



Superannuation
Complaints
Tribunal

Level 7, 120 Collins Street, Melbourne
Postal Address: Locked Bag 3060, Melbourne VIC 3001
Telephone (Inquiries and Complaints): 1300 884 114
Telephone (Administration): (03) 8635 5500 Fax: (03) 8635 5588
Internet Address: www.sct.gov.au

29 September 2017

Mr Alan Raine
A/g Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Email: economics.sen@aph.gov.au

Dear Mr Raine

The SCT welcomes the opportunity to make this submission to the Committee in response to Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017.

Throughout the Ramsay review and subsequent consultation the SCT has been committed to ensuring the current strengths and protections of the SCT statutory framework are maintained in the new Australian Financial Complaints Authority (AFCA) industry ombudsman scheme. Whilst it is not possible to provide exactly the same rights and protections in an ombudsman scheme it is the considered view of the SCT and SCT Advisory Council that the proposed legislation provides a framework that, together with appropriate terms of reference of AFCA, can facilitate the effective resolution of superannuation complaints, subject to:

- changes to the drafting of provisions relating to death benefit complaints to align with current requirements
- inclusion of confidentiality requirements to protect individuals
- inclusion that complaints relating to insurance policies held by trustees are superannuation complaints, to maintain unlimited dollar jurisdiction and align with trustee obligations.

Regarding the closure of the SCT, we reiterate that the 2017-18 budget did not provide resourcing to enable the SCT to resolve existing complaints by 30 June 2020. Based on current resource levels and complaint volumes it is estimated that if AFCA receives complaints from 1 July 2018, open complaints at the SCT will not be finalised until December 2022. The SCT continues to work with ASIC and Treasury to progress a funding proposal. It is critical for the SCT to be resourced appropriately if a smooth transition to AFCA is to be achieved.

The SCT continues its commitment to work with government and stakeholders to share our superannuation complaint resolution expertise and support a smooth transition to AFCA.

We look forward to continued engagement on this important process.

Yours sincerely


Helen Davis
Chairperson


Colin Neave
Chairperson Advisory Council



Submission: Treasury Laws Amendment (Putting Consumers First –
Establishment of the Australian Financial Complaints Authority) Bill 2017

SUPERANNUATION COMPLAINTS TRIBUNAL

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1. Executive summary

The Superannuation Complaints Tribunal (SCT) and the SCT Advisory Council¹ welcome the opportunity to provide a submission in response to *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017* (the Bill).

Throughout the Ramsay Review and subsequent consultation the SCT has been committed to ensuring the current strengths and protections of the SCT statutory framework are maintained in the new Australian Financial Complaints Authority (AFCA) industry ombudsman scheme. Whilst it is not possible to provide exactly the same rights and protections in an ombudsman scheme it is the considered view of the SCT and SCT Advisory Council that the proposed legislation provides a framework that, together with appropriate terms of reference (TOR) of AFCA, can facilitate the effective resolution of superannuation complaints, subject to:

- changes to the drafting of provisions relating to death benefit complaints to align with current requirements
- inclusion of confidentiality requirements to protect individuals
- inclusion that complaints relating to insurance policies held by trustees are superannuation complaints, to maintain unlimited dollar jurisdiction and align with trustee obligations.

Many of the concerns we raised in our submission to *Consultation Paper: Improving dispute resolution in the financial system* (Consultation Paper) and *Treasury Laws Amendment (External Dispute Resolution) Bill 2017* have been addressed in the Bill, recognising some matters will need to be addressed in AFCA's TOR.

There remain some differences to the rights of parties when compared with the SCT. This includes the ability of parties to appeal decisions of AFCA. The SCT notes that the Bill includes changes to the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act) to preclude decisions of AFCA.

The Bill provides for flexibility regarding the timeframe for AFCA to become operational and the corresponding closure of SCT. The SCT reiterates that the 2017-18 budget did not provide resourcing to enable the SCT to resolve existing complaints by 30 June 2020. Based on current resource levels and complaint volumes it is estimated that if AFCA receives complaints from 1 July 2018, open complaints at the SCT will not be finalised until December 2022. The SCT continues to work with the Australian Securities and Investments Commission (ASIC) and Treasury to progress a funding proposal to allow the SCT to resolve open complaints before closure of the SCT.

