FINANCIAL OMBUDSMAN SERVICE AUSTRALIA

Improving dispute resolution in the financial system

Response to the Consultation Paper

June 2017

Contents

Glossary

AFCA	Australian Financial Complaints Authority
ASIC	Australian Securities and Investments Commission
CIO	Credit and Investments Ombudsman
EDR	External Dispute Resolution
FOS	Financial Ombudsman Service
IDR	Internal Dispute Resolution
Ramsay Review	Review of the External Dispute Resolution & Complaints Framework
SCT	Superannuation Complaints Tribunal
TOR	Terms of Reference

Improving dispute resolution in the financial system

The industry model that currently applies to FOS

Our experience is as an operator of an independent industry based Ombudsman scheme whose objects are set out in the Constitution of the Financial Ombudsman Scheme Limited, and whose procedures for resolving disputes are established in the Financial Ombudsman Scheme Terms of Reference (TOR). The TOR is amended from time to time following consultation with stakeholders, and approved by ASIC. While we operate within a regulatory framework with performance benchmarks that are independently reviewed, operational aspects of FOS are based on private law (contractual) obligations between FOS and our members. These arrangements have reliably underpinned the delivery of dispute resolution services in the financial sector, allowing FOS to handle over 35,000 disputes per annum.

FOS is supportive of the establishment of the new single EDR scheme, based on an industry ombudsman model and operating under a co-regulatory framework**.**

The Government, in supporting the 11 recommendations made by the Ramsay Panel, has endorsed the view that an industry ombudsman scheme is the appropriate model for all areas of the financial system and in doing so has proposed legislation that sees a scheme:

- with an independent Board responsible for determining how the scheme is funded and how it will resolve disputes
- which has operational rules set out in Terms of Reference (TOR) approved by the Minister as part of the authorisation process, and
- which has appropriate statutory powers to deal with the complexity of some superannuation disputes.

With the establishment of the new single EDR scheme incorporating superannuation disputes, getting the balance right between scheme operational rules to be set out in an approved TOR[1] and those requiring legislative underpinnings is important.

As the Ramsay Review found:

> 'The operations of the ombudsman schemes are governed by terms of reference approved by their boards (and the Australian Securities and Investments Commission (ASIC)) rather than statute, which gives them flexibility to change their processes and funding arrangements without requiring changes to legislation of appropriation through the budget process.'[2]

Our examination of the draft legislation is guided by the policy intent – the establishment of 'a 'one-stop shop' EDR scheme ….based on an ombudsman model…established by industry as a public company limited by guarantee…governed by a board comprising of an independent chair and an equal number of directors with consumer and industry backgrounds.'[3]

[1] The TOR sets out who is eligible to lodge a dispute, the types of disputes that a scheme can consider, how the scheme resolves disputes, the types of remedies that the scheme can provide and other related matters. These Terms of Reference are binding upon Financial Services Providers who are members of the scheme.

[2] Review of the financial system external dispute resolution and complaints framework, Final Report, April 2017 p.10

[3] Treasury Laws Amendment (External Dispute Resolution) Bill 2017, Exposure Draft Explanatory Material p.5

Our comments are also guided by the recognised strengths of the EDR framework and the objective that effecting the proposed changes will make it easier for consumers and small businesses to access dispute resolution services.

We would also like to make an observation on the proposed use of the term “authority” in the name of the new one stop shop. This could create the impression that rather than a body established to resolve individual complaints, the new organisation is a standard setting body (for example the newly established Financial Adviser Standards and Ethics Authority) or a regulatory body that takes on some of the regulatory functions of ASIC. We also are concerned the use of the term “authority” will not help in raising awareness of the new one stop shop in the community or in ensuring the new scheme is accessible to all segments of the Australian community. We would be happy to discuss possible alternatives.

This submission highlights some practical issues that we consider need to be addressed and areas where greater clarification would be worthwhile.[4]

[4] This submission has been prepared by the Office of the Chief Ombudsman and does not necessarily represent the views of individual FOS directors. It draws on the experience of FOS and its predecessors in the resolution of disputes about financial services.

A summary of the issues raised in this submission

In regard to the establishment of the EDR body, we raise the following issues that relate to the current drafting of the Bill, or are absent from it. Our comments seek to improve the clarity of the legislation, remove ambiguity, and achieve the effective operation of the new single EDR scheme. Each of these issues are dealt with in more detail in the body of this submission. They are:

- **Single scheme:** the legislation should clearly reflect the policy intention to only have one scheme.
- **Independence:** we consider that there needs to be an explicit reference in the Bill that the scheme must not be subject to direction and must be free from interference on decision making on complaints.
- **Not-for-profit:** current drafting states that the operator of the scheme must be a company limited by guarantee, but does not state that is should be not-for-profit. This is an important aspect ensuring there is no conflict between the purpose of the scheme and financial interests of external shareholders. This also underpins the independence principle and should be stated in the legislation.
- **Expulsion of members:** currently the way the legislation is worded, it appears that the scheme would not be able to expel a member if the member fails to comply with a scheme determination or other requirement.
- **Scheme accessibility for eligible complainants:** the current wording requires the scheme to ensure the complaints mechanism is accessible to 'any persons dissatisfied with the members of the scheme'. This could prevent the scheme's TOR setting the types of jurisdictional limits currently in place.
- **Independent Assessor:** the term should be defined to clearly reflect that the role is limited to a review of issues relating to service standards. The current wording in the explanatory material states that the independent assessor assesses 'whether the EDR scheme treats complainants, and members of the scheme fairly'. This could suggest its role is to undertake a merits review of scheme decisions.
- **ASIC's direction to vary claims limits:** we query why a specific directions power is required as it undermines both the independence of the scheme and its co-regulatory structure.
- **Reporting non-compliance to ASIC**: current drafting states that the scheme will report to ASIC on contraventions of any law, governing rules or terms and conditions 'that may have

occurred'. We are concerned that this obligation could lead to an unsustainable volume of reporting for both the scheme and ASIC.

- **Non-superannuation determinations should not be binding on complainants:** the draft currently deals with the fact that superannuation determinations are binding on complainants but does not specifically state this does not apply to non-superannuation complaints.

- **The definition of a superannuation complaint:** we suggest a minor enhancement.

- **EDR decision maker applying to superannuation disputes:** the current drafting creates practical problems and is unduly restrictive as the powers apply to an individual rather than scheme operator and there is no express power of delegation.

- **Complaints about superannuation group life insurance:** we think all superannuation group life insurance complaints involving a life insurer should be dealt with in the same way and have a claim-free limit.

- **Traditional trustee disputes:** we think these disputes should operate under the same framework as for superannuation complaints.

- **Secrecy provisions for superannuation disputes:** we think these as drafted create difficulties for a single scheme with different standards of treatment of confidential information for one class of disputes and not others. We recognise that there could be specific issues concerning the resolution of superannuation disputes that will need to be considered in making amendments to this provision.

