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Our ref: NC-EDR/RP

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Dear Professor Ramsey

External Dispute Resolution Review Submission

I welcome the 'Review into the Financial System EDR Framework' and provide the following submission.

I make this submission on behalf of the many hundreds of constituents that contact my electoral office each year with concerns as to the fairness of the EDR framework. The majority of those constituents have had experience with FOS rather than the CIO, a not unsurprising fact noting the number of FOS cases in 2014/15 was 31,895 compared with the number of CIO cases of 4,848 in the same year. As a result this submission focusses on FOS, however, the recommendation I make is likely just as relevant for CIO.

I now go to the need to formalise a fair process and fairness in FOS dispute resolution.

In *Goldie Marketing and Ors v FOS and ANZ [2015]* the Victorian Supreme Court found that the FOS Terms of Reference constitute the entire contract between the parties. FOS' Term of Reference 8.2 states the following:

> *FOS will do what **in its opinion** is fair in all circumstances, having regards to each of the following: legal principles, applicable industry codes or guidance as to practice; good industry practice; and previous relevant decisions of the FOS or a Predecessor Scheme (although FOS will not be bound by these).* [Emphasis Added].

The term "*in its opinion*" is extremely problematic in that, when it comes to determining principles of fairness, it allows FOS to judge itself. When the courts have examined exactly what boundaries FOS has in law in respect of fairness, it has been found that "*a party to the contract must establish Wednesbury unreasonableness – namely that the decision was one to which no reasonable decision-maker could properly arrive at on the evidence*" *(Cromwell Property Securities Limited v Financial Ombudsman Service and Radford [2013] VSC).*

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The principle of 'Wednesbury unreasonableness' only really serves as a legal 'safety net' to decisions that have total lack of plausible justification, exhibit an irrationality, involve the capricious use of power, result from a complete lack of inquiry and other similarly high threshold criteria. I submit that 'Wednesbury unreasonableness' as a sole judicial remedy to unfairness in FOS decisions sets too high a bar.

I strongly argue that this situation must change. The community expects that EDR decision will be guided by good sense and sound judgement, that they are derived by a process of reasoning that is logical and that they will correspond to the facts on which they are based.

Fairness principles used by a multitude of statutory tribunals need to be adopted in order that 'fairness' is not left to the opinion of FOS. As a minimum, I submit that the following principles must be enshrined in the Terms of Reference:

- Mandatory discover for all parties
- The open exchange of information between the parties
- The prohibition of 'private advocacy' to the Ombudsman
- The prohibition of apprehended or actual bias
- The right to be heard
- That irrelevant material must not be considered
- That relevant considerations must be considered
- The tribunal cannot act in a manner that constitutes 'Wednesbury unreasonableness'

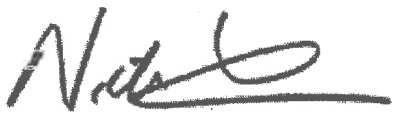
Despite ASIC responding positively to a number of these specific fairness principles in an answer to a 19 February 2016 Question of Notice (AET 2014-213) from me (attached), ASIC conceded those principles of fairness are not binding on FOS.

As is the case for tribunals, the mandating of these 'just' principles does not require undue formality and does not require conformance with judicial rules of evidence. Neither does it intend to spawn a raft of judicial cases, rather it serves to encourage a standard by FOS that seeks to avoid judicial review.

Recommendation: Principles of fairness, similar to those used in administrative tribunals, must be enshrined into the FOS TORs. Determination as to compliance with such principles of fairness must not be left solely to FOS itself, but be reviewable by a court of competent jurisdiction.

Should you have any questions in relation to this submission please feel free to contact me on Senator.Xenophon@aph.gov.au or my advisor Rex Patrick on rex.patrick@aph.gov.au.

Yours sincerely,



NICK XENOPHON
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Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Additional Estimates

2015 - 2016

Department/Agency: Australian Securities and Investment Commission
Question: AET 204-213
Topic: Financial Ombudsman Scheme
Reference: written - 19 February 2016
Senator: Xenophon, Nick

Question:

QON 92 through 96 of October 2015 Estimates were answered in a collective and undetailed manner (i.e. one answer for several detailed question). This approach is unsatisfactory. Please answer the following questions individually, Where an answer is not provided, please provide a detail public interest immunity claim.

