TREASURY CONSULTATION

External Disputes Resolution Review

SUPPLEMENTARY ISSUES PAPERS

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ABOUT INDUSTRY SUPER AUSTRALIA

Industry Super Australia is a research and advocacy body for Industry SuperFunds. ISA manages collective projects on behalf of a number of industry super funds with the objective of maximising the retirement savings of over five million industry super members. Please direct questions and comments to:

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EXECUTIVE SUMMARY

This submission is in response to the amended terms of reference to the Panel's review of the financial system external dispute resolution (EDR) framework which require the Panel to make recommendations regarding:

1. the merits and possible design of a compensation scheme of last resort and
2. the merits of providing access to redress for past disputes.

Industry Super Australia (ISA) considers it imperative to the fabric of a successful superannuation system to have an appropriate external dispute resolution framework. However, we urge the Panel not to expose superannuation members to any unintended consequences, including most importantly the unnecessary depletion of retirement benefits, in the creation of any new external dispute resolution framework.

ISA does not support the introduction of a compensation scheme of last resort that applies to the APRA-regulated superannuation sector. The structure and regulatory cosmos which dictate how APRA-regulated superannuation funds operate make it extremely unlikely that a regulated superannuation fund will fall foul of being unable to pay a claim due to being insolvent; having ceased trading or otherwise having insufficient assets to pay the claim. Fundamentally, a compensation scheme of last resort would not provide superannuation members with any benefit and would be detrimental to them.

The Panel has accepted at paragraph 122 of the Supplementary Issues Paper that "… due to the nature of prudential regulation in the superannuation system, it would be rare for a superannuation fund to be unable to pay its obligations."

It would be a perverse and inequitable public policy outcome to require superannuation fund members to reduce their retirement incomes to fund poor behaviour and unpaid EDR determinations in unrelated sectors of the finance industry. To do so would entrench moral hazards into the proposed financial services compensation scheme.

There is no merit or need in the APRA-regulated superannuation sector for the provision of access to redress past disputes. Superannuation members have had access to the Superannuation Complaints Tribunal as well as the court processes in dealing with disputes. Unlike other dispute resolution bodies, the Superannuation Complaints Tribunal does not have monetary limits and has no outstanding EDR payments. There are sound reasons why time limits apply and should continue to apply. There is no public policy good that can be found in a process which is irrelevant for APRA-regulated superannuation members.

Questions - Scope and principles

1. **Is the Panel's approach to the scope of these issues appropriate? Are there any additional issues that should be considered?**

   The Panel's approach to the scope of the issues relating to the establishment of a compensation scheme of last resort and providing redress for past disputes is broadly appropriate having regard to the revised Terms of Reference.

   Notwithstanding this, the Panel's intention to explore views regarding whether judgements and decisions from courts and tribunals should be considered as part of a scheme appears to be beyond the terms of reference as currently constituted.

2. **Do you agree with the way in which the Panel has defined the principles outlined in the Review's Terms of Reference? Are there other principles that should be considered?**

   The proposed principles guiding the review are rightly consumer focused. These general principles should equally apply across the diverse industry sectors to which the framework will apply. Applying the principles across diverse industry sectors would work to avoid the moral hazard in the way acknowledged by the panel's recognition that "costs should, where appropriate, be borne by those who create the requirement for regulation…". It is integral to avoiding this moral hazard that the structure and funding arrangements that apply to EDR frameworks and associated compensation schemes are equitable and transparent.

   There is no need to include APRA-regulated superannuation entities in a compensation scheme of last resort and doing so will be inequitable and unfair to its members who will bear the costs associated with funding arrangements that will apply principally or wholly to other unrelated sections of the financial services industry.

Compensation scheme of last resort

The Panel takes as its starting point on the premise that a compensation scheme of last resort is to be considered in the context of a dispute which:

- has been the subject of a decision; and
- has remained unsatisfied because, for example, the firm is insolvent, has ceased trading or otherwise has insufficient assets to pay the claim.