The SCT continues its commitment to work with government and stakeholders to share our superannuation complaint resolution expertise and support a smooth transition to AFCA.

¹ The SCT Advisory Council Members: Mr Colin Neave AM (Chairman), Mr Michael Dwyer AM, Mr John Berrill, Mr Chris Davies, Ms Leeanne Turner, Ms Linda Elkins, Mr Brett Clark, Ms Pam McAlister.

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2. Matters addressed in the Bill

The Bill addresses many of the concerns previously raised by the SCT. The SCT is pleased to note the Bill provides for:

- AFCA to be free to complainants and operated on a not for profit basis

Specifically in relation to superannuation complaints the SCT notes the Bill now provides for the following matters that more closely align to the statutory provisions in the *Superannuation (Resolution of Complaints) Act 1993* (Complaints Act) :

- No dollar limits on complaints that can be made or remedies
- Requirement that AFCA must affirm a decision, if the decision in its operation in relation to the complainant was fair and reasonable in all the circumstances
- The test applies to the complainant and joined parties in a death benefit dispute
- Expanded definition of regulated superannuation fund to align with current arrangements and includes:
 - Scheme provided for by *Australian Defence Force Cover Act 2015*
 - Exempt public sector superannuation schemes that elect to join AFCA
- Persons taken to be members of a superannuation fund aligns with current arrangements and includes:
 - Non-member spouse (*Family Law Act 1975* orders and arrangements)
 - Covered Australian Defence Force member (*Australian Defence Force Cover Act 2015*)
- An exclusion for self-managed superannuation funds

3. Matters to be addressed in AFCA's Terms of Reference

The transition from a statutory body to an industry ombudsman scheme for the external dispute resolution (EDR) of superannuation complaints is a material change and is an unfamiliar framework for the superannuation industry.

Following the Government's acceptance of the 11 recommendations made by the Ramsay Panel, FOS and the SCT formed a joint working group (JWG) for a prudent, preliminary examination of the issues that could flow from the creation of a single (EDR) body.

Through the JWG, the SCT has developed an understanding of how, under the proposed legislation, the operator's constitution and AFCA's TOR could be structured to be effective in addressing some matters previously specified in the Complaints Act. Whilst this provides a different legal framework the SCT considers the matters below, to the extent they are not addressed in the legislation, could be addressed in the governing arrangements for AFCA to support effective resolution of superannuation complaints.

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Jurisdiction and withdrawal of complaints

The SCT considers the following matters could be incorporated by AFCA into TOR on terms similar to current arrangements, subject to the appropriate stakeholder consultation.

- Jurisdiction matters such as:
 - Excluded subject matter (e.g. complaints that relate to management of the fund as a whole)
 - Defining/limiting who may make a complaint to AFCA
 - Time limits for making a complaint (e.g. replicating current time limits for total and permanent disability complaints)
- Grounds for withdrawing/not progressing a complaint

Confidentiality of conciliation

The current legislated requirement for statements made at conciliation to not be disclosed at review if they relate to a question for Tribunal determination is specific to the SCT and not necessarily the practice for other types of financial disputes. The requirement for confidentiality could be addressed in AFCA's TOR or operating guidelines and procedures. However, the SCT understands that it is an area with divergent dispute resolution practices and in the absence of it being legislated, the requirement for confidentiality of conciliation material may not be adopted by AFCA.

The reason that confidentiality is important in the conciliation of superannuation complaints, particularly death benefit complaints involving multiple parties (i.e. not just the trustee and the complainant), is that in the course of the conciliation conference, sensitive material about family circumstances is often revealed, or unsubstantiated inflammatory statements are made in what can be a highly charged setting. In practice, it is more likely to lead to a conciliated outcome if parties do not need to be concerned that these statements will be held against them in a later determination.

4. Death benefits: Requires amendments to align with current legislated arrangements

It is critical that the legislation provides the necessary framework for claim staking and the ability of trustees to pay death benefits on a timely basis and provide for the resolution of complaints relating to death benefit payments.

The SCT is pleased to note that the proposed legislation includes provision for death benefit complaints and, broadly speaking, preserves the elements necessary for claim staking.

