EDR and complaints framework

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AIST and ISA joint submission

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AIST

The Australian Institute of Superannuation Trustees (AIST) 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

The Australian Institute of Superannuation Trustees (AIST) and Industry Super Australia (ISA) welcome the opportunity to comment on the consultation paper 'Improving dispute resolution in the financial system' released 17 May 2017 and related proposed statutory changes incorporated in the:

- *Treasury Laws Amendment (External Dispute Resolution) Bill 2017* and accompanying explanatory memorandum; and the
- *Treasury Laws Amendment (External Dispute Resolution) Regulations 2017.*

AIST and ISA represent the profit-to-member superannuation industry and industry superannuation funds and as such our focus will be on the superannuation area of the proposed reforms.

Throughout this review process, AIST and ISA advocated strongly for the Superannuation Complaints Tribunal (SCT) to be retained as it offers a number of positive features unable to be replicated in an ombudsman scheme. While we express our disappointment at the proposal to remove the SCT from the external disputes resolution framework, we will strive to ensure that the protections and benefits brought about by the tribunal model are not lost as a result of the proposed transition.

Our key arguments can be summarised as follows:

- The new external dispute resolution scheme must have a suitable and transparent funding model in order to minimise inequity and cross-subsidisation. A risk based approach is most suitable.
- The transition from the current framework to the proposed framework will cause significant issues and if these issues are not addressed, both fund members and superannuation funds will be detrimentally impacted. Issues such as the management of superannuation expertise; funding; cost duplication and transfers of disputes need to be addressed.
- The new external dispute resolution scheme must have a suitably comprised board with superannuation industry representatives and the scheme should utilise expert panels to resolve complex disputes.
- The legislative arrangements underpinning the new scheme have significant gaps and the new body lacks certain powers to operate effectively. If these gaps are not addressed the scheme will fail to meet the efficiency criteria set out in the proposed legislation and the ability of the proposed scheme to resolve disputes in a timely and appropriate manner will be reduced. The key gaps and issues with the proposed framework include:

  - The exclusion of constitutionally exempt public sector funds from the scheme.
  - The failure to embed eligibility criteria to make a complaint, which creates uncertainty.
  - Lack of effective joinder mechanisms.
  - The failure to cater for the unique complexities of insurance complaints and their interaction with the superannuation system. This failure results in the trustee being excluded from the dispute resolution process, despite typically being the policyholder.
  - No time limits for bringing a complaint.
  - No timeframes in which the new dispute resolution body must resolve or respond to a complaint.
  - The removal of participant rights to seek judicial review.
  - A lack of assurance that the new body will be a not-for-profit entity.
- It is not possible to provide a full appraisal of the regulatory costs associated with the proposed external dispute resolution (EDR) framework until more information is released. We ask that additional information on the framework be released to facilitate an accurate assessment of potential regulatory costs associated with the scheme.
- We are concerned that the new regime risks compromising the independence of the Australian Investments and Securities Commission (ASIC). It is important for regulators, and the scheme itself, to be independent.
- We provide principled support to changes to internal dispute resolution (IDR) processes and reporting, however we require additional information on each of the proposals before making further comment. It is important for ASIC to consult extensively with superannuation funds and peak associations such as AIST and ISA on the development of IDR processes and reporting.

External dispute resolution under the new scheme

Introduction

The consultation material provides for the authorisation and establishment of a new external dispute resolution scheme; the Australian Financial Complaints Authority (AFCA). The establishment of AFCA is a major change, and we have a number of concerns that need to be addressed in order to ensure that the interests of superannuation funds, members and other scheme participants are not negatively impacted as a result of the change.

For the AFCA model to be successful it must have:

- A suitable and transparent funding model; and
- Suitable governance arrangements, in line with our recommendations.

Two major concerns with the set of documents released 17 May 2017 are:

- There are a number of legislative gaps between the proposed powers of AFCA and the current powers of the Superannuation Complaints Tribunal (SCT) – these gaps raise serious concerns about whether AFCA will have suitable powers to resolve superannuation complaints.
- There are a lack of transitional arrangements in place and this must be addressed; the SCT must be appropriately funded during the transitional period to determine the remaining complaints in an efficient manner.

We believe that:

- AFCA must have a suitable and transparent funding model.
- The transitional arrangements give rise to a number of issues that must be addressed.
- AFCA must have suitable governance arrangements, in line with our recommendations.
- That a number of legislative gaps exist and that AFCA does not have suitable powers to resolve superannuation complaints.

Funding

An appropriate funding regime is crucial to the success of AFCA. The most common methodologies that exist for funding are:

1. Risk based model.
2. Size based model.

For reasons set out below, AFCA should utilise a risk based funding model.

