

INTERIM REPORT

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

6 December 2016

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Manager
Communications
The Treasury
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Consultation Process

REQUEST FOR FEEDBACK AND COMMENTS

Interested parties are invited to lodge written submissions on the issues raised in this Interim Report.

Information (including name and address details) contained in submissions will generally be made available to the public on the Treasury website¹ 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.

To ensure that the privacy of third parties is protected, and that the Commonwealth complies with its own legal obligations, some submissions may be published with some details removed or may not be published. In addition, all or parts of submissions may not be published: if they promote a product or a service; contain offensive language or the sentiments expressed are liable to offend or vilify sections of the community; or for reasons other than those outlined.

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: 27 January 2017

Address written submissions to: EDRreview@treasury.gov.au

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.

¹ www.treasury.gov.au/ConsultationsandReviews/Reviews/2016/Review-into-Dispute-Resolution-and-Complaints-Framework.

Foreword

This Review is an opportunity to examine whether changes to Australia's External Dispute Resolution (EDR) framework are necessary to deliver effective outcomes for users in a rapidly changing and dynamic financial system.

The Review's Terms of Reference were released on 8 August 2016 and on 9 September 2016 the Panel released an Issues Paper. The large volume of high quality submissions received in response to the Issues Paper greatly assisted the Panel's understanding of the strengths of the current framework, as well as areas for improvement.

The purpose of this Interim Report is to make draft recommendations for changes to the EDR framework and seek further submissions and information on those draft recommendations prior to providing a final report to government. Submissions received in response to the Issues Paper have informed the draft recommendations.

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

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

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

The Panel has found that the existing industry ombudsman schemes are a cornerstone of the EDR framework and perform well against the Review's core principles. However, there is scope to improve outcomes for consumers, in particular by addressing problems caused by the existence of two industry ombudsman schemes with overlapping jurisdictions.

- The Panel's draft recommendation is that there should be a single industry ombudsman scheme for financial, credit and investment disputes (other than superannuation disputes) to replace FOS and CIO.

SCT has strengths, including its unlimited monetary jurisdiction, but the rigidity of the statutory model makes it more difficult to match the industry ombudsman schemes in terms of flexibility and innovation. This is a significant problem as existing pressures on SCT will continue to grow as the superannuation system matures and an ever increasing number of Australians enter the drawdown (retirement) phase.

- The Panel's draft recommendation is that SCT should transition into an industry ombudsman scheme for superannuation disputes.

The Panel considered the merits of moving immediately to a single industry ombudsman scheme to cover all disputes in the financial system, including superannuation disputes. On balance, the Panel's view is that it is preferable to initially introduce an industry ombudsman scheme focused exclusively on superannuation disputes, given the significance of the change relative to the status quo. Once both of the new ombudsman schemes are fully operational and have garnered strong consumer and industry support, consideration should be given to further integrating the schemes to create a single scheme covering all disputes in the financial system.

The Panel also made other draft recommendations to address gaps in the EDR framework. These include:

- that the monetary limits and compensation caps for the new scheme for financial, credit and investment disputes be increased (relative to the existing limits and caps imposed by FOS and CIO), including for small business disputes; and
- that there be enhanced accountability and oversight over the two new schemes, including through strengthening the Australian Securities and Investments Commission's powers.

The Panel's view is that these draft recommendations represent an integrated package of reforms to address shortcomings in the current EDR framework and ensure that the framework is well-placed to address both current problems and withstand future challenges.

In its Issues Paper, the Panel sought views on an additional statutory body for dispute resolution. The majority of submissions did not support this proposal. Having considered the views expressed in submissions and for reasons outlined in the body of its Interim Report, the Panel is of the view that an additional statutory dispute resolution body is not required.

The Panel recognises that such significant policy changes require extensive consideration of implementation and transitional issues. The Panel looks forward to receiving public submissions on this broad approach and the draft recommendations by 27 January 2017 to assist in preparing a final report to government by the end of March 2017.

ACKNOWLEDGMENTS

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

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

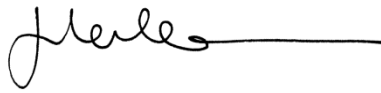
In addition, the Panel made requests to FOS, CIO and SCT for information on disputes received by each of the bodies, as well as their governance, funding and other arrangements. The Panel is grateful for the bodies' comprehensive responses to these information requests.

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

Yours sincerely



Professor Ian Ramsay
(Chair)



Julie Abramson



Alan Kirkland

Terms of Reference

Purpose of the review

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

Terms of 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.

Process

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

A final report is to be provided to the Minister for Revenue and Financial Services by the end of March 2017.

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

Executive Summary

SCOPE AND REACH OF THE FINANCIAL SYSTEM

The financial system plays a vital role in raising the living standards of all Australians, with its ultimate purpose being to facilitate sustainable economic growth by meeting the financial needs of its users.²

Its role in the lives of individual Australians has evolved, and it now touches many aspects of Australians' lives, as shown in the figure below.

A snapshot of consumer participation in financial services³



The superannuation system has also grown significantly in size since the introduction of compulsory superannuation, and now plays a vital role in funding the economy and providing for retirement incomes. The superannuation industry in Australia currently oversees in excess of \$2 trillion of funds under management⁴ and most projections forecast continued strong growth until the mid-2030s with between \$5 trillion and \$6.3 trillion under management.⁵

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

3 Figures provided by the Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, page 4.

4 Productivity Commission 2016, *Superannuation Competitiveness and Efficiency: Productivity Commission Research Report*, Commonwealth of Australia, Canberra, page iv.

5 Productivity Commission 2016, *Superannuation Competitiveness and Efficiency: Productivity Commission Research Report*, Commonwealth of Australia, Canberra, page 20.

WHY REDRESS MATTERS

It is now appreciated that **there are limitations on the efficiency and stability of the financial system** and there is a greater understanding that it operates as a complex, adaptive network. Therefore, for the system to operate effectively, it **should be subject to market forces and be overseen by a strong and effective regulatory framework.**

Consumers in the financial system can be disengaged, have low financial literacy and find it difficult to understand complex financial products. Collapses in the past 10 years involving problems such as poor advice and exploitation of consumer responses to information imbalances and complex documents and products have affected over 80,000 consumers, with losses totalling more than \$5 billion, or \$4 billion after compensation and liquidator recoveries.⁶

While the amounts and number of consumers affected is relatively small compared to the overall size of the system, the effect on individuals' lives can be devastating. Consumers should be able to expect that financial products will perform in the way they are led to believe **and, where they do not, have access to effective redress.**

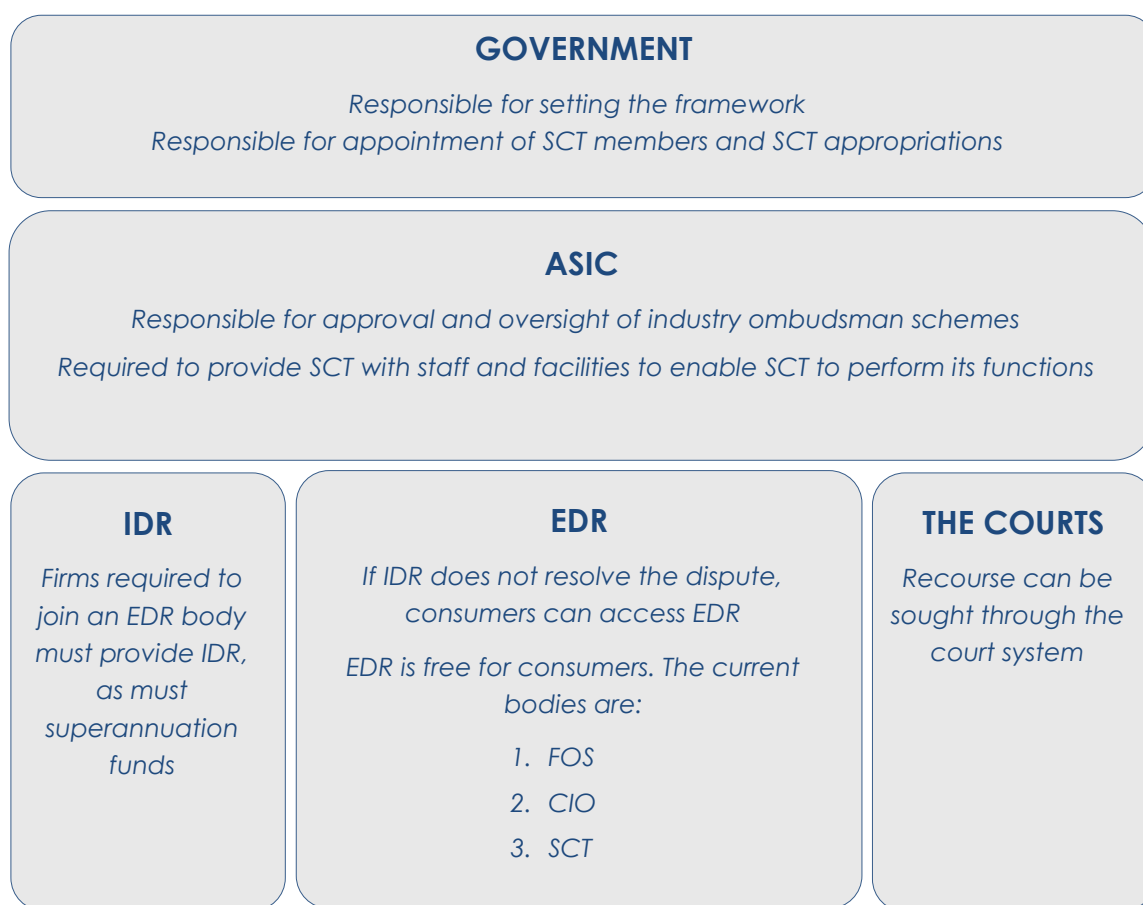
DISPUTE RESOLUTION IN THE FINANCIAL SYSTEM

When a consumer has a complaint or dispute with a financial firm, avenues for redress include accessing complaints handling by the financial firm (internal dispute resolution (IDR)), accessing industry-specific external dispute resolution (EDR) through the Financial Ombudsman Service (FOS), Credit and Investments Ombudsman (CIO) or Superannuation Complaints Tribunal (SCT), or commencing legal action through the court system.

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

The figure below depicts the dispute resolution framework in Australia, which consists of:

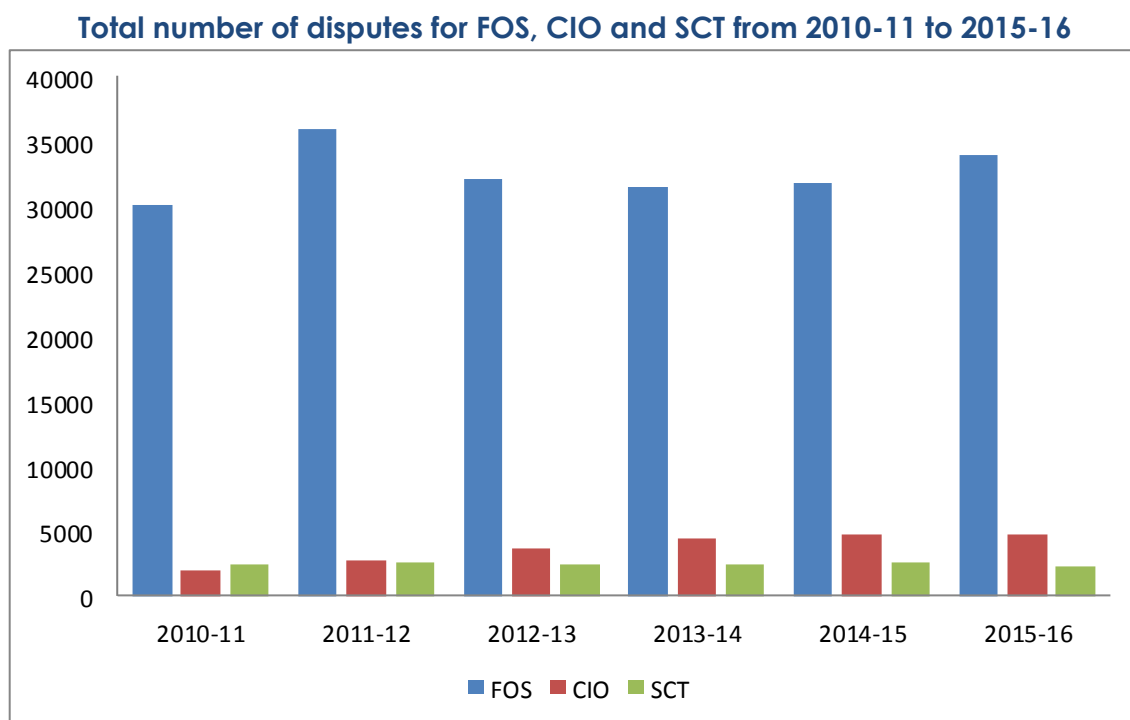
- government;
- the Australian Securities and Investments Commission (ASIC);
- IDR;
- EDR: two industry ombudsman schemes (FOS and CIO) and one statutory body (SCT); and
- the court system.



Financial system EDR bodies

FOS and CIO are the products of rationalisation of several financial services ombudsman schemes that were each approved by ASIC, which themselves were preceded by schemes that were voluntarily established by industry, in some cases up to 20 years ago. The third EDR body – SCT – was established by government at the time compulsory superannuation was introduced in Australia.

In 2015-16, the three bodies received 41,223 disputes. The chart below tracks the number of disputes per body since 2010-11.



The table below summarises the key similarities and differences between FOS, CIO and SCT.

	FOS	CIO	SCT
Legislative base	ASIC-approved industry ombudsman scheme.	ASIC-approved industry ombudsman scheme.	Statutory tribunal, established under legislation.
Jurisdiction	Monetary limit: the value of the claim under dispute must not exceed \$500,000. Compensation cap, typically \$309,000, applies.	Monetary limit: the value of the claim under dispute must not exceed \$500,000. Compensation cap, typically \$309,000, applies.	Unlimited monetary jurisdiction.
Small business jurisdiction	Monetary limits: value of the claim under dispute must not exceed \$500,000, or the credit facility must not exceed \$2 million. Compensation cap, typically \$309,000, applies.	Monetary limits: value of the claim under dispute must not exceed \$500,000, or the credit facility must not exceed \$2 million. Compensation cap, typically \$309,000, applies.	N/A
Powers	Contractual relationship between FOS and financial firm.	Contractual relationship between CIO and financial firm.	Statutory powers.
Governance	Scheme is governed by an independent board, with an independent chair and equal number of directors with a consumer and industry background.	Scheme is governed by an independent board, with an independent chair and equal number of directors with a consumer and industry background.	Tribunal members appointed by government.

	FOS	CIO	SCT
Funding arrangements	Free to complainants. Funded by industry, via a combination of membership fees, user charges and dispute fees. Dispute fees comprise about 75 per cent of funding.	Free to complainants. Funded by industry, via a combination of membership fees and case fees. Membership fees comprise about 70 per cent of funding.	Free to complainants. Budget set by government then recovered via annual financial sector levies set by the Minister and collected by APRA.
Rights of appeal	Complainant retains right to go to court/mediation. Financial firm bound by FOS decision. Limited rights of appeal.	Complainant retains right to go to court/mediation. Financial firm bound by CIO decision. Limited rights of appeal.	Complainant retains right to go to court/mediation. Superannuation trustee, insurer bound by SCT decision. Parties can appeal SCT decision to Federal Court on matters of law.

OUR APPROACH

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

PRINCIPLES GUIDING THE REVIEW

Efficiency

- Adequate coverage, powers, remedies, resources and dispute resolution methods.
- Flexible, forward-looking and responsive dispute resolution processes.

Equity

- Adequate access to redress for consumers and small business.
- Procedural and substantive fairness for all users.

Complexity

- Easy to navigate and use, with a focus on informality.

Transparency

- Transparency regarding funding, processes and decision outcomes.

PRINCIPLES GUIDING THE REVIEW (continued)

Accountability

- Accountable to users, including through regulatory and judicial oversight, where appropriate.

Comparability of outcomes

- Comparable outcomes for similar products.

Regulatory costs

- Impose the minimum regulatory costs needed to ensure effective outcomes, with costs to be borne by those who create the need for regulation.

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, including small business, who make complaints; and
- financial service providers, including superannuation funds, who respond to complaints – collectively referred to as 'financial firms'.

The Panel has also taken into account findings and recommendations of other reviews including the Financial System Inquiry, several Productivity Commission Reviews,⁷ and the Super System Review (Cooper Review). In developing its draft recommendations, the Panel has had regard to approaches in the United Kingdom, New Zealand, Singapore and Canada, and the telecommunications and energy and water sectors in Australia.

STAKEHOLDER PERSPECTIVES

The Review received a range of submissions in response to its Issues Paper that have assisted in identifying problems with the current system and areas for improvement.

⁷ Productivity Commission 2008, *Review of Australia's Consumer Policy Framework*, Commonwealth of Australia, Canberra; Productivity Commission 2014, *Access to Justice Arrangements*, Commonwealth of Australia, Canberra.

Industry ombudsman schemes: FOS and CIO

Key messages from submissions about the industry ombudsman schemes were:

- Overall, industry ombudsman schemes have provided free and fair access to redress to consumers. Schemes have shown themselves to be innovative and adaptive to changes in the financial system, changes in consumer expectations, and changing products and services. Through their work on systemic issues, whereby schemes investigate and resolve issues that have an effect on persons other than the parties to the dispute, schemes have improved industry behaviour. Their focus on stakeholder engagement also increases accessibility, including for vulnerable consumers.
- There was a sense that the two industry ombudsman schemes were working well, although some individuals considered the schemes were not sufficiently independent of their members (as they are industry funded) and were not always providing high quality, robust, unbiased and timely decisions, particularly in relation to complex disputes. Many stakeholders also indicated that the current monetary limit of \$500,000 and compensation cap of \$309,000 were too low, resulting in a gap in EDR coverage.
- A number of stakeholders were concerned that the framework of multiple schemes with overlapping jurisdictions results in consumer confusion and inconsistent outcomes and processes for consumers. Other stakeholders, however, had a different perspective and put forward submissions in support of the status quo, arguing it results in competitive tension between schemes, which encourages innovation and facilitates benchmarking to deliver net benefits to consumers.
- Stakeholders identified some clear gaps in the framework for small business disputes, indicating inadequate monetary limits resulted in many small businesses being excluded from the industry ombudsman schemes and therefore unable to pursue their disputes unless they had sufficient resources to do so via the court system. Another gap identified by some stakeholders was in relation to debt management firms. Stakeholders indicated that some of the practices of these firms – which are generally not required to hold a financial services or credit licence – have an adverse impact on vulnerable consumers and hamper the efficiency of the industry ombudsman schemes.

Superannuation Complaints Tribunal

Key messages from submissions were:

- SCT has a number of strengths, including that it is free, has an unlimited monetary jurisdiction, broad jurisdiction over trustee decisions, and actual and perceived independence derived from government.

- However, stakeholders were concerned by the pressures on SCT, largely due to growth in the number of disputes, and delays in resolving disputes. Since 2004-5, the number of disputes has increased by around 24 per cent.⁸ At the same time, stakeholders identified extensive delays of up to four years in resolving disputes.⁹ In 2015-16 the average time to resolve a complaint from lodgement to determination was 796 days (more than two years), an increase of 25 per cent from 2010-11.¹⁰ The delays in deciding complaints by SCT can be contrasted with the average time to decide complaints by FOS and CIO, which was on average 68 days in 2015-16.¹¹
- Stakeholders attributed delays to inadequate funding and lack of transparency over funding processes, and inappropriate and inflexible governance and dispute resolution arrangements.

As the chart below shows, SCT expenditure has broadly trended downwards over the past five years, albeit with some minor increases, in no correlation to the volume of disputes.

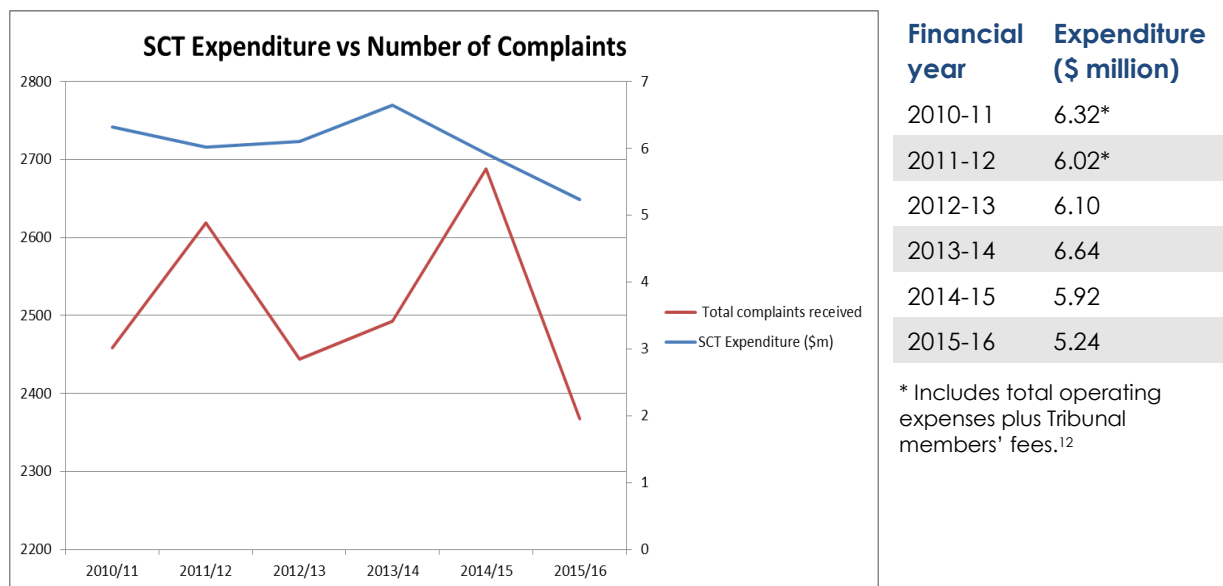


Table note: The fall in complaints to SCT in 2015-16 was a result of definition changes made by SCT to 'complaint' and 'inquiry'. As a result of these changes, some complaints are now recorded as inquiries as they relate to information requests.¹³

- Other problems identified by stakeholders include poor accessibility (especially for vulnerable consumers) and limited stakeholder engagement.
- There was a sense that in the case of superannuation disputes much more could be done to ensure both consumers and industry can maximise the benefits of EDR. Importantly, though, stakeholders did not see the problems of SCT as attributable to the staff, Tribunal members and the executive, who are held in high regard.¹⁴

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

9 For example: Davis, N, submission to the EDR Review Issues Paper, page 1.

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

11 Weighted average calculation of the time taken by FOS and CIO to resolve disputes in 2015-16.

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

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

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

Internal dispute resolution

Submissions also commented on the importance of IDR, indicating that effective IDR is necessary for effective EDR. However, they also noted that data on IDR is limited, inconsistent and very little is publicly reported, making it difficult to assess the effectiveness of an individual firm's IDR activities.

Last resort compensation scheme

Finally, many, but not all, stakeholders expressed support for a compensation scheme of last resort to address cases of unpaid determinations and promote confidence in EDR.

KEY FINDINGS OF THE REVIEW

Taking into account what the Panel has heard from submissions and other consultations, and reflecting the Panel's judgment, the Panel has made a series of findings in relation to the current arrangements. These are set out below.

External dispute resolution remains an important means of ensuring access to redress ...

The need to provide a viable alternative to the court system by way of low cost, speedy and flexible access to redress for users continues to be the goal of the overall framework. It is widely recognised that EDR provides a viable alternative to the court system, addressing some of the resourcing and power imbalances that would otherwise impede consumers' access to redress.

... however, the current framework is the product of history rather than design

The current framework, consisting of two industry ombudsman schemes and a statutory tribunal is the product of history rather than design. This Review now presents an opportunity to address shortcomings which are preventing the system as a whole from operating optimally and ensure the system is well-placed to meet future challenges, including changing consumer expectations and changes in the financial system, the regulatory framework and the broader socio-economic context (including an ageing population).

While industry ombudsman schemes remain a cornerstone and are generally working well ...

The Panel has found that aspects of the present system are working well, particularly the industry ombudsman schemes, which remain free for consumers and provide value for money for financial firms.

Industry ombudsman schemes generally provide speedy dispute resolution, with disputes taking on average approximately 68 days to resolve.¹⁵ They have a focus on providing fair outcomes for consumers: both substantive fairness (by taking into account a broader range of factors than just legislation and case law) and procedural fairness. The schemes are also flexible and innovative, employing a variety of dispute resolution procedures and developing new and flexible processes for dealing with issues such as financial hardship. Schemes play an important role in improving industry behaviour by working with financial firms to identify and address systemic issues, thereby bolstering the effectiveness of IDR. They also undertake considerable outreach to improve accessibility, particularly for vulnerable consumers.

... in significant areas, reform is needed

The current framework, consisting of multiple schemes with overlapping jurisdictions, gives rise to a range of problems:

- consumer confusion and difficulties in achieving comparable outcomes for consumers with similar complaints; and
- unnecessary duplicative costs and an inefficient allocation of resources for the industry (based on the need to establish and run two schemes) and for the regulator (based on the need to approve and oversee multiple schemes).

Having considered whether retaining the current system of multiple schemes with overlapping jurisdictions could provide competitive tension to the benefit of consumers, the Panel is not convinced that competition between EDR schemes is appropriate and is not persuaded that a framework consisting of multiple schemes with overlapping jurisdictions provides the most effective outcomes for users.

There are gaps in the framework ...

The Panel found the current monetary limit of \$500,000 and compensation cap of \$309,000 are no longer fit-for-purpose and bear little relationship to the value of some financial products (for example, mortgage balances) that may give rise to disputes.

In addition, it found that small business does not have adequate access to EDR because the existing monetary limits of \$500,000 for the value of the claim under disputes and \$2 million in relation to credit facilities preclude disputes from being able to be brought to the industry ombudsman schemes.

Finally, the absence of a requirement for debt management firms to be a member of an EDR scheme represents a gap in the framework (for consumers of services these firms provide) and hampers the effectiveness of the industry ombudsman schemes.

15 Weighted average calculation of the time taken by FOS and CIO to resolve disputes in 2015-16.

... the dispute resolution mechanisms for superannuation are broken and will not withstand future pressures ...

Existing pressures on SCT will, in the absence of significant reform, become more acute as the superannuation system matures and an increasing proportion of the population moves from the accumulation to the drawdown (retirement) phase, and engagement with the superannuation system, as well as the complexity of the system and range of financial products, increases.

SCT has a number of strengths, including: unlimited monetary jurisdiction; a broad jurisdiction to review trustee decisions; independence from industry; and statutory powers (such as the ability to join third parties to a dispute and require production of information). However, extensive delays mean that complainants (superannuation consumers and their beneficiaries) and funds are missing out on many of the benefits seen in industry ombudsman schemes. Delays are particularly troubling given that almost 50 per cent of disputes before SCT relate to death benefits and disability disputes where there is typically a pressing need for swift resolution of the dispute.

... and sufficient accountability and transparency must be built into the framework

While the co-regulatory model – which has provided industry ombudsman schemes with the flexibility to develop their own arrangements within a framework set by government – has been a strength of the existing framework, the Panel considers that schemes must be independent, and perceived to be independent, and accountable to users.

DRAFT RECOMMENDATIONS TO POSITION THE FRAMEWORK FOR THE FUTURE

A single industry ombudsman scheme for financial, credit and investment disputes (other than superannuation disputes)

The Panel recommends that there be a single industry ombudsman scheme to deal with all financial, credit and investment disputes (apart from superannuation disputes¹⁶) to replace FOS and CIO.

The Panel considers that a shift to a single industry ombudsman scheme for these disputes would incorporate all the strengths of the existing industry ombudsman model – such as the focus on providing low cost, fair and accessible dispute resolution, the ability to innovate and adapt to changes in the regulatory and broader socio-economic environment, and the focus on improving industry behaviour – while addressing the problems that arise where the framework consists of multiple schemes with overlapping jurisdictions.

An assessment of this draft recommendation against the Review principles is presented below.

¹⁶ Superannuation disputes include group life insurance disputes (that is, life insurance disputes within superannuation).

New industry ombudsman scheme for financial, credit and investment disputes	
Efficiency	<p>↑ economies of scale expected, as well as the capacity to reallocate resources as priority areas shift; opportunity to enhance coverage across the framework; and review scheme's powers and remedies.</p> <p>Removes jurisdictional overlap.</p>
Equity	<p>↑ equity as creating a new scheme provides an opportunity to strengthen accountability and improve fairness for users.</p>
Complexity	<p>↓ consumer confusion and complexity.</p>
Transparency	<p>↑ transparency is possible as a shift to a single scheme removes competition between financial firms on price, and so removes any incentives by the scheme not to be financially transparent.</p>
Accountability	<p>↑ accountability as creating a new scheme provides an opportunity to enhance accountability mechanisms and regulatory oversight.</p>
Comparability of outcomes	<p>↑ comparability of outcomes due to greater consistency in processes and procedures.</p>
Regulatory costs	<p>↓ costs for ASIC and industry: duplicative costs would reduce with the move to a single scheme.</p>

In relation to key features such as the scheme's jurisdiction, governance arrangements and monetary limits and compensation caps, the Panel considers that:

- the jurisdiction of the new scheme should be at least as broad as FOS's existing jurisdiction, which is the broader of the two existing schemes;
- governance arrangements should recognise the importance of ensuring that the scheme is, and is perceived to be, independent of its members, and is sufficiently resourced and has appropriate processes to render high-quality and timely decisions; and
- monetary limits and compensation caps should be higher than the current monetary limits and compensation caps of FOS and CIO.

A new industry ombudsman scheme for superannuation disputes

The Panel considers that the existing problems with SCT cannot be addressed within the existing tribunal structure, even with substantial reforms to funding, governance, appointment processes or other aspects of the legislative regime, as the rigidity of the statutory model would continue to hamper flexibility and innovation, making it difficult for SCT to respond to unanticipated future challenges. Recognising that the core purpose of the Review is to make recommendations to ensure that the EDR system can deliver effective outcomes in a rapidly changing and dynamic financial system, the Panel recommends that SCT be transitioned to a new industry ombudsman scheme for superannuation disputes.

In transitioning to a superannuation industry ombudsman scheme, the Panel intends to retain the existing strengths of SCT, such as:

- unlimited monetary jurisdiction; and
- a broad jurisdiction to review decisions of trustees of superannuation funds.

However, the new structure would also incorporate the strengths of industry ombudsman schemes such as:

- decision making centred on providing ‘fairness in all the circumstances’;
- flexibility to innovate;
- a flexible and responsive funding model;
- a board, with an independent chair and equal number of directors with industry and consumer backgrounds, to oversee the scheme;
- the ability to make timely and appropriate staffing decisions;
- systemic issues work to improve industry practice;
- regular independent reviews of the scheme; and
- strong stakeholder engagement to increase accessibility.

The following table assesses the draft recommendation for a new superannuation industry ombudsman scheme against the Review principles.

New industry ombudsman scheme for superannuation disputes	
Efficiency	↑ efficiency and more timely decision making due to more flexible and responsive funding, enhanced governance, faster and more flexible recruitment, flexibility to develop new procedures and tailor processes to disputes and respond to changes in the external environment.
Equity	↑ equity, with reduced delays, greater flexibility to define ‘fairness’ and to provide for a range of remedies, including for non-financial loss.
Complexity	↓ complexity, with a focus on developing informal dispute resolution processes and an easy-to-navigate system.
Transparency	↑ transparency of funding and operations, with a focus on stakeholder engagement.
Accountability	↑ accountability, with ASIC oversight and periodic independent reviews.
Comparability of outcomes	↑ comparability of outcomes; eg. as independent reviews provide additional scrutiny of procedures and processes.
Regulatory costs	↑ potential direct regulatory costs (increased industry funding, regulator costs from overseeing scheme, offset by some decreased costs in maintaining legislation, making appointments). A user pays (industry funded) model may reduce cost as there would be an incentive for funds to reduce complaints to EDR.

Future directions: a single industry ombudsman scheme for all disputes in the financial system

The Panel considered the merits of moving immediately to a single dispute resolution body to handle all disputes in the financial system, including superannuation disputes. On balance, the Panel's view is that it is preferable to initially introduce an ombudsman model in superannuation through a separate scheme focused exclusively on superannuation disputes. This approach is more likely to facilitate strong stakeholder engagement in the development and implementation of the scheme, which has been a critical foundation for industry ombudsman schemes in other parts of the financial system and in other industries.

The new industry ombudsman scheme for superannuation disputes should be encouraged to work closely with the new scheme for financial, credit and investment disputes, to share knowledge and resources (such as back-office functions) and realise efficiencies where possible.

Once the two new schemes are fully operational and have garnered consumer and industry support, consideration should be given to further integrating the schemes to create a single ombudsman scheme for all financial system disputes. The Panel notes that integration of this kind would be consistent with the evolution and adaptation that has been a hallmark of the existing EDR framework, with the current ombudsman schemes the products of amalgamations and consolidations.

The Panel is confident that its draft recommendations – which should be considered as an integrated package of reforms – will address shortcomings in the current EDR framework and ensure that the framework is well-placed to address current problems and withstand future challenges.

Other matters: whether an additional statutory dispute resolution body is needed

In its Issues Paper, the Panel sought stakeholder views on the establishment of an additional statutory dispute resolution body in the financial system. The majority of submissions did not support this proposal. For the reasons outlined in Chapter 6, the Panel is of the view that an additional statutory dispute resolution body is not required.

Report of the House of Representatives Standing Committee on Economics — Review of the Four Major Banks

On 24 November 2016, the House of Representatives Standing Committee on Economics released its *Review of the Four Major Banks: First Report*. One of the Committee's recommendations is:

... that the Government amend or introduce legislation, if required, to establish a Banking and Financial Sector Tribunal by 1 July 2017. This Tribunal should replace the Financial Ombudsman Service, the Credit and Investments Ombudsman and the Superannuation Complaints Tribunal. The Government should also, if necessary, amend relevant legislation and the planned industry funding model for the Australian Securities and Investments Commission, to ensure that the costs of operating the Tribunal are borne by the financial sector.

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

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

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

A difference between the recommendation of the Committee and the draft recommendations of the Panel is that the Committee recommends the establishment of a Tribunal to replace FOS, CIO and SCT. In this Interim Report, the Panel makes draft recommendations for the establishment of a single industry ombudsman scheme for financial, credit and investment disputes and an industry ombudsman scheme for superannuation disputes. In Chapters 2, 4 and 5 of this Interim Report the Panel identifies what it sees as the advantages that ombudsman schemes have when compared to tribunals, such as SCT, when dealing with disputes relating to financial products and services.

The recommendations of the Committee are a matter for the Government. However, the Panel will give further consideration to the Committee's recommendations in its Final Report.

Increased accountability and transparency

Recognising the importance of ensuring that the new ombudsman scheme for financial, credit and investment disputes and the new ombudsman scheme for superannuation disputes are, and are perceived to be, independent of financial firms and consumers, and are sufficiently resourced to provide robust, timely and quality decision making, the Panel considers there is a case for enhancing some existing accountability mechanisms.

Both new schemes, in order to fulfil their mandate of providing effective EDR, must meet the standards set by ASIC and be accountable to their users. At a minimum, the Panel recommends that ASIC's regulatory guidance requires schemes to:

- be adequately funded (for example, in order to be able to respond to unforeseen spikes in dispute volumes);
- have sufficient coverage (including fit-for-purpose monetary limits in the case of the new scheme for financial, credit and investment disputes);

- be subject to more frequent, periodic independent reviews (the Panel is of the view that given the importance of independent reviews, they should occur more frequently than every five years, which is currently the case for FOS and CIO. The Panel notes that independent reviews of ombudsman-type schemes in the financial services sector in the United Kingdom and Singapore occur every three years – see Chapter 2 and Appendix 1); and
- be responsive to findings of independent reviews, including by providing detailed updates on implementation of actions taken in response to an independent review and a detailed explanation when a recommendation of an independent review is not accepted by the scheme.

Additionally, the Panel recommends that each scheme establish an independent assessor whose role would be to investigate complaints by users (consumers, small business and financial firms) into the handling of a dispute by the schemes. The independent assessor's role would not involve reviewing the findings or outcomes of the relevant decision (that is, they would not be an avenue of appeal). The assessor would make a recommendation in relation to the service handling of the dispute which, where the dispute was not handled satisfactorily, may include that the scheme make an apology or provide compensation to the affected user. The independent assessor would report directly to the Board.

The Panel also recommends bolstering ASIC's capacity to oversee the new industry ombudsman schemes by providing ASIC with more specific powers to allow it to give directions to schemes, as appropriate, to comply with the EDR benchmarks.

Internal dispute resolution

Recognising that sound EDR is supported by sound IDR, the Panel also recommends that financial firms be required to undertake enhanced public reporting of their IDR activity and the outcomes consumers receive in relation to IDR complaints. ASIC should be provided with power to determine the content and format of IDR reporting. Additionally, the industry ombudsman schemes should be required to register and track the progress of disputes referred back to a financial firm's IDR processes.

Enhanced small business access to redress

It is clear that there are strong and compelling reasons for further steps to be taken in relation to the resolution of disputes for small business. The Panel considers that coverage of the framework should be expanded by improving access to dispute resolution for small business, to increase efficiency and equity. This is best achieved by ensuring the monetary limits of the new scheme for financial, credit and investment disputes are higher than the monetary limits of the existing industry schemes (FOS and CIO).

Better handling of complex disputes through panels

Recognising the potential for increased complexity of disputes, particularly given the increased monetary jurisdiction of the new industry scheme for financial, credit and investment disputes (relative to the status quo), the Panel recommends that both new industry schemes consider the use of panels (which consist of an industry representative, consumer representative and a scheme ombudsman) as a means of enhancing the quality and robustness of decisions.

While recognising the costs associated with decision making by panels (including additional time to resolve the dispute), the Panel notes the benefits of utilising industry and consumer expertise and of getting 'buy-in' from consumer and industry stakeholders.

Schemes should also ensure they are transparent to users about the circumstances where a panel will be used.

Compensation scheme of last resort

An efficient, resilient and fair financial system that facilitates economic growth and meets the financial needs of its users is dependent on the trust and confidence of those users.¹⁷ However, it is clear that many Australians currently lack confidence in the financial system and this is due, at least in part, to the issue of uncompensated consumer losses.

Where consumers are denied compensation due to a financial firm's lack of resources, it has a negative impact on both the individual consumer and the broader financial system. In circumstances where the market is currently unable to provide a solution to this problem, the Panel is of the view that there is considerable merit in introducing an industry-funded compensation scheme of last resort.

The Panel is aware that to help achieve broad consensus about the structure and operation of a compensation scheme of last resort, the Australian Bankers' Association and FOS are working with key stakeholders to identify any issues that would impede implementation of such a scheme.¹⁸ The Panel will consider the outcomes of this work in the context of its Final Report.

Implementation considerations

Noting these draft recommendations represent a significant shift from the current system, the Panel is calling for further submissions on the broad approach, the draft recommendations, and implementation and transitional issues. The Panel supports a staged process for implementation, recognising that such an approach may better manage transitional issues.

17 Commonwealth of Australia 2014, *Financial System Inquiry Final Report*, page xv; see also Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, page 44.

18 Financial Ombudsman Service 2016, *Circular*, Issue 27.

DRAFT RECOMMENDATIONS

Draft recommendation 1

A new industry ombudsman scheme for financial, credit and investment disputes

There should be a single industry ombudsman scheme for financial, credit and investment disputes (other than superannuation disputes) to replace FOS and CIO.

Draft recommendation 2

Consumer monetary limits and compensation caps

The new industry ombudsman scheme for financial, credit and investment disputes should provide consumers with monetary limits and compensation caps that are higher than the current arrangements, and that are subject to regular indexation.

Draft recommendation 3

Small business monetary limits and compensation caps

The new industry ombudsman scheme for financial, credit and investment disputes should provide small business with monetary limits and compensation caps that are higher than the current arrangements, and that are subject to regular indexation.

Draft recommendation 4

A new industry ombudsman scheme for superannuation disputes

SCT should transition into an industry ombudsman scheme for superannuation disputes.

Draft recommendation 5

A superannuation code of practice

The superannuation industry should develop a superannuation code of practice.

Draft recommendation 6

Ensuring schemes are accountable to their users

Both new schemes should be required to meet the standards developed and set by ASIC. At a minimum, ASIC's regulatory guidance should require the schemes to:

- ensure they have sufficient funding and flexible processes to allow them to deal with unforeseen events in the system, such as an increase in complaints following a financial crisis or natural disaster;
- provide an appropriate level of financial transparency to ensure they remain accountable to users and the wider public;
- be subject to more frequent, periodic independent reviews and provide detailed responses in relation to recommendations of independent reviews, including updates on the implementation of actions taken in response to the reviews and a detailed explanation when a recommendation of an independent review is not accepted by the scheme; and
- establish an independent assessor to review the handling of complaints by the scheme but not to review the outcome of individual disputes.

In addition, ASIC's regulatory guidance should require the new scheme for financial, credit and investment disputes to regularly review and update its monetary limits and compensation caps so that they remain relevant and fit-for-purpose over time.

Draft recommendation 7

Increased ASIC oversight of industry ombudsman schemes

ASIC's oversight powers in relation to industry ombudsman schemes should be enhanced by providing ASIC with more specific powers to allow it to compel performance where the schemes do not comply with EDR benchmarks.

Draft recommendation 8

Use of panels

The new industry ombudsman schemes should consider the use of panels for resolving complex disputes.

Users should be provided with enhanced information regarding under what circumstances the schemes will use a panel to resolve a dispute.

Draft recommendation 9

Internal dispute resolution

Financial firms should be required to publish information and report to ASIC on their IDR activity and the outcomes consumers receive in relation to IDR complaints. ASIC should have the power to determine the content and format of IDR reporting.

Draft recommendation 10

Schemes to monitor IDR

Schemes should register and track the progress of complaints referred back to IDR.

Draft recommendation 11

Debt management firms

Debt management firms should be required to be a member of an industry ombudsman scheme. One mechanism to ensure access to EDR is a requirement for debt management firms to be licensed.

OBSERVATIONS

Panel observation

The Panel is of the view that there is considerable merit in introducing an industry-funded compensation scheme of last resort.

Chapter 1: Context for the Review and Review principles

- 1.1. The Terms of Reference require the Panel to review the existing dispute resolution and complaints arrangements in the financial system to consider whether changes are necessary to deliver effective outcomes for users in a rapidly changing and dynamic financial system.
- 1.2. The financial system plays a vital role in raising the living standards of all Australians, with its ultimate purpose being to facilitate sustainable economic growth by meeting the financial needs of its users. For the system to operate effectively, it should be subject to market forces and be overseen by a strong and effective regulatory framework.¹ To ensure consumers are treated fairly and can have confidence and trust in the financial system, they should have access to an effective dispute resolution framework.
- 1.3. In assessing whether changes to the financial system's current dispute resolution and complaints schemes are necessary to deliver effective outcomes for users in a rapidly changing and dynamic financial system, it is important to establish how the financial system operates and how consumers engage with the system. This is because the types of complaints the framework receives from consumers are inseparable from the nature of the products, relationships and individuals which operate within the financial system.
- 1.4. In relation to how the financial system operates, it is now appreciated that there are limitations on its efficiency and stability, with a greater understanding that it operates as a complex, adaptive network.² Complex because of the number of interconnections and adaptive as behaviours inside the network are driven by interactions between individuals.³ These properties mean that the financial system has the ability to create or amplify economic shocks, which can result in a significant number of consumers suffering losses within a short period of time, which occurred during the global financial crisis.⁴

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

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

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

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

- 1.5. In recent years, the financial system has also undergone a number of changes, including in the area of superannuation. Since its introduction, the superannuation system has grown significantly in size and now plays a vital role in funding the economy and providing for retirement incomes.⁵ With its compulsory nature and its implications of age pension outlays for taxpayers, there is an imperative for the regulatory settings, including in the area of consumer redress, to deliver appropriate outcomes.⁶
- 1.6. For consumers in the financial system, it is recognised they can be disengaged, possess behavioural biases,⁷ have low financial literacy and are often confronted with complex documents and products.⁸ Technological changes and innovation, while having the potential to improve consumer outcomes, can also deliver negative outcomes as products become increasingly complex.⁹
- 1.7. Additionally, most financial goods are a form of ‘credence good’ meaning that their true value or utility to a consumer is not known or cannot be calculated at the point of purchase.¹⁰ There is also evidence to suggest that consumer confusion can exist even with less complex products, such as debentures.¹¹
- 1.8. For the financial system to achieve its goals of meeting the financial needs of its users, consumers must be treated fairly. This occurs where participants act with integrity, honesty, transparency and non-discrimination.¹² Fundamental to fair treatment is the concept that while consumers should generally bear responsibility for their financial decisions and that some losses are inevitable in a market economy, consumers should be able to expect that financial products will perform in the way they are led to believe.¹³
- 1.9. To ensure consumers are treated fairly and can have confidence and trust in the financial system, they should have access to effective redress.¹⁴ Existing avenues of redress include accessing complaints handling by the financial firms (internal dispute resolution), industry-specific alternative dispute resolution (ADR) schemes, tribunals and the courts.

