File Name: 2018/08

6 April 2018

Ms Clare McCarthy

Behavioural Research & Policy Unit

Australian Securities and Investments Commission

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Dear Ms McCarthy

Response to Consultation Paper 298: *Oversight of the Australian Financial Complaints Authority – update to RG 139*

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide the attached submission in response to ASIC's consultation paper CP 298, *Oversight of the Australian Financial Complaints Authority – update to RG 139,* released on 5 March 2018.

If you have any queries or comments in relation to the content of our submission, please contact me on (02) 8079 0808 or by email gmccrea@superannuation.asn.au, or senior policy advisor Julia Stannard on (03) 9225 4027 or jstannard@superannuation.asn.au.

Yours sincerely

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Response to CP 298: *Oversight of the Australian Financial Complaints Authority – update to RG 139*

ABOUT ASFA

ASFA is a non-profit, non-political national organisation whose mission is to continuously improve the superannuation system, so all Australians can enjoy a comfortable and dignified retirement. We focus on the issues that affect the entire Australian superannuation system and its $2.5 trillion in retirement savings. Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing over 90 per cent of the 14.8 million Australians with superannuation.

A. KEY POINT SUMMARY

ASIC will play a critical role in the new dispute resolution framework, with responsibility for oversight of the external dispute resolution (EDR) body for financial services, the Australian Financial Complaints Authority (AFCA). We welcome ASIC's engagement with stakeholders via Consultation Paper CP 298, and the proposed update to Regulatory Guide RG 139 (draft RG 139). We also look forward to engaging with ASIC when consultation begins on proposed new internal dispute resolution (IDR) arrangements.

ASFA's major concerns in relation to CP 298 and draft RG 139 may be summarised as follows:

1. **Reporting matters to appropriate authorities** – ASFA considers:
   - clarity is needed as to where, within AFCA, responsibility for identification and reporting of serious contraventions, systemic issues and other reportable matters will sit. These are tasks requiring experience and judgment and responsibility, and should rest with appropriately senior personnel. Such personnel should also possess the judgment to determine the appropriate time to make a report to ASIC. A rigid timeframe appears unnecessary and may lead to reports that are overly preliminary and do not reflect all relevant facts.
   - the reporting requirements should provide for a 'right of reply' by the financial firm and only permit AFCA to name in a report key contact points within a firm and/or senior staff with responsibility for the relevant operational area.
   - clarification is required of the implications for third party service providers, who may be named in a report to ASIC, but are not members of AFCA nor ASIC-regulated entities.
2. **Role of the independent assessor** – in ASFA's view:
   - draft RG 139 needs to be clarified to avoid implying that the assessor may provide remedies in relation to *specific complaints*.
   - it would be beneficial to positively confirm financial firms' access to the assessor.
   - greater transparency and accountability is required. In particular, AFCA should publish on the AFCA website annual reports to stakeholders on the actions it has taken in response to recommendations from the independent assessor, on an 'if not, why not' basis, and make reports of the independent assessor available to stakeholders, via the AFCA website.
3. **EDR disclosure obligations** – ASFA considers that ASIC's timeframe for trustees of APRA-regulated superannuation funds to update disclosure documents and consumer communications is **insufficient**.

   The transition to AFCA is significantly more complex for the APRA-regulated superannuation sector than other financial products, as the Superannuation Complaints Tribunal (SCT) will continue to operate alongside AFCA for a period (as yet unspecified).

   Many key details remain uncertain at this point in time, including matters as fundamental as the precise start date and contact details for AFCA, the date on which the SCT will cease to accept new complaints, and the scope of AFCA's jurisdiction. Much of this information will not be confirmed until AFCA has been formally established and its Terms of Reference (ToR) have been settled.

We appreciate that the settling of the AFCA start date and the ToR are not within ASIC's control. However, some of the outstanding information will need to be included in updates to funds' prescribed disclosure documents, and some will need to be reflected in other communication materials. Accordingly, it must be acknowledged that continuing uncertainty over these details is impeding trustees' efforts to prepare for the commencement of AFCA.

ASFA considers it critical that trustees are provided with transitional relief, through to 30 June 2019.

This should provide flexibility that enables trustees to address their disclosure obligations in a way that:

- provides clarity and certainty to the consumers impacted by the reforms – the fund members, beneficiaries and claimants of superannuation death benefits – rather than prescriptive but sub-optimal disclosure
- avoids imposing an unnecessary cost burden, as this will ultimately flow through to consumers
- balances the work effort required with the time available for implementation
- recognises that further amendments to superannuation funds' disclosure and communications material will be required in the short to medium term, as significant amendments to IDR arrangements are introduced and the SCT closes.

This relief should be drafted widely enough to allow adoption of a range of approaches – including providing updated and specific information via a fund's website, providing targeted disclosure through inclusion of a flyer or 'insert' with prescribed disclosure documents and/or a communication sent to individuals directly impacted by the transition. ASFA would be pleased to discuss the framing of such relief with ASIC.

ASFA considers it **critical that disclosure by financial firms is supported by clear, consumer-focussed messaging on ASIC's MoneySmart website**, providing information and FAQs about the transition.

B. RESPONSE TO SPECIFIC QUESTIONS RAISED IN CP 298

B.1 Referring matters to appropriate authorities

B.1.1 Timeframe for reporting

Consultation question B1Q1: Do you agree with our proposed timeframe for AFCA to report serious contraventions or systemic issues? If not, why not?

ASFA recommends that ASIC refines its proposed requirements in relation to the reporting by AFCA to ASIC of (actual or potential) serious contraventions, systemic issues etc, to

- provide clarity around where the responsibility for identification and reporting of such matters will sit within the AFCA organisational structure, and around key trigger points for reporting
- balance the desire for early notification of serious matters with the need to avoid setting a rigid timeframe, that leads to preliminary reporting that does not present a full and fair depiction of all relevant facts and circumstances.

The SCT is currently required to report to ASIC and/or APRA (as appropriate) particulars of a contravention of any law or of the governing rules of an APRA-regulated fund of which it becomes aware in connection with a complaint. The existing industry ombudsman schemes (the Financial Ombudsman Scheme and Credit and Investments Ombudsman) are currently required to report de-identified information on systemic issues and serious misconduct to ASIC.

