From the Desk of Director Andy Semple

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INTERIM REPORT REVIEW INTO THE EXTERNAL DISPUTE RESOLUTION & COMPLAINTS FRAMEWORK

SUBMISSION BY THE ASSOCIATION OF SECURITIES AND DERIVATIVES ADVISERS OF AUSTRALIA - ASDAA

The Association of Securities and Derivatives Advisers of Australia (ASDAA) appreciates the opportunity to provide these comments to the Expert Panel in respect to the Interim Report review into the current Financial System External Dispute Resolution (EDR) and Complaints Framework.

ASDAA represents the interests of its members, who are from the Securities and Derivatives advisory profession. Its members are comprised of individuals who are either directors, or employees, of small to medium sized firms which hold an Australian Financial Services Licence (AFSL), but are not a Participant Member of the Australian Stock Exchange.

ASDAA has a strong desire to see that investor's receive sound investment advice and the appropriate investor protection. ASDAA members rely on the ongoing trust of their clients, and on the integrity of the Australian financial markets, for their livelihood. Without both, our clients wouldn't participate in the markets and trade in securities, exchange traded options, and other listed financial products.

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DRAFT RECOMMENDATIONS TO POSITION THE FRAMEWORK FOR THE FUTURE

DRAFT RECCOMENDATION ONE

A new industry ombudsman scheme for financial, credit and investment disputes

It is the opinion of ASDAA that the creation of a monopoly EDR body is a backwards step, especially for the Financial Service Providers (FSP's) who will be compulsory financial members of such an EDR monopoly, and consumers who will rely on such a scheme to adjudicate disputes.

At best the recommendation can be described as a "Fawlty Towers" solution. It is apparent the Expert Panel has accepted hook, line, and sinker FOS's obvious power grab to force the merge of CIO into FOS.

It is ASDAA's preference that CIO and FOS are left alone to operate as completing EDR bodies.

ASDAA is not aware of any monopoly created that has demonstrated that it is cheaper, more efficient, less complex, more accountable and transparent in the absence of competition. Service does not improve if there is only one player in the market.

We appreciate that there are currently only two EDR bodies that are presently active, FOS and CIO, but at least they can each benchmark themselves against each other. This benchmarking actually produces better outcomes for consumers and FSP's because it forces the EDR's to adopt best practice and improve their service offerings. As the Interim Report notes on Page 11, FOS gets 75% of its revenue via dispute fees, whilst its competitor CIO gets 70% of its revenue via membership fees. This is a very stark difference in funding, which only competition can bring about. Remove competition and just watch the single EDR percentage of revenue ultimately become 100% from dispute fees.

It's accepted economic theory that when firms have a monopoly power they charge prices that are higher than can be justified based upon the costs of production, and prices are higher than they would be if the market was more competitive.

For example – look at ASIC's companies registry business.

The cost to ASIC of operating the registry is less than $6 million a year, yet this bears no resemblance to how much it charges businesses and the public for using it – about $720 million annually, a return to ASIC of more than 10,000%[1]

The bottom line is that when companies have a monopoly, prices are too high and production is too low. There's an inefficient allocation of resources which will lead to lower levels of service.

[1] ASIC 'screwing' small companies with registry fees. The Australian December 23 2016

So why would the Expert Panel conclude a monopoly EDR body would act any differently to a body or corporation that monopolises the companies registry, telecommunications, or the banking spaces for example?

The fact that FOS, a current EDR body, recommended in their initial submission (Page 23) the merger of CIO **into** FOS smacks of opportunism and rampant self-interest. If the outcome sought is to further entrench institutional bias then let FOS takeover CIO.

If one follows the logic put forward by FOS's argument on why they should absorb CIO then the same argument could be made that the big four banks should do the same and merge forming one big "mega" bank, but we all know that shouldn't be allowed to happen because a big "mega" bank monopoly would be a bad outcome for everyone.

Since monopolies are the only provider, they can set any price they choose. That's known as price-fixing. They can do this regardless of demand because they know the FSP has no choice but to pay whatever membership and dispute fees they deem fit.

The problems with monopolies also go beyond the economic effects. A single EDR will also have considerable political influence, and the ability to "capture" the political and regulatory process over time. This allows the sole EDR to tilt the legal and regulatory processes against any potential threat to its market power, and to bring about changes that further enhance the revenue it earns.

Furthermore, a forced merger of CIO into FOS would mean FSP's who are dissatisfied with service levels or costs would have nowhere else to go. That's unhealthy and a poor outcome.

If there is to be any single EDR body, then it should be statutory tribunal established under legislation. For Government and ASIC to bestow such market and jurisdictional power to an unlisted public company limited by guarantee trading as a monopoly EDR scheme is just mind boggling.

Should the prevailing recommendation of the Expert Panel be accepted, then at the very least the merger of FOS and CIO must be a merger of equals, not merely a paper and pen exercise for FOS to erase their competitor CIO from history. FOS could learn a lot from how CIO assesses disputes, especially how CIO ensures that their dispute Case Managers are experienced individuals from the investment space they assess.

In responding to the remaining Draft Recommendations, ASDAA will assume the Expert Panel's Recommendation One is accepted and going forward only one EDR body will exist.

DRAFT RECCOMENDATION TWO

Consumer monetary limits and compensation caps

It is the opinion of ASDAA that increasing of monetary limits and compensation caps will lead to significantly higher PI Insurance premium costs to all FSP's.

It stands to reason; the greater amount of potential compensation sort by a consumer will lead to higher PI insurance costs to FSP's. This basic axiomatic principle seems to have escaped the Expert Panels consideration.

The Expert Panel's acknowledgement about the concerns of smaller firms (6.15 & 6.16) would seem to be hollow because should draft recommendation two alone succeed, it would severely disadvantage smaller FSP firms in comparison to large FSP firms (like the Banks and the Insurers) who can easily absorb higher PI premiums, and are in a position to pass these costs off to their consumer base.

The interim report correctly notes the current monetary limit of $500,000 and the compensation cap of $309,000 but nowhere in this interim report is there a clear indication of what the higher limits and caps would be raised too.

