



Law Council
OF AUSTRALIA

Legal Practice Section

CP 311 Internal Dispute Resolution: Update to RG 165

Australian Securities and Investment Commission

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Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 28 June 2019 are:

- Mr Arthur Moses SC, President
- Ms Pauline Wright, Treasurer
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- Mr Ross Drinnan, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

About the Section

The Legal Practice Section of the Law Council of Australia was established in March 1980, initially as the 'Legal Practice Management Section', with a focus principally on legal practice management issues. In September 1986 the Section's name was changed to the 'General Practice Section', and its focus broadened to include areas of specialist practices including Superannuation, Property Law, and Consumer Law.

On 7 December 2002 the Section's name was again changed, to 'Legal Practice Section', to reflect the Section's focus on a broad range of areas of specialist legal practices, as well as practice management.

The Section's objectives are to:

- Contribute to the development of the legal profession;
- Maintain high standards in the legal profession;
- Offer assistance in the development of legal and management expertise in its members through training, conferences, publications, meetings, and other activities.
- Provide policy advice to the Law Council, and prepare submissions on behalf of the Law Council, in the areas relating to its specialist committees.

Members of the Section Executive are:

- Ms Maureen Peatman, Chair
- Mr Michael James, Deputy Chair
- Mr Geoff Provis, Treasurer
- Ms Tanya Berlis
- Mr Dennis Bluth
- Mr Mark Cerche
- Ms Peggy Cheong
- Mr Philip Jackson SC
- Dr Leonie Kelleher OAM
- Ms Christine Smyth

Acknowledgement

The Law Council is grateful to the Superannuation Committee of the Legal Practice Section for the preparation of this submission.

Executive Summary

1. The Superannuation Committee of the Law Council's Legal Practice Section (**the Committee**) is grateful for the opportunity to provide this submission in response to the Australian Securities and Investments Commission's (**ASIC**) Consultation Paper 311 entitled *Internal Dispute Resolution: Update to RG 165 (Consultation Paper)*.
2. The matters discussed in the Consultation Paper affect a very broad range of Australian Prudential Regulation Authority (**APRA**) and ASIC regulated entities ('**financial firms**') and their customers. Given the Committee's mandate, the Committee's feedback is based on those matters that affect superannuation trustees and superannuation fund members, although in some cases the effect on trustees and members is likely to be the same as the effect on other financial firms and their customers. Further, in many cases, ASIC seeks feedback on matters of policy or practice. Again, given the Committee's mandate, this response is limited to legal matters.
3. In summary the Committee provides the following feedback on the Consultation Paper:
 - (a) The proposed new definition of complaint is difficult to understand and, as a consequence, it is likely to be difficult for superannuation trustees to identify a complaint to which RG 165 applies. The Committee also considers that while the new and expanded definition of complaint will be problematic for trustees applying the definition, the Committee doubts that the expanded definition will provide any further protection for members of superannuation funds.
 - (b) The Committee notes that the existing definition of complaint does not adequately distinguish between an objection or request to review a decision of a Trustee and a complaint. While this is an existing problem, the Committee queries whether this is a matter that could be squarely addressed in RG 165.
 - (c) The Committee is concerned that the draft RG 165 does not take account of the fact that there may be a broad range of complaints relating to superannuation that cannot be escalated to Australian Financial Complaints Authority (**AFCA**) and that the proposal to expand the definition of small business will exacerbate this problem.
 - (d) The Committee considers that there may be some merit in treating death benefit objections separately from complaints. However, leaving that matter aside, the Committee does not believe that there is any need to have separate rules applying to written reasons or complaint decisions made by superannuation trustees. The Committee does think that trustees would benefit from examples about how reasons might be formulated in the context of complaints about exercises of discretion (for example in the context of a complaint (which, depending on ASIC's views, may or may not include an objection about the payment of a death benefit) where there are competing eligible prospective beneficiaries).

New definition of Complaint

B1Q1: Do you consider that complaints made through social media should be dealt with under IDR processes?

4. The Committee considers that complaints made through the financial firm's social media should be treated in the same way as complaints made by letter, email, telephone or in person (if the complainant can be identified and responded to).
5. However, the Committee considers that the existing definition of complaint in RG 165 already captures relevant complaints made on a firm's social media platforms and the Committee does not support the expansion of the definition of complaint as proposed to include complaints 'about' an organisation, complaints about staff or complaints to which a response is 'legally required'.
6. The new definition of complaint is both too wide and too uncertain. The Committee is concerned that the expanded definition will create an additional burden for superannuation trustees in identifying complaints made about the trustee and then determining whether they are complaints that call for a response. Further, it is difficult to see any added benefit or protection for fund members.
7. As ASIC notes in the Consultation Paper, the proposed new definition of complaint will expand the definition in the following ways:
 - Currently, a complaint must be made to an organisation in order to be brought within the IDR framework in RG 165; under the proposed definition a complaint may also be about an organisation.
 - Currently, a complaint must be related to the organisation's products, services or complaints handling process; under the proposed definition a complaint may also be about an organisation's staff.
 - Currently, a complaint is only a complaint if a response is expected; under the proposed definition a complaint will also be a complaint if a response is legally required.

