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7 August 2019

Jacqueline Rush,
Senior Policy Adviser
Australian Securities and Investments Commission
GPO Box 9827
Melbourne VIC 3001

By email: IDRSubmissions@asic.gov.au

Dear Ms Rush,

We welcome the opportunity to provide feedback in response to ASIC Consultation Paper 311 - Internal Dispute Resolution: Update to RG 165.

Please do not hesitate to contact me and my colleagues on 07 3014 5051 or at [redacted] if we can further assist with ASIC's important work.

Yours faithfully,

Josh Mennen
Principal Lawyer
Maurice Blackburn

Submission in response to ASIC Consultation Paper 311 - Internal Dispute Resolution: Update to RG 165

(August 2019)

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Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 32 permanent offices and 31 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

Our Submission

We congratulate ASIC on this consultation. We agree that current changes to dispute resolution schemes make it timely to review ASIC's advice in relation to Internal Dispute Resolution (IDR) processes. We provide feedback in relation to a number of the proposals and consultation questions in the following pages. That feedback could be summarised as follows:

- Maurice Blackburn believes that the definition of 'complaint' should be expanded to allow for circumstances where another firm's products, services or staff are involved in the dispute – for example, where a complaint lodged with a superannuation fund involves a third party insurer.

- Maurice Blackburn believes that just because a complaint was dealt with quickly does not necessarily mean that it was dealt with effectively. In fact if anything it may suggest a lack of adequate care and attention. In our experience, too often the Financial Service Provider's (FSP) response to the complaint is kept narrow, focusing on the technicalities of the exact wording of the complaint. We would prefer to see the FSP commit to working with the consumer to genuinely understand the core issues behind their frustrations.

- We believe that the format and content of IDR responses needs revision. We believe they should contain all information and material that the FSP took into consideration when making a determination. We also believe the response should note special circumstances, such as where the consumer has a special disadvantage in the complaint. We also argue that IDR responses should name any interested parties to the dispute, and declare any financial benefit derived by any of the parties.

- We also argue that IDR responses should contain additional information of relevance to the complainant, such as information about the relevant industry code of practice, and any relevant statutory time limits that apply.

- Maurice Blackburn argues that a lack of transparency and scrutiny, coupled with the excessive delay common to investigation and remediation schemes, often renders the investigation of systemic issues inadequate. Until the public can have confidence in the integrity of 'independent reports', it cannot have confidence in the regulatory response to misconduct, or the legitimacy of any remediation scheme.

We are pleased to note, in paragraph 22 of CP 311, that there is a plan in place to make "*…the core IDR requirements set out in RG 165 enforceable*". We see this as a positive outcome for consumers.

Responses to specific consultation questions.

Question B2Q1: Do you consider that complaints made through social media channels should be dealt with under IDR processes?

Yes.

We agree with paragraph 30 of CP 311 which says:

> *We consider that as consumers move beyond telephone, email and traditional written mediums, financial firms should:*
>
> *a) adopt a proactive approach to identifying complaints made on their social media platform(s); and*
> *b) have processes in place (including appropriate links between media and complaints departments) to deal with these matters through their IDR process.*

We also agree with paragraph 31 which reads:

> *At a minimum, we expect that complaints made on a financial firm's own social media platform(s) will be dealt with through the firm's IDR process when the consumer is both identifiable and contactable.*

Maurice Blackburn submits that IDR processes are an appropriate means for processing complaints made through the FSP's social media channels, which the FSP ought to reasonably be aware of.

Question B2Q2: Is any additional guidance required about the definition of 'complaint'?

Proposal B1 in the consultation paper tells us that:

> *We propose to update RG 165 to require financial firms' IDR processes to apply to complaints as defined in AS/NZS 10002:2014. It sets out the following definition of 'complaint' at p. 6:*
>
> > *[An expression] of dissatisfaction made to or about an organisation, related to its products, services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required.*

Maurice Blackburn believes that this definition should be expanded to allow for circumstances where another firm's products, services or staff are involved in the dispute.

For example, the definition should cover any relevant group insurance company in circumstances where the consumer makes a complaint to their superannuation fund that relates to insurance, whether or not the insurer is mentioned in the complaint.

This is necessary as often an insurance claimant will express dissatisfaction with their superannuation fund as that is their main or only point of contact - but they are also/really in dispute with the insurer even if they are not aware of the insurer's role.

Maurice Blackburn submits that the IDR process for a third party insurer should be automatically triggered by the original complaint.

