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Professor Ian Ramsay

EDR Review Secretariat

Financial Markets Division

Markets Group

The Treasury

Langton Crescent

PARKES ACT 2600

Dear Professor Ramsay

Response to issues paper: *Review of the financial System External Dispute Resolution Framework*

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide the attached response to the issues paper: *Review of the financial system external dispute resolution framework,* released on 9 September 2016.

If you have any queries or comments in relation to the content of our submission, please contact me on (02) 8079 0808 or by email gmccrea@superannuation.asn.au, or Julia Stannard, Senior Policy Adviser, on (03) 9225 4027 or by email jstannard@superannuation.asn.au.

Yours sincerely

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A. ABOUT ASFA

ASFA is a non-profit, non-political national organisation whose mission is to continuously improve the superannuation system so people can live in retirement with increasing prosperity. We focus on the issues that affect the entire superannuation system. Our membership, which includes corporate, public sector, industry and retail superannuation funds, plus self-managed superannuation funds and small APRA funds through its service provider membership, represent over 90 per cent of the 14 million Australians with superannuation.

B. GENERAL COMMENTS

This submission is primarily focussed on the experience of members, beneficiaries and trustees of APRA-regulated superannuation funds. During ASFA's consultations as part of this Review, our members have reported little or no involvement with the Credit and Investments Ombudsman (CIO). While many APRA-regulated superannuation funds are now also members of the Financial Ombudsman Service (FOS), the Superannuation Complaints Tribunal (SCT) is their primary scheme for external dispute resolution (EDR) and interactions with the FOS are typically focused on issues of advice.

ASFA notes the premise of this Review – "to consider whether changes to the current dispute resolution and complaints schemes in the financial sector are necessary to deliver effective outcomes for users in a rapidly changing and dynamic financial system"[1]. Given the growing value of the financial services industry and the fast pace of development, we agree that this is an important matter which should be considered from time to time.

At the outset, it must be noted that there are a number of fundamental differences between the SCT, on one hand, and the FOS and the CIO on the other. The most significant of these differences can be summarised as follows:

	Superannuation Complaints Tribunal	Financial Ombudsman Service Credit and Investments Ombudsman
Structure and membership	• Statutory tribunal, with all APRA-regulated funds automatically subject to its jurisdiction	• Industry-based schemes, approved by ASIC to provide EDR services for financial services providers which apply for and are granted membership • Relationships are contractual, governed by terms of reference
Powers and jurisdiction	• 'Stands in the shoes' of the trustee • Can exercise all powers and discretions available to trustee under its deed, superannuation and other relevant legislation, and trust law • No monetary limits on access or redress	• Terms of reference stipulate monetary limits on access to the schemes and the potential redress that can be awarded
Enforceability	• Statutory mechanisms exist to ensure enforceability of determinations	• Limits to the enforceability of determinations
Appeals	• Direct right of appeal to the Federal Court on a question of law	• No direct right of appeal to the court system
Funding	• Via an allocation from the supervisory levy paid by APRA-regulated funds	• Via membership and user-pays fees collected from members

[1] Department of the Treasury - Issues Paper: *Review of the financial system external dispute resolution framework*, 9 September 2016, page 1

These differences make consideration of the respective merits and disadvantages of the schemes - and any potential for integration – a challenging exercise. From discussions with our members and other industry stakeholders, it appears that each model is generally well-regarded by its users.

In ASFA's view, the primary consideration in any assessment of the financial services dispute resolution framework must be ensuring optimal outcomes for consumers. At a minimum, we consider that this necessarily involves providing access to an EDR mechanism which:

- is cost-effective and timely
- ensures that decisions are made by persons who are have a sufficient level of understanding and expertise in dealing with complaints of that nature
- involves no monetary limit on access to EDR and/or potential redress – or any limit is appropriate given the nature of the product/service and its typical consumers
- provides for enforcement of those decisions, where necessary, against the provider
- allows at least a limited avenue for review or appeal where the consumer is dissatisfied with the outcome.

Depending on the nature of the particular financial product or service involved, other features may also need to be added to this list of minimum requirements. That is, there should be recognition that a 'one size fits all' approach will not always deliver optimal or appropriate outcomes – and some types of financial products have particular characteristics which warrant a higher level of consumer protection.

In this respect, we note that superannuation is clearly a unique product - the overwhelming proportion of Australians who hold an interest in superannuation do so because of the compulsory superannuation guarantee (SG) regime. Superannuation is also subject to a far heavier level of regulation than all other types of financial products and services, including constraints on when and how it can be accessed. As a result, superannuation warrants the most stringent consumer protections and should not, in ASFA's view, necessarily be subjected to 'generic' EDR arrangements.

We note that the matter of appropriate EDR arrangements for superannuation was considered by the Senate Select Committee on Superannuation at the time of development of the current regulatory regime comprising the *Superannuation Industry (Supervision) Act 1993* and associated regulations (SIS regime), and just prior to the commencement of the SG regime.

The Committee found that several considerations "dictated that the establishment of an external review mechanism… was highly desirable". These included:

- superannuation was already compulsory for many and it was government policy that all employees should be covered, therefore the government "had a duty to ensure that member's rights were protected"
- it was "highly desirable that justice should not only be done, but should also be seen to be done"
- the cost of litigation was so high that it offered no real rights to members
- while members have the ability to 'vote with one's feet' (and move to another fund if dissatisfied), this "offered no comfort" to dependants of deceased employees or to members who might suffer heavy losses on withdrawal from a fund.[2]

These considerations are no less relevant today.

[2] First Report of the Senate Select Committee on Superannuation – *Safeguarding Super – the regulation of superannuation*, June 1992, pages 136-137

The Committee considered various models for EDR for superannuation, including an ombudsman scheme, an industry scheme with a code of practice and arbitration approach, a panel selected by the minister (independent of government, providers and the regulator) teamed with an advisory service for members, commercial arbitration, and a statute based review panel.

The Committee concluded that "a specialist body is more likely to develop the expertise necessary to build up the required degree of public confidence"[3]. While the review body recommended by the Committee is not identical on all points to the SCT as it was legislated, significantly a statutory model was recommended and ultimately adopted.

ASFA believes there are a number of aspects of the current SCT model which are so beneficial, in terms of the protections and rights provided to consumers and fund trustees, that they must be retained going forward. These include:

- the statutory tribunal structure, which provides clear independence from industry and from government and promotes consumer confidence
- the absence of any monetary limit on access to the SCT or the redress that can be awarded by the Tribunal which is critical, given the compulsory nature of superannuation
- the enforceability of determinations, which avoids issues of non-payment of determinations as is experienced with the FOS and, to a lesser extent, the CIO
- the ability to appeal directly from a determination of the SCT to the Federal Court on a question of law
- its specialist knowledge and expertise, which is vital given the often complex nature of complaints.

These matters are discussed in our responses to the specific questions raised by the Issues Paper.

ASFA considers that the SCT model has served superannuants and providers well for two decades.

We acknowledge that there are some significant current and entrenched issues with the SCT's operations - in particular, the delays often faced by consumers seeking to have their complaints resolved by the Tribunal are unacceptable.

In ASFA's view, these issues are capable of resolution within the current SCT structure, and our submission makes a number of recommendations on how they might be addressed. Primarily, this would involve providing the SCT with sufficient funding and resources that it is able to effectively perform its role not only in the short and medium term, but well into the future, as the increasing number of superannuants approaching retirement leads to greater engagement with their superannuation and thus greater scope for complaints to arise.

