



**Australian Government**

ISSUES PAPER

# **Review of the financial system external dispute resolution framework**

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Consultation on the financial system external  
dispute resolution framework

9 September 2016

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# Contents

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- Consultation Process.....iv**
  - Request for feedback and comments .....iv
- Introduction..... 1**
  - Principles guiding the review ..... 2
- Overview of the dispute resolution framework in the financial system .....4**
  - Internal dispute resolution ..... 4
  - External dispute resolution and complaints arrangements ..... 5
  - Regulatory oversight of the financial system external dispute resolution and complaints framework ..... 6
  - Approved industry schemes: financial ombudsman service and credit and investments ombudsman..... 8
  - The Superannuation Complaints Tribunal..... 13
  - Comparison of the existing external dispute resolution schemes and complaints arrangements..... 16
- Alternative models of dispute resolution ..... 19**
  - One-stop shop ..... 19
  - An additional forum for dispute resolution ..... 20
  - Overseas developments and other sectors ..... 22
- Other issues .....24**
  - Uncompensated consumer losses..... 24
- List of discussion questions .....25**
- Attachment A – Terms of Reference.....30**

# Consultation Process

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## REQUEST FOR FEEDBACK AND COMMENTS

Interested parties are invited to lodge written submissions on the issues raised in this paper by 7 October 2016.

All information (including name and address details) contained in submissions will be made available to the public on the external dispute resolution review website at <http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2016/FS-external-dispute-resolution> unless the party making the submission indicates that all or part of the submission is to remain confidential. Automatically generated confidentiality statements in emails are not sufficient for this purpose. Respondents who would like part of their submission to remain confidential should provide this information marked as such in a separate attachment. A request made under the Freedom of Information Act 1982 for access to a submission marked confidential will be determined in accordance with that Act.

Submissions should include the name of the organisation (or name if the submission is made by an individual) and contact details including an email address and telephone number where available. While submissions may be lodged electronically or by post, electronic lodgement is strongly preferred. For accessibility reasons, please email responses in a Word or RTF format. An additional PDF version may also be submitted.

### **Closing date for submissions: 7 October 2016**

Address written submissions to:

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

Mail: EDR Review Secretariat  
Financial System Division  
Markets Group  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Enquiries: Enquiries can initially be directed to the EDR Review Secretariat by emailing [EDRreview@treasury.gov.au](mailto:EDRreview@treasury.gov.au).

# Introduction

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1. On 20 April 2016, the Government announced a review of the financial system's external dispute resolution and complaints schemes. On 8 August 2016, the Government released the review's Terms of Reference (see **Attachment A**).
2. The review is being chaired by Professor Ian Ramsay. The panel members for the review are Ms Julie Abramson and Mr Alan Kirkland.
3. The panel has been asked to examine the Financial Ombudsman Service (FOS); the Credit and Investments Ombudsman (CIO); and the Superannuation Complaints Tribunal (the SCT) 'to consider whether changes to current dispute resolution and complaints schemes in the financial sector are necessary to deliver effective outcomes for users in a rapidly changing and dynamic financial system.'
4. The Terms of Reference require consideration of the role, powers, governance and funding arrangements of the three schemes as well as the extent of gaps and overlaps between the schemes, and the schemes' role in working with government, regulators, consumers, industry and other stakeholders to improve the framework to deliver better user outcomes. They also require the panel to consider the relative merits and any issues associated with different models in resolving disputes.
5. The purpose of publishing this issues paper is to seek information from interested stakeholders. In particular, the panel is seeking information from interested stakeholders on the issues discussed in the paper and any other issues which are relevant to the FOS, CIO and SCT. The submissions the panel receives will inform the recommendations in its interim report.
6. The consultation process is an opportunity for all interested parties to raise their concerns and put forward their ideas for the panel's consideration. The panel encourages all those who have an interest in the financial system's dispute resolution and complaints framework to comment on this issues paper and participate in the consultation process.
7. The panel will issue an interim report at the end of November 2016 which will contain draft recommendations and will provide its final report to Government by 31 March 2017. The panel will seek submissions on the draft recommendations contained in the interim report.
8. The panel looks forward to working with all interested parties to ensure that the regulatory framework strikes the right balance between providing adequate protection to consumers and reducing regulatory compliance costs whilst taking into account efficiency, equity, complexity, transparency, accountability and comparability of outcomes.

## PRINCIPLES GUIDING THE REVIEW

9. The financial system plays a vital role in meeting the financial needs of individual Australians. To fulfil this role effectively, consumers should be treated fairly and financial products and services should perform in the way consumers are led to believe they will. Consumers should be expected to accept their financial decisions, including market losses, when they have been treated fairly.<sup>1</sup>
10. The purpose of the review is to ensure Australia's dispute resolution and complaints framework effectively meets the needs of users of financial services. The panel considers the primary users to be consumers who make complaints and the financial service providers, including superannuation funds (collectively referred to as 'financial firms' in this issues paper), that are the respondents to complaints.<sup>2</sup>

### Question - Principles guiding the review

1. Are there other categories of users that should be considered as part of the review?
- 
11. In developing its recommendations to ensure the framework can adapt to a rapidly changing and dynamic financial system, the panel will take into account best practice developments overseas and in other industry sectors. The panel will also be guided by the following principles and outcomes:
    - **Efficiency:** schemes should have adequate coverage, powers and remedies for complaints to be resolved in a timely manner;
    - **Equity:** users should face minimal cost barriers and be able to easily access the system;
    - **Complexity:** schemes should be easy to use for users;
    - **Transparency:** decisions and processes of the schemes should be easily observable;
    - **Accountability:** schemes' final determinations and complaints information should be publicly available, detailed information about schemes should be publicly available, and schemes have a role in reporting systemic issues and misconduct;
    - **Comparability of outcomes:** users who have similar complaints (for example, in relation to similar financial products) should receive similar outcomes; and
    - **Regulatory costs:** the framework governing the schemes should impose the minimum amount of necessary costs to ensure effective user outcomes.

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1 *Financial System Inquiry, Inquiry Final Report, November 2014, page 193.*

2 Third parties who are affected by disputes, such as beneficiaries under an insurance policy, can also be users of the system. In disputes involving death benefits, affected third parties would include potential beneficiaries.

