Treasury LAWS AMENDMENT (External Dispute Resolution)   
BILL 2017

EXPOSURE DRAFT EXPLANATORY MATERIAL

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

| Abbreviation | Definition |
| --- | --- |
| APRA | Australian Prudential Regulation Authority |
| ASIC | Australian Securities and Investments Commission |
| AFS licensees | Australian Financial Services licensees |
| CIO | Credit and Investments Ombudsman |
| Corporations Act | *Corporations Act 2001* |
| EDR | External Dispute Resolution |
| Financial Firms | Australian Financial Services licensees, unlicensed product issuers, unlicensed secondary sellers, credit providers and credit representatives, superannuation funds (other than self-managed superannuation funds), approved deposit funds, retirement savings account providers, annuity providers, life policy funds and insurers |
| FOS | Financial Ombudsman Service |
| IDR | Internal Dispute Resolution |
| NCCP Act | *National Consumer Credit Protection Act 2009* |
| RSA | Retirement Savings Account |
| RSA Regulations | *Retirement Savings Accounts Regulations 1997* |
| RSE | Registrable Superannuation Entity |
| SCT | Superannuation Complaints Tribunal |
| SIS Act | *Superannuation Industry (Supervision) Act 1993* |
| SIS Regulations | *Superannuation Industry (Supervision) Regulations 1994* |
| SMSF | Self-managed Superannuation Funds |
| Superannuation Complaints Act | *Superannuation (Resolution of Complaints) Act 1993* |
| ToR | Terms of Reference |
| TPD | Total and Permanent Disability |

1. External Dispute Resolution

## Outline of chapter

* 1. Schedule 1 to this Exposure Draft Bill will amend the *Corporations Act 2001* (Corporations Act) and associated Acts to introduce a new framework for external dispute resolution (EDR) schemes.
  2. The Minister will be able to authorise a new EDR scheme for the purposes of the Corporations Act. Financial firms will be required to be members of the new EDR scheme and will be required to comply with the scheme’s determinations as a condition of their licence.
  3. The financial firms that will be required to participate in the new EDR framework are Australian Financial Services licensees, unlicensed product issuers, unlicensed secondary sellers, credit providers and credit representatives, regulated superannuation funds (other than self-managed superannuation funds*),* approved deposit funds, retirement savings account (RSA) providers, annuity providers, life policy funds and insurers (Financial Firms).
  4. The new EDR scheme aims to ensure that consumers and small businesses are able to access a financial dispute resolution system which is accessible and fast and makes determinations that are fair and binding.
  5. All legislative references in this Chapter are to the Corporations Act, unless otherwise stated.

## Context of amendments

### Review of the EDR framework

* 1. On 20 April 2016, the Government announced a package of measures to enhance the operation of the Australian Securities and Investments Commission (ASIC) and to improve consumer outcomes in the financial system.
  2. As part of this package, the Government announced a review of the EDR and complaints handling framework in the Australian financial system. The purpose of the review was to ensure that the three existing bodies, the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT), were working as effectively as possible to deliver the best possible outcomes for consumers and small businesses.
  3. Currently, FOS and CIO are ASIC approved industry ombudsman schemes. Financial Firms are required to be a member of one of these schemes as a condition of their licence.
  4. On 8 August 2016, the Government released the terms of reference for an independent review of the role, powers, governance and accountability of the existing financial system EDR and complaints handling framework. The review commissioned an expert panel, chaired by Professor Ian Ramsay, to consider these issues (the Ramsay Review).
  5. In particular, the Ramsay Review was tasked with examining whether changes to current dispute resolution and complaints bodies in the financial sector are necessary to deliver effective outcomes for users.
  6. The SCT is a statutory tribunal established under the *Superannuation (Resolution of Complaints) Act 1993* (Superannuation Complaints Act) which considers complaints about superannuation.

### Ramsay Review

* 1. The Ramsay Review found that:
* the existence of multiple EDR schemes with overlapping jurisdictions means that it is difficult to achieve comparable outcomes for consumers with similar complaints;
* multiple EDR schemes give rise to a duplication in costs for both industry and ASIC;
* the monetary limits and compensation caps ($500,000 and $309,000 respectively) that apply to financial disputes (other than superannuation complaints) are inadequate;
* small business does not have adequate access to EDR schemes because the existing monetary limits ($500,000 for the value of a general claim and $2 million in relation to credit facilities) are too low for many disputes; and
* there are long-standing problems with the arrangements for resolving superannuation complaints in the SCT.

### A new EDR framework

* 1. On 9 May 2017, the Government announced the creation of a new framework for dispute resolution with a ‘one-stop shop’ EDR scheme which will be known as the Australian Financial Complaints Authority (AFCA). AFCA will replace FOS, CIO and the SCT and will consider disputes about Financial Firms.
  2. The Government announced that AFCA will be based on an ombudsman model and will be established by industry as a public company limited by guarantee. It is expected that AFCA will be operational by 1 July 2018.
  3. Financial Firms will be required to be members of AFCA as a condition of their licence. AFCA members will be contractually bound to comply with the AFCA’s terms of reference (ToR) which will apply to the operation of the EDR scheme by AFCA.
  4. A key benefit of the one-stop shop EDR scheme is that it enables consumers to approach a single scheme to resolve all financial complaints.
  5. The new EDR scheme will have higher monetary limits and compensation caps than FOS and CIO and will have an unlimited monetary jurisdiction for superannuation complaints. This will ensure that more consumers and small businesses have access to the EDR scheme and are able to access fair compensation, where appropriate.
  6. AFCA will be governed by a board comprising of an independent chair and an equal number of directors with consumer and industry backgrounds.
  7. Generally, there will only be a single EDR scheme to resolve all financial disputes.
  8. The legislative framework for the EDR scheme sets out:
* authorisation of the EDR scheme by the Minister;
* mandatory membership of the EDR scheme for Financial Firms;
* strengthened regulatory oversight; and
* additional powers for the resolution of superannuation complaints.
  1. Under the new EDR framework, the broad conditions under which the new EDR scheme must operate will be dealt with in legislation. However, the way the scheme operates will be determined by AFCA’s Board and set out in its ToR. This will allow operational improvements to be implemented much more quickly than would be the case if a legislative change was required.
  2. The new EDR scheme will be authorised by the Minister. To ensure that the new scheme can satisfy the conditions of its authorisation, and deliver benefits to consumers and small businesses, the Minister will carefully consider the ToR when approving the EDR scheme.

