7 October 2016

Law Council
OF AUSTRALIA

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

By email: EDRreview@treasury.gov.au

Dear Sir

Law Council of Australia – Submission on the Review of the financial system external dispute resolution framework Issues Paper dated 9 September 2016

I enclose the Law Council of Australia's Submission on the Review of the financial system external dispute resolution framework Issues Paper dated 9 September 2016.

The submission contains five parts which have been separately prepared by:

- the SME Business Law Committee of the Business Law Section (Contact: Ms Coralie Kenny, Chair, (M) 0409 919 082);
- the Australian Consumer Law Committee of the Legal Practice Section (Contact: Mr Ben Slade, Chair, (T) (02) 8267 0914, (E) BSlade@mauriceblackburn.com.au);
- the Superannuation Committee of the Legal Practice Section (Contact Ms Michelle Levy, Chair, (T) (02) 9230 5170, (E) michelle.levy@allens.com.au);
- the National Insurance Lawyers Committee of the Legal Practice Section (Contact: Mr Andrew Sharpe, Chair, (T) (02) 9265 3261, (E) a.sharpe@mccabes.com.au); and
- the Alternative Dispute Resolution Committee of the Federal Litigation and Dispute Resolution Section (Contact: Mary Walker, Chair, (T) (02) 8815 9250, (E) inbox@marywalker.com.au).

For general matters, please contact Mr Nick Parmeter, Director of Policy, Law Council of Australia, on (02) 6246 3732 or nick.parmeter@lawcouncil.asn.au, in the first instance.

Yours sincerely

Jonathan Smithers
Chief Executive Officer

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Law Council
OF AUSTRALIA

Review of the Financial System External Dispute Resolution Framework

EDR Review Secretariat
The Treasury

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Business Law Section

The Business Law Section was established in August 1980 by the Law Council of Australia with jurisdiction in all matters pertaining to business law. It is governed by a set of by-laws passed pursuant to the Constitution of the Law Council of Australia and is constituted as a Section of Law Council of Australia Limited.

The Business Law Section provides a forum through which lawyers and others interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia, and enhance their professional skills.

The Section has a current membership of more than 1,100 members. The Section has 15 specialist Committees, all of which are active across Australia.

Current Office Holders on the Business Law Section's Executive Committee are:

- Ms Teresa Dyson, Chair;
- Ms Rebecca Maslen-Stannage, Deputy Chair; and
- Mr Greg Rodgers, Treasurer.

Legal Practice Section

The Legal Practice Section of the Law Council of Australia was established in March 1980, initially as the 'Legal Practice Management Section', with a focus principally on legal practice management issues. The Section's has since broadened its focus to include areas of specialist practices including Superannuation, Property Law, and Consumer Law.

The Section has a current membership of approximately 400 members. The Section has 8 specialist Committees, all of which are active across Australia.

Current Office Holders on the Legal Practice Section's Executive Committee are:

- Mr Dennis Bluth, Chair;
- Mr Philip Jackson SC, Deputy Chair; and
- Ms Maureen Peatman, Treasurer.

Federal Litigation and Dispute Resolution Section

Federal Litigation and Dispute Resolution Section was established in 1987 as the Federal Practice and Litigation Section. The Federal Litigation and Dispute Resolution Section is made up of lawyers who have litigation and dispute resolution practices in federal courts and tribunals. The Section covers a number of diverse areas of activity.

The Section has a current membership of approximately 600 members. The Section has 12 specialist Committees, all of which are active across Australia.

Current Office Holders on the Business Law Section's Executive Committee are:

- Mr John Emmerig, Chair;
- Mr Peter Woulfe, Deputy Chair; and
- Ms Gail Archer SC, Treasurer.

Introduction

1. The Law Council of Australia (**Law Council**) welcomes the opportunity to make a submission to the Review of the financial system external dispute resolution framework Issues Paper released on 9 September 2016.

2. This submission addresses a number of the discussion questions identified in the Issues Paper which are of most importance to the Law Council.

3. The Law Council's submission has been prepared in five parts:

    - Part A has been prepared by the SME Business Law Committee of the Business Law Section (**SME Committee**);
    - Part B has been prepared by the Australian Consumer Law Committee (**ACLC**) of the Legal Practice Section in consultation with the Law Institute of Victoria;
    - Part C has been prepared by the Superannuation Committee of the Legal Practice Section;
    - Part D has been prepared by the National Insurance Lawyers Committee of the Legal Practice Section; and
    - Part E has been prepared by the Alternative Dispute Resolution Committee (**ADR Committee**) of the Federal Litigation and Dispute Resolution Section.

About the Committees

SME Business Law Committee

4. The SME Committee has as its primary focus the consideration of legal and commercial issues affecting small businesses and medium enterprises (**SMEs**) in the development of national legal policy in that domain. Its membership is comprised of legal practitioners who are extensively involved in legal issues affecting SMEs.

Australian Consumer Law Committee

5. The practitioner members of the ACLC take an interest in legal developments affecting consumers in the areas of superannuation, banking and finance, insurance, public health, personal injury and accident compensation. The ACLC liaises with government and non-government bodies involved in consumer law. The ACLC has a particular interest in the harmonisation of consumer protection laws across Australia.

Superannuation Committee

6. The Superannuation Committee's objectives are to ensure that the law relating to superannuation in Australia is sound, equitable and clear. The Committee makes submissions and provides comments on the legal aspects of the majority of proposed legislation, circulars, policy papers and other regulatory instruments which affect superannuation funds.

National Insurance Lawyers Committee

7. The National Insurance Lawyers Committee provides a forum for lawyers who work with insurance law to discuss issues at a national level, and reflects the interests of

practitioners in major areas of insurance law. The primary objectives of the National Insurance Lawyers are:

- Stimulating interest in national insurance law issues;
- Encouraging and promoting national conformity of insurance laws; and
- Encouraging and promoting the development of uniform national systems and procedures for contracts of insurance and resolution of insurance disputes.

Alternative Dispute Resolution Committee

8. The Alternative Dispute Resolution Committee exists to provide policy advice to the Law Council on Alternative Dispute Resolution (ADR), including mediation, arbitration, early neutral evaluation, and conciliation. The Committee also liaises with other ADR bodies, including the ADR Committees of the various State and Territory Law Societies and Bar Associations, as well as the National Alternative Dispute Resolution Advisory Council (NADRAC).

Summary of Views

9. The views of the Committees are largely consistent, although there are some important differences which are summarised below.

10. The Law Council has not sought to reconcile any differences in the views of the Committees but would be happy to seek to do so if this would assist the Review.

11. The SME Committee and the ACLC have sought to address the questions raised. The views of the respective Committees are summarised as follows:

    (a) Responses to Questions 10-13 are broadly consistent. There is broad support for consistent ASIC regulatory oversight of all external dispute resolution (**EDR**) schemes and complaints mechanisms.

