



Superannuation Complaints

Tribunal

Submission in response to the Consultation Paper: Improving dispute
resolution in the financial system

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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 Consultation Paper: Improving dispute resolution in the financial system (Consultation Paper) and Treasury Laws Amendment (External Dispute Resolution) Bill 2017 (the Bill).

The SCT has prepared this submission in the context that:

- The Government has announced that the single External Dispute Resolution (EDR) scheme to replace the SCT, FOS and CIO will be a company established by industry and will operate under a 'co-regulatory framework'. The company's board would make its own decisions regarding funding, staffing and dispute resolution process, however it must comply with legislative and regulatory requirements set by Government and ASIC.²
- The Government agrees with the Review of the financial system external dispute resolution and complaints framework (Ramsay Review) recommendation that the single EDR scheme should have appropriate statutory powers in relation to superannuation complaints.³ However the Government considers some matters would be appropriate to include in the scheme's terms of reference.⁴

The Ramsay Review found that 'superannuation disputes can have unique and complex characteristics, which can distinguish them from other financial disputes'.⁵ The SCT strongly supports this finding and the associated recommendation that '(the) single EDR body should have... in the case of superannuation disputes, appropriate statutory provisions where required'.⁶

The SCT is concerned that the Bill in its current form does not contain all the required statutory provisions.

There are material changes in the Bill from the SCT framework. The SCT considers it vital that the design of the new EDR scheme not be vulnerable to constitutional challenge. If not already undertaken, this risk warrants careful investigation and consideration.

The SCT considers that the approach to transition should minimise impact on consumers, risks, costs and impact on the dispute bodies. From the date new complaints can be lodged with the Australian Financial Complaints Authority (AFCA), the SCT should not be able to accept new complaints.

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 Improving dispute resolution in the financial system, Consultation Paper, pg 2, para 8&9

³ Improving dispute resolution in the financial system, Consultation Paper, pg 4, para 23

⁴ Improving dispute resolution in the financial system, Consultation Paper, pg 6, para 37

⁵ Final Report Review of the financial system external dispute resolution and complaints framework, pg 139.

⁶ Final Report Review of the financial system external dispute resolution and complaints framework, pg 14.

The 2017-18 budget did not provide resourcing to enable the SCT to resolve existing complaints by 30 June 2020. Based on the SCT budget currently advised by ASIC for 2017-18, indicative early modelling suggest that open complaints at the SCT will not be finalised until December 2022. This scenario is untenable.

The SCT is committed to ensuring the current strengths and protections of the SCT statutory framework are maintained in the new EDR co-regulatory framework, and working with stakeholders to achieve a smooth transition to the new scheme.

2. General comments on the Government response to the Ramsay Review and the Treasury Laws Amendment (External Dispute Resolution) Bill 2017

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 previously raised some concerns regarding a move away from a statutory scheme to an industry ombudsman scheme. These concerns included:

- 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.

The SCT welcomed the finding in the Ramsay Review that 'superannuation disputes can have unique and complex characteristics, which can distinguish them from other financial disputes'⁷, and the associated recommendation that '(the) single EDR body should have... in the case of superannuation disputes, appropriate statutory provisions where required.'⁸

The key points outlined in the Ramsay Review section titled 'Accommodating unique features of superannuation disputes'⁹ generally address the concerns of the SCT.

The Government response to the Ramsay Review agreed with the recommendation that the single EDR body in the case of superannuation disputes have appropriate statutory provisions. 'We will develop legislation to ensure that the approved one-stop shop has the necessary powers to resolve superannuation disputes.'¹⁰

The consultation paper is seeking comment on draft legislation and regulations for a new EDR scheme which is to 'operate under a co-regulatory framework.'¹¹ However details relating to non-legislated aspects of the co-regulatory framework are yet to be released. In this context it is not possible to provide full consideration of the co-

⁷ Final Report Review of the financial system external dispute resolution and complaints framework, pg 139.

⁸ Final Report Review of the financial system external dispute resolution and complaints framework, pg 14.

⁹ Final Report Review of the financial system external dispute resolution and complaints framework, pg 139.

¹⁰ Building an accountable and competitive banking system, media release 9 May 2017, Attachment B Government Response to the Ramsay Review

¹¹ Improving dispute resolution in the financial system, Consultation Paper, May 2017, pg 2, para 9

regulatory framework and consequently complete consideration of the details of the Bill.