#### Strengthened regulatory oversight

* 1. As the new framework will involve a shift to a single EDR scheme, there will be enhanced oversight and monitoring by ASIC. ASIC will have a new power to issue regulatory requirements that AFCA, in operating the scheme, must comply with.
  2. ASIC will have the powers to approve material changes to the EDR scheme’s ToR.
  3. ASIC will also have directions powers that can be used where AFCA fails to meet legislative and regulatory requirements.

#### Additional powers for superannuation complaints

* 1. Although the operational aspects of the scheme will be based on private law (contractual) obligations between AFCA and members of the EDR scheme, the EDR scheme will be provided with some statutory powers to allow it to manage superannuation complaints effectively.
  2. Statutory powers are required because some superannuation complaints cannot be resolved by relying on contractual obligations between the operator of the EDR scheme and its members. For example, superannuation complaints may involve third parties who are not members of the EDR scheme but may have an interest in the outcome of a complaint (such as third parties to a complaint who may have an interest in a death benefit).

## Summary of new law

* 1. Schedule 1 to this Exposure Draft Bill introduces a framework for EDR schemes which will be included in the Corporations Act and will ensure that consumers have easy access to a single EDR scheme to resolve disputes with Financial Firms.
  2. These amendments create a new Part 7.10A ‘External Dispute Resolution’ in the Corporations Act which will consist of four divisions.
  3. Division 1 of Part 7.10A establishes a new authorisation framework which:
* provides the Minister with the power to authorise an EDR scheme for the purposes of the Corporations Act after taking into account certain matters;
* outlines the functions of an EDR scheme;
* provides the Minister with the power to revoke an authorisation of an EDR scheme; and
* requires the authorisation of an EDR scheme to be subject to certain conditions.
  1. Division 2 of Part 7.10A establishes an enhanced regulatory oversight regime by giving ASIC the power to:
* issue regulatory requirements regarding the performance of the scheme functions;
* approve any material changes to the authorised EDR scheme; and
* issue directions to the scheme operator to increase limits for the value of claims, or to comply with a condition of authorisation of the scheme.
  1. Under division 3 of Part 7.10A, the EDR decision-maker will have three statutory powers which can be used to assist in resolving a superannuation complaint. These powers are:
* the power to join certain third parties to a superannuation complaint;
* the power to obtain information and documents which are relevant to a superannuation complaint; and
* the power to require people to attend conciliation conferences to assist in the resolution of a superannuation complaint.
  1. The EDR decision-maker may refer questions of law to the Federal Court at its own initiative or at the request of one of the parties to the superannuation complaint.
  2. In making a determination regarding a superannuation complaint, the EDR decision-maker will have all the powers, obligations and discretions conferred upon the original decision-maker. However, the EDR decision-maker may only make a determination which removes any unfairness or unreasonableness from the original decision or conduct.
  3. A determination of an EDR decision-maker comes into operation immediately, unless otherwise specified in the determination.
  4. The determination will be treated as if it were a decision of the original decision-maker.
  5. The EDR decision-maker must give written reasons for the determination to all the parties to the complaint. Determinations of the EDR decision-maker will be subject to appeal to the Federal Court on questions of law.
  6. The EDR decision-maker and relevant staff members will be subject to secrecy requirements.
  7. Under division 4 of Part 7.10A, the EDR decision-maker must refer certain matters to ASIC and APRA.

Comparison of key features of new law and current law

| New law | Current law |
| --- | --- |
| The Minister will have the power to authorise an EDR scheme after taking into account a more detailed list of matters. | ASIC has the power to approve an EDR scheme and must take into account certain matters. |
| The Minister will have the power to revoke an EDR scheme’s authorisation. | ASIC has the power to vary or revoke an EDR scheme’s approval. |
| The Minister will need to take into account various scheme functions, as set out in the legislation, when considering whether to authorise an EDR scheme. | No equivalent. |
| The Minister’s authorisation of an EDR scheme will also be subject to the following conditions:   * a condition that the operator of the scheme must be a company limited by guarantee; * a condition that the operator of the scheme must perform the scheme functions and comply with any regulatory requirements and direction issued by ASIC; * a condition that the scheme must have an independent assessor; * a condition that material changes to the scheme must not be made without prior ASIC approval; and * any other conditions that the Minister specifies in the authorisation. | ASIC may make an approval of an EDR scheme subject to conditions specified in the approval, including conditions relating to the conduct of an independent review of the operation of the scheme. |
| ASIC will have the power to issue regulatory requirements relating to the performance of the scheme functions. | No equivalent. |
| All material changes to the TOR of an authorised EDR scheme must first be approved by ASIC. | No equivalent. |
| ASIC will have the power to issue directions to the scheme operator to increase limits on the value of claims or to undertake specific measures to comply with a condition of authorisation of the scheme. | No equivalent. |
| The EDR decision-maker will have the power to join certain persons to a superannuation complaint. | The SCT has the power to join other parties to the complaint. |
| The EDR decision-maker will have the power to obtain information and documents from people where the information or documents are relevant to a superannuation complaint. | The SCT has the power to obtain information and documents. |
| The EDR decision-maker will have the power to require certain person to attend conciliation conferences. | The SCT has the power to require attendance at conciliation conferences. |
| The EDR decision-maker may refer questions of law to the Federal Court. | The SCT may refer a question of law to the Federal Court. |
| When making a determination regarding a superannuation complaint, the EDR decision-maker will have all the powers, obligations and discretions conferred upon the original decision-maker. | The Superannuation Complaints Act provides the SCT with all the powers, obligations and discretions conferred on the trustee or other decision-maker when reviewing a decision. |
| A determination of an EDR decision‑maker in relation to a superannuation complaint comes into effect immediately unless specified. | A decision of a trustee, insurer, retirement savings account (RSA) provider or other decision-maker that is varied or substituted by the SCT comes into effect immediately, unless specified otherwise by the SCT determination. |
| Determinations of the EDR decision‑maker will be subject to appeal to the Federal Court on questions of law. | A party to a superannuation complaint may appeal to the Federal Court, on a question of law, from a determination of the SCT. |

## Detailed explanation of new law

* 1. Schedule 1 to this Exposure Draft Bill introduces a framework for the authorisation of EDR schemes to consider complaints about Financial Firms.
  2. This Chapter outlines:
* how an EDR scheme is authorised;
* ASIC’s role in regulating EDR schemes; and
* the powers that the EDR decision-maker has to consider and resolve superannuation complaints.