However, for the two year transition period an asset size funding model should be used because dispute resolution data will not be available to inform a risk based model. After the transition period the risk based model should be used, using dispute resolution data. These models should apply to each sector that is subject to AFCA's jurisdiction, with modification where necessary, in order to ensure that funding is as fair as possible.

Funding models

Superannuation Complaints Tribunal (SCT)	**Financial Ombudsman Service (FOS)**	**Australian Financial Complaints Authority (AFCA)**
Funded through the Australian Prudential Regulation Authority (APRA) Supervisory Levy. APRA collects a levy from superannuation funds and allocates some of the levy to ASIC. ASIC uses the money collected through this levy to fund part of its operations and the entirety of the SCT.	Funded by member subscription fees and by a 'user-fee' paid by financial service providers when a consumer brings a complaint regarding that provider.	Funded by contributions from members of the scheme, which includes superannuation funds.[1]

The table above illustrates that AFCA will be given considerable flexibility in determining their funding model and because of this flexibility is able adopt a risk based model. Each sector affected by AFCA should have a risk-based funding model. Our comments below relate to the superannuation sector model.

The funding model for superannuation members should be developed in two stages. Firstly, there should be a model for the transition period (first two years) and after that time a new, final model should be established.

The transition period model could comprise of a minimum baseline fee paid by all scheme members and a fee based on the asset size of the member. This model would only be temporary and would be replaced by a risk based model once dispute resolution data becomes available.

[1] *Corporations Act 2001* proposed s 1047(i) read with *Superannuation Industry (Supervision) Regulations 1994* proposed s 13.17AB(a).

The final risk based model could comprise of a minimum baseline fee paid by all scheme members and a risk adjusted fee, developed with regard to a particular set of risk-related metrics and how these relate to the scheme member. In principle, the risk-related metrics could include:

- The number of complaints made against the scheme member.
- The amount of time or resources spent by AFCA in resolving complaints against the scheme member.
- The number of complaints resolved by the scheme member through their IDR processes.

A risk based model is beneficial for a number of reasons:

- It ensures that the superannuation industry does not subsidise other financial sector participants, as institutions will pay a fee in proportion to the number of complaints brought against them and the resources AFCA uses to resolve those complaints.
- It is an equitable model that minimises cross-subsidisation between superannuation participants.
- It ensures that superannuation funds do not subsidise other funds.

The proposed section 1047(i) of the *Corporations Act 2001* should be modified to require the scheme's funding model to have regard to the risk profile of individual scheme participants and their sectors.

Transparent funding model

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.

The proposal is for AFCA to resolve disputes across the entire finance sector, which includes superannuation funds, financial advisers, banks, insurers and so on. Given the number of scheme participants, and the broad scope of AFCA, the funding needs to be transparent to ensure accountability. A transparent funding model also helps participants to understand how much reliance each sector places on the body, and therefore, how much they should be contributing to that body. The evidence to date shows there are fewer superannuation complaints than non-superannuation complaints. There is no reason why this will change under the new arrangement. For example in 2015-2016 FOS received 34,095 complaints whereas the SCT received only 2,368.[2] These marked differences in complaint numbers highlight the need for funding transparency. They

[2] The Superannuation Complaints Tribunal, *Annual Report 2015/16* (18 October 2016) <https://tinyurl.com/y82832zm> ; The Financial Ombudsman Service, *Annual Review 2015/16* <https://tinyurl.com/ycvgbkbq>.

also highlight the high risk of inappropriate cross-subsidisation if the funding model is not flexible, or does not have regard to the use by particular sectors that are subject to the dispute resolution scheme.

Funding transparency is crucial in the superannuation context because superannuation operates under a trust structure and as such each fund must have the capacity to inform its members how their money is being spent.

AFCA's funding model must be transparent and that a risk-based funding model is appropriate.

Transition arrangements

The shift from the current external dispute resolution framework to the proposed framework is significant. The transition will see AFCA commencing operations by 1 July 2018 and for the SCT to be wound up by 1 July 2020. Additionally, the SCT will also be able to hear new complaints until 6 months after 1 July 2018.[3]

We are deeply concerned that the transition arrangements give rise to issues around expertise, funding, costs, and effectively increase consumer confusion. We submit that it is in the best interests of members and superannuation funds that these issues are addressed.

The key issues can be summarised as follows:

- *Expertise:* It is unclear how expertise will be managed by each body during the transition, which may reduce the quality of the dispute resolution experience, increase delays and negatively impact the resolution of complaints.
- *Funding:* There is a risk that the funding issues faced by the SCT will continue through the transition, increasing delay.
- *Cost duplication:* Having concurrent schemes in operation effectively duplicates cost because two EDR bodies will be in operation at one time. Steps should be taken to reduce these costs where possible.
- *Transferring complaints between schemes:* The option to transfer has unintended consequences such as the loss of appeal rights; mismatch between operational processes; increased consumer confusion. As a result of these issues parties should not be given the option to transfer.

