



10 October 2016

By email to: EDRreview@treasury.gov.au

EDR Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir / Madam

EDR Review

Thank you for the opportunity to comment on the *Review of the Financial System Dispute Resolution Framework (Review) – Issues Paper*. This joint submission was coordinated by Consumer Action Law Centre with funding from ASIC.

The following organisations have contributed to and endorsed this submission:

Care Inc Financial Counselling Service and the Consumer Law Centre of the ACT (**Care Inc**)
Caxton Legal Centre
Consumer Action Law Centre (**Consumer Action**)
Consumer Credit Law Centre SA (**CCLCSA**)
Consumer Credit Legal Service (WA) Inc (**CCLSWA**)
Consumers' Federation of Australia
Financial Counselling Australia
Financial Rights Legal Centre (**Financial Rights**)

Details about each contributing organisation are contained in **Appendix A**. As part of the preparation of this submission, we consulted with John Berrill of Berrill & Watson.

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Our organisations strongly welcome the Review and the broad terms of reference. We consider this review an important opportunity to ensure that dispute resolution in the financial system is enhanced in the years to come by building on the largely successful operation of, in particular, the Financial Ombudsman Service (**FOS**).

Contributors to this submission have supported and represented thousands of consumers in disputes with financial services providers and superannuation funds over many years. This includes extensive experience with FOS, Credit and Investments Ombudsman (**CIO**) and the Superannuation Complaints Tribunal (**SCT**).

The Review is also a great opportunity to address some important shortcomings in consumer protection in financial services that have been exposed in a number of inquiries and scandals in recent years. Consumer organisations are concerned that many consumers who have legitimate grievances against financial institutions do not have convenient and effective access to justice with existing arrangements.

We are however strongly opposed to the creation of a new Banking Tribunal. We understand and share the frustrations of those who have proposed such a Tribunal but think the proposal is misconceived as it underestimates the strengths of the current EDR arrangements, the opportunities for improvement and the serious downsides of a statutory Tribunal funded from consolidated revenue. It would be far more effective to enhance and fix some of the problems and limitations of the current EDR system than to establish a new Tribunal which will undoubtedly decrease access to justice for hundreds of thousands of consumers compared to current arrangements.

The key benefits of an enhanced EDR system are:

- greater accessibility and faster dispute resolution compared to legalistic tribunals;
- greater flexibility in resolving disputes, including resolving on the basis of what is fair and reasonable not just the law;
- funding that responds to demand and does not depend on appropriation bills once this problem is no longer ‘flavour of the month’; and
- an ability to respond to systemic issues, resolve the cause of consumer problems and facilitate consumer redress.

We have identified a large number of ways in which the current system must be enhanced to address community concerns. These are set out in this submission however they can be grouped as follows:

- creating one EDR scheme that covers all financial institutions—effectively merging FOS, CIO and the SCT;
- extending the merged EDR system to cover financial services provided to small businesses;
- enhancing ASIC’s regulatory oversight of EDR;
- expanding the jurisdiction of the merged EDR scheme, in particular raising the financial limits for matters to be heard by the scheme and extending the scheme to include complaints about debt management firms;
- expanding the role of the merged EDR scheme in relation to systemic issues, including through naming financial services providers; and

- establishing a statutory scheme of last resort compensation where liable financial service providers do not or are unable to meet their obligations to consumers.

One of the more significant advances in consumer protection in the past 20 years has been the establishment of mandatory external dispute resolution (**EDR**) schemes in many industry sectors. EDR in the financial system has provided access to justice for hundreds of thousands of consumers who would have been unable to resolve disputes if they had to rely on existing courts and tribunals, which are expensive, slow, and largely inaccessible without legal representation.

However, the existence of more than one scheme is unnecessarily complex and confusing. In our view, the final dispute resolution framework in the financial system should empower a single industry-funded external dispute resolution scheme. Our survey of financial counsellors Australia-wide found that 74% support the merger of FOS and CIO.

We are opposed to the establishment of a new banking tribunal. The consumer experience of tribunals has not been positive. The SCT, as described later in this submission, has been hampered by a lack of funding and an inflexible structure. State-based civil tribunals are not accessible and can be overly legalistic. It remains unclear what a tribunal can deliver that an enhanced national financial ombudsman service cannot. If a tribunal were adopted, the form of it must complement rather than detract from a strong EDR process.

We are very concerned that a new tribunal may in fact deliver *worse* outcomes for consumers. A new tribunal may:

- delay dispute resolution even further, particularly if it is added to existing bodies or inadequately funded;
- add further costs for consumers seeking redress;
- operate legalistically, as is the case with many other Australian tribunals, in some cases requiring legal advice and representation, increasing barriers to access that many consumers may not be able to overcome;
- create further or multiple bodies in financial sector dispute resolution, exacerbating complexity and increasing consumer confusion;
- not be able to conduct, report on and enforce investigations into systemic issues;
- not address the issues underlying customer dissatisfaction with the banking sector insofar as the inadequacies relate to the applicable law as opposed to the decision-making forum;
- be less engaged with stakeholders (including consumers, industry and regulators) than the existing EDR regime; and
- be less flexible, nimble and responsive to the needs of consumers and industry.

By comparison to courts and tribunals, the existing EDR schemes have a number of useful features that contribute to strong justice outcomes:

- membership of an ASIC-approved scheme is a condition of holding a relevant licence, so all businesses in an industry must participate in the scheme;
- the schemes are funded by industry, so industry has a financial incentive to minimise consumer disputes;
- the schemes have independent boards with 50 per cent representation from consumers and from industry with an independent chair, so the dispute resolution processes are fair and balanced;

- the schemes provide flexible solutions to disputes but also have ‘teeth’ because the ombudsman can make decisions binding upon the trader;
- the schemes are required to report and, in the case of the CIO, enforce investigation decisions on systemic problems, meaning that they not only provide solutions for individual disputes but also help solve bigger problems at their source.

While there is certainly room for improvement, the existing EDR schemes are world class and an extremely important *alternative* to the court system. A robust, well-resourced single ombudsman scheme with appropriate scope and design, together with a well-funded regulator and a statutory scheme of last resort, will provide a free, fair, accessible and effective dispute resolution framework in the banking and financial sector.

Summary of Recommendations and Key Points

Principles Guiding the Review

- The Panel should be guided by the following principles and documents as part of the Review:
 - consumers should have access to effective EDR before a tribunal or court;
 - access to free and independent advice and representation is essential to an effective dispute resolution framework, particularly for vulnerable and disadvantaged consumers;
 - the Government’s Benchmarks and Key Practices for Industry-based Customer Dispute Resolution;
 - ANZOA Policy Statement on Competition among Ombudsman Offices.
- The Panel should not be guided by the principle of competition among EDR schemes.

Internal Dispute Resolution (*IDR*)

- The timeframe for a final IDR response should be reduced from 45 days to 30 days for simple credit, banking and insurance disputes where multiple party input is not required.
- Multi-tiered IDR processes in insurance disputes should be reviewed and simplified by:
 - Requiring the insurer to notify the consumer, at the time of receipt of the complaint, about all stages of its IDR process and about the consumer’s right to go to EDR after 45 days;
 - Clarifying that the 45-day timeframe for an IDR response starts from the date of the initial complaint to the financial service provider (*FSP*), regardless of whether this complaint is lodged with a designated ‘IDR team’ or any other area of the FSP.
- All consumers should be informed about their right to go to EDR in writing:
 - at the beginning of the transaction;
 - when a significant event occurs (such as an insurance claim); and
 - after a dispute has been raised.

- EDR schemes should work with the state court systems to ensure that statements of claim are accompanied by information about EDR.
- The Panel should consider the interaction between IDR and the newly created roles of Customer Advocates within the banks, and make recommendations that ensure this function does not impede efficient and accessible dispute resolution.
- The Panel should consider the interaction between IDR and remediation schemes.

Regulatory Oversight of EDR Schemes and Complaints Arrangements

- ASIC should have an enhanced role in responding to complaints about poor IDR.
- ASIC should publicly name FSPs where complaints and systemic issues are raised by recognised consumer groups or a sufficient number of consumers.
- ASIC's regulatory role in relation to EDR schemes should be clearer and more robust.
- ASIC should publicly report on EDR schemes' response to recommendations of periodic independent reviews. ASIC should require an explanation where a recommendation is not accepted by the EDR scheme.
- EDR schemes should have an enhanced role in identifying and responding to systemic issues such as poor internal dispute resolution.
- EDR schemes should be more transparent about the action taken to address systemic issues, including by notifying consumers of the outcomes of their complaints and by naming FSPs.

Existing EDR Schemes and Complaints Arrangements

- The existing (and final) dispute resolution schemes should:
 - establish and improve outreach programs to underrepresented communities;
 - consider a face-to-face option for the most vulnerable consumers;
 - engage with community and health workers;
 - facilitate the provision of necessary documentation from FSPs.
- The Panel should consider legislative reform to make membership of an ASIC-approved EDR scheme mandatory for all small business lenders.
- The final dispute resolution scheme should be able to consider superannuation complaints where the relevant time limit has passed if exceptional circumstances apply.
- The jurisdictional and compensatory limits for consumer disputes must be reviewed and raised significantly, including the limits for non-financial loss and third party beneficiaries under insurance contracts.
- The same jurisdictional and compensatory limits should apply to small business and consumer disputes.
- The final dispute resolution scheme should publish quarterly comparative complaints data about financial firms.
- FOS's data collection and analysis of applicants to its service should be maintained in the final dispute resolution body.

- The final dispute resolution scheme or ASIC should undertake periodic research on consumer satisfaction with complaints handling by financial firms.
- The superannuation industry should establish a Code of Practice and a Code Compliance Committee.
- A regulatory framework should be introduced for Debt Management Firms, including licensing by ASIC and compulsory membership of an ASIC-approved EDR scheme.
- ASIC and the final dispute resolution scheme should work closely and proactively to identify new and emerging gaps in the legal and regulatory framework.

Gaps and Overlaps in existing EDR Schemes and Complaints Arrangements

- We do not support 'competition' between schemes.
- Multiple schemes do not lead to better outcomes for users and cause consumer confusion.

Triage service

- We do not support a triage service.

One body

- FOS, CIO and SCT should be integrated into a single, industry-funded ombudsman scheme.
- 74% of surveyed financial counsellors support the merger of CIO into FOS.
- Should there be an insurmountable legal barrier to the integration of the SCT into one ombudsman scheme, FOS and CIO should be integrated into one ombudsman scheme, with significant reforms to the SCT, including:
 - a significant and stable increase to SCT funding;
 - a direct funding model, so that its funding is no longer administered by ASIC;
 - a move toward a flexible and responsive governance framework similar in form to the existing EDR schemes.

Alternative forum for dispute resolution

- Consumer advocates are strongly opposed to the establishment of an additional forum in the form of a tribunal.
- If an additional tribunal is established, it should be industry funded, and must complement a merged EDR scheme. The tribunal should be limited to disputes:
 - where the final EDR scheme determines that the tribunal is a more appropriate forum, in accordance with FOS's current guidance;
 - outside the final EDR scheme's monetary limits or compensation caps;
 - where the attendance of third parties is required; and
 - where a statutory decision is required in superannuation disputes.

- We do not support an enhanced role for the Small Business and Family Enterprise Ombudsman.

Uncompensated losses

- We strongly support the establishment of a statutory scheme of last resort.
- The scheme should:
 - apply to all financial services and credit licensees;
 - only accept claims from retail clients (consumer claims) and operate as a last resort scheme, that is, only be available for claims after all avenues have been exhausted, including a relevant award from an EDR scheme or a court;
 - involve industry and consumer representatives in its governance, based on the existing EDR model;
 - award compensation at tiered and appropriately capped levels that are reviewed and increased over time;
 - be retrospective in application;
 - be funded by industry, through a levy imposed by the government.

Survey of Financial Counsellors

For the purpose of this Review, Financial Counselling Australia undertook a survey of financial counsellors Australia-wide about the recent performance of FOS and CIO, and their views on a proposed merger of CIO and FOS. We note that few financial counsellors work with the SCT. Financial counsellors provide advice to people who have credit and debt problems. In advocating for their clients, financial counsellors may find that they need to lodge disputes with FOS or CIO. They are therefore well placed to comment on the way that these EDR schemes operate.

Methodology

The survey was sent to financial counsellors via peak bodies in each state and territory, and was open during the period 22 September to 7 October 2016. A total of 197 financial counsellors completed the survey. This represents a response rate of 25%.¹

The survey asked five questions:

1. In which state or territory are you located?
2. Have you lodged disputes in either FOS or the CIO in the past 12 months?
3. In the last 12 months, approximately how many disputes have you lodged with FOS/CIO?
4. Overall, how would you rate your experience in dealing with FOS/CIO in the last 12 months?
5. There is a proposal to merge the CIO into FOS so that there is just one external dispute resolution scheme in financial services. Is this a good idea?

¹ There are around 800 financial counsellors in Australia.

A comments field was included in questions 4 and 5.

Only financial counsellors who had lodged at least one complaint with FOS or CIO in the last 12 months were permitted to answer questions 3 to 5. A total of 122 financial counsellors had lodged disputes in FOS or CIO in the past 12 months. Only the results and comments from these 122 financial counsellors (***Surveyed Financial Counsellors***) are included in this submission.

Survey results are incorporated throughout this submission.

PRINCIPLES GUIDING THE REVIEW

Question 1: Other categories of users

A category of users that should be considered as part of the EDR Review is third party beneficiaries under insurance policies. This group is not necessarily considered customers and will not have a contract with a FSP. However, they have rights under those contracts and therefore deserve access to the dispute resolution framework.

Question 2: Principles that should be considered in the EDR Review and in the design of an EDR and complaints framework

We agree with the principles guiding the Review as outlined in the Issues Paper. However, the Panel should also consider the following principles as part of the Review.

Access to EDR before a tribunal or court

Effective IDR and EDR fundamentally increases the availability of effective, timely and affordable mechanisms as an alternative to formal court-based dispute resolution.

The main financial services laws require that financial services providers have a compulsory dispute resolution process.² The dispute resolution process must include:

1. an IDR process; and
2. membership of an ASIC-approved EDR scheme.³

Importantly, a determination of an EDR scheme is binding only on the scheme member, not on the consumer. A consumer can still take their dispute to court if they are dissatisfied with the outcome at EDR.

The principle of access to EDR before tribunal or court should apply to all disputes in the financial system, including superannuation complaints.

Access to advice and representation

An essential element of an effective and efficient dispute resolution and complaints framework in the financial system is access to free and independent legal and financial counselling advice.

FOS and CIO refer a large and increasing number of consumers to community legal centres and legal aid commissions for advice. Financial Rights, for example, received 1,363 client referrals from FOS alone in 2014. This increased to 1,838 referrals in 2015 and 1,102 referrals in the first nine months of 2016. In light of difficulties in tracking referrals, these figures significantly underestimate the actual number of referrals and need for assistance.

EDR schemes are intended to be accessible, free and fair. In theory, consumers should not need an advocate assisting with their dispute. In practice, however, some financial disputes are

² *Corporations Act 2001* (Cth) ss 912A(1)(g), 912A(2), 1017G; *National Consumer Credit Protection Act 2009* (Cth) ss 47, 64, 65.

³ *ASIC Regulatory Guide 165: Licensing: Internal and external dispute resolution* (July 2015) s165.2.

technically and legally complex. Independent legal advice is critical for consumers faced with complex matters, confused by the multiplicity of schemes and requiring assistance to navigate the rules and processes. Many consumers are simply overwhelmed by the process, compounding the stress arising from the substantive issues in dispute.

Some users of the dispute resolution framework have no or minimal access to free legal advice. Financial counsellors and community lawyers receive calls from small business owners who are desperate for advice and cannot afford a solicitor. It also follows that many small businesses cannot afford to take their dispute to court. There are no free legal assistance services to support people with financial advice and investments disputes.

Similarly, the SCT is unable to provide legal advice to applicants. It is very difficult to navigate the SCT process without advice and representation. Very few community legal centres are funded to assist with superannuation disputes.

Any consideration of the current and future dispute resolution framework (and funding for these arrangements) therefore must acknowledge and account for the heavy reliance that EDR schemes and tribunals place on community legal centres, financial counsellors and legal aid commissions to function properly. This reliance may be appropriate but increasingly problematic given the increasingly under-resourced nature of the sector.⁴

In a sense, the dispute resolution framework in the financial system is a symbiotic ecosystem. For EDR schemes to be effective, consumers must have access to effective advice and, in the case of many disadvantaged and vulnerable consumers, representation by a financial counsellor or lawyer. If the inadequate funding of financial counselling, community legal centres and legal aid commissions persists, consumers—particularly those experiencing vulnerability or disadvantage—will face significant barriers to effective, affordable dispute resolution in the financial system.

We expand on this point in response to Question 21, below, where we highlight our concerns and give examples of inconsistencies in outcomes for represented and unrepresented consumers.

Benchmarks and Key Practices for Industry-based Customer Dispute Resolution

Consumer advocates strongly endorse the existing Benchmarks⁵ and Key Practices⁶ for Industry-Based Customer Dispute Resolution, re-released by the Government in March 2015.

⁴ The Productivity Commission recommended that the federal, state and territory governments provide additional funding of \$200 million per annum for civil legal assistance services to address pressing gaps in services: *Inquiry Report: Access to Justice Arrangements* (December 2014), Recommendation 21.4.

⁵ Australian Government, The Treasury, *Benchmarks for Industry Customer Dispute Resolution* (February 2015):

<http://www.treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2015/benchmarks_ind_cust_dispute_reso/Documents/PDF/benchmarks_ind_cust_dispute_reso.ashx>.

⁶ Australian Government, The Treasury, *Key Practices for Industry Customer Dispute Resolution* (February 2015)

<http://www.treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2015/key%20pract%20ind%20cust%20dispute%20reso/Documents/PDF/key_pract_ind_cust_dispute_resol.ashx>.

These benchmarks are incorporated into existing financial services regulation as well as the approach taken by the Australian Securities and Investments Commission (**ASIC**) in approving EDR schemes.

The benchmarks are:

- Accessibility
- Independence
- Fairness
- Accountability
- Efficiency
- Effectiveness

The Key Practices give practical guidance to EDR schemes on the implementation of the Benchmarks.

The Benchmarks and Key Practices are well-developed principles and should guide the Review. These principles have provided strong foundations for many EDR schemes in Australia and New Zealand and should underpin the final dispute resolution framework recommended by the Panel.

Competition among EDR schemes

As a principle, we are strongly opposed to multiple EDR schemes servicing one industry sector. We consider that the Review should *not* be guided by the principle of competition, and are pleased that it does not feature in the Issues Paper as a principle guiding the Review.

We refer the Panel to the policy statement on *Competition among Ombudsman Offices* endorsed by Members of the Australian and New Zealand Ombudsman Association (**ANZOA**).⁷ ANZOA is the peak body for industry-based, parliamentary and other statutory Ombudsman offices in Australia and New Zealand. We urge the Panel to consider this policy statement as a guiding document.

We discuss our opposition to the principle of competition in dispute resolution in more detail in response to Question 31, below.

Recommendation

The Panel should be guided by the following principles and documents as part of the Review:

1. Consumers should have access to effective EDR before a tribunal or court.
2. Access to free and independent advice and representation is essential to an effective dispute resolution framework, particularly for vulnerable and disadvantaged consumers.
3. Benchmarks for Industry-based Customer Dispute Resolution.
4. Key Practices for Industry-based Customer Dispute Resolution.
5. ANZOA Policy Statement on Competition among Ombudsman Offices.

⁷ ANZOA, *Policy statement: Competition among Ombudsman Offices* (September 2011)

<http://www.anzoa.com.au/assets/anzoa-policy-statement_competition-among-ombudsman-offices.pdf>.

The Panel should not be guided by the principle of competition among EDR schemes.

Question 4: In determining whether a scheme is effectively meeting the needs of its users, how should the outcomes be defined and measured?

Broadly, we support the existing EDR framework for defining and measuring outcomes and meeting the needs of users.

We endorse the well-developed principles contained in the Benchmarks and Key Practices for Industry-based Customer Dispute Resolution. These principles have underpinned the existing EDR schemes and should form the benchmarks for the final dispute resolution scheme.

Essential to the measurement of user outcomes and performance is the process of periodic independent review. FOS and CIO are required to have their operations reviewed at set periods by an independent reviewer with full access to the scheme. The review must assess the accessibility, independence, fairness, accountability, efficiency and effectiveness of the scheme in accordance with the Benchmarks, as well as stakeholder satisfaction with the scheme. Regular independent review is critical to public accountability and promotes a culture of continuous improvement within the schemes.

