



Credit and Investments Ombudsman's
response to the Issues Paper for the Review of
External Dispute Resolution schemes

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Executive Summary

There is general consensus among stakeholders that external dispute resolution (**EDR**) schemes are effective in promoting access to justice and providing significant support for non-judicial redress.¹

In our view, Australia is currently very well served by the existing dispute resolution architecture in financial services. The existence of two ASIC-approved EDR schemes in the finance sector (the Credit and Investments Ombudsman (**CIO**) and the Financial Ombudsman Service (**FOS**)), has spurred productivity growth and created a self-sustaining process for continual reform and reassessment.

Specifically, CIO is fit for purpose, and has served both consumers and financial services providers (**FSPs**) extremely well. CIO is well regarded by its member FSPs, the vast majority of whom are small businesses and sole operators.

We note that the recent commentary about FSPs behaving poorly relates to agricultural lending, insurance and financial planning. Relevantly, these comprise only 1.6% of all complaints CIO receives, and the FSPs involved are not members of CIO.

The key reasons CIO believes that a two-scheme model should be maintained are as follows:

1. CIO's membership base differs significantly from FOS'. CIO's FSP members are generally not supportive of being in a single financial services EDR scheme which is, and has historically been, generally geared towards large institutional members such as banks and insurers. CIO's members would understandably not want to be treated in the same way as the large financial institutions who attract the vast majority of complaints and whose corporate structures and governance bear no resemblance to theirs.

¹ Page 221: <http://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer2.pdf>.
Page 221: <http://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer2.pdf>

2. CIO understands the non-bank and securitisation sectors well, and those who operate in it, from non-bank lenders to debt purchasers, from finance companies to credit reporting bodies, from aggregators to mortgage brokers, from building societies and credit unions to small amount lenders.
3. Any consolidation of CIO and FOS would result in FSPs who are dissatisfied with service levels or costs not being able to look at alternatives. This is a particularly poor outcome because EDR membership is mandatory and FSPs are required to fully fund the scheme's operating costs.
4. The existence of two ASIC-approved EDR schemes allows each scheme to benchmark its performance against the other. The independent and periodic reviews of CIO and FOS compare both schemes and recommend the implementation of particular improvements seen in the other. This produces better outcomes for FSPs, consumers and regulators alike and cannot be achieved under a single EDR scheme model.
5. Without the stimulus of this comparative discipline, turnaround times, service levels, innovation and continuous improvement would suffer, and there would be less incentive to keep costs in check and run the scheme efficiently. Both consumers and FSPs would be disadvantaged in this scenario.
6. A merger of the two remaining ASIC-approved schemes will not provide synergies and generate economies of scale. The Productivity Commission found no evidence that the existence of two schemes adds unnecessary and inefficient costs to EDR services in the form of inefficient duplication of infrastructure, resources, services or information systems.
7. Regulators are well placed to exploit the natural tension between the two EDR schemes to help drive innovation and improvements. This has provided ASIC with leverage and 'soft' influencing tools when selecting one EDR scheme's approach as their preferred position.
8. Multiple sources of high quality data and analysis in relation to financial services disputes and systemic issues can only improve the contribution that EDR schemes can make to policy development by regulators.

9. Each ASIC-approved EDR scheme is required to have equal numbers of consumer and industry directors on their board. It follows that an essential avenue for consumer input into regulatory processes is through participation as representatives on the management boards of schemes. The fewer schemes, the less are the opportunities for such important input.
10. Consumers are not overlooked or bounced from scheme to scheme as a result of the two-scheme model. ASIC's RG 139 and 165 and prescribed documents require FSPs to notify their clients of the EDR scheme to which they belong. Each scheme has a 'no wrong door' policy and a website with a search function to enable consumers and their representatives to confirm which scheme an FSP belongs to.
11. A single merged EDR scheme would be prone to dictating terms, rather than being responsive to stakeholder concerns about performance. A single scheme would also be out of step with comparable jurisdictions.²
12. A single statutory scheme is not the answer because a large bureaucracy would be substantially less flexible or capable of responding quickly to changes in the market, and this would have a negative effect on turnaround times, service levels and innovation.

CIO submits that the review panel should give serious consideration to the Australian Small Business and Family Enterprise Ombudsman (**ASBFEO**) being given jurisdiction to adjudicate and make binding decisions in relation to small business disputes in excess of the EDR schemes' existing monetary caps.

CIO recommends the establishment of a common entry point or triage service to allow consumers and small businesses to call a single phone number or visit a dedicated website and enquire as to the most appropriate body to assist them. The enquiries need not be limited to financial services. Such a gateway service could direct consumers and small businesses to an appropriate EDR scheme, a government department like Centrelink, the ASBFEO, financial counsellors, community legal centres, Legal Aid, State Fair Trading Offices, Government

² See our response to Question 45.

Ombudsman bodies, interpreter services, Law Societies and regulators such as ASIC, OAIC and ACCC.

About CIO

CIO is a not-for-profit public company, limited by guarantee. It receives no government subsidy and its operations are funded entirely by membership and complaint fees levied on its FSP members.

CIO's decision-making process is independent. It is not a consumer advocate, nor does it represent industry. The key object of CIO is to provide consumers and small businesses with a free alternative to legal proceedings for resolving their disputes with participating FSPs having regard to relevant legal principles, industry codes of practice, good industry practice and fairness in all circumstances.

CIO's membership of about 23,000 FSPs comprises mainly finance brokers, non-bank lenders, mutual banks, credit unions, building societies, credit reporting bodies, time share operators, small amount short term lenders, debt purchasers and some financial advice firms.

Significantly, more than 97% of CIO's members are sole operators or small businesses.

Legislative basis for EDR schemes

In Australia, most FSPs are required by law³ to join an industry-based EDR scheme 'approved' by the Australian Securities and Investments Commission (**ASIC**). ASIC's approval is subject to an EDR scheme first meeting stringent prescribed criteria.⁴

³ Sections 912A(2) and 1017G(2) of the Corporations Act 2001 and section 47 of the National Consumer Credit Protection Act 2009. (**Credit Act**)

⁴ To maintain this approval, CIO is required and continues to meet the conditions prescribed by ASIC's Regulatory Guide 139, including:

- (a) operating independently of the sectors of industry that fall within its jurisdiction and that provide its funding,
- (b) acting impartially and fairly in its decision-making and having an overseeing body (board of directors) comprised of an equal number of consumer and industry representatives and an independent chair,
- (c) being accountable to stakeholders by regularly reporting on its performance, FSP systemic issues and serious misconduct, and subjecting itself to periodic independent reviews, and
- (d) being accessible to consumers by providing a dispute resolution service (even when legal proceedings have commenced) at no cost to the consumer, and actively promoting its services so consumers are aware of its existence.

Further, credit providers and credit reporting bureaus, are now required⁵ to join an EDR scheme 'recognised' by the Office of the Australian Information Commissioner (**OAIC**). This is to allow privacy-related complaints made against them to be dealt with by a recognised EDR scheme.

It would be difficult, expensive and time consuming for any but the largest, best resourced and mature organised industry group to establish an EDR scheme that would meet the criteria prescribed by ASIC and the OAIC.

Indeed, no new EDR scheme has emerged despite the requirement, since 12 March 2014, for credit providers to join an EDR scheme for privacy-related complaints. Existing EDR schemes, CIO and FOS, the Telecommunications Ombudsman (**TIO**) and the various state-based utilities ombudsman schemes, were the only ones to apply for, and receive, recognition from the OAIC.

The barriers to entry for any new EDR scheme are demonstrably almost insurmountable and it is unlikely that new players will emerge in the market.

It follows that any consolidation of the two existing ASIC-approved EDR schemes in the finance sector will create a monopoly in EDR services with no or little chance of a new entrant emerging.

CIO's response to the Issues Paper

[Principles guiding the review](#)

[Q1. Are there other categories of users that should be considered as part of the review?](#)

FSPs and consumers and their advocates are the most obvious users of EDR.

FSP users of CIO are confined to the non-bank and securitisation sector, which includes non-bank lenders, debt purchasers, finance companies, credit reporting bodies, aggregators, mortgage brokers, small amount lenders, time share operators, building societies and credit unions.

There are three types of consumer representatives:

⁵ To the extent that they participate in the consumer credit reporting system See section 35A of the Privacy Act 1988 (As Amended).

- unpaid consumer representatives, such as financial counsellors, community legal centres and relatives and trusted friends of consumers,
- paid representatives who are professionals and regulated, like lawyers, and
- paid representatives who are largely unregulated, such as credit repair and debt management firms.

CIO has observed numerous instances of credit repair and debt management firms not acting in their clients' best interests or pursuing multiple complaints for an improper purpose ⁶.

Regulators such as ASIC and OAIC, although not users of the dispute resolution services offered by EDR schemes, may be considered to be "users" of the EDR schemes because, having approved or recognised the EDR schemes, they receive detailed reports from the schemes about the complaints they deal with and the systemic issues they have identified and for which they have sought remediation. These reports play a significant role in their monitoring and regulation of the sector.

Relevantly, the OAIC recognises several EDR schemes, apart from the two that are approved by ASIC for financial services.⁷

Q2. Do you agree with the way in which the panel has defined the principles outlined in the terms of reference for the review? Are there other principles that should be considered in the design of an EDR and complaints framework?

We would suggest two additional principles be considered.

The first is accessibility. This is referred to under the heading of Equity, but we think it is a fundamental feature of successful EDR and needs to be given appropriate prominence. Accessibility is one of the Benchmarks for Industry-Based Consumer Dispute Resolution Schemes (**the Benchmarks**)⁸ which have been incorporated into the relevant ASIC Regulatory Guide⁹ and incorporated into other consumer protection legislation.¹⁰ A scheme is described in the Benchmarks as achieving accessibility if: "the Scheme makes itself readily

⁶ [http://email.cosl.com.au/t/ViewEmail/y/OBB3976F9388B9FF](mailto:email.cosl.com.au/t/ViewEmail/y/OBB3976F9388B9FF)

⁷ <https://www.oaic.gov.au/privacy-law/privacy-registers/recognised-edr-schemes>

⁸ As published and recently reviewed by the Commonwealth Consumer Affairs Advisory Council.

See http://ccaac.gov.au/files/2013/04/CCAAC_FINAL_Benchmarks_Report.pdf

⁹ ASIC RG139: Approval and Oversight of External Dispute Resolution Schemes

¹⁰ Section 128(10)(a) Telecommunications Legislation Amendment (Consumer Protection) Act 2014

available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.”¹¹

As part of ensuring accessibility, we note the statement (under Equity) that ‘users should face minimal cost barriers’ and suggest a more explicit recognition of the importance of ensuring that EDR remains free for consumers.

It is also crucial that neither consumers nor FSPs need to ‘lawyer up’ in order to access EDR. Legal or other professional representation by paid representatives is neither necessary nor encouraged.

The second picks up a theme of the Issues Paper, which is flexibility or adaptability. Being able to adapt and change to meet changing user needs or requirements is critical to the continuing success of any dispute resolution body, and delays in being able to do so can result in poor or inappropriate outcomes for all users.

Finally, under the heading of Accountability (or elsewhere), consideration should be given to the quality of decision making, and the mechanisms in place to ensure that decisions are predictable, appropriate and fair.

Although the decisions of EDR schemes do not (and should not) have precedential value like the decisions of courts and tribunals, EDR decision-making needs to be reasonably predictable (given identical or substantially similar facts) in order to:

1. guide users as to the likely outcome of a particular complaint, and
2. allow FSPs to arrange their business processes and systems to conform with a scheme’s findings (thereby reducing the costs associated with compliance uncertainty).

¹¹ See Note 7

Q3. Are there findings or recommendations of other inquiries that should be taken into account in this review?

The Productivity Commission made some significant findings in relation to its Inquiry into Australia's Consumer Policy Framework¹². The Inquiry comprehensively examined many of the issues now being canvassed in the Issues Paper.

Q4. In determining whether a scheme effectively meets the needs of users, how should the outcomes be defined and measured?

The key to determining whether a scheme effectively meets the needs of users is to recognise the balance to be made between the different needs and interests of scheme users. All scheme users seek quality of complaints handling, decision making and reporting, but FSP members will prioritise low cost, efficiency and predictability of outcomes; complainants will prioritise outcomes and timeliness; and regulators will prioritise the extent to which schemes can assist their regulatory functions. There may be tension between some of those priorities. Effective outcomes can be measured against the extent to which the schemes demonstrate appropriate management of those tensions.

To give an example, the goals of timely outcomes, quality outcomes and low cost outcomes are in one sense competing goals – it is possible to achieve one in a way or to an extent that comprises the others (very cheap or uniformly swift complaints handling is likely to be of poor quality; decisions that are uniformly beyond criticism are likely to be expensive and slow). Effective EDR recognises the need for compromise and balance, and operates in a way that gets that balance right.

¹² <http://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer2.pdf>

[Internal dispute resolution \(IDR\)](#)

Q5. Is it easy for consumers to find out about IDR processes when they have a complaint? How could this be improved?

Many FSP websites have links to making a complaint, but this is certainly not universal. Legislatively prescribed documents also set out the contact details of the FSP's IDR.

CIO's website has a comprehensive search function identifying whether the FSP being complained about is a member of the scheme, and setting out the contact details of the FSP's IDR complaint contact person (as well as details of the FSP's contact for financial hardship applications, if any).

The onus should be on licensees to recognise a complaint (i.e. an expression of dissatisfaction) and deal with it through IDR, rather than merely making available a process that consumers must ask to access. This may rely too heavily on FSPs doing the right thing, even acknowledging the difficulty in training all customer-facing staff to identify complaints over and above the core responsibilities.

Q6. What are the barriers to lodging a complaint? How could these be reduced?

CIO contends that it is not so much the barrier to 'lodging' a complaint with an FSP, but rather a failure by some FSPs to understand their obligation, as licensees, to recognise complaints, even when it is abundantly clear that a consumer is complaining. CIO will treat such a failure as potentially a systemic issue.

CIO also believes that more could be done to publicise the current ombudsman schemes across all industries, and that the establishment of a single entry portal will allow consumers to be referred to appropriate dispute resolution services. This recognises that consumers can have disputes with providers operating in more than one industry sector.

Q7. How effective is IDR in resolving consumer disputes? For example, are there issues around time limits, information provision or other barriers for consumers?

IDR can be extremely effective in resolving complaints and will often go a long way to also preserving goodwill between the parties. It is also much more effective at resolving complaints in a timely and effective manner than its potential alternatives, such as a statutory scheme or industry-wide tribunal. However, IDR is only as effective as the commitment and resources an FSP puts into it.

About 50% of complaints received by CIO will not have been first addressed by the FSP. This does not necessarily suggest that FSPs are not advising consumers (through their website or communications) that they should approach the FSP in the event of dissatisfaction, or that their staff are failing to recognise complaints at the front-line. EDR schemes are not in a position to know what proportion of complaints are dealt with successfully at IDR and never reach EDR.

Of those complaints that are referred by CIO to the FSP's IDR process, only about one third of them are referred back to us.

We invite consumers to refer their complaint to us if the FSP's IDR response has not resolved their complaint to the consumer's satisfaction. This is done both at the time we first refer the complaint to IDR and again when the maximum IDR timeframe has elapsed and we have not heard back from the consumer.

We consider that the IDR time limits are adequate, but perhaps too generous for post-March 2013 financial hardship complaints which potentially extend IDR to 63 days (previously 21 days).

Consumer advocates sometimes encounter resistance from FSPs when requesting documents that may be relevant to their client's claim. Often, consumers present at these centres with little or no documents and this makes it exceedingly difficult for consumer advocates to provide them with advice.

If CIO finds that an FSP has failed to provide the documents to a consumer in breach of an applicable law, code of practice or the contract terms, it will require the FSP to provide the consumer with the documents.

If the FSP has delayed in providing the documents, the appropriate remedy may be:

- compensation for the direct financial loss the consumer has suffered, and/or
- compensation for non-financial loss.

As a general rule, CIO will not ask the consumer for information that the FSP is able to provide.

CIO has a number of significant concerns about the alternatives to IDR which are currently being canvassed by the Issues Paper. We believe that a tribunal or statutory scheme would:

- not have the multiplicity of access points for industry and consumer representation that the current structure affords,
- not have specialised industry knowledge required for the sensible resolution of disputes,
- not have the sense of involvement and, therefore, support by the relevant industry and consumer groups,
- be substantially less flexible, and
- not be capable of responding quickly to changes in relevant markets.

