



Submission in response to the Interim Report: Review of the financial
system external dispute resolution and complaints framework
9 February 2017

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1. Executive Summary

The Superannuation Complaints Tribunal (SCT) and the SCT Advisory Council¹ welcome the opportunity to provide a submission in response to the Interim Report of 6 December 2016 of the Review of the financial system external dispute resolution and complaints framework.

The SCT is highly supportive of the need for change in the current external dispute resolution (EDR) schemes to ensure that consumer protection is maintained and efficiencies are realised in a manner that can be practically achieved in a financial services environment that is dynamic and continually evolving.

The timing of the current Review provides the ideal opportunity for governance, service and operational improvements to the financial services EDR landscape. Moreover, as the Interim Report highlights, there is the need for flexibility and innovation to superannuation complaints.

The SCT recognises the two models for EDR considered in the Interim Report, statutory tribunal and industry-based ombudsman. Each have different structural characteristics with different advantages and limitations. An EDR model that combines the strengths of each model will provide the most appropriate balance and deliver on the core principles of the Review: efficiency; equity; complexity; transparency; accountability; comparability of outcomes; and regulatory costs.²

The SCT has, for some time, been advocating for changes to the EDR of superannuation complaints to ensure the best outcome for consumers. The unique nature of superannuation as a mandatory purchase, delivered through fiduciary arrangements and the involvement of multiple parties, predicates that any future EDR scheme for superannuation delivers:

- Improved consumer service experience;
- Robust consumer outcomes: for complainants, potential beneficiaries and other members of superannuation funds;
- Final decisions on complaints; and
- The same level of current consumer protections.

It is in this context that the SCT has raised some concerns regarding the detail of the proposed industry ombudsman(draft recommendation 4) model that need to be resolved. These concerns are considered in detail in Chapter 6. At a high level, they include:

- Delays to the timely payment of death benefits;
- Inability to determine death benefit distribution complaints; and
- Reduced effectiveness to resolve complaints dependent on third parties.

¹ The SCT Advisory Council Members: Mr Colin Neave AM (Chairman), Mr Michael Dwyer AM, Mr John Berrill, Mr Chris Davies, Ms Leeanne Turner, Ms Linda Elkins, Mr Brett Clark, Ms Pam McAlister.

² Interim Report Review of the financial system external dispute resolution and complaints framework, pg 11

These concerns do not exist in a statutory tribunal because the decisions and powers of the tribunal are enforceable by law.

In an industry scheme decisions and powers rely on conditions of membership and contract law. This creates risks for the effective resolution of superannuation related complaints and these risks are set out in Chapter 6. Any move away from a statutory tribunal would need to have practically implementable and enforceable arrangements to mitigate the risks.

The SCT supports the Interim Report's draft findings in relation to SCT governance arrangements, including:

- The need for modernisation;
- That current resourcing levels are neither sufficient nor sustainable; and
- That the transparency and accountability of operations is important for efficiency and performance and is currently lacking.

The SCT and the SCT Advisory Council consider these factors to be the underlying cause of other findings in the Interim Report relating to the SCT including the delays experienced, a restricted ability to adapt and reform, and the need for improved education and outreach.

The industry model proposed in the Interim Report provides for clear organisation governance, accountability and operational control through the establishment of a Board of Directors and a sustainable funding model that can be set to provide agreed services to agreed performance standards.

The SCT considers that these characteristics can also be delivered through a statutory model that would have the advantage of improved service experience and maintaining existing consumer protections.

Ultimately, whether the Government decides to adopt an industry ombudsman scheme or revised statutory scheme the transition will involve significant legislative change, organisational change and stakeholder impact. The approach taken to transition, and the oversight of that transition, is critical to the experiences of both future complainants and complainants already in the existing tribunal system.

The SCT considers that transition should be approached in a manner consistent with the principles guiding the Review. The approach to transition should minimise transition costs and the impact on consumers, providers and the dispute bodies themselves. The SCT outlines transition and continuity of service considerations in Chapter 16.

The SCT emphasises that it is highly supportive of the need for change to the current EDR arrangements and that the proposed changes are able to be implemented and not ultimately abandoned as unworkable or too hard. It is in this context that the SCT submits the following considered assessment of the proposals in the Interim Report.

2. General Comments on the Interim Report

The Interim Report contains observations and recommendations regarding dispute resolution for financial services broadly. As a specialist EDR body for superannuation related complaints the focus of SCT's response submission is limited to those matters impacting on superannuation consumers and providers.

The SCT notes the Interim Report should be considered as an integrated package of reforms and it provides a future direction of a single industry ombudsman scheme for all disputes across the financial system.³ Accordingly, the SCT has considered and provides observation on those recommendations that, whilst currently not impacting on superannuation complaints, could do so in the future or during any transition period.

Threshold Issues

In considering the recommendations of the Interim Report, the SCT believes that there are three threshold issues that must be resolved and/or further developed prior to a Government decision being made on the future structure of the financial system external dispute resolution and complaints framework as it relates to superannuation. These three threshold issues are:

1. Determinations need to be final upon issue in a superannuation environment. In multi-party complaints, reliance on contract law for issue of determinations is impractical.
2. Powers to obtain information and involve third parties in the complaint resolution process are important in the superannuation environment where there can be reliance on external parties such as employers.
3. The 'test' for an EDR body 'standing in the shoes of the trustee' must align with the fiduciary duties of the trustee. In the case of superannuation this incorporates the *Superannuation Industry (Supervision) Act 1993* (SIS Act) covenants.

In the circumstances that these threshold issues are unable to be adequately addressed in an industry model, the SCT has considered how a statutory model could be designed to deliver the principles of the Review without compromising the effectiveness of the EDR scheme to resolve complaints. A statutory model also has the advantage of not removing existing consumer rights such as those of appeal to the Federal Court and for the Commonwealth Ombudsman to investigate complaints about the EDR scheme.

³ Interim Report Review of the financial system external dispute resolution and complaints framework, pg 155, para 6.40

3. Draft Recommendation 1

A new industry ombudsman scheme for financial, credit and investment disputes

This recommendation relates to financial services broadly and the SCT considers that these recommendations are outside of the remit of the Tribunal and as such does not have any comment to make on this specific recommendation.

4. Draft Recommendation 2

Consumer monetary limits and compensation caps

In relation to monetary limits and compensation caps, the SCT observes that the Interim Report proposes that under an industry ombudsman EDR scheme the current unlimited dollar limits for superannuation complaints should be applied.

In a context of unlimited dollar jurisdiction and remedies, the ability to enforce determinations is critically important. A strength of the SCT's statutory standing has been adherence to determinations. Historically, the SCT has reported five occasions of non-compliance with a determination. There has only been one instance of non-compliance since 2010 and the result of reporting was adherence to the determination.

Directly contributing to the strict adherence to SCT determinations are the following unique factors:

- Judicial review of Tribunal decisions;
- SCT's reporting obligations to the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC); and
- APRA's ability to enforce failure to comply with a determination as an offence.

5. Draft Recommendation 3

Small business monetary limits and compensation caps

This recommendation relates to financial services broadly and the SCT considers that these recommendations are outside of the remit of the Tribunal and as such does not have any comment to make on this specific recommendation.

6. Draft Recommendation 4

A new industry ombudsman scheme for superannuation disputes

The SCT has identified a number of issues that are of significant concern associated with this recommendation. A detailed response to the Interim Report's comparison table⁴ of the proposed new industry ombudsman EDR scheme is at Table 1 (page 19).

The Interim Report attributes the historic problems and challenges of the SCT as attributable to any statutory dispute resolution body and that improvements can only be made in an industry ombudsman model. The Interim Report does not acknowledge what is unable to be delivered in an industry model nor how a statutory model could deliver the principles guiding the Review.

