FSC FINANCIAL SERVICES COUNCIL

10 October 2016

EDR Review Secretariat Financial System Division
Markets Group
The Treasury
Langton Crescent
PARKES ACT 2600

By email only: http://consult.reasury.gov.au/finacial-system-division/dispute-resolution/

Dear Colleague

FSC submission to the Treasury 9 September 2016 Review of the financial system external dispute resolution framework

The Financial Services Council (FSC) has over 100 members representing Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies. The industry is responsible for investing more than $2.7 trillion on behalf of 13.0 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the third largest pool of managed funds in the world.

The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

Thank you for the opportunity to provide a submission on the Review of the financial system external dispute resolution framework.

In this submission, references to "**FSP**" means Financial Services Providers who are members of FOS or users of the SCT.

The FSC has not submitted comments on the Credit and Investment Ombudsman (CIO) unless indicated specifically.

General comments

1. The FSC does not support any form of statutory compensation scheme.

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2. The FSC supports the use of both internal dispute resolution and, for complaints below a certain quantum, external dispute resolution, as a means of resolving complaints received from consumers.

3. We encourage FOS and the SCT continuing to work to resolve disputes earlier in the process, where appropriate and feasible.

4. We consider FOS to be open and engaged. FOS is also accessible to FSC. FOS has provided FSC and FSPs with an opportunity for regular liaison with FOS to discuss matters generally within FOS's remit (but clearly without reference to specific FOS cases).

We set out below our more specific comments as part of the Review of the financial system external dispute resolution framework

5. Our specific comments cover a range of matters under the following headings:

   (a) Principles guiding the review;
   (b) Internal dispute resolution;
   (c) Regulatory oversight of EDR schemes and complaints arrangements;
   (d) Approach to dispute resolution;
   (e) Jurisdiction and monetary limits/Powers;
   (f) Governance;
   (g) Funding Arrangements;
   (h) Gaps and overlaps in existing EDR schemes and complaints arrangements;
   (i) Triage Service/One body;
   (j) An additional forum for dispute resolution; and
   (k) Uncompensated consumer losses.

Principles Guiding the Review

We note that the Principles outlined in paragraph 11 of the Issues Paper (which come from the Terms of reference) are similar to, but not exactly the same, as the Commonwealth Government's *Benchmarks for Industry-based Customer Dispute Resolution*[1] published in February 2015. One of those benchmark principles which is implied in the Issues Paper but not specifically articulated as a principle is principle 3,

[1]http://www.treasury.gov.au/~/media/Treasury/Publications%20and%20Media/Publications/2015/benchmarks_ind_cust_dispute_reso/Documents/PDF/benchmarks_ind_cust_dispute_reso.ashx

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the principle of fairness, that is, that the procedures and decision making of the scheme are and are seen to be fair.

The principles and outcomes articulated in the Issues Paper are supported. One call out is the need for Consistency; this refers to approach, process and outcomes.

There also needs to be a measurement tool in place to assess the effectiveness of the scheme for all stakeholders. Feedback forms have limited value. Targeted questions by way of short interview could be directed to all parties to a dispute, following closure, in an effort to gauge whether or not the process "worked" for everyone.

This would need to be undertaken for matters with outcomes in favour of all parties, to ensure the results do not flavour the answers to the questions and to elicit honest feedback.

For consumers the key measures in determining outcomes are the time it takes to deal with disputes, whether consumers have a clear understanding of the EDR process and the reasons for the decision. In addition it is important consumers feel they have been treated fairly.

Similarly for FSPs, the key measures are time, transparency of decisions and processes and fairness of outcomes. It is important that any EDR is managed in an efficient and cost effective manner so that FSPs do not bear unnecessary costs (in the case of FOS through an increase in the member charge or in the case of the SCT by an increase in the APRA levy which is ultimately borne, to a large extent, by superannuation fund members).

Effective reporting is also important in determining if an EDR effectively meets the needs of users. FOS reporting is particularly useful for both consumers and FSPs. By way of example, FOS reporting allows consumers to find out if complaints have been made about a particular product/FSP. They might also use the outcomes of disputes to guide them in deciding whether to acquire a particular product or bring a complaint.

