

Submission on proposed reform of External Dispute Resolution schemes



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Introduction

This submission is made by:

- Independent Fund Administrators & Advisers Pty Ltd (IFAA), a Brisbane based administrator of industry superannuation funds and managed investment schemes. IFAA has approximately \$9.5 billion in funds under administration;
- QIEC Super – a profit for members industry fund established specifically for the benefit of all participants in the non-Government education sector, child and other care and community services in Queensland;
- Club Super - a profit for members industry fund established specifically for the benefit of employees in the sporting and recreational clubs and associated industries in Queensland.

IFAA, QIEC Super and Club Super appreciate the opportunity to make comment on the issues raised in the paper.

1. Executive summary

It is noted that the expert panel reviewing the external dispute resolution (EDR) frameworks for the financial services industry in Australia proposes very significant reforms to the EDR frameworks. The interim report outlines that the proposed reforms are expected to deliver gains in efficiency, reduced complexity, improved transparency, enhanced member outcomes and reduced regulatory costs.

Specifically, the interim report recommends:

- the creation of a single industry ombudsman scheme for financial, credit and investment disputes (other than superannuation disputes) to replace the Financial Ombudsman Service (FOS) and Credit and Investments Ombudsman (CIO);
- the transition of the Superannuation Complaints Tribunal (SCT) from its current statutory body structure into an industry ombudsman scheme for superannuation disputes;
- giving further consideration (after the above ombudsman schemes are fully operational and have garnered consumer and industry support) to further integrating the schemes to create a single industry ombudsman scheme covering all financial system disputes;
- development of a superannuation industry code of practice.

IFAA, QIEC Super and Club Super have focussed their attention on the implications for the superannuation industry of the proposed changes to the SCT.

2. Identified issues with the SCT model

The report acknowledges that the SCT has strengths, including its unlimited monetary jurisdiction, but the rigidity of the statutory model makes it more difficult to match the industry ombudsman schemes in terms of flexibility. Such schemes allow for innovation, and can apply a variety of dispute resolution procedures. This has direct implications for the timeliness of resolution.

The report highlighted that:

- in 2015/16, the average time to resolve a complaint from lodgement with the SCT, to determination, was 796 days. This represents a 25 per cent increase in delays over 5 years. Chronic underfunding of the SCT over many years was cited as the primary cause for the delays. However, with the maturing of the industry and the development of new products and services, complaints are also increasing in complexity, which is also adding to delays.

This is compared to an average dispute resolution timeframe of 68 days for FOS and CIO in 2015/16.

- almost 50 per cent of disputes before the SCT relate to death benefits and disability disputes, where claimants generally have an expectation for prompt resolution of the complaint.
- existing pressures on the SCT are expected to continue to grow as the superannuation system matures and an ever increasing number of members enter the drawdown (retirement) phase. In the absence of reform, this suggests delays are only likely to worsen in the years ahead.
- the existing SCT funding model is flawed, as it is unrelated to the volume of complaints received, or industry growth. Additionally, the SCT Chairperson does not have appropriate delegations to make staffing or budgeting decisions, adversely impacting the ability to appropriately resource the SCT. The broader governance structure of the SCT as a statutory body also does not provide for appropriate delegation, meaning SCT determinations are limited by the availability of a small number of Tribunal members.
- the SCT's current complaints handling process is too restrictive as it is limited to only conciliation and determination to resolve a complaint, and conciliation must be attempted in respect of every complaint before a determination is issued. This is in contrast to FOS and CIO, which are able to employ a variety of mechanisms to resolve a complaint, including negotiation, conciliation, mediation or the issue of a determination.
- the SCT process is inflexible and narrow. For example, TPD and death benefit complaints are subject to strict time limitations, and the SCT has no capacity to consider complaints where the time limit has passed, even in exceptional circumstances. It was also highlighted that the SCT is restricted to assessing whether trustee decisions are 'fair and reasonable'. This is more restrictive than the considerations made by industry ombudsman schemes, which consider 'fairness in all the circumstances'.

We consider that the above-mentioned extensive delays and other shortcomings with the existing operations of the SCT are likely to lead to disillusionment with the process, as well as greater disengagement with the superannuation industry. It may also be considered that the current position is causing the SCT to fail in its charter to be fair, informal, economical and quick in assisting in the resolution of complaints.

Further consideration would need to be given to the proposed broadening of the scope of the ombudsman's assessment as to whether resolution of a complaint is fair in all the circumstances. It would need to be ensured that appropriate Trustee decisions are not unreasonably overturned.

3. Proposed industry ombudsman scheme for superannuation disputes

We concur with the panel's assessment that even with reform to funding and governance arrangements, the existing rigidity of the SCT model cannot be fully addressed while the SCT's statutory body structure is retained. Inevitably, the legislative foundation of the SCT impedes flexibility and timeliness in the implementation of changes. This is contrasted with

the ability of industry ombudsman schemes to quickly adapt their operations and funding arrangements.

