Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

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Department/Agency: Australian Securities and Investment Commission
Question: AET 86
Topic: Goldie's case
Reference: Hansard page no. 28 - 11 February 2016
Senator: Xenophon, Nick

Question:

Senator XENOPHON: I want to go back to Goldie's case, which was determined on 19 June of last year. Paraphrasing, as I understand it, the court found that FOS had a broad discretion to abstain from determining disputes and indicated that successful attempts to challenge excise of that discretion have been few and far between. Is that a fair summary of the case?
Mr Kell: Yes.
Senator XENOPHON: And the court found that FOS were only bound by the terms of reference and that these formed the entire contract between the disputed parties and the FOS, and that their operational guidelines merely assisted in understanding the terms of reference. Is that a fair summary?
Mr Kell: In brief, yes.
Senator XENOPHON: You can elaborate on notice if you want. I am just conscious of time.
CHAIR: You are not under pressure here.
Senator XENOPHON: I am always under pressure.
CHAIR: You are not under any pressure from me.
Senator XENOPHON: Self-imposed. I am trying to be considerate to others who may want to ask questions. My understanding is that the court would not disturb a FOS decision unless there is evidence of bad faith, bias or the decision was so unreasonable that no reasonable decision maker could have arrived at that decision—that is, the unreasonableness test. Is that your understanding?
Mr Kell: Again, in short, yes.
Senator XENOPHON: I am not taking issue with the court's decision. The now clarified situation that emerges from the findings does concern me. FOS, like, say, the AAT, is supposed to act as a buffer in terms of likely expensive litigation. I suggest that if it is a financial institution, they will clearly have an advantage over the applicant or the complainant because of the financial resources disparity between the two.
I wonder whether ASIC has considered whether there ought to be a more administrative law dispute resolution flavour in FOS: that is, issues of procedural fairness, having all the cards laid face-up on the table, and with strong rights in relation to this and rules as to proper and improper considerations—in other words, the sort of rigour that we see with the Administrative Appeals Tribunal, rather than the more narrow confines that FOS seems to be within, which seem to be based on contractual terms of reference. Again, I am not criticising FOS, I am just saying that I wonder, as a result of Goldie's case, whether ASIC is looking at perhaps encouraging or being part of a reform of FOS—again, I am not criticising the good people of FOS—to get rid of the constraints as set out by the Victorian Supreme Court in the Goldie case.
Mr Kell: I do not think we would be of the view that Goldie's case itself generates that need, but it is the broader issue of how FOS goes about hearing disputes and what sorts of

processes it has—the evidentiary processes it has. That has been an issue pretty much from day one around these schemes, because there is a tension between their role as faster, quicker, cheaper alternative dispute resolution venues and having more complicated but arguably more court-like processes, and that tension remains. Our focus is very much on: are we seeing the quality of decision making overall at a level that is high and satisfactory and that enables the scheme to deal with the vast majority of retail complaints that come before it in an efficient way? To enable it to do that and to remain cost-effective and quick, there are inevitably aspects of the way that the courts work—or even that the AAT works—that, if you introduced them in FOS, would undermine that other objective. So that is the tension.
Senator XENOPHON: Unless you look at the European system, particularly the French inquisitorial system, where the bench, rather than having an adversarial role, has a more active role in trying to—
Mr Medcraft: You are guilty until proven innocent.
Senator XENOPHON: Well, that was not what I was thinking of. I was thinking more of the case that the format is different—it is less adversarial and more inquisitorial.
Mr Medcraft: Sure. But in the French system you are guilty until proven innocent.
Senator XENOPHON: At the risk of incurring the wrath of the Law Council of Australia, I am just seeing whether there is—
Mr Kell: Our understanding is—and some of these issues are probably better raised with FOS directly—that the case managers within FOS do undertake some of that process that you have just described. I think it can become more complex when you move from what might be regarded as conventional disputes about retail financial services to more complex commercial matters, and there inevitably has to be somewhere where the line is drawn and where you say, 'Right, this matter raises issues that are more appropriately dealt with by a court.' But there is an element of what you are talking about already in their process.
Senator XENOPHON: Can I ask you to take this on notice, and in particular to the chairman; given Goldie's case, given the concerns that are expressed from time to time in terms of FOS—again, I am not criticising FOS, but the constraints in the terms of reference are almost a contractual constraint upon them—is ASIC considering whether there can be ways to improve the FOS to deal with some of those concerns that have been expressed and some of the constraints that appear to have arisen out of the Victorian Supreme Court's decision in Goldie's case?
Mr Kell: Let us take that on notice

Answer:

ASIC's policy settings envisage that schemes will need to administer their jurisdictions (terms of reference, jurisdictional limits and compensation caps) to determine whether they can deal with certain disputes and from time to time, they will exclude certain disputes from their jurisdictions.