This context is not appropriate to APRA regulated superannuation funds for a number of reasons including:

1. trustees of superannuation funds are highly regulated. The operations of these trust entities are monitored closely by the APRA and the Australian Securities and Investments Commission (ASIC). Both of these bodies play an important role in ensuring that participants in the superannuation system are protected by vigorous regulators. APRA's prudential role which includes establishing and enforcing prudential standards and practices is designed to ensure that, under all reasonable circumstances, financial promises made by superannuation funds are achieved. ASIC's regulatory activities are equally an important counterbalance, and help to protect members of superannuation funds by working to ensure firms and individuals comply with the law.
2. the requirement that trustees of superannuation funds comply with Prudential Standards, including the requirement for:

a) an Operational Risk Reserve, which compels trustees to have adequate financial resources to address losses arising from operational risks that may affect the superannuation business operations. Operational risk is the risk of loss resulting from inadequate or failed internal processes, people and systems, or from external events. This definition includes legal risk but excludes strategic and reputational risk.

b) a Risk Management Framework, which necessitates trustees to have systems for identifying, assessing, managing, mitigating and monitoring material risks that may affect its ability to meet its obligations to beneficiaries.

c) an Insurance Framework, which requires trustees to have an insurance management framework that reflects the risks associated with making available insured benefits that is appropriate to the size, business mix and complexity of the RSE licensee's business operations.

d) Fit and Proper standards which set out minimum requirements for RSE licensees in determining the fitness and propriety of individuals to hold positions of responsibility. Its objective is to ensure that an RSE licensee prudently manages the risks posed to its business operations by having persons acting in responsible positions who are fit and proper.

3. Part 23 of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) which protects members of funds from the low incidence of superannuation losses resulting from fraudulent conduct and theft.

4. The fiduciary character of superannuation trustees. Fiduciary duties find their source in both the common law and legislation. As such trustees exercising their powers have overarching obligations, including the duty to:

   a) act in the best interest of the beneficiaries;

   b) to exercise care, skill and diligence in discharging their powers;

   c) to act honestly in all matters concerning the entity; and

   d) place the interest of the beneficiaries ahead of the trustee's own interests.

When all of the above factors are considered holistically, it is evident that there are sufficient arrangements in place to protect members from the unlikely event that they are not compensated because the superannuation fund has become insolvent, has ceased trading or otherwise has insufficient assets to pay the claim. Thus there is little (and possibly no) value that can be achieved for members of APRA-regulated superannuation funds in a compensation of last resort scheme.

To the extent that there are situations where an EDR body makes an order for compensation and that compensation is not paid, there are reasonable grounds for the continued exploration of a means to resolve this problem. While, the supplementary issues paper correctly identifies that there are gaps in the existing arrangements for unpaid compensation generally in financial services, the Panel did not identify gaps in compensation arrangements for superannuation fund members. These gaps are evidently not relevant to APRA regulated funds. Therefore, while there is a need for change in the non-APRA-regulated superannuation fund sector, it is imperative that the APRA-regulated superannuation sector be differentiated.

Further, applying a one-size-fits-all model would erode the benefits of superannuation members. Superannuation funds may have substantial asset holdings, however, these are assets being held on trust to pay retirement benefits for Australians.

Finally, the proposed model would send the wrong signals to individuals, firms and regulators involved in financial markets. In his report to Treasury on the Future of Financial Advise (FoFA) reforms in April 2012, Richard St. John noted that it would be inappropriate to require more responsible and financially secure

licensees to underwrite claims made against less responsible licensees. [1]

St. John report

Mr St. John argued that the introduction of a last resort compensation scheme would not address the underlying problems and that it would 'be inappropriate, and possibly counter-productive':

> A last resort scheme would have the effect of imposing on better capitalised and/or more responsibly managed licensees the cost of bailing out the obligations of failed licensees. It would not work to improve the standards of licensee behaviour or motivate a greater acceptance by licensees of responsibility for the consequences of their own conduct. It could well introduce an element of regulatory moral hazard by reducing incentive for stringent regulation or rigorous administration of the compensation arrangements. [2]

Mr St John's recommendations included:

- A requirement for Australian financial services licensees provide ASIC with additional assurance that their professional indemnity insurance cover is current and is adequate to their business needs;
- Giving more attention, on a risk targeted basis and in conjunction with the level of their insurance cover, to the adequacy of licensees' financial resources to enable better management of risks and unexpected costs such as compensation liabilities;
- ASIC take a more pro-active approach in monitoring licensee compliance with the requirement to hold adequate professional indemnity insurance cover and any new requirement in regard to financial resources, and in targeting licensees who are most at risk;
- Assistance to ASIC to playing a more pro-active role in administering the licensing regime with respect to compensation arrangements, consideration should be given to clearer powers to enforce standards and to sanction licensees who do not comply;
- When dealing with licensees who give up their licence or reduce the scope of their licensed activities, ASIC should seek where possible to secure ongoing protection for retail clients including by imposing appropriate conditions in relation to the termination of a licence or the amalgamation or takeover of a licensed business; and given their role in the regime for the protection of consumers of financial services, and marked increases in their jurisdiction, External Dispute Resolution schemes and ASIC should give more attention to the adequacy of the EDR scheme processes as those schemes grow beyond their origins as forums for small claims.

