

SUBMISSION

Submission to Treasury — Review of the Australian Financial Complaints Authority

26 March 2021

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26 March 2021

Dear Sir/Madam

Review of the Australian Financial Complaints Authority

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to the review of the Australian Financial Complaints Authority (AFCA). While this submission is not confidential, we have provided additional examples supporting some of the matters raised in a separate, confidential supplement.

About ASFA

ASFA is a non-profit, non-political national organisation whose mission is to continuously improve the superannuation system, so all Australians can enjoy a comfortable and dignified retirement. We focus on the issues that affect the entire Australian superannuation system and its \$3 trillion in retirement savings. Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing almost 90 per cent of the 16.5 million Australians with superannuation.

General comments

The reforms to the financial services external dispute resolution (EDR) framework that led to the creation of AFCA were substantial. Many complex legal and logistical challenges needed to be addressed in order to replace the three incumbent EDR schemes with a single scheme and to transfer the role of the Superannuation Complaints Tribunal (SCT) — a statutory tribunal — into an ombudsman model.

When implementing reforms of that magnitude, teething issues are to be expected and time is needed to bed down the new model. It is for that reason that ASFA called for a post-implementation review of AFCA to be built into the framework legislation, which is now underway. We welcome the opportunity to participate in the review. It provides an important opportunity to analyse the experiences of both financial firms and consumers and make refinements to ensure AFCA is well placed to support all stakeholders in the financial services industry going forward.

AFCA was launched with the promise it would provide consumers with access to “free, fast and binding dispute resolution”¹. In addition, its operational requirements require AFCA to ensure complaints made against its member financial firms are resolved in a way that is “fair, efficient, timely and independent”².

ASFA wishes to acknowledge the efforts made by AFCA, particularly during the early stages of its transition, to engage with stakeholders and seek to address emerging issues. In addition, ASFA members are appreciative of the way that AFCA approached the challenges presented by the COVID-19 pandemic, including the temporary modifications made to some of its processes.

Overall, ASFA is of the view that the transition to the new EDR model has certainly led to some improvement over the performance of the former SCT, particularly in terms of the increased accessibility to consumers and its more efficient handling of the simplest categories of superannuation complaints. However, based on the experience of our superannuation trustee members, we consider that while it has made a positive start, there is scope for AFCA to improve its handling of superannuation complaints.

Consideration of the review’s terms of reference has revealed a number of recurring themes. Addressing these would, in our view, significantly improve the fairness, efficiency, timeliness and independence of AFCA’s dispute resolution approach and performance in relation to superannuation complaints. These are:

1. **Embed superannuation knowledge and experience:** the conduct of many superannuation complaints would be improved by ensuring front-line staff have sufficient knowledge and experience of the complex legal and regulatory framework in which superannuation trustees operate, as well as access to subject matter experts to provide additional assistance where needed. We perceive this to be an underlying issue impacting many aspects of AFCA’s performance, including the efficiency and timeliness of dispute resolution as well as the provision of consistent, predictable, quality outcomes. There should also be clear escalation points allowing superannuation trustees to raise concerns about the handling of particular complaints before they reach preliminary assessment or determination.
2. **Streamline AFCA rules and processes to improve efficiency and the stakeholder experience:** AFCA’s Rules and processes include procedural steps that detract from its performance against its statutory objectives. These include processes that allow complaints that are outside AFCA’s jurisdiction or are without substance to progress, and allow registration of complaints that have not yet been considered through the trustee’s internal dispute resolution (IDR) process. Refining these will help to manage complainants’ expectations about the likely outcome, avoid unnecessary work and cost for AFCA and superannuation trustees, and improve the efficiency of the dispute resolution process. AFCA’s communication with regulators in relation to systemic issues should also be strengthened to ensure investigative work is not unnecessarily duplicated.
3. **Promote procedural fairness and clarify AFCA’s ‘fairness jurisdiction’:** tightening some process steps, improving communication and reducing delays as complaints move between stages of the dispute resolution process would improve procedural fairness. AFCA’s ‘Fairness Project’ should be relaunched with a view to enabling dialogue with stakeholders and providing greater certainty around AFCA’s approach to its ‘fairness jurisdiction’.
4. **Increase transparency to enhance stakeholder confidence:** greater detail and consistency in the data reported by AFCA around case volumes, resourcing and workload would improve AFCA’s accountability to stakeholders, including around its performance (timeliness of dispute resolution), resourcing and funding needs.

¹ The Hon Kelly O’Dwyer, Minister for Revenue & Financial Services Media Release: [Putting Consumers First: Australian Financial Complaints Authority Takes Shape](#), 1 May 2018

² *Corporations Act 2001*, section 1051(4)(b)

5. **Clarify AFCA's ongoing funding model for superannuation:** the funding model that will apply for superannuation complaints from 2021-22 onwards is yet to be disclosed. Before superannuation complaints are moved from the current interim funding arrangements to any full user-pays/complaint fee model, some issues with the AFCA dispute resolution process should be addressed to prevent a trustee incurring unnecessary (or unnecessarily high) complaint fees, which would impact detrimentally on the retirement savings held on trust for all members of the fund.

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

Yours sincerely

Glen McCrea

Deputy CEO and Chief Policy Officer

1. Delivering against statutory objectives

Is AFCA meeting its statutory objective of resolving complaints in a way that is fair, efficient, timely and independent?