The limits and caps, should they be increased, shouldn't be subject to indexation but reviewed on the same five year cycle in which ASIC reviews the EDR.

DRAFT RECCOMENDATION THREE

Small business monetary limits and compensation caps

ASDAA has no specific comment to make regarding recommendation three, other than the Expert Panel should consider our comment pertaining to recommendation two. We have no opinion on what the limits and caps should be.

DRAFT RECCOMENDATION FOUR

A new industry ombudsman scheme for superannuation disputes

ASDAA has no specific comment to make regarding recommendation four.

DRAFT RECCOMENDATION FIVE

A superannuation code of practise

ASDAA has no specific comment to make regarding recommendation five and supports the call for the superannuation industry as a whole to develop and abide by a superannuation code.

DRAFT RECCOMENDATION SIX

Ensuring schemes are accountable to their users

If FSP's and their advisers are to be forced to join a single new (monopoly) EDR scheme, then ASDAA considers an independent EDR oversight tribunal should be created as a Government statutory body that also has the power to investigate and annually review the new EDR scheme. EDR schemes should also be made to report to a parliamentary committee, as the four big banks recently did.

It is unacceptable that the current EDR's, FOS and CIO, write their own reviews which they submit to ASIC every five years.

If allegations of misconduct were to be levelled against an EDR, which current entity would be responsible for conducting such an investigation? If you thought it would be ASIC you'd be wrong.

While FOS and CIO are subject to regular reviews by ASIC every five years, ASIC have said on the record at a March 2016 hearing of the Parliamentary Joint Committee on Corporations and Financial Services that FOS, and I quote from Mr Warren Day, Senior Executive Leader for Assessment and Intelligence at ASIC that "***FOS is not, however, in a position to be scrutinised by the regulator***."

In an article published 1 July 2016 by the IFA, IFA further quoted Mr Day, "***We don't investigate FOS in that respect. We oversee their external dispute resolution activities and schemes, but we don't investigate matter by matter***." When Mr Day was pressed by Senator Deborah O'Neill on who would conduct an investigation into FOS, Mr Day is quoted in replying "***I would expect the Ombudsman himself***."

Pardon? So a senior figure in ASIC thinks it's perfectly okay for the FOS Ombudsman to conduct a review of the very service he's responsible for?

Apologies to the Expert Panel for this crude analogy but that's like asking a drunk if he thinks he's had too much to drink – the answer is always going to be "*No. I don't think I have a problem.*"

It's an incredibly inappropriate judgement that the FOS Ombudsman himself should be the one to review the body they are responsible for, and that a senior person within ASIC can suggest such should raise significant concerns within the senior management ranks of ASIC, and the Federal Minister responsible for ASIC.

ASIC's attitude only further reinforces ASDAA's call for the prompt establishment of an Independent EDR Oversight Tribunal.

No one is above the law, and that includes FOS, CIO, or a newly created EDR body.

Whist this Independent EDR Oversight Tribunal would be a Government statutory body, it could easily be funded 100 per cent by being included as part of the FSP's annual EDR membership fee.

ASDAA notes, there were 5,352 FSP's, and 9,396 Authorised Credit Representative members registered at 30 June 2015[2]. Using a theoretical fee of $50+GST charged annually as part of the annual membership fee would raise approximately $737,000.00 to fund a three person tribunal panel, for example, along with some back office support for an Independent EDR Oversight Tribunal.

In comparison to FOS's $2.66 million[3] in benefits paid to 19 Key Management Personnel, a newly established Independent EDR Oversight Tribunal would be comparatively well funded by the industry members.

[2] Page 11 of the FOS General Purpose Financial Report for the year ended 30 JUNE 2015
[3] Page 39 of the FOS General Purpose Financial Report for the year ended 30 JUNE 2015

ASDAA supports the establishment of an independent assessor (6.62) and its various responsibilities (6.63 & 6.64).

DRAFT RECCOMENDATION SEVEN

Increased ASIC oversight of industry ombudsman schemes

FOS and CIO are not judicial bodies. They are public companies limited by guarantee which derive their jurisdictional powers from ASIC (Regulatory Guide 139), and forms a contract with its compulsory FSP members via their respective Terms of Reference.

ASIC in effect controls CIO and FOS' Terms of References, and CIO and FOS are not independent of ASIC.

As administrative bodies, CIO and FOS are not subject to the Freedom of Information (FOI) regime. There is no way for anyone to shine a light on its internal processes. (Being a private organisation, there has always been some question as to whether or not decisions by FOS and CIO should be subject to judicial review).

A good place for ASIC to start would be to ensure EDR schemes ARE subject to an FOI regime.

ASIC should also have the power to question an EDR scheme on whether they are receiving an inordinate amount of revenue from dispute fees. FOS especially has form in this area, as it receives 75%[4] to 80% of its revenue from dispute fees.

FOS gets to make even more money from the FSP if the dispute goes past the "Case Management" stage an on to FOS's "Decision" stage.

For the year ended 30 June 2015, FOS' total revenue was approximately $46.5 million[5], of which approximately $37.4 million (or 80%) came from dispute resolution fees.

Actual compulsory FSP membership fees accounted only for 9% of FOS's year ended 30 JUNE 2015 revenue.

Either way, FOS wins financially to the detriment of the FSP if the dispute lasts a long time.

For a non-profit, FOS certainly does quite well financially.

ASIC should also ensure the EDR doesn't expose its financial members (FSP's) to unreasonable terms. Our members have also shared their opinions with respect to FOS's **13.3 TOR clause** regarding Defamation protection.

The clause strictly prohibits a FSP from instigating defamation action of any kind against a consumer in respect of allegations made by the consumer about an

[4] Page 11 of the Expert Panel Interim Report 6 December 2016
[5] Page 30 of the FOS General Purpose Financial Report for the year ended 30 JUNE 2015

adviser or their FSP to the EDR. Again, this is why our members feel the FOS dice is so firmly loaded against them because the same prohibitions are **not** restricted to the consumer who instigated such action against the FOS member. The prohibitions even include any employee, agent or contractor of the FSP member.

