Establishment of the Australian Financial Complaints Authority

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AIST and ISA Joint Submission

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AIST

The Australian Institute of Superannuation Trustees is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public-sector funds.

As the principal advocate and peak representative body for the $700 billion profit-to-members superannuation sector, AIST plays a key role in policy development and is a leading provider of research.

AIST provides professional training and support for trustees and fund staff to help them meet the challenges of managing superannuation funds and advancing the interests of their fund members. Each year, AIST hosts the Conference of Major Superannuation Funds (CMSF), in addition to numerous other industry conferences and events.

ISA

Industry Super Australia manages collective projects on behalf of Industry SuperFunds with the objective of maximising the retirement savings of five million industry super members. These projects include research, policy development, government relations and advocacy as well as the well-known Industry SuperFunds Joint Marketing Campaign.

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Executive summary

Superficially the combining of three different financial services complaints bodies into a new 'one stop shop' appears to have efficiency benefits. However, a deeper examination reveals profound challenges, which will be difficult for AFCA to overcome.

Superannuation fund complainants not better off

The superannuation industry has and continues to express concerns that the transfer of superannuation complaints from the Superannuation Complaints Tribunal (SCT) to the Australian Financial Complaints Authority (AFCA) will not benefit superannuation complainants. The proposed scheme does not sufficiently protect consumer rights. Unlike the SCT, if AFCA decides not to hear a complaint, the consumer cannot question or appeal that decision.

Superannuation trustees may face conflicting duties under law

Superannuation monies are held in trust and like all trustees superannuation trustees have strict obligations. In addition they have specific legislative obligations imposed by superannuation, tax, trust, family and corporations law. The proposed scheme which is based on contract is inadequate because it manifestly fails to provide certainty and stability to the system.

A number of scenarios can be readily constructed which would result in superannuation trustees, whilst being obliged under law to participate in the scheme, may not be in a position to abide by directions of AFCA. For example, where the trustee reasonably forms the opinion that AFCA's directions would not be in the best interests of its members or does not treat their members fair and equitably. It is inappropriate to establish a scheme that may place superannuation trustees in a position where they have potentially conflicted obligations.

The future funding decisions of the AFCA board is another area that may see the issue of conflicted obligations arise. In the event that AFCA replaces the role of the SCT it is essential that monies held in trust on behalf of Australian workers and retirees do not cross-subsidise the EDR process for non-superannuation related matters, such as bank and other financial services disputes. Should this not occur, superannuation trustees are on the one hand obliged to contribute to AFCA, but on the other hand to do so where it involves cross-subsidisation would put the trustees at risk of breaching trustee duties.

Superannuation a unique product and the case for change has not been made

Superannuation is a unique financial product in a number of ways, it is a product that:

- Parliament requires all Australian workers to participate in;
- It is a long term asset (relative to other financial investments); and
- There is a fiduciary relationship between the member and the trustees.

Complaints relating to superannuation matters are most appropriately handled by a specialist body; ideally one that is accountable to Parliament. Superannuation disputes are often complex not only because of their facts but also because of the intersection of the statutory provisions and trust law requirements. For these reasons, superannuation disputes require a level of expertise, such as currently provided by the SCT. Notwithstanding the limitations of the SCT, primarily the result of lack of funding, the case for change has not been currently made.

Introduction

We welcome the opportunity to comment on the *Establishment of the Australian Financial Complaints Authority* Consultation Paper released in November 2017. This submission outlines our concerns with the proposed establishment of the Australian Financial Complaints Authority (AFCA), its governance arrangements, Terms of Reference (ToR) and funding.

We are disappointed with the decision to dismantle the SCT and reiterate our concerns outlined in earlier submissions to the Ramsay Review, Treasury and the Senate Economics Legislation Committee.

The proposed complaints scheme fails to address the key concerns we have previously raised. The proposed replacement for the SCT:

1. Will result in a loss of protections and provide fewer consumer rights;
2. Is likely to provide less appropriate outcomes;
3. May result in conflicts of duties for superannuation trustees;
4. Has questionable governance arrangements; and
5. Has problematic funding arrangements.