12. The panel will also take into account recommendations and findings from recent reviews, including the Parliamentary Joint Committee on Corporations and Financial Services' report *Impairment of Customer Loans*, the Financial System Inquiry, the Productivity Commission Inquiry into *Access to Justice Arrangements*, the Commonwealth Consumer Affairs Advisory Council's Final Report *Benchmarks for Industry-Based External Dispute Resolution Schemes*, and the Richard St John report into *Compensation Arrangements for Consumers of Financial Services*.

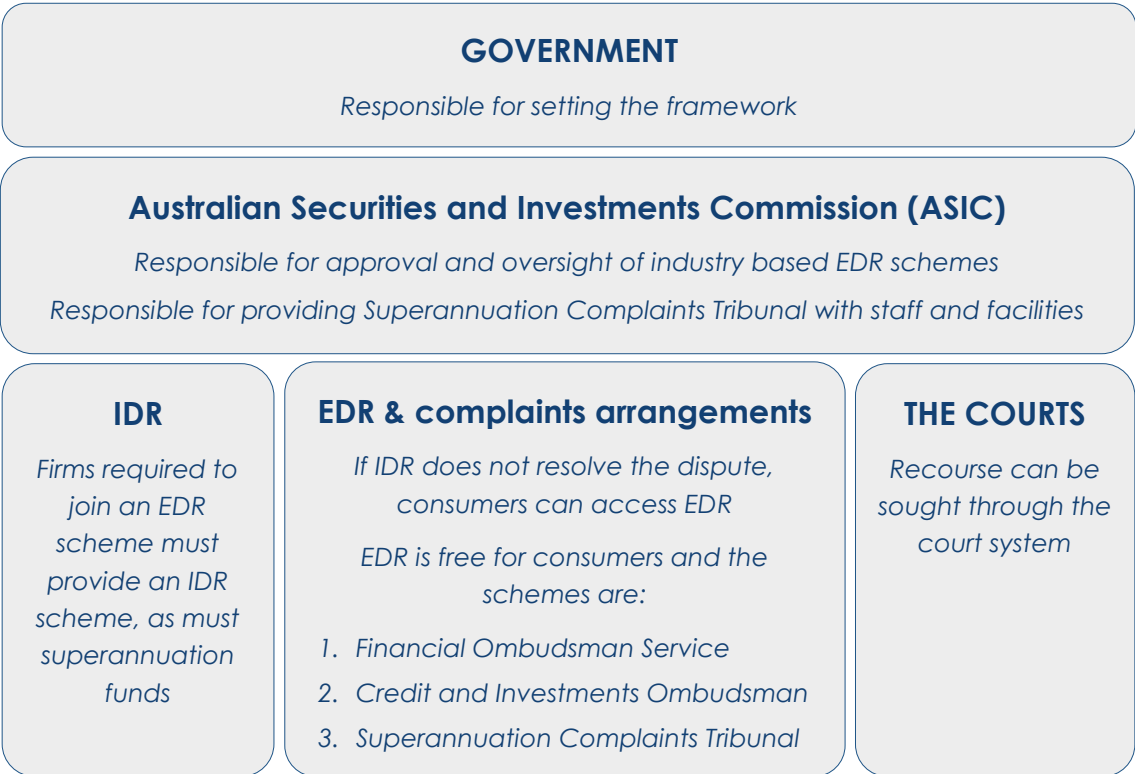
### **Questions - Principles guiding the review**

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?
3. Are there findings or recommendations of other inquiries that should be taken into account in this review?
4. In determining whether a scheme effectively meets the needs of users, how should the outcomes be defined and measured?

# Overview of the dispute resolution framework in the financial system

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13. Dispute resolution in the Australian financial system broadly consists of three steps:
- (a) internal dispute resolution (IDR);
  - (b) external dispute resolution (EDR) and complaints arrangements; and
  - (c) the court system.



## INTERNAL DISPUTE RESOLUTION

14. A consumer’s first option when wanting to resolve a dispute is through a financial firm’s IDR processes. An effective IDR framework can allow disputes to be resolved in a timely manner without the involvement of a third party – benefiting both consumers and financial firms.



15. Financial services providers and credit providers must by law have IDR procedures that meet ASIC's requirements.<sup>3</sup> Consumers must access these prior to seeking external dispute resolution. Under ASIC Regulatory Guide 165: Licensing: Internal and external dispute resolution (RG 165), firms have 45 days in which to deal with a matter through IDR before the EDR and complaints arrangements can be triggered.
16. Trustees of regulated superannuation funds (those regulated under the *Superannuation Industry (Supervision) Act 1993*), with the exception of self-managed superannuation funds and approved deposit funds, have an obligation to establish arrangements for dealing with inquiries and complaints and these must be dealt with within 90 days.
17. If a consumer is not satisfied with the outcome of their IDR processes, they may then submit a complaint to the EDR or complaints arrangements to which their financial firm belongs.

### 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?
6. What are the barriers to lodging a complaint? How could these be reduced?
7. How effective is IDR in resolving consumer disputes? For example, are there issues around time limits, information provision or other barriers for consumers?
8. What are the relative strengths and weaknesses of the schemes' relationships with IDR processes?
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?

## EXTERNAL DISPUTE RESOLUTION AND COMPLAINTS ARRANGEMENTS

18. EDR and complaints arrangements have successfully formed part of Australia's consumer protection framework for over three decades. EDR and complaints arrangements in the key areas of financial services, energy and telecommunications have operated since the 1990s and have paved the way for similar arrangements in other sectors.<sup>4</sup>

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<sup>3</sup> ASIC's requirements are set out in RG 165.

<sup>4</sup> Calluna Consultants, *External dispute resolution schemes and Systemic Issues: An examination of the telecommunications industry ombudsman's system issues functions against best practice*, 28 December 2010.

19. EDR provides an avenue for people to resolve their disputes without going through adversarial court processes. It allows disputes to be completed in a timelier manner and at lower cost than the formal legal system. EDR's focus on 'fairness' has the potential to produce results that are more satisfactory to participants.<sup>5</sup> In addition to providing a forum for resolving individual consumer complaints, EDR also allows for the identification and addressing of systemic issues within an industry.
20. Current EDR and complaints arrangements in the financial system consist of a mix of statutory and non-statutory schemes. Consumers are also able to take a complaint through the courts, either after exhausting EDR processes or as an alternative to EDR.

