



External Dispute Resolution

7 October 2016

AIST Submission

AIST

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

As the principal advocate and peak representative body for the \$700 billion not-for-profit superannuation sector, AIST plays a key role in policy development and is a leading provider of research.

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

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1 Executive summary

AIST welcomes the opportunity to comment on the current dispute resolution framework and our key arguments are as follows:

- The interests of consumers must be given priority in the review and any change to the current system must be carefully considered in order to avoid the interests of the consumers being adversely affected.
- Due to the continued growth of the superannuation industry it is vital that the dispute resolution system is forward looking and well equipped to deal with the growing volume of consumers and their needs.
- AIST has long been a supporter of the Superannuation Complaints Tribunal (SCT). As an independent statutory body with superannuation expertise it provides a highly valued free service to complainants. AIST submits:
 - The SCT does not require additional layers of oversight.
 - The legislative backing of the SCT positively contributes to the legal and regulatory framework.
 - Increased funding is required to service the needs of complainants and the growth in the superannuation system.
 - The SCT's resourcing continue to be derived from the APRA levy, however the money should be allocated directly to the SCT and the amount of resourcing required be determined following industry consultation.
 - The SCT should be permitted to utilise a broader range of ADR mechanisms.
- While both the Financial Ombudsman Service (FOS) and the SCT provide consumers with an avenue to resolve complaints, there is scope for improvement in areas such as jurisdiction and consumer awareness. There are a number of overlapping areas between FOS and the SCT, particularly in regards to jurisdiction, which is causing consumer confusion and it is in the interest of consumers that these be addressed.
- AIST is not opposed to the establishment of a complaints handling triage service, or a single dispute handling body however, this support is subject to a number of qualifications detailed in this submission.

2 Introduction

While this review relates broadly to the effectiveness of the Superannuation Complaints Tribunal (SCT), Financial Ombudsman Service (FOS) and the Credit and Investments Ombudsman (CIO), AIST is a superannuation industry representative association and as such our comments are restricted to the superannuation industry only.

Australia's superannuation system plays a pivotal role in ensuring adequate retirement for all Australians and due to its importance it is critical that consumers, as beneficiaries of the system, are afforded adequate protections. Given the importance of superannuation in ensuring adequate retirement outcomes and the compulsory nature of the system which mandates consumers' participation, there is a real need to ensure that there are robust consumer protection mechanisms entrenched within the system, such as specific consumer protection laws, appropriate oversight arrangements and external dispute resolution schemes.

Formal complaints handling frameworks, both internal and external, can contribute to consumer confidence within the sector by providing an avenue for aggrieved consumers to voice their concerns and seek redress where appropriate. AIST believes that it is important for superannuation members to be able to access dispute resolution services as and when required and that these services actually deliver outcomes for those who they have been established to serve. The two principal bodies generally used within the superannuation sector for resolving disputes are the SCT and FOS.

The SCT is an independent dispute resolution body, operating as a statutory tribunal that specifically deals with superannuation-related complaints. Broadly speaking it is charged with the responsibility of resolving complaints that relate to decisions of superannuation trustees and can be accessed free of charge by all consumers who are members of a superannuation fund that is subject to the SCT's jurisdiction. It serves a specialist function as it only deals with superannuation specific disputes and does not have any broader areas of operation.

FOS is an external dispute resolution scheme (EDR) approved by ASIC, operating as a not-for-profit, non-government organisation dealing with a variety of disputes about financial services. FOS has significant coverage in the financial services sector, including financial planning, general and life insurance and superannuation. The scope of issues dealt with by FOS is wider than that of the SCT because FOS is not a specialised scheme like the SCT, and is governed by broad Terms of Reference compared to the more prescriptive, legislative approach taken with the SCT.

3 The Superannuation Industry

Superannuation is a universal mandatory retirement savings system covering almost all Australian workers. It was introduced in 1992 through the introduction of the superannuation guarantee and since that time it has developed rapidly both in size and complexity. Today the system is incredibly complex and is regulated through a variety of legislative instruments and regulatory bodies. Understanding the superannuation environment is critical when considering how consumers interact with the system.

3.1 Legislative framework

- *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act) – principal Act and sets out the main requirements that superannuation funds must adhere to when carrying out their operations, including approaches to complaints, and the role of the regulators.
- *Superannuation Industry (Supervision) Regulations 1994* (Cth) (SIS Regs) – operate alongside the SIS Act and covers a wide variety of issues regarding the management of superannuation funds.
- *Superannuation (Resolution of Complaints) Act 1993* (Cth) (SRC Act) – establishes the SCT and sets out the jurisdiction, powers and operation of the tribunal.

3.2 Regulatory bodies

- The Australian Securities and Investments Commission (ASIC) is broadly responsible for consumer protection within the financial services sector, including superannuation. ASIC's superannuation responsibility includes:
 - Disclosure, including ensuring consumers receive relevant information about products
 - Ensuring consumers are treated fairly and have access to appropriate complaints handling processes
 - Licensing of financial service providers, which can include superannuation trustees and key service providers engaged by those trustees to offer products and services to their members such as insurance and investments advice
- The Australian Prudential Regulation Authority (APRA) is the prudential regulator of the financial services industry, and has a broad regulatory scope covering banks, credit unions, friendly societies, insurers and most superannuation funds. APRA is funded by industry and does not play a direct role in consumer protection.

