed to consult with someone, the Complainant should ask us for an extension of time.

The decision as to whether to accept or reject a Determination is an important decision. If the Complainant accepts a Determination, the Complainant cannot later change their mind and reject it. If the Complainant rejects a Determination, the Complainant is able to institute legal proceedings to pursue their claim against the Financial Firm.

Where a Complainant accepts a Determination, the Financial Firm may ask the Complainant to provide a binding release from liability – see guideline to rule A.15.4.

If a Determination has been accepted by a Complainant and, if applicable, a release signed, the Financial Firm is bound by that Determination. The Financial Firm, under its contract of membership with AFCA, must provide any remedy specified in the Determination within the timeframe specified.

If a Financial Firm does not comply with a Determination, we are required[33] to report this to ASIC. Our Constitution also provides that the Board of Directors can pass a resolution expelling the Financial Firm from membership. The Financial Firm would be given the opportunity to make submissions before the expulsion decision. If we expel a Financial Firm, we must advise the Financial Firm and ASIC. Because most Financial Firms are required by

[33] Corporations Act, s 1052E (1)(d)

legislation to be a member of AFCA, expulsion could risk the Financial Firm's right to continue to operate its business.

Can the Financial Firm ask a Complainant to sign a release?

Where a Complainant accepts a Determination, the Financial Firm may ask the Complainant to provide a binding release from liability. We expect the release to:

- be drafted fairly with a clear scope, and should finalise the dispute
- follow our core guiding principles to protect each party's rights, reflect the agreement between the Financial Firm and the Complainant, and not introduce new terms
- clearly set out the consequences of defaulting on the terms of the release. For most debt-related disputes, we would expect:

    1. That the terms of the release should generally give the applicant seven days notice to remedy a default before the Financial Firm takes action. If the Financial Firm then intends to reinstate legal proceedings, the notice should state that the Financial Firm may obtain judgment by default unless the Complainant corrects the default or files a defence with the court.

    2. They should not prevent the Complainant from disputing whether either party complied with the terms of the release.

    3. They may allow discontinued legal proceedings to be restored or reinstated on default. If so, the proceedings might need amending to reflect that a settlement agreement was not met.

    4. They should not require the Complainant to consent to judgment.

    5. The release should cover the Financial Firm's right to enter judgment on default, or to restore legal proceedings if the Complainant breaches the terms. This should not allow the Financial Firm to try to recover more than the agreed settlement or determined amount plus recovery costs (except where the debt has not been disputed, or the applicant is free to defend the initial claim).

If a Financial Firm requires a release, it must prepare the release and bear all associated costs. We will advise the Complainant to obtain legal advice about the wording of the release and may (in circumstances where the release is particularly complex) require the Financial Firm to pay costs incurred by the Complainant in obtaining this advice.

We will not provide legal advice to the Complainant about the effect of a release prepared by a Financial Firm. But we will conduct a limited review of the release. If we form the view that the release is consistent with the principles set out above, but the Complainant refuses to sign the release, we will not enforce the Determination even though it remains binding upon the Financial Firm. It is open for a Complainant who feels strongly against entering into a release to pursue their concerns outside of the AFCA scheme.

If we consider the release unacceptable, we will raise our concerns with the Financial Firm and ask it to redraft the release.

Examples of issues that AFCA may raise in relation to a release:

- The release does not accord with the Determination.
- The scope of the release is unreasonably wide.
- The release purports to prevent the Complainant enforcing the Financial Firm's compliance with its obligations.

A.15.4

If a Complainant does not accept a Determination, the Complainant is not bound by the Determination and may bring an action in the courts or take any other available action against the Financial Firm.

What are the consequences of a Complainant not accepting a Determination?

We provide an external dispute resolution service as an alternative to the Courts. A Complainant is not bound to a Determination unless they accept it as a binding resolution of their complaint. If they do not accept the Determination, they retain their right to pursue their claim against the Financial Firm through the Courts. The Complainant should seek their own legal advice if they wish to take legal action in the Courts.

A.16 Complaints about AFCA's service

A.16.1

A party to a complaint who is dissatisfied with the standard of service provided by AFCA when dealing with a complaint may lodge a complaint with AFCA about its service. Any user of the AFCA service including a Complainant, Financial Firm, joined party or representative of a party may lodge a complaint about AFCA's service.

How can a complaint be made about AFCA's consideration of a complaint?

If a Complainant or a Financial Firm, or other party to a complaint, is dissatisfied with the standard of service we provided when considering a complaint, they may call or write to us to lodge a complaint about our service. The complaint should be as specific as possible about the reasons for dissatisfaction, and be initially directed to the AFCA staff member they have been dealing with, or their manager. Alternatively, it is possible to phone 1800 931 678 and ask to speak to someone who can look into the concerns.

A service complaint against AFCA can be lodged through our online feedback form at www.afca.org.au or emailed to info@afca.org.au or posted to:

The Service Complaints Manager

Australian Financial Complaints Authority

GPO Box 3

Melbourne Vic 3001

Can a complaint be made about an AFCA Determination?

A Determination is a final decision. It is not possible to use the AFCA process for addressing service complaints to seek to re-open a Determination. If a service complaint against AFCA is made that, in effect, relates to a concern that a Determination reached the wrong outcome, we will advise that Determinations made by AFCA are final and our Complaints and Feedback procedure cannot be used as a review mechanism.

A.16.2

Where a party to a complaint expresses dissatisfaction to AFCA about its complaints service, AFCA must respond to the person within a reasonable timeframe. If that person remains dissatisfied after receiving that response, they may refer their concerns to the Independent Assessor within the timeframe specified in the Independent Assessor's Terms of Reference.

How does AFCA consider complaints about the service it provides?

We have a Complaints and Feedback Policy and Procedure available on AFCA's website that explains how we respond to complaints about our service. A summary also appears as a webpage on AFCA's website.

In brief, we aim to resolve most complaints in the first telephone call. Where this does not occur, an AFCA staff member who has not been involved in the matters raised in the complaint, acknowledges, assesses and then provides a response to the complaint. Typically, an acknowledgement is provided within seven days and a full response is provided within 28 days of the acknowledgement.

A.16.3

The Independent Assessor is appointed by AFCA's Board. The Independent Assessor's role is to consider whether AFCA provided an appropriate standard of complaints handling service. The Independent Assessor's function supplements AFCA's complaints and feedback process, which deals with complaints about AFCA's service. The Independent Assessor does not have power to re-open a complaint submitted to AFCA or to consider the merits of a complaint or the substantive outcome of a complaint.

A.16.4

If the Independent Assessor finds that AFCA has not provided an appropriate standard of complaints handling service, the Independent Assessor must recommend in writing to AFCA the action that AFCA should take. This may include compensation if an unusual degree of distress or inconvenience has been incurred by the person who escalated the complaint to the Independent Assessor (capped at the maximum amount that may be awarded under these Rules for non-financial loss). The Independent Assessor cannot make a recommendation that AFCA give consideration to re-opening, changing or correcting a Determination or other finding issued by AFCA about the merits of a complaint, or AFCA's jurisdiction.

A.16.5

The Independent Assessor must provide a copy of their recommendation to the person who referred the matter to the Independent Assessor.

A.16.6

The Independent Assessor is governed by separate Terms of Reference set by the AFCA Board, in accordance with any regulatory guidance.

What avenues are possible if AFCA's complaint response does not resolve the concern?

Any person or business directly affected by how we deal with a complaint can complain to the Independent Assessor. Before a service complaint against AFCA can be made to the Independent Assessor, we must have had a reasonable opportunity to respond through our own internal process for dealing with service complaints.

If a party who complains about our service remains dissatisfied with our response to their complaint, they can refer their concerns to the Independent Assessor, who will independently consider and respond to their complaint.

This can be done by using the Independent Assessor online form or by sending a written complaint to:

The Independent Assessor

Australian Financial Complaints Authority

GPO Box 3

MELBOURNE VIC 3001

The Independent Assessor does not review the merits or substance of our decision or the underlying complaint. Rather, the Independent Assessor considers whether the service we provided was satisfactory and, if not, can recommend what action we should take to address the service issues raised. The Independent Assessor will provide findings in writing and provide these to the party who complains, and to us.

There is no further appeal against the Independent Assessor's findings and recommendation. The Independent Assessor's recommendation will be considered by the AFCA Chief Ombudsman. If the AFCA Chief Ombudsman does not accept the recommendation, it will be referred to the Chair of the AFCA Board, or the AFCA Board in line with the process that is set out in the Independent Assessor's Terms of Reference.

The Independent Assessor has their own Terms of Reference that set out the types of complaints they can consider and what remedies they can offer. Information about their Terms of Reference and function is available on our website at www.afca.org.au.

A.17 Systemic issues

A.17.1

A systemic issue is an issue that is likely to have an effect on consumers or Small Businesses in addition to any Complainant.

What is a systemic issue?

A systemic issue is one that has been raised in a complaint or several complaints, or is otherwise identified by information obtained by, or provided to, us that is likely to affect a class of persons beyond any person who lodged a complaint or raised a concern.

Several complaints of the same type or a single complaint may raise a systemic issue, provided that the effect of the issue may clearly extend beyond a single Complainant.

Examples of systemic issues:

- A disclosure document that is inadequate
- A systems issue that produces errors, for example, benefit calculation errors or interest calculation errors
- A unit pricing error that incorrectly allocates investment earnings to members
- A documented procedure that does not comply with legal requirements, for example, it permits privacy requirements to be breached
- A procedural weakness that is liable to recur
- An erroneous interpretation of a superannuation trust deed provision
- A group insurance administration error that does not record cover for eligible members

A.17.2

AFCA will investigate potential systemic issues. In doing so, it:

a) must raise the potential systemic issue with the relevant Financial Firm and give it a reasonable opportunity to respond

b) can require the Financial Firm to provide any information and documents AFCA considers necessary to investigate the issue.

What is AFCA's role in systemic issues?

We identify systemic issues that have implications beyond the immediate actions and rights of the parties to a complaint. Where we do so, we refer the issues to the relevant Financial Firm for a response and report the issues to ASIC.[34] However, we are not a regulator of the financial services industry. Any regulatory action is appropriately addressed by the relevant regulator or the OAIC. The Rules and these guidelines to the Rules explain how we will comply with our systemic issues obligations.

How does AFCA identify a systemic issue?

When we receive a complaint, we will consider whether it raises an issue that is possibly systemic. As we learn more about the issues in a complaint, we will continue to revisit whether the complaint gives rise to a possible systemic issue. Accordingly, identification can occur at any stage throughout the complaint resolution process.

Examples of characteristics that may assist in identifying a possible systemic issue:

- Receipt of a number of new complaints about the same issue
- Where the issue that affected the particular parties to the complaint could have affected others in a similar way
- Where the Complainant claims the issue affected others in a similar way
- Where the Financial Firm indicates it has internally identified that the issue raised affected others in a similar way

[34] Corporations Act s1052E(4)

A.17.3

If AFCA identifies a systemic issue as a result of its investigation, it will:

a) refer the issue to the relevant Financial Firm for remedial action;

b) obtain a report from the Financial Firm as to the remedial action undertaken; and

c) continue to monitor the matter until a resolution has been achieved that is acceptable to AFCA.

What steps does AFCA take in relation to a possible systemic issue?

If we consider a complaint raises a possible systemic issue for the Financial Firm, we will write to the Financial Firm:

- detailing the possible systemic issue raised by the complaint
- seeking further information
- inviting the Financial Firm to make submissions in response.

When we receive the Financial Firm's response, we will consider the information provided and make a decision as to whether the issue is definitely systemic in nature. An AFCA Decision Maker is normally involved in making this decision.

A.17.4

As part of investigating and referring a systemic issue to the Financial Firm for remedial action, AFCA can require the Financial Firm to do, or refrain from doing, any act that AFCA considers reasonably necessary to achieve any one or more of the following objectives:

a) facilitating AFCA's investigation of the systemic issue;

b) improving industry practice and communication;

c) remedying loss or disadvantage suffered by consumers or Small Businesses (whether or not they have complained about the systemic issue);

d) preventing foreseeable loss or disadvantage to consumers or Small Businesses;

e) minimising the risk of the systemic issue recurring; or

f) efficiently dealing with multiple complaints related to the systemic issue.

What happens once AFCA considers an issue is systemic?

Where we determine an issue is definitely systemic in nature, we work with the Financial Firm to ensure all affected persons are identified and appropriately compensated for any financial loss and a strategy is put in place to prevent the problem from recurring.

We may request further information from the Financial Firm to identify the specific matter that caused the systemic issue, and/or to identify the affected group (both past and existing customers or fund members).

Examples of steps that may be required to be taken by a Financial Firm include:

- Financial Firm advertisements in newspapers at agreed intervals to promote contact with all affected customers/fund members
- Financial Firm establishing a dedicated toll-free number to take calls relating to the systemic issue
- Financial Firm sending a letter to affected customers/fund members explaining the issue and resolution that has been agreed with AFCA
- Financial Firm posting updates about the issue and its resolution on its website
- Agreeing on a formula or approach to calculate and reimburse the financial loss of the affected customer group
- Agreeing on a timeframe within which the identification and reimbursement process will be completed
- Ensuring the Financial Firm rectifies the systemic issue so it does not occur in the future

Throughout this process, we expect the Financial Firm to respect our independence and ensure this is reflected in all of its communications and in any litigation that may arise between the Financial Firm and any affected customer. If a regulator is also overseeing the

remediation of the systemic issue, we will liaise with the regulator to facilitate a consistent approach.

We will also operate as an avenue of redress for affected customers/fund members who claim they have particular rights or circumstances, which means the formula or approach to calculate and reimburse customer/fund member financial loss is not adequate for them. In relation to such appeals, the Financial Firm will be bound by our decision in accordance with its Rules.

A.17.5

In accordance with the Corporations Act, the Privacy Act and any other relevant obligations, after identifying a systemic issue AFCA must report the issue to:

a) ASIC;
b) the Australian Prudential Regulation Authority;
c) the Commissioner of Taxation;
d) the Office of the Australian Information Commissioner; or
e) any other appropriate body.

What systemic issues are AFCA required to report?

We are obliged by legislation,[35] ASIC Regulatory Guide 267, and our Rules to report systemic issues to regulatory and other bodies. The primary purpose of this reporting requirement is to enable the recipient body to consider whether regulatory action is necessary.

We do not wait until the underlying complaint, or the systemic issue investigation, has been finalised before reporting to the relevant regulator. Once a definite systemic issue has been identified, we will report it to the relevant regulator within the required timeframe set out in relevant regulatory guidance or other requirements. Prior to determining that there is a definite systemic issue, however, a Financial Firm will have normally had the opportunity to respond to the issue and provide us with relevant information.

Examples of systemic issues reportable to ASIC or other regulator:

- Credit policy and procedures that do not meet responsible lending obligations
- Errors in credit reporting processes, leading to incorrect default listings being made to a credit reporting body
- Poor IDR procedures involving significant complaints handling delay
- An administration error that affects multiple fund members

[35] Corporations Act 1052E(1)

A.18 Serious contraventions and other breaches

A.18.1

In accordance with the Corporations Act and any other relevant obligations, AFCA must refer certain matters to the bodies listed in rule A.17.5, such as:

a) the particulars of a settlement under section 1052E(3) of the Corporations Act if AFCA thinks the settlement may require investigation; and

b) serious contraventions by Financial Firms.

What settlements might AFCA report?

If the parties to a complaint made under the AFCA scheme agree to a settlement of the complaint and we think the settlement may require investigation, we must give particulars of the settlement to one or more of the regulators,[36] which may include the name of the Financial Firm, licensee, representative or employee involved (as appropriate).

Examples of settlements reportable to a relevant regulator, such as ASIC:

- It is so broad that it precludes a consumer lodging a further complaint or taking other action in relation to matters that are not the subject of the complaint.
- It precludes a consumer referring a complaint to a regulator.
- It is offered on onerous or unjust terms, or appears designed to avoid our scrutiny.
- It is entered into as a result of duress or misrepresentation.

What serious contraventions are AFCA required to report?

We must give particulars of a contravention, breach, refusal or failure to a regulator or other appropriate body if:

a) there are sufficient facts or information to form an objectively reasonable belief that the contravention is serious

b) in good faith we form the view that a serious contravention of the law (relevant to the subject matter and circumstances of the complaint and our complaint handling processes) may have occurred

c) a contravention of the governing rules of a regulated superannuation fund, or an approved deposit fund, may have occurred

d) a breach of the terms and conditions relating to an annuity policy, a life policy or an RSA may have occurred

e) a party to the complaint may have refused or failed to give effect to an AFCA Determination.

[36] Corporations Act 1052E(3)

We are not required to notify the Financial Firm before reporting a serious contravention or breach to a regulator but, where appropriate, we will do this at the time of, or before, reporting the breach.

Examples of serious contraventions reportable to ASIC:

- A mortgage broker has provided misleading, deceptive, or possibly fraudulent conduct when preparing a loan application.
- A Financial Firm may have engaged in unconscionable conduct when selling insurance that was not needed or would be unable to be claimed upon.
- A Financial Firm failed to ensure that client money was deposited into trust accounts as required by the Corporations Act.
- A superannuation provider charged fees it was not permitted to charge.

A.18.2

In addition to AFCA's reporting obligations under rule 18.1, AFCA may report to ASIC other serious breaches including non-compliance with these rules.

What other serious breaches might AFCA report to ASIC?

Under the AFCA Constitution, our Rules form a binding contract between each Financial Firm and AFCA. Each Financial Firm is therefore bound to comply with its obligations under the Rules.

Our response to AFCA Member non-compliance with its obligations will depend on the circumstances of each individual case. Our powers include expel ling the Financial Firm for non-compliance. The process for this is set out in clause 3.4 of the AFCA Constitution.

If a Financial Firm has seriously breached its contractual obligations under the Rules, we may report the Financial Firm to ASIC.

A.19 and A.20 Collection and publication of information

A.19.1

AFCA must collect and record comprehensive information about its complaint resolution, for example:

a) the number of complaints and enquiries, including the number of complaints referred to a Financial Firm to resolve through internal dispute resolution;

b) demographics of the Complainants;

c) details of complaints that AFCA excluded and why;

d) the outcome of complaints that were resolved by AFCA;

e) the current caseload, including the age and status of open cases;

f) the time taken to resolve complaints; and

g) a profile of complaints that identifies:

   (i) type and purpose of Financial Service;

   (ii) type of Financial Firm;

   (iii) issues raised in complaints; and

   (iv) any systemic issues or other trends.

What statistical information is AFCA obliged to collect and record?

We are obliged under ASIC Regulatory Guide 267, and our Rules, to collect, record and report certain statistical information to regulators and other bodies. Examples of this statistical information are set out in rule A.19.1.

We may also collect other relevant information to assist us to effectively resolve complaints, and to analyse and report on other relevant issues, including complaint trends and systemic issues. We also collect and record information concerning complaints and feedback about our service and complaints dealt with by the Independent Assessor.

We classify complaints according to the product or service they relate to, the issues they raise, and the sales or service channel through which the consumer purchased the products or services in dispute. This information assists us to select the most appropriate way to help the parties resolve complaints. It also enables us to report accurately and thoroughly about the complaints we have dealt with. We continue to update our complaint data and information as complaints progress and are resolved.

Where there is more than one product or service that has been complained about and more than one issue raised, there are different ways that we can count and report on complaints. We can count a complaint that involves multiple products and issues as a single complaint because it comes from one consumer and we hold one case file on it. Alternatively, we can count it as multiple complaints:

one for each product or distinct issue in dispute. Which of these counting methods we use depends on what we are reporting.

We explain this further when we publish this information in our annual report.

A.20.1

To facilitate public reporting, AFCA must produce a report at least every

12 months and provide this to ASIC, the Financial Firms and the public via AFCA's website. This report must be a comprehensive summary and analysis of the data collected. Among other things, it must include statistical information about:

a) the number of complaints submitted to AFCA per Financial Firm;

b) the number of complaints closed per Financial Firm; and

c) the outcome of those complaints.

A.20.2

AFCA will also provide quarterly reports to ASIC in respect of its operations.

How does AFCA report data to ASIC?

We must produce an annual public report that contains a comprehensive summary and analysis of the complaints we have received and dealt with, and the data we have collected during the year. This report must also include statistical complaint information about each Financial Firm, subject to any minimum threshold we may impose. In doing this, we:

- ensure the information is accurate
- present the information in the appropriate context, for example, by categorising AFCA Member information according to industry sector and the size of business and, in a superannuation context, by fund
- operate transparently as required by rule A.2.1(f).

The data will be collated from the information provided by the parties to us, and our analysis of complaints. We will normally publicly report on a financial year basis.

As part of this annual reporting, we may provide a separate comparative report that details the annual complaints statistics by Financial Firms.

We are required to report to ASIC about complaints we have received and closed on a quarterly basis.

A.21 and A.22 How AFCA operates and Immunity from liability

A.21.1	The Board of Directors of AFCA appoints the Ombudsmen, Adjudicators and Panel Members.

