

27 October 2023

Senator Jess Walsh
Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600
Via email: economics.sen@aph.gov.au

Dear Senator Walsh

**Re: Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023:
AFCA jurisdiction to hear superannuation matters**

The Council of Australian Life Insurers (CALI) is the trusted voice of life insurance in Australia. We support Australians to make informed choices about their future and help them live in a healthy, confident and secure way over their lifetime.

Our mission is to ensure Australians view life insurance and the industry as accessible, understandable, and trusted. We do this by supporting our members to deliver the protection and certainty Australians need on their best and worst days. This includes advocating for national policy settings that expand their access to the life insurance protection that suits them when they need it most.

CALI believes a fair, equitable and sustainable external dispute resolution service is critical for consumer trust and confidence in the financial services sector.

CALI supports the Australian Government's plan to make clear the jurisdictional boundaries of the Australian Financial Complaints Authority (AFCA) for superannuation complaints, in particular those relating to life insurance in superannuation. We support the objective of allowing consumers with life insurance in superannuation to commence complaints within similar timeframes to that of the AFCA general jurisdiction. Questions over jurisdictional boundaries can lead to an erosion of trust and support in AFCA from both consumers and financial service providers, and confusion for consumers in how their complaint will be handled.

In the attached submission we put forward the case for the following matters:

- complaints relating to superannuation should be heard within the superannuation jurisdiction given the complexities associated with superannuation complaints;
- amending the Bill to extend AFCA's superannuation jurisdictional time limits to six years where the complaint relates to life insurance in superannuation;
- proposing a mechanism for amendments to superannuation complaint types and time limit extensions be added to the Corporations Act; and
- limiting the application of retrospective amendments to complaints which are currently determined in the consumer's favour or stayed by AFCA awaiting this legislation.

Thank you for the opportunity to contribute to this consultation. I look forward to continued engagement as the Parliament progresses this important reform. For more information, please contact Benjamin Marshan, Director of Policy and Industry Affairs at [REDACTED]

Yours sincerely,

[REDACTED]
Christine Cupitt
Chief Executive Officer

COUNCIL OF AUSTRALIAN LIFE INSURERS

Submission in Response to Senate Economics Legislation Inquiry Into Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023 [Provisions]

BACKGROUND

Purpose and benefits of the AFCA superannuation jurisdiction

CALI believes it is important to consider why the Superannuation Complaints Tribunal (SCT) was set up through legislation in a distinct manner and separate from other external dispute resolution (EDR) mechanisms in financial services. Superannuation disputes can be complicated and unique due to the complex intersection of trust law and statutory regulation. Both the SCT and later AFCA in the superannuation jurisdiction, are required to follow the law in making decisions. Further, all parties to a complaint – including the consumer, AFCA, and the superannuation trustee (or joined third parties) can appeal decisions or clarify points of law to the Federal Court.

The ability for questions of law (including by AFCA) and appeals to be made to the Federal Court are limited to AFCA's superannuation jurisdiction. This clarification of superannuation law or appeal right in particular are of critical importance given the outcome of a superannuation complaint may have wider implications on the future payment of benefits by a trustee to members and because trustees owe obligations to members as a whole and not just the interests of individual members.

For example, if a decision is made in favour of a group member in the general jurisdiction based on a decision of fairness and not law, benefits may remain preserved in the member's account because the trustee is not legally able to release them (by virtue of either the trust deed or superannuation law). It is therefore critically important for the trustee and the member to ensure that decisions relating to superannuation complaints are supported by law and can be clarified or appealed where the law may have been incorrectly applied or applied in such a way which inadvertently offends the trustee's obligations to the group as a whole.

Outside of the application of the law, the superannuation jurisdiction also provides AFCA additional statutory powers to join parties and compel production of information from third parties which aren't otherwise available in the general jurisdiction. As noted in the Revised Explanatory Memorandum to the Treasury Laws Amendment (Putting Consumers First—Establishment of The Australian Financial Complaints Authority) Bill 2017, additional statutory powers were specifically required because “...*some superannuation complaints cannot be resolved by relying on contractual obligations between AFCA and the members of the AFCA scheme.*”. Given this, allowing superannuation complaints to be heard in the general jurisdiction of AFCA will limit AFCA's ability to rely on those statutory powers of joinder and production.

Additionally, AFCA's statutory powers within the superannuation jurisdiction include the ability to obtain information and documents that are relevant to a superannuation complaint; the power to issue directions to protect the confidentiality of information (including AFCA staff being subject to secrecy requirements); the power to require people to attend conciliation conferences to assist in the resolution of a superannuation complaint; and no financial limits on the value of the claims or the value of remedies that may be determined.

Further, section 1055 confers all powers, obligations and discretion to AFCA that are otherwise conferred on the trustee, insurer, retirement savings account provider or other person, and sets out the circumstances under which AFCA can make or vary a decision made in relation to superannuation rights.

In summary, these are important powers which give AFCA the ability to appropriately hear superannuation complaints and protect the interests of the broader superannuation membership of superannuation funds, which are not available to AFCA under the general jurisdiction.

RECOMMENDATIONS

CALI provides the following responses on:

- Jurisdictional time limits;
- Disadvantages of hearing superannuation complaints in the general jurisdiction;
- Section 1053(1) amendments;
- The scope of Section 1703 amendments.

Jurisdictional Time Limits

CALI understands the primary concern this legislation is seeking to address is the ability of consumers to make complaints about a superannuation trustee's decision (or a joined third party such as a life insurer) in a similar time frame to the general jurisdiction of AFCA (up to 6 years) where the complaint relates to life insurance in superannuation. CALI supports this objective.