Key issues

Superannuation fund complainants not better off

It is unclear whether AFCA is capable of improving outcomes for superannuation members.

Whilst it is generally accepted that the SCT has suffered from funding restrictions, it is also accepted that there is a high level of relevant superannuation expertise within the SCT and an acceptance of its decisions (evidenced by a low appeal rate) and accountability to Parliament.

A key benefit of the SCT structure is that in making its determinations the SCT is able to stand in the shoes of the trustee and is therefore subject to the same fiduciary duties. AFCA and its board will not have a fiduciary responsibility to superannuation complainants and this is a significant protection lost by consumers.

A statutory tribunal model is characteristically superior to a contractual ombudsman model. As a private body AFCA is not and cannot be subjected to the same Parliamentary oversight as currently applies to the SCT.

A specialist dispute resolution body that has an in-depth understanding of superannuation and the complex regulatory framework in which superannuation operates is essential. Superannuation is not just another financial product and as such any dispute resolution body must be appropriately equipped to understand the often complex superannuation disputes landscape.

One of the proposed guiding principles for the establishment of the AFCA scheme outlined in the consultation paper is the:

> *Incorporation of best practice principles for dispute resolution – including reflecting ASIC requirements on EDR, ensuring accessibility and ensuring that the coverage and consumer rights under the AFCA scheme are not less than those currently applying under the various EDR schemes.*

Under the proposed scheme consumers cannot appeal AFCA's decisions relating to:

- The complainant not meeting the standing requirements set out in the ToR;
- The matter being deemed to be outside jurisdiction;
- The matter being heard in another forum, such as a court; and
- There being a more appropriate forum to hear the complaint.

On balance consumers are not better off under the proposed scheme. Consumers, outside of superannuation matters, continue to have inadequate appeal rights. For superannuation complainants, AFCA cannot stand in the shoes of the trustee.

Superannuation trustees may face conflicting duties under law

Superannuation monies are held in trust and like all trustees superannuation trustees have strict obligations. In addition they have specific legislative obligations imposed by superannuation, tax, trust, family and corporations law.

Superannuation funds in Australia are creatures of trusts. It is the essence of a trust that a trustee holds property subject to an obligation to administer it in the interests of others – the beneficiaries. This protective rationale in the law of trust is a fundamental to the proper performance of trustee duties.

Superannuation trustees are bound to follow trust, common, tax and family law, including specific obligations imposed by the *Superannuation Industry (Supervision) Act 1993* (SIS Act). Trustees are bound by these strict obligations. The scheme as currently designed may result in a conflict between the existing trustee obligations and the operational directions of AFCA.

AFCA Terms of Reference

Under the reforms legislation will compel superannuation trustees to be a member of AFCA. AFCA will have ToR setting out AFCA's rules and other operational matters. The ToR will effectively operate as a contractual arrangement between AFCA and scheme members (superannuation trustees). A concern with the ToR is that a provision in the ToR is inconsistent with one of the trustee's legal duties, the duty will take priority. This is a serious issue because it means that elements of the ToR, and therefore a portion of the new EDR framework, may at times be in conflict with the duties of superannuation trustees.

Provisions of AFCA's ToR that we expect may be at odds with trust law include:

- A power for AFCA to direct a trustee to perform functions that may assist AFCA's consideration of a dispute. A direction such as this may breach the requirement for the trustee to perform the trustee's duties and exercise their powers in the best interests of beneficiaries if AFCA's direction would not be in the best interests of beneficiaries.[1]

[1] *Superannuation Industry (Supervision) Act 1993* s 52(2)(c).

- AFCA may require a fund trustee contribute towards the costs associated with including an expert party in a dispute. This may breach a number of duties, for example, if the trustee is of the opinion that including an expert would be of limited utility and an unnecessary expenditure of members' money.

In essence AFCA is to set its own rules; governance standards and funding arrangements. If the trustees of a superannuation fund formed the view that the operational rules, governance standards or funding arrangements set by AFCA were not in the best interests of the fund's members, then the trustees may be obliged to act in the best interests of their members and take a different course of action. This puts the credibility of AFCA in an untenable position.

