SUBMISSION

Submission to AFCA – Joint consultation on superannuation Approaches

30 September 2024

The Association of Superannuation Funds of Australia Limited
Level 11, 77 Castlereagh Street
Sydney NSW 2000

PO Box 1485
Sydney NSW 2001

T +61 2 9264 9300
1800 812 798 (outside Sydney)
F 1300 926 484
W www.superannuation.asn.au

ABN 29 002 786 290 CAN 002 786 290

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Ms Heather Gray

Lead Ombudsman – Superannuation

Australian Financial Complaints Authority

Via email: consultation@afca.org.au

30 September 2024

Dear Ms Gray

Joint consultation on superannuation Approaches

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to AFCA's consultation on the draft new Approach to sections 29(6) and (7) of the *Insurance Contracts Act 1984* and the draft updated Approach to delayed insurance claims in superannuation.

About ASFA

ASFA has been operating since 1962 and is the peak policy, research and advocacy body for Australia's superannuation industry. ASFA represents the APRA regulated superannuation industry with over 100 organisations as members from corporate, industry, retail and public sector funds, and service providers.

We develop policy positions through collaboration with our diverse membership base and use our deep technical expertise and research capabilities to assist in advancing outcomes for Australians.

ASFA has a keen focus on matters that impact the outcomes achieved by individuals through the superannuation system, their experiences with the system, and issues that impede the industry's operational effectiveness.

General comments

ASFA welcomes AFCA's efforts to expand and update its suite of Approaches. The provision of information about the way AFCA assesses and determines complaints about particular matters provides all stakeholders with a valuable reference point and supports transparency, consistency and efficiency – all of which are vital aspects of an industry funded external dispute resolution process.

ASFA also commends AFCA for adopting a forward-looking annual program to review its Approaches and we look forward to participating in the upcoming consultation on an update to the Approach to superannuation death benefit complaints.

Our feedback on the two draft Approaches that are the subject of the current consultation is set out below.

The AFCA Approach to sections 29(6) and 29(7) of the *Insurance Contracts Act 1984*

Subsections 6 and 7 of section 29 of the *Insurance Contracts Act 1984* relate to an *insurer's* ability to retrospectively vary a contract of insurance if the insured is found to have made a misrepresentation in their application for cover. It is understandable, therefore, that much of the discussion in the draft Approach is focussed on AFCA's expectations of an insurer seeking to invoke those subsections.

However, the subsections – and the draft Approach – also have implications for a superannuation fund *trustee* in complaints where the trustee is a party to the relevant contract, as 'owner' of the insurance policy.

The draft Approach notes that when reviewing a trustee's decision and conduct in relation to the exercise of the insurer's exercise of the remedy in subsection 29(6), AFCA will consider whether the trustee has unfairly and/or unreasonably agreed with the position of the insurer, not done everything that is reasonable to pursue an insurance claim for the benefit of the insured member (if the claim has a reasonable prospect of success), or not complied with applicable Codes of Practice or industry guidance.

The draft Approach further notes (on page 7) that AFCA "expects that trustees will exercise sufficient review of their insurer's actions to be satisfied they are treating insured members fairly and reasonably and are providing members with substantive procedural fairness." However, ASFA considers it is not always clear from section 2.1 of the draft Approach where expectations about evidence to be obtained to support a decision should be interpreted as applying to the *insurer* or to the *trustee*, and what AFCA will consider "sufficient" review by a trustee.

For example:

1. The language, scope and effect of the insurer's proposed variation to the contract

   ASFA requests further clarification, in the finalised Approach, of how AFCA expects a trustee to validate the language and scope of the contract variation.

   The draft Approach refers to an expectation that the insurer will "provide a copy of the underwriting guidelines in effect at the relevant time, together with a statutory declaration from an underwriter that sets out how those guidelines would be applied".

   We seek confirmation of whether this should be interpreted as an expectation that a trustee would obtain this information from an insurer in all cases where the insurer seeks to apply subsection 29(6), in advance of any potential complaint? While ASFA agrees it would be appropriate in cases where a consumer has raised a concern in relation to the proposed variation, we question whether it should be an expectation on trustees to obtain it in all cases where the insurer seeks to apply subsection 29(6), in advance of any potential complaint.

   We note that the underwriting guidelines may not be the insurer's intellectual property – rather, they may be owned by the reinsurer. As a result, the insurer may be reluctant – or unable – to provide them to the trustee prior to the insurer being joined to a complaint. If it is AFCA's expectation that trustees should obtain and review this material in advance of an insurer being joined to an active complaint, it will likely be necessary for the trustee, insurer and reinsurer to revisit contractual arrangements to enable this and a reasonable time for transition would be required. It is therefore important that the full extent of AFCA's expectation on trustees is clearly articulated.

We also note that the draft Approach refers to a requirement on the insurer to give the insured written notice of its variation to the contract. In practice, where the relevant contract is a group insurance policy to which a superannuation fund trustee is the contracting party, agreed communication protocols may apply, under which notice of the variation is provided to the trustee by the insurer and it is the trustee that makes the communication to the insured (the fund member). We recommend that the draft Approach is adjusted to reflect this practice.