## **REGULATORY OVERSIGHT OF THE FINANCIAL SYSTEM EXTERNAL DISPUTE RESOLUTION AND COMPLAINTS FRAMEWORK**

21. Membership of an EDR scheme approved by ASIC is a licence condition for all financial firms that deal with retail clients.<sup>6</sup> This includes all Australian financial services licensees, unlicensed product issuers, unlicensed secondary sellers, credit providers and credit representatives.<sup>7</sup> A financial firm that is not a member of an approved EDR scheme is in breach of their licence and can become the subject of administrative action by ASIC.
22. Under the current framework, ASIC's role is to provide oversight of EDR schemes to ensure they are working (and continue to work) effectively in dealing with consumer complaints.
23. ASIC's oversight role is limited to high level policy settings – ASIC approves the jurisdiction (terms of reference or rules) within which the approved schemes operate and ensures that they meet their obligations as an approved complaints scheme. 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.<sup>8</sup>

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5 For example, when deciding a dispute and determining whether a remedy should be provided, FOS will do what in its opinion is fair in all the circumstances, having regard to legal principles, applicable industry codes or guidance, good industry practice and, where appropriate, previous decisions of FOS or a predecessor scheme.

6 Section 912AA of the *Corporations Act 2001*.

7 Superannuation funds are subject to the jurisdiction of the Superannuation Complaints Tribunal.

8 Australian Securities and Investments Commission, *Information Sheet 174 - Disputes with financial services or credit providers*, July 2013, accessed at <http://download.asic.gov.au/media/3375680/info-174-disputes-with-financial-services-or-credit-providers.pdf>.

24. ASIC's requirements to approve an EDR scheme are set out in Regulatory Guide 139 - *Approval and oversight of external complaints resolution schemes* (RG 139). Key requirements are that:
- the dispute resolution service must be free for consumers;<sup>9</sup>
  - the scheme must meet minimum jurisdiction requirements;
  - it must be independent from industry;
  - it must be sufficiently resourced;
  - it must have fair decision-making processes and adequate remedies; and
  - it must be subject to periodic independent reviews.<sup>10</sup>
25. Approved schemes are also required to provide complaints data to ASIC on a quarterly basis and to report on systemic issues and serious misconduct. Approved schemes regularly report to ASIC about members who have ceased as a member of their scheme, and this includes firms who may have resigned (are no longer in business), moved to the other scheme or been expelled for non-compliance with the scheme's rules. This facilitates ASIC's monitoring of licensee compliance with the requirement to be a member of an EDR scheme.
26. As well as having the power to approve schemes, ASIC has the power to vary or revoke approval of an EDR scheme. ASIC must be consulted on changes to a scheme's terms of reference.
27. ASIC does not have an oversight role in relation to the Superannuation Complaints Tribunal, which is a statutory tribunal, established under the *Superannuation (Resolution of Complaints) Act 1993*.

### 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?
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?
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)?

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9 Charging is permitted in some limited cases, for example where the scheme seeks to extend its jurisdiction to provide its services for a complaint or dispute that is clearly outside the scheme's jurisdiction (see ASIC RG 139 at paragraph RG 139.49).

10 For example, FOS' most recent independent review was in 2013 (see *2013 Independent Review* accessed at: <https://www.fos.org.au/custom/files/docs/independent-review-final-report-2014.pdf>).

### Questions - Regulatory oversight of EDR schemes and complaints arrangements (continued)

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

## APPROVED INDUSTRY SCHEMES: FINANCIAL OMBUDSMAN SERVICE AND CREDIT AND INVESTMENTS OMBUDSMAN

28. Between 2001 and 2008, ASIC approved seven financial services EDR schemes, each of which had previously operated along discrete industry lines. Scheme rationalisation means that there are currently two approved schemes: FOS and CIO.<sup>11</sup>
29. FOS was established in 2008, following the merger of five predecessor schemes, some of which had been operating for more than 20 years. These schemes were the Financial Industry Complaints Service (FICS), the Banking and Financial Services Ombudsman (BFSO), the Insurance Ombudsman Service (IOS), the Credit Union Dispute Resolution Centre and the Insurance Brokers Disputes Ltd.
30. FOS' jurisdiction is set under its Terms of Reference. FOS can consider disputes about a wide range of investment, insurance, credit payment system and deposit taking products and services sold by a broad range of financial service providers.
31. FOS' members include:
- banks;
  - insurers (including life and general insurers);
  - credit providers;
  - credit unions;
  - financial advisers and planners;
  - brokers;
  - debt collection agencies; and
  - other businesses that provide financial products and services.
32. In 2015-16, FOS had 13,576 members, comprising 5,540 licensees and 8,036 authorised credit representatives.

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11 As well as being approved EDR schemes for financial services disputes, these schemes are also recognised EDR schemes for certain privacy-related complaints, see <https://www.oaic.gov.au/privacy-law/privacy-registers/recognised-edr-schemes>.

33. Although the number of disputes FOS receives has stabilised in the past few years, following a steep increase from 2009-2010 to 2011-2012,<sup>12</sup> it increased (by 7 per cent) in 2015-16 to 34,095 disputes (from 31,895 disputes in 2014-15). Of the 34,095 disputes received in 2015-16, FOS closed 32,871 disputes.<sup>13</sup> It is estimated that FOS receives around 80 per cent of the banking, investment and insurance disputes in Australia.
34. In 2014-15, FOS closed 22 per cent of disputes received within 30 days, 61 per cent within 60 days and 72 per cent within 90 days.<sup>14</sup> In 2015-16, these figures improved with FOS closing 43 per cent of disputes received within 30 days, 77 per cent within 60 days and 85 per cent within 90 days.<sup>15</sup>
35. CIO (formerly known as the Credit Ombudsman Service Limited) was established in 2003 as a result of Mortgage & Finance Association of Australia's self-regulation. In 2014-15, it had 20,475 members<sup>16</sup> including:
  - lenders (residential and commercial mortgage providers, personal loan and credit card providers, small amount lenders and pawn brokers);
  - mutual banks, credit unions and building societies;
  - finance brokers;
  - securitisers;
  - debt purchasers and collectors;
  - timeshare providers;
  - financial planners;
  - accountants; and
  - credit reporting schemes.
36. Around 97 per cent of CIO's members are sole traders or small businesses.
37. CIO's jurisdiction is set under its Rules. CIO can deal with a range of disputes about a range of financial products and services including disputes relating to credit products and services, finance broking, debt collection or debt purchasing arrangements, financial planning and credit reporting.

