



ASIC

Australian Securities & Investments Commission

15 September 2016

Committee Secretary
Parliamentary Joint Committee on Corporations
and Financial Services
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Dear Committee Secretary

We have become aware that at the hearing of the Committee on Wednesday, 16 March 2016, an inaccurate statement was made by Peter Kell, Deputy Chairman of ASIC to the Committee. We are writing to you to notify you of this and to seek the opportunity to correct the record at the next hearing.

I enclose a copy of the relevant page of Hansard for the 16 March hearing with the inaccurate statement highlighted. The Court decision referred to in Mr Kell's answer did not 'cover' the issue of file notes. In fact, what it did reference was a transcript of a conversation between a member of FOS and a representative of the complainant to FOS. Mr Kell's answer to the question about the file notes on 16 March was 'off the cuff' and the inaccuracy was inadvertent.

ASIC would like to be provided with the opportunity at the next hearing to correct the record.

Please contact me if you would like more information or to discuss the matter further.

Yours sincerely

Robert Rush
Manger – Government Relations

Mr Medcraft: If I could just pick up on the senator's question, I think we should come back to this, because if we do our three-yearly review, Peter, and we identify issues at FOS, and I think this is where the senator is getting this from, and we see major problems—maybe we need to take it on notice and come back to the senator.

Mr Kell: Yes. It is slightly difficult to have this discussion in the abstract. But I have dealt with FOS over many, many years and I think I am aware of one such allegation out of the hundreds of thousands of matters that go to them. If there are more, it would be very useful for us to hear about them.

Mr Medcraft: The thing that it comes back to is that we do approve of FOS as a scheme—

Mr Kell: Yes, very much so.

Mr Medcraft: and, if there are issues related to FOS, then we would have to really question that and we as ASIC would then have to take action. I think what we should do is come back to you, Senator, and answer that question with more—

Mr Day: When we say a false and misleading file note, that is an allegation. It may be that that is the recollection of the discussion of the person who took the file note. So you get into a very factual debate over someone who says, 'Hang on. I was involved in that discussion and that's not my recollection' and the other person says, 'Hang on. That's my recollection.' And then the other person says, 'Hang on. I think that's a false and misleading file note.' That is a dispute on fact, so does that mean that someone has done something to mislead another party? It is their own file note about those things. That is why, as Commissioner Kell says, in the abstract it is very difficult understand what the facts of it are and how we could respond to that.

Mr Medcraft: We will take it on notice and come back to you about what we can do as the oversight body of FOS and if we identify major issues.

Senator O'NEILL: If it got to a point, who would do the investigation, because it does not make me feel confident? If you investigate yourself, there is a degree of intimacy there that perhaps might not be as transparent as it needs to be.

Mr Medcraft: I expect if there are major problems, we would; and what would we do about it if we found problems?

Mr Kell: If there is any further information you can provide—

Senator KETTER: Can I assist with that in taking this matter on notice. I just googled the submission by an organisation called Dispute Assist to the scrutiny of financial advice inquiry. Dispute Assist is a company that assists in dispute resolution.

Mr Kell: Sure. Senator, maybe just to save time: we provided evidence before the Senate estimates committee in relation to that matter a few weeks ago. We also provided a substantial written response to Senator Xenophon on that matter. I am very happy to provide that to you to illustrate our analysis of the issue, what we did about it and the way that the Supreme Court of Victoria handled that matter.

Senator KETTER: That went to the issue of misleading file notes?

Mr Kell: The court's decision actually covered that amongst other things.

Mr Medcraft: We will come back to you on that.

Mr Kell: It was a very comprehensive decision in favour of FOS.

Senator KETTER: When was that decision?

Mr Kell: Quite recently—reasonably recently.

Senator O'NEILL: This year?

Mr Kell: I would have to come back to you on that.

Senator KETTER: This submission is dated 18 May 2015. Would it have been post that?

Mr Kell: I would have to check.

Mr Medcraft: We will come back.

Senator O'NEILL: Do you have any concerns about the industry funding model for FOS leading to a conflict in the performance of their duties of the ombudsman's service?

Mr Kell: I think it is critical that the industry pays for a dispute resolution scheme, ultimately. The funding model works has two elements to it: there is, if you like, a membership fee; and then there is a fee per dispute, which escalates as the dispute goes further through the scheme to, in effect, provide an incentive for the firm to resolve the matter. The scheme is set up in such a way that it actually incentivises firms to resolve matters where