3.3 FOS and the SCT

FOS and the SCT are the principal bodies used within the superannuation sector for resolving consumer disputes. The CIO has very little interaction with the superannuation sector and as such will not form a significant part of AIST's submission.

FOS and the SCT have distinct, separate and unique characteristics:

Features	SCT	FOS
Scope	Specialised and only deals with superannuation complaints.	Broad, covering banking and finance, insurance (including brokerage), financial planning, managed investments, superannuation, estate planning and traditional trustee services.
Purpose	The SCT's purpose is to act as an independent, low cost dispute resolution mechanism for the superannuation industry for disputes that have not been settled through the superannuation funds' own internal dispute resolution (IDR). ¹	FOS's purpose is to act as an independent forum to resolve disputes between applicants (consumers) and financial service providers. ²
Available dispute resolution mechanisms	Dispute resolution mechanisms are rigid and each dispute must progress through conciliation and if unresolved, determination. The determination stage considers whether the decision of the trustee was fair and reasonable in the circumstances.	Dispute resolution mechanisms are fluid, and include negotiation, conciliation, mediation, or a decision by FOS.
Establishment	Legislative tribunal established by an Act of Parliament, commencing operations in July 1994.	Non-governmental organisation, established in July 2008 following a merger of three self-regulatory bodies.
Jurisdiction	Jurisdiction derived from an Act of Parliament.	Jurisdiction derived from the contractual relationship between member organisations and FOS.
	Jurisdiction is not limited by any monetary amount and the SCT can award unlimited compensation.	Cannot hear disputes exceeding \$500,000 in value, and can only award compensation up to \$309,000.

¹ Explanatory Memorandum, Superannuation (Resolution of Complaints) Bill 1993 (Cth) 1.

² Financial Ombudsman Service, *Terms of Reference* (1 January 2015) <<http://tinyurl.com/ztgqn83>>.

Membership	All Superannuation funds regulated by the SIS Act are subject to the SCT's jurisdiction.	<p>Superannuation funds with an Australian Financial Services Licence (AFSL) must be a member of <i>an</i> EDR scheme in accordance with RG165. FOS is one such EDR scheme.</p> <p>Typically external service providers engaged by superannuation funds require an AFSL, and are therefore required to be a member of an EDR scheme in accordance with RG165.</p> <p>Not all superannuation funds are FOS members.</p>
Role of ASIC	Not subject to ASIC approval and is not required to comply with RG139.	Approved by ASIC under RG139 and must adhere to RG139 as it is an ASIC approved scheme.
	Not subject to review by ASIC.	Subject to regular review by ASIC.
Funding	A portion of the APRA levy paid by superannuation funds is allocated to ASIC, ASIC then allocates funding to the SCT.	FOS is funded by member subscription fees and by a 'user-fee' paid by financial service providers when a consumer brings a dispute regarding that provider.

The table above illustrates that the SCT and FOS are fundamentally different organisations, with different oversight arrangements, constraints, resolution processes, and jurisdiction. One of the major differences is that superannuation funds are obliged to comply with a determination made by the SCT and failure to do so may result in APRA or ASIC commencing enforcement proceedings, whereas failure to comply with a FOS decision does not carry the same consequences. Small distinctions such as these raise the arguable case that it would not be in the consumers' best interests to dismantle the SCT, as doing so may place the consumer in a position where they are unable to receive the compensation that they're entitled to. The differences between the bodies highlight the need to ensure that any change to the current system is carefully considered in order to avoid the interests of the consumers being adversely affected.

AIST submits that interests of consumers must be given priority in the review, and that consumers must be better off than before as a result of any changes that might be implemented.

3.4 The future needs of consumers

The principal aim of the superannuation system is to provide working Australians with income in retirement. While this remains the principal aim of superannuation, the sector has developed to meet the growing needs of consumers and the majority of superannuation funds now offer a variety of services beyond investment of retirement savings.

Services and products offered by most funds include:

- A selection of investment options, with different risk ratings and objectives
- Life and total and permanent disability insurance
- Income protection insurance
- Financial planning advice, ranging from factual information to personal financial product advice
- Transition to retirement products
- Retirement products, such as retirement income streams

Superannuation funds today have a greater degree of interaction with consumers than they have in the past, and some now offer a whole of life service – from the first day of work through to offering products and services in retirement. As superannuation funds continue down this path the need for an effective, specialised, well-resourced dispute handling scheme becomes critical. Any scheme must be well equipped to handle consumer disputes, covering any of the products provided to them as a consequence of their membership of the fund.