Between reviews, the final dispute resolution scheme should undertake a process of continuous improvement and engage in effective and regular stakeholder consultation with regulators, industry and the consumer sectors, and seek feedback from its users. The final scheme should be required to identify, report and enforce investigation decisions on systemic issues. These features are essential to meeting the needs of users.

INTERNAL DISPUTE RESOLUTION

Effective and timely internal dispute resolution is essential to a well-functioning dispute resolution framework. The objective of IDR, as stated in *ASIC Regulatory Guide 165 (ASIC RG 165)*, is to resolve disputes ‘genuinely, promptly, fairly and consistently.’⁸ One of the benefits for consumers and for industry of effective IDR is the ability to identify and address recurring or systemic problems within an FSP.

We highlight below a number of concerns with the existing IDR framework and industry practice.

Questions 5 and 6: Is it easy for consumers to find out about IDR processes when they have a complaint? What are the barriers to lodging a complaint?

Consumer advocates are concerned that IDR is poorly implemented in some financial services providers.

Financial counsellors at Consumer Action Law Centre (*Consumer Action*) speak with thousands of people with debt and money problems every year. In many cases, consumers who call Consumer Action have expressed dissatisfaction or raised a complaint with their FSP but are unaware of its IDR process. The financial services provider is required to have a process in place to resolve disputes. If the receiver of the initial complaint cannot resolve the dispute it should be referred to an area that can resolve the dispute. One financial counsellor noted that FOS and CIO’s membership databases are frequently used to locate escalated IDR contact information so that disputes can be resolved.

This suggests that many financial firms are failing to effectively notify their clients about IDR and ensure that staff are empowered to resolve disputes. This is a significant barrier to lodging a complaint.

There continues to be a widespread misunderstanding by FSPs that a consumer must be referred to or contact their specialist IDR team for a dispute (or expression of dissatisfaction) to have occurred and for IDR to have been triggered. This is incorrect and inconsistent with the requirements in ASIC RG 165.⁹ When a consumer expresses dissatisfaction it is up to the FSP to implement its IDR process and ensure that this process is concluded within (usually) 45 days.¹⁰ It is also up to the FSP to ensure that its staff are empowered to resolve the dispute (if possible) or the matter is referred to a team that *is* empowered to resolve the dispute. If the dispute is not resolved the consumer must be informed about their right to go to EDR.

One surveyed financial counsellor commented:

⁸ ASIC RG 165.44.

⁹ Under RG 165.78, a complaint is ‘an expression of dissatisfaction made to an organisation, related to its products or services, or the complaints handling process itself, where a response or resolution is explicitly or implicitly expected.’

¹⁰ ASIC RG 165.88.

Lodging a dispute with FOS helps the creditor review the original request by a more authorised staff member to invariably achieve original request. Same outcome could be achieved by creditors (eg CBA) having more empowered frontline staff—thereby avoiding the need to refer to a senior decision-maker via FOS.

Consumer advocates want IDR to be as effective as possible so disputes are resolved as quickly and fairly as possible. FSPs need to continue to improve IDR to comply with RG 165 and improve customer satisfaction. In our view, it would be useful for ASIC to review the effectiveness of IDR to drive further improvement.

FSPs should give consideration to transitional arrangements for IDR during mergers and acquisitions. This problem arose with the recent acquisition of Esanda's motor vehicle finance portfolio by Macquarie Leasing.¹¹ Consumer Credit Law Centre SA lodged a dispute on behalf of a client with Esanda's IDR team. Several attempts at email contact were made and no response was provided. It only became apparent upon later lodging a dispute with an EDR scheme that Macquarie Leasing should have been the respondent party. Financial counsellors have also reported the same problem.

Question 7: How effective is IDR in resolving consumer disputes? Are there issues around time limits, information provision or other barriers?

Provision of documents

The first step in many disputes is obtaining basic documents from the FSP. This often includes the contract, a statement of account and, where there are concerns about potential breaches of the responsible lending laws, the assessment of suitability. These documents can help to narrow the issues in dispute and identify any claims that the consumer may have against their FSP.

The *National Consumer Credit Protection Act 2009* (Cth) (***National Credit Act***) and *National Credit Code*¹² provide strict time limits for the provision of documents such as the contract, assessment of suitability, and statement of account. Generally, these limits are 14 or 30 days, depending on the type and age of the document.¹³

Nevertheless, consumers and their advocates often face considerable difficulty in obtaining basic documents from FSPs. We repeatedly see examples where the credit provider has failed to provide these documents within the mandated time limits. In some cases, it is clear that the credit or consumer lease provider does not have adequate record management systems to store and provide documents upon request.

¹¹ See <<http://www.macquarie.com/au/corporate/asset-finance/motor-vehicles/transferring-esanda-customers/faq#?accordion:esanda-transition-accordion=0,1&accordion:esanda-customer-contact-accordion=0,1,2>>.

¹² The *National Credit Code* is contained in Schedule 1 to the National Credit Act.

¹³ National Credit Act ss 155, 185(1); National Credit Code, s 20(2), s 36(2) and (4) s 38(4).

We commend FOS's new fast track procedure, which applies to complaints about the failure of an FSP to provide relevant documents upon request.¹⁴ We recommend that the final EDR scheme adopt this process.

Case study: Sonya

Sonya is a mother of four children. Sonya is reliant on Centrelink assistance and experiences significant mental health issues.

In 2013 and 2014, Sonya entered into a number of high cost consumer leases. After falling into financial hardship in mid-2015, Sonya saw a financial counsellor, who made a standard request for documents from the consumer lease provider. This included all consumer lease agreements, statement of account and the assessment of suitability.

The consumer lease company provided only part of the lease documents—pages were missing, including the terms and conditions—and failed to provide the remaining documents. In the absence of these documents, an assessment of the merits of Sonya's dispute could not be finalised and the substantive dispute with the consumer lease provider could not be progressed.

Sonya's financial counsellor referred the matter to Consumer Action in late 2015. Consumer Action made repeated requests for the outstanding documents. None were provided.

In February 2016, Sonya made a complaint to CIO about the outstanding documents. In June 2016, the consumer lease company provided some but not all of the requested documents. The CIO case manager asked if this resolved Sonya's dispute. Consumer Action responded with a request for the remaining documents and that the issue be referred to the CIO's systemic issues team. CIO gave the consumer lease provider until early September to respond.

In September 2016, Sonya received an incomplete set of documents from the consumer lease provider via the CIO. The documents that were provided revealed breaches of the responsible lending laws.

The National Credit Act and National Credit Code required these documents to be provided within 14 or 30 days of Sonya's request. It is now 15 months from the original request and seven months since the complaint was lodged with CIO. Yet, some of the consumer lease agreements remain outstanding. Consumer Action continues to assist Sonya.

Source: Consumer Action

The above case study is an example of the need for EDR schemes to play a greater role in identifying and responding to poor IDR by scheme members. We expand on this point below.

¹⁴ FOS, *Making dispute resolution easier: Fast Track fact sheet*, <<https://www.fos.org.au/custom/files/docs/fast-track-fact-sheet.pdf>>.

Timeframes for IDR

The maximum timeframes for IDR vary depending on the type of matter and date of entry into the relevant contract. Generally, a final IDR response is required from the FSP within 45 days.

We recommend that the timeframe for a final IDR response be reduced from 45 days to 30 days for simple credit, banking and insurance disputes, where multiple party input is not required.

Many consumers are frustrated to hear that they have to wait up to 45 days for an answer to their dispute. Consumers often point out that, given many disputes are now made by email or telephone, it should be easier and faster for the FSP to respond to a dispute.

Many other disputes are required to be resolved within 21 or 30 days. For example, a final IDR response is required in credit reporting disputes within 30 days.¹⁵ The *Code of Banking Practice* states that banks will complete an investigation of a complaint within 21 days.¹⁶ Similarly, the time frame for responding to requests for hardship variations is 21 days (this can be extended if the credit provider requests further information). It is unclear why these disputes can be managed within 30 days or less, but the vast majority of IDR disputes can take up to 45 days. We note that EDR schemes face increasing pressure to resolve disputes faster. IDR too should be completed as efficiently as possible.

Consumers are often confused when they are referred back to IDR after lodging a complaint with EDR. If IDR timeframes cannot be reduced, then we recommend that consumers who have already accessed IDR, and are subsequently referred back to IDR after lodging a dispute with EDR, should face a shorter time period before the EDR scheme commences its investigation. The referral back to the IDR team is not well understood by consumers. It can cause complaint fatigue and otherwise result in poor outcomes for consumers.

Recommendation

The timeframe for a final IDR response should be reduced from 45 days to 30 days for simple credit, banking and insurance disputes where multiple party input is not required.

Developments in the United Kingdom

In July 2015, the UK's Financial Conduct Authority made a rule change to their complaints handling regime with respect to IDR timeframes. The effect of the rule change was that from 30 June 2016 the UK Financial Ombudsman Service was able to consider a complaint directly from a consumer – avoiding the usual eight-week internal dispute resolution process. The UK Financial Ombudsman Service is however only able to do so if:

- a business consents;
- the Ombudsman has informed the complainant that the respondent must deal with the complaint within eight weeks and that it may resolve the complaint more quickly than the Ombudsman; and
- the complainant nevertheless wishes the Ombudsman to deal with the complaint.

¹⁵ *Privacy Act 1988* (Cth) ss23B(5)(a), 20T(2)(a), 21V(2)(a).

¹⁶ Australian Bankers' Association Inc, *Code of Banking Practice 2013*, cl 37.3(b), <<http://www.bankers.asn.au/industry-standards/ABAs-code-of-banking-practice>>.

The aim of the proposals was to bring the UK rules into line with the provisions of the EU's Alternative Dispute Resolution Directive,¹⁷ which is intended to give consumers and traders access to out-of-court schemes that can help settle contractual disputes. The ADR Directive sets out a complete list of grounds that ADR entities, such as the UK Financial Ombudsman Service, can use to refuse to deal with a dispute. However, the Directive also allows the UK to introduce rules that go beyond these grounds in order to achieve a higher degree of consumer protection. Given consumers sometimes contact the UK Financial Ombudsman Service before making a complaint to a firm, the FCA proposed to empower the UK Financial Ombudsman Service to consider complaints under certain circumstances.

The majority of feedback from industry agreed with the amendments on the grounds that both the firm and the consumer must agree to the ombudsman service considering the complaint before the firm investigated it. A number of firms responded to the FCA that it was unlikely that they would agree to the ombudsman service considering a complaint before they had had the chance to investigate and resolve it.

Consumer representatives in Australia and around the world have long argued that it is important that businesses act to resolve complaints with consumers directly, that appropriate procedures be in place, and that business take ownership of the problems that inevitably arise and act upon them quickly, efficiently and to the satisfaction of consumers.

While the UK changes are an interesting development, we would wish to see the impact of these changes on complaints handling outcomes, if any, before advocating a similar change be introduced in Australia. We believe that the Australian current regime should be maintained for the time being and that regulators, industry and consumer representatives keep a watching brief on the new process.

Multi-tiered IDR

As mentioned, consumer advocates support the principle that FSPs should have sufficient opportunity to resolve a consumer's complaint before the matter is escalated to EDR. However, we are concerned that consumers get 'lost' in multi-tiered IDR processes, resulting in complaint fatigue and ineffective resolution of complaints. In some cases, consumers view the requirement to proceed through an FSP's IDR process as a tactic to prevent resolution of a complaint where that complaint has already been considered or handled by some other department or area of the FSP. Consumer advocates want FSPs to ensure that front-end staff are empowered (as much as possible) to resolve disputes.

We are particularly concerned about confusing multi-tiered IDR processes in insurance disputes. The *General Insurance Code of Practice* contains a two-stage process for internal complaints.¹⁸ Some consumers are not made aware of their right to take their complaint to Stage Two, especially after an insurer makes a request for further information or documents in

¹⁷ European Parliament and Council of the European Union, Directive 2013/11/EU on alternative dispute resolution for consumer disputes (21 May 2013) <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF>>.

¹⁸ *General Insurance Code of Practice 2014*, cl 10.

Stage One. In our experience, many consumers simply give up on their dispute when faced with an overwhelming and confusing request for documents. Some consumers misinterpret a request for further information as a refusal of their claim.

Case study: Abdul

In November 2015, Consumer Action wrote to an insurer on Abdul's behalf requesting a refund of the premiums for two add-on insurance policies together with interest on the basis that both policies were mis-sold to Abdul.

The insurer responded in late November denying any breaches (the first IDR response). This letter did not advise Abdul about his option to take his dispute to external dispute resolution at FOS. In early December 2015, Consumer Action responded in writing to the insurer disputing its position. The insurer responded in mid-December, again denying liability and again failing to provide EDR information (the second IDR response).

Around this time, Consumer Action advised the insurer that Abdul's loan account was to close shortly and requested that any insurance premium be refunded directly to him. Consumer Action mentioned this again by email in late January 2016.

In mid-January 2016, Consumer Action asked the insurer to confirm that the second IDR response from mid-December was its final IDR response, with a view to lodging a complaint with FOS. The insurer responded stating that it was not its final response, and that Abdul would now have to seek an independent 'IDR review.'

By this point, 61 days had passed since the initial complaint, well in excess of the 45-day timeframe provided for by RG 165.

At no point did the insurer provide information about FOS.

Source: Consumer Action

Problems also arise with IDR where the consumer does not have an established relationship with the insurer as they do, for example, where a claim has been denied.

Case study: Rose

Rose used Consumer Action Law Centre's website DemandARefund.com to generate a letter to her insurer requesting a refund for two insurance policies that were added to her car loan by her car dealer. She sent the letter to the insurer by email in early August 2016. In the letter, she explained that she had approached the car dealer about making a claim when she lost her job and was told the policy only covered medical expenses, which is clearly incorrect.

The insurer responded asking seven very detailed questions, one of which asked Rose why she asked the car dealer (the insurer's authorised representative) about making a claim and not the insurer.

Rose responded promptly and answered all of the questions clearly and articulately.

20 days after the original complaint, the insurer denied Rose's request for a full refund. The

dispute was handled by the insurer's customer service team.

Rose is now fatigued by the process.

As at 57 days following the original complaint:

- The insurer had not advised her about her right to take the dispute to the Financial Ombudsman Service.
- The insurer had not corrected or apologised for the incorrect information provided to her by its authorised representative.
- The insurer had not advised that she may make a claim under the policy.

Source: Consumer Action

Recommendation

The multi-tiered IDR processes in insurance disputes should be reviewed and simplified.

Possible solutions include:

- Requiring the insurer to notify the consumer, at the time of receipt of the complaint, about all stages of its IDR process and about the consumer's right to go to EDR after 45 days.
- Clarifying that the 45-day timeframe for an IDR response starts from the date of the initial complaint to the FSP, regardless of whether this complaint is lodged with a designated 'IDR team' or any other area of the FSP.

This could be achieved by amending section 10 of the *General Insurance Code of Practice* or, preferably, by ASIC amending its guidance in RG165 to clarify that multi-tiered IDR is poor practice.

Superannuation complaints

Consumer advocates report that consumers often struggle to navigate the lengthy and complicated process in superannuation complaints.

The timeframe for superannuation IDR, including for insurance through super funds, is 90 days.¹⁹ This is twice the length of the 45-day timeframe for many financial service and consumer credit complaints. Yet, some consumers report that super funds fail to meet even this generous timeframe. Further, the IDR process is not effective where trustees fail to address the issues raised in the complaint letter, as Bob's story highlights.

Case study: Bob

Bob ceased work in March 2015 due to disability.

In September 2015, Bob's financial counsellor made a claim on his behalf to his superannuation fund under his salary continuance insurance policy for the period March 2015 onwards. She provided all requested information including a medical report, his tax

¹⁹ *Superannuation Industry (Supervision) Act 1993* (Cth), s101(b).

file number and authorities.

Between November 2015 and March 2016, Bob's financial counsellor contacted the Fund several times for status updates. In March 2016, she was told that the insurer had accepted the claim.

In April 2016, the Fund wrote advising that the claim had been accepted for the period October 2014 to March 2015, totalling only approximately \$2,200. In fact, Bob was not claiming for this period, which was clear from his claim form.

The Fund then requested further information, which Bob's financial counsellor provided.

In May 2016, the Fund advised Bob's financial counsellor by email that he would have to have his employment formally terminated because a clause in the policy provided that insureds who had been off work for more than 12 months must have their employment terminated for benefits to continue. However, Bob had not been paid 12 months of benefits.

In early June 2016, Bob's financial counsellor wrote a formal complaint letter. The Fund advised that the claim had been accepted, but only for the period July 2015 to March 2016. Bob's financial counsellor responded that benefits should be paid until at least July 2016 (i.e. 12 months) and that, in any event, the insurer could not rely on the termination requirement in these circumstances.

In late September 2016, 115 days after the complaint letter, the Fund finally responded to the complaint but failed to properly address the issues raised in the June complaint letter, including:

- the fact that he has not received 12 months' of benefits;
- the application of the clause requiring termination.

Source: Consumer Action

One of the structural difficulties in superannuation complaints that can contribute to delay and confusion is the involvement of fund managers and sometimes insurers. In disputes about insurance through super, the super trustees have an obligation to pursue claims that have reasonable prospects of success.²⁰ Nevertheless, this process can surely be completed within a shorter timeframe.

Recommendation

The Panel should consider measures that could simplify and shorten the IDR process in superannuation complaints, at least in relation to simple complaints that do not involve third parties (such as insurers).

²⁰ Under s 52(7)(d) of the *Superannuation Industry (Supervision) Act 1993* (Cth), trustees are required to do everything that is reasonable to pursue an insurance claim for the benefit of a beneficiary, if the claim has a reasonable prospect of success.

Question 9: How easy is it for consumers to escalate a complaint from IDR to EDR schemes and complaints arrangements?

Failure to inform consumers about EDR

Many FSPs fail to effectively notify their clients about EDR. Financial counsellors and lawyers report that consumers are often unaware of FOS and CIO, even after proceeding through IDR. It is left to the financial counsellor or lawyer to explain the EDR process. This is undesirable and inefficient, and an outsourcing of the FSP's responsibility to inform their customers about EDR.

Clients of the Consumer Credit Law Centre SA have reported that FSPs have not notified them of their right to go to EDR. In other cases, consumers may be notified in writing but no-one actually tells them verbally about their right to take the dispute to EDR. It is often the case that clients struggle to manage their financial difficulty and may only seek legal or financial counselling advice once the matter proceeds to court. It is only then that they are advised of the EDR option. For some, it is too late.

Case study: Don

Don, a client from a culturally and linguistically diverse background, was struggling with his mortgage. Don made an application for hardship and was declined. He had difficulty reading the letter declining his request for hardship and did not read it in its entirety. Don did not realise that he had a right to ask EDR to review the decision.

Don contacted the lender several times but was not told about his right to go to EDR. He was told that his only option was to make payments in accordance with the terms of his mortgage.

Don was not able to make payments and the lender ultimately obtained a Possession Order.

Source: Consumer Credit Law Centre SA

Financial Rights continues to be concerned about consumers being 'trapped in IDR'. This is a problem across the whole of industry and it occurs where the FSP fails to respond to the dispute in writing and inform the consumer about EDR. When an FSP does respond in writing, it does cover the dispute, response and EDR. The non-compliance seems to be for all other disputes where the FSP has decided a formal response is not required.

Greater prescription is therefore required to ensure FSPs direct consumers to EDR in reasonable circumstances.

The *Telecommunications Consumer Protections Code* is a good example of the type of prescription required to ensure consumers are better informed of their rights to go to EDR. In addition to providing contact details of the relevant EDR body at sign up, specific obligations are placed on service providers during the IDR process. For example, if there are lengthy delays or any expression of dissatisfaction with regards to timeframe, progress or outcome of a complaint, then a service provider must inform a consumer of their right to EDR.²¹ This obligation even

²¹ *Telecommunications Consumer Protections Code C628:2015 Incorporating Variation No.1/2016*, cl 8.2.1(a)(viii)C, 8.2.1(b) and 8.2.1(c).

exists in situations where a service provider deems the complaint to be frivolous.²² By contrast the *Code of Banking Practice* only commits that industry to generally publicise information about EDR and inform an individual about EDR when the final outcome of IDR is reached.²³

In the United Kingdom, the Financial Conduct Authority found that as few as 20% of complainants knew about the UK Financial Ombudsman Service without prompting and did not know that they could go elsewhere.²⁴ To address this, the FCA introduced new rules requiring firms to send a 'summary resolution communication' where a complaint is resolved within three business days, and allow complainants to complain direct to the ombudsman service if they subsequently decide they are dissatisfied. The summary resolution communication includes information regarding the right to take a complaint to the Financial Ombudsman Service. The summary resolution communication is simply intended to raise awareness of the right to go to the ombudsman service at the moment when a consumer needs it most: during the course of a complaint.