ASDAA believes this could have a significantly detrimental impact on an adviser or an FSP's reputation, which is founded on trust and credibility.

Whilst ASDAA agrees that certain information provided by a consumer to FOS as part of their dispute be subjected to qualified privilege so that the consumer can confidentially put their matter before the EDR, we strongly object to the fact that the complainant is freely able to make defamatory statements to the general public, the media, and especially on social media platforms against an adviser and their FSP.

Disputes should at all times be handled in a civil matter and its ASDAA's position that should it be found during the dispute process that an adviser, or their FSP, are defamed either in or outside the EDR process then they should be allowed to take external legal matters to defend their professional reputations. Better still, the EDR should inform the complainant that unless they immediately cease and desist their defamatory remarks then their case against the FSP will be closed without prejudice.

One of ASDAA's members was recently in receipt of dreadful defaming allegations made against him by a former disgruntled client. The complainant in written correspondence to FOS that was cc'd to the adviser used words like "*crooked, corrupt, low life, dishonest, liar, incompetent, inept, criminal*" in describing the adviser.

Fortunately for the adviser in question, whom FOS found in his favour, the defaming allegations about his character were noted only in the correspondence to FOS and to the adviser.

Fortuitously for the adviser, nothing was repeated (to his knowledge) to the public or on social media.

ASDAA asks the Expert Panel again, "***Surely it isn't an EDR's role to embolden complainants to freely shred to pieces an adviser or their FSP's reputation during and even after the dispute process***?"

Furthermore, it should be incumbent any new EDR to ensure the consumer who lodges a complaint keeps all information pertaining to a dispute confidential. If the FSP is obligated to keep confidentially then so should the complainant.

DRAFT RECCOMENDATION EIGHT

Use of (expert) panels

It is ASDAA's position that the new EDR body should ensure that the Case Managers who are assigned to assess a Securities/Stockbroking disputes hold a relevant University degree and have also had at least three years relevant work experience in the Securities/Stockbroking industry.

It seems only fair that under the Governments, *Raising Professional Standards of Financial Advisers* draft legislation that the very people who will make the serious decisions regarding a Securities/Stockbroking dispute are on the same qualified level as Securities and Derivative advisers/Stockbrokers.

Compulsory FSP members need to have the faith that the EDR individuals assigned to case manage a Securities/Stockbroking dispute also have relevant practical experience in the area they will be assessing.

If the single EDR body needs to hire such expertise then they should be made to hire in the expertise (Using FOS's revenue data, they received $46.5 million in revenue the year ended 30 June 2015, ASDAA is of the opinion that they can fund the employment of at least two or three individuals who have the required Securities/Derivatives experience).

ASDAA is aware of many well qualified semi-retired Securities and Derivative Advisers/Stockbrokers who would appreciate the opportunity to be employed full-time or even part-time in such a role.

ASDAA also would like to see the new EDR appoint at a minimum three suitably qualified individuals to sit on the Securities/Stockbroking Panel.

It is ASDAA's opinion (from our member experience) that FOS is dysfunctional in that inexperienced and unqualified Case Managers form opinions on what experienced and qualified Securities and Derivatives professionals should have done with the added benefit of hindsight. Just because the FOS Case Manager has a Law degree doesn't equip them to make judgements on what a qualified Securities and Derivatives professional standard of advice and care should be.

Just imagine the outcry if this happened in other professions say Medicine or Accounting?

Law degrees do not include training in Medicine, Accounting or Securities and Derivatives Advisory.

Given the importance of FOS' dispute function, as an example, ASDAA expects them to be leading the way with a team of Case Managers who actually have had practical hands on experience in the Securities/Stockbroking industry. Sadly FOS, in ASDAA's opinion, is not leading the way. Only one person at FOS appears to possess the qualification - FOS' Stockbroking Panel member Mr Matthew Wigzell.

ASDAA notes the following:

> Of the 8 FOS Board members - **none** have any experience working in the Securities/Stockbroking industry;
>
> Of the 7 FOS Senior Leadership Group - **none** have any experience working in the Securities/Stockbroking industry;

Only two individuals are named on FOS' Stockbroking Panel[6]:

[6] Page 18 of FOS annual Review 2015 2016

Mr Matthew Wigzell: Head of Wealth Management, Private Clients at ASX Participant Paterson's;

Mr Alex Knipping: Portfolio Manager with fund manager Intrinsic Investment Management.

Inexperienced FOS Case Managers can presently award monetary compensation damages of up to $309,000. That is getting close to the sort of monetary damages awarded by Supreme Court judges.

Unlike FOS, Supreme Court judges **are** bound by the law, the rules of evidence, contract law, and their prior decisions. Supreme Court judges just can't do whatever they like, and their decisions are subject to appeal.

With respected to FOS' TOR 8.1, it is startling that FOS **is not bound by any legal rules of evidence.**

An adviser, or their FSP, affected by an adverse FOS decision in effect has no right of reply, and this is not fair. A FOS decision can ruin a FSP and adviser's reputation, the FSP may lose their ability to get PI insurance, lose their AFS licence, and/or be forced into administration or liquidation of the business.

All of that may happen because the FSP has no right of appeal or a review of an adverse FOS Determination.

Even murderers get the right to appeal their sentences.

So it is important that should a new EDR body be established, as recommended by the Expert Panel, they at least ensure FOS's current short comings in the area of capable assessment aren't repeated with the new EDR body.

Those who do not learn from history are doomed to repeat it.

It is also the perfect opportunity that the new EDR scheme at least has a means for an FSP and their Adviser have a right to appeal.

The current system setup by the government denies an adviser and the FSP to their constitutional right to a fair trial and fair hearing. See attached link for further details:

https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Fairtrialandfairhearingrights.aspx

Australia is a party to seven core international human rights treaties. Fair trial and fair hearing rights are contained in article 14 of the International Covenant on Civil and Political Rights (ICCPR).
By adopting an EDR structure the government is effectively circumventing its obligation to ensure that everyone has a right to fair trial and fair hearing as this applies to cases before courts and tribunals.

