From the Desk of Director Andy Semple

25th September 2017

Senate Standing Committees on Economics
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Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017

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.

ASDAA
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ASDAA is not supportive of the creation of the Australian Financial Complaints Authority or AFCA.

Industry already has its own nick name for AFCA – *Frank*.
Frank is short for Frankenstein because that is precisely what AFCA is – a juggernaut Frankenstein-like aggressive consumer advocate granted with massive judicial like powers without sufficient oversight.

As we stated in previous submissions, ASDAA is very disappointed the Ramsay Review has given ZERO consideration in both of their interim and final reports on how to help reduce EDR red tape and lower the EDR cost to the FSP's (Financial Service Providers).
Everything presently on the table represents increased red tape and will put significant upside pressure on higher EDR membership and dispute fees to FSP's.

Furthermore, it is just mind boggling that the Ramsay Review failed to conduct any sort of cost benefit analysis in replacing CIO, FOS and the SCT with AFCA.

The numerous shortcomings of the current EDR bodies, FOS and CIO, have been completely ignored by the Ramsay Review (and the Government) and sadly are now firmly part of the DNA of AFCA.

AFCA is a rebadging exercise that achieves nothing – just like moving the deck chairs on the Titanic.
AFCA is nothing more than a political announcement and the appearance of action because of Government inaction to hold a Royal Commission into the Banking sector. It's no surprise the big banks have endorsed the Government's new EDR creation.
If anyone in Government thinks AFCA will weed out the disgraceful and entrenched poor corporate bank culture or even come close to addressing the long list of financial scandals is deluded. Only a Royal Commission can do this. AFCA has zero investigative powers and is completely powerless and toothless to prevent the re-occurrence of financial scandals.

All our previous correspondence to Treasury with regard to the current and new EDR framework are enclosed as appendices to this submission.

> **Review into the External Dispute Resolution & Complaints Framework** – Published 4 Oct 2016.
>
> **Interim Report Review into the External Dispute Resolution & Complaints Framework** – Published 19 Jan 2017.
>
> **The External Dispute Resolution & Complaints Framework** – Published 14 Jun 2017

ASDAA strongly encourages all Senate committee members to read the aforementioned submissions as our submissions clearly identify significant flaws with the EDR process.

Aspects of the bill that concern the members of ASDAA

1.36 AFCA's determinations of superannuation complaints will be subject to appeal to the Federal Court on a question of 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 Superannuation only complaints.

1.48 The scheme's operations must be financed through contributions made by members of the scheme, with the funding arrangements to be determined by the board of the operator of the scheme;

ASDAA recommend that the initial compulsory membership fees payable by small FSP's be fixed for a period of three years and the membership fee be no higher than what present EDR bodies FOS and CIO presently charge.

1.50 Appropriate expertise must be available to deal with complaints;

ASDAA recommend that the AFCA should ensure that the Case Managers who are assigned to assess a Securities/Stockbroking dispute hold a relevant University degree and have also had at least three years relevant work experience in the Securities/Stockbroking industry.
Compulsory FSP members need to have the faith that the AFCA 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.
It is ASDAA's opinion 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 beasts they are replacing (FOS & CIO).
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.

1.57 Time limits for bringing complaints under the scheme;

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 the committee consider reducing the statute of limitations to make such a complaint of "inappropriate advice" from the ***Investments and Advice*** **product line** expire **6 months** after the date of purchase of a listed equities and derivatives transaction.

It is vital this amendment is incorporated into AFCA's ToR (Clause 15.2 of FOS' ToR is the point example).

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.

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 AFCA Case Manager is implying that such a guarantee does in fact exist.

2.8 The enhanced IDR framework will also require IDR Firms to report their IDR activities in accordance with ASIC requirements. ASIC will be provided with the power to determine the content and form of IDR reporting by IDR Firms.

2.12 ASIC will also be provided with additional powers to determine the content and form of IDR reporting by IDR Firms and to publish this data at both the aggregate and firm level.

It is ASDAA's position that the last thing any FSP needs is more bureaucratic red tape and this recommendation delivers more red tape in spades.

FSP's are made up from "one man band" firms through to massive global investment/insurance conglomerates so there is no "one size fits all" IDR scheme to follow, as no one business is alike. There are small firms who deal in highly complex financial areas like Derivatives, while some large firms deal in relatively easy to understand financial areas like basic deposit products.

All AFS Licensees, regardless of their size, have the following condition noted on their license:

> **Compliance Measures to Ensure Compliance with Law and Licence**
> *The licensee must establish and maintain compliance measures that ensure, as far as is reasonably practicable, that the licensee complies with the provisions of the financial services laws.*

And all licensees are required to maintain a ***breach and complaints registers***, which must be reviewed by the FSP's external Compliance Auditor.

Licensees are already obligated to inform ASIC should a significant and material breach occur i.e. Fraud.

Under RG165, all licensees must have in place a process to try and resolve disputes internally. ASIC sensibly have left it up to the particular licensee to self-determine what their IDR process is. **The last thing any FSP wants is for an ASIC bureaucrat to determine what the content and format of IDR reporting should be**.

Moreover, AFCA will have the power to report to ASIC any form of "systemic" risk they may determine as a FSP goes through their respective EDR process. So any further bureaucratic impost is certainly not welcome.

Furthermore, if it's the Ramsay Reviews concern that because there is a lack of publically available IDR information that it could possibly lead to FSP's being able to hide from scrutiny any internal shortcomings let ASDAA explain to the Committee the three contemporaneous external audit processes each and every licensee, regardless of their business size, face annually.

Each FSP that holds an AFS License **must;**

1. Be financially audited by an ASIC noted Financial Auditor.
2. Have and external compliance review that is audited by a suitably qualified External Compliance Auditor.
3. Obtain a PI insurance policy with a min cover of $2.5 million which will only be considered by a reputable PI insurer once they have obtained a current copy of both the Financial and Compliance Audit.

All of these costs are 100% borne by the FSP. ASDAA would like to note that the costs of these audits are substantial in nature to the FSP, and especially to the small business FSP's, who has no capacity to pass the cost onto their clients in the current marketplace.

For example, an FSP with revenue in the vicinity of one million dollars per annum would be paying a financial audit fee of approximately $15,000, a compliance audit fee of approximately $15,000 and PI plus Director's insurance premiums of approximately $35,000 per annum (These PI fees are significantly higher for FSP's who had even minor EDR settlement payouts by their insurer). They would also face a substantial Accountants cost because they must provide special purpose accounts for the FSP's Auditor.

ASDAA can't see why a licensee's privacy should be waived so that ASIC can save in a database some more insignificant statistical information. ASIC already have the power to walk into any licensees place of business and demand the FSP turn over any requested information should the need arise.

What matters here are hard results. If a licensee and a complainant can come to an agreeable settlement via IDR then that's the best outcome, and is it then really anyone else's business to know what happened? If IDR fails, then that's what EDR schemes are set up for – to hopefully make an independent unbiased complaint determination.

As for IDR statistical info, if a consumer has complained to AFCA and they are now assessing it, then statistically the IDR process was 100% unsuccessful.

As for ASIC publically publishing FSP details (2.22), this should only ever occur under the most dire of circumstances. Should an FSP IDR fail in the opinion of a subjective assessment from an ASIC or AFCA bureaucrat and they are publically shamed that would represent a most grievous denial of the FSP and advisers natural justice.

It's also commonly accepted knowledge by industry that because there is a free EDR scheme to consumers; it basically makes the IDR process redundant.

3.11 This Bill is compatible with human rights as it does not raise any human rights issues.

AFCA 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 previous FOS/CIO structures into AFCA 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.

Unlike AFCA, Federal Court judges are bound by the law, the rules of evidence, contract law, and their prior decisions. Federal 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 incredible that FOS is **not bound by any legal rules of evidence**. ASDAA asks the committee to ensure that AFCA will be bound by the rules of evidence and their prior decisions.

