

SUBMISSION

Submission to Treasury –
*Treasury Laws
Amendment (Measures
for Consultation) Bill
2023: AFCA jurisdiction to
hear superannuation
matters*

16 June 2023

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Director
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Via email: superannuation@treasury.gov.au

16 June 2023

Dear Sir/Madam

Treasury Laws Amendment (Measures for Consultation) Bill 2023: AFCA jurisdiction to hear superannuation matters

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to Treasury's consultation on amendments to the jurisdiction of the Australian Financial Complaints Authority (AFCA) to hear superannuation matters.

About ASFA

ASFA is a non-profit, non-partisan 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 \$3.5 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 17 million Australians with superannuation.

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

Yours sincerely

Julian Cabarrus
Director – Policy Operations, Member Engagement & External Relations

1. General comments and executive summary

ASFA welcomes the opportunity to comment on the exposure draft *Treasury Laws Amendment (Measures for Consultation) Bill 2023*: AFCA jurisdiction to hear superannuation matters. The exposure draft outlines amendments intended to effectively overturn the judgment of the Full Court of the Federal Court in *MetLife Insurance Limited v Australian Financial Complaints Authority Limited*¹ ('MetLife v AFCA').

The ability of a complainant to make a complaint to AFCA directly against an insurer in relation to a potential benefit entitlement under a group insurance policy held by a superannuation fund trustee has, since the inception of AFCA, been the subject of some uncertainty. While industry had assumed the matter settled by the Full Court's judgment, we now have the amendments under consultation which facilitate AFCA's use of its general jurisdiction in such cases.

While ASFA supports efforts to bring certainty for all stakeholders in the external dispute resolution (EDR) process, we have some concerns in relation to the proposed amendments. These include:

- A need to ensure the proposed amendment cannot be used as a way to avoid time limits that were intended to apply to all superannuation-related total and permanent disablement (TPD) claims. ASFA considers this can be addressed through a further legislative amendment ensuring the time limits applicable to 'superannuation complaints' apply to all complaints related to superannuation.
- The proposed retrospective application of the amendments may present some legal and practical challenges for insurers and/or superannuation funds. It will likely be necessary for AFCA to adopt an appropriate level of flexibility for pre-commencement complaints, in relation to its dispute resolution process, timeframes and the availability of relevant evidence.
- Proposed new section 1053B of the *Corporations Act 2001* is broad enough to potentially cause further uncertainty. This provision, included for the avoidance of doubt, should in ASFA's view clearly state the intent and scope of the amendments. Further, it should explicitly state that a complaint that is a 'superannuation complaint' as defined in section 1053 of the *Corporations Act* can **only** be made through AFCA's superannuation jurisdiction.

ASFA considers it is critical to avoid creating any potential uncertainty, going forward, as to whether other types of superannuation complaints can be made through AFCA's general (non-superannuation) jurisdiction.

It is important to ensure that cases that properly fall within the superannuation jurisdiction are not diverted to the general jurisdiction. This is because – as recognised by the Full Court – AFCA's superannuation jurisdiction provides certain powers, protections and features that are not available through the general jurisdiction which can impact the ultimate outcome of the complaint. These include:

- the right to appeal from a Determination made by AFCA to the Federal Court on a matter of law
- the absence of compensation limits
- the powers given to AFCA to join parties to a complaint, obtain relevant information and documents, require attendance at a conciliation conference, and make directions to protect the confidentiality of information, all of which greatly assist the dispute resolution process.

2. Specific comments in relation to the proposed amendments

2.1 The intent of section 1053

The explanatory memorandum to the draft amendments notes that the judgment of the Full Court in *MetLife v AFCA* has the effect that a complaint relating to superannuation could only be brought to the Australian Financial Complaints Authority (AFCA) if it met the definition of ‘superannuation complaint’ as stated in section 1053(1) of the *Corporations Act 2001*. Section 1053(1) is located in Part 7.10A of that Act, along with other provisions that, in the words of the Full Court, “provide a mechanism for the determination of complaints relating to superannuation under the AFCA Scheme”².

The explanatory memorandum states at paragraph 1.6 that the outcome delivered by *MetLife v AFCA* is contrary to the original policy intent and that Part 7.10A was not intended to limit the complaints that may be brought under the AFCA scheme.