We look forward to continued engagement with the Review Panel as it considers industry's responses to the Issues Paper and develops its interim report.

[3] Ibid, page 140

C. SPECIFIC COMMENTS IN RESPONSE TO THE ISSUES PAPER

1. Introduction

1.1 Principles guiding the review

Q1. Are there other categories of users that should be considered as part of the review?

The identification in the issues paper of primary users (consumers and financial services providers) and third parties (beneficiaries under insurance policies and potential beneficiaries of death benefits) appears, in ASFA's view, to be appropriate.

Q2. Do you agree with the way in which the panel has defined the principles outlined in the terms of reference for the review? Are there other principles that should be considered in the design of an EDR and complaints framework?

ASFA broadly agrees with the guiding principles for the Review, as articulated in the Issues Paper. Efficiency, equity, complexity, transparency, accountability, comparability of outcomes and regulatory costs are all important and appropriate considerations in the design of an EDR and complaints framework.

However, we note that it would also be relevant – and important – for the Review to consider the benchmarks, and underlying principles, set out in the *Benchmarks for Industry-based Customer Dispute Resolution*[4] (Benchmarks for CDR), which were most recently updated by the Government in 2015. While there is some overlap between the principles set out in the Issues Paper and those in the Benchmarks for CDR, it is not clear that all aspects of the latter are reflected. In particular, ASFA is of the view that the principle of 'independence', as described in the Benchmarks for CDR, is absolutely critical for this Review.

Q3. Are there findings or recommendations of other inquiries that should be taken into account in this review?

As noted in the Issues Paper, matters raised during the 2011-12 consultation chaired by Richard St John: *Review of Compensation Arrangements for Consumers of Financial Services* (St John Review), and the 2013-14 *Financial System Inquiry*, will be of relevance for consultation questions 47-50 regarding a proposed compensation scheme of last resort.

Other reviews/inquiries that ASFA considers relevant to the Panel's Review are:

- the 2001 report by the Productivity Commission: *Review of the Superannuation Industry (Supervision) Act 1993 and Certain Other Superannuation Legislation*[5] and – importantly – the Government's final response in June 2003, which rejected the Commission's recommendation that the SCT be replaced with an industry based EDR scheme[6]

[4] Department of the Treasury - Benchmarks for Industry-based Customer Dispute Resolution, February 2015
[5] Productivity Commission – Inquiry Report No. 18 Review of the *Superannuation Industry (Supervision) Act 1993* and Certain Other Superannuation Legislation, 10 December 2001
[6] Minister for Revenue and Assistant Treasurer - Media Release C059/03 - Government responds to Productivity Commission Report on superannuation legislation, 20 June 2003

- the 2013-14 National Commission of Audit[7] (NCOA), which considered in detail the matter of rationalising the number of government agencies, committees and boards. The NCOA recommended the abolition and/or merger of a number of these bodies, and while this has occurred in some instances, in other cases no abolition/merger has transpired. It is noteworthy that the final report of the NCOA did not make any recommendation – or even contain any discussion – in relation to integration of the SCT
- the 2015 consultation *Proposed industry funding model for the Australian Securities and Investments Commission*[8], for industry's input regarding funding of the SCT.

Q4. In determining whether a scheme effectively meets the needs of users, how should the outcomes be defined and measured?

The question of how 'effectively' schemes meet users' needs is multi-faceted, and it must be acknowledged that is not possible to guarantee the *outcome*, only the *process*.

It will be necessary to assess outcomes against the principles outlined at paragraph 11 of the Issues Paper (efficiency, equity, complexity, transparency, accountability, comparability of outcomes and regulatory cost) and against the additional principles set out in the Benchmarks for CDR (accessibility, independence, fairness and effectiveness).

In considering how to define and measure outcomes for the EDR and complaints schemes, the Review should also have reference to the *Key Practices for Industry-based Customer Dispute Resolution*[9], released by the Government in February 2015.

In addition, each EDR scheme should have clear and transparent service standards and charters and should conduct annual self-assessment against those standards, with the results made publicly available. Each scheme currently provides information about what users can expect when dealing with the scheme. However, this varies greatly in terms of specificity, often incorporates qualitative criteria that are not capable of quantitative measurement (for example, that complainants will receive "courteous, polite attention") and may be fragmented between different factsheets, brochures and website material.

In ASFA's view, each scheme should have a clear, self-contained and publicly available service standard document to which it can be held accountable. It is important that this specifically addresses expected response times and other key service metrics.

There should also be mandatory periodic independent review for all schemes with the results made publicly available, as occurs currently for the FOS and the CIO.

The SCT – and/or its enabling legislation - has been considered as part of two formal, publicly reported reviews:

- a 1996 review of its first 12 months of operation, undertaken by the Senate Select Committee on Superannuation[10]
- a 2001 review by the Productivity Commission[11].

[7] National Commission of Audit - Towards Responsible Government, February 2014
[8] Department of the Treasury - Proposed industry funding model for the Australian Securities and Investments Commission, August 2015
[9] Department of the Treasury - Key Practices for Industry-based Customer Dispute Resolution, February 2015
[10] Senate Select Committee on Superannuation - 18th report of the Senate Select Committee on Superannuation - Review of the Superannuation Complaints Tribunal, April 1996
[11] Productivity Commission – Inquiry Report No. 18

These were point in time reviews with a specific focus. Such reviews do not replace the need for a regular assessment focussed on performance and efficiency. To the extent that any such assessment has been conducted, ASFA is not aware of the results having been made public.

ASFA considers that the periodic, independent reviews of the FOS and the CIO required under ASIC's Regulatory Guide RG 139 *Approval and oversight of external complaints resolution schemes* are a beneficial form of oversight which should be applied to the SCT. It is, in ASFA's view, important that the outcomes of any such review are formally considered by government, and that any funding/resourcing issues raised by the review are specifically addressed as part of the annual funding allocation.

2. Overview of the dispute resolution framework in the financial system

2.1 Internal dispute resolution

Q5. Is it easy for consumers to find out about IDR processes when they have a complaint? How could this be improved?

ASFA agrees that in assessing the effectiveness of internal dispute resolution (IDR) frameworks, the consumer experience is of paramount importance.

While the regulatory framework for financial products and services is clearly framed with the intent that it should be easy for consumers to find out about IDR processes, ASFA acknowledges that consumers are the ultimate arbitrator of its effectiveness.

While issues related to language and literacy will always present a challenge (see our response to Q6 below) a range of regulatory provisions require disclosure of IDR processes for financial products and services.

Subsection 101(1) of the SIS Act requires trustees of APRA-regulated superannuation funds to have in force at all times arrangements under which an eligible person "has the right to make an inquiry or a complaint of the kind specified … in relation to that person".

While section 101 does not contain an explicit stated requirement that trustees notify members about the IDR arrangements, such a requirement is in ASFA's view clearly implied, as arrangements which were not brought to the attention of eligible persons would not satisfy the terms of subsection 101(1). Further, section 101 is supplemented by provisions in the *Corporations Regulations 2001* which require trustees to include in the annual fund information "a named individual or person holding designated office/position available to receive/deal with member inquiries & complaints"[12].