With respect to the Financial Ombudsman Scheme (FOS):

204. How many personnel within ASIC are allocated to provide oversight of FOS
ASIC has a power under the Corporations Regulation and National Credit Regulation (RG 139) to approve an External Dispute Resolution Scheme and vary or revoke that scheme's approval. those regulations (RG139.23) indicate that ASIC must give regard to a scheme's accessibility, independence, fairness, accountability, efficiency and effectiveness.

205. How often in the past 5 years has ASIC had cause to formally examine the framework and conduct of FOS

206. With respect to fairness, and noting that the Victorian Supreme Court decision in 'Goldie' handed down on 19 June 2015 stated that the terms of reference contracts the entire contract between the parties (the Operational Guideline do not form part of the contract), how does ASIC view the TORs with respect to fairness adopted in tribunals, and particularly in relation to:

a. Discovery Principal (all cards must be laid out face up on the table)
b. Apprehended Bias
c. Open exchange of information presented to the Ombudsman by either party
d. Restrictions on communication with the Ombudsman without the other party present
e. Requirements not to consider irrelevant considerations
f. Requirement to consider relevant considerations
g. Wednesbury unreasonableness

(please provide an individual response to each criteria)

207. How many cases were referred to FOS in the last financial year?

208. With respect to those cases:

a. How many cases were resolved and not appealed to a court?

b. How many cases were resolved and appealed to a court?
c. How many cases were rejected by FOS?

209. What oversight activities does ASIC undertake with respect to the recourses that FOS has (numbers of personnel, qualification of personnel)

210. Does ASIC have a FOS Complaints Mechanism?

211. Please provide a copy of any audits/reviews or similar that ASIC has carried out on FOS over the past 5 years.

212. ASIC has a power under the Corporations Regulation and National Credit Regulation (RG 139) to approve an External Dispute Resolution Scheme and vary or revoke that scheme's approval. those regulations (RG139.23) indicate that ASIC must give regard to a scheme's accessibility, independence, fairness, accountability, efficiency and effectiveness.
213. The answer to question on notice QON 92 through 96 stated, inter alia, that "the court judgement [Goldie] explicitly considered the issue of the recorded telephone conversation". This seems inconsistent with [para 106 of] the judgement where the presiding Judge stated ""I do not consider that the 22 October 2014 conversation is relevant to the determination of the issues in this proceeding" because there was "no basis for the court to look behind [FOS'] Jurisdictional Decision".

Noting this:

a. Has ASIC examined the difference between the recorded conversations and the file notes adduced into evidence in the Goldie matter?

i. If so please provide ASICs analysis of the difference between the recorded conversations and the file notes and it's
ii. If not, why not (noting the public nature of this case, ASICs oversight role and the need for public confidence in the operation of FOS).

Answer:

204: There are 2 consumer policy staff whose responsibilities include overseeing the policy settings for schemes, managing quarterly meetings and dealing with changes to scheme's jurisdictions. However, it is important to note that a much broader set of ASIC interact with the schemes. For example around 6 members of ASIC's stakeholder or operational teams also attend regular meetings with the approved schemes and have their own points of contact, including for dealing with systemic issues.

The key stakeholder teams with responsibility in this area are the Misconduct and Breach Reporting Team, Deposit takers, Credit and Insurers team, Financial Advisers team, Investment Managers and Superannuation and Enforcement teams. Other areas of ASIC such as the Market Participants and Stockbroking teams or Investment Banks teams respond as needed when relevant issues arise.

ASIC receives complaints about schemes from time to time (see response to 210 below). Relevant teams engage with consumer and industry stakeholders where they raise issues or concerns about the operation of the schemes. Staff from ASIC's misconduct and breach reporting and licensing teams also engage with the schemes on relevant issues.

205: Formal examination of the framework and operational effectiveness and performance of EDR schemes is done by way of an Independent Review of the schemes. It is a requirement under ASIC's approval framework in Regulatory Guide 139 that approved schemes commission an independent review three years after initial approval and every five years thereafter, unless we specify a shorter timeframe. Independent Reviews provide essential feedback about how a scheme should evolve and identify any areas for change or improvement.

The FOS was established on 1 July 2008 from the merger of five predecessor schemes. Prior to the merger, independent reviews had been conducted into the following predecessor schemes:

- Independent Review of the Financial Industry Complaints Service 2002
- Independent review of the Banking and Financial services Ombudsman 2004
- Independent Review of the Credit Union Disputes Resolution Centre 2005.