An adviser or their FSP affected by an adverse AFCA decision in effect has **no right of reply**, and this is not fair. An AFCA 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 criminals get the right to appeal their sentences.

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

ASIC in effect controls AFCA's ToR, and AFCA will not independent of ASIC.

As administrative bodies, CIO and FOS are not subject to the Freedom of Information (FOI) regime. There is no way for anyone to shine a light on its 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).

A good place for the committee to start would be to ensure AFCA is subjected to an FOI regime.

ASIC should also ensure the AFCA 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 is so firmly loaded against them because the same prohibitions are **not** restricted to the consumer who instigated such action against the FOS 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.

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 AFCA, 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 AFCA process then they should be allowed to

take external legal matters to defend their professional reputations. Better still, AFCA 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, thief, 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 the committee, "***Surely it isn't AFCA'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 on AFCA 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.

It is ASDAA's preference that CIO and FOS are left alone to operate as completing EDR bodies.

ASDAA is not aware of any monopoly created that has demonstrated that it is cheaper, more efficient, less complex, more accountable and transparent in the absence of competition. Service does not improve if there is only one player in the market.

We appreciate that there are currently only three EDR bodies that are presently active, SCT, FOS and CIO, but at least they can each benchmark themselves against each other. This benchmarking actually produces better outcomes for consumers and FSP's because it forces the EDR's to adopt best practice and improve their service offerings. As the Ramsay Review Interim Report notes on Page 11, FOS gets 75% of its revenue via dispute fees, whilst its competitor CIO gets 70% of its revenue via membership fees. This is a very stark difference in funding, which only competition can bring about. Remove competition and just watch the single EDR percentage of revenue ultimately become 100% from dispute fees.

It's accepted economic theory that when firms have a monopoly power they charge prices that are higher than can be justified based upon the costs of production, and prices are higher than they would be if the market was more competitive.

For example – look at ASIC's companies registry business.

The cost to ASIC of operating the registry is less than $6 million a year, yet this bears no resemblance to how much it charges businesses and the public for using it – about $720 million annually, a return to ASIC of more than 10,000%[1]

The bottom line is that when companies have a monopoly, prices are too high and production is too low. There's an inefficient allocation of resources which will lead to lower levels of service.

So why would the Ramsay Review conclude a monopoly EDR body would act any differently to a body or corporation that monopolises the companies registry, telecommunications, or the banking spaces for example?

The fact that FOS, a current EDR body, recommended in their initial submission (Page 23) the merger of CIO **into** FOS - smacks of opportunism and rampant self-interest. If the outcome sought is to further entrench institutional bias then let FOS takeover CIO and be reborn as AFCA.

If one follows the logic put forward by the Ramsay Review to merge FOS, CIO and SCT then the same argument could be made that the big four banks should do the same and merge forming one big "mega" bank, but we all know that wouldn't be allowed to happen because a big "mega" bank monopoly would be a bad outcome for everyone.
AFCA is also a bad outcome for everyone.

Since monopolies are the only provider, they can set any price they choose. That's known as price-fixing. They can do this regardless of demand because they know the FSP has no choice but to pay whatever membership and dispute fees they deem fit.

The problems with monopolies also go beyond the economic effects. AFCA will also have considerable political influence, and the ability to "capture" the political and regulatory process over time. This allows AFCA to tilt the legal and regulatory processes against any potential threat to its market power, and to bring about changes that further enhance the revenue it earns.

Furthermore, a forced merger of CIO into FOS would mean FSP's who are dissatisfied with service levels or costs would have nowhere else to go. That's unhealthy and a poor outcome.

If there must be one EDR body - AFCA – then it should be statutory tribunal established under legislation as it is in the UK (**UK FOS**). For Government and ASIC to bestow such market and jurisdictional power to an unlisted public company limited by guarantee trading as a monopoly EDR scheme is just mind boggling.

[1] ASIC 'screwing' small companies with registry fees. The Australian December 23 2016

ASDAA appreciates the opportunity to provide this Submission to Senate Standing Committees on Economics.

ASDAA would be happy to discuss any issues arising from our submission, or to provide any further material that may assist the Standing Committee.

ASDAA implores the Senate Standing Committees on Economics to take heed of our concerns.

Should the Senate Standing Committees on Economics require any further information, or decide to hold public hearings, please contact myself on [redacted]

Yours Sincerely,

[redacted]

Andy Semple
B.Com., B.App.Sc., MEASDAA
Director

APPENDIXES

From the Desk of Director Andy Semple

4th October 2016

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

REVIEW INTO 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 these comments to the Expert Panel in respect to the review into the current Financial System External Dispute Resolution (EDR) and Complaints Framework.

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 members during the 2016 financial year were members of AFS licensed Financial Service Providers (FSP) whose compulsory EDR body at that time was the Financial Ombudsman Service (FOS), therefore our submission will refer directly to FOS.

However, our recommendations should be considered as applicable to all three current EDR bodies.

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

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their livelihood. Without both, our clients wouldn't participate in the markets and trade in shares, exchange traded options, and other listed financial products.

It is reassuring to note from the FOS 2015/2016 annual review[1] that accepted disputes by the *Investments and Advice* product line are essentially unchanged over the last four years, and typically represent between 4-5% of received disputes.

When the accepted disputes by sales and service channels are examined from the FOS 2015/2016 annual review[2], it is pleasing to note the channels *Derivatives Dealer* (79) and *Securities Dealer* (54), whom ASDAA represent, accounted for only 133 disputes or 0.59% of total disputes received.

Even our colleagues from the Stockbroking industry only account for 159 disputes.

Totalling only 133 from 22,376 disputes received further illustrates that professional advisers from the Securities and Derivatives industry have been absent from the extensively reported Banking and Financial Planning issues that have come about since the GFC. Why? Because advisers who specialise in the dealing and advising of Securities and Derivatives are under a much more defined and stringent management and supervision structure than those who provide Financial Planning advice outside this area.

Although the number of accepted disputes from our industry is exceptionally low, the amount of monetary compensation sought by the consumer is often a significant amount of money. It seems to be far too easy for a consumer to make a complaint that the value of their equity portfolio has declined due to "inappropriate advice", and not because of the general market volatility, and FOS seems only too keen to accept this as a legitimate complaint.

> (*Refer to the enclosed **Case Study** found at Appendix One for an example of how one frivolous complaint nearly cost an FSP $90,000 in monetary compensation, all because a client wanted compensation because the value of a their share portfolio had declined.*)

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.

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

FOS 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

[1] Page 59 of FOS annual Review 2015 2016
[2] Page 60 of FOS annual Review 2015 2016

of time, 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 the Expert Panel 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 an equity transaction.

Clause 15.2 of FOS' Terms of Reference (TOR) should be revised to include the above mentioned amendment.

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 equities.

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 a FOS Case Manager is implying that such a guarantee does in fact exist.

Keeping with the toaster analogy, even they don't come with a 6 year money back guarantee, FOS with their TOR's 15.2 provides a consumer with a 6 year statute of limitations.

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. Just because the FOS 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?

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

Given the importance of FOS' dispute function, 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]:

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.

These inexperienced FOS Case Managers can award monetary compensation damages of up to $309,000. That is getting close to the sort of monetary damages awarded by Supreme Court judges.

Unlike FOS, 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.

An adviser or their FSP affected by an adverse FOS decision in effect has no right of reply, and this is not fair. A FOS 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 FOS Determination.

Even murderers get the right to appeal their sentences.

FOS is not a judicial body. It is a private company which derives its jurisdictional powers from ASIC (Regulatory Guide 139), and forms a contract with its compulsory FSP members via FOS' Terms of Reference.

ASIC in effect controls FOS' Terms of References and FOS is not independent of ASIC.

