File Name: 2017/15

20 June 2017

Manager
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Dear Sir/Madam

External Dispute Resolution and Complaints Framework

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide the attached submission in response to the:

- *External Dispute Resolution and Complaints Framework* consultation package released on 17 May 2017, comprising the:
  - Consultation Paper: *Improving dispute resolution in the financial system*
  - Exposure draft *Treasury Laws Amendment (External Dispute Resolution) Bill 2017*
  - Exposure draft *Treasury Laws Amendment (External Dispute Resolution) Regulations 2017*
  - Exposure draft explanatory material to the *Treasury Laws Amendment (External Dispute Resolution) Bill 2017*
  - Fact Sheet: *The Australian Financial Complaints Authority (AFCA)*
- Consultation Note: *Consultation on the authorisation process*, released on 5 June 2017.

We appreciate the extension of time provided for us to make this submission.

If you have any queries or comments in relation to the content of our submission, please contact me on (02) 8079 0808 or by email gmccrea@superannuation.asn.au, or Senior Policy Adviser Julia Stannard, on 03 9225 4027 or by email jstannard@superannuation.asn.au.

Yours sincerely

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Response to *External Dispute Resolution and Complaints Framework* consultation package

A. ABOUT ASFA

ASFA is a non-profit, non-political national organisation whose mission is to continuously improve the superannuation system so people can live in retirement with increasing prosperity. We focus on the issues that affect the entire superannuation system. Our membership, which includes corporate, public sector, industry and retail superannuation funds, plus self-managed superannuation funds and small APRA funds through its service provider membership, represent over 90 per cent of the 14.8 million Australians with superannuation.

While the proposed new framework for external dispute resolution (EDR) and complaints resolution has significant implications for consumers and providers of all types of financial products and services, ASFA's response focuses on the potential impacts for the superannuation fund members, beneficiaries and trustees of superannuation funds.

B. KEY POINT SUMMARY

The proposed changes to the external dispute resolution (EDR) framework represent a substantial change for the superannuation industry and for consumers – the members and beneficiaries of superannuation funds.

While ASFA strongly supports reforms that will improve outcomes for consumers, we are concerned that the speed with which the reforms are being implemented, and the fragmented approach taken to the consultation process, will have an adverse impact on the quality of the outcome.

Our key concerns relate to a number of aspects of the consultation package and process:

(i) Effectiveness of consultation process compromised by short timeframe and lack of detail

ASFA considers that the timeframe for stakeholders to provide input on the consultation material is inadequate given the significant nature of the reforms. This is compounded by the fact that the current consultation package represents only a small part of the total EDR framework, with many important details still to be clarified.

We understand the need for an accelerated consultation process stems from the intention that the new Australian Financial Complaints Authority (AFCA) be operational by 1 July 2018. However, we note that it is simply not possible for stakeholder to fully assess the potential implication of the reforms without access to a draft of the terms of reference for AFCA, the constitution documents for the scheme operator, and the ASIC regulatory requirements.

The timeframe for stakeholders to provide input increases the likelihood of unintended – and potentially adverse – consequences for consumers and financial providers alike.

Rather than moving to an EDR framework that represents the best elements of both the current Tribunal and ombudsman frameworks, there is the risk that the current process may mean we end up with an inferior EDR model that adversely impacts stakeholders.

In ASFA's view, a more measured and appropriate implementation timeframe would be for the new EDR arrangements to commence the 30 June or 1 January arising no earlier than 12 months after the finalisation of all relevant materials.

(ii) Critical powers and provisions for resolving superannuation complaints should be in the legislation, not the terms of reference

The final report from the recent review of the EDR and complaints framework for the financial services industry[1] (the Ramsay Review) acknowledged many of the unique attributes of superannuation and recognised the need for strong statutory support of the new EDR arrangements for superannuation complaints. The Government accepted the Ramsay Review's recommendations.

While the consultation package does include some specific statutory provisions for superannuation complaints, ASFA's view is these are incomplete.

In particular, the test to be applied at EDR and some of the related processes appear, on the face of the Draft Bill, to differ from the current test and process. In ASFA's view, this risks introducing a level of uncertainty into the EDR process for superannuation, with the prospect that many aspects of the complaints-handling process – currently well-established through more than 20-years of Superannuation Complaints Tribunal (SCT) determinations and judicial consideration – may in future become the subject of challenge.

We note that in settling the balance between the statutory framework and the terms of reference, it is important to ensure there is no deleterious impact on consumer outcomes. At present, a number of fundamental details have been left to be addressed in the terms of reference, where they will receive no statutory protection. These include matters as important and diverse as:

- confirmation that unlimited monetary jurisdiction will apply for superannuation complaints
- who may make a superannuation complaint
- the permissible subject matter for a complaint
- the 'claim-staking provisions' that are vital to the effective handling of death-benefit related complaints
- the time limits within which certain categories of complaints must be made.

ASFA also notes that the proposed technique of including broad provisions in the statutory framework, then seeking to limit them via the terms of reference – a non-statutory document which will effectively operate as a contractual arrangement between the scheme operator of AFCA and its members – may involve some risk.

[1] Review of the Financial System External Dispute Resolution and Complaints Framework, Final Report, April 2017 (Ramsay Review Final Report)

(iii) Significant transitional issues will need to be adequately addressed

The transition to the new proposed new EDR arrangements will be significant and ASFA's submission notes a number of important issues that will need to be addressed.

These include a need for:

- a clear cut-over date from which all new complaints will go to AFCA rather than the SCT
- the provision and maintenance of adequate funding and resourcing to the SCT to enable it to conduct an efficient and orderly wind-down, and to maintain staff morale and retention at levels which ensure effective operations.

(iv) Proposed new internal dispute resolution obligations are unclear

New obligations in relation to internal dispute resolution (IDR) will apply to superannuation trustees from the day after the Bill receives Royal Assent.

The consultation package indicates these will involve requirements for superannuation trustees to:

- report to ASIC regarding their IDR activity – with the timing, content and form of this reporting unknown at this time
- comply with new IDR obligations in place of the well-established, superannuation-specific provisions currently in the *Superannuation Industry (Supervision) Act 1993* (SIS Act)
- undertake a new process whereby all complaints lodged with AFCA will be referred back for a final opportunity at IDR.

No detail has been made available regarding any of these requirements. It is not possible for stakeholders to assess their implications without seeing a draft of the draft legislative instrument and regulatory material to be issued by ASIC. This creates a risk for all stakeholders – including ASIC – that they may not be ready for commencement of the new IDR arrangements by the day after Royal Assent.

C. GENERAL COMMENTS

We note that the Exposure Draft *Treasury Laws Amendment (External Dispute Resolution) Bill 2017* (Draft Bill), the Exposure draft *Treasury Laws Amendment (External Dispute Resolution) Regulations 2017* (Draft Regulations) and the accompanying Exposure Draft Explanatory Material (Draft EM) all refer generically to the establishment of a new EDR scheme.

However, the Fact Sheet *The Australian Financial Complaints Authority (AFCA)* (Fact Sheet) and the Consultation Note *Consultation on the authorisation process* (Consultation Note) all refer to the new EDR scheme by its intended name, the Australian Financial Complaints Authority, or AFCA, and the Consultation Paper: *Improving dispute resolution in the financial system* refers to both AFCA and "the new EDR body".

This submission refers to both "AFCA" and "the new EDR scheme", as there are occasions where the generic concept of an 'EDR scheme' is more appropriate in the context of the operation of specific provisions in the Draft Bill or Regulations.

C.1 SCT remains ASFA's preferred model for superannuation complaints

In our submissions to the recent *Review of the financial system EDR framework* chaired by Professor Ian Ramsay (the Ramsay Review)[2], ASFA expressed our strong support for the retention of the SCT as the specialist complaints body for the APRA-regulated superannuation industry.

ASFA does not consider the SCT model to be 'broken'. In our view, the SCT has, within its historic and current funding and operational constraints, served the industry and consumers well.

ASFA has been vocal in calling for an improvement in the SCT's funding levels over many years. Our submissions to the Ramsay Review also highlighted the need to improve the SCT's operations and performance, via adequate funding and resourcing and enhancements to its governance structure and operating procedures. We also expressed our concerns that key protections for consumers and fund trustees may be lost if handling of superannuation complaints is moved to an EDR body with a generic (that is, not superannuation-specific) operating model. We direct Treasury's attention to those submissions.

While disappointed that the Government has elected to move to a generic model for complaints handling, ASFA's focus is on ensuring any adverse outcomes for trustees of superannuation funds, their members and beneficiaries that may flow from transition to the new EDR framework and, in particular, the establishment of AFCA are minimised.

[2] ASFA, Response to Issues Paper: *Review of the Financial System External Dispute Resolution Framework*, 7 October 2016, ASFA, *Response to Interim Report: Review of the Financial System External Dispute Resolution and Complaints Framework*, 27 January 2017

C.2 Timeframes could jeopardise a successful outcome

Given the significance of the proposed reforms, ASFA is concerned at the short timeframe provided for consultation on the draft legislation and the lack of detail about critical parts of the new EDR framework.

To ensure the delivery of improved consumer outcomes, the consultation process is critical. To minimise the risk of unintended consequences, and to ensure that important rights and protections for both consumers and fund trustees are preserved, it is important that all stakeholders are given adequate time to consider the consultation material, and that the material provided for consultation represents a comprehensive package, rather than simply fragments of the whole.

ASFA considers the timeframe allowed for consultation on the proposed draft legislation and regulations inadequate to allow stakeholders to provide a considered response. This is especially so given stakeholders do not, at this time, have access to:

- a draft of the terms of reference for AFCA, which will contain crucial information about its proposed operation
- a draft of the proposed constitutional documents for the AFCA scheme operator, which may provide more insight regarding its structure and governance
- the proposed ASIC regulatory requirements.