2. Whether the proposed varied position is consistent with the insurer's own underwriting guidelines and practices

   As noted above, a trustee may not always have access to the insurer's underwriting guidelines as these are not always the intellectual property of the insurer. Further, a trustee will not typically be privy to all the minutiae of the insurer's underwriting process although it should be expected, at a minimum, to have access to the information reviewed by the insurer and the outcome of the insurer's review.

3. Whether the proposed variation is inconsistent with what other reasonable and prudent insurers would have done for similar contracts

   AFCA's expectations as to the level of evidence to be provided in complaints invoking subsection 29(6) are extensive. ASFA requests that AFCA provide clarification, in the finalised Approach, of:

   - The extent to which this expectation is to be discharged by the trustee (as opposed to the insurer).
   - The amount of evidence expected to be provided in relation to the comparative analysis of variations undertaken in relation to similar contracts by other reasonable and prudent insurers.

     We note that Case Study 2 deals with a scenario where AFCA was satisfied the insurer had satisfied the requirements of subsection 29(7) to support the retrospective application of an exclusion. The case study details the evidence provided by the insurer in support of its position as including the language used in a comparable exclusion from **six** reinsurers and **four** insurers, along with a letter from the head of underwriting at a reinsurer setting out the language used in comparable exclusions by **five** different insurers.

     This is an extensive list of supporting evidence. While ASFA agrees that it helps to clearly demonstrate a situation where subsection 29(7) was satisfied, we query whether it is intended to describe AFCA's expectation of the evidence to be provided in **all** such cases. ASFA considers that this extent of evidence may be difficult to achieve in practice and we anticipate that it would not reflect standard practice within the industry.

   - Whether AFCA expects a trustee to obtain the type (and extent) of evidence referred to in the draft Approach in every case where an insurer invokes subsection 29(6) (in isolation of any complaint either to the trustee or to AFCA) or only at the point a complaint is made.

The AFCA Approach to delayed insurance claims in superannuation

Section 1.3 – Summary

The updated draft Approach notes that AFCA will consider whether a trustee has *"reasonably done everything necessary to ensure there were no unreasonable delays, including by the insurer*". ASFA considers it would be helpful if the finalised Approach could include some detail about the types of evidence that AFCA will expect trustees to provide to demonstrate this, in the event of a complaint about a delayed insurance claim.

Section 3.3 – Consequences for unreasonable delay

In the updated draft Approach, this original first paragraph of section 3.3 is marked for deletion: "AFCA cannot award non-financial loss to complainants in the superannuation jurisdiction. This means AFCA cannot award compensation for a complainant's stress or inconvenience caused by unreasonable delay."

ASFA notes that a stated purpose of AFCA's Approaches is to support consumers' and financial firms' understanding of AFCA's approach to certain issues and provide practical information on how AFCA will assess and determine complaints (https://www.afca.org.au/news/consultation/annual-approach-consultations). Section 1.2 of the draft updated Approach notes that it should be read by "trustees and insurers. It should also be read by superannuation fund members who wish to make a complaint about delay in the handling of their insurance claim" (our emphasis).

ASFA considers that the paragraph marked for deletion provides clear and important information that may help to manage fund members' expectations regarding the potential outcome of a complaint about a delayed insurance claim, and we recommend that it be retained.

Further, we note this new text marked for inclusion: "Subsection 1055(6) of the *Corporations Act 2001* (Cth) sets out the actions that AFCA may take if it is satisfied that a decision in its operation to the complainant is unfair or unreasonable, or both." ASFA considers that without additional context – and especially if the preceding text is deleted as marked – this language is unlikely to aid a complainant's understanding of the consequences should their complaint be upheld. Noting that complainants are an intended audience for the Approach, we recommend that a more 'plain English' description is adopted in the finalised Approach.

Section 3.4 – Systemic issues and Code referrals

ASFA also requests some additional clarification in relation to the treatment of a complaint about a delayed insurance claim as a (potential) systemic event.

The updated draft Approach states that if "AFCA identifies a trend in complaint records about delays in insurance claims handling (in superannuation) by a trustee or insurer, then AFCA's Systemic Issues Team may investigate whether the trend represents a systemic issue." Despite this emphasis on identification of a trend, we note that AFCA can investigate a potential systemic issue based on a single complaint, if there is some basis on which to suspect the issue that affected the particular parties to the complaint could have affected others in a similar way (as acknowledged in AFCA's Operational Guidelines).

Case Study 2 in the draft updated Approach is an example of a situation where AFCA "referred the matter to the Systemic Issues team to consider whether this represented any broader gaps in the insurer's and trustee's claims handling practices" - presumably due to a concern that the insurer and trustee in that case study did not, as part of their process, consider up front whether a complainant was covered, but rather they defaulted straight to seeking medical evidence.

ASFA suggests that, for clarity, section 3.4 could be revised to make it clear that investigation of a potential systemic issues does not *only* occur where a trend in complaints has been identified.

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If you have any queries or comments in relation to the content of our submission, please contact [redacted], Senior Policy Advisor, on [redacted] or by email [redacted].

Yours sincerely

James Koval

Head of Policy and Advocacy