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Head of Secretariat
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Dear Sir/Madam

Response to consultation paper: *Establishment of the Australian Financial Complaints Authority*

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide the attached response to the consultation paper *Establishment of the Australian Financial Complaints Authority*, released on 3 November 2017.

If you have any queries or comments in relation to the content of our submission, please contact me on (02) 8079 0808 or by email gmccrea@superannuation.asn.au, Julia Stannard, Senior Policy Advisor, on (03) 9225 4027 or jstannard@superannuation.asn.au, or Andrew Craston, Senior Research Advisor, on (02) 8079 0817 or acraston@superannuation.asn.au (in relation to funding-related aspects of the submission).

Yours sincerely

Glen McCrea
Chief Policy Officer

The Association of Superannuation Funds of Australia
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Response to consultation paper: *Establishment of the Australian Financial Complaints Authority*

The Association of Superannuation Funds of Australia
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A. ABOUT ASFA

ASFA is a non-profit, non-political national organisation whose mission is to continuously improve the superannuation system, so all Australians can enjoy a comfortable and dignified retirement. We focus on the issues that affect the entire Australian superannuation system and its $2.3 trillion in retirement savings. Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing over 90 per cent of the 14.8 million Australians with superannuation.

B. KEY POINTS

ASFA considers it critical that consumers of financial services have access to a dispute resolution framework that operates effectively and efficiently, and we are supportive of reforms that will improve outcomes for consumers. However, we remain concerned that the speed with which the proposed reforms are being implemented, and the fragmented approach taken to the consultation process, will have an adverse impact on the quality of the outcome. We note that the two week period allowed to respond to the Consultation Paper has not allowed stakeholders to fully consider the questions posed, and this will impact the quality of the submissions provided.

In the absence of final legislation to establish the new dispute resolution regime, and taking into account the significant amount of work that will be required to implement the new arrangements, ASFA remains of the view that a commencement date of 1 July 2018 is unrealistic. We consider that a measured commencement date would be no earlier than 1 January 2019. This would, in our view, more appropriately reflect the need to allow adequate time for passage of the legislation, authorisation of a company to operate the AFCA scheme, development and finalisation of the terms of reference for the AFCA scheme and the ASIC regulatory requirements, and all necessary establishment activities.

In relation to the specific matters canvassed in the Consultation Paper, ASFA notes:

- Significant issues specific to the resolution of superannuation complaints will need to be addressed in the AFCA terms of reference, including:
    - who can (and cannot) make a superannuation complaint
    - exclusions from AFCA's jurisdiction
    - handling of death benefit related complaints lodged around the time of the transition
    - time limits for certain types of superannuation complaints.
- The ability to withdraw a complaint where the SCT has not yet made a final determination and commence it anew with AFCA raises complex issues and will involve potentially considerable duplication of effort and cost, as well as the prospect of 'forum shopping'. ASFA has significant reservations regarding this proposal and is of the view it should apply only to those complaints that the SCT has received but not yet commenced to consider.
- As a general principle, the funding model should minimise cross-subsidisation of AFCA's costs in general, and the costs of dispute resolution in particular. The fee schedule ultimately adopted will need to recognise that the general funding model may not be appropriate for superannuation-related complaints, particularly for death benefit disputes.

C. GENERAL COMMENTS

ASFA welcomes the opportunity to comment on the consultation Paper issued by the Australian Financial Complaints Authority (AFCA) Transition Team on 3 November 2017: *Establishment of the Australian Financial Complaints Authority* ("the Consultation Paper").

Our submission builds upon previous ASFA responses to:

- the Review of the financial system external dispute resolution framework (Ramsay Review), in relation to the Review's issues paper and interim report (7 October 2016 and 30 January 2017)
- Treasury, in relation to the exposure draft *Treasury Laws Amendment (External Dispute Resolution) Bill 2017* (20 June 2017)
- The Senate Economics Legislation Committee in relation to the *Treasury Legislation Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017* (29 September 2017)

This submission is primarily focussed on the experience of members, beneficiaries and trustees of APRA-regulated superannuation funds. We note that while many APRA-regulated superannuation funds are also members of FOS, the SCT is their primary external dispute resolution (EDR) scheme and interactions with the FOS are focused on issues of advice and tend to be infrequent.

C.1 Timing issues – 1 July 2018 commencement appears unrealistic

It is critical that the transition from the current EDR model to the new single EDR body model is managed carefully and smoothly, to minimise both disruption and potential adverse consequences for consumers and financial services providers.

At the time of this consultation, the Bill to establish AFCA has not yet been passed by Parliament – in fact, it has not yet been brought on for debate. The absence of final legislation stands as a significant impediment to progressing the implementation of AFCA.

As outlined in our previous submissions to the Senate Economics Legislation Committee, Treasury and the Ramsay Review, it is clear that substantial effort will be required to create the new EDR scheme and prepare it for operation. Impacted stakeholders will include the AFCA Transition Team and (once installed) the AFCA Board and staff, ASIC, all financial firms that are required to become members of AFCA, and the three existing EDR schemes – the SCT, FOS and CIO. These impacts will be felt more severely by the APRA-regulated superannuation sector than by other sectors of the financial services industry, given the substantially different nature of AFCA and the SCT.

The regulatory and governance framework that must be created for the new dispute resolution framework is considerable, and will include:

- passage of the *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017* (AFCA Bill) and the making of regulations;
- incorporation of the AFCA corporate entity, appointment of its Board and engagement of staff;
- development and finalisation of the terms of reference for AFCA and establishment of its operating processes;

- development of a funding model;
- authorisation of the AFCA scheme by the Minister;
- development and finalisation of regulatory guidance by ASIC;
- implementation of transition and wind-down processes by the existing EDR schemes – the SCT, FOS and the CIO.

In addition, there will be significant implementation impacts on APRA-regulated superannuation funds including, but not limited to:

- updating regulated disclosure documents such as Product Disclosure Statements and periodic statement templates;
- issuing a prescribed 'significant event notification' under section 1017B of the *Corporations Act 2001;*
- substantial changes to the funds' internal processes for management of complaints that have gone to EDR, to reflect the operating processes adopted by the AFCA scheme;
- revision of all member communication materials where EDR is mentioned – including websites and a potentially large volume of letter templates;
- additional operating costs associated with maintaining processes, staffing and disclosure documents reflecting the existence of multiple EDR schemes during the transition phase.

The completion of this workload will involve a significant investment of effort and time by trustees, with many steps unable to be completed - or even commenced - without clarity as to the commencement date of the new EDR arrangements.

Taking all of this into account, ASFA has consistently questioned whether the proposed commencement date of 1 July 2018 for AFCA was realistic, and cautioned against a rushed implementation that may lead to adverse outcomes for consumers and financial firms. In our submission to the Senate Economics Legislation Committee, in relation to the AFCA Bill, we submitted that a measured commencement date would be no earlier than 1 January 2019.

The Consultation Paper states that the Transition Team is not responsible for the development of AFCA's terms of reference, funding or governance arrangements - these are matters that are the responsibility of the AFCA Board.

Whilst we acknowledge that this is the case, the implications are that, financial firms are effectively being asked to take on trust that the terms of reference, funding model and governance arrangements ultimately developed by the AFCA scheme operator will be adequate and appropriate. It appears, given the tightness of the timeframes, that there will be little, if any, opportunity for meaningful stakeholder consultation on any of these matters before they come into effect. Without these matters being largely resolved, our members have indicated that they consider it unrealistic that AFCA could move to operational status by 1 July 2018.

ASFA considers that a measured commencement date would be no earlier than 1 January 2019, reflecting the need to allow adequate time for passage of the legislation, consultation and finalisation of the terms of reference for the AFCA scheme and the ASIC regulatory requirements, and all necessary establishment activities.

D. SPECIFIC COMMENTS

D.1 Terms of Reference

D.1.1 Guiding principles for AFCA's establishment

ASFA is generally comfortable with the principles set out to guide the establishment of AFCA.

In particular, ASFA agrees that to the extent possible, AFCA should represent the 'best of breed', and should retain those elements of the existing EDR schemes that are working well. As noted in the Consultation Paper, we should avoid making changes simply for change's sake. We note, however, that the attainment of 'efficient and effective transitional arrangements' is likely to be quite problematic in the circumstances – see D.2.15, D.2.1.6 and D.2.2 below.

D.1.2 Monetary limits

ASFA welcomed the insertion, in the AFCA Bill, of an operational requirement that there should be no limit, for superannuation complaints, for the value of claims that may be made under the AFCA scheme or the value of remedies that may be determined under the scheme[1].

This effectively maintains the position that applies under the current EDR arrangements for APRA regulated superannuation, as set out in the *Superannuation (Resolution of Complaints) Act 1993* (SROC Act). As a result, ASFA does not anticipate that the absence of a monetary limit for superannuation complaints will have any impact on professional indemnity insurance for superannuation trustees.

D.1.2 Enhanced decision-making

The Treasury fact sheet[2] released to accompany the AFCA Bill and the Consultation Paper both note that in order to ensure AFCA has a robust and consistent approach to decision-making, the Government will require AFCA to:

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

ASFA agrees that these are critical matters that must be embedded within AFCA's governance framework and its operational behaviour. To maintain confidence in the financial services system - and in AFCA as the authorised EDR scheme - it is vital there is a strong element of consistency and predictability of outcomes. While the facts, circumstances and merits of each case will clearly be significant, it is important that like cases are decided in a like manner. Accordingly, when publishing its decisions in an anonymised form, it is important that AFCA also discloses the reasons for the decision or the approach used to arrive at it.

ASFA considers it would be appropriate for the matters outlined in relation to issue 2 in the Consultation Paper to be specifically reflected in the terms of reference, acknowledging their importance to AFCA's operations. We are of the view this could be achieved in a non-prescriptive manner that should not constrain AFCA's flexibility, allowing it to detail the means it adopts to comply with the requirements in operational guidelines. We note, however, that while the current operational guidelines for FOS provide some guidance, ASFA members consider these to be quite subjective in nature and would welcome a more objective statement.

In particular, ASFA welcomes the indication that AFCA should specifically take into account previous SCT decisions when resolving superannuation complaints. In its 23 years of operation, the SCT has established a base of decision-making which has provided invaluable guidance to the industry. Over that time, a number of the SCT's determinations have been appealed to the Federal Court, and the Court's judgments have provided important precedents upon which the industry relies. It is important that this depth of consideration of superannuation matters is not lost in the transition to AFCA.

