

The Manager,
Financial Services Unit,
The Treasury,
Langton Cres.,
Parkes ACT 2600

Dear Sir/Madam,

This submission is made in a personal capacity and in response to the consultation paper on the above topic issued by Treasury on 17 May 2017. I have also seen a copy of the draft legislation.

It is a relief that the draft proposed legislation retains appeals to the Federal Court for all parties involved in superannuation disputes. Superannuation is still a relatively new and emerging concept where, among other issues identified in my earlier submission to Treasury in response to the Ramsay report, guidance on legal questions from court decisions remains an important aspect for the stability and future development of the industry. I would be strongly opposed to any suggestion that appeals to the Federal Court on superannuation issues should not form part of the proposed ADR regime.

However concerns remain that other financial institutions involved in the proposed dispute resolution system will not have legislated court access to appeal Ombudsman decisions limited to the resolution of questions of law. I refer to my original submission in which it was recommended that consideration be given to permitting financial institutions limited appeal rights provided that they met the costs of the consumer, as determined by the court, regardless of outcome. I adhere to that view. The fact that the financial institution would need to meet the consumer's costs regardless of outcome and that appeals are limited to resolving questions of law only would ensure only the most deserving cases are appealed. By their nature ADR processes are based on undertaking administrative review with regard being had to the law. Clearly however Ombudsmen do not have the authority of the courts in interpreting the law. Given, among other issues, the proposed jurisdictional increase in the sums which can be the subject of dispute it is important that where uncertainty as to the law may exist that there be access to having an authoritative and binding resolution determined. The only way in which this can be achieved is by access to the courts. Since courts can be relied upon to act impartially neither the consumer nor the financial institution would be disadvantaged, and both would be positively advantaged, by making provision for institutions to appeal decisions on the limited basis outlined. My recommendation would further ensure that a somewhat more level playing field for all parties is retained (with no adverse cost implications for the consumer) since, as is currently the case and remains so under what is proposed, the consumer retains the right to reject an Ombudsman decision and proceed to court to have both factual and legal issues determined, whereas the financial institution has no such inherent right.

Not making provision in the proposed legislation for limited appeals for financial institutions leaves uncertainty as to whether, and if so on what basis, the courts may be prepared to intervene should a financial institution seek court access to review an Ombudsman decision. Uncertainty as to the courts' approach, as identified in differing NSW and Victorian court decisions referred to in my previous submission, remain. Given in particular the intervention of legislation into what had previously been an ADR system governed by private contract, it may transpire to be the case that on the basis of addressing the public interest, the courts would ultimately permit financial institutions full access to have Ombudsmen decisions reviewed. If that was to be the outcome it may stand to undermine the proposed ADR system in as far as it contemplates that Ombudsman decisions with respect to findings of fact are final and binding. Accordingly, it would be advantageous to the Ombudsman, the parties to a dispute, as well as being in the public interest, if a resolution on this important, albeit limited, aspect was to be addressed in the proposed legislation.

Yours truly,
Graham McDonald

Inaugural Australian Banking Ombudsman (1990-94)
Chairman Superannuation Complaints Tribunal (2000-2007)
Presidential Member Federal AAT (1988-2010)