- **Privacy:** we are seeking exemption from the privacy access requirements that is similar to section 47C of the *Freedom of Information Act 1982* (FOI Act) – one that preserves internal working documents containing opinions, advice, recommendations and consultation notes as part of an EDR decision making process.

On transition arrangements, we propose:

- That the timetable for transition is ambitious. If authorisation is not granted to an operator until late this calendar year, based on our experience it will be difficult to commence the full operation of the new single scheme on 1 July 2018.

- We suggest that information that the Minister should release in July 2017 about the authorisation process should include much

more detail about each of the criteria set out in the Bill and explanatory material.

In particular more detail should be provided about what would be required for a scheme to demonstrate it has the expertise and capacity to deal with disputes, not only in the long-run, but from day one.

- We are concerned about the limited information that has been made available to date about transition arrangements for the existing schemes to the new EDR body. This should be addressed to provide:
    - certainty to industry and consumers that the current schemes will continue to have the capacity and resources to resolve disputes up to the day prior to the commencement of the new scheme and that the new scheme will have the skills and resources to handle FOS and CIO 'transition' disputes and receive an expected 1,000 new disputes in its first week of operation
    - clarity to the Boards of the CIO and FOS about proposed transition arrangements for current staff, assets and commitments of each scheme so that they can fulfil their fiduciary responsibilities under the *Corporations Act 2001* (Corporations Act) as Directors of companies limited by guarantee, and
    - certainty to the very skilled dispute resolution staff that are employed by the current schemes about their future employment arrangements.
- We propose an alternative streamlined mechanism, outlined in more detail later in this submission, which would simplify the transitional arrangements for disputes and membership, reducing the costs of transition for industry.

Other consultation questions we address cover:

- **Monetary limits:** FOS is supportive of the increase in monetary limits for both consumers and small businesses.
- **Sub-limits for different insurance products**: the TOR of the single EDR scheme will need to include differential limits for income stream products although with broader overall claims limits this would not be as critical. We consider that third party general insurance claims could have a marginal increase consistent with broader increases, but have not conducted analysis to support this position. We also consider that claims against a general insurance broker should, in principle, align with

the broader industry claims, but that any movement should be based on deeper analysis.

- **Whether credit representatives need to be licensed**: we do not consider that credit representatives should be required to be licenced, provided the licensee is responsible for their conduct.
- **Regulatory impact**: if transition arrangements are simple and streamlined, the costs to industry of this policy change will be less than what is currently proposed in the draft legislation.

Consultation questions relating to the draft Bill

We consider that the draft Bill and its explanatory material are generally sound, however, there are a number of issues we wish to draw to the attention of the drafters to improve the clarity of the legislation, remove ambiguity, or achieve more effective dispute resolution.

Key Points:

1. The legislation should explicitly state that:

   - the approved EDR scheme is **independent** , not subject to direction and free from interference on decision making on complaints, and
   - the operator of the EDR scheme is a **not-for-profit** company limited by guarantee
   - the EDR scheme can expel members that fail to comply with a scheme requirement
   - there are jurisdictional limits for eligible complaints set out in the scheme's TOR
   - the role of the Independent Assessor is to consider complaints about the standard of service provided by the EDR scheme, not review the scheme's decisions.
   - non-superannuation dispute determinations will not be binding on complainants

2. In specific areas the nexus between overarching objectives in legislation and the scheme's TOR should be clearer.

3. There should be some modifications to ASIC powers as currently drafted

4. The legislation needs to be clear that 'EDR decision-makers' who determine superannuation disputes will be appointed by the Board of the scheme, in the same way that the Board appoints Ombudsman

5. Some changes to the classes of superannuation disputes are recommended

6. The scheme should have the benefit of an exemption from the privacy access requirements that is similar to section 47C of the FOI Act.

Consultation question 1:

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

While the Ramsay Panel acknowledges there is overlap between FOS and the SCT on life insurance disputes and some financial advice disputes, our comments on the Exposure Draft primarily deal with issue relating to FOS's current jurisdiction.

From our experience, however, we have not identified other statutory powers that the EDR body will need to resolve superannuation complaints effectively.

Consultation question 2:

Do you consider that the Bill strikes the right balance between setting the new EDR scheme's objectives in the legislation whilst leaving the operation of the scheme to the terms of reference?

From a FOS perspective the balance between the scheme's objectives set out in legislation and detailed operational rules established in the TOR is just about right. There are some important additional features that we believe should be set out in the legislation and for certain areas we believe the nexus between overarching objectives in legislation and the scheme's TOR should be clearer. We cover these issues in our response to consultation question 3 below.

We are very familiar with operating under a regime where the TOR establish the main elements of powers, jurisdiction and dispute processes and this experience guides our recommended amendments to the draft legislation.

As the Ramsay Review found:

> 'The operations of the ombudsman schemes are governed by terms of reference approved by their boards (and the Australian Securities and Investments Commission (ASIC)) rather than statute, which gives them flexibility to change their processes and funding arrangements without requiring changes to legislation of appropriation through the budget process.'[5]

As a general observation, we would caution against setting superannuation dispute rules in legislation based on what the superannuation industry are currently used to in this jurisdiction. Wherever possible, the rules, powers and procedures relating to superannuation disputes should be contained in the scheme's TOR. To do otherwise, would undermine the intent of the new scheme, as noted in the Explanatory Material:

[5] Review of the financial system external dispute resolution and complaints framework, Final Report, April 2017 p.10

'…the way the scheme operates will be determined by AFCA's Board and set out in its ToR. This will allow operational improvements to be implemented much more quickly than would be the case if a legislative change was required.'[6]

Consultation 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?

Minister's authorisation power – only one EDR scheme

It is clear from the Exposure Draft Explanatory Material that the policy intention is that 'only one scheme will be authorised by the Minister at any one time'.[7] However, section 1046 of the Bill does not require the Minister to take into account the desirability of a single external dispute resolution scheme for all financial disputes including superannuation disputes. Section 1046(2) (m) permits the Minister to take into account any other matter that the Minister considers relevant when making an authorisation decision.

Further, amendments to the *Corporation Act* 912A(2)(b) and 1017G(2)(b) set out in Schedule 1 Part 2 of the Exposure Draft refers to "membership of one or more external dispute resolution schemes that is, or are, authorised by the Minister under Part 7.10A.'

We consider that it would be clearer, and decisions by the Minister less susceptible to challenge, if the legislation clearly reflected the evident policy intention.

Independence

The legislation should explicitly state that the approved EDR scheme is independent, not subject to direction and is free from interference on decision making on complaints.

In making decisions that in their opinion are fair in all the circumstances, Ombudsman and EDR decision makers must be free from external interference on decision making on complaints.