The threshold at which scheme jurisdictions are set is an ongoing consideration in public policy debates and the role and effectiveness of EDR has been considered in various inquiries including the Financial Systems Inquiry which found that overall the dispute resolution framework was working well (194).

The value of disputes that schemes can consider has also been considered in the context of debates about the retail client threshold and in the context of the increasing value of superannuation balances as the superannuation system matures and in the context of access to EDR for small business in disputes relating to commercial lending such as the 2012 Senate Economics References Committee Inquiry into the post-GFC banking sector and more recently in the PJC inquiry into the impairment of customer Loans.

The threshold as to whether a matter should be considered by an EDR scheme or a court is a public policy consideration. Broadly, the Parliament has drawn this threshold at the retail level. Disputes of a more wholesale character or involving complex commercial matters should be more appropriately dealt with by a court. Approved schemes operate compensation caps which mean schemes can award compensation up to a limit of, currently, $309,000.

As explained in our response to Questions 209 and 213, day to day operational oversight of the scheme and its employees and responsible officers is the responsibility of the scheme's board. ASIC is not involved in the independent decision making of EDR schemes or in reviewing scheme decisions. It is the proper role of the court to consider whether FOS appropriately exercised its discretion to exclude this dispute, as provided for under its terms of reference.

We do not believe that this single example provides evidence of a systemic problem at the scheme that would warrant a review of the dispute resolution settings as provided for in the Corporations law; or that would found the basis for a lack of public confidence in the scheme.

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

The Productivity Commission issued its final report into *Access to Justice Arrangements* in September 2014. In this report, the Commission considered the role of ADR and Ombudsman schemes noting that

> ADR provides parties with "a range of dispute resolution options that are procedurally simpler and potentially less adversarial; than resolution by hearings in courts and tribunals. Indeed, ADR is increasingly used by courts and tribunals as an alternative or complement to formal hearings"(283).

In their consideration of Ombudsman schemes, they noted that "Ombudsmen are independent and impartial… [yet] they actively pursue the resolution of disputes rather than leaving the primary control of the case to the parties… This model removes the need for professional advocates or representatives (316). Further, in their consideration of improving efficiency and effectiveness, the report noted that the "factors that lend themselves to the use of Ombudsmen include:

- essential services are involved;
- the market is characterised by large firms and limited competition, thus creating significant power imbalance;
- there is significant asymmetry of information such that consumers would have difficulty asserting their rights
- there are a large number of disputes (334).

All of the above factors are relevant in the development and maturation of the EDR framework in financial services.

The FOS and CIO are not courts. They are intended as fora that provide accessible, independent, efficient, effective and fair processes to resolve consumer disputes, the vast majority of which are relatively low value.

Accessibility is one of ASIC's approval criteria for financial services EDR schemes. There are a number of limbs to this criteria including that it is free of charge to consumers, actively promotes itself and clearly sets out in its terms of reference the type of complaints or disputants it can deal with.

Predecessor schemes to the FOS developed as industry based schemes more than 20 years ago in recognition of the fact that consumers were unlikely to access courts to resolve disputes with a bank or an insurance company principally on the basis of the cost and difficulty involved.

Unlike industry based EDR schemes, courts cannot meet the important accessibility criteria that schemes are able to achieve, even with enhanced procedures including the adoption of more ADR like procedures. For example, legal aid arrangements are not sufficient to address the need for dispute resolution services that exists for consumers of a range of goods and services, including telecommunications, energy, water and financial services.

The AAT is not a comparable model to ADR as it deals with Government's own administrative decisions, rather than the 'civil' character of consumer disputes. The UK established a statutory financial services ombudsman scheme which like Australia's industry based EDR schemes is also responsible to resolve individual disputes fairly, reasonably, quickly and informally.

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

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

FOS also decides disputes on the basis of what is fair in all the circumstances having regard to legal principles, applicable industry codes or guidance as to practice, good industry practice and previous relevant decisions of FOS or a predecessor scheme, although FOS will not be bound by these.

FOS approach to the application of legal principles was endorsed for the similarly worded Rules (to FOS) of the Financial Industry Complaints Services Rules in Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd & Ors [2009] VSC 7.