As an administrative body, FOS is not subject to Freedom of Information or FOI regime. There is no way for anyone to shine a light on its internal processes.
(Being a private organisation, there has always been some question as to whether or not decisions of FOS may be subject to judicial review.)

It is ASDAA's position that FOS should ensure that the Case Managers who are assigned to assess a Securities/Stockbroking dispute hold a relevant University degree and have also had at least 3 years relevant work experience in the

[3] Page 18 of FOS annual Review 2015 2016

Securities/Stockbroking industry. If FOS needs to hire such expertise then they should (FOS received $46.5 million in revenue the year ended 30 June 2015 and ASDAA are of the opinion they can fund the employment of at least two or three individuals who have the required experience.)

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.

Surely FOS, with a workforce of 362 (293 full-time) people, can manage to employ such individuals who meet the above mentioned standards? 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 FOS appoint at a minimum two more suitably qualified individuals to sit on FOS Stockbroking Panel. It is our shared member opinion that it is unfair on Mr Wigzell being the sole Stockbroking Panel individual member with actual Securities/Stockbroking advisory experience.

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

Little wonder it is the shared opinion of ASDAA members that FOS is a highly aggressive consumer advocate and not an independent external dispute resolution process as they claim to be. It is the shared opinion of our members that FOS is no friend of Securities and Derivatives advisory/Stockbroking profession.

Our members say this because of FOS' inability, or unwillingness, to toss out the most obvious frivolous and/or vexatious disputes levelled against them and the FSP's they work for.

The distrust from Securities and Derivatives professionals begins when a complaint can be lodged about an adviser or FSP at no cost to the consumer.

It is ASDAA's position that the Expert Panel consider anyone who makes a formal complaint about an adviser, and/or an FSP, to an EDR body such as FOS should be required to pay a modest complaint registration fee of at least $250 + GST.

According to the FOS 2015/2016 annual review[4], 34,095 disputes were received by FOS.

By applying ASDAA's theoretical dispute registration fee of $250 + GST, this would have seen FOS raise approximately $8.5 million + GST, which FOS could then apply as an offset against the dispute fees charged to the FSP's, thus having the desired effect of lowering the dispute cost to FSP's.

A modest complaint registration fee would also go a long way to ensure the consumer isn't lodging a frivolous or vexatious complaint against an adviser or FSP. Should the consumers complaint end up being upheld by FOS, then the

[4] Page 54 of FOS annual Review 2015 2016

registration fee would be refunded along with the adjudicated monetary compensation awarded.

As it currently stands however, it is entirely unfair to the FSP member that they are 100 percent exposed to the cost of FOS' complaint fee structure.

It is not unreasonable for the complainant to have some cost exposure to the dispute process, especially if they are seeking a significant monetary compensation figure.

Again, we come back to the missing central tenet of fairness.

Maybe it would be appropriate for FOS to charge such a modest complaint registration fee when the consumer is seeking more than $10,000 in monetary compensation from a FSP?

ASDAA isn't averse to imposing a reasonable threshold and ask the Expert Panel to consider the merits of this recommendation.

Recently, one of our members had a significant FOS complaint resolved in their favour, yet the direct financial cost to our member's FSP was $5,665.00 in FOS fees. (This does not include the significant dollar cost incurred by the FSP, the adviser, and the insurer in responding to the complaint that extended over a 10 month period).

So even when a FSP wins, they still lose with FOS.

Now imagine if a small FSP had to deal with half a dozen or so claims made against them each year with them all being resolved in their favour – that's north of $33,000 in FOS fees alone and what small business can afford that?

There are well over 5,500 AFS Licensee's[5], with a significant proportion of them being small family owned businesses. Not every FSP is a subsidiary of a large Bank, Insurance, or Stockbroking company with its own internal resources and the financial capacity to easily settle any number of FOS disputes. This places FSP's in the ATO's Small Business Category, (e.g. those with a turnover of less than $2 million dollars), at a significant disadvantage in the EDR process.

As already stated, a modest complaint registration fee would help ensure that FOS' dispute fees that an FSP must pay, regardless of the dispute outcome, are at least lower than what they presently are.

It should be noted that while the direct financial FOS cost incurred by the FSP is significant, it only represents part of the overall direct financial cost the FSP ends up bearing. FSP's also spend an inordinate amount of time and money in defending the allegations made against them and FOS' TOR prevents the FSP from seeking damages against a complainant for the often significant costs they incur in the preparation of their defence.

Furthermore, it is ASDAA's opinion that FOS has a conflicted fee structure, as they make more money from the FSP the further a case escalates from a dispute from

[5] As of 1 July 2016, there were 5,517 AFS Licensees recorded by ASIC

the FSP's internal dispute resolution process to FOS's EDR case management stage.

FOS gets to make even more money from the FSP if the dispute goes past case management stage to FOS's Decision stage.

For the year ended 30 June 2015, FOS' total revenue was approximately $46.5 million[6], of which approx. $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 does quite well financially.

It is ASDAA's position that the Expert Panel also review FOS's conflicted fee structure and make their own determination on how it can be made simpler and fairer to the compulsory members who end up paying it regardless of the dispute outcome.

Sadly, the perception from the Securities and Derivatives advisory profession is that FOS' dice is firmly loaded against the adviser and the FSP, in other words FOS suffers from severe institutional bias.

As the FOS Ombudsman, Panel, and Adjudicator decisions are final and cannot be re-opened for review by an FSP, it is ASDAA's position that the Expert Panel considers the establishment of an **Independent EDR Oversight Tribunal** who has the power to put aside any FOS decision on the basis of a successful appeal by a FSP.

The independent EDR oversight tribunal should be a Government statutory body that also has the power to investigate and annually review FOS. It is unacceptable that FOS writes its own review which it submits to ASIC.

If allegations of misconduct were to be levelled against FOS, which current entity would be responsible for conducting such an investigation? If you thought it would be ASIC you'd be wrong.

While FOS is subject to regular reviews by ASIC, ASIC have said on the record at March 2016 hearing of the Parliamentary joint committee on Corporations and Financial Services that FOS, and I quote from Mr Warren Day, Senior Executive Leader for Assessment and Intelligence at ASIC that "***FOS is not, however, in a position to be scrutinised by the regulator.***"

In an article published 1 July 2016 by the IFA, IFA further quoted Mr Day, "***We don't investigate FOS in that respect. We oversee their external dispute resolution activities and schemes, but we don't investigate matter by matter***. "When Mr Day was pressed by Senator Deborah O'Neill on who would conduct an investigation into FOS, Mr Day is quoted in replying "***I would expect the Ombudsman himself.***"

[6] Page 30 of the FOS General Purpose Financial Report for the year ended 30 JUNE 2015

Pardon? So a senior figure in ASIC thinks it's perfectly okay for the FOS Ombudsman to conduct a review of the very service he's responsible for?

Apologies to the Expert Panel for this crude analogy but that's like asking a drunk if he thinks he's had too much to drink – the answer is always going to be "*No. I don't have a problem - nothing to see here.*"

It's an incredibly inappropriate judgement that the FOS Ombudsman himself should be the one to review the body they are responsible for, and that a senior person within ASIC can suggest such should raise significant concerns within the senior management ranks of ASIC and the Federal Minister responsible for ASIC.

ASIC's attitude only further reinforces ASDAA's call for the prompt establishment of an Independent EDR Oversight Tribunal.

No one is above the law, and that includes FOS.

Whist this Independent EDR Oversight Tribunal would be a Government statutory body, it could easily be funded 100 per cent by being included as part of the FSP annual EDR membership fee.

ASDAA notes, there were 5,352 FSP's and 9,396 Authorised Credit Representative members registered at 30 June 2015[7]. So using a theoretical fee of $50+GST charged annually as part of the annual membership fee, would raise approx. $737,000 to fund say a three person plus back office support Independent EDR Oversight Tribunal.