Ultimately, it is a policy decision for government regarding the preferred model to deliver superannuation EDR. The SCT is raising these matters to ensure any decision to move away from a statutory scheme has been afforded the opportunity to be considered on a balanced and no surprises basis.

The SCT is particularly concerned the Review Panel does not consider that the unique features of superannuation mean there should be a different dispute resolution model for superannuation disputes compared with other financial products.⁵

It is the considered view of the SCT that a statutory model is the only model that can effectively accommodate the nature of all types of superannuation complaints. As a statutory tribunal, SCT decisions and powers are enforceable by law. They do not rely on conditions of membership or contract law. This is required in a superannuation context where the complainant is not the only consumer to be impacted by the resolution of a complaint. It also accommodates the outsourced nature of the provision of superannuation and the ability of third parties, such as employers, to impact a consumer's superannuation experience.

This is quite different to the contractual basis of the relationship between the consumer and an insurance company or bank for example.

The unique features of superannuation and the implications for EDR were recognised and provided for in the establishment of SCT as a statutory tribunal.

The SCT has unique status as a Commonwealth administrative tribunal that conducts merits reviews of decisions made by private trustees. This was confirmed by the High Court in *Attorney General v Breckler* (1999). The SCT's review criterion was affirmed in the Breckler case as being consistent with the role of a superannuation trustee.

⁴ Review into the Financial Systems External Dispute Resolution and Complaints Framework, Interim Report, pg 151, paragraph 6.30.

⁵ Interim Report Review of the financial system external dispute resolution and complaints framework, pg 149 para 6.24.

It recognised that trustees are often required to make discretionary decisions that require the balancing of different factors. There is no single correct decision in such a case. As such, a trustee's decision is considered 'properly made' if it falls within the range of decisions that is fair and reasonable.

A legal history of the SCT is provided at Attachment 1.

The Interim Report has made findings regarding the complexity associated with dealing with the SCT. Whilst the SCT has recognised that changes are required to improve consumers' experience with 'ease of use' when accessing the Tribunal, it is important to note that this issue should not be taken out of context.

The SCT has recently undertaken a program of service improvements, including the introduction of an enquiries process, distinct from the complaints process. This demonstrates flexibility and innovation within the tribunal structure. The limited ability to fund service improvements and control operations has been a significant impost to the Tribunal investing in other new operational processes and practices.

One might expect to see higher levels of legal representation in an EDR scheme described as complex. However, the SCT notes that in 2015-16 complainants had similar levels of representation with industry schemes: 78% of SCT complainants were self-represented⁶ compared with 81% for the Financial Ombudsman Service (FOS)⁷.

A proportion of legal representation at SCT is expected given the consideration of death benefit disputes and the pre-existing reliance parties have on lawyers in managing the affairs of a deceased, and is not directly attributable to the SCT process.

In the experience of the SCT, legal representation is materially higher in complaints regarding death benefits than in any other complaint category.

Cases closed in 15-16:	Representation rate	Represented by
Death	50%	75% Lawyers
Disability	38%	58% Lawyers
Administration	13%	45% Family, 20% Planners

⁶ Interim Report Review of the financial system external dispute resolution and complaints framework, pg 86 para 4.145

⁷ Interim Report Review of the financial system external dispute resolution and complaints framework, pg 55 para 4.12

The Interim Report has noted 'There are a limited number of community centres that are able to assist with superannuation disputes and SCT does not provide legal advice to applicants.'⁸

The SCT agrees that in the superannuation context the option for consumers to access community legal advice is very limited. Further, there is a lack of superannuation consumer advocacy. The SCT does however consider that it is important for any EDR scheme to be independent and accordingly it is not appropriate for the dispute scheme to provide legal advice to applicants.

This issue needs to be further clarified by the Review Panel. It is conflicted for an independent EDR scheme, whether tribunal-based or industry-based, to maintain independence **and** provide legal advice to complainants.

Any move to introduce an advice service would need to be clearly segregated from the complaints resolution process.

The SCT considers that the finding below in the Interim Report needs to be put into context:

*"SCT is hampered by restrictive legislation which contains a narrow definition of fair and reasonable in comparison to industry ombudsman schemes."*⁹

The SCT's review criterion of 'fair and reasonable in all the circumstances' recognises that trustees are often required to make discretionary decisions that require the balancing of different factors. There is no single correct decision in such a case. As such, a trustee's decision is considered 'properly made' if it falls within the range of decisions that is fair and reasonable.

Trustees are required to balance competing equitable duties:

- To act in the best interests of members as a whole;
- To act impartially between members; and
- To act fairly between different classes of members.

The FOS test of 'fairness in all the circumstances' can be a very subjective test. Without the EDR scheme being required to balance the same considerations as the trustee, it may produce results that favour one complainant (consumer) over other members of the superannuation fund (consumers).

A trustee is not like other providers of financial services. A trustee exercises fiduciary powers under a trust deed, as well as making business decisions. In making its decisions, the SCT stands in the shoes of the trustee and is subject to the same fiduciary duties.

In the case of a licensed trustee this includes the SIS Act covenants. For powers exercised under a trust deed, the fair and reasonable test must be retained because it more aptly reflects the stewardship role of a trustee.

⁸ Interim Report Review of the financial system external dispute resolution and complaints framework, pg 124 para 5.123

⁹ Interim Report Review of the financial system external dispute resolution and complaints framework, pg 125

A detailed response to the Interim Report's comparison table¹⁰ of the proposed new industry ombudsman EDR scheme is at Table 1 (page 19).

Death Benefits

The single biggest type of complaint received by the SCT is complaints relating to the distribution of a death benefit. It is often not well understood that superannuation does not form part of a deceased member's estate. In the 2015-16 year 22% of all complaints received at the SCT were regarding the distribution of death benefits. For context, the next most common type of complaint at 9% was complaints regarding the deduction of insurance premiums.

It is critical that any future EDR model for superannuation can effectively determine death benefit disputes to the same or higher level than the SCT currently.

Risk 1: Loss of ability to issue final determination

As a statutory tribunal the determinations of the SCT are enforceable as a matter of law. The SCT determinations come into operation immediately upon the making of the determination.¹¹

By comparison, the determinations of an industry-based EDR scheme are only enforceable by agreement/contract. In the case of the trustee, agreement can be obtained upfront as a condition of membership. In the case of the complainant, agreement could potentially be obtained upfront as a condition of the scheme accepting the complaint.

FOS obtains the complainant agreement at the time of determination, requiring the complainant to accept or reject the determination within 30 days of receiving it. If the complainant accepts the determination it is binding on both parties; if the complainant rejects the determination, the determination is not binding on the financial firm.¹²

In a death benefit complaint, there can be numerous potential beneficiaries.

Typically, when a death benefit complaint is not resolved through conciliation it is because of disagreement between the potential beneficiaries.

In this circumstance, to require *all* potential beneficiaries to accept a determination is not practical.

The simplest of death benefit disputes would involve consumer A (the complainant) complaining that a trustee has determined to pay consumer B 100% of the death benefit. Even if consumer B agrees to become a party to the complaint, it is difficult to foresee that A and B would both agree to any possible determination. In practice, the majority of death benefit distribution complaints are far more complex, with many potential beneficiaries.

¹⁰ Interim Report Review of the financial system external dispute resolution and complaints framework, pg 151, para 6.30.

¹¹ *Superannuation (Resolution of Complaints) Act 1993*, s 41

¹² Interim Report Review of the financial system external dispute resolution and complaints framework, pg 59 para 4.25

In the absence of an enforceable determination with clear appeal rights, the trustee is left in an invidious position as to when a death benefit subject to complaint can be paid.

