



External Dispute Resolution: Response to
Interim Report

27 January 2017

AIST Submission

AIST

The Australian Institute of Superannuation Trustees is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public-sector funds.

As the principal advocate and peak representative body for the \$700 billion profit-to-member superannuation sector, AIST plays a key role in policy development and is a leading provider of research.

AIST provides professional training and support for trustees and fund staff to help them meet the challenges of managing superannuation funds and advancing the interests of their fund members. Each year, AIST hosts the Conference of Major Superannuation Funds (CMSF), in addition to numerous other industry conferences and events.

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1 Executive summary

AIST welcomes the opportunity to comment on issues raised in the Interim Report released on 6 December 2016.¹ Our position can be summarised as follows:

- AIST supports the draft recommendation to replace the Financial Ombudsman Service (FOS) and the Credit and Investments Ombudsman (CIO) with a single industry ombudsman scheme (Financial Ombudsman) to reduce consumer confusion.
- AIST strongly rejects the draft recommendation to transition the Superannuation Complaints Tribunal (SCT) to a superannuation industry ombudsman scheme. The SCT offers superior consumer protections that cannot be replicated within the ombudsman framework.
- AIST offers qualified support to the proposal to increase the level of compensation that future industry ombudsman schemes are able to award.
- AIST supports the development of a consumer Code of Practice in consultation with the industry.
- While AIST opposes transitioning the SCT to an industry ombudsman model, we support the use of panels within the SCT and the new Financial Ombudsman.
- AIST offers qualified support to the panel's recommendation that financial firms (including superannuation funds) be required to publicly publish, and report to ASIC, on their Internal Dispute Resolution (IDR) activity and consumer outcomes.
- AIST supports the recommendation that dispute resolution schemes should register and track the progress of complaints that are referred back to IDR.
- AIST does not support an industry funded compensation scheme of last resort as recommended by the panel.

¹ Interim Report, *Review of the Financial System External Dispute Resolution Framework*, 6 December 2016.

2 Introduction

AIST represents the profit-to-member superannuation industry and as such our comments will primarily focus on issues regarding the SCT and FOS.

In our previous submission we noted that Australia's superannuation system plays a pivotal role in ensuring adequate retirement for all Australians and it is critical that consumers, as beneficiaries of the system, are afforded adequate protections.² AIST believes that a number of the draft recommendations have the effect of lessening consumer protection and that there is a real risk that consumers will be detrimentally impacted if these recommendations are implemented.

Principally, AIST strongly rejects the draft recommendation to transition the SCT to an industry ombudsman scheme. This submission will highlight that the current tribunal model offers superior consumer protections and moving away from this model is not in consumers' best interests. AIST submits that the SCT ought to be retained and undergo significant reform in areas such as funding, jurisdiction and operational flexibility.

3 Multiple schemes and overlapping jurisdiction

3.1 Overlap between the CIO and FOS

AIST supports the panel's draft recommendation to replace FOS and the CIO with a single industry ombudsman scheme for financial, credit and investment disputes (Financial Ombudsman). The Financial Ombudsman would not have jurisdiction to deal with superannuation disputes.

3.2 Overlap between FOS and the SCT

Despite AIST's original submission the Interim Report notes that:

- A triage function should not be established³
- The SCT transition to a superannuation ombudsman model⁴
- The superannuation ombudsman eventually merge with the new Financial Ombudsman⁵

AIST strongly opposes replacing the SCT with a superannuation ombudsman and notes that the recommendation fails to meet the criteria set out by AIST in our original submission, which specified that

² Australian Institute of Superannuation Trustees, Submission to Treasury, *Review of the Financial System External Dispute Resolution Framework*, 7 October 2016, 4.

³ Interim Report, above n 1, 157.

⁴ Interim Report, above n 1, 24.