DRAFT RECCOMENDATION NINE

Internal dispute resolution

It is ASDAA's position that the last thing any FSP needs is more bureaucratic red tape and this recommendation delivers more red tape in spades.

FSP's are made up from "one man band" firms through to massive global investment/insurance conglomerates so there is no "one size fits all" IDR scheme to follow, as no one business is alike. There are small firms who deal in highly complex financial areas like Derivatives, while some large firms deal in relatively easy to understand financial areas like basic deposit products.

All AFS Licensees, regardless of their size, have the following Condition noted on their license:

> **Compliance Measures to Ensure Compliance with Law and Licence**
> *The licensee must establish and maintain compliance measures that ensure, as far as is reasonably practicable, that the licensee complies with the provisions of the financial services laws.*

And all licensees are required to maintain a ***breach and complaints registers***, which must be reviewed by the FSP's external Compliance Auditor.

Licensees are already obligated to inform ASIC should a significant and material breach occur i.e. Fraud.

Under RG165, all licensees must have in place a process to try and resolve disputes internally. ASIC sensibly have left it up to the particular licensee to self-determine what their IDR process is. **The last thing any FSP wants is for an ASIC bureaucrat to determine what the content and format of IDR reporting should be**.

Moreover, both FOS and CIO also have the power to report to ASIC any form of "systemic" risk they may determine as a FSP goes through their respective EDR process. So any further bureaucratic impost is certainly not welcome.

Furthermore, if it's the Expert Panels concern that because there is a lack of publically available IDR information that it could possibly lead to FSP's being able to hide from scrutiny any internal shortcomings let ASDAA explain to the Expert Panel the three contemporaneous external audit processes each and every licensee, regardless of their business size, face annually.

Each FSP that holds an AFS License must;

1. Be financially audited by an ASIC noted Financial Auditor.
2. Have and external compliance review that is audited by a suitably qualified External Compliance Auditor.
3. Obtain a PI insurance policy with a min cover of $2.5 million which will only be considered by a reputable PI insurer once they have obtained a current copy of both the Financial and Compliance Audit.

All of these costs are 100% borne by the FSP. ASDAA would like to note that the costs of these audits are substantial in nature to the FSP, and especially to the

small business FSP's, who has no capacity to pass the cost onto their clients in the current marketplace.

For example, an FSP with revenue in the vicinity of one million dollars per annum would be paying a financial audit fee of approximately $15,000, a compliance audit fee of approximately $15,000 and PI plus Director's insurance premiums of approximately $35,000 per annum (These PI fees are significantly higher for FSP's who had even minor EDR settlement payouts by their insurer). They would also face a substantial Accountants cost because they must provide special purpose accounts for the FSP's Auditor.

ASDAA can't see why a licensee's privacy should be waived so that ASIC can save in a database some more insignificant statistical information. ASIC already have the power to walk into any licensees place of business and demand the FSP turn over any requested information should the need arise.

What matters here are hard results. If a licensee and a complainant can come to an agreeable settlement via IDR then that's the best outcome, and is it then really anyone else's business to know what happened? If IDR fails, then that's what EDR schemes are set up for – to hopefully make an independent unbiased complaint determination.

As for IDR statistical info, if a consumer has complained to the EDR and they are now assessing it, then statistically the IDR process was 100% unsuccessful.

As for ASIC publically publishing FSP details, this should only ever occur under the most dire of circumstances. Should an FSP IDR fail in the opinion of a subjective assessment from an ASIC or EDR bureaucrat and they are publically shamed that would represent a most grievous denial of the FSP and advisers natural justice.

It's also commonly accepted knowledge by industry that because there is a free EDR scheme to consumers; it basically makes the IDR process redundant.

DRAFT RECCOMENDATION TEN

Schemes to monitor IDR

It is ASDAA's opinion that recommendation ten is an excessive overreach to allow any EDR scheme to require a FSP to register their IDR with them and for the EDR to monitor its progress. This just amounts to further layers of unnecessary and intrusive bureaucratic red tape on the FSP that helps no one.

It will also provide another excuse for monopoly EDR body to easily increase their fees – fees the FSP only pays.

DRAFT RECCOMENDATION ELEVEN

Debt management firms

ASDAA has no specific comment to make regarding recommendation eleven and supports the call for the debt management firms to be required to be a member of an industry ombudsman scheme and the requirement that they also hold a license to conduct a debt management business.

ASDAA has two specific recommendations the Expert Panel need to seriously consider and action regardless of whether there is a single EDR body created or the status quo remains unchanged.

ASDAA RECCOMENDATIONS THE EXPERT PANEL SHOULD CONSIDER

ASDAA RECCOMENDATION ONE

Modest complaint registration fee

The shared opinion of ASDAA members is that FOS is a highly aggressive consumer advocate, and not an independent external dispute resolution body, as they claim to be. It is the shared opinion of our members that FOS is no friend of Securities and Derivatives advisory/Stockbroking profession.

Our members say this because of FOS' inability, or unwillingness, to toss out the most obviously frivolous and/or vexatious disputes levelled against them and the FSP's they work for.

The distrust from Securities and Derivatives professionals begins when a complaint can be lodged about an adviser or FSP at no cost to the consumer.

It is ASDAA's position that the Expert Panel considers anyone who makes a formal complaint about an adviser, and/or an FSP to an EDR body be required to pay a modest complaint registration fee of at least $250 + GST.

According to the FOS 2015/2016 annual review[7], 34,095 disputes were received by FOS.

By applying ASDAA's theoretical dispute registration fee of $250 + GST, this would have seen FOS raise approximately $8.5 million + GST, which FOS could then apply as an offset against the dispute fees charged to the FSP's, thus having the desired effect of lowering the dispute cost to FSP's.

