Credit Ombudsman Service Limited
PO Box A252
Sydney South NSW 1235

T 02 9273 8400
F 02 9273 8481
raj.venga@cosl.com.au

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The General Manager
Retail Investor Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: futureofadvice@treasury.gov.au

COSL's response to the report by Richard St John on compensation arrangements for consumers of financial services

1. Introduction

The Credit Ombudsman Service Limited ("COSL") did not make a submission in response to the Consultation Paper produced by Mr St John, the Reviewer. This is because the paper, like Mr St John's Report ("the Report"), was focussed heavily on compensation arrangements for those consumers with disputes arising out of investment such as financial planning and stock broking.

Such complaints only comprise 2.6% of all complaints received by COSL in 2011-2012 and although COSL has power to make compensation orders[1], it has limited experience of its members being unable to comply with those orders through insolvency or otherwise. The vast majority of financial planning and investment disputes are dealt with by the Financial Ombudsman Service ("FOS").

Nonetheless, COSL is a financial services EDR scheme and observations made in the Report about such schemes clearly apply to it as well as to FOS. It is these observations, principally at 2.177 – 2.182 and the Chapter Two Assessment at paragraph (s), to which COSL is responding.

2. The scope of the Report

The Report says, quite rightly, at 2.177 that EDR schemes are "not the focus of this review." Yet, Mr St John, after a page of discussion with no references or specific citation of submissions, suggests that "issues of this kind call for further consideration including by EDR Schemes themselves and ASIC in its overview role."[2]

[1] COSL Rules, Rule 9.6
[2] Report 2.182

In the Chapter 2 "Assessment", the Reviewer goes even further and "sounds a note of caution" about the operations of EDR schemes as they "grow beyond their origins as forums for resolving small claims."[3] With respect, COSL was established in 2003 with a jurisdiction for disputes up to $100,000. This has grown to $500,000 with power to award compensation up to $280,000. It was never a forum for resolving small claims.

3. Industry Concerns

The Report claims, without specific reference to any submission, that "there appears to be some disquiet (within industry) about aspects of their (EDR scheme's) working in practice" and that "(t)hese concerns go to issues of fairness, touching on the rule of law and of cost."

In fairness, the Reviewer puts these "concerns" in the context of industry being "generally supportive" of the development of EDR schemes. This is certainly the case with COSL which, according to its last Independent Review, maintains high levels of industry liaison and support.[4]

However, this vague "disquiet" and unsourced "concerns" do not justify the suggestions which follow, some of which are based on incomplete information and reasoning and which, if taken up, could undermine the success of financial services EDR in Australia.

The following discussion of the "concerns" raised by the Reviewer will refer to the experience, rules, guidelines, operations and policy of COSL only although, it is likely, FOS could make similar responses.

4. Rights of Review

The Report asserts that there are concerns about the "lack of effective rights of review from decisions."[5] Firstly, this statement ignores the fact that most disputes are resolved without adjudication so there is no "decision" to review. Secondly, it also ignores those existing rights for external and internal review of decisions. Thirdly, there are profoundly important reasons for not expanding those existing rights.

4.1 Non-Adjudicative Resolutions

The vast majority of disputes are resolved by COSL without the need for a binding determination. In the 2010-2011 financial year, less than 1% of complaints went to the determination stage.[6] While the internal and, of course, external review of decisions is an issue for COSL, as it is for any EDR scheme, it is not one which has arisen in many complaints as most are resolved by non-adjudicative means.[7]

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[3] Ibid at p 50

[4] The Navigator Company Ltd *Independent Review of the Credit Ombudsman Service Limited* 2012 at p 82

[5] Report at 2.180

[6] Above N 1 at p 18

[7] This has always been the case for financial services EDR schemes in Australia. See O'Shea, P "The Lions' Question applied to industry-based consumer dispute resolution schemes" (2006) 26(1) *The Arbitrator and Mediator* 63

4.2 Internal Review

COSL Rule 39.5 provides for a process for the re-issuing of determinations on the application of the Member, the Complainant or the Ombudsman himself, when:

(a) there is a clerical mistake; or

(b) there is an error from an accidental slip or omission; or

(c) there is a material miscalculation of figures or a material mistake in the description of any person, thing or matter; or

(d) there is a defect in form; or

(e) the terms of the Determination or Award do not reflect the Ombudsman's actual intentions.

Such "errors on the face of the record" are easily reviewable without extra cost to the member or much delay.

4.3 External Review

External review of COSL decisions are available to any member by way of application to the relevant court, most likely, given the location of COSL in New South Wales, to that state's District or Supreme Court.

The grounds may include:

(a) the determination was not within the jurisdiction of COSL because, for example, the relevant complaint was:

(i) outside the monetary jurisdiction of COSL[8];

(ii) out of time[9]; or

(iii) not of a kind covered by the COSL Rules[10].