The draft legislation and regulations do not address critical aspects of AFCA's operation. These are not limited to simple procedural matters, but include matters as important, and diverse, as the governance of the scheme (including representation on the Board), whether a complaint will be eligible to be considered by AFCA or not, the claim-staking rules that are vital for the effective resolution of complaints involving superannuation death benefits, and prescribed time limits for certain categories of complaints.

In many cases it is indicated in the Consultation Paper that these details will be covered in the terms of reference - and as outlined in part C.3 of this submission, ASFA has concerns about the potential risks and appropriateness of this approach. Other matters – including all detail regarding the new IDR requirements – are to be outlined in ASIC regulatory guidance.

There are also many important aspects of the current complaints process for superannuation that are simply not mentioned in the consultation package. ASFA presumes this means they will be included in the terms of reference, but this is not clear.

The absence of information regarding all of these matters makes it extremely challenging for industry to fully assess the potential implications of the package.

The optimal approach for consultation would, in ASFA's view, have involved the release of a draft – or at least an outline – of the proposed terms of reference for AFCA, the constitutional arrangements for the scheme operator, and the draft ASIC regulatory requirements along with the Consultation Paper, Draft Bill, Draft Regulations, Draft EM, Fact Sheet and Consultation Note.

ASFA notes that the short timeframe and fragmented approach to the consultation means stakeholders will simply not be able to identify all potential issues at this time – it is inevitable that some omissions and unintended consequences will go unidentified, potentially until after the draft terms of reference has been released and the framework legislation passed.

ASFA recommends that:

- ASIC releases a draft of its proposed regulatory requirements for both EDR and IDR for consultation as soon as possible
- a draft of the terms of reference for AFCA – or at the very least, a detailed outline of the proposed terms of reference – is released as soon as possible
- once the EDR operator is established, stakeholder consultation on the proposed terms of reference for the scheme be commenced as a matter of urgency
- the legislative framework not be finalised until each of the above matters has been addressed.

C.3 Inappropriate balance between statute and terms of reference

Consultation Paper Q2:	Do you consider that the Bill strikes the right balance between setting the new EDR scheme objectives in the legislation whilst leaving the operation of the scheme to the terms of reference?

ASFA welcomes the approach of enshrining important provisions in relation to the EDR scheme's determination of a superannuation complaint into the framework legislation, including a provision confirming that the EDR decision maker must not make a determination that would be contrary to law or to the governing rules of the fund or the terms of any relevant contract of insurance.

However, we note that the drafting to set out the extent of the EDR decision maker's powers in relation to a superannuation complaint, and the test to be applied, is unclear and raises many questions about whether there is an intention to change the current decision-making test and process.

Other matters that ASFA considers critical to the effective resolution of superannuation complaints are not reflected in the statutory framework, but are left to the terms of reference. ASFA strongly disagrees with this approach.

In addition, we note that key aspects of the draft Bill are drafted very broadly. In particular, in defining what constitutes a 'superannuation complaint' there is no jurisdictional constraint on:

- who may make a complaint about a decision in relation to a particular member – that is, on the face of proposed new section 1052 of the *Corporations Act 2001*[3], the complainant need not be the member themselves or a person who would, currently, be considered to have an interest in a benefit
- who has an interest in a benefit and therefore is eligible to make a complaint – this is of general relevance but is particularly critical as part of the 'claim-staking provisions' that allow for effective handling of complaints about disputed death benefit distributions

[3] Exposure Draft *Treasury Laws Amendment (External Dispute Resolution) Bill 2017* (Draft Bill), Schedule 1, Part 1, item 2

- the subject matter of the complaint – there is no specific exclusion for complaints about decisions in relation to the management of the fund as a whole
- the time within which a complaint may or must be made – there are no time limits.

These matters are, according to the Consultation Paper, to be addressed in the terms of reference.

One concern that ASFA holds relates to the adopted technique, of seeking to impose constraints on these provisions via the terms of reference, is that if the operations of AFCA are narrowed by the terms of reference, they will be narrower than the fundamental scheme functions set out in new section 1047[4]. This would appear to introduce a risk that AFCA may be non-compliant with the framework legislation.

Additionally, we note that the terms of reference will effectively take the form of a contractual arrangement between the operator of AFCA and its members, albeit with approval by ASIC. The terms of reference will not have the status of delegated legislation and, in any event, the Draft Bill contains no power for delegated legislation to be made to constrain or vary the effect of the key statutory provisions.

Matters of legal efficacy aside, ASFA notes that any approach that fragments key considerations about a person's eligibility to make a complaint between the legislation and the terms of reference has the potential to cause confusion for all stakeholders. It is, in ASFA's view, a highly undesirable approach and one that should be avoided wherever possible.

Consultation Paper Q3:	Are there any issues that are currently in the Bill that would be more appropriately placed in the terms of reference or issues that are currently absent from the Bill that should be included in the Bill?

ASFA does not consider that any of the matters addressed in the draft Bill would be more appropriately placed in the terms of reference.

The final report from the Ramsay Review, and the Government in its response, acknowledged that there are a number of special features that require some differences in the handling of superannuation complaints compared to complaints about other financial products and services. These include the complexity of many of the complaints, the nature of superannuation regulation, and the number of individuals impacted, frequently involving persons other than the trustee, insurer and fund member.

Reflecting this, the Government has accepted that some different provisions are required to ensure superannuation complaints can be effectively resolved.

ASFA agrees with this – however ASFA considers that, as a number of the existing statutory provisions are so crucial to an effective outcome, they should be reflected in the statutory framework rather than the terms of reference. These include:

- clarity around the types of complaints that are **not** eligible to be considered by AFCA as 'superannuation complaints', which should include complaints about the management of the fund as a whole, and when a complaint cannot proceed

[4] Draft Bill, Schedule 1, Part 1, item 2

- confirmation that unlimited monetary jurisdiction is to be maintained for superannuation complaints
- provisions clearly identifying who has an 'interest' in a superannuation benefit, and is therefore eligible to make a superannuation complaint. Critically, this should include claim-staking provisions, which are essential if the new EDR framework is to effectively provide for payment of death benefits and resolution of complaints in relation to those benefits
- clarification of the parties to a superannuation complaint, and when a person may be joined to a complaint
- a provision requiring compliance with decisions of the EDR scheme, noting that existing section 64A of the SIS Act re compliance with SCT determinations is to be repealed. The presence of section 64A in the regulatory framework has, in ASFA's view, contributed to the historical low incidence of failure by superannuation trustees to comply with determinations
- prescription of any applicable time limits for the making of particular types of complaints.

We have addressed these matters in further detail in part D of this submission.

D. SPECIFIC COMMENTS IN RELATION TO THE CONSULTATION MATERIAL

D.1 Issues relating to the powers of AFCA and scope of its review

ASFA considers it important that there is complete clarity regarding fundamental matters regarding the powers of AFCA, and the scope of the review it is to undertake of superannuation complaints.

The Draft Bill would, in ASFA's view, benefit from additional clarity and precision in a number of key aspects. ASFA also holds a strong preference for matters relating to the powers of AFCA and the scope of its review to be fully contained within the statutory framework, and not covered in either the terms of reference of AFCA.

D.1.1 The concept of a 'superannuation complaint'

The concept of what constitutes a 'superannuation complaint' for the purposes of the new EDR framework is critical, and ASFA has a number of concerns with the definition in proposed new section 1052[5].

D.1.1.1 Complaints about the management of the fund as a whole

Subsection 14(6) of the *Superannuation (Resolution of Complaints) Act 1993* (the S(ROC) Act) currently provides that the SCT is unable to deal with a complaint to the extent that it relates to the management of the fund as a whole – for example, complaints about investment performance or the general level of fees and charges.

This is an important limit on the SCT's jurisdiction, as it ensures that fund trustees are able to make operational decisions about the fund overall without concern that they may be open to challenge by individual members. In this respect, it is important to note that trustees are subject to extensive statutory and fiduciary duties, as well as prudential regulation. These legal duties and obligations govern many of the operational decisions they make, and require them to act in the best interests of the overall membership of the fund.

The Draft Bill contains no specific exclusion of complaints relating to the management of the fund as a whole, however:

- paragraph (a)(i) of proposed new subsection 1052(1)[6] refers to a complaint regarding a decision by a trustee in relation to "a particular member or former member of a regulated superannuation fund". It is possible this phrasing may be intended to replace the current exemption for complaints about the "management of the fund as a whole". ASFA notes that the meaning of 'management of the fund as a whole' has been judicially considered, and is concerned that a rephrasing of the definition of what constitutes a 'superannuation complaint' in this way may create uncertainty.
- alternatively, it is possible that the exclusion for "management of the fund as a whole" is intended to be included in the terms of reference. The Draft EM and Consultation Paper provide no guidance on this issue. To the extent it is intended to exclude complaints about the 'management of the fund as a whole' in the terms of reference, ASFA has some concerns about the risks involved with this technique – see our comments above at C.3.

[5] Draft Bill, Schedule 1, Part 1, item 2
[6] Draft Bill, Schedule 1, Part 1, item 2

ASFA recommends that the Draft Bill be amended to include an explicit exclusion for complaints relating to "management of the fund as a whole".

D.1.1.2 No concept of when a person has an 'interest' in a superannuation benefit

Section 15 of the S(ROC) Act sets out when a person has an 'interest' in a superannuation benefit. This provision is of general relevance, but significantly it also includes the 'claim-staking' provisions which enable a trustee to act with certainty when paying a death benefit according to its determination. In contrast, the Draft Bill contains no concept of when a person will be found to have an 'interest' in a superannuation benefit.

We note that the Ramsay Review, in its final report, accepted that the claim-staking provisions were an essential aspect of superannuation complaints handling and must be retained[7]. ASFA considers it critical that these provisions are protected within the statutory framework. It is inappropriate, in our view, for such fundamental rules to be left to the terms of reference.