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

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

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

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

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

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

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

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

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

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

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

PRINCIPLES GUIDING THE REVIEW

Efficiency

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

Equity

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

Complexity

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

Transparency

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

Accountability

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

Comparability of outcomes

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

Regulatory costs

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

- 1.11. The Review principles are similar to the principles in the Benchmarks for industry-based customer dispute resolution schemes (DIST Benchmarks), which were first published by the then Department of Industry, Science and Tourism in 1997 and for which there continues to be strong and continuing support.¹⁵ The DIST Benchmarks formed the key principles that ASIC takes into account when considering whether to approve an external dispute resolution scheme (this is discussed further in Chapter 3).
- 1.12. In applying the review principles, it is important to recognise that there will often be trade-offs in their implementation, for example, increasing access to redress (which goes to equity) by allowing new types of claims to be heard may increase costs in the system (regulatory costs).

¹⁵ Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, page 6.

Chapter 2: Alternative dispute resolution

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

WHAT IS ALTERNATIVE DISPUTE RESOLUTION?

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

DISPUTE RESOLUTION PROCESSES

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



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

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

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

FORUMS FOR ALTERNATIVE DISPUTE RESOLUTION

Tribunals

- 2.9. Two common types of dispute resolution bodies in Australia are tribunals and ombudsmen. Tribunals are statutory, independent legal institutions established to provide a platform to resolve specific disputes. Recent figures suggest there are 54 tribunals in Australia, which collectively resolve approximately 395,000 disputes per year.⁷

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

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

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

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

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

- 2.10. There are two key types of tribunals in Australia: administrative tribunals, which deal with disputes arising from government decisions; and civil tribunals, which deal with disputes arising from private matters. The jurisdiction of Commonwealth tribunals is limited by Chapter III of Australia's Constitution, in that judicial power is reserved for the courts. Consequently, Commonwealth tribunals are purely administrative, whereas state and territory tribunals can have both administrative and civil jurisdiction.⁸
- 2.11. Like courts, tribunals must be impartial and detached from the executive government; have a defined jurisdiction; receive claims or applications; determine claims in accordance with due process; apply the relevant law to make a reasoned decision; and make a final order.⁹ However a key difference between a tribunal and a court is that tribunals cannot create binding precedents, nor can they apply criminal penalties.¹⁰
- 2.12. Tribunals can also be distinguished from courts in that they aim to provide quick, economic and inexpensive justice by being less formal than courts. They can provide active case management and employ alternative dispute resolution techniques, thereby limiting the need for legal representation and costs awards.
- 2.13. Whilst tribunals have an appropriate place in the alternative dispute resolution, compared with the experience with ombudsman schemes (which are discussed below), tribunals:
- can be less accessible: typically because there are costs associated with their use (unlike ombudsman schemes) and they require the completion of application forms (compared with online or telephone lodgement of disputes in the case of ombudsman schemes);¹¹
 - can be less flexible and dynamic: they can operate more like courts (adversarial, legalistic processes)¹², compared with the inquisitorial approach of an ombudsman scheme¹³, and have been accused of 'creeping legalism'.¹⁴ Further, as creatures of statute, Tribunals can be slower to evolve and respond to dynamic environments, often requiring legislative change or government involvement to respond to industry changes or to reform their operations;
 - can apply a 'black letter law' approach to decision making: in contrast to the approach of ombudsman schemes, where the approach to dispute resolution is based on achieving 'fairness in all the circumstances', which factors in good industry practice and Codes of Practice;¹⁵and

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

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

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

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

12 Joint Consumer Group 2016, submission to EDR Review Issues Paper, page 3.

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

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

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

- can be focused on making a decision in relation to the individual dispute under consideration, rather than on improving industry practice more broadly (that is, there is no function to identify or address systemic issues unlike ombudsman schemes)¹⁶ or undertaking community outreach or stakeholder engagement¹⁷.

2.14. A 2016 research report into the Victorian Civil and Administrative Tribunal (VCAT) that reviewed the experiences of consumers and tenants at the tribunal, and evaluated VCAT against benchmarks for industry ombudsman schemes, found 'there were very substantial barriers' that inhibit people from accessing justice at VCAT.¹⁸

Ombudsman schemes

2.15. Ombudsman schemes are independent organisations that receive complaints and conduct inquiries to resolve these complaints. They have the power to undertake investigations of their own motion.¹⁹ They can also engage with the community and industry to improve access to justice and raise industry standards.²⁰

2.16. There are two key types of ombudsman schemes: industry ombudsman schemes, which deal with disputes between consumers and service providers; and Government ombudsman schemes, which deal with disputes about the conduct and decision making of government agencies.

2.17. Industry ombudsman schemes exist in multiple sectors across the Australian economy. The Financial Ombudsman Service Limited (FOS) and the Credit and Investments Ombudsman (CIO) operate in the financial system. In the telecommunications sector, the Telecommunications Industry Ombudsman (TIO) is the single nationwide ombudsman, while there are various state-based ombudsmen in the utilities sector, including the Energy and Water Ombudsman Victoria (EWOV) and the Energy and Water Ombudsman Queensland (EWOQ). Further information on the TIO, EWOV and EWOQ can be found in Appendix 1.

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

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

18 Cameronralph Navigator 2016, *Review of Tenants' and Consumers' Experience of Victorian Civil and Administrative Tribunal: Residential Tenancies List and Civil Claims List – Research Report*, page 7.

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

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

2.18. According to the Australian and New Zealand Ombudsman Association (ANZOA), to identify as an Ombudsman scheme, a body must satisfy six requirements, set out below:²¹

Essential features of an ombudsman scheme

(1) Independence

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

(2) Jurisdiction

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

(3) Powers

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

(4) Accessibility

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

²¹ Australian and New Zealand Ombudsman Association 2010, *Essential criteria for describing a body as an ombudsman*, viewed 25 November 2016, <http://www.anzoa.com.au/assets/anzoa_media-release_essential-criteria-for-use-of-the-term-ombudsman.pdf>

(4) Accessibility (continued)

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

(5) Procedural fairness

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

(6) Accountability

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

Ombudsman schemes and access to justice

2.19. Ombudsman schemes provide complainants with an alternative to the judicial system. By providing a mechanism for complainants to resolve low value disputes, ombudsman services can deal with smaller issues in a proportional manner and can prevent them from evolving into bigger issues. Ombudsman services can also assist complainants to overcome power imbalances by helping them to assert their rights when dealing with large companies.²²

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

- 2.20. Unlike the traditional court system, which relies on lawyers, the rules of evidence and specific processes and procedures which can be complex and intimidating for consumers, ombudsman schemes provide claimants with a relatively simple process, led by the ombudsman, negating the need for formal legal representation. Furthermore, ombudsman services are not restricted to resolving legal issues; rather, they have scope to consider non-legal issues that would not be addressed by the judicial system.²³
- 2.21. Where there is a general problem in an industry affecting multiple consumers and a number of similar complaints are received about a particular issue, ombudsman schemes have the capacity to instigate and conduct investigations to identify systemic issues. Once these issues have been identified and investigated, ombudsman services can alert the relevant stakeholders and regulators and assist in their resolution. This approach is more cost-effective than litigation and has the potential to provide positive outcomes for consumers by promoting good industry practice.²⁴
- 2.22. Ombudsman schemes are also able to promote access to justice through their ability to adapt and innovate in response to changes in the external environment. This has been particularly relevant in the financial system, which has seen rapid changes in the types and products being sold and the types of consumers purchasing them.²⁵
- 2.23. There is a general consensus among stakeholders that ombudsman services are an effective dispute resolution mechanism which promotes access to justice and decreases the burden on the judicial system.²⁶ While there are clear benefits of ombudsman schemes, low awareness amongst consumers may prevent them from fully utilising these services.²⁷
- 2.24. Ombudsman-type schemes in the financial services sector also exist in a number of international jurisdictions. This Review has considered a number of these, including New Zealand, the United Kingdom, Singapore and Canada. A table comparing the key features of these bodies is contained in the below table, with further detailed information available at Appendix 1.

23 Ibid, page 316-317.

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

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

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

27 Ibid, page 320.

	Australia	New Zealand	United Kingdom	Singapore	Canada
Multiple or single scheme	Multiple schemes	Multiple schemes	Single scheme for complaints about financial services.	Single scheme	Multiple schemes
Funding model	Industry funded	Industry funded	Industry funded	Predominantly industry funded	Industry funded
Cost to consumers	Free for consumers	Free for consumers	Free for consumers	Consumers pay \$50 at the adjudication phase	Free for consumers
Frequency of independent reviews	Reviews of industry schemes required at least every five years	Reviews required at least every five years	Board has committed to three-yearly reviews	Reviews required every three years ²⁸	Various procedures and timeframes
Statutory and/or non-statutory	Statutory and non-statutory	Non-statutory	Statutory	Non-statutory	Statutory and non-statutory
Binding determinations	Consumers not bound by determinations	Consumers not bound by determinations	Consumers not bound by determinations	Consumers not bound by determinations	Neither party is bound by the determination
Governance	Governance models include boards and chairpersons	Governance models include boards and an advisory council	Governed by a board	Governed by a board	Governance models include boards and advisory bodies
Last resort compensation scheme	No	No	Yes	No	Yes, but limited ²⁹

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

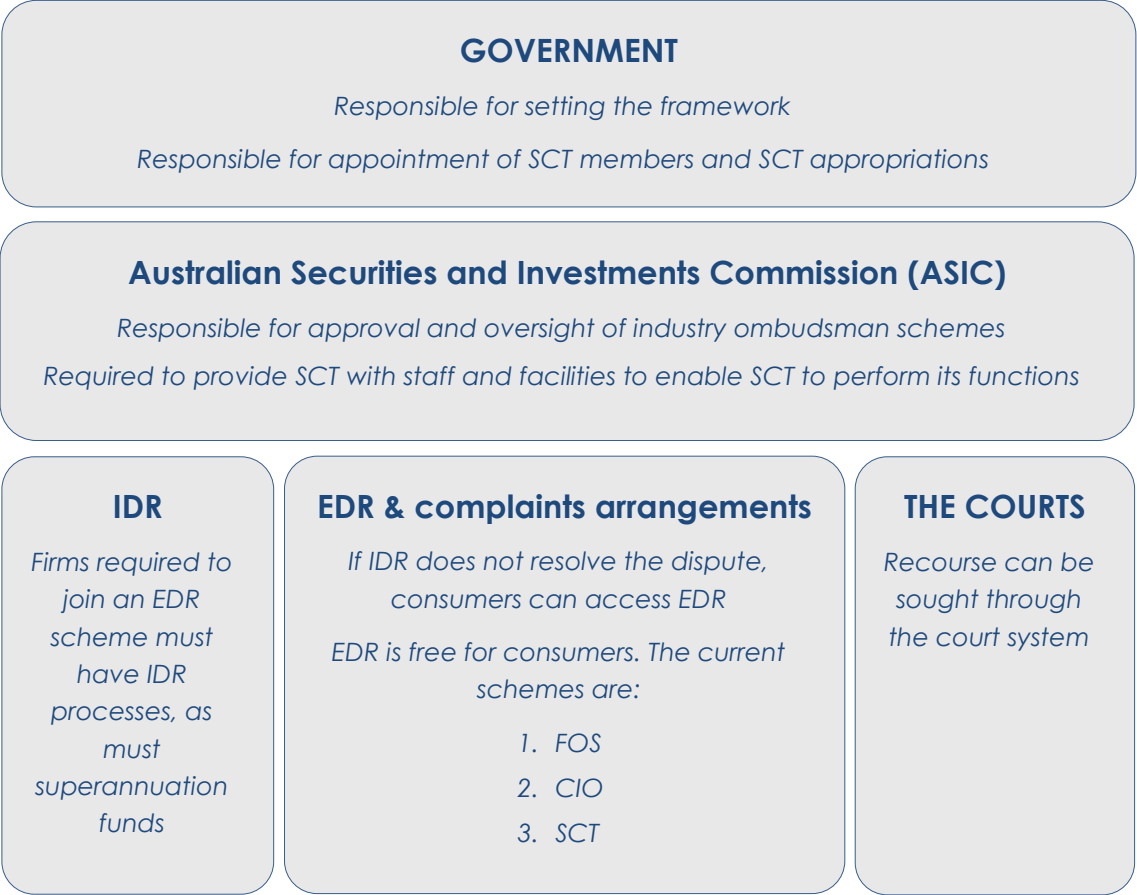
29 The Canadian Investor Protection Fund can provide compensation where an investment firm member becomes insolvent and they were holding property on behalf of a client at the time.

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

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

THE CURRENT FRAMEWORK

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



EVOLUTION OF THE DISPUTE RESOLUTION FRAMEWORK

Industry ombudsman schemes

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

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

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

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

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

Statutory Tribunal: Superannuation Complaints Tribunal

- 3.12. SCT was created alongside the introduction of compulsory superannuation in Australia in 1993 and preceded the co-regulatory framework established for industry based EDR schemes.
- 3.13. The Senate Select Committee on Superannuation considered various models for EDR for superannuation, including an ombudsman scheme, an industry scheme with a code of practice and arbitration approach, a panel selected by the Minister teamed with an advisory service for members, commercial arbitration, and a statute based review panel. The Committee ultimately recommended a statutory model, although SCT (which commenced operations in 1994) is not identical in all respects to the model recommended.⁶

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

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

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

3.14. Unlike the industry ombudsman schemes, ASIC does not have a policy or operational oversight role over SCT.

COMPARISON OF EXISTING DISPUTE RESOLUTION BODIES

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

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

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

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

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

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

	FOS	CIO	SCT
Powers	<p>Established in FOS Constitution. Contractual relationship between FOS and financial firm.</p> <p>Wide range of remedies, including ability to award non-financial loss.</p> <p>Able to join third parties where member of FOS.</p> <p>Able to expel member for non-compliance.</p>	<p>Established in CIO Constitution. Contractual relationship between CIO and financial firm.</p> <p>Wide range of remedies, including ability to award non-financial loss.</p> <p>Able to join third parties where member of CIO.</p> <p>Able to expel member for non-compliance.</p>	<p>Statutory powers set out in SRC Act. Can join third parties to complaint (if financial firm related to dispute can join compulsorily).</p> <p>Remedies specified in statute: cannot award non-financial loss.</p> <p>Non-compliance may be reported to regulator, may constitute an offence.</p>
Governance	<p>Scheme is governed by an independent board, with an independent chair and equal number of directors with a consumer and industry background.</p>	<p>Scheme is governed by an independent board, with an independent chair and equal number of directors with a consumer and industry background.</p>	<p>No Board of directors. SCT has established an Advisory Council to provide advice to Chairperson. Tribunal members appointed by government.</p>
Funding arrangements	<p>Free to complainants.</p> <p>Funded by FOS members.</p>	<p>Free to complainants.</p> <p>Industry funded.</p> <p>Funded by CIO members.</p>	<p>Free to complainants.</p> <p>Budget set by government, then recovered via APRA levies set by the Minister.</p>
Models of dispute resolution	<p>Flexibility to determine dispute resolution process.</p> <p>Majority of disputes resolved through negotiation/ conciliation.</p>	<p>Flexibility to determine dispute resolution process.</p> <p>Majority of disputes resolved through negotiation/ conciliation.</p>	<p>Limited flexibility to determine dispute resolution process.</p> <p>Dispute must progress from investigation to conciliation to determination.</p> <p>Majority of disputes are resolved through conciliation.</p>
Dispute resolution criteria	<p>'Fairness in all the circumstances' having regard to: legal principles; applicable industry codes; good industry practice; and previous FOS decisions (although FOS is not bound by these).</p>	<p>Independent and prompt resolution of dispute, having regard to: relevant legal requirements and rights provided by law to consumers; applicable codes of practice; good industry practice in the financial services industry; and fairness in all the circumstances.</p>	<p>Whether the trustee's decision was 'fair and reasonable' in the circumstances. If the trustee's decision was fair and reasonable, SCT must affirm decision.</p>

	FOS	CIO	SCT
Accountability	ASIC oversees FOS, which must comply with RG 139. Independent reviews every 5 years.	ASIC oversees CIO, which must comply with RG 139. Independent reviews every 5 years.	Parliamentary scrutiny. Not subject to independent reviews.
Systemic issues reporting	Required to monitor, address and report on systemic issues relating to complaints handling by a financial firm.	Required to monitor, address and report on systemic issues relating to complaints handling by a financial firm.	No formal requirement to undertake systemic issues reporting.
Rights of appeal	Complainant not bound by FOS decision, can still go to court/ mediation. Financial firm bound by FOS decision, able to appeal in limited circumstances.	Complainant not bound by CIO decision, can still go to court/ mediation. Financial firm bound by CIO decision, able to appeal in limited circumstances.	Complainant not bound by SCT decision, can still go to court/ mediation. Superannuation trustee (and other financial firm eg. insurer joined to dispute) bound by SCT decision. Parties can appeal SCT decision in Federal Court on matters of law.
Relationship to IDR	Consumer must have attempted IDR before accessing FOS.	Consumer must have attempted IDR before accessing CIO.	Consumer must have attempted IDR before accessing SCT.

ASIC'S OVERSIGHT ROLE

3.16. Having appropriate dispute resolution mechanisms in place, which are approved by ASIC, is a licence condition for all financial firms that deal with retail clients.¹¹ A financial firm that does not comply with this obligation is in breach of its licence and can be subject to ASIC administrative action.¹²

3.17. The dispute resolution mechanisms must consist of:

- an IDR procedure which complies with standards, and requirements and covers complaints against the licensee made by retail clients in connection with the provision of all financial services covered by the licence; and

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

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

- membership of one or more EDR schemes approved by ASIC which covers, or together cover, complaints (other than complaints that may be dealt with by SCT)¹³ against the licensee made by retail clients in connection with the provision of all financial services covered by the licence.¹⁴

3.18. ASIC's guidance on the standards required by financial firms in relation to their IDR procedures is contained in Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG 165).

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

The principles and requirements set out in RG 165 include:

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

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

13 Where the SCT can deal with all retail client complaints about the financial products and services a licensee provides, there is no need to join an ASIC-approved EDR scheme: Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, pages 24-25 [92]-[93]; section 912A(2)(b)(ii) of the *Corporations Act 2001* (Cth).

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

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

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

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

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

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

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

ASIC's oversight of remediation

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

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

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

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

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

ASIC's role in relation to industry ombudsman schemes

Approving an EDR scheme

- 3.21. As discussed above, ASIC has the power to approve an EDR scheme.¹⁵ ASIC's approval criteria is set out in Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes*.¹⁶ When considering whether to approve an EDR scheme, ASIC is required to take the following principles into account: accessibility; independence; fairness; accountability; efficiency; effectiveness; and any other matter it considers relevant.¹⁷
- 3.22. While RG139 states what a scheme must do to obtain initial approval, and maintain this approval, much of ASIC's influence rests at the point of initial approval. For example, where an approved scheme fails to meet one of the approval criteria, ASIC's powers are limited to either varying the approval, for example by imposing a condition on approval, or by revoking the approval.¹⁸

Oversight of EDR schemes

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

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

16 Australian Securities and Investments Commission 2013, Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes* has been updated a number of times in recent years to deal with new products, new members and to address problems that arise in the industry, for example, dealing with financial hardship applications: see Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, pages 17-18 [56]; Financial Ombudsman Service, submission to the EDR Review Issues Paper, page 16.

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

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

19 Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, pages 18-19 [60].

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

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

Regulatory Guide 139: Approval and oversight of EDR schemes

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

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

21 Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, page 21 [68]-[70].

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

23 Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, page 19 [61]-[65].

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

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

26 Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, page 22 [76].

Regulatory Guide 139: Key requirements (continued)

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

ASIC's role in relation to the Superannuation Complaints Tribunal

- 3.28. As SCT is an independent statutory tribunal, ASIC does not undertake any oversight of or have any powers in relation to SCT.
- 3.29. ASIC has statutory obligations under subsection 62(2) of the *Superannuation (Resolution of Complaints) Act 1993* to provide SCT with staff and facilities to enable SCT to perform its functions.

- 3.30. As SCT does not have a corporate legal identity, in practice, this means that ASIC enters into all contracts on behalf of SCT and makes all payments, including staff salaries, payments to tribunal members, third party providers or to ASIC (for rent and corporate services ASIC provides). Staff of SCT are ASIC employees, employed under the ASIC Enterprise Agreement and SCT is co-located in ASIC's Melbourne office.

Chapter 4: Existing external dispute resolution bodies

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

FINANCIAL OMBUDSMAN SERVICE

Role

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

Member base

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

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

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

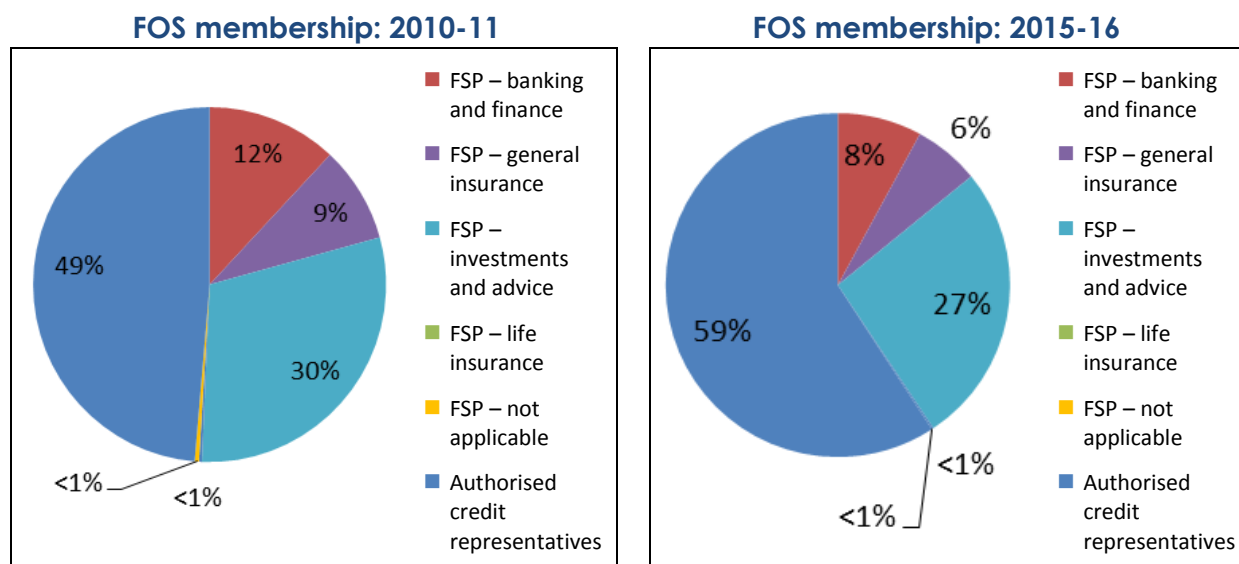


Table note: FSP (financial services provider) is referred to as financial firm in this Report).

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

Dispute data

Disputes received

4.8. In 2015-16, FOS handled just under 83 per cent of all financial system disputes received by the three EDR bodies (FOS, CIO and SCT – total of 41,223 disputes received) and nearly 88 per cent of disputes received by the industry ombudsman schemes (FOS and CIO – total of 38,855 disputes received).⁵

4.9. In 2015-16, FOS received 34,095 disputes, up 7 per cent from 31,895 disputes in 2014-15.⁶ Ninety-four per cent of members did not have any disputes lodged against them in 2015-16.

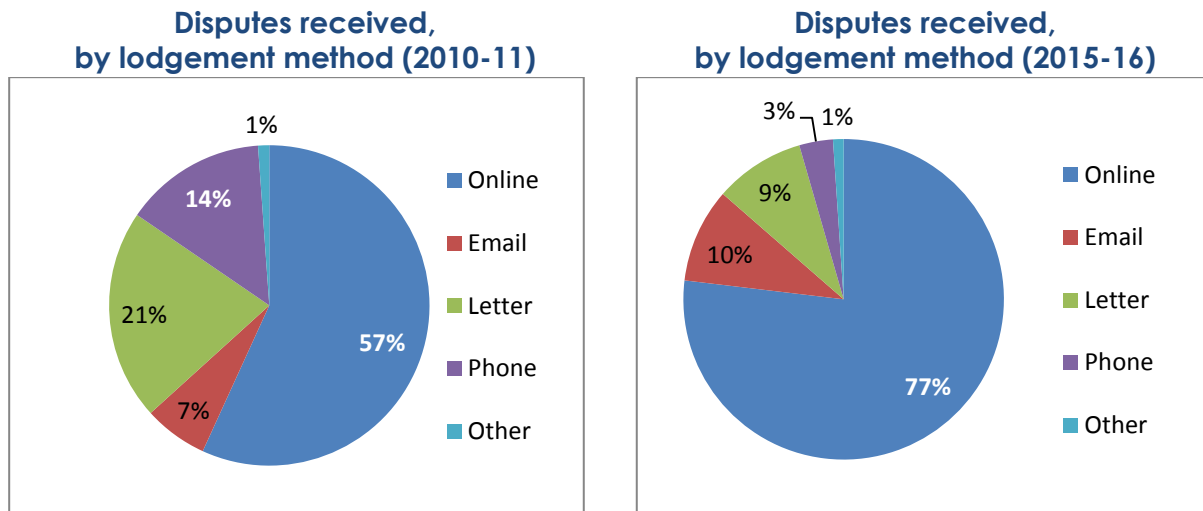
3 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016. To determine the size of a member, FOS uses a number of variables. The variables include: gross written premium on insurance; annual (in force) life insurance premiums; total income earned on client insurance premiums; client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

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

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

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

- 4.10. The number of disputes FOS receives has stabilised over the past few years, following a steep increase from 2009-2010 to 2011-2012.⁷ The increase in 2015-16 was driven by industry-specific issues in general insurance. During 2015-16, FOS closed 32,871 disputes.⁸
- 4.11. The mix of the types of disputes received by FOS between 2010-11 and 2015-16 has been relatively stable. Of disputes received each year, credit disputes generally make up between 45 and 50 per cent and general insurance disputes make up 26 to 30 per cent of disputes, although the number of general insurance disputes in 2015-16 increased significantly when compared to 2014-15.⁹ The remaining disputes relate to deposit taking, payment systems, life insurance, investments, and other matters.¹⁰
- 4.12. In 2015-16, the vast majority (94 per cent) of disputes were lodged by individuals, with the balance lodged by small businesses. Of the disputes lodged by individuals, most (81 per cent) were lodged by individuals without representation. Where an individual was represented, the most common type of representative was a family member or friend (34 per cent), followed by a private or paid consumer advocate, such as a credit repair or other fee for service representative (17 per cent).¹¹
- 4.13. Complainants are able to lodge disputes with FOS in a number of ways, as shown below. The most common way that disputes were lodged in 2015-16 was online, with 77 per cent of complainants using a new online dispute form. This is a substantial increase compared with 2010-11 when 57 per cent of complaints were lodged online.¹²



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

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

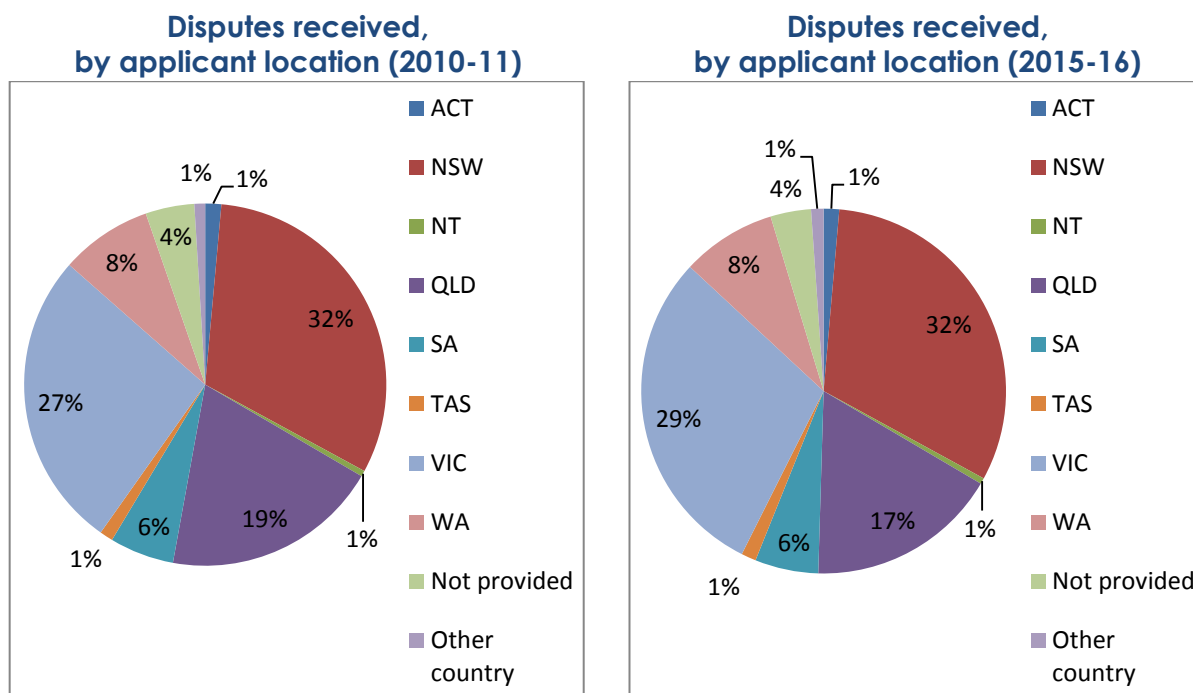
9 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016. In 2015-16, FOS received 10,588 general insurance disputes compared with 8,867 disputes in 2014-15 (a 19.4 per cent increase).

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

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

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

4.14. The geographic distribution of complainants has remained relatively stable between 2010-11 and 2015-16, as shown below. FOS has indicated that the geographic distribution is similar to that of the Australian population per state.¹³



Resolution of disputes

4.15. The timeliness of dispute closure improved in 2015-16 over the previous year and when compared to 2010-11. In 2015-16, FOS closed 43 per cent of disputes within 30 days (up from 22 per cent in 2014-15), 77 per cent within 60 days (up from 61 per cent in 2014-15) and 85 per cent within 90 days (up from 72 per cent in 2014-15).¹⁴

4.16. Ninety per cent of open disputes are less than 180 days old, while 98 per cent of disputes accepted during the financial year were closed within 180 days.¹⁵ Average number of days to resolution decreased accordingly from 95 days in 2014-15 to 62 days in 2015-16.¹⁶

4.17. The time taken to close disputes has almost halved since 2010-11 when the average time taken to close disputes was 122 days.¹⁷ In 2010-11, only 10 per cent of disputes were closed within 30 days, 50 per cent were closed within 60 days and 60 per cent were closed within 90 days, while 21 per cent of disputes took longer than 180 days to resolve.¹⁸

13 Ibid.

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

15 Ibid, page 15.

16 Ibid, page 56.

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

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

- 4.18. In terms of staffing, in 2015-16 FOS had 351 employees, working a full-time equivalent (FTE) load of 317 employees. For comparison, in 2010-11, FOS had 357 employees making an FTE of 283. Operational dispute resolution staff generally have industry experience in the area in which they work. Over 60 per cent have legal qualifications and most have been trained in conciliation/mediation. FOS has 14 ombudsmen, 10 adjudicators and 31 panel members. Staff turnover was 15.6 per cent in 2012-13, falling to 13.9 per cent in 2015-16.¹⁹

Approach to dispute resolution

- 4.19. Typical for ombudsman schemes, FOS has a high degree of discretion to choose the appropriate dispute resolution process for particular matters. FOS's approach aims to resolve disputes in a cooperative, efficient, timely and fair manner, with a minimum of formality.²⁰
- 4.20. Decisions, including determining the extent of loss or damage suffered by a complainant, are based on what is 'fair in all the circumstances', taking into account legal principles (including the common law, important precedents, applicable legislation and the terms of any contracts between the financial firm and the complainant), any applicable industry codes of practice, as well as good industry practice and previous relevant FOS decisions (although FOS is not bound by these).²¹
- 4.21. FOS's Operational Guidelines to the Terms of Reference seek to provide additional detail on what this means.²² FOS considers the law when handling a dispute but does not necessarily strictly apply the legal principles and, if necessary, will deviate from those principles to achieve fairness in the circumstances.²³ With regard to industry codes and good industry practice, FOS is not bound by the minimum standard set in a particular industry code. Doing what is fair in all the circumstances for both parties may involve deciding that a financial firm should have met a higher standard. FOS also considers good practice expressed by ASIC or other relevant regulators.

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

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

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

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

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

4.22. In response to feedback from stakeholders and its 2013 independent review, FOS introduced a new dispute resolution process from 1 July 2015, which involves:

- a new registration and referral process which gives financial firms a final opportunity to resolve disputes directly with their customers prior to the commencement of a FOS investigation;²⁴
 - The first stage in FOS's dispute resolution process²⁵ involves referring the dispute to the financial firm (member) and requesting that it responds to both FOS and the applicant within 45 days if IDR has not already taken place or within 21 days if the IDR process has already been conducted. All disputes received during 2015-16 were referred back to IDR and of these 11,342 disputes (33 per cent) were resolved without further escalation.²⁶
- fast-tracking decisions for simpler and low-value disputes;
- specialist expertise being provided earlier in the dispute process, and the reduction of multiple 'touch points' and process stages;
- a more efficient 'financial difficulty' dispute process, characterised by regular telephone engagement and a more tailored approach; and
- more effective communication of the outcomes of disputes to both parties through a new format for decisions.²⁷

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

24 Prior to 1 July 2015, some disputes were registered and referred to the member to resolve directly with their customer and others were immediately accepted and progressed to case management. This change has affected the number and profile of disputes that are accepted and progressed to the 'case management' stage; for example, the number of disputes closed at registration has increased from 8,645 in 2014-15 to 12,316 in 2015-16 (data supplied to the EDR Review by FOS, 7 October 2016). The previous process was also linear, with no fast tracking of straightforward disputes, and different staff handling disputes at different stages of the process.

25 There are three stages: 'Registration & Referral', 'Case Management' and 'Decision'. See Financial Ombudsman Service, *Dispute resolution process in detail*, viewed 25 November 2016, <<https://www.fos.org.au/resolving-disputes/dispute-resolution-process-in-detail/>>.

26 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016. In 2015-16, 58 per cent of disputes received (19,794) were subsequently returned to EDR, while 9 per cent (2,959) remained open at the end of the period.

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

- 4.24. If a dispute is unable to be resolved by early agreement between the parties, or through a preliminary view on merits being provided by FOS, the dispute is resolved by a decision. The decision is referred to as a 'determination' and can be made by an ombudsman, an adjudicator or a panel. Panels consist of a FOS ombudsman, an industry representative and a consumer representative and are appointed as needed from a pool of potential panel members to make determinations on particularly complex disputes relating to some, but not all, product lines.
- 4.25. The complainant (but not the financial firm) may accept or reject the determination within 30 days of receiving it. If the complainant accepts the determination, it is binding on both parties;²⁸ if the complainant is dissatisfied with the outcome of the process and rejects the determination, then the determination is not binding on the financial firm and the complainant may take any other action against the financial firm available, including action through the court system.
- 4.26. In 2015-16, around 37 per cent of the 32,871 disputes closed were resolved during the 'registration & referral' stage and 8 per cent (2,680 disputes) were progressed to a decision/determination. While 2,680 disputes proceeded to the determination stage, 2,359 determinations were issued by an ombudsman, panel or adjudicator, with the remaining disputes resolved at the determination stage without a determination being issued.²⁹
- 4.27. In 2015-16, 61.2 per cent of disputes were resolved by agreement (resolved by the financial firm, by negotiation or conciliation); 15.2 per cent were resolved by a FOS decision or assessment; 17.3 per cent were outside the FOS Terms of Reference; and 6.3 per cent were discontinued (either because the applicant decided not to proceed with the dispute or pursued it through alternative means). The most frequent reason for a dispute being outside the Terms of Reference in 2015-16 was referral to another dispute resolution scheme, in particular CIO or SCT.³⁰
- 4.28. A determination is a final decision on the merits of a dispute and there are no further appeal or review processes within FOS.
- 4.29. However, as FOS's authority is contractual, FOS may be challenged in court for breach of contract (for example, if a financial firm did not believe that FOS performed its services in accordance with its Terms of Reference). This can result in an appeal of a determination, but only on limited grounds and no party (either complainant or financial firm) has to date been successful in overturning a FOS determination in court.³¹

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

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

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

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

- 4.30. Additionally, there are informal and formal mechanisms available to financial firms, industry bodies or consumer organisations (but not complainants) to have the *approach* taken by FOS in determinations (as opposed to a particular decision) reviewed to assess whether the approach should be modified for future disputes.³² If a complainant is dissatisfied with the way in which FOS has handled a dispute they may make a complaint to FOS or to ASIC.
- 4.31. In 2015-16, FOS received a total of 360 complaints (1.1 per cent of disputes resolved) from persons dissatisfied with FOS's service. Of the 360 complaints received, 83.6 per cent (301 complaints) were by consumers, 8.1 per cent (29 complaints) were by financial firms and 8.3 per cent (30 complaints) were by third parties.³³ The main reasons for the complaints were: disagreement with the decision to discontinue the dispute and incorrect assessment of fact or law.
- 4.32. FOS has an internal complaints process to investigate and deal with complaints. Members of FOS management report complaints received about the operation of the scheme to the FOS Board. In 2015-16, the most common outcomes from reviewing the complaint was that FOS reiterated the original FOS decision or approach and explained the process.³⁴
- 4.33. In addition, as part of its overall quality assurance framework FOS conducts audits of closed disputes (now at least 700 per quarter, up from 150 per quarter in 2015-16) and assesses them against its quality objectives. A quarterly report is compiled for consideration by the Board and senior management to guide process improvements and skilling of staff.³⁵
- 4.34. FOS's approach to decision making, as set out in its Terms of Reference, has been subject to judicial consideration in a number of cases, where the courts have confirmed that its Terms of Reference provide FOS with wide and flexible powers to do justice between the parties.³⁶

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

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

34 Ibid.

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

36 *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.

Jurisdiction

- 4.35. FOS's jurisdiction is detailed in its Terms of Reference.³⁷ The Terms of Reference articulate the types of disputes that are within and outside of the scope of FOS. FOS may only consider a dispute if the dispute is between a financial services provider that is a member and a retail client listed in clause 4.1,³⁸ including an individual, a partnership comprised of individuals, the corporate trustee of a self-managed superannuation fund (SMSF) or a small business (a business with fewer than 20 employees, or fewer than 100 employees if involved in manufacturing).
- 4.36. As scheme membership has grown, the Terms of Reference have been revised to accommodate new members and a broader range of regulated financial and credit services. FOS can consider disputes about a wide range of investment, insurance, credit payment systems and deposit-taking products and services sold by a broad range of financial services providers.
- 4.37. Changes to the Terms of Reference, unless minor, require consultation with ASIC, relevant Board Advisory Committees and appropriate individuals and organisations (including key consumer, community and industry organisations) and must be approved by ASIC.³⁹
- 4.38. ASIC's RG 139 sets out the minimum jurisdiction requirements for approved EDR schemes and encourages schemes to go beyond the minimum requirements. An example of going beyond the minimum jurisdiction is FOS's definition of 'financial service', which is drafted more broadly than the statutory definition in the *Corporations Act 2001*.⁴⁰ This provides FOS with greater flexibility to accept disputes that may have otherwise been on the margins but that relate to products or services issued by FOS members. Other examples are FOS's approach to small business responsible lending disputes and its ability to consider disputes about non-regulated loans,⁴¹ and its discretion to deal with disputes from non-retail consumers when appropriate.

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

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

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

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

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

- 4.39. FOS applies a range of exclusions to its jurisdiction.⁴² In 2015-16, 5,692 (17 per cent) of disputes fell outside its jurisdiction, with the most common reasons being: the dispute was more appropriately dealt with in another forum (such as a court, tribunal or another dispute resolution scheme); the type of dispute was not one that FOS can consider (for example, it does not arise from the provision of financial services by a financial firm to an applicant); exclusion based on general discretion (for example, an investigation is not warranted or the claim was previously settled); the financial firm is not a current FOS member; or the dispute had previously been dealt with by FOS, another EDR scheme or a court/tribunal.⁴³ In addition, FOS has discretion to exclude disputes it considers to be frivolous, vexatious or lacking in substance⁴⁴ and is not able to deal with disputes which are currently being dealt with by CIO,⁴⁵ although in practice the number of disputes excluded on such grounds is tiny.
- 4.40. FOS operates a monetary limit on claims: the maximum value *per claim* under a dispute that can be considered by FOS is \$500,000. FOS considers that a single dispute can contain more than one claim, a position which was affirmed by the Federal Court decision in *Wealthsure Pty Ltd v Financial Ombudsman Services Limited* [2013] FCA 292. The case concerned financial planning advice provided in the form of three statements of advice. At the time of the dispute, the FOS Terms of Reference had a monetary limit of \$150,000. On that basis, the financial firm sought to exclude the dispute from being considered by FOS. However, FOS considered the dispute to consist of three separate claims arising from each of the statements of advice.
- 4.41. FOS is able to consider disputes involving a claim for more than \$500,000 if all parties and FOS agree. This agreement may be provided in respect of a particular dispute or it may be in the form of a waiver of the financial limit by a firm broadly in respect of a category of disputes. By way of example, such a waiver may be (and has been) provided in respect of disputes arising out of a remediation scheme conducted by a firm as is anticipated by ASIC Regulatory Guide 256.⁴⁶

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

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

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

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

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

- 4.42. Other than in relation to complaints about financial hardship applications, unjust transactions, or unconscionable interest and other charges under the National Credit Code, FOS will not consider a dispute unless it was brought within the earlier of six years from when the applicant became aware of their loss and two years of receiving an IDR response from their financial firm.⁴⁷
- 4.43. As well as monetary limits on the value of claims, there are also caps on the maximum value of the remedy that can be decided by FOS for a claim. Currently, the maximum compensation that may be awarded for most disputes lodged with FOS on or after 1 January 2015 is \$309,000 per claim (although lower limits apply for some other disputes; for example, claims against a general insurance broker have a limit of \$166,000 per claim and claims on an income stream life insurance policy such as an income protection policy are generally capped at \$8,300 per month).⁴⁸
- 4.44. Compensation caps have increased over time following public consultation processes, and since 2012 schemes have been required to adjust the limit every three years by a percentage linked to the percentage increase in the higher of the CPI and the Male Total Average Weekly Earnings over the preceding three years.⁴⁹ In addition, the Board of FOS will periodically review the limits in consultation with financial firms and other stakeholders including key consumer, community and industry organisations and change them as it considers appropriate.⁵⁰

Review of FOS's small business jurisdiction

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

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

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

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

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

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

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

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

Powers

- 4.45. FOS provides a wide range of remedies including the payment of a sum of money, compensation for financial or non-financial loss, forgiveness or variation of a debt, release of security for a debt, repayment, waiver or variation of a fee or other amount paid or owing to a financial firm and the variation of the terms of a credit contract in cases of financial hardship. FOS can also order interest to be paid on a payment to be made to a consumer and/or require the financial firm to contribute (generally up to a maximum of \$3,000) to the legal or travel costs incurred by a consumer in the course of the dispute.⁵¹
- 4.46. Once accepted by the applicant, determinations made by FOS are binding on the member. Since 1 January 2010, 35 financial firms have been unwilling or unable to comply with 143 FOS determinations made in favour of approximately 203 consumers. The value of these outstanding determinations was over \$17 million as at 30 October 2016⁵². A financial firm which refuses or neglects to comply with a binding decision may be expelled from FOS by the Board.⁵³ In practice, no member has been expelled for failing to pay a determination since 2010-11. This is because those members, who may otherwise have been expelled, have either become insolvent or have had open disputes brought by other customers.⁵⁴
- 4.47. The company constitution of FOS outlines other circumstances under which the Board has the sole discretion to expel a member from the scheme. These include such circumstances as: failing to comply with requirements of FOS or 'any other ASIC-approved dispute resolution scheme' (that is, currently, CIO); failing to comply with a binding decision of, or being expelled or excluded from, any other ASIC-approved dispute resolution scheme; ceasing to be licensed as a financial firm; or becoming insolvent.⁵⁵ ASIC is advised of any intention to expel a member and of the expulsion.