### Authorisation of EDR schemes

#### Minister may authorise an EDR scheme

* 1. Schedule 1 to the Bill provides that the Minister may authorise an EDR scheme by notifiable instrument. This will permit the Minister to authorise an EDR scheme after taking into account certain matters set out in the legislation. It is expected that only one scheme will be authorised by the Minister at any one time. [Schedule 1, Part 1, item 2, section 1046]
  2. The Minister may also revoke an authorisation for an EDR scheme if the scheme, or the scheme operator, fails to satisfy one or more of the conditions of authorisation. [Schedule 1, Part 1, item 2, subsection 1046(3)]

#### Matters to be taken into account

* 1. When considering whether to authorise an EDR scheme, the Minister may take into account the following matters:
* whether the scheme includes, and whether the operator of the scheme can perform, the scheme functions;
* how a person makes a complaint under the scheme, and how the complaint is managed under the scheme;
* the extent to which complainants are exempt from payment of any fee or charge, to the operator of the scheme or to any other entity, in relation to a complaint;
* the accessibility of the scheme;
* the independence of the scheme;
* the fairness of the scheme;
* the accountability of the scheme;
* the efficiency of the scheme;
* the effectiveness of the scheme;
* the capacity of the scheme to deal with complaints in a timely manner;
* the expertise available to the scheme in dealing with complaints;
* the extent to which the scheme complies with any matters prescribed in the regulations; and
* any other matter the Minister considers relevant to the authorisation of the scheme.

[Schedule 1, Part 1, item 2, subsection 1046(2)]

* 1. In relation to whether complainants are exempt from payment of fees or charges, the Minister will generally expect that the scheme should not charge a complainant to investigate or assist in resolving a complaint.
  2. When considering whether the scheme is ‘accessible’, the Minister will consider whether the scheme makes it easy for complainant’s to understand how complaints are made and dealt with. This includes providing assistance for complainants with special needs (for example, the availability of interpreters and the provision of documents in alternative formats such as Braille and audiotape).
  3. When considering whether the scheme is ‘independent’, the Minister will generally consider whether the Board of the company operating the EDR scheme has equal number of directors with consumer and industry experience.
  4. When considering whether the scheme is ‘accountable’, the Minister will generally consider whether the new EDR scheme has sufficient funding and flexible processes to allow it to deal with unforeseen events, such as an increase in complaints following a financial crisis. The Minister will also consider whether the scheme’s ToR provide that the scheme will be subject to frequent, periodic independent reviews.
  5. When considering whether the scheme is ‘efficient’, the Minister will generally consider whether the scheme has adequate resources (including funding and skilled staff) and dispute resolution skills to ensure that complaints are dealt with quickly and appropriately.
  6. When considering whether the scheme is ‘effective’, the Minister will generally consider whether the scheme will resolve disputes in a timely way and whether the scheme will provide fair outcomes for consumers, both in terms of substantive fairness and procedural fairness.
  7. When considering whether the scheme is ‘efficient’ and ‘effective’, it will be difficult for the Minister to consider these issues before the scheme has not started to operate. However, the Minister will consider whether the proposed scheme is likely to be ‘efficient’ and ‘effective’.

##### **Scheme functions**

* 1. When considering whether to authorise an EDR scheme, the Minister must consider whether the scheme includes the ‘scheme functions’ and whether the scheme can perform those functions. The scheme functions are as follows:
* to make membership of the scheme open to every entity that is required to be a member of an EDR scheme;
* to ensure that the complaints mechanism in the scheme is accessible to people who are dissatisfied with members of the scheme;
* to consider complaints against members of the scheme;
* to ensure that complaints are dealt with in a timely manner;
* to ensure that appropriate expertise is available to deal with complaints;
* as far as practicable, to resolve complaints (including by making determinations relating to such complaints);
* to take reasonable steps to ensure compliance by members of the scheme with those determinations;
* to report to ASIC about certain matters;
* to finance the EDR scheme’s operations through contributions by members of the scheme;
* to deal with complaints in a way that is fair, equitable and independent; and
* to commission the conducting of independent reviews of the scheme’s operations and procedures.

[Schedule 1, Part 1, item 2, section 1047]

#### Authorisation provided subject to conditions

* 1. Once an EDR scheme has been authorised, the authorisation of the scheme will be subject to conditions which the scheme operator must comply with. Failure to satisfy any condition of the authorisation may result in the Minister revoking the authorisation. [Schedule 1, Part 1, item 2, section 1048]
  2. The specific conditions that the operator of the EDR scheme must satisfy are as follows:
* a condition that the operator of the scheme is a company limited by guarantee;
* a condition that the operator of the scheme must perform the scheme functions and comply with any regulatory requirements issued by ASIC relating to the performance of the scheme functions;
* a condition that the operator of the scheme comply with any direction issued by ASIC;
* a condition that the scheme must have an independent assessor to assess whether the EDR scheme treats complainants, and members of the scheme, fairly; and
* a condition that any material changes to the scheme must not be made by the operator of the scheme unless they have obtained prior approval from ASIC.

[Schedule 1, Part 1, item 2, subsection 1048(1)]

* 1. In addition to the conditions outlined above, the Minister may impose other conditions on the authorisation of an EDR scheme. The Minister may choose to revoke or vary those other conditions by giving written notice of the revocation or variation to the operator of the scheme. [Schedule 1, Part 1, item 2, paragraph 1048(1)(e) and subsection 1048(2)]

### ASIC’s role in regulating EDR schemes

* 1. ASIC will perform three main functions in relation to regulatory oversight of the EDR scheme and operator of the EDR scheme. These functions are:
* to issue regulatory requirements;
* to consider whether changes to the authorised EDR scheme should be approved; and
* to issue directions to the scheme operator, if necessary.

