

19 June 2023

Director
Superannuation Insurance Governance Unit
Member Outcomes and Governance Branch
Retirement Advice and Investment Division
Treasury

By email: superannuation@treasury.gov.au

To whom it may concern,

**Treasury Laws Amendment (Measurer for Consultation) Bill 2023: AFCA
Jurisdiction to hear superannuation matters**

1. Thank you for the opportunity to make a submission on this important proposed amendment to the Corporations Act given the recent decision in *Metlife*.¹

Background

2. Berrill & Watson Lawyers is a leading consumer superannuation and insurance law firm who advocate for the rights of consumers in relation to insurance claims which are often linked to (owned by) superannuation funds.
3. We have represented thousands of consumers in relation to such claims and represent consumers in all external dispute resolution forums including the relevant state courts, the Federal Court of Australia and importantly, the Australian Financial Complaints Authority (AFCA) and its predecessor schemes.
4. The AFCA provides an important dispute resolution role for consumers. There are many reasons why the AFCA might be the forum of choice for a consumer for their particular dispute. Those reasons may include:
 - a. It is a costs neutral jurisdiction with no adverse costs risk (unlike the Court system);

¹ *Metlife v Australian Financial Complaints Authority* [2022] FCAFC 173

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- b. There are no fees for a consumer to file a complaint with the AFCA (unlike the court system);
 - c. The complainant may, if they choose, represent themselves through the AFCA process and it is a simpler forum for a consumer to deal with compared to a court system;
5. With the above in mind, it is important that as many consumers as possible have the AFCA available as an option for external dispute resolution.

Superannuation and Insurance Complaints

6. Prior to the enactment of AFCA, superannuation complaints were generally considered by the Superannuation Complaints Tribunal (SCT), while insurance complaints were considered by the Financial Ombudsman Service (FOS). However, there were some superannuation complaints which could also be considered by the FOS.
7. However, the SCT and FOS had different jurisdictional considerations that had to be applied before considering a superannuation complaint.
8. The FOS Terms of Reference (ToR) prior to AFCA's enactment said as follows in relation to superannuation complaints:

5.1 Exclusion from FOS's Jurisdiction

The service may not consider a Dispute:

.....

h) about decisions of the trustees (in their capacity as trustees) of approved deposit funds)

9. The guidelines to rule 5.1 h) state:

Superannuation trustees (5.1h)

Paragraph 5.1 h) only excludes Disputes relating to decisions by the trustees of approved deposit funds or regulated superannuation funds. Disputes relating to the conduct of these trustees other than their decisions are not excluded. Examples of Disputes that may come within FOS's jurisdiction are:

- *Disputes about the suitability of financial advice; and*
- *Disputes about the level of service or information provided to an Applicant.*

A Dispute that will usually be excluded by paragraph 5.1h) is a Dispute about a decision made by a trustee of a regulated superannuation fund to deny a fund member a disability benefit arising from a group life

insurance policy provided to fund members. However, a Dispute about the life insurer's decision to deny a claim under the policy is not excluded by this paragraph. (our emphasis)

10. As can be seen from the above, the FOS scheme was such that it could consider a complaint in relation to the denial of an insurance claim which was owned by a Superannuation fund, so long as the complaint was in relation to the insurer's decision (which is almost invariably the case).
11. The FOS also had a discretion to exclude a complaint under rule 5.2 of the ToR if "*There is a more appropriate place to deal with the Dispute, such as a court, tribunal or another dispute resolution scheme or the Privacy Commissioner*"²
12. It was relatively common in our experience that the FOS would exclude a complaint, for example in relation to a Superannuation TPD claim because it was more appropriate for the particular complaint to be considered by the Superannuation Complaints Tribunal.
13. However, a critical aspect of the overall scheme as it applied to insurance which was held through superannuation was that the FOS and SCT had different time limits which applied to the lodgement of a complaint³. So, where a superannuation complaint couldn't be considered by the SCT (which had stricter time limits) the consumer was still able to take their complaint, insofar as it related to a decision of a life insurer, to the FOS.
14. It is respectfully submitted that, as was argued before the Federal Court in *Metlife v AFCA*, it was never the intention of the Parliament that when AFCA was introduced, there was a class of complaints which could have been validly decided by the FOS but which now are extinguished.