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

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

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

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

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

- 4.48. Although FOS does not have court-like powers to compel the production of documents, its Terms of Reference state that FOS may require a party to a dispute to provide information or do certain things and that the party must comply with the request within the required timeframe.⁵⁶ Where a party fails to comply with a request FOS may draw an adverse inference from the party's failure to comply. Failure by the financial firm may constitute a breach of its membership obligations under the FOS Constitution, resulting in a referral to the Board for consideration. Failure to comply by the applicant may result in FOS deciding not to continue to consider the dispute.⁵⁷
- 4.49. FOS's power to join other parties to a dispute is generally limited to the joining of another member.⁵⁸ FOS may allow or require another member to be joined as a party to a dispute if doing so would lead to a more efficient and effective resolution of the dispute.⁵⁹

Governance

- 4.50. In terms of governance arrangements, the scheme is operated by a public company limited by guarantee (Financial Ombudsman Service Limited) in accordance with its Company Constitution and the Terms of Reference and Board Charter which support the Constitution. It is governed by a Board of Directors and managed by a Chief Ombudsman.
- 4.51. The Board is comprised of four consumer directors, four industry directors and an independent Chair as required under ASIC's RG 139.⁶⁰ Board appointments, including that of the Chair, are made by the Board following consultation with relevant stakeholders.

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

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

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

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

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

- 4.52. The roles of the Board include: appointing decision makers,⁶¹ including the Chief Ombudsman and ensuring independent decision making; monitoring the performance of FOS; commissioning an independent review in accordance with RG 139; providing direction to the Chief Ombudsman on policy matters; setting the budget; and, from time to time, reviewing and consulting on changes to the Terms of Reference, including the jurisdictional limits. There are two committees to assist it in its role: the Finance and Risk Management Committee and the Nominations and Remuneration Committee.
- 4.53. The Board does not become involved in the detail of disputes lodged with FOS as that would prejudice the independence of the ombudsmen and other decision makers.
- 4.54. The role of management is to implement the strategic direction provided by the Board and to ensure that FOS provides its EDR services within the terms of its approval from ASIC.
- 4.55. FOS's most recent independent review was conducted in 2013 and made 33 recommendations.⁶² FOS accepted or accepted in principle 30 recommendations, indicated it would consult on one recommendation, indicated it did not consider one recommendation as a priority and did not accept one recommendation. The FOS Board reported publicly on the implementation of the independent review recommendations.

Funding arrangements

- 4.56. FOS is funded from charges on its members using a combination of annual charge and 'user pays' arrangements. FOS's funding model recognises the varied size and resources of members and charges members in accordance with their use of FOS services, with members involved in more disputes making a greater contribution. The model therefore rewards members who have low or no disputes, encouraging members to resolve disputes via IDR wherever possible. The funding model also attempts to ensure FOS revenue adequately meets expenses but does not generate excessive accumulated funds.⁶³
- 4.57. The FOS Board determines the funding arrangements and reviews them periodically.⁶⁴
- 4.58. The fees consist of a membership levy (based on the size and type of business, increased annually by CPI and paid by all members), a user charge (based on the number of disputes and paid proportionally by members who had two or more disputes closed in the preceding year beyond the 'registration & referral' stage) and dispute resolution fees (based on case complexity and resolution stage reached).

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

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

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

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

4.59. The table illustrates the proportion of FOS revenue derived from the different charges.⁶⁵

		2014-15		2015-16	
Total revenue (\$m)		46.55		46.87	
Revenue source	Membership levies	4.63	10.0%	5.06	10.8%
	User charge	2.00	4.3%	5.00	10.7%
	Dispute resolution fees	37.40	80.3%	34.47	73.5%
	Code Monitoring	1.51	3.2%	1.57	3.3%
	Interest income	0.56	1.2%	0.55	1.2%
	Member application fees	0.13	0.3%	0.10	0.2%
	Member conference	0.19	0.4%	-	
	Other income	0.12	0.3%	0.13	0.3%

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

4.60. The bulk of FOS's funding is derived from dispute resolution fees in accordance with the 'user pays' principle. This means that funding is potentially variable year on year as it is dependent on the overall number of disputes and the circumstances of members with disputes.

4.61. In 2015-16, disputes were lodged against 6 per cent of FOS's members (835 members) and, of these, 42 per cent had only one dispute lodged against them. Forty seven FOS members had more than 100 disputes lodged against them during the year.⁶⁶

4.62. The user charge pool is set by the Board and varies only by decision of the Board. It was increased from \$2 million to \$5 million from 1 July 2015. Contributions to this pool by individual financial firms can vary from year to year in accordance with the number of members caught by the requirements to pay. The vast majority of members do not pay a user charge.

4.63. One free decision (preliminary view or determination) per financial year is provided to financial firms which meet certain criteria.

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

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

Improving industry behaviour

- 4.64. FOS uses a number of mechanisms to improve user behaviour and practices in both IDR and EDR. FOS convenes regular liaison meetings with industry and consumer groups to discuss key issues and collaborate on improvements to firms' IDR processes and to FOS's service delivery. FOS also holds quarterly industry forums to discuss FOS decisions and approaches, and consumer liaison forums and roundtable events. Relevant stakeholders have access to: real time dispute data (through the secure services portal for members), monthly and quarterly benchmark reports (currently provided to the top 42 user members) and annual comparative reporting (detailing disputes statistics about FOS's members and published on FOS's website).⁶⁷
- 4.65. Systemic issues and instances of serious misconduct are referred to ASIC and the Office of the Australian Information Commissioner (OAIC)⁶⁸. In 2015-16, FOS identified 1,635 possible issues, of which 58 were assessed as definite systemic issues following additional information being sought from the member, resulting in requests to members to take action to remedy the problem. Of these 58 issues, 11 related to processing errors and eight related to errors in credit listings. Sixty four definite issues were resolved during the period.⁶⁹ Five instances of serious misconduct were identified and reported in 2015-16 (down from 14 in 2014-15)—four for failure to pay a determination and one relating to the conduct of an authorised representative.⁷⁰
- 4.66. Training and information on systemic issues are provided both to FOS staff and external stakeholders through outreach activities and through FOS's e-learning systemic issues module.⁷¹
- 4.67. FOS conducted comprehensive surveys of its stakeholders (its members, industry associations and consumer representatives) in 2013 and 2016. For 76 per cent of respondents, FOS is either meeting or exceeding expectations.⁷²

Ensuring accessibility

- 4.68. FOS maintains a website with a range of information for consumers, business and members, including material on the scheme itself, on how to lodge a dispute and on special assistance which is available. Visits to the FOS website have increased over time: in 2010-11, there were 441,016 website visits; in 2015-16 this increased to 600,046.⁷³

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

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

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

70 Ibid.

71 Ibid.

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

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

- 4.69. FOS also receives a large number of telephone enquiries. In 2015-16, FOS received 214,439 telephone enquiries, compared with 230,874 in 2010-11. Since 1 July 2015, FOS has operated a free call number.⁷⁴
- 4.70. FOS also operates a dedicated natural disaster hotline to provide help and information on financial hardship, insurance claims and other financial issues experienced as a result of extreme weather events.⁷⁵ It received 255 calls to this line 2015-16.⁷⁶
- 4.71. FOS undertakes proactive community outreach. This includes an outreach brochure available in 14 languages, a companion animation and an Auslan video. FOS ran a four-week SBS radio campaign in July-August 2016 in 13 languages other than English and attended 27 community outreach events in 2015-16.⁷⁷
- 4.72. FOS implemented a consumer engagement strategy in 2012-13 to improve outcomes for vulnerable and disadvantaged consumers. A core component of the strategy is the Consumer Liaison Group, comprised of financial counsellors and legal advocates, which works with FOS to identify opportunities to improve the effectiveness and accessibility of the scheme. FOS also sponsors events that contribute to the education of consumer representatives engaging in EDR.⁷⁸
- 4.73. In addition, when lodging disputes, applicants are given the opportunity to request the help of a translator or interpreter. If one is required, FOS arranges and pays for the service. In 2015-16, FOS indicated that 625 applicants (1.8 per cent of the total disputes received) requested a translator/interpreter, an increase of 6 per cent from 2014-15.⁷⁹
- 4.74. FOS also asks applicants whether they require any additional assistance at the time they lodge their dispute. Information on additional needs for 2010-11 and 2015-16, which is self-reported by applicants, is set out in the charts below. The data reflects a sharp increase (from 2 per cent to 39 per cent) of applicants self-reporting mental health needs.⁸⁰

74 Ibid.

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

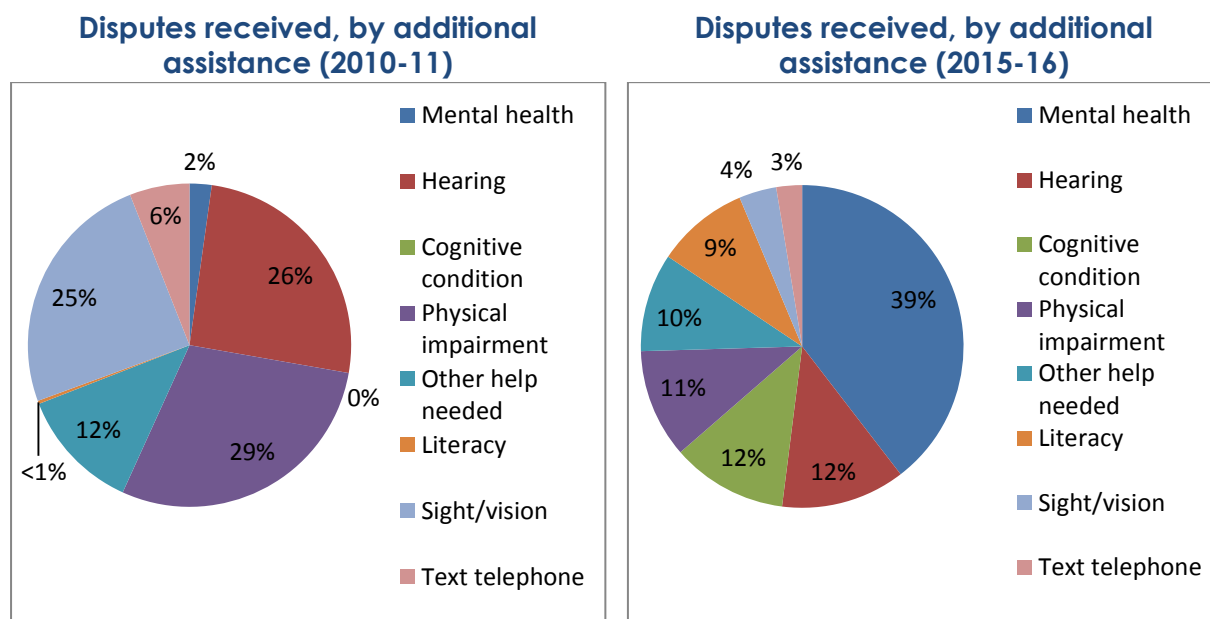
76 Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016.

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

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

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

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



4.75. Processes available to support vulnerable applicants include: a 1800 free call number; an online dispute form; priority call back within two days of lodgement for additional assistance from FOS, where requested; an electronic statement of financial position form; SMS communication; and a free translation service.⁸¹ If an applicant has advised FOS that they need additional assistance, this is flagged on the dispute and FOS will adapt its handling of the dispute to accommodate the applicant’s particular needs. This might include communicating more by phone, arranging translations of written material or using interpreters, extending response timeframes or working with an appropriate support agency to assist the applicant.

CREDIT AND INVESTMENTS OMBUDSMAN

Role

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

4.77. Credit Ombudsman Service Limited was originally incorporated as the Mortgage Industry Ombudsman Service Limited in 2003.⁸²

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

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

Member base

- 4.78. CIO members include lenders (residential and commercial mortgage providers, personal loan and credit card providers, small amount lenders and pawn brokers); mutual banks, credit unions and building societies; finance brokers; securitisers; credit reporting bodies; timeshare providers; financial planners; accountants; and credit reporting schemes.
- 4.79. In 2015-16, CIO had 22,973 members, up from 15,535 members in 2010-11.⁸³ In 2015-16, around 97 per cent of CIO's members were sole traders, partnerships or small businesses⁸⁴. Most of CIO's members are brokers.⁸⁵

Dispute data

Disputes received

- 4.80. In 2010-11, CIO received 1,983 disputes; in 2015-16 it received 4,760 disputes.⁸⁶ The number of disputes CIO receives has risen over the past five years, particularly after the introduction of national licensing obligations for credit providers and intermediaries.
- 4.81. The mix of the types of disputes received by CIO has varied considerably between 2010-11 and 2015-16. In 2010-11, the most common type of dispute was in relation to residential mortgages (56.2 per cent), followed by disputes relating to motor vehicle finance (13.2 per cent), personal loans (7.9 per cent) and credit or charge card (3.0 per cent). In 2015-16, the most common type of dispute was in relation to residential mortgages (17.8 per cent), followed by disputes relating to credit or charge cards (17.3 per cent), debt purchased or being collected (15.7 per cent)⁸⁷ and motor vehicle finance (12.5 per cent).⁸⁸
- 4.82. In 2015-16, the majority (78.6 per cent) of disputes were lodged by individuals. Almost 7 per cent of disputes were lodged by credit repair and debt negotiation businesses.⁸⁹
- 4.83. Complainants are able to lodge disputes with CIO in a number of ways, as shown below.⁹⁰

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

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

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

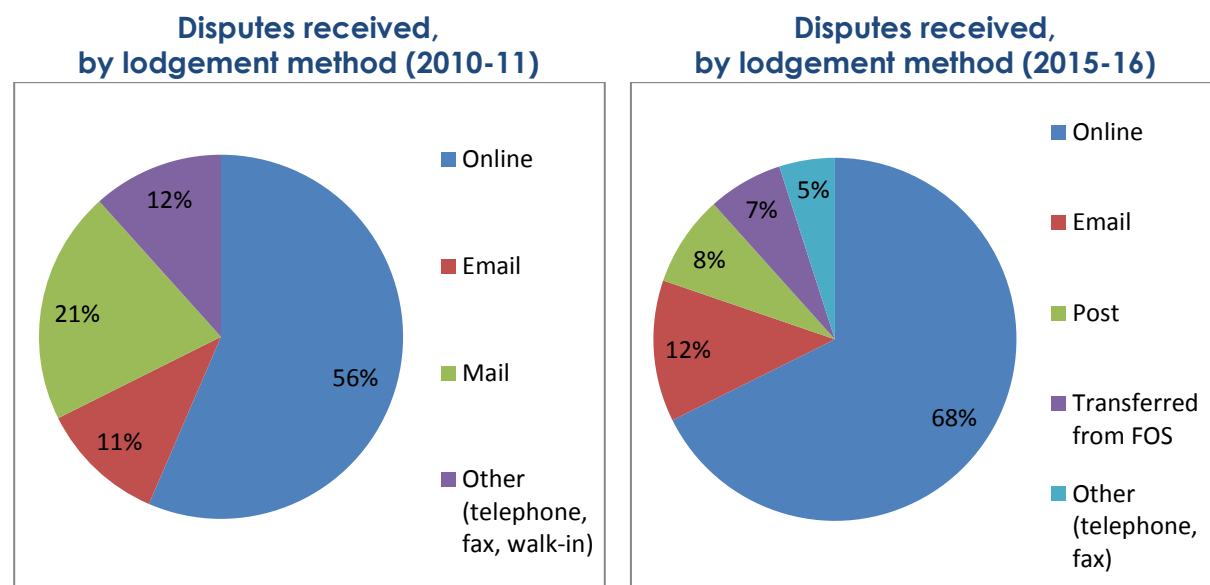
86 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 7 October 2016.

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

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

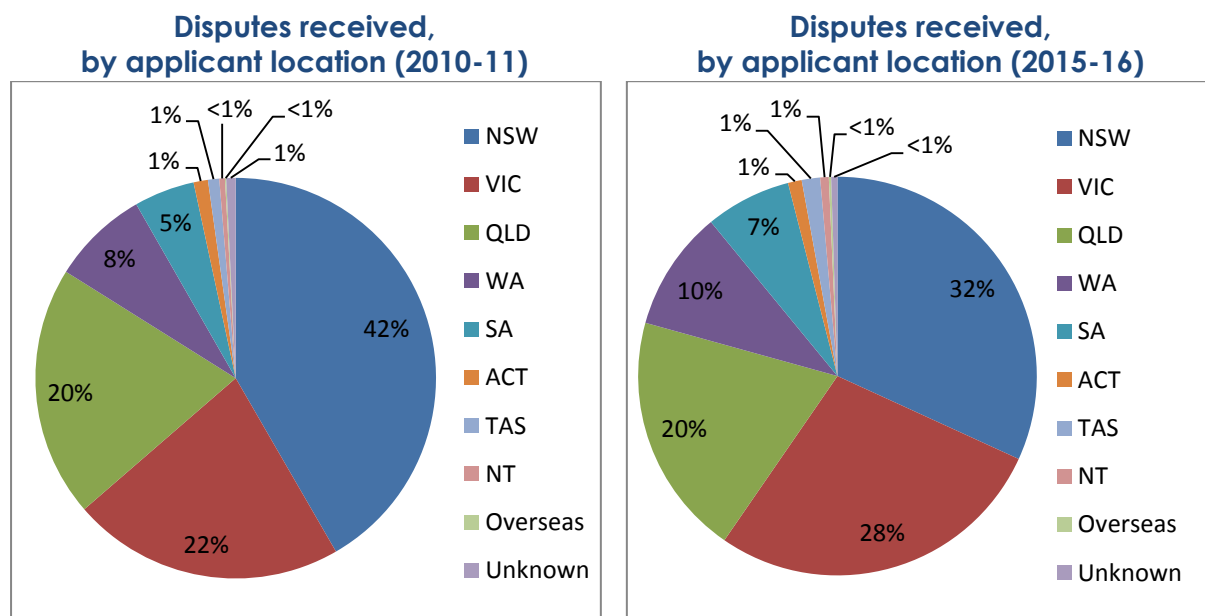
89 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 7 October 2016. These businesses are referred to as 'debt management firms' in Chapter 5 of this Interim Report.

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



4.84. Between 2010-11 and 2015-16, there has been an increase in complaints lodged online (from 56 per cent to 68 per cent). Since 2015-16, CIO has separately identified complaints received by way of transfer from FOS – previously, these were recorded under the channel that FOS provided the complaint to CIO (typically email).⁹¹ COSL’s Annual Report on Operations 2010-11 (as CIO was then known) indicates that 10.7 per cent of complaints were referred to COSL by FOS.⁹²

4.85. The geographic distribution of complainants in 2010-11 and 2015-16 is shown below.⁹³



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

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

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

Resolution of disputes

- 4.86. In 2015-16, CIO closed 23 per cent of disputes received within 30 days, 47 per cent within 60 days, 63 per cent within 90 days and 83 per cent within 180 days.⁹⁴ In 2010-11, CIO closed 29 per cent of disputes within 30 days, 48 per cent within 60 days, 62 per cent within 90 days and 80 per cent within 180 days.⁹⁵ The average number of days to close disputes decreased from 128 days in 2010-11 to 107 days in 2015-16.⁹⁶
- 4.87. CIO measures the time taken to resolve a complaint from the date it first receives the complaint (including the period during which a complaint is addressed 'internally' by a financial firm if referred back for internal dispute resolution), and not from the date the complaint is assigned to a case manager. CIO allocates every complaint it receives to a case manager within 48 hours of receipt.
- 4.88. In 2015-16, CIO had 59.4 FTE employees, compared with 34 FTE employees in 2010-11.⁹⁷ CIO does not have any temporary staff. All staff either have a fixed-term or permanent employment agreement.⁹⁸ All but six of CIO's case management team are legally qualified with, on average, 5.6 years post-qualification work experience. Those case managers that are not legally qualified have industry experience in financial services. Staff turnover was 22 per cent in 2010-11 and 36 per cent in 2015-16.⁹⁹

Approach to dispute resolution

- 4.89. Typical for industry ombudsman schemes, CIO has a high degree of discretion to choose the appropriate dispute resolution process for complaints. CIO resolves around half of its complaints through negotiation, conciliation or direct discussions between the member and the consumer. Other approaches include expediting simple and low value complaints and using tailored processes in cases of financial hardship.¹⁰⁰
- 4.90. The Deputy Ombudsman oversees case management and there are nine teams within case management. Case management is divided into the following areas: Privacy and debt collection; Hardship; General Credit; Financial planning and Investments; and Systemic Issues Investigations.¹⁰¹

94 Credit & Investments Ombudsman, *Annual Report on Operations 2015-16*, page 60.

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

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

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

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

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

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

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

- 4.91. CIO's dispute resolution process comprises four stages:¹⁰² 'validation' (this phase includes registration and acknowledgement, and the firm is required to provide a copy of its IDR response within seven days);¹⁰³ 'initial review', if a complaint is not resolved at this point it is moved to 'investigation' and, then finally, 'determination'.
- 4.92. The investigation stage is CIO's final round of information gathering. At any stage of the process, the parties may reach an agreement to resolve the complaint, or CIO may issue a review if the information indicates that it is not one that they can continue to deal with. Otherwise, CIO will issue a recommendation at the end of the investigation stage as to how a complaint should be resolved. If the parties do not accept a review or recommendation, the ombudsman will issue a determination which is the final decision on the complaint. If the complainant accepts the determination, the financial firm is bound by it. If the complainant does not accept the determination, the complaint is closed and the complainant may take any other action available against the financial firm, including action through the court system.
- 4.93. In 2015-16, 69.0 per cent of disputes were resolved at the validation stage, 25.3 per cent were resolved at the stage of initial review, 5.5 per cent were resolved at the investigation stage and a negligible percentage (0.2 per cent) were resolved by way of determination.¹⁰⁴ CIO advised that, in 2015-16, 60.8 per cent of complaints were resolved through conciliation.¹⁰⁵

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

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

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

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

- 4.94. CIO uses a tailored process for complaints involving financial hardship.¹⁰⁶ On registering a complaint, the financial firm is notified and reminded not to commence or continue with enforcement action. CIO may negotiate an outcome acceptable to both parties or facilitate a conciliation conference. Alternatively, CIO may make a formal recommendation to the firm that they enter into a particular payment arrangement with the complainant or provide some other type of hardship assistance. If the parties agree on an outcome, CIO reviews it to ensure it is fair and the terms are clear. If the parties cannot agree, and, on the information available, a payment arrangement or other hardship relief is appropriate, the ombudsman may make an order or determination.¹⁰⁷ If a payment arrangement or other hardship relief is not appropriate, CIO is generally not able to assist a complainant further and will provide reasons. The complainant has an opportunity to respond to the decision.¹⁰⁸
- 4.95. In determining a matter, including the extent of loss or damage suffered by a complainant, CIO has regard to the relevant legal requirements and rights provided by law to the complainant; applicable codes of practice; good industry practice in the financial services industry; and fairness in all the circumstances.¹⁰⁹
- 4.96. There is a limited internal appeal process. Under CIO rule 39.4, a party may seek an appeal within 28 days of the determination or award under the following circumstances: clerical mistake; material error, oversight or omission; material miscalculation of figures; material mistake in the description of any person, thing or matter; defect in form; or where the determination/award does not reflect the ombudsman's actual intentions. Under rule 39.4, the ombudsman may: re-open the complaint; make whatever amendments to the determination or award he or she thinks is appropriate; re-issue the determination or award; or give such directions as he or she thinks appropriate in connection with the determination or award. CIO has advised that no applications have been received to date under rule 39.4.¹¹⁰

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

107 Generally, if the parties do accept a recommendation as to how a complaint should be resolved, the ombudsman would issue a determination which is the final decision on a complaint. Under rule 9.10 of the CIO Rules, the ombudsman can make an order requiring the financial firm to do or to refrain from doing some act in relation to the subject matter of the complaint. For financial hardship complaints, the ombudsman generally issues an 'order' rather than a determination. An order is generally in a shorter form than a determination, and is more appropriate for the simpler decisions required for financial hardship complaints.

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

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

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

- 4.97. Judicial review can be sought on narrow grounds as follows: in instances of proven dishonesty or bias; where CIO acts outside its jurisdiction; in instances of ‘*Wednesbury* unreasonableness’¹¹¹; or where CIO breaches its Constitution, Rules or Terms of Reference. CIO has never been the subject of judicial review.¹¹²
- 4.98. There is also a test case mechanism for financial firms, which requires the firm, to CIO’s reasonable satisfaction, to show that: the dispute involves or may involve an issue that could have important consequences for the firm’s business or the financial services industry generally, or the dispute raises an important or novel point of law.¹¹³ To date, no dispute has gone through this process.¹¹⁴

Jurisdiction

- 4.99. CIO’s jurisdiction is set under its rules and complies with the minimum jurisdiction requirements for approved EDR schemes as set out in ASIC’s RG 139. CIO’s definition of ‘financial services’ also includes ‘financial services’ as defined by the *ASIC Act 2001*¹¹⁵, along with budget monitoring and management and debt collection and management¹¹⁶. This means that CIO can deal with a range of disputes about financial products and services including disputes relating to credit products and services, finance broking, debt collection or debt purchasing arrangements, financial planning and credit reporting.
- 4.100. CIO can consider a complaint about a financial firm if the complainant is a consumer and the complaint arises from or relates to a financial service.¹¹⁷ A complaint generally needs to be made within six years from when the complainant first becomes aware (or should have become aware) that they suffered a loss.¹¹⁸ Time limits apply unless CIO considers that exceptional circumstances apply or the financial firm and CIO agree to CIO having jurisdiction to consider the complaint.¹¹⁹

111 The term ‘*Wednesbury* unreasonableness’ is used to describe a decision considered to be so unreasonable, no reasonable authority could have made it.

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

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

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

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

116 In relation to budget monitoring and management, and debt collection and management, the financial firm must be a member of CIO to come within CIO jurisdiction. EDR membership requirements for debt management firms are discussed in Chapter 5 of the Interim Report.

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

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

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

- 4.101. CIO Rules set out when CIO will deal with a complaint, for example, if a financial firm breached relevant laws in relation to a financial service, breached an applicable code of practice, did not meet industry standards of good practice or acted unfairly towards the complainant.¹²⁰
- 4.102. CIO operates under a monetary limit: the maximum value per claim under a dispute that can be considered is \$500,000.¹²¹
- 4.103. There are also maximum compensation caps in operation. From January 2015, the CIO award limit is \$309,000 per claim.¹²² Similar to FOS, CIO takes the view that a single dispute can contain more than one claim, with each claim being separately subject to the compensation cap.¹²³
- 4.104. Compensation caps have increased over time after public consultation processes, and since 2012, CIO has been required to adjust its compensation caps every three years, in accordance with ASIC's RG 139. In addition, CIO's Board may increase the amount of the monetary compensation limit from time to time.¹²⁴
- 4.105. CIO applies a range of exclusions to its jurisdiction.¹²⁵ In 2015-16, 10.6 per cent of disputes received were determined to fall outside the CIO's jurisdiction and 6.6 per cent of the disputes excluded were excluded on the basis CIO considered the dispute would be more appropriately dealt with in another forum (such as a court, tribunal or other dispute resolution scheme). An example of where this occurs is where the CIO member is a debt purchaser that has purchased utilities and telecommunications debts. If the complaint is about the quality of the service provided by the utility or telecommunications provider, CIO considers the complaint will more appropriately be dealt with by the relevant energy and water ombudsman or the Telecommunications Industry Ombudsman.¹²⁶ Other reasons why a dispute was excluded in 2015-16 were: the complaint did not relate to a CIO member (1.9 per cent); the complaint did not concern a financial service (0.7 per cent); the complaint was previously dealt with by CIO (0.3 per cent); and the complaint was brought outside the relevant time limits (0.3 per cent).¹²⁷

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

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

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

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

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

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

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

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

Powers

- 4.106. CIO provides a wide range of remedies including compensation for financial or non-financial loss,¹²⁸ forgiveness or variation of a debt, or release of a security for a debt. CIO can also order interest to be paid on a payment.¹²⁹
- 4.107. CIO also has powers to join other parties that are members of CIO to a complaint if it believes it would not unfairly prejudice the complainant or financial firm; and it would lead to a more efficient and effective resolution of a complaint.¹³⁰ The complainant and financial firm must also provide CIO with such information and documents that the scheme considers may be necessary to deal with a complaint.¹³¹
- 4.108. CIO recently amended its rules to enable it to expel a financial firm who fails to implement CIO's recommendations for the resolution of a systemic issue.¹³² CIO may also suspend a financial firm's membership for a specified period or expel a firm for failing to comply with a scheme requirement and/or notify ASIC that a firm has failed to comply with a scheme requirement.¹³³ Since 2011-12, CIO has expelled seven members for refusing to comply with the CIO Constitution and Rules and, in all but one case, failure to pay fees owing to CIO.¹³⁴
- 4.109. While CIO determinations are binding on members, since 1 December 2014, four financial firms have been unwilling or unable to comply with five CIO determinations made in favour of seven complainants. The value of these outstanding determinations was approximately \$414,443 (including interest) as at 1 November 2016.¹³⁵

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

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

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

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

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

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

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

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

Governance

- 4.110. CIO is a not-for-profit company governed by a Board of directors comprised of an independent chair and two consumer and two industry directors, consistent with requirements under RG 139.¹³⁶ Article 22.3 of CIO's Constitution outlines the process for appointing directors and the Chair. The appointments are made after consulting relevant industry and consumer organisations.
- 4.111. The roles of the Board include: appointing the Ombudsman¹³⁷ and ensuring independent decision making; monitoring the performance of the scheme; setting the budget; and reviewing and ensuring effective consultation about changes to the scheme's jurisdiction, including monetary limits.¹³⁸
- 4.112. The Board does not become involved in the detail of cases which come before the scheme as that would undermine decision makers' independence. Each department within CIO provides the CEO with a quarterly report on its performance and the CEO presents the information to the Board.
- 4.113. CIO advised that the last independent CIO review was published in 2012 and made 47 recommendations, of which CIO accepted 43 and rejected 4.¹³⁹ The CIO Board did not accept recommendations about publicising non-compliance by members or those relating to taking legal action to enforce its determinations.

Funding arrangements

- 4.114. CIO is funded from charges on its members. The Board periodically determines funding arrangements but is not required under its constitution to consult with members.
- 4.115. CIO members pay a one-off application fee; an annual membership fee; complaints fees (but only if CIO receives a complaint about the member); and a systemic issues and serious misconduct fee (but only if CIO investigates a systemic issue or instance of serious misconduct about the member).¹⁴⁰

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

137 Ibid, article 23.1. Article 23.6 gives the Board power to engage and dismiss staff.

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

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

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

4.116. The table illustrates the proportion of CIO revenue derived from the different charges.¹⁴¹

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

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

4.117. Around 70 per cent of CIO’s funding comes from membership fees. Membership fees vary according to the financial firm’s business activity and the size of the business (for example, membership fees for brokers are calculated based on the number of authorised representatives). For larger members, the membership fee is based on the historical number of complaints. This provides CIO with certainty of funding and resourcing over the year. Members understand that reduced complaint levels will, all other things being equal, reduce membership fees in the following year. CIO has advised that this provides an ongoing incentive for these members to reduce the number of complaints that go to CIO.¹⁴²

4.118. In 2015-16 CIO received complaints against 2.2 percent of members (514 members). Seven financial firms received more than 100 complaints against them.¹⁴³

4.119. In addition, CIO charges complaint fees for each complaint received. Under the tiered fee structure, higher complaint fees apply to complaints that progress to the later stages of the dispute resolution process. The tiered fee structure incentivises financial firms to settle meritorious complaints in the early stages of the process.¹⁴⁴

4.120. A different fee structure applies to financial hardship and non-financial hardship complaints, reflecting that there is a separate case management team that deals with financial hardship using a different process.¹⁴⁵

4.121. All licensee members of CIO are entitled to one free complaint each membership year. This mechanism is intended to mitigate the cost of EDR membership for smaller members in particular.¹⁴⁶

141 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 November 2016.
 142 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 November 2016.
 143 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 November 2016.
 144 Additional fees also apply to complaints that are dealt with under CIO’s expedited process (for claims of less than \$3,000, or about a credit listing or enquiry), or if the ombudsman makes an order or award requiring a firm to do or to refrain from doing something or if CIO investigates a systemic issue or serious misconduct about the firm.
 145 Credit and Investments Ombudsman 2016, data supplied to EDR Review, 11 November 2016.

Improving industry behaviour

- 4.122. CIO has a dedicated team for the management and investigation of systemic issues. The team prepares quarterly reports, on a de-identified basis, on its investigations for the Board, ASIC and the OAIC.¹⁴⁷ This acts as a deterrent and encourages good behaviour.
- 4.123. CIO has the power to expel a financial firm who fails to implement CIO's recommendation for the resolution of a systemic issue. In 2015-16, there were 38 systemic issues reported, of which 34 were resolved (most commonly by the financial firm amending its internal policies/practices). The most common systemic issue was in relation to responsible lending (13 systemic issues in 2015-16).¹⁴⁸
- 4.124. Systemic issues are subject to a different fee structure, the fees are designed to recover CIO's costs in dealing with such matters. Different fees apply based on the complexity of the issue.¹⁴⁹ Complex systemic issues incur the largest fees.
- 4.125. As an ASIC and OAIC approved EDR scheme, CIO has ongoing reporting obligations to both regulators. CIO is required to report systemic issues and/or serious misconduct by a scheme member to ASIC. CIO must also provide quarterly information about complaints and attend regular meetings with ASIC.¹⁵⁰
- 4.126. In 2015-16, CIO reported six serious misconduct matters, relating to misrepresentation (one matter), poor complaints handling process (two matters), unconscionable conduct (two matters), and undue harassment (one matter). In four of these matters, the financial firm's membership with CIO was cancelled. However, in relation to two matters, the financial firm cooperated with CIO's investigation and agreed to change its practices.¹⁵¹
- 4.127. Upon invitation, CIO presented at professional development days of its members to discuss their approach to managing complaints. CIO also conducts presentations at industry conferences such as the Annual Credit Law Conference. CIO also holds an annual conference for its members and regular meetings with members who have large complaint volumes.¹⁵²

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

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

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

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

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

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

152 Ibid.

Ensuring accessibility

- 4.128. CIO maintains a website with a range of information for consumers and members. The website includes information about the scheme, including how to lodge a dispute and search function to check whether a financial firm is a member of CIO. CIO's Constitution, Rules and fee arrangements are also available on its website. Visits to CIO's website have increased significantly over time: from 87,113 website visits in 2010-11 to 140,461 visits in 2015-16.¹⁵³
- 4.129. CIO also receives a large number of telephone enquiries. In 2015-16, CIO received 26,217 telephone enquiries, compared with 13,610 enquiries in 2010-11. CIO operates a free call number.¹⁵⁴
- 4.130. CIO introduced a Consumer Engagement Strategy (CES) in 2014-15 and as a result, put more resources into a consumer outreach program. The CES focuses on raising awareness about CIO and the service it offers amongst disadvantaged demographic groups such as Indigenous consumers, low income earners and seniors. A key part of the strategy is working with community legal centres and financial counsellors to increase the reach of CIO to its clients and networks.¹⁵⁵
- 4.131. CIO has also undertaken various initiatives to improve accessibility such as redesigning and rewording brochures to make them more consumer friendly. The CIO complaint form and basic information about the organisation is available in 22 different languages on the website.¹⁵⁶ As part of its strategy to increase awareness amongst Indigenous communities, CIO has joined Good Service Mob (NSW), a group of agencies that provide free services to ensure consumer rights awareness among Indigenous groups.¹⁵⁷
- 4.132. CIO records indicate that in 2015-16, 0.8 per cent of applicants required a translator (compared with 0.25 per cent in 2010-11) and 0.8 per cent had other needs (this includes applicants who have physical, hearing, visual or speech impairments). As data on other needs was only recorded from 2011-12, data for 2010-11 is not available.¹⁵⁸

SUPERANNUATION COMPLAINTS TRIBUNAL

Role

- 4.133. SCT is an independent statutory administrative tribunal that provides consumers with a free service for resolving complaints relating to products or services provided by superannuation funds or trustees. Jurisdiction of SCT is determined by statute. Membership of SCT is not required.

153 Ibid.

154 Ibid.

155 Ibid.

156 Ibid.

157 Ibid.

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

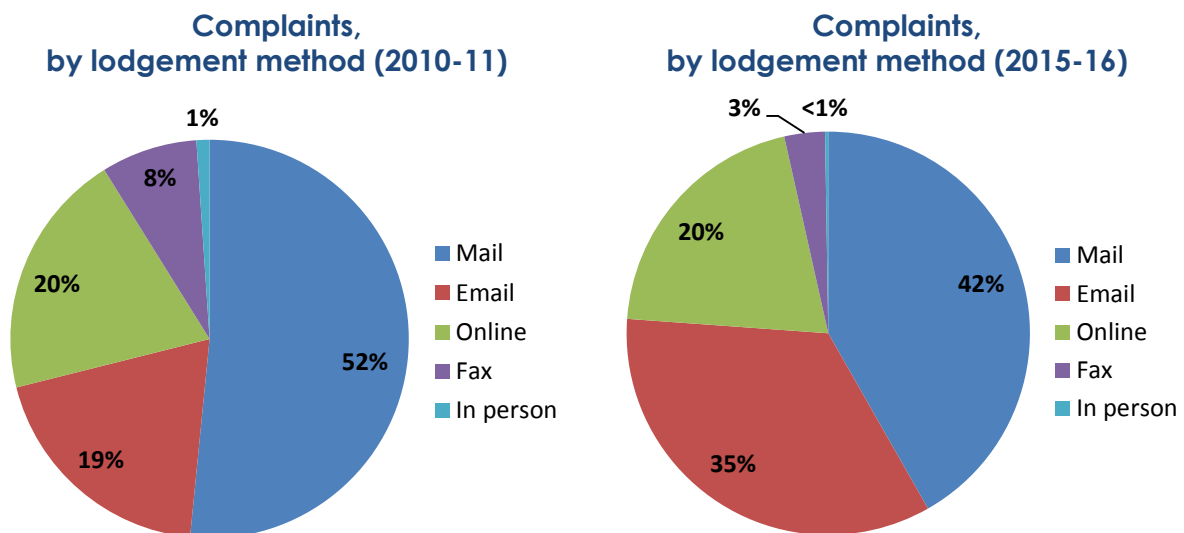
4.134. The Superannuation (Resolution of Complaints) Act 1993 (SRC Act) requires SCT to pursue the objectives of providing dispute mechanisms that are ‘fair, economical, informal and quick’.¹⁵⁹

Dispute data

Disputes received

4.135. The number of disputes received by SCT has increased from 1,907 disputes in 2004-05, to 2,688 disputes in 2014-15 (a 41 per cent increase over the period).¹⁶⁰ SCT received 2,368 complaints in 2015-16, but it should be noted 326 matters that would formerly have been classified as disputes were classified as inquiries.¹⁶¹

4.136. Complainants lodged disputes in a number of ways, as shown in the charts below. The most common way to lodge disputes in 2015-16 was electronically (35 per cent by email and 20 per cent online), and almost double the number of disputes were lodged by email in 2015-16 compared with 2010-11.¹⁶²



4.137. The geographic distribution of complainants is shown below for 2010-11 and 2015-16.¹⁶³

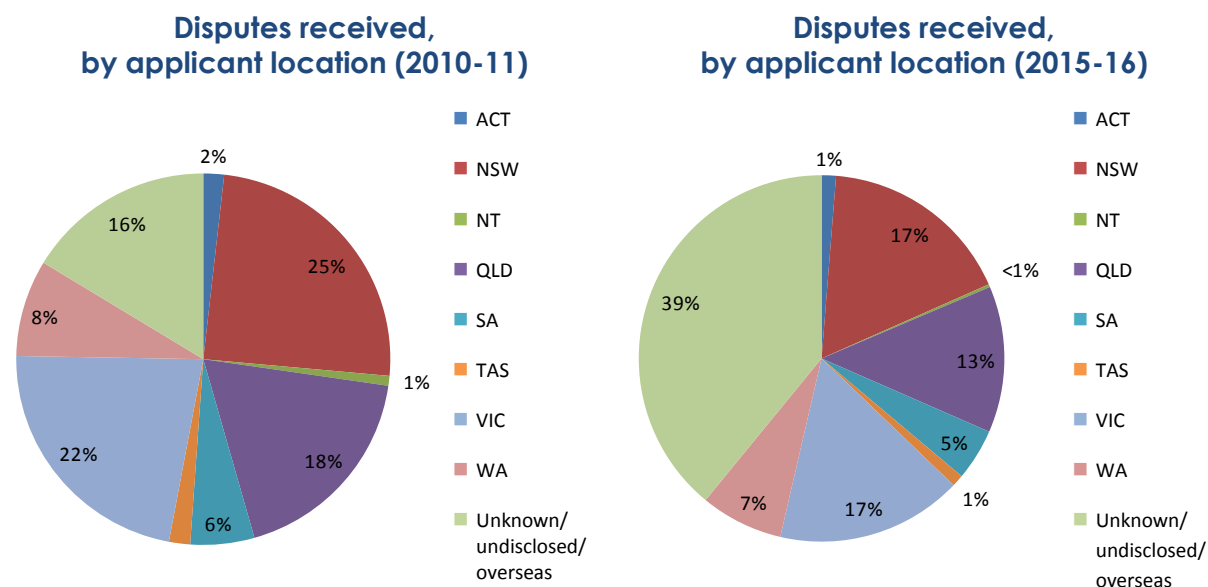
159 Section 11 of SRC Act.

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

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

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

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



Resolution of disputes

4.138. In 2015-16, SCT resolved 1,366 disputes, 111 disputes were withdrawn without resolution and 886 disputes were outside jurisdiction.¹⁶⁴ In 2010-11, SCT resolved 1,376 disputes, 79 disputes were withdrawn without resolution and 1,007 disputes were outside jurisdiction.¹⁶⁵

4.139. SCT forecasts a rise in complaints in the future due to demographic pressures, increasing financial literacy and Australians' growing engagement with their superannuation.¹⁶⁶

4.140. Delays and dispute resolution backlogs have long been an issue for SCT. SCT has indicated that if a dispute is not withdrawn or resolved with the superannuation provider before review, it will take at least 12 months to get to review, at which time SCT will make a formal decision in relation to the complaint.¹⁶⁷ SCT is taking action to reduce this waiting period.