The only current reference to independence is at section 1046(2)(e) where it is stated that the Minister, when considering whether to authorise an external dispute resolution scheme, must take account of the independence of the scheme. And, paragraph 1.47 of the explanatory material states that when considering whether the scheme is 'independent', the Minister will generally consider whether the Board of the company operating the EDR scheme has equal number of

[6] Treasury Laws Amendment (External Dispute Resolution) Bill 2017Exposure Draft Explanatory Material paragraph 1.54paragrahp 1.21
[7] Treasury Laws Amendment (External Dispute Resolution) Bill 2017Exposure Draft Explanatory Material paragraph 1.42

directors with consumer and industry experience. While this is an important aspect of independence, it should not, in our view be the sole consideration.

The current benchmarks and key practices for customer dispute resolution issued by Treasury[8] and set out in detail for financial services EDR in RG139[9], define the principle of the independence benchmark as:

> 'The decision-making process and administration of the office are independent from participating organisations.'

and the purpose of this benchmark as ensuring:

> '…that the processes and decisions of the office are objective and unbiased, and are seen to be objective and unbiased.'

We strongly recommend that the principle of independence that applies to AFCA be more prominent in the legislation and that the explanatory material at paragraph 1.47 expands the considerations to be made by the Minister to reflect the full attributes of independence defined in the benchmarks for customer dispute resolution and RG.139.

The operator of the scheme is a not-for-profit company

The legislation should explicitly state that the operator of the EDR scheme is a **not-for-profit** company limited by guarantee.

Section 1048 (1)(a) states that the operator of the scheme must be a company limited by guarantee. It does not state that this company should be a not-for-profit company.

A key principle underpinning current industry-based EDR schemes is that they must operate on a not-for-profit basis and be independent of the organisations being investigated.[10]

The role of the scheme is to provide independent and impartial dispute resolution in the interests of the broader community. This is why the governance structures of an industry scheme seek to embed the concept of independence from any finance sector, or other special interests. Operating on a for-profit basis would compromise the clear community purpose that underpins external dispute resolution.

[8] http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/key-pract-ind-cust-dis-reso

[9] http://download.asic.gov.au/media/1240742/rg139-published-13-june-2013.pdf

[10] Australian and New Zealand Ombudsman Association 2010, Essential criteria for describing a body as an ombudsman

Scope of scheme

We are concerned that the current drafting of section 1047(a) and (b) could have the unintended effect of unduly restricting the sensible operation of the scheme. In these two sub-sections of the Bill, we consider that the nexus between overarching objectives in legislation and the scheme's TOR should be clearer.

1047(a): The ability for the scheme to expel a member

We agree that the Minister, when deciding whether to authorise a scheme, should take into account the extent to which a scheme is open to all entities required by licence or law to be a member of an external dispute resolution scheme. However, the scheme should be able to expel a member if the member fails to comply with a scheme's determination because a scheme's effectiveness relies on its ability to ensure that members abide by its decisions and by its rules. Arguably, this would be incompatible with section 1047(a) as currently worded.

We acknowledge that expulsion of a member may result in that member losing its financial services licence. This could result in consumer detriment, if there are any active disputes with the EDR scheme which have not yet been decided. If there are active disputes on foot, the EDR scheme would need to keep the member active until such time as those disputes are finalised.

Grounds for expulsion[11] could be set out in the constitution of the company and would include when a member:

- refuses or ceases to comply with the constitution, the TOR and binding decisions of the scheme
- fails to pay monies to the scheme
- ceases to be a Financial Services Provider
- ceases to be licensed or authorised to operate, or
- becomes insolvent.

1047(b): The need to take in to account restrictions in jurisdiction

We also agree that the Minister, when deciding whether to authorise a scheme, should take into account the extent to which a scheme is available to a person dissatisfied with a member of the scheme, but this needs to be subject to the monetary and other jurisdictional limits in the scheme's TOR. Without this, the types of disputes that a complainant could bring to the scheme would not be limited by monetary or other criteria. Similar issues also appear to arise in

[11] Such grounds for expulsion are set out at 3.10 of the Financial Ombudsman Service Limited Constitution.

respect of superannuation disputes in the relevant sections of the draft legislation.

Currently, FOS's TOR specify a range of important criteria that define its jurisdiction:

- A complaint must be about the provision of financial services (and not other conduct of a member).
- A complainant must be a retail customer or small business.
- The complaint must be brought within specified time limits.
- Carve-outs from jurisdiction include complaints about commercial terms e.g. levels of fees or about investment performance, frivolous and vexatious complaints and complaints where legal proceedings are on foot. This would also apply when the scheme's jurisdiction is waived or increased e.g. to cater for specific remediation schemes as these still present instances where particular disputes would be excluded.

The requirement in section 1047(b) as currently worded that a scheme has the function of ensuring the complaints mechanism is accessible 'to any persons dissatisfied with members of the scheme' could have the unintended effect of preventing the scheme's terms of reference setting the kinds of jurisdictional limits currently contemplated in the exposure draft.

Independent assessor

The role of the independent assessor should be defined in the legislation to clearly reflect that the role is limited to a review of issues relating to service standards.

Section 1048(1)(c) requires the scheme to have an independent assessor but does not specify its role. The explanatory material states the independent assessor assesses 'whether the EDR scheme treats complainants, and members of the scheme, fairly'. [12] We consider this could suggest the independent assessor role is to undertake merits reviews of the scheme's decisions.

Given the existence of an independent assessor is an authorisation condition, we consider that the draft Bill and explanatory material should clearly define the role of the independent assessor using the Ramsay Panel's findings and recommendations. Based on this the definition could state that the independent assessor will 'review the handling of complaints' by the EDR scheme, focusing 'on reviewing

[12] Treasury Laws Amendment (External Dispute Resolution) Bill 2017Exposure Draft Explanatory Material paragraph 1.54

the service provided to users in the handling of the dispute'. 'The independent assessor should not be an avenue of appeal for individual disputes'.[13]

UK FOS's Independent Assessor is appointed by the FOS Board and its TOR state:

> 'The independent assessor can consider complaints about the standard of service provided by the ombudsman service. This covers the *practical handling* of a case – but not disagreements about its outcome.'[14]

ASIC direction to vary claims limits

Section 1048 (3*)* states that ASIC may give the operator a written direction requiring the limit, or some or all of the limits, of the scheme to be increased. The explanatory material states that this power is new and is intended to provide flexibility and to ensure that the claim limits can be increased if the limits become inadequate over time.

FOS currently consults with ASIC, industry and consumers on proposed changes to its TOR, including changes to claims limits. This consultation also includes seeking feedback on the timing of the proposed changes. The FOS Board takes all feedback into consideration prior to seeking final ASIC approval for the changes. It has not required a directions power from ASIC to effect the changes to its TOR. In our experience the current framework does not prevent changes to the TOR from being effected.

