

23 June 2023

The Treasury

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

Brief

AIST supports the important work undertaken by AFCA and their role to assist consumers and financial firms reach positive outcomes in the dispute resolution process. AIST sought feedback from member funds on the proposed changes to the *Corporations Act 2001* (the Corporations Act) to facilitate AFCA being able to consider certain complaints about insurance policies held inside superannuation which it would otherwise be unable to determine based on the *MetLife v AFCA [2022] FCAFC 173* (the MetLife case).

AIST recommends:

1. Treasury include a statement in the EM and correspondingly in the legislation that AFCA must treat all superannuation complaints as defined in section 1053 of the Corporations Act as a superannuation complaint. This requirement should also be specified in the AFCA Complaint Resolution Scheme Rules (the AFCA Rules).
2. Treasury consider further industry consultation prior to the enactment of any changes. This will reduce the likelihood of any unintended consequences to the proposal which are identified below. It will also improve transparency in the process, provide opportunity for system improvement to the benefit of all stakeholders and ensure surety in the process.
3. As the holder of the policy, it is preferential that trustees consistently be a party to a complaint relating to insurance in superannuation. AFCA or Treasury may like to consider extending the timeframe for AFCA to consider an insurance in superannuation complaint from two years to six years. Doing so will avoid cases with the same facts being treated differently under the AFCA regime.

AIST requests as a part of the consultation clarity on the following points which are set out in detail below:

- I. Consistency in treatment of superannuation complaints and superannuation related complaints for surety and transparency with the framework.
- II. Definition of a 'superannuation related complaint.'
- III. Who can make a superannuation related complaint.

About AIST

Australian Institute of Superannuation Trustees is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public sector superannuation funds. As the principal advocate and peak representative body for the \$1.7 trillion profit-to-members superannuation sector, AIST plays a key role in policy development and is a leading provider of research. AIST advocates for financial wellbeing in retirement for all Australians regardless of gender, culture, education, or socio-economic background. Through leadership and excellence, AIST supports profit-to-member funds to achieve member-first outcomes and fairness across the retirement system.

AIST would like to thank Treasury for the opportunity to provide feedback to this consultation.

Hermione example

For the purposes of this submission, AIST will be using the Hermione example, as used in the MetLife case, as a comparative example to understand how the new framework will operate for complaints classification. The Hermione example was:

Hermione makes a claim on a TPD insurance policy held by her superannuation fund. The claim is declined by the trustee on the basis that the superannuation fund's insurer has determined that Hermione's disability does not meet the definition of a TPD in the policy. Hermione makes a complaint under the AFCA scheme about the trustee's decision to reject her claim. AFCA joins the insurer as a party to Hermione's complaint. AFCA can review the decision of the trustee and the insurer. AFCA reviews the information used by the trustee and insurer in making their decisions and determines that the insurer did not gather sufficient information about Hermione's illness to properly determine whether she has a TPD. AFCA remits the decision back to the trustee and insurer with directions requiring them to obtain further medical information about Hermione's disability.¹

Submission

AIST requests the following points be considered in the consultation:

- I. Consistency in treatment of superannuation complaints and superannuation related complaints for surety of compliance with the framework.**
 - **AIST requests clarity as to how AFCA would classify a 'Hermione complaint' made under the new regime.**

¹ MetLife Insurance Limited v Australian Financial Complaints Authority Limited [2022] FCAFC 173, paragraph 122.

- **Will it be within AFCA’s discretion to treat all ‘superannuation related complaints’ under AFCA’s general complaints provisions to the exclusion of the trustee?**

Treasury’s website states *that the proposed bill will update the Corporations Act to expand AFCA’s jurisdiction so that it operates as intended:*

- *complaints specifically listed in section 1053 will be treated as superannuation complaints and will be subject to the additional provisions set out in Part 7.10A, Division 3.*
- *other complaints relating to superannuation will be able to be heard in AFCA’s non-superannuation jurisdiction.²*

AIST seeks clarity on the words, ‘will be able to be heard’ in AFCA’s non-superannuation jurisdiction.

AIST notes that the explanatory memorandum (EM) to the Bill does not include the same wording as the above italicised reference from the Treasury website. The EM does not state specifically that complaints relating to superannuation ‘will be able to be heard’ in AFCA’s non-superannuation jurisdiction. AIST understands that the amendments proposed to the Corporations Act seek to ensure that AFCA is not limited in scope as to the type of complaints within its jurisdiction.