    (b) Responses to Questions 14-29 are also broadly consistent. Both Committees note that the Superannuation Complaints Tribunal (**SCT**), as a statutory rather than industry body, is less able to evolve quickly. The ACLC considers the industry model offers a built-in incentive for industry participants to improve conduct. The SME Committee notes one advantage of a statutory regulator, however, is its perceived greater independence.

    (c) In regard to the establishment of a "triage service" (Questions 35-36) the views of the Committees differ slightly. The ACLC does not support the establishment of a triage service as it is of the opinion that such a service may create an additional administrative hurdle and make the process more complicated for consumers. The SME Committee, however, does not oppose the establishment of a triage service if that service provides easier access for consumers.

    (d) Both Committees support the redesign of current EDR systems to establish a 'one-stop shop' model (Questions 37-43). The ACLC does not consider it necessary to establish a new body and favours an approach which looks to expand and enhance the current mechanisms, in particular the Financial Ombudsman Service (**FOS**), rather than create a new forum. The SME Committee is not opposed to the establishment of a new body if this body would replace all current schemes.

(e) The ACLC and the SME Committee support the creation of a mechanism for redressing consumers who suffer what would otherwise be uncompensated losses (Questions 47-50). The ACLC does not have a strong view about the form that this mechanism takes. The SME Committee supports the establishment of a statutory compensation scheme that operates prospectively only and notes that a group indemnity insurance policy should be considered.

12. The National Insurance Lawyers Committee agrees with the general sentiment expressed by the ACLC and the SME Committee that establishment of a triage service is not required. However, the National Insurance Lawyers Committee has noted that it does not support the proposal for amalgamation of EDR schemes. It is the view of this Committee that the maintenance of a degree choice and competition is an important factor in ensuring the delivery of fair and reasonable outcomes in circumstances where EDR membership is mandatory.

13. The Superannuation Committee's response is guided by its objectives as identified above. Most of the issues and questions posed in the Issues Paper do not engage those objectives, and so the Superannuation Committee makes no comment on those issues. However, the broader question of whether the Superannuation Complaints Tribunal should continue to operate as it currently does, or in some modified form, or not at all, does engage those objectives, and the Superannuation Committee addresses this issue below. The Superannuation Committee has made particular reference to the report of the Australian Law Reform Commission (**ALRC**), *Collective Investments: Superannuation* [1992] ALRC 59 (**ALRC Report**) and recommends that the Review Panel consider the ALRC Report findings about external dispute resolution in the context of superannuation.

14. A brief request from the ADR Committee is included in Part D.

Part A - SME Business Law Committee

Law Council OF AUSTRALIA
Business Law Section

16. This part has been prepared by the Business Law Section's SME Business Law Committee. The SME Committee has sought to respond to each of the questions listed in the paper.

Principles guiding the review

Are there other categories of users that should be considered as part of the review?

17. The SME Committee notes that the forums the subject of this review prima face provide dispute resolution for retail consumers. The SME Committee considers that these dispute resolution processes should be extended to properly cater for financial services disputes where the complainant is a small business or family enterprise.

18. This alteration would accord with the government's policy of extending consumer support and protections to small businesses (such as has been done with the extension of unfair contract terms in standard form contracts) and family enterprises to enable a fairer competitive playing field.

Do you agree with the way in which the panel has defined the principles outlined in the terms of reference for the review? Are there other principles that should be considered in the design of an EDR and complaints framework?

19. The SME Committee agrees with the principles outlined in the terms of reference, and suggests that '**ability to access justice**' should also be included as another principle.

Are there findings or recommendations of other inquiries that should be taken into account in this review?

20. The Financial Ombudsman Service has recently received feedback on a 'small business jurisdiction' paper which could include extension of its processes to small business complainants.

In determining whether a scheme effectively meets the needs of users, how should the outcomes be defined and measured?

21. From the SME Committee's experience, the best way to determine whether an external dispute resolution scheme is meeting the needs of its users is to look at the appeal figures from the scheme's decisions. If users' needs are being met, appeals will be few.

22. Another determination whether an external dispute resolution scheme is meeting the needs of its users is to monitor the numbers of same or similar decisions over a period. If the scheme is assessing systemic complaint issues so that the relevant

regulator can deal with them, similar decisions will not continue once the issue has been dealt with by the regulator.

23. Finally, if a scheme is effectively meeting user needs then the use of the EDR scheme should far outweigh complainants choosing court action.

Internal dispute resolution (IDR)

Is it easy for consumers to find out about IDR processes when they have a complaint? How could this be improved?

24. The SME Committee considers that there are currently sufficient opportunities for a complainant to obtain information about internal dispute resolution processes. For licensed providers information about their internal dispute resolution process must be included in disclosure communications (such as the Product Disclosure Statement and Financial Services Guide) and in communications about the complaint. Information is also provided on provider and product websites.

25. The SME Committee considers that it would be an important improvement if providers of multiple product types (eg superannuation, life insurance, banking and general insurance) were to only have one internal dispute resolution access point, even if that required triage to specialists once the complaint has been raised.

What are the barriers to lodging a complaint? How could these be reduced?

26. From the SME Committee's experience, the requirement for complainants to lodge written complaints and provide copies of all relevant documents, often when the provider already has these on the complainant's file, is intimidating and can result in complainants not progressing their legitimate complaint. Alternatively such a complainant may need to engage a financial planner or lawyers to assist them in putting together their complaint information.

27. Improved on-line complaint applications and a requirement for providers to provide a complainant with access to complainant information and documents could reduce this barrier.

How effective is IDR in resolving consumer disputes? For example, are there issues around time limits, information provision or other barriers for consumers?

28. The SME Committee understands that IDR is a successful process for resolving a large number of disputes so long as the provider deals with the complainant quickly and fairly. Time limits imposed through legislation on providers assists in progressing a complaint through IDR, although, as mentioned in response to Question 6, the paperwork required from the complainant can be daunting and result in a complainant not progressing their complaint.

What are the relative strengths and weaknesses of the schemes' relationships with IDR processes?

29. IDR processes by their nature are not an independent determinant of a complaint, whereas the EDR Schemes are supposed to provide an independent assessment process to resolve a complaint. It is therefore very important that the facts provided to the EDR are correct.

How easy is it for consumers to escalate a complaint from IDR to EDR schemes and complaints arrangements? How common is it for disputes to move between IDR and EDR, or between EDR schemes?

30. Once the IDR process has completed, it is generally fairly easy for a complainant to escalate a complaint to the relevant EDR because the complainant will have contact and referral information received during the IDR process. This is also supported by the fact that commencement of an EDR application does not currently cost the complainant any fees.

Regulatory oversight of EDR schemes and complaints arrangements

What is an appropriate level of regulatory oversight for the EDR and complaints arrangements framework?

31. The SME Committee considers that the current level of regulatory oversight (both from ASIC and APRA) for the EDR and complaints arrangements framework is appropriate. Regulators require providers to have both IDR, and then EDR processes available and monitor usage to assess potential systemic issues that the provider needs to address.