After the merger, the FOS developed a single terms of reference for the scheme covering its banking and finance, general and life insurance, investments and insurance broking jurisdictions. The FOS TOR took effect from 1 January 2010.

In consultation with ASIC, the FOS Board commissioned the independent review in July 2013. This was the first independent review of the FOS commissioned three years after the new FOS TOR took effect in 2010.

Independent reviews involve a significant commitment of time and resources on the part of a scheme and stakeholders. To ensure the review produced meaningful and actionable insights, the review was conducted after the scheme had bedded down changes from the merger so both the scheme and stakeholders had had sufficient time and experience of how the scheme was operating under the new TOR.

The report of the independent reviewers, CameronRalph Navigator, followed a six-month detailed assessment of FOS’s operations and the final report of the review was issued in March 2014.

The review found that there had been significant improvements in key aspects of FOS’s performance, including in the clarity, quality and fairness of FOS’s decision making, and that FOS met all of the benchmarks for industry-based EDR schemes except timeliness.

The Independent review made 33 recommendations. The key recommendations related to the need to reduce the dispute backlogs and reshape processes to reduce the time taken to resolve disputes.

The Independent review resulted in significant changes to FOS processes including the introduction of a new process to fast track decisions for simpler and low-value disputes. It also added specialist expertise earlier in the dispute process to reduce the number of times a dispute changes hands.

FOS implemented its new streamlined dispute process on 1 July 2015.

FOS consulted publicly on proposed changes to its terms of reference (TOR) to give effect to the recommendations of the IR. In late 2014, ASIC approved changes to FOS’ TOR, the majority of which came into effect on 1 January 2015.

Consultation documents and public submissions to these processes are published on the FOS website.

206: EDR schemes are intended to operate as relatively low cost, accessible alternatives to the courts and to flexibly and with the minimum of formality resolve many thousands of consumer and small business disputes.

Fairness is one of the criteria against which ASIC approves EDR schemes. We set high level principles in RG 139, in particular that a scheme's complaints/disputes handling and other procedures must accord with the principles of natural justice.

Elements of fairness are reflected throughout the scheme's TOR, including at the centre of FOS' dispute resolution criteria reflected at 8.2 of their TOR which states that:

> FOS will do what in its opinion is fair in all the circumstances, having regard to each of the following: legal principles, applicable industry codes or guidance as to practice; good industry practice; and previous relevant decision of FOS or a Predecessor Scheme (although FOS will not be bound by these).

Australian courts, to date, have on nine occasions (not counting two applications made to Tribunals which were dismissed for lack of jurisdiction) considered issues related to FOS jurisdiction, powers and decision making since the FOS TOR took effect in 2010. The jurisdiction and powers of FOS predecessor schemes, notably the Financial Industry Complaints Service Ltd (FICS) have also been subject to consideration by the courts going back to 2004.

Courts have consistently found for FOS. In Cromwell Property Securities Limited v Financial Ombudsman Service Limited and Radford [2013] VSC 333 the court found that in order to successfully challenge a FOS decision, a party to the contract must establish Wednesbury unreasonableness – namely that the decision was one to which no reasonable decision-maker could properly arrive at on the evidence. This Supreme Court decision was appealed to the Victorian Supreme Court and to the High Court. On both occasions, the Courts supported the FOS submission that the correct standard was Wednesbury unreasonableness for FOS determinations and jurisdictional decisions.

In September 2014, the Productivity Commission issued its final report into *Access to Justice Arrangements*. In this report, the Commission considered the role of Alternative Dispute Resolution (ADR), Ombudsman schemes, Courts and Tribunals in Australia. Excepting administrative tribunals whose role it is to reconsider the merits of government decisions across state and territory jurisdictions, the Commission's report noted that

> "Civil tribunals are alternative forums to the courts for resolving disputes such as claims related to the supply of goods and services. Only states and territories have tribunals with civil jurisdiction.
>
> Tribunals aim to provide informal, low cost and timely avenues for resolving disputes through active case management; using alternative dispute resolution processes; limiting legal representation and costs awards; and assisting self-represented litigants (345)

The Commission found that "Some tribunals are not always meeting these aims. Options to improve the performance of tribunals and counteract the criticism of 'creeping legalism' include:

- More effective use of alternative dispute resolution
- More effective restrictions on legal representation, where appropriate
- Ensuring that all parties are under an obligation to assist the tribunal in achieving its objectives of being fair, just, economical, informal and quick (345).