1.1 'Fair'

The question of whether AFCA achieves its statutory objective to resolve complaints in a way that is 'fair' is multi-faceted. 'Fairness' is a concept that is critical to every step of the dispute resolution process and to every engagement by AFCA with the complainant and/or the financial firm. It is also entrenched in the dispute resolution test that must be applied by AFCA decision makers in relation to superannuation complaints.

1.1.1 Fairness in the process

ASFA members have identified a number of refinements to improve the efficiency and effectiveness of AFCA's dispute resolution process, and we have outlined these in Appendix 2 to this submission.

However, while the efficiency of the dispute resolution process is important, this must not come at the cost of fairness. ASFA members have raised a number of aspects of the current process that impact on its fairness to all parties:

- A complaint may sit at stages of the decision-making process for lengthy periods with no communication from AFCA — ASFA was provided with several examples in which complaints have been apparently 'stalled' for 10 - 15 months. The complaint may then progress to the next stage without notice, with AFCA requiring the trustee to provide information within a very short timeframe — for example, as little as seven days. Provision of very short timeframes impacts the trustee's ability to provide a fully considered response to AFCA's request.
- Instances have been reported where AFCA has not shared submissions made by a complainant with the trustee in a timely manner — for example, not until a complaint is in the queue for determination by an Ombudsman. As a matter of procedural fairness, submissions should be exchanged between the parties promptly. Delays in doing so impact the trustee's ability to assess the complainant's submission and consider whether it warrants them changing their decision.
- The rationale given for a preliminary assessment does not always provide sufficient explanation for a trustee to make an informed judgment whether to accept it or request that the complaint proceed to determination.
- Similarly, determinations can lack adequate explanation of the reasons for the outcome, making it difficult for a party to a superannuation complaint to assess whether it may be appropriate for them to appeal to the Federal Court on a question of law.

1.1.2 Fairness in application of the test and the 'fairness jurisdiction'

To summarise the *Corporations Act 2001*, subsections 1055(2) and (3):

AFCA must affirm a decision or conduct if satisfied that:

- the decision, in its operation in relation to the complainant (or — for a decision relating to the payment of a death benefit — the complainant and any other person joined to the complaint);
or
- the conduct;
was fair and reasonable in all the circumstances.

This differs to the test that applies when determining a non-superannuation complaint. That test requires an AFCA decision maker to do what he/she considers is fair and reasonable in all the circumstances having regard to: legal principles, applicable industry codes or guidance, good industry practice and previous determinations of AFCA or predecessor schemes.

ASFA members have noted a number of concerns in relation to how the test is applied by AFCA in practice.

Instances have been reported where AFCA staff have appeared to be unfamiliar with the different tests that apply to superannuation and non-superannuation complaints. This appears to be limited to situations where superannuation complaints are — presumably for workflow management reasons — assigned to staff who normally work on non-superannuation complaints.

More generally, there is an observed tendency for case managers to interpret the ‘fairness’ principle as ‘what is fair for the consumer’, without acknowledging that ‘fair and reasonable’ is a spectrum and the test set out in section 1055 can encompass a range of trustee conduct and decisions.

ASFA members have highlighted two specific examples that raise concern regarding the way AFCA approaches ‘fairness’ in the general sense in relation to superannuation complaints:

1. AFCA’s published approach document dealing with delays in relation to insurance claims in superannuation³ states that AFCA expects trustees to comply with timeframes set out in the Insurance in Superannuation Voluntary Code of Practice.

As indicated in its title, the Code is **voluntary** and will apply only where a trustee has bound itself to comply. Further, reflecting the recent and imminent legislative and regulatory change in relation to insurance in superannuation, the final date implementation date for Code adopters is 1 January 2022. AFCA’s approach document seeks to apply this voluntary Code to all trustees, even where a trustee has not bound itself to the code or is still transitioning toward implementation of its requirements.

2. AFCA has made determinations adverse to trustees, notwithstanding that the trustees’ conduct or decision was permitted under prevailing legislative provisions, on the basis the conduct or decision was not ‘fair’ to the complainant⁴.

We accept that ‘fairness’ is not a static concept but rather one that evolves over time. However, it is important that financial firms are able to conduct their business in a manner that complies with the legal requirements in force at that time without fear that they will, potentially several years later, be found not to have acted ‘fairly’ if judged against a different set of requirements.

Finally, we note that while AFCA considers whether a trustee decision is fair and reasonable in its operation *in relation to the complainant*, a superannuation trustee also has statutory and fiduciary obligations that are owed to the fund’s *beneficiaries as a whole*. This is a challenging matter to balance.

While AFCA has noted that its fairness jurisdiction “is not new and echoes the jurisdiction of AFCA’s predecessor schemes”, we submit that AFCA’s approach to ‘fairness’ does appear to differ from that of the predecessor schemes — or at least, that applied by the SCT. We acknowledge that AFCA has sought to provide stakeholders with information through its published ‘approach documents’ however these do not appear to have delivered the desired clarity. As matters stand, we consider there is a lack of certainty, for financial firms, as to what AFCA will consider ‘fair’ when considering complaints on a range of issues.

³ AFCA, [The AFCA approach to delayed insurance claims in superannuation](#) (undated)

⁴ An example is included in the confidential supplement to this submission.