Risk 2: Reduction of person's beneficial interest and/or accrued right

Any potential industry-based EDR model for superannuation needs to accommodate the above scenario (where consumer A complains about a trustee decision to pay consumer B the benefit) and consumer B declines to become a party to the complaint. When the SCT 'stands in the shoes of the trustee', it must take into consideration all the factors a trustee must consider. In the proposed industry model, the trustee decision is in effect delegated to a third party (the EDR scheme).

A possible EDR outcome is a determination whereby consumer A receives the benefit. The industry-based model would implement that determination through the creation of a contract with consumer A. Consumer B is not party to that contract yet their beneficial interest and/or accrued right by virtue of the trustee's decision is reduced.

Risk 3: Primary external dispute resolution shifts to the courts

Experience to date has seen nearly all disputes regarding death benefit distribution brought to the SCT, and on rare occasions an SCT decision appealed in the Federal Court. There are extremely few death benefit complaints that have been taken directly to the courts for resolution.

This demonstrates that the current tribunal system works well and is robust, particularly given the low level of appeals to the Federal Court. The current system serves consumers well.

The combination of risks 1 and 2, together with existing high levels of legal representation in death benefit complaints, could see the resolution of death benefit complaints shift to the courts under an industry-based EDR model.

If disputes move to the courts, it must be recognised that the criterion used will be 'if the trustee decision was properly made' rather than the notions of fairness and reasonableness incorporated in EDR.

Risk 4: Double jeopardy - Trustees delay the payment of benefits pending possible complaints (or pay twice)

The industry practice of claim staking¹³ has worked well to engage potential beneficiaries in the trustee decision because it provides clear opportunity for potential beneficiaries to 'be heard', and a defined path should a distribution still be contentious.

Claim staking is a manifestation of both the SIS Act and the *Superannuation (Resolution of Complaints) Act 1993* (Complaints Act). Further to this, the clear limit on time to consider a dispute provides the trustee with certainty regarding physical payment of the benefit.

Using the same example outlined in risks 1 and 2, the trustee through its claim staking process would be aware that consumer A disagrees with the distribution. However, if no complaint has been brought to the SCT within 28 days (typically) then the trustee pays the benefit to consumer B.

If there was the ability to extend the time to complain as proposed in the Interim Report, the trustee is faced with an open timeframe relating to when the benefit may be paid with reasonable certainty.

Practically, the extension of time to complain would result in a delay of payment to beneficiaries even in the circumstances where no complaint is subsequently made. Similarly, if a complaint is made to EDR but an ultimate determination is not enforceable at law, has no clear avenue of appeal, or has not considered the circumstances of all beneficiaries, the distribution may remain open to challenge.

Insurance

Complaints related to insurance provided through superannuation will generally fall into three categories:

- Complaints about premiums: generally do not involve an insurer;
- Complaints about claims: generally do involve an insurer and information from third parties; and
- Complaints about cover: may involve an insurer and may also involve information from third parties.

In a superannuation context, each of the above categories will involve consideration of a trustee decision, but not all will involve the consideration of an insurer decision.

¹³ Claim staking is the process where when a superannuation consumer dies the trustee provides information to identified potential beneficiaries about how the trustee proposes to distribute the death benefit. The potential beneficiaries are able to object to the proposed distribution. The trustee considers all objections before making their final decision regarding distribution. The decision is communicated with the potential beneficiaries together with reasons for the trustee's decision and a defined timeframe in which a complaint can be taken to the SCT.

Risk 5: Loss of recognition of fiduciary responsibility

It is an important protection to superannuation consumers to have an EDR model that recognises and explicitly considers trustees' fiduciary responsibilities in the determination of *any* complaint. This protection includes the trustee responsibility for any outsourced arrangements, such as life insurance, as distinct from the outsourced provider's contractual obligations.

CASE STUDY 1

KEY ISSUES: Trustee obligation to pursue insurance claim with reasonable prospect of success

DETERMINATION NO: D15-16\124

AMOUNT IN DISPUTE: Interest on late payment of claim

BACKGROUND: The deceased member, prior to her death, made a benefit claim with the trustee on the basis of terminal illness (\$525,000). The deceased member died prior to the insurer's acceptance of the benefit claim. An insured death benefit was approved and paid (\$375,000). A complaint was raised with the trustee regarding the payment of \$375,000 rather than \$525,000. Subsequently, the insurer paid the difference of \$150,000. The dispute was about interest for the late payment was brought to the SCT.

During the course of the dispute the insurer conceded to the Tribunal that the difference had been unduly delayed and that interest potentially applied.

DETERMINATION:

Insurer Decision: The Tribunal accepted that the insurer, by eventually paying an interest concession, had complied with their obligations.

Trustee Decision: The Tribunal considered the trustee had failed to demonstrate constructive steps 'to pursue an insurance claim for the benefit of a beneficiary, if the claim has a reasonable prospect of success' (a SIS Act covenant) at both the relevant date and throughout the complaint process. The Tribunal remitted the decision to the trustee to calculate and pay interest.

CASE STUDY 2

KEY ISSUES: Trustee role in insured death benefit

DETERMINATION NO: D15-16\045

AMOUNT IN DISPUTE: \$89,700

BACKGROUND: The deceased member, who had cancer of the bladder, had lodged a claim for income protection (IP) and total and permanent disablement (TPD).

The insurer paid the TPD claim and the deceased member's superannuation account was closed. The insurer also approved payment of the IP claim. This necessitated opening a new superannuation membership account as the IP payments included a superannuation contribution. The deceased member was allocated a new member number by the trustee's administrator. This new account identified that no TPD cover was available but also identified that death cover applied. The death cover was included in the deceased member's benefit statements.

The complaint was brought by the deceased member's spouse about the decisions of the trustee and insurer that no death benefit cover was afoot at the time of the deceased member's death.

DETERMINATION:

Insurer Decision: The Tribunal accepted that under the terms of the insurance policy, the deceased member was not entitled to a benefit. The Tribunal also found that the insurer was not responsible for the errors regarding the purported establishment of the death cover, nor for the transmission of misinformation. The Tribunal affirmed the insurer's decision as fair and reasonable.

Trustee Decision: The Tribunal found the trustee was responsible for establishing the account giving rise to the death cover, and for communication of the misinformation in the benefit statements. The Tribunal was satisfied that the deceased member had relied on the misinformation such that the complainant gave up her job and otherwise avoidable debts and costs were incurred. The Tribunal set aside the trustee's decision and substituted its own decision that the trustee compromise the \$89,700 together with interest.

Insurance and administration

Information from employers can be critical in the consideration of insurance and administration related complaints. An industry-based EDR model cannot be as effective at compelling external parties to participate in the process as a statutory model.

Risk 6: Ineffective resolution of some complaints reliant on third party information and/or participation

The SCT has extensive powers to investigate and resolve complaints. In particular, the SCT has the power to obtain information or documents from a trustee or any other person relevant to the complaint made.¹⁴

With the maturing of the superannuation industry and the acknowledged role of the SCT, this power is not used as frequently as it was in the early years of the SCT's existence. However, it is still used on occasion, typically in relation to insurance complaints as shown in the following case study.

CASE STUDY 3

KEY ISSUES: Employer role in insurance claim

BACKGROUND: A complaint was made to the Tribunal in 2013 in relation to a trustee's failure to pay a TPD claim. In 1993 the complainant suffered a neck and hip injury during a rugby match

The complainant commenced employment with the employer in April 2007 and last physically worked with the employer and ceased employment in September 2011.

