



Law Council
OF AUSTRALIA

Australian Financial Complaints Authority

The Treasury

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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 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

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

Acknowledgement

The Law Council is grateful for the contributions of the Business Law Section's Financial Services Committee and the Legal Practice Section's Superannuation Committee in the preparation of this submission.

Business Law Section

The Business Law Section was established in August 1980 by the Law Council of Australia with jurisdiction in all matters pertaining to business law. It is governed by a set of by-laws passed pursuant to the Constitution of the Law Council of Australia and is constituted as a Section of Law Council of Australia Limited.

The Business Law Section provides a forum through which lawyers and others interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia, and enhance their professional skills.

The Section has a current membership of more than 1,100 members. The Section has 15 specialist Committees, all of which are active across Australia.

Current Office Holders on the Business Law Section's Executive Committee are:

- Ms Teresa Dyson, Chair;
- Ms Rebecca Maslen-Stannage, Deputy Chair; and
- Mr Greg Rodgers, Treasurer.

Financial Services Committee

The current Chair of the FSC is:

- Ms Henrietta Thomas
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Legal Practice 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. The Section's has since broadened its focus to include areas of specialist practices including superannuation, property law, and consumer law.

The Section has a current membership of approximately 400 members. The Section has 8 specialist Committees, all of which are active across Australia.

Current Office Holders on the Legal Practice Section's Executive Committee are:

- Mr Philip Jackson SC, Chair
- Ms Maureen Peatman, Deputy Chair; and
- Mr Michael James, Treasurer.

Superannuation Committee

The Superannuation Committee's objectives are to ensure that the law relating to superannuation in Australia is sound, equitable and clear. The Committee makes submissions and provides comments on the legal aspects of most proposed legislation, circulars, policy papers and other regulatory instruments which affect superannuation funds.

The current Chair of the Superannuation Committee is:

- Mr Luke Barrett
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Introduction

1. The Law Council welcomes the opportunity to provide this submission to the Treasury regarding the Establishment of the Australian Financial Complaints Authority Consultation Paper (**the Consultation Paper**) and the Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017 (**the Bill**).
2. This document encompasses two separate submissions in response to many of those issues identified within the Consultation Paper and Bill. These submissions have been prepared by the Financial Services Committee (**FSC**) of the Law Council's Business Law Section and the Superannuation Committee of the Law Council's Legal Practice Section.
3. Comments provided by the FSC can be found at Part A of this document while comments provided by the Superannuation Committee can be found at Part B.
4. Whilst the FSC and Superannuation Committee generally agree on those issues that are commonly addressed in their respective submissions, these Committees have adopted different approaches in responding to the Consultation Papers and at times have provided contributions offering distinct insights with differences occurring in certain instances.



Part A: Financial Services Committee

Question 1 – Other principles that AFCA should adopt as guiding principles

5. The FSC suggests that the Australian Financial Complaints Authority (**AFCA**) should have the adoption and incorporation of alternative dispute resolution methods as a core guiding principle, inclusive of compulsory conciliation and mediation for all disputes that are not assessed as outside terms of reference.
6. The FSC also supports the principle of ‘user pays’ being built into the fee structure of AFCA, and enshrined in its terms of reference. That is, organisations who have fewer successful disputes brought before AFCA (being disputes resolved in favour of the complainant), should pay lower fees. This, coupled with a tiered fee structure (higher fees the further a dispute progresses through the AFCA system), should provide an incentive to financial services providers to resolve meritorious disputes early, or in internal dispute resolution (**IDR**) (as applicable).
7. Lastly, the FSC submits that resolving disputes in a timely manner should be a core guiding principle of AFCA. In making this suggestion, the FSC observes that a delay in achieving a just outcome can result in equivalent stress and harm to a complainant, to the angst and harm attributable to the cause underlying the complaint itself. We suggest that base time frames for resolving disputes be built into the AFCA terms of reference. This will, in turn, require to board of AFCA to ensure that the organisation is appropriately resourced at all times.
8. The FSC suggests that simple (low value and single issue) AFCA disputes should be resolved within 3 months, standard disputes within 6 months and complex disputes within 12 months of lodgement at AFCA.

