RESPONSE TO INTERIM REPORT

REVIEW OF FINANCIAL SYSTEM EXTERNAL DISPUTE RESOLUTION AND COMPLAINTS FRAMEWORK 2016

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VICTIMS OF FOS [www.victimsoffos.com]

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REVIEW OF FINANCIAL SYSTEM
EXTERNAL DISPUTE RESOLUTION AND COMPLAINTS FRAMEWORK
2016

RESPONSE TO INTERIM REPORT BY THE COMMITTEE OF VICTIMS OF FOS

27 January 2017

1. EXECUTIVE SUMMARY

Victims of FOS (**VOF**) is a group of investors in registered managed investment schemes dedicated to achieving a fair dispute resolution and compensation scheme for retail investors who have suffered losses as a result of investment in managed investment schemes.

VOF believes that there are three mutually supporting pillars in the proper governance of managed investment schemes:

- Licencing and Oversight;
- Internal Control and Direction; and
- Dispute Resolution and Compensation.

VOF has concluded that the current alternative dispute resolution procedures, involving FOS and COI are unjust and unsatisfactory, based on recent experience, and weaken the whole structure.

VOF agrees with the "Principles Guiding the Review" (Interim Report, 29).

It is the experience of VOF that FOS fails to meet the principles espoused by the Review:

Efficiency

- FOS processes take many years and are expensive for investors;
- FOS is more expensive to operate than VCAT[1];
- FOS cannot comment on the adequacy of supervision by ASIC;
- FOS is not well informed about accounting or financial product and service disclosure and this makes disputes longer than necessary;

Equity (and, the Review could well have added, the apprehension of equity)

- FOS is funded by financial product and service providers, with the larger product providers paying the majority of the cost, so there is no appearance of fairness;
- FOS, with the approval of ASIC, sets its own terms of reference, excluding many grounds of dispute, without parliamentary supervision;
- FOS ombudsmen and adjudicators are not independently appointed – FOS appoints them;
- FOS protects financial product providers to the detriment of investors;
- FOS is not required to and does not deliver fair process;

[1] Victorian Civil and Administrative Tribunal

Complexity

- FOS is not well informed about portfolio construction theory, financial product performance measurement and financial planning practice and, as a result, an applicant must produce material to educate FOS in these matters;
- FOS decisions are based on written submissions, which are complex to assemble, and the onus is on the applicant to produce the factual material, so professional advice (usually financial expertise or legal advice) is a requirement for success in a substantial dispute in FOS;
- FOS does not apply consistent rules for the types of information to be considered in different classes of dispute and makes requests for evidence in the course of consideration of disputes which are onerous on the applicant;

Transparency

- FOS can and does base decisions on internal (often ill-informed) opinion, not tested by the parties;
- FOS is not required to deliver reasonable decisions and, in fact, delivers decisions that are unreasonable;
- FOS decisions are patently inconsistent in material respects;

Accountability

- FOS decisions cannot be reviewed (except in the rare case of Wednesbury Unreasonableness);
- FOS ombudsmen and adjudicators cannot be removed except by FOS;
- Complaints about FOS are handled by FOS;
- FOS sets its own fees and charges and the remuneration of its staff and is not financially accountable even to its financial backers, as all its members are conscripts via the AFS Licence regime (and this will be made worse, if there is no choice of ombudsman);
- ASIC has complete discretion in setting or agreeing to the terms of reference of FOS and there is no accountability for the terms of reference, by which all applicants (and members) are bound, whether they like it or not.

The courts have held that, like the AFL Tribunal, disputes in FOS and COI are regulated by a three-way contract involving FOS or COI, the financial service provider and the consumer. However the consumer has no say in the constitution or terms of reference of FOS or COI. FOS and COI are unaccountable for the quality of their decisions, which may have grave financial consequences for investors and retirees.

When the legislation for managed investment schemes was introduced, it was decided that a tribunal for arbitrating disputes was not required at that time. VOF believes that the time has come to abolish FOS and COI and introduce a tribunal for disputes in the financial services industry modelled on the successful Victorian Civil and Administrative Tribunal.

From the limited analysis done by VOF it appears that, provided the tribunal deals only with ‘retail clients”, as is currently the case with FOS and COI, the tribunal would not be a net cost to the taxpayer, taxpayer funding being recovered by a levy on participants (licensees) in the financial services industry, comparable to the current membership fees for FOS and COI.

2. INTRODUCTION

Victims of FOS (**VOF**) is a group of investors in registered managed investment schemes dedicated to achieving a fair dispute resolution and compensation scheme for retail investors who have suffered losses as a result of investment in managed investment schemes. While members of VOF have suffered unjustly in FOS cases, VOF is seeking systemic change and not redress for its members.

VOF made a submission to the Review dated 30 August 2016. This submission was apparently not considered by the Review. After the publication of the Interim Report dated 6 December 2016 (**Interim Report**), VOF enquired via the website and was informed by "EDR Review Secretariat" that the submission could not be considered as it was submitted too early. This submission updates and replaces the earlier submission.

In the view of Victims of FOS, there are three pillars to governance of managed investment schemes (and, perhaps, financial services more generally):

- Licencing and Oversight;
- Internal Control and Direction; and
- Dispute Resolution and Compensation.

These three pillars are mutually supportive. For example, the dispute resolution process should identify systemic issues with internal controls, such as lack of adequate financial product disclosure or failures of internal compliance systems, and problems with oversight, such as inadequate surveillance, lack of guidance or defective licence conditions. On the other hand, ASIC compliance activities can enhance the quality of internal controls, for example, the issue by ASIC of RG 46 in October 2008 eliminated doubtful practices of responsible entities of unlisted property trusts involving related party loans.

In the experience of VOF, the current dispute resolution and compensation system is unfair, is not subject to proper supervision and is undermining confidence in the financial services industry for the reasons set out below. VOF advocates replacement of the ombudsman system with a tribunal modelled on the Victorian Civil and Administrative Tribunal, for the reasons set out in this submission.

3. BACKGROUND TO FOS AND COI

There are two streams in the history of the ombudsman concept. Let's label them the "Government Ombudsman" tradition and the "Industry Ombudsman" tradition. The Australian and New Zealand Association of Ombudsmen distinguish the former as dealing with complaints from citizens about the actions of public sector agencies and the latter as dealing with complaints from consumers about goods and services.

Although the modern use term "ombudsman" originated with the Swedish Parliamentary Ombudsman in 1809, this submission is concerned with the Industry Ombudsman tradition, from which FOS and COI have grown – and, perhaps, outgrown.

