



20 November 2017

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In Word and PDF formats

Dear Colleagues

**Establishment of the Australian Financial Complaints Authority
(AFCA)
Consultation Paper November 2017 (Paper)**

The Financial Services Council (**FSC**) has over 100 members representing Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies. The industry is responsible for investing more than \$2.7 trillion on behalf of 13 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the fourth largest pool of managed funds in the world. The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

Thank you for the opportunity to provide a submission on the Paper. For convenience, we will adopt in our response, the headings, issues and questions in the Paper.

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Summary

However, it is useful if in the first instance we outline in **summary form** our views on the various topics raised. This is as follows: –

(a) Insofar as is possible, AFCA should be governed by and have reference to in its constituent documents to "good governance" principles, appropriately modified for the circumstances of AFCA;

(b) We have suggested in our detailed observations guiding principles which should govern AFCA. These include matters such as affordability, effectiveness, fairness and impartiality and the appropriate reflection of effective decision-making in its Terms of Reference (**TOR**);

(c) The existing specific limits outlined in the Paper should be maintained. Clarity is required concerning the impact of any proposed increases;

(d) The TOR should clearly set out the principles governing decision-making – clarity is required in the TOR concerning fairness and consistency of decision – making;

(e) We agree that panels may be appropriate in particularly complex and difficult matters. There may also be scope for the use of panels to perform a review or guidance function in such matters. It may be that further consultation is required on the ongoing use and role of panels;

(f) Independent reviews should not only be independent but also be seen to be independent. It would be preferable in our view for ASIC, and indeed the Minister, to commission such reviews when required. Further, we believe consistent with the concept of independence and procedural fairness that AFCA as part of its TOR be required to grant irrevocable authority to the independent assessor to commission reviews;

(g) The independent assessor should have power to override any decision of AFCA and should have full and free access to the AFCA board and any AFCA records. The independent assessor should be appointed in a way which means the independent assessor is not only factually independent but also appears to be independent. The Minister should have power to review the role and appointment and function of the independent assessor;

(h) We have outlined in our submission, the relevant governance principles we believe AFCA should have regard to, appropriately modified according to the circumstances. These include principles developed by the ASX and the Governance Institute;

(i) In relation to funding, the key factor here is that there should be no cross-sector subsidisation. Funding should be directed to direct dispute resolution functions only and should be developed

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on a user pays basis. We anticipate that there will be further transparency and consultation as we move forward;

(j) We do not believe there should be an interim funding model. There should be sufficient industry knowledge amongst CIO and FOS participants to develop a model that will work going forward;

(k) In our view, the key stakeholders of AFCA are consumers and FSPs. Nevertheless, as an EDR body, AFCA must be independent in its decision-making from these stakeholders;

(l) Consideration could be given to a maximum ratio or quantum of fees payable by an FSP;

(m) We agree with the observations and have been made concerning privacy;

(n) It is undesirable for up to four EDR schemes to operate concurrently. The measures suggested to address this appear to be reasonable.

Our detailed comments follow.

PART 1 - TERMS OF REFERENCE GUIDING PRINCIPLES FOR AFCA'S ESTABLISHMENT

QUESTION FOR DISCUSSION

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

1. In our view, the guiding principle for AFCA is that it should adhere to principles of good governance. This is because it will be a significant body both in terms of policy outcomes and reach through the financial services and credit industries. For these reasons, we believe that those principles should be expressed in its Constitution and other constituent documents. As far as is practicable, reference should be had to similar-sized ASX listed entities and reference to the governance principles of the ASX and the Governance Institute appropriately modified for the circumstances. In the end result, AFCA should be a body which operates fairly for both financial service and credit providers (**FSPs**) and their customers. Good governance in this context in our view is the underpinning of a structure under which such fairness can be achieved.

In addition, we suggest the inclusion of the following additional principles:

(a) Affordability - any alternative dispute resolution process should not be costly for either consumers, or for FSPs as this

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could affect the affordability of financial products with knock-on effects for consumers.

(b) Complex or high value matters should be left and indeed referred to the courts - a dispute resolution body, where witnesses and experts cannot be cross-examined, is not a suitable venue for determining factually complex or claims where an FSP asserts fraud or other wrongdoing on the part of a consumer. This is not fair for either party. The court is a more appropriate forum in these circumstances.