However, the SCT is concerned that the drafting contains material changes to the current legislated arrangements and consideration must be given to aligning the drafting with current requirements.

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Section 1056: When a superannuation complaint cannot be made in relation to a decision about the payment of death benefit

Subsection 1056 (1) limits a person who can make a superannuation complaint to a person who 'has an **interest in the payment** of the death benefit'.

The Complaints Act provides in section 15 that a person may make a complaint about the 'payment of a death benefit'; if the person has an **interest in the benefit** or if they do not have an interest in the death benefit in limited circumstances.

The SCT is concerned that the proposed legislation provides for a broader group of people to complain about a death benefit, than is currently permitted. It may include people who are not able to receive the benefit themselves but have an interest in who might receive the payment.

It is the SCT's practical experience that many people seek to have a say in who should receive a death benefit, or who should not receive a death benefit. Examples of such groups might include grandparents or best friends. To permit access to EDR to this broader group risks:

- Delaying the payment of death benefits, as people not eligible to receive the death benefit seek to 'have a say'
- Potentially extending access to people seeking to 'disrupt' payment of a death benefit
- Increasing the resources required by AFCA, to handle an increase in dispute numbers and complexity
- Increasing the resource requirements of trustees to enable consideration of the complaints of these persons

Further, the Complaints Act in subsection 15 (2) provides for a person to have an interest in a death benefit where they:

- Were given written notice by the trustee, including a prescribed period in which to object; and
- Have objected to the trustee within that period.

The legislation does not define what gives rise to 'an interest in the payment of a death benefit'. Conversely under the Complaints Act, a person is deemed to have 'an interest in the death benefit' in circumstances where they objected within the prescribed period. A consequence of this difference in drafting is that the relevant interest, which is currently defined by statute, may need to be judicially considered or otherwise interpreted using principles of statutory interpretation, rather than having the clarity that is currently provided.

The SCT considers that access to EDR for death benefit payments should be available to people who have an 'interest in the benefit' consistent with the Complaints Act and the legislation needs to define 'interest in the benefit'.

In addition there will be a material practical difference. Currently the onus is on trustees to demonstrate a notice was given, something which is in their control. In

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the proposed legislation the onus will be on complainants to demonstrate a notice was received. This is not within the control of the trustees.

Subsection 1056 (3) provides access to EDR for a person who did not receive the required notices where it was unreasonable for the person not to receive those notices. The section focuses on the unreasonableness of the person not receiving the notices from the decision maker, whereas the Complaints Act 15 (2)(b) asks whether the trustee's failure to notify was unreasonable. The emphasis of the unreasonableness test has moved from the trustee's failure to give notice to the person not receiving the letter.

The SCT considers the change from 'given' to 'received' weakens the claim staking protection and will therefore impact the confidence of trustees to pay out death benefits lest someone later claims they did not receive the notice.

5. Confidentiality: Requires amendments to include that parties must keep information confidential

Section 38 of the Complaints Act permits the Tribunal to give a direction prohibiting or restricting the disclosure of documents or information relating to a review meeting. There is a penalty provision that applies to any party who fails to follow the direction.

This legislated provision is important given the nature of information exchanged during superannuation complaints, which can include information from individuals who are not party to the complaint, and the multi-party nature of many complaints. Without a statutory power and consequences (penalties), it will be difficult for AFCA to be effective in securing confidentiality of material exchanged.

Information collected during superannuation dispute resolution can be highly personal, sensitive, inflammatory and identifiable. The absence of a legislated arrangement requiring confidentiality of information exchanged and the subsequent potential for information to end up in a public arena creates a very real risk of harm to individuals.

The SCT considers it important to legislate the requirement for parties to maintain confidentiality of information exchanged during dispute resolution for a superannuation complaint.

6. Loss of appeal rights

Under the Bill, parties have reduced rights of appeal when compared with the SCT. In particular, the SCT notes that the Bill includes changes to the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) to preclude decisions of AFCA. This makes it very clear that only the determinations AFCA issues in respect of superannuation complaints would retain appeal rights.

Currently parties can appeal decisions regarding jurisdiction or withdrawal of a complaint. Also, where the SCT seeks to exercise a statutory power the impacted person has an avenue of appeal.