#### ASIC may issue regulatory requirements

* 1. ASIC will have the power to issue regulatory requirements, by legislative instrument, which relate to how the EDR scheme should perform the scheme functions. [Schedule 1, Part 1, item 2, section 1049]
  2. This power has a broad application so that ASIC has the flexibility to determine the requirements that the operator of the scheme must comply with in order to effectively perform the scheme functions. ASIC may issue and update the regulatory requirements at any time.
  3. The scheme operator must comply with all regulatory requirements relating to the performance of the scheme functions issued by ASIC.
  4. Failure to comply with any regulatory requirement will be a breach of a condition of the scheme’s authorisation which may result in the Minister revoking the authorisation of the EDR scheme.

#### ASIC approval of changes to the EDR scheme

* 1. It is a condition of authorisation for the EDR scheme, that the scheme operator cannot make material changes to the scheme without the prior approval of ASIC. Failure to comply with this requirement may result in the Minister revoking the authorisation of the EDR scheme. [Schedule 1, Part 1, item 2, subsections 1050(1) and (2)]
  2. In considering whether to approve the material change, ASIC must take into account the same matters that the Minister was required to consider when authorising the EDR scheme under subsection 1046(2) of the Corporations Act. [Schedule 1, Part 1, item 2, subsection 1050(3)]

#### ASIC — directions power to increase claim limits

* 1. ASIC will have a specific directions power which permits it to direct the EDR scheme to increase some or all of the monetary limits that relate to the value of claims that can be considered by the EDR scheme. [Schedule 1, Part 1, item 2, subsection 1048(3)]
  2. This power is intended to provide flexibility and to ensure that the claim limits can be increased if the limits become inadequate over time.
  3. Given this requirement, it is likely that the ToR will provide that the EDR scheme operator is able to unilaterally amend the terms of the EDR scheme to change claim limits in circumstances where this is required in order to comply with an ASIC direction.
  4. Any increase in relation to the claim limits will be prospective and cannot apply in relation to complaints the operator receives prior to ASIC giving the direction. [Schedule 1, Part 1, item 2, subsections 1048(3) and (4)]
  5. Before ASIC can give a written direction, ASIC must provide the EDR operator with at least three months notice of its intention to give a direction to change the claim limits. [Schedule 1, Part 1, item 2,   
     subsection 1048(4)]

#### ASIC — general directions power

* 1. ASIC will also have a general directions power which permits it to direct the EDR operator to act in a particular way in relation to the EDR scheme. A general directions power is required to ensure that the EDR operator and the EDR scheme operate in an appropriate way and to allow ASIC to intervene in order to protect consumers, if required.
  2. The directions power can only be used by ASIC if it considers that the operator of the EDR scheme has not done all things reasonably practicable to comply with any of the following conditions of authorisation:
* a condition that the operator of the scheme must be a company limited by guarantee;
* a condition that the operator of the scheme must perform the scheme functions and comply with ASIC regulatory requirements relating to the performance of those functions;
* a condition that the scheme must have an independent assessor;
* a condition that any material changes to the scheme must not be made without prior ASIC approval; and
* any other condition the Minister specifies in the authorisation for the scheme.

***[Schedule 1, Part 1, item 2, subsection 1051(1)]***

* 1. Prior to issuing a direction, ASIC will advise the operator of the EDR scheme that it intends to issue a specified direction. The advice must set out the specific measures that the operator will need to undertake to comply with the direction. [Schedule 1, Part 1, item 2, subsections 1051(1) and (2)]
  2. In addition, ASIC must state the reasons for its intention to give the direction, which may include any relevant information about the EDR scheme’s failure to comply with the relevant conditions. [Schedule 1, Part 1, item 2, subsections 1051(1) and (2)]
  3. In the event that the scheme operator fails to undertake the specific measures outlined in the written advice, ASIC may issue a written direction which requires the EDR scheme operator to carry out those specific measures. [Schedule 1, Part 1, item 2, subsection 1051(3)]
  4. The written direction will include a statement of reasons and may also include the time by which the operator must comply with the direction, or the period of time during which the direction is in force. Any timeframe provided by ASIC to carry out the specified direction must be reasonable. [Schedule 1, Part 1, item 2, subsections 1051(3) and (4)]
  5. The directions power allows ASIC to determine the level of corrective action which is required to rectify any non-compliance with one or more of the conditions of authorisation of the EDR scheme.
  6. Once a direction is issued, ASIC may vary or revoke that direction if it considers that the direction is no longer necessary. The direction has effect up until the time the notice is revoked. [Schedule 1, Part  1, item 2, subsections 1051(7), (8) and (9)]
  7. The scheme operator must comply with any direction issued by AISC as it is a condition of authorisation. Failure to comply with a direction is a breach of that condition, which may result in the Minister revoking the authorisation of the EDR scheme. [Schedule 1, Part 1, item 2, subsection 1051(5)]
  8. Further, failure to comply with a direction is also an offence under section 1311 of the Corporations Act and ASIC may seek a court order to enforce compliance with a direction. [Schedule 1, Part 1, item 2, subsections 1051(5) and (6)]

### Superannuation Complaints – additional powers

* 1. Schedule 3 to the Bill will repeal the *Superannuation (Resolution of Complaints) Act 1993*, and as a result, abolish the Superannuation Complaints Tribunal (SCT). Once the SCT is abolished, the operator of the EDR scheme will assume responsibility for resolving superannuation complaints.
  2. The abolition of the SCT will ensure that members of superannuation funds have the same access to dispute resolution as other consumers in the financial system. This will also mean that superannuation complaints will be dealt with in a more timely and efficient way.
  3. However, because of the unique nature of some superannuation complaints, it will be necessary for the person who makes a decision about a superannuation complaint (the EDR decision-maker) to have some additional powers which are necessary for the resolution of superannuation complaints.
  4. The additional powers that will apply in relation to superannuation complaints are as follows:
* a power to join certain persons to a superannuation complaint;
* a power to obtain information and documents about a superannuation complaint; and
* a power to require attendance at a conciliation conference about a superannuation complaint.
  1. These additional powers are required for superannuation complaints because it may be necessary in some cases to require people who are not parties to a dispute to participate in the superannuation complaints process.