(c) Ensuring quality decision-making - a decision-making body needs checks and balances to ensure its decision-making is appropriate. An independent assessment process, ASIC overview and regular audits should ensure that the decision makers are fair, correct and consistent in their decision-making and accountable.

(d) Proper and ongoing training for decision makers - this is necessary to ensure that they are competent to make decisions and their competence is tested on an ongoing basis.

(e) Fairness and impartiality - the right decision on the law and facts should be made regardless of extraneous factors.

(f) Early identification and removal of meritless complaints from EDR - a number of complaints arise from limited understanding on the part of the complainant where the matter has no real prospects of success. Unless such matters can be identified promptly, time can be inappropriately allocated to such matters.

(g) FSP Member Liaison. Currently FOS conducts a Life Insurance Liaison Group, made up of selected FSP member representatives. We would like to see this maintained and indeed greater emphasis placed upon such groups at AFCA.

ISSUE 1: MONETARY LIMITS

QUESTIONS FOR DISCUSSION

Specific monetary limits

2. As AFCA will be a new EDR scheme, is it appropriate to maintain specific limits for:

- ***income stream risk disputes;***
- ***general insurance broking disputes; and***
- ***third-party motor vehicle insurance?***

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3. If these specific limits are to be retained, should there be an increase in the limits?

Impact on Professional Indemnity Insurance

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

2. The purpose of an EDR scheme is to deal with the majority of complaints. An EDR scheme is not suitable for disputes of high value or complexity. It follows there is a need for tailored limits, depending on the type of products and services the subject of the dispute. The current FOS specific limit primarily relevant to our members is that of claims in respect of income streams (apart from the more general 'Other' limit). For the reasons we previously have advanced in respect of earlier iterations of the Treasury Laws Amendment (Putting Consumers First— Establishment of the Australian Financial Complaints Authority) Bill 2017 (Bill), we believe these specific limits should be retained.
3. In this regard, we note that under the revised FOS TOR for claims lodged on and from 1 January 2015, FOS broadly speaking may consider claims up to \$500,000. Nevertheless, the monetary cap for an award FOS may make is \$309,000 for all disputes, except:
 - (a) General insurance broking: \$166,000;
 - (b) Income stream life insurance: \$8,300 per month;
 - (c) Uninsured third party motor vehicle claims: \$5,000. (with a \$3000 cap limit per claim on consequential loss and non-financial loss).
4. In the context of income protection claims, we assume that if the general monetary limit increases to \$500,000, then AFCA would hear the matter, regardless of the monthly amount, but that the aggregate amount recoverable would be no greater than \$500,000. Clarification is required in this regard. If this is not correct, then there is the potential for recoverability well beyond the current and anticipated limits. On one view, the proposed limit applies only for lump-sum products. However, many income protection disputes concerned claims that may run for many years to the benefit expiry date (commonly, age 65) and thus the value over course of time will exceed the monetary Ltd. We understand that FOS currently has a

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monetary jurisdiction limit on such claims in accordance with the face value of the benefit. We would recommend this be retained and there be further consultation in this area.

5. We also would be concerned if as a consequence of the TOR a wider jurisdiction were envisaged for AFCA. We have set out our reasons for this in the following comments.
6. AFCA should not have a wider jurisdiction than that contemplated by the Corporations Act 2001 and the Bill. While membership to an external dispute resolution service is compulsory, the move to a single scheme with an all-encompassing jurisdiction should be consistent with principles of natural justice (which ordinarily includes rights of review). We note that the Bill contemplates a right of appeal will exist only in relation to superannuation matters. We accept this is the policy position of the Government and do not take issue with that position. However, this does mean that the correct and appropriate formulation of the TOR and the robustness of oversight mechanisms such as ASIC and the independent assessment process are critical. For example, we have suggested elsewhere in this submission that the use of Panels as an internal review mechanism in complex and difficult cases could be considered in certain cases in the TOR.
7. In *Financial Industry Complaints Service Ltd (FICS) v Deakin Financial Services Pty Ltd [2006] FCA 1805*, the Federal Court outlined how FICS was able to alter its rules to obtain a wider jurisdiction than that contemplated by law because its Constitution allowed it to change its rules without consulting its members. This was allowed in the contract the financial services providers (FSPs) had with FICS. It was found, however, that while FICS was able to review the complaint, its ability to resolve the complaint was limited by its monetary limits.
8. *Mickovski v FOS and Metlife [2011] VSC 257; [2012] VSCA 185* found that FOS decision was not amenable to judicial review even if an Ombudsman erred in its consideration because the TOR states that a Jurisdictional Decision is final. This was confirmed in *Bilaczenko v FOS [2013] FCCA 420*. The outcome from these authorities is that a TOR which provides for a wider jurisdiction than the law itself does not itself satisfy what are commonly perceived to be principles of natural justice or procedural fairness. We assume that consideration necessarily will be given to these types of issues in formulation of the TOR
9. It is also relevant to note that the SCT, unlike FOS, has built into its constituent legislation the principle that errors of law are amenable to review by the Federal Court.
10. Any increase in limits carries with it the risk that matters which are inappropriate for an EDR service are drawn into its