The burden placed on dispute resolution mechanisms is likely to increase into the future because:

- Superannuation is a high-value industry, with an increasing profile. According to APRA, since 1996 superannuation assets have grown by over \$1.7 trillion dollars. The industry is expected to grow to over \$3.2 trillion dollars by 2035 and represent 130% of Australia's gross domestic product.³
- As the proportion of wages going into super increases, consumers will take a keener interest in their superannuation. In 1992 the superannuation guarantee was 3%, but this figure has steadily risen to 9.5% in 2016 and will continue to increase.
- The sector will serve an increasing number of consumers as time goes on, meaning the pool of potential complainants will also increase. In 2012 approximately 90% of all employees had superannuation with their current employer,⁴ and there were over 32 million superannuation accounts.⁵ As these numbers grow so does the potential strain on the external dispute resolution system as each member account represents a potential complaint, therefore it is critically important that the dispute resolution framework can support these growing numbers.
- The number of consumers in the retirement phase will continue to increase, as will their involvement with superannuation as they access preserved benefits. In 2015 over one million

³ Professor Rodney Maddock, 'Superannuation Asset Allocations and Growth Projections' (Research Paper, Financial Services Council, 17 February 2014) 6.

⁴ Kai Swoboda, 'Major Superannuation and Retirement Income Changes in Australia: a Chronology' (Research Paper Series, 2013-14, Parliamentary Library, Parliament of Australia, 2014) 19.

⁵ The Treasury, *Superannuation Snapshot* (31 March 2013) <<http://tinyurl.com/zvkgd8h>>.

consumers had a pension account with a superannuation fund, with a total value of over \$263 billion dollars.⁶

These figures illustrate that the industry is growing both in asset size and membership numbers, and that consumers are becoming increasingly engaged with their superannuation. As such, it is vital that the dispute resolution system is forward looking and well equipped to deal with the growing complexity of the system and the volume of consumers and their needs.

AIST is concerned that if dispute resolution fails to achieve its stated objective of presenting consumers with an easy to navigate system then those consumers will turn to legal experts such as lawyers to assist in the resolution of complaints. AIST believes that while lawyers play an important role in the resolution of disputes they should not be utilised in the first instance by consumers unless absolutely necessary. The use of lawyers introduces added costs and complexity, increased delay, and ultimately a more adversarial dispute resolution process. One way to ensure that lawyers are not inappropriately over-utilised is by ensuring that dispute resolution systems are cost-effective, accessible, equipped to deal with the needs of consumers, fair and reasonable.

⁶ Australian Prudential Regulation Authority, *Superannuation Statistics Selected Feature – Pension Membership Profile* (23 August 2016) <<http://tinyurl.com/hp6hc4a>>.

4 Regulatory oversight of EDR schemes and complaints arrangements

AIST will now address the relevant questions posed in the Issues Paper.

Questions 10 and 11– What is an appropriate level of regulatory oversight for the EDR and complaints arrangements framework, should ASIC’s oversight role or powers in relation to FOS and CIO be increased or modified?

Currently, in RG165 ASIC requires AFSLs to have internal dispute resolution mechanisms in place and to be a member of an ASIC approved external dispute resolution scheme. ASIC is also responsible for approving EDR schemes and for ensuring they are running effectively in accordance with RG139. The assessment function is typically performed by ASIC through periodic reviews of EDR schemes.

AIST submits that ASIC’s current involvement is sufficient, and that an expansion of ASIC’s oversight arrangements is not warranted.

Question 12– Should there be consistent regulatory oversight of all three schemes (for example, should ASIC have responsibility for overseeing the SCT)?

A consistent approach to decision making is in the best interests of consumers and the superannuation industry. However, because of the differences in jurisdiction and governance structures, ASIC’s oversight of all three bodies is not an appropriate solution.

AIST submits that ASIC should not have responsibility for overseeing the SCT, and that the current parliamentary oversight arrangements of the SCT are adequate. AIST contends it is not appropriate for ASIC to oversee the activities the SCT for a number of reasons detailed below.

The SCT is an independent statutory tribunal, established under the *Superannuation (Resolution of Complaints) Act 1993* (Cth) and as such is not subject to the approval of ASIC, unlike FOS. Given ASIC does not need to approve the operations of the SCT there is little need for them to be responsible for overseeing the SCT.

The statutory nature of the tribunal ensures that it operates independently from government, regulators, industry and other bodies. Independence is critical in ensuring trust and integrity within the dispute resolution sector. The SCT should remain free from the influence of the executive arm of government.⁷

Consumers that utilise the SCT have the right to appeal decisions to the Federal Court of Australia, which serves as a check on the operations of the SCT. With this mechanism in place there is a reduced need for a regulator to have a broad oversight role. Introducing additional oversight would also increase costs, which is not in the interest of consumers.

⁷ In Australia the separation of powers doctrine is entrenched in the Constitution and divides power between the Parliament, Executive Government and the Judiciary. The SCT is a civil tribunal, and while not technically a repository of judicial power it’s closely aligned, as illustrated by the number of cases brought before the Federal Court of Australia where this very question was explored. In light of the SCT’s proximity with the Judiciary it is prudent to avoid providing the executive arm of government with oversight responsibilities, as there is a potential to breach the doctrine.

AIST submits that as the SCT is subject to parliamentary scrutiny, and its decisions are appealable to the Federal Court of Australia, there is no need to introduce another layer of oversight. Introducing additional complexities into the current landscape would ultimately reduce the efficiency of the scheme and introduce additional regulatory costs.

Alternatively, a single dispute resolution body could ensure consistency of decision making.

Question 13– In what ways do the existing schemes contribute to improvements in the overall legal and regulatory framework? How could their roles be enhanced?