Matters of eligibility of access and jurisdiction are fundamental to any EDR scheme and the co-regulatory framework is reliant on Terms of Reference (TOR) to define these critical aspects of the new scheme. The absence of TOR has been particularly problematic in responding to the consultation.

Section 4 of this submission highlights aspects of the Bill the SCT is concerned do not adequately provide for the unique nature of superannuation disputes or could be problematic for the operation of the new scheme. It also sets out areas where the Bill provides for consumer protections which differ from those that currently exist.

The SCT is raising these matters in the spirit of enabling their constructive consideration and revision.

3. Question 1: Are there other statutory powers the EDR body will need to resolve superannuation complaints effectively?

Question 2: Do you consider that the Bill strikes the right balance between setting the new EDR scheme's objectives in the legislation whilst leaving the operation of the scheme to the terms of reference?

Question 3: Are there any issues that are currently in the Bill that would be more appropriately placed in the terms of reference, or issues that are currently absent from the Bill that should be included in the Bill?

Governance

The Ramsay Review recommended the EDR body have certain governance arrangements, such as to be a company with an independent board, funded by industry and have minimum features.

The SCT considers it appropriate that any future EDR scheme be operated on a not for-profit basis. The draft legislation and explanatory material are silent on this matter.

The legislation establishes matters which must be considered by the Minister when authorising an EDR scheme. These matters align with the features identified in the Ramsay Review. However, the draft legislation does not contain some of the qualitative aspects of the Ramsay Review. An example is accessibility which in the draft legislation is a matter which must be considered, however it merely requires the Minister to take into account 'the extent to which complaints are exempt from payment of any fee or charge....'¹²

The Test

Currently the Tribunal must affirm a decision if it is satisfied that the **decision in its operation** in relation to the complainant was fair and reasonable. The draft legislation retains the notions of fair and reasonable. However has changed the test to **in relation to the decision** (s1057(2)(b)). Whilst the new EDR body will not be a statutory tribunal, it will make binding superannuation decisions. Consequently careful consideration of the *Breckler* case, in which the High Court held the SCT framework to be constitutionally valid, is prudent.

Impact

The SCT considers it vital that the new EDR scheme not be vulnerable to constitutional challenge. If not already undertaken, this risk warrants careful consideration.

¹² Proposed section 1046(2)(c)

The requirement to affirm a decision if it could be considered fair and reasonable is no longer included in legislation.

Impact

This changes the test to what the EDR decision maker would do, rather than recognising the range of fair and reasonable decisions a trustee could make when exercising discretion.

The draft legislation only requires fairness and reasonableness to be considered in the context of the complainant (s1057(2)(b)). This differs from the current requirement under the Superannuation (Resolution of Complaints) Act (Complaints Act) to also consider any person (other than the trustee) who is party to the complaint and has an interest in the death benefit. The nature of death benefit disputes requires the application of a fair and reasonable test to also apply to the other consumer parties to the dispute.

Impact

A consequence is that the proposed EDR decision maker considers whether the decision was fair and reasonable only to the complainant, not to other parties who might have a valid claim in the matter, particularly in the case of blended families.

Access and jurisdiction

The SCT notes that the draft legislation requires the EDR scheme to ensure that the complaints mechanism under the scheme is accessible to any persons dissatisfied with members of the scheme (s1047(b)). Any governing arrangements put in place by the EDR scheme, such as under TOR, that sought to narrow this access could potentially place the EDR scheme in breach of the legislation.

This is particularly problematic in respect to superannuation disputes.

Excluded subject matter

'A superannuation complaint is a complaint made under an authorised EDR scheme...' (s1057(1)). The legislation does not limit the subject matter of what types of complaints could be considered. Matters of jurisdiction are reliant on any TOR being legally effective to narrow the unbounded jurisdiction of the legislation. Under the Complaints Act restrictions are placed on jurisdiction.

Impact

Such restrictions are important to support the scheme to be effective and efficient in the resolution of complaints, distinct from matters that are best considered in other forums. An example is the SCT cannot deal with a complaint that relates to the management of a fund as a whole.

'Any person' vs 'person with an interest' vs 'qualifying person'

The notion of 'any person' is broad and the new EDR scheme would be reliant on its TOR to be effective in appropriately defining accessibility to the scheme.

