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Improving dispute resolution in the financial system

The Australian Financial Markets Association (AFMA) is commenting on the 'Improving dispute resolution in the financial system' Consultation Paper (Consultation Paper).

AFMA is a member-driven and policy-focused industry body that represents participants in Australia's financial markets and providers of wholesale banking services. AFMA's membership reflects the spectrum of industry participants including banks, stockbrokers, dealers, market makers, market infrastructure providers and treasury corporations.

Core proposition - Flawed framework

The core proposition of this submission is that the external dispute resolution (EDR) framework is fundamentally flawed as a hybrid of an industry based service with a statutory body overlay. AFMA accepts the recommendations of the Final Report of the 'Financial system external dispute resolution and complaints framework' (Ramsay Review) which is internally consistent and provides a logical EDR framework. The Ramsay Review put forward an industry-based organisational structure which is a rational development of current arrangements. However, this consultation framework does not appear to implement that structure in a logical form.

While the policy intention behind this deviation is unclear, it appears that the legislation was primarily drafted on the basis of following the Ramsay Review recommendations to create a single complaints industry based ombudsman service for the financial services sector, with statutory backing to require membership and the conferral of statutory powers with regard to superannuation complaints. The ministerial authorisation of an EDR scheme under ASIC oversight has a logical place in an EDR model which relies on

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industry to create one or more EDR schemes based on contract. However, under the proposal only one EDR organisation will be permitted with a nominated title of 'Australian Financial Complaints Authority'. This title connotes an independent statutory body exercising statutory rather than contract-based dispute resolution powers. It would be a misnomer to include the word 'authority' in the name of this entity as it is not intended to have the characteristics of a statutory body as described by the Department of Finance[1].

If it were intended for this organisation to be a statutory body, it could operate without all the organisational ASIC approval and oversight mechanisms adapted from the existing Corporations Act arrangements for EDR schemes, and could function on a model similar to the Telecommunications Industry Ombudsman (TIO). As a statutory body it would stand peer and independent to the industry regulator and be accountable directly to the Minister and Parliament. Adoption of a TIO type model does not appear to be the policy intention, which is to require industry to establish a single ombudsman organisation out of the existing industry-run infrastructure. It would be misleading to the general public for the body to operate under the proposed title when it is intended to be an industry-based ombudsman service. The body in this case should be called the 'Australian Financial Complaints Ombudsman', although the need to dictate the name in legislation is unnecessary.

Questions

> *Question 1*
> *Are there other statutory powers the EDR body will need to resolve superannuation complaints effectively?*

The Explanatory Memorandum does not explain the legal basis for the organisational structure and its exercise of statutory power of the envisaged ombudsman. When a government official or statutory agency exercises a decision-making power directly affecting the interests of an individual or corporation, the reach of administrative law remedies, such as judicial review, is relatively clear. However, when governments transfer decision-making responsibilities to 'outside' bodies, the applicability of these remedies becomes uncertain. Decisions made by private service providers or corporations established under the Corporations Act, may give rise to specific statutory remedies under the Corporations Act. However, the extent to which they are judicially reviewable in accordance with administrative law principles is less certain. We have sought some guidance in reference to case law on the matter, such as *FCT v Bank of Western Australia* 96 ATC 4009 (1995) 133 ALR 599, but it remains unclear to us what level of legal certainty will apply to the decisions of the new ombudsman when exercising statutory powers in relation to superannuation complaints. The divergence in High Court opinion in the case

[1] As a guide see - Department of Finance, Australian Government Organisations Register Types of Bodies https://www.finance.gov.au/sites/default/files/types-of-bodies.pdf; and Federal Court in *FCT v Bank of Western Australia* 96 ATC 4009; (1995) 133 ALR 599

of *NEAT Domestic Trading Pty Limited v AWB Limited* [2003] HCA 35 demonstrates how complex the characterisation analysis may be in relation to this question.

It is the responsibility of the Government to fully explain how the new ombudsman will function in terms of administrative law to allay concerns in respect of the legal certainty supporting superannuation complaints.

> *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?*

As noted in the introductory comments it is unclear in policy and practical terms why the hybrid statutory model has been put forward and the legislation is under-developed in this regard. The legislation would benefit from further policy development work drawing on the findings and analysis in the Ramsay Review, so the Government's policy rationale can be put forward before asking for a response to this question.

> *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?*

We refer to our in answer to Question 2.