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net. In particular, as we have indicated, larger, more complex matters are better suited to a court environment, which provides for the testing of evidence by cross-examination, and rules of evidence.

11. For these reasons, it is preferable that the current sector limits are retained within AFCA and clarity provided how these limits will work in the context of the increased general claim limit for income stream matters. There may also be merit in considering a reduction of the limits, bearing in mind that AFCA is required to commission an independent review of its monetary limit within 18 months of commencing operation. That is, it may well be more appropriate to set a lower level rather than a higher level at the outset so that the new scheme first can be tested before effecting significant increases in jurisdictional limits.

ISSUE 2: ENHANCED DECISION MAKING

QUESTIONS FOR DISCUSSION

5. What measures may assist in ensuring AFCA's decision making processes promote consistency, while:

- **deciding each case on its merits based on the facts and circumstances of the complaint;**
and

- **maintaining the objective of achieving fairness and flexibility to adapt to changed circumstances?**

6. Are there any other principles that may assist in ensuring AFCA provides fair, efficient, timely and independent decisions?

7. To what extent should these principles be reflected in the Terms of Reference, while allowing for operational flexibility?

12. By way of general observation, we note that we have made earlier submissions highlighting a level of frustration expressed on occasion by our members in relation to the FOS concept of "fairness in all the circumstances". Commonly, the experience of our members has been that fairness results in an outcome favourable to complainants, although the FSP may have acted, in accordance with the law-as it is required to do at general law and by its AFSL.

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13. The key measures here are checks on decision makers regarding the correctness of their decision making to ensure fairness and consistency. An appeal or review process (where it is available) and regular audits of decision-making are of paramount importance to ensure correctness and consistency. We accept, as we have said that, putting to one side superannuation matters, rights of appeal is not a matter for consideration. However, this necessarily focuses attention upon the TOR and independent assessments and reviews.

14. "Fair in all the circumstances" is a subjective concept which is susceptible to a wide range of possible interpretation. The TOR should set up detailed guidance around the concept of "fair in all the circumstances" to help ensure fairness and consistency. This should be backed up by granular reporting to monitor the occurrence of any unbalanced decision-making, or the over representation of outcome in relation to certain types of disputes. As we have said elsewhere in this submission, there would be utility in considering the use of Panels as a review body in certain matters in formulating the TOR.

15. The doctrine of precedent has a role to play here, as it is difficult for complainants and financial service providers to make an informed decision to invest time and effort into making or defending a complaint without appropriate benchmarks. The TOR should articulate what role precedent has to play but should be flexible as decisions may not always be correct, regardless of the forum in which they are heard.

16. Thus, as there is no right of appeal on questions of law or otherwise from an AFCA decision (except in superannuation matters), there should be clear articulation in the TOR to procedural fairness and outcomes arrived at being fair to both consumers and financial services providers.

17. In this context, we do note that the current operational guidelines for FOS do provide some guidance. It seems to us that there is a potential to include a review function to assess consistency of decisions and that this should be part of the role of the independent assessor.

18. The principles should be reflected in the TOR to provide clear guidance to decision makers, FSPs and consumers. Flexibility can be accommodated by periodic review of the Terms of Reference.

19. We also suggest that Practice Notes be (re)developed and made available to member FSPs, based upon the AFCA decision-making principles. The opportunity to discuss reasons behind decisions, with the Decision Maker, should be available to member FSPs.