Under the *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Act 2017* (AFCA Act) the reporting requirement has been significantly expanded and now covers serious contraventions of the law, contraventions of the governing rules of a regulated superannuation fund, a failure or refusal to give effect to a determination, settlements of complaints that may require investigation and systemic issues arising from the consideration of complaints[1]. However, the AFCA Act leaves it to ASIC to prescribe the detailed reporting requirements.

We note the proposal in draft RG 139 that AFCA must make reports to ASIC within a reasonable time, but no later than 30 days, of becoming aware that a serious contravention by a financial firm has occurred or may have occurred, or identifying a systemic issue. We acknowledge that this is framed around the desire to ensure ASIC is promptly made aware of serious contraventions, systemic issues etc. ASFA agrees that an enhanced reporting regime is an appropriate objective.

In particular, we understand there has been some uncertainty in relation to the threshold for reporting by the Financial Ombudsman Service to ASIC, and are keen to see this is clarified for AFCA going forward. In our view, industry would benefit from further consultation about establishing appropriate thresholds. This consultation was expressly contemplated in the explanatory material to the predecessor Bill[2]. We are of the view that the necessary consultation goes beyond the matters raised in CP 298 and draft RG 139.

While supportive of an enhanced reporting regime, we do have a number of concerns in relation to the specific details of the reporting requirement, as outlined in draft RG 139.

When does AFCA 'become aware' of a matter that potentially requires reporting?

We suggest that clarity be provided in relation to the intended trigger for AFCA 'becoming aware'.

In particular, it should be made clear *whose* awareness, within AFCA, is relevant to this test. Identification of serious contraventions and/or systemic issues is a matter that requires judgment and experience. We consider that the relevant awareness should be of a person of appropriate seniority within AFCA – a person delegated with decision-making authority, such as the Chief Ombudsman, Ombudsman or Adjudicator, rather than a member of the general administrative staff.

Clarity is also required in relation to *when* AFCA is taken to have identified a systemic issue. For example:

- does AFCA 'become aware' after step (b) in paragraphs 57 and 184 of draft RG 139 has been completed, and the financial firm has had an opportunity to respond, or the response has been considered by AFCA?
- will AFCA wait for this response in order to determine whether or not a matter is systemic ***before*** it is reported, and before the proposed 30 day time limit for reporting commences?

30 day timeframe may lead to reporting of unproven allegations

RG 139 does not currently prescribe a specific timeframe within which EDR schemes must report serious misconduct and/or systemic issues to ASIC. Similarly, the SCT is required to report to ASIC and/or APRA particulars of a contravention of any law or of the governing rules of a fund of which it becomes aware in connection with a complaint, but no timeframe is specified[3]. We understand that *unless the SCT perceives a risk to the integrity of the system*, it would not typically report such contraventions until after the closure of the relevant complaint, when it is able to provide a comprehensive and balanced report.

[1] *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Act 2017* (AFCA Act), section 1052E

[2] Revised Explanatory Memorandum to the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill* 2017, paragraph 1.95

[3] *Superannuation (Resolution of Complaints) Act 1993* (S(ROC) Act), section 64

ASFA is supportive of an enhanced reporting regime. We understand the desire to avoid delaying the time at which ASIC becomes aware of a serious contravention or systemic issue impacting one or more financial firms, and support the early reporting of serious matters. However, we consider that this must be balanced against the need to provide a reasonable time for AFCA to establish the veracity of its concerns, and provide a form of procedural fairness to financial firms.

We are concerned that a 30 day timeframe may lead to AFCA making reports to ASIC that are preliminary in nature and may not provide a comprehensive depiction of events and circumstances. For example:

- the matter may be identified by AFCA some time after it occurred and the financial firm may, in the intervening period, have taken steps to resolve and remediate the issue. If the matter constituted a reportable breach the financial firm should have notified ASIC (and/or APRA) within 10 business days. In such cases, any report should reflect the actions taken by the financial firm to comply with their breach reporting obligations and to resolve and remediate the matter.
- the complaint before AFCA, from which it became aware of a serious contravention, is likely to contain detailed submissions from the complainant, who may not fully understand their eligibility or entitlements under the financial services law and the rules of the relevant financial product. The material before AFCA might not, at that point in time, include a full response from the financial firm. This raises the risk that financial firms may be 'presumed guilty', before the complaint has been proven to raise a contravention or systemic issue.

ASFA considers that the requirements for reporting of (actual or potential) serious contraventions or systemic issues should require lodgement of reports on a timely basis, but must contain safeguards to ensure that any reporting is fair and reasonable to all parties. RG 139 should not require the lodgement of inappropriately preliminary reports simply to comply with a fixed reporting timeframe. In ASFA's view, the requirements should not be overly prescriptive and care should be taken to ensure they do not interfere with the efficient and effective resolution of the complaint by AFCA.

We note that the assessment of whether a matter involves a serious contravention or systemic issue (actual or potential) is one that requires judgment and experience. It is an assessment that should be made by a person within AFCA with an appropriate level of seniority – a Chief Ombudsman, Ombudsman or Adjudicator. We would expect that such individuals would also possess sufficient judgment to ascertain the appropriate time at which to make a report to ASIC.

B.1.2 Broad approach to AFCA reporting

Consultation question B1Q2: Do you agree with our broad approach to AFCA reporting? If not, why not?

ASFA recommends that ASIC refines its proposed requirements in relation to the reporting by AFCA to ASIC of (actual or potential) serious contraventions, systemic issues etc, to:

- require AFCA to provide a financial firm with a 'right to respond' prior to making a report or, at a minimum, to notify the firm within five days of making the report, providing it with a full copy of the report and an opportunity to directly respond
- provide that any naming of individuals in a report by AFCA should be limited to key contact points within a firm and/or senior staff with responsibility for the relevant operational area
- clarify the implications for third party service providers, who may be perceived to be involved in a contravention or systemic issue, but are not members of AFCA nor regulated by ASIC.