> *Question 4 - Are there any additional issues that should be considered to ensure an effective transition to the new EDR scheme?*

Transition

The timeline for a 1 July 2018 start date for the new ombudsman organisation is unrealistic and there is no presentation of a transition path to the new framework. A transition path is of fundamental importance and we recommend that the Government develop a detailed transition plan with input from industry bodies as soon as possible. We further recommend that this transition plan provides a detailed 'roadmap'[2] about the specific milestones involved in:

- gradually running down the operations of the existing EDR schemes (e.g. Financial Ombudsman Service (FOS), Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT); and
- the new ombudsman organisation becoming operational.

What would happen in the event that ASIC did not approve a new organisation to be the new ombudsman by 1 July 2018 and the proposed timeline is not met? History has shown that ASIC has slow new entity approval processes and cannot be directed by the Minister with regard to its advice and the timing processes or to meeting deadlines. Industry will

[2] The published timeline is insufficient in this regard.

also need to come to collective agreement about the new organisation to be put forward for approval and such collective agreement, given the range of members across the existing schemes, may take some time to be reached once the legislation is passed. We are not advocating any position with regard to ASIC's approval discretion but highlight the possibility that the regulatory processes and interaction with applicants will take considerably longer than suggested by the draft legislation.

The consultation paper appears to propose a 'handover period' where (i) the existing EDR schemes and (ii) the new ombudsman operate concurrently. We believe that the use of such a handover period would be less than satisfactory from the following perspectives:

- *Operational* – There is a high likelihood of duplication, inefficiency and loss of corporate memory and intellectual capital. Experience shows that restructuring will unsettle highly experienced staff with specialist knowledge especially in relation to superannuation complaints leading to high levels of departures. Staff dealing with complaints need special qualities to deal with emotional complainants and the high workloads. It cannot be expected that such staff can be quickly replaced and inexperienced new staff will need some time to be as competent and productive as current staff.
- *Transition frictions* – There will be significant transitional frictions for complainants, ASIC and industry, including from the cost perspective in the change. The establishment of a fresh organisation for new ombudsman appears to be unnecessarily 'reinventing the wheel' due to the non-utilisation of (i) existing specialist EDR expertise and (ii) mature and efficient industry-based organisations.
- *Complainant experience* – a complex and confusing engagement model that runs counter to the 'one stop shop' motivation for the EDR legislation. We emphasise that superannuation complaints handling is facing the biggest operational upheaval and is most likely to draw complainant ire.

Additionally, should there be any concurrent operation of the new ombudsman and old schemes for a limited period of time, it is likely that complainants will engage in forum shopping.

Retrospectivity

The Consultation Paper does not address the issue of retrospectivity. For example what if a complainant contacts the new ombudsman in 2021 with regard to a dispute arising from advice in 2015 that was covered by FOS. Will the new ombudsman review the matter under (i) new post 1 July 2018 protocols or (ii) the FOS protocols that were applicable in 2015? This is a further example of where more work on the legislative framework is needed.

ASIC role

The role of ASIC is considered important. However, the nature of ASIC's enhanced discretionary powers is concerning. Specifically, the unilateral nature of these powers has the potential to hinder the independence and effectiveness of the new ombudsman board. By way of example:

- ASIC should not be permitted to change maximum value of compensation thresholds without consulting the ombudsman board. The criteria that ASIC uses to increase these limits should be linked back to some form of objective and quantifiable source.
- Finite and clearly defined limits should be applicable to ASIC's power to approve the sort of material changes referred to in the consultation paper. Failure to utilise such limits would effectively reduce the role of the ombudsman board to a 'rubber stamping' function.

Corporate governance

It is unclear the extent to which there will be regulatory interference in the corporate governance independence of the new ombudsman. For example, to what degree will the choice of board members and their tenure be taken out of the hands of the members of new ombudsman organisation?

Certainty

The 'Terms of Reference' section of the Consultation Paper (paragraph 32) states that 'a key element of the new framework is that AFCA is flexible and responsive to new developments'. The Consultation Paper does not explain why such 'flexibility and responsiveness' is necessary by citing possible future developments. Certainty is an important characteristic for a dispute resolution framework and this statement detracts by introducing an element of uncertainty. It also raises a fundamental question - is the establishment of the new ombudsman the best means for the Government to achieve a responsive system? The current industry run system has more ability to be flexible and responsive as demonstrated by its past successful history of development.

AFMA has no comment on Questions 5, 6 and 7.

Please contact David Love either on 02 9776 7995 or by email dlove@afma.com.au if further clarification or elaboration is desired.

Yours sincerely

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