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ISSUE 3: USE OF PANELS

QUESTIONS FOR DISCUSSION

8. How should AFCA balance the advantages of using panels in certain circumstances against efficiency and service implications including cost and timeliness of its decision making?

9. Are there other factors that should be taken into account when considering whether a panel should be used?

10. How best can AFCA provide clear guidance about to users about when a panel should be used?

20. We suggest that as a starting point, the current FOS Guidance at paragraph 8.5 of its TOR should be considered. These guidelines include requirement for FOS to take into account a strong preference expressed by a party for a panel. The current panel process also includes a requirement to consider whether there is a class of disputes which would benefit from a panel, particularly where there is a complex set of facts or circumstances.
21. However, the question assumes that panels are better equipped to deal with complex and larger disputes. This assumption may or may not be correct. Properly trained decision makers, whose decisions are regularly audited, will have a degree of specialist knowledge in forensic and legal matters, which part-time or occasional panel members may lack. It may be that an internal review process from the decision maker to a Panel could be the appropriate place for a specialist panel in difficult and complex matters; accepting that it is not intended that there be specific appeal rights to the Court in non-superannuation matters.
22. In our view, it would be useful if the AFCA processes could include specific examples of complexity with a general discretion available as to the use of panels.
23. We also note that a panel is a much slower and more expensive form of decision-making. It is not necessarily more skilled or informed than a specialist decision maker. As we have indicated, a panel might best serve as an internal review from determinations of individual decision makers.
24. However, another view is that the use of a panel is to be preferred for strength of decision-making. If AFCA is to have

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options available to move between Ombudsman and Panel, then it must be very clear to FSPs as to what will drive this decision, so FSPs know beforehand where the final decision will be made. If it is to be quantum based, that figure must be contained in Terms of Reference. If it is to be based on terms such as "complexity", such terms must be defined. Certainly if a potential "industry standard" is to be set, this must be a Panel decision. FSPs may well be open to the higher fees, to obtain the more robust, consistent decision of a Panel. This will require further consideration and consultation.

ISSUE 4: INDEPENDENT REVIEWS

QUESTION FOR DISCUSSION

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

25. We note the comments in the Paper which refer to the recommendations in the Ramsay Review. We also note that ASIC will be further consulting in relation to matters such as timeframes for review. Importantly, the Paper notes that ASIC currently does not have a clear power to require a scheme to conduct a targeted review in response to a particular identified problem (page 11). In our view, this issue does need to be considered as a matter of priority, and it would be our preference for ASIC, and indeed the Minister to have such a power.
26. Similarly, it would be preferable to remove AFCA from the commissioning of reviews. It is important for the integrity of the AFCA regime that such reviews not only be independent but are seen to be independent. Thus, AFCA in its TOR should grant an irrevocable authority to the independent assessor, as its agent to commission reviews. Such reviews then would be and be perceived to be truly independent.
27. In relation to the substance of matters which should form part of any independent review, we suggest that the review first should consider the appropriateness and effectiveness of current funding models. It is important that the funding model is balanced and that there is no cross-subsidisation and these matters should form part of the scope of any independent review. In addition, the general effectiveness of AFCA should be considered and whether the application by AFCA of its powers is

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within not only the scope but also the spirit of the relevant legislation. It also seems to us that the following should be the subject of review:

- (a) Use of panels;
- (b) Appropriate skill sets of AFCA members;
- (c) The quality of decision-making,
- (d) The ability to filter unmeritorious claims, and
- (e) Ensuring that decisions better left to a court, for reasons discussed elsewhere, are not heard by AFCA.

ISSUE 5: INDEPENDENT ASSESSOR

QUESTIONS FOR DISCUSSION

12. How and where should the charter of the independent assessor be defined? Who should be able to make a complaint to the independent assessor?

13. What safeguards should be put in place to ensure the assessor remains 'independent' (for example, should there be restrictions on early termination of the independent assessor)?

14. Should the independent assessor have guaranteed direct access to the AFCA Board?

15. What other reporting arrangements should be in place (for example, if there is serious misconduct or a systemic issue)?

16. Should the independent assessor publish their findings in each case on an anonymised basis?

17. What should happen if AFCA disagrees with the independent assessor's decision?

18. When should a review of the functions and operation of the independent assessor be undertaken?

28. We do note that if robust internal review and audit processes were introduced, an independent assessor may not be necessary. Rather than have a particular individual acting as part of a review process, frequent audits together with targeted ASIC oversight may be more effective. However, we understand the reasoning for this model and we do support the concept of the appointment of an independent assessor.