In many situations, delay is likely to compound the consumer's problem, and may warrant the need for a complaint to be escalated to EDR. Consumers are unlikely to be aware of this right if they are only informed about it after IDR has reached a final outcome.

Consumer advocates note that there is a reference to the right to go to EDR in the Credit Guide and all default notices issued under the National Credit Act. This is a good step in ensuring consumers know about their right to access EDR for consumer credit disputes. However, consumers with insurance disputes have no such protections in place.

Recommendation

All consumers should be informed about their right to go to EDR in writing:

- at the beginning of the transaction;
- when a significant event occurs (such as an insurance claim); and
- after a dispute has been raised.

Complaint fatigue

The problem of 'complaint fatigue' is a significant issue for a well-functioning dispute resolution framework and can be compounded by lengthy IDR and the possible need for referral across multiple schemes.

Data from the telecommunications sector indicates that only 9% of consumers who were dissatisfied with IDR processes ended up escalating to EDR.²⁵ Among those who did not escalate to EDR:

²² Ibid cl 8.2.1(d).

²³ *Code of Banking Practice*, Part F, cl 39; see also ASIC RG 165.90 and 165.92.

²⁴ Financial Conduct Authority, *Consultation Paper CP14/30 Improving complaints handling* (December 2014) [2.25], <<https://www.fca.org.uk/publication/consultation/cp14-30.pdf>>.

²⁵ Galaxy Research, *Telco and ISP complaints: prepared for the Australian Communications Consumer Action Network* (May 2015), <<https://accan.org.au/files/Media%20Releases/ACCAN%20Galaxy%20Survey%20May%202015.pdf>>.

- 51% did not think that there was any point;
- 33% thought it was too difficult or too much effort;
- 15% had not heard of the Telecommunications Industry Ombudsman.

While different factors may be at play in the telecommunications market, this research indicates that we need to be constrained in our assumptions about how many consumers are willing to seek out EDR. The telecommunications sector has a single EDR body and more specific obligations on industry to inform consumers of its existence, yet the number of consumers seeking out EDR is low. This raises serious questions about the impact of complaint fatigue in the financial services sector where there are multiple EDR schemes and less specific requirements on FSPs to inform consumers of EDR.

Concerns about backlash

A significant barrier to lodging a complaint against a FSP is a concern about negative consequences from the FSP. Financial counsellors at Consumer Action report that many consumers are concerned that lodging a complaint against their lender will impair their ability to obtain further credit from their FSP.

Accessing EDR after legal proceedings commenced

We strongly support the ability of EDR schemes to consider disputes that are lodged after a scheme member has commenced debt recovery proceedings in court. This is consistent with the principle that consumers should have access to EDR before court. This innovation has permitted many consumers to avoid unnecessary, risky and costly litigation and have their dispute heard by FOS or CIO instead.

However, we are concerned that many consumers served with legal proceedings are unaware of their right to lodge a complaint with FOS or CIO until a defence to the proceedings is lodged. We recommend that EDR schemes work with the state court systems to ensure that statements of claim are accompanied by information about EDR. This would improve consumer awareness and discourage FSPs from initiating court proceedings to avoid the EDR process.

Recommendation

EDR schemes should work with the state court systems to ensure that statements of claim are accompanied by information about EDR.

Other issues

Interaction between IDR and Bank Customer Advocates

We strongly encourage the Panel to consider any overlap between IDR and 'Customer Advocates' employed by banks. A number of banks including ANZ, CBA and NAB have recently appointed Customer Advocates.²⁶

²⁶ Australian Bankers' Association Inc, *New voice for customer in complaints with banks*, September 2016, <<http://www.bankers.asn.au/media/media-releases/media-release-2016/new-voice-for-customers-in-complaints-with-banks>>.

The ANZ describes the role of its Customer Advocate as follows:

ANZ Customer Advocate's role is to review disputes from retail, small business and wealth customers in Australia, where the customer is not satisfied with the outcome of ANZ's internal dispute resolution process. On some occasions, particularly difficult complaints may be referred directly to the Customer Advocate for resolution.²⁷

Thus far, we do not have a clear understanding of their role. We note that the banks have appointed Customer Advocates previously and were found by many consumers to be ineffective because they were difficult to access. Accordingly, we remain sceptical about the value a Customer Advocate will add to the dispute resolution process and fear that their introduction will add another layer to internal dispute resolution. The ABA has also recently launched guiding principles for Customer Advocates, which we hope will provide some clarity.²⁸

We note that banks should already have very well-developed IDR procedures in accordance with ASIC Regulatory Guide 165, and that Customer Advocates should not act as a barrier to accessing EDR. Similarly, a customer who applies to the Customer Advocate should not lose their rights (including expiry of any time limits) to go to EDR if they are still dissatisfied with the bank's resolution of their dispute.

Given this, we consider that Customer Advocates, where they exist, should have a broader objective of improving systems for resolving complaints, and streamlining disputes and remediation processes. In particular, Customer Advocates should focus on ensuring that systemic issues identified through complaints handling are appropriately addressed. This should include facilitating redress to affected customers that have not complained, and influencing future practices, including product development and distribution processes.

Ultimately, the effectiveness of Customer Advocates will depend on whether they actually deliver tangible benefits to consumers.

Recommendation

The Panel should consider the interaction between IDR and Customer Advocates, and make recommendations that ensure this function does not impede efficient and accessible dispute resolution.

Interaction between IDR and remediation schemes

Recently, remediation schemes have been established in response to financial advice and life insurance scandals. This includes remediation schemes established by the CBA, NAB and Macquarie,²⁹ which typically form part of enforceable undertakings given to ASIC.

²⁷ See <<http://www.anz.com/auxiliary/contact-us/customer-advocate/>>.

²⁸ See <<http://www.bankers.asn.au/media/media-releases/media-release-2016/new-voice-for-customers-in-complaints-with-banks>>.

²⁹ See e.g. <<http://asic.gov.au/about-asic/media-centre/find-a-media-release/2014-releases/14-201mr-macquarie-equities-financial-advice-remediation/>>; <<http://asic.gov.au/about-asic/media-centre/find-a-media-release/2015-releases/15-355mr-commonwealth-bank-to-refund-80-million-after-failing-to-apply>>.

We support the principle that financial firms should clean up the mess they create for consumers. However, we are concerned about the transparency and accountability of these schemes.

We note that ASIC has recently released some guidance on the overlap between IDR and remediation schemes.³⁰ In particular, ASIC notes that remediation schemes are not 'complaints driven'. However, our view is that consumers should receive the same outcomes whether they are assisted through IDR or remediation schemes.

Recommendation

The Panel should consider how remediation schemes interact with IDR processes.

[benefits/](http://asic.gov.au/about-asic/media-centre/find-a-media-release/2015-releases/15-306mr-national-australia-bank-to-implement-a-large-scale-financial-advice-remediation-program/); <<http://asic.gov.au/about-asic/media-centre/find-a-media-release/2015-releases/15-306mr-national-australia-bank-to-implement-a-large-scale-financial-advice-remediation-program/>>.

³⁰ ASIC, *Regulatory Guide 256: Client review and remediation conducted by advice licensees* (September 2016), <<http://download.asic.gov.au/media/4009895/rg256-published-15-september-2016.pdf>>.

REGULATORY OVERSIGHT OF EDR SCHEMES AND COMPLAINTS ARRANGEMENTS

Question 10: What is the appropriate level of oversight for the EDR and complaints framework?

Broadly, the current level of regulatory oversight of EDR schemes is acceptable. We recommend, however, that ASIC play an expanded role in the oversight of both IDR and EDR, particularly in the reporting of systemic issues.

ASIC's oversight of IDR

Currently, ASIC provides very broad oversight of dispute resolution in accordance with RG 165. ASIC is responsible for:

- setting or approving standards for IDR procedures; and
- approving and overseeing the effective operation of EDR schemes.³¹

We consider that ASIC's role should be expanded where poor IDR is identified.

Consumer advocates have raised concerns about ineffective IDR at Commonwealth Bank of Australia (**CBA**). Consumer Action receives consistent feedback from clients, financial counsellors and community lawyers that CBA's IDR is defective, adversarial in nature and not focussed on fair and efficient outcomes for consumers. In April 2016, Consumer Action complained to ASIC about poor IDR at the CBA, including the following feedback:

- 'IDR appears to be broken—one talks to different members of staff every time one calls; emails go unanswered, letters from us claiming breach of responsible lending have been treated as requests for hardship.'
- 'Of the big four, I have found CBA most unwilling to offer a reasonable settlement offer to a good claim early on in the dispute resolution process. It always needs to be dragged into FOS, and only then will it consider making a reasonable offer of settlement.'
- 'Failure to recognise problems with responsible lending requirements, such as proper assessment of clients' income and living expenses. ... Loans with equally nonsensical figures – one giving a figure for expenses which works out at \$139.60 a week.'
- 'Impossible to negotiate. Irrespective of evidence, position is that CBA has done no wrong. Our clients can go to FOS, but for others, there is a serious issue of limited access to justice.'
- 'Opaque investigations: "we have investigated your complaint and are satisfied we have acted correctly."'
- 'Failure to provide all relevant documents during FOS investigation.'

CBA is the largest bank in Australia, with the highest proportion of home mortgages. As such, it is essential that CBA's internal dispute resolution processes are fair, accessible and effective.

³¹ ASIC RG 165.42.

A well-functioning market depends upon well-informed consumers who are able to make rational choices in their own best interests. It is for this reason we have advocated for the 'naming and shaming' of problematic traders to better inform consumers and encourage a culture of trader compliance.

We note that the New South Wales Office of Fair Trading has recently established a public complaints register.³² The Complaints Register provides information about businesses that are the subject of 10 or more complaints received by the Office of Fair Trading in a calendar month. The Register is updated monthly and only includes complaints considered by Fair Trading to have been made by a real person, relating to a real interaction with a business. Early indications suggest that the register has had a significant impact on some businesses.

We recommend that ASIC publicly name FSPs where complaints and systemic issues are raised by recognised consumer groups or by a sufficient number of consumers. This would deliver improvements in the overall legal and regulatory framework.

We expand on our recommendations for changes to reporting by EDR schemes in response to Question 28, below.

Recommendation

ASIC should have an enhanced role in responding to complaints about poor IDR.

ASIC should publicly name FSPs where complaints and systemic issues are raised by recognised consumer groups or a sufficient number of consumers.

Question 11: ASIC's oversight of EDR schemes

In 2014, a number of consumer advocacy organisations raised concerns with ASIC about the handling of complaints by EDR schemes, particularly by the CIO. The issues included:

- communications issues, including the accessibility of scheme correspondence with clients;
- the scheme making decisions that complaints were outside jurisdiction;
- concerns with the terms of settlement agreements;
- inconsistent outcomes where consumers are unrepresented;
- the fairness of case management processes; and
- problems with delay.

ASIC hosted a roundtable meeting with a number of consumer groups where these issues were canvassed, and consumer organisations provided case studies demonstrating examples of the concerns raised. Consumer groups were informed that these issues would be raised with the scheme, but we did not receive any information about the outcomes of these discussions or how the scheme would address these concerns. While it's possible that ASIC did raise these

³² NSW Government, Office of Fair Trading, *Complaints Register*, <http://www.fairtrading.nsw.gov.au/biz_res/ftweb/Public_Register/FT_Public_Register.htm>.

concerns, the extent of its regulatory authority over the EDR schemes is uncertain. At the very least, the process lacks transparency.

ASIC's regulatory role in relation to EDR schemes could be made clearer and more robust. For example, ASIC could be required to play a greater role where recognised consumer groups raise systemic concerns.

Similarly, ASIC could play a role in ensuring that there is an appropriate response by EDR schemes to the implementation of independent reviews. For example, ASIC could publicly report on the scheme's response to recommendations, and require an explanation where a recommendation is not accepted. This level of transparency would enhance confidence that the EDR scheme complies with the requirements of Regulatory Guide 165 and the Benchmarks.

We note that the independent review of CIO conducted in 2012 found that CIO did not achieve the fairness benchmark.³³ Despite this finding, it was not clear that ASIC took any public action to remedy this finding.

Recommendation

ASIC's regulatory role in relation to EDR schemes should be made clearer and more robust.

ASIC should publicly report on EDR schemes' response to recommendations of periodic independent reviews. ASIC should require an explanation where a recommendation is not accepted by the EDR scheme.

Question 13: In what ways do the existing schemes contribute to improvements in the overall legal and regulatory framework? How could their roles be enhanced?

The existing EDR schemes are required to report any systemic issues to ASIC. The identification of systemic issues and gaps in the regulatory framework should be a key focus of reporting and collaboration between ASIC and dispute resolution bodies.

In our view, the existing EDR schemes should expand their role in identifying and responding to poor IDR. FOS and CIO have access to unparalleled data about the nature and frequency of complaints about the IDR failures of FSPs. We note that, should the Panel favour a move to one merged EDR scheme as we recommend, the final EDR scheme will be in an even better position to identify and respond to systemic issues and poor IDR.

Currently, the ability for some financial service providers to choose which EDR scheme they join creates a potential incentive for schemes to not take any action on poor IDR for fear that the member may forum shop and move schemes. An example of this fear of forum-shopping is given in response to Question 31.

³³ The Navigator Company, *Independent Review of Credit Ombudsman Service Ltd: Report* (May 2012), <[http://www.cio.org.au/cosl/assets/File/Independently%20Review%202012%20\(The%20Navigator%20Group\).pdf](http://www.cio.org.au/cosl/assets/File/Independently%20Review%202012%20(The%20Navigator%20Group).pdf)>.

At present, we are concerned that existing schemes should do more to address systemic issues with FSPs. There is a lack of transparency because the EDR schemes do not name traders that have systemic issues.

For example, a number of complaints were lodged with FOS in relation to the Commonwealth Bank, NAB and Macquarie financial planning scandals before these were exposed in the media. It remains unclear whether FOS identified systemic issues here. At the very least, it appears that any response did not result in swift action by the institutions or regulator.

EDR schemes are in an excellent position to undertake regular surveys of consumer satisfaction with IDR, having direct access to consumers with complaints that were not resolved in IDR. The Energy and Water Ombudsman Victoria report, 'Can I speak with a Manager?' contains a useful analysis of energy and water companies' complaints handling performance based on surveys of actual complainants.³⁴

Recommendation

EDR schemes should have an enhanced role in identifying and responding to systemic issues such as poor internal dispute resolutions.

EDR schemes should be more transparent about the action taken to address systemic issues, including by notifying consumers of outcomes of their complaints and by naming FSPs.

Please refer to our response to Questions 27 and 28 for further recommendations.

³⁴ Energy and Water Ombudsman Victoria, 'Can I Speak with a Manager?': *An analysis of energy and water company performance in handling your complaint* (March 2015), <
https://www.ewov.com.au/files/can_i_speak_with_a_manager_full_report.pdf>.

EXISTING EDR SCHEMES AND COMPLAINTS ARRANGEMENTS

Survey results

Surveyed financial counsellors across Australia gave the following assessment of their experience of FOS and CIO in the last 12 months.



Financial counsellors interact more with FOS than the CIO, as indicated by the relatively large 'unable to say/unsure' response for the CIO. For those financial counsellors that commented on the performance of both, FOS is seen as the better performing scheme. The weighted average response for FOS on a scale of 1 to 10, where 1 was 'really bad' and 10 was 'really good' was 7.5. In contrast, the weighted average for CIO was 3.5.

Forty-six financial counsellors made comments about this question. Of these, 28 comments referenced FOS in either a positive or negative way: 20 of the comments were positive. In contrast, 16 comments referenced CIO and of these, 13 were negative.

Comments illustrating these themes included:

- 'I had one case of an 80 year old with excessive credit card debt with GE. I believed it was unconscionable lending. The presence of FOS resolved the dispute favourably in the client's favour so I was very pleased with the FOS input.'
- 'I was very happy with both outcomes for my clients with FOS and CIO.'
- 'CIO was probably coming from a point of poor performance over the last number of years and has improved in all aspects of performance.'
- 'I have a lot more confidence in the decisions from FOS and its process. CIO tends to find reasons to not determine the complaint.'
'CIO is very slow.'

Some comments to Survey Question 4 touched on specific consultation questions. These comments are included in response to the relevant question below.

Question 14: What are the most positive features of the existing arrangements? What are the biggest problems?

FOS / CIO

Contributors to this submission have significant experience in supporting and acting on behalf of consumers with disputes considered by industry ombudsman schemes across Australia, including FOS and CIO.

We strongly believe that, in providing access to justice, the establishment of these schemes has been one of the most significant advances in consumer protection of the past 20 years. Without industry ombudsman schemes, hundreds of thousands of people would have been left with no avenue for redress other than courts or, more likely (due to cost and other access barriers) would have been left with nowhere to turn.

In our view, industry-based external dispute resolution schemes, including FOS and CIO, contain a number of useful features that contribute to strong justice outcomes:

- membership of an ASIC-approved scheme is a condition of holding a relevant licence, so all businesses in an industry must participate in the scheme;
- the schemes are funded by industry, meaning that industry has a financial incentive to minimise consumer disputes;
- the schemes have independent boards with 50 per cent representation from consumers and from industry so the dispute resolution processes are fair and balanced;
- the schemes provide flexible solutions to disputes but also have 'teeth' because the ombudsman can make decisions binding upon the trader;
- the schemes are required to report and, in the case of the CIO, enforce investigation decisions on systemic problems, meaning that they not only provide solutions for individual disputes but also help solve bigger problems at their source.

These benefits were cited by the Productivity Commission report on Access to Justice Arrangements.³⁵

The existing EDR schemes could be improved, as we detail in the following sections. However, by comparison to cumbersome tribunal and court processes, the existing schemes perform well.

SCT

Consumer advocates have significant concerns about the structure, funding and operation of the SCT, and the consequential impact on vulnerable consumers.

The SCT was established under the *Superannuation (Resolution of Complaints) Act 1993* (Cth) as part of the Superannuation Industry Supervision package of legislation, which ushered in compulsory employment-based superannuation in Australia. The Tribunal was thought necessary as a means by which superannuation fund members and beneficiaries could obtain affordable access to justice in a setting where they were forced into a financial product they may know little about.

³⁵ Productivity Commission, *Inquiry Report: Access to Justice Arrangements* (September 2014) Volume 1, page 338, <<http://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-volume1.pdf>>.

The Tribunal has been in place now for 23 years and has had a similar longevity to the industry-based ombudsman schemes for life insurance, general insurance and banking. However, unlike the other complaint schemes, the SCT has remain untouched throughout its somewhat chequered history. It is has remained a stand-alone statutory scheme whose terms, practices and procedures have never been reviewed or updated, in part because to do so would require legislative reform—in itself an inflexible and complex process worthy of reconsideration.

We note with concern that stakeholder consultation does not appear to be a prominent feature of the SCT. The SCT has an Advisory Council, which includes some consumer representation. The Advisory Council provides high-level support and advice to the SCT Chairperson. However, broader periodic consumer consultation, consistent with the other EDR schemes, is strongly recommended.

Superannuation consumers should have access to the benefits of industry-funded external dispute resolution. We recommend that superannuation complaints be integrated into one industry-funded EDR scheme.

There are, however, some benefits associated with the SCT that should not be lost in any transition. First, the SCT has unlimited monetary jurisdiction. Monetary limits associated with FOS and CIO should not be imposed on superannuation disputes, particularly given the SCT often deals with significant amounts held in superannuation or life insurance matters. Second, the SCT is able to join parties, for example, life insurers and trustees into one dispute. This assists with the efficiency of dispute resolution.

Questions 15 and 16: Accessibility and ease of use

FOS / CIO

The broad view of contributors is that the existing EDR schemes are more accessible and easy to use than the SCT. Nevertheless, improvements could be made, particularly to improve access for vulnerable and disadvantaged consumers.

We make the following recommendations to improve accessibility and ease of process.