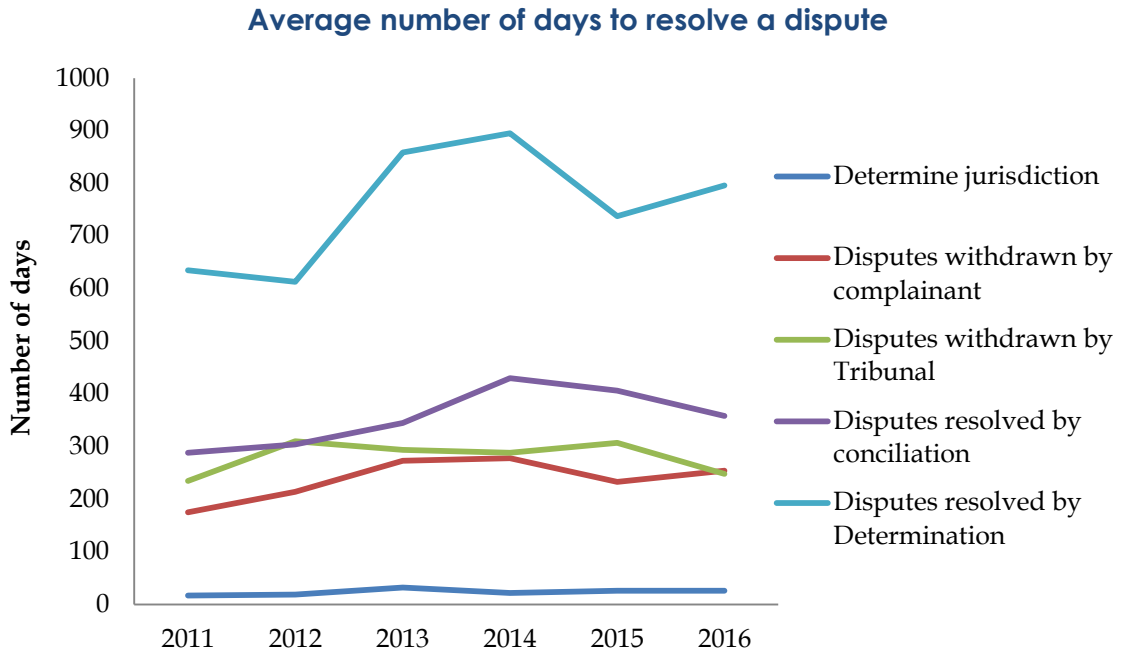
164 Superannuation Complaints Tribunal 2015, *2014-15 Annual Report*, page 19.

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

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

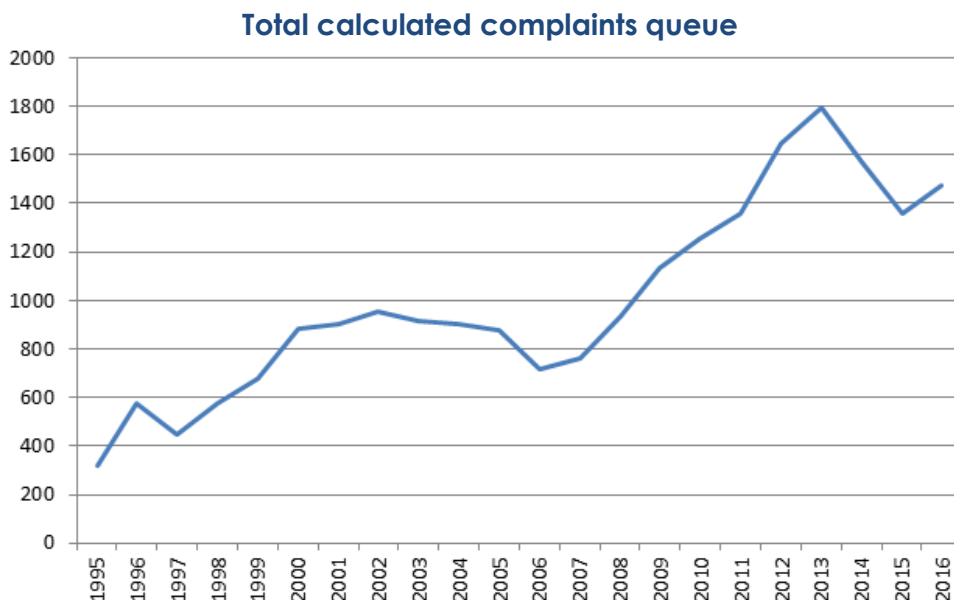
167 Superannuation Complaints Tribunal website, accessed 27 November 2016, <<http://www.sct.gov.au/faqs/frequently-asked-questions>>.

4.141. The chart below shows the average number of days taken to resolve a complaint at SCT:¹⁶⁸



4.142. In 2010, the average time in days to resolve a dispute from lodgement to determination was 635 days. In 2015-16, this number had increased to 796 days. The time taken by SCT to make decisions regarding whether a dispute was outside its jurisdiction also increased from 17 days in 2010-11 to 26 days in 2015-16.¹⁶⁹

4.143. The chart below outlines the number of open complaints by year at SCT.¹⁷⁰



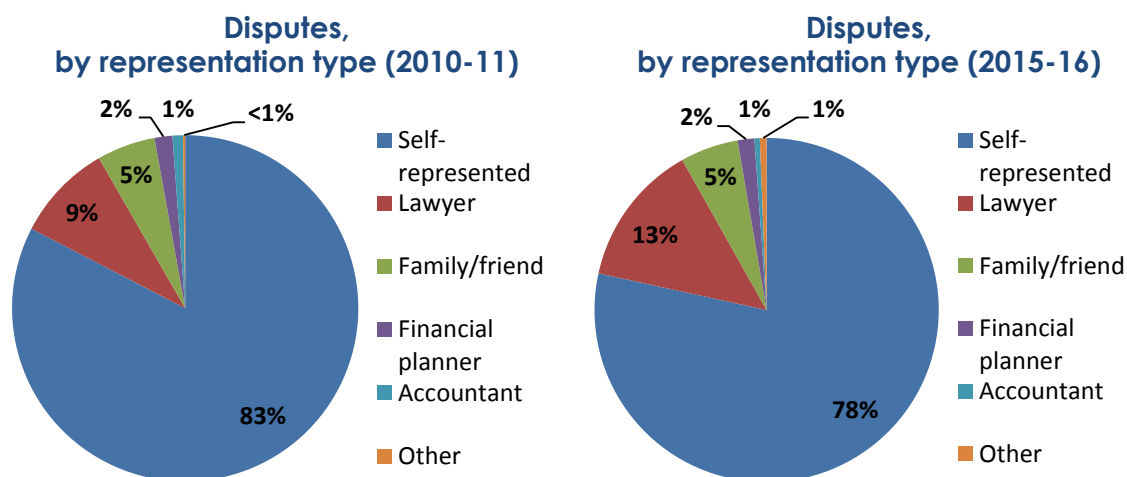
168 Superannuation Complaints Tribunal, data supplied to EDR Review, 7 October 2016.

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

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

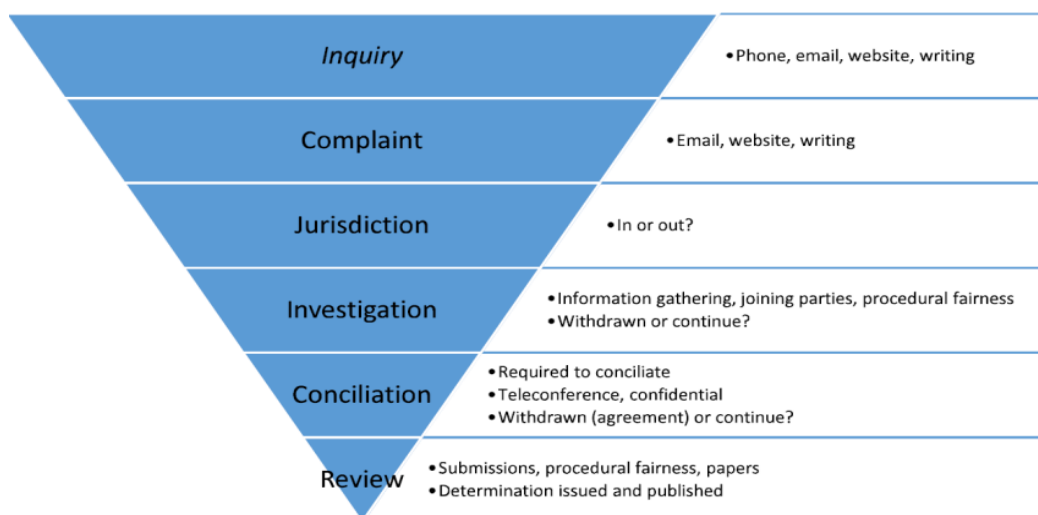
4.144. Generally, complaints are lodged by the individual making the complaint. A complainant can request to be represented at any stage of SCT process, however the request must be approved by SCT.

4.145. There is a presumption against representation contained in the SRC Act, except where the complainant has a disability or where SCT considers it 'necessary in all the circumstances',¹⁷¹ consistent with SCT's objectives of providing complaint resolution that is 'fair, economical, informal and quick'.¹⁷² The charts break down complaints by type of representation (including self-representation) for 2010-11 and 2015-16 and show an increase in complaints involving legal representation.¹⁷³



Approach to dispute resolution

4.146. The figure below provides an overview of SCT's dispute resolution process:¹⁷⁴



171 Section 23 of SRC Act.

172 Section 11 of SRC Act.

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

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

- 4.147. Resolution of a complaint can occur at any stage of the process. In 2015-16, of the complaints that were within SCT's jurisdiction, 87 per cent were resolved during investigation or conciliation and 13 per cent by determination.
- 4.148. Reviews are held on the papers. The Chairperson constitutes the Tribunal by selecting one to three Tribunal members for the purpose of dealing with a particular complaint. SCT currently has 13 part-time members and constitution of the Tribunal is not a delegable function.
- 4.149. Once the complaint is scheduled for review, a document exchange occurs between the parties and each party is provided with an opportunity to make written submissions. The submissions are exchanged and parties are provided with a further opportunity to respond prior to the set hearing date to ensure procedural fairness. The submissions are reviewed by the Complaints Analyst to ensure no new issues are being raised prior to the matter being heard by the constituted Tribunal.
- 4.150. SCT publishes anonymised versions of its determinations on SCT's website as well as on the Australasian Legal Information Institute website (www.austlii.edu.au). Determinations are not published by SCT where they are subject to appeal or where SCT cannot guarantee the anonymity of the parties.

Jurisdiction

- 4.151. As a statutory tribunal, SCT's jurisdiction, powers and time limits are set out in the SRC Act. In contrast to the industry ombudsman schemes, SCT draws its jurisdiction from the identity of the decision maker, with the SRC Act relying upon the concept of a 'decision' by the trustee of a regulated superannuation fund. Accordingly, SCT can deal with complaints relating to the decisions and conduct of trustees, insurers, retirement savings account (RSA) providers, superannuation providers in relation to regulated funds (excluding SMSFs¹⁷⁵), approved deposit funds, life policy funds and annuity policies.
- 4.152. Jurisdictional and standing provisions are set out in the SRC Act. Superannuation providers become subject to the jurisdiction of SCT when they become regulated under the *Superannuation Industry (Supervision) Act 1993* (SIS Act). SCT can deal with a diverse range of superannuation-related complaints, excluding complaints in relation to SMSF's. If superannuation providers offer products or services that fall outside the SCT's jurisdiction they must also belong to an ASIC-approved EDR scheme.¹⁷⁶

175 SMSFs are specifically excluded in the legislation governing SCT. In general, since non-APRA regulated funds do not pay levies to APRA, they are not privy to the benefits that are provided by such regulation, including fraud protection and access to SCT. The trustees of an SMSF are also the members of the fund except in limited situations (e.g. children of adult SMSF members).

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

4.153. Broadly speaking, complaints lodged with SCT generally fall into one of the following categories:

- death benefits claims (635 complaints (26.8 per cent) in 2015-16);
- total or permanent disability claims (519 complaints (21.9 per cent) in 2015-16); and
- fund administration claims (1214 complaints (51.3 per cent) in 2015-16).¹⁷⁷

4.154. SCT has no monetary limit for complaints, including in relation to disputes relating to life insurance. No time limits apply except in certain circumstances defined in the SRC Act such as death benefit distribution claims (generally 28 days) and total permanent disability claims (generally four years).¹⁷⁸

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

4.156. The table below provides a breakdown of complaints received by SCT that fall outside of its jurisdiction.¹⁷⁹

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

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

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

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

- 4.157. SCT can only accept disputes where the consumer has made all reasonable efforts to have the dispute resolved by the superannuation provider through internal dispute resolution (IDR).¹⁸⁰ Section 101 of the SIS Act requires superannuation providers to establish arrangements for dealing with enquiries and complaints. In the 2015-16 financial year, around 23 per cent of disputes were referred back to IDR because the consumer had not been through IDR before lodging the complaint with SCT.
- 4.158. Under Section 22A of the SRC Act, SCT also has the power to refer a dispute to another complaint handling scheme so long as it is satisfied that the scheme has the necessary powers to deal with the dispute. In such circumstances, SCT must obtain the complainant's consent to refer the dispute before doing so. Over the past five years only four disputes have been referred to another complaint handling body (FOS), with an average of one dispute per year.¹⁸¹ In 2015-16, SCT also suggested to 15 consumers that they contact FOS to resolve their dispute and SCT received 119 referrals from FOS.¹⁸²

Powers

- 4.159. SCT's statutory powers are outlined in the SRC Act. Broadly, SCT 'stands in the shoes' of the trustee and can exercise all the powers and discretions available to the trustee under its deed, superannuation and other relevant legislation, and trust law.
- 4.160. In making a determination, SCT must consider whether the trustee's decision was 'fair and reasonable' in the circumstances. If SCT determines that a decision was 'fair and reasonable', it must affirm the decision. If SCT determines that a decision was not 'fair and reasonable', it may only exercise its powers to place the complainant, as nearly as practicably, back into the position they would have been before the decision was taken. SCT cannot award costs or damages or provide a remedy where there has been no adverse practical outcome or financial loss.¹⁸³
- 4.161. SCT is unable to provide a remedy for complaints about the design of a fund.¹⁸⁴ 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.¹⁸⁵
- 4.162. SCT has the power to join parties to a dispute, which is important for the resolution of many superannuation complaints:
- As trustees provide insured benefits through group life policies held with an insurer, SCT is able to join insurers as a party to the dispute, effectively allowing for the decisions of both the trustee and insurer to be considered as a single dispute. SCT is able to join multiple insurers to a dispute where there is disagreement as to which is the relevant insurer in relation to the complainant's dispute.

180 SRC Act, section 19.

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

182 Ibid, 14.

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

184 SRC Act, subsection 14(6).

185 SRC Act, subsection 37(5).

- Death benefit disputes have the potential to impact on numerous parties (other potential beneficiaries) and again, SCT has the capacity to join the potential beneficiaries to the complaint, where they have applied to be joined.
- 4.163. Pursuant to the operating standards under regulation 13.17B, trustees are legally required to comply with SCT determinations and may face enforcement action by APRA in the event of non-compliance.¹⁸⁶
- 4.164. There is no provision for SCT to hear 'test cases'. However, SCT Chairperson's guidelines and procedural rules allow for the establishment of a multi-person panel in circumstances where SCT, or a party to the dispute, notifies SCT that there is an issue or principle to be determined. Disputes can only be commenced by members/former members and beneficiaries; they cannot be initiated by financial firms. SCT determinations do not set a binding precedent.
- 4.165. Appeals against a SCT determination can be made to the Federal Court on questions of law only.¹⁸⁷
- 4.166. Appeals against other decisions, such as the rejection of a complaint, can be made to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1997* and the *Judiciary Act 1903*. Issues that can be considered on appeal include the review of decisions (and failure to make a decision), the conduct of SCT and includes SCT decisions relating to jurisdiction or rejection of complaints. Under subsection 46(5) of SRC Act, the Federal Court cannot make adverse cost orders against consumers that do not defend an appeal 'instituted by another party to the complaint'.¹⁸⁸
- 4.167. Over the last decade, there have been 88 appeals to the Federal Court, 69 of which were appeals of SCT determinations.¹⁸⁹ Over the past five years, 89 per cent of appeals to the Federal Court were initiated by consumers (including beneficiaries), as opposed to financial firms.¹⁹⁰

Governance

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

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

187 SRC Act, section 46.

188 SRC Act, subsection 46(5).

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

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

- 4.170. Sections 6 and 7 of the SRC Act limit the powers and delegations of the Chairperson. For example, the Chairperson possesses no financial delegations under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and is unable to make unilateral staffing or budgeting decisions. There is also no provision for delegating certain functions, such as the constitution of the Tribunal for the purpose of hearing a complaint.
- 4.171. Unlike the industry ombudsman schemes, SCT does not have a board of directors. An Advisory Council has been established by SCT, comprising of six industry representatives, one consumer representative and an independent chair.¹⁹¹ The Council's role is to maintain and strengthen SCT's governance and to provide a forum for stakeholders to provide regular feedback and high level strategic advice to SCT. Council membership is on a voluntary basis with members invited to participate by the SCT Chairperson.
- 4.172. The Chairperson and Deputy Chairperson are appointed by the Governor-General. Tribunal members are Ministerial appointees with two members appointed following consultation with the Consumer Affairs Minister.¹⁹² In addition to a full-time Chairperson and Deputy Chairperson, there are currently 13 part-time members. Four of these are new appointments, two are reappointments and seven have had their terms extended to January 2017.

Funding arrangements

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

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

192 SRC Act, sections 7 and 8.

4.174. The table below outlines SCT expenditure as reported in its annual reports:¹⁹³

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

* Includes total operating expenses plus Tribunal members' fees.

4.175. In the 2016-17 Budget, the Government allocated additional non-ongoing funding of \$5.2 million for SCT.¹⁹⁴ SCT's 2015-16 Annual Report indicates this additional funding will help SCT increase 'operational resources to resolve complaints and continue to improve systems and process in future periods'.¹⁹⁵

4.176. The table below outlines staffing levels since 2010-11 at SCT:¹⁹⁶

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

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

Oversight

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

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

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

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

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

4.179. SCT's operations are scrutinised by Parliament through the legislative process, as well as through the tabling of regulations and SCT's annual report. In accordance with *Senate Standing Order No 12*, SCT also provides its biannual indexed list of files to be tabled before the Senate. SCT also responds to Ministerial queries and Parliamentary Questions on Notice when required.

4.180. SCT's jurisdiction, powers and operations are also open to judicial scrutiny by way of appeal and judicial review by the courts.

4.181. Additional oversight is provided through the Commonwealth Ombudsman, who is responsible for investigating complaints relating to SCT and the *Freedom of Information Act 1982*, which provides rights to access SCT documents. From 2010-11 to 2015-2016, 49 complaints about SCT have been made to the Ombudsman. Over the past five years, complaints against SCT have been decreasing, from 16 in 2010-2011 to 4 complaints in 2015-2016. The main reasons for complaints were:

- delay in dealing with a consumers dispute; and
- SCT decisions to reject complaints outside SCT's jurisdiction.

4.182. In all complaints to date, the Commonwealth Ombudsman has found no administrative deficiency and has not requested any further action by SCT.

Improving industry behaviour

4.183. Section 64 of the SRC Act requires the SCT Chairperson to provide particulars to ASIC and/or APRA on each instance where any law, governing rule or terms and conditions may have been contravened in relation to a complaint.¹⁹⁷ Since 2006, the SCT Chairperson has provided 82 of these notices to ASIC and 19 to APRA.¹⁹⁸ The particulars provided by the SCT Chairperson to ASIC mostly related to issues surrounding:

- trustee compliance with superannuation choice obligations; and
- trustee non-compliance with requirements to provide written reasons for decisions.¹⁹⁹

4.184. Thirteen referrals of contraventions to ASIC and/or APRA were recorded in 2015-16.²⁰⁰ Over the past five years, the number of referrals has increased.

4.185. In 2015-16, one failure to comply with a SCT determination was referred to both ASIC and APRA. During the process of reporting to ASIC/APRA, the trustee initiated steps to implement SCT's determination.²⁰¹

197 SRC Act, section 64.

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

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

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

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

Chapter 5: Assessment of external dispute resolution framework

- 5.1. The purpose of this chapter is to assess the external dispute resolution (EDR) framework across five major areas identified in the Terms of Reference:
- overlaps in the framework (implications of a multi-scheme framework);
 - gaps in the framework;
 - problems with SCT;
 - problems with the industry ombudsman schemes (FOS and CIO); and
 - problems with internal dispute resolution (IDR) and its linkages to EDR.
- 5.2. The Panel sought stakeholder views on each of these areas in its Issues Paper.
- 5.3. This chapter presents views expressed in submissions received in response to the Issues Paper as well as the draft findings made by the Panel, which draw on these submissions and other evidence provided by the EDR bodies in response to the Panel’s data request (refer to Chapter 4).

MULTIPLE SCHEMES WITH OVERLAPPING JURISDICTIONS

- 5.4. The main areas of overlap between the bodies are:
- credit disputes (which may be dealt with by both CIO and FOS);
 - life insurance disputes (which are dealt with by both FOS and SCT); and
 - financial advice disputes (which may be dealt with by FOS, CIO or SCT depending on who provided the advice and which scheme they are a member of).¹
- 5.5. There is a high degree of overlap in the FOS and CIO jurisdictions in particular, as shown in the table below, which is based on dispute numbers for 2015-16.

	Number of disputes (2015-16)	Percentage (of total disputes)
Jurisdiction exclusive to FOS	11,987 disputes	29%
Jurisdiction exclusive to CIO	359 disputes	<1%
Overlapping jurisdictions (CIO and FOS)²	28,333 disputes	70%

1 Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, page 36.
 2 Overlapping jurisdictions include credit, deposit taking, payment systems and investments disputes. Treasury calculations based on data provided in response to EDR Review data requests to FOS and CIO.

- 5.6. The discussion below sets out stakeholder views and draft Panel findings regarding the implications of multiple schemes with overlapping jurisdictions.

Consumer confusion

- 5.7. A number of stakeholders believe the current multi-scheme framework results in consumer confusion and unnecessary complexity for consumers.³ These stakeholders argue that many consumers find it difficult to understand and navigate the existing framework because it is not immediately obvious to which scheme a consumer should take their complaint.⁴
- 5.8. The schemes themselves take a different view: FOS indicates that efforts by the schemes to increase consumer awareness of their services, including by collaborating with consumer advocacy organisations, engaging in outreach programs or activities and ensuring financial firms are facilitating their customers' referral to EDR when appropriate, are important ways in which consumer confusion can be reduced or mitigated.⁵ CIO submitted there was no evidence of consumer confusion.⁶
- 5.9. It is difficult to measure consumer confusion. There is a degree of cross-referral between bodies: FOS referred fewer than 1,000 disputes to CIO and SCT in 2015-16; CIO indicates that it referred 4 percent of complaints received and 16 per cent of enquiries to FOS in 2015-16.⁷ In addition, in the event the consumer lodges a dispute with the wrong scheme, schemes have processes in place to transfer or refer misdirected phone calls to each other and, under the Memorandum of Understanding (MOU) between FOS and CIO, transfer complaint files to each other.⁸
- 5.10. A different concern was raised in relation to disputes where there is an overlap between FOS's and SCT's jurisdictions. In this case, it was submitted by National Australia Bank that it is FOS alone that determines what part of the dispute can fall within its jurisdiction. Concerns were raised about 'subjectiveness' in what aspects of a matter can be taken by FOS, which can result in fragmentation of disputes to different bodies, in turn resulting in inconsistent outcomes and confusion for consumers who lodge complaints with the incorrect EDR scheme.⁹

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

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

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

6 Credit and Investments Ombudsman, submission to the EDR Review Issues Paper, page 43.

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

8 Credit and Investments Ombudsman, submission to the EDR Review Issues Paper, page 43.

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

Inconsistency between dispute resolution bodies

- 5.11. A significant concern about the current multi-scheme framework reflected in the Joint Consumer Group submission is that consumers can potentially have different experiences and outcomes depending on which body has jurisdiction over their dispute.
- 5.12. These differences are linked to the fact that dispute resolution bodies have different:
- jurisdictions (for example, FOS and CIO have different definitions of ‘financial services’; and SCT and FOS have different monetary limits);
 - processes for dealing with disputes (for example, some schemes have fast-track processes for certain disputes); and
 - decision making criteria.
- 5.13. On one view, some of the differences in processes may be characterised as innovations by one scheme yet to be adopted by the other. Conversely, as the Joint Consumer Group submission states, the innovation of one scheme does not help consumers who are facing different outcomes through the other scheme.¹⁰
- 5.14. It is difficult to make an assessment of the extent to which the current system produces inconsistent outcomes for consumers. The current emphasis on resolving decisions via agreement or conciliation, with fewer published decisions, makes it difficult to compare outcomes. Differences in the ways in which FOS, CIO and SCT report data about disputes received and closed also makes proper analysis of consumer outcomes difficult.¹¹
- 5.15. Consumers should be able to expect a comparable process and similar outcome irrespective of which EDR scheme they access, but this is difficult to achieve under a framework that consists of multiple bodies with different jurisdictions, processes and decision making criteria.

Difficulties in progressing disputes involving multiple schemes

- 5.16. Disputes can involve members of different schemes, for example, a dispute may involve a mortgage broker who is a CIO member, but relate to a home loan issued by a major bank (which is a FOS member).

¹⁰ Joint Consumer Group, submission to the EDR Review Issues Paper, page 45.

¹¹ FOS reports data online and in a searchable format in comparative tables which includes an indication of what stage in the process a complaint resolves while CIO reports and publishes this data in its annual report: Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, page 29. Independent reviews conducted by ASIC and utilising meaningful benchmarks common to all schemes could alleviate this according to one submission: Australian Finance Conference, submission to the EDR Review Issues Paper.

- 5.17. The problem arises because a scheme can generally only join a third party to a dispute where that third party is a member of that scheme. Where the third party is a member of a different scheme, the consumer may be required to pursue the dispute through both schemes, necessitating two sets of documents and responding to different case managers and different procedures.¹² This places unnecessary strain on the consumer.
- 5.18. FOS states that the schemes' inability to join members of the other scheme into a dispute *'adds complexity for consumers and results in less effective dispute resolution, particularly as the financial sector evolves with new participants and products'*.¹³ The Financial Services Council submits that the flexibility of joining another responsible party is desirable and a single scheme would allow all relevant parties, where they are financial firms required to have EDR membership, to be included in a dispute.¹⁴
- 5.19. From the Panel's perspective, it is unsatisfactory that a consumer may have to pursue the same dispute through two different schemes. It places an unnecessary burden on the consumer during what may be an already stressful time.

Draft Panel finding

The existence of multiple schemes that have overlapping jurisdictions contributes to consumer confusion and makes it more challenging to achieve and be seen to achieve comparable outcomes for consumers with similar complaints.

Competition between schemes

Competition and innovation

- 5.20. A contentious issue where a range of views were expressed is whether competition between schemes is beneficial or harmful to users.
- 5.21. One argument put forward in favour of the current multi-scheme framework is that competition between schemes leads to innovation to the benefit of consumers, as schemes and regulators are able to benchmark against each other creating an incentive to innovate. CIO is a strong proponent of this view. CIO points to the changes to its rules, enabling it to expel a firm that fails to implement CIO's recommendations for the resolution of a systemic issue, as an example of innovation arising from benchmarking. Another example put forward by CIO is the financial hardship procedure it instituted, requiring firms to cease enforcement action when a complaint had been lodged with a scheme, which it says was subsequently adopted by FOS.¹⁵

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

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

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

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

- 5.22. CIO's position on competition is contested by a number of stakeholders. The Joint Consumer Group submission argues that:

a range of other factors are stronger drivers for change and innovation within EDR schemes. These factors include: consumer movement advocacy, policy development and campaigning; periodic independent reviews; and individual actors within EDR schemes who (for a variety of reasons) drive proactive change within their organisations.¹⁶

- 5.23. Likewise, the Australian Securities and Investments Commission (ASIC) in its submission states that:

ASIC does not consider competition between EDR schemes enhances consumer outcomes. Dispute resolution is not a competitive market, and access to EDR does not drive consumer choice of financial product or service. The potential for firms to seek to switch to a lower cost scheme, on the basis that fees and costs are likely to be one of the most salient features of dispute resolution, is undesirable from a policy perspective and can inhibit innovation or efforts of schemes to extend beyond the minimum jurisdiction.¹⁷

- 5.24. Finally, FOS in its submission argues that competition with CIO has not been the driver of change within FOS and instead refers to a range of other factors, including feedback from members and consumer advocates, independent reviews, law reform, technological advancements, regulatory oversight and other mechanisms.¹⁸

- 5.25. Competition is generally considered a 'good' – competitive markets provide the potential for lower prices, better services and more choice for consumers and businesses. They can also provide stronger discipline to keep business costs down, promote faster innovation and better information allowing more informed consumer choices.¹⁹

- 5.26. However, competition generally benefits the person or entity that has the choice of whether to acquire the good or service. For example, competition in financial services is generally seen to benefit the consumer because the consumer has the ability to choose the financial service or product of value to them. This means companies must compete with each other to attract consumers and therefore strive to produce what benefits or attracts the consumer.

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

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

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

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

- 5.27. In the current EDR framework, it is the financial firms and not consumers that have the choice of which industry ombudsman scheme to belong to. In general terms, this means that there could be the potential for a scheme to provide a service which is valued by the firms, but which does not align with what is in the consumer's best interests. Alternatively, it is possible that efforts to attract financial firms to an EDR scheme may also have benefits for consumers (for example, by creating pressure on the schemes to provide value for money EDR services which benefit consumers to the extent lower EDR costs flows through to the pricing of financial services). However, this is not guaranteed and competition between schemes could, for example, result in a reluctance for schemes to accept disputes that go beyond the minimum jurisdiction, an outcome not beneficial to consumers.
- 5.28. For these reasons, the Panel is not convinced that competition between industry ombudsman schemes is appropriate or provides the most effective outcomes for all users.

Tailoring to membership base

- 5.29. Another argument put forward in support of a multi-scheme framework is that competition drives schemes to:
- focus on increasing efficiency, transparency and accountability and keep costs low for members; and
 - differentiate their services and tailor to their particular membership base.²⁰
- 5.30. While these effects would obviously be to the benefit of financial firms, to the extent lower costs of EDR are passed through, they could also benefit consumers.
- 5.31. Again, this proposition is contested. For example, the Australian and New Zealand Ombudsman Association's (ANZOA's) position is that competition among ombudsman schemes runs counter to the principles of independence, accessibility, fairness, efficiency, effectiveness and accountability. ANZOA asserts that poor performing financial firms may choose to join a scheme they believe is not as rigorous in its approach to complaints. In addition, ANZOA argues that a framework consisting of multiple schemes can impact negatively on firms in that:
- it may lead to manipulation of dispute resolution services, differing standards and inconsistencies in decision making which could be adverse for both consumers and members; and
 - the value of the ombudsman scheme as a source of information and analysis to contribute to the ongoing improvement of an industry is diluted, to the detriment of consumers, financial firms and the wider community.²¹

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

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

Movement between schemes

- 5.32. Another concern expressed in some submissions is that under a framework with more than one scheme, a financial firm expelled from one scheme is able to immediately apply to join the other scheme (and continue to satisfy their licensing obligation), which weakens the first scheme's effectiveness and ability to enforce its rules.²²
- 5.33. However, the actual number of firms moving between FOS and CIO is very low (in 2015-16, 45 members moved from CIO to FOS and 141 members moved from FOS to CIO).²³ In addition, the MOU between FOS and CIO governs the exchange of information about members, including where a member moves from one scheme to another. One of the purposes of the MOU is to reduce any associated risks to consumers such as non-compliance with decisions and gaps in access to EDR and this may, therefore, reduce the extent of regulatory arbitrage.

Draft Panel finding

Where it is the financial firms (and not the consumers) that have a choice of scheme for dispute resolution, it is not clear that competitive tension drives innovation and better outcomes for consumers.

Regulatory costs

Costs to firms

- 5.34. A significant number of submissions assert that duplication caused by the operation of multiple schemes imposes direct costs on scheme members and limits the capacity to take advantage of potential economies of scale.²⁴ Stakeholders commented that there is no compelling policy reason for the existence of two schemes.²⁵
- 5.35. Examples of duplication that may result in inefficiency are:
- duplicated governance arrangements, including separate boards;
 - administration of multiple sets of terms of reference/rules and guidelines;
 - duplicated case management systems, support infrastructure and overheads;
 - duplicated administrative and regulatory reporting obligations and arrangements (including arrangements for members switching schemes);

22 Joint Consumer Group, submission to the EDR Review Issues Paper, page 62.

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

24 See for example, Association of Superannuation Funds of Australia, submission to the EDR Review Issues Paper; Australian Securities and Investments Commission, submission to the EDR Review Issues Paper.

25 National Australia Bank, submission to the EDR Review Issues Paper, page 8.

- duplicated statistical, systemic issues and serious misconduct processes and reporting requirements (additionally, the effectiveness of systemic issues work could be compromised as each individual scheme receives only a proportion of the total data reported to schemes);
- duplicated membership services, stakeholder management, consumer outreach/engagement and communications, and more broadly inefficiencies arising as a result of the need to provide information to consumers about different schemes; and
- multiple independent reviews.

5.36. These stakeholders argue that consolidating the existing framework would lead to economies of scale, with cost savings for financial firms. For example, ASIC submits that a reduction in the number of EDR schemes in the past has resulted in improvements in economies of scale and efficiency which could be amplified by a further consolidation.²⁶ A single scheme could potentially enable disputes to be resolved more efficiently and effectively as it would have greater ability to shift resources to those areas within the scheme experiencing higher dispute volumes.

5.37. On the other hand, CIO disputes the proposition that merging the two schemes would create synergies and generate economies of scale.²⁷ It claims that there is no evidence to suggest that the existence of two or more schemes adds unnecessary and inefficient costs to EDR services as the membership bases are distinct and diverse.²⁸

5.38. Other concerns raised by stakeholders include a concern that moving to a single scheme could *add* to costs for smaller operators,²⁹ on the assumption that a larger scheme would need to charge higher membership fees than a smaller scheme, and that a single scheme would create a large bureaucracy and entrench an inward-looking and unaccountable organisation which is incapable of operating efficiently.³⁰

5.39. It is generally accepted that the dispute resolution framework should provide outcomes in an efficient manner and should impose the minimum amount of regulatory costs necessary to ensure effective user outcomes. However, the current framework is not meeting this objective.

5.40. There is inherent duplication involved in having an EDR framework in which multiple schemes are performing essentially the same function. The system as a whole bears a burden where functions are duplicated, particularly if the arguments for providing choice for firms are not compelling. Duplication is inefficient and this imposes costs on financial firms and, ultimately, consumers.

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

27 Credit and Investments Ombudsman, submission to the EDR Review Issues Paper, page 2.

28 Credit and Investments Ombudsman, submission to EDR Review Issues Paper, page 50.

29 Farley, J, submission to the EDR Review Issues Paper, page 1.

30 Credit Corp Group, submission to the EDR Review Issues Paper, page 8.

5.41. It is difficult to quantify the value that choice provides to financial firms. Arguments that financial firms choosing to join CIO have distinct needs which are serviced better by a smaller scheme may have merit but, in the Panel's view, are not insurmountable in potentially moving to a single, consolidated scheme, given that 88 per cent of FOS's licensee members are classified as small and very small, and FOS members include accountants (who are required to hold a limited licence when providing SMSF advice).

Costs to ASIC

5.42. ASIC identifies the following duplicative costs in overseeing two EDR schemes:³¹

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

5.43. As these duplicative costs are unavoidable in a framework comprising two schemes, they are undesirable and are not an effective use of scarce public resources.

Draft Panel finding

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

GAPS IN THE FRAMEWORK

5.44. The Review's Terms of Reference require the Panel to assess whether changes to current dispute resolution and complaints bodies in the financial sector are necessary to deliver optimum outcomes for users. They also require the Panel to consider the extent of gaps and overlaps in the current system.

5.45. Submissions to the Issues Paper identified major gaps in the existing framework in relation to:

- outdated monetary limits for consumers;
- inadequate dispute resolution arrangements for small businesses;

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

- lack of access to EDR for consumers using debt management firms; and
- lack of a compensation scheme of last resort.

Outdated monetary limits for consumers

- 5.46. Stakeholders submitted that monetary limits need to be broad enough for consumers to have appropriate access to the schemes, while ensuring there are mechanisms to require more complex cases to be heard in different forums.³² However, this is currently not the case.
- 5.47. FOS observed that its jurisdictional caps and limits had not kept pace with economic parameters, including growth in average wages and in home lending facilities, and noted that 1991 was being used as the benchmark year for the existing caps.³³ This observation was supported by consumer organisations who submitted that they regularly meet with people who have disputes which fall well outside of the schemes' jurisdiction.³⁴
- 5.48. An issue raised by a number of stakeholders was that recent increases in housing costs had pushed many mortgages and guarantees on home loans beyond the schemes' jurisdiction.³⁵ By way of example, it was noted that in circumstances where consumers suffered a total loss claim following the destruction of their house in a natural disaster, they were precluded from making a claim.³⁶ However, CIO submitted that only a small proportion of the complaints it received involved amounts close to the monetary cap and that there was a point at which the amount in dispute meant that a court was a more appropriate forum.³⁷
- 5.49. While there was broad agreement that the limits and caps should be increased, there were diverging views about what the new thresholds should be. The Australian Bankers' Association submitted that consumers and small businesses should be able to bring complaints up to the value of \$1 million, with schemes having the power to make an award of up to \$1 million.³⁸ In contrast, the Joint Consumer submission, citing FOS's proposal to extend its small business jurisdiction to allow it to consider claims and award compensation of up to \$2 million, stated that consumers should be provided with equivalent rights. This would simplify the schemes' jurisdictions and avoid consumer confusion. It was also submitted that if the limits and caps are increased, they should be regularly reviewed.³⁹

32 Australian Bankers' Association, submission to the EDR Review Issues Paper, page 5.

33 Financial Ombudsman Service, submission to the EDR Review Issues Paper, pages 34-35.

34 Joint Consumer Group, submission to the EDR Review Issues Paper, page 41.

35 Joint Consumer Group, submission to the EDR Review Issues Paper, page 41.

36 Legal Aid New South Wales, submission to the EDR Review Issues Paper, page 25; Legal Aid Queensland, submission to the EDR Review Issues Paper, page 12.

37 Credit and Investments Ombudsman, submission to the EDR Review Issues Paper, page 28.

38 Australian Bankers' Association, submission to the EDR Review Issues Paper, page 5.

39 Joint Consumer Group, submission to the EDR Review Issues Paper, page 42.

Draft Panel finding

The current monetary limits for consumers are inadequate.

Inadequate dispute resolution arrangements for small businesses

- 5.50. The Panel is of the view that the current dispute resolution arrangements for small businesses in the financial system are inadequate.
- 5.51. Small businesses can possess characteristics that mean they face many of the same issues as consumers in dealing with disputes and when seeking redress. This can include the owner's personal characteristics (language and cultural barriers), the nature of small business (lack of time and money) and the power imbalances they face against larger businesses.⁴⁰
- 5.52. Additionally, the impact of a lack of access to justice can be even more acute for a small business. Where a small business is faced with a dispute, this can impact on its financial viability and can result in an inability to pay employees and suppliers, the threat of bankruptcy, and personal stress and family breakdown.⁴¹ In the case of financial facilities, the small business owner will have often provided a mortgage over assets such as the family home and there may be guarantees from other family members.
- 5.53. For small businesses, the costs associated with disputes are not confined to the costs of resolving the individual dispute, such as legal fees, but extend to emotional stress and opportunity costs. These opportunity costs include the economic and social opportunities which small business operators could have pursued with their time and effort.
- 5.54. Ensuring small businesses have access to affordable dispute resolution has the potential not only to effectively resolve individual disputes and minimise the associated costs, but also to improve the conduct of financial firms, which may reduce the likelihood of future disputes arising. The Joint Consumer Submission highlighted this point:

Access to affordable dispute resolution for consumers through existing EDR schemes has led to an improvement in the conduct of financial institutions. Access for a wider range of customers is likely to further improve the quality of the financial services provided to small businesses and the industry response when disputes arise.⁴²

40 Western Australian Small Business Development Corporation 2016, submission to the Australian Consumer Law Review Issues Paper, page 4. See also Australian Government 2015, *Competition Policy Review Final Report*, Canberra, page 407, where the Panel stated that it was 'convinced that there are significant barriers to small business taking private action to enforce competition laws'.

41 Western Australian Small Business Development Corporation 2016, submission to the Australian Consumer Law Review Issues Paper, page 5.

42 Joint Consumer Group, submission to the EDR Review Issues Paper, page 40.

Inquiry into small business lending practices

- 5.55. The Panel notes that the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) is currently conducting an inquiry into small business lending practices. The inquiry's Terms of Reference, relevantly, require the ASBFEO to review a selection of small business lending cases and ascertain whether there are any deficiencies in the regulation of authorised deposit taking institutions in lending to small business. The inquiry's Terms of Reference also require it to provide interim findings to this Review. On 8 November 2016, ASBFEO provided its interim findings to the Panel.
- 5.56. The Panel supports the work being undertaken by ASBFEO as it complements the Panel's work, which is focused on the dispute resolution processes available for small business. The Panel is of the view that an effective regulatory framework requires both a system of laws which are fit-for-purpose and a dispute resolution system which is effective and affordable.

Dispute resolution and advice services available to small businesses

- 5.57. The Panel is aware that small businesses can access advice and advocacy services from small business specific organisations, such as ASBFEO and state-based small business commissioners. However, as the information below demonstrates, these bodies are unable to provide the comprehensive dispute resolution procedures which small businesses require.

Australian Small Business and Family Enterprise Ombudsman

The ASBFEO commenced on 11 March 2016. It works with existing government services to avoid duplication and ensure that small businesses and family enterprises have access to the services best placed to help them.

The ASBFEO has two key functions, to assist small businesses and to advocate for them. Where a person requests assistance from the ASBFEO about a dispute, it can make recommendations on how the dispute may be managed. This includes making a recommendation that the parties undertake an alternative dispute resolution process and who should conduct that process.

To address concerns around impartiality, the ASBFEO is precluded from conducting the alternative dispute resolution process itself. However, it does have the power to publicise the fact that a party has refused to engage, or has withdrawn, from a dispute resolution process. In this regard, the Joint Consumer Submission observed that the ASBFEO is unable to make binding determinations and doesn't meet the Australian and New Zealand Ombudsman Association's definition of an 'ombudsman'.

New South Wales Small Business Commissioner

The *Small Business Commissioner Act* commenced in 2013. The Commissioner is an independent statutory officer, providing a voice for small business within government. The Commissioner's objectives include facilitating the fair treatment of small businesses and resolving disputes involving small businesses through mediation and other appropriate forms of alternative dispute resolution.

New South Wales Small Business Commissioner (continued)

The Commissioner may deal with a small business complaint if it is satisfied that: the subject-matter of the complaint relates to the unfair treatment of, or an unfair practice involving, the small business; the complaint relates to an unfair contract to which the small business is a party; or it is in the public interest to deal with the complaint.

The Office of the Small Business Commissioner's (OSBC) Dispute Resolution Unit provides strategic and procedural advice and information to help small business operators prevent or deal with a business dispute. It also assists parties to a dispute come up with their own commercial resolution, rather than resolving issues through litigation.

If an application is made to the Commissioner for assistance in resolving a complaint or other dispute involving a small business, the OSBC will contact the other party to hear their perspective and help the parties identify what needs to be addressed; allowing them to find a resolution. Where complex problems arise which cannot be resolved through informal mediation, the Commissioner will organise a formal mediation session.