Maurice Blackburn staff have had instances where a complaint was lodged with a fund trustee in respect to its related insurance entity but the insurer later argued it was not required to respond to the complaint because it was not expressly stated to be a complaint against the insurer.

Maurice Blackburn believes it is unreasonable to make such a distinction to exclude complaints made to trustees in circumstances where, as is typically the case in TPD claims within superannuation, the trustee is merely the conduit between the consumer and the insurer.

Such a position enables a trustee to essentially insulate a related insurer from the obligations flowing from receipt of a complaint.

We are pleased to note that this is alluded to in paragraph 40 of CP 311 as a matter for additional consultation.

Question B4Q1: Do you agree that firms should record all complaints that they receive?

Yes.

We agree with the sentiment expressed in paragraph 49 of CP 311 that:

> *We consider that our guidance should be updated to require firms to record all complaints, regardless of the timeframe within which they are resolved.*

Maurice Blackburn believes that just because a complaint was dealt with quickly does not necessarily mean that it was dealt with effectively. In fact if anything it may suggest a lack of adequate care and attention.

It may also be the case that the consumer has been 'managed' by the FSP (usually via a phone call) to withdraw their legitimate complaint. Indeed, Maurice Blackburn staff have seen numerous instances where this has occurred.

Consumers, having lodged a complaint, do not necessarily know what outcomes are possible and so may trustingly accept a resolution without knowing it is not in their interests to do so. For example:

- Where a consumer complains that an insurance benefit for heart attack has been denied because they did not meet the medical definition defined in the policy, when in fact the definition is medically obsolete. This was demonstrated in the CommInsure case study[1] at the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Royal Commission).

  Such complainants need assistance to remediate the fact that the insurer is acting contrary to the law in seeking to enforce that policy term.

- Where a consumer raises a complaint about an insurer's request for information from a third party medical provider, and is told they must provide an authority to allow the

[1] https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-2-final-report.docx at 3.2.1)

insurer access. This request itself may seek irrelevant information and be in breach of privacy laws. The request may also enliven rights under the Life Insurance Code of Practice[2] to enable the consumer to only agree to targeted authorities (clause 8.6) that the consumer is not aware of.

- Where a consumer complains to their FSP of financial hardship due to having been provided with a loan that they cannot afford, in circumstances where the loan was unaffordable when entered into or was gained through the improper conduct of an intermediary (e.g. in a rent to buy scheme or through vendor finance). The proper response to the complaint should include information detailing how the credit provider reviewed its credit assessment for the loan against its responsible lending obligations, or otherwise escalate the matter for review.

In our experience, often the FSP's response narrowly deals with the precise complaint rather than working with the consumer to understand the core issues behind their frustrations which they may not be able to articulate easily.

All of the above highlights the importance of complainants having adequate support in negotiating the IDR process. Please see our response to Question B12Q1 for input related to the use of consumer advocates.

This type of risk should be managed, starting with the consistent recording of all complaints.

Question B6Q1: Do you agree with our proposed requirements for IDR data reporting?

We respond particularly to part (c) of this question, namely:

> *When the status of an open complaint has not changed over multiple reporting periods, should the complaint be reported to ASIC for the periods when there has been no change in status?*

Yes.

This scenario suggests a deadlock or communication breakdown that should be addressed. It may also suggest a special disadvantage which should prompt a referral of the consumer for professional support.

We further note the wording of the Proposal B6 of CP 311, which (in part) states:

> *We will issue a legislative instrument setting out our IDR data reporting requirements.*

Maurice Blackburn encourages ASIC to provide clear information as to *how* these requirements will be determined.

Question B7Q1: What principles should guide ASIC's approach to the publication of IDR data at both aggregate and firm level?

Maurice Blackburn suggests that ASIC should draw on the objectives which underpin APRA's Life Claim Data Collection processes[3].

[2] https://www.fsc.org.au/policy/life-insurance/code-of-practice/life-code-of-practice.pdf
[3] https://www.apra.gov.au/sites/default/files/Response-to-Submissions-Life-Claims.pdf (p.7)

> *The objectives of the public reporting regime for life insurance claims information are to:*
>
> - *improve accountability and performance of life insurers in relation to claims; and*
> - *facilitate an informed public discussion about the performance of the life insurance industry.*
>
> *These objectives will be achieved through publication of credible, reliable and comparable data. The agencies' intention is for this data to be collected and published on each insurer with sufficient granularity to allow for meaningful comparisons of insurer claims performance, and with sufficient context and accessibility to effectively inform policyholders and other interested people.*

From this, we can glean that the core principles should note the importance of:

- Credibility of data,
- Reliability of data,
- Comparability of data,
- Transparency, and
- Consumer centred publication (the data should be easily accessible, and meaningful in assisting consumers to make an informed decision in their choice of service provider).