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29. An independent assessment process in our view is likely to be a good and effective vehicle to ensure that issues we have raised such as consistency of decision-making, decision-making processes and delivery of the services under this scheme are identified, addressed and managed where necessary.
30. At one level, logically, the charter of the independent assessor should be defined in the TOR. All users of the scheme should be able to make complaints to the independent assessor. We note that current FOS guidance is that any person or business directly affected by a decision may complain. There may also be merit in considering whether in respect of specific classes of dispute industry or other advocacy bodies also should be able to raise issues with the independent assessor.
31. Again, we stress that for the integrity and robustness of the AFCA process, independence requires that the assessor be independent in appearance and actuality. The concept of independence requires that an entity separate from, and not subordinate to, AFCA appoint the independent assessor. Our strong preference would be that the Minister appoints the independent assessor. The charter of the independent assessor should be subject to further detailed consultation with relevant stakeholders including industry.
32. We also make the following observations-
- (a) If an independent assessor is appointed, then that person should have the ability to override any decision, including that of the Chief Ombudsman. To ensure his or her independence, the independent assessor should have access to the AFCA Board.
 - (b) In relation to serious misconduct and systemic issues, AFCA should set up its own division to which decision makers could refer matters of this nature. This specialist division could then make an informed judgment as to how to proceed, with regulatory reporting as necessary.
 - (c) We agree that the assessor's findings and reports should be published as suggested.
 - (d) AFCA should be bound by any determinations of the independent assessor.
 - (e) For good governance and transparency the role of the assessor should be reviewed periodically but this should be a review undertaken at Ministerial level.
 - (f) The independent assessor should have access at all times to the Minister and to ASIC.

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ISSUE 6: EXCLUSIONS FROM AFCA'S JURISDICTION

QUESTIONS FOR DISCUSSION

19. Do existing exclusions from FOS and CIO jurisdictions present any unreasonable barriers to accessing the schemes?

20. Is there more that could be done so that complaints lacking substance are excluded from being dealt with by AFCA?

21. What, if any, further practices should be adopted to ensure the correct balance between accessibility to the scheme and ensuring that complaints not appropriate for consideration by an EDR scheme are excluded?

33. The existing exclusions from the relevant jurisdictions do not in our opinion present any unreasonable barriers to accessing schemes. In our view, the existing exclusions should be maintained.

34. By way of separate observation, and to confirm our previous comments. We do note that the experience of our members is that on occasion there have been issues in the current arrangements where FOS has heard matters where clearly the matter would be best served by court processes. Examples of this include matters said to involve fraud and complex, fraudulent non-disclosure matters.

35. Observations of our members indicate that there could be a strengthening in processes to determine at the outset whether a claim lacks substance or is frivolous. We would like to see a more robust and discerning approach to review of claims at the initial level (triage) going forward.

36. Our members experience at the FOS level is that inappropriate claims are a major issue which can clog the EDR process for genuine claimants. Better training for decision makers, better triage, more vigorous guidelines for decision makers and a willingness to exclude matters appropriately could all assist.

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

QUESTIONS FOR DISCUSSION

22. What requirements relating to accessibility should be included in AFCA's terms of reference?

23. Having regard to the current FOS terms of reference and CIO rules, what principles and topics are of sufficient ongoing significance that they should be addressed in the AFCA terms of reference?

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24. Are there any matters not currently included in the FOS terms of reference/CIO rules that warrant inclusion in AFCA's terms of reference?

37. Generally, the current TOR and rules are appropriate, as is FOS guidance not currently included in the TOR. This guidance should be reflected in the TOR with appropriate modifications.

<http://www.fos.org.au/custom/files/docs/consumer-fact-sheet-on-accessibility.pdf>

38. There may be merit in more targeted information being made available to the public. Consideration perhaps could be given to introducing a more refined search function on the website so consumers can search for disputes that have similar facts to their own.
39. More information could be provided to the public to explain what a genuine complaint looks like and what is inappropriate for consideration by the AFCA. This could be a feature of the AFCA's website and the dispute form filled in by a complainant.
40. Matters before a court or where the AFCA is being used as a testing ground for future litigation should not be considered by the AFCA.
41. More detailed rules around the criteria for exclusion, the meaning of "fair in all the circumstances" and rules reflecting a realistic appraisal of the suitability of a complex matter for a body such as the AFCA are required.