ASFA notes that, just prior to the onset of the COVID-19 pandemic, AFCA had planned to release a consultation paper as part of its 'Fairness Project'. This project is designed to "provide certainty about how AFCA assesses what is fair in a way that is clearly understood by all stakeholders". AFCA indicates that a planned output from the project is "a framework and fairness tool to clearly articulate our decision-making jurisdiction and ensure our decision-making process is clear and robustly supports the exercise of our jurisdiction by ensuring procedural fairness, consistency, transparency and fair engagement by the parties in the resolution of disputes".

ASFA considers that all stakeholders would benefit from greater transparency in relation to AFCA's approach to 'fairness' and an opportunity to engage in constructive dialogue with AFCA around the scope of its 'fairness' jurisdiction.

Recommendation

Fairness

AFCA should proceed with its planned 'fairness project' consultation. It is important that this process provides stakeholders with:

- greater clarity as to how AFCA assesses 'fairness'; and
- an opportunity to engage in constructive dialogue with AFCA around the scope of its 'fairness' jurisdiction.

AFCA should also tighten some process steps, improve communication and reduce delays as complaints move between stages of the dispute resolution process to improve procedural fairness.

1.2 'Efficient and timely'

Feedback from ASFA members indicates the early stages of the AFCA dispute resolution process generally operate efficiently. However, where a superannuation complaint progresses beyond case management or preliminary assessment, ASFA members report timeframes to resolution that are often significant.

Some members have reported that certain types of complaints are not being resolved in an efficient or timely manner. This is particularly the case with complaints in relation to death benefit distributions and insured benefits — matters where the complainants may already be experiencing distress.

Members have also noted that matters can take around 100 days to progress to a panel view or determination, regardless of the type of complaint. Often, no updates are received by the parties during that period. In fact, it appears that the overall timeframes to resolution for some complaint types may not be significantly shorter than those achieved previously by the SCT.

Recommendation

Timeliness

- Steps should be taken to reduce the time taken by AFCA to resolve some categories of superannuation complaints, particularly those in relation to death benefit distributions.
- AFCA should set, and publish, clear KPIs for each stage of the dispute resolution process.
- AFCA should provide regular updates to the parties throughout the dispute resolution process.

We have provided, at Appendix 1, examples of delays and timeframes reported by ASFA member trustees. The experiences reported to ASFA suggest that some of these delays and inefficiencies may be due to the involvement, in the early stages of the process, of staff who do not have extensive superannuation knowledge or experience in resolving superannuation complaints. For example, ASFA members have reported:

- Information requests that are unclear or incomplete, or appear to be checklist driven and not tailored to the particular complaint. One ASFA member has reported receiving five separate information requests from AFCA in relation to one complaint. Issues of this nature impact on a trustee's ability to respond promptly and keep the complaint progressing.
- A mistaken assumption that the trust deed is the sole source of a trustee's duties and obligations, requiring detailed explanation from the trustee of additional obligations imposed by legislation and regulatory requirements.
- An apparent lack of confidence in less-experienced case managers to close out complaints that are clearly outside AFCA's jurisdiction or lacking in substance, allowing them to progress to later stages of the dispute resolution process.
- Some complaints are misclassified at the outset and initially streamed through the incorrect (non-superannuation) team, suggesting the 'triage' process may need some refinement.

Recommendation

Embedding superannuation expertise to improve efficiency

Ensuring AFCA front-line staff have appropriate levels of superannuation knowledge and experience would alleviate delays and improve the efficiency of complaint resolution.

While a fund trustee is able to monitor the timeframes to resolution for the complaints to which it is party, it is difficult to confidently assess the timeliness of AFCA's dispute resolution overall. In making such an assessment, stakeholders rely heavily on the data published by AFCA. ASFA members have made a number of observations in relation to the data:

- In reporting the 'days under management', AFCA does not distinguish between complaints handled via its 'Fast Track' process or the 'Standard & Complex' process.

It would be expected that simpler complaints considered suitable for the 'Fast Track' process should be resolved more quickly than those which require the 'Standard & Complex' process. This is supported by analysis undertaken by ASFA members of the complaints to which they are a party. Combining the data therefore produces an average 'days under management' figure which is not representative of either category. This makes it difficult to assess the efficiency of AFCA's dispute resolution process.

- It is difficult to reconcile the complaint volumes in AFCA's annual reports to the data reported via the DataCube for the same periods. Compared against the figures for superannuation complaints received from the AFCA annual reports for 2018-19 and 2019-20 (or its recently published two-year report), the volumes extracted from the DataCube are significantly lower for each period.

We understand that the DataCube does not include every complaint — for example, it excludes financial firms that have had less than four complaints during a reporting period. However, we submit that published data should be comparable across sources or, to the extent there are reasons for variances, these should be clear to users.

The data published by AFCA is important as an indicator of its efficiency and effectiveness in resolving complaints — its ‘timeliness’. We note that the volume of cases received in relation to superannuation complaints is also a factor that has been used to support annual increases in the membership fee paid by trustees and is likely to be influential in setting AFCA’s ongoing funding arrangements.

Recommendation

Clarity and consistency in data reported regarding timeliness of dispute resolution

Greater clarity is required in relation to the data published by AFCA about the volume of complaints received and progressed, and there should be consistency in the data published across different channels — for example, annual reports and the DataCube.

Finally, we refer you to Appendix 2 of our submission. This includes some more detailed recommendations to improve the efficiency and timeliness of aspects of the dispute resolution process for superannuation complaints.