- EDR schemes should establish and improve outreach programs to underrepresented communities, like the Electricity and Water Ombudsman NSW.³⁶ This should include culturally and linguistically diverse, deaf, indigenous and newly arrived communities.
- EDR should consider a face-to-face option for the most disadvantaged and vulnerable consumers.
- EDR should engage with health and community workers. In our experience, disputes involving vulnerable clients are often activated by a family member or community worker with an established relationship with the consumer.
- EDR schemes should improve access to interpreters. For example, the first page of the online CIO complaint form asks if the person requires an interpreter. If the answer is yes,

³⁶ See <<http://www.ewon.com.au/index.cfm/publications/newsletters/ewonews-issue-31/community-outreach/>>.

the person is then expected to complete the rest of the form without accessing an interpreter. Interpreting services should be available at the point that the consumer indicates their need for an interpreter.

- We do not support a triage or concierge service. However, some consumer representatives suggest trialling a short contact form that would require a call back from the EDR scheme to assist the person complete their complaint form. While we acknowledge this is resource intensive it could provide an easier referral pathway to financial counsellors and consumer credit solicitors, and to accessing interpreters to assist in completing the complaint form. This dispute would be treated as a lodgement in EDR.
- EDR schemes should play a greater role in obtaining documents from the FSP, particularly where the consumer faces technological or other barriers to providing documents. This will remove some of the pressure from vulnerable clients who may not understand or hold the documentation that is needed.
- EDR schemes should use consistent language. For example, FOS refers to a 'dispute' and CIO refers to a 'complaint.'

SCT

There are significant problems with the accessibility of the SCT, particular for people experiencing vulnerability or disadvantage. This is central to our support for the integration of the SCT into a single EDR scheme, outlined below.

Case study: Mick

Mick is an Aboriginal man with very low literacy. He is on heavy pain medication, which makes dealing with the insurer and understanding the issues more difficult.

In mid-2014 Mick sustained a back injury at work. Three weeks earlier he had started his own business. Mick lodged an Income Protection claim. He was back-paid income protection payment to July 2014. In December, Mick got claim forms for a total and permanent disability (*TPD*) claim, and in March lodged a TPD claim. The reason for the delay was that Mick has literacy problems and it took him a long time to get the documents together.

In July 2016, Mick's payments stopped as income protection is only paid for 2 years under his policy. At this time, Mick was still waiting on decision on his TPD claim. Mick says he sought updates on progress of his case almost weekly. The insurer never got back to him. The insurer only contacted Mick when it wanted something such as asking him to see their doctor or submit to an investigator's interview.

Mick was unable to lodge his complaint—about the delays and other unfairness in their processing— in writing because of his low literacy.

Mick believed he could complain to FOS. He telephoned FOS a couple of times to try to complain about the insurer's delays but FOS refused to take Mick's complaint over the phone, telling him that he had to lodge his dispute in writing. It is unclear whether he was advised to go take his complaint to the SCT; however, when he contacted Financial Rights, he was unaware of the SCT.

Eventually someone at the insurer responded to part of Mick's complaint and sent him a document called 'procedural fairness,' which contained a transcript of his interview and

employability studies obtained by the insurer. The Insurer called these studies 'independent' but Mick did not accept that they were independent as they were arranged and paid for by insurer.

In August 2016, Mick received an email from his insurer recommending that his claim be declined. There is no decision from his super trustees yet.

Given his literacy problems, Mick is unable to prepare a complaint to the SCT himself. Mick says that, being in financial hardship, he is unable to get own medical reports to comment on insurer's specialist reports.

Source: Financial Rights Legal Centre

Question 17: To what extent do the schemes provide an effective avenue for resolving disputes?

Largely, we consider CIO and, in particular, FOS, to be effective avenues for resolving disputes. Many of the problems identified in this submission ultimately go to the effectiveness of the existing schemes, and improvements could certainly be made. Ultimately, we consider that a single, merged ombudsman scheme will be more effective than the existing framework. We expand on this in response to Question 38.

CIO

Consumers, financial counsellors and lawyers have consistently raised concerns about delay at the CIO. Other concerns raised include a 'hand-off' approach and, at times, poor quality decision-making. These problems undermine its effectiveness and cause consumer detriment.

An important innovation led by CIO was its requirement that FSPs put a hold on enforcement action while a CIO complaint was active. However, we have seen examples where scheme members fail to comply with the policy, undermining its effectiveness.

Case study: Mary

Mary is a single parent and reliant on Centrelink to support her three children. In 2015, Mary entered an unaffordable car lease. By January 2016, Mary was in financial hardship. With the assistance of a financial counsellor, Mary applied for a hardship variation, which was refused. Mary's financial counsellor lodged a complaint with CIO about irresponsible lending.

A few weeks later, while the CIO complaint was still open, the FSP commenced enforcement activity, which included:

- demanding payment of money;
- threatening to immobilise her vehicle; and
- attending at Mary's home seeking possession of the car.

Mary says that her vehicle was then immobilised while parked at a shopping centre. As a consequence, Mary had to arrange for the vehicle to be towed to her home, adding further costs. Representatives from the FSP demanded payment of \$1,000 to remove the vehicle immobilisation.

Consumer Action reported the matter to the CIO and requested that it intervene and recover

the towing costs from the FSP.

The FSP denied the immobilisation, but when Mary said she would get a mechanic's report, the car suddenly started working again.

Mary is still out of pocket for the towing costs.

Source: Consumer Action

Delay is a concern for many consumers and their advocates. Consumer Credit Legal Service WA currently has five active complaints with CIO, lodged between March and June 2016. Aside from the first complaint, where an unclear offer of settlement has been made, its clients are no further forward with their complaints than they were at the IDR stage. This is very frustrating and stressful for those clients.

Delay can have a variety of detrimental impacts on consumers. In some cases, the slow progress of an EDR dispute can prejudice a consumer's ability to take their dispute to court. We have seen examples where the limitation period for commencing legal action can expire while the consumer is awaiting a decision at EDR.

Case study: Max

Max saw a financial counsellor about his inability to make payments on an investment property loan. The financial counsellor assisted Max seek hardship variations and later to negotiate the voluntary surrender of the investment property. After the settlement, there was a shortfall of \$200,000.

Max sought legal advice. One dispute was filed in the CIO against the broker. One year later whilst the dispute was still being reviewed by the CIO, a second dispute was filed in the FOS. The same documents were produced in both EDR schemes. The CIO dispute progressed very slowly. Even though the FOS dispute was filed one year later against the lender, a preliminary recommendation was issued by FOS before the CIO dispute progressed to recommendation.

The dispute progressed very slowly. The delay in the EDR process had an impact on Max forcing him to decide whether to start court action before his EDR dispute was finalised.

EDR was further complicated by the necessity to access two schemes for a dispute involving the same facts.

Source: Consumer Credit Law Centre SA

Case study: Lara

Lara helped her daughter establish a hair salon by acting as a guarantor, using her house as security. However it turned out that the loan had been placed in Lara's name only, and the daughter ceased paying the loan.

A complaint was lodged in CIO against Mortgage Company A, using the Mortgage Company name that appeared on her account statements and which responded to the IDR complaint. Mortgage Company A didn't produce any documents to CIO. Ten months after

the complaint was lodged, CIO identified that another company, Mortgage Company B, was the correct mortgage provider that should be responding to the complaint. The CIO then assigned a new case number and case open date once the correct company was identified, so the delay in the progress of the matter wasn't properly reflected in CIO's records about how long the matter had been left unresolved. Mortgage Company B's first response to the complaint was received over a year after the complaint was initially lodged in CIO.

CIO interviewed the client as part of the complaint. Financial Rights was concerned that CIO's questions did not focus on some of the main legal issues, being what the lender knew about her financial situation and the purpose of the loan.

Lara requested conciliation early in the complaint, but CIO decided that, given the parties' positions, conciliation would not be beneficial, and opted for offers and counter-offers by written correspondence instead. There was no indication Mortgage Company B was asked specifically about its position on a conciliation by the CIO until months later. Mortgage Company B did agree to a conciliation 11 months from the date a conciliation was first requested through CIO. Lara, with the assistance of Financial Rights, organised a conciliation directly with the mortgage provider without CIO involvement as CIO were between conciliator contracts and waiting would have caused further delays. The dispute ultimately settled.

Source: Financial Rights Legal Centre

Consumer Action reports that, in some disputes, clients achieve a faster and better outcome by taking their dispute to court instead of CIO. Many of its cases remain open in the CIO up to a year or more after the complaint is made, even where there are clear breaches of the law.

Due to concerns about delay, Consumer Action recently assisted a client to lodge a consumer lease dispute in a court. The dispute settled quickly and on favourable terms. Active complaints with similar merit against the very same consumer lease provider languish in CIO. Consumer Action has seen similar outcomes in disputes against Cash Converters.

Case study: Paloma

Consumer Action assisted Paloma to lodge a complaint in CIO against a consumer lease provider in August 2015 after it initiated legal action against Paloma in an interstate court. At this time, Paloma had been leasing goods from the FSP for approximately 10 years. There was a dispute about her payments, the supply of second-hand and unsuitable goods, and irresponsible lending, including over commitment on the earlier consumer leases.

Consumer Action requested copies of all contracts and statements of account from the FSP. After six months of repeating the request with no success, Consumer Action wrote directly to the Ombudsman at CIO in February 2016. The FSP provided documents, but only relating to the consumer leases that were the subject of its own legal action.

In March 2016, Consumer Action wrote to CIO pointing out that there were no documents verifying Paloma's living expenses (as required under the responsible lending laws) and some statements of account were missing. Consumer Action repeated its request, via the CIO, for the outstanding documents.

To date, over 12 months later, all information has not been provided.

Source: Consumer Action

The causes of delay at CIO are, no doubt, many and varied. One difficulty faced by CIO is its membership base. Some small business members of CIO are not prepared to step back and consider the dispute in a dispassionate manner. In our view, differences in membership alone cannot account for the inconsistency of outcomes at the CIO. As a matter of principle, smaller lenders should not be let off the hook simply because the costs of compliance with financial services and consumer credit laws may be more strongly felt.

A further cause of delay appears to be high rate of staff turnover at the CIO. We are aware that the CIO has difficulties in retaining staff, with case managers typically remaining at the CIO for approximately two years. Given the loss of expertise and lengthy training required, it is little wonder that consumers and advocates face long delays and, at times, inexperienced case managers at CIO.

We are aware that CIO is attempting to reduce the long-standing problems with delay. It may be some time before the benefits of any improvements and new hiring are seen.

FOS

FOS is not without its own problems with process and delay. While the majority of financial counsellor comments about FOS were positive, there were also some concerns. For example, surveyed financial counsellors stated:

- 'In my experience FOS has deteriorated substantially in their ability to respond to disputes in a timely fashion.'
- 'FOS's responses often seem weighted towards the credit provider's version of events.'
- 'The new FOS streamlined process has been good but for complex issues it continues to be a lengthy process.'

Some consumer advocates are also concerned about the devolution of decision-making from panels to single Ombudsman determinations, particularly for complex investments and insurance matters. At the determination stage, FOS will decide the dispute by a single ombudsman or by a panel of three decision-makers, including a consumer representative, industry representative and chaired by an Ombudsman.

SCT

The problems with delay at SCT are even worse. There are significant delays at the SCT, with cases taking up to three years to reach a determination. As at April 2016, the SCT had a complaints backlog of at least 1,500 cases, with some complaints dating back to 2012. This has disastrous implications for consumers waiting on a determination, and significantly impairs its effectiveness as dispute resolution forum.

We understand that the delay is largely caused by the long-term underfunding of the SCT and, in part, an increasingly legalistic approach at the SCT.

In light of the known delays, it is concerning that the SCT lacks an effective process to expedite matters that are urgent or exacerbating the applicant's financial hardship. The SCT appears to have few effective processes for identifying and responding to issues affecting vulnerable applicants, as Serena's story highlights.

Case study: Serena's story

Serena suffered from ongoing debilitating illnesses including chronic fatigue syndrome, fibromyalgia, anxiety and depression. She was unable to engage in daily living without assistance. She required oxygen therapy at times. Serena's total and permanent disability insurance claim had been rejected by her superannuation fund.

Financial Rights lodged an application to the SCT on Serena's behalf in April 2012. The SCT responded with a letter that stated:

acknowledge receipt of the above complaint.

Please note that, because of the large number of complaints currently before the Tribunal, the complaint cannot be dealt with immediately but will be dealt with as soon as possible.

The Tribunal will contact you again when it is able to proceed with its investigation. Please do not contact the Tribunal within this period to check progress of the complaint. However, if there is any development or new information which affects the complaint, you should notify the Tribunal in writing, quoting the reference number at the top of this letter.

Please be assured that the Tribunal will commence its investigation of the complaint at the earliest opportunity. We will contact you again at that time.

In late August 2012, Financial Rights contacted the SCT and was told the case was still 'waiting to be allocated' to a complaints analyst.

In September 2012, SCT sent a letter confirming they received the complaint in April 2012 and that the Tribunal had given the Trustee and Insurer 28 days to provide a response.

By October 2012, Serena was in dire straits. Her situation had deteriorated, both financially and medically. Serena was unable to afford her private rental accommodation on her Disability Support Pension and was at risk of homelessness. She reported a very low quality of life due to worsening ongoing illnesses and the stress of dealing with this claim.

In late October 2012, Financial Rights requested that the SCT expedite the matter due to Serena's circumstances. In November 2012, the SCT replied:

The Tribunal has a substantial workload with limited resources and it has found that the fairest way to prioritise matters is in order of their lodgement. The Tribunal recognises the urgency of your client's situation and will endeavour to address the matter as soon as possible.

In December 2012, SCT stated:

As it has been some time since the Tribunal last contacted you in relation to this matter, I wish to advise you that the complaint is still under investigation.

I have contacted both the Trustee and Insurer for further information.

We will contact you again if we require further information from you, or when the Tribunal is able to proceed to the next stage of dealing with the complaints.

In February 2013, Financial Rights again requested that the matter be expedited due to Serena's hardship, reiterating that she faced homelessness, had severe ongoing anxiety about the delay with the claim, and suffered from ongoing debilitating illness.

In March 2013, the insurer changed its mind and accepted Serena's TPD claim. As such, the complaint to SCT was withdrawn.

Source: Financial Rights

Question 18: Ability to evolve in response to changes in markets or needs of users

One of the key advantages of the existing EDR schemes is the ability to respond to developments in markets and the needs of users, particularly by comparison to courts and tribunals, including the SCT. EDR schemes engage in a process of continuous improvement, with regular periodic review, stakeholder engagement, and the requirement to identify and respond to systemic issues. In particular, we support the CIO's requirement to enforce its decisions on systemic issues.

The governance framework at FOS and CIO permits a degree of flexibility and responsiveness. FOS and CIO have powers and procedures set out under rules or terms of reference determined by their governing boards which can be amended by those boards, usually after public consultation and with the approval of ASIC. This system has proved to be much more flexible in allowing scheme rules to be updated and their powers, procedures and approach to be improved where appropriate.

By comparison, the SCT's ability to innovate is far more limited. The SCT's powers and procedures are set out in statute, although the Tribunal must issue a memorandum explaining how complaints are to be dealt with.³⁷ The statute can only be amended by Federal legislation. Even simple procedural amendments can be delayed due to the need for legislative change.

Question 19: Jurisdiction

The SCT has a limited number of prescribed exclusions which, generally speaking, has given it flexibility to deal with a broad range of disputes.

In contrast, FOS and CIO have, on balance, a wider range of exclusions that have operated in some cases to restrict consumers' access to justice. These include claims outside the low monetary limits and matters requiring the attendance of third parties. Another limitation of EDR jurisdiction is an inability to interrogate verbal representations and consider the credibility of

³⁷ *Superannuation (Resolutions of Complaints) Act 1993* (Cth), s 13.

witnesses. Efforts could be made to better deal with these disputes, rather than merely referring to a court as a more appropriate forum.

Case study: Ted's story

Ted has a reverse mortgage and said that the bank staff told him incorrect information about the product. The FSP denies providing Ted with incorrect verbal advice immediately before entering into the transaction. The FSP relied on a checklist filled in at the time the reverse mortgage was entered. As the dispute related to the credibility of witnesses, Ted was told by the ombudsman that court was the appropriate forum for his dispute. This would have required Ted to navigate through rules of evidence and civil procedure. Ted abandoned the dispute.

Source: Consumer Credit Law Centre SA

Small business disputes

We are aware of the difficulties facing struggling small business owners and their lack of access to affordable dispute resolution. Some financial counselling clients have debts arising from the operation of small businesses and are often struggling to make repayments under small business loans. Many of the community legal centres contributing to this submission are not currently funded to assist small businesses. However, lawyers do receive calls from small business owners who are desperate for advice and cannot afford a private lawyer. It also follows that many small businesses cannot afford to take their dispute to court.

We are supportive of FOS's proposed expansion of its small business jurisdiction,³⁸ subject to our comments below about monetary and compensatory limits for consumer disputes.

Access to affordable dispute resolution for consumers through existing EDR schemes has led to an improvement in the conduct of financial institutions. Access for a wider range of customers is likely to further improve the quality of the financial services provided to small businesses and the industry response when disputes arise. We believe that it is harmful to the reputation of financial institutions when small business owners lack the resources to pursue a dispute against their financial institution.

We note that the Small Business and Family Enterprise Ombudsman is unable to make binding determinations and does not meet ANZOA's definition of an 'Ombudsman.'

We are aware that some small business lenders are not members of FOS or CIO. This may be confusing for small businesses, particularly if the proposed changes to FOS's Terms of Reference are widely publicised. If the proposed expansion of FOS's small business jurisdiction is adopted, FOS will need (at a minimum) an effective communication strategy to clearly warn small businesses about the risk that their lender may not be, or may cease to be, a member of FOS.

³⁸ FOS, *Consultation Paper: Expansion of FOS' small business jurisdiction* (August 2016), <<https://www.fos.org.au/custom/files/docs/fos-small-business-consultation-paper.pdf>>.

Recommendation

The Panel should consider legislative reform to make membership of an ASIC-approved EDR scheme mandatory for all small business lenders.

Time limits

The time limits for applying to the SCT are not extendable in some superannuation complaints, for example in relation to total and permanent disability claims.

In contrast, FOS is able to consider any dispute where the relevant time limit has passed if it considers that exceptional circumstances apply.³⁹ CIO is able to consider any dispute where the relevant time limit has passed if it considers that exceptional circumstances apply or where the FSP and CIO agree that it has jurisdiction.⁴⁰ We consider that the EDR model of extending time limits in 'exceptional circumstances' is desirable, and we recommend that this be adopted in superannuation disputes.

Recommendation

The final dispute resolution body should be able to consider superannuation complaints where the relevant time limit has passed if exceptional circumstances apply.

Question 20: Are the current monetary limits for determining jurisdiction fit for purpose? If not, what should be the new monetary limit? Is there any rationale for the monetary limit to vary between products?

The SCT has no monetary limits. In contrast, FOS and CIO have monetary and compensatory limits that are far too low. Consumer advocates have consistently argued that the jurisdictional monetary limits and compensation caps for consumer disputes must be reviewed and raised significantly.

Consumer organisations regularly speak with people who have disputes that fall well outside of the monetary and compensatory limits at FOS and CIO. Indeed, many mortgages on the family home will now fall outside these limits. Worse, the vast majority of personal guarantee disputes for home loans will now be outside the limits as the cost of housing continues to increase. Generally, free legal and financial counselling services are not able to assist these consumers. Instead, consumers are advised to contact a private solicitor in order to take their dispute through the court system.

A common jurisdictional problem involves insurance disputes relating to claims on Home Building or Home Building and Contents insurance policies. Given building and repair costs have increased significantly, many consumers are unable to access EDR and instead have to navigate the court system.

Case study: Naomi and Sam

³⁹ FOS, *Terms of Reference* (as amended 1 January 2015), TOR 6.2.

⁴⁰ CIO, *Credit and Investments Ombudsman Rules* (10th edition), r 6.4.

Naomi and Sam entered into a reverse mortgage with their bank in about 2008. They received about \$500,000. The value of the property was \$3,000,000.

Some years later Naomi and Sam wished to sell the property and downsize. They approached their bank for a payout figure and were advised that the break fee was approximately \$500,000. Naomi and Sam said they had not been advised of the potential size of the break fee.

By the time that Naomi and Sam sought advice from CCLSWA, the break fee was over \$600,000, meaning the dispute could not be considered by the ombudsman.

Although Naomi and Sam owned a substantial asset, they were not in a financial position to commence risky court litigation. Furthermore, Sam had been diagnosed with a terminal illness, so they were also not in an emotional or physical position to undertake stressful Supreme Court litigation.

Had the jurisdictional claim limit been higher, Naomi and Sam would have been entitled to take their complaint to the ombudsman.

Source: CCLSWA

Another common problem arises when uninsured drivers pursue an insured driver who was at fault in the accident. The current monetary limit of \$5,000 is too low given the rising costs of car repair. Uninsured drivers are often a vulnerable group of consumers with many experiencing financial hardship when their car is damaged.