Rights where AFCA reports a serious contravention or systemic issue to ASIC

As noted above, ASFA is concerned that the 30-day timeframe may lead it to make reports to ASIC that are preliminary in nature and may not fully and fairly represent all relevant facts.

We consider that as a matter of best practice, prior to making a report to ASIC regarding a serious contravention or systemic issue etc involving a particular financial firm, AFCA should be required to advise the firm of its intention to report and provide the firm with the opportunity and a short period of time – for example, five business days - within which to respond.

Alternatively, and at a minimum, we consider that AFCA should be required to:

- advise financial firms within five days of making a report to ASIC
- provide the financial firm with a full copy of the report
- provide the financial firm with the opportunity to directly respond to the report.

Naming of individual employees and representatives in reports to ASIC is inappropriate

The particulars of the report to be made by AFCA to ASIC are not prescribed by the AFCA Act. The particulars outlined in draft RG 139 go beyond those set out in the current version of RG 139.

ASFA questions the appropriateness of AFCA naming, in a report to ASIC regarding a serious contravention, systemic issue etc, individual employees of the financial firm. Any naming of employees should, in ASFA's view, be limited to identifying key contact points within the financial firm and, potentially, senior staff with overall responsibility for the relevant operational area. We would consider it inappropriate if any report by AFCA named an employee who operated 'on the front line' within a financial firm but had little control or decision making responsibility over the conduct of the relevant operational area, or was only one of many employees whose actions might be relevant to the matter.

Should ASIC determine that AFCA's report warrants further investigation, the degree of responsibility that should be attributed to individual employees is a matter that can be more appropriately assessed by ASIC as part of that process, along with its consideration of any sanctions that might be applicable.

Alleged systemic issues relating to general industry practice, or involving multiple financial firms

Clarification is also required of whether alleged systemic issues identified by AFCA, which relate to general industry practices or appear to involve multiple firms, will also go through the process identified in paragraphs 57 and 184 of draft RG 139. These paragraphs only appear to relate to systemic issues identified during AFCA's consideration of complaints, and there is no indication of how matters relating to general industry practice, or may involve multiple financial firms, will be managed before being reported.

Implications for third parties not regulated by ASIC

Many APRA-regulated superannuation funds utilise third party service providers to assist in delivering products and services to fund members and beneficiaries. This is often necessary given the scale of many funds and the need to access expertise across a diverse range of operational and regulatory areas. In many cases, these service providers will not be members of AFCA and may not be regulated by ASIC.

ASFA recommends that ASIC clarifies how these service providers may be impacted as a result of AFCA's obligations in relation to reporting of serious contraventions and systemic issues. For example, where a potential systemic issue is identified that involves more than one AFCA member, the use of a common service provider may lead to a perception that the service provider has some degree of involvement in the contravention/issue. In such an instance, it is not presently clear how AFCA would proceed, in terms of obtaining information to prepare its report to ASIC.

Other matters

We welcome the acknowledgement in paragraph 50 of draft RG 139 that, in specifying requirements for the format and timing of reports, ASIC will consult with APRA, the ATO and AFCA with a view to harmonising and streamlining reporting arrangements as far as practicable. It is important that all stakeholders remain mindful of the need to minimise the creation of new administrative and/or reporting burdens during the establishment of AFCA.

B.2 Role of the independent assessor

B.2.1 Role of the independent assessor

Consultation questions:

B3Q1 Do you agree with our proposed guidance on the primary role of the independent assessor? If not, why not?

B4Q1 Do you agree with our proposed guidance on what is outside the role of the independent assessor? If not, why not?

ASFA recommends that ASIC revises wording in draft RG 139 to make it clear the independent assessor may recommend process improvements to enhance AFCA's general handling of complaints, but avoid creating the impression that the assessor may provide remedies in relation to specific complaints.

ASFA agrees with most aspects of proposals B3 – B4 regarding the role of the AFCA independent assessor. In particular, we welcome the confirmation, via draft RG 139, that the assessor is not to undertake a merits review of an AFCA decision or re-open a complaint or the outcome of a complaint.

However, we have a concern with some of the language used in paragraph 189 in relation to the primary role of the independent assessor. Paragraph 189(c) indicates that one aspect of the primary role of the independent assessor is to "as appropriate, make recommendations **or provide remedies to identified issues**" (our emphasis). ASFA would caution against the use of language such as "provide remedies", which carries with it a connotation that the assessor will provide an individual remedy in relation to a specific complaint. This is inconsistent with paragraph 190, which makes it clear that the independent assessor's role is not to undertake a merits review of an AFCA decision or re-open a complaint **or the outcome of a complaint**", which would include any remedy determined by AFCA (our emphasis).

We note that, once finalised, RG 139 will be a publically available document and may be consulted by consumers. In this context, it is important to avoid creating an impression that if the consumer seeks a review by the independent assessor, this may alter the outcome of a complaint that has been dealt with by AFCA and, in particular, may result in them receiving a different remedy to that determined by AFCA.

B.2.2 Requirements for the independent assessor

Consultation question B5Q1: Do you agree with our proposed requirements for the independent assessor? If not, why not?

ASFA recommends that additional requirements be included in RG 139, to require AFCA to:

- clarify that financial firms may make service complaints to the independent assessor
- publish on the AFCA website annual reports to stakeholders on the actions it has taken in response to recommendations from the independent assessor, on an 'if not why not' basis
- make reports of the independent assessor available to stakeholders, via the AFCA website.

Access to the independent assessor

We welcome the confirmation, in paragraph 191 of draft RG 139, that the independent assessor must accept service complaints from all users of the scheme. While it is implicit from draft RG 139 that 'users' of AFCA includes its members (financial firms), this could be more clearly stated, for the avoidance of doubt.