1.3 ‘Independent’

AFCA’s EDR model is designed to be consumer-focussed, and ASFA fully supports that approach in principle. AFCA deserves credit for the efforts it makes to ensure the dispute resolution process is accessible. However, while it is important that AFCA assists consumers with valid complaints to seek resolution, it is also vital that the assistance given is measured and appropriately balanced.

Aspects of the case management process do, in ASFA’s opinion, suggest that some re-balancing may be required. ASFA members advise that they have:

- Observed a failure to appropriately manage and withdraw trivial and/or vexatious complaints and complaints without substance, allowing these to continue on to later stages of the dispute resolution process. This may be seen as ensuring the complainant feels they have received a fulsome EDR experience, but in practice it merely creates or strengthens an unrealistic expectation that the complainant will receive a favourable outcome.
- Experienced pressure to settle complaints, especially those of relatively lower value, even where the trustee considers they lack substance. This forces the trustee to strike a balance between its duty to act in the best interests of all of its members and the validation of an unmeritorious claim for the sake of expediency — to minimise the workload involved in responding to detailed AFCA information requests and, if a full user-pays model is adopted, to avoid incurring escalating complaint fee.

It is suggested this may be largely attributed to AFCA staff in the early stages of the dispute resolution process not having a deep understanding of the superannuation regulatory regime. That is, they may not appreciate that the trustee’s decision or conduct is supported — and in some cases actually required — under legislative and regulatory requirements.

As noted throughout this submission, this can be addressed by ensuring front-line staff have detailed superannuation knowledge and experience and can access additional subject matter expertise where necessary. ASFA understands that in some instances, case managers confer with an Ombudsman prior to issuing a preliminary assessment. This need not impact on the independence of the process. A best practice policy can easily be implemented to ensure an Ombudsman who was consulted in relation to a preliminary assessment is not involved in any subsequent determination of the complaint, either alone or as part of a panel.

Recommendation

Independence

While AFCA plays a critical role in making EDR accessible to consumers, embedding more superannuation knowledge and expertise in front-line staff will improve the handling of superannuation complaints and ensure the dispute resolution process strikes an appropriate balance between the parties.

1.4 Consistent, predictable, quality outcomes

Overall, the experience reported to ASFA suggests the outcomes produced under the AFCA model are less predictable than those delivered by the SCT, with some concerns in relation to the quality and consistency of AFCA's decision making.

There is a strong view that some front-line AFCA staff do not have sufficient knowledge and experience in resolving superannuation complaints. Superannuation is a highly technical area, with trustees subject to extensive legislative and regulatory requirements in addition to the terms of their trust deed. It is important that there is clear understanding of these matters at all stages of the dispute resolution process, not merely at the determination stage. ASFA members report that it is not uncommon for front-line staff to suggest outcomes that are inconsistent with a fund's trust deed, or to mistakenly assume that the deed is the sole source of a trustee's obligations, to the exclusion of relevant legislative and regulatory requirements.

Both the 'Fast Track' and 'Standard & Complex' process lines in AFCA's dispute resolution process involves a step known as the 'preliminary assessment'. This involves the case manager reviewing material submitted by the parties and, where it has not been possible to resolve the complaint by negotiation or conciliation, outlining a proposed decision. The step is intended to provide an opportunity for early resolution of a complaint, with complaints only proceeding through to an adjudicator or to an Ombudsman for determination where one of the parties rejects the preliminary assessment.

The preliminary assessment process has the potential to lead to more efficient and timely resolution of complaints. In order to achieve this, it is important that the parties have confidence in the assessment.

We accept that a preliminary assessment represents, by definition, a less detailed consideration of a complaint than a final determination. Despite this, we consider that preliminary assessments must still meet appropriate standards in terms of quality. When considering whether to accept a preliminary assessment, the parties should have confidence that it results from a sufficiently rigorous analysis, undertaken by staff with an appropriate level of knowledge and experience, taking into account the complexity of the complaint.

ASFA members report numerous instances where preliminary assessments made in favour of complainants are overturned in favour of the trustee when progressed to a full determination. This has the potential to reduce stakeholder confidence in the preliminary assessment process. It also raises the prospect that factually identical cases could have different outcomes depending on whether they are resolved at preliminary assessment or determination.

ASFA has, throughout this submission recommended that AFCA strengthen the level of superannuation knowledge and experience of its front-line staff and provide them with a mechanism to access additional subject matter expertise where needed. We consider this will improve the quality of the preliminary assessment process.

We also consider it would be beneficial for AFCA to report, in the data it makes available to stakeholders, on the extent to which preliminary assessments are reversed or varied if progressed through to determination. This would provide insight as to the effectiveness of the preliminary assessment process.

Recommendation

Ensuring confidence in the preliminary assessments process

Embedding greater superannuation knowledge and experience in AFCA front-line roles will improve the quality of preliminary assessments and enable stakeholders to more confidently judge whether to accept a preliminary assessment or seek a full determination of the complaint.

