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

Dear Professor Ramsay

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

Our submission is based on three broad, critical themes relating to EDR frameworks plus responses to specific questions put in the Issues Paper. Those three themes are:

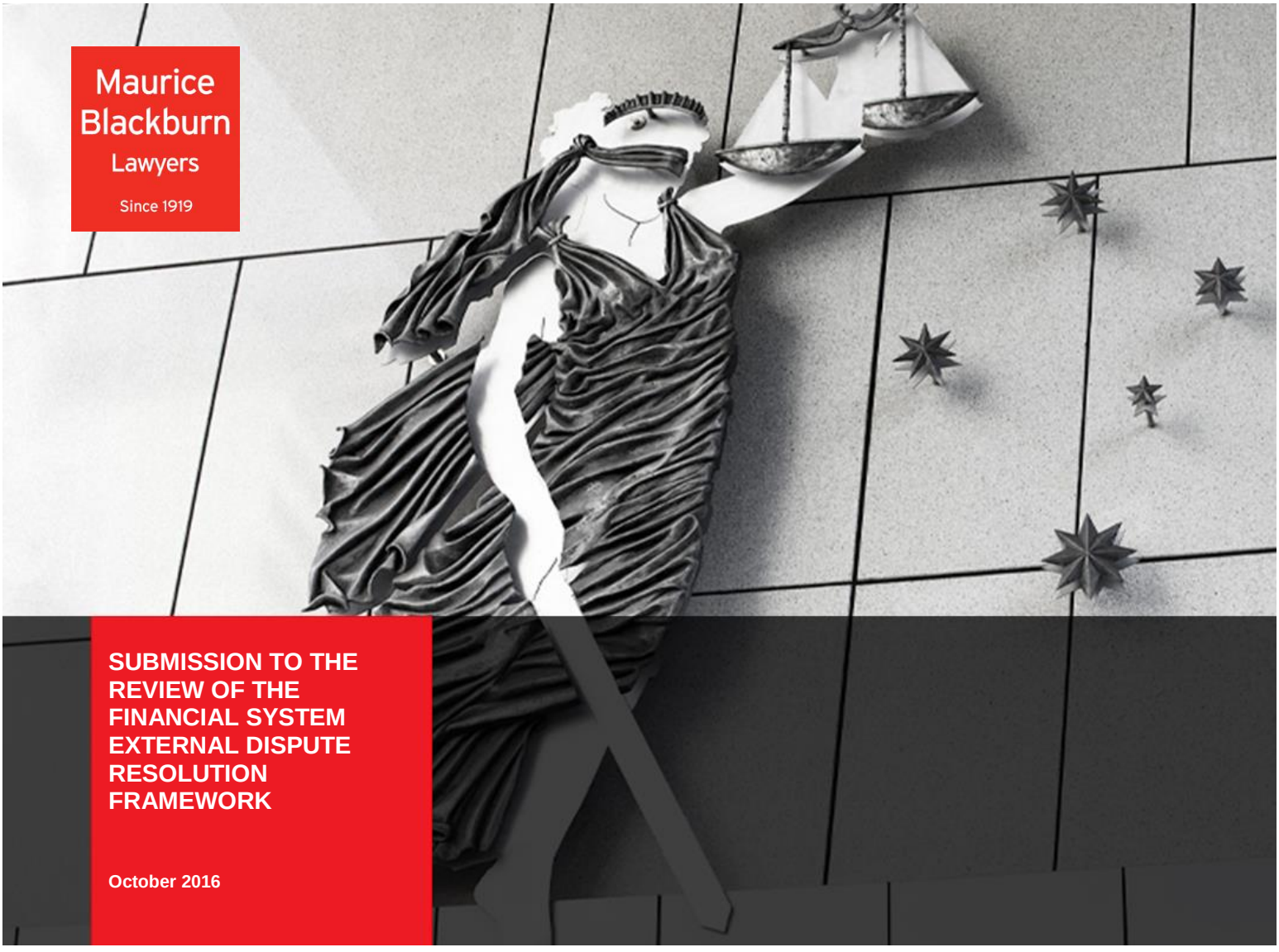
1. A new framework must lead to fair and balanced outcomes
2. Any scheme must be seen as independent, in both theory and practice, and
3. There needs to be a change in behaviour of all sophisticated participants.

