

REVIEW OF THE FINANCIAL SYSTEM EXTERNAL DISPUTE RESOLUTION FRAMEWORK

ISA SUBMISSION

7 October 2016



ABOUT INDUSTRY SUPER AUSTRALIA

Industry Super Australia (ISA) is an umbrella organisation for the industry super movement. ISA manages collective projects on behalf of a number of Industry SuperFunds with the objective of maximising the retirement savings of five million industry super members. Please direct questions and comments to:

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1. Introduction

ISA welcomes the review of the financial system's external dispute resolution (EDR) and complaints schemes.

This submission focuses on the experiences of members, beneficiaries and trustees of APRA-regulated superannuation funds.

Given that superannuation is mandated, it is critical that consumers have access to an effective and transparent dispute resolution framework that includes a tailored external dispute review mechanism. The compulsory nature of superannuation, cognitive limitations, behavioural biases, and low levels of financial literacy must inform the design of external dispute resolution for superannuation fund members.

Superannuation is different to other financial products and services

Superannuation differs from other financial products and services in a number of significant respects.

These include:

1. Superannuation is compulsory. Employers are required by law to pay 9.5 per cent of every employee's salary into a superannuation fund.
2. A majority of superannuation fund members do not choose their superannuation fund and many of these people are disengaged from their superannuation.
3. Superannuation fund trustees are fiduciaries with extensive obligations to fund members at common law and under the superannuation Industry (Supervision) Act 1993 Cth. This is not true for other financial services providers and underpins the dispute resolution criteria applied by the Superannuation Complaints Tribunal (SCT) which centres on whether the decision complained about was 'fair and reasonable' in the circumstances.
4. As the system matures there is a greater variety of products and services, which may result in an increased complexity of complaints.

Types of complaints resolved through external dispute resolution

The types of complaints relating to Industry SuperFunds that make their way to external dispute resolution tend to fall into three main categories:

- Complaints about how a fund trustee has chosen to exercise its discretion as to the distribution of superannuation death benefits between family members when a member dies.
- Insurance complaints, in particular complaints about the denial of claims on total and permanent disability policies.
- Complaints relating to administration matters such as unit pricing errors.

External dispute resolution of superannuation complaints is different to external dispute resolution of complaints about other financial products and services

All financial services providers must be a member of an external dispute resolution scheme. Most financial services providers can choose which scheme to join. APRA-regulated superannuation funds are subject to the jurisdiction of the SCT (a compulsory legislated tribunal that they are bound by) as a result of being regulated under the Superannuation Industry (Supervision) Act 1993 (SIS Act).

Complaints about superannuation that are dealt with at the SCT are different to complaints about other financial products and services dealt with by other financial services' external dispute resolution schemes:

- Unlike the other schemes, the SCT is a statutory authority established under the Superannuation (Resolution of Complaints) Act 1993 (SRC Act). Its decisions are subject to administrative and judicial review.
- The jurisdiction of the SCT is not subject to any monetary limits.
- Determinations are enforceable, which avoids the problem of unpaid determinations that is a feature of Financial Ombudsman Service (FOS).
- The SCT is funded by Government (although funding recovery occurs via annual APRA financial sector levies).
- The ability to appeal determinations to the Federal Court on a question of law.
- Many complaints do not involve the fund member or other stakeholders in addition to the fund member. For example:
 - complaints about the distribution of a superannuation death benefit are brought by potential beneficiaries of the member’s superannuation death benefit
 - complaints about the denial of total and permanent disability claims are brought by the member but also involve an insurer.

In addition, the statutory foundation of the SCT means that the SCT, its members and staff are subject to federal legislation such as the Freedom of Information Act 1982 (Cth).

The unique nature of superannuation justifies the existence of a specialist external dispute resolution scheme for superannuation funds and their members. The unique features of the SCT deliver significant consumer protections. Any change to the external dispute resolution settings that result in the removal or reduction of any of the unique features of the SCT would weaken consumer protections and would be strongly opposed by ISA.

ISA strongly supports the continued existence of the SCT as a separate, stand-alone external dispute resolution scheme.