A TPD claim was lodged with the superannuation fund in December 2011. The claim was declined on the basis that the complainant was not eligible for cover or limited cover as his condition was pre-existing at the time he joined the fund.

The insurer decided the complainant did not meet the 'Active Employment' definition contained in the insurance policy because the complainant was on restricted duties while employed with the employer as noted in a doctor's report.

The Tribunal requested the insurer provide information it had obtained about the duties carried out in the course of the complainant's employment when he first joined the fund. The insurer informed the Tribunal that it had been unable to obtain information about the complainant's duties carried out with the employer.

The Tribunal utilised its power to obtain information from the employer.

OUTCOME: The employer provided the information to the Tribunal. This information was exchanged with the parties to the complaint and the claim was admitted by the trustee and insurer.

¹⁴ Superannuation (Resolution of Complaints) Act 1993, s 25

This case study is a good illustration of how a consumer's experience with superannuation can be impacted by the actions (or inactions) of parties who are not directly regulated as part of the superannuation industry.

Risk 7: Future drawdown environment with increased reliance on third parties

Information from employers can be important for the consideration of administration complaints, such as those relating to the calculation of defined benefits. The superannuation industry has a high degree of interaction with, and reliance upon, outsourced providers such as administrators, with the trustee retaining overall responsibility consistent with their fiduciary duty.

The SCT notes the current government consultation for development of comprehensive income products for retirement (CIPRs) is considering trustees partnering with third parties to offer the underlying component products.¹⁵

Any future EDR model for superannuation will potentially need to be able to effectively address an increased reliance on the information provided by third parties, either through standing in the shoes of the trustee, or through direct powers.

¹⁵ Development of the framework for Comprehensive Income Products for Retirement Discussion Paper 15 December, pg 21

7. Threshold Issues

The SCT believes that the risks identified in Chapter 6 create three threshold issues that must be resolved and/or further developed prior to a Government decision being made on the future structure of the financial system external dispute resolution and complaints framework as it relates to superannuation. These threshold issues are:

1. Determinations need to be final upon issue in a superannuation environment. In multi-party complaints reliance on contract law for issue of determination is impractical.
2. Powers to obtain information and involve third parties in the complaint resolution process are important in the superannuation environment where there can be reliance on external parties such as employers.
3. The 'test' for an EDR body 'standing in the shoes of the trustee' must align with the fiduciary duties of the trustee. In the case of superannuation this incorporates the SIS Act covenants.

In the circumstances that these threshold issues are unable to be adequately addressed in an industry model, the SCT has considered how a statutory model could be designed to deliver the principles of the Review without compromising the effectiveness of the EDR scheme to resolve complaints.

A statutory model also has the advantage of not removing existing consumer rights such as those of appeal to the Federal Court and for the Commonwealth Ombudsman to investigate complaints about the EDR scheme.

8. Alternative Statutory EDR Scheme

The SCT supports the Interim Report's draft findings that current SCT governance arrangements can be enhanced.

These include the following observations:

- The need to modernise the SCT governance framework;
- Current resourcing levels are neither sufficient nor sustainable; and
- The transparency and accountability of operations is important for efficiency and performance and is currently lacking.

The SCT and the SCT Advisory Council consider these factors to be the underlying cause of other findings made in the Interim Report in relation to the SCT. This includes findings that consumers experience delays in their disputes, the organisation is restricted in its ability to adapt and reform, and a need for improved education and outreach.

An improved statutory model for the SCT would provide an appropriate framework to effectively address these identified areas of need. Importantly, delivering clear organisation governance, transparent accountability and operational control, and a sustainable funding model can occur in a statutory model, obviating the need for the establishment of a new industry-based ombudsman scheme for superannuation.

The statutory superannuation EDR scheme and any new industry ombudsman scheme for financial, credit and investment disputes could establish a memorandum of understanding detailing how the schemes can work together.

The characteristics of an improved statutory model would be:

- Establishment of a Board of Directors with overall responsibility for organisation strategy and performance.
- Establishment of organisational legal identity and recognition that accountability for performance requires ability to control operations and resources:
 - SCT ability to enter into contract;
 - SCT ability to open bank account; and
 - SCT ability to employ staff.
- Clear allocation of funding to the revised SCT body:
 - Utilise existing APRA levy mechanism and introduce clear allocation direct to SCT;
 - Immediately reset level of operational funding to sustainable level;
 - Design future funding model formula to provide for future flexibility reflecting demand; and
 - Transition to future funding model.

- Government to retain key Tribunal member appointments, however provide for 'operational flexibility in terms of appointment' (for example full-time, part-time or sessional).
- Panel of Tribunal members to reflect requirements related to skills, expertise and representation.
- Board of Directors responsible for key operational appointments with capacity to delegate.

The above changes would enable recognition and management of the business operations associated with an effective and efficient EDR body, in addition to the decision making functions.

Table 1: SCT analysis of industry ombudsman scheme and proposed alternative statutory option for consideration

	Superannuation Complaints Tribunal	A superannuation industry ombudsman scheme	SCT analysis of the implications of the proposed ombudsman scheme	Alternative mechanism to obtain EDR advantages within a statutory model
Structure and membership	Statutory tribunal established by legislation.	Company limited by guarantee operating as an ASIC-approved EDR scheme. License 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.	<p><u>Threshold Issue</u></p> <ul style="list-style-type: none"> An industry model has material adverse implications for consumer protection and access to effective EDR. <p><u>Disadvantage</u></p> <ul style="list-style-type: none"> Determinations are not immediately binding. Loss of current statutory powers over third parties. Loss of consumer and provider appeal rights. Dual membership of two schemes required for insurers – lead to confusion and significant costs. <p><u>Advantage</u></p> <ul style="list-style-type: none"> Company with clear operational autonomy. 	<ul style="list-style-type: none"> Establish a Governing Board – including industry and consumer representatives. Reset the current SCT baseline budget to an ongoing sustainable level. Full public disclosure of proposed levy for SCT and allocation direct to SCT. Establish legal corporate identity for SCT Government to appoint key Tribunal Members Board and Chairperson responsible for other appointments
Function	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,	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	<p><u>Disadvantage</u></p> <ul style="list-style-type: none"> Increased use of courts (particularly for death benefit complaints). Members of public sector 	<ul style="list-style-type: none"> Important function of EDR is to resolve complaints, reflected in current objective and functions of SCT (SRC Act s11 and s12)

	Retirement Savings Account (RSA) providers and certain insurers.	providers and certain insurers.	superannuation funds, with access to the SCT will no longer have access to a specialist superannuation alternative dispute resolution ¹⁶ .	<ul style="list-style-type: none"> Flexibility relates to the operations of the EDR scheme and ability to adapt to changing industry products and practices.
Jurisdiction	<p>Defined by legislation (sections 14 to 15K of SRC Act). Jurisdiction over decisions by trustees of regulated superannuation funds, RSA providers and certain insurers.</p> <p>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.</p>	<p>Terms of Reference could be designed to replicate the existing SCT's jurisdiction, including unlimited monetary jurisdiction.</p> <p>Terms of Reference could provide scheme with flexibility to extend time limits for disability and death benefits complaints in exceptional circumstances.</p>	<p><u>Disadvantage</u></p> <ul style="list-style-type: none"> Delay in payment of all death benefits Potential future restrictions to jurisdiction as Terms of Reference are revised <p><u>Advantage</u></p> <ul style="list-style-type: none"> No short term reduction of jurisdiction in any change of EDR schemes 	<ul style="list-style-type: none"> Nature of current SCT jurisdiction provides for 'inbuilt' flexibility to accommodate changing industry products and practices Consideration of extension to time for disability complaints requires further detailed analysis to consider implications of currency of information, product design, timeframes and any potential operational impact The low levels of confusion regarding which dispute body can consider a complaint, can be managed by the dispute bodies themselves, e.g. through a Memorandum of Understanding.
Powers and approach to decision making	When reviewing a trustee's decision, SCT has all the powers, obligations and	Terms of Reference could permit broader considerations to inform decision making	<p><u>Threshold Issue</u></p> <ul style="list-style-type: none"> The test for an EDR body 'standing in the shoes of 	<ul style="list-style-type: none"> Both statutory and industry models can apply a range of

¹⁶ Interim Report Review of the financial system external dispute resolution and complaints framework, page 126 para 5.129 "Access to EDR for members of exempt state and territory superannuation funds may best be delivered in their jurisdiction's ombudsman or equivalent schemes."