The expertise and experience of the decision-maker(s) will also be of paramount importance in ensuring that decisions made by AFCA are appropriate and consistent. In this respect, ASFA has in our previous submissions noted the complexity of superannuation and the need for superannuation complaints to be determined by decision-makers with appropriate qualifications, experience and expertise. We remain of the view that the best way to ensure this is through the establishment of a specialised stream for handling superannuation complaints within AFCA.

Finally, we note that FOS is not bound by legal rules of evidence. To the extent that this will also be the case for AFCA, we consider that it will be necessary to ensure that there are clear guidelines established as to how AFCA will operate, including protections for stakeholders.

ASFA recommends that provisions ensuring that AFCA's decision-making processes promote consistency are included in its terms of reference, with more detailed requirements outlined in its operational guidelines.

D.1.3 Use of panels

ASFA agrees that it will be important to balance the advantages of using panels in certain circumstances against efficiency and service implications, including cost and timeliness of its decision making.

We consider that the considerations outlined in the final report of the Ramsay Review, as noted in the Consultation Paper, appear to be appropriate for determining when a panel should be used. These considerations recognise the key factors of complexity, the amount of the loss and other potential consequences, whether a systemic issue is indicated, and whether the dispute is likely to result in a 'new' decision that raises novel issues and may set an industry standard.

We note that FOS currently uses panels, comprising consumer representatives, industry representatives and medical representatives (for medical indemnity insurance disputes only). The terms of reference provides for the appointment of panel members and the composition of a panel but contain no further detail about when or how a panel may be used, however some detail is set out in the operational guidelines to the terms of reference and this would appear to be an appropriate basis for the development of principles for AFCA.

ASFA is of the view that the AFCA Board should ensure a greater level of clarity is provided, for both consumers and financial firms, in relation to the use, composition of panels and their role in dispute resolution – in particular, in relation to how the 'complexity' of a matter will be assessed.

Given the complexity of many superannuation complaints, ASFA anticipates that the use of panels will be a common feature of AFCA's superannuation-related work – see D.2.1.7 below.

ASFA recommends that the terms of reference for AFCA should:

- provide for Board to appoint panel members and specify the considerations to which the Board should have regard in making appointments
- specify the requirements for the composition of panels and their role, powers and responsibilities in the dispute resolution process
- specify (at a high level) when a panel may be utilised.

Additional detail should be provided in operational guidelines and on the AFCA website, regarding the circumstances in which a panel may be utilised. This should include illustrative examples based on the more common types of complaints that AFCA expects to receive.

D.1.4 Independent reviews

As noted in our response to the Ramsay Review's issues paper, we are not aware of any independent review of the SCT, undertaken since 2001, for which the results have been made publically available[3]. This represents a missed opportunity. Such a review would have provided stakeholders with quantitative and qualitative evidence regarding the SCT's resourcing and governance challenges, and potentially allowed those issues to be appropriately remedied within the statutory tribunal model that has, in ASFA's view, served both the superannuation industry and consumers well.

ASFA therefore welcomes the inclusion in the AFCA Bill of a requirement that the operator of the AFCA scheme commissions the conducting of independent reviews of the scheme's operations and procedures[4]. It is important that such reviews consider the extent to which AFCA produces reasonable and consistent decisions.

We suggest it would be appropriate to conduct independent reviews of whether AFCA is meeting its benchmarks every three years (rather than five years, as currently indicated), in line with independent reviews of financial services ombudsman-type schemes in the United Kingdom and Singapore.

We also support the proposed requirement that AFCA should establish mechanisms to collect detailed data by which to measure its performance as well as trends in complaints and dispute outcomes across the different sectors. This information should be made publically available on the AFCA website.

The independent review process has the potential to provide accountability to members in relation to the scheme's performance, provided:

- the scope and terms of the review are appropriately framed and the reviewer is appropriately qualified and independent
- the outcomes of the review are made available to stakeholders (including AFCA members and ASIC as the regulator with oversight responsibility for AFCA) and to the public more broadly, on a timely basis
- the operator reports to stakeholders in relation to its implementation of recommendations made by the independent reviewer, including reporting on an 'if not, why not' basis if recommendations are not adopted.

In relation to the latter point, we note that the AFCA Bill does not require the operator to take any action in relation to a report emanating from an independent review. While ASIC's Regulatory Guide RG 139 contains some requirements in relation to the commissioning of an independent review by EDR schemes (currently, FOS and the CIO), it is also silent on the outcomes that should flow from the review process.

ASFA is of the view that when RG 139 is updated by ASIC to reflect the establishment of AFCA, it should include a more detailed statement of ASIC's expectations of the scheme operator in relation to independent reviews. This should include clear guidance as to when ASIC will consider a reviewer to be 'independent', the types of qualifications and experience required and the general process for the assessment.

ASFA recommends that ASIC's updated regulatory guidance on approval and oversight of EDR schemes should set out, in some detail, ASIC's expectations of the AFCA scheme operator in relation to the commissioning of an independent review and its response to the report from such a review.

The establishment of AFCA will involve significant changes to the resolution of superannuation complaints, and involves transitioning from a statutory regime to one comprising a combination of statute, contractual terms of reference and operational guidelines

While ASFA acknowledges that these changes include the prospect of improved consumer outcomes through more timely and efficient complaints handling, this outcome cannot simply be assumed and it is important that any issues that may arise are promptly addressed.

Superannuation is a largely compulsory product. It is held on a long-term basis, and is the largest financial asset many Australians hold at retirement. These features distinguish superannuation from other financial products and create a moral imperative to ensure the EDR arrangements for superannuation operate effectively and promote consumer confidence. It is, in ASFA's view, critical that the effectiveness of the hybrid EDR model for APRA-regulated superannuation is actively monitored and formally reviewed, to ensure it achieves appropriate outcomes.

Our submission to the Senate Economics Legislation Committee on the AFCA Bill recommended a formal review of the effectiveness of AFCA as the EDR scheme for superannuation, one year after AFCA commences to take superannuation complaints. That recommendation was favourably noted by the Committee, which concluded in its majority report:

> This is an important measure and is innovative in its approach. The committee is of the view that the new arrangements should be reviewed after a year and again after five years.[5]

ASFA recommends that the effectiveness of AFCA's operation as the EDR body for superannuation is independently reviewed no more than 12 months after AFCA commences to take superannuation complaints. Where deficiencies are identified, these should be promptly addressed.

This review should be entrenched as a requirement for the Minister's authorisation of AFCA. The Minister's authorisation should also be subject to a requirement that the Board specifically and promptly consider the outcome of the independent review and report to the Minister, on an 'if not, why not' basis, regarding their proposed response to any recommendations made by the reviewer.

ASFA concurs with the recommendations made in the final report of the Ramsay Review regarding the value of regular independent reviews, as outlined in the Consultation Paper. In particular, we consider these reviews should cover matters such as:

- the appropriateness and equity of the funding model
- the adequacy and appropriateness of AFCA's resourcing, and in particular, ensuring that decisions are made by appropriately qualified and experienced staff
- AFCA's application of its statutory powers.

D.1.5 Independent assessor

The AFCA Bill makes it a mandatory requirement that AFCA has an independent assessor[6], but provides no detail of what the function entails. The independent assessor function is unfamiliar to the superannuation industry, and ASFA therefore welcomes the confirmation in the Consultation Paper that the independent assessor's function "will not be to review the merits of an AFCA decision, but to review complaints about ***service issues*** in AFCA's dispute handling" (our emphasis).

This is important because, despite comments to that effect in the final report of the Ramsay Review[7] and the Government's May 2017 consultation paper[8], the phrasing of some comments in the Explanatory Memorandum to the AFCA Bill had caused concern among some stakeholders the process could involve an assessment of AFCA's determination in relation to a complaint – that is, that it could amount to a review of the merits of the complaint[9], a de facto appeal process. That aside, some ASFA members have suggested there may be merit in considering whether there is scope for the independent assessor's role to include assessment of the consistency in the approach adopted by AFCA to key industry issues, and to provide a report to the Board on such matters.

The Consultation Paper refers to the appointment of an independent assessor by FOS. The independent assessor was appointed by and will report annually to the Board of FOS, and operates in accordance with terms of reference. The assessor's role is limited to considering complaints, from persons or businesses who have had a dispute handled by FOS, about the standard of service provided in handling those disputes. While the arrangements implemented by FOS appear to be reasonable, we note that the function was implemented so recently that it is not possible to draw any observations about how effectively it operates in practice - the appointment of the assessor was only announced on 4 October[10].

Given the framework the Government has settled upon for AFCA – a high-level legislative framework supplemented with non-legislative rules – ASFA accepts that some of the detail of the independent assessor's role will be addressed in a document such as the AFCA terms of reference. Whilst this is essentially a contractual document, we anticipate that it will be subject to consultation with AFCA members, and that process should provide a level of accountability in relation to the arrangements put in place for the independent assessor. To the extent the independent assessor role is covered in *separate* terms of reference (as is the case for FOS) or a separate charter, this would be acceptable provided these are also subject to consultation. We anticipate that process documents such as operational guidelines may not be subject to consultation with AFCA members and accordingly these should not contain matters pertaining to critical aspects of the assessor's role.

The terms of reference for the FOS independent assessor set out criteria for when and by whom a complaint can be made, as well as the types of complaints that the independent assessor may and may not consider[11]. These criteria appear appropriate as a base model for the AFCA independent assessor. All users of the AFCA scheme should be able to make a complaint to the independent assessor – we note that under the FOS model, any person or business directly affected by a decision of the scheme is entitled to make a complaint. In the event that the role of the independent assessor is framed to enable the review of AFCA's approach to specific classes of disputes (rather than, or in addition to, specific complaints), there may be scope to provide for industry bodies to raise issues on behalf of their membership, and for consumer bodies to raise issues on behalf of consumers more broadly.

In order to ensure full oversight and accountability, ASFA suggests that ASIC's updated regulatory guidance on authorisation of EDR schemes should set out the fundamental criteria it expects to be satisfied in relation to independent assessment of the performance of the AFCA scheme. This should include clear guidance as to when ASIC will consider an assessor to be 'independent', the types of qualifications and experience required and the general process for the assessment.