We support the recommendation for the transition of the SCT to this structure on an in-principle basis for the following reasons, with the qualification set out below.

1. In recognition of the shortcomings with the current SCT model, as outlined above; and
2. The probable advantages of a superannuation industry ombudsman scheme outlined in the report (and re-produced at Appendix 1); and
3. The relative benefits of the industry ombudsman scheme vs SCT outlined in the report (and re-produced at Appendix 2).

However, it is noted that there are potentially some disadvantages to the proposed change in structure of the superannuation EDR scheme, including the loss of independence from industry, as well as the loss of statutory powers to require production of information.

If the proposed scheme were to be implemented then these deficiencies must be addressed in the relevant legislation and regulations.

We do not support the proposal that complainants should retain an unlimited right to undertake private action, as this is likely to result in many complaints escalating and being duplicated through the Court system, at considerable additional time and cost to all parties.

Aside from the above matter, on balance, we consider the advantages of reform outweigh the disadvantages. We also support the proposal that the superannuation industry collaboratively produce a code of practice, which would then be referred to by the industry ombudsman scheme in coming to any decisions.

However, further consultation is required in terms of the timeframe for transition, the structure of the scheme, proposed licence variations and the industry funding model, to ensure costs are not prohibitive for Funds and ultimately members.

Given the significant differences that apply between the superannuation industry and other sectors of the financial, investment and credit industries, it is not clear to us that eventual amalgamation of these industry ombudsman schemes would be appropriate. While amalgamation may provide some back office efficiencies, the differences in the relevant industries would seem to warrant maintenance of separate EDR schemes.

Appendix 1 – expected advantages of an industry ombudsman scheme for superannuation disputes

Efficiency

↑ in efficiency relative to status quo due to:

- an efficient funding model, governance structure and resource allocation. Funding more directly linked to volume of complaints; flexibility to allocate resources as priority areas shift; flexibility to recruit within the scheme's budget.
- flexibility to choose the most appropriate resolution mechanisms for a dispute, allowing the scheme to tailor processes to different types of disputes.
- flexibility to respond and adapt to future challenges, including through changing processes and operations, and amending terms of reference.

Equity

↑ in equity relative to status quo due to:

- flexibility in defining fairness and the ability to consider more than the relevant legislation (e.g. the industry code once established).
- flexibility to extend time limits for death benefits and TPD claims in extenuating cases.
- flexibility to provide a broader range of remedies which may include compensation for non-financial loss.

Complexity

↓ in complexity relative to status quo due to:

- focus on developing informal processes and tailored processes where appropriate.
- simpler and easier to navigate processes for stakeholders.

Transparency

↑ in transparency due to:

- industry funding provides transparency and reporting of scheme's funding.
- governance arrangements provide transparency over the scheme's operations, performance reporting, priorities and resourcing decisions.
- enhanced reporting of internal dispute resolution outcomes of funds.

Accountability

↑ in accountability due to:

- governance by an independent board of directors, with a balance of industry and consumer expertise and an independent chair.
- oversight through periodic independent reviews, including of its operations, with results publicly available for consumer and industry consideration.

Comparability of outcomes

↑ in comparability of outcomes within scheme relative to status quo:

- independent reviews provide opportunities for scrutinising decisions to enhance consistency of decision making within the scheme.
- better comparability of outcomes in superannuation and financial disputes as all disputes will be covered by EDR and regulated by ASIC.

Regulatory costs

Potential ↑ in direct regulatory costs overall:

- dependent on the level of industry funding and degree of oversight by ASIC (although other resources involved in maintaining legislation and government appointing Tribunal members no longer required). To the extent a user-pays model is adopted, there would be incentives on individual superannuation funds to reduce complaints referred to EDR, and thereby reduce costs of the scheme.

Appendix 2 – comparison of SCT and industry ombudsman scheme

	Superannuation Complaints Tribunal	A superannuation industry ombudsman scheme
Structure and membership	<ul style="list-style-type: none"> • Statutory tribunal established by legislation. 	<ul style="list-style-type: none"> • Company limited by guarantee operating as an ASIC-approved EDR scheme. • Licence conditions could require trustees and other financial firms contracted to provide services to superannuation funds (such as insurers providing group life policies) to be members of the scheme.
Function	<ul style="list-style-type: none"> • to provide a 'fair, economical, informal and quick' alternative to the court system. • to inquire into complaints about the decisions of trustees of superannuation funds, Retirement Savings Account (RSA) providers and certain insurers. 	<ul style="list-style-type: none"> • to provide a fair, economical, informal, quick and flexible alternative to the court system. • To inquire into complaints about the decisions of trustees of superannuation funds, RSA providers and certain insurers.
Jurisdiction	<ul style="list-style-type: none"> • defined by legislation (sections 14 to 15K of SRC Act). Jurisdiction over decisions by trustees of regulated superannuation funds, RSA providers and certain insurers. • unlimited monetary jurisdiction. • No time limits for lodging disputes, apart from certain disputes including those relating to disability and death benefits. Discretion to refuse to consider dispute if lodged more than 12 months after the decision was made. 	<ul style="list-style-type: none"> • Terms of Reference could be designed to replicate the existing SCT's jurisdiction, including unlimited monetary jurisdiction. • Terms of Reference could provide scheme with flexibility to extend time limits for disability and death benefits complaints in exceptional circumstances.