In comparison to FOS's $2.66 million[8] in benefits paid to 19 Key Management Personnel, a newly established Independent EDR Oversight Tribunal would be comparatively well funded by the industry members.

Our members have also shared their opinions with respect to FOS's 13.3 TOR clause 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 FOS. Again, this is why our members feel the FOS dice is so firmly loaded against them because the same prohibitions are **not** restricted to the consumer who instigated such action against the FOS member. The prohibitions even include any employee, agent or contractor of the FSP member.

ASDAA believes this could have significant unfair impact on an adviser or their FSP's reputation, which is founded on trust and credibility.

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

[7] Page 11 of the FOS General Purpose Financial Report for the year ended 30 JUNE 2015
[8] Page 39 of the FOS General Purpose Financial Report for the year ended 30 JUNE 2015

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 FOS EDR process then they should be allowed to take external legal matters to defend their professional reputations.

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 the Expert Panel, "Surely it isn't FOS'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 on FOS 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.

Lastly, ASDAA would like to bring to the Expert Panel's attention that should a current FSP FOS member decide they would like to cease their membership with FOS to join another EDR body, that under the FOS constitution clause 3.8[9], the member must give not less than **twelve months' notice** to FOS of their intention to leave.

The FSP can request a waiver of FOS' clause 3.8, but in doing so the FSP isn't entitled under FOS constitution clause 3.14(a) to any repayment of the whole or any part of the annual levy fee already paid.

These annual fees charged can range anywhere between $300 and $500.

ASDAA considers this to be a completely unfair arrangement and asks the Expert Panel to consider ASDAA's recommendation 9 that FOS' Constitutional clause 3.8 be amended to a period of one months' notice and not twelve and that clause 3.14(a) does allow for a refund of the annual levy already paid by the FSP on a pro rata basis.

It is outrageous that FOS can gouge a FSP the cost of a full membership fee again all because the FSP decides to move to another EDR body.

ASDAA is of the opinion that if everyday consumers faced a similar egregious notice to leave requirement that came with a full annual financial penalty cost all because they wanted to exert their right to terminate a membership, then FOS would mostly likely find in their favour.

[9] Page 7 of the FOS Constitution

So to summarise ASDAA's positions on the review into Dispute Resolution and Complaints Framework, ASDAA would like the Expert Panel to consider our following recommendations:

1. That the statute of limitations to lodge a Securities/Stockbroking related "inappropriate advice" dispute **expires 6 months after** the purchase/transaction date of the said equities/investment.

   For Example: if a client, with or without advice, purchased a listed equity position on Jan 2nd then the statute to lodged a dispute about that purchase must be made to FOS before July 2nd of the same year. A dispute made on the grounds of "inappropriate advice" after July 2nd would be outside of FOS's TOR and therefore would be dismissed. Clause 15.2 of FOS' TOR would state this inclusion;

2. That FOS should be bound by the legal rules of evidence. Clause 8.1 of FOS' TOR to be amended to: "FOS **is** bound by any legal rule of evidence."

3. The introduction of a modest complaint registration fee that should help reduce frivolous and vexatious complaints received and also assist in lowering the dispute cost to FSP's. A fee of $250 + GST in the opinion of ASDAA doesn't seem to be an unreasonable amount to charge. The fee should only be applicable for those who seek monetary compensation of $10,000 or more;

4. That FOS needs to ensure its Case Managers who are assigned to assess a Securities/Stockbroking dispute are suitably qualified to do so, must hold a relevant University degree and have at least 3 years relevant professional experience in the Securities/Stockbroking industry. If no such personnel are currently employed then FOS should make it a priority to employ at least two or three suitably qualified individuals to meet this standard;

5. That FOS should appoint, at a minimum, two or more suitably qualified individuals to sit on FOS Stockbroking Panel;

6. That FOS' conflicted fee structure is replaced with a fairer fee structure;

7. That a Government statutory body which ASDAA refers to as the *Independent EDR Oversight Tribunal* be setup to hear FSP appeals and has the power to put aside any FOS Determination decision. That this Tribunal also has the power to investigate and annually review FOS. This Independent EDR Oversight Tribunal could easily be funded 100 percent by being included as part of the FSP annual EDR membership fee;

8. That FOS' TOR clause 13.3 regarding Defamation protection be **deleted in its entirety**;

9. That FOS' Constitutional clause 3.8 to leave FOS be amended to a period of one months' notice and not twelve and that clause 3.14(a) does allow for a refund of the annual levy already paid by the FSP on a pro rata basis.

From the Terms of Reference, it is stated that the Expert Panel's review of EDR's will have regard to its: efficiency; equity; complexity; transparency; accountability; comparability of outcomes; and regulatory costs.

It is ASDAA's position that FOS is: inefficient, unfair, makes rather simple disputes seem complex, has poor transparency, is fundamentally unaccountable, and makes the compulsory FSP member bare all of the regulatory costs.

Perhaps Senator Nick Xenophon is right, and FOS should be completely disbanded and replaced with a Government statutory body which is supported by all state and federal Governments? Perhaps the Expert Panel should consider the Senator's call to disband?

The Government of the day, ASIC, FOS, 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 the Expert Panel on these significant EDR reviews.

We would be happy to discuss any issues arising from our submission, or to provide any further material that may assist the Expert Panel.

Should the Expert Panel or the Treasury department require any further information, please contact myself on [redacted]

Yours sincerely,

[redacted]

Andy Semple
B.Com., B.App.Sc., MEASDAA
Director

Media Articles the Expert Panel may find of interest

Calls for Financial Ombudsman Service to be disbanded over issues in Goldie Marketing court case. Posted 16 March 2016

http://www.abc.net.au/news/2016-03-16/calls-for-financial-ombudsman-service-to-be-disbanded/7250894

The questions the Financial Ombudsman needs to answer. Posted 1 April 2016

http://www.abc.net.au/news/2016-04-01/long-the-questions-the-financial-ombudsman-needs-to-answer/7292044

Increasing FOS surveillance. Posted 1 July 2016

http://www.ifa.com.au/opinion/16484-under-surveillance

APPENDIX ONE

CASE STUDY

The following Cast Study is based on an actual FOS Dispute. Only the identities of those involved have been supressed. ASDAA believes it to be important the Expert Panel gets an understanding of what unfolds during a FOS dispute involving our members.

The client met with their adviser on the afternoon of 12th September 2012 at the FSP offices, where the client proceeded downstairs to a coffee shop for the initial meeting. During this meeting the client declined to accept and complete the *FSP's Client Financial Information and Risk Profile Form*.
The FSP's *FSG* was issued to them.

As the client elected not to complete the FSP *Client Financial Information and Risk Profile Form,* the adviser was only able to provide the client with the "*General Advice and Execution Only*" service level relating to listed ASX stocks.

The adviser explained at the meeting to the client exactly what the "*General Advice and Execution Only*" service level meant – that the adviser would provide the clients with stock recommendations but these recommendations would **not consider their personal financial circumstances**. The adviser also confirmed what execution only advice only meant – that the adviser would accept trade orders from the client directly and would not question their motive on why they wanted to trade in those stocks.

The adviser also recalls that the client came to the meeting with a pre-determined list of stocks that they wished to purchase, with their dividend amounts and franking percentages already noted next to them. The stocks list consisted of the four major listed Australian Banks. The adviser noted these stocks in his diary notes. The client and the adviser then settled what the agreed brokerage rate would be charged on stock transactions.

As the adviser was about to determine what understanding the client had of the *Risk vs Reward* equation, the client interjected and said they understood what risk meant, and again just wanted someone to buy and sell stocks for them. The client then advised that he had been employed as a risk adjuster in an insurance industry for many years, and that he did not need a lecture on risk management.

The adviser made diary notes of his 12th September 2012 meeting.

The adviser assisted the client in completing the ASX Participant new account paperwork.