We therefore query why a specific directions power is required. Moreover, we consider this undermines both the independence of the scheme and its co-regulatory structure. The retention of an ASIC approval power for material changes to the scheme's TOR is in our view the more appropriate regulatory mechanism.

As advised in our response to the Ramsay Review Interim Report we support continuation of the current annual indexation of claim limits based on CPI and periodic regular review based on agreed factors to ensure that the claims limits remain at appropriate levels for the prevailing financial services environment.[15]

If it is determined that it remain, we suggest changes be made to the wording of 1048(3) and (4). The specific directions power should require that ASIC must not give a direction without first requiring the scheme to consult with its members, industry associations and

[13] 'Review of the financial sustem external dispute resolution and complaints framework", Final Report, 9.42

[14] http://www.financial-ombudsman.org.uk/about/IA_terms_reference.htm#tr

[15] FOS submission to the Interim Report of the EDR Review Panel p.18

consumers about the adequacy of the prevailing claims limits and any proposed changes to them.

Further, section 1048(4) states that ASIC must give the operator at least 3 months written notice of ASIC's intention to issue the direction. Our experience is that financial firms require a longer notice period to change systems and resource levels to respond to changes in EDR jurisdictions.

Reporting non-compliance to ASIC

Section 1047(h)(i) to (iii) makes it a function of the scheme to report to ASIC on contraventions of any law, governing rules or terms and conditions 'that may have occurred'. This is reinforced by section 1065 which makes it clear that the obligation is mandatory and particulars 'must' be given of the contravention or breach that 'may have occurred'. These sections mirror *section 64 of the Superannuation (Resolution of Complaints) Act 1993.*

We are concerned that this obligation could lead to an unsustainable volume of reporting for both the scheme and ASIC.

In most disputes where FOS finds in favour of a consumer there is likely to have been some non-compliance with some term and condition or other obligations owed to the consumer. These may involve breaches of general legal principles, industry codes or other standards.

We do not consider it practical for all such matters to be reported to ASIC. In order to operationalise this requirement, a scheme would by default report all matters where decision or settlement led to a positive outcome for a consumer. To do otherwise would require the scheme to engage in additional investigation of matters beyond what is required to settle a dispute and may also cause members to take a less co-operative approach in seeking to reach agreement with complainants and settle disputes early in the process.

We recognise, of course, that complaints provide an EDR scheme with important intelligence as to regulatory compliance. Accordingly, we remain committed to the requirement that a scheme must report serious breaches as serious misconduct and have arrangements for the identification and reporting of systemic contraventions and issues to ASIC.

Non-superannuation determinations should not be binding on complainants

It is clear from section 1059 that a determination of a superannuation complaint comes into operation immediately and if, for example, it varies the decision of the trustee, it operates as if the decision was

made by the trustee. The complainant is not given a choice as to whether or not to accept a determination.

The Bill does not explicitly provide whether, for determinations of other complaints, the complainant is bound by the determination. However, in our view, this is implied by the reference in section 1047(b) to the scheme's function to report to ASIC on "refusals or failures by any parties to complaints to give effect to determinations".

This would be a departure from the current situation. FOS's TOR clearly gives complainants the opportunity to choose whether or not to accept a FOS determination.[16] If the complainant decides not to accept the determination, they may institute court proceedings and these are conducted without reference in any way to the FOS proceedings.

Our experience is that complainants are more comfortable bringing a complaint to an EDR scheme if they are told that where they do not agree to an outcome this does not prejudice their ability to proceed to court. For this reason, we suggest that the Bill includes specific provision that a determination (other than of a superannuation complaint) is not binding on a complainant.

This would be consistent with the policy intention of enhancing dispute resolution for complainants (rather than diminishing complainant rights). It is also consistent with the efficiency and effectiveness benchmark set out in RG139.188 (c) where it is stated that:

> 'the EDR scheme outcome should not bind the consumer or investor if they do not choose to accept it.'[17]

Definition of a superannuation complaint

Section 1052 defines a superannuation complaint by reference to decisions of trustees, insurers and RSA providers. There is no equivalent to *Superannuation (Resolution of Complaints) Act 1993* section 4 that extends the concept of 'decision' to 'failing to make a decision'. We think that this should be included in the legislation.

EDR decision-maker

The legislation needs to be clear that 'EDR decision-makers' who determine superannuation disputes will be appointed by the Board of the scheme, in the same way that the Board appoints Ombudsmen.

The proposed legislation defines 'EDR decision-maker' as the person who is to determine a superannuation complaint. The implication from

[16] FOS TOR paragraph 8.9 states: If an Applicant does not accept a Recommendation or Determination in relation to the Applicant's Dispute, the Applicant is not bound by the Recommendation or Determination and may bring an action in the courts or take any other available action against the Financial Services Provider.

[17] http://download.asic.gov.au/media/1240742/rg139-published-13-june-2013.pdf

sections 1055 and others is that the EDR decision-maker is a natural person yet, section 1064 refers to 'staff of the EDR decision-maker'.

We are concerned that superannuation complaints powers (e.g. to join a third party, to serve a notice requiring the production of information, to attend a conciliation conference) are expressed as applying to EDR decision-makers. This means that a decision-maker has to be appointed at the outset and has to personally action the joinder and other steps before the matter reaches determination (and the SCT's experience is that most matters are conciliated and so never reach determination). The problem is exacerbated by the fact that there is not an express power of delegation.

This drafting structure creates practical problems and is unduly restrictive. Our suggestion is that all powers, including making a determination, should be expressed as applying to the operator of the EDR scheme. The Constitution of the operator of the new EDR scheme would set out the ability for the Board to delegate to the Chief Ombudsman (Chief Executive) and other decision-makers to exercise powers and duties in the applicable TOR or the Act. This would be consistent with paragraph 1.21 of the Explanatory material:

> 'Under the EDR framework, the broad conditions under which the new EDR scheme must operate will be dealt with in legislation. However, the way the scheme operates will be determined by AFCA's Board and set out in its ToR. This will allow operational improvements to be implemented much more quickly than would be the case if a legislative change was required.'

Complaints about superannuation group life insurance

Superannuation group life insurance complaints should have an unlimited claim limit.

The current EDR scheme structure produces mixed results in relation to in-superannuation group life insurance complaints. A complaint of this type is dealt with by the SCT if the complaint is expressed as being about a trustee decision, in which case the SCT joins the life insurer so that it is bound by the result. If, however, the complainant expresses the complaint as being about the life insurer, FOS under its TOR is currently able to resolve the complaint. In the case of a complaint decided by the SCT, there is no monetary limit to the award that can be made. In the case of FOS, a monetary limit does apply.

We think that the proposed legislation provides an opportunity to resolve this arbitrariness and create a level playing field for consumers. Our recommendation is that all superannuation group life insurance complaints involving a life insurer should be dealt with in the same way (regardless of whether the complaint is expressed as being

against the trustee) and all should be free of a limit on the value of claim that may be made. This could be achieved by:

- excluding from the definition of "superannuation complaint" a complaint about superannuation group life insurance, and
- specifying in the scheme's TOR, as a category of complaint that is free of a claim limit, superannuation group life insurance complaints involving the life insurer.