The first Industry Ombudsman established in Australia was the Australian Banking Industry Ombudsman, set up in 1990 by the Australian Banking Association. The Banking Industry Ombudsman is now part of FOS. The Banking and Financial Services Ombudsman (as it was then) was approved by ASIC in September 2001 under the new Corporations Act as an "*approved external dispute resolution scheme*" for providers of financial services under the newly created Australian Financial Services Licence (AFSL). Shortly afterwards the name was changed to the Financial Industry Complaints Service.

The court also found that the scheme had an obligation to grant procedural fairness.

The Credit and Investments Ombudsman was established by the Mortgage Industry Association as the Mortgage Industry Ombudsman Service on 18 June 2003. Following the establishment of the Australian Credit Licence (ACL) under the Corporations Act in 2011, the service adopted the name Credit and Investments Ombudsman on 17 February 2014.

COI is also an external dispute resolution scheme approved by ASIC under the Corporations Act.

Originally, an Industry Ombudsman resolved disputes according to a voluntary code of practice adopted by progressive or right-thinking participants in an industry, grouping together to promote consumer confidence in the industry. In essence, the group offered the dispute resolution service as a "free giveaway" with their products or services.

Every holder of an AFSL or ACL is required to be a member of an external dispute resolution service approved by ASIC – that is, either FOS or COI. The Review has recommended that there be only one "choice" of ombudsman. The structure is similar to the Telecommunications Industry Ombudsman (TIO), where the *Telecommunications (Consumer Protection and Services Standard) Act 1999* (Cth) requires all eligible carriage service providers to be members of the TIO.

However, an important difference between the TIO and the ombudsman proposed by the Review is that the terms of reference of the TIO are set out by Parliament in the Act, subject to directions by the Minister under section 128(9), which may be disallowed by either house of parliament under the *Legislation Act 2003* (Cth). The parliament has no such ability to scrutinise the terms of reference of FOS, having delegated this completely to ASIC. This reduces the accountability of FOS.

If there is a statutory requirement for participants in an industry to be members of an approved ombudsman service, this creates a hybrid situation. The ombudsman is owned and funded by the members of the industry group but the jurisdiction and terms of reference of the ombudsman are approved by parliament or a government authority and, as set out below in the case of FOS and COI, the "code of conduct" is not a code developed by the industry but a statutory consumer protection regime (note that, through the terms of reference, FOS, with the approval of ASIC, can determine the types of disputes under the regime that FOS will or will not deal with).

Importantly, ASIC has itself recognised that the process has become one of resolution of disputes and not dealing with complaints. The title of the relevant regulatory guide[2] has been changed from "Complaints Handling" to "Internal and External Dispute Resolution". While an ombudsman may be an appropriate vehicle for handling complaints, resolution of disputes requires the ability to make and enforce determinations or judgements (always allowing that the parties may settle the dispute before this point arrives).

4. LEGAL CHARACTER OF FOS AND COI

The legal character of the ombudsman service is a question of enormous consequences for participants and the ombudsman service itself –

(a) if the ombudsman service is a tribunal, the determinations of the ombudsman service are subject to judicial review; whereas

(b) if the ombudsman service is a contractual obligation like the AFL Tribunal, the determinations of the ombudsman service are subject to review only in the event that the

[2] ASIC RG 165, previously PS 165

> determination is so unreasonable that no reasonable ombudsman could have decided in that way (Wednesbury Unreasonableness) on the available evidence – an extremely high hurdle for any dissatisfied participant.

In 2004, the Supreme Court of NSW[3] found that the Financial Industry Complaints Service was exercising powers of a public nature and its decisions were subject to review on the basis that:

- the federal government had appointed a substantial number of board members;
- the federal government appointed two-thirds of any panel;
- the scheme was constituted in compliance with an ASIC policy statement;
- the scheme was established under the umbrella of a regulation made under statute by the executive government; and
- failure to comply with a decision of the scheme could result in the cancellation of a licence and prosecution.

The Appeal Court of the Supreme Court of Victoria since addressed this matter directly[4] and, in the light of the current structure of FOS, came down in favour of the AFL Tribunal model, stating that the case "falls squarely within the line of authority identified in *Carlton Football Club*[5] … "(88). The Supreme Court held that an applicant in FOS enters a "tripartite agreement" with FOS and the respondent in the complaint (87).

However, the applicant has no say in the terms of that contract. The respondent is a member of FOS and has subscribed to the constitution and terms of reference. FOS itself has compiled the terms of reference and put them to ASIC for approval. Only the applicant has no influence over the rules of the game.

There is no Parliamentary review of the terms of reference, which exclude many types of disputes.

There are two important public policy differences between the circumstances of the AFL Tribunal and FOS and COI.

First, the AFL Tribunal is making determinations under the rules of a sporting code. That is, the participants in the sporting code have both settled on the rules and set up the tribunal to make judgements on specified matters according to the rules. By contrast, FOS and COI are making judgements under a statutory code – the statutory consumer protection provisions[6] applicable to the financial services and credit industries. That is, in a way that cannot be said of the AFL Tribunal, FOS and COI are performing a judicial role, determining civil disputes and making awards of compensation under a statutory code laid down by the Parliament.

However FOS and COI, with the approval of ASIC, can decide which bits of the statutory consumer protection code they deal with and which types of disputes must be dealt with elsewhere.

VOF strongly believes that consumers seeking redress for substantial losses from investments deserve something better than an equivalent of the AFL Tribunal.

In a letter to the Parliamentary Joint Committee on Corporations and Financial Services on 24 July 2014, the chairman of the VOF Committee stated:

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[3] *Masu Financial Management Pty Ltd v FICS and Julie Wong (No 2)* [2004] NSWSC 829
[4] *Cromwell Property Securities Limited v Financial Ombudsman Service Limited & Ors* [2014] VSCA 179
[5] *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546
[6] *Corporations Act 2001* (Cth), Division 2 of Part 2 of the *Australian Securities and Investment Commission Act 2001* (Cth) [inherited from the Trade Practices Act], *National Consumer Credit Protection Act 2009* (Cth)

> The code which is overseen by FOS is no longer a voluntary industry code. It is the statutory consumer protection provisions of the Corporations Act and the ASIC Act. The government has effectively delegated to FOS and COSL the majority of disputes under the consumer protection provisions of the Corporations Act and the ASIC Act.
>
> There has been no overarching review of the role and status of FOS and COSL, since the advent of the Australian Consumer Law in January 2011, when all consumer protection related to financial services was incorporated in the ASIC Act.
>
> The Commonwealth Law Reform Commission produced the report "Collective Investments: Other People's Money" in 1993. This report led ultimately to the *Managed Investments Act 1998 (Cth)*. The report stated at point 26 of the Summary (emphasis added):
>
> > *Recent legislation introduced into the Federal Parliament would establish a complaints tribunal for the superannuation industry. A similar measure for collective investment schemes generally is not needed at this stage. However, each scheme operator should have to have an appropriate internal mechanism to try to resolve any misunderstandings or disputes which might arise.*

Secondly, applicants in FOS or COI disputes have not voluntarily placed themselves in a position of being subject to a determination by the ombudsman. This should be contrasted with the professional player for an AFL club, who knows that every player in the code is subject to the jurisdiction of the tribunal. The position of the player is comparable to that of the holder of an AFS Licence participating in the financial services industry, who understands that a condition of the licence is membership of COI or FOS. The investor applicant is in a position more like a member of the football crowd.