Should ASIC's oversight role in relation to FOS and CIO be increased or modified? Should ASIC's powers in relation to these schemes be increased or modified?

32. The SME Committee is of the view that combining the FOS and Credit & Investments Ombudsman (**CIO**) under ASIC's oversight (or that of a purpose established independent body) could improve efficiencies and outcomes for consumer and (if included) small business and family enterprise complainants as a standardised process and approach could be implemented for financial services disputes.

Should there be consistent regulatory oversight of all three schemes with responsibility for dealing with financial services disputes (for example, should ASIC have responsibility for overseeing the SCT)?

33. The SME Committee strongly supports consistent regulatory oversight of all three schemes (FOS, CIO and SCT) by ASIC or a purpose established independent body given that each applies to benefit retail consumers (and maybe in future also small businesses and family enterprises).

34. Albeit the SCT deals with specialised complaints from superannuation members, in principle its purpose is the same as FOS and CIO in that its objective is to determine disputes. There should be no reason that a combined body should not be able to deal with specialist dispute requirements so long as it has resources to do so.

In what ways do the existing schemes contribute to improvements in the overall legal and regulatory framework? How could their roles be enhanced?

35. The existing schemes provide information and data to providers and regulators to identify systemic issues which are the subject of complaints and processes that aren't working as anticipated as well as to identify deficiencies in legislation/regulation that could benefit from improvements through changes to legislation or regulation.

Existing EDR schemes and complaints arrangements

What are the most positive features of the existing arrangements?

36. Existing arrangements are fee free for complainants, independent of the provider (which IDR is not) and undertaken through a conciliation based process as opposed to an adversarial process.

What are the biggest problems with the existing arrangements?

37. The documentation required to progress the process and the different schemes applicable depending on the product or service the complaint relates to. At FOS, there is no opportunity for verbal evidence or acceptance of transcripts of verbal evidence given in other related proceedings in FOS. Most consumers are not aware of this during their engagement with their financial adviser and face adverse outcomes in FOS when coming up against financial advisers who have intentionally left no paper trail.

38. From the SME Committee's experience, consumers are rarely capable of pursuing a dispute through EDR without some form of legal representation or advice. The $3,000 cap for recovery of complainant legal costs in FOS is nowhere near adequate to cover proper representation.

39. The SME Committee also observes that both FOS and CIO in practice suffer from a perceived bias by providers for favouring of consumer complainants, and from an inherent bias by complainants in favouring providers due to being funded by providers.

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

40. EDR schemes are fairly accessible once the appropriate scheme has been identified, and the paperwork completed. Awareness does not need raising, rather simplification by access through one location and reduction in 'red tape' documentation would be beneficial to improve access and usage by complainants.

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

41. From experience, the SME Committee has never had any problems with communicating with any of the EDR schemes. However, given FOS is funded by providers, the negotiating position of providers in practice appears stronger and the Committee from experience has observed that providers are sometimes consequently less likely to negotiate in good faith.

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

42. The SME Committee is of the view that EDR schemes and complaints arrangements are an effective avenue for resolving consumer complaints, albeit the processes could be improved.

43. Efficiency in resolving dispute through FOS is also an issue and disputes can take up to 2 years to get through the FOS process.

To what extent do the current arrangements allow each of the schemes to evolve in response to changes in markets or the needs of users?

44. The SME Committee understands that FOS and CIO, being private independent bodies, are able to make changes fairly quickly in response to changes in markets of user needs. The SCT, on the other hand, being a statutory body, may require legislative or regulatory change which can be subject to politics and take some time to achieve.

Are the jurisdictions of the existing EDR schemes and complaints arrangements appropriate? If not, why not?

45. The SME Committee is of the view that the jurisdictions of the EDR schemes should be combined.

46. The SME Committee also supports the value increases proposed for FOS in its recent paper, and would welcome the inclusion of small businesses and family enterprises into the FOS and CIO EDR regimes (recognising that small businesses and family enterprises would be unlikely to require access to the SCT), with commensurate value increases for small business and family enterprise complainants.

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?

47. The SME Committee supports the value increases proposed for FOS in its recent paper for individual consumers with commensurate value increases for small business and family enterprise complainants.

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?

48. From the SME Committee's experience, there are real problems in inconsistency of handling of disputes, recommendations and determinations made by FOS.

49. Given the different complaint issues that FOS and CIO look to deal with, from experience the SME Committee considers the consistency of outcome may be challenging, although none of the determinations are binding. The SCT deals with quite different issues. Any difference in outcomes for a similar or the same issue would not be beneficial as it would not result in consistency of access to justice outcomes.

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

50. From experience, the SME Committee considers that in most cases the EDR scheme and complaints arrangements currently have sufficient powers to settle disputes. FOS has, however, in its recent Paper, noted that it would benefit from having the ability to also include third parties in its disputes process, including to have them bound by determinations.

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

51. From the SME Committee's experience the criteria used by EDRs to make determinations is in the vast majority of complaints appropriate, and could be

improved though improved information being provided in user friendly terms so as to enable potential complainants to realistically assess their chances of receiving a favourable determination.

What are the advantages and disadvantages of the different governance arrangements? How could they be improved?

52. In the SME Committee's view, the fact that FOS and CIO are privately established and funded could lead to a perception that their required independence in determining complaints might be open to compromise.

53. The SCT as a statutory body is clearly independent, although suffers from a consequent inability to be nimble in a changing environment.

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

54. The SME Committee notes that as FOS and CIO are both funded by participant providers, the annual budget should allow for adequate resourcing. From the SME Committee's experience, however, the qualifications of case managers and decision makers of EDRs should be reviewed. In FOS there is a lack of understanding of fundamental legal principles and financial services legislation.

How transparent are current funding arrangements? How could this be improved?

55. The SME Committee notes that as FOS and CIO both publish their Business Plan and annual reports on their websites and that their annual budget should allow for adequate funding. Despite this, the SME Committee is of the view that more transparency is required about the funding of EDR schemes as most consumers are not aware that FOS is not an independent government body and is funded by the provider they are complaining about.

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

56. FOS and CIO are required to provide regular reporting to ASIC, and the SCT to Parliament (as it is a statutory body). Further information and annual reports are published on the EDR websites.

57. The SME Committee considers these are adequate arrangements to hold these EDRs to account.

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?

58. Albeit there is information on the EDR websites that provides information to explains to users how the scheme operates, the key themes in decision-making and any systemic issues identified, from the SME Committee's experience this can be intimidating for consumers who are not practised in providing process documentation.

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

59. From the SME Committee's experience, the best way to assess performance is to look at the appeal figures from the scheme's decisions, the data on systemic

complaints and the use of the EDR scheme compared with complainants choosing court action.

Gaps and overlaps in existing EDR schemes and complaints arrangements

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

60. In the SME Committee's view, gaps would best be addressed by combining the EDR schemes so that there is no opportunity for there to be any uncovered gap in the financial services complaints arena.