For FSPs, FOS reporting provides a useful tool to allow FSPs to compare their dispute performance to that of other FSPs. It can also assist in helping them develop new products, and in improving the overall consumer experience.

Internal Dispute Resolution

Generally it is easy for consumers to find out about IDR processes however this depends largely on the FSP's web site, help line services and other disclosure

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material. The websites and helplines for FOS and SCT should also ensure they first refer consumers to their IDR. Additionally, when you type in “superannuation complaint” to a search engine what typically comes up is “SCT” rather than IDR. This should be improved to make it easier for consumers.

On the basis that FSP’s do as required and ensure information about IDR processes is readily advertised (PDS, Policy, Denial Letters etc.) then it is considered relatively easy for consumers to be aware of the availability of IDR.

In respect to barriers, probably the biggest issue is the disconnect between FSP personnel and consumers as to what actually constitutes a complaint. Now it may be a prudent time to review the definitions around this issue, with emphasis given to changing work practices (we now have more phone and technology interaction).

There is also need for greater clarity around who is responsible for the IDR process in those matters where an insurance based claim is lodged under a group superannuation policy. Presently there can be barriers and potential disadvantage to the consumer if the insurer and trustee are not clear as to who will action and respond (and by when) to a complaint. This can also lead to delay and confusion at the SCT.

However, generally there are limited barriers to lodging a complaint with an IDR if the FSP is well managed and values its customer experience/ relationship.
Generally the time limit in which a complaint has to be considered under an IDR (90 days for superannuation and 45 days for FOS type complaints) is appropriate in meeting the needs of FSPs and consumers. Whilst the time limits surrounding when a disablement claim can be referred to the SCT are appropriate, they are complicated to understand and some simplification would be beneficial.

An effective IDR process can significantly reduce the number of complaints that get escalated to an EDR whilst strengthening the consumer experience and the overall FSP/consumer relationship. An ineffective IDR process can have the opposite effect.

Regulatory Oversight of EDR Schemes and Complaints Arrangements

The current regulatory oversight by ASIC in relation to FOS appears appropriate, however, FSPs would invite a greater transparency in term of the schemes general performance and compliance with the Terms or Reference.

The FSC queries what active oversight is maintained over the SCT given that it is a statutory tribunal.

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The FSPs were of the view that FOS is now more efficient, timely and responsive than SCT which may be a function of their respective levels of funding but may also be the fact that FOS is established essentially on a contractual basis (in the Terms of Reference) which enables it to adapt more nimbly than the SCT which has a statutory foundation basis.

The FSPs do not see FOS as having a role in the overall legal framework, especially as FOS does not follow or establish precedent. However the FSPs do submit that FOS plays an important role in the regulatory framework given its ability to highlight actual or potential systemic issues across a number of different FSPs and bring these to the attention of the industry.

Regulatory oversight should generally be consistent across FOS and the SCT given the similarity of the consumer base, the FSPs and the nature of the complaints.

FOS has improved considerably over the last few years and has been very good at taking on feedback from users (and presumably from ASIC as a result of their oversight).

There appears to be some opportunity for improvement by the SCT largely due lack of funding In this regard as FSPs have had differing level of engagement with the SCT,

FOS performs well and contributes positively to the overall regulatory framework of the financial services industry. This is illustrated by the fact FOS has been encouraging greater conciliation between complainants and FSPs and encourages low value complaints to settle. The SCT are also strong proponents of conciliations.

SCT and FOS both appear to reduce the number of matters that end up in the courts thereby reducing costs to the industry and consumers overall, reducing the time it takes for complaints to be dealt with and enhancing consumer confidence in the industry. Whether this is because of the costs associated with bringing court proceedings or because complaints are being effectively dealt with at the EDR level is not clear but there are very few appeals from the SCT to the Federal Court. The majority of complaints that end up in court are disputed insurance disability claims, many of which, if not most, are within the jurisdiction of an EDR scheme.