Q8. What are the relative strengths and weaknesses of the schemes' relationships with IDR processes?

FSPs generally trust us to refer to them those complaints that they have not had a chance to address. Our members, particularly the smaller ones, are quite passionate about being given the opportunity to resolve a complaint before the complaint is investigated by CIO. This is understandable because further complaint fees would otherwise be payable. It follows that it is in the interests of FSPs to use their best endeavours to resolve a complaint internally.

Particularly in relation to financial hardship complaints (which comprise about 21% of all the complaints we receive), FSPs often ask CIO to facilitate an outcome (normally a payment arrangement) with the consumer even though the complaint may still be within IDR. This is indicative of the collaboration between CIO and its members to achieve mutually acceptable outcomes.

In fact, there has only been two occasions where CIO has had to issue an Order on the FSP to comply with a direction about how to deal with a financial hardship complaint. In all other cases, the FSPs have been willing to accept a recommendation as to how the complaint should be resolved.

In our experience, financial hardship complaints should not be addressed internally by the FSP's collections area. Collections staff have as their primary focus the management of delinquent accounts and are often motivated by considerations that are not consistent with a consumer-focused complaints handling process (for example, they may be awarded bonuses based on amounts recovered).

[Q9. How easy is it for consumers to escalate a complaint from IDR to EDR schemes and complaints arrangements? How common is it for disputes to move between IDR and EDR, or between EDR schemes?](#)

Consumers are entitled, at law, to receive certain prescribed documents that set out the contact details of the EDR scheme of which the FSP is a member.¹³ FSPs are also required to inform the consumer of the scheme's contact details if the FSP has not been able to resolve the complaint.

In addition, CIO provides a number of resources to assist consumers to lodge complaints. For example, CIO's website allows a consumer to search for the complaint contact details of an FSP. Our case managers can assist consumers to articulate their complaints when they wish to lodge a complaint and will inform them of the information they need to provide to substantiate their complaint. We offer consumers Translation and Interpreting Services when a person's first language is not English and our complaint form and the basic information about CIO are in 22 languages.

CIO accepts every complaint that it receives, whether it has been through the FSP's IDR process or not. Where the FSP has not had the opportunity to first address the complaint, we refer the complaint to the FSP's IDR process. We nevertheless record the complaint as having been received, we assign the complaint to a case manager within 48 hours of receipt, and we provide both the

¹³ Credit Act 2009. In relation to financial hardship: sections 72(4)(b)(iii), and 177B(4)(b)(iii); in relation to enforcement proceedings: 88(3)(g) and 179D(2)(f); and in Credit Guides: sections 126(2)(e)(ii), 149(2)(e)(ii), 113(2)(h)(ii), 136(2)(h)(ii), 127(2)(e)(ii), 150(2)(e)(ii), 158(2)(h) and 160(3)(f)(ii).

consumer and the FSP with the contact details of the case manager. This allows either party to contact CIO even while the complaint is in IDR.

The consumer is invited to inform us of the outcome of the IDR process. If we do not hear from the consumer after the expiration of the maximum IDR timeframe, we follow up the consumer to ascertain whether the complaint is resolved or whether they would like to escalate the complaint to us.

In 2015-16, consumers heard about our services from FOS in about 20% of the complaints we received. However, only 7% of complaints were actually transferred to us. We are not aware of what percentage of consumers heard about FOS through us, but we do know that we transferred 4% of our complaints and 16% of our enquiries to FOS.

As noted later in this submission,¹⁴ referrals between ombudsmen and other complaint bodies are common.

This is also in keeping with protocols established between CIO and FOS for the transfer of complaints, as well as the Memorandum of Understanding between CIO and FOS established to address the handling of complaints about loans that are part of a securitisation programme.¹⁵

Consumers will have also heard about us from FOS where their debt has been assigned by a FOS member to a CIO debt purchaser member. In fact, 85% of the complaints FOS transferred to us were about debt purchasers. (Consumers typically look to the original credit provider when they discover that their past due debt has been assigned to a debt purchaser.)

The protocols and memoranda of understanding mean that consumers are not bounced from scheme to scheme or are not slipping through the cracks. Indeed, under both schemes' terms of reference, the complaint is deemed to have been lodged with the transferee scheme on the date that it was lodged with the transferor scheme. Therefore, any enforcement action, including legal proceedings, will remain discontinued while the complaint is open.

¹⁴ See our response to Question 35

¹⁵ <http://www.cio.org.au/cosl/assets/File/MOU-between-COSL-and-FOS-Securitisation-Only.pdf>

Regulatory oversight of EDR schemes and complaints arrangements

Q10. What is an appropriate level of regulatory oversight for the EDR and complaints arrangements framework?

CIO is approved and overseen by two regulators, ASIC and the OAIC. We have reporting obligations to both, including on general complaints data (numbers and types of complaints, trends or emerging issues, our caseloads and timeframes) and systemic issues and serious misconduct. CIO's reporting to ASIC in particular is very detailed and comprehensive. We consult both regulators on any proposed changes to our Rules or other relevant matters relating to our operations, and our decisions and guidance notes are available to both for review.

We also meet regularly with ASIC to discuss our quarterly reports. In accordance with RG139 we undertake an independent review every five years, which assesses our performance and capabilities against the requirements established by ASIC in RG139 as well as the Benchmarks.

We think that the guidance provided in RG139 is appropriate and calibrated to meet the important balance between the needs of consumers and licensees. It is our view that ASIC and the OAIC have a very good understanding of CIO, how we deal with complaints and how we respond to any challenges that might from time to time emerge. We also consider that our regulators have sufficient information to allow them to be confident, on an ongoing basis, that we are meeting the standards required for their approval.

Q11. Should ASIC's oversight role in relation to FOS and CIO be increased or modified? Should ASIC's powers in relation to these schemes be increased or modified?

For the reasons set out in our response to Question 10, we do not consider that any changes to ASIC's oversight role or powers in relation to EDR need to be made. We would observe, however, that the fact of ASIC having an oversight role in respect of two schemes, and with the level of very constructive engagement between ASIC and CIO (and ASIC and FOS), allows ASIC to apply what it learns from each scheme to enhance the operation of the other scheme

where such opportunities arise. Comparison is a necessary prerequisite to explanation and understanding.¹⁶

Consistent with one of the themes running through our response to this Issues Paper, we do not feel that regulatory oversight of a single scheme would allow for such comparison and cross-pollination.

Q12. Should there be consistent regulatory oversight of all three schemes with responsibility for dealing with financial services disputes (for example, should ASIC have responsibility for overseeing the SCT)?

The oversight role that ASIC has in relation to CIO and FOS is extremely robust and we consider that the SCT could benefit from this.

Q13. In what ways do the existing schemes contribute to improvements in the overall legal and regulatory framework? How could their roles be enhanced?

We consider that both CIO and FOS significantly enhance ASIC's understanding of the financial services landscape, at both macro and micro levels. In addition to our formal reporting of complaints data, systemic issues and serious misconduct, we are able to provide insights into trends and industry behaviours derived from our close understanding of our FSP members, their operations and the issues that result in consumer complaints.

The systemic issues jurisdiction of approved EDR schemes, while not a regulatory function as such, nevertheless relieves ASIC of the need to resource its own formal investigations of issues that might otherwise warrant a regulatory response. While in some cases ASIC may investigate conduct that has been identified by CIO as systemic, allowing CIO to resolve a systemic issue is particularly efficient where it is appropriate to limit action to rectification and remediation, rather than seek a more punitive outcome. Industry-based non-punitive remedies, where effective, are to be preferred in a functioning and balanced regulatory system, as was observed by the Productivity Commission in its Inquiry into the Consumer Policy Framework which adopted, with approval, the famous "Enforcement Pyramid."¹⁷ This model, developed by Professor John

¹⁶ D.Nachmias, *Research Methods in the Social Sciences* (New York: St Martins' Press, 1987) p 110.

¹⁷ Productivity Commission, *Review of Australia's Consumer Policy Framework* (Inquiry Report No 45, 2008), p 228.

Braithwaite, suggests that a successful regulatory regime will use far less of those more punitive and non-discretionary tools at the top of the pyramid than those of a more consultative, voluntary and self-regulatory nature at the bottom.¹⁸ A pyramid, by its nature, is narrower the top.¹⁹

Through the provision of guidance in documents like CIO's Position Statements, the publication of decisions and information about systemic issues, and our engagement generally with stakeholders, we provide predictability of outcomes and facilitate a greater understanding of applied law and good practice for the benefit of both financial services providers and their customers.

Our experience in dealing with the problems that do arise in the financial services sector, at a more practical than theoretical level, also allows us to make a significant contribution to discussions about law reform. Our submissions and feedback to a range of initiatives, including the development of the national credit regime, have allowed for better understanding of the issues that need to be addressed and the ways to best address them.

Many of the regulatory and legal process improvements are driven by the fact that EDR environment is a multi-scheme environment. CIO argues that if a merger between existing schemes was implemented, or a statutory tribunal were to be introduced, many of these process improvements would be lost. The current two-scheme model enhances the efficiency of the schemes, reduces complexity and has led to greater accountability.

For example, having two ASIC-approved EDR schemes has allowed each scheme to benchmark its performance against the other. To take a very specific example, we have observed the material improvements in industry's handling of complaints about financial hardship following the introduction of a financial hardship jurisdiction at CIO and, subsequently, FOS. It is also very clear that ASIC's approval requirements for the EDR schemes have changed over time to impose on one scheme improvements observed in the other.

¹⁸ J Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (State University of New York Press, Albany, 1985) and I Ayres I and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, New York 1992) p 35.

¹⁹ For an application of the Braithwaite Pyramid to regulation of financial services in Australia, see P.O'Shea, "Regulatory Consistency and Powers" in J Malbon and L Nottage, *Consumer Law and Policy in Australia and New Zealand* (Federation Press, 2013) at pp382-383

Existing EDR schemes and complaints arrangements

Q14. What are the most positive features of the existing arrangements? What are the biggest problems with the existing arrangements?

Over and above our response to Question 31, one of the real strengths of CIO is its ability to evolve, and to do so swiftly in a sector that is dynamic and innovative. The skills and experience of our workforce, our Rules, the ways in which we engage with members, consumer advocates and other stakeholders, have all changed over time and continue to change as we identify new and better ways of doing things. To give two current examples:

- we are in the process of finalising changes to the way we accept complaints that will make us even more accessible, particularly to consumers on the financial and social margins, and
- we have recently updated our Rules to make clear our ability to respond appropriately and comprehensively to systemic issues even where our member may choose not to cooperate with us.

We think this ability to evolve is a product of CIO being a non-statutory, member-based scheme operating within principles-based parameters established by a regulator that understands what we do and the environment in which we operate. Our governance arrangements ensure our independence from the members who fund us, and despite having more than 23,000 members, we operate on a scale that allows us to change quickly where necessary.

The success of EDR in this sector, and in Australia more generally, serves only to highlight its absence where EDR is not available. As the Issues Paper observes (for example, at para 77), not all financial services providers are required to be members of an EDR scheme and not all consumers of financial services have access to EDR as a dispute resolution mechanism.

We do not support the introduction of a new forum or tribunal to deal with such complaints, nor indeed do we advocate the extension of EDR to all areas of financial or other services. Consistent with our Rules allowing us to exclude complaints where we consider there to be a more appropriate forum, we say that disputes involving large sums of money and complex products and structures

are probably best dealt with by the traditional court system notwithstanding the issues of access that formal legal processes entail.

We do, however, encourage the panel to consider whether the very successful EDR model currently in place for consumer and retail financial services could be applied more broadly, including as a result of changes to RG 139 and the Rules of the existing schemes.

**Q15. How accessible are the EDR schemes and complaints arrangements?
Could their awareness be raised?**

CIO believes that while the current EDR arrangements are very accessible, potentially more could be done to consistently promote EDR and ombudsman services across all industries. As we have mentioned, we believe that the establishment of a single portal for all industry dispute resolution services is worth considering. This option is further developed in our response to Question 35.

ASIC's requirements for accessibility

ASIC's RG139 requires an EDR scheme to:

- (a) promote equitable access by providing its services free of charge,
- (b) actively promote itself so consumers and investors become aware of the existence of the scheme, thereby improving accessibility of the scheme,
- (c) develop a communications strategy to improve consumer and investor knowledge of the EDR process and the role of the scheme,
- (d) be capable of accepting complaints from an FSP where there is an intractable complaint,
- (e) specify in its Terms of Reference how legal proceedings can be brought where a complaint has been lodged with an EDR scheme, and
- (f) in its Terms of Reference, set out the types of complainants who can access the scheme.

CIO believes that these requirements for accessibility are adequate.

Engagement with consumer representatives

CIO established a Consumer Liaison Committee (CLC) as a crucial component of CIO's accessibility and stakeholder engagement strategy.

The CLC, comprising nine consumer bodies across Australia, is intended to provide a platform through which CIO and consumer representative organisations can formally consult and collaborate on matters in the EDR environment.

The CLC enables consumer representative organisations and CIO to:

- raise and discuss issues relevant to CIO's operations and the financial services industry generally,
- provide feedback on CIO's current work and proposed initiatives, and
- identify areas and opportunities where CIO and consumer representative organisations can focus resources to achieve better consumer outcomes.

Migrant communities

In terms of migrant access to CIO, CIO actively uses Translation and Interpreting Service when a person's first language is not English. Also, we distribute pamphlets translated into the most common languages spoken in Australia. Our complaint form and the basic information about CIO as appearing on our website are in 22 languages. We are developing videos in AUSLAN for our website. These videos will be subtitled into community languages as well.

Family violence

We are conscious of the effect of family violence on consumers needing access to EDR schemes. In these cases, we do not ask the consumer to provide us with information if it means putting them back in contact with the aggressor or alerting the aggressor to the complaint. We will first look at other ways of obtaining the information we require. For example, we may rely on a Statement of Financial Position prepared by a consumer even if it is not accompanied by supporting information if this means that the consumer can avoid having contact with the aggressor. Or we may ask and rely on the information the FSP will have received at the time of entering into a loan.

Reconciliation Action Plan

As an integral part of our accessibility and stakeholder engagement strategy, we are well advanced in developing a Reconciliation Action Plan to make CIO more accessible to Indigenous consumers.

Currently about 3% of our complainants identify themselves as Aboriginal or Torres Strait Islander. While this figure is proportionate to the wider Australian

population, we are concerned about consumers falling through the gaps of our outreach program.

Social, cultural and economic factors relevant to Aboriginal consumers mean they are at a higher risk of falling victim to predatory mis-selling. Furthermore, they may be disadvantaged by impaired literacy and numeracy skills, and can find it a challenge to obtain documentary evidence in support of their complaints.

Our staff participate in cultural appreciation workshops to ensure they are aware of issues or circumstances that may affect Indigenous consumers and their ability to make a complaint. This will enable us to meet their specific needs and process their complaints more effectively.

Next year we expect to launch our Reconciliation Action Plan which envisions a much closer collaboration with other organisations catering to the needs of Indigenous consumers, regular visits to communities in remote areas and a number of initiatives to further improve accessibility.

[Q16. How easy is it to use the EDR schemes and complaints arrangements process? For example, is it easy to communicate with a scheme?](#)

A complaint can be lodged with CIO online, by email, fax, post, in person and by phone. Our client services officers are available to explain our process and to assist consumers to complete complaint forms. Within 48 hours of receiving a complaint, we acknowledge receipt of the complaint, inform the FSP that a complaint has been made about it (and request the FSP not to commence or continue enforcement action while the complaint is open), and allocate the complaint to one of our case managers with expertise in the subject matter of the complaint.

A case manager has carriage of the complaint for as long as the complaint remains open. This means that consumers are not having to deal with different case managers over a period of time. The consumer is asked, at the time of lodging their complaint, to nominate their preferred means of contact.

Case managers are encouraged to use the phone as much as possible to update the parties, explain the strengths and weaknesses of each party's relative position and conciliate outcomes. Our experience indicates that many consumers relate better to having someone on the other end of the phone,

rather than having to read email or other communications. Case managers also phone consumers before the despatch of a written decision.

Decisions and recommendations are also always put in writing so as to limit the scope of any misunderstanding by consumers or FSPs. If a consumer is not happy with a decision, the consumer is invited to ask for the decision to be reviewed by the Ombudsman.