Providers who are holders of an AFSL are also required, as a condition of their licence, to have IDR procedures that meet the standards or requirements made or approved by ASIC[13]. These are set out in Regulatory Guide RG 165: *Licensing: Internal and external dispute resolution* (RG 165), which incorporates requirements from the Australian Standard *AS ISO 10002-2006 Customer satisfaction – Guidelines for complaints handling in organizations*. RG 165 includes requirements about communicating with complainants at all stages of the complaints handling process.

[12] Corporations Regulations 2001, sub-regulation 7.9.36(a) definition of 'contact details of the fund', read with regulation 7.9.01 definitions of 'contact details' and 'contact person'
[13] Corporations Act 2001, subsections 912A(1)(g), (2)

The level of information regarding IDR processes that is made available to consumers on providers' websites does vary greatly, and is not always prominently featured. This is an area that could, in ASFA's view, be improved.

Q6.What are the barriers to lodging a compliant? How could these be reduced?

ASFA members perceive few barriers to the lodging of a complaint, with complainants able to utilise a variety of channels, including telephone, email and (traditional) mail. Those barriers that do exist typically relate to language, literacy and financial literacy.

Each of the EDR schemes and complaints bodies makes obvious attempts to provide information for consumers in a 'plain English' style, avoiding technical and legal terminology, using examples and case studies and even, in some cases, sample complaint letters. However, the EDR schemes providing varying levels of support for consumers who need information in a language other than English:

- the FOS website has a prominently displayed 'special assistance' section, with links for accessibility help and the interpreter and national relay service, as well as translations of website material in several languages.
- the CIO website features a prominent, scrolling banner style display of material available in other languages.
- no translated material is provided on the SCT website. This is, in ASFA's view, a significant omission which could, with sufficient resourcing, be readily addressed. Accessibility features are beneficial to consumers and should, in ASFA's view, be standard on all EDR scheme and complaints body websites. We note that the SCT's service charter does indicate that complainants can be provided with access to an interpreter service[14].

One other barrier that is commonly mentioned relates to a lack of clarity about how to complain. However, given the extent of information that financial services providers are required to provide to consumers regarding their ability to complain (refer our response to Q7-9 below), ASFA is of the view this is a *perceived* barrier rather than one that is actually borne out in practice.

Another issue that is reducing, but anecdotally is still a concern for some consumers, is a lack of access to computer and copying facilities to facilitate preparation and lodgement of complaint documents.

Q7. How effective is IDR in resolving consumer disputes? For example, are there issues around time limits, information provision or other barriers for consumers?

Q8. What are the relative strengths and weaknesses of the schemes' relationships with IDR processes?

Q9. How easy is it for consumers to escalate a complaint from IDR to EDR schemes and complaints arrangements? How common is it for disputes to move between IDR and EDR, or between EDR schemes?

ASFA members indicate that IDR is extremely effective in resolving consumer disputes. For example:

- one large APRA-regulated fund reported that fewer than 10 per cent of complaints made during the 2015-16 financial year proceeded to EDR
- another large fund advised that it has not had a single complaint proceed to a final determination at the FOS

[14] Superannuation Complaints Tribunal - Service Charter

- one advice business reported that only two disputes were submitted to the FOS in the last three years.

ASFA is not aware of any particular concerns regarding time limits, information provisions or other barriers.

We note that financial services entities are required to provide consumers with detailed information about their ability to access EDR, at multiple points in time and through multiple channels. For superannuation, for example, this includes via the Product Disclosure Statement (PDS) received before or shortly after acquiring an interest in the fund, periodic statements, and at the point a decision has been made in relation to a complaint in accordance with the trustee's IDR mechanism. Further, complainants have the ability to access written reasons for the decision made by the provider under its IDR mechanism[15], which they can use to inform any decision regarding proceeding to EDR.

We understand that the EDR schemes still receive a volume of complaints that have not first been considered through the IDR process. While this undeniably creates some additional workload for the schemes, ASFA members have not indicated any concern regarding how promptly these complaints are referred back for IDR.

Additionally, we understand that each year the EDR schemes receive a relatively small number of complaints/disputes which would more properly fall within the jurisdiction of another scheme. While processes exist for such complaints/disputes to be referred on, there is always scope for these to be streamlined to ensure that consumers do not experience any unnecessary delay. We note that this is an issue which might be effectively addressed through the proposed 'triage' interface (refer Q35-36).

2.2 Regulatory oversight of EDR schemes and complaints arrangements

Q10. What is an appropriate level of regulatory oversight for the EDR and complaints arrangements framework?

Q12. Should there be consistent regulatory oversight of all three schemes with responsibility for dealing with financial services disputes (for example, should ASIC have responsibility for overseeing the SCT)?

Our submission raises a number of issues in relation to the need for additional funding for the SCT (and transparency over that funding), as well as potential enhancements to accountability including periodic reviews of the SCT's performance. Subject to those matters, ASFA considers that the current arrangements for regulatory oversight of the SCT are appropriate.

We note that ASIC already has administrative responsibility for the regulatory provisions relating to the SCT and to EDR for APRA-regulated funds – the *Superannuation (Resolution of Complaints) Act 1993* (S(ROC) Act) and section 101 of the SIS Act. In ASFA's view, it is not clear that additional ASIC oversight would result in any improvement in the SCT's performance, particularly given ASIC's existing responsibilities and limited resources.

ASFA considers that the current regulatory oversight of the industry based EDR schemes, the FOS and the CIO, are - with one significant exception - broadly appropriate. The lack of any effective mechanism to enforce the payment of determinations is, in ASFA's view, a major deficiency in the current structure.

[15] ASIC Regulatory Guide RG 165 Licensing: internal and external dispute resolution, guiding principle 4.5. Regulations 7.9.48B-D of the Corporations Regulations 2001 require superannuation providers to give written reasons for decisions in relation to complaints about death benefits, and to give written reasons for decisions in relation to complaints about other types of benefits on request.

Q13. In what ways do the existing schemes contribute to improvements in the overall legal and regulatory framework? How could their roles be enhanced?

All schemes publish their determinations in a de-identified form. While these are heavily fact-based and do not constitute binding precedent, they do provide a level of general guidance to providers on appropriate conduct.

Importantly, where a determination of the SCT is appealed to the Federal Court on a question of law, the Court's decision is publicly reported and may be relied upon as precedent, adding to the growing body of superannuation law. This is a particular strength of the current SCT structure which is not replicated in the FOS/CIO model.

The schemes also highlight what they see emerging as trends, potential systemic issues or misunderstanding of the law through channels such as:

- their annual reports
- newsletters and periodic bulletins
- holding (or attending) industry and consumer forums
- liaison with regulators and government
- in the case of the FOS and the CIO, making submissions to relevant inquiries.

However, the inevitable time lags inherent in issues becoming complaints, progressing through IDR and coming before the EDR scheme means that such reporting is generally not timely enough (even when conducted according to schedule) to allow providers to promptly address emerging issues. More frequent reporting to providers would be beneficial.

ASFA members have noted that the level of industry communication and engagement from the SCT has reduced in recent times – for example, a quarterly bulletin was last published for January-March 2015. ASFA considers it likely that this is a function of the SCT's current resourcing.

2.3 Existing EDR schemes and complaints arrangements

Q14. What are the most positive features of the existing arrangements? What are the biggest problems with the existing arrangements?