ASFA considers that as well as clearly defining a 'superannuation complaint', the Bill should set out the circumstances when a complaint is **not** eligible to be heard by the EDR scheme, including where the purported complainant does not have an 'interest' in the benefit. It is preferable that this is addressed in the statutory framework rather than the terms of reference as this would:

- provide an additional level of certainty for trustees
- ensure that all rules relevant to determining whether a particular matter is a 'superannuation complaint' that can be heard by the EDR scheme can be located in the one source, providing clarity of the law to all stakeholders.

Further, see our comments at C.3 above regarding the potential risks involved in seeking to constrain broadly drafted legislative provisions through content in the terms of reference. ASFA is concerned that attempting to limit the persons who have an interest in a benefit via the terms of reference may not be effective to constrain the wide statutory provisions.

In addition, we note that the S(ROC) Act[8] currently includes a concept of a 'qualifying person' – a person who may, by the regulations, be declared to be a member of a superannuation fund, or a person with an interest in a death benefit. Importantly, the *Superannuation (Resolution of Complaints) Regulations 1994*[9] (S(ROC) Regulations) expand on this concept to provide that these 'qualifying persons' include a person who has an interest in a superannuation benefit under the family law superannuation splitting regime. The Draft Bill contains no similar concept and the consultation package is silent on the treatment of such interests.

ASFA recommends that the framework legislation clearly specifies when a person has, or does not have, a relevant 'interest' in a superannuation benefit such that they are eligible to make a 'superannuation complaint'.

[7] Ramsay Review, Final Report, paragraphs 7.12 - 7.15
[8] *Superannuation (Resolution of Complaints) Act 1993* (S(ROC) Act), section 4B
[9] *Superannuation (Resolution of Complaints) Regulations 1994* (S(ROC) Regulations), regulation 4B

D.1.1.3 The parties to a complaint, and joining parties

Section 18 of the S(ROC) Act provides that the trustee will always be a party to a complaint. In contrast, while proposed new section 1053[10] outlines when "other parties" may be joined to a complaint, it does not specify that the *trustee* is a party. While the drafters may have considered this to be self-evident, it would be preferable for it to be specified. It is critical that the trustee is clearly understood to be a party to all complaints relating to a benefit provided by the fund.

We note that the wording of the Draft Bill, and the examples provided in the Draft EM regarding the joining of parties to a complaint – such as trustees, insurers and medical practitioners - are not reflective of how complaints are currently managed in practice. In particular:

- Examples 1.1 and 1.2 in the Draft EM regarding the joining of parties to a complaint make no reference to the role of the trustee in assessment of a member's claim.
- Examples 1.1 and 1.3 both indicate that it is proposed to join medical practitioners to complaints – this differs substantially from the current process.

  While it is possible, under subsection 18(1)(d) of the S(ROC) Act, to join a medical practitioner, this is not the usual process. Rather, the practice is typically limited to those relatively uncommon situations where the governing rules of a fund specifically nominate a person other than the trustee as the decision-maker in respect of a disability-related complaint (it appears that Example 1.3 may be intended to address this scenario).

  In the overwhelming majority of disability-related complaints, the process involves the medical practitioner making a judgment about the complainant's disability (taking into account medical evidence and the definition of 'disability' relevant to the particular benefit) and providing information to be considered by the trustee and insurer. The trustee and insurer retain the final decision-making authority. However, Example 1.3 indicates that when further information is obtained, "the EDR decision- maker decides that the trustee and the insurer should pay the TPD". This is in contrast to Example 1.1, where the EDR decision-maker remits the decision back to the medical practitioner for reassessment, the practitioner determines that the complainant has a total and permanent disability and advises the insurer of its new decision, whereupon "**the trustee decides** to pay the total and permanent disability claim" (our emphasis).
- Proposed new section 1053 contemplates that AFCA can join a decision-maker that is not an insurer or trustee, and that it can make a determination that relates to a decision of a trustee, insurer or other decision-maker, but (unlike the S(ROC) Act), it does not require them to be a party to the complaint. This may be unintended – presumably it would not be the intention to permit AFCA to overturn the decision of a person who is not a party to the complaint and does not have the opportunity to participate in the complaint to justify their decision.

[10] Draft Bill, Schedule 1, Part 1, item 2

- It is also not clear what power AFCA would have to bind a person who is not a trustee or an insurer. That is, to the extent that the person is not a product issuer or a financial services licensee, it is not clear how they are made subject to the new EDR arrangements and bound by any determination or direction of AFCA. Currently, such parties would be made a party to the complaint and then fall under section 64A of the SIS Act, which requires that any party joined to a complaint must comply with a determination of the SCT. Section 64A is being abolished in its entirety by the Draft Bill, from a date to be fixed by proclamation[11].

ASFA presumes that there is no intention to vary the current decision-making process and role of the trustee. In this context, ASFA considers that there is a need for greater precision in the Draft Bill and the examples in the Draft EM to make it clear that this is not the case.

Additionally, in some cases where a consumer currently has a superannuation benefit insured through the fund (for example, insured disability or death cover), the consumer may initially seek to bring a complaint against the insurer rather than the trustee, as 'owner' of the policy. Currently such instances are typically, but not always, resolved as a result of either discussions between the consumer and their fund trustee, or by identification of the issue once it reaches EDR (for example, the Financial Ombudsman Service may inform the consumer that the complaint is more appropriately made against the trustee, and then, if dissatisfaction remains, to the SCT).

ASFA is concerned that, under the proposed new EDR framework, such complaints may not receive the appropriate treatment.

We note that a complaint made in respect of a decision or conduct of an insurer is not generally a 'superannuation complaint' as defined in proposed new section 1052 (with exceptions in relation to the conduct or decision of an insurer in relation to sale of an annuity policy or in relation to an insurance contract where the premiums are paid from a Retirement Savings Account).

A complaint that is not a 'superannuation complaint' will still fall to be handled by AFCA. However, if a complaint is not correctly identified as one that should in fact be a 'superannuation complaint' when first lodged for EDR, it will not attract the specific statutory powers, protections and appeal rights that will apply to superannuation complaints.

ASFA notes that issues may arise if AFCA, on hearing such a complaint, decides there is a need for the superannuation fund trustee to be involved – there does not appear to be any scope, within the terms of the Draft Bill, for the trustee to be joined to a complaint brought against an insurer. It is possible that this may be provided for by the terms of reference, but it would be preferable, in ASFA's view, for further clarity to be provided in the Draft Bill.

We note that this issue reinforces the importance, under the new model, of consumers having good awareness of the appropriate party against which to bring their complaint.

ASFA recommends that further clarity be provided on the parties to a superannuation complainant and joining of persons as parties to a complaint.

[11] Draft Bill, Schedule 3, Part 2, item 26

D.1.1.4 Decisions that do, or do not, involve an exercise of discretion

Proposed new subsection 1052(5)[12] provides that a complaint can be made about a decision whether or not it involved the exercise of a discretion, equivalent to current section 14AA(1) of the S(ROC) Act.

However, the draft Bill contains no equivalent to the current subsection 14AA(2) of the S(ROC) Act, which provides that a decision that did not involve an exercise of a discretion is taken to be unfair and unreasonable if the decision was contrary to law. The insertion of this provision was considered specifically necessary, in relation to non-discretionary decisions, to "resolve the tension between the requirement to determine a complaint by reference to the 'fair' and reasonable' test and the requirement not to do anything that is contrary to law"[13].

Given the preservation of subsection 14AA(1) in new subsection 1052(5), and the retention of the 'fair and reasonable' test for superannuation complaints, ASFA considers it prudent to also include within the statutory provisions one equivalent to subsection 14AA(2).

D.1.1.5 No prescribed time limits for key complaint types

ASFA considers it important that the statutory concept of an eligible 'superannuation complaint' incorporates the requirement that certain types of complaints be made within the prescribed period – complaints regarding death benefit and disability claims, and complaints relating to information provided by a trustee to the Commissioner of Taxation.

The Draft Bill is silent on the time limits for making a complaint regarding a death or disability benefit claim, and the Consultation Paper (paragraph 37) indicates that these will be specified in the terms of reference. In contrast, the time limits within which claims or objections must be lodged with a trustee in order for the SCT to hear a complaint are clearly stated in the S(ROC) Act and/or the S(ROC) Regulations[14].

The Draft Bill provides scope for complaints to be made regarding a trustee's provision of certain statements to the Commissioner of Taxation but, unlike the current S(ROC) Act,[15] fails to recognise any time limit that may apply to such complaints. These types of complaints are also not referred to in the Consultation Paper where it discusses other time limits intended to be covered in the terms of reference (paragraph 37).

ASFA considers that the Draft Bill should also recognise that complaints can only be heard by the new EDR scheme when made before the expiry of any time limit as prescribed in the regulations. It is preferable to include any relevant time limit in the legislative regime, rather than the terms of reference, to ensure:

- the time limits cannot be amended without being subject to a transparent parliamentary process
- trustees are provided with the necessary certainty to pay a death benefit
- disability claims can be made without the lapse of time impacting access to relevant information regarding the member's health and employment

[12] Draft Bill, Schedule 1, Part 1, item 2
[13] Explanatory Memorandum to *Superannuation Legislation Amendment (Resolution of Complaints) Bill 1998*
[14] S(ROC) Act subsection 14(6A) & (6B) re disability complaints; S(ROC) Act subsection 15(2) and S(ROC) Regulations, regulation 5 re death benefit complaints
[15] S(ROC) Act, subsection 15CA(2)

- all rules relevant to determining whether a particular matter is a 'superannuation complaint' that can be heard by the EDR scheme can be located in the one source, providing clarity of the law to all stakeholders.

Further, note our comments above at C.3 regarding the potential risks of seeking to limit broad statutory provisions via content in the terms of reference. ASFA is concerned that time limits prescribed by the terms of reference may not be effective in constraining the wide statutory provisions.

