Law Council
OF AUSTRALIA

Consultation Paper – Improving dispute resolution in the financial system

Treasury

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Executive Summary

1. On 9 May 2017, the Government adopted the recommendations in the Review of the Financial System External Dispute Resolution and Complaints Framework (3 April 2017) (**Final Report**) and announced a new framework for dispute resolution in the financial system under which the proposed Australian Financial Complaints Authority (**AFCA**) will deal with all financial disputes, including superannuation disputes.[1]

2. The law Council is grateful for the opportunity to comment on the Consultation Paper entitled *'Improving dispute resolution in the financial system*' (May 2017) (**Consultation Paper**).

3. This submission has been prepared by the following Committees of the Law Council of Australia's Legal Practice Section:

    - Superannuation Committee - The Superannuation Committee's objectives are to ensure that the law relating to superannuation in Australia is sound, equitable and clear. The Superannuation 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 Australian Consumer Law Committee (**ACLC**) - The ACLC takes an interest in legal developments affecting consumers generally, including superannuation, banking and finance, insurance and other matters. As such it is uniquely positioned to comment on the matters raised in the Consultation Paper.

4. This submission has been prepared in two parts. Part A provides the response of the Superannuation Committee and Part B, the response of the ACLC. The views of the Committees are largely consistent, although there are some important differences which are summarised below. The Law Council has not sought to reconcile any differences in the views of the Committees but may attempt to do so if this would assist Treasury.

Summary of Views

5. The Superannuation Committee does not necessarily support the introduction of AFCA. However, the Superannuation Committee does accept the introduction of the new body as a Government decision and has focussed its response on ensuring that AFCA operate effectively in the superannuation space. The key points made by the Superannuation Committee, include:

    (a) that it is doubtful that AFCA's terms of reference (**TOR**) can override specific requirements under proposed Part 7.10A and therefore that care is required in the delineation between what superannuation-specific safeguards and features are included in legislation and what is left to the TOR;

    (b) in attempting to replicate certain statutory provisions of the *Superannuation (Resolution of Complaints) Act 1993* (Cth) (**Complaints Act**), there have been some changes in wording which are likely to have unintended consequences; and

[1] Ian Ramsay, Julie Abramson and Alan Kirkland, *Review of the financial system external dispute resolution and complaints framework* (The Treasury, Commonwealth of Australia, April 2017) ('*Final Report*').

(c) that the Superannuation Committee is concerned by the Australian Securities and Investments Commission's (**ASIC**) proposed role under the new framework, in particular the negative effect that role and ASIC's powers will have on AFCA's independence.

On the first two points, the Superannuation Committee notes that attention to detail is critically important.

6. The ACLC, however, welcomes the establishment of AFCA and believes that is will benefit consumers. The key points made by the ACLC in its response include that:

   (a) renaming AFCA as the *Australian Financial Complaints Ombudsman* be considered in order to further clarify the role of the new body; and

   (b) the increase to the claim limits and compensation caps will likely result in larger and more complex claims being lodged with AFCA than has occurred with the Financial Ombudsman Service (**FOS**) and Credit and Investments Ombudsman (**CIO**) and that therefore it would be desirable for AFCA to have the same ability to compel financial services providers to cover the cost of expert legal assistance required to support these claims.

Part A – Superannuation Committee

Introduction

7. The Superannuation Committee's response to the Consultation Paper is guided by its objectives as identified above. The Superannuation Committee's submission does not consider the implications for Retirement Savings Account (**RSA**) providers, insurers and parties other than superannuation trustees about whom complaints might be made under the current regime.[2]

8. Part A is divided into three sections:

    (i) Comments on questions 1 – 4 and 8 in the Consultation Paper;

    (ii) comments on the draft legislation and regulations (**draft legislation**); and

    (iii) comments on the proposed role of ASIC under the new framework.

9. The Superannuation Committee has considered:

    - the extent to which the recommendations in the Final Report are reflected in the draft legislation; and
    - the extent to which current statutory protections for trustees and superannuation beneficiaries in the Complaints Act are reflected in the draft legislation.

10. That said, it is difficult to comment comprehensively without seeing AFCA's proposed TOR. It is not clear to the Superannuation Committee how the TOR will be developed (and with what specialist input) in order to ensure that they are appropriate for superannuation complaints. For example, it seems to be assumed that a requirement for a complaint to have first been made under the trustee's internal dispute resolution procedures can be included in the TOR.[3] The disconnect is exacerbated by the fact that many statutory provisions assume that the TOR will contain certain content; for example that the trustee will always be a party to a superannuation complaint and that superannuation complaints will have no monetary limits.