The Commissioner has the power to compel a party to attend mediation and produce documents which would assist in resolving the dispute. A failure to comply with this request without reasonable excuse can result in the imposition of a penalty of \$11,000 for corporations and \$5,500 for individuals. To date this power has not been levied and is considered a last resort. However, as with all mediation, the mediator doesn't have the power to decide a matter or impose a resolution on the parties.

Where an application is made to the Commissioner and the Commissioner decides to deal with the dispute, the matter may not be the subject of any proceedings before any court unless and until the Commissioner has certified in writing that alternative dispute resolution services provided by the Commissioner have failed to resolve the matter.

Dispute resolution services available to small businesses in the financial sector

Financial Ombudsman Service

- 5.58. The focus on advice and advocacy undertaken by ASBFEO and the NSW Small Business Commissioner can be contrasted with the ability of FOS to make binding determinations in favour of small businesses against financial firms.
- 5.59. FOS can hear a dispute from a 'small business', which is defined as a business with less than 20 employees, or if the business is or includes the manufacture of goods, a business with less than 100 employees.⁴³ This definition potentially covers the large majority of businesses as approximately 98 per cent of Australian businesses have less than 20 employees.⁴⁴

43 Financial Ombudsman Service 2015, *Terms of Reference (as amended 1 January 2015)*, clause [20.1] 'Defined terms'.

44 Australian Bureau of Statistics 2015, *8165.0 - Counts of Australian Businesses, including Entries and Exits, Jun 2011 to Jun 2015*, ABS, Canberra.

5.60. FOS's current monetary limits are set out in the below table. Acknowledging that its current small business jurisdiction can provide limited access for some small business disputes, FOS is currently consulting on proposals to expand this jurisdiction and proposed monetary limits are also set out in the table below.⁴⁵

Small Business Credit Facility (SBCF) element	Description	Current monetary limits	Proposed monetary limit
Claim limit	FOS cannot consider a dispute with a claim above this amount	\$500,000	\$2 million
Compensation cap	FOS cannot award compensation that exceeds this cap (excludes compensation for costs and interest)	\$309,000	\$2 million
SBCF limit for debt related disputes	FOS cannot consider a debt related dispute by a small business when the SBCF is above this amount	\$2 million	\$10 million

5.61. FOS's \$2 million limit on credit facilities was introduced in January 2015; prior to this change there was no limit on the credit facilities which FOS could consider. The change occurred following a recommendation contained in FOS's 2013 Independent Review which stated that in the case of large, complex commercial credit disputes, FOS should be more active in exercising its discretion to refuse to consider a dispute if FOS considers there to be a more appropriate forum.⁴⁶

5.62. The number of small business disputes FOS receives and the number of disputes that fall outside of its jurisdiction are contained in the table below.

	FY11	FY12	FY13	FY14	FY15	FY16
Disputes received	30,283	36,099	32,307	31,680	31,895	34,095
Disputes lodged by small business (% of disputes)⁴⁷	1,674 (5.5%)	1,937 (5.4%)	1,941 (6%)	1,658 (5.2%)	1,785 (5.6%)	1,931 (5.7%)
Disputes where related body corporate has greater than 20/100 employees	6	16	4	4	10	5
Disputes where small business credit facility exceeds \$2m	0	0	0	0	10	15

45 Financial Ombudsman Service 2016, *Expansion of FOS's Small Business Jurisdiction Consultation Paper*, page 4.

46 Cameron Ralph Navigator 2013, *Report to Board of Financial Ombudsman Service 2013 Independent Review*, pages 63-65. See also Financial Ombudsman Service, *Independent Review Recommendations action table*.

47 While the percentage of disputes lodged by small business is low, it may not reflect the true need of small businesses for access to EDR as small business disputes may not be brought to EDR because they fall outside of the scheme's jurisdictional limits.

5.63. FOS's proposals would allow it to:

- consider disputes involving larger claims (up from \$500,000 to \$2 million);
- award higher compensation (up from \$309,000 to \$2 million);
- consider debt related disputes about larger small business credit facilities (up from \$2 million to \$10 million for a single loan contract);
- increase the size of credit facilities covered by the prohibition of debt recovery action against small businesses while FOS considers disputes (from \$2 million to \$10 million);⁴⁸
- require a financial firm to ensure that a relevant third party attends a FOS conference;⁴⁹ and
- vary an unregulated credit contract, which includes small business credit contracts, in cases of financial hardship.⁵⁰

5.64. In its submission, FOS states that the proposed caps and limits would provide greater scope to deal with small business disputes, while ensuring well-resourced business operators utilise the courts as appropriate.⁵¹

5.65. FOS received a range of responses to its proposals. On increasing its relevant limits and caps, while a majority of parties agreed that these should be increased, there were diverse views about the amount of the increase. A number of parties submitted that the proposals were too high. For example, the Australian Bankers' Association submitted that increasing the credit facility limit to \$3 million was more appropriate as a \$10 million limit would introduce a number of complex matters, given approximately 98 per cent of small businesses hold loans of less than \$2 million.⁵² In contrast, the Joint Consumer Group agreed with FOS's proposals and stated that these should be extended to consumer disputes,⁵³ while others argued that there should be no monetary limits.⁵⁴

48 FOS states that its proposed \$10 million facility is based on its analysis of debt-related small business credit facility disputes, which evidenced a clustering of disputes around the \$8-10 million range: see Financial Ombudsman Service 2016, *Expansion of FOS's Small Business Jurisdiction Consultation Paper*, page 8.

49 Financial Ombudsman Service 2016, *Expansion of FOS's Small Business Jurisdiction Consultation Paper*, pages 9-10.

50 Financial Ombudsman Service 2016, *Expansion of FOS's Small Business Jurisdiction Consultation Paper*, page 12.

51 Financial Ombudsman Service 2016, *Expansion of FOS's Small Business Jurisdiction Consultation Paper*, page 8.

52 Australian Bankers' Association, submission to the Financial Ombudsman Service 2016, *Expansion of FOS's Small Business Jurisdiction Consultation Paper*, pages 3-4.

53 Joint Consumer Group, submission to the Financial Ombudsman Service 2016, *Expansion of FOS's Small Business Jurisdiction Consultation Paper*, page 3. The Submission also observed (at page 2) that some small business lenders are not a member of FOS or CIO and that (at a minimum) an effective communications strategy would be required to warn about this risk.

54 Tasmanian Small Business Council, submission to the Financial Ombudsman Service 2016, *Expansion of FOS's Small Business Jurisdiction Consultation Paper*, page 2.

- 5.66. Regarding the proposal to provide FOS with the power to require a financial firm to ensure third parties attend a FOS conference, a range of views were expressed. Insolvency practitioners submitted that any power to compel them to attend a FOS conference would be analogous to a subpoena power, which should remain in the jurisdiction of the courts, and such a power would be at odds with their independent role and statutory duties.⁵⁵ Some parties provided in-principle support for FOS's proposal,⁵⁶ while others encouraged FOS to adopt a flexible process to allow third parties to participate if they are prepared to do so.⁵⁷
- 5.67. As part of its consultation process, FOS observed that it would establish a dedicated specialist small business unit, which would include FOS staff and decision makers who possess strong expertise and experience to deal with small business disputes.⁵⁸
- 5.68. More generally on closing the gaps in redress for small businesses, FOS stated in its submission to the Issues Paper that this would be best achieved by:
- merging CIO into FOS, thereby forming a single industry ombudsman;
 - extending the national consumer credit protection law to small businesses;
 - expanding FOS's jurisdiction based on the proposals in its current consultation paper; and
 - FOS providing periodic detailed reports to relevant regulatory and policy bodies, including ASBFEO, so they hold data to inform regulatory action, advocacy and policy development.⁵⁹

Credit and Investments Ombudsman

- 5.69. Similarly to FOS, CIO can hear a complaint from a small business⁶⁰ if the claimed loss does not exceed \$500,000, with compensation capped at \$309,000.⁶¹ In 2015-16, small business disputes accounted for approximately 6.5 per cent of CIO's total complaints.

55 See submissions by the Australian Restructuring Insolvency & Turnaround Association, BRI Ferrier and KordaMentha to the Financial Ombudsman Service 2016, *Expansion of FOS's Small Business Jurisdiction Consultation Paper*.

56 Law Council of Australia, SME Committee, submission to the Financial Ombudsman Service 2016, *Expansion of FOS's Small Business Jurisdiction Consultation Paper*.

57 Joint Consumer Group, submission to the Financial Ombudsman Service 2016, *Expansion of FOS's Small Business Jurisdiction Consultation Paper*, page 3.

58 Financial Ombudsman Service 2016, *Expansion of FOS's Small Business Jurisdiction Consultation Paper*, page 5.

59 Financial Ombudsman Service, submission to the EDR Review Issues Paper, pages 44-45.

60 A small business is defined as a business which employs fewer than: 100 full-time (or equivalent) employees, if the business is or includes the manufacture of goods; or otherwise, 20 full-time (or equivalent) employees: *Credit and Investment Ombudsman Rules (10th edition)*, clause 45.1 'Dictionary'.

61 Credit and Investments Ombudsman 2016, *Credit and Investments Ombudsman Rules (10th edition)*, clause 9.1 'Remedies and Orders available to a complainant'. In certain cases, CIO limits the small business complaints it can hear to businesses which did not have net assets of \$2.5 million or more, or gross income of \$250,000 or more, for each of the two financial years prior to the date of making the complaint: see *Credit and Investment Ombudsman Rules (10th edition)*, clause 45.1 'Dictionary'.

While the number of small business disputes has increased in recent years, as a proportion they have remained relatively stable, as the following table demonstrates:⁶²

	FY11	FY12	FY13	FY14	FY15	FY16
Complaints received	1,983	2,741	3,763	4,513	4,848	4,760
Disputes lodged by small business (%)⁶³	94 (4.7%)	156 (5.7%)	162 (4.3%)	235 (5.2%)	252 (5.2%)	308 (6.5%)
Not a consumer or small business as defined⁶⁴	5	10	5	11	14	6

- 5.70. In 2015-16, the average loan size the CIO considered was \$285,982, with 97 per cent of small business complaints associated with loans that do not exceed \$2 million.⁶⁵
- 5.71. CIO states in its submission that, as a matter of consistency, should FOS amend its small business jurisdiction, it would adopt the same or substantially similar monetary thresholds. It also notes that any changes should form part of a broader regulatory regime, for example, CIO asks whether small businesses should have the same protections as consumers under the *National Consumer Credit Protection Act 2009*.⁶⁶
- 5.72. In circumstances where monetary thresholds are increased, CIO observes there are limitations inherent in EDR schemes which can hinder their ability to deal fairly with a small business complaint and which mean a court would be a more appropriate forum. These include an inability to subpoena documents, summon and cross-examine witnesses, and investigate criminal fraud.⁶⁷ To deal with these issues, CIO submits consideration should be given to ASBFEO having the power to adjudicate and make binding decisions on small business disputes which exceed EDR schemes' existing monetary caps.⁶⁸

Small business lenders who are not required to be members of an EDR scheme

- 5.73. As 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.

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

63 While the percentage of disputes lodged by small business is low, it may not reflect the true need of small businesses for access to EDR as small business disputes may not be brought to EDR because they fall out of the scheme's jurisdictional limits.

64 Disputes lodged which fall outside of the Credit and Investments Ombudsman's definition of who constitutes a 'consumer' and 'small business': see Credit and Investments Ombudsman, *Credit and Investments Ombudsman Rules (10th edition)*.

65 Credit and Investments Ombudsman, submission to the EDR Review Issues Paper, page 45.

66 Credit and Investments Ombudsman, submission to the EDR Review Issues Paper, pages 27 and 44.

67 Credit and Investments Ombudsman, submission to the EDR Review Issues Paper, page 44.

68 Credit and Investments Ombudsman, submission to the EDR Review Issues Paper, page 3.

5.74. Where a small business dispute is with a lender that is not required to be a member of an EDR scheme, raising the jurisdictional limits of the scheme will result in these disputes still being excluded from EDR. FOS has proposed that this gap in coverage could be addressed by extending the national consumer credit protections to small businesses.⁶⁹

Information request

Should the national consumer credit protection law be extended to small businesses?

Draft Panel finding

The small business jurisdictional limits at the schemes are currently inadequate which means small businesses are unable to access effective dispute resolution arrangements.

Debt management firms

5.75. Debt management firms typically offer a range of services to consumers experiencing financial difficulty including:

- developing and managing budgets;
- negotiating with creditors, including lenders, telecommunications companies, utilities companies or debt collectors;
- advising and arranging formal debt arrangements under the *Bankruptcy Act 1966* (Cth); and
- assisting with the removal of default listings or other negative information on a credit report.

5.76. There is no uniform regulatory framework applying to the activities of debt management firms in Australia.⁷⁰ Most of the services provided by debt management firms do not meet the definition of 'financial services' or 'credit activity' and therefore most debt management firms are not required to hold a licence under the financial services or credit regime, although general consumer law prohibitions against misleading and deceptive conduct, and unconscionable conduct would apply.⁷¹

69 Financial Ombudsman Service, submission to the EDR Review Issues Paper, page 45.

70 Debt agreement administration services are regulated under the *Bankruptcy Act 1966* (Cth).

71 In some cases, where a debt management firms undertakes other regulated credit activity, they will be required to hold a credit licence which will cover the provision of those services.

5.77. ASIC's research report, *Paying to get out of debt or clear your record: The promise of debt management firms* (Report 465), while noting that there was limited data on the size and scale of the industry, raised concerns about the fact that firms often charge a high upfront fee, have opaque fee structures, and services are targeted to vulnerable consumers experiencing financial stress.⁷²

Implications for EDR

5.78. Under the current framework, should a consumer have a grievance with a debt management firm they have little scope for redress. Debt management firms are not required to be licenced, therefore they are not required to be a member of a recognised dispute resolution scheme.⁷³ In addition, debt management firms can present problems for the EDR schemes where the disputes being pursued do not have merit, as schemes will incur costs in dealing with the firms.

5.79. The ASIC report found that:

- a growing number of debt management firms were representing consumers at EDR;
- disputes brought to EDR schemes were almost exclusively related to arguments about the removal of default listings on consumer credit reports; and
- while an increasing number of consumers are being represented, this is not leading to more credit related disputes being determined in favour of consumers.⁷⁴

5.80. CIO states, in its submission, that the fact of EDR being free to complainants but attracting case fees for members has been exploited by some for-profit third party representatives who utilise EDR as leverage to obtain a desired outcome rather than as a vehicle to determine the merits of a genuine dispute.⁷⁵

5.81. The submission goes on to say that while this does not characterise all complaints from the sector, these are undesirable outcomes for all – for the integrity of the credit reporting system, for the financial services provider and for the consumer who will pay significant amounts of money for a service that either should not be provided (because the complaint lacked reasonable prospects of success in the first instance) or should be provided at no cost (as the consumer may be able to resolve the complaint themselves at no cost through a financial counsellor or the EDR scheme itself).⁷⁶

72 Australian Securities and Investments Commission 2016, Report 465 *Paying to get out of debt or clear your record: The promise of debt management firms*, pages 20-22.

73 Australian Securities and Investments Commission 2016, Report 465 *Paying to get out of debt or clear your record: The promise of debt management firms*, page 29.

74 Australian Securities and Investments Commission 2016, Report 465 *Paying to get out of debt or clear your record: The promise of debt management firms* (Report 465), pages 29-30.

75 Credit and Investments Ombudsman, submission to the EDR Review Issues Paper, page 38.

76 Credit and Investments Ombudsman, submission to the EDR Review Issues Paper, page 38.

Draft Panel findings

- There is currently no mechanism for consumers with complaints in respect of unlicensed debt management firms to seek access to EDR.
- Where the dispute brought to EDR does not have merit, the activities of some debt management firms can hamper the efficiency of EDR schemes by diverting scheme resources from other disputes.

Lack of a compensation scheme of last resort

- 5.82. It is clear to the Panel that many Australian consumers currently lack confidence in the financial system and this is due, at least in part, to the issue of uncompensated consumer losses.
- 5.83. According to FOS, more than \$17 million in determinations it has made in favour of complainants has not been paid (as at 1 November 2016) as the financial firm lacks the financial resources to pay the determinations. Similarly, CIO has unpaid determinations worth approximately \$414,443 (as at 1 November 2016). However, this might be treated as a minimum given the difficulties with quantifying losses suffered by those who have not lodged a dispute and those whose disputes were closed early as there was no reasonable prospect of any compensation order being satisfied.
- 5.84. Where a consumer does not receive the compensation due to them because of a financial firm's lack of resources, it has a negative impact on both the individual consumer and the broader financial system. In circumstances where the market is currently unable to provide a solution to this problem, the Panel is of the view that there is considerable merit in introducing an industry-funded compensation scheme of last resort.
- 5.85. Further observations about a compensation scheme of last resort are contained in Chapter 7.

Draft Panel finding

Where a consumer does not receive the compensation due to them because of a financial firm's lack of resources, it has a negative impact on both the individual consumer and the broader financial system.

PROBLEMS WITH SUPERANNUATION COMPLAINTS TRIBUNAL

- 5.86. The Terms of Reference require the Panel to examine the role, powers, governance and funding arrangements of the dispute resolution and complaints framework in providing effective complaints handling processes for users.

5.87. This section of the chapter considers some of the problems raised by stakeholders in relation to the SCT. Importantly though, stakeholders did not see the problems of SCT as attributable to its staff and the executive who are held in high regard.⁷⁷

The nature of superannuation

5.88. For many Australians, superannuation is likely to be their second largest asset in retirement after the family home. The superannuation industry in Australia currently oversees in excess of over \$2 trillion of funds under management, in over 30 million accounts. Over 1.1 million people are receiving income in retirement from superannuation.⁷⁸ In the future, as an increasing proportion of the population moves from the accumulation to the draw-down (retirement) phase, these numbers are expected to grow.

5.89. Superannuation has a number of unique features. First, superannuation is compulsory for all working Australians, supported by a system of default funds. As a result, many consumers do not consciously choose their superannuation fund or related products or services. Second, the nature of the relationship between consumers and trustees of superannuation funds is fiduciary in nature, a higher standard than that of standard contracts for sale or services. Superannuation is a long-term investment, which leads to complex complaints with larger monetary sums involved. Superannuation complaints can also be more complex because of decisions involving multiple parties, such as decisions about the distribution of death benefits or decisions involving both a trustee and an insurance company.

5.90. Currently, consumers typically have minimal interactions with their superannuation trustees. However, as an increasing number of consumers transition from accumulating superannuation during their working life to drawing down on their superannuation in retirement, disputes about superannuation are expected to increase significantly. Since 2004-5, complaints to SCT about superannuation have increased by 41 percent, growing at an annual average rate of 3.7 per cent.⁷⁹ As the sector matures, new superannuation products and services are developing and with them, complaints are increasing in complexity.

5.91. Given the above, it is important that consumers and their dependents are provided with strong and adequate protections through access to informal, cheap, accessible, quick and effective mechanisms for resolving their superannuation complaints.

77 Financial Services Council, submission to the EDR Review Issues Paper, page 7.

78 Association of Superannuation Funds of Australia 2016, *Superannuation Statistics September 2016*.

79 Superannuation Complaints Tribunal, submission to the EDR Review Issues Paper, page 7.

Delay in progression of superannuation complaints

- 5.92. Significant delays in the progression of superannuation complaints at SCT were identified as a key concern among stakeholders.⁸⁰ Submissions noted timeframes for resolving complaints ranging from at least twelve months up to four years.⁸¹ SCT has publicly acknowledged the delay in progressing complaints, listing on its website timeframes of a minimum of twelve months to resolve disputes, although submissions noted a number of complaints are taking significantly longer than this to reach a formal decision.⁸²
- 5.93. Delays 'are a feature of every stage in the process, from investigations, through [to] conciliations and issuing [of] determinations'.⁸³ A particularly concerning development has been delays at the preliminary stages of the complaint process, notably where SCT confirms its jurisdiction to hear a matter.⁸⁴
- 5.94. Delays are particularly acute in the case of death benefits and total permanent disability (TPD) claims as Maurice Blackburn notes:

*For working people with a TPD Claim, they typically are unable to wait 12 months, let alone 12 weeks given the stretched financial situation they will be in. By contrast, the insurer or superannuation fund is able to wait years, and are often happy to do so. By contrast, most workers compensation schemes require a decision within weeks despite the TPD claims often involving similar types of injuries.*⁸⁵

- 5.95. Submissions also noted 'delays in progressing superannuation complaints in a timely manner have resulted in plaintiff legal firms increasingly using the court systems to resolve disputes'.⁸⁶

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

81 Superannuation Complaints Tribunal, submission to the EDR Review Issues Paper, page 33; Davis, N, submission to the EDR Review Issues Paper, page 1.

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

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

84 Association of Superannuation Funds of Australia 2016, submission to the EDR Review Issues Paper, page 10.

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

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

- 5.96. In addition to the increase in volume and complexity of complaints, submissions identified chronic underfunding, both at present and historically, as the primary reason for delays.⁸⁷ Other reasons identified were an increasingly legalistic approach adopted by SCT,⁸⁸ as well as internal operating processes that are seen as inefficient and heavily manual in nature.⁸⁹ The absence of any fast-track process within SCT complaints process, especially for vulnerable consumers, was also identified as a factor exacerbating delays. These are discussed in further detail below.
- 5.97. SCT has taken action to address the delays, including instituting a new process of recognising and managing general inquiries distinct from the complaints process, which has assisted with a more effective allocation of resources.⁹⁰

Funding and resourcing

- 5.98. Since its inception, SCT has been subject to claims of chronic underfunding and resourcing.⁹¹ In their submissions, stakeholder groups were united in their calls for an increase in funding and improved transparency over funding for SCT.⁹²
- 5.99. Stakeholder groups commented on the absence of any link between funding, industry growth and the number of complaints before SCT, noting the existing funding is inconsistent with industry growth. AIST submitted:

*current arrangements do not allow for an appropriate assessment of the funding needs of the SCT which can result in the SCT being underfunded. Under existing legislative provisions there is no guidance on how the SCT's funding is to be determined, and provides ASIC with an absolute discretion with no guiding principles.*⁹³

87 See for example, Superannuation Complaints Tribunal, submission to the EDR Review Issues Paper, page 3; Association of Superannuation Funds of Australia, submission to the EDR Review Issues Paper, page 10; Australian Institute of Superannuation Trustees, submission to the EDR Review Issues Paper, page 14.

88 Joint Consumer Group, submission to the EDR Review Issues Paper, page 37.

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

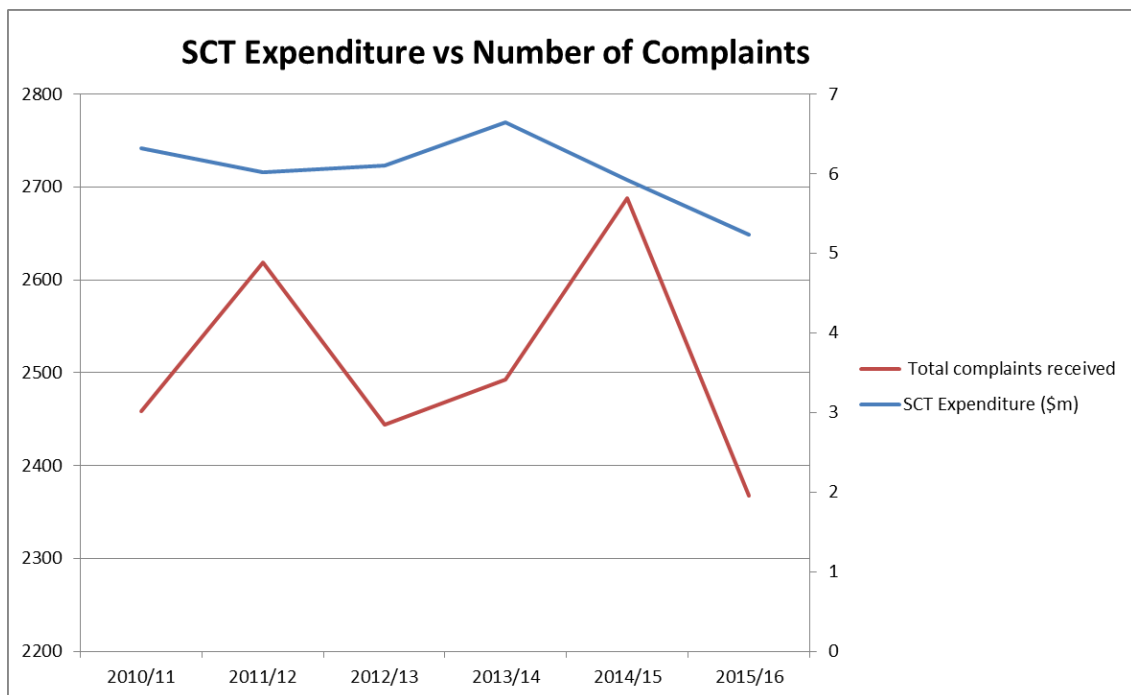
90 Superannuation Complaints Tribunal 2016, *Annual Report 2015-16*, page 3.

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

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

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

As the figure below demonstrates, there is no correlation between the level of complaints SCT receives and SCT expenditure.



5.100. Expenditure has broadly trended downwards over the past five years, albeit with some minor increases. The large drop in complaints in 2015-16 arose as a result of definition changes to ‘complaint’ and ‘inquiry’ which were made by SCT.⁹⁴ Complaints have tended to increase each year and stakeholders expect them to continue to rise as the industry matures.

5.101. SCT submitted ‘the direct impact of under resourcing is translated into the time it takes to resolve complaints’.⁹⁵ It also noted that there has been a ‘year on year increase’ in complaints where more complaints are received each year than are resolved and that where additional funding has been provided to clear the backlog of complaints there has been a ‘clear increase of complaints finalised’.⁹⁶

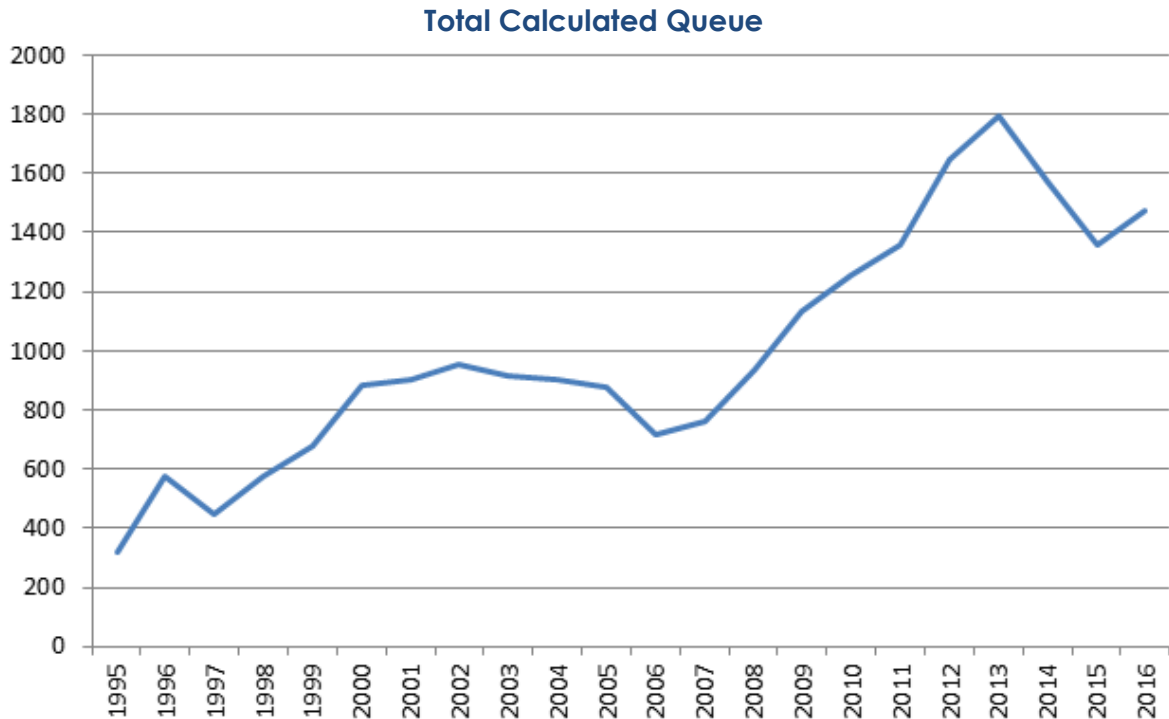
5.102. The figure below highlights this and outlines SCT total calculated queue for complaints:⁹⁷

94 The change by SCT means that some complaints are now recorded as inquiries because they relate to information requests. For further details see Superannuation Complaints Tribunal 2016, *Annual Report 2015-16*, page 35.

95 Superannuation Complaints Tribunal 2016, submission to the EDR Review, page 32.

96 Superannuation Complaints Tribunal 2016, submission to the EDR Review, page 32.

97 Superannuation Complaints Tribunal 2016, submission to the EDR Review, page 32.



5.103. Stakeholder groups also noted insufficient transparency over the management of SCT's budget.⁹⁸ Currently, ASIC manages SCT's finances within the government appropriation and has a statutory responsibility under the SRC Act to provide SCT with staff and facilities. SCT has indicated 'there is no oversight by the SCT on the funding from consolidated revenue allocated to it'⁹⁹ and managed by ASIC. There is little transparency over how much of the APRA levy is provided to ASIC for SCT in each financial year.¹⁰⁰

5.104. In addition, SCT funding is subject to government efficiency measures. Over the past five years this has contributed to annual reductions in SCT's funding, irrespective of the volume of complaints received by SCT. In the case of a small entity such as SCT, such cuts are likely to have a greater effect on the organisation's ability to manage its operations.

98 See for example Superannuation Complaints Tribunal, submission to the EDR Review, page 34; Davis, N, submission to the EDR Review Issues Paper, page 1; Industry Super Australia, submission to the EDR Review Issues Paper, page 7; and Joint Consumer Group, submission to the EDR Review Issues Paper, page 49.

99 Superannuation Complaints Tribunal 2016, submission to the EDR Review Issues Paper, page 34.

100 Superannuation Complaints Tribunal 2016, submission to the EDR Review Issues Paper, page 34.

Draft Panel findings

The delays experienced at SCT, particularly in relation to TPD and death benefits complaints, are unacceptable and have serious implications for the effectiveness of SCT as a dispute resolution forum.

SCT funding has been steadily decreasing with current resourcing levels neither sufficient nor sustainable.

There is a lack of transparency of current funding and budget arrangements.

Processes and operations

5.105. Submissions indicated that SCT's current complaints handling process is too restrictive as it limits mechanisms to only conciliation and determination to resolve a complaint, and conciliation must be attempted in respect of every complaint before a determination is issued.¹⁰¹ This is in contrast to FOS and CIO, which are able to employ a variety of mechanisms to resolve a complaint, including negotiation, conciliation, mediation or the issue of a determination.¹⁰²

5.106. Some submissions suggested the introduction of a triage and/or fast-track system for expediting complaints,¹⁰³ with a view to reducing delays and their impacts on consumers, especially in cases of financial hardship.

5.107. Consumer groups also commented on the capacity of SCT to innovate and reform, submitting that it is more limited than the industry-based ombudsman schemes and dependent on government and legislative change:

The SCT's powers and procedures are set out in statute, although the Tribunal must issue a memorandum explaining how complaints are to be dealt with. The statute can only be amended by Federal legislation. Even simple procedural amendments can be delayed due to the need for legislative change.¹⁰⁴

101 Section 27 of the SRC Act requires all complaints to proceed first through conciliation before determination. Section 11 also requires SCT to provide mechanisms for conciliation and review of the decision of the trustee where conciliation fails to resolve the dispute.

102 Australian Institute of Superannuation Trustees, submission to the EDR Review Issues Paper, page 18.

103 Industry Super Australia, submission to the EDR Review Issues Paper, page 7; Legal Aid New South Wales, submission to the EDR Review Issues Paper, page 25.

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

5.108. On the other hand, ASFA contends the operational issues and lack of innovation are a result of underfunding and under-resourcing rather than statute. Further, in its submission, ASFA noted:

Subsection 9(4) of the S(ROC) Act gives to the SCT Chairperson the responsibility – and the power – to establish procedural rules for the conduct of review meetings, and that section 28(7) requires the Tribunal to formulate, and publish, guidelines regarding when it would ordinarily require persons to attend a conciliation conference. Aside from those specific requirements, there is flexibility in the processes and procedures that may be adopted.¹⁰⁵

5.109. Submissions from both industry and consumer groups noted that SCT still uses a paper-based file management system with complaints managed in hard copy files.¹⁰⁶ One industry stakeholder suggested SCT would benefit from improving its processes through the digitisation of complaint records and implementing an enhanced workflow management capability.¹⁰⁷ An additional one-off funding of \$5.2 million in the 2016-17 Budget was provided to assist SCT with modernising its processes.

Reporting

5.110. The level of reporting by SCT, both operationally and of systemic issues, was another issue raised by stakeholders in their submissions. Consumer groups noted:

Like most tribunals, the SCT lags far behind EDR schemes in its accountability, transparency and reporting. This is of particular concern given the compulsory nature of superannuation. If a systemic issue exists with a particular fund or the industry generally, many Australians will be affected.¹⁰⁸

5.111. SCT also does not report on individual consumer complaints data, including complaints referred to IDR and then returned back to SCT.

Independent reviews

5.112. SCT is subject to Parliamentary scrutiny and must provide an annual report to Parliament. Stakeholders also submitted oversight arrangements are ‘too passive and indirect to provide meaningful oversight’.¹⁰⁹

5.113. SCT is not subject to periodic independent reviews.

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

106 See for example, Association of Superannuation Funds of Australia, submission to the EDR Review Issues Paper, page 12.

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

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

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

5.114. Stakeholders in their submissions said SCT would benefit from independent reviews.¹¹⁰ ASFA stated they were not aware of ‘any subsequent review of the SCT’s operations, performance and efficiency for which the results have been made public’.¹¹¹ ASFA also suggests that an independent review function could be performed by the Auditor General and that it ‘is critical that the report arising from such a review is made publicly available and that its outcomes are considered by government as part of the annual process for allocation of funding for the SCT’.¹¹²

Stakeholder outreach

5.115. Stakeholder groups also suggested there is room for improvement in stakeholder education and outreach activities.¹¹³ One industry group noted in its submission the ‘level of industry communication and engagement from SCT has reduced in recent times – for example, a quarterly bulletin was last published for January-March 2015’.¹¹⁴ Similarly, consumer groups noted ‘with concern that stakeholder consultation does not appear to be a prominent feature of SCT’.¹¹⁵

5.116. In its submission, SCT notes this is an area in which it is seeking to make further improvements, establishing an Advisory Council and increasing engagement with industry. Further, SCT notes it would like to re-establish its communications activities, including the publication of bulletins and newsletters but it has been unable to do so at present due to under-resourcing.¹¹⁶

5.117. In its 2015-16 Annual Report, SCT notes it has made some changes in this area including the publication of educative fact sheets and more time directed to member education.¹¹⁷

Draft Panel findings

The legislative prescriptions on how SCT is currently permitted to handle complaints inhibit its ability to choose the most appropriate dispute resolution mechanism.

Transparency and accountability of operations is important for efficiency and performance and is currently lacking.

110 See for example Industry Super Australia, submission to the EDR Review Issues Paper, page 6; Association of Superannuation Funds of Australia, submission to the EDR Review Issues Paper, page 5; and Legal Aid New South Wales, submission to the EDR Review Issues Paper, page 28.

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

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

113 See for example, Joint Consumer Group, submission to the EDR Review Issues Paper, page 32; Industry Super Australia, submission to the EDR Review Issues Paper, page 4; and Association of Superannuation Funds of Australia, submission to the EDR Review Issues Paper, page 12.

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

115 Joint Consumer Group, submission to the EDR Review Issues Paper, page 32.

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

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

Draft Panel findings (continued)

Compared to industry ombudsman schemes, SCT is restricted in its ability to adapt and reform itself to address issues and future challenges because it requires involvement by government and legislative change.

SCT can improve its stakeholder education and outreach activities.

Governance

- 5.118. As SCT's submission notes, the existing structure of SCT 'has not kept pace with modern governance arrangements'.¹¹⁸ Under the current structure, there are no provisions for delegating certain functions, such as how SCT is constituted, which means SCT decisions are limited by the availability of a small number of Tribunal members. In addition, there is currently no formal board of directors.
- 5.119. Recently, SCT has established an Advisory Council to attempt to fulfil a similar role and has also expressed a desire to incorporate a governance board into the existing model. At present, the Advisory Council includes an independent chair as well as six industry representatives and one consumer representative who provide high-level support and advice to the Chairperson.¹¹⁹
- 5.120. Consumer groups argue that stakeholder consultation and direct involvement in SCT's governance are not prominent features of the existing arrangements.¹²⁰ There is one consumer representative currently on the Advisory Council, the Council is limited to providing high level support and advice to the Chairperson and broader, periodic consultation with stakeholders is more limited than that found in FOS and CIO.¹²¹
- 5.121. Stakeholders also submitted that the current role and delegations of the Chairperson were insufficient and in need of reform.¹²² For instance, the Chairperson is the executive officer responsible for the overall operation and administration of SCT. However, as noted earlier in relation to funding, SCT does not have full visibility and accountability over its funding allocation. This issue is partly attributable to the fact that SCT is not subject to the *Public Governance and Accountability Act* (PGPA Act). This means the Chairperson does not possess financial delegations under the PGPA Act and so ASIC is responsible for day to day management of SCT and administrative resourcing. In fact, as SCT staff are ASIC employees, they have financial delegations that the Chairperson does not. As a result, the Chairperson is unable to make unilateral staffing or budgeting decisions. This significantly restricts the ability of SCT to make effective resourcing decisions and deliver process improvements.

118 Superannuation Complaints Tribunal, submission to the EDR Review Issues Paper, page 29.

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

120 Joint Consumer Group, submission to the EDR Review Issues Paper, pages 32 and 48; Legal Aid New South Wales, submission to the EDR Review Issues Paper, page 28.

121 Joint Consumer Group, submission to the EDR Review Issues Paper, pages 32.

122 Superannuation Complaints Tribunal, submission to the EDR Review Issues Paper, page 29.

5.122. The appointments process, with the Chair and Deputy Chairpersons appointed by the Governor-General and the Tribunal representatives appointed by the Minister can be lengthy. The process inhibits SCT's ability to quickly respond to an increase in the volume of complaints and to manage the operations of SCT in accordance with its organisational priorities, and to quickly respond to emerging issues.

Draft Panel findings

SCT governance arrangements are in need of modernisation. The current situation, with the Chairperson performing a dual role as a CEO as well as Chair of the Tribunal and lacking financial delegations, has resulted in a misalignment of accountability and powers and does not align with good public sector practice.

There is a lack of direct input by consumer and industry experts in the governance of SCT.

The current appointments process for Tribunal members can be lengthy making it more difficult for SCT to manage its operations and to quickly respond to emerging issues.

Accessibility

5.123. Consumer groups submitted that the current system is legalistic and difficult to navigate without any advice and representation.¹²³ There are a limited number of community legal centres that are able to assist with superannuation disputes and SCT does not provide legal advice to applicants. This can also be seen in the rise over the past five years in legal representation of consumers in SCT.

5.124. The current process for lodging a complaint is difficult and heavily reliant on written documents. This makes it harder for vulnerable applicants, especially those who have literacy or language difficulties, to navigate the system. The problem is magnified in relation to TPD and death benefits disputes where strict time limits apply. SCT has no capacity to consider complaints where the time limit has passed, even in exceptional circumstances.

5.125. In addition, consumer groups argue that SCT has 'few effective processes for identifying and responding to issues affecting vulnerable applicants'.¹²⁴ This problem is exacerbated by the absence of an effective process for expediting 'matters that are urgent or exacerbating the applicant's financial hardship'.¹²⁵ However, SCT has recently taken action to speed up some of its processes.¹²⁶

123 Joint Consumer Group, submission to the EDR Review Issues Paper, pages 10 and 69.

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

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

126 See Superannuation Complaints Tribunal 2016, *2015-16 Annual Report*, page 35.

5.126. When making determinations under the current model, SCT applies a narrow construction of what is considered 'fair and reasonable'. Unlike the industry ombudsman schemes, SCT is unable to make broader assessments of 'fairness in all the circumstances'. In view of the discussion of the strengths of the industry ombudsman model this is too restrictive. Like the industry ombudsman schemes, SCT should be able to permit broader considerations to inform decision making, using 'fairness in all the circumstances' and there should also be flexibility to take into account more than the legislation, such as industry codes. The Panel notes that the superannuation sector does not have an industry code at present.

Draft Panel findings

Consumers can find it difficult to access and navigate SCT.

SCT is hampered by restrictive legislation which contains a narrow definition of fair and reasonable in comparison to industry ombudsman schemes.

Systemic issues

5.127. There was a view in submissions that SCT is not doing enough to address systemic issues. Consumer groups noted that the requirement found in sections 64 and 64A of the SRC Act, requiring SCT to report instances of non-compliance with legislation to ASIC and/or APRA, is different to a systemic issues function:

we understand that SCT plays no role in resolving systemic matters directly with superannuation trustees, rather merely reports noncompliance to ASIC. Given that the regulator cannot act on every instance of non-compliance, this is? a serious shortcoming.¹²⁷

5.128. SCT is increasing its advocacy work where systemic issues are identified from complaints (for example, educating consumers about SCT's role), although there are no mandatory requirements for SCT to undertake systemic issues reporting to the levels undertaken by the industry ombudsman schemes.¹²⁸

Draft Panel finding

Although it can refer issues to regulators, a shortcoming is that SCT is not required to resolve systemic issues relating to complaints handling.

127 Joint Consumer Group, submission to the EDR Review, pages 46 and 51; see also Legal Aid Queensland, submission to the EDR Review Issues Paper, page 20.

128 Legal Aid New South Wales, submission to the EDR Review Issues Paper, page 22; Australian Institute of Superannuation Trustees, submission to the EDR Review Issues Paper, page 20.

Other issues

5.129. Submissions also identified gaps relating to several areas of superannuation disputes where consumers currently have limited recourse. These included exempt state and territory public sector superannuation funds and the payment of superannuation contributions by employers.¹²⁹ Access to EDR for members of exempt state and territory superannuation funds may best be delivered in their jurisdiction's ombudsman or equivalent schemes. As to non-payment of contributions by employers, these may best be considered in the context of taxation or employment entitlements given the issue arises from the actions of an employer rather than that of a trustee of a superannuation fund.

PROBLEMS WITH INDUSTRY OMBUDSMAN SCHEMES (FOS AND CIO)

5.130. The Terms of Reference require the Panel to examine the role, powers, governance and funding arrangements of the dispute resolution and complaints framework in providing effective complaints handling processes for users. While there was broad agreement that the introduction of industry ombudsman schemes in the financial system had been a positive development, the Panel received a number of submissions which indicated that the schemes could improve to ensure that users were being provided with more effective outcomes.

Promoting independence and accountability

5.131. While the majority of stakeholders were supportive of schemes remaining industry-based (non-statutory) and industry-funded, the Panel received a number of submissions from individuals who were concerned that these features compromised a scheme's ability to act independently of its members and, in particular, could result in a scheme's decision making and processes being biased in favour of the financial firm.

5.132. Some financial firms also expressed concerns that scheme decision making and processes were biased in favour of consumers. For example, one stakeholder submitted that EDR schemes were fundamentally unfair and that the processes were infected with bias against financial firms.¹³⁰

5.133. In order for users to have confidence in EDR schemes, it is important that schemes are, and are perceived to be, independent and accountable. Under the current framework, schemes are held to account through a number of different mechanisms, including:

- being governed by an independent board;
- the requirement to undertake periodic independent reviews; and
- the obligation to report outcomes of the schemes publicly (but not publish outcomes in relation to individual cases).

¹²⁹ Australian Institute of Superannuation Trustees, submission to the EDR Review Issues Paper, page 7.