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12 In 2008-09, FOS received 22,392 disputes, this increased to a peak of 36,099 in 2011-12.

13 Financial Services Ombudsman Service Australia, *Annual Review 2015-16*, 2016.

14 Financial Services Ombudsman Service Australia, *Annual Review 2014-15*, 2015.

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

16 Credit and Investments Ombudsman, *Annual Report on Operations 2015*, 2015.

38. The number of complaints CIO receives has risen over the past five years, particularly after the introduction of national licensing obligations for credit providers and intermediaries. In 2010-11, CIO received 1,983 complaints; this increased to 3,763 in 2012-13 and in 2014-15 it received 4,848 complaints (and closed 4,979 complaints, as complaints received in a financial year are not necessarily closed in the same year).<sup>17</sup>
39. In 2014-15, CIO closed 23 per cent of claims within 30 days, 46 per cent within 60 days and 64 per cent within 90 days.<sup>18</sup>
40. Most financial firms (excluding superannuation funds) can choose which of the two approved schemes to join. CIO and FOS operate under a Memorandum of Understanding for the exchange of information about members, especially where members apply to move from one scheme to another. The primary purpose is to minimise risks to consumers including non-compliance with decisions and gaps in access to EDR.

## Approach to dispute resolution

41. There is a high level of discretion for Ombudsman schemes to choose the appropriate dispute resolution process for each matter. Schemes utilise a range of referral and case management techniques with the objective of providing fair and timely outcomes for consumers and scheme members.
42. Where a dispute is lodged with an EDR scheme, the first step is generally to encourage the scheme member to resolve the dispute directly with the consumer even where the consumer has already been through the member's IDR process.
43. Where the member and consumer are unable to resolve the complaint directly, schemes will utilise a number of different approaches to try and provide a fair and timely outcome. These include utilising negotiation or conciliation where possible – FOS and CIO each resolve around half of their complaints through negotiation, conciliation or direct discussions between the member and the consumer. Other approaches include expediting simple and low value complaints and using tailored processes in cases of financial hardship.
44. Schemes may provide a preliminary view on the merits of the dispute to encourage parties to reach agreement, however, where parties do not reach agreement, the scheme can make a decision (determination) that is binding on the member but not the consumer who lodges the complaint. Schemes also have discretion to exclude disputes: FOS can exclude disputes it considers to be frivolous, vexatious or lacking in substance;<sup>19</sup> and the CIO can exclude complaints that lack in substance or that are being pursued for an improper purpose.<sup>20</sup>

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17 Credit and Investments Ombudsman, *Annual Report 2015*, 2015.

18 Ibid.

19 FOS Terms of Reference paragraph 5.2.

20 CIO Rules, paragraph 10.1(v).

45. In determining a matter, including the extent of loss or damage suffered by a complainant or disputant, the schemes have regard not only to the relevant legal principles but also to the concept of fairness and to relevant industry best practice.<sup>21</sup>

## Jurisdiction and monetary limits

46. The minimum jurisdiction requirements for approved EDR schemes are set out in ASIC's RG 139. An approved scheme must be able to deal with complaints made by retail clients in connection with the provision of all financial services covered by the licence.<sup>22</sup> As scheme membership has grown, FOS' Terms of Reference and CIO's Rules have varied to accommodate new members and a broader range of regulated financial and credit services.
47. ASIC's RG 139 encourages schemes to go beyond these minimum requirements. An example is FOS' definition of 'financial services', which is drafted more broadly than the statutory definition in the *Corporations Act 2001*. This provides FOS with greater flexibility to accept disputes that may have otherwise been on the margins but related to products or services issued by FOS members. Examples of this include FOS' broader definition of financial services, its approach to small business responsible lending disputes and ability to consider disputes about non-regulated loans,<sup>23</sup> and discretion to deal with disputes from non-retail consumers when appropriate.
48. FOS' approach to decision-making, as set out in its Terms of Reference, has been subject to judicial consideration in a number of cases, where the courts have confirmed that its Terms of Reference provide FOS with wide and flexible powers to do justice between the parties.<sup>24</sup>
49. Both schemes operate a monetary limit: the maximum value per claim under a dispute that can be considered is \$500,000.<sup>25</sup> There are also maximum compensation caps in operation. Currently, the maximum compensation that may be awarded is \$309,000 per claim for most disputes (although lower limits apply for some other disputes, for example, general insurance broking disputes have a limit of \$166,000 per claim). Monetary limits have increased over time after public consultation processes, and commencing in 2012, schemes must adjust the compensation cap every three years.<sup>26</sup>

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21 ASIC RG 139 at paragraph RG139.225.

22 Subparagraph 912A(2)(b)(ii) of the *Corporations Act 2001* and also section 47 of the *National Consumer Credit Protection Act 2009*.

23 FOS is able to consider disputes about maladministration in lending as a result of the jurisdiction conveyed by FOS' Terms of Reference at paragraph 5.1(c). 'Maladministration' is defined in paragraph 4.20 of the Terms of Reference, as 'an act or omission contrary to or not in accordance with a duty or obligation owed at law or pursuant to an express or implied term of the contract'. The maladministration jurisdiction applies to both regulated and unregulated credit.

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

25 However, schemes do have some provisions for considering disputes exceeding this amount. For example, FOS can consider a dispute involving a claim for more than \$500,000 if all parties and FOS agree (see FOS circular - <https://www.fos.org.au/the-circular-4-home/monetary-limit-caps/>).

26 See ASIC RG 139 at paragraph RG 139.191.



50. Approved schemes also apply a range of exclusions to their jurisdiction. Some of the key reasons why a complaint may fall outside a scheme's jurisdiction include: the complaint exceeds the relevant monetary limit; the complaint was previously dealt with by the scheme or a court; the complaint was brought outside the relevant time limits; or the scheme decides it was more appropriately dealt with in another forum.<sup>27</sup> There are also a number of specific exclusions which relate to proper commercial decision-making by financial firms.