There is scope for improving the EDR's procedures which will in turn improve the contribution they make to the overall legal and regulatory framework. Most comments in this regard relate to the need for process improvements at the SCT including improvements to reflect those that have been implemented at FOS over the last few years (refer question 14).

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Existing EDR schemes and complaints arrangements - Approaches to Dispute Resolution

Question 14 - What are the most positive features of the existing arrangements? What are the biggest problems with the existing arrangements?

The positive features for this arrangement are:
At every touch point consumers are well informed of their rights to complain and escalate. Generally FSC members believe customers are well informed about the IDR process through on line disclosure material including the fact that if they are not satisfied with the IDR decision they can escalate to the EDR. Complaints brochures or other methods of information explaining the process are provided with every decline.

The biggest problems with existing arrangements:

There are delays with certain cases due to the complexity or the introduction of some key roles may improve the process of engagement between FOS and the FSP in this regard. .

At the moment confusion does exist in terms of consumers having certainty around which is the correct EDR body applicable to the complaint. One integrated EDR scheme would go a long way towards removing this problem. However, in the event separate schemes continue, more work is required by all stakeholders to ensure this is improved.

There is scope for improving the type of information required to be provided by FSPs to the SCT and the manner in which such information is provided. Improvements in this regard will benefit the effective resolution of complaints for consumers. For example:

i. SCT is still paper based, the online procedures used by FOS would improve SCT's processing of disputes in a more timely manner;
ii. some of the information the SCT asks for is unnecessary (for example, in the case of a disputed death benefit they request the last 3 periodic statements which are not relevant yet take time and resources on the part of the FSP to provide);
iii. SCT often asks for a long (standard) list of documents many of which are not relevant to the complaint – it is suggested the FSP should be able to choose what documents best support their case.

SCT decisions are limited by the availability of a small number of Government appointed Tribunal members and there is no ability to delegate decision making under the SCR Act so that simple cases and lower value cases can be fast tracked.

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Consideration of a more extensive tiered decision making process could be undertaken with a view to ensuring that the SCT process can better manage low quantum matters in a more resource effective manner with an improved experience for all stakeholders. One way this could be achieved would be to give tribunal members the power to delegate their decision making power in simple cases

The time it is currently taking to resolve a complaint at the SCT (up to 2 years) is currently the biggest concern with the way the SCT operates. FSPs feel that this is the result of funding issues and certainly not a reflection of the personnel at the SCT who are held in high regard.

The FSC believes that 'modernising' the SCT and increased funding would go a long way to improving the effectiveness of the SCT as an EDR.

The FSC would like to see both the SCT and FOS use conciliations more regularly and at an earlier stage of a dispute. Both organisations have capable conciliators although depth could be increased.

Question 15 - How accessible are the EDR schemes and complaints arrangements? Could their awareness be raised?

Consumers are informed of the EDR scheme at various touch points and the FOS website is very easy to follow on how to lodge a complaint, for computer literate consumers. Consumers who are not computer savvy may have more difficulties lodging a complaint with FOS.

Question 16- How easy is it to use the EDR schemes and complaints arrangements process? For example, is it easy to communicate with a scheme?

The process of lodging an EDR is relatively easy. Improved regular contact from the EDR Scheme Case Manager to the FSP contact would be beneficial if the FOS case manager can stay in contact with the FSP to keep the FSP updated on delay etc.

Question 17 - To what extent do EDR schemes and complaints arrangements provide an effective avenue for resolving consumer complaints?

An independent review of disputes is vital for consumers and FSPs, this ensures that a fair, open and consistent approach is provided to consumers. This process also assists FSPs in looking at ways to review and improve their processes to ensure that they are effective.

Existing EDR schemes and complaints arrangements - Jurisdiction and monetary limits/Powers

Question 19 – Are the jurisdictions of the existing EDR schemes and complains arrangements appropriate? If not why not?

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FOS – it is thought the jurisdiction (including the monetary limits) set out in RG 139 for FOS are appropriate.

SCT - it is thought the jurisdiction (including no monetary limits) set out in the SRC Act are appropriate should the current EDR schemes be maintained.