Consultation Paper

11. Specifically addressing the questions raised in the Consultation Paper, the Superannuation Committee responds as follows.

Question 1	Are there other statutory powers the EDR body will need to resolve superannuation complaints effectively?

12. The Superannuation Committee submits that the EDR body should have a statutory power to refuse complaints that relate to the management of the superannuation fund as a whole. This is an important jurisdictional constraint under s 14(6) of the

[2] The Superannuation Committee notes that the SCT has different powers depending on the type of decision-maker.

[3] *Superannuation (Resolution of Complaints) Act 1993* (Cth) s 19 ('*Complaints Act*'). It should be noted that under this section, a complainant can come to the SCT if the complaint has not been resolved to the complainant's satisfaction within the 90 day timeframe. As such, failure of a trustee to consider the complaint would entitle the complainant to come to the SCT.

Complaints Act that is consistent with a trustee's duty to act in the interests of beneficiaries as a whole. Alternatively, this could be addressed by narrowing the definition of 'superannuation complaint' in proposed s 1052 to exclude subject matter related to the management of the fund as a whole.

Question 2	Do you consider that the Bill strikes the right balance between setting the new EDR scheme objectives in the legislation whilst leaving the operation of the scheme to the terms of reference?

13. There appear to be a number of matters recommended in the Final Report that are not reflected in the draft legislation, because it is assumed that they are 'operational' and can be covered by the TOR. In the Superannuation Committee's view:

    - Claim-staking is a matter that requires legislative backing, in order to provide the same protection as the Complaints Act for trustees that pay superannuation death benefits after no objection has been received within 28 days. The retention of claim-staking formed part of the Panel's recommendations in the Final Report.[4] Without the statutory protection of claim-staking, trustees may be unable to pay superannuation death benefits in a timely manner, lest a dispute subsequently arises that leads to a double payment. It may be difficult to bind all potential parties to a dispute in the absence of legislative provision.

    - The EDR body should be required to affirm a trustee decision if it is within the range of what is fair and reasonable. This protection currently provides statutory protection for trustees making discretionary decisions and formed part of the recommended features of a single EDR body in the Final Report.[5] It reinforces that the EDR decision maker is reviewing the merits of the trustee's decision in the first instance and then, only if the trustee's decision falls outside the permissible range, does the EDR body make its own decision.

    - Time limits for making death and total permanent disability claims should be included in the legislation. The Final Report supported retaining time limits for death and total permanent disability claims.[6] Since these time limits affect the rights of members to bring complaints, the Superannuation Committee considers that they should also be given legislative backing. If they are left to the TOR, AFCA could be in breach of the requirement under s 1047(b) to ensure that the scheme's complaints mechanism is accessible to 'any persons dissatisfied' with the trustee's decision.

14. The Superannuation Committee also notes that s 26 of the Complaints Act (which preserves the legal effect of a trustee decision, notwithstanding a complaint being lodged) has not been reflected in the proposed legislation. This is an important protection in cases where a trustee decision may affect a group of fund members, not simply the complainant.

15. Finally, it should be noted that complainants have effectively lost their right to appeal to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), which is currently available to them in respect of jurisdictional issues and the withdrawal of complaints when made by the **SCT**.

[4] *Final Report*, above n 1, [7.12].
[5] Ibid 136.
[6] Ibid [7.16].

Question 3	Are there any issues that are currently in the Bill that would be more appropriately placed in the terms of reference or issues that are currently absent from the Bill that should be included in the Bill?

16. See question 2 above for matters that should be included in legislation.

17. There are some rights of an operational nature for complainants under the Complaints Act that could be included in the TOR. Examples include the:

    - right to be told of their appeal rights;[7]
    - absence of time limits for complaints other than death and disability complaints; and
    - requirement for trustees to advise interested parties about a complaint made in relation to payment of a death benefit.[8]

Question 4	Are there any additional issues that should be considered to ensure an effective transition to the new EDR scheme?