⁵ Interim Report, above n 1, 96.

any new body must be grounded in legislation, with a mandatory jurisdiction that resembles the current functions and powers of the SCT – that is, a tribunal model.⁶

AIST submits that it is imperative that the SCT be retained and that there is a clearer delineation between the SCT and the new Financial Ombudsman as to the disputes that can be handled by each entity. This distinction, coupled with the development of a process to redirect disputes that fall outside the SCT's jurisdiction, will reduce confusion and ultimately enhance consumer experience. It will also make it easier for superannuation funds to direct their members to the correct dispute resolution body.

There are a number of options available to decrease complexity and consumer confusion due to overlapping jurisdictions and AIST encourages the panel to explore these options. It is important to also note that unlike the CIO, the SCT serves a mandatory, highly complex superannuation industry and as such it is inappropriate for it to be merged with another entity.

4 Response to Draft Recommendations

4.1 Recommendation 1: A new industry ombudsman scheme for financial, credit and investment disputes

As previously noted, AIST supports the recommendation to replace FOS and CIO with a new Financial Ombudsman.

4.2 Recommendation 2: Consumer monetary limits and compensation caps

In the Interim Report the panel recommended that the new Financial Ombudsman and superannuation ombudsman schemes have higher compensation caps than those that are currently in place for FOS and the CIO.⁷ AIST is strongly opposed to the establishment of a superannuation ombudsman, but is supportive of an increase in the level of compensation that future schemes are able to award.

Notwithstanding this support, AIST is wary of the negative impact that such an increase can have on consumers as the contractual nature of the proposed schemes means that both consumers and superannuation funds would be unable to appeal determinations.

The jurisdictional basis of ombudsman schemes comes from the contractual relationship between member organisations and the body itself; members agree to be bound by the bodies' determinations where they are made in accordance with the Terms of Reference. When authority is derived from a contractual relationship, as opposed to statute, it is harder for participants to appeal a decision, as they must do so

⁶ Australian Institute of Superannuation Trustees, above n 2, 21.

⁷ Interim Report, above n 1, 24.

under the principles of contract law and commence civil litigation, rather than use an established appeal mechanism. The lack of clear appellate avenues is one of the reasons why the SCT should not transition to an ombudsman scheme.

AIST is also concerned that increasing monetary caps while simultaneously removing established appeal mechanisms in the context of superannuation disputes, as suggested by the expert panel, is not in consumers' or funds' interests.

4.3 Recommendation 4: New industry ombudsman for superannuation disputes

AIST strongly rejects the proposal to transition the SCT to a superannuation industry ombudsman scheme because the tribunal model provides consumer protections that cannot be offered by an ombudsman. In particular the SCT, as a tribunal:

- Can make enforceable, appealable decisions
- Can hear disputes without requiring the consent of each party
- Has greater investigative powers not available to an ombudsman

The proposal to transition the SCT also introduces unnecessary transition costs. AIST cautions that the panel's suggestions regarding compensation for non-financial loss and changing the decision making criteria will also lead to unintended consequences.

AIST believes it is imperative that the SCT be retained and undergo significant reform for the reasons outlined below.

4.3.1 Enforceability of decisions

One of the key strengths of the SCT is that its determinations are enforceable,⁸ which significantly reduces participant non-compliance with determinations.

The proposed successor scheme will be unable to make enforceable decisions.⁹ The practical consequence of this is that it is possible for non-compliance with decisions to increase, and for consumers to be left in a situation where they cannot access a remedy following a determination. While non-compliance amongst superannuation funds is rare this should not be used as justification for the removal of an enforceability mechanism, which exists primarily to protect consumers' rights and interests.

AIST submits that due to the compulsory nature of superannuation, a specialist, legislative tribunal should be retained as it is the only model that can satisfactorily protect the needs of consumers, and provide

⁸ Australian Institute of Superannuation Trustees, above n 2, 11.

⁹ Interim Report, above n 1, 153.

superannuation funds with the confidence that only a specialised tribunal can provide due to the highly complex nature of superannuation decisions.

4.3.2 Appeal rights

Parties to a dispute at the SCT can follow clear appeal avenues when they believe that the tribunal has made an erroneous decision. This vitally important right would be lost under the proposed transition because ombudsman schemes do not have this power and parties are required to allege a breach of contract, which is a complex process and introduces inefficiencies by increasing the burden on the court system.