Question 20 – Are the current monetary limits for determining jurisdiction fit-for-purpose? If not what should be the new monetary limit? Is there any rationale for the monetary limit to vary between products?

FSC members are generally of the view the current monetary limits are appropriate as above. However should the EDR schemes be merged, consideration will need to be given to applying the monetary limits across various products.

Should monetary limits be lifted, the FSC members are of the view that appeals on an error of law should be available to the FSP. This is expanded upon below.

FSC members are not in favour of any EDR scheme awarding non-financial loss and/or consequential loss (currently a $3,000 cap on each). FOS have tended to award non-economic loss in matters which are not deserving and would certainly not attract such an award if the matter were before a Court. If this is to be maintained or the review were to favour an increase, the FSC would suggest that specific guidelines be formulated setting out the circumstances in which such awards could be made. (The FSC acknowledge that in July 2015, the FOS published an approach document setting its approach to non-financial loss claims).

Question 21 – Do the current EDR schemes and complaints arrangements provide consistent or comparable outcomes for users? If outcomes differ, is this a positive or negative feature of the current arrangements?

There is some concern with the uncertainty of SCT decisions lately. In some cases the determinations have strayed close to or outside its jurisdiction.

FSC members are also concerned about the position taken by the FOS on the application of the law (which they are not bound to follow). As members are bound by a FOS determination they have been unable to appeal FOS determinations to a Court where there in a clear error of law and members therefore seek this right, particularly should monetary limits be increased.

FOS and SCT reporting of decisions are useful and should be retained.

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Existing EDR schemes and complaints arrangements - Governance

Question 22 - Do the existing EDR schemes and complaints arrangements possess sufficient powers to settle disputes? Are any additional powers and remedies required?

The FSC generally considers that the existing EDR schemes and complaints arrangements have adequate powers to resolve the disputes that fall within their respective jurisdictions. The FSC members do not consider that those powers need to be extended. They also consider that the current monetary limits for FOS jurisdiction are appropriate.

In the past, there has been some concern about the ability of FOS to deal with disputes involving more than two parties – the consumer and one FSP. On many occasions, a dispute between a consumer and a financial service provider involves another party. The Richard St John report *Compensation arrangements for consumers of financial services* (April 2012) (the **St John report**) noted (at page 20) that:

> "*2.55 In assessing the amount payable as a result of a breach, FOS indicates that it 'may consider whether there was any contributory negligence' by the applicant, but it will not consider the liability of financial service providers other than the licensee member against whom the claim has been made. In the case of Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd [2009] VSC the Supreme Court of Victoria concluded, on several grounds, that FICS (a predecessor ombudsman service to FOS) was not obliged to, and in many cases was not able to apply the principle of proportionate liability by considering the liability of parties other than the financial adviser in question, such as the contribution to that loss of the finance company, directors, the product provider, auditors or the investment research firm. It was noted that some of these parties were not members and thus not subject to an EDR scheme's jurisdiction.*"

With effect from 1 January 2015, the FOS has amended its Terms of Reference to permit it to allow or require another FSP to be added as a party to a dispute if it would lead to a more efficient and effective resolution of the dispute (TOR clause 7.4). While a welcome reform, joinder of another party depends both on that party being a member of FOS (as it must) and also on FOS agreeing to the joinder. There is no right for a financial services provider to join another party to the dispute, even where that other party may bear primary responsibility for the loss suffered by the consumer.

In the interests of delivering an efficient and effective EDR service, the FSC is of the view that should there be a one-stop shop EDR scheme then all relevant parties could

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be joined to a dispute and the EDR scheme should have the power to apportion liability.

Question 23- Are the criteria used to make decisions appropriate? Could they be improved?