18. The draft legislation appears to allow a six month period when superannuation complaints could come to either AFCA or the SCT,[9] although the Consultation Paper does not envisage any overlap, presumably on the basis that AFCA will be authorised by 1 January 2018. If there is an overlap, however, this could create communication challenges for trustees. In addition the amendments in Part 2 of the exposure draft apply once the first EDR scheme is authorised. These amendments include the replacement of references to 'membership of ASIC approved EDR schemes' with references to 'membership of EDR schemes authorised by the Minister'.[10] These amendments do not align with the proposed start date of 1 July 2018 if the scheme is authorised by 1 January 2018.[11]

19. The Consultation Paper also states that 'consumers' will have the option to refer complaints previously made to the SCT to the new scheme. Where multiple parties have been joined to a complaint (e.g. in the case of a death benefit dispute) the Superannuation Committee would expect that *all* parties to the complaint would need to agree to the complaint being referred. The Superannuation Committee queries whether it would be simpler (and act as a disincentive to 'forum shopping') if the referral option were to be limited to say, within 6 months of AFCA commencing operation.

20. A transitional issue that has not been considered is the effect of a Court remitting a matter back to the SCT in the case of an appeal that goes beyond the proposed transition period. It is also unclear what will happen to any 'open' or unresolved complaints at the SCT.

21. It will be important that the SCT is properly resourced to effectively deal with complaints during the transition period.

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[7] *Complaints Act* s 45.
[8] *Complaints Act* s 24A.
[9] See Treasury Laws Amendment (External Dispute Resolution) Bill 2017 (Cth) Exposure Draft sch 1, item 42 ('*Exposure Draft*'), which inserts proposed s 14AB into the *Complaints Act*.
[10] Exposure Draft sch 1, items 6-7.
[11] This is also relevant to the commencement of the new operating standard proposed by Treasury Laws Amendment (External Dispute Resolution) Regulations 2017 (Cth) Exposure Draft ('*Exposure Draft Regulations*') sch 1, item 4.

22. To avoid double handling, the EDR body should be empowered to refuse complaints about the same subject matter if they have already been determined by the SCT.

Question 8 What will the regulatory impacts of the new EDR framework be?

23. For superannuation trustees, the Superannuation Committee would expect there to be the additional complication of assisting members to understand the advantages and disadvantages of referring complaints to AFCA in the period while the SCT is still operational. Many trustees will need to update all of their communication material that currently refers to the SCT.

24. While it is not stated, the Superannuation Committee assumes that the deletion of s 101 of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) (and hence the current 90 day timeframe for dealing with complaints) will mean that superannuation trustees will become subject to the 45 day timeframe that applies to other financial service providers. This may require internal procedures and claims committee meeting schedules to be altered.

Draft legislation and regulations

25. The Final Report recommends that an EDR scheme would have the following features: accessibility, accountability, enforceability, improving industry practice, expertise and community engagement.[12] However, proposed s 1046, which lists the matters to which the Minister must have regard in authorising an EDR scheme, does not include any reference to enforceability, systemic improvements or community engagement. The scheme's functions in s 1047 do include taking reasonable steps to ensure compliance with determinations[13] and reporting to ASIC on systemic issues.[14] However the outreach activities contemplated by the Final Report are not currently mentioned.[15]

26. The draft legislation does not restrict the persons who can bring a complaint to fund members. Proposed s 1047 of the exposure draft states that it is a scheme function to ensure that the complaints mechanism is accessible to any persons dissatisfied with members of the scheme (which in this context would be the superannuation trustee). Conversely, under s 15(1) of the Complaints Act only fund members, former fund members or in the case of a death benefit, persons with an interest in the benefit (directly or indirectly) can make a complaint about a decision of the trustee. These provisions are reflected in s 1052 of the exposure draft, but for clarity, s 1047 should be made subject to Division 3 in the case of superannuation complaints. This is not a matter that can be narrowed by the TOR because then AFCA would be non-compliant with s 1047.

27. Proposed s 1052(1)(a) defines a 'superannuation complaint' as a complaint about a decision of the trustee of a regulated superannuation fund. In order that the trustees of exempt public sector superannuation schemes can 'elect in' to the new EDR framework (as contemplated by the Final Report and in paragraph 31 of the CP) and receive the same 'protections' as trustees of regulated superannuation funds, the Superannuation Committee submits that s 1052 should include an additional paragraph to cover decisions by the governing body of an exempt public sector superannuation scheme that elects to be covered by the EDR scheme. In addition,

[12] Final Report, above n 1, ch 6.
[13] Exposure Draft sch 1, item 2, s 1046(g). See also, s 1046(h)(iv).
[14] Ibid sch 1, item 2, s 1046(h)(v).
[15] The Superannuation Committee notes that the both Interim and Final Reports were critical of the SCT for its perceived lack of outreach activity.

because s 1052 is expressed to apply to a 'complaints made under an authorised external dispute resolution scheme', there is an assumption that the complaint has already been validly made under the scheme's TOR. This reinforces the critical importance of the TOR being consistent with the legislation.