[3] Proposed s 14AB *Superannuation (Resolution of Complaints) Act 1993.*

Expertise

Under the proposed arrangements the SCT and AFCA will operate concurrently for approximately two years. There is a real risk that both bodies will not have a full complement of superannuation expertise as a result of the concurrent operation of the schemes.

AFCA, which is set to commence operations 1 July 2018, must source suitable superannuation expertise. There is a risk that this experience may be sourced from current SCT staff. This will likely increase the difficulty for the SCT to resolve its 1,600 open complaints, and any new complaints it receives. The draft proposal does not establish any mechanisms by which expertise is to be managed throughout the transition and this lack of management will most likely negatively impact the dispute resolution experience as a result of the potential unavailability of suitably qualified staff. Furthermore failure to address this issue would result in difficulty for the scheme to be approved by the Minister, because it is a function of the scheme to ensure appropriate expertise is available to the scheme in dealing with complaints;[4] if appropriate expertise is unavailable, the scheme fails one of its key functions (before it even commences).

Funding

As part of the Ramsay Report the panel found that "the problems facing the SCT can be attributed to chronic underfunding and a lack of flexibility in its funding"[5]. There is a serious risk that these funding problems will not only continue, but be exacerbated during the transition period as the regulations make no provision to ensure during the transition the SCT is appropriately funded.

The Government has signalled an intention to reduce the SCT's funding, stating that:[6]

> *The additional resourcing to ASIC to monitor AFCA is also offset by a reduction of funding of $7.2 million over four years from 2017-2018 associated with the SCT being wound down and no longer operating from 1 July 2020. The Australian Prudential Regulation Authority Financial Institutions Supervisory Levies will be reduced accordingly.*

This statement clearly highlights that the SCT's funding will be reduced over the coming years until it is finally wound up in 2020. The SCT will not be able to satisfactorily resolve its current 1,600 open complaints, or any new complaints it receives until 6 months after 1 July 2018[7] if its funding is reduced.

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[4] *Corporations Act 2001* proposed s 1046 (2)(a)–(2)(k).
[5] Final Report, *Review of the Financial System External Dispute Resolution and Complaints Framework*, April 2017, 9.
[6] The Treasury, *Budget Measures 2017-18 Part 2: Expense Measures*, 162.
[7] *Superannuation (Resolution of Complaints) Act 1993* proposed s 14AB.

The level of funding currently available to the SCT should not be unduly restricted or reduced in a way that would jeopardise the dispute resolution process, or negatively affect scheme participants.

Cost duplication and jurisdictional overlap

The simultaneous operation of AFCA and the SCT coupled with the fact that there appears to be no legislative restriction on taking the same dispute to both entities will result in a duplication of costs, expense and complexity.

Appropriate legislative restriction should be introduced to prevent complainants having a matter heard by both the SCT and AFCA during the transition period. By preventing the same dispute being dealt with by each body efficiency will be increased and cost duplication will be minimised. The restriction will also increase comparability of outcomes because it will avoid the situation where both entities may make a different finding on the same factual scenario due to their different operational processes.

Transferring complaints between the schemes

The Treasury Fact sheet states that during the transition period "consumers will have the option to transfer their complaint to AFCA if they wish to do so".[8] The mechanics of the transfer power are not included in the accompanying draft exposure legislation, regulations, or explanatory memorandum. We understand that this transfer mechanism will be enabled by section 22A of the *Superannuation (Resolution of Complaints) Act 1993,* which gives the tribunal the discretionary power to transfer a complaint to another body for the resolution of the complaint.

The exercise of this power, or a replication of it, may cause issues that will jeopardise the interests of parties to a complaint. 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 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 parties may lose their appeal rights. Under the current system participants have greater appeal rights than they would under the proposed system because the right to

[8] The Treasury, *Fact Sheet: The Australian Financial Complaints Authority* (9 May 2017) <https://tinyurl.com/yd3dnf4o>.

judicial review will be removed. Clearly, the loss of appeal rights may not be in the best interests of scheme participants.

- The Ramsay Review found that overlapping jurisdictions between dispute resolution bodies increased the risk of consumer confusion.[9] We believe that 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.

For the reasons above it is suggested that complainants should not be given the option to move their complaint to the new body and instead that each complaint currently before an EDR body should be resolved by that body. We are also concerned that a poor transition experience would result in significant reputational damage to AFCA and it would be difficult to rebuild a tarnished reputation.

Resolution of transition arrangements

It would be beneficial for the administrative arrangements of the new dispute resolution authority to be addressed as soon as practicable. Our concerns regarding the management of superannuation expertise, funding and cost duplication may, in part, be resolved through the release of additional information. The information should clearly outline the arrangements for staffing, staff transition and resourcing.