The Commission noted that Tribunals are commissioned to be just, quick, efficient and low cost, and to operate without regard to technicalities and legal form. Tribunals generally set their own procedures and are not bound by the rules of evidence (Standing Committee on Law and Justice (NS) 2012). This promotes substantive justice as all relevant evidence is admissible. The Commission also considered issues such as active case management, use of ADR, limiting rights of legal representation and cost awards, assisting self-represented litigants, cost to litigants and timeliness. Many of these principles, functions and approaches are common to industry based EDR schemes such as the FOS and the Credit and Investments Ombudsman.

It is also important to note that there is some variation across different Tribunals in relation to their practices and procedures.

While EDR schemes are not bound by rules of evidence or the formal technical procedures of courts, schemes do adopt an inquisitorial approach to their handling of disputes. They take steps to obtain all the relevant information from the parties, to assess and weigh that information, considering the relevant facts to reach conclusions on the balance of probabilities.

FOS dispute handling processes involve the exchange of information, the opportunity to make submissions or provide further information about the matters in dispute before FOS makes an assessment of the dispute and reaches a decision. FOS endeavours to resolve disputes in this way with the minimum of formality, although the scheme can require expert advice where it is appropriate to do so. FOS will adopt the appropriate resolution processes for the type, nature and complexity of the dispute. Given the volume, diversity and relative complexity of the disputes FOS deals with, different processes may apply in different matters.

In relation to the specific issues in the question:

a. Discovery Principal (all cards must be laid out face up on the table)

Taking into account the matters noted above, we consider the terms of reference to be appropriate in that scheme procedures must accord with the principles of natural justice and that FOS's obligation to provide information to the parties as set out at 8.4 of their TOR are appropriate.

b. Apprehended Bias

As above, we consider the TOR to be appropriate.

c. Open exchange of information presented to the Ombudsman by either party

As above, we consider the relevant provisions in the TOR under Parts 7 and 8 to be appropriate.

d. Restrictions on communication with the Ombudsman without the other party present.

Under the TOR, the scheme can decide the dispute resolution methods and procedures they employ to decide particular disputes. As noted above, schemes are intended to flexibly and with the minimum of formality to resolve many thousands of consumer and small business disputes in accordance with the principles of natural justice and we consider the TOR appropriately balance the objectives of procedural fairness whilst facilitating efficient and effective complaints handling.

e. Requirements not to consider irrelevant considerations

As above, we consider the FOS processes for deciding disputes under Parts 7 and 8 of the TOR to be appropriate.

f. Requirement to consider relevant consideration.

As above.

g. Wednesbury unreasonableness

See commentary above in relation to judicial consideration of this issue.

207: Last financial year the FOS received 31,895 disputes and closed 34,714 disputes.

208: FOS closed 34,714 disputes last financial year.

The vast majority were resolved by the scheme. As noted above there have been 11 concluded cases in courts and tribunals since 2010. This excludes cases where an applicant may take action to enforce a determination, for example. These cases refer only to those where FOS is a party.

There may be further litigation on foot that ASIC is unaware of.

c. How many cases were rejected by FOS?

We read this to mean, how many cases were outside the scheme terms of reference (OTR)?

Of the 34,714 cases closed last financial year, 5,913 cases or 17% were OTR.

209: It is a requirement of ASIC approval in RG 139 that a scheme's overseeing body must monitor whether the scheme is adequately resourced to carry out its promoted functions. This includes monitoring how the scheme manages its caseload over time.

While it is the proper responsibility of the scheme board to ensure the scheme is appropriately resourced, scheme resources are also an area of focus for ASIC in the course of ASIC's engagement with the schemes, typically in the context of significant events such as natural disasters; in response to the GFC where complaint numbers to schemes increased significantly in a relatively short time period; or in the context of the expansion of scheme jurisdiction to cater for new members as a consequence of law reform. For example, changes to the regulation of consumer credit in 2010 saw many new members join EDR schemes.

The Independent review recommended that FOS apply additional resources to address its dispute backlog and improve timeliness and FOS responded to this recommendation to increase the pace of its existing initiatives and subsequently eliminated its dispute backlog. FOS also implemented significant process changes to improve the efficiency and timeliness of scheme decision making.