A modest complaint registration fee would also go a long way to ensure the consumer isn't lodging a **frivolous or vexatious complaint** against an adviser or FSP. Should the consumers complaint end up being upheld by the EDR, then the registration fee would be refunded along with the adjudicated monetary compensation awarded.

As it currently stands however, it is entirely unfair to the FSP member that they are 100 percent exposed to the cost of the EDR's complaint fee structure.

It is not unreasonable for the complainant to have some cost exposure to the dispute process, especially if they are seeking a significant monetary compensation figure.

Again, we come back to the missing central tenet of fairness.

[7] Page 54 of FOS annual Review 2015 2016

Maybe it would be appropriate for the EDR to charge such a modest complaint registration fee when the consumer is seeking **more than $10,000 in monetary compensation from a FSP?**

ASDAA isn't averse to imposing a reasonable threshold and ask the Expert Panel to consider the merits of this recommendation.

Recently, one of our members had a significant FOS complaint resolved in their favour, yet the direct financial cost to our member's FSP was $5,665.00 in FOS fees. (This does not include the significant dollar cost incurred by the FSP, the adviser, and the insurer in responding to the complaint that extended over a 10 month period).

So even when a FSP wins, they still lose with FOS, and if a new EDR body is to be born, then at least let it come about without the baggage of FOS's dispute handling process.

Now imagine if a small FSP had to deal with half a dozen or so claims made against them each year with them all being resolved in their favour – that's north of $33,000 in FOS fees alone and what small business can afford that?

There are well over 5,500 AFS Licensee's[8], with a significant proportion of them being small family owned businesses. Not every FSP is a subsidiary of a large Bank, Insurance, or Stockbroking company with its own unlimited internal resources and the financial capacity to easily settle any number of EDR disputes.

This places FSP's in the ATO's Small Business Category, (e.g. those with a turnover of less than $2 million dollars), at a significant disadvantage in the EDR process.

As already stated, a modest complaint registration fee would help ensure that EDR dispute fees that an FSP must pay, regardless of the dispute outcome, are at least lower than what they presently are.

ASDAA notes from the comparison table of the five international jurisdictions[9] noted that Singapore's EDR scheme isn't completely free to consumers and makes consumers pay **$50 Singaporean** at the adjudication phase. ASDAA gathers the Singaporeans do this to help stamp out frivolous or vexatious complaints and to help provide downward price pressure on fees Singaporean FSP face.

Insisting the EDR process must be "free to consumers" is an progressive ideological position adopted by aggressive consumer advocates and needs to be challenged and changed for the reasons noted in this section.

[8] As of 1 July 2016, there were 5,517 AFS Licensees recorded by ASIC

[9] Page 38 of Expert Panel Interim EDR Report

ASDAA RECCOMENDATIONS THE EXPERT PANEL SHOULD CONSIDER

ASDAA RECCOMENDATION TWO

Reduce the statute of limitations to make a complaint on the grounds of "inappropriate advice" to 6 months from the date of advice given

What ASDAA members specifically would like from their EDR body is fairness. Anyone who invests their money into listed equities, whether they received personal advice or general advice, needs to understand and accept that the value of their equity portfolio can not only go up in value but that it can decline in value. This point is highlighted in writing, and verbally, to the clients of FSP'S before commencing any market trading activity.

Market risk obviously does exist, but the current EDR complaint structure does not seem to be able or willing to differentiate between "market risk" and "inappropriate advice" when accepting complaints to pursue.

FOS, for example, encourages a consumer (a disgruntled investment client) to make a complaint of economic loss on the basis of "inappropriate advice" within **6 years** of when the consumer **first became "reasonably" aware** of such "economic loss."

This extended time period is grossly unfair to the adviser and their FSP, as it enables clients to "test" their adviser's recommendation over a significant length of time (6 years), and if the investment falls in value it can be pursued as "inappropriate advice" by a client years after the advice has been received and acted upon.

It is ASDAA's position that the Expert Panel consider reducing the statute of limitations to make such a complaint of "inappropriate advice" from the ***Investments and Advice*** **product line** to expire **3 months** after the date of purchase of a listed equities and derivatives transaction.

Clause 15.2 of FOS' Terms of Reference (TOR) should be revised to include the above mentioned amendment. **Should a new single EDR body be established then it is vital this amendment is incorporated into the new EDR TOR**.

It is extremely prejudicial that a consumer can have virtually an uncapped statute of limitations to make a complaint on the grounds of "inappropriate advice."

It should also be acknowledged that there is no legislative "Cooling Off" period for anyone who buys and sells listed securities and derivatives.

ASDAA knows of no other profession that faces such a generous statute of limitations. It is unique to all FSP's.

There is a saying in the broader Securities/Stockbroking industries that if a "*client wants a guarantee then they should buy a toaster.*" Preservation of capital in the stock market is not guaranteed and this is generally well understood and acknowledged by the vast majority of investors. By allowing consumers to lodge a complaint about economic loss on the pretence of receiving "incorrect or

inappropriate advice" as determined by an EDR Case Manager is implying that such a guarantee does in fact exist.

Keeping with the toaster analogy, even consumer products like toasters don't come with a 6 year money back guarantee should they breakdown.

ASDAA is very disappointed the Expert Panel has given ZERO consideration in their interim report on how to help reduce red tape and lower the cost to the FSP's. Everything presently on the table for discussion represents increased red tape and will put significant upside pressure on higher EDR membership and dispute fees.

The Government of the day, ASIC, and ASDAA all want to see consumers receive good advice, but good intentions can often lead to unintended consequences and the failure to achieve anything useful.

ASDAA appreciates the opportunity to provide this Submission to the Expert Panel on these significant EDR reviews.

We would be happy to discuss any issues arising from our submission, or to provide any further material that may assist the Expert Panel.