Issue 1 Monetary Limits

9. If the existing proposal regarding guarantees is retained (with no limits or caps on disputes about a guarantee, where it is secured by a mortgage over a guarantor’s principal place of residence), this will result in securities for multi-million-dollar corporate facilities falling within the ambit of AFCA’s terms of reference. This will in turn frustrate or delay the enforcement of commercial loans, while disputes are resolved by AFCA. For example, it is not unusual for facilities in favour of medium and large size businesses to be secured by director’s guarantees. Those guarantees are frequently secured, at least in part, by mortgages over the homes of directors.
10. The FSC submit that it is not the intent that such facilities be caught by AFCA, which should be a dispute resolution service intended to assist Australians who cannot ordinarily afford to challenge their financial service provider in court (unlike the directors of a large company). The FSC submits further, that ordinary consumers would not expect AFCA resources to be diverted away from ‘mum and dad’ disputes to deal with such guarantor disputes.

11. In respect of the cap proposed to apply to small business credit facilities, the FSC suggests that this should be limited to small businesses –
 - (a) that are not joint ventures between large businesses; and/or
 - (b) that are not small businesses (start-ups) that are part of a larger corporate group.
12. This qualification will ensure that AFCA's terms of reference do not extend to facilities and entities beyond the intended scope of AFCA and well beyond the existing remit of the existing Ombudsman schemes.
13. Further, the FSC suggests that in formulating the terms of reference as they apply to small business, the relevant drafts-people acquire a thorough understanding of the way in which business credit facilities are and can be structured. These facilities include working capital facilities, which may not have a clearly defined credit limit or may have significant notional credit limits (thereby putting them outside of the ambit of the proposed AFCA terms of reference).
14. Such facilities may not ever be fully drawn due to the draw-down conditions applicable to them. Likewise, in work-out circumstances, a working capital facility with a drawn limit in the hundreds of millions, could have its credit limit reduced to less than \$5 million by its financier, by a certain date. Under the current wording, this would appear to bring such a facility within the ambit of AFCA's jurisdiction - this cannot be an intended consequence.
15. Alternatively, the FSC suggests that it would be relatively easy to structure a working capital facility for a small business, such that AFCA would not have jurisdiction, in circumstances where the full credit limit (being greater than \$5 million) in practice would never be drawn down.

Questions 5-7 – Enhanced decision making

16. The FSC submits that there should be clearly articulated guidance published by AFCA in relation to decision making precedents and the overturning of previous decisions. The criteria for overturning precedent decision should be set out in the AFCA terms of reference. The terms of reference should also clearly set out that similar fact cases will be determined in a like way (absent any material reason for departing from an established line of AFCA and legal precedent). The FSC supports the publication of all final decisions made by AFCA in the interests of certainty and transparency.

Question 6 – Principles for assisting in ensuring appropriate decision making

17. The FSC recommends that AFCA decision handling staff should be required to hold certificate 4 level qualifications in the industry sub-sector in which they are making decisions (being - banking & finance, investments and advice, general insurance or superannuation). Decision makers should have an Australian law degree and Final Decision makers should hold a current legal practising certificate and have at least 15 years of relevant experience in the industry sub-section relevant to their decision stream. The FSC also recommends that in order to ensure decision rigour and consistency, final decision makers should be specialists not generalists in their sub-section. Further, the CEO should hold the same qualifications as Final Decision Makers, for the purpose of being adequately qualified to effectively oversee his/her decision makers and monitor the quality of their decisions.

Question 8 – Panels

18. The FSC submits that the AFCA terms of reference should require disputes to be categorised as ‘simple’ (relating to a straightforward, single issue, with a low value), ‘standard’ or ‘complex’. Complex disputes should be decided by a panel of at least three people – being an AFCA final decision maker, an industry expert and a consumer expert, with appropriate reports from other experts to inform the panel being commissioned.