¹³⁰ Financial Industry Delegation, submission to the EDR Review Issues Paper, page 8.

Governance arrangements

- 5.134. The majority of submissions commenting on the schemes' governance arrangements were broadly supportive of the existing governance arrangements. These require the board to have an equal number of consumer and industry directors and an independent chair, who are appointed following consultation with a range of stakeholders, including consumer representatives.
- 5.135. The Panel is aware that alternative ombudsman governance models exist. For example, the Board of the Telecommunications Industry Ombudsman (TIO) has an equal number of consumer, industry and independent representatives, along with an independent chair. At the United Kingdom's Financial Ombudsman Service (UK FOS), directors are approved by the Financial Conduct Authority (FCA). The Chairperson is appointed by the FCA with approval of HM Treasury.
- 5.136. One issue which arose during the Panel's consultations was the level of oversight required in relation to decisions made by the board, in particular, the amount of funds the board raises from industry to conduct scheme activities.
- 5.137. While some individual submissions raised concerns that the current funding model undermines scheme independence,¹³¹ a number of submissions noted that industry funding provides schemes with autonomy to determine their own funding needs and how funds should be applied.¹³² For example, the Joint Consumer Group submission notes 'the funding model is a critical element of success of industry-based EDR'.¹³³ The funding model allows schemes to flexibly respond to new issues or circumstances, including unanticipated rises in disputes numbers and, where there is a greater reliance on dispute resolution fees (rather than membership fees), can provide appropriate incentives for financial firms to settle disputes.¹³⁴
- 5.138. The Panel is aware that other jurisdictions adopt different approaches to determining the appropriate funding levels for ombudsman schemes. For example, UK FOS's budget is approved by the FCA.

Draft Panel findings

The governance model of industry ombudsman schemes, with even numbers of directors with industry and consumer expertise and an independent chair, assists in ensuring that schemes can operate independently of industry, despite being industry funded.

Where EDR schemes have sufficient funding flexibility, it allows them to respond quickly to changes, such as an increase in the number of disputes received.

131 O'Reilly, S, submission to the EDR Review Issues Paper, page 15; Field, S, submission to the EDR Review Issues Paper, page 1.

132 Australian Bankers' Association, submission to the EDR Review Issues Paper, page 12.

133 Joint Consumer Group, submission to the EDR Review Issues Paper, page 49.

134 Joint Consumer Group, submission to the EDR Review Issues Paper, page 49; ASIC, submission to EDR Review Issues Paper, page 31; IAG, submission to the EDR Review Issues Paper, page 2.

Independent reviews

5.139. ASIC's Regulatory Guide 139 requires that approved EDR schemes commission an independent review of their operations and procedures three years after their initial approval and every five years thereafter, unless a shorter timeframe is specified.¹³⁵ Independent reviews involve an intensive and comprehensive examination of whether the scheme continues to comply with the relevant EDR benchmarks and whether it is meeting its regulatory obligations.¹³⁶ They include both a qualitative assessment and quantitative measures of a scheme's performance.¹³⁷

5.140. Regular independent reviews of an EDR scheme's performance and procedures provide important feedback about how the scheme should evolve and areas that should be changed or improved.¹³⁸ They are critical to public accountability and help to promote a culture of continuous improvement within the schemes.¹³⁹ In this regard, they are a valuable source of information for the scheme itself, ASIC and stakeholders more broadly.

5.141. However, it was observed that there are limitations under the current framework, including:

- reviews are generally only required to be undertaken every five years and ASIC has limited powers to require schemes to initiate reviews outside of this cycle;
- there is uncertainty regarding ASIC's ability to require a scheme to conduct a targeted review in response to a particular identified problem; and
- there is no statutory obligation on schemes to publish detailed responses to an independent review's recommendations or to report on implementation or follow-up action following an independent review, although this is their current practice.

5.142. The Joint Consumer Group submitted that ASIC should publicly report on EDR schemes' responses to recommendations of periodic independent reviews and require an explanation where a recommendation is not accepted.¹⁴⁰

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

136 Financial Ombudsman Service, submission to the EDR Review Issues Paper, page 17.

137 Australian Securities and Investments Commission 2013, Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes*, page 33.

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

139 Joint Consumer Group, submission to the EDR Review Issues Paper, page 12.

140 Joint Consumer Group, submission to the EDR Review Issues Paper, page 5.

Independent Assessor

5.143. Related to this, FOS has stated that, in order to increase accountability and transparency, it will appoint an external assessor to independently review complaints about service issues in dispute handling (an 'Independent Assessor'). The person would be appointed by and report to the FOS Board.¹⁴¹ The Independent Assessor would not review the substance of FOS decisions (that is, they would not act as a review or appeal mechanism on the findings or outcomes of FOS decisions on the substance of a dispute or jurisdictional decision). Their role would be limited to complaints from consumers and financial firms about service issues in relation to the handling of the dispute.

5.144. This is similar to the remit of the Independent Assessor at UK FOS.

5.145. Another model of independent complaints review, akin to an independent assessor, operating in relation to taxation complaints is the Inspector-General of Taxation (IGT).

5.146. The IGT is an independent, statutory body that has, as part of its role, investigating complaints relating to administrative actions (or inaction) of the Australian Taxation Office (ATO) or the Tax Practitioners Board (TPB).

5.147. The IGT's remit generally covers dealings or interactions relating to:

- the timeliness of responses to a person's requests;
- the conduct of ATO or TPB officers;
- the availability of services (such as the Tax Agent Portal); or
- whether the ATO auditor has considered all relevant information provided in a matter.

5.148. The IGT is not empowered to look at complaints regarding a person's obligation to pay an amount of tax; or laws about the qualification of that amount of tax.¹⁴²

Draft Panel findings

Regular independent reviews of an EDR scheme's performance and procedures are an important feedback and accountability mechanism to ensure they continue to evolve and improve.

Independent Assessors have the ability to promote scheme accountability and improve scheme decision making processes.

141 Financial Ombudsman Service, submission to the EDR Review Issues Paper, page 22.

142 Inspector-General of Taxation website, viewed on 27 November 2016, <<http://igt.gov.au/making-a-complaint/complaint-faqs/>>

Reporting

- 5.149. A number of submissions suggested that the schemes' reporting requirements could be made more rigorous. At present, schemes are required to publish a detailed annual report, which includes information such as the number of complaints received and the time taken to resolve complaints.
- 5.150. An issue noted by the Joint Consumer Group was that the information published was not always comparable, for example, schemes used different measures of timeliness in their reporting. It was submitted that the schemes should publish quarterly comparative complaints data about financial firms, which occurs at TIO and for certain ombudsman services in the United Kingdom.¹⁴³ It was argued that more comparable data would improve and streamline the consumer experience and make the data more meaningful. As ANZ noted, comparative performance reporting is important for consumer confidence in dispute resolution generally.¹⁴⁴

Equity and efficiency

Powers

- 5.151. A number of stakeholders submitted that the powers of the schemes should be increased. In particular, that schemes should be given the power to compel documents,¹⁴⁵ require mandatory discovery and the open exchange of information between the parties,¹⁴⁶ and award penalties that are a multiple of any losses.¹⁴⁷ There were diverse stakeholder views on the issue of remedies. For example, some thought the cap on expenses and/or non-financial loss was too low,¹⁴⁸ while others did not support the awarding of non-economic loss.¹⁴⁹
- 5.152. FOS submitted that its powers should be strengthened, including but not limited to the power to obtain information and documents (noting that SCT and UK FOS have this power) and a power covering fair compensation for loss or damage (including a direction that the financial firm takes such steps as the Ombudsman considers just and appropriate, with the direction being enforceable by injunction).¹⁵⁰

143 Joint Consumer Group, submission to the EDR Review Issues Paper, pages 50-51.

144 ANZ Bank, submission to the EDR Review Issues Paper, page 2.

145 Joint Consumer Group, submission to the EDR Review Issues Paper, page 47.

146 Senator Nick Xenophon, submission to the EDR Review Issues Paper, page 2.

147 Holt Norman Ashman Baker Action Group, submission to the EDR Review Issues Paper, page 8.

148 Law Council of Australia, SME Committee, submission to the EDR Review Issues Paper, page 18; Holt Norman Ashman Baker Action Group, submission to the EDR Review Issues Paper, page 26.

149 AMP, submission to the EDR Review Issues Paper, page 3.

150 Financial Ombudsman Service, submission to the EDR Review Issues Paper, page 36.

Information request

Should schemes be provided with additional powers and, if so, what additional powers should be provided?

How should any change in powers be implemented?

Approach to dispute resolution

- 5.153. EDR schemes have the ability to adopt less adversarial processes, which provides unrepresented consumers with a more favourable forum than that offered by courts and tribunals.¹⁵¹ FOS and CIO have a high degree of discretion in choosing the appropriate dispute resolution process for a particular matter. Both schemes employ flexible decision making criteria, which includes reference to legal principles, applicable legislation and good industry practice, with an overarching principle of ‘fairness in all the circumstances’.
- 5.154. While these processes can provide significant benefits, there was concern among some stakeholders that the criteria used were both subjective and dependent on personal values and interpretation. It was submitted that it was unclear what ‘fairness in all the circumstances’ really involved and that the schemes needed to increase their guidance on this issue.¹⁵² Stakeholders also called for a greater level of clarity around their decision making processes generally.¹⁵³
- 5.155. By contrast, ASIC submitted that, particularly in relation to outdated medical definitions in trauma policies, there could be greater clarity around, and strengthening of, the use of ‘fairness’ in FOS’s handling and determination of a dispute. According to ASIC, while in the vast majority of cases a policy’s terms reflected its intent and spirit, in a small number of cases, due to changing medical understanding, a consumer could receive an outcome which did not reflect an appropriate application of ‘fairness’ in FOS’s decision making process.¹⁵⁴
- 5.156. A number of submissions also raised the issue of procedural fairness within the schemes. In particular, that because the schemes are not bound by the legal rules of evidence or previous decisions, it was possible for consumer outcomes to differ and for inconsistencies to arise.¹⁵⁵ However, on these points FOS submitted that it considered that its decision making processes were clear and based on criteria set out in its Terms of Reference.¹⁵⁶

151 Queen Margaret University 2014, *Models of Alternative Dispute Resolution (ADR) A report for the Legal Ombudsman*, page 78.

152 Senator Nick Xenophon, submission to the EDR Review Issues Paper, pages 1-2.

153 The Association of Super Funds of Australia, submission to the EDR Review Issues Paper, page 13.

154 Australian Securities and Investments Commission, supplementary submission to the EDR Review Issues Paper, pages 2-5.

155 National Australia Bank, submission to the EDR Review Issues Paper, page 6.

156 Financial Ombudsman Service, submission to the EDR Review Issues Paper, page 20.

The role and transparency of panels for complex disputes

5.157. The issue of the schemes' ability to deal adequately with complex disputes was raised by a number of stakeholders. There was support amongst some stakeholders for a greater use of panels to deal with complex disputes.¹⁵⁷ Consumer advocates were concerned about the devolution of decision making from panels to single ombudsman determinations, particularly for complex investments and insurance matters.¹⁵⁸

5.158. There are a number of advantages to using panels, including access to consumer and industry expertise in a particular product or sector and increased likelihood that the decision will have 'buy-in' from consumer and industry stakeholders. These are particularly relevant in the context of complex disputes. However, the Panel notes there are costs associated with the use of panels, including financial costs and the time taken to resolve the dispute.

5.159. One issue raised was the low levels of transparency surrounding when a panel will be used to hear a dispute. FOS provided the Panel with the internal criteria it applies when determining whether a matter should be decided by a panel or single ombudsman. FOS uses panels when there is a particular need to bring in the expertise of a consumer and industry representative. While FOS applies different criteria depending on the dispute's subject matter, for example, general insurance, life insurance, investments, credit and deposit-taking, at a general level FOS takes into account:

- the particular complexity of the dispute;
- the amount of loss and other potential consequences of a dispute; and
- whether the decision is likely to be a 'new' decision about the industry standard in a particular context.¹⁵⁹

5.160. While parties to the dispute may suggest that a matter should be heard by a panel, the ultimate decision rests with FOS, specifically the Chief Ombudsman or Ombudsman to whom the matter is allocated.¹⁶⁰ By contrast, CIO does not use panels, with all decisions made by the Ombudsman.¹⁶¹

Draft Panel findings

Panels play an important role in resolving complex disputes, however, they do impose costs on the system.

There is currently a lack of transparency around when a panel will be used.

157 Holt Norman Ashman Baker Action Group, submission to the EDR Review Issues Paper, page 32.

158 Joint Consumer Group, submission to the EDR Review Issues Paper, page 37.

159 Financial Ombudsman Service 2015, *Operational Guidelines to the Terms of Reference (1 January 2015)*, pages 84-86.

160 Financial Ombudsman Service 2015, *Operational Guidelines to the Terms of Reference (1 January 2015)*, page 86.

161 Credit and Investments Ombudsman, information supplied to EDR Review, 5 November 2016.

Accessibility

- 5.161. Stakeholders submitted that there was a need for case managers to be trained to respond sensitively to the particular experience and needs of vulnerable and disadvantaged people.¹⁶² For example, trauma-informed training was important as it would allow staff to appreciate why normally reasonable requests and expectations may pose difficulties for a complainant.¹⁶³ The question was also raised about whether the heavy reliance on lawyers as case managers provided better outcomes for consumers or resulted in an overly legalistic approach to dispute resolution.¹⁶⁴
- 5.162. Both FOS and CIO provided information to the Panel about the processes they have in place to assist individuals who are affected by financial or other trauma. FOS stated that its approach was multi-faceted, involving staff training, and working with referral agencies to ensure its identification of trauma was effective and its assistance for vulnerable clients was supportive and appropriate. It identified particular areas where it was assisting individuals and groups, including those affected by family violence and Aboriginal and Torres Strait Islander peoples. CIO also provided the Panel with information about how it handles complaints made by victims of family violence.
- 5.163. Submissions were generally of the view that the schemes were accessible and there was a good level of awareness, but that improvements could be made. The Joint Consumer Group submitted, relevantly, that the schemes should: establish and improve outreach programs to underrepresented communities; consider a face-to-face option for the most disadvantaged and vulnerable consumers; engage with health and community workers; and improve access to interpreters.¹⁶⁵

ASIC's oversight powers

- 5.164. While ASIC's policy guidance sets out the EDR benchmarks that schemes are required to meet, ASIC's oversight role has not extended to compelling scheme performance on specific operational matters or an active involvement in the resolution of individual disputes.
- 5.165. Instead, in circumstances where an approved industry EDR scheme fails to meet one of the approval criteria in ASIC Regulatory Guide 139, ASIC's powers are limited to either varying the approval, for example by imposing a condition, or revoking the approval.
- 5.166. These limited powers mean ASIC is unable to take appropriate action to address a specific problem with a scheme and continue to ensure that scheme users are provided with effective outcomes.

162 Joint Consumer Group, submission to the EDR Review Issues Paper, page 49.

163 Holt Norman Ashman Baker Action Group, submission to the EDR Review Issues Paper, page 7.

164 Joint Consumer Group, submission to the EDR Review Issues Paper, page 49.

165 Joint Consumer Group, submission to the EDR Review Issues Paper, page 32. See also Legal Aid New South Wales, submission to the EDR Review Issues Paper, page 22.

Draft Panel finding

ASIC's limited oversight powers do not allow it to take targeted action to address problems within a scheme.

Other issues: EDR membership requirements for credit representatives

5.167. ASIC's submission notes that one of ASIC's roles in relation to the industry ombudsman schemes is monitoring scheme membership to ensure that licensees meet their dispute resolution obligations.¹⁶⁶ In order to facilitate this monitoring, schemes are required to report to ASIC when a member withdraws from a scheme, switches between schemes or is expelled from membership of a scheme.¹⁶⁷

5.168. ASIC's submission notes that a substantial number of these notifications relate to credit representatives. For example, for the 2015-16 financial year, ASIC received:¹⁶⁸

- from CIO: 2,786 member notifications of which 343 related to licensees and 2,443 to credit representatives; and
- from FOS: 526 member notifications relating to both licensees and representatives.

5.169. Under the National Consumer Credit Protection Act 2009, both credit licensees and credit representatives are required to maintain separate membership of an approved EDR scheme, even though the credit licensee is responsible and liable for any conduct of its representative that relates to a credit activity, including where the conduct of the representative is outside of the authority of the licensee.

5.170. The requirement for both credit licensees and credit representatives to have EDR membership is in contrast to the Australian financial services licensing regime where only licence holders are required to maintain membership of an approved EDR scheme. The policy rationale for this approach is that making licensees responsible for the conduct of their representatives combined with compulsory membership of EDR by the licensee provides adequate protection for consumers dealing with those representatives.

5.171. Requiring credit representatives to maintain separate EDR membership imposes costs on both the credit representative and ASIC, and will unnecessarily increase regulatory costs of the EDR framework where they do not otherwise enhance consumers' access to EDR.

166 Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, page 20.

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

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

Information request

Does EDR scheme membership by credit representatives provide an additional or necessary layer of consumer protection that is not already met through the credit licensee's membership?

INTERNAL DISPUTE RESOLUTION

5.172. The Panel's Terms of Reference require this Review to consider the linkages between EDR and internal dispute resolution procedures (IDR).

5.173. As noted in Chapter 3, a licence condition for financial firms dealing with retail clients is the maintenance of appropriate dispute resolution mechanisms including an IDR procedure which complies with standards and requirements, and membership of an EDR scheme approved by ASIC. For trustees of regulated superannuation funds, the requirement to establish arrangements for dealing with complaints arises under section 101 of the *Superannuation Industry (Supervision) Act 1993*.

5.174. IDR in Australia's financial system refers to the processes that allow a consumer to attempt to resolve a dispute directly with a financial firm. IDR plays a critical role in the financial dispute resolution framework. Indeed, IDR – not EDR – is the primary avenue for aggrieved consumers to seek redress,¹⁶⁹ so any consideration of dispute resolution arrangements must include consideration of the quality of IDR provided by financial firms. The way in which firms facilitate the resolution of complaints by their customers directly impacts on customer outcomes across the financial system. Effective IDR also significantly reduces the pressure on EDR.

Effective IDR has benefits for both firms and consumers

5.175. Effective IDR can benefit both firms and consumers. IDR is an important element of financial firms' overall relationship with their customers.¹⁷⁰ Good IDR can maintain – or even generate – goodwill between parties. It is in firms' interests to maintain a positive relationship with their customers by taking complaints seriously and using their best endeavours to resolve them promptly and effectively. The fact that IDR involves the firm attempting to resolve the complaint directly with its customer without third party assistance facilitates an informal process with the consumer and has the potential to reach a satisfactory outcome for both parties.

169 Disputes to be considered by FOS, CIO or SCT must first be raised with the financial firm or superannuation fund, providing the firm with an opportunity to resolve the complaint through IDR before it is escalated. IDR is therefore a prerequisite to EDR in the financial system.

170 Australian Bankers' Association, submission to the EDR Review Issues Paper, page 2.

- 5.176. Both FOS and CIO have processes for referring complaints that have not been through IDR back to the relevant financial firm, although these processes are different, as noted in below in the section 'Tracking of Referrals to IDR by EDR bodies'. SCT refers complainants that have not been through a fund's IDR back to the fund, but does not otherwise monitor or track the complaint.
- 5.177. This is an arrangement which CIO indicates is strongly supported by its members, particularly smaller members,¹⁷¹ who seek to avoid the expenses associated with EDR. As noted in Chapter 4, funding EDR at least partly through user-pays fees can create financial incentives for behavioural change by firms; that is, it can encourage financial firms to improve their management of complaints at IDR. However, Australian Finance Conference and some others suggested¹⁷² that the funding arrangements could also lead to a perverse outcome whereby financial firms feel pressured to settle unmeritorious claims via IDR to avoid EDR-related fees.
- 5.178. Tracking the nature of complaints received through a financial firm's IDR can provide useful intelligence to the senior management or board of a large firm or to the proprietor and management of a smaller organisation on any recurring or systemic issues arising. This can assist to drive internal improvements for the benefit of the firm and its customers. A number of banks and others indicated that both IDR and EDR provide valuable feedback on changes that need to be made to improve processes, including IDR processes.¹⁷³ This can have positive impacts on all of a firm's customers, not only those who have been involved in IDR.
- 5.179. Legal Aid Queensland indicated that the most significant barrier to consumers lodging a complaint at IDR is trust, as many consumers see IDR as another way to prolong a dispute. This was a view echoed in some submissions by individuals, who indicated that when a financial firm is not acting in good faith to seek to resolve a complaint, IDR prolongs the compensation process as the complaint is inevitably escalated into EDR.

Volume of complaints at IDR

- 5.180. ASIC does not have the power to collect recurring data about financial firms' IDR. Firms are not required to report this information externally unless they are members of an industry code of practice, under which they must annually report IDR statistics to the relevant Code Compliance Committee. Current codes in operation which have this requirement are: the Code of Banking Practice; General Insurance Code of Practice; Customer Owned Banking Code of Practice; and Insurance Brokers Code of Practice.

171 Credit and Investments Ombudsman, submission to the EDR Review Issues Paper, page 11.

172 For example, Finance Industry Delegation, submission to the EDR Review Issues Paper, page 3; Moneybox Loans, submission to EDR Review Issues Paper, pages 8 to 9; Australian Retail Credit Association, submission to the EDR Review Issues Paper, page 9.

173 Westpac, submission to the EDR Review Issues Paper, page 2; Legal Aid Queensland, submission to the EDR Review Issues Paper, page 5.

5.181. Available data on the number of complaints at IDR is provided below.

Code	Code subscribers	No. of complaints received at IDR	Time taken to complete IDR
Banking	13 banking groups	1.2 million	92% of complaints closed within 5 days
General insurance	158 code subscribers	21,719	Data not available
Customer owned banking	76 institutions	16,709	64% of complaints resolved on the spot or within 5 days
Insurance brokers	324 insurance brokers	1,023	41% of complaints resolved on the spot or within 5 days

5.182. There is no public reporting of complaints dealt with by superannuation funds at IDR.

Problems with and opportunities for improvement of IDR

Lack of consistent reporting on IDR processes and outcomes

5.183. A key difficulty with IDR is that, as it pertains to individual financial firms and the way they run their business, the nature and quality of processes and outcomes can be very variable.

5.184. Reporting on IDR activity and outcomes is very limited. While FOS and CIO collect some data on those disputes which are referred or returned to financial firms, and details of the IDR complaints dealt with by subscribers of the various Codes of Practice are published, there is no comprehensive, consistent, comparable, publicly available IDR data.

5.185. ASIC identifies a need to improve both the data that is collected and the format and reporting of dispute data at IDR (as well as at EDR). Improved information could assist ASIC in monitoring trends, identifying emerging issues and determining regulatory priorities. It could also help firms to benchmark their performance against their peers and could help consumers to compare firms' performance.¹⁷⁴

5.186. FOS notes that the lack of data hampers a system-wide assessment of financial sector dispute resolution: both how effective it is at a given point in time and whether it is improving over time.¹⁷⁵ Collecting and publishing comprehensive data across the financial system about IDR would allow better monitoring and a stronger response.

¹⁷⁴ Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, page 44.

¹⁷⁵ Financial Ombudsman Service, submission to the EDR Review Issues Paper, page 14.

- 5.187. By way of international comparison, in the United Kingdom, most firms are required to report directly to the Financial Conduct Authority twice each year on the number, type and outcome of complaints received during the reporting period. The FCA then publishes the data on a complaints data web page at both aggregate and firm levels.¹⁷⁶
- 5.188. One possible concern with such an approach is that financial institutions record complaints differently: some capture all expressions of dissatisfaction, regardless of the point of contact or the time taken to resolve these, while others only record those 'disputes' that are not resolved immediately and require follow-up action.¹⁷⁷ While the different processes can make the monitoring of the effectiveness of IDR procedures difficult, the Panel notes that ASIC RG 165 currently requires financial firms to use the definition of 'complaint' articulated in Australian Standard AS ISO 10002-2006.¹⁷⁸

Inconsistent timeframes

- 5.189. There are a range of different time limits for IDR processes, which vary depending on the category of complaint. For most complaints, financial firms must give a 'final response' to the complainant within 45 days; hardship disputes typically have a 21-day time limit;¹⁷⁹ and superannuation trustees have 90 days to complete IDR processes.
- 5.190. The Joint Consumer Group submission suggests that the timeframe for a final IDR response for simple credit, banking and insurance disputes should be reduced from 45 to 30 days where multiple party input is not required (such as the opinion of an expert, for example, a valuer) and that the 90-day timeframe for IDR procedures in superannuation disputes should be reduced.¹⁸⁰ Similarly, Legal Aid New South Wales suggests that firms should acknowledge complaints within seven days and make decisions within 30 days.¹⁸¹
- 5.191. Data reported by the Code Compliance Monitoring Committee suggests that financial firms are dealing with complaints well within the required timeframes, sometimes by a considerable margin. However, again, there is no comprehensive, consistent, publicly available IDR data.¹⁸²

176 Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, page 44.

177 Code Compliance Monitoring Committee, submission to the EDR Review Issues Paper, page 3.

178 Australian Securities and Investments Commission 2015, Regulatory Guide 165 *Licensing: Internal and external dispute resolution*, 'Complaint' therein defined as 'An expression of dissatisfaction made to an organisation, related to its products or services, or the complaints handling process itself, where a response or resolution is explicitly or implicitly expected.', page 20.

179 However, the Credit and Investment Ombudsman submission to the EDR Review Issues Paper, page 10, notes that post-March 2013, financial hardship complaints potentially extend IDR to 63 days.

180 Joint Consumer Group, submission to the EDR Review Issues Paper, pages 16 and 20.

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

182 The Code Compliance Monitoring Committee states in its submission to the EDR Review Issues Paper, page 4, that the code-subscribing banks have indicated that, in total, 92% of the complaints received in 2015-16 were dealt with in under 5 days and only 0.8% took over 45 days to resolve.

Barriers to IDR

- 5.192. While financial firms and industry representative bodies claim that IDR processes are generally accessible and that there are few to no barriers to consumers lodging complaints through IDR,¹⁸³ this view was not unanimous. A number of submissions indicated that it can be difficult for consumers to find out about IDR,¹⁸⁴ and some consumers have expressed dissatisfaction or raised a complaint with their financial firm but have not been made aware of its IDR process. The Joint Consumer Group submission indicates that there is a widespread misunderstanding by financial firms that a consumer must be referred to or contact their specialist IDR team for a complaint to trigger IDR, however this is inconsistent with ASIC's requirements in RG 165.¹⁸⁵
- 5.193. Views on whether it is easy to escalate complaints from IDR to EDR were also mixed. A number of submissions, particularly from consumer advocates,¹⁸⁶ indicate there are barriers to escalation such as insufficient notification being provided by financial firms about the availability of EDR, while others suggest it is easy to escalate.¹⁸⁷ Legal Aid Queensland indicates that, while it is generally straightforward to move complaints from IDR to EDR, when IDR is of poor quality it can be difficult to identify when it has been completed.¹⁸⁸ Other problems are 'complaint fatigue' and customer concerns about backlash from financial firms.

Tracking of referrals to IDR by EDR bodies

- 5.194. A significant number of disputes are made to EDR bodies before attempts have been made to resolve them through IDR. FOS, CIO and SCT each take a different approach to such disputes.
- 5.195. FOS and CIO have both embedded in their processes the primacy of IDR.
- 5.196. FOS refers each complaint that it registers – whether already considered by a firm's IDR procedures or not – back to the financial firm for a (final) opportunity to resolve the dispute in-house. The financial firm must provide a response to the applicant and FOS within 45 days if the matter has not previously been through the IDR procedures, or within 21 days if it has. If the dispute remains unresolved once the relevant time period elapses, then FOS proceeds to deal with the matter. In 2015-16, 11,342 disputes (33 per cent of the total 34,095 disputes received) were referred to IDR and resolved, while 19,794 (58 per cent) were referred to IDR and then returned to EDR.¹⁸⁹

183 For example, Credit Corp Group, submission to the EDR Review Issues Paper, page 6.

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

185 Joint Consumer Group, submission to the EDR Review Issues Paper, page 13.

186 Holt Norman Ashman Baker Action Group, submission the EDR Review Issues Paper, pages 12-13.

187 QBE Insurance, submission to the EDR Review Issues Paper, page 2.

188 Legal Aid Queensland, submission to the EDR Review Issues Paper, page 6.

189 The remainder are disputes referred to IDR and open at year end: Financial Ombudsman Service 2016, data supplied to EDR Review, 7 October 2016.

- 5.197. CIO registers the complaint as received. Where the complaint has not already been through IDR, the consumer is referred to the firm's IDR process and advised that the firm must respond within a specified timeframe. The consumer is invited to advise CIO if the complaint is not resolved. The financial firm is advised of the fact that the consumer has been referred to their IDR process. If CIO does not hear from the consumer about the outcome of IDR, CIO makes two attempts to follow up with the consumer. If they still do not hear from the consumer, CIO assumes the consumer does not wish to proceed with EDR and closes the case.
- 5.198. The process for complaints to be resolved by SCT is different again. Whether or not a dispute has been raised at IDR is relevant to SCT's consideration of whether a dispute falls within its jurisdiction. If the complainant has not attempted to resolve the dispute through the trustee's IDR procedures (which may, under the *Superannuation Industry (Supervision) Act 1993*, take up to 90 days), then SCT is unable to accept the dispute. In 2015-16, around 23 per cent of complaints were referred back to IDR because the consumer had not been through IDR before lodging the complaint with SCT. SCT does not track disputes referred to IDR.
- 5.199. The Panel considers that where an EDR body has referred a dispute to IDR and is actively monitoring its progress, it provides an incentive for the financial firm to deal with the dispute more promptly than may otherwise be the case. This approach also reduces barriers to IDR because it does not require the consumer to take the further step of initiating the IDR process. Furthermore, tracking by EDR bodies may assist in identifying possible systemic issues which require investigation; for example, it may identify situations where members are not advising their customers adequately of the IDR procedures available.

Role of Customer Advocates

- 5.200. A number of banks have recently appointed Customer Advocates,¹⁹⁰ which review disputes from consumers and small business which have not been able to be resolved to the customer's satisfaction through IDR.
- 5.201. The appointment of Customer Advocates could potentially assist with the resolution of disputes, however, a number of submissions expressed concern about the presence of these roles within the large banks, suggesting that some consumers may mistakenly believe that they must use the Customer Advocate before they can pursue EDR.¹⁹¹
- 5.202. The Joint Consumer Group suggests that Customer Advocates could have a broader role in improving systems for dispute resolution, and in streamlining disputes and remediation programs.¹⁹²

190 Joint Consumer Group, submission to the EDR Review Issues Paper, page 23.

191 Legal Aid Queensland, submission to the EDR Review Issues Paper, page 4.

192 Joint Consumer Group, submission to the EDR Review Issues Paper, page 24.

IDR in life insurance

- 5.203. The Joint Consumer Group submission expresses concern that where firms have multi-tier IDR processes (for example two stages of IDR, including effectively an internal IDR appeal mechanism), there is a risk of consumer confusion (with consumers not aware of the point in time at which they are eligible to escalate a complaint to the second stage) or customer fatigue (where the consumer gives up on pursuing the dispute).
- 5.204. Related to this is the issue identified in ASIC's supplementary submission regarding timeframes for making claims decisions under the new Life Insurance Code.¹⁹³ The Code provides an overall timeframe of 12 months for claims decisions, and allows insurers to go over this time for a range of reasons. Once the claim goes beyond 12 months, the Code only requires insurers to provide the consumer with information about how to make a complaint regarding the delay.

ASIC oversight

- 5.205. As noted in Chapter 3, ASIC's guidance on the standards required by financial firms in relation to their IDR procedures is contained in RG 165.
- 5.206. There appears to be appetite amongst consumer representatives and others (such as FOS) for a more proactive role for ASIC in monitoring and enforcing compliance with RG 165. For example, the Joint Consumer Group suggests that ASIC should have an enhanced role in responding to complaints about poor IDR and should name financial firms where systemic issues exist.¹⁹⁴
- 5.207. FOS also suggests that ASIC be granted greater powers to manage remediation matters where failings in a firm (or an industry) cause widespread consumer detriment which requires systemic redress.¹⁹⁵

Draft Panel findings

Effective EDR is supported by effective IDR.

Data on IDR outcomes is limited and inconsistent and this means that it is difficult to determine how effective internal dispute resolution currently is and whether it is improving over time.

Tracking by EDR bodies of disputes referred back to IDR is an important element of the framework and could assist in encouraging firms to reach a solution or identify systemic issues in IDR.

193 Australian Securities and Investments Commission, supplementary submission to the EDR Review Issues Paper.

194 Joint Consumer Group, submission to the EDR Review Issues Paper, page 27.

195 Financial Ombudsman Service, submission to the EDR Review Issues Paper, page 17.

Chapter 6: A future framework

- 6.1. The need to provide a viable alternative to the court system by way of low cost, speedy and flexible access to redress for users continues to be the overall goal of the external dispute resolution (EDR) framework. It is widely recognised that EDR provides a viable alternative to the court system, addressing some of the resourcing and power imbalances that would otherwise impede consumers' access to redress.
- 6.2. The current framework, consisting of two industry ombudsman schemes and a statutory tribunal, is the product of history rather than design. This review presents an opportunity to address shortcomings which are preventing the system as a whole from operating optimally and ensure the system is well-placed to meet future challenges, including changing consumer expectations and changes in the financial system, regulatory framework and broader socio-economic context.
- 6.3. The Panel has found that aspects of the present system are working well, particularly the industry ombudsman schemes, which are free for consumers and provide value for money for financial firms. The existing arrangements for FOS and CIO, underpinned by a co-regulatory approach, have provided these schemes with flexibility to develop their own procedures within a framework set by government and the Australian Securities and Investments Commission (ASIC).
- 6.4. Key strengths of the industry ombudsman schemes are that, while funded by industry, schemes are governed by independent boards with an independent chair and an equal number of directors with consumer and industry backgrounds. Being industry funded creates incentives for the schemes and firms to resolve disputes efficiently, resulting in lower costs for the system. The focus on providing fair and accessible dispute resolution (including for vulnerable consumers), the ability to innovate and adapt to changes in the regulatory and broader socio-economic environment (such as unanticipated increases in dispute volumes, changing consumer expectations, technological change, and changes in regulatory settings) are all hallmarks of industry ombudsman schemes. Schemes also play an important role in improving industry behaviour by working with financial firms to identify and address systemic issues, thereby bolstering the effectiveness of internal dispute resolution.
- 6.5. In this regard, industry ombudsman schemes provide benefits not observed, or not observed to the same degree, in bodies established by government, whose objectives, functions and operational flexibility are typically determined and constrained by the legislation under which they are established. While not strictly linked to their structure, statutory schemes (such as state-based tribunals) have tended to be more adversarial and legalistic compared with the industry ombudsman schemes, which can impede accessibility. Statutory models have also tended to be more focussed on addressing the individual dispute before the scheme than on improving broader industry practice, in contrast to industry ombudsman schemes.

- 6.6. While recognising the benefits of industry ombudsman schemes, the Panel did observe that the presence of two EDR schemes (FOS and CIO) with overlapping jurisdictions gives rise to a range of problems:
- consumer confusion and difficulties in achieving comparable outcomes for consumers who have similar complaints; and
 - unnecessary duplicative costs and an inefficient allocation of resources for the industry (based on the need to establish and run two schemes) and for the regulator (based on the need to approve and oversee multiple schemes).
- 6.7. The Panel also found that where it is the financial firms (but not consumers) who have a choice of scheme for dispute resolution, it is not clear that competitive tension drives innovation and better outcomes for consumers.
- 6.8. Having considered the impacts of competitive tension within the current framework, the Panel is not convinced that competition between EDR schemes is appropriate and is not persuaded that maintaining the status quo, of multiple schemes with overlapping jurisdictions, provides superior outcomes for users compared with a single scheme.

A NEW INDUSTRY OMBUDSMAN SCHEME FOR FINANCIAL, CREDIT AND INVESTMENT DISPUTES

Draft recommendation 1

A new industry ombudsman scheme for financial, credit and investment disputes

There should be a single industry ombudsman scheme for financial, credit and investment disputes (other than superannuation disputes) to replace FOS and CIO.

- 6.9. The Panel recommends that there be a single industry ombudsman scheme for all financial, credit and investment disputes (other than superannuation disputes¹) to replace FOS and CIO.

Benefits of a single industry ombudsman scheme for financial, credit and investment disputes

- 6.10. Moving to a single industry ombudsman scheme for financial, credit and investment disputes is expected to have benefits relative to the status quo, as summarised in the following table.

1 Superannuation disputes include disputes in relation to life insurance products held within superannuation (group life policies).

Benefits of the new single industry ombudsman scheme compared to status quo

	Status quo (two industry ombudsman schemes)	Single industry ombudsman scheme
Efficiency	Efficiency compromised by jurisdictional overlaps, delays in resolving some disputes.	<p>↑ economies of scale expected, as well as the capacity to reallocate resources as priority areas shift; opportunity to enhance coverage across the framework; and review scheme's powers and remedies.</p> <p>Removes jurisdictional overlap, with all financial product disputes (apart from superannuation matters) being considered by a single body.</p>
Equity	Consumer confusion (potential for consumer to be lost between schemes).	↑ equity; single scheme would reduce consumer confusion and new scheme provides an opportunity to strengthen accountability and improve fairness for users.
Complexity	Schemes with overlapping jurisdictions results in consumer confusion.	↓ consumer confusion and complexity as all financial product disputes (apart from superannuation disputes) will be dealt with by one body.
Transparency	Presence of competition between schemes may provide incentives to minimise financial disclosure (due to price competition), which reduces financial transparency.	↑ transparency is possible as a shift to a single scheme results in elimination of competitive pressure, removing barriers to financial transparency.
Accountability	Lack of consistency of reporting between schemes makes it difficult to compare the schemes and monitor their effectiveness.	↑ accountability as existing accountability mechanisms and regulatory oversight will be strengthened under a single scheme model.
Comparability of outcomes	Different processes and criteria for decision making across the schemes compromises comparability of outcomes.	↑ comparability of outcomes due to greater consistency in processes and procedures.
Regulatory costs	Currently duplicative costs for ASIC as it oversees two schemes and also for members as two schemes require management, board oversight, infrastructure, staff and other overheads.	<p>↓ costs for ASIC: duplicative regulatory costs would reduce (with some increase in allocative efficiency), although this would be at least partly offset by ASIC having an expanded role in relation to the EDR framework.</p> <p>↓ duplicated costs for members to the extent a single scheme realises efficiencies (by removing need for two boards, two terms of reference, etc).</p>

Powers, jurisdiction, governance and funding

6.11. While the powers, jurisdiction, governance and funding arrangements in place currently for the existing industry ombudsman schemes appear to be generally working well, there is scope to reconsider and improve them in light of the new single scheme.

6.12. The Panel considers that:

- the jurisdiction of the new scheme should be at least as broad as FOS's existing jurisdiction, given it is the broader of the two schemes;
- governance arrangements should recognise the importance of ensuring that the scheme is, and is perceived to be, independent of its members, and is sufficiently resourced and has appropriate processes to deliver high-quality and timely decisions; and
- monetary limits and compensation caps, for consumers and small business, should be increased and indexed to ensure they remain appropriate over time (draft recommendations 2 and 3).

Maintaining awareness of the needs of all of its members

6.13. As the requirement to be a member of an industry ombudsman scheme is part of the licensing framework, the population of financial firms requiring EDR membership is diverse and varied, ranging from the large publicly listed banks and insurance companies, through medium-sized financial firms, to single owner mortgage brokers and accountants.

6.14. In order to maintain industry engagement, which has been essential to the success of the EDR schemes, the new scheme must reflect the needs of its entire membership base, including smaller firms, in terms of:

- how it operates: it should be easy to understand and have flexible processes with minimal bureaucracy that is sensitive to and can accommodate the different levels of sophistication among members (for example, recognise that smaller firms may require additional support to participate fully in the dispute resolution process);
- appropriate governance arrangements: giving both larger and smaller members the ability to have input into the running of the scheme (alongside other key stakeholders, such as consumer organisations); and
- funding arrangements that reflect user-pays principles and do not impose excessive costs on smaller members: there is some potential for a larger scheme to exploit efficiencies associated with economies of scale, providing scope to pass through savings to members.

- 6.15. The Panel has received submissions reflecting concerns that the shift to a single scheme would compromise the ability to cater to the needs of smaller firms. However, in practice both existing industry ombudsman schemes have a very high percentage of smaller members: FOS defines 88 per cent of its members as small or very small, and CIO has indicated that 97 per cent of its members are sole traders, partnerships or small businesses.
- 6.16. Accordingly, both schemes have experience dealing with smaller firms and it is desirable that practices that have worked to accommodate smaller firms be incorporated into the new scheme, such as, for example, the 'one free complaint' program that both FOS and CIO have,² and that the new scheme continues to maintain and increase industry engagement through a broad range of forums.

Features of a single industry ombudsman scheme for financial, credit and investment disputes

- 6.17. Some preliminary observations on the features of the new scheme are provided in the table below.

High level features of a single industry ombudsman scheme for financial, credit and investment disputes	
Powers and approach to decision making	<p>Decisions should bind members but not complainants.</p> <p>The scheme should retain a focus on fairness with regard to decision making, including incorporating the broadest definition of fairness (currently in FOS's Terms of Reference).</p> <p>The scheme should operate flexibly, with minimal bureaucracy and policies and processes (including on matters such as when it will use conciliation and panels) should be clear and transparent to users.</p>
Jurisdiction	<p>The monetary limits of the scheme should provide maximum protection for consumers (including small businesses) and maximum flexibility to enable the scheme to provide fair and reasonable redress.</p> <p>FOS's jurisdiction currently goes beyond the basic jurisdiction required by RG 139. The new scheme's jurisdiction should cover, as a minimum, the consumers and the products and services which are currently covered by FOS, and monetary limits and compensation caps should be increased and indexed over time.</p>
Governance	<p>The board should be independent, and perceived to be independent, of the firms who provide the scheme's funding and membership base, and should take into account input from a range of stakeholders, including small and large members, and consumer and industry stakeholders.</p>

² Since February 2007, all licensee members of CIO are entitled to one free complaint each membership year which can be used to offset the complaint fees that would normally apply to a complaint heard by CIO. This is intended to mitigate the cost of EDR membership for smaller members: see <<http://www.cio.org.au/members/rebate/>> for further information. (Credit and Investments Ombudsman 2016, data provided to EDR Review, 11 October 2016.) Likewise FOS provides one free decision (preliminary view or determination) per financial year to those members whose membership levy falls below a certain threshold, provided the decision is wholly in favour of the member and the member paid all fees and charges on time in the previous year. This arrangement took effect from 1 July 2015. (Financial Ombudsman Service, data provided to EDR Review, 7 October 2016.)

High level features of a single industry ombudsman scheme for financial, credit and investment disputes (continued)

Funding	<p>The scheme should be industry funded. A user-pays model which incentivises firms to minimise disputes or to resolve disputes early, including through IDR, should be encouraged, as well as policies that support smaller members, such as a 'one free complaint' program.</p> <p>There should be financial transparency, with the scheme required to publish information on its funding arrangements, revenue and expenditure.</p>
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Draft recommendation 2

Consumer monetary limits and compensation caps

The new industry ombudsman scheme for financial, credit and investment disputes should provide consumers with monetary limits and compensation caps that are higher than the current arrangements, and that are subject to regular indexation.

- 6.18. The current monetary limit of \$500,000 and the compensation cap of \$309,000 are inadequate and no longer in line with the values of some financial products (such as mortgage balances) that may give rise to disputes, resulting in a gap in EDR coverage.
- 6.19. Increased monetary limits and compensation caps will improve efficiency and equity by extending coverage of the EDR framework and enhance consumers' access to redress. However, where the scheme increases its jurisdiction and accepts more complex disputes, it should ensure it has the expertise and processes in place to appropriately deal with those matters.