In particular, we note that as the primary scrutineer of AFCA's performance, it is critical that the assessor is genuinely independent and able to conduct its role without actual or perceived interference. We anticipate this is a matter ASIC would have regard to as part of its ongoing oversight of AFCA. We are of the view that the assessor should be appointed for a fixed term, with early termination possible in cases of serious misconduct or with ASIC's approval. Similarly, the regulatory guidance should provide for the independent assessor to directly raise with ASIC any significant concerns it may have regarding the response of the AFCA Board to a report it has made.

ASFA considers that it would be appropriate for the independent assessor to have guaranteed direct access to the Board. The assessor should report at least annually on the number and nature of the complaints it has received, the findings made, and the outcomes of any recommendations. These reports should be addressed to the AFCA Board and copied directly to ASIC. To aid accountability to stakeholders and consumers, the AFCA Board should also publish on its website the assessor's reports and the Board's response thereto. In the event that serious misconduct or a systemic issue is identified, a prompt ad hoc report should be made by the assessor to the AFCA Board and to ASIC.

ASFA considers that it would be prudent for a review of the functions and operation of the independent assessor to be undertaken within three years of the commencement of AFCA.

ASFA recommends that ASIC's updated regulatory requirements for an authorised EDR scheme reflect the importance of the independent assessor function and provide safeguards to ensure the assessor of AFCA can perform its role with genuine independence and without actual or perceived interference. To provide accountability for stakeholders, detail regarding the role and charter of the assessor should be set out in terms of reference that are subject to consultation with AFCA members, rather than process documents such as operational guidelines.

D.1.6 Exclusions from AFCA's jurisdiction

It is critical that the framework for AFCA provides consumers with access to a forum for resolution of their genuine and meritorious disputes, while excluding complaints that are unmeritorious or that would, if permitted to be prosecuted via AFCA, impinge unreasonably upon the ability of financial firms to conduct their business.

ASFA is of the view that any change made after authorisation to the range of excluded complaints should be considered a 'material change' to AFCA that would require ASIC approval. We also consider that restrictions on complaints that AFCA can handle should be based on the well-established exclusions from the jurisdictions of the SCT, FOS and CIO.

ASFA members have indicated that they consider the current range of exclusions from FOS's jurisdiction and its arrangements for excluding complaints lacking in substance are appropriate and should be maintained.

Our views on superannuation-specific exclusions from AFCA's jurisdiction are set out at D.2.1 below.

D.1.7 Other issues to be addressed in the terms of reference

ASFA's views on superannuation-specific matters relating to the terms of reference are addressed at D.2.1 below.

More generally, we consider that many of the matters addressed in the terms of reference for FOS and the CIO currently should appropriately be covered in the terms of reference for AFCA. These will include the powers of the decision-makers and the time limits for making complaints.

ASFA agrees it is important to ensure that dispute resolution is accessible for consumers. We have acknowledged, in its submission in response to the interim report of the Ramsay Review, the superior levels of assistance and resources that are currently provided by FOS and the CIO, as compared to more limited resources that the SCT is able to provide, given its funding constraints. The guidance currently provided by FOS[12] is generally appropriate, albeit not included in its terms of reference.

We consider that the terms of reference for AFCA should include requirements relating to accessibility at a fairly high level, with the detail to be set out in operational guidelines and other procedural documents to allow for flexibility and innovation. The matters to be addressed should include those outlined in the Government's benchmarks and key practices for industry based customer dispute resolution[13].

One further matter of significant concern to ASFA is the process through which the terms of reference will be settled. ASFA considers it critical that the terms of reference are subject to industry consultation and notes that, given the breadth and volume of important detail intended to be covered in the terms of reference, it is imperative that adequate time is provided to allow full and genuine consultation on all issues. We note that the consultation process adopted by FOS in relation to its most recent terms of reference commenced in July 2014, with the final terms of reference released in early December 2014 and commencing (primarily) on 1 January 2015.

We note that if the Government's proposed 1 July 2018 implementation date for AFCA is adhered to, there will be little time for meaningful consultation on AFCA's initial terms of reference prior to AFCA's commencement.

We consider that in order to comprise a 'meaningful' consultation, stakeholders should be allowed no less than three months to consider the (proposed) terms of reference and make submissions. It is also vital that the final, approved terms of reference are released to stakeholders with sufficient time for them to complete their implementation efforts prior to the commencement of AFCA. Adequate 'lead time' is especially important in the transition phase, when the terms of reference to be adopted by financial firms – particularly superannuation trustees - are likely to be quite significantly different to the EDR arrangements they currently have in place. The lead time required for subsequent changes to terms of reference may vary in future, depending on the materiality of the changes, however we consider that any period less than two months would be unacceptable.

As the AFCA Bill has not been passed by Parliament at this time, it appears to ASFA that it will not be possible to meet these requirements prior to 1 July 2018. Given the significance of these reforms – particularly for superannuation trustees and complainants, who are transitioning to a complaints model that is very different from the current SCT process - we consider this to be an unacceptable outcome.

In our submission to the Senate Economics Legislation Committee in relation to the AFCA Bill, we recommended that the commencement of AFCA be deferred until at least 1 January 2019 to allow for passage of the AFCA Bill and completion of all necessary implementation work. ASFA remains of the view that a deferral of AFCA's commencement is the only prudent course at this point in time.

In the event that the Government proceeds with a 1 July 2018 commencement for AFCA, we strongly recommend that AFCA is required to undertake a full consultation process on its terms of reference within six months of its commencement, allowing no less than three months for stakeholder submissions.

Finally, we anticipate that ASIC will, in its amendments to Regulatory Guide RG 139, stipulate when a change to the terms of reference would be considered to be 'material', as well as processes to ensure material changes are approved by ASIC[14].

ASFA recommends that:

- Given the absence of final legislation and the difficulties in completing all other work necessary for establishment of AFCA – including development of the terms of reference – the commencement of AFCA be deferred until at least 1 January 2019.
- If the Government proceeds with a 1 July 2018 commencement date, AFCA should be required to commence a full process of consultation on its terms of reference, allowing no less than three months for stakeholder submissions, within six months of its commencement.

D.2 SUPERANNUATION

D.2.1 Additional elements of the superannuation dispute resolution process to be addressed in terms of reference

ASFA considers that each of the matters noted in relation to issue 9 in the Consultation Paper are significant and should be addressed in the terms of reference rather than the operational guidelines.

As noted at D.2.1.7, although a contractual document, the terms of reference will be subject to stakeholder consultation and to an overriding caveat that material changes cannot be made without ASIC's approval. We anticipate that the operational guidelines will be a purely internal document, not subject to either of those forms of oversight. While it may be appropriate to provide additional guidance on some matters in the operational guidelines – for example, on the use of panels – the terms of reference should provide at least an overarching statement of the processes to be adopted by AFCA.

The comments below highlight ASFA's major concerns regarding the handling of superannuation complaints.

D.2.1.1 Who can make a superannuation complaint

In general terms, the AFCA Bill does not specifically identify the persons who are, or are not, eligible to make a 'superannuation complaint'. This is a matter that will, in ASFA's view, need to be set out in the terms of reference, clearly indicating any exclusions that may apply and any pre-conditions that must be met before a complaint can be brought.

We note that while the AFCA Bill incorporates the concept of who is eligible to make a complaint in relation to a superannuation death benefit, the wording used differs to that used in the *Superannuation Resolution of Complaints) Act 1993* (S(ROC) Act) currently and appears – presumably inadvertently – to expand the range of potential complainants. The S(ROC) Act currently provides that a complaint may be only made in relation to the payment of a death benefit if "the person has *an interest in the benefit*"[15] (our emphasis). In contrast, the AFCA Bill provides that (amongst other conditions) a person cannot make a superannuation complaint relating to the payment of a death benefit "unless the person has an *interest in the payment of the death benefit*" (our emphasis)[16].

ASFA is concerned that the wording in the AFCA Bill is potentially broader in scope than the current framing, and may therefore inadvertently expand the range of individuals who may seek to make a complaint about the payment of a superannuation death benefit. This is of concern given the regrettable reality that consideration of a death benefit complaint frequently involves navigating complex and often fractured familial relationships and multiple parties claiming an entitlement. One scenario that ASFA can envisage arising relates to the grandparents of a deceased fund member seeking to involve themselves in a complaint with a view to influencing the payment of a death benefit in favour of the deceased's children (their grandchildren) rather than the deceased's or former spouse. While the grandparents may not have "an interest in the benefit", they may be perceived to have an interest in "the payment of the death benefit" – that is, an interest in how it is disbursed.

While ASFA considers it preferable that this matter is addressed via an amendment to the AFCA Bill, should this not occur we are of the view the terms of reference should provide clarification.

We further note that the claim-staking provisions in relation to death benefits set out in the AFCA Bill vary the current notice procedures as set out in the S(ROC) Act, which establish when a person has an interest in a death benefit and is eligible to make a complaint. The AFCA Bill changes the focus from the *giving* of a written notice by the trustee about proposed payment of a benefit or the period within which a person may object[17], to *receipt* of such a notice by a person[18].

While the S(ROC) Act does not prescribe the means by which the notice must be "given", the SCT has adopted an expansive interpretation and identified a number of methods of giving notice that are considered to meet the requirements of the S(ROC) Act, consistent with the provisions of the Acts Interpretation Act 1901[19], "the common law and the practicalities of modern day communications"[20].

The SCT's approach has been clearly documented[21] and applied in its determinations. The SCT has noted that its acceptance of a range of methods to 'give' a notice is intended to "promote efficiency, and to provide flexibility in the methods by which these notices can be given, without minimising consumer protection intended by the written notice requirements"[22]. This is, in ASFA's view, a reasonable approach, and one that is consistent with general business practice and other legal requirements where notice is required.

We note that this approach allows normal legal and business assumptions to be made as to the date on which service of a notice is taken to have been effected, depending on the method adopted for service. As a result, it also provides certainty as to when any prescribed period for taking particular actions may be taken to have expired. In the context of the making of a decision regarding payment of a superannuation death benefit, certainty as to the date of expiry of any objection period is important as it allows the trustee to proceed to pay the death benefit to the identified recipients (for example, the deceased's spouse and/or children) without unnecessary delay.