AIST seeks clarity as to how AFCA will categorise superannuation complaints defined under section 1053 of the Corporations Act and superannuation related complaints and whether there will be a consistent approach in classification of cases with substantially the same facts.

If Treasury and AFCA’s intent is to continue to treat all superannuation complaints as defined under section 1053 of the Corporations Act as a superannuation complaint only, and not as a superannuation related complaint when time limits lapse, AIST recommends this be included in the EM and embedded in the primary legislation as a requirement.

Recommendation: Treasury include a statement in the EM and in the primary legislation that AFCA must treat all superannuation complaints as defined in section 1053 of the Corporations Act as a superannuation complaint. This requirement should also be specified in the AFCA Rules.

Classification prior to the MetLife decision

Prior to the MetLife decision and as reflected at A.6.1 AFCA’s Operational Guidelines to the Rules April 2021, AFCA would:

*Usually register a Superannuation Complaint as being against the superannuation trustee, RSA provider, life company or other superannuation provider. **This is the case even if the complaint is about the decision or conduct of a person acting on behalf of the Financial***

² The Treasury, [Treasury Laws Amendment \(Measures for Consultation\) Bill 2023: AFCA jurisdiction to hear superannuation matters](#), accessed 9 June 2023

Firm. To ensure that a Superannuation Complaint is efficiently resolved, section 1054 of the Corporations Act gives us the power to join other parties to the complaint.

Examples of when we will usually join another party to a Superannuation Complaint:

- *The insurer, if the complaint is about the payment of a benefit that includes an insured component.*
- *Any other person, if we decide that the person is responsible for determining the existence or extent of the Complainant's disability.*
- *The insurer that issued the life policy if the complaint is about a trustee decision to admit the Complainant to a life policy fund.*

Based on the above information, a case brought to AFCA prior to the MetLife case, in the same form as the Hermione example would have been classified as a superannuation complaint if the complaint was made within the jurisdictional time limit. AFCA would register the complaint against the superannuation trustee and join the insurer as another party.

AIST seeks clarity as to whether:

- The intent of the proposal is not to change the current practice outlined in A.6 which is the preferential treatment of complaints such as the Hermione example. AIST recommends that the practice outlined at A.6 continue should a complainant after the enactment of the proposed bill, raise a complaint as per the Hermione example within the jurisdictional time limit. This will provide an assurance to superannuation trustees as to consistency in application of the AFCA operational framework and that the complaint will be against the trustee and the insurer joined as another party.
- The intent of the proposal is to ensure that AFCA can hear those complaints made to AFCA before the commencement of this section but are unresolved at this time due to the MetLife decision. AIST appreciates that AFCA would like to address these unresolved complaints. AIST seeks clarity whether any of these outstanding complaints were considered under previous EDR schemes.
- AFCA's discretion to register the Hermione example as a superannuation related complaint if the complaint is made inside the jurisdictional time limit but directly against a decision of the insurer. This would mean that AFCA would exercise its discretion to not register the complaint as a superannuation complaint but as a superannuation-related complaint and exclude the superannuation trustee from the complaints process. Should this be a possibility, AIST has specified further considerations as to the unintended consequences of this decision making below. AIST reiterates the preferential treatment would be to treat all these types of complaints as superannuation complaints rather than create a new sub-category of complaints known as superannuation related complaints.
- AFCA's discretion to register the Hermione example as a superannuation related complaint if the complaint is made outside the jurisdictional time limit only. This supposes that the Hermione example would always be registered and treated as a superannuation complaint but for the complainant not meeting the jurisdictional time

limit requirements. Should this be a possibility, AIST has specified further considerations of the unintended consequences of case-by-case decision making below. AIST supports the intent of the proposal to not limit AFCA's ability to hear superannuation related cases. AIST considers that further industry consultation on this topic may yield more proactive ways to address the current consequences of the MetLife decision rather than creating inconsistencies in the treatment of a certain type of complaint.

Reasons for seeking clarity in AFCA's discretion for the registration of complaints.