It is important that financial firms have the opportunity to make a complaint to the independent assessor. While the consumer experience is an undeniably important factor in assessing AFCA's performance, consumers would typically only have first-hand knowledge of the conduct of their own complaint. In contrast, given the breadth of AFCA's jurisdiction covering all financial services complaints – a large financial firm is likely to have a volume of complaints raised with AFCA in any given period. This provides firms with the opportunity to identify any broader issues that may arise – for example, in relation to the consistency of approach adopted by different decision makers within AFCA, or where particular processes are not operating efficiently or effectively. Patterns and volumes in complaints to the independent assessor from financial firms – both from individual firms and across firms - will therefore be an important indicator of potentially systemic issues in AFCA's complaint handling operations.

Appointment of the independent assessor

We recommend that additional guidance be inserted into RG 139 regarding ASIC's expectations in relation to the selection of an independent assessor by the AFCA Board. In particular, this should clarify whether the assessor is to be appointed on a personal basis or whether a firm or company may be appointed.

It is important that the independent assessor is fiercely independent, appropriately qualified and also adequately resourced to undertake their role. Some ASFA members have expressed a concern that the independent assessor is to be appointed by the AFCA Board and would prefer ASIC to make the appointment, with a view to ensuring impartiality.

We note that the independent assessor for FOS acts in an individual capacity, and is appointed by the FOS Board. Regrettably it has not been possible to make any assessment of how effectively these arrangements are operating, as the assessor was only appointed in October 2017.

Reporting by the independent assessor

ASFA disagrees with the reporting requirements for the independent assessor as set out in paragraphs 191(h) and (i). These require the assessor to report to the AFCA Board and ASIC on a quarterly basis, and to report publicly on an annual basis on complaints received, findings or recommendations made, and outcomes achieved. It is implicit that these reports will be quite different in nature and it is assumed the report to the AFCA Board and ASIC will be significantly more detailed than the public annual report. The annual report is likely to be one prepared for a broad range of potential readers – including consumers – and ASFA is concerned it may not contain sufficient detail for member firms about AFCA's performance.

AFCA has been proposed as a body that will deliver improved outcomes in terms of efficiency and cost effectiveness, as compared to the existing EDR bodies. Further, AFCA will be entirely funded by its member financial firms. In this context ASFA considers it reasonable for those firms to have access to reporting from the independent assessor that is transparent and detailed, and more frequent than once per year.

Action to be taken by AFCA following a report from the independent assessor

Draft RG 139 is silent on any specific action that AFCA should take any action upon receipt of recommendations from the independent assessor, although paragraph 120 acknowledges that in order to "meet the requirements for efficiency and effectiveness over time, AFCA will need to take into account and respond to" matters including "recommendations made by the independent assessor".

In ASFA's view, the inclusion of an independent assessor role has the potential to provide an important level of accountability over AFCA's operation. However, we consider that this accountability may be undermined unless there is an onus on AFCA to specifically consider and respond to the assessor's recommendations and the outcomes of this process are made available to stakeholders.

ASFA considers that AFCA should be required to report on its implementation of recommendations by the independent assessor on an 'if not, why not' basis. These reports should be made available to all stakeholders, via the AFCA website, on an annual basis.

B.3 EDR disclosure obligations

Consultation questions:

B6Q1 Is this a sufficient timeframe for financial firms to update all of their legal disclosures (as set out in paragraph 35) and other consumer communications? If not, why not?

B6Q2 Should we provide transitional relief from external dispute resolution disclosure obligations in the lead up to AFCA commencement? If so please provide reasons

ASFA does not agree that the timeframe envisaged by ASIC for updating of legal disclosures and consumer communications by trustees of APRA-regulated superannuation funds is sufficient. The transition to AFCA is significantly more complex for the APRA-regulated superannuation sector than for other financial products. Further, many key details remain uncertain at this point in time and this is hampering trustees' implementation efforts.

ASFA considers it critical that trustees are provided with transitional relief. Trustees should be provided with sufficient flexibility, during the transition to AFCA and the period that the SCT operates alongside AFCA, to allow them to address their EDR disclosure obligations in a way that:

- provides clarity and certainty to the consumers impacted by the reforms – rather than prescriptive but sub-optimal disclosure
- avoids imposing an unnecessary cost burden, as this will ultimately flow through to consumers
- balances the work effort required with the time available for implementation
- recognises that further amendments to funds' disclosure and communications material will be required in the short to medium term, as significant amendments to IDR arrangements are introduced and the SCT closes.

Trustees should be provided with relief for updating of disclosure documents until 30 June 2019. This relief should be drafted widely enough to allow trustees to adopt a range of approaches during the intervening period to provide consumers with updated information. These may include: providing updated and specific information via a fund's website, providing targeted disclosure through inclusion of a flyer or 'insert' with prescribed disclosure documents, and/or a communication sent to individuals directly impacted by the transition. ASFA would be pleased to discuss the framing of such relief with ASIC.

Disclosure by financial firms must also be supported by clear, consumer-focussed messaging on ASIC's MoneySmart website, providing information and FAQs about the transition.

B.3.1 Uncertainty over key details is compounding the disclosure challenge

In ASFA's view, the positions outlined in CP 298 take a somewhat simplistic approach to the transition to AFCA, by assuming that all 'predecessor schemes' cease to be relevant on the AFCA start date.

This is not the case for APRA-regulated superannuation funds, as the SCT will continue to operate for a period (the duration of which is not yet confirmed), to clear its existing caseload. This fact introduces complexity for trustees of superannuation funds which will not be experienced by financial firms who are currently members of FOS, which will effectively be subsumed into AFCA from 1 May 2018[4].

The magnitude of changes required to superannuation funds' prescribed disclosure documents and communication materials – typically referred to as a fund's 'collateral' - should not be underestimated, and nor should the overall volumes of collateral affected.

ASFA members have highlighted a number of factors that need to be considered as part of any decision ASIC may make in relation to the granting of transitional disclosure relief. These are discussed below.

1. Key details about AFCA, relevant to funds' disclosure and communications, are yet to be confirmed

Significant uncertainty remains around many important details that will need to be included in the prescribed disclosures of APRA-regulated superannuation funds, and/or otherwise communicated to consumers. For example:

(i) The precise date from which AFCA will begin to receive complaints, and the SCT will cease accepting new complaints, is yet to be confirmed. The announcement that AFCA will start receiving disputes "from ***no later than*** 1 November 2018"[5] (our emphasis) leaves open the potential that an earlier start date could potentially be announced.