Complaints about an organisation

8. By requiring financial firms to adopt the definition of complaint in the AS/NZS 10002:2014 standard, complaints made about a firm, and not only to a firm will be brought within the regulatory framework and, ASIC proposes, the Internal Dispute Resolution (**IDR**) framework.
9. The Committee notes ASIC's view that by including a complaint about an organisation within the meaning of a complaint that the new definition will 'establish social media as a legitimate channel for making complaints'. The Committee does not question this. However, the existing definition of complaint does not exclude a complaint made on social media and it seems very likely that a member of a superannuation fund (for example) could make a complaint to a trustee on the trustee's social media platforms today and such a complaint would be a complaint to which the trustee's IDR framework would already properly apply.
10. The Committee agrees that the addition of the words 'about an organisation' will bring additional complaints made on social media within the scope of RG 465. However, the definition does not limit such complaints to those made on social media. While the

Committee notes that there are practical limitations to how an organisation can identify all complaints made about it, it queries the correctness, as a matter of interpretation, of limiting complaints about an organisation to those made on social media. A complaint about an organisation made in any forum and in any form is prima facie a complaint. Therefore, if this expanded definition is adopted, any limitation would have to be extended by RG 165 itself. Having said this, the Committee does not support the broadening of the definition of complaint in this way, but wishes to draw to ASIC's attention the difficulties of adopting such a broad definition.

11. No doubt in recognition of the reach of the definition, in the Consultation Paper, ASIC foreshadows that it may not require firms to identify complaints made in forums other than the firm's own social media. ASIC states at paragraph 31 of the Consultation Paper that:

at a minimum, we expect that complaints made on a financial firm's own social media platform[s] will be dealt with through the firm's IDR process where the consumer is both identifiable and contactable.

12. While the Committee believes that imposing a minimum requirement that did not extend beyond the firm's own social media would assist in making the expansion of the definition more manageable, it queries whether, as noted above, such complaints are in fact already captured by the current formulation as a complaint 'to' the organisation, and suggest that if these complaints are ASIC's primary focus, it is not necessary or (for the reasons set out here) desirable to include complaints 'about an organisation' in the definition of complaint.

Complaints about an organisation and relating to the prescribed matters

13. Another difficulty with the proposed definition of complaint is in the formulation itself. When a complaint is made to a superannuation trustee today, the trustee must consider the subject matter of the complaint. That will in the ordinary case be straightforward: does the complaint relate to a product or service or the complaints handling process.
14. Under the new definition the organisation will have to ask whether the complaint is about an organisation and whether the complaint relates to a product, service, staff member or the complaints handling process. It is not clear that all complaints about a service, product or staff member will also be about the organisation. This might be particularly the case when a complaint is made about a staff member. This would mean that whenever a complaint is made to a trustee about a staff member, the IDR process would apply and whenever a complaint is made about a staff member and not to the trustee, the trustee will need to determine whether it is also a complaint about the trustee (the organisation).
15. In the Committee's view, the formulation of the definition following the introduction of the words 'about an organisation' introduces an unhelpful degree of uncertainty and complexity and the possibility of different treatment of a complaint depending on whether it is made to an organisation or not.
16. If the proposed expanded definition is adopted, the Committee considers that it would be helpful if ASIC's guidance explained that not all complaints about, for example, a staff member made on social media are complaints about the organisation – indeed the Committee suspects that in many instances such complaints would not be.

Complaints about staff members

17. ASIC notes that it does not expect that the expansion of the definition of complaint to include complaints about an organisation's staff will have a significant impact on firms. The Committee queries the basis for the opinion but note that this is a matter on which it would be useful for ASIC to have empirical evidence.
18. The Committee also has reservations about treating a complaint about a staff member in the same way as a complaint about a service or product. An important part of the IDR framework is that unresolved complaints can be escalated to AFCA or to a court. The Committee doubts that a court would have any jurisdiction to deal with such a complaint and the Committee queries whether it would be appropriate for complaints about staff members to be escalated to AFCA. The Committee notes that AFCA has a discretion not to consider complaints, but that the discretion will only be used where there are compelling reasons. If complaints about staff members are included in the definition of complaint, as is currently proposed, ASIC may need to consider reviewing how many such complaints are in fact made and how many are then escalated to AFCA and whether there is any benefit to the interested parties in doing so.
19. The Committee suggests that if complaints about staff are to be included in the definition, guidance about who are the organisation's staff would be helpful. For example, does an organisation's staff include employees of a related body corporate or employees of an outsourced service provider?