All three of the existing EDR and complaints arrangements reference 'fairness'; in their decision making criteria. The FOS is structured so it can operate in a less formal way than the SCT (or the courts). The Terms of Reference give it greater flexibility than the SCT and the ability to consider more creative solutions than those available at law while remaining consistent with the principle of fairness. This wide discretion in determining a remedy has been recognised by the courts. In *Utopia Financial Services Pty Ltd v Financial Ombudsman Service Ltd* [2012] WASC 279 the Supreme Court of Western Australia stated:

> *"FOS's discretion in deciding a remedy is very wide. Paragraph 9.1 should not be narrowly construed to empower FOS to make decisions that could only be made at common law or in equity. Such an approach is inconsistent with the purpose of [9.1], which is to provide FOS with wide and flexible powers in order to do justice between the parties." (Paragraph 9.1 is the relevant paragraph of FOS's terms of Reference.)*

The FSC acknowledge that this flexibility can assist in resolving disputes.

However flexibility is also manifest in the FOS approach to precedent. FOS states that no Determination (decision) can be seen as a precedent for future cases, and they consider each matter on a case by case basis. This can lead to an unexpected Determination, whether from the perspective of the financial service provider or the consumer, or perhaps the perception of unexpected Determinations. Also, the FSC is informed that occasionally there may be differences in the approaches of particular Case Managers to substantially similar disputes and that this can unnecessarily complicate and sometimes delay the resolution of those disputes. While some members consider that the FOS' are becoming more consistent in their approach to similar disputes, they would be concerned if that development were not to continue.

The FSC acknowledges that flexibility necessarily involves some trade-off with procedural safeguards. However as the Richard St John report *Compensation arrangements for consumers of financial services* (April 2012) (the **St John report**) noted (at page 47):

> *"2.179 While industry has been involved in and generally supportive of the development of EDRs, there appears to be some disquiet about aspects of their working in practice. The concerns go to issues of fairness, touching on the rule of law, and of cost. These concerns are of lesser significance in the context of handling of run of the mill complaints by consumers about the administration*

> *of their accounts or policies, which constitute a large proportion of EDR business, and may be accepted in the interest of a ready means for the resolution of consumer disputes. The concerns are more serious however when considered in the context of the recently expanded jurisdiction of EDRs…"*

Consideration could be given to mandating that a more rigorous, rule of law and precedent based approach be followed when considering claims for compensation in excess of a particular monetary threshold.

In the event that compensation caps are increased, consideration should be given to allowing an FSP to appeal to a Court on an error of law.

<u>Question 24 - What are the advantages and disadvantages of the different governance arrangements? How could they be improved?</u>

The *Benchmarks for Industry-based Customer Dispute Resolution* provide standards for industry-based dispute resolution in Australia and New Zealand[2]. Governance is a key part of the second benchmark, the principle of independence.

As the Commonwealth Consumer Affairs Advisory Council's (CCAAC) Final Report *Benchmarks for Industry-based External Dispute Resolution Schemes* stated (at page 17):

> *Governance should focus on oversight of policy development, to ensure stakeholders in EDR processes are consulted and accommodated. An overseeing body should be comprised of independent members. This should include ensuring EDR has a balance of stakeholders from member organisations, relevant regulators, consumer bodies, legal expertise and other dispute resolution experts.*

The governance arrangements of both the FOS (and CIO) specifically reflect this underlying principle. Each are governed by an independent board which has general oversight of the scheme's operations but is not involved in decision making.

The SCT is not industry-based but is a statutory body. The Tribunal does not have a board and the members of the Tribunal do not have an oversight role and are involved in decision making. The FSC acknowledges that the SCT has established an advisory council to provide a forum to enable stakeholders to provide feedback and advice in relation to high level strategic issues. Each of the members of the advisory council represent a different group of stakeholders with an independent chair, thus reflecting CCAAC's statement in relation to governance and the composition of an overseeing body set out above.

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[2] http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/benchmarks-ind-cust-dispute-reso

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Although the governance arrangements of both the FOS and the SCT include an overseeing body, there is a perception among some FSC members that the FOS is more open to giving and receiving feedback to and from industry than the SCT.

Existing EDR schemes and complaints arrangements - Funding Arrangements

Question 25 - Are the current funding and staffing levels adequate? Is additional funding or expertise required? If so, how much?

Generally the FSC members are of the view that the SCT does not have adequate funding and staffing levels.