The change in emphasis of the claim-staking provision from a notice 'given' to a notice 'received' reduces the level of certainty afforded to trustees. It is entirely reasonable to expect a trustee to demonstrate that it has 'given' a notice – for example, through the use of facilities that track the delivery of mail, or evidence of detailed procedures to ensure the giving of notices and its record of adherence to those procedures. However, it is not clear to ASFA how a trustee may effectively dispute a claim by a person that they are entitled to make a complaint because a notice was not 'received'.

ASFA is of the view that the AFCA Bill should be amended to reinstate the concept of the giving of a notice, consistent with the S(ROC) Act. In the event that this does not occur before commencement of AFCA, the terms of reference should set out how AFCA will apply the claim-staking provisions, noting that a literal interpretation may result in inconsistency in outcomes of death benefit complaints heard by AFCA as opposed to those that remain to be dealt with by the SCT.

ASFA recommends that the terms of reference:

- clearly set out who is, and is not, eligible to make a superannuation complaint – including any exclusions and pre-conditions.
- provide clarification in relation to the application of the proposed legislative provisions in relation to superannuation complaints involving death benefits.

D.2.1.2 Exclusions from AFCA's jurisdiction

The AFCA Bill defines a 'superannuation complaint' that may be made to AFCA in very broad terms, without reflecting a number of important exclusions that currently apply to the SCT's jurisdiction. Our submission to the Senate Economics Legislation Committee on the AFCA Bill highlighted the most important of these, which relate to:

(i) complaints about the management of the fund as a whole

(ii) instances where the subject matter of the complaint has already been dealt with by a court, the SCT itself, or another dispute resolution body – this will also need to include, during the transition period, complaints *currently* being considered by the SCT

(iii) complaints that have not first been raised with the superannuation trustee for resolution under its internal dispute resolution process.[23]

The Treasury fact sheet released to accompany the AFCA Bill expresses an *expectation* that items (i) and (ii) will be addressed in the terms of reference, and notes that exclusions from AFCA's jurisdiction are "a matter to be further considered by the AFCA transition team".

In ASFA's view, it is ***imperative*** that an exclusion from jurisdiction for each of these three matters is included in the AFCA scheme's terms of reference:

- Allowing a complainant to raise a dispute with AFCA for a matter that has already been considered by an existing EDR scheme (for example, the SCT) or a court would be tantamount to allowing a 'double bite' at EDR for the same facts and subject matter, as well as duplicating the workload and cost associated with EDR. To effectively prevent this, there will need to be provision for exchange of information between AFCA and the SCT, which is likely to require amendments to the secrecy provisions that govern the SCT's operations currently.
- The current exclusion from the SCT's jurisdiction for complaints that relate to the management of the fund as a whole[24] is important as it ensures trustees are able to make operational decisions about the fund overall without concern that they may be open to challenge by individual members. In this respect, it is important to note that trustees are subject to extensive statutory and fiduciary duties, as well as prudential regulation. These legal duties and obligations govern many of the operational decisions they make, and require them to act in the best interests of the overall membership of the fund.
- Allowing a complaint to go to EDR without first proceeding through the financial firm's IDR process denies the financial firm the opportunity to directly address the concerns of their customer and to at least attempt to resolve their complaint before it progresses.

The failure to provide exclusions for these matters would increase the volume of superannuation complaints that AFCA may be called upon to handle – unnecessarily increasing its workload and therefore the cost to its member firms.

ASFA recommends that the terms of reference for AFCA contain exclusions from its jurisdiction for superannuation complaints that:

- relate to management of the fund as a whole; or
- have not first been considered by the trustee under its internal dispute resolution process; or
- have already been dealt with by a court, the SCT or another EDR body.

D.2.1.3 Time limits for superannuation complaints

The AFCA Bill sets out the timeframe within which a superannuation complaint in relation to a death benefit must be brought before AFCA[25], but does not specify any time limit for other types of superannuation complaints.

The S(ROC) Act currently sets out time limits for the making of superannuation-related complaints that relate to:

- payment of a disability benefit[26]
- a trustee's provision of certain statements to the Commissioner of Taxation[27].

ASFA considers it would have been preferable to include these time limits in the legislative framework (Act or regulations) however as this has not occurred we consider it essential that they are clearly stated in the terms of reference. We would further consider that any proposed amendment to these time limits should be a 'material' change, for which ASIC approval is required.

ASFA recommends that the time limits for superannuation complaints about payment of disability benefits and provision of statements to the Commissioner of Taxation are clearly specified in the statutory framework.

D.2.1.4 Exception from referral back for IDR for complaints subject to time limits

ASFA has, in our previous submissions, questioned the likely effectiveness of the 'referral back' process for superannuation complaints. We welcomed the confirmation, in the Treasury press release accompanying the release of the AFCA Bill, that the process would not apply for superannuation death benefits, and we consider it important that this is stated in the terms of reference for AFCA.

We are also of the view that the 'referral' back process should not apply to any superannuation complaint that is subject to a time limit. As noted at D.2.1.3, complaints regarding disability benefits and the provision of certain information to the Commissioner of Taxation are currently subject to statutory time limits. While these limits have not been carried over into the AFCA Bill, we note that they remain necessary and should be reflected in the terms of reference.

ASFA recommends that the terms of reference stipulate that the 'referral back' process for further IDR does not apply to any superannuation complaint that is subject to a time limit.

D.2.1.5 Transition period

It will, in ASFA's view, be necessary for strong guidelines to be put in place to ensure an effective exchange of information is possible between the SCT and AFCA for the transition period during which both bodies will be hearing superannuation complaints.

This will be critical to ensure that complaints are not heard by AFCA that have already been dealt with by the SCT (see D.2.1.2 above), and to avoid duplication of effort by all stakeholders.

ASFA is also of the view that there should be a process of regular dialogue between the two bodies during the transition phase to ensure, to the extent possible, that there is consistency in the approach adopted for the resolution of superannuation disputes.

The AFCA Bill reflects the recommendations of the Ramsay Committee that the key elements of the superannuation dispute resolution framework – in particular, the dispute resolution test - should be carried over into the AFCA model. While there will be some differences in the dispute resolution processes adopted by the bodies, it is important, in ASFA's view, that the overall tone of decision making is consistent. That is, if one assumes two complaints with identical fact situations, one being heard by the SCT and the other by AFCA, ASFA would expect to see a high degree of consistency in the outcomes.

ASFA considers that the terms of reference should include measures to facilitate an effective transition from the SCT to AFCA.

D.2.1.6 Handling of death benefit complaints lodged in June-July 2018

Superannuation death benefit complaints lodged around the time of the transition to AFCA have the potential to be particularly problematic. This is because of the multi-party nature of these complaints, the tight timeframes that (generally) apply to their lodgement, and the secrecy provisions that will, unless addressed, prevent an effective exchange of information between the SCT and AFCA regarding complaints lodged. The comments below assume that AFCA commences on 1 July 2018, and the SCT closes for new complaints after 30 June 2018, as proposed by the Government (however the issue will remain to be addressed, whatever commencement and closure dates are ultimately settled upon).

Where the various notification requirements of the 'claim-staking' process for death benefit complaints have been satisfied, an individual has 28 days to lodge their complaint with the SCT, and will similarly have 28 days to lodge their complaint with AFCA. Where the individual did not receive proper notification under the claim-staking process, the 28 day time limit may not apply.

It is relevant to note that more than one individual may seek to make a complaint regarding the same death benefit distribution decision of a superannuation trustee. Assuming for example that a trustee makes a final decision regarding payment of a death benefit and gives notice to all potential beneficiaries on 15 June 2018, it is entirely foreseeable that one individual may lodge a complaint with the SCT about the decision prior to 30 June 2018, while another individual lodges a separate complaint regarding the *same trustee decision* with AFCA within the first fortnight of July 2018.

There is nothing in the AFCA Bill to prevent this occurring, to enable the SCT and AFCA to exchange information to identify that this has occurred, or to indicate how the complaints should be addressed. It would, in ASFA's view, be wholly inappropriate for both complaints to proceed separately – as well as a duplication of workload and cost, it would create the potential for a trustee to be subject to conflicting determinations in relation to payment of the same benefit.

ASFA considers that this is a matter on which the Government and the Transition Team should provide clear guidance to all stakeholders – superannuation trustees, potential beneficiaries of death benefits, AFCA and the SCT. ASFA suggests that the most practicable solution may be for an amendment to the AFCA Bill to specifically provide that superannuation complaints about death benefit decisions by superannuation trustees after 31 May 2018 (or one month before the ultimate commencement date for AFCA) may only be made to AFCA, not to the SCT.

We suggest that the AFCA terms of reference also includes specific provisions regarding handling of death benefit complaints lodged during the first six months following AFCA's commencement. These provisions should ensure that expert consideration of these complaints is provided, to assist in:

- identifying any potential issues that may flow from the transition to AFCA; and
- addressing any issues arising where an individual is entitled to lodge a complaint outside the normal 28 day time limit because of the trustee's failure to adhere to the claim-staking process (noting that other claimants of the same benefit may already have lodged a complaint with AFCA or, potentially, with the SCT).

ASFA recommends that:

- Government and the Transition Team should carefully consider how to address death benefit complaints lodged around the time of the transition to AFCA, which may require an amendment to the AFCA Bill.
- the AFCA terms of reference should include specific provisions regarding handling of death benefit complaints lodged during the first six months following AFCA's commencement.

D.2.1.7 Complex superannuation matters - use of panels and other specific requirements

Superannuation complaints are extremely varied in nature and many involve consideration of complex factual and legal issues and/or the involvement of multiple parties. As a result, the resolution of superannuation complaints typically requires a mixture of specialist skills and experience. Accordingly, we anticipate the use of panels will be a common feature of AFCA's resolution of superannuation complaints.

The use of panels is not unfamiliar in the superannuation context: the SCT presently uses panels of Tribunal members for the determination of complaints, with panels constituted by the Chairperson and consisting of between one and three members.

ASFA considers that the terms of reference should clearly set out the requirements for decision making in relation to superannuation complaints, including:

- when a superannuation complaint will be considered 'complex', such that specific expertise and/or the use of a panel may be required
- the types of specific expertise that may be utilised and the obligations on the parties in relation to the use of such expertise (for example, any additional cost).

D.2.1.8 Right to review of 'administrative' decisions made by AFCA

Under the current complaints framework for superannuation, a party who considered that the SCT erred in ruling a complaint outside its jurisdiction, or disagreed with a decision by the SCT to treat a complaint as withdrawn, is able to seek judicial review under section 5 of the *Administrative Decisions (Judicial Review) Act 1977* and section 39B of the *Judiciary Act 1903*.