The client's share trading account was opened on 14th September 2012 and the follow three bank stocks were purchased for the client:

Date of Trade	TXN	Consideration
14/09/2012	B 5,857 NAB @ $25.48	$150,057.16
14/09/2012	B 6,140 ANZ @ $24.30	$150,022.61
14/09/2012	B 6,180 WBC @ $24.15	$150,067.86
		$450,147.63

The adviser on 10th December 2012 received their first instruction to sell their entire share portfolio which consisted entirely of bank share holdings. The portfolio was sold down completely over a period of 37 days, not instantly as the client claimed in their FOS dispute.

The table below notes the sell transaction dates.

Date of Trade	TXN	Consideration	Profit/Loss	Days Owned	Dividends Paid
10/12/2012	S 6,180 WBC @ $25.18	$158,628.52	$8,560.66	87	$5,191.20
21/12/2012	S 6,140 ANZ @ $25.00	$152,655.75	$2,633.14	98	$4,850.60
16/01/2013	S 5,857 NAB $25.88	$150,745.47	$688.31	124	$5,271.30
		$462,029.74	$11,882.11		$15,313.10

The client ended up making a capital gain of $11,882.11 while also receiving $15,313 in fully franked dividends.

21st of February 2013, the client instructs the adviser to action the following NCM buy trade:

Date of Trade	TXN	Consideration
21/02/2013	B 4,600 NCM @ $21.688	$100,313.65

27th of February 2013, the client instructs the adviser to action the following LYC buy trade:

Date of Trade	TXN	Consideration
27/02/2013	**B 80,000 LYC @ $0.63**	**$50,677.20**

In both instances, the adviser notes in his trading dairy that each buy trade action was a "*No Advice Given*" or what is referred to in the industry as a "NAG" trade.

28th of February 2013, the client instructs the adviser to action the following NCM sell trade to lock in a quick trade profit. It too was noted in the adviser's diary as a "NAG" trade.

Date of Trade	TXN	Consideration	Profit/Loss	Days Owned
28/02/2013	S 4,600 NCM @ $22.40	$102,473.28	$2,159.63	7

The client went on to have the adviser action the following buy and sell trades which included the **purchase again** of equity NCM on 15th April 2013 at a price of $17.90, a price significantly lower when the client first bought NCM equities.

Date of Trade	TXN	Consideration	Profit/Loss	Days Owned	Dividends Paid
4/03/2013	B 11,300 FMG @ $4.41	$50,107.09			
5/09/2013	S 11,300 FMG @ $4.44	$49,896.05	-$211.04	185	$1,130.00
13/03/2013	B 1,620 NAB @ $30.80	$50,170.43			$1,506.60
5/03/2014	S 1,620 NAB @ $35.01	$56,404.35	$6,233.92	357	$1,571.40
15/04/2013	**B 4,190 NCM @ $17.90**	**$75,413.51**			

At the close of business 5th March 2014, the client's portfolio consisted only of the following two stocks, 80,000 LYC and 4,190 NCM shares.

On the 17th July 2014, the client writes to the adviser complaining that the value of their share portfolio is down approximately **$67,250** and demands the adviser immediately compensates them for the "paper loss." The client warns the adviser if they don't compensate them the requested amount they will be pursing the matter with FOS.

The complaint is received **505 days** after the purchase date of equity LYC and **458 days** after the purchase date of equity NCM.

Here is why ASDAA's Recommendation 1 is required

Now had FOS' TOR regarding the statute of limitations been what ASDAA has recommended, namely in order to lodge a complaint about "inappropriate advice" surrounding the purchase of listed equities, the complainant must have notified FOS within 6 months of the said equities/investment purchase date then this dispute should have been dismissed immediately because the dispute falls well outside the TOR statute of limitations. If the consumer was aggrieved by the "inappropriate advice," whether the advice was given or not, then the consumer should have lodged their dispute against the adviser regarding the LYC purchase by 27 August 2013 and 15 October 2013 regarding the NCM purchase.

The adviser follows the FSP's IDR process and advises the client on 29th July that the FSP will respond within 45 days of receipt of the client' complaint.

As required, the FSP conducts their internal investigation. Many sources of documents, including diary notes, emails, contract notes, trading ledgers and client account forms are gathered and examined. The FSP spends in excess of 50 professional hours conducting their internal investigation.

The FSP writes to the client on 27th August 2014 advising them of the outcome of their internal investigation which is the FSP finds no basis for their demand for compensation. The FSP lists the various reasons on why they made that conclusion.

Here is why ASDAA's Recommendation 2 is required

As the IDR stage has now expired and the consumer still feels aggrieved, the consumer is advised by FOS that should they wish to advance their complaint through the FOS EDR process they now need to pay FOS the modest $250 + GST Complaint Registration fee.

As the consumer is seeking a monetary compensation amount greater than $10,000, the payment of such a Complaint Registration fee is reasonable.
In the event the consumer doesn't pay the Complaint Registration fee, then that could reasonably suggest their complaint is highly likely a frivolous one.

The FSP receives their first of many FOS correspondences on 18th September 2014.

It was verbally conveyed to the FSP by the FOS Case Manager that the FSP should consider making an **offer of compensation**. The FSP declined to do so on the basis that the adviser had not done anything wrong.

The FSP ends up writing to FOS **four times**, with the first correspondence being 7 pages on 16th October 2014.

Here is why ASDAA's Recommendation 3 is required

It is the opinion of ASDAA that had FOS ensured their Case Managers had the relevant experience in the Securities/Stockbroking industry then the need for the FSP to write four lengthy correspondence letters to FOS wouldn't have been required. The facts surrounding this dispute were not that complex to begin with.

The FSP writes to FOS for a second time on 27th November 2014 in response to FOS emails received on the 12th and 13th November 2014. The FSP's correspondence to FOS this time around was 11 pages in length.

It was verbally conveyed to the FSP again by the FOS Case Manager that the FSP should consider making an **offer of compensation**. The FSP again declined to do so. The amount of compensation sort by the client had also increased to $77,900 from the $67,250 initially demanded. The FSP questioned FOS why the complainant can alter upwards the amount of monetary compensation they now seek but FOS never acknowledges the FSP on this point.

The client also offers an alternative to the FSP - buy back the client's LYC and NCM shares at the purchase price the client had initially paid. This was also rejected by the FSP but was considered by FOS as a viable alternative to a monetary compensation payment.

FOS then also allowed the client to alter their reason for monetary compensation from alleging that their adviser provided inappropriate advice, to alleging that their adviser didn't recommend that they should sell their LYC and NCM shares, which the adviser had not even recommended purchasing in the first instance.

Here is why ASDAA's Recommendation 4 is required

> Case Manager's assigned to assess a Securities/Stockbroking Dispute need to be suitably qualified to do so, must hold a relevant University degree and have at least 3 years relevant professional experience in the Securities/Stockbroking industry.

The FSP concludes FOS isn't averse to moving the goal posts on behalf of the consumer. This supports why ASDAA members consider the FOS dice is firmly loaded against them.

The FSP supplied to FOS in its second correspondence - emails from the client **admitting** they got their "advice" from Channel 7 morning tabloid TV show host *Mr David Koch*, News Limited journalist *Mr Terry McCrann,* and Financial commentator *Mr Noel Whittaker*.

The client also admitted in an email the FSP presented to FOS that they did get the idea to buy the three banks from listening to "*Koch on the TV*."

The FSP asked FOS to immediately make a recommendation about this case, as it was becoming more apparent it was frivolous and the goalposts appeared to be continually moving. FOS never responded to the FSP request to go to the Recommendation stage.

At no stage did the client ever ask the adviser if they should consider selling their LYC and NCM shares.

The impression from the FSP was that FOS was only too keen to string along the dispute ensuring a higher FOS fee – a fee the FSP alone would be made to pay.

The FSP writes to FOS for a third time on 7th January 2015 in response to FOS' 5th January 2015 email which contained correspondence from the client dated 24th November 2014. The FSP's correspondence to FOS was 15 pages in length.