The SCT serves as an informal cost-effective dispute resolution body for consumers. While the SCT seeks to resolve disputes in the first instance through a conciliation process, it has the power to carry a dispute through to final determination. The determination is effectively binding on the user and superannuation funds are legally obligated to comply with prescribed standards⁸, one of which is that funds comply with SCT determinations.⁹

The operation of these provisions effectively compel superannuation funds to adhere to determinations of the SCT; failure to adhere to a determination results in the SCT referring non-compliance to ASIC or APRA for enforcement.¹⁰

The legislative backing of the SCT positively contributes to the legal and regulatory framework because it ensures that determinations are enforceable, which means consumers will directly benefit and also may correct behaviour amongst system participants. FOS's overall impact on the legal and regulatory framework is more limited than that of the SCT due to the fact it does not have the same statutory foundation.

The SCT also publishes determinations, accompanied with clear reasons for their decision. While each case is determined on its own merits and past determinations are not binding, they serve as a useful tool to understand how the tribunal approaches particular matters and how it might decide future disputes.

See below for a discussion on how the role of the SCT can be enhanced.

Question 17– To what extent do EDR schemes and complaints arrangements provide an effective avenue for resolving consumer complaints?

While both FOS and the SCT provide consumers an avenue to resolve complaints, there is scope for improvement in areas such as jurisdiction and consumer awareness. This submission details some of the issues consumers face due to jurisdictional overlap between FOS and the SCT and AIST believes that a triage service, or a consolidation of the schemes into one body may assist in boosting the effectiveness of dispute resolution overall.

⁸ *Superannuation Industry (Supervision) Act 1993* (Cth) s 34.

⁹ *Superannuation Industry (Supervision) Regulations 1994* (Cth) s 13.17B.

¹⁰ *Superannuation (Resolution of Complaints) Act 1993* (Cth) s 65.

5 Dispute resolution resourcing

Question 25– Are the current funding and staffing levels adequate? Is additional funding or expertise required? If so, how much?

The funding arrangements between FOS and the SCT differ significantly. FOS is funded by annual member subscription fees in addition to a user-fee, which is paid by financial service providers when a consumer brings a dispute against them. The SCT is funded by the superannuation industry from the annual APRA levy. A portion of the levy paid by superannuation funds is allocated to ASIC and AISC then allocates funding to the SCT.

AIST submits that the SCT is underfunded and that ASIC should not be responsible for providing resources or funding to the SCT for the reasons detailed below:

Each year APRA collects a levy from organisations within the financial sector that are subject to the supervision of APRA, which includes superannuation funds. The amount collected from this levy is then allocated to a variety of government departments, including ASIC. ASIC uses the money collected through this levy to fund part of its operations and the entirety of the SCT.¹¹ This funding arrangement is problematic, for a number of reasons.

Firstly, current arrangements do not allow for an appropriate assessment of the funding needs of the SCT which can result in the SCT being underfunded. Under existing legislative provisions there is no guidance on how the SCT's funding is to be determined, and provides ASIC with an absolute discretion with no guiding principles.¹²

The SCT's funding is inconsistent with industry growth, leaving the tribunal under resourced to address the increasing number of consumers and their demands. In 2016 industry held over \$2 trillion dollars worth of assets, which is expected to grow to \$3.2 trillion by 2035¹³ and AIST believes that the SCT's funding should be appropriate in line with the high-value of the industry, the volume and complexity of complaints.

In 2012 there were over 32 million superannuation accounts,¹⁴ a number that is likely to increase in the future. With a greater number of consumers entering the system each year it is critically important that dispute resolution funding allocation is appropriate to meet the growth of potential complainants.

¹¹ ASIC's obligation to provide the SCT's resourcing stems from section 62 (2) of the *Superannuation (Resolution of Complaints) Act 1993* (Cth) which states that ASIC must make available to the Tribunal "Staff and facilities as are necessary or desirable for the tribunal to perform its functions".

¹² The test of funding is whether it is 'adequate' or 'necessary', but there are no indicators to assist in the determination of adequacy or necessity.

¹³ Professor Rodney Maddock, 'Superannuation Asset Allocations and Growth Projections' (Research Paper, Financial Services Council, 17 February 2014) 6.

¹⁴ The Treasury, *Superannuation Snapshot* (31 March 2013) <<http://tinyurl.com/zvkgd8h>>.

In 2015 there were approximately one million pension accounts,¹⁵ each of which is a potential source of complaint and as more people retire and interact with their fund there is greater potential for dispute.

AIST submits that dispute resolution mechanisms need to be appropriately funded, having regard to the projected asset and member growth of the industry.

FOS's funding arrangements are different from that of the SCT. FOS is funded by member subscription fees and a 'user-fee' charged to financial service providers when a consumer brings a dispute against them. FOS's board has the capability to address any funding shortfalls by implementing changes to the business overall to cut costs, or by increasing membership fees and charges. As such, FOS would be in the best position to determine the adequacy of their funding.

Question 26– How transparent are current funding arrangements? How could this be improved?

The SCT's funding transparency is poor. As mentioned the SCT is funded through the APRA levy. The APRA levy must be met by superannuation funds, and it is a cost that is ultimately passed on to fund members. In light of the fact that superannuation operates under a trust structure it is absolutely critical that each fund has the capacity to inform its members how their money is being spent. However this is not possible under the current arrangements because the APRA levy papers only detail the sum of money that has been allocated to ASIC each year with no further breakdown, which means it is impossible to work out the proportion of funding that has been provided to the SCT.

