



**Australian Government**

**ESTABLISHMENT OF THE  
AUSTRALIAN FINANCIAL COMPLAINTS  
AUTHORITY**

---

**CONSULTATION PAPER  
NOVEMBER 2017**

© Commonwealth of Australia 2017

This publication is available for your use under a **Creative Commons Attribution 3.0 Australia** licence, with the exception of the Commonwealth Coat of Arms, the Treasury logo, photographs, images, signatures and where otherwise stated. The full licence terms are available from <http://creativecommons.org/licenses/by/3.0/au/legalcode>.



Use of Treasury material under a **Creative Commons Attribution 3.0 Australia** licence requires you to attribute the work (but not in any way that suggests that the Treasury endorses you or your use of the work).

*Treasury material used 'as supplied'.*

Provided you have not modified or transformed Treasury material in any way including, for example, by changing the Treasury text; calculating percentage changes; graphing or charting data; or deriving new statistics from published Treasury statistics — then Treasury prefers the following attribution:

*Source: The Australian Government the Treasury*

#### **Derivative material**

If you have modified or transformed Treasury material, or derived new material from those of the Treasury in any way, then Treasury prefers the following attribution:

*Based on The Australian Government the Treasury data*

#### **Use of the Coat of Arms**

The terms under which the Coat of Arms can be used are set out on the It's an Honour website (see [www.itsanhonour.gov.au](http://www.itsanhonour.gov.au)).

#### **Other uses**

Enquiries regarding this licence and any other use of this document are welcome at:

Manager  
Editorial, Media and Speeches Unit  
The Treasury  
Langton Crescent  
Parkes ACT 2600  
Email: [medialiaison@treasury.gov.au](mailto:medialiaison@treasury.gov.au)

# CONTENTS

---

<b>CONSULTATION PROCESS .....</b>	
<b>CONTEXT AND OVERVIEW.....</b>	<b>1</b>
Reform of the external dispute resolution framework.....	1
Purpose of current consultation .....	2
References.....	3
<b>PART 1 - TERMS OF REFERENCE.....</b>	<b>5</b>
Background and settled positions.....	5
Guiding principles for AFCA's establishment .....	6
Issue 1: Monetary limits.....	7
Issue 2: Enhanced decision making .....	9
Issue 3: Use of panels.....	11
Issue 4: Independent reviews .....	12
Issue 5: Independent assessor .....	13
Issue 6: Exclusions from AFCA's jurisdiction .....	14
Issue 7: Other issues to be addressed in the terms of reference .....	14
<b>PART 2 - SUPERANNUATION .....</b>	<b>17</b>
Background and settled positions.....	17
Issue 8: Additional elements of the superannuation dispute resolution process to be addressed in terms of reference.....	17
Issue 9: Disputes currently before the SCT .....	18
<b>PART 3 - GOVERNANCE .....</b>	<b>21</b>
Background and settled positions.....	21
Issue 10: Ensuring that directors have appropriate skills and experience without being simply representative of sectional interests .....	22
Issue 11: Board responsibilities .....	23
<b>PART 4 - FUNDING .....</b>	<b>25</b>
Background and settled positions.....	25
Issue 12: Funding matters for consideration as part of authorisation .....	26
Issue 13: Interim funding arrangements .....	27
Issue 14: Transparency and accountability.....	28
<b>PART 5 - OTHER ISSUES .....</b>	<b>31</b>
Issue 15: Privacy.....	31
Issue 16: Dealing with non-superannuation legacy disputes .....	31
<b>ATTACHMENT A.....</b>	<b>33</b>

# CONSULTATION PROCESS

---

## FEEDBACK AND COMMENTS

Interested parties are invited to comment on this consultation paper. While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please submit responses sent via email in a Word or RTF format. An additional PDF version may also be submitted.

All information (including name and address details) contained in submissions will be made available to the public on the Treasury website unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails are not sufficient for this purpose. If you would like only part of your submission to remain confidential, please provide this information clearly marked as such in a separate attachment.

**Closing date for submissions: Monday 20 November 2017**

Email: [afca@treasury.gov.au](mailto:afca@treasury.gov.au)

Mail: Head of Secretariat  
AFCA Transition Team  
Financial Services Unit  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Enquiries: Enquiries can be initially directed to AFCA Transition Team.

Phone: 02 6263 2111

The Transition Team will use feedback from this Consultation Paper to inform its advice to the Minister on those matters that should be addressed by a company seeking authorisation as AFCA.

# CONTEXT AND OVERVIEW

---

## REFORM OF THE EXTERNAL DISPUTE RESOLUTION FRAMEWORK

On 9 May 2017, the Government announced that it would establish a new one stop shop to deal with financial system complaints, in response to the *Review of external dispute resolution and complaints arrangements in the financial system* (the Ramsay Review), whose findings and recommendations the Government endorsed.

On 26 July 2017 the Minister for Revenue and Financial Services established a Transition Team led by Dr Malcolm Edey to ensure a smooth transition from the existing three external dispute resolution (EDR) schemes to the new Australian Financial Complaints Authority (AFCA).

On 14 September 2017, the Government introduced legislation to establish the new body.<sup>1</sup> The bill sets out standards that AFCA must meet, provides additional powers to enable AFCA to effectively resolve superannuation disputes and gives ASIC certain regulatory powers, including the power to issue general directions and approve material changes to the AFCA scheme.

The key elements of the AFCA scheme are set out in **Attachment A**. The table reflects the key findings and recommendations of the Ramsay Review and indicates where matters are addressed in the bill. AFCA will be a not-for-profit company limited by guarantee funded by member contributions. While building on the foundations of the existing ombudsman schemes (the Financial Ombudsman Service (FOS) and the Credit and Investments Ombudsman (CIO)), AFCA will have a number of important features. In particular, it will:

- operate with higher monetary limits;
- be more accountable to users, including by having an independent assessor to deal with complaints about its handling of disputes; and
- have powers to support its dispute resolution functions in its terms of reference and, in the case of superannuation disputes, in legislation.

AFCA's terms of reference will set out the way in which AFCA will meet the requirements set in legislation and announced Government policy.

---

<sup>1</sup> **Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017 – Parliament of Australia**. The Bill was referred to the Senate Economics Legislation Committee for inquiry and the Committee's report was tabled on 17 October 2017.

## PURPOSE OF CURRENT CONSULTATION

Dr Edey will advise the Minister for Revenue and Financial Services on key elements relating to the Minister's authorisation of AFCA, including AFCA's terms of reference, governance and funding arrangements.

The Transition Team will not develop AFCA's terms of reference, funding or governance arrangements — these are matters that are the responsibility of the AFCA Board, subject to the legislation and any conditions imposed as part of the authorisation process. The operational details — the "how to" of the scheme — should be included in operational guidelines and other AFCA guidance material that can be easily amended as required to provide a flexible and efficient response to changing requirements. However, fundamental principles and key features of the AFCA scheme will need to be grounded in the terms of reference if they are not in legislation.

The Minister will require a company seeking authorisation to develop a range of materials — specifically a *draft* terms of reference, company constitution and funding model — to demonstrate their capability to satisfy operator, organisational, operational and compliance requirements to which the Minister must have regard in making the authorisation decision.