Who is an AFCA Decision Maker?

An AFCA Decision Maker could be an Ombudsman, an Adjudicator or a Panel. Ombudsmen and Adjudicators are employees of AFCA, while Panel members normally provide services to AFCA on a sessional basis.

What are the powers of an AFCA Decision Maker?

In its non-superannuation jurisdiction, an AFCA Decision Maker has the power to exercise all powers and discretions conferred on AFCA by the Rules, including resolving complaints by making Determinations.

In its Superannuation jurisdiction, an AFCA Decision Maker is also bound by the Corporations Act – see rule A.14.1.

AFCA Decision Makers are appointed by the AFCA Board as independent decision makers. AFCA Decision Makers operate independently of other AFCA staff in making decisions.

A.21.2	The Chief Ombudsman is responsible for the operations of AFCA, and is able to authorise an employee or contractor to AFCA to carry out any responsibility of AFCA other than making a Determination.

What are the powers of other AFCA staff members?

The Chief Ombudsman is also the Chief Executive Officer of the company that operates the AFCA scheme. The Chief Ombudsman is operationally responsible to the AFCA Board, and is authorised to delegate responsibility (other than making a Determination) to other AFCA staff.

The extent of this delegated authority will differ between AFCA staff depending on their role, function and seniority.

A.21.3	These rules specify some timeframes that apply to parties to a complaint. Unless a rule expressly states otherwise, AFCA may extend a timeframe if it considers this appropriate (even if the original period has ended).

Can AFCA extend a timeframe specified in the Rules?

We can extend a timeframe unless the rules state otherwise.

Because of rule B.4.4.1, no extension is possible to the timeframes that apply to submitting a Superannuation Complaint about the payment of a disability benefit or a death benefit, or about a contributions statement given to the Australian Taxation Office.

Where an extension is possible, we can provide this, whether or not the timeframe has ended or has been extended before.

Timeframes specified in the Rules that we are able to extend are:

- Rule A.15.3 – 30-day timeframe to decide whether to accept a Determination.
- Rule B.5.1(b) – 28-day timeframe for a Complainant in a Traditional Trustee Company Services complaint to consent in writing to being bound by the outcome of our considering of the complaint.
- Rule B.5.1 – 28-day timeframe for Other Affected Parties in a Traditional Trustee Company Services complaint to consent in writing to us considering the complaint.

What other timeframes can AFCA extend?

We usually provide a specific timeframe for parties to a complaint to provide information or their views. We specify what we consider to be a reasonable timeframe, typically between one to two weeks, taking into account:

- the circumstances of the complaint
- the nature of the requested information
- what steps will need to be undertaken by the Complainant or Financial Firm to obtain requested information.

How can a party to a complaint apply for an extension of time?

A party to a complaint may request an extension of time. This can be done by phone or in writing by providing:

- details of the extension sought
- the reasons an extension is needed
- supporting information, where this is available.

What approach does AFCA take to an application for an extension of time?

The Rules require us to consider complaints in a timely manner. An extension of time can delay the resolution process. For this reason, we only provide an extension where sound reasons are provided for an extension. To confirm whether this is the case, we may ask the

party to the complaint seeking an extension to provide further material to support of their request.

Where, however, a request is made by a Complainant for an extension of time to decide whether or not to accept a Determination, we will usually agree to at least one extension. We usually allow an extension because we recognise it is important to a Complainant to decide whether to accept a Determination.

Factors we consider when deciding whether to agree to an extension of time include:

- our obligation to resolve complaints in a cooperative, efficient, timely and fair manner
- the reasons for the delay
- whether the party requesting the extension could take steps to avoid or reduce the delay
- whether the party has acted promptly and diligently
- the impact of an extension on the other parties and the resolution of the complaint
- where the extension of time is to provide requested information, we may make the extension subject to conditions required for individual complaints.

For example, we may request information be provided to us in a format that enables it to be readily analysed.

Where we decide to provide an extension of time, we need to decide what period of extension to grant. Typically, we will not grant an extension that is longer than the original timeframe. We will specify a shorter extension if we consider that this would adequately address the party's reasons for the delay.

We will inform the parties when we agree to an extension.

A.22.1

AFCA, the Chief Ombudsman, Ombudsmen, Adjudicators, Panel Members, someone authorised by the Chief Ombudsman to carry out any responsibilities or exercise any powers or discretions of AFCA and AFCA employees, contractors and agents shall not be liable to a party to a complaint for any loss or damage arising directly or indirectly in the course of carrying out AFCA functions.

What does AFCA's immunity encompass?

Rule A.22.1 operates as a contractual release of liability of AFCA, the Chief Ombudsman and his or her delegates, all AFCA Decision Makers and our staff, contractors and agents for any loss suffered by a party to a complaint as a result of us carrying out our functions.

While we are released from liability for loss, rule A.22.1 does not prevent a party to a complaint issuing legal proceedings to set aside a decision we made if the decision is beyond our powers or is so unreasonable, that no reasonable decision maker could have made it.

A.23 Changes to AFCA rules

A.23.1	AFCA must periodically consider the adequacy of the monetary limits that are set out in Section D for complaints other than Superannuation Complaints.
A.23.2	These rules, including the monetary limits set out in Section D, may be changed to meet any regulatory requirements or directions given to AFCA by ASIC under the Corporations Act.
A.23.3	AFCA must consult with stakeholders including Financial Firms, key consumer, community and industry organisations and ASIC, before making an amendment to the rules. This does not apply if the amendment is to comply with an ASIC regulatory requirement or direction under the Corporations Act.
A.23.4	AFCA will not make a material change to the rules without the approval of ASIC under section 1052D of the Corporations Act.
A.23.5	When considering a complaint, AFCA must apply the rules that were in existence at the date that the complaint was first submitted to AFCA. If AFCA decides that a previously submitted complaint should be re-opened, AFCA will consider the complaint by applying the rules that were in existence at the date that the complaint was first submitted.

What process does AFCA follow to change its rules?

Changes to the Rules may be required to adapt to the changing environment of the financial services industry, technological advances, or to remedy consequences that were not intended or anticipated when the Rules were originally drafted.

Unless it is a regulatory requirement, or direction given by ASIC, we must consult with stakeholders before implementing any proposed changes. This will involve meeting with

stakeholders including industry, consumer groups and regulators to discuss the proposed changes. We will also release the proposed changes on our website for public comment and invite individual written submissions during the consultation period. We will publish submissions on our website, unless they are marked as confidential.

Following any consultation, the AFCA Board will consider all submissions and make any further appropriate changes to the proposed changes that were consulted about. The changes to the Rules will then be submitted to ASIC for final review and approval, which may result in further changes prior to the finalised Rules being settled and released.

No formal consultation process is required to amend these Operational Guidelines. However, we will endeavour to take into account stakeholders' views about information that should be included in these Guidelines. We may also be required to obtain ASIC approval for any changes to these Guidelines, depending on the nature and extent of the changes.

Which version of the Rules applies to complaints?

The first version of the Rules will be effective from 1 November 2018.

When the first version of the Rules is superseded by a second version, complaints lodged before the second version takes effect will continue to be bound by the first version.

For example, if an uninsured third party Complainant has property damage exceeding $15,000, if the compensation cap subsequently increases after their complaint has been submitted to AFCA, the $15,000 cap will continue to apply to their complaint. This is because the Complainant is bound by the limits in place when they first submitted their complaint under the first version of the Rules.

Section B

Requirements

Section B – Requirements

B.1 Relationship giving rise to the complaint – Superannuation Complaints

B.1.1

A Superannuation Complaint must be submitted by:

a) a member or former member of a Regulated Superannuation Fund, other than a Self-Managed Superannuation Fund

b) a beneficiary or former beneficiary of an Approved Deposit Fund

c) a person who is, or claims to be, the holder or former holder of an RSA

d) a person acting for the estate of a person referred to in paragraphs (a), (b) or (c)

e) a person who has, or claims to have, an interest in an Annuity Policy

f) a person who is, or claims to be, a member of a life policy fund

g) in the case of a complaint about a death benefit payable from a Regulated Superannuation Fund, an Annuity Policy, a RSA, or an Approved Deposit Fund, a person with an interest in the benefit

h) a person in respect of whom a superannuation provider has set out an amount in a statement referred to in section 1053(2) of the Corporations Act.

What is a Superannuation Complaint?

A Superannuation Complaint is about:

- the decisions (and related conduct) of trustees of regulated superannuation funds[37] (other than self-managed superannuation funds), trustees of approved deposit funds, life companies as providers of annuity products and providers of Retirement Savings Accounts (RSAs) (called 'superannuation providers') and people acting on their behalf, including insurers for decisions (and related conduct) about insured benefits through superannuation
- the conduct of a life company in selling a superannuation annuity product, of an RSA provider in opening an RSA and of an insurer in selling an insurance contract where the premiums are paid from an RSA and people acting on their behalf
- the decision (and related conduct) of the trustee of a life policy fund and people acting on its behalf to admit the member to the fund

[37] An exempt public sector superannuation fund can elect to join AFCA and be treated as a regulated superannuation fund for the purposes of AFCA's superannuation jurisdiction. The AFCA website contains a list of AFCA Members.

- the decision of a superannuation provider to include a person's contribution amounts in a statement provided to the Commissioner of Taxation for the purposes of determining the person's tax liability.[38]

We will regard a person as acting on behalf of a superannuation provider if:

- the person is an officer, employee or agent of the superannuation provider
- where the entity holds an Australian Financial Services Licence (AFSL), the person is a representative of the AFSL holder.

A decision includes making a decision, and failing to make a decision.[39]

Conduct includes acts, omissions and representations.[40]

[38] Corporations Act, s 1053(1)
[39] Corporations Act, s 1053(5)(a)
[40] Corporations Act, s 1053(5)(b)

Examples of Superannuation Complaints that are **within** jurisdiction:

- A death benefit is being paid to the wrong person or persons
- An unreasonable delay in processing an instruction to switch investment options
- An unreasonable delay in paying a benefit
- Miscalculation of a benefit
- Errors in insurance cover provided through the fund
- Errors in the deduction of fees or insurance premiums from an account
- Refusal to approve a claim for a disability benefit (including an insured disability benefit provided through the superannuation fund)
- An unreasonable delay in making a decision about a disability claim
- Errors in a benefit statement or annual statement
- Errors on statements provided to the ATO about a member's contributions for surcharge or higher contributions tax purposes
- Errors or delay in splitting a superannuation benefit in accordance with a binding agreement or Family court order
- Wrong advice provided by a superannuation trustee

Examples of complaints that are **outside** our superannuation jurisdiction:

- An employer's failure to pay superannuation contributions – such a complaint, however, can be made to the ATO
- A life insurance product that is not an annuity or superannuation product – we can, however, deal with these complaints under our general jurisdiction
- An annuity that is not issued by a life company, for example, an annuity issued by a friendly society – we can, however, deal with these complaints under our general jurisdiction
- Financial advice relating to superannuation, unless the adviser was acting under the superannuation provider's AFSL when providing the advice – we can, however, deal with these financial advice complaints and other advice complaints under our general jurisdiction

Who can submit a Superannuation Complaint?

There are three groups of people who can make a Superannuation Complaint:

1. Superannuation Product Holders

These are the members or former members of a superannuation fund, the beneficiaries or former beneficiaries of an approved deposit fund, the persons with an interest in the policy, or insurance contract, or the holders or former holders of the RSA (including a person acting for the estate of any of these people) who think that the relevant decision or conduct was unfair or unreasonable.

We will regard a person as acting for the estate of a member, beneficiary or RSA holder if the person is the legal personal representative of the member, beneficiary or RSA holder or, where there is no legal personal representative, a family member.

We will regard a person as having an interest in a superannuation annuity policy if the person purchased the policy or is a beneficiary under the policy.

If a person claims to be a superannuation product holder or claims to have an interest in a superannuation product, we will investigate whether the claim is valid as part of our consideration of their complaint.

2. Persons with an interest in a death benefit

If the complaint is about payment of a death benefit, a person with an interest in the death benefit can also complain that a decision or related conduct was unfair or unreasonable.

We will regard a person as having an interest in a death benefit if the person is within the class of people eligible to receive all or part of the death benefit under the governing rules of the fund, annuity policy or RSA.

B.1.2	The persons described in section 1053A of the Corporations Act are taken to be members of a Regulated Superannuation Fund or an Approved Deposit Fund or holders of an RSA (as applicable).

3. Parties (and intending parties) to a Family Law agreement or order affecting superannuation

If, for Family Law purposes, a member, beneficiary or holder's spouse or former spouse is party to an agreement or subject to an order relating to the member, beneficiary or holder's superannuation interest or a person is eligible to request information about that superannuation interest,[41] they are treated as members, beneficiaries or holders and can complain that a decision or related conduct about the agreement, order or information request was unfair or unreasonable.

[41] These persons are the member or legal personal representative, the member's spouse or legal personal representative and a person intending to enter into a superannuation agreement (for Family Law Act purposes) with the member.

B.2 Relationship giving rise to the complaint – other complaints

B.2.1

A complaint (other than a Superannuation Complaint) must arise from or relate to:

a) the provision of a Financial Service by the Financial Firm to the Complainant;

b) the provision by the Complainant of a guarantee or security for, or repayment of, financial accommodation provided by the Financial Firm to an Eligible Person;

c) an entitlement or benefit under a Life Insurance Policy that specifies or refers to the Complainant, whether by name or otherwise, as a person to whom the insurance cover extends or to whom money becomes payable under the Life Insurance Policy;

d) an entitlement or benefit under a General Insurance Policy that specifies or refers to the Complainant, whether by name, or otherwise, as a person to whom the policy extends;

e) a legal or beneficial interest of the Complainant arising out of:

  (i) a financial investment (such as life insurance, a security or an interest in a managed investment scheme or a superannuation fund); or

  (ii) a facility under which the Complainant seeks to manage financial risk or to avoid or limit the financial consequences of fluctuations in, or in the value of, an asset, receipts or costs (such as a derivatives contract)

f) a claim by the Complainant under another person's Motor Vehicle Insurance Product for:

  (i) property damage to an Uninsured Motor Vehicle caused by a driver of the insured motor vehicle

  (ii) non-financial loss as a result of claims handling by the Financial Firm that insured the motor vehicle,

  but only where a valid claim has been submitted by the owner of the insured motor vehicle (unless the claim is being made pursuant to section 51 of the Insurance Contracts Act 1984)

g) an investment made by the Complainant that was offered by a Financial Firm under a foreign recognition scheme to Australian resident investors, unless expressly excluded from access to AFCA or a Predecessor Scheme by the investment offer document; or

h) a Traditional Trustee Company Service where:

  (i) the Complainant is entitled to request an Annual Information Return from the trustee; and

  (ii) at least one co-trustee was at that time a current AFCA Member, and all co-trustees that are not AFCA Members have consented to AFCA considering the complaint

i) a breach of obligations arising from the operation of the:

  (i) Privacy Act; or

  (ii) the Consumer Data Framework.

What does the term ‘arise from or relate to’ mean?

We can consider claims that either ‘arise’ directly or indirectly ‘relate to’ the connection between the Complainant and the Financial Firm. This means that provided there is a relationship between the parties as set out in rule B.2.1, we can consider a wide range of complaints that come about as an incidental consequence of that relationship.

What is a complaint about provision of a Financial Service?

The term ‘Financial Service’ is defined in Section E of the Rules. This definition is broader than the definition of ‘financial service’’ in the *Corporations Act 2001* (Cth). For an Australian Financial Services Licensee, we are not restricted to considering complaints about services that are provided under the licence.

For example, their advice to invest in real property is not regulated under the Corporations Act, but is nevertheless a Financial Service under these Rules.

AFCA cannot, however, consider all complaints about Financial Firms. For example, industrial or employment complaints will not be within our jurisdiction.

Example of complaints about the provision of a Financial Service that we may be able to consider:

- An AFCA Member’s failure or refusal to provide loan documents to which the Complainant is entitled
- An extended warranty product issued by an AFCA Member

What complaints about superannuation advice can AFCA consider?

We are able to consider complaints about superannuation-related advice, but we will consider a complaint as a Superannuation Complaint if the superannuation advice was provided by a superannuation provider (or its employees or representatives) under the superannuation provider’s AFSL.

If the superannuation advice was provided under the AFSL of a Financial Firm that is not a superannuation provider, we will consider the complaint under our general jurisdiction. This will be the case even if the advice was provided by the Financial Firm (or its employees or representatives) under an arrangement with a superannuation provider.

The main differences in jurisdiction for these complaints are:

- A Superannuation Complaint is not subject to monetary limits, but we can only remedy any unfairness or unreasonableness found to exist in the superannuation provider’s decision in relation to the complaint.

- A complaint under our general jurisdiction is subject to monetary limits, and we will have regard to what is fair in all the circumstances in deciding whether any compensation is payable.

What complaints about guarantees can AFCA consider?

We can consider complaints concerning a guarantee or security for, or repayment of, a loan or other financial accommodation if both the Complainant and the person or entity provided with the loan or other financial accommodation is/are an individual, Small Business or other category of person eligible to submit a complaint to us. So if a borrower is not eligible to submit a complaint (because, for example, it is a company with over 100 employees), then a guarantor will not be able to submit a complaint about guaranteeing that borrower's debt.

Examples of guarantee or security complaints that we may be able to consider:

- The guarantor was not adequately aware of the legal effect of, or the financial exposure under, a guarantee.
- The Financial Firm was required to, but did not take adequate steps to ensure that a guarantor made an independent and informed decision about giving a guarantee.
- The Financial Firm did not comply with any applicable Code of Practice, such as providing copies of statements or the loan contract.
- The Financial Firm increased a loan or overdraft limit or made some other material change to the underlying financial accommodation without the guarantor's consent or knowledge where this was not permitted by law or under the terms of the guarantee.

What complaints about life insurance is AFCA able to consider?

Rules B.2.1(c) and (e) allow us to consider a complaint about a life insurance policy between the Financial Firm and the policy holder. They also allow us to consider a complaint about a life insurance policy between the Financial Firm and a Complainant who is not the policy holder if the Complainant:

- is specified or referred to 'by name or otherwise' as a person covered by the policy or to whom a benefit may become payable
- is otherwise a beneficiary under the policy.

Examples of life insurance complaints where the Complainant is not the policy holder:

- The policy holder dies and their spouse makes a claim under life insurance death cover
- An employee making a claim under a group life insurance policy, for example, for a disability benefit where the policy holder is the employer or superannuation trustee

If the policy holder is a superannuation trustee, we will treat the complaint as a Superannuation Complaint if the time limits for a disability complaint have been met – see

rule B.4.1.1. If not, we may be able to treat the complaint as against the disability benefit insurer – see guideline to rule B.4.1.

What does the term 'referred to by name or otherwise' mean?

We can consider a complaint about a General Insurance Policy even if the Complainant is not a party to the contract of general insurance, if the Complainant is specified or referred to 'by name or otherwise' as a person covered by the policy.

Examples of general insurance complaints where the Complainant is not the policy holder:

- A sporting club participant who is entitled to make a claim under the sporting club's group personal accident policy
- A credit card holder entitled to make a travel insurance claim under their bank's policy for credit card holders

What complaints about financial investments or financial risk can AFCA consider?

We have broad jurisdiction in relation to complaints about financial investments and financial risk products including derivatives. For example, we can consider a complaint where the Financial Firm deals with securities in a way that is inconsistent with the Complainant's legal or beneficial interest (even though the Financial Firm is not providing a Financial Service to the Complainant).

In what circumstances can AFCA consider a complaint about a motor vehicle insurer that is brought by a person whose car was damaged by the insured car?

We can consider some complaints relating to a claim for damage to an uninsured car that is made under the insurance policy of the driver who caused the damage. There are important limitations as to what we can consider.

- We cannot consider a complaint that is only about another driver's insurer pursuing a Complainant for a debt arising from property damage caused by the Complainant's uninsured car.
- If the insured driver (whether or not the Financial Firm is acting on their behalf) has issued legal proceedings in court against the uninsured Complainant before the AFCA complaint is submitted, we will likely exercise our discretion to exclude the complaint, on the basis that the court is the more appropriate place to deal with the question of liability – see rule C.2.2(a).

Where, however, the Complainant has submitted an AFCA complaint about the insured driver's liability for damage to the Complainant's uninsured car before the insuring Financial Firm has issued legal proceedings, the Financial Firm will be prevented from issuing legal

proceedings about the question of liability while AFCA is considering the complaint – see rule A.7.1(c).

If the claim is made under section 51 of the *Insurance Contracts Act 1984* (Cth), we can consider the complaint without the insured making a claim on their insurer to cover the damage to the other driver's car. Section 51 applies where the policy holder has died, or cannot be found after making reasonable enquiries. Otherwise, the insured must have lodged a valid claim with the Financial Firm.

What is a valid claim?

When describing the term 'valid claim', a distinction must be drawn between:

- the uninsured Complainant's claim (known as a third-party claim) against the driver of the other car on the basis of that driver's negligent driving; and
- an insured (the other driver) claiming under their insurance policy issued by the Financial Firm to cover the against third-party claims.