Looking at consistency more broadly, we note that AFCA has published a number of documents setting out how it will approach various types of complaints, including in relation to superannuation complaints. We generally consider this to be a good initiative, which should lead to greater consistency in decision-making. However, ASFA has some concerns in relation to these 'approach' documents:

- While AFCA has recently commenced including a date of publication for some of the individual approach documents on the landing page on its website, the documents themselves are not dated and do not contain a version number to indicate when they have been updated. This makes it difficult for trustees to be sure, at any given point in time, they are referring to the document that reflects AFCA's current approach. It may also lead to confusion and uncertainty due to AFCA and one or more parties to a complaint relying on different versions of the approach document.
- Instances have been observed where case managers appear to make decisions and preliminary assessments that are inconsistent with the relevant AFCA approach document.
- As noted in section 1.1, the approach document in relation to delayed insurance claims in superannuation seeks to apply to all trustees the terms of a voluntary code that is still in transition.

Recommendation

AFCA approach documents

All AFCA approach documents should be clearly dated and include version numbers.

AFCA determinations do not provide any identification of the decision-makers. This means stakeholders cannot form a view about whether there is consistency between decision makers (do different decision makers decide similar cases in a consistent manner?) or if individuals are themselves making consistent decisions. In contrast, there was clear disclosure of decision makers by the SCT.

Identification of the decision makers for a complaint would, in ASFA's view, improve transparency and accountability as well as allowing informed judgments to be made about the consistency of AFCA decisions.

Recommendation

Identification of AFCA decision makers

AFCA decision makers involved in the making of a determination should be identified in the determination notice provided to the parties as well as the version published on the AFCA website.

1.5 Systemic issues

ASFA acknowledges that the framework legislation requires AFCA to refer a systemic issue arising from its consideration of complaints to APRA, ASIC and/or the ATO, as relevant. We consider this appropriate but have some reservations regarding AFCA's approach to identification of potential systemic issues and the extent of investigation it conducts before referring a matter to the relevant regulator.

RG 267.198 defines a 'systemic issue' very broadly, as one that may affect more than one complainant, involve many complaints that are similar in nature, affect all current or potential complainants at a particular firm, or affect more than one firm.

This definition requires AFCA to consider whether a particular complaint it is considering may raise issues that are not isolated to that complaint. While this requires AFCA staff to be open minded when considering a particular complaint, we submit that there must be some aspect of a particular complaint that causes AFCA to be 'on notice' that it may need investigation as a potential systemic issue. ASFA members have reported instances where AFCA staff have appeared to have presume that the issues raised in a particular complaint are systemic, or to consider complaints which have very different root causes to be systemic.

ASFA members have also noted that in some instances where AFCA identifies a systemic issue, the financial firm may already be engaged with the relevant regulator to address it. Where AFCA continues its investigation, this leads to potentially significant duplication of effort for the financial firm and, we would submit, unnecessary effort by AFCA. We suggest that the communication process between AFCA and the regulators may need to be strengthened to prevent this occurring.

A concern has also been raised that AFCA has sometimes raised an issue with a trustee as potentially systemic, based on an apparent misunderstanding of regulatory provisions relevant to the fact situation. This suggests there may be a need for AFCA to incorporate an internal review function (or enhance any existing function) before it raises a potential systemic issue — although the embedding of greater superannuation expertise within the AFCA teams handling superannuation complaints would also alleviate this issue.

We have included examples of some of these concerns regarding system issues in the confidential supplement to this submission.

Recommendation

Systemic issues

- Communication between AFCA and the regulators should be strengthened to ensure AFCA does not unnecessarily expend time and effort investigating matters that are already the subject of dialogue between the financial firm and the relevant regulator.
- Matters identified by AFCA staff as potential systemic issues should undergo an internal review prior to AFCA formally raising them with fund trustees.

1.6 Funding and fee structure

AFCA's interim funding arrangements are due to expire at the end of the current financial year. Under those interim arrangements, the superannuation sector typically does not incur a user charge levy or specific complaint-based fees based. However, superannuation funds pay an annual, formula-based membership fee significantly higher than other financial firms. In general terms, that fee is calculated to recoup the costs associated with AFCA's handling of superannuation complaints.

An exception to this interim funding arrangement applied in relation to ‘legacy complaints’ — these were accepted by AFCA, during 2019-20, in relation to conduct of financial firms dating back to 1 January 2008. AFCA was given authority to consider these complaints as part of the Government’s response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services sector. AFCA charged complaint-based fees in relation to all legacy complaints, including superannuation complaints.

We understand AFCA is currently considering its ongoing funding arrangements, with an expectation it may seek to move superannuation complaints onto a fully ‘user-pays’/complaint fee model. We note that no information has been provided to superannuation trustees or other stakeholders regarding the funding arrangements that may apply from 1 July. ASFA members would appreciate urgent clarity around this matter, particularly if there is any intent to move to a full user-pays model for superannuation complaints.

ASFA considers it important that AFCA has a funding model that is sustainable and supports an adequate and appropriate level of resources. This is necessary to ensure the EDR service operates effectively and efficiently for all stakeholders. We maintain that the lack of a sustainable funding model was a primary reason for the performance issues of the former SCT. However, it is important to ensure that AFCA’s funding model does not impact in an inequitable manner on any particular sector of the financial industry or on particular financial firms.

The annual membership fee paid by superannuation trustees toward AFCA’s funding is already significant. For example, some ASFA member trustees report paying membership fees of between \$200,000 and \$330,000 per quarter, while another pays around \$325,000 per year. These are substantial amounts and are based on funds under management — payable even if the trustee has only a small number of complaints registered with AFCA during the year.

