

FINAL REPORT

Review of the financial
system external
dispute resolution and
complaints framework

April 2017

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**Review of the financial system
external dispute resolution and
complaints framework**

3 April 2017

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3 April 2017

The Hon Kelly O'Dwyer MP
Minister for Revenue and Financial Services
Parliament House
CANBERRA ACT 2600

Dear Minister

EXTERNAL DISPUTE RESOLUTION REVIEW FINAL REPORT

In accordance with the Terms of Reference, we are pleased to present the Final Report of the Review of external dispute resolution and complaints arrangements in the financial system.

This Report marks the first comprehensive review of the financial system's external dispute resolution (EDR) framework. The Panel found that the current framework has been the product of history rather than design and, in significant areas, reform is needed.

The Report makes 11 recommendations, representing an integrated package of reforms that will see the EDR framework well placed to address current problems and ensure it is designed to withstand the challenges of a rapidly changing financial system.

The Panel received 187 submissions in response to its Issues Paper and Interim Report. The Panel also met with many stakeholders representing a wide range of interests at each stage of the consultation process. Many organisations and individuals gave considerable time and resources to assist this Review, for which the Panel is grateful.

The Panel would also like to thank the individuals who in many cases shared their quite distressing personal experiences.

Finally, the Panel wishes to acknowledge the support of the members of the Secretariat.

Yours sincerely



Professor Ian Ramsay
(Chair)



Julie Abramson



Alan Kirkland

Foreword

This Review is an important opportunity to ensure Australia's external dispute resolution (EDR) framework delivers effective outcomes for users in a rapidly changing and dynamic financial system.

The Review's original Terms of Reference were released on 8 August 2016. The Panel's approach has been to assess the current framework, consisting of the Financial Ombudsman Service (FOS), Credit and Investments Ombudsman (CIO) and Superannuation Complaints Tribunal (SCT), against the Review's core principles of efficiency, equity, complexity, transparency, accountability, comparability of outcomes and regulatory costs, and to incorporate best practice developments from other sectors in Australia and overseas jurisdictions.

On 9 September 2016, the Panel released an Issues Paper. Following this, on 6 December 2016, the Panel released its Interim Report, with 11 draft recommendations for consultation.

The large volume of high quality submissions received in response to the Issues Paper and Interim Report have greatly assisted the Panel's work. The Panel also met with many stakeholders representing a wide range of interests at each stage of the process. The Panel acknowledges the significant contributions of stakeholders throughout the consultation process.

On 2 February 2017, the Government amended the Terms of Reference to ask the Panel to make recommendations on the establishment, merits and possible design of a compensation scheme of last resort and to consider the merits and issues involved in providing access to redress for past disputes. A report on these matters is due to Government by the end of June 2017.

MEMBERS OF THE EDR REVIEW PANEL

Professor Ian Ramsay (Chair)

Professor Ian Ramsay is the Harold Ford Professor of Commercial Law at Melbourne Law School, University of Melbourne, where he is Director of the Centre for Corporate Law and Securities Regulation.

He has practised law with firms in New York and Sydney. Former positions Ian has held include Dean of Melbourne Law School and Head of the Australian Government inquiry on auditor independence. He is a past member of the Takeovers Panel, the Government's Corporations and Markets Advisory Committee, the Auditors and Liquidators Disciplinary Board, ASIC's External Advisory Panel, the Audit Quality Review Board, the Law Committee of the Australian Institute of Company Directors, the International Federation of Accountants taskforce on rebuilding confidence in financial reporting, and consultant to the House of Representatives Standing Committee on Economics, Finance and Public Administration.

Ian has published extensively on corporate law, financial regulation and corporate governance issues both internationally and in Australia. He has extensive experience as an expert consultant to government reviews and as a member of government advisory committees.

Julie Abramson

Julie Abramson is a lawyer with over 20 years regulatory experience at both State and Federal levels. She was appointed a part-time Commissioner with the Productivity Commission in December 2015.

Her career in public policy includes working with government, industry bodies, the private sector and a regulatory agency. She was also a part-time Commissioner with the Victorian Essential Services Commission from 2014 to 2016 and a member of the Code Compliance Monitoring Committee from 2008 to 2011.

Alan Kirkland

Alan Kirkland has been CEO of CHOICE, Australia's largest consumer organisation, since 2012.

Alan has a background in the justice system, having previously worked as CEO of Legal Aid New South Wales and Executive Director of the Australian Law Reform Commission. He has also been a part-time member of a number of state and federal tribunals.

Alan has a long-term interest in redressing socio-economic disadvantage, which he has pursued through voluntary roles with organisations including the Australian Council of Social Service and the Public Interest Advocacy Centre.

ACKNOWLEDGMENTS

The Panel would like to thank the many consumer organisations, businesses and representative bodies who made submissions to this Review. The Panel would also like to thank the individuals who in many cases shared their quite distressing personal experiences.

The Panel is also grateful to the organisations and individuals who have met with it. The meetings have been very helpful in assisting the Panel in its deliberations.

In addition, the Panel would like to thank FOS, CIO and SCT for the considerable time they have spent assisting the Panel to understand the underpinning of Australia's EDR framework.

Finally, the Panel wishes to acknowledge the outstanding professional work and commitment of the members of the Secretariat: Kate Phipps (Head), Neena Pai (Manager), Alicia Da Costa, Michael Denahy, Jackie Dixon, Joanna Orton and Julian Parise.

Terms of Reference

Purpose of the review

The Financial Ombudsman Service, Superannuation Complaints Tribunal and Credit and Investments Ombudsman help Australians to resolve disputes with financial services providers. The Government is committed to ensuring that these bodies are working effectively to meet the needs of users, including consumers and industry.

Terms of Reference¹

1. The review will examine the following dispute resolution and complaints arrangements to consider whether changes to current dispute resolution and complaints schemes in the financial sector are necessary to deliver effective outcomes for users in a rapidly changing and dynamic financial system:
 - 1.1. the Financial Ombudsman Service (FOS);
 - 1.2. the Superannuation Complaints Tribunal; and
 - 1.3. the Credit and Investments Ombudsman Scheme.
2. The review will have regard to: efficiency; equity; complexity; transparency; accountability; comparability of outcomes; and regulatory costs.
3. The review will make recommendations on:
 - 3.1. the role, powers, governance and funding arrangements of the dispute resolution and complaints framework in providing effective complaints handling processes for users, including linkages with internal dispute resolution;
 - 3.2. the extent of gaps and overlaps between each of the schemes (including consideration of legislative limits on the matters each scheme can consider) and their impacts on the effectiveness, utility and comparability of outcomes for users;
 - 3.3. the role of the schemes in working with government, regulators, consumers, industry and other stakeholders to improve the legal and regulatory framework to deliver better outcomes for users;
 - 3.4. the relative merits, and any issues that would need to be considered (including implementation considerations), of different models in providing effective avenues for resolving disputes; and

1 The original Terms of Reference for the Review were released on 8 August 2016. On 2 February 2017, the Government amended the Terms of Reference to ask the Panel to make recommendations on the establishment, merits and possible design of a compensation scheme of last resort and to consider the merits and issues involved in providing access to redress for past disputes (clauses 3.5 and 6). The Panel will report on these matters by the end of June 2017. For more information, see Minister for Revenue and Financial Services and Minister for Small Business media release of 3 February 2017, available at: <http://www.asbfeo.gov.au/sites/default/files/20170203-Carnell_report_into_banking_practices_released.pdf>.

- 3.5. the establishment, merits and possible design of a compensation scheme of last resort.
4. In making its recommendations, the review will, to the extent relevant, take into account best practice developments in dispute resolution arrangements in overseas jurisdictions and other sectors.
5. The review will take into consideration and consult with ASIC on the concurrent review of FOS's small business jurisdiction.
6. The review will consider the merits and issues involved in providing access to redress for past disputes.

Process

The review will be led by an independent expert panel, consisting of a Chair and two members, and be supported by a secretariat from Treasury.

A final report is to be provided to the Minister for Revenue and Financial Services by the end of March 2017 (with the exception of issues contained in clauses 3.5 and 6 which will be provided to the Minister by the end of June 2017).

The review will invite submissions from the public and consult with a range of stakeholders, including consumers and industry.

Executive Summary

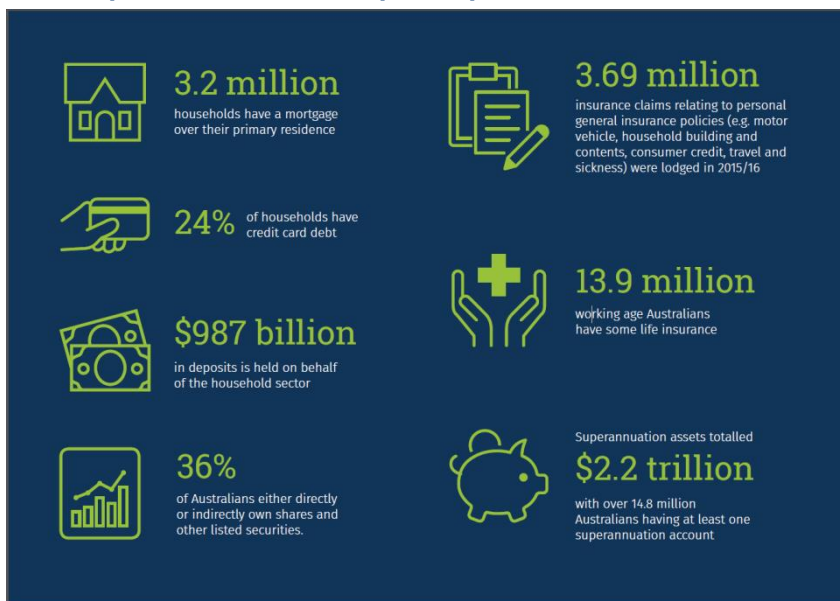
ACCESS TO REDRESS IS CRITICAL

This Report marks the first comprehensive review of the financial system's external dispute resolution (EDR) framework.

The review is both timely and important. The financial system plays a vital role in raising the living standards of all Australians, with its ultimate purpose being to facilitate sustainable economic growth by meeting the financial needs of its users. Its role in the economy and the lives of individual Australians continues to grow and evolve. In particular, since the introduction of compulsory superannuation, the superannuation system has grown significantly in size and now plays a crucial role in providing retirement incomes.

This increase in interactions between individuals and the financial system inevitably increases the demand for dispute resolution. Although the number of disputes remains small compared to the overall size of the system and the number of interactions individuals have with it, the impact of financial disputes on the lives of individuals and their families can be devastating. The public debate calling for speedier, low-cost methods of resolving financial disputes, together with the number of submissions to this review, highlights the importance of this issue for many Australians.

A snapshot of consumer participation in financial services²



2 Figures provided by the Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, page 4. See also Australian Bureau of Statistics, Finance and Wealth Accounts, September 2016 and Australian Taxation Office, Superannuation Statistics, <<https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Super-statistics/Super-accounts-data/Super-accounts-data-overview/>>.

When things go wrong, it can have distressing consequences for individuals and families. There have been a number of financial collapses in the past 10 years that have affected over 80,000 consumers, with losses totalling more than \$5 billion, or \$4 billion after compensation and liquidator recoveries.³ Common factors have been consumers receiving poor advice, having difficulty understanding complex documents and products and, in some cases, being taken advantage of for their lack of financial literacy. In these and other circumstances, it is important that people have access to effective redress mechanisms.

CURRENT ARRANGEMENTS

The current EDR arrangements consist of the Financial Ombudsman Service (FOS), Credit and Investments Ombudsman (CIO) and Superannuation Complaints Tribunal (SCT).

The EDR framework generally provides low cost, speedy and flexible access to redress.

In 2015-16, FOS, CIO and SCT received 41,223 disputes in total, with FOS receiving 34,095 disputes (83 per cent), CIO receiving 4,760 disputes (12 per cent) and SCT receiving 2,368 disputes (6 per cent).⁴

However, a number of features of the design of the current system mean that it is not producing the best possible outcomes for some users, in particular, consumers.

THE PANEL'S APPROACH

In undertaking its review, as required by its Terms of Reference, the Panel has had regard to, and has assessed the current framework against, the Review's core principles of efficiency, equity, complexity, transparency, accountability, comparability of outcomes and regulatory costs.

Using this approach, the Panel found strengths in the current system that should be retained, but also a number of problems which are undermining trust and confidence in the EDR framework and, hence, the financial system overall.

PROBLEMS TO BE ADDRESSED

The Panel found that the current framework is the product of history rather than design and, in significant areas, reform is needed.

The existence of multiple EDR schemes with overlapping jurisdictions means: it is difficult to achieve comparable outcomes for consumers with similar complaints; it is more difficult for consumers to progress disputes involving firms that are members of different schemes; and there is an increased risk of consumer confusion. Multiple EDR schemes also result in duplicative costs for industry and for the regulator.

³ Commonwealth of Australia 2014, *Financial System Inquiry Final Report*, page 28.

⁴ Data on dispute numbers available in: Financial Ombudsman Service 2016, *Annual Review 2015-16*, page 22; Credit and Investments Ombudsman 2016, *Annual Report on Operations 2015-16*, page 2; and Superannuation Complaints Tribunal 2016, *2015-16 Annual Report*, page 34. Percentages have been rounded to the nearest whole per cent.

Allowing competition between schemes, as currently occurs between FOS and CIO, creates the risk that schemes compete in relation to benefits provided to financial firms, rather than on achieving better outcomes for consumers.

The monetary limits and compensation caps of the schemes have fallen behind what is required to ensure access to justice for consumers and small business.

FOS and CIO's current monetary limit of \$500,000 and compensation cap of \$309,000 are no longer fit-for-purpose and bear little relationship to the value of some financial products (for example, mortgage balances, home insurance policies and some investments). This results in a gap in EDR coverage.

The Panel also found that small business does not have adequate access to EDR because the existing monetary limits of \$500,000 for the value of the claim under dispute and \$2 million in relation to credit facilities, and the existing compensation cap of \$309,000, preclude many disputes from being able to be brought to the schemes.

The dispute resolution arrangements for superannuation are broken, as identified in the Panel's Interim Report.

Although SCT has a highly professional staff and Chairperson, it is unable to resolve disputes quickly, in contrast to FOS and CIO. In 2015-16, for disputes that reached determination, it took an average of 796 days for a dispute to be resolved.

The problems facing SCT can be attributed to chronic underfunding and a lack of flexibility in its funding – there is no link between SCT funding and the level of complaints it receives – as well as outdated governance arrangements and limited flexibility to determine its dispute resolution process. There is a lack of focus on achieving system-wide improvements and the existing accountability mechanisms are passive and indirect.

The pressures on SCT will increase in the absence of significant reform, as the superannuation system matures and an increasing proportion of the population moves from the accumulation to the drawdown (retirement) phase. Fundamental reform will be required to manage ongoing changes in demand and to provide more effective dispute resolution for consumers.

Finally, there are gaps and overlaps in membership of EDR schemes. The absence of a requirement for debt management firms to be members of an EDR scheme represents a gap in the framework (for consumers of services these firms provide) and the requirement that both credit licensees and credit representatives hold EDR membership (rather than just credit licensees) results in unnecessary duplication and costs to the system without providing additional consumer protection.

IMPORTANT STRENGTHS TO BE RETAINED

Industry ombudsman schemes

In the Panel's view, factors critical to the success of the existing ombudsman schemes are that, although they are industry-funded, they are independent of industry and governed by boards that consist of an independent chair and equal numbers of directors with consumer and industry backgrounds. The operations of the ombudsman schemes are governed by terms of reference approved by their boards (and the Australian Securities and Investments Commission (ASIC)) rather than statute, which gives them flexibility to change their processes and funding arrangements without requiring changes to legislation or appropriation through the budget process.

These factors have provided schemes with administrative flexibility and responsiveness so that they can move quickly when circumstances require it; for example, by raising funds for additional staff if dispute numbers rise unexpectedly. As a result, FOS and CIO are generally capable of resolving disputes quickly – FOS within 62 days and CIO within 107 days.⁵

Superannuation disputes

The current arrangements for superannuation disputes also have a number of special features, including: an unlimited monetary jurisdiction; a broad jurisdiction to review trustee decisions; and statutory provisions (such as the ability to join third parties to a dispute and to require the production of information) to deal with the added complexity of some superannuation disputes.

A NEW SINGLE EDR BODY TO HANDLE ALL FINANCIAL DISPUTES

The Report makes 11 recommendations that represent an integrated package of reforms that will see the EDR framework well-placed to address current problems and ensure it is designed to withstand the challenges of a rapidly-changing financial system.

The Panel's central recommendation is the establishment of a new single EDR body for all financial disputes (including superannuation disputes) to replace FOS, CIO and SCT.

The Panel is of the view that an industry ombudsman scheme is the appropriate model for all areas of the financial system, including for the effective resolution of superannuation disputes. Identified strengths of the current superannuation dispute resolution arrangements will be accommodated through statutory provisions where required.

The Panel's preferred structure for the new EDR body is a company limited by guarantee.

5 Figures supplied by FOS and CIO. Schemes have separate approaches to calculating average time to resolve disputes, so the figures are not directly comparable.

The single EDR body should be formally approved. It will include, at a minimum, the following elements:

Governance, funding and membership

- It will be governed by a board with an independent chair and equal numbers of directors with industry and consumer backgrounds.
- It will be funded by industry through a transparent process.
- It will require compulsory membership through a licensing condition (or equivalent requirement) for financial firms (including superannuation funds).

Key features

The single EDR body will have the following key features:

- **Accessibility:** it will be free to consumers when they lodge a complaint.
- **Accountability:** it will be subject to strengthened accountability mechanisms, including regular independent reviews (with the reports and the body's responses to recommendations reported publicly) and will have an 'independent assessor' to review how disputes are handled (but not to review the outcome of individual disputes).
- **Enforceability:** firms will be required to comply with its determinations as a condition of membership and it will report firms that fail to comply to the appropriate regulator. The body will have the power to expel firms that fail to comply.
- **Improving industry practice:** it will monitor, address and report systemic issues to the appropriate regulator.
- **Expertise:** it will use panels to resolve disputes in specific circumstances, such as complex disputes, and will provide clear guidance and transparency to users on when a panel will be used.
- **Community engagement:** it will engage in outreach activities to raise awareness amongst consumers (in particular vulnerable consumers) and financial firms.

Increased access to redress

The single EDR body will allow more people to have their dispute heard and those who suffer losses will receive higher compensation.

Monetary limits and compensation caps will be set by the single EDR body in consultation with ASIC and small business, industry and consumer stakeholders.

However, the Panel has made the following recommendations:

- in relation to consumer disputes (and small business disputes, other than credit facility disputes), the new body should commence operations with a monetary limit of \$1 million (an increase of 100 per cent relative to the current limit) and a compensation cap of no less than \$500,000 (an increase of 62 per cent relative to the current cap). Prior to commencement, there should be consultation on whether disputes relating to certain products (including mortgages and general insurance products) should move immediately to a compensation cap of \$1 million; and
- in relation to small business credit facility disputes, small businesses should be able to bring a claim where the credit facility is of an amount up to \$5 million (an increase of 250 per cent relative to the current limit) and the body should operate a compensation cap of \$1 million (an increase of 224 per cent relative to the current cap).

Within 18 months of the single EDR body commencing its operations, an independent review should be undertaken to determine what impact (if any) the higher compensation cap has had on competition and consumer outcomes.

The Panel has also recommended that:

- there should be no monetary limits and compensation caps for disputes about whether a guarantee should be set aside where it has been supported by a mortgage or other security over the guarantor's primary place of residence; and
- the monetary jurisdiction for superannuation disputes should continue to be unlimited, in line with current arrangements.

Faster access to redress

The single EDR body will be funded on the basis of need and will have operational autonomy. This means:

- it will be better positioned than current arrangements to respond to increased volumes of disputes as it will be better able to shift resources within the body to those areas experiencing rises in disputes; and
- it will make the resolution of superannuation disputes more timely.

The single EDR body will provide a single point of redress for consumers and small business. It will have the power to make determinations that are binding on financial firms.

In order to ensure minimal disruption to users and minimise the costs of transition, the Panel has recommended a single stage transition to the EDR body.

A STRONGER REGULATORY FRAMEWORK

A strength of the EDR framework has been the co-regulatory approach, which has provided industry ombudsman schemes with the flexibility to evolve in response to market changes, changing stakeholder expectations and the recommendations of independent reviews, while being subject to oversight by ASIC.

With the move to a single EDR body for all financial disputes, the Panel considers it important to strengthen accountability and oversight.

The single EDR body will be required to have adequate funding and flexible processes to deal with unforeseen events (such as an increase in disputes following a financial crisis or natural disaster) and must be financially transparent. It will also be subject to regular independent reviews and will be required to publish detailed responses to the recommendations of those reviews. The body must also have an independent assessor to review complaints about the way it handles disputes.

The Panel has also recommended an increase in ASIC's powers through the introduction of a general directions power to allow ASIC to intervene when the single EDR body does not comply with legislative and regulatory requirements. These powers should only be used as a last resort following consultation with the EDR body.

OTHER RECOMMENDATIONS

The Panel has made recommendations to improve the effectiveness of internal dispute resolution (IDR) through increased reporting of IDR activity to ASIC and increased tracking of IDR disputes by the single EDR body. IDR is the primary avenue for aggrieved consumers to seek redress in the financial system and effective IDR supports effective EDR.

The Panel has also recommended requiring debt management firms to become members of the single EDR body. In principle, the Panel sees no reason why credit representatives should be required to hold EDR membership, but recommends that further work be undertaken to confirm there would be no unintended consequences.

NEXT STAGE OF THE REVIEW

On 2 February 2017, the Minister for Revenue and Financial Services wrote to the Panel amending the Review's Terms of Reference to ask the Panel to make recommendations on the establishment, merits and possible design of a last resort compensation scheme and to consider the merits and issues involved in providing access to redress for past disputes. A report on these matters is due to the Government by the end of June 2017. The Panel will release an Issues Paper on these matters in April 2017.

TABLE OF RECOMMENDATIONS

Recommendation 1: A single EDR body for all financial disputes (see Chapter 5)

There should be a single EDR body for all financial disputes to replace FOS, CIO and SCT.

Recommendation 2: Features of the single EDR body (see Chapter 6)

The single EDR body must be formally approved and must have, at a minimum, the following features:

Governance, funding and membership

- It should be governed by an independent board (with an independent chair and equal numbers of directors with industry and consumer backgrounds).
- It should be funded by industry through a transparent process.
- Membership should be compulsory through a licensing condition (or equivalent requirement) for financial firms.

Features

- **Accessibility:** It should be free to consumers when they lodge a complaint.
- **Accountability:** It should be subject to strengthened accountability mechanisms, which include regular independent reviews (with the reports of reviews and the EDR body's response to recommendations reported publicly) and the appointment of an 'independent assessor' to review the handling of disputes by the body (but not to review the outcome of individual disputes).
- **Enforceability:** Firms should be required to comply with its determinations as a condition of membership, with the body required to report firms that fail to comply to the appropriate regulator. The body should have the power to expel firms that fail to comply.
- **Improving industry practice:** It should monitor, address and report systemic issues to the appropriate regulator.
- **Expertise:** It should use panels to resolve disputes in specific circumstances, such as complex disputes, and provide clear guidance and transparency to users on when a panel will be used by the body.
- **Community engagement:** It should engage in outreach activities to raise awareness amongst consumers (in particular vulnerable consumers) and financial firms.

Recommendation 3: Powers of the single EDR body (see Chapters 6 and 7)

The single EDR body should have appropriate powers within its Terms of Reference to support its dispute resolution functions and, in the case of superannuation disputes, appropriate statutory provisions where required.

Recommendation 4: Enhancing access to redress for consumers (see Chapter 8)*4.1 Higher monetary limits and compensation caps (other than for superannuation disputes)*

The single EDR body should commence operations with a monetary limit of \$1 million and a compensation cap of no less than \$500,000.

4.2 Reviews of impacts of higher monetary limits and compensation caps

There should be two reviews of the body's monetary limits and compensation caps: an initial consultation prior to the commencement of the body and a second independent review following its implementation.

Pre-commencement consultation

During the process of transition and prior to commencement of the single EDR body, there should be consultation about:

- whether disputes in relation to certain products, including mortgages and general insurance products, should move immediately on commencement to a compensation cap of \$1 million; and
- whether there are compelling reasons to retain the current sub-limits applying to different insurance products.

The lower compensation cap of \$500,000 should only apply where there is evidence that moving immediately to a compensation cap of \$1 million is likely to result in a substantial lessening of competition (as a result of smaller firms being unable to obtain professional indemnity insurance and therefore being unable to enter or remain in the market).

Post-implementation review

Within 18 months of the single EDR body commencing its operations, an independent review should be undertaken to determine what impact (if any) the higher compensation cap has had on competition and consumer outcomes.

Where there is evidence that there has not been a substantial lessening of competition in the market, the compensation cap should be increased. This review process should continue in a staged manner until the compensation cap and monetary limits are aligned.

4.3 Guarantees

There should be no monetary limits and compensation caps for disputes about whether a guarantee should be set aside where it has been supported by a mortgage or other security over the guarantor's primary place of residence.

4.4 Ensuring monetary limits and compensation caps remain fit-for-purpose

The consumer monetary limits and compensation caps should be subject to regular indexation and review. Monetary limits and compensation caps should be set by the EDR body in consultation with ASIC and industry and consumer stakeholders to ensure they remain fit-for-purpose and that the substantial majority of disputes can be resolved through EDR.

4.5 Monetary jurisdiction for superannuation disputes

The monetary jurisdiction for superannuation disputes should continue to be unlimited, in line with current arrangements.

Recommendation 5: Enhancing access to redress for small business (see Chapter 8)

For small business disputes, other than credit facility disputes, the single EDR body should commence operations with a monetary limit of \$1 million and a compensation cap of no less than \$500,000.

For credit facility disputes, small businesses should be able to bring a claim where a small business credit facility is of an amount up to \$5 million and the single EDR body should be able to award compensation of up to \$1 million.

There should be no monetary limits and compensation caps for disputes about whether a guarantee should be set aside where it has been supported by a mortgage or other security over the guarantor's primary place of residence.

The small business monetary limits and compensation caps should be subject to regular indexation and review. Monetary limits and compensation caps should be set by the single EDR body in consultation with ASIC and small business, industry and consumer stakeholders to ensure they remain fit-for-purpose and that the substantial majority of disputes can be resolved through EDR.

Recommendation 6: Ensuring the single EDR body is accountable to users (see Chapter 9)

The single EDR body should be subject to enhanced accountability which would, at a minimum, include:

- ensuring it has sufficient funding and flexible processes to allow it to deal with unforeseen events, such as an increase in disputes following a financial crisis or natural disaster;
- providing an appropriate level of financial transparency to ensure it remains accountable to users and the wider public;
- being subject to regular independent reviews and publishing detailed responses in relation to recommendations of independent reviews; and
- an independent assessor to review complaints about the handling of disputes by the body.

Recommendation 7: Increased ASIC oversight of the single EDR body (see Chapter 9)

ASIC should be provided with a general directions power to allow it to compel performance from the single EDR body if it does not comply with legislative and regulatory requirements.

Recommendation 8: Transparency of internal dispute resolution (see Chapter 10)

To improve the transparency of IDR, financial firms should be required to report to ASIC in a standardised form on their IDR activity, including the outcomes for consumers in relation to complaints raised at IDR.

ASIC should have the power to:

- determine the content and format of IDR reporting (following consultation with industry and other stakeholders and having regard to the principles set out in Chapter 10 of the Final Report); and
- publish data on IDR both at aggregate level and, at its discretion, at firm level.

Recommendation 9: Referral of complaints back to financial firm (see Chapter 10)

Upon receipt, the single EDR body should refer all complaints back to the financial firm for a final opportunity to resolve the matter via IDR within a defined timeframe. It should register and track the progress of complaints referred back to IDR.

Recommendation 10: Debt management firms (see Chapter 11)

Debt management firms should be required to be members of the single EDR body. Further work should be undertaken to determine the most appropriate mechanism by which to impose this requirement.

Recommendation 11: Credit representatives (see Chapter 11)

In principle, there is no reason why credit representatives should continue to be required to hold EDR membership. However, further work should be undertaken before membership requirements are removed to confirm there would be no unintended consequences.

Chapter 1: Context for the Review and Review principles

- 1.1. The Terms of Reference require the Panel to review the existing dispute resolution and complaints arrangements in the financial system to consider whether changes are necessary to deliver effective outcomes for users in a rapidly changing and dynamic financial system. The Panel considers the primary users to be:
 - consumers and small businesses, who make complaints; and
 - financial service providers, which for the purposes of this report include superannuation fund trustees (other than self-managed superannuation funds),¹ approved deposit funds, retirement savings account providers, annuity providers, life policy funds and insurers, who respond to complaints – collectively referred to as ‘financial firms’.
- 1.2. The financial system plays a vital role in raising the living standards of all Australians, with its ultimate purpose being to facilitate sustainable economic growth by meeting the financial needs of its users. For the system to operate effectively, it should be subject to market forces and be overseen by a strong and effective regulatory framework.² To ensure consumers are treated fairly and can have confidence and trust in the financial system, they should have access to an effective dispute resolution framework.
- 1.3. In assessing whether changes to the financial system’s current dispute resolution and complaints schemes are necessary to deliver effective outcomes for users in a rapidly changing and dynamic financial system, it is important to establish how the financial system operates and how consumers engage with the system. This is because the types of complaints the framework receives from consumers are inseparable from the nature of the products, relationships and individuals which operate within the financial system.
- 1.4. In relation to how the financial system operates, it is now appreciated that there are limitations on its efficiency and stability, with a greater understanding that it operates as a complex, adaptive network.³ Complex because of the number of interconnections and adaptive as behaviours inside the network are driven by

1 The trustees of self-managed superannuation funds (SMSFs) are also the members of the fund (except in limited circumstances, such as children of adult SMSF members). As a result, these members do not have a need to participate in the EDR process in the same way as a financial firm. Members of SMSFs may participate in EDR processes as consumers; for example, as consumers of financial advice or other financial products.

2 Commonwealth of Australia 2014, *Financial System Inquiry Final Report*, page xv.

3 Commonwealth of Australia 2014, *Financial System Inquiry Final Report*, page 8, citing Haldane, A 2009 *Rethinking the financial network*, speech to the Financial Student Association Amsterdam, 28 April.

interactions between individuals.⁴ These properties mean that the financial system has the ability to create or amplify economic shocks, which can result in a significant number of consumers suffering losses within a short period of time, which occurred during the global financial crisis.⁵

- 1.5. In recent years, the financial system has also undergone a number of changes, including in the area of superannuation. Since the introduction of compulsory superannuation, the superannuation system has grown significantly in size and now plays a vital role in providing retirement incomes.⁶ With its compulsory nature and its implications of age pension outlays for taxpayers, there is an imperative for the regulatory settings, including in the area of consumer redress, to deliver appropriate outcomes.⁷
- 1.6. Consumers in the financial system can be disengaged, may possess behavioural biases,⁸ may have relatively low financial literacy and are often confronted with complex documents and products.⁹ Technological changes and innovation, while having the potential to improve consumer outcomes, can also deliver negative outcomes as products become increasingly complex.¹⁰
- 1.7. Additionally, most financial products are a form of 'credence good' meaning that their true value or utility to a consumer is not known or cannot be calculated at the point of purchase.¹¹ There is also evidence to suggest that consumer confusion can exist even with less complex products, such as debentures.¹²
- 1.8. For the financial system to achieve its goals of meeting the financial needs of its users, consumers must be treated fairly. This occurs where participants act with integrity, honesty, transparency and non-discrimination.¹³ Fundamental to fair treatment is the concept that while consumers should generally bear responsibility for their financial decisions and that some losses are inevitable in a market economy, consumers should be able to expect that financial products will perform in the way they are led to believe.¹⁴
- 1.9. To ensure consumers are treated fairly and can have confidence and trust in the financial system, they should have access to effective redress.¹⁵ Existing avenues

4 Haldane, A 2009, *Rethinking the financial network*, speech to the Financial Student Association Amsterdam, 28 April, page 3.

5 Commonwealth of Australia 2014, *Financial System Inquiry Final Report*, page 10.

6 Commonwealth of Australia 2014, *Financial System Inquiry Final Report*, page 89.

7 Commonwealth of Australia 2014, *Financial System Inquiry Final Report*, page 94.

8 Behavioural biases refers to the fact that consumers are subject to a range of emotional biases (for example, overconfidence bias, loss-aversion bias) and use various heuristics (rules-of-thumb, educated guesses, and so on) when making choices: see Financial Conduct Authority 2013, *Occasional Paper No. 1, Applying behavioural economics at the Financial Conduct Authority*, London.

9 Commonwealth of Australia 2014, *Financial System Inquiry Final Report*, page 199.

10 Commonwealth of Australia 2014, *Financial System Inquiry Final Report*, page 208.

11 Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, page 3.

12 Commonwealth of Australia 2014, *Financial System Inquiry Final Report*, page 209.

13 Commonwealth of Australia 2014, *Financial System Inquiry Final Report*, page xv.

14 Commonwealth of Australia 2014, *Financial System Inquiry Final Report*, page 12.

15 Commonwealth of Australia 2014, *Financial System Inquiry Final Report*, page 197.

of redress include accessing complaints handling by the financial firms (internal dispute resolution), alternative dispute resolution (ADR) and the courts.

- 1.10. In examining whether changes to the current dispute resolution and complaints schemes are necessary to deliver effective outcomes for consumers, regard will be had to a number of principles set out in the Terms of Reference, including: efficiency; equity; complexity; transparency; accountability; comparability of outcomes and regulatory costs.

PRINCIPLES GUIDING THE REVIEW

Efficiency

A complaints resolution framework should provide outcomes in an efficient manner. This requires ensuring the relevant body or bodies within the framework possess adequate coverage, powers, remedies, resources (that is, funding and skilled staff) and dispute resolution methods to enable complaints to be resolved quickly and with a minimum of resources. Equally important, is the power to refuse to hear disputes which are not suited to being resolved in an informal manner. There should also be flexible, forward-looking processes, including the appropriate use of technology, which enables a body to respond quickly to new issues and any variability in complaints volumes.

Equity

Complainants should be treated fairly. They must have adequate access to redress with minimal cost barriers and be able to easily access the system. Users should be provided with unbiased decision making and fair treatment, including procedural fairness.

Complexity

Given individuals can possess low levels of financial literacy and behavioural biases, a complaints resolution framework should have minimal complexity. The framework as a whole, and individual bodies within the framework, must be easy to navigate and use, with a focus on informality.

Transparency

A complaints resolution framework should be transparent and open. Users should have access to appropriately tailored information about the relevant body, including what services are provided and how disputes can be lodged. Users should also be informed about what outcomes they can reasonably expect from the process. Decisions, including reasons for a decision, and processes should be easily observable.

Accountability

A complaints resolution framework should ensure decision makers account for their actions both to users and the wider public, for example, through regulatory oversight and judicial oversight where appropriate. Final decisions and complaints information should be publicly available, along with detailed information about the relevant body. Periodic independent reviews, and the bodies' responses to the reviews, also play an important role in ensuring accountability.

Comparability of outcomes

A complaints resolution framework should ensure that consumers receive comparable outcomes, both procedurally and substantively. Consumers who have similar complaints (for example, in relation to substantively similar financial products) should receive similar outcomes, whether these complaints are resolved by the same or different bodies.

Regulatory costs

The regulatory settings for a dispute resolution framework should, as appropriate, utilise market forces and avoid creating moral hazards. The framework should impose the minimum amount of regulatory costs necessary to ensure effective user outcomes. These costs should be borne by those who create the requirement for regulation, with incentives for costs to be minimised.

- 1.11. The Review principles are similar to the principles in the benchmarks for industry-based customer dispute resolution schemes, which were first published in 1997 and reviewed and rereleased in 2015¹⁶ and for which there is strong and continuing support.¹⁷ The benchmarks formed the key principles that ASIC takes into account when considering whether to approve an external dispute resolution scheme (this is discussed further in Chapter 3).
- 1.12. In applying the Review principles, it is important to recognise that there will often be trade-offs in their implementation, for example, increasing access to redress (which goes to equity) by allowing new types of claims to be heard may increase costs in the system (regulatory costs).
- 1.13. In arriving at its recommendations, the Panel has also taken into account findings and recommendations of other reviews including the Financial System Inquiry, several Productivity Commission Reviews,¹⁸ and the Super System Review

16 As announced by the then Minister for Small Business, 4 March 2015, <<http://www.brucebillson.com.au/2015/03/04/helping-businesses-resolve-customer-disputes/>>. The Benchmarks are available at: <<http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/benchmarks-ind-cust-dispute-reso>>.

17 Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, page 6.

18 Productivity Commission 2008, *Review of Australia's Consumer Policy Framework*, Commonwealth of Australia, Canberra; Productivity Commission 2014, *Access to Justice Arrangements*, Commonwealth of Australia, Canberra.

(Cooper Review). In developing its draft recommendations, the Panel has had regard to approaches in the United Kingdom, New Zealand, Singapore and Canada, and the telecommunications and energy and water sectors in Australia.

- 1.14. In examining overseas jurisdictions and domestic sectors, it has become clear that there are a range of EDR models operating internationally and domestically. The Panel has concluded that ultimately, the appropriate EDR framework for a jurisdiction is a product of its regulatory landscape and other features unique to the jurisdiction.
- 1.15. There are also a number of more recent reports and Inquiries that have informed the Panel's deliberations and final recommendations:
- FOS consultation on an extension to its small business jurisdiction;
 - The Report of the House of Representatives Standing Committee on Economics – Review of the Four Major Banks, which was released on 24 November 2016 and included recommendations to establish a single statutory dispute resolution body for financial system disputes (Recommendation 1: establishment of a Banking and Financial Sector Tribunal) and to strengthen internal dispute resolution (IDR) (Recommendation 8: ASIC should have the power to collect recurring data about licensees' IDR procedures to enable it to identify non-compliance with IDR requirements); and
 - The Australian Small Business and Family Enterprise Ombudsman's Inquiry into small business loans, which was released on 3 February 2017. The Panel has had particular regard to the recommendations which relate to external dispute resolution, being Recommendation 11 of the Inquiry (establishment of a one-stop shop with a dedicated small business unit that has appropriate expertise to consider disputes with a credit facility limit of up to \$5 million) and Recommendation 13 (that the relevant external dispute resolution schemes be expanded to include disputes with third parties of the bank, such as valuers, investigating accountants and receivers appointed by the bank).

Chapter 2: Alternative dispute resolution

2.1. The Terms of Reference require the Panel to assess the current dispute resolution framework, which consists of two industry-based ombudsman schemes and a statutory tribunal. This chapter identifies the differences between these two forms and the range of dispute resolution techniques available to them.

WHAT IS ALTERNATIVE DISPUTE RESOLUTION?

2.2. Alternative Dispute Resolution or ADR¹ is an umbrella term for processes in which an impartial person (an ADR practitioner) assists those in a dispute to resolve the issues between them. It provides an alternative to resolving disputes through the Courts and is more flexible and informal in approach.

DISPUTE RESOLUTION PROCESSES

2.3. ADR encompasses a variety of dispute resolution processes, ranging from informal negotiation and mediation through to formal determinations by arbitration. These ADR processes can broadly be categorised as one of, or often a combination of, the following:²

- facilitative;
- advisory; and
- determinative.



1 ADR can also mean assisted or appropriate dispute resolution, see the Attorney General’s Department, 2015, *Guidance Note No 12 – Use of Alternative Dispute Resolution (ADR)*, Re-issued July 2015.

2 See the Attorney General’s Department, *Alternative Dispute Resolution*, Commonwealth of Australia, viewed on 25 November 2016, <<https://www.ag.gov.au/legalsystem/alternatedisputeresolution/pages/default.aspx>>.

- 2.4. Facilitative processes aim to resolve disputes by assisting parties to identify the disputed issues, develop options, consider alternatives and try to reach an agreement about some issues or the whole dispute.³ Examples of facilitative processes include negotiation, facilitation, conferencing, conciliation and mediation.
- 2.5. In advisory dispute resolution processes, an impartial person 'considers and appraises the dispute and provides advice as to the facts of the dispute, the law, and, in some cases, possible or desirable outcomes and how these may be achieved'.⁴ Examples of advisory processes are case or expert appraisals and early neutral evaluations.
- 2.6. In determinative dispute resolution, an independent adjudicator evaluates the dispute in question and makes a decision. This process is most like a court in that it may include a hearing and a determination by an impartial person of formal evidence from the parties to the dispute. Examples of determinative processes include arbitration, expert determination and private judging.⁵
- 2.7. Often ADR mechanisms involve a combination of these processes. For example, an ombudsman scheme may conduct conciliation (facilitative), case or expert appraisal (advisory) and a formal determination (determinative) to resolve a dispute. The strength of ADR is its flexible approach and the range of techniques available to it to resolve a dispute.
- 2.8. These categories are not strictly delineated and it is better to consider them across a spectrum. At one end is facilitative ADR, which is the 'most empowering' as it gives the parties the most control over resolving their dispute. At the other end is determinative ADR, which is the 'most directed' and involves a decision being imposed on the parties.⁶

3 National Alternative Dispute Resolution Advisory Council 2009, *Alternative Dispute Resolution in the Civil Justice System Issues Paper*, page 3.

4 National Alternative Dispute Resolution Advisory Council 2009, *Alternative Dispute Resolution in the Civil Justice System Issues Paper*, Commonwealth of Australia.

5 National Alternative Dispute Resolution Advisory Council 2009, *Alternative Dispute Resolution in the Civil Justice System Issues Paper*, Commonwealth of Australia.

6 National Alternative Dispute Resolution Advisory Council 2009, *Alternative Dispute Resolution in the Civil Justice System Issues Paper*, Commonwealth of Australia.

FORUMS FOR ALTERNATIVE DISPUTE RESOLUTION

Tribunals

- 2.9. Two common types of dispute resolution bodies in Australia are tribunals and ombudsmen. In many cases, tribunals are statutory, independent legal institutions established to provide a platform to resolve specific disputes. Recent figures suggest there are 54 tribunals in Australia, which collectively resolve approximately 395,000 disputes per year.⁷
- 2.10. There are two key types of tribunals in Australia: administrative tribunals, which deal with disputes arising from government decisions; and civil tribunals, which deal with disputes arising from private matters. The jurisdiction of Commonwealth tribunals is limited by Chapter III of Australia's Constitution, in that judicial power is reserved for the courts. Consequently, Commonwealth tribunals are administrative and no Commonwealth tribunal has general civil jurisdiction, whereas state and territory tribunals can have both administrative and civil jurisdiction.⁸
- 2.11. Like courts, tribunals must be impartial and detached from the executive government; have a defined jurisdiction; receive claims or applications; determine claims in accordance with due process; apply the relevant law to make a reasoned decision; and make a final order.⁹ However a key difference between a tribunal and a court is that tribunals cannot create binding precedents nor can they apply criminal penalties.¹⁰
- 2.12. Tribunals can also be distinguished from courts in that they aim to provide quick, economic and inexpensive justice by being less formal than courts. They can provide active case management and employ alternative dispute resolution techniques, thereby limiting the need for legal representation and costs awards.
- 2.13. Whilst tribunals have an appropriate place in the alternative dispute resolution framework in Australia, compared with ombudsman schemes (which are discussed below), tribunals:
- can be less accessible: there can be costs associated with their use and they can require the completion of written application forms (compared with online or telephone lodgement of disputes);¹¹
 - can be less flexible and dynamic: they can operate more like courts compared with the inquisitorial approach of an ombudsman scheme¹²

7 Productivity Commission 2014, *Access to Justice Arrangements Inquiry Report*, Commonwealth of Australia, Canberra, page 346.

8 Productivity Commission 2014, *Access to Justice Arrangements Inquiry Report*, Commonwealth of Australia, Canberra, page 347.

9 *N (No 2) v Director General, Attorney-General's Dept* [2002] NSWADT 33 (8 March 2002) at [15].

10 Productivity Commission 2014, *Access to Justice Arrangements Inquiry Report*, Commonwealth of Australia, Canberra, page 346.

11 Legal Aid New South Wales, submission to the EDR Review Issues Paper, page 40.

and have been accused of ‘creeping legalism’.¹³ If governed by statute, Tribunals can be slower to evolve and respond to dynamic environments, requiring legislative change or government involvement to respond to industry changes or to reform their operations;

- can apply a relatively ‘black letter law’ approach to decision making: in contrast to ombudsman schemes, where the approach to dispute resolution can be based on a broader range of factors, including good industry practice and Codes of Practice;¹⁴ and
- can be focused on making a decision in relation to the individual dispute under consideration, rather than on improving industry practice more broadly (that is, there is no function to identify or address systemic issues)¹⁵ or undertaking community outreach or stakeholder engagement.¹⁶

Ombudsman schemes

- 2.14. Ombudsman schemes are independent organisations that receive complaints and conduct inquiries to resolve these complaints. They have the power to undertake investigations of their own motion.¹⁷ They can also play a broader role in engaging with the community and industry to improve access to justice and raise industry standards.¹⁸
- 2.15. There are two key types of ombudsman schemes: industry ombudsman schemes, which deal with disputes between consumers and service providers; and government ombudsman schemes, which deal with disputes about the conduct and decision making of government agencies.
- 2.16. Industry ombudsman schemes exist in multiple sectors across the Australian economy. The Financial Ombudsman Service Limited (FOS) and the Credit and Investments Ombudsman (CIO) operate in the financial system. In the telecommunications sector, the Telecommunications Industry Ombudsman (TIO) is the single nationwide ombudsman, while there are various state-based ombudsmen in the utilities sector, including the Energy and Water Ombudsman Victoria (EWOV) and the Energy and Water Ombudsman Queensland (EWOQ). Further information on the TIO, EWOV and EWOQ can be found in Appendix 1.

12 Legal Aid New South Wales 216, submission to the EDR Review Issues Paper, page 40.

13 Productivity Commission 2014, *Access to Justice Arrangements Final Report*, Commonwealth of Australia, page 36.

14 Legal Aid New South Wales, submission to the EDR Review Issues Paper, page 40.

15 Financial Ombudsman Service 2016, submission to the EDR Review Issues Paper, page 41. See for example, Cameronralph Navigator 2016, *Review of Tenants’ and Consumers’ Experience of Victorian Civil and Administrative Tribunal: Residential Tenancies List and Civil Claims List – Research Report*, page 45.

16 Financial Ombudsman Service, submission to the EDR Review Issues Paper, page 34.

17 Productivity Commission 2014, *Access to Justice Arrangements Final Report*, page 314.

18 Financial Ombudsman Service 2016, submission to the EDR Review Issues Paper, page 41.

- 2.17. According to the Australian and New Zealand Ombudsman Association (ANZOA), to identify as an Ombudsman scheme, a body must satisfy six requirements, set out below:¹⁹

Essential features of an ombudsman scheme

(1) Independence

- The Ombudsman must operate on a not-for-profit basis and be independent of the organisations being investigated.
- The person appointed as Ombudsman must be appointed for a fixed term, must not be subject to direction, nor be an advocate for a special interest group, agency or company.
- The Ombudsman must have an unconditional right to make public reports and statements on the findings of investigations undertaken by the office and on issues giving rise to complaints.
- The Ombudsman's office must operate on a not-for-profit basis.

(2) Jurisdiction

- The jurisdiction of the Ombudsman should be clearly defined in legislation or in the document establishing the office.
- The jurisdiction should extend generally to the administrative actions or services of organisations falling within the Ombudsman's jurisdiction.
- The Ombudsman should decide whether a matter falls within jurisdiction—subject only to the contrary ruling of a court.

(3) Powers

- The Ombudsman must have the right to: investigate whether an organisation within jurisdiction has acted fairly and reasonably; deal with systemic issues or commence an own motion investigation; obtain information or to inspect the records of an organisation relevant to a complaint; discretion to choose the procedure for dealing with a complaint, including use of conciliation and other dispute resolution processes.

(4) Accessibility

- A person must be able to approach the Ombudsman's office directly.
- It must be for the Ombudsman to decide whether to investigate a complaint.
- There must be no charge to a complainant for the Ombudsman's investigation of a complaint.

¹⁹ Australian and New Zealand Ombudsman Association 2010, *Essential criteria for describing a body as an ombudsman*, viewed 25 November 2016, <http://www.anzoa.com.au/assets/anzoa_media-release_essential-criteria-for-use-of-the-term-ombudsman.pdf>.

(4) Accessibility (continued)

- Complaints are generally investigated in private, unless there is reasonable justification for details of the investigation to be reported publicly by the Ombudsman—for example, in an annual report or on other public interest grounds.

(5) Procedural fairness

- The procedures that govern the investigation work of the Ombudsman must embody a commitment to fundamental requirements of procedural fairness:
 - The complainant, the organisation complained about and any person directly adversely affected by an Ombudsman's decision or recommendation—or criticised by the Ombudsman in a report—must be given an opportunity to respond before the investigation is concluded.
 - The actions of the Ombudsman and staff must not give rise to a reasonable apprehension of partiality, bias or prejudice.
 - The Ombudsman must provide reasons for any decision, finding or recommendation to both the complainant and the organisation which is the subject of the complaint.

(6) Accountability

- The Ombudsman must be required to publish an annual report on the work of the office.
- The Ombudsman must be responsible—if a Parliamentary Ombudsman, to the Parliament; if an Industry-based Ombudsman, to an independent board of industry and consumer representatives.

Ombudsman schemes and access to justice

2.18. Ombudsman schemes provide complainants with an alternative to the judicial system. By providing a mechanism for complainants to resolve low value disputes, ombudsman services can deal with smaller issues in a proportional manner and can prevent them from evolving into bigger issues. Ombudsman services can also assist complainants to overcome power imbalances by helping them to assert their rights when dealing with large companies.²⁰

20 Productivity Commission 2014, *Access to Justice Arrangements Inquiry Report*, Commonwealth of Australia, Canberra, page 315.

- 2.19. The traditional court system, which relies on lawyers, the rules of evidence and specific processes and procedures can be complex and intimidating for consumers. In this regard, a benefit of ombudsman schemes is that they provide claimants with a relatively simple process, led by the ombudsman, negating the need for formal legal representation. Furthermore, ombudsman services are not restricted to resolving legal issues; rather, they have scope to consider a broader range of factors.²¹
- 2.20. Where there is a general problem in an industry affecting multiple consumers and a number of similar complaints are received about a particular issue, ombudsman schemes have the capacity to instigate and conduct investigations to identify systemic issues. Once these issues have been identified and investigated, ombudsman services can alert the relevant stakeholders and regulators and assist in their resolution. This approach is more cost-effective than litigation and has the potential to provide positive outcomes for consumers by promoting good industry practice.²²
- 2.21. Ombudsman schemes are also able to promote access to justice through their ability to adapt and innovate in response to changes in the external environment. This has been particularly relevant in the financial system, which has seen rapid changes in the types of products being sold and the types of consumers purchasing them.²³
- 2.22. There is a general consensus among stakeholders that ombudsman services are an effective dispute resolution mechanism which promotes access to justice and decreases the burden on the judicial system.²⁴ While there are clear benefits of ombudsman schemes, low awareness amongst consumers may prevent them from fully utilising these services.²⁵
- 2.23. Ombudsman-type schemes in the financial services sector also exist in a number of international jurisdictions. This Review has considered a number of these, including New Zealand, the United Kingdom, Singapore and Canada. A comparison of the key features of these bodies is contained in the below table, with further detailed information available at Appendix 1.

21 Productivity Commission 2014, *Access to Justice Arrangements Inquiry Report*, Commonwealth of Australia, Canberra, page 316-317.

22 Legal Aid New South Wales 2016, submission to the EDR Review Issues Paper, page 19; Joint Consumer Group 2016, submission to the EDR Review Issues Paper, page 31.

23 Financial Ombudsman Service, submission to the EDR Review Issues Paper, pages 4 and 8; Joint Consumer Group, submission to the EDR Review Issues Paper, page 39.

24 Productivity Commission 2014, *Access to Justice Arrangements Inquiry Report*, Commonwealth of Australia, Canberra, page 318.

25 Productivity Commission 2014, *Access to Justice Arrangements Inquiry Report*, Commonwealth of Australia, Canberra, page 320.

	Australia	New Zealand	United Kingdom	Singapore	Canada
Multiple or single scheme	Multiple schemes	Multiple schemes	Single scheme for complaints about financial services.	Single scheme	Multiple schemes
Funding model	Industry funded	Industry funded	Industry funded	Predominantly industry funded	Industry funded
Cost to consumers	Free for consumers	Free for consumers	Free for consumers	Consumers pay \$50 at the adjudication phase	Free for consumers
Frequency of Independent reviews	Reviews of industry schemes required at least every five years	Reviews required at least every five years	Board has committed to three-yearly reviews	Reviews required every three years ¹	Various procedures and timeframes
Statutory and/or non-statutory	Statutory and non-statutory	Non-statutory	Statutory	Non-statutory	Statutory and non-statutory
Binding determinations	Consumers using industry schemes not bound by determinations; superannuation consumers can appeal a determination on matters of law	Consumers not bound by determinations	Consumers not bound by determinations	Consumers not bound by determinations	Neither party is bound by the determination
Governance	Governance models include boards and chairpersons	Governance models include boards and an advisory council	Governed by a board	Governed by a board	Governance models include boards and advisory bodies
Last resort compensation scheme	No	No	Yes	No	Yes, but limited ²

1 Although this can be made later with the discretion of the regulator, and the regulator can require any other kind of review at any time.

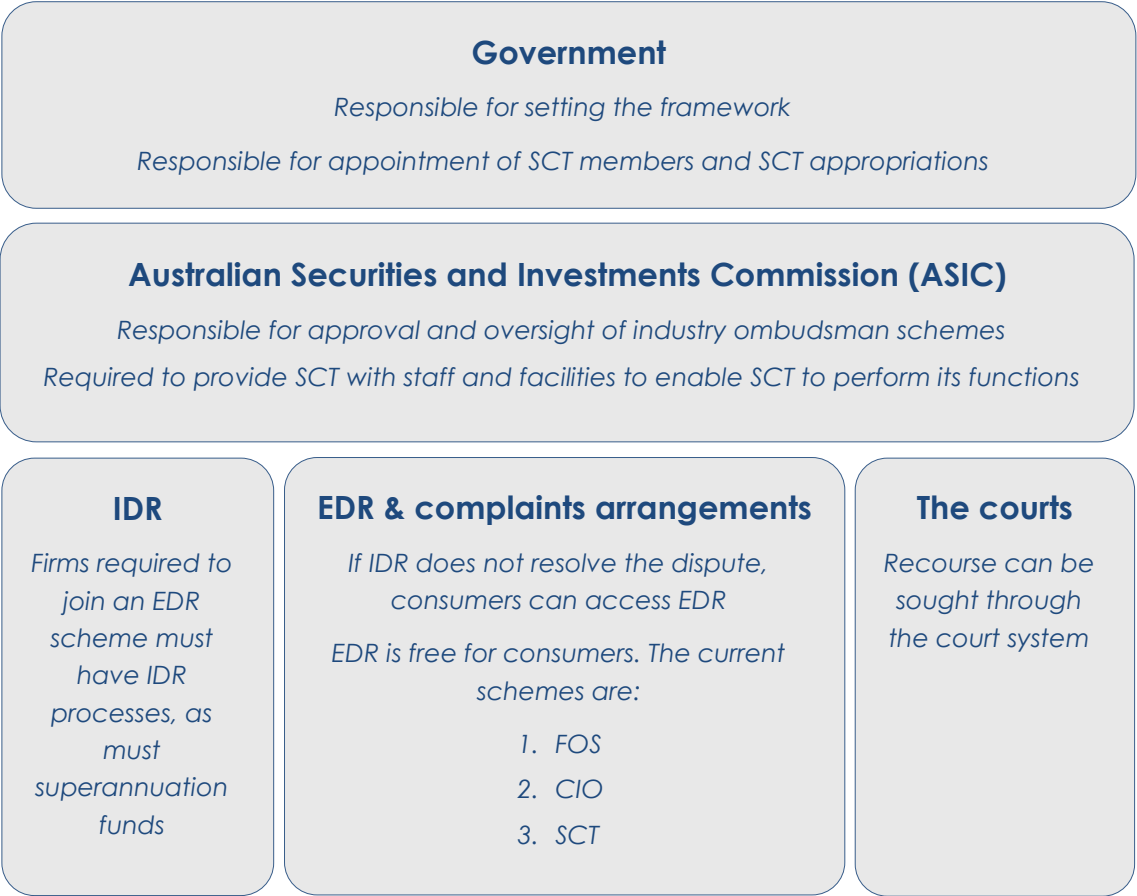
2 The Canadian Investor Protection Fund can provide compensation where an investment firm member becomes insolvent and they were holding property on behalf of a client at the time.

Chapter 3: Overview of the dispute resolution framework in the financial system

3.1. The Terms of Reference require the Panel to make recommendations on the role, powers, governance and funding arrangements of the dispute resolution and complaints framework in providing effective complaints handling. This chapter traces the evolution of the current framework, provides a comparison of the three existing bodies, and information on ASIC’s oversight role.

THE CURRENT FRAMEWORK

3.2. The current dispute resolution framework in the Australian financial system consists of government, the Australian Securities and Investments Commission (ASIC), internal dispute resolution (IDR), external dispute resolution (EDR) bodies – the Financial Ombudsman Service (FOS), Credit and Investments Ombudsman (CIO), and Superannuation Complaints Tribunal (SCT) and the courts, as depicted below.



EVOLUTION OF THE DISPUTE RESOLUTION FRAMEWORK

Industry ombudsman schemes

- 3.3. The history of dispute resolution in Australia is well established. The establishment of industry based schemes has been actively supported by government, recognising that EDR makes good business sense by improving industry practices while providing consumer redress and negating the need for government intervention. Consumer advocates also played a role in establishing dispute resolution bodies in Australia. Strong lobbying by consumer groups in the 1980s and 1990s created significant pressure for the development of effective dispute resolution processes.¹ Various industries within Australia, including banking, telecommunications, insurance, utilities and investment recognised this growing consumer pressure and responded by voluntarily creating industry specific dispute resolution schemes. As a result, in the 1980s dispute resolution was comprised of voluntarily established, industry ombudsman schemes.
- 3.4. The 1990s was a period of change and development in the financial services industry with rapid growth in financial products, industry consolidation, technological developments and globalisation. At the same time, the governing regulation was piecemeal and varied leading to increased compliance costs and limited opportunities for competition. The Government was concerned that the law was not keeping up with the pace of change in the financial services industry.²
- 3.5. In 1996, the Financial System Inquiry (the Wallis Committee) was established to analyse the forces driving change in the financial system and to recommend ways to improve the existing regulatory environment.
- 3.6. The Wallis Committee recommended a single licensing regime in relation to all financial products. The thinking behind the harmonised licensing regime was that principals rather than agents were licensed so that principals bore the costs of training, supervising and controlling their agents and employees. Another key Wallis Committee recommendation was mandatory membership of an ASIC-approved EDR scheme, recognising the importance of industry providing low-cost means to resolve disputes where a consumer felt a promise by a financial firm was not being kept.³

1 Neave, C, and Pinnock, J, 2003, *Setting the Scene: Industry-based customer dispute resolution schemes*, presentation to the National Alternative Dispute Resolution Advisory Council, Sydney, page 4.

2 Australian Treasury, *Financial Products, Service Providers and Markets – An Integrated Framework*, page 56, viewed 19 November 2016, <[archive.treasury.gov.au/documents/196/PDF/round 4.pdf](http://archive.treasury.gov.au/documents/196/PDF/round%204.pdf)>.

3 Parliament of the Commonwealth of Australia 2001, *Financial Services Reform Bill 2001, Explanatory Memorandum, Regulation Impact Statement*, page 3.

- 3.7. The *Financial Services Reform Act 2001* was the legislative response to the recommendations from the Wallis Committee. Hence, to obtain an Australian Financial Services Licence (AFSL) a licensee had to satisfy a prescribed set of criteria, including (where the licensee is providing services to retail clients) having adequate internal dispute resolution procedures in place and membership of an external dispute resolution scheme/mechanism approved by ASIC.
- 3.8. In 1999, ASIC released its policy guidelines for EDR schemes: *Policy Statement 139 Approval of external complaints resolution schemes*, setting out the matters ASIC would take into account when considering whether to approve an external dispute resolution scheme.
- 3.9. Between 2001 to 2004, ASIC approved seven schemes, including the Banking and Financial Services Ombudsman Limited (BFSO); the Credit Ombudsman Service Limited (COSL); the Credit Union Dispute Resolution Centre Pty Limited (CUDRC); the Financial Co-operative Dispute Resolution Scheme (FCDRS); the Financial Industry Complaints Service Limited (FICS); Insurance Brokers Disputes Limited (IBDL); and the Insurance Ombudsman Service Limited (IOS). In 2004, ASIC rejected an application for EDR approval for a new time-share EDR scheme, which was subsequently affirmed in the Administrative Appeals Tribunal.⁴
- 3.10. In 2008, FOS was formed through a merger of the BFSO, FICS and IOS. On 1 January 2009, CUDRC and IBDL also joined FOS.
- 3.11. CIO was first established as the Mortgage Industry Ombudsman Service Limited on 18 June 2003 and commenced operations on 1 July 2003. It adopted the name Credit Ombudsman Service Limited (COSL) on 17 February 2004 before becoming CIO on 19 November 2014.⁵

Statutory Tribunal: Superannuation Complaints Tribunal

- 3.12. SCT was created in 1993 following the introduction of compulsory superannuation in Australia and preceded the co-regulatory framework established for industry based EDR schemes.
- 3.13. The Senate Select Committee on Superannuation considered various models for EDR for superannuation, including an ombudsman scheme, an industry scheme with a code of practice and arbitration approach, a panel selected by the Minister teamed with an advisory service for members, commercial arbitration, and a statute based review panel. The Committee ultimately recommended a statutory

4 *Australian Timeshare and Holiday Ownership Council Limited v Australian Securities and Investments Commission* [2008] AATA 62 (23 January 2008).