At present, the primary factor preventing this from occurring is the two-year (except for complaints in relation to death benefit decisions) time limit to make a complaint about the decision of a trustee to AFCA, rather than the six years from the date the complainant became aware of the financial loss available for most other financial service product complaints. CALI believes the simplest and most effective way to achieve this outcome for consumers is to extend the timeframe for life insurance in superannuation complaints from the current two years, to up to six years while maintaining the existing time limits for other superannuation complaints.

Disadvantages of hearing superannuation complaints in the general jurisdiction

As noted above, CALI is concerned that the proposed amendments to allow superannuation complaints to be heard in the general jurisdiction will limit AFCA's ability to appropriately hear and make determinations on superannuation complaints. Specifically, the lack of statutory powers and determinations which are based on the principle of fairness rather than the law and what is in the best interests of fund members has the potential to conflict with trustee obligations and potentially lead to poor consumer outcomes.

If superannuation complaints are made against a third party such as an insurer or a third party administrator in the general jurisdiction, they are not binding on the superannuation trustee. This can again give rise to a situation where a determination is compelling a life insurance policy to respond but the trustee cannot legally release the benefit from the fund. This is a poor consumer outcome and one which places trustees in a challenging situation with their member.

Complaints brought within the general jurisdiction also have financial jurisdictional limits which may limit the member's ability to the full benefit of the determination based on the jurisdictional limitation (as per Section D.4 of AFCA's Rules). Particularly in the case of superannuation and group life insurance claims within superannuation, the benefits available to the member of the superannuation fund may significantly exceed these limits (both in terms of the potential benefit and the monetary restriction on AFCA's jurisdiction).

It is also important to consider the intended outcomes envisaged by the Treasury *Review of the financial system external dispute resolution and complaints framework* (April 2017). The Review's recommendations, specifically those at paragraphs 5.70-5.73, noted that an important principle in creating a single disciplinary body was that similar consumer complaints should be dealt with in similar ways. Hearing similar complaints about group insurance in superannuation in the first 2 years in the superannuation jurisdiction, then similar complaints in years 3-6 in the general jurisdiction has the potential to lead to inconsistent outcomes due to

differences in how the jurisdictions operate. This again could lead to an erosion of trust and support in AFCA from both consumers and financial service providers and confusion for consumers who may see similar determinations to theirs lead to different outcomes.

Section 1053(1)

CALI believes member complaints in relation to superannuation should be heard within the superannuation jurisdiction. CALI notes that there may be complaints other than those outside the jurisdictional time limits which may fall outside the types of complaints listed under section 1053(1). CALI recommends that as other types of complaints are identified which fall outside this list, a mechanism ought to be created to allow for the expansion of the list in section 1053(1) or an extension of the time limits for complaints to be made via disallowable instruments. Alternately, where additional complaint types (or time limitation issues) are identified, section 1053(1) could be directly modified in Treasury Law Amendment bills as they occur. This will again ensure superannuation complaints are not heard in the general jurisdiction which may lead to the unintended consequences raised above.

Section 1703

CALI supports that the proposed amendments are applied to the *Metlife* determination and the other complaints at AFCA which have been stayed (CALI understands there are approximately 110 complaints currently on hold). CALI also supports the retrospective application of the proposed amendments to any life insurance in superannuation complaints previously excluded by AFCA under the two-year jurisdictional limit, if those complaints are still within the 6-year jurisdictional time limit.

However, CALI is concerned about the scope and potential unintended consequences of the proposed amendments in Section 1703, in so far as they relate to determinations previously made by AFCA on the substantive issues of the complaint. CALI believes that insurance in superannuation complaints which have already been dealt with by AFCA by way of determination should not form part of the proposed amendments, as the substantive issues of these complaints have already been finalised. CALI considers that there is some ambiguity in Section 1703 which may lead to new complaints being lodged in AFCA's general jurisdiction notwithstanding the substantive issues having already been ventilated and determined in the superannuation jurisdiction. CALI acknowledges that whilst AFCA's rules mandate that AFCA must exclude complaints which have the same or similar subject matter as that of a complaint already dealt with by AFCA, there are exceptions to this rule for *exceptional circumstances*. CALI considers that if this unintended consequence were to take place, this may lead to increased challenges with sustainability of insurance products in superannuation and volatility of premiums of products which are already held by consumers in the market.

CONCLUSION

CALI is concerned that the bill as drafted will:

- limit AFCA's ability to appropriately hear and make determinations on superannuation complaints based on a lack of statutory powers;
- potentially lead to determinations which are not in the best interests of fund members;
- lead to determinations which are in conflict with statutory and regulatory trustee obligations;
- not close potential gaps in the superannuation jurisdiction if they occur in the future; and
- retrospectively allow previous determinations in the favour of the superannuation trustee and life insurer to be reopened in the general jurisdiction.

CALI therefore recommends that:

- member complaints in relation to life insurance held in superannuation are only heard in the superannuation jurisdiction;
- complaints specifically in relation to life insurance in superannuation be extended in appropriate circumstances to 6 years (in line with the general AFCA jurisdictional time limits) and that the existing

time frame limitations in relation to superannuation complaints listed in Section 1053(1)(a-j) be maintained;

- that Section 1053(1) be amended from time to time either through amendments to the Act or disallowable instrument as new types of superannuation complaints are identified or further time limits are required to provide certainty to the industry; and
- limit the application of Section 1703 in invalidating previous determinations to those already registered with AFCA without a determination having been made.