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

61. From the SME Committee's experience prior to the existence of both VCAT and NCAT, having multiple dispute resolution schemes does not lead to better outcomes for users because users can find it is confusing and intimidating to ascertain which scheme is applicable and to understand and implement the different processes to access each scheme.

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

62. From the SME Committee's experience the current arrangements are confusing given there is more than one EDR body. This could be reduced by combining access to the schemes.

63. In addition, improved transparency of funding, or perhaps by a change to funding to have EDRs funded equally by providers and complainants (with allowance for hardship) may remove the confusion suffered by complainants once they appreciate (FOS) is funded by providers.

How could concerns about insufficient jurisdiction with respect to small business lending (including farming) disputes be best addressed?

64. The SME Committee is of the view that the *National Consumer Credit Protection Act 2009* (Cth) should be altered to apply to loans for small business purposes, thereby allowing the legislation to apply to small business lending, including farming. This alteration would accord with the government's policy of extending consumer support and protections to small businesses (such as has been done with the extension of unfair contract terms in standard form contracts) and family enterprises to enable a fairer competitive playing field.

What impact will the extension of the unfair contracts legislation to small business contracts (once operational), or other recent or proposed reforms, have on the existing EDR schemes and complaints arrangements?

65. Until the existing EDR schemes have jurisdiction to deal with unfair contract term complaints, these complaints will need to be taken to existing forums that have jurisdiction to deal with them, such as courts or fair trading tribunals. This was an access to justice issue raised with Treasury when the unfair contracts extension legislation was being finalised.

Triage service

Would a triage service improve user outcomes?

66. The SME Committee is of the view that if a triage service provides easier access for consumers and small business and family enterprises to EDR opportunities, then it would improve use outcomes.

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

Who should run the service?

67. The SME Committee is of the view that if not run by ASIC, or the (Commonwealth) Small Business and Family Enterprise Ombudsman, the services should be run by an independent body.

How should it be funded?

68. Such a one-stop shop for triage should be funded by government as it is not a decision maker, merely a reference service.

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

69. In its capacity as a triage one-stop shop it should not provide referrals for other issues. Although if was government funded, then government could decide to use it for a range of other triage reference services, which the SME Committee would not be opposed to.

One body

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

70. The SME Committee does not consider it appropriate or efficient to leave it to industry to determine the number and form of the financial services ombudsman schemes.

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

71. The SME Committee considers it desirable to integrate the existing schemes and notes the improved efficiencies that occurred when former EDRs were integrated in the past into FOS.

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)?

72. The SME Committee notes the 'one-stop shop' model for VCAT and NCAT includes access to specialised resources for specialised issues, and are of the view this could occur including the requirements for EDR that arise from superannuation.

What form should a 'one stop shop' take?

73. In the SME Committee's view a new single statutory body would best provide the jurisdictional requirements, ability to negotiate and conciliate outcomes and

specialised resources, including the needs that FOS has raised to be able to include third parties in the EDR process. As with the current SCT, determinations of the EDR body could be binding on participants and appeals should only be to the Federal Court on questions of law.

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?

74. The SME Committee considers it could be either, so long as determinations are binding with appeals to the Federal Court on questions of law

What should its jurisdictional limits be?

75. The SME Committee considers the values FOS has suggested in its recent paper to be appropriate, with commensurate increases to cater for small businesses and family enterprises.

How should it be funded?

76. The SME Committee considers that a combination of government, provider and complainant funding should be considered so as to remove any perception of lack of independence from providers, and to encourage government to support a process that will truly benefit both consumers and small businesses and family enterprises.

What powers should it possess?

77. The SME Committee would like to see a new single dispute resolution body having power to include third parties in the dispute resolution process, and the power for its determinations to bind participants, with appeals to the Federal Court on questions of law.

What regulatory oversight and governance arrangements would be required?

78. If the body was a statutory body then ASIC would be an appropriate oversight regulator. Alternatively the (Commonwealth) Small Business and Family Enterprise Ombudsman could take oversight, although would more likely be seen as having a conflict of interest in doing so.

An additional forum for dispute resolution

Would the introduction of an additional forum, in the form of a tribunal, improve user outcomes?

79. It is the SME Committee's view that this would improve user outcomes so long as it replaces the existing EDR schemes by making access easier to identify and standardising the process, approach and user outcomes.

If a tribunal were desirable:

Should it replace or complement existing EDR and complaints arrangements?

80. The SME Committee considers it should replace existing EDR arrangements.

Should it be more like a court (judicial powers, compulsory jurisdiction, adversarial processes and legal representation)?

81. The SME Committee does not think it should be more like a court, rather it should retain the current EDR scheme approaches of negotiation and conciliation in a less formal setting.

Should it be more like current EDR schemes (relatively more flexible, informal decision-making and processes)?

82. The SME Committee agrees it should be more like current EDR schemes.

How should the jurisdiction of the tribunal be defined?

83. The SME Committee considers it should include retail consumers and small businesses and family enterprises with value limits based on those suggested by FOS in its recent papers with commensurate increases for small businesses and family enterprises.

Should its jurisdiction only extend to small business disputes or other disputes?

84. The SME Committee considers that family enterprise disputes should also be included.

Should its jurisdiction only be available in the case of disputes with providers of banking products?

85. The SME Committee considers that its jurisdiction should not be limited to disputes with banking product providers, and should extend to all financial services and products including insurances, financial planning, superannuation, retail pooled investments and credit….anything currently covered by existing EDR should also be included.

Should monetary limits and compensation caps apply?

86. The SME Committee does not consider it necessary to apply monetary limits or compensation caps because either the provider determined to be liable for compensation or damages to the complainant should have indemnity insurance to fund such compensation or damages or will have sufficient assets of its own to do so.

Should its decisions be binding on one or both parties and what avenues of appeal should apply?

87. The SME Committee considers that determinations should be binding on both parties with appeals to the Federal Court on questions of law.

Should it be publicly (taxpayer) or privately (industry) funded?

88. The SME Committee considers that a combination of government, provider and complainant funding should be considered so as to remove any perception of lack of independence from providers, and to encourage government to support a process that will truly benefit both consumers and small businesses and family enterprises.

Should its focus only be on providing redress or should it take on a role to prevent future disputes, for example, by advocating for changes to the regulatory framework, seeking to improve industry behaviour?

89. The SME Committee's position is that such a body should not also take on a role to prevent future disputes, for example, by advocating for changes to the regulatory framework, seeking to improve industry behaviour as this would detract from its key purpose as an EDR body. However, the SME Committee considers it would be opportune and appropriate for the body to maintain data and provide reports to its oversight regulator (or other body) which would all0ow that other body to action strategies to advocating for changes to the regulatory framework and seek to improve industry behaviour with a view to preventing future disputes.

What type of representation and other support should be available for persons accessing the tribunal?