The requirements set out in s15 of the Complaints Act limit persons who may make a complaint to those who 'have an interest'. In a superannuation context the ability to

limit access to complain about death benefits to persons who may have an interest in the benefit is critical.

The Complaints Act s4B also provides for persons to be a 'qualifying person' because of regulations made for that purpose. The Superannuation (Resolution of Complaints) Regulations operate to provide non-member spouses (and others) under the Family Law Act access to the SCT.

Impact

The change to 'any person' is too broad and may increase unwarranted claims. This may not be in the best interest of all superannuation members.

Exempt Public Sector Superannuation Schemes

The Exposure draft explanatory material states that 'in line with current arrangements to apply to the SCT these funds will not be required to become members of the new EDR scheme, but will be able to elect to do so.'¹³ However the draft legislation does not provide a mechanism for them to be included as a superannuation complaint.

Impact

The exempt public sector superannuation schemes and their members lose access to the new EDR scheme.

Self-Managed Superannuation Funds

The Complaints Act does not apply to self-managed superannuation funds as an **exclusion** (s5). The drafting in s1052(3) provides for a complaint to not be a superannuation complaint if it **relates** to a SMSF.

Impact

This is a different test with potentially different operational impacts and implications.

Time limits

The time limits for superannuation complaints are not established in the draft legislation. The SCT understands that the extent to which time limits can be effected in TOR provides for ongoing flexibility.

The SCT considers that it is critical for time limits regarding death benefits to be legislated. This matter is further discussed under the section 'Death benefit distributions and complaints' on page 11.

The SCT notes the removal of time constraints such as those linked to product design (e.g. life policies and annuity policies admitted after Assent of SIS) or other Acts and Regulations (e.g. Income Tax Assessment) and questions if they can be appropriately and effectively defined in TOR.

Impact

There may be changes to the ability for consumers to access EDR in the new scheme. The range of complaints able to be considered could increase or decrease.

¹³ Exposure Draft explanatory material, pg 27, para 1.132

Rights and powers

As a broad observation, the Complaints Act separately recognises different types of superannuation providers, parties and complaints. The proposed legislation at times treats them in a consolidated manner. This has implications for the powers of the new EDR scheme and implications for parties.

Different powers of remedy

In the Complaints Act powers are specific for each type of provider. The draft legislation is more general in nature and, as a consequence, some powers are no longer specified. As an example, s1052 provides for the decision of an RSA provider to be a superannuation complaint. However, the legislation does not provide all the powers currently in s37D of the Complaints Act, such as the power to require a party to repay money, or set aside the terms and conditions of a contract of insurance.

Impact

Without existing powers, consumers may not have access to the current redress mechanisms.

Different party obligations and penalties

As one example, s1055 provides the statutory power to require attendance at conciliation conferences, including each party to a complaint and third parties. It also specifies that a person commits an offence if he or she does not attend a conference when required (s1055(4)). Consequently, it is an offence attracting penalty units for a complainant not to attend. Currently under the Complaints Act (s28(5)) it is only an offence for 'a person, other than the complainant' not to attend, with the sanction for a complainant only being the power to withdraw the complaint.

Impact

Complainants might be unnecessarily penalised by the draft legislation.

Ability to effect determinations

The draft legislation contemplates that third persons can be joined to a superannuation complaint (s1053) and provides for the EDR decision maker to have all the powers, obligations and discretions that are conferred on the trustee, insurer, RSA provider or other decision maker (s1057). However, it does not require that these decision makers be 'a party to the complaint'.

The capacity to give effect to a determination with respect to a decision maker other than a trustee or insurer in the draft legislation is problematic as Superannuation Industry (Supervision) Act (SIS) s64A is to be omitted and other decision makers (for example, medical practitioners) are not product issuers or financial service licensees.

Impact

The EDR decision maker under the draft legislation could potentially alter the decisions of persons who have not been party to the complaint.

There could be implications for giving effect to some determinations e.g. where determinations as to disablement are dependent on the formation of an opinion of a doctor.

Different appeal rights

The proposed legislation provides for appeals to the Federal Court, on a question of law, from the EDR decision maker's determination of a superannuation complaint. Importantly s1061 also provides the existing protection regarding awarding of costs against a complainant.

Currently the Court cannot award costs against the SCT unless the decision is in excess of power, or involves serious misconduct or a perverse action. This is based on case law specific to tribunals. It is unclear in a co-regulatory framework if the courts would have a broader ability to award costs against the new scheme.

