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EDR Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

To whom it may concern

We welcome the opportunity to provide a submission to the Review Panel in response to the Interim Report of the *Review of the financial system external dispute resolution framework*.

Given we have already made a substantive submission to the Review, comments in this submission are narrow and specific. Where content relates to the Interim Report, a specific reference is made.

We hope this submission adds value to the Panel's consideration of this important issue.

Please do not hesitate to contact me and my colleagues if we can further assist with the Panel's important work.

Yours sincerely,

Peter Koutsoukis
Principal
MAURICE BLACKBURN

Maurice Blackburn submission in response to the Interim Report of the *Review of the financial system external dispute resolution framework*.

Draft recommendation 4 - A new industry ombudsman scheme for superannuation disputes

The comparison of the current SCT and a proposed superannuation industry ombudsman scheme notes that a new scheme "could provide a broader range of remedies, including compensation for non-financial loss"**.**

This comparison is silent regarding the awarding of costs for consumers in EDR processes.

In our previous submissions, we stated that the design and detail of any new scheme must reflect the realities of everyday Australians.

Unlike Financial Services Providers (particularly Banks and insurers), consumers do not have a battery of corporate lawyers on the payroll. In fact, there is a significant financial barrier to accessing legal representation for many Australians.

Although we understand the concept of 'user friendly' EDR schemes which assumes consumers are unrepresented and are therefore largely costs neutral, the hobbling of consumer legal representation does not work in practice because it creates an inherent resource imbalance: Financial Services Providers are routinely directly represented by articulate advocates with legal training.

Financial Services Providers also routinely obtain expert evidence to support their position. Consumers are severely disadvantaged in those circumstances as they are often unable to fund their own expert evidence. That disadvantage is particularly stark in disability insurance claims where Financial Services Providers commission medico-legal reports which the consumer is unable to rebut as they are often surviving on no more than government welfare.

An effective legal costs structure is needed to accommodate consumers who are in need of legal help to address this imbalance. Further, greater costs consequences imposed on Financial Services Providers will also incentivize them to take a more commercial approach to settlement.

Financial Services Providers have long promoted the use of EDR schemes by consumers over litigation, despite the well understood failings of EDR schemes such as delay and lack of accountability. That support is driven in large part by their comfort that if the complaint is successful in an EDR scheme there is negligible if any costs consequences for them. This attitude results in lower or nil offers being made by Financial Services Providers through EDR processes, and therefore less matters resolving through negotiation. The result being that matters are dragged out as they need to be processed all the way to a formal determination, which in turn increases a scheme's operating costs, as well as the emotional toll on consumers who are often living with disability and minimal financial support.

This reality makes the current EDR schemes particularly unattractive prospects for consumers. It is hardly surprising that this environment leads consumers to litigation where Financial Services Providers are acutely aware of the costs pressures they face from start to finish, and are far more likely to take a commercially minded approach to quickly understand the dispute and resolve it at an early stage.

It is also concerning that many consumers participate in an EDR process in good faith whilst their statutory limitation date to commence Court proceedings may expire without their knowledge. In that regard, there is no obligation on any existing EDR scheme (nor Financial Services Providers) to warn or even notify consumers of the existence of Court limitation dates. We have seen this occur on many occasions after a consumer has spent years in an EDR scheme, often to be told that the scheme cannot determine the issues because it would require the taking of evidence on oath and cross-examination of witnesses which only a Court or Tribunal is equipped for. Where that occurs, and the court limitation has expired, we have never seen a Financial Services Provider agree to waive the limitation.

This is another important reason why lawyer involvement for consumers should not be discouraged through the exclusion of a reasonable costs regime within EDR processes, given that a lawyer's role includes providing limitation advice so that a consumer can make an informed decision about the jurisdiction they wish to engage in.

Draft recommendation 5 - A superannuation code of practice

Maurice Blackburn has been a vocal advocate for an enforceable code that sets standards of behavior and process for Group Insurance claims.