There are a number of extremely positive aspects of the current SCT model which provide such value and protection to both consumers and trustees that must, in the view of ASFA and its members, be retained. These include:

- the statutory tribunal structure, which provides clear independence from industry and from government and promotes consumer confidence
- the absence of any monetary limit on access to the SCT or the redress that can be awarded by the Tribunal which is critical, given the compulsory nature of superannuation
- the enforceability of determinations, which avoids issues of non-payment of determinations as is experienced with the FOS and, to a lesser extent, the CIO
- the ability to appeal directly from a determination of the SCT to the Federal Court on a question of law, which is not available for disputes before the FOS or the CIO

- its specialist knowledge and expertise, which is vital given the often complex nature of complaints, particularly those involving defined benefit arrangements, insurance through superannuation and death benefit distributions[16].

There are, undeniably, a number of concerns that have been levelled at the SCT's operations. The most significant involves unacceptable delays in resolving complaints via determination and also, more recently, at the investigation and analysis stage. We note that the SCT's service charter does not contain any provisions regarding the timeframes within which a complaint should reach various milestones such as investigation, conciliation, and (where necessary) review. (See our response to Q4 regarding the need for quantitative, measurable service standards.)

ASFA members have indicated that it is common for a complaint escalated to the SCT to take at least 12 months – and frequently longer – to reach a determination. While the SCT's website acknowledges that "a complaint received at the Tribunal today will take at least 12 months to get to review"[17], ASFA understands that, in practice, some complaints are taking significantly longer. The vast majority of complaints are, however, resolved more quickly, at the conciliation stage.

Worryingly, members have also reported more recent experience of delays at the preliminary stages – including increasing time taken for the SCT to confirm jurisdiction, assign a case officer, and investigate the complaint. One ASFA member has reported that in a recently lodged complaint involving a death benefit distribution, the SCT has indicated a likely wait-time of six to seven months for allocation of a case officer.

The delays currently experienced in the SCT model are, by any measure, unacceptable. However they are, in ASFA's understanding, substantially caused by inadequate funding and resourcing (historically and currently – refer Q25 for more discussion of our concerns about the SCT's funding and resourcing), as well as internal operating processes which are inefficient and heavily manual in nature. These are matters which could be readily addressed, given adequate resourcing on an ongoing basis.

Other criticisms levelled at the SCT model include a need for more transparency and accountability in relation to its operations. ASFA agrees that further transparency is required, particularly in relation to the SCT's funding, and that additional accountability measures such as a periodic, independent review of the SCT's performance and operations would be beneficial.

Major strengths of the FOS model include:

- the timeliness with which disputes are heard and resolved, particularly through use of the fast-track process. The 2015-16 Annual Review notes that the FOS closed 43 per cent of disputes within 30 days, 77 per cent within 60 days and 85 per cent within 90 days. The average time taken to close disputes was reportedly 62 days (compared with 95 days in 2014-15), and 99.6% of disputes lodged before 1 July 2015 have been closed[18]
- the level of information made available to both consumers and providers about the dispute resolution process.

[16] Resolution of contested death benefit distributions frequently involves the unravelling of complex family relationships, including assessment of whether interdependency, financial dependency and/or a de facto relationship existed, appropriate distribution between multiple beneficiaries and issues regarding appropriate management of distributions for minor beneficiaries, and increasingly also involves questions as to the legal validity of beneficiary nominations.

[17] SCT Frequently Asked Questions: How long will it take before my complaint gets to review?

[18] FOS Annual Review 2015-16, page 56

However, several major concerns are reported in relation to the FOS model, in particular:

- the lack of any ability to appeal directly from a determination of the FOS, with any potential court action having to be brought as an entirely fresh action
- the lack of enforceability, which has led to a substantial amount of determinations remaining unpaid – and consumers uncompensated (see our response to Q47-50).

Q15. How accessible are the EDR schemes and complaints arrangements? Could their awareness be raised?

Q16. How easy is it to use the EDR schemes and complaints arrangements process? For example, is it easy to communicate with a scheme?

Each of the existing EDR and complaints schemes is, in ASFA's view, quite accessible.

- each scheme has a website, although these are of variable quality. The SCT's website, in particular, is extremely basic in layout), utilises a much less engaging and user-friendly style than those of the FOS and the CIO, and would benefit greatly from a redesign
- information about making complaints is available via the ASIC MoneySmart website, including a prominent note that consumers who are unsure which scheme is relevant should contact the ASIC Infoline
- the EDR and complaints schemes and the MoneySmart 'how to complain' page feature high in the list of search results from website engines such as Google
- the schemes are considered easy to access, with the majority of complainants able to proceed without legal representation
- the EDR and complaints schemes provide detailed and layered information to consumers regarding their rights to access EDR (see our response to Q7-9).

While concerns may be raised that consumers find the statutory tribunal structure of the SCT to be 'legalistic' and/or 'off-putting', this is not, in ASFA's experience, borne out in practice. Anecdotal reports provided by ASFA members indicate that consumers generally appear to find the SCT easy to deal with - although current delays in assigning case officers can mean a period of uncertainty for the complainant with little transparency over progress of their complaint.

It is noted that at the time the SCT was established, and again in a review of its first 12 months of operation, consideration was given to whether the EDR mechanism for superannuation should involve an 'independent consumer advice service' to assist consumers with lodging their complaints[19]. This was considered by the Senate Select Committee on Superannuation to be unnecessary, as the SCT model already incorporated administrative measures to assist consumers with making complaints, and introduction of such a service was likely to make the SCT more legalistic in approach and add cost and delay to the EDR process.

Q17. To what extent do EDR schemes and complaints arrangements provide an effective avenue for resolving consumer complaints?

ASFA members indicate that they consider the SCT to be an effective, albeit slow, avenue for resolution of consumer complaints.

Those ASFA members with exposure to the FOS indicate that it is also an effective EDR mechanism, and not subject to the delays currently experienced by the SCT.

[19] 18th report of the Senate Select Committee on Superannuation,

Q18. To what extent do the current arrangements allow each of the schemes to evolve in response to changes in markets or the needs of users?

The FOS and the CIO each has somewhat of a reputation, within the industry, for evolution or 'agility' in terms of process. As noted in the Issues Paper, each has a high level of discretion to choose the appropriate dispute resolution process for each matter and to utilise different referral and case management techniques including, for example, a 'fast track' process for claims below a certain threshold.

In contrast, there is a *perception* that the SCT's ability to 'evolve' is somewhat limited given its jurisdiction/terms of reference and operational framework is essentially specified in its enabling legislation. However, ASFA understands that the primary difficulties which impact the SCT's procedural operation are related to its current and historic level of resourcing, rather than any specific legislative constraint.

We note that subsection 9(4) of the S(ROC) Act gives to the SCT Chairperson the responsibility – and the power – to establish procedural rules for the conduct of review meetings, and that section 28(7) requires the Tribunal to formulate, and publish, guidelines regarding when it would ordinarily require persons to attend a conciliation conference. Aside from those specific requirements, there is flexibility in the processes and procedures that may be adopted.

While the SCT does not have a formal 'fast track' process, ASFA understands that it has - to the extent permitted by its current resourcing - commenced to apply streamlined internal processes to deliver efficiencies in complaints handling. For example, it has endeavoured to ensure that conciliation is attempted as early as possible once a complaint has been lodged, introduced efficiencies in allocation of cases to analysts, and we understand that it is developing factual information for consumers to address common superannuation questions and concerns.

