AUSTRALIAN INSTITUTE of SUPERANNUATION TRUSTEES

Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017

29 September 2017

AIST Submission to the Senate Economics Legislation Committee

ABN 19 123 284 275

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

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

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

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Executive summary

AIST provides the following recommendations in relation to this Bill:

Death benefit provisions lack clarity: We are concerned that the drafting of the death benefit provisions do not provide sufficient clarity, which may negatively impact superannuation fund trustees and members.

Consultation on non-legislative measures: It is critical for the superannuation industry to continue to be consulted regarding the non-legislative measures that will result if this legislation is passed. Without meaningful engagement there is a risk that superannuation funds and members will be adversely effected. The industry must be consulted on key issues such as Australian Financial Complaints Authority's (AFCA) ongoing funding, transition arrangements and AFCA's terms of reference.

Appeal rights: Under the Bill, parties to a complaint will not have the right to seek judicial review. We believe that this leaves scheme participants worse off under the new system and therefore a right similar to judicial review should be retained.

Profit-to-member representation essential on AFCA board: We believe that due to the inherent differences between the retail and profit-to-member superannuation industry it is vital for at least one profit-to-member superannuation industry representative to be appointed to the AFCA board.

Transferring complaints: We have concerns with the ability of complainants to withdraw and progress their complaint under the AFCA scheme instead of the Superannuation Complaints Tribunal, and believe this measure does not fully appreciate the complexity of superannuation complaints.

Internal dispute resolution: There are a number of significant changes to the internal dispute resolution (IDR) processes and reporting outlined in the Bill. While we support the principle behind these changes we have a number of concerns and reiterate our arguments in the AIST/ISA joint submission dated 14 June 2017[1], with slight modifications.

[1] AIST and ISA (2017). *EDR and complaints framework*. 14 June 2017, AIST and ISA joint submission. [online] Melbourne: Australian Institute of Superannuation Trustees and Industry Super Australia. Available at: http://tinyurl.com/ybw2rayc [Accessed 28 Sep. 2017].

Introduction

The Australian Institute of Superannuation Trustees (AIST) welcomes the opportunity to comment on the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017* (the "Bill").

On 14 September 2017 the Government introduced four Bills that, if passed, will have a significant impact on the superannuation system. The other bills are the subject of other Committee inquiries and AIST will respond to these separately.

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 dollars by 2035 and represent 130% of Australia's gross domestic product.[2] This projected growth, and value of the industry, highlights the need for the concerns of the superannuation industry to be addressed in the development of AFCA.

We broadly welcome the Government's stated objective in this Bill which is to 'introduce a new EDR framework for the financial system'[3] and 'an enhanced internal dispute resolution framework'[4] however we have a number concerns with the measures and these must be addressed.

[2] Maddock, R. (2014). *Superannuation asset allocations and growth projections*. 17 February 2014. [online] Sydney: Financial Services Council, p.6. Available at: https://tinyurl.com/yaj5r8nj [Accessed 28 Sep. 2017].

[3] Explanatory Memorandum (EM), p.7 para 1.1

[4] EM, p.49, para 2.1

Death benefit provisions lack clarity

We note that the majority of our concerns outlined in our submission to Treasury[5] related to the resolution of death benefits claims have been addressed in the Bill. However, we are concerned that the drafting of the death benefit provisions do not provide sufficient clarity, which may negatively impact superannuation fund trustees and members.

The Bill provides that a person must have 'an interest in the payment of a death benefit'[6] in order to bring a complaint before AFCA regarding a death benefit. However what constitutes an 'interest in the payment of a death benefit' is unclear and we submit the Bill should clearly define what is considered to be an *interest in the payment of a death benefit* in order to reduce confusion and improve clarity in the death benefits process. Greater clarity is necessary because the proposed provision appears to broaden the standing test that is currently applied under the *Superannuation (Resolution of Complaints) Act 1993*, that provides a person can bring a complaint where they have an 'interest in the benefit'.[7] It is unclear whether having an 'interest in the payment of a benefit' is easier to satisfy than having an 'interest in the benefit', and whether the legislative intent is to make it easier to establish standing.

[5] AIST and ISA (2017), as cited in a previous footnote.

[6] Proposed section 1056 (1), *Corporations Act 2001*.

[7] *Superannuation (Resolution of Complaints) Act 1993*, Section 15 (1)(a)(i)

Consultation on non-legislative measures necessary

A number of measures related to AFCA's operations and transitional arrangements are not set out in Bill or accompanying explanatory memorandum. The success of AFCA will depend on how its terms of operations are set and how the transition from the existing arrangements to AFCA will be handled therefore it is essential for there to be meaningful consultation on these issues.

We believe that if the profit-to-member industry is not consulted around AFCA's proposed operations and transition arrangements there is a risk that the unique needs of the industry will not be addressed in the scheme, which may result in superannuation funds and members being adversely effected. We believe that the industry must be consulted on key issues such as:

- AFCA's ongoing funding.
- Funding arrangements during the transition.
- AFCA's terms of reference.

