

Chapter 2

Provisions of the bill

2.1 The bill works at a high level. Much of the operational detail of the measure will be contained in the terms of reference (TOR) for the AFCA scheme, which have yet to be worked out. This is intended to allow for flexibility so that operational improvements can be made promptly.¹

2.2 The Senate Committee on the Scrutiny of Bills has not, at time of writing, commented on the bill.

Schedule 1—External dispute regulation

2.3 Part 1 of Schedule 1 of the bill inserts into the *Corporations Act 2001* a new Part 7.10A, External dispute resolution. It follows existing Part 7.10—Market misconduct and other prohibited conduct relating to financial products and financial services.

2.4 The new Part 7.10A provides that the Minister may authorise an external dispute resolution scheme—and only one such scheme. This is done by means of a notifiable instrument. This is not a legislative instrument or regulation, and cannot be disallowed by Parliament. It can be varied or overturned by another notifiable instrument made by the Minister. In principle the Minister could make the choice of a scheme to authorise by calling tenders or otherwise comparing several candidates, but there are no criteria for making a choice among competing organisations.

Division 1 of Part 7.10A—Authorisation of an external dispute resolution scheme

Mandatory requirements

2.5 The new section 1051 details four groups of mandatory requirements for the EDR scheme. To a great extent they reflect the findings of the Ramsay Review. They are in general terms and will be operationalised in the terms of reference for AFCA.

Organisational requirements

2.6 The organisational requirements are:

- Membership of the scheme is open to entities that are required to be members of the scheme, either by law or by conditions on their licence. In general, members of AFCA will be financial and credit service providers who are required as a condition of their licence to belong to an EDR scheme.
- The scheme is funded by the members, but how—whether by membership dues or user charges—is not specified.
- The scheme has an independent assessor.

1 Explanatory Memorandum, p. 10.

- The scheme is free to users.

Operator requirements

2.7 The operator requirements for the new scheme are:

- There are independent reviews of the scheme's operations and procedures. (The frequency is not specified.)
- The operator is a not-for-profit company limited by guarantee.
- The number of directors with experience in carrying on the kinds of businesses operated by members of the scheme (that is, financial and credit services) must equal the number of directors with experience in representing consumers. This presumably does not preclude having other directors who have, for example, expertise in technical financial matters, although this possibility is not mentioned in the Explanatory Memorandum. The number of directors is not specified.
- The Minister may appoint an independent Chair and may appoint a minority of directors (including the Chairs).

Operational requirements

2.8 The operational requirements are:

- The scheme is accessible, complaints are resolved in a way that is fair, efficient, timely and independent, and appropriate expertise is available.
- Reasonable steps are taken to ensure compliance with determinations, which are binding on members of the scheme but not on complainants.
- For superannuation complaints there are no limits on the value of claims or of remedies.

Compliance requirements

2.9 Compliance requirements include that the approval of ASIC is required for material changes to the scheme. This is spelt out further in new section 1052D.

General considerations

2.10 The new section 1051A sets out general considerations for the EDR scheme: accessibility, independence, fairness, accountability, efficiency and effectiveness.

Division 2—Regulating the AFCA scheme

2.11 New section 1052A allows ASIC to issue regulatory requirements relating to compliance with the mandatory requirements, and to any of the general considerations. If there are financial limits in the AFCA scheme, ASIC can direct that they be increased for future complaints.

2.12 More generally, section 1052D deals with approval of changes by ASIC.

2.13 Section 1052E provides that if AFCA becomes aware of a contravention of a law, or of the rules of a superannuation fund or an approved deposit fund, or of the terms and conditions of life insurance and similar policies, it must notify APRA,

ASIC and/or the Commissioner of Taxation. There is a parallel provision for notifying the minister in the case of a Defence Force scheme.

2.14 AFCA may also refer a settlement between parties for investigation. If a systemic issue becomes apparent, it may also refer it.

Division 3—Additional provisions relating to superannuation complaints

2.15 While the operation of AFCA will be based on contractual obligations between AFCA and its members, the bill retains statutory provisions for dealing with superannuation. According to the Explanatory Memorandum, this is because some superannuation complaints cannot be resolved between the parties. For example, third parties may have an interest in a death benefit.²

2.16 The provisions are similar, but not identical, to current arrangements. For example, the bill provides that a person can make a complaint about a death benefit if she has 'an interest in the payment of a death benefit'. The current wording is 'an interest in a death benefit'. This and other minor changes are dealt with below in the section on Views on the bill.

2.17 For superannuation, time limits for complaints are set out in the bill. AFCA will be able to join third parties to complaints. AFCA will have power to compel attendance at conciliation conferences and to produce documents. Appeal to the Federal Court will be available on questions of law, because determinations on superannuation may have wider ramifications, and because superannuation is compulsory.³ Confidentiality provisions are set out in the bill. These provisions are not made in the bill for other complaints to be handled by AFCA.

Other amendments relating to EDRs

2.18 Part 2 of Schedule 1 of the bill excludes decisions of AFCA on superannuation matters from the *Administrative Decisions (Judicial Review) Act 1977*. Determinations relating to superannuation will be binding on both financial service providers and consumers. As mentioned above, there will be appeal on questions of law to the Federal Court.

2.19 There is no need to exempt other decisions of AFCA. The *Administrative Decisions (Judicial Review) Act 1977* does not apply to other decisions of AFCA because they will not be made under an act.⁴

2.20 Part 3 of Schedule 1 of the bill makes amendments to several other acts to require financial and credit service providers to be members of AFCA. Parts 4 and 5 make amendments to close off membership of existing schemes.

2 Explanatory Memorandum, p. 11.

3 Explanatory Memorandum, p. 13.

4 Explanatory Memorandum, p. 44.

Schedule 2—Internal dispute resolution

2.21 Financial and credit service firms and superannuation funds and approved deposit funds are currently required to have an internal dispute resolution scheme. Schedule 2 provides that firms will be required to report their IDR activities to ASIC (with the content and form of the reporting to be decided by ASIC). It also allows ASIC to publish data relating to IDR activities. This will allow comparison between firms of their performance on IDR.⁵

Starting date

2.22 The Government has foreshadowed a starting date of 1 July 2018. There does not seem to be anything in the legislation (including the commencement dates for the legislation) to require this.

5 Explanatory Memorandum, pp. 50–51.