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,

Greg Tucker
CEO
MAURICE BLACKBURN



Maurice Blackburn
Lawyers
Since 1919

SUBMISSION TO THE REVIEW OF THE FINANCIAL SYSTEM EXTERNAL DISPUTE RESOLUTION FRAMEWORK

October 2016

About Maurice Blackburn

Maurice Blackburn Pty Ltd is a plaintiff law firm with 32 permanent offices and 29 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

Maurice Blackburn assists more Australians every year in making TPD and other insurance claims under their Superannuation policy than any other law firm.

Through the hundreds of clients we assist, we see the best of intentions and the best of performance from Superannuation Funds and their insurers. We unfortunately also see the worst of culture and behaviours that have real and profound consequences for their members and our clients at a time they can least cope with such difficulty.

These behaviours largely involved dispute resolution processes, including current EDR structures and through our Courts.

Introduction

Every day, Maurice Blackburn advises clients on their options when they have a dispute with a Financial Services Provider. Where they have the basis to pursue their complaint with the Superannuation Complaints Tribunal, we typically advise our client not to. .

And this is not done on the basis of inclination or personal preference. Our lawyers have a specific responsibility to put their clients' interests first.

This advice and experience should not be considered as opposition to the principle and operation of EDRs – far from it.

We have specific concerns relating to the current system of EDR mechanisms and the significant reform that is required to ensure the interests of our clients and consumers more generally are protected by EDR arrangements.

Given the Prime Minister's comment that his Government is "working towards … one tribunal that deals with consumer claims in the most cost-effective and speedy way to get these matters resolved", we strongly encourage the Panel to spend the time to get the model right at the start.

This is too important to the Australians we represent every day to do otherwise.

Key themes

There are three key themes that sum up our overall view on the EDR framework.

Theme 1 – A new framework must lead to fair and balanced outcomes

We wholeheartedly concur with the sentiment in the Issues Paper that "consumers should be treated fairly and financial products and services should perform in the way consumers are led to believe they will. Consumers should be expected to accept their financial decisions, including market losses, when they have been treated fairly."

Equally, we submit that EDR scheme processes ought not place too great a burden on aggrieved consumers to prove they haven't been treated fairly.
Rather, consumers should be aided by EDR staff to develop and articulate their complaints which ought then be put to Financial Services Providers for their response and rebuttal if they deem it appropriate.

As consumer advocates, our daily experience with EDR schemes is often one of frustration due to a combination of low success rates and settlement offers relative to court (particularly in the SCT), jurisdictional hurdles, monetary caps, and other factors explored below.

We have consistent and regular examples of insurers treating people badly – and many relate to Maurice Blackburn's clients. Here are some examples from national media earlier this year:

> *March 2016 – Australian Financial Review*
> *"The former chief medical officer of Commonwealth Bank of Australia's life insurance division has pointed to a culture where doctors are pressured to alter or delete medical records and opinions to allow CBA to avoid paying claims…*
> *CBA's insurance division CommInsure has also failed to pay out the claims of two of the bank's former staff members, who were too sick to work at the bank but were told they should be able to work somewhere else."*
>
> *March 2016 - Australian Financial Review*
> *"The joint investigation found that CommInsure has been denying heart attack claims by deliberately using an outdated definition buried in the policy.*
> *…It also found the way it approaches mental health issues and assesses potential policyholders leaves a lot to be desired.*
> *…Other revelations include the refusal to pay total permanent disability (TPD) and terminal illness claims on the chance that a dying person facing organ failure may have their life saved by a transplant. A person can claim their life insurance if they are declared terminally ill by two doctors and deemed likely to die within 12 months."*
>
> *April 2016 – The Australian*
> *"Commonwealth Bank's embattled life insurance arm, CommInsure, repeatedly misrepresented a consultant as a doctor although he did not have a medical degree…*
> *The Australian has obtained details of three disability insurance claims in which CommInsure incorrectly described Sydney psychologist Greg Fathers as a "doctor" and asked clients to attend him for examination. CommInsure rejected two of the three claims…*

These news stories relate to real people who should represent the key beneficiaries of any reforms.

And 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.

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.

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.

Theme 2 - Any scheme must be seen as independent, in both theory and practice

Whilst FOS and the CIO are incorporated bodies funded by a base and user pays levy on industry, the SCT is established by legislation[1] and funded via ASIC.

Both models have their own pros and cons; however we observe that non-government bodies may be perceived as being too closely connected to industry, from whom they recruit many of their staff and Board members, and are therefore too susceptible to influence. That risks undermining the presentation of the schemes as independent.

Furthermore, the Board structure is inconsistent with public perceptions of independent tribunals and courts.

More generally, having Financial Service Providers that sit on the Board are conflicted whenever they are required to decide on industry levy arrangements. Such a conflict does little to encourage consumer confidence in the institution.