The client again wanted more monetary compensation – this time it was increased to $90,000. Again, when queried by the FSP why FOS has allowed the consumer to yet again increase the amount of monetary compensation sort, FOS declined to respond to the FSP.

Here is why ASDAA members consider FOS is an aggressive consumer advocate. They just seem to go out of their way to assist the consumer.

The complainant also admitted to FOS they had also sort the "advice" from two unnamed Financial Advisers. They admitted they sort advice about LYC and NCM around 7th June 2013, some 40 days **before** they lodged their official complaint.

It was verbally conveyed to the FSP for a **third time** now by the FOS Case Manager that the **FSP should consider making an offer of compensation**. This time the FOS Case Manager suggested an amount within the ball park of $10,000 be offered. The FSP instead counter offered with $1,000 which was flatly refused by the complainant.

It is quite obvious to the FSP that the FOS Case Managers are more interested in getting the FSP to make an offer of monetary compensation to the complainant in the very initial stages of the EDR process, than for the FOS Case Managers to discharge their duties and fairly adjudicate the dispute.

Again, for the second time, the FSP asked in their 7th January 2015 response to FOS to immediately make a recommendation about this case, as it was apparent it was completely frivolous.

On the 27th January 2015, FOS advises the FSP that they have made a Recommendation which was in favour of the FSP. It only took FOS 131 days to close this dispute.

As previously stated in this submission, winning this dispute still cost the FSP $5,665.00 in FOS fees and a significant amount of professional time.

Here is why ASDAA's Recommendation 6 is required

FOS has a conflicted fee structure. It needs to be simplified and made fairer to the FSP.

The FSP conservatively estimates the opportunity cost in defending itself against the frivolous demand for monetary compensation allegations to be a conservative amount of at least $20,000.

The FSP accepts FOS' Recommendation and the Dispute is now closed.

On the 3rd February 2015, the FSP receives a highly defamatory email from the complainant threatening immediate civil action if the FSP doesn't pay $90,000 by 10th February 2015.

Here is why ASDAA's Recommendation 8 is required

It is completely unacceptable for anyone, let alone the FSP, that they can be viciously defamed by a consumer with no legal recourse to protect their reputation. FOS' TOR clause 13.3 regarding Defamation protection must be deleted in its entirety.

The FSP ignores the complainant email and legal threat contained therein and to this day, no civil proceedings have yet been launched against the adviser or FSP but the threat still looms.

The complainant has the right to take such action against a FSP when they lose a FOS dispute, but should a FSP lose a FOS dispute they are prevented from taking similar legal action.

Had ASDAA's recommendations 1, 2, 3, 4, 6 and 8 already been implemented by FOS, ASDAA doubts very much this particular dispute would have been considered by FOS in the first place or if it had been accepted it would have reached the Recommendation stage significantly earlier than what it actually did, thus saving the FSP considerable time and money.

From the Desk of Director Andy Semple

19th January 2017

EDR Review Secretariat
Financial System Division
Markets Group
The Treasury
Langton Crescent
Parkes ACT 2600

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

INTERIM REPORT REVIEW INTO 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 these comments to the Expert Panel in respect to the Interim Report review into the current Financial System External Dispute Resolution (EDR) and Complaints Framework.

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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DRAFT RECOMMENDATIONS TO POSITION THE FRAMEWORK FOR THE FUTURE

DRAFT RECCOMENDATION ONE

A new industry ombudsman scheme for financial, credit and investment disputes

It is the opinion of ASDAA that the creation of a monopoly EDR body is a backwards step, especially for the Financial Service Providers (FSP's) who will be compulsory financial members of such an EDR monopoly, and consumers who will rely on such a scheme to adjudicate disputes.

At best the recommendation can be described as a "Fawlty Towers" solution. It is apparent the Expert Panel has accepted hook, line, and sinker FOS's obvious power grab to force the merge of CIO into FOS.

It is ASDAA's preference that CIO and FOS are left alone to operate as completing EDR bodies.

ASDAA is not aware of any monopoly created that has demonstrated that it is cheaper, more efficient, less complex, more accountable and transparent in the absence of competition. Service does not improve if there is only one player in the market.

We appreciate that there are currently only two EDR bodies that are presently active, FOS and CIO, but at least they can each benchmark themselves against each other. This benchmarking actually produces better outcomes for consumers and FSP's because it forces the EDR's to adopt best practice and improve their service offerings. As the Interim Report notes on Page 11, FOS gets 75% of its revenue via dispute fees, whilst its competitor CIO gets 70% of its revenue via membership fees. This is a very stark difference in funding, which only competition can bring about. Remove competition and just watch the single EDR percentage of revenue ultimately become 100% from dispute fees.

It's accepted economic theory that when firms have a monopoly power they charge prices that are higher than can be justified based upon the costs of production, and prices are higher than they would be if the market was more competitive.

For example – look at ASIC's companies registry business.

The cost to ASIC of operating the registry is less than $6 million a year, yet this bears no resemblance to how much it charges businesses and the public for using it – about $720 million annually, a return to ASIC of more than 10,000%[1]

The bottom line is that when companies have a monopoly, prices are too high and production is too low. There's an inefficient allocation of resources which will lead to lower levels of service.

[1] ASIC 'screwing' small companies with registry fees. The Australian December 23 2016

So why would the Expert Panel conclude a monopoly EDR body would act any differently to a body or corporation that monopolises the companies registry, telecommunications, or the banking spaces for example?

The fact that FOS, a current EDR body, recommended in their initial submission (Page 23) the merger of CIO **into** FOS smacks of opportunism and rampant self-interest. If the outcome sought is to further entrench institutional bias then let FOS takeover CIO.

If one follows the logic put forward by FOS's argument on why they should absorb CIO then the same argument could be made that the big four banks should do the same and merge forming one big "mega" bank, but we all know that shouldn't be allowed to happen because a big "mega" bank monopoly would be a bad outcome for everyone.

Since monopolies are the only provider, they can set any price they choose. That's known as price-fixing. They can do this regardless of demand because they know the FSP has no choice but to pay whatever membership and dispute fees they deem fit.

The problems with monopolies also go beyond the economic effects. A single EDR will also have considerable political influence, and the ability to "capture" the political and regulatory process over time. This allows the sole EDR to tilt the legal and regulatory processes against any potential threat to its market power, and to bring about changes that further enhance the revenue it earns.

Furthermore, a forced merger of CIO into FOS would mean FSP's who are dissatisfied with service levels or costs would have nowhere else to go. That's unhealthy and a poor outcome.

If there is to be any single EDR body, then it should be statutory tribunal established under legislation. For Government and ASIC to bestow such market and jurisdictional power to an unlisted public company limited by guarantee trading as a monopoly EDR scheme is just mind boggling.

Should the prevailing recommendation of the Expert Panel be accepted, then at the very least the merger of FOS and CIO must be a merger of equals, not merely a paper and pen exercise for FOS to erase their competitor CIO from history. FOS could learn a lot from how CIO assesses disputes, especially how CIO ensures that their dispute Case Managers are experienced individuals from the investment space they assess.

In responding to the remaining Draft Recommendations, ASDAA will assume the Expert Panel's Recommendation One is accepted and going forward only one EDR body will exist.

DRAFT RECCOMENDATION TWO

Consumer monetary limits and compensation caps

It is the opinion of ASDAA that increasing of monetary limits and compensation caps will lead to significantly higher PI Insurance premium costs to all FSP's.

It stands to reason; the greater amount of potential compensation sort by a consumer will lead to higher PI insurance costs to FSP's. This basic axiomatic principle seems to have escaped the Expert Panels consideration.