We are conscious that this would mean that the scheme would be able to make larger monetary awards in relation to superannuation group life insurance policies than for other types of policies. Superannuation group life insurance is, however, different from other types of life insurance with group life insurers employing different processes, different risk considerations and usually offering lower amounts of insurance.

To make all life insurance claims limit free would be a change in current policy and could significantly change the regulatory impact of the legislation.

Traditional trustee company disputes

We suggest that traditional trustee company disputes should operate under the same framework as superannuation complaints.

Since 1 January 2012, trustee companies providing traditional trustee company services have been obliged to be a member of an EDR scheme[18]. FOS has 19 trustee company members.[19]

These disputes frequently involve FOS in reviewing the trustee's exercise of its fiduciary duties.

Almost invariably there are multiple parties affected by the outcome of the dispute.

Where a favourable dispute outcome would benefit the estate or trust as a whole (for example, a dispute about trustee fees), FOS resolves the dispute if one beneficiary brings the complaint to FOS.

But sometimes, a complaint is about whether the trustee has been fair as between beneficiaries.

For these types of complaints, FOS has developed special procedures set out in paragraph 15 of its TOR.

[18] Traditional Trustee Company Services are defined in section 601 RAC of the Corporations Act 2001. These services are very specific and distinct from, for example, the operation of a managed investment scheme established as a trust by a responsible entity acting as trustee, which is governed by different legal requirements in a separate part of the Corporations Act.
[19] 19 FOS Members have classified themselves as Trustees in FOS's annual assessment questionnaire. Since January 2012, FOS has received 249 disputes about Traditional Trustee companies.

Under these procedures, FOS will only consider the dispute if the beneficiaries of the trust or estate form a closed class and all affected parties have given their consent to FOS's role and to be bound by the outcome. This has been necessary because, in the absence of the statutory framework applying to SCT death benefit disputes a resolution would only be effective if all affected parties have agreed to be bound by that resolution.

It is, of course, important for fairness reasons for FOS to provide all affected parties with an opportunity to express their views, where they will be affected by FOS's resolution of the complaint. But the requirement for all affected parties to give their consent creates practical problems. Often there is one or a couple of disengaged beneficiaries who are unresponsive to a request to provide consent to FOS's jurisdiction, to the frustration of the majority of beneficiaries.

By comparison, the statutory framework surrounding the review of superannuation trustee disputes allows the current SCT to review death benefit complaints, even if not all potential beneficiaries have consented to jurisdiction, provided they have been notified of the complaint.

We consider "multiple affected party" traditional trustee company service complaints strongly resemble superannuation complaints about the allocation of death benefits, in that they involve:

- competing claims for a benefit, which the trustee and in its turn the EDR scheme must decide between, and
- resolution is only possible if the EDR scheme decision is binding on the trustee and, through the trustee and in the absence of any legal challenge, on third parties.

Accordingly we suggest that the proposed statutory framework for superannuation complaints within AFCA should be extended to also apply to traditional trustee service complaints.

Secrecy provision for superannuation complaints

We consider that as drafted section 1064(3) has the potential to give rise to inconsistency as to when the scheme is permitted to disclose otherwise-confidential information to another complaint and when it is not. We also think it is undesirable for a regime for confidential information to apply under the legislation for superannuation complaints and a different regime to apply to non-superannuation complaints. For example, FOS deals with countless disputes that require information about individuals' personal financial details and/or medical records.

We recognise, however, that there is a need for the legislation to provide the scheme with a waiver from the usual confidentiality

constraints so far as joined third parties are concerned. Our suggestion is that the legislation should provide:

- when deciding whether to authorise a scheme, the Minister must consider whether the scheme has appropriate procedures to deal with confidential information provided to it in relation to a complaint, and
- the scheme is entitled to deal with confidential information provided to it in relation to a complaint (whether by a complainant, a member of the scheme or a third party) in accordance with its procedures and, to the extent that it does so, no claim for breach of confidentiality may be made.

This would permit the scheme's TOR to craft an appropriate balance between confidentiality considerations and procedural fairness considerations.

Privacy

The public interest is best served by all parties to a dispute receiving all relevant information provided to the decision-maker. This approach is enshrined in the TOR of EDR schemes.

The scheme should have the benefit, however, of an exemption from the privacy access requirements that is similar to section 47C of the FOI Act – one that preserves internal working documents containing opinions, advice, recommendations and consultation notes that as part of an EDR decision making process.

At the moment, under Australian Privacy Principle 12.2 the SCT as a government agency is able to refuse to give an individual access to information where the agency is required or authorised to refuse access under the FOI Act. Section 47C of the FOI Act provides an exemption for deliberative matter i.e. opinion, advice, recommendation, and consultation as part of the deliberative purposes of the agency. The exemption does not include operational information or purely factual material.

As an independent decision-making body subject to procedural fairness obligations, it is important that decisions can be based on robust internal deliberations and advice and that all material documents to a decision are exchanged with the parties as part of the decision process.

In the course of performing that function, an EDR scheme will be provided with information by the parties. Where the scheme intends to rely on the information, it would be required under its TOR to exchange that information with the other party unless consent is reasonably refused. The FOS TOR, for example, provides that FOS is

not obliged to provide any memoranda, analysis or other documents generated by FOS's employees or contractors.

The reasons for not usually exchanging internally generated documents is because in the course of reviewing the information provided by the parties, FOS staff may express a view about the merits or otherwise of a particular argument. As part of a robust decision making process, the views expressed by one staff member, whether in an internal file note or draft decision, may not be accepted by the Ombudsman when making a final decision. This is because the views expressed may change because of new information, or because of a different interpretation of the facts or law is taken by the Ombudsman when making a final decision. It is only the final decision that the applicant is required to accept or reject.

EDR schemes are designed to provide a confidential, informal, efficient forum for the resolution of disputes. In order to do this in the most effective manner, all parties, including the employees of the relevant scheme, need to be able to have full and robust consideration of the relevant issues.

When it comes to internally-generated documentation, including drafts, working copies and internal discussion documents, the public interest is better served by the efficient and effective operation of the EDR scheme itself. This can be frustrated through:

- an inability to consider matters with frankness and candour
- creating a misleading impression
- generating an unhelpful contribution to the public debate, and
- causing prejudice to other parties to the dispute.

An EDR Scheme should be able to properly examine, and test the submissions put by the parties without fear that the considerations may be released to a party and used against the EDR scheme in the future. This has been termed a 'jeopardy to candour' in the FOI Guidelines.