Should the Expert Panel or the Treasury department require any further information, please contact myself on (07) 5657 3620 or email andy@asdaa.com.au

Yours Sincerely,

Andy Semple
B.Com., B.App.Sc., MEASDAA
Director

Media Articles the Expert Panel may find of interest

ASIC 'screwing' small companies with registry fees. Published 23rd December 2016 in the Australian.

http://www.theaustralian.com.au/business/economics/asic-screwing-small-companies-with-registry-fees/news-story/f1c9c00cc4f9d701f7d17d8434b4205d

Increasing FOS surveillance. Posted 1 July 2016

http://www.ifa.com.au/opinion/16484-under-surveillance

Calls for Financial Ombudsman Service to be disbanded over issues in Goldie Marketing court case. Posted 16 March 2016

http://www.abc.net.au/news/2016-03-16/calls-for-financial-ombudsman-service-to-be-disbanded/7250894

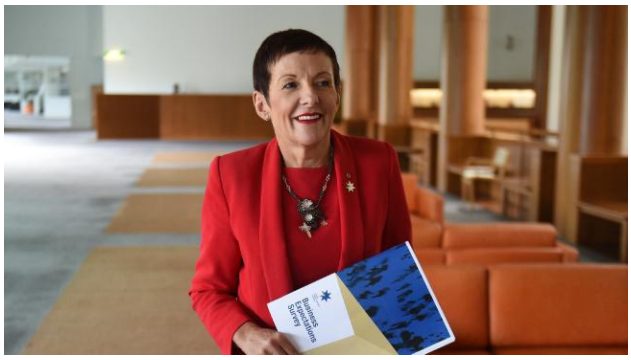
The questions the Financial Ombudsman needs to answer. Posted 1 April 2016

http://www.abc.net.au/news/2016-04-01/long-the-questions-the-financial-ombudsman-needs-to-answer/7292044

A copy of each article is attached to this submission.

THE AUSTRALIAN

ASIC ‘screwing’ small companies with registry fees



Small business ombudsman Kate Carnell

MICHAEL RODDAN THE AUSTRALIAN 12:00AM December 23, 2016

The government should immediately launch a review of the ASIC companies registry which is “screwing” small business out of hundreds of millions of dollars a year in red tape fees, says Small Business and Family Enterprise Ombudsman Kate Carnell.

Ms Carnell, the country’s first small business ombudsman, welcomed the Turnbull government’s decision to back down from its controversial plan to sell the Australian Securities & Investments Commission’s companies registry, but said it opened an opportunity to rationalise the system.

The tender process was closed without a sale after bids for the public database were found to fall well short of the revenue received by gouging users for access, with the announcement laid out in this week’s midyear economic and fiscal outlook.

“We opposed the sale because we didn’t think there were adequate safeguards to stop it being even more expensive than it is now,” Ms Carnell told *The Australian*. “And because we thought it was really important to focus on some rationalisation between the ASIC registry and the Australian Business Register that sits within the ATO.”

The scuttling of the proposed sale was welcomed by independent senator Nick Xenophon, the public sector union, accounting body CPA Australia and campaigning group GetUp, which had lobbied against the tender for potentially putting at risk public access to information, already charged at a price more than 100 times what it costs to operate — comparatively one of the highest fees in the world.

Finance Minister Mathias Cormann said the government would not proceed with a sale of the registry because it did not deliver a “net financial benefit to the commonwealth”.

Ms Carnell said the government should now use this opportunity to review the charges and focus on a "user pays" model. "In other words: charging what it costs — not a significant amount more than what it costs," Ms Carnell said.

The cost to ASIC of operating the registry, less than $6 million a year, bears no resemblance to how much it charges business and the public for using it — about $720m annually, a return to government coffers of more than 10,000 per cent.

Companies — the vast majority small businesses — are slugged about $660m a year to lodge documents with the corporations registry and the public is charged $60m a year to access that information, or $720m in total.

It appears unlikely the exorbitant charges will be lowered.

"In this case, small business is paying significantly more than what it costs and significantly more than big business in what their capacity is to pay," Ms Carnell said.

Ms Carnell said both sides of government had presided over the high fee structure charged by the ASIC registry, but there was now a timely opportunity to review it and the ABR register.

"Let's have a look at the cost of using the registries and make sure it isn't a way of screwing small business. I don't think they mean it that way but it has turned out that way and now it's time to change it," Ms Carnell said.

"Make it user pays, but don't make it a profit centre," she said.

After the sale was disbanded, ASIC commissioner John Price told staff in an internal email the tender "highlighted the need to consider registry modernising functions more broadly across government".

Back to top

Increasing FOS surveillance

LINDA SANTACRUZ - Friday, 01 July 2016 1 comments

Following claims against the Financial Ombudsman Service (FOS) of misconduct, politicians have zoned in on FOS and its arguably self-regulatory model. But will that slide in a new government review?

If allegations of misconduct were to be made against the Financial Ombudsman Service (FOS), which entity would be responsible for conducting an investigation?

That was the question asked by Senator Deborah O'Neill during a March hearing, at which ASIC could not give a direct answer.

The corporate regulator stressed that as an approved dispute resolution scheme, FOS is subject to regular reviews by ASIC and is also required to report complaints data and systemic issues within the industry.

FOS is not, however, in a position to be scrutinised by the regulator, said Warren Day, senior executive leader for assessment and intelligence at ASIC.

"We don't investigate FOS in that respect," Mr Day told the parliamentary joint committee on corporations and financial services. "We oversee their external dispute resolution activities and schemes, but we don't investigate matter by matter."

Ms O'Neill, seemingly growing impatient, repeated her question: "If there was a general concern raised, who would do the investigation? Not the, what you called, 'regular, independent reporting' every 3 to 5 years," she said.

"Who is responsible? If something goes wrong, who would do the investigation?"

"I would expect the Ombudsman himself," Mr Day responded.

This was not the first time that concerns about FOS have arisen.

The grilling by Ms O'Neill stemmed from a submission to the committee last year which accused FOS of biased conduct.

Dispute Assist – a company that represents consumers in dispute with financial services providers – claimed FOS had an agenda to "get rid of complaints" and deny applicants "natural justice".

The submission provided several examples of supporting cases, including an incident when a FOS representative had filed notes of a telephone conversation that were purportedly inconsistent with the recording.