The relationship between superannuation funds and AFCA will be based in contract. The SIS Act contains a covenant to the effect that fund trustees must not enter into any contract, or do anything else, that would prevent the trustee from, or would hinder the trustee in properly performing or exercising their functions or powers.[2] We are concerned that there may be provisions in the AFCA ToR and rules that would effectively prohibit trustees from exercising their discretion when required. Until such time as the AFCA ToR are adopted the extent of this potential problem cannot be identified.

AFCA funding model

As previously explained superannuation trustees are fiduciaries and the main purpose of the trust is to provide financial benefits to beneficiaries and the best interest of the beneficiaries are normally their best financial interests.

The best interest duty is an overriding duty applying to all decision making by a trustee. The trustee must assess the best interest of beneficiaries as a collective group. Under common law the equitable duties of a superannuation funds trustee includes a 'duty to ensure to the best of the trustees ability the economic wellbeing of the trust by securing possession of trust property, preserving the assets of the trust fund and investing assets of the trust appropriately.'

It is not too difficult to envisage the circumstances where the best interest duty may be contravened if trustees are required to fund AFCA's operations in such a way that is not fair and equitable to superannuation fund members.

[2] *Superannuation Industry (Supervision) Act 1993* s 52(2)(h).

Adhering to AFCA decisions

Amendments to the SIS Act seek to ensure the decisions of AFCA will be enforceable in the same manner as currently provided by the *Superannuation (Resolution of Complaints) Act 1993*. This is done via amendments to section 58 of the SIS Act. These changes require superannuation trustees to abide by compliant determinations made by AFCA.

There is no dispute with a requirement that a superannuation trustee be required to abide by a complaint determination. What is unresolved is the potential conflict of duties that a superannuation trustee may face when confronted with operational decisions made by the AFCA board.

The amendments requiring trustees to abide by AFCA dispute determinations do not remove or override the fiduciary duties superannuation trustees have and obligations imposed upon them by legislation. In particular section 55(2) of the SIS Act imposes covenants into the relevant governing rules of a regulated superannuation fund. These include covenants:[3]

> a) To perform the trustee's duties and exercise the trustee's powers in the best interests of the beneficiaries.
>
> b) Where there is a conflict between the duties to beneficiaries and others to give priority to the interests of and duties to beneficiaries.
>
> c) To act fairly in dealing with classes of beneficiaries within the fund and in dealing with beneficiaries within a class.
>
> d) Not to enter into any contract or do anything else, that would prevent the trustee from, or hinder the trustee in, properly performing or exercising the trustee's functions and powers.

The Bill does not extinguish, limit or alter the existing obligations upon trustees to their fund members and beneficiaries. Unlike the SCT, AFCA cannot stand in the shoes of trustees. Nor does AFCA have the statutory authority and mandate that underpins the funding and governance model of the SCT.

Whilst subject to Ministerial oversight, AFCA is to set its own rules; governance standards and funding arrangements. If the trustees of a superannuation fund formed the view that the operational rules, governance standards or funding arrangements set by AFCA were not in the best interests of the fund's members, then the trustees may be obliged to act in the best interests

[3] *Superannuation Industry (Supervision) Act 1993* s 52(2)(c) – (h).

of their members and take a different course of action. This puts the credibility of AFCA in an untenable position.

Governance

The merging of superannuation complaints with general financial services complaints creates a real risk in diminishing the representation of superannuation interests and superannuation expertise in the complaints process. Superannuation complaints vary in nature from complaints about illness benefits, death benefits, to administration processes, disclosures, and so on. Complaints often necessitate a sound understanding of the superannuation landscape.

Following the minority appointments by the Minister the board will appoint the remainder of the board and will thereafter be responsible for board replacements. This is an entirely inappropriate arrangement for a compulsory financial product such as superannuation which has its roots in legislation and retirement incomes policy. We are also concerned that the unique nature and considerations applying to not for profit superannuation funds will not be reflected in AFCA.