We note that the proposed expansion of FOS's small business jurisdiction includes a proposal to increase the monetary limits and compensation caps for small business disputes.⁴¹ This includes a proposal to increase the current claim limit from \$500,000 to \$2 million, and to increase the compensation cap from \$309,000 to \$2 million.

If this proposal is adopted, the unfairness of the current consumer limits will be exacerbated by comparison to the new small business limits. It would be inequitable if a small business could receive compensation of \$2 million but an individual consumer could receive only \$309,000.

It would be sensible and fair for the same limits to apply to consumer and small business disputes. This would also simplify the jurisdiction of EDR Schemes and avoid further confusion for consumers. The jurisdiction of EDR Schemes is already difficult to understand, particularly for unrepresented consumers.

Once the jurisdictional limits and compensation caps are raised, they should continue to be reviewed regularly to ensure that the final EDR scheme's coverage is sufficient, in accordance with Regulatory Guide 139.

Recommendation

The jurisdictional and compensatory limits for consumer disputes must be reviewed and raised significantly, including the limits for non-financial loss and third party beneficiaries

⁴¹ See Proposal 1.1, *Consultation Paper: Expansion of FOS' small business jurisdiction* (August 2016), <<https://www.fos.org.au/custom/files/docs/fos-small-business-consultation-paper.pdf>>.

under insurance contracts.

The same jurisdictional and compensatory limits should apply to small business and consumer disputes.

Question 21: Consistency and comparability of outcomes

The current dispute resolution framework leads to inconsistent outcomes, generally to the detriment of consumers. This includes inconsistencies in respect of represented and unrepresented consumers, FOS and CIO, and EDR schemes and the SCT. These inconsistencies are highlighted throughout this submission.

Consumer advocates contend that, in principle and in practice, consistent and comparable outcomes will never be achieved if the CIO, FOS and the SCT remain separate.

Inconsistencies for represented and unrepresented consumers

Consumer advocates are concerned about differences in outcomes for represented and unrepresented consumers in the existing dispute resolution framework. Unrepresented consumers face greater difficulties in navigating the process and achieve worse outcomes.

Care Inc highlights concerns about the process for vulnerable and disadvantaged consumers. Clients of Care are generally vulnerable and disadvantaged; they may have mental and/or physical illnesses, low literacy or have not had the opportunity to develop the skills needed to engage with what are essentially quite sophisticated EDR processes. When asked, clients indicate that they find the process, to varying degrees, intimidating, overwhelming, inaccessible and sometimes impossible if they are trying to do it alone. Many clients have not accessed EDR schemes either because they were not told by their FSP or, if they were, they didn't understand how to go about it.

The process, not just the final outcome, is important to Care's clients. If they have an advocate (for example, a financial counsellor or lawyer) who is able to explain what is likely to happen and what it means, clients can become much more engaged with their dispute, regardless of the final outcome.

As a result, we are concerned for people, particularly those experiencing financial hardship, who do not access the support of an advocate. While it is difficult to know how many people give up on the process (or never begin), the consistent message from our clients that without an advocate's help they would likely not have proceeded to access EDR.

Of course, these difficulties are greatly exacerbated for consumers attempting to access tribunals or court without the assistance of an advocate.

Case study: Malik

Malik is sixty three years old. Malik experienced an assault on his way home from work one afternoon and subsequently developed severe anxiety and depression. He had found it impossible to get back to work as the assault had occurred not far from his office. As a result he had significant arrears on his personal loan and was in financial hardship. Malik had used up all

his leave entitlements and had not thought about applying for Centrelink—he said he had always worked and did not want to go onto Centrelink unless he absolutely had to.

Malik had initially approached the lender with the help of his GP and received some hardship assistance through the IDR scheme. However, due to his deteriorating mental health he became increasingly isolated. Although he had tried his best to keep the lender up to date, Malik felt they had stopped assisting him once he said that he wasn't sure when, or if, he could return to work.

Malik said he was not advised of the right to go to EDR by the lender although it could have been on a letter he received. However, given the lender knew about his fragile mental health, he felt they should have talked to him about this option and not have just expected him to see the information on a letter. He said he felt like ignoring the debt but a mental health support worker suggested contacting FOS, which he did. It turned out the lender was a member of CIO and he was referred there.

He then tried three times to complete the online CIO Financial Hardship Questionnaire but found it overwhelming as he was having difficulty concentrating. Malik looked at the Statement of Financial Position but, because of how he was feeling, he couldn't do that either. Malik stated he had again felt like giving up on the process but due to increasingly persistent calls from the lender, decided to contact a financial counsellor (from information on the CIO website). The financial counsellor assisted Malik with the process and to achieve an outcome that was manageable for him.

Source: Care Inc

Case study: Bill

Bill took out a loan of \$3,900 in 2011. The loan was secured by a caveat over his home. Bill made some repayments at the beginning of the loan, but failed to repay the entire loan amount. In 2015, Bill sought to consolidate this debt with other loans. The debt consolidation business contacted the lender who advised that the original debt had now increased to over \$200,000, and demanded payment in full. Bill lodged a complaint with the ombudsman. The ombudsman told him they could not consider his complaint as a court judgment had been made against him in 2012 in the Local Court of NSW. The ombudsman referred Bill to CCLSWA for advice.

CCLSWA sought advice in relation to the NSW judgment from Financial Rights Legal Centre. After receiving that advice, CCLSWA considered that the complaint fell within the ombudsman's jurisdiction and lodged a complaint on Bill's behalf. At first the ombudsman rejected the complaint, but CCLSWA appealed this decision and the question as to whether or not the complaint fell within the ombudsman's jurisdiction was reconsidered. On appeal, the ombudsman agreed that the complaint fell within its jurisdiction and was considered by the ombudsman.

Had Bill not sought the assistance of CCLSWA it is likely that he would have lost his home.

Source: CCLSWA

Case study: Phillip

Phillip contacted his lender in response to his declined hardship variation request. The IDR team refused to grant Phillip further hardship assistance. When Phillip filed a dispute with EDR, Phillip was referred back to the same IDR team that he had earlier tried to negotiate a variation with unsuccessfully.

Phillip was tired of the uncertainty and exhausted at the thought of being referred back to negotiate with the same people who had already said no. As a result, Phillip accepted the payment plan proposed by the lender without carefully considering whether he could realistically meet the varied obligations.

When Phillip soon breached his obligations under the variation agreement, the lender commenced legal enforcement action. When Phillip eventually saw a financial counsellor, he then realised that the lender's payment proposal had been based on an Income and Expenditure Statement that did not accurately record all of his expenditure.

If Phillip had seen a financial counsellor during his dispute at the IDR level, Phillip may not have entered into a variation agreement he was unable to sustain and could have thereby avoided legal enforcement costs.

Source: CCLCSA

Inconsistencies between FOS and CIO

In our experience, consumers face a number of inconsistencies in process and outcomes depending on whether their complaint is handled by FOS or by CIO. Examples include:

- Approach to unregulated loans: A difference of approach applies to loans where the lender engaged in maladministration but the loan may not be regulated by the consumer credit laws. FOS has a well-developed and described system of dealing with these disputes,⁴² whereas the CIO has no such system.
- Approach to 'fair and reasonable' in negotiations and settlement offers: Consumer Action reports that CIO generally appears less likely than FOS to consider what is 'fair and reasonable' to consumers in negotiations and settlement offers.
- Differences in process and procedures: for example, FOS has a fast track process for some disputes;
- Systemic issues: unlike FOS, CIO is able to enforce decisions on its systemic issues investigations.

The problems caused by inconsistencies in process was a theme in comments from surveyed financial counsellors.

Some of these differences may be described as innovation that the other scheme has yet to adopt. However, the innovation of one scheme does not assist consumers facing different outcomes in the other. Consumers should be able to expect the same level of service and outcome regardless of which EDR scheme they access. This is central to our support for one body.

⁴² See < <https://www.fos.org.au/the-circular-5-home/responsible-lending-conduct-obligations-maladministration/>>.

Inconsistencies between EDR and SCT

The approach of the SCT is more legalistic than that of FOS and CIO, particularly in light of the criteria for decision-making. We refer to our response to Question 23, below.

An inconsistency between SCT and the EDR schemes is the delay faced by consumers in the resolution of their complaints. As Serena's story details, the SCT has no effective process for expediting cases when needed or responding to a consumer's hardship.

We also note that the SCT does not deal with systemic issues in the same way that EDR schemes are required to under the relevant regulatory framework. While we note that sections 64 and 64A of the *Superannuation (Resolution of Complaints) Act 1993* requires the SCT to report certain instances of non-compliance with legislation to ASIC and/or APRA, this is not the same as a systemic issues function. In particular, we understand that SCT plays no role in resolving systemic matters directly with superannuation trustees, rather merely reports non-compliance to ASIC. Given that the regulator cannot act on every instance of non-compliance, this a serious shortcoming.

Question 22: Are additional powers and remedies required?

Powers of compulsion

The SCT has statutory powers to join and compel parties to participate in disputes, for example potential death benefit beneficiaries, insurance companies and medical decision-makers. The SCT also has discovery powers. These powers have proved to be valuable in getting all parties to a dispute together, particularly in death benefit disputes, which can sometimes involve many parties.

In contrast, EDR schemes do not have powers of joinder or compulsion. This can be a problem in small business disputes, which may rely on evidence from third parties such as company directors or an administrator. This can also present evidentiary difficulties where a consumer claims that verbal statements made at the time of entering the transaction were misleading and deceptive.

These matters can be excluded from EDR on the basis that court is a more appropriate forum. Some consumer representatives report that, alternatively, the EDR scheme may accept the dispute but prefer the contemporaneous file notes of the FSP and award in its favour.

A related problem occurs when FSPs refuse to provide their training and sales manuals. These documents could provide useful evidence substantiating a consumer's claims about misleading verbal representations and high pressure sales tactics used during the sales process.

The Benchmarks allow EDR schemes to 'demand' that scheme members provide information relevant to a dispute, but cannot compel them to do so.⁴³ This is reflected in schemes' terms of reference.⁴⁴ However, in our experience schemes can be reluctant to enforce requests for

⁴³ Benchmarks for Industry-Based Customer Dispute Resolution, above n 5, Clauses 3.8 and 3.9.

⁴⁴ *FOS Terms of Reference 7.2; Credit and Investments Ombudsman Rules* (10th edition) r 19.1.

documents even where those documents have been requested repeatedly, they are relevant to the case and there is no genuine reason for withholding them.

FOS and CIO do allow for requests for document information documentation to be made with adverse finding or dismissal sanctions for non-compliance.⁴⁵ Ideally, EDR schemes should be given additional powers to compel relevant documents. This would assist consumers and the EDR schemes in resolving disputes involving verbal misrepresentations and tactics used during the sales process.

Remedies

We encourage the Panel to give consideration to alternative remedies or powers that could improve industry compliance with the responsible lending laws. The introduction of responsible lending laws in 2011 was a significant advance in consumer credit laws and the protection of consumers. However, we are concerned that the remedies for a breach of these laws have been insufficient to improve industry practice. Consumer credit lawyers and financial counsellors frequently see breaches of these laws.

Industry-wide failures have been well-documented. For example, ASIC's recent report on the payday lending industry found that nearly two-thirds of payday loans failed to meet the specific responsible lending laws for payday loans.⁴⁶

The typical remedy for a breach of these laws is a refund of interest, fees and charges, with the principal to be repaid by the consumer. For some consumers, this means the loss of a home. In our view, this remedy is insufficient to deter consumer credit providers from irresponsible lending. If in the unlikely event that the consumer takes action, generally the worst that will happen to the lender is the loss of its profit on the irresponsible loan.

Question 23: the criteria to make decisions appropriate? Could they be improved?

FOS / CIO

We strongly support the existing criteria used to make decisions at FOS and the CIO.

To the extent that there are problems, it is in the application of the decision-making criteria to individual cases. For example, Financial Rights and Consumer Action have seen recent examples where FOS has placed an over-reliance on banking experts and standardised measures (such as the Henderson Poverty Index) in assessing affordability and financial circumstances in responsible lending disputes. ASIC RG 209 sets out that, while standardised benchmarks can be a useful fallback or minimum standard, the starting point should be the borrower's actual financial circumstances. Further, the leading case law on responsible lending states that an FSP must make an assessment of the consumer's *actual* income, expenses and debts.⁴⁷

⁴⁵ *FOS Terms of Reference* 8.4(c); *Credit and Investments Ombudsman Rules* (10th edition) r 16.

⁴⁶ ASIC, *Report 426: Payday lenders and the new small amount lending provisions* (March 2015) [53], <<http://download.asic.gov.au/media/3038267/rep-426-published-17-march-2015.pdf>>.

⁴⁷ *ASIC v Cash Store Pty Ltd (in liquidation)* [2014] FCA 926, [42].

SCT

The SCT determines whether the decision in questions was fair and reasonable in the circumstances. As a matter of law, these criteria are significantly narrower than the criteria for decisions at FOS and CIO, which operate more broadly to overturn black letter law in light of fairness and good industry practice. This can lead to comparatively unfair outcomes at the SCT.

Case study: Emily

Emily held a life insurance policy attached to her superannuation. Her insurer paid it as one lump sum and did not differentiate over the two financial years. As such, the ATO wanted to tax her higher and Centrelink wanted to cancel her payments. Emily took her dispute to FOS; however, FOS determined it did not have jurisdiction and referred Emily to the SCT in 2012.

The SCT made its decision upholding the superannuation funds decision in June 2014, two years after the initial approach to the SCT. The SCT process also relied on the consumer to make arguments that ultimately were very technical. This is opposed to the FOS process that is more inquisitorial. The central issue—did Emily’s provider have a duty to inform her of the financial implications of a lump sum payment—was one that related to best practice. In the end the discussion centred on a technical argument about loss.

It is the view of Financial Rights that the SCT process did not serve Emily well.

Source: Financial Rights

Question 24: What are the advantages and disadvantages of the different governance arrangements?

FOS / CIO

We strongly support the existing governance arrangements of FOS and CIO. The boards are comprised of 50 per cent consumer representatives and 50 per cent industry representatives, with an independent chair. The equal mix of consumer and industry representatives on the boards of FOS and the CIO has significantly aided collaboration, trust and good consumer outcomes.

We note that the boards in the superannuation industry and the Telecommunication Industry Ombudsman area generally comprised of 1/3rd consumer, 1/3rd industry and 1/3rd independent representatives with an independent chair. We do not support this model and note that all directors (no matter their background) have governance obligations to act in the best interests of the EDR scheme.

We are strongly opposed to any move towards a model with ministerial appointments or government oversight. Again, the purpose of any such oversight is not clear, particularly given the current arrangements have been successful.

SCT

In our view, the governance model of the SCT should also be overhauled. Should the SCT remain, we recommend that it move to a Terms of Reference model with governance by a board, ideally comprised of an equal number of consumer and industry representatives.

Question 25: Funding and staffing levels

We refer to our response to Question 17, above, in respect of staffing and delay.

FOS / CIO

We broadly support the existing funding arrangements for FOS and the CIO. Industry-based EDR schemes are funded by their members through regular membership fees and complaints fees. Importantly, the schemes are free for consumers to use.

This funding model is a critical element of the success of industry-based EDR. Businesses have a clear incentive to settle disputes with their customers before the dispute reaches EDR, and low-income consumers are not deterred from bringing disputes by an unaffordable fee or potential costs risks.

However, we consider that increasing transparency is needed about the funding of FOS and CIO and, in particular, the amount and process for setting fees. We do understand that the majority of CIO's funds are raised from membership fees, while the majority of FOS's funds are raised from case fees. In our view, a greater reliance on case fees provides an appropriate commercial incentive to FSPs to resolve disputes efficiently.

We note that the CIO only employs lawyers as case managers. It is unclear whether this necessarily leads to better outcomes for consumers and, if unchecked, may lead to an overly legalistic approach. Care Inc noted that some of the most marginalised and vulnerable members of the community may prefer not to deal with a lawyer. It is important that case managers and staff interacting with consumers are appropriately trained to respond sensitively and empathically to the experience and needs of vulnerable and disadvantaged consumers.

SCT

The SCT is funded by a federal government levy imposed on regulated superannuation funds. The SCT is entirely dependent upon funds being allocated to it by ASIC to provide staff and facilities as it deems 'necessary or desirable to enable the Tribunal to perform its functions.'

This funding model has proved to be very problematic. The SCT has seen its funding reduced, particularly in the last few years, despite a steady increase in enquiries and complaints. In 2015, the Australian superannuation system had assets of over \$2 trillion. Yet the SCT was required to operate on a budget of \$5.2 million to resolve 2,688 new written complaints and 11,436 telephone enquiries, plus outstanding complaints from previous years.⁴⁸ This has undoubtedly contributed to significant increases in the delay in dealing with complaints, which currently stands at a completely unacceptable period of up to 3 years to have a complaint determined by the Tribunal.

The funding model of the existing SCT is entirely unworkable, both in the amount of funding and the funding arrangements. Unlike FOS and CIO, there is no link between the amount of funding and the number of disputes. Whilst there have certainly been issues with delay, industry-based EDR schemes have not experienced the funding problems facing the SCT.

⁴⁸ SCT, Annual Report 2014-2015, page 18.

We note that the SCT recently received a one-off funding injection of \$5.2 million earlier this year.⁴⁹ This, however, will be inadequate to resolve the long-term funding decline at the SCT.

In our view, the SCT should be merged into one industry-based EDR scheme. However, should the existing SCT remain, we recommend that the SCT receive a stable increase to its funding, and that its funding be de-coupled from ASIC.

Questions 27 and 28: Accountability, transparency and reporting

FOS / CIO

On the whole, FOS and CIO are to be commended on their approach to accountability, transparency and reporting, particularly by comparison to courts and tribunals. The approach to these issues is a significant benefit of the existing EDR framework.

Regular periodic review is essential to the accountability of the existing EDR schemes. As discussed above, we recommend that ASIC play a greater role in ensuring that recommendations from these reviews are implemented by FOS and CIO.

We refer to our response to Question 13 about the need for EDR schemes to play an enhanced role in identifying and responding to poor IDR.

Systemic issues reporting

The main issue with the existing reporting arrangements is the lack of transparency with systemic issues reporting. As noted above, RG 165 requires FOS and CIO to report to ASIC 'any systemic issues and matters involving serious misconduct by a scheme member.'⁵⁰ We recommend that EDR schemes and ASIC improve the transparency of systemic issue reporting, including by naming the relevant FSPs.

Comparative complaints data

The Benchmarks for Industry-Based Customer Dispute Resolution Schemes require a detailed annual report including information such as number of complaints received and the time taken to resolve complaints. FOS's complaints tables are reasonably user-friendly. While this information is useful, it is not always comparable to other EDR schemes, for example when different measures of timeliness are reported.

Further, the frequency of publication should increase. At present, CIO and FOS report on complaints data annually. By comparison, the TIO publishes its supplier-specific complaints data quarterly,⁵¹ as does Ombudsman Services: Energy in the United Kingdom.⁵² The NSW Office of Fair Trading updates its Complaints Register monthly.⁵³

⁴⁹ See <<http://kmo.ministers.treasury.gov.au/media-release/039-2016/>>.

⁵⁰ ASIC RG 139.116.

⁵¹ See <<https://www.tio.com.au/publications/statistics>>.

⁵² See <<https://www.ombudsman-services.org/complaints-data.html>>.

⁵³ See <http://www.fairtrading.nsw.gov.au/biz_res/ftweb/Public_Register/FT_Public_Register.htm>.

We recommend that the final dispute resolution body or bodies publish comparable quarterly complaints data.

Ideally, EDR schemes across all sectors should publish comparative quarterly complaints data, so that comparisons can be made across sectors.

User surveys

In conjunction with publishing data about EDR complaints, customer research on satisfaction with IDR and complaints handling can be informative. Energy and Water Ombudsman Victoria recently released an analysis of energy retailer complaint handling based on a consumer survey.⁵⁴ In the United Kingdom, the energy regulator Ofgem undertakes a survey every two years on consumer satisfaction with complaints handling.⁵⁵ These surveys provide useful insight into whether IDR is meeting the needs of users, and identifying any systemic issues.