The term 'valid claim' is in context of the insured's claim under the policy, not the Complainant's third-party claim. It is not necessary for the insured to have paid their excess in order for them to have a 'valid claim', as such excess may be deducted from any amount payable to the uninsured Complainant. In order for an insured to make a valid claim under the policy:

- the insured must unequivocally seek protection under the policy for indemnity against the Complainant's third-party claim; and
- the policy must provide the insured with cover for third party claims.

Examples of 'no valid claim' include:

- Where the insured fails to lodge a claim or withdraws the claim (including during the course of the Complainant's AFCA dispute)
- Where the insured's policy is cancelled for non-disclosure and so the policy does not cover the insured

What complaints about foreign investments can AFCA consider?

We can consider complaints about an investment made under a foreign recognition scheme.

Section 1200A of the Corporations Act and Corporations Regulation 8.1.01 specify the provisions of Subpart 6 of Part 9 of the Financial Markets Conduct Act 2013 of New Zealand and the Financial Markets Conduct Regulations 2014 of New Zealand to be a foreign recognition scheme.

This means that we can consider a complaint about an investment under these New Zealand provisions that is offered by the Financial Firm. There is an exception. We cannot consider the complaint if the investment offer document expressly excludes access to AFCA, or a

Predecessor Scheme. Also there must be a sufficient connection with Australia – see Rule B.3.

What complaints about a Traditional Trustee Company Service can AFCA consider?

We can consider some complaints about a licensed trustee company providing a Traditional Trustee Company Service as defined in the Corporations Act 2001.

Examples of Traditional Trustee Company Services:

- Acting as trustee of any kind or administering or managing a trust
- Acting as executor or administrator of a deceased estate
- Acting as agent, attorney or nominee
- Acting as guardian of the estate of an individual
- Preparing a will, a trust instrument, a power of attorney or an agency arrangement
- Applying for probate of a will or grant of letters of administration

To be eligible to submit a complaint, the Complainant must be entitled under the Corporations Regulations to receive an Annual Information Return from the licensed trustee. Rule A.5 explains what an Annual Information Return is and who is entitled to receive this.

If there are co-trustees that are not members of AFCA, they must all consent to us considering the complaint. If they are not willing to do so, we cannot consider the complaint.

What privacy-related complaints will AFCA consider against Privacy Act Participants?

A privacy-related complaint is a complaint that relates to a right or obligation arising under the *Privacy Act 1988* (Cth).

A Privacy Act Participant generally includes a Financial Firm that carries on:

a) a retail business where it issues credit cards to individuals in connection with the sale of its goods or the supply of its services

b) a business or undertaking where it provides credit in connection with the sale of its goods or the supply of its services, and the repayment of the credit is deferred for at least seven days

c) a business or undertaking where it provides credit in relation to the hiring, leasing or renting of goods, and the credit is in force for at least seven days and no amount (or amount less than the value of the goods) is paid as a deposit for the return of the goods.

A Privacy Act participant does not include:

a) a bank

b) a superannuation trustee

c) a Financial Firm, where a substantial part of their business is the provision of credit

d) a Financial Firm that is required to be a member of an EDR scheme under the Corporations Act 2001 (Cth) or the *National Consumer Credit Protection Act 2009* (Cth).

For example, some utility companies are AFCA Members, not because they provide a financial service, but because they are a Privacy Act Participant. We are limited to considering complaints about a breach of privacy obligations by these Privacy Act Participants.

What complaints will AFCA consider against Consumer Data Right Participants?

The Consumer Data Framework allows customers a right to direct Consumer Data Right (CDR) Participants, such as banks, to share information held with other CDR Participants. Progressively, this consumer data right will cover other sectors including energy and telecommunications. It is expected that this will allow customers more choice and convenience in choosing their service providers.

The Consumer Data Framework will be progressively introduced, and our approach to complaints against CDR Participants will evolve over time. We will consider complaints that are primarily about breach of privacy or other CDR obligations as set out by the Consumer Data Framework, including the *Competition and Consumer Act 2010* (Cth) and Consumer Data Rules.

Whether the complaint is against a Privacy Act Participant or CDR Participant, we have expertise in dispute resolution in respect of the provision of financial services. Where a Complainant disputes liability for an outstanding debt in respect of the provision of telecommunications, energy or postal services, they should take their complaint at first instance to the relevant scheme that has expertise to deal with those utilities, such as the Telecommunications Industry Ombudsman, various state and territory energy ombudsmen, and postal (or Commonwealth) ombudsmen schemes. This is because in order to determine the Complainant's liability for the service, consideration will need to be given to the specific circumstances of the complaint and its regulatory environment.

B.3 Sufficient connection with Australia

B.3.1

A complaint must arise from:

a) a contract or obligation arising under Australian law including, but not limited to, privacy obligations;

b) an offer to invest that was received in Australia by a Complainant in relation to a recognised Foreign Collective Investment Scheme; or

c) a direct or indirect investment in a product through a platform that was offered in Australia.

What is required for a contract or obligation to arise under Australian law?

We can consider a complaint if the contract or obligation arose under Australian law. This will be the case if the complaint is about a transaction that was entered into in Australia or about a Financial Service that was provided in Australia.

Examples of complaints about a contract or obligation arising under Australian law:

- Use of Australian issued credit or debit card outside Australia
- Financial facilities established in Australia for overseas residents
- Overseas travel insurance issued in Australia
- Transfers of funds by an Australian financial institution (as sender) to an overseas recipient
- Transfers of funds from an overseas sender to an Australian financial institution (as recipient)

What complaints about Foreign Collective Investment Schemes can AFCA consider?

We can consider some complaints about an offer received in Australia to invest in a Foreign Collective Investment Scheme as defined in rule E.1. In order for the complaint to be within our jurisdiction, the Foreign Collective Investment Scheme must be a recognised scheme.

There are three categories of recognised schemes:

1. A Foreign Collective Investment Scheme that ASIC has relieved from Corporations Act obligations, as explained in ASIC Regulatory Guide 178.

Examples of where ASIC has provided relief to Foreign Collective Investment Schemes:

- Class Order 04/526 – for New Zealand and United States schemes and schemes operating out of Jersey
- Class Order 07/753 – for Singaporean schemes
- Class Order 08/506 – for Hong Kong schemes

2. A managed investment scheme offered in Australia, but issued in another jurisdiction that meets the conditions set out in section 1200C of the Corporations Act to be a 'recognised offer'. This includes New Zealand (see Corporations Regulations 8.1.1–8.1.3, and ASIC Regulatory Guide 190 Offering securities in New Zealand and Australia under Mutual recognition).

3. Offers made under the Asia Region Funds Passport arrangements in Chapter 8A of the Corporations Act.

Where an investment is made through a platform, can AFCA consider the complaint?

Where a financial product is held through a platform, rather than directly, the investor may have a complaint either about the platform (which would need to be pursued against the platform provider) or about the underlying product (which would need to be pursued against the issuer of the product).

If the complaint otherwise falls within our jurisdiction, we can consider a complaint against the underlying product issuer, whether or not the issuer has a contract with the investor, and whether or not the obligations it owes the investor are governed by Australian law.

Where a financial product is held through a superannuation fund that is styled as a 'platform', all complaints, whether against the superannuation provider or about the underlying product, should be made as Superannuation Complaints against the superannuation provider.

B.4 Time limits for complaints

Superannuation Complaints

B.4.1.1

For complaints about a decision of a trustee of a Regulated Superannuation Fund or an Approved Deposit Fund, an RSA Provider, or an insurer (where the premiums under the policy have been paid from an RSA), relating to the payment of a disability benefit because of total and permanent disability:

a) if the Complainant permanently ceased employment because of the physical or mental condition that gave rise to the claim for the disability benefit, the Complainant must have made a claim to the Financial Firm for the payment of a disability benefit within two years of permanently ceasing employment, and the Complainant must have submitted the complaint to AFCA within four years of the Financial Firm's decision about the disability claim

b) if the Complainant did not permanently cease employment because of the physical or mental condition that gave rise to the claim for the disability benefit, the Complainant must have submitted the complaint to AFCA within six years of the Financial Firm's decision about the disability claim.

What is the time limit for disability benefit complaints?

We can only deal with a Superannuation Complaint about the decision of a superannuation trustee[42] ('decision maker') relating to a total and permanent disablement (TPD) benefit provided through superannuation in the following circumstances:

If the fund member permanently ceased employment because of the physical or mental condition that gave rise to the TPD claim then:

1. The fund member must have submitted a TPD claim to the decision maker within two years of permanently ceasing employment.

2. The fund member must make a complaint to us about the decision to deny the claim within four years of the decision being made.

If the fund member did not permanently cease employment because of the physical or mental condition that gave rise to the TPD claim:

That is, the fund member permanently ceased employment for reasons unrelated to their disability), the fund member must make a complaint to us about the decision to deny the claim within six years of the decision being made.

[42] Most commonly, the decision maker will be a superannuation trustee, but the decision maker could also be an RSA Provider or an insurer (where premiums for the policy have been paid through an RSA).

What is the date of permanently ceasing employment?

Sometimes, if an employee stops work due to a disabling condition, employers will maintain the employee's employment to see whether the employee recovers and is able to return to work. If the employee does not recover, employment may be formally terminated at a later date.

The two-year time limit for lodging a TPD claim with the decision maker after permanently ceasing employment runs from when the date the fund member's employment is formally terminated, not the date the fund member was last able to work.

What if the disability benefit is insured through superannuation?

Sometimes a TPD claim is denied by a superannuation trustee because the group insurer declines payment of the insured benefit. In these cases, the superannuation trustee is still the decision maker and the Superannuation Complaint is made against the trustee.

If the superannuation trustee has taken out insurance for a superannuation disability benefit and the fund member meets the time limits for a Superannuation Complaint, we will generally join the insurer to the Superannuation Complaint so that the complaint can be resolved against the trustee and the insurer at the same time.

If the fund member does not meet the time limits for a Superannuation Complaint, we will not be able to accept a complaint against the superannuation trustee, but we may be able to accept a complaint against the insurer under our general jurisdiction.

Where an insured benefit is provided under an individual policy by an insurer but the premiums are paid from an RSA, a Superannuation Complaint can be made directly against the insurer as the decision maker.

B.4.1.2

A reference to a decision in rule B.4.1.1 is to the original decision of the trustee, RSA Provider or insurer (decision maker) in relation to the matter and if, as a result of a complaint to the decision maker about the original decision, the original decision was confirmed or varied, or another decision was substituted for the original decision:

a) the decision as so confirmed or varied, or the substituted decision, is taken to be the original decision; and

b) the decision as so confirmed or varied, or the substituted decision, is taken to have been made at the time when the original decision was made.

What is the date of a decision?

Sometimes, after the Decision Maker has denied a TPD claim, the fund member may ask the Decision Maker to reconsider the claim, may provide new information in support of the claim, or may simply complain to the Decision Maker about the decision.

The date of the decision is the date of the first (or original) decision to deny the fund member's TPD claim. The four- and six-year time limits for complaining to us run from the date of the original decision, even if the Decision Maker may later confirm or change their original decision.

B.4.1.3

For complaints relating to the payment of a death benefit to which neither rule B.4.1.5a) nor B.4.1.5b) applies, the Complainant must have, consistent with section 1056 of the Corporations Act:

a) objected to the payment of the death benefit proposed by the Financial Firm within 28 days of being given notice of the proposed decision; and

b) submitted the complaint to AFCA within 28 days of being given a notice from the Financial Firm of its decision in relation to the payment of the death benefit.

What is the time limit for death benefit complaints?

The time limits for death benefit complaints are reflected in both the AFCA Rules and in section 1056 of the Corporations Act.

There are two 28-day periods that must be met: an interested person must object to the superannuation provider within 28 days of being notified of the proposed decision to pay the death benefit, and the interested person must complain to us within 28 days of being notified of the final decision to pay the death benefit.

Who is an interested person?

To complain about a superannuation provider's decision, a person must have an interest in the death benefit.[43] We regard a person as having an interest in the death benefit (interested person) if the person is within the class of people eligible to receive all or part of the death benefit under the governing rules.

To be eligible to receive all or part of a superannuation death benefit, a person will usually need to be a dependant of the deceased member, or the legal personal representative of the deceased member. A dependant includes a spouse, a child, any person who had an interdependency relationship with the deceased member and any person who was financially dependent on the deceased member. However, if there are no dependants or legal personal representatives, other individuals (e.g. family members) may be eligible.

Interested person is properly notified of proposed decision and objects within 28 days

If an interested person has been notified in writing about the provider's proposed payment of the death benefit and disagrees with it, the interested person must **submit a written objection to the proposed payment to the superannuation provider within 28 days of the date that written notice of the proposed decision was given.** If an interested person does not make a written objection within the 28-day period, the person cannot later complain to us about the decision.

If an interested person who has been given written notice about the proposed payment of the death benefit, makes a written objection to the superannuation provider within the 28-day period and then receives written notice of the provider's final decision, **the person must then make a complaint to us within 28 days of the date that written notice of the final decision was given.**

Interested person is not properly notified

We would generally consider it unreasonable for a superannuation provider not to notify an interested person of its decisions relating to the payment of a death benefit.

If an interested person has not been notified in writing about the proposed payment of the death benefit, or if there is an error in the notice (i.e. the notice does not explain the 28-day objection period), then the 28-day period to object to the trustee does not apply.

Similarly, if an interested person has not been notified in writing about the final decision to pay the death benefit, or if there is an error in the notice (i.e. the notice does not explain the 28-day complaints period), then the 28-day period to make a complaint to AFCA does not apply.

When is a death benefit notice 'given'?

We will regard a death benefit notice as 'given' when it is received by the intended recipient. The 28-day period will commence to run from that date.

[43] Corporations Act, s 1056(1)

The day a notice is 'given' may, therefore, be later than the actual date of the notice. If all communications with the intended recipient have been by email, a notice may be given by email, because consent to communicate by email can be inferred in that case.

What if the superannuation provider changes the proposed payment of the death benefit after considering an objection?

The 28-day period for making a complaint to AFCA runs from the date when written notice of the final decision was given.

If the superannuation provider changes its original proposal for payment of the death benefit after considering one or more objections from interested persons, it will give all interested persons notice of the new proposal for payment of the death benefit. An interested person who disagrees with the new proposal must then submit a written objection to the superannuation provider within 28 days of the date written notice of the new proposal was given. If an interested person does not make a written objection to the new proposal within the 28-day period, the person cannot later complain to AFCA about the decision.

If an interested person who has been given written notice about the superannuation provider's new proposed payment of the death benefit, submits an objection to the superannuation provider within the 28-day period and then receives written notice of its final decision, the person must then make a complaint to AFCA within 28 days of the date notice of the final decision was given.

B.4.1.4

For complaints about a statement referred to in section 1053(2) of the Corporations Act, the complaint to AFCA must have been submitted within 12 months of notice being given by the Financial Firm of the time period to complain with a copy of the statement.

What is the time limit for contribution statement complaints?

If a superannuation provider has notified a fund member that it has given a contributions statement to the ATO (with a copy of the statement), the fund member must complain to AFCA within 12 months of being given the written notice.

As for notice of death benefits above, notice is given upon being received by the fund member.

B.4.1.5

AFCA will generally not consider other types of Superannuation Complaint unless it was submitted to AFCA within two years of the date of the IDR

Response. This includes a complaint relating to the payment of a death benefit where AFCA is satisfied that the Complainant has an interest in the death benefit but:

a) the Complainant was not notified by the Financial Firm of the proposed payment of the death benefit and the failure to notify was unreasonable; or

b) the Complainant was notified of the proposed payment of the death benefit but was not notified of the 28-day period to object.

Are there any time limits for other types of Superannuation Complaint?

There are no strict time limits for making other types of Superannuation Complaint to AFCA, including where an interested person has not been properly notified of the proposed payment of the death benefit. This could be because an interested person was not notified at all or because an interested person was not notified of the 28-day period.

However, Superannuation Complaints to AFCA should generally be made within two years of receiving an IDR Response to the person's complaint from the superannuation provider. We can extend this two-year timeframe, and would generally do so if there is a good reason why the complaint was not submitted within two years of the date of the superannuation provider's IDR Response and AFCA is satisfied that it can effectively resolve the complaint despite the delay.

What constitutes an IDR Response is explained in the following guideline.

Time limits for complaints other than Superannuation Complaints

For complaints that are not Superannuation Complaints, the timeframe available to the Complainant to submit their complaint to AFCA depends, in part, on the length of time since the Financial Firm's IDR Response.

What is an IDR Response?

An IDR Response is a written response to the complaint from the Financial Firm to the Complainant to the following effect:

- The Financial Firm's IDR process has concluded.
- The Financial Firm sets out its final decision about the complaint
- The Complainant has the right to take the complaint to AFCA.
- The Complainant may have time limits to complain to AFCA and so should act promptly, or otherwise consult the AFCA website to find out if, or when, the time limit relevant to their circumstances expires.
- AFCA's contact details are provided.

A Financial Firm should ensure that an IDR Response is dated, record when the IDR Response was sent to the Complainant and keep a copy of the IDR Response.

B.4.2.1

Where a complaint relates to a variation of a credit contract as a result of financial hardship, an unjust transaction or unconscionable interest and other charges under the National Credit Code, AFCA will generally not consider the complaint unless it was submitted to AFCA before the later of the following time limits:

a) within two years of the date when the credit contract is rescinded, discharged or otherwise comes to an end; or

b) where, prior to lodging the complaint with AFCA, the Complainant was given an IDR Response in relation to the complaint from the Financial Firm – within two years of the date of that IDR Response.

What is the usual time limit for a complaint seeking the variation of a credit contract to which the National Credit Code applies?

Where a Complainant seeks a variation of a contract regulated under the National Credit Code, we will generally only consider the complaint if it is submitted while the regulated credit contract is on foot, or within two years of it coming to an end, for example, by being terminated by the credit provider. If the regulated credit contract is still on foot, then there is effectively no time limit – it does not matter how long ago the issue arose or when the Complainant became aware of it.

To determine whether rule B.4.2.1 applies, we will first determine if the complaint concerns a credit contract that is regulated under the National Credit Code. (If the credit contract is not regulated, see rule B.4.3.1 following). If the credit contract is regulated, we then consider if the issue raised relates to financial hardship, an unjust transaction, or unconscionable interest and other charges under the National Credit Code.

Examples of types of complaints excluded if the regulated contract ended more than two years ago:

- Regardless of when a credit card or home loan was granted, it is too late to raise irresponsible lending if the credit card or home loan was discharged over two years ago.
- It is too late to submit a complaint about fees or interest applied at any time during the life of the regulated loan if the regulated loan was paid out over two years ago.

If a complaint is submitted more than two years after the regulated credit contract ended, we will, nevertheless, consider the complaint if the complaint is submitted within two years of the Financial Firm's IDR Response in relation to the complaint. Because rule B.4.2.1 specifies that the later of the two time limits applies, an IDR Response will start the time to submit a complaint again, even if the regulated credit contract ended more than two years previously.

For example, in 2019 the Complainant submits a complaint about irresponsible lending on a personal loan that was paid out in 2014. In 2018, the Financial Firm gave an IDR Response. Although the regulated credit contract ended more than two years ago, we will consider the complaint because it was submitted within two years of the IDR Response.

B.4.3.1

In other situations, AFCA will generally not consider a complaint unless it was submitted to AFCA before the earlier of the following time limits:

a) within six years of the date when the Complainant first became aware (or should reasonably have become aware) that they suffered the loss; and

b) where, prior to submitting the complaint to AFCA, the Complainant was given an IDR Response in relation to the complaint from the Financial Firm – within two years of the date of that IDR Response.

What is the usual time limit for other complaints?

For complaints other than Superannuation Complaints and National Credit Code credit contract variation complaints, we will generally only consider the complaint if it is submitted before the earlier of the two time limits:

- within six years after the Complainant first became aware, or 'should reasonably have become aware' they suffered the loss
- within two years of an IDR Response from the Financial Firm.

To work out the date when the Complainant 'should reasonably have become aware' they suffered the loss, we consider when a reasonable person, in the Complainant's particular circumstances, should have become aware that they suffered the loss. Under this approach, the six-year time limit will start to run once the Complainant is able to identify and describe a basis for damage or loss, or should be reasonably able to do so. However, the full extent of the damage or loss need not be fully particularised at the time the complaint is lodged.

In a complaint about irresponsible lending, the claim is that the Financial Firm failed to exercise the care and skill of a diligent and prudent lender and, in doing so, provided a loan that could not be serviced without substantial hardship. We consider when did the Complainant become (or should reasonably have become) aware that they have suffered a loss – that is, that they could not repay the loan without substantial hardship. In our view, a person who is unable to repay a loan without substantial hardship should reasonably become aware when the person commences making monthly repayments they cannot afford. Although this is assessed on a case-by-case basis, it will generally be within the first few months of the loan. We will take into account factors that could indicate unaffordability if the Complainant was not required to make repayments, or made repayments from another debt.

