SUBMISSION

Submission to Senate Economics Legislation Committee – *Treasury Laws Amendment (Support for Small Business & Charities & Other Measures) Bill 2023*

27 October 2023

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Mr Alan Raine
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Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

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

27 October 2023

Dear Mr Raine

Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to the *Treasury Laws Amendment (Support for Small Business and Charities and Other measures) Bill 2023* (the Bill).

ASFA's submission focusses on two schedules of the Bill – Schedule 7, which makes amendments to the non-arm's length expense rules for superannuation funds and Schedule 8, which modifies the jurisdiction of the Australian Financial Complaints Authority.

About ASFA

ASFA is a non-profit, non-partisan national organisation whose mission is to continuously improve the superannuation system, so all Australians can enjoy a comfortable and dignified retirement. We focus on the issues that affect the entire Australian superannuation system and its $3.5 trillion in retirement savings. Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing almost 90 per cent of the 17 million Australians with superannuation.

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If you have any queries or comments in relation to the content of our submission, please contact Julia Stannard, Senior Policy Advisor, on (02) 8079 0819 or by email JStannard@superannuation.asn.au.

Yours sincerely

Julian Cabarrus

Director – Policy Operations, Member Engagement & External Relations

Schedule 7: Non-arm's length expenses of superannuation funds

ASFA strongly supports the amendments in relation to non-arm's length expenses (NALE) of superannuation funds, set out in Schedule 7. The amendments exempt APRA-regulated superannuation funds, exempt public sector superannuation schemes (EPSSSs), approved deposit funds (ADFs) and pooled superannuation trusts (PSTs) from the non-arm's length income (NALI) rules to the extent they relate to NALE. These entities will remain subject to the remaining NALI rules for income derived on a non-arm's length basis.

Currently, even inadvertent breaches of the NALE rules can have disproportionately severe outcomes. Under the current rules and the compliance approach outlined by the Australian Taxation Office (ATO), where an amount determined to be a non-arm's length general expense is incurred by a fund, this could cause **all** the ordinary and statutory income of the fund to be subject to tax at the highest marginal tax rate – currently 45%. This would severely and directly impact the returns that flow through to fund members.

Further, the ATO's compliance approach would have caused large APRA-regulated funds, EPSSSs, ADFs and PSTs to incur significant compliance costs in relation to documenting justification for the expenditure. This additional cost – which would ultimately be borne by fund members – would be incurred in scenarios where, we submit, the mischief intended to be addressed by the NALI/NALE provisions was not present.

The NALI rules are a long-standing feature of our tax law. They are an integrity measure, originally designed to ensure income is not diverted into the concessionally taxed superannuation environment to benefit from lower rates of tax compared to other entities – particularly the marginal rates applying to individual taxpayers. The NALE rules were introduced with effect from 1 July 2018 as an additional layer of integrity to the NALI rules. The explanatory material at the time made it clear that a primary objective was to prevent circumvention of the contribution caps and the threshold at which the higher rate of tax applies to a person's contributions in a way that would benefit one or more members of the fund.

ASFA is firmly of the view that the integrity issues to which the NALE aspects of the NALI rules were directed do not – and indeed cannot – arise in large APRA-regulated funds, EPSSSs, ADFs and PSTs. ASFA welcomes the amendments, which are a positive outcome for Australian superannuation fund members and follow extensive consultation with the industry over the last two years.

Recommendation
ASFA recommends that the proposed amendments to non-arm's length expense rules for large APRA-regulated funds, EPSSSs, ADFs and PSTs are passed.

Schedule 8 – AFCA scheme

Schedule 8 contains amendments to the remit of the Australian Financial Complaints Authority (AFCA), to reverse the outcome of the Full Court of the Federal Court judgment in *MetLife Insurance Limited v Australian Financial Complaints Authority* [2022]FCA 23 (MetLife v AFCA).

In that case, the Court held that a complaint relating to superannuation could **only** be brought under the AFCA scheme if it met the definition of 'superannuation complaint' in section 1053 of the *Corporations Act 2001*. The complaint that led to the *MetLife v AFCA* decision involved a disablement claim under an insurance policy held through the complainant's superannuation fund that was not made within the relevant time limits to be a 'superannuation complaint'. The Court held that since the complaint was not a 'superannuation complaint' as defined, AFCA lacked the jurisdiction to consider it, even as a complaint against the insurer in its general remit.

Under the proposed amendments, a complainant will be able to make a complaint relating to superannuation to AFCA even if it does not meet the definition of a 'superannuation complaint'. Subject to AFCA's rules, it will be able to deal with such complaints under its 'general' remit (not under the special legislative requirements, set out in Division 3 of Part 7.10A, that apply to 'superannuation complaints').

ASFA supports a robust and effective external dispute resolution (EDR) scheme for superannuation and has closely followed AFCA's replacement of the former Superannuation Complaints Tribunal and Financial Ombudsman Service. It is, in ASFA's view, critical to ensure there is certainty for all stakeholders as to the scope and coverage of the EDR arrangements provided by AFCA.

While we note that the Full Court's judgment in *MetLife v AFCA* was unanimous and emphatic, we recognise that a policy decision has been made to overturn the decision through legislation. ASFA does, however, have some concerns in relation to the proposed amendments:

1. Retrospective application will present legal and practical challenges for insurers and/or funds

   The application provisions in Schedule 8 make it clear the amendments apply in relation to a complaint made under the AFCA scheme *whether before or after the commencement of the amendments* [subsection 1703(1)]. The amendments are intended to apply retrospectively so AFCA can progress a number of complaints it has received and placed on hold due to the *MetLife v AFCA* proceedings.

