

Improving dispute resolution in the financial system – Consultation Paper

Submission by Legal Aid Queensland



Improving dispute resolution in the financial system

Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission on the Consultation Paper – Improving dispute resolution in the financial system.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of “giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way” and is required to give this “legal assistance at a reasonable cost to the community and on an equitable basis throughout the State”. Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ’s services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ seeks to offer policy input that is constructive and based on the extensive experience of LAQ’s lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ’s Consumer Protection Unit lawyers have extensive experience providing specialist advice and representation in consumer law matters. The unit provides advice to clients as well as lawyers and financial counsellors throughout Queensland in relation to mortgage stress, house repossession, debt, contracts, loans, telecommunications and unsolicited consumer agreements.

LAQ deals with the financial system external dispute resolution (EDR) framework on a daily basis. This submission is informed by that knowledge and experience.

Questions

Question 1

Are there other statutory powers the EDR body will need to resolve superannuation complaints effectively?

LAQ supports the new powers that the EDR body has been provided with to resolve superannuation disputes which include:

- power to join parties (s.1053);
- power to require information and documents to be produced (s.1054); and
- power to require attendance at conciliation conferences. (s.1055).

However, in LAQ’s submission the additional power in section 1054 to require the production of information and documents should also apply across all disputes heard by the EDR body.

Applying this additional power to all disputes will ensure that all disputes are decided on the basis of all information relevant to each dispute.

Question 2

Do you consider that the Bill strikes the right balance between setting the new EDR schemes objectives in the legislation whilst leaving the operation of the scheme to the terms of reference?

Name of the new EDR Scheme

LAQ supports the decision that the name of the new EDR scheme is not included in the draft legislation. Deciding the name of the new scheme is a matter that should be decided by the board of the new EDR scheme.

Independence of the new EDR Schemes

LAQ refers to section 1051 that provides ASIC with the powers to give a written direction to the operators of the EDR scheme to take specific measures or actions in relation to the conduct of the scheme.

LAQ does not support providing ASIC with the significant and wide powers set out in section 1051.

While LAQ supports ASIC's existing role that involves oversight of an EDR scheme and the provision of guidance concerning how to meet EDR benchmarks, we do not support giving ASIC specific powers to compel performance or give directions to an EDR scheme.

One of the important characteristics of a successful ombudsman scheme is that its operations and decision making, within the EDR framework set by ASIC, are independent and free from influence from consumers, industry and government. Granting ASIC the power to give directions to a scheme risks that the scheme may not appear to be completely independent. Independence, and an appearance of independence, are vital for the success of the scheme.

Question 3

Are there any issues that are currently in the Bill that would be more appropriately placed in the terms of reference or issues that are currently absent from the Bill that should be included in the Bill?

Matters taken into account by the Minister in authorising an EDR Scheme

LAQ supports the list of matters set out in section 1046(2) that the Minister must take into account in considering whether to authorise an external dispute resolution scheme. It is important that the characteristics needed for a strong EDR scheme are reflected in the matters for consideration when authorising a new EDR body.

However, in LAQ's submission there are three important additional matters that have not been included in the proposed section 1046 that are crucial to ensuring a free, independent and accessible EDR scheme. These additional matters which should be included in section 1046 are:

- (1) the EDR scheme should be free for consumers to lodge a complaint with the scheme;
- (2) complainants should not be at risk of costs being awarded against them if their complaint is unsuccessful; and
- (3) there should be consumer representation in the governance of the scheme.

Governance issues – importance of industry and consumer representation on the board of the EDR scheme

It is critical when considering appropriate governance structures, and good governance requirements, to examine the organisation's specific nature and needs. For an EDR scheme there are critical needs based on the nature of the work undertaken by, and the characteristics of, the organisation. These needs centre on a governance structure that guarantees, and is seen to guarantee, the independence of the EDR scheme from the members who fund the scheme. There is also a need for the members to be assured through the governance structure that the organisation is being run effectively and efficiently, and is compliant with all regulatory requirements.

These needs are currently met in the existing EDR schemes through a board that contains an independent chair and an equal number of industry and consumer directors. LAQ supports the proposed EDR scheme having the same board structure.

