Finance Industry Delegation
Australia

SUBMISSION

to the

REVIEW OF THE FINANCIAL SYSTEM EXTERNAL DISPUTE RESOLUTION FRAMEWORK

To: Minister, The Hon. Kelly O'Dwyer MP and
The EDR Review Secretariat
Financial System Division
Markets Group
The Treasury
Langton Crescent
Parkes ACT 2600

Website: http://consult.treasury.gov.au/financial-system-division/dispute-resolution/

Email: EDRreview@treasury.gov.au

Submission prepared by:

Phillip Smiles LL.B., B.Ec., M.B.A., Dip.Ed.
Lyn Turner M.A., Dip.Drama
Co-ordinators
Legal Counsel:
Dr Robert Spence B.A., LL.B., LL.M., PhD.
Finance Industry Delegation
Tel: 02 9975 4244
Post: PO Box 366, Belrose West, NSW 2085
Email: lyn@financeindustrydelegation.com.au

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About the Finance Industry Delegation

The Finance Industry Delegation (the Delegation) is a consortium representing and/or reporting to the owners and management of 190 bricks and mortar and internet lending sites and 6 significant suppliers of loan management software, marketing advice and/or compliance advice to the small amount, short term lending industry sector. Delegation supporters lend in excess of 40,000 loans per month.

Over 90% of the Delegation's supporters are members of the Credit and Investments Ombudsman (CIO), formerly the Credit Ombudsman Service Limited (COSL), which has targeted small to medium size credit providers, in order to acquire its claimed 20,000 membership. The remainder are members of the Finance Ombudsman's Service (FOS).

That means the comments included in this submission are based largely on the Delegation's supporters' dealings with CIO. With very rare exception, those dealings have been profoundly unsatisfactory. In fairness while, on many occasions, FOS and CIO's officers have not impressed when dealing with a complaint, the opportunity to deal with FOS' Ombudsmen has been far more satisfactory than dealing with the CIO Ombudsman.

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INTRODUCTION

The Delegation appreciates the opportunity to present this submission at the commencement of the Review of the Financial System External Dispute Resolution Framework.

The Issues Paper distributed by the Treasury Secretariat is welcomed by the Delegation's supporters as a most comprehensive and incisive document. This is critically important because, as this submission outlines, the current External Dispute Resolution (EDR) framework is profoundly unsatisfactory and a new model to deal with consumer disputes and complaints has now become essential.

ASIC failure

Throughout this submission the Delegation is highly critical of the current EDR scheme framework. However, the Delegation encourages the Panel to recognise that ASIC must shoulder some of the blame.

ASIC itself acknowledges its responsibilities in this area in Regulatory Guide 139, "*Approval and oversight of external dispute resolution schemes*", at paragraph RG 139.21 -

"*...we are responsible for overseeing the effective operation of EDR schemes, and approving these schemes as required*".

The certainty of 2009 has long gone

A consideration by the Panel as to what is required for the future must entail a consideration as to what the relevant Minister intended when he introduced the National Consumer Credit Protection Bill to the Commonwealth Parliamentarians in 2009.

The Hon Chris Bowen presented the intentions behind the legislation in his Explanatory Memorandum, dated 2008-9. In the opinion of the Delegation, key statements in that Explanatory Memorandum include (at the paragraph indicated):

2.117 "*A licensee must comply with the credit legislation (Part 2-2, Division 5, paragraph 47(1)(d). This requires the licensee to conduct their business with an appreciation of the credit legislation, and the need to conduct their business with respect for the law*".

There was no mention of ASIC-made law, or law according to the EDR scheme officer's philosophic preferences.

The Delegation asserts that, in 2016, the lender facing investigation by an EDR scheme following a complaint, faces assessment on the basis of the above three sources of "law", with only the legislation and ASIC Regulatory Guide codified. This in an EDR "Rules" environment where the this source of "law" does not necessarily set a precedent for other lenders to note in the future.

Response to the Panel's Overview

The Delegation would like to respond to the general statements included in the Panel's Overview -

"*The review is being conducted to ensure that Australia's external dispute resolution framework effectively meets the needs of users of the financial system*".

The Delegation is concerned to avoid the word "users" only being defined as the consumers who seek credit. The EDR framework involves another party - the credit providers - who pay all the costs of conducting the scheme. It would be extremely unfortunate if the Expert Panel failed to consider that the "Audience" listed on its behalf on the Treasury website, includes 14 categories other than individuals (consumers).

The Delegation believes the Panel should be aware of the reasons for Delegation supporters facing EDR scheme complaint resolution. These are often not over a major issue. The reason for this is that the market sector is so heavily regulated and this provides numerous possible opportunities for both minor and spurious complaints, as well as legitimate complaints.

There are both genuine and non-genuine cases involving whether or not the lender did a competent assessment of loan suitability (affordability). However, the current EDR scheme system encourages the unscrupulous consumer to commit fraud, in this claims area.

The most common complaint is where the consumer has defaulted after a period of successful repayment - and it is claimed to be the lender's fault for lending the loan. It is never the fault of the consumer who can no longer manage their money, or who has been involved in a cost issue that has arisen during the term of the loan that was not expected at the time the loan was agreed to. The consumer is never expected to take responsibility for their own actions.

The next biggest issue is so called "credit repair" companies - pushing consumers to complain about an adverse default listing and demanding that it be removed.

Then there is the occasional case involving the consumer who pretends that they did not understand that they had entered into a lease - despite the term "lease", or a derivative such as "lessee", appearing hundreds of times in their documentation.

Similarly, there are the consumers who claim they did not understand the contract and it was not explained to them. Frequently, these consumers have borrowed on a number of occasions before, have at least Year 10 schooling, do not seem to have any problem texting their friends and have long forgotten anything to do with signing their credit contracts.

"*External dispute resolution provides an avenue for people to resolve their disputes without going through the formal legal system*".

This is a fundamentally incorrect statement, particularly when considering the continuing behaviour of the EDR schemes. Disputes are not "resolved".

Any claim that the current EDR schemes "resolve disputes" - implying some sort of compromise or negotiation - is considered to be totally inaccurate by the respondents to the Delegations' EDR Review survey.

All who responded to the question, which provided a choice of resolving disputes, imposing a decision like a court - or doing both - indicated that they considered the EDR schemes simply imposed a decision like a court. The Delegation's problem with this fact is that neither of the existing EDR schemes in any way follow the equal and fair processes of a court.

The current EDR scheme framework promotes the blackmailing of credit providers into submission, due to the costs the schemes quickly impose as they seek every opportunity to escalate the dispute and create a greater cash flow for themselves. This is one of the drawbacks identified by the Delegation of allowing essentially private companies to perform the duties of, what should be, a government concern.

The small credit provider "member", with an unsecured loan in dispute of $500 for a 3 month term, that might generate a gross profit of $160, is faced with the EDR charging an initial fee of $210, and with the threat of escalation of the complaint to generate scheme fees calculated in the thousands of dollars. The "member" also faces the cost of devoting the management and staff time necessary to collect and forward information to the scheme, often in response to more than one request - and, particularly in regard to the Credit and Investments Ombudsman (CIO), often from more than one officer.

With the lender only making a gross profit of $160, it is highly relevant to note CIO's current billing structure - the fear of a cost escalation is not insignificant.

With CIO any consumer enquiry currently costs the lender $210 - even if the result is simply to refer the consumer back to the lender's IDR process. An "initial review" costs $775. An early investigation costs $1,600 and a later investigation costs $2,990. A determination - whether right or wrong - costs $6,600.

This fee structure applies to fees for each officer when a complaint is simultaneously "investigated" by a complaints officer and a systemic issues officer.

Where the complaint is due to the lender refusing a hardship application, the equivalent costs are $210, $775, $865 and $865.

These fees accumulate as the scheme goes from one stage to another. That means the total cost could be $12,085 for a complaint, or $2,715 for a hardship disagreement.

At no time has CIO ever offered members any explanation as to how these fees are calculated.

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Unfortunately, disputes are frequently not resolved - with a biased focus on the complainant - when the EDR schemes' role as an arbiter should mean they approach a dispute with a lack of bias. Because of this lack of resolution, arbitrary decisions are imposed.

One major problem is the prevalence of the schemes declaring the possibility of a "systemic issue". One complaint can face escalation, when a scheme case manager arbitrarily decides the issue/s involved could be applicable to other loans approved by the credit provider, without any other complaint being lodged.

The schemes do not require any evidence to make this decision, nor do they require multiple complaints - simply the highly subjective assessment by a systemic issues' manager who has a vested interest in creating work and justifying their position. Yet another situation where the use of a private company to undertake government duties is unwise - opening up numerous opportunities for conflicts of interest to go unchallenged.

The opportunity for a systemic issues manager to decide a complaint is systemic is suggested in ASIC Regulatory Guide 139, but is not reflected in any provision in either the National Consumer Credit Protection Act (NCCP Act), or the associated Regulations. It should be noted that ASIC Regulatory Guides, by ASIC's own admission, do not constitute legal advice and are simply presented as an indication of ASIC's interpretation of the law.

Unfortunately, in the case of CIO this scheme is particularly interested in adopting the powers provided to ASIC by the Parliament, in an attempt to generate income. Acting as a quasi-court, without Constitutional or legislative authority, CIO's focus is not on resolution - but on punishment, as it autocratically determines.

The essential challenge for the Panel is to recognise that the CIO brand of EDR does not bring two parties together to facilitate an end to a dispute, in a cost efficient manner.

The CIO brand of EDR is to usurp court powers and turn an essentially private company (notwithstanding its formal Corporations Act status), that:

- does not provide an opportunity for credit providers to elect a representative to the board;
- selects its own board members;
- charges whatever it likes;
- fails to provide financial statements to its "members" (the credit providers) who provide all the funding; and
- ruthlessly and without consultation changes its Rules in order to counter any efficacious challenge, then enforces those changes on members without warning and, as has happened recently, without notification.

All of this on the basis of misguided legislative coercion, that demands credit providers be a member of an EDR scheme as a pivotal requirement - before ASIC will grant an Australian Credit Licence. A company cannot conduct a business involving the provision of personal credit, without an Australian Credit Licence (Sections 27 and 28, NCCP Act).

The Delegation is not alone in its views

The Delegation is not alone in its views regarding the continuing behaviour of the EDR schemes.

In that context it might be useful for the Panel to refer to a widely distributed paper published in 2012 entitled, "*A step too far in consumer protection: Are external dispute resolution schemes wielding the sword of Damocles?*", written by Dr Franci Cantatore, Senior Teaching Fellow, and Brenda Marshall, Associate Professor, both with the Faculty of Law, Bond University [(2012) 40 *Australian Business Law Review* at 322 (Thompson Reuters)].

In part, the header of the paper reads, "*This article explores the scope of COSL (now CIO) powers, finding them to be excessively wide, and inherently unfair towards credit providers... instead of providing a dispute resolution service, COSL imposes a "tyranny" on credit providers obliged to comply with the scheme's onerous and oppressive Rules*".

The final two paragraphs of the paper also deserve the Panel's attention -

"*The relationship between COSL and its members appears to resemble an autocratic system with COSL assuming a dictatorial position towards its subordinate members.*

Although cloaked as "membership" of an EDR scheme, members are effectively deprived of exercising any power in decision-making due to COSL's ability to amend its Rules as it deems fit. Viewed through the lens of "fairness", the relationship between COSL and its members is fundamentally flawed, being characterised by a significant power imbalance between the parties which is reflected in the ability of one party to make unilateral amendments to the terms of the agreement. Moreover, membership is obligatory and the member has no say in the terms of agreement.

Consumer Credit legislation by its very nature has a primary purpose of consumer protection aligning itself with the "weaker" consumer vis-à-vis the "stronger" credit provider, the Damocles in our analogy. Yet it is difficult to deny that undue pressure is being exerted on credit providers as a consequence of the obligation to belong to an EDR scheme, resembling a "sword of Damocles" positioned precariously above their unfortunate heads".

A Dot Point Response to the Terms of Reference

- Purpose of the review - these bodies are not working effectively "*to meet the needs of users, including... industry*". They provide an opportunity for every debtor that wants to escape his or her loan obligations, to lie and exploit a blackmailing opportunity to force a loss on the credit provider.
- Changes are not only necessary - but essential.
- CIO is far from efficient. Lengthy delays in the conduct of the matter is common for around 40% of all complaints.
- CIO is not equitable. The credit provider is presumed guilty from the start of the complaint process.
- CIO exhibits complexity when it determines the individual matter and then proceeds to refer the matter to its systemic issues section - to begin the matter all over again.
- CIO fails to be transparent, particularly in regard to its processes and finances. In regard to its finances, it is useful to note that its annual financial statements are not permanently included on its website, as part of the Annual Report and access to these statements only appears to be by way of the statement accompanying the notice of the company's Annual General Meeting, which the "members" do not report receiving.
- Both schemes are notionally accountable to ASIC. However, the Delegation does not believe there is any robust accountability to ASIC. The Delegation considers that this state of affairs may have occurred because there is no parliamentary prescription anywhere in the NCCP Act or Regulations for ASIC to actually monitor the EDR schemes.

  It is significant to note that Regulation 10 in the NCCP Regulations has three relevant subsections.

  Subsection (1) relates to internal, as opposed to external dispute resolution and is the only subsection that prescribed standards to which to adhere. There is no similar prescription for ASIC's consideration of standards of conduct for external dispute resolution schemes.