Statistical analysis of users

FOS currently collects extensive statistics relating to over 31,000 applicants to the service. These statistics are reported in their Annual Review and include applicants' geographic distribution, gender, age, language barriers, hearing speech, vision and other physical impairments, medical conditions, literacy barriers, mental health issues, social and economic barriers and the use of translators. FOS also collects the indigenous status of applicants on the online dispute form. FOS, however, does not currently report on the specific numbers of disputes involving allegations of insurance fraud—an area of particular recent concern.⁵⁶

This data collection and the statistical analysis it enables provides a valuable source of information to policymakers and the industry. It is also a critical tool for examining the work and effectiveness of the EDR schemes and in holding schemes to account. We recommend that this important role be maintained and expanded in the final dispute resolution framework.

SCT

Like most tribunals, the SCT lags far behind EDR schemes in its accountability, transparency and reporting. This is of particular concern given the compulsory nature of superannuation. If a systemic issue exists with a particular fund or the industry generally, many Australians will be affected.

Recommendations

- The final dispute resolution body publish quarterly comparative complaints data about financial firms
- FOS's data collection and analysis of applicants to its service be maintained in the final dispute resolution body.
- The final dispute resolution body or ASIC should undertake periodic research on

⁵⁴ See <<https://www.ewov.com.au/publications/can-i-speak-with-a-manager/201503>>.

⁵⁵ See <<https://www.ofgem.gov.uk/publications-and-updates/complaints-energy-companies-research-report-2016>>.

⁵⁶ Financial Rights Legal Centre, *Guilty Until Proven Innocent: Insurance Investigations in Australia* (March 2016), <<http://financialrights.org.au/wp-content/uploads/2016/03/Guilty-until-proven-innocent.pdf>>.

consumer satisfaction with complaints handling by financial firms.

Other issues in the existing dispute resolution framework

Code of Practice and Code Compliance Committee

We recommend that the superannuation industry establish a Code of Practice and a Code Compliance Committee.

The life insurance industry via the Financial Services Council has recently introduced a new *Life Insurance Code of Practice*. However, it should be noted that the Code is a modest first attempt to address a number of issues faced by life insurance consumers. Most significantly, the Code does not cover group and superannuation fund trustees. Most Australians, however, have their life insurance through their super funds.⁵⁷ The new life insurance code gives those people no guarantee that their insurance claims will be dealt with appropriately.

It is therefore critical that the superannuation industry ensure that people with life insurance through super have appropriate protections when they make claims. Doing so will further empower the final EDR scheme to address consumer complaints and disputes.

Recommendation

The superannuation industry should establish a Code of Practice and a Code Compliance Committee.

⁵⁷ Life insurance held in superannuation funds accounts for 67% of sums insured: Rice Warner, *Insurance Administration Expenses* (August 2014).

GAPS AND OVERLAPS IN EXISTING EDR SCHEMES AND COMPLAINTS ARRANGEMENTS

Question 31: Do multiple dispute resolution schemes lead to better outcomes for users?

There are significant and problematic overlaps in the existing dispute resolution framework in the financial sector, particularly between FOS and CIO. In our view, multiple dispute resolution schemes generally lead to worse outcomes for consumers and result in consumer confusion.

'Competition' between schemes

The view has been sometimes put that competition between EDR schemes leads to better outcomes for consumers. The argument seems to be that the schemes will seek to beat each other's performance benchmarks, helping drive stronger consumer protection and innovation.

We are opposed to this argument on two bases:

1. We do not agree that competition alone drives innovation in EDR.
2. We oppose competition between EDR schemes as a matter of principle.

It is true that existing EDR schemes in the financial sector have been able to evolve and innovate. FOS and CIO are to be commended on their respective innovations, many of which have subsequently been adopted by the other scheme.

However, we do not accept the argument that competition alone drives innovation and improved consumer outcomes. A range of other factors are stronger drivers for change and innovation within EDR schemes. These factors include:

- consumer movement advocacy, policy development and campaigning;
- periodic independent reviews; and
- individual actors within EDR schemes who (for a variety of reasons) drive proactive change within their organisations.

One recent improvement was the implementation of a fast track process at FOS for simple and low value disputes. The fast track process was implemented in response to a recommendation in FOS's Independent Review in 2013.⁵⁸

Competition in EDR schemes is a poor and inefficient way to drive innovation and change. While one scheme may innovate and experiment with a change, it takes a significant amount of time for the other EDR scheme to follow, if they do at all. In the meantime, thousands of consumers lose out.

In particular, we make the point that 'competition' between EDR schemes does not operate in the interest of consumers. To the extent that there is competition between FOS and CIO, it is competition for members, not consumers. Consumers have no ability at all to drive any competition because consumers do not get to choose which of the two schemes they access.

⁵⁸ See <<https://www.fos.org.au/resolving-disputes/our-new-process/>>; <<https://www.fos.org.au/news/news/board-statement/>>.

Consumer advocates are well aware that one EDR scheme is better than another on some types of dispute. If consumer advocates are aware, then so too are industry members. Financial service and credit providers acting rationally will choose the scheme where they are likely to pay lower fees (which may reduce resources available per complaint received) and that has processes and policies in its interest – not the interest of consumers.

ANZOA members, including FOS and the CIO, operate according to principles of independence, accessibility, fairness, efficiency, effectiveness and accountability. ANZOA considers that competition among ombudsman offices runs counter to these principles, particularly the principle of independence, and can lead to inefficient and undesirable outcomes on a range of policy levels. ANZOA's Policy Statement on *Competition among Ombudsman* states the following reasons for opposing competition between schemes:

- It is not in the interests of consumers or their advocates, as it may not be clear where to take complaints or which is the most appropriate service to deal with particular issues.
- It is likely to add unnecessary and inefficient costs to Ombudsman services, e.g. inefficient duplication of infrastructure/resources/services/information systems, mechanisms to establish a 'common door' approach, and the need to provide information to consumers about different offices.
- It may lead to manipulation of dispute resolution services, differing standards, and inconsistencies in decision making which could be adverse for consumers and participating organisations.
- Poor performing organisations may choose to join an alternative office that they believe is not as rigorous in its approach to complaints.
- An office may focus more on participating organisations rather than on complainants or consumers in order to keep or grow its membership.
- Where offices are subject to regulatory approval and/or other regulatory mechanisms, regulators may need to set up separate reporting and communication systems for different offices, potentially about the same issues.
- The value of the Ombudsman's office as a source of information and analysis to contribute to the ongoing improvement of an industry or service area will be diluted, to the detriment of consumers, service providers and the wider community.

In short, ANZOA's position is that there should be only one Ombudsman office for an industry or service area. We agree with ANZOA's position and the reasons stated above.

It is, as ANZOA has stated 'inappropriate to apply concepts of market forces and competition to what are effectively 'natural monopolies'.⁵⁹ Other tried and tested, robust mechanisms such as independent reviews, strong consumer liaison functions, benchmarking, peer reviews and ASIC oversight can produce the benefits in a monopoly dispute resolution scheme.

A clear example of the potential race to the bottom caused by competition between multiple schemes was seen in Ombudsman Services' Consultation on Data Publishing. Ombudsman Services is a company in the United Kingdom that provides EDR schemes in a number of

⁵⁹ ANZOA, *Policy Statement: Competition among Ombudsman Offices* (Sept 2011), <http://www.anzoa.com.au/assets/anzoa-policy-statement_competition-among-ombudsman-offices.pdf>.

sectors, including energy, communications and property, by approval from the relevant regulator in those sectors. One of its schemes, *Ombudsman Services: Energy*, is the only approved EDR scheme in the energy sector. Its other EDR schemes are not the sole ombudsman in the sector. For example, *Ombudsman Services: Communications* is one of two approved EDR schemes in the communications sector. In 2012, Ombudsman Services consulted on a proposal to publish more company-specific complaints data from its various ombudsman schemes. The consultation paper stated that:

- 4.1.2 Where we are the sole provider of Alternative Dispute Resolution for a sector, and the regulator or approval body has requested it, we will publish complaints data per named company. Currently, this only applies to the energy sector. ...
- 4.1.3 We do not propose to publish named company data where there is more than one dispute resolution scheme in operation. *This is because it would be unfair to our participating companies as other dispute resolution schemes may not publish similar data about their participating companies; also, schemes are different so any data would be unlikely to be comparable. It would also be detrimental to our business as companies may choose to leave us and join a scheme that does not publish data.*⁶⁰

It was clear that Ombudsman Services was concerned about losing scheme members due to competition with other ombudsman schemes in the same sector. Competition impaired its ability to innovate and achieve better consumer outcomes by, in this case, publishing company-specific complaints data. This is a clear example of multiple ombudsman schemes leading to a race to the bottom, not a race to the top. By comparison, Ombudsman Services: Energy now publishes quarterly energy retailer-specific complaints data.⁶¹

Recent developments resulting from the European Union Directive on Consumer Alternative Dispute Resolution are instructive, which has seen a proliferation of ombudsman schemes arise, arguably to consumers' detriment.⁶²

Multiple schemes require multiple complaints

The multiplicity of bodies in the existing dispute resolution framework can necessitate multiple disputes. This often occurs where:

- a mortgage broker is in one scheme and lender in another;
- a debt collector is in one scheme and the credit provider in another.

The need to lodge complaints arising out of a similar circumstances (such as the entry of a mortgage) in multiple schemes is confusing and inefficient for consumers. This necessitates

⁶⁰ Ombudsman Services, *Consultation on Publishing Data* (September 2012), page 11, <https://www.ombudsman-services.org/downloads/data_publishingconsultation2012.pdf> (emphasis added).

⁶¹ Ombudsman Services, Complaints Data, <<https://www.ombudsman-services.org/complaints-data.html>>.

⁶² Carolyn Hirst, *The Ombudsman Today: An International Context*, keynote address to ANZOA Conference (5 May 2016), http://anzoa.com.au/assets/carolyn-hirst-paper_the-ombudsman-today-an-international-context_anzoa-conference-2016.pdf.

preparing two sets of documents (for example, two Statements of Financial position) and responding to different case managers and different procedures.

For some clients, re-telling their story is emotionally exhausting and undesirable, for example, in situations involving family violence. One financial counsellor specialising in this area reports that she does what she can to avoid running complaints in multiple schemes. Given that a consumer may already need to lodge complaints in other industry schemes (such as the TIO or the energy and water ombudsman), avoiding further duplication for financial service and credit disputes is desirable.

We note that FOS and CIO have entered a Memorandum of Understanding in relation to complaints involving securitised lending but not in relation to other areas of related financial service or credit providers.⁶³

Where there are joint wrongdoers, it may be more convenient to join them to one complaint in a single ombudsman scheme. It is our understanding that FOS does this regularly in insurance disputes where there is an insurer and advisor involved. As demonstrated in its case study *House fire dispute: broker breached its duty of care*,⁶⁴ FOS determined that the broker be joined as a party to the dispute to help resolve the dispute more efficiently and effectively.

Case study: Gerry

Gerry's son had taken financial advantage of Gerry by organising a mortgage in her name over her previously unencumbered home through a finance broker. The loan was unaffordable for Gerry as she was on Centrelink. Gerry's son had promised to make the repayments for the loan obtained in Gerry's name but ceased to do so.

The finance broker was a member of COSL (as CIO then was) and the lender a member of FOS. That the broker and the lender were members of separate EDR schemes added further complicated layer and delays to the resolution of the interrelated disputes. As the matter was complex, COSL waited for the FOS settlement to be finalised before making its own resolution.

Although Gerry gave consent for COSL and FOS to access each scheme's information but there were still significant delays. However if the whole interrelated dispute could have been considered in one EDR scheme, the dispute could have taken less time.

Source: Financial Rights

⁶³ FOS and CIO, Memorandum of Understanding, <<http://www.cosl.com.au/cosl/assets/File/MOU-between-COSL-and-FOS-Securitisation-Only.pdf>>.

⁶⁴ See FOS, *Annual Review 2015-16*, page 73, <<http://fos.org.au/publications/flipbooks/annual-review/2015-2016/publication/contents/pdfweb.pdf>>.

Case study: Latif

Latif's investment mortgage just settled but he found that his bank had charged additional fees taken from repayments put into his account. The fees were not in the contract he signed. He originally went through a broker, who did not tell him about any fees and who said they don't know anything about it.

If Latif ends up having to pursue both parties he will have to pursue the broker in CIO and the bank in FOS.

Source: Financial Rights

Case study: Polly

Polly went to a broker, who in 2010 arranged a loan she could not afford as she was on the Disability Support Pension. She had inherited her mother's house, sold it and bought another one with a mortgage. Polly now needed to sell the house as she could not afford the mortgage.

The lender was in FOS and the broker in CIO. Financial Rights assisted Polly to claim against both the lender and broker in the respective schemes. Damages were claimed against both, which meant ideally they should be joined and heard together on a proportionate liability basis. Financial Rights arranged a conciliation through CIO, however nothing compelled the lender to attend. The lender only did so out of spirit of settlement and could easily have decided not to attend.

Source: Financial Rights

Multiple schemes lead to inconsistent outcomes

Consumer advocates' casework experience reveals a number of inconsistencies between FOS and CIO that impact upon outcomes for consumers. Some of these inconsistencies are detailed in response to Question 21, above.

Multiple schemes are inefficient for stakeholder consultation

Stakeholder consultation is an important and desirable feature of the existing industry-based EDR schemes, and consumer groups are committed to their important role in such consultation. However, the existence of multiple schemes is fundamentally inefficient for stakeholder consultation. Multiple schemes require separate processes for consumer advocates, industry bodies and regulators to feed into and duplication of effort is therefore inevitable.

A recent example of this occurred when Consumer Action was approached independently by FOS and CIO to consult on their respective draft guidelines on family violence. The approaches of each scheme were quite different. Given the different approaches by FOS and CIO, it appeared that the schemes had not consulted with each other, or with a similar group of stakeholders in order to reach their respective positions. Consumer Action provided feedback to each scheme, highlighting the gaps in each approach. We anticipate that a further round of consultation will be necessary on the revised guidelines of each scheme, which will necessitate further work.

For consultation to be meaningful, the organisation being consulted will put significant time and resources into ensuring it is providing high level advice and feedback in circumstances where this is not necessarily its core role.

Although we are confident that both FOS and CIO are committed to stakeholder consultation, the point remains that the existence of multiple schemes led to different initial positions and duplication of work for stakeholders providing feedback on their differing positions.

We refer to our comments above about the need for broader periodic consumer consultation by the SCT.

Question 32: Do the current arrangements result in consumer confusion?

Multiple schemes in the dispute resolution framework creates confusion for consumers. This includes confusion about the correct forum for the dispute and confusion due to the inconsistencies in process, jurisdiction, delay and outcomes.

The existing jurisdiction of the schemes is due to historical reasons, not due to a principled and necessary division. For example, whether a complaint is heard by FOS and the CIO depends on which scheme the financial service or credit provider chooses, not on the type of financial product or service. Confusion exists between the jurisdiction of FOS and the SCT, which both hear disputes related to insurance policies. At times, even consumer advocates, financial firms and the schemes themselves are confused about the correct forum for the dispute.

Case study: Lachlan

Lachlan's income protection claim was declined by his insurer. When sending a final IDR response, the insurer referred Lachlan to the SCT. Financial Rights on behalf of Lachlan lodged a complaint in the SCT only to be referred to FOS, which then referred Lachlan to SCT. We then lodged in the SCT again only to be referred back to FOS. In the end FOS was the correct jurisdiction but everyone, including the insurer, was confused.

Source: Financial Rights

A common theme in responses from surveyed financial counsellors was the confusion that results from the existence of both FOS and CIO. Financial counsellors gave the following observations:

- 'It would be less confusing for consumers to send to one Ombudsman service and then internally the Ombudsman can forward to the relevant section.'
- '[Merger] definitely a good move in terms of the consumer understanding as well as industry process.'
- 'Having one ombudsman will make it less confusing for everyone.'

The only way to properly address this confusion is a merger of the existing schemes. As Lachlan's story highlights, a triage or 'concierge' service will not assist in resolving the overlapping jurisdictions of the existing schemes.

Question 33: Insufficient jurisdiction for small business disputes

We support the proposed expansion of FOS's small business jurisdiction as outlined in the consultation paper,⁶⁵ subject to our comments above on consumer and small business monetary limits and compensatory caps.⁶⁶

Please refer to our answer to Questions 19 and 20.

Other gaps in the existing framework: Debt Management Firms

A recent example of a new and predatory business models existing in a regulatory gap are debt management firms including credit repair companies, debt negotiators, Part IX debt agreement 'brokers' and budgeting services. Most debt management firms are not required to hold a licence administered by ASIC, and are not required to be a member of an ASIC-approved EDR scheme.⁶⁷ As ASIC found in its recent report on debt management firms:

Unless a debt management firm holds an AFS licence or credit licence, there is no requirement on the firm to belong to an EDR scheme. This means that consumers who may have a complaint about the service provided by a debt management firm will not generally have access to EDR. A small number of firms hold credit licences and belong to EDR schemes, but the majority do not.⁶⁸

There is growing recognition of the harm caused by debt management firms, and a recognition by various groups that mandatory EDR membership should be required.⁶⁹ Further, a growing number of debt management firms are representing consumers at EDR, often at significant cost.⁷⁰ While both FOS and CIO have issued guidance about such representatives, emphasising that EDR is a free service, it appears that better regulation of these businesses will ultimately be required.

Recommendation

A regulatory framework should be introduced for Debt Management Firm, including licencing by ASIC and compulsory membership of an ASIC-approved EDR scheme.

ASIC and the final dispute resolution scheme should work closely and proactively to identify new and emerging gaps in the legal and regulatory framework.

⁶⁵ See <<https://www.fos.org.au/custom/files/docs/fos-small-business-consultation-paper.pdf>>.

⁶⁶ See, for example, joint submission by Financial Counselling Australia, Consumer Action Law Centre and Financial Rights Legal Centre to the consultation on the Expansion of FOS's Small Business Jurisdiction (23 September 2016), <<http://consumeraction.org.au/expansion-financial-ombudsman-services-fos-small-business-jurisdiction/>>.

⁶⁷ ASIC, *Report 465: Paying to get out of debt or clear your record: The promise of debt management firms* (January 2016) [144] <<http://download.asic.gov.au/media/3515432/rep465-published-21-january-2016.pdf>>.

⁶⁸ Ibid [126].

⁶⁹ See *Debt Management Firms Communiqué*, <<http://consumeraction.org.au/debt-management-firms-comm/>>.

⁷⁰ ASIC Report 465, above n 67, [129].

TRIAGE SERVICE

Question 35: Would a triage service improve user outcomes?

Consumer advocates do not support a triage service as it is not the best response to the problems in the existing dispute resolution framework. While a triage service may help, it is not an adequate solution and will likely add additional expense with minimal benefit.

It is not clear that there is any need to establish a single call centre, as there appear to be effective referrals between the existing schemes. FOS and the CIO refer clients who contact the existing scheme to the other scheme if necessary. Indeed, 18% of CIO complainants came to know about the CIO in 2014-15 from FOS.⁷¹ This made FOS the top source of referrals to the CIO.

Previous attempts at a triage service have been largely unsuccessful. In 2007, ASIC established and operated a single call centre for FOS's predecessor schemes, Banking and Financial Services Ombudsman, Insurance Ombudsman Service and Financial Industry Complaints Service. The single call centre lasted for approximately six months. One difficulty appears to have been that ASIC staff did not appear to have enough information and experience to triage calls appropriately. This goes to a difficulty with triage services—to be effective, they require highly skilled and knowledgeable operators at the point of triage, as in a hospital system. This is particularly so given the confusing and overlapping jurisdiction of FOS and the CIO at present.

In our view, an effective triage service may be quite expensive to run, with little added benefit to consumers. A better solution is a merger of the existing schemes, which would reduce the need for referrals, reduce confusion, and increase public awareness and understanding of EDR in the financial sector.

In 2007, following the less than successful ASIC-run call centre, the FOS's precursor schemes established a joint call centre in the lead up to their merger in 2008. This was helpful, and should be considered as part of any merger of current schemes.

⁷¹ CIO, *Annual Report on Operations 2014-15*, page 33.

ONE BODY

We strongly support the consolidation of existing dispute resolution schemes into one, industry-funded external dispute resolution scheme in the financial system.

Question 37: Should it be left for industry to determine the number and form of the financial services ombudsman schemes?

We do not agree that the number and form of ombudsman schemes in the financial sector should be a decision left to industry. The dispute resolution framework in the financial sector should be focused on outcomes for consumers. Many financial service and credit providers will choose the scheme that best suits its interests—not the interest of its customers.

Question 38: Is integration of the existing arrangements desirable? What are the merits and limitation of further integration?

We strongly support the merger of FOS, CIO and SCT into one industry-funded external dispute resolution scheme in the financial sector.