AFCA's ongoing funding arrangements:

The Bill provides that:

> *(b) the operations of the scheme are financed through contributions made by members of the scheme.*[8]

We believe that it is essential for the industry to be consulted on the proposed funding model in order to ensure that the funding model is sufficiently transparent and that the impacts of cross-subsidisation are minimised.

We support increased transparency because it is vital that the industry and fund members are able understand how AFCA is funded, where their money is going, and which sectors are heavily reliant on AFCA. Transparency can also increase accountability.

It is intended for AFCA to hear complaints from firms across the entire finance sector, which includes superannuation funds, financial advisers, banks, and insurers. As each sector of the finance industry will required to fund the AFCA it is important that each does not pay more than their fair share. The evidence to date shows there are fewer superannuation complaints than non-superannuation complaints. For example in 2015-2016, the Financial Ombudsman Service received 34,095 complaints whereas the Superannuation Complaints Tribunal (SCT) received only

[8] *Corporations Act 2001* proposed s 1051(2)(b).

2,368.[9] Figures such as these highlight the risk of inappropriate cross-subsidisation if the funding model is not developed appropriately and does not account for differences between sectors.

Funding arrangements during the transition.

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."[10] 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. If the SCT is not appropriately funded during the transition period there is a risk that fund members will be detrimentally impacted.

The Government has signalled an intention to reduce the SCT's funding, stating that:[11]

> *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, when read with the financial impact statement contained in the explanatory memorandum, suggests that the SCT's funding will be reduced over the coming years until it is wound up.

The financial impact statement contained in the explanatory memorandum outlines the costs associated with the establishment of AFCA over the 4 year forward estimates period. The table details in 2017-2018, the financial year by which AFCA is expected to be established, the costs will be negative $1.8m.[12] The fact that the costs are negative suggest a funding reduction, which is

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[9] Superannuation Complaints Tribunal (2016). *Annual report*. 2015/16. [online] Melbourne: Superannuation Complaints Tribunal. Available at: http://tinyurl.com/y8l8sdyx [Accessed 28 Sep. 2017]; Financial Ombudsman Service Australia (2016). *Annual Review 2015-16*. [online] Melbourne: Financial Ombudsman Service Limited. Available at: http://tinyurl.com/yavpupuo [Accessed 28 Sep. 2017].

[10] Ramsay, I., Abramson, J. and Kirkland, A. (2017). *Review of the financial system external dispute resolution and complaints framework*. Final report, April 2017, p.9. [online] Canberra: Australian Government | The Treasury. Available at: http://tinyurl.com/yc37fkvn [Accessed 28 Sep. 2017].

[11] Morrison, S. and Cormann, M. (2017). *Budget Measures Budget Paper No. 2 2017-18*. Budget 2017-18, 9 May 2017. [online] Canberra: The Commonwealth of Australia, p.162. Available at: http://tinyurl.com/yad9o6zv [Accessed 28 Sep. 2017].

[12] EM, p.4.

cause for concern because the major reason the SCT had problems in the first place was due to underfunding.

If the SCT is underfunded during the transition period there is a risk that 1,600 complainants and funds, as well as any new members that open complaints prior to the establishment of AFCA, will be detrimentally impacted.

It is also unclear what will happen if the complaints before the SCT are not resolved before it is legislated to close, which is on a day fixed by proclamation or automatically four years after the day of Royal assent to the Bill.[13] We request greater clarity around this concern.

AFCA's terms of reference

AFCA's terms of reference will set out how the scheme operates and as such it is vital for the industry to be consulted when the terms of reference are being developed.

We note the work that the AFCA transition team has done to date and invite them to discuss potential terms of reference provisions with the superannuation industry and peak associations such as AIST.

[13] Proposed section 2(1) of the Bill; read with EM page 47 paras 1.199 and 1.200.

Appeal rights

Under the Bill parties to a complaint will not have the right to seek judicial review. We believe that this leaves scheme participants worse off under the new system and therefore a right similar to judicial review should be retained.

In the Bill, the right to seek judicial review of a decision, or conduct leading up to a decision, has removed through an amendment to the *Administrative Decisions (Judicial Review) Act 1977*. We are deeply concerned that this appeal mechanism has been lost, and we believe 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.

In our previous submissions we argued that it is vital 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.[14] 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.

We submit that 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.

[14] Ramsay, I., Abramson, J. and Kirkland, A. (2017), as cited in a previous footnote.

A profit-to-member superannuation industry representative must be on the AFCA board

The Bill provides that it is requirement of the body operating AFCA, the operator, that:

> *'The operator's constitution provides that the number of directors of the operator who have experience in carrying on the kinds of businesses operated by members of the scheme must equal the number of directors who have experience in representing consumers'*[15]

If the profit-to-member sector 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 interests of members of profit-to-member funds. We submit that in order to safeguard members and fund interests', there must be profit-to-member representation on the Board.

[15] *Corporations Act 2001* proposed section 1051(3)(d).

Transferring the complaints between schemes

We have concerns with the ability of complainants to withdraw and progress their complaint at the AFCA scheme instead of the SCT, and believe the measure does not fully appreciate the complexity of superannuation complaints.