The current funding arrangements also put ASIC in a position whereby it has to navigate real or apparent conflicts of interest, as funding received from the APRA levy must be split between ASIC operations and the SCT, which falls outside ASIC's central oversight obligations. This is an apparent conflict of interest because ASIC will benefit if they allocate funding to their own operations over that of the SCT. AISC is not responsible for the outcomes of the SCT but is responsible for the outcomes of their own departments. A possible conflict exists that potentially disadvantages superannuation consumers.

AIST submits that the SCT's resourcing continue to be derived from the APRA levy, however the money should be allocated directly to the SCT and the amount of resourcing required should be determined following industry consultation. This is consistent with the way in which the APRA levy is calculated. We believe that this approach will allow the SCT to be adequately resourced into the future and respond to growing demands on their services.

We believe that these recommendations will have positive impacts on the operations of the SCT because it:

- Removes the perception of conflicts of interest
- Improves funding transparency
- Improves SCT accountability
- Ensures adequacy of funding, by requiring an in depth consideration of the SCT's needs prior to the allocation of funding amounts

¹⁵ Australian Prudential Regulation Authority, *Superannuation Statistics Selected Feature – Pension Membership Profile* (23 August 2016) <<http://tinyurl.com/hp6hc4a>>.

6 Problems and positive features

Question 14– What are the most positive features of the existing arrangements? What are the biggest problems with the existing arrangements?

Positive features of the SCT:

- Independent
- No cost to consumers
- Allows consumers to complain about a decision of the superannuation trustee, and ultimately seek redress
- Does not have a cap on the amount of monetary compensation that it can award, however it only seeks to put a complainant in the position they would have been in had the decision been fair and reasonable in the circumstances
- Superannuation funds must comply with determinations made by the SCT
- Superannuation specific expertise

Positive features of FOS:

- Has a very wide jurisdiction allowing it to deal with a variety of financial services complaints, however, the amount of compensation it can award is capped at \$309,000
- Has an active advocacy role, and works with its members to address systemic issues
- Conducts broader outreach programs in the community, which can have wide reaching positive impacts for consumers more generally

Notwithstanding the benefits of each scheme, there are a number of problems that must be addressed.

Firstly, the SCT currently has a back-log of complaints, which is leading to undue delay thus preventing the SCT from meeting its objective as a speedy dispute resolution service. It is likely that this delay is caused by underfunding. AIST submits that appropriate funding changes are necessary to reduce the backlog and prevent further delays. Changes to funding should not be brought about by an increase in the APRA levy, but rather a more appropriate allocation to the SCT within the levy itself.

Undue delay by the SCT contributes to consumers bypassing the SCT and proceeding directly to court with their dispute. This consumes significant resources, such as legal representation, court costs and fees, and other resources expended by the fund by virtue of their involvement in the matter.

AIST believe that the SCT would be in a better position to address their back-log if they received a short period of exemption from efficiency dividend. Each year government departments are subject to an efficiency dividend, which effectively reduces their funding by a certain percentage. AIST believe that if the SCT was exempted from this reduction they would be able to allocate more resources to addressing their case back-log.

While the SCT's case flow issues result in consumers having to wait for resolution of their complaints, FOS consumers are affected by decision non-compliance as FOS cannot enforce its decisions. Since 1 January 2010 a number of FOS members have been unable, or unwilling to comply with FOS determinations,

resulting in approximately 150 consumers being disadvantaged.¹⁶ The current amount owed to consumers, taking into account inflation, is approximately \$16.5 million dollars.¹⁷ This is cause for concern and highlights that it is necessary for a dispute resolution body to have a binding legal nature, with statutory underpinnings.

AIST believes that the changing nature of superannuation fund services requires a holistic dispute resolution framework that can handle all superannuation related complaints with no monetary limits, and enforceable decisions.

6.1 Flexibility

Question 18– 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?

As discussed previously FOS has a greater degree of flexibility than the SCT, owing to their respective governance structures. The flexibility afforded to FOS is beneficial for consumers as it allows FOS to respond to the needs of consumers and work alongside consumer facing entities, such as financial counsellors, community lawyers, and financial capability workers to drive an understanding of FOS's operations and how they can assist aggrieved consumers.

Unlike FOS the SCT is quite rigid and there is limited scope for discretionary operations, however a single dispute resolution body may be able to address some of the limitations inherent in both schemes.

6.2 Jurisdiction:

Question 19– Are the jurisdictions of the existing EDR schemes and complaints arrangements appropriate? If not, why not?

AIST believes there are significant issues regarding the jurisdiction of FOS and the SCT. These issues concern both the breadth of matters the respective bodies have jurisdiction over as well as the monetary limits.

FOS has the power to consider disputes between financial service providers and consumers, however this is qualified in that if the dispute is in regard to a *decision* of the trustee, it falls outside the jurisdiction of FOS.¹⁸ Conversely, the SCT can only hear disputes that relate to a *decision* of the trustee. One of the problems with the current framework is that what constitutes a decision of the trustee is not defined, and must be established in light of circumstances by which the decision is made. This leads to potentially problematic questions about jurisdiction and can be confusing for consumers.