There are clear administrative law principles that apply to tribunal decision making. It is unclear what principles will apply to invalidate the decisions of the EDR decision maker.

The Administrative Decisions Judicial Review Act (ADJR Act) currently applies to 'decisions of an administrative character made...under an enactment'¹⁴. Decisions made under the Complaints Act fall within the ADJR framework.

The ADJR Act currently provides the ability for complainants to appeal SCT decisions, including decisions to: deny access (find a complaint outside jurisdiction); summarily dismiss a complaint; not allow oral submissions; require attendance at conciliation. The draft legislation is silent on withdrawn complaints; presumably the circumstances in which a complaint is withdrawn would be part of any TOR. Whether such a determination would attract a right of appeal to the Federal Court would be problematic.

The ADJR Act also provides third parties the right to appeal decisions to compel the production of documents or attendance at conciliation.

It is unclear whether decisions of these kinds made under the proposed legislation could be appealed.

Trustees and insurers might also bring action against the new scheme for breach of contract (ie the TOR).

Impact

Consumers' and third parties' appeal rights are potentially reduced.

It is unclear what approach the Court may take in the awarding of costs.

Rights no longer legislated

The following rights are not provided for in the draft legislation

- Right to be advised of appeal rights (could be included in TOR)
- Right to representation (could be included in TOR)
- Confidentiality of conciliations
- Requirement to formalise conciliated settlements (could be in TOR)
- Unlimited dollar jurisdiction and remedy

¹⁴ ADJR Act s3

- Right to complain about the scheme to Commonwealth Ombudsman (similar role might be fulfilled by the independent assessor, noting it is not appropriate for an independent assessor to review the decision)

Impact

Some consumer rights are no longer legislated. If conciliation is not required to be confidential the potential exists for the EDR decision maker to be influenced and potentially reliance on the parties to request confidentiality.

Parties to a complaint

The draft Division 3 provides the power to join various parties to a complaint. However it does not specify that a trustee must be a party to a complaint. Presumably this is reliant on any such requirement being effected in TOR.

Risks to Insurance Complaints

The SCT is concerned that the wording of s1053(b) may preclude a trustee from being a party to an insurance complaint where the complaint is initially taken directly to the insurer or where the claim is dealt with directly with the insurer during the course of the claim. The SIS Prudential Standards place specific obligations on trustees in relation to insurance. To not include the trustee in an insurance dispute circumvents these obligations.

If the insurance dispute is not considered a superannuation dispute for the purposes of Division 3 the parties will not be afforded the same statutory protections as currently provided, such as unbound dollar limits to jurisdiction and remedies. Further, trustees' obligations under the SIS Act such as to pursue an insurance claim on behalf of a member where it is reasonable to do so cannot be tested if the complaint is not dealt with as a superannuation dispute under the new scheme.

Impact

If the insurance dispute is not considered to be a superannuation dispute for the purposes of Division 3, the parties will not be afforded the same statutory protections as currently provided, such as unbound dollar limits to jurisdiction and remedies.

Death benefit distributions and complaints

The Ramsay Review supported retaining the claim staking process for superannuation death benefit disputes in line with current arrangements.¹⁵ The removal of SIS s101 and the repeal of the Complaints Act remove the legislative framing necessary for claim staking and critical elements have not been incorporated into the draft legislation.

These processes need to be legislated and are not suitable for inclusion in TOR. They apply to all interested parties, not only those who have brought a complaint or are party to a complaint. In addition, the support of legislative framing is required should distributions subsequently be disputed in the courts. Key elements that need to be legislated include:

¹⁵ Final Report Review of the financial system external dispute resolution and complaints framework, pg 141, para 7.12

- Trustee must give notice to all persons the trustee believes, after reasonable inquiry, may have an interest in the outcome of the complaint;
- Requirement for the trustee to notify the EDR scheme of the identity of such persons;
- Requirement for written reasons for a decision made by the trustee in relation to a death benefit;
- Time limits to complain regarding a trustee decisions, both at Internal dispute resolution (IDR) and EDR, with the consequent protection for trustees if they pay death benefits once time limits expire; and
- Fairness and reasonableness needs to be considered in the context of all potential beneficiaries who are party to a complaint (not only the complainant) to align with the nature of the trustee decision.