"The Ombudsman's file notes do not remotely resemble the facts they purport to represent," Dispute Assist stated.

"This leads one to seriously question the Ombudsman's conduct, whether [the rep] is a fit and proper person to hold the position of Financial Ombudsman and most importantly whether the public can trust the FOS."

Despite heightened scepticism about FOS, ASIC stands by the approved scheme and reminded Ms O'Neill that the court had ultimately ruled in favour of FOS in the Goldie Marketing case.

"I've dealt with FOS for many, many years. I think I'm aware of [only] one allegation [of misconduct] out of the hundreds of thousands [of cases] that go to them," said ASIC deputy chair Peter Kell.

"If it was the case that a scheme was completely failing, we would be in a position potentially to withdraw our approval but that's not something, thankfully, that has been on the cards."

Innocent or not, however, FOS is still not in the clear.

A review of FOS and other industry schemes was announced in May which, if continued after the 2 July election, may see the government finding the lack of a FOS watchdog a problem.

The Turnbull government said it commissioned a review of the role, powers, governance and accountability of the existing financial system external dispute resolution and complaints framework, Assistant Treasurer Kelly O'Dwyer has said.

At the same time, ASIC is set to undertake a separate review of FOS's small business jurisdiction.

“Currently, there are three bodies to help consumers resolve disputes with financial services providers: the Financial Ombudsman Service (FOS); the Superannuation Complaints Tribunal; and the Credit and Investments Ombudsman," Ms O’Dwyer said.

“The government is committed to ensuring that these bodies are working as effectively as possible to meet the needs of users."

It is hard to tell what the government would propose as a solution should it find that FOS does lack proper governance and accountability.

At least one senator, however, has an idea.

Independent Senator Nick Xenophon has made calls to disband FOS entirely and to replace it with a government body, according to the ABC.

“Sooner rather than later, we need to go down the path of a statutory scheme that is supported by state and federal governments, that actually has real teeth,” he said.

Join the discussion

NEWS

Calls for Financial Ombudsman Service to be disbanded over issues in Goldie Marketing court case

7.30 By Stephen Long

Updated Wed 16 Mar 2016, 7:58pm

Independent Senator Nick Xenophon is calling for the Financial Ombudsman Service (FOS) to be disbanded and replaced with a government body in the wake of a controversial case that has raised issues of trust and credibility in the bank-funded dispute resolution scheme.

"This is a very serious case that relates to issues of the credibility of this service," Senator Xenophon told 7.30.

"Sooner rather than later we need to go down the path of a statutory scheme that is supported by state and federal governments, that actually has real teeth."

His comments come after the Goldie Marketing court case, during which a senior official in the FOS made inaccurate file notes of phone conversations.

Dr Justi Tonti-Filippini, the office's Financial Ombudsman Decisions, told Bruce Ford, advocate for Goldie Marketing, the small manufacturing business seeking redress, that FOS could not hear the case because of a staff shortage, after suffering "a significant loss of banking advisors" including its "business banking guru".

Goldie Marketing challenged that decision in the Supreme Court of Victoria.

It argued that ruling the case out because of a staff shortage was not a valid exercise of the ombudsman's jurisdiction.

In response, FOS furnished file notes Dr Tonti-Filippini made of phone conversations with Bruce Ford.

Some of the content of the file notes was at odds with what was actually said in the discussions.

According to a file note made by the ombudsman, she spoke to Bruce Ford on October 20 and "rattled off reasons" for ruling the case outside FOS's terms of reference.

The reasons included "complexity, FOS can't compel testimony production, overseas dealings, cross collateralisation, combative delaying tactics of the parties".

Dr Tonti-Filippini described this as her "heads up call to discuss my preliminary view".

According to a recording Bruce Ford made of the phone conversations and tendered in court, the ombudsman actually said:

> "I still haven't finished making my decision; I am expecting I will probably finish it tonight so I'll give you a call tomorrow morning."
>
> "I won't tell you what the outcome is now because I want to sleep on it."

In a phone call the following day, Dr Tonti-Filippini said she was exercising her discretion to knock the case out because FOS did not have "the in-house knowledge" to deal with the dispute.

"If anything I may be prejudicing myself by being transparent … when our business banking guy was still here, we would have taken it on and the dispute has merit in my view," she said.

"I have possibly said too much, but I think if I were in Goldie Marketing's position I would want to know exactly why."

In a submission to a Senate Committee Inquiry on Scrutiny of Financial Advice, Bruce Ford's firm, Dispute Assist, wrote:

> "It is inconceivable when one listens to the telephone recordings or reads the transcripts and compares the file notes, that a professional in such an important national position could have such a divergence of mind supposedly on the same day or day later when making the file notes."
>
> "The questions raised by the misleading file notes are:
>
> 1. Why do the Ombudsman's file notes diverge so extremely from what she actually said in the telephone conversations?
> 2. Did FOS attempt to advance their case at all costs?
> 3. If the telephone recordings were not available, would FOS have been exposed and would natural justice be served?"

Xenophon says FOS risking credibility over case

Senator Xenophon said he was of the same mind.

"Given the discrepancy between the recordings, the file notes and what the financial ombudsman apparently said, that raises some big questions about the way the organisation operates," he told 7.30.

"Unless the FOS gives a thorough explanation of what happened here, then it is basically finished as a credible body to deal with these disputes."

FOS rejected the allegations in its submissions to the Senate inquiry, saying there was "no evidence to support the conclusion that the Ombudsman used or created the file notes to mask the reason for her decision", and that no allegation of fraud or lack of good faith had been made in court.

Goldie Marketing gained an injunction to stop FOS ruling the case out after a judge found that on the face of it, a staff shortage was not a valid reason.

But in the final judgement, the court ruled in favour of FOS.

It found that the formal, written reasons FOS gave for ruling the case out were reasoned and compelling but, in any event, the service has very broad discretion to rule cases outside its terms of reference and a staff shortage would have been reason enough.