Questions 12-18 – Independent Assessor

19. The FSC supports AFCA’s operations and decisions being subjected to external review by an independent assessor, akin to the independent assessor at Financial Ombudsman Service (**FOS**). However, the FSC respectfully suggests that the independent assessor should not be selected and appointed by the board of AFCA (as is the case at FOS), but rather, should also be independently selected and appointed by the regulator (the Australian Securities and Investments Commission (**ASIC**)).

Question 21 – Access and exclusions

20. In terms of ensuring that unmeritorious/querulant complaints, and complaints brought for an ulterior motive, do not come before AFCA, the FSC suggests that consideration be given to having a register of complainant agents/representatives and an applicant code of conduct for the following reasons:
 - In many cases, unmeritorious cases are brought on behalf of complainants by unscrupulous for-profit agents. Permitting these disputes into the scheme not only delays justice for meritorious claims and absorbs scarce scheme resources, but also potentially disadvantages complainants (who are generally charged a fee by these agents and misled to believe that they will have a successful claim). Having a register of agents will more efficiently draw attention to unscrupulous behaviour by agents, that can then be reported to ASIC. AFCA’s terms of reference should also give the board of AFCA the power to ban or refuse to deal with unscrupulous agents (where due process and the principles of procedural fairness in banning these agents has been followed).
 - It is a matter of public record that historically staff from the existing schemes have been threatened and subjected to inappropriate complainant behaviour. If disputes are to be dealt with effectively by appropriately skilled staff, ensuring the safety of dispute handling staff is important. The FSC suggest that AFCA adopt an applicant code of conduct similar to the Centrelink Code of Conduct. That Code of Conduct should permit AFCA to refuse to deal with, or have limited and tightly controlled dealings with, querulant complainants and complainants who engage in inappropriate behaviour towards AFCA staff.

Questions 31-33 – Board responsibilities

21. It is important that the board and senior leadership group of AFCA is regularly refreshed and infused with updated knowledge about industry trends and practices and contemporary skills. To achieve this end, members of the senior leadership group, the CEO and board members should be limited to two terms of appointment, exceeding no more than 8 years in total.

Questions 39, 41 – Stakeholder accountability

22. The FSC recommends that the AFCA terms of reference formerly acknowledge that both members and consumers are AFCA stakeholders and that AFCA is accountable to both.

Superannuation complaints

23. The FSC does support the merging of the Superannuation Complaints Tribunal (**SCT**) into AFCA, and submits that the existing tribunal based structure of the SCT serves the community well and should not be amended.



Part B: Superannuation Committee

Introductory Comments

The Superannuation Committee's comments respond to those questions raised in the Consultation Paper that relate directly or indirectly to the resolution of superannuation complaints. These comments regarding are guided by the Superannuation Committee's objectives as identified in the Acknowledgment.

The Superannuation Committee has not responded to questions relating to the independent assessor, but makes a general observation that those questions might equally be asked about the independent review function (relating to AFCA's operation against benchmarks for external dispute resolution) given that the role of an independent assessor would seem to be confined purely to service issues.

Consultation Paper Part 1 – Terms of Reference

Question 1 – Are there any other principles that should be included in the guiding principles for AFCA's establishment?

24. In addition to the proposed principles of compliance, incorporation of better practice for dispute resolution, adoption of what's working and efficient and effective transitional arrangements mentioned in the Consultation Paper, the Superannuation Committee suggests that a principle of transparency would also be appropriate.

Question 5 – What measures may assist in ensuring AFCA's decision-making processes promote consistency while deciding each case on its merits based on the facts and circumstances of the complaint and maintaining the objective of achieving fairness and flexibility to adapt to changed circumstances?

25. The Superannuation Committee would like to make the following points about the concept of promoting consistency within a merits review framework:

- While consistency of outcomes is desirable, by its very nature 'merits review' takes account of the individual circumstances of a complaint and therefore it may not be possible to ensure consistency of outcomes unless the facts and circumstances of two complaints are identical.
- In particular, with AFCA having jurisdiction to resolve complaints over a broad number of industries, at best it will only be possible to promote consistency of outcomes within a discrete sector.
- The Superannuation Committee doubts whether operational guidelines can secure consistent outcomes, but could facilitate a consistent approach in resolving different types of complaint.