Impact

Consumers who might, under current legislation, be justly regarded as interested parties to a death benefit distribution, may no longer be swept up without the claim staking process. These protections are significant for individuals who may not have strong negotiating positions (such as young children) and consequently should be legislated.

Trustees delay the payment of death benefits with removal of the protection provided by legislated time limits.

Decision maker

'EDR decision maker' is not specifically defined in the draft legislation other than by way of s1053 as 'the person who is to determine a superannuation complaint'.

The draft legislation currently refers to an EDR decision maker as a single person (such as in s1053), or as 'he or she' (such as in s1055), implying a single person. This appears to be inconsistent with the Ramsay Review finding regarding the use of panels.¹⁶

In other sections the draft legislation refers to 'a member of the staff of the EDR decision maker' (such as s1064), indicating the EDR decision maker may be the scheme operator.

Further confusion arises as the draft legislation uses EDR decision maker for matters of a procedural or organisation-wide nature, such as the formulation of guidelines in s1055. There is no provision or guidance in the legislation regarding an EDR decision maker's authority to delegate.

The draft legislation appropriately provides for the determination of a superannuation complaint by the EDR decision maker to replace the trustee decision and come into operation immediately upon the making of a determination. Accordingly, it is appropriate for EDR decision makers to be senior appointments made by the Board of the new EDR scheme.

¹⁶ Final Report Review of the financial system external dispute resolution and complaints framework, pg 129

Impact

Any final legislation, together with the governing rules of the new EDR scheme, needs to clarify the definition of an EDR decision maker, the appointment of EDR decision makers, and the ability for panels to be a EDR decision maker. The TOR, or other governing document, should also identify the expertise, skills and experience for EDR decision makers.

Other considerationsSecrecy and access to information

The proposed legislation in s1064 aligns with the secrecy provisions of s63 of the Complaints Act. The SCT considers that it is important to have strong confidentiality requirements for any future EDR scheme, particularly in relation to superannuation complaints, where information may be sought from third parties and the nature of information that can be provided by parties about other individuals (who may not be a party to the complaint).

The secrecy provisions also serve to provide a positive obligation enabling the SCT to provide documents. This is particularly important when inviting third parties to join a complaint. The sharing of documents can only be done for the purposes of the Complaints Act. The proposed drafting is for the 'purposes of the Part' which is broader than the consideration of a superannuation complaint.

Secrecy requirements also impact on the operations of the EDR scheme and services provided. For example, the Complaints Act s63 currently works with s22A to provide the circumstances in which a complaint can be transferred to another complaint-handling body. There is no such provision in the draft legislation.

The SCT as an Australian Government Agency is subject to the Freedom of Information Act (FOI Act). The new EDR scheme will have statutory provisions yet be operated by a private body (not subject to the FOI Act). This may have implications for people's abilities to access information and the new EDR scheme's obligations regarding the provision of information.

Operational Flexibility

The drafting of Division 3 in some instances appears to reflect the current Complaints Act and operations of the SCT. Accordingly, the draft legislation may not afford the desired operating flexibility sought in the new scheme. As an example, the draft legislation prescribes that the conciliation notice must be provided in writing. The draft legislation provides powers specifically for conciliation, but it is silent on other alternatives such as mediation.

4. Question 4: Are there any additional issues that should be considered to ensure an effective transition to the new EDR scheme?

The SCT considers that the approach to transition should minimise the impact on consumers, risks, costs and impact on the dispute bodies. From the date that new complaints can be lodged with the Australian Financial Complaints Authority (AFCA), the SCT should not be able to accept new complaints.

The operation of duplicate schemes with the same jurisdiction will create consumer confusion, additional costs and risks and the potential for consumers to 'game' between different schemes. The SCT considers that an objective for transition should be to prudently minimise any periods of duplicate scheme operation.

The transition from a legislated framework to a co-regulatory framework is a new context for superannuation disputes and the engagement of industry and consumer representatives will be critical to a smooth transition.

New superannuation complaints

The SCT considers that all new superannuation complaints should be taken to AFCA once it is fully operational (which includes the finalisation and implementation of TOR). The SCT is concerned that current legislative drafting could provide for a period of six months during which complaints can be taken to either the SCT or AFCA. This could extend the period before which all complaints are finalised by the SCT and create extra resourcing problems.

Duplicate complaint consideration or loss of access

The creation of AFCA creates the possibility that complaints previously considered by SCT are lodged as new complaints with AFCA. This creates an extreme burden for trustees and insurers and provides opportunity for consumers to have second consideration of a complaint under a different framework.