Some stakeholders are currently arguing for the integration of existing arrangements in the form of a single tribunal as a response to ongoing problems with conduct and culture in the banking industry, and the need for additional oversight of banks. ISA agrees that there are significant problems in the banking industry and that additional oversight is required. However, we reject this approach which would effectively lead to the not-for-profit superannuation sector contributing funding to address problems that relate to the retail banking sector. It is inappropriate that not-for-profit funds should be required to fund oversight of the banking sector. Funding should be closely linked to risk to incentivise the banking sector to address ongoing problems with conduct and culture.

However, there are inefficiencies in the SCT which must be addressed.

2. ISA Response

2.1 Principles guiding the review

Q 2 Do you agree with the way in which the panel has defined the principles outlined in the terms of reference for the review? Are there any other principles that should be considered in the design of an EDR and complaints framework?

ISA agrees that efficiency, equity, complexity, transparency, accountability, comparability of outcomes and regulatory costs are appropriate principles that should be considered in the design of an EDR and complaints framework.

ISA recommends the inclusion of independence as an additional guiding principle, in accordance with the Benchmarks for Industry-based Customer Dispute Resolution and ASIC Regulatory Guide 139 Approval and oversight of external dispute resolution schemes.

2.2 Other reviews

Q 3 Are there findings or recommendations of other inquiries that should be taken into account in this review?

ISA recommends that the review also have regard to the following:

- The Productivity Commission Review of the Superannuation Industry (Supervision) Act 1993 and Certain Other Superannuation Legislation (2001), including the Government's response (2003) which rejected the Commission's recommendation that the SCT be replaced with an industry-based EDR scheme;
- The 2014-15 National Commission of Audit, which examined whether to rationalise a number of government agencies, committees and boards and which did not make any recommendations in relation to the SCT;
- The 2015 proposed industry funding model for ASIC, which identified issues with funding of the SCT.

2.3 Internal Dispute Resolution (IDR)

Q 5 Is it easy for consumers to find out about Internal Dispute Resolution (IDR) processes when they have a complaint? How could this be improved?

A large proportion of complaints to the SCT are found to be out of jurisdiction. The majority of out of jurisdiction complaints arise because the complainant has not attempted to resolve the complaint through the fund's IDR process.

Industry SuperFunds work hard to inform members about the existence of IDR and educate members about the IDR process. However, the high number of complaints to the SCT by complainants who have not complained directly to the fund concerned suggests that there is room for improvement in terms of informing and educating complainants about the existence and role of IDR. Better triaging arrangements might also help refer complainants who do not satisfy jurisdictional requirements.

The level of information about the IDR process available for consumers to access varies between providers, so there may be merit in promoting uniform disclosure in a manner that is clear and consistent.

Q 7 How effective is IDR in resolving consumer disputes? For example, are there issues around time limits, information provision or other barriers for consumers?

A majority of complaints to Industry SuperFunds are resolved by IDR. This suggests that IDR by Industry SuperFunds is extremely effective in resolving consumer disputes.

Q 9 How easy is it for consumers to escalate a complaint from IDR to EDR schemes and complaints arrangements? How common is it for disputes to move between IDR and EDR, or between EDR schemes?

The process of escalating a complaint from IDR to external dispute resolution is relatively easy. As a result, many complainants escalate a complaint on grounds that are not valid. For example, one common situation where a complaint is escalated from IDR to external dispute resolution is where a person who is neither a beneficiary nor a dependent of a deceased member pays for the member's funeral and asks the fund to reimburse them. In this situation, there is no prospect of the complaint being upheld.

In addition, the demarcation of responsibilities between FOS and the SCT is not always clear from the perspective of consumers. In addition, superannuation funds frequently belong to the FOS as well as the SCT. This is necessary because funds provide advice services to members, and FOS deals with complaints about advice.

The schemes have processes in place to transfer a complaint made to the wrong scheme. However, the experience of Industry SuperFunds is that there can be delays in this process. This makes it more difficult for the scheme that ultimately receives the complaint to conduct an investigation, due to the additional time that has passed since the original dispute. Fund trustees incur a fee for the transfer of a complaint from FOS to the SCT.

2.4 Existing EDR schemes and complaints arrangements

Q 13 In what ways do the existing schemes contribute to improvements in the overall legal and regulatory framework? How could their roles be enhanced?

All schemes publish de-identified determinations which provide guidance to industry. Where a determination of the SCT is appealed to the Federal Court on a question of law, the Court's decision is publicly reported and provides a precedent, contributing to the evolving body of superannuation law.

This is a strength of the SCT which is not a feature of the other EDR schemes in the financial services sector.