#### Meaning of superannuation complaint

* 1. A ***superannuation complaint*** is defined as a complaint that relates to any of the following:
* a decision of a trustee of a regulated superannuation fund or approved deposit fund in relation to a particular member or former member (including a decision of a trustee to admit a member to a life policy fund) which was unfair or unreasonable;
* a decision of an RSA provider in relation to a particular RSA holder or former RSA holder which was unfair or unreasonable;
* a decision of an insurer under an annuity policy which was unfair or unreasonable;
* a decision of an insurer in relation to a contract of insurance where the premiums are paid from an RSA, where the decision was unfair or unreasonable;
* the conduct of an insurer or a representative of an insurer in relation to the sale of an annuity policy which was unfair or unreasonable;
* the conduct of an RSA provider in relation to a particular RSA holder or former RSA holder which was unfair or unreasonable; or
* the conduct of an insurer or a representative of an insurer, in relation to the sale of insurance benefits where the premiums are paid from an RSA, which was unfair or unreasonable.

[Schedule 1, Part 1, item 2, section 1052]

#### Additional power to join certain persons to a superannuation complaint

* 1. The EDR decision-maker will have the ability to join certain people as parties to a superannuation complaint at any time.
  2. The power to add parties to a superannuation complaint ensures that the interests of all relevant parties are adequately represented during the complaint resolution process.[Schedule 1, Part 1, item 2, subsections 1053(1) and (5)]
  3. People who may by joined as a party to the superannuation complaint by the EDR decision-maker include:
* a person who has applied to become a party to the complaint;
* an insurer;
* an RSA provider; and
* a person responsible for determining a disability.
  1. However, persons who may be joined as a party to the superannuation complaint can only be joined by the EDR decision-maker in certain specific circumstances.
  2. Firstly, a person (other than the complainant or the person against whom the complaint is made) can be joined if that person has applied to the EDR decision-maker to become a party to the superannuation complaint. The decision-maker will generally take into account whether the person has a real interest in the outcome of the superannuation complaint before making a decision to join the party. [Schedule 1, Part 1, item 2, paragraph 1053(1)(a)]
  3. Secondly, an insurer can be joined as a party to a superannuation complaint if the complaint relates to a death or disability benefit, or the complaint relates to admitting a person to membership of a life policy fund.[Schedule 1, Part 1, item 2, paragraph 1053(1)(b)]
  4. Thirdly, an RSA provider can be joined as a party to a superannuation complaint if the complaint relates to a death or disability benefit, under a contract of insurance where the premiums are paid from the RSA. [Schedule 1, Part 1, item 2, paragraph 1053(1)(c)]
  5. Finally, a person who is responsible for determining a disability can be joined as a party to a superannuation complaint if the complaint relates to a disability benefit and the EDR decision-maker decides that the person is responsible for determining either the existence or the extent of a disability (for example, whether the disability is total and permanent). [Schedule 1, Part 1, item 2, paragraph 1053(1)(d)]
     + 1. : Joining third parties

Hermione makes a total and permanent disability claim which is rejected by the trustee of her superannuation fund. The claim was rejected on the basis that a medical practitioner advised the insurer that Hermione’s disability was not a ‘total and permanent’ disability.

Hermione makes a complaint under the EDR scheme about the decision to reject her claim. The EDR decision-maker joins the insurer and the medical practitioner as parties to Hermione’s complaint.

The EDR decision-maker can review the decision of Hermione’s superannuation fund trustee, the insurer and the medical practitioner.

The EDR decision-maker reviews the medical practitioner’s decision and determines that the medical practitioner did not gather sufficient information about Hermione’s illness to determine whether she has a total and permanent disability.

The EDR decision-maker remits the decision back to the medical practitioner for reassessment. Upon review, the medical practitioner determines that Hermione has a total and permanent disability. The medical practitioner advises the insurer of the new decision and the trustee decides to pay the total and permanent disability claim to Hermione.

* + - 1. : Joining third parties

Harry is deceased and has four adult children. Harry’s superannuation fund trustee pays Harry’s death benefit equally to each of Harry’s children.

One of Harry’s children makes a complaint under the EDR scheme, saying that he should receive a greater share of the benefit because he is a full‑time carer for his daughter, who has a rare neurological condition.

The other beneficiaries to Harry’s death benefit apply to be joined to the complaint and the EDR decision-maker decides to join them to the complaint.

The EDR decision-maker reviews the information provided by all beneficiaries and determines that the trustee’s decision was unfair and unreasonable, and determines that a larger share of Harry’s death benefit should have been paid to the complainant.

The EDR scheme’s decision is taken to be the original decision of the trustee.

* 1. If a decision is made to join a person as a party to a superannuation complaint, the EDR decision maker must give written notice of the decision, and the reasons for the decision, to the new party and all other existing parties to the superannuation complaint. [Schedule 1, Part 1, item 2, subsection 1053(2)]
  2. In addition, the written notice provided to the new party must outline the party’s obligations to give information or produce documents to the EDR scheme that are relevant to the superannuation complaint. [Schedule 1, Part 1, item 2, subsection 1053(3)]
  3. If the EDR decision-maker makes a decision not to join a person who has applied to become a party to the complaint, the EDR decision maker must give the person written notice of the decision and the reasons for the decision. [Schedule 1, Part 1, item 2, subsection 1053(4)]