The integration of the existing schemes into one body is fundamentally in the best interests of consumers. A move to one body in the financial sector will have the following benefits:

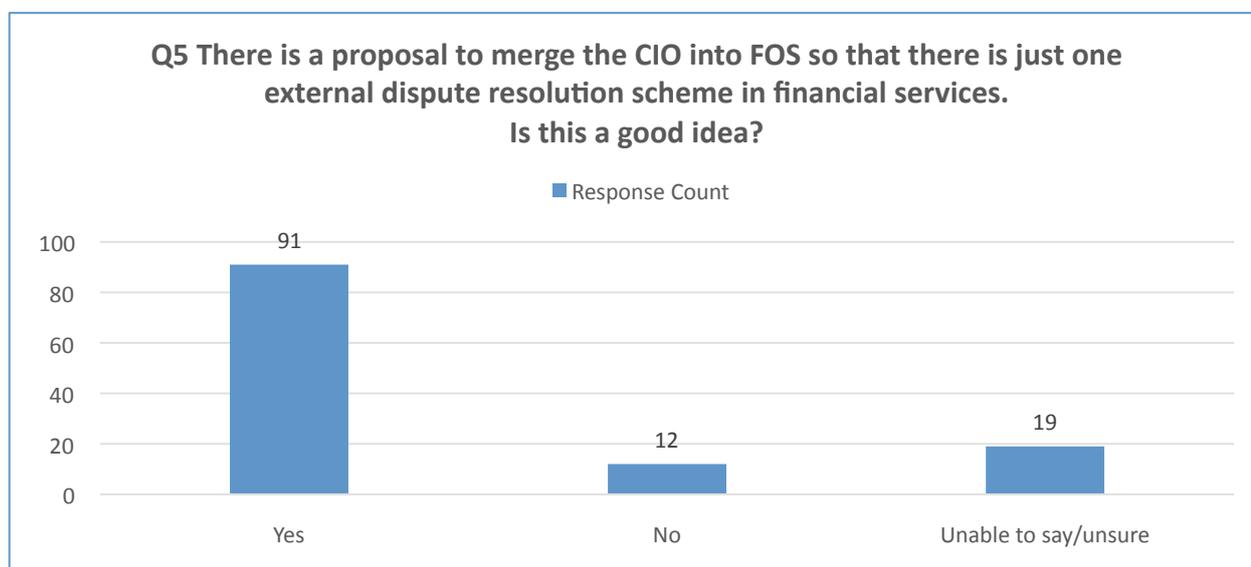
- 1. Consistency in process** – One EDR scheme will create consistency in the processes faced by consumers, industry members and advocates. The current system involves multiple approaches to lodging and dealing with disputes. Consolidating the existing three schemes into one scheme will simplify and streamline the process, in turn increasing efficiency for dispute resolution.
- 2. Consistency in outcomes** – One EDR scheme will improve consistency in the decision making processes and therefore consistency in outcomes for consumers. Current inconsistencies including approaches to ‘fair and reasonable’ in negotiations and settlement offers and approaches to unregulated loans are detailed above
- 3. Reduce confusion** – The existence of multiple dispute resolution schemes is confusing not just for consumers but also for advocates and financial service and credit providers as Lachlan’s story, above, demonstrates. Simply choosing the correct ombudsman and lodging an application can be overwhelming for many consumers. Many are already suffering from financial, health and other hardships that make the process even more difficult to navigate.
- 4. Improve access** – One EDR scheme allows for one brand. This will improve understanding of, and therefore access to, external dispute resolution by the public.
- 5. Cost and administrative efficiencies** – One EDR scheme will necessarily produce significant cost and administrative efficiencies in the medium- and long-term. These savings can be used to improve outcomes for consumers. Multiple schemes add unnecessary inefficiencies and duplication of infrastructure, services and resources. Just

the simple act of having to explain and triage disputes over different organisations is resource intensive and wasteful.

- 6. Greater sophistication in infrastructure, complaints management and achieve best practice** – A single dispute resolution scheme will be able to bring greater sophistication to infrastructure, complaints management and achieve best practice.
- 7. Improve the capacity to identify and respond to systemic issues** – A single EDR scheme will be better able to identify systemic issues in the financial sector and improve consumer outcomes as a result, particularly if it is able to enforce systemic investigation decisions (as is the case with CIO). The value of the scheme's data collection will increase, serving to further contribute to policy and regulatory development.
- 8. Specialisation by product not provider** – One EDR scheme will allow for specialisation within the scheme by product or industry, as appropriate, instead of by financial service provider.
- 9. Reduce need for multiple claims** – One EDR scheme avoids the need for a consumer to pursue claims in different scheme in relation to the similar circumstances. For example, where the consumer has a complaint against a broker and their lender arising out of the entry into a mortgage, or where a debt has been assigned.
- 10. Improve compliance by scheme members** – One EDR scheme would incentivise compliance with existing laws and with the rules of the final EDR scheme. Membership of an ASIC-approved EDR scheme is a licence requirement for financial service and credit providers. Expulsion from an existing EDR scheme for a non-complying member is currently an insufficient 'stick' as the member can immediately apply to the other scheme. If there was one ASIC-approved EDR scheme in the dispute resolution framework, expulsion would necessarily result in the loss of a licence. In our view, the increased risks associated with expulsion would assist the single EDR scheme in ensuring compliance by members with its rules, processes and determinations.
- 11. Improve efficiency of stakeholder engagement** – Consumer advocate input into one scheme will bring about significant efficiencies in the non-government sector. Rather than having to engage with multiple schemes duplicating our input and advice, be it, for example, through representation on boards or input into reviews, providing input into the one scheme will save time and scarce resources. One scheme will also improve the efficiency of stakeholder engagement with regulators and industry representatives.

Support for one body

The vast majority of surveyed financial counsellors support a merger of CIO and FOS. As shown in the graph below, 74 per cent support the merger of CIO into FOS and 9 per cent do not support a merger.



58 financial counsellors also made comments in response to this question. The majority of comments were from those supporting a merger with a strong theme that it would reduce confusion and improve accessibility.

‘It may be easier for clients to have a one stop shop for their complaints. It can be confusing for clients to know which one to go to.’

Some financial counsellors also noted that the benefits could very much depend on how the new merged entity operated:

‘Sounds like a good idea, but not if there are less staff to deal with our complaints’

‘It depends if the merger is merely a cost-cutting exercise. I would not like to see FOS's current excellent service reduced’

Superannuation determinations

We note that there is a potential issue relating to the ability of an industry-funded ombudsman scheme to make determinations that bind superannuation trustees. We encourage the Panel to investigate this issue and options for resolving it.

Consolidation process

One argument against further consolidation of schemes that may be made is that the process of merging will be productivity-sapping.⁷² While there will be inevitable teething problems in any merger, these will be short term. Present-day FOS is not experienced ongoing inefficiencies due to the merger of its predecessor schemes, nor has UK FOS from the consolidation of its predecessor schemes.

Recommendation

FOS, CIO and SCT should be integrated into a single, industry-funded ombudsman scheme.

Question 39: How could a ‘one-stop shop’ most effectively deal with the unique features of the different sectors and products of the financial system?

Sectoral differences can be easily accommodated in a ‘one-stop’ EDR scheme; in fact, they already are. FOS has mechanisms to deal with different sectors differently, which appear to be working, while maintaining a consistent approach overall. This approach could be extended to the integration of CIO members and super funds, with specialist teams and expertise retained.

Useful guidance can also be gained from the merger of several predecessor ombudsman schemes into the UK Financial Ombudsman Service in 2008, with the intention of retaining the expertise from the prior sectoral schemes.⁷³ Likewise, this could be achieved in a merger of FOS and CIO.

We are aware that the merger of the SCT into an ombudsman scheme may appear to be a significant transition. However, most of the work of the SCT is in EDR-like activities such as negotiating and conciliating disputes. We note that only a small proportion of matters progress to a determination. The Productivity Commission observed on the differences between ombudsmen and tribunals that:

Some bodies are difficult to classify, for example the Superannuation Complaints Tribunal, which initially attempts to resolve complaints like an ombudsman does, but, if that is not successful, will conduct a formal review of the complaint and issue a determination.⁷⁴

In our view, these processes will benefit from integration into an EDR framework.

Question 40 and 41: Form of a new ‘one-stop shop’

On balance, we consider that the best dispute resolution in the financial sector would result from the integration of CIO, FOS and the SCT into one ombudsman scheme, while retaining sectoral expertise in the final body.

⁷² See e.g. Credit Ombudsman Service Ltd, *Submission to the Finance System Inquiry*, <http://fsi.gov.au/files/2014/04/Credit_Ombudsman_Services_Limited.pdf>.

⁷³ See <<http://www.financial-ombudsman.org.uk/news/speech/lessons-from-merging.htm>>.

⁷⁴ Productivity Commission, *Inquiry Report: Access to Justice Arrangements* (No, 72, 5 September 2014) Volume 1, page 314.

Ombudsman or statutory tribunal

Our preference would be an industry-based ombudsman scheme established as a company limited by guarantee. As described above, this governance arrangement has facilitated the ability of the scheme to evolve in response to market changes. One of the disadvantages of a statutory tribunal is that they are generally less flexible or adaptable to change, requiring legislative change to alter their mandate. Moreover, state-based civil tribunals are generally legalistic and not accessible.

In 2016, Consumer Action Law Centre, WestJustice and Tenants' Union of Victoria commissioned an independent report, *Review of Tenants' and Consumers' Experience of Victorian Civil and Administrative Tribunal: Residential Tenancies List and Civil Claims List*.⁷⁵ The report found that, despite VCAT's aspiration to be accessible and informal, there are 'very substantial barriers' that inhibit people from accessing the Residential Tenancies and Civil Claims lists at VCAT.

The report makes 22 recommendations to enhance the accessibility, fairness, accountability and effectiveness of VCAT. Suggested reforms include:

- Simplifying the application process to make it less legalistic and easier to complete.
- Expanding the Civil Claims List hotline to offer broader assistance to unrepresented consumers, such as preparing a first draft of an application, and giving information about preparing for the hearing.
- Allowing legal representation for vulnerable and disadvantaged consumers in small claims.
- Reforms to the conduct of hearings, including allowing for hearings 'on the papers'.
- Developing a regular user survey to test satisfaction with key aspects of VCAT's service, in line with the approach of EDR schemes.
- Implementing an internal quality monitoring program to address the variable quality of VCAT decisions.
- Increasing transparency and accountability by engaging in external periodic review and publishing more detailed statistical information in VCAT's reports.

It is noteworthy that EDR schemes, particularly FOS, already respond to the above recommendations. There is a real risk that adopting a tribunal approach could set us backwards in terms of the accessibility and effectiveness of dispute resolution in financial services.

It is also important to note that, under the Australian Constitution, tribunals cannot exercise judicial power, and that tribunals are not courts. At the Federal level, tribunals have been primarily established to assist review government or executive decisions, not resolve civil disputes. It is thus unclear what type of body is being considered when there is discussion of a 'financial services tribunal'.

Further, if a tribunal is established under Federal law, then parties will likely have rights to appeal matters to courts. This would disadvantage consumers. An important benefit of EDR

⁷⁵ Cameron Ralph Navigator, *Review of Tenants' and Consumers' Experience of Victorian Civil and Administrative Tribunal: Residential Tenancies List and Civil Claims List* (July 2016) <<http://consumeraction.org.au/review-tenants-consumers-experience-victorian-civil-administrative-tribunal/>>.

schemes is that they can make determinations binding on FSPs, without the risk that the matter will be appealed to court. Risk of appeals by FSPs would bring costs and other risks to consumers, and dampen access to justice.

Jurisdictional limits

We refer to our response to Question 20, above. Consumer advocates agree that the current monetary and compensatory limits at FOS and CIO are too low and must be increased.

There are some benefits associated with the SCT that should not be lost in any transition. First, the SCT has unlimited monetary jurisdiction. The current low monetary limits associated with FOS and CIO should not be imposed on superannuation disputes, particularly given the SCT often deals with significant amounts held in superannuation or life insurance matters. Second, the SCT is able to join parties, for example, life insurers and trustees into one dispute. This assists with the efficiency of dispute resolution.

Funding

A merger of the schemes should not reduce the existing levels of funding. As identified above, current delays at FOS, CIO and, in particular, the SCT lead to significant consumer detriment.

Transitional arrangements

In moving to one body, careful consideration must be given to transitional arrangements. In particular, current members of CIO and the superannuation industry must be engaged and involved. Again, useful guidance can be gained from the successful merger of UK FOS.

Alternative form

Should there be an insurmountable legal barrier to the merger of the SCT into an industry-based ombudsman model, our preferred approach is for CIO to be integrated with FOS (for the reasons given above) with significant reforms to the SCT.

At a minimum, the reforms needed at the SCT include:

- a significant and stable increase to SCT funding;
- a direct funding model, so that its funding is no longer administered by ASIC.
- a move toward a flexible and responsive governance framework, with an independent board (containing equal consumer and industry representation) and operation according to terms of reference.

Further, there is significant opportunity to enhance cooperation between a merged FOS / CIO EDR scheme and the SCT. For example, the EDR scheme could be responsible for community engagement, conciliation and mediation, back-office and corporate functions, while the Tribunal could operate the determinative function.

Recommendation

FOS, CIO and SCT should be integrated into a single, industry-funded ombudsman scheme.

Should there be an insurmountable barrier to the integration of the SCT into one ombudsman scheme, FOS and CIO should be integrated into one ombudsman scheme,

with significant reforms to the SCT, including:

- a significant and stable increase to SCT funding;
- a direct funding model, so that its funding is no longer administered by ASIC.
- a move toward a flexible and responsive governance framework in similar form to the existing EDR schemes.

ADDITIONAL FORUM FOR DISPUTE RESOLUTION

Question 42: Would the introduction of an additional forum, in the form of a tribunal, improve user outcomes?

Consumer advocates are strongly opposed to the creation of a new banking tribunal in the financial system.

We note that the Government is reportedly considering the merits of a new banking tribunal and that public discussion of the positives and negatives of a banking tribunal is taking place as this review is being conducted.⁷⁶ It is unclear from this public discussion how such a body would meet the benchmarks of accessibility, independence, fairness, accountability, efficiency, and effectiveness.

It should be acknowledged that calls for a new banking tribunal—and for a banking royal commission—come in response to numerous scandals in the financial sector. Many of these problems stem from misconduct by financial firms and gaps in the existing legislation, not necessarily from concerns about the external dispute resolution framework.

Trust and confidence in the financial services sector, particularly the banking sector, remains low. A recent survey demonstrates the lowest customer satisfaction in three years and a rapid decline in recent years.⁷⁷ The key causes of concern for dissatisfaction were poor service, fees and charges, ethics and honesty, interest rate levels, poor advice, aggressive sales, a lack of staff and errors.⁷⁸ Indeed, the banking, finance and insurance sectors are perceived to be the least ethical sectors of Australia's economy.⁷⁹

It has been suggested that a new banking tribunal could 'force banks to pay compensation to victims of unethical behaviour'.⁸⁰ It is unclear how 'unethical behaviour' would be defined and captured within the jurisdiction of any tribunal.

We urge the Government to consider specific law reform to regulate 'unethical behaviour' in the financial sector, and not just leave it to a tribunal. In any event, EDR schemes consider

⁷⁶ See e.g. <<http://www.smh.com.au/federal-politics/political-news/malcolm-turnbull-confirms-federal-government-will-create-new-banking-tribunal-20161006-grwvu5.html>>.

⁷⁷ Hope William-Smith, *Banks record lowest customer satisfaction in three years*, Money Management, <<http://www.moneymanagement.com.au/news/funds-management/banks-record-lowest-customer-satisfaction-three-years>>.

⁷⁸ Ibid.

⁷⁹ Governance Institute of Australia, *Ethics Index*; see also Clancy Yeates, *Ethics survey: Banking, media and big business on the nose*, *Sydney Morning Herald*, 20 July 2016, <<http://www.smh.com.au/business/banking-and-finance/ethics-survey-banking-media-and-big-business-on-the-nose-20160719-gg9f5h.html>>.

⁸⁰ The Hon, Craig Kelly MP, as reported in Tom Iggulden, ABC, *Tribunal could force banks to pay compensation to victims of unethical behaviour* (5 October 2016) <<http://www.abc.net.au/news/2016-10-05/banking-tribunal-considered-government-could-force-compensation/7903662>>.

‘fairness’ in their decisions—it is a criteria for decision-making. A single, merged EDR scheme can deal with unfairness, if appropriately empowered.

Further, it has been suggested that a new banking tribunal could subpoena documents and make decisions about past financial scandals such as the 2008 Timbercorp collapse.⁸¹ EDR schemes are not bound by legal rules of evidence and do not have the powers of a court, and therefore cannot subpoena documents or witnesses. EDR schemes, however, are expected to examine what is fair in all the circumstances, apply legal principles, and may make adverse inferences when documents are not provided. Importantly, if consumers are unsuccessful at the Ombudsman stage, they still have the option to go to court.

As noted above, lawyers in consumer advocacy organisations have extensive experience with courts and tribunals. Overall, consumers find courts and tribunals difficult to navigate, overly procedural, stressful and intimidating. Tribunal members can tend to be strict on evidence and procedure. The difficulty for ordinary consumers is that an adversarial process puts any unrepresented consumer at a considerable disadvantage against a well-resourced bank with a large legal department and bevy of solicitors. By comparison, Ombudsman schemes use a more inquisitorial approach to disputes, which is of benefit to unrepresented consumers.

Our experience is that unrepresented consumers have far superior access to justice through EDR schemes than in any of the courts and tribunals with which we also work. If a tribunal is established, then consumers will need access to free legal representation. In the context of crippling cuts to legal assistance services, any tribunal must be established in conjunction with a substantial increase in funding for legal assistance services.

Recent research confirms consumer advocates’ experience that tribunals are generally less accessible than EDR schemes. As part of the research mentioned above,⁸² the researchers undertook a thorough assessment of the Victorian Civil and Administrative Tribunal against the Benchmarks for Industry-based Customer Dispute Resolution. Like EDR schemes, VCAT aims to provide fair and accessible dispute resolution in an informal and timely manner. VCAT’s purpose is to:

provide Victorians with a low cost, accessible, efficient and independent Tribunal delivering high quality dispute resolution including the use of Alternative Dispute Resolution processes. [VCAT] aims for service excellence by being cost-effective, accessible, informal, timely, fair, impartial and consistent.

However, in spite of this admirable goal, the researchers found ‘substantial barriers’ inhibit consumers from initiating and running disputes at VCAT. VCAT fell short of the Benchmarks expected of EDR schemes,⁸³ and 22 recommendations were made to significantly improve accountability, effectiveness, fairness and accessibility at VCAT.

⁸¹ Ibid.

⁸² Cameronralph Navigator, *Review of Tenants’ and Consumers’ Experience of the Victorian and Administrative Tribunal: Residential Tenancies List and Civil Claims List* (July 2016), <<http://consumeraction.org.au/review-tenants-consumers-experience-victorian-civil-administrative-tribunal/>>.

⁸³ Ibid 41-46.

While there is little further detail about the proposal, it is our view that a new statutory tribunal has the strong potential to deliver significantly worse outcomes for consumers than an industry-led external dispute resolution scheme. A new tribunal may:

- delay dispute resolution even further, particularly if it added to existing bodies or inadequately funded;
- add further costs for consumers seeking redress;
- operate legalistically, as is the case with many other Australian tribunals, in some cases requiring legal advice and representation, creating increased barriers to access that many consumers may not be able to overcome;
- create further or multiple bodies in financial sector dispute resolution, exacerbating consumer confusion;
- not be able to conduct, report on and enforce investigations into systemic issues;
- not address the issues underlying customer dissatisfaction with the banking sector insofar as the inadequacies relate to the applicable law as opposed to the decision-making forum;
- be less engaged in a process of stakeholder consultation and continuous improvement, which is our experience of tribunals; and
- be less flexible, nimble and responsive to the needs of consumers and industry.

Importantly for consumers and for conduct in the financial sector, it is unclear how a tribunal will consider *fairness* in dispute resolution. A key benefit of EDR schemes is that they consider, in complaints-handling and making determinations, not only the law, but also good industry practice, and what is fair and reasonable in all the circumstances. This, together with an ability to look at systemic issues rather than merely individual complaints, has contributed to substantial improvements in the finance sector, including rightfully compensating consumers where there has been misconduct.

Compared to a new tribunal, a robust, well-resourced EDR scheme with appropriate scope and design (together with the other recommendations we make in this submission) will provide a free, accessible and fair process for dispute resolution in the banking and financial services sector.