The Transition Team will use feedback from this Consultation Paper to inform its advice to the Minister on those matters that should be addressed in material submitted to the Minister. This may include advice as to the conditions that should be imposed on authorisation.

### Structure of the Consultation Paper

The Consultation Paper focuses on those aspects of AFCA's operations that will differ from the current arrangements for FOS, CIO and SCT. It does not address arrangements that will not change, or re-open those issues where the Government has either endorsed the Ramsay Review recommendations and findings or where the Minister has indicated the Government's policy intention, whether included in the bill or otherwise.

The following matters are canvassed, with a brief description of relevant issues and/or current practice followed by several questions for discussion:

#### Terms of reference

1. Monetary limits;
2. Enhanced decision-making;
3. Use of panels;
4. Independent reviews;
5. An independent assessor;
6. Exclusions from AFCA's jurisdiction;
7. Other issues to be addressed in the terms of reference;

## Superannuation

8. Additional elements of the superannuation dispute resolution process to be addressed in terms of reference;
9. Disputes currently before the SCT;

## Governance

10. Ensuring that Directors have appropriate skills and experience without being simply representative of sectional interests;
11. Board responsibilities;

## Funding

12. Funding matters for consideration as part of authorisation;
13. Interim funding arrangements;
14. Transparency and accountability;

## Other

15. Privacy; and
16. Dealing with non-superannuation legacy disputes.

## Other consultation processes

ASIC will undertake separate consultation with stakeholders on amendments that will be required to its regulatory guides (RG 139 *Approval and oversight of external dispute resolution schemes*, RG 165 *Licensing: Internal and external dispute resolution*) to reflect the new statutory and policy requirements.

## REFERENCES

References in this paper to proposed sections are to proposed sections of the *Corporations Act 2001*, unless otherwise indicated.



# PART 1 - TERMS OF REFERENCE

---

## BACKGROUND AND SETTLED POSITIONS

### Matters to be taken into account in authorising the AFCA scheme

The Minister when making the decision to authorise the new scheme must be satisfied that mandatory statutory requirements are met (proposed section 1050(1)). These requirements, set out in proposed section 1051, are:

- **Organisational requirements** – that membership of the scheme is open to every entity that is required to be a member of an EDR scheme; operations are financed through contributions by members; the scheme has an independent assessor; and complainants pay no fees or other costs;
- **Operator requirements** – that the scheme operator is a company limited by guarantee; it commissions independent reviews of operations and procedures; and its constitution provides for certain matters including appointment of directors;
- **Operational requirements** – that the complaints mechanism is appropriately accessible; complaints are resolved in a way that is fair, efficient, timely and independent; appropriate expertise is available; reasonable steps are taken to ensure compliance with determinations; determinations are binding on members but not complainants; and for superannuation complaints there are no limits on the value of claims that are made or remedies that may be determined; and
- **Compliance requirements** – that the conditions on authorisation, regulatory requirements, ASIC directions and requirements to notify contraventions and breaches are complied with.

The Minister must also take into account the general considerations of accessibility, independence, fairness, accountability, efficiency and effectiveness of the scheme, and may take into account any other matter the Minister considers relevant (proposed section 1051A). The Explanatory Memorandum to the Bill gives examples of what the Minister may consider in relation to each of the general considerations:

- **Accessibility** - whether the scheme will make it easy for consumers and small businesses to lodge a complaint; whether it will be actively promoted to ensure that consumers and small businesses are aware of its existence; and whether the scheme terms of reference set out the types of complaints that can be considered;
- **Independence** - whether the decision-making will be independent, and whether there will be sufficient funding for the scheme;
- **Fairness** - whether the complaints handling procedures will accord with the principles of natural justice;

- **Accountability** – whether the scheme will: be committed to dealing with and reporting systemic issues to the relevant regulators; provide for an independent assessor; provide for regular consultation with stakeholders; and be subject to regular independent reviews;
- **Efficiency and effectiveness** - the adequacy of the coverage of the scheme, including dispute limits and compensation caps; the time limits for bringing complaints; the processes that will be in place to ensure compliance with determinations; and the remedies that can be provided.<sup>2</sup>

The Ramsay Review noted that many of the key features of the proposed AFCA model are strengths of the current industry ombudsman schemes. These have been important factors in the schemes' success in providing speedy, low cost and flexible dispute resolution to large numbers of consumers (p. 133). The Review recommended other measures, including in relation to accountability, that it considered necessary in order to improve outcomes for users of EDR.

Many matters included in the terms of reference, operational guidelines, funding arrangements and constitution will be common across all financial sector complaints, including superannuation. As a result, this consultation paper considers what matters to include in the terms of reference for all financial sector disputes, including superannuation, except in the cases where specific statutory provisions apply to superannuation disputes.

A small number of additional matters that could be included in the terms of reference, which are specific to superannuation disputes, are discussed in *Part 2 – Superannuation*.

## AFCA's accountability framework

It is critical that AFCA's delivery of dispute resolution services is transparent and accountable to stakeholders. Accountability measures are discussed in more detail below in relation to independent reviews and an independent assessor, at Issue 9 in relation to governance, and in *Part 3 – Funding*.

While the broad conditions under which the AFCA scheme must operate will be set out in legislation as outlined above, the AFCA Board is responsible for determining how AFCA will operate to deliver its services, subject to the legislation and any conditions imposed as part of the authorisation process. Including a range of key matters in AFCA's terms of reference allows appropriate flexibility for the Board to respond to changing needs and operational requirements, while ensuring that any material changes are subject to oversight by ASIC. Further operational detail can be left to the operational guidelines and other guidance issued by the new body, which will not require approval from ASIC prior to change.

AFCA's operations will also be subject to ongoing ASIC oversight and regulation, including directions powers and regulatory guides.

## GUIDING PRINCIPLES FOR AFCA'S ESTABLISHMENT

When considering the guiding principles for AFCA's establishment, it is important to bear in mind the Government's purpose, that is, to have a new 'one stop shop' dispute resolution body to ensure that consumers and small businesses have access to free, fast and binding dispute resolution.<sup>3</sup>

---

2 Explanatory Memorandum, paras 1.52-1.57.

The following guiding principles for establishment of the AFCA scheme are proposed:

- **Compliance** – with statutory requirements, Ramsay Review recommendations, any guidance the Minister gives on the requirements for a scheme to be authorised and ASIC regulatory requirements.
- **Incorporation of better practice principles for dispute resolution** – including reflecting ASIC requirements on EDR, ensuring accessibility of the AFCA scheme and ensuring that the coverage and consumer rights under the AFCA scheme are not less than those currently applying under the various EDR schemes.
- **Adoption of what’s working** – effective and well-established dispute resolution processes and practices should be incorporated in arrangements for the new body – there should be no ‘change for change’s sake’.
- **Efficient and effective transitional arrangements** – no dispute existing on AFCA’s commencement should be left behind.

#### QUESTION FOR DISCUSSION

1. Are there any other principles that should be included in the guiding principles for AFCA’s establishment?

## ISSUE 1: MONETARY LIMITS

*Recommendation 4* of the Ramsay Review was that AFCA on commencement should have significantly higher monetary limits and compensation caps than the existing EDR schemes (FOS and CIO). To remain fit for purpose, they should be subject to regular indexation and review. The Review also recommended maintaining an unlimited monetary jurisdiction for superannuation disputes.