In the "tripartite agreement" held to exist by the Supreme Court of Victoria, one party is less equal than the other two.

Example of how the rules are biased in favour of larger members of FOS and COI:
A dispute about the overall management of a managed investment scheme is explicitly excluded under the terms of reference of FOS and COI. That is, no matter how negligent or even fraudulent is the mismanagement of the scheme, a dispute cannot be brought by a consumer on the grounds of that mismanagement.

As foreshadowed by the original Law Reform Commission Report on managed investment schemes, the time has come for change.

5. FINANCING OF FOS AND COI

FOS and COI are financed by subscriptions from their members, the holders of Australian Financial Services Licences and Australian Credit Licences under the Corporations Act. The membership subscription increases with the size of the member's business. Members also pay a fee for each dispute considered by the ombudsman service.

Applicants do not pay for the service.

FOS and COI usually exclude wholesale clients, as defined in the Corporations Act. Wholesale clients include professional investors, high net worth investors, and highly experienced investors. VOF accepts that the cost of compulsory external dispute resolution for retail investors may increase substantially if it is not restricted to retail investors. Further, it is arguable that wholesale investors are better placed to take legal action and the costs of legal action are not prohibitive for the larger losses of wholesale investors.

Although there are limited provisions for the member of FOS or COI to contribute to the legal professional or travel costs of an applicant in a dispute, such an award is limited to $3,000 in other than exceptional circumstances and, in any case, such costs awards are very infrequent.

Since holders of an Australian Financial Services Licence or Australian Credit Licence are required to belong to FOS or COI, the annual subscription is in the same cost category as an annual fee to renew the licence. Of course, the cost of maintaining FOS and COI is ultimately borne by the consumers of products and services provided by licensees, since the capital, investment income or interest payments of consumers are the sole sources of revenue for the financial services sector.

VOF objects to the financing structure of FOS and COI. As the major financial backing is provided by the larger service providers, the perception easily arises that FOS and COI are reluctant to bite the hand that feeds and tend to favour the big end of town. When a key purpose of the whole ADR system is to shift the balance of power towards consumers, this is a fatal flaw.

6. VOF EXPERIENCE OF FOS

Based on the experience of members of Victims of FOS, the following problems are endemic:

- FOS protects responsible entities to the detriment of investors;
- FOS processes take many years and are expensive for investors;
- FOS is not well informed about accounting and financial product or service disclosure;
- FOS is not well informed about investment theory and financial planning practice;
- FOS bases decisions on internal (often ill-informed) opinion, not tested by the parties;
- FOS does not deliver fair process;
- FOS delivers decisions that are unreasonable;
- FOS decisions are patently inconsistent in material respects;
- FOS cannot examine the adequacy of supervision by ASIC; and
- FOS decisions cannot be reviewed (except in the rare case of Wednesbury Unreasonableness).

Case studies in which these problems are manifest are set out in the attached letter from the Chairman of Victims of FOS.

7. THE VCAT MODEL

The Victorian Civil and Administrative Tribunal (VCAT) was formed by the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), consolidating the several tribunals, appeal boards and other bodies into a single tribunal, with the president having the status of a Supreme Court Judge. What was then an experiment has turned out to be highly successful, with additional jurisdictions being added to the scope of VCAT over the years.

The **Civil Division** hears and determines a range of civil disputes relating to:

- consumer matters
- domestic building works
- owners corporation matters
- retail tenancies
- sale and ownership of property
- use or flow of water between properties.

The **Administrative Division** deals with applications from people seeking a review of government and other bodies' decisions that affect them. These include decisions relating to:

- local council land valuations and planning permits

- Transport Accident Commission decisions
- state taxation
- legal services
- business licences and professional registrations
- Freedom of Information applications
- WorkSafe assessments
- disciplinary proceedings for a range of professions and industries.

The **Residential Tenancies Division** deals with matters involving:

- residential tenants and landlords
- rooming house owners and residents
- the Director of Housing and public housing tenants
- caravan park owners and residents.

The **Human Rights** Division deals with matters relating to:

- guardianship and administration
- equal opportunity
- racial and religious vilification
- health and privacy information
- the Disability Act 2006 (Vic)
- decisions made by the Mental Health Tribunal.

Importantly for this submission, VCAT has jurisdiction in civil matters, which do not involve decisions of public sector bodies.

Importantly, unlike FOS, VCAT decisions can be appealed on a point of law. This keeps VCAT Members accountable, as their decisions may be reviewed in detail. In 2014-15, the Supreme Court of Victoria and Court of Appeal finalised 80 appeals against VCAT decisions. Leave to appeal was given in 18 matters and the Court overturned the decision of VCAT in 11 cases (Annual Report).

While only 11 decisions out of tens of thousands were overturned, the importance of this quality control cannot be overestimated. Where, as with FOS and COI, there is no judicial review, the possibility of carelessness and even corruption arises. In the letter to the Joint Standing Committee, the Chairman of VOF states:

> "Corruption of the mind" may take the form of allowing irrelevant factors to influence outcomes. Possible irrelevant considerations in FOS include who pays the bills, excessive respect for submissions of legal practitioners, ideology, or the race, religious affiliation, gender or sexual preference of the applicant. While we do not suggest that any FOS staff or panel members derived any personal benefit from the determinations, when large amounts of money hinge on the outcomes of FOS decisions, the possibility of financial influence cannot be discounted completely.

The VCAT members, both judicial, full-time and sessional, are appointed by the Victorian Governor in Council. Retiring Chief Justice Robert French believed that those with judicial functions should be appointed by elected representatives. "*In the end, it is a decision for the elected representatives through the executive government to make*" he said[7]. FOS appoints its own ombudsmen and panel members and is not accountable for the quality or independence of those members.

VCAT hearings vary enormously, from informal compulsory conferences with no representatives, to formal hearings of major planning matters, with barristers, expert witnesses and cross-examination.