28. Proposed s 1053 defines an 'EDR decision maker' as the person who is to determine a superannuation complaint. This seems to contemplate the individual or individuals within AFCA who will make a final decision (see proposed ss 1057 - 1063).[16] However the 'EDR decision maker' is also given a number of procedural powers, such as to join parties under proposed section 1053, to obtain information and documents under proposed s 1054 and to require attendance at conciliation conferences under proposed s 1055. The Superannuation Committee queries whether the procedural powers would be better conferred on the scheme operator and suggests that the distinction between the scheme operator, on the one hand, and the EDR decision maker, on the other, be reviewed more generally and reconsidered and, if it remains appropriate, it should be made clearer than it currently is. The Superannuation Committee also queries whether, given that the EDR decision maker may displace an existing trustee decision, some qualifications should be required for this important role.[17]

29. There is a curious exception to the ability of the EDR body to join an insurer under proposed s 1053(1) of the exposure draft. As it reads, an insurer can only be joined if the insurer is not the person against whom the complaint is made. Because in a superannuation context a complaint in relation to an insured benefit should always be made against the trustee, who then has the legal responsibility under s 52(7)(d) of the SIS Act to pursue the matter with the insurer, the Superannuation Committee considers that the qualification in proposed s 1053(1) is only likely to create confusion and should therefore be deleted.

30. Proposed s 1055 allows the 'EDR decision maker' to require parties to attend a conciliation conference. Under sub-s 1055(4), it is an offence not to attend a conference when required to do so, with a penalty of 30 penalty units. However, under proposed sub-s 1055(3), if the complainant fails to attend the conference the complaint may be treated as withdrawn. The Superannuation Committee queries whether it is intended for the complainant to both have the complaint withdrawn and be guilty of an offence. Consideration should be given to whether sub-s 1055(4) should be limited to persons other than the complainant. In any event, sub-s 1055(4) should be subject to a 'reasonable excuse' defence of the kind found in sub-s 1054(6). The Superannuation Committee also notes that the requirement under the Complaints Act for conciliation conferences to remain confidential, lest they influence the independence of a determination, is missing from the legislation.[18]

31. Proposed s 1057(2) of exposure draft attempts to replicate s 37(4) of the Complaints Act. However, because the exposure draft does not contain any equivalent to s 37(6) of the Complaints Act (which requires the Tribunal to affirm a decision that is fair and reasonable in its operation in relation to the complainant or in the case of a death benefit any other interested party), there is currently a 'gap' in terms of placing *all* parties in a position such that the unfairness or unreasonableness no longer exists in the case of a death benefit dispute with multiple parties. As a drafting matter, the Superannuation Committee suggests that the conferral of powers under s 1057(1) should be confined to those of relevant decision makers who are party to the

[16] Interestingly, the term is not used in relation to a referral to regulators under proposed s 1065: see Exposure Draft sch 1, item 2.
[17] Under the Complaints Act, only Tribunal members have that power; not administrative staff.
[18] See *Complaints Act* s 30.

complaint or who have been joined. It may also be worthwhile to 'enshrine' that the remediation of unfair or unreasonable decisions is not subject to a monetary limit other than as may be specified under the fund's governing rules.

32. Proposed ss 1057 and 1059 are said to be 'consistent with' the current position under the SCT regime.[19] Although the SCT regime was held by the High Court to be constitutionally valid in *AG v Breckler*,[20] the Superannuation Committee suggests that very close and careful attention be given to the *Breckler* case (if it has not already been given) with a view to ensuring that the proposed new regime is no less constitutionally valid than the SCT regime. For example, the words 'in relation to the operation of the decision' have been omitted from proposed s 1057(2)(b). The Superannuation Committee acknowledges that the EDR body is not a statutory tribunal, but it will still make binding superannuation determinations.[21]

33. Item 38 of the exposure draft deletes s 101 of the SIS Act once the first EDR scheme is authorised. Apart from the timing issue referred to above, we query whether it is intended to also delete the requirement for trustees to give written reasons for decisions about death benefit complaints and for complainants to request reasons. These requirements were introduced by the Stronger Super reforms because trustees are not otherwise required to give reasons for their decisions.