For completeness, we set out below how scheme oversight occurs in practice:

1. Board oversight - EDR schemes approved under RG 139 are independent companies limited by guarantee with their own independent governance arrangements as set out under their respective constitutions. Schemes operate independently of ASIC and their boards comprise an independent chair and equal numbers of consumer and industry directors. The board is responsible for key decisions about scheme operations and resources including that the schemes meet and continue to meet their approval requirements under RG 139.

2. ASIC oversight – is concerned with ensuring that schemes meet and continue to meet the approval criteria as set out in our policy settings and involves review of statistical and systemic issues reports, direct engagement with senior scheme personnel and monitoring complaints we receive about the schemes and where appropriate raising those concerns with the schemes. Corporations Regulation 7.6.02A sets out the high level EDR approval criteria which require ASIC to take the following matters into account when considering whether to approve and external dispute resolution scheme: the accessibility of the scheme, independence, fairness, accountability, efficiency, effectiveness and any other matter ASIC considers relevant.
3. Independent reviews - the key mechanism for review of the schemes is the Independent Review. This requirement was introduced by ASIC as part of its EDR approval policy in RG 139 and is a transparent public process in which all stakeholders participate. See the response to 205 above for further detail.

210. ASIC receives complaints from both consumers and industry members about the EDR schemes.

For 2014-15, we received 99 complaints about FOS.

For 2014-15, we received 24 complaints about CIO.

These complaints are assessed by our Misconduct and Breach reporting team in accordance with their usual process. Depending on the issues raised, a complaint may be escalated to the relevant stakeholder team or the policy team where policy issues may be relevant. We reiterate that ASIC does not intervene in or review scheme decisions.

211: The 2013 Independent Review of FOS published in 2014 was FOS' first review since the scheme was created from the merger of five predecessor schemes into the FOS in 2008. The first Financial Ombudsman Service TOR came into effect on 1 January 2010. As noted above (see 205), there had been three previous independent reviews of FOS predecessor schemes. Those reports and submissions to the reviews are published on the FOS website.

The final report of the FOS Independent Review and copies of all the public submissions to the review are published on the FOS website.

212 This is correct save that RG 139 is a Regulatory Guide setting out ASIC's approach rather than a Regulation.

213. One of the responsibilities of FOS decision makers is to decide whether a particular dispute is within jurisdiction. In the Goldie case, the court considered a FOS Ombudsman's decision to exclude the Goldie case from its jurisdiction.

In making its decision in the Goldie case, the court had regard to the transcript provided by Mr Ford of his recording of a telephone conversation with the Ombudsman. In making its decision, the court found that

> the November Jurisdictional Decision provides *comprehensive, rational, cogent and persuasive reasons* why FOS should exercise its discretion to exclude the dispute. There is nothing on the face of the November Jurisdictional Decision *that would suggest the decision was infected by bad faith, bias or was so unreasonable that no other decision-maker could have arrived at that decision (15).*

The difference between the recorded telephone conversation and file notes subsequently produced by FOS in the court proceedings is a separate issue to the question decided by the court.

We note FOS statement in relation to this issue:

> "In regard to differences between a recording of a conversation with an Ombudsman and file notes later produced in court, in the court proceedings both parties acknowledged the file notes reflected the practice of this Ombudsman, were a mixture of comment, observation and notation, and were something other than a verbatim record of the phone conversation" (17 March 2016).

ASIC has neither asked for nor reviewed the specific documents or recordings in the Goldie case. As explained in our response to question 209 above, day to day operational oversight of the scheme and its employees and responsible officers is the responsibility of the scheme's-board. ASIC does not intervene in the independent decision making of EDR schemes or in reviewing scheme decisions. This is an important feature of the policy framework for EDR Schemes. It would undermine the effective operation of EDR schemes if ASIC became an 'appeal court' for scheme decisions. Rather, it is the proper role of the court to consider whether FOS appropriately exercised its discretion to exclude this dispute, as provided for under its terms of reference.

ASIC has not received an allegation or claim of this type against a FOS decision maker in more than 15 years of oversight of this sector. We do not believe that this single example provides evidence of a systemic problem at the scheme that would warrant a review of the dispute resolution settings as provided for in the Corporations law; or that would found the basis for a lack of public confidence in the scheme.

In our view, the framework is well calibrated given the role of the courts in reviewing individual decisions and the respective oversight responsibilities of the scheme board; ASIC's role; and the requirement for public, independent reviews of scheme operations and performance.