In addition, ASFA notes the comment at paragraph 37 of the Consultation Paper that the terms of reference should include "appropriate time limits for total and permanent disability complaints, which should be designed to ensure that consumers do not have to wait long periods of time to access these benefits". ASFA agrees that timely resolution of all complaints is important and desirable. However, it appears that paragraph 37 misunderstands current subsections 14(6A) and (6B) of the S(ROC) Act regarding the existing time limits for disability complaints. These provisions set an ***outer*** limit on the period within which complaint about a decision in respect of a disability claim must be made, they do not impose any 'waiting period' that must elapse before a claim or a complaint can be made.

ASFA considers it important that any prescribed time limits for making particular types of superannuation complaints are clearly specified in the statutory framework.

D.1.1.6 When a complaint cannot proceed

Section 20 of the S(ROC) Act currently provides that the SCT is not to deal with a complaint if the matter is the subject of legal proceedings that have not been finally disposed of.

The Draft Bill contains no such exclusion. While it is possible that it is intended to cover this in the terms of reference, ASFA is of the view it should be clearly stated in the statutory framework.

D.1.2 Test to be applied by EDR decision-maker different to the current test

Current subsection 37(6) of the S(ROC) Act provides that the SCT **must affirm** a decision if it is satisfied that the decision, **in its operation** in relation to the complainant and, for a complaint regarding payment of a death benefit, any person (other than the complainant, a trustee, insurer or decision-maker) who has become a party to the complaint and has (or claims to have) an interest in the death benefit, was fair and reasonable in the circumstances.

Proposed new section 1057[16] varies in a number of key respects, which ASFA is concerned may lead to unintended consequences.

- Proposed new subsection 1057(2) provides that if the EDR decision-maker is considering making a determination and is satisfied that unfairness, unreasonableness or both exist in relation to the decision or conduct complained about, "the EDR decision-maker may only make a determination for the purpose of placing ***the complainant*** as nearly as practicable in such a position that the unfairness, unreasonableness, or both, no longer exists" (our emphasis).

[16] Draft Bill, Schedule 1, Part 1, item 2

The requirement to consider fairness and reasonableness is limited to ***the complainant***. The requirement would not appear to extend, in a death benefit complaint, to other persons joined to the complaint who may have an interest in the death benefit.

ASFA notes that a common scenario in disputed death benefit complaints before the SCT currently involves an adult child, not financially dependant on their deceased parent, making a complaint that they are entitled to a share, or a greater share, of the parent's death benefit than children – frequently infant and/or financially dependant children - from a later relationship. A consistent body of SCT determinations have found, in this scenario, that the benefit (or the greater share of it) should go to those who would have had an expectation of continuing support from the deceased, had they not died. Typically this results in a determination affirming (or directing) a greater payment to the infant or financially dependant child. This scenario underlines the importance of considering the impact of a decision on all parties who have an interest in the death benefit.

- Proposed new section 1057 appears to limit the focus of the EDR decision-maker to whether the decision or conduct complained about is itself fair and reasonable, and does not contain any requirement to consider whether the decision or conduct is, ***in its operation***, fair and reasonable (unlike current subsection 37(6) of the S(ROC) Act). The ability of the SCT to consider the operation of a decision has been confirmed in previous challenges to the SCT's jurisdiction. It is unclear what impact its removal may have on the ability of AFCA to effectively resolve superannuation complaints.
- Additionally, the determination of whether a decision was "fair and reasonable" recognises that a range of possible decisions and outcomes may exist and that there is not necessarily one "correct" decision or outcome in the circumstances. This is appropriate given the fiduciary duties of a superannuation trustee and the need for trustees to act in the interests of all members.

  The absence of a specific requirement in proposed new section 1057 to affirm a decision if it is considered fair and reasonable raises the dual concerns that:

  - the EDR process may be focussed less on the fairness/reasonableness of the trustee's decision
  - the process may become more a question of what decision the EDR decision-maker would have made in the circumstances.

  This would depart significantly from the current approach to superannuation complaints resolution.

The final report of the Ramsay Review made a finding that the current test applied by the SCT for superannuation complaints was appropriate and should be maintained under the new EDR framework[17], and the Government indicated its acceptance of the Ramsay Review's recommendations. The current drafting of proposed new subsection 1057(2) does not appear, in ASFA's view, to be consistent with this position and has the potential to result in outcomes from AFCA that differ from those that result currently, and historically, from the SCT. It is not clear whether this is intended.

[17] Ramsay Review, Final Report, paragraph 5.117 and the 'panel finding' immediately following; paragraphs 7.19 – 7.22

It is also not clear whether the terms of reference may seek to vary the effect of proposed new subsection 1057(2), to effectively mirror the current test in subsection 37(6) of the S(ROC) Act. If that is the case, ASFA notes our concern, expressed in part C.3 of this submission, about the potential risks associated with the terms of reference seeking to constrain widely drafted legislative provisions.

ASFA recommends that clarification is urgently provided regarding any intention to modify the current EDR test for superannuation complaints.

D.1.3. Conferral of powers and obligations on the 'EDR decision-maker'

The obligations and statutory powers set out in the draft Bill are imposed on or exercisable by "the EDR decision-maker". The only definition of this term, in proposed new subsection 1053(1), indicates that this is the "person who is to determine a superannuation complaint"[18].

We acknowledge – and support – the introduction of flexibility into the framework, so that AFCA is not hampered by unnecessarily prescriptive operating procedures. However, no information has been provided regarding the intended operation of the scheme, such as:

- how decision makers will be selected for the scheme generally and for complaints requiring specific expertise
- the extent of any investigation that will be undertaken before a determination is made
- how the scheme may use panels to resolve complaints
- the requirements to constitute a 'determination' of the EDR decision-maker (for example, whether it is possible that a determination could be made by a single, junior staff member as part of a 'fast track' determination process).

Given the determination by the EDR decision-maker will be taken to replace the trustee's decision[19], these are important matters which should be clarified as a matter of some urgency.

To avoid concerns arising in future about whether powers have been properly exercised and determinations validly made, we recommend that additional clarity be provided as to the identity of the 'EDR decision-maker'. For example, this may require a specific definition to be inserted into the Bill along the lines that the 'EDR decision-maker' is the member (or members, for complaints heard by a panel) of the EDR scheme authorised under Part 7.10A of the *Corporations Act 2001* who is to determine a superannuation complaint. Further, the terms of reference should clearly and specifically address the requirements for composition of, and the making of a valid determination by, the EDR scheme, and the use of panels.

Finally, we do not consider it unreasonable to subject the exercise of some of the more significant statutory powers to some 'checks and balances', to ensure these powers are used appropriately.

[18] Draft Bill, Schedule 1, Part 1, item 2
[19] Draft Bill, Schedule 1, Part 1, item 2 - new subsection 1059(3)

In this respect, we note that the exercise by the SCT of the power to obtain information and documents - one of its most significant powers - requires a written notice signed by the Chairperson. This is appropriate to ensure that the power is used in a measured way, mindful of the potential impact on persons receiving such a notice – particularly where those persons are neither the person whose decision or conduct has been complained of, nor a party to the complaint. It would be appropriate, in ASFA's view, for the exercise the power granted by proposed new section 1054[20] by the EDR decision-maker to be permissible only where approved at a suitably senior level within AFCA.

ASFA considers that further clarity should be provided in relation to 'the EDR decision-maker'.

D.1.4 Inclusion of exempt public sector superannuation schemes is unclear

Certain exempt public sector superannuation schemes are not bound by the SIS Act, and therefore not automatically subject to the jurisdiction of the SCT.

Under the current complaints framework, these schemes may effectively elect that the SCT apply for complaints resolution purposes, and they are thereby "taken to be a regulated fund for the purposes of" the S(ROC) Act[21]. We note that 'regulated superannuation fund' is a term with an established and clear definition, which has been adopted in the Draft Bill, and requires, amongst other things, that the trustee has elected to be bound by the SIS Act.[22]

The Draft EM notes, at paragraph 1.132, that

> Some trustees of superannuation funds are not required to hold an AFS licence and are not regulated by APRA, including some exempt public sector superannuation schemes. In line with current arrangements that apply to the SCT, these funds will not be required to become members of the new EDR scheme, but will be able to elect to do so.

However, the Draft Bill does not contain any provision, equivalent to the current drafting in the S(ROC) Act and S(ROC) Regulations, deeming a fund that has 'elected' to become a member of AFCA to be a 'regulated fund'. This raises the concern that a complaint in relation to such a scheme would not be a 'superannuation complaint' under proposed new subsection 1052(1)(a), as that paragraph specifically refers to a decision of 'the trustee of a regulated superannuation fund'.

ASFA recommends that clarification be provided as to the manner in which exempt public sector superannuation schemes are be brought within the AFCA regime.

[20] Draft Bill, Schedule 1, Part 1, item 2

[21] Section 4A of the S(ROC) Act, taken with regulation 4A and Schedule 1 of the S(ROC) Regulations

[22] SIS Act, section 19; definition adopted by Draft Bill, Schedule 1, Part 1, item 1 – proposed new section 761A

D.1.5 Other matters

Consultation Paper, Q1: Are there any other statutory powers the EDR body will need to resolve superannuation complaints effectively?

In terms of statutory *powers* for AFCA, ASFA considers that the Draft Bill should be amended to permit the EDR decision-maker to share information with other complaints or dispute resolution bodies, with the consent of the individual (consistent with section 63(3B)(5) of the S(ROC) Act). This process can lead to a better consumer experience in circumstances where aspects of a complaint are relevant to other dispute resolution processes or are more appropriately dealt with by another dispute resolution channels. In this respect, we note that while the intent of the new EDR framework is that there will be a single EDR scheme for the financial services industry, there is still the prospect that a superannuation complaint may raise issues that may be relevant to other dispute-resolution processes - for example, a complaint may raise matters relating to discrimination.

ASFA also considers it important that the identity, role, powers and limitations of the 'EDR decision-maker' are more clearly stated in the legislation.