It is intended that the AFCA board will have no sectorial representation from various components of the finance sector. This is of concern to superannuation trustees as the unique character and responsibilities of superannuation trustees is likely to not be adequately represented in decision making and funding decisions may not involve a level of cross sectorial complaint cross-subsidisation.

It is unacceptable that the governance of complaints relating to Australia's compulsory superannuation system be dominated by persons with limited or no superannuation related experience.

Funding

There is both a moral and legal obligation upon superannuation trustees to ensure that members' superannuation monies held in trust are not used to fund the settlement of complaints in other areas of the finance sector.

Superannuation trustees may be obliged to refuse to agree to funding arrangements that cross subsidise the resolution of complaints outside of the superannuation environment. Although a consideration, there is currently no guarantee that a level of cross-subsidisation will not occur. In the absence of clear requirements that superannuation monies held in trust will not be used to finance non-superannuation complaints, including complaints against banks and other financial service providers, there remains an unresolved conflict of deep concern to superannuation trustees.

The unique nature of superannuation matters has been recognised in the *Treasury Laws Amendment (External Dispute Resolution) Bill 2017* by the requirement to have different legislative directions in relation to superannuation matters. Whilst there has been an attempt to recognise where differences lie between superannuation and other financial services, this has not been successful.

The scheme as currently proposed does not adequately recognise the unique character of superannuation complaints and importantly fails to address the potential conflict of duties superannuation trustees have to superannuation fund beneficiaries and any other legislative requirements or common law duty they owe, as outlined above.

The proposed dispute resolution system does not provide sufficient assurances that it will not place trustees in a position of conflict with trust law and the fiduciary obligations of trustees of funds. AFCA cannot satisfactorily replace the SCT and as such the establishment of AFCA is a retrograde step.

Case for change not made

ISA, AIST and others have previously expressed the view that the SCT is seriously underfunded and that there is a need to change the operational arrangements of the SCT, including its governance. Long delays in dealing with complaints have resulted in a level of justified disquiet. However, there has been no evidence provided that indicates that the dismantling of the SCT and the introduction of AFCA will improve the dispute resolution experience for members.

Prior to an overhaul of the SCT and the development of a new framework it is important to first consider evidence regarding the:

- Existing scheme failures and the impacts on participants;
- Rate of failure; and
- Costs of the existing schemes, and the costs associated with merging the schemes, including any potential cross-subsidisation of EDR between different components of the financial services sector.

At the 9 October 2017 Senate Economics Legislation Committee public hearing Treasury informed the Committee that no economic modelling had been performed that considered the costs and

benefits associated with keeping the three existing schemes compared with merging them into a single entity.[4]

The lack of economic evidence to support the proposed changes highlights a significant flaw in this reform process. Regulated superannuation funds are a major contributor to the Australian economy, with the profit-to-member superannuation sector representing more than $700 billion in funds under management. While we support improvements to the external dispute resolution process these can take multiple forms, only one of which is merging the schemes. For example the Ramsay Report found that "the problems facing the SCT can be attributed to chronic underfunding and a lack of flexibility in its funding."[5] The issues faced by the SCT were largely funding based and they can be resolved as can concerns regarding its governance structure.

The establishment of AFCA will likely cause disruption to superannuation funds that will be obliged to retrain dispute resolution staff in the new dispute practices of AFCA, set new internal dispute resolution mechanisms and so on. While we understand that disruption is sometimes necessary, in this instance it is not justified as no evidence has been presented that these measures will objectively improve member outcomes and reduce the system wide costs of dispute resolution.

AFCA is not a statutory authority

The term 'authority' is a misnomer. AFCA is the proposed name for a company limited by guarantee intended to operate an external disputes scheme authorised by the Minister. AFCA is not a government body. The use of the term 'authority' is likely to mislead consumers in that it incorrectly infers attachment to or control by government. This is misleading and should be corrected. The term 'scheme' is to be preferred.