  Subsection (3) is limited to matters that must be taken into account "*when considering whether to approve an external dispute resolution scheme*". This subsection does not specifically prescribe that ASIC will monitor the EDR scheme according to the approval conditions, after it has been approved.

  Subsection 4 does not assist. The concerns of subsection 4 are merely to specify a period for approval, to approve with conditions and/or to vary or revoke an approval. Again, there are no standards indicated in regard variation or revoking the approval.
- In the matters reported to the Delegation by its supporters, there does not appear to be any comparability between CIO decisions and FOS decisions. The advantage of having ombudsmen for different membership classes at FOS, is in stark contrast to the one position of ombudsman at CIO who, without any apparent regard by the board as to conflicts of interest, is also the Chief Executive Officer at CIO.
- The costs of CIO regulation of members is the key blackmail weapon to avoid resolution of disputes, in favour of a regime that bludgeons members into submission in an effort to avoid costly escalation of CIO applied fees.

In response to the question, "*What is the most money any one complaint has ever cost your company in EDR scheme fees*", the respondents to the Delegation's EDR Review survey indicated that, where the complaint was considered and investigated, the costs generally ranged from $775 to $4,400. However, costs in excess of $6,000 and more have been reported.

However, this does not include:

1. the real costs associated with professional advice;
2. staff and management time collecting the necessary information to provide to the EDR scheme;
3. the amount of the loan written off as part of the outcome; and
4. the opportunity cost of never recovering that amount.

* The role and powers adopted by the CIO are those of a ruthless court, not an EDR as contemplated by the Parliament. Unfortunately, the Explanatory Memorandum issued by then Minister Chris Bowen did not provide any clear guidance as to expected conduct.

  What the Minister did stress in his original Memorandum was his concern that lenders would be conscious of and obey the law. There was no recognition of any opportunity for EDR schemes to effectively supplant the Parliament and create their own laws.

* As indicated above, governance and funding arrangements are imposed on "members". There is no participation in the decision making for "members". Governance is essentially about exploiting the "members" with a rule structure clearly designed to rigidly control the "members".

* The original linkage expected between IDR and EDR is under threat, with the 2014 change to CIO Rules to provide greater opportunity for CIO to take on the complaint - even if it has not first gone to IDR - which was the original first step.

  The requirement for an automatic referral back to IDR, when the complainant has gone straight to CIO, has been replaced. This occurred after the Delegation's co-ordinators, on behalf of a client and others, challenged CIO over non-application of this policy - with this changed rule giving CIO autocratic right not to refer any complaint to IDR in the first instance.

* Delegation representatives have not observed CIO working with other non-industry parties in any manner, other than that of a consumer advocate.

* A different and far more equitable model is required. The state Consumer Tribunal model, which avoids all the inherent conflicts of interest associated with the CIO model, has to be considered a far more equitable model. It is also a model that reduces the opportunity for credit providers to be blackmailed into submission and does not reward dishonest consumers, in the wholesale way the CIO model does.

Addressing paragraph 8 in the Panel's introduction to the Issues Paper - currently, "*the right balance between providing adequate protection to the consumer and reducing regulatory compliance costs whilst taking into account efficiency, equity, complexity, transparency, accountability and comparability of outcomes*" is <u>not</u> being achieved. "*...adequate protection of the consumer*" has become <u>excessive protection</u> of the consumer, with the other criteria thwarted or ignored, in large part, by CIO.

RESPONDING TO THE QUESTIONS

Qs 1 to 4 - Principles guiding the review

Q1:	*Are there any other categories of users that should be considered as part of the review?*

<u>Comment</u>

Paragraph 9 of the Issues Paper quotes the Financial System Inquiry Final Report (page 193), with a message that is consistently totally ignored by CIO - "*Consumers should be expected to accept their financial decisions, including market losses, when they have been treated fairly*".

CIO's consistent presumption is that all consumers are treated unfairly - and that, following any complaint, credit contracts must be effectively rewritten to ensure an EDR outcome that does not place any expectation on the consumer to accept any responsibility.

Paragraph 10 of the Issues Paper makes a statement of expectation that financial services providers will be considered "*primary users*" of "*Australia's dispute resolution and complains framework*" (EDR). However, in the preceding sentence, a fundamental bias is presented that the Delegation fears will underpin the review.

That is the acknowledgement that "*The purpose of the review is to ensure Australia's dispute resolution and complaints framework effectively meets the needs* (only) *of users of financial services*". It is noted with great concern that the needs of the financial service providers, who pay for everything associated with EDR and who have correctly been identified as "*primary users*", are not recognised as part of "*the purpose of the review*".

The industry sector has been the subject of two sham reviews over the last 18 months, where Treasury has provided the secretariat. Will this review be the third?

Answer

Yes, in the sense that the category called financial service providers absolutely must be considered part of this Review.

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

Comment

Any attempt at defining the principles and outcomes that may guide the Review must be preceded by an analysis of parliamentary expectations. This should be the fundamental context in which the principles and outcomes are defined.

As discussed in the forward to this submission, the current framework has:

1. taken a relatively simple prescription adopted by the Commonwealth Parliament;
2. allowed ASIC to redefine the legislators' intent in its relevant Regulatory Guide 106; and
3. thus provided the EDR schemes with an opportunity to adopt "Rules" and processes to impose on financial service providers.

Without recognising the Australian Constitution, these powers extend beyond that of a court - without any of the safeguards adopted in court processes to ensure at least some equity in the treatment of both applicants and defendants.

The current framework does not provide any opportunity for equitable treatment of the defendant, being the financial service provider. The Panel should commence the Review with an acceptance that the current framework is "worst practice".

As considered in the answer to Question 2 below, the concern is not with the 7 bold headings listed in paragraph 11 of the Issues Paper, but with the content of the explanation that follows.

In regard to paragraph 12, while the Delegation is pleased to learn that the Panel will be considering other reviews, the Delegation would also like to be reassured that the Panel will be seriously considering submissions presented to this Review by the financial service providers and their representatives. This consideration is important in an environment where Government Departments consistently presume to know better and to know more about an industry sector than the companies and people actually associated with that industry sector.

Answer

The Delegation has 2 major concerns:

1. The Panel has not defined the principles and outcomes in the Terms of Reference, but merely provided a list.

   However, the Delegation is pleased to note that this list has been replicated in paragraph 11 of the Issues Paper and some definition has been attempted. However, the definitions provided overlook some important elements -

Efficiency:

The issues of "*adequate... powers and remedies for complaints to be resolved*" needs further clarification. Are these "*powers and remedies*" to be confined to a traditional and universally accepted role of achieving an equitable outcome for the complainant?

Or are these "*powers and remedies*" to be defined and approved by the Panel as those not even available to the Commonwealth DPP or courts of any kind in Australia?

Are these "*powers and remedies*" to be applicable to the actual complainant, or are they going to continue to also be applicable to non-complainants under the current tyrannical regime of "systemic issues"?

Equity:

The omission of any consideration of "*fairness*" and the EDR scheme continuing to ignore an unbiased approach are of concern. Cost and access are important, but their importance is much diminished if the conduct of the EDR scheme is fundamentally unfair and the process is infected with bias against the finance service provider from the beginning.

Complexity:

Is "*easy to use for users*" going to continue to mean the EDR scheme entirely relying on written submissions and material and acting like a court - yet completely avoiding any opportunity for the financial service provider to test those submissions and "cross examine" the complainant?

Accountability:

Will the "*schemes' final determinations*" that are made publicly available go beyond a brief boast for the EDR scheme in one of their newsletters or reports?

Will these "*final determinations*" include engaging with issues of law and evidence presented by the financial service provider - as opposed to the current approach by CIO officers and some FOS officers, which is to present a shallow subjective statement, ignoring inconvenient applicable statutory and common law and dismissing evidence that does not favour the consumer - even strong evidence from third party sources?

To what extent should EDR schemes be expected to be agents of ASIC, with the requirement to report?

If the requirement to report to ASIC is to continue (despite never being envisaged in the enabling legislation), will there be an opportunity for the financial service provider to be made aware of the content of the intended report and given an opportunity to provide a response to accompany whatever is being communicated by the EDR scheme to ASIC?

Will the scheme report on how many hours have been spent by EDR scheme personnel considering the complaint, and what the financial service provider has been charged?

Will the EDR scheme report on why, in the relevant cases, it did not first refer the complaint to the financial service provider's IDR process?

Regulatory costs:

Will the inherent conflict of interest in the current EDR framework be recognised by the Panel? It is currently much in the EDR schemes' financial interest to find any excuse to inflate the dispute and escalate the process, so that the defending financial service provider can be charged more.

To hide behind a claim to be a "*non-profit company*" is nonsense.

The bigger the income, the more opportunity to keep your job and the more opportunity for the Ombudsman and the CEO to demand increased remuneration. All of this in an environment where the EDR schemes do not report any financial detail to their so-called "members".

Further, will the outrageous opportunity to allow EDR schemes to self declare a "systemic issue" be reigned in, to avoid the EDR schemes having an avenue whereby

they can unconscionably impose the maximum amount of costs on the financial service provider?

The above should be considered in the current environment where the EDR schemes unilaterally impose their charges without any opportunity for input from so called "members", and without any opportunity for the so called "members" to elect one or more representatives to the schemes' boards.

2. The Delegation notes that the Commonwealth Treasury provided a paper entitled "*Benchmarks for Industry-based Customer Dispute Resolution. Principles and Purposes*", which was released by the then Hon Bruce Billson MP, Minister for Small business, in February 2015.

   Six benchmarks were listed. These included accountability and efficiency - mirroring the Terms of Reference for the Review.

   However, the other four benchmarks do not appear in the Terms of Reference.

   As these other four were so important to Treasury 20 months ago, the Delegation considered that it might be useful to list them and provide comment regarding the current EDR scheme framework.

   Accessibility

   The listed "*underlying principle*" is satisfied with mandatory requirements for the promotion of the scheme in most of the lenders' disclosure documents provided to consumers and on the lenders' websites - easy to use and without any cost barriers for consumers.

   A key practice identified in paragraphs 1.24 and 1.25 is not achieved by either EDR scheme, because the practices outlined are never used by either EDR scheme.

   "*1.24 The office uses appropriate techniques including conciliation, mediation, and negotiation in attempting to settle complaints.*

   1.25 The office provides for informal proceedings which discourage a legalistic, adversarial approach at all stages of the office's processes".

   Independence

   The underlying principle demands that decision making and administration are independent from participating organisations. This is currently not achieved by selecting board members from businesses that do not represent the membership.

   It is not achieved by the selection of board members who are from consumer advocate organisations, in an environment where consumer advocate organisations encourage consumers to complain to EDR schemes in an effort to impose costs on lenders.

   The result is that the purpose which is stated to be, "*To ensure that the processes and decisions of the office are objective and unbiased, and are seen as objective and unbiased"* is <u>fundamentally not achieved</u>.

   The opportunity to present detailed and numerous case studies during the review will support this claim.

   Fairness

   The underlying principle is currently not achieved - as detailed throughout this submission. "*The procedures and decision making of the office are fair and seen to be fair*" is <u>not</u> achieved, despite the need to "*ensure*" such.

   The key practice of transparency is not achieved.

   Elsewhere in this submission, in regard to CIO, the Delegation identifies the conflict of interest associated with two of the board and their close association with the consumer advocate movement, the conflict of interest associated with the Ombudsman also being the CEO, and how the need for income can be generated by escalating as many disputes as possible and "discovering" as many systemic issues as possible.

   The issues of transparency and fairness are <u>not</u> dealt with by CIO and hence the key practice outlined at paragraph 2.10 is not achieved, "*The office manages any actual or perceived conflicts of interest and bias in a transparent manner*".

Effectiveness

The Delegation supporters who are members of either EDR scheme all report having absolutely no confidence in the current EDR scheme framework. That means the purpose has not been achieved.

In regard to the listed underlying principle identified by Treasury, the need for "*periodic independent reviews of* (its) *performance*" cannot be achieved - when the auditor is not available and prepared to receive comments and concerns from stakeholders such as the members' representatives and, as discussed elsewhere in this submission, there is no requirement for the relevant EDR scheme to implement the auditor's recommendations.

Both EDR schemes breach the periodic independent review key practice.

Considering the requirement listed in paragraph 6.14 and 6.15, the following deficiencies are apparent:

1. A regular review at set periods. This has not been adopted by CIO.
2. The review to involve consultation with relevant stakeholders. Neither FOS nor CIO "members" are known to have been consulted during any review.
3. Reporting on progress towards meeting benchmarks. The Delegation is unaware of any such inclusion in the review reports.
4. Assessment as to whether or not the dispute resolution process is just and reasonable. The Delegation is unaware of any of its supporter "members" being contacted - by either scheme - as part of this assessment.

It is the Delegation's contention that the current EDR scheme framework fails the benchmark tests issued by Treasury both last year and this year.

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

Comment

The Delegation is pleased to note that the Panel is interested in considering the outcomes of other Inquiries.

Answer

The Delegation's particular concern is that the Financial System Inquiry recognition of financial service providers being "*primary users*" of EDR is recognised in the Panel's deliberations.

The Delegation is also concerned that Standards Australia publications concerning EDR schemes is considered during the Review (see Appendix 4). As the Panel would be aware, the publication of any Australian Standard is preceded with an inquiry involving numerous relevant stakeholders. The stakeholders are provided with considerable opportunity to participate and the associated processes are always comprehensive and frequently take over 18 months.

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

Comment

It is the Delegation's view that there is currently no on-going attempt to determine the EDR schemes' effectiveness in meeting "*the needs of users*". The only apparent measurement comes from the EDR schemes' own various publications.