(b) the Member was not accorded natural justice in the process leading to the determination; examples of which could be:

(i) a failure by COSL to provide the Member with a reasonable opportunity to respond to all allegations made against them before they receive an adverse determination.[11]

(ii) any bias whether real or reasonably apprehended on the part of the Credit Ombudsman in making his determination.

(iii) failure to provide adequate reasons.[12]

[8] COSL Rule 9.1 limits the amount of the subject matter of the complaint to $500,000 and the monetary compensation which can be awarded is limited to $280,000 for each complaint.

[9] Ibid Rule 10.2 imposes a 2 year time limit.

[10] Ibid Rule 10.1 lists a number matters which will exclude complaints.

[11] This was the ground in the only successful action for review of a financial services EDR scheme decision in Australia *Masu Financial Management Pty Ltd v Finance Industry Complaints Service Limited and Julie Wong* [2004] NSWSC 826 and (2004) 50 ACSR 554

(c) the determination was irrational such that the decision be "so unreasonable that no reasonable authority could ever have come to it ...(and)...to prove a case of that kind would require something overwhelming."[13]

It is not the case, therefore, that there is no effective review of the decisions of COSL or FOS. Indeed, any attempt to expand these rights of review so as to allow them to be full judicial review of the facts and the law would be wrong in principle and potentially disastrous in practice.

4.4 Full judicial review should not be available for EDR scheme decisions

Wrong in Principle

The Courts have established over a series of cases over the past decade that the basis of the jurisdiction of the financial services EDR schemes, like COSL, is contractual.[14] It is not a statutory authority and full judicial is not available in the same way as it is for administrative decisions. Any rights of review are to be found in the contract between the parties, namely COSL, its Members and, possibly, the complainant consumer.[15] The terms of that contract are to be found in the Constitution and Rules of COSL with some implications of natural justice and rationality as discussed above.

COSL's Rules and Constitution provide that members are bound by its decisions.[16] While there is an obligation attached to their licences for members to join a scheme like COSL[17], there is a choice of schemes.

Up until 2008, there were seven schemes but they have been now consolidated down to two. This process, although supported by government, was voluntary and based on cooperation between industry and consumer stakeholders. The mechanisms for achieving this consolidation were contractual not regulatory. It is still a matter of contractual choice for a member which scheme they join. Once they do so, they are then bound by its terms as a matter of contract.

Having contracted for the finality of scheme decisions, the grounds for review are limited by the terms of that contract. This is correct as a matter of law and principle.

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[12] For a discussion of the possible grounds of review of a financial services EDR scheme see McGill, D "Are the financial services external complaints resolution schemes subject to judicial review?" (2008) 26 *C&SLJ* 438

[13] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 per Lord Greene MR at p 230. In Australia, the principle is embodied in section 52(g) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

[14] See, most recently, *Mickovski v FOS* [2011] VSC 257 and for a fuller discussion of the caselaw in this area, see O'Shea P "Review Roadblock" (2012) April, *Proctor* 34 and McGill above N 13. Other cases include *FICS v Deakin* [2006] FCA 1805 and *National Mutual Life Association Ltd (t/a AXA Australia) v FICS* [2006] VSC 121 and *Wealthcare Financial Planning v FICS* [2009] VSC 7

[15] See *Mickovski* ibid at p [16] and [17].

[16] COSL Rules 16 and 17

[17] *Corporations Act 2001* (Cth) ss912A(2) and 1017G(2) for AFS licence holders and ss47 and 64 of the *National Consumer Credit Protection Act 2009* (Cth) for Australian Credit Licence holders.

Problems in Practice

The availability of full judicial review over scheme decisions would have negative results for consumers and, ultimately, for industry. Firstly, it would lead to more such reviews by disgruntled industry members. Consumers would lose the finality of decision-making so essential to an effective dispute resolution mechanism. Efficiency of decision making is one of the requirements of ASIC PS139 for financial services dispute resolution services.[18] EDR schemes, like COSL, resolve disputes much faster than the courts[19] but the increased availability of further review by industry members would subject consumers, once again, to "the law's delay."

Secondly, it would add substantially to the costs of EDR. COSL's Rules provide that the costs of such exercises would be initially borne by the Members[20] but, if such reviews became common, Members would factor in their possibility into the calculation of their overheads and pass this cost on to consumers in the provision of services. Further, COSL itself, would have to factor in increased and protracted litigation as part of its costs of doing business and thus increase its fees for membership. No one wins in this scenario.

Thirdly, and probably most disturbingly, the flexibility and sensibilities of decision making by financial services EDR schemes, like COSL would be at risk of compromise. Defensive decision making, always "looking over the shoulder at the courts", would replace the robust and increasingly resilient processes now employed. Scheme decision making processes would become more bureaucratic and legalistic. They would be, not only, less consumer-friendly but more unwieldy and complex for scheme members to negotiate. The only group to gain from such a development would be lawyers.

5. Transparency

The Report at 2.180 claims that there are concerns about "the limited transparency of dispute resolution processes including the grounds for awards." With respect, this statement is unsustainable on the facts.

