Review of the financial system external dispute resolution framework

Submission by Legal Aid Queensland

TRIM no 2010/610309

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Introduction

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

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

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

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

Questions – Principles guiding the review:

1. Are there other categories of users that should be considered as part of the review?

LAQ agrees that the primary users of financial system external dispute resolution schemes are consumers, who make complaints, and service providers, who provide financial services. The review should also consider interested third parties such as beneficiaries under car insurance claims.

TRIM no 2016/610339

2. 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?

LAQ agrees with the principles and their definitions set out by the panel in the terms of reference for this review.

However, LAQ recommends that the principles of accessibility, independence and fairness should also be considered by the panel in assessing the financial system EDR framework. These principles are highlighted in the Benchmarks for Industry-Based Customer Dispute Resolution, re-released by the Government in March 2015.[1] These principles are also incorporated into current financial services regulation[2] and the Australian Securities and Investments Commission Regulatory Guide on the approval of external complaints resolution schemes.[3]

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

LAQ recommends that the Panel also review the Productivity Commission's Review of Australia's Consumer Policy Framework, 2008 which in part examined similar issues to this review.
http://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer2.pdf

Although a final report or finding has not been made LAQ also draws the panels attention to the recent consultation by the Financial Ombudsman Service regarding expansion of its small business jurisdiction.

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

LAQ strongly supports the existing Benchmarks for Industry-Based Customer Dispute Resolution, re-released by the Government in March 2015[4]. These Benchmarks are accessibility, independence, fairness, accountability, efficiency and effectiveness.

LAQ submits that the most important benchmarks are:

- Accessibility – consumers should be able to access an EDR scheme through a simple process and at no cost;

Treasury, Benchmarks for Industry-based Customer Dispute Resolution, March 2015, available at: http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/benchmarks-ind-cust-dispute-reso

[2] Reg 7.6.02(3) and 7.9.77(3) Corporations Regulations; reg 10(4) (c) National Credit Regulations.

[3] ASIC, Regulatory Guide 139: Approval and oversight of external complaints resolution schemes, available at: http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-139-approval-and-oversight-of-external-complaints-resolution-schemes/

Treasury, Benchmarks for Industry-based Customer Dispute Resolution, March 2015, available at: http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/benchmarks-ind-cust-dispute-reso

- Independence – it is important that an EDR scheme reach decisions independent of influence from any party to the dispute; and
- Fairness and efficiency – it is important that the individual circumstances of each consumer's complaint to be assessed on its merits in a timely manner. It is also important that EDR schemes continue to make decisions on the basis of what is fair in all the circumstances.

Questions - Internal dispute resolution

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

Over the past decade the financial services industry has significantly improved the information available to consumers about the existence of IDR processes and the IDR process once a consumer has lodged a complaint. LAQ supports the financial services industry continuing to develop the quality of the information they provide about IDR processes to consumers.

In LAQ's experience, one area that could be improved by the industry concerns the use of a customer advocate position within companies in the financial services industry. LAQ has encountered a number of consumers who mistakenly believe that once a company has finished its IDR process the consumer also has to run their complaint through the customer advocate before they can lodge a complaint with an EDR scheme. It is important for the industry to provide clear information to consumers around the role of the customer advocate and how it fits within the IDR process.

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

In LAQ's experience, the biggest barrier faced by consumers in lodging an IDR complaint is one of trust.

When LAQ provides advice to consumers about the IDR process within financial services providers, the most common questions include:

Why do we have to go back to them when they have already said no?

I have already told my story once, they won't change their mind?

These questions indicate a concern that an IDR process, rather than trying to assist a consumer to reach an appropriate resolution to a dispute, is a just another process designed to prolong the dispute.

To address this problem the financial services industry should continue its efforts to communicate and demonstrate to the community its renewed focus on providing consumers with customer focused support, service and outcomes.

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

In LAQ's experience, the quality and effectiveness of IDR processes can vary significantly between companies and between industries in the financial services area. A quality IDR process is very effective at

resolving consumer disputes and builds a relationship between the company and the consumer that they are trying to assist.

When a company has a genuine commitment to IDR and it is done well, a consumer's IDR experience is characterised by:

- a feeling that their complaint has been genuinely heard;
- that the company has given genuine consideration to the issues they have been raised;
- the dispute is examined in a timely manner; and
- a mutually acceptable outcome to both parties is often reached.

