

13 June 2017

Manager  
Financial Services Unit  
Financial System Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Email: [EDR@treasury.gov.au](mailto:EDR@treasury.gov.au)

Dear Manager,

**RE: EXTERNAL DISPUTE RESOLUTION AND COMPLAINTS FRAMEWORK**

We refer to the proposed *Treasury Laws Amendment (External Dispute Resolution) Bill 2017* and *Treasury Laws Amendment (External Dispute Resolution) Regulations 2017* (collectively 'the Legislation'), and the invitation for feedback by the Government for interested parties.

Ballast Financial Management Pty Ltd ('Ballast') is a boutique Australian Financial Services Licensee ('AFSL') which provides holistic financial planning advice to a wide variety of consumers. Ballast is not aligned with a major bank, and has operated in the industry for over 20 years. Over this time, Ballast has become familiar with the operation and terms of the External Dispute Resolution ('EDR') schemes, particularly in relation to the Financial Ombudsman Service Limited ('FOS') and the Credit and Investments Ombudsman Limited ('CIO').

Accordingly, please find below Ballast's response to a number of points raised by the Legislation. Ballast's response does not cover all issues, just those which Ballast believes is particularly important in ensuring a fair and efficient EDR system.

**RESPONSE**

**Who is EDR designed for?**

1. Ballast acknowledges that the current EDR framework suffers from several issues. Between lack of funding, overlapping jurisdiction and industry inexperienced staff, finding a resolution can often be a long and arduous process. On this basis, Ballast broadly supports the amalgamation of the EDR schemes, with reference to the reasons employed in the Financial Report (April 2017).<sup>1</sup> However, in deciding the governing rules of the new scheme, consideration needs to be made with regard to what service the current EDR schemes actually provide.

<sup>1</sup> Financial Report: Review of the financial system external dispute resolution and complaints framework (April 2017).

2. Currently, the EDR schemes provide a unique service which diverts from traditional alternative dispute resolution procedures. When engaging EDR as an AFSL, the EDR scheme acts as both an intermediary for discussion, but also as the ultimate decision maker. In this sense it combines elements of mediation, conciliation and arbitration. Whilst this is fairly well understood, what is less clear is who this process is tailored towards.
3. In comparison with Legal Aid, who has a clear demographic informed by a means test, the EDR schemes are available to all who fall within the monetary limits stated within the Terms of Reference ('TOR') of each scheme. This means that consumers who are financially capable of arguing a claim in court are offered the same free service as those who are not.
4. In reviewing the Final Report, there is little discussion around the topic of who the service is actually designed to assist. This is the most important question, and should underpin the whole EDR framework. Does the Government intend for the new scheme to assist only those who cannot assist themselves through court, or will it simply be an all inclusive low cost alternative.
5. If the Government intends for the former, the proposed increases to monetary compensation limits may not be appropriate. The increase will allow for higher income individuals to make claims through the scheme, and provide minimal benefit to those who need the scheme the most. In addition, it will likely result in the scheme being more expensive for financial service providers due to an increase in claims and Professional Indemnity Insurance costs.
6. The evidence supplied in support of the monetary limit increase within the Final Report spoke specifically about mortgages, insurance claims and other like products. The Final Report does not provide any insight into why this increase should be uniform across all financial products. Ballast would be interested to know what percentage of claims are being rejected due to the current monetary limits for products other than mortgages and insurance, and the circumstances of the consumers who have had these claims rejected.
7. It is critically important that the new scheme remain accessible to consumers, however the Government should first consider what demographic the service will cater to beyond simply providing "low cost, speedy and flexible access to redress".

#### **Thresholds, Impartiality and Accountability**

8. Another pertinent issue is the impartiality and accountability of decision makers within the service. It is integral that the service operate and be perceived as being impartial. In the event that impartiality is questioned, or a decision regarding a particular point of law is disputed, there should be avenues for appeal available to both the consumer and the member.