### Review of FOS' small business jurisdiction

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

The Government has asked ASIC to work with FOS on an immediate review of its small business jurisdiction.

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

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

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

FOS is currently seeking stakeholder feedback on the proposals outlined in its issues paper. Submissions are due by 23 September 2016.

### Powers

51. Both FOS and CIO provide a wide range of remedies including compensation for financial or non-financial loss,<sup>28</sup> forgiveness or variation of a debt, or release of a security for a debt. They can also order interest to be paid on a payment. ASIC's policy settings do not require scheme decision-makers to adopt a particular approach to the determination of remedies. The policy settings do anticipate that schemes may consider claims for non-financial loss where appropriate, excluding exemplary or aggravated damages.<sup>29</sup>

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27 Other than in relation to complaints about financial hardship applications, unjust transactions, or unconscionable interest and other charges under the National Credit Code, FOS and CIO will not consider a complaint unless it was brought within the earlier of six years from when the applicant became aware of their loss and two years of receiving an IDR response from their financial firm.

28 Non-financial losses at FOS are capped at \$3,000, while CIO does not impose a cap.

29 See ASIC RG 139 at paragraph RG 139.224-227. Exemplary damages are awarded to punish a defendant and deter them from committing similar conduct. Aggravated damages are awarded where the defendant's conduct was so outrageous that additional compensation is required to appropriately compensate the injured party.



52. Determinations made by either scheme are binding on the financial firm but not the complainant. Complainants can therefore seek recourse through the court system should they be unhappy with the outcomes of the EDR process.

## **Governance**

53. Both FOS and CIO are governed by a Board of Directors comprised of independent consumer and industry directors and an independent chair as required under RG 139.
54. The roles of the Board include to: appoint decision-makers and ensure independent decision-making by scheme staff and decision-makers; monitor the performance of the scheme; provide direction to the Chief Ombudsman on policy matters; set the budget; and review and ensure effective consultation about changes to the scheme's jurisdiction, including monetary limits.
55. The Board does not become involved in the detail of cases which come before the scheme as that would prejudice decision-makers' independence.

## **Funding arrangements**

56. Both schemes are funded from charges on their members. The FOS Board determines the funding arrangements for FOS in consultation with members. FOS funding is reviewed periodically. The CIO board periodically determines funding arrangements but is not required under its constitution to consult with members.
57. FOS is funded by its members under a 'user pays' model that charges members in accordance with their use of FOS. The fees consist of a membership fee, a user charge and dispute fees. Around 75 per cent of the funding comes from dispute fees. This means that funding is more variable year on year as it is more dependent on the overall number of disputes and a member with multiple and/or more complex disputes before FOS will pay a higher amount.
58. CIO is also funded by its members. Fees are tiered depending on the size of the member, and include an annual fee as well as case fees. Around 70 per cent of funding comes from membership fees, which means funding is potentially more stable overall, but may provide less incentive to settle or reduce the volume of disputes.

## **THE SUPERANNUATION COMPLAINTS TRIBUNAL**

59. The SCT is a statutory tribunal established under the Superannuation (Resolution of Complaints) Act 1993 (SRC Act). The SCT was established with the introduction of compulsory superannuation in Australia in 1993. The SCT is not subject to ASIC approval and RG 139 does not apply to it.
60. Superannuation funds become subject to the jurisdiction of the SCT when they elect to be regulated under the Superannuation Industry (Supervision) Act 1993 (SIS Act). The SCT can deal with a diverse range of superannuation-related complaints, excluding complaints in relation to self-managed superannuation funds.

61. The SCT provides a free service to consumers and aims to be an alternative to the court system for superannuation-related complaints. The SRC Act requires the SCT to pursue the objectives of providing dispute mechanisms that are fair, economical, informal and quick.<sup>30</sup> Parties do not have an automatic right to legal representation; this needs to be approved by the SCT.
62. Since 2004-05, the number of complaints received by the SCT has increased by around 41 per cent, growing from 1,907 complaints in 2004-05 to 2,688 complaints in 2014-15. In 2014-15, the SCT resolved 1,582 complaints, 157 complaints were withdrawn without resolution and 1,102 were outside jurisdiction.<sup>31</sup> Resolution of a complaint can occur at any stage of the process. If a complaint is not resolved at the investigation or conciliation stage, it may proceed to review. The SCT has indicated that if a complaint is not withdrawn or resolved with the superannuation fund before review, it will take at least 12 months to get to review, at which time the SCT will make a formal decision in relation to the complaint.<sup>32</sup>
63. ASIC has statutory responsibilities under subsection 62(2) of the SRC Act to provide the SCT with staff and facilities to enable the SCT to perform its functions.

## Jurisdiction and powers

64. The SCT's jurisdiction is set in statute. The SCT can deal with complaints relating to the decisions and conduct of trustees, insurers, retirement savings account (RSA) providers, superannuation providers in relation to regulated funds (excluding self-managed superannuation funds), approved deposit funds, life policy funds, annuity policies and RSAs. Jurisdictional and standing provisions are set out in the SRC Act. The SCT has no monetary limits but does have time limits.<sup>33</sup> The SCT has the power to join parties to a complaint.
65. The SCT's statutory powers are also set out in the SRC Act. In making a determination, the SCT must consider whether the trustee's decision was 'fair and reasonable' in the circumstances. If the SCT determines that a decision was not 'fair and reasonable', it may only exercise its powers to place the complainant, as nearly as practicably, back into the position they would have been before the decision was taken. The SCT cannot award costs or damages or provide a remedy where there has been no adverse practical outcome or financial loss.<sup>34</sup>
66. The SCT has limited powers. For example, it is unable to provide a remedy for complaints about the design of a fund. In carrying out its review, it also is not able to exercise its powers in a way which is contrary to the relevant trust deed or insurance policy.

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30 Section 11 of the SRC Act.