As AFCA will not be a statutory body, the parties will no longer have the ability to seek judicial review, and this represents a reduction in consumer protection. ASFA's submissions to Treasury on the exposure draft Bill and to the Senate Economics Legislation Committee in relation to the AFCA Bill highlighted the reduction in consumer rights that this represents. We recommended that this be mitigated by providing the parties to a complaint with a specific right of review, for example by a panel within AFCA.

This is particularly important given the new regime will also involve AFCA making a new type of 'administrative' decision: whether a complaint should be characterised as a 'superannuation complaint' or not. The decision made by AFCA will have potentially significant consequences for a consumer, because:

- AFCA may only utilise its statutory powers in relation to superannuation complaints
- the EDR tests for superannuation complaints and other complaints are different
- monetary limits apply to complaints other than superannuation complaints
- a right of appeal to the Federal Court applies only in relation to superannuation complaints.

These implications make it vital there is some form of review for administrative decisions made within AFCA. ASFA considers that the AFCA terms of reference should provide the parties to a complaint with a specific right to review of administrative decisions of this nature, by a panel within the AFCA scheme.

ASFA recommends that the AFCA terms of reference provide a complainant with access to some form of review in relation to a decision that a complaint is not a 'superannuation complaint', is outside the AFCA scheme's jurisdiction, or should be withdrawn.

D.2.1.9 Handling of superannuation complaints involving advice

Currently, complaints in relation to advice provided under an Australian Financial Services Licence (AFSL) held by a superannuation trustee are addressed by FOS rather than the SCT.

Under the single EDR scheme model, there may be a need to clarify how advice-related complaints against a superannuation trustee will be addressed, to ensure fairness and consistency – for example, whether they will be treated as 'superannuation complaints' and therefore attract the statutory provisions and protections in the AFCA Bill, and if so how the AFCA decision-makers will ensure consistency of outcome with advice-related complaints that are not also superannuation complaints.

ASFA recommends that the terms of reference clarify the treatment of complaints in relation to advice provided by superannuation trustees.

D.2.1.10 Other matters for the terms of reference

Other matters that ASFA considers should be addressed in the terms of reference include:

- The circumstances in which AFCA can treat a complaint as withdrawn (consistent with section 22 of the S(ROC) Act).
- The provision of information by trustees – requirements reflecting sections 24, 24AA of the S(ROC) Act, that the trustee provides all relevant documents to the AFCA decision-maker upon being notified that a superannuation complaint has been made.
- The complainant's right to have representation, consistent with section 23 of the S(ROC) Act.
- A requirement that AFCA advise each party of their right to appeal the determination (consistent with section 45 of the S(ROC) Act).
- Clarification of the treatment of complaints relating to insurance within superannuation, where the consumer initially (mistakenly) brought a complaint against the insurer rather than the fund trustee.

The AFCA Bill provides that one operational requirement of the AFCA scheme is that it will have unlimited monetary jurisdiction for 'superannuation complaints'[28]. The scheme will also have important powers that it may exercise only when dealing with 'superannuation complaints'[29]. A consumer who is dissatisfied with a determination made by AFCA will have the right to appeal to the Federal Court only where the determination was in respect of a 'superannuation complaint'. As a result, it is likely that a consumer's EDR experience and outcome will differ significantly depending on whether or not a matter is categorised as a 'superannuation complaint'.

Many consumers have insured benefits within their superannuation – for example, insured death and/or total and permanent disability benefits that are funded by a group insurance policy held by the superannuation fund trustee. These insured benefits may form a significant component of a member's overall superannuation interest. The AFCA Bill duly recognises that any complaints in relation to these benefits can be treated as 'superannuation complaints', and provides the AFCA scheme with the power to join an insurer to a superannuation complaint[30].

We note, however, that on occasions, a consumer may initially seek to bring a complaint against the insurer rather than against the trustee, as 'owner' of the policy. Currently such instances are resolved through discussions between the consumer and their fund trustee, or by identification of the issue once it reaches EDR (for example, FOS may inform the consumer that the complaint is more appropriately made to the trustee, and then, if dissatisfaction remains, to the SCT).

ASFA is concerned that, under the proposed new EDR framework, complaints that are not correctly identified as 'superannuation complaints' at the outset may not receive the appropriate treatment. In particular, we note that there does not appear to be any scope, within the terms of the AFCA Bill, for the complaint to be withdrawn and recommenced as a 'superannuation complaint'. This will need to be clearly addressed in the terms of reference for the AFCA scheme.

ASFA recommends that the matters considered above are included in the AFCA terms of reference.

D.2.2 Disputes currently before the SCT

ASFA members have significant reservations regarding the proposal to allow a complainant to withdraw a complaint that is before the SCT and commence it anew with AFCA, given the duplication of cost and effort and the potential for forum shopping that the proposal creates.

The Explanatory Memorandum[31] indicates that where the SCT has not made a final determination of a complaint, the complainant may choose to continue to progress it with the SCT or withdraw it and instead progress it via a complaint to the AFCA scheme.

This ability to effectively re-start a complaint with the AFCA scheme raises a number of complex considerations. In particular, we note that:

- Any concept of 'transferring' a complaint from the SCT (a statutory tribunal) and the new AFCA scheme (an ombudsman) must be considered in the context of the very different legal attributes of the bodies and their different approaches to dispute resolution.
- The withdrawal of a complaint that the SCT had commenced to consider, and its re-commencement as a new complaint to the AFCA scheme, will involve duplication of effort and cost to industry. Depending on how far the complaint had progressed before the SCT, the duplication could be significant.

- The AFCA Bill does not propose any specific amendments that would facilitate the 'transfer' of a complaint from the SCT, but would seek to rely on provisions currently in the S(ROC) Act. We note the following in relation to those provisions:
    - The S(ROC) Act currently permits the SCT to refer a complaint to another complaints handling body or court, where satisfied that it has the power to deal with the complaint and *all parties* to the complaint have provided their consent[32].
    - However, the SCT may only provide to the other body personal information in relation to 'an individual' with the consent of that individual – it is important to note here that the files for a superannuation death benefit complaint would frequently include personal information in relation to individuals other than the parties to the complaint.
    - The SCT can currently only transfer a complaint to a "body responsible for dealing with disputes under an external dispute resolution scheme that complies with paragraph 912A (2) (b) of the *Corporations Act 2001*"[33], however that paragraph will be repealed immediately after the AFCA Bill receives Royal Assent[34]. As a result, an amendment to the *Superannuation (Resolution of Complaints) Regulations 1994* would be required to allow the SCT to transfer a complaint to AFCA.
    - To the extent a complaint is referred to another body, it is taken to have been withdrawn from the SCT.[35] Currently, referrals occur from the SCT to FOS on an infrequent basis. Under the new EDR arrangements, it will be necessary to establish mechanisms for the 'transfer' of material relating to a complaint from the SCT to the new AFCA scheme.

  The effectiveness of a 'transfer' mechanism as a means of reducing the SCT's caseload and expediting the transition to the AFCA scheme will, however, be impacted by one feature that is prevalent in complaints about superannuation as distinct from other types of financial products and services - superannuation complaints, especially those in relation to death benefits, may involve multiple parties.

  In such cases it is likely that one or more of the parties may prefer to continue the complaint before the SCT, while others may prefer to withdraw it and commence it afresh before the AFCA scheme. Given the consent requirements in the S(ROC) Act, a complaint could not, in these circumstances, be 'transferred' to the AFCA scheme. We note that complaints relating to death benefits represent a significant proportion of the SCT's caseload – for the 2015-16 financial year, 32 per cent of complaints within the SCT's jurisdiction related to death benefits.

- Even in matters involving a single complainant, the option to re-commence a complaint with a different decision-maker creates the potential for 'forum-shopping'. ASFA considers that this runs counter to good policy and the intent of the reforms to establish a single EDR scheme for the financial services industry.

- It will be necessary to ensure that there are no gaps in coverage where an individual finds that their complaint is no longer able to be dealt with by either the SCT or the AFCA scheme. For example, a person may withdraw a complaint from the SCT, intending to re-commence it before the AFCA scheme, but find that it is now outside any applicable time period imposed under the legislation (in relation to death benefits) or under the AFCA terms of reference (as noted at D.2.1.3 above, we consider it critical that time limits in relation to superannuation complaints involving disability benefits and statements to the Commissioner of Taxation, which are not covered in the AFCA Bill, are addressed in the terms of reference). This may particularly be an issue in the latter stages of the SCT's wind-down period.

Accordingly, ASFA is of the view that that any ability to withdraw a complaint from the SCT and then commence a complaint dealing with identical facts and subject matter before the AFCA scheme should be limited to those complaints that the SCT had received but not yet commenced to consider.

We note that in the absence of finalised terms of reference for AFCA, it is not possible to confirm that the jurisdiction of AFCA and the SCT will be identical in relation to superannuation complaints (see D.2.1.2 above regarding the need to specify exclusions from AFCA's jurisdiction). Accordingly, it is not possible to take the view that an assessment by the SCT of whether a complaint is within jurisdiction could be accepted and proceeded upon by AFCA – AFCA would be required to re-conduct even this most basic screening process. At every stage beyond the jurisdictional assessment, the work effort invested by the SCT increases significantly, with a corresponding increase in duplicated work effort (and cost) if the complaint is then withdrawn and recommenced with AFCA.

ASFA recommends that any ability to withdraw a complaint from the SCT and then commence a complaint dealing with identical facts and subject matter before the AFCA scheme is limited to those complaints that the SCT had received but not yet commenced to consider.

Given the legal and practical issues associated with a 'transfer' of complaints from the SCT to AFCA, it is vital that clarification is provided of how any complaints will be dealt with that remain unresolved as at the date the Government has proposed for the SCT's closure, 30 June 2020.

We note that the AFCA Bill, as currently worded, provides scope for the SCT to continue until 30 June 2022. While this would allow for a more orderly and efficient handling of the SCT's remaining caseload, ASFA is concerned that a four-year close-down period would place an unreasonable funding burden on the APRA-regulated superannuation sector, given that trustees will also be obliged to contribute directly to the funding of AFCA. Our submission to the Senate Economics Legislation Committee highlighted the need to consider alternative funding and/or wind-down arrangements for the SCT to avoid this outcome[36].