Any such Code should establish hard time limits that provide certainty for consumers.

As such, it is critical that time limits for deciding claims be considered for the Review's Final Report. It is encouraging that the Review highlighted this need in the Interim Report (page 116 etc).

FOS's current Terms of Reference provides for the following time limits:

- six years from the date when the Applicant first became aware (or should reasonably have become aware) that they suffered the loss; and
- where, prior to lodging the Dispute with FOS, the Applicant received an internal dispute resolution response in relation to the Dispute from the FSP - within 2 years of the date of that response.

The former does not always, in practice, conform with statutory time limits, which is generally 6 years from the date a cause of action arises which for example in the case of a claim in negligence is the date of loss being ascertained or ascertainable[1].

This has led, for example, FOS to provide in matters involving a loan which was alleged to have caused hardship, that the 6 years starts to run from the date the Applicant was first required to make a repayment, not the date they actually started to not be able to meet their repayments. Hence the consumer's complaint would be excluded by FOS.

We advocate for more consistency and terms favourable to consumers regarding time limits applicable to claims, by both EDR schemes and Financial Services Providers.

[1] *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514

Draft recommendation 6 - Ensuring schemes are accountable to their users

The recommendation, as it stands, does not consider greater possibility for judicial review of EDR determinations.

At present, judicial review of EDR determinations are severely limited.

The SCT is currently the most accountable model as its decisions may be appealed for review by the Federal Court on a question of law, and there are many examples of successful appeals by consumers where the Court found that the decision maker had erred and then either remitted the matter back for redetermination or decided it anew. We broadly support that model as it is critical for fairness and comparability of outcomes.

The barrier to have a FOS or CIO decision reviewed is far more onerous. Indeed, even where it can be clearly established that the EDR decision was in error, a Court may be unable to intervene. 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).

All grounds are onerous and difficult for claimants to demonstrate, evidenced by the leading cases on the issue: *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*.

Panel observation – Scheme of Last Resort

Maurice Blackburn supports the observation that there is merit in introducing an industry-funded compensation scheme of last resort.

Recoverability is a major issue for claimants. Since 1 January 2010, 34 FSPs have been unwilling or unable to comply with 136 FOS Determinations made in favour of approximately 192 consumers; and the real value of this uncompensated was as at January 2016, $16,622,513.74.

Our lengthy experience, coupled with the unwillingness or inability of FSPs to comply with FOS, lead us to supporting it as a scheme of last resort.

In the absence of such a scheme, we would advocate for FSPs' professional indemnity insurers to be required to be Members of FOS and where an FSP is unable or unwilling to comply with a Determination, that insurer to be required to meet the terms of the Determination, if they would otherwise be obliged to under the insurance contract.

The capacity to legally recover funds from non-complying FSPs or their insurers would be an important legislative option for any EDR scheme.

Furthermore, any scheme of Scheme of Last Resort needs to be retrospective to compensate for GFC losses. These losses are still being acutely felt and would play a significant role in rebuilding some of the consumer trust lost and confidence lost over recent years.

Without such retrospectively, the impact would be marginal at best, and negligible at worst over the short to medium term.

Chapter 5 - Information request

Should schemes be provided with additional powers and, if so, what additional powers should be provided?

How should any change in powers be implemented?

The current schemes, as discussed, and the proposed arrangements for discussion do not consider the interplay of claim scale and judicial pathways.

For instance, a claim of $150,000 is highly significant in the life and the future dignity of a working Australian suffering a chronic disease. But at present, the FOS scheme does not give that Citizen or their lawyer the opportunity to cross examine and test evidence – it is all done on the papers by way of written submissions.

For such a life-changing issue, and particularly for claims at $150,000 and above, a quicker, speedier and more reliable judicial process would be appropriate. The jurisdictions of tribunals would be capped and for plaintiffs to still be able to choose to use the courts should they wish to do so and for consideration to be given to legal costs recovery.