



Law Council
OF AUSTRALIA

Legal Practice Section

29 September 2017

Committee Secretary
Senate Standing Committees on Economics
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: economics.sen@aph.gov.au

Dear Sir/Madam

SUBMISSION ON TREASURY LAWS AMENDMENT (PUTTING CONSUMERS FIRST – ESTABLISHMENT OF THE AUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY) BILL 2017

This submission has been prepared by the Law Council of Australia's Superannuation Committee (**the Committee**), which is a committee of the Legal Practice Section of the Law Council of Australia.

The Committee's objectives are to ensure that the law relating to superannuation in Australia is sound, equitable and clear. The Committee makes submissions and provides comments on the legal aspects of most proposed legislation, circulars, policy papers and other regulatory instruments which affect superannuation funds.

The Government has introduced the *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017 (the Bill)* to implement a new framework for dispute resolution in the financial system under which the Australian Financial Complaints Authority (**AFCA**) will deal with all financial disputes, including superannuation disputes.

The Committee's response to the Bill is guided by our objectives as identified above. The Committee had previously provided a submission to Treasury on exposure drafts of the Bill and is pleased to note that many of its comments were taken into account in preparing the Bill that has been introduced to Parliament.

Summary

The Committee has four main residual concerns with the Bill:

1. The Bill does not include statutory time limits within which complaints about disability benefits can be made, as recommended Final Report of the *Review of the financial system external dispute resolution and complaints framework (the Ramsay Report)*. These time limits are critical to the effective review of trustee decisions about superannuation disability benefits because they recognise the essential nexus between entitlement to such a benefit and the cessation of employment due to disability;

2. The Bill does not include a jurisdictional exclusion for complaints about the management of the fund, as recommended by the Ramsay Report;
3. The Bill excludes 'jurisdictional' decisions that AFCA may make about whether or not to accept a complaint from judicial review by the Federal Court under the Administrative Decisions (Judicial Review) Act 1977 (**ADJR Act**). This reduces consumer rights.
4. In attempting to replicate the claim staking provisions of the *Superannuation (Resolution of Complaints) Act 1994* (Cth) (**SRC Act**) as recommended by the Ramsay report, subtle changes in wording have made them less certain, which may provide less confidence for trustees to pay out death benefits in a timely manner (as was intended).

The Committee also notes some technical drafting issues and the omissions of powers that may be useful for AFCA to have in a superannuation context. In addition, the Committee raise an issue relating to the status of trustee decisions pending review.

Detailed Comments

Time limits for disability complaints

Under the SRC Act, there are time limits within which a complaint about a decision of a trustee relating to the payment of a disability benefit due to total and permanent disability (**TPD**) can be made. These time limits are two-fold:

1. If a person permanently ceased work because of the medical condition that gives rise to the claim, the person must lodge a claim for the TPD benefit with the trustee within two years of ceasing employment.
2. In addition, the person must make a complaint to the Tribunal within 4 years of the trustee decision about the claim.¹

These time limits recognise that, in the majority of superannuation trust deeds, there is a nexus between a condition amounting to TPD and the cessation of employment. This nexus reflects the occupational nature of superannuation. In a superannuation context, the relevant question is not whether the member is TPD now, but whether the member was TPD at the time when they ceased employment.

If TPD claims are lodged outside these timeframes, it becomes increasingly difficult to obtain medical evidence and other information to support the member's claim that he or she was totally and permanently disabled at the relevant date.

Professor Ramsay recognised the importance of these timeframes with his recommendation that they be retained for superannuation complaints.²

While the timeframes for disability benefits could be included in AFCA's terms of reference, the Committee submit that these timeframes are so fundamental to the effective review of disability decisions that they warrant inclusion in the Bill. This is so that the timeframes cannot be changed without parliamentary scrutiny.

¹ See SRC Act, ss 14(6A) and 14(6B).

² Final Report, para 7.16.

Management of the fund as a whole

The Committee consider that AFCA should have a statutory power to refuse complaints that relate to the management of the superannuation fund as a whole. This is an important jurisdictional constraint under s. 14(6) of the SRC Act that is consistent with a trustee's duty to act in the interests of beneficiaries as a whole.

While the Treasury Fact Sheet that accompanied the Bill expresses an expectation that this exclusion would form part of AFCA's terms of reference, it warrants inclusion in the Bill. This is so that AFCA's jurisdiction could not be expanded in a manner inconsistent with a trustee's duties without parliamentary scrutiny.