ASFA recommends that the transition team work with the SCT to ensure it is adequately funded and resourced to clear its legacy cases within two years of the commencement of the AFCA scheme, whilst avoiding an unreasonable cost burden on the APRA-regulated superannuation sector which will also be contributing toward the funding of AFCA.

D.3 Governance

D.3.1 Ensuring directors have appropriate skills and experience without being simply representative of sectional interests

The AFCA Bill requires that the number of directors on the AFCA Board "who have experience in carrying on the kinds of businesses operated by members of the scheme must equal the number of directors who have experience in representing consumers"[37].

The former group of directors may be loosely described as 'industry directors', although ASFA acknowledges the intent is that these directors will bring their skills and experience to the Board, without directly representing any specific industry sector.

It is critical that the 'industry directors' on the AFCA board have expertise and experience that is sufficiently deep and also, given the speed with which the financial services sector is innovating and evolving, sufficiently current and up to date. The selection criteria for directors should be specific about the need for relevant industry experience, as opposed to merely the holding of formal qualifications.

Given the need for currency of experience and expertise, it must be recognised that the pool of qualified candidates is likely to include – or primarily comprise - individuals who are presently, or were recently, employed within the industry. The AFCA Board will need to take steps to manage any perception of direct sectoral representation, and/or conflicts of interest, that may arise from this. In this respect, we do not consider that having a director with a background in a particular aspect of financial services would automatically give rise to a conflict of duty and thereby act as a barrier to appointment. However, we anticipate that the processes for selection and replacement of directors would, as a matter of good governance, include disclosure of any conflicts of interest or duty and of any material relationships.

Given the very diverse nature of the financial services industry, it will not be a simple matter to ensure the Board maintains sufficient depth of experience and expertise across all sectors, and in particular in relation to the more complex financial services and products, such as superannuation.

The complaints profiles of financial firms will be impacted by the types of financial products and services they offer – the sector in which they operate. This means that decisions made by the AFCA Board about the operation of the scheme may impact differently on financial firms from different sectors.

In particular, we note that superannuation complaints have a number of unique features. These have been set out at length in submissions by ASFA and other industry stakeholders to the Ramsay Review, to Treasury in relation to the exposure draft Bill, and to the Senate Economics Legislation Committee in relation to the AFCA Bill. They include the complex subject matter of many complaints (particularly those relating to defined benefits), the involvement of multiple parties (often including complicated family relationships), the fact that many death benefit related complaints are, in essence, a dispute between competing third parties over which the fund trustee can exert little control, and the overarching fiduciary duties that superannuation trustees owe to the members of the fund as a whole.

The AFCA Board will need to be mindful of these features when making key decisions about the operation of the AFCA scheme, including in relation to matters such as:

- determining the scheme's funding model and making any future changes to the fee schedule (refer D.3 below)
- assessing the potential impacts of particular aspects of the terms of reference, and future changes to the terms of reference
- appointment of the staff who will hear and decide superannuation related complaints
- approval of processes adopted to resolve complaints.

ASFA welcomes the indication, in the Treasury fact sheet[38] issued upon introduction of the Bill, that the ***initial*** Board for AFCA will have at least one director with superannuation experience and expertise. In order to ensure that the special attributes of superannuation are adequately reflected in the governance and operational arrangements for the AFCA scheme, we consider that representation of the superannuation sector on the AFCA Board will be required on an ***ongoing*** basis.

ASFA also sees merit in providing AFCA with access to additional superannuation specialist expertise and experience through an advisory committee.

We note that when FOS was formed to replace a number of existing EDR schemes with effect from 1 July 2008, its constitution was drafted to include "Board Advisory Committees", which the Board could consult on matters relating to the operation of FOS, including consideration of any proposed changes to the FOS terms of reference that are not minor in nature. The use of the Committees provides the FOS Board with the potential to access deeper – or different – industry expertise than that held by the directors themselves.

ASFA considers that the Board Advisory Committee model is one model that might be adopted to provide the AFCA Board with access to additional experience and expertise in relation to particular sectors. In particular, we are of the view this would be beneficial to ensure that the unique attributes of superannuation, and superannuation complaints, are adequately reflected. However, we note that the FOS constitution leaves the formation of a Board Advisory Committee to the discretion of the Board. ASFA considers that any use of a Board Advisory Committee on superannuation should, for AFCA, be mandatory, and not limited to the transition phase.

ASFA considers that the special attributes of superannuation warrant ***ongoing*** representation of the superannuation sector on the AFCA board.

In addition, **ASFA recommends** that the AFCA constitution should mandate the formation of a Board Advisory Committee on superannuation, to include industry representatives who hold substantial experience and expertise in superannuation. The constitution should entrench a requirement that the Board consult with this Advisory Committee prior to making decisions on matters relating to the operation of AFCA that have the potential to impact:

- consumers who may seek to make a superannuation complaint to AFCA and/or
- members of AFCA against whom superannuation complaints may be made.

D.3.2 Board responsibilities

The provision of effective dispute resolution for financial services – and in particular, for the APRA-regulated superannuation sector, given it is largely compulsory in nature – is critical. ASFA therefore agrees that, prior to authorising AFCA as an EDR scheme the Minister should be satisfied that its Board will adhere to the highest levels of corporate governance.

The Consultation Paper notes an expectation that the AFCA Board would "have regard to the ASX corporate governance principles, as well as APRA's prudential standards and guidance in relation to corporate governance". ASFA considers these to be appropriate matters to which the Board should have regard - the Board of AFCA should adhere to standards of corporate governance that are at least as stringent as those expected of the financial firms that will comprise its membership base.

The constitutions of the existing schemes, FOS and the CIO, appear to ASFA to be an appropriate starting point for drafting the constitution of AFCA. ASFA also endorses the recognition in the paper of the importance of specifically considering matters such as board renewal, diversity, board performance assessment, management of conflicts of interest or duty and remuneration policy. We consider that the governance framework for the AFCA board should reflect the recommendations of the ASX Corporate Governance Principles, as in force from time to time, in relation to these matters.

We further anticipate that AFCA would adopt a range of processes to ensure compliance with its corporate governance responsibilities. These should include, for example, the development and application of a competency matrix to assist in selecting directors with an appropriate mix of skills, experience and other attributes for the AFCA Board.

We note question 33 in the Consultation Paper, which asks whether AFCA's constitution or governing rules should 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 dispute". As there is no discussion of this issue in the paper, it is unclear what type of direction is envisaged. We note that the duties of the FOS Board include providing direction to the Ombudsman on policy matters[39], and would consider it appropriate that this is also reflected in the role of the AFCA Board.

However, ASFA considers that the independence of the decision-makers, and their ability to undertake their role without interference, is paramount. We note that it is explicitly stated in relation to FOS that:

> The Board does not get involved in the detail of cases which come before the Ombudsman as that would prejudice the independence of the Ombudsman. The decisions of the Ombudsman are independent of any interference from the Board.[40]

ASFA considers that the above statement neatly reflects the position that should apply in relation to AFCA. We are of the view this is such a fundamental principle that it should hardly need to be stated, however for the avoidance of any doubt we support including in the AFCA constitution or governing rules a prohibition on direction of the decision makers, in the terms outlined in the Consultation Paper.

ASFA considers that the governance framework for AFCA should:

- ensure that its Board is expected to adhere to standards of corporate governance that are at least as stringent as those expected of the financial firms that will comprise its membership base
- reflect the ASX Corporate Governance Principles, as in force from time to time
- include a prohibition on the Board, or individual directors, directing a decision-maker with regard to the outcomes of a particular dispute or class of disputes.

D.4 Funding matters for consideration as part of authorisation

The AFCA Bill stipulates an 'organisational requirement' that the operations of the AFCA scheme are to be "financed through contributions made by members of the scheme"[41]. The Explanatory Memorandum further indicates that the funding arrangements are to be "determined by the board of the operator of the scheme"[42]. This is consistent with the current arrangements for FOS.

ASFA is broadly comfortable with this approach, provided AFCA's funding model meets certain design principles and that AFCA meets appropriate standards of transparency and accountability. Ultimately, it is the role of the Minister when making a decision to authorise the operator of the scheme to consider whether the operator meets these principles and standards. These issues are addressed in detail below.

D.4.1 Funding matters for consideration as part of authorisation

The Consultation Paper notes that the company seeking authorisation should have to demonstrate that its costs would be recovered via a funding model that is both feasible and acceptable to the future members of AFCA. In this regard, ASFA considers that the funding model should meet a number of design principles.

The funding model should be sustainable

The funding model should be able to raise sufficient annual revenue on an ongoing basis, such that AFCA is able to conduct its dispute resolution functions in the manner prescribed in the legislation.

For AFCA members, a sustainable funding model would provide some degree of certainty, over time, regarding AFCA's funding requirements and the fees that members would be charged. This relates to funding requirements (and thus fees) for AFCA's general costs, but also fees related to specific stages of dispute resolution (these are discussed in more detail below). Greater certainty regarding fees would make it easier for members to make allowances for fees in annual budget processes.

The funding model should minimise cross-subsidisation of costs

The funding model should minimise cross-subsidisation of AFCA's costs in general, and the costs of dispute resolution in particular. This includes cross-subsidisation of disputes across the superannuation industry, but also cross-subsidisation of disputes across the broader AFCA membership.

To that end, ASFA supports a funding model that the Consultation Paper refers to as "a combination model". A combination model would account for the legislative requirement that all (affected) entities must become members of AFCA and thus should contribute to certain general costs, while those entities which generate complaints that require external resolution should bear those specific costs. In this regard, AFCA's costs would comprise two main components:

- 'Base' operational costs that do not directly relate to specific disputes (for example, general administrative costs and costs of responding to general inquiries from consumers, as well as costs related to property, IT and corporate services).
- Specific costs of processing and resolving disputes.

With respect to 'base' operational costs, it would impractical to charge members fees on a user-pays basis. However, it would be expected that, all other things being equal, a larger AFCA member would account for a relatively large proportion of such costs.

As such, for each member, the fee payable in respect of base' operational costs should be a function of one or more metrics of the relative size of the member's business. For entities with a superannuation business, metrics could include funds under management or the number of fund members (or a combination thereof). It would also be appropriate to set minimum and maximum fee amounts.