In line with *Recommendation 4.2* concerning pre-commencement consultation, the Government has undertaken consultation on the monetary limits that should operate on commencement and has decided that AFCA will commence operations with the following monetary limits:

- a dispute limit of \$1 million and a compensation cap of \$500,000 for most non-superannuation disputes;
- unlimited monetary jurisdiction for superannuation disputes;
- no dispute limits and compensation caps for disputes about whether a guarantee should be set aside where it has been supported by a mortgage or other security over the guarantor’s primary place of residence; and

---

3 Second Reading Speech, Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017, Senate Hansard, Thursday 14 September 2017.

- for small business credit facility disputes, where a small business credit facility is of an amount up to \$5 million, AFCA should have a compensation cap of \$1 million.

The Government, in announcing the new higher general limits, indicated that there would be further consultation on the sub-limits — referred to in this paper as specific limits — such as the limit for general insurance broking.

The Government also announced that AFCA would be required to commission an independent review of its monetary limits within 18 months of commencing operations, as recommended by the Ramsay Review (*Recommendation 4.2*).

**Current limits** - The current FOS specific limits are as follows:<sup>4</sup>

Type of Claim		Amount per claim
1.	Claim on a Life Insurance Policy or a General Insurance Policy dealing with income stream risk or advice about such a contract. If the claim is in excess of this monthly limit, the monthly limit will apply unless: <ul style="list-style-type: none"> <li>• the total amount payable under the policy can be calculated with certainty by reference to the expiry date of the policy and/or age of the insured; and</li> <li>• that total amount is less than the amount specified in row 4.</li> </ul> If this is the case, then the limit will be the amount in row 4.	\$8,300 per month
2.	Third party claim on a General Insurance Policy providing cover in respect of property loss or damage caused by or resulting from impact of a motor vehicle.	\$5,000
3.	Claim against a General Insurance Broker except where the claim solely concerns its conduct in relation to a Life Insurance Policy (in which case row 1 to 4 applies, whichever is applicable).	\$166,000
4.	Other	\$309,000

## QUESTIONS FOR DISCUSSION

### Specific monetary limits

2. As AFCA will be a new EDR scheme, is it appropriate to maintain specific limits for:
  - income stream risk disputes;
  - general insurance broking disputes; and
  - third-party motor vehicle insurance?
3. If these specific limits are to be retained, should there be an increase in the limits?

### Impact on Professional Indemnity Insurance

4. Are there any anticipated effects on firms that will be disproportionate to any increase in specific increased monetary limits?

<sup>4</sup> FOS Terms of Reference 1 January 2010 (as amended 1 January 2015), Schedule 1.

## ISSUE 2: ENHANCED DECISION MAKING

The Bill requires AFCA to resolve complaints in a way that is ‘fair, efficient, timely and independent’ (proposed section 1051(4)).

The Ramsay Review found (p. 126) that the current decision making test for financial disputes, based on achieving ‘fairness in all the circumstances’ was appropriate and should continue.

In the case of superannuation disputes, the Review found that the current decision making test, which considers whether the trustee’s decision was ‘fair and reasonable’ in the circumstances, was appropriate and should continue. Proposed section 1055 of the Bill reflects this test in requiring AFCA to affirm a decision if satisfied it was fair and reasonable in the circumstances.

The FOS Terms of Reference<sup>5</sup> and CIO Rules<sup>6</sup> set out criteria they will apply in deciding disputes (and in the case of CIO, more generally in dealing with complaints). Relevant extracts from those documents are in the following table.

FOS TERMS OF REFERENCE	CIO RULES
<p><b>Deciding disputes</b></p> <p>8.2 FOS will do what in its opinion is fair in all the circumstances, having regard to each of the following:</p> <ul style="list-style-type: none"> <li>a. legal principles;</li> <li>b. applicable industry codes or guidance as to practice;</li> <li>c. good industry practice; and</li> <li>d. previous relevant decisions of FOS or a Predecessor Scheme (although FOS will not be bound by these).</li> </ul> <p><b>8.1 Rules of evidence</b></p> <p>FOS is not bound by any legal rule of evidence.</p> <p><b>8.3 Specialist input</b></p> <ul style="list-style-type: none"> <li>a. When deciding a dispute, FOS may consult with industry and consumer advisors as FOS thinks appropriate.</li> <li>b. FOS may also obtain expert advice including from a legal expert, industry expert, medical practitioner or building expert appointed by FOS.</li> </ul>	<p><b>Principles CIO has regard to</b></p> <p>12.1 In dealing with a complaint at any stage of the CIO process, the scheme will observe procedural fairness and have regard to:</p> <ul style="list-style-type: none"> <li>a. relevant legal requirements or rights provided by law to the complainant in relation to the subject matter of the complaint;</li> <li>b. applicable codes of practice;</li> <li>c. good practice in the financial services industry; and</li> <li>d. fairness in all the circumstances.</li> </ul> <p>12.3 In considering what is good practice in the financial services industry, the scheme may:</p> <ul style="list-style-type: none"> <li>a. consult within the financial services industry;</li> <li>b. seek, but is not bound by, advice from such persons (including but not limited to those in the financial services industry) that the scheme regards as suitably qualified to give that advice; or</li> <li>c. have regard to an applicable code of practice or industry or regulatory guideline or protocol which has application in the industry in which the financial services provider operates and which the scheme reasonably considers reflects good industry practice, even if the financial services provider has not subscribed to that code of practice or industry or regulatory guideline or protocol.</li> </ul>

5 FOS Terms of reference 1 January 2010 (as amended 1 January 2015), section B8 ‘Deciding disputes’.

6 CIO Rules 10th edition, 15 August 2016, section 12, ‘Principles CIO has regard to’.

In order to maintain the confidence of consumers and member firms, it is critical that AFCA has a robust and consistent approach to decision making. To achieve this, the Government has announced it is appropriate that AFCA:

- adopt a consistent approach to decision-making;
- adhere to a principle of comparability of outcomes;
- publish its decisions in an anonymised form; and
- take into account previous FOS, CIO and SCT decisions as appropriate.

‘Consistency’ in this sense does not mean that the same test will be applied to decisions in superannuation and non-superannuation disputes. It refers to the principle that AFCA should strive for consistency in relation to the way in which it applies each decision making test – to enhance predictability – but also maintain flexibility to take account of the specific facts and circumstances of each individual dispute and, where appropriate, to permit a change in approach.

Also crucial to enhancing confidence in AFCA’s decision making are matters reflecting good internal governance including:

- ensuring that staff at all levels are skilled, knowledgeable about relevant industry sectors and receive appropriate training;
- having detailed operational guidelines to assist staff, including decision makers; and
- having internal quality assurance mechanisms.

#### QUESTIONS FOR DISCUSSION

5. What measures may assist in ensuring AFCA’s decision making processes promote consistency, while:
  - deciding each case on its merits based on the facts and circumstances of the complaint; and
  - maintaining the objective of achieving fairness and flexibility to adapt to changed circumstances?
6. Are there any other principles that may assist in ensuring AFCA provides fair, efficient, timely and independent decisions?
7. To what extent should these principles be reflected in the Terms of Reference, while allowing for operational flexibility?