AIST seeks clarity regarding the application of the proposed reforms for the following reasons:

Managing expectations and obligations of superannuation trustees

- Complaints that fall within the Hermione example should continue to include the trustee as a relevant party as the holder of the insurance policy. This is for several reasons. In Australia, life insurance within a superannuation fund is typically owned by the superannuation trustee on behalf of the members. As the policy is between the trustee and the insurer, the trustee has an intrinsic interest in the outcome of any complaints process or AFCA proceedings related to that policy. Superannuation trustees have a duty to make decisions in the best financial interests of their members. Any complaints process outcome that may impact the payment of group policy premiums could potentially affect this best financial interests' duty.
- Under RG 271 superannuation trustees must advise a complainant of escalation options at the cessation of internal dispute resolution (IDR). Should AFCA categorise a Hermione example complaint as either a superannuation complaint or a superannuation related complaint, it may result in unintended consequences which may make it challenging for a superannuation fund to meet this notification requirement. This is due to the differing treatments of superannuation complaints and other complaints under the regime. This includes:
 - Jurisdictional timeframes to make a complaint.
 - The refer-back period for a financial firm to resolve the complaint.
 - The types of remedies available to a complainant.

A full list of comparative differences in process between superannuation complaints and other complaints is included in Attachment A.

AFCA's role is to assist consumers and financial firms to resolve complaints. Under the proposed bill, there may be the unintentional consequence that two complainants with similar complaints, such as the Hermione example, may have their complaints classified differently and with inconsistent outcomes.

For instance, if AFCA chooses to classify a Hermione example complaint made within the jurisdictional timeframe, as a superannuation complaint, the complainant cannot seek compensation for non-financial loss, or reimbursement for costs incurred in the pursuit of the

complaint. Should the second Hermione complaint be classified as a general or 'other' complaint, this complainant can seek these remedies.

A complaint handling process must be equitable to ensure all parties understand their roles and responsibilities and to create surety in the framework. By providing AFCA with the discretion to classify a Hermione example complaint in different ways, AFCA may treat complainants inconsistently and with conflicting outcomes.

II. Definition of a 'superannuation related complaint.'

AIST notes that the current draft EM or bill does not specify the definition of a superannuation related complaint. AIST seeks clarification on:

- How a 'superannuation related complaint' will be defined.
- In which written instrument a 'superannuation related complaint' will be defined and will it include industry consultation prior to finalisation.

As specified above, should the definition of a superannuation related complaint be determined at the discretion of AFCA and on a case-by-case basis, this will create inconsistency in the application of the AFCA framework and may result in the jurisdiction of AFCA being expanded unintentionally.

For instance, would it be within AFCA's discretion to consider a superannuation complaint in relation to a death benefit claim that is made outside of the jurisdictional time limit and after the death benefit has been paid by classifying the complaint as a superannuation related complaint. Should this be the case it may create the perception that AFCA is using this new provision to circumvent the legislative parameters that AFCA must operate within.

Without a clear definition of what a superannuation related complaint means, complainants themselves may not understand their right to lodge a complaint with AFCA. It may also result in an increase in vexatious complaints to AFCA as discussed under point III below.

Although AFCA has the discretion not to consider complaints under C.2.1, this discretion may be harder to exercise if superannuation related complaints are not defined and a precedent is established where some types of complaints are heard but not others. As a result, complainants and financial firms will not have surety in processes. It will also result in reduced transparency in processes due to the inconsistent nature of the application of the framework.

Recommendation: Further industry consultation be undertaken to fully understand the consequences of this proposal. AIST considers that an industry wide consultation may yield practical solutions to the current situation presented by the MetLife decision. This may also solve the unintended consequences of treating superannuation related complaints as other complaints, such as differing remedies and complainant types. Industry consultation may result in a solution that ensures a consistent way of treating complaints arising from insurance through superannuation. An example may be that the timeframe for a complainant to make an insurance in superannuation complaint be extended from two years to six years.

III. Who can make a superannuation related complaint.

Under B.1.1 of the AFCA Operational Guidelines superannuation complaints are only able to be considered by AFCA if the complainant falls within the categories listed from B.1.1(a) to (h).