   We acknowledge that the intent of retrospective application is to ensure impacted complainants are not left without access to EDR. However, it is likely that retrospectivity of application will raise some legal and practical considerations for impacted insurers and superannuation trustees. By their nature, TPD complaints are likely to have their origin in events which occurred many years ago (given the time frames for making a complaint 'within time' through AFCA's superannuation remit).

   Retrospective application is therefore likely to have a significant – and potentially unquantifiable – impact. In the absence of exceptional circumstances, businesses should expect to be entitled to engage on a level, consistent and predictable basis. When pricing insurance premiums for group policies taken out by superannuation funds, one factor relied upon is past claims experience. Retrospective amendments effectively change the potential for claims to be payable under those policies, meaning premiums may have been mispriced. Going forward, insurers may consider it necessary to factor the risk of retrospective amendments into pricing of insurance policies held within superannuation, with the result that higher premiums will flow through to superannuation fund members.

   In addition, an insurer, and a superannuation trustee assisting an insurer in responding to such a complaint, are likely to face considerable challenges in contesting such a complaint. With the passage of time, personnel familiar with the matter may no longer be available (including treating medical personnel) and relevant documentation may not be available or easily recoverable.

   This is especially the case since the general jurisdiction does not afford AFCA the same powers to join parties and access information and documents as the superannuation jurisdiction. Accordingly, a respondent to such a complaint is likely to be at a distinct forensic disadvantage. If the amendments are to proceed with retrospective application, it will likely be necessary for AFCA to provide some flexibility in relation to complaints made prior to commencement. As necessary, this should extend to:

   - the timeframes provided to the insurer and/or superannuation trustee to attempt to access relevant evidence and respond to submissions made as part of the complaint
   - the processes adopted for dealing with the complaint
   - the format and type of evidence AFCA will accept if relevant material is no longer accessible.

2. A need for certainty regarding the potential scope of the amendments

   Subsection 1703(1) makes it clear the amendments will apply to complaints made to AFCA before or after commencement. The application provisions also state that the amendments "do not affect the validity (or invalidity) of a determination, made or purportedly made by AFCA before that commencement, of a complaint made under the AFCA scheme" [subsection 1703(3)]. The explanatory memorandum notes this means "if a determination made by AFCA was invalid due to *MetLife*, AFCA may redetermine the complaint on or after commencement (subject to any necessary changes to the AFCA Rules)".

   It is unclear how many determinations might potentially be subject to redetermination on this basis, and as a result it is not possible for insurers and superannuation funds to assess any liability that may arise as a result of these amendments.

   Further, the application provision in subsection 1703(3) is quite different to the provision in the May 2023 exposure draft – under that provision, the amendments would apply in relation to a complaint made under the AFCA scheme on or after commencement, or before commencement "if AFCA did not make, or purport to make, a determination of the complaint before that commencement" [exposure draft subsection 1704(1)].

   Section 1057 of the *Corporations Act* permits a party to a 'superannuation complaint' to appeal from AFCA's determination to the Federal Court on a question of law. Aside from this limited right of appeal, all stakeholders should be able to operate on the basis that a determination by AFCA is final and not subject to potential redetermination. In ASFA's view, the change to the application provisions, between the exposure draft and Bill, creates uncertainty with regard to the finality of determinations previously made by AFCA.

   ASFA considers that the wording utilised in the exposure draft should be reinstated – that is, the amendments should **not** apply to a complaint made prior to commencement if AFCA had made, or purported to make, a determination of the complaint.

3. A need for clear communication regarding the impact of the amendments

   The amendments will undoubtedly cause some confusion: 'superannuation complaints' that meet a specific definition can be heard through AFCA's superannuation jurisdiction and are subject to one set of rules, powers and remedies, while complaints relating to superannuation that are not 'superannuation complaints' can be heard through AFCA's general jurisdiction and are subject to different rules, powers and remedies.

   It will be important to ensure consumers are not led to believe AFCA will have the ability to re-examine claims that were previously declined and/or 'superannuation complaints' that were resolved against them in the past, for reasons unrelated to the issue raised in *MetLife v AFCA*. There is a risk that advocates and representatives may seek to test the new limits of AFCA's jurisdiction by encouraging consumers to raise complaints that are not within the scope of the amendments and have no likelihood of success. Care must be taken to avoid creating unrealistic expectations in circumstances where consumers may ultimately be disappointed. ASFA encourages AFCA to ensure clear messaging about the scope of the amendments is provided to coincide with their commencement.

   It is also presently unclear how – or whether – superannuation funds are expected to address the impact of the amendments as part of their mandated disclosures about EDR. ASFA encourages ASIC to provide clarity on this matter.

Recommendation

ASFA recommends that:

- If the amendments proceed with retrospective application, AFCA should adopt an appropriate level of flexibility for pre-commencement complaints in relation to its dispute resolution process, timeframes and the availability of relevant evidence
- The amendments should not apply to a complaint made to AFCA before commencement if AFCA had made, or purported to make, a determination of that complaint
- AFCA should ensure clear messaging is available to ensure consumers understand the scope of the amendments and when they will and will not apply
- ASIC should provide clarity about the impact of the amendments on superannuation funds' EDR disclosure requirements.