## ISSUE 3: USE OF PANELS

The Ramsay Review (*Recommendation 2*) recommended that AFCA utilise expert decision making panels to resolve disputes where appropriate, noting the advantages including access to consumer and industry expertise in a particular product or sector. The Review found that panels can serve as a valuable internal measure to strengthen the quality of decision making (p. 129).

The Review noted that FOS uses expert panels to determine particularly complex issues, and that there are financial and time costs associated with their use. The Review considered it important that AFCA balance the need to provide effective outcomes for consumers with efficiency and service considerations such as cost and timeliness.

The Review suggested (p. 129) that considerations that may be appropriate in determining whether to use a panel include:

- the complexity of the dispute;
- the amount of loss as well as other potential consequences of the dispute;
- whether the dispute raises a systemic issue; and
- whether the dispute is likely to result in a 'new' decision that raises novel issues and may set an industry standard in a particular context.

The Review also recommended that AFCA provide clear guidance and transparency to users on when a panel will be used by the body (*Recommendation 2*).

### QUESTIONS FOR DISCUSSION

8. How should AFCA balance the advantages of using panels in certain circumstances against efficiency and service implications including cost and timeliness of its decision making?
9. Are there other factors that should be taken into account when considering whether a panel should be used?
10. How best can AFCA provide clear guidance about to users about when a panel should be used?

## ISSUE 4: INDEPENDENT REVIEWS

AFCA will be required to commission independent reviews of its operations and procedures (proposed section 1051(3)(a)). This is an important aspect of the accountability framework.

FOS and CIO are currently subject to requirements for independent reviews under ASIC RG 139 *Approval and oversight of external dispute resolution schemes*. RG 139 provides that an approved EDR scheme must commission an independent review of its operations and procedures three years after initial approval and every five years thereafter, unless ASIC specifies a shorter timeframe or an earlier review is appropriate (ASIC will be consulting further in relation to these matters). Reviews include both a qualitative assessment and quantitative measures of a scheme's performance. The terms of the review and appointment of the reviewer are subject to consultation with ASIC, but ASIC does not currently have a clear power to require a scheme to conduct a targeted review in response to a particular identified problem.

While the SCT is not subject to independent reviews, it is subject to parliamentary scrutiny and complaint investigation by the Commonwealth Ombudsman.

The Ramsay Review concluded that there should be more frequent independent reviews, based on a program of reviews approved by ASIC. This should include a comprehensive review of how AFCA is meeting EDR benchmarks at least every five years and more targeted reviews in the intervening period (para 9.39). AFCA should consult with ASIC on the terms of reference for a review, with ASIC having the power to require additional matters be included where appropriate (Ramsay Review, para 9.40). Review reports and AFCA's response to any recommendations, including updates on actions taken, should be reported publicly (Ramsay Review, *Recommendation 6* and para 9.41). The Ramsay Review also recommended an independent review within 18 months of commencement of the impact of the higher compensation cap on competition and consumer outcomes (discussed at Issue 1: Monetary limits).

ASIC will consult separately with stakeholders, and will provide guidance in RG 139 about independent reviews of AFCA, including their frequency, the requirements for targeted reviews and ASIC's role. It is important some flexibility is maintained, particularly in relation to targeted reviews, to ensure that their timing is not dictated by hard timelines, but rather is determined by ASIC in consultation with the AFCA Board and in response to matters such as dispute data and trends, stakeholder feedback, complaints or findings of the independent assessor. It is also important that the reviews of AFCA are truly independent, both in practice and in perception.

It is also crucial that from commencement of its operations, AFCA has measures in place to collect detailed data by which to measure its performance, as well as trends in complaints and dispute outcomes across different industry sectors. These data should be published outside the independent review process (for example, FOS and CIO each publish an Annual Review on their websites, and FOS publishes separate annual comparative tables of its dispute statistics).<sup>7</sup>

---

7 See <http://www.fos.org.au/publications/comparative-tables/>.

**QUESTION FOR DISCUSSION**

11. Apart from the review of the impact of the higher compensation cap, are there other aspects of AFCA's operations that should be subject to independent review within the first three years of its commencement?

**ISSUE 5: INDEPENDENT ASSESSOR**

AFCA will be required to have an independent assessor (proposed section 1051(2)(c)). This function will not be to review the merits of an AFCA decision, but to review complaints about service issues in AFCA's dispute handling. Where the independent assessor determines that a dispute, or series of disputes, was not handled satisfactorily, the assessor may recommend that the EDR body take certain actions, including making an apology, providing compensation to the affected user and/or recommending a change to a scheme process or procedure, for example.

The UK FOS has an independent assessor who is appointed by the board and can make recommendations to the Chief Ombudsman. If a recommendation is not accepted, it is remitted to the Board for a final decision. The independent assessor provides an annual report which is published in the FOS annual director's report. There is no review of or appeal from the independent assessor's decision.

FOS has recently appointed an independent assessor.<sup>8</sup> In brief:

- If a person or business is dissatisfied with the standard of service provided by FOS in handling a dispute, they can complain to FOS. If dissatisfied with the response, they can then refer the complaint to the independent assessor for review.
- The independent assessor can make a recommendation to the Chief Ombudsman. If the Chief Ombudsman does not agree with the recommendation, the matter is referred to the Chair of the FOS Board, who may make a final decision or refer the matter to the Board for a final decision.
- The independent assessor is appointed by the FOS Board and reports annually to the FOS Board on the number and nature of the complaints received, the findings made, and the outcomes of any recommendations made. The independent assessor's annual report will be published within the FOS Annual Review each year (available on the FOS website).

ASIC will consult with stakeholders and provide guidance in RG 139 about the role of the independent assessor.

---

<sup>8</sup> The terms of reference are available on the FOS website with details of how the office will operate – see <http://www.fos.org.au/about-us/independent-assessor/>.

### QUESTIONS FOR DISCUSSION

12. How and where should the charter of the independent assessor be defined? Who should be able to make a complaint to the independent assessor?
13. What safeguards should be put in place to ensure the assessor remains 'independent' (for example, should there be restrictions on early termination of the independent assessor)?
14. Should the independent assessor have guaranteed direct access to the AFCA Board?
15. What other reporting arrangements should be in place (for example, if there is serious misconduct or a systemic issue)?
16. Should the independent assessor publish their findings in each case on an anonymised basis?
17. What should happen if AFCA disagrees with the independent assessor's decision?
18. When should a review of the functions and operation of the independent assessor be undertaken?

## ISSUE 6: EXCLUSIONS FROM AFCA'S JURISDICTION

Proposed section 1053 sets out when complaints relating to superannuation may be made. AFCA's terms of reference will set out other restrictions on complaints that AFCA can handle, including monetary and time limits (where not set out in statute for superannuation complaints), and circumstances in which AFCA may determine not to deal, or deal further, with a complaint.

FOS and CIO each have established exclusions from their jurisdiction. The FOS terms of reference and CIO rules currently contain a range of exclusions from jurisdiction, including where there is a more appropriate place to deal with the dispute, such as another dispute resolution scheme or court; where the dispute relates to a financial firm's practice or policy and does not involve an allegation of maladministration or inappropriate application of the practice or policy; the dispute being made is frivolous or vexatious or lacking in substance; or where the applicant has commenced legal proceedings against the financial firm after lodging the dispute with the EDR scheme.