Consumers can also contact us through the Translation and Interpreting Service, and the National Relay Service.

Our case managers, almost all of whom are legally qualified, are able to articulate to consumers the relevant issues and causes of action in plain language, suggest possible remedies and explain what information is relevant to their complaint. They also inform both the consumer and the FSP of the relative strengths and weaknesses of their respective cases, keep them updated on the progress of our investigations and assist them through our process. Where possible, we will look to the FSP to provide us with information that the consumer may also have - consumers are often unable to locate documents which are required to make out their case.

Critically, the experience and active role played by our case managers ensures that consumers do not need to be legally represented in order to access and effectively navigate CIO. While that is generally recognised as a significant benefit for consumers, what is often less understood is the benefit this also provides our smaller members who often do not have in-house legal staff, and who may be less well-equipped to deal with or understand the implications of more complex complaints than larger institutions.

[Q17. To what extent do EDR schemes and complaints arrangements provide an effective avenue for resolving consumer complaints?](#)

Satisfaction levels

In the 2015/16 financial year, 61% of complaints received by CIO were resolved in the consumer's favour.²⁰

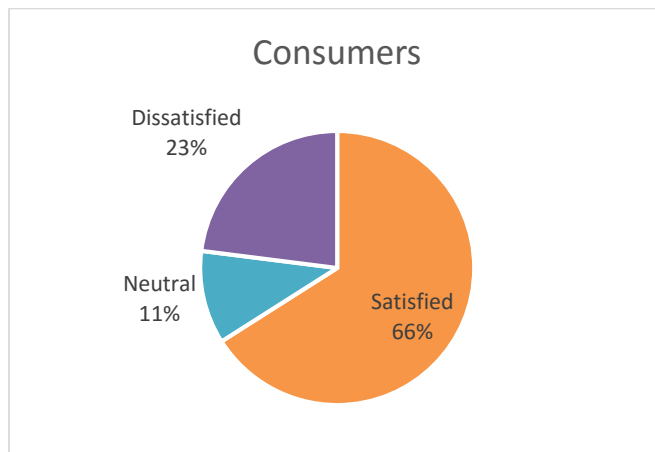
²⁰ 60.7% of complaints were resolved with the consumer and FSP agreeing to a mutually acceptable outcome. A further 0.5% were resolved by a formal written decision in the consumer's favour after a full investigation of the complaint.

Looking elsewhere overseas, for 2015/16 an average of 51% of complaints received by UK FOS were in the consumer's favour.²¹ For 2014/15, this was 40% for the Banking Ombudsman (NZ)²² and 56% for the Financial Services Complaints Limited (NZ).²³

FOS Australia appears to have a higher rate of complaints being resolved in the consumer's favour.

An accurate comparison of each scheme's proportion of favourable outcomes is impossible without knowing the criteria that each scheme has adopted because, as noted in our response to Question 38, each scheme has members of different sizes, who provide different services and products and who receive different types of complaints.

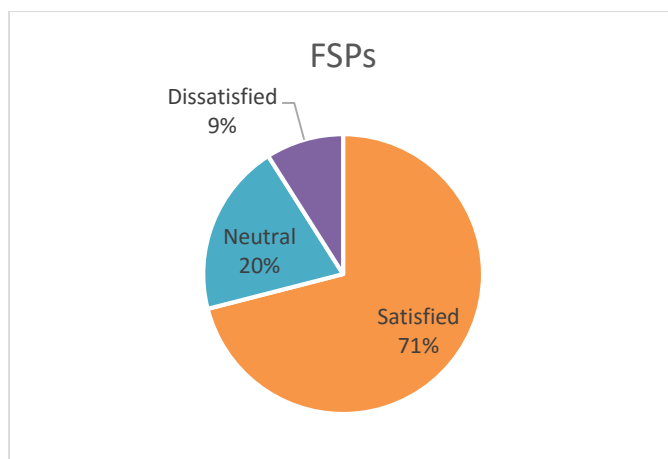
When a complaint is closed for whatever reason, CIO sends out a survey inviting the consumer and FSP to provide us with feedback. The results of the surveys for 2015/16 indicate that 66% of consumers and 71% of FSPs were satisfied with our services. This indicates that the majority of our FSP members were satisfied even when the outcome was in the consumer's favour.



²¹ This includes Payment Protection Insurance complaints. The 51% would presumably be markedly lower if these were excluded. Page 20: <http://www.financial-ombudsman.org.uk/publications/directors-report-2016.pdf>

²² https://bankomb.org.nz/ckeditor_assets/attachments/291/annual_report_2014-15.pdf

²³ http://www.fscl.org.nz/sites/all/files/FSCL_AR2015_Low_Res_final.pdf



Systemic issues

As an EDR scheme approved by ASIC and recognised by the OAIC, CIO is required to investigate any systemic issues or serious misconduct that we identify when dealing with complaints. These issues, which have the potential to cause widespread or serious harm, are managed separately to our standard complaints process.

In 2015/16, this important area of our work produced some valuable outcomes, both for consumers and for industry:

Number of Potential Systemic Issues opened	101
Number of Definite Systemic Issues	38
Number of Serious Misconduct	6
Number of Credit Listings amended	15 default credit listings were removed, with a further 50,000 credit listings recommended to be removed (yet to be actioned by FSP). 11 serious credit infringement listings removed.
Compensation paid to consumers	\$396,016.45 (for breaches of responsible lending obligations and charging amounts in excess of interest rate caps) So far this 2016/17 financial year, a further \$170,000 in compensation has been paid by an FSP because of its failure to provide consumers with adequate notice of interest rate variations.

Other outcomes:	<ul style="list-style-type: none"> • Changes to consumer credit contracts, • Changes to default notices, • Improvements to FSPs' complaints handling systems, • Improvements to FSPs' lending processes in line with responsible lending obligations, • Changes to Code-regulated disclosure documents, • Improvements to FSPs' financial hardship policies and procedures, • General improvements to FSPs' internal policies and procedures (for example, in one investigation the FSP agreed to stop referring consumers to a related pawn broker business after declining consumers' applications for small amount credit contracts), and • (In cases where the FSP did not co-operate with CIO), referral to ASIC on a named basis and/or expulsion from CIO (resulting in the subsequent cancellation of the FSP's credit license).
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Significantly, CIO amended its Rules to enable it to expel an FSP that fails to implement CIO's recommendations for the resolution of a systemic issue. This is a first in Australia, and provides a strong disincentive for any non-compliance with CIO's recommendations for consumer remediation.

We communicate the general trends and themes from our investigations to our stakeholders to promote transparency and accountability around our work.

Timelines

The time taken to resolve a complaint depends on:

- the complexity of facts and applicable law,
- the time taken by parties to provide information,
- the level of assistance consumer may require to articulate complaint or understand what's needed,
- the willingness of parties to engage in good faith,
- procedural fairness for both parties, and
- our overall workload.

CIO's timelines for 2015-16 are as follows:

Time taken	Number	%	Cumulative
Under 1 month	962	23.2%	23.2%
Over 1 but under 2 months	970	23.5%	46.7%
Over 2 but under 3 months	673	16.2%	62.9%
Over 3 but under 6 months	829	20.0%	82.9%
Over 6 but under 9 months	311	7.5%	90.4%
Over 9 but under 12 months	176	4.2%	94.6%
Over 12 but under 18 months	205	4.9%	99.5%
Over 18 but under 24 months	19	0.5%	100.0%
TOTAL	4,145	100%	-

These timelines include the period during which a complaint is being addressed 'internally' by the FSP in IDR.

We include the IDR period to be transparent and accountable in our reporting to stakeholders. As far as consumers are concerned, time starts running from the date they raise their complaint with the EDR scheme. It is of no consequence to them that the EDR scheme will refer the complaint to the FSP's IDR where the FSP has not had the opportunity to first address the complaint internally.

Further and perhaps more importantly, our timelines start from the time we receive a complaint, not from the time the complaint is first assigned to a case manager. We have not opted to allow complaints received to sit in a queue until it can be allocated to a case manager. CIO allocates every complaint it receives to a case manager within 48 hours of receipt.

Differences in timelines between Ombudsman schemes can also be attributed to differences in their respective membership bases. This has a direct effect on the nature of the complaints each scheme receives and the willingness and capacity of members to resolve them.

Most of CIO's members are challenged by resourcing issues, both in terms of responding to our requests and other correspondence and in their ability to make commercial decisions to settle. In many cases, the nature of the complaints against them is inherently difficult to resolve, whether because of the nature of the facts in dispute²⁴ or because the complaint actually challenges the member's business model.²⁵

Q18. To what extent do the current arrangements allow each of the schemes to evolve in response to changes in markets or the needs of users?

As noted in our response to Question 13 and earlier, we think the fact of operating non-statutory schemes according to a principles-based regime controlled by ASIC allows and encourages the schemes to evolve and respond to changing markets and needs.

The existence of two EDR schemes approved by ASIC to operate in the financial services sector has provided an excellent opportunity for each scheme to benchmark its performance against the other. As demonstrated repeatedly through the independent reviews of each schemes, this has produced better consumer and industry outcomes.

Without the stimulus of EDR benchmarking and a comparative discipline, turnaround times, service levels, innovation and continuous improvement would suffer and there would be less incentive to keep costs in check and run the scheme efficiently.

As noted in our response to Question 31, CIO was the first financial services EDR scheme to undertake a number of best practice initiatives, including, critically, dealing with financial hardship complaints and with complaints where legal proceedings had commenced.

The present two-scheme EDR model in Australia has therefore spurred productivity growth and created a self-sustaining process for continual reform

²⁴ For example, allegations of verbal misrepresentations about credit in a retail sales context are common in complaints about motor vehicle and other retail financiers (including consumer lease providers) and timeshare operators

²⁵ This is particularly true of most of our responsible lending and time share complaints

and reassessment. That process drives ongoing benefits for the sector and for consumers and small businesses.

Regulators are well placed to exploit the natural tension between the two EDR schemes to help drive innovation and improvements. This has provided ASIC with leverage and 'soft' influencing tools when selecting one EDR scheme's approach as their preferred position.²⁶

A single merged EDR scheme would be prone to being monopolistic in its behaviour – dictating terms, rather than being responsive to stakeholder concerns about performance.

Q19. Are the jurisdictions of the existing EDR schemes and complaints arrangements appropriate? If not, why not?

As noted in our response to Question 14, we think this is a very useful opportunity to consider extending EDR to some types of complaints – whether according to the amounts in dispute or the nature of the service provider – that currently fall outside the Rules of the existing schemes, the requirements of the law and/or RG 139.

Where EDR has been most successful, however, is where it is a component part of a broader regulatory regime. For example, the National Consumer Credit Protection Act (2009) imposes a licensing regime that makes EDR membership mandatory but also sets standards of conduct, prescribes disclosure obligations and gives consumers rights and protections that they can seek to benefit from by accessing EDR. We would encourage the panel to consider the substantive protections available to those who might take advantage of any expanded EDR jurisdiction, and whether it would be appropriate to recommend new or expanded protections alongside access to EDR. For example, should not small businesses have the same protections as consumers have under the National Consumer Credit Protection Act (2009)?

It is important, however, to ensure that the inherent limitations of EDR, or informal dispute resolution more generally, are not ignored or overlooked. We understand concerns raised in recent public commentary about the

²⁶ For example, see ASIC Consultation Paper 172: EDR jurisdiction over complaints when members commence debt recovery legal proceedings - Paras 5 and 10(b).

inaccessibility of the traditional court system, but it remains true that the nature and formality of the court process will continue to be the most appropriate manner of resolving some disputes, particularly larger scale and complex commercial disputes.

Q20. 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?

Our consistent experience is that only a small proportion of complaints to CIO involve amounts close to our monetary cap. The monetary limits are consistent with RG 139, and were set following extensive consultation by ASIC with a range of stakeholders. They are also indexed to ensure currency.

As previously stated, we think there is a point at which the amount in dispute means that a court will be the more appropriate dispute resolution forum. Nevertheless, CIO is currently considering increased monetary limits, particularly for small business complaints. We welcome the views of the panel on this issue.

Q21. Do the current EDR schemes and complaints arrangements provide consistent or comparable outcomes for users? If outcomes differ, is this a positive or negative feature of the current arrangements?

Both CIO and FOS have regard to the law, applicable codes of practice, good industry practice and fairness. These settings are consistent, and in accordance with RG 139. We are not aware of any evidence of inconsistent outcomes between the two schemes, or any reason why there would be inconsistent outcomes beyond the parameters of what the interpretation and application of law allow.

Like any legal adjudicator, there is room for different interpretation of the law – if that were not the case there would be no need for appellate jurisdictions or a final determination by an authority such as the High Court. CIO's process essentially operates as its own appeals process, with the opportunity for both parties to escalate a complaint through to a final Determination, which even at that point is binding only if accepted by the consumer.

The publication of decisions and other guidance has created clarity and a quasi-jurisprudence for users of both schemes, which also assists to promote consistency of outcomes.

While EDR decisions do not have precedent-setting effect it is important that EDR, like any form of dispute resolution, is reasonably predictable in the outcomes it produces.

We have a number of mechanisms in place to ensure consistency of approach to the complaints we receive. Our complaints managers receive centralised training, we have developed an extensive knowledge manual, the teams and team leaders meet regularly to discuss new and current matters, novel or unusual issues are escalated to the Ombudsman or Deputy Ombudsman for consideration, and key decisions are circulated to all relevant case managers to provide guidance and direction.

We also have a separate Risk and Compliance team that, among other things, conducts regular audits of cases and provides feedback to senior staff and case managers.

To the extent that the schemes have differed in their approach to certain matters from time to time, this has invariably led to better outcomes for consumers and scheme members. For example, CIO (or COSL as it then was) decided to accept complaints about financial hardship, based on a different approach to the hardship protections in the old Uniform Consumer Credit Code to that of the then-Banking and Financial Services Ombudsman. In time, both schemes began dealing with such complaints which now make up a significant proportion of our respective complaints intake.

[Q22. Do the existing EDR schemes and complaints arrangements possess sufficient powers to settle disputes? Are any additional powers or remedies required?](#)

We can make decisions that are binding on our members. While FOS in particular has experienced a growing issue with unpaid Determinations, we think that is an issue leading to consideration of a last-resort compensation scheme, rather than one requiring any additional powers for the EDR schemes.

It is important to note that any move to increase the powers of EDR schemes needs to be measured against the objectives of EDR, namely to resolve disputes fairly, cheaply and expeditiously.

Q23. Are the criteria used to make decisions appropriate? Could they be improved?

Our view is that the current criteria are appropriate. We deal with complaints having regard to the law, applicable codes of practice, good industry practice and fairness in all the circumstances. Fairness is increasingly a concept becoming enshrined in law, and informs interpretation of the law, and it is appropriate that it explicitly be a factor which we consider.

Q24. What are the advantages and disadvantages of the different governance arrangements? How could they be improved?

Each ASIC-approved EDR scheme is required to have equal numbers of consumer and industry directors on their Board and an independent Chair.²⁷ It follows that an essential avenue for consumer and FSP input into regulatory processes is through participation as representatives on the management boards of different schemes. The fewer schemes, the less are the opportunities for such important input.

We think the existing governance arrangements work well, but will be interested in the views of stakeholders and the panel on this important question.

Q25. Are the current funding and staffing levels adequate? Is additional funding or expertise required? If so, how much?

An ASIC-approved EDR scheme's Board is required to monitor whether, and ensure that, the scheme is adequately resourced to carry out its functions. This includes monitoring how the scheme manages its caseload over time. A consideration of resourcing must include provision to assist complainants to lodge their complaints.²⁸

²⁷ ASIC's RG 139.94

²⁸ ASIC's RG 139.88(a), 139.100 and 139.101

CIO's funding requirements vary from year to year depending on, among other things, the number of complaints it anticipates it will receive in a given year, the projected staffing levels required for the following year, any IT, outreach or other projects it considers is necessary to undertake, any likely increase in fixed costs (salaries, rent) and the need for specialist services from time to time.

We consider that our present funding levels are appropriate and adequate to carry out our functions.

The Issues Paper is correct in saying that around 70% of CIO's funding comes from membership fees. This not only means that our funding is more stable overall (in terms of limiting the effect of any potential volatility in complaint volumes), but it also means that our case managers are not incentivised to unnecessarily escalate claims to generate revenue.