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

32 Superannuation Complaints Tribunal website, accessible at <http://www.sct.gov.au/faqs/frequently-asked-questions>.

33 Time limits apply to complaints about death benefit distribution (generally 28 days) and total and permanent disability claims (generally 4 years). Time limits do vary. For further information see the SCT website on time limits: <http://www.sct.gov.au/pages/make-a-complaint/time-limits>.

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

67. Appeals against a SCT determination can be made to the Federal Court on questions of law only. Appeals against other decisions such as the withdrawal of a complaint can be made to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1997* and the *Judiciary Act 1903*.

## Governance

68. The SCT consists of a Chairperson, Deputy Chairperson and no fewer than seven other members. The Chairperson and Deputy Chairperson are appointed by the Governor-General. Remaining SCT members are Ministerial appointments with two members appointed following consultation with the Consumer Affairs Minister.<sup>35</sup>

## Funding arrangements

69. The Government provides an annual appropriation for the SCT in each budget. This appropriation is then recovered from Australian Prudential Regulation Authority (APRA) regulated superannuation funds via the annual financial sector levies determined by the Minister and collected by APRA. In accordance with subsection 62(2) of the SRC Act, ASIC, on behalf of the SCT, manages the SCT's finances within the designated appropriation, consistent with the *Public Governance, Performance and Accountability Act 2013*. There is no link between the volume of disputes involving a superannuation fund and the amount of levies that it contributes towards the operating expenses of the SCT.

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35 Sections 7 and 8 of the SRC Act.

## COMPARISON OF THE EXISTING EXTERNAL DISPUTE RESOLUTION SCHEMES AND COMPLAINTS ARRANGEMENTS

70. The table below summarises and compares key features of the existing EDR schemes and complaints arrangements.

	FOS	CIO	SCT
<b>Governance and legislative base</b>	FOS is an ASIC-approved EDR scheme, set up as a not for profit company. Financial firms are required to be members of an EDR scheme by law. It must submit to periodic independent reviews.	CIO is an ASIC-approved EDR scheme, set up as a not for profit company. Financial firms are required to be members of an EDR scheme by law. It must submit to periodic independent reviews.	The SCT is a statutory authority established under the SRC Act.
<b>Relationship to IDR</b>	Where a consumer has not undertaken or completed IDR, FOS will refer the consumer to the financial firm's IDR processes, and monitors complaints.	Where a consumer has not undertaken IDR, CIO will refer the consumer to the financial firm's IDR processes, and monitors complaints.	The SCT cannot hear a consumer's complaint unless the consumer has attempted to resolve the matter through the superannuation fund's complaints processes.
<b>Jurisdiction</b>	Minimum jurisdiction set out in ASIC RG 139. Terms of Reference can exceed minimum requirements. Monetary limits apply.	Minimum jurisdiction set out in ASIC RG 139. Rules can exceed minimum requirements. Monetary limits apply.	Jurisdiction set out in SRC Act. No monetary limits.
<b>Powers</b>	Established in FOS Constitution.	Established in CIO constitution.	Statutory powers set out in SRC Act.
<b>Funding arrangements</b>	No upfront payment by complainants. Funded by industry, via a combination of membership fees, user charges and dispute fees. Dispute fees comprise about 75 per cent of funding.	No upfront payment by complainants. Funded by industry, via a combination of membership fees and case fees. Membership fees comprise around 70 per cent of funding.	No upfront payment by complainants. Budget set by government then recovered via annual financial sector levies set by the Minister and collected by APRA.
<b>Models of dispute resolution</b>	Majority of disputes resolved through negotiation/ conciliation. Operates different dispute resolution streams with several ombudsmen and adjudicators and a lead ombudsman for each stream. <sup>36</sup> Publishes final decisions and guidance documents.	Majority of cases resolved through negotiation/ conciliation. The Ombudsman is the final decision-maker. Publishes final decisions and position statements.	Combination of investigation, conciliation and decision by Tribunal members. The SCT publishes decisions.

<sup>36</sup> FOS decisions are made by ombudsmen, panels and adjudicators, depending on the types of dispute.

	FOS	CIO	SCT
<b>Ability to evolve</b>	Terms of Reference can be changed after public consultation with stakeholders and Board agreement and approval by ASIC. <sup>37</sup>	Rules can be changed after public consultation with stakeholders and Board agreement and approval by ASIC. <sup>38</sup>	Jurisdiction changes require legislative change.
<b>Dispute resolution criteria</b>	In making its decisions, FOS does what in its opinion is fair in all the circumstances, having regard to: legal principles; applicable industry codes; good industry practice; and previous FOS or FOS predecessor scheme decisions (although FOS is not bound by these).	In dealing with a complaint, CIO will have regard to: relevant legal requirements; applicable codes of practice; good practice in the financial services industry; and fairness in all the circumstances.	The Tribunal makes a determination about whether the decision complained about was 'fair and reasonable' in the circumstances.

### 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?
15. How accessible are the EDR schemes and complaints arrangements? Could their awareness be raised?
16. How easy is it to use the EDR schemes and complaints arrangements process? For example, is it easy to communicate with a scheme?
17. To what extent do EDR schemes and complaints arrangements provide an effective avenue for resolving consumer complaints?
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?
19. Are the jurisdictions of the existing EDR schemes and complaints arrangements appropriate? If not, why not?
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?
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?

<sup>37</sup> Changes to the Terms of Reference that are of a minor or technical nature do not require public consultation but must be approved by ASIC.

<sup>38</sup> Changes to the Rules that are of a minor or technical nature do not require public consultation but must be approved by ASIC.

### **Questions - Existing EDR schemes and complaints arrangements (continued)**

22. Do the existing EDR schemes and complaints arrangements possess sufficient powers to settle disputes? Are any additional powers or remedies required?
23. Are the criteria used to make decisions appropriate? Could they be improved?
24. What are the advantages and disadvantages of the different governance arrangements? How could they be improved?
25. Are the current funding and staffing levels adequate? Is additional funding or expertise required? If so, how much?
26. How transparent are current funding arrangements? How could this be improved?
27. How are the existing EDR schemes and complaints arrangements held to account? Could this be improved?
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?
29. What measures should be used to assess the performance of the existing EDR schemes and complaints arrangements?

### **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?
31. Does having multiple dispute resolution schemes lead to better outcomes for users?
32. Do the current arrangements result in consumer confusion? If so, how could this be reduced?
33. How could concerns about insufficient jurisdiction with respect to small business lending (including farming) disputes be best addressed?
34. 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?