The adequacy of the current funding and staffing arrangements is highlighted more so in relation to the SCT rather than the FOS. This has been illustrated through the length of time a complaint remains open in the SCT including the length of time a complaint progresses from one phase to the next. As referred to in the Issues Paper (at page 14, paragraph 62), '…The SCT has indicated that if a complaint is not withdrawn or resolved with the superannuation fund before review, it will take at least 12 months to get to review, at which time the SCT will make a formal decision in relation to the complaint'. The impact of funding arrangements on this needs to be further explored and understood including whether the current funding arrangements are impacting staffing levels (a representation of the adequacy of resource allocation).

Also, the adequacy of funding may be gleaned from the different funding models. The FOS is funded by way of a user pay model, which means funding is variable in response to the number of disputes (refer to page 13 paragraph 57 of the Issues Paper) whereas with the SCT, whilst the government provides an annual appropriation for the SCT in each budget, there is no link between the volume of disputes involving a superannuation fund and the amount of levies that is contributed towards the operating expenses of the SCT (refer to page 15, paragraph 69 of the Issues Paper). The impact of the current funding models on how resources are allocated within each scheme needs to be better understood before it can be said whether more funding is needed as opposed to better appropriation of funds. Either way, any additional funding should serve to drive efficiencies in the process and respond to increases in demand (which is questionable if there is a decrease in government funding).

FSPs, particularly superannuation trustees, are already under considerable pressure to contain fees and costs in an ever increasing regulatory environment. FSC members are wary of imposing further costs on FSPs and consumers including members of superannuation funds who often end up bearing such costs through increased fund costs and charges.

Question 26 - How transparent are current funding arrangements? How could this be improved?

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The FSPs are of the view that there is the need for greater transparency regarding funding of the respective schemes. Improvements in how funds are allocated and the purpose served or to be served will provide stronger transparency and improvement in management controls. The viability of the internal processes as well as resource allocation would also be better served if funding choices were accounted for in annual reports/reviews (for example).

Question 27- How are the existing EDR schemes and complaints arrangements held to account? Could this be improved?

In so far as accountability regarding funding is concerned, greater regulatory oversight in relation to not only funding itself but the allocation of funding by the schemes may assist in this regard in addition to accounting for funding choices in annual reports/reviews. The aim would be to ensure that the schemes hold accountability for the adequacy of their respective arrangements.

The FSC is of the view that there is the need for greater transparency regarding funding of the respective schemes. Improvements in how funds are allocated and the purpose served or to be served will provide stronger transparency and improvement in management controls. The viability of the internal processes as well as resource allocation would also be better served if funding choices were accounted for in annual reports/reviews (for example).

Question 28 - To what extent does current reporting by the existing EDR schemes and complaints arrangements assist users to understand the way in which the scheme operates, the key themes in decision-making and any systemic issues identified?

The annual reports provide detailed statistical information in relation to complaints/disputes received and determinations made. The analysis by the schemes is comprehensive in providing an overview of the disputes generally. However, focusing on key themes in decision making and identification of systemic issues could be an additional aspect that could addressed in these reports so as to create a feedback loop not only for particular scheme members but also for the industry as a whole.

Question 29 - What measures should be used to assess the performance of the existing EDR schemes and complaints arrangements?

Since 2010 the FOS has been issuing comparative tables in its annual report in which information about complaints/disputes received and closed along with the outcome of the complaints/disputes against each scheme member. As stated by FOS, the purpose of providing comparatives allows FSP members to view their dispute performance so as to be able to set targets to improve performance and keep in check their progress (as well as compare performance against other scheme members). In particular, FOS states 'One of FOS' company objectives, as stated in our Constitution, is to 'protect, promote and advance the industry's dispute resolution procedures and standard'. The overall objective being to provide a stimulus and benchmarking tool to improve IDR processes. This is a tool that may be well utilised

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by the SCT for relevant FSPs to assess performance and assist in improving complaint arrangements.

Gaps and overlaps in existing EDR schemes and complaints arrangements

Question 30 - To what extent are there gaps and overlaps under the current arrangements? How could these best be addressed?