With respect, ASFA disagrees with that conclusion. We note that the Full Court’s judgment was unanimous, emphatic and very clear in its findings. The draft explanatory memorandum does not counter or even address the Court’s reasons for its decision.

To paraphrase, those findings include that:

- a construction of s 1053(1) that meant a superannuation complaint could be made to AFCA under its superannuation jurisdiction within the relevant time limit and thereafter in AFCA’s general jurisdiction, “is antithetical both to the comparable outcomes for comparable complaints objective and the recognition that the particular characteristics of superannuation complaints require different procedures to non-superannuation complaints”³.
- the construction propounded by AFCA would permit a person, “either carelessly or intentionally”, to allow the time period for bringing a complaint against a superannuation trustee under section 1053 to lapse, thereby transferring the complaint from AFCA’s superannuation jurisdiction to its general jurisdiction with its different procedures, standards, rights of appeal and leading to a potentially different outcome for the same complaint.⁴

That said, we recognise that a policy decision has been made to overturn, through legislation, the Full Court’s judgment.

2.2 Complaints against the insurer directly in relation to an insurance policy held by a fund trustee

Some of ASFA’s member superannuation funds have expressed support for permitting a complaint to be made directly against an insurer in relation to a potential entitlement under a policy held by the superannuation trustee in limited circumstances.

Sub-section 52(7) of the *Superannuation Industry (Supervision) Act 1993* imposes on superannuation trustees covenants in relation to insurance. These include, in sub-para 52(7)(d), a covenant that the trustee will do everything that is reasonable to pursue an insurance claim for the benefit of a beneficiary, if the claim has a reasonable prospect of success.

In some cases, an insurer may deny a claim for an insured benefit in circumstances where the trustee considers the claim to be payable. In these cases, it is arguable that a complaint cannot be brought against the trustee through AFCA’s superannuation jurisdiction. This is because the decision *of the trustee* was not unfair or unreasonable and therefore none of the paragraphs (a)-(j) in sub-section 1053(1) were satisfied.

ASFA members advise that, prior to the Full Court's judgment, they had, where appropriate in these cases, supported fund members to make a superannuation-related complaint through AFCA's life insurance jurisdiction. Presently (that is, following the Full Court judgment), that avenue is not available. Currently, therefore, although consistent with sub-para 52(2)(7), it is arguable that a trustee's support of a claimant against an insurer's decision to deny their claim would effectively prevent the claimant being able to pursue their complaint at AFCA.

The proposed amendment to Part 7.10A would remove this hurdle.

However, ASFA's concern – on behalf of all stakeholders to the EDR process – is to ensure that the proposed amendments operate fairly, are not wider than necessary, and do not create further uncertainty. Our observations on these matters are set below.

2.3 Avoiding the potential for unintended consequences

The draft explanatory memorandum indicates the intent of the amendment is to address the outcome of the Full Court decision in *MetLife v AFCA*.

The facts of *MetLife v AFCA* involved a complaint against an insurer in relation to a potential entitlement to a TPD benefit under a group insurance policy held by the trustee of the complainant's superannuation fund.

However, the proposed amendments are not specifically tailored to address such cases. Proposed new section 1053B – the 'for avoidance of doubt' provision – is, on its face, broadly stated notwithstanding the note referring to *MetLife v AFCA*:

To avoid doubt, this Division does not limit the ability of a person to make a complaint under the AFCA scheme (including a complaint relating to superannuation) that is not a superannuation complaint.

Note: Schedule 1 to the Treasury Laws Amendment (Measures for Consultation) Act 2023, which added this section, was enacted as a response to the decision of the Federal Court of Australia in *MetLife Insurance Limited v Australian Financial Complaints Authority Limited* [2022] FCAFC 173.

The breadth of the substantive text of proposed section 1053B has raised concerns that it may appear to provide scope for a complainant to seek to make other types of complaints about superannuation through AFCA's general jurisdiction *as an alternative* to the superannuation jurisdiction. Potential motivators for this might include complainants seeking to avoid the time limits applicable to 'superannuation complaints', or to access remedies not available in respect of 'superannuation complaints', in particular compensation for non-financial loss.

We understand from discussions with Treasury that this is not the intended operation of the amendments. Rather, the intent is that a complaint which satisfies the definition of 'superannuation complaint' (in section 1053) can **only** be heard in the superannuation jurisdiction.