In a complaint about poor and inappropriate investment advice, we consider when and how the Complainant became (or should reasonably have become) aware they had suffered the loss, and given that the loss occurred so long ago, why they delayed in bringing the complaint to AFCA. If appropriate, we will also ask the Complainant why they did not act when they received documents (such as investment return statements) that showed significant losses.

We consider not only what the Complainant was aware of, but also what additional enquiries it would have been reasonable for the Complainant to make. For example, if a Complainant received information in a document, but did not read it carefully when determining when they should reasonably have become aware they suffered the loss, we may take into account:

- the format of the document
- how complex the document was
- how long the Complainant had to read it
- whether the Complainant had any warnings or recommendations from the Financial Firm, for instance, about the need to obtain independent legal advice in relation to the document.

Because we consider the earlier of the two time limits set out in rule B.4.3.1, an IDR Response will not start the time limit running again, especially if it has already expired.

Examples of types of complaints excluded if the Complainant was aware (or should reasonably have been aware) of the loss more than six years ago:

- A complaint about the Financial Firm's actions as mortgagee in possession in selling a house in 2009
- A disputed transaction on a credit card in 2011 (whether or not the card remains on foot)
- Advice in respect of investment losses incurred during the 2008 Global Financial Crisis where the Complainant bought shares or other securities in entities that later become insolvent more than six years ago
- Where a life insurance policy has stepped premiums applicable, which was adequately disclosed at inception more than six years ago
- A Complainant was aware of defects following insured car repairs over six years ago, but does not seek to have them rectified until after the time limit expired
- A Complainant seeks to submit a complaint more than six years after the insurer's decision to deny a claim

Extension of time limits

B.4.4.1

AFCA will not extend any of the time limits set out in rules B.4.1.1 to B.4.1.4.

What time limits for Superannuation Complaints cannot be extended?

There are strict time limits for certain types of Superannuation Complaints, which we cannot extend unilaterally:

- Death benefit complaints
- Disability benefit complaints
- Complaints about contribution statements provided to the ATO

We can neither unilaterally (even if parties do not agree) nor consent (even if all parties agree) to extend time limits that apply to Superannuation Complaints about death benefit payments because of legislative requirements, and because the effect it would have on interested parties who are not involved in the complaint.

We cannot unilaterally extend time limits for Superannuation Complaints about disability benefit payments and ATO contribution statements if lodged out of time. However, we will consider doing so with the consent of all parties – see rule A.4.7.

B.4.4.2

AFCA may deal with a complaint submitted after the time limits set out in rules B.4.1.5, B.4.2 and B.4.3 if AFCA considers that special circumstances apply.

When will AFCA extend a time limit?

Rule B.4.4.2 allows us to extend the time limit to submit certain types of complaints if we consider there are special circumstances that warrant this. This will be assessed on a case-by-case basis. When assessing whether special circumstances apply, we consider factors such as:

1. The reasons for the delay

A Complainant must be able to demonstrate that they were subjected to circumstances that were truly out of the ordinary, and that the circumstances prevented them from pursuing their complaint for the period between when time started to run and the date they submitted the complaint to AFCA. For instance, it will not be sufficient for the Complainant to say they were not aware of AFCA, as the reason for the delay. If a Complainant cannot satisfy this threshold requirement, we are unlikely to consider that special circumstances exist to warrant consideration of a complaint submitted out of time.

2. The degree of disadvantage sustained by the Complainant

The higher the degree of disadvantage suffered by the Complainant if we refuse to extend time limits, the more likely special circumstances might apply. However, we will not decide that special circumstances apply merely because the time allowed for submission has expired and the Complainant is disadvantaged by being unable to use the AFCA process. It is clear that almost all Complainants will be disadvantaged if they are unable to use the AFCA process. Therefore, there is nothing special about this factor alone.

3. The extent of the delay

The greater the delay between when the time limit expired and when the complaint was submitted, the less likely we would exercise its discretion in the Complainant's favour.

4. The level of prejudice to the Financial Firm

This is to be assessed by comparing the Financial Firm's position if we accept the complaint out of time to that if the complaint was lodged within time. If the Financial Firm is unable to defend its position because it has destroyed its records given the passage of time, we may consider it to be prejudiced by a complaint submitted out of time.

Time limits generally

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 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.

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.

B.4.5.2

The following table summarises the time limits within which a Complainant must submit a complaint with AFCA. For avoidance of doubt, rules B.4.1 to B.4.4 prevail.

Type of complaint					Time limit within which an AFCA complaint must be submitted	
Superannuation	TPD decision by trustee, RSA provider or insurer see B.4.1.1	Has the Complainant permanently ceased employment because of the condition that gave rise to the claim for the disability benefit?	Yes. Was the claim made with Financial Firm within two years of permanently ceasing employment?	Yes	Four years from TPD decision	No extension of time limits See B.4.4.1
				No	Out of time	
			No. The Complainant ceased employment for other reasons		Six years from TPD decision	
	Payment of a death benefit see B.4.1.3	Has the Complainant objected to the Financial Firm within 28 days of being given notice of the proposed decision?		Yes	28 days from final decision	
				No	Out of time	
	Statement given to the Commissioner of Taxation under s.1053(2) of the Corporations Act see B.4.1.4				12 months from notice	
	Other Superannuation Complaints, including: • where the Complainant has an interest in the death benefit, but was not properly notified of the proposed payment or the objection period see B.4.1.5				Two years from IDR Response	Special circumstances may extend time limits See 5.4.4.2
NCC facility	Financial hardship, unjust transaction or unconscionable interest and other charges under the National Credit Code see B.4.2.1	Complaint must be submitted by the later of:	when the credit contract is rescinded, discharged or otherwise come to an end		Two years from contract end	
			when an IDR Response was provided		Two years from IDR response	
Other	All other complaints including: • unregulated loans. see B.4.3.1	Complaint must be submitted by the earlier of:	when the Complainant was aware or should reasonably have become aware of the loss claimed		Six years from awareness of the loss	
			when an IDR Response was provided		Two years from IDR Response	

B.5 Additional requirements for Traditional Trustee Company Services complaints

B.5.1

If the complaint is about Traditional Trustee Company Services and AFCA considers that a favourable outcome would be unlikely to benefit the estate or trust as a whole (and therefore all beneficiaries), the following requirements must be met in order for AFCA to consider the complaint:

a) The beneficiaries of the estate or trust must form a closed class.

b) All Other Affected Parties must have been identified.

c) AFCA must explain to the Complainant the process for AFCA considering the complaint and their right to obtain independent legal advice – and within 28 days of receiving this information from AFCA, the Complainant must consent in writing to AFCA considering the complaint and agree to be bound by the outcome.

d) AFCA must send a notice to each Other Affected Party informing them that the complaint has been submitted, and that if AFCA considers the complaint their interests may be affected by the outcome and that they have a right to obtain independent legal advice before deciding whether to consent to AFCA considering the complaint – and within 28 days of receiving this information from AFCA, all Other Affected Parties must consent in writing to AFCA considering the complaint and agree to be bound by the outcome.

What is a complaint about a Traditional Trustee Company Services?

The definition of Traditional Trustee Company Services refers to Corporations Act section 601RAC. The result is that Traditional Trustee Company Services encompass:

- estate management functions
- preparing a will, trust instrument, a power of attorney or agency arrangement
- applying for probate of a will
- applying for letters of administration or electing to administer a deceased estate
- establishing and operating common funds.

When must all beneficiaries consent to us considering the complaint?

We will generally not consider a complaint about Traditional Trustee Company Services if we consider that the complaint may affect people other than the Complainant and the Financial Firm, and those other people have not provided their consent to AFCA's role. However, if we consider that a favourable outcome would likely benefit all beneficiaries, it will not be necessary to obtain the consent of all beneficiaries.

This could be because it is not possible to identify all beneficiaries as they do not form a closed group of beneficiaries.

Examples of where an estate or trust does not have a closed group of beneficiaries:

- The will or the trust instrument includes as beneficiaries people who are not yet born.
- The will or the trust instrument includes as beneficiaries people or entities who in the future acquire the attributes or otherwise qualify to be beneficiaries.

Alternatively, it could be because there are Other Affected Parties who have not consented to our role. An Other Affected Party is a person who can request an Annual Information Return – see rule A.5. Where ASIC considers that there are Other Affected Parties, we will ask the Financial Firm to provide their details – see rule A.5. We will then manage the process of seeking their consent.

Whether the group of potential beneficiaries is closed or open, we can consider the complaint if we think that a favourable outcome would likely benefit all beneficiaries.

What happens if an additional Other Affected Party is identified later in AFCA's complaint handling process?

If we start to consider a complaint after having contacted all known Other Affected Parties and obtaining their consent, and an Other Affected Party is later identified, we must stop considering the complaint until that Other Affected Party is also contacted and provides their consent. If that Other Affected Party refuses their consent, we will not be able to consider the complaint.

Why is it important for AFCA to explain the process and allow an opportunity to obtain independent legal advice?

Because the complaint involves parties other than the Complainant (who has agreed to the AFCA process by submitting the complaint) and the Financial Firm (which is bound by our process as a condition of its membership of the AFCA scheme), we cannot, in fairness, deal with the complaint until and unless we are satisfied that all Other Affected Parties have been identified and informed of the complaint and they have consented to us dealing with the complaint and to be bound by the outcome.

As the Other Affected Parties and the Complainant are all equally consumers of the Traditional Trustee Company Service provided by the Financial Firm, in the interests of equity, we may not deal with the complaint unless the Complainant has also agreed to be bound by the outcome.

By agreeing to be bound by the outcome, the Complainant and Other Affected Parties may lose their rights, or achieve a less favourable outcome than if they pursued their individual interests in court. For this reason, we will allow them to obtain independent legal advice to protect their interests before they consent to our consideration of the complaint.

What happens if an Other Affected Party gives consent and then changes their mind?

Consent, once validly given, cannot be rescinded. Because of this, we will ensure that an Other Affected Party is informed of their right to obtain legal advice before deciding whether to give their consent.

Section C

Exclusions

Section C – Exclusions

C.1 Mandatory exclusions

AFCA must exclude certain categories of complaints

C.1.1 Rules C.1.2 to C.1.6 specify categories of complaints that AFCA must exclude unless all parties to the complaint and AFCA agree to AFCA considering the complaint.

What exclusions must be excluded?

We have no discretion whether or not to exclude the types of complaints set out in rules C.1.2 to C.1.6 inclusive. These types of complaints must be excluded mandatorily.

Parties may, however, request us to consider a dispute by agreement if the complaint is outside our jurisdiction – see guidance to rule A.4.7.

Exclusions applying generally

C.1.2 AFCA must exclude:

a) a complaint about the level of a fee, premium, charge, rebate or interest rate – unless:

   (i) the complaint concerns non-disclosure, misrepresentation or incorrect application of the fee, premium, charge or interest rate by the Financial Firm having regard to any scale or practices generally applied by that Financial Firm or agreed with that Complainant;

   (ii) the complaint concerns a breach of any legal obligation or duty on the part of the Financial Firm; or

   (iii) the Complainant's complaint is with a medical indemnity insurer and pertains to the level of medical indemnity insurance premium or the application of a risk surcharge as defined:

   - For complaints received before 1 July 2020: in the Services Contract between the Health Insurance Commission, and the Commonwealth of Australia represented by the Department of Health and Ageing, and medical indemnity insurers;
   - For complaints received on or after 1 July 2020: section 52 of the Medical Indemnity Act 2002.

b) a complaint that relates to a decision by a Financial Firm as to how to allocate the benefit of a Financial Service between the competing claims of potential beneficiaries, unless the complaint relates to a Superannuation Complaint or a Traditional Trustee Company Service

c) a complaint that raises the same events and facts and is brought by the same Complainant as a complaint previously dealt with by AFCA and there is insufficient additional events and facts raised in the new complaint to warrant AFCA considering the new complaint

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, AFCA may consider a complaint by a Primary Producer about issues unresolved after a farm debt mediation.

e) a complaint where the value of the Complainant's claim when the complaint is submitted to AFCA exceeds $1 million or higher amount that applies as a result of an adjustment in accordance with rule D.4.3. This jurisdictional limit does not apply to:
   (i) a Superannuation Complaint; or
   (ii) a complaint by a borrower arising from a credit facility provided to a Small Business (including Primary Producer); or
   (iii) a complaint to set aside a guarantee supported by security over the guarantor's primary place of residence

f) a complaint where the Complainant is a member of a group of Related Bodies Corporate and that group has 100 employees or more

g) a complaint that would require review of a trustee's exercise of discretion but this does not exclude:
   (i) a complaint to the extent that an allegation is made of bad faith, failure to give fair and proper consideration to the exercise of the discretion, or failure to exercise the discretion in accordance with the purpose for which it was conferred; or
   (ii) a Superannuation Complaint

h) a complaint about professional accountancy services provided by an Accountant unless they are provided in connection with one of the following:
   (i) a financial service within the meaning of section 766A of the Corporations Act or section 12BAB of the ASIC Act;
   (ii) credit activity within the meaning of the National Consumer Credit Protection Act 2009; or
   (iii) tax (financial) advice services within the meaning of the Tax Agent Services Act 2009

i) a complaint about a:
   (i) Privacy Act Participant that does not relate to a right or obligation arising under the Privacy Act; or
   (ii) CDR Participant that does not relate to a right or obligation arising under the Consumer Data Framework.

To what extent are complaints about fees and the like outside AFCA's jurisdiction?

We cannot generally consider a complaint about the level of a fee, premium, charge, rebate or interest rate. This means we will not consider a complaint that has arisen merely because the Complainant is dissatisfied that a cost has increased. Financial Firms set the level of these costs by exercising their commercial judgment in a competitive and open market where other similar products are available. It is open for the consumer to choose the product

which is most suitable for their needs and circumstances taking into account the product features including its cost.

While we accept that the Financial Firm is at commercial liberty to set the level of its fees, premiums, charges, rebates or interest rates, this is not an absolute freedom. If the level has increased disproportionally without justification, it is open for us to review such an increase. We have jurisdiction to consider a complaint in any of the following situations.

1. The complaint is about a misrepresentation or failure by the Financial Firm to properly disclose the disputed cost.

2. The complaint is that the Financial Firm calculated or applied the cost incorrectly. We will have regard to any scale or practices generally applied by that Financial Firm.

3. The complaint is that, by applying the disputed cost, the Financial Firm breached a legal obligation or duty owed to the Complainant.

4. The complaint is about a medical indemnity insurance premium, or application of a risk surcharge for the policy.

Where a complaint about a fee, premium, charge, rebate or interest rate raises some issues that are within our jurisdiction and some that are not, we will confine our consideration to those issues within our jurisdiction.

Examples of complaints that AFCA can consider about the level of fee, premium, charge, rebate or interest rate:

- A bank has applied a $40 account keeping fee which was not set out in the terms and conditions or the bank manager promised it would be waived for a period.
- An insurer has calculated this year's premium based on three at-fault accidents in the previous year, when the Complainant denies he was at fault for one of those accidents.
- An insurer has breached a legal obligation or duty owed to the Complainant such as a duty of utmost good faith by raising its premium disproportionally having regard to any scale or practices generally applied by that Financial Firm without adequate justification.
- the Complainant paid a fee for a service a Financial Firm failed to provide, such as an annual review fee, and so should make a total or partial refund of the fee.

To what extent are competing claims of beneficiaries outside AFCA's jurisdiction?

We cannot generally consider a complaint about a decision by a Financial Firm about how to allocate the benefit of a Financial Service between potential beneficiaries.

Rule C.1.2(b) does not, however, apply to Superannuation Complaints or complaints about Traditional Trustee Company Services. Both will frequently involve decisions affecting competing claims of beneficiaries.

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

We cannot generally consider a complaint that raises the same events and facts and is brought by the same Complainant as a complaint previously dealt with by AFCA.

Factors that we will take into account to decide whether a complaint has been 'dealt with' previously include:

- whether the nature and subject matter of the complaint is substantively the same as an earlier complaint
- whether the parties were the same for the two complaints
- whether the earlier complaint was resolved by a final decision or an agreed settlement.

Examples of situations where the complaint has not been 'dealt with' previously:

- The earlier complaint was discontinued
- The new complaint is that the Financial Firm has not complied with the terms of the settlement agreed in the earlier complaint

Rule C.1.2(c) specifies that the exclusion does not apply if there are additional events and facts raised that are sufficient to warrant us considering the complaint.

Factors we will take into account when additional events and facts are raised in the new complaint:

- Whether the additional events and facts are so significant that it would not be fair in all the circumstances to allow the outcome of the earlier complaint to stand.
- The length of time since the earlier complaint. Generally, AFCA will consider it fair to leave in place the outcome of a complaint resolved at least two years ago.

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.

What does AFCA expect a Financial Firm to do if it has already obtained default judgment and the Complainant has requested a stay on execution?

While we cannot set aside or interfere with default judgments, we require a Financial Firm to stay execution to allow the parties an opportunity to discuss the Complainant's request for a stay. Through our specialist financial difficulty process, we would examine the Complainant's financial position, details of the debt and security, and whether the Complaint is able to present a genuine and immediate alternative to execution of the default judgment. See the guidelines to rules A.7.2(f) and A.8.2.

What does 'dealt with' mean – if excluded as being outside of a Predecessor Scheme's jurisdiction?

Where a complaint was assessed as outside the jurisdiction of a Predecessor Scheme and now comes within our jurisdiction, we do not consider the complaint to have been 'dealt with' under C.1.2(d), if the complaint has not been resolved through an agreed outcome or a decision.

Matters that were outside the jurisdiction of a Predecessor Scheme that now come within jurisdiction of AFCA will be dealt with by AFCA, subject to any other AFCA jurisdictional provisions. Most commonly this will relate to complaints previously outside of a Predecessor Scheme's monetary limits, but that are now within our monetary limits.

However, if a complaint is now within our monetary limit, but outside of our jurisdiction because of other AFCA time limits, we will consider if any special circumstances should be applied to assess the relevant time limit. Exceptions apply in the case of superannuation death benefit complaints, where the time limit is prescribed by law, and superannuation disability complaints, where the AFCA rules do not permit the time limits to be extended. This is to ensure parties are not disadvantaged by the period between our establishment and when it commences operations on 1 November 2018.

What does ‘dealt with’ mean – outside FOS or CIO jurisdiction, but not assessed until after 1 November 2018

A complaint received by FOS or CIO before 1 November 2018 may be subsequently assessed as outside those schemes’ jurisdictions; however, it may come within AFCA’s jurisdiction. In those circumstances the FOS or CIO jurisdictional assessment will be completed and provided in writing by the relevant predecessor scheme as required by their governing rules. FOS or CIO will tell the Complainant that while the complaint is outside of their jurisdiction, it will be dealt with as an AFCA complaint under the AFCA Rules.

What does ‘dealt with’ mean – complaints discontinued by FOS

A FOS complaint received prior to 1 November 2018 may be discontinued if a Complainant asks for it to be closed before it is dealt with, or does not respond to a request for information before it is dealt with. Where a complaint has been discontinued with FOS and the Complainant seeks to reopen the dispute on or after 1 November 2018, we would consider if it is appropriate to reopen under the FOS Terms of Reference and apply the FOS criteria for reopening a dispute. If it is, then the complaint would proceed as a complaint under the FOS process.

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.

How will AFCA deal with a complaint that has already been though farm debt mediation?

Even after farm debt mediation has been conducted and no agreement is reached, we may still consider the complaint, which is often about irresponsible lending and financial difficulty. Merely because a complaint had previously been the subject of a farm debt mediation does not exclude the complaint from our jurisdiction.

Given that a prior mediation has already occurred, it is likely that we will proceed directly to Determination without first providing a preliminary assessment on the merits of the complaint – see rule A.8.2. However, we will consider whether a further case conference is appropriate, in circumstances where liability is not in question and the sole question before us is how to address the Complainant's financial difficulty in meeting their repayment obligations.

What complaints are outside AFCA's jurisdiction on the basis that the amount claimed is too high?

We cannot consider a complaint where the value of the Complainant's claim exceeds $1 million (or higher amount that applies because of an adjustment under the Rules to this cap). This exclusion does not, however, apply to a Superannuation Complaint, a complaint about a Primary Producer credit facility, or a complaint to set aside a guarantee supported by security over the guarantor's primary place of residence.

We recognise that some Complainants have difficulty assessing the value of their claim. For this reason, we will not simply rely on the amount that the Complainant states they are seeking by way of redress. Rather, we make our own objective assessment of the value of the Complainant's claim after reviewing the information provided by the parties to the complaint and obtaining any additional information required to make this assessment.

The monetary limit of $1 million applies in relation to a claim, rather than to a complaint or to the value of the financial product in question. The term 'claim' is explained in Section D. A Complainant who has a claim exceeding $1 million may not abandon the excess to bring it within the monetary limit or artificially construct a claim for this purpose.

Where a complaint contains multiple interrelated claims, some of which exceed $1 million and some of which do not, we may consider it would be more appropriate for all the claims to be dealt with together in another place with the jurisdiction to consider them all.

