Law Council
OF AUSTRALIA
Legal Practice Section

**30 January 2017**

EDR Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

By email: EDRreview@treasury.gov.au

Dear Sir/Madam

**Submission on Interim Report on the Financial System External Dispute Resolution Framework**

This submission has been prepared by the Superannuation Committee of the Law Council's Legal Practice Section (**the Committee**).[1] The Committee's objectives are to ensure that the law relating to superannuation in Australia is sound, equitable and clear. The Committee makes submissions and provides comments on the legal aspects of the majority of all proposed legislation, circulars, policy papers and other regulatory instruments which affect superannuation funds.

The Committee is pleased to have the opportunity to provide feedback on the Interim Report entitled *Review of the financial system external dispute resolution and complaints framework* of 6 December 2016 (**Interim Report**). The Committee's response is guided by its objectives as identified above.

The Committee confines its submission to:

- draft recommendation 4, which states that the Superannuation Complaints Tribunal (**SCT**) should 'transition' into an industry ombudsman scheme for superannuation disputes; and

- draft recommendation 5, which states that the superannuation industry should develop a superannuation code of practice.

The Committee does not support either of these draft recommendations and urges the Panel to reconsider including them in its Final Report.

[1] The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

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**Draft recommendation 4 - A new industry ombudsman scheme for superannuation disputes**

Main comments

The Panel accepts that superannuation is unique, by reference to four matters: it is mandatory for all working Australians; it is a long-term asset (relative to financial purchases); there is a fiduciary relationship between the trustee and the individual members; and, there are typically minimal interactions between the individual member and the superannuation fund.[2] However, the Panel does not accept that these features require a different dispute resolution model for superannuation disputes to those of other financial products.[3]

The Committee notes that the Panel's identification of features specific to superannuation is not comprehensive. The Committee submits that disputes concerning superannuation are typically much more complex than disputes concerning other financial products, not only because of factual matters but also due to the complex intersection of trust law and statutory regulation.[4] Superannuation disputes also often concern more than just the provider and holder of the financial product (for example, death benefit disputes). Secondly, even if the Panel is correct that the differences between superannuation and other financial products do not justify differences in a dispute resolution model, it does not follow that the correct approach is to move from the SCT to an ombudsman structure. Rather, the Committee submits that the appropriate approach may be to move Financial Ombudsman Service (**FOS**) and Credit & Investments Ombudsman (**CIO**) to a tribunal structure. The Committee's submission in this respect is consistent with the recommendation of the House of Representatives Standing Committee on Economics in its *Review of the Four Major Banks: First Report*.[5]

The Panel considers that the existing problems with the SCT cannot be fully addressed while a tribunal structure is retained, even with substantial reforms to funding, governance or other aspects of the legislative regime, 'as the rigidity of the statutory model will continue to hamper flexibility and innovation'.[6] With respect, there is nothing in the Interim Report that substantiates the proposition that the SCT's statutory model has hampered 'flexibility' or 'innovation', or shows that legislative change could not address any such issues. For two reasons, the Committee considers that it would be a mistake to dispense with that model,

First, the Committee considers a statutory tribunal model to be inherently superior to a contractual ombudsman model. A tribunal established by legislation is more independent of the industry than an ombudsman established by contract (even with 'safeguards' built into it). The Committee submits that independence from industry is critical to the integrity of an external dispute resolution scheme and to the confidence of users in that scheme. In its Report *Collective Investments: Superannuation*, the Australian Law Reform Commission (**ALRC**) stated that the superannuation complaints review body should be 'independent of government, of [superannuation] schemes and the regulator'.[7]

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[2] Treasury, *Review of the financial system external dispute resolution and complaints framework*, Interim Report (6 December 2016) [6.24] (`*Interim Report*').
[3] Ibid.
[4] Ibid [5.89].
[5] House of Representatives Standing Committee on Economics, Parliament of Australia, *Review of the Four Major Banks: First Report* (2014).
[6] Interim Report, [6.26].
[7] Australian Law Reform Commission, *Collective Investments: Superannuation*, Report No 59 (1992) 191 [12.37]

The Committee respectfully agrees with the ALRC, the report of which ultimately led to the creation of the SCT.

Secondly, the cost, dislocation and confusion that would inevitably be associated with abolishing the SCT are likely to be considerable and unjustified. As the Panel has recognised, moving from the SCT to a superannuation ombudsman scheme would involve a very significant change.[8]

The Committee submits that a very important feature of the SCT is the ability of a party – the complainant or the trustee – to appeal the SCT decision to the Federal Court on matters of law. Neither the FOS nor the CIO has this feature, and nor would the proposed superannuation ombudsman scheme (see the table at [6.30]). This would amount to a considerable weakening of the protections for scheme users. And, further to the earlier points made about independence, the decisions of a statutory tribunal being subject to judicial review provides an important layer of independent scrutiny over the way the tribunal conducts itself.