For dispute-related costs, a fee schedule similar to that currently in place for the FOS could help minimise cross-subsidisation. A fee schedule could include fees that relate to the number of disputes a member has in a particular period (for example, a flat fee per dispute), and fees that relate to the resources required to resolve separate disputes. With regard to the latter, dispute fees could increase:

- the further a dispute progresses through the dispute resolution process
- the more complex the particular dispute.

This type of 'tiered' dispute fee schedule would mean that, in general, AFCA members that have a large number of complex disputes would be expected to pay more than those with a smaller number of simpler disputes.

ASFA recommends that the funding model should minimise cross-subsidisation of AFCA's costs in general, and the costs of dispute resolution in particular.

A 'combination funding model' would be appropriate, where fees are levied on all members in respect of 'base' operational costs that do not directly relate to specific disputes, while fees related to specific disputes are levied on concerned entities.

The funding model should account for issues specific to superannuation

As noted in Part D.2 of this submission, superannuation disputes can be very different from non-superannuation disputes. This is reflected in how Australia's dispute resolution framework has evolved to this point to include a separate body for superannuation disputes (that is, the SCT).

The funding principles (as set out above) with respect to the broader funding model are largely appropriate for superannuation disputes. However, any dispute fee schedule would need to recognise specific design issues related to superannuation disputes.

Potential for conflicts of duty for superannuation trustees

A fee schedule such as that outlined above would provide incentives for members to resolve disputes early. The Consultation Paper identifies this as a key design principle for the funding model.

However, to the extent that the funding model does lead to the early resolution of superannuation-related disputes, this could generate conflicts of duty for superannuation trustees. In particular, settling a dispute early to avoid incurring dispute fees, where a trustee decision might nonetheless have been upheld, may conflict with a trustee's fiduciary duty to their broader membership.

In this regard, ASFA considers that the fee schedule with respect to superannuation disputes should seek to find a balance between these two competing factors. Ultimately, this may require a separate fee schedule for superannuation disputes, which adheres to the broader principles of the funding model that would apply to AFCA's broader membership.

A superannuation-specific fee schedule would need to be informed by data regarding the behaviour of members and consumers with respect to dispute resolution after AFCA begins operations. As is noted in Section D.4.2 of this submission, AFCA will need to collect detailed cost data in its first couple of years of operation to allow it to develop a refined funding model. As part of this process, AFCA could seek to collect data to determine whether a superannuation-specific fee schedule would be required, and the specifics of that schedule.

Tiered dispute fees may not be suitable for death benefit disputes

A portion of superannuation disputes will arise in circumstances where there is no lack of trustee diligence, and where trustees are unable to negotiate an early settlement. The prime example of such disputes is contested death benefit disputes. For such disputes, a tiered dispute fee schedule would unfairly disadvantage affected trustees.

ASFA therefore considers that tiered dispute fees may not be suitable for death benefit disputes.

A potential solution is a separate fee on all superannuation fund trustees specifically for death benefit disputes. This fee could have a similar structure to the fee for 'base' operational costs – that is, the fee payable in respect of these costs could be a function of one or more metrics of the relative size of the member's business (metrics could include funds under management or the number of fund members, or a combination thereof). It would also be appropriate to set minimum and maximum fee amounts.

As is the case for determining a separate fee schedule for superannuation disputes, determining appropriate fees for death benefit disputes would require detailed data with respect to dispute resolutions after AFCA begins operations.

ASFA recommends that the funding model should recognise specific design issues related to superannuation disputes.

If required, a specific fee schedule could be implemented for superannuation disputes to reduce the potential for conflicts of duty for superannuation trustees regarding early dispute resolution.

For death benefit disputes, a separate fee could be levied on all superannuation fund trustees.

The funding model should appropriately account for any additional functions of AFCA

The Consultation Paper states that the Bill does not preclude AFCA from undertaking other functions that are not related to the direct resolution of complaints – such as community outreach and education.

In determining whether it is appropriate for AFCA to undertake an additional function, the operator should have to demonstrate there are clear benefits of these functions to the either AFCA's membership or to consumers, and that these functions would ultimately lead to a better functioning dispute resolution system – for instance, that it would lead to a faster resolution of complaints than otherwise would be the case.

In addition, the functions would have to be appropriately reflected in the funding model. That is, if the additional functions related to all of AFCA's consumers or members, then it would be appropriate for the cost of those functions to be reflected 'base' operational costs. If the functions related to only a sub-set of consumers or members, then it would be appropriate for the relevant members to bear those costs.

Other issues related to the funding model

There are a number of other requirements that an operator should be required to demonstrate in respect of authorisation.

<u>Details on funding arrangements should be made available</u>

The Consultation Paper makes reference to requirements that information on the funding model be made available to members and consumers. ASFA agrees that the company seeking authorisation should have to demonstrate that it will provide certain information to relevant parties.

AFCA's funding arrangements would need to be transparent for AFCA members and for other interested parties. This would be particularly important where fee schedules are complex – likely to be the case in a funding model that seeks to minimise cross-subsidisation where there is necessarily higher/different fees according to factors such as the degree of complexity.

As such, documentation for AFCA's broader funding model, as well as any special funding arrangements for specific sectors, would need to clearly explain how the funding model would apply to AFCA members. Documentation would need to be readily available to AFCA members and other interested parties.

Details on AFCA's costs should be made available

The Consultation Paper suggests that authorisation would require the operator to provide estimates of costs for AFCA to begin receiving and resolving disputes by 1 July 2018 (effectively, AFCA's 'start-up' costs). As noted in Section C.1, ASFA considers that an appropriate commencement date for AFCA is no earlier than 1 January 2019. In this regard, such cost estimates should be provided for the period up to when the AFCA commences operations.

The Consultation Paper also notes that authorisation would require that estimates of costs be included for AFCA's its first year of operations (that is, 2018-19 in the Consultation Paper). ASFA agrees that cost estimates should be provided for AFCA's first year of operations – regardless of the ultimate starting time. ASFA also considers that the operator should, on an ongoing basis, provide annual cost forecasts (particularly with respect to 'base' operating costs) as part of an annual process of forward cost estimation.

D.4.2 Interim funding arrangements

ASFA acknowledges the challenges in developing a refined funding model for the start of the dispute resolution scheme. The Consultation Paper notes that it is unlikely there will be sufficient time between AFCA's authorisation and the time its first members join for it to have a fully-developed and sustainable funding model. The Paper notes that AFCA would likely need to collect detailed cost data in its first couple of years of operation to allow it to develop a refined funding model.

In principle an interim funding model could be based on data from the current EDR schemes, and then adjusted after AFCA has collected the required data from its dispute resolution activities.

This approach is problematic with respect to superannuation. The Consultation Paper rightly points out that the SCT secrecy provisions make it difficult to associate dispute costs with particular funds or sectors. The FOS does receive superannuation-related disputes, but refers the bulk of these to the SCT. As such an interim funding schedule is unlikely to reflect of the actual costs of dispute resolution, which may lead to significant cross-subsidisation of disputes. If this is the case, the funding model may require significant adjustment.

An alternative transitional funding arrangement with respect to superannuation-related disputes could be provided via a temporary increase in the existing APRA levy (the Financial Institutions Supervisory Levies, or FISLs) on superannuation trustees until the fee schedule is finalised and implemented. An appropriate transition period could be two years.

That said, the superannuation industry has consistently raised concerns regarding the lack of transparency around funding provided by ASIC for the operations of the SCT.

Any increase in funding provided via the existing APRA levies would have to be accompanied by an improvement in transparency regarding the monies made available to the SCT. As ASFA has stated in unrelated submissions, with respect to future determination processes for the APRA levies, the associated documentation should, for the duration of the SCT's transition period, clearly specify the amount of funding allocated for the operations of the SCT. ASIC should also be required to provide a greater level of transparency over the monies made available to the SCT for its operational purposes until wind-up.[43]

ASFA recommends that transitional funding arrangement with respect to superannuation-related disputes could be provided via a temporary increase in the existing APRA levy (on superannuation trustees) until the fee schedule is finalised and implemented.

Any increase in funding provided via the existing APRA would have to be accompanied by an improvement in transparency over the monies made available to the SCT.

D.4.3 Transparency and accountability

In moving to a new, fully industry-funded EDR model, it is in ASFA's view critical to ensure that full transparency and accountability is provided by the scheme operator.

Superannuation has a number of features that set it apart from other financial products. These features are of such importance that they create a moral imperative to ensure the EDR arrangements for superannuation operate effectively and promote consumer confidence.

ASFA's support of the SCT as the EDR body for superannuation has been clearly stated throughout the Ramsay Review and our subsequent submissions to Treasury and the Senate Economics Legislation Committee. We have acknowledged that some shortcomings in the SCT's governance framework impeded its accountability to stakeholders, but consider that these could have been addressed within the tribunal model and did not justify replacing the specialist SCT with a generic 'one stop shop'. Given that increased accountability is one of the justifications put forward for the establishment of AFCA, ASFA's concern now is to ensure that the AFCA framework does in fact deliver on that promise.

Key provisions in the AFCA Bill provide for AFCA's accountability to the Minister – for example, the power to authorise AFCA as an EDR scheme if satisfied that the 'mandatory requirements' specified in the Bill[44], and the power to revoke or vary that authorisation[45]. It has also been indicated that as a condition for authorisation, AFCA will be required to report to the responsible Minister annually on any decisions to vary fees[46].

AFCA will also be accountable to ASIC through a number of mechanisms:

- ASIC will have the power to issue specific regulatory requirements regarding compliance with the mandatory requirements and 'general considerations' for the AFCA scheme set out in the AFCA Bill[47]
- AFCA will have a broad power to issue directions to AFCA regarding limits on the value of claims and its compliance with the mandatory requirements, the conditions of its authorisation or ASIC's regulatory requirements[48]
- material changes to the terms of reference cannot be made without ASIC's approval[49] (the term 'material change' is not defined in the Bill, in ASFA's view this should be clearly addressed in ASIC's regulatory requirements and not left to AFCA's discretion).

In terms of accountability to stakeholders, the AFCA Bill requires AFCA to:

- commission the conducting of independent reviews of the scheme's operations and procedures[50]
- appoint an independent assessor[51].

Both these processes have the potential to provide accountability to stakeholders, however it will be necessary to put in place measures to ensure their effectiveness –refer our comments at D.1.4 and D.1.5 above.