ASFA considers that continued emphasis within the SCT on development of more agile and efficient processes – supported by appropriate resourcing – would be extremely beneficial for all users. In particular, this should include:

- digitisation of complaint records (we understand that files are still managed in paper-based form)
- enhanced workflow management capability
- development of a 'self service' portal for trustees, allowing them to lodge documents, check whether a complaint has been made in relation to a particular decision, and ascertain the status of all complaints currently before the SCT to which they are a party
- continued development of material designed to inform consumers about common superannuation questions and concerns. As well as providing a consumer education benefit, such material is likely to have a significant 'pre-emptive' effect, by reducing the number of unfounded 'complaints' made to providers and, often, through to the SCT.

Q19. Are the jurisdictions of the existing EDR schemes and complaints arrangements appropriate? If not, why not?

Q20. Are the current monetary limits for determining jurisdiction fit-for-purpose? If not, what should be the new monetary limit? Is there any rationale for the monetary limit to vary between products?

ASFA is strongly of the view that there should not be any monetary limit on complaints in relation to superannuation interests.

Given the compulsory nature of superannuation - and the fact it typically represents a substantial portion of a complainant's net wealth - we consider it inappropriate to impose a limit on the redress that may be received by a complainant or to deny access to EDR on the basis the superannuation entitlement involved exceeds a particular threshold.

ASFA members have not reported any concerns in relation to matters falling outside of jurisdiction of the schemes.

Q21. Do the current EDR schemes and complaints arrangements provide consistent or comparable outcomes for users? If outcomes differ, is this a positive or negative feature of the current arrangements?

While comparison of outcomes between the FOS and the CIO may be meaningful, ASFA considers that comparison between SCT and FOS is more problematic given inherent differences in nature of those bodies.

ASFA members who are members of the FOS (as well as being subject to the SCT's jurisdiction) have noted that they find the FOS to be more interactive than the SCT, with the process to be followed set out clearly at the outset and a perception that this can lead to earlier settlement or resolution of disputes. However, those members have also noted that typically, the types of disputes to which they are party which go before the FOS are much more straightforward than the complex disability related complaints, or death benefit distributions, which are taken to the SCT.

Q22. Do the existing EDR schemes and complaints arrangements possess sufficient powers to settle disputes? Are any additional powers or remedies required?

ASFA considers that the powers and remedies available to the SCT are appropriate – noting that the SCT effectively 'stands in the shoes' of the trustee and can exercise all powers available to the trustee under its deed and under the relevant legislation.

Q.23 Are the criteria used to make decisions appropriate? Could they be improved?

While each of the EDR schemes provides a general description of the criteria it uses to make decisions, this could, in ASFA's view, be expanded and additional clarity provided. However, it is noted that each complaint/dispute is heavily fact based and the outcomes are not always readily comparable, and this may lead to a perception of 'unpredictability' or lack of consistency even though the appropriate decision-making criteria and tests have been applied.

Q25. Are the current funding and staffing levels adequate? Is additional funding or expertise required? If so, how much?

ASFA notes that the FOS Annual Review for 2016 reports a total workforce of 362 (293.2 full-time equivalent) as at 30 June 2016[20]. ASFA has no visibility over the funding levels of the FOS, however the absence of any significant delay in hearing and resolving disputes suggests that both its current staffing and funding levels are broadly appropriate.

ASFA has for some years expressed our concern that level of funding provided to the SCT on an ongoing basis is not adequate to ensure that it can effectively deal with the volume of complaints received, within an appropriate timeframe. ASFA is strongly of the view that the funding and staffing levels of the SCT are insufficient to support its workload and allow it to operate in an effective manner. Based on our members' experience, ASFA is of the view that the SCT urgently needs a substantial number of additional case officers and conciliators to address two of the major bottlenecks in the current process.

The SCT is a service of critical importance to APRA-regulated superannuation funds and their members, and the time taken to resolve complaints is an issue which impacts on consumers' confidence in the superannuation system. In this respect we note that ASFA members have, over recent years, reported increased activity within some parts of the legal profession such that fund members are being actively encouraged to pursue litigation in respect of a benefit entitlement (particularly in relation to claims for insured disablement benefits) instead of following their fund's usual benefit claim and complaints process.

One of the reasons cited by some legal practitioners and law societies for the increased trend toward litigation is the time taken for fund members to achieve a resolution of their complaint through the SCT. While the usual claims and complaints process would typically involve a dissatisfied member complaining to the SCT and having their complaint heard without cost and without the need for legal representation, where a member engages legal representation and pursues a claim through the courts, the costs involved may in some cases represent a material portion of any benefit ultimately paid out. ASFA, and our members, are deeply concerned that this outcome may lead to sub-optimal outcomes for many consumers. Increasing the resourcing available to the SCT would, in ASFA's view, reduce the current delays in handling of complaints and minimise the need for consumers to pursue such alternatives.

We note that the SCT's operating budget was reduced (from $5.9m to $5.2m for the 2016 financial year) and its staffing level has been reduced as a result (from 39 to 32 staff in 2016)[21]. This funding amount bears no relationship to the level of complaints currently before the Tribunal, or to anticipated complaints volumes.

Historically, the shortfall in ongoing funding for the SCT has caused backlogs of unresolved complaints to develop, which successive governments have sought to address via ad hoc funding allocations as part of the Budget process. This occurred most recently in the 2016-17 Budget, when the amount of additional funding allocated, $5.2 million, was some 87 per cent of the total that ASIC advises it expended in relation to the SCT in the 2014-15 year.

[20] FOS Annual Review 2015-16, page 16

[21] Super complaints boss Helen Davis calls for more funding – Australian Financial Review, 18 September 2016; SCT - 2014-15 Annual Report, page 42

While ASFA welcomed this additional funding, we consider that there is an urgent need to move past such 'band-aid' solutions and put the SCT's funding on a more stable and sustainable footing going forward to ensure that it can conduct its ongoing operations in an effective and efficient manner, and fulfil its purpose of ensuring accessible, timely and fair resolution of complaints.

It is of particular concern to ASFA that while the SCT's funding has failed to consistently keep pace with the volume of complaints experienced to date, there is no likelihood of any significant reduction in complaint volumes into the future. Rather, it is expected that complaint volumes will continue to increase, given the growing pool of superannuation savings, the extensive superannuation coverage across the Australian population, and the proportion of an individual's – or household's – net wealth which is (or will be, in future) represented by superannuation.

ASFA supports the SCT continuing to be funded via an allocation from the APRA levy. Given the relatively modest amount of funding concerned there would not appear to be any merit in changing the current collection process, which appears to operate efficiently and effectively. Further, given the SCT's role as the external dispute resolution body for all APRA-regulated funds, it is in ASFA's view both reasonable and logical that the SCT's funding is considered as an aspect of determining the supervisory levy for APRA-regulated funds from year to year. However, we consider it vital that the SCT is given greater involvement in determining its funding needs, on an ongoing basis.

ASFA considers that industry funding of the SCT – through the APRA levy – is more appropriate than a purely user pays model, as in a significant proportion (anecdotally, around one third) of the SCT's claims, the trustee concerned is not 'at fault'. These claims involve, for example, disputed death benefit distributions or eligibility for insured disability benefits. In such circumstances it is inappropriate to penalise trustees for their perceived failure to achieve early resolution.