The earlier parts of section D.1 of this submission identify a number of other matters which we consider should be covered in the legislation rather than the terms of reference.

D.2 Statutory framework Vs terms of reference

ASFA has noted earlier in this submission our concern that too much detail has been left to be addressed in the terms of reference of AFCA, rather than being specified in the statutory framework.

A number of these concerns have been addressed in part D.1 above, where we identified the fragmented approach to dealing with the powers of AFCA and the scope of its review. Part D.2 below addresses a number of additional matters that go to the balance between the statute and the terms of reference.

D.2.1 'Material changes' to the terms of reference

ASFA welcomes the inclusion in the draft Bill of a condition that material changes to the EDR scheme must not be made without the approval of ASIC[23] and the requirement that in assessing a request for such approval, ASIC must take into account a list of prescribed matters[24].

We note, however, that the term 'material change' is not defined in the Draft Bill and the Draft EM gives no indication of what types of changes would be considered 'material' or 'immaterial'. Given the significance of the approval process and the need to provide certainty to members of the AFCA, ASFA considers it appropriate that clear guidance is provided regarding the types of changes for which approval is, or is not, required.

[23] Draft Bill, Schedule 1, Part 1, item 2 - new subsection 1048(1)(d)
[24] Draft Bill, Schedule 1, Part 1, item 2 - new sections 1050, 1046(2)

We anticipate that – as is the case with the current financial services ombudsman schemes – member approval will be required for significant changes to the terms of reference. However, we note that membership of the new scheme will be significantly more diverse than that of the existing schemes. This raises the potential that changes to the terms of reference will impact differently, or have different degree of importance, depending on which sector of the financial services industry a member belongs. Further, as the governance arrangements for the new scheme have not yet been outlined, it is unclear what representation each sector may have on the Board and how the scheme operator will balance differing sectoral views on a change to the terms of reference.

ASFA considers it important that the framework legislation defines what constitutes a 'material change' to the terms of reference, and that further clarification is urgently provided, via ASIC regulatory guidance.

D.2.2 Unlimited monetary jurisdiction for superannuation complaints

The final report from the Ramsay Review acknowledged the critical importance of the current unlimited monetary jurisdiction for superannuation complaints, and recommended that this be preserved "in line with current arrangements".[25]

The Consultation Paper notes (at paragraphs 38 and 45) that unlimited monetary jurisdiction for superannuation complaints will be maintained. However, this is not a provision that is enshrined in the Draft Bill.

Further, while the draft Bill provides that one of the scheme's functions is to "ensure that the complaints mechanism under the scheme is accessible to any persons dissatisfied with members of the scheme"[26], this must be read as subject to any limits imposed via the terms of reference, such as the claim limits and compensation caps that will be continued (albeit at increased levels) for consumer complaints and non-credit small business complaints. ASFA is concerned that the absence of specific statutory protection for unlimited monetary jurisdiction for superannuation complaints leaves open the prospect that jurisdiction may be limited, via an amendment to the terms of reference at some time in the future.

As clearly stated in our previous submissions to the Ramsay Review, ASFA considers it absolutely crucial that unlimited monetary jurisdiction is maintained for superannuation complaints. This matter is of such significance that we consider it should be enshrined in statute - where any future amendments would be subject to public and parliamentary scrutiny - and not left to be addressed in the terms of reference.

ASFA considers that unlimited monetary jurisdiction for superannuation complaints should be clearly specified in the framework legislation.

[25] Ramsay Review, Final Report, recommendation 4.5
[26] Draft Bill, Schedule 1, Part 1, item 2 - new subsection 1047(1)(b)

D.2.3 Critical that the 'claim-staking provisions' receive statutory protection

The Ramsay Review accepted the importance of the current 'claim-staking' provisions in the S(ROC) Act as a feature that is necessary to ensure the effective resolution of superannuation death benefit complaints. The claim-staking provisions are essential to ensure payment of death benefits is not unduly delayed, to protect trustees from further claims where claim-staking processes have been properly applied, and to enable effective resolution of death benefit complaints.

In effect, the provisions set out a 'due diligence' process whereby trustees identify potential beneficiaries, assess their claims, communicate their proposed distribution of the benefit and allow a prescribed time for objections. At the conclusion of this process, a trustee is able to proceed to pay the benefit without fear that a disappointed complainant (who had not raised an objection, or whose objection had been considered and dismissed) cannot subsequently lodge a further complaint with the SCT about the trustee's decision in relation to payment of the benefit.

While nothing in the S(ROC) Act prevents a disappointed claimant commencing litigation proceedings, the claim-staking provisions at least provide certainty to a trustee that if it paid a death claim those notified claimants who had not objected could not go back later and make a claim to the SCT. Without such a mechanism in the framework legislation for the new EDR arrangements, trustees will be denied the current reasonable level of certainty currently provided by the S(ROC) Act.

Without effective claim-staking provisions, it is extremely doubtful that an ombudsman style EDR scheme could provide a workable complaints-resolution outcome for complaints involving superannuation death benefits – which comprised 21.5 per cent of complaints before the SCT for quarter 1 of 2017[27].

The Consultation Paper notes, at paragraph 37, that claim-staking provisions for superannuation death benefits will be included in the terms of reference for AFCA.

Given the importance of the claim-staking provisions, ASFA considers it critical that these are enshrined in statute – where any future amendments would be subject to public and parliamentary scrutiny - and not left to be addressed in the terms of reference. In ASFA's view, it is clear that the process for dealing with death claims by superannuation fund trustees is certainly one of the unique features which the Ramsay Review concluded requires statutory provisions for effective dispute resolution.

ASFA considers it critical that the 'claim-staking provisions' for superannuation death benefits be specified in the framework legislation, rather than the terms of reference for AFCA.

D.2.4 Matters that should be included in the terms of reference

The consultation package is silent on a number of important details. We have noted elsewhere those matters which we consider must be included in the statutory framework rather than the terms of reference.

[27] SCT Quarterly - Q1 2017

In ASFA's view, it is important that the terms of reference address matters including:

- The provision of information by trustees – a requirement equivalent to sections 24, 24AA of the S(ROC) Act, that the trustee provides all relevant documents to the EDR decision-maker upon being notified that a superannuation complaint has been made.
- The complainant's right to have representation, consistent with section 23 of the S(ROC) Act.
- A requirement for the EDR decision-maker to provide the parties with a copy of a determination, consistent with section 44 of the S(ROC) Act[28].
- A requirement that a matter remitted for consideration by the trustee be considered as soon as practicable, consistent with section 65 of the S(ROC) Act.
- Notification requirements:
    - provisions equivalent to section 24A of the S(ROC) Act, which require trustees to advise persons who may have an interest in the outcome of a complaint – this is critical to effective death benefit distributions, as in the absence of such notification a person may not be aware they have an interest.
    - a requirement for the EDR decision-maker to advise each party of their right to appeal the determination (consistent with section 45 of the S(ROC) Act).
- The circumstances in which the EDR decision-maker can treat a complaint as withdrawn (consistent with section 22 of the S(ROC) Act).

D.3 AFCA – structure, governance, operation, funding and settling the terms of reference

At this time, very little meaningful information has been made available regarding the proposed new EDR body, AFCA.

The Consultation Paper indicates that it will be "based on an ombudsman model" and established "by industry" as a company limited by guarantee[29].

Further, the Consultation Paper states that AFCA will:

> …operate under a co-regulatory framework. This means that while the AFCA board will make its own decisions regarding funding, staffing and dispute resolution processes, it must comply with legislative and regulatory requirements, as set by Government and ASIC. Such an approach will provide the scheme with flexibility and adaptability to respond to changes in the regulatory framework, user expectations and the overall economic context, but ensure that minimum standards and protections for users are retained.[30]

[28] Proposed new section 1060 provides that a copy of the EDR decision-maker's determination is evidence of the determination but does not require the EDR decision-maker to provide copies to the parties

[29] The Treasury, Improving dispute resolution in the financial system - Consultation Paper, May 2017 (Consultation Paper) , paragraph 8

[30] Consultation Paper, paragraph 9

The final report of the Ramsay Review recommended that the new EDR scheme be formally approved and that it must have, at a minimum an independent board with an independent chair and equal numbers of directors with industry and consumer backgrounds, and that it be funded by industry. The Review also recommended that membership for financial firms should be compulsory through a licensing condition (or equivalent requirement).[31]

The Government has indicated its agreement with that recommendation, however the consultation material released to date provides industry with no genuine detail on key matters regarding AFCA. In particular, we have noted in part C.2 of this submission the difficulty of properly assessing the impacts of the proposed EDR framework without access to a draft of the constitution for the scheme operator and the terms of reference – or even an outline of the terms of reference.

In ASFA's view, an optimally conducted consultation process would have involved these documents being made available to stakeholders along with the Draft Bill and Draft EM. We further note that the 'Treasury Consultation Note' *Australian Financial Complaints Authority: Consultation on the Authorisation Process*, released on 5 June, contains no real information of any kind and represents only an indicative (and somewhat optimistic) timeline.

ASFA anticipates that the consultation yet to occur in relation to the establishment of AFCA and its terms of reference will provide more clarity, and we look forward to participating in that process.

In the meantime, we note below a number of matters that will need to be considered.

As noted above, the Ramsay Review indicated that the new EDR body should have an independent board, with an independent chair and equal numbers of directors with industry and consumer backgrounds. No further information has been provided regarding:

- How many directors will be appointed to the Board – in this case, the need to maintain a workable sized Board may be in conflict with the need to ensure diversity of experience and appropriate sectoral balance.
- How sectoral representation will be maintained when the membership of AFCA will be substantially more diverse than the two existing financial services ombudsman schemes, covering all financial services and products. It will be important, in ASFA's view, to ensure that:
    - all sectors of the financial services industry are fairly represented on the AFCA board, given (virtually) all providers will be subject to its jurisdiction and will contribute toward its funding.
    - there is equitable balancing of sectoral differences – for example, the diverse membership raises the genuine prospect that particular terms of reference (or future changes to the terms of reference) will impact differently on the providers of different types of products and services.
- How will the independent chair be appointed – by the Minister?
- How will directors' eligibility for appointment be determined and what will be the process for their appointment – importantly, who is responsible for making the initial appointments of directors (the independent chair and/or the Minister?) and how are future appointments to be handled?