	<p>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).</p> <p>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.</p> <p>Powers of discovery. Failure to comply is an offence.</p>	<p>– '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.</p> <p>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.</p> <p>Terms of Reference could require trustee to provide information to the scheme.</p> <p>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).</p>	<p>the trustee' must align with the fiduciary duties of the trustee. In the case of superannuation this incorporates the SIS Act covenants.</p> <ul style="list-style-type: none"> • Reduction in power to obtain information and involvement of third parties, in an industry where consumer experience can depend on third parties such as employers. <p><u>Observation</u></p> <ul style="list-style-type: none"> • The SCT already has and utilises the capacity to take into consideration existing body of case law, industry codes of practice etc. 	<p>tests to decision making.</p> <ul style="list-style-type: none"> • 'fair and reasonable in all the circumstances' is the appropriate test for disputes involving consideration of trustee discretion.
<p>Remedies</p>	<p>Cannot award costs or damages or provide a remedy where there has been no adverse practical outcome or</p>	<p>Terms of Reference could provide a broader range of remedies, including compensation for non-financial loss.</p>	<p><u>Observation</u></p> <ul style="list-style-type: none"> • The extension to remedy non-financial loss or where 	<ul style="list-style-type: none"> • The current remedy (namely, to place the complainant as nearly as practicable in such a position that the unfairness

	<p>financial loss. For example, not able to award compensation for non-financial loss.</p>		<p>there is no practical outcome would increase the range of disputes able to be remedied by the dispute body. Currently complaints are withdrawn as 'misconceived or lacking in substance' when there is no available remedy</p> <ul style="list-style-type: none"> • However – if the dispute body is standing in the shoes of the trustee – the trust deeds do not provide for 'damages'. Trust deeds provide for rectifying consequential loss but not for compensating pain and suffering. <p><u>Disadvantage</u></p> <ul style="list-style-type: none"> • A remedy that compensates for no adverse practical outcome or financial loss has implications for how a trust would financially provision for such remedies. • There would be an impact on fund members more broadly. • Unlimited dollar remedy is not issued by statutory body – removing appeal rights and weakening of direct enforceability. 	<p>or unreasonableness no longer exists) is appropriate for the compulsory nature of superannuation.</p> <ul style="list-style-type: none"> • This includes being able to remedy a non-financial matter. • Situations where SCT may use these remedies: category of membership, right to apply for extenuating circumstances, contribution classification. Example D15-16\089 (classification of contribution as reported to ATO) and D16-17\055 (the rollover of an account to an ERF and associated cancelling off insurance cover – at the heart of the dispute was the ability to remit a contribution)
<p>Enforceability of decisions</p>	<p>Decisions are binding on the trustee only.</p>	<p>Trustees would be contractually bound to abide by decision if</p>	<p><u>Threshold issue</u></p> <ul style="list-style-type: none"> • Determinations need to be 	<ul style="list-style-type: none"> • SCT determinations are directly enforceable.

	Non-compliance by trustee reported to ASIC or APRA. 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).	accepted by complainant. 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 APRA. Complainant or the scheme operator could seek contractual remedies against trustee to enforce compliance with the decision.	final upon issue in a superannuation environment. In multi-party complaints, reliance on contract law for issue of determination is impractical.	Compliance with determinations has not been an issue for the SCT.
Rights of appeal	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 <i>Administrative Decisions (Judicial Review) Act 1977</i> and section 39B of the <i>Judiciary Act 1903</i> .	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.	<p><u>Observation</u></p> <ul style="list-style-type: none"> The right to appeal to the Federal Court is not the same as the right to take action for a breach of contract. <p><u>Disadvantage</u></p> <ul style="list-style-type: none"> Loss of appeal rights to Federal Court. Complainants exposed to orders awarding costs¹⁷ Reduced creation of valuable precedent to guide both industry and the dispute body. 	<ul style="list-style-type: none"> Right to appeal retained.
Funding and resourcing	Annual government appropriation in the Federal Budget. Recovered via annual	Industry funded by members of the scheme. Funding managed by the scheme with resourcing decisions	<p><u>Disadvantages</u></p> <ul style="list-style-type: none"> Scheme control own funding, 	<ul style="list-style-type: none"> Governing Board oversight of strategic considerations including desired services,

¹⁷ the Federal Court must not make an order awarding costs against a complainant if the complainant does not defend an appeal instituted by another party to the complaint Superannuation (Resolution of Complaints) Act 1993 s 46

	financial sector levies set by Minister. Funding managed by ASIC and subject to government efficiency measures.	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.	reduced external scrutiny <u>Advantages</u> <ul style="list-style-type: none"> • Scheme control own funding – not subject to external scrutiny • Flexibility to alter funding outside of government budget cycle and process • Clear transparency of what industry contribute and what available to scheme • Scheme has both responsibility for outcomes and control of resources. 	service standards and required resourcing <ul style="list-style-type: none"> • Baseline budget set to sustainable level • Disclosure of proposed levy for SCT, direct allocation to SCT • Establish legal corporate identity • Transition to funding model that provides for funding linked to demand.
<u>Appointments</u>	Statutory appointments of Tribunal members subject to ministerial approval.	No statutory appointments. Staffing decisions would be made by the scheme, facilitating quicker response to a change in circumstances.	<u>Advantages</u> <ul style="list-style-type: none"> • Board with responsibility for outcomes, is responsible for key appointments and terms of appointment. <u>Disadvantage</u> <ul style="list-style-type: none"> • Reduced real or perceived independence of decision makers given appointment by representative board. 	<ul style="list-style-type: none"> • Role of Chairperson appointed by government • Recognition that dual functions of Tribunal Chairperson and CEO • Board advice regarding skill requirements and resourcing needs • Board key operational appointments.
<u>Processes and ADR mechanisms available</u>	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	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.	<u>Observation</u> <ul style="list-style-type: none"> • Legislation establishes that SCT must inquire and resolve by conciliation and if not resolved at conciliation review and determine. Within those parameters 	<ul style="list-style-type: none"> • Establish governing board with oversight or scheme performance • The governing rules establishing an organisation, be that legislation or corporate constitution, is not

	processes.		<p>there is broad flexibility to adapt operating processes and practices.</p> <ul style="list-style-type: none"> Ability of SCT to expedite cases has not been limited by prescriptive legislation, it has been restricted by resource levels. 	<p>the appropriate place to prescribe procedures.</p> <ul style="list-style-type: none"> The operating practices and priorities of any organisation are a reflection of its strategy and culture.
Oversight and accountability	<p>Parliamentary scrutiny, and the Commonwealth Ombudsman for complaints relating to the SCT.</p> <p>No governance board but an Advisory Council.</p> <p>Chairperson is responsible for SCT outcomes, but does not have ability to spend public funds (does not possess financial delegations).</p>	<p>New scheme would be subject to additional accountabilities and oversight mechanisms recommended by this review as well as periodic independent external reviews.</p> <p>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.</p>	<p><u>Disadvantage</u></p> <ul style="list-style-type: none"> Consumers and providers lose ability to complain regarding handling of their case to Commonwealth Ombudsman. Reduce requirements for public disclosure of organisation information. <p><u>Observation</u></p> <ul style="list-style-type: none"> Freedom of Information legislation not applicable. 	<ul style="list-style-type: none"> Statutory model can include Board, and requirement for periodic independent reviews Statutory models can provide for legal identity and financial delegation.
Systemic issues	<p>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.</p>	<p>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.</p>	<p><u>Advantages</u></p> <ul style="list-style-type: none"> Trend and systemic issues reporting can provide meaningful information to providers, industry and regulators raising the overall standards and practice of industry. <p><u>Observation</u></p> <ul style="list-style-type: none"> Currently both ASIC and APRA have the power to undertake investigations. 	<ul style="list-style-type: none"> Both a statutory and industry model can undertake investigations and report on systemic issues and incidences of non-compliance.