Superannuation disputes are rarely straightforward, and determinations can impose liability on trustees, as such the need for a clear appeal mechanism cannot be understated. Determinations in superannuation disputes may contain errors of law and as such users of the dispute resolution system must be given the opportunity to appeal decisions on this basis. The removal of appeal mechanism will reduce the overall integrity of the dispute resolution process.

4.3.3 Power to hear disputes

The SCT is free to hear disputes from consumers, irrespective of whether all parties to that dispute agree to the tribunal investigating the matter. The tribunal also has the power to join third parties to a complaint, which ensures that all parties are given the option of being involved throughout the process.

This is not the case in the context of ombudsman schemes. They can only deal with disputes if all parties agree to the dispute being heard by the ombudsman. For example in order for FOS to investigate a multiple party dispute each party to that dispute must consent to the investigation at the outset.¹⁰

The practical consequence of this difference is that consumers are prevented from accessing justice, especially in the case of death benefit claims where there are typically multiple parties, or disputes where a party simply does not want to be involved. The proposal impacts superannuation funds as well as consumers as the trustee still needs to make a decision as to which party is entitled to the benefit, but cannot rely on a tribunal to serve as a check on their decision making.

Therefore there is a risk that consumers would be negatively impacted if the SCT transitions to ombudsman model; the anticipated gap in consumers' outcomes is why the tribunal model should be retained.

¹⁰ Financial Ombudsman Service, *Operational Guidelines to the Terms of Reference* (January 2015) 148-149 <<http://tinyurl.com/j6ypfot>>

4.3.4 Better investigative powers

The SCT, by virtue of its legislative foundation, has a number of powers which ensure that the tribunal consistently makes correct decisions.

For example, the SCT has the power to request parties to a complaint to provide documentation if those documents are relevant and are within the control or possession of the party.¹¹ As evidence is key in many disputes, the power is critical; if the SCT moves to an industry ombudsman this power will be lost, meaning the ombudsman cannot conduct a full and proper investigation.

On this basis alone, it is clear that an ombudsman scheme cannot investigate disputes in the same depth that the SCT can and will therefore disadvantage consumers and funds, each of whom want a comprehensive investigation to ensure the right outcome is reached.

4.3.1 Unnecessary transition costs

The panel's recommendation that the SCT move to a superannuation ombudsman introduces unnecessary costs and disruption to the overall dispute resolution framework.

AIST believes that the bulk of the perceived issues within the external dispute resolution framework can be addressed by amending the *Superannuation (Resolution of Complaints) Act 1993* and as such the proposed transition would be nothing more than an avoidable cost.

4.3.2 Unintended consequences flowing from a transition to an ombudsman scheme

Compensation for non-financial loss

Currently the SCT cannot award compensation for non-financial loss suffered by a complainant, and is restricted to a remedy that would put the complainant in the position they would have been in had the decision been fair and reasonable in the circumstances. Under the proposed recommendations, the panel suggests that a superannuation ombudsman have the power to award compensation for non-financial loss.¹²

AIST opposes the panel's suggestion because superannuation operates within a trust structure, and monies are held for the predominant purpose of providing an income in retirement – not to compensate members for non-financial loss. The introduction of such a power means that members would effectively be subsidising remedies for other members' suffering, which is not only inequitable but also inconsistent with the overarching purpose of superannuation.

¹¹ *Superannuation (Resolution of Complaints) Act 1993* (Cth) s 24, s 24AA.

¹² Interim Report, above n 1, 152.

Furthermore, the sole purpose test in the SIS Act¹³ does not contemplate superannuation monies being paid to fund members as compensation for pain and suffering and other non-financial loss.

Fair and reasonable in the circumstances versus fairness in all the circumstances

The proposal suggests that the decision making criteria of the new ombudsman be expanded to include a consideration of 'fairness in all the circumstances'.¹⁴

AIST opposes this proposal, because the broadening of the decision making power would effectively usurp the fiduciary duties of the trustee which are set out in common law and codified in the *Superannuation Industry (Supervision) Act 1993* (Cth). The power can effectively compel a trustee to contravene the trust deed, legislation, regulations, case law or act beyond their power and it is simply unsatisfactory for decisions to compel trustees to contravene these sources of law.