EDR Scheme Functions set out in the Bill

LAQ refers to section 1047 of the bill which sets out the proposed EDR scheme's functions. In LAQ's view section 1047:

- (a) does not address the important community education and outreach role that is performed by the existing financial services EDR schemes. This outreach role increases awareness of the scheme and its benefits amongst the community and community advocates who assist vulnerable members of the community. In LAQ's submission this function should be added as a new sub-section to section 1047;
- (b) recognises in section 1047(b) that the scheme needs to be accessible. However, in LAQ's submission this function should contain a proactive requirement to ensure those groups who are disadvantaged or who are in vulnerable circumstances such as those people from CALD communities and people with disabilities can access the new scheme;
- (c) requires, in section 1047(g), the scheme to take reasonable steps to ensure members comply with determinations. However, it is unreasonable to suggest that the scheme should be required to take court action against a member for unpaid determinations where that member is insolvent. As a consequence, in LAQ's submission, this requirement should be accompanied by a compensation scheme of last resort. The importance of a last resort compensation scheme is that it will address circumstances where consumers are not currently receiving substantive access to justice because a member does not have the financial resources or the insurance that covers the loss that they have caused; and
- (d) narrows, in section 1047(h)(v), the scope of systemic issues reporting to "systemic issues affecting the complaints management functions of the members of the scheme." In LAQ's submission, this definition is too narrow and restricts systemic issues reporting to problems with members' IDR processes. In LAQ's experience, systemic issues occur in more than just a member's IDR process. A more appropriate definition of systemic issues is contained in the existing ASIC Regulatory Guide 139 at paragraph 117. This definition requires a scheme to report "any systemic issues and matters involving serious misconduct."

Question 4

Are there any additional issues that should be considered to ensure an effective transition to the new EDR scheme?

LAQ is concerned that the proposed transitional arrangements could lead to a loss of staff, culture and expertise from the existing EDR schemes that would affect the quality and timeliness of dispute resolution for claims that were started before the commencement of the new EDR scheme.

In LAQ's view, rather than the old EDR schemes continuing to operate after 1 July 2018, the new EDR scheme should take over the assets, staff and processes of the existing EDR scheme. Without this approach there is a strong risk that effective dispute resolution could be disrupted as the old schemes lose well trained staff to the new scheme.

Question 5

Would moving immediately to a compensation cap of \$1 million have significant impacts on the availability/price of professional indemnity insurance?

LAQ supports the proposal that the claim limits and monetary limits for consumer and non-credit small business complaints should move immediately to \$1 million. These limits more accurately reflect the credit that is being obtained by consumers in today's society.

In LAQ's submission significant evidence of an inability to obtain professional indemnity cover at a reasonable cost should be required before any delay in implementing the higher monetary and jurisdictional limits should be considered.

Question 6

Are the existing sub-limits for different insurance products still required?

LAQ is aware of no practical reasons for the existing sub-limits for different insurance products to be retained.

Question 7

Are there any reasons why credit representatives should be required to be a member of an EDR scheme?

LAQ supports the proposal that credit representatives no longer need to be a member of an EDR scheme if the following, enforceable, requirements are placed on credit representatives:

- (a) credit representatives are acknowledged in the legislation as agents of the licensee;
- (b) licensees are responsible for the actions of credit representatives;
- (c) credit representatives must still co-operate with EDR schemes by providing documents and information that the credit licensee does not have;
- (d) there will still be a searchable, public list of credit representatives and whose credit license they operate under on ASIC's and the new EDR scheme's website;

- (e) there are obligations on credit representatives when they are approached by consumers to facilitate resolution of disputes by putting them in touch with the correct credit licensee; and
- (f) the new arrangements are reviewed in 18 months' time to ensure there are no gaps in the law or unintended consequences as a result of the change.

Question 8

What will the regulatory impacts of the new EDR framework be?

LAQ notes that the consultation paper focuses on the costs that are imposed on businesses as a result of the new EDR framework.

In LAQ's view it is important that these regulatory impacts also be assessed in the context of the benefits that the new EDR framework will provide to both consumers and the industry.