The difference in CIO and FOS' funding models (70% of CIO's overall funding comes from membership fees while 75% of FOS' funding comes from case fees) may also be explained by the fact that CIO received 4,760 complaints in the 2015/16 financial year compared to FOS's 34,095.²⁹

We do not agree with the suggestion in the Issues paper that CIO's funding model 'may provide less incentive to settle or reduce the volume of disputes'. We would challenge the assertion that financially incentivising the settlement of complaints without regard to merit is an appropriate approach to complaints resolution.

The overwhelming majority of complaints we receive are closed at the earlier stages of our process, but for those that progress to the later stages, higher case fees are payable.

Under our tiered case fee structure,³⁰ FSPs will pay less case fees if:

1. the consumer and FSP reach a mutually acceptable outcome at the earlier stages of our process, or

²⁹ Page 4 <http://fos.org.au/publications/flipbooks/annual-review/2015-2016/index.html#page=1>

³⁰ Our fee schedule is available at: [http://www.cio.org.au/cosl/assets/File/CIO%20service%20fee%20schedule%202016-2017\(5\)\(3\).pdf](http://www.cio.org.au/cosl/assets/File/CIO%20service%20fee%20schedule%202016-2017(5)(3).pdf)

2. the FSP is able to provide us with sufficient information at the earlier stages of our process to show that the consumer's claims have no merit.

Conversely, FSPs pay more case fees if complaints progress to the later stages of our process because:

1. the FSP declines to settle a meritorious complaint, or
2. the complaint is more complex and requires extensive investigation.

We acknowledge there will be instances where FSPs may feel inclined to make commercial decisions to settle complaints that have no merit. However, we think a tiered case fee structure like ours is necessary to strike an appropriate balance between providing an incentive for FSPs to make sensible decisions about settling meritorious complaints early while not feeling financially blackmailed into settling unmeritorious complaints.

As to staffing, our primary consideration when setting our funding levels is to ensure that our case management team (including systemic issues investigations) is adequately staffed to deal with the complaints we receive. Staffing levels are determined by considering:

1. the appropriate caseloads that will allow our staff to deal with complaints and systemic issues in a quality and timely manner,
2. the number of staff we need to deal with the set caseloads, and
3. any anticipated changes in the volume of complaints we receive.

When setting our funding levels, we also consider the resources required to carry out our other functions like consumer awareness building, stakeholder engagement, maintaining our website, publishing guides for stakeholders, internal training and knowledge management, and internal audits.

As complaint volumes may fluctuate, we temporarily divert resources between our case management, systemic issues investigations and compliance teams as and when the need arises. The staff in these teams have similar knowledge and skill sets.

Almost all our Case Managers are lawyers. This is a deliberate strategy so we have people who understand the law and its application, who can identify the causes of action that may give rise to a valid claim, can understand the respective merits of different claims, can communicate clearly and effectively and can act decisively.

We consider that our present funding levels are appropriate and adequate to carry out our functions.

Q26. How transparent are current funding arrangements? How could this be improved?

Any individual or firm that is a holder of an Australian Financial Services licence or an Australian Credit licence (or is a credit representative of an Australian Credit licensee), is legally required to be a member of an ASIC-approved EDR scheme. ASIC requires CIO and other approved EDR schemes to provide their services to consumers without charge to them.³¹

It follows that members of these EDR schemes bear the entire operating cost of the schemes. It is therefore incumbent on ASIC-approved schemes to be both transparent in their disclosure of their fees and mindful of the cost to industry.

In the case of CIO, FSPs pay:

- a one-off application fee,
- an annual membership fee,
- complaint fees, but only if CIO receives a complaint about the FSP, and
- a fixed fee for systemic issues investigations.

CIO publishes all membership and complaint fees in full on its website,³² except for the membership fees of its largest complaint-generating members.

We use a variable cost model to calculate the membership fees of our largest complaint generating members. Under the variable cost model, the appropriate membership fee is arrived at by deducting the estimated complaint fees payable

³¹ ASIC's RG 139.47 and 139.49

³² [http://www.cio.org.au/cosl/assets/File/CIO%20service%20fee%20schedule%202016-2017\(5\)\(2\).pdf](http://www.cio.org.au/cosl/assets/File/CIO%20service%20fee%20schedule%202016-2017(5)(2).pdf)

by the member for the year (based on the estimated number of complaints and the stages at which these would typically close, using historical data) from our costs in having to deal with these complaints (essentially, the salaries of the case managers that will deal with these complaints).

Our estimate of the complaint fees for a large complaint-generating FSP is, therefore, unique to that FSP (based, as it is, on the FSP's particular complaint profile). Consequently, we are not able to disclose on our website the membership fees for our large complaint-generating FSPs (as a dollar value). Further, given the variables referred to above, it is not possible for CIO to have a 'calculator' on its website that allows a large complaint-generating member to work out its membership fee for the following year.

This variable cost model is designed to ensure some level of cost recovery; that is, the total income we receive from these large complaint-generating members (in the form of membership and complaint fees) is not less than the cost we incur in dealing with the complaints generated by them. This ensures that CIO will not be financially disadvantaged if a large complaint-generating member resigns from membership – the reduction of income will be offset by a corresponding reduction in CIO's costs.

The rationale for the variable cost model is that CIO members who do not receive any complaints, or who only receive a small number of complaints, should not have to bear CIO's increased costs in having to service a large complaint-generating member. Since February 2007, all licensee members of CIO are entitled to one free complaint each membership year which can be used to offset the complaint fees that would normally apply to a complaint heard by CIO. This is intended to mitigate the cost of EDR membership for our smaller members in particular.

The other benefit of the variable cost model is that, if a member is able to reduce the number of complaints we receive about them, there will be a reduction in their complaint fees (in the current year) and a corresponding reduction in their membership fees in the following year. This provides a strong incentive for CIO's members to resolve complaints before they reach us.

We understand that the complaints fees charged by CIO and FOS are comparable. In other words, neither scheme competes on price.

Q27. How are the existing EDR schemes and complaints arrangements held to account? Could this be improved?

Oversight

CIO and its Rules and processes are subject to rigorous oversight by ASIC and the OAIC. ASIC ensures our compliance with RG 139 on an ongoing basis, and our five-yearly independent reviews add another level of assurance and arms-length feedback.

We operate in a very transparent manner, publishing decisions, guidance, case studies, position statements, fact sheets, FSP and Consumer Newsletters and a detailed Annual Report on Operations. We engage and actively seek feedback from scheme users, including our FSP members and consumers through our Consumer Liaison Committee and regular meetings with consumer advocates from a range of agencies.

Our Board, with equal representation of Directors representing consumer and member interests, with an independent Chair, is a final and important layer of accountability.

Our response to this Question 27 applies equally to the following questions in the Issue Paper:

41. If a 'one-stop shop' in the form of a new single dispute resolution body were desirable: should it be an ombudsman or statutory tribunal or a combination of both?
42. Would the introduction of an additional forum, in the form of a tribunal, improve user outcomes?

Both of these reforms would be counter-productive for consumer outcomes, as well as for the Benchmark values of fairness, effectiveness and efficiency.³³ They would fundamentally change how financial services EDR operates in Australia

³³ These are also incorporated into ASIC RG139-Approval and oversight of external dispute resolution schemes (April, 2011)

and would, over time, undo much of the good work and progress which the sector has achieved for Australian consumers and small business.

Judicial review

One way in which EDR schemes can be held to be accountable is for them to be subject to an appeals mechanism (either by their replacement with a statutory ombudsman scheme or the imposition of an appellate tribunal above the EDR schemes). However, this would severely undermine the role of EDR as an alternative to the courts and the ability of a scheme to offer informal, low cost and accessible dispute resolution.

A decision of CIO or FOS is open to judicial review where the scheme:

- (a) goes outside its jurisdiction and is ultra vires,
 - (b) decision under review was so irrational and without foundation that no properly informed decision-maker could have made it, i.e. the so-called '*Wednesbury*' principle,³⁴
 - (c) decision makers are guilty of proven dishonesty or bias, or
 - (d) breaches the contract between the scheme, its members and complainants as formed by its constitution, rules or terms of reference.
- These also embody the principles of natural justice in determining disputes.

While that may seem unduly limited, and this Review may hear calls for EDR decisions to be open more generally to appeal, it is a critical part of protecting the special nature of EDR, its ability to offer informal, low cost and accessible dispute resolution. While there is room for poor decisions in isolated cases, provided the schemes are adequately resourced to ensure quality staff in complaints-handling roles, and recruit and retain good quality decision makers, that risk is very low and appropriate in the circumstances. Any persistent failures will invariably be identified and rectified.

A more detailed examination of judicial review of EDR decisions is set out in the Appendix to this submission.

³⁴ Named for the case of *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223

Q28. To what extent does current reporting by the existing EDR schemes and complaints arrangements assist users to understand the way in which the scheme operates, the key themes in decision-making and any systemic issues identified?

CIO publishes extensive information about its operations in a variety of forms, including our Annual Report on Operations, Decisions, Case Studies and Position Statements, all of which are available on our website. We have regular newsletters that are sent to FSP and consumer subscribers, that provide updates about our activities and links to new materials.

We meet regularly with our larger members and those that generate higher numbers of complaints, to discuss the issues we are identifying and our progress on current matters.

We also meet regularly with consumer representatives, both with individual agencies and through our Consumer Liaison Committee. In addition, we regularly attend and present at events such as financial counselling conferences to ensure that case workers hear from and about us and understand how they and their clients can utilise our services.

Q29. What measures should be used to assess the performance of the existing EDR schemes and complaints arrangements?

We suggest that the measures accord with the principles (as amended if necessary) set out in paragraph 11 of the Issues Paper (see our response to Question 2). As noted earlier, the challenge will be to balance often competing goals (low cost, high quality, fast) and interests (members, complainants and other scheme users), and an assessment of the performance of the existing schemes is ultimately an assessment of how well they have managed that balance.

Gaps and overlaps in existing EDR schemes and complaints arrangements

Q30. To what extent are there gaps and overlaps under the current arrangements? How could these best be addressed?

Investment advice about property

The most evident gaps in the current EDR frameworks arise from the legislative frameworks on which we rely. To give an example, we can deal with complaints about investment advice, but not about advice relating to investment in real property because this is an unregulated activity and so not a financial service for the purposes of our Rules (or mandatory EDR membership). While there may be compelling policy rationales for that position, for the consumers of that advice it appears an arbitrary and irrelevant distinction, and one that can be difficult to explain to someone who is facing significant losses.

Credit repair and debt management

While not so much a gap or overlap, the fact of EDR being free to complainants but attracting case fees for members, has been exploited by some for-profit third party representatives, who utilise EDR as leverage to obtain a desired outcome rather than as a vehicle to determine the merits of a genuine dispute.

While this does not characterise all complaints from these sectors, there is no doubt that some for-profit entities providing credit repair and debt management services are heavily reliant on FSPs removing a credit listing or otherwise meeting the demands of the represented consumer simply in order to avoid the proportionately significant cost of defending a legitimate listing through the EDR process.

These are undesirable outcomes for all – for the integrity of the credit reporting system, for the FSP and for the consumer who will pay significant amounts of money for a service that either should not be provided or should be provided at no cost.

CIO has engaged with industry and consumer stakeholders on this issue, however the solution to the identified problem is not clear. One step we have taken is to ban third party representatives where there is evidence that they are not in fact working in the consumer's best interest, and to date we have banned

three entities on this basis and deal directly with the relevant consumers instead. We recognise that it is by no means a complete response to the issue, but it demonstrates our commitment to doing what we can in response to it.

Fraud

Finally, complaints involving fraud are generally not able to be determined through a traditional EDR process due to the nature and scope of the EDR terms of reference and processes. The advantages of those processes compared to court proceedings may be lost because different standards of proof and evidence will, necessarily, be required in the consideration of fraud claims.³⁵

Q31. Does having multiple dispute resolution schemes lead to better outcomes for users?

While a proliferation of EDR schemes may not be ideal, CIO is of the firm view that the current arrangements offer better outcomes for consumers.

Scheme benchmarking

Having two ASIC-approved EDR schemes allows each scheme to benchmark their performance against the other (scheme benchmarking), and this produces better consumer and industry outcomes.

This is typical of a 'co-regulatory' approach to regulation where government sets out broad principles and goals and industry, together with other stakeholders, such as the organised consumer movement, work together to produce the ways and means of achieving them.³⁶ Although RG139 is quite detailed, it, and the Benchmarks, are set out as 'principles' which allow for a degree of flexibility for their achievement. Flexibility does not mean laxity and ASIC has demonstrated that it will refuse its approval for proposed EDR schemes that, in its view, do not meet the Benchmarks.³⁷

³⁵ *Briggenshaw v Briggenshaw* (1938) 60 CLR 336

³⁶ Ian Ramsay, "Consumer Law, Regulatory Capitalism and the New Learning in Regulation" (2006) 28(1) *Sydney Law Review* 9-35 at p 12; Julia Black, "Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World" (2001) 54 *Current Legal Problems* 103, particularly at p 106 and by the so-called 'Australian school of regulation', Christine Parker, Colin Scott, Nicola Lacy and John Braithwaite (eds) *Regulating Law* (Oxford University Press: 2004)

³⁷ *Australian Timeshare and Holiday Ownership Council Limited v Australian Securities and*

The benefits of this approach have been well documented. As Prof Julia Black says: 'Government has insufficient knowledge to be able to identify the causes of problems, to design solutions that are appropriate and to identify non-compliance.'³⁸

Setting out broad principles and requiring industry and its consumer stakeholders to find the solutions not only fills these gaps in knowledge but provides better motivation for compliance by industry participants. If there is only one conduit to government for such information and opinion about dispute resolution and other market developments, through one monopolistic dispute resolution agency, then quality of input into the regulatory process will be diminished.

Indeed, the independent and periodic reviews of EDR schemes compare each of the schemes, and in doing so, recommend one scheme implement particular improvements seen in the other.³⁹ This can only raise best practice in EDR. It cannot be achieved under a single EDR scheme model.

Innovation

The innovations and improvements resulting from scheme benchmarking directly and empirically contradict any suggestion that multiple schemes might engage in a 'race to the bottom'.

CIO was the first EDR scheme to undertake a number of best practice initiatives:

- dealing with financial hardship complaints, even in relation to non-regulated loans (this major reform led to a major change in the case profiles of both CIO and FOS - financial hardship complaints now make up 21% and 30% of disputes with CIO and FOS, respectively),
- requiring an FSP to discontinue or not commence enforcement action while the complaint is open with CIO,

Investments Commission [2008] AATA 62

³⁸ Black ibid

³⁹ See, for example, FOS' Independent Review 2013, pages 25 (para 3), 39 (para 3), 44 (last para), 60 (second last para), 75 (para 5), 76 (para 3), 132 (last para) and 133 (second last para): <https://www.fos.org.au/custom/files/docs/independent-review-final-report-2014.pdf>

- dealing with financial hardship complaints even when legal proceedings have commenced,
- dealing with complaints received after default judgment has been entered in certain circumstances,
- reviewing fees and charges (rather than relying on the FSP's 'commercial judgement' exemption), and
- effectively managing credit repair firms and debt management companies that take advantage of vulnerable and disadvantaged consumers.

More recently, CIO amended its terms of reference to enable it to expel an FSP who fails to implement CIO's recommendations for the resolution of a systemic issue.

Indeed, CIO's Independent Review concluded that CIO 'has been an innovator and policy leader in the area of consumers confronting financial hardship and has developed its own very successful approach to dealing with financial hardship complaints'⁴⁰ and that 'there is no doubt that CIO has done some fine work for consumer rights and has in some cases been bolder than others in acting in the public interest'.⁴¹

Competition among Ombudsmen

There are some who take the position that there should be no competition at all between ombudsmen in the same industry sector. They go so far to say that 'financial services' as whole should only have one EDR scheme to prevent the perceived drawbacks of competition.⁴² This position not only ignores many of the benefits of the 'competition of ideas' which the current arrangements foster, as discussed above, it misconceives the nature of industry-based EDR.