- Other mechanisms to promote consistency in approach among decision makers might include:
 - use of panels in complex matters so that decision makers have the benefit of each other's previous consideration of similar matters;
 - internal updates to decision makers about determinations made during a quarter; and
 - internal review of decisions, supplemented by training if necessary.
- It might also be possible for an independent review to consider consistency of outcomes as part of the scope of review.

Question 6 – are there any other principles that may assist in ensuring AFCA provides fair, efficient, timely and independent decisions?

26. The Superannuation Committee considers that having strong internal procedures to manage conflicts and any perception of bias would be important.

Question 7 – to what extent should these principles be reflected in the Terms of Reference while allowing for operational flexibility?

27. The Superannuation Committee considers that high level principles should be reflected in the Terms of Reference, with operational guidelines to 'flesh out' the detail. Such an approach would allow AFCA to implement improved processes from time to time without changing the Terms of Reference.

Question 8 – how should AFCA balance the advantages of using panels in certain circumstances against efficiency and service implications, including cost and timeliness of its decision making?

28. The Superannuation Committee considers that, for the replacement of decisions that have involved the exercise of trustee discretion, it will generally be appropriate to use panels, because the trustee decision of itself will usually represent a collective decision of the trustee board or a trustee committee. This might be compared with complaints about an administrative matter, where a commercial decision might have been made.

29. The Superannuation Committee therefore suggests that a highly relevant factor for superannuation complaints will be the nature and complexity of the complaint.

Question 10 – how best can AFCA provide clear guidance to users about when a panel should be used?

30. The Superannuation Committee considers that AFCA should have flexibility to determine when a panel should be used in a particular case and therefore that users should only require general guidance about the types of factors that AFCA will take into account. In this regard, the Superannuation Committee notes that users are likely to have opportunities during the investigation phase to 'agree' an outcome without formal AFCA determination.

Question 11 – are there other aspects of AFCA’s operations that should be subject to independent review within the first three years of commencement?

31. As indicated above, a broad consistency review across sectors might be conducted within the first three years of commencement. It might also be appropriate to consider how well AFCA has dealt with multi-party disputes within superannuation and its superannuation jurisdiction generally.

Consultation Paper Part 2 - Superannuation

Question 25 – what additional matters related to superannuation should be addressed in AFCA’s terms of reference (as opposed to operational guidelines)?

32. Given the nature of trustee decisions, the Superannuation Committee considers that it will be important for superannuation trustees to be given an opportunity to consider a complaint before it is determined by AFCA. This is currently enshrined in section 19 of the *Superannuation (Resolution of Complaints) Act 1993* (Cth) whereby the Tribunal cannot deal with a complaint unless it has been firstly considered by the trustee. The Superannuation Committee considers that a similar requirement should be included in AFCA’s Terms of Reference for superannuation complaints.
33. Another important matter, given that superannuation fund members will have lost their right to appeal to the Federal Court if they disagree with the exclusion of their complaint, will be an independent mechanism for any exclusion decision made by AFCA to be challenged and reviewed.
34. The third matter is for AFCA’s Terms of Reference (**TOR**) to contain a mechanism for requiring parties to be bound by confidentiality if they wish to be joined to a complaint. This is particularly important for death benefit complaints where sensitive information about family circumstances can be disclosed.

Question 26 – what matters related to superannuation would benefit from the additional flexibility that comes from being addressed in operational guidelines?

35. The Superannuation Committee considers that operational guidelines should address how AFCA will operate under its TOR, rather than dealing with the imposition of any substantive requirements (which should be in the TOR).
36. Operational guidelines could also elaborate on:
- how AFCA interprets specific provisions of its TOR (for example, when it considers that a complaint has been previously ‘dealt with’);
 - the approach it will generally take to its discretionary powers under its TOR (for example, the types of situations when it would require a financial contribution to the cost of expert opinion or when it is likely to approve a test case being brought);
 - the approach it will take in fulfilling its statutory duties (for example, how it will liaise with regulators about the remediation of systemic issues); and
 - purely administrative matters (such as how it will conduct conciliation conferences).