As ASFA outlined in an earlier submission⁵ in relation to AFCA, the introduction of a full user-pays model, with escalating fees incurred based on how far through the dispute resolution process a matter progresses, would be problematic for superannuation complaints. This is because the resolution of superannuation complaints involves some considerations that do not arise in relation to other financial products and services. These include:

- The decision whether to incur escalating dispute fees or settle a complaint that is without substance, or where it is likely the trustee decision would ultimately be upheld as fair and reasonable, is challenging given a trustee has a fiduciary duty to their broader membership. This includes a duty to act in members’ best interest and, it is proposed from 1 July 2021, a duty to act in members’ best financial interest.
- Tiered complaint fees for death benefits are unlikely to be suitable for complaints regarding death benefit distributions. In combination, the lack of any EDR cost to consumers and the benefit amount that may be at stake act serve as a powerful incentive for a dissatisfied claimant to pursue a complaint through to determination, regardless of the strength of their claim.

We have also noted in section 1.4 a perceived issue with the quality of the preliminary assessments given for some complaints. ASFA does not consider it appropriate for any funding model to effectively force a financial firm to incur escalating complaint fees in order to obtain appropriate resolution of the complaint. This is of particular concern for superannuation trustees, given their fiduciary duty to members. We consider that where a preliminary assessment in favour of a complainant is overturned and replaced with a determination in favour of the financial firm, AFCA should rebate to the firm any additional complaint fees associated with the determination.

⁵ ASFA, [Submission to AFCA Transition Team, Response to consultation paper: Establishment of the Australian Financial Complaints Authority](#), 21 November 2017, section D.4.1

AFCA's dispute resolution process involves acceptance of virtually all complaints and does not at the outset consider whether they are outside its jurisdiction or clearly without merit. AFCA also accepts complaints that have not been previously made to the trustee, and 'refers' them back for the trustee to complete its IDR process. In contrast, the former SCT conducted a review to confirm a complaint was within its jurisdiction and/or not without merit *before* it was accepted and refused to accept complaints that the trustee had not already had an opportunity to resolve through IDR.

ASFA takes the view this is inefficient and inappropriately manages consumer expectations. When considering a potential complaint-based funding model, however, we note that where complaints are registered that have not been through IDR, are outside jurisdiction, or are clearly without merit, work is commenced by AFCA and fees begin to be incurred by the financial firm. We do not consider it appropriate that financial firms should incur fees in relation to complaints that should have been promptly excluded by AFCA.

We also note that where the SCT considered it necessary to join an insurer to a complaint made in relation to a decision of a superannuation trustee, this was treated as a single complaint. In contrast, AFCA registers separate complaints against the trustee and insurer. This leads to unnecessary duplication in complaint volumes and, currently, means the insurer incurs complaint fees in respect of a complaint for which the trustee is also paying, indirectly, via its annual membership fee. Analysis of AFCA's reported data indicates there may have been more than 500 'duplicate' cases of this nature in 2019-20. If superannuation trustees are also required to pay complaint fees under a future funding model, retaining this approach would effectively involve double charging for the same complaint.

Finally, we note there is a need to improve transparency and clarity in relation to the costs incurred by AFCA and how that translates into the membership and complaint fees it charges:

- ASFA members have noted they do not consider there is currently adequate disclosure of the fees received by AFCA and where its funding is outlaid – including in relation to the different activities it undertakes. Further, we are concerned that trustees have received little explanation of the significant increases in membership fees since AFCA's commencement.
- Little information about AFCA's fee structures is publicly available. Given the concerns raised about the difficulty reconciling the superannuation complaint volumes reported by AFCA, we consider that greater disclosure and transparency as to its funding would improve stakeholders' confidence.
- ASFA members who have had involvement with non-superannuation complaints subject to the full user-pay model have noted that it is difficult to understand when the complaint fees applicable to various stages of the process will be charged.
- Some ASFA members indicate they have, on occasion, been incorrectly charged complaint-based fees — suggesting that some superannuation complaints are being incorrectly classified for billing purposes.
- One ASFA member was charged very substantial complaint fees — totalling in excess of \$25,000 — for AFCA's handling of a single matter under its 'legacy complaint' arrangements, with very little explanation provided to substantiate the charges. ASFA considers that the imposition of a fee of this magnitude warrants a detailed explanation.

We recommend AFCA considers these issues when it reviews its ongoing funding arrangements.

Recommendation

AFCA funding model

- AFCA should, as a matter of priority, release information regarding its proposed funding arrangements for financial firms for the 2021-22 and later financial years.
- Transparency in relation to the membership and complaint fees charged (or to be charged) by AFCA should be improved.
- Where a preliminary assessment favourable to the complainant is overturned at determination in favour of the financial firm, any additional complaint fees charged to the firm should be rebated.
- In the event a full user-pays (complaint fee) model is proposed for superannuation complaints, it is important that this reflects the fiduciary duties of a superannuation trustee and does not incentivise settlement of unmeritorious complaints in order to avoid incurring escalating complaint fees.
- Before any full user-pays model is proposed for fund trustees, AFCA processes should be refined to ensure trustees would not incur complaint fees where AFCA has failed to exclude, at the outset, complaints that are clearly outside its jurisdiction or without merit, or have not been through a trustee's IDR process.
- When AFCA finalises its funding model for 2021-22 and later years, it should aim to provide greater clarity about when particular fees will be incurred and make more information about its fee arrangements publicly available.