Some of the recommendations from Mr St. Johns report remain relevant whilst others have been included in the FoFA and other consumer protection related reforms.

The importance of the St. John report is its highlighting of moral hazard issues and the importance of

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[1] St. John, R; *Compensation arrangements for consumers of financial services: Future of financial advice*; April 2012. Commonwealth of Australia
http://futureofadvice.treasury.gov.au/content/consultation/compensation_arrangements_report/downloads/Final_Report_CACFS.pd.

[2] ibid p143

appropriate regulatory control and oversight.

It is entirely inappropriate to require regulated superannuation fund members to fund the less responsible or secure sectors of the finance industry, especially when they are unlikely to benefit from such a scheme.

Why superannuation monies are unique

Superannuation products are unique. The superannuation system is Australia's compulsory retirement savings system that is the beneficiary of considerable taxation and other concessions paid for by the community as a whole. Australian workers are required contribute 9.5 per cent of their earnings into superannuation accounts and this is legislated to grow to 12 per cent in July 2025.Successive governments and policy makers have recognised that compulsory contributions are a form of deferred wages and as such have been differentiated from other financial products.

Superannuation contributions, both compulsory and voluntary are recognised as an integral component of Australia's retirement incomes system. The public interest and taxpayer subsidisation of the superannuation system warrants and has attracted considerable prudential regulation. It is both the trust nature of superannuation and its legislative and regulatory environment that have combined to see no unpaid EDR determinations that require addressing.

Why APRA regulated superannuation funds are unique

Monies held by APRA regulated superannuation funds are held in trust on behalf of fund members by the trustees who are obligated to act in the best interests of fund members.

Compensation levies are a direct levy on the retirement incomes of Australians. There is no objection to the application of levies to trustees operating in the industry where the levy adds to the benefit or protection of members of funds

As members of superannuation funds are highly unlikely to benefit from a compensation scheme of last resort, such a scheme would neither benefit nor add protection to members. Rather it would harm the interests of members.

To impose a requirement upon superannuation fund members that they fund a compensation scheme that will largely or entirely be applied for the benefit of others is a crude application of cross-subsidisation for losses incurred within other sectors of the financial services industry and would be entirely inconsistent with the Panel's proposed framework principles.

Why the role of superannuation trustees is unique

Superannuation trustees are fiduciaries. When the purpose of the trust is to provide financial benefits to beneficiaries (as is the case in superannuation), the best interest of the beneficiaries are normally their best financial interests. However, 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*.'

Compensation for non-financial loss and losses incurred in the distant past may be inconsistent with the existing fiduciary obligations of trustees to act in the best interests of members as a whole.

Part 23 of the Superannuation Industry (Supervision) Act 1993

Significantly, the APRA-regulated superannuation sector already has an effective compensation scheme of last resort in the form of Part 23 of the SIS Act.

Part 23 of the SIS Act enables a trustee of a superannuation fund to apply for assistance if the fund has suffered an 'eligible loss', subject to certain conditions. An eligible loss is a loss that is suffered as the result of fraudulent conduct or theft. The loss must have caused substantial diminution of the fund's assets leading to difficulties paying benefits. Upon the Minister being appropriately satisfied that the fund has suffered an eligible loss, the Minister must determine whether the public interest requires that a grant of assistance be made to the fund.

With one small exception relating to a non-public offer defined benefit fund, Part 23 of the SIS Act has only been used in response to the fraudulent event and subsequent collapse of the Trio group[3]. Using the powers provided within the *Superannuation (Financial Assistance Funding) Levy Act 1993*, the Federal Government imposed a levy on superannuation funds[4] to offset the cost of providing $55 million in compensation.[5]

It is difficult to envisage a scenario that is likely to arise where an APRA-regulated superannuation fund would not make a payment in accordance with a relevant EDR decision. The proposed amendments to the *Corporations Act 2001* at proposed section 1065(1)(d)[6] are intended to require a fund make good on any order for compensation or risk reporting to ASIC or APRA who have significant powers to compel payment.