Those responsible for EDR scheme oversight appear to be accepting the self-serving content as an adequate determination.

Answer

EDR outcomes must be defined and measured with at least the following elements considered:

1. Has the EDR scheme engaged with all elements of the submissions presented by both complainant and financial service provider?
2. Has the EDR scheme recognised all relevant statutory and common law?
3. Given that it is attempting a quasi-judicial function, has the EDR scheme applied the principles of considering evidence that are imposed on the courts, including the consideration of all relevant evidence and avoiding placing undue weight on irrelevant or circumstantial evidence, or unsupported assertions by either party?
4. What "Rules" of the EDR scheme have been involved and have the Rules selected introduced an inherent bias in the conduct or considerations of the EDR scheme?
5. In all the circumstances, can the decision be considered fair?
6. Are there substantial reasons for one party to suffer from the final decision, or are the reasons provided subjective - rather than objective?
7. Does the decision recognise the legal obligations of the parties, or has the EDR scheme put itself beyond the law?

Delegation supporters were surveyed as to what they thought were the top three outcomes required to access the fairness of EDR schemes. Their responses included the following additional outcomes, in order of frequency:

1. Complainants should be truthful and statutory declarations should be required.
2. There should be proper regard for IDR as the first step.
3. Attention to what the legislation requires, rather than the subjective preferences of EDR scheme complaints officers.
4. No fee for simply taking a phone call and having the complainant referred to the "member" for application of the IDR process.
5. Cost of membership more adequately related to size of business.
6. Transparency in the process.
7. EDR staff to understand the nature of the "member" being dealt with.
8. Balanced outcomes.
9. An effective education and guidance role.
10. Procedural fairness.

Qs 5 to 9 - Internal Dispute Resolution

<u>Comment</u>

Paragraphs 14, 15 and 17 recognise what was intended - that consumers would <u>first complain</u> to the financial service provider's IDR process.

Unfortunately, the Panel's outline fails to note that both FOS and CIO have unilaterally imposed a rule on "members" that allows the EDR scheme to determine whether or not a complaint first brought to the EDR scheme should be referred back to the financial service provider's IDR process. The Delegation considers that this is <u>in conflict with</u> Parliamentary intentions.

The Delegation notes that this attempt to minimalise the IDR process can also be found with the careful omission of reference to the IDR process on ASIC's MoneySmart website, the Victorian Government's Money Help website and all the Legal Aid websites of which the Delegation is aware.

There is also another important omission - the fact that the <u>Internal</u> Dispute Resolution process has been substantially successful.

Despite mandatory requirements to list the contact details of the chosen EDR scheme on everything from Credit Guides to Information Statements, Privacy Consent Agreements to Credit Contracts and Default Notices - with an accompanying message that the EDR

process is free for consumers - Delegation supporters report very few complaints addressed at the IDR stage end up being considered by an EDR scheme.

The numbers range from nil to 6%.

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

Answer

There is already substantial information available to consumers indicating where to contact an EDR scheme if they have a credit related complaint.

Apart from the mandatory consumer disclosure documentation listed above, whereby every consumer receives information via at least 4 documents (Credit Guide, Privacy Consent Agreement, Information Statement and Credit Contract) the EDR contact information is included on every financial service provider's website.

In addition there is the ASIC MoneySmart website, the Victorian government's Money Help website, Legal Aid websites and the EDR schemes' own websites.

Q6: *What are the barriers to lodging a complaint? How could they be reduced?*

Answer

There are no barriers to lodging a complaint with an EDR scheme.

Every complaint is welcomed. Every complaint makes the scheme money, particularly given the schemes even charge the "member" when they refer the matter back to the financial service provider's IDR process.

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

Comment

Before considering the answer to this question, it may be useful for the Panel to gain a perspective as to how big the issue of complaints - of any kind - is.

In the introduction to this submission, the Delegation indicated that its supporters lend in excess of 40,000 loans per month. With this number in mind, it is appropriate to compare the following results from a survey conducted for this review of Delegation supporters.

With Delegation supporters individually lending from under 30 to over 10,000 loans per month, the research concerning IDR applications received directly by the lenders this year, indicated:

1. None of the small lenders had received an IDR application this year.
2. The largest number of IDR applications received by a small to medium lender was 2. Most reported 0 and three reported 1.
3. The largest number of IDR applications received by a medium lender was 8, which was reported by one lender. Otherwise the range was 0 to 4.
4. Two larger lenders reported receiving 30 to 35 IDR applications this year, otherwise the range for larger lenders was 5 to 25.

Complaints going from IDR to EDR -

1. Two larger lenders reported 2 and 5.
2. One medium lender reported 1.
3. All other lenders reported 0.

Concerning complaints that had gone directly to EDR - and not been referred back:

1. Three medium lenders reported 1
2. Two small to medium lenders reported 2 and one reported 1.
3. All small lenders and the bigger lenders reported 0.

Concerning complaints that had gone directly to EDR and were referred back to IDR:

1. The largest number reported by a small to medium lender was 2.
2. The largest number for a medium lender was 4
3. the largest number for a big company was 25.
4. None of the small companies reported this occurring.

Answer

IDR is very effective.

The very small number of complaints that are not satisfactorily resolved to the consumer's satisfaction and that are referred to EDR after consideration at IDR, is evidence of the success of the IDR process.

As indicated above, most Delegation supporters report nil, others at most 1 per year and the most referrals reported by one of the very big lenders was 6%.

The statutory time limits are irrelevant to almost all Delegation supporters as, at best, they aim to reach a decision in the IDR process on the day of the complaint or dispute and, at worst, within 5 days. Only the failure of the consumer to provide requested evidence or information in a timely manner, or at all, slows the process down.

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

Answer

Relative strength - the EDR scheme has no involvement if the matter is resolved at IDR.

Further, provided the consumer has approached IDR first, the IDR resolution saves the financial service provider any EDR fees and the matter is handled in a timely manner, with a minimum of stress to the consumer.

Relative weakness - the opportunity for the schemes to unilaterally decide not to refer a complaint for IDR consideration first, with the attendant failure to request a full report on the IDR process before launching into an investigation.

The latter enhances the opportunity for the consumer who just wants to avoid their legal obligations, to exploit the blackmail opportunity of escalating EDR involvement costs to the financial service provider.

Q9:	*How easy is it for consumers to escalate a complaint from IDR to EDR schemes and complaints arrangements? How common is it for disputes to move between IDR and EDR, or between EDR schemes?*

Answer

It is very easy for the consumer to escalate the complaint to an EDR scheme.

The consumer does not have to have any objective reason, just a subjective feeling of dissatisfaction about the IDR outcome or process.

The EDR scheme does not attempt any enquiry as to the satisfactory nature of the IDR history, including the merits of the IDR decision, or the reasonableness of the consumer seeking to escalate the process.

As indicated above, it is most uncommon for a dispute to move from IDR to EDR.

None of the Delegation supporters have reported a complaint moving from one EDR scheme to another. This would be contrary to an arrangement FOS and CIO have that inhibits a financial service provider joining the second scheme, while there is still an outstanding matter with the first scheme.

Qs 10 to 13 - Regulatory oversight of EDR schemes and complaints arrangements

Comment

The Delegation is most concerned in regard to some of the content contained in paragraphs 18 to 27 in the Issues Paper. In particular -

Paragraph 19 is not exactly true:

1. EDR has become adversarial for the financial service provider.

   The environment has not attracted the court process that presumes innocence until proven guilty and adopts the rules of evidence previously referred to.

   The process is now far from a level playing field for the financial service provider.

2. Many disputes before EDR are not completed in a timely manner.

   The CIO itself admits 40% are not resolved within 60 days. Delegation supporters report instances where disputes are now involved with the EDR process in excess of 6 months.

   A considerable contribution to this lack of timeliness is the propensity for EDR schemes to seek the opportunity to extend the "investigation" by constantly requesting further information and, often in parallel, having a second officer declaring the complaint a "systemic issue" to investigate further.

3. The claim that lower costs are incurred than in "*the formal legal system*" will be strenuously debated by financial service providers who have faced $6,000+ bills from their EDR scheme.

4. The FOS inspired claim as to "fairness" cannot be attributed to CIO as well. CIO does not have any no such focus.

5. The implied presentation of EDR schemes' involvement in identifying and addressing systemic issues as a benefit, is most unfortunate.

   This is a matter of ASIC improperly delegating its duties to an essentially private company, with a board dominated by consumer advocates. Then allowing the EDR schemes to employ a systemic issues manager, with a vested interest and a conflict of interest in maintaining enough work so they can keep their job.

Paragraph 20 highlights a fundamental inequity under the current system. Consumers can go to court after EDR or as an alternative to EDR. Financial service providers cannot.

There is no appeal process for them from a biased or unsound EDR decision - and they pay for it regardless of the decision outcome.

Paragraph 21 demonstrates the real dilemma for financial service providers. EDR membership is compulsory - not only under the Corporations Act, but also under the National Consumer Credit Protection Act 2009.

However, membership opportunities are effectively limited to two schemes for a credit provider. The two relevant EDR schemes developed their rules largely prior to credit providers joining and have not provided any consultation process or vote in regard to amendment. This while enforcing their rules by stating that the so called "member" has signed a contract agreeing to them.

They have included in their processes the use of letters threatening to terminate "membership", in the full knowledge that the result of such termination would be the statutory imposed prohibition from trading, because "membership" of an EDR is a fundamental requirement to obtain an Australian Credit Licence. This is used as a powerful weapon.

Concerning paragraph 22, the Delegation is unaware of any publicly provided evidence that ASIC fulfils its oversight of the EDR schemes' performance. Rather, it appears to be that an untenable situation has emerged where ASIC has been leaving the EDR schemes to fulfil some of ASIC's functions.

This provides the opportunity:

- for ASIC to avoid allocating its resources,
- for the EDR schemes to spiral out of control, and
- for the financial service providers to foot the bill, no matter what the EDR outcome.

This while the consumers can act without responsibility or honesty, generally encouraged by their financial counsellor or a consumer advocate legal centre, who are philosophically driven to destroy financial service providers.

Paragraph 23 provides an illustration of the conflict inherent in claiming any ASIC control.

There has never been any report of ASIC refusing to approve anything the EDR schemes want in their rules. The obligations of the schemes are not directed by the Parliament, but by ASIC, without any statutory approved guidelines.

This situation then is compounded by the circumstances accurately described in the final sentence in paragraph 23 (referenced to ASIC's "Information sheet 174"), "*However, the schemes are independent and responsible for their own internal processes and management of disputes. ASIC does not intervene in the decision-making process of the scheme*".

The reality is that the two EDR schemes relevant for credit providers, CIO and FOS, are acting without effective direction and oversight from ASIC. This in an environment where their rules and processes have allowed them to self-acquire more power than any Australian court - without any right of appeal for the credit provider.

The last 2 dot points in paragraph 24 deserve comment.

(a) No credit provider could claim that CIO has "*fair decision making processes*". The inherent and constantly exploited bias favours the consumer (see the case study summary in Appendix 1 to this submission).

(b) CIO remedies are far from adequate. In fact they provide excessive power beyond that of any court attending to a matter under the National Consumer Credit Protection Act 2009. There does not appear to be any limit to CIO officers' use of subjective statements to justify whatever occurs to them.

(c) Concerning "*periodic independent reviews*" - the Delegation notes that the Panel did not, or could not, refer to such a review being undertaken in regard to CIO.

    None of the Delegation's supporters have ever been contacted by anyone involved in undertaking a review of CIO. Any review must be regarded as unsound if an investigation into "member" attitudes - as one of the 2 classes of primary users and the financiers of the entire EDR scheme budget - has not been included as an important part of the review process and extensively covered in the review report.

The Delegation notes the requirement for ASIC to be consulted in regard to any changes to a scheme's terms of reference. It is also noted that, prior to ASIC's determination concerning approval of a change, just like the EDR scheme, ASIC does not attempt to consult with the "members" who will be subject to the change.

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

Answer

On the assumption that the current EDR scheme framework does continue in some way, there are at least 4 requirements:

1. Actual transparent involvement by ASIC in the supervisory/oversight process.
2. The overview committee, the establishment of which has been promised now that ASIC has the new opportunity of seeking industry funding, must have the review of EDR schemes in its mandate and must include at least one industry representative.
3. There must be greater transparency and contact with the "members" of the EDR scheme for input, when a so-called "*independent review*" is conducted.
4. Like the consumer, the financial service provider must have the opportunity to be able to progress from an EDR decision, to a court.

It is noted that point 4 would require a substantial amendment to CIO's rule 29, which pretends to provide an opportunity for the financial service provider to go to court when there is an issue of important consequence for the provider's business, or when a novel point of law is involved.

However, the rule actually gives CIO the absolute right to unilaterally determine if it will accept that application or reject it if, in CIO's opinion, there are "*no reasonable grounds*" or there is an "*improper purpose*" involved.

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

Answer re. ASIC's oversight

Any changes to ASIC's stipulated "*oversight role*" and "*powers in relation to these schemes*" will mean little if ASIC continues to take no apparent action.

If any changes are recommended by the Panel they must be accompanied with direction as to how ASIC will also be monitored for performance. Simply increasing powers on paper will mean nothing.

If recommended changes are not accompanied by recommendations to reduce the EDR schemes' self appointed powers, little will be achieved because, in the Delegation's opinion, the existing informal, non-critical relationship between ASIC and the EDR schemes can simply be expected to continue.