Governance

AFCA must have a suitably comprised board with superannuation industry representatives and AFCA should utilise expert panels to resolve complex disputes. These arrangements are integral to AFCA's ability to achieve outcomes.

Board composition

Under proposed section 1048(1)(a) of the *Corporations Act 2001* it is a condition of authorisation that the body's operator is a company limited by guarantee, which means that the company will likely have a Board of directors. It is integral that the superannuation industry, and superannuation funds more specifically, are represented on the Board. Superannuation is a high-value industry, with an increasing profile. According to APRA, since 1996 superannuation assets have grown by over $1.7 trillion dollars. The industry is expected to grow to over $3.2 trillion

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

dollars by 2035 and represent 130% of Australia's gross domestic product.[10] This projected growth, and value of the industry, highlights the need for the industry to have direct representation on the Board of AFCA.

If the industry is not represented on the Board, there is a real risk that decisions may be made that have unintended impacts on the operation of the scheme, in such a way that may be detrimental to the best interest of members and super funds. We submit that in order to safeguard members and fund interests', there must be industry representation on the Board.

Expert panels

Superannuation complaints can be complex, involving large sums of money and multiple parties. The Ramsay Review stated that one of the key features of the EDR body is that it:[11]

> *Will use panels to resolve disputes in specific circumstances, such as complex disputes, and will provide clear guidance and transparency to users when a panel will be used*.

We support the use, and establishment of an expert panel to resolve complicated superannuation disputes. This is consistent with AIST's response to the Interim Report, in which AIST stated:[12]

> *A panel's true value is derived from the expertise that it offers above all else, and a suitably constructed panel can enhance the dispute resolution process, and consumer outcomes, by bringing collective skill and experience to bear on complicated issues. The superannuation system is incredibly complex, and it would be in consumers' interests for resolution bodies to be given the freedom to call on subject matter experts to assist in the resolution of complex claims. It is important, when establishing any panel, that its members have appropriate experience and a solid understanding of the superannuation industry as a whole.*

It is likely that AFCA will look to elements of FOS's Terms of Reference (ToR) when drafting their own ToR. The panel appointment process set out in FOS's ToR are suitable.[13]

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[10] Professor Rodney Maddock, 'Superannuation Asset Allocations and Growth Projections' (Research Paper, Financial Services Council, 17 February 2014) 6.
[11] Final Report, *Review of the Financial System External Dispute Resolution and Complaints Framework*, April 2017, 11.
[12] Australian Institute of Superannuation Trustees, Response to Interim Report, *Review of the Financial System External Dispute Resolution Framework,* 27 January 2017, 11.
[13] Financial Ombudsman Service, *Terms of Reference* (1 July 2010) <https://tinyurl.com/ybw42u4c> 3 – 4.

However any new ToR should explicitly require the Board of directors to engage with the superannuation industry, either directly or through peak associations, when determining who is to be appointed to the panel. This ensures there is meaningful engagement by the Board and the industry when establishing a specialist superannuation panel.

Similar to the use of panels, in order to ensure a just outcome for superannuation funds and members there needs to be an independent specialist stream, or chapter, of AFCA. This specialist stream should be the repository of superannuation expertise and should comprise of suitability qualified and experienced individuals with a firm understanding of the purpose of superannuation, superannuation law and trustee operations.

Legislative gaps and missing powers

Proposed section 1046(2)(h) of the *Corporations Act 2001* requires the Minister to consider the efficiency of the scheme prior to approval. As such, in order for the scheme to be approved it must be deemed to be 'efficient'.

The legislative gaps and missing powers below mean that the scheme does not meet the efficiency criteria. This means the scheme should not be approved unless the elements below are addressed.

A summary of our arguments below is as follows:

- Constitutionally exempt public sector funds are excluded from becoming members of the scheme. This an unnecessary barrier and the legislation should be amended to allow public sector funds to become members of the scheme if they wish to do so.
- Eligibility to make a superannuation complaint to the new body should be entrenched in legislation, rather than being in the dispute resolution scheme's ToR. Embedding the requirements in legislation will provide certainty to scheme participants and prevent eligibility from being modified without considered debate as any proposed changes will need to go through the parliamentary process.
- The proposed legislation lacks effective joinder mechanisms, particularly in regards to joining parties that potentially have an interest in a death benefit distribution. If the flaws in the mechanism are not addressed there is a risk that the correct outcome will not be reached by the decision maker in death benefit distribution complaints.
- The proposed legislation does not effectively address the unique complexities of insurance complaints and their interaction with superannuation. The treatment of insurance complaints has the potential to exclude the trustee from the dispute process and effectively erodes procedural fairness.
- The applicable time limits to make a superannuation complaint have not been set out in legislation. The failure to entrench time limits introduces uncertainty, reduces oversight, increases the likelihood for a perceived conflict of interest to arise, and fails to give effect to the Ramsay Review findings. Time limits must be embedded in legislation.