#### Additional power to obtain information and documents

* 1. The EDR decision-maker will have the ability to obtain certain information and documents that are relevant to a superannuation complaint. This ensures that the EDR decision-maker will have available all appropriate information when making any determinations relating to a superannuation complaint. [Schedule 1, Part 1, item 2, section 1054]
  2. The EDR decision-maker will be able to obtain the relevant information or documents from any person the EDR decision-maker has reason to believe is capable of providing the information or producing the documents.[Schedule 1, Part 1, item 2, subsection 1054(1)]
  3. The person who receives the written notice and who is required to give information or produce documents must comply with the information set out in the notice. [Schedule 1, Part 1, item 2, subsection 1054(1)]
  4. The power to give information or produce documents will ensure that all the information relevant to a superannuation complaint is available to the EDR decision-maker during the complaint resolution process.
  5. If the person refuses to, or fails to, comply with a requirement in the written notice given by the EDR decision-maker, the person commits an offence (of strict liability) and will be liable for a penalty of 30 penalty units, unless that person has a reasonable excuse. [Schedule 1, Part 1, item 2, subsections 1054(3), (4), (5) and (6)]
  6. To avoid any doubt, the EDR decision-maker would have the authority to take possession, make copies or take extracts from a document (whether originals or copies) produced by the person and may keep those documents for as long as is necessary for the purposes of resolving the superannuation complaint. [Schedule 1, Part 1, item 2,   
     subsection 1054(2)]
     + 1. : Obtaining information from third parties

Ron makes a superannuation complaint to the EDR scheme about his superannuation trustee’s failure to pay a total and permanent disability (TPD) claim.

Ron suffered a hip injury during a soccer match. Ron’s TPD claim was declined on the basis that his condition was pre-existing and that Ron did not meet the ‘active employment’ definition contained in the insurance policy because he was on restricted duties while employed.

The EDR decision-maker requests the insurer to provide the information it obtained about the duties carried out in the course of Ron’s employment when he first joined.

The insurer informs the EDR decision-maker that it has been unable to find information about the duties that Ron carried out with his employer.

The EDR decision-maker uses its statutory powers to obtain information directly from the employer. The employer provides the information to the EDR scheme and the information is exchanged with the parties to the complaint.

As a result of the new information, the EDR decision-maker decides that the trustee and the insurer should pay the TPD.

#### Additional power to require attendance at conciliation conferences

* 1. The EDR decision-maker will have the ability to require people to attend conciliation conferences to participate in the resolution of a superannuation complaint.
  2. This additional power is required because although members of the EDR scheme will be contractually obliged to participate in resolution of complaints, there may be third parties who are not EDR members (e.g. a medical practitioner or an insurer), who will not be contractually obliged to participate in the resolution of the superannuation complaint.
  3. The inclusion of the power to require attendance will ensure that the EDR scheme has equivalent powers to the SCT in this respect. [Schedule 1, Part 1, item 2, section 1055]
  4. The EDR decision-maker must give written notice to the person who is required to attend, which must fix the date, time and place for the conference. [Schedule 1, Part 1, item 2, subsections 1055(1) and (2)]
  5. A person must comply with the requirements in the written notice. If the person refuses to or fails to comply with a requirement in the written notice given by the EDR decision-maker, the person will commit an offence (of strict liability) and will be liable for a penalty amount of 30 penalty units, unless that person has a reasonable excuse. [Schedule 1, Part 1, item 2, subsection 1055(4)]
  6. If a complainant fails to attend a conference, the EDR decision‑maker may treat the complaint as being withdrawn. [Schedule 1, Part 1, item 2, subsection 1055(3)]
  7. The operator of the EDR scheme must release written guidelines, which are available to the public, about the circumstances where people could be required to attend a conciliation conference. [Schedule 1, Part 1, item 2, subsection 1055(5)]

#### Reference of questions of law to the Federal Court

* 1. The EDR decision-maker may seek the Federal Court’s opinion about a question of law.
  2. In making a determination in relation to the complaint concerned, the EDR decision-maker must not then do anything which is inconsistent with the relevant opinion of the Federal Court. This is consistent with the current position in the SCT.
  3. The EDR decision-maker may initiate a request to the Federal Court at their own initiative, or at the request of one of the parties to the complaint. [Schedule 1, Part 1, item 2, section 1056]

#### Making a determination

* 1. In making a determination in relation to a superannuation complaint, the EDR decision-maker will have all the powers, obligations and discretions conferred on the trustee, insurer, RSA provider or other decision-maker who made the original decision or engaged in conduct to which the superannuation complaint relates. This is consistent with the current position in the SCT. [Schedule 1, Part 1, item 2, subsection 1057(1)]
  2. However, the EDR decision-maker may only make a determination which removes any unfairness or unreasonableness from the original decision or conduct. [Schedule 1, Part 1, item 2, subsection 1057(2)]
  3. Any determination made by the EDR decision-maker must not contravene any law, or governing rules of a regulated superannuation or approved deposit fund or terms of a contract. [Schedule 1, Part 1, item 2, subsection 1057(3)]

#### Decision maker to give reasons about a superannuation complaint

* 1. Once an EDR decision-maker has made a determination relating to a superannuation complaint, the EDR decision-maker must provide all parties to the complaint with his or her reasons for making the decision. [Schedule 1, Part 1, item 2, section 1058]

#### Operation of a determination about a superannuation complaint

* 1. An EDR determination will come into operation immediately upon the making of the determination, unless the EDR decision-maker specifies another time. [Schedule 1, Part 1, item 2, subsections 1059(1) and (2)]
  2. An EDR determination which varies the decision of another person (for example, a trustee of a superannuation fund) or substitutes a decision for a decision of another person will be treated as if the decision of the EDR decision-maker was the decision of the trustee or original decision-maker. This is consistent with the position in the SCT. [Schedule 1, Part 1, item 2, subsection 1059(3)]
  3. This means that superannuation determinations will have a slightly different legal status to determinations made by the EDR scheme in relation to other financial complaints. This reflects the special status of superannuation complaints, their potential impact on third parties, and the need for certainty in respect of decisions.