### QUESTIONS FOR DISCUSSION

19. Do existing exclusions from FOS and CIO jurisdictions present any unreasonable barriers to accessing the schemes?
20. Is there more that could be done so that complaints lacking substance are excluded from being dealt with by AFCA?
21. What, if any, further practices should be adopted to ensure the correct balance between accessibility to the scheme and ensuring that complaints not appropriate for consideration by an EDR scheme are excluded?

## ISSUE 7: OTHER ISSUES TO BE ADDRESSED IN THE TERMS OF REFERENCE

As explained earlier in this Consultation Paper, AFCA's terms of reference will play a crucial part in governing its operations and the framework for its accountability. Not only will the terms of

reference be a public statement of key features of the AFCA scheme and the fundamental principles that will govern how AFCA carries out its functions, but any material change to the terms of reference following authorisation by the Minister will need to be approved by ASIC.

The details of how AFCA will carry out its day to day activities should not be included in the terms of reference but in operational guidelines that can be easily amended as the need arises. AFCA will also over time develop a series of other publications to provide guidance on how it will approach various issues, such as case studies and practice notes, as well as public information materials.

This Consultation Paper has not canvassed all matters that are in the current FOS and CIO terms of reference/rules and that should be included in AFCA's terms of reference (for example, the powers of decision makers; the time limits on making complaints; and the remedies that may be applied). However, there may be other important issues not currently in the FOS and CIO documents which stakeholders consider warrant inclusion in AFCA's terms of reference.

One key issue to be addressed is accessibility, which is one of the general considerations for the AFCA scheme under proposed section 1051A. DIST Benchmarks for industry-based customer dispute resolution schemes (included in RG 139) define accessibility as follows: 'The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers'. Means of promoting accessibility include such measures as ensuring information is written in plain English; not requiring complaints to be put in writing and assisting complainants if necessary to make a complaint (including by offering interpreter services and translations of basic guidance material); providing a range of ways to complain (including through electronic formats that meet WCAG 2.0 accessibility requirements); and promoting knowledge of the scheme and consumer rights, especially in vulnerable and disadvantaged communities.

#### **QUESTIONS FOR DISCUSSION**

22. What requirements relating to accessibility should be included in AFCA's terms of reference?
23. Having regard to the current FOS terms of reference and CIO rules, what principles and topics are of sufficient ongoing significance that they should be addressed in the AFCA terms of reference?
24. Are there any matters not currently included in the FOS terms of reference/CIO rules that warrant inclusion in AFCA's terms of reference?



## PART 2 - SUPERANNUATION

---

### BACKGROUND AND SETTLED POSITIONS

From 1 July 2018, the SCT will no longer receive new superannuation complaints. All new superannuation complaints will be made to AFCA. The SCT will continue to operate until 30 June 2020 to resolve its existing backlog of complaints.

All trustees of APRA-regulated superannuation funds, other than self-managed superannuation funds, will be required to be members of AFCA. The trustees of Exempt Public Sector Superannuation Schemes (EPSSSs) may choose to be members of AFCA.

The transition from a statutory dispute resolution scheme to an ombudsman-based model for superannuation complaints is intended to provide more flexibility, accountability and transparency in relation to funding, governance and dispute resolution processes. The Ramsay Review recommended superannuation complaints transition to an industry ombudsman-based model, and that statutory powers be provided to AFCA where required to resolve superannuation complaints. The Ramsay Review also recommended that the current decision making test for superannuation complaints (applying the 'fair and reasonable in all the circumstances' test) should be maintained and the unlimited monetary jurisdiction for superannuation complaints should be retained.

Consistent with Ramsay Review *Recommendation 3*, in recognition of the unique characteristics of superannuation complaints, the Bill contains a number of legislative provisions related to the resolution of these complaints, ensuring that AFCA has the appropriate statutory powers to resolve these complaints effectively. The Bill also contains statutory provisions where the Government has determined that elements of the resolution of superannuation complaints should not be changed (for example, unlimited monetary jurisdiction or the 'fair and reasonable in all the circumstances' test).

As superannuation complaints will transition to an industry ombudsman-based model, FOS and SCT have formed a joint working group that has, amongst other things, considered the design of the complaints resolution process given the statutory provisions in the AFCA Bill.<sup>9</sup>

### ISSUE 8: ADDITIONAL ELEMENTS OF THE SUPERANNUATION DISPUTE RESOLUTION PROCESS TO BE ADDRESSED IN TERMS OF REFERENCE

To enhance flexibility in the resolution of superannuation complaints, other elements of the dispute resolution process for superannuation will be set out AFCA's terms of reference, operational guidelines, funding arrangements and constitution, as appropriate.

---

<sup>9</sup> Financial Ombudsman Service, submission to Senate Economics Legislation Committee, Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017, page 14.

Many matters included in the terms of reference, operational guidelines, funding arrangements and constitution will be common across all financial sector complaints, including superannuation. These matters have been addressed in **Part 1 – Terms of Reference**. This includes accountability for the terms of reference, with any material changes being approved by ASIC.

There could be additional matters specific to superannuation that may need to be addressed in AFCA’s terms of reference or operational guidelines. Examples include:

- who can make a superannuation complaint;
- time limits for superannuation complaints other than death benefit complaints, where required, such as disability benefit complaints;
- superannuation-specific exclusions to AFCA’s jurisdiction, such as:
  - complaints that deal with the management of a fund as a whole; and/or
  - complaints that have been or are being considered by the SCT before or during the transition period;
- specific requirements for decision making on complex superannuation matters, such as death benefit complaints (for example, where specific expertise may be required);
- the use of panels for complex superannuation matters; and
- exceptions to referrals back to internal dispute resolution for death benefit complaints, for example where statutory time limits apply.

#### QUESTIONS FOR DISCUSSION

25. What additional matters related to superannuation should be addressed in AFCA’s terms of reference (as opposed to operational guidelines)?
26. What matters related to superannuation would benefit from the additional flexibility that comes from being addressed in operational guidelines?

## ISSUE 9: DISPUTES CURRENTLY BEFORE THE SCT

The *Superannuation Industry (Resolution of Complaints) Act 1993* provides that a complaint can be withdrawn by the complainant at any time.

The Explanatory Memorandum to the Bill states:

*“Where the SCT has not made a final determination of a complaint, the complainant may choose to continue to progress the complaint with the SCT. Alternatively, the complainant may withdraw the complaint and progress the complaint with the AFCA scheme instead.”*

The AFCA Bill does not preclude AFCA from accepting a complaint that has been previously lodged with another external dispute resolution body. However, AFCA has the ability to exclude such complaints in its terms of reference.

For example, the current FOS terms of reference state:

*“The Service may not consider a Dispute:*

*...*

- k) where the Dispute raises the same events and facts and is brought by the same Applicant as a Dispute previously dealt with by FOS or a Predecessor Scheme and there is insufficient additional events and facts raised in the new Dispute to warrant FOS’s consideration of the new Dispute;*
- l) that has already been dealt with by a court or dispute resolution tribunal established by legislation, or by another external dispute resolution scheme approved by ASIC”.*

The FOS terms of reference also state:

*“FOS may refuse to consider, or continue to consider, a Dispute, if FOS considers this course of action appropriate, for example, because:*

- a) there is a more appropriate place to deal with the Dispute, such as a court, tribunal or another dispute resolution scheme or the Privacy Commissioner”.*

Stakeholders have indicated that there may be inefficiencies if a complaint that is currently being considered by the SCT is withdrawn and considered afresh by AFCA. This inefficiency becomes larger the further the complaint progresses with the SCT and more resources have been devoted to its resolution. Conversely, complainants who have not had their complaint progress with the SCT may wish to withdraw their complaint and have it considered by AFCA, rather than waiting for the SCT to resolve its backlog of complaints.

