

21 September 2017



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Dear Mr Raine

ASIC welcomes the introduction of the *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017* (the Bill), and the opportunity to make this submission to the Committee. We think that the proposed reforms will strengthen and improve the Australian financial services external dispute resolution (EDR) framework.

The Bill is the Government's response to the recommendations of the *Review of the financial system external dispute resolution framework* conducted by the expert Panel chaired by Professor Ian Ramsay (the Ramsay Review).

ASIC has played a leading role in setting and applying standards in the financial services EDR sector since 1998. ASIC has legislative power to approve and oversee the operation of industry-based EDR schemes (dealing with all non-superannuation related consumer disputes) and key mandatory reforms that were initiated by ASIC over this period include:

- Requiring schemes to operate independently of the industry sectors that funded them;
- Introducing the requirement that approved schemes identify, deal with and report systemic issues and serious misconduct to the regulator; and
- Formalising the requirement to hold independent reviews on a regular basis.

It is difficult to overstate the importance of EDR schemes in the financial services sector. In 2015/16 the three EDR schemes [the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT)] collectively dealt with 41,223 consumer disputes across Australia.

The schemes not only provide financial redress but they support consumer engagement in financial services markets. Financial products (and services) represent extreme examples of 'credence goods' meaning that suitability and quality is hard to gauge before or even after purchase, and consumers may not discover the real value or quality of the underlying product or service for many years. If consumers are to confidently make long term investments, seek advice, borrow money and

purchase insurance, then it is essential that they have – and know that they have - effective access to an impartial dispute resolution forum if things go wrong.

The core business of an EDR scheme, including a consumer Tribunal such as the SCT, is to resolve individual consumer disputes. While effective schemes do in practice identify trends and systemic issues arising out of the disputes that are lodged with them, the role of the scheme is not to "fix" industry culture or to prevent misconduct or mistakes from happening. It is to provide impartial and efficient access to justice for individual and small business complainants.

ASIC supports consolidation of the financial services EDR sector as envisaged in the Ramsay Review, and believes that it will ultimately benefit consumers and industry stakeholders. As noted in ASIC submissions to the Ramsay Review, there is a strong history of rationalisation in the EDR sector that has improved scheme efficiencies, removed uncertainty for consumers and reduced jurisdictional boundary issues. From 2008, ASIC supervised the consolidation of six approved EDR schemes into one: the current FOS. This process involved successfully bringing together schemes whose membership ranged from the largest banking and insurance institutions, through to small financial advisers and insurance brokers.

We think that the Bill strikes the necessary balance identified in the Ramsay Review between retaining the inherent flexibility of an Ombudsman model while providing legislative backing where there is an established need. There is important work still to be done in finalising the underlying Terms of Reference/Rules of the new scheme which will flesh out its detailed operation, although clearly the existing schemes provide many years of relevant operational experience to draw upon.

In ASIC's view a single EDR scheme will be better placed to deal with unexpected dispute events that could arise in the future, for example from systemic industry misconduct or from an economic shock causing increased disputes. A single scheme also provides a stronger platform on which to base a last resort compensation scheme, the merits of which are currently being considered by the Ramsay Review.

Below we comment on a number of the key reforms proposed in the Bill.

New powers for ASIC

Under the Bill, the new AFCA scheme will be authorised by the Minister.

ASIC will continue to have a role in issuing regulatory guidance about compliance by the scheme with the mandatory requirements and any of the general considerations for authorisation [1052A] and in approving material changes to the AFCA scheme [1052D]. This is broadly similar to ASIC's current regulatory role in relation to the approved Ombudsman schemes, however it is now backed by legislation, and includes an ability for ASIC to issue regulatory requirements by way of legislative instrument in relation to any of these areas.

The Bill also provides ASIC with new powers to issue general directions to AFCA [1052C] if *ASIC considers that AFCA has not done all things reasonably practicable to ensure compliance with the mandatory requirements, a condition of authorisation or regulatory requirements issued by ASIC* and specifically to issue a direction to increase limits on the value of claims [1052B].