4.3.3 Options for reform and amendment

In the Interim Report the panel states that transitioning to an industry ombudsman scheme is advantageous due to the following strengths in that model:¹⁵

- Flexibility
- Flexible, responsive funding model
- Appropriate governance model, with a board, independent chair and equal representation of industry and consumers
- Strong stakeholder engagement
- Ability to make timely staffing decisions

AIST submits it is in the best interests of consumers to retain the current model because a tribunal provides greater protection than an ombudsman can and because the strengths of an ombudsman, such as those listed above, can be replicated in the current tribunal model through legislative amendment. Each of the strengths listed above can be incorporated into a tribunal as detailed below.

Flexibility

AIST submits that the legislation underpinning the SCT should be amended in order to improve the ability of the SCT to respond to the shifting needs of consumers and the industry as the sector continues to mature. A more flexible SCT will result in better consumer outcomes. For example the SCT will be able to conduct consumer and industry outreach programs, do greater work to address systemic issues, and also reduce

¹³ *Superannuation Industry (Supervision) Act 1993* (Cth) s 62.

¹⁴ Interim Report, above n 1, 152.

¹⁵ Interim Report, above n 1, 19.

confusion about complex questions of jurisdiction and provide guidance on which entity is able to hear their dispute.

While we support improving SCT in this way, great care should be taken to minimise the potential for adverse consequences. Prior to any change the SCT's powers should be reviewed by government in conjunction with industry and consumer groups to ensure that any modification is appropriate and is in the best interests of those who use the system.

Responsive funding model

AIST submitted that the SCT is underfunded and that the current arrangements do not allow for an appropriate assessment of the funding needs of the SCT.¹⁶ The current funding model has not benefited the end consumer, and has contributed to the delay faced by many consumers that use the SCT to resolve their dispute.

AIST welcomes the opportunity for further discussions on how the SCT is to be funded into the future. In principle the funding should be:

- Transparent - superannuation operates under a trust structure it is absolutely critical that each fund has the capacity to inform its members how their money is being spent
- Independent
- Adequate and appropriate to the needs of the tribunal, with the SCT to report on its performance

Appropriate governance model

AIST submits that it is appropriate to consider revising the SCT's governance structure in order to improve organisational accountability and flexibility, with the ultimate aim to increase efficiency and provide a better service to consumers and the superannuation sector.

AIST believes that the SCT would be improved through the addition of a governing board. Ideally the board would be comprised of suitably experienced, qualified and knowledgeable individuals with a strong commitment to the work of the tribunal. The chair of such a board should be the most appropriate person for the job in order to ensure that the board functions effectively.

AIST welcomes a more in-depth discussion with the panel on the proposed governance model of the SCT.

AIST submits that retaining the current tribunal model does not mean that the system will be inherently slower, especially if the body is adequately funded, has flexibility to determine its own operating parameters and has an appropriate governance model.

¹⁶ Australian Institute of Superannuation Trustees, above n 2, 12.

4.4 Recommendation 5: Industry Code of Practice

The panel has recommended that the superannuation industry develop a Code of Practice.¹⁷ AIST believes that the superannuation industry is responsive to the needs of consumers, as evidenced by the fact that the recently established Insurance in Superannuation Working Group has resolved to develop an industry Code of Practice to “lift superannuation fund and RSE licensee obligations to meet consumer needs and expectations.”¹⁸ Further, in 2015 the industry commenced a review into the governance arrangements in profit-to-member funds, with a view to develop a best practice Governance Code.

AIST supports further consideration of the development of a consumer Code of Practice, however regard should be had to the fact that the fiduciary overlay within the sector already provides consumers with a number of protections.

4.5 Recommendation 8: Use of Panels

The Interim Report recommends that new industry ombudsman schemes ought to consider using panels to assist in the resolution of complex disputes.¹⁹ While AIST opposes the transition of the SCT to an industry ombudsman model, we support the use of panels within the SCT and the new Financial Ombudsman.