90. The SME Committee is firmly of the view that all complainants should be entitled to legal representation if they are able and willing to fund this. In the alternative, the SME Committee also strongly supports the ability of complainants who are financially unable to fund legal representation to be allowed to access pro bono legal support in the EDR jurisdiction if needed. As previously mentioned, from the SME Committee's experience, consumers are rarely capable of pursuing a dispute through EDR without some form of legal representation or advice. The $3,000 cap for recovery of complainant legal costs in FOS is nowhere near adequate to cover proper representation.

Is there an enhanced role for the Small Business and Family Enterprise Ombudsman in relation to small business disputes? How would this interact with current decision-making processes?

91. As mentioned, the SME Committee is of the view that if a One-stop shop triage process was put in place the triage function could rest with the Small Business and Family Enterprise Ombudsman.

92. However, given the independent role of a new EDR body (eg a tribunal) it would not, in the SME Committee's view, be appropriate for the Small Business and Family Enterprise Ombudsman to provide regulatory oversight to that new EDR body because with the other activities undertaken by that Ombudsman would cause conflicts of interest that could not be overcome simply by being disclosed.

Developments in overseas jurisdictions and other sectors

What developments in overseas jurisdictions or other sectors should guide this review?

93. The SME Committee is not able to answer this question.

Are there any particular features of other schemes or approaches that would improve user outcomes from EDR and complaints arrangements in the financial system?

94. The SME Committee is not able to answer this question.

Uncompensated consumer losses

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

95. The SME Committee is not able to answer this question.

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

96. The SME Committee recognises that although regulated financial services providers are required to have in place indemnity insurance, this is sometimes not available for a variety of reasons, sometimes due to the provider doing the wrong thing, which is why there is a complaint. The SME Committee from experience is of the view that the addressing of the issue of the inability of a provider to fund an EDR determination is a policy issue for government. It may involve establishing a 'compensation pool' to which providers of certain products or services must contribute, the establishment of a group insurance cover policy that does not cease to provide cover as existing policies often do, or government being prepared to make payments in certain circumstances.

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?

97. The SME Committee supports the establishment of a statutory compensation scheme that operates prospectively only as it is not appropriate to introduce such a liability retrospectively if imposed on providers, which would seem to be the most appropriate place from which it should be funded.

What impact would such a scheme have on other parts of the system, such as professional indemnity insurance?

98. The SME Committee, as set out in its answer to Question 48, considers that a group indemnity insurance policy should be considered because the providers who are unable to fund payment of an EDR determination to a complainant tend to be those who are suffering from financial vulnerability issues and whose insurer will then look to not confirm cover.

Contact

99. The SME Committee would be happy to discuss any aspect of this feedback. Please contact Ms Coralie Kenny, the Chair of the SME Committee, on 0409 919 082 if you would like to do so.

Part B – Australian Consumer Law Committee

Law Council OF AUSTRALIA
Legal Practice Section

100. This Part has been prepared by the Legal Practice Section's Australian Consumer Law Committee (**ACLC**) in consultation with the Law Institute of Victoria.

Introductory comments

101. The ACLC believes that some internal dispute resolution schemes have proven ineffective, particularly in the area of financial advice and insurance claims. As such, the ACLC supports moves to require companies that provide consumer and small business financial advice and insurance services to be members of **EDR** schemes.

102. The ACLC believes that there are currently too many EDR schemes resulting in both overlap and gaps. Some EDR schemes have very poor consumer visibility such as the **CIO**, for example, whereas others are relatively well known.

103. The ACLC would prefer to see one EDR scheme for financial services.

104. The ACLC would prefer that ASIC, as a one stop regulator, oversee the financial services EDR scheme(s) rather than that role being left to either APRA, industry or a board.

105. The ACLC would like to see those companies that provide financial advice and insurance services to small businesses to be required to be members of an EDR.

106. The arrival of industry-based EDR schemes in the Australian legal landscape, commencing in the 1990s, has been one of the most important – and successful – developments in consumer protection law since the enactment of the *Trade Practices Act 1974* (Cth) and State and Territory Fair Trading legislation. The establishment of those various industry-based EDR schemes, including those in the financial services sector (such as what were known as the Banking Ombudsman, Insurance Enquiries and Complaints Limited and the Financial Industry Complaints Service) afforded consumers an accessible forum for the investigation and resolution of what were becoming increasingly complex disputes.

107. The evolution of those schemes since their establishment has been largely positive, building on their sound early foundations. Those evolutionary changes have included:

    (a) the expansion of their jurisdiction to include small business disputes;

    (b) increased monetary limits on disputes;

    (c) the amalgamation of multiple governance bodies for some schemes, with schemes now having equal numbers of industry and consumer directors on one governance organ, to help ensure the independence of the schemes; and

(d) the rationalization of a number of previous schemes into what is now the Financial Ombudsman Service (**FOS**).

108. The ACLC believes that the review of the EDR schemes in the financial sector ought to be informed by, and build on, the successful evolution of those schemes to date.

Principles guiding the review (*Questions 1-4*)

109. The Commonwealth Government's *Benchmarks of Industry-Based Customer Dispute Resolution Schemes* (**the *Benchmarks***) have provided a useful and effective guide for the EDR schemes. Originally promulgated by what was then the Commonwealth Department of Industry Science and Tourism in 1997, they were recently reviewed by the Commonwealth Consumer Affairs Advisory Council and re-released in 2015 with an accompanying *Key Practices for Industry-based Customer Dispute Resolution* document. In the ACLC's view the *Benchmarks* provide a sound framework for both conceptualizing the features of an effective industry-based EDR scheme, and providing guidance about improving those schemes' features.

110. The ACLC understands that the EDR schemes that are the subject of this review (being FOS, the CIO and the SCT) have on occasion conducted reviews of their operations against the *Benchmarks*. The results of those reviews, in as much as they can be made available for the purpose of this review, may be of assistance.

111. The ACLC agrees with the way in which the panel has defined the principles outlined in the terms of reference for the review. EDR schemes should provide efficient, accessible and transparent resolution of disputes for both parties to a dispute. EDR schemes should be able to resolve complex disputes and should have mechanisms in place to facilitate this. EDR schemes should make consistent decisions that future participants can see and rely on as consistency and transparency enables potential complainants and respondents to reliably predict the outcome of many complaints. This, in turn, facilitates complaint resolution, often without the parties needing to access the EDR.

112. It is therefore a matter of great importance that EDR schemes publish their final determinations and that complaints information should be publicly available.

113. The ACLC agrees that schemes should impose minimal costs on complainants who wish to access the scheme but the Council cautions that the resolution of complex complaints may be resource intensive. If the resolution of such complaints requires the assistance of legal and other experts, then it is important that a regime be available to the participants in which those costs can be met. The alternative, which is suspected to exist within some schemes at the moment, is that the scheme makes a bad decision that fails to address the issues, misunderstands the facts or misinterprets and misapplies important legal principles.