Powers and approach to decision making

- when reviewing a trustee's decision, SCT has all the powers, obligations and discretions conferred on the trustee, but may only exercise its determination making power to counteract any unfairness or unreasonableness in the trustee's decision, and must also act within the terms of the fund's governing rules (section 37 of the SRC Act).
- able to compulsorily join insurers to a dispute. Other third parties (e.g. persons with an interest in a death benefits dispute) can be joined upon application.
- powers of discovery. Failure to comply is an offence.
- Terms of Reference could permit broader considerations to inform decision making – 'fairness in all the circumstances' and the flexibility to take into account more than the legislation (for example, the provisions of a superannuation industry code if established). Terms of Reference could also allow the scheme to take into account existing body of case law developed in relation to SCT where appropriate.
- third parties that are members of the scheme (for example, an insurer providing a group life policy) could be compulsorily joined to a dispute. Other third parties (for example, persons with an interest in a death benefits dispute) could be joined upon application.
- Terms of Reference could require trustee to provide information to the scheme. Non-compliance would not be an offence but there would be sanctions available under the scheme itself, or consideration could be given to alternative regulatory action by ASIC or the Australian Prudential Regulation Authority (APRA).

Remedies

- Cannot award costs or damages or provide a remedy where there has been no adverse practical outcome or financial loss. For example, not able to award compensation for non-financial loss.
- Terms of Reference could provide a broader range of remedies, including compensation for non-financial loss.

Enforceability of decisions

- Decisions are binding on the trustee only.
- Non-compliance by trustee reported to ASIC or APRA.
- Trustees would be contractually bound to abide by decision if accepted by complainant. Non-compliance would not be an offence but there would be sanctions

	<ul style="list-style-type: none"> ASIC/APRA or the complainant may apply to the court for a performance injunction requiring compliance with the decision (section 315 of the SIS Act). 	<p>available under the scheme itself, or consideration could be given to alternative regulatory action by ASIC or APRA. Complainant or the scheme operator could seek contractual remedies against trustee to enforce compliance with the decision.</p>
Rights of appeal	<ul style="list-style-type: none"> Parties have a right to appeal to the Federal Court on questions of law (section 46 of SRC Act) and/or seek judicial review under section 5 of the Administrative Decisions (Judicial Review) Act 1977 and section 39B of the Judiciary Act 1903. 	<ul style="list-style-type: none"> Appeals would take the form of an action for breach of contract (e.g. if the scheme failed to follow the procedures set out in its Terms of Reference or acted unreasonably). Complainant should retain right to undertake private action.
Funding and resourcing	<ul style="list-style-type: none"> Annual government appropriation in the Federal Budget. Recovered via annual financial sector levies set by Minister. Funding managed by ASIC and subject to government efficiency measures. 	<ul style="list-style-type: none"> Industry funded by members of the scheme. Funding managed by the scheme with resourcing decisions made by its board of directors to respond to the scheme's priorities. Funding linked to volume of complaints and other priorities of the scheme.
Appointments	<ul style="list-style-type: none"> Statutory appointments of Tribunal members subject to ministerial approval. 	<ul style="list-style-type: none"> No statutory appointments. Staffing decisions would be made by the scheme, facilitating quicker response to a change in circumstances.
Processes and ADR mechanisms available	<ul style="list-style-type: none"> Processes specified in statute. Currently, SCT must attempt conciliation before proceeding to determination. Limited flexibility for test cases, fast-tracking or expediting cases or hardship processes. 	<ul style="list-style-type: none"> Flexibility to develop and tailor processes to different types of disputes (e.g. in cases of hardship, or fast-tracking of simpler disputes) as scheme deems necessary.
Oversight and accountability	<ul style="list-style-type: none"> Parliamentary scrutiny, and the Commonwealth Ombudsman for complaints relating to the SCT. 	<ul style="list-style-type: none"> New scheme would be subject to additional accountabilities and oversight mechanisms recommended by this review as well as periodic independent external

- No governance board but an Advisory Council.
- Chairperson is responsible for SCT outcomes, but does not have ability to spend public funds (does not possess financial delegations).
- A board of directors with an independent chair and equal number of directors with industry and consumer backgrounds would be responsible for ensuring scheme meets its objectives and would have authority to spend funds raised from members.

Systemic issues

- Reports all incidences of non-compliance and any breaches of law, governing rules, or terms and conditions to ASIC/APRA, but otherwise not required by legislation to undertake any systemic issues work.
- Scheme would be required to investigate, address and report on systemic issues and report all incidences of non-compliance and any breaches of law, governing rules, or terms and conditions to ASIC and/or APRA.