We welcome that clarification but recommend that this intent be clearly reflected in the proposed legislative amendments.

Any apparent lack of clarity may influence how a complainant frames their complaint to AFCA, potentially complicating AFCA's jurisdictional assessment and unnecessarily delaying its handling of the complaint. This would be a sub-optimal outcome for the complainant, and inefficient for AFCA and the superannuation trustee.

The proposed amendments are aimed at addressing a matter that has been characterised (despite the Full Court's judgment) as an unintended consequence of the drafting of section 1053. ASFA would encourage Treasury to ensure the intent – and potential scope – of the amendments is clearly stated on the face of the amended legislation, to avoid any risk of further unintended consequences in the future.

Recommendation

The intent and potential scope of the proposed amendments should be more clearly stated on the face of the amended legislation. This should include an explicit statement that a complaint that is a 'superannuation complaint' as defined in section 1053 of the *Corporations Act 2001* can **only** be made through AFCA's superannuation jurisdiction.

2.4 The general jurisdiction should not be used to circumvent time limits for 'superannuation complaints'

It is important that the proposed amendment is not able to be used as a way to avoid time limits that were intended to apply to all superannuation-related TPD claims, or to superannuation complaints more broadly.

The time limits in section 1056 of the *Corporations Act 2001* (death benefits) and the AFCA Rules (other complaints) reflect those that applied to complaints made to the Superannuation Complaints Tribunal (SCT), under the *Superannuation (Resolution of Complaints) Act 1993* (SROC Act). We note that the 'Ramsay Review' of the EDR framework⁵, which ultimately led to the replacement of the SCT with AFCA, did not find any issue with the time limits for superannuation complaints. Nor, to our understanding, were concerns raised during the extensive consultation processes to develop Part 7.10A and the AFCA Rules.

With regard to a 'superannuation complaint' in respect of an entitlement to a TPD benefit under a group insurance policy owned by the superannuation fund – the fact scenario involved in *MetLife v AFCA* – the relevant time limits are expressed in AFCA Rule B.4.1.1. In summary,

- if the complainant permanently ceased employment because of the condition that gave rise to the claim for the disability benefit, the Complainant must have made a claim for the payment of a disability benefit within **two years** of permanently ceasing employment **and** must have submitted the complaint to AFCA within **four years** of the financial firm's decision about the disability claim.
- if the complainant did not permanently cease employment because of the condition that gave rise to the claim for the disability benefit, the Complainant must have submitted the complaint to AFCA within **six years** of the financial firm's decision about the disability claim.

Rule B.4.1.1 reflects the time limits that were applicable for complaints to the SCT under sub-sections 14(6A) and (6B) of the SROC Act. These time limits were substantially extended in 2013 as part of a considered response to a recommendation from the Review into the governance, efficiency, structure and operation of Australia's superannuation system (the 'Super System Review')⁶. While it recommended an extension to the (then) existing limits, the Review recognised that "a time limit helps in excluding complaints that relate to a claim that is not genuine, or where the linkage between events which led the member to cease work and the onset of total and permanent disablement can become blurred"⁷.

ASFA concurs with that conclusion. The more time that passes between a disabling event and consideration of a complaint, the less likely it is that parties will be able to access evidence about the complainant's health at the relevant time that could be critical to determining the claim. This may be particularly important if any such cases are permitted to be taken as complaints against insurers through AFCA's general jurisdiction, because that jurisdiction does not entail the same powers to join parties, require production of documents and require participation in conciliation that apply in the superannuation jurisdiction.

ASFA does not consider that evidence has been presented to warrant any further review of the existing time limits for complaints in relation to TPD. Nor do we think it appropriate to effectively allow the time limits applicable to 'superannuation complaints' to be avoided through artificial constructs.

Prior to the Full Court's judgment, AFCA permitted super-related TPD claims that fell outside the time limits in Rule B.4.1.1 to proceed via AFCA's Life Insurance division. ASFA does not consider this to be consistent with the intent of Part 7.10A, for the reasons outlined by the Full Court.

To ensure the appropriate time-limits apply to all superannuation-related TPD claims, ASFA is of the view there should be a specific provision in Part 7.10A to that effect. Alternatively, the time limits for **all** 'superannuation complaints' presently in the AFCA Rules could be enshrined in Part 7.10A, effectively mirroring the previous approach under the SROC Act. (At the time the legislation leading to Part 7.10A was under development, ASFA advocated for the inclusion of **all** time limits relevant to superannuation complaints within the statutory provisions, rather than the AFCA Rules.)