Maurice Blackburn notes paragraph 71 of CP 311, which says in part:

> *We will conduct a separate, targeted consultation about our approach to the publication of IDR data.*

Maurice Blackburn looks forward to participating in this consultation, on behalf of the clients we represent.

Question B8Q1: Do you agree with our minimum content requirements for IDR responses?

Maurice Blackburn notes the rationale for these proposed changes, as detailed in paragraph 73 of CP 311 which reads, in part:

> *We are concerned that the quality of IDR responses provided to complainants across the financial services sector is generally poor, particularly when a complaint is rejected or partially rejected by a financial firm.*

We share this concern.

We also note the research into complainants' experience of IDR processes, as documented in paragraphs 74 to 77 of CP 311.

We provide below a number of issues which, from our experience in working with complainants, should be taken into account when determining minimum requirements for IDR responses.

We submit that an IDR response should:

- Identify if the consumer has a special disadvantage that may inhibit their ability to understand or advocate their position and what the FSP has done to assist them. This may include referring them for legal or other professional support.

  We believe that IDR responses should clearly identify circumstances where consumers have a particular vulnerability, or there is an inequality of bargaining power between the consumer and the FSP, which affects the consumer's ability to make a judgment as to their own best interests. Examples of such vulnerabilities may include:

  - Consumers from non-English speaking / cultural and linguistically diverse backgrounds
  - Inexperience with financial matters
  - Illiteracy or lack of education
  - Poverty or need of any kind of the consumer
  - Consumers with mental health issues, or other physical illness
  - Age or emotional dependency
  - Other groups that may experience disadvantage in the current systems.

- Include information provided as to the relevant Code of Practice applicable to the case, and the options available for reporting a breach to the code administrator.

- Name any other interested entities, whether or not they were materially involved in the IDR process. This may include any relevant professional indemnity insurer, reinsurer, credit assistance provider or third party agent of the FSP. This would assist the consumer to understand the role and interest of all stakeholders involved in the dispute. This in turn would increase transparency and better enable consumers to direct their concerns towards the appropriate entity.

- List all material and information considered by the FSP in reaching its findings. In doing so, it should be a requirement that the FSP notes what steps they have taken to ensure that the consumer has had an opportunity to see and respond to any such material in accordance with procedural fairness.

- Require that FSPs should positively disclose any financial interest they may have in making its finding.

- Require that IDR responses emphasise to the consumer that time limits apply. We have encountered many consumers who were operating under a false assumption that they had protected themselves from a statute of limitations expiry by lodging an IDR complaint, when in fact it was necessary to commence court proceedings, and are now statute barred from pursuing their matter.

- Require that, where the IDR response is in the consumer's favour, the decision must seek to ensure that the FSP has not obtained a financial advantage by reason of the conduct complained about. The process for meeting this objective should involve:

  - the IDR setting out a consideration of whether the FSP has benefited financially from the conduct that led to the complaint (e.g. the non-payment or delay of an insurance claim); and

- the IDR setting out whether interest or other compensation is payable (including non-financial losses for mental anguish, personal insecurity and distress due to an FSP's actions[4]) and if not, why not.

In that regard, there is a serious concern that insurers remain incentivised to delay claims for as long as possible. Insurers are able to invest assets for returns that well exceed any penalty interest they have to pay on an unreasonably delayed claim.

To demonstrate this, APRA's life insurance statistics for the December 2017[5] quarter show that annualised return on net assets for the industry were 10.9 per cent, yet the penalty interest rate is currently only around 5.58 per cent[6].

It is obvious that while this anomaly exists insurers will continue to get a windfall for delaying the assessment of genuine claims.

Clearly, the interest payable for unreasonable delay does not represent an actual penalty to a life insurer. Indeed, insurers remain financially incentivised to delay claims for as long as possible even where they are required to pay interest.

That is an unacceptable situation and it remains a major moral hazard for insurers until the statutory interest rate for claim delays is significantly greater than the investment returns an insurer enjoys on its capital reserves.