¹⁶ Financial Ombudsman Service, *Unpaid Determinations Update* (August 2016) <<http://tinyurl.com/hrtyodc>>

¹⁷ Ibid.

¹⁸ Financial Ombudsman Service, above n 2.

Decision	Jurisdiction
Financial advice provided to fund member by a provider unrelated to trustee.	FOS.
Financial advice provided to fund member by trustee staff, under the trustee's own AFSL.	FOS or SCT, depending on whether it is a decision of the trustee.
Financial advice provided to fund member by third party related to trustee, or agent of the trustee.	

The question of whether a third party financial service provider's decision is subject to FOS or the SCT can be very difficult to answer, requiring an in depth assessment of the decision itself.

The same jurisdiction question arises in the context of insurance disputes too. Typically, superannuation funds offer insurance to their members and engage the services of an insurer. In this scenario the contractual relationship is between the superannuation fund and the member, not the member and the insurer. The effect of this is that when a member's claim is denied, they are able to lodge a dispute with the SCT, as the decision to refuse a claim is ultimately that of the fund, not the insurer. As the dispute is with the fund and not the insurer the dispute would not fall within FOS's terms of reference.

However, there are instances where it is unclear which body has jurisdiction to handle the dispute. For example, a superannuation fund has a contractual relationship with an insurer, the member lodges a claim with that insurer, and the insurer acts in such a way whereby a reasonable person would view their relationship as being with the member, rather than the fund. For example the insurer may send correspondence directly to the member regarding their claim or be in continual contact with them throughout the process, without engaging the superannuation fund. In these circumstances it might be open to argue the relationship is between the insurer and the member, rather than between the insurer and the fund. In such a case the question of jurisdiction becomes complicated as the insurer is likely to be a member of FOS, and their decision may be subject to FOS as the decision was that of the financial service provider.

These jurisdictional questions will be further amplified as the sector continues to grow and an increasing number of different products and services are provided to consumers by superannuation funds.

Question 21– 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?

FOS can only hear disputes totaling \$500,000 or less and can only award compensation up to \$309,000 whereas the SCT's monetary jurisdiction is unlimited. Given there is the possibility for a consumer's dispute to be subject to both FOS and the SCT's jurisdiction it becomes even more important for the consumer to select the correct body, as the wrong choice could limit the quantum of remedies that they can receive.

As an ordinary person can expect to grow their accumulation account balance over a 45 year period and have insurance arrangements within their superannuation fund, their superannuation benefits can be of significant value. Given that the value of superannuation can be large, it is critical that all consumers in the system have access to a low cost, specialised, dispute resolution body.

AIST submits that it is in the best interests of consumers for dispute resolution systems:

- To cater for the needs of consumers, which may involve there being no monetary limits on claims, in recognition that superannuation can be a high value arrangement.
- To be supported by a triage service, or for there to be a centralised resolution body as to ensure consumers access the correct forum and to prevent the chance of unsatisfactory remedies (eg poor jurisdiction, unenforceable decisions).

Question 30– To what extent are there gaps and overlaps under the current arrangements? How could these best be addressed?

AIST has identified a significant gap in the current arrangements, which presents a risk that members of exempt public sector superannuation funds are unable to access either FOS or SCT.

Currently the SCT's jurisdiction only covers regulated superannuation funds within the meaning of the SIS Act,¹⁹ which means that a number of exempt public sector superannuation funds are not subject to the SCT's jurisdiction, unless these funds are specified in the Regulations. While the Regulations²⁰ specify five superannuation funds, there are a number of public sector funds that do not come within the SCT's jurisdiction, and where these funds are not FOS members they are also not within FOS's jurisdiction.

This means that there are pockets of consumers that cannot access the SCT or FOS for assistance, and these consumers must instead rely on state based Ombudsman services. This is a serious coverage gap and is plainly unsatisfactory because it creates a class of consumers that are precluded from enjoying the same protections afforded to regulated superannuation fund members. It also limits the effectiveness of dispute resolution overall with a lack of standardised decision making across Australia as a consequence of the current system.

This gap can be addressed by the various state and territory governments as well as the exempt public sector superannuation funds.

AIST believes that consumers have limited recourse following non-payment of superannuation by employers. Typically when a consumer is not paid their superannuation they contact their employer, superannuation fund or union. Due to the fact that the SCT can only deal with decisions of the trustee and that employers may not be a member of FOS, consumers cannot turn to either body for assistance regarding non-payment of SG. AIST submits that it may be appropriate for the SCT's operations to be expanded to cover issues such as complaints against employers for the non-payment of SG.

There a number of overlaps between FOS and the SCT, particularly in regards to the jurisdictional issues which have been raised above. AIST believes that these overlaps can be addressed by either a triage service, or through the establishment of one centralised dispute resolution body that preserves the benefits of an independent, free service with the ability to make binding determinations without a monetary limit. AIST also values specialised superannuation expertise in any dispute resolution scheme for complaints relating to superannuation.

¹⁹ *Superannuation (Resolution of Complaints) Act 1993* (Cth) s 4A.