Disputes involving multiple parties

We note that the proposal raises a number of questions about the standing and rights of non-fund members, for example, spouses, children, interdependants and financial dependants claiming death benefits. We also note that the abandonment of a statutory model would mean that determinations would no longer be binding as a matter of law. This change could potentially affect death benefit distributions. For membership based ombudsman schemes, where determinations become binding by agreement, it is hard to see why joined parties to a death benefit dispute who 'miss out' would be prepared to accept the determination. This has implications for claim staking, the timely payment of death benefits and certainty for those involved in the dispute.

The Committee now turns to the specific problems with the SCT as identified by the Panel at paragraphs 5.86– 5.129 of the Interim Report.

Delay in progression of superannuation complaints

The Committee accepts that the SCT is affected by delays in processing complaints. However, if chronic underfunding is the primary reason for these delays,[9] it is difficult to see how moving from a tribunal structure to an ombudsman structure would, of itself, do anything to address the problem. The same applies to the contention that the SCT's 'operating processes are inefficient and heavily manual in nature'.[10] If that contention is true, the appropriate response would seem to be to change those processes, rather than changing the entire architecture of the external dispute resolution scheme in question.

The Committee submits that the Panel should ignore the proposition advanced by some stakeholders that the legislative foundation of the SCT is an impediment to innovation and reform.[11] First, the proposition assumes that the SCT's legislative foundation unnecessarily restricts what the SCT can do. As the Panel itself appears to have recognised at paragraph 5.108, that assumption is eminently contestable. Secondly, even if the SCT's legislative foundation did, somehow, unnecessarily restrict what the SCT can do, the appropriate response would seem to be for Parliament to amend the legislation to

[8] Interim Report, 3.
[9] Ibid [5.96], [5.98]–[5.104].
[10] Ibid [5.96].
[11] Ibid [5.107].

relax or remove the restriction in question. However, it is difficult for the Parliament to do so when no relevant restriction appears to have been identified. For example, the Interim Report does not identify any particular legislative barrier to introducing a 'fast-track process' into the SCT's complaints process, for cases where such a process might be appropriate.

The Committee wishes to comment on the reference to the allegedly 'increasingly legalistic approach adopted by SCT'.[12] It is very easy to call something 'legalistic' and thereby criticise it. It is harder to demonstrate that what has been called 'legalistic' is, in fact, not legalistic and does not deserve the implied criticism. Superannuation is complex, heavily regulated and operated within a trust law framework that draws upon both legislation and substantial case law. Trustee decisions may involve the exercise of discretion where there is no single 'correct' outcome. There can be numerous stakeholders in respect of a particular member's benefit. The circumstances relevant to that benefit can be complex. The considerations relevant to a dispute in respect of that benefit can be numerous.

It does not follow from the circumstance that a dispute resolution scheme gives careful consideration to all aspects of a dispute and to the interaction of legal principles that the scheme's treatment of the dispute is 'legalistic', or to be criticised. Careful consideration is likely to be precisely the right kind of consideration where the dispute is complex, particularly where it involves the exercise of trustee discretion. In that category of case, a 'fast track' process is likely to be the wrong kind of process. Applying a 'fast track' process in those cases is unlikely to result in an equitable outcome, and achieving an equitable outcome must surely be the primary objective of an external dispute resolution scheme.

As noted in the Committee's submission in response to the Panel's Issues Paper, while speed and efficiency are important and do need to be improved, the quality of the decision making process needs to be maintained if the current arrangements were to be changed. Where disputes need to be determined by a third party body, the determination should continue to be made by fairly and consistently applying established legal principles to the relevant set of facts.

Finally, the Committee also notes that when a complaint to FOS proceeds to determination, FOS will issue a written determination. These determinations are, to the Committee members' knowledge, typically well-reasoned and involve careful consideration and application of law and principle to the facts of the case - yet FOS is not criticised for being 'legalistic'.