Those who argue that an industry-based EDR scheme is a 'natural monopoly'⁴³ ignore the constitutional position, namely that the only appropriate monopoly for dispute resolution is that enjoyed by the Courts and the practical reality that

⁴⁰ Page 4:
[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)

⁴¹ Page 13:
[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)

⁴² http://www.anzoa.com.au/assets/anzoa-policy-statement_competition-among-ombudsman-offices.pdf

⁴³ *ibid*

EDR, and ADR generally, are growing as the preferred means of resolving disputes in preference to the Courts.⁴⁴

Granting one single scheme, whether statutory or not, a monopoly over financial services dispute resolution would render it more 'court like' than any of the current schemes. EDR schemes are not and should not be like courts. They do not determine rights. They resolve disputes. They achieve such resolutions by a variety of means most of them non-adjudicative and consensual.⁴⁵ It is their very flexibility and independence from the Courts that enhances their capacity to respond to changes in markets and to achieve outcomes for consumers which are fair and reasonable, influenced but not hidebound by black letter law.

A plurality of agencies which satisfy the benchmarked criteria developed independently by the regulator allows for numerous sources of policy and interpretative development. Consumer law and consumers can only benefit from such a situation.

The alternative, a monopoly of dispute resolution services facilitates the re-emergence of the failures of old-style regulation, bureaucracy, inflexibility and industry capture. Enforcing a monopoly for external dispute resolution services on an industry makes that body more like a state-centred agency exercising public power. Its decisions will be more likely subjected to full judicial review.

As discussed elsewhere in this submission, that will be a very bad outcome for consumers and FSPs.

⁴⁴ Sir Laurence Street, "Mediation and the Judicial Institution" (1997) 71 Australian Law Journal 194 at p 195; Paul O'Shea and Charles Rickett, "In Defence of Consumer Law: The Resolution of Consumer Disputes" (2006) 28(1) Sydney Law Review 139 -169 at 149

⁴⁵ O'Shea and Rickett, *ibid* at p 151

Q32. Do the current arrangements result in consumer confusion? If so, how could this be reduced?

There is no evidence either here in Australia⁴⁶ or in the United Kingdom⁴⁷ prior to the *Financial Services and Markets Act* which established the UK FOS, of consumer confusion as to which service they should take their complaints.

Even prior to the establishment of UK FOS, which brought together eight of the existing industry based schemes, the ‘...empirical evidence that consumers were confused by the multiplicity of regulators was conspicuous by its absence.’⁴⁸

In Australia, consumer confusion is nowhere evident because:

- (a) ASIC’s Regulatory Guides 139 and 165 require FSPs to notify their clients of the EDR scheme to which they belong,⁴⁹
- (b) many of the prescribed documents which legislation requires to be sent to consumers must set out the contact details of the EDR scheme of which the FSP is a member,⁵⁰
- (c) each scheme’s website has a comprehensive search function identifying whether the FSP being complained about is a member of the scheme, and
- (d) finally, even if a consumer approaches the wrong scheme, both CIO and FOS have a ‘no wrong door’ policy – each scheme will transfer phone calls to the other when an inquiry has been misdirected and, under a Memorandum of Understanding between CIO and FOS, each scheme transfers complaint files to the other in the rare event of an incorrect lodgement.⁵¹

⁴⁶ <http://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer2.pdf>. While the Productivity Commission Report refers at Vol 2 p 158 to ‘feedback from ASIC’ in support of the possibility of consumer confusion, the ASIC Submission to the Inquiry only refers to feedback from ‘consumer advocates’ with no empirical evidence. None of the submissions by consumer organisations to the Productivity Commission Inquiry has any empirical evidence of such consumer confusion. Indeed, only one, that of the Consumers Federation of Australia, addresses the issue at all calling for a ‘single entry point’ but not, necessarily, a single scheme.

⁴⁷ R James and P Morris P, ‘The new Financial Ombudsman Service in the United Kingdom: has the second generation got it right?’ in C Rickett and T Telfer, *International Perspectives on Consumers’ Access to Justice* (Cambridge: CUP, 2003), at p 157

⁴⁸ James, R and Morris, P *ibid*

⁴⁹ RG 139.6, 139.9 and 139.19 - <http://download.asic.gov.au/media/1240742/rq139-published-13-june-2013.pdf>, RG 165.91, 165.97 and 165.107 -

<http://download.asic.gov.au/media/3285121/rg165-published-2-july-2015.pdf>

⁵⁰ National Credit Act 2009. In relation to financial hardship: sections 72(4)(b)(iii), and 177B(4)(b)(iii); in relation to enforcement proceedings: 88(3)(g) and 179D(2)(f); and in relation to Credit Guides: sections 126(2)(e)(ii), 149(2)(e)(ii), 113(2)(h)(ii), 136(2)(h)(ii), 127(2)(e)(ii), 150(2)(e)(ii), 158(2)(h) and 160(3)(f)(ii).

⁵¹ <http://www.cio.org.au/cosl/assets/File/MOU-between-COSL-and-FOS-Securitisation-Only.pdf>

As the Australian Productivity Commission itself notes, 'the biggest risk of consumer confusion arises when they (consumers) complain about a credit provider who is not a member of any service.'⁵² That is a matter for coverage not convergence.

Q33. How could concerns about insufficient jurisdiction with respect to small business lending (including farming) disputes be best addressed?

As we see it, there are possibly two options.

The jurisdiction of CIO and FOS could be expanded to better cover small business disputes. We understand that FOS is presently consulting with industry and others as to its proposed new monetary limits. CIO, as a matter of consistency, will be adopting the same or substantially similar monetary thresholds.

As noted in our response to Question 19, however, merely expanding the jurisdiction of the EDR schemes without considering the substantive protections in place for potential beneficiaries of an expanded jurisdiction may not deliver intended benefits. It is important to understand what right or protections small businesses will have at the same time as considering how best to ensure those protections are accessible.

We also appreciate, however, the limitations of EDR schemes insofar as they cannot:

- subpoena documents,
- verify discovery by affidavit,
- summon witnesses,
- administer oaths,
- cross-examine witnesses on the statements or documents they have given,
or
- investigate criminal fraud.

These limitations may, in the given circumstances, inhibit the ability of an EDR scheme (with expanded monetary caps) to properly and fairly deal with a small

⁵² Vol 2, Page 207: <http://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer2.pdf>

business complaint. It may well be that the scheme will be an inappropriate forum in these circumstances and the complaint would be better heard in court.

About 7% of all complaints we receive are from small businesses. For 2015/16, the credit amounts for the small business complaints were:

Credit amount	Total	%	Cumulative
Up to \$100,000	245	76%	76%
Over \$100,000, up to \$500,000	44	14%	90%
Over \$500,000, up to \$1m	18	6%	96%
Over \$1m, up to \$2m	5	2%	97%
Over \$2m, up to \$3m	6	2%	99%
Over \$3m, up to \$4m	2	1%	100%
Over \$4m	1*	<1%	100%
Total	321	100	-

* Credit amount was \$14.3 million

The average loan size was \$285,982.

As illustrated in the table above, the nature of CIO's membership base is such that 97% of small business complaints are in relation to loans that do not exceed the existing schemes' monetary cap of \$2m.

The top 5 small business complaint issues were:

Issue	% of small business complaints
Collections activity	22.0%
Hardship	14.7%
Credit reporting - mostly default information	12.2%
Fees or interest	7.0%
Misrepresentation/misleading conduct	6.6%

In relation to inappropriate finance and unfair contract terms:

Issue	% of small business complaints
Inappropriate finance (including responsible lending)	3.5%

Unfair contract terms	1.7%
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The second option is for the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) to be given jurisdiction to adjudicate and make binding decisions in relation to small business disputes. The jurisdiction could be triggered by any claim in excess of the schemes' existing monetary caps. It would be necessary, however, for the ASBFEO to be stripped of any advocacy role it may have given this is inconsistent with the fundamental principle that financial ombudsman schemes should be impartial and demonstrably independent of both the financial industry and consumer bodies.⁵³

We discuss this further in our response to Question 43 of the Issues Paper.

Q34. What impact will the extension of the unfair contracts legislation to small business contracts (once operational), or other recent or proposed reforms, have on the existing EDR schemes and complaints arrangements?

Any extension or addition to the legal rights and protections of consumers of products and services offered by entities that are members of an EDR scheme will result in additional complaints to EDR. We don't consider that the extension of unfair contract terms legislation to small business will have a significant impact, but will monitor the situation.

In some cases, reforms may require EDR schemes to acquire or develop new skills. We have for example, recruited an experienced credit assessor to assist our lawyers when dealing with complex responsible lending complaints. The ability to add to the skill set of a dispute resolution body is an important feature of EDR.

⁵³ International Network of Financial Services Ombudsman Schemes: Effective approaches to fundamental principles guide <http://www.networkfso.org/independence.html>

Triage service

Q35. Would a triage service improve user outcomes?

Although information about the existence of EDR (and other Ombudsman) services is promoted as widely as possible, the reality is that ombudsmen do not have the resources to reach the whole community and often have to rely on referrals from intermediaries and other organisations.⁵⁴ This is despite the fact that most schemes already have outreach programs to increase community awareness and publish information about their schemes on complaints and consumer information websites, with service providers often providing information on their websites and in correspondence to consumers.

Referrals between ombudsmen and other complaint bodies are therefore common. For example, the Victorian Ombudsman used 13% of their complaints-handling resources to redirect complaints that were not within its jurisdiction — almost half of all calls in 2012-13.⁵⁵ In terms of enquiries, CIO refers 16% of enquiries to FOS and a further 2% to other Ombudsman schemes.

According to the Australia and New Zealand Ombudsman Association:

“Referral of out-of-jurisdiction matters is an established part of the role of all Ombudsman offices. Where someone contacts an Ombudsman office and the office cannot assist, the person is provided with detailed contact information for an appropriate dispute resolution service — be that another Ombudsman, Fair Trading or Consumer Affairs, a tribunal or court, or another body.”⁵⁶

A common entry point or triage service, if widely publicised to the general public, would allow a consumer or small business to call a single phone number or visit a dedicated website and enquire as to the most appropriate body to assist them. It would be a ‘gatekeeper’ service - a service that consumers can approach when they have a problem. The enquiries need not be limited to financial services. This would be a vast improvement on the present situation: a significant number

⁵⁴ Page 330: <http://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-volume1.pdf>

⁵⁵ Page 330: <http://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-volume1.pdf>

⁵⁶ Page 330: <http://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-volume1.pdf>

of consumers are not aware of the existence of a relevant ombudsman scheme or support service.

A common entry point need not mean a single integrated scheme handling all complaints. In the Commonwealth context, for example, ASBFEO is presently charged with, among others, being 'a concierge to help smaller businesses with issues, complaints and disputes find the best organisation to deal with their complaint....'

CIO believes that a consumer-facing common help desk funded by EDR schemes - essentially an online and telephone access point – would substantially improve user outcomes. It would be able to:

- assist consumers and small business at first instance by providing them with information about how to pursue a complaint with a business,
- where appropriate, to refer the consumer or small business to specialist services (eg. financial counsellors, consumer legal services⁵⁷ or Lifeline),
- the common help desk could also register the complaint, if appropriate, and
- importantly, direct the consumer or small business to the appropriate EDR scheme, government department like Centrelink, the ASBFEO, financial counsellors, community legal centres, Legal Aid, State Fair Trading Offices, Government Ombudsman bodies, interpreter services, Law Societies, regulators such as ASIC, OAIC and ACCC, and even peak industry bodies or self-regulating bodies. The referrals would include providing appropriate contact details, including phone numbers.

Some funding would be needed to establish and maintain the common helpdesk, but this would be at the cost of the EDR schemes.

Q36. If a 'one-stop shop' in the form of a new triage service were desirable:

- who should run the service?
- how should it be funded?
- should it provide referrals for issues other than that related to the financial firm?

⁵⁷ EDR schemes are not intended, designed or equipped to provide financial or legal advice

The triage service could be run either:

- (a) out of one of the existing EDR schemes on behalf of all participating schemes, with each participating scheme funding the cost of running the service in proportion to the volume of their enquiries and complaints, or their size, or
- (b) by a separately incorporated body funded directly by participating schemes in proportion with the volume of their enquiries and complaints, or their size.

The appeal of the triage service is that, depending on the nature of the issues presented, it could be tasked with referring consumers and small businesses to appropriate forums, even those outside the finance sector.

Q37. Should it be left for industry to determine the number and form of the financial services ombudsman schemes?

Because industry is compelled by law to join and fund the operation of EDR schemes, the views of scheme members are critical and must be given due weight. We are mindful that many CIO members are small businesses such as mortgage brokers, who have expressed concerns about being forced into a single scheme. Many of their concerns relate to the 'fitness for purpose' of such a scheme, and the fact that dealing with large financial institutions such as the major four banks is very different to dealing with a small mortgage broker.

Against this must be balanced the interests of consumers in terms of accessibility at no cost and without legal representation, although the interests of industry and consumers are not necessarily incompatible with innovation, impartiality and quality-decision making.

Q38. Is integration of the existing arrangements desirable? What would be the merits and limitations of further integration?

We do not consider that the integration of the existing arrangements would be desirable.

There is ample evidence to demonstrate that having two ASIC-approved EDR schemes has allowed each scheme to benchmark its performance against the other, and in doing so, both schemes strive to improve their performance and

meet best practice.

Any duplicity of functions has little, if any, relevance in the present context given CIO and FOS operate in relatively distinct markets and there is little, if any, overlap in their respective memberships. FOS' members are from the big end of town, while CIO's are from the small end of town and comprise almost whole industry sectors. So for example, CIO's membership includes almost all (or the overwhelming majority of) building societies, securitisation servicers, lenders mortgage insurers, non-bank lenders, mortgage managers, aggregators, debt purchasers, finance brokers, small amount lenders and time share operators. This has allowed CIO to develop specific expertise in these areas.

The usual argument that mergers can provide synergies and generate economies of scale is not persuasive in this context. There is no evidence to suggest that the existence of two or more schemes adds unnecessary and inefficient costs to EDR services in the form of inefficient duplication of infrastructure, resources, services or information systems.

Indeed, the Australian experience has been to the contrary and, as the Productivity Commission concluded, after examining the cost per contact/case/dispute reported by each scheme, the differences 'do not appear to be scale-related', suggesting that physical consolidation might not yield big scale benefits or, perhaps, none at all.⁵⁸

Furthermore, on reviewing the merger of the five EDR schemes into FOS in 2008, the Productivity Commission suggested in its draft Report that 'present sharing of fixed overheads' may have brought about such efficiency benefits as can be achieved and, therefore, further consolidation may not produce much more⁵⁹.

Any proposal to merge the schemes fails to adequately recognise the benefits of having two or more distinct EDR schemes in the sector. It also belies the fact that the merger of five EDR schemes⁶⁰ into FOS more than seven years ago has not produced the efficiencies anticipated. Indeed, the recent independent review

⁵⁸ Productivity Commission's Review of Australia's Consumer Policy Framework, page 207 - <http://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer2.pdf>

⁵⁹ Productivity Commission's Draft Report 'Inquiry into Australia's Consumer Policy Framework and its Administration, Vol 2 page 159. The draft report is not available online.

⁶⁰ The Banking and Financial Services Ombudsman Limited (BFSO), the Financial Industry Complaints Service Limited (FICS), the Insurance Ombudsman Service Limited (IOS), the Credit Union Dispute Resolution Centre Pty Limited (CUDRC) and the Insurance Brokers Disputes Limited (IBDL).

of FOS by CameronRalph Navigator described the merger-related activities as 'productivity-sapping'.⁶¹

A consolidation of the two remaining ASIC-approved EDR schemes will mean that FSPs, who are legally required to join an EDR scheme and fully meet the scheme's operating costs, will have no choice as to which scheme they join. FSPs would therefore be denied a key advantage of having more than one scheme to choose from; that is, that they can 'vote with their feet' if they are dissatisfied with service levels.⁶² This has led to a focus by both CIO and FOS on efficiency, transparency, accountability and regulatory cost.

Because EDR membership in the financial services sector is compulsory for FSPs and entirely at their costs, the Government must continue to ensure that costs and burdens on businesses are kept to a minimum while maintaining a high level of consumer protection.

CIO's small FSP members (who comprise more than 97% of its membership) are generally not supportive of being in a single financial services EDR scheme which is, and has historically been, generally geared towards large institutional members such as banks and insurers. Being at the smaller end of town, these FSPs would understandably not want to be treated in the same way (and it may be inefficient to treat them in the same way) as the large financial institutions who attract the vast majority of complaints and whose corporate structures and governance bear no resemblance to theirs.