It is also difficult to imagine a circumstance where an APRA-regulated superannuation fund would not be in a financial position to make a compensatory or other order flowing from and EDR scheme, or indeed the order of a court or other tribunal. The level of prudential regulation and oversight over the solvency and governance of APRA-regulated funds is rigorous. This combined with the provisions of section 23 of the SIS Act ensure that insolvency is highly unlikely amongst APRA-regulated funds.

While in the past, there have been cases of corporate operated defined benefit funds not allowing adequate provision for an insolvency contingency,[7] an increase in regulatory oversight; a significant reduction in the number of corporate funds and their offering of defined benefit components has resulted in a scenario where insolvency events are highly unlikely amongst APRA-regulated funds.

Indeed the Panel recognises that there are no unpaid determinations in the superannuation sector and that

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[3] The Hon. Bill Shorten, MP, Media Release Number 28, Comprehensive response to combating superannuation Investment Fraud, 26 April 2013.

[4] Section 229 of the SIS Act provides that the compensation scheme and consequently the levy, applies only to superannuation schemes with 5 or more members, being APRA regulated funds.

[5] The $55 million in Trio collapse compensation was recovered by imposing a levy of 0.0001347% of APRA funds assets, with a minimum of $50 and a maximum of $750,000 per fund. The funds benefitted members of four superannuation funds that were formerly under the trusteeship of Trio.

[6] Treasury Laws Amendment (External Dispute Resolution) Bill 2017

[7] One such case were the various funds operated by Ansett Airlines Pty Ltd which when into administration on 14 September 2001 and ceased to operate on 4 March 2002. Following the purchase of Ansett Airlines by Air New Zealand, the parent company failed to follow actuarial advice and make contributions to the various defined benefit components of the Ansett funds. Notwithstanding, the administrators of the company eventually paying the 16,000 affected employees on average 96 cents in the dollar in entitlements.

"...it would be rare for a superannuation fund not to be unable to pay its obligations."[8]

Members of not-for-profit funds should not be levied

If the Panel is of a contrary view there is a strong case that not-for-profit superannuation funds should not be required to contribute to any compensation scheme. Such funds do not have an option of reducing shareholder returns; their only option is to reduce returns to members. Every dollar derived from a not-for-profit superannuation fund is money that will be debited from member accounts.

Compensation scheme outside of the superannuation sector

There may be a legitimate case for the establishment of a compensation scheme of last resort outside of superannuation. It is recognised that professional indemnity protections are designed to protect providers not consumers and there are regulatory and legislative gaps which are likely to continue to see some consumers fail to be compensated, despite orders to pay.

However, the warnings made in the St. John report remain relevant and any proposed scheme must adequately address issues relating to moral hazard.

The schemes proposed by the representatives of banks and others are likely, as currently constituted, to increase, not decrease moral hazard issues and are examples of inappropriate and poor public policy.

Questions - Existing compensation arrangements

3. **What are the strengths and weaknesses of the existing compensation arrangements contained in the *Corporations Act 2001* and *National Consumer Credit Protection Act 2009*?**
4. **What are the strengths and weaknesses of the National Guarantee Fund, the Financial Claims Scheme and Part 23 of the *Superannuation Industry (Supervision) Act 1993*?**
5. **Are there other examples of compensation schemes of last resort that the Panel should be considering?**

   Most non-payments of EDR orders follow an insolvency event. A compensation scheme of last resort should be just that, a scheme of last resort. Further attention to insolvency laws, in particular the rights of unsecured creditors to pursue EDR determinations and the personal liability of directors is required. The future ability of directors and associates of failed financial advice businesses to operate in the financial services sector also requires further scrutiny.

   The Panel has accepted that *"... due to the nature of prudential regulation in the superannuation system, it would be rare for a superannuation fund not to be able to pay its obligations."* [9] Matters relating to director solvency and non-payments are important in the superannuation sector, but not relevant in an EDR context.

   The Commonwealth Fair Entitlements Guarantee program has a number of relevant features. In particular the ability of the fund guarantor, in this case the Commonwealth, to once having paid

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[8] Supplemental Issues paper, [122]

[9] Supplemental Issues Paper, [122]

entitlements, to stand in the shoes of the employee and be provided priority over other unsecured creditors.