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[4] Senate Economics Legislation Committee Hansard, *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017,* October 2017 p 57. Available at: http://tinyurl.com/y9v3gtql [Accessed 17 November 2017].

[5] Ramsay, I., Abramson, J. and Kirkland, A. (2017). *Review of the financial system external dispute resolution and complaints framework*. Final report, April 2017, p.9. [online] Canberra: Australian Government | The Treasury. Available at: http://tinyurl.com/yc37fkvn [Accessed 17 November 2017].

Response to consultation questions

1. ***Are there any other principles that should be included in the guiding principles for AFCA's establishment?***

The Australian Standard Customer Satisfaction – Guidelines for Complaints Handling in Organisations (ISO 10002-2006) provides guidance for the design and implementation of an effective and efficient complaints-handling process for all types of commercial or non-commercial activities, including those related to electronic commerce.[6] The standard contains a number of principles to help achieve objectivity within the complaints handling process and should be applied in this context.

Relevant principles include:

- Openness: the complaints process should be clear and well publicised.
- Impartiality: the process should avoid any bias.
- Confidentiality: the process should be designed to protect claimant identity.
- Accessibility: the complaints process should be accessible for users.
- Completeness: a full and detailed examination of the facts of the dispute should be performed.
- Equitability: parties to a dispute must receive equal treatment.
- Sensitivity: each case should be considered on its merits with regard to individual differences and needs.
- Responsiveness: the complaint should be notified as soon as their complaint is received.
- Objectivity: each complaint should be addressed in an equitable, objective and unbiased manner through the complaints-handling process.
- Continual improvement: the continual improvement of the complaints-handling process should be a permanent objective.

[6] Standards Australia, *Customer Satisfaction – Guidelines for Complaints Handling in Organisations (ISO 10002-2006),* page V.

In addition to the above, the following principles should also be included:

- Avoidance of cross-subsidisation: there should be no funding cross-subsidisation that sees any portion of superannuation trust monies being utilised to resolve non-superannuation related disputes.
- Any issues of ambiguity regarding the operation of or enforceability of the scheme to be resolved prior to its commencement.
- Ensuring equal treatment between all scheme participants.
- Transparency: this body will be the only EDR body so it is vital that there is transparency in the entire process.
- Power to obtain specialist advice if necessary.
- Adoption of what's working and efficient and effective transitional arrangements– these are at best transactional and certainly unclear as is their intersection with proposed sections 1050 and 1051A of the *Corporations Act 2001*.

2. As AFCA will be a new EDR scheme, is it appropriate to maintain specific limits for:

- ***income stream risk disputes;***
- ***general insurance broking disputes; and***
- ***third-party motor vehicle insurance?***

3. If these specific limits are to be retained, should there be an increase in the limits

4. Are there any anticipated effects on firms that will be disproportionate to any increase in specific increased monetary limits?

We express no view in relation to specific non-superannuation limits, except to note that there appears to be a level of consensus that the $5,000 limit relating to third-party motor vehicle insure is too low.

5. What measures may assist in ensuring AFCA's decision making processes promote consistency, while:

- ***Deciding each case on its merits based on the facts and circumstances of the complaint; and***
- ***Maintaining the objective of achieving fairness and flexibility to adapt to changed circumstances?***

While it is intended for each complaint before AFCA to follow the exact same resolution process it is clear that, due to the differences in the superannuation sector, superannuation disputes will have a different resolution process. This is because the test applied by AFCA when making superannuation determinations must reflect the unique context that super operates in, and must take into account trust law duties, fund governing rules and so on.

While it is vital that super disputes do have a different test, we are concerned that it will be difficult for the scheme to promote consistent and comparable decision making when, in effect, there are two distinct schemes and resolution processes operating as one.

8. ***How should AFCA balance the advantages of using panels in certain circumstances against efficiency and service implications including cost and timeliness of its decision making?***
9. ***Are there other factors that should be taken into account when considering whether a panel should be used?***
10. ***How best can AFCA provide clear guidance about to users about when a panel should be used?***

Given the uniqueness of superannuation matters, including the unique character of the compulsory product, there should be a presumption that superannuation issues will be managed by a superannuation panel containing members with superannuation expertise, including those with relevant expertise such as medical and/or insurance expertise.