Answer re. ASIC's powers

The Delegation asserts that, if the Panel's identified principles are to be successfully addressed beyond the current review, it is essential that ASIC's powers be increased by removing the current assumed protection the EDR schemes have from ASIC oversight concerning their procedures and conduct, as expressed in ASIC Information Sheet 174.

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

Answer

The oversight of the SCT is not an issue of relevance to Delegation supporters.

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

Answer

They do not contribute to improvements at all - for the following reasons:

1. CIO, in particular, adopts a highly subjective assessment process, which is in conflict with the overall framework that presumes objective standards and applications of the relevant law.
2. CIO "cherry picks" from the law and ASIC expectations, as outlined in the ASIC Regulatory Guides. ASIC recognises scalability - CIO does not. The Credit Act and Regulations, and the ASIC Regulatory Guides provide opportunity for a range of considerations - CIO processes focus on the one of least strength or favour to the credit provider under challenge.
3. The framework assumes resolution, CIO presumes autocratic decisions.
4. CIO's Position Statement 5 distorts the concept of responsible lending, as presented in the legislation:
    - paragraph 4.9 introduces a range of "*base requirements*" that go beyond those recognised in the Credit Act.
    - paragraph 5.4 demands disclosure of not only the acquisition of verifying information, as the Credit Act does, but also how it was used.
    - paragraph 5.9 recognises "*reasonable enquiries*" as a "*concession*", not something that is mandated.
    - paragraphs 6.2 and 6.3 inhibit the credit provider's access to evidence.
    - paragraph 8 presents a definition of "*substantial hardship*" that does not reflect that which the Parliament has mandated.
5. The anti-financial service provider ruthlessness engenders inordinate management time and cost, forces many credit providers to simply capitulate, regardless of the merit of the complaint. Blackmail, regardless of merit, cannot be considered a positive contribution to a regulatory framework in a democratic society.

The question presupposes an opportunity for legitimately usurping the role of the Commonwealth Parliament and the Minister responsible.

EDR schemes should only have one avenue of contributing to the improvement of the regulatory framework - that is the opportunity to lobby the Minister and Parliament for change. They should not have the freedom to usurp the Parliament as they do now. Credit law is for them to acknowledge - not to unilaterally create.

In regard to enhancing the role of the EDR schemes, the Delegation supporters' Review survey asked the following question, "*If you ran an EDR scheme, what would you do to improve it?*"

The responses to this question, grouped in rough topic category and in order of frequency, were:

1. Make complainants sign a statutory declaration and be accountable for what they tell the EDR scheme.
2. Structure fees to reflect the size of the loan that has led to the dispute.
3. Refer back the complaint that has not been through IDR - without charging.
4. Get better organised investigation lawyers, so that complaints do not drag on for 12 months.
5. Cease taking up to 6 months to act and then demanding further information with a time constraint of 2 weeks for the lender to provide it.
6. Introduce a requirement that any complainant must have an IDR number to indicate that they have been through IDR.
7. Easier opportunity for lenders to take consumers to EDR.
8. Commence the investigation to determine if there is any merit. If not, charge the consumer, or the entity that referred the consumer to EDR.
9. Make sure that the staff understand the client and the client's environment.
10. Cease automatically presenting and thinking that the lender is wrong.
11. Have staff understand that consumers can be dishonest.

Have staff understand that consumers alone, and sometimes encouraged by some consumer advocates and/or financial counsellors, play the system to avoid their repayment obligations.

Qs 14 to 21 - CIO and FOS and complaints arrangements.

Comment

The Delegation is highly critical of CIO in this submission. The primary reason for this is revealed in paragraph 36 of the Issues Paper. Most of the Delegation's supporters, typical of the industry sector, are sole traders and/or small businesses.

That means the weight of an EDR framework that imposes uncontrolled tyranny when it chooses and escalates cost in a conflict of interest environment - with a board dominated by consumer advocates - is very significant. The credit provider targets are rarely well resourced and capable of putting up an effective fight.

The Delegation is particularly concerned about some of the misrepresentation included in the section of the Issues Paper under the subheading "*Approach to dispute resolution*" on page 10 and following.

In particular, the content of the following paragraphs:

1. Paragraph 41 -

   (a) claims that "*There is a high level of discretion for Ombudsman schemes to choose the appropriate dispute resolution process...*".

   In the Delegation supporters' experience, this discretion is rarely exercised and the process adopted is fairly standard.

   In addition, it has to be asked, why should there be a "*high level of discretion*"? This simply invites bias and a lack of uniformity in process;

(b) goes on to imply that EDR schemes have "*the object of providing fair and timely outcomes*". This may be the stated objective, but the history of conduct - particularly of CIO's conduct with credit providers - indicates it is little more than a statement. For the credit provider, the outcome is rarely fair and, by their own admission in the CIO Annual Review 2015-16, only 22% of their determinations are timely.

2. Paragraph 42 claims "*the first step is generally to encourage the scheme member to resolve the dispute directly with the consumer*". Delegation supporters believe that the EDR schemes are not as strong as they should be in regard to this encouragement.

3. Paragraph 43 claims the use of "*negotiation and conciliation*". These processes are foreign to any dealings Delegation supporters have with the EDR schemes. Arbitration - without any conciliation - is the process adopted by both schemes.

   "*Direct discussions between the member and consumer*" have never been promoted by CIO for credit providers. None of the Delegation supporters, nor their professional advisers, have reported the opportunity for "*direct discussions*" being offered or facilitated.

4. Paragraph 44 -

   (a) asserts that "*Schemes may provide a preliminary view on the merits of the dispute to encourage parties to reach agreement*".

   None of the Delegation supporters have reported this ever happening with CIO.

   (b) Paragraph 44 also asserts that "*CIO can exclude complaints that lack in substance or that are being pursued for an improper purpose*" [Rule 10.1(v)].

   None of the Delegation supporters have reported this ever occurring, despite there being justification for such from time to time.

   To the extent that CIO has attempted to make the above claims, they should be regarded as nothing more than self-serving "spin" by the Panel.

5. Paragraph 45 correctly reflects ASIC Regulatory guide 139 at paragraph RG 139.191.

   This is an example, amongst many, where ASIC has usurped the role of the Commonwealth Parliament. While always claiming that its Regulatory Guides merely present ASIC's interpretation of the credit law, ASIC has attempted a definition as to how to determine a matter that goes far beyond what the Commonwealth Parliament approved. EDR schemes enthusiastically embrace the expanded power.

   The National Credit Code (Schedule 1, Part 4, Division 3 of the National Consumer Credit Protection Act) presents opportunities for the complainant consumer to recover actual financial loss or damage via the court, while ASIC and the EDR schemes add the extra highly subjective dimensions of "*the concept of fairness and... relevant industry best practice*" - which are not included in the legislation.

6. Paragraph 46 acknowledges that there have been changes to CIO's Rules. However, these have not necessarily been predicated on accommodating "*new members and a broader range of regulated financial and credit services*".

   What the paragraph fails to note is that rule changes have also come about to cover the rebuttal of situations where "members" have successfully challenged a CIO decision or assertion under the existing Rules. As was the case in 2014, when CIO was challenged for not referring complaints to a "member's" IDR processes in the first instance - some weeks later, without consultation or warning, the rules were changed to give CIO absolute discretion as to whether or not the scheme made such referrals.

   It may well reflect badly on the claimed independence of the audit process to which the EDR schemes are supposedly subject, when the background to the rule change allowing CIO greater discretion to continue dealing with a complaint is considered.

   The writers and another contacted the CIO's auditor and expressed a concern that he had not considered this issue in his performance review. The only known result of this contact was the arbitrary change in the CIO Rules.

   In Regulatory Guide 139, "*Approval and oversight of external dispute resolution schemes*", ASIC prescribes the expectation that an EDR scheme will consult with

"members" in paragraphs RG 139.106 - "*must consult with industry"* - and RG 139.107 - "*We consider it important that a scheme publicly consults about proposed changes*".

However, ASIC provides a highly subjective exception which, if challenged, the Delegation assumes CIO would offer as an explanation.

In paragraph RG 139.108, this is provided for as follows, "*We recognise, however, that there may be some proposed changes to a scheme's rules or procedures that are 'minor' in nature. It may be unnecessary for a scheme to consult publicly about such changes*".

The Delegation notes that the exception only applies to consulting "*publicly*", not to consulting with "*industry*". The Delegation asserts that "*industry*" includes "members".

The Delegation invites the two lawyers on the Panel to consider the detail provided under the sub-sub heading, "*Powers*".

7. Paragraph 51 -

   (a) expresses a major concern for Delegation supporters, "*ASIC's policy settings do not require scheme decision makers to adopt a particular approach to the determination of remedies*", i.e. they do not specify acceptable remedies.

       The problems with this are threefold:

       i. The Parliament should be setting the policy.

       ii. ASIC should not be a policy setting body - its role is investigation and enforcement according to the laws of the Parliament.

       iii. The absence of any imposed policy settings means that the EDR schemes are out of any control when it comes to "punishments" imposed by their decisions. Even the courts do not have such latitude.

   (b) Paragraph 51 also exposes the fact that there are ASIC "policy settings" that provide EDR schemes with an opportunity to impose compensation for both financial and non-financial loss, for forgiveness or variation of a debt, release of the security for a debt, and with only exemplary and aggravated damages excluded (ASIC Regulatory guide at RG 139.224 to 227). In other words ASIC - not the Parliament - is approving EDR schemes imposing penalties like a court, while fundamentally failing to act or adopt the processes of a court and doing so without having any Constitutional or legislative power.

8. Paragraph 52 raises an equity issue for the Panel to address. Why can consumer complainants go to court if they are unhappy with an EDR decision, but credit providers are prohibited from doing so, as provided in the EDR scheme rules?

   The detail provided under the sub-sub-heading "*Governance*" requires critical evaluation.

9. Paragraph 53 claims that the board of directors for the EDR schemes include "*industry directors*". That claim particularly does not sit well in regard to CIO.

   The so called "*industry directors*" are both from ASX listed companies - not representative of 97% of so called "members". Both were appointed by the existing board, without any opportunity for the unrepresented 97% of members to nominate a candidate or to vote.

10. Paragraph 54 lists the role of the EDR board. The Panel should not assume the board of the CIO has satisfactorily addressed each element.

    Given the treatment of the Delegation's credit provider supporters by CIO, the Delegation does not believe:

    (a) CIO exhibits "*independent decision-making*" by scheme staff;

    (b) that the performance of the scheme is adequately monitored; or

    (c) that the board provides direction to the one and only Ombudsman, who is also the CEO, on policy matters - as opposed to the Ombudsman setting the policy agenda.

    The detail concerning CIO under the sub-sub-heading "*Funding arrangements*" supports comment included in this submission above.

11. Paragraph 56 correctly and disturbingly notes that, unlike FOS, CIO sets its fees and charges without any consultation with those paying - the so called "members". This policy is reflected in all CIO's dealings with "members".

12. As paragraph 57 and 58 reveal, unlike FOS, where 75% of funding comes from dispute fees, CIO attracts 70% of its funding from membership fees.

While the Delegation is unsure of the argument being presented by the Panel that encourages the situation, the Delegation's analysis of the two schemes agrees with the Panel's statement that, with CIO, there is "*less incentive to settle or reduce the volume of disputes*". The Delegation contends that this is because CIO exhibits continuing concern to maximise revenue out of attracting and escalating disputes.

This in the context where the two board members from ASX-listed companies come from a corporate environment where, the bigger the turnover of the entity, the more the CEO is paid. Also part of the environment is the CIO policy of not disclosing the CEO's salary package to members, or the incentive structure employed for dispute assessment officers.

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

Answer

The Delegation struggles to identify anything positive about the current arrangements involving CIO. However, the writers of this submission have dealt with the specialist Ombudsman from FOS and were impressed with the Ombudsman's more non-combative, non-judgemental or anti credit provider approach, although this was not reflected by FOS' assessing personnel.

The biggest problems with the current arrangement (primarily involving the CIO) are:

1. Inherent bias against the "members".
2. The exploited conflict of interest to enhance revenue at the expense of refusing an application, or of seeking very early resolution.
3. The attempt by CIO to be more powerful than a court, with ASIC's most unfortunate encouragement.
4. The blackmail opportunities involved with escalating cost.
5. The exploitation of the concept of "systemic issues", without any evidence and based on just one complaint.
6. Consumer advocates being aware of the uncritical (of the consumer) processes adopted by CIO and, by referring matters to CIO, taking the opportunity to punish credit providers, at the same time as increasing their complaint numbers in order to enhance obtaining future government grants.
7. Despite compulsory "membership", there is a total lack of opportunity for "members" to have any input in regard to policy and governance of EDR schemes.

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

Answer

It is nonsense to suggest that any literate consumer who is prepared to read even half of the mandatory documentation provided to them, could fail to miss the opportunity for EDR.

In addition, almost all financial counsellors and the consumer advocate legal services are pushing their clients to go to EDR.

With their quest for income creation, the EDR schemes are very accessible. Beyond the issue of IDR first, none of the Delegation's supporters have ever reported that a consumer had any problems gaining access to EDR.

The Delegation does not accept that there is any need to further raise awareness of EDR schemes.

Q16:	*How easy is it to use the EDR schemes and complaints arrangements process? For example, is it easy to communicate with a scheme?*

Answer

None of the Delegation's supporters have ever reported a consumer complaining that it was hard to use the EDR process.

In fairness, the channels of communication between EDR and "members", when there is a complaint, are very open and contact is easy.