The Bill provides for statutory powers and associated penalties for failure to comply. This is necessary for the effective resolution of superannuation complaints. However

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the SCT is concerned about the removal of a right for an affected person to appeal a decision exercising a statutory power. For example, the Bill provides the power to obtain information from third parties and an offence of strict liability for failure to comply. Currently, through the ADJR Act, the third party has an avenue to appeal a decision of the SCT to request the information.

The SCT is concerned about a loss of ability for people to appeal decisions of AFCA related to the exercise of statutory powers.

7. Insurance complaints: No requirement to be a superannuation complaint

The SCT remains concerned that if a consumer makes a complaint about a decision relating to life insurance provided under a policy held by a trustee, the complaint is not required by legislation to be a superannuation complaint. This has the potential for:

- The complainant to lose access to unlimited jurisdiction and remedies, which is particularly pertinent given the size of sums insured under life policies
- The circumvention of the *Superannuation Industry Supervision Prudential Standards*, which places specific obligations on trustees in relation to insurance, by not including the trustee in the dispute.

If the insurance dispute is not considered a superannuation dispute for the purposes of Division 3 the parties will not be afforded the same statutory protections as currently provided. Further, trustees' obligations under the *Superannuation Industry (Supervision) Act 1993* (SIS Act) (such as to pursue an insurance claim on behalf of a member where it is reasonable to do so) cannot be reviewed if the complaint is not dealt with as a superannuation dispute under the new scheme. It is the SCT's experience that some insurance related complaints result in a determination that the operation of an insurer's decision was fair and reasonable but the trustee's was unfair or unreasonable. The resulting remedy has been to substitute the trustee's decision to correct the unfairness or unreasonableness.

The SCT considers the proposed legislation could be amended to require that complaints about insurance where the policy is held by a trustee are a superannuation complaint.

8. Remedies: Different remedy power

Broadly, section 1055 provides for the same powers when making a determination as those currently available to the SCT. However, the SCT notes that the current drafting does not replicate Section 37 (A) of the Complaints Act which provides a power to cancel the membership of a life policy fund if the Tribunal finds the conduct relating to the 'selling' of that fund was unfair or unreasonable.

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9. Observation on Explanatory Memorandum and operation of determination about a superannuation complaint

The SCT notes that the Explanatory Memorandum at paragraph 1.179 states 'In relation to superannuation disputes, determinations by AFCA will be binding on both Financial Firms and consumers...'. This is incorrect.

The legislation provides for a determination regarding a superannuation complaint to come into operation immediately by altering the decision of the trustee, replicating the operation of determinations under the Complaints Act. This is critical in multi-party complaints.

For clarity, superannuation determinations are only binding on the decision makers (typically trustees and insurers). Determinations are not binding on complainants. Rather, the determinations come into operation by virtue of the statutory provisions and do not require complainants to consent to be effected through contract law. It is important to note that the determinations are not binding on the complainants. They retain rights associated with a trustee decision, including the avenue of challenging the trustee decision through the courts.

10. Timeframes and transition

The Bill provides for flexibility regarding the timeframe for AFCA to become operational and the corresponding closure of SCT. The SCT reiterates that the 2017-18 budget did not provide resourcing to enable the SCT to resolve existing complaints by 30 June 2020.

If AFCA receives complaints from 1 July 2018, based on current resource levels and complaint volumes, it is estimated that open complaints at the SCT will not be finalised until December 2022.

The SCT continues to work with ASIC and Treasury to progress a funding proposal to support the SCT to resolve open complaints before closure of the SCT.

The SCT notes that the Bill does not specifically provide for any transfer of complaints from SCT to AFCA and this will need to be accommodated in accordance with the Complaints Act.

11. Conclusion

It is the considered view of the SCT and SCT Advisory Council that the proposed legislation provides a framework that, together with appropriate TOR of AFCA, can facilitate the effective resolution of superannuation complaints, subject to:

- changes to the drafting of provisions relating to death benefit complaints to align with current requirements
- inclusion of confidentiality requirements to protect individuals
- inclusion that complaints relating to insurance policies held by trustees are superannuation complaints, to maintain unlimited dollar jurisdiction and align with trustee obligations.

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The SCT is committed to working with government and key stakeholders to contribute to the establishment of AFCA and the smooth transition of dispute resolution for superannuation complaints.