9. Currently, there is an observable amount of distrust of the EDR schemes by dissatisfied members. This is due to a few factors, namely:
  - a. Lack of accountability of the scheme;
  - b. Inadequately trained staff leading to incorrect interpretations of the TOR or misunderstanding of product functions;
  - c. No obligations on the consumer to provide evidence or make efforts to understand the process; and
  - d. High amounts of assistance to consumers, beyond what would normally be considered impartial.
10. The threshold for making a complaint is very low. Consumers are not obligated to provide any evidence of their claim, nor is there any disincentive for claims to be made. Whilst this is good for consumers, it is often unfair on members and has caused an increase in frivolous claims.
11. In turn, this has led to the Internal Dispute Resolution ('IDR') process becoming less about negotiation, and more about mitigating EDR scheme fees. Frequently, it is preferable to settle with a consumer in IDR despite a frivolous claim, than to proceed to EDR due to the nature of the process. This is unhealthy for the industry and fosters a negative attitude towards EDR.
12. To resolve this, Ballast proposes the Government consider implementing a preliminary case review within the new IDR scheme. This review will require the consumer to provide *prima facie* evidence of their case for consideration. In the event that the scheme is satisfied that the case is genuine, it may proceed, otherwise it will be rejected. This preliminary review will put onus on the consumer to properly consider their case before the scheme, reduce the amount of frivolous cases heard, and in turn help alleviate the aforementioned issues within IDR.
13. Further, consumers who have been presented with a reasonable offer by the member during either IDR or EDR should be bound to accept that offer. This rule currently exists within CIO's TOR and should be replicated within the new scheme.
14. With regard to accountability, currently there is no appeals process for decisions made by the EDR scheme during the course of a dispute. For example, a dispute surrounding the interpretation of the TOR will only be heard by the Case Officer and on appeal by the Manager of the division. Ballast does not consider this to be a genuine appeals process.
15. The TOR is essentially a contract between the member and the scheme which governs their arrangement. It is fundamental to the process that the member and the scheme have the same interpretation and understanding of these rules. From Ballast's experience, this has not always been the case, which has led to instances of disputes being heard which are outside the TOR.

16. Consistency is particularly important in relation to monetary limits and the level of assistance the scheme is able to provide a consumer. These provisions should be unambiguous to avoid any misinterpretation. Currently, the amount of assistance the schemes can provide a consumer is unclear, which has resulted in some Case Officers providing legal advice to consumers on how best to proceed with their case.
17. Assistance to a consumer should be limited to providing factual information about the process, financial services law and products the consumer is exposed to. A consumer should have the capability to understand this factual information and apply it to their own circumstance. In doing so, consumers will be able to better identify a reasonable resolution and not change their course of action halfway through the process.

### **Determinations and Reporting**

18. Currently, determinations made by the EDR schemes are binding on the member but not the consumer. Ballast believes that this should be reviewed, particularly in light of the proposed increase to monetary limits.
19. If the EDR process is to truly operate as a low cost alternative to conventional litigation and provide closure for the affected individuals, it should be binding on all parties to the dispute. For a member, despite a determination, the threat of litigation remains until the action is barred by the respective State's Statute of Limitations. In addition, by having different rules for members and consumers, the scheme perpetuates the current stigma of consumer partiality.
20. A further issue surrounds the confidentiality of disputes and the material presented as evidence in support of each party's case. Currently, any material presented to an EDR scheme is void of its confidentiality if it is relied upon. This is problematic in two ways: firstly, because internal process documents such as file notes and emails lose their rights to legal privilege; and secondly because a consumer may use this information as evidence in another claim outside of the EDR scheme. These documents should be assessed and presented to the scheme in confidence but not provided to the consumer.
21. Finally, the proposal to have IDR information recorded and provided to the Australian Investments and Securities Commission ('ASIC') must be viewed with caution. Ballast believes that fundamentally this information would be valuable for ASIC statistics and may assist their investigation into misconduct, however the level and detail of information requested must be appropriate.
22. These statistics could be misinterpreted, particularly given the individual and unique nature of each case through IDR. For example, as previously discussed, it is common commercial practice for financial service providers to settle with a consumer in IDR, regardless of whether any fault has been identified. Depending on the level of data being collected by ASIC, this could be construed in a number of ways which do not accurately reflect the situation.

## Summary

23. Ballast is concerned with the function rather than the form of the new EDR scheme. The Legislation proposes a number of changes which would be beneficial in improving the current regime, however careful consideration needs to be taken to resolve the issues plaguing the system, lest they be repeated.
24. The new scheme should have a clear identity, whether it is a forum for all or low income consumers, the governing rules should be adjusted to fit this ethos. The Legislation makes a range of valid suggestions for the current schemes but does not directly speak to the new schemes target audience, making it somewhat difficult to assess their effectiveness.
25. Likewise, the TOR for the new scheme should be unambiguous and clearly define the monetary limits and consumer assistance arrangements. Currently this is not the case, and is a main contributor to the inequality felt by members.
26. Consumers need to be more accountable for making a complaint without limiting accessibility to those who need it. This should be done by promoting consumers participation in the process, and making the presentation of evidence mandatory. All complaints should be screened initially to prevent frivolous claims which will in turn improve the IDR process.
27. Ultimately, Ballast broadly supports the proposals within the Legislation, however requests that the above issues be addressed prior to implementation.

Should you have any questions please do not hesitate to contact [calc@ballast.com.au](mailto:calc@ballast.com.au).

Regards



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