Legally required

20. The Committee thinks that the expansion of the definition to include complaints to which a response is 'legally required' is very difficult in the context of RG 165 which requires organisations to provide a response to a complaint as defined. In short, the addition of these words into the definition introduces a circularity into the determination of whether a complaint is one that meets the definition in RG 165.
21. The Committee recommends that these words not be included and notes that, to the extent that a response is required by a legal requirement other than RG 165, this will be a complaint to which a response might also said to be expected and therefore would be caught by the current definition of complaint.

Distinction between an objection and a complaint

22. ASIC refers in the Consultation Paper to the different treatment by superannuation trustees as to whether they treat an 'objection' to a decision about the distribution of a death benefit as a complaint or not. It appears to be assumed that all such objections should be dealt with as if they were complaints. The Committee queries whether this is in fact the correct default position.
23. The definition (including the proposed expanded definition) of complaint does not easily answer the description of a response to a proposal by a trustee to distribute a death benefit. The definition requires that there is an expression of dissatisfaction about the 'product' or 'service' (assuming the objection is made to the trustee). The term 'expression of dissatisfaction sits uneasily with an objection to a proposal that has been invited by the trustee as part of its claims staking and the subject matter does not readily relate to a 'product or service'.

24. In addition to querying whether an objection to the proposed payment of a death benefit is in fact a complaint under RG 165, the Committee is not convinced that such objections and requests should be treated as complaints under RG 165.
25. The Committee notes that the timing requirements in RG 165 are likely to be too short to deal with such objections. There is often a lot of information that must be collected by a trustee to properly consider the objections and its decision. There is often more than one person objecting to a proposal. The regime required by RG 165 does not apply easily where there are multiple parties interested in the trustee's decision.
26. The Committee suggests that further consideration should be given to the relationship between a complaint and an objection in the context of decisions relating to death benefits and queries whether it is in fact a matter that should be dealt with as part of the IDR framework for dealing with complaints as defined.

AFCA's jurisdiction

B8Q1: Do you agree with our minimum content requirements for the IDR responses?
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27. It is proposed that RG 165 require an IDR response to 'inform the complainant of their right to pursue their complaint with AFCA'.
28. The Committee is concerned that RG 165 assumes that a complainant will have this right and does not take sufficient account of the fact that there will be many cases where a complainant will not be able to do so. There are many examples of 'superannuation complaints' that will fall outside AFCA's jurisdiction, and the types of complaints that are complaints for the purposes of RG 165 and that will not be able to be escalated to AFCA will expand if the broader definition of complaint is adopted.
29. A superannuation complaint is defined in section 1053 of the Corporations Act and, relevantly, that section restricts the nature of the complaints that can be brought to AFCA. In summary, the only complaints relating to superannuation that may be taken to AFCA are complaints that relate to a 'decision' of the trustee (or the conduct of an insurer) and the decision must relate to a particular member or former member or a particular beneficiary or former beneficiary.
30. As a result, it is very unlikely that a complaint to a superannuation trustee about a staff member would be capable of being a superannuation complaint that could be escalated to AFCA. As noted earlier, in considering whether the definition of complaint should be expanded, the Committee considers that it is relevant to consider what should happen to the complaint if it is not capable of being resolved to the satisfaction of the complainant.
31. There are a number of other important exclusions from AFCA's jurisdiction. RG 165 does not touch on these and appears to require all letters responding to complaints to tell the complainant about their 'right' to go to AFCA. The Committee considers that it would be helpful for the prescribed IDR response to take account of the cases where a complaint cannot be escalated to AFCA. Default wording at the end of every IDR response saying that a complainant may be able to do so is unlikely to be helpful to a complainant.

Special rules for superannuation trustees

B9Q1: Do you agree with our proposed approach not to issue a separate legislative instrument about the provision of written reasons for complaint decisions made by superannuation trustees?

32. The Committee assumes that the instrument issued to provide legal force to the new RG 165 will (also) be an instrument made under section 101(1B) of the *Superannuation Industry (Supervision) Act 1993* (Cth) in order to bring an end to the transitional provision for giving written reasons.
33. Subject to the assumption being correct, and to ASIC's views on the distinction between a complaint and an objection, the Committee agrees that there is no need for a special instrument dealing with reasons for decisions relating to complaints regarding decisions of superannuation trustees. However, the Committee does think there would be merit in providing examples in RG 165 of reasons for decisions on exercises of discretion by trustees (e.g. payment of a death benefit where the trustee has a discretion and where there are competing prospective beneficiaries) in contrast to decisions about matters of fact (e.g. whether a member is totally and permanently disabled).
34. Finally, the Committee thinks it may be helpful if the new RG 165 made specific reference to the fact that exempt public sector superannuation schemes that have opted into AFCA are also covered by the requirements for an IDR framework.