As confirmed in the Explanatory Memorandum to the Bill, in practice these powers would only be used on an exceptional, last-resort basis. However they provide an important new accountability measure that does not feature in the current co-regulatory EDR framework. Currently, if ASIC did have significant concerns about the operation of an approved EDR scheme, our primary regulatory lever is to revoke scheme approval. This is a blunt response which would have direct and likely disproportionate consequences for member firms and potentially also for consumers. It is arguably so blunt as to be illusory.

The proposed directions power provides ASIC a more fit-for-purpose power that could be applied in a very targeted way (e.g. to direct AFCA to conduct a targeted independent review of a specific procedure/issue/sub-sector). It is important to remember that the AFCA scheme and its decision makers would continue to operate independently of ASIC and there would be no role for ASIC to either intervene in or review individual decisions. We also welcome in this regard the mandatory requirement that AFCA appoint an independent assessor to deal with complaints about service standards in the handling of disputes.

Internal Dispute Resolution

The Ramsay Review recognised the important links between internal dispute resolution (IDR) and the effective operation of EDR, including observing that the vast majority of consumer disputes about financial firms are resolved at IDR. There is limited transparency about the numbers of disputes dealt with in IDR by financial firms including what they are about, how they are resolved and in what timeframe. There is some limited reporting of IDR information by firms that subscribe to industry codes but where this is published it is at an aggregate level which provides little insight into trends, peer performance, timeliness etc.

In response to the Ramsay Review recommendations, the Bill:

- a) Requires financial firms including credit providers and superannuation funds to provide information relating to their IDR procedures and operations to ASIC; and
- b) Gives ASIC power under the *Australian Securities and Investments Act 2001* to publish IDR data (that is not personal information) including on a firm level which identifies the firm.

ASIC welcomes this reform and believes that enhanced transparency of IDR performance will inform ASIC's regulatory activities as well as enable firms to benchmark their performance against peers and consumers to compare a firm's performance. It has the potential to act as a 'sunlight remedy' to improve IDR performance where this is needed. It is important to remember that going through IDR is a mandatory step for consumers who are seeking redress, and failures in IDR will inevitably compromise the effectiveness of EDR.

ASIC will consult with industry and consumer stakeholders about IDR data collection and publication. We will also look to harmonise IDR reporting fields with reporting by AFCA to improve the "end-to-end" transparency of disputes activity and performance across the financial services sector.

Superannuation disputes (including monetary limits)

The Ramsay Review recommended the transition of the SCT into an industry-funded contractually based scheme. ASIC supports the retention in the Bill of key legislative elements/powers of the SCT

that are necessary to ensure that AFCA can deal effectively with superannuation complaints including death benefit disputes involving multiple parties. ASIC also strongly supports the retention of the unlimited claims jurisdiction for superannuation related disputes, as well as the proposed higher limits for non-superannuation disputes including for small businesses and a new unlimited jurisdiction for guarantees over a guarantor's primary place of residence.

Superannuation disputes will, for the first time, be dealt with under a user pays model. We think this will provide both incentives for superannuation funds to more effectively manage disputes at both IDR and EDR, and a stronger funding base for effective superannuation dispute resolution in the future. There will also be capacity for the superannuation industry to be represented on the Board of AFCA and where appropriate on decision making Panels.

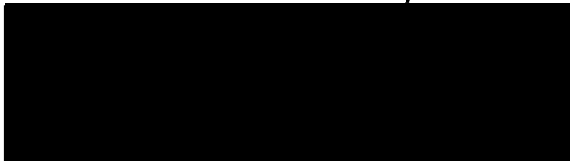
ASIC consultation and guidance

In order to support the establishment of AFCA, ASIC will need to consult on and revise its existing dispute resolution regulatory guides: RG 139, *Approval of external dispute resolutions schemes* and RG 165, *Licensing: internal and external dispute resolution*.

ASIC is also likely to prepare and consult on legislative instruments dealing with reporting by AFCA to appropriate authorities (1052E) and on IDR reporting by firms.

ASIC remains committed to supporting the effective operation of the financial services EDR sector, and will be pleased to provide further information or to respond to questions of the Committee if required.

Yours sincerely,

A large black rectangular redaction box covering the signature of Greg Kirk.

Greg Kirk
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