The complexity of specific superannuation complaints to AFCA is likely to be sufficient to warrant a standing superannuation panel. The establishment of a superannuation panel will aid the scheme in maintaining its efficiency which is vital in the context of superannuation disputes where delay can cause financial and emotional distress. This is usually true in the case of death benefit disputes because these disputes usually involve multiple beneficiaries, who are often grieving the passing of a loved one. Some of the beneficiaries may have also been financially reliant and dependent on the dispute, and their economic wellbeing and therefore quality of life is inextricably linked with the outcome of a death benefit distribution.

11. Apart from the review of the impact of the higher compensation cap, are there other aspects of AFCA's operations that should be subject to independent review within the first three years of its commencement?

We note that it is intended that ASIC will consult about the nature of and frequency of reviews and their nature. The consultation paper's comments that reviews should be truly independent are noted, however, the removal of parliamentary scrutiny and complaint investigation by the Commonwealth Ombudsman is a retrograde step for superannuation complainants.

The appropriateness of the funding model should also be reviewed within three years of the scheme operating. This is essential because as the scheme matures and more dispute resolution data becomes available, AFCA will be in a better position to consider their resourcing needs. The purpose of any review should be to ensure that the funding arrangements are designed to:

- completely avoid cross-subsidisation;
- be transparent;
- provide for efficient cost recovery;
- be appropriate, now and into the future; and
- quarantine and allocate resources fairly between financial sector divisions.

The AFCA scheme should be subject to independent review after three years of operation. A scheme wide review is necessary because scheme participants will have no choice but to utilise AFCA as the proclaimed one-stop shop for financial services complaints. AFCA will be the only EDR body operating in Australia aside from the court system. The operational review should:

- be accompanied by an analysis of scheme participant satisfaction with the system;
- examine results in the different sectors within it operates;
- whether AFCA has achieved its objectives; and
- if AFCA's powers are adequate.

12. How and where should the charter of the independent assessor be defined? Who should be able to make a complaint to the independent assessor?

An individual's right to make a complaint to the independent assessor must be documented and it is important for the grounds of complaint to be clearly set out. Clear thresholds must be put in place to prevent frivolous or vexatious complaints coming before the assessor and it is vital that it is clear to users of the scheme that the role of the independent assessor is not to review the merits of an AFCA decision.

The proposed measures enable the independent assessor to provide recommendations to AFCA that it provide compensation to members if the assessor determines that a dispute or series of disputes, was not handled satisfactorily.[7] While we strongly support accountability and the ongoing improvement of dispute resolution, we believe that the ability for AFCA to provide compensation to complainants is at odds with trustee duties – especially if compensation is to be funded by contributions by scheme members.

Superannuation monies are held for the predominant purpose of providing an income in retirement – not to compensate complainants of an external dispute resolution scheme. The suggestion that AFCA could compensate complainants due to AFCA's deficient handling of a dispute means that superannuation fund members would effectively be compensating others due to AFCA's mistakes. This is not only inequitable but also inconsistent with the overarching purpose of superannuation and the specific duties imposed upon trustees.

Furthermore, the sole purpose test in the SIS Act[8] is likely to prohibit superannuation monies being paid to an external dispute resolution scheme for the purpose of compensating individuals that are unhappy with that scheme's complaint handling processes.

[7] Consultation Paper, p 13.
[8] *Superannuation Industry (Supervision) Act 1993* (Cth) s 62.

25. What additional matters related to superannuation should be addressed in AFCA's terms of reference (as opposed to operational guidelines)?

26. What matters related to superannuation would benefit from the additional flexibility that comes from being addressed in operational guidelines?

We reiterate our earlier comments regarding the removal of any possibility of superannuation trust monies subsidising non-superannuation complaint resolution and the use of superannuation panels.