The Government funded and regulated SCT model should be supported, however such a forum can only work if it is sufficiently resourced.

Theme 3 - There needs to be a change in behavior of all sophisticated participants

For some time, Maurice Blackburn and its peak group, the Australian Lawyers Alliance, have been advocating for an enforceable Code of Practice to be developed to regulate the conduct of the insurance and superannuation industries.

The above examples clearly indicate that a self-regulated code will be insufficient, and will represent a wasted opportunity to effect genuine change in the industry.

Behaviour and culture needs to change, but a floor needs to be put under sophisticated participants to create this new start.

This proposed Code should ensure that these industries operate in an ethical and fair manner. It should be developed through an open and transparent process, involving genuine consultation with both community representatives and industry groups.

[1] Superannuation (Resolution of Complaints) Act 1993

Specific responses to Discussion Paper

The below are selective responses to the questions and where relevant, the points made in the preceding paragraphs in the paper.

2. 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?

There needs to be confidence in any new scheme. The proposed principles are adequate, but we are concerned that the specific principle of "comparability of outcomes" is a lesser substitute for "fairness".

More generally, as our elected representatives often ask out loud – 'does it pass the Pub Test?'

The only addition would be whether there needs to be commitment to build confidence in the new arrangements. As stated earlier, such an outcome is important for engagement and operational effectiveness and can only be achieved if perceptions of independence are managed, and there is symmetry in legal advice and representation.

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

The proposed Code, as suggested above, directly highlights specific issues relating to complaints in Group Insurance Schemes.

Common tactics employed by some insurance companies include delaying decisions, changing definitions to new definitions inconsistent with the SIS Act, and unreasonable conduct in providing documentation.

The Code would ensure that the objectives of the SIS Act and the Insurance Contracts Act 1984 (Cth) are met. ASIC's Regulatory Guide 165 regarding time limits for internal dispute resolution should also be reflected in the Code. Consistent with the above concerns, the definition of Permanent Incapacity should reflect that found in the Superannuation Insurance (Supervision) Regulations 1994 (Cth), extracted above.

The Code would regulate conduct of insurance companies and regulators in assessing claims. It would agree to the fair and reasonable exchange of documentation relied upon in assessing claims. It would include hard time frames. Claims would be assessed in a timely manner and avoid excessive delays. Any delays in assessing claims due to their complexity would be agreed between the parties.

Any claim that is not assessed within a reasonable period of time after an internal complaint is lodged would be assessed in line with ASIC Regulatory Guide 165.

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

Our experience in the IDR complaint process is that such complaints are almost always declined or ignored by the Financial Services Provider, and our success rate in taking such matters further through EDR or Court prove the incorrectness of the Financial Services Providers approach. The impression is that Financial Services Providers see IDR not as an opportunity to resolve a dispute on terms, but to defend its position and wait to see if the consumer has the wherewithal and resources to take them on further.

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

Paragraphs 53 and 56 discuss the current governance of FOS and CIO and the fact that funding comes from their members but the budget is set by the member representatives. As stated earlier, this does not create a sense of independence and therefore undermines confidence.

Paragraph 61 notes that "parties do not have an automatic right to legal representation; this needs to be approved by the SCT". But obviously the Superannuation Fund, the Financial Services Provider or the Insurer will have lawyers advising them, and likely have lawyers representing them.

Paragraph 62 notes one of the biggest problems relating to SCT complaints - "it will take at least 12 months to get to review". For working people with a TPD Claim, they typically are unable to wait 12 months, let alone 12 weeks given the stretched financial situation they will be in . By contrast, the insurer or Superannuation Fund is able to wait years, and are often happy to do so.

By contrast, most workers compensation schemes require a decision within weeks despite the TPD claims often involving similar types of injuries.
Paragraph 66 notes that "the SCT has limited powers. For example, it is unable to provide a remedy for complaints about the design of a fund. In carrying out its review, it also is not able to exercise its powers in a way which is contrary to the relevant trust deed or insurance policy".

Given Maurice Blackburn's experience with a range of extraordinary failures by Insurers, it is frustrating to think that a well functioning EDR scheme could deal with repeated poor behavior and not have any mechanisms to address behavior in a regulatory or systemic sense. To that end, the SCT ought to report systemic failings to ASIC for investigation, as is the case for FOS and the CIO.

Relating to the Panel's principles and outcomes, such limited powers are far from efficient nor does they put downward pressure on regulatory costs.