Questions — Evaluation of a compensation scheme of last resort

6. What are the benefits and costs of establishing a compensation scheme of last resort?

A compensation scheme can add stability and consumer confidence to an industry. However, as is discussed elsewhere, a scheme can also introduce moral hazards, costs and inequities. It is important that the framework of any scheme sends the right signals to participants and this includes ensuring that the funding is based on risk.

7. Are there any impediments in the existing regulatory framework to the introduction of a compensation scheme of last resort?

The greatest impediment in the existing regulatory framework is a lack of clarity as to which scheme operates and when. For the reasons set out above, in the case of superannuation funds, a clear exemption from any scheme would be the best public policy outcome.

8. What potential impact would a compensation scheme of last resort have on consumer behaviour in selecting a financial firm or making decisions about financial products?

Consumers are unlikely to consider such matters when purchasing a product from a provider. Behavioural economics informs us that consumers, including consumers of financial products do not consider certain matters at the time of making an investment decision, including matters relating to disputes frameworks.[10]

9. What potential impact would a compensation scheme of last resort have on the operations of financial firms?

As stated earlier, a one-size-fits-all compensation scheme would cause moral hazard among certain firms. We reiterate our comments in the 'Richard St. John Report' section above in this regard.

10. Would the introduction of a compensation scheme of last resort impact on competition in the financial services industry? Would it favour one part of the industry over another?

If the APRA-regulated superannuation funds were included in such a scheme they would be heavily subsiding the remaining participants. This would be grossly inequitable in light of our commentary in relation to the purpose of superannuation being to provide benefits in retirement.

In the event APRA-regulated superannuation fund trustees were compelled to participate in the scheme as proposed by the ABA; it is likely a legal challenge would follow. Trustees may form a view that in the circumstances where fund members are unlikely to benefit from a scheme and will suffer a financial loss, participation in the scheme may be contrary to the fiduciary and legislative duties imposed upon the trustees to act in the best interests of all members.

11. What flow-on implications might be associated with the introduction of a compensation scheme of

[10] Chater, N; Huck, S; Inderst, R; Decision Technology Ltd: Consumer Decision-Making in Retail Investment Services: A Behavioural Economics Perspective; Nov 2010

last resort? How could these be addressed to ensure effective outcomes for users?

The key flow-on implication from the proposed scheme would be the possible introduction of morahazards. In addition, the introduction of compensation schemes is likely to see greater legal intervention where payments may partly fund professional legal fees. If a last resort scheme was introduced it should be readily understood and accessible to minimise the need for legal intervention.

12. What other mechanisms are available to deal with uncompensated consumer losses?

Consistent with the St. John recommendations, greater regulatory scrutiny and protections provide a focus on prevention and behavioural change.

13. What relevant changes have occurred since the release of Richard St. John's report, *Compensation arrangements for consumers of financial services*?

There has been considerable change flowing from the FoFA and other reforms. However, as acknowledged by the Panel there remains issues associated with poor behaviour and gaps flowing from insolvency events. These need to be addressed in a manner that encourages change rather than accepting sub-optimal outcomes and compensating thereafter.

Funding, compensation caps and scheme administration

For the reasons given above, APRA-regulated superannuation funds should not be required to contribute funding to resolve issues in other parts of the financial services industry. There are no unpaid EDR determinations in the superannuation sector to our knowledge.

Caps are inappropriate because they go against the fundamental principles of providing compensation to those who have suffered loss.

The scheme should be administered by the relevant EDR body. This is particularly appropriate if access to the scheme was limited to EDR decisions and excluded unpaid court or tribunal decisions. It is important that the EDR framework, including a compensation scheme be linked to ensure a direct feedback relating to the nature of non-payment issues that may subsequently be the subject of compensation claims. This feedback will enable determinations relating to appropriate funding for possible future claims.

Questions — Potential design of a compensation scheme of last resort

14. What are the strengths and weaknesses of the ABA and FOS proposals?

We refer to our commentary above. Such schemes should not apply to APRA-regulated superannuation funds.

15. What are the arguments for and against extending any compensation scheme of last resort beyond financial advice?

There are little to no grounds for extending any scheme beyond financial advice. The Panel's own work recognises that financial advice issues and related insolvency of advice firms are by far the greatest issues that needs to be resolved when considering unpaid EDR determinations. There is no evidence that unpaid EDR determinations are an issue in the APRA-regulated superannuation sector.