Recommendation

Consumer advocates are strongly opposed to the establishment of an additional forum in the form of a tribunal.

Question 43: If a tribunal were desirable, what form should it take?

An additional forum in the form of a new tribunal is not desirable, as detailed above.

In the event that the Panel recommends the establishment of an additional forum in the form of a tribunal, we propose that FOS, CIO and SCT be merged into one industry-based EDR scheme, with a separate tribunal limited to matters outside the final EDR scheme's terms of reference.

This would include disputes:

- where the final EDR Scheme determines that the tribunal is a more appropriate forum, in accordance with FOS's current guidance;
- outside the final EDR scheme's monetary limits or compensation caps;
- where the attendance of third parties is required; or
- where a statutory decision is required in superannuation disputes.

This model would have the following benefits:

- maintaining the demonstrated advantages of industry-based EDR schemes and avoiding the need for many disputes to progress through an inaccessible and expensive court-like process;
- resolving the difficulties disputes outside the current FOS jurisdiction, such as small business dispute, which often require the attendance of third parties;
- should there be a barrier to superannuation issues being determined by an ombudsman, avoiding such a complication while also enabling the many disputes that don't progress to a determination to be heard by an ombudsman;
- provide a specialist tribunal with all its inherent advantages over a formal court.

If the additional tribunal was limited to these disputes, it would be relatively small, and thus could be funded by industry without significant impost.

It is essential that any additional tribunal complement, not replace, the existing and successful EDR framework in the financial system.

Further, any additional tribunal must be free to consumers. Any cost, even a low cost, is a barrier to applications, and therefore a barrier to justice.

Should the Panel favour this approach, we would be happy to provide further comment. However, we repeat our comments above that best framework for dispute resolution in the financial system is a single EDR scheme, not an additional tribunal.

Recommendation

If an additional tribunal is established, it should be industry funded, and must complement a merged EDR scheme. The tribunal should be limited to disputes:

- where the final EDR Scheme determines that the tribunal is a more appropriate forum, in accordance with FOS's current guidance;
- outside the final EDR scheme's monetary limits or compensation caps;
- where the attendance of third parties is required; and
- where a statutory decision is required in superannuation disputes.

Finally, to the extent that there is a serious proposal to *replace* the existing EDR schemes with a new tribunal, further consultation with the consumer sector will be necessary. The contributors to this submission have not had sufficient notice or time to consider and comment on the long-term structural consequences of any such proposal.

Question 44: Small Business and Family Enterprise Ombudsman

We do not support an enhanced role for the Small Business and Family Enterprise Ombudsman (**SBFEO**).

The primary function of the SBFEO is to act as an advocate for small business. We refer the Panel to ANZOA policy statement on the essential criteria for describing a body as an Ombudsman.⁸⁴ SBFEO does not meet this definition of an 'Ombudsman' because it is not independent and performs an advocacy function. Further, unlike FOS and CIO, the SBFEO is unable to make decisions binding upon firms.

For these reasons, while the SBFEO may perform an important and valuable role in advocating for small business, it is not an independent dispute resolution body and should not have an expanded role in the final dispute resolution framework

Please refer to our comments on the proposed expansion of FOS's small business jurisdiction in response to Questions 19.

Recommendation

We do not support an enhanced role for the Small Business and Family Enterprise Ombudsman

DEVELOPMENT IN OVERSEAS JURISDICTIONS AND OTHER SECTORS

We have included comments on developments from other jurisdictions throughout this submission in response to other consultation questions.

UNCOMPENSATED CONSUMER LOSSES

This section responds to Questions 47 to 50

Consumer advocates have consistently called for the establishment of a statutory scheme of last resort. Many consumers successfully take on FSPs through EDR schemes or court only to find themselves uncompensated when the provider becomes insolvent. For justice to be served in these situations, a statutory scheme of last resort is essential.

Current compensation arrangements

Current government policy is that consumers should be compensated where there is loss or damage due to breaches of financial services or credit laws. This is implemented through the requirements in financial services legislation that requires licensed businesses to have

⁸⁴ ANZOA, *Essential criteria for describing a body as an Ombudsman* (February 2010), <http://www.anzoa.com.au/assets/anzoa-policy-statement_ombudsman_essential-criteria.pdf>.

arrangements for compensating consumers.⁸⁵ The law requires that this is generally satisfied through the holding of adequate Professional Indemnity (PI) insurance cover.

Despite the existence of this policy goal, it is clear that the current compensation arrangements for consumers of financial services are inadequate and are not achieving the policy objective. An unknown number of additional consumers suffer loss that is likely to have been caused by misconduct but do not pursue a claim in a court or EDR.

A primary reason for failing to pay compensation is that the licensee is insolvent (or missing) and lacks adequate PI insurance. Some of the factors as to why PI insurance cover may not result in consumers receiving compensation include:

- the total funds available under an adviser's insurance may not cover all of the compensation that FOS awards against that adviser;
- an adviser's insurance may not cover the conduct for which FOS awards compensation against that adviser; and
- the amount of compensation that FOS awards against an adviser may be below the excess under their insurance policy.

It appears that a key reason for this outcome is that there is market failure in the PI market—the market is not able or willing to deliver affordable policies that cover the risk of all licensees being unable to pay compensation awards. In truth this is a small risk for insurers. However, it is also an unknown risk for insurers, and the response has been to only provide limited cover. For example, PI cover will not cover some instances that cause consumer loss, such as adviser fraud. Insufficient cover results in the risk of uncompensated loss.

There are also inadequate PI insurance arrangements in the credit industry. Currently, not all credit providers are required to have a PI insurance policy. Unless a licensee provides credit assistance, it is merely required to have 'adequate compensation requirements'.⁸⁶ We understand that licensees are required to verify their compensation arrangements at the time they apply for their licence, which tends to be a multiple of their average expected loan or lease amount. However, ongoing compliance is only monitored by way of the annual compliance certificate, in which the credit provider self-certifies that they are compliant. The requirement for 'adequate compensation requirements' is therefore meaningless from a consumer compensation perspective, as the regulator may not even discover compensation arrangements are inadequate until after the business becomes insolvent.

The impact of uncompensated losses

Our organisations see the impact of uncompensated losses on consumers. The losses may arise in the context of financial advice, but also from unpaid determinations against credit providers and brokers.

Uncompensated losses arising from FSP misconduct can cause a range of financial and non-financial losses. They impact the affected consumer and their family, the community generally

⁸⁵ *National Consumer Credit Protection Act 2009* (Cth) s 48; *Corporations Act 2001* (Cth) s 912B.

⁸⁶ See <<http://asic.gov.au/regulatory-resources/credit/credit-general-conduct-obligations/rg-210-compensation-and-insurance-arrangements-for-credit-licensees/>>.

and the reputation of the financial services and credit industries. This is exacerbated where the consumer has spent considerable time and energy pursuing a meritorious complaint through an EDR scheme—or worse, through the expensive court process—only to be left uncompensated.

As noted above, the actual risk is small—compared to the total number of consumers that purchase financial products, only a small number of consumers are affected by uncompensated loss. However, should the loss occur, the impact is generally very substantial.

The impact of uncompensated loss was the subject of research commissioned by ASIC's Consumer Advisory Panel and reported in Susan Bell Research, *Compensation for retail investors: the social impact of monetary loss*, ASIC Report 240, May 2011.

The Bell research reported on the experiences of 29 consumers affected by losses. Some of the research's key findings included:

- 17% of the group were living below the poverty line and had either lost their home or were perilously close to losing it;
- a further 27% were experiencing a significant decline in living standards to the point where they were now 'living frugally'. Many suffered from long-term depression;
- affected consumers draw more on community resources than would otherwise be the case; and
- one of the most significant impacts of these investors' losses is the damage to their confidence in the financial system.

More generally, the risk of uncompensated loss has significant implications for community trust and confidence in the financial sector. The Murray Financial System Inquiry stated that 'confidence and trust in the system are essential ingredients in building an efficient, resilient and fair financial system that facilitates economic growth and meets the financial needs of Australians'.⁸⁷

Case study: Carol

In early 2012, Carol approached a 'rent-to-buy' caryard to trade in her old car and purchase a larger car. At the time, Carol was living in emergency accommodation and supporting three children. She had limited experience with complex transactions.

Due to misrepresentations by staff members, Carol believed that she was buying a car under finance. She traded-in her old vehicle as part of the deal. However, the FSP claimed that the agreement was for short-term rental only.

At the end of 2012, the FSP repossessed the new car. The FSP sold both her new car and her old car.

Carol lodged a dispute with FOS. In 2014, FOS made a determination in favour of Carol, finding that the FSP had engaged in misleading or deceptive conduct, irresponsible lending and inappropriate debt collection. Carol was awarded over \$10,000 in compensation.

The FSP did not pay Carol. Having lost both the new and old cars, Carol was left with no car

⁸⁷ Financial System Inquiry, *Final Report* (December 2014) page xv, <http://fsi.gov.au/files/2014/12/FSI_Final_Report_Consolidated20141210.pdf>.

and no compensation.

At the end of 2015, FOS obtained an order for specific performance of the tripartite contract between it, the FSP and Carol in the Magistrates' Court of Victoria in respect of a number of unpaid determinations, including Carol's. The total order against the FSP was for over \$50,000.

The FSP is insolvent and did not pay.

In Victoria, the Motor Car Traders Guarantee Fund may pay compensation to a consumer as a result of a motor car trader's failure to satisfy a court order. In Consumer Action's view, the FSP met the definition of a 'motor car trader' under the Victorian legislation.

Consumer Action assisted Carol to make a claim to the Motor Car Traders Guarantee Fund. The Fund refused the claim on three grounds:

1. The FSP was not a Motor Car Trader under the Act.
2. The loss did not arise from a failure to satisfy a Court Order, but rather the FSP's breach of its contract with FOS.
3. The Court Order arose from the provision of credit not motor car trading.

Carol remains uncompensated.

Source: Consumer Action

Consumer Action assisted two other clients with unpaid determinations against the same trader as Carol, who also remain uncompensated.

The need for a last resort compensation scheme

A last resort compensation scheme is the only way to ensure that consumers who suffer loss from misconduct are compensated. It is effectively the missing piece of the financial services regulatory architecture.

Any last resort compensation scheme would only be called on in a minority of cases—those where loss flows from proven misconduct by a licensee, the licensee then cannot meet the claim and the consumer cannot be compensated by recourse to PI insurance arrangements.

It has been suggested that the establishment of a last resort compensation scheme will create 'moral hazard'. That is, there is a risk that consumers will make decisions in the knowledge that compensation will be available and will be less likely to take responsibility. We reject this concern. In our view, this risk is not realistic as almost no consumers understand the detail of regulatory arrangements and a scheme can be designed to minimise this risk. For example, there could be limits to the compensation available through the scheme. This is discussed further below. The scheme would also be 'last resort': that means that a consumer who alleges liability against a licensee would first have to seek a compensation award from a court or external dispute resolution. If this was unpaid, they would have to seek payment from any PI insurer. Only if PI insurance did not provide cover, would a consumer have a valid claim on the fund.

Further, rather than create 'moral hazard', the establishment of a last resort compensation scheme would create both an important constituency for effective reform and a mechanism to

identify and perhaps implement reform. More responsible and better capitalised firms (such as the big banks) will want to ensure that the scheme is called on as rarely as possible and will thus have an incentive to advocate for reforms that minimise misconduct. The scheme itself may have a role in monitoring and acting on problems that lead to claims on the scheme.

The clearer ‘moral hazard’ risk involves a licensee becoming insolvent and allowing affected consumers to claim on the compensation scheme. The relevant directors and managers involved in the licensee may then seek to establish a new business and obtain another licence. This risk could be dealt through a number of design measures. First, the scheme might only make compensation payments on the basis that the claimant assigns their rights against the licensee to the scheme. This would enable the scheme to pursue recoveries against directors and managers where possible—the scheme would have an incentive to do this. Second, claiming against the scheme could trigger enforcement investigations against any relevant directors or managers that were involved in misconduct. ASIC’s banning power could be used to prevent the possibility of businesses ‘phoenixing’.

There are options that could be considered other than a last resort compensation scheme. For example, the Government could seek to specify mandatory levels of PI insurance cover to ensure it covered the risk of uncompensated loss. Another alternative is to require licensees to have more stringent capital adequacy requirements that could be called upon. Both these options are likely to impose significant costs on industry. Moreover, it is not clear that a private PI insurance market would be willing or able to provide this level of cover—there has been failure in other private last resort insurance markets, for example, home building warranty insurance in a number of states where private providers have opted not to provide cover due to uncertainty in pricing for the risk. In comparison, a last-resort compensation scheme can operate as an industry-wide insurance mechanism: a comparatively low cost arrangement that can provide cover for a small risk that, if eventuates, will have substantial impacts on individuals and families.

A last resort compensation scheme can also enable other elements of the compensation system—EDR and PI insurance—to work more effectively. If it is established, consumers will have confidence that taking their complaint to EDR will not result in uncompensated loss. It may also allow the PI insurance market to work more effectively: insurers will be able to price policies affordably, allowing the product to play the role it was designed for, and not for it to be expected to provide for entire consumer protection.

Design of a last resort compensation scheme

FOS prepared a proposal outlining the design and functioning of a financial services compensation scheme.⁸⁸ We endorse this work (completed in 2009) and suggest that it could be reviewed and updated in light of recent market activities.

We endorse the following suggestions for the design of a last resort scheme:

⁸⁸ FOS, *A proposal to establish a financial services compensation scheme* (October 2009) <http://www.fos.org.au/custom/files/docs/proposal_to_establish_a_financial_services_compensation_scheme_revision_october_09_pdf.pdf>.

- That it apply to all financial services and credit licensees: while it is financial advice that has caused the most uncompensated loss, the risk applies in relation to all licensees, including credit providers. As noted in the case study above, there are problems with the design of compensation arrangements in the consumer credit sector. This has real impact on consumers and undermines the effectiveness of the dispute resolution framework.
- That it only accept claims from retail clients (consumer claims) and operate as a last resort scheme, that is, only be available for claims after all avenues have been exhausted, including a relevant award from an EDR scheme or a court.
- That its governance involve both industry and consumer representatives. The EDR scheme governance arrangements offer a working effective example. They provide for independence from industry and other stakeholders, while involving them through an independent corporate governance entity. This can facilitate effective industry engagement which can improve the culture of risk management inside financial services and credit licensees.
- That its awards of compensation are tiered and capped at appropriate levels. The proposal prepared by FOS mentioned above suggests compensation limits of 90% of loss incurred up to a certain tier, limiting total compensation to an amount equating the compensation limits of EDR schemes. Tiers and caps would have to be increased over time.
- That it will be retrospective to allow consumers with a compensation claim arising from behaviour before the scheme is implemented to make a claim. As new consumer protections such as the Future of Financial Advice reforms have only recently been implemented, to be effective and go some way towards restoring consumer confidence, the scheme needs to address problems created in the last ten or more years that still have not been addressed by major financial institutions
- That it be funded by industry, through a levy imposed by the government.

We recognise that the funding mechanism is perhaps the most controversial part of a new scheme. In particular, many of the large institutions may argue that they should not contribute to the cost of the scheme, as they are already able to compensate their customers for any loss.

There are a number of reasons that we think that the industry broadly should contribute to the cost of the scheme. First, it must be acknowledged that many of the financial advice scandals have been the result not only of poor financial advice, but also financial products that have not been appropriate to the needs of consumers. Those products are for the most part designed and/or distributed by larger better capitalised industry participants. Large participants also benefit from the sales activities of smaller financial advisers when they provide finance to investors. Given the integrated nature of the financial services sector, it makes sense that all levels of the supply chain should contribute, including product issuers.

Second, we submit that large product manufacturers have not experienced significant penalties as a result of their involvement in financial advice misconduct. The Murray Financial System Inquiry recognised that the penalty regime is low in Australia comparatively to other jurisdictions, and that it should be reviewed.⁸⁹ In the United Kingdom, for example, penalties available to the Financial Conduct Authority are unlimited, and in recent years that have been a number of instances of multi-million pound penalties. In this context, it is not unreasonable to expect all licensees in Australia to contribute to compensating uncompensated loss caused by financial misconduct.

Finally, we note that it may be appropriate for the Government to make a small contribution to the establishment of such a last-resort compensation scheme, given the wider benefit to the community in reduced calls on social security, health and other welfare services as a result of uncompensated losses.

Recommendation

We strongly support the establishment of a statutory scheme of last resort. The scheme should:

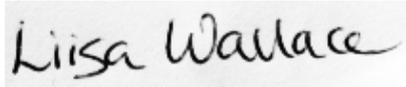
- apply to all financial services and credit licensees;
- only accept claims from retail clients (consumer claims) and operate as a last resort scheme, that is, only be available for claims after all avenues have been exhausted, including a relevant award from an EDR scheme or a court;
- involve industry and consumer representatives in its governance, based on the existing EDR model;
- award compensation at tiered and appropriately capped levels that are reviewed and increased over time.
- be retrospective in application;
- be funded by industry, through a levy imposed by the government.

⁸⁹ See < <http://fsi.gov.au/publications/interim-report/07-regulatory-architecture/execution-of-mandate/>>.

The contributors to this submission would be pleased to discuss the issues addressed in this submission in further detail.

Please contact Policy Officer Cat Newton at Consumer Action Law Centre on 03 9670 5088 or at cat@consumeraction.org.au if you have any questions about this submission.

Yours sincerely



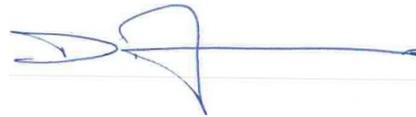
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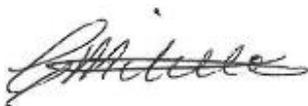
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Katherine Lane
Acting Coordinator
FINANCIAL RIGHTS LEGAL CENTRE

APPENDIX A: ABOUT THE CONTRIBUTORS

Care Inc Financial Counselling Service and the Consumer Law Centre of the ACT

Care Inc. Financial Counselling Service has been the main provider of financial counselling and related services for low to moderate income and vulnerable consumers in the ACT since 1983. Care's core service activities include the provision of information, counselling and advocacy for consumers experiencing problems with credit and debt. Care also has a Community Development and Education program, provides gambling financial counselling as part of the ACT Gambling Counselling and Support Service in partnership with lead agency Relationships Australia; operates outreach services in the region and at the Alexander Maconochie Centre and makes policy comment on issues of importance to its client group. Care also operates the ACT's first No Interest Loans Scheme, which was established in 1997, and hosts the Consumer Law Centre of the ACT.

Caxton Legal Centre

Established in 1976, Caxton Legal Centre Inc. is Queensland's oldest community legal centre. Caxton is a non-profit community organisation providing free legal advice to people on low income or who face other disadvantage. Caxton has a specialist Consumer Law Service providing advice and assistance to people with legal problems arising out of consumer disputes and consumer credit contracts.

Consumer Action Law Centre

Consumer Action Law Centre is an independent, not-for-profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

Consumer Credit Law Centre South Australia

The Consumer Credit Law Centre South Australia was established in 2014 to provide free legal advice, legal representation and financial counselling to consumers in South Australia in the areas of credit, banking and finance. The Centre also provides legal education and advocacy in the areas of credit, banking and financial services. The CCLCSA is managed by Uniting Communities who also provide an extensive range of financial counselling and community legal services as well as a large number of services to low income and disadvantaged people including mental health, drug and alcohol and disability services.

Consumer Credit Legal Service (WA) Inc

Consumer Credit Legal Service (WA) Inc. (CCLSWA) is a not-for-profit charitable organisation which provides legal advice and representation to consumers in WA in the areas of credit, banking and finance, and consumer law. CCLSWA also takes an active role in community legal

education, law reform and policy issues affecting consumers. In the 2015 / 2016 financial year, CCLSWA provided comprehensive legal advice to 1350 clients on 1424 matters.

Consumers' Federation of Australia

The Consumers' Federation of Australia is the peak body for consumer organisations in Australia. CFA represents a diverse range of consumer organisations, including most major national consumer organisations. Our organisational members and their members represent or provide services to millions of Australian consumers.

Financial Counselling Australia

FCA is the peak body for financial counsellors. Financial counsellors provide information, support and advocacy for people in financial difficulty. They work in not-for-profit community organisations and their services are free, independent and confidential. FCA is the national voice for the financial counselling profession, providing resources and support for financial counsellors and advocating for people who are financially vulnerable.

Financial Rights Legal Centre

Financial Rights is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the Credit & Debt Hotline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. Financial Rights took over 25,000 calls for advice or assistance during the 2014/2015 financial year.