Lessening of consumer rights

The Bill specifically excludes 'decisions making or forming part of the process of making or leading up to the making of determinations under the AFCA scheme' from being decisions that are subject to judicial review under the ADJR Act.³ This means that complainants have effectively lost their right to appeal to the Federal Court if AFCA decides to exclude their complaint. This right is currently available to them in respect of jurisdictional issues and the withdrawal of complaints when made by the Tribunal under the SRC Act. While AFCA's terms of reference could require them to provide procedural fairness in respect of such decisions, this does not carry the same independent scrutiny as a right of judicial review.

Uncertainty of claim staking provisions

The purpose of 'claim staking' is to give trustees confidence to pay out death benefits if they have given notice to the identified beneficiaries of the proposed distribution and have not received any objection. Claim staking therefore facilitates the timely payment of death benefits to the deceased member's family.

Proposed s 1056 of the Bill attempts to replicate the 'claim staking' provisions of the SRC Act, as recommended by the Ramsay Report.⁴ In doing so, the section refers to those with an interest in the payment of a death benefit, rather than those with an interest in the death benefit. This change of wording might inadvertently expand the persons who could complain about the trustee's decision. Even a person who does not qualify as a dependant under superannuation law may still be interested in the payment of a death benefit. Since the expression 'interest in a death benefit' is well known to the superannuation industry, we recommend that it be retained.

There is also a subtle change to the notice provisions that form part of the 'claim staking' procedure. Under the SRC Act, notice is required to be 'given' by the trustee, where under proposed s 1056 it is required to be 'received' by the relevant person. Since it is more difficult for a trustee to show that a notice was received, the claim staking protection afforded to trustees in order to give them confidence to promptly pay death benefits has been weakened. The Committee recommends that the wording reflect the SRC Act.

Other matters

Tribunal's powers to require confidentiality

Sections 30 and 38(2)-(5) of the SRC Act have not been reflected in the Bill. These provisions provide for statements made at conciliation conferences to be confidential and a power for the Tribunal to give directions prohibiting the disclosure of documents or information that may be submitted in connection with a review meeting (ie a formal

³ Schedule 1, Part 2, item 11.

⁴ Final Report, para 7.12.

determination). The reason that these powers are important is that complaints about death benefit payments involve multiple parties (not just the trustee and the complainant) and in the course of making submissions, sensitive material about family circumstances is often provided and exchanged (for procedural fairness reasons). In these cases, the Tribunal can use its statutory powers to require parties to keep the material confidential. This may be difficult to replicate in AFCA's terms of reference where not all of the parties will be 'bound' by the AFCA 'contract'.

Determination making powers

Proposed section 1055(6) attempts to replicate the powers of the Tribunal under ss 37 – 37G of the SRC Act. However, one power is missing, being the power to cancel membership of a life policy fund if the Tribunal finds that conduct relating to the 'selling' of that fund was unfair or unreasonable.⁵ We also note that the prescribed factors for the Tribunal to take into account in reviewing cases of 'miss-selling' have been omitted.⁶

Trustee decisions may not be specific to the complainant

Section 26 of the SRC Act (which preserves the legal effect of a trustee decision, notwithstanding a complaint being lodged) has not been reflected in the Bill. This is an important protection in cases where a trustee decision may affect a group of fund members, not simply the complainant. While this matter could be dealt with in AFCA's terms of reference, it would be preferable for statutory protection to be provided.

Drafting error:

There is a missing paragraph (a) in new section 101(1) of the *Superannuation Industry (Supervision) Act 1993 (SIS Act)*, as inserted by item 9 of Schedule 2. The Committee suggests that paragraph (a) is meant to replicate the current paragraph 101(1)(a) of the SIS Act, which sets out the people to whom the trustee must make internal dispute resolution available: ie beneficiaries, former beneficiaries and people claiming through them. The Committee does not understand this to simply be a numbering error because paragraph (a) is expressly referred to in new section 101(1A.)

Contacts

The Committee would welcome the opportunity to discuss the submission further. Please contact John Farrell, Policy Lawyer, at john.farrell@lawcouncil.asn.au or (02) 6246 3714, if you would like further information or clarification in the first instance.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Jonathan Smithers', with a long horizontal stroke extending to the right.

Jonathan Smithers
Chief Executive Officer

⁵ SRC Act s 37A(4).

⁶ SRC Act ss 14A(4), 15E(3) and 15H(3) – these factors tend to reflect the sorts of circumstances when a court of equity might intervene, such as undue influence.