9. Draft Recommendation 5

A superannuation code of practice

The SCT is supportive of this recommendation. An appropriately developed superannuation code of practice would provide important clarity and consumer awareness of the complexity of a superannuation complaint.

Because the trustees of superannuation funds have a fiduciary role in the complaint process, a superannuation complaint is can be complex. For example, a superannuation complaint relating to insurance provided through superannuation is more complex than a standard contractual-based insurance complaint. A code of practice would greatly assist consumers in understanding the process of the complaint cycle.

An industry code that implements the consumer interaction expectations of the existing legislative framework is a valuable step and it is something the SCT (or future EDR scheme) would be able to take into consideration when resolving complaints.

A code of practice would provide a focus point for the industry to establish clear standards and expectations for consumers and their interaction with funds.

10. Draft Recommendation 6

Ensuring schemes are accountable to their users

The SCT conceptually supports the matters raised in recommendation 6. The SCT believes they can be adapted to a statutory model whereby they could be directly legislated rather than through ASIC regulatory guidance. In the context of an industry ombudsman model, the SCT supports the recommendation.

Ensure sufficient funding and flexible processes for unforeseen events

The SCT acknowledges that a statutory body will not have the same degree of funding flexibility as a private company (i.e. industry ombudsman). However, the SCT believes a statutory model can be designed to be sufficiently funded with increased flexibility and transparency compared with the existing and historical SCT arrangements.

The SCT is pleased to note the Interim Report has recognised that the past performance of the SCT has been impacted by inadequate funding.

The following changes would address the current shortcomings in the resourcing model of the SCT:

- The establishment of a governing board (which would provide strategic oversight of the organisation including forward resource requirements);
- An immediate lift of the baseline funding (which can be implemented through existing budget and levy processes);
- Setting the level of funding to reflect those services required of a modern EDR body (including service improvements and outreach activities);

- The separate disclosure of industry levies for the SCT, and allocation direct to the SCT;
- Providing SCT with financial delegation and resource control; and
- A transition to a future funding model linked to demand.

Provide an appropriate level of financial transparency to ensure accountable to users and wider public

As a statutory body, the SCT is already required to publically disclose financial and operational information.

Improved visibility and control of funding to the SCT would enable a governing board to undertake business diligence to appropriately assess and decide on the level of services to be provided, and the required funding.

Frequent periodic and independent reviews

The SCT considers this a sound organisational governance practice and one that can be incorporated into the governing rules of an organisation including a statutory body.

Establish an independent assessor to review handling of complaints by the scheme

As a statutory tribunal, anyone can take a complaint regarding the SCT's handling of a case to the Commonwealth Ombudsman. In addition the Commonwealth Ombudsman can undertake own motion investigations.

The SCT notes that it is subject to judicial review providing complainants and firms with the following grounds for review of complaints:

- *Administrative Decisions (Judicial Review) Act 1977*, - review of decisions, conduct, failure to make a decision; and
- Section 46 Complaints Act - appeals against a determination.

The level of judicial review and avenue to have a decision reviewed is particularly important for any EDR not bound by dollar limits. Importantly, through the judicial review process, clear precedent for industry practice is established.

In an industry model that does not inherently provided for external scrutiny of complaint handling, the SCT is supportive of the role of an independent assessor.

11. Draft Recommendation 7

Increased ASIC oversight of industry ombudsman schemes

A statutory tribunal is directly established under legislation, is subject to Parliamentary oversight and is independent from any regulator. It is not a company that relies on or requires the approval of ASIC; nor do providers become members of the scheme through a licence condition. The SCT provides a forum for resolving superannuation complaints regardless of whether or not the trustee holds an Australian Financial Services Licence.

Should an industry ombudsman EDR scheme be adopted for superannuation complaints, the SCT is supportive of consistent ASIC oversight and supervision for industry EDR schemes.

12. Draft Recommendation 8

Use of Panels

The SCT uses panels of Tribunal members for the determination of complaints. A panel is constituted by the Chairperson and can consist of between one and three members.

The number of members constituting a panel is outlined in the SCT Chairperson's guidelines and considers both the dollar quantum of the dispute and the nature of the complaint (its complexity).

A key consideration for the constitution of the panel is aligning the skills and experience required in a complaint with the available skills and experience of Tribunal members.

It is the SCT's experience that the determination of superannuation complaints requires a mixture of specialist skills and experience reflecting the varied nature of complaints. In recent years, the SCT has made more use of single Tribunal member reviews reflecting the need to resolve a volume of complaints within an under-resourced environment.

The SCT is supportive of the use of multi person panels, comprising the necessary skill, but recognises this has a cost implication. Multi-person panels could be more efficiently and effectively utilised through having:

- The flexibility to appoint Tribunal members on a full-time, part-time or sessional basis;
- The ability for a governing board to provide input as to the required skills and expertise; and
- A requirement for the appointment of consumer representatives.

13. Draft Recommendation 9

Internal dispute resolution

The SCT considers that effective dispute resolution is broader than the resolution of single complaints. Activities that serve to improve consumer experience based on complaint trends either at a provider level or industry level are an important component of dispute resolution broadly and can raise industry practices and standards.

In principle the SCT supports a requirement to capture and report IDR information.

14. Draft Recommendation 10

Schemes to monitor IDR

The SCT does not currently monitor the progress of complaints referred back to IDR. This is in a large part reflective of the complaint being outside the SCT's jurisdiction (the SCT is unable to consider a complaint unless it has first been considered by the trustee).

The SCT supports the monitoring of complaints that have not first been taken to IDR (where the provider can be identified) and if the complaint is referred back to EDR.

The SCT considers it important that trustees remain the primary point for resolving complaints prior to the complaint progressing to EDR and this is clear in the current segregation between IDR and EDR for superannuation complaints.

Any change that creates ambiguity regarding responsibility for the complaint (IDR or EDR) would need careful consideration regarding impact on consumers and claim and dispute processes in the superannuation industry, for example claim staking during death benefit decisions.

The SCT notes that any change to the EDR test (as recommended in the Interim Report) to determine complaints that differs from the test a trustee must apply when considering a complaint has the potential to create a scenario where consumers 'cherry pick' which avenue they think would more favourably resolve their complaint.

15. Draft Recommendation 11

Debt management firms

This recommendation relates to financial services broadly and the SCT considers that these recommendations are outside of the remit of the Tribunal and as such does not have any comment to make on this specific recommendation.

16. Transition Considerations

The SCT considers that a revised statutory scheme would have the advantage of improved service experience while maintaining existing consumer protections. A transition to a revised statutory scheme would not have a direct transition impact on consumers; continuity of protections and rights would be maintained. Similarly, there would be no requirement for trustees and insurers to join a new scheme as part of new licensing arrangements and conditions.