2. Internal review mechanism

2.1 Independent Assessor function

ASFA members have not reported significant direct experience with the Independent Assessor but have highlighted a need for greater clarity about the process, include the mechanism through which Independent Assessors are appointed.

As part of our response to AFCA's consultation on its draft Rules and draft Terms of Reference for the Independent Assessor⁶, ASFA made some detailed recommendations directed at providing transparency and accountability in relation to the Independent Assessor role.

We note that many of the matters addressed in those recommendations remain of concern. In particular, we note that the Independent Assessor's recommendations are not binding on AFCA and there is no recourse for the complainant if a recommendation is not accepted. Significantly, there is no requirement that AFCA provides reasons if it decides to reject a recommendation.

ASFA considers there is a need for all stakeholders to feel confident that any shortcomings identified by the Assessor receive due consideration and translate, where appropriate, into remedial action. Accordingly, ASFA considers that AFCA should be required to report on its implementation of recommendations by the independent assessor on an 'if not, why not' basis. These reports should be made available to all stakeholders, via the AFCA website, on at least an annual basis.

⁶ ASFA, [Submission to AFCA ASFA response to Consultation on Proposed AFCA Rules](#), 29 June 2018 – refer section D.1.2

In addition, we note that although the Assessor's role is not focused on the substance or merits of a particular complaint, an understanding of the issues raised is necessary in order for them to reach an informed judgment on whether the AFCA service level was appropriate. The complexity of the complaint is likely to influence the timeframe to resolution, the extent and frequency of contact with AFCA staff and the number of steps the matter progresses through the AFCA decision making process. What is critical is that the AFCA staff involved in the complaint acted appropriately at each stage.

Given AFCA's jurisdiction covers the entire financial services industry, forming a judgement as to what was 'appropriate' service may, where the subject matter of the complaint was technical and/or complex, present some challenges. We would encourage monitoring of this matter and, should it be considered necessary, the appointment of additional Independent Assessors to ensure adequate coverage of the diverse financial services and products within AFCA's jurisdiction.

Recommendation

Independent Assessor

- Greater clarity should be provided regarding the role and the performance of the Independent Assessor.
- AFCA should report on its implementation of recommendations by the Independent Assessor on an 'if not, why not' basis.

2.2 Internal review: substance of decisions

ASFA notes that the framework legislation preserved, for determinations made in relation to superannuation complaints, the ability of the trustee or the complainant to appeal to the Federal Court on a question of law.

We consider the introduction of an additional internal mechanism to review the substance of all AFCA's decisions is likely to adversely impact the timely resolution of complaints. It is also likely, under the 'user-pays' funding arrangements, to result in additional fees being incurred by the financial firm.

However, as we have noted in this submission, we consider there is scope to improve the quality of decisions made at the earlier stages of the dispute resolution process, particularly preliminary assessments.

We recommend that greater superannuation knowledge and expertise is embedded at the case manager level, and case managers should have the ability to consult internal subject matter experts where they require additional assistance. This should help to ensure the cases progressed beyond preliminary assessment are those that genuinely warrant or require full determination by an Ombudsman.

Recommendation

Internal review of the substance of AFCA decisions

Rather than introducing a formal internal review of the substance of all AFCA decisions, the quality of the preliminary assessment process should be strengthened by ensuring case managers have, or have access to, a deeper level of superannuation knowledge and expertise.

Appendix 1 — Delays in resolution of superannuation complaints

Further to our comments in section 1.2 of this submission, ASFA member trustees have reported examples of delays and lengthy timeframes to resolve superannuation complaints.

These include the following:

- Complaints in relation to death benefit distributions (experience reported by multiple trustees):
 - A complaint opened with AFCA in October 2019 that is still awaiting determination by an Ombudsman, with the last communication received from AFCA in July 2020 when a party was joined to the complaint.
 - Several complaints that have been open in excess of 500 days — 568 days in one case, with a preliminary assessment made in favour of the trustee over 12 months ago.
 - A complaint which remains unresolved where there was a delay of almost five months between lodgment of the trustee's initial response and a request by AFCA for further information — possibly due to a new case manager having been appointed.
- A TPD claim where the complainant rejected a preliminary assessment in favour of the trustee in early May 2020 and requested the case proceed to determination, which has yet to issue.
- Complaints in relation to insured superannuation benefits opened in January and May 2020, where preliminary assessments in favour of the trustee were rejected by the complainant and determinations are still outstanding.
- A complaint opened with AFCA in April 2019 where AFCA made a preliminary assessment in the financial firm's favour in November 2019, but the matter has since stalled and remains unresolved.
- A complaint that has remained unresolved for over two years.
- A complaint where AFCA took around 15 months to communicate at a particular stage of the process, then allowed the trustee only 7 days to respond.
- A complaint that remains at the preliminary assessment stage after 469 days.
- Multiple 'complex' complaints currently awaiting decision that have been open an average of 338 days.

Appendix 2 - Recommendations to improve the efficiency and timeliness of the dispute resolution process for superannuation complaints

Based on our engagement with ASFA members since AFCA’s inception, we have set out below some recommendations for how the efficiency and timeliness of AFCA’s dispute resolution process for superannuation complainants could be improved.