At the very least, FSPs should be required to declare if they have benefitted financially as a result of their actions and conduct in the IDR process.

Question B11Q1: Do you agree with our proposals to reduce the maximum IDR timeframes?

Yes.

In our experience, the stress of an unresolved complaint is often worse for the consumer than a denial. A delay in resolution leaves the consumer in limbo, unable to move forward – unable, for example, to decide whether it is necessary to sell an asset, declare bankruptcy, commence court proceedings etc – until such time as a resolution is achieved.

Often, consumers who are caught in this position are people with disabilities, injured or in dire financial hardship.

Maurice Blackburn believes that reducing the maximum IDR timeframe will greatly help consumers, often at a time in their lives when they most need help.

We note that Proposal B11 (c) proposes that FSPs should only be able to issue delay notifications under 'exceptional circumstances'. Maurice Blackburn believes that separate and focused consultation on the definition and regulation of this term is necessary.

Our concerns are drawn from a parallel discussion occurring within the Life Insurance industry. The equivalent definition within the draft Life Insurance Code of Practice 2.0[7] reads as follows:

[4] See for example *Newman v Financial Wisdom Ltd* [2004] VSC 216
[5] *http://www.apra.gov.au/lifs/Publications/Documents/1802-QLIPS-20171231.pdf*
[6] *https://www.fos.org.au/publications/practice-notes/application-of-interest/*
[7] *https://www.fsc.org.au/resources/1695-life-insurance-code-of-practice-with-appendix*

"Exceptional cases" for the purposes of Chapter 2 means any of the following:

a) the claim is lodged so late that there are significant difficulties obtaining information necessary for the claim assessment;
b) we, as trustee, believe that a claim which has been declined by the insurer may have a reasonable prospect of success, but involves complex matters that require further consideration by us;
c) despite reasonable follow up, reports from third parties have not been received
d) the insurer has not provided information to us that we require to make a decision about a claim or complaint, which we have requested in line with our Code commitments;
e) you or your Representative have not responded to our reasonable enquiries or requests for documents or information concerning your claim.

Life insurers have, in our opinion, misused the 'Unexpected Circumstances' clause in the Life Insurance Code of Practice to afford themselves a further open ended period of time.

For example we have seen an insurer claim that a request for Medicare records made more than a year after the lodgement of the claim constituted a legitimate trigger that invokes the 'Unexpected Circumstances' clause. Insurers tend to invoke this provision as the basis for requesting documents and information that are routine (or expected) but which the insurer has not sought in a timely manner. The tendency of insurers to make requests on a piecemeal basis which contributes to the historically high delays[8] in the assessment of life insurance TPD and income protection claims.

We have also seen a life insurer argue that the 90 days complaint response timeframe is 'reset' if it receives any new information from the consumer after the lodgement of the complaint.

In light of the above, Maurice Blackburn submits that careful consultation is required to ensure that the definition of 'exceptional circumstances' is not excessively broad.

Maurice Blackburn further submits that, in relation to insurance claims, the definition could include a non-exhaustive list of information requirements that are expected in claims/complaints (and are therefore not to be relied upon to invoke this clause) such as financial and medical records, and surveillance material.

Question B12Q1: Do you agree with our approach to the treatment of customer advocates under RG 165?

Yes.

Maurice Blackburn supports the proposal that customer advocates should be required to comply with RG 165 (including meeting the maximum IDR timeframes and minimum content requirements for IDR responses) if they:

- act as an escalation point for unresolved consumer complaints; or
- have a formal role in making decisions on individual complaints.

[8] Noting for example ASIC Report 498, *Life insurance claims*: An industry review, October 2016 found that one life insurer took an average of 21 months to determine TPD claims: https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-498-life-insurance-claims-an-industry-review/

Further, we believe that greater transparency could be built into RG 165, so consumers can be fully informed about the status and role of the customer advocate.

Maurice Blackburn submits that RG 165 should require that where a customer advocate has been involved in the IDR process, it be made clear:

- whether the customer advocate is independent of the FSP,
- the extent of the customer advocate's power in the dispute, including whether the FSP has the right to veto a finding by the customer advocate,
- whether the information provided by the consumer to the customer advocate was covered by legal professional privilege or may be disclosed to the FSP,
- whether the customer advocate will actually provide advice, including in relation to time limitations and if not, give adequate warnings,
- whether the advice/services of the customer advocate is covered by the professional indemnity insurance,
- whether the customer advocate's remuneration is in any way linked to the financial performance of the respondent,
- where and when the customer advocate's role finishes (noting they do not in our experience ever assist consumers beyond the IDR process - such as to court).