Earlier in this submission the issue of the potential conflict between the varying legislative and common law duties superannuation trustees have was raised. When establishing its terms of reference, operational guidelines, funding arrangements and constitution the scheme operator should take great care to not infringe upon the flexibility required of trustees to perform their duty to members by acting in their best interests and to treat all members of the fund fairly, individually and collectively.

The consultation paper's example of operational guidelines dealing with who can make a superannuation complaint and time limits for complaints are matters that should be a clear and enforceable right to consumers and not subject to change.

27. What additional arrangements could be put in place to facilitate the transition of complaints that were lodged with the SCT prior to 1 July 2018, but are not yet 'dealt with', to be considered by AFCA? At what point could a complaint be considered to be 'dealt with' by the SCT?

Allowing complainants to transfer a dispute has unintended consequences such as the loss of appeal rights; mismatch between operational processes; and increased consumer confusion. As a result of these issues parties should not be given the option to transfer.

Complaints can be complex and involve multiple parties, for example a death benefit claim can involve the trustee and multiple potential beneficiaries. In the case of a death benefit claim it is unclear what would happen if one of the beneficiaries with an interest in the claim does not agree for the claim to be transferred over to the new entity. It is not in the best interests of scheme participants, in particular consumers, if they are given the power to transfer a dispute from the SCT to AFCA for the following reasons:

- The outcome may differ between the schemes due to the different operational processes between the SCT and AFCA.
- The rights available to complainants differs between the SCT and AFCA; for example complainants do not enjoy the same appeal rights at AFCA as they do at the SCT when it comes to jurisdictional matters (for example if a matter is a superannuation or general financial services complaint).
- It would make it difficult for AFCA to accurately predict amount of resourcing that it requires during the start-up phase, as it is not clear how many complaints will be transferred.
- It would be difficult for complainants to provide full and informed consent due to the complexity of superannuation complaints. For example it would require beneficiaries, potential beneficiaries, member organisations and anyone else with an interest in the payment of a benefit to which the dispute relates to receive information detailing the differences between the two schemes and how a transfer may would affect their rights.
- The Ramsay Review found that overlapping jurisdictions between dispute resolution bodies increased the risk of consumer confusion.[9] Allowing parties to move complaints from the SCT to AFCA would have a similar impact – it increases consumer confusion as once again they have the choice as to which jurisdiction they want to have their complaint heard in.
- Introducing the possibility of multiple jurisdictions also introduces unwarranted complexity and uncertainty.

[9] Final Report*, Review of the Financial System External Dispute Resolution and Complaints Framework*, April 2017, 8.

28. What measures could be put in place to secure sufficient knowledge of how different parts of the industry operate, while avoiding the representative tag for directors?

29. What measures should be put in place to ensure the AFCA Board appropriately balances the considerations of currency of director knowledge of particular industry sectors, conflict of interests, and breadth of competencies required?

30. What needs to be addressed at a Board/constitution level and what can be addressed through additional governance arrangements established by AFCA such as industry sector advisory panel(s) for transition?

The consultation paper notes that the initial AFCA board should have at least one director with superannuation experience and expertise.[10] This is insufficient representation. The value of the superannuation industry is $2.1 trillion dollars at 30 June 2016.[11] It is essential to the integrity of the scheme that there be adequate superannuation representation of the board on the board.

It is possible to appoint directors with appropriate skills and experience without specifically representing sectoral interests. Issues relevant to the selection and appointment of a director representing the super industry may include:

- Understanding the risks of superannuation fund business operations
- Understanding of fund legal and prudential obligations
- Understanding of statutory and general trust law, including the SIS Act and regulations, licensing requirements, the *Corporations Act* and regulations
- Relevant knowledge of specific insurance arrangements within superannuation
- Other assessment and selection criteria includes: experience in the super industry, competence, character, and technical qualifications.

31. Are there additional functions or responsibilities of the AFCA board that are not reflected in the constitutions of the existing schemes?

Yes, an expert panel with superannuation expertise.

[10] Consultation Paper, p 21.

[11] Australian Prudential Regulation Authority (2017). Annual Superannuation Bulletin. [online] Available at: http://tinyurl.com/yc8hrwgn [Accessed 3 Nov. 2017].