5 Credit and Investments Ombudsman website, viewed 22 November 2016, <<http://www.cio.org.au/about/about-cio/>>.

model, although SCT (which commenced operations in 1994) is not identical in all respects to the model recommended.⁶

- 3.14. ASIC does not have a policy or operational oversight role over SCT. Further information on ASIC’s role in relation to SCT is at paragraphs 3.28 to 3.30.

COMPARISON OF EXISTING DISPUTE RESOLUTION BODIES

- 3.15. The table below summarises and compares key features of FOS, CIO and SCT. Detailed information on each of the bodies is in Chapter 4.

	FOS	CIO	SCT
Dispute numbers (2015-16)	34,095 disputes received; 32,871 disputes closed. ⁷	4,760 complaints received; 4,145 complaints closed. ⁸	2,368 complaints received; 1,366 complaints resolved. ⁹
Who lodged dispute (2015-16)	Individuals: 94 per cent Small business: 6 per cent. ¹⁰	Individuals: 94 per cent Small business: 6 per cent.	Individuals: 100 per cent.
Legislative base	ASIC-approved EDR scheme, set up as a not for profit company.	ASIC-approved EDR scheme, set up as a not for profit company.	Statutory authority established under the <i>Superannuation (Resolution of Complaints) Act (SRC Act)</i> .
Jurisdiction	Minimum jurisdiction set out in ASIC RG 139. Terms of Reference can exceed minimum requirements. Monetary limits apply: each claim under dispute must not exceed \$500,000 and compensation cap, typically, \$309,000 applies. Time limits apply.	Minimum jurisdiction set out in ASIC RG 139. Terms of Reference can exceed minimum requirements. Monetary limits apply: each claim under dispute must not exceed \$500,000 and compensation cap, typically \$309,000, applies. Time limits apply.	Jurisdiction set out in SRC Act. No monetary limits or compensation caps apply. Time limits apply for certain disputes (such as death benefits and total and permanent disability claims).

6 Association of Superannuation Funds of Australia, submission to the EDR Review Issues Paper, page 3.

7 Complaints received in a financial year are not necessarily closed in the same year.

8 Complaints received in a financial year are not necessarily closed in the same year.

9 Superannuation Complaints Tribunal, data supplied to EDR Review, 7 October 2016.

10 While the low percentage of small business disputes may suggest small businesses are not significant users of EDR, the jurisdictional limits of FOS and CIO may mean many small businesses are not taking their disputes to an EDR schemes. In this way, the percentage of small business disputes may understate the need for small business access to redress.

	FOS	CIO	SCT
Small business jurisdiction	Monetary limits apply: each claim under dispute must not exceed \$500,000 and, where the dispute relates to a credit facility, the facility must not exceed \$2 million. Compensation cap, typically \$309,000, applies.	Monetary limits apply: each claim under dispute must not exceed \$500,000 and, where the dispute relates to a credit facility, the facility must not exceed \$2 million. Compensation cap, typically \$309,000, applies.	N/A
Powers	Established in FOS Constitution. Contractual relationship between FOS and financial firm. Wide range of remedies, including ability to award non-financial loss. Able to join third parties where member of FOS. Able to expel member for non-compliance.	Established in CIO Constitution. Contractual relationship between CIO and financial firm. Wide range of remedies, including ability to award non-financial loss. Able to join third parties where member of CIO. Able to expel member for non-compliance.	Statutory powers set out in SRC Act. Can join third parties to complaint. Remedies specified in statute: complainant must be put into a position where the unfairness or unreasonableness experienced by a decision no longer exists. Non-compliance may be reported to regulator, may constitute an offence.
Governance	Scheme is governed by an independent board, with an independent chair and equal number of directors with a consumer and industry background.	Scheme is governed by an independent board, with an independent chair and equal number of directors with a consumer and industry background.	No Board of directors. SCT Chairperson is chief decision-maker and is in charge of administration, but has minimal powers. SCT has established an Advisory Council to provide advice to Chairperson. Tribunal members appointed by government.
Funding arrangements	Free to complainants. Funded by FOS members.	Free to complainants. Funded by CIO members.	Free to complainants. Budget set by government, then recovered via APRA levies set by the Minister.
Models of dispute resolution	Flexibility to determine dispute resolution process. Majority of disputes resolved through negotiation/ conciliation.	Flexibility to determine dispute resolution process. Majority of disputes resolved through negotiation/ conciliation.	Limited flexibility to determine dispute resolution process. Dispute must progress from investigation to conciliation to determination. Majority of disputes are resolved through conciliation.

	FOS	CIO	SCT
Dispute resolution criteria	'Fairness in all the circumstances' having regard to: legal principles; applicable industry codes; good industry practice; and previous FOS decisions (although FOS is not bound by these).	Independent and prompt resolution of dispute, having regard to: relevant legal requirements and rights provided by law to consumers; applicable codes of practice; good industry practice in the financial services industry; and fairness in all the circumstances.	Whether the trustee's decision was 'fair and reasonable' in the circumstances. If the trustee's decision was fair and reasonable, SCT must affirm decision.
Accountability	ASIC oversees FOS, which must comply with RG 139. Independent reviews every 5 years.	ASIC oversees CIO, which must comply with RG 139. Independent reviews every 5 years.	Parliamentary scrutiny, including annual report tabled in Parliament and option for individuals to raise complaints with Commonwealth Ombudsman. Subject to Freedom of Information laws. Not subject to independent reviews.
Systemic issues reporting	Required to monitor, address and report on systemic issues relating to complaints handling by a financial firm.	Required to monitor, address and report on systemic issues relating to complaints handling by a financial firm.	No formal requirement to undertake systemic issues reporting.
Rights of appeal	Complainant not bound by FOS decision, can still go to court/ mediation. Financial firm bound by FOS decision, able to appeal in limited circumstances.	Complainant not bound by CIO decision, can still go to court/ mediation. Financial firm bound by CIO decision, able to appeal in limited circumstances.	Complainant can still go to court before SCT determination is made (SCT must stop investigating if complaint is subject to court proceedings). Superannuation trustee (and other financial firm for example, insurer joined to dispute) bound by SCT decision. Parties can appeal SCT decision in Federal Court on matters of law.
Relationship to IDR	Consumer must have attempted IDR before accessing FOS.	Consumer must have attempted IDR before accessing CIO.	Consumer must have attempted IDR before accessing SCT.

ASIC'S OVERSIGHT ROLE

- 3.16. Having appropriate dispute resolution mechanisms in place, which are approved by ASIC, is a licence condition for all financial firms that deal with retail clients.¹¹ A financial firm that does not comply with this obligation is in breach of its licence and can be subject to ASIC administrative action.¹²
- 3.17. The dispute resolution mechanisms must consist of:
- an IDR procedure which complies with standards, and requirements and covers complaints against the licensee made by retail clients in connection with the provision of all financial services covered by the licence; and
 - membership of one or more EDR schemes approved by ASIC which covers, or together cover, complaints (other than complaints that may be dealt with by SCT)¹³ against the licensee made by retail clients in connection with the provision of all financial services covered by the licence.¹⁴
- 3.18. ASIC's guidance on the standards required by financial firms in relation to their IDR procedures is contained in Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG 165).

11 Section 912A of the *Corporations Act 2001* (Cth) and section 47 of the *National Consumer Credit Protection Act 2009* (Cth). This obligation applies to all Australian financial services licensees, unlicensed product issuers, unlicensed secondary sellers, credit providers and credit representatives. Superannuation funds are subject to separate arrangements and under the jurisdiction of the Superannuation Complaints Tribunal.

12 Section 915C of the *Corporations Act 2001* (Cth).

13 Where the SCT can deal with all retail client complaints about the financial products and services a licensee provides, there is no need to join an ASIC-approved EDR scheme: Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, pages 24-25; section 912A(2)(b)(ii) of the *Corporations Act 2001* (Cth).

14 Section 912A(2) of the *Corporations Act 2001* (Cth).

ASIC Regulatory Guide 165 Licensing: Internal and external dispute resolution (RG 165)

The principles and requirements set out in RG 165 include:

- *Tailoring IDR procedures:* when reviewing or establishing IDR procedures, financial firms should take into account: the size of their business; the range of products offered; the nature of their customer base; and the likely number and complexity of complaints or disputes.
- *Coverage of IDR procedures:* financial service providers, as a minimum, must be able to deal with complaints made by 'retail clients', as defined in section 761G of the *Corporations Act 2001*, which includes small businesses. For credit related activities, IDR procedures must, as a minimum, be able to deal with activities engaged in by the credit licensee or its representatives or an unlicensed carried over instrument lender.
- *Outsourcing:* a financial firm that outsources its IDR procedures to a third party service provider remains responsible for ensuring that its IDR procedures comply with RG165.
- *Definition of 'complaint' and 'dispute':* financial firms are required to adopt the following definition of 'complaint' in their IDR procedures, which is contained in Australian Standard AS ISO 10002-2006:

An expression of dissatisfaction made to an organisation, related to its products or services, or the complaints handling process itself, where a response or resolution is explicitly or implicitly expected.

ASIC Regulatory Guide 165 Licensing: Internal and external dispute resolution (RG 165) (continued)

Financial firms are also required to comply with the following sections of AS ISO 10002-2006: section 5.1 - commitment; section 6.4 - resources; section 8.1 - collection of information; and section 8.2 - analysis and evaluation of complaints.

- *Timeframes*: for most complaints, financial firms should provide a final response to a consumer within a maximum of 45 days, although the pursuit of 'best practice' procedures should result in shorter timeframes. The final response must contain information about: the final outcome of the complaint or dispute; the right to take the complaint or dispute to EDR; and the name and contact details of the relevant EDR scheme to which the person may take their matter.
- *Multi-tiered IDR procedures*: the 45 day timeframes for resolving disputes also apply to multi-tiered procedures, which are procedures which include internal appeals or escalation mechanisms.
- *Documenting IDR procedures*: IDR procedures are required to be documented to: enable staff to understand and follow procedures; promote accountability and transparency of the procedures; and facilitate the ease of understanding and accessibility of the procedures for consumers.
- *Links between IDR procedures and EDR schemes*: IDR procedures must ensure that, if a matter remains unresolved, or is not resolved within the appropriate time limits, the relevant staff will inform the consumer that they have a right to pursue their matter with an EDR scheme and provide details about how to access the relevant EDR scheme.

3.19. Linked to IDR and EDR are review and remediation processes. Review and remediation processes are a set of activities set up within a financial firm to:

- review the services provided to clients, where a systemic issue caused by misconduct or other compliance failure in relation to those services has been identified; and
- remediate clients who have suffered loss or detriment as a result (whether monetary or non-monetary).

3.20. Remediation processes interact closely with both IDR and EDR. Systemic issues are often identified through trends in IDR complaints or in disputes handled by the firm's EDR scheme. Consumers in a remediation process maintain rights to access EDR if they are unhappy with the progress or outcome of their review and EDR schemes can also require firms to provide remedies to classes of consumers who have suffered loss as part of their systemic issues role.

ASIC's oversight of remediation

All financial services licensees have an obligation to ensure that their financial services are provided efficiently, honestly and fairly. Complying with this obligation includes financial services licensees taking responsibility for the consequence of their actions if things go wrong when financial services are provided and clients suffer loss or detriment.

ASIC's policy in relation to remediation is contained in Regulatory Guide 256 *Client review and remediation conducted by advice licensees*, which sets out guidance on review and remediation conducted by financial services licensees who provide personal advice to retail clients. The guide notes that while the guidance is intended to apply to advice licensees providing personal advice, many of the principles in the guide are applicable to review and remediation that is not related to personal advice.

The guide sets out guidance for advice licensees in relation to:

- when to initiate the process of review and remediation;
- the scope of review and remediation;
- designing and implementing a comprehensive and effective process of review and remediation;
- communicating effectively with clients; and
- ensuring access to external review.

ASIC does not have a power to direct a firm or firms to undertake consumer remediation and to set the terms on which such a remediation might take place (for example, the scale and scope of the remediation and whether or not firms should waive EDR monetary or time limits). ASIC may currently negotiate the need for and terms of a remediation with individual licensees, including as part of an Enforceable Undertaking.

ASIC's role in relation to industry ombudsman schemes

Approving an EDR scheme

- 3.21. As discussed above, ASIC has the power to approve an EDR scheme.¹⁵ ASIC's approval criteria is set out in Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes*.¹⁶ When considering whether to approve an EDR scheme, ASIC is required to take the following principles into account: accessibility; independence; fairness; accountability; efficiency; effectiveness; and any other matter it considers relevant.¹⁷
- 3.22. While RG 139 states what a scheme must do to obtain initial approval, and maintain this approval, much of ASIC's influence rests at the point of initial approval. For example, where an approved scheme fails to meet one of the approval criteria, ASIC's powers are limited to either varying the approval, for example by imposing a condition on approval, or by revoking the approval.¹⁸

Oversight of EDR schemes

- 3.23. Under ASIC's co-regulatory approach, in which industry schemes have flexibility to develop their own arrangements within a framework set by government, primary oversight of an approved EDR scheme is the board's responsibility.¹⁹ The board's functions, relevantly, include: appointing the scheme's decision maker(s); agreeing the scheme's budget with relevant industry representatives; and recommending and promoting consultation about proposed changes to a scheme's terms of reference.²⁰
- 3.24. Under the existing framework, ASIC has limited oversight powers and is not able to take appropriately nuanced action to address a problem with a scheme, for example by compelling a scheme to engage in certain actions, including undertaking a targeted file audit. Instead, ASIC's role is focused on receiving specific information from the schemes about their members and working with the schemes on their periodic independent reviews.

15 An approved scheme must be able to deal with complaints made by retail clients in connection with the provision of all financial services covered by the licence: section 912A(2)(b)(ii) of the *Corporation Act 2001* and section 47 of the *National Consumer Credit Protection Act 2009*.

16 Australian Securities and Investments Commission 2013, *Regulatory Guide 139 Approval and oversight of external dispute resolution schemes* has been updated a number of times in recent years to deal with new products, new members and to address problems that arise in the industry, for example, dealing with financial hardship applications: see Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, pages 17-18; Financial Ombudsman Service, submission to the EDR Review Issues Paper, page 16.

17 These considerations are based on the principles in the Benchmarks for Industry-Based Customer Dispute Resolution Schemes, which were originally published by the then Department of Industry, Science and Tourism in 1997 and relaunched in 2015 following a review by the Commonwealth Consumer Affairs Advisory Council.

18 Regulations 7.6.02(4) and 7.9.77(4) of the *Corporations Regulations 2001*.

19 Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, pages 18-19.

20 Australian Securities and Investments Commission 2013, *Regulatory Guide 139 Approval and oversight of external dispute resolution schemes*, page 23 [RG 139.98].

- 3.25. In relation to information provision, approved schemes regularly report to ASIC about members who have ceased as a member of their scheme, which includes firms who may have resigned (or are no longer in business), have moved to the other scheme or been expelled for non-compliance with the scheme's rules.²¹ This facilitates ASIC's monitoring of licensee compliance with the requirement to be a member of an EDR scheme. ASIC also requires financial firms to notify it within three business days if their membership of an EDR scheme ceases and details of the new EDR scheme they intend to join or have joined.²²
- 3.26. ASIC holds quarterly meetings with approved schemes and monitors and registers complaints made by consumers and industry members about the schemes. In 2015-16, 100 complaints to ASIC were made against FOS and 14 complaints were made in relation to CIO. Dissatisfaction with a scheme decision is the most common type of complaint ASIC receives, however, ASIC doesn't review the decisions made by schemes.²³
- 3.27. EDR schemes are required to commission an independent review of their operations and procedures every five years, unless a shorter timeframe is specified.²⁴ As part of conducting these reviews, schemes are required to consult with ASIC about the terms of the review and the appointment of the reviewer. The review generally includes a qualitative and quantitative assessment of the scheme's performance. The review's results must be made available to ASIC and other stakeholders.²⁵ Schemes also report publicly to varying degrees on their response to and implementation of review recommendations.²⁶

Regulatory Guide 139: Approval and oversight of EDR schemes

Key requirements set out in ASIC's Regulatory Guide 139 are that:

- the dispute resolution scheme must promote equitable access by providing its services free of charge and actively promote itself so consumers and investors become aware of its existence, thereby improving its accessibility;
- the scheme must meet jurisdiction requirements, which includes, as a minimum, complaints from 'retail clients', as defined in s761G of the *Corporations Act 2001* and related regulations, with the scheme's Terms of Reference covering the vast majority of disputes; schemes should also seek to reduce consumer confusion where a complaint or dispute involves multi-party multi-licensees and/or credit representatives;

21 Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, page 21.

22 Australian Securities and Investments Commission, viewed 26 November 2016, <<http://asic.gov.au/regulatory-resources/financial-services/dispute-resolution/>>.

23 Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, page 19.

24 Australian Securities and Investments Commission 2013, *Regulatory Guide 139 Approval and oversight of external dispute resolution schemes*, page 32 [139.156].

25 Australian Securities and Investments Commission 2013, *Regulatory Guide 139 Approval and oversight of external dispute resolution schemes*, page 33 [RG 139.160].

26 Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, page 22.

Regulatory Guide 139: Key requirements (continued)

- scheme decisions are binding on financial firms, but are not binding on consumers unless they choose to accept the scheme's decision at the end of the EDR process and (when a compensation cap applies) waive the excess of their claim - this ensures consumers can reject an EDR outcome and pursue their complaint through the court system;
- the scheme must be independent from the industry that provides its funding and constitutes its membership, which, relevantly, requires the independent overseeing boards to have equal numbers of consumer and industry representatives and an independent chair;
- the scheme must be adequately resourced to carry out its promoted functions, with consideration given to providing assistance for consumers when drafting and lodging their complaints or disputes, but this should not jeopardise the impartiality of the complaints resolution process;
- the scheme must have dispute handling procedures which accord with the principles of natural justice, and in the interests of ensuring that parties are treated fairly, a scheme should provide written reasons for any decision made about the merits of a complaint or dispute;
- the scheme must: report to ASIC about systemic issues and matters involving serious misconduct, and while the scheme is not required to identify the scheme member, ASIC can compel the information; collect and report information to ASIC about complaints and disputes it receives on a quarterly basis and in its annual report; conduct independent periodic reviews every five years, unless otherwise specified; and report to ASIC where a member withdraws from a scheme, switches between schemes or is expelled from membership of a scheme;
- schemes must have procedures for dealing with non-compliance by a member with a scheme decision or rule, and there are a range of administrative responses available to ASIC following a referral of non-compliance, including imposing or varying licence conditions or suspending or revoking a licence; and
- the scheme must, as a minimum, be able to award compensation for any direct loss or damage caused by a breach of any obligation owed in relation to the provision of a financial or credit product or service, excluding an award for punitive or exemplary damages.

ASIC's role in relation to the Superannuation Complaints Tribunal

- 3.28. As SCT is an independent statutory tribunal, ASIC does not undertake any oversight of or have any powers in relation to SCT.
- 3.29. ASIC has statutory obligations under subsection 62(2) of the *Superannuation (Resolution of Complaints) Act 1993* to provide SCT with staff and facilities to enable SCT to perform its functions.
- 3.30. As SCT does not have a corporate legal identity, in practice, this means that ASIC enters into all contracts on behalf of SCT and makes all payments, including staff salaries, payments to tribunal members, third party providers or to ASIC (for rent and corporate services ASIC provides). Staff of SCT are ASIC employees, employed under the ASIC Enterprise Agreement and SCT is co-located in ASIC's Melbourne office.

Chapter 4: Existing external dispute resolution bodies

- 4.1. The Review's Terms of Reference require the Panel to make recommendations in relation to the role, powers, governance and funding arrangements of the Financial Ombudsman Service (FOS), Credit and Investments Ombudsman (CIO), and Superannuation Complaints Tribunal (SCT).
- 4.2. This Chapter provides information on each of the three bodies, drawn from data the bodies have provided in response to the Panel's request for data and publicly available information (including the bodies' annual reports).

FINANCIAL OMBUDSMAN SERVICE

Role

- 4.3. FOS is an independent industry ombudsman dispute resolution scheme. It is a not-for-profit organisation established as a public company limited by guarantee. The principles underpinning FOS's operations and processes are to resolve disputes in a cooperative, efficient, timely and fair manner, with a minimum of formality and technicality, and to be as transparent as possible.¹
- 4.4. FOS's establishment in mid-2008 was the result of an industry-led merger of three ASIC-approved industry ombudsman schemes: the Banking and Financial Services Ombudsman, the Financial Industry Complaints Service and the Insurance Ombudsman Service. The Credit Union Dispute Resolution Centre and Insurance Brokers Disputes Ltd (also ASIC-approved schemes) chose to merge with FOS six months later on 1 January 2009. A number of these five predecessor schemes had been operating for almost 20 years.

Member base

- 4.5. FOS's members include: banks; insurers (including life and general insurers); credit providers; credit unions; financial advisers and planners; brokers; debt collection agencies; accountants; and other businesses that provide financial products and services.
- 4.6. In 2015-16, FOS had 13,576 members compared to 9,915 members in 2010-11. The chart below shows the changes in FOS membership between 2010-11 and 2015-16.²

1 Financial Ombudsman Service 2015, *Terms of Reference (as amended 1 January 2015)*, clause 1.2 'Principles that underpin FOS operations and processes'.

2 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016.

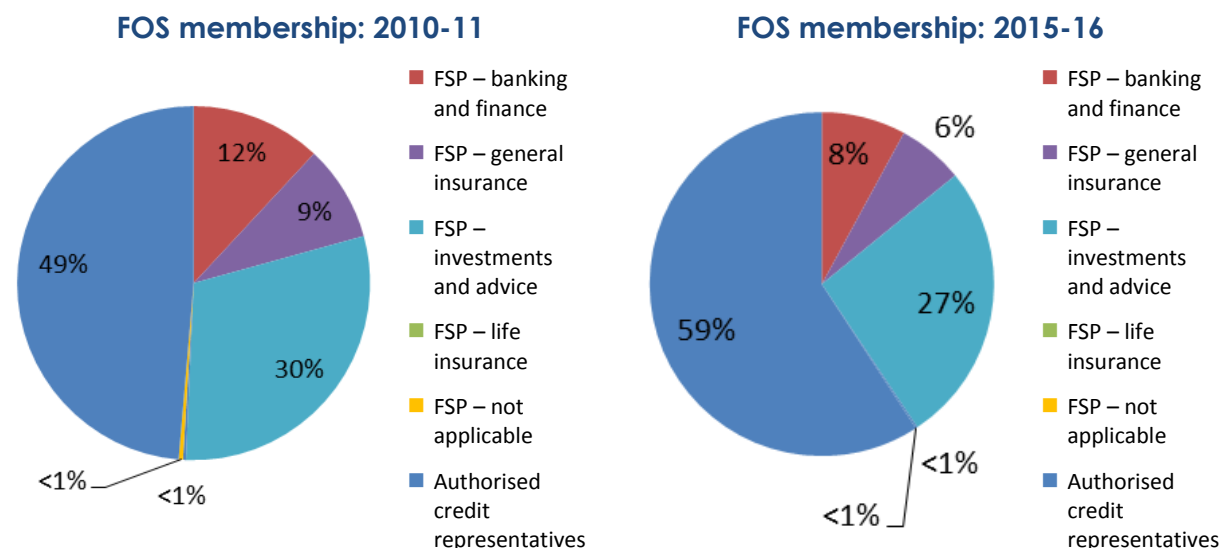


Table note: FSP (financial services provider) is referred to as financial firm in this Report).

4.7. Of the 5,540 licensee members in 2015-16, FOS classifies 78 per cent (4,340 members) as ‘very small’ and a further 10 per cent (555 members) as ‘small’.³ This assessment then influences the membership levy the member will pay.⁴

4.8. In 2015-16, 141 members moved from FOS to CIO.⁵

Dispute data

Disputes received

4.9. In 2015-16, FOS handled just under 83 per cent of all financial system disputes received by the three EDR bodies (FOS, CIO and SCT – total of 41,223 disputes received) and nearly 88 per cent of disputes received by the industry ombudsman schemes (FOS and CIO – total of 38,855 disputes received).⁶

3 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016. To determine the size of a member, FOS uses a number of variables. The variables include: gross written premium on insurance; annual (in force) life insurance premiums; total income earned on client insurance premiums; client loan portfolio; client loans under management; client funds held in deposits; client funds under advice; client funds under management and number of representatives (Financial Ombudsman Service 2016, data supplied to EDR Review, 28 November 2016).

4 Financial Ombudsman Service 2016, data supplied to EDR Review, 28 November 2016.

5 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 7 October 2016. An MOU between FOS and CIO governs the exchange of information about members, including where a member moves from one scheme to another. One of the purposes of the MOU is to reduce any associated risks to consumers such as non-compliance with decisions.

6 Percentages calculated based on 34,095 disputes received by FOS (Financial Ombudsman Service 2016, *Annual Review 2015-16*, page 22), 4,760 disputes received by CIO (Credit and Investments Ombudsman 2016, *Annual Report on Operations 2015-16*, page 2) and 2,368 disputes received by SCT (Superannuation Complaints Tribunal 2016, *2015-16 Annual Report*, page 34).

- 4.10. In 2015-16, FOS received 34,095 disputes, up 7 per cent from 31,895 disputes in 2014-15.⁷ Ninety-four per cent of members did not have any disputes lodged against them in 2015-16.
- 4.11. The number of disputes FOS receives has stabilised over the past few years, following a steep increase from 2009-2010 to 2011-2012.⁸ The increase in 2015-16 was driven by industry-specific issues in general insurance. During 2015-16, FOS closed 32,871 disputes.⁹
- 4.12. The mix of the types of disputes received by FOS between 2010-11 and 2015-16 has been relatively stable. Of disputes received each year, credit disputes generally make up between 45 and 50 per cent and general insurance disputes make up 26 to 30 per cent of disputes, although the number of general insurance disputes in 2015-16 increased significantly when compared to 2014-15.¹⁰ The remaining disputes relate to deposit taking, payment systems, life insurance, investments, and other matters.¹¹
- 4.13. In 2015-16, the vast majority (94 per cent) of disputes were lodged by individuals, with the balance lodged by small businesses. Of the disputes lodged by individuals, most (81 per cent) were lodged by individuals without representation. Where an individual was represented, the most common type of representative was a family member or friend (34 per cent), followed by a private or paid consumer advocate, such as a credit repair or other fee for service representative (17 per cent).¹²
- 4.14. Complainants are able to lodge disputes with FOS in a number of ways, as shown below. The most common way that disputes were lodged in 2015-16 was online, with 77 per cent of complainants using a new online dispute form. This is a substantial increase compared with 2010-11 when 57 per cent of complaints were lodged online.¹³

7 Financial Ombudsman Service 2016, *Annual Review 2015-16*, page 22.

8 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016. In 2008-09, FOS received 22,392 disputes; this increased to a peak of 36,099 in 2011-12.

9 Financial Ombudsman Service Australia 2016, *Annual Review 2015-16*, page 4.

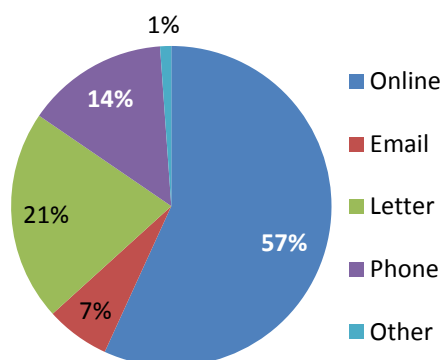
10 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016. In 2015-16, FOS received 10,588 general insurance disputes compared with 8,867 disputes in 2014-15 (a 19.4 per cent increase).

11 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016.

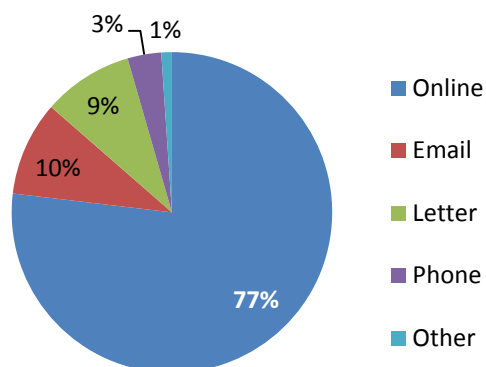
12 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016. Data on type of representation is available in Financial Ombudsman Service, part 2 of submission to the EDR Review Issues Paper, page 4.

13 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016. Data for 2015-16 available in Financial Ombudsman Service, part 2 of submission to the EDR Review Issues Paper, page 4.

Disputes received, by lodgement method (2010-11)

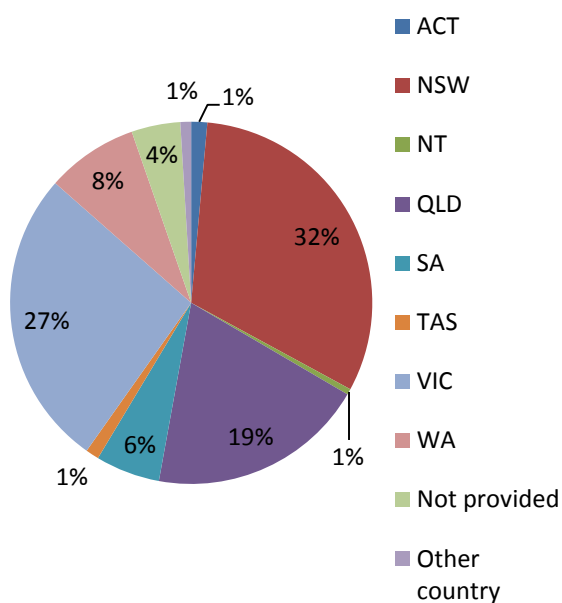


Disputes received, by lodgement method (2015-16)

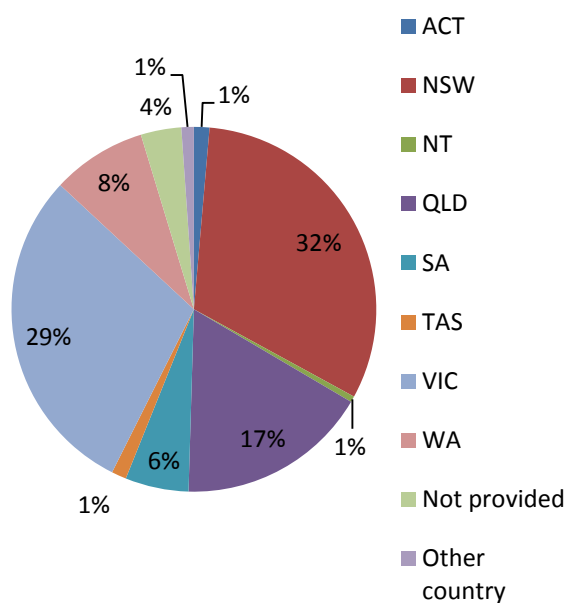


4.15. The geographic distribution of complainants has remained relatively stable between 2010-11 and 2015-16, as shown below. FOS has indicated that the geographic distribution is similar to that of the Australian population per state.¹⁴

Disputes received, by applicant location (2010-11)



Disputes received, by applicant location (2015-16)



Resolution of disputes

4.16. The timeliness of dispute closure improved in 2015-16 over the previous year and when compared to 2010-11. In 2015-16, FOS closed 43 per cent of disputes within 30 days (up from 22 per cent in 2014-15), 77 per cent within 60 days (up from 61 per cent in 2014-15) and 85 per cent within 90 days (up from 72 per cent in 2014-15).¹⁵

14 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016. Data for 2015-16 available in Financial Ombudsman Service, part 2 of submission to the EDR Review Issues Paper, page 4.

15 Financial Ombudsman Service Australia 2016, *Annual Review 2015-16*, page 56.

- 4.17. Ninety per cent of open disputes are less than 180 days old, while 98 per cent of disputes accepted during the financial year were closed within 180 days.¹⁶ Average number of days to resolution decreased accordingly from 95 days in 2014-15 to 62 days in 2015-16.¹⁷
- 4.18. The time taken to close disputes has almost halved since 2010-11 when the average time taken to close disputes was 122 days.¹⁸ In 2010-11, only 10 per cent of disputes were closed within 30 days, 50 per cent were closed within 60 days and 60 per cent were closed within 90 days, while 21 per cent of disputes took longer than 180 days to resolve.¹⁹
- 4.19. In terms of staffing, in 2015-16 FOS had 351 employees, working a full-time equivalent (FTE) load of 317 employees. For comparison, in 2010-11, FOS had 357 employees making an FTE of 283. Operational dispute resolution staff generally have industry experience in the area in which they work. Over 60 per cent have legal qualifications and most have been trained in conciliation/mediation. FOS has 14 ombudsmen, 10 adjudicators and 31 panel members. Staff turnover was 15.6 per cent in 2012-13, falling to 13.9 per cent in 2015-16.²⁰

Approach to dispute resolution

- 4.20. FOS has a high degree of discretion to choose the appropriate dispute resolution process for particular matters. FOS's approach aims to resolve disputes in a cooperative, efficient, timely and fair manner, with a minimum of formality.²¹
- 4.21. Decisions, including determining the extent of loss or damage suffered by a complainant, are based on what is 'fair in all the circumstances', taking into account legal principles (including the common law, important precedents, applicable legislation and the terms of any contracts between the financial firm and the complainant), any applicable industry codes of practice, as well as good industry practice and previous relevant FOS decisions (although FOS is not bound by these).²²

16 Financial Ombudsman Service Australia 2016, *Annual Review 2015-16*, page 15.

17 Financial Ombudsman Service Australia 2016, *Annual Review 2015-16*, page 56.

18 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016.

19 Financial Ombudsman Service Australia 2011, *Annual Review 2010-11*, page 22.

20 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016 and 15 November 2016. FOS has indicated that data for the staff turnover rate for 2010-11 and 2011-12 is not available.

21 Financial Ombudsman Service, part 2 of submission to EDR Review Issues Paper, page 3.

22 Financial Ombudsman Service 2015, *Terms of Reference (as amended 1 January 2015)*, clause 8.2 'Dispute resolution criteria'; consistent with requirements in ASIC Regulatory Guide 139 at paragraph RG 139.225.

- 4.22. FOS's Operational Guidelines to the Terms of Reference seek to provide additional detail on what this means.²³ FOS considers the law when handling a dispute but does not necessarily strictly apply the legal principles and, if necessary, will deviate from those principles to achieve fairness in the circumstances.²⁴ With regard to industry codes and good industry practice, FOS is not bound by the minimum standard set in a particular industry code. Doing what is fair in all the circumstances for both parties may involve deciding that a financial firm should have met a higher standard. FOS also considers good practice expressed by ASIC or other relevant regulators.
- 4.23. In response to feedback from stakeholders and its 2013 independent review, FOS introduced a new dispute resolution process from 1 July 2015, which involves:
- a new registration and referral process which gives financial firms a final opportunity to resolve disputes directly with their customers prior to the commencement of a FOS investigation;²⁵
 - FOS refers each complaint that it registers²⁶ – whether already considered by a firm's internal dispute resolution (IDR) procedures or not – back to the financial firm for a (final) opportunity to resolve the dispute directly with the consumer.²⁷ The financial firm must provide a response to the applicant and FOS within 45 days if the matter has not previously been through IDR, or within 21 days if it has. If the dispute remains unresolved once the relevant time period elapses, or a response has not been provided by the financial firm within that timeframe, then FOS proceeds to deal with the matter by progressing it to its 'case management' stage. In 2015-16,

23 Guidance is provided in paragraph 8.2 of FOS's *Operational Guidelines to the Terms of Reference (1 January 2015)* on the requirement to have regard to the law, industry codes and previous FOS decisions. Additional guidance on what is considered to be fair in all the circumstances for particular types of disputes is provided through FOS Approach documents (see <<https://www.fos.org.au/publications/our-approach/>>) and Circular case studies (see, for example, <<https://www.fos.org.au/the-circular-4-home/fairness-case-studies/>>).

24 Financial Ombudsman Service 2015, *Operational Guidelines to the Terms of Reference (1 January 2015)*, paragraph 8.2. According to this paragraph, this approach was endorsed, for the similarly worded Financial Industry Complaints Service Rules, in *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd & Ors* [2009] VSC 7.

25 There are now three stages in the process: 'Registration & Referral', 'Case Management' and 'Decision'. See Financial Ombudsman Service, *Dispute resolution process in detail*, viewed 25 November 2016, <<https://www.fos.org.au/resolving-disputes/dispute-resolution-process-in-detail/>>. Prior to 1 July 2015, some disputes were registered and referred to the member to resolve directly with their customer and others were immediately accepted and progressed to case management. This change has affected the number and profile of disputes that are accepted and progressed to the 'case management' stage; for example, the number of disputes closed at registration has increased from 8,645 in 2014-15 to 12,316 in 2015-16 (data supplied to the EDR Review by FOS, 7 October 2016). The previous process was also linear, with no fast tracking of straightforward disputes, and different staff handling disputes at different stages of the process.

26 FOS registers each dispute that it receives unless the dispute is outside the FOS Terms of Reference.

27 In limited circumstances, FOS may determine that a dispute should not be referred back to a financial firm and instead progress directly to FOS's 'case management' phase. These circumstances may include where a dispute is particularly urgent for reasons such as family violence or a medical condition, where particular accessibility issues are present, or where the financial firm requests that the matter be progressed directly by FOS.

11,342 disputes (33 per cent of the total 34,095 disputes received) were referred to IDR and resolved without further escalation, while 19,794 (58 per cent) were referred to IDR and then returned to EDR.²⁸

- fast-tracking decisions for simpler and low-value disputes;
- specialist expertise being provided earlier in the dispute process, and the reduction of multiple ‘touch points’ and process stages;
- a more efficient ‘financial difficulty’ dispute process, characterised by regular telephone engagement and a more tailored approach; and
- more effective communication of the outcomes of disputes to both parties through a new format for decisions.²⁹

4.24. If a dispute remains unresolved through referral and is within FOS’s jurisdiction, FOS allocates a case owner who commences the investigation process. FOS applies specialised case management processes to investigate and resolve disputes, which take into account the nature and complexity of a dispute. Dispute resolution techniques utilised include joint conference calls, negotiation and conciliation conference. If the dispute cannot be resolved by agreement the case manager may express a preliminary view (or recommendation) about the merits of the dispute which may encourage the parties to reach agreement.

4.25. If a dispute is unable to be resolved by early agreement between the parties, or through a preliminary view on merits being provided by FOS, the dispute is resolved by a decision. The decision is referred to as a ‘determination’ and can be made by an ombudsman, an adjudicator or a panel. Panels consist of a FOS ombudsman, an industry representative and a consumer representative and are appointed as needed from a pool of potential panel members to make determinations on particularly complex disputes relating to some, but not all, product lines.

4.26. The complainant (but not the financial firm) may accept or reject the determination within 30 days of receiving it. If the complainant accepts the determination, it is binding on both parties;³⁰ if the complainant is dissatisfied with the outcome of the process and rejects the determination, then the determination is not binding on the financial firm and the complainant may take

28 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016. The remainder ((2,959, or 9 per cent) are disputes referred to IDR and open at year end.

29 Financial Ombudsman Service, *New dispute resolution process*, viewed 25 November 2016, <<https://www.fos.org.au/resolving-disputes/our-new-process/>>.

30 Financial Ombudsman Service 2015, *Terms of Reference (as amended 1 January 2015)*, clauses 8.7(b) ‘Recommendations and Determinations’ and 8.8 ‘Applicant acceptance of a Recommendation or Determination’. Clause 8.8 provides that, if requested by the financial firm, for an applicant to accept a determination (or recommendation) they must provide the financial firm with a binding release from liability in respect of the matters so resolved. The release must be for the full value of the claim, even if this exceeds the amount of the remedy decided by FOS.

any other action against the financial firm available, including action through the court system.

- 4.27. In 2015-16, around 37 per cent of the 32,871 disputes closed were resolved during the 'registration & referral' stage and 8 per cent (2,680 disputes) were progressed to a decision/determination. While 2,680 disputes proceeded to the determination stage, 2,359 determinations were issued by an ombudsman, panel or adjudicator, with the remaining disputes resolved at the determination stage without a determination being issued.³¹
- 4.28. In 2015-16, 61.2 per cent of disputes were resolved by agreement (resolved by the financial firm, by negotiation or conciliation); 15.2 per cent were resolved by a FOS decision or assessment; 17.3 per cent were outside the FOS Terms of Reference; and 6.3 per cent were discontinued (either because the applicant decided not to proceed with the dispute or pursued it through alternative means). The most frequent reason for a dispute being outside the Terms of Reference in 2015-16 was referral to another dispute resolution scheme, in particular CIO or SCT.³²
- 4.29. A determination is a final decision on the merits of a dispute and there are no further appeal or review processes within FOS.
- 4.30. However, as FOS's authority is contractual, FOS may be challenged in court for breach of contract (for example, if a financial firm did not believe that FOS performed its services in accordance with its Terms of Reference). This can result in an appeal of a determination, but only on limited grounds and no party (either complainant or financial firm) has to date been successful in overturning a FOS determination in court.³³
- 4.31. Additionally, there are informal and formal mechanisms available to financial firms, industry bodies or consumer organisations (but not complainants) to have the *approach* taken by FOS in determinations (as opposed to a particular decision) reviewed to assess whether the approach should be modified for future disputes.³⁴ If a complainant is dissatisfied with the way in which FOS has handled a dispute they may make a complaint to FOS or to ASIC.

31 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016 and 15 November 2016.

32 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016 and 15 November 2016.

33 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016.

34 The informal review mechanism involves the financial firm, industry body or consumer organisation raising their concerns with the Chief Ombudsman or Lead Ombudsman, either directly or in an open forum or stakeholder meeting. FOS internally reviews its approach and then sets out its response in writing to the stakeholder. The formal review mechanism are set out in section 19A of the Financial Ombudsman Service 2015, *Operational Guidelines to the Terms of Reference (1 January 2015)*. The formal review mechanism is available to an industry body (on behalf of its members) or consumer organisation if: the informal review mechanism has been first used; the stakeholder has legal advice concluding that in making a determination, FOS made an error of law; in the absence of a change in FOS approach, there would be a significant adverse impact on consumers, the industry or a particular financial firm or group of financial firms. Other formal review mechanisms include test case procedures (as outlined in Financial Ombudsman Service 2015, *Terms of Reference (as amended 1 January 2015)*, clause 10 'Test case procedures').

- 4.32. In 2015-16, FOS received a total of 360 complaints (1.1 per cent of disputes resolved) from persons dissatisfied with FOS's service. Of the 360 complaints received, 83.6 per cent (301 complaints) were by consumers, 8.1 per cent (29 complaints) were by financial firms and 8.3 per cent (30 complaints) were by third parties.³⁵ The main reasons for the complaints were: disagreement with the decision to discontinue the dispute and incorrect assessment of fact or law.
- 4.33. FOS has an internal complaints process to investigate and deal with complaints. Members of FOS management report complaints received about the operation of the scheme to the FOS Board. In 2015-16, the most common outcomes from reviewing the complaint was that FOS reiterated the original FOS decision or approach and explained the process.³⁶
- 4.34. In addition, as part of its overall quality assurance framework FOS conducts audits of closed disputes (now at least 700 per quarter, up from 150 per quarter in 2015-16) and assesses them against its quality objectives. A quarterly report is compiled for consideration by the Board and senior management to guide process improvements and skilling of staff.³⁷
- 4.35. FOS's approach to decision making, as set out in its Terms of Reference, has been subject to judicial consideration in a number of cases, where the courts have confirmed that its Terms of Reference provide FOS with wide and flexible powers to do justice between the parties.³⁸

Jurisdiction

- 4.36. FOS's jurisdiction is detailed in its Terms of Reference.³⁹ The Terms of Reference articulate the types of disputes that are within and outside of the scope of FOS. FOS may only consider a dispute if the dispute is between a financial services provider that is a member and a retail client listed in clause 4.1,⁴⁰ including an individual, a partnership comprised of individuals, the corporate trustee of a self-managed superannuation fund (SMSF) or a small business (a business with fewer than 20 employees, or fewer than 100 employees if involved in manufacturing).
- 4.37. As scheme membership has grown, the Terms of Reference have been revised to accommodate new members and a broader range of regulated financial and credit services. FOS can consider disputes about a wide range of investment,

35 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016.

36 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016.

37 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016 and 15 November 2016.

38 *Utopia Financial Services v FOS* [2012] WASC 279; *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service and Norris* [2009] VSC 7; *Wealthsure Pty Ltd v Financial Ombudsman Service Ltd* [2013] FCA 292.

39 Financial Ombudsman Service 2015, *Terms of Reference (as amended 1 January 2015)*, section B 'Jurisdiction of FOS'. New terms of reference were issued on 1 January 2010 for the merged entity; these were last amended on 1 January 2015.

40 FOS can also consider a dispute if the financial services provider is a member at the time the dispute is lodged with FOS even if it was not a member at the time of the events giving rise to the dispute (see *Terms of Reference (as amended 1 January 2015)*, clause 4.2(c)).

insurance, credit payment systems and deposit-taking products and services sold by a broad range of financial services providers.

- 4.38. Changes to the Terms of Reference, unless minor, require consultation with ASIC, relevant Board Advisory Committees and appropriate individuals and organisations (including key consumer, community and industry organisations) and must be approved by ASIC.⁴¹
- 4.39. ASIC's RG 139 sets out the minimum jurisdiction requirements for approved EDR schemes and encourages schemes to go beyond the minimum requirements. An example of going beyond the minimum jurisdiction is FOS's definition of 'financial service', which is drafted more broadly than the statutory definition in the *Corporations Act 2001*.⁴² This provides FOS with greater flexibility to accept disputes that may have otherwise been on the margins but that relate to products or services issued by FOS members. Other examples are FOS's approach to small business responsible lending disputes and its ability to consider disputes about non-regulated loans,⁴³ and its discretion to deal with disputes from non-retail consumers when appropriate.
- 4.40. FOS applies a range of exclusions to its jurisdiction.⁴⁴ In 2015-16, 5,692 (17 per cent) of disputes fell outside its jurisdiction, with the most common reasons being: the dispute was more appropriately dealt with in another forum (such as a court, tribunal or another dispute resolution scheme); the type of dispute was not one that FOS can consider (for example, it does not arise from the provision of financial services by a financial firm to an applicant); exclusion based on general discretion (for example, an investigation is not warranted or the claim was previously settled); the financial firm is not a current FOS member; or the dispute had previously been dealt with by FOS, another EDR scheme or a court/tribunal.⁴⁵ In addition, FOS has discretion to exclude disputes it considers

41 Financial Ombudsman Service Limited 2012, *Constitution (as at 9 November 2012)*, clause 14 'Terms of Reference'.

42 'Financial service' is defined in clause 20.1 of FOS's Terms of Reference as a product or service that: (a) is financial in nature including a product or service which is or is in connection with one of the following: a loan or any kind of credit transaction, a deposit, an insurance policy, a financial investment, a facility under which a person seeks to manage financial risk (for example, derivatives contract), a facility under which a person may make a non-cash payment (for example, direct debit arrangement), leasing and hire purchase arrangements, financial or investment advice, or Traditional Trustee Company Services; or (b) is a custodial service.

43 FOS is able to consider disputes about maladministration in lending as a result of the jurisdiction conveyed by FOS's Terms of Reference at clause 5.1(c). 'Maladministration' is defined in clause 20.1 of the Terms of Reference, as 'an act or omission contrary to or not in accordance with a duty or obligation owed at law or pursuant to the term (express or implied) of the contract'. The maladministration jurisdiction applies to both regulated and unregulated credit.

44 Financial Ombudsman Service 2015, *Terms of Reference (as amended 1 January 2015)*, clauses 4.2 'Types of disputes that can be considered by FOS', 5.1 'Exclusions from FOS's jurisdiction' and 5.2 'Discretion to exclude Disputes'. There are also time limits for the lodging of disputes and a number of specific exclusions which relate to proper commercial decision making by financial firms.

45 Financial Ombudsman Service 2015, *Terms of Reference (as amended 1 January 2015)*, clauses 4 'Disputes within scope of the Service' and 5 'Disputes outside the scope of FOS'; also Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016.

to be frivolous, vexatious or lacking in substance⁴⁶ and is not able to deal with disputes which are currently being dealt with by CIO,⁴⁷ although in practice the number of disputes excluded on such grounds is tiny.

- 4.41. FOS operates a monetary limit on claims: the maximum value *per claim* under a dispute that can be considered by FOS is \$500,000. FOS considers that a single dispute can contain more than one claim, a position which was affirmed by the Federal Court decision in *Wealthsure Pty Ltd v Financial Ombudsman Services Limited* [2013] FCA 292. The case concerned financial planning advice provided in the form of three statements of advice. At the time of the dispute, the FOS Terms of Reference had a monetary limit of \$150,000. On that basis, the financial firm sought to exclude the dispute from being considered by FOS. However, FOS considered the dispute to consist of three separate claims arising from each of the statements of advice.
- 4.42. FOS is able to consider disputes involving a claim for more than \$500,000 if all parties and FOS agree. This agreement may be provided in respect of a particular dispute or it may be in the form of a waiver of the financial limit by a firm broadly in respect of a category of disputes. By way of example, such a waiver may be (and has been) provided in respect of disputes arising out of a remediation scheme conducted by a firm as is anticipated by ASIC Regulatory Guide 256.⁴⁸
- 4.43. Other than in relation to complaints about financial hardship applications, unjust transactions, or unconscionable interest and other charges under the National Credit Code, FOS will not consider a dispute unless it was brought within the earlier of six years from when the applicant became aware of their loss and two years of receiving an IDR response from their financial firm.⁴⁹
- 4.44. As well as monetary limits on the value of claims, there are also caps on the maximum value of the remedy that can be decided by FOS for a claim. Currently, the maximum compensation that may be awarded for most disputes lodged with FOS on or after 1 January 2015 is \$309,000 per claim (although lower limits apply for some other disputes; for example, claims against a general insurance broker have a limit of \$166,000 per claim and claims on an income stream life insurance

46 Financial Ombudsman Service 2015, *Terms of Reference (as amended 1 January 2015)*, clause 5.2 'Discretion to exclude Disputes'.

47 Financial Ombudsman Service 2015, *Terms of Reference (as amended 1 January 2015)*, clause 5.1(n) 'Exclusions from FOS's jurisdiction'. In 2015-16, four disputes were excluded on this ground. Paragraph 5.1 of FOS's *Operational Guidelines to the Terms of Reference (1 January 2015)* at page 32 indicate that if CIO is dealing with a dispute between the same parties and raising the same events and facts then the applicant can elect to either continue through CIO or close the dispute with CIO and lodge it with FOS.

48 Financial Ombudsman Service 2015, *Terms of Reference (as amended 1 January 2015)*, clauses 5.1(o) 'Exclusions from FOS's jurisdiction' and 4.4 'Consideration of other Disputes by agreement'; also Australian Securities and Investments Commission 2016, *Regulatory Guide 256: Client review and remediation conducted by advice licensees (September 2016)*, paragraph RG 256.194.

49 Financial Ombudsman Service 2015, *Terms of Reference (as amended 1 January 2015)*, clause 6.2 'Time limits'.

policy such as an income protection policy are generally capped at \$8,300 per month).⁵⁰

- 4.45. Compensation caps have increased over time following public consultation processes, and since 2012 schemes have been required to adjust the limit every three years by a percentage linked to the percentage increase in the higher of the CPI and the Male Total Average Weekly Earnings over the preceding three years.⁵¹ In addition, the Board of FOS will periodically review the limits in consultation with financial firms and other stakeholders including key consumer, community and industry organisations and change them as it considers appropriate.⁵²

Review of FOS's small business jurisdiction

In April 2016, the Australian Government announced that there would be advantages in extending FOS's jurisdiction when covering disputes involving small business.

On 12 August 2016, FOS issued a consultation paper seeking stakeholder views on proposals to increase its small business jurisdiction so that FOS can:

- consider disputes involving larger claims (up from \$500,000 to \$2 million);
- award higher compensation (up from \$309,000 to \$2 million); and
- consider debt related disputes about larger small business credit facilities (up from \$2 million to \$10 million for a single loan contract).

Proposals would also increase the size of the credit facilities covered by the prohibition of debt recovery action against small businesses while FOS considers disputes (from \$2 million to \$10 million).

Powers

- 4.46. FOS provides a wide range of remedies including the payment of a sum of money, compensation for financial or non-financial loss, forgiveness or variation of a debt, release of security for a debt, repayment, waiver or variation of a fee or other amount paid or owing to a financial firm and the variation of the terms of a credit contract in cases of financial hardship. FOS can also order interest to be paid on a payment to be made to a consumer and/or require the financial firm to contribute (generally up to a maximum of \$3,000) to the legal or travel costs incurred by a consumer in the course of the dispute.⁵³

50 Financial Ombudsman Service 2015, *Terms of Reference (as amended 1 January 2015)*, Schedule 2.

51 Australian Securities and Investments Commission 2013, *Regulatory Guide 139: Approval and oversight of external dispute resolution schemes*, paragraph RG 139.191. See also Financial Ombudsman Service 2015, *Terms of Reference (as amended 1 January 2015)*, clause 9.8 'Review of monetary value of remedies'.

52 Financial Ombudsman Service 2015, *Terms of Reference (as amended 1 January 2015)*, clause 9.8(b) 'Review of monetary value of remedies'.

53 Financial Ombudsman Service 2015, *Terms of Reference (as amended 1 January 2015)*, clause 9 'Remedies'.

- 4.47. Once accepted by the applicant, determinations made by FOS are binding on the member. Since 1 January 2010, 35 financial firms have been unwilling or unable to comply with 143 FOS determinations made in favour of approximately 203 consumers. The value of these outstanding determinations was over \$17 million as at 30 October 2016.⁵⁴ A financial firm which refuses or neglects to comply with a binding decision may be expelled from FOS by the Board.⁵⁵ In practice, no member has been expelled for failing to pay a determination since 2010-11. This is because those members, who may otherwise have been expelled, have either become insolvent or have had open disputes brought by other customers.⁵⁶
- 4.48. The company constitution of FOS outlines other circumstances under which the Board has the sole discretion to expel a member from the scheme. These include such circumstances as: failing to comply with requirements of FOS or 'any other ASIC-approved dispute resolution scheme' (that is, currently, CIO); failing to comply with a binding decision of, or being expelled or excluded from, any other ASIC-approved dispute resolution scheme; ceasing to be licensed as a financial firm; or becoming insolvent.⁵⁷ ASIC is advised of any intention to expel a member and of the expulsion.
- 4.49. Although FOS does not have court-like powers to compel the production of documents, its Terms of Reference state that FOS may require a party to a dispute to provide information or do certain things and that the party must comply with the request within the required timeframe.⁵⁸ Where a party fails to comply with a request FOS may draw an adverse inference from the party's failure to comply. Failure by the financial firm may constitute a breach of its membership obligations under the FOS Constitution, resulting in a referral to the Board for consideration. Failure to comply by the applicant may result in FOS deciding not to continue to consider the dispute.⁵⁹

54 Financial Ombudsman Service 2016, data supplied to EDR Review, 15 November 2016.

55 Financial Ombudsman Service Limited 2012, *Constitution (as at 9 November 2012)*, clause 3.10(a) 'Cessation of membership'.

56 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016 and 17 November 2016. In 2010-11, one member was expelled for failing to pay a determination. In 2015-16, a total of 149 members were expelled from the scheme, in each case for failing to pay FOS membership or other fees, and one applicant for membership was refused FOS membership on the basis that it had previously been expelled from CIO and had monies owing.

57 Financial Ombudsman Service Limited 2012, *Constitution (as at 9 November 2012)*, clause 3.10 'Cessation of membership'.

58 Financial Ombudsman Service 2015, *Terms of Reference (as amended 1 January 2015)*, clauses 7.2 'Provision of information by the parties to the Dispute' and 7.3 'Other obligations of the parties to the Dispute'.

59 Financial Ombudsman Service 2015, *Terms of Reference (as amended 1 January 2015)*, clause 7.6 'Consequences of non-compliance by either party with a FOS request'; and Financial Ombudsman Service 2015, *Operational Guidelines to the Terms of Reference (1 January 2015)*, paragraph 7.6. The FOS Constitution (at section 3) provides that each member agrees to be bound by the Terms of Reference and that refusing or failing to comply with the provisions of the FOS Constitution or the Terms of Reference constitutes grounds for expulsion from the scheme by the Board.

- 4.50. FOS's power to join other parties to a dispute is generally limited to the joining of another member.⁶⁰ FOS may allow or require another member to be joined as a party to a dispute if doing so would lead to a more efficient and effective resolution of the dispute.⁶¹

Governance

- 4.51. In terms of governance arrangements, the scheme is operated by a public company limited by guarantee (Financial Ombudsman Service Limited) in accordance with its Company Constitution and the Terms of Reference and Board Charter which support the Constitution. It is governed by a Board of Directors and managed by a Chief Ombudsman.
- 4.52. The Board is comprised of four consumer directors, four industry directors and an independent Chair as required under ASIC's RG 139.⁶² Board appointments, including that of the Chair, are made by the Board following consultation with relevant stakeholders.
- 4.53. The roles of the Board include: appointing decision makers,⁶³ including the Chief Ombudsman and ensuring independent decision making; monitoring the performance of FOS; commissioning an independent review in accordance with RG 139; providing direction to the Chief Ombudsman on policy matters; setting the budget; and, from time to time, reviewing and consulting on changes to the Terms of Reference, including the jurisdictional limits. There are two committees to assist it in its role: the Finance and Risk Management Committee and the Nominations and Remuneration Committee.
- 4.54. The Board does not become involved in the detail of disputes lodged with FOS as that would prejudice the independence of the ombudsmen and other decision makers.
- 4.55. The role of management is to implement the strategic direction provided by the Board and to ensure that FOS provides its EDR services within the terms of its approval from ASIC.

60 The power refers to the joining of a 'financial services provider', defined in clause 20.1 of the Terms of Reference as: (a) a provider of a financial service that is a member; or (b) for the purpose of a dispute relating to a traditional trustee company service (as defined in the *Corporations Act 2001*) only, all co-trustees whose joint conduct is the subject of the dispute, provided at least one co-trustee is a member and all other co-trustees have consented to FOS dealing with the dispute.

61 Financial Ombudsman Service 2015, *Terms of Reference (as amended 1 January 2015)*, clause 7.4 'Joining other parties'.

62 The composition of the Board is provided for in the FOS Constitution at section 4 'Directors' and at clauses 9 to 16 of the FOS Board Charter. The composition is consistent with the requirement in ASIC's RG 139 at paragraph RG 139.94.

63 Financial Ombudsman Service Limited 2012, *Constitution (as at 9 November 2012)*, clauses 12 'Ombudsman' and 13 'Panel Members, Referees and Adjudicators'; also Financial Ombudsman Service 2015, *Terms of Reference (as amended 1 January 2015)*, clauses 2.1 'Appointment of Ombudsmen', 2.3 'Appointment of Panel Members' and 2.5 'Appointment of Adjudicators'.

- 4.56. FOS's most recent independent review was conducted in 2013 and made 33 recommendations.⁶⁴ FOS accepted or accepted in principle 30 recommendations, indicated it would consult on one recommendation, indicated it did not consider one recommendation as a priority and did not accept one recommendation. The FOS Board reported publicly on the implementation of the independent review recommendations.