However, ASFA notes that there may be some appetite for consideration of a partial user-pays approach to the SCT's funding, to address perceptions that some trustees are 'over-represented' in complaints before the Tribunal. Such an approach might involve applying an additional charge or levy once the number of complaints in a year exceeds a particular threshold. ASFA notes that adoption of such a system would involve some cost and administrative burden and this would need to be weighed against the amount likely to be recouped before any decision was made to proceed.

While ASFA is of the view the SCT's funding should be sourced from the APRA levy, we believe it appropriate that the level of that funding that is determined – and advised to industry and to the SCT itself – will apply for a minimum of two years. This will better enable the SCT to make resourcing decisions and to devise, schedule and roll out a program of process improvement.

Funding allocated for the operation of the SCT from the APRA levy is currently channelled through ASIC, which provides staff and various services to the SCT in accordance with the requirements of the S(ROC) Act and a memorandum of understanding executed in 1999 (and evidently not since amended). As noted at Q26 below, these arrangements provide virtually no transparency over the funding provided to the SCT, and this is a matter which needs, in ASFA's view, to be rectified.

ASFA further considers that the SCT's funding and resourcing should not be automatically subject to any fiscal impacts applied to ASIC, as is currently the case. In particular, any efficiency dividend or headcount reduction that the Government might impose on ASIC should not be permitted to flow through to the SCT without confirmation from the SCT Chair that it can be accommodated without adverse impact on the SCT's ability to effectively perform its role.

Q26. How transparent are current funding arrangements? How could this be improved?

The level of transparency currently regarding the funding of the existing EDR and complaints schemes varies significantly between bodies.

The CIO provides considerable transparency over its funding arrangements. Its annual reports, including its financial statements, are publicly available on its website. The CIO also publishes a detailed fee schedule setting out the amount of all fees that might potentially arise from a provider's membership, including annual membership fees and service fees.

ASFA has no visibility over the funding arrangements of the FOS, and there is also little transparency of its fee schedule to non-members. The website makes it clear that a financial services provider seeking to become a member of FOS must pay an application fee and an annual membership fee, which varies depending on the nature and size of the provider's business. The website also refers variously to 'user charges', 'case fees' and 'service fees', but there is no publicly available information regarding the amount of these fees or when they will be incurred. The financial statements for the FOS are not publicly available.

There is currently very little transparency in relation to the funding arrangements for the SCT. The 'financial statement' published by the SCT is limited to a bare few lines in an appendix to its Annual Report. For 2014-15, this stated simply as follows:

> *Pursuant to s 62(2) of the SRC Act, ASIC provides the staff and facilities as are necessary or desirable to enable the Tribunal to perform its functions.*
>
> *ASIC advised that it incurred $5.919m on behalf of the Tribunal in 2014-15.*
>
> *For more information, please refer to Note 26 of ASIC's 2014-15 annual report.* [22]

The corresponding note 26 in the ASIC Annual Report simply states that $5.919m of direct expenditure was incurred on behalf of the SCT.

We note the wording used in the SCT's Annual Report: "ASIC advised that it incurred $5.919m on behalf of the Tribunal", which suggests that even the SCT lacks any genuine visibility over its own budget and funding.

Without full visibility and accountability over its funding allocation, the SCT is severely constrained in its ability to effectively resource its operations and deliver much needed process improvement. For example, if the SCT Chair does not have access to regular data throughout the financial year detailing disbursement of the SCT's funding against its allocation:

- detailed analysis, and forward planning for workload management and process improvement cannot occur
- decisions cannot be made about the cost implications of retaining existing processes or adopting alternatives
- it is not possible to take advantage of opportunities that may arise to apply any unused allocation toward process improvement.

At a minimum, ASFA considers that a more transparent and accountable process for funding of the SCT should involve:

- the development by the SCT of a business plan covering at least the ensuring two years, clearly setting out its funding requirements based on current and planned expenditure on process improvement

[22] SCT - 2014-15 Annual Report, Appendix 1

- a direct and identifiable relationship between the SCT's proposed budget and the volume of complaints before it (refer our response to Q25)
- the collection of the identified level of funding via the APRA levy, with clear transparency, in both the levy proposal and any Cost Recovery Implementation Statement published by APRA, of the specific amount of the levy which is to be collected on behalf of the SCT
- clear and regular reporting by ASIC to the Chair of the SCT regarding the disbursement of monies on behalf of the SCT from the amount allocated from the APRA levy.

Q27.How are the existing EDR schemes and complaints arrangements held to account? Could this be improved?

The FOS and the CIO are each subject to initial and ongoing approval by ASIC pursuant to the *Corporations Regulations 2001* and Regulatory Guide 139 *Approval and oversight of external complaints resolution schemes*. They each undergo periodic independent reviews against the Benchmarks for CDM as a requirement of that approval, with a copy of the review report provided to ASIC. Each consults with their members on major changes to their operating rules, and actively seeks feedback from stakeholders. The FOS also states that it has "robust internal and external accountability mechanisms", including internal audit, an organisation wide quality assurance program and comprehensive policy and procedures for our dispute operations[23].

Accountability mechanisms for the SCT are quite different. In particular:

- the Chairman of the SCT reports to the Minister annually under the S(ROC) Act
- the SCT indicates that it is subject to "external scrutiny by the Parliament, various parliamentary committees, the courts, and certain Commonwealth departments and statutory bodies". The latter includes the Commonwealth Ombudsman, to which complainants who are not satisfied with the SCT's conduct may complain. During 2014-15 the Ombudsman made five formal enquiries regarding complaints about undue delay by the SCT in dealing with complaints and/or responding to complainants[24]
- the SCT notes that Parliament scrutinises its operations "by way of the legislative process, the tabling of regulations and the tabling of the Tribunal's annual report"
- the SCT also provides "indexed lists of files to be tabled before the Senate in accordance with the requirements of Senate Standing Order No 12" and "responds to questions on notice as required".[25]

In ASFA's view, these mechanisms are too passive and indirect to provide meaningful oversight.

As noted in our response to Q4, a review of the SCT was undertaken by the Senate Select Committee on Superannuation in 1996[26] and by the Productivity Commission in 2001. ASFA is not aware of any subsequent review of the SCT's operations, performance and efficiency for which the results have been made public.

ASFA considers that periodic, independent review of the SCT (as occurs for the FOS and the CIO) would be beneficial. In ASFA's view, such a review could be appropriately conducted by the Commonwealth Auditor General. It is critical that the report arising from such a review is made publicly available and that its outcomes are considered by government as part of the annual process for allocation of funding for the SCT.

[23] FOS Fact Sheet - clear and open
[24] SCT - 2014-15 Annual Report, page 43
[25] Ibid.
[26] 18th report of the Senate Select Committee on Superannuation

Q28. To what extent does current reporting by the existing EDR schemes and complaints arrangements assist users to understand the way in which the scheme operates, the key themes in decision-making and any systemic issues identified?

The perceived value of reporting by EDR schemes and complaints arrangements would be different for different types of users.

Detailed reporting clearly assists with financial services providers' understanding of how the schemes operate. However, it would be of little value for complainants/potential complainants, who are typically more interested in higher level, factsheet type information.

Reporting regarding key themes/systemic issues would most likely be of little interest or value to complainants/potential complainants. While that type of information is of value to financial services providers, its relevance is often is diminished by its lack of timeliness.