33. Should the Constitution or governing rules provide that neither the board nor individual directors can direct a decision-maker with regard to the outcomes of a particular dispute or class of disputes?

It is agreed that the board or individual directors should not be in a position to direct a decision maker.

Systemic issues can be addressed at a board level without interference at a case level which may compromise the independence or perception of independence of the decision maker.

34. In addition to matters identified in paragraphs 1-3 above, what other material should a company seeking authorisation to operate the AFCA scheme provide to demonstrate that it has satisfied the requirements of adequate funding and sufficient funding flexibility?

35. Are there any principles beyond those identified in paragraph 2 above that should underpin AFCA's funding model?

36. Should the funding arrangements for superannuation and non-superannuation disputes be separate and distinct, given the very different nature of these disputes?

Funding issues require careful consideration. The consultation paper notes that funding should be fair through annual levies according to the size of members.[12]

An objective to simply minimise the level of cross subsidisation is not acceptable – there must be no cross subsidisation at all. Furthermore, it should not be forgotten that the SCT will continue to operate for 2 years and APRA will continue to charge a SCT level to funds.

The funding model must follow a clear set of principles in order to ensure that it is appropriate and as fair as possible, the principles include:

- Avoid gaming - how is a 'dispute' classified by participants, what are the transparency obligations on organisations?
- Remove cross-subsidisation between sectors and within sectors. There must be a fair allocation of membership levies/cost recovery.
- Provide for efficient collection of revenue.

[12] Consultation Paper, p 26.

- Have a mechanism entrenched to test the appropriateness and equity of the funding model at regular intervals: 1, 3 and 5 years.
- Transparency measures so participants know precisely where their money is going.
- Clear quarantining and allocation of resources between sectors and disclosure of this (Super money must go to super disputes - this is especially case given the sole purpose test and trustee covenants that tightly regulate spending of trust money).

Irrespective of which funding model is adopted it is essential for there to be transparency in the funding model. Transparency enables the industry and consumers to understand how the body is funded and who is drawing on the model – to ensure accountability and to reflect the trust structure of superannuation.

37. If an interim funding arrangement were put in place, what features should it have and when would it be appropriate to transition to a long-run funding model?

38. What special considerations might need to be factored into an interim funding model to balance the need for adequate resources (certainty) with the principles (accuracy)?

The superannuation industry current provides funding to the SCT through the APRA levy. We have concerns about the lack of transparency around the amount of funding that the SCT actually receives from the levy. As such, before an interim funding model can be discussed it is essential to identify how much of the APRA levy the SCT actually receives.

We also believe it is inappropriate for the superannuation industry to be asked to contribute to funding two dispute resolution systems during the transition, especially in light of the fact that no evidence has been presented that a transition to AFCA would be in the best interests of members, or result in a cost saving to scheme participants.

39. Who are the key stakeholders AFCA is accountable to? What is the key objective and measure of importance to each stakeholder?

RSE licensees are one of the key AFCA stakeholders. This is because AFCA decision maker must operate within the environment that the trustee was, with regard to the fund rules and regulatory framework in which the fund operates. Given that AFCA is determining whether the decision was

fair and reasonable in the circumstances it is essential that they have regard to the rights of trustees. Furthermore, RSE licensees are also responsible for AFCA's funding.

40. In addition to the accountability measures in the Bill, are there additional measures that should be embedded in AFCA's Constitution and/or terms of reference or reflected in ASIC guidance to ensure accountability to stakeholders?

41. Are there other conditions that could be put in place to ensure the scheme is accountable to members in relation to fees?

The following should be noted:

- Parliamentary scrutiny is an important safeguard that exists in the present dispute resolution framework. In this instance, it is preferred over other mechanisms.
- Fee accountability could be improved by including a requirement in AFCA's constitution that cross-subsidisation is prohibited and that the board, prior to approving a funding arrangement, must receive assurance from APRA that the fees are fair and reasonable and by paying the fees the trustees are not likely to be in breach of their duties to members.

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