ASFA considers these concerns can be addressed via a legislative amendment providing that any complaint involving superannuation that is made:

- against the trustee only – must proceed as a 'superannuation complaint' and is subject to the time limits for 'superannuation complaints'
- against both the insurer and the trustee – must proceed as a 'superannuation complaint' and is subject to the time limits for 'superannuation complaints'
- against the insurer only (in the limited circumstances noted in section 2.2 above) – must proceed through the general jurisdiction but remains subject to the time limits for 'superannuation complaints'.

Recommendation

All complaints relating to superannuation – even if considered via the general jurisdiction – should be subject to the time limits that apply to 'superannuation complaints'.

2.5 Application of the amendments

The application provisions for the proposed amendments make it clear the amendments are intended to apply to complaints:

- made to AFCA on or after the date of commencement of the amendments; and
- to complaints made to AFCA before commencement, provided AFCA "did not make (or purport to make) a determination of the complaint before that commencement".

ASFA wishes to raise two points in relation to the application provisions.

Firstly, the use of the term 'determination' in the application provision requires clarification. In particular, it is unclear whether it is intended to refer to a formal Determination made by an AFCA ombudsman. It should be noted that only a relatively small proportion of complaints considered by AFCA proceed all the way through the EDR process to the making of a formal Determination. Many complaints terminate at an earlier stage of the EDR process – for example, due to a decision by an AFCA decision-maker that the complaint is not within AFCA's jurisdiction, or a preliminary assessment.

Secondly, while ASFA is generally not supportive of retrospective amendments, we note that the intent in this case is to ensure impacted complainants are not left without access to EDR via AFCA. We acknowledge that these complainants should not be denied the opportunity to have their complaint heard and that retrospective application may be appropriate in this instance.

However, it should be noted that retrospectivity of application will raise some legal and practical considerations for the insurer and/or superannuation trustee.

By their nature, TPD complaints are likely to have their origin in events which occurred many years ago (given the time frames for making a complaint 'within time' through AFCA's superannuation jurisdiction). Retrospective application is therefore likely to have a significant – and potentially unquantifiable – impact.

In addition, an insurer, and a superannuation provider assisting an insurer in responding to such a complaint, are likely to face considerable challenges in contesting such a complaint. With the passage of time, personnel familiar with the matter may no longer be available (including treating medical personnel). Additionally, relevant documentation may not be available or easily recoverable. This is especially the case since the general jurisdiction does not afford AFCA the same powers to join parties and access information and documents as the superannuation jurisdiction. Accordingly, a respondent to such a complaint is likely to be at a distinct forensic disadvantage.

If the amendments are to proceed with retrospective application, it will likely be necessary for AFCA to provide some flexibility in relation to complaints made prior to commencement. As necessary, on a case-by-case basis, this should extend to:

- the timeframes provided to the insurer and/or superannuation fund trustee to attempt to access relevant evidence and respond to submissions made as part of the complaint
- the processes adopted for dealing with the complaint
- the format and type of evidence AFCA will accept if relevant material is no longer available/accessible.

This may require AFCA to adopt an approach similar to that applied to the 'legacy complaints' AFCA was able to accept under a limited expansion of its jurisdiction during 2019-20.⁸

Recommendation

If the amendments proceed with retrospective application, AFCA should adopt an appropriate level of flexibility for pre-commencement complaints in relation to its dispute resolution process, timeframes and the availability of relevant evidence.

¹ [2022] FCAFC 173

² Ibid para 104

³ Ibid para 143

⁴ Ibid para 151

⁵ [Review of the financial system external dispute resolution and complaints framework - Final Report](#), 3 April 2017

⁶ [Super System Review Final Report – Part Two – Recommendation Packages](#), 9 November 2015, recommendation 5.7

⁷ Ibid p147

⁸ These were complaints about the conduct of a financial firm that occurred on or after 1 January 2008, which fell outside the time limits that normally apply to complaints submitted to AFCA. AFCA's jurisdiction to accept these 'legacy complaints' was in place only for the 12-month period 1 July 2019 – 30 June 2020.