The AFCA Act provides that the Minister must authorise the AFCA scheme. The Minister will effectively specify the date from which AFCA is to commence receiving disputes, and the date from which the SCT may not accept new complaints, via a notifiable instrument. For simplicity, our submission refers to this date as the "AFCA start date", although AFCA will be in existence and conducting some administrative and preparatory functions prior to commencing to receive disputes. At this time, the Minister is yet to announce the successful application by any company to operate the AFCA scheme.

We appreciate that the settling of the AFCA start date is not within ASIC's control. However, it is important to recognise that the uncertainty impedes financial firms' efforts to formulate and implement their transition plans in a measured way. It also prevents firms making clear disclosures to their customers about the transition and its potential impact on their EDR arrangements.

(ii) The contact details a consumer would use to lodge a complaint with AFCA are unavailable, and there has been no clarification of whether there will be a central point of contact for consumers who may be confused about which scheme (AFCA or the SCT) is relevant to them.

(iii) It is unclear whether there will be arrangements for the 'transfer' of complaints between the SCT and AFCA and whether any limitations will be placed on an individual's ability to withdraw an open complaint from the SCT and re-commence it with AFCA.

[4] http://www.fos.org.au/members/afca-updates/afca-transition-faqs/, FAQ 4, accessed on 27 March 2018
[5] The Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services and the Hon Craig Laundy MP, Minister for Small and Family Business, the Workplace and Deregulation - Joint Media Release: *Consumers win as a one-stop-shop for financial complaints passes through parliament*, 14 February 2018

(iv) The scope of AFCA's jurisdiction remains unclear.

Indications have been made that the ToR will exclude some types of complaints, consistent with the jurisdiction of the predecessor schemes. We anticipate this will include, for superannuation, complaints about management of the fund as a whole. However, until AFCA has been established and its ToR are settled, financial firms will not have certainty about its jurisdiction.

Similarly, the AFCA Act prescribes a time limit in relation to the making of a complaint about payment of a death benefit, but leaves all other timeframes for superannuation complaints to be outlined in AFCA's ToR. This includes complaints in relation to payment of a disability benefit or about an information statement a trustee has provided to the Commissioner of Taxation.

While this level of detail is not typically required for prescribed disclosure documents, it is relevant to the complaints handling processes of superannuation trustees and to communications that may need to be sent to members, beneficiaries and/or complainants throughout that process.

(v) There are no clear arrangements for the handling of some particular transitional issues that will arise in relation to superannuation in the lead in to the AFCA start date.

In particular, cases will arise where one potential recipient of a superannuation death benefit complains to the SCT prior to the AFCA start date, while another complains to AFCA after its start date, with both complaints made within the timeframe allowed for the complaint[6]. At this point in time no clarification has been provided to trustees regarding how these complaints will be handled, and by which EDR body – the SCT or AFCA.

The drafting of updates to disclosure documents and other communication material to address the transition to AFCA cannot be completed until the above details have been confirmed.

One ASFA member has indicated that if all these outstanding details are confirmed by 30 June, it may be possible for them to complete updating of the documents outlined in paragraph 38 of CP 298 – final responses or written reasons given to consumers about a complaint at IDR, online information and forms, and personalised disclosures such as periodic and exit statements – by 1 November. However, additional time will be needed to complete updating of the remaining prescribed disclosure materials mentioned in paragraph 35, as well as some other types of fund collateral. The time needed will vary depending on the particular circumstances of a trustee, and will be heavily impacted by the factors outlined below in this section of our submission.

Even after these initial updates to fund collateral have been implemented, there will be a need for ***further*** updates to reflect changes to IDR arrangements, which are tracking to a later timeframe than the AFCA transition. For superannuation, these changes are likely to be significant.

We note that ASIC does not intend to undertake consultation on proposed amendments to IDR changes until sometime after the commencement of AFCA, and very little detail is currently available about what those changes will entail. It will not be possible for trustees to address – or even meaningfully foreshadow – those changes when making updates to fund collateral for the transition to AFCA. As a result, many of the same documents and materials will need to be updated again, potentially within a matter of months. This will significantly increase the cost and implementation burden for trustees and has the potential to confuse consumers, with the risk that they may disengage.

Finally, aspects of funds' collateral may later need to be **amended again** to reflect the closure of the SCT.

[6] Generally, this is 28 days after the trustee's final decision in relation to any objection: S(ROC) Act, subsection 15(2) and *Superannuation (Resolution of Complaints) Regulations 1994,* regulation 5; AFCA Act, section 1056

Key issues that are presently unresolved in relation to the closure include arrangements to deal with any complaints that may remain unresolved by the SCT, and how any matters remitted from the court system will be addressed. While these matters would not typically be mentioned in funds' prescribed disclosure documentation, they may be relevant to how funds engage with impacted consumers and may be to communication materials sent to affected members, beneficiaries and complainants.

2. The number and type of documents and materials to be updated is significant.

Paragraph 35 of CP 298 outlines the prescribed disclosure documents that are impacted by the reforms, and we would add to this list the need for trustees to provide a 'significant event notification'[7] to members/beneficiaries.

In addition to prescribed disclosure documents, information about EDR arrangements would typically be included in a diverse range of communication materials. These will include fund websites, forms, factsheets, letters advising of a trustee's final decision (which may trigger a right to IDR and EDR), and letters that may be sent throughout the IDR process.

Virtually all APRA-regulated funds offer more than one distinct 'product' and some offer many products. Each will have its own suite of disclosure documents and communications materials. This means trustees with responsibility for a large number of product offerings may have many dozens, hundreds, or even thousands of separate disclosure documents to review and update to reflect the reforms. By way of indication, one large ASFA member has indicated that it will be necessary to review over 5,000 discrete pieces of communication material, including letters, to assess potential impacts. Another has estimated that it will have "thousands" of documents requiring an update.

3. The format for production and supply of documents will impact on the time needed to update them.

While disclosure documents are increasingly accessed by consumers electronically, trustees are nonetheless required to have printed copies available to supply to consumers on request.