[31] Ramsay Review, Final Report, recommendation 2 and Government response thereto

- How will the terms of reference be settled – ASFA considers it critical that they be subject to industry consultation and notes that, given the sheer volume of important detail intended to be covered in the terms of reference, it is imperative that adequate time is provided to allow full and genuine consultation on all issues.

  It should be accepted that more than one round of consultation may be necessary to ensure all matters are adequately addressed. ASFA also notes that the existing EDR bodies (the SCT, Financial Ombudsman Service and the Credit and Investments Ombudsman) may be able to provide invaluable insight into the drafting of the terms of reference and we strongly recommend they are engaged as part of the process.

- How is the staffing of AFCA to be determined – given the diversity of membership and the products and services provided by those members, it will be important that AFCA is resourced in a way that ensures sufficient expertise is maintained to provide effective dispute resolution.

  In particular, we have noted in our previous submissions to the Ramsay Review that superannuation is a significantly more complex product than most others and that resolution of superannuation related complaints requires specialist knowledge and expertise, not merely generic dispute resolution skills. ASFA would recommend establishing a superannuation-specific stream within AFCA to serve as a repository of superannuation experience and expertise.

- What will be the funding arrangements for AFCA – the Consultation Paper makes it clear that AFCA will be industry funded but gives no indication how this is to occur. In particular:
  - Is funding to be levied based on the scale of a provider's business/operations, or solely on the volume of complaints its members/customers have made to AFCA?
  - Is funding to be an upfront levy, an annual in arrears levy (taking into account complaint experience), or a mixture of both?
  - Will the levy be collected as part of, or separate to, the imminent ASIC cost recovery levy, and what level of transparency will be provided to stakeholders?

    ASFA notes that industry has consistently raised concerns over the lack of transparency provided in relation to the funding provided by ASIC for the operations of the SCT, which has been recouped from the amount paid as financial institutions supervisory levy by APRA-regulated superannuation funds.

    In particular, it is vital to ensure, in ASFA's view, that the funding model does not in any way involve cross-subsidisation between the different sectors of the financial services industry. Any outcome that might see the trustees of APRA-regulated superannuation funds subsidising AFCA's activities that relate to complaints other than 'superannuation complaints' would be unacceptable.

    In moving to a new, fully industry-funded EDR model, it is in ASFA's view critical to ensure that full transparency and accountability is provided by the scheme operator on matters such as its total funding needs, its sources and application of funding, the breakdown of its activities between the different sectors of the financial services industry, its actual spend against budgeted spend, and how any under or over collections are to be handled. In short, a comprehensive budgeting and annual reporting process will be required.

- The role of the independent assessor

  The Draft Bill, which provides that one of the conditions to which the Minister's authorisation of an EDR scheme is subject is that the scheme "must have an independent assessor"[32]. The Consultation Paper notes that the role of the independent assessor will be to "review the way in which disputes were handled by the scheme (but not the outcome of the dispute)" (paragraph 36).

  The independent assessment process represents a potentially significant new development for superannuation complaints, and further clarity is required as to the intended operation of this role. For example - the reasons that independent assessment would be undertaken, whether members of AFCA will have any input into the assessment process, and any obligations on AFCA in relation to the findings of the independent assessor. ASFA suggests that for the process to deliver meaningful outcomes, and to ensure full oversight, it will be necessary for any requirements to be supported by the proposed ASIC regulatory requirements and not left entirely to the terms of reference of AFCA, where they may be subject to future amendment.

- Finally, we note that there is no requirement in the Draft Bill that AFCA be operated by the scheme operator on a not-for-profit basis. While it may be the intention that this is specified in either the terms of reference or the constitution document for the scheme operator, ASFA considers it preferable – to avoid any potential inference that a profit-making objective is appropriate – that this is clearly stated in the framework legislation. Given that AFCA is to be entirely industry-funded it would not be acceptable, in ASFA's view, for it to be operated with a view to profit.

ASFA recommends that further clarity regarding the establishment, structure, governance, funding arrangements and terms of reference for AFCA be released as a matter of urgency.

Consultation Paper, Q2: Do you consider that the Bill strikes the right balance between setting the new EDR scheme objectives in the legislation whilst leaving the operation of the scheme to the terms of reference?

As indicated throughout this submission, ASFA does not agree that an appropriate balance has been struck between the legislation and the terms of reference.

There are a number of matters that we consider so fundamental to the effective resolution of superannuation complaints that these should be reflected in the framework legislation and not left to the terms of reference (see, in particular, our response below to Q3).

Consultation Paper, Q3: Are there any issues that are currently in the Bill that would be more appropriately placed in the terms of reference or issues that are currently absent from the Bill that should be included in the Bill?

ASFA does not consider that any of the matters addressed in the draft Bill would be more appropriately placed in the terms of reference.

The final report from the Ramsay Review, and the Government in its response, acknowledged that there are a number of special features that require some differences in the handling of superannuation complaints compared to complaints about other financial products and services.

[32] Draft Bill, Schedule 1, Part 1 – new subsection 1048(1)(c)

These include the complexity of many of the complaints and the number of individuals impacted, frequently involving persons other than the trustee, insurer and fund member.

Reflecting this, the Government has accepted that some different provisions are required to ensure superannuation complaints can be effectively resolved. ASFA agrees with this – however ASFA considers that, as these provisions are so crucial to an effective outcome, they should be reflected in statute rather than the terms of reference. These include:

- unlimited monetary jurisdiction for superannuation complaints.
- identification of who has an interest in a superannuation benefit, and is therefore eligible to make a complaint. Significantly, this must in ASFA's view include specific 'claim-staking provisions', which are essential if the new EDR framework is to effectively provide for payment of death benefits and resolution of complaints in relation to those benefits.
- a provision requiring compliance with decisions of the EDR scheme, noting that existing section 64A of the SIS Act re compliance with SCT determinations is to be repealed. In ASFA's view, the presence of section 64A in the regulatory framework has contributed to the historical low incidence of failure by superannuation trustees to comply with determinations.
- prescription of any applicable time limits for the making of particular types of complaints.

We also note, as outlined in section C.2 above, our concern is that stakeholders have been asked to provide feedback on the Draft Bill without the benefit of seeing a draft of the terms of reference. Given the decision to split the detail between these two critical documents, the unavailability of the terms of reference – or even an outline of them – makes it extremely challenging for stakeholders to fully assess the potential implications of the new EDR framework.

D.4 Transitional issues

The success of the new EDR framework will depend heavily on how effectively the many transitional issues are addressed.

D.4.1 Choice of EDR body during transition period?

The Consultation Paper states, at paragraph 42, that "all new superannuation complaints will be made to the new EDR scheme from the date the new body is operational".

This is not reflected in the Draft Bill – in fact, proposed new section 14AB of the S(ROC) Act[33] indicates that the SCT may continue to accept new complaints for the first six months after the commencement of AFCA, or such longer period as is prescribed by the regulations.

This appears to suggest the potential that consumers will initially have the choice of lodging a superannuation complaint with either AFCA or the SCT. ASFA is strongly of the view that this is an inappropriate outcome.

[33] Draft Bill, Schedule 1, Part 2, item 42

To provide certainty for all stakeholders, and to maximise the prospects of an orderly clearing of the SCT's caseload before its scheduled closure by 1 July 2020, it is important that there is a clear cut-over date from which complaints can no longer be made to the SCT. This could be a specific future date prescribed in the legislation, or set by proclamation, however we consider it appropriate that it is aligned with the date on which AFCA commences operations.

ASFA does not consider it appropriate to allow complaints to be made to either the SCT or AFCA at the election of the complainant, given the different EDR models employed and other key differences including, potentially the test to be applied at EDR (see D.1.2 above). A choice of EDR scheme would also raise significant practical issues, particularly for death benefit complaints – for example, where one potential beneficiary complained to the SCT and another complained to AFCA, how would it be determined which body heard the complaint?

It is important to ensure there is no scope for double consideration or, conversely, for gaps in coverage where complaints cannot be determined by either body - for example, if a person initially complained to the SCT then seeks to have the complaint transferred to AFCA, but it is by then outside any applicable time period.

ASFA is strongly of the view that the SCT should be unable to accept new superannuation complaints from the date of commencement of AFCA.

D.4.2 Complaints to AFCA where previous SCT consideration

The Consultation Paper indicates, at paragraph 42, consumers "will have the option to refer complaints previously made to the SCT to the new scheme once it is operational".

This raises two important issues.

D.4.2.1 Current complaints that SCT has commenced to deal with

ASFA presumes that any ability to transfer a current complaint from the SCT to AFCA would apply only to those complaints lodged with the SCT that had not yet commenced to be addressed. The transfer of SCT complaints that have commenced would be problematic (given the differences between the existing and new EDR frameworks), would jeopardise the prospect of an orderly wind-up of the SCT, and would involve duplication of effort (and therefore cost to industry) as the complaint would effectively be heard afresh.

Given that superannuation complaints can involve multiple parties, it would also be necessary to ensure that any conditions on the ability to transfer a complaint from the SCT to the new EDR body are clearly stated. For example, in a contested death benefit complaint involving many potential beneficiaries, is it necessary for all to agree to the transfer?

It is important to ensure there is no scope for double consideration - any scope for 'forum shopping' must be avoided.

Additionally, the transition must ensure there are no gaps in coverage where complaints cannot be determined by either body (for example, if a person initially complain to the SCT then seeks to transfer the complaint to AFCA, but has by then exceeded any applicable time period.