Funding arrangements

- 4.57. FOS is funded from charges on its members using a combination of annual charge and 'user pays' arrangements. FOS's funding model recognises the varied size and resources of members and charges members in accordance with their use of FOS services, with members involved in more disputes making a greater contribution. The model therefore rewards members who have low or no disputes, encouraging members to resolve disputes via IDR wherever possible. The funding model also attempts to ensure FOS revenue adequately meets expenses but does not generate excessive accumulated funds.⁶⁵
- 4.58. The FOS Board determines the funding arrangements and reviews them periodically.⁶⁶
- 4.59. The fees consist of a membership levy (based on the size and type of business, increased annually by CPI and paid by all members), a user charge (based on the number of disputes and paid proportionally by members who had two or more disputes closed in the preceding year beyond the 'registration & referral' stage) and dispute resolution fees (based on case complexity and resolution stage reached).
- 4.60. The table illustrates the proportion of FOS revenue derived from the different charges.⁶⁷

		2014-15		2015-16	
Total revenue (\$m)		46.55		46.87	
Revenue source	Membership levies	4.63	10.0%	5.06	10.8%
	User charge	2.00	4.3%	5.00	10.7%
	Dispute resolution fees	37.40	80.3%	34.47	73.5%
	Code Monitoring	1.51	3.2%	1.57	3.3%

64 Cameronralph Navigator 2014, 2013 Independent Review: Report to Board of Financial Ombudsman Service, viewed 25 November 2016, <<https://www.fos.org.au/custom/files/docs/independent-review-final-report-2014.pdf>>.

65 Financial Ombudsman Service, part 2 of submission to the EDR Review Issues Paper, page 17.

66 Financial Ombudsman Service Limited 2012, *Constitution (as at 9 November 2012)*, clauses 5.4 to 5.10 'Levies'.

67 Financial Ombudsman Service Limited 2016, *General Purpose Financial Report for the year ended 30 June 2016*, page 28, viewed 8 November 2016, <<http://fos.org.au/events/2016/11/17/531/fos-annual-general-meeting-2016/>>.

	Interest income	0.56	1.2%	0.55	1.2%
	Member application fees	0.13	0.3%	0.10	0.2%
	Member conference	0.19	0.4%	-	
	Other income	0.12	0.3%	0.13	0.3%

Note: percentages refer to proportion of total revenue for the year.

- 4.61. The bulk of FOS's funding is derived from dispute resolution fees in accordance with the 'user pays' principle. This means that funding is potentially variable year on year as it is dependent on the overall number of disputes and the circumstances of members with disputes.
- 4.62. In 2015-16, disputes were lodged against 6 per cent of FOS's members (835 members) and, of these, 42 per cent had only one dispute lodged against them. Forty seven FOS members had more than 100 disputes lodged against them during the year.⁶⁸
- 4.63. The user charge pool is set by the Board and varies only by decision of the Board. It was increased from \$2 million to \$5 million from 1 July 2015. Contributions to this pool by individual financial firms can vary from year to year in accordance with the number of members caught by the requirements to pay. The vast majority of members do not pay a user charge.
- 4.64. One free decision (preliminary view or determination) per financial year is provided to financial firms which meet certain criteria.

Improving industry behaviour

- 4.65. FOS uses a number of mechanisms to improve user behaviour and practices in both IDR and EDR. FOS convenes regular liaison meetings with industry and consumer groups to discuss key issues and collaborate on improvements to firms' IDR processes and to FOS's service delivery. FOS also holds quarterly industry forums to discuss FOS decisions and approaches, and consumer liaison forums and roundtable events. Relevant stakeholders have access to: real time dispute data (through the secure services portal for members), monthly and quarterly benchmark reports (currently provided to the top 42 user members) and annual comparative reporting (detailing disputes statistics about FOS's members and published on FOS's website).⁶⁹
- 4.66. Systemic issues and instances of serious misconduct are referred to ASIC and the Office of the Australian Information Commissioner (OAIC).⁷⁰ In 2015-16, FOS identified 1,635 possible issues, of which 58 were assessed as definite systemic issues following additional information being sought from the member, resulting

68 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016.

69 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016 and 17 November 2016.

70 FOS is an OAIC-recognised EDR scheme for the purposes of handling particular privacy-related complaints under the *Privacy Act 1988*.

in requests to members to take action to remedy the problem. Of these 58 issues, 11 related to processing errors and eight related to errors in credit listings. Sixty four definite issues were resolved during the period.⁷¹ Five instances of serious misconduct were identified and reported in 2015-16 (down from 14 in 2014-15) – four for failure to pay a determination and one relating to the conduct of an authorised representative.⁷²

- 4.67. Training and information on systemic issues are provided both to FOS staff and external stakeholders through outreach activities and through FOS's e-learning systemic issues module.⁷³
- 4.68. FOS conducted comprehensive surveys of its stakeholders (its members, industry associations and consumer representatives) in 2013 and 2016. For 76 per cent of respondents, FOS is either meeting or exceeding expectations.⁷⁴

Ensuring accessibility

- 4.69. FOS maintains a website with a range of information for consumers, business and members, including material on the scheme itself, on how to lodge a dispute and on special assistance which is available. Visits to the FOS website have increased over time: in 2010-11, there were 441,016 website visits; in 2015-16 this increased to 600,046.⁷⁵
- 4.70. FOS also receives a large number of telephone enquiries. In 2015-16, FOS received 214,439 telephone enquiries, compared with 230,874 in 2010-11. Since 1 July 2015, FOS has operated a free call number.⁷⁶
- 4.71. FOS also operates a dedicated natural disaster hotline to provide help and information on financial hardship, insurance claims and other financial issues experienced as a result of extreme weather events.⁷⁷ It received 255 calls to this line 2015-16.⁷⁸
- 4.72. FOS undertakes proactive community outreach. This includes an outreach brochure available in 14 languages, a companion animation and an Auslan video. FOS ran a four-week SBS radio campaign in July-August 2016 in 13 languages other than English and attended 27 community outreach events in 2015-16.⁷⁹

71 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016. In 2010-11, only 114 possible issues were identified, of which 42 were assessed as definite issues. Twenty issues were resolved during that period.

72 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016.

73 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016.

74 Financial Ombudsman Service, part 2 of submission to the EDR Review Issues Paper, page 20.

75 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016. FOS has indicated that a single visit to the website may contain multiple page views, search actions, etc.

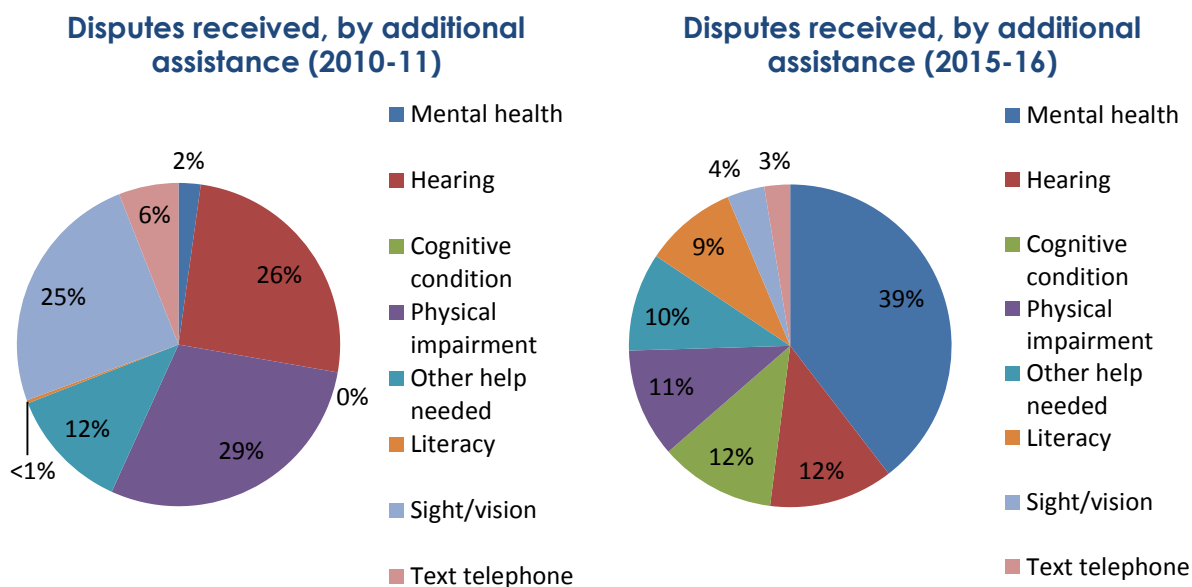
76 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016.

77 Financial Ombudsman Service, *Flood Assistance*, viewed 6 November 2016, <<https://www.fos.org.au/news/news/flood-assistance/>>.

78 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016.

79 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016.

- 4.73. FOS implemented a consumer engagement strategy in 2012-13 to improve outcomes for vulnerable and disadvantaged consumers. A core component of the strategy is the Consumer Liaison Group, comprised of financial counsellors and legal advocates, which works with FOS to identify opportunities to improve the effectiveness and accessibility of the scheme. FOS also sponsors events that contribute to the education of consumer representatives engaging in EDR.⁸⁰
- 4.74. In addition, when lodging disputes, applicants are given the opportunity to request the help of a translator or interpreter. If one is required, FOS arranges and pays for the service. In 2015-16, FOS indicated that 625 applicants (1.8 per cent of the total disputes received) requested a translator/interpreter, an increase of 6 per cent from 2014-15.⁸¹
- 4.75. FOS also asks applicants whether they require any additional assistance at the time they lodge their dispute. Information on additional needs for 2010-11 and 2015-16, which is self-reported by applicants, is set out in the charts below. The data reflects a sharp increase (from 2 per cent to 39 per cent) of applicants self-reporting mental health needs.⁸²



- 4.76. Processes available to support vulnerable applicants include: a 1800 free call number; an online dispute form; priority call back within two days of lodgement for additional assistance from FOS, where requested; an electronic statement of financial position form; SMS communication; and a free translation service.⁸³ If an applicant has advised FOS that they need additional assistance, this is flagged on the dispute and FOS will adapt its handling of the dispute to accommodate

80 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016.

81 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016; see also Financial Ombudsman Service, part 2 of submission to the EDR Review Issues Paper, page 12.

82 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016.

83 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016.

the applicant's particular needs. This might include communicating more by phone, arranging translations of written material or using interpreters, extending response timeframes or working with an appropriate support agency to assist the applicant.

CREDIT AND INVESTMENTS OMBUDSMAN

Role

- 4.77. CIO (formerly known as the Credit Ombudsman Service Limited) is an independent industry ombudsman dispute resolution scheme. It is a not-for-profit organisation established as a public company limited by guarantee. CIO provides consumers with a free and impartial dispute resolution service as an alternative to legal proceedings for resolving complaints with their financial services and product providers.
- 4.78. Credit Ombudsman Service Limited was originally incorporated as the Mortgage Industry Ombudsman Service Limited in 2003.⁸⁴

Member base

- 4.79. CIO members include lenders (residential and commercial mortgage providers, personal loan and credit card providers, small amount lenders and pawn brokers); mutual banks, credit unions and building societies; finance brokers; securitisers; credit reporting bodies; timeshare providers; financial planners; accountants; and credit reporting schemes.
- 4.80. In 2015-16, CIO had 22,973 members, up from 15,535 members in 2010-11.⁸⁵ In 2015-16, around 97 per cent of CIO's members were sole traders, partnerships or small businesses.⁸⁶ Most of CIO's members are brokers.⁸⁷
- 4.81. In 2015-16, 45 members moved from CIO to FOS.⁸⁸

Dispute data

Disputes received

- 4.82. In 2010-11, CIO received 1,983 disputes; in 2015-16 it received 4,760 disputes.⁸⁹ The number of disputes CIO receives has risen over the past five years,

84 Ali, S (2013) *Consumer Financial Dispute Resolution in a Comparative Context: Principles, Systems and Practice*, Cambridge University Press, page 70.

85 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 7 October 2016.

86 A small business is one with fewer than 20 employees.

87 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 7 October 2016.

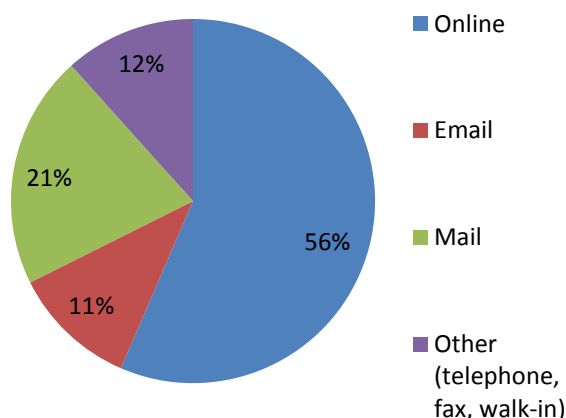
88 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 7 October 2016. The MOU between FOS and CIO governs the exchange of information about members, including where a member moves from one scheme to another. One of the purposes of the MOU is to reduce any associated risks to consumers such as non-compliance with decisions.

89 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 7 October 2016.

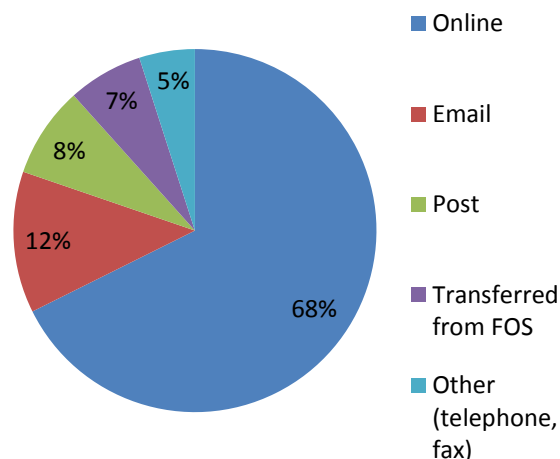
particularly after the introduction of national licensing obligations for credit providers and intermediaries.

- 4.83. The mix of the types of disputes received by CIO has varied considerably between 2010-11 and 2015-16. In 2010-11, the most common type of dispute was in relation to residential mortgages (56.2 per cent), followed by disputes relating to motor vehicle finance (13.2 per cent), personal loans (7.9 per cent) and credit or charge card (3.0 per cent). In 2015-16, the most common type of dispute was in relation to residential mortgages (17.8 per cent), followed by disputes relating to credit or charge cards (17.3 per cent), debt purchased or being collected (15.7 per cent)⁹⁰ and motor vehicle finance (12.5 per cent).⁹¹
- 4.84. In 2015-16, the majority (78.6 per cent) of disputes were lodged by individuals. Almost 7 per cent of disputes were lodged by credit repair and debt negotiation businesses.⁹²
- 4.85. Complainants are able to lodge disputes with CIO in a number of ways, as shown below.⁹³

Disputes received, by lodgement method (2010-11)



Disputes received, by lodgement method (2015-16)



- 4.86. Between 2010-11 and 2015-16, there has been an increase in complaints lodged online (from 56 per cent to 68 per cent). Since 2015-16, CIO has separately identified complaints received by way of transfer from FOS – previously, these were recorded under the channel that FOS provided the complaint to CIO (typically email).⁹⁴ COSL’s Annual Report on Operations 2010-11 (as CIO was

90 Where the underlying product is known, CIO records the complaint with the underlying product.

91 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016.

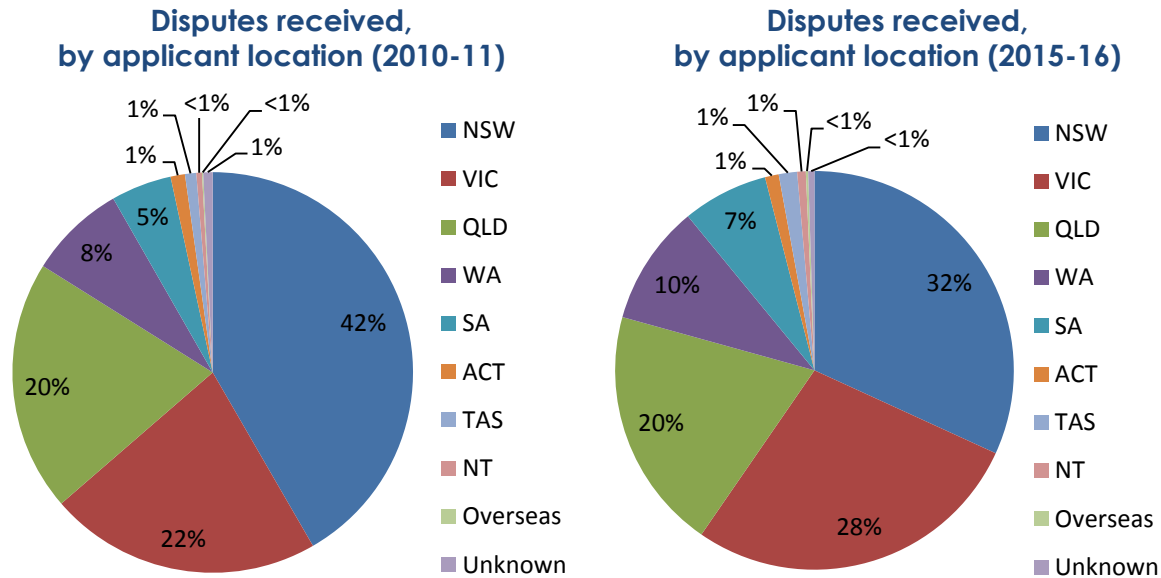
92 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 7 October 2016. These businesses are referred to as ‘debt management firms’ in Chapter 5 of this Interim Report.

93 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016.

94 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 7 October 2016.

then known) indicates that 10.7 per cent of complaints were referred to COSL by FOS.⁹⁵

- 4.87. The geographic distribution of complainants in 2010-11 and 2015-16 is shown below.⁹⁶



Resolution of disputes

- 4.88. In 2015-16, CIO closed 23 per cent of disputes received within 30 days, 47 per cent within 60 days, 63 per cent within 90 days and 83 per cent within 180 days.⁹⁷ In 2010-11, CIO closed 29 per cent of disputes within 30 days, 48 per cent within 60 days, 62 per cent within 90 days and 80 per cent within 180 days.⁹⁸ The average number of days to close disputes decreased from 128 days in 2010-11 to 107 days in 2015-16.⁹⁹
- 4.89. CIO measures the time taken to resolve a complaint from the date it first receives the complaint (including the period during which a complaint is addressed 'internally' by a financial firm if referred back for IDR), and not from the date the complaint is assigned to a case manager. CIO allocates every complaint it receives to a case manager within 48 hours of receipt.
- 4.90. In 2015-16, CIO had 59.4 FTE employees, compared with 34 FTE employees in 2010-11.¹⁰⁰ CIO does not have any temporary staff. All staff either have a

95 Credit Ombudsman Service 2011, *Annual Report on Operations 2010-11*, page 3, viewed 6 November 2016, <<http://www.cio.org.au/cosl/assets/File/AnnualReportOnOperations-2010-11.pdf>>.

96 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016.

97 Credit and Investments Ombudsman, *Annual Report on Operations 2015-16*, page 60.

98 Credit Ombudsman Service 2011, *Annual Report on Operations 2010-11*, page 15.

99 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016.

100 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016.

fixed-term or permanent employment agreement.¹⁰¹ All but six of CIO's case management team are legally qualified with, on average, 5.6 years post-qualification work experience. Those case managers that are not legally qualified have industry experience in financial services. Staff turnover was 22 per cent in 2010-11 and 36 per cent in 2015-16.¹⁰²

Approach to dispute resolution

- 4.91. CIO has a high degree of discretion to choose the appropriate dispute resolution process for complaints. CIO resolves around half of its complaints through negotiation, conciliation or direct discussions between the member and the consumer. Other approaches include expediting simple and low value complaints and using tailored processes in cases of financial hardship.¹⁰³
- 4.92. The Deputy Ombudsman oversees case management and there are nine teams within case management. Case management is divided into the following areas: Privacy and debt collection; Hardship; General Credit; Financial planning and Investments; and Systemic Issues Investigations.¹⁰⁴
- 4.93. CIO's dispute resolution process comprises four stages:¹⁰⁵ 'validation');¹⁰⁶ 'initial review'; if a complaint is not resolved at this point it is moved to 'investigation'; and then, finally, 'determination'.
- 4.94. In the validation stage, CIO registers each complaint that it receives and notifies the parties of its receipt of the complaint.
- If the complaint has not already been through the financial firm's IDR process, then CIO refers the consumer to the firm's IDR process and the financial firm is advised of that fact. The consumer is advised that the firm must respond within a specified timeframe¹⁰⁷ and is also invited to advise CIO in due course if the complaint is not resolved. If CIO does not hear from the consumer about the outcome of IDR, CIO makes two attempts to follow up with the consumer. If no update is provided,

101 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016.

102 CIO has indicated that 2015-16 saw an unusually high number of staff take up roles in financial firms that were bulking up their IDR functions in response to increased regulatory scrutiny – Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 November 2016.

103 According to data supplied by CIO to the EDR Review (11 October 2016), for financial service providers like small amount lenders and consumer retail lease providers, CIO's standard four-stage dispute resolution process was not appropriate given the dollar values involved. As a result, CIO introduced an expedited process.

104 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016.

105 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016.

106 If the consumer is seeking less than \$3,000 or the complaint is about a credit listing or enquiry, CIO may deal with the complaint using their expedited process. If this is the case, the complaint will not be moved to the 'initial review' stage: Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016.

107 The timeframes are summarised in Annexure 3 of CIO's *Guidelines to the Rules of the Credit and Investments Ombudsman* (5th edition), available at <<http://www.cio.org.au/assets/1212604/CIO%20Guidelines%20-%205th%20Edition.pdf>>, and are consistent with the maximum IDR timeframes in ASIC's Regulatory Guide 139 and the *Privacy Act 1988*.

CIO assumes the consumer does not wish to proceed with EDR and closes the case

- If the complaint has already been through the financial firm's IDR process, the financial firm is required to provide a copy of its IDR response to CIO within seven days, before the complaint is progressed to the initial review stage.¹⁰⁸ (This provides the financial firm with a brief, final opportunity to seek to resolve the complaint directly with its customer before it is escalated by CIO.)

- 4.95. The investigation stage is CIO's final round of information gathering. At any stage of the process, the parties may reach an agreement to resolve the complaint, or CIO may issue a review if the information indicates that it is not one that they can continue to deal with. Otherwise, CIO will issue a recommendation at the end of the investigation stage as to how a complaint should be resolved. If the parties do not accept a review or recommendation, the ombudsman will issue a determination which is the final decision on the complaint. If the complainant accepts the determination, the financial firm is bound by it. If the complainant does not accept the determination, the complaint is closed and the complainant may take any other action available against the financial firm, including action through the court system.
- 4.96. In 2015-16, 69.0 per cent of disputes were resolved at the validation stage, 25.3 per cent were resolved at the stage of initial review, 5.5 per cent were resolved at the investigation stage and a negligible percentage (0.2 per cent) were resolved by way of determination.¹⁰⁹ CIO advised that, in 2015-16, 60.8 per cent of complaints were resolved through conciliation.¹¹⁰
- 4.97. CIO uses a tailored process for complaints involving financial hardship.¹¹¹ On registering a complaint, the financial firm is notified and reminded not to commence or continue with enforcement action. CIO may negotiate an outcome acceptable to both parties or facilitate a conciliation conference. Alternatively, CIO may make a formal recommendation to the firm that they enter into a particular payment arrangement with the complainant or provide some other type of hardship assistance. If the parties agree on an outcome, CIO reviews it to ensure it is fair and the terms are clear. If the parties cannot agree, and, on the information available, a payment arrangement or other hardship relief is appropriate, the ombudsman may make an order or determination.¹¹² If a

108 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016; Credit and Investments Ombudsman 2017, data supplied to EDR Review, 8 March 2017.

109 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016.

110 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 November 2016.

111 Before making a hardship complaint, the consumer should contact the financial firm to discuss their circumstances and give the firm an opportunity to consider their request for a payment arrangement or other type of hardship assistance. (See Credit and Investments Ombudsman, *Financial hardship process*, viewed 6 November 2016, <<http://www.cio.org.au/complaint-resolution/financial-hardship-process/>>.)

112 Generally, if the parties do accept a recommendation as to how a complaint should be resolved, the ombudsman would issue a determination which is the final decision on a complaint. Under rule 9.10 of the CIO Rules, the ombudsman can make an order requiring the financial firm to do or to refrain from doing some act in relation to the subject matter of the complaint. For financial hardship complaints, the

payment arrangement or other hardship relief is not appropriate, CIO is generally not able to assist a complainant further and will provide reasons. The complainant has an opportunity to respond to the decision.¹¹³

- 4.98. In determining a matter, including the extent of loss or damage suffered by a complainant, CIO has regard to the relevant legal requirements and rights provided by law to the complainant; applicable codes of practice; good industry practice in the financial services industry; and fairness in all the circumstances.¹¹⁴
- 4.99. There is a limited internal appeal process. Under CIO rule 39.4, a party may seek an appeal within 28 days of the determination or award under the following circumstances: clerical mistake; material error, oversight or omission; material miscalculation of figures; material mistake in the description of any person, thing or matter; defect in form; or where the determination/award does not reflect the ombudsman's actual intentions. Under rule 39.4, the ombudsman may: re-open the complaint; make whatever amendments to the determination or award he or she thinks is appropriate; re-issue the determination or award; or give such directions as he or she thinks appropriate in connection with the determination or award. CIO has advised that no applications have been received to date under rule 39.4.¹¹⁵
- 4.100. Judicial review can be sought on narrow grounds as follows: in instances of proven dishonesty or bias; where CIO acts outside its jurisdiction; in instances of 'Wednesbury unreasonableness'¹¹⁶; or where CIO breaches its Constitution, Rules or Terms of Reference. CIO has never been the subject of judicial review.¹¹⁷
- 4.101. There is also a test case mechanism for financial firms, which requires the firm, to CIO's reasonable satisfaction, to show that: the dispute involves or may involve an issue that could have important consequences for the firm's business or the financial services industry generally, or the dispute raises an important or novel point of law.¹¹⁸ To date, no dispute has gone through this process.¹¹⁹

ombudsman generally issues an 'order' rather than a determination. An order is generally in a shorter form than a determination, and is more appropriate for the simpler decisions required for financial hardship complaints.

113 For additional information in relation to CIO's powers and processes regarding financial hardship applications, see Credit and Investments Ombudsman, *Financial hardship process*, <<http://www.cio.org.au/complaint-resolution/financial-hardship-process/>>.

114 Credit and Investments Ombudsman 2016, *Credit and Investments Ombudsman Rules* (10th Edition), rule 1.5.

115 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016.

116 The term 'Wednesbury unreasonableness' is used to describe a decision considered to be so unreasonable, no reasonable authority could have made it.

117 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016.

118 Rule 29 of the *Credit and Investments Ombudsman Rules* (10th Edition) sets out the process a firm is required to follow if it wants a complaint to be dealt with as a test case. Under rule 29.1, the firm must, to the scheme's reasonable satisfaction, show that: the complaint involves or may involve an issue that could have important consequences for the firm's business or the financial services industry generally, or the complaint raises an important or novel point of law.

119 Rule 29 of the *Credit and Investments Ombudsman Rules* (10th edition); Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016.

Jurisdiction

- 4.102. CIO's jurisdiction is set under its rules and complies with the minimum jurisdiction requirements for approved EDR schemes as set out in ASIC's RG 139. CIO's definition of 'financial services' also includes 'financial services' as defined by the *ASIC Act 2001*,¹²⁰ along with budget monitoring and management and debt collection and management.¹²¹ This means that CIO can deal with a range of disputes about financial products and services including disputes relating to credit products and services, finance broking, debt collection or debt purchasing arrangements, financial planning and credit reporting.
- 4.103. CIO can consider a complaint about a financial firm if the complainant is a consumer and the complaint arises from or relates to a financial service.¹²² A complaint generally needs to be made within six years from when the complainant first becomes aware (or should have become aware) that they suffered a loss.¹²³ Time limits apply unless CIO considers that exceptional circumstances apply or the financial firm and CIO agree to CIO having jurisdiction to consider the complaint.¹²⁴
- 4.104. CIO Rules set out when CIO will deal with a complaint, for example, if a financial firm breached relevant laws in relation to a financial service, breached an applicable code of practice, did not meet industry standards of good practice or acted unfairly towards the complainant.¹²⁵
- 4.105. CIO operates under a monetary limit: the maximum value per claim under a dispute that can be considered is \$500,000.¹²⁶
- 4.106. There are also maximum compensation caps in operation. From January 2015, the CIO award limit is \$309,000 per claim.¹²⁷ Similar to FOS, CIO takes the view that a single dispute can contain more than one claim, with each claim being separately subject to the compensation cap.¹²⁸

120 This means CIO can consider whether the financial firm has breached any of the protections available under the *ASIC Act 2001*, such as the prohibitions against misleading and deceptive conduct and unconscionable conduct.

121 In relation to budget monitoring and management, and debt collection and management, the financial firm must be a member of CIO to come within CIO jurisdiction. EDR membership requirements for debt management firms are discussed in Chapter 11 of this report.

122 Credit and Investments Ombudsman 2016, *Credit and Investments Ombudsman Rules (10th Edition)*, rule 6.1. See page 43 of the rules for the CIO definition of a 'financial service'.

123 Credit and Investments Ombudsman 2016, *Credit and Investments Ombudsman Rules (10th Edition)*, rule 6.3. Complaints relating to financial hardship applications, unjust transactions or unconscionable interest and other charges under the National Credit Code must be made two years from when the credit contract or consumer lease is rescinded, discharged or otherwise comes to an end; or two years from when a final response is given by a firm at IDR.

124 Credit and Investments Ombudsman 2016, *Credit and Investments Ombudsman Rules (10th Edition)*, rule 6.4.

125 Credit and Investments Ombudsman 2016, *Credit and Investments Ombudsman Rules (10th Edition)*, rule 7.1.

126 Credit and Investments Ombudsman 2016, *Credit and Investments Ombudsman Rules (10th Edition)*, rule 9.1.

127 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016.

128 Credit and Investments Ombudsman, *Increase of monetary compensation limit*, viewed 6 November 2016, <<http://www.cio.org.au/news/news-and-information/increase-of-monetary-compensation-limit/>>.

- 4.107. Compensation caps have increased over time after public consultation processes, and since 2012, CIO has been required to adjust its compensation caps every three years, in accordance with ASIC's RG 139. In addition, CIO's Board may increase the amount of the monetary compensation limit from time to time.¹²⁹
- 4.108. CIO applies a range of exclusions to its jurisdiction.¹³⁰ In 2015-16, 10.6 per cent of disputes received were determined to fall outside the CIO's jurisdiction and 6.6 per cent of the disputes excluded were excluded on the basis CIO considered the dispute would be more appropriately dealt with in another forum (such as a court, tribunal or other dispute resolution scheme). An example of where this occurs is where the CIO member is a debt purchaser that has purchased utilities and telecommunications debts. If the complaint is about the quality of the service provided by the utility or telecommunications provider, CIO considers the complaint will more appropriately be dealt with by the relevant energy and water ombudsman or the Telecommunications Industry Ombudsman.¹³¹ Other reasons why a dispute was excluded in 2015-16 were: the complaint did not relate to a CIO member (1.9 per cent); the complaint did not concern a financial service (0.7 per cent); the complaint was previously dealt with by CIO (0.3 per cent); and the complaint was brought outside the relevant time limits (0.3 per cent).¹³²

Powers

- 4.109. CIO provides a wide range of remedies including compensation for financial or non-financial loss,¹³³ forgiveness or variation of a debt, or release of a security for a debt. CIO can also order interest to be paid on a payment.¹³⁴
- 4.110. CIO also has powers to join other parties that are members of CIO to a complaint if it believes it would not unfairly prejudice the complainant or financial firm; and it would lead to a more efficient and effective resolution of a complaint.¹³⁵ The complainant and financial firm must also provide CIO with such information and documents that the scheme considers may be necessary to deal with a complaint.¹³⁶

129 Credit and Investments Ombudsman 2016, *Credit and Investments Ombudsman Rules (10th Edition)*, rule 9.2.

130 Credit and Investments Ombudsman 2016, *Credit and Investments Ombudsman Rules (10th Edition)*, rule 10.

131 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016.

132 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016.

133 CIO has advised (data supplied to EDR Review on 11 November 2016) that it does not have a cap on non-financial loss. The most common or likely reasons for compensation for non-financial loss are set out in rule 9.8 of the *Credit and Investments Ombudsman Rules (10th Edition)* as follows: (a) where the complainant has been unduly harassed, caused physical inconvenience, embarrassment, humiliation or distress; or (b) where the financial firm has unnecessarily delayed or extended the time taken to resolve the situation; or (c) where CIO is satisfied that the financial firm has interfered with the complainant's privacy or expectation of peace of mind.

134 Credit and Investments Ombudsman 2016, *Credit and Investments Ombudsman Rules (10th Edition)*, rule 9.4.

135 Credit and Investments Ombudsman 2016, *Credit and Investments Ombudsman Rules (10th Edition)*, rule 30.

136 Credit and Investments Ombudsman 2016, *Credit and Investments Ombudsman Rules (10th Edition)*, rule 16. It is noted that under rule 16.2, the scheme may draw any appropriate adverse inference against a party from that party's failure to respond to a request from the scheme under rule 16.1.

- 4.111. CIO recently amended its rules to enable it to expel a financial firm who fails to implement CIO's recommendations for the resolution of a systemic issue.¹³⁷ CIO may also suspend a financial firm's membership for a specified period or expel a firm for failing to comply with a scheme requirement and/or notify ASIC that a firm has failed to comply with a scheme requirement.¹³⁸ Since 2011-12, CIO has expelled seven members for refusing to comply with the CIO Constitution and Rules and, in all but one case, failure to pay fees owing to CIO.¹³⁹
- 4.112. While CIO determinations are binding on members, since 1 December 2014, four financial firms have been unwilling or unable to comply with five CIO determinations made in favour of seven complainants. The value of these outstanding determinations was approximately \$414,443 (including interest) as at 1 November 2016.¹⁴⁰

Governance

- 4.113. CIO is a not-for-profit company governed by a Board of directors comprised of an independent chair and two consumer and two industry directors, consistent with requirements under RG 139.¹⁴¹ Article 22.3 of CIO's Constitution outlines the process for appointing directors and the Chair. The appointments are made after consulting relevant industry and consumer organisations.
- 4.114. The roles of the Board include: appointing the Ombudsman¹⁴² and ensuring independent decision making; monitoring the performance of the scheme; setting the budget; and reviewing and ensuring effective consultation about changes to the scheme's jurisdiction, including monetary limits.¹⁴³
- 4.115. The Board does not become involved in the detail of cases which come before the scheme as that would undermine decision makers' independence. Each department within CIO provides the CEO with a quarterly report on its performance and the CEO presents the information to the Board.
- 4.116. CIO advised that the last independent CIO review was published in 2012 and made 47 recommendations, of which CIO accepted 43 and rejected 4.¹⁴⁴ The CIO

137 Credit and Investments Ombudsman, submission to the EDR Review Issues Paper, page 24.

138 Credit and Investments Ombudsman 2016, *Credit and Investments Ombudsman Rules (10th Edition)*, rules 27.1(ii) and (iii). CIO can also enforce an award through legal proceedings.

139 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016.

140 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 November 2016.

141 Credit and Investments Ombudsman Limited 2014, *CIO Constitution (as at 19 November 2014)*, article 22 (available at <<http://www.cio.org.au/about/cio-constitution/>>). This article sets out the rules governing the appointment of the Board. The number of industry/member directors and consumer directors must be equal at all times. The existing member directors appoint new industry/consumer directors after consultation with key industry bodies or key consumer and community organisations as appropriate.

142 Credit and Investments Ombudsman Limited 2014, *CIO Constitution (as at 19 November 2014)*, article 23.1. Article 23.6 gives the Board power to engage and dismiss staff.

143 See article 23.1 of the CIO Constitution for further information.

144 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 November 2016.

Board did not accept recommendations about publicising non-compliance by members or those relating to taking legal action to enforce its determinations.

Funding arrangements

- 4.117. CIO is funded from charges on its members. The Board periodically determines funding arrangements but is not required under its constitution to consult with members.
- 4.118. CIO members pay a one-off application fee; an annual membership fee; complaints fees (but only if CIO receives a complaint about the member); and a systemic issues and serious misconduct fee (but only if CIO investigates a systemic issue or instance of serious misconduct about the member).¹⁴⁵
- 4.119. The table illustrates the proportion of CIO revenue derived from the different charges.¹⁴⁶

		2014-15		2015-16	
Total revenue (\$m)		7.37		8.05	
Revenue source	Application fees	0.05	0.7%	0.04	0.5%
	Membership fees	5.18	70.2%	5.75	71.4%
	Complaints fees	2.15	29.2%	2.12	26.3%
	Systemic issues and serious misconduct fees	-		0.13	1.6%

Note: percentages refer to proportion of total revenue for the year.

- 4.120. Around 70 per cent of CIO’s funding comes from membership fees. Membership fees vary according to the financial firm’s business activity and the size of the business (for example, membership fees for brokers are calculated based on the number of authorised representatives). For larger members, the membership fee is based on the historical number of complaints. This provides CIO with certainty of funding and resourcing over the year. Members understand that reduced complaint levels will, all other things being equal, reduce membership fees in the following year. CIO has advised that this provides an ongoing incentive for these members to reduce the number of complaints that go to CIO.¹⁴⁷
- 4.121. In 2015-16 CIO received complaints against 2.2 percent of members (514 members). Seven financial firms received more than 100 complaints against them.¹⁴⁸

145 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 November 2016.
 146 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 November 2016.
 147 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 November 2016.
 148 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 November 2016.

- 4.122. In addition, CIO charges complaint fees for each complaint received. Under the tiered fee structure, higher complaint fees apply to complaints that progress to the later stages of the dispute resolution process. The tiered fee structure incentivises financial firms to settle meritorious complaints in the early stages of the process.¹⁴⁹
- 4.123. A different fee structure applies to financial hardship and non-financial hardship complaints, reflecting that there is a separate case management team that deals with financial hardship using a different process.¹⁵⁰
- 4.124. All licensee members of CIO are entitled to one free complaint each membership year. This mechanism is intended to mitigate the cost of EDR membership for smaller members in particular.¹⁵¹

Improving industry behaviour

- 4.125. CIO has a dedicated team for the management and investigation of systemic issues. The team prepares quarterly reports, on a de-identified basis, on its investigations for the Board, ASIC and the OAIC.¹⁵² This acts as a deterrent and encourages good behaviour.
- 4.126. CIO has the power to expel a financial firm who fails to implement CIO's recommendation for the resolution of a systemic issue. In 2015-16, there were 38 systemic issues reported, of which 34 were resolved (most commonly by the financial firm amending its internal policies/practices). The most common systemic issue was in relation to responsible lending (13 systemic issues in 2015-16).¹⁵³
- 4.127. Systemic issues are subject to a different fee structure, the fees are designed to recover CIO's costs in dealing with such matters. Different fees apply based on the complexity of the issue.¹⁵⁴ Complex systemic issues incur the largest fees.
- 4.128. As an ASIC and OAIC approved EDR scheme, CIO has ongoing reporting obligations to both regulators. CIO is required to report systemic issues and/or serious misconduct by a scheme member to ASIC. CIO must also provide

149 Additional fees also apply to complaints that are dealt with under CIO's expedited process (for claims of less than \$3,000, or about a credit listing or enquiry), or if the ombudsman makes an order or award requiring a firm to do or to refrain from doing something or if CIO investigates a systemic issue or serious misconduct about the firm.

150 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 November 2016.

151 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016.

152 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016. It is noted that under ASIC's current policy settings, systemic issues reports are anonymous. Schemes will generally only identify the licensee where there is non-compliance or in cases of serious misconduct (Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, page 23).

153 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016.

154 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 7 October 2016.

quarterly information about complaints and attend regular meetings with ASIC.¹⁵⁵

- 4.129. In 2015-16, CIO reported six serious misconduct matters, relating to misrepresentation (one matter), poor complaints handling process (two matters), unconscionable conduct (two matters), and undue harassment (one matter). In four of these matters, the financial firm's membership with CIO was cancelled. However, in relation to two matters, the financial firm cooperated with CIO's investigation and agreed to change its practices.¹⁵⁶
- 4.130. Upon invitation, CIO presented at professional development days of its members to discuss their approach to managing complaints. CIO also conducts presentations at industry conferences such as the Annual Credit Law Conference. CIO also holds an annual conference for its members and regular meetings with members who have large complaint volumes.¹⁵⁷

Ensuring accessibility

- 4.131. CIO maintains a website with a range of information for consumers and members. The website includes information about the scheme, including how to lodge a dispute and search function to check whether a financial firm is a member of CIO. CIO's Constitution, Rules and fee arrangements are also available on its website. Visits to CIO's website have increased significantly over time: from 87,113 website visits in 2010-11 to 140,461 visits in 2015-16.¹⁵⁸
- 4.132. CIO also receives a large number of telephone enquiries. In 2015-16, CIO received 26,217 telephone enquiries, compared with 13,610 enquiries in 2010-11. CIO operates a free call number.¹⁵⁹
- 4.133. CIO introduced a Consumer Engagement Strategy (CES) in 2014-15 and as a result, put more resources into a consumer outreach program. The CES focuses on raising awareness about CIO and the service it offers amongst disadvantaged demographic groups such as Indigenous consumers, low income earners and seniors. A key part of the strategy is working with community legal centres and financial counsellors to increase the reach of CIO to its clients and networks.¹⁶⁰
- 4.134. CIO has also undertaken various initiatives to improve accessibility such as redesigning and rewording brochures to make them more consumer friendly. The CIO complaint form and basic information about the organisation is available in 22 different languages on the website.¹⁶¹ As part of its strategy to increase awareness amongst Indigenous communities, CIO has joined Good

155 See ASIC *Regulatory Guide 139: Approval and oversight of external dispute resolution schemes* and OAIC *Guideline for recognising external dispute resolution schemes* for further information.

156 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016.

157 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016.

158 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016.

159 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016.

160 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016.

161 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016.

Service Mob (NSW), a group of agencies that provide free services to ensure consumer rights awareness among Indigenous groups.¹⁶²

- 4.135. CIO records indicate that in 2015-16, 0.8 per cent of applicants required a translator (compared with 0.25 per cent in 2010-11) and 0.8 per cent had other needs (this includes applicants who have physical, hearing, visual or speech impairments). As data on other needs was only recorded from 2011-12, data for 2010-11 is not available.¹⁶³

¹⁶² Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 October 2016.

¹⁶³ Credit and Investments Ombudsman 2016, data supplied to EDR Review, 7 October 2016.

SUPERANNUATION COMPLAINTS TRIBUNAL

Role

- 4.136. SCT is an independent statutory administrative tribunal that provides consumers with a free service for resolving complaints relating to products or services provided by superannuation funds, approved deposit funds, retirement savings account providers, insurers and annuity providers. Jurisdiction of SCT is determined by statute. Superannuation fund trustees agree to abide by SCT determinations as a condition of their registrable superannuation entity (RSE) licence.
- 4.137. The *Superannuation (Resolution of Complaints) Act 1993* (SRC Act) requires SCT to pursue the objectives of providing dispute mechanisms that are 'fair, economical, informal and quick'.¹⁶⁴

Dispute data

Disputes received

- 4.138. The number of disputes received by SCT has increased from 1,907 disputes in 2004-05, to 2,688 disputes in 2014-15 (a 41 per cent increase over the period).¹⁶⁵ SCT received 2,368 complaints in 2015-16, but it should be noted 326 matters that would formerly have been classified as disputes were classified as inquiries.¹⁶⁶
- 4.139. Complainants lodged disputes in a number of ways, as shown in the charts below. The most common way to lodge disputes in 2015-16 was electronically (35 per cent by email and 20 per cent online), and almost double the number of disputes were lodged by email in 2015-16 compared with 2010-11.¹⁶⁷

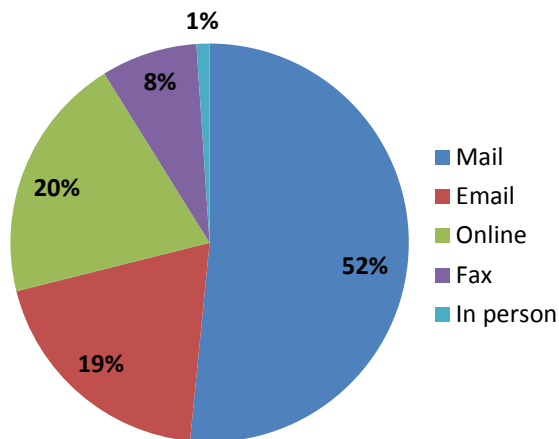
164 Section 11 of SRC Act.

165 Superannuation Complaints Tribunal 2016, submission to the EDR Review Issues Paper, page 7. SCT advises that the reason for the change in classification is to improve the service experience for consumers and to allow a better allocation of resources.

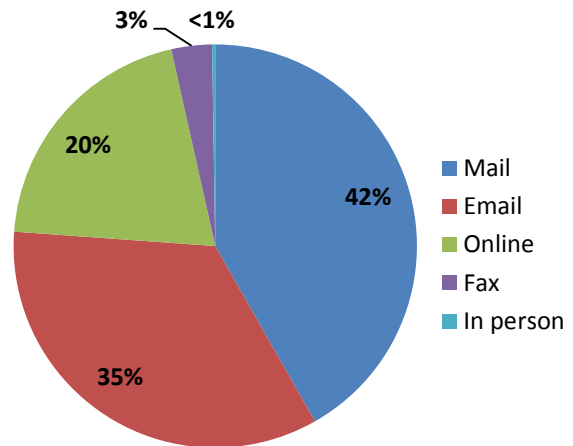
166 Superannuation Complaints Tribunal 2016, *2015-16 Annual Report*, page 34.

167 Superannuation Complaints Tribunal 2016, data supplied to EDR Review, 7 October 2016.

Complaints, by lodgement method (2010-11)

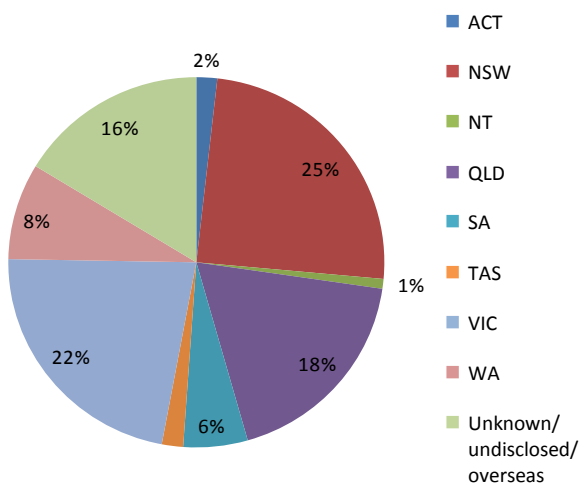


Complaints, by lodgement method (2015-16)

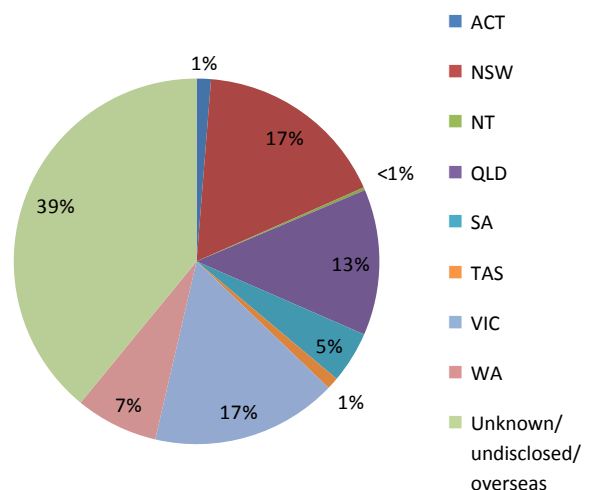


4.140. The geographic distribution of complainants is shown below for 2010-11 and 2015-16.¹⁶⁸

Disputes received, by applicant location (2010-11)



Disputes received, by applicant location (2015-16)



Resolution of disputes

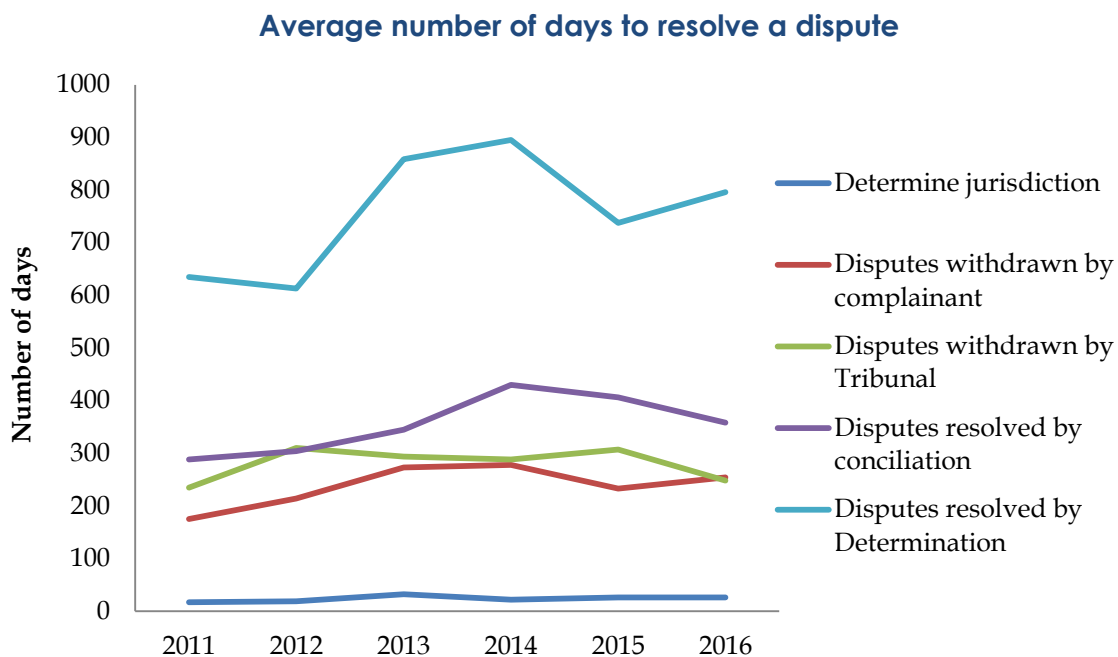
4.141. In 2015-16, SCT resolved 1,366 disputes, 111 disputes were withdrawn without resolution and 886 disputes were outside jurisdiction.¹⁶⁹ In 2010-11, SCT resolved 1,376 disputes, 79 disputes were withdrawn without resolution and 1,007 disputes were outside jurisdiction.¹⁷⁰

¹⁶⁸ Superannuation Complaints Tribunal 2016, data supplied to EDR Review, 7 October 2016.

¹⁶⁹ Superannuation Complaints Tribunal 2015, *2014-15 Annual Report*, page 19.

¹⁷⁰ Superannuation Complaints Tribunal 2016, data supplied to EDR Review, 7 October 2016.

- 4.142. SCT forecasts a rise in complaints in the future due to demographic pressures, increasing financial literacy and Australians' growing engagement with their superannuation.¹⁷¹
- 4.143. Delays and dispute resolution backlogs have long been an issue for SCT. SCT has indicated that if a dispute is not withdrawn or resolved with the superannuation provider before review, it will take at least 12 months to get to review, at which time SCT will make a formal decision in relation to the complaint.¹⁷² SCT is taking action to reduce this waiting period.
- 4.144. The chart below shows the average number of days taken to resolve a complaint at SCT:¹⁷³



- 4.145. In 2010, the average time in days to resolve a dispute from lodgement to determination was 635 days. In 2015-16, this number had increased to 796 days. The time taken by SCT to make decisions regarding whether a dispute was outside its jurisdiction also increased from 17 days in 2010-11 to 26 days in 2015-16.¹⁷⁴
- 4.146. The chart below outlines the number of open complaints by year at SCT.¹⁷⁵

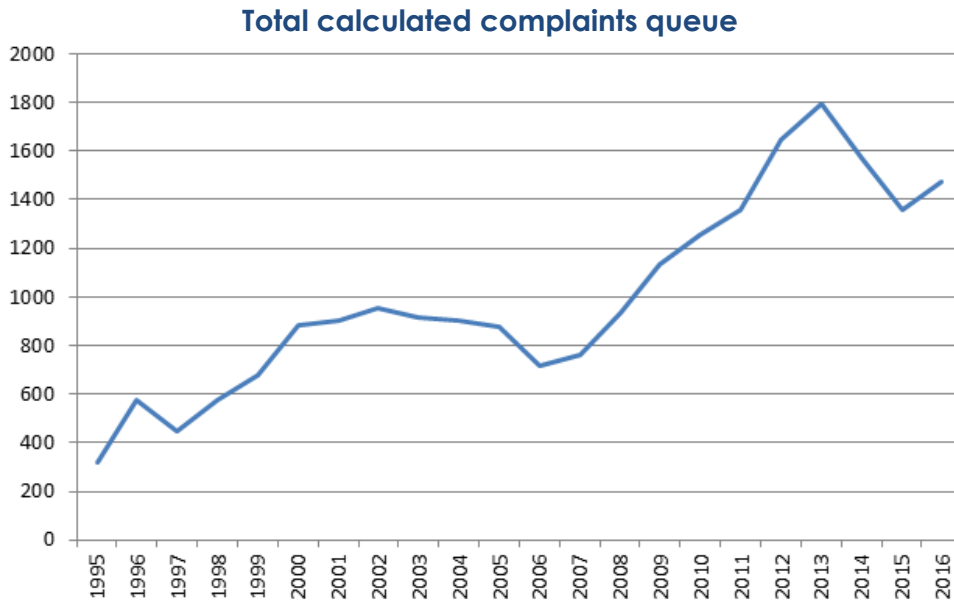
171 Superannuation Complaints Tribunal, submission to EDR Review Issues Paper, page 21.

172 Superannuation Complaints Tribunal website, accessed 27 November 2016, <<http://www.sct.gov.au/faqs/frequently-asked-questions>>.

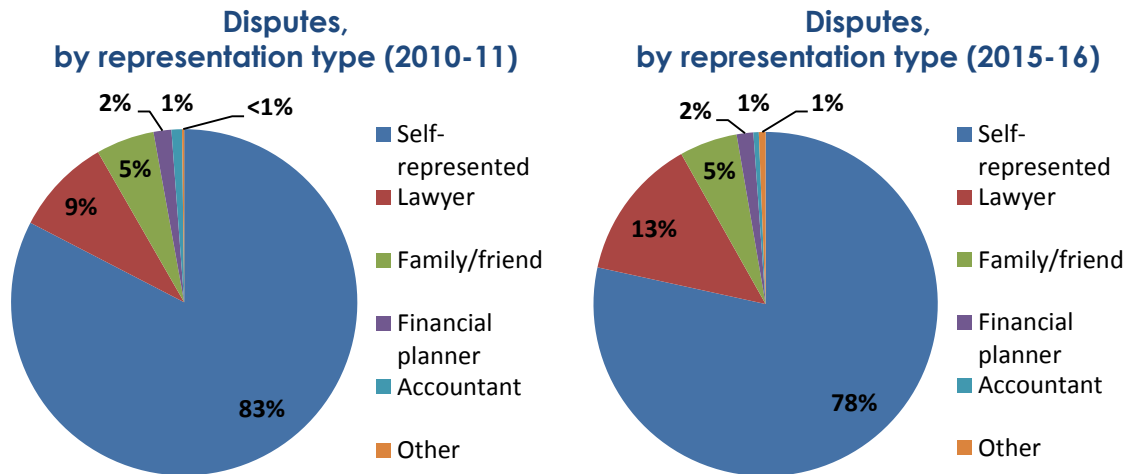
173 Superannuation Complaints Tribunal, data supplied to EDR Review, 7 October 2016.

174 Superannuation Complaints Tribunal, data supplied to EDR Review, 7 October 2016.

175 Superannuation Complaints Tribunal 2016, data supplied to EDR Review, 7 October 2016.



- 4.147. Generally, complaints are lodged by the individual making the complaint. A complainant can request to be represented at any stage of SCT process, however the request must be approved by SCT.
- 4.148. There is a presumption against representation contained in the SRC Act, except where the complainant has a disability or where SCT considers it ‘necessary in all the circumstances’,¹⁷⁶ consistent with SCT’s objectives of providing complaint resolution that is ‘fair, economical, informal and quick’.¹⁷⁷ The charts break down complaints by type of representation (including self-representation) for 2010-11 and 2015-16 and show an increase in complaints involving legal representation.¹⁷⁸



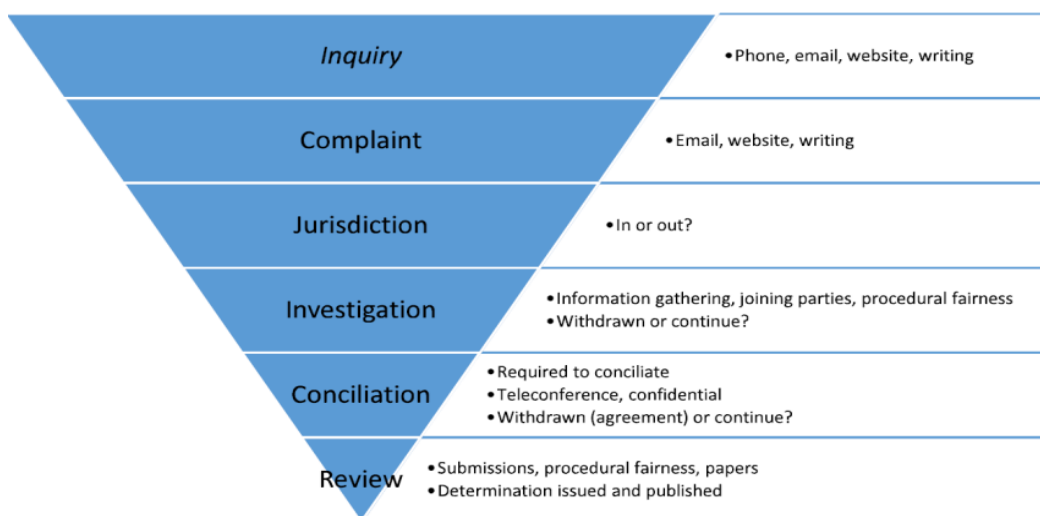
176 Section 23 of SRC Act.

177 Section 11 of SRC Act.

178 Superannuation Complaints Tribunal 2016, data supplied to EDR Review, 7 October 2016.

Approach to dispute resolution

4.149. The figure below provides an overview of SCT’s dispute resolution process:¹⁷⁹



4.150. Resolution of a complaint can occur at any stage of the process. In 2015-16, of the complaints that were within SCT’s jurisdiction, 87 per cent were resolved during investigation or conciliation and 13 per cent by determination.

4.151. Reviews are held on the papers. The Chairperson constitutes the Tribunal by selecting one to three Tribunal members for the purpose of dealing with a particular complaint. SCT currently has 13 part-time members and constitution of the Tribunal is not a delegable function.

4.152. Once the complaint is scheduled for review, a document exchange occurs between the parties and each party is provided with an opportunity to make written submissions. The submissions are exchanged and parties are provided with a further opportunity to respond prior to the set hearing date to ensure procedural fairness. The submissions are reviewed by the Complaints Analyst to ensure no new issues are being raised prior to the matter being heard by the constituted Tribunal.

4.153. SCT publishes anonymised versions of its determinations on SCT’s website as well as on the Australasian Legal Information Institute website (www.austlii.edu.au). Determinations are not published by SCT where they are subject to appeal or where SCT cannot guarantee the anonymity of the parties.

Jurisdiction

4.154. As a statutory tribunal, SCT’s jurisdiction, powers and time limits are set out in the SRC Act. In contrast to the industry ombudsman schemes, SCT draws its jurisdiction from the identity of the decision maker, with the SRC Act relying upon the concept of a ‘decision’ by the trustee of a regulated superannuation

179 Superannuation Complaints Tribunal, submission to the EDR Review Issues Paper, page 15.

fund. Accordingly, SCT can deal with complaints relating to the decisions and conduct of trustees, insurers, retirement savings account (RSA) providers, superannuation providers in relation to regulated funds (excluding SMSFs), approved deposit funds, life policy funds and annuity policies.¹⁸⁰

- 4.155. The SRC Act specifically excludes SMSFs from SCT's jurisdiction. Since the trustees of an SMSF are also the members of the fund, except in limited situations (such as children of adult SMSF members) there is no reason for SMSF members to require external dispute resolution against a trustee (since they themselves are the trustees). Further, in general, since non-APRA regulated funds do not pay levies to APRA, they are not privy to the benefits provided by such regulation, including access to external dispute resolution.
- 4.156. Jurisdictional and standing provisions are set out in the SRC Act. Superannuation providers become subject to the jurisdiction of SCT when they become regulated under the *Superannuation Industry (Supervision) Act 1993* (SIS Act). SCT can deal with a diverse range of superannuation-related complaints, excluding complaints in relation to SMSFs. If superannuation providers offer products or services that fall outside the SCT's jurisdiction, they must also belong to an ASIC-approved EDR scheme.¹⁸¹
- 4.157. Broadly speaking, complaints lodged with SCT generally fall into one of the following categories:
- death benefits claims (635 complaints (26.8 per cent) in 2015-16);
 - total or permanent disability claims (519 complaints (21.9 per cent) in 2015-16); and
 - fund administration claims (1214 complaints (51.3 per cent) in 2015-16).¹⁸²
- 4.158. SCT has no monetary limit for complaints, including in relation to disputes relating to life insurance. No time limits apply except in certain circumstances defined in the SRC Act such as death benefit distribution claims (generally 28 days) and total permanent disability claims (generally four years).¹⁸³
- 4.159. When a trustee distributes a death benefit, it undertakes a search for beneficiaries and provides information to identified potential beneficiaries about how it proposes to distribute the benefit, called 'claim-staking'. The potential beneficiaries can object to the proposed distribution. The trustee considers all objections before making its final decision. The decision is communicated to the potential beneficiaries, together with reasons for the trustee's decision and a

180 *Superannuation (Resolution of Complaints) Act 1993*, Part 4. Section 5 of the Act excludes SMSFs from SCT's jurisdiction.