Finally, as stated above, although the government regulated model is preferable for independence (perceived and actual), structure and accountability, such a forum must be adequately funded, which the SCT has evidently not been for many years - if ever. We believe aspects of the user pays levy, which incentivizes good industry conduct, can and ought to be applied to the Government regulated model.

17. To what extent do EDR schemes and complaints provide an effective avenue for resolving consumer complaints

Our reservations in relation to the FOS are multiple.

Firstly, matters may take as long or even longer through FOS than Court. In our experience, a Dispute is actually less likely to resolve through FOS than Court – this may be because there is less incentive for an FSP to settle because their cost exposure is lower and because they generally do not engage external lawyers

There are differing levels of experience between case managers and Ombudsman in addition to the lack of established precedent, which means decisions can be inconsistent.

Consumers may not be aware that by pursuing their matter through FOS they may be prejudicing their ability to pursue it through Court because the Statute of Limitation dates continue to run while the dispute is with FOS, and it could expire while they are at FOS.

FOS can take a different approach to quantification than Courts which may in fact be less favourable than a judge would award, for example the cap on consequential losses is $3,000 whereas hypothetically an Applicant could be awarded a far greater amount by a Court.

If a matter is complex and the Applicant engages a lawyer they will generally not be able to recover their costs whereas costs form part of a Court claim. More generally, there is a cap on compensation for general damages.

FOS does not have the powers of cross examination of a Court so where a dispute hinges on evidence from witnesses it may not be an appropriate forum, and it may therefore decline to investigate certain disputes, because its ability to determine probity by oral examination is too limited.[2]

Nevertheless, FOS clearly has an important role and provides the opportunity for consumers to pursue complaints that would be uneconomical or unviable through Court.

There are also a number of issues relating to jurisdictional limits and caps.

FOS's 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[3].

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

Further, FOS's terms of reference currently provide for both jurisdictional caps, and compensatory caps.

The former refers to the maximum value of a dispute FOS will consider. For most disputes, FOS will not consider it if the claimed quantum is more than $500,000.

The latter refers to the maximum amount that FOS can actually award claimants. For most disputes, it is currently $309,000. Consequential losses (e.g. inability to pay a loan because of financial stress) and legal costs are capped at $3,000.

[2] See for example, Determination 206609: https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/206609.pdf.
[3] *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514

We would advocate for these to be unlimited.

Historically it appears these limits were imposed because it was assumed that FOS did not have expertise to deal with high value claims. There is no reason, in the current financial landscape and given the breadth of FOS's Terms of Reference (e.g. it can require an FSP to provide an expert report), to enforce these arbitrary limits.

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

As stated earlier, there are advantages to an arm's length scheme without representatives on the Board and the budget is set independently to the participants – and ideally funded from consolidated revenue.

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

Possibilities for judicial review of EDR determinations are severely limited and are a cause for great concern.

The SCT is 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

The Applicant had lodged a Dispute with FOS against a decision made by the FSP, a life insurer, to cease paying him income protection benefits. The insurer had unilaterally altered the contract to provide that if an insured was eligible for payment of TPD, their IP entitlement would cease. They then accepted the Applicant TPD claim without notifying him first of the alteration to the policy.

FOS decided that his Dispute was out of time having been lodged more than 6 years after the Panel said he ought to have been aware of his loss, and therefore excluded it.

The Court found that the Panel chair erred in law in his construction of clause 14.1(p) of the Terms of Reference as it existed then, which specified that FOS could not deal with Disputes lodged more than 6 years after the Applicant was aware of the loss, however that did not vitiate FOS's decision. The Panel Chair believed that the Applicant could not succeed in his claim because of the wording of the policy, therefore FOS did not have jurisdiction to determine whether it could succeed. The Court held as follows:

> *In one sense, the Panel Chair's error may be described a jurisdictional error in that it went to the question of whether FOS had jurisdiction under clause 14.1(p) to determine the dispute in the circumstances which obtained. In the sense which matters for the purposes of clause 15.3 [which provides that the decision of the Panel Chair is final], however, it was not a jurisdictional error but rather an error made in the exercise of jurisdiction or more accurately within the ambit of decision-making power conferred on the Panel Chair by clause 15. That is to say, the Panel Chair was not guilty of fraud or lack of good faith; he was not prejudiced; and he did not misconceive the task which he was required to undertake. He simply made an error in the process of reasoning which he adopted in the execution of his decision making responsibility.*

The Court accordingly held that error, although it was an error of law, was not reviewable, and the Applicant failed.