If a statutory scheme is maintained in the form of a revised SCT, transition issues to be considered include significant changes to the current governance arrangements:

- Establish a Board;
- Establish and maintain an appropriate level of baseline funding;
- Establish legal identity to enable operational control;
- Revise funding mechanism to directly allocate funds to SCT; and
- Make amendments to the Complaints Act such as those covering member appointments.

The transition to a revised statutory scheme would involve material organisational changes for the SCT, however continuity of dispute resolution could continue for consumers and trustees.

If it is ultimately decided to move to an industry ombudsman scheme for superannuation disputes, as an overarching observation, the SCT questions the logic of the Interim Report's recommendation to create a new industry ombudsman scheme for superannuation disputes initially and then transition to a single industry ombudsman scheme for all disputes in the financial system in the future.

The recommendation of a two-step approach will have a detrimental effect on consumers and on the superannuation industry with duplicate costs, communication and transition considerations.

The Interim Report is also not clear as to the framework that is envisaged on page 155 at paragraph 6.38. The reference to the two new industry ombudsman schemes working closely together to 'share knowledge and resources (such as back-office functions), and realise efficiencies where possible' appears inconsistent with the establishment of two separate schemes in the first instance.

If the final outcome of the proposed process is for a single industry ombudsman EDR scheme then it is more efficient to simply transition the SCT once rather than the proposed two-stage approach.

The SCT does consider any transition to an industry scheme will require strong ownership and guidance from industry and consumer representatives which is provided for in the two-stage approach.

The SCT considers this could also be provided for in a 'change once' approach in the following manner:

- Continue the SCT as the only dispute body for superannuation during the period it takes to establish the ombudsman for financial credit and investment disputes;
- During that period increase the operational resourcing and activity of the SCT to reduce the number of open complaints, thereby minimising the number of open complaints at the time an industry ombudsman for superannuation comes into existence with different rights and obligations;
- Establish a Board Committee of the industry ombudsman comprising representatives from the board of that body and representatives from superannuation industry and consumers. This will be the governing body to transition superannuation to the new model;
- During the period to establish and implement the ombudsman for financial credit and investment disputes (or longer if necessary), undertake the requisite design of the new model for superannuation (within the ombudsman), including legislative change, transition issue management etc;
- Direct new superannuation complaints to the ombudsman from an agreed date, coinciding with changes to the ombudsman governance (e.g. TOR, board composition); and
- Finalise the minimal complaints remaining at the SCT.

This would have the advantages of:

- The new industry ombudsman scheme being designed and brought into operation with a view to ultimately including superannuation (minimising change on that body);
- Only one change for superannuation industry - reduced costs, one change to communication materials;
- Less change and confusion for consumers during the transition phase; and
- Reduced number of open complaints with different implications for consumers during period of both SCT and ombudsman.

The success of such an approach would be contingent upon the Terms of Reference and composition of the Board Committee being appropriately structured and empowered.

To provide for continuity of consumer protections for those who had lodged a complaint with the SCT, the SCT would need to continue operations until all complaints had been resolved. In effect, a 'dual' system would operate for a period with implications for trustees, insurers and consumers.

Any transition from SCT to an industry ombudsman scheme also has the added complication of needing to provide for complaints resolved at the SCT which are subsequently appealed. In other words, the need to support a statutory scheme continues beyond the date the last complaint is resolved. This period is not confined to the 28 days to appeal a decision; it needs to accommodate extensions to an appeal and the time frames of the court.

Recently in *McAtamney v Superannuation Complaints Tribunal [2016] FCA 1062* an appeal was brought under s 39B(1A)(c) of the Judiciary Act 1903 and s 5 of the

Administrative Decision (Judicial Review) Act 1977. Justice North allowed the appeal to be brought more than five years after the decision was notified. This was because Mr McAtamney suffered serious ill health during that period and also because he had a strong case.

Mr McAtamney lodged a complaint with the Tribunal that his benefit payment was inadequate.

On 17 October 2007, the Tribunal determined under s 22(3)(b) of the Complaints Act to treat the complaint as withdrawn on the basis that it was lacking in substance. However, in view of further information it received, the Tribunal reopened the complaint.

On 14 January 2009, the Tribunal confirmed the decision made on 17 October 2007. Mr McAtamney commenced his Federal Court appeal on 24 July 2014 and the judgement of 2 September 2016 set aside the Tribunal's decision to withdraw the complaint and remitted the matter to the Tribunal.

Transition funding

In either scenario (transition to revised statutory or industry scheme), the ability for the SCT to contribute their experience and expertise will be critical and this will require additional resourcing during the design and transition phases.

In any circumstance of a revised model for superannuation EDR there is a requirement for the SCT to maintain a sufficient operating budget to ensure that the work of the Tribunal is resourced.

The current SCT operating/baseline budget (for 2016-17) is \$5.2m. An additional \$5.2m was approved for the 16-17 year as part of budget appropriations in November 2016.

At a minimum, the SCT will require an increase to its baseline operational budget to prevent an increase in open complaints and further delays during the transition period. Additional resourcing will also be required for the additional work that will be required for the SCT to appropriately deliver on a transition model. This is new resourcing for the SCT distinct from the business as usual resourcing.

The SCT has not submitted a new policy proposal (NPP) for business as usual funding above current levels for the 2017-18 Budget. This will need to be addressed for 2018-19.

17. Conclusion

The SCT is a strong advocate for the need for change to the current EDR structure for superannuation.

This is because the current governance arrangements need to be improved to deliver greater operational transparency in terms of funding, improved oversight through the establishment of a Board and greater operational autonomy for the EDR body to make strategic and business decisions.

This can be achieved through a statutory tribunal scheme with the benefits of maintaining existing consumer protections.

There are significant threshold issues and risks associated with moving towards an industry based EDR scheme.

18. Attachment 1: Legal History of the SCT

Legislative Scheme

In 1992 the *Superannuation Guarantee (Administration) Act 1992* (Cth) was enacted to mandate a minimum level of employer sponsored superannuation. At the same time concerns were expressed about the adequacy of traditional trust law remedies in protecting the rights of superannuation fund members.¹⁸ Both the Senate Select Committee on Superannuation and the Australian Law Reform Commission recommended the establishment of an external dispute resolution mechanism for superannuation disputes between fund trustees and members.¹⁹

In particular, it was inconsistent with the government's retirement incomes policy for superannuation fund members to only have access to judicial review of trustee decisions. This was especially so when their 'compulsory' superannuation could be regarded as a form of 'deferred pay'. In 1992, the Treasurer issued a Press Release:

“The Government considers that consumers should have an appropriate forum to settle any disputes between themselves and the superannuation funds. To this end, the Government will be working with industry participants to develop a suitable low-cost dispute resolution mechanism.”²⁰

The Superannuation Complaints Tribunal (**SCT**) was subsequently established by the *Superannuation (Resolution of Complaints) Act 1993* (Cth) (**Complaints Act**) as part of the federal government's legislative scheme for the prudential supervision of the superannuation industry.²¹ The constitutional foundations for the legislative scheme are a combination of the Federal Parliament's powers under paragraphs 51(xx) and 51(xxiii) of the *Australian Constitution* to make laws with respect to trading or financial corporations and old age pensions respectively. In addition, a trustee must irrevocably elect for the fund to be a 'regulated superannuation fund'.²² Only a regulated superannuation fund can be a complying superannuation fund and receive taxation concessions.