181 Australian Securities and Investments Commission 2016, submission to EDR Review Issues Paper, page 25.

182 Fund administration covers a range of disputes. In 2015-16, the key types were disputes relating to: deduction of insurance premiums; delay in benefit payment or transfer/frozen funds; and account balances; Superannuation Complaints Tribunal 2016, data supplied to EDR Review, 7 October 2016.

183 Time limits do vary. For further information see SCT website on time limits: <<http://www.sct.gov.au/pages/make-a-complaint/time-limits>>.

defined timeframe in which a complaint can be taken to the SCT (currently 28 days by regulation). If a complaint is not raised, a trustee will distribute the death benefit.¹⁸⁴ If a complaint on a death benefit is raised with SCT, a trustee must undertake a ‘reasonable inquiry’ within 28 days and invite identified parties to apply to be joined to the dispute before SCT makes its decision.

4.160. In 2015-16, 35 per cent of complaints received by SCT fell outside its jurisdiction. On average, the main reason SCT was unable to hear the complaint is that the complaint had not been considered through the trustee’s IDR procedure before being lodged with SCT. Another key reason was that matters were actually enquires rather than complaints. In 2015-16, SCT launched a new initiative to reclassify certain matters as enquiries to improve the service experience for consumers and to allow a better allocation of resources.

4.161. The table below provides a breakdown of complaints received by SCT that fall outside of its jurisdiction.¹⁸⁵

Dispute type	2015-16
Dispute has not first been considered by IDR	65%
Consumer enquiry	11%
Outside claim time limits	6%
No interest under s15(1)(a) of the SRC Act or not a member or beneficiary	4%
Dispute not related to a trustee decision	4%
Dispute employer related	3%
Exempt public sector scheme	2%
Other (includes SMSF (<1% of complaints))	6%

4.162. SCT can only accept disputes where the consumer has made all reasonable efforts to have the dispute resolved by the superannuation provider through IDR.¹⁸⁶ If the consumer has not attempted to resolve the dispute through the trustee’s IDR procedures (which may, under the SIS Act, take up to 90 days),¹⁸⁷ then SCT cannot consider the dispute. In 2015-16, nearly two thirds (65 per cent) of disputes that were deemed to be outside SCT’s jurisdiction (that is, around 23 per cent of all disputes) were so because consumers had not yet complained to their fund.¹⁸⁸ SCT does not track disputes referred to IDR. ,

4.163. Under Section 22A of the SRC Act, SCT also has the power to refer a dispute to another complaint handling scheme so long as it is satisfied that the scheme has

184 Superannuation Complaints Tribunal, submission to the EDR Review Interim Report, page 11, footnote 13.

185 See Superannuation Complaints Tribunal 2016, *Annual Report 2015-2016*, page 38.

186 SRC Act, section 19.

187 Section 101 of the SIS Act requires superannuation providers to establish arrangements for dealing with enquiries and complaints.

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the necessary powers to deal with the dispute. In such circumstances, SCT must obtain the complainant's consent to refer the dispute before doing so. Over the past five years only four disputes have been referred to another complaint handling body (FOS), with an average of one dispute per year.¹⁸⁹ In 2015-16, SCT also suggested to 15 consumers that they contact FOS to resolve their dispute and SCT received 119 referrals from FOS.¹⁹⁰

Powers

- 4.164. SCT's statutory powers are outlined in the SRC Act. Broadly, SCT 'stands in the shoes' of the trustee and can exercise all the powers and discretions available to the trustee under its deed, superannuation and other relevant legislation, and trust law.
- 4.165. In making a determination, SCT must consider whether the trustee's decision was 'fair and reasonable' in the circumstances. If SCT determines that a decision was 'fair and reasonable', it must affirm the decision. If SCT determines that a decision was not 'fair and reasonable', it may only exercise its powers to place the complainant, as nearly as practicably, back into the position they would have been before the decision was taken. SCT cannot award costs or damages or provide a remedy where there has been no adverse practical outcome or financial loss.¹⁹¹
- 4.166. The SRC Act offers no general guidance as to what is 'unfair or unreasonable', although in some specific cases specified in the SRC Act, SCT is directed to take certain matters into account. Where a complaint concerns a non-discretionary decision, the decision is taken to have been unfair and unreasonable if the decision was contrary to law. In the absence of guidance in the SRC Act, SCT can turn to the common law (that is, court decisions), which has established various grounds on which a decision or conduct may be found to be unfair or unreasonable.¹⁹²
- 4.167. SCT is unable to provide a remedy for complaints about the design of a fund.¹⁹³ In carrying out its review, it also is not able to exercise its powers in a way which is contrary to the relevant trust deed or insurance policy.¹⁹⁴
- 4.168. SCT has the power to join parties to a dispute, which is important for the resolution of many superannuation complaints:
- As trustees provide insured benefits through group life policies held with an insurer, SCT is able to join insurers as a party to the dispute, effectively allowing for the decisions of both the trustee and insurer to be considered as a single dispute. SCT is able to join multiple insurers to a dispute

189 Superannuation Complaints Tribunal, submission to the EDR Review Issues Paper, page 13.

190 Superannuation Complaints Tribunal, submission to the EDR Review Issues Paper, page 14.

191 Superannuation Complaints Tribunal 2015, *2014-15 Annual Report*, page 3.

192 Leow, J and Murphy, S *Australian Master Superannuation Guide 2016/17*, 20th Edition.

193 SRC Act, subsection 14(6).

194 SRC Act, subsection 37(5).

where there is disagreement as to which is the relevant insurer in relation to the complainant's dispute.

- Death benefit disputes have the potential to impact on numerous parties (other potential beneficiaries) and again, SCT has the capacity to join the potential beneficiaries to the complaint, where they have applied to be joined.
- 4.169. Pursuant to the operating standards under regulation 13.17B, trustees are legally required to comply with SCT determinations and may face enforcement action by APRA in the event of non-compliance.¹⁹⁵
- 4.170. There is no provision for SCT to hear 'test cases'. However, SCT Chairperson's guidelines and procedural rules allow for the establishment of a multi-person panel in circumstances where SCT, or a party to the dispute, notifies SCT that there is an issue or principle to be determined. Disputes can only be commenced by members/former members and beneficiaries; they cannot be initiated by financial firms. SCT determinations do not set a binding precedent.
- 4.171. Appeals against a SCT determination can be made to the Federal Court on questions of law only.¹⁹⁶
- 4.172. Under subsection 46(5) of SRC Act, the Federal Court cannot make adverse cost orders against consumers that do not defend an appeal 'instituted by another party to the complaint'.¹⁹⁷
- 4.173. Over the last decade, there have been 88 appeals to the Federal Court, 69 of which were appeals of SCT determinations.¹⁹⁸ Over the past five years, 89 per cent of appeals to the Federal Court were initiated by consumers (including beneficiaries), as opposed to financial firms.¹⁹⁹

Governance

- 4.174. The SRC Act outlines the constitution and governance arrangements for SCT. The Act provides that the SCT consists of a Chairperson, Deputy Chairperson and no fewer than seven other members.
- 4.175. The current structure differentiates the roles of the Chair and Deputy Chairperson. The Chairperson is the executive officer of SCT and is responsible for the overall operation and administration of its powers and functions in accordance with its statutory objectives. ASIC is responsible for the day to day management of SCT, and provides all administrative resourcing for SCT including staff employment, payment of bills, IT support and tenancy.

195 *Superannuation Industry (Supervision) Regulations 1994, Regulation 13.17B Orders etc of the Superannuation Complaints Tribunal to be Complied With.*

196 SRC Act, section 46.

197 SRC Act, subsection 46(5).

198 Australian Securities and Investments Commission, submission to EDR Review Issues Paper, page 26.

199 Superannuation Complaints Tribunal 2016, data supplied to EDR Review, 25 November 2016.

- 4.176. Sections 6 and 7 of the SRC Act limit the powers and delegations of the Chairperson. For example, the Chairperson possesses no financial delegations under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and is unable to make unilateral staffing or budgeting decisions. There is also no provision for delegating certain functions, such as the constitution of the Tribunal for the purpose of hearing a complaint.
- 4.177. Unlike the industry ombudsman schemes, SCT does not have a board of directors. An Advisory Council has been established by SCT, comprising of six industry representatives, one consumer representative and an independent chair.²⁰⁰ The Council's role is to maintain and strengthen SCT's governance and to provide a forum for stakeholders to provide regular feedback and high level strategic advice to SCT. Council membership is on a voluntary basis with members invited to participate by the SCT Chairperson.
- 4.178. The Chairperson and Deputy Chairperson are appointed by the Governor-General. Tribunal members are Ministerial appointees with two members appointed following consultation with the Consumer Affairs Minister.²⁰¹ In addition to a full-time Chairperson and Deputy Chairperson, there are currently 21 part-time members, including 13 new appointments and two reappointments.

Funding arrangements

- 4.179. The Government provides an annual appropriation for SCT in each Federal Budget. This appropriation is then cost recovered from Australian Prudential Regulation Authority (APRA) regulated superannuation funds via the annual financial sector levies determined by the Minister and collected by APRA. The share of the APRA levy allocated to SCT is determined by SCT's Commonwealth budget allocation rather than being directly linked to the forecast number of disputes SCT may consider. In addition, SCT funding, as a government appropriation to a public sector entity, is subject to Government efficiency measures, including the annual efficiency dividend.

200 SCT website, viewed 26 November 2016, <<http://www.sct.gov.au/pages/about-us/advisory-council>>.

201 SRC Act, sections 7 and 8.

4.180. The table below outlines SCT expenditure as reported in its annual reports:²⁰²

Financial Year	Expenditure (\$ Million)
2010-11	6.32*
2011-12	6.02*
2012-13	6.10
2013-14	6.64
2014-2015	5.92
2015-2016	5.24

* Includes total operating expenses plus Tribunal members' fees.

4.181. In the 2016-17 Budget, the Government allocated additional non-ongoing funding of \$5.2 million for SCT.²⁰³ SCT's 2015-16 Annual Report indicates this additional funding will help SCT increase 'operational resources to resolve complaints and continue to improve systems and process in future periods'.²⁰⁴

4.182. The table below outlines staffing levels since 2010-11 at SCT:²⁰⁵

SCT Staffing Levels	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16
Total Staff	44	45	42	45	39	32
Permanent	43	44	41	36	35	30
Temporary	1	1	1	9	4	2
Full time	38	41	40	43	35	26
Part time	6	4	2	2	4	6
Staff Turnover	20.69%	13.33%	14.89%	17.20%	16.67%	33.80%

4.183. Since 2010-11, total staffing levels at SCT have generally been decreasing on an annual basis. In 2010-11, SCT employed a total of 44 staff compared to 32 in 2015-16. The ratio of full-time to part-time staff has been decreasing. Staff turnover is currently at 33.8 per cent and averaged 19.43 per cent between 2010-11 and 2015-16.

Oversight

4.184. As an Australian Government agency, SCT is subject to external scrutiny and oversight by Parliament, courts and several Commonwealth entities.

202 Superannuation Complaints Tribunal Annual Reports for the periods 2010-11 to 2015-16.

203 Superannuation Complaints Tribunal 2016, Media release - *Tribunal welcomes \$5.2 million funding increase*, accessible at: <<http://www.sct.gov.au/latest-news/tribunal-welcomes-52-million-funding-increase>>.

204 Superannuation Complaints Tribunal 2016, *Annual Report 2015-16*, page 3.

205 Superannuation Complaints Tribunal Annual Reports for the periods 2010-11 to 2015-16.

- 4.185. SCT's operations are scrutinised by Parliament through the legislative process, as well as through the tabling of regulations and SCT's annual report. In accordance with *Senate Standing Order No 12*, SCT also provides its biannual indexed list of files to be tabled before the Senate. SCT also responds to Ministerial queries and Parliamentary Questions on Notice when required.
- 4.186. SCT's jurisdiction, powers and operations are also open to judicial scrutiny by way of appeal and judicial review by the courts.
- 4.187. Additional oversight is provided through the Commonwealth Ombudsman, who is responsible for investigating complaints relating to SCT and the *Freedom of Information Act 1982*, which provides rights to access SCT documents. From 2010-11 to 2015-2016, 49 complaints about SCT have been made to the Ombudsman. Over the past five years, complaints against SCT have been decreasing, from 16 in 2010-2011 to 4 complaints in 2015-2016. The main reasons for complaints were:
- delay in dealing with a consumers dispute; and
 - SCT decisions to reject complaints outside SCT's jurisdiction.
- 4.188. In all complaints to date, the Commonwealth Ombudsman has found no administrative deficiency and has not requested any further action by SCT.

Improving industry behaviour

- 4.189. Section 64 of the SRC Act requires the SCT Chairperson to provide particulars to ASIC and/or APRA on each instance where any law, governing rule or terms and conditions may have been contravened in relation to a complaint.²⁰⁶ Since 2006, the SCT Chairperson has provided 82 of these notices to ASIC and 19 to APRA.²⁰⁷ The particulars provided by the SCT Chairperson to ASIC mostly related to issues surrounding:
- trustee compliance with superannuation choice obligations; and
 - trustee non-compliance with requirements to provide written reasons for decisions.²⁰⁸
- 4.190. Thirteen referrals of contraventions to ASIC and/or APRA were recorded in 2015-16.²⁰⁹ Over the past five years, the number of referrals has increased.
- 4.191. In 2015-16, one failure to comply with a SCT determination was referred to both ASIC and APRA. During the process of reporting to ASIC/APRA, the trustee initiated steps to implement SCT's determination.²¹⁰

206 SRC Act, section 64.

207 Superannuation Complaints Tribunal 2016, data supplied to EDR Review, 7 October 2016.

208 Australian Securities and Investments Commission, submission to EDR Review Issues Paper, page 26.

209 Superannuation Complaints Tribunal 2016, data supplied to EDR Review, 7 October 2016.

210 Superannuation Complaints Tribunal 2016, data supplied to EDR Review, 28 November 2016.

Chapter 5: A single EDR body to handle all financial disputes

Key points

- The Panel's central recommendation is the establishment of a new single EDR body for all financial disputes (including superannuation disputes) to replace FOS, CIO and SCT.
- Key benefits of the single EDR body are that:
 - more people will be able to have their dispute heard and those who suffer losses will receive higher compensation;
 - disputes across the system will be resolved quickly (in particular, because the resolution of superannuation disputes will be more timely, similar to other financial disputes); and
 - disputes will be able to be lodged, and redress provided, in a seamless and straightforward way.
- A single EDR body will also:
 - address the existing overlaps between the bodies;
 - deal with consumer confusion and complexity; and
 - benefit from increased economies of scale.
- The current arrangements for superannuation disputes require significant reform. There are substantial delays in resolving disputes, stemming from:
 - a lack of flexibility in funding, governance and dispute resolution processes;
 - a lack of focus on system-wide improvements; and
 - accountability measures that are passive and indirect.
- A move to an industry-based EDR body will increase flexibility and responsiveness, provide a greater focus on consumer education, be more accessible, support system-wide improvements and provide enhanced and more direct independent and regulatory scrutiny.
- With careful design and, where necessary, statutory provisions, particular structural and legal aspects of superannuation can be accommodated.
- Enhanced oversight and accountability mechanisms for the single EDR body will maintain a focus on important features such as cost efficiency, service quality and innovation in processes.
- To ensure minimal disruption to users, the transition to the new EDR body will take place in a single step, rather than through operating concurrent EDR bodies for a period and later moving to a single body.

- 5.1. The Panel's central recommendation is the establishment of a new single EDR body for all financial disputes (including superannuation disputes) to replace the Financial Ombudsman Service (FOS), Credit and Investments Ombudsman (CIO) and Superannuation Complaints Tribunal (SCT).
- 5.2. Key benefits of the single EDR body are that:
- more people will be able to have their dispute heard and those who suffer losses will receive higher compensation;
 - disputes across the system will be resolved quickly (in particular, because the resolution of superannuation disputes will be more timely, similar to other financial disputes); and
 - disputes will be able to be lodged, and redress provided, in a seamless and straightforward way. This will have benefits for consumers but also for financial firms who will be able to deal with disputes expeditiously and continue running their business.
- 5.3. The Panel's considerations and analysis in arriving at its recommendation for a single EDR body are outlined in this Chapter as follows:
- why the current arrangements for superannuation disputes are in need of fundamental reform through an industry-based EDR body; and
 - why there should be a single EDR body.
- 5.4. The Panel also sets out its recommended implementation pathway, which is to move to the single EDR body in a single step.
- 5.5. The key features of the single EDR body are set out in Chapter 6, supplemented by Chapter 7 (accommodating unique features of superannuation disputes), Chapter 8 (addressing gaps in the framework, which includes discussion of the proposed monetary limits and compensation caps of the single EDR body) and Chapter 9 (accountability and oversight of the single EDR body).

RESOLUTION OF SUPERANNUATION DISPUTES

Current framework

- 5.6. Within the EDR framework, superannuation disputes are currently resolved by SCT.
- 5.7. There are a number of strengths with the existing arrangements including:
- an unlimited monetary jurisdiction;
 - a broad jurisdiction to review trustee decisions; and
 - statutory provisions (such as the ability to join third parties to a dispute and to require the production of information) to deal with the added complexity of some superannuation disputes.

- 5.8. In submissions to the Review, the consensus among most stakeholders was that fundamental reform was required to current superannuation dispute resolution arrangements. In addition to the delays experienced by consumers, stakeholders highlighted a range of problems with current arrangements and were particularly concerned by the future pressures on SCT, in light of the anticipated growth in the number of superannuation disputes.¹
- 5.9. Importantly, stakeholders did not see the problems as attributable to the highly professional staff or the Chairperson, who are held in high regard.²

Problems with the existing arrangements

- 5.10. There are significant delays in resolving superannuation disputes, ranging from 12 months up to 4 years.³ Delays 'are a feature of every stage in the process, from investigations, through [to] conciliations and issuing [of] determinations.'⁴ SCT has publicly acknowledged the delays, listing on its website a minimum of 12 months to resolve disputes that reach the determination stage.⁵ Submissions noted a number of disputes are taking significantly longer than this to reach a formal decision.⁶
- 5.11. Delays in the progression of disputes mean consumers are not receiving adequate support from EDR. Of particular concern are delays at the preliminary stages of the dispute process, where SCT confirms its jurisdiction, assigns a case officer and investigates the complaint.⁷ Delays at this stage of the process can mean consumers wait for long periods of time only to hear that their dispute cannot be dealt with by SCT.
- 5.12. Delays are particularly concerning in the case of death benefits and total and permanent disability (TPD) claims. As legal firm Maurice Blackburn noted:

For working people with a TPD Claim, they typically are unable to wait 12 months, let alone 12 weeks given the stretched financial situation they will be in. By contrast, the insurer or Superannuation Fund is able to wait years, and are often happy to do so. By contrast, most workers compensation schemes require a decision within weeks despite the TPD claims often involving similar types of injuries.⁸

1 For example, Superannuation Complaints Tribunal, submission to the EDR Review Issues Paper, page 3; Association of Superannuation Funds of Australia, submission to the EDR Review Issues Paper, page 15.

2 See, for example: Financial Services Council, submission to the EDR Review Issues Paper, page 7.

3 For example, see submissions to the EDR Review Issues Paper from Superannuation Complaints Tribunal, Noel Davis, QSuper, Industry Super Australia, Association of Superannuation Funds of Australia, Australian Institute of Superannuation Trustees, Joint Consumer Group, Legal Aid NSW, Legal Aid Queensland, Financial Services Council, the Law Council of Australia and Maurice Blackburn.

4 Industry Super Australia, submission to the EDR Review Issues Paper, page 5.

5 See SCT website, <www.sct.gov.au> Frequently Asked Questions: 'How long will it take before my complaint gets to review?'

6 See for example, Association of Superannuation Funds of Australia, submission to the EDR Review Issues Paper, page 10 and Joint Consumer Group, submission to the EDR Review Issues Paper, page 37.

7 Association of Superannuation Funds of Australia, submission to the EDR Review Issues Paper, page 10.

8 Maurice Blackburn, submission to the EDR Review Issues Paper, page 6.

- 5.13. Delays in the progression of disputes can also result in disputes being directed to the courts, defeating the purpose of EDR. QSuper noted ‘delays in progressing superannuation disputes in a timely manner have resulted in plaintiff legal firms increasingly using the court systems to resolve TPD insurance disputes’.⁹
- 5.14. SCT has taken action to address the delays, including instituting a new process of recognising and managing general inquiries distinct from the disputes process, which has assisted with a more effective allocation of resources.¹⁰ However, funding and governance constraints limit the amount of change SCT can instigate.
- 5.15. In their submissions, stakeholders highlighted a number of issues with SCT in its current form, which can be grouped into three categories:
- lack of flexibility in funding, governance and dispute resolution processes;
 - lack of focus on system-wide improvements; and
 - passive and indirect accountability measures.

Lack of flexibility

Funding and resourcing

- 5.16. Since its inception, SCT has been subject to claims of chronic underfunding and resourcing.¹¹ Over the past five years, SCT expenditure has broadly trended downwards. As the Joint Consumer Group noted, there is currently no link between SCT expenditure and funding and the number of disputes SCT receives.¹² Funding is determined by government and does not necessarily increase as SCT complaints increase. Complaints have tended to increase each year and stakeholders expect them to continue to rise as the industry matures.
- 5.17. As a statutory body, SCT’s budget is determined by government, although it is funded by industry through the Financial Institutions Supervisory Levies (FISL). SCT does not have direct control over its funding, with the funding and staff provided to SCT through ASIC.¹³
- 5.18. Stakeholders commented that there was insufficient transparency over the management of SCT’s budget.¹⁴ There is little transparency over how much of the FISL is provided to ASIC for SCT in each financial year. One industry association submitted:

9 QSuper, submission to the EDR Review Issues Paper, page 1.

10 Superannuation Complaints Tribunal Annual Report 2015-16, page 35.

11 Superannuation Complaints Tribunal, submission to the EDR Review Issues Paper, page 32.

12 Joint Consumer Groups, submission to the EDR Review Issues Paper, page 49.

13 *Superannuation (Resolution of Complaints) Act 1993* section 62.

14 See for example Superannuation Complaints Tribunal, submission to the EDR Review Issues Paper, page 34; Davis, N, submission to the EDR Review Issues Paper, page 1 and Industry Super Australia, submission to the EDR Review Issues Paper, page 7.

*current arrangements do not allow for an appropriate assessment of the funding needs of the SCT which can result in the SCT being underfunded. Under existing legislative provisions there is no guidance on how the SCT's funding is to be determined, and provides ASIC with an absolute discretion with no guiding principles.*¹⁵

- 5.19. As a statutory body, SCT is subject to ongoing funding cuts through the efficiency dividend which have had a detrimental effect on its operations. SCT submitted the 'direct impact of under resourcing is translated to the time it takes to resolve complaints'.¹⁶ It also noted that there has been a 'year on year' increase in open disputes where more disputes are received each year than are resolved and that where additional funding has been provided to clear the backlog of disputes there has been a 'clear correlation in an increase of complaints finalised'.¹⁷
- 5.20. SCT's internal operating processes are also seen as inefficient and heavily manual in nature. ASFA noted that SCT still uses a paper-based file management system with disputes managed in hard copy files.¹⁸
- 5.21. The Association of Superannuation Funds of Australia (ASFA) suggested SCT would benefit from improving its processes through the digitisation of dispute records and implementing an enhanced workflow management capability.¹⁹
- 5.22. The Government provided SCT with additional one-off funding of \$5.2 million in the 2016-17 Budget to assist SCT with modernising its processes and clearing its backlog of complaints²⁰.
- 5.23. A key message from submissions was that there was a need for increased funding and improved transparency of funding for SCT.²¹

Governance

- 5.24. SCT's legislation does not prescribe a board of directors, although SCT has established an Advisory Council to attempt to fulfil a similar role and has also expressed a desire to incorporate a governance board into the existing model.²² At present, the Advisory Council includes an independent chair as well as

15 Australian Institute of Superannuation Trustees, submission to the EDR Review Issues Paper, page 12.

16 Superannuation Complaints Tribunal, submission to the EDR Review Issues Paper, page 33.

17 Superannuation Complaints Tribunal, submission to the EDR Review Issues Paper, page 32.

18 Association of Superannuation Funds of Australia, submission to the EDR Review Issues Paper, page 10.

19 Association of Superannuation Funds of Australia, submission to the EDR Review Issues Paper, page 12.

20 Australian Government Budget 2016-17, Budget Paper 2, page 153.

21 For example see submissions to the EDR Review from Superannuation Complaints Tribunal; Davis, N; QSuper; Industry Super Australia; Association of Superannuation Funds of Australia; Australian Institute of Superannuation Trustees; Joint Consumer Group; Legal Aid New South Wales; Legal Aid Queensland; the Law Council of Australia; and Corporate Super Association.

22 Superannuation Complaints Tribunal, submission to the EDR Review Issues Paper, page 4.

six industry representatives and one consumer representative who provide high-level support and advice to the Chairperson.²³

- 5.25. Stakeholders submitted that the current role and delegations of the Chairperson are insufficient and in need of reform. For instance, the Chairperson is the executive officer responsible for the overall operation and administration of SCT. However, the Chairperson does not possess financial delegations and is unable to make unilateral staffing or budgeting decisions²⁴. This significantly restricts the ability of SCT to make effective resourcing decisions and deliver process improvements.
- 5.26. There are no provisions for delegating certain functions, such as how SCT is constituted, which means SCT decisions are limited by the availability of Tribunal members.
- 5.27. The appointments process, with the Chair and Deputy Chairpersons appointed by the Governor-General and the Tribunal members appointed by the Minister, can be lengthy. The process inhibits SCT's ability to respond quickly to an increase in the volume of disputes, and emerging issues, and to manage the operations of SCT in accordance with its organisational priorities.

Dispute resolution processes

- 5.28. Some stakeholders indicated that SCT's current disputes handling process is too restrictive, for example, conciliation must be attempted in respect of every dispute before a determination is issued.²⁵ This is in contrast to FOS and CIO, which have the flexibility to select from a variety of mechanisms to resolve a dispute, including negotiation, conciliation, mediation or the issue of a determination.
- 5.29. Consumer groups also commented on the capacity of SCT to innovate and reform its processes, submitting that it is more limited than the industry-based ombudsman schemes and dependent on government and legislative change:

The SCT's powers and procedures are set out in statute, although the Tribunal must issue a memorandum explaining how complaints are to be dealt with. The statute can only be amended by Federal legislation. Even simple procedural amendments can be delayed due to the need for legislative change.²⁶

- 5.30. ASFA countered that the lack of innovation in processes are a result of underfunding and under-resourcing rather than statute. ASFA noted:

Subsection 9(4) of the S(ROC) Act gives to the SCT Chairperson the responsibility – and the power – to establish procedural rules for the conduct of review meetings, and that section 28(7) requires the Tribunal to formulate, and publish, guidelines

23 Superannuation Complaints Tribunal Website <www.sct.gov.au> 'About Us – Advisory Council'.

24 Superannuation Complaints Tribunal, submission to the EDR Review Issues Paper, pages 29 and 30.

25 *Superannuation (Resolution of Complaints) Act 1993* section 12.

26 Joint Consumer Group, submission to the EDR Review Issues Paper, page 39.

regarding when it would ordinarily require persons to attend a conciliation conference. Aside from those specific requirements, there is flexibility in the processes and procedures that may be adopted.²⁷

Panel analysis

- 5.31. The Panel is of the view that the current arrangements result in a lack of flexibility in funding and insufficient funding transparency. The structure of SCT, set in statute, has not kept pace with modern governance arrangements and there is limited flexibility to select the most appropriate dispute resolution process. The current arrangements have resulted in significant and unacceptable delays in the resolution of superannuation disputes.
- 5.32. Superannuation dispute resolution requires more flexible, responsive and transparent funding mechanisms. The current arrangements would also benefit from modernised governance arrangements and more flexible processes for resolving disputes.

Panel finding

Superannuation dispute resolution requires significantly more funding flexibility, enhanced governance arrangements and flexible dispute resolution processes to manage ongoing changes in demand and to provide effective dispute resolution for consumers.

Lack of focus on system-wide improvements

- 5.33. The current SCT model has a lack of focus on achieving system-wide improvements. Identifying recurring or systemic issues through the analysis of EDR disputes can be valuable to identify and implement improvements in the superannuation sector, avoiding future disputes on similar issues and leading to better outcomes for consumers and superannuation funds.

Systemic issues function

- 5.34. Currently, SCT does not have a mandate to investigate systemic issues in the superannuation sector that come to its attention as a result of individual complaints. Consumer groups noted:

SCT lags far behind EDR schemes in its accountability, transparency and reporting. This is of particular concern given the compulsory nature of superannuation. If a systemic issue exists with a particular fund or the industry generally, many Australians will be affected.²⁸

27 Association of Superannuation Funds of Australia, submission to the EDR Review Issues Paper, page 12.

28 Joint Consumer Group, submission to the EDR Review Issues Paper, page 51.

- 5.35. While SCT is required to report instances of non-compliance with legislation to ASIC and/or APRA, the Joint Consumer Group indicated that this is different from a systemic issues function:

*... we understand that SCT plays no role in resolving systemic matters directly with superannuation trustees, rather merely reports noncompliance to ASIC. Given that the regulator cannot act on every instance of non-compliance, this is a serious shortcoming.*²⁹

- 5.36. SCT is increasing its advocacy work where systemic issues are identified from disputes (for example, educating consumers about SCT's role),³⁰ although there are no mandatory requirements for SCT to undertake systemic issues reporting to the levels undertaken by the industry ombudsman schemes.

Stakeholder outreach and consumer access

- 5.37. Consumer groups were concerned that stakeholder consultation and direct involvement in SCT's governance are not prominent features of the current system.³¹ While there is one consumer representative currently on the Advisory Council, the Council is limited to providing high level support and advice to the Chairperson and broader, periodic consultation with stakeholders is more limited than that found in FOS and CIO. A number of stakeholder groups also suggested there is room for improvement in stakeholder education and outreach activities. One industry group noted in its submission the 'level of industry communication and engagement from SCT has reduced in recent times – for example, a quarterly bulletin was last published for January-March 2015'.³²
- 5.38. In its submission, SCT noted that engagement was an area in which it was seeking to make improvements through establishing an Advisory Council and increasing its engagement with industry. Further, SCT noted it would like to re-establish its communications activities, including the publication of bulletins and newsletters, but has been unable to do so due to under-resourcing.
- 5.39. In addition, consumer groups argued that SCT is legalistic and difficult to navigate without any advice and representation.³³ SCT has 'few effective processes for identifying and responding to issues affecting vulnerable applicants' This problem is exacerbated by the absence of an effective process for expediting 'matters that are urgent or exacerbating the applicant's financial hardship'.³⁴

29 Joint Consumer Group, submission to the EDR Review, page 46.

30 Superannuation Complaints Tribunal Annual Report 2015-16, page 34.

31 Joint Consumer Group, submission so the EDR Review Issues Paper, page 32.

32 Association of Superannuation of Australia, submission to the EDR Review Issues Paper, page 9.

33 Joint Consumer Group, submission to the EDR Review Issues Paper, page 10.

34 Joint Consumer Group, submission to the EDR Review Issues Paper, page 38.

Panel analysis

- 5.40. The Panel considers that there is a strong case for enhancing the investigation of systemic issues in superannuation. Superannuation fund members are typically not engaged consumers, meaning there may not be sufficient pressure exerted on trustees from consumers or their advocates for system-wide improvements to IDR or other services.
- 5.41. The Panel considers that more could be done in superannuation disputes to engage with stakeholders and to undertake outreach activities to raise awareness amongst all users, especially vulnerable consumers.

Panel finding

Dispute resolution in the superannuation system would be improved if there were a greater focus on outreach activities and responding to systemic issues. This would result in benefits for consumers and financial firms.

Passive and indirect accountability mechanisms

- 5.42. SCT is a government body. As such:
- SCT is subject to parliamentary scrutiny and its annual report must be tabled in Parliament each year; and
 - the Commonwealth Ombudsman can investigate concerns raised over the way SCT manages disputes and SCT is subject to Freedom of Information laws.
- 5.43. ASFA submitted these oversight arrangements 'are too passive and indirect to provide meaningful oversight'.³⁵ Unlike industry ombudsman schemes, ASIC has no role in SCT oversight.
- 5.44. Stakeholders also suggested that SCT is missing out on the benefits of several accountability mechanisms enjoyed by FOS and CIO under the co-regulatory approach. In particular, ASFA argued that SCT would benefit from independent reviews. ASFA was not aware of 'any subsequent review of the SCT's operations, performance and efficiency for which the results have been made public'.³⁶

Panel analysis

- 5.45. The Panel considers that the current oversight and accountability arrangements for superannuation disputes are passive and indirect.
- 5.46. The Panel supports superannuation dispute resolution arrangements being subject to improved accountability arrangements, including regular independent reviews. These arrangements provide independent, direct and specific

35 Association of Superannuation Funds of Australia, submission to the EDR Review Issues Paper, page 17.

36 Association of Superannuation Funds of Australia, submission to the EDR Review Issues Paper, page 17.

accountability and a means for driving continuous improvement. Further discussion of accountability mechanisms is in Chapter 9.

Panel finding

Current accountability mechanisms for superannuation disputes are passive and indirect, with no regulator or independent scrutiny. Accountability arrangements such as regular independent reviews provide more direct and specific accountability and are a means for driving continuous improvement.

Stakeholder views on an ombudsman scheme for superannuation disputes

5.47. In its Interim Report, the Panel proposed transitioning SCT from a statutory tribunal to an industry ombudsman scheme for superannuation disputes.

5.48. There were a range of views expressed in relation to the draft recommendation.

Support for maintaining the tribunal model

5.49. One view expressed by a number of stakeholders, particularly superannuation industry representatives, was that SCT should be retained as a statutory body and the current problems should be addressed through improving the existing SCT governance and funding arrangements.³⁷ These stakeholders were of the view that the complexity of superannuation disputes, as well as significant costs involved, did not warrant a change in the existing model.

5.50. These stakeholders also expressed the view that ombudsman schemes provide fewer consumer protections than statutory tribunals and any change from the current model would result in worse outcomes for consumers as well as less certainty for industry.³⁸ There were also concerns that the ability of an ombudsman scheme to amend its own terms of reference would exacerbate this, making any consumer protections less certain and permanent than those currently entrenched in statute.³⁹

Support for transition to an industry ombudsman scheme

5.51. These views were contested by the Joint Consumer Group, which strongly supported a transition to an industry ombudsman scheme on the basis that the existing problems of SCT could not be fully remedied within the existing model, even with substantial reforms to funding and governance.⁴⁰ The Joint Consumer Group submission stated that 'superannuation customers should not have to wait any longer to access the free, fair, fast and accessible dispute resolution that

37 For example, Australian Institute of Superannuation Trustees, Industry Super Australia, Association of Superannuation Funds of Australia, submissions to the EDR Review Interim Report.

38 For example, Australian Institute of Superannuation Trustees, submission to the EDR Review Interim Report, page 2; Industry Super Australia, submission to the EDR Review Interim Report, page 6.

39 Association of Superannuation Funds of Australia, submission to the EDR Review Interim Report, page 5.

40 Joint Consumer Group, submission to the EDR Review Interim Report, page 2.

can be offered by an industry ombudsman scheme model'.⁴¹ The Joint Consumer group indicated that some beneficial features of SCT – such as industry knowledge, expert staff and unlimited jurisdiction – should be retained in an industry ombudsman scheme.⁴²

Support for a stand-alone superannuation ombudsman scheme

- 5.52. Some stakeholders commented on the Panel's proposal that the two new industry ombudsman schemes proposed in its Interim Report be merged once they had garnered sufficient stakeholder support.
- 5.53. Some stakeholders did not agree with merging the two new industry ombudsman schemes, on the basis that superannuation disputes are so fundamentally different from other financial disputes to warrant a separate EDR scheme for each.⁴³
- 5.54. Conversely, the Joint Consumer Group was in favour of the move to a single scheme, arguing the best framework for dispute resolution in the financial system was one scheme that worked collaboratively with the superannuation industry and other stakeholders and addressed any jurisdictional overlaps or inconsistencies currently existing between SCT and FOS.⁴⁴

Panel analysis

- 5.55. The Panel confirms its view, outlined in the Interim Report, that an industry-based EDR body is the most effective model for the resolution of superannuation disputes.
- 5.56. Current arrangements do not provide effective outcomes for users, particularly consumers, who face unacceptable delays with regard to the resolution of superannuation disputes.
- 5.57. The Panel considered whether the current issues with SCT could be addressed through improvements to the current statutory framework. On balance, the Panel considers that statutory reforms alone will not result in enduring improvements to SCT processes.
- 5.58. Superannuation disputes are likely to increase as the superannuation system continues to grow and more consumers enter the drawdown phase. The EDR framework needs to be significantly more flexible and responsive to changes in consumer demand as the superannuation sector matures.
- 5.59. As noted previously, a government-funded statutory body, which requires government approval for a change in funding, is significantly less flexible than an industry-based model, which has the ability to raise additional funds

41 Joint Consumer Group, submission to the EDR Review Interim Report, page 26.

42 Joint Consumer Group, submission to the EDR Review Interim Report, page 26.

43 CPA Australia, submission to the EDR Review Interim Report, page 1.

44 Joint Consumer Group, submission to the EDR Review Interim Report, pages 25 to 26.

relatively quickly in response to a change in demand. Similarly, governance arrangements and processes set in statute are significantly less flexible than those in an industry-based model.

5.60. The Panel considers that moving to an industry-based ombudsman model will provide:

- **increased flexibility and responsiveness:** the ability to independently adapt and innovate in response to changes in the external environment through flexibility in funding, resourcing and operational arrangements and more responsive governance. This increased flexibility will provide better outcomes for users;
- **faster resolution of disputes:** the ability to tailor processes more effectively to particular types of disputes and to adjust funding in response to changes in demand, resulting in faster processes and smaller backlogs;
- **a greater focus on consumer education and accessibility:** a focus on stakeholder engagement, improving accessibility (particularly for vulnerable consumers) and consumer outreach activities will ensure a broader range of people have access to dispute resolution;
- **ongoing system-wide improvements:** a stronger focus on systemic issues will improve dispute resolution across the system, including within superannuation funds; and
- **enhanced and more direct independent and regulatory scrutiny:** regular independent reviews and active monitoring by the regulator, with issues identified required to be resolved.

Preserving the strengths of the existing arrangements

5.61. The Panel has noted there are aspects of superannuation disputes that distinguish them from other financial disputes, including the structural and legal aspects of superannuation (for example, the fiduciary duties of trustees). The Panel has given careful consideration to these issues, including obtaining legal advice.

5.62. The Panel considers that an informal, accessible and effective industry-based EDR body, in conjunction with careful design and, where necessary, statutory provisions, will be able to effectively manage the unique features of superannuation disputes. This is discussed in detail in Chapter 7.

IMPLICATIONS OF A MULTI-BODY FRAMEWORK

5.63. As noted in Chapter 4, the history of dispute resolution in Australia has been one of evolution and consolidation.

5.64. Between 2001 and 2004, there were seven approved EDR schemes in operation – Banking and Financial Services Ombudsman Limited (BFSO), Credit Ombudsman Service Limited (COSL), Credit Union Dispute Resolution Centre

Pty Limited (CUDRC), Financial Co-operative Dispute Resolution Scheme (FCDRS), Financial Industry Complaints Service Limited (FICS), Insurance Brokers Disputes Limited (IBDL), and Insurance Ombudsman Service Limited (IOS).

- 5.65. In 2008, FOS was formed through a merger of BFSO, FICS and IOS. On 1 January 2009, CUDRC and IBDL also joined FOS. The process of consolidation brought together schemes whose membership ranged from the largest banking and insurance institutions, through to small financial advisers and insurance brokers. In each case, consolidation improved scheme efficiencies, removed uncertainty for consumers and reduced the overlaps between the schemes.⁴⁵
- 5.66. The following section identifies the problems of the existing multi-scheme framework and its implications for users (consumers, financial firms, the regulator and other stakeholders). This is followed by discussion of the nature of competition between the existing EDR schemes, and whether it is beneficial or harmful to consumers, and the implications of a shift to a single EDR body.

Overlap between the EDR bodies

- 5.67. Under the current arrangements, there are a number of overlaps in jurisdiction between the three EDR bodies. The main areas of overlap are:
- credit disputes (which may be dealt with by either FOS or CIO);
 - life insurance disputes (which may be dealt with by either FOS or SCT); and
 - financial advice disputes (which may be dealt with by FOS, CIO or SCT depending on who provided the advice and the scheme to which they belong).⁴⁶
- 5.68. In particular, there is a high degree of overlap in the FOS and CIO jurisdictions, as shown in the table below, which is based on dispute numbers for 2015-16.

	Number of disputes (2015-16)	Percentage (of total disputes)
Jurisdiction exclusive to FOS	11,987 disputes	29%
Jurisdiction exclusive to CIO	359 disputes	<1%
Overlapping jurisdictions (CIO and FOS)⁴⁷	28,333 disputes	70%

⁴⁵ Australian Securities and Investments Commission, submission to the EDR Review Interim Report, page 6.

⁴⁶ Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, page 36.

⁴⁷ Overlapping jurisdictions include credit, deposit taking, payment systems and investments disputes. Treasury calculations based on data provided in response to EDR Review data requests to FOS and CIO.

5.69. These overlaps can give rise to a number of problems for users as set out below.

Risk of inconsistent outcomes across EDR bodies

5.70. A key principle guiding this Review is that the outcomes from similar disputes should be comparable. This is critical for consumer confidence in the financial system overall.

5.71. At present, the EDR bodies have different:

- jurisdictions (for example, FOS and CIO have different definitions of 'financial services' and SCT and FOS/CIO have different monetary limits⁴⁸);
- processes for dealing with disputes (for example, some schemes have fast-track processes for certain disputes) and different decision making models (for example, decisions by ombudsmen or panels, depending on the nature of the dispute); and
- decision making criteria.⁴⁹

5.72. These factors mean that consumers can have different dispute resolution experiences and different outcomes for similar disputes.

5.73. This is clearly illustrated in the case of life insurance disputes. The mere fact of whether the insurance was obtained within or outside superannuation determines which EDR body (FOS or SCT) deals with the dispute and results in very different experiences for the consumer, given the lengthy delays currently experienced by SCT.

48 Differences between FOS and CIO's jurisdictions, and SCT and FOS/CIO monetary limits are discussed in Chapter 4.

49 FOS determinations seek to achieve an outcome that is 'fair in all the circumstances', taking into account legal principles (including the common law, important precedents, applicable legislation and the terms of any contacts between the financial firm and the complainant), any applicable industry codes of practice, as well as good industry practice and previous relevant FOS decisions (although FOS is not bound by these). CIO in determining a matter has regard to the relevant legal requirements and rights provided by law to the complainant; applicable codes of practice; good industry practice in the financial services industry; and fairness in all the circumstances. SCT will affirm a decision of a trustee if it was 'fair and reasonable' in the circumstances.

Case study: Emily

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

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

- 5.74. An emphasis of the schemes on resolving disputes via agreement or conciliation, with fewer published decisions, makes it difficult to observe the consistency of decisions across EDR bodies. Differences in the ways in which FOS, CIO and SCT report data about disputes received and closed makes proper analysis of consumer outcomes challenging.⁵⁰
- 5.75. CIO submitted that both FOS and CIO are required to satisfy the relevant regulatory guidance (Regulatory Guide 139), which mandates minimum standards across ombudsman schemes to achieve equal treatment of complaints. Additionally, CIO stated that it is not possible for ombudsman schemes to evolve, innovate and go beyond their minimum jurisdiction if they consistently produce only comparable outcomes.⁵¹ CIO characterised some differences in processes as ‘innovations’ yet to be adopted by the other scheme.

Panel analysis

- 5.76. In general, consumers can choose the financial product or service that best suits their needs. However, in the case of EDR, consumers do not have the choice of which EDR body resolves their disputes. This means a consumer cannot take their dispute to the body they might regard as having better processes or outcomes. It is also unlikely that a consumer will decide which financial product or service to buy on the basis of the dispute resolution scheme to which the firm belongs. For these reasons, the Panel considers that a well-functioning EDR framework should provide consistent outcomes for consumers in relation to similar disputes.

50 FOS reports data online and in a searchable format in comparative tables which includes an indication of what stage in the process a complaint resolves while CIO reports and publishes this data in its annual report: Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, page 29. Independent reviews conducted by ASIC and utilising meaningful benchmarks common to all schemes could alleviate this according to one submission: Australian Finance Conference, submission to the EDR Review Issues Paper.

51 Credit and Investments Ombudsman, submission to the EDR Review Interim Report, page 12.

- 5.77. There may be benefits to consumers where a scheme innovates through observing the processes and practices of another scheme. However, the Panel considers that the evidence of such innovation is weak and, in any case, that these benefits are outweighed by the costs to consumers of where outcomes of similar disputes are not comparable.
- 5.78. For this reason, the Panel sees merit in a single EDR body having responsibility for resolving all financial disputes in order to improve consistency in decision making and processes. In the case of life insurance disputes referred to previously, a single EDR body would provide a more consistent experience for the consumer irrespective of whether they acquired their life insurance product within or outside of superannuation.

Difficulties in progressing disputes with multiple parties

- 5.79. Disputes can involve members of different EDR bodies. For example, in the context of the two industry ombudsman schemes, a dispute may involve a mortgage broker who is a CIO member, but relate to a home loan issued by a major bank (which is a FOS member).
- 5.80. Where the third party is a member of a different scheme, the consumer may be required to pursue the dispute through both schemes, necessitating two sets of documents and responding to different case managers and different procedures.⁵² This problem arises because a scheme can generally only join a third party to a dispute where that third party is a member of the scheme (this is because powers of the scheme stem from the contractual relationship between the scheme and the financial firm that is a member).
- 5.81. In its submission, FOS stated that a scheme's inability to join members of the other scheme into a dispute 'adds complexity for consumers and results in less effective dispute resolution, particularly as the financial sector evolves with new participants and products'.⁵³ The Financial Services Council submitted that the flexibility of joining another responsible party is desirable and a single scheme would allow all relevant parties, where they are financial firms required to have EDR membership, to be included in a dispute.⁵⁴
- 5.82. In contrast, CIO submitted that any benefit gained by removing duplication, through the establishment of a single scheme, would be more than offset by increased bureaucracy and a lack of accountability to stakeholders.⁵⁵

52 Joint Consumer Group, submission to the EDR Review Issues Paper, page 55.

53 Financial Ombudsman Service, submission to the EDR Review Issues Paper, page 26.

54 Financial Services Council, submission to the EDR Review Issues Paper, pages 14-15.

55 Credit and Investments Ombudsman, submission to the EDR Review Interim Report, page 14.

Panel analysis

5.83. The Panel considers that the current arrangements are unsatisfactory for the following reasons:

- more financial products are now sold as a bundle with multiple parties involved, and this is unlikely to decrease. Consequently, the incidence of disputes involving firms that are members of different schemes is likely to increase;
- it is unsatisfactory that a consumer may have to pursue a single dispute through multiple schemes. It places an unnecessary burden on the consumer during what may be an already stressful time; and
- there are inefficiencies, such as time delays, from the perspective of the consumer and financial firm that arise where a consumer has to pursue the same dispute through multiple schemes.

Consumer confusion

5.84. Several stakeholders had indicated that the current multi-body framework results in consumer confusion and unnecessary complexity for consumers.⁵⁶ These stakeholders argued that many consumers find it difficult to understand and navigate the existing framework because it is not immediately obvious to which scheme a consumer should take their complaint.⁵⁷

5.85. By contrast, CIO submitted there is no empirical evidence of consumer confusion, arguing:

- ASIC's Regulatory Guides 139 and 165 require financial firms to notify their clients of the EDR scheme to which they belong;
- many of the prescribed documents which legislation requires to be sent to consumers must set out the contact details of the ombudsman scheme of which the financial firm is a member;
- each scheme's website has a comprehensive search function identifying whether the financial firm being complained about is a member of the scheme; and
- even if a consumer approaches the incorrect scheme, both CIO and FOS have a 'no wrong door' policy under which each scheme will transfer phone calls to the other when an inquiry has been misdirected and, under

56 Australian Bankers' Association, submission to the EDR Review Issues Paper; ANZOA, submission to the EDR Review Issues Paper; Law Council of Australia, SME Committee, submission to the EDR Review Issues Paper.

57 AMP, submission to the EDR Review Issues Paper, page 2.

a Memorandum of Understanding, each scheme will transfer complaint files to the other where there is an incorrect lodgement.⁵⁸

- 5.86. Similar arguments were made by the Australian Finance Conference⁵⁹ and Credit Corp Group.⁶⁰
- 5.87. FOS indicated that efforts by the schemes to increase consumer awareness of their services, including by collaborating with consumer advocacy organisations, engaging in outreach programs or activities and ensuring financial firms are facilitating their customers' referral to EDR when appropriate, are important ways in which consumer confusion can be reduced or mitigated.⁶¹
- 5.88. The cross-referral of disputes between bodies indicates that there is some degree of confusion amongst consumers as to where they should seek redress. In 2015-16, FOS referred just under 1,000 disputes to CIO and SCT; CIO indicated that it referred 4 per cent of complaints received and 16 per cent of enquiries to FOS in 2015-16.⁶²
- 5.89. The cross-referral of disputes is a source of inefficiency, as resources are expended in ensuring the dispute is directed to the appropriate scheme rather than in resolving the dispute. In addition, the re-direction of disputes results in delays to the resolution of a dispute and carries a greater risk of 'consumer fatigue' as a consumer must wait while the dispute is referred to the right body, which may discourage consumers from pursuing disputes through EDR.
- 5.90. A separate concern was raised in relation to disputes where there is an overlap between FOS's and SCT's jurisdictions. In such cases, it was submitted that it is FOS alone that determines what part of the dispute falls within its jurisdiction.⁶³ Concerns were raised about 'subjectiveness' in what aspects of a matter can be taken by FOS, which can result in fragmentation of disputes to different bodies, in turn resulting in inconsistent outcomes and confusion for consumers who lodge complaints with the incorrect EDR body.⁶⁴

Panel analysis

- 5.91. The Panel considers that the existence of cross-referral of disputes between EDR bodies is evidence that there is consumer confusion under the existing framework, which results in:

58 Credit and Investments Ombudsman, submission to the EDR Review Issues Paper, page 43 and submission to the EDR Review Interim Report, pages 10-11. Reference to cross-referral procedures was also made in the Customer Owned Banking Association submission (Customer Owned Banking Association, submission to the EDR Review Interim Report, page 3).

59 Australian Finance Conference, submission to the EDR Review Interim Report, pages 2-3.

60 Credit Corp Group, submission to the EDR Review Interim Report, pages 2-3.

61 Financial Ombudsman Service, submission to the EDR Review Issues Paper, page 47.

62 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016; Credit and Investments Ombudsman, submission to the EDR Review Issues Paper, page 13.

63 National Australia Bank, submission to the EDR Review Issues Paper, page 7.

64 Association of Superannuation Funds of Australia, submission to the EDR Review Issues Paper, page 18.

- costs to the consumer (a delay in the resolution of the dispute and an increased risk of consumer fatigue); and
- costs to the EDR bodies (with resources expended in re-directing resources to the correct EDR body).

5.92. These costs are a direct consequence of a multi-body framework.

Panel finding

The current multi-body framework imposes unnecessary costs on consumers because it results in:

- inconsistent outcomes and processes for similar disputes;
- difficulties where a dispute involves financial firms that are members of different EDR schemes; and
- consumer confusion as to where they should seek redress.

Imposition of unnecessary costs for financial firms, ASIC and stakeholders

- 5.93. This section considers whether the existence of two EDR schemes gives rise to duplicated costs and the consequences that follow for financial firms, consumers and the regulator (ASIC) which oversees the schemes.
- 5.94. Duplication caused by the operation of multiple EDR bodies imposes unnecessary costs on the EDR framework, resulting in an inefficient allocation of resources.

Costs for firms

- 5.95. Examples of duplication in current arrangements are:
- duplicated governance arrangements, including separate boards;
 - duplicated case management systems, support infrastructure and overheads;
 - duplicated administrative and regulatory reporting obligations and arrangements (including arrangements for members switching schemes);
 - duplicated statistical, systemic issues and serious misconduct processes and reporting requirements (additionally, the effectiveness of systemic issues work could be compromised as each individual scheme receives only a proportion of the total data reported to schemes);
 - duplicated membership services, stakeholder management, consumer outreach/ engagement and communications, and more broadly inefficiencies arising as a result of the need to provide information to consumers about different schemes;

- administration of multiple sets of terms of reference/rules and guidelines; and
- multiple independent reviews.

5.96. These represent increased costs on the financial system as a whole, compared to the costs that would be incurred under a single-scheme model. These costs are passed on to financial firms and, ultimately, consumers.

Regulatory costs for ASIC

5.97. ASIC identified the following duplicative costs in overseeing two EDR schemes:⁶⁵

- duplication in the ongoing monitoring of two schemes' statistical and systemic issues reporting and processes;
- approval and oversight of changes to two sets of terms of reference/rules;
- oversight of two independent reviews;
- managing the risks of regulatory arbitrage in the two-scheme environment; and
- overseeing the movement of members between schemes which requires scheme notification to ASIC and changes to ASIC's registers.

5.98. In contrast, CIO submitted that ASIC's supervisory costs were unlikely to decrease in the absence of competitive tension between the schemes as under the current two scheme model, ASIC is not required to monitor efficiency, innovation, jurisdictional reach and ombudsman fees. Additionally, in circumstances where ASIC did not have the benefit of an alternative scheme to draw on, it may need to devote more resources to identify deficiencies and limitations in the single scheme and examine what improvements and innovations were necessary.⁶⁶

Costs for stakeholders

5.99. Stakeholder engagement is an important feature of the industry ombudsman model. While this involves costs for the ombudsman schemes, the Panel notes that it also results in costs for stakeholders, such as industry and consumer groups, through duplication of:

- advocacy to schemes in relation to dispute resolution practices;
- participation in reviews of scheme terms of reference and guidelines; and
- participation in independent review processes.

65 Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, page 33.

66 Credit and Investments Ombudsman, submission to the EDR Review Interim Report, page 14.

- 5.100. For consumer groups that provide direct assistance to consumers who have disputes, this duplicated effort is likely to result in fewer resources being available for direct assistance.

Panel analysis

- 5.101. The dispute resolution framework should provide outcomes in an efficient manner and should impose the minimum amount of regulatory costs necessary to ensure effective user outcomes. The Panel considers that the current framework is not meeting this objective as there is inherent duplication resulting from multiple bodies performing essentially the same function. This duplication imposes unnecessary costs on financial firms and potentially consumers, as well as the regulator and stakeholder groups. Ultimately, it results in an inefficient allocation of resources.

Panel finding

The need to establish and run and, in the case of the regulator, approve and oversee multiple schemes, results in unnecessary duplicative costs and an inefficient allocation of resources.

Competition between schemes

- 5.102. The Review received a number of submissions on the issue of whether the existence of multiple EDR schemes gives rise to competition that is beneficial or harmful to consumers. This section considers:
- the nature of competition between the two EDR schemes and its implications for consumer outcomes; and
 - the implications of a shift to a single EDR body.

Competition and innovation

- 5.103. One argument put forward in favour of the current multi-scheme framework is that competition between schemes leads to innovation to the benefit of consumers, as schemes and regulators are able to benchmark against each other creating an incentive to innovate.⁶⁷ CIO is a strong proponent of this view. CIO pointed to the changes to its rules, enabling it to expel a firm that fails to implement CIO's recommendations for the resolution of a systemic issue, as an example of innovation arising from benchmarking. Another example that was put forward by CIO was the financial hardship procedure it instituted, requiring

⁶⁷ This argument was made by a number of bodies in their submissions to the EDR Review Issues Paper, including the Australian Retail Credit Association at page 9; Australian Finance Conference at page 10; Customer Owned Banking Association at pages 1-2; Commercial Asset Finance Brokers Association of Australia at page 2; Credit Corp Group at pages 3-5.

firms to cease enforcement action when a complaint had been lodged with a scheme, which it says was subsequently adopted by FOS.⁶⁸

5.104. CIO's position on competition and innovation was contested by a number of stakeholders. The Joint Consumer Group submission argued that:

*... a range of other factors are stronger drivers for change and innovation within EDR schemes. These factors include: consumer movement advocacy, policy development and campaigning; periodic independent reviews; and individual actors within EDR schemes who (for a variety of reasons) drive proactive change within their organisations.*⁶⁹

5.105. The Australian and New Zealand Ombudsman Association (ANZOA) stated that competition among ombudsman schemes runs counter to the principles of independence, accessibility, fairness, efficiency, effectiveness and accountability. ANZOA is of the view that poor performing financial firms may choose to join a scheme they believe is not as rigorous in its approach to complaints. In its submission, ANZOA argued that a framework consisting of multiple schemes could have negative impacts because:

- it may lead to manipulation of dispute resolution services, differing standards and inconsistencies in decision making which could be adverse for both consumers and members; and
- may dilute the value of the ombudsman scheme as a source of information and analysis to contribute to the ongoing improvement of an industry, to the detriment of consumers, financial firms and the wider community.⁷⁰

5.106. Likewise, ASIC stated in its submission that it:

*... does not consider competition between EDR schemes enhances consumer outcomes. Dispute resolution is not a competitive market, and access to EDR does not drive consumer choice of financial product or service. The potential for firms to seek to switch to a lower cost scheme, on the basis that fees and costs are likely to be one of the most salient features of dispute resolution, is undesirable from a policy perspective and can inhibit innovation or efforts of schemes to extend beyond the minimum jurisdiction.*⁷¹

5.107. FOS in its submission argued that competition with CIO has not been the driver of change within FOS and instead referred to a range of other factors, including feedback from members and consumer advocates, independent reviews, law

68 Legal Aid Queensland, submission to the EDR Review Issues Paper, page 16.

69 Joint Consumer Group, submission to the EDR Review Issues Paper, page 53.

70 Australian and New Zealand Ombudsman Association, submission to the EDR Review Issues Paper, pages 1-2.

71 Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, page 39.

reform, technological advancements, regulatory oversight and other mechanisms.⁷²

- 5.108. In its paper *'Lessons in Ombudsmania'*, prepared to facilitate debate about the future directions of ombudsman schemes, the National Consumer Council (UK) concluded that a model where choice of which scheme to belong to is given to financial firms rather than the consumer is 'conceptually and practically flawed'.⁷³ It also made some specific observations in relation to FOS UK arguing that 'there is no evidence that the single statutory scheme model is actually inefficient; in fact, the unit cost (cost per case) achieved by FOS UK compares very favourably with other private sector ombudsmen'. The paper also noted the importance of other accountability mechanisms, such as the approval of FOS UK's budget by the regulator and independent triennial reviews in driving efficiency.⁷⁴
- 5.109. The National Consumer Council paper was considered in the context of an independent review of the Financial Services Complaints Ltd (New Zealand), an EDR body operating within a context that allows for multiple schemes. On balance, the New Zealand review found 'risks and disadvantages in both competitive and monopoly models'.⁷⁵ While ultimately affirming the multi-scheme model, the Review noted that 'changes in markets and consumer needs will require periodic review of the nature and structure of external dispute resolution services. As a result of this and as it seems to be a trend internationally, in time, there might be consideration of some amalgamation of EDR schemes which could lead to advantages in terms of efficiency for both industry and consumers.'⁷⁶ This later view has been the Australian experience. Further information on New Zealand's multi-scheme model can be found in Appendix 1.

A framework which ensures low costs and high quality service

- 5.110. Another argument put forward in support of a multi-scheme framework is that competition drives schemes to:
- focus on increasing efficiency, transparency and accountability and keep costs low for members; and

72 Financial Ombudsman Service, submission to the EDR Review Issues Paper, page 29.

73 Broker, Steve (2008), *Lessons in Ombudsmania*, accessed 31 March 2017 at http://collections.europarchive.org/tna/20080804145057/http://www.ncc.org.uk/nccpdf/poldocs/NCC198ft_ombudsmania.pdf, page 1.

