First State Super and StatePlus

Joint submission

Response to external disputes resolution, complaints framework and draft legislation

16 June 2017

Background

First State Super is one of Australia's largest profit-for-members superannuation funds, responsible for the accumulation and pension savings of over 770,000 members. In June 2016, First State Super acquired StatePlus. The combined group manages over $82 billion in funds and the savings of over 830,000 members and retirees ($22 billion are retirement assets supporting over 70,000 pensioners).

First State Super and StatePlus together have a strong interest in the financial future of our shared members and clients, the people whose lives are dedicated to helping others – nurses, teachers, emergency services workers and public servants. We are committed to our member community and to the national interest as these are intrinsically linked.

We submit this response to *External Dispute Resolution and Complaints Framework consultation package* released on 17 May 2017 and *The Consultation Note: Consultation on the authorisation process,* released on 5 June 2017.

We comment on the Government's response to the Review of the financial system external dispute resolution and complaints framework (the Ramsay Review), and the draft legislation.

Our concerns arise from the proposed incorporation of the Superannuation Complaints Tribunal (the SCT) into the Australian Financial Complaints Authority (AFCA). We note that our preferred position was retention of the SCT as a standalone and properly resourced body, which was granted management powers over its internal governance and finances.

Legislation and terms of reference

We acknowledge the attention given to superannuation in the Final Report of the Ramsay Review, and appreciate the efforts taken to incorporate industry feedback in relation to superannuation. Special treatment of superannuation is important due to its compulsory nature, its lifetime significance to individuals, the complexity of the regulations and product, and the insurance cover required within the MySuper regime.

We are concerned that the legislation is being proposed, and may be passed, with undue haste. We therefore find it difficult to comment with any great insight on how the proposed structures, powers and operations will work or whether they will be effective.

Terms of reference

The Consultation paper notes that:

- AFCA will be based on the ombudsman model and "will be established by industry as a company" (point 8, page 2),

- that the scheme will be "formally authorised by the Minister" (point 11, page 2), and
- that the Minister "will have regard to the proposed operational rules of the scheme (its 'terms of reference')" (point 13, page 3).

This appears to be a circular and confusing process. Together with our concerns that the draft legislation depends for operating detail on as-yet unwritten terms of reference by an as-yet undetermined Board, we do not have a clear view as to how the scheme will be formed and operate.

Consequently, we wish to make sure there will be adequate consultation processes for all industry groups to provide input, including superannuation, credit, investments, insurance etc, and that this can be conducted within a reasonable time frame.

The superannuation industry and its members, and other industries, are being asked to accept the proposed scheme without the full terms of reference, and are therefore trusting that the draft legislation will provide a sufficient scaffold to ensure retention of the protections in the current system. We believe there would be greater certainty and transparency if governing and operating rules were set out in the terms of reference at the same time as the legislation so a complete picture of AFCA was available.

Where there is a future change to the terms of reference, we request that proper industry consultation be part of the process and conducted in a reasonable timeframe (ideally six to eight weeks as a minimum).

AFCA's proposed powers and trust law

In transitioning from a Tribunal to a co-regulatory regime, there are practical issues in transferring the powers of the tribunal to the corporation that will function as AFCA. The proposed approach is to keep some statutory powers within legislation which governs AFCA, while transitioning other powers into AFCA's terms of reference. We are concerned this may be a weakening of consumer protections, the extent of which is impossible to determine until the full terms of reference are established. We view consumer protections as applying to all members of a fund, not only those making a complaint.

We consider it appropriate that AFCA's review powers are limited to complaints and do not cover *the management of a fund as a whole*, and that the current definition of a superannuation complaint should be retained. This concern arises from the trust law requirements for Trustees to consider the equity and merits of all members' interests. We are concerned that an EDR, in resolving a single complaint, should not unwittingly make a decision which creates a cost to unaffected members, or changes conditions for other members in a superannuation fund.

Claim staking and closure of matters

There are two powers of the SCT which we regard as extremely important. The process of claim staking allows a trustee to establish the parties who may have a claim on a death benefit. This step allows appropriate discovery measures and also ensures that once a matter is closed, it remains closed (this is particularly to avoid inappropriate pushing back

of later claims costs to all members in a fund). Similarly, the EDR process should have a mechanism for rejecting and closing matters.