Q29. What measures should be used to assess the performance of the existing EDR schemes and complaints arrangements?

As mentioned in relation to Q2 and Q4 above, ASFA considers that the performance of the existing EDR schemes and complaints arrangements should be measured against:

- the Benchmarks for CDR
- the Key Practices for Industry-based Customer Dispute Resolution
- the metrics set out in each body's detailed service level agreement/charter.

Q30. To what extent are there gaps and overlaps under the current arrangements? How could these best be addressed?

Q31. Does having multiple dispute resolution schemes lead to better outcomes for users?

Q32. Do the current arrangements result in consumer confusion? If so, how could this be reduced?

We note that each of the EDR schemes has in place arrangements to refer on complaints/disputes that are more appropriately addressed by another scheme. ASFA members have not reported any concern with the operation of these arrangements.

The main area of overlap and/or potential confusion between the FOS and the SCT identified by ASFA members relates to matters involving a member of an APRA-regulated superannuation fund who has received financial advice. In this respect, ASFA members have reported an element of perceived 'subjectiveness' in terms of the aspects of a matter that will be taken on by the FOS[27]. This is seen to create confusion, as what the consumer perceives to be a single complaint is then fragmented into different matters which need to be taken to different EDR schemes.

[27] For example, ASFA was advised of an instance where a member of an APRA regulated fund who was dissatisfied with the service received from their adviser challenged the level of fees deducted from their fund account. The complainant was directed to the SCT, but chose to lodge a complaint with the FOS. The FOS reportedly ruled that the complainant needed to make a separate complaint against their adviser, (correctly) ruled that the aspect of the complaint related to the trustee's decision re the amount of fees charged was outside its jurisdiction, but concluded that it was able to consider an allegation that the trustee had failed to disclose the level of those fees.

One option to avoid an individual's complaint being 'split' between the FOS and the SCT might be an extension of the SCT's jurisdiction to allow it to deal with financial advice aspects of complaints in such cases, however ASFA does not favour this approach. While it would avoid splitting of a complaint for an affected consumer, it would mean an additional complaints body now dealing with advice related matters, potentially leading to issues of comparability of outcomes.

Another option might involve assigning a 'lead' scheme in those instances where a consumer's complaint was split between schemes. Under this approach, the schemes would each continue to address those aspects of the complaint falling within their jurisdiction according to their own processes, but the consumer would have a single point of contact.

In ASFA's view, the 'triage service' proposed in the Issues Paper (refer Q35-36) may in fact be the most appropriate model to reduce such confusion, provided it is cost effective for industry and structured and resourced so that it can operate efficiently and not introduce further delay into the EDR process.

ASFA members indicate that in some cases when IDR has been unsuccessful, complainants have been advised of the most appropriate EDR scheme by their financial services provider but have actively chosen to take their complaint to another EDR/complaints body. This suggests that, for at least a small number of consumers, having multiple dispute resolution schemes provides an element of choice, which is perceived to be of value to those consumers. In a small number of such cases it appears that consumers may actively seek escalate their matter through more than one scheme, which creates double handling and potential delay while jurisdictional issues are resolved.

In ASFA's view, having multiple schemes is likely to create confusion for less financially sophisticated consumers. As noted above, the proposed 'triage service' has the potential to assist in this respect, and warrants further investigation.

3. Alternative models of dispute resolution

3.1 Triage service

Q35. Would a triage service improve user outcomes?

Q36. If a 'one-stop shop' in the form of a new triage service were desirable:

- who should run the service?
- how should it be funded?
- should it provide referrals for issues other than that related to the financial firm?

ASFA considers there is merit in further investigating a 'triage' service for financial services disputes and complaints, comprising a single entry point for consumers with complaints filtered to the appropriate EDR scheme.

There is clear potential for a single entry point to improve consumer outcomes by reducing confusion and improving the ease with which complaints can be made. However, any triage service would need to be carefully designed to ensure that it is cost-effective and does not simply create double handling and additional delays.

ASFA considers that a 'triage service' should operate primarily as an interface, with no change to the structure of the underlying EDR schemes. However, we note that its introduction would create an opportunity to provide an enhanced consumer experience in those instances where a consumer's complaint was split between schemes, by allowing a 'lead scheme' to be assigned. Under this approach, the schemes would each continue to address those aspects of the complaint falling within their jurisdiction according to their own processes, but the consumer would have a single point of contact for all aspects of their complaint (refer also to our response to Q30-32 in relation to this matter).

In ASFA's view, the triage service could reasonably be performed by ASIC, which already provides a basic consumer interface, with its MoneySmart website advising consumers (including as prominently displayed 'smart tips') to contact the ASIC Infoline if they are unsure which EDR scheme to contact.

Regardless of the body selected to run the triage service, it will be critical that the service is given sufficient profile or 'presence' – through consumer education and advertising and also communication from providers – to ensure an appropriate level of consumer awareness. Unless consumers are aware of the service, and how to access it, it cannot achieve its intended purpose.

The triage service should be funded via an allocation from the proposed ASIC levy. The levy amount for financial services providers could readily incorporate a base contribution, calculated by reference to the percentage of claims triaged that relate to each regulated sector. (This may only be practicable after a year's operation, therefore each sector's contribution to the initial year's funding may need to be based on a reasonable estimate.) Consideration could also be given to applying a threshold number of claims, above which entities would pay an additional amount toward operation of the triage service (that is, a user pays element).

It is not entirely clear what is envisaged with the question in the Issues Paper about whether the triage service should "provide referrals for issues other than that related to the financial firm". If it is intended that the service might provide a general consumer information or advisory role, ASFA would not be supportive. Such a role would not, in ASFA's view be appropriate for a service which will be funded (directly or indirectly) by industry, and any dilution in the nature of services provided may cause confusion for consumers.

3.2 One body

Q37. Should it be left for industry to determine the number and form of the financial services ombudsman schemes?

ASFA does not agree that the number and form of the EDR schemes should be self-determined by the industry.

While it may be argued that this might create a level of competition between schemes (where there is overlap on the types of financial products/services covered), this is in ASFA's view likely to be outweighed by the potential to create confusion for consumers and difficulties with comparability of outcomes. Further, any potential increase or decrease in the number of EDR schemes would need to be carefully managed to ensure that full coverage is maintained for all potential types of complaints/disputes.

Access to an effective EDR mechanism is of critical importance for consumers. The means through which EDR is delivered is a matter which is, in ASFA's view, more appropriately resolved by government. This is particularly important in relation to superannuation, given the number of Australians who hold an interest in an APRA-regulated superannuation fund – and the proportion who do so because of the compulsory nature of the SG regime.

Q38. Is integration of the existing arrangements desirable? What would be the merits and limitations of further integration?

Q39. How could a 'one-stop shop' most effectively deal with the unique features of the different sectors and products of the financial system (for example, compulsory superannuation)?

Q40. What form should a 'one stop shop' take?

Q41. If a 'one-stop shop' in the form of a new single dispute resolution body were desirable:

- should it be an ombudsman or statutory tribunal or a combination of both?
- what should its jurisdictional limits be?
- how should it be funded?
- what powers should it possess?
- what regulatory oversight and governance arrangements would be required?