Clearly, a greater turnaround time is required for materials which must be published in paper form, particularly disclosure documents such as PDSs that would be professionally published using outsourced service providers, than those made available in electronic form or published internally. One large ASFA member has indicated that a minimum of three to four months is needed to 'roll' PDSs for all of its products.

4. Reliance on service providers will impact the time for implementation

Another factor that must be considered is the degree of control that trustees may have over the timing of any updates to their collateral. Trustees which self-administer their products will have an appreciably higher degree of control over these matters than a trustee whose products are externally administered.

Where a product is externally administered, as is common for superannuation, the administrator will necessarily have some involvement in implementing the necessary changes to collateral and associated processes. This may be limited to updating processes to ensure the most current versions of collateral are being used, but would often also involve system coding, for example to generate updates to letters.

Where an administrator has multiple trustee clients, and those trustees have multiple products, the scheduling of these updates can become complex. If delays are encountered – for example, because trustees are awaiting confirmation of key details that must be included in the updates to collateral (see item 1 above) - this impacts trustees' ability to schedule the development and production of updates to their collateral. Where administrators need to accommodate the needs of multiple trustees, each of whom will be grappling with the same update process and the same uncertainty over timing and content, it will be difficult to ensure that all necessary updates are made in time to ensure compliance.

[7] Under section 1017B of the *Corporations Act 2001*

By way of illustration, one large ASFA member has indicated that the minimum lead time required to make any changes to correspondence managed by its third party administrator is three months, from the time that final updated copy is approved by the trustee. Where collateral is managed in-house, some ASFA members have indicated that a minimum of four weeks' notice would be required to complete the updating process. This will vary depending on the type of documents/materials to be updated.

5. 'Dual disclosure' in relation to AFCA and the SCT

CP 298 indicates that ASIC expects that, by the AFCA start date:

(a) any final response or written reasons financial firms give to a consumer about a dispute at IDR will refer to AFCA

(b) financial firms will update online information and forms to refer to AFCA, as appropriate; and

(c) personalised disclosures, including periodic and exit statements, will refer to AFCA.[8]

CP 298 is silent as to whether superannuation trustees should – or may – also refer to the SCT in these materials. We recommend that this be clarified as a matter of some urgency.

Updates to fund disclosure documents could be progressively rolled out once clarity is obtained in relation to the issues raised at item 1 above. This would allow trustees to take advantage of scheduled update cycles, provided confirmation of all outstanding details is received in a timely manner.

However, to the extent these updates occur before the AFCA start date it would, in the absence of relief, appear necessary for trustees to effectively provide 'dual disclosure' regarding the SCT and AFCA. That is, fund collateral would need to refer to the SCT as the EDR body for complaints lodged until the AFCA start date and AFCA as the relevant body thereafter. Several considerations apply in relation to this approach:

- however carefully the dual disclosure is expressed, it will necessarily be more complicated than disclosure about a single EDR body.
- only a very small proportion of the decisions made by trustees translate to a complaint that proceeds to EDR, and the window for consumers to lodge complaints with the SCT is narrowing.
- retaining disclosure about the SCT may therefore risk confusing the majority of consumers, for whom the SCT will not be an eligible EDR body.

The 'dual disclosure' approach may therefore produce a sub-optimal outcome for consumers.

Documents containing dual disclosure would also need to be updated again after the AFCA start date, to reflect that AFCA is the only EDR body for complaints lodged after that date. For some collateral that is less frequently updated, this may mean dual disclosure remains in place for some months or even up to a year – long after the SCT has ceased to be an eligible EDR body for most consumers. The alternative is that trustees produce further updates to affected materials, incurring additional cost and implementation burden.

ASFA recommends that ASIC provide transitional relief allowing trustees to supplement the information provided about EDR arrangements in prescribed disclosure documents and other fund collateral with additional information provided through means including fund websites, flyers or inserts accompanying fund collateral, and/or specific communications to individuals directly affected by the transition. This would allow trustees to manage their updates to fund collateral in a more measured fashion while ensuring that consumers still receive appropriate disclosure.

[8] ASIC, Consultation Paper 298, *Oversight of the Australian Financial Complaints Authority: Update to RG 139*, proposal B6, page 16

6. Ability to incorporate changes in trustee's regular review and update schedule

If confirmation of outstanding information about AFCA is received too late to allow trustees to incorporate the necessary changes in their regular update cycle, they will be forced to make separate, additional, updates to documents. This will add significantly to the cost and effort associated with the reforms and, critically, is likely to cause confusion amongst members and beneficiaries.

In this respect, it is important to understand that updates to prescribed disclosure documents can take time to implement. Such documents are subject to rigorous review and sign-off processes and many are based on templates which involve substantial hard-coding of content items, to ensure compliance with strict disclosure obligations. Any delay in receiving confirmation regarding changes to prescribed content can jeopardise a trustee's ability to have disclosure documents updated in time.

For example, the list of prescribed disclosure documents that must contain information about the relevant EDR body includes the periodic statement - sent by superannuation trustees on an annual or six-monthly basis[9] and also following a member's withdrawal from the product (an 'exit statement'). A periodic statement contains a significant number of prescribed data items, which must be drawn from multiple areas within a fund's administration or registry system(s).

For statements issued on an annual basis, trustees will undertake a review process to identify any necessary changes (due to either regulatory changes or changes within the product offering) and generally finalise the templates by the start of June each year, to allow sufficient time for programming (coding) and testing. For larger products, with high volumes of members, the production and delivery of annual statements will then be rolled out over a period of time, typically commencing mid-late July (trustees have a period of six months after the end of the reporting period within which to issue periodic statements to product holders[10]).

While the template for an exit statement is of similar complexity to an 'annual (or six-monthly) statement, the timeframe for making updates is constrained by the fact that a compliant exit statement must be issued within one month of a member exiting the product. Short timeframes like this make it critical that trustees receive early confirmation of any changes to the prescribed content.