Currently there does not appear to be any exclusion for the consideration of such complaints and/or their subject matter. In seeking to exclude such complaints it is important to note that the current secrecy provisions in the Complaints Act will prevent the SCT from providing information about past complainants and complaints.

In addition, under legislation the SCT must deal with complaints. If a complaint was lodged with the SCT and subsequently with AFCA, the SCT must continue to resolve the complaint. This scenario could arise in the case of death benefit disputes where different parties lodge complaints at different times with the different schemes.

Alternatively if AFCA has time limits on when a complaint can be lodged, this may preclude complainants who would otherwise have had access to the SCT, particularly if those limits were different from those in operation under the SCT framework.

Existing SCT complaints

The proposal to allow complainants with complaints at the SCT the option to 'transfer' their complaint to AFCA is problematic, potentially confusing and has risks.

- The rights and obligations under the SCT and AFCA are different. Consumers will need to be carefully advised regarding the option.
- It will be an intensive process to transfer complaints that have been progressed under one set of business rules and practices to a scheme with different business rules and practices. There are associated costs and risks.
- It will be an individual process, involving consumers, to seek the permission of parties to implement the transfer given secrecy provisions in the Complaints Act.
- Alternatively, if the 'transfer' was to be undertaken by the complainant withdrawing their complaint at the SCT and lodging a new complaint with AFCA there is the risk that the consumer might lose access, particularly in the case of TPD insurance complaints (assuming AFCA's time limits are similar to the SCT's time limits). This approach would also require all parties to resubmit information.
- In the case of death benefit disputes a complaint could only be transferred if all consumer parties agreed. This could be problematic and create additional stress for the parties.

It is the SCT's considered view that the least risk option regarding any transition period is to not allow current complainants the option of transferring existing complaints to AFCA. Rather the focus should be to resource the SCT to resolve those complaints in a timely and efficient manner at the SCT.

If complainants were to be provided the option to transfer to AFCA the SCT considers it prudent to:

- Limit the time period in which an election can be made, to say 3 months from AFCA commencing operations; and/or
- Limit the 'stage of resolution' at which the election can be made, say jurisdiction and preliminary investigation; and
- Fund the additional work associated with contacting and advising complainants and other parties, and administering the transfer of complaints.

Resolving open SCT complaints

The SCT considers that it is desirable to minimise the period required for the SCT to resolve open complaints. This period will be one of duplicate costs and administrative complexity for industry and confusion for consumers.

It is proposed that the SCT will continue operations until 1 July 2020.¹⁷ This necessitates SCT finalising all existing complaints by 30 June 2020. This will only be achievable if the SCT is resourced appropriately. Resourcing is a function of both funding and available experienced staff.

During any sustained period of uncertainty, or any significant period during which both the SCT and AFCA are operating, there is the risk that experienced staff will leave the SCT.

¹⁷ Improving dispute resolution in the financial system, Consultation Paper, pg7, para 42

The 2017-18 budget did not provide resourcing to enable the SCT to resolve existing complaints by 30 June 2020. Based on the SCT budget currently advised by ASIC for 2017-18, indicative early modelling suggest that open complaints at the SCT will not be finalised until December 2022. This scenario is untenable.

Legacy SCT Matters

Appropriate arrangements will need to be made to manage:

- A small number of open complaints that have been unable to be resolved (such as those under Complaints Act s20);
- Appeals with and to the Federal Court (including the possibility that the Federal Court may remit matters to the SCT for reconsideration);
- Custody of records and associated obligations such as Freedom of Information; and
- Post year end/wind up activities, such as preparation of the Annual Report to Parliament.

5. Question 5, 6 and 7

These matters relate to financial services broadly and the SCT considers that these questions are outside of the remit of the Tribunal.

6. Question 8: What will the regulatory impacts of the new EDR framework be?

The SCT expects the superannuation industry will be impacted by the new EDR framework. A considered assessment of the impacts requires visibility of the complete co-regulatory framework, not only those aspects included as part of the Bill.

Broadly, the SCT would expect the impacts to include:

- Period of funding multiple dispute schemes;
- Disclosure requirements associated with introduction of a new EDR scheme;
- Operational process and system changes that may be required, particularly as the superannuation dispute resolution process designed in AFCA may differ from that of the SCT;
- Operational process and system changes associated with changes to IDR arrangements;
- Development of training and communication materials reflecting the new IDR and EDR framework.