Even where a mutually acceptable outcome is not reached, LAQ has had clients still express satisfaction with the process where the company has a genuine commitment to IDR.

When a company does not have an effective IDR process, a consumer's IDR experience is characterised by a feeling that:

- the company is going through the motions and is happy for their IDR function to be outsourced to an EDR scheme;
- no genuine consideration of the issues by the company;
- the company is doing IDR because they have to and not because they have a genuine interest in resolving the dispute;
- time limits for completing the IDR process are often not met; and
- when the IDR process includes multiple levels within a company, consumers feel like they have multiple barriers to overcome before being able to access EDR.

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

In LAQ's experience the EDR schemes play an important role in shaping and improving IDR processes in the financial services industry. Through complaints being made to EDR schemes, the schemes are able to identify:

- complaints that should have resolved at IDR but didn't because of flaws in the IDR process;
- ways of improving the IDR process that enhance the customer experience with IDR; and
- patterns in the type of complaints about a company that are made that indicate a systemic problem.

LAQ is aware that both Ombudsmen in the financial services area identify systemic issues and have on-going dialogue with all companies about the types of complaints that are being lodged.

LAQ submits that where possible the role of EDR schemes should be expanded provided it does not impact on the ability of EDR schemes to deal promptly with the complaints brought by consumers.

9. 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?

In LAQ's experience, the accessibility of EDR schemes is very good. Both schemes allow complaints to be lodged on the phone, on-line or in paper form. Both schemes also have defined processes for when consumer advocates are representing consumers and where consumer advocates are not representing consumers but are lodging a dispute on the consumer's behalf because the consumer does not have regular access to the internet.

LAQ is also aware that both schemes are continuing to improve the accessibility of their website and complaint process for consumers with a disability or who are from CALD communities.

The most significant difficulty for consumers in escalating a complaint to EDR is not with the EDR scheme complaint process, but rather identifying when the IDR process of companies, which who do IDR poorly, is complete.[5]

In LAQ's experience it is common that disputes move between IDR and EDR which reflects a healthy EDR dispute resolution system, consumers are happy to exercise their rights to take a dispute to EDR if they feel a valid claim has not been recognised through the IDR process.

In LAQ's experience, not many claims are transferred between EDR schemes. This indicates that consumers are successful in identifying the correct EDR scheme that they need to lodge a complaint with. As LAQ understands it, where a complaint is lodged with the wrong scheme, FOS and the CIO have an established process that sees claims transferred between the schemes with no disadvantage to the consumer.

Questions - Regulatory oversight of EDR schemes and complaints arrangements

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

LAQ supports the current level of regulatory oversight that ASIC has over EDR schemes. It is appropriate that ASIC has an oversight role to confirm that an EDR scheme meets the standards required.[6]

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[5] See LAQ's response to Question 8.
[6] RG139 – Approval and oversight of external complaints resolution schemes - http://www.asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-139-approval-and-oversight-of-external-complaints-resolution-schemes/
RG165 – Licensing: Internal and External Dispute Resolution - http://www.asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-165-licensing-internal-and-external-dispute-resolution/

11. 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?

LAQ does not support modifying or increasing ASIC's oversight role in relation to FOS and the CIO. LAQ is unaware of any evidence which shows that there is a gap in ASIC's oversight role.

12. 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)?

LAQ would support extending ASIC's current oversight role to the SCT because it would provide consistency and certainty as to how oversight of all financial services EDR schemes is approached.

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

In LAQ's experience, under the existing reporting requirements EDR schemes provide ASIC with the following information:

- quarterly complaints data;
- reports on systemic issues and misconduct; and
- reports on firms who have ceased to be a member of their scheme.

These requirements are very important to ensuring that the credit licensing regime works effectively.

EDR schemes also contribute to improvements in the overall legal framework in the following ways:

- by providing low or no cost access to justice for vulnerable and low income consumers;
- by addressing systemic issues in a business or industry as they arise, which provides remedies for consumers without each individual consumer having to run their own separate court actions;
- by publishing determinations and guidance about how they would approach disputes which allow consumers, consumer advocates and companies to resolve disputes before they reach an EDR scheme.

In LAQ's submission this role would be enhanced by both EDR schemes continuing to provide guidance[7] on how they would approach particular common consumer issues.

[7] FOS Approach and CIO Position Statements.