ASFA is of the view that trustees will need to ensure that their disclosure to impacted consumers in relation to the changes to EDR arrangements satisfies the requirements of section 1017B of the *Corporations Act 2001*. Section 1017B relates to significant changes or events – including changes to information that is required to be disclosed in a PDS. Colloquially, such disclosure is known as a 'significant event notification'.

The EDR changes will necessitate the provision of a significant event notification to all current members and beneficiaries of a superannuation fund. Ideally, trustees will aim to incorporate this notification in any already scheduled disclosures around the time of the transition. This may include the sending of annual or six-monthly periodic statements and/or fund annual reports. Managing notification in this way will minimise the cost and implementation burden associated with the disclosure, and will avoid the confusion members/beneficiaries may experience if they receive separate communications.

A trustee's ability to combine their significant event notification and routine/scheduled disclosure in this way is entirely dependent on industry receiving speedy confirmation of all necessary details regarding AFCA and the transition, as outlined at item 1 above. Failure to receive this confirmation by the time at which routine disclosure materials must be 'locked down' for production and distribution will mean a separate significant event notification will need to be made.

[9] This will depend on the 'reporting period' specified in the fund's governing rules
[10] Corporations Act 2001, subsection 1017D(3)

7. Scenarios where trustees should have no disclosure obligations in relation to the EDR changes

Individuals with whom a fund trustee has a current relationship will receive information about the EDR changes via a prescribed disclosure document or other fund communication. However, there will be groups of individuals who are no longer members/beneficiaries of the fund and are therefore not in receipt of regular disclosure or communication materials. These include:

- some individuals who have a complaint currently before the SCT - for example, former members of the fund, and non-members who are potential recipients of a deceased member's death benefit. These individuals will likely be receiving communications from the SCT, and we would anticipate that such communications may address the transition and its impact on the individual (for example, any right to transfer from the SCT to AFCA that may be implemented – see item 1(iii) above).
- individuals who may retain a right to bring a complaint to an EDR in relation to a final trustee decision to either the SCT or AFCA (depending on the timing), but have not yet done so - and in fact may never do so. As many types of superannuation complaints are not subject to time limits, this will include individuals impacted by trustee decisions made in the past - potentially even some years ago. It is, in ASFA's view, unreasonable to expect that a trustee will provide any disclosure in relation to the EDR changes to these individuals.

ASFA requests ASIC's confirmation that trustees have no obligation to provide disclosure in relation to the EDR changes to these groups of individuals.

In ASFA's view, these individuals – who no longer have a relationship with their superannuation fund – will benefit greatly from consumer-facing disclosure provided via ASIC's MoneySmart website. We would also expect that while it continues in operation, the SCT would provide any consumers who may seek to lodge a new complaint with information about AFCA – in effect, providing a referral service.

8. Updating of documents cannot occur in isolation – fund staff will need to be trained

Once all necessary updates have been made to fund collateral, there will be a need to train staff – for example, contact centre and complaints management teams - to ensure they are equipped to address queries from consumers. This will need to be completed prior to the date consumers begin to receive or access updated collateral.

B.3.2 Transitional relief should avoid prescription and allow flexibility

Given the many challenges outlined above, ASFA considers that ASIC's proposed timeframe for updating of fund collateral will be extremely challenging for all trustees and unachievable for many. We are further concerned that a prescriptive and/or 'one size fits all' approach during the transition to AFCA and the continued operation of the SCT may lead to outcomes that are sub-optimal in terms of clarity, while imposing a costly and onerous implementation burden on trustees.

ASFA considers it would be appropriate for ASIC to provide fund trustees with transitional relief until 30 June 2019 for updating of all necessary disclosure documents and fund collateral.

This relief should allow for flexibility, so trustees can progressively implement updates and adopt the optimal approach to disclosure during this period given their particular circumstances. Relief should be broad enough to allow trustees to adopt a range of techniques to provide updated information to impacted members, beneficiaries and complainants in the interim. These techniques might include:

- additional disclosure via fund websites
- provision of a flyer or 'insert' to correct, clarify or elaborate upon information in prescribed disclosure documents where time has not permitted these to be updated
- specific, tailored communication to individuals directly impacted by the EDR changes.

Options of this type would enable trustees to update all relevant fund collateral to refer to AFCA as the appropriate EDR body for superannuation complaints (once all necessary details for AFCA and the transition are confirmed), without complicating that disclosure by retaining information about the SCT. Additional information about the continued operation of the SCT could then be provided via the fund website, a flyer, and/or a tailored letter to those individuals the trustee knows has a complaint currently before the SCT.

ASFA members have indicated that this would save considerable effort and cost, by avoiding the need to make further amendments to the same collateral at a later date, to reflect the closure of the SCT. Importantly, ASFA members have emphasised that this approach would also optimise the disclosure received by consumers.

In this respect, it should be noted that the proportion of superannuation complaints that proceed to EDR each year is extremely small, when compared to the number of 'final decisions' made by trustees and the total number of fund members, beneficiaries and potential death benefit claimants. The window for lodging complaints with the SCT is also narrowing. Providing dual disclosure (covering both the SCT and AFCA) presents the very real risk of confusing the overwhelming majority of fund members, beneficiaries and potential complainants, for whom AFCA will be the only applicable EDR body.

Finally, we note that it is critical that the changes to fund collateral by fund trustees are complemented by clear messaging from ASIC and by AFCA and the SCT. In particular, we recommend that, as a matter of urgency, ASIC update its consumer-facing MoneySmart website to include clear information about the transition to AFCA and the continued existence of the SCT. This should include FAQs addressing common types of queries that may be expected, and should be updated as further information regarding AFCA and the closure of the SCT becomes available.

C. OTHER ISSUES IN RELATION TO DRAFT RG 139

The comments below address a number of issues in relation to draft RG 139 and the transition to AFCA, that are not raised in CP 298.

C.1 Material changes to AFCA's terms of reference

In previous submissions in relation to the new dispute resolution framework, ASFA has noted our concerns that while the AFCA Act only permits 'material changes' to AFCA's ToR to be made with ASIC's approval, that term is not defined.

