From the Desk of Director Andy Semple

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The Treasury
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Submission sent via the website and cc'd to EDRreview@treasury.gov.au

THE EXTERNAL DISPUTE RESOLUTION & COMPLAINTS FRAMEWORK

SUBMISSION BY THE ASSOCIATION OF SECURITIES AND DERIVATIVES ADVISERS OF AUSTRALIA - ASDAA

The Association of Securities and Derivatives Advisers of Australia (ASDAA) appreciates the opportunity to provide feedback on the Bill and accompanying regulations.

ASDAA represents the interests of its members, who are from the Securities and Derivatives advisory profession. Its members are comprised of individuals who are either directors, or employees, of small to medium sized firms which hold an Australian Financial Services Licence (AFSL), but are not a Participant Member of the Australian Stock Exchange.

ASDAA has a strong desire to see that investor's receive sound investment advice and the appropriate investor protection. ASDAA members rely on the ongoing trust of their clients, and on the integrity of the Australian financial markets, for their livelihood. Without both, our clients wouldn't participate in the markets and trade in securities, exchange traded options, and other listed financial products.

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AFCA, like FOS & CIO, will have too much discretion in reaching compliant decisions

FOS and CIO are not judicial bodies and neither will AFCA. It will be a public company limited by guarantee which derives their jurisdictional powers from ASIC (Regulatory Guide 139), and forms a contract with its compulsory FSP members via their respective Terms of Reference.

ASIC in effect controls AFCA's Terms of References, and AFCA is not going to be independent of ASIC.
(Everyone in Industry knows this.)

As administrative bodies, CIO and FOS were not subject to the Freedom of Information (FOI) regime. There is no way for anyone to shine a light on their internal processes. (Being a private organisation, there has always been some question as to whether or not decisions by FOS and CIO should be subject to judicial review).

Will AFCA be subject to the FOI process?

A good place for Treasury to start would be to ensure this new monopoly EDR scheme IS subject to an FOI regime.

ASIC should also have the power to question an EDR scheme on whether they are receiving an inordinate amount of revenue from dispute fees. FOS especially has form in this area, as it receives 75%[1] to 80% of its revenue from dispute fees.

FOS gets to make even more money from the FSP if the dispute goes past the "Case Management" stage an on to FOS's "Decision" stage.

For the year ended 30 June 2015, FOS' total revenue was approximately $46.5 million[2], of which approximately $37.4 million (or 80%) came from dispute resolution fees.

Actual compulsory FSP membership fees accounted only for 9% of FOS's year ended 30 JUNE 2015 revenue.

Either way, FOS wins financially to the detriment of the FSP if the dispute lasts a long time.

For a non-profit, FOS certainly did quite well financially.

ASIC should also ensure the EDR doesn't expose its financial members (FSP's) to unreasonable terms. Our members have also shared their opinions with respect to FOS's **13.3 TOR clause** regarding Defamation protection.

The clause strictly prohibits a FSP from instigating defamation action of any kind against a consumer in respect of allegations made by the consumer about an adviser or their FSP to the EDR. Again, this is why our members feel the FOS dice especially was so firmly loaded against them because the same prohibitions are **not** restricted to the consumer who instigated such action against the FOS

[1] Page 11 of the Expert Panel Interim Report 6 December 2016
[2] Page 30 of the FOS General Purpose Financial Report for the year ended 30 JUNE 2015

member. The prohibitions even include any employee, agent or contractor of the FSP member.

ASDAA believes this could have a significantly detrimental impact on an adviser or an FSP's reputation, which is founded on trust and credibility.
So will AFCA be a carbon copy of FOS and have the same prejudicial TOR clause concerning Deformation protection for complainants but not the FSP member?

Whilst ASDAA agrees that certain information provided by a consumer to AFCA as part of their dispute be subjected to qualified privilege so that the consumer can confidentially put their matter before the EDR, we strongly object to the fact that the complainant is freely able to make defamatory statements to the general public, the media, and especially on social media platforms against an adviser and their FSP.

Disputes should at all times be handled in a civil matter and its ASDAA's position that should it be found during the dispute process that an adviser, or their FSP, are defamed either in or outside the EDR process then they should be allowed to take external legal matters to defend their professional reputations. Better still, the EDR should inform the complainant that unless they immediately cease and desist their defamatory remarks then their case against the FSP will be closed without prejudice.

One of ASDAA's members was recently in receipt of dreadful defaming allegations made against him by a former disgruntled client. The complainant in written correspondence to FOS that was cc'd to the adviser used words like "*crooked, corrupt, low life, dishonest, liar, incompetent, inept, criminal*" in describing the adviser.