The Expert Panel's acknowledgement about the concerns of smaller firms (6.15 & 6.16) would seem to be hollow because should draft recommendation two alone succeed, it would severely disadvantage smaller FSP firms in comparison to large FSP firms (like the Banks and the Insurers) who can easily absorb higher PI premiums, and are in a position to pass these costs off to their consumer base.

The interim report correctly notes the current monetary limit of $500,000 and the compensation cap of $309,000 but nowhere in this interim report is there a clear indication of what the higher limits and caps would be raised too.

The limits and caps, should they be increased, shouldn't be subject to indexation but reviewed on the same five year cycle in which ASIC reviews the EDR.

DRAFT RECCOMENDATION THREE

Small business monetary limits and compensation caps

ASDAA has no specific comment to make regarding recommendation three, other than the Expert Panel should consider our comment pertaining to recommendation two. We have no opinion on what the limits and caps should be.

DRAFT RECCOMENDATION FOUR

A new industry ombudsman scheme for superannuation disputes

ASDAA has no specific comment to make regarding recommendation four.

DRAFT RECCOMENDATION FIVE

A superannuation code of practise

ASDAA has no specific comment to make regarding recommendation five and supports the call for the superannuation industry as a whole to develop and abide by a superannuation code.

DRAFT RECCOMENDATION SIX

Ensuring schemes are accountable to their users

If FSP's and their advisers are to be forced to join a single new (monopoly) EDR scheme, then ASDAA considers an independent EDR oversight tribunal should be created as a Government statutory body that also has the power to investigate and annually review the new EDR scheme. EDR schemes should also be made to report to a parliamentary committee, as the four big banks recently did.

It is unacceptable that the current EDR's, FOS and CIO, write their own reviews which they submit to ASIC every five years.

If allegations of misconduct were to be levelled against an EDR, which current entity would be responsible for conducting such an investigation? If you thought it would be ASIC you'd be wrong.

While FOS and CIO are subject to regular reviews by ASIC every five years, ASIC have said on the record at a March 2016 hearing of the Parliamentary Joint Committee on Corporations and Financial Services that FOS, and I quote from Mr Warren Day, Senior Executive Leader for Assessment and Intelligence at ASIC that "***FOS is not, however, in a position to be scrutinised by the regulator***."

In an article published 1 July 2016 by the IFA, IFA further quoted Mr Day, "***We don't investigate FOS in that respect. We oversee their external dispute resolution activities and schemes, but we don't investigate matter by matter***." When Mr Day was pressed by Senator Deborah O'Neill on who would conduct an investigation into FOS, Mr Day is quoted in replying "***I would expect the Ombudsman himself***."

Pardon? So a senior figure in ASIC thinks it's perfectly okay for the FOS Ombudsman to conduct a review of the very service he's responsible for?

Apologies to the Expert Panel for this crude analogy but that's like asking a drunk if he thinks he's had too much to drink – the answer is always going to be "*No. I don't think I have a problem.*"

It's an incredibly inappropriate judgement that the FOS Ombudsman himself should be the one to review the body they are responsible for, and that a senior person within ASIC can suggest such should raise significant concerns within the senior management ranks of ASIC, and the Federal Minister responsible for ASIC.

ASIC's attitude only further reinforces ASDAA's call for the prompt establishment of an Independent EDR Oversight Tribunal.

No one is above the law, and that includes FOS, CIO, or a newly created EDR body.

Whist this Independent EDR Oversight Tribunal would be a Government statutory body, it could easily be funded 100 per cent by being included as part of the FSP's annual EDR membership fee.

ASDAA notes, there were 5,352 FSP's, and 9,396 Authorised Credit Representative members registered at 30 June 2015[2]. Using a theoretical fee of $50+GST charged annually as part of the annual membership fee would raise approximately $737,000.00 to fund a three person tribunal panel, for example, along with some back office support for an Independent EDR Oversight Tribunal.

In comparison to FOS's $2.66 million[3] in benefits paid to 19 Key Management Personnel, a newly established Independent EDR Oversight Tribunal would be comparatively well funded by the industry members.

[2] Page 11 of the FOS General Purpose Financial Report for the year ended 30 JUNE 2015
[3] Page 39 of the FOS General Purpose Financial Report for the year ended 30 JUNE 2015

ASDAA supports the establishment of an independent assessor (6.62) and its various responsibilities (6.63 & 6.64).

DRAFT RECCOMENDATION SEVEN

Increased ASIC oversight of industry ombudsman schemes

FOS and CIO are not judicial bodies. They are public companies limited by guarantee which derive 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 CIO and FOS' Terms of References, and CIO and FOS are not independent of ASIC.

As administrative bodies, CIO and FOS are not subject to the Freedom of Information (FOI) regime. There is no way for anyone to shine a light on its 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).

A good place for ASIC to start would be to ensure EDR schemes ARE 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%[4] 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[5], 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 does 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

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

adviser or their FSP to the EDR. Again, this is why our members feel the FOS dice is so firmly loaded against them because the same prohibitions are **not** restricted to the consumer who instigated such action against the FOS 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.

Whilst ASDAA agrees that certain information provided by a consumer to FOS 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 the Expert Panel again, "***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.

DRAFT RECCOMENDATION EIGHT

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. Just because the FOS 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?

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

Given the importance of FOS' dispute function, 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[6]:

[6] 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.

Unlike FOS, 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.**

An adviser, or their FSP, affected by an adverse FOS decision in effect has no right of reply, and this is not fair. A FOS 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 FOS Determination.

Even murderers get the right to appeal their sentences.

So it is important that should a new EDR body be established, as recommended by the Expert Panel, they at least ensure FOS's current short comings in the area of capable assessment aren't repeated with the new EDR body.

Those who do not learn from history are doomed to repeat it.

It is also the perfect opportunity that the new EDR scheme at least has a means for an FSP and their Adviser have a right to appeal.

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 an EDR 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.

DRAFT RECCOMENDATION NINE

Internal dispute resolution

It is ASDAA's position that the last thing any FSP needs is more bureaucratic red tape and this recommendation delivers more red tape in spades.

FSP's are made up from "one man band" firms through to massive global investment/insurance conglomerates so there is no "one size fits all" IDR scheme to follow, as no one business is alike. There are small firms who deal in highly complex financial areas like Derivatives, while some large firms deal in relatively easy to understand financial areas like basic deposit products.

All AFS Licensees, regardless of their size, have the following Condition noted on their license:

> **Compliance Measures to Ensure Compliance with Law and Licence**
> *The licensee must establish and maintain compliance measures that ensure, as far as is reasonably practicable, that the licensee complies with the provisions of the financial services laws.*

And all licensees are required to maintain a ***breach and complaints registers***, which must be reviewed by the FSP's external Compliance Auditor.

Licensees are already obligated to inform ASIC should a significant and material breach occur i.e. Fraud.

Under RG165, all licensees must have in place a process to try and resolve disputes internally. ASIC sensibly have left it up to the particular licensee to self-determine what their IDR process is. **The last thing any FSP wants is for an ASIC bureaucrat to determine what the content and format of IDR reporting should be**.

Moreover, both FOS and CIO also have the power to report to ASIC any form of "systemic" risk they may determine as a FSP goes through their respective EDR process. So any further bureaucratic impost is certainly not welcome.

Furthermore, if it's the Expert Panels concern that because there is a lack of publically available IDR information that it could possibly lead to FSP's being able to hide from scrutiny any internal shortcomings let ASDAA explain to the Expert Panel the three contemporaneous external audit processes each and every licensee, regardless of their business size, face annually.

Each FSP that holds an AFS License must;

1. Be financially audited by an ASIC noted Financial Auditor.
2. Have and external compliance review that is audited by a suitably qualified External Compliance Auditor.
3. Obtain a PI insurance policy with a min cover of $2.5 million which will only be considered by a reputable PI insurer once they have obtained a current copy of both the Financial and Compliance Audit.