[7] *The Australian* 20 January 2017, p23, reporting an interview in Canberra, December 2016

Importantly, within the rules of procedural fairness, VCAT regulates its own procedures to ensure that the process is appropriate to the stage of the matter and the questions being determined.

Of course, this does not mean that VCAT is approaching perfection. In their report for the Consumer Law Action Centre[8] Phil Khoury and Debra Russell note that while "*we observed and were told about some excellent experiences and outcomes for tenants and consumers*", there were outstanding issues with access, fairness, reporting and enforcement of decisions, in the jurisdictions examined.

This report was seriously misrepresented in the Interim Report of the Review (2.14 page 34), through selective quotation. The Review stated that the report:

> "*evaluated VCAT against benchmarks for industry ombudsman schemes and found "there were very substantial barriers' that inhibit people from accessing justice at VCAT"*.

The only comparison with ombudsman schemes in the report where "substantial barriers" were found was in relation to applications and the report recommended simpler application forms and more assistance in initiating disputes at VCAT, short of legal advice. The report did not, for example, find that, like FOS, the requirement for procedural fairness in VCAT should be abandoned. Nor did the report suggest that VCAT, like FOS, appoint its own members or write its own terms of reference. Further, the report advocated expanding the involvement of tenants and consumers in oral hearings, which FOS and COI do not provide.

8. COMPARISON OF COSTS

Notwithstanding the breadth of the jurisdiction, at 1 July 2015, VCAT had 14 judicial members and 199 other members, including 148 sessional members and about 220 staff[9]. VCAT hears and finalises 85,000 cases per year (same place).

By way of contrast, FOS had 22 ombudsmen and adjudicators and about 360 staff, as at 1 July 2015 and received 31,894 disputes in 2014-15[10] (same p48).

The annual revenue for VCAT was made up of:

$18.23m	from government
21.75m	from industry-specific funds boards and authorities; and
7.19m	from fees
$47.17m	

The annual report for FOS[11] for the year to 30 June 2015 shows income as follows:

$4.63m	from member fees
37.40m	from dispute resolution fees; and
4.52m	from other sources
$46.55m	

That is, with approximately the same budget as FOS, VCAT deals with almost three times the number of disputes (as well as handling appeals to the Supreme Court, see below). The reason for this

[8] *Review of Tenants' and Consumers' Experience of Victorian Civil and Administrative Tribunal (Residential Tenancies List and Civil Claims List)* July 2016
[9] VCAT *Annual Report 2014-15* p2.
[10] Financial Ombudsman Service *Annual Review 2014-15* pp 17 & 48
[11] FOS *General Purpose Financial Report for the financial year ended 30 June 2015*

disparity is clear: VCAT is subject to the auditor general and accountable to the Parliament of Victoria for the use of its funds and FOS is not accountable to anyone for the use of its funds.

The figures for COI, for the year ended 30 June 2016, show that, with 2 ombudsmen, 4,760 disputes were received during the year[12] and the income was as follows[13]:

$5.79m	from member fees
2.27m	from case management revenue; and
0.08m	from other sources
$8.14m	

As a rough guide, FOS had $1,480 in revenue per dispute and COI had $1,710. The difference may reflect economies of scale. By contrast, VCAT had $550 in revenue per dispute.

Financial accountability will be decreased by the amalgamation of FOS and COI into a single body, not subject to public audit or financial reporting.

9. A FINANCIAL SERVICES TRIBUNAL

VCAT provides a well tried model for a financial services tribunal, providing accessible, fair and accountable, yet informal dispute resolution process for the Australian Financial Services industry.

VOF believes that a Financial Services Tribunal would provide a vastly superior service to FOS and COI for the following reasons:

1. **Accessibility** – FOS and COI procedures are unwieldy, producing great volumes of paper evidence and requiring applicants to engage specialist advisers and legal representation, whereas a tribunal process can, through a conference and oral hearings process, hone the issues in dispute and require detailed evidence only on the key matters in dispute;
2. **Fair Process** – FOS and COI are not bound by rules requiring fair process and, as a result, require applicants to produce voluminous evidence while accepting legal rhetoric and assertion from financial product providers;
3. **Independence** – a tribunal would be prima facie independent, with members appointed by elected officials and funding through parliamentary appropriation, while FOS and COI, appointing their own members and dependent on funding from the big end of town, are manifestly compromised;
4. **Fair Jurisdiction** – the jurisdiction of a tribunal would not be limited by cosy deals on the terms of reference, such as is the case with FOS and COI, which exclude many complaints from the jurisdiction;
5. **Accountability** – not only would a tribunal be accountable publicly for its budget, the decisions of individuals adjudicating disputes and the processes by which the decisions were reached would be subject to review on a matter of law;
6. **Cost and efficiency** – there is every reason to believe that a tribunal, publicly accountable for its expenditure and flexible in its approach could be more cost effective than FOS and COI but, more importantly, there is every likelihood that a tribunal could devise procedures of lower cost to consumers than FOS and COI; and

[12] COI *Annual Report on Operations 2015/16*, p2
[13] COI *Financial Statements for the year ended 30 June 2016*, p4

7. **Effectiveness** – as the body enforcing the consumer protection provisions of Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001* (Cth) (inherited from the Trades Practices Act), the *National Consumer Credit Protection Act 2009* (Cth) and provisions in the Corporations Act, relating to licensed providers of financial products and services, a tribunal would be more appropriate than an ombudsman owned and paid for by participants in the financial services and credit industries and, importantly, a tribunal would be competent to comment on the effectiveness of ASIC in particular dispute factual scenarios.

VOF believes that, given the evidence of VCAT, there is no reason to believe that a tribunal would be any more expensive than the current dual ombudsman arrangement and, just as at present, the cost could be completely defrayed by a levy on financial services and financial product providers. That is, there should be no requirement for additional taxpayer funding, provided the restriction to "retail clients" remains, although VOF concedes that there may need to be more work done here.

On 25 August 2016 Mr Raj Venga, Chief Executive Officer and Ombudsman of COI sent a statement to all members headed "Ombudsman cautions on tribunal".

According to Mr Venga, the establishment of a tribunal, which will necessarily be a statutory scheme, would:

- create a tax-payer funded right of appeal to the courts, defeating the objective to resolve disputes fairly, cheaply and expeditiously,
- not have the multiplicity of access points for industry and consumer representation that the current structure affords,
- not have specialised industry knowledge required for the sensible resolution of disputes,
- be substantially more inflexible, and
- not be capable of responding quickly to changes in relevant markets.

These arguments appear to be spurious.