The explanatory memorandum notes that:

> *Where the SCT has not made a final determination of a complaint, the complainant may choose to continue to progress the complaint with the SCT. Alternatively, the complainant may withdraw the complaint and progress the complaint with the AFCA scheme instead.*[16]

The explanatory memorandum does not specify the actual transfer provisions or mechanisms, however 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 transfer power, or a replication of it, may cause issues that will jeopardise the interests of parties to a complaint. It is not in the interests of scheme participants, particularly members, that they're given the freedom to withdraw and progress the complaint under the AFCA scheme for the following reasons:

- The outcome of the complaint may differ markedly between the schemes due to different operational processes between the SCT and AFCA. Broadly speaking the AFCA terms of reference, which will likely set out things such as eligibility to bring a complaint, may have different processes from the SCT, which will result in the outcome being different.
- Parties that transfer to AFCA will lose their appeal rights. Parties to a SCT complaint can appeal to Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* for a review of a decision, or the process leading up to the making of a decision. In the Bill this right has been explicitly removed and we reiterate our concern that this appeal mechanism has been lost. It is difficult to see how losing a right to appeal a decision, or conduct leading up to a decision, can 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.[17] We believe that allowing parties to move complaints from the SCT to AFCA would have a similar impact – it increases consumer

[16] EM, p.48, para 1.201

[17] Ramsay, I., Abramson, J. and Kirkland, A. (2017), as cited in a previous footnote, p.8.

confusion as once again they have the choice as to which jurisdiction they want to have their complaint heard in.

- Complaints can be incredibly complicated with multiple parties and it is difficult to see how a complaint can be transferred to AFCA where there are multiple parties. Consider the example of a death benefit claim, which can involve the trustee and multiple potential beneficiaries. In this case 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.

Internal dispute resolution:

There are a number of significant changes to the internal dispute resolution (IDR) processes and reporting outlined in the Bill. While we support the principle behind these changes we have a number of concerns and reiterate our arguments in the AIST/ISA Joint submission dated 14 June 2017, with slight modification.[18]

New IDR processes

The Bill repeals section 101 of the *Superannuation Industry (Supervision) Act 1993* which establishes a duty for regulated superannuation funds trustees to have arrangements for dealing with inquiries or complaints. The new provisions require trustees of regulated superannuation funds to have an internal dispute resolution procedure that complies with standards set by the Australian Securities and Investments Commission (ASIC).[19] ASIC's current standards are set out in *Regulatory Guide 165: Licensing- Internal and external dispute resolution* (RG 165).

The proposals give rise to a number of serious risks that, if not suitably managed, will result in superannuation funds and their 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 and do not impose an undue, or significant burden. In particular it is inappropriate for RG 165 to be supplanted over the superannuation industry without significant modification because the audience for which RG 165 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 greatly welcomes any consultation with ASIC on the development of IDR standards and requirements for superannuation funds.

Requirement to access IDR before EDR

The Bill does not appear to contain measures that require complainants to access a regulated superannuation fund's IDR processes prior to lodging a complaint with AFCA. We believe it is

[18] AIST and ISA (2017), as cited ion a previous footnote, pp.23-24

[19] Proposed section s 101(1)(b), SIS Act.

important for funds to be given the opportunity to resolve a complaint with their members before a complaint is progressed to an external body for review.

Current jurisdictional limitations on the SCT mean that a complainant must have tried to resolve their complaint with the regulated superannuation fund before the SCT can hear it. We believe that this should be preserved in the new body because allowing a complaint to be resolved by the fund first would:

- Increase efficiency because the regulated superannuation fund would likely have all the information relating to the complaint available to them.
- Reduce the burden placed on AFCA, as some complaints would be able to be resolved with the fund in the first instance.
- Reduce cost because AFCA would not need to expend their finite resources on complaints that may have been able to be resolved at the first instance by the fund.
- Potentially improve the complaints experience because funds would be able to adopt a streamlined complaints mechanisms that would be suitable to the needs of their members (because funds would know their members better than AFCA would).

ASIC publishing of information related to firm IDR activity including firm specific data

The Bill will give ASIC the power to publish information relating to the IDR processes of financial firms, including regulated superannuation funds and information published may specifically identify the entity to which it relates.[20]

We do not oppose these measures provided the issues outlined below are addressed. We are concerned that there are a number of risks associated with open-ended public disclosure of IDR activity and firm specific data and that legislative safeguards need to be put in place to ensure that unintended outcomes do not arise as a result of the broad power of ASIC to report. Appropriate safeguards, which should be enshrined in legislation, include that the reporting of IDR should:

- Be for the predominant purpose of reporting.
- Be for constructive improvement of fund IDR processes.
- Where possible, avoid misleading representations being able to be derived for the information.
- Be appropriately standardised to prevent misleading comparisons from being made.

[20] *Australian Securities and Investments Commission Act 2001* proposed s 243C (1) and (2).

- Acknowledge if there have been any structural changes within a fund, or systemic changes that may have resulted in a difference in IDR outcomes and processes.
- Include a disclaimer that comparability of data may not be possible.
- Only be developed once ASIC has engaged with industry regarding the development of standard reporting forms.