Questions - Existing EDR schemes and complaints arrangements

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

In LAQ's experience the most important features of the existing EDR scheme arrangements are that:

- there are no costs for consumers and therefore provide meaningful access to justice;
- they provide a forum for vulnerable and low income consumers, who cannot afford to take their dispute to court; and
- they are not legally formal like a court or tribunal and have the ability to make decisions on the basis of what it considers to be fair in all the circumstances.

In LAQ's experience the above features are very difficult to reproduce through a tribunal process.

Cost risks of a tribunal

In addition members of EDR schemes are bound by decisions of the Ombudsman unless they use the EDR schemes test case procedures.[8] Since the establishment of the EDR schemes the industry has sought to appeal an Ombudsman decision through the courts on only 15 occasions. The Ombudsman and not the consumer bear the costs risks of these appeals. This record suggests that the decisions reached by the EDR schemes are of a high quality as none have been overturned on appeal.

The danger of a tribunal system, even where appeals are limited to questions of law, is that the consumer carries the risk of legal costs if the matter is appealed by industry. Even where the industry member case has limited merit, it is difficult for a consumer to effectively respond to any appeal that is made due the issue of costs.

When advising consumers about the tribunal process they would have to be advised of the risk of costs, which even when a matter has merit, may discourage the consumer from proceeding.

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

In LAQ's view, both FOS and the CIO are responsive to accessibility issues and are continually improving the accessibility of their complaints process through initiatives such as:

- providing multiple avenues for the lodgement of disputes (such as email, online complaint, telephone or by mail);

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[8] See Clauses 10 and 19 – FOS terms of reference - http://fos.org.au/custom/files/docs/fos-terms-of-reference-1-january-2010-as-amended-1-january-2015.pdf
Clause 39.5 CIO Rules - http://www.cio.org.au/cosl/assets/File/CIO%20Rules%2010th%20Edition%20-%20August%202016%20(2)(1).pdf

- translating key documents into other languages;
- regularly calling clients to explain what is required of them (stepping them through the process);
- providing interpreters at no charge; and
- drafting letters with minimal legal jargon.

It is important that the EDR schemes continue to respond to accessibility issues to ensure that all consumers can access the benefit of the schemes.

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

LAQ refers to the answer provided in Question 15.

In LAQ's experience it is easy to communicate with the schemes and the scheme's expectations are clear during the course of the EDR complaint process.

17. To what extent do EDR schemes and complaints arrangements provide an effective avenue for resolving consumer complaints?

In LAQ's experience EDR schemes provide an effective avenue for resolving consumer complaints that:

- are at no cost to consumers;
- provide meaningful access to justice for consumers who cannot afford a court or tribunal process;
- can make decisions based on what is fair in all the circumstances; and
- are independent, accessible and accountable.

The combination of all of these factors allows consumers to bring complaints before the EDR schemes with the confidence that their complaint will be treated fairly and a decision based on their individual circumstances will be reached by the EDR scheme.

18. 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?

One of the important challenges for EDR schemes is balancing the need to provide certainty for consumers and industry about the scope of its jurisdiction and service with the need to respond to changes in markets or circumstances.

LAQ supports the current arrangements that require the EDR schemes to:

- obtain the approval of ASIC to make a minor or technical amendment to its terms of reference; and
- undertake public consultation about any other changes.

This process provides certainty for EDR schemes, consumers and industry while still allowing flexibility.

Operationally, recent examples of the EDR schemes evolving in response to changes include FOS's new Fast Track process and the CIO's strategy for reducing dispute timelines.

We refer to the FOS' and CIO's procedural changes that restrict how credit repair agencies access EDR schemes. This procedural change was made in response to the consumer detriment being caused by the actions of credit repair agencies. This change is an excellent example of how EDR schemes can be responsive to the needs of users without legislative change being required.

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

In LAQ's experience the existing jurisdictions of the EDR schemes provide excellent scope to allow vulnerable consumer's access to justice regarding personal debt, insurance and other credit matters.

However, in LAQ's experience existing EDR jurisdictions do not adequately allow rural producers and rural small businesses access to an EDR complaints scheme. LAQ also considers existing EDR jurisdictions do not adequately allow uninsured third parties to have their complaints fully determined.

Rural producers/Rural Small Business

The Queensland Farm Finance Strategy and other voluntary and legislative approaches throughout Australia provide that financial services providers must offer farm debt mediation before they take enforcement action.