5.1 Grounds for Awards

All COSL determinations are published, with the parties de-identified, on its website. Of course, the parties themselves have received the determination and its reasoning. COSL Rule 23.4 requires the Ombudsmen to give reasons for his determinations. These reasons frequently include references to case law, statutes, industry codes, COSL Rules and other statements of industry practice. They have run to 20 pages though, on average, they are about 6-12 pages in length. As Justice Shaw said in the *Masu* case against FICS, such reasons given by an EDR scheme should not be "prolix legal treatises".

[18] ASIC PS139 at pp 33-34
[19] See COSL above N1 at p 22
[20] COSL Rule 39.6

It would be excessive and pedantic to require an administrative tribunal of this kind to refer expressly to a particular case in the High Court decided in 1940, but nonetheless it is reasonable to require that the general concept should be adverted to as, at least, relevant to the adjudication of the matter.[21]

COSL's published reasons for its determinations are transparent and comprehensive.

5.2 Processes

All COSL's dispute resolution processes are articulated in its Rules. It is difficult to understand how they could be more transparent. Of course, when disputes are resolved by non-adjudicative means, as most of them are, both parties are interested in maintaining confidentiality. The terms, therefore, of such settlements remain confidential to the parties. This is both understandable and essential for the resolution of disputes.

Only when "Systemic Issues" are identified by COSL, as required by ASIC, will they be reported. Again, there is no publication of such reportage and it is left to the regulator, ASIC, as to how it proceeds once such a report is made.

6. Joining of Other Parties

The Report notes at 2.180 the "inability of a licensee member to join in a proceeding other licensees who may share responsibility for the loss or damage in question…" With respect, this statement again ignores COSL' rules.

COSL Rule 30 provides that another member may be joined to a complaint if to do so would allow that complaint to be resolved more "efficiently and fairly."

Costs

The Report again at 2.180 suggests that "Payment of a fee (by consumers) even if relatively limited in amount would be consistent with the seriousness and demands of the process as well as providing at least some disincentive for claims of limited substance."

ASIC Regulatory Guide 139 provides as follows:

RG 139.52 To promote equitable access, a scheme must provide its EDR procedures free of charge to any complainant or disputant whose complaint or dispute falls within the scheme's jurisdiction.

RG 139.53 We consider it a fundamental principle that consumers and investors of financial and credit products and services have free access to the complaint or dispute handling procedures offered by a scheme.

It is difficult to add more to this clear statement of a "fundamental principle." It is unlikely that there will be wide support, even from industry, for the Reviewer's suggestion.

[21] Above N 12 at [20]

7. Fairness

"The fact that the liability standard for EDR awards is not confined to breaches of legal rights but may include broader notions such as fairness or industry practice" is one of the "concerns" listed in the Report at 2.180.

With respect, it is curious to see an argument against "fairness" in consumer dispute decision making. Further, there is unlikely to be much industry support for the reduction in the importance of "industry practice" as a criteria for decision making.

COSL's decision-making criteria is set out in its Rule 12.1 as follows:

In dealing with a Complaint at any stage of the Credit Ombudsman Service process, COSL will observe procedural fairness and have regard to:

(a) relevant legal requirements or rights provided by law to the Complainant in relation to the subject matter of the Complaint;

(b) applicable codes of practice;

(c) good practice in the Financial Services Industry; and

(d) fairness in all the circumstances.

The "law" is clearly the first matter to which COSL must have regard. One of the essential features of EDR schemes in the financial services industry, however, is the further flexibility which such schemes have to consider other matters such as fairness and good industry practice. This is required by ASIC RG 139[22] and is accepted by the courts both here and in the United Kingdom as a desirable feature of such schemes.[23]

Any undermining of the "fairness" criteria in financial services EDR is unacceptable and highly unlikely to gain any support.

8. Inconsistencies with ASIC

COSL is not aware of any "inconsistency between (its) interpretation of licensee obligations and regulatory guidance issued by ASIC." Indeed, COSL's own publications giving guidance on how it will resolve disputes and stating its positions on certain regulatory matters, refer frequently to ASIC's regulatory guides. For instance, the COSL Policy Statement on 'Responsible Lending' refers to the relevant ASIC Regulatory Guide over 24 times.

There are many opportunities for ASIC to raise any alleged inconsistencies with its approaches to that of COSL as the two agencies are in constant communication and conduct several formal liaison meetings every year.

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[22] ASIC RG139 at p 25

[23] See N 15 above and, for a more detailed discussion including references to the UK case law, see O'Shea P and Rickett, C "In defence of consumer law: the resolution of consumer disputes" (2006) 28(1) *Sydney Law Review* 139

CONCLUSION

Without commenting generally on the other issues raised in the Report, COSL takes issue strongly with the matters raised at 2.180. These "concerns" which are quite peripheral to the task of the Reviewer, have little founding in fact and if they were to prompt further action are likely to produce detriment for consumers, industry and the financial services sector as a whole.

Sincerely

Raj Venga
Chief Executive Officer and Ombudsman