**ISSUE 8: ADDITIONAL ELEMENTS OF THE SUPERANNUATION DISPUTE RESOLUTION PROCESS TO BE ADDRESSED IN TERMS OF REFERENCE
*QUESTIONS FOR DISCUSSION***

25. What additional matters related to superannuation should be addressed in AFCA's terms of reference (as opposed to operational guidelines)?

26. What matters related to superannuation would benefit from the additional flexibility that comes from being addressed in operational guidelines?

42. We agree with the observations in the Paper as to the superannuation-specific matters which do need to be addressed

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in the TOR or operational guidelines. In addition, we note the following-

- (a) It would be prudent to clarify that both discretionary and non-discretionary decisions of trustees come within the jurisdictional ambit of AFCA;
- (b) There may be merit in outlining in the guidelines of some practical examples of where AFCA might consider a matter not to be within jurisdiction or frivolous or vexatious.

ISSUE 9: DISPUTES CURRENTLY BEFORE THE SCT

QUESTION FOR DISCUSSION

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

43. As a general observation, we note that although it is proposed that the SCT will operate until 30 June 2020, our understanding is that the SCT does not appear currently to be resourced to meet that deadline. As we have said in our prior submissions, we recommend that the ideal way of ensuring that the expertise of the SCT is available to AFCA is for there to be a lift and drop of SCT functions and "governing rules". Failing this, there should be clarity on how complaints not yet finalised with the SCT at this date will be dealt with (i.e. will they transfer across to AFCA in a partially complete state, or will the SCT closure be extended)? Our preferred position remains however that if a complaint has been lodged with the SCT prior to 1 July 2018 that is where it should remain. That is surely why the SCT will continue to operate until 30 June 2020. To allow withdrawal and re-lodgement with AFCA post 1 July 2018, only promotes inefficiencies for all parties and apports additional costs to individual complaints that cannot be justified.
44. We also note that Treasury expressed a view at a recent roundtable that there will be a duplication of costs during the transition period. Our members would like to avoid duplication of costs to the extent reasonably practicable.

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45. In the normal course a matter would be “dealt with” when heard, a decision made and any appeal period has expired. However, we can see the proposed dual approach of the SCT and AFCA giving rise to potential duplication of costs.

46. For completeness, we note that there are some very real and substantive issues here from our members’ perspective, some of which do not appear to be fully-addressed at this stage, including the following-

- (a) A clear cutover date is critical. There needs to be a specific date when no further complaints are lodged with the SCT. This will avoid general confusion and misinformation occurring. It also reduces the possibility of duplicated lodgements of the same complaint to both SCT and AFCA, or, different complainants lodging a complaint on the same matter to both and receiving entirely different determinations. Superannuation complaints can have multiple parties with an interest. Death benefits are of particular concern;
- (b) A complaint that has already been determined by the SCT should not be capable of resurrection by lodgement of the complaint again with AFCA;
- (c) AFCA is intended to improve outcomes for consumers and provide greater transparency and accounting. It is not clear how creating a generic complaints body achieves this intention. There is real concern that the specialist knowledge, expertise and well established processes built up over the many years that the SCT has operated will be diluted and largely lost over time;
- (d) If the loss of expertise in the above point is to be stemmed, AFCA should have a dedicated superannuation team as part of its operation;
- (e) Once the SCT is wound up in 2020 – all SCT records will need to be transferred to AFCA and be easily retrievable and able to be cross-referenced to ensure ‘new’ complaints have not already been considered and determined;
- (f) Once operational, AFCA will be referring the complaint back for a final opportunity to resolve. How will this work in practice? Will an organisation’s internal IDR manage this or will it be referred straight back to the Trustee? What time frames will apply?
- (g) Resolution of superannuation complaints are generally more complex than non-superannuation products and the decision makers at AFCA will need a strong understanding of the superannuation framework

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and the role of the Trustee to navigate these issues. Expertise in resolving disputes will be insufficient to properly consider and determine superannuation matters;

(h) At this stage, there is little detail about the day-to-day operation of AFCA, how it will deliver service or be resourced. Our members emphasise that more detail and time to consult and work through the many issues is needed to avoid the SCT to AFCA transition being overly difficult and ultimately unsuccessful.