CIO has acquired a deep understanding of the industries in which its FSP members operate and has, over time, acquired particular specialisation in dealing with complaints about these FSPs. For example, many of CIO's non-bank lender members raise funds through securitisation programmes and CIO has had to acquaint itself with the complexities of these programmes in terms of identifying the correct respondent and allocating liability. Similarly with the particularities of the debt purchasing and collections industry.

⁶¹ Page 23 - <https://www.fos.org.au/custom/files/docs/independent-review-final-report-2014.pdf>

⁶² To the extent that FSPs compare different EDR schemes and 'shop' them, comparisons are made based on service levels, value and the ease of doing business – not bias to business or perceived laxity. In any event, to limit any potential abuse, CIO and FOS have entered into a Memorandum of Understanding which allows each scheme, before accepting an applicant as a member, to consult with the other about, among other things, whether the applicant has paid a consumer any compensation that may have been awarded by the scheme.

The following table sets out the number of complaints both CIO and FOS members received in the 2015/16 financial year:

Number of complaints per FSP	CIO			FOS ⁶³		
	Number of FSPs	Total number of complaints	% of all complaints	Number of FSPs	Total number of complaints	% of all complaints
1	277	277	5.9%	351	351	1.1%
2	65	130	2.8%	120	240	0.7%
3	33	99	2.1%	69	207	0.6%
4-10	73	452	9.6%	142	848	2.6%
11-20	31	474	10.1%	43	611	1.8%
21-50	19	632	13.5%	41	1,252	3.8%
51-100	9	609	13.0%	22	1,645	4.9%
>100	7	2,015	43.0%	47	28,096	84.5%
Total	514	4,688 ⁶⁴	100%	835	33,250 ⁶⁵	100%

As the above table indicates, a significant proportion (84.5%) of the complaints dealt with by FOS were about FSPs who receive more than 100 complaints. In contrast, only 43% of the complaints dealt with by CIO were about FSPs who received more than 100 complaints.

The number of complaints an FSP receives has a bearing on how we deal with the particular FSP.

FSPs who receive fewer complaints are more likely to require our assistance in understanding our process and our approach to particular claims. This is particularly so because, being smaller FSPs, they generally do not have the benefit of in-house lawyers or compliance teams to advise them. As we have a

⁶³ Page 22 <http://fos.org.au/publications/flipbooks/annual-review/2015-2016/index.html#page=1>

⁶⁴ Does not include 72 complaints about non-members.

⁶⁵ Does not include 845 complaints where the FSP had not yet been determined.

higher proportion of FSPs who receive few complaints, our general process and approach is geared towards facilitating the resolution of complaints made against these FSPs.

On the other hand, FSPs who receive more complaints are likely to have engaged more with us and understand our processes and approach to claims. They need less assistance and are better placed to address a consumer's complaint more effectively.

Not many of our FSP members receive more than 30 complaints a year. In order to deal with complaints about these FSPs more effectively and efficiently, we meet with them regularly to discuss trends, our approach to common claims, possible systemic issues and the more complex or entrenched complaints. FSPs value this level of engagement.

According to the Productivity Commission:

'There can also be offsetting disadvantages associated with some forms of convergence (as explored particularly by COSL, sub. DR148 and by the Association of Superannuation Funds of Australia, sub. DR188). Full consolidation into a scheme like the UK model is one option, but may lack the flexibility of present arrangements. There are marked differences in the types of complaints dealt with — for example, insurance or superannuation claims compared with credit issues. As well, the different nature of member businesses covered by the different ADRs (some dominated by small businesses and others by big business) may raise difficulties for fee-setting arrangements for members (Khoury and Russell 2006, p. 42). And any model of convergence should not undermine the need for expertise in the very different areas covered by the financial services ADR schemes (COSL, sub. 53, p. 7), or for the capacity for unique innovative approaches.'⁶⁶

The types of complaints that CIO and FOS deal with are noticeably different. 94% of the complaints CIO deals with are credit-related compared to FOS's 45%.⁶⁷

⁶⁶ Page 207 <http://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer2.pdf>

⁶⁷ Page 59 <http://fos.org.au/publications/flipbooks/annual-review/2015-2016/index.html#page=1>

The table below illustrates the percentage of complaints CIO and FOS receive in relation to different types of FSPs:⁶⁸

CIO		FOS	
Debt collector or buyer	45%	Debt collector or buyer	2%
Credit providers and mortgage managers (non-bank lenders) ⁶⁹	44%	Credit providers and mortgage managers	16%
Finance brokers	7%	Finance brokers	<1%
ADIs	1%	Banks	72%
Credit reporting bodies	1%	Credit reporting bodies	4%
Lender's mortgage insurance providers	1%	Lender's mortgage insurance providers	-
Other	1%	Other	5%
Total	100%	TOTAL	100%

The membership of the CIO differs greatly to that of the FOS. Over 97% of CIO's members are sole traders and small businesses who would be greatly concerned that any move to a single EDR scheme will mean that their needs will be subordinate to those of the big four banks and larger financial service providers.

Indeed, the FOS Constitution provides that a member has one vote for every dollar paid by way of fees to FOS.⁷⁰ This means that the big four banks and other large financial service providers can outvote the smaller FSPs that presently comprise CIO's membership.

⁶⁸ CIO's figures are based on all credit complaints received in the 2015/16 financial year. FOS's figures are based on all accepted credit complaints in the same financial year, and is a weighted average by product category, page 62 to 65
<http://fos.org.au/publications/flipbooks/annual-review/2015-2016/index.html#page=1>

⁶⁹ This is made up of residential lenders and mortgage managers (16%), consumer retail finance providers (8%), small and medium amount lenders (8%), motor vehicle finance providers (8%), personal loan providers (2%), credit or charge card providers (1%), and commercial lenders (0.3%).

⁷⁰ Article 11.15(c). https://www.fos.org.au/custom/files/docs/fos_constitution.pdf

The Report went on to say that:

‘In light of these competing considerations, the Commission, on balance, considers that the mandated introduction of a single scheme, like the UK Financial Services Ombudsman, is not warranted at this stage.’⁷¹

As an alternative, the Productivity Commission suggested that:

‘However, ahead of any formal consolidation, a more loose-knit ‘umbrella’ arrangement is likely to be beneficial — as mooted in the draft report. This could be achieved by affiliating the existing separate entities into a federation — with common telephone, website, mail and email consumer contact details — allowing a single referral and complaint pathway for consumers and suppliers. This would extend the role of the existing gateway service, the Financial Ombudsman Service, and would not represent a radical organisational step entailing complex internal bureaucracies.’⁷²

This meant that schemes ‘could still maintain their independence as arms within the umbrella organisation so as to maintain some of the flexible features of the current arrangements. For example, the Superannuation Complaints Tribunal could maintain its existing unbounded financial limits to compensation’⁷³

Our proposal of a triage arrangement is analogous to the umbrella arrangement preferred by the Productivity Commission, but goes further by proposing that other dispute resolution schemes, such as the telecommunications and energy and utility schemes, and possibly Fair Trading Departments, also come within the triage arrangement.

Forum shopping

There is no evidence of forum shopping or arbitration by FSPs (for instance, where an FSP selects an EDR scheme with a reputation for leniency).

To the extent that FSPs compare different schemes and ‘shop’ them, comparisons are made based on service levels, value and the ease of doing

⁷¹ Page 207 <http://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer2.pdf>

⁷² Page 207 <http://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer2.pdf>

⁷³ Page 207 <http://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer2.pdf>

business – not bias to business or perceived laxity.

Those FSPs that have joined CIO from FOS have told us that they have done so for a number of reasons; for example, their location in the same city as CIO has meant that they can meet with CIO on a regular basis more conveniently and economically; their competitors are existing members of CIO and they are inclined to be in the same scheme as their cohort; or they are of the view that a scheme that was formed essentially for the non-bank sector is more appropriate for them.

Accordingly, although there is some movement between the two schemes, scheme shopping by FSPs is not a live issue. In any event, to limit any potential abuse, CIO and FOS have entered into a Memorandum of Understanding which allows each scheme, before accepting an applicant as a member, to consult with the other about whether the applicant has paid a consumer any compensation that may have been awarded by the scheme, whether any complaints are open, whether any systemic issues have been identified and whether any fees are outstanding.⁷⁴

Consumer choice – a myth?

It has been argued that under the present arrangement, consumers do not have a choice as to which scheme to go to, but FSPs do. Consumers would, however, also not have a choice if there was only one EDR scheme. The reality is that consumers do not choose, and have no interest in choosing, a provider based on the EDR scheme to which it belongs.

Further, a consumer ought not get a better outcome from one EDR scheme over the other - both ASIC-approved EDR schemes must satisfy the requirements of ASIC's Regulatory Guide 139 which promotes minimum standards across EDR schemes to achieve "parity of schemes and equal treatment of complaints".⁷⁵

We are not aware of any statistical or substantial evidence of substantive differences in consumer outcomes between CIO and FOS. If there is a perception of such a difference, it may be explained by the differences in the size of the two schemes and their overall dispute numbers and by differences in their respective

⁷⁴ <http://www.cio.org.au/cosl/assets/File/MOU%20between%20FOS%20and%20COSL.pdf>

⁷⁵ ASIC Regulatory Guide 139.35(b)

membership bases.

Larger FSPs, like banks, are members of FOS and are more likely to settle complaints against them based solely on commercial considerations, notwithstanding the merits of the case. There is clearly a greater propensity for bigger firms with deep pockets to 'pay off' the inconvenience of EDR disputes rather than engage with them.

CIO's members, on the other hand, are generally small operators. They often do not have the resources or inclination to settle a complaint on a commercial basis.

New Zealand review

In New Zealand, all financial service providers who provide services to retail clients are required to be members of one of four approved dispute resolution schemes. An Options Paper released by the NZ Ministry for Business, Innovation and Employment sought submissions on the effects (both positive and negative) of competition between the schemes. It concluded:

Given the current lack of evidence of negative impacts of competition (including 'scheme hopping' by members to the detriment of the consumer), and recognising the collaborative and positive relationship between the schemes, we have not proposed an option in which the current multiple scheme model would be replaced with a single scheme⁷⁶.

The same Ministry, in seeking Cabinet endorsement of legislative changes, noted that:⁷⁷

While the four scheme model may not be common practice and some improvements could be made, there is no evidence to show that it is not working as intended or not delivering the right consumer outcomes.

In short, not only did the NZ review find no evidence of consumer detriment

⁷⁶ Page 34 - <http://www.mbie.govt.nz/info-services/business/business-law/financial-advisers/review-of-financial-advisers-act-2008/options-paper-consultation/options-paper.pdf>

⁷⁷ Review of the Financial Advisers Act 2008 and the Financial Service Providers (Registration and Dispute Resolution) Act 2008
<http://www.mbie.govt.nz/info-services/business/business-law/financial-advisers/review-of-financial-advisers-act-2008/?searchterm=financial%20advisers>

(despite suggestions to the contrary from various quarters), it also found, significantly, that there was no evidence that the multiple scheme model was not delivering the right consumer outcomes.

Integration neither necessary or desirable

We also do not consider the integration of the existing arrangements desirable because:

1. Each ASIC-approved EDR scheme is required to have equal numbers of consumer and industry directors on their board. It follows that an essential avenue for consumer input into regulatory processes is through participation as representatives on the management boards of schemes. The fewer schemes, the less are the opportunities for such important input.
2. A single merged scheme may be at risk of being bureaucratic and substantially less flexible or capable of responding quickly to changes in the market. This can affect turnaround times, service levels and innovation. This would not be a good outcome for consumers and small businesses.
3. From a regulator's perspective, there is a risk that a single merged scheme may adopt a more bureaucratic approach to dispute resolution. This could lead to a reduction in service levels and responsiveness, a complacency about its own performance and the scheme being inwardly focused rather than stakeholder-focused.
4. Also from a regulator's perspective, there is a risk that the quality of case management may be undermined – with more layers of management come more bureaucratic processes and a greater tendency to rely on standard systems.
5. Multiple sources of high quality data and analysis in relation to financial services disputes and systemic issues can only improve the contribution that EDR schemes can make to policy development in their respective industries. If there is only one conduit to the regulator for such information, through a single EDR scheme, the quality of data available to support the regulatory process will be diminished.

Q39. How could a 'one-stop shop' most effectively deal with the unique features of the different sectors and products of the financial system (for example, compulsory superannuation)?

We do not consider that a 'one-stop shop' can effectively deal with the unique features of the different sectors and products of the financial system.

Our response to Question 38 argues that the unique features of the different sectors and the distinct membership bases of CIO and FOS make the establishment of a one-stop shop/single EDR entity undesirable. CIO's 23,000 members (more than 97% of whom are sole traders and small businesses) would not want to be treated in the same way as a large institutional FSP member of FOS.

Our response to Question 45 notes that the UK does not have a unitary system for the resolution of all financial services disputes, and that the Pensions Ombudsman (similar to Australia's SCT) and Pensions Protection Fund Ombudsman have not merged with UK FOS.

Q40. What form should a 'one stop shop' take?

For the reasons set out in our response to Question 38, we do not consider that a one-stop shop is necessary or desirable.

Q41. If a 'one-stop shop' in the form of a new single dispute resolution body were desirable:

- should it be an ombudsman or statutory tribunal or a combination of both?
- what should its jurisdictional limits be?
- how should it be funded?
- what powers should it possess?
- what regulatory oversight and governance arrangements would be required?

For the reasons set out in our response to Question 38, we do not consider that a one-stop shop is necessary or desirable.

[An additional forum for dispute resolution](#)

Q42. Would the introduction of an additional forum, in the form of a tribunal, improve user outcomes?

Given our argument that most dispute resolution is best handled by an appropriate industry-based EDR scheme, the imposition of a tribunal jurisdiction between such a scheme and the existing courts seems unnecessarily resource-intensive.

However, there may be merit in considering the establishment of a tribunal for claims in excess of the EDR schemes' existing or proposed monetary caps. As noted in our response to Question 33, the limitations of EDR schemes may inhibit their ability to properly and fairly deal with disputes involving large sums of money or complex products and structures. Such disputes are probably best dealt with by a tribunal or court.

We do not consider, however, that a tribunal would be appropriate for disputes that would normally come within the jurisdiction and monetary caps of the existing EDR schemes. There are a number of reasons for this.

EDR schemes accept complaints by telephone and email, while statutory tribunals generally require applications in forms prescribed by regulation and there are substantial limitations on how much assistance registry officials can provide to complainants.

The criteria for EDR scheme decision-making and determination vary slightly but all of them give primacy to what is 'fair and reasonable' or 'fair in the circumstances.'

The primacy of the 'fairness' criteria in EDR schemes allows them a flexibility and 'fact driven' approach which could not be achieved by a statutory tribunal.

A statutory tribunal will, by its very nature, be more legalistic in its approach and limited in the flexibility with which it can apply the law to achieve fairness.

The work done by various courts and tribunals around Australia to improve case management and efficiency is impressive, but they can never approach EDR

schemes for efficient disposition of disputes.

A tribunal would typically place the burden of evidence on the consumer. By contrast, an industry-based EDR scheme would seek information from the party from which the information can most easily and conveniently be obtained – typically, the FSP.

Industry EDR schemes report on systemic issues to its stakeholders. Tribunals have no responsibility to identify or address systemic issues or refer these to regulators or policy makers.

An important aspect of effectiveness is the finality of the process and enforcement. While the orders of a tribunal can be enforced as judgements of a higher court, they are, of course, subject to appeal. Sometimes this can be a complete appeal on the merits or simply appeals on matters of law.

While EDR schemes do not enjoy judicial enforcement of their determinations, as a failure to comply leads to licensing consequences for members, they do enjoy high levels of 'voluntary' compliance without the risk of constant judicial review. They are, therefore, more effective than statutory tribunals.

According to Cameron Ralph Navigator:⁷⁸

- A tribunal would be more integrated into the Court system than is the case for industry-based EDR schemes. Tribunal's decision making utilises a hearings process. Tribunal normally requires physical attendance, with a discretion to allow a telephone hearing. This may discourage access because consumers may not have the knowledge, skills and confidence to pursue their case. Also, those in remote locations can find it particularly difficult to travel to the specified location.
- In comparison, industry-based EDR schemes typically undertake an investigative process with decisions being made on the basis of the information provided by the parties over the telephone and in writing and with the scheme responsible for ensuring that both parties are provided

⁷⁸ <http://consumeraction.org.au/wp-content/uploads/2016/08/Research-report-Review-of-Tenants-and-Consumers-Experience-of-VCAT.pdf>

with the other's information and given an opportunity to make their response.