If a rural producer/small business accepts an offer to mediate under any of the strategies, including the legislative schemes, the FOS will not consider the matter even where the farmer's complaint would otherwise fall within its jurisdiction. Presumably, the FOS exercises its powers relying upon the discretionary exclusions provided in FOS TOR 5.2. that "*there is a more appropriate place to deal with the dispute, such as a court, tribunal or another dispute resolution scheme or the Privacy Commissioner.*"

Generally, farmers are unaware of their rights to refer matters to the FOS even if they fall within the current guidelines. Because of the time limits for accepting mediation, farmers often accept mediation before seeking advice, thinking their interests are being protected by accepting mediation.

It is also common that, only after advisors take instructions to prepare for mediation that concerns regarding responsible lending, the provision of documents, the conduct of bank case management and collection processes, or bank maladministration become apparent.

LAQ is aware that there is currently no mechanism contained in any farm debt mediation process, whether legislative or otherwise, which requires a bank to produce documentation or information it used to assess the suitability of the loan or later credit limit increases (see Clause 27 of the *Code Of Banking Practice*) or to provide all relevant communication between the parties which the banker relied upon to make decisions. However, there is a Bill currently before the Queensland Parliament for Farm Business Debt Mediation which does require some documents to be provided.

Also, in the mediation process there is currently no obligation on the banks to take into account the effect of any breaches of the *Code of Banking Practice*. In one farm debt mediation, where an issue existed as to the appropriateness of the loan for the farmer's circumstances, the bank representative advised that he would not discuss or consider these issues as they should have been referred to the FOS.

The farmer had attempted to raise these issues with FOS after accepting, but prior to, the actual mediation and was refused by FOS.

Under the current TOR guidelines of the FOS, many rural producers and rural small businesses are excluded from accessing FOS to have breaches of the *Code of Banking Practice* considered in an independent and cost effective manner.

This can occur in two ways:

- the rural producer/business has accepted mediation and are excluded because of this regardless of whether they were within the monetary limits of FOS; or
- the rural producer/business has a genuine dispute regarding breaches of *Code of Banking Practice* but they cannot be determined by FOS because of the current monetary limits.

In both cases the farm debt mediation process does not adequately address and protect the customer in relation breaches of the *Code of Banking Practice* as the bank is aware that the customer is excluded from applying to FOS. This knowledge increases the power imbalance between the Bank and its customer and reduces the fairness and effectiveness of the mediation.

The only avenue of redress for rural producers and rural businesses experiencing financial distress is court action which is costly and prohibitive for most. Anecdotally, private lawyers report that legal costs for a Supreme Court debt dispute can exceed $200,000 and these costs need to be paid up front by the customer. Banks can also seek orders for security for costs against the customer at the commencement of the action. These costs and litigation strategies by banks make it commercially unrealistic for a rural producer and rural small business to seek redress through the court system. Unfortunately, there is no other avenue available if FOS will not consider these matters.

This problem cannot be solved by the introduction of a tribunal because a tribunal is similar to a court process as it places the rural producer/business at the same costs risk that prevents them from accessing the court system. The access to justice of rural producers/businesses can only be improved by expanding the jurisdiction of the financial services EDR schemes to allow consideration of disputes such as those outlined above.

Uninsured third party insurance matters

Currently FOS jurisdiction in insurance matters for uninsured third parties is limited to considering whether the insured was wholly at fault for the accident involving themselves and an uninsured third party. This means that FOS cannot apportion liability between the parties. If FOS is not able to find who was at fault, the insured is able to take legal action against the uninsured party. The consequence of this is the uninsured party is unable to defend the court action because of the cost and as a result has a judgement made against them for the full amount of the insurance claim.

The jurisdiction of FOS ought to be expanded to allow for FOS to apportion liability in relation to claims made by uninsured third parties.

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

In LAQ's experience there are two circumstances where the current monetary limits for determining jurisdiction are not fit for purpose:

(a) The current jurisdictional limit for claims[9] and the compensation cap on awards[10] does not reflect the value of most ordinary consumer's major assets.

The risk created by these limits for consumers is most evident in times of natural disasters where consumers often see their homes completely destroyed. Two scenarios are faced by consumers:

(i) their house is worth more than $500,000 and the house is destroyed. Such a claim would exceed the EDR scheme jurisdictional limit;

(ii) their house is worth less than $500,000 but the damage caused is greater than $309,000. The maximum compensation available under such a claim is $309,000.

In both cases court action is not available to the affected consumer due to the costs of litigation.