Question 27 – what additional arrangements could be put in place to facilitate the transition of complaints that were lodged with the SCT prior to 1 July 2018 but are not yet ‘dealt with’ to be considered by AFCA? At what point could a complaint be considered to be ‘dealt with’ by the SCT?

37. The Superannuation Committee is of the view that legislation would be required to enable the SCT to ‘transfer’ a complaint that is already in progress to AFCA (at the complainant’s request) and that this is a preferable methodology in order to ensure that a complainant is not forced to ‘withdraw’ and ‘re-lodge’ a complaint with AFCA. Re-lodging a complaint has the disadvantage of putting timelines in jeopardy, but is also administratively inefficient where information has already been collected by the SCT and would then have to be re-obtained by AFCA. Transfer would also have the advantage that any parties who had already been joined to the complaint could automatically be deemed to have been joined to the AFCA complaint.
38. In terms of when a complaint is considered to be ‘dealt with’, the Superannuation Committee’s view is that the ordinary meaning of these words conveys a sense of ‘resolution’. Thus, a complaint would be considered to be ‘dealt with’ if the merits of the complaint had in some sense been determined – either through conciliation or through a Tribunal review meeting. For this reason, the Superannuation Committee does not consider that the transition of complaints should be dependent on whether or not they have been ‘dealt with’, but rather dependent on whether the SCT has commenced to investigate them (which could be certified by the SCT).
39. Alternatively, given that the jurisdictional considerations and investigative processes are likely to be slightly different as between the SCT and AFCA (at least from a practical perspective) a time limit could be placed on when complaints could transition – for example within three months of the complaint being made to the SCT.

Consultation Paper Part 3 – Governance

Question 28 – what measures could be put in place to secure sufficient knowledge of how different parts of the industry operate while avoiding the representative tag for directors?

40. The Superannuation Committee is of the view that the appointment of directors should be based on having skills, experience and knowledge related to different parts of the industry but that directors should not be appointed to ‘represent’ specific sectors of industry. A ‘skills matrix’ that reflects the need for industry-specific skills, experience and knowledge would be the usual mechanism for enabling directors with the appropriate spectrum of knowledge to be appointed.
41. If an appropriate spectrum cannot be achieved in this way, then consideration might be given to having industry sector advisory panels.

Question 32 – what benchmarks should AFCA have in relation to matters addressed in the ASX corporate governance principles?

42. The Superannuation Committee agrees that, as a public company, AFCA might have regard to ASX corporate governance principles in formulating its own governance procedures although some flexibility would be needed to reflect that AFCA is not a listed company and it is not run ‘for profit’.

Question 33 - should the Constitution or governing rules provide that neither the board nor individual directors can direct a decision-maker with regard to outcomes of a particular dispute or class of disputes?

43. While it would be unusual in the experience of the members of the Superannuation Committee for a Constitution to contain a prohibition on directors intervening in the 'business decisions' of the company, in the context of AFCA and its role, it may provide assurance to stakeholders for such a provision to be included.

Consultation Paper Part 4 - Funding

Question 36 – should the funding arrangements for superannuation and non-superannuation disputes be separate and distinct, given the very different nature of these disputes?

44. A user-pays model where the amount paid 'escalates' depending on at what stage a matter is resolved may not be appropriate for superannuation disputes that involve multiple parties. This would be the case for death benefit disputes and disability disputes (where the insurer has refused to pay the insured benefit). In these cases, the trustee does not have any control over when the matter resolves and it does not seem appropriate for other fund members to bear the escalated cost of these kinds of disputes.
45. The Superannuation Committee therefore suggests that there could be some merit in developing a different model for superannuation and non-superannuation disputes that may involve a higher base fee being paid by all superannuation trustees (which is effectively the case now with the whole of the superannuation industry 'subsidising' the cost of disputes through the levy), but no escalated fee in the case of multi-party disputes.
46. Another important issue will be the potential 'double' payment by superannuation trustees while both AFCA and the SCT are operating. Consideration might be given to having the 'run off' costs of the SCT paid from consolidated revenue, rather than continuing to impose an APRA levy once membership of AFCA becomes mandatory.