74 Broker, Steve (2008), *Lessons in Ombudsmania*, accessed 31 March 2017 at http://collections.europarchive.org/tna/20080804145057/http://www.ncc.org.uk/nccpdf/poldocs/NCC198ft_ombudsmania.pdf, pages 11-12.

75 Foundation for Effective Markets and Governance (2015), *Financial Services Complaints Ltd – Independent Review*, accessed 31 March 2017 at <http://www.fscl.org.nz/sites/all/files/FSCL%20Report%20%28June%202015%29.pdf>, page 11.

76 Foundation for Effective Markets and Governance (2015), *Financial Services Complaints Ltd – Independent Review*, accessed 31 March 2017 at <http://www.fscl.org.nz/sites/all/files/FSCL%20Report%20%28June%202015%29.pdf>, page 12.

- differentiate their services and tailor them to their particular membership base.⁷⁷
- 5.111. CIO commissioned a consulting firm to provide a critique of the Panel's Interim Report. This analysis made a number of claims about the impact of moving to a single EDR scheme, including:
- a single scheme would see the loss of the benefits which the multi-scheme framework provides, including: price competition; service quality competition, pressure to keep costs down and to innovate with better processes and services;
 - financial firms would not be able to leave the new scheme as membership is mandatory and if they have concerns about high charges and poor service they will not be able to vote in a new board as scheme boards are not voted in by members;
 - a monopoly not-for-profit organisation can cause the same amount of economic damage as a monopoly for-profit organisation by charging more and using the funds for unnecessarily high expenditure; and
 - because a single scheme will not be constrained by competitive pressures as to what it can charge financial firms, ASIC may have to step in and become a price regulator, which the analysis alleges is 'something it has no expertise in'.⁷⁸

Panel analysis

- 5.112. Competition is generally considered a 'good' – competitive markets provide the potential for lower prices, better services and more choice for consumers and businesses. It can also provide stronger discipline to keep business costs down, promote faster innovation and better distribution of information allowing more informed consumer choices.⁷⁹
- 5.113. However, competition generally benefits the person or entity that has the choice of whether to acquire the good or service. For example, competition in financial services is generally seen to benefit the consumer because the consumer has the ability to choose the financial service or product of value to them. This means companies must compete with each other to attract consumers and therefore strive to produce what benefits or attracts the consumer. This is consistent with a key objective of competition policy, which is to make markets work in the long-term interests of consumers.⁸⁰
- 5.114. In the current EDR framework, it is the financial firms and not consumers that have the choice of which industry ombudsman scheme to join. In this context,

77 This argument is made by a number of CIO members, who argue that CIO caters to the 'smaller end of town'. In 2015-16, 97 per cent of its members were sole traders, partnerships or small businesses.

78 Credit and Investments Ombudsman, submission to the EDR Review Interim Report, page 8.

79 Australian Government 2015, *Competition Policy Review Issues Paper*, Canberra, page 1.

80 Australian Government 2015, *Competition Policy Review Final Report*, Canberra, page 7.

there is a lack of competitive forces to encourage firms to compete by differentiating themselves from each other on the basis of how well they meet the needs of consumers. Instead, there is a risk that EDR schemes will compete on factors that are in the interests of firms – such as lower fees or more restrictive terms of reference.

- 5.115. While it is possible that competition between schemes could result in some benefits for consumers (for example, by encouraging schemes to reduce costs of EDR, which are passed on to consumers by way of reduced costs of financial services), this is not guaranteed, and in the Panel’s view, the risks of competition between schemes greatly outweigh any potential benefits.
- 5.116. The Panel also noted that there were very few examples provided of innovations that had purportedly been driven by competition between schemes. The Panel accepted the view of a number of stakeholders that there were a number of other forces that were more powerful in driving change – such as pressure from stakeholders, ASIC oversight and independent reviews. The evidence for change being driven by the independent reviews is compelling. Many positive changes have resulted from recommendations made by independent reviews, including FOS re-engineering its dispute resolution processes which reduced the time to resolve disputes and eliminated the backlogs that existed at the time.
- 5.117. Given this, the Panel considers that competition between industry ombudsman schemes:
- cannot be expected to make the market for EDR services work in the long-term interests of consumers;
 - is not the primary driver of innovation for EDR schemes; and
 - does not provide the most effective outcomes for all users.
- 5.118. The Panel notes that a similar conclusion was reached in the House of Representatives Standing Committee on Economics’ Review of the Four Major Banks.⁸¹
- 5.119. The Panel also gave careful consideration to arguments that a single EDR body would engage in monopolistic behaviours. The Panel does not agree with these arguments for the reasons outlined below.
- 5.120. First, the Panel considers that arguments in support of competition and against monopolistic provision of goods or services are more relevant in the context of commercial enterprises than in a dispute resolution framework. EDR schemes have been underpinned by a shared commitment amongst the key stakeholders – consumer organisations, financial firms, government and the regulators – to deliver effective mechanisms for non-court based consumer redress. The EDR schemes have historically engaged with stakeholders in a co-operative and

81 House of Representatives Standing Committee on Economics (2016), *Review of the Four Major Banks (First Report)*, pages 5-12.

collaborative manner, for example, through consulting on amendments to terms of reference, and the Panel expects that this approach would continue.⁸²

- 5.121. Secondly, boards play an important role in ensuring EDR bodies operate efficiently, provide value for money and deliver high quality dispute resolutions services. The combination of an independent chair and equal numbers of directors with consumer and industry backgrounds, who are appointed following consultation with a range of stakeholders, can help to ensure that a balance is struck between the costs imposed on scheme members and the quality of service provided.
- 5.122. Thirdly, the EDR schemes are subject to ASIC oversight and have an ongoing obligation to comply with the requirements set out in ASIC's regulatory guidance. For example, the schemes are required to consult with ASIC on specific issues, such as certain changes to their terms of reference, the terms of reference of an independent review and the appointment of the independent reviewer.⁸³
- 5.123. Importantly, as set out in Chapter 9, the single EDR body will be subject to enhanced accountability measures, including:
- appropriate levels of financial transparency to ensure it remains accountable to users and the wider public;
 - more regular independent reviews; and
 - an independent assessor to review the handling of disputes by the body.
- 5.124. The Panel's recommendations will also see ASIC provided with a general directions power to allow it to compel performance from the EDR body where it does not comply with legislative and regulatory requirements.
- 5.125. These enhanced accountability mechanisms will ensure that the single EDR body will not engage in the practices that CIO has raised as a concern.

82 See for example, Australian Securities and Investments Commission 2013, Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes*.

83 Australian Securities and Investments Commission 2013, Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes*, pages 25 and 32.

Panel finding

Competition between industry ombudsman schemes:

- cannot be expected to make the market for EDR services work in the long term interests of consumers;
- is not the primary driver of innovation for EDR schemes; and
- does not provide the most effective outcomes for all users.

A SINGLE EDR BODY FOR FINANCIAL DISPUTES

5.126. The previous sections have outlined in some detail the problems that the Panel identified in the Interim Report and has considered the response of stakeholders in respect of these issues. This section deals with the broad views of stakeholders in relation to the Panel's proposal in the Interim Report that FOS and CIO be replaced with a single industry ombudsman for financial, credit and investment disputes (draft recommendation 1).

Support for a single ombudsman scheme to replace FOS and CIO

- 5.127. A number of stakeholders supported the recommendation, including ASIC, the Joint Consumer Group, and industry bodies, including the Australian Bankers' Association.
- 5.128. ASIC considered that 'the benefits of scheme consolidation outweigh the potential negatives'.⁸⁴ The submission noted that previous consolidations have 'improved scheme efficiencies, removed uncertainty for consumers and reduced jurisdictional boundary issues'.
- 5.129. NAB indicated that there were no compelling policy reasons for the existence of two schemes, and that a single scheme would 'provide customers with a more uniform and enhanced experience' and 'a simpler experience, further ensuring the consistency of decision making and providing for economies of scale benefits'.⁸⁵
- 5.130. Other views expressed included that reducing the number of schemes would reduce confusion for consumers,⁸⁶ that a single scheme would be more flexible and efficient and that the presence of competition was not required to ensure the scheme is accountable. These views are also reflected in the preceding discussions.

84 Australian Securities and Investments Commission, submission to the EDR Review Interim Report, page 5.

85 National Australia Bank, submission to the EDR Review Interim Report, page 2.

86 Financial Planning Association of Australia, submission to the EDR Review Interim Report, page 3.

Support for the status quo

- 5.131. A number of stakeholders strongly opposed the proposal to consolidate FOS and CIO, asserting that the evidence does not support a case for change and there are benefits to the status quo. Those who did not support a move to a single EDR body include CIO, some of its current members in their own capacity,⁸⁷ and a number of industry bodies, primarily representing organisations involved in the retail credit sector, such as Australian Retail Credit Association, Mortgage and Finance Association of Australia, Customer-Owned Banking Association, Australian Finance Conference, Australian Collectors and Debt Buyers' Association, and Chartered Accountants Australia and New Zealand.
- 5.132. These stakeholders indicated that the existence of the two EDR schemes results in competition, encouraging innovation and allowing for benchmarking. They were concerned that a move to a single scheme would lead to increased costs, particularly for smaller financial firms, and lower quality.⁸⁸ (These arguments, and the Panel's views, were discussed earlier in this Chapter.)

Support for a statutory body to resolve financial disputes

- 5.133. A number of organisations⁸⁹ indicated that if there were to be a single EDR body it should be a statutory tribunal, answerable to Parliament and the courts.
- 5.134. The Australian Finance Conference considered that 'a Tribunal better balances the competing considerations of ease of access, low cost, dispute resolution focus, speed of resolution and legal accountability than an enlarged single ombudsman scheme.'⁹⁰
- 5.135. Other stakeholders, such as the Customer Owned Banking Association, despite rejecting a consolidation of FOS and CIO, advocated for an ombudsman scheme over a statutory dispute resolution body and reiterated the Panel's observations about the benefits of ombudsman schemes for dispute resolution.⁹¹
- 5.136. The Panel considered the option of an additional statutory dispute resolution body in its Interim Report and did not support it. The Panel's reasons included that such a body may not be accessible, flexible or dynamic, and its ability to adapt and reform itself may require involvement by government and legislative change.⁹²

87 For example, Credit Corp Group; Downes, Brendan; Elliot, Alison; Farley, John; Hooper, Dave; Little, Sean; and Mitchell, Adrian.

88 For example, Hooper, Dave, submission to EDR Review Issues Paper, page 1; Mitchell, Adrian, submission to EDR Review Issues Paper, page 1. See also Little, Sean, submission to EDR Review Issues Paper, page 1.

89 For example, Association of Securities and Derivatives Advisers of Australia, submission to the EDR Review Interim Report, page 3; Credit Corp Group, submission to the EDR Review Interim Report, page 2; Victims of FOS, submission to the EDR Review Interim Report, page 10.

90 Australian Finance Conference, submission to the EDR Review Interim Report, page 2.

91 Customer Owned Banking Association, submission to the EDR Review Interim Report, page 3.

92 EDR Review Interim Report, page 157, paragraphs 6.51 and 6.52.

Panel analysis

- 5.137. The shift to a single EDR body will address a number of problems with the existing framework. It will improve outcomes for consumers by: increasing consistency in processes and outcomes for similar complaints; making it easier to pursue disputes involving multiple financial firms; and decreasing consumer confusion. It will also eliminate duplicative costs for industry, the regulator and other stakeholders.
- 5.138. In the context of superannuation disputes in particular, a single EDR body based on an industry ombudsman model will provide flexibility and increase responsiveness to improve the timeliness of superannuation disputes.
- 5.139. The Panel does not accept that competitive tension is appropriate in the context of dispute resolution, for the reasons stated earlier in this Chapter. Arguments in support of competition and against the monopolistic provision of goods or services are more relevant in the context of commercial enterprises than in a dispute resolution framework.
- 5.140. The Panel's view is that accountability and oversight mechanisms play a vital role in achieving outcomes for consumers (the Panel's recommendations for enhanced accountability and oversight of the single EDR body are contained in Chapter 9). The Panel considers there is a need to increase the scope of ASIC's role and powers regardless of whether it is overseeing one or multiple schemes and is of the view that ASIC will be in a much better position to scrutinise the effectiveness of EDR and encourage innovation and reform if it is able to focus on a single EDR body rather than multiple bodies.
- 5.141. Having considered the views provided by stakeholders and the evidence from previous consolidations, the Panel has concluded that a move to a single EDR body subject to stronger oversight is likely to create greater economies of scale, with pressure for the body to improve its effectiveness over time.
- 5.142. The Panel rejects arguments that the creation of a single EDR body for all financial disputes will create an unwieldy or excessively bureaucratic EDR body. One of the current ombudsman schemes (FOS) currently deals with the substantial majority of disputes (83 per cent of all disputes based on the number of disputes in 2015-16). FOS is a relatively large scheme that incorporates both large and very small financial firms and, in fact, in 2015-16, 78 per cent of FOS's membership was classified as 'very small' and a further 10 per cent as 'small'.⁹³
- 5.143. Advantages of a single EDR body include that disputes will be resolved more efficiently as a single body will have greater ability to shift resources from those areas experiencing a reduction in dispute volumes to those areas experiencing higher dispute volumes.

93 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016.

- 5.144. This is currently the case with FOS, which has a dedicated Flex Team that works across a number of different dispute areas responding to changes in demand. For instance, over the last year the Flex Team has worked with Fast Track Teams, on general insurance disputes and with the Terms of Reference Teams. FOS also redeploys staff from existing teams that are experiencing a decline in dispute numbers to those areas experiencing increases in dispute numbers. An example is Financial Difficulty case workers transferred to Fast Track Teams.
- 5.145. There are other ancillary benefits that would follow from a single EDR body in the event of an unanticipated disaster or crisis, including that it will be easier for government and other stakeholders to coordinate responses with a single body than with multiple bodies.

Recommendation 1: A single EDR body for all financial disputes

There should be a single EDR body for all financial disputes to replace FOS, CIO and SCT.

Other call to implement a single EDR body

- 5.146. On 24 November 2016, the House of Representatives Standing Committee on Economics released its *Review of the Four Major Banks: First Report*. One of the Committee's recommendations is:
- ... that the Government amend or introduce legislation, if required, to establish a Banking and Financial Sector Tribunal by 1 July 2017. This Tribunal should replace the Financial Ombudsman Service, the Credit and Investments Ombudsman and the Superannuation Complaints Tribunal. The Government should also, if necessary, amend relevant legislation and the planned industry funding model for the Australian Securities and Investments Commission, to ensure that the costs of operating the Tribunal are borne by the financial sector.*⁹⁴
- 5.147. This recommendation was based on a number of concerns of the Committee, including that Australia's system of multiple EDR schemes and overlapping jurisdictions is overly complex and overly legalistic, creating confusion for consumers and small business and often preventing them from accessing justice.⁹⁵
- 5.148. The Committee did not agree with the argument that competition between multiple schemes produces better outcomes for financial firms, consumers and regulators. In response, the Committee noted that tribunals and the courts system 'manage to deliver good outcomes for consumers without competition' and that it was difficult to envisage how any benchmarking could meaningfully

94 House of Representatives Standing Committee on Economics (2016), *Review of the Four Major Banks (First Report)*, page 5.

95 House of Representatives Standing Committee on Economics (2016), *Review of the Four Major Banks (First Report)*, page 5.

occur, given the different dispute resolution processes and reporting standards used by both FOS and CIO.⁹⁶

5.149. The Committee recommended the Government replace the FOS, CIO and SCT with a 'one-stop' Tribunal to handle complaints from consumers and small businesses with the intention of:

- reducing confusion for consumers;
- enhancing small businesses' EDR scheme coverage;
- helping to ensure consistent outcomes for complainants; and
- improving scheme efficiency by eliminating unnecessary duplication.

5.150. The Panel observes that many of the Committee's recommended features for this body are consistent with the Panel's findings and recommendations, including:

- free access for consumers;
- decisions to be binding on members of the body;
- the body to be funded directly by the financial services industry; and
- the body to have a board that is comprised of equal numbers of consumer and industry representatives.

5.151. The Panel also observes that the Committee has recommended the Government establish the body by legislation if required indicating it is not necessarily the case the body would be established by legislation or that it would operate within a legislative framework. This would only occur if it is required.

5.152. A difference between the recommendation of the Committee and the recommendation of the Panel is that the Committee recommends the establishment of a Tribunal to replace FOS, CIO and SCT. In this Final Report, the Panel makes a recommendation for the establishment of a single EDR body for financial, credit and investment and superannuation disputes. In this Report, the Panel identifies what it sees as the advantages that industry funded EDR schemes have when compared to tribunals when dealing with disputes relating to financial products and services.

TRANSITION TO A SINGLE EDR BODY

5.153. The Interim Report contemplated creating two new industry ombudsman schemes – one for financial, credit and investments disputes to replace FOS and CIO and a separate one for superannuation disputes to replace the SCT – with consideration being given to merging the two in the future once the schemes were well established and had garnered strong industry support.

96 House of Representatives Standing Committee on Economics (2016), *Review of the Four Major Banks (First Report)*, page 7.

Stakeholder views on the transition to a single scheme

- 5.154. A number of submissions expressed a strong view that a single scheme, including superannuation disputes, should be created from the outset, rather than, as contemplated in the Interim Report, through a possible two-step process following post-implementation review.
- 5.155. The Joint Consumer Group submitted that its 'primary position remains that the best framework for dispute resolution in the financial system is a single industry ombudsman scheme for all disputes, including superannuation' and that this could best be achieved by 'integrat[ing] the SCT and CIO into FOS, rather than creating two new schemes'.⁹⁷ It urged the Panel to include in its final recommendation concrete steps for the merger of the two new ombudsman schemes, should this be the approach ultimately adopted, including timeframes, co-location, sharing of back office functions, joint reporting and development of consistent approaches to dispute resolution.⁹⁸
- 5.156. Similarly, ASIC identified that it would be more efficient and less complex for consumers and members to transition SCT directly into a superannuation division of the broader consolidated scheme. It stated that the two-step process contemplated by the Panel in its Interim Report would create additional legislative and transitional complexity as it would:
- potentially require dual membership for some firms (for example, life insurers;
 - continue to involve regulatory oversight of multiple schemes; and
 - require two separate legislative processes.⁹⁹
- 5.157. Other stakeholders questioned the proposed approach. For example, whilst supporting a single EDR body, the Australian Bankers' Association suggested that the merits of establishing a new body should be weighed against the potential time and cost savings of merging FOS and CIO.¹⁰⁰
- 5.158. The Association of Securities & Derivatives Advisers of Australia did not support the creation of a single scheme cautioning that if it were to proceed the merger should be a 'merger of equals'¹⁰¹ rather than a takeover.

One transition

- 5.159. Moving to a single body in one transition would minimise the regulatory burden on industry, particularly the superannuation industry, which would otherwise be

97 Joint Consumer Group, submission to the EDR Review Interim Report, page 2.

98 Joint Consumer Group, submission to the EDR Review Interim Report, page 10.

99 Australian Securities and Investments Commission, submission to the EDR Review Interim Report, pages 7-8.

100 Australian Bankers' Association, submission to the EDR Review Interim Report, page 7.

101 Association of Securities and Derivatives Advisers of Australia, submission to the EDR Review Interim Report, page 3.

subject to two significant transitions. A single transition would provide greater certainty and prevent unnecessary complexity involved in transitioning legacy disputes from the predecessor (existing) schemes.

- 5.160. If there were instead two schemes initially, depending on their design:
- dual membership could be required for some firms (for example, life insurers and financial firms providing advice about superannuation);
 - benefits of moving to a single scheme would not accrue for some time, such as comparability of outcomes and certainty for consumers, reduction in costs for the regulator to oversee the schemes, removal of duplication of costs for industry through the operation of multiple schemes; and
 - there would be inefficiency in the implementation, with costs to the taxpayer of two processes of policy and legislative work to implement the two stages.
- 5.161. The Panel agrees that there is considerable merit in simplifying the transition by creating a single EDR body for the whole financial system from the outset; in particular, to minimise regulatory costs.

A new entity

- 5.162. Given the complexities in transitioning three bodies, including a statutory tribunal, into a single EDR body, the Panel's view is that a new body should be created rather than merging FOS and CIO, or CIO into FOS, and adding SCT (see Chapter 6). There are positive aspects which are unique to each of the three existing bodies and these should be carried over into the new EDR body.

OTHER ISSUES

- 5.163. This section sets out three issues raised by stakeholders in the context of the existing arrangements for the resolution of financial disputes (other than superannuation disputes, which are discussed in Chapter 7). Issues raised were:
- whether additional information-gathering powers are required;
 - whether decision making based on providing 'fairness in all the circumstances', as is currently the case with FOS and CIO (but not SCT), is appropriate;¹⁰² and
 - whether there should be increased use of panels.
- 5.164. These issues are also relevant in the context of a single EDR body.

102 FOS and CIO use slightly different tests to determine 'fairness in all the circumstances' – see comparison table in Chapter 3 and explanations in Chapter 4.

Powers to compel the production of information

- 5.165. Currently, the powers of the industry ombudsman schemes are grounded in the contractual relationship that exists because financial firms are members of the schemes.
- 5.166. In its Interim Report, the Panel made an information request on the issue of whether EDR schemes require additional powers.

Support for additional information-gathering powers

- 5.167. ASIC supported enhanced scheme powers that better promoted outcomes for users and did not see any legal barriers to these being provided by statute, noting that each specific power would require legal and policy analysis.¹⁰³ The Joint Consumer Group submitted that consumer outcomes and overall efficiency would be improved were the powers of the schemes increased, in particular the power to obtain information and documents.¹⁰⁴ They indicated this should be achieved through changes to the schemes' terms of reference in consultation with consumer advocates with training for industry and consumers.¹⁰⁵
- 5.168. FOS indicated that as a practical matter, additional powers have not been required under the current ombudsman model to ensure effective resolution of the substantial majority of disputes.¹⁰⁶ Currently, where a financial firm refuses to provide information to FOS, the FOS decision maker is able to draw an adverse inference against the party and, where an applicant does not cooperate with the dispute process, FOS can decide not to continue with the dispute. FOS also indicated that where it identifies significant failure by a financial firm to provide information or fully cooperate with dispute processes, it could refer the serious misconduct to ASIC, in accordance with its reporting obligations.¹⁰⁷

Not all stakeholders provided support

- 5.169. Some stakeholders did not support additional powers for the EDR schemes. For example, ANZ submitted that the existing powers (including drawing an adverse inference, expelling a financial firm from the scheme or reporting a member to ASIC for wilful breaches of obligations under the Terms of Reference) were 'sufficiently robust'.¹⁰⁸ Some stakeholders were concerned that additional powers would result in the EDR schemes becoming more court-like¹⁰⁹ and would undermine the minimal formality, technicality and speed of the schemes.¹¹⁰

103 Australian Securities and Investments Commission, submission to the EDR Review Interim Report, page 11.

104 Joint Consumer Group, submission to the EDR Review Interim Report, page 3.

105 Joint Consumer Group, submission to the EDR Review Interim Report, page 8.

106 Financial Ombudsman Service, submission to EDR Review Interim Report, page 12.

107 Financial Ombudsman Service, submission to the EDR Review Interim Report, page 11.

108 ANZ, submission to the EDR Review Interim Report, page 3.

109 Australian Financial Markets Association, submission to the EDR Review Interim Report, pages 1-2.

110 Financial Services Council, submission to the EDR Review Interim Report, page 17.

Panel analysis

- 5.170. Based on the information the Panel has received in the course of the Review, the Panel has concluded that EDR schemes are generally able to obtain information relevant to the dispute – or draw an adverse inference where information is not provided – through their existing contractual powers. The Panel does not see a need for additional statutory powers to be provided to the single EDR body in relation to financial disputes other than superannuation disputes.
- 5.171. In the case of superannuation disputes, the Panel supports the EDR body having statutory powers to compel the production of information from third parties, to address situations where a contractual relationship between parties may not exist and the trustee or consumer has limited ability to require the third party to provide information to the EDR body. Further information on the Panel recommendation on statutory provisions relating to superannuation disputes (Recommendation 3) is discussed in Chapter 7.

Decision making

- 5.172. Currently, schemes are able to employ flexible decision making criteria, which includes reference to legal principles, applicable legislation, good industry practice (including any applicable industry codes of practice) and previous relevant decisions, within an overarching principle of ‘fairness in all the circumstances’.

Stakeholder views

- 5.173. A small number of stakeholders raised concerns about this approach, indicating, for example, that the meaning of ‘fairness in all the circumstances’ is unclear because it is subjective.¹¹¹ Other concerns raised in relation to the decision making approach of the EDR schemes were that improvements could be made to procedural fairness¹¹² and the level of clarity around decision making processes generally.¹¹³
- 5.174. There were other stakeholders that expressed support for current processes. For example, QBE noted that the general insurance industry has worked closely with FOS to increase transparency, improve the efficiency of dispute handling processes and reduce dispute resolution timeframes, and that the ‘success achieved to date’ should not be undone.¹¹⁴ FOS submitted that it considers that its

111 Senator Nick Xenophon, submission to the EDR Review Issues Paper, pages 1-2; Australian Securities and Investments Commission, supplementary submission to the EDR Review Issues Paper, pages 2-5.

112 Australian Retail Credit Association, submission to the EDR Review Interim Report, page 2; National Australia Bank, submission to the EDR Review Issues Paper, page 6.

113 Association of Superannuation Funds of Australia, submission to the EDR Review Issues Paper, page 13.

114 QBE, submission to the EDR Review Interim Report, page 2; see also National Insurance Brokers Association, submission to the EDR Review Interim Report, page 3.

decision making processes are clear and based on criteria set out in its Terms of Reference.¹¹⁵

Panel analysis

- 5.175. The Panel considers that the current decision making approaches of FOS and CIO are generally operating soundly. The current approach provides schemes with a high degree of discretion in choosing the appropriate dispute resolution approach for a particular matter.
- 5.176. The Panel considers that the single EDR body should seek to achieve an outcome that is 'fair in all the circumstances'. The EDR body should provide clear guidance to users on how the body will apply this approach. The Panel also considers that some of the concerns expressed by stakeholders could be addressed through the appropriate use of panels, which is discussed below.
- 5.177. In relation to superannuation disputes, the Panel supports that the current test, which looks to whether the trustee's decision was 'fair and reasonable' in the circumstances. This test provides certainty for trustees and ensures an EDR decision is consistent with trustee duties. Further details on the Panel's reasoning are discussed in Chapter 7.

Panel finding

The current decision making test for financial disputes, based on achieving 'fairness in all the circumstances', is appropriate and should continue.

The current decision making test for superannuation disputes, which considers whether the trustee's decision was 'fair and reasonable' in the circumstances, is appropriate and should continue.

Using panels to resolve disputes effectively

- 5.178. Currently, FOS uses expert decision making panels (which consist of a person with industry expertise, a person with consumer expertise and a FOS ombudsman) to make determinations on particularly complex disputes relating to some, but not all, product lines. A panel is appointed by the FOS Board from a pool of panel members covering specialist expertise and experience. While parties to the dispute may suggest that a matter should be heard by a panel, the ultimate decision rests with FOS, specifically the Chief Ombudsman or Ombudsman to whom the matter is allocated.¹¹⁶
- 5.179. SCT's governing legislation permits the use of panels of up to three members selected by the Chairperson to resolve disputes, although SCT's significant

115 Financial Ombudsman Service, submission to the EDR Review Interim Report, page 8.

116 Financial Ombudsman Service 2015, Operational Guidelines to the Terms of Reference (1 January 2015), page 86.

backlog of complaints has meant that it has been unable to use panels in more recent years.

Stakeholder views on the use of panels

- 5.180. In its Interim Report, the Panel highlighted the importance of the new schemes, particularly the proposed new financial, credit and investments ombudsman scheme, using panels for decision making. In addition, the Panel proposed that the new industry ombudsman schemes should be transparent to users about the circumstances where panels will be used.
- 5.181. Stakeholders generally expressed support for the use of panels. The Joint Consumer Group submitted that consumers often respond more favourably to panel decisions than individual ombudsman decisions, even when their claim is unsuccessful. They also argued consumers perceive decisions by a panel as more independent, more important, with greater attention dedicated to it by the scheme to the issues in question and that the consumer's perspective was adequately presented. Panel members with consumer expertise can sometimes ventilate issues not well articulated by consumers. Conversely, others suggest that single ombudsman decisions can be of just as high quality as those of a panel.¹¹⁷
- 5.182. Other stakeholders supported the use of panels but noted potential trade-offs in relation to their cost and timeliness.¹¹⁸ They suggested flexibility should remain to use panels only in relation to some product types and some dispute types given timeliness and costs. The Financial Services Council stated that care should also be taken to ensure there are no unintended repercussions of adopting panels, such as the potential creation of a need for legal representation.¹¹⁹
- 5.183. Another issue raised was the low levels of transparency surrounding when a panel will be used to hear a dispute and in relation to panel processes. FOS provided the Panel with the internal criteria it applies when determining whether a matter should be decided by a panel or single ombudsman. FOS uses panels when there is a particular need to bring in the expertise of panel members with consumer and industry expertise. While FOS applies different criteria depending on the dispute's subject matter, for example, general insurance, life insurance, investments, credit and deposit-taking, at a general level FOS takes into account: the particular complexity of the dispute; the amount of loss and other potential consequences of a dispute; and whether the decision is likely to be a 'new' decision about the industry standard in a particular context.¹²⁰

117 Joint Consumer Group, submission to the EDR Review Interim Report, page 31.

118 Financial Ombudsman Service, submission to the EDR Review Interim Report, pages 10-11; Australian Bankers' Association, submission to the EDR Review Interim Report, page 10.

119 Financial Services Council, submission to the EDR Review Interim Report, page 11.

120 Financial Ombudsman Service 2015, Operational Guidelines to the Terms of Reference (1 January 2015), pages 84-86.

- 5.184. Stakeholders also expressed a preference for clearer guidance on what constitutes a 'complex dispute'. Some also argued that disputes of all values that are complex deserve the benefit of panels, not just high value disputes.¹²¹
- 5.185. In their responses to the Interim Report, stakeholders noted SCT is permitted to use, and has historically used, panels to resolve superannuation disputes, although current resourcing constraints have limited the practice.¹²² Stakeholders stated that the use of panels in a new body for superannuation disputes would require panellists to possess appropriate experience and a solid understanding of the superannuation industry.¹²³

Panel analysis

- 5.186. The Panel sees a number of advantages to using panels, including access to consumer and industry expertise in a particular product or sector, and increased likelihood that the decision will have 'buy-in' from consumer and industry stakeholders.
- 5.187. The Panel recognises that the increased monetary limits of the single EDR body (relative to the existing FOS and CIO monetary limits) could increase the overall complexity of disputes, particularly with regard to disputes from small business. The Panel also agrees that complex disputes are not just limited to high value disputes and that other factors besides complexity may also influence where a panel may best be used. The potential for an increase in both the value and complexity of disputes further supports the need for the EDR body to be able to use panels in resolving disputes.
- 5.188. The Panel considers that the new EDR body should develop a pool of industry and specialist expertise (including, for example, medical, actuarial and small business expertise) as a further tool to improve the quality of the scheme's decision making. The pool from which panels are drawn should also reflect the EDR body's membership, including for example, small financial firms, to ensure that these perspectives are appropriately reflected in decision-making where required.
- 5.189. The Panel considers that when combined with other accountability and internal appeal mechanisms found in industry ombudsman schemes, panels serve as a valuable internal measure for strengthening the quality of decision making within the new EDR body. In this regard, panels can act to provide an additional degree of accountability (by including consumer and industry expertise) and oversight (through access to other relevant expertise) in a more timely and cost-effective way than a formal right of appeal.

121 Joint Consumer Group, submission to the EDR Review Interim Report, page 31.

122 For example, Association of Superannuation Funds of Australia, submission to the EDR Review Interim Report, page 19.

123 Australian Institute of Superannuation Trustees, submission to the EDR Review Interim Report, page 11.

Improving transparency over when panels are used

- 5.190. The Panel notes there are costs associated with the use of panels, including financial costs and the time taken to resolve the dispute. To that end, the new EDR body should be transparent to users about the circumstances under which a panel will be used to resolve a dispute. The Panel views the following as possible considerations that may be appropriate in determining whether to use a panel to resolve a dispute:
- complexity of the dispute;
 - the amount of loss as well as other potential consequences of the dispute;
 - the dispute raises a systemic issue; or
 - the decision is likely to be a ‘new’ decision about the industry standard in a particular context.
- 5.191. Ultimately, the Panel considers it important that the new EDR body balance the need to provide effective outcomes for consumers with efficiency and service considerations, such as cost and timeliness of resolution. The new EDR body should also ensure panel composition, selection processes and costs are clear and transparent to both members and users of the body.

Panel finding

Panels, when used transparently, can serve as a valuable internal measure to strengthen the quality of decision-making within the EDR body.

- 5.192. The Panel has recommended that the single EDR body use panels to resolve disputes in specific circumstances, such as complex disputes, and provide clear guidance and transparency to users on when a panel will be used by the body (see Recommendation 2).

Chapter 6: Key features of the single EDR body

Key points

- The Panel has recommended the establishment of a new single EDR body, which will require formal approval to operate.
- The Panel's preferred approach is that the body will be a company limited by guarantee, governed by an independent board and funded by industry, with membership compulsory for financial firms.
- The single EDR body will have, at a minimum, the following features:
 - Accessibility: Free to consumers when they lodge a complaint.
 - Accountability: Strengthened accountability mechanisms, which include regular independent reviews (with the reports of reviews and the EDR body's response to recommendations reported publicly) and the appointment of an 'independent assessor' to review the handling of disputes by the body (but not to review the outcome of individual disputes).
 - Enforceability: Firms will be required to comply with determinations as a condition of membership, with the body required to report firms that fail to comply to the appropriate regulator. The body should have the power to expel firms that fail to comply.
 - Improving industry practice: Monitoring, addressing and reporting systemic issues to the appropriate regulator.
 - Expertise: Use of panels to resolve disputes in specific circumstances, such as complex disputes, and provide clear guidance and transparency to users on when a panel will be used by the body.
 - Community engagement: Outreach activities to raise awareness amongst consumers (in particular vulnerable consumers) and financial firms.

KEY FEATURES OF A SINGLE EDR BODY

- 6.1. The Panel has recommended the establishment of a single EDR body.
- 6.2. The EDR body will be formally approved. Formal approval could occur either through the Minister or ASIC approving a new organisation to be the EDR body. Formal approval will be contingent on the body having, at a minimum, the required structure and features described below.

Role of the EDR body

- 6.3. The single EDR body will provide a fair, economical, informal, quick and flexible alternative to the court system. It will replace FOS, CIO and SCT and so perform the roles currently performed by those bodies. This includes:
 - providing an impartial service which is free of charge for consumers (including small business consumers) to resolve disputes with their financial firm, including disputes relating to products or services provided by superannuation funds;
 - monitoring and addressing systemic issues to improve future outcomes for consumers; and
 - engaging in outreach activities to enhance accessibility, in particular in relation to vulnerable consumers.
- 6.4. The operations of the single EDR body will be consistent with the EDR benchmarks (accessibility; independence; fairness; accountability; efficiency; and effectiveness), as well as the structure and features described below.

Structure

- 6.5. The single EDR body will be established as a company limited by guarantee, in line with current governance structures for FOS and CIO.

Governance

- 6.6. The single EDR body will be governed by an independent board, with an independent chair and equal numbers of directors with industry and consumer backgrounds. Chapter 9 discusses governance arrangements in the context of accountability for the new body, as well as oversight by ASIC to ensure compliance with the governance framework.

Funding

- 6.7. A fundamental means of ensuring EDR is accessible is by making access free of charge for consumers, similar to current arrangements. The single EDR body will be funded by industry and be free for consumers.

- 6.8. Chapter 9 discusses the need for flexibility in the design of the funding model for the single EDR body to ensure that appropriate funding levels are maintained to accommodate fluctuations in demand. It also discusses the need for financial transparency to ensure accountability.

Membership

- 6.9. Membership of the body will be compulsory for financial firms through a licensing condition (or equivalent requirement). For the purposes of this Report, 'financial firm' includes superannuation funds, approved deposit funds, annuity providers and retirement savings account providers that are currently subject to the jurisdiction of the *Superannuation (Resolution of Complaints) Act 1993*.

Features

- 6.10. The key features of the EDR body should include, at a minimum:
- **Accessibility:** Free to consumers when they lodge a complaint.
 - **Accountability:** Strengthened accountability mechanisms, which include regular independent reviews (with the reports of reviews and the EDR body's response to recommendations reported publicly) and the appointment of an 'independent assessor' to review the handling of disputes by the body (but not to review the outcome of individual disputes).
 - **Enforceability:** Firms required to comply with determinations as a condition of membership, with the body having the power to expel firms that fail to comply.
 - **Improving industry practice:** Monitoring, addressing and reporting systemic issues to the appropriate regulator.
 - **Expertise:** Use of panels to resolve disputes in specific circumstances and provide clear guidance and transparency to users on when a panel will be used by the EDR body. Further discussion on the use of panels is in Chapter 5.
 - **Community engagement:** Outreach activities to raise awareness amongst consumers (in particular vulnerable consumers) and financial firms.
- 6.11. Many of the features outlined above are strengths of the current industry ombudsman schemes that have been important factors in the schemes' success in providing speedy, low cost and flexible dispute resolution to large numbers of consumers. Other features reflect changes that the Panel considers necessary in order to improve outcomes for users of EDR.
- 6.12. The Panel's recommendation for the features of the EDR body is set out below (Recommendation 2).

- 6.13. Following the recommendation is a table that sets out the proposed features of the EDR body. Recognising the particular characteristics of superannuation disputes, the Panel has recommended that some features of current superannuation dispute arrangements be retained.

Recommendation 2: Features of the single EDR body

The single EDR body must be formally approved and must have, at a minimum, the following features:

Governance, funding and membership

- It should be governed by an independent board (with an independent chair and equal numbers of directors with industry and consumer backgrounds).
- It should be funded by industry through a transparent process.
- Membership should be compulsory through a licensing condition (or equivalent requirement) for financial firms.

Features

- **Accessibility:** It should be free to consumers when they lodge a complaint.
- **Accountability:** It should be subject to strengthened accountability mechanisms, which include regular independent reviews (with the reports of reviews and the EDR body's response to recommendations reported publicly) and the appointment of an 'independent assessor' to review the handling of disputes by the body (but not to review the outcome of individual disputes).
- **Enforceability:** Firms should be required to comply with its determinations as a condition of membership, with the body required to report firms that fail to comply to the appropriate regulator. The body should have the power to expel firms that fail to comply.
- **Improving industry practice:** It should monitor, address and report systemic issues to the appropriate regulator.
- **Expertise:** It should use panels to resolve disputes in specific circumstances, such as complex disputes, and provide clear guidance and transparency to users on when a panel will be used by the body.
- **Community engagement:** It should engage in outreach activities to raise awareness amongst consumers (in particular vulnerable consumers) and financial firms.

Table: Proposed features of the single EDR body

	Financial disputes (other than superannuation disputes)	Superannuation disputes
Role	To provide a fair, economical, informal, quick and flexible alternative to the court system.	
Structure (Discussed in Chapter 5)	A single EDR body for all financial disputes (including superannuation disputes). The Panel's preferred approach is that the EDR body will be a company limited by guarantee.	
Governance (Accountability mechanisms are discussed in Chapter 9)	The EDR body will be governed by an independent board, with an independent chair and equal numbers of directors with industry and consumer backgrounds.	
Funding arrangements	Free to complainants, funded by industry through a transparent process. Funding arrangements will be flexible to deal with a range of circumstances, including unanticipated increases in disputes.	
Membership (Credit representatives' membership is discussed in Chapter 11)	Australian financial services licensees and credit licensees. Superannuation trustees and other entities within SCT's current jurisdiction.	
Jurisdiction (Monetary limits are discussed in Chapter 8 and the subject of Recommendations 4 and 5)	Monetary limits that are higher than existing FOS/CIO limits will apply. Existing time limits that apply to disputes will continue to apply.	There will be an unlimited monetary jurisdiction, maintaining existing levels of access to redress. Time limits for death benefit and total and permanent disability disputes will apply. 'Claim-staking' process for death benefit disputes will be retained (see Chapter 7).

	Financial disputes (other than superannuation disputes)	Superannuation disputes
Powers (Recommendation 3) (Powers for financial disputes (other than superannuation disputes) are discussed in Chapter 5) (Statutory provisions for superannuation disputes are discussed in Chapter 7)	Contractual powers, articulated in the Terms of Reference.	Combination of contractual and statutory. Contractual powers would be articulated in Terms of Reference. In addition, statutory provisions will apply to the EDR body where required to accommodate the unique features and complexities of some superannuation disputes.
Dispute resolution criteria (Discussed in Chapter 5, in relation to financial disputes (other than superannuation disputes) and Chapter 7, in relation to superannuation disputes)	'Fair in all the circumstances', taking into account legal principles, any applicable industry codes of practice, as well as good industry practice and previous relevant decisions of FOS and CIO (noting the EDR body is not bound by these).	Whether the trustee's decision was 'fair and reasonable' in the circumstances (current test). If the trustee's decision was fair and reasonable, the EDR body must affirm decision.
Remedies	Wide range of remedies, including ability to award non-financial loss. Non-compliance with a determination will be reported to the appropriate regulator.	Retain existing remedies. Non-compliance with a determination will be reported to the appropriate regulator.
Accountable to users (Discussed in Chapter 9)	Must be subject to enhanced accountability. The EDR body must have funding flexibility, financial transparency, and be subject to regular independent reviews, as well as have an independent assessor to review complaints about the handling of disputes.	
Systemic issues reporting	The EDR body must monitor, address and report systemic issues.	

	Financial disputes (other than superannuation disputes)	Superannuation disputes
Rights of appeal	<p>Consumer not bound by decision, can still go to court/mediation.</p> <p>Financial firm bound by decision, able to appeal in limited circumstances (similar to what is currently available in relation to FOS/CIO decisions).</p>	<p>Parties can appeal decision to Federal Court on matters of law, given unlimited monetary jurisdiction. A consumer that does not defend the appeal will not have costs ordered against them.</p>
Internal dispute resolution (IDR) (Discussed in Chapter 10)	<p>Consumer must have attempted IDR before accessing the EDR body.</p> <p>Body must provide a final opportunity to resolve the dispute at IDR and monitor disputes returned to IDR.</p>	

Chapter 7: Accommodating unique features of superannuation disputes

Key points

- Superannuation disputes can have unique and complex characteristics, which can distinguish them from other financial disputes.
- The single EDR body will be supported by appropriate statutory provisions where required in relation to superannuation disputes (Recommendation 3).
- The single EDR body, in relation to third parties, will be able to:
 - compel the production of information (while maintaining secrecy provisions);
 - name third parties as decision makers for certain types of disputes; and
 - permit other third parties to be joined to a dispute upon application.
- The single EDR body will be able to manage death benefit and total and permanent disability disputes effectively by:
 - preserving the 'claim-staking' process for death benefit disputes; and
 - including time limits for death benefit and total and permanent disability disputes.
- Industry will have certainty because EDR decisions will be aligned with trustee duties, including through:
 - retaining the current test for superannuation disputes which requires a trustee's decision to be 'fair and reasonable' in the circumstances;
 - retaining the ability for an EDR decision in superannuation to replace the original decision; and
 - limiting the remedies for superannuation disputes to removing the unfairness or unreasonableness of a decision.
- All parties will be able to appeal a decision of the single EDR body in relation to a superannuation dispute to the Federal Court on a question of law.
- Exempt public sector superannuation schemes will be able to elect to become members of the single EDR body, should they wish to do so.
- Once a code of practice or conduct for insurance in superannuation is established, the superannuation industry should consult stakeholders on whether other aspects of superannuation could also benefit from the development of a code.

ACCOMMODATING UNIQUE FEATURES OF SUPERANNUATION DISPUTES

- 7.1. The Panel has recommended that the single EDR body, for superannuation disputes, should be supported by appropriate statutory provisions where required (Recommendation 3).
- 7.2. Superannuation disputes can have unique and complex characteristics, which distinguish them from other financial sector disputes. The Law Council of Australia noted in its submission that ‘disputes concerning superannuation are typically much more complex than disputes concerning other financial products, not only because of factual matters but also due to the complex intersection of trust law and statutory regulation’.¹
- 7.3. To ensure that the single EDR body can effectively resolve superannuation disputes, the Panel recommends the following features of the current superannuation dispute resolution process be retained in the new body, supported by statutory provisions if required. The Panel has obtained legal advice on these matters.
- 7.4. The legislation that governs SCT applies to entities other than superannuation funds, such as approved deposit funds, insurers, annuity providers and retirement savings account providers.² While the discussion below refers to superannuation funds for simplicity, the Panel’s intention is that statutory provisions, where required, should also extend to disputes which relate to other relevant entities, in line with current arrangements.

Retain certain powers with respect to third parties

Retain information-gathering powers

- 7.5. The Panel supports the single EDR body being conferred with statutory powers to compel the production of information from third parties, where required, to resolve a superannuation dispute. The use and disclosure of the information obtained will be constrained by secrecy provisions protecting the information, in line with current arrangements.³
- 7.6. The power to compel the production of information is necessary because trustees and consumers may rely on decisions and/or information from third parties, such as insurers, administrators and employers, or in the case of a disability benefit, persons such as medical practitioners who may need to determine the existence or the extent of a disability.⁴ It is important that the EDR body is able to consider this information when assessing whether a decision was ‘fair and reasonable’ in the circumstances.

1 Law Council of Australia, submission to the EDR Review Interim Report, page 2.

2 See *Superannuation (Resolution of Complaints) Act 1993* Part 4.

3 *Superannuation (Resolution of Complaints) Act 1993* sections 24, 24AA, 25 and 63.

4 *Superannuation (Resolution of Complaints) Act 1993* section 18.

- 7.7. SCT noted in its submission that the ‘superannuation industry has a high degree of interaction with, and reliance upon, outsourced providers such as administrators’ and ‘powers ‘to obtain information and involve third parties in the complaint resolution process are important in the superannuation environment where there can be reliance on external parties such as employers’.⁵
- 7.8. Currently, SCT’s powers to request information, including from third parties, are extensive and the Panel agrees with stakeholders that these powers are critical to the investigation and resolution of some disputes.

Retain the ability to join third parties to a dispute, including as decision makers

- 7.9. The Panel supports certain decision makers who are not members of the single EDR body being joined as decision makers for certain disputes, in line with current arrangements. This ensures that consumers have access to EDR even when a superannuation fund trustee is not the decision maker. The Panel also supports retaining the ability for other third parties to apply to be joined to a dispute.
- 7.10. In superannuation disputes, a ‘decision maker’ is the person that is required to take action (or refrain from taking action) to implement a decision. The decision maker may not always be the trustee of the superannuation fund. Superannuation disputes may cover insurance within superannuation (in which the insurer may be the person who decides if a death benefit can be paid to a consumer) and in some cases, may involve a third party such as a medical practitioner, who may be responsible for determining the existence and extent of a disability, to allow a disability benefit to be paid.
- 7.11. Superannuation disputes can also involve third parties who are not decision makers, such as parties with something to gain or lose (an ‘interest’) in the dispute. For example, because ‘superannuation does not form part of a deceased [superannuation fund] ‘member’s estate’,⁶ superannuation fund trustees are required to make decisions about the distribution of superannuation to the beneficiaries of the deceased, who are identified through the ‘claim-staking’ process (see next section). For this reason, third parties such as beneficiaries who may have had no previous relationship to the trustee may wish to be considered a party to the dispute.

Retain certain provisions to manage death benefit and total and permanent disability disputes

Retain the claim-staking process for death benefit disputes

- 7.12. To ensure the timely and confident payment of death benefits by trustees, the Panel supports retaining the ‘claim-staking’ process for superannuation death benefit disputes, in line with current arrangements.

5 Superannuation Complaints Tribunal, submission to the EDR Review Interim Report, pages 15- and 16.

6 Superannuation Complaints Tribunal, submission to the EDR Review Interim Report, page 9.

- 7.13. Before a trustee distributes a death benefit, it 'provides information to identified potential beneficiaries about how the trustee proposes to distribute the death benefit. The potential beneficiaries are able to object to the proposed distribution. The trustee considers all objections before making their final decision regarding distribution. The decision is communicated with the potential beneficiaries, together with reasons for the trustee's decision and a defined timeframe in which a complaint can be taken to the SCT'⁷ (currently 28 days).⁸ If a complaint is not raised, a trustee will distribute the death benefit. This process is known as 'claim-staking'. A person does not have an interest in a death benefit unless a trustee notifies them of that interest, or certain requirements in the law are not met by the trustee.⁹
- 7.14. Following this, if a complaint on a death benefit is raised with SCT, a trustee must, within a further 28 days, provide written notice to those it believes, after a 'reasonable inquiry', have an interest in the dispute and inform these persons that they may apply to SCT to be joined to the dispute.¹⁰
- 7.15. A trustee is considered to have fulfilled its duties if it has undertaken a 'reasonable inquiry' to identify potential beneficiaries and notified them in accordance with the law. This allows the trustee to pay a death benefit with confidence. The specified time limits ensure that the search for beneficiaries is finite and a trustee can make a confident and timely payment of a death benefit.

Retain time limits for death benefit and total and permanent disability disputes

- 7.16. The Panel supports retaining time limits for death benefit and total and permanent disability disputes within superannuation to ensure the timely payout of benefits. Benefits should be paid in accordance with an EDR decision, even if under appeal by a court, as is currently the case.
- 7.17. Currently, a consumer must raise a dispute with SCT about a trustee's decision on a death benefit within 28 days¹¹ and must raise a dispute about a total and permanent disability claim decision within certain timeframes, depending on circumstances prescribed in law.¹²
- 7.18. Time limits are placed on these disputes to ensure the timely payment of such benefits by the trustee or insurer. SCT noted in its submission that 'the clear limit on time to consider a dispute provides the trustee with certainty regarding physical payment of the benefit [...] the extension of time to complain would

7 Superannuation Complaints Tribunal, submission to the EDR Review Interim Report, page 11, footnote 13.

8 *Superannuation (Resolution of Complaints) Regulations 1994* regulation 5.

9 See *Superannuation (Resolution of Complaints) Act 1993* Part 4.

10 See *Superannuation (Resolution of Complaints) Act 1993* Part 4 and *Superannuation (Resolution of Complaints) Regulations 1994* regulation 5.

11 *Superannuation (Resolution of Complaints) Regulations 1994* regulation 5.

12 *Superannuation (Resolution of Complaints) Act 1993* subsection 14(6A).

result in a delay of payment to beneficiaries even in the circumstances where no complaint is subsequently made'.¹³

Retain the 'fair and reasonable' in the circumstances test

- 7.19. The Panel supports retaining the current test for superannuation disputes, requiring a single EDR body to 'stand in the shoes' of the trustee¹⁴ and to affirm the trustee's decision except where the decision was 'unfair or unreasonable', in line with current arrangements.¹⁵ Why this is important is outlined in more detail below. This provides certainty for trustees and ensures an EDR decision is consistent with trustee duties.
- 7.20. Superannuation funds are set up as trusts. A 'trustee' is someone who holds property, authority or a position of responsibility for the benefit of others ('beneficiaries'). The duties and obligations of trustees derive from several sources, including common law and legislation. They are often referred to as 'fiduciary duties'.
- 7.21. In superannuation, certain trustee duties and obligations are codified in the *Superannuation Industry (Supervision) Act 1993*. These include the trustee performing its duties and exercising its powers in the best interests of beneficiaries and to act fairly in dealing with classes of beneficiaries within the entity.¹⁶ This means that when determining an individual dispute, a trustee must also have regard to the effect of the decision on the other beneficiaries of the fund. This makes the resolution of superannuation disputes fundamentally different to the resolution of disputes involving other types of financial firms.
- 7.22. The current test for assessing superannuation disputes under EDR is that a trustee's decision must be 'fair and reasonable' in the circumstances.¹⁷ This test is considered to be consistent with trustee duties¹⁸ and is different to the test that the Panel recommends to continue to apply for other types of financial disputes, which is 'fairness in all the circumstances' (see Chapter 5). As SCT notes, the current test for superannuation disputes 'recognises that trustees are often required to make discretionary decisions that require the balancing of different factors. There is no single correct decision [...] a trustee's decision is considered 'properly made' if it falls within the range of decisions that is fair and reasonable'.¹⁹

13 Superannuation Complaints Tribunal, submission to the EDR Review Interim Report, page 11.

14 See *Superannuation (Resolution of Complaints) Act 1993* Part 6, Division 3.

15 Ibid.

16 *Superannuation Industry (Supervision) Act 1993* section 52.

17 *Superannuation (Resolution of Complaints) Act 1993* section 37.

18 See discussion in Superannuation Complaints Tribunal, submission to the EDR Review Interim Report, pages 35 to 37.

19 Superannuation Complaints Tribunal, submission to the EDR Review Interim Report, page 8.

Retain the requirement that an EDR decision replaces the original decision

- 7.23. In line with adopting a decision making test which is consistent with trustee duties, the Panel supports requiring an EDR decision for superannuation disputes to replace the decision of the original decision maker (trustee, insurer or other decision maker) from the time the original decision was made and for a determination to be issued without the agreement of the complainant or third parties. Essentially, this means parties must comply with the EDR decision as if it was the original decision.²⁰ The Panel also agrees that an EDR decision with respect to superannuation should be enforceable even while under appeal to ensure decision makers comply with the EDR decision, in line with current arrangements.²¹
- 7.24. Currently, trustees are required to comply with an EDR decision to fulfil their obligations under their Registrable Superannuation Entity (RSE) licence, which allows an entity to operate as a superannuation fund.²² Reports of non-compliance with an EDR decision by any party to the complaint can be reported to ASIC or APRA.²³
- 7.25. Stakeholders raised the importance of EDR decisions being enforceable. In particular, the Association of Superannuation Funds of Australia (ASFA) – noted that the ‘robustness of the current legislative framework for enforceability of SCT determinations is such that the incidence of non-compliance, historically and currently, is negligible – the mere availability of the prescribed sanctions has been sufficient to encourage compliance’.²⁴
- 7.26. Additionally, the enforceability of a decision is important when making death benefit payments. As SCT noted in its submission ‘if a complaint is made to EDR but an ultimate determination is not enforceable at law [...] the distribution may remain open to challenge’.²⁵

Allow remedies that are consistent with trustee duties

- 7.27. The Panel considers that remedies for superannuation disputes should be limited to removing the unfairness or unreasonableness of a decision, in line with current arrangements.²⁶ This ensures remedies available for superannuation disputes are consistent with trustee duties. The remedies for superannuation disputes are different to those the Panel recommends should continue to be available to consumers for other types of financial disputes (see Chapter 6).

20 *Superannuation (Resolution of Complaints) Act 1993* section 41.

21 *Superannuation (Resolution of Complaints) Act 1993* section 47.

22 *Superannuation Industry (Supervision) Regulations 1994* regulation 13.17B.

23 *Superannuation (Resolution of Complaints) Act 1993* section 65.

24 Association of Superannuation Funds of Australia (ASFA), submission to the EDR Review Interim Report, page 5.

25 Superannuation Complaints Tribunal, submission to EDR Review Interim Report, page 11.

26 See *Superannuation (Resolution of Complaints) Act 1993* Part 6, Division 3.

- 7.28. Currently, SCT may only make decisions to put a consumer in a position where the unfairness or the unreasonableness of a decision no longer exists.²⁷

Maintain rights of appeal on matters of law for all parties

- 7.29. The Panel supports, for superannuation disputes, retaining the ability for all parties to appeal a determination of the single EDR body on a question of law,²⁸ given the compulsory nature of superannuation and the unlimited monetary jurisdiction of superannuation disputes.
- 7.30. As superannuation is compulsory for working Australians and a long-term asset that builds up over a consumer's working life, superannuation disputes can involve large sums of money. The Panel has recommended that the monetary jurisdiction for superannuation disputes continue to be unlimited (see Chapter 8 and Recommendation 4).
- 7.31. Superannuation fund trustees noted that the unlimited monetary jurisdiction of superannuation disputes and the obligation of trustees to act in the best interests of beneficiaries mean all parties, including trustees, should have the ability to appeal a determination which may be incorrect because the law was incorrectly applied. This is particularly important if the outcome of a dispute may have wider implications on the future payment of benefits by a trustee.

Retain the ability for exempt public sector superannuation schemes to elect to be members of the single EDR body

- 7.32. The Panel recommends retaining the ability for exempt public sector superannuation schemes (EPSSs) that are not subject to regulation by APRA under the *Superannuation Industry (Supervision) Act 1993*, to elect to become members of the single EDR body if they wish to do so.
- 7.33. Currently, EPSSs, which can be governed by separate State legislation, are not required to submit to the jurisdiction of SCT, although they may elect to do so.²⁹ This would allow EPSSs which are currently under the jurisdiction of the SCT to elect to become a member of the single EDR body.

Recommendation 3: Powers of the single EDR body

The single EDR body should have appropriate powers within its Terms of Reference to support its dispute resolution functions and, in the case of superannuation disputes, appropriate statutory provisions where required.

27 *Superannuation (Resolution of Complaints) Act 1993* Part 6, Division 3.

28 *Superannuation (Resolution of Complaints) Act 1993* section 46.

29 For example, under the *Superannuation (Resolution of Complaints) Act 1993* section 4A.

A NEW SUPERANNUATION CODE OF PRACTICE

- 7.34. In its Interim Report, the Panel proposed that the superannuation industry develop a superannuation code of practice. Stakeholders held a range of views on this issue.
- 7.35. The Joint Consumer Group, SCT and the Financial Planning Association of Australia considered that a code could provide greater clarity for consumers.
- 7.36. The Joint Consumer Group noted that a code could cover broader aspects of superannuation service provision³⁰ such as complaints handling processes, general conduct by superannuation trustees, fund managers and service providers.³⁰ They also noted that codes also have the benefit of being more flexible than legislation and therefore more responsive to changes in consumer demand.³¹
- 7.37. SCT viewed a code as an opportunity to provide clarity and consumer awareness of the complexity of superannuation complaints, assist consumers to understand the complaint cycle and provide a focal point for industry to establish clear standards and expectations for consumers and their interaction with funds.³²
- 7.38. The Financial Planning Association of Australia submitted that a code could focus on the competence and ethical standards of individuals and organisations involved in the industry, providing some orderliness to the industry and aligning with consumer expectations on service levels from financial firms.³³
- 7.39. Some industry stakeholders submitted that the fiduciary nature of superannuation rendered a code unnecessary, with some stakeholders noting the potential for overlap with a range of extensive existing consumer protection mechanisms arising from a trustee's fiduciary obligations and substantial legislative prescription.³⁴
- 7.40. Some industry stakeholders also noted the work being undertaken in relation to insurance in superannuation; in particular, the current work of superannuation industry bodies the Australian Institute of Superannuation Trustees, the Association of Superannuation Funds of Australia, the Financial Services Council, the Industry Funds Forum and Industry Super Australia to develop a binding code of practice or conduct for life insurance in superannuation, to improve group insurance standards in superannuation.

30 Joint Consumer Group, submission to the EDR Review Interim Report, pages 27-28.

31 Joint Consumer Group, submission to the EDR Review Interim Report, page 27.

32 Superannuation Complaints Tribunal, submission to the EDR Review Interim Report, page 26.

33 Financial Planning Association of Australia, submission to the EDR Review Interim Report, page 4.

34 National Australia Bank, submission to the EDR Review Interim Report, page 4; Financial Services Council, submission to the EDR Review Interim Report, page 8; Australian Institute of Superannuation Trustees, submission to the EDR Review Interim Report, page 11.

Panel analysis

- 7.41. The Panel notes and supports the current work being undertaken by the superannuation industry to develop a code of practice for life insurance in superannuation.
- 7.42. While in the longer term, development of a code of practice for superannuation is desirable, it is not a prerequisite for the improvements to dispute resolution that the Panel has recommended in this Report.
- 7.43. The Panel considers that once a code of practice or conduct for life insurance in superannuation is established, the superannuation industry should consult stakeholders on whether other aspects of superannuation could also benefit from the development of a code. Such a code could, for example, seek to set clear expectations and service standards for consumers and their interaction with superannuation funds, especially in relation to internal dispute resolution.

Panel finding

While development of a code of practice for superannuation is desirable, it is not a prerequisite for the improvements to dispute resolution recommended in this Report.

The Panel considers that once a code of practice or conduct for life insurance in superannuation is established, the superannuation industry should consult stakeholders on whether other aspects of superannuation could also benefit from the development of a code.