However, there are three concerns:

1. Complaint files can often go through numerous CIO officer's hands, with the duplication of requests for information and the ensuing time delays.
2. Progress reports are not provided and there are often long delays in between activity concerning the complaint.
3. There is a failure to recognise that these delays have a commercial disadvantage - under the EDR rules, while the complaint is still before the EDR scheme the credit provider cannot take recovery action. The longer the period of default, the more likely that the credit provider will never recover their money.

Q17:	*To what extent do EDR schemes and complaints arrangements provide an effective avenue for resolving consumer complaints?*

Answer

They are very effective if the scheme's concern is to ruthlessly exploit the "member" and give every opportunity to the complainant.

Very frequently, the profit in a small to medium loan is far less than any accelerated process cost.

Even with a very rare "win", the credit provider still loses financially when any matter goes to CIO. Commercial imperatives encourage the success of the consumer/complainant's blackmail inherent in the current framework. The consumer/complainant cannot lose.

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

Answer

The Delegation cannot comment on FOS' evolution. However, it can comment on the evolution that appears to have taken place with CIO.

That evolution is to adopt an increasingly anti-member stance and seek every opportunity to declare a complaint as being a "systemic issue".

Despite CIO's Constitution providing for consultation with ASIC, "*consumer organisations, industry organisations and relevant stakeholders*", the Delegation is unaware of CIO ever consulting on anything with industry organisations and relevant (credit provider) stakeholders. The exclusion of stakeholders includes the "members".

CIO is now effectively an arm of the Consumer Action Law Centre, the nation's best-funded and most publicity conscious consumer advocacy entity. Even the CIO website provides more information to consumers than "members".

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

Answer

The Delegation does not have any issue with the jurisdictions of the EDR schemes.

However, it is noted that CIO sets its own jurisdiction (Rule 10) and that it provides itself with the discretion to go outside the Rule 10 parameters, with Issue 4 in its publication "*Specific Issues Relating to EDR*".

Q20: *Are the current monetary limits for determining jurisdiction fit-for-purpose? If not, what should be the new monetary limit? Is there any rationale for the monetary limit to vary between products?*

Answer

The Delegation supporters have no issue with the current monetary limits.

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

Answer

The outcomes appear consistent, despite CIO declaring that it is not bound by its previous decisions.

However, this apparent consistency includes ignoring the "members" submissions, including evidence. This is generally reflected in highly subjective expressions of refusal that do not give any attention to what the legislation actually provides and that determine the issue purely on subjective personal preferences.

In addition, it is assumed that the consumer/complainant is always honest and is not simply looking for a way to avoid financial obligations into which they freely entered. It is noted that the consumer has always spent all the money that they borrowed from the credit provider - before submitting their complaint or dispute.

The Delegation regards this consistency of CIO decisions as a very negative feature.

Q22: *Do the existing EDR schemes and complaints arrangements possess sufficient powers to settle disputes? Are any additional powers or remedies required?*

Answer

Yes, both schemes have sufficient powers. However, particularly in the case of CIO, they assume too much power and certainly do not need any increase.

It must be remembered that CIO officers know that the "member" cannot appeal their decision, except internally to the Ombudsman. In this case the Ombudsman has a vested interest in supporting his officers' decisions because he is also their CEO, and the content of relevant legislation can be ignored, disingenuously claiming it is in the interests of "*fairness*" and "*industry standards*", or "*good practice in the financial services industry*".

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

Answer

The criteria used to make decisions are totally inappropriate.

How appropriate is a framework that allows the EDR scheme to effectively ignore the law passed by the Parliament, in favour of highly subjective criteria such as "*fairness*" and "*good practice*"?

This being determined by officers who have no prescribed methodology for determining the definitions to which to refer and do not have the benefit of any research into what is considered "*good practice*" and what that entails within the industry sector.

An additional concern is the publication by CIO of "Position Statements" which they duplicitously claim are not mandatory. It is the experience of the Delegation's supporters that CIO officers treat these Position Statements as absolutely mandatory.

There are two Position Statements that particularly concern the Delegation. They are Position Statement 5 and Position Statement 10.

Position Statement 5 - Responsible Lending - seeks to extend the provisions of the Credit Act without Parliamentary, or presumably ASIC, sanction. In particular:

1. Paragraph 4.9 removes all consumer responsibility by way of its "*base requirements*".
2. Paragraph 5.4 demands that the financial service provider explain what was acquired by way of verifications and how it was used. The latter is an extension of the legislative requirements.

3. Paragraph 6.3 removes the presumed right of financial service providers to take the information on primary documents at face value. This implies that credit providers must undertake a forensic check on all documentation acquired.
4. Paragraph 7.8 demands that all information collected must be kept, not just that which is relevant to the assessment of "not unsuitable".

Position Statement 10 provides for an improper devolution of ASIC powers.

5. The Delegation is deeply concerned that the current EDR framework appears to permit ASIC to simply devolve its powers to an essentially private company - which does not face the same scrutiny as ASIC. EDR schemes are not under the direct responsibility of a Minister, there is no Act of Parliament or Regulation that prescribes what an EDR scheme can or cannot do, and EDR scheme Ombudsmen and CEO's are not known to have appeared before Parliamentary Committees and Senate Estimate Committees.
6. Position Statement 10 provides CIO with the self imposed and ASIC-permitted power to demand a wide range of documentation that has no actual connection with the original complainant. This demand is made without any provision to first get permission from the consumers to which the documentation relates and is a fundamental breach of the Privacy Act.
7. ASIC has handed over part of its most powerful policing and investigatory powers without any Parliamentary approval and without the EDR scheme facing any new checks and balances. This is in an environment where ASIC has been claiming that it will be more proactive in its role because of the change to industry funding, plus the increase in government funding provided this financial year.

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

Answer

The Delegation has been unable to detect any vigorously applied governance arrangements. Even the CIO's alleged independent reviews are not every 3 to 5 years, as is claimed on the CIO website.

There has not been any public confirmation of ASIC applying any governance, except that CIO continues to maintain its EDR role.

The Delegation is unable to discover any requirement that mandates that the infrequent "*independent reviews*" recommendations have to be implemented.

The Delegation notes that Regulatory Guide 139, "*Approval and oversight of external dispute resolution schemes*", at paragraph RG 139.104(c), only provides that a scheme must "*conduct independent reviews of its operations*" and there is no requirement to adopt any recommendation that emerges from such a review.

In addition, the Delegation has been unable to discover any provision in that Regulatory Guide, the NCCP Act, or the ASIC Act, that provides for any ASIC oversight of the EDR schemes once approved for establishment.

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

Answer

The Delegation supporters who are "members" of CIO are provided with insufficient information to assess whether or not funding and staffing levels are adequate. To that end, no "investigation" into a complaint has ever been known to have problems, or be discontinued, because of claimed inadequate funding or staffing. Conversely, there seems to be an overabundance of staffing for each complaint, particularly when two separate divisions - complaints handling and systemic issues - seem to be able to "investigate" at the same time. Further, it is not unusual for the one complaint to be passed to other officers - in one case to five different people.

CIO staffing levels do not appear to be published.

Assessing funding adequacy for the CIO is also difficult, given that the 2015 publicly available financial statement revealed that:

1. there was $1,116,799 cash held in a bank account;
2. $2,613,061 held in term deposits; and
3. after deducting liabilities of $1,046,979, there was a net positive position of $1,566,082.

This is noted in the context that CIO is a non-profit organisation and there is no information to assess whether or not such a strong positive cash position is required to meet seasonal or other factors in the second half of the calendar year.

Additional expertise is another matter.

Greater expertise in procedural fairness and knowledge of the appropriate content of the National Consumer Credit Protection Act appears desperately needed, particularly within CIO.

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

Answer

Apart from the figures quoted above, there is little information published that addresses transparency issues.

Improvement would require a revolutionary change, whereby "members" were provided with sufficient financial information to determine whether or not their membership fees and the complaint charges were justified. Greater detail in the published financial statements is definitely required.

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

Answer

The Delegation is unaware of any efforts to hold the EDR schemes to account, apart from the current Review.

Improvement can only come with:

1. the enactment of legislation to provide clear direction and accountability;
2. ASIC being stripped of its ability to define and proceed with self acquisition of powers not prescribed by the Parliament;
3. the EDR schemes being abolished, with their ability to transcend the law; and
4. the development of a Tribunal to replace the EDR schemes.

Suggestions for improvement from Delegation supporters responding to the research questions included the following, with each coming from a number of respondents:

1. Both parties having a right of appeal.
2. Remove any power to consider systemic issues.
3. Set three months as the maximum time to reach a decision.
4. Ensure lenders are property represented on the Boards, not consumer advocate friends from ASX listed companies.
5. Direct legislative oversight with an appointed regulator with clear responsibility and authority. Not ASIC, which has failed in this role.
6. Replace with a VCAT-type approach.

Members' input and voting rights, with the members treated like shareholders in a public company.

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

Answer

Current reporting is dominated by image concerns. Operational descriptions are rare and any revelations, concerning the key themes in decision making, largely constitute

nominating the categories of complaint, rather than providing any in-depth comment on the conduct of the schemes in regard to making the decisions.

Case reports are not very helpful, because they are not binding as a precedent for the schemes and documents such as CIO's Position Statements are not mandatory, as claimed. That means neither of these assist the "member" with any certainty.

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

Answer

The measures to assess performance have already been discussed in this submission (see **Q4**).

However, it might be useful to add:

Assessment of financial performance - to allow recommendations for the reduction of "membership" fees and dispute handling fees, if the EDR scheme demonstrated a significant level of profitability.

Qs 30 to 34 - Gaps and overlaps in existing EDR schemes and complaints arrangements

Comment

The majority of questions under this sub-sub heading overlook the fact that the financial service provider joins one scheme but, due to the deal between the two EDR schemes, cannot easily move to the other if there is a dispute outstanding.

In addition, all the credit provider's disclosure documents and contracts have been prepared with the name of the EDR scheme of which they are a "member". The cost and inconvenience of changing the computer systems and printing can be a significant factor, particularly for the small credit provider.

If there is a dispute outstanding and the credit provider believes they are being harassed, targeted, unfairly treated or that their EDR scheme is acting unconscionably, this "deal" between the EDR schemes raises the spectre of unfair play and a lack of a free market. The credit provider should have the choice to move schemes and it should be up to the scheme they are approaching to decide whether or not to accept the provider's "membership" application.

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

Answer

The most significant "gap" is the lack of opportunity for financial service providers to apply to a court following an EDR scheme decision, which the credit provider believes is wrong.

This could be best addressed by taking away from the EDR schemes the power to do anything they want, which they currently have, and replacing them with a Tribunal where a right of appeal to a court is enshrined for both parties.

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

Answer

No, because the opportunity to move from one to another is inhibited, as discussed above and both schemes have chosen to specialise, or specify, the different "membership" type they are primarily trying to attract.

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

Answer

The Delegation has not received any reports of consumer confusion. However, the opportunity for face to face contact between the consumer bringing the complaint and the Tribunal member hearing it would bring more certainty to the situation, because this contact would facilitate the opportunity to ask questions and get an immediate response.

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

Answer

The Delegation is not in a position to respond to this question. Only a few Delegation supporters are involved in small business lending and none have reported any concerns about insufficient jurisdiction.

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

Answer

Any attempt to respond, given the legislation in question is yet to commence, would be no more than guessing.

However, it is the writer's experience that the schemes will attempt to use any change as another weapon to target credit provider's pockets.

Qs 37 to 41 - One body

Comment

Paragraph 72 presumes that there are problems that could be solved and become potential benefits, from the adoption of a one-stop shop.

The Delegation is unaware of any consumer confusion associated with having the two schemes. Each consumer group is repeatedly directed to the appropriate scheme (see comment earlier, regarding the number of times the EDR scheme details are listed in disclosure documents, contracts and on websites).

Further, it is not onerous to approach one EDR scheme and to then be directed to the other. A phone conversation, or an exchange of simple emails, resolves the problem.

However, there cannot be any assurance of consistency in process and outcomes until the Parliament legislates for the adoption of such a criteria - whether for two schemes or for a Tribunal.

The suggestion in Paragraph 73 is unnecessary. The adoption of such a "triage" service would just add another cost that would be passed on to the financial service providers.

The Delegation emphasises - it is <u>not</u> difficult for one EDR scheme to give out the contact details of the other scheme if contact by the other scheme "member's" consumer.

Q35:	*Would a triage service improve user outcomes?*

Answer

No.

The introduction of a triage service would simply create a "middle man" situation, where the employees would have nothing to do.

With the Delegation supporters' consumers being almost overwhelmed with information concerning where to contact the relevant EDR scheme, the suggestion is totally unnecessary.

Further, improvement in user outcomes can only occur with changes to the actual EDR service itself. The envisaged triage has nothing to do with the actual complaint resolution.

Q36:	*If a one-stop shop in the form of a new triage service were desirable: Who should run the service? How should it be funded? Should it provide referrals for issues other than that related to the financial firm?*

Answer

If the unnecessary triage service <u>were</u> to be introduced:

1. ASIC should run the service, as this might help that organisation understand the type of consumers who approach EDR schemes.

2. Government should be in charge, because the industry sector should not be forced to pay for something that is totally unnecessary. In the alternative, the consumers that use the service could be charged a fee if they have failed to read any of their disclosure documentation.

3. The opportunity to provide referrals for other issues raises the question - what other issues need a referral service?

   The paragraph 74, under the sub-sub-heading "*One body*", contains a number of untested assumptions:

   (a) That integration is inherently good. One body, if it is like the current EDR schemes, would essentially be a private company, again, no matter how registered under the Corporations Act. This new company would be granted a monopoly, with all the inherent opportunities for corruption that occur when there is no competition.