- The user experience of external dispute resolution would be improved if the dispute resolution body was compelled to respond to, or resolve a claim, within a specified legislative time limit.
- The removal of the right to seek judicial review under the proposed reforms means that scheme participants will be worse off under the new system and accordingly the right to judicial review should be retained. It is critically important that the right to appeal a decision, or conduct relating to the making of a decision, of the new scheme is maintained.
- The new external dispute resolution must be a not-for-profit company because it is inappropriate for monies, particularly superannuation trust monies, to be used to derive a profit.
- It is not possible to provide a full appraisal of the regulatory costs associated with the proposed EDR framework.

Exclusion of constitutionally exempt public sector funds

Constitutionally exempt public sector funds are precluded from becoming members of the scheme. Currently the SCT's jurisdiction only covers regulated superannuation funds within the meaning of the *Superannuation Industry (Supervision) Act 1993*, which means that a number of exempt public sector superannuation funds are not subject to the SCT's jurisdiction. However, there is a mechanism in place that allows these funds to subject themselves to the jurisdiction of the SCT. This important right has not been carried over into AFCA.

The proposed section 1047(a) of the *Corporations Act 2001* states that it is a scheme function to make membership of the scheme open to every entity that is required, under a law of the Commonwealth or licence condition, to be a member of an EDR scheme. This provision suggests that if an entity is not required to be a member of the scheme would be precluded from joining.

The legislation should be amended to make provision for constitutionally exempt public sector funds to submit themselves to the jurisdiction of the entity if they wish to do so. This right should be clearly outlined in legislation, rather than in the ToR in order to provide certainty to participants that are looking to be members of the scheme, and prevent the risk that the ToR may, through amendment, require more of those public sector funds than is required for regulated superannuation funds.

Standing

Eligibility to make a superannuation complaint to AFCA (standing) should be entrenched in legislation, rather than being in AFCA's ToR. Putting eligibility requirements in legislation provides certainty to scheme participants and acts as an important safeguard against modification without public scrutiny.

Current law	**Proposed law**
Generally (some exceptions apply), the following persons and their representatives may bring a claim:[14] • Member or former member of a regulated superannuation fund; or • A person with an interest, or claims to have an interest, in a death benefit.	Any person dissatisfied with members of the scheme.[15] In order for the body's powers over superannuation complaints to be activated, the complaint must also be classified as a *superannuation complaint.*

Limitations on standing set out in legislation are beneficial because:

- It makes the management of unmeritorious applications easier – if a claimant has no real legal right, interest or responsibility in the claim then limits on standing can prevent them from bringing that claim.
- It provides clarity to superannuation fund trustees as to the types of persons who may need to be involved in a dispute, allowing them to incorporate those persons throughout the IDR process.
- It ensures that any change to standing must go through the parliamentary process.

Standing should be set out in legislation, rather than in the ToR to provide scheme participants with certainty, and to establish safeguards that prevent the standing test from being changed without the rigours offered by the parliamentary process.

[14] *Superannuation (Resolution of Complaints) Act 1993* s 14(1); s 4B(1)–(4).
[15] *Corporations Act 2001* proposed s 1047.

Joinder for death benefit complaints and claim staking

The proposed legislation does not have effective joinder mechanisms. This limits the ability of the new scheme to join parties that have a potential interest in a death benefit claim. The defective powers may prevent the correct outcome being reached as the scheme will not hear arguments from potential beneficiaries as they are excluded from the decision making process.

Current law	**New law**
If a complaint has been made regarding the decision of a trustee about a death benefit then the trustee must give written notice to *all persons* that the trustee believes may have an interest in the outcome of the complaint.[16] That person can then apply to the tribunal to be joined to the complaint.[17]	No equivalent – the new body will have the power to join a person that has *applied* to become a party to a complaint.[18]

While under the proposed laws AFCA will have the discretion to join a person that has applied to become a party to a complaint,[19] there is a risk that potential beneficiaries may not be aware that they have the right to apply to be joined to a complaint. This risk arises due to the removal of the trustee's obligation to provide written notice to all persons that may have an interest in the outcome of a complaint. In the context of death benefit disputes, which can be high value, it is absolutely critical that all parties with a potential interest are involved in the dispute process. There is a real risk that members will be worse off under the proposed changes as a result of the removal of the notification requirement.