²⁰ *Superannuation (Resolution of Complaints) Regulations 1994* (Cth) schedule 1.

Question 31– Does having multiple dispute resolution schemes lead to better outcomes for users?

It is arguable that having more dispute resolution schemes available to consumers does not result in better outcomes for either superannuation funds or consumers. The presence of multiple schemes can have a number of negative impacts such as confusion as to the appropriate body to approach to deal with the complaint, potential forum shopping, a requirement for users to understand multiple dispute resolution processes, increased costs in regards to running each scheme, and for oversight (if appropriate). Specialised superannuation expertise in a highly complex and perpetually changing super system is also vital to protect consumers.

Question 32– Do the current arrangements result in consumer confusion? If so, how could this be reduced?

Yes. While we acknowledge that both FOS and the SCT can help consumers that have an ongoing dispute with a superannuation fund or service provider, each offers different remedies. These differences can cause significant confusion amongst consumers as to which entity they should turn to for assistance in resolving their dispute. Furthermore, the issue of jurisdictional overlap outlined above is another source of consumer confusion. Many disputes occur when complainants are vulnerable, such as following the death of a loved one, and therefore any mechanism to improve the consumer experience should receive positive consideration.

AIST submits that the consumer confusion can be reduced by either introducing a triage function, or consolidating the schemes into one body.

6.3 Powers:

Question 22– Do the existing EDR schemes and complaints arrangements possess sufficient powers to settle disputes? Are any additional powers or remedies required?

FOS can use negotiation, conciliation, mediation, or determination to settle disputes whereas the SCT can only utilise conciliation and determination. This is problematic and has the effect of:

- Reducing efficiency, as it forces each dispute through a conciliation process even though that may not be appropriate in the circumstances
- Increasing complexity, by forcing consumers to go through a conciliation or determination, when an easier process might achieve a speedier outcome
- Increase regulatory costs as determinations ultimately require more resources than mediation or negotiation

The SCT should be permitted to utilise a broader range of ADR mechanisms.

7 Alternative models of dispute resolution

AIST believes that there is scope for improvement within the existing dispute resolution framework, and more can be done to reduce complexity while simultaneously enhancing consumer experiences in navigating the system. AIST is not opposed to the establishment of a complaints handling triage service, or a single dispute handling body however, AIST's support is subject to a number of qualifications. In the absence of empirical data on the effectiveness of either model AIST believes that further enquiry is necessary before a decision can be reached as to the appropriate model and that dispute resolution must be:

- Fit for purpose
- Cost effective for users
- Appropriately funded
- Quick
- Efficient
- Easy to navigate
- Effective in resolving disputes
- Staffed by individuals with relevant superannuation experience and expertise
- Suitable, with the following features:
 - Power to make binding determinations (with appeal rights)
 - Breadth to cover all disputes arising within the superannuation sector

7.1 Triage

[Questions 35 and 36– Would a triage service improve user outcomes, and if a new triage service were desirable who should run the service, how should it be funded and should it provide referral services?](#)

AIST is not opposed to the establishment of a single triage service to act as a central contact point for consumers.

Currently, consumers are faced with the daunting task of deciding which of the dispute resolution bodies is most appropriate for their complaint. Sometimes this question can be difficult to answer, for example a superannuation trustee may hold an AFSL with financial product advice authorisation and may provide advice services to a consumer. That consumer may have received advice from the trustee staff, acting under the trustee's AFSL. In this scenario it is possible for both the jurisdiction of FOS (as the trustee is a financial service provider) and the SCT to be invoked, depending on the nature of the decision. If the decision can be viewed as being a decision of the trustee it will fall within the SCT's jurisdiction, however if it's not a decision of the trustee it may go to FOS, provided the trustee is a member.

As it currently stands consumers will need to resolve this complex question on their own, or may place reliance on their superannuation fund to provide guidance as to which scheme is most appropriate. This is plainly unsatisfactory and presents consumers with a barrier, in that if they do not understand the nature of the dispute they cannot access the correct forum. Furthermore, it is in the interest of consumers to have an easily accessible dispute resolution system that adequately serves their needs. It is plain to see that the current system needs to evolve to serve the changing nature of the superannuation system.

With these concerns in mind a single triage function can benefit consumers by:

- Acting as a single entry point, effectively reducing the complexity of the system.
- Ensuring comparability of outcomes by:
 - Allocating similar disputes to the same dispute resolution body; and
 - Allowing one body to decide who has jurisdiction to handle a particular complaint. Currently consumers are approaching their superannuation funds for advice on which forum is appropriate, which leads to significant variations of outcomes.
- Increasing efficiency by taking the triage burden off the resolution bodies themselves, allowing them to focus more closely on resolving complaints.
- Recognising that FOS and the SCT are distinctly different entities, which:
 - Ensures the protections afforded to consumers by the SCT are maintained; and
 - Ensures FOS can continue to be flexible, and produce ancillary benefits for consumers.
- Acting as a specialised body, well suited to refer disputes in an expeditious manner.

The triage function also allows for:

- The shortcomings of both FOS and the SCT to be addressed separately.
- FOS to continue to build outreach capacity, address systemic problems (while SCT reports non-compliance to ASIC or APRA, it is up to those bodies to address the systemic issues), investigate design questions, and continue to be flexible.
- The SCT to remain as a quasi-adversarial avenue for consumers, with independent funding.