Draft recommendation 3

Small business monetary limits and compensation caps

The new industry ombudsman scheme for financial, credit and investment disputes should provide small business with monetary limits and compensation caps that are higher than the current arrangements, and that are subject to regular indexation.

- 6.20. Small businesses can possess characteristics that mean they face many of the same issues as consumers in dealing with disputes and when seeking redress. However, small businesses do not have adequate access to EDR because the existing monetary limits (\$500,000 for the value of claims under dispute and \$2 million in relation to credit facilities) are too low and exclude many small businesses from being able to seek redress within the EDR framework.
- 6.21. This gap in the framework can be remedied by the new scheme for financial, credit and investment disputes having higher monetary limits and compensation caps relative to the existing limits and caps imposed by FOS and CIO.

- 6.22. The new scheme for financial, credit and investment disputes should ensure: that the increase in small business jurisdiction is appropriately resourced, including with staff with relevant expertise; that the increase in small business jurisdiction does not compromise the scheme's ability to provide effective EDR to other users (such as consumers); and that the scheme has appropriate dispute resolution processes in place (including, for example, appropriate use of panels for more complex disputes – see draft recommendation 5).

Information request

What should be the monetary limits and compensation caps for the new scheme? Should they be different for small business disputes?

What principles should guide the levels at which the monetary limits and compensation caps are set? What indexation arrangements should apply to ensure the monetary limits and compensation caps remain fit-for-purpose?

A NEW INDUSTRY OMBUDSMAN SCHEME FOR SUPERANNUATION DISPUTES

Draft recommendation 4

A new industry ombudsman scheme for superannuation disputes

SCT should transition into an industry ombudsman scheme for superannuation disputes.

- 6.23. Consumers (and their dependents in the case of death benefits) who have disputes in relation to superannuation (including in relation to life insurance within superannuation) should have access to a viable, low cost, quick and flexible alternative to the court system that provides strong consumer protections and is responsive to future challenges.
- 6.24. It is recognised that there are a number of elements that are unique to superannuation (compared with other financial products) such as the fact that it is mandatory for all working Australians, it is a long-term asset (relative to financial purchases), there is a fiduciary relationship between the trustee and the individual members (rather than the typical contractual relationship between a consumer and financial firm) and there are typically minimal interactions between the individual member and the superannuation fund. However, the Panel does not consider that these features mean there should be a different dispute resolution model for superannuation disputes compared with other financial products.
- 6.25. The Panel is concerned that, in the absence of significant reform, the existing pressures on SCT will only grow as the superannuation system matures and an ever increasing number of consumers enter the drawdown (retirement) phase. The Panel also notes that currently consumers and industry are missing out on key benefits provided by the industry ombudsman schemes.

- 6.26. The Panel considers that the existing problems with regard to SCT cannot be fully addressed while a tribunal structure is retained, even with substantial reforms to funding, governance or other aspects of the legislative regime, as the rigidity of the statutory model will continue to hamper flexibility and innovation. A critical feature of industry ombudsman schemes is their ability to rapidly respond to changes in the financial system, consumer expectations and the broader socio-economic context. Schemes are able to amend their operations, processes, funding and jurisdictions, including through changes they initiate to their Terms of Reference. This flexibility allows for more effective future proofing compared with the tribunal structures, which are reliant on government action (through legislation) for change.
- 6.27. It is for these reasons that, in order to ensure the system is well-positioned to respond to present and future challenges, the Panel recommends that SCT should be transitioned to a new industry ombudsman scheme for superannuation disputes. The transition would need to carefully consider any concerns of stakeholders already within the current system.
- 6.28. Transitioning from a statutory tribunal to an industry ombudsman scheme would have a number of benefits as outlined below.

New industry ombudsman scheme for superannuation disputes	
Efficiency	<p>↑ in efficiency relative to status quo due to:</p> <p>An efficient funding model, governance structure and resource allocation. Funding more directly linked to volume of complaints; flexibility to allocate resources as priority areas shift; flexibility to recruit within the scheme's budget.</p> <p>Flexibility to choose the most appropriate resolution mechanisms for a dispute, allowing the scheme to tailor processes to different types of disputes.</p> <p>Flexibility to respond and adapt to future challenges, including through changing processes and operations, and amending terms of reference.</p>
Equity	<p>↑ in equity relative to status quo due to:</p> <p>Flexibility in defining fairness and the ability to consider more than the relevant legislation (e.g. the industry code once established – see draft recommendation 5).</p> <p>Flexibility to extend time limits for death benefits and TPD claims in extenuating cases.</p> <p>Flexibility to provide a broader range of remedies which may include compensation for non-financial loss.</p>
Complexity	<p>↓ in complexity relative to status quo due to:</p> <p>Focus on developing informal processes and tailored processes where appropriate (for example, for hardship).</p> <p>Simpler and easier to navigate processes for stakeholders.</p>
Transparency	<p>↑ in transparency due to:</p> <p>Industry funding provides transparency and reporting of scheme's funding.</p> <p>Governance arrangements provide transparency over the scheme's operations, performance reporting, priorities and resourcing decisions.</p> <p>Enhanced reporting of IDR outcomes of funds (draft recommendation 9).</p>

New industry ombudsman scheme for superannuation disputes

Accountability	<p>↑ in accountability due to:</p> <p>Governance by an independent board of directors, with a balance of industry and consumer expertise and an independent chair.</p> <p>Oversight through periodic independent reviews, including of its operations, with results publicly available for consumer and industry consideration.</p>
Comparability of outcomes	<p>↑ in comparability of outcomes within scheme relative to status quo:</p> <p>Independent reviews provide opportunities for scrutinising decisions to enhance consistency of decision making within the scheme.</p> <p>Better comparability of outcomes in superannuation and financial disputes as all disputes will be covered by EDR and regulated by ASIC.</p>
Regulatory costs	<p>Potential ↑ in direct regulatory costs overall:</p> <p>Dependent on the level of industry funding and degree of oversight by ASIC (although other resources involved in maintaining legislation and government appointing Tribunal members no longer required). To the extent a user-pays model is adopted, there would be incentives on individual superannuation funds to reduce complaints referred to EDR, and thereby reduce costs of the scheme.</p>

6.29. The Panel considers that an industry ombudsman scheme for superannuation, appropriately designed, would incorporate the key benefits of both the tribunal structure and industry ombudsman schemes.

6.30. The table below compares SCT with the proposed industry ombudsman scheme for superannuation disputes.

	Superannuation Complaints Tribunal	A superannuation industry ombudsman scheme
Structure and membership	Statutory tribunal established by legislation.	Company limited by guarantee operating as an ASIC-approved EDR scheme. Licence conditions could require trustees and other financial firms contracted to provide services to superannuation funds (such as insurers providing group life policies) to be members of the scheme.
Function	<p>To provide a 'fair, economical, informal and quick' alternative to the court system.</p> <p>To inquire into complaints about the decisions of trustees of superannuation funds, Retirement Savings Account (RSA) providers and certain insurers.</p>	<p>To provide a fair, economical, informal, quick and flexible alternative to the court system.</p> <p>To inquire into complaints about the decisions of trustees of superannuation funds, RSA providers and certain insurers.</p>

	Superannuation Complaints Tribunal	A superannuation industry ombudsman scheme
Jurisdiction	<p>Defined by legislation (sections 14 to 15K of SRC Act). Jurisdiction over decisions by trustees of regulated superannuation funds, RSA providers and certain insurers.</p> <p>Unlimited monetary jurisdiction.</p> <p>No time limits for lodging disputes, apart from certain disputes including those relating to disability and death benefits.</p> <p>Discretion to refuse to consider dispute if lodged more than 12 months after the decision was made.</p>	<p>Terms of Reference could be designed to replicate the existing SCT's jurisdiction, including unlimited monetary jurisdiction.</p> <p>Terms of Reference could provide scheme with flexibility to extend time limits for disability and death benefits complaints in exceptional circumstances.</p>
Powers and approach to decision making	<p>When reviewing a trustee's decision, SCT has all the powers, obligations and discretions conferred on the trustee, but may only exercise its determination making power to counteract any unfairness or unreasonableness in the trustee's decision, and must also act within the terms of the fund's governing rules (section 37 of the SRC Act).</p> <p>Able to compulsorily join insurers to a dispute. Other third parties (e.g. persons with an interest in a death benefits dispute) can be joined upon application.</p> <p>Powers of discovery. Failure to comply is an offence.</p>	<p>Terms of Reference could permit broader considerations to inform decision making – 'fairness in all the circumstances' and the flexibility to take into account more than the legislation (for example, the provisions of a superannuation industry code if established). Terms of Reference could also allow the scheme to take into account existing body of case law developed in relation to SCT where appropriate.</p> <p>Third parties that are members of the scheme (for example, an insurer providing a group life policy) could be compulsorily joined to a dispute. Other third parties (for example, persons with an interest in a death benefits dispute) could be joined upon application.</p> <p>Terms of Reference could require trustee to provide information to the scheme. Non-compliance would not be an offence but there would be sanctions available under the scheme itself, or consideration could be given to alternative regulatory action by ASIC or the Australian Prudential Regulation Authority (APRA).</p>
Remedies	<p>Cannot award costs or damages or provide a remedy where there has been no adverse practical outcome or financial loss. For example, not able to award compensation for non-financial loss.</p>	<p>Terms of Reference could provide a broader range of remedies, including compensation for non-financial loss.</p>

	Superannuation Complaints Tribunal	A superannuation industry ombudsman scheme
Enforceability of decisions	<p>Decisions are binding on the trustee only.</p> <p>Non-compliance by trustee reported to ASIC or APRA. ASIC/APRA or the complainant may apply to the court for a performance injunction requiring compliance with the decision (section 315 of the SIS Act).</p>	<p>Trustees would be contractually bound to abide by decision if accepted by complainant. Non-compliance would not be an offence but there would be sanctions available under the scheme itself, or consideration could be given to alternative regulatory action by ASIC or APRA. Complainant or the scheme operator could seek contractual remedies against trustee to enforce compliance with the decision.</p>
Rights of appeal	<p>Parties have a right to appeal to the Federal Court on questions of law (section 46 of SRC Act) and/or seek judicial review under section 5 of the <i>Administrative Decisions (Judicial Review) Act 1977</i> and section 39B of the <i>Judiciary Act 1903</i>.</p>	<p>Appeals would take the form of an action for breach of contract (e.g. if the scheme failed to follow the procedures set out in its Terms of Reference or acted unreasonably).</p> <p>Complainant should retain right to undertake private action.</p>
Funding and resourcing	<p>Annual government appropriation in the Federal Budget. Recovered via annual financial sector levies set by Minister. Funding managed by ASIC and subject to government efficiency measures.</p>	<p>Industry funded by members of the scheme. Funding managed by the scheme with resourcing decisions made by its board of directors to respond to the scheme's priorities. Funding linked to volume of complaints and other priorities of the scheme.</p>
Appointments	<p>Statutory appointments of Tribunal members subject to ministerial approval.</p>	<p>No statutory appointments. Staffing decisions would be made by the scheme, facilitating quicker response to a change in circumstances.</p>
Processes and ADR mechanisms available	<p>Processes specified in statute. Currently, SCT must attempt conciliation before proceeding to determination.</p> <p>Limited flexibility for test cases, fast-tracking or expediting cases or hardship processes.</p>	<p>Flexibility to develop and tailor processes to different types of disputes (e.g. in cases of hardship, or fast-tracking of simpler disputes) as scheme deems necessary.</p>
Oversight and accountability	<p>Parliamentary scrutiny, and the Commonwealth Ombudsman for complaints relating to the SCT.</p> <p>No governance board but an Advisory Council.</p> <p>Chairperson is responsible for SCT outcomes, but does not have ability to spend public funds (does not possess financial delegations).</p>	<p>New scheme would be subject to additional accountabilities and oversight mechanisms recommended by this review as well as periodic independent external reviews.</p> <p>A board of directors with an independent chair and equal number of directors with industry and consumer backgrounds would be responsible for ensuring scheme meets its objectives and would have authority to spend funds raised from members.</p>

	Superannuation Complaints Tribunal	A superannuation industry ombudsman scheme
Systemic issues	Reports all incidences of non-compliance and any breaches of law, governing rules, or terms and conditions to ASIC/APRA, but otherwise not required by legislation to undertake any systemic issues work.	Scheme would be required to investigate, address and report on systemic issues and report all incidences of non-compliance and any breaches of law, governing rules, or terms and conditions to ASIC and/or APRA.

Draft recommendation 5

A superannuation code of practice

The superannuation industry should develop a superannuation code of practice.

- 6.31. A number of industry codes currently operate in the financial system, including the Banking Code of Practice, Customer Owned Banking Code of Practice, General Insurance Code of Practice and Insurance Brokers Code of Practice.
- 6.32. A code of practice is a set of rules setting out an industry's commitment to deliver a certain standard of practice that can be expected by consumers and (depending on the code) small business. By establishing minimum standards and helping raising industry standards, codes of practice can enhance confidence in the industry. As they are developed by industry, there is scope to review and strengthen codes over time in response to changing consumer expectations and changes in the regulatory environment. In some cases, they can lessen the need for government regulation.
- 6.33. Codes of practice have a particularly important role in EDR as the industry ombudsman schemes, in making decisions, can have regard to the provisions in a relevant industry code of practice.
- 6.34. The Panel notes that five major superannuation industry peak bodies, the Australian Institute of Superannuation Trustees, the Association of Superannuation Funds of Australia, the Financial Services Council, the Industry Funds Forum and Industry Super Australia, are currently working on the development of a binding code of conduct/practice to improve group insurance standards. The Panel supports this initiative.
- 6.35. The Panel recommends that the superannuation industry collaborate on the development of a superannuation code of practice to cover matters such as the industry's key commitments and obligations to consumers on standards of practice across all services provided.
- 6.36. Having had regard to the history of EDR in Australia, where many industry ombudsman schemes were preceded by an industry code of practice, the Panel sees the establishment of a superannuation industry code of practice as an important complement to an industry ombudsman scheme for superannuation disputes.

FUTURE DIRECTIONS: A SINGLE INDUSTRY OMBUDSMAN SCHEME FOR ALL DISPUTES ACROSS THE FINANCIAL SYSTEM

- 6.37. The Panel considered the merits of moving immediately to a single industry ombudsman scheme to handle all disputes in the financial system, including superannuation disputes. On balance, the Panel's view is that it is preferable to initially introduce an industry ombudsman scheme focussed exclusively on superannuation disputes. This approach is more likely to facilitate strong stakeholder engagement in the development and implementation of the scheme, which has been a critical foundation for industry ombudsman schemes in other parts of the financial system.
- 6.38. The new superannuation industry ombudsman scheme should be encouraged to work closely with the new industry ombudsman scheme for financial, credit and investment disputes, to share knowledge and resources (such as back-office functions), and realise efficiencies where possible.
- 6.39. Once the two new ombudsman schemes are fully operational and have garnered consumer and industry support, consideration should be given to further integrating the schemes to create a single industry ombudsman scheme covering all financial system disputes. The Panel notes that integration of this kind would be consistent with the evolution and adaptation that has been a hallmark of the existing EDR framework, with the current industry schemes being the products of amalgamations and consolidations.
- 6.40. The Panel is confident that its draft recommendations – which should be considered as an integrated package of reforms – will address shortcomings in the current EDR framework and ensure that the framework is well-placed to address current problems and withstand future challenges.

OTHER MATTERS: WHETHER A TRIAGE SERVICE OR ADDITIONAL STATUTORY DISPUTE RESOLUTION BODY IS NEEDED

- 6.41. The options of creating a triage service and an additional statutory dispute resolution body were canvassed in the Panel's Issues Paper of 9 September 2016.

Triage service

- 6.42. The Issues Paper sought stakeholder views on the establishment of a triage service, where either:
- there would be a single point of entry, with information passing behind the scenes to the correct scheme; or
 - after making contact with the triage service, consumers would be provided with information about how to pursue their complaint and would be referred to the most appropriate dispute resolution body.

- 6.43. Submissions contemplated a triage service only for financial system disputes as well as a broader triage service for all disputes or complaints across all sectors. A triage service limited to financial system disputes would refer disputes to FOS, CIO or SCT, or other schemes operating outside of the financial system where required. A service operating more broadly across the financial and other sectors would, for example, also triage disputes to ombudsmen in the telecommunications and the energy and water sectors, as well as to other organisations such as Centrelink, community legal services providers and Offices of Fair Trading.
- 6.44. There were mixed views on a triage service. Some stakeholders, such as CIO, argued that a 'consumer-facing common help desk funded by EDR schemes – essentially an online and telephone access point – would substantially improve user outcomes'³ by:
- assisting consumers and small businesses with information about how to pursue a complaint with a business;
 - where appropriate, referring the consumer or small business to specialist services (for example, financial counsellors or Lifeline);
 - if appropriate, registering the complaint; and
 - importantly, directing the consumer or small business to the appropriate EDR scheme, government department (Centrelink, the ASBFEO), financial counsellors, Legal Aid, state Fair Trading offices, government ombudsman bodies, interpreter services, the Office of the Australian Information Commissioner, the Australian Competition and Consumer Commission and even peak industry or self-regulating bodies.
- 6.45. While recognising there would be costs in establishing and running the service, the CIO submission indicates these would be borne by schemes participating in the triage service.
- 6.46. Other stakeholders were opposed to a triage service. ASIC argued that a triage service was unnecessary given the lack of evidence of 'consumers being shopped around schemes or potentially never getting to the scheme that can help them'.⁴
- 6.47. The Joint Consumer Group submission noted that previous attempts at a triage service were largely unsuccessful, one reason being that in order for the service to be effective it required 'highly skilled and knowledgeable operators at the point of triage'⁵, making it expensive to run with little added benefit.

3 Credit and Investments Ombudsman, submission to EDR Review Issues Paper, page 48.

4 Australian Securities and Investments Commission, submission to EDR Review Issues Paper, page 41.

5 Joint Consumer Group, submission to EDR Review Issues Paper, page 60.

- 6.48. While there is a degree of cross-referral between schemes, the Panel notes that schemes have well-developed processes to refer misdirected phone calls and complaints files (in the case of FOS and CIO). While a triage service of the kind proposed by CIO (covering a broad range of bodies within and outside of the financial sector) could provide benefits to consumers and small business in terms of quickly directing them to the scheme or body best able to assist, the breadth of coverage means there would be challenges in running (staffing) and funding such a service (given the mix of private and public bodies proposed to be covered).
- 6.49. For these reasons and in light of its recommendation that FOS and CIO be replaced with a new industry ombudsman scheme for financial, credit and investment disputes, the Panel does not recommend a triage service be established.

Additional statutory dispute resolution body

- 6.50. The Issues Paper, noting the public debate at that time, also sought stakeholder views in relation to the establishment of an additional statutory body for dispute resolution in the financial system.
- 6.51. Most stakeholder submissions did not support the establishment of an additional statutory dispute resolution body, expressing concerns that it would increase complexity,⁶ would not be accessible, flexible or dynamic, and would apply a 'black letter law' approach rather than providing 'fairness in all the circumstances'.⁷
- 6.52. Additionally, the Panel's detailed consideration of SCT (as a statutory tribunal) highlights some of the many difficulties of a statutory tribunal in practice, such as that its objectives, functions and operational flexibility are constrained by the legislation under which it is established, and its ability to adapt and reform itself requires involvement by government and legislative change (refer to Chapter 5).
- 6.53. For these reasons, and in light of the Panel's recommendations that the new industry ombudsman scheme for financial, credit and investment disputes:
- have increased monetary jurisdiction, to allow it to provide adequate access to redress for small business disputes and also to provide increased access for consumers;
 - consider the use of panels in complex disputes, bringing the benefits of utilising industry and consumer expertise and of 'buy-in' from consumers and industry;
 - be made more accountable to users; and
 - be the subject of increased oversight by ASIC

the Panel's view is that an additional statutory dispute resolution body is not needed.

6 Association of Superannuation Funds of Australia, submission to EDR Review Issues Paper, page 23.

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

REPORT OF THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON ECONOMICS — REVIEW OF THE FOUR MAJOR BANKS

6.54. On 24 November 2016, the House of Representatives Standing Committee on Economics released its Review of Four Major Banks: First Report. One of the Committee's recommendations is:

"The committee recommends that the Government amend or introduce legislation, if required, to establish a Banking and Financial Sector Tribunal by 1 July 2017. This Tribunal should replace the Financial Ombudsman Service, the Credit and Investments Ombudsman and the Superannuation Complaints Tribunal. The Government should also, if necessary, amend relevant legislation and the planned industry funding model for the Australian Securities and Investments Commission, to ensure that the costs of operating the Tribunal are borne by the financial sector."

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

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

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

6.57. A difference between the recommendation of the Committee and the draft recommendations of the Panel is that the Committee recommends the establishment of a tribunal to replace FOS, CIO and SCT. In this Interim Report, the Panel makes draft recommendations for the establishment of a single industry ombudsman scheme for financial, credit and investment disputes and an industry ombudsman scheme for superannuation disputes. In Chapters 2, 4 and 5 of this Report, the Panel identifies what it sees as the advantages that ombudsman schemes have when compared with tribunals, such as SCT, when dealing with disputes relating to financial products and services.

6.58. The recommendations of the Committee are a matter for the Government. However, the Panel will give further consideration to the Committee's recommendations in its final report.

ACCOUNTABILITY AND OVERSIGHT

Draft recommendation 6

Ensuring schemes are accountable to their users

Both new schemes should be required to meet the standards developed and set by ASIC. At a minimum, ASIC's regulatory guidance should require the schemes to:

- ensure they have sufficient funding and flexible processes to allow them to deal with unforeseen events in the system, such as an increase in complaints following a financial crisis or natural disaster;
- provide an appropriate level of financial transparency to ensure they remain accountable to users and the wider public;
- be subject to more frequent, periodic independent reviews and provide detailed responses in relation to recommendations of independent reviews, including updates on the implementation of actions taken in response to the reviews and a detailed explanation when a recommendation of an independent review is not accepted by the scheme; and
- establish an independent assessor to review the handling of complaints by the scheme but not to review the outcome of individual disputes.

In addition, ASIC's regulatory guidance should require the new scheme for financial, credit and investment disputes to regularly review and update its monetary limits and compensation caps so that they remain relevant and fit-for-purpose over time.

- 6.59. A strength of the existing framework has been the co-regulatory approach, which has provided industry ombudsman schemes with the flexibility to develop their own arrangements within a framework set by government. Under this approach, ASIC's policy guidance sets out the EDR benchmarks that industry ombudsman schemes must meet but does not extend to detailed operational matters of the scheme or resolution of individual disputes (that is, ASIC is not an appeal body for decisions).
- 6.60. The Panel considers that this co-regulatory approach should continue. However, it is important that both new industry ombudsman schemes, in order to fulfil their mandate of providing effective EDR, meet the standards set by ASIC and be accountable to their users.
- 6.61. At a minimum, the Panel recommends that ASIC's regulatory guidance must require schemes to:
- be adequately funded (for example, in order to be able to respond to unforeseen spikes in dispute volumes);
 - have sufficient coverage (including fit-for-purpose monetary limits and compensation caps in the case of the new scheme for financial, credit and investment disputes);

- be subject to more frequent, periodic independent reviews (the Panel is of the view that given the importance of independent reviews, they should occur more frequently than every five years – which is currently the case with FOS and CIO. The Panel notes that independent reviews of ombudsman type schemes in the financial services sector in the United Kingdom and Singapore occur every three years – see Chapter 2 and Appendix 1); and
 - be responsive to findings of independent reviews, including by providing detailed updates on implementation of actions taken in response to an independent review and a detailed explanation when a recommendation of an independent review is not accepted by the scheme.
- 6.62. In addition, the Panel recommends that the new schemes establish an independent assessor to review complaints made by users (including financial firms) about service issues that arise in the handling of a dispute by the scheme.
- 6.63. The independent assessor would not be an avenue of appeal on the findings or outcome of the dispute, but would assess whether or not the scheme treated the consumer or financial firm fairly in handling the dispute. Where the dispute was not handled satisfactorily, the independent assessor would make a recommendation, which could include that the scheme issues an apology or provide compensation to the relevant user. The independent assessor would report directly to the Board and where the scheme rejected the assessor's recommendation, it should promptly be required to publish its reasons.
- 6.64. Where sufficiently resourced and empowered, an independent assessor would play an important role in improving the standard of complaints handling by the schemes, and in enhancing their accountability and transparency.

Draft recommendation 7

Increased ASIC oversight of industry ombudsman schemes

ASIC's oversight powers in relation to industry ombudsman schemes should be enhanced by providing ASIC with more specific powers to allow it to compel performance where the schemes do not comply with EDR benchmarks.

- 6.65. ASIC's powers in relation to the existing EDR schemes are limited: approving a scheme, varying an approval (for example, by imposing a condition on approval), or revoking the approval. Revoking approval for a scheme would have significant implications for members who must, as a licence condition, belong to an approved EDR scheme. The effect of this is that ASIC is unable to take appropriate action to address a specific problem with a scheme, where it fails to comply with the relevant legislation or regulatory guidance.
- 6.66. Therefore, the Panel considers it necessary to provide ASIC with more specific powers to enable ASIC to give directions to schemes as appropriate to comply with the relevant standards. These could include providing ASIC with powers to require schemes to undertake targeted reviews of particular types of disputes or more frequent independent reviews.

Information request

On what matters should ASIC have the power to give directions? For example, should ASIC be able to give directions in relation to governance and funding arrangements and monetary limits?

OTHER DRAFT RECOMMENDATIONS**Draft recommendation 8****Use of panels**

The new industry ombudsman schemes should consider the use of panels for resolving complex disputes.

Users should be provided with enhanced information regarding under what circumstances the schemes will use a panel to resolve a dispute.

- 6.67. The Panel recognises that the increased monetary limits of the new industry ombudsman scheme for financial, credit and investment disputes (relative to FOS and CIO) is potentially likely to increase the number of complex disputes received, particularly with regard to small business disputes.
- 6.68. Currently, FOS utilises expert decision making panels (which consist of an industry representative, consumer representative and a FOS ombudsman) to make determinations on particularly complex disputes relating to some, but not all, product lines. A panel is appointed by the FOS Board from a pool of panel members covering specialist expertise and experience. CIO does not currently use panels.
- 6.69. There are a number of advantages to using panels, including access to consumer and industry expertise in a particular product or sector and increased likelihood that the decision will have 'buy-in' from consumer and industry stakeholders. These are particularly relevant in the context of complex disputes.
- 6.70. While there are costs associated with the use of panels, including financial costs and time taken to resolve the dispute, the move to a single scheme provides an opportunity to consider the use of panels across all product lines.
- 6.71. The use of panels should also be considered in the development of the new industry ombudsman scheme for superannuation disputes.
- 6.72. In addition, the new industry ombudsman schemes should be transparent to users about the circumstances where panels will be used.

Draft recommendation 9

Internal dispute resolution

Financial firms should be required to publish information and report to ASIC on their IDR activity and the outcomes consumers receive in relation to IDR complaints. ASIC should have the power to determine the content and format of IDR reporting.

- 6.73. Effective EDR is supported by effective IDR. A key difficulty with IDR is that, as it pertains to individual financial firms and the way they run their business, the nature and quality of processes and outcomes can be very variable. There is no comprehensive, consistent, publicly available IDR data, making it difficult to determine how effective each firm's IDR is.
- 6.74. Requiring firms to publish data on their IDR activity and outcomes would have the benefit of:
- enabling different firms' IDR activity to be compared, creating an additional incentive for firms to invest in IDR; and
 - providing evidence to ASIC that it can utilise in developing regulatory guidance in relation to IDR.
- 6.75. Publication of data on firms' IDR would be achieved by providing ASIC with additional powers to determine the content and format of the IDR reporting.
- 6.76. The Panel observes that recommendation 8 of the House of Representatives Standing Committee on Economics Review of Four Major Banks: First Report is broadly consistent with the draft recommendation presented here. The Committee recommends that legislation be amended to give ASIC the power to collect recurring data about licensees' IDR procedures to enable it to identify non-compliance with IDR requirements and take action where appropriate and to enable it to determine whether changes are required to the IDR requirements. The Committee further recommends that ASIC respond to all alleged breaches of IDR requirements, including by notifying complainants of its response. As noted above, the Panel will give further consideration to the Committee's recommendations in its final report.

Information request

What IDR metrics should financial firms be required to report on?

Should ASIC publish details of non-compliance or poor performance IDR, including identifying financial firms?

Draft recommendation 10**Schemes to monitor IDR**

Schemes should register and track the progress of complaints referred back to IDR.

- 6.77. The current dispute resolution bodies have different processes for handling disputes that are lodged with them before having been through IDR. Requiring the new industry ombudsman scheme for financial, credit and investment disputes and the new ombudsman scheme for superannuation disputes to monitor the progress of all complaints referred back to IDR will increase oversight over financial firms' IDR, providing additional incentives to address complaints promptly, and also increase the potential for systemic issues relating to how firms handle disputes in IDR to be identified and addressed.

Draft recommendation 11**Debt management firms**

Debt management firms should be required to be a member of an industry ombudsman scheme. One mechanism to ensure access to EDR is a requirement for debt management firms to be licensed.

- 6.78. There is currently no mechanism for a consumer that has a complaint with an unlicensed debt management firm to seek access to EDR. In some cases, the activities of the firms can impact negatively on consumer outcomes where services are targeted towards vulnerable consumers and do not provide value for money. Additionally, the activities of some debt management firms can hamper the efficiency of EDR schemes by diverting scheme resources where the dispute brought to EDR does not have merit.
- 6.79. Requiring debt management firms to have membership of an EDR scheme will address these problems by providing an avenue for aggrieved consumers to seek redress, and by enhancing the ability of the new scheme for financial, credit and investment disputes to deal with these firms.

Chapter 7: Compensation scheme of last resort

- 7.1. The Panel's Terms of Reference require it to consider whether changes to current dispute resolution and complaints bodies in the financial sector are necessary to deliver effective outcomes for users in a rapidly changing and dynamic financial system. As part of its consideration, the Panel may make observations, but not recommendations, on the establishment of a compensation scheme of last resort.
- 7.2. An efficient, resilient and fair financial system that facilitates economic growth and meets the financial needs of its users is dependent on the trust and confidence of those users.¹ However, and as identified in Chapter 5, it is clear that many Australian consumers currently lack confidence in the financial system and this is due, at least in part, to the issue of uncompensated consumer losses.

UNCOMPENSATED CONSUMER LOSSES

- 7.3. The Panel was provided with evidence from both FOS and CIO about the scale of their unpaid determinations. These figures might be treated as a minimum given the difficulties with quantifying losses suffered by those who haven't lodged a dispute and those whose dispute was closed early as there was no reasonable prospect of any compensation order being satisfied.²
- 7.4. According to FOS, more than \$17 million in determinations it has made in favour of complainants has not been paid (as at 1 November 2016) as the financial firm lacks the financial resources to pay the determinations. FOS has stated that its unpaid determinations are unrelated to its powers, capacity or willingness to enforce its determinations and that it has used litigation to ensure compliance with its determinations where the financial services provider is solvent and there is a good likelihood of recovery.³
- 7.5. At the CIO, since 1 December 2014, four financial firms have not complied with five CIO determinations made in favour of seven consumers. The value of these outstanding determinations was approximately \$414,443 (as at 1 November 2016).⁴

1 Commonwealth of Australia 2014, *Financial System Inquiry Final Report*, page xv. See also Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, page 44.

2 Australian Securities and Investments Commission, submission to the EDR Review Issues Paper, page 44; Joint Consumer Group, submission to the EDR Review Issues Paper, page 73.

3 Financial Ombudsman Service October 2016, *Circular*, Issue 27.

4 Credit and Investments Ombudsman, data supplied to EDR Review, 25 November 2016.

EXISTING COMPENSATION ARRANGEMENTS FOR CONSUMERS

- 7.6. Financial firms are required to have arrangements in place to compensate consumers where losses arise following a breach of financial services or credit laws.⁵ These arrangements are generally satisfied through the holding of adequate professional indemnity insurance (PI Insurance).⁶ However, the policy objective underpinning the PI insurance requirement is to reduce the risk that compensation claims cannot be satisfied by a firm due to a lack of financial resources.⁷ It is not to provide compensation directly to consumers.⁸
- 7.7. As a number of stakeholders identified, there are significant limitations in using PI insurance as a compensation mechanism, including:
- the total funds available under a policy may not cover all of the compensation awarded against the insured;
 - the policy may not cover the conduct which gave rise to the order for compensation, for example, fraud;
 - the amount of compensation payable may be less than the policy's excess;⁹
 - cover may not have been taken out at all and self-certification often means this is only discovered after the firm is insolvent;¹⁰ and
 - PI insurance is a commercial, market-driven product, which means that its availability, cost and terms can vary, and insurers cannot be required to provide it.¹¹

CALLS FOR A COMPENSATION SCHEME OF LAST RESORT

- 7.8. The current gaps in the dispute resolution system which sees consumers denied access to justice either because there is no prospect of receiving compensation, or their successful action remains unsatisfied, has resulted in calls for the introduction of a compensation scheme of last resort.
- 7.9. Compensation schemes protecting against certain classes of losses already exist in other areas of financial services,¹² in different sectors of the Australian economy¹³ and in overseas jurisdictions.¹⁴

5 Section 912B of the *Corporations Act 2001* (Cth); *National Consumer Credit Protection Act 2009* (Cth), s.48.

6 Clause 7.6.02AAA of the *Corporations Regulations 2001* (Cth); Regulation 12 of the *National Consumer Credit Protection Regulations 2010* (Cth).

7 Australian Securities and Investments Commission 2007, Regulation Impact Statement, *Compensation and insurance arrangements for AFS licensees*, page 2.

8 Australian Securities and Investments Commission 2015, Report 459 *Professional indemnity insurance market for AFS licensees providing financial product advice*, page 14.

9 Joint Consumer Group, submission to the EDR Review Issues Paper, page 73.

10 Legal Aid New South Wales, submission to the EDR Review Issues Paper, page 46.

11 Australian Securities and Investments Commission 2015, Report 459 *Professional indemnity insurance market for AFS licensees providing financial product advice*, page 14.

- 7.10. In the superannuation sector, the Commonwealth Government can provide financial assistance to certain superannuation entities that have suffered loss as a result of fraudulent conduct or theft.¹⁵ However, a pooled superannuation trust and a self-managed superannuation fund are not eligible for such assistance.
- 7.11. The Panel received a large number of submissions which supported establishing an industry-funded compensation scheme of last resort, although there were some differences around the scheme's design details. Stakeholders submitted that the current compensation arrangements for consumers were inadequate and that a scheme was important to build trust and confidence in both industry ombudsman schemes and the financial system more generally.
- 7.12. The Australian Bankers' Association submitted that a scheme should be 'accompanied by other reforms to improve the quality of financial advice and consumer protections', including:
- a greater professionalisation of financial advice;
 - expanding the availability and coverage of PI Insurance, including run-off cover, insolvency, fraud and other misconduct;
 - ensuring the scheme is well understood by consumers of financial products so that it is clear it is a last resort scheme, and not intended to cover investment losses; and
 - ASIC requiring an annual assurance statement from all AFS licensees that they have met their licence obligations, including compliance with ASIC's *Regulatory Guide 126: Compensation and insurance arrangements for AFS licensees* and *Regulatory Guide 166: Licensing: Financial requirements*.¹⁶
- 7.13. The Panel notes that any changes to PI insurance should be consistent with the principle that firms, particularly small financial firms, have access to affordable PI Insurance.

12 If a bank, building society or credit union becomes insolvent, the Australian Government may activate the Financial Claims Scheme, which enables quick access to deposits that are protected under the Scheme: see <www.apra.gov.au/CrossIndustry/FCS/Pages/fcs-adi.html.aspx> (viewed on 15 November 2016).

13 Under the Fair Entitlements Guarantee, the Australian Government provides financial assistance to cover certain unpaid employment entitlements to eligible employees who lose their job due to the liquidation or bankruptcy of their employer: see <www.employment.gov.au/fair-entitlements-guarantee-feg> (viewed on 15 November 2016).

14 In the United Kingdom, the Financial Services Compensation Scheme provides protection if, for example, an authorised investment firm is unable to pay claims against it for loss arising from bad investment advice, poor investment management or misrepresentation: see www.fscs.org.uk/what-we-cover/eligibility-rules/when-is-fscs-cover-triggered/ (accessed on 15 November 2016). Canada also has a limited compensation scheme. The Canadian Investor Protection Fund can provide compensation where an investment firm member becomes insolvent and they were holding property on behalf of a client at the time: see <<http://www.cipf.ca/>>

15 Part 23 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

16 Australian Bankers' Association, submission to the EDR Review Issues Paper, pages 6-7.

7.14. The Panel also received submissions from stakeholders who had concerns about a compensation scheme of last resort, which included:

- that all taxpayers would be required to subsidise the scheme, as even with risk mitigation strategies, risk wouldn't be fully priced into the market; and¹⁷
- it would be inequitable to impose such a burden on fully compliant financial firms (in respect to ongoing operating solvency and holding adequate PI Insurance).¹⁸

7.15. The Panel is also aware of the arguments that introducing a compensation scheme of last resort would create moral hazard issues. In particular, that financial firms may be encouraged to provide riskier advice and consumers may become less diligent.

PANEL OBSERVATIONS

7.16. Where consumers are denied access to justice due to a financial firm's lack of resources, this has a negative impact on both the individual consumer and the broader financial system. In circumstances where the market is unable to provide a solution to this problem, the Panel is of the view that there is considerable merit in introducing an industry-funded compensation scheme of last resort.

7.17. The Panel is aware that to help achieve broad consensus about the structure and operation of a compensation scheme of last resort, the Australian Bankers' Association and FOS are working with other key stakeholders to identify any issues that would impede implementation of such a scheme.¹⁹ The Panel will consider the outcomes of this work in the context of its Final Report.

Panel observation

The Panel is of the view that there is considerable merit in introducing an industry-funded compensation scheme of last resort.

17 Financial Planning Association of Australia, submission to the EDR Review Issues Paper, page 15.

18 Australian Collectors & Debt Buyers Association, submission to the EDR Review Issues Paper, page 29.

19 Financial Ombudsman Service October 2016, *Circular*, Issue 27.

Appendix 1: Dispute resolution practices overseas and in other sectors

- A1.1. The Terms of Reference require that, to the extent relevant, the Panel will take into account best practice developments in dispute resolution arrangements in overseas jurisdictions and other sectors when making its recommendations.
- A1.2. This analysis will ensure Australia's dispute resolution and complaints arrangements incorporate the most recent policy solutions, both domestic and international, to enable it to deliver effective outcomes for users in a rapidly changing and dynamic financial system.
- A1.3. Detailed analysis has been undertaken on the United Kingdom, New Zealand, Singapore and Canada. These jurisdictions have been selected for a number of reasons, including that they have financial systems with similar characteristics to Australia, but offer a variety of types of framework and approaches to dispute resolution. Apart from Singapore, the jurisdictions all have ombudsman-style schemes, although there are differences, such as the United Kingdom having a single financial sector ombudsman, while New Zealand and Canada have multiple schemes. Singapore has adopted a hybrid system of adjudication, drawing on aspects of the arbitration and ombudsman models.¹
- A1.4. The sectors chosen from the Australian economy are telecommunications, and water and energy. These were chosen because of their comparability with the financial services sector (they are also regulated, service-providing sectors) and because they provide examples of different alternative dispute resolution (ADR) models, with some being statute-based and others industry-based.
- A1.5. In conducting a qualitative analysis of these overseas jurisdictions and domestic sectors, to the extent relevant, consideration has been given to: their role, powers, governance and funding arrangements; the extent of any gaps and overlaps; and their role in working with government, regulators, consumers, industry and other stakeholders to improve the legal and regulatory framework to deliver better consumer outcomes.

1 Ali, S, *Consumer Financial Dispute Resolution in a Comparative Context, Principles, Systems and Practice*, Cambridge University Press, Cambridge, 2013, page 137.

INTERNATIONAL COMPARISONS

United Kingdom

Overall regulatory framework

- A1.6. The United Kingdom has a single statutory financial services dispute resolution body established by Parliament, the Financial Ombudsman Service (UK FOS).
- A1.7. Under the *Financial Service and Markets Act 2000* (UK) (the FSM Act), financial firms are required to attempt to initially resolve disputes through internal complaints handling systems. Where this fails, a complainant may seek resolution through UK FOS.²
- A1.8. UK FOS is an independent statutory dispute resolution scheme, which was formed in 2001 under Part XVI and Schedule 17 of the FSM Act.³ It was established to create a free, informal and single point of contact for consumers to replace the former eight ADR schemes, which had been criticised for having inaccessible procedures and overlapping jurisdictions.⁴
- A1.9. In the 2015-16 financial year, UK FOS received 340,899 complaints and resolved 438,802 cases.⁵ It resolved 90 per cent of complaints informally, with the remaining 10 per cent of cases proceeding to the final stage of the process where an Ombudsman is asked to make a decision on the matter.⁶
- A1.10. Recent complaints data is shown in the table below:⁷

Type of Complaint	2012		2013		2014		2015		2016	
	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases	%	No. of Cases
Banking and Credit	24	64,234	15	77,176	13	65,077	24	79,763	31	106,327
Investments and Pensions ⁸	6	14,862	4	19,834	3	15,938	4	14,723	4	14,576
Insurance	10	27,563	7	33,172	6	31,213	9	30,080	9	31,284
Payment Protection Insurance	60	157,716	74	378,699	78	399,939	63	204,943	56	188,712
New Cases in Total		264,375		508,881		512,167		329,509		340,899

2 Hodges, C, Benohr, I, and Creutzfeldt-Banda, N, *Consumer ADR in Europe*, Oxford, 2012, page 273.

3 Section 225 of the FSM Act.

4 Hodges, C, Benohr, I, and Creutzfeldt-Banda, N, *Consumer ADR in Europe*, Oxford, 2012, page 273.

5 Financial Ombudsman Service, *2015-16 Annual Report*, page 20.

6 Financial Ombudsman Service, *2015-16 Annual Report*, page 20.

7 Financial Ombudsman Service, *2015-16 Annual Report*, page 20.

8 In relation to pension disputes, there is a Memorandum of Understanding between the Pensions Ombudsman and the Financial Ombudsman Service which states that the Pensions Ombudsman deals with matters which predominantly concern the administration and/or management of personal and occupational pensions (after sale of marketing in the case of personal pensions), while the Financial Ombudsman Service deals with matters which predominantly concern advice in respect of the sale or marketing of individual pension arrangements. See Memorandum of Understanding between the Pensions Ombudsman and the Financial Ombudsman Service, viewed 28 November 2016, <<http://www.financial-ombudsman.org.uk/publications/pdf/memorandum-of-understanding.pdf>>

Jurisdiction

A1.11. The scope of the UK FOS's two jurisdictions – compulsory and voluntary – depends on:

- the type of activity;
- the place where the activity was carried on;
- whether the complaint is eligible; and
- whether the complaint was referred to UK FOS in time.

A1.12. UK FOS can consider a complaint under its compulsory jurisdiction if it relates to an act or omission by a firm in carrying on one or more of the following activities:

- regulated activities;
- payment services;
- a consumer buy-to-let business;
- lending money secured by a charge on land;
- lending money and paying money by plastic card; or
- providing ancillary banking services (as defined) or ancillary activities, including advice, carried on by the firm in connection with them.

A1.13. The Ombudsman can consider a complaint under the voluntary jurisdiction if it is not covered by the compulsory jurisdiction and it relates to a defined list of activities.

A1.14. UK FOS can hear complaints which fall within its jurisdiction from:

- a consumer;
- a micro-enterprise - an enterprise that employs less than 10 people and has a turnover or annual balance sheet that does not exceed €2 million;
- a charity which has an annual income of less than £1 million; or
- a trustee of a trust which has a net asset value of less than £1 million.