The schemes also highlight emerging and systemic issues through annual reports, periodic publications and liaison with regulators.

ISA notes that there has been a clear reduction in regular communication from the SCT, which may also be a result of underfunding. ISA considers regular communication between the SCT and providers to be an important aspect of its function.

Q 14 What are the most positive features of the existing arrangements? What are the biggest problems with the existing arrangements?

There are a number of positive aspects of the current SCT model. These include:

- The statutory framework, which provides independence from industry and government
- The absence of any monetary limit on access to the SCT
- The enforceability of SCT determinations
- The ability to appeal a SCT determination to the Federal Court on a question of law.

There are also a number of issues with the operation of the SCT. The first principle guiding this review is efficiency: schemes should have adequate coverage, powers and remedies for complaints to be resolved in a timely manner (Issues Paper, paragraph 11).

The Issues Paper states that it takes at least 12 months for the SCT to make a formal decision in relation to complaints. This timeframe would not satisfy the Panel's guiding principle in relation to timeliness. However, the experience of Industry SuperFunds is that it often takes considerably longer than 12 months for the SCT to make a formal decision. Delays are a feature of every stage in the process, from investigations, through conciliations and issuing determinations. It is not uncommon for consumers to wait two or even three years for a final decision. These delays are unacceptable for consumers. This is particularly the case given the nature of complaints to the SCT. Many of these complaints involve the distribution of superannuation death benefits between beneficiaries, who may well be dependents of a deceased fund member, and denial of insurance claims.

Several factors contribute to this problem. Resource constraints are the single biggest factor. This is addressed separately in response to Q 25 below. Historically, withdrawal of complaints occurred through negotiation between SCT staff and complainants. However, recently there has been a decrease in the

number of complaints that are withdrawn. In addition, the success rate of conciliations has decreased. As most complaints proceed to formal review, this contributes to the lengthy delays experienced by consumers.

Another issue with the SCT is a need for greater transparency and accountability in relation to its governance and operations. One option to consider would be a regular review of its operations by an independent panel.

While there is scope to address the concerns with the SCT, the problems with FOS go to the very heart of its operations. The lack of enforceability which leads to lack of consumer compensation, means that it has very little power to create meaningful outcomes for consumers.

Q 16 How easy is it to use the EDR schemes and complaints arrangements process?

A consumer who makes a complaint to the SCT does not have the right to legal representation unless the SCT approves this. However, the experience of Industry SuperFunds is that it has become increasingly common for the SCT to approve the use of legal representation throughout the complaints process.

The involvement of lawyers does not necessarily improve outcomes for consumers. Anecdotal evidence suggests that some plaintiff lawyers encourage complainants to persist with complaints that do not have a realistic prospect of success. In all cases, the fact that the complainant pays the legal representative means that even if the complaint is upheld, any payment the complainant receives will be reduced by the cost of legal representation. The industry is currently working on protocols that address the involvement of, and appropriate remuneration arrangements for, legal representatives in insurance claims within superannuation.

Q 19 Are the jurisdictions of the existing EDR schemes and complaints arrangements appropriate?

ISA strongly supports the existing jurisdiction of the SCT, in particular the absence of any monetary limits on complaints. This is necessary given the compulsory nature of superannuation and the fact that superannuation balances represent significant amounts and a substantial proportion of member assets.

Q 22 Do the existing EDR schemes and complaints arrangements possess sufficient powers to settle disputes? Are any additional powers or remedies required?

The SCT stands in the shoes of fund trustees and can exercise all of the powers of the trustee under its trust deed and the Superannuation Industry (Supervision) Act 1993. ISA's view is that this gives the SCT sufficient powers to settle disputes.

Q25 Are the current funding and staffing levels adequate? Is additional funding or expertise required?

The SCT is funded by government. However, cost recovery occurs indirectly as part of the annual levy funds pay to the Australian Prudential Regulation Authority (APRA).

It has long been widely recognised that the SCT is chronically underfunded. An urgent review is required to address this. Funding was reduced from \$5.9 million to \$5.2 million for the 2016 financial year (SCT Annual Report 2015). This resulted in a significant staff reduction from 39 to 32 staff. Funding of \$5.2 million is not adequate to support an industry of \$2 trillion. Industry SuperFunds are committed to funding the SCT to an adequate level.