As commented earlier, the SCT has identified a number of areas where consumer protections have been reduced.

7. Conclusion

The SCT considers it critical that the co-regulatory framework of AFCA is designed to accommodate the unique and complex characteristics of superannuation disputes, which distinguish them from other financial disputes, and that the framework is not vulnerable to constitutional challenge.

The SCT is concerned that the Bill does not currently contain all the required statutory provisions for the resolution of superannuation complaints. The current drafting has some problematic consequences which will impact on the rights and obligations of parties to a complaint and the new scheme's operational flexibility.

To ensure any future co-regulatory framework successfully achieves the best of both the statutory and industry ombudsman models, a co-ordinated and considered design of the details of the framework is necessary. The SCT is committed to working with key stakeholders to ensure the current strengths and protections of the SCT statutory framework are maintained in the new co-regulatory framework.

Appendix 1: Impacts on the new scheme, complainants, third parties, and industry

The following table captures what the SCT considers to be key impacts regarding superannuation disputes from the perspective of stakeholders. It is not a complete presentation of the differences, nor a presentation of broader aspects to the Bill (ie those relating to governance of the scheme or IDR).

Feature	Existing Framework	New Framework Observation
Scheme		
The test	<p>The SCT must affirm a decision if it is satisfied that the decision in its operation in relation to the complainant was fair and reasonable.</p> <p>High Court held the SCT framework to be constitutionally valid (<i>Breckler case</i>)</p>	<p>The test is in relation to the decision and there is no requirement to affirm a decision if it was fair and reasonable.</p> <p>Constitutional validity in the new framework is not certain.</p>
Appeal of determination – basis of award for costs	Based on current case law specific to tribunals the Federal Court cannot award costs against the SCT unless the decision is in excess of power, serious misconduct or a perverse action.	The new co-regulatory framework is novel. The case law that applies to awarding costs against a tribunal may not apply to a private body.
Appeal of Determination – what is an error of law	Clear administrative law principles that apply to SCT decision making. The decision maker knows what must be adhered to.	Unclear what principles will apply to invalidate a decision.
Complainants		
Free access	The SCT as a statutory body is not provided under the Complaints Act with any power to charge a fee.	The new scheme is a private body and the legislation does not require free access, although it is a matter to be taken into account in authorising the scheme.
Equivalent appeal rights	At the SCT all parties have equivalent appeal rights.	Different appeal rights. Trustees and insurers might also bring action against the new scheme for breach of contract (i.e. TOR).

<p>Right to appeal a decision to:</p> <ul style="list-style-type: none"> deny access to the scheme summarily dismiss a complaint 	<p>SCT's jurisdiction set out in various sections of the Complaints Act.</p> <p>The Complaints Act s22 provides the power to treat a complaint as withdrawn.</p> <p>Complainant can appeal such a decision under the ADJR Act.</p>	<p>Matters of jurisdiction not established in legislation.</p> <p>Power to withdraw not established in legislation.</p> <p>Unclear if ADJR Act would apply.</p>
<p>Parties in a death benefit dispute</p>	<p>Test considers if fair and reasonable for complainant and other parties with an interest in the benefit.</p>	<p>Test only considers if fair and reasonable for complainant.</p>
<p>Payment of death benefits</p>	<p>The interaction of the Complaints Act and SIS Act to create claim staking. Provides trustee with protection to pay death benefit once time limits expire.</p> <p>Timely payment of death benefits.</p>	<p>No equivalent.</p> <p>Delays to the payment of death benefits.</p>
<p>Insurance complaints</p>	<p>Trustee is always a party to the complaint.</p> <p>Unlimited dollar jurisdiction and remedy.</p>	<p>May not be considered a superannuation complaint. Trustee decision may not be considered.</p> <p>Not afforded same statutory protections, such as unlimited dollar jurisdiction and remedies.</p>
<p>Third Parties (doctors, employers)</p>		
<p>Right to appeal a decision to compel third party to produce documents, attend conciliation</p>	<p>ADJR Act</p>	<p>Unclear if ADJR Act would apply.</p>
<p>Industry</p>		
<p>Certainty about death benefit payments</p>	<p>The interaction of the Complaints Act and SIS Act to create claim staking</p>	<p>No equivalent.</p>