Chapter 8: Addressing gaps in the framework

Key points

- The new EDR body will provide consumers and small businesses with higher monetary limits and compensation caps than the current industry ombudsman schemes.
- The monetary limits and compensation caps should be set with regard to the following key principles:
 - the substantial majority of disputes should be able to be resolved through EDR;
 - the monetary limits and compensation caps should reflect general economic indicators and the current values of financial products held by consumers and small business;
 - the impact of increasing the compensation cap on competition should be considered; and
 - the monetary limits and compensation caps should be easy for users to understand and for the EDR body to apply.
- The monetary limits and compensation caps should be set by the EDR body in consultation with ASIC and small business, industry and consumer stakeholders. But, at a minimum:
 - for consumer disputes (and non-credit facility related small business disputes), the EDR body should commence operations with a monetary limit of \$1 million and a compensation cap of no less than \$500,000. For disputes concerning certain products (including mortgages and general insurance products), there should be consultation about whether the body should move immediately to a compensation cap of \$1 million;
 - the lower compensation cap of \$500,000 should only apply where there is evidence that moving immediately to a compensation cap of \$1 million is likely to result in a substantial lessening of competition (as a result of smaller firms being unable to obtain professional indemnity insurance and therefore being unable to enter or remain in the market).
 - for credit facility disputes, small businesses should be able to bring a claim where the credit facility is of an amount up to \$5 million and the EDR body should operate a compensation cap of \$1 million;
 - the monetary limit and compensation cap should not apply for disputes about whether a guarantee should be set aside where it has been supported by a mortgage or other security over the guarantor's primary place of residence; and
 - the monetary jurisdiction for superannuation disputes should continue to be unlimited, in line with current arrangements.
- The monetary limits and compensation caps should be subject to regular indexation and review to ensure they remain fit-for-purpose and that the substantial majority of disputes can be resolved through EDR.

IMPROVING CONSUMER ACCESS TO REDRESS

Current framework

- 8.1. Under the current framework, FOS and CIO operate a monetary limit of \$500,000 and apply a compensation cap of \$309,000.¹
- 8.2. FOS also operates a number of compensation sub-limits for specific products, which are contained in its Terms of Reference and set out below (excluding compensation for costs and interest payments).²

	Type of claim	Amount per claim
1.	<p>Claim on a Life Insurance Policy or a General Insurance Policy dealing with income stream risk or advice about such a contract.</p> <p>If the claim is in excess of this monthly limit, the monthly limit will apply unless:</p> <p>the total amount payable under the policy can be calculated with certainty by reference to the expiry date of the policy and/ or age of the insured; and</p> <p>that total amount is less than the amount specified in row 4.</p> <p>If this is the case, then the limit will be the amount in row 4.</p>	\$8,300 per month
2.	Third party claim on a General Insurance Policy providing cover in respect of property loss or damage caused by or resulting from impact of a motor vehicle.	\$5,000
3.	Claim against a General Insurance Broker except where the claim solely concerns its conduct in relation to a Life Insurance Policy (in which case row 1 or 4 applies, whichever is applicable).	\$166,000
4.	Other.	\$309,000

1 Financial Ombudsman Service 2015, *Terms of Reference (as amended 1 January 2015)*, at cl 5(o); Credit and Investments Ombudsman 2016, *Credit and Investments Ombudsman Rules (10th Edition)*, rule 9.1.

2 Financial Ombudsman Service 2015, *Terms of Reference (as amended 1 January 2015)*, page 46.

Outdated monetary limits and compensation caps for consumers

- 8.3. In order to provide adequate access to redress, monetary limits and compensation caps need to be broad enough for consumers to have appropriate access to the schemes, while ensuring there are mechanisms to require more complex cases to be heard in different forums.³ However, this is currently not the case.
- 8.4. The schemes' monetary limits and compensation caps have not kept pace with economic indicators, including growth in average wages and in home lending facilities,⁴ which results in consumers having disputes which fall well outside of the schemes' jurisdiction.⁵ For example, recent increases in housing costs have pushed many mortgages and guarantees on home loans beyond the schemes' jurisdiction.⁶
- 8.5. In its Interim Report, the Panel recommended that the monetary limit and compensation cap for the new EDR scheme be higher than the current arrangements and subject to regular indexation. The Panel also made an information request in relation to what the monetary limits and compensation caps should be for the new scheme and whether consumers and small businesses should have different limits and caps. Additionally, the Panel requested information on what principles should guide the levels at which the monetary limits and compensation caps are set, and what indexation arrangements should apply to ensure the monetary limits and compensation caps remain fit-for-purpose.

Submissions on raising monetary limits and compensation caps

Support for higher monetary limits and compensation caps

- 8.6. There was strong support for raising the monetary limits and compensation caps. A number of submissions supported increasing the limits and caps without nominating a specific level,⁷ while other stakeholders were more specific about the amount of the increase. For example, the Joint Consumer Group submitted that the existing limits and caps should be raised substantially, with the monetary limits and compensation caps increased and aligned at \$2 million.⁸ In supporting its position, the Joint Consumer Group submitted that the monetary limits and compensation caps should reflect the value and cost of financial services and products in Australia, including: the cost of home loans; property

3 Australian Bankers' Association, submission to the EDR Review Issues Paper, page 5.

4 Financial Ombudsman Service, submission to the EDR Review Issues Paper, pages 34-35.

5 Joint Consumer Group, submission to the EDR Review Issues Paper, page 41.

6 Joint Consumer Group, submission to the EDR Review Issues Paper, page 41.

7 Australian Securities and Investments Commission, submission to the EDR Review Interim Report, page 18.

8 Joint Consumer Group, submission to the EDR Review Interim Report, page 17.

prices; the cost of a rebuild on total loss insurance claims; and the average coverage on insurance policies.⁹

- 8.7. The Australian Bankers' Association, as well as NAB and ANZ, stated that retail customers should be able to bring disputes up to the value of \$1 million and receive compensation of up to \$1 million.¹⁰
- 8.8. In its submission supporting the Panel's finding that the existing limits should be raised, FOS commissioned an analysis of the changes and volatility in the economic market conditions from 2002 to 2016. FOS submitted this analysis supported increasing the limit to a range of between \$634,000 and \$955,000, with a limit of about \$730,000 resulting from indexing 2002 as the base year.¹¹ FOS stated that it supported an increase at the higher end of the range to help future proof the claims limit, provide certainty to all participants and reduce the need to make significant changes within the next three to five years.¹²
- 8.9. FOS proposed that the increased claim limit would not apply where the applicant's claim was to set aside a guarantee supported by a mortgage or other security over the guarantor's primary place of residence. In those circumstances, there would be no limit on the claim cap.¹³ It also recommended removing the distinction between monetary limits and compensation caps as they were confusing for consumers and financial firms.¹⁴
- 8.10. ASIC supported increasing the current monetary limits and compensation caps. However, it identified a number of trade-offs which would need to be considered when determining the quantum of any increase, including:
- current views and evidence about what constitutes a 'consumer' and 'small business' transaction in practice;
 - what are appropriate limits for consideration by a scheme that is designed to be a low-cost, more efficient alternative to the courts; and
 - the cost, availability and limitations of professional indemnity insurance and the significance of this for smaller licensees as distinct from a prudentially regulated institution that can self-insure.¹⁵
- 8.11. On the issue of applying different monetary limits and compensation caps to different products, stakeholders adopted a range of positions. FOS stated that the differences could be complex and confusing for consumers and financial firms,

9 Joint Consumer Group, submission to the EDR Review Interim Report, page 17.

10 Australian Bankers' Association, submission to the EDR Review Interim Report, page 7; National Australia Bank, submission to the EDR Review Interim Report, page 3; ANZ, submission to the EDR Review Interim Report, page 3.

11 Financial Ombudsman Service, submission to the EDR Review Interim Report, page 17.

12 Financial Ombudsman Service, submission to the EDR Review Interim Report, page 17.

13 Financial Ombudsman Service, submission to the EDR Review Interim Report, page 18.

14 Financial Ombudsman Service, submission to the EDR Review Interim Report, page 18.

15 Australian Securities and Investments Commission, submission to the EDR Review Interim Report, page 17.

but considered these matters required further consideration and detailed review once the overall level of compensation caps and limits had been settled.¹⁶ The Joint Consumer Group submitted that there should still be a degree of differentiation, albeit at higher levels than under the current framework.¹⁷

- 8.12. Other submissions observed that the different monetary limits and compensation caps were important to maintain and cautioned against raising these for financial products which possess a lower average claim amount, such as general insurance claims, and that in the absence of compelling evidence that the current limits were inadequate, these should be maintained.¹⁸

Indexation arrangements

- 8.13. On the issue of what indexation arrangements should apply to ensure monetary limits and compensation caps remain fit-for-purpose, stakeholders put forward different approaches, including:

- a fixed increase every three years, with the new limits and caps based on a review of the adequacy of the existing limits having regard to the value and cost of financial services and products in Australia, with the limits and caps rounded to the nearest \$10,000 to ensure the jurisdiction is as simple and clear as possible;¹⁹ and
- continuing the current annual indexation of claim limits based on increases in the Consumer Price Index and periodic regular reviews based on agreed factors.²⁰

Support for maintaining the current monetary limits and compensation caps

- 8.14. The Panel received a number of submissions which did not support increasing the current monetary limits and compensation caps, or increasing them for specific products beyond a certain amount. A number of reasons were given for why caution should be exercised before considering any increase, including:

- it would likely lead to an increase in the complexity of matters and decrease efficiency in the dispute resolution process;²¹

16 Financial Ombudsman Service, submission to the EDR Review Interim Report, page 23.

17 Joint Consumer Group, submission to the EDR Review Interim Report, pages 16-17. The submission proposes a general monetary limit and compensation cap, but also specifies different limits and caps for uninsured third party motor vehicle claims, income stream life insurance claims and life insurance claims.

18 QBE, submission to the EDR Review Interim Report, page 2; Insurance Council of Australia, submission to the EDR Review Interim Report, page 4; see also the Financial Services Council, submission to the EDR Review Interim Report, pages 2-6.

19 Joint Consumer Group, submission to the EDR Review Interim Report, page 18.

20 Financial Ombudsman Service, submission to the EDR Review Interim Report, page 18; see also National Australia Bank, submission to the EDR Review Interim Report, page 3.

21 Financial Services Council, submission to the EDR Review Interim Report, pages 2-6.

- complex, high value claims should not be determined in a system where financial firms have very few appeal rights and the schemes do not apply the rules of evidence;²²
- it could see firms placed in a position where they are not able to secure professional indemnity insurance if insurers do not offer cover to match the higher monetary limits and compensation caps or increase premiums so that they become unaffordable;²³ and
- there could be an anti-competitive effect as the impact of large awards would have the potential to lead to small-to-medium sized firms exiting the market.²⁴

8.15. A number of submissions identified that international EDR schemes have similar or substantially lower monetary limits and compensation caps than both FOS and CIO, as do most other Australian ombudsman schemes.²⁵ It was also submitted that a sense of proportion needed to be applied in thinking about monetary limits. Some submissions referred to court civil claim limits, such as the NSW Local Court and Victorian Magistrates Court, which have a civil claim limit of \$100,000 and the NSW District Court which has a limit of \$750,000.²⁶

Panel analysis

Inadequacy of current monetary limits and compensation caps

- 8.16. The Panel received evidence that many consumers were unable to bring their dispute to the schemes or receive adequate compensation as the monetary limits and compensation caps had not kept pace with economic indicators and the current values of financial products. For example, due to the high cost of housing in some of Australia's largest capital cities, consumers can face particular challenges when dealing with complaints about mortgages, mortgage guarantees and insurance claims where a consumer is required to rebuild their house.
- 8.17. FOS provided the Panel with evidence about the changes in six economic indicators aligned to specific FOS product lines and four indicators related to

22 Financial Services Council, submission to the EDR Review Interim Report, pages 2-6; National Insurance Brokers Association, submission to the EDR Review Interim Report, pages 4-5; Insurance Council of Australia, submission to the EDR Review Interim Report, page 4; Australian Financial Markets Association, submission to the EDR Review Interim Report, pages 2-3.

23 National Insurance Brokers Association, submission to the EDR Review Interim Report, pages 4-5; Insurance Council of Australia, submission to the EDR Review Interim Report, pages 4-5; Stockbrokers and Financial Advisers Association Limited, submission to the EDR Review Interim Report, pages 2-6.

24 Stockbrokers and Financial Advisers Association Limited, submission to the EDR Review Interim Report, pages 2-6.

25 The Financial Services Council states in its submission that: New Zealand's four schemes each have a limit of NZ\$200,000; the United Kingdom has a limit of approximately A\$240,000; Singapore's limit is approximately A\$94,000; and Canada's OBSI has a limit of approximately A\$355,000: see Financial Services Council, submission to the EDR Review Interim Report, pages 2-6; see also Insurance Council of Australia, submission to the EDR Review Interim Report, page 4; Stockbrokers and Financial Advisers Association Limited, submission to the EDR Review Interim Report, pages 5-6.

26 Australian Financial Markets Association, submission to the EDR Review Interim Report, pages 2-3.

overall Australian economic conditions and levels of market volatility during the period 2002-2016.²⁷ This analysis found that the current FOS claims limit, when adjusted for annual CPI increases, was lagging when compared to the historical growth of these economic indicators. The Panel found this analysis particularly compelling.

- 8.18. Based on the evidence provided, the Panel has found that the existing monetary limits and compensation caps are resulting in consumers being excluded from accessing EDR and must be raised.

Panel finding

The current monetary limits and compensation caps are inadequate which means many consumers are unable to access effective dispute resolution arrangements.

A principles-based approach to setting monetary limits and compensation caps

- 8.19. When determining the monetary limits and compensation caps for disputes, the Panel considers the following principles to be relevant:
- the substantial majority of consumer disputes should be able to be resolved by the EDR body;
 - the monetary limits and compensation caps should reflect general economic indicators and the current values of financial products held by consumers;²⁸
 - the impact of increasing the compensation cap on competition (as a result of smaller financial firms being unable to obtain professional indemnity insurance and therefore being unable to enter or remain in the market) should be considered; and
 - the monetary limits and compensation caps should be easy for consumers to understand and for the EDR body to apply.

²⁷ The FOS Product-Specific parameters identified were: housing loans outstanding; banks' fee income from deposit accounts; net premiums from general insurance; total managed funds; assets of superannuation funds; net premiums from life insurance. The general economic indicators identified were: household debt to income; cost of living index; interest rate volatility; and stock market volatility: see Financial Ombudsman Service, submission to the EDR Review Interim Report, Appendix C.

²⁸ The Australian Securities and Investments Commission in its submission to the EDR Review Interim Report at page 18 stated that such evidence would be likely to include: home loans; value of residential and investment properties across Australia; personal credit exposures; small business facilities and exposures; value of funds under advice; sum insured of life insurance policies; and superannuation balances.

Higher monetary limits and compensation caps

- 8.20. Given the co-regulatory nature of the EDR framework, the Panel considers that the monetary limits and compensation caps should be set by the EDR body in consultation with ASIC, industry and consumer stakeholders. However, given the nature of this Review, the Panel has taken the opportunity to set what it regards as key benchmarks and recommends that the new EDR body should commence operations with a monetary limit of \$1 million and a compensation cap of no less than \$500,000.
- 8.21. The increases in the monetary limit and compensation cap are significant – a 100 per cent increase in the monetary limit and a 62 per cent increase in the compensation cap relative to current levels – which will greatly expand the ability of consumers to obtain access to EDR.
- 8.22. On the issue of the distinction between the monetary limit and compensation cap, the Panel considers this can be confusing for consumers and more difficult for the EDR body to administer.²⁹ Under the current arrangements, where the compensation cap is inadequate, a separate monetary limit can function as a means of allowing a consumer to bring their dispute to EDR and waive their right to pursue the balance of their claim where they settle the dispute at EDR. Once the compensation cap is raised to a level where the substantial majority of disputes can be resolved by the EDR body, a separate monetary limit becomes unnecessary. The Panel, therefore, in-principle supports removing the distinction between the monetary limit and compensation cap.
- 8.23. However, the Panel has not recommended that the distinction be removed immediately for all products as it is aware of the impact that an increase in the compensation cap could have on competition if it results in smaller firms in some areas of financial services being unable to obtain professional indemnity insurance and therefore being unable to enter or remain in the market.

Reviews of impacts of higher monetary limits and compensation caps

- 8.24. There should be two reviews of the body's monetary limits and compensation caps: an initial consultation prior to the commencement of the body; and a second independent review following its implementation.

Pre-commencement consultation

- 8.25. During the process of transition and prior to commencement of the new EDR body, there should be consultation about:
- whether disputes in relation to certain products, including mortgages and general insurance products, should move immediately on commencement to a compensation cap of \$1 million; and

29 See Financial Ombudsman Service, submission to the EDR Review Interim Report, page 18.

- whether there are compelling reasons to retain the current sub-limits applying to different insurance products.
- 8.26. The lower compensation cap of \$500,000 should only apply where there is evidence that moving immediately to a compensation cap of \$1 million is likely to result in a substantial lessening of competition (as a result of smaller firms being unable to obtain professional indemnity insurance and therefore being unable to enter or remain in the market).

Post-implementation review

- 8.27. Within 18 months of the single EDR body commencing its operations, an independent review should be undertaken to determine what impact (if any) the higher compensation cap has had on competition and consumer outcomes.
- 8.28. Where there is evidence that there has not been a substantial lessening of competition in the market, the compensation cap should be increased. This review process should continue in a staged manner until the compensation caps and monetary limits are aligned.

Ensuring the monetary limits and compensation caps remain fit-for-purpose

- 8.29. The Panel considers that monetary limits and compensation caps should be subject to regular indexation and review to ensure they remain fit-for-purpose and that the substantial majority of disputes can be resolved through EDR. Indexation should occur annually having regard to the principles identified above and the indexation process should be simple for the body to undertake and for users to understand.
- 8.30. The monetary limits and compensation caps should also be subject to review during the body's regular independent reviews and be subject to ASIC oversight and review.

A single monetary limit and compensation cap for all products

- 8.31. The Panel considers that the current system of differentiated product limits can be confusing for consumers and financial firms, and more difficult for the EDR body to administer. The Panel is generally of the view that, as a matter of principle, there should be a consistent monetary limit and compensation cap which applies across all financial products, except where there are compelling reasons for differences.
- 8.32. The Panel considers that there are at least two types of disputes where the imposition of a consistent monetary limit and compensation cap would be inappropriate: (a) disputes relating to whether a guarantee should be set aside where it has been supported by a mortgage or other security over the guarantor's primary place of residence; and (b) superannuation disputes.
- 8.33. In the case of a dispute in relation to a guarantee over a primary place of residence, the Panel was persuaded that, in light of the strong growth in house prices in major capital cities, the imposition of a monetary limit would result in the inappropriate exclusion of such disputes from EDR, even where the new limit

was raised to \$1 million.³⁰ The Panel is of the view that no monetary limit and compensation cap should apply in the case of these disputes, thereby ensuring that they can be brought to EDR and, where appropriate, the EDR body can set aside the guarantee.

- 8.34. In the case of superannuation disputes, the Panel is of the view that the shift to a new dispute resolution body should not result in a diminution of consumer protections, particularly given the compulsory nature of superannuation and expected increase in superannuation balances over time. The Panel, therefore, supports retaining the current unlimited monetary jurisdiction.
- 8.35. Without further evidence about whether the other different limits and caps currently operating are impeding consumers' access to redress, the Panel has decided not to make a final recommendation in relation to these monetary limits and compensation caps, but has recommended that these matters be considered by the new EDR body.

Recommendation 4: Enhancing access to redress for consumers

4.1 Higher monetary limits and compensation caps (other than for superannuation disputes)

The single EDR body should commence operations with a monetary limit of \$1 million and a compensation cap of no less than \$500,000.

4.2 Reviews of impacts of higher monetary limits and compensation caps

There should be two reviews of the body's monetary limits and compensation caps: an initial consultation prior to the commencement of the body and a second independent review following its implementation.

Pre-commencement consultation

During the process of transition and prior to commencement of the single EDR body, there should be consultation about:

- whether disputes in relation to certain products, including mortgages and general insurance products, should move immediately on commencement to a compensation cap of \$1 million; and
- whether there are compelling reasons to retain the current sub-limits applying to different insurance products.

30 Unlike many mortgage disputes where the amount in question relates to interest and charges, a dispute about a guarantee has the potential to make the guarantee unenforceable, which means that the full amount of the guarantee will often be in issue: see Khoury, Phil, *Independent Review of the Code of Banking Practice 2017*, page 118.

Enhancing access to redress for consumers (continued)

The lower compensation cap of \$500,000 should only apply where there is evidence that moving immediately to a compensation cap of \$1 million is likely to result in a substantial lessening of competition (as a result of smaller firms being unable to obtain professional indemnity insurance and therefore being unable to enter or remain in the market).

Post-implementation review

Within 18 months of the single EDR body commencing its operations, an independent review should be undertaken to determine what impact (if any) the higher compensation cap has had on competition and consumer outcomes.

Where there is evidence that there has not been a substantial lessening of competition in the market, the compensation cap should be increased. This review process should continue in a staged manner until the compensation cap and monetary limits are aligned.

4.3 Guarantees

There should be no monetary limits and compensation caps for disputes about whether a guarantee should be set aside where it has been supported by a mortgage or other security over the guarantor's primary place of residence.

4.4 Ensuring monetary limits and compensation caps remain fit-for-purpose

The consumer monetary limits and compensation caps should be subject to regular indexation and review. Monetary limits and compensation caps should be set by the EDR body in consultation with ASIC and industry and consumer stakeholders to ensure they remain fit-for-purpose and that the substantial majority of disputes can be resolved through EDR.

4.5 Monetary jurisdiction for superannuation disputes

The monetary jurisdiction for superannuation disputes should continue to be unlimited, in line with current arrangements.

IMPROVING ACCESS TO REDRESS FOR SMALL BUSINESS

- 8.36. Small businesses can possess characteristics which means they face many of the same issues as consumers in dealing with disputes and when seeking redress. This can include the owner's personal characteristics (language and cultural barriers), the nature of small business (lack of time and money) and the power imbalances they face against larger businesses.³¹
- 8.37. Additionally, the impact of a lack of access to justice can be particularly acute for a small business. Where a small business is faced with a dispute, this can impact on its financial viability and can result in an inability to pay employees and suppliers, the threat of bankruptcy, and personal stress and family breakdown.³² In the case of financial facilities, the small business owner will have often provided a mortgage over assets, such as the family home, and there may be guarantees from other family members.
- 8.38. For small businesses, the costs associated with disputes are not confined to the costs of resolving the individual dispute, such as legal fees, but extend to emotional stress and opportunity costs. These opportunity costs include the economic and social opportunities which small business operators could have pursued with their time and effort.
- 8.39. Ensuring small businesses have access to affordable dispute resolution has the potential not only to effectively resolve individual disputes and minimise the associated costs, but also to improve the conduct of financial firms, which may reduce the likelihood of future disputes arising. The Joint Consumer Group highlighted this point:

Access to affordable dispute resolution for consumers through existing EDR schemes has led to an improvement in the conduct of financial institutions. Access for a wider range of customers is likely to further improve the quality of the financial services provided to small businesses and the industry response when disputes arise.³³

Dispute resolution and advice services available to small businesses

- 8.40. The Panel is aware that small businesses can access advice and advocacy services from small business specific organisations, such as the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) and state-based small business commissioners. However, as the information below demonstrates, these bodies are unable to provide the comprehensive dispute resolution procedures which small businesses require.

31 Western Australian Small Business Development Corporation 2016, submission to the Australian Consumer Law Review Issues Paper, page 4. See also Australian Government 2015, *Competition Policy Review Final Report*, Canberra, page 407, where the Panel stated that it was 'convinced that there are significant barriers to small business taking private action to enforce competition laws'.

32 Western Australian Small Business Development Corporation 2016, submission to the Australian Consumer Law Review Issues Paper, page 5.

33 Joint Consumer Group, submission to the EDR Review Issues Paper, page 40.

Australian Small Business and Family Enterprise Ombudsman

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) commenced on 11 March 2016. It works with existing government services to avoid duplication and ensure that small businesses and family enterprises have access to the services best placed to help them.

The ASBFEO has two key functions, to assist small businesses and to advocate for them. Where a person requests assistance from the ASBFEO about a dispute, it can make recommendations on how the dispute may be managed. This includes making a recommendation that the parties undertake an alternative dispute resolution process and who should conduct that process.

To address concerns around impartiality, the ASBFEO is precluded from conducting the alternative dispute resolution process itself. However, it does have the power to publicise the fact that a party has refused to engage, or has withdrawn, from a dispute resolution process. On this issue, the Joint Consumer Submission observed that the ASBFEO is unable to make binding determinations and doesn't meet the Australian and New Zealand Ombudsman Association's definition of an 'ombudsman'.

New South Wales Small Business Commissioner

The Small Business Commissioner Act commenced in 2013. The Commissioner is an independent statutory officer, providing a voice for small business within government. The Commissioner's objectives include assisting small businesses to resolve their commercial dispute through mediation and other appropriate forms of alternative dispute resolution.

The Commissioner has received applications from small businesses on various issues including matters which relate to the unfair treatment of, or an unfair practice involving, the small business; concerns that a contract may contain unfair terms to which the small business is a party; or generally, where the parties cannot agree on how particular terms of their contract are to be performed. While the Commissioner provides small businesses an independent forum for dispute resolution as an alternative to potentially costly litigation, during the dispute resolution phase the Commissioner does not form a view regarding the parties' dispute.

The Office of the Small Business Commissioner's (OSBC) Dispute Resolution Unit provides strategic and procedural advice and information to help small business operators prevent or deal with a business dispute. It also assists parties to a dispute come up with their own commercial resolution, rather than resorting to litigation.

If an application for mediation is made to the Commissioner, the OSBC's Dispute Resolution Unit will contact the other party to hear their perspective and help the parties identify what needs to be addressed via its case management process; guiding them to find a resolution. Where appropriate, the Commissioner will organise a formal mediation session.

New South Wales Small Business Commissioner (continued)

The Commissioner has the power to compel a party to attend mediation and produce documents which would assist in resolving the dispute. A failure to comply with this request without reasonable excuse can result in the imposition of a penalty of \$11,000 for corporations and \$5,500 for individuals. To date this power has not been used and is considered a last resort. However, as with all mediation, the mediator doesn't have the power to decide a matter or impose a resolution on the parties.

Where an application is made to the Commissioner and the Commissioner decides to deal with the dispute, to assist the parties and the court, the Commissioner may ultimately certify in writing that alternative dispute resolution services provided by the Commissioner have failed to resolve the matter. A small business operator dealing with red tape, a systemic issue, or a matter of public interest can appeal to the Commissioner for advocacy on their matter. The Commissioner cannot challenge the decisions of regulators, yet where there is an allegation that a regulator has acted unfairly in the application of its authority, the Commissioner may assist the parties in resolving the matter

Dispute resolution services available to small businesses in the financial system

Financial Ombudsman Service

- 8.41. The focus on advice and advocacy undertaken by the ASBFEO and the NSW Small Business Commissioner can be contrasted with the ability of FOS to make binding determinations in favour of small businesses against financial firms.
- 8.42. FOS can hear a dispute from a 'small business', which is defined as a business with less than 20 employees, or if the business is or includes the manufacture of goods, a business with less than 100 employees.³⁴ This definition potentially covers the vast majority of businesses as approximately 98 per cent of Australian businesses have less than 20 employees.³⁵

34 Financial Ombudsman Service 2015, *Terms of Reference (as amended 1 January 2015)*, clause [20.1] 'Defined terms'.

35 Australian Bureau of Statistics 2016, *8165.0 – Counts of Australian Businesses, including Entries and Exits, Jun 2012 to Jun 2016*, ABS, Canberra.

- 8.43. FOS's current monetary limits and compensation caps for credit facility disputes are set out in the table below. For non-credit facility related small business disputes, a monetary limit of \$500,000 and a compensation cap of \$309,000 applies, which is the same as for consumer disputes.³⁶

Small Business Credit Facility (SBCF) element	Description	Current limits and caps
Claim limit	FOS cannot consider a dispute with a claim above this amount	\$500,000
Compensation cap	FOS cannot award compensation that exceeds this cap (excludes compensation for costs and interest)	\$309,000
SBCF limit for debt related disputes	FOS cannot consider a debt related dispute by a small business when the SBCF is above this amount	\$2 million

- 8.44. FOS's \$2 million limit on credit facilities was introduced in January 2015; prior to this change there was no limit on the credit facilities which FOS could consider. The change occurred following a recommendation contained in FOS's 2013 Independent Review which stated that in the case of large, complex commercial credit disputes, FOS should be more active in exercising its discretion to refuse to consider a dispute if it considered there to be a more appropriate forum.³⁷

- 8.45. The number of small business disputes FOS receives and the number of disputes that fall outside of its jurisdiction are contained in the table below.

	FY11	FY12	FY13	FY14	FY15	FY16
Disputes received	30,283	36,099	32,307	31,680	31,895	34,095
Disputes lodged by small business (% of disputes)³⁸	1,674 (5.5%)	1,937 (5.4%)	1,941 (6%)	1,658 (5.2%)	1,785 (5.6%)	1,931 (5.7%)
Disputes where related body corporate has greater than 20/100 employees	6	16	4	4	10	5
Disputes where small business credit facility exceeds \$2m	0	0	0	0	10	15

36 For all other (non-credit facility related) small business disputes, the monetary limits and compensation caps which apply for consumer disputes apply equally for small business disputes.

37 Cameron Ralph Navigator 2013, Report to Board of Financial Ombudsman Service 2013 Independent Review, pages 63-65. See also Financial Ombudsman Service, Independent Review Recommendations action table.

38 While the percentage of disputes lodged by small business is low, it may not reflect the true need of small businesses for access to EDR as small business disputes may not be brought to EDR because they fall outside of the scheme's monetary limits and compensation caps.

Credit and Investments Ombudsman

- 8.46. Similarly to FOS, CIO can hear a complaint from a small business³⁹ if the credit facility does not exceed \$2 million and the claimed loss does not exceed \$500,000, and it can award compensation up to \$309,000.⁴⁰ In 2015-16, small business disputes accounted for approximately 6.5 per cent of CIO's total complaints.⁴¹

	FY11	FY12	FY13	FY14	FY15	FY16
Complaints received	1,983	2,741	3,763	4,513	4,848	4,760
Disputes lodged by small business (%)⁴²	94 (4.7%)	156 (5.7%)	162 (4.3%)	235 (5.2%)	252 (5.2%)	308 (6.5%)
Not a consumer or small business as defined⁴³	5	10	5	11	14	6

- 8.47. In 2015-16, the average loan size CIO considered was \$285,982, with 97 per cent of small business complaints associated with loans that did not exceed \$2 million.⁴⁴

Panel finding

The small business monetary limits and compensation caps are currently inadequate which means small businesses are unable to access effective dispute resolution arrangements.

Small business lenders

Submissions on small business monetary limits and compensation caps

- 8.48. In its Interim Report, the Panel made a draft recommendation that the new EDR scheme should have monetary limits and compensation caps for small business

39 A small business is defined as a business which employs fewer than: 100 full-time (or equivalent) employees, if the business is or includes the manufacture of goods; or otherwise, 20 full-time (or equivalent) employees: Credit and Investment Ombudsman *Rules (10th edition)*, clause 45.1 'Dictionary'.

40 Credit and Investments Ombudsman, *Credit and Investments Ombudsman Rules (10th edition)*, clause 9.1 'Remedies and Orders available to a complainant'. In certain cases, CIO limits the small business complaints it can hear to businesses which did not have net assets of \$2.5 million or more, or gross income of \$250,000 or more, for each of the two financial years prior to the date of making the complaint: see Credit and Investment Ombudsman *Rules (10th edition)*, clause 45.1 'Dictionary'.

41 Credit and Investments Ombudsman, data supplied to EDR Review, 11 October 2016.

42 While the percentage of disputes lodged by small business is low, it may not reflect the true need of small businesses for access to EDR as small business disputes may not be brought to EDR because they fall out of the scheme's monetary limits and compensation caps.

43 Disputes lodged which fall outside of the Credit and Investments Ombudsman's definition of who constitutes a 'consumer' and 'small business': see Credit and Investments Ombudsman, *Credit and Investments Ombudsman Rules (10th edition)*.

44 Credit and Investments Ombudsman, submission to the EDR Review Issues Paper, page 45.

disputes that are higher than the current arrangements, and that are subject to regular indexation.

- 8.49. The Panel made an information request in relation to what the monetary limits and compensation caps should be for the new scheme and whether consumers and small businesses should have different limits and caps. The Panel also requested information on what principles should guide the levels at which the limits and compensation caps are set, and what indexation arrangements should apply to ensure the limits and compensation caps remain fit-for-purpose.

Support for higher monetary limits and compensation caps

- 8.50. A majority of stakeholders who provided a submission in response to the Panel's draft recommendation supported an increase in the small business credit facility limit and compensation cap.
- 8.51. FOS submitted there should be an increase in the small business credit facility limit to \$5 million and a compensation cap for those disputes of at least \$1 million.⁴⁵ Beyond these limits, FOS stated that because of the limitations and gaps in data and information, there was uncertainty about the types and appropriateness of matters that FOS might receive.⁴⁶ However, it submitted that there could be grounds to support an increased jurisdiction of a \$2 million compensation cap and a \$10 million credit facility limit should this form part of an integrated package of reforms.⁴⁷
- 8.52. FOS also proposed that the claim limit not apply where the small business applicant's claim was to set aside a guarantee supported by a mortgage or other security over the guarantor's primary place of residence.⁴⁸
- 8.53. In preparing its submission, FOS submitted that it used feedback it received through its recent consultation process on expanding its small business jurisdiction, additional data from banks, the Reserve Bank of Australia, the Australian Prudential Regulation Authority and the Australian Bureau of Agricultural and Resources Economics and Sciences. FOS also commissioned KPMG to undertake some additional modelling on recent changes in relevant economic indicators.⁴⁹
- 8.54. Legal Aid Queensland submitted that FOS's existing jurisdiction was not reflective of current commercial reality for rural producers and rural small business. It considered that the claim limit and compensation cap should be increased to \$3 million as this was a commercially realistic figure given the

45 Financial Ombudsman Service, submission to the EDR Review Interim Report, page 25.

46 Financial Ombudsman Service, submission to the EDR Review Interim Report, page 26.

47 Financial Ombudsman Service, submission to the EDR Review Interim Report, page 26; see also Financial Ombudsman Service 2016, *Expansion of FOS's Small Business Jurisdiction Consultation Paper*, where FOS proposed a monetary limit and compensation cap of \$2 million and a credit facility limit of \$10 million.

48 Financial Ombudsman Service, submission to the EDR Review Interim Report, page 26.

49 Financial Ombudsman Service, submission to the EDR Review Interim Report, page 24.

operational costs of establishing and maintaining a small business.⁵⁰ The Joint Consumer Group submitted there should be a claim limit and compensation cap of \$2 million. It was stated that this would be consistent with the consumer monetary limits and compensation caps and it would simplify the scheme's jurisdiction and avoid further confusion for all parties.⁵¹

8.55. The ABA also supported increasing the limits and compensation caps for small business credit disputes so that in relation to a credit facility of up to \$3 million:

- small businesses could bring credit disputes up to the value of \$1 million; and
- a scheme could award compensation in relation to credit disputes up to \$1 million.⁵²

8.56. The ABA stated that this approach reflected the intention that EDR be an alternative dispute resolution process for small disputes and customers who do not have the resources to use the court system.⁵³ It also submitted that there should be a revised small business test which took into account: the number of employees; business turnover; size of the loan for business purposes; and total credit exposure of the business group.⁵⁴ The ABA's position was broadly supported by ANZ and NAB.⁵⁵

50 Legal Aid Queensland, submission to the EDR Review Interim Report, page 5.

51 Joint Consumer Group, submission to the EDR Review Interim Report, pages 16-18.

52 Australian Bankers' Association, submission to the EDR Review Interim Report, page 5.

53 Australian Bankers' Association, submission to the EDR Review Interim Report, page 5.

54 Australian Bankers' Association, submission to the EDR Review Interim Report, page 4.

55 ANZ, submission to the EDR Review Interim Report, pages 2-3; National Australia Bank, submission to the EDR Review Interim Report, page 3.

Inquiry into small business lending practices

On 31 August 2016, the Australian Government directed the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) to undertake an inquiry into the adequacy of the law and practices governing financial lending to small businesses to address concerns raised by the Parliamentary Joint Committee on Corporations and Financial Services in its report, *Impairment of Customer Loans*.

The Ombudsman's Terms of Reference also required it to provide interim findings to this Review. On 8 November 2016, the ASBFEO provided its interim findings to the Panel.

On 3 February 2017, the Australian Government released the ASBFEO's report into small business lending practices.

The report made 15 recommendations designed to address gaps in the existing regulatory environment and with the practices of industry participants.

The report found that under the current framework, there was an inability for small businesses to obtain access to justice, which was unsatisfactory and needed to be addressed. As a result, the ASBFEO recommended (recommendation 11) that the banking industry fund an external dispute resolution one-stop shop with a dedicated small business unit that has appropriate expertise to resolve disputes relating to a credit facility limit of up to \$5 million.

This independent body would be able to:

- consider disputes relating to credit facilities up to \$5 million;
- award compensation of up to \$2 million;
- make a determination that is binding on the banks;
- require bank customer advocates to report on determinations to ensure they are enforced; and
- investigate and reach a determination within a fixed timeframe.

When releasing the report, the Minister for Revenue and Financial Services wrote to the Panel to ask that it take particular account of recommendation 11 in developing the Final Report.

Independent Review of the Code of Banking Practice

On 20 February 2017, the *Independent Review of the Code of Banking Practice* was publicly released. The Review made a number of findings and recommendations in relation to small business lending.

The Review, relevantly, found that, consistent with the ASBFEO's report, the Code provisions relating to loans should apply only to a small business credit facility of less than \$5 million. A \$5 million limit was chosen as it was considered that a credit facility above that amount had the potential to take on a heightened level of complexity.

Support for maintaining the current limits and compensation caps

- 8.57. The Panel also received a number of submissions which did not support higher monetary limits and compensation caps for small business disputes.⁵⁶
- 8.58. The Customer Owned Banking Association (COBA) was concerned that expanding the existing small business jurisdiction would be a move away from the original intention of EDR as a mechanism for those without the means to pursue their claim through the courts. It submitted that sole-traders and small operators (with less than 20 employees) should have access to EDR as these businesses had limited resources and knowledge to challenge a dispute with their financial institution through the court system. According to COBA, the ASBFEO was better placed to deal with small business disputes because they tend to be complex and require highly specialised skills.⁵⁷
- 8.59. CIO was of a similar view, stating that even if the limits and caps were raised, its ability to deal fairly and effectively with small business loans was limited given it lacked the powers of a statutory scheme. In those circumstances, small businesses with complicated loans involving large sums of money would be more appropriately dealt with by a tribunal.⁵⁸
- 8.60. The Insurance Council of Australia submitted that with regard to small business insurance disputes, it had not been made aware that the compensation cap had resulted in a lack of access.⁵⁹ The Australian Financial Markets Association also did not support the Panel's draft recommendation and stated that the concept of 'small business' was alien to the *Corporations Act 2001* which was based on the concepts of retail investor and consumer credit protection.⁶⁰

Indexation arrangements

- 8.61. A number of submissions supported indexation arrangements to ensure the limits and compensation caps remained fit-for-purpose. The types of proposed arrangements the Panel received included:
- a fixed increase every three years, with the new limits and caps based on a review of the adequacy of the existing limits having regard to the value and cost of financial services and products in Australia, with the limits and caps rounded to the nearest \$10,000 to ensure the jurisdiction is as simple and clear as possible;⁶¹ and

56 Financial Services Council, submission to the EDR Review Interim Report, page 6.

57 Customer Owned Banking Association, submission to the EDR Review Interim Report, page 3.

58 Credit and Investments Ombudsman, submission to the EDR Review Interim Report, pages 27-28.

59 Insurance Council of Australia, submission to the EDR Review Interim Report, page 5.

60 Australian Financial Markets Association, submission to the EDR Review Interim Report, page 3.

61 Joint Consumer Group, submission to the EDR Review Interim Report, page 18.

- indexation which accounts for inflation and which maintains the real value of the monetary limits and compensation caps.⁶²

Panel analysis

A principles-based approach to setting monetary limits and compensation caps

- 8.62. Small business must be able to access effective dispute resolution arrangements. In determining the appropriate monetary limits and compensation caps for disputes, the Panel considers the following principles to be relevant:
- the substantial majority of small business disputes should be able to be resolved by the EDR body;
 - the monetary limits and compensation caps should reflect general economic indicators and the levels of credit facilities and financial products held by small businesses;
 - account should be taken of the impact that increasing the compensation cap could have on competition (as a result of smaller financial firms being unable to obtain professional indemnity insurance and therefore being unable to enter or remain in the market); and
 - the monetary limits and compensation caps should be easy for small businesses to understand and for the body to apply.
- 8.63. As was the case with consumer disputes, the Panel is aware that an increase in the monetary limits and compensation caps may impact the cost and availability of professional indemnity insurance. However, the Panel notes that most small business lenders are authorised deposit-taking institutions, which are prudentially regulated and not required to hold professional indemnity insurance.
- 8.64. The Panel was provided with information from a number of sources about the levels of small business lending in the economy. FOS submitted that, broadly, about 98 per cent of business customers have loans under \$5 million and most of these are below \$1 million.⁶³ The ASBFEO's Inquiry into small business loans also indicated that the banks had informed the Inquiry that approximately 98 per cent of lending to small business customers was under \$5 million.⁶⁴ However, the Panel notes that there are challenges in obtaining an accurate picture about the extent of lending to small business.⁶⁵
- 8.65. FOS provided evidence of analysis performed on the economic indicators related to the small business credit facility limit and the claims limit for small business

62 National Australia Bank, submission to the EDR Review Interim Report, page 3; Legal Aid Queensland, submission to the EDR Review Interim Report, page 5.

63 Financial Ombudsman Service, submission to the EDR Review Interim Report, page 27.

64 Australian Small Business and Family Enterprise Ombudsman 2016, *Inquiry into small business loans*, page 23.

65 Khoury, Phil, *Independent Review Code of Banking Practice 2017*, page 44.

credit disputes.⁶⁶ This analysis indicated that business debt had been growing over the past two decades at a rate about 2.7 times greater than inflation and businesses were increasingly using debt to finance investments.⁶⁷ This analysis found that the current credit facility and claims limits were below current target levels based on relevant economic indicators.⁶⁸

8.66. FOS also provided a case study of potential accrued interest payments under a range of default scenarios, which supported a compensation cap in the range of \$1 to 2 million.⁶⁹

Higher monetary limits and compensation caps

8.67. As observed above in relation to consumer disputes, given the co-regulatory nature of the EDR framework, the monetary limits and compensation caps should be set by the single EDR body itself in consultation with ASIC and small business, industry and consumer stakeholders. However, given the nature of this Review, the Panel has taken the opportunity to set what it regards as key benchmarks and recommends that:

- for small business disputes, other than credit facility disputes, the EDR body should commence operations with a monetary limit of \$1 million and a compensation cap of no less than \$500,000; and
- for credit facility disputes, small businesses should be able to bring a claim where a small business credit facility is of an amount up to \$5 million and the EDR body should commence operations with a compensation cap of \$1 million.

8.68. The Panel considers that, in relation to credit facility disputes, the monetary limit, which is currently \$500,000, should be abolished to ensure small businesses are not unnecessarily denied access to justice.

8.69. The increases the Panel has recommended are significant and will expand the ability of small business to obtain access to EDR:

- for small business disputes, other than credit facility disputes, the monetary limit will increase by 100 per cent relative to the current limit and the compensation cap will increase by 62 per cent relative to the current cap; and
- for small business credit facility disputes, the credit facility limit will increase by 250 per cent relative to the current limit and the compensation cap will increase by 224 per cent relative to the current cap.

66 Financial Ombudsman Service, submission to the EDR Review Interim Report, Appendix D. The economic indicators specific to the credit product line were business debt outstanding and interest rates applicable to businesses. The general economic indicators used were stock market volatility and interest rate volatility.

67 Financial Ombudsman Service, submission to the EDR Review Interim Report, page 28.

68 Financial Ombudsman Service, submission to the EDR Review Interim Report, Appendix D, page 18.

69 Financial Ombudsman Service, submission to the EDR Review Interim Report, page 29.

- 8.70. The Panel also considers that the claim limits should not apply where there is a dispute relating to whether a guarantee should be set aside where it has been supported by a mortgage or other security over the guarantor's primary place of residence.
- 8.71. As part of the post-implementation review to be conducted in relation monetary limits and compensation caps for consumers (described above), the EDR body should also consider whether the credit facility limit and compensation cap for credit facility disputes should be increased.
- 8.72. For the reasons identified in relation to consumer disputes, the distinction between monetary limits and compensation caps should also be removed.

Ensuring the monetary limits and compensation caps remain fit-for-purpose

- 8.73. The small business monetary limits and compensation caps should be subject to regular indexation and review to ensure they remain fit-for-purpose and that the substantial majority of disputes can be resolved through EDR. Indexation should occur annually having regard to the principles identified above and the indexation process should be simple for the body to undertake and for users to understand.
- 8.74. The monetary limits and compensation caps should also be subject to review during the regular independent reviews of the EDR body and be subject to ASIC oversight and review.

Defining 'small business'

- 8.75. The Panel considers it important for small business to have appropriate access to effective dispute resolution arrangements. Under the current framework, the definition of small business used, for example by FOS, covers the substantial majority of businesses as approximately 98 per cent of Australian businesses have less than 20 employees.⁷⁰
- 8.76. The Panel's recommendation to increase the monetary limits and compensation cap for small business disputes will enhance access to redress for these businesses. The Panel, therefore, does not consider that a change in the definition of small business is currently required. However, the EDR body should continue to engage with stakeholders to ensure its small business definition remains appropriate.

Small business lenders who are not required to be members of an EDR scheme

- 8.77. As the *National Consumer Credit Protection Act 2009* (Credit Act) does not apply to loans for business purposes, lenders that do not provide consumer credit are not required to hold an Australian credit licence and are, therefore, not required to belong to an EDR scheme.

⁷⁰ Australian Bureau of Statistics 2016, *8165.0 – Counts of Australian Businesses, including Entries and Exits*, Jun 2012 to Jun 2016, ABS, Canberra.

- 8.78. Where a small business dispute is with a lender that is not required to be a member of an EDR scheme, increasing the monetary limits and compensation caps will not enhance access to redress. In its Interim Report, the Panel made an information request about whether the protections in the Credit Act should extend to small businesses.
- 8.79. The Panel received a small number of submissions concerning this issue. The Joint Consumer Group recommended that all small business lenders should be required to hold a relevant licence and maintain membership of an ASIC-approved industry ombudsman scheme, with one method of achieving this being to extend the protections of the Act to small business lending.⁷¹ The ABA supported small business customers having appropriate access to EDR, but stated that this could be achieved without extending the Credit Act to small business.⁷²
- 8.80. Given the lack of evidence received by the Panel, including on the number of small business disputes that may be excluded from EDR as a result of this issue, the diverging views of stakeholders who did comment and potential implications of extending the Credit Act, for example, a possible negative impact on the cost and availability of credit for small business, the Panel has decided not to make a recommendation.

Recommendation 5: Enhancing access to redress for small business

For small business disputes, other than credit facility disputes, the single EDR body should commence operations with a monetary limit of \$1 million and a compensation cap of no less than \$500,000.

For credit facility disputes, small businesses should be able to bring a claim where a small business credit facility is of an amount up to \$5 million and the single EDR body should be able to award compensation of up to \$1 million.

There should be no monetary limits and compensation caps for disputes about whether a guarantee should be set aside where it has been supported by a mortgage or other security over the guarantor's primary place of residence.

The small business monetary limits and compensation caps should be subject to regular indexation and review. Monetary limits and compensation caps should be set by the single EDR body in consultation with ASIC and small business, industry and consumer stakeholders to ensure they remain fit-for-purpose and that the substantial majority of disputes can be resolved through EDR.

71 Joint Consumer Group, submission to the EDR Review Interim Report, page 20.

72 Australian Bankers' Association, submission to the EDR Review Interim Report, page 12.

Chapter 9: Accountability and oversight

Key points

- A strength of the current EDR framework has been the co-regulatory approach. This has provided industry ombudsman schemes with the flexibility to evolve, while being subject to legislative and regulatory requirements and ASIC oversight.
- With the move to a single EDR body for all financial disputes, accountability and oversight within the EDR framework should be strengthened.
- The single EDR body will be required to:
 - ensure it has sufficient funding and flexible processes to allow it to deal with unforeseen events;
 - have appropriate levels of financial transparency;
 - be subject to regular independent reviews and publish detailed responses in relation to recommendations of independent reviews; and
 - have an independent assessor to review how it handles disputes.
- ASIC should be provided with a general directions power to allow it to compel performance from the single EDR body if it does not comply with legislative and regulatory requirements. This power should be used as a last resort following consultation with the single EDR body.

ENSURING THE SINGLE EDR BODY IS ACCOUNTABLE TO USERS

The current framework

- 9.1. Under the current co-regulatory approach, industry ombudsman schemes have the flexibility to develop their own arrangements within a regulatory framework. This has provided industry ombudsman schemes with the flexibility to evolve, while being subject to legislative and regulatory requirements and ASIC oversight.
- 9.2. Under the current framework, industry ombudsman schemes are held to account through a number of different mechanisms, including:
 - being governed by an independent board; and
 - being required to commission regular independent reviews.

Independence

- 9.3. In order for users to have confidence in EDR, it is important that the EDR schemes are, and are perceived to be, independent and accountable.
- 9.4. Current governance arrangements require the board to have an independent chair and an equal number of directors from consumer and industry backgrounds, who are appointed following consultation with consumer and industry stakeholders.¹
- 9.5. The majority of submissions commenting on the schemes' governance arrangements were broadly supportive of the current model, although some stakeholders suggested minor amendments.²
- 9.6. The Panel is aware that alternative ombudsman governance models exist. For example, the Board of the Telecommunications Industry Ombudsman (TIO) has an equal number of consumer, industry and independent directors, along with an independent chair. At the United Kingdom's Financial Ombudsman Service (UK FOS), directors are approved by the Financial Conduct Authority (FCA). The Chairperson is appointed by the FCA with approval of HM Treasury.

1 Australian Securities and Investments Commission 2013, Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes*, page 23.

2 For example, the Financial Planning Association of Australia (FPAA) stated there was a need for different professions, including financial planners, to be represented on the board (see FPAA, submission to the EDR Review Interim Report, page 3).

- 9.7. Another issue raised with the Panel was in relation to the schemes being industry funded. Some individuals raised concerns with the Panel that the current funding model undermines scheme independence,³ however, a number of submissions noted that industry funding provides schemes with autonomy to determine their own funding needs and how funds should be applied.⁴ For example, the Joint Consumer Group noted ‘the funding model is a critical element of the success of industry-based EDR’.⁵

Panel analysis

- 9.8. The Panel considers industry funding to be a strength because, when properly designed, the funding mechanism creates incentives for firms to resolve disputes at the earliest possible stage. The evidence of schemes changing funding models and increasing the scope of their terms of reference over time demonstrates that their operations are not dictated by industry, despite industry funding.

Panel finding

The governance model of industry ombudsman schemes, with equal numbers of directors of industry and consumer backgrounds and an independent chair, ensures that schemes can operate independently of industry.

Independent reviews

- 9.9. ASIC’s Regulatory Guide 139 requires approved EDR schemes to commission an independent review of their operations and procedures three years after their initial approval and every five years thereafter, unless a shorter timeframe is specified.⁶ Independent reviews involve an intensive and comprehensive examination of whether the scheme continues to comply with the relevant EDR benchmarks and whether it is meeting its regulatory obligations.⁷ They include both a qualitative assessment and quantitative measures of a scheme’s performance.⁸

3 O’Reilly, S, submission to the EDR Review Issues Paper, page 15; Field, S, submission to the EDR Review Issues Paper, page 1.

4 Australian Bankers’ Association, submission to the EDR Review Issues Paper, page 12.

5 Joint Consumer Group, submission to the EDR Review Issues Paper, page 49.

6 Australian Securities and Investments Commission 2013, *Regulatory Guide 139 Approval and oversight of external dispute resolution schemes*, page 32.

7 Financial Ombudsman Service, submission to the EDR Review Issues Paper, page 17.

8 Australian Securities and Investments Commission 2013, *Regulatory Guide 139 Approval and oversight of external dispute resolution schemes*, page 33.

Panel analysis

- 9.10. Regular independent reviews of an EDR scheme's performance and procedures provide important feedback about how the scheme should evolve and areas that should be changed or improved.⁹ They are critical to public accountability and help to promote a culture of continuous improvement within the schemes.¹⁰
- 9.11. Many positive changes have resulted from recommendations made by independent reviews, including FOS re-engineering its dispute resolution processes which reduced the time to resolve disputes and eliminated the backlogs that existed at the time.
- 9.12. In these regards, independent reviews are a valuable source of information for the scheme itself, ASIC and stakeholders more broadly.
- 9.13. However, there are limitations under the current framework, including:
- reviews are generally only required to be undertaken every five years and ASIC has limited powers to require schemes to initiate reviews outside of this cycle;
 - while in practice schemes negotiate with ASIC over the terms of reference for a review, there is no requirement that ASIC approves the terms of reference;
 - ASIC does not have a clear power to require a scheme to conduct a targeted review in response to a particular identified problem; and
 - there is no obligation on schemes to publish detailed responses to an independent review's recommendations or to report on implementation or follow-up action following an independent review.

Panel finding

Regular independent reviews of an EDR scheme's performance and procedures are an important feedback and accountability mechanism to ensure they continue to evolve and improve.

9 Australian Securities and Investments Commission 2013, Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes*, page 32.

10 Joint Consumer Group, submission to the EDR Review Issues Paper, page 12.

Submissions on enhancing accountability

- 9.14. In its Interim Report, the Panel made a draft recommendation that ASIC's regulatory guidance must require the two proposed new industry ombudsmen to:
- ensure they have sufficient funding and flexible processes to allow them to deal with unforeseen events in the system, such as an increase in complaints following a financial crisis or natural disaster;
 - provide an appropriate level of financial transparency to ensure they remain accountable to users and the wider public; and
 - be subject to more frequent, periodic independent reviews and provide detailed responses in relation to recommendations of independent reviews.
- 9.15. The Panel also proposed each scheme establish an independent assessor to review the handling of complaints, but not to review the outcome of individual disputes (that is, not to be an avenue of appeal). The Panel considered that where sufficiently resourced and empowered, an independent assessor would play an important role in improving the standard of complaints handling and in enhancing accountability and transparency.
- 9.16. The Panel received submissions from a number of stakeholders in response to its draft recommendation, with stakeholders supportive of the Panel's approach overall.¹¹

Support for sufficient funding and flexible processes

- 9.17. The Insurance Council of Australia (ICA) agreed with the Panel's proposal that the scheme should have sufficient funding and flexible processes indicating it was particularly important for general insurance disputes where events, such as a natural disaster, could lead to an unforeseen increase in dispute numbers.¹²
- 9.18. FOS also agreed that schemes should have sufficient funding and flexibility to manage significant events that could create an increase in disputes. FOS submitted that it had a significant events framework in place to respond to events which could cause a spike in disputes. It also stated that its funding framework included mechanisms that enabled resourcing to be scaled up as required, such as through dispute fees and levy arrangements.¹³

11 Joint Consumer Group, submission to the EDR Review Interim Report, page 28; Association of Superannuation Funds of Australia, submission to the EDR Review Interim Report, page 15; Financial Planning Association of Australia, submission to the EDR Review Interim Report, page 5.

12 Insurance Council of Australia, submission to the EDR Review Interim Report, page 6.

13 Financial Ombudsman Service, submission to the EDR Review Interim Report, page 34.

Support for financial transparency

- 9.19. The ICA supported the Panel's recommendation that there should be an appropriate level of financial transparency to ensure the EDR body remains accountable to users and the wider public. It stated that it was important that any new body provided clarity around fee structures and charges to all stakeholders, including the financial firms who fund the scheme.¹⁴
- 9.20. FOS submitted that it supported transparency of its funding arrangements consistent with current practice. It stated that it publishes annual financial statements, which it presents at its Annual General Meeting, and consults widely with members on any changes to funding arrangements.¹⁵
- 9.21. SCT noted that as a statutory body, it is already required to publicly disclose financial and operational information. It noted that 'improved visibility and control of funding [...] would enable a governing board to undertake business diligence to appropriately assess and decide on the level of services to be provided, and the required funding'.¹⁶
- 9.22. QBE provided in-principle support for the Panel's draft recommendation and submitted that, in the interests of transparency, industry users who fund the body should be provided with a level of detail on fee setting and charges.¹⁷

Support for regular independent reviews

- 9.23. The ICA submitted that there may be some merit in reducing the period between independent reviews to every three or four years. However, it stated that the right balance must be maintained. Most important for the ICA was that a full and thorough independent review be carried out and that, following this, there was time for the recommendations to be implemented, embedded and evaluated.¹⁸ The ICA suggested that it would be more helpful to stipulate periodic independent reviews combined with ongoing opportunity for stakeholder consultation and feedback. This would facilitate constructive, continuous development.¹⁹
- 9.24. SCT considered frequent independent reviews to be a sound organisational governance practice and one that could be incorporated into the governing rules of an organisation including a statutory body.²⁰
- 9.25. The ABA provided in-principle support for the Panel's draft recommendation and submitted that the requirement to undertake independent reviews should

14 Insurance Council of Australia, submission to the EDR Review Interim Report, page 6.

15 Financial Ombudsman Service, submission to the EDR Review Interim Report, page 35.

16 Superannuation Complaints Tribunal, submission to the EDR Review Interim Report, page 27.

17 QBE, submission to the EDR Review Interim Report, page 3.

18 Insurance Council of Australia, submission to the EDR Review Interim Report, page 6.

19 Insurance Council of Australia, submission to the EDR Review Interim Report, page 6.

20 Superannuation Complaints Tribunal, submission to the EDR Review Interim Report, page 27.

still allow for sufficient flexibility to target resources to address specific risks or issues, and manage costs.²¹

- 9.26. FOS agreed that schemes should provide detailed responses in relation to recommendations of independent reviews, including updates on the implementation of actions taken in response to the reviews and a detailed explanation when a recommendation of an independent review was not accepted.²²
- 9.27. However, FOS submitted that if more frequent periodic reviews were considered an important accountability mechanism, then it was critical that there be sufficient flexibility to enable the reviews to focus on specific areas rather than mandate a full review on each occasion, which was a major, costly and time consuming exercise.²³

Views on an independent assessor

- 9.28. The ICA supported the establishment of an independent assessor to review the handling of complaints by the scheme, with the assessor available to both consumers and financial firms. This could work alongside the ability to grant financial firms the right to appeal a determination to genuinely test the handling of disputes.²⁴
- 9.29. CIO submitted that it supported the establishment of an independent assessor whose role would be to investigate complaints by users.²⁵ The Association of Securities and Derivatives Advisers of Australia also supported the establishment of an independent assessor.²⁶
- 9.30. SCT noted in its submission that, in an industry model that does not inherently provide for external scrutiny of dispute handling, it is supportive of the role of an independent assessor.²⁷
- 9.31. FOS submitted that it would appoint an external assessor to independently review complaints about service issues in dispute handling (an 'independent assessor') and in December 2016 advertised this position. The person would be appointed by and report to the FOS Board.²⁸ The independent assessor would not review the substance of decisions (that is, they would not act as a review or appeal mechanism on the findings or outcomes of FOS decisions). Their role would be limited to complaints from consumers and financial firms about service issues in relation to the handling of the dispute.

21 Australian Bankers' Association, submission to the EDR Review Interim Report, page 9.

22 Financial Ombudsman Service, submission to the EDR Review Interim Report, page 35.

23 Financial Ombudsman Service, submission to the EDR Review Interim Report, pages 35-36.

24 Insurance Council of Australia, submission to the EDR Review Interim Report, page 6.

25 Credit and Investments Ombudsman, submission to the EDR Review Interim Report, page 31.

26 Association of Securities and Derivatives Advisers of Australia, submission to the EDR Review Interim Report, page 6.

27 Superannuation Complaints Tribunal, submission to the EDR Review Interim Report, page 27.

28 Financial Ombudsman Service, submission to the EDR Review Issues Paper, page 22.

- 9.32. By contrast, Legal Aid Queensland submitted that it was concerned that the proposed independent assessor would:
- create confusion for vulnerable consumers who would see the assessor as an avenue of appeal for their dispute;
 - unnecessarily extend the dispute resolution process as it was likely that unhappy parties would use the independent assessor even where they had been treated fairly; and
 - not add to the quality assurance frameworks that exist in current ombudsman schemes.²⁹

Panel analysis

- 9.33. A strength of the EDR framework has been the co-regulatory approach, which has provided industry ombudsman schemes with the flexibility to evolve in response to market changes, changing stakeholder expectations and the recommendations of independent reviews, while being subject to oversight by ASIC.
- 9.34. The strong governance model of industry ombudsman schemes, with an independent chair and equal numbers of directors of consumer and industry backgrounds, ensures that boards are able to make decisions about funding and other matters in the best interests of the scheme.
- 9.35. While industry funding of industry ombudsman schemes can create a perception among some stakeholders that schemes are biased towards industry, there is no evidence that this arrangement compromises scheme independence. The Panel considers industry funding to be a strength because, when properly designed, the funding mechanism creates incentives for firms to resolve disputes at the earliest possible stage. The evidence of schemes changing funding models and increasing the scope of their terms of reference over time demonstrates that their operations are not dictated by industry, despite industry funding.
- 9.36. With the move to a single EDR body for all financial disputes, the Panel considers it important to strengthen the body's accountability to its users.
- 9.37. First, there should be a stronger requirement for the single EDR body to demonstrate that it has adequate funding and flexibility to respond to unanticipated events.
- 9.38. Secondly, financial transparency should be improved, so that users of EDR can understand how funding is collected and used. Transparency about funding arrangements, and levels of revenue and expenditure, provides an important form of accountability. It also has the potential to drive efficiencies, which reduces the costs imposed on users.