Transitional Arrangements

Key Points:

1. The timetable for establishment of the new scheme is challenging
2. We recommend that more detail about the specific attributes of AFCA be included in the outline of requirements for making an application to operate AFCA
3. We propose an alternative streamlined mechanism that would simplify the transitional arrangements and reduce the costs of transition for industry.

In addition to the questions asked about transition arrangements in the consultation paper on the Exposure Draft. On 6 June, the Treasury issued a further consultation request asking stakeholders for feedback on the following proposed authorisation process arrangements:

Authorisation process

Under the Treasury Laws Amendment (External Dispute Resolution) Bill 2017, the Minister for Revenue and Financial Services will authorise a company limited by guarantee to operate AFCA.

In order to ensure that AFCA meets the Government's objectives of providing fast, fair and binding dispute resolution for all financial disputes, including superannuation disputes, it is important that the authorisation process be fair, transparent and rigorous.

A proposed timeline for the authorisation process is set out below.

Date	Action
14 June	Consultation on exposure draft legislation concludes.
Mid-July	Minister For Revenue and Financial Services publicly outlines the requirements for making an application for authorisation of AFCA.
Second half of 2017	Formal application process commences. Applicants will be provided with four weeks to submit an application. Minister will authorise a company limited by guarantee to operate AFCA.
1 July 2018	AFCA commences operations

Treasury has also asked stakeholders to provide views on what information the Minister should release in mid-July to assist potential nominees.

Authorisation process timetable

While the timetable as proposed by Treasury understandably takes account of the need to have the Treasury Laws Amendment (External Dispute Resolution) Bill passed through the Parliament before the

authorisation of a new operator can be effected, FOS believes the authorisation timetable as proposed will make the achievement of a 1 July 2018 commencement of the new EDR scheme challenging. We base this assessment on two key areas of experience:

- the collaborative merger of five EDR schemes with the creation of FOS. These schemes had very different TORs, funding models and processes. It took 18 months in the planning and approximately two years to establish a single TOR and operating model, and
- the significant re-engineering of FOS's own dispute processes which involved broad consultation with industry and consumers, changes to the FOS TOR, upgrades to the case management system and the secure portal (for the paperless exchange of information between FOS and its members), organisational re-design and re-skilling of staff. This took a full 12 months to plan and achieve, with a further 6 months of bedding down new procedures. This change involved FOS only working with stakeholders, not any other EDR scheme.

Information to assist potential nominees

We consider it would be useful for the Minister to provide detailed criteria against each of the matters defined in section 1046 (2) (a) to (l) of the draft Bill.

We note that the Explanatory material (paragraphs 1.46 to 1.51) define the terms used in section 1046 (2) (d) to (i) but in our view these definitions should be expanded to reflect the detailed attributes of the existing benchmarks for financial services EDR with reference to both RG139 and the Benchmarks for Industry-based Customer Dispute Resolution issued by Treasury in February 2015.

In particular more detail should be provided in the information to be released by the Minister about what would be required to demonstrate:

- the capacity of the scheme to deal with complaints in a timely manner (1046 (2)(j)), and
- the expertise available to the scheme in dealing with complaints (1046 (2)(k)).

We also consider that the Minister should request details about how the scheme will have resources and skills to operate effectively from the date of its commencement. This is an important consideration because it will provide:

- certainty to industry and consumers that the current schemes will continue to have the capacity and resources to resolve

disputes up to the day prior to the commencement date of the new scheme and that the new scheme will have the skills and resources to handle FOS and CIO 'transition' disputes and receive around 1,000 disputes in its first week of operation

- clarity to the Boards of the CIO and FOS about proposed transition arrangements for current staff, assets and commitments of each scheme so that they can fulfil their fiduciary responsibilities under the Corporations Act as Directors of companies limited by guarantee, and

- certainty to the very skilled dispute resolution staff that are employed by the current schemes about their future employment arrangements.

The following section addresses the transition questions posed in the consultation paper.

Consultation question 4:

Are there any additional issues that should be considered to ensure an effective transition to the new EDR scheme?

While the draft Bill sets out some transitional arrangements for FOS, CIO and SCT, neither the Bill nor explanatory material address transitional arrangements for the three existing bodies in any detail. Paragraphs 1.137 to 1.141 of the Explanatory Material and Schedule 1, Part 2 item 48 of the Bill deal with the commencement of the various sections of the Bill, transitional periods for EDR membership, and existing determinations of the SCT.

The accompanying consultation paper describes proposed transitional arrangements for FOS/CIO and the SCT (p. 6/7 paras 40-42).

In brief it is proposed:

- All disputes, including superannuation disputes, from the date of operation of the new scheme will be lodged with the new scheme

- That FOS and CIO will continue to operate until their existing disputes are closed

- That financial service and credit providers will need to be members of the new scheme and existing schemes until existing disputes are closed, but they will not be obliged to become members of the new scheme until 6 months after the Application Day or such longer period as prescribed by regulation, and

- That the SCT will continue until 1 July 2020.

In our view there are more appropriate alternative streamlined mechanisms that would simplify and reduce the costs of the transitional arrangements. We set our views on these below.

Disputes and membership arrangements on the commencement of the new scheme

The Explanatory material (paragraph 1.140) sets out a transitional period of scheme membership stating that those required to be members of an EDR scheme will not be required to become members of a new authorised EDR scheme until 6 months after the Application Day or such longer period as prescribed by regulation. Further, the consultation paper (paragraph 40) states that 'it is anticipated that financial service and credit providers will be required to be members of the new EDR scheme and their existing EDR scheme as FOS and CIO work through their remaining complaints'.

We are concerned these arrangements will result in complexity and increased costs for scheme members. In our view there are more appropriate alternative streamlined mechanisms that would simplify and reduce the costs of the transitional arrangements, as set out below.

We also consider the legislation and approval criteria of the new scheme by the Minister should allow sufficient flexibility to enable aspects of the new scheme's TOR to be phased in if required to facilitate effective transition.

The membership model that is utilised by FOS involves:

- A company limited by guarantee.
- Financial services and credit industry participants are members of the company and so bound by the Constitution and a Member Agreement which link into the TOR.
- FOS's Constitution gives it the capacity to have multiple TOR at any point in time – in effect to operate more than one complaints handling scheme at any point in time. In fact, this was the situation in the past when a predecessor body operated the Banking and Financial Services Scheme and the Credit Union Dispute Resolution Scheme. Upon the establishment of FOS, FOS operated different TORs until there were no complaints that predated the new unified FOS TOR.

The same arrangements could apply to the operator of the new EDR scheme, so long as the transitional arrangements are set out in legislation and the operator's Constitution is drafted to allow for multiple TOR. In effect this would mean that on day one of operation the new scheme would:

- Have as its members all entities that are required under a law of the Commonwealth or under the conditions of a licence or permission issued under such a law to be a member of the new EDR scheme from its commencement.