A panel’s true value is derived from the expertise that it offers above all else, and a suitably constructed panel can enhance the dispute resolution process, and consumer outcomes, by bringing collective skill and experience to bear on complicated issues. The superannuation system is incredibly complex, and it would be in consumers’ interests for resolution bodies to be given the freedom to call on subject matter experts to assist in the resolution of complex claims. It is important, when establishing any panel, that its members have appropriate experience and a solid understanding of the superannuation industry as a whole.

4.6 Recommendation 9: Internal Dispute Resolution reporting

AIST offers qualified support to the panel’s recommendation that financial firms (including superannuation funds) be required to publicly publish, and report to ASIC, on their IDR activity and consumer outcomes.²⁰

While AIST supports the proposal in principle it is important that participants are not inadvertently disadvantaged, therefore the data must be standardised so that IDR effectiveness can be objectively measured. The predominant purpose of the reporting mechanism should be for constructive improvement

¹⁷ Interim Report, above n 1, 154.

¹⁸ Australian Institute of Superannuation Trustees, *Improving Life Insurance in Superannuation for Consumers* (20 December 2016) <<http://tinyurl.com/jnem82v>>.

¹⁹ Interim Report, above n 1, 25.

²⁰ Interim Report, above n 1, 162.

of fund IDR processes and for consumers to assess comparability of outcomes. AIST understands that not all superannuation funds record IDR activity in the same way and that funds may have very different IDR processes and IDR outcomes. For example:

- *Fund A* may have a more engaged membership base, and as a result a higher rate of IDR activity than *Fund B* whose members are disengaged. Similarly, *Fund A* may also actively encourage members to pursue IDR whereas *Fund B* may not – *Fund A's* public IDR report should not make it look less favourable than *Fund B* by virtue of volume of IDR activity
- Funds with different membership backgrounds may have different IDR outcomes, which is a reflection of the membership rather than the funds' operations itself
- Some funds may offer simpler products than other funds – which may result in speedier resolution of IDR complaints

4.7 Recommendation 10: Schemes to monitor Internal Dispute Resolution (IDR)

AIST supports the recommendation that dispute resolution schemes should register and track the progress of complaints that are referred back to IDR.²¹ AIST believes that a tracking arrangement would benefit consumers by allowing the resolution bodies to identify any systemic issues that may impact the effectiveness of particular IDR processes, and work with the entity in question to ultimately improve their IDR.

5 Response to panel observations

5.1 Compensation Scheme of last resort

AIST does not support an industry funded compensation scheme of last resort as recommended by the panel.²² While a compensation scheme may be appropriate for other financial services, it is unnecessary in the context of the superannuation industry for the reasons outlined below.

Superannuation is a prudentially regulated industry and as such superannuation funds typically have the financial capacity to adhere to SCT determinations, and pay compensation to a member following a determination.

This compensation initiative on its own may provide consumers with confidence, but is unnecessary especially if the industry considers developing a Code of Practice or funds commit to publicly report on their IDR processes, which sends a clear message that consumers have primacy of focus.

²¹ Interim Report, above n 1, 25.

²² Interim Report, above n 1, 165.

The Interim Report contemplates that a compensation scheme of last resort would be funded by industry²³ which introduces a number of problematic issues:

- It adds a further unnecessary indirect cost for consumers as superannuation entities may have little choice but to recoup the costs from their members
- It does not correct errant behaviour amongst scheme participants that fail to comply with a determination as they can refuse to pay, and ultimately pass the cost on to the industry as a whole
- There are risks of cross-subsidisation. Within the superannuation industry there are a number of business models, some of which include inherently conflicted vertically integrated systems whereby the fund contracts with related entities. It is arguable that the risks of non-compliance are higher within vertically integrated models due to their profit structures, as such, non-vertically integrated funds would be required to foot the bill for those with inherently riskier models such as these.

It is for these reasons that AIST does not support the proposal to develop an industry funded scheme of last resort.

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²³ Interim Report, above n 1, 168.