The SCT is funded from the same budget allocation as the Australian Securities and Investments Commission (ASIC). Staff required to assist the Tribunal in the performance of its functions are appointed or employed by ASIC under the Public Service Act 1922(Cth) and are answerable to the Tribunal Chairperson. They are subject to ASIC human resources policies, as determined by ASIC from time to time.

ASIC also provides facilities to support the SCT's functions within terms of a service level agreement agreed between ASIC and the SCT and reviewed in conjunction with the annual determination of the SCT's budget allocation. The SCT pays ASIC for these facilities.

In practice, the impact of these arrangements is that the SCT's funding and resourcing are subject to fiscal impacts applied by Government to ASIC and that the SCT does not have control over the level of funding it receives.

ISA is not aware of the funding levels of FOS, but would note that it does not seem to be subject to chronic underfunding of the SCT.

Q 26 How transparent are current funding arrangements? How could this be improved?

There is little transparency in relation to the funding arrangements for the SCT: neither the ASIC annual Report nor the SCT Annual Report include comprehensive disclosure about funding or resourcing.

It is likely that the lack of transparency about funding constrains the ability of the SCT to ensure sufficient resourcing of its operations and address inefficiencies.

2.5 Triage service

Q 35 Would a triage service improve consumer outcomes?

ISA considers that there may be merit in introducing a triage system which directs consumers to the appropriate forum for their dispute. This may go some way in addressing the issues raised in Q9 around consumers directing complaints to the wrong forum. It may also minimise timeframes during the initial phases of a complaint. However, the development of a system-wide triage system would need to take into account the unique nature of superannuation complaints, including the fact that the SCT is required to apply statutory criteria in dealing with complaints that are different to the criteria used to resolve complaints about other financial products and services.

There is also merit in introducing a robust triage system within the SCT. Given the significant number of complaints that are withdrawn, a triage process that identifies these complaints as early as possible has the potential to generate considerable efficiencies. A triage process could also enable the SCT to identify complaints that are well suited to conciliation and fast track this process.

ISA recognises that the implementation of a triage system for complaints would require additional resources.

2.6 One body

Q 38 Is integration of existing arrangements desirable? What would be the merits and limitations of further integration?

Q 39 How could a one-stop-shop most effectively deal with the unique features of the different sectors and products of the financial system (for example, compulsory superannuation?)

Q 40 What form should a one-stop-shop take?

Q 41 If a one-stop-shop in the form of a new single dispute resolution body were desirable:

- **Should it be an ombudsman or statutory tribunal or a combination of both?**
- **What should its jurisdictional limits be?**
- **How should it be funded?**
- **What powers should it possess?**
- **What regulatory oversight and governance arrangements would be required?**

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ISA strongly supports the continued existence of the SCT as a separate, stand-alone external dispute resolution scheme.

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2.7 Uncompensated consumer loss

Q 47. How many consumers have been left uncompensated after being awarded a determination and what amount of money are they still owed?

Q 48. In what ways could uncompensated consumer losses (for example, unpaid FOS determinations) be addressed? What are the advantages and limitations of different approaches?

Q 49. Should a statutory compensation scheme of last resort be established? What features should form part of such a scheme? Should it only operate prospectively or also retrospectively? How should the scheme be funded?

Q 50. What impact would such a scheme have on other parts of the system, such as professional indemnity insurance?

For a scheme to meet the needs of consumers, providers must comply with its determination. This is not always currently the case in relation to FOS.

According to FOS, unpaid determinations represent 22.83 per cent of all accepted determinations issued in favour of consumers in the Investments and Advice area. More than half (56 per cent) of the non-compliance relates to disputes in the financial planning and advisory sector. (FOS Circular, August 2016, Issue 26)

There is significant consumer risk in engaging with a financial services provider who does not comply with determinations. ISA recommends that where there is non-compliance with an EDR scheme or SCT determinations, this information should be made public.

A statutory compensation scheme of last resort should be established to ensure that consumers who suffer loss as a result of the action or inaction of a financial services provider should not be left uncompensated. The scheme should be industry funded using a formula which ensures that industry sectors which pose the greatest risks to consumers carry a proportionate funding burden. Prudentially regulated super funds should not be forced to cross subsidise a compensation scheme to support a compensation scheme for non-prudentially regulated providers that have paid conflicted remuneration such as commissions to advisers. The design of the industry funding model for the last resort compensation scheme should reflect this.