All of these costs are 100% borne by the FSP. ASDAA would like to note that the costs of these audits are substantial in nature to the FSP, and especially to the

small business FSP's, who has no capacity to pass the cost onto their clients in the current marketplace.

For example, an FSP with revenue in the vicinity of one million dollars per annum would be paying a financial audit fee of approximately $15,000, a compliance audit fee of approximately $15,000 and PI plus Director's insurance premiums of approximately $35,000 per annum (These PI fees are significantly higher for FSP's who had even minor EDR settlement payouts by their insurer). They would also face a substantial Accountants cost because they must provide special purpose accounts for the FSP's Auditor.

ASDAA can't see why a licensee's privacy should be waived so that ASIC can save in a database some more insignificant statistical information. ASIC already have the power to walk into any licensees place of business and demand the FSP turn over any requested information should the need arise.

What matters here are hard results. If a licensee and a complainant can come to an agreeable settlement via IDR then that's the best outcome, and is it then really anyone else's business to know what happened? If IDR fails, then that's what EDR schemes are set up for – to hopefully make an independent unbiased complaint determination.

As for IDR statistical info, if a consumer has complained to the EDR and they are now assessing it, then statistically the IDR process was 100% unsuccessful.

As for ASIC publically publishing FSP details, this should only ever occur under the most dire of circumstances. Should an FSP IDR fail in the opinion of a subjective assessment from an ASIC or EDR bureaucrat and they are publically shamed that would represent a most grievous denial of the FSP and advisers natural justice.

It's also commonly accepted knowledge by industry that because there is a free EDR scheme to consumers; it basically makes the IDR process redundant.

DRAFT RECCOMENDATION TEN

Schemes to monitor IDR

It is ASDAA's opinion that recommendation ten is an excessive overreach to allow any EDR scheme to require a FSP to register their IDR with them and for the EDR to monitor its progress. This just amounts to further layers of unnecessary and intrusive bureaucratic red tape on the FSP that helps no one.

It will also provide another excuse for monopoly EDR body to easily increase their fees – fees the FSP only pays.

DRAFT RECCOMENDATION ELEVEN

Debt management firms

ASDAA has no specific comment to make regarding recommendation eleven and supports the call for the debt management firms to be required to be a member of an industry ombudsman scheme and the requirement that they also hold a license to conduct a debt management business.

ASDAA has two specific recommendations the Expert Panel need to seriously consider and action regardless of whether there is a single EDR body created or the status quo remains unchanged.

ASDAA RECCOMENDATIONS THE EXPERT PANEL SHOULD CONSIDER

ASDAA RECCOMENDATION ONE

Modest complaint registration fee

The shared opinion of ASDAA members is that FOS is a highly aggressive consumer advocate, and not an independent external dispute resolution body, as they claim to be. It is the shared opinion of our members that FOS is no friend of Securities and Derivatives advisory/Stockbroking profession.

Our members say this because of FOS' inability, or unwillingness, to toss out the most obviously frivolous and/or vexatious disputes levelled against them and the FSP's they work for.

The distrust from Securities and Derivatives professionals begins when a complaint can be lodged about an adviser or FSP at no cost to the consumer.

It is ASDAA's position that the Expert Panel considers anyone who makes a formal complaint about an adviser, and/or an FSP to an EDR body be required to pay a modest complaint registration fee of at least $250 + GST.

According to the FOS 2015/2016 annual review[7], 34,095 disputes were received by FOS.

By applying ASDAA's theoretical dispute registration fee of $250 + GST, this would have seen FOS raise approximately $8.5 million + GST, which FOS could then apply as an offset against the dispute fees charged to the FSP's, thus having the desired effect of lowering the dispute cost to FSP's.

A modest complaint registration fee would also go a long way to ensure the consumer isn't lodging a **frivolous or vexatious complaint** against an adviser or FSP. Should the consumers complaint end up being upheld by the EDR, then the registration fee would be refunded along with the adjudicated monetary compensation awarded.

As it currently stands however, it is entirely unfair to the FSP member that they are 100 percent exposed to the cost of the EDR's complaint fee structure.

It is not unreasonable for the complainant to have some cost exposure to the dispute process, especially if they are seeking a significant monetary compensation figure.

Again, we come back to the missing central tenet of fairness.

[7] Page 54 of FOS annual Review 2015 2016

Maybe it would be appropriate for the EDR to charge such a modest complaint registration fee when the consumer is seeking **more than $10,000 in monetary compensation from a FSP?**

ASDAA isn't averse to imposing a reasonable threshold and ask the Expert Panel to consider the merits of this recommendation.

Recently, one of our members had a significant FOS complaint resolved in their favour, yet the direct financial cost to our member's FSP was $5,665.00 in FOS fees. (This does not include the significant dollar cost incurred by the FSP, the adviser, and the insurer in responding to the complaint that extended over a 10 month period).

So even when a FSP wins, they still lose with FOS, and if a new EDR body is to be born, then at least let it come about without the baggage of FOS's dispute handling process.

Now imagine if a small FSP had to deal with half a dozen or so claims made against them each year with them all being resolved in their favour – that's north of $33,000 in FOS fees alone and what small business can afford that?

There are well over 5,500 AFS Licensee's[8], with a significant proportion of them being small family owned businesses. Not every FSP is a subsidiary of a large Bank, Insurance, or Stockbroking company with its own unlimited internal resources and the financial capacity to easily settle any number of EDR disputes.

This places FSP's in the ATO's Small Business Category, (e.g. those with a turnover of less than $2 million dollars), at a significant disadvantage in the EDR process.

As already stated, a modest complaint registration fee would help ensure that EDR dispute fees that an FSP must pay, regardless of the dispute outcome, are at least lower than what they presently are.

ASDAA notes from the comparison table of the five international jurisdictions[9] 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.

[8] As of 1 July 2016, there were 5,517 AFS Licensees recorded by ASIC
[9] Page 38 of Expert Panel Interim EDR Report

ASDAA RECCOMENDATIONS THE EXPERT PANEL SHOULD CONSIDER

ASDAA RECCOMENDATION TWO

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 the Expert Panel 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.

Clause 15.2 of FOS' Terms of Reference (TOR) should be revised to include the above mentioned amendment. **Should a new single EDR body be established then it is vital this amendment is incorporated into the new EDR 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.

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 the Expert Panel on these significant EDR reviews.

We would be happy to discuss any issues arising from our submission, or to provide any further material that may assist the Expert Panel.

Should the Expert Panel or the Treasury department require any further information, please contact myself on [redacted]

Yours Sincerely,

[redacted]

Andy Semple
B.Com., B.App.Sc., MEASDAA
Director

Media Articles the Expert Panel may find of interest

ASIC 'screwing' small companies with registry fees. Published 23rd December 2016 in the Australian.

http://www.theaustralian.com.au/business/economics/asic-screwing-small-companies-with-registry-fees/news-story/f1c9c00cc4f9d701f7d17d8434b4205d

Increasing FOS surveillance. Posted 1 July 2016

http://www.ifa.com.au/opinion/16484-under-surveillance

Calls for Financial Ombudsman Service to be disbanded over issues in Goldie Marketing court case. Posted 16 March 2016

http://www.abc.net.au/news/2016-03-16/calls-for-financial-ombudsman-service-to-be-disbanded/7250894

The questions the Financial Ombudsman needs to answer. Posted 1 April 2016

http://www.abc.net.au/news/2016-04-01/long-the-questions-the-financial-ombudsman-needs-to-answer/7292044

A copy of each article is attached to this submission.

From the Desk of Director Andy Semple

Association of Securities & Derivatives Advisers of Australia

14th June 2017

The Manager
Financial System Division
Markets Group
The Treasury
Langton Crescent
Parkes ACT 2600

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.

ASDAA
ASDAA is the trading name of the Association of Securities & Derivatives Advisers of Australia Ltd
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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 [redacted]

Yours Sincerely,

[redacted]

Andy Semple
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Director