PART 3 - GOVERNANCE

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

QUESTIONS FOR DISCUSSION

28. What measures could be put in place to secure sufficient knowledge of how different parts of the industry operate, while avoiding the representative tag for directors?

29. What measures should be put in place to ensure the AFCA Board appropriately balances the considerations of currency of director knowledge of particular industry sectors, conflict of interests, and breadth of competencies required?

30. What needs to be addressed at a Board/constitution level and what can be addressed through additional governance arrangements established by AFCA such as industry sector advisory panel(s) for transition?

47. As we have said elsewhere in this submission, it is important that AFCA because of its reach and function be subject to the highest and most appropriate standards of good governance. It seems to us that the relevant yardstick should be what is expected of a similarly sized entity providing goods and/or services to the public. In this regard, the ASX Corporate Governance Council's Principles and Recommendations and the Governance Institute's Good Governance Guides should specifically be referred to in the TOR and other relevant documents for AFCA (with appropriate modifications as might be required). It would be appropriate for there to be ASIC oversight in this regard and that any departures from those standards be publicly stated with supporting reasons and approved by ASIC.

48. It also seems to us that it is important and critical to the success of AFCA that industry be appropriately represented. It is important that the AFCA Constitution provide that

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notwithstanding that AFCA directors have been appointed to “represent” industry or consumers that at all times they must act in the best interests of AFCA as a whole. All directors should be chosen based on competence and knowledge and that industry-based directors should be persons with current or recent industry experience in the types of businesses operated by FSPs.

49. As a safeguard, directors could be required to attest to their independence and willingness to put the interests of the AFCA first. Indeed, as we have indicated elsewhere, this could be addressed by specific reference in the Constitution to directors being required to act in the interests of AFCA as a whole and not the “interests” they represent.
50. Further, the Board of AFCA should give policy direction and not become involved in the day-to-day management of AFCA. It is in the day-to-day management that decision-making in respect of complaints takes place. Accordingly, it is axiomatic that directors should not interfere in individual decision-making. To this extent, the appointment of representatives from FSPs and consumer groups should not involve issues of fairness. The industry is complex and without specialists (consumer or business) effective and correct decision making will be hampered.
51. Finally, we note that appropriate safeguards of independence need to be built into the AFCA Constitution to ensure fair determinations in complaints are reached. Board committees should be established for particular areas of the financial services industry so that consumer bodies and industry representatives can consult.

ISSUE 11: BOARD RESPONSIBILITIES

QUESTIONS FOR DISCUSSION

31. Are there additional functions or responsibilities of the AFCA board that are not reflected in the constitutions of the existing schemes?

32. What benchmarks should AFCA have in relation to matters addressed in the ASX corporate governance principles, including:

- **board renewal;**
- **diversity;**
- **procedures for assessing board performance;**
- **management of conflicts of interest or of duty on the part of directors and executive staff; and**
- **remuneration policy?**

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33. Should the Constitution or governing rules provide that neither the board nor individual directors can direct a decision-maker with regard to the outcomes of a particular dispute or class of disputes?

52. As we have indicated, the adoption of the ASX corporate governance principles, with appropriate adjustments, appears appropriate. The highest standards should be adopted, save where there is a valid reason for departure. Appropriate advice could be taken from the ASX, the AICD and the Governance Institute.

53. The AFCA Board from a corporate governance perspective should give policy and overall operational direction, and should not be involved in day-to-day management. Accordingly, decision-makers should not be subject to Board direction in relation to a particular dispute or classes of dispute and it is imperative that such interference should not be permitted. Further, the Board's understanding of a particular case is limited in terms of time, knowledge of the evidence, the applicable law and forensic ability. It is inappropriate for the Board to intervene in individual cases to the detriment of a particular party to the dispute.

PART 4 - FUNDING

ISSUE 12: FUNDING MATTERS FOR CONSIDERATION AS PART OF AUTHORISATION

QUESTIONS FOR DISCUSSION

34. In addition to matters identified in paragraphs 1-3 above, what other material should a company seeking authorisation to operate the AFCA scheme provide to demonstrate that it has satisfied the requirements of adequate funding and sufficient funding flexibility?