The first point sets up a straw man. The VCAT model proposed above will not create a "taxpayer funded right of appeal to the courts". An appeal would be available on a matter of law but there would be no taxpayer funding for appellants.

Further, the actual number of appeals in VCAT is low compared to the number of cases (see above). The point of the right to seek review on a point of law is not that there are frequent appeals but the discipline that it imposes on the adjudicator in the first instance.

The Ombudsman does not explain the inherent benefits of a "multiplicity of access points" – actually, there are only two. It could equally be argued, as does the Interim Report, that more than one external dispute resolution service is confusing and dysfunctional for consumers.

For example, a consumer may wish to pursue a complaint about both the provider of a failed financial product and the financial adviser that recommended the product. If the two are not members of the same external dispute resolution service, two separate disputes must be prosecuted by the consumer and two different panels will decide on the amount of the consumer's loss and the proportional liability of each respondent and the consumer. There is great potential for confusion.

As to "specialised industry knowledge", the experience of VOF is that this is not a feature of FOS. It is very rare for ombudsmen to have had a previous career as a successful financial planner or fund manager. Many are recruited from ASIC and have no hands-on experience at all of financial planning, investment and portfolio management or issue and management of financial products. It is much more likely that, just as VCAT attracts as members people with extensive experience in the

relevant discipline, a Financial Services Tribunal would have the status necessary to attract men and women with appropriate experience.

Flexibility in a body determining disputes is not an obvious virtue. To the extent that the Ombudsman is referring to adapting processes to the nature of a dispute, VCAT has shown that a well-run tribunal can deploy an array of techniques depending on the nature and content of the dispute under consideration.

VCAT also holds hearings in regional Victoria, while FOS does not stray from its Docklands headquarters and COI does not leave Sydney. It could be argued that a Financial Services Tribunal could be more flexible in its operations than FOS and COI.

The purpose of setting out the variety of the jurisdictions of VCAT above was to demonstrate that a single tribunal is capable of handling a very large range of disputes. There is no reason to believe that a well constituted Financial Services Tribunal would not be similarly able to adapt personnel, processes and procedures to the full range of financial disputes.

In the final point, the Ombudsman combines the two previous points about industry knowledge and flexibility. Just as the number of financial services disputes increases after a financial downturn and wanes when financial times are good, so the disputes considered by VCAT have cycles. For example, planning disputes are driven by permit applications which reflect cycles in the development and construction industry. One of the ways VCAT adjusts to this is the use of sessional members.

10. CONCLUSION

The time has come for the establishment of a specialist tribunal for the Australian financial services industry. Financial consumers deserve something better than an equivalent of the AFL Tribunal.

A Financial Services Tribunal, modelled on the Victorian Civil and Administrative Tribunal would be a superior dispute settling venue than the current external dispute resolution services run by the financial product and financial service providers and credit providers.

A well formed tribunal would have the following key characteristics:

- ***jurisdiction*** – the jurisdiction should be limited to consumers, including small business, at whom the consumer protection provisions are directed, and, to keep funding within existing limits, continue to exclude sophisticated or institutional investors[14]and the jurisdiction should be set down by legislation, not determined by the body itself;
- ***members*** – members, both full-time and sessional, should be appointed on fixed terms by the executive and should have expertise in law, provision of financial services, investment, or provision of consumer credit;
- ***funding*** – funding should be by parliamentary appropriation, with the tribunal subject to audit and accountable to parliament for disposition of the funds, and the taxpayer should be reimbursed through charges on holders of AFS Licences and Credit Licenses (as well as public offer superannuation funds, if this jurisdiction is included);
- ***fairness*** – there should be a requirement for the tribunal to provide procedural fairness;
- ***accessibility*** – the tribunal should be able to hold oral hearings and compulsory conferences, sitting in capital cities and using technology as appropriate to overcome distance or

[14] Sub-sections 708(8) and (10) of the *Corporation's Act 2001* (Cth) define sophisticated investors for the purpose of securities and Sections 761G and 761GA of the act define sophisticated investors for the purposes of financial services and financial products other than securities. Section 12BC of the *Australian Securities Commission Act 2001* (Cth) defines "consumer" and "small business".

disadvantage, as well as settle disputes through written submissions, and assistance for consumers in making effective applications should be available, short of providing legal advice;

- ***basis of decisions*** – the strict rules of evidence should not apply and the body should be able to inform itself on any relevant issue – legal questions arising in the course of a dispute should be able to be referred to a legal member for prompt determination;
- ***reporting and confidentiality*** – decisions should be available to the public but the body should have the ability to make rules to preserve privacy, where appropriate;
- ***enforcement*** – decisions should be binding on all parties and the body would be able to make orders for enforcement; and
- ***appeal*** – a right of appeal to a court on a matter of law should be provided but there would be no ability to re-hear a matter and no administrative review of decisions.

On the information available, it appears that the current level of funding for FOS and COI would be sufficient for a tribunal and no additional taxpayer funding should be necessary.

The Victims of FOS believe that abolition of FOS and COI and their replacement with a tribunal would be a significant step towards providing a fair and reasonable independent dispute resolution and determination regime for retail investors suffering a loss as a result of the actions of participants in the financial services industry.

On the other hand, the consolidation of the current two services into a single ombudsman service would magnify all the problems with the current system.

Finally, a tribunal would be superior from a policy perspective, as a tribunal could give better feedback through its determinations on the actions of ASIC and the ways in which financial services laws and policies are working out on the ground, based on the factual situations coming before the tribunal.

ATTACHMENT

Letter from Victims of FOS to Parliamentary Joint Standing Committee on Corporations and Financial Services 24 July 2014

Chairman of the Victims of FOS Committee

120 Araluen Drive

HARDYS BAY NSW 2257

24 July 2014

Senator David Fawcett
Senator for South Australia
Committee Chair
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6011
CANBERRA ACT 2600

By e-mail:

Dear Senator,

Financial Ombudsman Service Fails Small Investors

Reform of FOS

I am writing to you about the urgent need to reform the Financial Ombudsman Service (**FOS**). The Victims of FOS Committee was established following unsound and unreasonable findings by FOS, which cannot be appealed or reviewed.

However, Victims of FOS does not seek to reopen past cases. We had our go and we accept the decisions, no matter how illegitimate and twisted. Victims of FOS wants key changes made to FOS to make the system work for those consumers that come after us.

FOS is a key corner of the managed investment scheme triangle of supervision. The single responsible entities operate the schemes and ASIC licenses the operators. When non-compliance or negligence causes damage to investors, which is inevitable in human institutions such as commercial markets, FOS is the place where investors can seek compensation. To complete the triangle, FOS is approved as an external dispute resolution scheme by ASIC. If FOS fails, the triangle collapses and supervision of managed investment schemes fails.