ASFA acknowledges that a number of benefits might be expected to might flow from integration of the current EDR/complaints bodies, but is of the view that not all are straightforward as they might first appear. These include:

- realisation of efficiencies and/or cost savings, through reduction of overheads and sharing of administrative structures.
- the potential to free up resources by having multi-skilled staff
- removing potential confusion where consumers are unclear how to proceed
- recognition of the increasing sophistication of the industry, with an increasing uptake of advice potentially leading to an increase in complaints which would, under the current arrangements, involve both the SCT and the FOS.

ASFA notes that, in practice, the efficiencies and savings initially realised upon merger are often not maintained into the long term. This is especially the case where the bodies being merged are quite different in nature, as there is often recognition over time that a 'one size fits all' approach is not effective and differences in operational processes are incrementally re-established.

Further, while multi-skilling has its benefits, it also has its limitations. In ASFA's view it would be extremely difficult to ensure that a sufficient number of staff in an integrated model have the deep level of knowledge/skills/expertise to competently address complex superannuation complaints.

Reducing confusion for consumers and managing the splitting of complaints across EDR schemes are both valid objectives, however ASFA is of the view that it should first be considered whether these matters cannot be adequately resolved through the proposed 'triage service' (refer Q35-36), before wholesale changes to the underlying EDR structures are contemplated.

Funding of any integrated model would also be an important - and challenging - matter to resolve, with a need to ensure that no sector effectively cross-subsidises the cost of handling complaints arising in relation to any other sector. In particular, it would in ASFA's view be critical to ensure that the APRA-regulated superannuation sector does not bear any costs which do not relate directly to complaints lodged by members of APRA-regulated funds or its demonstrable share of any shared operating expenses.

In addition, ASFA is concerned that the adoption of an integrated model would involve a level of 'compromise' in terms of which characteristics of the underlying schemes are retained. As noted in this submission (and acknowledged in the Issues Paper), there are few points of commonality between the current structures of the SCT, on one hand, and the FOS and the CIO on the other.

In our response to Q14, we identified a number of current benefits and protections for superannuation fund members/beneficiaries and trustees under the SCT model that must, in ASFA's view, be retained for superannuants:

- the statutory tribunal structure
- the absence of any monetary limit on compensation/redress
- enforceability of determinations
- the ability to appeal directly from a determination on a matter of law
- specialist knowledge and expertise.

These attributes are of such importance that ASFA considers they must not be diluted, whether the SCT is retained as a standalone tribunal or as part of an integrated structure.

As indicated in our submission, however, ASFA does not consider that there is evidence at this time of any compelling need to integrate the SCT into a 'one stop shop' dispute resolution service. There are undeniable issues in relation to the current resourcing, funding and operational efficiency of the SCT, which have significantly impacted its operations and led to unacceptable delays in resolution of complaints. However, ASFA is of the view that these are matters which could be readily and appropriately addressed whilst retaining the SCT model.

3.3 An additional forum for dispute resolution

Q42. Would the introduction of an additional forum, in the form of a tribunal, improve user outcomes?

Q43. If a tribunal were desirable:

- should it replace or complement existing EDR and complaints arrangements?
- should it be more like a court (judicial powers, compulsory jurisdiction, adversarial processes and legal representation)?
- should it be more like current EDR schemes (relatively more flexible, informal decision-making and processes)?
- how should the jurisdiction of the tribunal be defined?
- should its jurisdiction only extend to small business disputes or other disputes?
- should its jurisdiction only be available in the case of disputes with providers of banking products?
- should monetary limits and compensation caps apply?
- should its decisions be binding on one or both parties and what avenues of appeal should apply?
- should it be publicly (taxpayer) or privately (industry) funded?
- should its focus only be on providing redress or should it take on a role to prevent future disputes, for example, by advocating for changes to the regulatory framework, seeking to improve industry behaviour?
- what type of representation and other support should be available for persons accessing the tribunal?

ASFA does not consider that the introduction of an additional tribunal, over and above the existing EDR schemes and complaints bodies, would improve user outcomes. Rather, we consider that it would simply add further complexity.

4. Other issues

4.1 Uncompensated consumer losses

Q47. How many consumers have been left uncompensated after being awarded a determination and what amount of money are they still owed?

Q48. In what ways could uncompensated consumer losses (for example, unpaid FOS determinations) be addressed? What are the advantages and limitations of different approaches?

Q49. Should a statutory compensation scheme of last resort be established? What features should form part of such a scheme? Should it only operate prospectively or also retrospectively? How should the scheme be funded?

Q50. What impact would such a scheme have on other parts of the system, such as professional indemnity insurance?

As acknowledged in the Issues Paper, there are no outstanding/unpaid SCT determinations, given its statutory powers to enforce determinations:

- on becoming aware that a party to a complaint has failed to give effect to a determination, the SCT must give particulars to ASIC and/or APRA pursuant to section 65 of the S(ROC) Act. ASIC has extensive powers to enforce the SCT's decision, including court action for a performance injunction.

- section 64A of the SIS Act imposes an obligation on trustees of regulated funds to comply with determinations of the SCT. Failure to comply constitutes a contravention of 'RSE licensee law' which potentially endangers a trustee's Registrable Superannuation Entity licence.

ASFA understands that there have only been five instances since its inception in 1993 where the SCT has needed to report a fund to APRA for failure to comply with a determination[28].

In contrast, as the Issues Paper notes, there are outstanding determinations for both the FOS and the CIO:

- there is approximately $16.7m worth of unpaid FOS determinations, involving 32 financial service providers and 194 consumers[29]
- there is approximately $413,415 in unpaid CIO determinations involving 4 providers in relation to 5 determinations, affecting 7 consumers[30].

While these figures admittedly represent a small percentage of the total number of complaints considered by the FOS and the CIO, it must also be noted that they relate to a very much shorter period of operation than the SCT – since 1 January 2010 for the FOS and since only 1 December 2014 for the CIO.

The fact that there is such an incidence of unpaid determinations for the FOS and the CIO but not the SCT clearly demonstrates, in ASFA's view, the need for any EDR scheme to be able to take appropriate and effective enforcement action in respect of its determinations.

Enforceability of determinations is one of the most critical aspects of the SCT model. It must, in ASFA's view, be retained in any revised EDR model and should potentially be extended to apply to all financial services consumer complaints and disputes.

ASFA notes that while the question of a compensation scheme of last resort was briefly considered in the Financial System Inquiry, the need for – and appropriateness of – such a scheme has not been considered in detail since the St John Review in 2011-12. Since that time, there has been significant evolution within financial services industry.

The Issues Paper effectively seeks industry's thoughts on a scheme 'at first principles', without proposing any particular model. In addition, this Review raises significant questions which could – depending on their resolution –reshape key aspects of the relationship between financial services providers and consumers. In order to be able meaningfully consider a potential compensation scheme, it is necessary for industry to first have clarity around any changes to IDR and EDR arrangements that may flow from this Review.

ASFA is of the view it is not possible for industry to express a considered view on any theoretical compensation scheme, without any detail as to a specific proposed scheme and how it will operate. Accordingly, we believe that consideration of any proposed compensation scheme of last resort should be deferred until the outcomes of this Review – and the impacts on IDR and EDR arrangements - are known. ASFA will, however, be pleased to participate in any future dialogue in the context of any proposal for a specific compensation scheme model.

[28] Super complaints boss Helen Davis calls for more funding
[29] Issues Paper, para 87; also: FOS option not explicitly advised to clients – MoneyManagement, 13 September 2016, FOS Circular – Issue 26, August 2016
[30] Ibid.