35. Are there any principles beyond those identified in paragraph 2 above that should underpin AFCA's funding model?

36. Should the funding arrangements for superannuation and non-superannuation disputes be separate and distinct, given the very different nature of these disputes?

54. A key consideration is that the AFCA will be run at a cost lower than the separate decision making bodies it supplants. This should be possible due the efficiencies arising from its greater size and scale. We assume that detailed forecasting and estimates will be undertaken.

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55. The relevant principles should include an acknowledgement that there is no cross-sectoral subsidisation and the mechanics need to be outlined how this is to be achieved. Our members would be particularly concerned with any approach which is based on FUM or similar measures. Our members would welcome further consultation; however the view which has been to the fore is that the funding should be on a "user pays" basis ie, the complaints that an FSP receives should be a significant factor. In relation to a user pays system, for fairness it is imperative that cross-subsidisation does not take place. Not only should superannuation and non-superannuation be considered differentially, but also banking, insurance, insurance broking and investment products should have their own appropriate scale fees.
56. We also confirm our previous comments that members must be confident that any proposed funding model be restricted to direct dispute resolution functions only. There must be no cross-subsidisation. We anticipate that there will be further transparency and consultation as we move forward.

ISSUE 13: INTERIM FUNDING ARRANGEMENTS

QUESTIONS FOR DISCUSSION

37. If an interim funding arrangement were put in place, what features should it have and when would it be appropriate to transition to a long-run funding model?

38. What special considerations might need to be factored into an interim funding model to balance the need for adequate resources (certainty) with the principles (accuracy)?

57. In our view, there should be sufficient industry knowledge amongst CIO and FOS participants to develop a model that is not interim and is based on an approach that incentivises early case management (as is currently the case). The SCT transition and funding model will be different and this should be canvassed in a funding model that meets the needs of superannuation complaints.
58. Further, it seems to us that it would be unwise to put an interim funding arrangement in place, as there is a need to establish the model properly from the outset. If need be, SCT secrecy provisions could be amended by appropriate legislation providing safeguards.

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ISSUE 14: TRANSPARENCY AND ACCOUNTABILITY

QUESTIONS FOR DISCUSSION

39. Who are the key stakeholders AFCA is accountable to? What is the key objective and measure of importance to each stakeholder?

40. In addition to the accountability measures in the Bill, are there additional measures that should be embedded in AFCA's Constitution and/or terms of reference or reflected in ASIC guidance to ensure accountability to stakeholders?

59. The key stakeholders of AFCA are the customers, suppliers and manufacturers of the financial service products over which the AFCA has jurisdiction. The sole objective for all these stakeholders is that the financial products are provided fairly in accordance with the agreement set out in the financial product and any relevant laws.

60. Care is needed that neither FSPs nor consumers groups can deflect the AFCA from doing what is legal, fair and correct. An EDR body has to be independent in its decision making from stakeholders. While matters of general policy might be suitable for accountability, individual decision-making should not be.

QUESTION FOR DISCUSSION

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

61. Consideration could be given to a maximum ratio of fees payable to the overall size in premium or income of the financial product or service in question, as an additional check.

PART 5 - OTHER ISSUES

ISSUE 15: PRIVACY

62. Noted and agreed.

ISSUE 16: DEALING WITH NON-SUPERANNUATION LEGACY DISPUTES

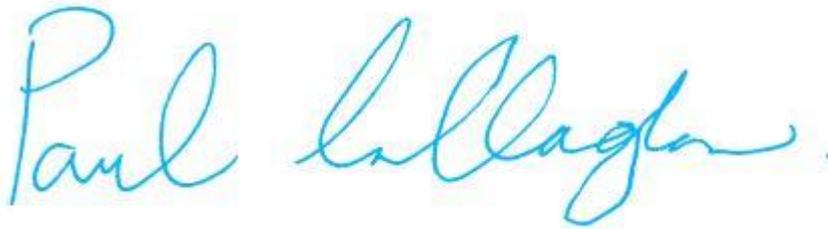
Transitional arrangements

63. We agree that it is undesirable that up to four EDR schemes operate concurrently. The measures suggested appear to be reasonable.

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Should you have any questions, please contact the writer on 02-9299 3022.

Yours Faithfully

A handwritten signature in blue ink that reads "Paul Callaghan". The signature is written in a cursive style with a period at the end.

**Paul Callaghan
General Counsel**