- Receive all new disputes under the new scheme's TOR. This would cover all financial disputes including superannuation disputes and apply the new claims limits and compensation caps to those disputes.

- Accept all 'transitional' disputes from the CIO and FOS and continue to resolve these disputes under the applicable TOR of the former schemes. Once these 'transitional' disputes are resolved, the scheme will operate with a single TOR as authorised by the Minister.

The SCT would continue as a separate body to resolve disputes it received prior to the commencement of the new scheme and up until 1 July 2020.

Paragraph 42 of the consultation paper states that: 'Consumers will have the option to refer complaints previously made to the SCT to the new scheme once it is operational', although we can see nothing in the draft Bill or explanatory material that supports this statement. In addition, the Treasury Fact Sheet implies this choice relates to complaints made to any of the three existing bodies:

'The existing dispute resolution bodies will continue to operate after 1 July 2018 to work through their existing complaints.

Consumers will have the option to transfer their complaint to AFCA if they wish to do so.'[20]

We consider this option is not desirable as it would add cost to industry, increase time-frames for resolving disputes and mean that all work already done by FOS and the CIO, and the SCT (under its existing statutory arrangements) with parties would be disregarded.

[20] Treasury Fact Sheet: The Australian Financial Complaints Authority (AFCA)

Monetary Limits

Consultation question 5

Would moving immediately to a compensation cap of $1 million have significant impacts on the availability/price of professional indemnity insurance?

Industry is better placed than us to respond to this question.

However, as noted in our previous submission to the Ramsay Review, we are aware that in past reviews of compensation and claim limits, arguments have been put that some members of EDR schemes may have difficulties in arranging sufficient professional indemnity insurance cover. The Productivity Commission considered this issue in 2008 in its review of the consumer policy framework and rejected these arguments as follows:

> 'Reasonable notice of threshold changes should help in most cases. But just as safety standards are not waived for those facing a high cost in meeting them, ongoing difficulties in securing insurance should not be a basis for seeing a lower standard of consumer protection. Rather, the appropriate responses are better supply-side risk management and rationalisation of any excessively risky suppliers.'[21]

Consultation question 6

Are the existing sub-limits for different insurance products still required?

The sub-caps that currently apply in the FOS TOR are as follows:

[21] Productivity Commission Consumer Policy Framework p. 208

	Type of Claim	Amount per claim
1.	Claim on a Life Insurance Policy or a General Insurance Policy dealing with income stream risk or advice about such a contract. If the claim is in excess of this monthly limit, the monthly limit will apply unless: • the total amount payable under the policy can be calculated with certainty by reference to the expiry date of the policy and/ or age of the insured; and • that total amount is less than the amount specified in row 4. If this is the case, then the limit will be the amount in row 4.	$8,300 per month
2.	Third party claim on a General Insurance Policy providing cover in respect of property loss or damage caused by or resulting from impact of a motor vehicle	$5,000
3.	Claim against a General Insurance Broker except where the claim solely concerns its conduct in relation to a Life Insurance Policy (in which case row 1 or 4 applies, whichever is applicable).	$166,000
4.	Other	$309,000

As discussed earlier, we think that complaints about a superannuation group life insurance product involving a life insurer should not be subject to an award limit (as is the case currently under the SCT). The result would be that the following categories of insurance complaints would possibly need to be recognised for the purposes of defining monetary limits:

- claim on an income stream product
- third party claim for property loss on a general insurance motor vehicle policy
- complaint involving a life insurer in relation to a superannuation group life insurance policy (no limit to award possible), and
- other insurance complaints.

Income stream risk products

The current arrangements as set out in our TOR for income stream risk products is confusing for consumers and needs substantial improvements. It is not easy to explain to a consumer how current limits and caps in this area apply.

In addressing this issue we acknowledge that there has been long term resistance to upward movements in compensation caps and limits by industry, yet studies commissioned by industry associations

highlight the level of underinsurance by Australians and the cost this has on the economy as a whole.[22]

If industry is calling for higher take-up by employed people in life insurance, including TPD and income protection cover, then EDR redress should be available to a broader consumer base than currently exists. Overall, we consider:

- An increase in the overall compensation cap as endorsed by Government will provide broader accessibility to EDR for life insurance claims overall.

- If the overall jurisdictional limit and compensation cap are increased to the extent proposed, a separate monthly compensation cap is probably not necessary.

Uninsured Third Party Motor Vehicle Claims (UTPMV)

In addressing a recommendation from the last independent review of FOS, in January 2015 FOS increased the compensation cap for third party claims on a General Insurance Policy from $3,000 to $5,000. There were a number of concerns expressed by the insurance industry at that time about any increase in this jurisdiction as uninsured third parties were not seen by the industry as "contributing" to the cost of the scheme via payment of any premiums.

The number of disputes FOS has received relating to UTPMV claims is set out below.

2010-11	2011-12	2012-13	2013-14	2014-15	2015-16
254	383	424	483	480	457

We note that consumers have argued for an increase in the compensation cap to $15,000. We have not been able to undertake any further detailed analysis on these limits. However, as the overall jurisdictional limit and compensation cap are increasing, similar considerations could apply to this compensation cap.

Broker General Insurance Claims

The current FOS jurisdictional limits take into account historical considerations. We think that in principle there is scope for some simplification so that the same limit applies to broker and insurer claims but have not undertaken any specific analysis to support this view.

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22 http://www.fsc.org.au/downloads/file/ResearchReportsFile/FSCKPMG_UnderinsuranceDI_lowres.pdf

Credit Representatives

Consultation question 7:

Are there any reasons why credit representatives should be required to be a member of an EDR scheme?

We consider that it adds little to consumer protection for credit representatives (ACRs) to be required to be a member of an EDR scheme. The cost of membership cannot, therefore, be justified. We suggest reform in this area would be appropriate and would reduce the regulatory burden on industry.

Since the National Consumer Credit Protection (NCCP) regime was introduced, FOS has had no disputes lodged against an ACR. It is unclear from published reporting whether the CIO has handled any disputes against ACRs, particularly where there was an option to lodge against the credit licensee that authorised the credit representative, or if so, what the rationale for doing so would be.

We consider the regime for ACRs should be aligned with that for authorised representatives of Australian financial services licensees (AFS licensees) for the following reasons:

Statutory obligations of licensees

Under the *National Consumer Protection Act 2009 (NCCP Act)*, credit licensees are responsible and liable for any conduct of their ACRs, whether or not this conduct is within the granted authority. This mirrors the provisions relating to AFS licensees and their authorised representatives, as set out in the Corporations Act. Unlike ACRs, authorised representatives of an AFS licensee are not required to hold individual EDR scheme membership.

Practical inability to meet award obligations

Both Acts require licensees to ensure that adequate compensation arrangements are in place for the protection of consumers. There is no such obligation on authorised representatives of an AFS licensee or ACRs. It is unlikely that ACRs would have the insurance or capital adequacy to meet consumer compensation awards without the backing of their licensee.