114. The ACLC is also very keen to see EDR schemes playing a vigorous role in exposing systemic issues and misconduct. If this requires terms of reference that give the scheme enhanced investigatory powers and the power to require scheme members to respond to requests for information, then the terms of reference should be amended to do this.

115. It is also important that EDR schemes be subject to regulatory oversight by ASIC and that they regularly report to ASIC the outcomes of their determinations and outcomes of their investigations into systemic issues of concern and misconduct.

Internal Dispute Resolution (IDR) (Questions 5-9)

116. That consumers are aware of, and have first, easy access to, internal dispute resolution is an important feature of an effective EDR landscape. Scheme members must ensure that consumers are not only aware of the existence of IDR but that they are explicitly alerted to the existence of IDR *at the point of dispute* with their service provider. The point of dispute may differ from product to product, and accordingly a one-size-fits-all approach to ensuring consumer awareness is unlikely to be possible.

117. An effective EDR scheme will also provide feedback to industry participants on matters including complaint-types, complaint-trends and any identified IDR failings, so as to reduce disputes or improve their handling internally. FOS and the CIO have such mechanisms. The ACLC understands that the SCT does not provide such information to participants in the same way.

Regulatory oversight of EDR schemes and complaints arrangements (*Questions 10-13*)

118. It is appropriate that ASIC has single regulatory oversight over EDR schemes. The ACLC is of the view that the current balance in relation to FOS and the CIO – where ASIC has an interest in high-level policy settings and the EDR schemes independently operate as complaint-resolution entities – is important and valuable. As noted above, the ACLC suggests that EDR schemes regularly report to ASIC the outcomes of their determinations and outcomes of their investigations into systemic issues of concern and misconduct.

119. The different model of oversight in relation to the SCT is anomalous. This is exemplified to some degree in relation to systemic issues. ASIC ought to properly have an interest in uncovering systemic consumer protection failures in the financial services sector. Whereas FOS and the CIO have obligations to report on systemic issues to ASIC, the ACLC understands that no similar obligations exist in respect of the SCT. That appears to be a gap in the current regulatory regime.

Existing EDR schemes and complaints arrangements (*Questions 14-29*)

120. By virtue, in part, of their compliance with the *Benchmarks* in the way they operate, the FOS and the CIO generally respond to complaints efficiently and effectively. The SCT is not seen as being quite so effective. There are shortcomings in each scheme. Some of these have been identified by members as including:

    (a) The schemes cannot award costs to a complainant whose issue is complex. If the presentation of a complex complaint properly requires legal or other expert assistance, and that complaint is made out, then the scheme should be empowered to order that the respondent meet those costs. Clause 9.4 provides the Terms of Reference for FOS provides that FOS may decide that the member contribute to the legal or other professional costs or travel costs incurred by the complainant in the course of the dispute, but such an award is capped at $3,000, unless exceptional circumstances apply. This cap makes it impossible for many claimants with complex cases for which legal or other expert assistance is essential to use this scheme. The alternative is for the complainant to sue in court or, what is possibly more often the case, to merely give up;

    (b) Rights of review are overly constrained. Courts have held that the only grounds on which claimants can generally appeal from a FOS determination

is where there is bias, bad faith, or where the decision was so unreasonable that no reasonable decision maker could make it ("*Wednesbury*" unreasonableness). These grounds are onerous and difficult for claimants to demonstrate, and a greater level of accountability through Judicial review is needed. A good example is provided by the leading cases on this point: *Mickovski v FOS Ltd & Anor* [2012] VSCA 185 and *Goldie Marketing Pty Ltd & Ors v FOS Ltd & Australian and New Zealand Banking Group Ltd* [2015] VSC 292;

(c) The jurisdictional limits are too low. The schemes, if they are to be effective to meet the expectations of consumers need to be able to determine disputes worth more than $500,000;

(d) There is a perceived lack of consistency in the handling of disputes and their determination. This issue reinforces the need for transparency in decision making and the need for published reasons for many complaints. It may also suggest that the schemes do not properly record the processes used to reach the final determination and it may be that many decision makers are inadequately trained or qualified;

(e) The time limits applicable to each scheme are not always consistent with statutory time limits to commence a proceeding in court.

121. Consumers must have confidence that the schemes have the capacity to resolve disputes fairly. This also requires schemes to be capable of evolving by amending their rules thereby allowing them to adapt in a timely way to the needs of their stakeholders. This is much more possible for FOS and CIO than it is for the SCT

122. The model of the SCT is very different, in respect of which changes to its jurisdiction requires legislative change. In the ACLC's view that process is less flexible, and less able to result in timely jurisdiction and other changes than the process available to FOS and CIO. Further, the SCT's funding model (where it obtains funding from the Commonwealth government annually, having in turn been sourced at an industry level) means it is less able to respond quickly to increases (or decreases) in complaint demand.

123. The mixed membership fee and fee-per-complaint industry funding model is considered a better model, although some members report concerns that 100% industry funding creates an impression of these schemes being biased in favour of industry. While an actual bias is not alleged it is important that industry funded schemes go to significant lengths to not only be independent of industry but be seen to be so.

124. On the other hand, the in-built incentive in the industry funded model for industry participants to improve their conduct and/or internal complaint-handling in order to avoid the expenses associated with EDR is another positive feature of the model missing in the SCT funding arrangements.

Gaps and overlaps in existing EDR schemes and complaints arrangements (*Questions 30-34*)

Investigation and Resolution of Systemic Issues

125. The primary function of EDR schemes in the financial services sector ought to be to investigate and resolve disputes raised by consumers (including small business

consumers). However it is also important, in the ACLC's view, that EDR schemes have the capacity to identify, investigate and seek to reach resolutions for systemic issues affecting a wider group of consumers.

126. EDR schemes are extremely well placed to review complaint types and trends, and to identify where an issue that is the subject of a particular complaint to it, has wider ramification for more than just one consumer. Where EDR schemes lack the capacity to respond adequately to systemic issues, they ought to be empowered to do so. In the ACLC's view this should be a high-order priority.

Triage Services (*Questions 35 & 36*)

127. The ACLC does not support the establishment of a "triage service". In its view it risks creating another layer of administration (with the attendant costs associated with establishing and operating that layer), while placing a further barrier between a consumer and the resolution of her or his dispute. In this respect, the design of access-channels for consumers needs to be wary of the phenomenon of consumer fatigue. It is not uncommon for consumers, prior to attempting to lodge a dispute with an EDR scheme, to have struggled to have their disputes dealt with by a service-provider's IDR processes. A mechanism which requires consumers to make additional phone calls, and spend additional time pursuing their complaints to EDR, is not attractive.

One body (Questions 37-41)

General Comments

128. As a general comment, it is important for consumers that they are aware of, and able to access, an EDR forum at the time of any dispute they may have with their service provider. The existence of multiple EDR schemes risks being a source of confusion for consumers as they look for a forum where their dispute may be investigated and resolved.