It will be important for both the SCT and AFCA to have appropriate arrangements in place to manage the withdrawal of complaints effectively. It will also be important for the SCT and AFCA to provide information to complainants about when a complaint can and cannot be heard by each body during the transition period and what the consequences of a withdrawal of a complaint from the SCT may be. For example, if a complaint is withdrawn from the SCT and lodged with AFCA, time limits that apply to the complaint may have been exceeded.

To the extent that AFCA’s terms of reference may exclude consideration of complaints that have been ‘dealt with’ by a predecessor scheme, the point at which a complaint is considered to be ‘dealt with’ by the SCT will need to be clearly defined. Additionally, it will be important to consider what information can be exchanged between the SCT and AFCA, given the statutory provisions in the *Superannuation (Resolution of Complaints) Act 1993*.

#### **QUESTION FOR DISCUSSION**

27. What additional arrangements could be put in place to facilitate the transition of complaints that were lodged with the SCT prior to 1 July 2018, but are not yet ‘dealt with’, to be considered by AFCA? At what point could a complaint be considered to be ‘dealt with’ by the SCT?



# PART 3 - GOVERNANCE

---

## BACKGROUND AND SETTLED POSITIONS

### The company

As outlined in *Attachment A*, AFCA will be a not-for-profit company limited by guarantee authorised by the Minister to operate an external dispute resolution scheme for the finance sector. Only one company can be authorised at any time. The Minister may impose conditions on the authorisation.

Membership of the company will be open to each financial services provider required under law or a licence condition to be a member.

AFCA operations will be financed by contributions made by its members. Complainants will not be subject to any fee.

### The Board

The AFCA Board will comprise an independent Chair, and equal numbers of:

- directors with experience in carrying out the types of businesses operated by the members; and
- directors with experience in representing consumers.

The Minister will appoint a minority of the initial directors, including the initial Chair. Ministerial authority to appoint directors will lapse six months after the date of authorisation (proposed section 1051(3)(e)).

The constitutions of FOS and CIO each provide that any board vacancy should be filled by a nomination of the remaining directors, following consultation with relevant industry or consumer bodies. There has been no suggestion in submissions to the Ramsay Review or in relation to the draft legislation that AFCA should depart from this practice.

Given that under the new framework superannuation disputes will, for the first time, be resolved under an ombudsman scheme rather than a tribunal, the Government has determined that the initial AFCA board should have at least one director with superannuation experience and expertise.

The FOS board has nine directors, while CIO has up to seven. In each case there is an independent chair and equal numbers of directors drawn from an industry and a consumer background. The SCT has an eight member advisory board, including one consumer representative.

Having regard to the need for diversity of experience on the board, and its effective functioning, the Transition Team suggests that a board of 9 to 11 directors is likely to provide the optimal governance arrangement for AFCA.

## Board responsibilities

The AFCA Board will be responsible for ensuring that the scheme meets the requirements imposed by legislation, Ministerial conditions and ASIC directions. In particular, it must ensure that the scheme is accessible, independent, fair, accountable, efficient and effective. It should provide for monitoring and addressing systemic issues to improve future outcomes for consumers, as well as for community engagement, including outreach activities.

Any material change proposed for the scheme must be approved by ASIC.

## ISSUE 10: ENSURING THAT DIRECTORS HAVE APPROPRIATE SKILLS AND EXPERIENCE WITHOUT BEING SIMPLY REPRESENTATIVE OF SECTIONAL INTERESTS

Both FOS and CIO have a requirement in their constitutions to consult members and consumer groups before their boards appoint new directors. SCT does not have an equivalent process as it does not have a board of directors – Tribunal members are appointed by the responsible minister, while the Chairperson and Deputy Chairperson are appointed by the Governor-General.

AFCA will have a broader membership base than any of the existing EDR schemes, ranging from the largest banks, insurers, fund managers and superannuation funds through to sole trader brokers. The legal relationship between superannuation funds and their members is different from that between other financial service providers and their customers, in that consumer rights are defined by the governing rules of a trust rather than by contract.

There is a risk that, if there were a requirement to appoint at least one director with a background in a particular aspect of financial services, that director may be seen as a representative of the industry segment and having obligations to it. That could give rise to an apparent (if not an actual) conflict of duty.

Both FOS and CIO constitutions use the term “independent” in relation to the board chair, without defining it. Both the ASX governance principles and APRA’s prudential standards provide a description of independence.<sup>10</sup>

---

<sup>10</sup> For example, APRA states “an ‘independent director’ is a non-executive director who is free from any business or other association — including those arising out of a substantial shareholding, involvement in past management or as a supplier, customer or adviser — that could materially interfere with the exercise of their independent judgement”.

**QUESTIONS FOR DISCUSSION**

28. What measures could be put in place to secure sufficient knowledge of how different parts of the industry operate, while avoiding the representative tag for directors?
29. What measures should be put in place to ensure the AFCA Board appropriately balances the considerations of currency of director knowledge of particular industry sectors, conflict of interests, and breadth of competencies required?
30. What needs to be addressed at a Board/constitution level and what can be addressed through additional governance arrangements established by AFCA such as industry sector advisory panel(s) for transition?

**ISSUE 11: BOARD RESPONSIBILITIES**

The constitutions of both FOS and CIO establish objectives or functions for the companies. It is likely that AFCA will draw on both of these, and adjust them to have regard for the somewhat different arrangements applying in respect of superannuation.

As an organisation charged with offering an external dispute resolution service, it is expected that AFCA will apply at least as high a standard of governance as is required of its members. As such, it is expected that AFCA would have regard to the ASX corporate governance principles, as well as APRA's prudential standards and guidance in relation to corporate governance.

**QUESTIONS FOR DISCUSSION**

31. Are there additional functions or responsibilities of the AFCA board that are not reflected in the constitutions of the existing schemes?
32. What benchmarks should AFCA have in relation to matters addressed in the ASX corporate governance principles, including:
  - board renewal;
  - diversity;
  - procedures for assessing board performance;
  - management of conflicts of interest or of duty on the part of directors and executive staff; and
  - remuneration policy?
33. Should the Constitution or governing rules provide that neither the board nor individual directors can direct a decision-maker with regard to the outcomes of a particular dispute or class of disputes?



# PART 4 - FUNDING

---

## BACKGROUND AND SETTLED POSITIONS

Under the new framework, AFCA will be required to ensure it has:

- adequate resourcing (including funding, infrastructure and skills) to fulfil all the tasks it undertakes so that it can conduct its dispute resolution function in the manner prescribed in legislation;
- sufficient funding and flexible processes to allow it to deal with unforeseen events; and
- appropriate levels of financial transparency to ensure it is accountable to member firms.