(b) The current jurisdictional limit for claim[11] and the compensation cap on awards[12] does not allow most rural producers and rural small businesses to access financial services EDR schemes.

The FOS jurisdiction set out in TOR 5.1(o) excludes claims exceeding $500,000. TOR 5.1(r) further limits jurisdiction to exclude claims against a small business where the contract provides for a credit facility of more than $2M.

LAQ submits that FOS's existing monetary limits are not reflective of current commercial reality for rural producers and rural small business.

It is common for rural producers and rural small business to have credit facilities well in excess of $2Mand disputes relating to credit facilities in excess of $500,000. It is not unusual for LAQ FRLS clients to have overdrafts in excess of $1.5M. These facilities do not include core debt which relates to the purchase, development, or expansion of the farming property and enterprise which are often well in excess of $2M.

Overdraft limits are often reached annually. Generally speaking, farming is a costly business requiring significant inputs. The fluctuations in the overdraft facilities are dependent upon many things including seasonal conditions, commodity fluctuations, timing of sales and harvest/picking regimes. Income is irregular and may only occur several times a year.

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[9] $500,000.
[10] $309,000
[11] $500,000.
[12] $309,000

Additionally equipment to operate a farming enterprise is also very expensive and sophisticated requiring large capital outlays which are often financed independently of the overdraft. Livestock operations can also have separate funding facilities independent of the overdraft. It is quite common for the value of a farm's plant and equipment to be in excess of $1m while livestock values reflect similar if not greater investments for farming clients.

The current monetary jurisdiction of FOS ensures that many rural producers and rural small business will not be afforded any protections offered by FOS. Their only recourse in the event of a dispute is to apply to court.

Additionally, LAQ submits that commencing court action to enforce rights is beyond the financial capacity of small business and rural producers who are seeking legal assistance with financial distress.

As a consequence, LAQ recommends that the current monetary limits be expanded to allow more consumers access to financial services EDR schemes.

21. 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?

LAQ supports the continued use of a decision making process that:

(a) examines the individual circumstances of a consumer's complaint and makes a decision about what is fair and reasonable in the circumstances in light of the law and relevant industry codes of practice; and

(b) has the ability to refer one individual consumer's case for examination as a systemic issue affecting multiple consumers.

The fact that outcomes for users can differ is a positive feature of the current EDR scheme arrangements because it shows that FOS and CIO are examining the individual circumstances of consumers that make complaints to them.

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

In LAQ's experience EDR schemes have sufficient powers to settle disputes that fall within their current jurisdiction. LAQ however refers to submissions made earlier in relation to rural producers/rural small businesses and to uninsured third parties and the need to change jurisdictional limits for EDR schemes.

LAQ also wishes to draw attention to the current EDR jurisdictional limitations in relation to interested third parties in rural debt matters.

In the context of farm debt disputes it is not uncommon for a rural producer to have several financiers financing different parts of the enterprise. For example: Bank A finances the overdraft and credit facility, Bank B finances the crop, Bank C finances livestock and Bank D finances equipment.

Disputes relating to a specific financier can rarely be separated from the whole financial structure. Obligations of the borrower and trying to mediate isolated disputes leave the rural producer exposed to other creditors who are not party to the negotiations and agreements.

This can have significant impact on the capacity of the rural producers to meet commitments under the negotiated agreement as pressure is brought to bear by other creditors.

As a consequence, it is important to expand the SBCF powers of EDR schemes to allow them to take a holistic approach to a rural producer's circumstances and require a party to attend a compulsory conference and ensure that relevant third parties attend the conference.

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

LAQ supports the existing criteria that are used to make decisions by FOS and the CIO.

To ensure access to justice and improved consumer outcomes it is important that both FOS and the CIO continue to make decisions that are fair in all the circumstances having regard to existing law, relevant industry codes and good practice.

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

LAQ supports the existing governance arrangements of FOS and CIO which require them to be an ASIC approved EDR scheme under RG139.[13] It is also important that the FOS and CIO boards continue to retain a structure that has an equal number of consumer and industry representatives because that allows all users of the scheme to have a real voice in the important decisions about how the EDR schemes operate and ensures their independence.

The current governance and funding structures of the FOS and CIO mean that they are better equipped to respond to fluctuations in demand than a government funded scheme or tribunal.

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

LAQ recognises the improvements that both the FOS and the CIO have made in the last 2 years in improving the average time taken to resolve individual disputes.