16. Who should be able to access any compensation scheme of last resort? Should this include small business?

Where such a business is a sole operator or micro business there may be grounds for allowing access to the compensation scheme. This is because the personal risk and financial sophistication may be similar to that of an individual. Large businesses typically have a greater range of options and face different risks to individuals, sole operators and micro businesses. Whilst it appears there is no discussion regarding access to large businesses, there is no definition of what a small business is, and we suggest this needs to be resolved.

17. What types of claims should be covered by any compensation scheme of last resort?

Certain claims that are able to be pursued in an EDR process should be covered by a compensation scheme of last resort. However, no cogent argument has been put forward as to why there is a need for superannuation matters to be the subject of a compensation scheme of last resort.

18. Should any compensation scheme of last resort only cover claims relating to unpaid EDR determinations or should it include court judgments and tribunal decisions?

It would be inappropriate for a compensation scheme of last resort to include judgements and tribunal decisions as it could result in uncertainty as to costing and may undermine the EDR process.

19. What steps should consumers and small businesses be required to take before accessing any compensation scheme of last resort?

A compensation scheme of last resort should only be available when all other possible steps have been taken. Establishing appropriate funding levels would be very difficult if this was not the case.

20. Where an individual has received an EDR determination in their favour, should any compensation scheme of last resort be able to independently review the EDR determination or should it simply accept the EDR scheme's determination of the merits of the dispute?

An independent review of an EDR determination is unnecessary. The EDR scheme should be independent and should be adequately instituted so that it does not require a further independent review.

21. If a compensation scheme of last resort was established and it allowed individuals with a court judgment to access the scheme, what types of losses or costs (for example, legal costs) should they be able to recover?

Anything other than demonstrated financial loss should be excluded. To do otherwise would provide a level of uncertainty to the scheme that will make it difficult to forecast possible future funding requirements. The role of any compensation scheme should be to ensure EDR determinations are meet. Exemplary damages, legal costs and other related costs should not form part of any scheme.

22. Should litigation funders be able to recover from any compensation scheme of last resort, either directly or indirectly through their contracts with the class of claimants?

We refer to our response to question 17 above.

23. What compensation caps should apply to claims under any compensation scheme of last resort?

Any cap should be reasonable.

24. Who should fund any compensation scheme of last resort?

We reiterate our argument that there is simply no basis that a compensation scheme of last resort should be funded by APRA-regulated funds.

25. Where any compensation scheme of last resort is industry funded, how should the levies be designed?

The levies in a compensation scheme of last resort should be risk based. In support of this we point to our extensive commentary above in relation to the Richard St. John report.

26. Following the payment of compensation to an individual, what rights should a compensation scheme of last resort have against the firm who failed to pay the EDR determination?

Similar to the Department of Employment's Fair Entitlements Guarantee scheme, it would make sense for a compensation scheme of last resort to have the right to stand in the shoes of the claimant.

Questions — Potential design of a compensation scheme of last resort

27. What actions should ASIC take against a firm that fails to pay an EDR determination or its directors or officers?

ASIC has a range of powers to take action against individuals and financial service licensees. It should be a financial service licence condition that:

- EDR determinations are paid by the licensee;
- it is a duty upon the relevant directors that the firm meet its financial obligations, including EDR determinations.

Failure to do so should result in the imposition of fines, including fines on directors and possible licence implications.

28. Should any compensation scheme of last resort be administered by government or industry? What other administrative arrangements should apply?

No view is expressed.

29. Should time limits apply to any compensation scheme of last resort?

Ordinary statutory limitations should apply to the compensation scheme of last resort for the reasons set out in the 'Providing access to redress for past disputes', above. If time limits were not imposed the scheme would be overly complex and potentially administratively difficult and expensive. When considering such matters there are considerations of fairness and equity balanced with efficiency considerations.

30. How should any compensation scheme of last resort interact with other compensation schemes?

A scheme of last resort must operate as one and other schemes should continue to apply within their jurisdiction.

31. Are there any aspects of compensation schemes of last resort in other sectors and jurisdictions that should be considered in the design of any compensation scheme of last resort?

See earlier commentary.

Questions — Legacy unpaid EDR determinations

32. What existing mechanisms are available for individuals who have legacy unpaid EDR determinations to receive compensation?

One possible mechanism which may be available would be to issue court proceedings, yet it is acknowledged that this would be far from a satisfactory option to those that have already been aggrieved and possibly only available in limited circumstances.

33. Is there a need for an additional mechanism for those with legacy unpaid EDR determinations to receive compensation? If so, who should fund the payment of the legacy unpaid EDR determinations?