As noted at D.4.1 above, ASFA strongly prefers to see a clear cutover date with all complaints arising from that date only able to be made to AFCA, with all complaints lodged before that date remaining with the SCT for resolution.

D.4.2.2 Complaint or subject matter previously dealt with by the SCT

The Draft Bill contains no provision which prevents an individual making a complaint to AFCA which has already been considered and either determined or dismissed by the SCT, or where the subject matter of the complaint has already been addressed.

Currently, subsection 22(3)(d) of the S(ROC) Act provides that the SCT may treat a complaint as withdrawn if, in a case where the subject matter of the complaint has already been dealt with by the Tribunal or by another statutory authority "the Tribunal thinks that the subject matter of the complaint has been adequately dealt with".

While this power is not commonly used, it has some relevance in circumstances where, for example, a potential beneficiary to a death benefit initially elected not to be joined as a party to a complaint made by another person, then decided to lodge a complaint themselves after the SCT had already heard the initial complaint. Similarly, there appears to be nothing in the Draft Bill currently that would prevent an individual who has had a complaint determined by the SCT seeking to have it also considered by AFCA. While an exclusion for such cases could be provided in the terms of reference, ASFA considers it preferable that it is clearly specified in the legislation.

We further note that the secrecy provisions in the S(ROC) Act would currently prevent the SCT confirming to AFCA whether it has previously dealt with a complaint or the subject matter of a complaint. This could be addressed through an amendment to the S(ROC) Act but it is unclear how any such confirmation could be provided once the SCT has been wound up and has ceased to have any functional existence or staffing.

To minimise duplication of effort and cost, avoid 'forum shopping' and maximise the prospects of an orderly wind-down of the SCT, ASFA considers it important that:

- a complaint that the SCT has already commenced to consider should remain with it for resolution, with no ability for the consumer to transfer it to AFCA
- AFCA be prevented from hearing a complaint (or its subject matter or circumstances) that has already been dealt with by the SCT.

D.4.3 Funding and resourcing of SCT during transition period

With the SCT continuing its operations until 1 July 2020 to resolve its current backlog of complaints, it is critical that it receives adequate funding during its wind-down period.

It should be noted that it is likely the SCT will actually require an ***increase*** over its current level of operational funding in order to complete its caseload before its closure.

ASFA notes with some concern that the Government's Budget papers state[34] (our emphasis):

> The additional resourcing to ASIC to monitor AFCA is also offset by **a reduction of funding of $7.2 million over four years from 2017-18 associated with the SCT being wound down** and no longer operating from 1 July 2020. The Australian Prudential Regulation Authority Financial Institutions Supervisory Levies will be reduced accordingly.

This indicates a proposed ***decrease*** in funding for the SCT, effective almost immediately. We note that the consultation paper setting out the proposed financial institutions supervisory levy for 2017-18 – the levy collected by APRA, part of which is provided to ASIC for disbursement on behalf of the SCT – is, as for the last several years, silent on the amount to be allocated to fund the SCT's operations.

It is, in ASFA's view, unacceptable the SCT may face a reduction in its annual operating budget at this time. We consider it a very real risk that underfunding of the SCT may jeopardise its ability to clear its caseload before wind-up.

Additionally, we note that in the 2016-17 Budget, the SCT was awarded additional funding of $5.2 million (including $2.7 million in capital funding) to improve its processes and reduce its complaints backlog. ASFA acknowledges that it may no longer be considered appropriate to expend this money on capital works that were intended to deliver medium and long term improvements in the SCT's performance. However, we consider it imperative that the SCT retains access to the full $5.2 million and is empowered to apply it as needed toward clearing its caseload by 1 July 2020.

The documentation for the annual financial institutions supervisory levy (APRA levy) should, for the duration of the transition period, clearly specify the amount of funding allocated for the operations of the SCT. ASIC should also be required to provide a greater level of transparency over the monies made available to the SCT for its operational purposes until wind-up.

It will also be imperative to ensure there is adequate resourcing for the SCT in the transition phase, in terms of ensuring the availability of appropriately qualified and experienced staff (noting that it may be difficult to maintain SCT staffing while simultaneously establishing superannuation experience and expertise in the new EDR scheme). We note that the SCT is currently undertaking a modelling exercise to ascertain its funding and resourcing needs for the wind-down period[35]. We strongly urge Treasury, APRA and ASIC to take the output of this modelling into account in finalising the SCT's funding for its remaining years of operation.

Without adequate funding and resourcing for the SCT, ASFA holds genuine concerns that it will be unable to fully clear its caseload by 1 July 2020.

ASFA considers it absolutely critical that adequate funding and resourcing is provided to the SCT during its wind-down phase, to enable it to conduct a professional, efficient and orderly closeout of its existing caseload. We note that this may actually require an increase in the SCT's current funding level, rather than the decrease foreshadowed in the 2017-18 Budget papers.

[34] Budget Paper 2 for 2017-18, page 162

[35] Ms Helen Davis, Chair of the Superannuation Complaints Tribunal - Senate Economics Legislation Committee Estimates, 31 May 2017

D.4.4 Other transitional issues

Consultation Paper, Q4:	Are there any additional issues that should be considered to ensure an effective transition to the new EDR scheme?

According to the Consultation Paper and the Government's Budget night announcement, AFCA is intended to be operational from 1 July 2018.

The establishment of AFCA and the transition of superannuation complaints and other financial services disputes to it is a substantial undertaking. ASFA considers the proposed commencement date ambitious and is concerned that a rushed implementation may lead to seriously flawed outcomes.

We note that only a small part of the detail has been provided in the consultation package, while much of the overall package remains outstanding including the ASIC regulatory guidance, details of AFCA's structure and governance, and – perhaps most significantly – the terms of reference for the scheme. These are all pieces that will, along with the framework legislation, make up the new EDR framework.

It is imperative that the time needed for development, industry consultation and finalisation of all these outstanding pieces is not underestimated. It must also be clearly understood that industry will need adequate lead time to implement the necessary changes (as outlined in section D.7 below in response to Q8), and these cannot practicably be made until the package has been finalised. When all these matters are taken into consideration, the 1 July 2018 commencement date for AFCA appears, in ASFA's view, to be overly ambitious.

Important transition issues include:

- **Resourcing:** It will be imperative to ensure there is adequate resourcing for the SCT in the transition phase. This will require the provision of sufficient monetary resourcing, as well as ensuring the availability of appropriately qualified and experienced staff (noting that it may be difficult to maintain SCT staffing while simultaneously establishing superannuation experience and expertise in AFCA). See further comments in section D.4.3 above.
- **Cut-off date:** There should be a clear cut-off date for the lodging of complaints with the SCT. As noted in section D.4.1 above, a situation where the SCT may be forced to continue to accept complaints for the first six months of the transition period runs in direct conflict with an orderly and effective wind up of its case-load
- **Archival of records:** It will be vital to ensure that all SCT records are transferred and held in a central location (presumably within ASIC) so they can be retrieved in future if required.
- **Suspended cases:** There will need to be consideration of how the new framework will address those complaints to the SCT that were suspended for a time because the subject matter was the subject of court proceedings[36], but now fall to be determined at EDR.
- **Court appeals and returns:** In the event that the Federal Court, in hearing an appeal against a determination of the SCT, remits the matter back, how will this be addressed?
- **Residual matters:** In the event there are complaints before the SCT at the date it is to be wound up that are not finalised, how will these be resolved (will AFCA have to commence hearing them afresh?).

ASFA recommends that clarity be provided in relation to the above transitional issues as a matter of some urgency.

[36] Under section 20 of the S(ROC) Act

D.5 Other matters relevant to the new EDR framework

D.5.1 Failure to attend conciliation harshly penalised

Where a complainant fails to attend conciliation, the consequences under the Draft Bill are more severe than under the S(ROC) Act.

In addition to the EDR decision-maker being able to treat the complaint as if it has been withdrawn (consistent with subsection 28(4) of the S(ROC) Act) the complainant also commits an offence under proposed new subsection 1055(4)[37] and is subject to a penalty of 30 penalty units. In contrast, the offence for failure to attend conciliation currently under section 28(5) of the S(ROC) Act specifically excludes the complainant.

ASFA considers it inappropriate that a complainant may be subject to the same penalty for failure to comply as a trustee or insurer. The appropriate sanction for a complainant's failure to attend conciliation is, in ASFA's view, the withdrawal of the complaint, with no further penalty.

D.5.2 Right of appeal against determinations

The draft Bill preserves the right of a party to appeal to the Federal Court against a determination of a superannuation complaint[38]. However, as the new EDR scheme will not be a statutory body, the parties will no longer have the ability to seek judicial review under section 5 of the *Administrative Decisions (Judicial Review) Act 1977* and section 39B of the *Judiciary Act 1903*.

Under the current complaints framework for superannuation, a party who considered that the SCT erred in ruling a complaint outside its jurisdiction, or disagreed with a decision by the SCT to treat a complaint as withdrawn, is able to seek judicial review. This could potentially be mirrored in the new framework by providing the parties to a complaint with a specific right of review of such decisions, for example by a panel within AFCA.

D.6 Internal Dispute Resolution (IDR)

In its final report, the Ramsay Review noted that:

> Effective IDR benefits both firms and consumers. IDR is an important element of financial firms' overall relationship with their customers and is the primary avenue for aggrieved consumers to seek redress. Pressure on EDR is reduced when complaints are resolved directly between firms and their customers.[39]

The Review recommended that the existing IDR arrangements for financial services should be significantly revised to enhance the transparency and effectiveness of the IDR process. In particular, the Review recommended, and the Government accepted, that:

- to improve the transparency of IDR, financial firms should be required to report to ASIC on their IDR activity, including the outcomes for consumers in relation to complaints raised at IDR[40].