However, LAQ refers to its answers to Questions 19 and 20 where it recommends the expansion of the jurisdiction of EDR schemes to allow better access for rural producers/rural based businesses and uninsured third parties. A natural consequence of expanding the jurisdiction of EDR schemes is that more funding will be required to deal with a potential increase in complaints.

[13] RG139 – Approval and oversight of external complaints resolution schemes - http://www.asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-139-approval-and-oversight-of-external-complaints-resolution-schemes/

LAQ also recommends the establishment of a separate business unit within the EDR Scheme's Banking and Finance Area staffed by case workers and decision-makers with strong expertise and experience in dealing with rural producers and small business disputes including specialist agribusiness decision makers.

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

LAQ supports the existing funding arrangements that see the FOS and the CIO being funded by industry. LAQ supports a similar model being introduced for the Superannuation Complaints Tribunal (SCT).

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

LAQ supports the existing arrangements for the FOS and the CIO that require them to obtain approval to operate from ASIC in accordance with RG139 and RG165.[14] LAQ also supports the requirement that any changes to the FOS and the CIO's terms of reference or rules require approval from ASIC if they are minor or of a technical nature, and public consultation if the changes to terms of reference are more substantial.

LAQ submits that a similar accountability framework should apply to the SCT.

28. 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?

LAQ supports the current reporting arrangements for FOS and the CIO. They provide a good summary of the annual operations conducted by the scheme. The CIO position statements and the FOS approaches released by the EDR schemes also contribute to improving users understanding of key themes and problems identified by the schemes. The publication of more of these advisory documents would further assist the understanding of all users as to how the schemes approach particular issues.

LAQ supports the expansion of the information provided by EDR schemes about systemic issues. LAQ believes that for reasons of transparency it is important for EDR schemes to provide consumers with information about the companies who have been affected by systemic issues so that consumers can ensure that they obtain an appropriate remedy for their disputes.

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[14] RG139 – Approval and oversight of external complaints resolution schemes - http://www.asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-139-approval-and-oversight-of-external-complaints-resolution-schemes/
RG165 – Licensing: Internal and External Dispute Resolution - http://www.asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-165-licensing-internal-and-external-dispute-resolution/

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

LAQ supports the use of the Treasury Benchmarks for Industry based Customer Dispute Resolution[15] as a means for assessing the performance of the existing EDR schemes and complaints arrangements.

These benchmarks highlight the importance of accessibility, independence, fairness, accountability, efficiency and effectiveness.

Questions - Gaps and overlaps in existing EDR schemes and complaints arrangements

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

We refer to our responses to Questions 19 and 20 where we submitted that the jurisdiction of the EDR schemes should be expanded to allow greater access to the schemes for rural producers/rural based businesses and uninsured third parties.

LAQ has no evidence that there are any major overlaps in the current arrangements.

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

The existence of multiple dispute resolution schemes has led to better outcomes for consumers for the following reasons:

- Having multiple EDR schemes allows one EDR scheme to benchmark itself against the other, which improves the performance of both schemes. In LAQ's experience, the CIO was the first scheme to introduce procedures for dealing specifically with financial hardship and requiring an FSP to cease enforcement action once a complaint was lodged with the scheme. Both of these initiatives were subsequently adopted by FOS. It is unlikely that these changes in process would have been adopted as quickly without the comparative pressure that results from having multiple EDR schemes in financial services.
- There is no evidence that the merger of the two schemes will generate any economies of scale or further improve performance. There is a big risk that a proposed merger of the existing schemes would create a larger, more bureaucratic organisation that is less open to change and the improvement in process that can be created by comparisons between existing EDR schemes.
- In LAQ's experience there is no evidence that consumers find it difficult to identify which scheme they need to lodge a dispute with. We are aware that both the FOS and the CIO have an agreed procedure that allows the easy transfer of disputes that are lodged with the wrong Ombudsman.

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[15] Treasury, Benchmarks for Industry-based Customer Dispute Resolution, March 2015, available at: http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/benchmarks-ind-cust-dispute-reso

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

LAQ has no evidence that the current arrangements result in consumer confusion. It is very rare that LAQ sees any clients who have lodged disputes with the wrong EDR scheme because of confusion created by there being two financial services EDR schemes.

LAQ is also aware that FOS and the CIO have an established process that allows complaints to be easily transferred between the two schemes.