The current joinder arrangements contained in section 24A (1) of the *Superannuation (Resolution of Complaints) Act 1993* must be replicated in the proposed legislative framework to ensure that members interests' are protected and that potential beneficiaries receive notice of their interest in a death benefit. We note that the Ramsay Review final report recommended that the claim staking process for death benefit disputes be retained, in line with current arrangements.[20]

[16] *Superannuation (Resolution of Complaints) Act 1993* proposed s 24A(1)(a)–(b).
[17] *Superannuation (Resolution of Complaints) Act 1993* proposed s 24A(3)(c).
[18] *Corporations Act 2001* proposed s 1053(1)(a).
[19] Ibid.
[20] Final Report, *Review of the Financial System External Dispute Resolution and Complaints Framework*, April 2017, 141–142.

Insurance

Under the proposed model a complainant will have the right to bring a claim against an insurer or against a trustee. Depending on who the complainant chooses to bring a complaint against will drastically alter the dispute resolution process, procedural fairness, and the outcome.

Many superannuation fund members are not themselves insurance policy holders, rather it is the trustee of the fund that has the contractual arrangement with the insurer. This is not immediately clear to many fund members.

If a member brings a complaint against an insurer, rather than the trustee then the dispute resolution body will be prevented from compelling the trustee to join the complaint because the power to join is only activated if the complaint is a *superannuation complaint* within the meaning of the proposed *Corporations Act 2001* provisions.[21] If the member initiates a complaint against an insurer and not the trustee then this will not be classified as a superannuation complaint. This is obviously a poor outcome and is not in the best interests of members.

Conversely, if a member brings a complaint against the trustee, not the insurer then the dispute resolution body will have the power to join the insurer and will have the benefit of the legislative powers in the act by virtue of the complaint being a *superannuation complaint.*

This regulatory gap must be addressed. It is clear that if the dispute resolution body is engaged with a *superannuation complaint* then they will be able to resolve the complaint more easily by virtue of the extra powers. These powers in turn improve the efficiency, effectiveness and ability of the scheme to deal with complaints in a timely manner.

Furthermore, when the contractual relationship is between the superannuation fund and the insurer, the trustee has a role to play in the decision making of the insurance benefit, and complaint. Given the trustee's direct decision making role in the payout of an insurance benefit, it is integral that the trustee is involved in the dispute.

It is also important to recognise that superannuation trustees have the duty to make a decision in the best interests of the beneficiary and fund members taken as a whole.

The proposed legislation needs to reflect the fact that insurance complaints within the superannuation context may need to be treated as *superannuation complaints* in order to involve the trustee throughout the process – as the trustee is ultimately the decision maker when it comes

[21] *Corporations Act 2001* proposed s 1052(1).

to decisions relating to an insurance payout. Failure to involve trustees in the process could lead to perverse and unfair consequences and potentially unenforceable decisions.

Time limits to bring a claim

The applicable time limits to make a superannuation complaint are not set out in the proposed legislation. The failure to entrench time limits introduces uncertainty, increases the likelihood for a perceived conflict of interest to arise, and fails to give effect to the Ramsay Review findings. For these reasons the time limit for bringing a claim should be entrenched in legislation, as is currently the case.[22]

Having time limits set out in the ToR, rather than in the proposed legislation, introduces uncertainty in the dispute resolution process. This is because the Board will be free to vary the ToR and thus change the timeframes within which a claim can be brought. Similarly, the Board will be free to change the timeframe without parliamentary scrutiny, which is an important safeguard that currently exists in the present system.

If the time limits are in legislation then there is less chance for a perceived or actual conflict of interest to arise. If the body itself has the ultimate power to decide who can bring a claim, the timeframes they need to bring a claim, and the claims process, there is a very real risk that people may believe that the body has too much influence over the entire process, or favours a particular group of claimants over another.

Finally, the Ramsay Review supported retaining time limits for death and total and permanent disablement disputes to ensure the timely payout of benefits.[23]

Time limits, particularly for death and total and permanent disablement claims, be set out in legislation.

Time limits to resolve a claim

The user experience of external dispute resolution would be improved if the dispute resolution body was compelled to respond to, or resolve a claim, within a specified legislative time limit. It is clear the external dispute resolution process can sometimes be a lengthy one, as highlighted by the fact that some complaints to the SCT have taken years to progress through to resolution (this is a consequence of chronic underfunding).

Where a complaint takes considerable time to progress or for a dispute to be resolved the interests of members and potential beneficiaries and the fund are all affected. Further, lengthy

[22] Currently the time limit for parties to bring a complaint to the SCT relating to death and total and permanent disablement claims is 2 to 4 years, depending on the circumstances.
[23] Final Report, *Review of the Financial System External Dispute Resolution and Complaints Framework*, April 2017, 142.

delays may prejudice members that decide it is easier to settle the dispute and take an unfavourable outcome rather than proceeding to final determination.