A Superannuation Complaint must be submitted by:

- a) a member or former member of a Regulated Superannuation Fund, other than a Self-Managed Superannuation Fund*
- b) a beneficiary or former beneficiary of an Approved Deposit Fund*
- c) a person who is, or claims to be, the holder or former holder of an RSA*
- d) a person acting for the estate of a person referred to in paragraphs (a), (b) or (c)*
- e) a person who has, or claims to have, an interest in an Annuity Policy*
- f) a person who is, or claims to be, a member of a life policy fund*
- g) in the case of a complaint about a death benefit payable from a Regulated Superannuation Fund, an Annuity Policy, a RSA, or an Approved Deposit Fund, a person with an interest in the benefit*
- h) a person in respect of whom a superannuation provider has set out an amount in a statement referred to in section 1053(2) of the Corporations Act.*

Complaints classified as ‘other’ complaints have a broader definition of complainants as specified under B.2.1. AIST notes that should superannuation related complaints be heard by AFCA as an ‘other’ type of complaint, complainants may not be bound by B.1.1.

AIST seeks clarity as to whether a Hermione example complaint could be made to AFCA by a complainant that does not fall within the categories specified within B.1.1(a) to (h).

For example, under B.2.1(a) of AFCA’s Operational Guidelines, AFCA may determine a complaint that arises from or relates to the provision of a financial service by the financial firm to the complainant. The term ‘arise’ is widely interpreted to include claims that directly or indirectly provide a connection between the complainant and the financial firm. This may open the floodgates for complainants such as a spouse of a TPD beneficiary who may argue that they are indirectly connected to the provision of the service by way of association, determinable on the facts of the situation.

If this is the case, there could be unintended consequences which include the rise of vexatious complaints from parties who are not a member of a superannuation fund and/or not a beneficiary of an insurance policy through the superannuation fund.

As a consequence of point II above and issues related to the clear definition of a superannuation related complaint, widening the scope of the complainant may also result in an increase in complaints relating to death benefit claims.

AIST member funds advise that a large portion of their IDR is spent resolving complaints from those contesting a death benefit claim who do not meet the definition of a dependant as per the

Superannuation Industry (Supervision) Act 1993 (SIS Act). As mentioned previously, if a superannuation related complaint is not clearly defined, it may unintentionally broaden the scope of complaints in a way unintended by the authors of the proposal.

Recommendation: As specified above, it should be clarified in the EM and included in the primary legislation and AFCA's Rules that AFCA must treat all superannuation complaints as defined in section 1053 of the Corporations Act as a superannuation complaint. This requirement should also be specified in the AFCA Complaint Resolution Scheme Rules. This will provide clarity as to the types of the complainants that can make a superannuation complaint as initially intended by the AFCA Rules.

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Conclusion

AIST appreciates that the MetLife decision has left a number of active AFCA complaints unresolved and complainants potentially without recourse under the current EDR framework. AIST appreciates that AFCA would like to address these unresolved complaints. AIST has concerns regarding the retrospectivity of the proposal, presumably to resolve these outstanding complaints. Retrospective legislative amendments may create uncertainty in the framework. As such, AIST recommends any amendments apply after the commencement of any amendments.

For the reasons specified above in points I to III, AIST requests that as a part of the consultation Treasury clearly enunciate in the EM the purpose for the proposed changes and what specific situations the proposal will be addressing. If the proposal is adopted, this will mean clarifying the definition of superannuation related complaints and the type of complainants that can make these complaints. This will ensure there is not an administrative creep with a wide interpretation of what is being proposed. By placing the purpose of the proposal specifically in the EM and in primary legislation, it will go towards creating transparency in the decision making. This could be used in any future processes that requires assessing the intended scope of AFCA's jurisdictional powers. AIST also seeks clarity as to whether any of the outstanding complaints with AFCA were considered under previous EDR schemes as per the MetLife case. AIST also seeks clarity whether the intent of this proposal is to allow AFCA the jurisdiction to hear further complaints that have been considered and determined by a previous EDR regime. Any complaints closed through a previous EDR process have been assessed under the rigors of that regime. Extending AFCA's jurisdiction to hear these already resolved complaints may result in the resurrection of previously heard claims by vexatious complainants to the detriment of all parties.

For further information regarding our submission, please contact Sonia Hunyadi, Government Relations and Policy Advisor via email at [REDACTED].

Yours sincerely,

[REDACTED]

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