Size of the Problem

There have been many cases of failed fund managers causing billions of dollars of losses to small investors. To give more concrete form to the issues, I have chosen two unlisted property funds with which the Victims of FOS have direct experience. Both were managed by funds managers listed on the ASX.

The Becton Office Fund was managed by a subsidiary of the listed Becton Property Group. 2,850 investors lost all their money – $199 million. Cromwell Property Fund was managed by a subsidiary of the listed Cromwell Corporation. 2,220 investors lost $142 million.

The only possible source of compensation for these investors is FOS (or the much smaller Credit Ombudsman Service [**COSL**], in some cases). FOS is failing these investors.

This is a much larger problem than the allegations against CBA financial advisers: more investors and more money.

Systemic Issue – Breach of Terms of Reference

In fact, the FOS terms of reference require that systemic issues be brought to the attention of the responsible entity, so that all investors in the relevant fund can apply for appropriate compensation. A systemic issue is one that will have an effect on people other than the particular applicant before FOS. There is no doubt that the findings of a defective PDS and misleading disclosure to investors reveal a systemic issue, having an effect on people other than the applicants.

It is clear that FOS has breached its own terms of reference. This failure to observe the terms of reference produces a result that is favourable to the responsible entity, since it does not have to contact all investors in the fund and notify them of the flawed disclsoures.

Role of ASIC

The role of ASIC is overall supervision. ASIC does not compensate investors. It would be a waste of taxpayers' money to have ASIC vet every disclosure document. It is the duty of directors of responsible entities to manage investments in the interests of investors and make disclosures in accordance with the law. ASIC should not be expected to be in every boardroom monitoring every decision.

My impression is that, considering the growth of managed investment schemes since the *Managed Investments Act 1998 (Cth)*, ASIC has done well in their role in supervising managed investment schemes, within the available resources.

Fatal Flaws of FOS

Based on the experience of members of Victims of FOS, the following problems are endemic:

- FOS protects responsible entities to the detriment of investors;
- FOS processes take many years and are expensive for investors;
- FOS is not well informed about accounting and financial disclosure;
- FOS does not deliver fair process;
- FOS delivers decisions that are unreasonable;
- FOS decisions are inconsistent in material respects;
- FOS decisions cannot be reviewed.

These *problems* are illustrated below using the Becton and Cromwell examples.

In my case, *our* superannuation fund lost $110,000.

Background to FOS

FOS is one of the bodies established under the *Corporations Act 2001 (Cth)* (**Corporations Act**) to compensate consumers like us when funds managers do not fulfil their obligations. The other is COSL.

According to the Banking and Financial Services Ombudsman Limited (**BFSO**) Background paper of June 2004, industry based alternative dispute resolution (ADR) schemes emerged in Australia in the late *1980s* and early 1990s, following the development of a Banking Ombudsman model in the UK.

Through the 1990s, industry based ADR spread to life and general insurance, financial planning, electricity, water and telecommunications. The BFSO merged into FOS in 2008.

According to the Background Paper, ADR developed as part of the trend to industry self-regulation. Originally, *the* disputes were based on voluntary industry codes of practice. Reducing court costs to the taxpayer and to the complainants was a common theme.

In 2001, following the Wallis Inquiry, as part of broader financial services reform, the Corporations Act was amended to require all financial services licensees, including operators of managed investment schemes, to be a member of an external dispute resolution scheme approved by ASIC.

FOS is no longer just an "industry based alternative dispute resolution scheme." Every holder of an Australian Financial Services Licence or an Australian Credit Licence is compelled to be a member of FOS or the Credit Ombudsman Service (COSL), as a prerequisite for the issue of the licence.

Responsibilities of Directors.

PDS documents are not lodged with ASIC unless the financial product is to be listed. Although ASIC generally oversees the content of PDS documents, it is unreasonable to expect ASIC to vet every single document. After all, it is the responsible entities that have the duty to disclose. We do not breathalyse every driver every time the driver is behind the wheel but rely on general compliance with the law and random enforcement checks.

It is even more unrealistic to expect ASIC to supervise continuous disclosures. Becton did not lodge any disclosure notices about the Office Fund with ASIC. ASIC cannot be expected to vet every piece of information sent to investors by a fund manager for breaches of the consumer protection provisions of the Corporations Act or the *Australian Securities and Investments Commission Act 2001 (Cth)* (**ASIC Act**).

The directors of the responsible entity of a managed investment scheme have the duty to act honestly and put the interests of their investors ahead of the interests of the responsible entity. The duty to make full and proper disclosure also falls on the directors. This was reinforced by the courts in the Centro case. ASIC cannot continually watch over the directors.

Becton directors destroyed or carelessly lost <u>all</u> the records relating to the Office Fund, according to the story given to FOS by their lawyers. This is a clear breach of the Act and the compliance plan for the Office Fund, which the directors were bound to adhere to. If the directors were so negligent with records they were bound to keep safe, slackness in making disclosures to investors can be expected. FOS accepted Becton's "dog ate my homework" excuses for not producing documents.

This responsible entity has form. In 2012, the directors attempted to make unilateral amendments to the constitution of the 360 Capital Industrial Fund (formerly Becton Industrial Fund) which adversely affected the rights of investors. The investors took the responsible entity to the Supreme Court of Victoria and had the purported amendments declared invalid – see *Watts and Watts & Ors v 360 Capital RE Limited*. Since then the responsible entity has been retiring from all funds it operates, in favour of related companies, to avoid liability for claims.

ASIC Action on Disclosure.

ASIC did survey the disclosure by managers of property funds in 2007 and came to the conclusion that there was substantial non-compliance with disclosure laws by managers of unlisted property funds, whereas listed funds tended to make full and proper disclosure. ASIC then introduced

Regulatory Guide (**RG**) 46 in October 2008 to bring the compliance into line with listed property funds, which have virtually the same disclosure obligations.

From the evidence available to Victims of FOS, not only did disclosure by managers of unlisted property funds improve when RG 46 became operative but bad practices that thrive in a culture of secrecy, such as excluding related party loans from disclosed gearing, boosting distributions with capital (it was 100% in the Office Fund one year), not basing the unit price on the net tangible asset backing and so on, ceased rather than being exposed to investors.

Case Studies

I and other consumers were duped into investing in the Becton Office Fund between 2005 and 2006 by misleading statements made by the fund manager, 2,850 investors in this fund, mostly retirees, lost all their money - $199 million. This case alone is bigger than the CBA issue.