##### **Evidence of determination of superannuation complaint**

* 1. A document purporting to be a copy of the EDR decision‑maker’s determination, or a document that is certified by the EDR decision-maker to be a true copy, is evidence of the determination in any proceeding. This is consistent with the current position in the SCT. [Schedule 1, Part 1, item 2, section 1060]

#### Appeals to the Federal Court

* 1. Each party to a superannuation complaint will have the right to appeal a superannuation determination to the Federal Court on a question of law. The appeal must be made in accordance with the specified timeframes and the rules of court made under the *Federal Court of Australia Act 1976*. This is consistent with the current position in the Superannuation Complaints Act. [Schedule 1, Part 1, item 2, section 1061]

##### **Operation and implementation of a determination subject to appeal**

* 1. Decisions of the EDR decision-maker are subject to appeal to the Federal Court, but the institution of an appeal in relation to a decision will not as a general rule have any effect on the operation of that determination or prevent any person from giving effect to it, unless the Federal Court makes an order which impacts the operation or implementation of the determination. [Schedule 1, Part 1, item 2, section 1062]

##### **Disclosure of documents to the Federal Court**

* 1. If an appeal in relation to a superannuation determination is commenced in the Federal Court, the EDR decision-maker must provide the Court with all documents that relate to the superannuation complaint. [Schedule 1, Part 1, item 2, subsection 1063]

#### Secrecy provision

* 1. Information relating to a consumer’s superannuation complaint may contain sensitive information about the complainant’s personal financial position and may include medical information. Accordingly, it is very important that the information is treated as confidential and is not disclosed.
  2. The amendments include a general secrecy provision which operates to make it an offence to disclose or make records of information, or produce or permit access to documents, acquired by the EDR decision‑maker for the purposes of resolving a superannuation complaint.
  3. The EDR decision-maker, and members of staff of the EDR decision-maker must not copy, or disclose to any person, any information acquired by that person in connection with a superannuation complaint. [Schedule 1, Part 1, item 2, subsection 1064(1)]
  4. Subject to a limited number of exceptions, failure to comply with the secrecy provision is an offence (of strict liability) and a court can impose a penalty of 10 penalty units. [Schedule 1, Part 1, item 2,   
     subsections 1064(1) and (2)]

##### Exceptions to the general secrecy provision

* 1. Despite the general secrecy provision, it is permissible to disclose information in the following circumstances:
* making records or disclosing information, producing a document or permitting access to a document in accordance with the new Part 7.10A;
* disclosing information to ASIC;
* disclosing information to APRA;
* disclosing information if the person who provided the information consents in writing; or
* disclosing information in a way that does not enable the identification of the parties to a complaint.

[Schedule 1, Part 1, item 2, subsections 1064(3), (4) and (5)]

#### Referring matters to ASIC and APRA

* 1. The EDR decision-maker will be required to provide particulars to ASIC or APRA if he or she becomes aware that certain things happen in relation to a superannuation complaint. These things include:
* a contravention of any law;
* a contravention of the governing rules of a regulated superannuation fund or of an approved deposit fund;
* a breach in the terms and conditions relating to an annuity policy, a life policy or an RSA; or
* a refusal or failure by a party to a complaint to give effect to a determination made by an EDR decision-maker.

[Schedule 1, Part 1, item 2, subsection 1065(1)]

* 1. If a superannuation complaint is settled between parties, the EDR decision-maker who hears the superannuation complaint may also give the particulars of the settlement to APRA, ASIC or the Commissioner of Taxation if he or she believes that the settlement requires further investigation by any of these agencies. [Schedule 1, Part 1, item 2, subsection 1065(2)]

## Entities who are required to by members of a scheme

* 1. Part 2 of Schedule 1 to the Bill includes amendments which mean that certain Financial Firms must be members of the new EDR scheme.
  2. This licence condition applies to all Australian Financial Services (AFS) licensees, unlicensed product issuers, unlicensed secondary sellers, credit providers and credit representatives. [Schedule 1, Part 2, items 6, 8 and 17, paragraphs 912A(2)(b) and 1017G(2)(b) of the Corporations Act 2001 and paragraphs 47(1)(i), 64(5)(c) and 65(6)(c) of the National Consumer Credit Protection Act 2009]
  3. Some trustees of regulated superannuation funds are not required to hold an AFS licence, but do hold a registrable superannuation entity (RSE) licence and are regulated by APRA. The *Superannuation Industry (Supervision) Regulations 1994* will be amended to ensure that all trustees of regulated superannuation funds (other than self-managed superannuation funds) and approved deposit funds are required to be members of the new EDR scheme. This will be an operating standard that applies to their RSE licence.
  4. Some trustees of superannuation funds are not required to hold an AFS licence and are not regulated by APRA, including some exempt public sector superannuation schemes. In line with current arrangements that apply to the SCT, these funds will not be required to become members of the new EDR scheme, but will be able to elect to do so.
  5. Some RSA providers are not required to hold an AFS licence. Amendments to the *Retirement Savings Accounts Regulations 1997,* will be made to require these RSA providers to maintain membership of the new EDR scheme.

## Minor and consequential amendments

* 1. Part 1 of Schedule 1 to this Exposure Draft Bill also makes a number of minor amendments to the Corporations Act to add additional definitions that are required for the new EDR framework. [Schedule 1, Part 1, item 1]
  2. Part 2 of Schedule 1 to this Exposure Draft Bill makes a number of minor and consequential amendments to a number of Commonwealth Acts to update various provisions to take into account the new EDR framework and to repeal provisions that are no longer necessary. [Schedule 1, items 3 to 5, 7, 9 to 16, 18 to 47]
  3. Schedule 3 to this Exposure Draft Bill repeals the *Superannuation (Resolution of Complaints) Act 1993* and makes a number of consequential amendments to give effect to the repeal. [Schedule 3,   
     items 1 to 36]

## Application and transitional provisions

* 1. The amendments in Schedule 1 to the EDR Bill commence on the day following Royal Assent. [Item 2 of the table in subsection 2(1) of the Bill]
  2. The amendments in Part 2 of Schedule 1 to the EDR Bill apply on the first day (ApplicationDay) after the day on which the authorisation of the EDR scheme commences. [Schedule 1, Part 2, item 48]
  3. The amendments in Schedule 3 to the EDR Bill commence on a day to be fixed by proclamation. [Item 3 of the table in subsection 2(1) of the Bill]

#### Transitional period for EDR membership

* 1. To provide flexibility, financial services licensees, product issuers and regulated persons who are existing members of one or more EDR schemes approved by ASIC will not be required to become members of the new authorised EDR scheme until 6 months after the Application Day or such longer period as prescribed by regulation. [Schedule 1, Part 2, item 48]

#### Existing determinations of the SCT

* 1. To provide certainty, determinations made by the SCT will be unaffected by the repeal of the Superannuation Complaints Act*.* Those determinations will continue to have the same legal status and apply as if the amendments under Part 2 of Schedule 3 to the EDR Bill had not been made. [Schedule 3, Part 3, item 37]

1. Internal Dispute Resolution

**Outline of chapter**

* 1. Schedule 2 to this Exposure Draft Bill will amend the Corporations Act, NCCP Act and relevant regulations to introduce an enhanced internal dispute resolution (IDR) framework.
  2. The enhanced IDR framework extends the requirement to have IDR procedures to entities that are required to hold RSE licence.