The payment of legacy determinations is not supported if APRA regulated superannuation funds are to fund any part of those payments, because to compel them to do so would be unjust and inequitable. These legacy issues stem from uncompensated losses in relation to FOS and CIO determinations. APRA regulated funds should not subsidise the failings of others. It is vitally important we keep in mind that individuals have been compulsory required to defer a portion of their salary (i.e. have superannuation contributions) for retirement. For those individuals who have suffered losses, it is without doubt the effect on their lives can be devastating, and the non-payers should be brought to account but not at the cost of superannuation retirement benefits.

Providing access to redress for past disputes

The Panel sought feedback on the situations where consumers or small businesses with disputes of a type that could be resolved through EDR have, for various reasons, not been able to resolve their disputes to date, e.g. because:

1. the financial firm no longer exists (for example, because of insolvency) and therefore the dispute was either never lodged with an EDR scheme or was lodged but unable to proceed to determination;
2. the monetary value of the dispute exceeded the EDR scheme's monetary limits at the time, but could potentially fall within the monetary limits of the new Australian Financial Complaints Authority (once established);
3. the dispute was outside of the EDR scheme's time limits; or
4. the consumer or small business did not pursue their dispute with the EDR scheme for other unspecified reasons (for example, because of personal circumstances, the costs of pursuing the dispute or emotional distress).

Access to redress for past disputes is not supported for the following reasons:

1. it is most unlikely that a superannuation fund no longer exists (for example, because of insolvency) and therefore the dispute was either never lodged with an EDR scheme or was lodged but unable to proceed to determination. Most superannuation funds that no longer exist have gone through successor fund arrangements, in which case the new trustee has taken on the liabilities of the old trustee;
2. the Superannuation Complaints Tribunal does not have a monetary limit and therefore the argument that a dispute exceeded the EDR scheme's monetary limits is not applicable;

3. The intention of limitation period is to facilitate resolution within a "reasonable" length of time. Time limits are in place to ensure:
   - A claimant with a valid cause of action pursues it with reasonable diligence.
   - By the time a stale claim is considered, evidence can and does deteriorate and disappear with the passage of time and it can become impossible to fairly adjudicate the matter
   - Long-dormant claims may result in an unreasonable burden on the defendant and is more cruel than just. In this regard it is accepted that people should be able to arrange affairs and utilise their resources without concern of a potential action.
4. While it is acknowledged, that a dispute may not have been heard because it was outside of the EDR scheme's time limits or because they did not pursue their dispute with the EDR scheme for other unspecified reasons (for example, because of personal circumstances, the costs of pursuing the dispute or emotional distress), is unfortunate this needs to be balanced with the ability of defendant/respondent not being grossly disadvantaged. Introducing a requirement to deal with old matters, some of which will not have been raised in the past, presents unique challenges. Records may no longer exist, relevant personnel and entities may have changed. Time limits are imposed to prove both efficiency and fairness to all parties. In certain circumstances there may be grounds for a time limit to be extended where it can be shown a respondent was unaware of the disputed event until a later date. The examples of the James Hardie fund and abuse claims briefly discussed by the Panel are relevant. It is highly unlikely that these scenarios would be relevant to these considerations.

There is no public policy good that can be found in a process that does little more than encouraging re-litigation of past disputes at a significant cost to existing participants in the system. To allow access to a past dispute is not good public policy in circumstances where access to an EDR process was restricted by prevailing policy or was open but not pursued.

Questions — Evaluation of providing access to redress for past disputes

A scheme providing access to redress for past disputes cannot adequately address the fundamental problems associated with such a proposal. This includes fairness to past claimants who may have been subject to more restrictive limitations on their claim.

Considerations of fairness and efficiency arise to such an extent that in the absence of a clear unmet demand providing access to redress for past disputes, previously articulated or otherwise will result in administrative and operational costs which in the case of superannuation funds will be borne by fund members.

There is no suggestion that a time-limit of any sort be imposed on past unresolved disputes. It should be noted that there remain persons affected by financial events and unpaid determinations relevant to non-superannuation financial service providers going back decades. In the event that the Panel is predisposed to recommend that a compensation scheme of last resort be introduced and that such a scheme provide access to redress for past disputes, the panel should clarify the limitations, that are to be applied, if any, and consider the potential cost, financial and implications for the funding and stability of any proposed scheme.