ASIC's role under the new framework

34. One of the key functions of an authorised EDR scheme is that it should be independent. Indeed, the Minister must take into account 'the independence of the scheme' in deciding whether to authorise it.[22] However, the scheme's independence may be undermined by ASIC's role and powers under the new framework as:

    - ASIC will have power to give directions to the EDR body;[23]
    - ASIC will have power to make legislative rules about how the EDR body performs its scheme functions;[24] and
    - ASIC will have power to approve material changes to the EDR scheme.[25]

35. At the same time, ASIC is the regulator of financial services licensees who may be the subject of complaints to the EDR body. Under the new framework, ASIC will receive reports of systemic issues from the EDR body[26] and IDR data from licensees, which presumably it will use in its regulatory oversight. In this regard, ASIC has power to vary and suspend licences and to take other administrative or enforcement action against licensees.

36. ASIC is therefore placed in a position of enormous power and is exercising both administrative and legislative power over both the EDR body and the parties over whom the EDR body can make enforceable superannuation determinations. This may

[19] See Exposure Draft Explanatory Material, Treasury Laws Amendment (External Dispute Resolution) Bill 2017 [1.111], [1.116].
[20] (1999) 197 CLR 83.
[21] Exposure Draft sch 1, item 2, s 1059.
[22] Ibid sch 1, item 2, s 1046(2)(e).
[23] Ibid sch 1, item 2, s 1051; non-compliance with ASIC's direction will be an offence.
[24] Ibid sch 1, item 2, s 1049.
[25] Ibid sch 1, item 2, ss 1048(1)(d), 1050.
[26] Ibid sch 1, item 2, s 1047(h).

compromise the ability of the EDR scheme to 'deal with complaints in a way that is 'fair, equitable and independent'.[27]

37. In order to honour the 'spirit' of the separation of powers doctrine, the Superannuation Committee queries whether some of the powers proposed to be conferred on ASIC should be reserved to the Minister.

38. As noted, the proposed functions of the EDR scheme will include reporting to ASIC on contraventions of law or of the 'governing rules' of a regulated superannuation fund that 'may have occurred'.[28] The Superannuation Committee submits that, wherever possible, the EDR's reporting obligation should be consistent with an AFS licensee's reporting obligation under section 912D. The Superannuation Committee notes that section 912D is itself currently the subject of consultation.[29] As noted in the Superannuation Committee's submission in respect of section 912D, a reporting obligation should not turn on a criterion that is uncertain as to whether a contravention 'may have occurred'. The Superannuation Committee acknowledges that the proposed reporting obligation reflects the existing reporting obligation imposed on the SCT under section 64 of the Complaints Act. However, the Superannuation Committee does not consider that circumstance to justify the imposition of the same requirement on the EDR body under the new co-regulatory framework.

[27] Ibid sch 1, item 2, s 1047(j).
[28] Ibid sch 1, item 2, ss 1047(h)(i)-(ii), 1065(1)(a)-(b).
[29] The Treasury, Commonwealth of Australia, *Self-reporting of contraventions by financial services and credit licensees* (ASIC Enforcement Review, Position and Consultation Paper 1, 11 April 2017) <http://www.treasury.gov.au/ConsultationsandReviews/Reviews/2016/ASIC-Enforcement-Review>.

Part B – Australian Consumer Law Committee

Introduction

39. The proposed single EDR scheme is intended to deal with all financial disputes, including superannuation disputes, and adopts the recommendations in the Final Report. As noted in the Final Report, the financial system plays a crucial role in individual Australians' lives, particularly since the introduction of compulsory superannuation and disputes arising out of individual Australians' interaction with the financial system can have a devastating impact on the lives of individuals and their families.[30]

40. The existence of multiple EDR schemes with overlapping jurisdictions can make it difficult for consumers to progress complaints. ACLC members welcome the establishment of a new single EDR scheme.