What is the issue	How can the process be improved?
Acceptance of complaints that are outside jurisdiction/clearly without merit/have not gone through IDR	
<p>AFCA processes lead to acceptance and registration of complaints that are clearly outside its jurisdiction or without substance. As the assessment of jurisdiction is deferred, unnecessary workload and cost begins to be incurred for AFCA and the financial firm and an unrealistic expectation is created for the complainant that they have a ‘winnable’ case.</p> <p>Some AFCA staff appear reluctant to withdraw a complaint without the complainant’s agreement.</p> <p>AFCA accepts and registers complaints that have not first been made to the superannuation fund trustee, then ‘refers’ them to the trustee to complete its IDR process. This means unnecessary workload and cost is incurred by AFCA and the trustee is not given an opportunity to resolve a complainant at IDR before the EDR process is engaged.</p>	<p>AFCA’s Rules should be amended to:</p> <ul style="list-style-type: none"> • Require an upfront assessment to reject complaints that are outside jurisdiction or are clearly misconceived or lacking in substance. No further work should be conducted on these complaints. • Enable complaints to be more readily withdrawn where they are lacking in substance and/or misconceived, where there is no chance of the complaint succeeding. AFCA should develop clear processes for staff to support this reform. • As was the case with the SCT, AFCA should reject complaints that have not first proceeded through the trustee’s IDR process.

What is the issue	How can the process be improved?
Lack of specialised superannuation knowledge/experience	
<p>Some AFCA staff, particularly frontline staff, appear not to have significant knowledge and/or experience in relation to superannuation matters or, specifically, resolution of superannuation complaints.</p> <p>There has been significant turnover of staff and current escalation points for trustees — for example, case manager to team leader to senior manager for superannuation — are informal and do not always operate effectively.</p> <p>This is an underlying issue that has a flow-on effect through many steps of AFCA’s decision-making process. In particular, we believe this contributes to inappropriate/unclear information requests, failure to withdraw complaints that are without substance (and to manage the complainant’s expectations in relation to these), delays in complaints moving between stages of the dispute resolution process, and preliminary assessments that are subsequently reversed on determination.</p>	<ul style="list-style-type: none"> • All AFCA staff dealing with superannuation staff should have an appropriate level of experience and knowledge as well as the ability to access, in a formalised manner within the AFCA organisational structure, additional subject matter expertise. • A clear and consistent process should be made available to superannuation trustees to escalate concerns regarding the handling of individual complaints before they are finalised. The need for ad hoc approaches to senior AFCA staff to address concerns with the handling of a particular complaint must be avoided. Issues identified through this escalation process should be promptly reviewed and any systemic concerns promptly addressed. • AFCA should review all complaints where there is a significant variation between the preliminary assessment and determination. To the extent this highlights deficiencies in the earlier stages of the dispute resolution process or the performance of particular staff — such as a need for greater training or support — these should be promptly addressed.
Conciliation	
<p>There appears to be a tendency for less experienced case managers to schedule conciliation conferences that are premature (for example, where information from the complainant or from medical experts is outstanding) or unlikely to produce an outcome.</p> <p>There do not appear to be clear requirements regarding attendance at conciliation conferences by case managers.</p> <p>Conciliators often appear unfamiliar with the details of the case, causing confusion and distress for complainants. This may be because the conciliation is scheduled prematurely or without allowing the conciliator adequate time to prepare.</p>	<p>AFCA should establish consistent guidelines to:</p> <ul style="list-style-type: none"> • Assist its staff in determining when a complaint should progress to conciliation. • Require case manager attendance at conciliation conferences. • Ensure conciliators are adequately prepared.

What is the issue	How can the process be improved?
Information requests and access to trustee documents	
<p>Multiple requests for the same information are frequently made as a complaint progresses through the dispute resolution process (for example, by the Registration team and then again by the Case Manager). It appears some front-line staff may adopt a 'checklist'/formulaic approach as information is often requested that is not relevant to the issues raised in the complaint.</p> <p>Trustees may be asked to substantiate numerous points to a high level of precision before it is determined they are relevant to the issues at hand. For example, mail house records are requested to verify that particular correspondence was actually sent to the complainant, when the correspondence could be reviewed first to determine whether it has any bearing on the issues raised in the complaint.</p>	<ul style="list-style-type: none"> • The wording used in information requests should be streamlined to avoid multiple requests for the same information, minimise requests for information not relevant to the complaint and defer the requirement to positively verify (through mail house records) the sending of a specific document until a review of the correspondence has indicated it is relevant to the complaint. • AFCA should develop a reference library of the documents its staff commonly request from fund trustees, such as trust deeds, insurance policies, Product Disclosure Statements. This would remove the need to separately request them in respect of each complaint made against the trustee. (We note the SCT maintained such a reference library. We understand the documents previously held by the SCT have been transferred to ASIC and will be accessible by AFCA once proposed legislation takes effect⁷. While this will be of considerable benefit, there will also be a need for AFCA to maintain the library by adding to it over time.
AFCA Secure Portal	
<p>The portal only accepts a limited range of data files. In particular, email files cannot easily be uploaded and must be converted to PDF, which is time consuming and, where the email included multiple attachments, can make the link between files unclear.</p>	<p>The portal should be enhanced to enable trustees to upload additional file types, for example .wav files (recordings) and all common email filetypes.</p>

⁷ Treasury Laws Amendment (2020 Measures No 4) Bill 2020 (currently before the House of Representatives), Schedule 2