- It is the scheme staff's responsibility to assess whether a legal cause of action results. Further, if an applicant does not provide documents at the outset, this is not fatal for the application. Rather the scheme staff speak to the applicant and ask for the documentation that they think is relevant.
- EDR requires participating FSPs to set up IDR processes, and to inform those affected by the FSP's services about their IDR process. Tribunals do not refer the complaint back to the FSP to resolve.
- Industry-based EDR schemes offer public accountability by providing detailed statistical reporting in their annual reports, with analysis of the statistics. Tribunals generally don't.
- Unlike tribunals, industry-based EDR schemes are required to have their operations reviewed periodically by an independent reviewer. The review has to assess the accessibility, independence, fairness, accountability, efficiency and effectiveness of the scheme and stakeholder satisfaction with the scheme, and consult broadly with stakeholders including by inviting submissions.

Q43. If a tribunal were desirable:

- should it replace or complement existing EDR and complaints arrangements?
- should it be more like a court (judicial powers, compulsory jurisdiction, adversarial processes and legal representation)?
- should it be more like current EDR schemes (relatively more flexible, informal decision-making and processes)?
- how should the jurisdiction of the tribunal be defined?
- should its jurisdiction only extend to small business disputes or other disputes?
- should its jurisdiction only be available in the case of disputes with providers of banking products?
- should monetary limits and compensation caps apply?

- should its decisions be binding on one or both parties and what avenues of appeal should apply?
- should it be publicly (taxpayer) or privately (industry) funded?
- should its focus only be on providing redress or should it take on a role to prevent future disputes, for example, by advocating for changes to the regulatory framework, seeking to improve industry behaviour?
- what type of representation and other support should be available for persons accessing the tribunal?

Given our response to Question 42, we do not consider that a tribunal should replace the existing EDR schemes.

However, a statutory tribunal may be appropriate for claims in excess of the EDR schemes' existing or proposed monetary caps or which involve complex products and structures. The jurisdiction of such a tribunal need not be confined to small business disputes (or banking disputes, for that matter). Significantly, the tribunal would not be subject to the limitations of EDR schemes. For example, it would be able to join third parties, subpoena documents, take evidence on oath and deal with criminal fraud.

The tribunal would inevitably be more like a court, but it would have (or could be made to have) the power to enforce its decisions by registering an order with the court. (A registered order becomes a judgment of the court and can be enforced in the same way).

Its decisions must, necessarily, be binding on both parties to provide finality, subject to a right to appeal to the Federal Court or the Administrative Appeals Tribunal. The reality is, however, that the right to appeal is more likely to be used by a better resourced FSP or other service provider, rather than a small business complainant.

Such a tribunal would have to be publicly funded because of the difficulty, if not impossibility, of identifying individual entities on whom to impose a levy. For example, 'pure' commercial credit providers are not required to be licensed to carry on the business of providing commercial credit, and there would be no way of identifying each one of them in the absence of compulsory licensing.

Further, the tribunal's funding would be far too uncertain and inadequate if its

only source of revenue was from fees paid each time a small business complaint was made against it.

Q44. Is there an enhanced role for the tribunal in relation to small business disputes? How would this interact with current decision-making processes?

See our response to Question 43 above.

Developments in overseas jurisdictions and other sectors

Q45. What developments in overseas jurisdictions or other sectors should guide this review?

Two patterns emerge from an examination of the historical experience of financial services alternative dispute resolution (**ADR**) across different jurisdictions. Firstly, single large statutory 'super-schemes' like the UK Financial Ombudsman Service (**UK FOS**), are rare if not unique. Secondly, resort to statutory, as opposed to industry-based, schemes, is usually in response to market failure and dysfunction in the local financial services ADR environment.

The European Union

The UK is alone among the major European economies in adopting a single scheme model for financial services ADR. France has three financial services schemes dealing with different product groups, banking, investment and insurance respectively. Germany has eleven schemes with cross-cutting jurisdictional cleavages across product types and institutional structures. Italy has three, cross-cut along product lines, as does Spain.⁷⁹

At the European level, 'even greater union'⁸⁰, the policy maligned in the UK by those supporting its departure from the European Union, has not resulted in EU directives seeking to establish a single European consumer ombudsman for financial services or otherwise. Rather, the emphasis has been on a 'single point of entry' for consumers and traders, preferably online, through which they can access the variety of appropriate schemes within each national jurisdiction.

⁷⁹ Source: http://ec.europa.eu/finance/fin-net/members_en.htm

⁸⁰ European Council. 1983. '[Solemn Declaration on European Union](#)'. Bulletin of the European Communities 6-1983: 25-29.

EU Directive 2015/11/EU states at paragraph 15:

The development within the Union of properly functioning ADR is necessary to strengthen consumers' confidence in the internal market, including in the area of online commerce, and to fulfil the potential for and opportunities of cross-border and online trade. Such development should **build on existing ADR procedures in the Member States and respect their legal traditions** (emphasis added).

The Directive mandates member states to facilitate by legislation or otherwise participation by service providers in the 'Online Dispute Resolution Platform' established by the Commission under EU524/13. As the Commission stated:

It provides for the establishment of an ODR platform which offers consumers and traders a single point of entry for the out-of-court resolution of online disputes, through ADR entities which are linked to the platform and offer ADR through quality ADR procedures. The availability of quality ADR entities across the Union is thus a precondition for the proper functioning of the ODR platform.⁸¹

The European Union position is that for ADR schemes, and indeed, consumer redress mechanisms in general, diversity is important and that co-operation and communication between diverse schemes and jurisdiction is the preferred approach. As Prof Stefan Wrzka summarised: 'Introducing only one kind of mechanism might have solved some issues but it was acknowledged that consumer disputes can adopt various forms and therefore warrant several different redress devices.'⁸²

The United Kingdom

It should be noted that UK FOS does not do the work of the Superannuation Complaints Tribunal in Australia. Complaints about 'Pension Schemes' as they are called in the UK are dealt with by the Pensions Ombudsman, a statutory body authorised under section 145 of the *Pension Schemes Act*.

So, even the UK does not have a completely unitary system for the resolution of all financial services disputes. A review in 2007 did recommend a merger

⁸¹ 2015/11/EU para 12

⁸² Wrzka, *S European Consumer Access to Justice* (Cambridge University Press, 2015) p 35.

between the Pensions Ombudsman, the Pensions Protection Fund Ombudsman and the UK FOS.⁸³ After a considerable amount of work was done by the schemes on such a merger, it was resolved (supported by government) not to proceed. In a triennial review of pension bodies by the UK Department of Work and Pensions in 2013, the Pensions Ombudsman submitted that:

Since the decision not to merge the two bodies, nothing of significance has changed to suggest that the obstacles then present can now be overcome. If anything the similarity of activity is likely to lessen as employers' fulfilment of automatic enrolment requirements will tend to be a growing proportion of our work – with no comparable activity presently within Financial Ombudsman Service's jurisdiction.⁸⁴

The 'automatic enrolment' requirements referred to are analogous to the compulsory element of superannuation in Australia and, therefore, to the more statutory aspect of the jurisdiction of the Superannuation Complaints Tribunal.

The UK position is, therefore, only unitary for non-superannuation financial services. Given the history of unsuccessfully attempting a merger between the UK FOS and its Pensions Ombudsmen, this is unlikely to change in the short to medium term. The lesson for Australia is that ADR schemes for superannuation products with statutory compulsory contribution do not sit well with those for other financial services.

The balkanized nature of the financial services ADR environment in the United Kingdom prior to the passing of the *Financial Services Markets Act 2000* has been well documented. There were more than 12 schemes, some industry and institutionally specific, some for different products. Several were operated for profit.⁸⁵ The environment was dysfunctional, producing unsatisfactory consumer outcomes and deficiencies in fairness, transparency and accountability. Incredibly, despite the number of schemes, there were still gaps in coverage. As Prof James notes, there was a 'plethora of schemes which between them

⁸³ Paul Thornton: A Review of Pensions Institutions- An independent report to the Department for Work and Pensions, June 2007.

⁸⁴ Pensions Ombudsman and Pensions Protection Fund Ombudsman, *Response to Call for Evidence*, 2013, P 4

⁸⁵ James, R *Private Ombudsman and Public Law* (Ashgate, 1997)

managed to combine areas of overlap with areas where no ombudsman's writ ran.⁸⁶

The establishment of the UK FOS was part of a larger reform of financial services markets in the UK and a reaction against the failures of previous attempts at self-regulated consumer dispute resolution. Still, the resultant scheme has been seen less as a reduction in self-regulation *per se* and more as a structural improvement. Prof Ferrand says: '...the reduction in fragmentation of regulation rather than the level of self-regulation is really the significant change brought about by the FSMA.'⁸⁷

Consumer confusion, an idea canvassed by proponents of the single scheme model, was not in evidence. Professors James and Morris, writing together in 2003, said that: '...empirical evidence that consumers were confused by the multiplicity of regulators was conspicuous by its absence.'⁸⁸ The establishment of the UK FOS brought together eight of the existing industry based schemes.⁸⁹

There is widespread support, in general, for the UK FOS. It has not, however, been without its critics and many of these criticisms seem rooted in the almost inevitable inertia that develops in such a large statutory bureaucracy.⁹⁰

Lord Hunt, who conducted a review of the UK FOS published in 2009 said:

At the FOS today I see a model that can seem intimidating and unwelcoming to the less educated, more vulnerable complainant and at times frustrating even for the more articulate and self-confident; I see a service which has been slow to share its

⁸⁶ James R, 'Reform of the Complaints Process in Financial Services' (1998) Private Law 201

⁸⁷ Ferran E, 'Dispute Resolution Mechanisms in the UK Financial Sector' (2002) 21 Civil Justice Quarterly 135.

⁸⁸ James, R and Morris, P 'The New Financial Ombudsman Service in the United Kingdom: has the second generation got it right' in Rickett C and Telfer T (eds) International Perspectives on Consumer's Access to Justice (Cambridge University Press, 2003) p 167.

⁸⁹ Ibid

⁹⁰ For example see Hetherington, A 'Santander won't pay £5,300 PPI refund without my ex-husband's agreement - even though he left us and our divorce says it's mine' Daily Mail, 2 November, 2014, <http://www.thisismoney.co.uk/money/experts/article-2816982/TONY-HETHERINGTON-Divorce-wrangle-PPI-refund-splits-court-ombudsman.html#ixzz3lPEdeay4>, where the Finance Editor for the Daily Mail commented that: 'The Ombudsman has a huge workload of PPI claims and it is impossible not to sympathise with overburdened staff...It is disheartening to see just how long it takes to get a superficial and flawed ruling from an official who failed to understand the issues.'

thinking and processes more widely for fear of being perceived as a quasi-regulator; and I see a service whose perceived constituency needs to expand radically.⁹¹

The UK FOS said it 'welcomed' Lord Hunt's Report and its then Chairman, Sir Christopher Kelly said:

Some of the recommendations for accessibility and transparency that Lord Hunt makes in his detailed and thought-provoking report endorse strands of work that we already carry out. Other recommendations involve innovative – and sometimes radical – departures from current practice. However, the board and management of the ombudsman service are committed to taking forward the actions needed to ensure that accessibility and openness are at the very heart of our service, as we evolve to face new challenges in a changing world – and we will consider all of Lord Hunt's very helpful suggestions in that light.⁹²

More recent reviews by the UK National Audit Office, although mostly positive in their overall conclusions, have highlighted inefficiency and delays in the UK FOS and concluded that it needed to: '...strengthen some elements of its programme management arrangements, such as the monitoring of both benefits and unintended impacts of change, and budget control.'⁹³

Canada

OBSI was founded in 1996 as the Canadian Banking Ombudsman to review complaints by small business against the chartered banks. In a few short months the mandate was expanded to cover unresolved consumer complaints as well. In 2002, as a result of discussions among government, industry and consumer groups about improving consumer protection in financial services, all members of the Investment Industry Regulatory Organization of Canada and the Mutual Fund Dealers Association of Canada joined the organization. At the same time OBSI invited credit unions to join and changed its name to 'Ombudsman for Banking Services and Investments' (OBSI).

There was no compulsion for industry members to join the scheme. In 2008, the Royal Bank of Canada, complaining about delays in complaint handling by

⁹¹ Lord Hunt, Opening Up Reach Up and Aiming High: An Agenda for Accessibility and Excellence in the Financial Ombudsman Service (Beachcroft, 2009) p 3

⁹² http://www.financial-ombudsman.org.uk/news/updates/LordHunt_Report.html

⁹³ National Audit Office, Financial Ombudsman Service: Efficient Handling of Financial Services Complaints, NAO, 2012, p 9.

OBSI, withdrew from the scheme and sent its consumer complaints to a private mediation service called ADR Chambers Banking Ombudsman Office ('ADRCBO'). In 2012, while the Canadian government was considering mandating external ADR membership and standards, another financial institution, the Toronto-Dominion Bank also withdrew from OBSI and joined ADRCBO. However, they appear to be the two largest members of ADRCBO with the 'overwhelming' number of Canadian Banks being members of OBSI. The voluntary status of OBSI, and the continued operation of ADRCBO, is the subject of some criticism particularly by consumer groups such as the Canadian Foundation for the Advancement of Investor's Rights ('FAIR Canada').⁹⁴

In 2014, the Canadian Securities Administrators (CSA) adopted amendments to National Instrument 31-103 (NI31-103) that require all registered dealers and advisors outside of Québec to use OBSI as their dispute resolution service for investment and financial adviser disputes. So, membership of OBSI for investment and financial advisers is not optional.

In 2002, the General Insurance Ombudservice was founded. It is very similar in structure to Australian financial services industry ADR schemes though its Board has a majority of non-industry directors (though none are specifically designated as 'consumer' representatives). Its membership is also voluntary but it claims 164 members, the 'vast majority' of insurance companies operating in Canada.⁹⁵

While it is still a 'work in progress', the Canadian financial services ADR regime rests on multiple service providers, none of whom are statutory though, for some, membership is required as a condition of registration, similarly to Australia, apart from superannuation.

New Zealand

New Zealand, with a population of only 4.47 million, after some serious assessment has opted to retain a multiple-scheme model for financial services ADR.

Under the NZ Financial Advisers Act 2008 and the Financial Service Providers (Registration and Dispute Resolution) Act 2008, all financial service providers who provide services to retail clients in New Zealand are required to be members of one of four approved dispute resolution schemes: The Banking Ombudsman

⁹⁴ FAIR, Comments on Independent Evaluation of OBSI (2016) at <http://faircanada.ca/submissions/fair-canada-comments-on-independent-evaluation-of-obsi/>

⁹⁵ General Insurance Ombudservice, Annual Report 2015 p 12

Service, the Financial Dispute Resolution Service, Financial Services Complaints Limited and the Insurance and Financial Services Ombudsman. The particular procedures and jurisdiction of each scheme are set out in their individual scheme rules, which are approved by the Minister of Commerce and Consumer Affairs. All of the schemes have a \$200,000 monetary limit set out in their rules.

Over 18 months, from 2005-2016, the NZ Ministry of Business Innovation and Employment (“MBIE”) conducted a comprehensive review of the relevant legislation. The terms of reference for that review included an assessment of effective redress for consumers.

While the Final Report did have some recommendations about standardising rules and jurisdictions for the dispute resolution schemes⁹⁶, it did not address the ‘multiple schemes’ issue at all. This is because, it had been thoroughly investigated in the process leading to the Options Paper in November 2015. In that paper, the MBIE said:

Given the current lack of evidence of negative impacts of competition (including ‘scheme hopping’ by members to the detriment of the consumer), and recognising the collaborative and positive relationship between the schemes, we have not proposed an option in which the current multiple scheme model would be replaced with a single scheme. MBIE will continue to seek feedback on the performance of the multiple scheme model.⁹⁷

MBIE did not receive any feedback between November 2015 and July 2016 to change its view that the multiple scheme model for financial services dispute resolution in New Zealand was working well and did not require any forced statutory consolidation.