   (b) There is the assertion of consumer confusion, which Delegation supporters have never experienced with their consumers and which does not need a monopoly to address.

   (c) The model may have the "*potential to simplify the overall framework*". However, without careful design and clear prescription - it may not.

   (d) The one body model will not necessarily "*enhance consistency in outcomes and decision making processes*" if it has a no-precedence policy like the CIO.

4. How does the Panel know that there will be a reduction in administration costs for regulators? Next to no effort has been known to occur in attempting to regulate the current schemes. Therefore it will be hard to achieve a reduction in current costs, as any real attempt at regulation will generate a cost not currently occurring.

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

Answer

Yes. Industry pays all the costs, industry should be responsible for establishing and supporting its choice of EDR schemes.

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

Answer

Integration of the existing arrangements would not be desirable.

The current scheme model is already flawed, particularly in the way it is misused by CIO. As such its perpetuation in an amalgamated body would be most unfortunate and may lead to even greater miscarriages of justice.

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

Answer

Only if the one-stop shop had different sections for different sectors, much as occurs with FOS now. Certainly the tyranny and arrogance of a one ombudsman approach must be avoided.

Q40: *What form should a 'one stop shop' take?*

Answer

After the failure of the essentially private company model and the anti-industry bias shown by both CIO and FOS officers, the Delegation is strongly of the view that the current framework must be replaced by a Government Tribunal.

The models for this Tribunal are the successfully run NSW Consumer and Tenancy Tribunal and the Commonwealth's Administrative Appeals Tribunal. In addition, the Panel may care to consider the similarly successful Tribunals in Queensland and Victoria.

Q41: *If a 'one-stop shop' in the form of a new single dispute resolution body were desirable: Should it be an ombudsman or statutory tribunal or a combination of both? What should its jurisdictional limits be? How should it be funded? What powers should it possess? What regulatory oversight and governance arrangements would be required?*

Answer

1. It should be a statutory Tribunal. The survey respondents overwhelmingly indicated that they favoured a Tribunal model to replace the current EDR scheme framework, with only one respondent expressing concerns about costs having to be resolved first.
2. Certainly not a mixture of Government Tribunal and existing schemes. The limitations of the existing EDR schemes have been outlined earlier in this submission and they do not support them continuing in a joint or any role. The statutory Tribunal must stand alone.
3. Jurisdictional limits are not an issue for the Delegation. The existing limitations do not provide any problems for Delegation supporters.
4. Funding should be licensing and user pays, including the consumer making some modest or token contribution.
5. The single dispute resolution body, being a Tribunal, should have powers similar to the NSW tribunal.
6. Clarification of governance arrangements by the Parliament, and of its role with regulatory oversight by the Attorney General's Department.

Qs 42 to 44 - an additional forum for dispute resolution

Comment

The Delegation notes the current Coalition Government's discussion favouring a banking Tribunal. Such a proposal is in parallel with the Delegation's request for the external dispute resolution framework to move to a Tribunal.

This is in line with the highly successful NSW and Victorian Tribunals that, for years, have avoided the bias, procedural unfairness and conflicts of interests that are apparent with FOS and particularly with CIO.

No State Tribunal has ever effectively fallen under the control of one man - as has CIO. This because, somewhat like FOS with its variety of ombudsmen, there would be a variety of Tribunal members - not just one ombudsman, who is also CEO, as with CIO.

A balanced approach to the assessment of both factual and legal issues is always likely to be promoted by a panel of assessors working part time in that position, and otherwise in touch with reality, than with one individual ombudsman working full time in that role, while also acting as the organisation's CEO. Such a panel-based procedure, with the Tribunal acting in the role of an informal court, effectively acknowledges our long history of decisions concerning two opposing parties being made in open court.

A Tribunal model would also allow proper recognition of the seriousness of decisions concerning systemic issues, if such considerations are to be continued under the new model. A wrong adverse decision in a systemic issue case can completely financially ruin a credit provider.

As with the courts of criminal appeal, with their two judges for a sentencing appeal and three judges for a conviction appeal, the proposed Tribunal could have more than one Tribunal Member hear a case involving a systemic issue. This provides a procedural safeguard and not only promotes a sound decision, but provides an opportunity for justice to be seen to be done. The current one-person critical decision, made in private, has got to be replaced.

The writers of this submission are very experienced in advising on and writing submissions to CIO and/or FOS in response to complaints from consumers, and have also had considerable previous experience preparing for and attending Tribunal hearings with and for clients. That means the writers are extremely conscious of the advantages the Tribunal model provides for all parties.

Very significantly, the Tribunal concept moves away from the complete dependence on written submissions, to an opportunity for the parties to both present their evidence and case summary in writing and then explain themselves and answer questions from the Tribunal member. The current complete dependence on written submissions allows matters to be contrived by both parties, collection and consideration of information on key issues to be only partially carried out and distortion to occur, due to time lags as the credit provider responds to extra requests for information.

The current complete dependence on written submissions does not provide any opportunity for the equivalent of cross-examination, nor questions to be presented by someone who is not conflicted by a prior staff decision on the existing matter. This prior decision also made with the assistance of only a distorted paper trail.

The Tribunal model also avoids the opportunity for what has occurred with CIO. Tribunal Members are not the CEO of the entity as well - directly responsible for generating income that will not only determine the economic viability of the organisation, but also the size of their own salary and benefits package. Ever more expensive steps of escalation of the dispute would not be available and hence would not introduce the issue of conflict of interest between proper procedure and income generation.

The Delegation notes the explanation of the "*Inquiry into small business practices*" included at page 20 of the Issues Paper. The significance of consumer responsibility being acknowledged in the Terms of Reference cannot be overlooked.

The Delegation notes the critical content of the second element of the Terms of Reference, "*...taking into account that consumers have a responsibility to accept their financial decisions, including market losses, when they have been treated fairly...*". The Delegation would have preferred to see the phrase "*and according to law*" added to this stipulation.

However, what is significant for any consideration of the current EDR framework is that the EDR process consistently fails to recognise this responsibility dynamic.

Credit providers who have acted fairly - with full disclosure of all the significant issues associated with the transaction and in accordance with the law - are challenged by complainants who are supported by the process to take absolutely no responsibility for their actions - at a cost only to the credit provider. This in an environment where the common law of contract, developed and settled over 400 years, is simply totally ignored because the current EDR framework has no regard for the freely signed contract, unless it can be alleged that the contract was not according to the provisions in the National Credit Code and therefore effectively not binding on the consumer.

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

Answer

The need is not for an additional forum, but for a forum to replace the existing untenable EDR scheme framework.

Q43: *If a tribunal were desirable:*

Answers

Tribunal is most desirable. Taking the dot points as (a) to (k):

(a) *Should it replace or complement existing EDR and complaints arrangements?*

It must replace the existing EDR scheme framework. There is no room for a complementary role unless the Tribunal is to act as an appeal mechanism from the EDR scheme decisions.

(b) *Should it be more like a court (judicial powers, compulsory jurisdiction, adversarial processes and legal representation)?*

It does not have to adopt all the court characteristics. The models are the successful NSW and Victorian (Consumer, etc) Tribunals, which are essentially small claims tribunals. The methodologies of the Commonwealth's Administrative Appeals Tribunal should also be considered.

(c) *Should it be more like current EDR schemes (relatively more flexible, informal decision-making and processes)?*

The model should be based on the Tribunals, not on the current EDR schemes. Any claim that they are more flexible and informal in their decision making and processes should be ignored. They are not. Both schemes have developed a rigidity that belies any such claim.

(d) *How should the jurisdiction of the tribunal be defined?*

The jurisdiction defined for the current EDR schemes could be adopted.

(e) *Should its jurisdiction only extend to small business disputes or other disputes?*

The jurisdiction should extend to both consumer and small business complaints.

(f) *Should its jurisdiction only be available in the case of disputes with providers of banking products?*

No. The jurisdiction should include banking products, but extend to non-bank lenders.

(g) *Should monetary limits and compensation caps apply?*

The current limits set for the EDR schemes are appropriate for the introduction of the Tribunal.

(h) *Should its decisions be binding on one or both parties and what avenues of appeal should apply?*

Decisions should be binding on both parties, with some limited rights of appeal to the courts for both parties. This limitation not to exclude any decision associated with an alleged systemic issue.

(i) *Should it be publicly (taxpayer) or privately (industry) funded?*

The Delegation accepts that it would be politically untenable to suggest entire government funding. However, the funding model adopted must provide for a consumer/complainant contribution and, where the complaint is determined as frivolous or spurious, a contribution from the entity that recommended the consumer lodge the complaint.

Ideally, the Tribunal should have the power to apportion costs between these 3 parties on these and other equitable grounds, as the Tribunal may determine on the merits of the case.

(j) *Should its focus only be on providing redress or should it take on a role to prevent future disputes, for example, by advocating for changes to the regulatory framework, seeking to improve industry behaviour?*

Providing multiple roles must be avoided, to ensure there is no repeat of the conflicts of interest faced by consumer advocate legal centres around the country. The primary and only role should be the equitable determination of the complaint before the Tribunal.

The advocacy role is not short of stakeholders seeking changes to the regulatory framework, many funded by government grants. CIO has morphed into adopting a consumer advocate role that is deeply resented by the "members" who are effectively funding an enemy, critic, and advocate of change that is adverse to their business positions. None of the "members" approved the development of this role when they signed up.

Wise and equitable Tribunal decisions resolving complaints, with appropriate comment from the Members of the Tribunal and consistency in decision making, will make a useful contribution to the improvement of industry standards and behaviour. This in contrast to the current EDR scheme framework, where decision explanation is minimal and often highly subjective and the schemes are not bound by their decisions - which cannot be relied on by lenders as a precedent.

(k) *What type of representation and other support should be available for persons accessing the tribunal?*

Rules for representation and support for the parties should be modelled on the successful small claims' Tribunal models.

Q44: *Is there an enhanced role for the Small Business and Family Enterprise Ombudsman in relation to small business disputes? How would this interact with current decision-making processes?*

Answer

The Delegation has no settled view on the matters raised in the question, but suggests some consideration of the following:

1. The Small Business and Family Enterprise Ombudsman, as it is currently developing, rightly appears to be focusing on assisting small business deal with their big business environment.
2. Disputes between small business and consumers is a very different field.
3. The issue of resolving disputes between credit providers and consumers should not involve two dispute resolution mechanisms, with the size of the credit provider being the determinant. Size is not a relevant determinant. This also avoids consumer confusion and demarcation problems.
4. Consumer protection issues are not small business protection issues and the opportunity for consistency encourages the adoption of a one small claims' Tribunal approach.

Qs 45 and 46 - overseas developments

Comment

Although without the resources to undertake a major review, the Delegation attempted a comprehensive internet search to learn of overseas developments. In the time available to respond to the Issues Paper, overseas study trips were not possible and, on this occasion, the resources to interview relevant overseas personnel were not available.

However, the writers and their advisory team have had some contact with relevant overseas personnel in the past, including obtaining detailed comment on the UK Financial Ombudsman Service. This contact has assisted in shaping the Delegation's response to the next two questions.

As considered in the following answers, the Delegation recommends caution in adopting any particular overseas model.

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

Answer

While developments noted in the Issues Paper are worthy of attention, this attention must recognise the different cultural and legal constraints. A model or alternative framework cannot be imposed without a consideration of the different environments involved.

Critically, any complaint resolution framework imposed in Australia must recognise that non-bank credit providers in Australia are the most regulated credit providers in the world. They also face the toughest penalties in the world, including fines up to nearly $2 million and goal terms measured in years.

That means the credit provider must not face disadvantage for obeying the National Consumer Credit Protection, ASIC, Electronic Transactions, SPAM, Privacy, AML/CTF and Corporations Acts, by decision made in conflict with the legislation, or by decision making which seeks to extend the meaning of the legislation in a manner that imposes a retrospective responsibility on the credit provider.

The consumer advocates' constant attempts to punish and disadvantage Australian credit providers in their crusade to abolish all small lending provided by the commercial sector, by manipulating consumers to lodge complaints, cannot be overlooked. The extent of this ruthless Australian behaviour has only been discovered in two overseas jurisdictions and these do not include the UK.

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

Answer

The Delegation considers other schemes that offer a one-stop-shop for complaints against all credit providers, including both bank and non-banks, to be very attractive, particularly given the provisions of the National Consumer Credit Protection Act that apply to both bank and non-bank lenders.

The Delegation considers that other schemes that offer a small claims' Tribunal, relatively informal approach, "on paper" appear to support the Delegation's request for such an alternative to be adopted as a replacement of the existing EDR scheme framework.

The Delegation stresses the limitations faced by the Delegation, outlined in the comment section above, and that the Delegation does not claim any comparative expertise in responding to this question.

However, should the Panel include any overseas model as the basis for a recommended new framework in its interim report, we trust that the Panel will provide enough time for all stakeholders to critically research the success of that model and review the cultural and statutory environment in which it operates.

Qs 47 to 50 - Uncompensated consumer loss

Comment

The challenges involving larger lenders who have been members of FOS, and their unwillingness to compensate consumers in accordance with FOS decisions, is not one ever faced by any Delegation supporter, regardless of the EDR scheme to which they belong.