· *Goldie Marketing Pty Ltd & Ors v FOS Ltd & Australian and New Zealand Banking Group Ltd* [2015] VSC 292

The First Plaintiff was a manufacturing company that had lodged a dispute with FOS regarding the provision of financial facilities by the Second Defendant to it, totalling over $8,000,000. The other Plaintiffs, directors of the company, were guarantors. The Dispute was lodged because the Plaintiffs defaulted on the loans and the Second Defendant cancelled the facilities.

FOS made two decisions to exclude the Dispute:

1. in April 2014, because the Dispute was outside the Terms of Reference because the First Plaintiff was not a small business in the terms of Terms of Reference; and
2. in November 2014, that a Court was a more appropriate forum, pursuant to Terms of Reference clause 5.2(a).

The Plaintiffs challenged the decision made in November 2014 in view of a conversation they had with one of FOS's Ombudsmen, on 22 October 2014. The Plaintiffs recorded that conversation in which the Ombudsman said that FOS had a temporary staff shortage which meant it did not have the resources to deal with the Dispute and that was why it was excluded. That was contrary to a file note and written reasons provided by the Ombudsman, which provided a number of other reasons including a lack of in-house expertise, that FOS could not take statements from witnesses nor require third parties to produce documentation, that the Plaintiffs had legal representation so could be assisted through Court, and because of the compensation cap. The Ombudsman did not deny that the file note did not accurately reflect the conversation.

Despite these factual circumstances, the Court found that the reasons provided by FOS or even simply staff shortages was sufficient for it to exercise its jurisdiction to exclude the dispute because FOS's discretion was very wide. The Court concluded that a decision of FOS could only be disturbed if FOS acted in bad faith, was biased, or the decision was so unreasonable that no other decision make could have come to that decision.

Questions – Triage service 35. Would a triage service improve user outcomes?

It could, but only if delay is addressed. This presumably will be a mix of resourcing, process design, personnel and roles, and legislative design all requiring change.

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

No.

The earlier discussed problems of perception of independence (or lack thereof) would be compounded, and the incentives to resolve disputes in a fair and timely manner will be absent.

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

An additional forum on top of the three in existence would likely cause more confusion for consumers in navigating their dispute to the appropriate forum. We are aware of cases where consumers have wasted many months seeking to establish jurisdictional entry into one EDR scheme only to be told to go to another.

Any new entity ought to be a result of consolidation and simplification, and as above ought to be subject to rigorous regulatory and judicial oversight to ensure accountability and independence.

Any new tribunal should not be limited to just banking products. Recent scandals show that it is just as important with insurance products and superannuation funds.

43. If a tribunal were desirable:
• should it replace or complement existing EDR and complaints arrangements?
• should it be more like a court (judicial powers, compulsory jurisdiction, adversarial processes and legal representation)?
• should it be more like current EDR schemes (relatively more flexible, informal decision-making and processes)?
• how should the jurisdiction of the tribunal be defined?
….
• should its jurisdiction only be available in the case of disputes with providers of banking products?

The capacity to appeal decisions on points of law is critical for confidence and fairness.

Legal representation should be symmetric, and as stated earlier, it is unrealistic to think the strategy, tactics, presentation and engagement of Banks, insurers and other financial service companies won't be based on high quality legal advice.

On the issue of cost awards, SCT can't award in favour of a consumer costs, but as argued above, it should have the power to do so where the issues are of sufficient complexity to warrant representation or it is necessary for some other reason such as vulnerability due to illness.

In relation to FOS Terms of Reference, clause 9.4 provides that FOS may decide that the Member contribute to the legal or other professional costs or travel costs incurred by the Applicant in the course of the Dispute, but such an award is capped at $3,000, unless exceptional circumstances apply.

This makes it unviable for many claimants with complex cases necessitating legal assistance to use the EDR schemes, and hence steers them towards court.

There are also important considerations regarding interest.

FOS Terms of Reference clause 9.5 provides that FOS may decide that the Member pay interest on a payment to be made by it to the Applicant. When deciding an award of interest:

- if the *Insurance Contracts Act 1984* applies - FOS will calculate interest in accordance with that Act;
- otherwise:
  - FOS will calculate interest from the date of the cause of action or matter giving rise to the claim; and
  - FOS may have regard to any factors it considers relevant, including the extent to which either party's conduct contributed to delay in the resolution of the matter.

Our experience is that FOS is very conservative in awards of interest, particularly in financial advice disputes where it has often ordered interest at no greater than CPI when in fact the claimant could have invested their funds at much greater yield if they had received proper advice. Hence FOS is too reluctant to apply a 'counter factual' loss quantification approach

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?

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 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.