Gaps include the jurisdictional limits between the respective schemes. In relation to the FOS, there is a minimum jurisdiction as set out under ASIC RG 139 and monetary limits apply. In relation to the SCT, the jurisdiction is as set out under the SRC Act and no monetary limits apply. In relation to monetary limits, the FOS has jurisdiction to award compensation up to $3,000 each for non-economic loss and consequential loss whereas the SCT has no power to make any such awards. The SCT's power (as set out in the SRC Act) is to consider whether the decision was fair and reasonable in the circumstances and may not make awards 'where there has been no adverse practical outcome or financial loss.' In relation to the FOS' power to issue an award for non-economic loss or consequential loss, members do not support this being retained in the event of a merger of schemes. If it is retained, clearer justification is desirable in relation to making any such awards and this also calls for a more transparent process in relation to why these awards are made.

In making its decisions, the FOS and the SCT both make decisions which are fair (and reasonable). In making its decision, the SCT makes a determination about whether a decision (of a trustee) was fair and reasonable in the circumstances whereas the FOS makes its determination about whether a decision was fair having regard to not only legal principles but also applicable industry codes, good industry practice and its own prior decisions. A gap however, is the precedent value in the determinations made and going outside the rule of law (i.e. making a decision beyond the legal rights of the parties). A consistent reasoning process is desirable from not only a precedent value perspective but also from the perspective of allowing scheme members to better understand why adverse determinations are made which go beyond the parties' legal rights.

There is no right of appeal for scheme members in relation to a FOS Determination whereas in the SCT, there is a right of appeal in relation to points of law which can be made to the Federal Court and outside of this, appeals can be made to the Federal Court under the Administrative Decisions (Judicial Review) Act 1997 and the Judiciary Act 1903 (refer to page 15 paragraph 67 of the Issues paper). A gap in the respective appeal rights may be influenced by the respective jurisdictional limits and this may be justified (for example when dealing with disputes concerning simple account or policy administration issues) but there has been disquiet expressed in relation to a scheme member's right of appeal from a FOS determination when the issue is more serious when considered in the context of the complaint/dispute at the higher end of the FOS' jurisdictional limit. It may be desirable to have an appeal or review process in place subject to certain conditions such as the amount involved and the complexity of the issues.

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A gap in the process, may also be the right of choice by an FSP to join another scheme member to a proceeding who may share responsibility for the complainant's loss. The flexibility of joining another responsible party is desirable.

Question 31- Does having multiple dispute resolution schemes lead to better outcomes for users?

FSC members are of the view that a one-stop shop is more likely than the current arrangements to lead to a better outcome for users for the reasons set out below.

Question 32 - Do the current arrangements result in consumer confusion? If so, how could this be reduced?

There is often confusion in relation to which is the right scheme to pursue the complaint/dispute. Advising consumers of the right to pursue his/her complaint/dispute through the relevant scheme starts with the FSP advising the consumer about these rights. Reviewing how the consumers are advised of the correct scheme perhaps needs to be addressed but where a consumer has lodged a complaint/dispute under the wrong scheme (which occurs with regards to superannuation related complaints involving group policies) each scheme has its own review process with regards to addressing jurisdiction. Having a one stop shop would address any such confusion, although consideration needs to be given as to whether this would potentially create another level of administration and complexity in relation to the process as a whole.

Triage Service

Question 35 - Would a triage service improve user outcomes?

This would depend on the structure and application of any tirage service.

Question 36 - If a 'one-stop shop' in the form of a new triage service were desirable:

who should run the service?

how should it be funded?

should it provide referrals for issues other than that related to the financial firm?

One suggestion might be that the service should be run with members from each team handling the initial contact and it could be run by one of the existing schemes with the others contributing to the costs. It should be limited to financial services with the ability to refer other issues to relevant schemes as per current arrangements but not introducing a more formal process, as this would increase the costs for FSP's.

One body

Question 37 - Should it be left for industry to determine the number and form of the financial services ombudsman schemes?

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The FSC is of the view that this decision should include a strong stakeholder engagement plan to ensure that all issues and concerns are understood and managed where possible in the set up and monitoring stages.

Question 38 - Is integration of the existing arrangements desirable? What would be the merits and limitations of further integration?