What complaints are outside AFCA's jurisdiction on the basis that the Complainant is part of a large corporate group?

We cannot consider a complaint by a Complainant that is a member of a group of related bodies corporate that together have 100 employees or more.

The Corporations Act definition of 'related body corporate' applies. A company is related to another company if it is its holding company or subsidiary, or if the two companies share the same holding company.

What complaints are outside AFCA's jurisdiction on the basis that a trustee's exercise of discretion is involved?

We cannot consider a complaint that would require review of a trustee's exercise of discretion – for example, a discretion under a will or a trust deed. But this exclusion does not apply if the complaint is a Superannuation Complaint. Or if the complaint alleges bad faith, failure to give fair and proper consideration to the exercise of the discretion, or failure to exercise the discretion in accordance with the purpose for which it was conferred.

What complaints about professional accountancy services are outside AFCA's jurisdiction?

We cannot consider a complaint about professional accountancy services provided by an AFCA Member that is a member of CPA Australia, the Institute of Chartered Accountants in Australia or Institute of Public Accountants. In deciding whether a service is a professional accounting service, we will take into account the nature of that service, how professional accounting services are defined by the relevant professional association and any industry standards.

Examples of professional accountancy services

- Preparing and auditing accounts and financial reports
- Preparing and submitting tax returns and business activity statements
- Advising on taxation issues
- Advising on business structuring and insolvency issues

We will, however, consider a complaint about professional accountancy services if provided in connection with a financial service, a credit activity or tax (financial) advice services.

Example of complaints that AFCA will consider:

- A complaint about a financial plan provided by an Accountant that includes advice about the tax implications of the recommended investment products

What complaints about a Privacy Act Participant are excluded?

We cannot consider a complaint about a Privacy Act Participant if the complaint is about something other than privacy.

For example, a complaint in relation to the quality of goods or services provided by the Privacy Act Participant is not about privacy and so is excluded from our jurisdiction.

Although framed as an exclusion, this provision provides that we have jurisdiction to consider a privacy-related complaint against a Privacy Act Participant – see rule B.2.1(i)(i).

A Privacy Act Participant is not required by legislation to be a member of AFCA, but has chosen to be an AFCA Member for the purposes of privacy complaints.

Examples of Privacy Act Participants:

- Suppliers or goods or services on terms that provide credit of more than seven days
- Commercial credit providers

What complaints about a CDR Participant are excluded?

We cannot consider a complaint about a CDR Participant if the complaint is about something other than privacy or breach of obligation arising from the regulatory framework, which applies the CDR such as the Competition and Consumer Act or Consumer Data Rules.

For example, a complaint in relation to the quality of goods or services provided by the CDR Participant is not about privacy or other CDR obligations and so is excluded from our jurisdiction.

Although framed as an exclusion, this provision provides that we have jurisdiction to consider a complaint against a CDR Participant about breach of privacy or other CDR obligation – see rule B.2.1(i)(ii).

Example of CDR Participant:

- A CDR data holder specified in an instrument designating a sector under subsection 56AC(2) of the Competition and Consumer Act
- A CDR data recipient accredited under subsection 56CE(1) of the Competition and Consumer Act

Exclusions applying specifically to credit complaints

C.1.3

AFCA must exclude:

a) a complaint about the Financial Firm's assessment of the credit risk posed by a borrower or the security to be required for a loan unless the complaint is about:

   (i) maladministration in lending, loan management or security matters; or

   (ii) the variation of a credit contract as a result of the Complainant being in financial hardship

b) a complaint about a Small Business (including Primary Producer) credit facility:

   (i) of more than $5 million or higher amount that applies as a result of an adjustment in accordance with rule D.4.3; and

   (ii) where the complaint is submitted by the borrower or a guarantor of the borrower's debt.

What complaints about the assessment of credit risk are outside AFCA's jurisdiction?

We cannot consider complaints about a Financial Firm's assessment of credit risk. However, we can consider a complaint about Maladministration in lending, loan management or security matters. Maladministration is defined as a failure to meet a legal duty or obligation. This includes a failure by a Financial Firm to meet responsible lending obligations.

We can also vary a credit contract as a result of the Complainant being in financial hardship. This is whether or not the credit contract is a consumer contract regulated under the National Consumer Credit Code.

Examples of where AFCA may decide to vary a credit contract on the basis of financial hardship:

- Where AFCA considers that a credit provider has not met its obligations under the National Consumer Credit Code in relation to a request for a hardship variation
- Where AFCA considers that a bank has not met its obligations under the Code of Banking Practice or the Customer Owned Banking Code of Practice where a request is made for financial difficulty assistance
- Where AFCA considers that a credit provider has not responded to a request for financial difficulty assistance in accordance with its own policy or good industry practice
- Where AFCA considers that a credit provider has not met obligations under Commonwealth and State legislative protections designed to assist Centrelink recipients

In assessing how a credit provider has responded to a debtor's request for financial assistance, we will consider whether the credit provider has given genuine consideration to the request and has responded with reasons referable to the Complainant's particular circumstances. We will also consider whether the credit provider's response has sufficiently addressed the Complainant's financial difficulty or hardship.

In addition, we will take into account:

- whether the credit provider started or continued with enforcement action before it considered and responded to the request for assistance
- if the Complainant appointed a representative, whether the credit provider respected that appointment
- whether the Complainant demonstrated a willingness to work with the credit provider – for example, by responding to reasonable requests for information and making payments where possible.

What Small Business credit facilities are outside AFCA's jurisdiction?

We cannot consider a complaint about a Small Business credit facility that exceeds $5 million (or higher cap where an adjustment under rule D.4.3 applies).

A credit facility may include a loan, lease, line of credit, guarantee or other debt instrument, or a combination of these if approved under the same credit contract or at the same time. The exclusion of Small Business credit facilities over $5 million applies whether the Complainant is the borrower or a guarantor of the credit facility.

Examples of situations in which the rule C.1.3(b) exclusion **will** apply:

- A responsible lending complaint by the borrower or guarantor of a facility if the facility document committed the credit provider to providing credit of more than $5 million (even if less than $5 million is owing at the time of submitting the AFCA complaint)
- A complaint by a guarantor seeking to reduce their liability under the guarantee by the amount of a claim the Small Business has against the credit provider, if the facility document committed the credit provider to provide credit of more than $5 million

Examples of situations in which the rule C.1.3(b) exclusion **will not** apply:

- A complaint about a facility that made available credit of up to $5 million (even if more than $5 million is owing at the time of submitting the AFCA complaint)
- A complaint about a facility that was originally more than $5 million, but that was varied to reduce available credit to $5 million or less
- A complaint where there are two credit contracts and neither provide credit of more than $5 million, even if the aggregated credit is greater than $5 million.

Exclusions applying specifically to insurance complaints including Superannuation Complaints

C.1.4

AFCA must exclude:

a) a complaint about a General Insurance Policy other than a:
   (i) Retail General Insurance Policy;
   (ii) Residential Strata Title Insurance Product;
   (iii) Small Business Insurance Product;
   (iv) Medical Indemnity Insurance Product; or
   (v) Title Insurance Policy

b) a complaint about underwriting or actuarial factors leading to an offer of a Life Insurance Policy on non-standard terms

c) a complaint about rating factors and weightings an insurer under a General Insurance Policy applies to determine the insured's or proposed insured's base premium that is commercially sensitive information

d) a complaint about a decision to refuse to provide insurance cover except where:
   (i) the complaint is that the decision was made indiscriminately, maliciously or on the basis of incorrect information;
   (ii) the complaint is that the Complainant was misinformed about the insurance cover; or
   (iii) the complaint relates to a Medical Indemnity Insurance Product.

For the avoidance of doubt, rules C.1.4 (b), (d)(i), and (d)(ii) apply to a Superannuation Complaint to the extent that the insurance policy is issued to either the trustee of a Regulated Superannuation Fund, or an Approved Deposit Fund or an RSA provider.

What general insurance products can AFCA's consider?

Our jurisdiction to consider complaints about general insurance products is limited by reference to the product type. Although framed as an exclusion, this means we can consider complaints about certain General Insurance Policies. A General Insurance Policy is defined in Section E, and adopts the meaning given by the *Insurance Contracts Act 1984* (Cth).

Examples that are not a General Insurance Policy:

- life insurance
- health insurance
- workers compensation
- insurance to which the Marine Insurance Act applies

In turn, the General Insurance Policy must be one of the five types set out in rule C.1.4 and defined in Section E.

1. Retail General Insurance Policy

The Complainant must be an individual. If the Complainant is a Small Business, see Small Business Insurance Product (following).

The complaint is about a broker's conduct in respect of a Retail General Insurance Policy

The Complainant may allege the broker failed to follow instructions or failed to arrange adequate insurance. The individual Complainant cannot bring a complaint about the broker's actions in respect of an Excluded Product – for example, health insurance or insurance provided by the State or Commonwealth.[44]

The complaint is about an insurer's decision or conduct in respect of a Retail General Insurance Policy

We can consider the complaint if the insurance product is specified in s.761G(5)(b) of the Corporations Act. In turn, each type of retail general insurance product is defined in the Corporations Regulations:

- A motor vehicle insurance product

For example, a bus or vehicle with a carrying capacity of more than two tonnes is not a motor vehicle

- A home building insurance product

For example, home builder's warranty is not a home building insurance product

- A home contents insurance product

For example, because a General Insurance Policy is defined as including any part of such a contract, a contents policy will include any cover for legal liability

- A sickness and accident insurance product

For example, worker's compensation and compulsory third party compensation is not a sickness and accident insurance product

- A consumer credit insurance product

For example, individuals entering a regulated contract for personal, domestic or household purposes

[44] see s.765A Corporations Act

- A travel insurance product

For example, financial loss in respect of transport fares because the insured does not commence or complete the journey

- A personal and domestic property insurance product

For example, individuals entering a regulated contract in respect of loss or damage to property that is for personal, domestic or household purposes

2. Residential Strata Title Insurance Product

Although called a 'Residential' Strata Title Insurance Product, this type of insurance policy also covers a small business if it insures the body corporate of a strata title or company title building that is wholly occupied for residential or small business purposes.

The complaint is about a broker's conduct in respect of a Residential Strata Title Insurance Product

Only the chair of an owner's corporation or a body corporate manager may lodge a complaint about its broker's failure to follow instructions or failure to arrange adequate residential strata title insurance.

Even though a lot owner or tenant may be a beneficiary under a Residential Strata Title Insurance Product, they are not the client of the broker (no Financial Service has been provided by the broker to the lot owner or tenant) and, therefore, they have no standing to bring a complaint against the broker.

The complaint is about an insurer's decision or conduct in respect of a Residential Strata Title Insurance Product

We can consider complaints about strata building, common contents, and personal accident or sickness for voluntary workers in or about the strata building or common property.

We cannot consider complaints about professional indemnity, public liability or workers compensation in respect of a Residential Strata Title Insurance Product.

3. Small Business Insurance Product

The complaint is about a broker's conduct in respect of a Small Business Insurance Product

A small business cannot bring a complaint about a broker in respect of an Excluded Product.[45] Otherwise, we can consider a complaint against a broker about a General Insurance Policy. This means that regardless of whether the insurance policy is a Small

[45] see s.765A Corporations Act

Business Insurance Product, we can consider a complaint about the broker's conduct in following instructions or arranging the policy.

The complaint is about an insurer's decision or conduct in respect of a Small Business Insurance Product

We can only consider complaints about a policy, or part of a policy, that provides insurance cover for (this is an exhaustive list):

a) Computer and Electronic Breakdown;

b) Fire or Accidental Damage – to the extent that the cover relates to: Fire/Lightning/Explosion; Storm/Tempest/Rainwater; Flood; Water from leaking pipes/water systems; Impact; Earthquake; Riot and Civil Commotion or Industrial Disputes; Malicious Damage; Fusion; Spoilage of refrigerated goods;

c) Loss of Profits/Business Interruption;

d) General Property;

e) Glass;

f) Land Transit;

g) Machinery Breakdown;

h) Money; and

i) Theft.

We cannot consider cover in relation to Contractors All Risks; Fidelity Guarantee;

Legal Liability (including Public Liability and Products Liability); Professional Indemnity; and Industrial Special Risks in respect of a Small Business Insurance Product.

Just because we cannot consider complaints in respect of these excluded types of cover does not mean that we have no jurisdiction over these excluded types of policies. Industrial Special Risks policies are specifically drafted for a particular industry or segment of that industry. We cannot consider complaints about industrial special risks insurance cover, but we can consider certain cover within an industrial special risks policy.

For example, we can consider cover for accidental damage that appears in an Industrial Special Risks policy. But we cannot consider cover for Industrial Special Risks under that same policy.

4. Medical Indemnity Insurance Product

This type of insurance product provides medical indemnity cover for a medical practitioner or a registered health professional as set out in the Corporations Regulations.

For example, a dentist is not a health professional as defined.

5. Title Insurance Policy

Title insurance is often sold by conveyancers to protect against defects in the title or boundaries of land.

To what extent is AFCA precluded from considering a complaint about a life insurer's decision to impose non-standard policy terms?

We cannot consider a complaint about an offer of a Life Insurance Policy (including for insurance cover within superannuation) if it contains exclusions or conditions that the life insurance company does not standardly impose for that type of policy.

Examples of non-standard terms in a life insurance policy

- Exclusion of cover for a specified medical condition
- Higher premium on the basis that the insured has a pre-existing medical condition

However, rule C.1.4 does not operate as a blanket exclusion of complaints merely because there are underwriting or actuarial factors involved.

We must be satisfied that those underwriting or actuarial factors led (that is, were relied upon in the decision) to the offer a life insurance policy on nonstandard terms. In the absence of showing that such underwriting, actuarial or statistical data exists and that information was relied upon in applying the exclusion, we cannot be satisfied that such factors led to the non-standard term being imposed and the rule C.1.4 would not apply.

To what extent is AFCA precluded from considering a complaint about rating factors and weighting that affect the premium?

We generally cannot consider a dispute about the fairness of the level of a premium applied by a Financial Firm – see rule C.1.2(a).

We also cannot consider a dispute about the commercially sensitive underwriting rating factors and weighting used by a general insurer Financial Firm to arrive at that base premium.

For example, we cannot consider a dispute about the postcode, address of the insured property, gender or age of the insured driver, unless that information is incorrectly recorded.

To what extent is AFCA precluded from considering a complaint about the refusal of insurance cover?

We cannot consider a complaint about a refusal, for commercial reasons, to provide insurance, including within superannuation. But there are three situations where we can consider a complaint about refused insurance.

1. A complaint that the decision to refuse insurance cover (whether an individual policy, or as part of a superannuation or other group policy) was not made properly. We use the term ‘indiscriminately’ in the context of the refusal decision being made arbitrarily, or without sound reason.

2. A complaint that the Complainant was misinformed about the cover.

For example, the Complainant was given a misleading statement showing that they did have cover, even though it was actually refused

3. A complaint about a refusal to provide medical indemnity insurance.

A Financial Firm cannot usually distinguish on grounds such as mental illness, a disability or an impairment. However, the law provides for exemptions for insurance policies and so, if the different treatment is reasonably based on actuarial or statistical data and any other relevant factors, then the discrimination will be excused. In this context, ‘discrimination’ means different treatment.

When faced with an allegation that a discriminatory exclusion ought not be applied, we expect a Financial Firm to:

1. Provide us with the actuarial or statistical data that was relied on.

2. Provide reasons to show that it was reasonable to have relied on that data.

3. Provide reasons why the discrimination is reasonable having regard to any other factors in the event that no such actuarial or statistical data is available, or cannot be reasonably obtained.

4. Provide any evidence of unjustifiable hardship (it is not unlawful to discriminate if it can be shown that providing cover would cause unjustifiable hardship).

Exclusions applying specifically to investment complaints including Superannuation Complaints

C.1.5

AFCA must exclude:

a) a complaint solely about the investment performance of a financial investment, other than a complaint concerning non-disclosure or misrepresentation

b) a complaint relating to the management of a fund or scheme as a whole

c) a complaint against the trustee of a Self Managed Superannuation Fund in respect of their conduct as trustee of that fund

d) a complaint relating to the management as a whole of an RSA Provider or insurer, the RSA Provider's or insurer's business or the RSA Provider's or insurer's investments.

For the avoidance of doubt, rules C.1.5 (a), (b), and (d) apply to a Superannuation Complaint.

e) a complaint relating to the management, as a whole, of an RSA Provider or insurer, the RSA Provider's or insurer's business or the RSA Provider's or insurer's investments.

What complaints about investment performance are outside AFCA's jurisdiction?

We cannot consider a complaint that is solely about the investment performance of a financial investment, other than a complaint about non-disclosure or misrepresentation.

This does not, however, prevent us from considering a complaint about an act or omission by the Financial Firm merely because it relates to an investment that happens to be performing poorly.

Examples of complaints that would not be excluded by Rule C.1.5(a):

- A complaint that an investment made by a fund manager was not an authorised investment
- A complaint that investment earnings were improperly allocated to a member's account

What complaints are outside AFCA's jurisdiction because they relate to the management of a fund or scheme as a whole?

We cannot consider a complaint about the management of a fund or scheme as a whole. Typically, a complaint of this type will concern day-to-day management decisions about the fund or scheme and apply to, or affect, all members of the fund or scheme in the same way.

Usually, if the nature of the complaint would require analysis of the scheme's constitution, the trust's trust deed or copies of minutes of directors' meetings and board or committee papers, the complaint would be considered as one relating to the management of the fund as whole. However, if the alleged breach of a scheme's constitution or trust's trust deed gives rise to specific harm for the Complainant and an in-depth analysis of the Financial Firm's conduct (including commercial judgments) is not required, we do not take the view that the complaint relates to the management of the fund or scheme as a whole and we will consider the complaint.

In applying this exclusion to Superannuation Complaints we will take into account Federal Court decisions about the application of this exclusion to the jurisdiction of the Superannuation Complaints Tribunal. Therefore, if a complaint is about the adverse impact of a decision on the interests or entitlements of a particular member of a superannuation fund, it does not relate to the management of the fund as a whole. Similarly, a complaint involving a breach of a fund's trust deed does not relate to the management of the fund as a whole, even if the breach affects other members.

Examples about the management of the fund as a whole for a superannuation fund:

- Complaints about the investment strategies of the fund
- Complaint about the design of the fund, including the design of the fund's insured benefits

Examples of complaints that are not about the management of a fund as a whole for a superannuation fund:

- Complaints that the trustee did not allocate earnings to the member in the manner required by the trust deed
- Complaints that the trustee applied a policy in a way that was unfair, or unreasonable, to the Complainant in the particular circumstances

Example of complaints about the management of the fund as a whole (not being a superannuation fund):

- General allegations of mismanagement that do not identify a clear legal obligation that has been breached
- Complaints about strategic decisions about the fund such as a decision to wind up a scheme, to rollover an investment or to change the scheme's constitution
- Allegations that concern the exercise of commercial judgment by the fund manager
- Alleged breaches of fund manager directors' duties

- Complaints about investment decisions made by a fund manager
- Complaints about decisions by fund managers to freeze redemptions in a falling market
- Complaints about the categorisation of assets and liabilities

Examples of complaints that are not about the management of a fund (not being a superannuation fund) as a whole:

- Failure to redeem an investment within the timeframes specified in the scheme constitution (provided the scheme is liquid at the time)
- Failure to satisfy the mandatory pre-conditions for a fee increase
- Where ASIC has granted relief to allow some redemptions from an illiquid fund – a failure to consider a redemption request consistently with the terms of ASIC's relief

Sometimes a complaint may contain both allegations concerning the management of the fund as a whole, and other allegations such as non-disclosure or misrepresentation. Where it is possible to separate the allegations, we will consider those aspects of the complaint that are within our jurisdiction.

We will look to the substance of the complaint regardless of how it is framed.

For example, if a Complainant frames an allegation as a breach of disclosure (or other allegation within our jurisdiction), but the complaint fundamentally relates to the management of the fund as whole, we must exclude the complaint. This could either be on the basis that the complaint concerns the management of the fund as a whole, or alternatively we could exercise our discretion under rule C.2 to exclude the complaint – see rule C.2. Issues of this kind can arise in a complaint about a representation by a fund manager as to a future matter and whether there was a reasonable basis for the representation.

We take the same approach to management of the whole of an RSA Provider or insurer as we take to a superannuation fund.

Exclusions applying specifically to Traditional Trustee Company Service complaints

C.1.6

AFCA must exclude:

a) a complaint about a Traditional Trustee Company Service where:

(i) at least one beneficiary is a minor or lacks mental capacity;

(ii) the service may be made under any of the laws listed in Schedule 8AC of the Corporations Regulations; or

(iii) the service is provided to a person lacking mental capacity and the trustee was appointed by a court

b) a complaint about the alleged capacity of the testator to make a valid will

c) a complaint relating to the management of a common fund.

What Traditional Trustee Company Services complaints are outside AFCA's jurisdiction?