The Establishment of AFCA

41. The ACLC welcomes the establishment of AFCA. The proposed body, both in its flexibility and funding mechanism is very likely to improve determination of superannuation complaints. The SCT has been underfunded for some time and has resulted in the inefficient determination of complaints. AFCA is likely to result in improved outcomes for consumers by reducing the time associated with resolving superannuation complaints. The ability for AFCA to join parties, and to compel non-parties to attend conciliation conferences, will greatly assist in the determination of disputes about distribution of death benefits.

42. The ACLC submit that the name given to the new body be examined. Given its primary function is to resolve disputes rather than regulate or issue penalties, the proposed forum appears to be akin to an ombudsman rather than an authority. So as to aid community understanding about the nature of the office and to ensure expectations of complainants are met, we urge reconsideration of the name and suggest the *Australian Financial Complaints Ombudsman*.

43. As stated by the Australian and New Zealand Ombudsman Association (**ANZOA**), the fundamental role of an ombudsman is independent resolution, redress and prevention of disputes.[31] Federal Treasury has also issued benchmarks and key practices for ombudsman or industry-based customer dispute resolution.[32] These are well-developed standards, described by the Minister as 'immutable, that underpin effective dispute resolution in a number of sectors across the economy'. The ACLC suggest that the legislation require the new body to adopt these benchmarks as key criteria to be considered when the Minister approves a new scheme.

Monetary Limits

44. The proposed new framework is directed to ensure that AFCA will be flexible and responsive to new developments – standards that AFCA must adhere to will be set in legislation, the way in which it operates will be determined by its board and set out in

[30] Final Report, above n 1, 7.
[31] Australian and New Zealand Ombudsman Association, *Ombudsman a particular model of alternative dispute resolution* <http://www.anzoa.com.au/about-ombudsmen.html>.
[32] Benchmarks for Industry-based Customer Dispute Resolution (The Treasury, Commonwealth of Australia, February 2015) <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/benchmarks-ind-cust-dispute-reso>.

its TOR. The Government has accepted the Final Report recommendations that the claim limits and compensation caps be raised for consumer complaints as the existing limits are inadequate and no longer in line with the values of many financial products. Additionally, ASIC will have the legislative power to direct AFCA to amend its future monetary limits if considered ineffective.

45. In practice, insurers and policy holders are required to deal with disputes where the value exceeds the current FOS/CIO jurisdictional limit. These types of claims are commonly either articulated on a without prejudice basis and resolved privately between complainant and respondent or court proceedings are issued.

46. The ACLC generally welcomes an increase to the claim limits and compensation caps. It has been the experience of ACLC members that FOS claim limits have resulted in otherwise meritorious claims being rejected by FOS. This has resulted in Australian consumers having no choice but to litigate their claims. Litigation is a stressful, often lengthy and generally costly experience, and in many instances Australian consumers who have suffered devastating financial losses as a result of inappropriate financial advice do not have the resources to pursue their otherwise meritorious claims.

47. The ACLC anticipates that the increase to the claim limits and compensation caps will result in larger and more complex claims being lodged with AFCA than have been lodged with FOS. The claims are likely to be more complex both in the factual scenario and in the calculation of losses.

Complex financial services disputes

48. The experience of many consumer lawyers in Australia has been that financial disputes, particularly those arising out of inappropriate financial advice, are often complex due to the volume of materials under review and the length of time the subject financial services have been provided. The matters which arise can often be difficult for individual consumers to articulate or to progress without legal assistance. Notwithstanding that FOS and the CIO are designed to be non-legal alternative dispute resolution forums, ACLC members have experience in acting for clients in claims lodged with these bodies.

49. Complex financial disputes are presently handled by FOS and the CIO within jurisdictional loss limits. Examples of complex financial disputes broadly fall into three categories – those that concern inappropriate financial advice, those that concern complex financial products, and those where the legal issues in dispute are complex.

50. Complex inappropriate financial advice matters often concern multiple applicants (individuals, and related bodies corporate or trust entities or self-managed superannuation funds) or multiple instances of financial advice over an extended period. Identifying how such financial advice was implemented, and identifying the losses stemming from the advice can be complex. Complex financial products include products such as agricultural investment schemes, options trading, margin lending and OTC derivatives. Complex legal issues include disputes concerning unconscionable conduct or unjust contracts.

51. It is the experience of the members of the ACLC that where a complainant has access to independent legal advice, the relevant facts and issues in dispute can be more readily identified and articulated along with the losses arising from the matters in dispute. This in turn results in a more efficient dispute resolution process for the complainant, the respondent and the decision maker.