## Context of amendments

* 1. On 8 August 2016, the Government released the terms of reference for an independent review of the role, powers, governance and accountability of the existing financial system EDR and complaints handling framework. The review commissioned an expert panel, chaired by Professor Ian Ramsay, to consider these issues (the Ramsay Review).
  2. In its terms of reference, the Ramsay Review was tasked with examining the dispute resolution and complaints framework, including linkages between EDR and IDR. IDR plays a critical role in the financial dispute resolution framework and is the primary avenue for aggrieved consumers to seek redress, so any consideration of dispute resolution arrangements must include consideration of IDR provided by financial firms.
  3. Currently, it is a licence condition for financial firms to have an IDR procedure in place which complies with ASIC standards and requirements. This licence condition currently applies to all AFS licensees, unlicensed product issuers, unlicensed secondary sellers, credit providers and credit representatives.
  4. Trustees of regulated superannuation funds (other than self-managed superannuation funds (SMSFs)) and approved deposit funds are subject to separate requirements under the *Superannuation Industry (Supervision) Act 1993* (SIS Act)*.* This includes requiring regulated superannuation funds (other than SMSFs) and approved deposit funds to establish arrangements for dealing with enquiries and complaints by beneficiaries, former beneficiaries and other interested parties.

### Review of the internal dispute resolution framework

* 1. The Ramsay Review found:
* transparency around IDR needs to be strengthened as there is no comprehensive, consistent, comparable and publicly available IDR data;
* ASIC does not currently have the power to collect recurring data about financial firms’ IDR and firms are not legally required to report this information to ASIC; and
* the lack of data on IDR outcomes makes it difficult to benchmark and compare schemes, and also monitor their effectiveness to see if IDR is improving over time.

### Enhanced IDR framework

* 1. All Financial Firms under the enhanced IDR framework will be required to have IDR procedures in place that comply with ASIC regulatory requirements.
  2. The enhanced IDR framework will also require Financial Firms to report their IDR activities in accordance with ASIC requirements. ASIC will be provided with the power to determine the content and form of IDR reporting by Financial Firms.
  3. This new reporting requirement is necessary to improve both the data that is collected and the format and reporting of IDR dispute data. Improved information will assist ASIC in monitoring trends, identifying emerging issues and determining regulatory priorities in the dispute resolution system.

## Summary of new law

* 1. Schedule 2 to this Exposure Draft Bill introduces an enhanced framework for IDR which extends the requirement to have IDR procedures to entities that hold a RSE licence and ensures that Financial Firms report their IDR activities in accordance with ASIC requirements.
  2. The enhanced IDR framework will extend the requirement to have IDR procedures to entities that are required to hold a RSE licence as a condition of that licence.
  3. ASIC will also be provided with an additional power to determine the content and form of IDR reporting by Financial Firms.

## Comparison of key features of new law and current law

|  |  |
| --- | --- |
| New law | Current law |
| RSE licence holders must have adequate IDR procedures that comply with the standards and requirements made by ASIC. | No equivalent. |
| All Financial Firms are required to report their IDR activities in accordance with ASIC requirements. | No equivalent. |
| ASIC will be provided with the power to determine the content and form of IDR reporting by Financial Firms. | No equivalent. |

## Detailed explanation of new law

* 1. Schedule 2 to this Exposure Draft Bill introduces an enhanced framework for IDR which extends the requirement to have IDR procedures to entities that hold a RSE licence and ensures that Financial Firms report their IDR activity in accordance with ASIC requirements.
  2. This Chapter outlines:
* new IDR requirements for RSE licence holders;
* ASIC’s power to determine content and form; and
* new IDR reporting requirements.

### New IDR requirements for RSE licence holders

* 1. Under the enhanced IDR framework, trustees of regulated superannuation funds (other than SMSFs) and approved deposit funds that are not required to hold an AFS licence, but hold a RSE licence will now be required to have an IDR procedure which complies with ASIC standards.
  2. The *Superannuation Industry (Supervision) Regulations 1994* (SIS Regulations) and the *Retirement Savings Accounts Regulations 1997* (RSA Regulations) will be amended to ensure that these trustees are required to have the same IDR requirements as AFS licensees, and this will be a condition of their RSE licence. These requirements will replace those contained in section 101 of the SIS Act.

### ASIC power to determine content and form

* 1. Under the enhanced IDR framework, ASIC will have the power to specify information that financial services licensees must give relating to their IDR procedures and the operation of their IDR procedures through a legislative instrument. [Schedule 2, item 2, subsection 912A(2A) of the   
     Corporations Act 2001]
  2. This will allow ASIC to require Financial Firms to report information in a standardised manner about their IDR activity and determine the content and format for that reporting.

### IDR reporting requirements

* 1. Under the enhanced IDR framework, a new requirement will be placed on Financial Firms to give ASIC any information specified in an ASIC legislative instrument relating to the operation of the firm’s IDR procedures. [Schedule 2, items 1, 3 and 4, paragraph 912A(1)(g) and subsection 1017G(1) of the Corporations Act 2001 and paragraph 47(1)(ha) of the National Consumer Credit Protection Act 2009]

## Application and transitional provisions

* 1. The amendments in Schedule 2 to the EDR Bill commence on the day following Royal Assent. [Item 2 of the table in subsection 2(1) of the Bill]