Funding for dispute resolution functions must come from member firms — the dispute resolution services must be free to consumers.

There are two basic models for funding currently operating:

- solely membership based (along the lines of SCT funding where levies are collected by APRA based on fund size);
- a combination of membership fee plus a case related component (as used by both FOS and CIO).

The combination model reflects that all member firms are required to be part of an EDR scheme, and so should contribute to its base costs, while those firms which generate complaints requiring external resolution should bear the greater part of those costs.

Within the combination model, variants are available with different weightings applied to the base membership fee as compared with the case management component. In this regard, FOS and CIO arrangements differ markedly.

There is consensus that good design would provide an incentive for firms to minimise the number of complaints requiring external resolution. At the same time, firms should not suffer disproportionately from customers who prove to be vexatious.

Good design would also minimise cross-subsidisation between different parts of the financial sector, and between firms depending on the nature of disputes they encounter. As a general principle, it should cost less to resolve a simple, low value complaint or ones which settle by consensus, while a higher charge should apply in respect of more complex cases and/or those requiring determination by a panel. At the same time, the cost of AFCA administering a highly detailed charging model needs to be taken into account.

Recognising that membership of AFCA will be required in most instances as a condition of providing a financial service, good practice would also provide for members to be consulted on the design of the funding model. This has been the current practice of both FOS and CIO; it has not been applicable for the SCT as it is funded by appropriation from the Commonwealth budget.

## ISSUE 12: FUNDING MATTERS FOR CONSIDERATION AS PART OF AUTHORISATION

In assessing the organisational and operational requirements for authorisation, it is likely that the Minister will have regard to the requirements above when making the authorisation decision. In this regard, it is expected that the board of a company seeking authorisation as AFCA will present the Minister with sufficient information about the likely costs of operation for 2017-18 and 2018-19, together with how such costs could be covered through a feasible funding model likely to be acceptable to future AFCA members.

This might best be achieved by the company seeking authorisation:

1. Demonstrating that:
  - its likely costs of operation for 2017-18 take into account all measures likely to be necessary to ensure that AFCA can commence receiving and resolving disputes by 1 July 2018, including ensuring that a mechanism is in place for all prospective members to join the scheme by a date specified by the Minister in accordance with s. 44 of the Bill; and
  - its likely costs of operation for 2018-19 reflect operating processes that would enable disputes received in that year (and any legacy disputes referred by the existing EDR bodies) can be resolved in a manner that satisfies the specific and general considerations for authorisation.
2. Demonstrating that the framework for its future funding model will meet the following design principles:
  - The funding model will be such that the Board can be confident that AFCA will consistently raise the revenue necessary to meet the costs of effective operation and ongoing enhancements of a service that satisfies the relevant EDR benchmarks;
  - The model will provide a fair allocation of annual membership levies to members according to their size, incorporates incentives to resolve disputes early and, as appropriate, reflects attributes of a user-pays approach;
  - The model will seek to minimise direct sectoral cross-subsidisation to the extent practicable; and
  - The model will support an efficient and reliable system for the collection of revenue.
3. Providing details of how it will meet its financial reporting requirements and report its progress against business plans.

The Bill does not preclude the company operating the AFCA scheme from undertaking other functions – as FOS does currently with monitoring compliance with industry codes of conduct. It is expected that, in considering a proposal for authorisation, the Minister would wish to be clear whether the company proposed undertaking any function not directly linked to the resolution of complaints against members of the company.

In this respect, activities such as community outreach and education would be seen as directly linked to the complaint resolution function, as they enhance the accessibility of the scheme for consumers. However, monitoring industry codes would not have that direct relationship.

If the company were undertaking functions not directly related to the resolution of complaints, it is likely that the Minister would require that the authorisation proposal would demonstrate that funding for disputes resolution would be undertaken separately from funding for those other, without cross-subsidisation between functions.

#### QUESTIONS FOR DISCUSSION

34. In addition to matters identified in paragraphs 1-3 above, what other material should a company seeking authorisation to operate the AFCA scheme provide to demonstrate that it has satisfied the requirements of adequate funding and sufficient funding flexibility?
35. Are there any principles beyond those identified in paragraph 2 above that should underpin AFCA's funding model?
36. Should the funding arrangements for superannuation and non-superannuation disputes be separate and distinct, given the very different nature of these disputes?

### ISSUE 13: INTERIM FUNDING ARRANGEMENTS

While initial data to support estimates of costs for different types of disputes drawn from different industries could be sourced from FOS, SCT and CIO, it should be acknowledged that those costs would be based on the operating styles and processes adopted by those bodies, rather than on an AFCA approach. SCT secrecy provisions make it difficult to associate dispute costs with particular funds or sectors. AFCA would need to collect detailed data in its first couple of years of operation to allow more refined estimates to be developed.

For these reasons, it is likely that there would be insufficient time between AFCA's authorisation and the time its first member firms join AFCA for it to have a fully developed and sustainable funding model accepted.

On that basis, it is likely that an interim funding model will be required. The interim funding model should, ideally, conform as far as possible to the design principles noted above, but there will be challenges in achieving this given the differences in existing funding arrangements.

#### QUESTIONS FOR DISCUSSION

37. If an interim funding arrangement were put in place, what features should it have and when would it be appropriate to transition to a long-run funding model?
38. What special considerations might need to be factored into an interim funding model to balance the need for adequate resources (certainty) with the principles (accuracy)?

## ISSUE 14: TRANSPARENCY AND ACCOUNTABILITY

Accountability of the scheme is one of the general considerations about which the Minister must be satisfied before authorising AFCA (proposed sections 1050(2) and 1051A).

The Bill requires that AFCA is appropriately accessible to consumers, and that complaints are resolved in a way that is fair, efficient, timely and independent (proposed section 1051(4)). Achieving this requires adequate resourcing and sensible procedures. AFCA will need to be accountable to stakeholders in respect of each of these dimensions.

As AFCA will be the sole dispute resolution body for financial disputes, it is also critical that there is adequate transparency and accountability to members for fees charged.

The Explanatory Memorandum to the Bill states that when considering whether the EDR scheme is 'accountable', the Minister may consider matters such as:

- whether the scheme will be committed to dealing with and reporting systemic issues to the relevant regulators;
- whether the scheme will provide for an independent assessor, and
- whether the scheme will provide for regular consultation with stakeholders and be subject to regular independent reviews.<sup>11</sup>

AFCA will be subject to at least the following accountability mechanisms:

- governance by a board with an independent chair and equal numbers of directors with industry and consumer backgrounds, ensuring it balances the needs of consumers and industry members. The Minister will make a one-off appointment of the minority of the board;
- enhanced ASIC oversight. ASIC will consult on guidance and regulatory instruments which provide for its statutory oversight role. It will have a new directions powers to require AFCA to comply with its legal obligations;
- regular independent reviews; and
- financial transparency, including in relation to funding arrangements, level of revenue and level of expenditure.

Additionally, the Minister for Revenue and Financial Services has signalled that AFCA will be required to report annually to her on any changes to fees, as a condition of authorisation.

---

<sup>11</sup> Explanatory Memorandum, para 1.56.