Fortunately for the adviser in question, whom FOS found in his favour, the defaming allegations about his character were noted only in the correspondence to FOS and to the adviser.

Fortuitously for the adviser, nothing was repeated (to his knowledge) to the public or on social media.

ASDAA asks Treasury, "***Surely it isn't an EDR's role to embolden complainants to freely shred to pieces an adviser or their FSP's reputation during and even after the dispute process***?"

Furthermore, it should be incumbent any new EDR to ensure the consumer who lodges a complaint keeps all information pertaining to a dispute confidential. If the FSP is obligated to keep confidentially then so should the complainant.

Use of (expert) panels

It is ASDAA's position that the new EDR body should ensure that the Case Managers who are assigned to assess a Securities/Stockbroking disputes hold a relevant University degree and have also had at least three years relevant work experience in the Securities/Stockbroking industry.

It seems only fair that under the Governments, *Raising Professional Standards of Financial Advisers* draft legislation that the very people who will make the serious

decisions regarding a Securities/Stockbroking dispute are on the same qualified level as Securities and Derivative advisers/Stockbrokers.

Compulsory FSP members need to have the faith that the EDR individuals assigned to case manage a Securities/Stockbroking dispute also have relevant practical experience in the area they will be assessing.

If the single EDR body needs to hire such expertise then they should be made to hire in the expertise (Using FOS's revenue data, they received $46.5 million in revenue the year ended 30 June 2015, ASDAA is of the opinion that they can fund the employment of at least two or three individuals who have the required Securities/Derivatives experience).

ASDAA is aware of many well qualified semi-retired Securities and Derivative Advisers/Stockbrokers who would appreciate the opportunity to be employed full-time or even part-time in such a role.

ASDAA also would like to see the new EDR appoint at a **minimum three** suitably qualified individuals to sit on the Securities/Stockbroking Panel.

It is ASDAA's opinion (from our member experience) that FOS is dysfunctional in that inexperienced and unqualified Case Managers form opinions on what experienced and qualified Securities and Derivatives professionals should have done with the added benefit of hindsight. We lack any confidence that AFCA will be any different to the beast they are replacing. Just because the AFCA Case Manager has a Law degree doesn't equip them to make judgements on what a qualified Securities and Derivatives professional standard of advice and care should be.

Just imagine the outcry if this happened in other professions say Medicine or Accounting or in the Federal Bureaucracy?

Law degrees do not include training in Medicine, Accounting or Securities and Derivatives Advisory.

Given the importance of AFCA' dispute function, and using FOS as an example, ASDAA expects them to be leading the way with a team of Case Managers who actually have had practical hands on experience in the Securities/Stockbroking industry. Sadly FOS, in ASDAA's opinion, is not leading the way. Only one person at FOS appears to possess the qualification - FOS' Stockbroking Panel member Mr Matthew Wigzell.

ASDAA notes the following:

> Of the 8 FOS Board members - **none** have any experience working in the Securities/Stockbroking industry;
>
> Of the 7 FOS Senior Leadership Group - **none** have any experience working in the Securities/Stockbroking industry;

Only two individuals are named on FOS' Stockbroking Panel[3]:

[3] Page 18 of FOS annual Review 2015 2016

Mr Matthew Wigzell: Head of Wealth Management, Private Clients at ASX Participant Paterson's;

Mr Alex Knipping: Portfolio Manager with fund manager Intrinsic Investment Management.

Inexperienced FOS Case Managers can presently award monetary compensation damages of up to $309,000. That is getting close to the sort of monetary damages awarded by Supreme Court judges. We see as part of the package, AFCA will have even higher monetary compensation limits which will achieve one thing: that the annual Professional Indemnity insurance policies will rocket higher in price.
Thanks Government, it would have been helpful had the Expert Panel actually bothered to find meaningful solutions to actually help all FSP's.
The PI Jackboot will now get a little tighter on the necks of all FSP's.

Unlike AFCA (I assume?), Supreme Court judges **are** bound by the law, the rules of evidence, contract law, and their prior decisions. Supreme Court judges just can't do whatever they like, and their decisions are subject to appeal.

With respected to FOS' TOR 8.1, it is startling that FOS **is not bound by any legal rules of evidence.**

Will AFCA be the same? I suspect it will be and that's completely unfair to all FSP's.

An adviser, or their FSP, affected by an adverse FOS decision in effect has no right of reply, and this is not fair. AAFCA decision can ruin a FSP and adviser's reputation, the FSP may lose their ability to get PI insurance, lose their AFS licence, and/or be forced into administration or liquidation of the business.

All of that may happen because the FSP has no right of appeal or a review of an adverse AFCA Determination.