Addressing the suggestion of a statutory compensation scheme of last resort, noted in paragraph 88 of the Issues Paper, raises the issues as to:

1. what further impost may be placed on credit providers who have done the right thing and have very adequate compensation arrangements in place that come at a cost; and
2. what proportion of credit providers detailed in paragraph 87 of the Issues Paper were actually unable, as opposed to being unwilling, to pay the compensation awarded to the complainant/consumer.

If unwilling, that is a matter for EDR scheme rules and, ultimately, ASIC and prosecution in the courts.

If unable to pay, that is a matter of the credit provider breaking the law (Sections 47 and 48 of the National Consumer Credit Protection Act) and not having adequate compensation arrangements in place.

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

Answer

While the FOS statistics presented in the Issues Paper have impact, subject to the reservations expressed above, it is interesting to note that none of the respondents to the Delegation's survey on EDR, undertaken for the Review, revealed that they had faced an EDR scheme order to pay compensation.

Five indicated that paying compensation had been suggested during the complaint investigation process, but not pressed at when the decision was announced.

One respondent included a very important comment, which is applicable to numerous lenders facing aggressive consumer advocate entities representing consumers. They stated, "*It's the bodies that represent the client that ask for compensation and, even though you are in the right if you don't pay the compensation, or forgo the balance, you risk the higher fees from the EDR system in the hope they get it correct. Their charges are much higher than the compensation or releasing the client would be*".

These responses are consistent with an environment where complaining consumers, particularly if represented by consumer advocate entities, are focused on avoiding having to pay any more of their loan. The majority are also in a position where the balance of the

principal owing is greater than any interest (annual cost rate), fees and charges paid to the lender to that date.

None have directly or indirectly suffered by having the lender's money to spend and it has always been spent by the time they complain. That means the genuine opportunities to press for compensation are rare.

For small amount lenders, apart from any refund of interest (annual cost rate), fees and charges, there is very little chance of the consumer justifying any other form of compensation.

However, it is almost always the case that the credit provider is left without even recovering the loan principal.

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

Answer

It must not be overlooked that, under the current EDR scheme framework, there are:

1. rules that exclude a credit provider from membership if they do not obey a scheme decision; and
2. the opportunity for the EDR scheme to take the credit provider to court to obtain an injunction, order for specific performance, or debt recovery order.

In addition, there are the normal insolvency/bankruptcy avenues provided under the Bankruptcy Act.

Advocates of compensation schemes to cover where the credit provider is insolvent, overlook the bankruptcy rules that might determine that any such payout rightfully belongs in the pool of available money to distribute to creditors, in accordance with the Bankruptcy Act.

These advocates, generally seeking an industry-pays model, also overlook that such a new scheme means that the credit providers who are paying to do the right thing, are then required to pay for their competitors, who are not doing the right thing.

The answer must be to ensure ASIC is more diligent in checking that the compensation arrangements that must be in place to satisfy continuation of an Australian Credit Licence are adequate, given the nature and extent of the credit provider's business.

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

Answer

The Delegation's answer to Question 48 applies in response to this question. The one additional issue is that of retrospectivity.

Establishing a retrospective fund doubles the impost on the compliant credit provider contributing to an industry-funded scheme. They are then paying for the non-compliant credit provider - past, current and future.

It may also be useful for the Panel to address the nightmare questions as to how you determine risk - past, present and future - and how you fix contribution levels - given that most small lenders will never generate and could never generate a claim for compensation beyond that of repaying interest (annual cost rate) fees and charges.

On many occasions, the consumer/complainant owes more in principal than the lender has collected in interest (annual cost rate), fees and charges. That means there will not be any compensation payable to the consumer, because the NCCP Act does not recognise that compensation can include not repaying the loan principal.

It may also be significant that it is FOS' larger lending "members" who have initiated the need for this debate - not the smaller lenders who are generally "members" of CIO.

The Panel must also recognise that the compliance costs are now so relatively large, the caps on interest (annual cost rate) and fees are now fixed without any opportunity for any

increase, and the other restrictions on lending so numerous - and likely to increase in number following the Small Amount Credit Contract Review - that the creation of yet another cost for smaller amount credit providers will force them out of business. Any calculations for an industry-funded scheme of last resort must factor in the possibility of a large number of smaller amount lenders leaving the industry when the scheme is introduced, due to the extra contribution cost imposed.

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

Answer

The Delegation expects the impact would be significant. In the Delegation's opinion the foreseeable impact could include:

1. as indicated above, smaller amount lenders leaving the industry due to the new cost impost of an industry-funded scheme;
2. credit providers no longer worrying about providing their own compensation arrangements and simply relying on the new scheme;
3. insurance companies providing PI insurance, always seeking excuses to avoid paying claims, being even more uncooperative knowing that there is a scheme of last resort;
4. larger companies involved in lending, with adequate resources to do so, engaging advisers with methods to reduce their contribution to any industry-funded scheme - thereby placing a greater relative burden on the small to medium companies who do not have the resources to acquire such assistance;
5. challenges in assessing risk, such that any assessor would have to err on the side of caution, resulting in larger contributions being required than probably necessary; and
6. a costly bureaucracy developing to administer the scheme, with this cost being another burden for the contributing lenders. Again, this is in circumstances where legislation and regulation is continuously being introduced to effectively lower the profitability for lending.

Conclusion

The Delegation notes that Minister Kelly O'Dwyer, in her 8 August 2016 announcement of the review, indicated an expectation that "*The additional time* (provided to the Panel) *will allow for in-depth consultation with stakeholders, industry,... peak bodies...*". As the second largest representative entity for the lenders in the sector and the entity most committed to research and analysis since 2011, the Delegation looks forward to participating in that in-depth consultation.

The Delegation would like to thank the Panel and Secretariat for their consideration of this submission.

Finance Industry Delegation

7 October 2016

APPENDIX 1

Case Study Summaries

At the appropriate time, the Delegation will be pleased to provide considerable detail on a number of case studies involving the EDR schemes. To assist the Panel members in their initial understanding of how seriously out of control the current EDR framework has become, we provide the following case summaries:

Credit provider blackmail - consumer advocate manipulation

The Consumer Action Law Centre (CALC) in Victoria, the most ruthless consumer advocate entity in Australia, that is dependent on Government for their substantial funding and anti-credit provider campaign war chest, has adopted a consistent policy of brutal and unprincipled harassment of credit providers.

One element of that policy is to refer everything they possibly can to EDR so that, regardless of merit, the credit provider is punished financially.

So ruthless and unprincipled is this policy in its application, that even when a credit provider agrees to waive all interest and fees and charges and simply accept repayment of the principal - CALC still refers the matter to EDR.

There are two current matters that illustrate this situation. One where a consumer borrowed $1,600 and has repaid $982, and another where a consumer borrowed some $2,000 and repaid $1,000. The credit provider involved will now face a FOS bill of a minimum of $700 and, if CALC is successful in escalating the matter, a further $2,000-odd for each matter.

As these cases demonstrate the credit provider will face more than double the amount they are already owed in financial loss and that is net of the management and staff time preparing EDR submissions. The defaulting consumers will not face any cost and CALC will have enhanced their statistics under at least 3 different government grant application categories, in order to justify why they deserve further and increased government funding in the next round of funding applications.

Further case studies can be provided to illustrate the following issues in detail:

1. CIO Action re. systemic issues.

   On the basis of only three credit contracts - issued to the same two consumers - CIO oppressively sought a comprehensive audit of all the credit providers contracts over a six year period. These numbered some 400 since 2010.

2. Multiple officers assigned.

   In one case - involving only one complainant - 6 different officers were involved, over a nine month period, with requests repeated and with an apparent failure to have succeeding officers fully briefed by their predecessor.

3. Multiple “complaints” from one issue.

   The Delegation is aware of cases where one complaint has led to CIO alleging multiple complaints, employing multiple investigation officers and charging every time, over an extended period.

4. Failure to acknowledge legislation.

   Despite two attempts to draw the attention of the EDR scheme to the exact wording of the legislation - this was ignored in preference to a subjective assessment that was not supported by either legislation or regulation.

5. Failure to engage.

   Despite numerous legal decisions being provided in a submission, the EDR scheme did not respond to these cases, but attempted to rely on just one case that appeared to present a view the officer thought was against the lender. However, in successive paragraphs of the same case thereafter, the judge qualified his remarks - placing his judgement in favour of the lender.

   Either the EDR officer did not read beyond the single paragraph, or they accepted it as a citation from some other case, without going to the source and reading the whole judgement.

6. Attempting to impose legislation that was never presented to the Parliament.

   A number of EDR officers have attempted to import the concept of a non-complaint "scheme". This was included in a proposed bill in 2012/13 that was successfully lobbied against by the writers of this submission, and which never proceeded beyond a draft stage.

7. Refusing to acknowledge document content.

   EDR officers presumed that an arrangement for a lease, all in accordance with the legislation, was misleading and that a consumer could interpret it to be a loan.

   This ignored the clear intention of the lessor, with the heading including the word "lease" on the front page of the contract and with over 200 mentions of the word "lease", or some derivative such as "lessee", in the disclosure documentation provided to the complainant, as well as the contract itself. The EDR scheme continued to entertain the complainant's claim that she did not know she had signed a lease.

8. Ignoring common law of contract.

   Continuing refusal by EDR officers to accept the common law of contract, formation of agreement principle. This principle being that a signatory to a contract is deemed to have agreed to all the terms and conditions appearing above their signature.

9. Presumption of lender guilt.

   A process where the EDR investigation is not from a "blank sheet of paper", but starts with the presumption of guilt and only seeks evidence that assists supporting that presumption.

10. Documentation.

    Excessive requests for documentation - frequently over a number of requests (the lender being charged for each) and from a variety of officers (the lender also being charged for each).

11. Subjective dismissal of pro-lender evidence.

    Refusal to address lender evidence, with this explained away by a subjective statement such as "*the EDR scheme prefers...*".

12. Consumer responsibility.

    Refusal to acknowledge that the consumer has any personal responsibility at all.

13. Consumer characteristics.

    Failure to give any recognition to the complainant's characteristics. The fact that the complainant is an educated business manager is ignored when assessing their ability to understand their contract and legal/contractual responsibilities.

14. Failure to identify the consumer.

    The EDR scheme accepted a complaint from a relative (father) who was not a party to the contract. Despite the father dropping the complaint 6 months later, the EDR scheme attempted to invoice the lender, until the lender threatened to bring the matter to the attention of the Panel as part of a submission to the EDR Review.

15. Disorganisation of investigating lawyers.

    The EDR scheme took 12 months to run an investigation, with work done and contact with the lender made "in dribs and drabs" (charged to the lender of course).

16. Stopping court action.

    Under the Rule that demands the credit provider cease court action when a complaint has been submitted to CIO, there have been occasions where the consumer has exploited this Rule to stop a matter continuing to a hearing by a court. While it is understandable when a complaint is being considered by CIO before the credit provider initiates court action, it must be considered an interference with the court to have a situation where an essentially private company can interfere with an already commenced court process.

17. Phone call constitutes IDR.

    A request for a consumer's financial statement generated an EDR investigation, with the EDR officer claiming that the phone call requesting the statement was an IDR process.

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APPENDIX 2:

CIO Representation - at meetings

One of the writers attended the numerous Treasury stakeholder representatives' consultation meetings that were organised to consider proposals for inclusions in the National Consumer Credit Protection Act.

That writer also attended the one similar roundtable meeting of stakeholders in Sydney that was organised to consider proposals, by the Panel conducting the review, regarding small amount credit contracts. The CIO Ombudsman was in attendance at those meetings. On all occasions that can be recalled, the CIO Ombudsman presented views that would have been expected from a leader of the consumer advocates' organisations - not a resolution scheme that has Rules purporting to deny the application of bias and prejudice.

The Delegation emphasises that these statements were made in the context of the speaker being both CEO and Ombudsman at CIO.

The Delegation alleges that there has been a general bias in these presentations and, together with the regular reports published by CIO, to reveal the extent of CIO decision-making activity. These presentations and reports list lender wrongdoing, but never consumer wrongdoing and the general treatment of "members" under investigation. Delegation supporters have reached a view that CIO is at war with its members. So serious has this toxic issue become, that a recent Delegation Briefing circulated to all supporters of the Delegation has recommended they not continue with their membership of the CIO.

Apart from any contribution to influencing the legislation and regulation content decision-makers, there is the extremely serious issue of the impact the above has on the CIO case managers/investigators.

These people are recruited by, and depend for their continuing employment on, the approval of the CEO - who is also the Ombudsman. In such an environment, the Delegation alleges that, as they investigate and make and impose their complaint decisions adverse to the "member" involved, these CIO officers are, as the courts express it - "open to persuasion".

CIO Ombudsman's public statements

The Delegation contends that any consideration of CIO statements by an informed Panel would have to consider their veracity.

Comment on statement entitled "Ombudsman cautions on tribunal" dated 25 August 2016

The Delegation welcomes the CIO Ombudsman/CEO's call for the Review Panel "*to consider the relative merits of establishing a tribunal as compared to other models of dispute resolution*", issued on 25 August this year.

Unfortunately, the Delegation cannot agree with other statements made in that August announcement. In particular, the Delegation cannot agree that "*Australia is currently very well served by the existing dispute resolution architecture in financial services*" - it is not.

The non-bank credit providers or lenders who support the Delegation are currently receiving very poor treatment from this "*architecture*". In part, this submission explains why.

The Delegation also cannot agree with the implications of the statement that the establishment of a tribunal would "*not have specialised industry knowledge required for the sensible resolution of disputes*".

This prejudges the process of recruiting Tribunal Members and incorrectly implies that the CIO scheme does have the specialised knowledge and does facilitate sensible resolutions to disputes. In the Delegation supporters' and the writers' experience - CIO fails in both areas.