FOS and the CIO

129. The ACLC is aware of the arguments that, as a matter of principle, it is useful to have more than one EDR scheme in the financial services sector because it creates constructive "competition" between schemes where the successes of one scheme will be adopted by the others, thereby leading to more effective schemes overall.

130. The ACLC is unaware, however, of any tangible examples supporting this proposition.

131. In the ACLC's view, the most critical feature of a successful EDR scheme is its capacity to continue to deliver fair and reasonable outcomes to disputes. In the event that there was further rationalisation of EDR schemes in the financial services sector, resulting in **one overarching EDR body**, such a body would not be delivering outcomes in a vacuum. What would be considered "fair and reasonable" would continue to be informed by:

    (a) the outcomes of regulatory action taken against financial services providers by ASIC (including decisions by Courts) as the sole responsible regulator;

    (b) the outcomes of class-action litigation dealing with products in the financial services industry.

132. The ACLC believes that the reasons for merging FOS and the CIO outweigh the reasons for keeping those schemes as separately operating.

The Superannuation Complaints Tribunal

133. The SCT operates quite differently in a number of respects, to FOS and the CIO. For example:

    (a) it is funded by an industry levy that is paid by APRA rather than ASIC;

    (b) its funding is not linked to its work load or number of complaints;

    (c) it has less control of its funding levels as compared to FOS and CIO;

    (d) it is severely underfunded;[1]

    (e) it is not subject to regulatory oversight by ASIC in the same way that FOS and the CIO are;

    (f) there is no financial limit to its jurisdiction; and

    (g) it has a different governance framework.

134. Further, the legal framework undergirding the SCT and its governance is quite different from that which has established FOS and the CIO. While FOS and the CIO are established as companies limited by guarantee where membership is (by various mechanisms) compulsory, the SCT is a creature of statute.

135. The ACLC does not regard the nature of the disputes heard by the SCT as being so inherently different to those heard by FOS and the CIO, as to necessarily justify circumstances where consumers with superannuation (or related insurance) disputes go to one forum (ie the SCT) and consumers with other financial services disputes go to another forum.

136. The jurisdictional limits imposed on FOS and CIO will require review if the SCT was to become part of an EDR scheme that included disputes that currently go to FOS and CIO. The ACLC cannot see that this issue should cause any difficulty in practice.

137. The ACLC notes, as a practical matter, that the merger of a number of pre-existing schemes into FOS in 2008 was largely a successful merger. This suggests that FOS has both the experience and the capacity to manage any future rationalization of current schemes.

138. When considering potential alternative frameworks by which consumer superannuation (and related insurance) disputes can be heard by a scheme with features of FOS, the model of the Telecommunications Industry Ombudsman (**TIO**) may bear careful scrutiny. In this respect, the TIO is also a creature of statute, but only minimally so. There, the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) establishes that there must be a TIO bearing the description of the TIO, makes it obligatory for telecommunications service providers to be members of the TIO and imposes sanctions on service providers who do not comply with TIO decisions found in favour of a consumer. Beyond this bare legislative framework however, the TIO is also a company limited by guarantee

[1] For example see: http://www.afr.com/personal-finance/superannuation-and-smsfs/super-complaints-boss-helen-davis-calls-for-more-funding-20160917-gris1s.

whose constitution and articles of association largely set out its jurisdiction and powers.

139. The TIO has provided a very effective EDR scheme over a period of time where telecommunication plans have become pervasive and quite complicated.

An additional forum for dispute resolution (*Questions 42-44*)

140. The ACLC does not support the creation of an additional forum of dispute resolution, including an additional tribunal-type forum, which would replace the existing EDR mechanisms. Rather, the ACLC favours an approach which looks to expand and enhance the current mechanisms (and in particular FOS) rather than create a new forum. In the absence of compelling reasons for the establishment of a new forum, the ACLC is concerned that such a forum risks leading to increased consumer confusion and fragmentation.

141. Should expanding and enhancing the current mechanisms (eg by increasing monetary jurisdiction) not be possible, and there is a compelling case for a new court-alternative forum, then it is the ACLC's view that such a forum:

    (a) be one in respect of which there is no potential overlap between its jurisdiction and that of, for example, FOS (ie it only deals with matters outside of FOS's Terms of Reference); and

    (b) be established, as much as it is practicable to do so, on a similar governance model to FOS, be industry-funded, and be underpinned by compliance with the *Benchmarks.*

Uncompensated consumer losses (*Questions 47-50*)

142. The ACLC supports the creation of a mechanism for redressing consumers who suffer what would otherwise be uncompensated losses. The aggregate of uncompensated losses (in the form of outstanding determinations of FOS and CIO over recent years, as set out in the issues paper), is not extraordinary when compared to the size of transactions within the financial services industry as a whole but the sum of $16.6 million that has not been paid to successful FOS complainants suggests that a statutory or other compensation scheme should be established. The ACLC is agnostic about whether a compensation model is statutory in nature or established pursuant to the rules of a scheme itself, to be funded by a levy paid by members.

Contact

143. The ACLC would welcome providing additional information to the Review. Please contact Mr Ben Slade, the Chair of the ACLC on (02) 8267 0914 or at BSlade@mauriceblackburn.com.au if you would like to do so.

Part C – Superannuation Committee

144. This Part has been prepared by the Legal Practice Section's Superannuation Committee.

Introductory Comments

145. As stated above, the Superannuation Committee's response to the Issues Paper focuses on the broader question of whether the SCT should continue to operate as it currently does, or in some modified form, or not at all.

ALRC Report No 59

146. The SCT was established under the *Superannuation (Resolution of Complaints) Act 1993* (Cth) (**Complaints Act**). The Complaints Act was one of several pieces of legislation enacted as a package, with another being the *Superannuation Industry (Supervision) Act 1993* (Cth). The package of legislation was, in part, the Government's response to a 1992 report of the Australian Law Reform Commission (**ALRC**), *Collective Investments: Superannuation* [1992] ALRC 59 (**ALRC Report**).

147. We recommend that the Review Panel consider what the ALRC Report had to say about external dispute resolution in the context of superannuation. The topic is addressed at [12.33] – [12.42] of the ALRC Report.

Costs of external dispute resolution

148. The Government had indicated that there should be a suitable low cost dispute resolution mechanism to "raise consumers' confidence in the superannuation industry and increase their willingness to invest in superannuation" (at [12.33]). According to the ALRC, seeking judicial review of a trustee's decision by the Supreme Court of the relevant State or Territory was, for most people, "simply an unrealistic option because of the cost involved" (at [12.36]). We observe that the way in which legal services are charged for has evolved since 1992 and that the contemporary prevalence of no-win / no-fee charging arrangements in relation to superannuation claims has resulted in costs being less of an impediment to access to courts than was previously the case. Nevertheless, even with no-win / no-fee charging arrangements, a member, beneficiary or other claimant remains exposed to the risk of an adverse costs order by a court in the event that their claim is unsuccessful.