### QUESTIONS FOR DISCUSSION

39. Who are the key stakeholders AFCA is accountable to? What is the key objective and measure of importance to each stakeholder?
40. In addition to the accountability measures in the Bill, are there additional measures that should be embedded in AFCA's Constitution and/or terms of reference or reflected in ASIC guidance to ensure accountability to stakeholders?

Since membership of AFCA is compulsory for financial services businesses, members will expect that the cost to them is minimised, consistent with AFCA fulfilling its core function. Transparency in operational costs, business planning and outcomes will be an important accountability tool. So too, all users of AFCA and the broader community will have an interest in ensuring accessibility and outreach are key attributes of the scheme.

### QUESTION FOR DISCUSSION

41. Are there other conditions that could be put in place to ensure the scheme is accountable to members in relation to fees?



## PART 5 - OTHER ISSUES

---

There are several other issues which are currently under consideration by the Transition Team for discussion with the three dispute resolution bodies.

These are:

- privacy; and
- transitional arrangements for legacy disputes.

### ISSUE 15: PRIVACY

Both FOS and CIO are EDR schemes recognised by the Australian Information Commissioner under the *Privacy Act 1988* (s 35A). This means they can, subject to their terms of reference, investigate, facilitate, decide and make recommendations on complaints about acts or practices of their members that may be an interference with the privacy of an individual. While SCT is not a recognised EDR scheme, it is subject to the Australian Privacy Principles.

Section 21D of the Privacy Act requires credit providers to be members of a recognised scheme to be able to disclose information to credit reporting bodies. The *National Consumer Credit Protection Act 2009* (s 47(1)(i)) also requires credit licensees to be members of an EDR scheme approved by ASIC). Parts 4 and 5 of the Bill (when commenced) will change this membership requirement to the AFCA scheme. Accordingly AFCA will need to take steps to be recognised by the Australian Information Commissioner as an EDR scheme, and the AFCA terms of reference will need to recognise complaints against members about privacy issues as falling within its scope.

### ISSUE 16: DEALING WITH NON-SUPERANNUATION LEGACY DISPUTES

#### Transitional arrangements

While the Bill accommodates an approach whereby FOS and CIO continue operations from 1 July 2018 solely to resolve legacy disputes, feedback from industry and consumer bodies to date has been that this approach, which could see up to four EDR schemes in operation concurrently, is undesirable.

The alternative approach — which would see a transfer of legacy disputes from FOS and CIO to AFCA, to be resolved under the originating scheme's terms of reference, would necessitate specialised agreements between the originating schemes and AFCA.

Targeted consultation with the existing EDRs in relation to the appropriate management of legacy disputes will be conducted upon passage of the legislation to develop a common sense approach that will minimise confusion, disruption and cost to consumers and financial firms.



# ATTACHMENT A

**TABLE 1: PROPOSED FEATURES OF AFCA, REFLECTING THE RAMSAY REVIEW (RR) AND PROVISIONS OF THE BILL**

<b>Financial disputes (other than superannuation disputes) Superannuation disputes</b>	
<b>ROLE</b>	To provide a fair, economical, informal, quick and flexible alternative to the court system. (RR p. 135)
<b>STRUCTURE</b>	A single EDR body for all financial disputes (including superannuation disputes). A company limited by guarantee. <b>Proposed section 1051(3)(c)</b>
<b>GOVERNANCE</b>	Governed by an independent board, with an independent chair and equal numbers of directors with industry and consumer backgrounds. <b>Proposed section 1051(3)(d)</b> Minister may appoint the Chair and a minority of directors within 6 months. <b>Proposed section 1051(3)(e)</b>
<b>FUNDING ARRANGEMENTS</b>	Free to complainants, funded by industry through a transparent process. <b>Proposed section 1051(2)(b)</b> Funding arrangements will be flexible to deal with a range of circumstances, including unanticipated increases in disputes.
<b>MEMBERSHIP</b> <b>(Credit representatives – RR Chapter 11)</b>	Australian financial services licensees and credit licensees. Superannuation trustees and other entities within SCT's current jurisdiction. Proposed section 1051(2)(a) – scheme is open to every entity required by law or licence/permission to be a member
<b>JURISDICTION</b> <b>(RR Chapter 8, Recommendations 4 and 5)</b>	Monetary limits that are higher than existing FOS/CIO limits will apply. <b>Government announcement</b> Existing time limits that apply to disputes will continue to apply. There will be an unlimited monetary jurisdiction, maintaining existing levels of access to redress. <b>Proposed section 1051(4)(f)</b> Time limits for death benefit and total and permanent disability disputes can apply. 'Claim-staking' process for death benefit disputes should be retained (RR Chapter 7).

Financial disputes (other than superannuation disputes)		Superannuation disputes
<b>POWERS</b> (RR Recommendation 3, Chapters 5 and 7)	Contractual powers, set out in the Terms of Reference.	Combination of contractual and statutory. Contractual powers would be articulated in Terms of Reference. In addition, statutory provisions will apply to the EDR body where required to accommodate the unique features and complexities of some superannuation disputes. <b>Proposed sections 1054-1054C</b>
<b>DISPUTE RESOLUTION CRITERIA</b> (RR Chapters 5 and 7)	‘Fair in all the circumstances’, taking into account legal principles, any applicable industry codes of practice, as well as good industry practice and previous relevant decisions of FOS and CIO (noting the EDR body is not bound by these). <b>Proposed section 1051(4)(b) partly addresses – complaints to be resolved ‘in a way that is fair, efficient, timely and independent’. Rest to be in TOR.</b>	Whether the trustee’s decision was ‘fair and reasonable’ in the circumstances (current test). If the trustee’s decision was fair and reasonable, the EDR body must affirm decision. <b>Proposed section 1055(4)-(6)</b>
<b>REMEDIES</b>	Wide range of remedies, including ability to award non-financial loss. Non-compliance with a determination will be reported to the appropriate regulator. <b>Proposed section 1052E</b>	Retain existing remedies. <b>Proposed section 1055</b> Non-compliance with a determination will be reported to the appropriate regulator. <b>Proposed section 1052E</b>
<b>ACCOUNTABLE TO USERS</b> (RR Chapter 9)	Must be subject to enhanced accountability. Must have funding flexibility, financial transparency, and be subject to regular independent reviews. <b>Proposed section 1051(3)(a)</b> An independent assessor to review complaints about the handling of disputes. <b>Proposed section 1051(2)(c)</b>	
<b>SYSTEMIC ISSUES REPORTING</b>	The EDR body must monitor, address and report systemic issues. <b>Proposed section 1052E</b>	
<b>RIGHTS OF APPEAL</b>	Consumer not bound by decision, can still go to court/mediation. <b>Proposed section 1051(4)(e)</b> Financial firm bound by decision, able to appeal in limited circumstances (similar to what is currently available in relation to FOS/CIO decisions). <b>Proposed section 1051(4)(e)</b>	Parties can appeal decision to Federal Court on matters of law, given unlimited monetary jurisdiction. A consumer who does not defend the appeal will not have costs ordered against them. <b>Proposed section 1057</b>

**Financial disputes (other than superannuation disputes) Superannuation disputes**

**INTERNAL DISPUTE  
RESOLUTION (IDR)  
(RR Chapter 10)**

Consumer must have attempted IDR before accessing the EDR body.

Body must provide a final opportunity to resolve the dispute at IDR and monitor disputes returned to IDR.