Using my case (241989) as an example, FOS found that Becton made misleading statements but has denied us compensation on the ridiculous grounds that, although we had signed an application form stating that we had read and understood the PDS, we could not produce contemporaneous notes, taken while we were reading the product disclosure statement (**PDS**). What law requires investors to make notes when reading a disclosure document?

Worse still, FOS found that I and other investors, acting reasonably and rationally, would have persisted in purchasing the units in the Becton Office Fund for $1.00 if Becton had disclosed that the units were only worth 50 cents at the time.

Even worse, FOS has determined that, if I and other investors had been informed by Becton that the gearing of the Fund was 90% we would have carried on, like Londoners in the blitz, and not redeemed the investment; and our financial advisers would have been similarly sanguine and not advised us to redeem.

As a retired litigation lawyer and trustee of our family superannuation fund, I find these conclusions by FOS ridiculous, unfair and personally insulting. There was no foundation in the evidence for these bizarre findings by FOS.

My conclusion is that, if the CBA had not agreed to compensation but had sent the complainants to FOS and argued reliance and causation, FOS would have found against the CBA complainants because they could not produce contemporaneous notes to show they relied on key details of the CBA advice.

The use of ASIC RG 46 by FOS was astounding. Forget the legal obligations, which RG 46 did not change. The practices of managers of unlisted property funds which ASIC found to be in need of improvement before issuing RG 46, FOS found to be “industry practice” and more than acceptable. This is like the magistrate accepting that, because there was no red light camera installed, it was OK to run the red light. Disclosure that was unlawful cannot be excused because “everyone was doing it” – unless the magistrate is FOS.

The cases took 3 long years to reach a seriously flawed determination. In my case, the dispute was lodged on 28 April 2011, after my complaint to the responsible entity was dismissed summarily after 45 days, and the FOS Determination was given on 8 May 2014.

Lodged in FOS on 4 April 2012, another case (279980) involving a member of Victims of FOS related to the Cromwell Property Fund. More than two years later there has been no consideration of the substantive issues by FOS. The responsible entity, again, a subsidiary of a listed company, has tied

FOS up in Court arguing the jurisdiction for the entire time. The applicant is awaiting the judgement of the Victorian Supreme Court of Appeal, Cromwell having been unsuccessful in the first instance.

Why did FOS not proceed to gather evidence for the dispute while the court proceedings were on foot? Why is FOS allowing Cromwell to delay the FOS finding, ensuring that many potential applicants will be statute barred before the FOS determination is published?

FOS Fails its Own Criteria

When there is non-compliance with the law, consumers have limited recourse to FOS for compensation. ASIC said, in Consultation Paper 102 reviewing external dispute resolution schemes (EDR's):

> *The fundamental principles for approving EDR schemes are accessibility, independence, fairness, accountability, efficiency and effectiveness.*

FOS failed us on every one of these six criteria.

Accessibility

When we lodged our dispute with FOS, we were represented by our financial adviser without cost but, at the recommendation stage, FOS announced that FOS considered our adviser had a conflict of interest, so we had to engage lawyers.

FOS was clearly lacking in experience with disclosure requirements for unlisted property schemes and investment and accounting concepts but, instead of calling for expert assistance as provided in the terms of reference, we were forced to engage accounting and financial planning experts ourselves to put factual evidence before FOS, assisting to overcome their inexperience with accounting and investment fundamentals.

Of course, we were opposed by a well-resourced public company and its insurer, hiding behind their legal representatives. The whole dispute was very costly.

Independence

FOS is clearly not independent. It depends on financial service providers to pay for its very existence. It is understandable that FOS seeks to protect responsible entities when they are large financial contributors.

The responsible entity submitted no evidence, saying it had lost all the records. FOS was sympathetic. FOS allowed the responsible entity to argue jurisdiction, conflict of interest for the representative of the applicant, procedural matters, interpretation of disclosure obligations, anything except the non-disclosures and misrepresentations alleged by the applicants.

Fairness

Our counsel identified many problems with the FOS procedure and outcomes, in breach of the FOS guidelines:

- FOS set applicants (but not the responsible entity) a set of questions and required answers in the form of a statutory declaration, in breach of the guidelines excluding interrogation under oath;

- FOS acted in bad faith by not revealing the reasons behind the request for the statutory declarations and stating that a declaration would be in the best interests of the applicants;
- FOS denied the applicants procedural fairness, agreeing with allegations by the responsible entity and effectively accusing us of lying under oath, without any evidence and without putting the allegations to us for an explanation;
- FOS came to conclusions based on the occupation and gender of the applicant, rather than concrete evidence; and
- FOS came to internally inconsistent conclusions, finding that the applicants had read and understood the warnings and risk statements in the PDS but not relied on the remainder of the PDS.

FOS agreed with submissions of the responsible entity impugning our statutory declarations that we had relied on the disclosures, effectively accusing us of lying under oath. FOS demanded contemporaneous "notes to self", to prove reliance.

Of course, when the boot is on the other foot, FOS has regularly found that signing the application form is evidence of knowledge of all disclosures in the relevant document, <u>when this counts against the applicant</u>.

Following the High Court in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* the FOS panel in case no 231958 concluded in June 2012:

> *The Panel is satisfied that the Applicant was aware that he was dealing with important contractual documents and thus should have made the effort to read the documents and ask questions before signing anything. The Applicant had an obligation to protect his interest in this regard.*

This followed a long sequence of cases where the signed application form was evidence of reading and understanding the related document.

In the Victims of FOS cases, FOS ignored the signed application form, which included a statement that the person signing the form had read and understood the PDS. FOS required additional "*contemporaneous evidence of reliance of the disputed sections of the PDS*". Once it is accepted that the applicant had read the PDS (which it was), what possible form could such "contemporaneous evidence" take? The PDS was a disclosure document. The only possible purpose in reading it was to discover information about the Office Fund on which to base an investment decision.

This outrageous decision flies in the face of long established legal principles confirmed by the High Court in Alphapharm. It sets the bar for reliance so high that all applicants would fail, unless there were fortuitous circumstances, such as a recorded conversation with a financial adviser or accountant. It opens the door to shonky fund managers to make whatever disclosures they think they can get away with, in the knowledge that an applicant in FOS will, almost certainly, fail on reliance. This failure breaks the triangle of supervision of managed investment schemes.

FOS has slammed the door on the remaining 2,500 odd investors in the Office Fund, who lost all their $199 million in savings.