Independence

149. Importantly, the ALRC said that the review body should be "independent of government, of [superannuation] schemes and the regulator" (at [12.37]). While the ALRC did not provide specific reasons in support of this statement, we consider it to be plainly correct – and no less relevant today than when it was made in 1992. The need for independence is self-evident. Clearly, the concept of independence involves questions of degree. We do not suggest that either FOS or the CIO lack

independence. At the same time, the circumstance that the SCT is part of a *legislative* scheme is, we consider, an important contributor to the SCT's independence.

150. We suggest it is no coincidence that the Complaints Act was enacted not long after the introduction of the Superannuation Guarantee in 1992. The Superannuation Guarantee, and the compulsion it entails, makes superannuation unique when compared with other sectors in the broader financial sector. This makes it more important for there to be high levels of public confidence in the independence and competence of those entrusted – possibly on a monopolistic basis – to resolve disputes between consumers and the organisations that hold their compulsory retirement savings. Statutory bodies have an inherent perception of independence. If a non-statutory approach were to be taken, it would seem to us that issues of ownership, profit motive (if any) and governance (for example, who has power to appoint directors and senior officers) would be important issues to consider to avoid undue threat to actual and perceived independence.

151. In relation to the banking sector, we note that Minister for Financial Services Kelly O'Dwyer has been reported as saying that a banking tribunal could be a good alternative to the court system:

> *"What we're saying is [the court system's] not always the best mechanism to deal with these complaints, they can be dealt with in a very timely manner, through the right mechanism where they can get their matter heard and examined independently and potentially have access to compensation."*

Binding and public nature of determinations

152. The ALRC said that for a review by the review body to be effective, "the responsible entity whose decision is the subject of the review will have to be bound by it" (at [12.41]). Again, we do not suggest that members of FOS or the CIO fail to comply with the determinations made under those schemes. However, the way in which the SCT's determinations are made binding on superannuation trustees and, where joined, insurers, is, we consider, an important contributor to the SCT's effectiveness.

153. The SCT's effectiveness is also reinforced through its determinations being carefully reasoned and publicly available (albeit on a de-identified basis). This is a feature which we submit ought to be retained under any alternative model, as it contributes to the progressive accumulation of a known body of principles. Even though SCT decisions are not binding precedents, they nevertheless foster the fair and consistent application of principles and a level of predictability which is beneficial for industry and consumers.

A body of case law

154. We also note that a large body of case law has been built up over the years in relation to the jurisdiction, function and approach of the SCT. The case law has been built up in part through the right of appeal on a question of law under the Complaints Act. The benefit of this case law is that each participant in the workings of the SCT – the SCT itself, the superannuation trustee, the insurer (where relevant) and the complainant – is able to have reasonably clear expectations of what the SCT can and cannot do and how the SCT is likely to approach any particular complaint. This is not an argument against making improvements where improvements can be made. However, it recognises that there would, unavoidably, be costs – both financial and

non-financial – associated with any significant change to the jurisdiction, function and approach of the SCT.

Speed of review process

155. Finally, the ALRC contemplated that review by the review body would be "speedy" (at [12.42]). The time it can take for a complaint to the SCT to get to the determination stage is well-known. However, we would caution the Review Panel against inferring from this that any aspect of the jurisdiction, function or approach of the SCT is somehow defective. It would appear that the issue is, at least to some extent, a question of funding and funding arrangements. We merely observe that change (outside the area of funding) may not, of itself, solve the timeliness issue. Minister O'Dwyer's comments suggest that a tribunal and timeliness are not incompatible.

156. While speed and efficiency are important and do need to be improved, the quality of the decision making process needs to be maintained if the current arrangements were to be changed. Where disputes need to be determined by a third party body, the determination should continue to be made by fairly and consistently applying established legal principles to the relevant set of facts.

Contacts

157. The Committee would welcome the opportunity to discuss its submission further and to provide additional information in respect of the comments made above. In the first instance, please contact:

- Ms Michelle Levy, Chair, Superannuation Committee on (02) 9230 5170 or at michelle.levy@allens.com.au; or
- Mr Luke Barrett, Deputy Chair, Superannuation Committee on (03) 8831 6145 or at luke.barrett@unisuper.com.au.

Part D – National Insurance Lawyers Committee

158. The National Insurance Lawyers Committee of the Legal Practice Section provides the following comments:

Generally

159. The operation of the various EDR Schemes is an issue which has a significant intersection with insurance because:

    (a) insurers (general and life) and insurance brokers are financial services providers which are members of, and directly participate in, EDR Schemes; and

    (b) general insurers provide cover which indemnifies other participants in the financial services sector against liability arising from disputes determined within the EDR framework.

Internal Dispute Resolution

160. IDR is generally highly effective in respect of disputes between insurers (and/or insurance brokers) and consumers. Statistics released by FOS in respect of insurance show a generally effective use of IDR with a large majority of disputes lodged with FOS being either settled, withdrawn or decided in favour of the Financial Service Provider (**FSP**). A greater number of complaints lodged with insurers (and/or insurance brokers) are resolved without being registered or lodged with FOS.

Triage Service

161. It does not support the addition of a formal triage service. Any consumer confusion in relatively limited and can be effectively minimised by enforcing the FSP's obligation to clearly inform consumers of the details of the relevant EDR service. In any event, in its experience both FOS and CIO effectively triage the relatively low number of claims which are directed to the incorrect scheme.

One Body

162. It does not support the proposal for amalgamation of EDR schemes. This is because well regulated competition in the EDR industry promotes efficiency and the achievement of fair and reasonable (and balanced) outcomes. Within the context of mandatory EDR membership such competition provides an essential check against any particular EDR Scheme departing from what would be regarded by the financial services industry as an appropriate balance between the rights and interests of consumers and the regulated activities.

163. While regulatory action and private civil proceedings assist in defining standards which may inform EDR scheme decision making, the higher volume and greater temporal efficiency of EDR disputes relative to such decided case law means that

EDR schemes often make decisions which deal with issues which have not yet been dealt with in other forums. This limits the external sources against which a single EDR scheme could calibrate its own perception of what constitutes a fair and reasonable outcome.

Contact

164. The National Insurance Lawyers Committee would welcome the opportunity to provide further assistance to the Review. Please contact Mr Andrew Sharpe, Chair, on (02) 9265 3261 or at a.sharpe@mccabes.com.au.

Part E – Alternative Dispute Resolution Committee

Law Council OF AUSTRALIA
Federal Litigation and Dispute Resolution Section

165. The ADR Committee requests that the Review include in its report, statistics on the use of ADR processes in each of the existing schemes (ie. FOS, CIO and the SCT).

166. The ADR Committee would welcome the opportunity to provide additional information on ADR issues if this would assist the Review. Please contact Mary Walker, the Chair of the ADR Committee on (02) 8815 9250 or at inbox@marywalker.com.au in the first instance.