FOS declined to do an interview, but said in a written statement:

> "As the matters you raise have been fully dealt with by the Victorian Supreme Court which upheld FOS's approach to, and decision in this matter, we do not consider it is appropriate to comment further."

Dr Tonti-Filippini said that under FOS's protocols, she could not comment.

Senator Xenophon said the discrepancy between the file notes and the recordings had not been adequately explained.

"It is simply not good enough for the FOS to say that this case has been dealt with," he said.

Topics: consumer-finance, banking, government-and-politics, australia

First posted Wed 16 Mar 2016, 6:37pm

The questions the Financial Ombudsman needs to answer

OPINION

The Drum By Stephen Long

Posted Fri 1 Apr 2016, 1:23pm

The Financial Ombudsman Service has serious questions to answer over how one of its senior officials handled a contentious matter. But so far no proper answer has been forthcoming, writes Stephen Long.

"Take detailed file notes," the Financial Ombudsman Service advises clients who use financial services.

"Contemporaneous file notes of conversations or actions are *solid gold* when a dispute comes to us." (Their emphasis.)

Oh, the irony.

Earlier this month, the ABC revealed that one of the most senior officials in the Financial Ombudsman Service (FOS) made file notes, tendered in court on a contentious matter, which purported to detail an entire conversation, the majority of which did not take place.

Dr Justi Tonti-Filippini, Ombudsman Decisions at FOS and a former chair of the Law Council's Financial Services Committee, also made another file note that appears to misrepresent the nature of a conversation.

This is no small matter.

The Financial Ombudsman Service is an alternative dispute resolution scheme banks and other finance companies are required to fund and maintain; being a member of such a scheme is a condition for holding a financial services license.

Tens of thousands of people who can't afford to go to court use the Financial Ombudsman Service each year. It goes without saying that trust in the integrity of the service is vital.

Yet to this day, nearly 10 months after the issue was first raised with it, the Financial Ombudsman Service has provided no reasonable explanation for this behaviour.

It has failed to explain why a senior official in a quasi-judicial role would make file notes in which she claimed to say things that were not said, nor has it provided any sensible account of why she would document a conversation that did not happen.

The context for the curious affair is this.

Dr Tonti-Filippini was deciding whether or not the Financial Ombudsman Service would make a determination in a long-standing dispute between a small business, Goldie Marketing, and ANZ bank.

After much deliberation, she phoned Goldie Marketing's advocate and told him that she was exercising her discretion to rule the dispute outside the terms of reference for FOS, because the organisation, after losing key staff, did not have the expertise to deal with it.

She made it clear that FOS would have accepted the case were it not for the staff shortage.

Goldie Marketing mounted a court challenge, arguing that a staff shortage was not a valid reason for ruling the dispute was outside FOS's terms of reference.

The Supreme Court of Victoria ordered that the ombudsman discover all relevant documents, including file notes; FOS furnished file notes in which Dr Tonti-Filippini said she had "rattled off" of a long list of other reasons for ruling the dispute out in a phone call to Goldie Marketing's advocate.

But unbeknown to FOS, Goldie Marketing's advocate had recorded all his conversations with the ombudsman. The recordings and transcripts of those recordings were tendered in court and accepted as accurate.

They show that the actual conversation was a world away from what the file notes said.

She says in her file notes she called the advocate the day before she informed him of her decision and "rattled off" reasons for ruling the case out.

In fact, in that conversation, the transcript of which is not in dispute, she "rattled off" no reasons at all.

Her file notes of the phone call where she did give her reason describe the conversation, inaccurately, as "2nd part of my heads up call" and claim, wrongly, that the ombudsman had "almost got through all reasons for my view earlier in the week".

All this begs the question: why would a highly experienced and respected lawyer, serving in a role vital to the public, make a supposedly contemporaneous file note that claims important statements were made that were not?

The ABC first raised these issues with FOS about 10 months ago, and again in February and March this year. When we prepared a report for 7.30 on the issue, it declined to participate in an interview. After the story aired FOS responded by issuing a statement.

But the statement by the Financial Ombudsman Service does not provide any explanation for why or how the Ombudsman would provide inaccurate records of her conversations with Goldie's advocate.

It states, correctly, that the Supreme Court of Victoria upheld FOS's decision to rule the Goldie Marketing matter outside its terms of reference. But the Court's decision did not rest on the notes of the Ombudsman. The judge found that the formal, written reasons she later gave were sound and the court did not need to look beyond them.

FOS also takes the application of a basic legal principle - that a court won't overturn an administrative decision unless it was made in bad faith or so unreasonable that no other decision-maker could have made it - and uses it to imply that the Ombudsman's conduct was fully examined by the court and cleared.

It was not. The judgement did not deal with the discrepancy between the file notes and what was actually said in conversations.

In this statement and also in communications to me, FOS says the matters we raise have been dealt with by the court. But they haven't.

Senator Nick Xenophon, who raised questions about the Goldie Marketing controversy in a Senate committee, is scathing.

He says that FOS's credibility is being undermined by its insistence that the issue has been "fully dealt with" when it has not.

The Australian Securities and Investments Commission (ASIC) oversees the Financial Ombudsman Service and approved its formation.

In questions put to ASIC, Senator Xenophon said:

> The FOS files notes raise serious questions as to trust and compliance with ASIC RG 139.23. The FOS has yet to account for the divergence from fact in the file notes despite being requested for an explanation.

And later:

> Can ASIC explain if a consumer has a complaint before the FOS, how can they trust the FOS when the Ombudsman creates files notes that do not remotely resemble the facts of the actual recorded telephone conversation, and will a consumer be comfortable that they will receive fair, impartial, efficient and effective service from FOS and will they receive natural justice?

In response, ASIC parroted FOS's line that the issues have been dealt with by the Supreme Court.

According to FOS, there is no evidence that its ombudsman made the file notes to mask her reasons for the decision; so what is the explanation?

There may be a perfectly reasonable answer. But the Financial Ombudsman Service isn't giving it.

Stephen Long is an investigative reporter with the ABC, covering business and finance.

Topics: banking, industry, law-crime-and-justice, laws