<u>Accountability</u>

FOS is accountable to no-one:

- FOS does not have to give fair process;
- FOS does not have to reach reasonable findings;
- FOS can decide what is evidence and what is not evidence;
- in any case, FOS does not have to base findings on the evidence;
- FOS does not have to be consistent; and
- FOS findings cannot be reviewed or appealed – FOS has jurisdiction comparable to an intermediate court, such as the NSW District Court, but FOS panels do not have the discipline of being subject to review and appeal.

Efficiency and Effectiveness

The disputes brought by the Victims of FOS were simple. The responsible entity issued a defective disclosure document. As expected, the applicant relied on the disclosure document, having signed an application form that included a declaration that they had read and understood the disclosure document. As a result of investing, the applicants lost all their money.

Further, the responsible entity, having lodged no continuous disclosure notices at all, made misleading disclosures in regular mailings to investors. As a result, the investors did not take part in liquidity offers and lost all their money.

Why did the cases take thee long years for FOS to determine?

Protection of Large Responsible Entities

The Victims of FOS cases show a bias in favour of large responsible entities which were subsidiaries of listed companies. While the bias could have been unintentional or due to incompetence, the financial support which FOS derives from this class of member is also a potential source of bias. The sources of funding for FOS are not disclosed in its publications.

The terms of reference of FOS also protect responsible entities. The jurisdiction of FOS is restricted, so that disputes about the management of a fund cannot be heard by FOS, even if there has been fraud or gross negligence. Obviously one tactic by responsible entities, which was used in the Victims of FOS cases, is to argue that issues are not about disclosure but concern management of the managed investment scheme and are beyond jurisdiction. It worked.

Possibility of Corruption where no Accountability

William Pitt the Elder, in a speech to the House of Lords in 1770, told us that "*unlimited power is apt to corrupt the minds of those who possess it*." If this is true, a decision-making body whose decisions are not subject to review is unsatisfactory and open to corruption. The decisions of judges, ministers and public servants are subject to review. The Administrative Review Council opened its April 2011 Consultation Paper with the words:

> *Judicial review plays an important role in Australia's system of government as a means of ensuring the accountability of public officials for the legality of their actions.*

"Corruption of the mind" may take the form of allowing irrelevant factors to influence outcomes. Possible irrelevant considerations in FOS include who pays the bills, excessive respect for submissions of legal practitioners, ideology, or the race, religious affiliation, gender or sexual preference of the applicant. While we do not suggest that any FOS staff or panel members derived any personal benefit from the determinations, when large amounts of money hinge on the outcomes of FOS decisions, the possibility of financial influence cannot be discounted completely. In

our cases, for example, the potential financial losses to the responsible entity ran to hundreds of million of dollars, making the determinations of FOS highly significant financially. As a matter of sound public policy, such decisions should be open to review.

Change is Urgently Required

A review of FOS by the Joint Standing Committee is essential.

The code which is overseen by FOS is no longer a voluntary industry code. It is the statutory consumer protection provisions of the Corporations Act and the ASIC Act. The government has effectively delegated to FOS and COSL the majority of disputes under the consumer protection provisions of the Corporations Act and the ASIC Act.

There has been no overarching review of the role and status of FOS and COSL, since the advent of the Australian Consumer Law in January 2011, when all consumer protection related to financial services was incorporated in the ASIC Act.

The Commonwealth Law Reform Commission produced the report "Collective Investments: Other People's Money" in 1993. This report led ultimately to the *Managed Investments Act 1998 (Cth)*. The report stated at point 26 of the Summary (emphasis added):

> *Recent legislation introduced into the Federal Parliament would establish a complaints tribunal for the superannuation industry. A similar measure for collective investment schemes generally is not needed <u>at this stage</u>. However, each scheme operator should have to have an appropriate internal mechanism to try to resolve any misunderstandings or disputes which might arise.*

After the Wallis Inquiry, membership of an ASIC-approved external disputes resolution scheme was made compulsory in 2001. Perhaps it is now time for the tribunal the Law Reform Commission saw as premature in 1993. Perhaps the jurisdiction of the Superannuation Complaints Tribunal (SCT) could be extended. The decisions of that tribunal are, unlike FOS determinations, subject to review by the Federal Court on a point of law. The cost of the enhanced jurisdiction for the SCT could be funded by the same funds that responsible entities now pay for the services which they receive from FOS.

In a time when courts, such as the Victorian County Court, are streamlining their processes and increasingly using mediation and catering for unrepresented parties, the case for having disputes arising under statutory consumer protection laws heard under in an alternative dispute régime may well have diminished. It may be time for FOS and COSL to be limited to smaller disputes – say losses of up to $50,000 – and giving jurisdiction to a statutory body, such as a court for remaining disputes.

Since an original NSW Supreme Court finding regarding the Financial Industry Complaints Service (a precursor of FOS) that the dispute service was a "tribunal" whose decisions were subject to administrative review, the case law has favoured the view that FOS is a creature of contract. Its decisions, like those of the AFL Tribunal, are not reviewable in court, except in highly unusual circumstances (Wednesbury unreasonableness). FOS and COSL decisions should be subject to limited review.

If it is concluded that review by the Supreme Court of a state or the Federal Court is too expensive for applicants and industry, conferring review jurisdiction of the Commonwealth AAT or the Victorian County Court could be considered.

One way to minimise the potential for corruption is to limit the jurisdiction of FOS to a smaller amount. Another is to amend the Terms of Reference to require that FOS decisions must be

reasonable and require the FOS process to be fair. At present FOS does not have to provide fair process and decisions can be unreasonable (see above). The potential for review of decisions would then feed into the FOS process and work against bias and incompetence, as well as corruption.

In any case, the training of FOS officers and panel members is inadequate. Training in reading financial statements, investment fundamentals, evidence, legal principles, arbitration and dispute resolution should be compulsory. Mere legal qualifications are insufficient, as many law graduates are insufficiently trained in financial matters and never become exposed to civil disputes processes or arbitration. Even judges do more professional development training than FOS staff.

In relation to investments, if FOS is to retain jurisdiction, the FOS terms of reference should be amended to remove the bar on disputes about management of fund, particularly where there are allegations of negligence, such as not adhering to the compliance plan, or fraud.

The Committee of the Victims of FOS look forward to participating constructively in the review of FOS and COSL by the Joint Standing Committee.

Yours faithfully,

Russell James (Jim) Keeling
Chairman
Victims of FOS Committee

CC
Members of the Parliamentary Joint Committee on Corporations and Financial Services
The Hon Joe Hockey MP, Treasurer of Australia
The Hon Senator Mathias Cormann, Acting Assistant Treasurer
The Hon Chris Bowen MP, Shadow Treasurer
Bernie Rippol MP
Clive Palmer MP
Shane Tregillis, Chief Ombudsman, FOS
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