This is unsatisfactory and there should be a maximum time limit set in legislation for the dispute resolution body to resolve the claim, or conversely, for the resolution body to be duty bound to make their best endeavours to resolve the complaint in a timely manner.

Appeals

It is critically important that the right to appeal a decision, or conduct relating to the making of a decision, of the new scheme is maintained. The removal of the right to seek judicial review under the proposed reforms means that scheme participants will be worse off under the new system and we believe that a right similar to judicial review should be retained.

In both AIST's and ISA's previous submissions we argued that it is vitally important for members and trustees to be given the opportunity to appeal determinations because superannuation disputes can be complex and impose legal liabilities on parties. We argued that the removal of an appeal mechanism would reduce the overall integrity of the dispute resolution process.

In an environment where Australians are compelled by legislation to contribute a substantial percentage of their income into superannuation accounts and decisions relating to those accounts have potentially life changing impacts; the importance of appeal rights are emphasised.

The Ramsay Review Final Report ultimately suggested that under the new scheme participants should be able to appeal a determination to the Federal Court on a question of law.[24] While we support this finding, we are still concerned that the right to seek a judicial review has been lost under the proposed reform package.

Current law	**New law**
Appeal to the Federal Court, on a question of law, from a determination of the SCT.[25]	Appeal to the Federal Court, on a question of law, from a determination of the EDR decision maker.[26]

[24] Final Report, *Review of the Financial System External Dispute Resolution and Complaints Framework*, April 2017, 139.
[25] *Superannuation (Resolution of Complaints) Act 1993* s 46(1).
[26] *Corporations Act 2001* proposed s 1061(1).

Right to seek judicial review of a decision[27], or conduct in connection with the making of a decision,[28] by the Federal Court.	No equivalent.

As a statutory body, decisions and conduct of the SCT staff are subject to judicial review. It is important for an appeal right akin to judicial review be retained because there may be cases where the new dispute resolution body engages in conduct or makes a decision that is not classified as a determination, or the appeal does not relate to a question of law. In this situation it is vital that participants are given the right to seek a review or appeal.

There should be a right for scheme participants to appeal to a panel, or a decision maker, within the new body. This appeal right should replicate the judicial review process available to participants under the current SCT scheme. Notwithstanding the internal appeal mechanism, it is vital that the reviewing decision maker is independent and was not involved with the initial dispute.

Not-for-profit

The new external dispute resolution body must be a not-for-profit company because it is inappropriate for monies, particularly superannuation trust monies, to be used to derive a profit.

Section 1048(1)(e) of the *Corporations Act 2001* should be amended by including the following provisions:

- (f) a condition that the scheme does not operate for the profit or personal gain of particular people;
- (g) a condition that the scheme use any money received for carrying out its approved purpose.

Potential regulatory impacts of the proposed EDR framework

We are unable to provide a full assessment of the regulatory impacts of the proposed framework because there is insufficient information available, for example:

- How ASIC proposes to manage their new role and functions.
- The requirements or format of new IDR reporting.
- The governance structure of the proposed new dispute resolution body.

[27] *Administrative Decisions (Judicial Review) Act 1977* s 5(1).
[28] *Administrative Decisions (Judicial Review) Act 1977* s 6(1).

- The proposed ToR of the new dispute resolution body and its interaction with the legislation.
- Operational aspects of the proposed dispute resolution body.

Potential regulatory impacts include:

- Superannuation funds being required to implement and resource separate workflows for SCT and disputes before the new dispute resolution body.
- Training staff on the new dispute resolution process, while keeping knowledge of SCT processes up-to-date.
- Implementation of new IDR processes and compliance with reporting to ASIC.
- Increased disclosure costs.

Additional information on the entire framework to be released to facilitate an accurate assessment of potential regulatory costs associated with the scheme.

Role of the Australian Securities and Investments Commission (ASIC)

Under the proposed reforms ASIC's role in relation to external dispute resolution is set to change dramatically. The table below details the significant changes.

Topic	Role of ASIC	Current or new law
IDR	Registerable Superannuation Entity license holders must have adequate IDR procedures that comply with ASIC standards and requirements.	New law
IDR	Financial Firms (including regulated superannuation funds) must report their IDR activities in accordance with ASIC requirements.	New law
IDR	ASIC to determine content and form of IDR reporting by financial firms (including regulated superannuation funds).	New law

Regulatory requirements	ASIC can issue regulations requiring scheme to perform the functions set out in *Corporations Act 2001* proposed section 1047.[29]	New law
Material scheme changes	ASIC must approve material changes to the scheme.[30]	New law
Directions power	ASIC can require the scheme operator to comply with a condition of their authorisation if ASIC considers they are non-compliant.[31]	New law
Referral to ASIC	The EDR decision maker *must* inform ASIC, and provide particulars, if they become aware that a party to a complaint contravened or may contravene a law, governing rules of a fund, or fail to give effect to a determination.[32]	New law

The new structure and the proposed changes risks compromising the independence of ASIC. Additionally ASIC's power to approve a material change to the scheme is concerning because the materiality threshold has not been defined. There must be greater clarity in the legislation around the meaning of 'material change', so that the extent of ASIC's power is clear.