29 Legal Aid Queensland, submission to the EDR Review Interim Report, pages 7-8.

- 9.39. Thirdly, there should be more frequent independent reviews, based on a program of reviews approved by ASIC. This should include a comprehensive review of how the EDR body is meeting the EDR benchmarks at least every five years, with more targeted reviews in the intervening period.
- 9.40. Fourthly, the single EDR body should consult with ASIC on the terms of reference of the reviews it commissions, with ASIC having the power to amend those terms of reference to require the inclusion of additional matters where it believes that is appropriate.
- 9.41. The single EDR body should also publish detailed responses in relation to recommendations of independent reviews, including updates on the implementation of action in response to recommendations and a detailed explanation where a recommendation has not been accepted.
- 9.42. Finally, the single EDR body should establish an independent assessor to review the handling of complaints. The independent assessor should not be an avenue of appeal for individual disputes. Instead, the assessor's role should focus on reviewing the service provided to users in the handling of the dispute. Where the independent assessor determines that the dispute was not handled satisfactorily, the assessor may recommend that the EDR body take certain actions, including making an apology or providing compensation to the affected user.

Recommendation 6: Ensuring the single EDR body is accountable to users

The single EDR body should be subject to enhanced accountability which would, at a minimum, include:

- ensuring it has sufficient funding and flexible processes to allow it to deal with unforeseen events, such as an increase in disputes following a financial crisis or natural disaster;
- providing an appropriate level of financial transparency to ensure it remains accountable to users and the wider public;
- being subject to regular independent reviews and publishing detailed responses in relation to recommendations of independent reviews; and
- an independent assessor to review complaints about the handling of disputes by the body.

ENHANCING OVERSIGHT OF THE NEW EDR BODY

Current framework

- 9.43. ASIC's powers in relation to the existing EDR schemes are limited to approving a scheme, varying an approval (for example, by imposing a condition on approval), or revoking the approval. Revoking approval for a scheme would have significant implications for members who must, as a licence condition, belong to an approved EDR scheme. This means, in practice, ASIC is limited in

its ability to take action to address non-compliance with legislative or regulatory requirements.

- 9.44. In its Interim Report, the Panel proposed providing ASIC with more specific powers to enable it to compel performance if the schemes do not comply with EDR benchmarks. The Interim Report also included an information request seeking views on the matters on which ASIC should have the power to give directions.

Stakeholder submissions on increased powers

Maintaining character of industry ombudsman schemes

- 9.45. Many stakeholders were supportive of increased powers for ASIC, but also referred to the inherent tension between ASIC's regulatory role and the desire to maintain the independence of the schemes.³⁰
- 9.46. The Joint Consumer Group submission supported enhanced powers for ASIC, but was of the view that these powers should not be increased to such an extent that the schemes become statutory schemes, noting the trade-off between the flexibility and responsiveness of the schemes at present and increased ASIC oversight. The submission also cautioned that increased ASIC oversight should not detract from the important role of the board.³¹
- 9.47. QBE supported ASIC oversight of the schemes, but also noted the importance of ensuring that the schemes ultimately retain a degree of independence.³² Likewise, the ICA commented that clear boundaries must be established to ensure the scheme operates with accountability to ASIC yet remains independent.³³
- 9.48. ASIC was supportive of taking an increased role in the oversight of schemes, but not to the extent that the new schemes effectively became statutory schemes. Similarly, FOS reiterated the importance of the schemes remaining, and being seen to remain, independent of the regulator.³⁴

What powers should ASIC be granted?

- 9.49. Rather than a series of specific powers in relation to the operation and performance of the schemes, ASIC was of the view it required a new general directions power. ASIC suggested that any new powers should be used to ensure schemes comply with EDR benchmarks and that, if a scheme was failing to meet EDR benchmarks, then ASIC should be empowered to give directions to the scheme to remedy the problem.³⁵

30 Australian Bankers' Association, submission to the EDR Review Interim Report, page 9.

31 Joint Consumer Group, submission to the EDR Review Interim Report, page 28.

32 QBE, submission to the EDR Review Interim Report, page 3.

33 Insurance Council of Australia, submission to the EDR Review Interim Report, page 7.

34 Financial Ombudsman Service, submission to the EDR Review Interim Report, page 36.

35 Australian Securities and Investments Commission, submission to the EDR Review Interim Report, page 10.

- 9.50. ASIC provided some examples of when such a power might be used including, but not limited to, directing a scheme to:
- conduct independent audits and reviews;
 - raise additional funds to ensure adequate resourcing;
 - report certain information to ASIC, for example, about systemic issues; and
 - change its monetary limits and compensation caps.³⁶
- 9.51. FOS supported an ability for ASIC to compel performance if a scheme did not comply with an ASIC requirement. However, FOS saw this power as a reserve power, to be used as a last resort and after appropriate consultation with the scheme, and did not consider it appropriate for the directions power to stipulate specific matters, such as governance, funding or monetary limits. FOS cited the range of mechanisms already available to ASIC to ensure the schemes meet the conditions of their approval. FOS stated these provide ASIC with a considerable ability to influence a scheme's operations.³⁷
- 9.52. CIO also supported more specific powers for ASIC to enable it to compel performance where schemes do not comply with the EDR benchmarks.³⁸
- 9.53. Some stakeholders expressed in-principle support for ASIC's oversight role, but did not support a broad directions power and wanted clearly defined limits on any new powers for ASIC. For example, Legal Aid Queensland did not support ASIC having powers to compel performance or give directions to a scheme, arguing it would compromise the independence of the scheme, thereby reducing its effectiveness.³⁹

Support for the status quo

- 9.54. A small number of stakeholders did not support any increase in ASIC powers. For example, the Financial Services Council opposed new powers for ASIC to compel performance with generic EDR principles. It noted that no overseas equivalent industry ombudsman schemes were subject to directions from the regulator and indicated there was no suggestion in the Panel's Interim Report that the current EDR schemes do not presently comply with the benchmarks, relevant legislation or Regulatory Guide 139.⁴⁰
- 9.55. The National Insurance Brokers Association of Australia (NIBA) said it was up to the board of each EDR scheme to ensure the scheme operates in accordance with

36 Australian Securities and Investments Commission, submission to the EDR Review Interim Report, pages 10-11.

37 Financial Ombudsman Service, submission to the EDR Review Interim Report, page 37.

38 Credit and Investments Ombudsman, submission to the EDR Review Interim Report, page 20.

39 Legal Aid Queensland, submission to the EDR Review Interim Report, page 8.

40 Financial Services Council, submission to the EDR Review Interim Report, page 10.

ASIC requirements and the Regulatory Guide. NIBA submitted this was important because both consumers and industry were represented on the board, which was preferable to the power being vested in ASIC.⁴¹

Panel analysis

- 9.56. The Panel considers that ASIC's current powers do not allow it to take adequate actions in relation to the performance of EDR schemes, especially where a scheme is failing to comply with legislative or regulatory requirements, including EDR benchmarks.
- 9.57. In light of the Panel's recommended shift to a single EDR body for all financial disputes, it is even more critical for ASIC to have increased powers, because it will be more difficult for ASIC to apply its current sanction of revoking approval for the scheme.
- 9.58. The Panel considered whether ASIC should have a general power or more specific, limited powers of direction. On balance, the Panel considers that a general directions power will be more flexible and adaptable. It should, however, be constrained through procedural requirements (see below) to ensure that it is only used as a last resort and after consultation with the EDR body, and that decisions to use it are fair and reasonable.
- 9.59. Taking these factors into account, the Panel considers that ASIC's oversight role should:
- remain focused, in accordance with the current approach, on ensuring the EDR body meets the relevant EDR benchmarks; and
 - not extend to every-day operational matters, nor to the resolution of individual disputes (that is, ASIC should not be, or be perceived to be, providing a right of appeal).
- 9.60. To assist ASIC in carrying out these regulatory responsibilities, ASIC should have a general directions power, but this should only be used as a last resort and after consultation with the EDR body. ASIC should also provide clarity and certainty to stakeholders as to when and in what circumstances this power will be used, and be required to report publicly on when the power has been used.
- 9.61. ASIC's use of the directions power should also be subject to merits review. This means the EDR body can challenge in the Administrative Appeals Tribunal how ASIC has exercised this power (that is, upon examination of the relevant facts, law and policy) to determine whether it was used properly.

Recommendation 7: Increased ASIC oversight of the single EDR body

ASIC should be provided with a general directions power to allow it to compel performance from the single EDR body where it does not comply with legislative and regulatory requirements.

41 National Insurance Brokers Association, submission to the EDR Review Interim Report, page 9.

Chapter 10: Strengthening internal dispute resolution

Key points

- Internal dispute resolution (IDR) is the primary avenue for aggrieved consumers to seek redress in the financial system and is a gateway to EDR.
- High-quality IDR outcomes benefit consumers and lower costs for firms.
- Effective IDR is necessary for, and supports, effective EDR, but transparency around IDR needs to be strengthened.
- In order to improve user outcomes from IDR:
 - financial firms will be required to report to ASIC on their IDR activity and the outcomes consumers receive in relation to IDR complaints, with ASIC having the power to determine the content and format of reporting and to publish certain information; and
 - the single EDR body will refer all complaints back to IDR upon receipt for a further attempt at resolution within defined timeframes, and register and track the progress of those complaints.

IMPROVING THE TRANSPARENCY OF IDR PROCESSES AND OUTCOMES

Current framework

- 10.1. Internal dispute resolution (IDR) in Australia’s financial system refers to the processes that allow consumers and financial firms to attempt to resolve a dispute directly.
- 10.2. As part of their licence conditions, financial firms dealing with retail clients have to maintain appropriate IDR arrangements. Trustees of regulated superannuation funds (other than self-managed superannuation funds and approved deposit funds) are also required to establish arrangements for dealing with complaints.¹

Lack of available IDR data

- 10.3. There is currently no comprehensive, consistent, comparable, publicly available IDR data.
- 10.4. ASIC does not have the power to collect recurring data about financial firms’ IDR activities. Firms are not currently required to report this information externally unless they subscribe to an industry code of practice.²
- 10.5. The available data on the number of complaints received at IDR in 2015-16 is provided below.³

Code	Code subscribers	No. of complaints received at IDR	Time taken to complete IDR
Banking	13 banking groups	1.2 million	93% of complaints closed within 5 days
General insurance	158 code subscribers	21,719	Data not available
Customer owned banking	76 institutions	16,709	64% of complaints resolved on the spot or within 5 days; 93% resolved within 21 days
Insurance brokers	324 insurance brokers	1,023	41% of complaints resolved on the spot or within 5 days; 79% resolved within 21 days

- 10.6. There is no public reporting of complaints dealt with by superannuation funds at IDR.

1 Section 101 of the *Superannuation Industry (Supervision) Act 1993*.

2 Current codes in operation which have an IDR activity reporting requirement are: the Code of Banking Practice; General Insurance Code of Practice; Customer Owned Banking Code of Practice; and Insurance Brokers Code of Practice.

3 Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, pages 9-10; Financial Ombudsman Service 2016, *Annual Review 2015-16*, pages 116-17 (Code Compliance Monitoring Report).

Panel finding

Data on IDR outcomes is limited and inconsistent which means that it is difficult to determine the effectiveness of IDR and whether it is leading to improved consumer outcomes over time.

- 10.7. The Panel's draft recommendation was to require financial firms to publish information and report to ASIC on their IDR activity, with ASIC having the power to determine the content and format of IDR reporting.

Views on enhanced IDR reporting

- 10.8. The majority of stakeholders supported, or supported in-principle, the draft recommendation.
- 10.9. FOS noted that the lack of data hampers a system-wide assessment of the effectiveness of financial sector dispute resolution.⁴
- 10.10. ASIC identified a need to improve both the data that is collected and the format and reporting of dispute data at IDR (as well as at EDR).
- 10.11. Some stakeholders suggested that ASIC's reporting requirements be developed in consultation with industry, and that ASIC should work with the Code Compliance Monitoring Committee, which is responsible for monitoring the compliance of signatory banks with the Code of Banking Practice, to ensure consistency and reduce additional compliance costs.⁵ For superannuation fund trustees, it was suggested that reporting should be lodged through the existing Direct-to-APRA (D2A) system.⁶
- 10.12. Objections to the draft recommendation were made by a small number of stakeholders, primarily industry organisations. The main concerns raised were that requiring firms to publish and/or report to ASIC on their IDR activity would create unjustified compliance costs and duplicate systems or powers already in place.⁷

4 Financial Ombudsman Service, submission to the EDR Review Issues Paper, page 14.

5 See, for example, Australian Bankers' Association, submission to the EDR Review Interim Report, page 10; Financial Services Council, submission to the EDR Review Interim Report, page 11; National Australia Bank, submission to the EDR Review Interim Report, page 4; QBE, submission to the EDR Review Interim Report, page 3.

6 Association of Superannuation Funds of Australia, submission to the EDR Review Interim Report, page 22.

7 Stockbrokers and Financial Advisers Association Limited, submission to the EDR Review Interim Report, page 9; Australian Financial Markets Association, submission to the EDR Review Interim Report, page 4.

Suggestions for IDR metrics

- 10.13. A number of submissions provided suggestions for IDR metrics that might be appropriate,⁸ including:
- number of complaints received;
 - nature or types of complaints received (for example, product/problem);
 - dollar amounts involved;
 - number of cases resolved, unresolved or abandoned/withdrawn;
 - timeframes, including time taken to resolve dispute; and
 - outcome or types of resolution provided for different types of complaint and whether the dispute was resolved in favour of the financial firm or the consumer.

Publication of identifying information

- 10.14. There were mixed views on whether ASIC should publish details of non-compliance or poor performing IDR, including identifying financial firms.
- 10.15. Stakeholders in favour of publishing identifying information in cases of non-compliance⁹ suggested that such an approach would promote a culture of compliance and continuous improvement and would reduce information asymmetry for consumers.¹⁰
- 10.16. Those who did not support identification were of the view that the information could be misleading,¹¹ and therefore inadvertently disadvantage some firms by allowing comparison with non-comparable firms,¹² or that it should only be made available in extreme circumstances, such as where a firm has agreed to an enforceable undertaking or is subject to other enforcement action.¹³ The Australian Bankers' Association indicated that metrics need to take into account the business context and the size of the business (such as the number of

8 Suggestions were made in submissions to the EDR Review Interim Report by ANZ, Australian Securities and Investments Commission, Institute of Public Accountants-Deakin University, the Joint Consumer Group and Legal Aid Queensland.

9 Includes: ANZ, submission to the EDR Review Interim Report, page 5; Joint Consumer Group, submission to the EDR Review Interim Report, page 35.

10 Joint Consumer Group, submission to the EDR Review Interim Report, page 35.

11 Insurance Council of Australia, submission to the EDR Review Interim Report, page 8.

12 For example, Australian Institute of Superannuation Trustees (submission to the EDR Review Interim Report, p11-12) indicated that the data must be standardised so that IDR effectiveness can be objectively measured and Association of Superannuation Funds of Australia (submission to the EDR Review Interim Report, page 22) stated that care would need to be taken not to compare APRA-regulated funds with non-regulated funds.

13 See, for example, Institute of Public Accountants-Deakin University SME Research Centre, submission to the EDR Review Interim Report, page 6; Association of Securities and Derivatives Advisers of Australia, submission to the EDR Review Interim Report, page 11.

customers and volume of transactions) and present the IDR statistics as a percentage rather than only as raw numbers.¹⁴

Panel analysis

- 10.17. Effective IDR benefits both firms and consumers. IDR is an important element of financial firms' overall relationship with their customers and is the primary avenue for aggrieved consumers to seek redress. Pressure on EDR is reduced when complaints are resolved directly between firms and their customers.
- 10.18. Increased transparency and comparability in IDR reporting can:
- facilitate informed decision making by consumers by enabling comparison of different firms' IDR activity and outcomes;
 - enable firms to benchmark themselves against other comparable firms in the industry, giving consumers more consistent processes and outcomes;
 - provide a greater incentive for firms to invest in IDR because they know their performance will be compared to others';
 - enable financial firms, the single EDR body and ASIC to identify trends over time; and
 - provide evidence to ASIC on emerging issues that it can utilise in developing regulatory guidance in relation to IDR or otherwise determining regulatory priorities.

Principles to guide improvements in IDR reporting

- 10.19. It is important, however, that IDR reporting be underpinned by a number of key principles, which are outlined below:
- **Comparability:** Reporting should facilitate aggregation and comparability for the benefit of ASIC, the single EDR body, industry and consumers.
 - **Specificity, usefulness and measurability:** The metrics to be included in IDR reports should be informative and useful.
 - **Minimisation of compliance costs:** Data should be collected efficiently. This can be achieved by leveraging off current reporting on IDR by some firms (for example, reporting to the Code Compliance Monitoring Committee).
 - **Transparency:** Data should be made available publicly. This could be achieved by ASIC publishing aggregate data and having the discretion to determine whether firm-level (that is, identifying) data should be published.

¹⁴ Australian Bankers' Association, submission to the EDR Review Interim Report, page 15.

- **Timeliness:** Data should be reported and published in a timely manner so as to be of maximum value to industry and consumers. This can be achieved by ASIC specifying the timeframes on which reporting is required.
- 10.20. The Panel considers that IDR metrics should be determined by ASIC in consultation with stakeholders. Concerns about the comparability of data that is collected can be mitigated through careful design to a set of agreed principles.
- 10.21. The Panel is also aware that the costs of increased IDR reporting may be felt most acutely by small financial firms who are less able to absorb costs and may have less sophisticated systems than larger firms. To reduce the regulatory impacts of IDR data collection, ASIC should work with industry, consumers and other stakeholders in the design of the new IDR reporting requirements.
- 10.22. The Panel considers that ASIC should be given additional powers to enable it to determine the content and format of reporting and to publish IDR data.

Recommendation 8: Transparency of internal dispute resolution

To improve the transparency of IDR, financial firms should be required to report to ASIC in a standardised form on their IDR activity, including the outcomes for consumers in relation to complaints raised at IDR.

ASIC should have the power to:

- determine the content and format of IDR reporting (following consultation with industry and other stakeholders and having regard to the principles set out in this Chapter); and
- publish data on IDR both at aggregate level and, at its discretion, at firm level.

- 10.23. The Panel notes that this recommendation is consistent with the House of Representatives Standing Committee on Economics *Review of the Four Major Banks (First Report)*, which recommended that ASIC be empowered to collect data on financial services licensees' IDR activity such as: the number of disputes initiated; the number of disputes resolved; the number of disputes abandoned; and the average time taken to resolve a dispute.¹⁵

¹⁵ House of Representatives Standing Committee on Economics *Review of the Four Major Banks (First Report)* 24 November 2016, paragraph 8.12, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/House/Economics/Four_Major_Banks_Review/Report>.

REFERRALS TO IDR AND TRACKING BY THE SINGLE EDR BODY

Current framework

- 10.24. Disputes to be considered by an EDR body (FOS, CIO or SCT) must have first been through IDR. Some disputes are made to EDR bodies before attempts have been made to resolve them through IDR. The existing dispute resolution bodies have different processes for handling such disputes:
- Both FOS and CIO refer each dispute that they receive, whether it has already been through IDR or not, back to the relevant financial firm (but timeframes and tracking differ – see Chapter 4).
 - SCT refers consumers who have not been through a superannuation fund’s IDR process back to the fund but does not otherwise monitor or track the dispute.

Barriers to IDR

- 10.25. A number of submissions to the Issues Paper indicated that it can be difficult for consumers to find out about the availability of IDR,¹⁶ in part, because of ‘a widespread misunderstanding by FSPs [financial firms] that a consumer must be referred to or contact their specialist IDR team’ for a complaint to trigger IDR.¹⁷
- 10.26. Other stakeholders were of the view that IDR processes are generally accessible and that there are few or no barriers to consumers lodging complaints through IDR.¹⁸
- 10.27. Mixed views were expressed by stakeholders on the ease with which complaints may be escalated from IDR to EDR. A number of submissions indicated that there are barriers to escalation such as insufficient notification being provided by financial firms about the availability of EDR,¹⁹ while others suggested that it is easy to escalate complaints.²⁰
- 10.28. Other concerns raised were that consumers can suffer ‘complaint fatigue’, becoming disenfranchised with the process or overwhelmed by the experience, and end up accepting any offer merely to achieve closure or simply giving up on pursuing the dispute.²¹

16 Legal Aid New South Wales, submission to the EDR Review Issues Paper, page 11.

17 Joint Consumer Group, submission to the EDR Review Issues Paper, page 13.

18 For example, Credit Corp Group, submission to the EDR Review Issues Paper, page 6.

19 Holt Norman Ashman Baker Action Group, submission the EDR Review Issues Paper, pages 12-13.

20 QBE, submission to the EDR Review Issues Paper, page 2.

21 Views expressed by Holt Norman Ashman Baker Action Group in discussions with the Panel.

Support for better tracking

- 10.29. In its Interim Report, the Panel recommended that the EDR schemes register complaints that have come to the scheme and track the progress of complaints referred back to IDR.
- 10.30. The draft recommendation was supported by a number of stakeholders. For example, the Australian Institute of Superannuation Trustees and the Joint Consumer Group expressed a view that this recommendation would assist an EDR scheme in identifying systemic issues and improving the effectiveness of IDR processes by firms.²²
- 10.31. The Joint Consumer Group also pointed to direct benefits for consumers from tracking, such as the incentive provided to financial firms to address complaints promptly. In addition, consumers would benefit from the reassurance that their dispute will be considered, a reduction in complaint fatigue and adequate support to understand the process.²³
- 10.32. In its submission to the Interim Report, FOS confirmed that it already registers and tracks the progress of complaints that it refers back to IDR, and analysis of the data is provided to major and mid-tier firms (both individually and via benchmarking reports), peak industry bodies and ASIC when required.²⁴ The Australian Bankers' Association suggested that the design of any further reporting obligations leverage off this existing practice of FOS's rather than creating new or additional obligations.²⁵
- 10.33. While SCT does not currently track complaints which have not first been taken through IDR, it is supportive of the practice. Similarly ASIC identified that tracking of complaints referred back to IDR is particularly warranted in the superannuation sector.
- 10.34. Some stakeholders expressed concerns about the draft recommendation, saying that it would lead to unnecessary increases in red tape and direct costs on firms.²⁶

Panel analysis

- 10.35. There are a number of benefits to EDR bodies referring disputes back to IDR and tracking the progress of those disputes:
- It increases oversight over financial firms' IDR, providing incentives for the financial firm to address complaints more promptly than may

22 Australian Institute of Superannuation Trustees, submission to the EDR Review Interim Report, page 12; Joint Consumer Group, submission to the EDR Review Interim Report, page 35.

23 Joint Consumer Group, submission to the EDR Review Interim Report, page 35.

24 Financial Ombudsman Service, submission to the EDR Review Interim Report, page 39.

25 Australian Bankers' Association Inc., submission to the EDR Review Interim Report, page 11.

26 Association of Securities and Derivatives Advisers of Australia, submission to the EDR Review Interim Report, page 11; Financial Services Council, submission to the EDR Review Interim Report, pages 12-13; Tyro Payments, submission to the EDR Review Interim Report, page 2.

otherwise be the case. Registration of the complaint and then tracking by the single EDR body ensures that consumer disputes do not fall through the cracks should they remain unresolved.

- It increases the potential for systemic issues relating to how firms handle disputes in IDR, and which may require investigation, to be identified and addressed.
- It reduces barriers to IDR because it does not require the consumer to take the further step of initiating the IDR process. This can be particularly important where there has been a breakdown of trust between the consumer and the financial firm.

10.36. Requiring all disputes to be returned to IDR, not just those which have not yet been through IDR, provides a final opportunity for the financial firm and the consumer to resolve the dispute. The single EDR body should, however, retain a discretion to exempt certain cases, in limited circumstances, from this default approach, to ensure that consumers are adequately supported in seeking access to justice.

10.37. Disputes should not be abandoned due to complaint fatigue or the complexity of the system. The single EDR body can minimise these concerns by providing appropriate time limits for action by firms but then stepping in to resolve the dispute where not resolved by the firm.

Superannuation disputes

10.38. The Panel recognises that, for superannuation disputes, an approach of referring a complaint back and tracking its progress will be a new requirement. The single EDR body will need to design its referral process carefully to ensure that time-sensitive disputes, such as those about death benefits and total and permanent disability claims, achieve a timely resolution.

Panel finding

Tracking by EDR bodies of disputes referred back to IDR encourages early resolution of disputes and helps to identify systemic issues in IDR.

Recommendation 9: Referral of complaints back to financial firms

Upon receipt, the single EDR body should refer all complaints back to the financial firm for a final opportunity to resolve the matter via IDR within a defined timeframe. It should register and track the progress of complaints referred back to IDR.

OTHER ISSUES

Timeframes

- 10.39. There are a range of different time limits for IDR procedures, which vary depending on the category of complaint.²⁷
- 10.40. A number of consumer representative organisations suggested that the timeframes for a final IDR response be reduced, for example from 45 to 30 days for simple credit, banking and insurance disputes.²⁸
- 10.41. A separate issue was raised in relation to insurance disputes. The Joint Consumer Group submission expressed concern that where firms have multi-tier IDR processes (for example two stages of IDR, including effectively an internal IDR appeal mechanism), there is a risk of consumer confusion (with consumers not aware of the point in time at which they are eligible to escalate a complaint to the second stage) or fatigue.²⁹
- 10.42. Related to this is the issue identified by ASIC regarding timeframes for making claims decisions under the new Life Insurance Code.³⁰ The Code provides an overall timeframe of 12 months for claims decisions, and allows insurers to exceed this time for a range of reasons. Once the claim goes beyond 12 months, the Code only requires insurers to provide the consumer with information about how to make a complaint regarding the delay.

Panel analysis

- 10.43. Data reported by the Code Compliance Monitoring Committee, which is responsible for monitoring the compliance of signatory banks with the Code of Banking Practice, suggests that financial firms are dealing with complaints well within the required timeframes, sometimes by a considerable margin.³¹ However, again, there is currently no comprehensive, consistent, publicly available IDR data on which to base a case for change to the timeframes.
- 10.44. The Panel considers that having access to improved IDR data will allow for better assessment of the appropriateness of the timeframes permitted for IDR.

27 For most complaints, financial firms must give a 'final response' to the complainant within 45 days; hardship disputes typically have a 21-day time limit; and superannuation trustees have 90 days to complete IDR processes.

28 Joint Consumer Group, submission to the EDR Review Issues Paper, pages 16 and 20; Legal Aid New South Wales, submission to the EDR Review Issues Paper, page 14.

29 Joint Consumer Group, submission to the EDR Review Issues Paper, pages 17-18.

30 Australian Securities and Investments Commission, supplementary submission to the EDR Review Issues Paper.

31 The Code Compliance Monitoring Committee states in its submission to the EDR Review Issues Paper, page 4, that the code-subscribing banks have indicated that, in total, 92% of the complaints received in 2015-16 were dealt with in under 5 days and only 0.8% took over 45 days to resolve. Thirteen banking groups covering 95% of the Australian retail banking market subscribe to the voluntary Code: see the Code Compliance Monitoring Committee website, <<http://www.ccmc.org.au/2017/02/20/ccmc-welcomes-review-of-its-work/>>.

Role of Customer Advocates

- 10.45. A number of banks have recently appointed Customer Advocates,³² which review disputes from consumers and small businesses which have not been able to be resolved to the customer's satisfaction through IDR.
- 10.46. A number of submissions expressed concern about the presence of these roles within the large banks, suggesting, for example, that some consumers may mistakenly believe that they must use the Customer Advocate before they can pursue EDR.³³
- 10.47. The Joint Consumer Group suggested that Customer Advocates could have a broader role in improving systems for dispute resolution, and in streamlining disputes and remediation programs.³⁴

Panel analysis

- 10.48. The appointment of Customer Advocates could potentially assist with the resolution of disputes, but these positions have only recently been created and it is too soon to evaluate their role. Improved IDR data should make it easier to assess the impact of Customer Advocates in the future.

32 Joint Consumer Group, submission to the EDR Review Issues Paper, page 23.

33 Legal Aid Queensland, submission to the EDR Review Issues Paper, page 4; Joint Consumer Group, submission to the EDR Review Issues Paper, page 24.

34 Joint Consumer Group, submission to the EDR Review Issues Paper, page 24.

Chapter 11: Firms that should be part of the financial system EDR framework

Key points

- Debt management firms should be required to be members of the single EDR body. Further work should be undertaken to determine the most appropriate mechanism by which to impose this requirement.
- As valuers, investigating accountants and receivers are not financial firms and EDR schemes currently have means of obtaining required information from them when relevant to a dispute, it is not necessary to require them to be members of the single EDR body.
- The review currently being undertaken into a nationally consistent approach to farm debt mediation should consider whether a borrower who has undertaken farm debt mediation should be able to access EDR.
- In principle, there is no reason why credit representatives should be required to hold EDR membership. However, further work should be undertaken before membership requirements are removed to confirm there would be no unintended consequences.

FIRMS THAT SHOULD BE PART OF THE EDR FRAMEWORK

- 11.1. The Panel's terms of reference require it to consider gaps and overlaps between EDR schemes.
- 11.2. In this Chapter, the Panel considers whether:
- there are gaps in membership of EDR schemes in relation to debt management firms, and valuers, investigating accountants and receivers;
 - individuals who have already undertaken farm debt mediation should have access to EDR; and
 - there is an overlap in EDR membership in relation to credit representatives.

DEBT MANAGEMENT FIRMS

Current framework

- 11.3. Debt management firms offer a range of services to consumers experiencing financial difficulty, including:
- developing and managing budgets;
 - negotiating with creditors, including lenders, telecommunications companies, utilities companies or debt collectors;
 - advising and arranging formal debt arrangements under the *Bankruptcy Act 1966* (Cth); and
 - assisting with the removal of default listings or other negative information on a credit report.
- 11.4. There is no uniform regulatory framework applying to the activities of debt management firms in Australia. Most of the services provided by debt management firms do not meet the definition of 'financial services' or 'credit activity' and, therefore, most debt management firms are not required to hold a licence under the financial services or credit regime and are not required to be a member of one of the ASIC approved EDR schemes. Instead, general consumer law prohibitions against misleading and deceptive conduct and unconscionable conduct apply.¹
- 11.5. ASIC's research report, *Paying to get out of debt or clear your record: The promise of debt management firms* (Report 465), while noting that there was limited data on the size and scale of the industry, raised a number of concerns including: that

1 In some cases, where a debt management firms undertakes other regulated credit activity, they will be required to hold a credit licence which will cover the provision of those services.

firms often charge a high upfront fee; that firms have opaque fee structures; and that services are targeted to vulnerable consumers experiencing financial stress.²

- 11.6. In addition, debt management firms can present problems for the EDR schemes where the disputes being pursued do not have merit, as schemes will incur costs in dealing with the firms.³
- 11.7. CIO has indicated that the fact of EDR being free to complainants while attracting case fees for member financial firms was exploited by some debt management firms who utilised EDR as leverage to obtain a desired outcome rather than as a vehicle to determine the merits of a genuine dispute.⁴
- 11.8. The submission went on to say that while this does not characterise all complaints from the sector, these are undesirable outcomes for all – for the integrity of the credit reporting system, for the financial firm and for the consumer who will pay significant amounts of money for a service that either should not be provided (because the complaint lacked reasonable prospects of success in the first instance) or should have been provided at no cost (as the consumer may be able to resolve the complaint themselves at no cost through a financial counsellor or the EDR scheme itself).⁵

Panel finding

- The activities of some debt management firms can hamper the efficiency of EDR schemes by diverting scheme resources from other disputes, especially where the dispute brought to EDR does not have merit.
- There is currently no mechanism for consumers with complaints in respect of unlicensed debt management firms to seek access to EDR.

- 11.9. The Panel's draft recommendation – that debt management firms be required to be members of an EDR scheme – was intended to address these problems.

2 Australian Securities and Investments Commission 2016, Report 465 *Paying to get out of debt or clear your record: The promise of debt management firms*, pages 20-22.

3 Credit and Investments Ombudsman, submission to the EDR Review Issues paper, page 6.

4 Credit and Investments Ombudsman, submission to the EDR Review Issues paper, page 38.

5 Credit and Investments Ombudsman, submission to the EDR Review Issues paper, page 38.

Stakeholder views

Support for imposing EDR membership requirements

- 11.10. There was general support amongst the few stakeholders that commented on this issue, including the schemes themselves, for the recommendation that debt management firms be required to be a member of an EDR scheme.
- 11.11. The Joint Consumer Group submission strongly supported the recommendation ‘to stem the ongoing harm caused by debt management firms.’⁶ The submission also noted that the introduction of a licensing requirement and rules to regulate behaviour would bring debt management firms into line with other financial services in Australia.⁷
- 11.12. ASIC supported the recommendation ‘as the financial harm caused by these entities is likely to increase as lenders increasingly move towards rating for risk pricing models and the state of a consumer’s credit report has a greater impact on the cost of credit.’⁸ ASIC saw value in EDR scheme membership as it provides consumers with a free mechanism to have their complaints heard. However, ASIC questioned whether licensing was the appropriate way to regulate the activities of debt management firms cautioning that ‘the services offered by debt management firms are different from those provided by entities that are required to hold either a credit licence or an AFS licence.’⁹
- 11.13. The Australian Bankers’ Association (ABA) expressed qualified support for the recommendation. It cautioned that EDR membership should not be the determining driver of a requirement to license these businesses and suggested that other factors, including the benefits and costs of regulation and improved consumer protection, should be given close consideration.¹⁰

Panel analysis

- 11.14. The Panel considers that consumers who use services provided by debt management firms should have access to EDR. The Panel has received evidence of how the activities of some debt management firms negatively impact on consumer outcomes and hamper the efficiency of EDR schemes.
- 11.15. The Panel recognises that the EDR membership obligation would need to be imposed in the context of a broader decision about how to enhance the regulation of debt management firms more generally.

6 Joint Consumer Group, submission to the EDR Review Interim Report, page 22.

7 Joint Consumer Group, submission to the EDR Review Interim Report, page 22.

8 Australian Securities and Investments Commission, submission to the EDR Review Interim Report, page 32.

9 Australian Securities and Investments Commission, submission to the EDR Review Interim Report, page 32.

10 Australian Bankers’ Association, submission to the EDR Review Interim Report, page 11.

11.16. The Panel is aware that there are different approaches that could be used to enhance the regulation of debt management firms, including in the United Kingdom.

- the introduction of a licensing regime; or
- the introduction of conduct requirements (as occurs in the United Kingdom).

Conduct obligations for debt management firms in the United Kingdom

The Financial Conduct Authority's (FCA's) Principles for Business apply to all firms authorised by, or holding interim permission with, the FCA, including debt management firms. They are similar in nature to the licensing principles found in the *National Consumer Credit Protection Act 2009* and the *Corporations Act 2001* and include:

- *Integrity*: conduct its business with integrity
- *Due skill*: conduct its business with due skill, care and diligence
- *Financial resources*: maintain adequate financial resources
- *Conflicts*: manage conflicts of interest fairly, both between itself and its customers and between a customer and another client
- *Fairness*: pay due regard to the interests of its customers and treat them fairly.

Particular emphasis is placed on the fairness principle – a debt management firm must pay due regard to the 'interests of its customers and treat them fairly'. In particular, where consumers receive advice, the advice must be suitable, in the consumer's best interest and take account of their personal and financial circumstances. Consumers must be provided with products that perform as firms have led them to expect and of a standard that the consumer has been led to expect. For-profit debt management firms are also required to make customers aware of free debt advice services available in their first communication and are not to discourage a consumer from using these free services. There are also strict requirements relating to pre-contractual disclosure, contractual disclosure and prohibited contract terms.

Panel recommendation

- 11.17. The introduction of a licensing regime would be a substantial undertaking for a relatively small industry and result in significant regulatory costs. Therefore, the Panel sees some benefits in the authorisation and conduct approach adopted in the United Kingdom.
- 11.18. The Panel considers that further work is needed to determine what would be the most appropriate mechanism by which to impose an EDR membership requirement.

Recommendation 10: Debt management firms

Debt management firms should be required to be members of the single EDR body. Further work should be undertaken to determine the most appropriate mechanism by which to impose this requirement.

VALUERS, INVESTIGATING ACCOUNTANTS AND RECEIVERS

ASBFEO Inquiry into small business loans

- 11.19. The Australian Small Business and Family Enterprise Ombudsman's report (ASBFEO's report) into the small business lending practices of the major banks and other lenders considered the role of valuers, investigating accountants and receivers appointed by a bank in the EDR framework.¹¹
- 11.20. Recommendation 13 of the ASBFEO report is as follows:
- EDR dispute resolution schemes must be expanded to include disputes with third parties that have been appointed by the bank, such as valuers, investigating accountants and receivers, and to borrowers who have previously undertaken Farm Debt Mediation.*¹²
- 11.21. In light of the recommendation in the ASBFEO report, the Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services, asked the Panel to take particular account of Recommendation 13 (as well as Recommendations 11)¹³ in its final report.

11 Australian Small Business and Family Enterprise Ombudsman, Inquiry into small business loans (2016), page 6.

12 Australian Small Business and Family Enterprise Ombudsman, Inquiry into small business loans (2016), page 8.

13 The establishment of an EDR one-stop shop with a dedicated small business unit that has appropriate expertise to consider disputes involving a credit facility limit of up to \$5 million.

Current framework

- 11.22. Under the current framework, valuers, investigating accountants and receivers appointed by a financial firm are not required to be members of an EDR scheme. However, the following matters, relevant to the actions of a valuer, accountant or receiver, may become part of a financial dispute:
- the fees charged for the valuation and the financial firm's use of the valuation (as opposed to the valuation itself);
 - the cost of the accountant (which is passed on to the consumer) or the initial decision to appoint an investigating accountant; or
 - whether the financial firm should have appointed a receiver, whether the receiver's costs were excessive, or whether the receiver undersold the company's assets.

Stakeholder views on expanding the EDR framework to include valuers, investigating accountants and receivers

- 11.23. The Panel invited submissions on Recommendation 13 of the ASBFEO report.
- 11.24. No submissions were received supporting extending the EDR framework to third parties.
- 11.25. CPA Australia indicated that compelling a third party to participate in dispute resolution would add to the costs of third parties, including through higher professional indemnity insurance premiums, and questioned whether there is sufficient evidence to warrant such an expansion.¹⁴
- 11.26. The Australian Restructuring Insolvency and Turnaround Association (ARITA) noted that investigating accountants provide a professional opinion to their client (the lender) which is not suitable to be mediated and that a dispute about a report prepared by an investigating accountant is generally between the lender and the borrower.¹⁵ ARITA also noted that receivers have personal liability for debts incurred during the conduct of the receivership and questioned who would be responsible for ongoing trading liabilities while the EDR process was underway, noting the receiver's personal liability if trading were to continue.¹⁶
- 11.27. Both CPA Australia and ARITA pointed to the current high levels of oversight that insolvency practitioners are subject to, including ASIC oversight. They raised concerns that any cost impact on an insolvency practitioner's conduct of

14 CPA Australia, submission on ASBFEO Small Business Loans Inquiry recommendations, pages 1-2.

15 Australian Restructuring Insolvency & Turnaround Association, submission on ASBFEO Small Business Loans Inquiry recommendations, page 1.

16 Australian Restructuring Insolvency & Turnaround Association, submission on ASBFEO Small Business Loans Inquiry recommendations, page 6.

an insolvency administration would be met out of the remaining assets, which ultimately would be borne by creditors through reduced returns.¹⁷

- 11.28. ABA expressed concern that it is unclear how compulsory participation in an EDR process for third parties might be achieved. Valuers and other third parties are contracted to provide an expert and independent opinion and it is not clear what criteria an EDR scheme would use to assess a professional opinion provided on a point in time basis. ABA also noted that third parties such as valuers and investigating accountants are professional advisers and are subject to separate legal and professional obligations in their own right. Finally, it noted that EDR is free to consumers and that, if it was expanded to include third parties, there would be little deterrent for consumers to seek to lodge disputes against as many parties as possible.¹⁸
- 11.29. The Institute of Public Accountants drew attention to the various complex legal, financial, ethical and regulatory issues inherent in expanding EDR to include bank-appointed third parties, including: how 'third party' would be defined and whether it would cover agents, contractors, sub-contractors; and who would be liable for any compensation, settlements and payments to a consumer.¹⁹

Panel analysis

- 11.30. In practice, if a consumer is making a complaint about the conduct of a third party or agent, such as a valuer, accountant or receiver, the EDR scheme will look to the financial firm (commonly a bank that is a member of the EDR scheme) to provide the relevant information.
- 11.31. It is the Panel's understanding that generally, the contractual relationship between the EDR scheme and the financial firm enables the scheme to obtain information that relates to a third party engaged by the financial firm from the financial firm itself. If this information is not provided, the EDR scheme is able to draw an adverse inference against the financial firm, as discussed in Chapter 5. Where the financial firm has a contractual or agency relationship with the third party – which is generally the case with accountants or valuers it appoints – it is able to obtain the information from the third party.
- 11.32. In the case of receivers, the legal position is that they are taken to be an agent of the company to which they are appointed and not an agent of the financial firm. This means the financial firm cannot rely on an agency relationship to obtain information from a receiver to provide to the scheme. Even so, the Panel has not received evidence to this Review that there are difficulties in the scheme obtaining information from receivers relevant to a dispute.

17 CPA Australia, submission on ASBFEO Small Business Loans Inquiry recommendations, page 1, and Australian Restructuring Insolvency & Turnaround Association, submission on ASBFEO Small Business Loans Inquiry recommendations, page 5.

18 Australian Bankers' Association, submission on ASBFEO Small Business Loans Inquiry recommendations, pages 2-3.

19 Institute of Public Accountants, submission on ASBFEO Small Business Loans Inquiry recommendations, pages 2-3.

- 11.33. The Panel has, therefore, concluded that EDR scheme membership is not required for valuers, investigating accountants and receivers appointed by a financial firm.

ACCESS TO EDR FOR BORROWERS WHO HAVE ACCESSED FARM DEBT MEDIATION

- 11.34. Recommendation 13 of the ASBFEO report states that 'EDR dispute resolution schemes must be expanded to include [...] borrowers that have previously undertaken farm debt mediation'.²⁰
- 11.35. Under the current framework, borrowers that have previously undertaken farm debt mediation are precluded from accessing EDR.
- 11.36. The Panel notes that Recommendation 14 of the ASBFEO report is that a nationally consistent approach to farm debt mediation be introduced. The Panel is aware that the Minister for Agriculture and Water Resources has been consulting with his state and territory counterparts to assess the best way to implement a nationally consistent approach.
- 11.37. It is the view of the Panel that the recommendation to permit a borrower to access EDR after having undertaken farm debt mediation should be considered within the context of the current consultation.

CREDIT REPRESENTATIVES

Current framework

- 11.38. Under the *National Consumer Credit Protection Act 2009* (Credit Act), both credit licensees and credit representatives are required to maintain separate memberships of an approved EDR scheme. This is the case even though the credit licensee is responsible and liable for any conduct of its representative that relates to a credit activity, including where the conduct of the representative is outside of the authority of the licensee.
- 11.39. The requirement for both credit licensees and credit representatives to have EDR membership is in contrast to the Australian financial services licensing regime where only licence holders are required to maintain membership of an approved EDR scheme.

Costs of credit representative EDR membership

- 11.40. The requirement to maintain EDR membership imposes direct costs on credit representatives, which are ultimately borne by consumers.

²⁰ Australian Small Business and Family Enterprise Ombudsman, *Inquiry into small business loans* (2016), page 8.

- 11.41. There are currently almost 26,465 credit representatives, of which 8,036 are current members of FOS and 18,429 are current members of CIO).²¹ Annual membership fees are \$110 (FOS) and \$140 (CIO).²² The Panel understands that schemes offer discounts and waivers in some circumstances. Absent data from the schemes, the Panel estimates an annual maximum cost for credit representatives of maintaining EDR membership is likely to be around \$3 million.²³
- 11.42. The present system also places a significant administrative and legal burden on licensees. All licensees must have processes in place to certify and track their representative's EDR membership to fulfil their obligations under the Credit Act and to ASIC.
- 11.43. Finally, there is an administrative cost to ASIC in monitoring EDR membership requirements. There is a high level of movement among representatives in and out of the industry and EDR schemes, which increases ASIC's administrative costs. In 2015-2016, ASIC received 2,786 notifications of changes in membership from CIO of which 343 related to licensees and 2,443 to representatives. In the same year, ASIC received 526 notifications from FOS relating to both licensees and representatives.

Submissions on EDR membership requirements

- 11.44. In its Interim Report, the Panel sought information on whether EDR scheme membership for credit representatives provides an additional or necessary layer of consumer protection that is not already met through credit licensees' membership.

Support for removing EDR membership requirements

- 11.45. Of the few submissions that addressed this issue, the vast majority agreed that requiring credit representatives to maintain separate EDR membership was an additional layer of regulation that was not required for consumer protection reasons.
- 11.46. ASIC submitted that EDR membership does not provide an additional or necessary layer of consumer protection, and that it does not justify the associated industry and regulatory costs.²⁴ While the requirement was originally introduced to ensure there would be no gaps in coverage or access for consumer complaints, ASIC's view is that the subsequent national credit reforms resolved any uncertainty about this issue and that the risks the requirement was designed to

21 Figures supplied by the Australian Securities and Investments Commission.

22 FOS website, accessed 30 March 2017, <<https://www.fos.org.au/members/become-a-member/membership-fees/>>; CIO website, accessed 30 March 2017, <<http://www.cio.org.au/members/fee-information.html>>.

23 Annual membership revenue of \$883,960 for FOS (8,036 members x \$110) and \$2,580,060 for CIO (18,429 members x \$140). Total figure of \$3,464,020 rounded down to nearest million to account for possible discounts and waivers on some members' fees.

24 Australian Securities and Investments Commission, submission to the EDR Review Interim Report, page 11.

address have not materialised.²⁵ In ASIC's view, the Credit Act provisions are drafted in a way that a client of a credit representative who is not a member of an EDR scheme would be able to seek recourse against the relevant credit licensee for any misconduct by that representative.²⁶

- 11.47. FOS similarly does not consider that licensing authorised credit representatives adds substantively to consumer protection and indicated that the cost of membership outweighs any marginal consumer benefit.²⁷
- 11.48. The Joint Consumer Group expressed support for the removal of the requirement for authorised credit representatives to be a member of an EDR scheme subject to certain safeguards being in place, including that credit representatives be under a specific obligation to facilitate dispute resolution and be required to cooperate with the EDR body.²⁸

Support for maintaining EDR membership requirements

- 11.49. CIO strongly supported retaining EDR scheme membership for credit representatives, arguing it was required under the following circumstances:
- a licensee is only liable for its credit representative's conduct to the extent that it relates to a credit activity, so where the representative's conduct does not relate to a credit activity, the consumer only has access to EDR if the credit representative is a member of an EDR scheme;
 - consumers can be left without access to redress where there is a significant delay between the event giving rise to the complaint and the complaint being made and the licensee has ceased trading or ceased being a member of the EDR scheme;
 - consumers can be left without access to redress where the credit representative has switched licensees and the conduct complained of relates to a period where the representative was operating under a

25 Australian Securities and Investments Commission, submission to the EDR Review Interim Report, page 12. ASIC also noted that the Credit Act provides that a licensee will be responsible and liable for any conduct of its credit representatives. This applies equally to conduct of a representative that is outside of the authority of the licensee. Where the credit representative acts for more than one licensee, those licensees are jointly and severally liable for the conduct of the credit representative. Licensees must also have adequate compensation arrangements that cover the conduct of their representatives.

26 Australian Securities and Investments Commission, submission to the EDR Review Interim Report, page 13.

27 Financial Ombudsman Service, submission to the EDR Review Interim Report, page 16.

28 Joint Consumer Group, submission to the EDR Review Interim Report, page 25. The Joint Consumer Group recommended the following conditions: Authorised Credit Representatives be required to cooperate with the industry ombudsman scheme, for example, by providing information and documentation; Authorised Credit Representative's be under a specific obligation to facilitate dispute resolution, for example, by putting the consumer in touch with the licensee; the licensee be liable for the conduct of the credit representative even where the Authorised Credit Representative acts outside the authority of the licensee, including in cases of fraudulent or illegal activity; and these changes are reviewed two years after implementation to ensure that there are no gaps or unintended consequences.

licensee that has since ceased trading or ceased being a member of an EDR scheme;²⁹

- if a finance broker provides financial advice without holding an Australian Financial Services licence (or being an authorised representative of an AFS licensee) but was a credit representative and member of an EDR scheme, a consumer would have access to redress; and
- if the complaint relates to an event that took place before the Credit Act commenced and the credit representative is a member of an EDR scheme, the consumer would have access to redress in relation to the representative, but not the licensee.³⁰

11.50. CIO also raised a separate concern regarding the difficulties in identifying the relevant EDR scheme if credit representatives were not required to maintain membership in their own right.³¹

Panel analysis

11.51. In order to determine the extent to which EDR membership provides additional consumer protection, the Panel sought data from FOS and CIO on the number of disputes in relation to credit representatives alone.

11.52. There was little evidence of disputes being run against credit representatives:

- FOS advised it has never handled a dispute against an authorised credit representative;³² and
- CIO advised that it does not record whether a complaint is resolved directly with the licensee or with the credit representative. However, it indicated in the 2015-16 financial year, all determinations issued were against licensees who had not appointed credit representatives.³³

11.53. The Panel notes the substantial costs of maintaining EDR membership, which are ultimately borne by consumers. While requiring credit representatives to be members of an EDR scheme provides a consumer with access to EDR, consumers already have access to redress with regard to the credit licensee, who is responsible for the conduct of its representatives whether within or outside of their authorisation. Furthermore, it is only credit licensees that are required to have internal dispute resolution processes and maintain adequate compensation arrangements (that is, professional indemnity insurance).

29 Section 74(a) of the Credit Act. Conduct in relation to the following products or services are not credit activities: (a) consumer leases for a fixed term of four months or less or for an indefinite period; (b) credit leases provided to small businesses; (c) credit provided to purchase commercial property like farm land; retail property or warehouses; and (d) other services like budget monitoring, debt management, credit repair, property spruiking and (unlicensed) financial advice.

30 Credit and Investments Ombudsman, submission to the EDR Review Interim Report, pages 29 to 30.

31 Credit and Investments Ombudsman, supplemental submission to EDR Review Interim Report, pages 1 to 2.

32 Financial Ombudsman Service, submission to the EDR Review Interim Report, page 52.

33 Credit and Investments Ombudsman, data provided to the EDR Review, 22 March 2017.

- 11.54. The Panel has considered arguments raised by CIO, but does not agree with them for the following reasons:
- The current legislative framework for EDR is intended to cover regulated credit activities. Membership of EDR is not intended to automatically extend cover to conduct that is unauthorised or conduct that occurred prior to the commencement of the Credit Act.
 - While a consumer's access to redress may be limited where the relevant credit licensee has ceased trading or ceased being a member of an EDR scheme, it is equally possible that the credit representative themselves may also no longer be trading or a member of an EDR scheme.
- 11.55. In light of the above, the Panel does not consider that the EDR membership obligation imposed on credit representatives provides consumers with much additional benefit in terms of consumer protection or access to redress over and above what is provided by the credit licensee's EDR membership obligation.
- 11.56. However, the Panel considers that prior to the EDR membership requirement for credit representatives being removed, further work should be undertaken to confirm there would be no unintended consequences.

Panel finding

Requiring authorised credit representatives to be members of an EDR scheme provides limited benefit, in terms of enhanced consumer protection or access to redress, but imposes substantial costs (annual membership fees).

Recommendation 11: Credit representatives

In principle, there is no reason why credit representatives should continue to be required to hold EDR membership. However, further work should be undertaken before membership requirements are removed to confirm there would be no unintended consequences.

Appendix 1: Dispute resolution practices overseas and in other sectors

- A1.1. The Terms of Reference require that, to the extent relevant, the Panel will take into account best practice developments in dispute resolution arrangements in overseas jurisdictions and other sectors when making its recommendations.
- A1.2. The purpose of this analysis was to ensure Australia's dispute resolution and complaints arrangements incorporate the most recent policy solutions, both domestic and international, to enable them to deliver effective outcomes for users in a rapidly changing and dynamic financial system.
- A1.3. Detailed analysis has been undertaken on the United Kingdom, New Zealand, Singapore and Canada. These jurisdictions have been selected for a number of reasons, including that they have financial systems with similar characteristics to Australia, but offer a variety of types of framework and approaches to dispute resolution. Apart from Singapore, the jurisdictions all have ombudsman-style schemes, although there are differences, such as the United Kingdom having a single financial sector ombudsman, while New Zealand and Canada have multiple schemes. Singapore has adopted a hybrid system of adjudication, drawing on aspects of the arbitration and ombudsman models.¹
- A1.4. The sectors chosen from the Australian economy are telecommunications, and water and energy. These were chosen because of their comparability with the financial services sector (they are also regulated, service-providing sectors) and because they provide examples of different EDR models, with some being statute-based and others industry-based.
- A1.5. In conducting a qualitative analysis of the dispute resolution and complaints arrangements in overseas jurisdictions and domestic sectors, to the extent relevant, consideration has been given to: their role, powers, governance and funding arrangements; the extent of any gaps and overlaps; and their role in working with government, regulators, consumers, industry and other stakeholders to improve the legal and regulatory framework to deliver better consumer outcomes. In examining overseas jurisdictions and domestic sectors, it is clear that there are a range of EDR models operating internationally and domestically. As noted in Chapter 1, the Panel has concluded that ultimately, the appropriate EDR framework for a jurisdiction is a product of its regulatory landscape and other features unique to the jurisdiction.

¹ Ali, S, *Consumer Financial Dispute Resolution in a Comparative Context, Principles, Systems and Practice*, Cambridge University Press, Cambridge, 2013, page 137.

INTERNATIONAL COMPARISONS

United Kingdom

Overall regulatory framework

- A1.6. The United Kingdom has a single statutory financial services dispute resolution body established by Parliament, the Financial Ombudsman Service (UK FOS).
- A1.7. Under the *Financial Service and Markets Act 2000* (UK) (the FSM Act), financial firms are required to attempt to initially resolve disputes through internal complaints handling systems. Where this fails, a complainant may seek resolution through UK FOS.²
- A1.8. UK FOS is an independent statutory dispute resolution scheme, which was formed in 2001 under Part XVI and Schedule 17 of the FSM Act.³ It was established to create a free, informal and single point of contact for consumers to replace the former eight ADR schemes, which had been criticised for having inaccessible procedures and overlapping jurisdictions.⁴
- A1.9. In the 2015-16 financial year, UK FOS received 340,899 complaints and resolved 438,802 cases.⁵ It resolved 90 per cent of complaints informally, with the remaining 10 per cent of cases proceeding to the final stage of the process where an Ombudsman is asked to make a decision on the matter.⁶
- A1.10. Recent complaints data is shown in the table below:⁷

Type of Complaint	2012		2013		2014		2015		2016	
	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases
Banking and Credit	24	64,234	15	77,176	13	65,077	24	79,763	31	106,327
Investments and Pensions ⁸	6	14,862	4	19,834	3	15,938	4	14,723	4	14,576
Insurance	10	27,563	7	33,172	6	31,213	9	30,080	9	31,284
Payment Protection Insurance	60	157,716	74	378,699	78	399,939	63	204,943	56	188,712
New Cases in Total		264,375		508,881		512,167		329,509		340,899

2 Hodges, C, Benohr, I, and Creutzfeldt-Banda, N, *Consumer ADR in Europe*, Oxford, 2012, page 273.

3 Section 225 of the FSM Act.

4 Hodges, C, Benohr, I, and Creutzfeldt-Banda, N, *Consumer ADR in Europe*, Oxford, 2012, page 273.

5 Financial Ombudsman Service, *2015-16 Annual Report*, page 20.

6 Financial Ombudsman Service, *2015-16 Annual Report*, page 20.

7 Financial Ombudsman Service, *2015-16 Annual Report*, page 20.

8 In relation to pension disputes, there is a Memorandum of Understanding between the Pensions Ombudsman and the Financial Ombudsman Service which states that the Pensions Ombudsman deals with matters which predominantly concern the administration and/or management of personal and occupational pensions (after sale of marketing in the case of personal pensions), while the Financial Ombudsman Service deals with matters which predominantly concern advice in respect of the sale or marketing of individual pension arrangements. See Memorandum of Understanding between the Pensions Ombudsman and the Financial Ombudsman Service, viewed 28 November 2016, <<http://www.financial-ombudsman.org.uk/publications/pdf/memorandum-of-understanding.pdf>>

Jurisdiction

- A1.11. The scope of the UK FOS's two jurisdictions – compulsory and voluntary – depends on:
- the type of activity;
 - the place where the activity was carried on;
 - whether the complaint is eligible; and
 - whether the complaint was referred to UK FOS in time.
- A1.12. UK FOS can consider a complaint under its compulsory jurisdiction if it relates to an act or omission by a firm in carrying on one or more of the following activities:
- regulated activities;
 - payment services;
 - a consumer buy-to-let business;
 - lending money secured by a charge on land;
 - lending money and paying money by plastic card; or
 - providing ancillary banking services (as defined) or ancillary activities, including advice, carried on by the firm in connection with them.
- A1.13. The Ombudsman can consider a complaint under the voluntary jurisdiction if it is not covered by the compulsory jurisdiction and it relates to a defined list of activities.
- A1.14. UK FOS can hear complaints which fall within its jurisdiction from:
- a consumer;
 - a micro-enterprise - an enterprise that employs less than 10 people and has a turnover or annual balance sheet that does not exceed €2 million;
 - a charity which has an annual income of less than £1 million; or
 - a trustee of a trust which has a net asset value of less than £1 million.
- A1.15. The maximum money award which the Ombudsman can make is £150,000, excluding interest and costs. If the Ombudsman considers that fair compensation requires payment of a larger amount, they may recommend that the financial firm pays the complainant the balance.

Approach to dispute resolution

- A1.16. If the complainant has been through IDR (and is dissatisfied with the final response or eight weeks have passed and the firm has not responded) the matter is sent to an adjudicator who will determine whether the complaint is within jurisdiction.
- A1.17. UK FOS's approach involves attempting to first settle the dispute informally through mediation or conciliation. If the matter is not able to be resolved easily at conciliation (or if the nature of the case makes a written explanation more appropriate), the adjudicator will confirm their position in writing via an adjudication. This sets out their view of the case and how, in the adjudicator's opinion, the case should be resolved. Each party then has a chance to respond.
- A1.18. If the matter remains unresolved for either party, they may ask for a final decision by an Ombudsman, which occurs in about 10 per cent of cases. The Ombudsman will carry out an independent review of the complaint and make a final decision. The Ombudsman will determine a complaint by reference to what is, in their opinion, fair and reasonable in all the circumstances of the case.
- A1.19. If the complainant accepts the decision within the time limit specified by the Ombudsman, both parties are bound by the decision. If not, the member is not bound, and the complainant remains free to take court proceedings.
- A1.20. Because UK FOS is a 'public body', its decisions are subject to judicial review.⁹ This review will generally focus on how an Ombudsman came to a decision rather than the merits of the case.
- A1.21. For members, there also exists a test case procedure. If the member applies before an Ombudsman has made a decision, the case can be heard by a court if:
- the member believes the case involves an important and novel issue;
 - the Ombudsman agrees; and
 - the member agrees to pay the complainant's legal costs.

Governance

- A1.22. Under the FSM Act, the 'scheme operator' is the 'body corporate' that administers the ombudsman scheme and takes the form of a company limited by guarantee (with no share capital).¹⁰
- A1.23. UK FOS's Board must have at least three directors. It currently has six, who are appointed by the Financial Conduct Authority (FCA). The Board's Chairman is also appointed by the FCA following approval from HM Treasury. Directors have an initial term not exceeding 3 years (the Chairman 5 years) and they can be

9 Part 54 of the *Civil Procedure Rules 1998* (UK).

10 Section 225 of the FSM Act.

re-appointed by FCA. However, they cannot serve periods of longer than 10 years. Directors are 'non-executive' and are not involved in considering individual complaints. Their role is to take a strategic overview and ensure that the ombudsman service is properly resourced and able to carry out its work effectively and independently. Directors are not appointed to represent the individual interests of any particular group or sector, but to ensure the Board as a whole can draw on a wide range of experience, knowledge and skills.