We cannot consider a complaint about a Traditional Trustee Company Service (see Rule B.2) if either the Complainant, or another beneficiary of the trust or estate, is a minor or lacks mental capacity. If so, they are not able legally to consent to us considering the complaint. For a Traditional Trustee Company Services complaint, all Other Affected Parties must consent to our role.

Example of a complaint that may be excluded under Rule C.1.6(a)(i):

- A complaint about the conduct of a trustee company in its capacity as administrator of the financial affairs of a minor, or a person who lacks the mental capacity to manage their own affairs

We cannot consider a complaint about a trustee acting under a State or Territory guardianship law (these laws are listed in Schedule 8AC of the Corporations Regulations). Guardianship laws enable a court or tribunal in the State or Territory to review the appointment of a trustee. So these forums are more appropriate for complaints of this type.

If a complaint raises issues, some of which can be dealt with under guardianship laws and some of which cannot, we will consider whether the issues that are not subject to the relevant law can be dealt with in isolation from the other issues. If so, we may be able to deal with those issues in isolation.

We cannot consider a complaint about a court-appointed trustee's management of the affairs of a person who lacks mental capacity.

We cannot consider a complaint about the administration of a will alleging that a deceased person did not have the capacity to make a valid will.

We cannot consider a complaint relating to the management of a common fund (a fund that pools money from multiple estates for investment purposes).

C.2 AFCA's discretion not to consider complaints

C.2.1

AFCA may in its discretion exclude a complaint, if AFCA considers this course of action is appropriate.

AFCA will not exercise its discretion to exclude a complaint lightly. The discretion will only be used in cases where there are compelling reasons for deciding that AFCA should not consider the complaint.

What factors does AFCA take into account when exercising its discretion not to consider a complaint?

We have discretion to decide that it is not appropriate for us to consider a complaint. We will only exercise this discretion where there are compelling reasons to exclude a complaint. We take into account:

- the nature of the complaint
- any circumstances or factors relevant to the complaint
- the principles stated in rule A.2.

Sometimes we will make the decision to exclude a complaint soon after the complaint is submitted. In other cases, we will not be in a position to judge whether the complaint should be excluded until we have collected and analysed relevant information and clarified the issues.

For example, we may exclude a complaint on the basis of rule C.2.1 where the Complainant is seeking to re-open a complaint after entering into a settlement with the other party and the settlement was clearly intended to be a full and final settlement of all the claims made in the AFCA complaint. In considering whether this is appropriate, we will take into account the fact that a settlement normally discharges any liability of the Financial Firm.

Other relevant factors include:

- Whether the Financial Firm induced the Complainant to settle by providing false or misleading information or placing undue pressure on the Complainant to settle quickly
- The overall fairness of the terms of the settlement
- Whether the Complainant was represented during the settlement discussions
- Whether the Complainant had any medical or other issues that place them in a position of particular vulnerability at the time of the settlement discussions

C.2.2

Examples where AFCA may consider excluding a complaint include:

a) if there is a more appropriate place to deal with the complaint, such as a court, tribunal, another dispute resolution scheme, or the Office of the Australian Information Commissioner;

b) if the subject matter of the complaint has already been adequately dealt with by AFCA or a Predecessor Scheme;

c) if the complaint relates to a Financial Firm's practice or policy, and does not involve any allegation of either maladministration or inappropriate application of the practice or policy;

d) if the complaint being made is frivolous, vexatious, misconceived or lacking in substance;

e) if the Complainant has commenced legal proceedings in relation to the subject matter of the complaint unless:

   (i) the Complainant discontinues the legal proceedings; or

   (ii) the relevant statute of limitation period will shortly expire and the Complainant undertakes in writing to AFCA not to take any further steps in the proceedings while AFCA is considering the complaint

f) if AFCA agrees to allow a Financial Firm to treat the complaint as a test case and the Financial Firm:

   (i) undertakes within six months to institute proceedings in any superior court or tribunal that has the ability to make a binding decision of the issue or point of law in respect of the complaint;

   (ii) undertakes to pay the Complainant's costs and disbursements (if not otherwise agreed, on a solicitor and own client basis) of the proceedings at first instance and any subsequent appeal proceedings commenced by the Financial Firm (except by way of respondent's notice, cross appeal or other similar procedure);

   (iii) undertakes to make interim payments of account of such costs and disbursements if and to the extent that it appears reasonable to do so;

   (iv) undertakes to meet any other requirements of AFCA; and

   (v) complies with these undertakings

g) if the Complainant is represented or assisted by an agent who may receive remuneration for this service and AFCA considers that:

   (i) the agent is engaging in inappropriate conduct that is not in the best interest of the Complainant, or

   (ii) the complaint is not accompanied by information required by AFCA

h) if the Complainant is represented or assisted by an agent who may receive remuneration for this service and the agent has previously submitted complaints that have been excluded under rule C.2.2(g); or

i) AFCA considers that the complaint involves (or may involve) another Complainant who has not consented to the submitting of the complaint to AFCA and without that person's consent it would not be appropriate for AFCA to consider the complaint

j) a complaint about a financial service where the Complainant is a wholesale client within the meaning of the Corporations Act, but is not a Small Business.

Rule C.2.2 lists examples where AFCA may exclude a complaint. We do not have to exclude a complaint in these circumstances. Nor is our discretion to exclude a complaint limited to these circumstances.

In what circumstances might AFCA decide that there is a more appropriate place to decide a complaint?

We may exclude a complaint if we think that a court, tribunal, another dispute resolution scheme, or the Office of the Australian Information Commissioner is a more appropriate place than AFCA to deal with a complaint.

We will take into account the following factors when considering if the complaint is more appropriately dealt with elsewhere:

- The potential advantages and disadvantages to each party of having the complaint determined by AFCA, or in another place. These may include the time and expense involved, as well as each party's ability to obtain or enforce a decision.
- Whether our process is appropriate to resolve the complaint, as compared to the process adopted in other places. In doing so, we consider, the consequences for each party of the alternative processes available.
- Issues that are partly within and partly outside our jurisdiction. If we are unable to award the remedy sought, we are likely to exclude consideration of the complaint. However, we may decide to consider a complaint that raises significant issues that are within our jurisdiction, where those issues can be dealt with separately from the issues that are outside jurisdiction.
- Complexity is relevant, but is not a sufficient reason alone to exclude a complaint.

Examples where we might exclude a complaint on the basis that another place is more appropriate:

- Where we consider that the only way to determine the issues raised by the complaint would be for a third party to give evidence subject to cross-examination.
- Where a complaint contains multiple interrelated claims, some of which are within our jurisdiction and some of which are not, and we consider that it would be more appropriate for all the claims to be dealt with together in another forum with jurisdiction to consider them all.
- Where a Predecessor Scheme is in the process of dealing with the complaint.
- A complaint about who caused a motor vehicle accident between an uninsured Complainant and the driver insured by a Financial Firm, in circumstances where the insured driver has already issued debt recovery legal proceedings against the Complainant for repair costs.
- If a Family Law property settlement or court orders are obtained between the Complainant and their spouse or de-facto partner before we have finished our consideration of a complaint, it may not be possible to continue with the complaint. This is because of the possibility that the allocation of assets and/or liabilities in the property settlement has taken into account the benefit obtained by the other party because of the Financial Firm's error, and additional compensation through our Determination would not be appropriate.

Where the superannuation trustee is seeking judicial advice from the court about the validity of a trust deed amendment that would affect all fund members (or a class that includes the Complainant).

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.

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.

How does rule 2.2(b) differ from rule 1.2(c)?

Rule 2.2(b) deals with the subject matter of the complaint, but rule 1.2(c) deals with the complaint itself. Under rule 1.2(c), we must exclude a complaint about the same set of facts and circumstances that has already been addressed. Under rule 2.2(b), we have the discretion to exclude a complaint about the same subject matter that has already been addressed. This means that our discretion to exclude is broader than the mandatory exclusion.

For example, we are unlikely to exercise our discretion to exclude:

- A complaint about the subject matter of financial difficulty in repaying a home loan if new facts and circumstances have given rise to a new event of financial difficulty.

In what circumstances might AFCA decide that it should not consider a complaint because it relates to a Financial Firm's policy or practice?

We may exclude a complaint relating to a Financial Firm's practice or policy that does not involve a breach of a legal or contractual obligation, or inappropriate application of the Financial Firm's practice or policy. We will not, however, exercise our discretion to exclude a complaint if the Financial Firm's alleged conduct is contrary to law, good industry practice, or contractual obligations regardless of whether such conduct was in line with the Financial Firm's practice or policy.

The result is that compliance by a Financial Firm with a practice or policy does not necessarily put a complaint about that practice or policy outside our jurisdiction. If, for example, a practice or policy specifies the actions that the Financial Firm's representatives must take in the course of dealings with customers, our role includes considering whether the practice or policy achieved legal compliance with obligations owed to customers and met good industry practice.

We do not accept a Financial Firm's submission that it is their practice or policy to apply their terms and conditions to explain their conduct. Rather, we ask whether the Financial Firm was entitled to act in accordance with its terms or conditions in the circumstances.

Examples where we might exclude a complaint on the basis that it relates to a Financial Firm policy or practice:

- A complaint about RFID chips on credit cards
- A complaint that the Financial Firm provides emailed account statements rather than paper account statements
- It is not appropriate for the Financial Firm to change its practice or policy because to do so would adversely affect other customers (albeit be of advantage to the Complainant)
- The Financial Firm cannot change its practice or policy because of system (for example – it cannot print paper statements) or regulatory (for example – AML/CTF) constraints
- The practice or policy is not contrary to law or good practice, but rather is an outcome of the Financial Firm's exercise of commercial judgment

In a superannuation context, it may also be unfair or unreasonable for the superannuation provider to have applied its policy to the Complainant in the particular circumstances; for example, where the Complainant was misled about the application of the policy.

In what circumstances might AFCA decide that a complaint is frivolous, vexatious, misconceived or lacking in substance?

We may exclude a complaint that is frivolous, vexatious, misconceived or lacking in substance. A complaint of this type will clearly not warrant redress by the Financial Firm. Accordingly, it is efficient for all parties for us to identify this at an early stage and thereby spare the parties the time and effort of responding to our requests for information and making submissions.

Courts have considered the meaning of the terms 'frivolous', 'vexatious' and 'lacking in substance'. Helpful points from court decisions are summarised below.

Frivolous may mean 'insupportable at law', 'disclosing no cause of action' or 'groundless'.

Bringing an action is only **vexatious** if done with a particular motive, such as a malicious motive.

An action is **frivolous or vexatious** if:

- it is 'so obviously untenable that it cannot possibly succeed'
- it is 'manifestly groundless'
- it is 'so manifestly faulty that it does not admit of argument'
- 'useless expense' would be involved in allowing the action to proceed • the action 'discloses a case that the court is satisfied cannot succeed'.

Misconceived means mistaken or misunderstood. A complaint may be misconceived if it is made against the wrong party, or if there is no remedy that can lawfully be provided.

Lacking in substance has been said to mean:

- in relation to a claim, ‘a claim that presents no more than a remote possibility of merit and that does no more than hint at a just claim’
- in relation to a complaint, where ‘the Complainant has no arguable case that should be allowed to be resolved at a full hearing’
- in relation to a case, a case depending on ‘an untenable position of law or fact’.

If on the available information, we can conclude a complaint is frivolous, vexatious, misconceived or lacking in substance, we may exclude the complaint even if the Complainant argues further enquiries by us might elicit further information in support of the claim.

In what circumstances might AFCA decide that it should not consider a complaint because of Complainant-initiated legal proceedings?

We may exclude a complaint if the Complainant has issued legal proceedings in a court about matters that are the subject of the AFCA complaint. This is whether the legal proceedings are instituted before or after the complaint is submitted. We will not, however, exclude the complaint if the Complainant discontinues the legal proceedings. Nor will we exclude the complaint if the limitation period for legal proceedings will shortly expire and the Complainant undertakes to us not to take further steps in the court proceedings while AFCA is considering the complaint.

A Complainant who lodges a defence and counterclaim in legal proceedings instituted by the Financial Firm will not be considered as commencing proceedings – see rule A.7.2.

In what circumstances might AFCA agree to a complaint being decided as a test case in the courts?

We may allow a Financial Firm to treat a complaint as a test case to be decided in court proceedings, rather than by AFCA.

Typically, this will be where the Financial Firm considers that the claim raises issues that will have a significant impact on the Financial Firm’s future operations or, in a superannuation context would affect all, or a significant group of fund members, in the same way. One reason may be where the Financial Firm believes that other similar claims are likely to be made. Another may be where there is an important question of law to be resolved.

If a Financial Firm wants a complaint to be resolved in court proceedings as a test case rather than by AFCA, the Financial Firm must write to us to request this. The request should explain the potential significance of the claim on the Financial Firm’s operations, or in a superannuation context – the fund. If the Financial Firm has obtained legal advice about the reasons why the complaint is best resolved through court proceedings, this advice should be provided to us.

We do not have to agree to a request. Factors that we are likely to take into account when considering a request include:

- the Complainant's views
- the urgency of the complaint from the Complainant's perspective
- whether the complaint raises a new issue for us and whether we consider we have the expertise to consider the complaint
- whether the complaint raises an important legal issue about which different judicial views have previously been expressed
- in a trustee context, whether the Financial Firm would be entitled to seek judicial advice about the issue
- the extent of the potential impact of the complaint on the Financial Firm, or in a superannuation context, the fund
- whether other industry participants or representatives share the Financial Firm's view that the complaint would best be resolved as a test case.

We can only agree to a complaint being resolved through court proceedings as a test case if the Financial Firm provides us with undertakings as required by rule C.2.2(f). These undertakings include that the Financial Firm will institute the court proceedings within six months and will pay the Complainant's legal costs and expenses. In the case of a superannuation fund, the superannuation trustee may have a right of indemnity against the fund assets that entitles the superannuation trustee to recover these costs and expenses. We may also require other undertakings, for example, to address any unfairness that might flow to the Complainant as a consequence of delay in resolution of the complaint.

Examples of conditions that we may impose before we agree to a test case:

- The Financial Firm cannot pursue a technical point in the proceedings that prevents the substantive issue from being decided
- The Financial Firm cannot seek summary judgment
- The Financial Firm cannot prevent the Complainant from presenting a counter argument

If the Financial Firm provides us with the required undertakings in writing, we will inform the Complainant that the complaint will be resolved through court proceedings as a test case and, therefore, we will not consider the complaint. We will also explain to the Complainant the implications for them, including their right to be represented and the Financial Firm's obligation to bear the Complainant's legal costs and expenses.

If we later become aware that the Financial Firm is not complying with one of its undertakings, we may recommence our consideration of the complaint.

Example where AFCA might recommence considering a complaint:

- If a Financial Firm has not issued legal proceedings in relation to the complaint within six months of the Financial Firm's undertaking to AFCA

If a test case is being pursued by a Financial Firm with our agreement, we may decide to defer consideration of complaints raising similar issues pending the outcome of the test case.

In what circumstances might AFCA decide not to consider a complaint because of inappropriate conduct by a paid representative?

Rule C.2.2(g) and (h) gives us discretion to decline to consider a complaint if the Complainant is represented by a paid agent who engages in inappropriate conduct, or has done so in the past for other clients. An example would be if the paid agent is obstructing the fair resolution of a complaint by agreement, or on its merits.

If we have concerns that a paid agent is not using our process in good faith, we will contact the Complainant directly to discuss the issue. If the Complainant insists on using the representative, then AFCA may refuse to consider the complaint further.

Some paid agents may encourage Complainants to conceal their involvement to avoid us exercising our discretion to refuse to consider a complaint. This is unacceptable conduct of the kind that could result in us using our discretion under rule C.2.2(h) to decide not to consider future complaints for clients of the paid agent.

We also expect that paid agents, even more than other representatives, should be familiar with the information and documentation that will be required to support their client's complaint, and should ensure the following information is provided at the time the complaint is submitted:

General information

- Name and contact details of the applicant. While we will request contact information for the paid agent, we also require contact details of the applicant should we need to contact them directly. It is not acceptable that a paid agent only provides contact information for themselves.
- A complaint raised by a paid agent should be clearly articulated. Specific details of the key issues in dispute, along with supporting documentation, will be required when the complaint is submitted. It is not sufficient to use a generic template of allegations without providing specific details relating to the applicant.
- A paid agent should identify all issues in dispute when the complaint is submitted, wherever practical. It is not acceptable that a paid agent introduces further complaint issues during the progression of the complaint, where it is clear that they were able to be identified earlier.
- A paid agent should give details of the outcome sought, including any calculations and reasoning for the request.

- A paid agent should, if available, give the name of the Financial Firm against which the complaint is lodged, along with relevant details of the financial service (for example a policy or account number).
- A paid agent should give the date of any complaint made to the Financial Firm.

Credit repayment history listing

If a representative disputes a credit listing on behalf of their client, we will require the representative to provide relevant documentation, including a copy of their client's credit file, a completed AFCA agent authority, clear reasons why the default listing is being disputed and documentation to support the reasons provided. The documentation may include evidence to show that the Complainant notified their Financial Firm of a change of address, evidence that the Complainant notified their Financial Firm of their financial difficulty, or evidence to show that repayments were made to clear a past due amount before the credit listing was recorded.

Financial difficulty

If a representative is seeking a credit provider's assistance for their client's financial difficulty, we will require the representative to provide documentation that is relevant to the Complaint at time the complaint is lodged. This may include a completed statement of financial position, a completed AFCA agent authority, reasons for their client's financial difficulty, an outline of how their client's circumstances will change (if they have not already done so) and a summary of the assistance being requested of the Financial Firm. The representative should also be willing to facilitate timely negotiations between their client and the Financial Firm.

In what circumstances might AFCA decide not to consider a complaint because another party is not involved?

We may exercise our discretion to exclude a complaint where we cannot effectively investigate the circumstances and allegations without the involvement of another person who is not a party to the complaint.

For example:

- We cannot investigate an allegation that a co-borrower forged home loan redraws from a jointly held account without their handwriting samples.
- We cannot investigate whether a Financial Firm's delay in property settlement allowed a third party to lodge a caveat, without the third party's involvement.

What if the Complainant is a wholesale client?

A Financial Firm has an obligation under section 912A(2)(b) of the Corporations Act 2001, to belong to an ASIC-approved external dispute resolution (EDR) scheme. This obligation to provide access to an EDR scheme applies to Financial Firms with an Australian Financial Services Licence to provide services to retail clients (see section 912A(1)(g) of the Corporations Act). The intent of the legislature was to ensure that retail clients had the benefit of a number of protections, including access to an EDR scheme as a free and user-friendly alternative to the courts. The Corporations Act does not require that an EDR scheme be made available to non-retail (or wholesale) clients. Where a Financial Firm is licensed to deal with both retail and wholesale clients, its membership of AFCA also gives its wholesale clients potential access to the AFCA scheme.

For this reason, we have discretion to exclude complaints from wholesale clients. However, we will not exercise our discretion to exclude a complaint merely because it is submitted by a wholesale client.

Section D

Remedies

Section D – Remedies

D.1 Types of remedies for a Superannuation Complaint

D.1.1

To the extent permitted by section 1055 of the Corporations Act, the AFCA Decision Maker for a Superannuation Complaint may:

a) affirm, vary or set aside and substitute the decision or conduct the subject of the complaint; and/or

b) set aside and remit part or all of the decision to the trustee, insurer or other decision maker with directions; or

c) in the case of a life policy, annuity policy, contract of insurance or RSA, set aside or vary the terms of the governing rules in relation to the Complainant or order the repayment of money; or

d) in the case of a life policy fund, determine that the Complainant's membership of the fund is cancelled.

D.1.2

To the extent required by section 1055 of the Corporations Act, the AFCA Decision Maker for a Superannuation Complaint must affirm a decision or conduct if satisfied it is fair and reasonable in all the circumstances.

D.1.3

To the extent permitted by section 1055 of the Corporations Act, there is no monetary limit on the remedies under rule D1.1.

D.1.4

The remedies in rules D.2 to D.5 do not apply to a Superannuation Complaint.

What remedies can AFCA provide for Superannuation Complaints?

Our powers to determine Superannuation Complaints are set out in section 1055 of the Corporations Act and are summarised in rules D.1.1 and D.1.2.

- When we determine a Superannuation Complaint, we have all of the same powers, obligations and discretions of the trustee, insurer or RSA provider who made the decision or engaged in the conduct complained of.[46]
- If we are satisfied that the decision or conduct was fair and reasonable in all the circumstances, we must affirm it.[47]
- If not, we must decide if:
  - the decision is unfair or unreasonable in its operation in relation to the Complainant (that is – the person making the complaint)
  - the conduct is unfair or unreasonable.[48]
- If the decision relates to the payment of a death benefit, we must decide if the decision is unfair or unreasonable in its operation in relation to the Complainant and any other interested party who has been joined to the complaint.[49]

What is fair and reasonable depends on the circumstances. There may be a range of decisions that could be considered fair and reasonable. If the trustee's decision falls within that range, it must be affirmed.