South Africa

South Africa, with its population of 52 million with 11 different official languages, presents unique difficulties for efficient resolution of financial services disputes. It has a truly multi-scheme model with six different schemes: Ombuds for both Short and Long Term Insurance; Ombud for Financial Services Providers (investment advisers and intermediaries); Pension Funds Adjudicator; Ombudsman for Banking Services; and the Credit Ombudsman.

⁹⁶ NZ MBIE, Review of the Operation of the Financial Services Providers (Registration and Dispute Resolution) 2008 and the Financial Advisers Act 2008: Final Report, July 2016 pp74-75.

⁹⁷ NZ MBIE, Review of the Operation of the Financial Services Providers (Registration and Dispute Resolution) 2008 and the Financial Advisers Act 2008: Issues Paper, November 2015, p 34.

These schemes (with the exception of the Pension Funds adjudicator which has its own legislation) are recognised under the Financial Services Ombudsmans Schemes Act of 2004. It is thus a 'hybrid' system, similar to Australia, in that there is statutory recognition of schemes which are, themselves, industry based, whose decisions are binding on industry members but not consumers.

The South African government has embarked on a large scale reform of existing regulation of the entire financial services sector, including its ADR schemes. The *Financial Services Regulation Bill*, tabled on 27 October 2015 is still with the Standing Committee on Finance of the South African Parliament. It is intended to pass the Bill either in late 2016 or early 2017.⁹⁸

The Bill, if passed as is, will set up an Ombud Regulatory Council, ('**ORC**') for financial services, with a Chief Ombud. The ORC will recognise, set standards for and supervise the existing industry ombudsman schemes. The objective of the ORC:

is to assist in ensuring that financial customers have access to, and are able to use, affordable, effective, independent and fair alternative dispute resolution processes for complaints about financial products and financial services.⁹⁹

Membership of a scheme will be a statutory requirement of FSP registration and material contravention of an ORC Rule is grounds for suspension or revocation of a licence.¹⁰⁰ Thus, industry ombudsman decisions will be enforceable through licensing, as they are in Australia.

The Bill also establishes a 'Financial Services Tribunal' but it hears appeals from decisions of the Financial Services Regulators and the ORC, not individual ombudsman schemes.¹⁰¹

It would appear, therefore, that South Africa is choosing to maintain a multi-scheme model with overall regulatory supervision and mandatory membership. It is not establishing an appeal mechanism for individual complaint decisions by ADR schemes, but the proposed tribunal may review decisions by the regulators and the ORC.

⁹⁸ Elliott, F 'Market Conduct Regulatory Framework in South Africa' KPMG March 2016 at <https://home.kpmg.com/za/en/home/home/press-releases/2016/03/market-conduct-regulatory-framework-in-south-africa.html>

⁹⁹ Financial Services Regulation Bill 2015 s 174

¹⁰⁰ Ibid s 120

¹⁰¹ Ibid ss 212-214.

Conclusions

Of course, Australia does not have to follow trends and decisions made abroad. We have been a world leader in financial services ADR (and indeed in consumer ADR generally). However, the Issues Paper, quite sensibly, at Questions 45-46 does ask for submissions which canvass 'developments in overseas jurisdictions and other sectors.'¹⁰²

In terms of Questions 38-41 of the Issues Paper, consolidation of all existing financial services ADR schemes and mechanisms (including the SCT) into one super-scheme would be contrary to international trends in financial services ADR. Further, given the relatively successful existing arrangements and the absence of the historical pre-conditions for statutory consolidation of such schemes in other jurisdictions, there appears to be little or no case to be made for such reform in Australia. It is likely to be expensive and counter-productive.

Some useful conclusions to draw from the overseas experiences canvassed above are:

- The establishment of 'common entry points' or 'triage' services. Taking the lead from the EU, these would cover a wide variety of consumer and small business complaints and not be confined to those traditionally identified as 'financial services.'
- The need to establish and maintain standards and some degree of jurisdictional consistency among multiple schemes.
- The mandating of scheme memberships for service providers.
- Small business should have access to financial services ADR.

Q46. Are there any particular features of other schemes or approaches that would improve user outcomes from EDR and complaints arrangements in the financial system?

We are not aware of any. See our response to Question 45 above.

Uncompensated consumer losses

¹⁰² Issues Paper p 22

Q47. How many consumers have been left uncompensated after being awarded a determination and what amount of money are they still owed?

Since 1 December 2014, four financial firms have been unwilling or unable to comply with five CIO determinations made in favour of seven consumers. The value of these outstanding determinations was approximately \$413,415 (including interest) as at 30 August 2016.

Q48. In what ways could uncompensated consumer losses (for example, unpaid FOS determinations) be addressed? What are the advantages and limitations of different approaches?

In the absence of having recourse to an FSP's professional indemnity (PI) insurance (which may not always be available), the only way uncompensated losses can be effectively addressed is to establish a last resort compensation scheme (**LRCS**). But this is by no means a straight-forward proposition.

We appreciate that a last resort compensation scheme may give rise to moral hazard, in the sense that the FSPs whose clients the scheme is intended to benefit may be encouraged to provide riskier advice than is appropriate, in the knowledge that any losses incurred by their clients will be compensated. The concept is not new.

The reality is that the FSPs which are likely to contribute the most to the last resort compensation scheme will be self-insured given their size and financial standing, and would pose little, if any, threat of determinations against them not being paid. This makes it even more difficult to argue that the last resort compensation scheme should be retrospective in its application.

It should be borne in mind that EDR schemes such as CIO are not the only forum in which consumers can resolve disputes with their financial advisers. They may, in the alternative, elect to pursue their claim in court, particularly if their claim is above the monetary limit of the EDR scheme or if the FSP has, for example, ceased to be a member of the scheme because it no longer provides financial services.

Given that a consumer is able to pursue a claim against an FSP either in court or an EDR scheme, it is critical that any LRCS be kept separate from both the court system or EDR scheme.

The LRCS should ideally be a statutory scheme so to ensure consistent treatment with other last resort schemes. We note that the Financial Conduct Authority in

the United Kingdom, which performs a similar regulatory function to ASIC in Australia, administers the UK's Financial Services Compensation Scheme.

Similarly, the Financial Claims Scheme in Australia, which protects depositors of authorised deposit-taking institutions and policyholders of general insurance companies from potential loss due to the failure of these institutions, is administered by the Australian Prudential Regulation Authority.

In both these instances, a statutory levy to fund the last resort scheme is imposed on industry participants. It is inappropriate for such a levy to be collected, held and disbursed by a private body such as an EDR scheme.

Q49. Should a statutory compensation scheme of last resort be established? What features should form part of such a scheme? Should it only operate prospectively or also retrospectively? How should the scheme be funded?

See our response to Question 48 above.

Q50. What impact would such a scheme have on other parts of the system, such as professional indemnity insurance?

Recourse should always be had against PI insurer at first instance, where this is available, so as not to otherwise financially burden participants of the LRCS.

Appendix – Judicial Review of EDR decisions

Since 2004, the two industry-based financial services EDR schemes, FOS and one of its predecessors, Financial Industry Complaints Service (FICS), have been the subject of 16 attempts at judicial review of their decisions.¹⁰³

Two patterns emerge. Firstly, only one of these, *MASU* (No 2) could be interpreted as a decision against an EDR scheme. (The original EDR decision was in the consumer's favour, and a review was sought by the FSP). Even then, Justice Shaw, of the NSW Supreme Court, ordered the matter be referred back to FICS to re-determine it with a newly constituted panel which, ultimately, resolved it in favour of the consumer.¹⁰⁴

Secondly, only one such case has ever been brought by a consumer.¹⁰⁵ Mr Mickovski was disputing the decision of FOS to reject jurisdiction over his complaint against Metlife because it was out of time. The Victorian Supreme court ruled in favour of FOS.

Overall, the position is that the decisions of FOS and CIO are not easily amenable to judicial review except on certain, quite specific, grounds. This is largely because of the very nature of the schemes and the contractual nature of the relationships between its members, complainants and the schemes themselves. The 'contractual' or essentially 'private' nature of the schemes has been the focus of all these decisions: See *FICS v Deakin*; *National Mutual Life Association of Australasia Ltd v FICS Ltd* and *Wealthcare Financial Planning v FICS*.¹⁰⁶

¹⁰³ *MASU Financial Management Pty Ltd v Financial Industry Complaints Service Limited and Julie Wong* (No. 1) [2004] NSWSC 826; *MASU; Financial Management Pty Ltd v Financial Industry Complaints Service Limited and Julie Wong* (No. 2) [2004] NSWSC 829; *National Mutual Life Association of Australasia Ltd (t/as AXA Australia) v Financial Industry Complaints Service Limited and Mr. Kevin Day* [2006] VSC 121; *Financial Industry Complaints Service Limited v Deakin Financial Services Pty Ltd* [2006] FCA 1805; *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service and Norris* [2009] VSC 7; *Mickovski v FOS and Metlife* [2011] VSC 257; [2012] VSCA 185; *In the Matter of Australian Property Custodian Holdings* [2011] VSC; *Utopia Financial Services Pty Ltd v FOS and Rees* [2012] WASC 279; *Candice Gate v FOS* [2012] NSWCTTT GEN: 12/51694; *Lazarus v HSBA and FOS* [2012] VCAT C6851/2012; *Wealthsure Pty Ltd v Financial Ombudsman Service Ltd* [2013] FCA 292; *Bilaczenko v FOS* [2013] FCCA 420; *Cromwell Property Securities Limited v Financial Ombudsman Service Limited and Radford* [2013] VSC 333; *FOS v Pioneer Credit Acquisition Services* [2014] VSC 172; *Goldie Marketing and Ors v FOS and ANZ* [2015] VSC; *Paterson Securities Limited v FOS* [2015] WASC 321

¹⁰⁴ For more detailed discussion, see O'Shea P 'Judicial review of an industry based consumer dispute resolution scheme' (2005) 16(2) *Australasian Dispute Resolution Journal* 99

¹⁰⁵ *Mickovski v FOS and Metlife* [2011] VSC 257

¹⁰⁶ Note 19 above

In *Mickovski*, Pagone J, of the Victorian Supreme Court, dealt the final blow to common law judicial review of industry based consumer dispute resolution schemes by saying, unequivocally, that even if the *Datafin* principle of 'hybrid' bodies was the law of Australia, it did not apply to FOS:

The public interest evident in the regulatory framework is that there should be a mechanism for private dispute resolution but I do not think it can be said that FOS is exercising a public duty or public element when its jurisdiction is consensually invoked by the parties to a complaint. (emphasis added)

More recent decisions such as *Cromwell Property Securities Ltd, FOS v Pioneer Credit Acquisition Services Pty Ltd*, and *Paterson*¹⁰⁷ assume its private and contractual nature and deal with that accordingly.

As Justice Cavanagh, of the Victorian Supreme Court said in *Wealthcare*:

The role of a FICS panel is not equivalent to that of a court. It is not established to hear and determine legal proceedings. For constitutional reasons it could not be so established because FICS, as its name suggests, entertains complaints rather than causes of action. It conducts an industry based scheme for the resolution of consumer disputes. It offers opportunities for investigation, negotiation and conciliation as well as for the making of determinations by appointed adjudicators and by appointed panels. The general nature of such schemes is helpfully reviewed in a recent article by O'Shea and Rickett. Having referred to the FICS scheme in particular, the learned authors point out that the various schemes differ in significant ways from courts: 'They are less concerned with the articulation and determination of legal rights than with the simple resolution of disputes.'¹⁰⁸

More recently in *Paterson*, Justice Mitchell of the West Australian Supreme Court said:

That FOS is to do what in its opinion is fair means that its decisions will rarely be open to successful curial challenge on their merits. The standard applied in determining what is fair is not exclusively legal.¹⁰⁹ (emphasis added)

¹⁰⁷ Note 19 above

¹⁰⁸ *Wealthcare*, Note 2 at [21] citing O'Shea P and Rickett C, 'In Defence of Consumer Law: The Resolution of Consumer Disputes' (2006) 28:1 Sydney Law Review 139. This article has also been cited with approval in *Mickovski* and *Utopia* Note 2.

¹⁰⁹ *Patterson* Note 2 at [94]

Consequently, almost all the cases about industry dispute resolution schemes have resulted in the courts declining to disturb determinations by the scheme even when they conceded they may not have made the same decision themselves e.g. *Wealthsure* and *Cromwell*.¹¹⁰

The only bases, therefore, for judicial review of a decision of FOS or CIO are currently if the scheme:

- (e) goes outside its jurisdiction and is ultra vires,
- (f) decision under review was so irrational and without foundation that no properly informed decision-maker could have made it, i.e. the so-called 'Wednesbury' principle,¹¹¹
- (g) decision makers are guilty of proven dishonesty or bias, or
- (h) breaches the contract between the scheme, its members and complainants as formed by its constitution, rules or terms of reference. These also embody the principles of natural justice in determining disputes.

While that may seem unduly limited, it is a critical part of protecting the special nature of EDR, its ability to offer informal, low cost and accessible dispute resolution. While there is room for poor decisions in isolated cases, provided the schemes are adequately resourced to ensure quality staff in complaints-handling roles, and recruit and retain good quality decision makers, that risk is very low and appropriate in the circumstances. Any persistent failures will invariably be identified and rectified.

Fairness

The particular norm of 'fairness' is given equal ranking in both the terms of reference of FOS and CIO with 'the law' and 'established legal principles', as is required by the Benchmarks. This could not be the case for a court as it must decide all cases according to law, and judges are bound not to let their own ideas of 'fairness' usurp their application of the law.¹¹²

¹¹⁰ Note 2 above, and particularly for *Cromwell* at [74] – [75]

¹¹¹ Named for the case of *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223

¹¹² See e.g. *ACCC v Radio Rentals Ltd* (2005) 146 FCR 292 per Finn J; and *Louth v Diprose* (1992) 175 CLR 621 at 654.

'Fairness' is not the only value threatened by the imposition of an appellate tribunal above the EDR schemes, whether as an 'add on' to the existing schemes or a consequence of their replacement by a statutory ombudsman.

An appellate tribunal (or the AAT or Federal Court in the case of a statutory scheme) will have the power of full judicial review. It will be able to review EDR decisions 'on the merits' and will be able to substitute their own rulings on matters of fact and law for those originally made by the relevant scheme. While it is possible the courts will continue their previous approach and 'stay their hand', the imperial temptation¹¹³ to treat ADR schemes as just another administrative or regulatory body may be too much.

This will, we submit, inevitably lead to a 'creeping legalism' in the decision making processes of the schemes as they 'look over their shoulders' at the appellate tribunals or the courts.¹¹⁴

Further, it will be industry who benefits the most from judicial reviews. Overwhelmingly, it will be FSPs who have the resources to make applications for judicial review and this is evident from the case law history thus far. Thus, the inequality of litigious power which the industry-based EDR schemes help to alleviate for their consumer and small business complainants will be undermined by the prospect of court action by FSPs dissatisfied with determinations by the schemes in favour of consumers.

Efficiency

This will impact enormously on the efficiency of the schemes, another primary value for EDR both in the Benchmarks and RG 139. The costs of defending their decisions against applications for judicial review will be prohibitive and will add to the cost of operating the schemes.

Further, scheme decision makers, increasingly mindful of the prospect of judicial review, will take longer and provide more extensive reasons (referenced with more and more citations to case law and statute) in order to better 'appeal proof' their determinations, particularly if they favour the consumer.

¹¹³ Martin CJ, 'Peripheral Vision? Judicial Review in Australia' Australian Institute of Judicial Administration National Conference, July 2014.

¹¹⁴ See James R and Morris P 'The New Financial Ombudsman Service in the United Kingdom: has the second generation got it right' in Rickett C and Telfer T International Perspectives on Consumer's Access to Justice (CUP, 2003), p 191

This will start to further undermine the very benefits which the existing industry based ADR schemes have brought to the resolution of consumer disputes.

Effectiveness

One of the requirements for scheme approval under ASIC RG 139 is that the scheme is capable of rendering enforceable final decisions where a mediated or conciliated outcome is not possible. Judicial reviews or appeals to an appellate tribunal will not only undermine that certainty for successful complainants, but will also add the prospect of further delay in their redress.

No party to a dispute appreciates delay in its resolution, but delay impacts disproportionately against the interests of the consumers of financial services more so than the suppliers.