The government had a working model for merits review bodies, most notably the Commonwealth Administration Appeals Tribunal (**AAT**), which reviews decisions of 'public' governmental bodies to ascertain whether the decision maker made the correct or preferable decision on the merits.²³ The SCT was established as a merits review body, specialising in the resolution of superannuation-related disputes. The government justified the imposition of this model on 'private' trustees by reference to the increased public significance of superannuation:

¹⁸ Australian Law Reform Commission *Collective Investment Schemes: Superannuation*, Discussion Paper No 50 (1992); Commonwealth, Senate Select Committee on Superannuation, *Safeguarding Super* (1992)

¹⁹ Senate Select Committee on Superannuation, *Safeguarding Super*, above n 1, 11, 143; Australian Law Reform Commission *Collective Investment Schemes: Superannuation*, above n 1, 113

²⁰ The Hon John Kerin, MP, Commonwealth of Australia, *Review of Supervisory Framework for the Superannuation Industry*, Press Release No 73 (20 August 1992)

²¹ Complaints Act, s 6

²² SIS Act, ss 19(4) and 19(5)

²³ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 557, 589

“Given the public element in superannuation, and strong arguments for the Government to participate actively in any external enquiry and dispute resolution mechanism, the Government will provide for impartial external dispute arrangements through a statutorily appointed full-time office holder. The external dispute resolution arrangements ... will involve decisions being made by a Tribunal chaired by a statutory officeholder.”²⁴

Features of the SCT as a statutory body

The government’s intention in creating the SCT was to provide a mechanism for reviewing the merits of decisions made by superannuation fund trustees that is ‘fair, economical, informal and quick’.²⁵ This is to be contrasted with review by a court of the legality of a trustee decision, which tends to focus on the process by which the decision was reached,²⁶ rather than the outcome. It was contemplated that the SCT would supplement the court’s jurisdiction.²⁷

Fair and reasonable standard

The SCT is a statutory body with powers to investigate, conciliate and review complaints from members of regulated superannuation funds.²⁸ In the case of a complaint about a death benefit, a complaint can also be made by a person with an interest in the benefit.²⁹ The ground of complaint is that a trustee ‘decision’ (defined expansively in section 4 of the Complaints Act) is unfair or unreasonable.³⁰ In this sense, the Complaints Act has been described as providing ‘important new rights’ for superannuation fund members,³¹ since trustee decisions are not reviewed by courts against a substantive ‘fair and reasonable’ standard.³²

In *Pope v Lawler*,³³ Nicholson J held that ‘fair’ means ‘just, unbiased, equitable and impartial’, while ‘reasonable’ means ‘within the limits of reason, not greatly less or more than what might be thought likely or appropriate. This interpretation was confirmed by Sundberg J in *National Mutual Life Association v Jevtovic*³⁴ and by Merkel J in *Briffa v Hay*.

²⁴ The Hon John Dawkins MP, *Strengthening Super Security* (AGPS Canberra) 1992, 15

²⁵ Complaints Act, s 11

²⁶ In good faith, with real and genuine consideration and for a proper purpose: *Karger v Paul*

²⁷ This is reflected by the fact that the SCT does not have jurisdiction if the same matter is before a court: Complaints Act, s 20

²⁸ Complaints Act, s 15(1)

²⁹ Complaints Act, s 15(2) and 24A.

³⁰ Complaints Act, s 14(2)

³¹ Merkel J in *Briffa v Hay* (1997) 147 ALR 226, 234 (**Briffa v Hay**)

³² As acknowledged by Kirby J in *Attorney General v Breckler* (1999) 197 CLR 83, 130

³³ (1996) 41 ALD 127

³⁴ Fed Ct (unreported) 8 May 1997 (Sundberg J) (**Jevtovic**)

Review Powers

The SCT is given all of the powers, obligations and discretions that are conferred on the trustee³⁵ and thus ‘stands in the shoes of’ the trustee to make a *de novo* decision based on the information before it. It must then either:

- affirm the trustee’s decision
- remit the matter to the trustee for reconsideration in accordance with the SCT’s directions
- vary the trustee decision; or
- set aside the trustee decision and substitute its own decision.³⁶

These review powers are similar to those conferred on the AAT.³⁷ In addition, the SCT cannot do anything that is contrary to law or the governing rules of the fund.³⁸

Enforceability

It is a prescribed standard under the *Superannuation Industry Supervision Act 1993* (Cth) (**SIS Act**) that a trustee must not fail, without lawful excuse, to comply with an SCT determination.³⁹ A person who intentionally or recklessly breaches a prescribed standard is guilty of an offence,⁴⁰ so in this sense SCT determinations have the force of law.

Affirmation by High Court

One of the main differences between the SCT and the AAT is that, out of deference to trust law, the SCT reviews trustee decisions by reference to whether the decision was ‘fair and reasonable’ in relation to the complainant, rather than ‘correct or preferable’. Trustee discretion is particularly amenable to the ‘fair and reasonable’ standard, since an exercise of discretion necessarily involves a choice between rational alternatives. Hence in cases of trustee discretion, such as the distribution of a death benefit among a deceased member’s dependants, the SCT will consider whether the trustee’s decision was within the range of decisions that were fair and reasonable. If so, the trustee’s decision is affirmed. This approach has been judicially confirmed.⁴¹

The relative novelty of the ‘fair and reasonable’ standard for a merits review body resulted in a constitutional challenge to the validity of the SCT. In *Wilkinson v Clerical Administrative & Related Employees Superannuation Pty Ltd*⁴² and in

³⁵ Complaints Act, s 37(1)

³⁶ Complaints Act, s 37(3)

³⁷ *Administrative Appeals Tribunal Act* (Cth), s 43(1)

³⁸ Complaints Act, s 37(5)

³⁹ SIS Act, s 31 with reg. 13.17B of the SIS Regulations

⁴⁰ SIS Act, s 34(2)

⁴¹ By Sundberg J in *Jevtovic*, Merkel J in *Briffa v Hay* and Heerey J in *Adkins v Health Employees Superannuation Trust Australia* Fed Ct (unreported) 15 August 1997

⁴² (1998) 152ALR 332

Breckler v Leshem,⁴³ the majority of the Full Federal Court held that the SCT was exercising judicial power in breach of chapter III of the Australian Constitution.⁴⁴

On appeal, however, the High Court confirmed the SCT's constitutional validity.⁴⁵ The joint judgment of Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ held that the SCT performs a merits review function that is not open to a court. They also noted that, as members of the SCT are 'officers of the Commonwealth' within the meaning of s 75(v) of the Australian *Constitution*, the SCT's decisions are subject to judicial review, which is also consistent with an administrative review function.⁴⁶ In addition, the joint judgment noted that trustees have voluntarily submitted to the legislative scheme (which includes the review of their decisions by the SCT) by virtue of their irrevocable elections under the SIS Act.

Kirby J also held that the SCT does not exercise judicial power, but added that administrative law review is not limited to governmental activities. In His Honour's view the 'huge sums' involved in superannuation and their 'large significance for the well-being of the nation'⁴⁷ mean that a rigid distinction between public and private decision-makers need not be made. As such His Honour considered it apt for a statutory tribunal to uphold proper standards of decision making by trustees.

⁴³ Full Fed Ct (Unreported) 12 February 1998 (Lockhart, Heerey and Sundberg JJ)

⁴⁴ During the 9 months from 11 December 1998 to 13 September 1998 when the SCT's lost its determination powers an arbitration function operated. The SCT experience was that arbitration was not successful. There were approximately 352 matters awaiting finalisation by the arbitration process, yet just 27 arbitrations were conducted. The voluntary arbitration process saw parties unwilling or slow to participate.

⁴⁵ *Attorney-General v Breckler* (1999) 197 CLR 83

⁴⁶ *Ibid* 108

⁴⁷ *Ibid* 127