In determining Superannuation Complaints, AFCA Decision Makers consider all of the available information to see whether there are adverse practical outcomes or consequences of a decision for the Complainant (and joined parties, in the case of a death benefit payment decision).

While there is no monetary limit for superannuation, our powers to provide a remedy can only be used for the purpose of placing the Complainant as nearly as practicable in a position that any unfairness or unreasonableness no longer exists.[50]

Examples of unfair or unreasonable decisions or conduct:

- The trustee has not complied with the fund's governing rules.
- The trustee has decided to pay a death benefit to a person who was not financially dependent on the deceased member when there were other people who were financially dependent on the deceased member.
- The trustee has refused to pay a TPD benefit when the weight of relevant medical opinion indicates that the member was TPD when the member ceased employment.

[46] Corporations Act, s 1055(1)
[47] Corporations Act, s 1055(2) and (3)
[48] Corporations Act, s 1055(4)
[49] Corporations Act, s 1055(5)
[50] Corporations Act, ss 1056(4) and (5)

- The trustee has failed to actively make its own decision (for example because it simply 'rubber stamped' an insurer's decision to deny a TPD claim without reviewing it and satisfying itself that the insurer's decision was fair and reasonable).
- The trustee or the insurer has not given a member a reasonable opportunity to respond to information adverse to the member's TPD claim, such as an adverse medical opinion that the member has not previously seen.
- The trustee (or its administrator) has given the member misleading disclosure about the member's benefits that the member relied on to the member's detriment.

Are there any remedies AFCA cannot provide for a Superannuation Complaint?

We cannot make a Determination that is:

- contrary to law
- contrary to the governing rules of a superannuation fund or an approved deposit fund (except to the extent permitted to redress an unfair or unreasonable admission to a life policy fund)
- contrary to the terms and conditions of an annuity policy, a contract of insurance or RSA (except to the extent permitted to redress an unfair or unreasonable sale of the product).[51]

This means that we cannot provide a remedy that would:

- require a trustee, insurer or RSA provider to act contrary to other laws, such as superannuation or taxation legislation
- require a trustee, insurer or RSA provider to act contrary to the relevant trust deed, insurance policy or RSA contract – for example, where a particular decision was required under the governing document, we cannot substitute a different decision unless the trustee could have lawfully made a different decision.

We cannot award compensation in relation to a Superannuation Complaint, but we can consider whether it was unfair or unreasonable for a trustee not to settle a claim or take a different approach to the claim.

[51] Corporations Act, s 1055(7)

D.2 Types of remedies for a complaint other than a Superannuation Complaint

D.2.1

An AFCA Decision Maker may decide that the Financial Firm or the Complainant must undertake a course of action to resolve the complaint including:

a) the payment of a sum of money

b) the forgiveness or variation of a debt

c) the release of security for debt

d) the repayment, waiver or variation of a fee or other amount paid to or owing to the Financial Firm or to its representative or agent including the variation in the applicable interest rate on a loan

e) the reinstatement, variation, rectification, or setting aside of a contract

f) the meeting of a claim under an insurance policy by, for example, repairing, reinstating or replacing items of property

g) in the case of a complaint involving a privacy issue with an individual – that the Financial Firm should not repeat conduct on the basis that it constitutes an interference with the privacy of an individual or that the Financial Firm should correct, add to or delete information pertaining to the Complainant

h) in relation to a default judgment, not enforcing the default judgment

i) in relation to privacy-related complaints, to make an order that is generally consistent with the declarations available to the Information Commissioner when they make a decision under section 52 of the Privacy Act j) an apology.

What remedies can AFCA provide?

Rule D.2.1 sets out examples of remedies that may be provided to a Complainant. Some remedies have a financial value; others do not. The list of remedies is not exhaustive. The AFCA Decision Maker may decide that the Financial Firm should take some other course of action not listed.

Examples of remedies with a financial value:

- Payment of money
- Discharge of a guarantee
- Variation of the terms of a credit contract

What remedies are available in a financial hardship complaint?

In a financial hardship complaint, the remedies we can provide include varying the credit contract.

Examples of credit contract variations:

- Extending the period of the contract and reducing the amount of each repayment due under the contract
- Postponing repayments under the contract for a specified period
- Changing payment arrangements for either a short or longer term
- Reducing the loan interest rate for either a short or longer term

If we conclude that there has been a breach of the credit provider's obligations to provide financial hardship assistance, we will also consider whether the Complainant has suffered any financial or non-financial loss. Financial loss might result from default charges or enforcement costs that could have been avoided if the credit provider complied with its obligations. Non-financial loss might include unnecessary stress or inconvenience – see guideline to rule D.3.3.

What information should the parties provide to assist AFCA to decide about a remedy?

When a Complainant submits a complaint to AFCA, it is helpful if the Complainant explains what remedy is sought and why the proposed remedy is appropriate.

Where compensation for loss is sought, the Complainant must provide information that substantiates the losses that the Complainant claims were caused by the Financial Firm. We will not award compensation for losses that the Complainant expects to incur, but that have not yet been incurred.

When responding to the complaint, the Financial Firm should comment on what remedy it considers is appropriate if we find for the Complainant. Comments by the Financial Firm as to this will not be taken to be an admission of liability or responsibility.

How does AFCA generally decide whether a remedy is appropriate?

We will only provide a remedy if we decide that the Complainant incurred loss or harm that was caused by the Financial Firm's conduct.

Example of loss that is not caused by the Financial Firm's conduct:

- A Complainant buys goods that the vendor fails to provide. The Complainant paid for those goods with a bank cheque, having been told by the bank teller that the bank cheque could be stopped if the vendor does not send the goods. This information proves to be incorrect. The bank did not cause the loss. Rather the Complainant's loss was caused by the vendor failing to comply with its obligations.

We would provide no remedy against the bank in this case.

We will have regard to established legal principles as to the recoverability of loss. For example, we will not award compensation for direct financial loss where the losses are too remote. When considering the remoteness of the loss, relevant factors include:

- whether the loss may fairly and reasonably be considered as arising naturally (that is, accordingly to the usual course of things) from the breach of contract itself
- whether the loss may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of a breach.

We will also take into account the extent of the Complainant's responsibility for the loss. We expect Complainants to take reasonable steps to minimise or mitigate their own losses. If they have not done so, we may reduce the amount of compensation to take into account that the Complainant could have avoided some, or all, of the loss suffered.

Example

- A Financial Firm fails to inform the Complainant that their investment has been rolled into a non-interest bearing account. The Complainant is later informed and takes no action to move the investment for some time. We may award compensation for the loss prior to the Financial Firm informing the Complainant, but may take the view the Complainant is responsible for losses after that date.

When deciding the remedy, we often seek to achieve, as nearly as possible, either:

- to place the Complainant in the position they would have been in if the conduct of the Financial Firm had not caused the loss; or
- to compensate the Complainant for their loss to the extent AFCA holds the Financial Firm responsible for the loss.

Alternatively, a remedy may be designed to prevent the Financial Firm from repeating the harm to the Complainant. This is particularly the case for a privacy complaint.

We may require the Complainant to take some action to facilitate the remedy.

Examples of where Complainant action may be needed to facilitate the remedy:

- Complainant co-operation in a claims assessment process that AFCA decides the Financial Firm must carry out
- Transfer by the Complainant of an asset to the Financial Firm in return for a payment of compensation

How does AFCA decide on remedy where an insurer has refused the Complainant's insurance policy claim?

We will apply the terms of an insurance contract when deciding the amount to be paid in response to a claim. This includes refraining from providing compensation for indirect financial loss arising from a claim on a General Insurance Policy that expressly excludes liability for such loss.

However, there may be some cases where we consider the insurer has responded to a claim so unreasonably, it should compensate the Complainant for loss they incurred due to the delay in payment of the claim – even if the contract does not provide for this.

Examples

- Where the insurer's unreasonable delay in responding to a claim causes the Complainant to suffer a specific loss that it can substantiate, we may consider compensation in excess of the terms of the policy.
- Where an insurer has incorrectly denied a claim and a Complainant has incurred costs obtaining an expert opinion to demonstrate their entitlement under the policy, we may consider compensation for these on the basis that they are direct financial losses.

D.3 Compensation for complaints other than Superannuation Complaints

D.3.1

An AFCA Decision Maker may decide that the Financial Firm is to compensate the Complainant for direct financial loss. When calculating the value of such a remedy, monetary compensation and any remedy where the value can readily be calculated, such as the waiving of a debt, are included.

D.4 sets out the maximum amount that an AFCA Decision Maker can award for direct financial loss.

How much compensation can AFCA provide for direct financial loss?

Rule D.4 sets out the maximum compensation that we can award for direct financial loss per claim.

For the purposes of the application of the monetary cap, we include both money and the value of any compensation that can readily be calculated, for example, the amount of a debt that is waived. The value of a remedy is calculated as at the date of our decision. Interest payments and compensation for costs are not included in the calculation.

The compensation cap applies per claim. A complaint by a Complainant against a Financial Firm may include multiple claims.

For the purposes of the Rules, the term ‘claim’ should not be confused with an ‘insurance claim’ which is an application for benefits under an insurance policy. Rather, a ‘claim’ for the purposes of the Rules constitutes a set of events and facts that together lead to the losses, and give the Complainant the right to ask for a remedy.

We do not aggregate a number of claims into one claim just because the claims all arise from an ongoing relationship between a Financial Firm and a Complainant. Nor will we permit a complaint that is properly a single claim to be ‘split’ and treated as multiple claims (with the monetary cap applying to each claim).

The following examples illustrate our approach to determining whether the Complainant has one claim or multiple claims.

- If a financial planner provides a statement of advice recommending a number of investments and the Complainant disputes the suitability of this advice, we are likely to treat the complaint as one claim. This is because the claim arises from a single statement of advice.
- If a financial planner gives advice recommending an investment and then separate advice recommending another investment and the Complainant disputes the suitability of both pieces of advice, we are likely to treat this complaint as involving two claims, with the effect that a cap applies in relation to each claim.
- Where the Complainant claims a credit provider failed to meet its obligations in relation to a number of loans over a period of time, we are likely to treat the credit decision for each loan as a separate claim and will not aggregate the claims.
- If the Complainant claims a bank allowed a third party to access funds from the Complainant's account without the proper authority, we are likely to treat this as one claim and will aggregate all the unauthorised withdrawals. This is because the withdrawals all arose from the same set of circumstances, that is, the bank allowing the third party unauthorised access to funds in the account.

D.3.2

In addition, or instead, an AFCA Decision Maker may decide that the Financial Firm is to compensate the Complainant for indirect financial loss. This is not the case if the complaint arises as a result of a claim:

a) on a General Insurance Policy that expressly excludes such liability; or

b) by the Complainant under another person's Motor Vehicle Insurance Product.

D.4 sets out the maximum amount that an AFCA Decision Maker can award for indirect financial loss.

What is AFCA's approach to indirect financial loss?

Indirect financial loss is otherwise known as consequential loss.

Rule D.4 gives us the ability to provide compensation for indirect financial loss capped at $5,000 per claim. The amount of the cap will be indexed every three years – see rule D.4.3. A complaint may make more than one claim for indirect financial loss.

There are exceptions to our ability to award indirect financial loss. Compensation for indirect losses cannot be provided where a General Insurance Policy expressly excludes liability for indirect losses (for example, loss of use of car, car registration costs, loss of income as a result of loss of use of the car). Nor can indirect losses (such as loss of use of car, or hire car costs) be awarded where an uninsured third party makes a claim against another person's insurer for car damage the other person caused – see rule B.2.1(f).

In the case of indirect losses occasioned by Financial Firm delay (for example, delay in providing compensation when due), we take the approach that an award of interest is the usual remedy.

D.3.3

An AFCA Decision Maker may decide that the Financial Firm is to compensate the Complainant for non-financial loss:

a) for a complaint relating to an individual's privacy rights – injury has occurred to the Complainant's feelings or humiliation has been suffered by the Complainant; or

b) for other complaints – an unusual degree or extent of physical inconvenience, time taken to resolve the situation or interference with the Complainant's expectation of enjoyment or peace of mind has occurred.

This type of compensation, however, is not permitted if the complaint arises as a result of a claim on a General Insurance Policy that expressly excludes such liability.

D.4 sets out the maximum amount that an AFCA Decision Maker can award for non-financial loss.

What is AFCA's approach to non-financial loss?

Compensation for non-financial loss is capped at $5,000.

We take a conservative approach to awarding compensation for non-financial loss. We may decide a non-financial remedy, such as a letter of apology, should be provided rather than compensation. In a privacy complaint, nonfinancial loss compensation is, however, possible if the Complainant's feelings have been injured or the Complainant has suffered humiliation. For other non-Superannuation Complaints, non-financial loss compensation is only provided where the Complainant has suffered from an unusual amount of physical inconvenience or stress, or the Financial Firm's conduct has meant that the time taken to resolve the situation has been unusually excessive.

In particular, we do not award non-financial loss compensation merely because the Complainant has suffered some inconvenience and anxiety. We expect Complainants to be moderately robust and to bear the normal degree of inconvenience experienced when a problem occurs and to take reasonable steps to manage the situation.

Example of where non-financial loss compensation may be awarded:

- The Financial Firm breached the Complainant's privacy by revealing her new address to her estranged spouse in circumstances where she was a victim of domestic violence.
- The Financial Firm unreasonably delayed approving an income protection claim in circumstances where it repeatedly requested information already in its possession.

D.3.4

Punitive, exemplary or aggravated damages cannot be awarded.

Why does AFCA not award punitive, exemplary or aggravated damages?

We are a dispute resolution service with responsibility for considering individual complaints regarding loss or damage caused by a Financial Firm's conduct. It is not our role to punish or impose a fine on a Financial Firm.

We are not a regulator of the financial services industry. Organisations such as the Australian Securities and Investments Commission (ASIC), the Australian Prudential Regulation Authority (APRA), and the Australian Competition and Consumer Commission (ACCC) have a role in consumer protection and the regulation of the financial services industry.

D.4 Monetary limits for complaints other than Superannuation Complaints

D.4.1

The table below specifies the maximum amounts that may be awarded by an AFCA Decision Maker for complaints other than Superannuation Complaints, not including costs awarded under rule D.5 or interest under rule D.6.

D.4.2

The table below also sets out monetary restrictions on AFCA's jurisdiction as at 1 November 2018.

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 September quarter in the previous year

   (ii) the Male Total Average Weekly Earnings for the three-year period ending with the September quarter 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.

	Row	Type of claim					Compensation amount limit per claim	Monetary restriction on AFCA's jurisdiction
Claim for direct financial loss	1	**Income Stream Insurance** Claim on a Life Insurance Policy or a General Insurance Policy dealing with income stream risk or advice about such a contract. If the claim is in excess of this monthly limit, the monthly limit will apply unless: • the total amount payable under the policy can be calculated with certainty by reference to the expiry date of the policy and/or age of the insured; and • that total amount is less than the amount specified in row 6. If this is the case, then the limit will be the amount in row 6.					$13,400 per month	Amount claimed by Complainant must not exceed $1 million
	2	**General Insurance Broking** Claim against a General Insurance Broker except where the claim solely concerns its conduct in relation to a Life Insurance Policy (in which case row 1 or 6 applies, as the case may be).					$250,000	Amount claimed by Complainant must not exceed $1 million
	3	**Uninsured Motor Vehicle** Claim under another person's Motor Vehicle Insurance Product for property damage to an Uninsured Motor Vehicle caused by a driver of the insured motor vehicle – see B.2.1 f)(i)					$15,000	Amount claimed by Complainant must not exceed $1 million
	4	Credit Facility	Claim arising from a credit facility provided to a Small Business or Primary Producer – see C.1.2e and C.1.3b	by a borrower	of a Small Business loan		$1 million	Credit facility must not exceed $5 million
					of a Primary Producer loan		$2 million	
				by a guarantor to set aside a guarantee supported by security over	the guarantor's principal place of residence		unlimited	Credit facility must not exceed $5 million
					other security	for a Small Business loan	$1 million	Credit facility must not exceed $5 million
						for a Primary Producer loan	$2 million	
	5		Claim arising from a credit facility that was provided to someone other than a Small Business or Primary Producer	by a borrower			$500,000	Amount claimed by Complainant must not exceed $1 million
				by a guarantor to set aside a guarantee supported by security over	the guarantor's principal place of residence – see C.1.2e		unlimited	unlimited
					other security		$500,000	Amount claimed by Complainant must not exceed $1 million
	6	**All other claims (excluding Superannuation Complaints)** In any other circumstance by any Complainant (whether or not a Small Business or Primary Producer)					$500,000	Amount claimed by Complainant must not exceed $1 million
	7	Claim for indirect financial loss					$5,000	not applicable
	8	Claim for non-financial loss					$5,000	not applicable

D.5 Costs of pursuing complaint other than a Superannuation Complaint

D.5.1	An AFCA Decision Maker may decide that the Financial Firm is to contribute to the legal or other professional costs, or travel costs incurred by the Complainant in the course of the complaint.

D.5.2	Unless special circumstances apply, AFCA will not require the Financial Firm to contribute more than $5,000 to these costs.

D.5.3	A contribution to the Complainant's costs of pursuing a complaint is not taken into account for the purposes of the maximum value of remedy under D.4.

When does AFCA require a Financial Firm to contribute to a Complainant's costs?

We provide a free service for Complainants. It is not usually necessary for either party to be legally represented.

Financial Firms are unable to pass on their legal costs of dealing with an AFCA complaint. If the Complainant chooses to be represented, they will usually have to cover their legal fees themselves. Lawyers acting for Complainants should make this clear to the Complainant.

Although there is no automatic right to legal costs, we can decide that the Financial Firm should contribute to the Complainant's legal costs (but not in a Superannuation Complaint). We can also require the Financial Firm to contribute to the costs of other professionals engaged by the Complainant or the Complainant's travel costs (again not in a Superannuation Complaint). These costs are, however, usually capped at a total of $5,000 per complaint, regardless of the number of claims or issues raised in it or the types of costs incurred.

When considering whether to require the Financial Firm to make a costs contribution, we take into account the complexity of the complaint and whether the Complainant needed to incur the costs to understand or establish their claim.

Examples of where we might decide that the Financial Firm should contribute to costs incurred by the Complainant:

- The complaint raised legal issues about which the Complainant reasonably needed advice despite our availability to assist the Complainant
- The complaint involved complex financial data about which the Complainant reasonably needed the advice of an Accountant despite our availability to assist the Complainant
- Travel costs for attending an AFCA interview
- The costs charged by an engineer, or other technical expert, where this is needed to establish the Complainant's case
- Expert costs if the Complainant needed an expert opinion to respond to the Financial Firm's arguments

If special circumstances apply, we may require the Financial Firm to contribute more than the usual $5,000.

Examples of possible special circumstances

- The Complainant's calculation of loss involves multiple complex financial calculations
- The complaint involves complex legal issues in areas where there is uncertainty in the law
- The complaint is complex and involves a very large amount of money for the Complainant

If we require a Financial Firm to make contribution to legal, professional or travel costs incurred by a Complainant, we will contact the Financial Firm to discuss this before requiring the contribution.

How does a Complainant seek costs contribution by a Financial Firm?

If the Complainant wants to seek Financial Firm contribution to their legal costs, they should discuss the matter with us before incurring the costs.

If the Complainant thinks it would be fair for a Financial Firm to contribute to their other professional or travel costs, the Complainant should, as promptly as possible, provide to us:

- details of the contribution sought
- a brief explanation of why the Complainant thinks that contribution would be fair
- an explanation of the costs incurred together with documents that verify those costs.

Complainants should not wait for the outcome of a complaint before claiming costs.

We will only require a Financial Firm to contribute to the Complainant's costs after we have received proof of the amount of the costs and payment by the Complainant.

D.6 Interest

D.6.1

An AFCA Decision Maker may decide that the Financial Firm is to pay interest on a payment to be made by the Financial Firm to the Complainant. Subject to the terms of the Determination, any interest accrues until the payment is made.

D.6.2

When deciding an award of interest:

a) if the Insurance Contracts Act 1984 applies – AFCA will normally calculate interest in accordance with that Act; and

b) otherwise:

(i) AFCA will normally calculate interest from the date of the cause of action or matter giving rise to the claim; and

(ii) AFCA may have regard to any factors it considers relevant, including the extent to which either party's conduct contributed to delay in the resolution of the matter.

D.6.3

An award of interest is not taken into account for the purposes of the maximum value of remedy under rule D.4.

When does AFCA decide the Financial Firm should pay interest on the compensation amount?

If we decide a Financial Firm is to pay compensation to a Complainant, we can decide that the Financial Firm must also pay interest on that compensation. In a Superannuation Complaint, we may determine that it is fair and reasonable for interest to be included if the Complainant has been unfairly or unreasonable denied an amount properly payable to them.

We take the following factors into account when deciding whether it would be fair in all the circumstances for the Financial Firm to pay interest: • the type of Financial Service that is the subject of the complaint

- whether a contract provides for interest
- if time has elapsed, how to maintain the real value of the compensation.

How does AFCA determine the amount of interest to be paid?