There is some desirability for integration however more information on models and funding needs to be discussed for the FOS, CIO & SCT.

The advantages of a one-stop shop would include: greater certainty for customers; the potential for greater consistency in decision making; creation of division of expertise in subject matter areas (similar to a Court Division); and benefits of scale.

A single financial services EDR scheme would also mean that most, if not all, relevant parties could be included in a dispute. Often disputes involve a number of parties such a life insurer, trustee, financial adviser and consumer or bank mortgage broker or adviser and consumer. Having all potential parties under the same EDR scheme would mean that these parties could all be joined to a dispute and issues such as apportionment of liability may be dealt with more appropriately than they are under the current arrangements.

Question 39 - How could a 'one-stop shop' most effectively deal with the unique features of the different sectors and products of the financial system (for example, compulsory superannuation)?

This model could have many benefits and it could still operate as specific teams to manage the unique features of the different sectors once a dispute reached case management but the front end and back end could be managed as one business e.g. reporting and invoicing.

However, it is important to ensure that adopting a one-stop shop does not result in a dilution of superannuation experience. It is critical that super complaints remain handled by individuals with clear expertise in superannuation law and practice given the specific legal and fiduciary duties imposed on trustees which are unique to other financial products.

Question 40 - What form should a 'one stop shop' take?

This would vary depending on the model chosen and the schemes included. More investigation and consideration of issues needs to be understood in the first instance.

Question 41 - If a 'one-stop shop' in the form of a new single dispute resolution body were desirable:

should it be an ombudsman or statutory tribunal or a combination of both?

what should its jurisdictional limits be?

how should it be funded?

what powers should it possess?

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what regulatory oversight and governance arrangements would be required?

The more succinct answers would be based on completion of Question 40 above. However generally we believe that If it was a one stop shop the model should be an Ombudsman Scheme with the benefits of a review process that the Statutory tribunal has. This model would also help with the funding management and an improve consumer experience in the model.

An additional forum for dispute resolution

Without the benefit of further background information and particulars at this time the FSC does not see the utility in adding an additional body or Tribunal over and above existing schemes or a one-stop shop. This would present as a further forum before a matter could be taken to a Court and could add cost, expense and delay with no apparent benefit.

A properly structured EDR scheme with appropriate jurisdiction, powers and limited right of appeal for FSPs would deal adequately with the overwhelming majority of customer disputes and remain aligned with the principle guiding this review.

Uncompensated consumer losses

Question 47 - How many consumers have been left uncompensated after being awarded a determination and what amount of money are they still owed?

FSC members are unable to comment further than the statistics provided in paragraph 87 of the Issues Paper.

Question 48 - In what ways could uncompensated consumer losses (for example, unpaid FOS determinations) be addressed? What are the advantages and limitations of different approaches?

Ensuring FSPs have adequate professional indemnity insurance is the most appropriate way of ensuing consumers are compensated.

FSC is generally opposed to any increase in levies or other funding which will increase the costs for FSPs many of which are ultimately borne by consumers (including members of superannuation funds).

The FSC is of the view that minimum standards should be in place which ensure that FSPs have adequate professional indemnity insurance and capital requirements for AFSL's to ensure consumers are compensated.

Such measures will undoubtedly minimise, more likely eliminate, the possibility of there being unpaid determinations arising in the future.

Question 49 - Should a statutory compensation scheme of last resort be established? What features should form part of such a scheme? Should it only operate prospectively or also retrospectively? How should the scheme be funded?

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FSC members are wary of imposing further costs on FSPs and consumers including members of superannuation funds. However, the FSC is also committed to ensuring that consumers in our industry are protected and treated fairly.

We expect that licensees will be required to be adequately capitalised, based on their relative risk.

Appropriate professional indemnity and capital requirements will reduce the likelihood of unpaid FOS determinations in the first place. These should therefore take priority in terms of a review rather than establishing a scheme of last resort.

Please feel free to contact Paul Callaghan or Michael Beatty on (02) 9299 3022 if you have any questions on the FSC submission.

Yours faithfully,

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