Even murderers get the right to appeal their sentences.

So here lies our key concern.

To address the need for certainty under the law, ASDAA recommend that provisions which apply to superannuation complaints within the Bill are extended to apply to **all disputes**. Proposed section 1057(3) requiring that all decisions must not be contrary to the law and proposed sections 1056 and 1061(1) providing for appeal to the Federal Court on questions of law should be extended to all disputes.

There is no reason why these very important "rule-of-law" provisions should be limited to the Superannuation.

The current system setup by the government denies an adviser and the FSP to their **constitutional right to a fair trial and fair hearing**. See attached link for further details:

https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-

scrutiny/PublicSectorGuidanceSheets/Pages/Fairtrialandfairhearingrights.aspx

Australia is a party to seven core international human rights treaties. Fair trial and fair hearing rights are contained in article 14 of the International Covenant on Civil and Political Rights (ICCPR).

By adopting and continuing the FOS/CIO structure the government is effectively circumventing its obligation to ensure that everyone has a right to fair trial and fair hearing as this applies to cases before courts and tribunals.

ASDAA further notes from the comparison table from the Expert Report that of the five international jurisdictions[4] noted that Singapore's EDR scheme isn't completely free to consumers and makes consumers pay **$50 Singaporean** at the adjudication phase. ASDAA gathers the Singaporeans do this to help stamp out frivolous or vexatious complaints and to help provide downward price pressure on fees Singaporean FSP face.

Insisting the EDR process must be "free to consumers" is a progressive ideological position adopted by aggressive consumer advocates and needs to be challenged and changed for the reasons noted in this section.

Reduce the statute of limitations to make a complaint on the grounds of "inappropriate advice" to 6 months from the date of advice given

What ASDAA members specifically would like from their EDR body is fairness. Anyone who invests their money into listed equities, whether they received personal advice or general advice, needs to understand and accept that the value of their equity portfolio can not only go up in value but that it can decline in value. This point is highlighted in writing, and verbally, to the clients of FSP'S before commencing any market trading activity.

Market risk obviously does exist, but the current EDR complaint structure does not seem to be able or willing to differentiate between "market risk" and "inappropriate advice" when accepting complaints to pursue.

FOS, for example, encourages a consumer (a disgruntled investment client) to make a complaint of economic loss on the basis of "inappropriate advice" within **6 years** of when the consumer **first became "reasonably" aware** of such "economic loss."

This extended time period is grossly unfair to the adviser and their FSP, as it enables clients to "test" their adviser's recommendation over a significant length of time (6 years), and if the investment falls in value it can be pursued as "inappropriate advice" by a client years after the advice has been received and acted upon.

It is ASDAA's position that Treasury consider reducing the statute of limitations to make such a complaint of "inappropriate advice" from the ***Investments and Advice* product line** to expire **6 months** after the date of purchase of a listed equities and derivatives transaction.

[4] Page 38 of Expert Panel Interim EDR Report

It is vital this amendment is incorporated into the new AFCA's TOR.

It is extremely prejudicial that a consumer can have virtually an uncapped statute of limitations to make a complaint on the grounds of "inappropriate advice."

It should also be acknowledged that there is no legislative "Cooling Off" period for anyone who buys and sells listed securities and derivatives.
ASDAA knows of no other profession that faces such a generous statute of limitations. It is unique to all FSP's.

There is a saying in the broader Securities/Stockbroking industries that if a "*client wants a guarantee then they should buy a toaster.*" Preservation of capital in the stock market is not guaranteed and this is generally well understood and acknowledged by the vast majority of investors. By allowing consumers to lodge a complaint about economic loss on the pretence of receiving "incorrect or inappropriate advice" as determined by an EDR Case Manager is implying that such a guarantee does in fact exist.

Keeping with the toaster analogy, even consumer products like toasters don't come with a 6 year money back guarantee should they breakdown.

As we stated in previous submission, ASDAA is very disappointed the Expert Panel has given ZERO consideration in their interim report on how to help reduce red tape and lower the cost to the FSP's. Everything presently on the table for discussion represents increased red tape and will put significant upside pressure on higher EDR membership and dispute fees.

The Government of the day, ASIC, and ASDAA all want to see consumers receive good advice, but good intentions can often lead to unintended consequences and the failure to achieve anything useful.

ASDAA appreciates the opportunity to provide this Submission to Treasury.

We would be happy to discuss any issues arising from our submission, or to provide any further material that may assist Treasury. ASDAA implores Treasury to take heed of our concerns.

Should the Expert Panel or the Treasury department require any further information, please contact myself on (07) 5657 3620 or email andy@asdaa.com.au

Yours Sincerely,

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