These processes should also, in ASFA's view, be supplemented with additional measures to ensure accountability to stakeholders, and these should be embedded in the governance framework for AFCA.

ASFA notes the Australian Government has published high level benchmarks[52] and key practices[53] for industry-based customer dispute resolution. These include an 'accountability' principle that the dispute resolution office "publicly accounts for its operations by publishing its final determinations and information about complaints and reporting any systemic problems to its participating organisations, policy agencies and regulators". A number of 'key practices' are outlined, in relation to availability of its procedures for complaints handling, publishing of determinations, responding to complainants and participating organisations, and publication of an annual report.

ASFA considers that these principles and practices provide a useful starting point, but in order to provide superior accountability, the governance framework for AFCA should also include specific measures addressing matters such as:

- business planning and outcomes, including staffing levels and requirements
- funding, including specific measures to ensure transparency and avoid cross-subsidisation
- strong reporting to stakeholders and to the public regarding: complaint volumes, the average time taken to resolve different categories of complaints, and outcomes of complaints (whether upheld, dismissed, varied)
- provision of regular information to AFCA members outlining significant matters considered by the Board
- a detailed level of reporting about systemic issues.

The Treasury fact sheet released to accompany the AFCA Bill notes, under the heading of 'accountability' that to "ensure procedural fairness, AFCA should also have internal review mechanisms for dealing with complaints about its processes and procedures, such as its decisions regarding jurisdiction[54].

As noted at D.2.1.8 above, this is a matter of particular significance for superannuation complaints, given right to judicial review of such 'administrative' decisions will be lost with the transition to AFCA. The decisions made by AFCA regarding complaints it will or will not hear, or whether a complaint is a 'superannuation complaint' or not, will have potentially significant consequences for a consumer and it is therefore vital there is some form of review for administrative decisions made within AFCA.

ASFA recommends that the governance framework for AFCA should reflect the Government's published benchmarks and key practices for industry-based customer dispute resolution. The framework should include specific measures to ensure accountability to stakeholders, including a right to review of decisions by AFCA on matters such as whether a complaint was within its jurisdiction.

D.5 Other issues

D.5.1 Privacy

ASFA notes, and endorses, the comments in the Consultation Paper regarding the need for AFCA to be recognised by the Australian Information Commissioner as an EDR scheme and for recognition, in the AFCA Terms of reference, that complaints against members about privacy issues are within AFCA's scope.

D.5.2 Dealing with non-superannuation legacy disputes

Under the AFCA Bill as currently framed, there is the potential that there may be up to four financial services EDR schemes in operation for a period. In our submission to the Senate Economics Legislation Committee in relation to the AFCA Bill[55], we noted our concern at this outcome, which has the potential cause significant confusion for consumers as well as significantly increasing the cost and operational burden on financial firms.

ASFA welcomes the indication in the Consultation Paper that a more direct transfer of legacy disputes from FOS and CIO to AFCA may be under consideration. At a minimum, we consider it would be beneficial for CIO and FOS to be placed under AFCA to manage run-off complaints, rather than operating as separate bodies in parallel.

[1] *Treasury Legislation Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017* (AFCA Bill), schedule 1, item 2, proposed new section 1051(4)(f) of the *Corporations Act 2001*. However this reference must be read together with the limits on the powers of the AFCA scheme, as set out in proposed new subsections 1055(4) and (5). Those subsections provide that where the AFCA scheme is satisfied that a decision-maker's conduct or decision is unfair and unreasonable (or both), it may only exercise its powers for the purpose of placing the complainant, as nearly as practicable, in such a position that the unreasonableness or unfairness (or both) no longer exists.

[2] The Treasury, Fact Sheet: The Australian Financial Complaints Authority (AFCA) - the Government's response to consultation, 14 September 2017

[3] ASFA, Response to issues paper: Review of the financial System External Dispute Resolution Framework, 7 October 2016

[4] AFCA Bill, schedule 1, item 2 – proposed subsection 1051(3)(a) of the *Corporations Act 2001*

[5] Senate Economics Legislation Committee, *Treasury Legislation Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017*, October 2017, paragraph 4.7

[6] AFCA Bill, schedule 1, item 2 – proposed subsection 1051(2)(c) of the *Corporations Act 2001*

[7] Review of the financial system external dispute resolution and complaints framework, final report, 3 April 2017, Page 14

[8] *The Treasury, Consultation Paper: Improving dispute resolution in the financial system*, May 2017, Paragraph 36

[9] The Explanatory Memorandum states, at paragraph 1.48 that "the scheme must have an independent assessor to assess the handling of complaints, with a focus on reviewing the service provided to users in the handling of the disputes (**if the assessor determines that the complaint was not handled satisfactorily, the assessor may recommend that AFCA take certain actions**)" (our emphasis). The Explanatory Memorandum does not elaborate on what types of "actions" AFCA might be required to take if the assessor determines that a complaint "was not handled satisfactorily", but this phrasing had caused concern, amongst some stakeholders, that the independent assessment may involve, or effectively amount to, a review of the merits of a complaint.

[10] Financial Ombudsman Service, Independent Assessor appointed to enhance FOS quality assurance program, 4 October 2017

[11] Financial Ombudsman Service, Independent Assessor Terms of Reference, clauses 1 - 3

[12] Financial Ombudsman Service, Factsheet: Accessing FOS - how can we help?

[13] The Treasury, Benchmarks for Industry-based Customer Dispute Resolution, Principles and Purposes, February 2015, The Treasury, Key Practices for Industry-Based Customer Dispute Resolution, February 2015

[14] AFCA Bill, schedule 1, item 2, proposed new subsection 1051(5)(b) and section 1052D of the *Corporations Act 2001* require ASIC approval of 'material' changes to the AFCA terms of reference, but provide no clarification of when a change will, or will not, be considered 'material'

[15] Subsection 15(1). Other conditions apply, but are not presently of concern.

[16] AFCA Bill, schedule 1, item 2, proposed new subsection 1056(1). Other conditions apply, but are not presently of concern.

[17] Subsection 15(2)(a). Other conditions apply, but are not presently of concern.

[18] AFCA Bill, schedule 1, item 2, proposed new subsection 1056(2a). Other conditions apply, but are not presently of concern.

[19] In particular sections 28A regarding service of documents and section 29 regarding the meaning of 'service by post'

[20] Superannuation Complaints Tribunal, Key Considerations that Apply to Death Benefit Claims, paragraph [12]

[21] Superannuation Complaints Tribunal, Key Considerations that Apply to Death Benefit Claims, paragraph [12]

[22] Superannuation Complaints Tribunal, Key Considerations that Apply to Death Benefit Claims, paragraph [13]

[23] ASFA, Submission to the Senate Economics Legislation Committee: Inquiry into the Treasury Laws Amendment (Putting Consumers First - Establishment of the Australian Financial Complaints Authority) Bill 2017, section C.4

[24] *Superannuation (Resolution of Complaints) Act 1993* (S(ROC) Act), subsection 14(6)

[25] AFCA Bill, schedule 1, item 2, proposed new subsection 1056(2) of the *Corporations Act 2001*

[26] S(ROC) Act subsection 14(6A) & (6B)

[27] S(ROC) Act, subsection 15CA(2)

[28] AFCA Bill, schedule 1, item 2, proposed new subsection 1051(4)(f) of the *Corporations Act 2001*

[29] AFCA Bill, schedule 1, item 2, proposed new section 1053 of the *Corporations Act 2001*

[30] AFCA Bill, schedule 1, item 2, proposed new section 1054 of the *Corporations Act 2001*

[31] AFCA Bill, Explanatory Memorandum, paragraph 1.201

[32] *Superannuation (Resolution of Complaints) Act 1993*, subsection 22A(1), read with subsection 63(3B)

[33] *Superannuation (Resolution of Complaints) Regulations 1994*, regulation 6

[34] AFCA Bill, schedule 1, item 59

[35] *Superannuation (Resolution of Complaints) Act 1993*, subsection 22A(2)

[36] ASFA, Submission to the Senate Economics Legislation Committee: Inquiry into the Treasury Laws Amendment (Putting Consumers First - Establishment of the Australian Financial Complaints Authority) Bill 2017, section C.2

[37] AFCA Bill, schedule 1, item 2, proposed new subsection 1051(2)(3)(d) of the *Corporations Act 2001*

[38] The Treasury, Fact Sheet: The Australian Financial Complaints Authority (AFCA) - the Government's response to consultation, 14 September 2017

[39] Financial Ombudsman Service website, accessed 3 November 2017

[40] Financial Ombudsman Service website, accessed 3 November 2017

[41] AFCA Bill, schedule 1, item 2, proposed new subsection 1051(2)(b) of the *Corporations Act 2001*

[42] Explanatory Memorandum to AFCA Bill, paragraph 1.48

[43] ASFA submission, Proposed Financial Institutions Supervisory Levies for 2017-18

[44] AFCA Bill, schedule 1, item 2, proposed new subsection 1050(1) of the *Corporations Act 2001*

[45] AFCA Bill, schedule 1, item 2, proposed new subsection 1050(4) of the *Corporations Act 2001*

[46] The Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services, Media Release: Putting consumers first - improving dispute resolution, 14 September 2017

[47] AFCA Bill, schedule 1, item 2, proposed new subsection 1052A of the *Corporations Act 2001*

[48] AFCA Bill, schedule 1, item 2, proposed new subsection 1052B, 1052C of the *Corporations Act 2001*

[49] AFCA Bill, schedule 1, item 2, proposed new subsection 1051(5)(b) and section 1052D of the *Corporations Act 2001*

[50] AFCA Bill, schedule 1, item 2, proposed new subsection 1051(3)(a) of the *Corporations Act 2001*

[51] AFCA Bill, schedule 1, item 2, proposed new subsection 1051(2)(c) of the *Corporations Act 2001*

[52] The Treasury, Benchmarks for Industry-based Customer Dispute Resolution, Principles and Purposes, February 2015

[53] The Treasury, Key Practices for Industry-Based Customer Dispute Resolution, February 2015

[54] The Treasury, Fact Sheet: The Australian Financial Complaints Authority (AFCA) - the Government's response to consultation, 14 September 2017

[55] ASFA, Submission to the Senate Economics Legislation Committee: Inquiry into the Treasury Laws Amendment (Putting Consumers First - Establishment of the Australian Financial Complaints Authority) Bill 2017, section D.1.3