Accordingly, requiring credit representatives to maintain separate EDR membership imposes costs on both the credit representative and ASIC. It unnecessarily increases regulatory costs of the EDR framework without otherwise enhancing consumer access to EDR

FOS understands the arguments in support of the current policy rationale to be substantively as follows:

Where an ACR is a scheme member, in the event that the licensee is unwilling or unable to meet obligations to the consumer, some recourse may be made to the ACR.

This is impractical given the lack of adequate compensation arrangements and, in practice, has not happened since the introduction of the NCCP regime.

Further, the vast majority of ACRs in Australia are authorised by prudentially regulated ACLs who are unlikely to experience an insolvency event which would render the ACL unable to meet its obligations. As FOS understands it, the obligation for ACRs to hold EDR scheme membership seeks to address a concern about how to resolve a dispute when the licensee is effectively out of business and information is required from the adviser to try to resolve the dispute.

In those limited circumstances where the ACR should be directly liable for the loss, the licensee could potentially seek a contribution action from its ACR through normal contractual or common law channels.

Where an ACR is a scheme member there is greater certainty regarding the ability of the licensee and EDR scheme to obtain relevant information from the adviser/broker

Given the requirement of licensees to adequately supervise their representatives and have proper reporting and document retention practices in place, this should not be an issue. In practice, FOS relies on the licensee for the provision of information to resolve disputes. If the licensee does enter an insolvency event, these records should be available to the relevant insolvency practitioner.

However, in cases where there has been some breakdown in proper record keeping, our ability under our TOR for FOS to require an FSP to obtain relevant documentation or to make adverse inference from the non-provision of relevant documentation has meant that this has not given rise to any consumer detriment in our experience.

Regulatory Impact

Consultation question 8:

What will the regulatory impacts of the new EDR framework be?

In this section we draw out some issues that could influence the regulatory impact of the new EDR framework.

Transition to the new scheme

Clarity around the proposed transition arrangements will allow for the regulatory impact of the new EDR framework to be properly assessed. In our view two scenarios present very different impacts.

The first is where no clear simple transitional mechanisms are settled early. This means that the operators of a new scheme will be unlikely to leverage the assets, expertise and infrastructure of the existing schemes. This could result in financial firms:

- being required to hold multiple EDR scheme memberships during the transition period
- paying additional costs to fund the operations of the start-up scheme
- being required to ensure funding is sufficient for existing schemes to remain operating, while they are in wind up mode
- potentially being asked to fund wind-up costs via additional levies, and
- maintaining current systems to connect with FOS/CIO and at the same time change their processes and technologies to accommodate ACFA's new operating model.

With current schemes in a wind-down phase the risk of growing delays in dispute resolution timeframes will be high as staff look for new employment opportunities.

The second scenario would be one where there are clear transitional arrangements in place early for the transition of existing disputes, scheme membership and the assets, liabilities and key dispute staff from the CIO and FOS to ACFA.

This would still incur one-off start-up costs, in terms of:

- development of a new TOR
- building superannuation expertise into the new scheme while the SCT continues to 2020

- design of processes to accommodate all types of disputes handled by each of the three existing bodies
- upgrades of technology to adapt to the new processes
- data migration costs, and
- communication with key stakeholders.

This scenario, however, will capitalise on the technologies and infrastructure of the CIO and FOS and the skills of the CIO, FOS and SCT staff. There will be some residual wind-up costs for the schemes, but these will be small in comparison to scenario one.

Cost to industry will be minimised as transition will utilise, wherever possible, familiar processes, forms and technologies.

There will be regulatory impacts on firms in regard to the new Internal Dispute Resolution (IDR) reporting framework, and industry is best placed to comment on this.

A single scheme will result in less cost for industry, the regulator and stakeholders

The Ramsay Review final report sets out in detail the current duplication of costs that result from having multiple EDR bodies.[23]

These include:

- costs for firms from duplicated governance arrangements, including separate boards; duplicated case management systems, support infrastructure and overheads; duplicated administrative and regulatory reporting obligations and arrangements, duplicated statistical, systemic issues and serious misconduct processes and reporting requirements, duplicated membership services, stakeholder management, consumer outreach/ engagement and communications, administration of multiple TORs, and multiple independent reviews
- duplicative costs for ASIC in overseeing multiple schemes, and
- additional costs for stakeholders who regularly engage with multiple schemes.

The cost impact for many smaller firms will be reduced with the proposed changes

If the decision to remove the requirement for around 26,000 Authorised Credit Representatives (ACR) to be a member of an EDR

[23] Review of the financial system external dispute resolution and complaints framework, Final Report, April 2017 p.109-111

scheme, these ACRs will no longer be required to pay annual fees for EDR membership. These firms do not have EDR disputes, yet their fees contribute to overall revenue of the schemes (in FOS's case some 1.5% and for the CIO approximately 30% of total revenue). Both schemes incur costs in membership administration that could also be avoided.

Claims are made by those who support the continuation of the existing multiple scheme EDR arrangements that the large financial firms will be the main beneficiaries of the single scheme 'because their ombudsman costs will be subsidised by the significant number of smaller financial firms (presently members of CIO) who will be made to join the new single scheme'.[24]

The funding arrangements of the new scheme will be established by its Board in consultation with industry and ASIC. If the agreed funding model is one that incorporates the user pays principles similar to those underpinning the current FOS funding model, small firms would contribute less than 5% of the scheme's overall revenue and as such would not be subsidising larger firms.

The above analysis is supported by the following facts:

- FOS handles 88% of combined disputes received by FOS and the CIO. Now, 85% of FOS's AFSL and limited AFSL members are very small and rarely or ever have a dispute at FOS. They currently pay $335 annually for membership[25] (compared to the CIO of $390) which in total represents 2% of FOS's annual revenue. FOS operates on a user pays principle so that smaller members with infrequent disputes do not subsidise others.

- As reported by the Ramsay Review, the CIO has 18,429 Authorised Credit Representative (ACR) members who pay an annual fee of $140. The CIO annual review does not record any disputes lodged against an ACR, yet they would contribute around $2.5m or 30% of the CIO's total revenue.

- If the single scheme is not established but it is agreed that ACRs are no longer required to be members of an EDR scheme, the CIO will need to increase its fees to existing members to cover the $2.5m shortfall. This would not be in the interests of smaller financial firms with thinner margins.

[24] Joint Statement by Mortgage and Financial Association of Australia (MFAA), Customer Owned Banking Association (COBA), Australian Collectors & Debt Buyers Association (ACBDA), Association of Securities and Derivatives Advisers of Australia (ASDAA), Australian Timeshare and Holiday Ownership Council (ATHOC) and Association of Independently Owned Financial Professional (AIOFP) 24 May 2017 source: MFAA website

[25] In 2017-18 this will adjust to $345.