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

We refer to our answers to Questions 19 and 20.

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?

LAQ does not provide advice or representation services to small businesses, except to formers and rural-based small business, through the Farm and Rural Legal Services. We have recently lodged submissions in response to the consultation being undertaken by the Financial Ombudsman Service regarding expansion of the FOS's small business jurisdiction. In our view the proposed changes to FOS's small business jurisdiction will have a positive impact on rural producers and rural small business.

In the submission LAQ:

- supported an increase the FOS's monetary jurisdiction but we are of the view that the SBCF claim limit and compensation cap should be $3M rather than the current $2M and that the the monetary limit for the credit facility should be to $10m. These are more commercially realistic figures given the operational costs of establishing and maintaining small businesses and, in particular, rural producers and rural small businesses;
- supported rural producers and rural small businesses having access to FOS for compulsory conferences and dispute resolution. It was submitted that access to compulsory conferences and dispute resolution should be available to rural producers and rural small businesses regardless of whether farm debt mediation has been offered, accepted or undertaken;
- supported paragraph 7.3 of FOS TOR being amended to apply to SBCF disputes in a way that allows FOS, when considering such a dispute, to require a party to:
    - attend a compulsory conference; and
    - ensure that a relevant third party also attends the conference;
- supported the proposal to be able to forgive a debt or vary an unregulated credit facility would have a significant and positive impact of rural producers and rural small business and would provide a fair, equitable, costs effective, independent and binding resolution of the dispute;
- suggested the establishment of a separate business unit within FOS's Banking and Finance Area staffed by case workers and decisions makers with strong expertise and experience in dealing with rural producers and small business disputes including specialist agribusiness decision makers;
- supported the proposed funding model and imposition of a "small business levy"; and

- submitted that FOS, when considering the commencement date of proposed changes to FOS's TOR, should take into account and compliment the legislative changes being considered by the State and Commonwealth Governments. It should be made clear that rural producers and rural small business have access to FOS notwithstanding that farm mediation been offered accepted or undertaken.

Questions - Triage service

34. Would a triage service improve user outcomes? and

36. 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?**

In LAQ's submission a triage service would improve the access of vulnerable consumers to financial services EDR schemes because it will provide a consumer with a central point to access financial services EDR schemes.

However, rather than restricting a triage service to financial services EDR schemes, any triage service should provide a central point for vulnerable consumers to access any EDR schemes for essential services, for example, financial services, telecommunications and energy and utilities.

In LAQ's submission, the triage service should be funded by Industry in the same way that the FOS, CIO and Telecommunications Industry Ombudsman (TIO) are funded. LAQ understands that the Superannuation Complaints Tribunal is currently funded differently to these schemes and recommends that it should adopt a similar funding model to FOS, CIO and TIO.

The triage service should be run by call centre staff from each of the Ombudsman schemes participating in the triage service because they already have significant experience in identifying relevant issues when a consumer seeks assistance.

Questions - One body

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

LAQ does not support leaving industry to determine the number and form of the financial services ombudsman services. In LAQ's submission for any complaints scheme to be effective it is important that all users of that scheme, which includes consumers and their advocates, should have a voice and a role in determining the number and form of the financial services EDR schemes.

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

LAQ supports the view that the SCT should be subject to the same governance, funding and reporting requirements as the FOS and the CIO.

We refer to our answer to Question 31 where it sets out the benefits experienced from having both the FOS and the CIO operating as EDR schemes in the Financial Services area. LAQ is concerned that any integration of the existing arrangements might result in the existing benefits being lost or reduced.

LAQ also recognises that within the financial services area there are a number of specialist areas of law, for example superannuation, insurance, consumer credit and banking. It is important to give consideration to whether further integration would achieve any further economies of scale beyond what was achieved through the merger of schemes that saw the creation of the FOS.

39. 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)?

In LAQ's submission, if a one stop shop was created it would be important that specialist units with consumer and industry expertise in for example superannuation, insurance, banking and rural finance be created so that disputes which may turn on the unique features of particular products in the financial system can be addressed.

40. What form should a 'one stop shop' take? and

41. If a 'one-stop shop' in the form of a new single dispute resolution body were desirable:
- **should it be an ombudsman or statutory tribunal or a combination of both?**
- **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?**

If the preferred view of the Panel is that a one stop shop for all financial services EDR complaints should be created, LAQ recommends that:

- it be a no cost scheme to the consumer;
- it ensures access to justice for vulnerable consumers;
- its decisions made be based on what is fair in all the circumstances;
- the current EDR schemes jurisdictional limits be expanded as previously outlined in this submission;
- any new scheme be funded by industry and be subjected to the same oversight and governance arrangements as the existing FOS and CIO EDR schemes; and
- an Ombudsman Scheme be created and not a Tribunal.