We welcome the clarity provided in draft RG 139 regarding the *types* of changes to the AFCA ToR that ASIC would considered 'material' and therefore requiring ASIC's approval, but believe this could be expanded to provide additional guidance.

ASFA recommends that ASIC provides further examples of the changes to the AFCA Terms of Reference that it would consider to be "material".

C.2 Public reporting of AFCA complaint data

Paragraph 66-67 of draft RG 139 indicates that "AFCA may exercise discretion not to publish information about members whose level of complaints fall below a certain threshold".

Given the significant reputational impact that public reporting may have on financial firms, it is important that this threshold is carefully and appropriately determined.

In ASFA's view, the threshold should be subject to periodic review and both the setting and review process should involve consultation with financial firms and other key stakeholders. We recommend that RG 139 be updated to reflect this.

ASFA recommends that ASIC provides additional detail in RG 139 regarding the threshold for reporting of complaint data by AFCA, and that the setting and review of this threshold is subject to consultation.

D. OTHER ISSUES IN RELATION TO THE TRANSITION TO AFCA

D.1 Clarity needed - AFCA's funding model, jurisdiction & other key details

ASFA members have expressed concern about the lack of information provided regarding the cost recovery arrangements that will be imposed in relation to AFCA. It is important that financial firms are made aware of the cost impact of AFCA membership, so this can be appropriately budgeted for going into the new financial year. This is especially important for superannuation trustees, as they will also continue to bear the cost of the SCT's operations, including additional funding to be allocated to the SCT during its wind-down period from the APRA supervisory levy.

The FOS website was recently updated to the following FAQ:

> **8. When will the membership renewal invoices be issued and what period does this cover?**
>
> Invoices for AFCA membership are planned to be issued from mid June, covering membership from 1 July 2018 to 30 June 2019.[11]

There has been for some time a general assumption that financial firms will be required to pay an annual AFCA membership fee as well as fees related to their volume of complaints and also how far each individual complaint progresses.

As a result, confirmation of a membership fee was not unexpected. However, the manner of this announcement *was* somewhat unexpected. Many financial firms that are required to become members of AFCA are not current members of FOS and would not be actively monitoring its website.

We recommend that information regarding AFCA's likely fee structure be made available to financial firms as a matter of urgency.

Previous submissions by ASFA have highlighted the uncertainty as to the **precise jurisdiction of AFCA**, due to the broad drafting of the AFCA Act. Accordingly, we welcome the confirmation in paragraph 75 of draft RG 139 that exclusions from AFCA's jurisdiction are "based on statutory exclusions and the well-established exclusions from the jurisdictions of predecessor schemes".

We note the examples in para76 of the types of complaints that may be excluded, including complaints that have been dealt with in another forum, are outside the scheme's time limits, or relate to the management of the fund as a whole. However, we note the specific language used – such complaints "may be excluded, ***subject to specific drafting in the terms of reference***" (our emphasis).

Until the ToR have been finalised, uncertainty will remain as to the precise scope of AFCA's jurisdiction and other key details in relation to how AFCA will operate in practice.

ASFA recommends that all possible efforts are made to expedite the formal establishment of AFCA and the settling of its Terms of Reference, operational guidelines and fee structure (funding model).

[11] http://www.fos.org.au/members/afca-updates/afca-transition-faqs/, FAQ 8, accessed on 27 March 2018

D.2 Further refinements to dispute resolution must be carefully managed

The current reforms are substantial – particularly for APRA-regulated superannuation, given the transition from a purely statutory regime to a hybrid industry ombudsman model. Taking into account the wind-down arrangements for the SCT and the pending introduction of changes to IDR arrangements, it will be a number of years before the new dispute resolution framework will be fully implemented.

Given the magnitude of the reforms, it is important that they are given time to 'bed down' so their operation can be fairly assessed. All stakeholders – financial firms, AFCA and its predecessor schemes, and ASIC – will have invested considerable cost and effort to implement the new framework. It will also be necessary for consumers to adjust to the new arrangements, and this will be a particular issue for superannuation, where the SCT has considerable brand recognition.

ASFA considers it critical that dispute resolution arrangements operate effectively and efficiently and promote confidence in the industry.

As such, we do not consider that dispute resolution arrangements should ever be treated as 'carved in stone' and exempt from refinement. In fact, we have in previous submissions called for a post-implementation review of effectiveness of the new arrangements and were pleased that this recommendation was reflected in the AFCA Act, as passed by Parliament. The Minister now required to cause a review of the operation of the Act within 18 months of AFCA's commencement. The timing of the statutory review is not presently clear – if it is assumed that AFCA will begin to hear complaints from 1 November 2018, the review must commence as soon as practicable after 1 May 2020.

We note there is also the potential for impacts arising from the Royal Commission into misconduct in the banking, superannuation and financial services industry, which is due to deliver its final report by 1 February 2019. It is important that any relevant recommendations from the Royal Commission are not considered in isolation, but form part of the broader, statutory review of the operation of the framework.

It is also critical that in implementing the reforms, ASIC is mindful of the prospect that they will most likely be subject to refinement in the relatively near future. In this respect, ASFA urges ASIC to exercise particular care in designing any requirements that may be difficult, or costly, to change in future – for example, the detail and mechanism for reporting of IDR data to ASIC by financial firms.

Should further refinements to the framework be required, it will be important that ASIC supports industry by providing:

- appropriate transitional timeframes for the implementation of any further reforms
- clear consumer-focussed messaging, to alleviate the concerns and loss of confidence that consumers may experience where changes are made to arrangements that were only recently the subject of such major reform. There is a genuine risk, in this context, that consumers will assume the additional refinements are needed because industry failed to fully or properly implement the original reforms.

ASFA recommends that, in implementing the new dispute resolution framework, ASIC is mindful that further changes may be necessary to implement any outcomes or recommendations from the scheduled statutory review of the framework and also the Royal Commission into misconduct in the banking, superannuation and financial services industry.

Should either the statutory review or Royal Commission result in further refinements to the dispute resolution framework, it will be important for ASIC to support industry by providing appropriate transitional timeframes for implementation and clear consumer-focussed messaging, to mitigate any potential loss of consumer confidence.