[37] Draft Bill, Schedule 1, Part 1, item 2
[38] Draft Bill, Schedule 1, Part 1, item 2 - new section 1061, consistent with section 46 of the S(ROC) Act
[39] Ramsay Review, Final Report, paragraph 10.17
[40] Ramsay Review, Final Report, recommendation 8 and The Hon Scott Morrison, Media Release: Building an accountable and competitive banking system, Attachment B: Government Response to the Ramsay Review (Government response)

- upon receipt, the EDR body should refer all complaints back to the financial firm (or superannuation trustee) for a final opportunity to resolve the matter via IDR. It should register and track the progress of complaints referred back to IDR and should have the power to determine a dispute where the financial firm fails to resolve it within a set timeframe[41].

The first of these recommendations is reflected in the consultation package, with a proposed commencement date of the day after Royal Assent. ASFA notes, with some concern, that the consultation package provides absolutely no detail about the nature and extent of these requirements, which are due to commence the day after the Bill receives Royal Assent.

Our particular concerns with the proposed new IDR arrangements are outlined below.

D.6.1 Replacement of superannuation IDR arrangements with generic requirements

ASFA agrees that timely resolution of complaints is important and desirable and that trustees should make all reasonable efforts to expedite complaint resolution.

Section 101 of the SIS Act currently requires a superannuation trustee to have in place arrangements for IDR that ensure that (amongst other things), and inquiry or complaint "will be properly considered and dealt with within 90 days after it was made"[42]. This is greater than the 45 day period allowed for IDR for other financial products and services, as it reflects:

- the complexity of many superannuation complaints, often involving multiple parties (not simply the product holder and product issuer)
- the need to obtain the often detailed information required to assess particular types of complaints, which can involve:
    - for disability-related complaints - detailed specialist evidence from medical practitioners and also evidence from employers
    - for death benefit related complaints - medical evidence about the cause of death, as well as often extensive details establishing the claims of all potential beneficiaries (including their relationship to the deceased, and the extent of any financial dependence or interdependence).

Superannuation trustees, bound by their fiduciary duties to act in the best interests of fund members, act with diligence when considering superannuation complaints and endeavour, where possible, to deal with them as promptly and efficiently as possible. The 90 day timeframe allowed under section 101 is understood to be the outer time limit, with trustees typically imposing internal service standards seeking to achieve resolution well within that timeframe. Nonetheless, given the nature of superannuation, there will be cases where 90 days – and in some cases longer – may be required to ensure a full assessment of the complainant's case.

ASFA considers it important that, in moving from the specific superannuation IDR arrangements to a generic IDR regime, the IDR timeframe for superannuation complaints remains at the current 90 days.

[41] Ramsay Review, Final Report, recommendation 9 and Government Response
[42] *Superannuation Industry (Supervision) Act 1993*,subsection 101(1)(b)

D.6.2 Reporting of IDR activity to ASIC

As noted above, the consultation package proposes to introduce new IDR reporting requirements on trustees, with effect from the day after the Bill receives Royal Assent, however no detail has been provided about the nature, extent or frequency of this reporting nor the format and reporting channel to be adopted.

The Draft Bill provides ASIC with completely unfettered powers to determine all of this detail, and specify it via legislative instrument. ASFA notes that it would have greatly aided the consultation process had a draft – or at the very least, a detailed outline – of the proposed ASIC requirements been made available as part of the consultation package.

The new IDR arrangements are likely to involve significant implementation effort by trustees (see our comments in section D.7 below) and it is therefore important that the requirements are settled well in advance of their commencement date. This raises two further important concerns:

(i) There is a need to ensure genuine transparency and comparability - as we noted in an earlier submission to the Ramsay Review[43], in order to deliver genuine transparency and comparability over IDR activity, any IDR reporting requirements will need to be extremely carefully framed. In particular:

- Careful consideration would be needed to ensure the content of any reporting is appropriately formulated to ensure consistency and true comparability. For example, it would be necessary to ensure that all providers are required to report using consistent definitions of 'complaint' or 'dispute', as relevant, and that any 'materiality' thresholds that may be applied are clearly defined.
- It would be necessary to avoid drawing comparisons between different types of providers that are subject to different requirements – for example, trustees of APRA-regulated superannuation funds should not be compared to other types of providers.
- There is no existing mechanism for superannuation trustees to provide data to ASIC on a regular basis, however APRA collects some data on behalf of ASIC through its framework of quarterly, annual and ad hoc returns, lodged electronically via the Direct-to-APRA (D2A) system. This mechanism should also be utilised, in ASFA's view, for any reporting obligations imposed on superannuation trustees in relation to IDR.
- It would be beneficial for ASIC to regularly publish an assessment of IDR performance, by type of financial service provider, as for example, it currently reports on surveillance and reviews it undertakes on providers' compliance with specific requirements.
    - Any assessment released by ASIC should not, in ASFA's view, identify particular providers either for 'good' or 'poor' IDR performance. Where ASIC identifies aspects of a particular provider's IDR processes that it considers constitutes worthy of highlighting to other providers, this can be achieved via a media release or similar communication, or an update to any relevant guidance material.

[43] *ASFA, Response to Interim Report: Review of the Financial System External Dispute Resolution and Complaints Framework*

- Where ASIC considers that a provider has demonstrated poor performance against its IDR obligations, that is a matter that should be addressed directly with the provider, with enforcement action taken if necessary (at which time the provider may be identified, under existing processes). To the extent that the provider's performance involves matters of wider application, ASIC could notify other providers via a media release or similar communication, and/or update any relevant guidance material.

(ii) The commencement date for these measures being tied to Royal Assent provides little certainty for trustees and raises genuine concerns about the implementation timeframe that may be allowed.

ASFA recommends that the Bill be amended to provide a clear and specific commencement date for the IDR measures, aligned with the commencement of AFCA and the EDR reforms, and certainly no earlier than 1 July 2018. The reporting requirement should apply on an annual basis. The ASIC regulatory requirements should also defer the first reporting date until after the IDR reporting requirements have been in effect for a completed financial year.

ASFA considers that:

- the reporting requirements should commence no earlier than the date of commencement of the new EDR arrangements, and AFCA
- reporting of IDR data to ASIC should be annual, not more frequent
- assuming the EDR arrangements, and AFCA, commence from 1 July 2018, the first date for reporting of the requirement to report IDR activity to ASIC should be no earlier than 30 September 2019, for the year ended 30 June 2019
- consultation should begin immediately on the content, format and method for reporting of IDR activity, to ensure that genuine transparency and comparability can be achieved and to minimise the compliance cost and burden on trustees.

D.6.3 Referring complaints back for final IDR opportunity before EDR

The Ramsay Review recommended that all complaints received by the new EDR scheme be referred back to the provider for a final opportunity at resolution via EDR[44]. This recommendation was accepted by the Government however the consultation package is silent on it – presumably it is to be developed as part of the terms of reference of AFCA, and/or ASIC's regulatory requirements.

ASFA is not persuaded by the merits of this process. It will appreciably add to the IDR workload of trustees, by effectively re-opening complaints that had already been considered, but were unable to be resolved, during IDR initially.

More significantly, however, we are concerned that it will serve only to frustrate a consumer who, having believed themselves to have completed the IDR process and now desiring resolution via EDR, finds themself returned to their financial services provider for further IDR.

[44] Ramsay Review, Final Report, recommendation 9

We note that frequently, where it has not been possible to resolve a superannuation complaint at IDR this is because it involves a:

- fundamental disagreement as to the facts
- highly technical matter - such as some defined benefit complaints
- perceived matter of principle this is common in cases involving death benefit distributions, especially those where the deceased may have had multiple relationships and there are adult children from an earlier relationship who feel aggrieved that the benefit will be paid to a later spouse and/or to younger children from that later relationship.

In these cases, it is questionable whether a further, forced round of IDR will deliver an outcome. Proceeding straight to EDR would, in such cases, be the more efficient approach.

D.7 Regulatory impacts

Consultation Paper, Q8: What will the regulatory impacts of the new EDR framework be?

The Consultation Paper recognises, at paragraph 53, that industry will incur an increase in its regulatory burden - and an associated cost - as a result of the implementation of the new EDR and complaints framework.

It is important that the full regulatory impacts are clearly understood and, importantly, that they are reflected in the timeframe allowed for implementation.

ASFA note that the regulatory impacts for the superannuation industry are likely to involve:

- Extensive updating of disclosure materials – this is likely to include websites, Product Disclosure Statements, member guides/booklets, periodic statement templates and benefit claim forms
- Rewriting of all member communications relating to claims and complaints
- A specific 'significant event notification' to all members, under section 1017B of the *Corporations Act*
- Staff training and updating of internal processes
- The time and effort required to complete the necessary requirements to become a member of the AFCA
- The cost of implementing and administering the new IDR arrangements:
    - providing IDR data to ASIC - ASFA members have indicated that this impact is impossible to estimate at present, given the absence of any detailed information about what the reporting may entail
    - referral back of all complaints for 'last chance IDR' before EDR process commences – this process will significantly increase the workload associated with trustees' IDR processes, by effectively re-opening complaints that had already completed the IDR process and remained unresolved

  It is anticipated that these reforms will require potentially significant upgrades to processes and systems, and the increased compliance burden is likely to involve a need for additional staffing.
- The need for extensive advertising of the new EDR arrangements, to overcome the strong brand recognition of the SCT.

These impacts will be compounded by the fact that, for a period, the SCT will continue to operate in parallel to AFCA. During this period, trustees will be required to provide different versions of member communications and follow different processes, depending on whether an individual's complaint remains with the SCT or is with AFCA. It will also be necessary for disclosure materials to refer to both the SCT and AFCA, which will potentially cause confusion for consumers.

ASFA notes that the above regulatory impacts must be given adequate weight in settling the commencement date for both the new EDR and IDR frameworks. A rushed implementation will jeopardise the prospects for a successful outcome.

ASFA also recommends that consultation commence immediately on the outstanding aspects of the EDR and IDR framework, to enable a full assessment of the potential implications – and regulatory impacts and costs – to be understood.