Questions - An additional forum for dispute resolution

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

LAQ does not support the introduction of a new forum such as a banking tribunal. LAQ strongly submits that a banking tribunal is likely to lead to significantly poorer outcomes for consumers.

For example, a new tribunal:

- may be unable to consider what is fair and reasonable in the circumstances given the law and good industry practice;
- may be a costs jurisdiction that puts vulnerable consumers at risk of paying legal costs. In LAQ's experience, the major impediment to low income and vulnerable consumers accessing justice is the risk that they might have to pay costs and legal fees;
- may potentially drag out or delay dispute resolution, particularly if it is added to existing bodies or is not funded appropriately;
- may operate legalistically, as is the case with many other Australian tribunals, creating barriers to access that many consumers may not be able to overcome;
- may create further or multiple bodies in financial sector dispute resolution, exacerbating consumer confusion;
- may not address the issues underlying consumer dissatisfaction with the banking sector in so far as the inadequacies relate to the applicable law as opposed to the decision-making forum; and
- may only be able to deal with the specific issue in front of them relating to one individual. One of the strongest features of the current financial services EDR schemes is their ability to deal with issues on a systemic basis. The results of these systemic investigations often lead to many hundreds of consumers being compensated for misconduct without them having to each run their own individual case. A tribunal is unlikely to have the power to look at disputes from a systemic perspective. The decision of existing EDR schemes are already binding on financial service providers when accepted by the consumer and the existing EDR schemes provide an efficient and timely dispute resolution process.

43. If a tribunal were desirable:

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

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

For the reasons outlined in Question 42, LAQ does not support the introduction of a banking tribunal. Many of the proposed roles of a tribunal listed in Question 43 are already performed by the existing EDR schemes who received over 55,000 complaints in the last 12 month period.[16] It is unlikely a Tribunal would be able to cope with this volume of complaints as efficiently and cost effectively for the Government as the current EDR schemes. Rather than creating a new tribunal to replace or add to what is already working effectively, for the reasons outlined in Question 19 and 20, LAQ supports the expansion of the existing financial scheme EDR jurisdiction but not the creation of a new tribunal.

44. 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?

LAQ currently understands the primary roles of the Small Business and Family Enterprise Ombudsman (SBFEO) to be:

- providing guidance and advice about starting, running, growing and closing a business;
- referring to appropriate low cost dispute resolution services to assist small businesses;
- providing advocacy for small businesses and family enterprises.

LAQ submits that it may be difficult for the SBFEO to balance their existing role with any expanded power to resolve disputes.

Questions – Developments in overseas jurisdictions and other sectors

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

LAQ has no submissions to make on this question.

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

LAQ has no submissions to make on this question.

[16] FOS Annual Report 2015/2016 34095 complaints were received. CIO Annual Report on Operations 2014/2015 21,839 enquiries received.

Questions - Uncompensated consumer losses

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

LAQ has assisted clients who are successful in obtaining a determination against an FSP but have not been paid by the FSP, including a client who as a result lost their house. Accordingly, LAQ supports the establishment of a statutory compensation scheme of last resort.

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

49. 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?

In LAQ's submission, a statutory compensation scheme of last resort should be established to address uncompensated consumer losses. The scheme should be funded by all members of a financial services EDR scheme paying a small levy linked to their annual turnover.

A last resort compensation scheme through the industry would provide all industry members with a direct interest in ensuring that industry members pay determinations. This is because if a determination is not paid it will affect each member financially. This incentive may create a culture of self-enforcement in the industry and also encourage EDR schemes to be more robust concerning the membership of FSP's with unpaid determinations.

LAQ submits that any scheme should be retrospective because of the large personal impact that existing unpaid determinations have had on consumers.

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

LAQ submits that a compensation scheme of last resort would not greatly affect professional indemnity insurance. A professional indemnity insurance policy is insurance taken out by an FSP to protect itself against risk including a compensation award. This insurance performs a different role to providing consumers with compensation when the FSP commits a legal wrong. It should not be viewed as product designed to provide compensation to consumers.