Maurice Blackburn believes that these matters should be disclosed at both the commencement of the customer advocate's involvement, and in the IDR response. We believe it is important for consumers to understand the purview of the customer advocate, in the context of an industry with a poor record of managing conflicts of interest. We believe that full disclosure as described above would enable the consumer to decide whether, and to what extent, to use the consumer advocate.

We share ASIC's concern, as expressed in paragraph 101 of CP 311 that:

> *…consumers may be confused, or even misled, about when they can take their complaint to AFCA from IDR.*

We believe that RG 165 can and should aim to provide significantly more clarity for consumers in this area.

Question B13Q1: Do you consider that our proposals for strengthening the accountability framework and the identification, escalation and reporting of systemic issues by financial firms are appropriate?

Too often systemic problems have not been reported or investigated in a timely manner as they have relied upon self-reporting by the FSP who have a financial and/or reputational interest in concealing or playing down the scope of a systemic issue.

Maurice Blackburn is aware of the widespread practice by FSPs of commissioning independent investigations by third parties such as large legal or accounting/auditing firms and then submitting those reports to regulators as 'independent'.

Maurice Blackburn believes that regulators must do more to monitor investigations of this type, to mitigate the risk that such reports lack real independence, and merely result in a 'whitewash' of the true extent of the systemic issues being investigated.

Maurice Blackburn highlights the following examples of inappropriate use of 'independent reports':

- In evidence presented to the Royal Commission, a report characterised as 'independent' was submitted to ASIC after 25 drafts passed between Clayton Utz and AMP, wherein significant changes were made at AMP's request.

- Two reviews commissioned by CommInsure from DLA Piper and Ernst & Young in 2017 were not released to the public on the ground of confidentiality and privilege[9] despite the fact that CommInsure 'cherry picked' parts of those reports to clear itself of any systemic wrongdoing in its investigation into its claims handling practices.[10]

- It has recently come to light, for example, that NAB Chairman had told EY consultants in the midst of the Hayne royal commission he was 'confident' the bank was still selling products that ripped off its customers and would eventually trigger compensation.[11]

We note that these inappropriate relationships have led to the establishment of two Parliamentary inquiries[12], exploring the roles of independent auditors and consultants.

These "independent reports" are often material to ASIC's decision as to the action to take against an FSP for systemic misconduct. Where it is determined that an Enforceable Undertaking is appropriate, they are therefore material to the terms negotiated including the parameters of any remediation scheme[13].

Maurice Blackburn argues that the lack of transparency and scrutiny detailed above, coupled with the excessive delay common to such investigations and remediation schemes, renders the current investigations and reporting of systemic issues inadequate. Until the public can have confidence in the integrity of the so called 'independent report' process, it cannot have confidence in the regulatory response to misconduct, or the legitimacy of any remediation scheme.

Any properly functioning system for reporting systemic issues must include clear standards for the use of consultants, with greater levels of transparency to avoid the misconduct cited above. This should include regulations on the management of confidential and commercially sensitive information which is so often used as an excuse by FSP's to withhold primary source documents from consumers and regulators when systemic issues are on the cards.

Maurice Blackburn respectfully suggests that ASIC consider a separate consultation process on this topic, drawing on and responding to the outcomes of current inquiries. Maurice Blackburn would look forward to making a more in-depth submission to such an inquiry.

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[9] See for example https://www.afr.com/business/banking-and-finance/financial-services/comminsure-to-keep-independent-reviews-private-20170301-guo54v

[10] https://www.commbank.com.au/guidance/newsroom/comminsure-releases-deloitte-report-into-claims-handling-201702.html

[11] https://www.smh.com.au/business/banking-and-finance/time-s-up-for-henry-but-also-the-billion-dollar-audit-club-20190802-p52dak.html

[12] See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/RegulationofAuditing; and https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/ServiceDelivery

[13] See for example https://asic.gov.au/about-asic/news-centre/find-a-media-release/2015-releases/15-022mr-macquarie-equities-limited-enforceable-undertaking-and-next-steps/

Question B15Q1: Do the transition periods in Table 2 provide appropriate time for financial firms to prepare their internal processes, staff and systems for the IDR reforms?

Yes.

Maurice Blackburn believes that the transition periods, as documented, appear reasonable.