<u>Reporting, review, stakeholder outreach and governance</u>

If the SCT's reporting on its operations is, in fact, inadequate (as suggested at paragraph 5.110), the Committee suggests that the correct response is to require the SCT to increase and improve its reporting and to increase its funding to enable it to do so. Likewise, the fact that the SCT is not subject to periodic independent review,[13] surely has nothing to do with it being a tribunal. Moving to an ombudsman structure would, of itself, make no difference in that regard. In fact, the current judicial review oversight would be lost. The same can be said for the suggestion that 'there is room for improvement in stakeholder

[12] Ibid [5.96]. See also [5.123].
[13] Ibid [5.113].

education and outreach activities',[14] and the apparent need to modernise the SCT's governance arrangements.[15]

Accessibility

The Panel notes that there are 'a limited number of community legal centres that are able to assist with superannuation disputes and SCT does not provide legal advice to applicants'.[16] If community legal centres are underfunded, this will not be remedied by changing the SCT's structure. As for not providing legal advice, the Committee understands that FOS likewise does not provide users with legal advice. It does not seem to be the role of an external dispute resolution scheme to provide legal advice to users. Again, if the time limits applicable to specific kinds of claims are inappropriate, as is suggested at paragraph 5.124, the solution would appear to be to change the time limits (or to provide for flexibility in relation to them).

At paragraph 5.126, the Panel says:

> *When making determinations under the current model, SCT applies a narrow construction of what is considered 'fair and reasonable'. Unlike the industry ombudsman schemes, SCT is unable to make broader assessments of 'fairness in all the circumstances'.*

If the 'fair and reasonable' test set by the *Superannuation (Resolution of Complaints) Act 1993* (Cth) (**Complaints Act**) is considered to be the wrong test, the Committee suggests that the test that is considered to be the right test should be introduced into the Complaints Act. The SCT does not need to be abolished.

However, the Committee suggests that caution should be exercised in terms of changing the applicable test, which was affirmed by the High Court as an appropriate 'merits review' test for trustee discretions.[17] As noted in the Committee's submission in response to the Panel's Issues Paper, a significant body of case law has been built up over the years in relation to the jurisdiction, function and approach of the SCT. The benefit of this case law is that each participant in the workings of the SCT – the SCT itself, superannuation trustees and complainants – is able to have reasonably clear expectations of what the SCT can or cannot do and how the SCT is likely to approach any particular complaint.

Changing the test would mean starting again, with all the associated uncertainty. We also note that the proposed new test is not as consistent with the way trustees approach the exercise of discretion under trust law.

Proposal that damages be awarded

The Panel has suggested that an ombudsman model would allow for an award of 'damages' in appropriate cases. We respectfully submit that 'damages' would be inappropriate in the context of a dispute about an exercise of trustee discretion. In this regard, trustees often do not have capital resources from which to pay awards of 'damages' and to pay them from the fund itself would be to disadvantage other members. We submit that the current legislative framework that allows the SCT to remove any

[14] Ibid [5.115].
[15] Ibid [5.118]–[5.122].
[16] Ibid [5.123].
[17] *A-G (Cth) v Breckler* (1999) 197 CLR 83.

element of unfairness or unreasonableness is an appropriate remedy in the trust environment.

Transparency and governance

We submit that there are legal mechanisms that would improve the transparency and governance of the SCT, but that have not been explored in the Interim Report. These would include conferring 'legal personality' on the SCT as a statutory body, so that it could employ its own staff, determine its own internal procedures and receive its own funding.

**Draft recommendation 5 - A superannuation code of practice**

The Committee considers that whether the superannuation industry should develop a superannuation code of practice is a matter for the superannuation industry; it is not clear that it should be the subject of a recommendation by the Panel.

At paragraph 6.36, the Panel says:

> *Having had regard to the history of EDR in Australia, where many industry ombudsman schemes were preceded by an industry code of practice, the Panel sees the establishment of a superannuation industry code of practice as an important complement to an industry ombudsman scheme for superannuation disputes.*

However, the Panel has not identified why an industry ombudsman scheme requires an industry code, or why such a scheme would operate more effectively with a code. The Committee submits that, unless a majority of the superannuation industry indicates to the Panel that it would like a code, the Panel should be silent on the matter in its Final Report.

**Contact**

The Committee would welcome the opportunity to discuss its submission further and to provide additional information in respect of the comments made above. In the first instance, please contact:

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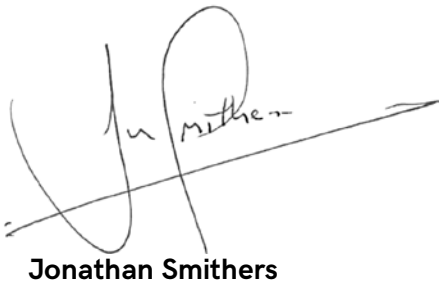
Yours sincerely



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