AIST believes that triage may be a suitable option but notes that such services can be subject to criticism as little more than an additional hurdle consumers must pass on their dispute resolution journey. For example, a consumer may contact a triage service and be referred to a dispute resolution scheme, that then conducts a more thorough examination of the dispute (that is not possible at the triage stage) and determines that they are not the appropriate forum to handle the dispute. The consumer would then have to return to triage to be directed to a more appropriate body. This effectively increases complexity and reduces efficiency, as both the triage service and the dispute resolution bodies may need to continue to consider questions of jurisdiction and have back and forth conversations.

Another issue may arise when the consumer's dispute falls within more than one dispute resolution scheme and must make the choice at the triage stage of which body they would like to lodge their dispute with.

AIST believes that issues such as these would need to be addressed if triage is considered to be a viable option. If the issues are successfully addressed triage will reduce complexity within the dispute resolution framework by effectively allocating consumers to the appropriate dispute resolution body, which means that consumers would not need to go through the process of determining which body is appropriate.

Theoretically, triage would be funded by the savings that both the SCT and FOS will experience in not having to triage complaints. In 2016, 39% of all written complaints to the SCT were outside of its jurisdiction, and 70% of these complaints were outside jurisdiction because the consumer had not first complained to their fund. An effective triage function would reduce the burden on the SCT in responding to written complaints that are outside of their jurisdiction, as the triage body itself would be responsible for replying to these consumers. Discussions with FOS indicate that in 2015, FOS's triage function referred approximately 18% of the CIO's complaints to the CIO and over 350 disputes to the SCT.

AIST is not opposed to the establishment of a well-resourced triage service, however in order to ensure better outcomes for consumers weaknesses in the current dispute resolution system, as outlined in this submission, would also need to be addressed. Clearer jurisdictional parameters that remove overlap between the schemes would be beneficial to the establishment of a successful triage service.

7.2 One body:

Question 38– Is integration of the existing arrangements desirable? What would be the merits and limitations of further integration?

Questions 39 to 41– 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) and what form should it take?

AIST is not opposed to the establishment of one, centralised body with responsibility for handling disputes, however the body must operate independently, provide free service to consumers and have the ability to make binding determinations with no monetary limit. It must also be funded appropriately and in a way that reduces the inherent unfairness presented by cross-subsidisation.

If consolidation of FOS and the SCT is deemed to be appropriate, we believe that a possible scheme may assume the following model:

- Be established by an Act of Parliament
- Operate as a Commonwealth entity with national reach
- Have two distinct parts:
 - A mandatory jurisdiction, covering all regulated superannuation funds, that closely resembles the functions and powers of the SCT
 - A voluntary jurisdiction, similar to how FOS currently operates, in that all AFSL’s must be a member of it, or another ASIC approved EDR scheme
- Each part should be funded separately – it is inappropriate for superannuation funds to fund the voluntary jurisdiction if their operations are not caught by that jurisdiction (for example entities covered by the mandatory jurisdiction only should not be responsible for resourcing the operations of the voluntary jurisdiction of the proposed body)

By introducing a new model such as the one above it is possible to maintain the benefits of each of the current systems while simultaneously reducing overall complexity.

Merging the two systems into one is not inconsistent with international practice, for example the Irish Government is considering merging The Pensions Ombudsman with the Financial Services Ombudsman Bureau.²¹

²¹ Pensions Ombudsman (October 2016) <<http://www.pensionsombudsman.ie/cms/index.php>>

8 International practice:

Question 45– What developments in overseas jurisdictions or other sectors should guide this review?

8.1 United Kingdom:

The United Kingdom's (UK) dispute resolution schemes are similar to those in Australia as the UK has a Financial Ombudsman Service (UKFOS) and a Pensions Ombudsman. While each of these bodies are operationally independent, they have a memorandum of understanding which makes it clear that the Ombudsman covers matters regarding the operation and management of pensions, whereas UKFOS looks at advice in respect of the sale and marketing of pension products.

The Pensions Ombudsman is similar to the SCT in that it has the power to investigate a complaint and make a decision that is binding on members. If a consumer is unhappy with a decision of the Ombudsman they have a right of review in court.

The UK's system suffers from the same jurisdictional issues as Australia and where each body thinks the other body is more suitable, the bodies will each ask the consumer where they would prefer their complaint to be handled. While this puts the consumer in control of their dispute, it may not be appropriate given the complexity of most complaints. Maintaining the current arrangements between FOS and the SCT, while introducing a triage overlay would not be at odds with international practice.

8.2 South Africa:

While South Africa's pension fund dispute resolution system is incredibly complicated²² they have a separate, distinct tribunal responsible for pension disputes. The Office of the Pension Funds Adjudicator is a specialist tribunal capable of binding determinations regarding pension fund disputes that fall within its jurisdiction. The establishment of the tribunal is recognition that within the pension fund sector there is a real need for a formal statutory tribunal with responsibility for handling disputes.

* * *

²² Sue Myrdal, *Pension Funds Dispute Resolution: An Alternative Model for the Future?* (February 2004) Pension Lawyers Association <<http://tinyurl.com/hvxcxt2>>