Adding claim staking to the three powers retained in legislation – to join other parties, obtain documents and require attendance at conciliation, would enhance the operability of the superannuation external disputes resolution processes. We also support including the definition of complaints in legislation rather than the Terms of Reference.

We recommend that draft legislation is reviewed and re-written to incorporate substantive matters, or at very least operating principles, that AFCA should not be responsible for drafting its own terms of reference on which the system will rely. Failing that, we request that the terms of reference are made available for consultation prior to the passing of legislation.

Funding and governance

We support the proposal for AFCA to make its own decisions regarding funding, staffing and dispute resolution processes.

However, we note that the historical mismatch of funding to need at the SCT, and a lack of transparency as to allocation of funding, have led to the current situation at the SCT. Its case load has increased as its funding and resourcing have been reduced.

We request that AFCA's funding mechanisms and receipts are published, along with the allocation to sector group. We note that where a complaint is raised with FOS, institutions are charged a fee, on a sliding scale (free to member). In some cases, matters are settled when otherwise worth contending, but the commercially sensible route is to settle. For example, the institution may decide to settle a claim for $2,000 rather than incur a cost of $8,000. Other institutions choose to challenge matters on points of principle. We note that design of fees and levies should ideally avoid potential to distort outcomes for any participants. We also note there may be opportunities for cross subsidisation between sectoral groups, particularly if a compensation fund of last resort is established.

We request that consultation with the superannuation industry occurs before any future changes to funding arrangements are implemented to ensure appropriate resourcing is maintained for superannuation complaints. A similar review of funding for the SCT should be conducted to secure funding to cover its operations for the coming 18 months.

Continued superannuation knowledge and expertise, adequate funding of the new body, and transparent financial reporting are key factors for the success of AFCA. In our view, this includes the presence of superannuation representation on the governing board, to ensure that a practical focus on superannuation is maintained.

We regard it as a matter of high importance that there be a knowledgeable and experienced superannuation industry representative on the Board of AFCA, to protect

and promote funds' and members' interests in the context of funding and resource allocation; ensuring experienced and skilled EDR members; and maintaining a strong understanding of superannuation.

Transitional matters

The timing of the transition is a matter of interest to us, and we prefer to see a fixed date from which no further complaints can be registered with the SCT to avoid dual lodgement of complaints, and shopping around by complainants. This is especially important for death benefit complaints. We recognise the SCT has to finalise current cases, but do not believe there is any virtue in allowing members to either register with two EDR bodies or to swap from one to another.

Compounding the difficulty of adequately and appropriately resourcing AFCA is the critical need to ensure the SCT remains adequately funded (acknowledging that current funding levels are insufficient) until 2020.

In addition to funding, the existing experience and skill within the SCT must also be maintained to close the current backlog of complaints – while setting up the new body, presumably transferring some or all staff.

We request a single cut over date to minimise disruption for all parties. We also request a transition plan be formally prepared to aid with funding and staff retention, as well as preparation for the new body. As part of this, we request that ASIC publish the funding committed to the SCT for this period.

Internal dispute resolution

We have a strong and robust internal complaint and dispute resolution processes, in line with current regulatory requirements, and do not see the need for further regulatory review or oversight, especially as ASIC already has oversight of IDR through licence conditions.

We expect the increased reporting will lead to higher costs, although there is little information to guide us in terms of the nature and form of the proposed reporting. It is difficult to contemplate how funds can prepare for the implementation of IDR changes without seeing what is proposed in some detail. More information as to the requirements for publishing results of IDR resolution are needed before comment can be made to enhance the outcomes.

We endorse ASFA's comments on the IDR reporting, and further note our concerns about confidentiality and privacy.

Conclusion

We note that without regulation and terms of reference for both IDR and EDR it will be very difficult for funds to prepare for implementation by July 2018.

In conclusion, our key concerns are the appropriate coverage of external disputes governance and process in legislation (rather than terms of reference); a superannuation representative on the Board of AFCA; appropriate and transparent funding of AFCA and of the SCT in the coming 18 months; a single cut over date; and the addition of claim staking and closing of matters to legislation.

We also note that we have participated closely in industry consultation with both AIST and ASFA and support these submissions. ASFA's comprehensive paper provides useful insights into complaints processes and governance, and we support their comments on operating powers.

We thank Treasury for the opportunity to participate in the consultation.