Funding arrangements

- A1.24. UK FOS is funded by a levy and case fees which members have to pay by law. The levy can range from around £100 a year for a small firm of financial advisers to over £300,000 for a major bank or insurance company. The levy is payable irrespective of whether the member has had a complaint referred to UK FOS. The levy is collected by the FCA.
- A1.25. Each year, UK FOS and the FCA consult on the amount of UK FOS's annual budget which is to be raised from the general levy. While there are no specific criteria against which the decision is made, it is noted that the decision is based on the budgeted costs and number of UK FOS staff required to deal with the number of complaints which it expects to receive. Members are required to submit certain information about their business (for example, the size or volume of it) which is used to help decide the general levy. UK FOS's budget is ultimately approved by the FCA.
- A1.26. Members also pay an individual case fee when UK FOS handles a complaint about it and the case becomes 'chargeable'. All members are entitled to a number of 'free' cases. Under the current arrangements, a member does not have to pay a case fee for the first 25 cases settled during the year. For each subsequent complaint, a case fee of £550 is payable.
- A1.27. In April 2013, UK FOS introduced a group-account fee for the largest banking and financial services groups. Approximately 75 per cent of UK FOS's workload is now paid for on this more financially stable basis.

UK FOS's Independent Assessor

- A1.28. UK FOS has an Independent Assessor who is appointed by the Board. The Independent Assessor has its own Terms of Reference, which includes accepting complaints by consumers and firms about the level of service provided. It does not hold the power to assess or review the merits of a case or the actual decisions made.
- A1.29. On reviewing a complaint (and providing opportunities for both the complainant and UK FOS to produce documents and reasons to support their case), the Independent Assessor provides its findings in writing. There are no appeals against its opinion and recommendations.

A1.30. If the Independent Assessor decides that the service has not met the required standards, it can make a recommendation to the Chief Ombudsman about how this can be remedied. This may include issuing an apology or paying compensation for any damage, distress or inconvenience caused (compensation will be equivalent to what an ombudsman would award against a business in similar circumstances). If the Chief Ombudsman does not accept the Independent Assessor's recommendation it is remitted to the Board for a final decision.

New Zealand

Overall regulatory framework

A1.31. The *Financial Service Providers (Registration and Disputes Resolution) Act 2008* (NZ) (the FSP Act) has the twin purposes of:

- promoting the confident and informed participation of businesses, investors and consumers in the financial markets; and
- promoting and facilitating the development of fair, efficient and transparent financial markets.

A1.32. The FSP Act generally requires all financial service providers (FSPs) (that is, firms and/or individuals) who provide services to retail clients to be participants in an approved Dispute Resolution Scheme (DRS). Financial firms were required to join an approved DRS from 1 December 2010 and financial advisers from 1 April 2011.

A1.33. There are four approved schemes:

- Insurance & Financial Services Ombudsman Scheme (IFSO);
- Banking Ombudsman Scheme (BOS);
- Financial Services Complaints Limited (FSCL); and
- Financial Dispute Resolution Service (FDRS) (formerly the reserve scheme).

A1.34. The schemes compete with each other for membership of FSPs. BOS accepts banks as members while IFSO, FSCL and FDRS accept all types of financial service providers.¹¹ While banks can be accepted as customers by the other schemes, in practice they utilise BOS.¹² Originally, each of the schemes had different specialities however, this is changing with the majority of schemes opening up their membership to a wider range of FSPs.¹³

11 BOS participants are registered banks, their subsidiaries and related companies and certain non-bank deposit takers that meet BOS participation criteria.

12 New Zealand Ministry of Business, Innovation & Employment, *Review of the operation of the Financial Advisers Act 2008 and the Financial Service Providers (Registration and Dispute Resolution) Act 2008, Final Report*, page 27.

13 New Zealand Ministry of Business, Innovation & Employment, *Review of the operation of the Financial Advisers Act 2008 and the Financial Service Providers (Registration and Dispute Resolution) Act 2008, Final Report*, page 29.

A1.35. Key features of the schemes are summarised in the table below.

IFSO	BOS	FSCL	FDRS
Relationship to IDR			
Ordinarily, consumers must go through the FSP's own IDR process first.	To access the scheme, consumers must have first attempted to resolve their dispute with their bank directly.	Consumers must first go through the FSP's own IDR process.	Consumers must first go through the FSP's own IDR process.
Governance			
IFSO has an independent chair and a Board with equal numbers of directors from industry and consumer backgrounds.	BOS has an independent chair and a Board with equal numbers of directors from industry and consumer backgrounds.	FSCL has an independent chair and a Board with equal numbers of directors from industry and consumer backgrounds.	Governed by an advisory council staffed by an independent chair and people with industry and consumer backgrounds.
Jurisdiction			
Can only consider complaints relating to a scheme participant. Can hear disputes where the claim (or the part of the claim in dispute) is not more than NZ\$200,000 or NZ\$1,500 per week where the claim relates to a regular payment.	Can only consider complaints relating to a scheme participant. Can hear disputes up to NZ\$200,000 and award up to NZ\$9,000 compensation for inconvenience.	Can only consider complaints relating to a scheme participant. Can hear disputes up to NZ\$200,000 for direct financial loss and up to NZ\$2,000 for inconvenience (for example, stress and humiliation).	Can only consider complaints relating to a scheme participant. Can hear disputes up to NZ\$200,000.
Funding arrangements (including cost to complainants)			
Free for consumers - funded through participant fees and levies.	Free for consumers - funded through participant fees and levies.	Free for consumers - funded through participant fees and levies.	Free for consumers - funded through participant fees and levies.
Caseload			
FY2014-2015: 3,057 disputes and 254 complaints.	FY2014-15: 2,372 enquiries, 576 complaints, 265 disputes. ¹⁴	FY2014-15: 2,615 consumer enquiries and 193 cases investigated.	FY 2014-15: 1,419 enquiries and 475 complaints. ¹⁵

14 Banking Ombudsman Scheme, 2014-15 Annual Report, page 11.

15 Financial Dispute Resolution Scheme, 2014-15 Annual Report, page 4.

IFSO	BOS	FSCL	FDRS
Membership			
Over 4,000 scheme participants who provide insurance and financial services for potentially more than one million consumers.	Registered banks and non-bank deposit takers that: are regulated by the NZ Reserve Bank and can demonstrate high quality internal dispute resolution services.	Membership stands at over 6,000 with members drawn from most sectors of the financial services industry, excluding retail banking. ¹⁶	There are 1,499 members who represent all FSP types. ¹⁷
Powers			
Scheme participants are bound by IFSO decisions.	Scheme participants are bound by BOS decisions.	Scheme participants are bound by FSCL decisions.	Some participants are bound by FDRS decisions.

Scheme approval and oversight

A1.36. The relevant Minister approves schemes and has the power to withdraw this approval in prescribed circumstances. On considering an application, the Minister must be satisfied that the scheme rules are adequate and comply with the FSP Act. Any changes to the scheme rules must be approved by the Minister.

A1.37. The schemes are, relevantly, required to:

- co-operate with other DRSs if a complaint involves members of those other schemes; and
- if there is a series of material complaints about a particular FSP, communicate that fact to the relevant authority.

A1.38. Independent reviews of the schemes must occur at least once every five years after the date of the scheme's first approval. Schemes must also provide an annual report to the Minister.

Addressing systemic issues and consumer complaints

A1.39. On systemic issues, the Financial Markets Authority (FMA) has Memorandum of Understandings with all DRSs and utilises shared data from the schemes on complaints and emerging issues to inform its risk assessments.

16 Financial Services Complaints Ltd 2015, *Independent Review, Foundation for Effective Markets and Governance*.

17 Financial Dispute Resolution Scheme, 2014-15 Annual Report, page 14.

- A1.40. The schemes ensure staff are trained in how to recognise and escalate systemic issues to the appropriate personnel (for example, CEO). Further, the schemes raise systemic issues directly with the FMA through quarterly reporting and discuss systemic issues at their quarterly meetings. The annual report to the Minister also includes discussion of systemic issues.
- A1.41. The schemes can investigate the following complaints about their members:
- any breach of contract with a consumer;
 - a failure to follow industry codes of practice (which may include not dealing fairly or responsibly with a consumer);
 - conduct that is not fair or reasonable in the circumstances; and
 - an alleged contravention of the law.
- A1.42. However, a scheme cannot investigate:
- a member's commercial judgment (for example, whether an investment is suitable) unless this breaches a relevant code of practice;
 - a member's interest rates or standard fees and charges;
 - a product's investment performance;
 - events that took place before the scheme's establishment or before a member belonged to the scheme; and
 - complaints that could be better dealt with by another body, that have already been made to another body, or that have already been investigated by the scheme.
- A1.43. On the application of the person responsible for the DRS, a District Court may make an order requiring a member to do either or both of the following: (a) comply with the rules of the scheme; and (b) comply with a resolution of a complaint that constitutes a binding resolution under those rules (a binding settlement). A DRS member who fails to comply with a binding settlement is liable on conviction to a fine not exceeding NZ\$200,000.
- A1.44. A DRS can terminate an FSP's membership if they refuse to comply with a final decision. This prevents them from joining another scheme until the existing complaint is settled. An FSP who does not belong to a scheme is not authorised to give financial advice and can be prosecuted by the FMA if it continues acting as an adviser.

Singapore

Overall regulatory framework

- A1.45. The Monetary Authority of Singapore (Dispute Resolution Schemes) Regulations 2007 (Singapore) enable the Monetary Authority of Singapore (MAS) to approve schemes for resolving disputes relating to the provision of financial services. Currently, the Financial Industry Dispute Resolution Centre (FIDReC) is the only approved scheme.
- A1.46. FIDReC's mission is to provide an affordable alternative dispute resolution scheme that is independent and impartial so as to encourage and assist in the resolution of disputes between consumers and financial institutions in an amicable and fair manner.
- A1.47. FIDReC was established in 2005 following a review by MAS, which recommended the establishment of a new scheme with the aim of providing coverage for most retail consumer complaints in the financial sector. It subsumed the work of the Consumer Mediation Unit of the Association of Banks in Singapore and the Insurance Disputes Resolution Organisation.
- A1.48. In 2014-15, more than 530 financial institutions were subscribed to FIDReC including: banks and finance companies; life insurers; general insurers; capital market services licensees; licensed financial advisers; and insurance intermediaries.¹⁸ In that year, it dealt with 3,220 new cases of which 2,311 were inquiries and 911 were accepted.¹⁹ Of the 911 complaints accepted, 903 went on to mediation or adjudication.
- A1.49. In 2014-15, FIDReC resolved 981 complaints. Of these, 673 complaints were resolved by mediation and 308 complaints were resolved by adjudication. Of the cases resolved: 43.5 per cent were resolved within 3 months; 86.4 per cent within 6 months; 99.6 per cent within 9 months; and the balance (0.4 per cent) took longer than 9 months.
- A1.50. The 2014-15 annual report also included 10-year statistics, which indicated that FIDReC resolved around 10,528 cases over the 10-year period, with 7,815 complaints resolved by mediation and 2,713 cases resolved by adjudication.

Jurisdiction

- A1.51. FIDReC's jurisdiction covers all disputes brought by individuals and sole proprietors against financial institutions who are members of FIDReC, except disputes over commercial decisions (including pricing and other policies, such as interest rates and fees); cases under investigation by any law enforcement agency; and cases that have been subjected to a court hearing, for which a judgment or order is passed.

18 Financial Industry Dispute Resolution Centre, *2014-15 Annual Report*, page 4.

19 Financial Industry Dispute Resolution Centre, *2014-15 Annual Report*, page 4. This included two cases which were at the pre-acceptance stage in 2013-14.

- A1.52. Cases may be dismissed if the dispute is considered frivolous or vexatious; had been previously considered and excluded under FIDReC's predecessor schemes; or if there are other compelling reasons why it is inappropriate for the dispute to be dealt with by FIDReC.
- A1.53. The following compensation caps apply:
- for claims between insureds and insurance companies, the complainant can claim up to S\$100,000;
 - for disputes between banks and consumers, capital market disputes (including third party claims and market conduct claims): up to S\$50,000.
- A1.54. The adjudicator may specify that reasonable interest may be payable on the award.
- A1.55. The 2014-15 Annual Report notes that financial institutions have been voluntarily submitting to the jurisdiction of FIDReC to handle and adjudicate claims for amounts exceeding its S\$100,000 limit - FIDReC's largest adjudication was for S\$729,000.
- A1.56. FIDReC also has a Non-Injury Motor Accident Scheme jurisdiction, which was incorporated in 2008 (and further expanded in 2011). Non-injury motor accident claims of less than S\$3,000 have to first be heard by FIDReC before court proceedings can be commenced.

Approach to dispute resolution

- A1.57. FIDReC will only handle a complaint if the financial institution has failed to resolve the complaint to the satisfaction of the complainant within four weeks of receiving it.
- A1.58. If the complaint is not resolved, FIDReC applies a three-stage process to dispute resolution:
- Preliminary review: a case officer reviews the facts of the case and highlights relevant clauses (of the relevant contracts) and issues to the consumer. This is to provide the consumer with an opportunity to consider whether they would like to proceed with lodging a formal complaint.
 - Mediation stage: a case manager encourages the parties to resolve the dispute in an amicable but fair way, but will formally mediate in appropriate cases. Case managers do not have the ability to make monetary awards, they can only seek to reach a settlement with parties' agreement.
 - Adjudication stage: when the dispute is not settled by mediation, the case can be heard and adjudicated by a FIDReC Adjudicator(s). The process is developed and modelled after that used by the Singapore courts. The Adjudicator has to assess each case based on its facts and merits taking into account all relevant facts such as written submissions and oral testimonies of both parties and allowed witnesses. They also have to make appropriate

findings of fact and determine the issues of law and equity relevant to the case.

- Once a decision has been made, they will write a determination (a Grounds of Decision) which is read to both parties at a hearing. If the complainant accepts the determination, both parties are required to sign and have approved by the Adjudicator a Settlement Agreement in relation to the matter.
- During the adjudication stage, each party must present their case without representation by an advocate or solicitor (only a person acting as translator for the complainant is permitted).

Governance

A1.59. FIDReC is currently governed by a Board of six directors, comprised of an independent chair, three directors with non-industry background and two directors with industry backgrounds. This is consistent with the requirement that the Board shall have no less than three and no more than six other directors of which at least half are required to be independent directors.²⁰

A1.60. Before a director is appointed, approval from MAS is required.

Funding arrangements

A1.61. No fees are payable by a consumer for filing an initial complaint for preliminary review, or if the case is resolved by mediation. If the case proceeds to adjudication, in general, the consumer pays S\$50 fee. The purpose of the fee is to deter vexatious/frivolous complaints, but not to be so high as to act as a barrier to a consumer accessing redress.

A1.62. Firms pay a combination of levies and case fees to contribute to the cost of running FIDReC, with case fees tiered to take into account the complexity of cases. The case fee is S\$50 for any complaint which is investigated or resolved at the first case manager/mediation stage of the process. When complaints go through to the Adjudication stage, firms pay a flat case fee of S\$500. Fees and levies are paid directly to FIDReC.

A1.63. FIDReC has a power to impose a supplementary levy on financial institutions as a whole, at the group level or individually, when additional funds are required.

Powers

A1.64. FIDReC members are required to enter into an agreement by which they are bound by the scheme's Terms of Reference, agree not to take legal action against FIDReC and agree to pay subscriptions, levies and other fees to FIDReC.

²⁰ An independent director is one who is not a substantial shareholder, officer or employee of a financial institution or a related corporation.

- A1.65. Members may be expelled for failing to comply with the Terms of Reference or failing to make full payment of subscriptions, levies or fees, although MAS must consent to the removal of members.
- A1.66. Decisions of FIDReC are binding on members, but not the complainant who remains free to pursue other avenues, including legal action.
- A1.67. In the event that a financial firm fails to comply with an adjudication or the rules or standards in the Terms of Reference, FIDReC has the power to require the financial institution to take such steps as may be necessary to rectify the breach within 14 days, and can impose the following penalties:
- a penalty of up to S\$100 per day for 14 days following the breach;
 - a penalty of up to S\$200 per day for a further 14 days after the initial period expires;
 - a penalty of up to S\$400 per day for a continuing breach after this period until the breach is rectified; and then
 - termination of the financial institution's subscription to FIDReC should they fail to rectify the breach despite the imposition of the penalties. All fees due continue to remain payable even after the financial institution's membership has been terminated.
- A1.68. The Terms of Reference set out that the Board may delegate certain of FIDReC's powers and duties, including requesting information from the relevant parties. As such, case managers and adjudicators are entitled to request all relevant data and material relevant to the dispute from both parties. Mediators can also request that the financial institution or its representatives attend interviews for the purpose of recording a statement.

Systemic issues

- A1.69. Aside from the publication of an Annual Report, the scheme must provide to MAS:
- each quarter: a report on the disputes received during that period and an indication of the time taken to resolve complaints. There is also a section entitled 'Identification of Trends, Systemic Issues & Other emerging concerns' in which the scheme includes details about whether a dispute relates to a particular financial institution or is industry-wide;
 - within 14 days from any failure by a member to comply with an award against them a report about such failure.

Accountability

- A1.70. An independent review is to be undertaken every three years (although this can be made later with the discretion of MAS, and MAS has discretion to require any other kind of review at any time). The scheme is required to consult with MAS about the terms of the review. The external review must include a qualitative

assessment of the scheme's operations and procedures and the results must be provided to both MAS and its members.

Canada

Overall regulatory framework

- A1.71. Canada has four schemes in place: the Ombudsman for Banking Services and Investments (OBSI); Client Services and Compensation Division of the Autorité des Marchés Financiers, Québec (AMF); Ombudservice for Life & Health Insurance; and General Insurance OmbudService (GIO). Information on OBSI, AMP and GIO will be presented in this Appendix.
- A1.72. OBSI and the GIO are national industry organisations while the AMF is a provincial regulator. OBSI is Canada's independent dispute resolution service for consumers and small businesses. The majority of Canada's banks use OBSI as their external dispute resolution scheme. GIO is an independent dispute resolution service to help Canadian consumers resolve disputes with their home, auto or business insurers.
- A1.73. AMF is Québec's financial markets regulator. AMF regulates insurance, securities, derivatives, deposit institutions (other than banks) and the distribution of financial products and services in Québec. It is also responsible for providing assistance to consumers of financial products and services. AMF offers its complaint resolution services to consumers with a dispute with a financial firm subject to the laws overseen by AMF. The schemes do not compete with each other for membership.
- A1.74. All three schemes provide dispute resolution to consumers free of charge. OBSI and the GIO are industry funded. AMF is funded through dues and levies paid by financial firms governed by the laws it administers.

OBSI	AMF	GIO
Statute or Industry based scheme		
Industry based.	Statute based.	Industry based.
Relationship to IDR		
Consumer must seek resolution through IDR before commencing a claim with OBSI or if 90 days have passed since lodging a complaint through IDR.	Parties required to consider the use of IDR but the decision to offer dispute resolution services remains at the discretion of the AMF.	GIO may refer a consumer to the relevant Insurer's complaints officer before offering conciliation.
Governance		
Governed by a Board of Directors (7 community directors and 3 industry directors) to which the Ombudsman is accountable.	Quarterly reporting to an Advisory Board and Steering Committee but no specific Steering Board for dispute resolution.	Board of Directors (5 independent members and 2 industry representatives)

OBSI	AMF	GIO
Funding arrangements (including cost to complainants)		
Jurisdiction		
Can only hear complaints relating to a member firm. Can hear disputes up to \$350,00 Canadian dollars. If a customer's claim is for a higher amount, the customer can voluntarily reduce it.	AMF is the Québec regulator. It can hear disputes relating to financial firms subject to the laws administered by the AMF.	Can only hear complaints relating to member firms. No reference to a monetary limit in the Terms of Reference.
Free for consumers, funded through participant fees.	Free for both parties but funded through the dues and fees paid by the individuals and enterprises governed by the laws it enforces. Parties may also have to pay for mediation where it lasts longer than 3 hours.	Free for consumers, industry funded.
Caseload		
FY2014-2015: 571 cases opened.	No caseload data publicly available.	FY2015-16: 3,251 complaints
Membership		
All Canadian banks must be a member of an external complaints body (ECB) approved in accordance with the Bank Act. The majority of Canada's banks have chosen OBSI as their ECB.	There is no membership. AMF offers its services to consumers of financial products and services who deal with a financial firm subject to the laws administered by the AMF.	Home, auto or business insurance member companies. All insurance companies doing business in Alberta and British Columbia are required to be members of GIO. Insurance companies are required by law to be a member of an independent ombudsman organisation.
Powers		
Recommendations are not binding on either party but OBSI will make public the failure of a firm to comply with its recommendation.	Recourse to AMF services is voluntary. AMF has no power to compel parties to use them or to force a settlement.	GIO has no power to compel parties to use their services or to force a settlement.

SECTORAL COMPARISONS

A1.75. Domestically, ombudsman services are available to assist with resolving complaints relating to government agencies, financial institutions and telecommunications, energy, water and public transport service providers.

A1.76. Most ombudsmen, including the Telecommunications Industry Ombudsman (TIO) and state energy and water ombudsmen, as well as FOS and CIO, are members of the Australian and New Zealand Ombudsman Association (ANZOA), the peak body for ombudsmen in Australia and New Zealand. Members of ANZOA must observe the Benchmarks for Industry-based Customer Dispute Resolution which relate to the principles of accessibility, independence, fairness, accountability, efficiency and effectiveness.²¹

Telecommunications

A1.77. A single nationwide telecommunications ombudsman scheme operates in relation to the telecommunications industry.

A1.78. TIO is an independent dispute resolution service for small business and residential consumers who have a complaint about their telephone or internet service.²² The scheme is funded by industry but established by legislation (Part 6 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*). It is free for consumers and aims to resolve complaints in a way which is fair, independent, economical, informal and fast.²³

A1.79. Unless exempted by the regulator, all telecommunications carriers and suppliers of telecommunication services are required by law to be members of the TIO scheme and to comply with it.²⁴ As at 30 June 2016, TIO had 1,599 members.²⁵

A1.80. In 2015-16, TIO handled 112,518 new complaints (9.6 per cent fewer than in 2014-15) and 46,778 enquiries from telecommunications consumers.²⁶ Of the complaints received in 2015-16, 9,161 conciliations and 48 investigations were opened, while 9,125 conciliations, 66 investigations and seven land access objection cases were closed.²⁷ Most complaints received related to billing and payments, customer service, faults and complaint handling.

A1.81. TIO only handles complaints which have been first raised with the telecommunications service provider; that is, the provider must first be given the opportunity to consider and resolve the complaint through its own internal processes (IDR).²⁸ If this has not occurred, TIO will refer the consumer and/or their complaint to the provider.

21 These are referred to as the CDR Benchmarks and are available at <<http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/benchmarks-ind-cust-dispute-reso>>.

22 Telecommunications Industry Ombudsman, *Consumers*, viewed 9 November 2016, <www.tio.com.au/consumers>.

23 Subsection 128(4A) of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* requires that the service be free to consumers. The TIO Terms of Reference (at paragraph 1.7) outline TIO's goals for resolving complaints.

24 Sections 128 and 132 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*.

25 Telecommunications Industry Ombudsman 2016, *2015-16 Annual Report*, page 3. Note that a new Ombudsman was appointed in March 2016 and the Board settled on a new strategy during 2015-16.

26 Telecommunications Industry Ombudsman 2016, *2015-16 Annual Report*, page 7.

27 Telecommunications Industry Ombudsman 2016, *2015-16 Annual Report*, page 7.

28 Telecommunications Industry Ombudsman 2014, *Telecommunications Industry Ombudsman Terms of Reference (1 December 2014)*, paragraph 2.5.

Approach to dispute resolution

- A1.82. In exercising its functions and powers, TIO has regard to the Benchmarks for Industry-based Customer Dispute Resolution as well as relevant laws, good practice and what is fair and reasonable.²⁹ It is not bound by its previous decisions and considers each matter on its merits.
- A1.83. To resolve a complaint, TIO first refers the complaint back to the provider for a final opportunity to resolve the matter. The majority of complaints are resolved in this manner. If a complaint remains unresolved through referral, TIO works with the consumer and provider to reach an agreement through conciliation. If this is unsuccessful, then TIO commences an investigation, which results in a settlement, a view about the merits of a case, a determination and, if appropriate, a recommendation. Once TIO makes a determination, the consumer has 21 days in which to accept it. If the consumer accepts the determination, then no further action may be taken in relation to the complaint and the provider must comply with the determination.³⁰ In 2015-16 no determinations or temporary rulings were issued (other than land access objection cases, which are finalised with a decision of the Ombudsman).³¹
- A1.84. Land access objections under Schedule 3 of the *Telecommunications Act 1997* are resolved through arbitration.

Jurisdiction and monetary limits

- A1.85. TIO's jurisdiction is articulated in its Terms of Reference. The Terms of Reference provide examples of the types of complaints made by consumers against a member of the TIO scheme which may be handled by TIO (such as the supply of or faults with a telecommunications service) and which may not be handled by TIO (complaints relating to such matters as telecommunications policy or the setting of prices).³² TIO also handles any other type of complaint if a member asks it to and the customer agrees.³³
- A1.86. TIO places limits on the age of complaints which it will handle. While it handles all complaints within its jurisdiction which relate to problems discovered by the consumer within the prior two years, it does not handle complaints relating to an event or problem which was discovered by the consumer more than six years

29 Telecommunications Industry Ombudsman 2014, *Telecommunications Industry Ombudsman Terms of Reference (1 December 2014)*, paragraph 1.5.

30 Telecommunications Industry Ombudsman 2014, *Telecommunications Industry Ombudsman Terms of Reference (1 December 2014)*, paragraphs 3.12 to 3.14. (In certain circumstances the consumer has a right to request a review of the decision - see Telecommunications Industry Ombudsman 2016, *2015-16 Annual Report*, page 11.)

31 Telecommunications Industry Ombudsman 2016, information provided to the EDR Review, 17 March 2017. Seven land access objection cases were closed in 2015-16 (Telecommunications Industry Ombudsman 2016, *2015-16 Annual Report*, page 7).

32 Telecommunications Industry Ombudsman 2014, *Telecommunications Industry Ombudsman Terms of Reference (1 December 2014)*, section 2.

33 Telecommunications Industry Ombudsman 2014, *Telecommunications Industry Ombudsman Terms of Reference (1 December 2014)*, paragraph 2.8.

earlier and it applies discretion in deciding whether or not to handle complaints about matters discovered by the consumer between two and six years earlier.³⁴

A1.87. TIO will also not handle a complaint if the specific issues raised by the complaint have been or are likely to be dealt with by a court or tribunal or by a regulator such as the Australian Communications and Media Authority (ACMA) or the Australian Competition and Consumer Commission.³⁵

A1.88. TIO decisions on complaints are confined by monetary limits. When TIO decides the resolution of a complaint, the total value of any action it requires by the provider must not exceed \$50,000.³⁶ Where TIO decides the resolution of a complaint and also recommends further action by the provider, the total value of the decision and the associated recommendation must not exceed \$100,000.³⁷ The TIO Terms of Reference provide for an annual review of these financial limits.³⁸ TIO can arbitrate a complaint if the value is over \$100,000 and both the consumer and the provider agree.³⁹

Powers

A1.89. Section 128 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*:

- requires the scheme to provide for TIO to investigate complaints about carriage services by end users of those services and to make determinations and give directions relating to such complaints;⁴⁰ and
- prevents the scheme from providing for TIO to investigate complaints about the tariffs charged for services or the content of a content service.

A1.90. The legislation also requires TIO to maintain a register of members of the scheme.⁴¹

A1.91. TIO has powers which are additional to resolving disputes, including the power to award damages in accordance with the *Telecommunications (Customer Service Guarantee) Standard 2011* and to make decisions about objections to

34 Telecommunications Industry Ombudsman 2014, *Telecommunications Industry Ombudsman Terms of Reference (1 December 2014)*, paragraph 2.6.

35 Telecommunications Industry Ombudsman 2014, *Telecommunications Industry Ombudsman Terms of Reference (1 December 2014)*, paragraph 2.11.

36 Telecommunications Industry Ombudsman 2014, *Telecommunications Industry Ombudsman Terms of Reference (1 December 2014)*, paragraph 3.11.

37 Telecommunications Industry Ombudsman 2014, *Telecommunications Industry Ombudsman Terms of Reference (1 December 2014)*, paragraph 3.16.

38 Telecommunications Industry Ombudsman 2014, *Telecommunications Industry Ombudsman Terms of Reference (1 December 2014)*, paragraph 7.7.

39 Telecommunications Industry Ombudsman 2014, *Telecommunications Industry Ombudsman Terms of Reference (1 December 2014)*, paragraph 3.19.

40 Telecommunications Industry Ombudsman 2014, *Telecommunications Industry Ombudsman Terms of Reference (1 December 2014)*, paragraph 3.8.

41 Section 133 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*.

proposed low-impact facility activities by carriage services under Schedule 3 of the *Telecommunications Act 1997*.⁴²

- A1.92. Members must comply with determinations made by TIO. Non-compliance with the scheme by a member may be reported to the regulator.⁴³
- A1.93. TIO has certain other powers or rights as outlined in its Terms of Reference. These include:
- the power to make recommendations that a member takes or does not take further actions;⁴⁴
 - the power to make temporary rulings to prevent a provider from seeking to collect a disputed debt while the complaint is being considered;⁴⁵
 - the power to request information (members must give TIO information and/or documents that TIO requests);⁴⁶
 - the right to publish the names of providers who fail to comply with the TIO scheme;⁴⁷ and
 - the power to share information with regulators and others.⁴⁸

Governance

- A1.94. The scheme is operated by a company (Telecommunications Industry Ombudsman Limited) which was established in 1993 in accordance with legislation⁴⁹ when the telecommunications industry was opened to competition. It is independent of industry, the government and consumer groups. It is governed by a Board of Directors and is managed by an independent Ombudsman and Deputy Ombudsman in accordance with the company Constitution and Terms of Reference.
- A1.95. The Board is chaired by an independent director and comprises two other independent directors (one with commercial governance experience and one with not-for-profit governance experience), four directors with consumer

42 Telecommunications Industry Ombudsman 2016, *2015-16 Annual Report*, page 3.

43 Telecommunications Industry Ombudsman 2014, *Telecommunications Industry Ombudsman Terms of Reference (1 December 2014)*, paragraph 6.3.

44 Telecommunications Industry Ombudsman 2014, *Telecommunications Industry Ombudsman Terms of Reference (1 December 2014)*, paragraph 3.16.

45 Telecommunications Industry Ombudsman 2014, *Telecommunications Industry Ombudsman Terms of Reference (1 December 2014)*, paragraph 4.1.

46 Telecommunications Industry Ombudsman 2014, *Telecommunications Industry Ombudsman Terms of Reference (1 December 2014)*, paragraph 3.6.

47 Telecommunications Industry Ombudsman 2014, *Telecommunications Industry Ombudsman Terms of Reference (1 December 2014)*, paragraph 6.2.

48 Telecommunications Industry Ombudsman 2014, *Telecommunications Industry Ombudsman Terms of Reference (1 December 2014)*, paragraphs 6.3 and 4.11.

49 Now Part 6 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*.

experience and four directors with industry experience.⁵⁰ Over the course of 2016-17, TIO is transitioning to a nine-member Board by reducing the directors with consumer and industry experience to three each.⁵¹ Appointments are made by the Board based on recommendations made by the Nominations Committee.⁵² The Board appoints the Chair after informing the relevant Minister about the proposed appointment.⁵³ The Ombudsman is appointed by the Board.

Funding arrangements

- A1.96. As noted above, TIO is an industry-funded ombudsman scheme. Its income is generated solely from TIO members who are charged fees for complaint resolution services provided by TIO in accordance with the TIO Limited Constitution.
- A1.97. The nature of fees is specified in the TIO Limited Constitution⁵⁴ and the amount is determined by the Ombudsman and/or by the Board, having regard to the funding required for TIO to perform its functions. Service providers are only charged if a complaint is made to TIO by one of their customers. This provides an incentive for service providers to take action to resolve complaints through their internal dispute resolution mechanisms and to minimise the number of complaints that are escalated to TIO.
- A1.98. The TIO commenced work in 2016 on a review of the TIO Funding Model. The initial phase of the project included consultation with members and key stakeholders, leading into the development of various models for assessment against the current model, demand scenarios and other criteria.⁵⁵ The Board and Ombudsman are currently considering the proposed models.

Improving outcomes for users

- A1.99. TIO's vision involves not only 'deliver[ing] an exceptional telecommunications dispute resolution service' but also aiming 'to contribute to better customer

50 Telecommunications Industry Ombudsman 2016, *2015-16 Annual report*, page 4.

51 Telecommunications Industry Ombudsman 2016, *2015-16 Annual report*, page 1; also Telecommunications Industry Ombudsman 2016, information provided to the EDR Review, 17 March 2017.

52 Telecommunications Industry Ombudsman 2015, *2014-15 Annual report*, page 4. Under clause 12.2(g) of the TIO Limited Constitution, the Nominations Committee is comprised of the independent Chair of the Board, one director with consumer experience, one director with industry experience, one person nominated by a peak telecommunications industry group and one person nominated by a peak group representing users or public interest issues.

53 Telecommunications Industry Ombudsman, *Constitution of Telecommunications Industry Ombudsman Limited*, clause 12.6(c).

54 Parts 7 and 9 of the TIO Limited Constitution describe annual volume-related and operating costs and special levies and capital expenditure funds. The Statement of Comprehensive Income for the year ended 30 June 2016 indicates that revenue from members in 2015-16 was \$24.3 million (Telecommunications Industry Ombudsman Limited 2016, *Financial Report for the year ended 30 June 2016*, page 17).

55 Telecommunications Industry Ombudsman Limited 2016, *Financial Report for the year ended 30 June 2016*, page 12.

service and complaint handling in the telecommunications industry'.⁵⁶ Thus the goals of the scheme are both to provide redress and also to aid in prevention.

- A1.100. Where TIO identifies a systemic issue, it first works with the member to try to resolve the issue. If this is unsuccessful, TIO may make recommendations which must be considered by the member, and the member must take steps to resolve the issue.⁵⁷
- A1.101. The roles of TIO which may improve outcomes for users include:
- reporting non-compliance both in a public forum (for example, on the website) and to the regulator⁵⁸ – in 2015-16 TIO referred seven providers to ACMA for non-compliance⁵⁹; and
 - recommending improvements to members' procedures.⁶⁰
- A1.102. Feedback about TIO is overseen by the Board. In 2014-15 TIO received 78 formal complaints about the service provided by the scheme, of which 26 were found to be substantiated.⁶¹
- A1.103. In terms of accessibility, consumers can lodge a complaint by telephoning, emailing, completing an online form on the TIO website or by writing to TIO. A multicultural brochure and factsheet are available on the TIO website in 31 languages.⁶²
- A1.104. During the 2015-16 financial year, TIO distributed a suite of resources for Indigenous consumers, attended 43 community outreach events and facilitated a review of the industry's financial hardship guidelines.⁶³
- A1.105. The Telecommunications Consumer Protections Code was revised in 2012 to include new consumer protection measures and was updated in 2015 to remove duplication with existing laws and code rules.
- A1.106. An organisational restructure undertaken in 2014-15 resulted in a reduction of the workforce by 21 per cent from 242 at 30 June 2014 to 191 at 30 June 2015, which included the role of Case Officer being made redundant. Forty one

56 Telecommunications Industry Ombudsman 2015, *2014-15 Annual Report*, page 1.

57 Telecommunications Industry Ombudsman 2014, *Telecommunications Industry Ombudsman Terms of Reference (1 December 2014)*, section 5.

58 This is also governed by a Memorandum of Understanding between TIO and the regulator (ACMA).

59 Telecommunications Industry Ombudsman 2016, *2015-16 Annual Report*, page 8. In each case non-compliance related to failing to become a member of TIO. No providers were referred to ACMA during the 2015-16 year for failing to comply with an Ombudsman decision.

60 Telecommunications Industry Ombudsman 2014, *Telecommunications Industry Ombudsman Terms of Reference (1 December 2014)*, paragraphs 6.4 and 6.5.

61 Telecommunications Industry Ombudsman 2015, *2014-15 Annual Report*, page 4. Statistics on complaints about the scheme in 2015-16 were not published.

62 Telecommunications Industry Ombudsman, *Translations*, viewed 25 November 2016, <<https://www.tio.com.au/publications/translations>>. Additional detail on accessibility is provided in the TIO 2014-15 Annual Report at page 13 and TIO 2015-16 Annual Report at pages 8-9.

63 Telecommunications Industry Ombudsman 2016, *2015-16 Annual Report*, pages 8-9.

positions were made redundant as a result of a decline in complaint demand and a change in the nature of complaints.⁶⁴

Energy and water

- A1.107. State-based external dispute resolution bodies operate in the energy and water sector. The nature of the bodies and the way in which they are established varies from state to state. For example:
- the Energy and Water Ombudsman Victoria (EWOV) and the Energy and Water Ombudsman (NSW) are non-statutory, industry-funded schemes;
 - the Energy and Water Ombudsman Queensland (EWOQ) is an industry-funded scheme established by statute; and
 - the Australian Capital Territory Civil & Administrative Tribunal, established and governed by statute, considers and resolves disputes across a wide range of issues including energy and water hardship and complaints. It has the same jurisdiction and powers as the Magistrates Court.⁶⁵
- A1.108. The role of energy and water ombudsmen is to provide an independent dispute resolution service for consumers' unresolved complaints with their electricity, gas or water supplier.
- A1.109. For the purposes of this report, the schemes that have been selected for comparison are EWOV and EWOQ.
- A1.110. Typically for ombudsman schemes, no charge is payable by consumers for their use of the service. Rather, each scheme is funded by fees charged to scheme participants (energy/water suppliers who are members of the scheme).
- A1.111. Under each state's scheme, consumers are required to have attempted to resolve their complaint using the internal dispute resolution procedures offered by suppliers before escalating their complaint to the ombudsman.⁶⁶
- A1.112. The table below provides some of the key features and statistics of the two schemes. Additional information and observations about the schemes, including how the scheme promotes accessibility and works to improve consumer outcomes, is provided in text below.

64 Telecommunications Industry Ombudsman 2015, *2014-15 Annual Report*, page 6.

65 *ACT Civil and Administrative Tribunal Act 2008*, section 22.

66 Energy and Water Ombudsman Victoria 2006, *Energy and Water Ombudsman Charter (30 May 2006)*, clause 5.1; Energy and Water Ombudsman Queensland 2013, *Energy and Water Ombudsman Queensland Charter of Service*, clause 10.

Key features and statistics for energy and water ombudsman schemes

EWOV	EWOQ
Establishment	
Not-for-profit company limited by guarantee; founded in 1995 by six electricity companies, later joined by other electricity, gas and water companies	Statutory body formed under the <i>Energy and Water Ombudsman Act 2006</i> (Qld)
Dispute resolution techniques	
<p>(1) 'Unassisted referral' – customer is referred to supplier's internal dispute resolution process</p> <p>(2) Assisted referral – EWOV contacts a more senior contact within supplier and asks that they investigate customer's concerns</p> <p>(3) Real time resolution – EWOV negotiates directly with customer and supplier</p> <p>(4) Investigation – an EWOV conciliator investigates the complaint to find a fair and reasonable resolution</p> <p>(5) Binding decision – in the absence of a conciliated settlement of complaint Ombudsman issues binding decision on supplier if customer accepts the determination⁶⁷</p>	<p>(1) (a) Internal dispute resolution (within supplier)</p> <p>(b) Referral to Higher Level (within supplier)</p> <p>(c) Investigation</p> <p>(2) Negotiation</p> <p>(3) Conciliation – work through options to reach mutually acceptable outcome</p> <p>(4) Final order – binding on both customer and supplier once customer accepts or is taken to have accepted the decision;⁶⁸ taken to be a judgment of the court⁶⁹</p>
Jurisdiction & monetary limits	
<p>Complaints from events which have become known to the complainant less than one year prior to the complaint being lodged.</p> <p>A binding decision by the Ombudsman is limited to an amount of \$20,000, or if both parties agree, an amount of no more than \$50,000. No limit to the amount of a conciliated outcome as such outcomes are reached by agreement.⁷⁰</p>	<p>Generally, complaints arising from events which have become known to the complainant less than 12 months prior to the complaint being lodged.</p> <p>Costs and compensation awarded under final order are capped at \$20,000 (unless otherwise prescribed) or if all parties agree an amount of no more than \$50,000.⁷¹</p>

67 Energy and Water Ombudsman Victoria 2016, *2016 EWOV Annual Report*, page 21.

68 Under section 40 of the *Energy and Water Ombudsman Act 2006*, the customer is taken to have accepted the order if, within 21 days after receiving the order, they do not notify the ombudsman that they do not accept the order.

69 *Energy and Water Ombudsman Act 2006*, sections 40 and 42.

70 Energy and Water Ombudsman Victoria 2006, *Energy and Water Ombudsman Charter (30 May 2006)*, clauses 3.2 and 6.1.

71 *Energy and Water Ombudsman Act 2006*, sections 19A and 37.

EWOV	EWOQ
Powers	
Approved by the Essential Services Commission (ESC) to nominate an Ombudsman with the authority to receive, investigate and facilitate the resolution of complaints against suppliers; ⁷² decisions made that result in a determination are binding on the supplier; non-compliance by a supplier can result in escalation to the CEO, referral to the Board or ESC ⁷³ or termination of membership in the event of wilful non-compliance with the Charter, Constitution or rules. ⁷⁴	Receive, investigate and facilitate the resolution of disputes referred under the Act, to promote the operation of the service and identify systemic issues arising out of complaints; ⁷⁵ the Ombudsman has the power to refer to the State regulator for non-compliance with requests for documents (max penalty 100 penalty units) ⁷⁶ and non-compliance with issued interim orders (max penalty 100 penalty units); ⁷⁷ if the dispute is not resolved the Ombudsman may make a final order which is binding on the supplier if the complainant accepts the decision. ⁷⁸ The order can be filed at the Magistrates Court, and once filed the order is taken to be a judgment of the Magistrates Court. ⁷⁹
EWOV	EWOQ
Governance	
Board is comprised of an independent Chair, four industry directors appointed by members to represent electricity, gas and water suppliers, and four consumer directors appointed by the ESC. ⁸⁰ Board appoints Ombudsman of the scheme. ⁸¹	Advisory council which monitors the independence of the Ombudsman and provides advice relating to the Act; ⁸² advisory council consists of a chairperson and at least six other members appointed by the Minister; ⁸³ Ombudsman appointed directly by the Governor in Council. ⁸⁴

72 Energy and Water Ombudsman Victoria 2006, *Energy and Water Ombudsman Charter (30 May 2006)*, clauses 1.1 and 1.2.

73 Energy and Water Ombudsman Victoria 2006, *Energy and Water Ombudsman Charter (30 May 2006)*, clause 7.2.

74 Energy and Water Ombudsman (Victoria) Limited 2010, *Constitution of Energy and Water Ombudsman (Victoria) Limited (17 May 2010)*, clause 10.2.

75 *Energy and Water Ombudsman Act 2006*, section 11.

76 *Energy and Water Ombudsman Act 2006*, section 29; also Energy and Water Ombudsman Queensland 2016, information provided to EDR Review, 23 November 2016.

77 *Energy and Water Ombudsman Act 2006*, section 32; also Energy and Water Ombudsman Queensland 2016, information provided to EDR Review, 23 November 2016.

78 *Energy and Water Ombudsman Act 2006*, section 41.

79 *Energy and Water Ombudsman Act 2006*, section 42.

80 Energy and Water Ombudsman (Victoria) Limited 2010, *Constitution of Energy and Water Ombudsman (Victoria) Limited (17 May 2010)*, clause 14.2.

81 *Ibid*, clause 18.

82 *Energy and Water Ombudsman Act 2006*, section 49.

83 *Energy and Water Ombudsman Act 2006*, section 50.

84 *Energy and Water Ombudsman Act 2006*, section 51.

EWOV	EWOQ
Funding	
<p>Proposed annual funding figure is approved by members through general meeting (or, if rejected, is determined by the ESC).⁸⁵ Members pay annual levy of between \$2,000 and \$20,000 based on customer numbers at commencement of the calendar year, with the balance of the annual levy being allocated between members on a user-pays basis.⁸⁶</p> <p>Special levies may be raised by the Board as and when required.</p> <p>In 2015-16, EWOV's revenue was \$10 million. Six per cent was funded by a fixed annual levy and 94 per cent was funded by complaints-based user-pays fees.⁸⁷</p>	<p>Industry funded, members pay a participation fee (generally either \$5,000 or \$10,000) and user pays fees.⁸⁸</p> <p>In 2015-16, scheme income comprised \$172,000 participation fee; user pays fees of \$5.85 million and other revenue of \$58,000.⁸⁹</p> <p>User pays fees are invoiced quarterly in advance and reconciled twice yearly. The legislation requires that members are only charged the actual costs required to operate the scheme for the year, and so surplus funds are returned to members.⁹⁰</p> <p>Supplementary funding may be raised – this has only happened once in history of EWOQ.⁹¹</p>
Membership	
<p>EWOV is the sole Victorian EDR scheme approved under the ESC and is intended to allow electricity, gas and water licensees to satisfy applicable licence conditions, legislative requirements or industry code requirements;⁹² members of the scheme are bound by the EWOV Constitution and Charter.</p>	<p>Required by the <i>Energy and Water Ombudsman Act 2006</i> and retail authorisation for energy entities.</p>

85 Energy and Water Ombudsman (Victoria) Limited 2010, *Constitution of Energy and Water Ombudsman (Victoria) Limited (17 May 2010)*, section 11.

86 Ibid, clause 9.2.

87 Energy and Water Ombudsman Victoria 2016, data provided to EDR Review, 16 November 2016.

88 *Energy and Water Ombudsman Act 2006*, section 65; also Energy and Water Ombudsman Queensland 2016, *Annual Report 2015-16*, page 54.

89 Energy and Water Ombudsman Queensland 2016, *Annual Report 2015-16*, page 55.

90 Energy and Water Ombudsman Queensland 2016, *Annual Report 2015-16*, page 54.

91 Energy and Water Ombudsman Queensland 2016, *Annual Report 2015-16*, page 54.

92 Legislative and other requirements are contained in the *Electricity Industry Act 2000; Gas Industry Act 2001; Essential Services Legislation (Dispute Resolution) Act 2000; Victorian LPG Retail Code*.

EWOV	EWOQ
Number of members as at 30 June 2016	
83 (some operating under the same name in different industries) ⁹³	34 ⁹⁴
Complaints	
<p>2015-16: 36,152 new cases received (down from 50,437 in 2014-15); and 31,652 finalised.⁹⁵</p> <p>Main issues are credit (30 per cent of cases in 2015-16) and billing (41 per cent).</p> <p>Business complaints made up 9 per cent of complaints.⁹⁶</p> <p>91.1 per cent of complaints closed within 28 days; 98.8 per cent within 180 days.⁹⁷</p>	<p>2015-16: 8,749 new cases received (down from 11,133 in 2014-15); 8,895 cases closed.⁹⁸</p> <p>Billing and credit-related complaints make up more than 70 per cent of case load.⁹⁹</p> <p>Five per cent of complaints were made by small business.¹⁰⁰</p> <p>92 per cent of complaints closed within 28 days; 98 per cent within 60 days; 99 per cent within 90 days.¹⁰¹</p>
Determinations / binding decisions	
Total of 36; latest one in 2003. ¹⁰²	No final orders were issued in 2015-16; 11 were issued in 2014-15 and none in the three years prior. ¹⁰³

93 Energy and Water Ombudsman Victoria 2016, *2016 EWOV Annual Report*, page 40.

94 Energy and Water Ombudsman Queensland 2016, data provided to EDR Review, 23 November 2016.

95 Energy and Water Ombudsman Victoria 2016, *2016 EWOV Annual Report*, pages 17 and 22-3.

96 Energy and Water Ombudsman Victoria 2016, *2016 EWOV Annual Report*, page 17.

97 Energy and Water Ombudsman Victoria 2016, *2016 EWOV Annual Report*, page 12.

98 Energy and Water Ombudsman Queensland, *2015-16 Annual Report*, page 92.

99 Energy and Water Ombudsman Queensland, 4 October 2016, *Media release: Queenslanders still struggling to pay utility bills*, viewed 23 November 2016, <<http://www.ewoq.com.au/userfiles/files/20161004%20Queenslanders%20still%20struggling%20to%20pay%20utility%20bills.pdf>>.

100 Energy and Water Ombudsman Queensland, *Annual Report 2015-16*, page 7.

101 Energy and Water Ombudsman Queensland, *Annual Report 2015-16*, page 9.

102 Energy and Water Ombudsman Victoria, *Binding decisions*, viewed 16 November 2016, <<https://www.ewov.com.au/about/binding-decisions>>.

103 Energy and Water Ombudsman Queensland, *Annual Report 2015-16*, page 92.

Energy and Water Ombudsman Victoria

Improving outcomes for users

- A1.113. Documents underpinning systemic improvements include the EWOV Charter (clauses 7.1 and 7.2), the EWOV Constitution, regulatory memoranda of understanding and reporting protocols, and the Benchmarks for Industry-Based Customer Dispute Resolution.
- A1.114. The Ombudsman has the power to make a report to the supplier and to the ESC where the general policy or commercial practices of a supplier have contributed to a complaint or a number of complaints; or have impeded the investigation or handling of a particular complaint.¹⁰⁴
- A1.115. Identification of systemic issues occurs through the cases and investigations conducted by EWOV. The ongoing focus of this is on data analysis to identify emerging complaint issues and drive improvement.¹⁰⁵
- A1.116. EWOV identified and dealt with 30 potential systemic issues in 2015-16.¹⁰⁶

Independent reviews

- A1.117. EWOV undertakes regular independent reviews of its compliance with the Benchmarks for Industry-based Customer Dispute Resolution. The last review was conducted in 2014 and found that EWOV meets the Benchmarks and is a professionally-run scheme whose staff are highly engaged with their work and committed to continuous improvement. The report made recommendations for 'subtle shifts in balance', and the Board has released its response.¹⁰⁷

Energy and Water Ombudsman Queensland

Improving outcomes for users

- A1.118. Systemic issues are identified in a number of ways including: monitoring customer complaints by frontline investigative staff; monitoring and review of complaints by the Policy and Research Team; Systemic Issues Monitoring Committee meetings; advice of the Advisory Council; and collaborative relationships with members, government agencies and ombudsman schemes in other jurisdictions.¹⁰⁸

104 Energy and Water Ombudsman Victoria 2006, *Energy and Water Ombudsman Charter* (30 May 2006), clause 7.2.

105 Energy and Water Ombudsman Victoria 2016, *2016 EWOV Annual Report*, page 38.

106 Energy and Water Ombudsman Victoria 2016, *2016 EWOV Annual Report*, page 38.

107 Energy and Water Ombudsman Victoria, *Our principles*, viewed 18 November 2016, <<https://www.ewov.com.au/about/who-we-are/our-principles>>.

108 Energy and Water Ombudsman Queensland, *Annual Report 2015-16*, page 18.

A1.119. If a systemic issue is identified the relevant member is notified immediately and EWOQ provides advice about how the issue should be resolved. EWOQ notifies the appropriate regulatory agency of any systemic issues that could constitute a breach of legislation, code or licence. Thirty one systemic issues were identified in 2015-16.¹⁰⁹ The process aims to create changes, for example to processes and procedures, to prevent identified issues from recurring.

Independent reviews

A1.120. Independent reviews of EWOQ, assessing against the national benchmarks of accessibility, independence, fairness, accountability, efficiency and effectiveness, were conducted in 2010 and 2013, with the next one planned for 2017.¹¹⁰

A1.121. The 2013 independent review¹¹¹ found that EWOQ was exceeding the benchmarks and operating effectively. While it made 15 recommendations, it noted that due to the effective running of the scheme 'suggestions for enhancement are [...] likely to achieve modest rather than fundamental improvement'. The majority of the recommendations were accepted by EWOQ and the implementation of the recommendations was finalised in 2015-16, with a funding model review completed.

A1.122. The issues identified in the report were that the definition of 'small energy users' was excluding small businesses outside of EWOQ's threshold, those accessing services through bulk on-sellers or wholesalers were unable to utilise EWOQ, the Ombudsman did not have authority to investigate issues identified as such within the industry unless complaints have been received (that is, as soon as the problem becomes evident as opposed to when it manifests) and that emerging technologies were not adequately covered by the scheme.

109 Energy and Water Ombudsman Queensland, *Annual Report 2015-16*, page 18.

110 Energy and Water Ombudsman Queensland, *Annual Report 2015-16*, page 12; also Energy and Water Ombudsman Queensland, *Reports to stakeholders*, viewed 23 November 2016, <<http://www.ewoq.com.au/stakeholder-reports/>>.

111 The Consultancy Bureau 2013, *Independent review of the Office of the Energy and Water Ombudsman Queensland*, viewed 23 November 2016, <<http://www.ewoq.com.au/userfiles/files/EWOQ-Independent-Review-report.pdf>>.

Appendix 2: Consultation

OVERVIEW

In the course of the Review, the Panel undertook the following consultation processes:

- The EDR Review Issues Paper was released for public consultation for a period of four weeks from 9 September 2016 to 7 October 2016.
- The EDR Review Interim Report was released for public consultation for a period of seven weeks from 6 December 2016 to 27 January 2017.
- Interested parties were invited to make submissions by 3 March 2017 on Recommendations 11 and 13 of the Australian Small Business and Family Enterprise Ombudsman’s report on the *Inquiry into small business loans*, released on 3 February 2017.

The Panel held numerous roundtables and meetings with individual stakeholders as part of these consultation processes.

Visits to the EDR bodies

The Panel undertook site visits of each of the bodies: CIO (14 September 2016); FOS (16 September 2016) and SCT (16 September 2016).

CONSULTATION ON THE ISSUES PAPER

Submissions

The Panel received 127 submissions to the EDR Review Issues Paper, 33 of which were marked as confidential and 1 anonymous. Non-confidential submissions are listed below.

AMP
ANZ
Association of Securities & Derivatives Advisers of Australia (ASDAA)
Association of Superannuation Funds of Australia (ASFA)
Australian and New Zealand Ombudsman Association (ANZOA)
Australian Bankers’ Association (ABA)
Australian Collectors & Debt Buyers Association (ACDBA)
Australian Finance Conference (AFC)
Australian Institute of Superannuation Trustees (AIST)
Australian Retail Credit Association (ARCA)

Australian Securities and Investments Commission (ASIC)

Australian Securities and Investments Commission (ASIC) – supplementary submission

Australian Timeshare and Holiday Ownership Council

Barrett, Janine

Beamond, Adrian

Beslic, Damien

beyondblue

Brown, Ross

Cadwallader, Greg

Cashmore, Jean

Chandler, Brett

Coburn, Niall

Code Compliance Monitoring Committee (CCMC)

Cole, Mike

Commercial Asset Finance Brokers Association of Australia Limited (CAFBA)

Cooper, Haydn

Corporate Superannuation Association

Cosstick, John

Credit and Investments Ombudsman (CIO)

Credit Corp

Cumming, Malcolm and Joan

Customer Owned Banking Association (COBA)

Davis, Noel

Dispute Assist

Downes, Brendan

Dun & Bradstreet

Elliot, Alison

Farley, John

Field, Susan

Finance Industry Delegation (FID)

Financial Ombudsman Service (FOS)

Financial Planning Association of Australia (FPA)

Financial Services Council (FSC)

Florek, Stan

Fraser, Veronika

Goddard, Thomas and Philippa

Harris, Leanne

Heslop, Graham

Hodder, Michael Ellis

Holt Norman Ashman Baker Action Group

Hooper, Dave

IAG

Industry Super Australia (ISA)

Insurance Council of Australia (ICA)

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

Jones, Gretel Mary

Juda, Scott

Law Council of Australia

Legal Aid NSW

Legal Aid Queensland

Little, Sean

Matheson, Michelle

Maurice Blackburn

McFarlane, Duncan

Mitchell, Adrian

Mortgage & Finance Association of Australia (MFAA)

Moss, Kelley

Murray, Pauline

National Australia Bank (NAB)

National Insurance Brokers Association of Australia (NIBAA)

Nicholson, Afrovite

Offenhauser, Craig

Office of the Australian Information Commissioner

O'Reilly, Steve

PayPal

Phillips, Sandy

Pinhorn, Antony

Pioneer Credit

Private Mortgage Funding & Management

Public Interest Advocacy Centre

QBE

QSuper

Sapienza, Joseph

Schumlow, Andy

Smith, Deborah

Superannuation Complaints Tribunal (SCT)

Thearle, Anthony

Victims of Financial Fraud

Wall, Joanne

Weir, Mark

Westpac

Williams, Paul

Xenophon, Nick

Roundtables

The Panel held a number of roundtables, summarised below.

Event	Date held	Venue
Consumer roundtable	5 September 2016	Sydney, Melbourne, Canberra
Industry roundtable	5 September 2016	Sydney, Melbourne, Canberra
Roundtable with individuals that have suffered financial loss	21 September 2016	Sydney, Melbourne, Canberra
Roundtable with advocates/representatives of individuals that have suffered financial loss	21 September 2016	Sydney, Melbourne, Canberra
Superannuation roundtable	14 November 2016	Sydney, Melbourne, Canberra

Meetings

The Panel members¹ held a range of meetings, which are summarised below.

Stakeholder category	No. of meetings
Bodies under review	5
Government	4
Other	6

CONSULTATION ON THE INTERIM REPORT

Submissions

The Panel received 56 submissions to the EDR Review Interim Report, four of which were marked as confidential. Non-confidential submissions are listed below.

ANZ

Association of Securities and Derivatives Advisers of Australia (ASDAA)

Association of Superannuation Funds Australia (ASFA)

Australian Bankers' Association (ABA)

Australian Collectors and Debt Buyers Association (ACDBA)

Australian Finance Conference (AFC)

Australian Financial Markets Association (AFMA)

¹ The majority of meetings were attended by all three Panel members.

Australian Institute of Superannuation Trustees (AIST)

Australian Retail Credit Association (ARCA)

Australian Securities and Investments Commission (ASIC)

Beyondblue

Bibo, David

Certified Practising Accountants Australia (CPAA)

Chartered Accountants Australia and New Zealand (CAANZ)

Collection House Group

Community and Public Sector Union (CPSU)

Credit and Investments Ombudsman (CIO)

Credit and Investments Ombudsman Supplemental Submission

Credit Corp Group

Customer Owned Banking Association (COBA)

Digwood, Terrence

Financial Ombudsman Service (FOS)

Financial Planning Association Australia (FPA)

Financial Services Council (FSC)

Freeman, Lynton

Holt Norman Ashman Baker Action Group

Huggins Legal

IG Markets

Independent Fund Administrators and Advisers QIEC Super and Club Super

Industry Super Australia

Institute of Public Accountants - Deakin SME Research Centre

Insurance Australia Group (IAG)

Insurance Council of Australia (ICA)

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

Law Council of Australia

Legal Aid Queensland
Marcos, Jacqueline
Maurice Blackburn
McCarthy, Ron
Mortgage & Finance Association of Australia (MFAA)
National Australia Bank (NAB)
National Insurance Brokers Association (NIBA)
Office of the Australian Information Commissioner (OAIC)
Patersons Securities Limited
Pittman, Keith
QBE Insurance
Ryan, Michael and Rani
Stockbrokers and Financial Advisers Association
Superannuation Complaints Tribunal (SCT)
Tyro Payments
Tyrone Corporation
Victims of FOS

Roundtables

The Panel held roundtables as outlined below.

Event	Date held	Venue
Roundtable to discuss draft recommendation 1	15 February 2017	Sydney, Melbourne, Canberra
Roundtable to discussion draft recommendation 4	15 February 2017	Sydney, Melbourne, Canberra

Attempts were made to convene a roundtable to discuss issues particular to small business but were not successful. The Panel did, however, consult with representative bodies.

Meetings

The Panel members² held a range of meetings, which are summarised below.

Stakeholder category	No. of meetings
Bodies under review	3
Government	2
Other	9

SUBMISSIONS ON RECOMMENDATIONS 11 AND 13 OF THE *INQUIRY INTO SMALL BUSINESS LOANS*

The Panel invited a range of stakeholders to make submissions on Recommendations 11 and 13 of the Australian Small Business and Family Enterprise Ombudsman's *Inquiry into small business loans* report. The Panel received four submissions.

Certified Practising Accountants Australia – Additional Submission

Institute of Public Accountants – Additional Submission

Australian Restructuring Insolvency & Turnaround Association

Australian Bankers' Association – Additional Submission

² The majority of meetings were attended by all three Panel members.