Large scale systemic disputes and the role of independent lawyers

52. Over the last decade there have been many high profile, large scale systemic financial advice failures. Those affected by these systemic failures have been individual Australians and their families. Examples include the collapse of Storm Financial, agribusiness investment schemes and systemic inappropriate financial advice given by the financial advice arms of major Australian banks.

53. Where major Australian banks have established independent review and compensation schemes, an allowance has been made for customers to obtain independent legal or financial advice (examples include the Commonwealth Bank of Australia (**CBA**) Open Advice Review Program and the Macquarie Equities Remediation Program). In the experience of ACLC members the involvement of independent consumer lawyers has:

    - assisted scheme participants to understand the basis upon which the bank has concluded its review of the financial advice provided; and

    - typically narrowed the scope of issues in dispute thereby increasing prospects of an early resolution of a matter.

54. ASIC Regulatory Guide 256, *'Client Review and Remediation conducted by Advice Licensees'* provides AFSL's with guidance on how to respond to instances of misconduct or compliance failure in connection with the provision of personal financial advice. ASIC recommends licensees' consider providing financial assistance to consumers to obtain independent advice such as occurred within the CBA and Macquarie Equities schemes, as follows:

    RG 256.198 You should also consider whether it is appropriate to offer assistance to clients who wish to seek their own professional advice about your decision on whether remediation is appropriate. We think this is appropriate where, given the nature of the remediation offer (e.g. its relative size compared to the client's overall wealth or the complexity of the underlying issues), the client might reasonably want to test the offer but may not have the resources to do so.

    RG 256.199 Assistance could come in different forms—for example: (a) offering to reimburse the client (e.g. up to a limit of $5,000) for professional advice sought by the client (e.g. advice from a lawyer, accountant or financial adviser); or

    (b) offering the services of a group of professionals independent of your business to provide advice to the client, free of charge.

The role of AFCA and independent lawyers

55. Industry supported EDR schemes play a vital role in assisting consumers to resolve complaints or disputes, in a forum that is generally faster and cheaper than the formal legal system.

56. The current FOS Terms of Reference and CIO Rules make provision for specialist input, including legal expertise or other appropriate professional advice. Clause 8.3 allows FOS to compel the respondent to pay or contribute to the cost of obtaining such advice. Rule 19.1 allows the CIO to obtain such specialist advice as the scheme considers is desirable or necessary to deal with a complaint, at the expense of the financial services provider. Given the increase to claim limits and compensation caps

and likely rise in overall complexity of disputes, it is the ACLC's view that it would be desirable for AFCA to have the same ability to compel financial services providers to cover the cost of expert assistance to AFCA.

57. Perhaps more importantly, the ACLC urge the Government to consider including a process by which AFCA can direct an applicant to obtain independent legal advice at the cost of the financial services provider. It is the experience of ACLC members that in financial services disputes concerning complex advice or complex products or complex loss calculations, the costs of obtaining legal advice and independent expert accounting advice where required (for example, to accurately quantify losses) can be significant. It is recommended that:

    - AFCA should be constituted such that a matter triaging processes be in place to identify matters of sufficient complexity that warrant the complainant having the option of retaining an independent solicitor from a panel of independent law firms (for example, the CBA's Open Advice Review Program was constituted with a panel of three national law firms). Doing so would assist AFCA and the parties to resolve the matter more fairly and efficiently. In these circumstances, AFCA ought to have the power to compel payment of fixed amount(s) by the respondent to the panel law firm. The fixed amounts would be determined by reference to the AFCA assessor's assessment of the complexity and amount in dispute.

    - Should an applicant choose to retain an independent solicitor at their own cost to assist in lodging and pursuing a claim through AFCA, the permission of AFCA to do so ought not to be onerous or required at all. The CIO presently requires each party to seek permission if it wishes to have legal representation in a hearing or conciliation conference convened by the scheme (CIO rule 31.3). FOS does not presently require a party to seek permission.

    - Where a complainant requires legal representation, AFCA is to have the power to award reasonable costs against the respondent where AFCA determines that the respondent could have reasonably taken steps to resolve the matter at an earlier time. This award would only extend to any costs incurred over and above the amount of any fixed amount ordered at the commencement of a matter.

    - If a costs provision is made in AFCA terms of reference, it ought to clearly provide that no adverse costs orders be made against a complainant.