

16 June 2023

Mr Luke Spear
Superannuation Insurance and Governance Unit
Member Outcomes and Governance Branch
Retirement, Advice and Investment Division

Via email: superannuation@treasury.gov.au

Dear Mr Spear,

Re: Treasury Laws Amendment (Measures for Consultation) 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 relation to life insurance in superannuation. We support the objective of allowing consumers with life insurance in superannuation complaints to make those complaints in similar timeframes to 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:

- complaints relating to superannuation should be heard within the superannuation jurisdiction given the complexities hearing superannuation complaints in the general jurisdiction could lead to, including the potential for compensation awarded in the general jurisdiction being unable to be released by a trustee due to a condition of release not being met;

- amending the bill to extend AFCA's superannuation jurisdictional time limits to six years where the complaint relates to life insurance in superannuation; and
- proposing a mechanism for amendments to superannuation complaint types and time limit extensions be added to the Corporations Act to ensure there aren't superannuation based complaints which are required to be heard in the general jurisdiction.

Thank you for the opportunity to contribute to this consultation. I look forward to continued engagement as the Government progresses this important reform. Please contact Benjamin Marshan, Director of Policy and Industry Affairs at ben.marshan@cali.org.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Christine Cupitt', followed by a long horizontal line extending to the right.

Christine Cupitt
Chief Executive Officer

COUNCIL OF AUSTRALIAN LIFE INSURERS

SUBMISSION IN RESPONSE TO TREASURY CONSULTATION PAPER ON LAWS AMENDMENT (MEASURES FOR CONSULTATION) BILL 2023: AFCA JURISDICTION TO HEAR SUPERANNUATION MATTERS

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 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.

For example, where a decision is made in favour of the member in the general jurisdiction based on a decision around fairness, but not based in the 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 in relation to superannuation complaints are based in the law and can be clarified or appealed where the law may have been incorrectly applied.

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.

Additionally, AFCA's statutory powers limited to 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.

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 trustees' 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 limiting this 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 requiring the life insurance to respond but the trustee cannot / will not 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 in the general jurisdiction also have benefit 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 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 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 diverse 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 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 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.

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;
- which are in conflict with trustee obligations; and
- don't close potential gaps in the superannuation jurisdiction if they occur in the future.

CALI therefore recommends that:

- member complaints in relation to 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; and
- 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.