We will not impose a standard rate when making interest awards, and will not have one rate for all cases. Rather, we have discretion to apply a rate that best fits the circumstances and that maintains the real value of the award of compensation.

We may apply a rate that replicates what a court might do, or may use a statutory rate where this exists; however, we are not obliged to do so and may choose to apply a lower or higher rate as required in the circumstances. If we decide that an insurer should pay interest to an insured person, we will use the interest rate that applies under section 57 of the Insurance Contracts Act 1984.

An award of interest is not capped. We will calculate the time period over which interest should be paid by taking into account factors such as:

- when the Complainant submitted the complaint
- any delays caused by the parties
- the extent to which the conduct of either party contributed to a delay in resolving the complaint
- the parties' conduct in the course of us dealing with the complaint.

These will be taking into account to determine what interest would be fair in all the circumstances – or for a Superannuation Complaint, fair and reasonable in the circumstances.

Section F

Legacy Complaints

F.1 Application of this section

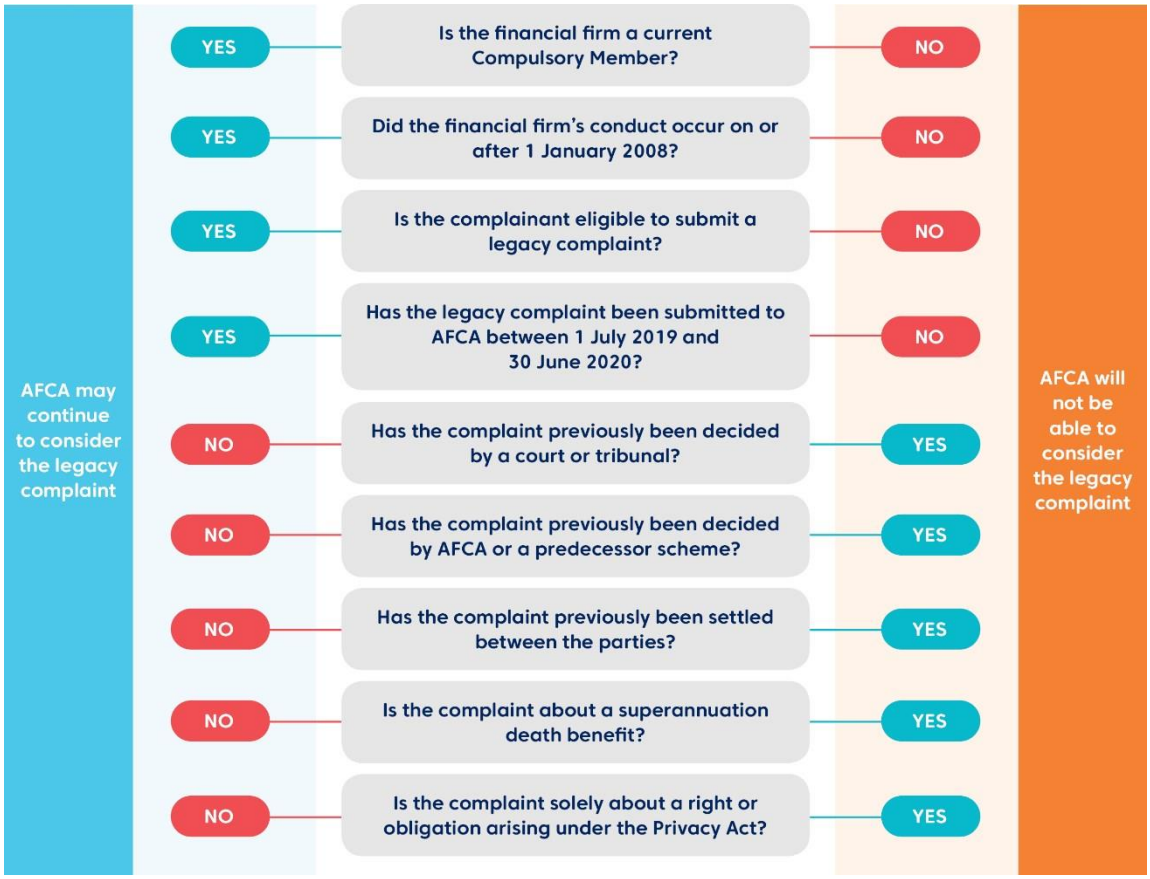
F.1.1 Legacy Complaints will be dealt with under this section of the Rules effective as at 30 June 2019. All other complaints will be dealt with under the other sections of the Rules that apply.

What is a legacy complaint?

A legacy complaint is a complaint about conduct of a Financial Firm that occurred on or after 1 January 2008, which would fall outside the time limits that would normally apply to complaints submitted to AFCA. The definition is set out in rule F.2.2.

AFCA has a number of time limits, which still apply to complaints other than legacy complaints. These are set out in rule B.4.

This diagram sets out some of the key considerations when deciding whether AFCA has jurisdiction to deal with a legacy complaint. Each key consideration is discussed separately in these guidelines.



What rules will apply when considering a legacy complaint?

When considering a legacy complaint, we must apply the AFCA Rules as at 30 June 2019 (subject to any subsequent amendments). This applies regardless of the governing rules or Terms of Reference of any predecessor scheme that were applicable at the date the loss or right to bring an action arose, or the rules or Terms of Reference that applied if a legacy complaint was previously lodged with a predecessor scheme. This is different to other complaints, when AFCA must apply the rules that were in existence at the date the complaint was first submitted – see rule A.23.5.

If a predecessor scheme has not dealt with a legacy complaint previously, AFCA can award the remedies set out in Section D of the rules, even though a predecessor scheme may have been limited by lower compensation amounts. Similarly, AFCA must apply the current defined terms (such as for a small business), which may differ from those applied by predecessor schemes.

We will consider the available information and documents and have regard to the law, codes, and standards that were in place at the time of the disputed conduct. This is the case regardless of whether it is a legacy complaint, or one about conduct which occurred within the last six years. For further commentary about considering past conduct, see rule A.14.2.

Who can submit a legacy complaint?

A complainant must be an eligible person at the time their complaint is submitted to AFCA, even if they may not have been eligible at the time the loss or right to bring an action arose – this is consistent with rule A.4.1.

For example:

- A complainant (now an adult) may submit a legacy complaint about conduct in respect of his bank account in 2008 (when he was seven years old).
- A current director of a company may submit a legacy complaint on behalf of the company, even though they were not a director at the time of the misconduct.
- A former bankrupt may be prevented by operation of the Bankruptcy Act from exercising certain rights which do not revert back after they are discharged from bankruptcy and may not be able to submit a legacy complaint as a result of this.

Who can a legacy complaint be about?

A legacy complaint must be about a compulsory member firm of AFCA, who is required to hold membership of AFCA under their license, credit representative or other legislative condition, rather than a member firm who participates in the AFCA scheme voluntarily.

A Financial Firm need not have been a member of a relevant predecessor scheme at the time of the conduct complained of. However, it needs to be the same Financial Firm responsible for the disputed conduct. Entities may no longer exist in the form they did at the

time of the disputed conduct, which may in some instances prevent AFCA from accepting a legacy complaint against a subsequent entity.

A complaint must be about a Financial Firm that is a current AFCA member at the time the complaint is submitted – see rule A.4.2. This applies regardless of whether or not the AFCA member is solvent or operating their business at the time the legacy complaint is submitted to AFCA. Claims against former AFCA, FOS or CIO members that are not current AFCA members, including deregistered or insolvent entities, will remain outside AFCA's jurisdiction.

F.1.2	Legacy Complaints will not be subject to the time limits set out in B.4.

What time limits apply to legacy complaints?

The time limits set out in rule B.4 do not apply to legacy complaints. It is enough that the conduct complained about occurred on or after 1 January 2008 – see rule F.2.1(b).

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry considered whether any conduct, practices, behaviour or business activities by financial services entities since 1 January 2008 fell below community standards and expectations or otherwise broke the law. AFCA's time limits have been extended to reflect the Royal Commission's timeframe to allow complainants an opportunity to seek redress.

Some complaints cannot be considered as legacy complaints under Section F. AFCA can still consider these complaints however, provided they are within the time limits set out in rule B.4 – see rules B.4 and F.2.1(a)-(f).

F.1.3	In all other respects, Sections A to E of the Rules will apply to Legacy Complaints unless modified by Section F. In the event of inconsistency with the other sections of the Rules, Section F prevails as it relates to Legacy Complaints.

What complaint resolution processes will AFCA apply for legacy complaints?

The complaint resolution processes set out in Section A of the Rules will apply to all complaints including legacy complaints.

We may, however, apply particular approaches to legacy complaints, given the unique nature of considering historical misconduct in circumstances where evidentiary issues make establishing a position difficult.

We may also modify the processes we apply when dealing with legacy complaints. This may include varying the referral back timeframe when we first receive a legacy complaint and refer it to the Financial Firm, conducting a greater number of conciliation conferences and referring legacy complaints more directly to decision, if they cannot be quickly resolved by agreement. Our Chief Ombudsman or his or her delegate may decide on further approaches as appropriate to decide a legacy complaint.

What if relevant documents relating to a legacy complaint are not available?

In some complaints about events dating back several years or more, relevant documents may no longer be available due to the passage of time. Because of their nature, this may more often be the case with legacy complaints, and AFCA acknowledges this may make it more difficult to establish what happened. AFCA will do what it can to resolve these complaints fairly and in accordance with the requirements of the Rules.

The onus of providing information and documents in a legacy complaint is the same as that for non-legacy complaints. That is, the complainant has the initial burden to present sufficient evidence and outline the issues in dispute with sufficient specificity. It is not enough to raise general and vague assertions. Once the complainant has established what is known as a *prima facie* claim, the responsibility then falls upon the financial firm to respond to the *prima facie* claim and establish their position.

What happens if a party does not provide relevant documents?

Various laws require Financial Firms to retain documents for a set period of time. For example, section 286 of the Corporations Act requires companies to retain financial records for seven years after the transactions covered by the records are completed. We will not generally draw an adverse inference if a party is unable to provide information that is no longer required to be held.

Where a party does not provide the information AFCA reasonably requires, and does not have a reasonable excuse, AFCA can draw adverse inferences about this under rule A.9.5. However, where the party cannot provide the information because it has not been retained – because it was destroyed after the timeframe for which it should be kept had expired – AFCA would not normally draw such an inference. We may however, require parties to provide a statutory declaration or other supporting information setting out the steps taken to try to comply with AFCA's request for information and detailing the reasons they were unable to do so – see rule A.9.2.

Financial Firms should revisit their document retention practices in light of the requirement to respond to legacy complaints. Complainants who intend to submit a legacy complaint should retain relevant documents that will help establish or support their position.

What happens if, despite best efforts, there is insufficient documentary evidence?

If, due to the passage of time, there is so little information that we cannot resolve the complaint fairly and in accordance with our obligations under the AFCA Rules, and any other relevant obligations, we may consider whether we should not investigate the complaint

further. We recognise it would defeat the purpose of the jurisdiction to refuse to deal with a legacy complaint because of a lack of information and we will not lightly exclude a complaint for this reason.

If a party cannot provide information to support their position, we may find that they have not established their case. Where a claim is unsupported by documentary information, we will try to reach a conclusion based on the weight of the information available. If conflicting statements of recollection are evenly weighted, and a determination could only reasonably be made by the testing of the parties' recollection by cross-examination under oath (which AFCA cannot do), we may be unable to find that the claim is established.

We will generally only decline to consider a legacy complaint due to lack of evidence if we consider it would not be possible to resolve the complaint fairly and in accordance with our legal obligations and the principles in Rule A.2.

If we consider a complaint should be excluded for this reason, we will follow the process for excluding a complaint set out in rules A.4.5 and A.4.6. Parties should use this as a final opportunity to provide the necessary information sought.

F.2 Requirements for legacy complaints

F.2.1(a)

AFCA will not consider a Legacy Complaint:

unless it is submitted to AFCA between 1 July 2019 and 30 June 2020.

When can a legacy complaint be submitted to AFCA?

The responsible Minister has changed the authorisation conditions of the AFCA scheme, requiring us to accept legacy complaints for a period of one year, between 1 July 2019 and 30 June 2020. Subject only to any further changes to the authorisation conditions, we will not extend this one year period.

Although Section F will automatically be removed from the AFCA Rules after this one-year period expires, we will continue to apply Section F to legacy complaints received during that period until all have been dealt with.

F.2.1(b)

AFCA will not consider a Legacy Complaint:

about conduct that occurred and ended before 1 January 2008.

What conduct can be considered by AFCA in a legacy complaint?

We can consider a legacy complaint about conduct by a Financial Firm that occurred on or after 1 January 2008. Regardless of the nature of the complaint, conduct means acts or omissions by the Financial Firm resulting in loss suffered by the complainant.

When is the conduct considered to have occurred and ended?

We will not consider a complaint that is only about conduct that occurred and ended before 1 January 2008, even if the loss occurred on or after 1 January 2008. The Financial Firm must have taken steps to act or failed to act in a manner which gives rise to the claim for loss. It is not enough for the consequences or effects of the Financial Firm's conduct to be felt on or after 1 January 2008 where there is no continuing obligation to review such conduct on or after 1 January 2008.

This means that our ability to consider complaints about ongoing relationships where advice or service has been provided before and after 1 January 2008 is limited to acts or omissions on or after that date, and loss caused by those acts or omissions.

There is no requirement for a complainant to have been aware, or reasonably been aware, of such conduct or loss. This means that a complaint about conduct that occurred and ended before 1 January 2008, where the complainant was not aware of the loss until on or after this date, does not come within the rules as a legacy complaint. Similarly, a Financial Firm is not

able rely upon a complainant's awareness or an IDR Response to submit that the time limit to lodge a complaint has expired.

Whether a Financial Firm's conduct occurred and ended before 1 January 2008 will be a question of fact and will be considered based on the circumstances of each particular complaint.

For example:

- AFCA cannot consider a complaint about a statement of advice given before 1 January 2008, unless the legacy complaint is about the Financial Firm's conduct on or after 1 January 2008 by:
  - implementing a strategy contrary to the advice given.
  - implementing or continuing a strategy recommended in the earlier advice in circumstances where the strategy may no longer have been inappropriate.
  - failing to provide ongoing advice or review as promised in the advice given.
- AFCA cannot consider a complaint about a credit decision to lend before 1 January 2008, unless the legacy complaint is about the Financial Firm's conduct on or after 1 January 2008 to lend further funds not previously contemplated, or to refinance existing loans.
- Where fees or charges have been applied to an account before 1 January 2008 and continued to be applied after 1 January 2008, AFCA could generally only consider the complaint in relation to fees or charges incurred on or after 1 January 2008. This will depend on the circumstances of each complaint, however, and if fees or charges have been incorrectly applied, AFCA would expect the Financial Firm to appropriately remedy this beyond 1 January 2008 if the error was systemic or similar in nature.

F.2.1(c)

AFCA will not consider a Legacy Complaint:

in relation to which a decision or determination has been made by a court or tribunal.

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

We cannot consider a legacy complaint that has already been decided by a court or statutory tribunal – this is consistent with rule C.1.2(d). This means that where a court or tribunal has made final orders (whether they were made on the merits or in the absence of the complainant's defence), we cannot review those orders made.

However, we have limited jurisdiction to stay the execution of a default judgment, if the complainant is able to present a genuine and immediate alternative to execution of the default judgment – see rule A.7.2(f).

Where a court or tribunal has not made final orders but the legal proceedings have been discontinued or settled by agreement between the parties, rule F.2.1(e) may apply to

exclude the legacy complaint. AFCA recognises that legal proceedings can be discontinued by agreement for reasons that do not necessarily mean the dispute has been finally settled, but where the consent orders or other settlement agreement shows finality to the complaint, it is not appropriate for AFCA to revisit it.

F.2.1(d)

AFCA will not consider a Legacy Complaint:

in relation to which a decision or determination about the merits of the complaint has been made by a Predecessor Scheme or AFCA.

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

We cannot consider a legacy complaint that has already been decided by a predecessor scheme – this is consistent with rule C.1.2(d).

We may consider a legacy complaint that has previously been excluded by a predecessor scheme because it did not fall within the governing Rules or Terms of Reference at the time of the previous complaint, because in such cases there has been no consideration of the merits of the complaint. However, if a predecessor scheme has dealt with the merits of a complaint, we cannot consider or deal with the complaint.

If a superannuation complaint was previously withdrawn by the SCT, AFCA would generally consider it is not appropriate to revisit it because it was open for the Complainant to challenge the SCT's decision in the Federal Court. For further guidance, please see page 103 of the Transitional Superannuation Guide. However, if a superannuation complaint was discontinued by the complainant or the merits of the complaint were not dealt with by the SCT, we would generally deal with the complaint, subject to it otherwise being within the Rules.

Where a predecessor scheme has not decided the complaint but it was resolved by agreement between the parties, rule F.2.1(e) may apply to exclude the legacy complaint.

In relation to whether a predecessor scheme has dealt with a complaint, please see the guidelines to rule C.1.2(d). In relation to complaints currently before a court, tribunal or the SCT, please see the guidelines to rule C.2.2(a).

For example:

- If a complainant received the maximum compensation a predecessor scheme could award at the time in an earlier dispute, which was less than their actual claimed loss. AFCA's compensation caps are now higher, however, as the complaint was dealt with by the predecessor scheme, the complainant cannot now submit a legacy complaint for more compensation.
- Where a complaint has been previously lodged by a complainant to AFCA or a predecessor scheme but it was closed because of a lack of response by the complainant, AFCA will not treat the complaint as being dealt with by AFCA or a predecessor scheme.
- Where matters have previously been resolved by AFCA or a predecessor scheme's conciliation process, AFCA will treat the complaint as being dealt with by AFCA or a predecessor scheme.
- Where matters resolved by a preliminary assessment or recommendation being accepted, AFCA will treat the complaint as being dealt with by AFCA or a predecessor scheme.

Can AFCA consider a legacy complaint that has been previously decided by AFCA?

We cannot consider a legacy complaint that has previously been decided on the merits by AFCA. This is consistent with the authorisation conditions relating to legacy complaints. For a matter that is not a legacy complaint, rule C.1.2(c) will otherwise apply.

Where AFCA has not decided the complaint but it was resolved by agreement between the parties, rule F.2.1(e) may apply to exclude the legacy complaint.

F.2.1(e)

AFCA will not consider a Legacy Complaint:

that has previously been finally settled by the Complainant and the Financial Firm to whom the complaint relates (other than a complaint which can still be made under the Rules).

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

We have discretion over whether to consider a complaint that has been settled in full and final satisfaction of the parties' obligations. Our discretion to exclude a complaint on this basis is outlined in rule C.2.1. A complaint can, however, still be made under the Rules where we choose not to exercise this discretionary exclusion.

Please see the guidelines to rule C.2.1 for some of the factors we will consider whether it is appropriate to revisit a complaint that has been settled between the parties. Whether a

settlement agreement discharges the parties' obligations will be a question of fact and will be considered based on the circumstances of each particular complaint.

F.2.1(f)

AFCA will not consider a Legacy Complaint:

in relation to a superannuation death benefit.

Can AFCA consider a legacy complaint about a superannuation death benefit?

No. The time limits set out in rule B.4.1.3 continue to apply to any complaint about the payment of a superannuation death benefit. This is because Section 1056 of the Corporations Act continues to apply to a complaint in relation to a superannuation death benefit, which cannot be extended even if the parties agree. For further guidance, please see Chapter 23 of the Transitional Superannuation Guide.

Can AFCA consider a legacy complaint about other superannuation issues?

Yes. Time limits in relation to other superannuation complaints do not apply to legacy complaints. This means that AFCA can consider other superannuation legacy complaints, including complaints relating to total and permanent disability (TPD) or other insurance claims, fees and other services.

Transitional arrangements that are currently in place in relation to superannuation complaints will continue to apply subject to a complaint otherwise coming within this jurisdiction. Transitional arrangements that will continue to apply include arrangements in relation to complaints previously lodged and being dealt with by the Superannuation Complaints Tribunal.

F.2.1(g)

AFCA will not consider a Legacy Complaint:

that solely relates to a right or obligation arising under the Privacy Act.

Can AFCA consider a legacy complaint about Privacy Act obligations?

We will not consider legacy complaints that are solely about rights or obligations arising under the Privacy Act. In accordance with the change to AFCA's authorisation conditions, such complaints do not come within the legacy complaint jurisdiction. Those complaints should be raised with the Office of the Australian Information Commissioner (OAIC), who will have their own jurisdictional requirements.

AFCA will, however, consider a legacy complaint that raised an issue which relates to privacy that is part of a broader complaint between the financial firm and the complainant.

For example:

- We will not consider a complaint solely about a bank sending statements to the wrong address in 2008.
- We will not consider a complaint solely about a default listing on a consumer's credit report in 2009, because the Privacy Act sets out the requirements before a default listing can be made.

Version 1.4

AFCA acknowledges the traditional owners of country throughout Australia and their continuing connection to land, culture and community. We pay our respects to elders past, present and emerging.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