Metlife v AFCA

15. As a consequence of the recent decision of the Full Bench of the Federal Court, a legally unrepresented claimant who the AFCA held was entitled to succeed in his claim has now been held to have been outside of jurisdiction and therefore has no recourse through the AFCA scheme in respect of a complaint which was otherwise absolutely valid.
16. It is important to note that the claimant who was the subject of the complaint in *Metlife v AFCA*, had two insurance policies, both of which were insured with Metlife and both of which were declined by Metlife. The AFCA held that the decision to decline each of the claims was unfair and unreasonable and the AFCA ordered that the decisions of Metlife and FSS Trustees both be set aside and that the claims be accepted.

² Rule 5.2 Financial Ombudsman Service Terms of Reference pg 37

³ ss.14(6A-6D) Superannuation (Resolutions of Complaints) Act 1993

17. However, one of the complaints had been lodged with the FOS, and the second complaint was lodged after the AFCA scheme had been introduced and was lodged with the AFCA. Metlife appealed the question of AFCA's jurisdiction to the Federal Court in respect of only one of the two complaints. The Full Bench ultimately held that the claim that was the subject of the appeal (which was the more valuable claim) was outside of AFCA's jurisdiction.
18. The consequence is that the claimant, who was judged independently by the AFCA to be entitled to both of the TPD benefits, has only been paid one of the benefits, and the benefit which was paid was the benefit of lesser value. So, the claimant has not been paid a claim worth over half a million dollars. A devastating outcome for an injured policeman who can no longer work as a result of his injuries.

Complaints relating to Superannuation that are not Superannuation Complaints

19. There are many complaints which are related to superannuation, but which do not meet the definition of a Superannuation Complaint. For example, there are many instances in which a superannuation fund member has lodged a TPD claim with a fund and the fund's insurer. It is not uncommon throughout the course of such a claim for there to have been unreasonable delay in the assessment of the claim, and the superannuation fund member therefore may have a right to claim interest from the insurer (an Interest Claim).
20. When an Interest Claim is made, a complainant is frequently complaining about the conduct of the insurer (and not necessarily the superannuation fund). Such a complaint by the time it is made to the AFCA may not be within the time limits for a superannuation complaint.⁴
21. In such a case, it is submitted that a consumer ought to be able to pursue a claim for interest against the insurer for the delays caused throughout the claim process. If such a complaint were outside of the Superannuation Complaint time limits, then the insurer would stand to benefit by not having their decision/conduct reviewed.
22. There are many complaints which match the description above which are currently before the AFCA, some of whom we represent, who have had their cases placed on hold for a very significant period of time pending the outcome of the *Metlife v AFCA* court case. We welcome the fact that the draft legislation proposes to enable such complaints to still be considered so long as the AFCA has not yet made a determination.

⁴ Rule B.4.1.1 a) and b)

Draft Legislation

23. The draft legislation proposed would enable the AFCA to consider a complaint that is “related to” superannuation, even though it is not a “superannuation complaint” as defined under s.1053 of the Act.
24. The proposed amendment to the legislation appropriately recognises that there are complaints “in relation to” superannuation, which are not necessarily “superannuation complaints”. As can be seen from the decision in *Metlife v AFCA* many disputes arise due to the conduct and decisions made by insurers in respect of insurance policies owned by superannuation trustees.
25. When AFCA was originally established, it was expressly intended to be a one stop shop for financial services complaints, which involved bringing all of the complaints from the other financial services ombudsman schemes and tribunals under one roof. The draft legislation will in our view enable complaints to be considered in relation to superannuation, even where such a complaint doesn’t meet the definition of a Superannuation Complaint, which is an appropriate amendment to restore AFCA’s jurisdiction to what was originally intended when the AFCA was first established.
26. The proposed legislation expressly applies to complaints which have been made to the AFCA where that AFCA has not made a determination prior to the commencement of the amendments. In our view, it is appropriate that the amendments apply to matters which are presently before the AFCA but where the AFCA hasn’t made a determination.
27. Given that it is recognised that these amendments are made so as to restore the original intent of AFCA’s jurisdiction, it is appropriate that those disputes which are currently before AFCA are allowed to proceed in that forum, as originally intended.
28. Whilst we welcome the proposed legislation enabling many of these complaints to proceed, it is regrettable that Mr Edgecombe, the claimant in the decision in *Metlife v AFCA* is left with no recourse via the AFCA and may instead need to pursue litigation through the civil courts with the consequent costs and risks associated with the litigation process.

We support the legislation in its proposed form.

Should you wish to discuss any aspect of the above, please let the writer know.

Yours sincerely,



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Principal
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