## Alternative models of dispute resolution

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71. The Terms of Reference require the panel to provide recommendations on the merits and any issues (including implementation issues) related to alternative models of dispute resolution.

### ONE-STOP SHOP

72. There has been debate around whether a 'one-stop shop' is necessary to assist consumers seeking to resolve disputes within the financial system. Depending on the design of a one-stop shop, potential benefits include reducing consumer confusion about where to lodge a dispute, minimising the possibility of consumers being referred between the schemes and ensuring consistency in process and outcomes, and realising efficiencies.

### Triage service

73. One method of achieving this is to overlay a 'triage' service on existing schemes. Under this model, a one-stop shop would provide a single point of entry for dispute resolution for consumers, with information passing behind the scenes to the correct scheme. It would not require any changes to the resolution schemes themselves, merely a single application point for consumers, where notifications would be sent to the correct scheme. After making contact, consumers would be provided with information about how to pursue their complaint with the financial firm involved and they would also be referred to the dispute resolution scheme which was most appropriate for them.

#### Questions - Triage service

35. Would a triage service improve user outcomes?
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?

### One body

74. Another model involves creating one entirely new body, or integrating the existing schemes and arrangements, which would hear all consumer disputes in the financial system. As well as lessening consumer confusion, such a model would have the potential to simplify the overall framework, enhance consistency in outcomes and decision-making processes and reduce administration costs for regulators.

### Questions - One body

37. Should it be left for industry to determine the number and form of the financial services ombudsman schemes?
38. Is integration of the existing arrangements desirable? What would be the merits and limitations of further integration?
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)?
40. What form should a 'one stop shop' take?
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?

## AN ADDITIONAL FORUM FOR DISPUTE RESOLUTION

75. In addition to the debate about a 'one-stop shop', there is currently public debate about the merits of establishing new dispute resolution forums for redress. The Parliamentary Joint Committee on Corporations and Financial Services, in its report on the *Impairment of Customer Loans*, recommended that the Australian Small Business and Family Enterprise Ombudsman take on new functions including acting as a small business loans dispute tribunal in certain circumstances. Following the release of that report, there have also been calls for the establishment of a banking tribunal as an alternative to private legal action.

### Inquiry into small business lending practices

On 31 August 2016, the Federal Government announced that it had directed the Australian Small Business and Family Enterprise Ombudsman to undertake an inquiry into the adequacy of the law to address concerns raised by the Parliamentary Joint Committee on Corporations and Financial Services (PJC) in its report, *Impairment of Customer Loans*.

The Terms of Reference require the Ombudsman to relevantly:

- review a selection of the cases that have been identified by the PJC as unfair and ascertain whether there are any deficiencies in the regulation of authorised deposit taking institutions in lending to small business; and



### **Inquiry into small business lending practices (continued)**

- recommend whether additional reform measures should be implemented (legislation, regulations, guidance and practices) to ensure products perform in the way they should, taking into account that consumers have a responsibility to accept their financial decisions, including market losses, when they have been treated fairly, and any impact on the availability and cost of credit to small business.

The Ombudsman has been asked to provide interim findings to the *Ramsay Review into External Dispute Resolution and Complaints Schemes* to inform the wider review of external dispute resolution schemes in the financial services sector. The final report is due to be provided to the Federal Government within 12 weeks from the date of the review's announcement.

76. Some of the criticisms of the existing EDR framework focus on complaints and disputes that cannot be adequately dealt with by existing schemes (for example, because the value of the dispute exceeds the scheme's monetary limits).
77. A related criticism goes to the schemes' ability to deal with disputes relating to small business lending. Because the *National Consumer Credit Protection Act 2009* does not apply to loans for business purposes, lenders that do not provide consumer credit are not required to hold an Australian credit licence and are therefore not required to belong to an EDR scheme.
78. A tribunal could potentially have powers to make determinations in some or all of these matters. Another potential role for a tribunal would be as an alternative to court action for a complainant who is not satisfied with a determination made by one of the existing EDR schemes. The extent to which a new forum could enhance the existing framework and improve outcomes for users would depend on its design and how it would fit alongside existing dispute resolution schemes.

### **Questions - An additional forum for dispute resolution**

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

### Questions - An additional forum for dispute resolution (continued)

- 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?
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?

## OVERSEAS DEVELOPMENTS AND OTHER SECTORS

79. The Terms of Reference require the panel to take into account best practice developments in dispute resolution arrangements in overseas jurisdictions and other sectors.
80. The panel welcomes information from interested parties on which jurisdictions and sectors can provide examples of best practice for dispute resolution in Australia's financial system.
81. One example of an overseas dispute resolution scheme is the United Kingdom Financial Ombudsman Service.
82. In the United Kingdom, the *Financial Services and Markets Act 2000* created a consolidated statutory dispute resolution scheme – the Financial Ombudsman Service. The Service was introduced following the incorporation of eight independent ombudsmen and complaint-handling schemes. The rules setting out how the Service should handle complaints are contained in the Financial Conduct Authority's Handbook.
83. The Financial Ombudsman Service can hear complaints which fall within its jurisdiction from:
- consumers;
  - a micro-enterprise - an enterprise that employs less than 10 people and has a turnover or annual balance sheet that does not exceed €2 million;
  - a charity which has an annual income of less than £1 million;
  - a trustee of a trust which has a net asset value of less than £1 million.

84. The maximum money award which the Ombudsman can make is £150,000. This does not include interest and costs. If the Ombudsman considers that fair compensation requires payment of a larger amount, they may recommend that the respondent pays the complainant the balance.
85. One example of an ombudsman operating in another sector is the Telecommunications Industry Ombudsman, which is an independent dispute resolution service for small business and residential consumers who have a complaint about their telephone or internet service.<sup>39</sup> There are also state-based ombudsman schemes operating in the energy and water sector.

### **Questions – Developments in overseas jurisdictions and other sectors**

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

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39 Telecommunications Industry Ombudsman website: <https://www.tio.com.au/consumers>.