Finally, the Delegation cannot agree with the subsequent claim of the CIO Ombudsman/CEO, in the August statement, that a tribunal would "*be substantially more inflexible*". Given the current level of inflexibility of the CIO - now a burdensome bureaucracy for lender "members" - this could not be possible.

Comment on statement entitled, "Review into External Dispute Resolution Schemes", dated 12 September 2016-10-07

Again, the CIO Ombudsman/CEO presents comments that the Delegation believes the Panel or Treasury Secretariat should have qualified by other comments.

At point 2 in the statement, "*CIO understands the non-bank sector well*". This is followed by the mention of small amount lenders as one of the market segments within this sector. Universally, "members" of CIO that are also supporters of the Delegation have just responded to a Delegation EDR Review survey indicating that <u>the very opposite is the case</u> for their segment of the market.

A point 3, the CIO Ombudsman/CEO asserts that CIO's membership base differs from its competitor and that "*they have different needs, expectations and resources than the larger financial institutions that are members of FOS*". While the Delegation does not disagree with this claim - apart from a fair guess about resources, we are at a loss to know how the Ombudsman would even be aware of the different needs and expectations, given the non-representation of this membership base on the CIO board and the lack of any CIO enquiry reported by CIO member supporters of the Delegation.

At point 4, the CIO Ombudsman/CEO claims, "*CIO's smaller members are generally not supportive of being in a single EDR scheme...*". The Delegation is intrigued to learn of this, given none of the Delegation supporters have ever reported receiving a survey from CIO concerning this matter.

We are also intrigued because the Delegation supporters who have completed the Delegation's EDR Review Survey have all indicated that they want a Tribunal and an end to the current EDR scheme framework.

Finally, at point 7, the Ombudsman/CEO asserts that, "*A single merged EDR scheme would be prone to be monopolistic in its behaviour - dictating terms, rather than being responsive to stakeholder concerns about performance*".

The Delegation supporters consistently report that the current duopoly is equally capable of creating the same situation. CIO in particular is regarded by supporters of the Delegation who have commented, as having <u>the very characteristics</u> that the CIO Ombudsman/CEO attributes to monopolies.

ANNEXURE 3:

How the CIO changes its Rules

The Finance Industry Delegation circulates a briefing to supporters from time to time. In September the briefing included a comment on the CIO changes to the Rules and the newly published Version 10.

CIO have only recently put their Version 10 Rules on their website. These Rules commenced 15 August. They were foreshadowed in both the June and August CIO Newsletters to "members", with both newsletters using the phrase "*CIO proposes to make a small number of amendments...*".

Significantly, there was only very broadly expressed explanation as to what the new Rules would "clarify", and a draft of the actual Rules was never presented for the "members" to consider.

In June, "members" were asked if they would like to comment "on these amendments" in writing by 15 July. The lack of detail meant that "members" were never given anything specific to comment about.

Five questions followed this comment. The following is one supporter's very typical response. This supporter is very conscious of rules and rule changes and the writers have never had any problems communicating with him by email and receiving responses very quickly.

1. Have you ever heard of the CIO "Consumer Liaison Committee", which the August newsletter mentioned as providing comment regarding the amendments and unanimous support for them?

   [... says:] What August Newsletter!!!!! .... is a member of CIO. Never saw it. It was definitely not sent to us by e-mail. Never heard of the Consumer Liaison Committee.

2. If you have heard of this Committee, do you know any "member" that has had the opportunity to be a member of the Committee?

   [... says:] Don't know anything about it.

3. Were you personally consulted on potential changes to the Rules, prior to 15 August (including being provided with a draft)?

   [... says:] No never!

4. Were you personally informed that the new version of the CIO Rules had been finalised and was to be introduced on the 15 August - prior to 15 August?

   [... says:] No not at all. Nothing received.

5. If you were personally informed that the new set of CIO Rules were finalised and would commence 15 August - were you informed after that date and prior to reading this briefing (17.9.16)?

   [... says:] I never knew anything about it until reading your briefing. I keep all e-mails from CIO and there is nothing sent to us about these rules changes. Slimy ...!

It is significant that Rules 41.4, 4.15 and 41.7, on page 36 of this 10th edition, have the potential to have a profound influence on the outcome of a systemic issues investigation.

Importantly, CIO has made it clear that its investigation will not stop at "*relevant laws*", but will include the highly subjective elements of "*applicable codes of practice.... good practice in the financial services industry...* (and) *fairness in all the circumstances*".

The new Rules do not reflect any of these three highly subjective criteria.

These concerns are compounded in Rule 41.5 by CIO unconscionably adopting the power to demand any information or documents that the CIO investigator "*considers necessary... make any recommendation the scheme considers necessary for the resolution of a systemic issue...* (and) *make any order under Rule 41.7*".

Rule 41.7 adds another layer of subjectivity, allowing CIO to make any order it likes, with justification, amongst other things, based on:

"*(b) Improving industry practice and communication,*

(c) *remedying loss or disadvantage suffered by consumers (not all of whom may have complained about the systemic issue),*

(d) *preventing foreseeable loss or disadvantage to consumers,...*

(f) *efficiently dealing with multiple complaints or disputes related to the systemic issue*".

Section 253 of the NCCP Act requires ASIC to issue a notice to acquire documentation, but does not make any mention of EDR schemes having the same power.

Significantly, CIO is currently attempting to exploit these changes and apply them to complaints referrable to credit contracts entered into, even years before the amendments were introduced.

In addition, in attempting to introduce these improper amendments and requesting documents belonging to consumers who have not complained, CIO is breaching these consumers' protections under the Privacy Act.

In usurping ASIC's role, it is providing an opportunity to act without the public protection afforded by the Ministerial, Parliamentary Committee and Senate Estimates' Committee oversight of ASIC.

In this context, the Delegation alleges that CIO has ignored ASIC Regulatory Guide 139 that demands it be "fair" and "accountable".

APPENDIX 4

Standards Australia

It is also most unfortunate that the Delegation is forced to be so critical of the current EDR scheme framework, given the work Standards Australia has done in establishing widely recognised and endorsed, substantially researched and carefully developed standards, that are applicable to the procedures and processes that are inherent in an EDR framework.

Standards Australia's work is recognised by the Commonwealth Government.

Treasury's "*Key Practices for Industry-based Customer Dispute Resolution*" publication acknowledges Standards Australia's AS ISO 10002 - 2006 on "*Customer Satisfaction: Guidelines for complaints handling in organisations*", on page 7. ASIC has adopted the definition of "complaint" from that standard in its Regulatory Guide, to apply to the finance industry sector.

Many of the Delegation's supporters have referred to Standards Australia's AS 4269 - 1995, on "*Complaints Handling*" when setting up their IDR function. This standard is also referred to on page 22 of the "*Key Practices*" publication.

It would be appropriate for the Panel to compare current EDR scheme performance with the content of these standards.

Terms of Reference 3.1 demands consideration by the Panel of the role, governance and effectiveness of processes associated with the current disputes resolution and complaints framework - the EDR schemes.

The current EDR schemes have had the benefit of Standards Australia's standards to guide them for the entire period that the Commonwealth regulatory regime has afforded them the responsibility to mediate complaints against lenders in the Delegation supporters' industry sector.

Throughout this submission, the Delegation alleges that the opportunity to access this guidance has been ignored or poorly addressed.

The Delegation alleges that a consideration of AS 4269 - 1995, focusing on process, indicates that the current EDR scheme framework fails in regard to four of the identified standards associated with, what Standards Australia refers to as, the "*essential elements of effective complaints handling*". These are:

1. commitment;
2. fairness;
3. responsiveness; and
4. accountability.

The Delegation notes that fairness and accountability are also prescribed in the Corporations Regulations (for companies), the NCCP Regulations (for IDR arrangements) and in ASIC Regulatory Guide 139, "*Approval and oversight of external dispute resolution schemes*", at paragraph RG 139.13.

It is also apparent that the management of the current EDR schemes need to carefully consider and apply the content of Section 5 of AS 4269 - 1995, with a review of the subsections on dispute resolution and dispute resolution system basics.

Such a reconsideration is imperative, given the transition that has occurred from resolution - with its focus on mediation and conciliation - to arbitration - with its focus on imposing a decision. Due to the mix of structure, process and anti-lender bias, this arbitration is always adverse to the lender.

The Delegation also believes Standards Australia's AS 4608 - 2004, on "*Dispute management systems*", would be useful for the Panel to consider when assessing current EDR scheme performance. With its focus on dispute management, this standard gives attention to the important areas of dispute management that the Delegation alleges are frequently poorly addressed by the current EDR schemes.

These include:

1. Management responsibility.

2. Dispute management policy.
3. Dispute handling process.
4. Monitoring and assessment.
5. Dispute resolution processes.

The Delegation considers that these areas come under the concepts of efficiency and effectiveness, which are demanded of EDR schemes by the Corporations Regulations and NCCP Regulations and as listed in RG 139.13.

The content of this submission supports these various allegations.

APPENDIX 5

Board structures

The Delegation contends that the ASIC Regulatory Guide which prescribed the structure of the EDR boards, meant that the EDR scheme framework was doomed to failure for either the consumer or the lender.

The fact that it has failed the lenders is no surprise.

The current board structures have operated in a changing environment, steadily more and more adverse to the lenders. The rise of the philosophic commitment to "social justice" transcending the law, as adopted by the consumer advocate movement in the last decade, has always been a challenge for lenders.

Ministerial permission - deliberately or by omission, inaction or lack of concern or interest - for ASIC to effectively attempt to extend already tough and comprehensive law introduced by the Parliament, by publishing the ASIC Regulatory Guides, provided a whole raft of opportunities for anti-lender interpretations. This was exacerbated by all non-lender stakeholders being encouraged by ASIC to treat the Guides as if they were regulations sanctioned by the Parliament.

The near universal adoption, by the non-business sector of Australian society, of the premise that people are not responsible for their obligations under a contract they have signed. Critics refer to this issue as an element associated with the "nanny state" concept, to be applied to the perceived "less fortunate". This list of social trends re-enforces the inevitable failure of the original EDR scheme concept.

However, while the social trends have had a profound impact, the structure imposed for the EDR boards, by ASIC, ensured a one side win all result.

Regulatory Guide 139, at paragraph RG 139.81, demands an equal number of consumer and industry representatives and an independent Chair for EDR boards, "*to ensure that a Scheme is clearly perceived to be independent*".

However, the perception is rarely the reality. From the lenders' perspective, four issues emerge from that structure to ensure that the EDR organisation operates adversely to lender interests.

1. The boards self-appoint. The relatively small leadership group of the consumer advocates, in constant contact with each other, make their choices from amongst their well known friends and colleagues who share broadly the same pro-consumer values, and are used to acting against lenders in a united front before Ministers, government departments and the media.

   The fragmented non-bank lenders, without any coherent social or industry contact with their commercial competitors, have no such opportunity. By secret processes the lenders end up having "representatives" on the board that they do not know, have not voted for, who are not involved in businesses such as those run by the majority of lenders in the industry sector, and who never have any contact with the lenders' struggling representative organisations.

2. The social networking opportunities work against the non-bank lenders that make up the majority of CIO's membership.

   While the non bank lenders are scattered all over the country, it is no coincidence that both the consumer advocate board members and the business board members work in the CBDs and, as leaders in their fields, mix socially from time to time. From both sides, these people have the resources, (Government funded for the consumer advocates and big business funded for the businessmen and women), the personal contacts and the time to operate far above the ordinary consumer who complains to the EDR scheme, or the lender (primarily small and medium business in the CIO case) who, as a consequence of the complaint, has to defend themselves.

   At the annual CIO conference, held earlier this year, this opportunity for social networking was easily observed, as was the CIO Ombudsman's continuing social contact with leading members of the consumer advocate leadership and lack of contact with the non-bank lender attendees and their representatives.

3. The independence given to CEOs.

   As is the case in most organisations where the board unfortunately appoints the CEO, and even more so in the case of an EDR scheme that allows that CEO to also be the one and only Ombudsman, the CEO dominates the board rather than serves the board. The CEOs also mix socially with the consumer advocate leadership at pivotal government and departmental meetings and functions, and yet have no personal or industry contact with the ordinary lenders who have become the embattled defendants in the EDR system and who pay for it all.

   The CEO's are also at arms' length from the lenders' representatives they occasionally see at consultation meetings. This distance has been increasing as the EDR schemes increasingly become an extension of the consumer advocate framework.

   Contacts with others shape value systems. The Delegation is not aware of any dynamic professional tension existing between consumer advocate representatives and business representatives on the boards, with both sides and the CEO having very little idea of the business realities besetting the lenders who are dragged into the EDR process.

4. A court but not a court.

   As the EDR schemes have attempted to adopt the role of a court, the lenders have experienced the self-imposed limitations involved. The court role of imposing a sentence is readily embraced, but the EDRs do not embrace the issues recognised by courts of:

   (a) proper attention to evidence;

   (b) procedural fairness;

   (c) the separation of investigator from prosecutor; and

   (d) the separation of the decision maker from both.

   A kangaroo court has emerged hiding behind the facade of being an EDR scheme dedicated to resolution, mediation and conciliation.

It is little wonder that the lenders now do not have any confidence that the CEOs are fulfilling their role and appointing people to investigate and arbitrate who can satisfy the first listed requirement for their board that was prescribed by ASIC - a focus on ensuring "*independent decision making by scheme staff and the decision makers...*" [RG 139.80 (a)].