[29] *Corporations Act 2001* proposed s 1049.
[30] *Corporations Act* proposed s 1050(1)–(3).
[31] *Corporations Act* proposed s 1051(1)–(9).
[32] *Corporations Act* proposed s 1065(1)–(2).

Internal Dispute Resolution (IDR)

The draft proposals set out a number of changes to IDR processes, and reporting. While we are cautiously supportive of the principle behind these changes, a significant amount of detail is still not known and therefore our comments will be limited. In order to provide a considered and full response to the proposals, we need to know more about how the dispute resolution processes will look, and how reporting to ASIC will work.

Notwithstanding the limitations presented by the lack of data and certainty around the processes our views are below.

New internal dispute resolution processes

Under the proposed reforms superannuation funds will be required to comply with a new set of internal dispute resolution processes. While these processes are still unclear, this is likely to be a significant shift from the current requirements and it is vital for any new dispute resolution process to be flexible, appropriate and clear.

Current law	**New law**
Regulated superannuation fund trustees have a duty to establish and maintain IDR arrangements to facilitate the making of complaints by current and former beneficiaries, executors and administrators of estates and parties that have or may have an interest in a death benefit. The trustee must deal with such a complaint within 90 days.	Regulated superannuation fund trustees that are not financial service licensees must have an IDR procedure in place that complies with standards and requirements made or approved by ASIC.[33] ASIC's current requirements are outlined in Regulatory Guide 165.

The new law gives rise to a number of risks that, if not suitably managed, will result in super funds and members being worse off as a result of the reforms. The proposals mean that there may be significant change to funds' internal dispute resolution processes, as such there needs to be extensive consultation.

When setting the standards and requirements ASIC should engage extensively with the superannuation industry to ensure that the standards are appropriate for superannuation funds

[33] *Superannuation (Resolution of Complaints) Act* 1993 proposed s 13.17AB(b)(i); *Corporations Act 2001* s 912A(2)(a)(i).

and do not impose an undue, or significant burden. In particular it is inappropriate for RG165 to be supplanted over the superannuation industry without significant modification because the audience for which RG165 was developed did not include superannuation funds.

If the proposals are implemented, ASIC should have extensive and productive engagement with the superannuation industry by way of industry roundtables. AIST and ISA greatly welcome any consultation with ASIC on the development of IDR standards and requirements for superannuation funds.

Fund reporting of IDR activities in accordance with ASIC requirements

Under the proposals ASIC will be given the power to specify what information superannuation funds must give ASIC about both their IDR procedures, and the operation of their IDR procedures.[34]

While there are no details available yet for what this will actually entail, our principled view is that:

- The predominant purpose of the reporting mechanism should be for constructive improvement of fund IDR processes
- ASIC should engage with industry in the development of standard reporting forms
- Any information requested by ASIC under this power must be capable of standardisation
- Funds should not be disadvantaged or unduly burdened as a result of the collection power.

[34] *Corporations Act 2001* proposed s 912A(2A).

Response to the Consultation Paper

Many of the questions contained in the consultation paper have been answered elsewhere in this submission. Please refer to the table below for our answers to the particular consultation questions:

Consultation Paper question	Location of response
Question 1: Are there other statutory powers the EDR body will need to resolve superannuation complaints effectively?	• Pages 13 – 21: Legislative gaps and missing powers. • We are unable to fully comment on the interaction between the Terms of Reference and the proposed legislation because the Terms of Reference have not been released. This introduces significant uncertainty and we require further information on the scope of operations for the Terms of Reference before being able to provide a detailed response.
Question 2: Do you consider that the Bill strikes the right balance between setting the new EDR schemes objectives in the legislation whilst leaving the operation of the scheme to the terms of reference?	
Question 3: Are there any issues that are currently in the Bill that would be more appropriately placed in the terms of reference or issues that are currently absent from the Bill that should be included in the Bill?	
Question 4: Are there any additional issues that should be considered to ensure an effective transition to the new EDR scheme?	• Pages 13 – 21: Legislative gaps and missing powers. • Pages 5 – 11: EDR under the new scheme (Introduction, funding and transition arrangements).
Question 8: What will the regulatory impacts of the new EDR framework be?	• Pages 20 – 21: Potential regulatory impacts of the proposed EDR framework.