## Other issues

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### UNCOMPENSATED CONSUMER LOSSES

86. All Australian financial services and credit licensees who provide financial and credit services to retail clients must have arrangements for compensating those clients. Generally, this means holding adequate professional indemnity (PI) insurance unless an exemption applies or a licensee has alternative arrangements approved by ASIC.
87. Although EDR scheme determinations are binding on the member, losses may go uncompensated where the firm is insolvent, does not have adequate PI insurance or when PI insurance does not respond to all claims. Since 1 January 2010, 32 financial firms have been unwilling or unable to comply with 137 FOS determinations made in favour of approximately 194 consumers. The value of these outstanding determinations was over \$16.6 million as at August 2016.<sup>40</sup> In addition to the losses incurred by consumers in these cases, EDR schemes also bear the costs of unpaid case fees. Since 1 December 2014, four financial firms have been unwilling or unable to comply with five CIO determinations made in favour of seven consumers. The value of these outstanding determinations was approximately \$413,415 (including interest) as at 30 August 2016. Due to the nature of prudential regulation in the superannuation system, the SCT does not have any unpaid determinations.
88. Past reviews have highlighted the potential for consumers to be uncompensated under the existing EDR system where the financial services provider is unable to pay the determination. The panel has been asked to make observations on the establishment of a statutory compensation scheme of last resort that could assist consumers in these circumstances.

#### 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?
48. In what ways could uncompensated consumer losses (for example, unpaid FOS determinations) be addressed? What are the advantages and limitations of different approaches?
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?
50. What impact would such a scheme have on other parts of the system, such as professional indemnity insurance?

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<sup>40</sup> FOS Circular - Issue 26 August 2016 - \$16,629,929.56 inclusive of the interest awarded by the decision-maker and adjusted for inflation over time on a simplified per annum basis.

# List of discussion questions

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## General instructions

Please include relevant statistics and/or case examples, and a discussion of the costs and benefits in responses.

Please consider the following when making a submission: efficiency; equity; complexity; transparency; accountability; comparability of outcomes; and regulatory costs.

## Principles guiding the review

1. Are there other categories of users that should be considered as part of the review?
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?
3. Are there findings or recommendations of other inquiries that should be taken into account in this review?
4. In determining whether a scheme effectively meets the needs of users, how should the outcomes be defined and measured?

## 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?
6. What are the barriers to lodging a complaint? How could these be reduced?
7. How effective is IDR in resolving consumer disputes? For example, are there issues around time limits, information provision or other barriers for consumers?
8. What are the relative strengths and weaknesses of the schemes' relationships with IDR processes?
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?

## Regulatory oversight of EDR schemes and complaints arrangements

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

### **Regulatory oversight of EDR and complaints arrangements (continued)**

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

### **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?
15. How accessible are the EDR schemes and complaints arrangements? Could their awareness be raised?
16. How easy is it to use the EDR schemes and complaints arrangements process? For example, is it easy to communicate with a scheme?
17. To what extent do EDR schemes and complaints arrangements provide an effective avenue for resolving consumer complaints?
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?
19. Are the jurisdictions of the existing EDR schemes and complaints arrangements appropriate? If not, why not?
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?
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?
22. Do the existing EDR schemes and complaints arrangements possess sufficient powers to settle disputes? Are any additional powers or remedies required?
23. Are the criteria used to make decisions appropriate? Could they be improved?
24. What are the advantages and disadvantages of the different governance arrangements? How could they be improved?
25. Are the current funding and staffing levels adequate? Is additional funding or expertise required? If so, how much?
26. How transparent are current funding arrangements? How could this be improved?
27. How are the existing EDR schemes and complaints arrangements held to account? Could this be improved?

**Existing EDR schemes and complaints arrangements (continued)**

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

**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?
31. Does having multiple dispute resolution schemes lead to better outcomes for users?
32. Do the current arrangements result in consumer confusion? If so, how could this be reduced?
33. How could concerns about insufficient jurisdiction with respect to small business lending (including farming) disputes be best addressed?
34. 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?

**Triage service**

35. Would a triage service improve user outcomes?
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?

**One body**

37. Should it be left for industry to determine the number and form of the financial services ombudsman schemes?
38. Is integration of the existing arrangements desirable? What would be the merits and limitations of further integration?
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)?
40. What form should a 'one stop shop' take?

### **One body (continued)**

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?

### **An additional forum for dispute resolution**

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



### **Developments in overseas jurisdictions and other sectors**

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

### **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?
48. In what ways could uncompensated consumer losses (for example, unpaid FOS determinations) be addressed? What are the advantages and limitations of different approaches?
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?
50. What impact would such a scheme have on other parts of the system, such as professional indemnity insurance?

# Attachment A – Terms of Reference

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89. The Terms of Reference for the review are outlined below.

## Terms of reference

1. The review will examine the following dispute resolution and complaints arrangements to consider whether changes to current dispute resolution and complaints schemes in the financial sector are necessary to deliver effective outcomes for users in a rapidly changing and dynamic financial system:
  - 1.1 the Financial Ombudsman Service (FOS);
  - 1.2 the Superannuation Complaints Tribunal; and
  - 1.3 the Credit and Investments Ombudsman Scheme.
2. The review will have regard to: efficiency; equity; complexity; transparency; accountability; comparability of outcomes; and regulatory costs.
3. The review will make recommendations on:
  - 3.1 the role, powers, governance and funding arrangements of the dispute resolution and complaints framework in providing effective complaints handling processes for users, including linkages with internal dispute resolution;
  - 3.2 the extent of gaps and overlaps between each of the schemes (including consideration of legislative limits on the matters each scheme can consider) and their impacts on the effectiveness, utility and comparability of outcomes for users;
  - 3.3 the role of the schemes in working with government, regulators, consumers, industry and other stakeholders to improve the legal and regulatory framework to deliver better outcomes for users; and
  - 3.4 the relative merits, and any issues that would need to be considered (including implementation considerations), of different models in providing effective avenues for resolving disputes.
4. In making its recommendations, the review will, to the extent relevant, take into account best practice developments in dispute resolution arrangements in overseas jurisdictions and other sectors.
5. The review will take into consideration and consult with ASIC on the concurrent review of FOS's small business jurisdiction.
6. The review may make observations, but not recommendations, on the establishment of a statutory compensation scheme of last resort.