A1.15. The maximum money award which the Ombudsman can make is £150,000, excluding interest and costs. If the Ombudsman considers that fair compensation requires payment of a larger amount, they may recommend that the financial firm pays the complainant the balance.

Approach to dispute resolution

A1.16. If the complainant has been through IDR (and is dissatisfied with the final response or eight weeks have passed and the firm has not responded) the matter is sent to an adjudicator who will determine whether the complaint is within jurisdiction.

- A1.17. UK FOS's approach involves attempting to first settle the dispute informally through mediation or conciliation. If the matter is not able to be resolved easily at conciliation (or if the nature of the case makes a written explanation more appropriate), the adjudicator will confirm their position in writing via an adjudication. This sets out their view of the case and how, in the adjudicator's opinion, the case should be resolved. Each party then has a chance to respond.
- A1.18. If the matter remains unresolved for either party, they may ask for a final decision by an Ombudsman, which occurs in about 10 per cent of cases. The Ombudsman will carry out an independent review of the complaint and make a final decision. The Ombudsman will determine a complaint by reference to what is, in their opinion, fair and reasonable in all the circumstances of the case.
- A1.19. If the complainant accepts the decision within the time limit specified by the Ombudsman, both parties are bound by the decision. If not, the member is not bound, and the complainant remains free to take court proceedings.
- A1.20. Because UK FOS is a 'public body', its decisions are subject to judicial review.⁹ This review will generally focus on how an Ombudsman came to a decision rather than the merits of the case.
- A1.21. For members, there also exists a test case procedure. If the member applies before an Ombudsman has made a decision, the case can be heard by a court if:
- the member believes the case involves an important and novel issue;
 - the Ombudsman agrees; and
 - the member agrees to pay the complainant's legal costs.

Governance

- A1.22. Under the FSM Act, the 'scheme operator' is the 'body corporate' that administers the ombudsman scheme and takes the form of a company limited by guarantee (with no share capital).¹⁰
- A1.23. UK FOS's board must have at least three directors, it currently has six, who are appointed by the Financial Conduct Authority (FCA). The Board's Chairman is also appointed by the FCA following approval from HM Treasury. Directors have an initial term not exceeding 3 years (the Chairman 5 years) and they can be re-appointed by FCA. However, they cannot serve periods of longer than 10 years.

⁹ Part 54 of the *Civil Procedure Rules 1998* (UK).

¹⁰ Section 225 of the FSM Act.

A1.24. Directors are 'non-executive' and are not involved in considering individual complaints. Their role is to take a strategic overview and ensure that the ombudsman service is properly resourced and able to carry out its work effectively and independently. Directors are not appointed to represent the individual interests of any particular group or sector, but to ensure the board as a whole can draw on a wide range of experience, knowledge and skills.

Funding arrangements

A1.25. UK FOS is funded by a levy and case fees which members have to pay by law. The levy can range from around £100 a year for a small firm of financial advisers to over £300,000 for a major bank or insurance company. The levy is payable irrespective of whether the member has had a complaint referred to UK FOS. The levy is collected by the FCA.

A1.26. Each year, UK FOS and the FCA consult on the amount of UK FOS's annual budget which is to be raised from the general levy. While there are no specific criteria against which the decision is made, it is noted that the decision is based on the budgeted costs and number of UK FOS staff required to deal with the number of complaints which it expects to receive. Members are required to submit certain information about their business (for example, the size or volume of it) which is used to help decide the general levy. UK FOS's budget is ultimately approved by the FCA.

A1.27. Members also pay an individual case fee when UK FOS handles a complaint about it and the case becomes 'chargeable'. All members are entitled to a number of 'free' cases. Under the current arrangements, a member does not have to pay a case fee for the first 25 cases settled during the year. For each subsequent complaint, a case fee of £550 is payable.

A1.28. In April 2013, UK FOS introduced a group-account fee for the largest banking and financial services groups. Approximately 75 per cent of UK FOS's workload is now paid for on this more financially stable basis.

UK FOS's Independent Assessor

A1.29. UK FOS has an Independent Assessor who is appointed by the Board. The Independent Assessor has its own Terms of Reference, which includes accepting complaints by consumers and firms about the level of service provided. It does not hold the power to assess or review the merits of a case or the actual decisions made.

A1.30. On reviewing a complaint (and providing opportunities for both the complainant and UK FOS to produce documents and reasons to support their case), the Independent Assessor provides its findings in writing. There are no appeals against its opinion and recommendations.

A1.31. If the Independent Assessor decides that the service has not met the required standards, it can make a recommendation to the Chief Ombudsman about how this can be remedied. This may include issuing an apology or paying compensation for any damage, distress or inconvenience caused (compensation will be equivalent to what an ombudsman would award against a business in similar circumstances). If the Chief Ombudsman does not accept the Independent Assessor's recommendation it is remitted to the Board for a final decision.

New Zealand

Overall regulatory framework

A1.32. The Financial Service Providers (Registration and Disputes Resolution) Act 2008 (NZ) (the FSP Act) has the twin purposes of:

- promoting the confident and informed participation of businesses, investors and consumers in the financial markets; and
- promoting and facilitating the development of fair, efficient and transparent financial markets.

A1.33. The FSP Act generally requires all financial service providers (FSPs) (that is, firms and/or individuals) who provide services to retail clients to be participants in an approved Dispute Resolution Scheme (DRS). Financial firms were required to join an approved DRS from 1 December 2010 and financial advisers from 1 April 2011.

A1.34. There are four approved schemes:

- Insurance & Financial Services Ombudsman Scheme (IFSO);
- Banking Ombudsman Scheme (BOS);
- Financial Services Complaints Limited (FSCL); and
- Financial Dispute Resolution Service (FDRS) (formerly the reserve scheme).

A1.35. The schemes compete with each other for membership of FSPs. BOS accepts banks as members while IFSO, FSCL and FDRS accept all types of financial service providers.¹¹ While banks can be accepted as customers by the other schemes, in practice they utilise BOS.¹² Originally, each of the schemes had different specialities however, this is changing with the majority of schemes opening up their membership to a wider range of FSPs.¹³

11 BOS participants are registered banks, their subsidiaries and related companies and certain non-bank deposit takers that meet BOS participation criteria.

12 New Zealand Ministry of Business, Innovation & Employment, *Review of the operation of the Financial Advisers Act 2008 and the Financial Service Providers (Registration and Dispute Resolution) Act 2008, Final Report*, page 27.

13 New Zealand Ministry of Business, Innovation & Employment, *Review of the operation of the Financial Advisers Act 2008 and the Financial Service Providers (Registration and Dispute Resolution) Act 2008, Final Report*, page 29.

A1.36. Key features of the schemes are summarised in the table below.

IFSO	BOS	FSCL	FDRS
Relationship to IDR			
Ordinarily, consumers must go through the FSP's own IDR process first.	To access the scheme, consumers must have first attempted to resolve their dispute with their bank directly.	Consumers must first go through the FSP's own IDR process.	Consumers must first go through the FSP's own IDR process.
Governance			
IFSO has an independent chair with equal representation from industry and consumer groups.	BOS has an independent chair with equal representation from industry and consumer groups.	FSCL has an independent chair with equal representation from industry and consumer groups.	Governed by an advisory council staffed by an independent chair, industry and consumer representatives.
Jurisdiction			
Can only consider complaints relating to a scheme participant. Can hear disputes where the claim (or the part of the claim in dispute) is not more than NZ\$200,000 or NZ\$1,500 per week where the claim relates to a regular payment.	Can only consider complaints relating to a scheme participant. Can hear disputes up to NZ\$200,000 and award up to NZ\$9,000 compensation for inconvenience.	Can only consider complaints relating to a scheme participant. Can hear disputes up to NZ\$200,000 for direct financial loss and up to NZ\$2,000 for inconvenience (e.g. stress and humiliation).	Can only consider complaints relating to a scheme participant. Can hear disputes up to NZ\$200,000.
Funding arrangements (including cost to complainants)			
Free for consumers - funded through participant fees and levies.	Free for consumers - funded through participant fees and levies.	Free for consumers - funded through participant fees and levies.	Free for consumers - funded through participant fees and levies.
Caseload			
FY2014-2015: 3,057 disputes and 254 complaints.	FY2014-15: 2,372 enquiries, 576 complaints, 265 disputes. ¹⁴	FY2014-15: 2,615 consumer enquiries and 193 cases investigated.	FY 2014-15: 1,419 enquiries and 475 complaints. ¹⁵

14 Banking Ombudsman Scheme, 2014-15 Annual Report, page 11.

15 Financial Dispute Resolution Scheme, 2014-15 Annual Report, page 4.

IFSO	BOS	FSCL	FDRS
Membership			
Over 4,000 scheme participants who provide insurance and financial services for potentially more than one million consumers.	Registered banks and non-bank deposit takers that are regulated by the NZ Reserve Bank and can demonstrate high quality internal dispute resolution services.	Membership stands at over 6,000 with members drawn from most sectors of the financial services industry, excluding retail banking. ¹⁶	There are 1,499 members who represent all FSP types. ¹⁷
Powers			
Scheme participants are bound by IFSO decisions.	Scheme participants are bound by BOS decisions.	Scheme participants are bound by FSCL decisions.	Some participants are bound by FDRS decisions.

Scheme approval and oversight

A1.37. The relevant Minister approves schemes and has the power to withdraw this approval in prescribed circumstances. On considering an application, the Minister must be satisfied that the scheme rules are adequate and comply with the FSP Act. Any changes to the scheme rules must be approved by the Minister.

A1.38. The schemes are, relevantly, required to:

- co-operate with other DRSs if a complaint involves members of those other schemes; and
- if there is a series of material complaints about a particular FSP, communicate that fact to the relevant authority.

A1.39. Independent reviews of the schemes must occur at least once every five years after the date of the scheme's first approval. Schemes must also provide an annual report to the Minister.

Addressing systemic issues and consumer complaints

A1.40. On systemic issues, the Financial Markets Authority (FMA) has Memorandum of Understandings with all DRSs and utilises shared data from the schemes on complaints and emerging issues to inform its risk assessments.

¹⁶ Financial Services Complaints Ltd 2015, *Independent Review, Foundation for Effective Markets and Governance*.

¹⁷ Financial Dispute Resolution Scheme, 2014-15 Annual Report, page 14.

A1.41. The schemes ensure staff are trained in how to recognise and escalate systemic issues to the appropriate personnel (for example, CEO). Further, the schemes raise systemic issues directly with the FMA through quarterly reporting and discuss systemic issues at their quarterly meetings. The annual report to the Minister also includes discussion of systemic issues.

A1.42. The schemes can investigate the following complaints about their members:

- any breach of contract with a consumer;
- a failure to follow industry codes of practice (which may include not dealing fairly or responsibly with a consumer);
- conduct that is not fair or reasonable in the circumstances; and
- an alleged contravention of the law.

A1.43. However, a scheme cannot investigate:

- a member's commercial judgment (for example, whether an investment is suitable) unless this breaches a relevant code of practice;
- a member's interest rates or standard fees and charges;
- a product's investment performance;
- events that took place before the scheme's establishment or before a member belonged to the scheme; and
- complaints that could be better dealt with by another body, that have already been made to another body, or that have already been investigated by the scheme.

A1.44. On the application of the person responsible for the DRS, a District Court may make an order requiring a member to do either or both of the following: (a) comply with the rules of the scheme; and (b) comply with a resolution of a complaint that constitutes a binding resolution under those rules (a binding settlement). A DRS member who fails to comply with a binding settlement is liable on conviction to a fine not exceeding NZ\$200,000.

A1.45. A DRS can terminate an FSP's membership if they refuse to comply with a final decision. This prevents them from joining another scheme until the existing complaint is settled. An FSP who does not belong to a scheme is not authorised to give financial advice and can be prosecuted by the FMA if it continues acting as an adviser.

Singapore

Overall regulatory framework

- A1.46. The Monetary Authority of Singapore (Dispute Resolution Schemes) Regulations 2007 (Singapore) enable the Monetary Authority of Singapore (MAS) to approve schemes for resolving disputes relating to the provision of financial services. Currently, the Financial Industry Dispute Resolution Centre (FIDReC) is the only approved scheme.
- A1.47. FIDReC's mission is to provide an affordable alternative dispute resolution scheme that is independent and impartial so as to encourage and assist in the resolution of disputes between consumers and financial institutions in an amicable and fair manner.
- A1.48. FIDReC was established in 2005 following a review by MAS, which recommended the establishment of a new scheme with the aim of providing coverage for most retail consumer complaints in the financial sector. It subsumed the work of the Consumer Mediation Unit of the Association of Banks in Singapore and the Insurance Disputes Resolution Organisation.
- A1.49. In 2014-15, more than 530 financial institutions were subscribed to FIDReC including: banks and finance companies; life insurers; general insurers; capital market services licensees; licensed financial advisers; and insurance intermediaries.¹⁸ In that year, it dealt with 3,220 new cases of which 2,311 were inquiries and 911 were accepted.¹⁹ Of the 911 complaints accepted, 903 went on to mediation or adjudication.
- A1.50. In 2014-15, FIDReC resolved 981 complaints. Of these, 673 complaints were resolved by mediation and 308 complaints were resolved by adjudication. Of the cases resolved: 43.5 per cent were resolved within 3 months; 86.4 per cent within 6 months; 99.6 per cent within 9 months; and the balance (0.4 per cent) took longer than 9 months.
- A1.51. The 2014-15 annual report also included 10-year statistics, which indicated that FIDReC resolved around 10,528 cases over the 10-year period, with 7,815 complaints resolved by mediation and 2,713 cases resolved by adjudication.

Jurisdiction

- A1.52. FIDReC's jurisdiction covers all disputes brought by individuals and sole proprietors against financial institutions who are members of FIDReC, except disputes over commercial decisions (including pricing and other policies, such as interest rates and fees); cases under investigation by any law enforcement agency; and cases that have been subjected to a court hearing, for which a judgment or order is passed.

18 Financial Industry Dispute Resolution Centre, *2014-15 Annual Report*, page 4.

19 Financial Industry Dispute Resolution Centre, *2014-15 Annual Report*, page 4. This included two cases which were at the pre-acceptance stage in 2013-14.

A1.53. Cases may be dismissed if the dispute is considered frivolous or vexatious; had been previously considered and excluded under FIDReC's predecessor schemes; or if there are other compelling reasons why it is inappropriate for the dispute to be dealt with by FIDReC.

A1.54. The following compensation caps apply:

- for claims between insureds and insurance companies, the complainant can claim up to S\$100,000;
- for disputes between banks and consumers, capital market disputes (including third party claims and market conduct claims): up to S\$50,000.

A1.55. The adjudicator may specify that reasonable interest may be payable on the award.

A1.56. The 2014-15 Annual Report notes that financial institutions have been voluntarily submitting to the jurisdiction of FIDReC to handle and adjudicate claims for amounts exceeding its S\$100,000 limit – FIDReC's largest adjudication was for S\$729,000.

A1.57. FIDReC also has a Non-Injury Motor Accident Scheme jurisdiction, which was incorporated in 2008 (and further expanded in 2011). Non-injury motor accident claims of less than S\$3,000 have to first be heard by FIDReC before court proceedings can be commenced.

Approach to dispute resolution

A1.58. FIDReC will only handle a complaint if the financial institution has failed to resolve the complaint to the satisfaction of the complainant within four weeks of receiving it.

A1.59. If the complaint is not resolved, FIDReC applies a three-stage process to dispute resolution:

- **Preliminary review:** A case officer reviews the facts of the case and highlights relevant clauses (of the relevant contracts) and issues to the consumer. This is to provide the consumer with an opportunity to consider whether they would like to proceed with lodging a formal complaint.
- **Mediation stage:** A case manager encourages the parties to resolve the dispute in an amicable but fair way, but will formally mediate in appropriate cases. Case managers do not have the ability to make monetary awards, they can only seek to reach a settlement with parties' agreement.
- **Adjudication stage:** when the dispute is not settled by mediation, the case can be heard and adjudicated by a FIDReC Adjudicator(s). The process is developed and modelled after that used by the Singapore Courts. The Adjudicator has to assess each case based on its facts and merits taking into account all relevant facts such as written submissions and oral testimonies of both parties and allowed witnesses. They also have to make appropriate findings of fact and determine the issues of law and equity relevant to the case:

- Once a decision has been made, they will write a determination (a Grounds of Decision) which is read to both parties at a hearing. If the complainant accepts the determination, both parties are required to sign and have approved by the Adjudicator a Settlement Agreement in relation to the matter.
- During the adjudication stage, each party must present their case without representation by an advocate or solicitor (only a person acting as translator for the complainant is permitted).

Governance

A1.60. FIDReC is currently governed by a board of six directors, comprised of an independent chair, three directors with non-industry background and two directors with industry background. This is consistent with the requirement that the board shall have no less than three and no more than six other directors of which at least half are required to be independent directors.²⁰

A1.61. Before a director is appointed, approval from MAS is required.

Funding arrangements

A1.62. No fees are payable by a consumer for filing an initial complaint for preliminary review, or if the case is resolved by mediation. If the case proceeds to adjudication, in general, the consumer pays S\$50 fee at this stage. The purpose of the fee is to deter vexatious/frivolous complaints, but not to be so high as to act as a barrier to a consumer accessing redress.

A1.63. Firms pay a combination of levies and case fees to contribute to the cost of running FIDReC, with case fees tiered to take into account the complexity of cases.

- Firms pay a case fee of S\$50 for any complaint which is investigated or resolved at the first case manager/mediation stage of the process. When complaints go through to the Adjudication stage, firms pay a flat case fee of S\$500. Fees/levies are paid directly to FIDReC.

A1.64. FIDReC has a power to impose a supplementary levy on financial institutions as a whole, at the group level or individually, when additional funds are required.

Powers

A1.65. FIDReC members are required to enter into an agreement by which they: are bound by the scheme's Terms of Reference; agree not to take legal action against FIDReC; and agree to pay subscriptions, levies and other fees to FIDReC.

A1.66. Members may be expelled for failing to comply with the Terms of Reference or failing to make full payment of subscriptions, levies or fees, although MAS must consent to the removal of members.

²⁰ An independent director is one who is not a substantial shareholder, officer or employee of a financial institution or a related corporation.

A1.67. Decisions of FIDReC are binding on members, but not the complainant who remains free to pursue other avenues, including legal action.

A1.68. In the event that a financial firm fails to comply with an adjudication or the rules/standards in the Terms of Reference, FIDReC has the power to require the financial institution to take such steps as may be necessary to rectify the breach within 14 days, and can impose the following penalties:

- a penalty of up to S\$100 per day for 14 days following the breach;
- a penalty of up to S\$200 per day for a further 14 days after the initial period expires;
- a penalty of up to S\$400 per day for a continuing breach after this period until the breach is rectified; and then
- termination of the financial institution's subscription to FIDReC should they fail to rectify the breach despite the imposition of the penalties. All fees due continue to remain payable even after the financial institution's membership has been terminated.

A1.69. The Terms of Reference set out that the Board may delegate certain of FIDReC's powers and duties, including requesting information from the relevant parties. As such, case managers and adjudicators are entitled to request all relevant data and material relevant to the dispute from both parties. Mediators can also request that the financial institution or its representatives attend interviews for the purpose of recording a statement.

Systemic issues

A1.70. Aside from the public publishing of an Annual Report, the scheme must provide to MAS:

- each quarter: a report on the disputes received during that period and an indication of the time taken to resolve complaints. There is also a section entitled 'Identification of Trends, Systemic Issues & Other emerging concerns' in which the scheme includes details about whether a dispute relates to a particular financial institution or is industry-wide;
- within 14 days from any failure by a member to comply with an award against them, a report about such failure.

Accountability

A1.71. An independent review is to be undertaken every three years (although this can be made later with the discretion of MAS, and MAS has discretion to require any other kind of review at any time). The scheme is required to consult with MAS about the terms of the review. The external review must include a qualitative assessment of the scheme's operations and procedures and the results must be provided to both MAS and its members.

Canada

Overall regulatory framework

- A1.72. Canada has four schemes in place: the Ombudsman for Banking Services and Investments (OBSI); Client Services and Compensation Division of the Autorité des Marchés Financiers, Québec (AMF); Ombudservice for Life & Health Insurance; and General Insurance OmbudService (GIO). Information on OBSI, AMP and GIO will be presented in this Appendix.
- A1.73. OBSI and the GIO are national industry organisations while the AMF is a provincial regulator. OBSI is Canada's independent dispute resolution service for consumers and small businesses. The majority of Canada's banks use OBSI as their external dispute resolution scheme. GIO is an independent dispute resolution service to help Canadian consumers resolve disputes with their home, auto or business insurers.
- A1.74. AMF is Québec's financial markets regulator. AMF regulates insurance, securities, derivatives, deposit institutions (other than banks) and the distribution of financial products and services in Québec. It is also responsible for providing assistance to consumers of financial products and services. AMF offers its complaint resolution services to consumers with a dispute with a financial firm subject to the laws overseen by AMF. The schemes do not compete with each other for membership.
- A1.75. All three schemes provide dispute resolution to consumers free of charge. OBSI and the GIO are industry funded. AMF is funded through dues and levies paid by financial firms governed by the laws it administers.

OBSI	AMF	GIO
Statute or Industry based scheme		
Industry based.	Statute based.	Industry based.
Relationship to IDR		
Consumer must seek resolution through IDR before commencing a claim with OBSI or if 90 days have passed since lodging a complaint through IDR.	Parties required to consider the use of IDR but the decision to offer dispute resolution services remains at the discretion of the AMF.	GIO may refer a consumer to the relevant Insurer's complaints officer before offering conciliation.
Governance		
Governed by a Board of Directors (7 community directors and 3 industry directors) to which the Ombudsman is accountable.	Quarterly reporting to an Advisory Board and Steering Committee but no specific Steering Board for dispute resolution.	Board of Directors (5 independent members and 2 industry representatives)
Jurisdiction		
Can only hear complaints relating to a member firm. Can hear disputes up to \$350,00 Canadian dollars. If a customer's claim is for a higher amount, the customer can voluntarily reduce it.	AMF is the Québec regulator. It can hear disputes relating to financial firms subject to the laws administered by the AMF.	Can only hear complaints relating to member firms. No reference to a monetary limit in the Terms of Reference.

OBSI	AMF	GIO
Funding arrangements (including cost to complainants)		
Free for consumers, funded through participant fees.	Free for both parties but funded through the dues and fees paid by the individuals and enterprises governed by the laws it enforces. Parties may also have to pay for mediation where it lasts longer than 3 hours.	Free for consumers, industry funded.
Caseload		
FY2014-2015: 571 cases opened.	No caseload data publicly available.	FY2015-16: 3,251 complaints
Membership		
All Canadian banks must be a member of an external complaints body (ECB) approved in accordance with the Bank Act. The majority of Canada's banks have chosen OBSI as their ECB.	There is no membership. AMF offers its services to consumers of financial products and services who deal with a financial firm subject to the laws administered by the AMF.	Home, auto or business insurance member companies. All insurance companies doing business in Alberta and British Columbia are required to be members of GIO. Insurance companies are required by law to be a member of an independent ombudsman organisation.
Powers		
Recommendations are not binding on either party but OBSI will make public the failure of a firm to comply with its recommendation.	Recourse to AMF services is voluntary. AMF has no power to compel parties to use them or to force a settlement.	GIO has no power to compel parties to use their services or to force a settlement.

SECTORAL COMPARISONS

- A1.76. Domestically, ombudsman services are available to assist with resolving complaints relating to government agencies, financial institutions and telecommunications, energy, water and public transport service providers.
- A1.77. Most ombudsmen, including the Telecommunications Industry Ombudsman (TIO) and state Energy and Water Ombudsmen, as well as FOS and CIO, are members of the Australian and New Zealand Ombudsman Association (ANZOA), the peak body for ombudsmen in Australia and New Zealand. Members of ANZOA must observe the Benchmarks for Industry-based Customer Dispute Resolution which relate to the principles of accessibility, independence, fairness, accountability, efficiency and effectiveness.²¹

²¹ These are referred to as the CDR Benchmarks and are available at <<http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/benchmarks-ind-cust-dispute-reso>>.

Telecommunications

- A1.78. A single nationwide telecommunications ombudsman scheme operates in relation to the telecommunications industry.
- A1.79. TIO is an independent dispute resolution service for small business and residential consumers who have a complaint about their telephone or internet service.²² The scheme is funded by industry but established by legislation (Part 6 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*). It is free for consumers and aims to resolve complaints in a way which is fair, independent, economical, informal and fast.²³
- A1.80. Unless exempted by the regulator, all telecommunications carriers and suppliers of telecommunication services are required by law to be members of the TIO scheme and to comply with it.²⁴ As at 30 June 2015, TIO had 1,539 members.²⁵
- A1.81. In 2014-15, TIO handled 124,417 new complaints (10.5 per cent fewer than in 2013-14) and 44,365 enquiries from telecommunications consumers, which makes it the busiest ombudsman in Australia.²⁶ Of the complaints received in 2014-15, 11,082 conciliations and 114 investigations were opened, while 11,873 conciliations and 210 investigations were closed.²⁷ Most complaints received related to billing and payments, customer service, faults and complaint handling.
- A1.82. TIO only handles complaints which have been first raised with the telecommunications service provider; that is, the provider must first be given the opportunity to consider and resolve the complaint through its own internal processes (IDR).²⁸ If this has not occurred, TIO will refer the consumer and/or their complaint to the provider.

22 Telecommunications Industry Ombudsman, *Consumers*, viewed 9 November 2016, <www.tio.com.au/consumers>.

23 Subsection 128(4A) of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* requires that the service be free to consumers. The TIO Terms of Reference (at paragraph 1.7) outline TIO's goals for resolving complaints.

24 Sections 128 and 132 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*.

25 Telecommunications Industry Ombudsman 2015, *2014-15 Annual Report*, page 15. Note that the 2015-16 Annual Report was not available at the time of drafting. A new Ombudsman was appointed in March 2016 and the Board settled on a new strategy during 2015-16.

26 Telecommunications Industry Ombudsman 2015, *2014-15 Annual Report*, page 3.

27 Ibid, page 7.

28 Telecommunications Industry Ombudsman 2014, *Telecommunications Industry Ombudsman Terms of Reference (1 December 2014)*, paragraph 2.5.

Approach to dispute resolution

A1.83. In exercising its functions and powers, TIO has regard to the Benchmarks for Industry-based Customer Dispute Resolution as well as relevant laws, good practice and what is fair and reasonable.²⁹ It is not bound by its previous decisions and considers each matter on its merits.

A1.84. To resolve a complaint, TIO first refers the complaint back to the provider for a final opportunity to resolve the matter. The majority of complaints are resolved in this manner. If a complaint remains unresolved through referral, TIO works with the consumer and provider to reach an agreement through conciliation. If this is unsuccessful, then TIO commences an investigation, which results in a decision and, if appropriate, one or more recommendations. Once TIO makes a decision, the consumer has 21 days in which to accept it. If the consumer accepts the decision, then no further action may be taken in relation to the complaint and the provider must comply with the decision.³⁰ In 2014-15 no determinations (decisions) or temporary rulings were issued.³¹

A1.85. Land access objection decisions are resolved through arbitration.

Jurisdiction and monetary limits

A1.86. TIO's jurisdiction is articulated in its Terms of Reference. The Terms of Reference provide examples of the types of complaints made by consumers against a member of the TIO scheme which may be handled by TIO (such as the supply of or faults with a telecommunications service) and which may not be handled by TIO (complaints relating to such matters as telecommunications policy or the setting of prices).³² TIO also handles any other type of complaint if a member asks it to and the customer agrees.³³

A1.87. TIO places limits on the age of complaints which it will handle. While it handles all complaints within its jurisdiction which relate to problems discovered by the consumer within the prior two years, it does not handle complaints relating to an event or problem which was discovered by the consumer more than six years earlier and it applies discretion in deciding whether or not to handle complaints about matters discovered by the consumer between two and six years earlier.³⁴

29 Ibid, paragraph 1.5.

30 Telecommunications Industry Ombudsman 2014, *Telecommunications Industry Ombudsman Terms of Reference (1 December 2014)*, paragraphs 3.12 to 3.14.

31 Telecommunications Industry Ombudsman 2015, *2014-15 Annual Report*, page 14; but 10 were issued in 2013-14 (Telecommunications Industry Ombudsman 2014, *2013-14 Annual Report*, page 36).

32 Telecommunications Industry Ombudsman 2014, *Telecommunications Industry Ombudsman Terms of Reference (1 December 2014)*, section 2.

33 Ibid, paragraph 2.8.

34 Ibid, paragraph 2.6.

A1.88. TIO will also not handle a complaint if the specific issues raised by the complaint have been or are likely to be dealt with by a court or tribunal or by the regulator (the Australian Communications and Media Authority, or ACMA).³⁵

A1.89. TIO decisions on complaints are confined by monetary limits. When TIO decides the resolution of a complaint, the total value of any action it requires by the provider must not exceed \$50,000.³⁶ Where TIO decides the resolution of a complaint and also recommends further action by the provider, the total value of any action required must not exceed \$100,000.³⁷ The TIO Terms of Reference provide for an annual review of these financial limits.³⁸ TIO can arbitrate a complaint if the value is over \$100,000 and both the consumer and the provider agree.³⁹

Powers

A1.90. Section 128 of the Telecommunications (Consumer Protection and Service Standards) Act 1999:

- requires the scheme to provide for TIO to investigate complaints about carriage services by end users of those services and to make determinations and give directions relating to such complaints⁴⁰; and
- prevents the scheme from providing for TIO to investigate complaints about the tariffs charged for services or the content of a content service.

A1.91. The legislation also requires TIO to maintain a register of members of the scheme.⁴¹

A1.92. TIO has powers which are additional to resolving disputes, including the power to award damages in accordance with the Telecommunications (Customer Service Guarantee) Standard 2011 and to make decisions about objections to proposed low-impact facility activities by carriage services under Schedule 3 of the *Telecommunications Act 1997*.⁴²

A1.93. Members must comply with determinations made by TIO. Non-compliance with the scheme by a member may be reported to the regulator.⁴³

35 Ibid, paragraph 2.11.

36 Ibid, paragraph 3.11.

37 Ibid, paragraph 3.16.

38 Ibid, paragraph 7.7.

39 Ibid, paragraph 3.19.

40 Ibid, paragraph 3.8.

41 Section 133 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*.

42 Telecommunications Industry Ombudsman 2016, data provided to the EDR Review, 9 November 2016.

43 Telecommunications Industry Ombudsman 2014, *Telecommunications Industry Ombudsman Terms of Reference (1 December 2014)*, paragraph 6.3.

A1.94. TIO has certain other powers or rights as outlined in its Terms of Reference. These include:

- the power to make recommendations that a member takes or does not take further actions;⁴⁴
- the power to make temporary rulings to prevent a provider from seeking to collect a disputed debt while the complaint is being considered;⁴⁵
- the power to request information (members must give TIO information and/or documents that TIO requests);⁴⁶
- the right to publish the names of providers who fail to comply with the TIO scheme;⁴⁷ and
- the power to share information with regulators and others.⁴⁸

Governance

A1.95. In terms of governance structure, the scheme is operated by a company (Telecommunications Industry Ombudsman Limited) which was established in 1993 in accordance with legislation⁴⁹ when the telecommunications industry was opened to competition. It is independent of industry, the government and consumer groups. It is governed by the company Board of Directors and is managed by an independent Ombudsman and Deputy Ombudsman in accordance with the company Constitution and Terms of Reference.

A1.96. The Board is chaired by an independent director and comprises two other independent directors, four directors with consumer experience and four directors with industry experience. Appointments are made by the Board based on recommendations made by the Nominations Committee.⁵⁰ The Chair is appointed by the Board following notification and consultation about the proposed appointment with the relevant Ministers. The Ombudsman is appointed by the Board.

44 Ibid, paragraph 3.16.

45 Ibid, paragraph 4.1.

46 Ibid, paragraph 3.6.

47 Ibid, paragraph 6.2.

48 Ibid, paragraphs 6.3 and 4.11.

49 Now Part 6 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*.

50 Telecommunications Industry Ombudsman 2015, *2014-15 Annual report*, page 4. Under clause 12.2(g) of the TIO Limited Constitution, the Nominations Committee is comprised of the independent Chair of the Board, one director with consumer experience, one director with industry experience, one person nominated by peak telecommunications industry group and one person nominated by peak industry group.

Funding arrangements

A1.97. As noted above, TIO is an industry-funded ombudsman scheme. Its income is generated solely from telecommunications companies who are charged fees for complaint resolution services provided by TIO in accordance with the TIO Terms of Reference.⁵¹

A1.98. The nature of fees is specified in the TIO Limited Constitution⁵² and the amount is determined by the Ombudsman and/or by the Board, having regard to the funding required for TIO to perform its functions. Service providers are only charged if a complaint is made to TIO by one of their customers. This provides an incentive for service providers to take action to resolve complaints through their internal dispute resolution mechanisms and to minimise the number of complaints that are escalated to TIO.

Improving outcomes for users

A1.99. TIO's vision involves not only 'deliver[ing] an exceptional telecommunications dispute resolution service' but also aiming 'to contribute to better customer service and complaint handling in the telecommunications industry'.⁵³ Thus the goals of the scheme are both to provide redress and also to aid in prevention.

A1.100. Where TIO identifies a systemic issue, it first works with the member to try to resolve the issue. If this is unsuccessful, TIO may make recommendations which must be considered by the member, and the member must take steps to resolve the issue.⁵⁴

A1.101. The roles of TIO which may improve outcomes for users include:

- reporting non-compliance both in a public forum (for example, on the website) and to the regulator⁵⁵ – in 2014-15 TIO referred 19 providers to the regulator for non-compliance⁵⁶; and
- recommending improvements to members' procedures.⁵⁷

51 TIO commissioned a review of its funding arrangements in January 2016. At the time of drafting, the TIO Board was yet to be provided with the findings.

52 Parts 7 and 9 of the TIO Limited Constitution describe annual volume-related and operating costs and special levies and capital expenditure funds. The Statement of Comprehensive Income for the year ended 30 June 2015 indicates that revenue from members in 2014-15 was \$27.5 million (Telecommunications Industry Ombudsman Limited 2015, *Financial Report for the year ended 30 June 2015*, page 20).

53 Telecommunications Industry Ombudsman 2015, *2014-15 Annual Report*, page 1.

54 Telecommunications Industry Ombudsman 2014, *Telecommunications Industry Ombudsman Terms of Reference (1 December 2014)*, section 5.

55 This is also governed by a Memorandum of Understanding between TIO and the regulator (ACMA).

56 Telecommunications Industry Ombudsman 2015, *2014-15 Annual Report*, page 5.

57 Telecommunications Industry Ombudsman 2014, *Telecommunications Industry Ombudsman Terms of Reference (1 December 2014)*, paragraphs 6.4 and 6.5.

A1.102. Feedback about TIO is overseen by the Board. In 2014-15 TIO received 78 formal complaints about the service provided by the scheme, of which 26 were found to be substantiated.⁵⁸

A1.103. In terms of accessibility, consumers can lodge a complaint by telephoning, emailing, completing an online form on the TIO website or by writing to TIO. A multicultural brochure and factsheet are available on the TIO website in 31 languages.⁵⁹

A1.104. During the 2014-15 financial year, TIO published a suite of resources for indigenous consumers, attended 64 outreach events and published its Terms of Reference in plain English.⁶⁰

A1.105. The Telecommunications Consumer Protections Code was revised in 2012 to include new consumer protection measures.

Findings from recent reviews

A1.106. An organisational restructure undertaken in 2014-15 resulted in a reduction of the workforce by 21 per cent from 242 at 30 June 2014 to 191 at 30 June 2015, which included the role of Case Officer being made redundant. Forty one positions were made redundant as a result of a decline in complaint demand and a change in the nature of complaints.⁶¹

Energy and water

A1.107. State-based external dispute resolution bodies operate in the energy and water sector. The nature of the bodies and the way in which they are established varies from state to state. For example:

- the Energy and Water Ombudsman Victoria (EWOV) and the Energy and Water Ombudsman (NSW) are non-statutory, industry-funded schemes
- the Energy and Water Ombudsman Queensland (EWOQ) is an industry-funded scheme established by statute
- the Australian Capital Territory Civil & Administrative Tribunal, established and governed by statute, considers and resolves disputes across a wide range of issues including energy and water hardship and complaints. It has the same jurisdiction and powers as the Magistrates Court.⁶²

58 Telecommunications Industry Ombudsman 2015, *2014-15 Annual Report*, page 4.

59 Telecommunications Industry Ombudsman, *Translations*, viewed 25 November 2016, <<https://www.tio.com.au/publications/translations>>. Additional detail on accessibility is provided in the TIO 2014-15 Annual Report at page 13.

60 Telecommunications Industry Ombudsman 2015, *2014-15 Annual Report*, page 5.

61 Ibid, page 6.

62 ACT Civil and Administrative Tribunal Act 2008, section 22.

A1.108. The role of energy and water ombudsmen is to provide an independent dispute resolution service for consumers' unresolved complaints with their electricity, gas or water supplier.

A1.109. For the purposes of this report, the schemes that have been selected for comparison are EWOV and EWOQ.

A1.110. Typically for ombudsman schemes, no charge is payable by consumers for their use of the service. Rather, each scheme is funded by fees charged to scheme participants (energy/water suppliers who are members of the scheme).

A1.111. Under each state's scheme, consumers are required to have attempted to resolve their complaint using the internal dispute resolution procedures offered by suppliers before escalating their complaint to the ombudsman.⁶³

A1.112. The table below provides some of the key features and statistics of the two schemes. Additional information and observations about the schemes, including how the scheme promotes accessibility and works to improve consumer outcomes, is provided in text below.

Key features and statistics for energy and water ombudsman schemes

EWOV	EWOQ
Establishment	
Not-for-profit company limited by guarantee; founded in 1995 by six electricity companies, later joined by other electricity, gas and water companies	Statutory body formed under the <i>Energy and Water Ombudsman Act 2006</i> (Qld)
Dispute resolution techniques	
(1) 'Unassisted referral' – customer is referred to supplier's internal dispute resolution process (2) Assisted referral – EWOV contacts a more senior contact within supplier and asks that they investigate customer's concerns (3) Real time resolution – EWOV negotiates directly with customer and supplier (4) Investigation – an EWOV conciliator investigates the complaint to find a fair and reasonable resolution (5) Binding decision – in the absence of a conciliated settlement of complaint Ombudsman issues binding decision on supplier if customer accepts the determination ⁶⁴	(1) (a) Internal dispute resolution (within supplier) (b) Referral to Higher Level (within supplier) (c) Investigation (2) Negotiation (3) Conciliation – work through options to reach mutually acceptable outcome (4) Final order – binding on both customer and supplier once customer accepts or is taken to have accepted the decision; ⁶⁵ taken to be a judgment of the court ⁶⁶

63 Energy and Water Ombudsman Victoria 2006, *Energy and Water Ombudsman Charter* (30 May 2006), clause 5.1; Energy and Water Ombudsman Queensland 2013, *Energy and Water Ombudsman Queensland Charter of Service*, clause 10.

64 Energy and Water Ombudsman Victoria 2016, *2016 EWOV Annual Report*, page 21.

EWOV	EWOQ
Jurisdiction & monetary limits	
<p>Complaints from events which have become known to the complainant less than one year prior to the complaint being lodged.</p> <p>A binding decision by the Ombudsman is limited to an amount of \$20,000, or if both parties agree, an amount of no more than \$50,000. No limit to the amount of a conciliated outcome as such outcomes are reached by agreement.⁶⁷</p>	<p>Generally, complaints arising from events which have become known to the complainant less than 12 months prior to the complaint being lodged.</p> <p>Costs and compensation awarded under final order are capped at \$20,000 (unless otherwise prescribed) or if all parties agree an amount of no more than \$50,000.⁶⁸</p>
Powers	
<p>Approved by the Essential Services Commission (ESC) to nominate an Ombudsman with the authority to receive, investigate and facilitate the resolution of complaints against suppliers;⁶⁹ decisions made that result in a determination are binding on the supplier; non-compliance by a supplier can result in escalation to the CEO, referral to the Board or ESC⁷⁰ or termination of membership in the event of wilful non-compliance with the Charter, Constitution or rules.⁷¹</p>	<p>Receive, investigate and facilitate the resolution of disputes referred under the Act, to promote the operation of the service and identify systemic issues arising out of complaints;⁷² the Ombudsman has the power to refer to the State regulator for non-compliance with requests for documents (max penalty 100 penalty units)⁷³ and non-compliance with issued interim orders (max penalty 100 penalty units)⁷⁴; if the dispute is not resolved the Ombudsman may make a final order which is binding on the supplier if the complainant accepts the decision.⁷⁵ The order can be filed at the Magistrates Court, and once filed the order is taken to be a judgement of the Magistrates Court.⁷⁶</p>

65 Under section 40 of the *Energy and Water Ombudsman Act 2006*, the customer is taken to have accepted the order if, within 21 days after receiving the order, they do not notify the ombudsman that they do not accept the order.

66 *Energy and Water Ombudsman Act 2006*, sections 40 and 42.

67 *Energy and Water Ombudsman Victoria 2006, Energy and Water Ombudsman Charter (30 May 2006)*, clauses 3.2 and 6.1.

68 *Energy and Water Ombudsman Act 2006*, sections 19A and 37.

69 *Energy and Water Ombudsman Victoria 2006, Energy and Water Ombudsman Charter (30 May 2006)*, clauses 1.1 and 1.2.

70 *Energy and Water Ombudsman Victoria 2006, Energy and Water Ombudsman Charter (30 May 2006)*, clause 7.2.

71 *Energy and Water Ombudsman (Victoria) Limited 2010, Constitution of Energy and Water Ombudsman (Victoria) Limited (17 May 2010)*, clause 10.2.

72 *Energy and Water Ombudsman Act 2006*, section 11.

73 *Energy and Water Ombudsman Act 2006*, section 29; also *Energy and Water Ombudsman Queensland 2016*, information provided to EDR Review, 23 November 2016.

74 *Energy and Water Ombudsman Act 2006*, section 32; also *Energy and Water Ombudsman Queensland 2016*, information provided to EDR Review, 23 November 2016.

75 *Ibid*, section 41.

76 *Ibid*, section 42.

EWOV	EWOQ
Governance	
<p>Board is comprised of an independent Chair, four industry directors appointed by members to represent electricity, gas and water suppliers, and four consumer directors appointed by the ESC.⁷⁷</p> <p>Board appoints Ombudsman of the scheme.⁷⁸</p>	<p>Advisory council which monitors the independence of the Ombudsman and provides advice relating to the Act;⁷⁹ advisory council consists of a chairperson and at least six other members appointed by the Minister;⁸⁰ Ombudsman appointed directly by the Governor in Council.⁸¹</p>
Funding	
<p>Proposed annual funding figure is approved by members through general meeting (or, if rejected, is determined by the ESC).⁸² Members pay annual levy of between \$2,000 and \$20,000 based on customer numbers at commencement of the calendar year, with the balance of the annual levy being allocated between members on a user-pays basis.⁸³</p> <p>Special levies may be raised by the Board as and when required.</p> <p>In 2015-16, EWOV's revenue was \$10 million. Six per cent was funded by a fixed annual levy and 94 per cent was funded by complaints-based user-pays fees.⁸⁴</p>	<p>Industry funded, members pay a participation fee (generally either \$5,000 or \$10,000) and user pays fees.⁸⁵</p> <p>In 2015-16, scheme income comprised \$172,000 participation fee; user pays fees of \$5.85 million and other revenue of \$58,000.⁸⁶</p> <p>User pays fees are invoiced quarterly in advance and reconciled twice yearly. The legislation requires that members are only charged the actual costs required to operate the scheme for the year, and so surplus funds are returned to members.⁸⁷</p> <p>Supplementary funding may be raised – this has only happened once in history of EWOQ.⁸⁸</p>

77 Energy and Water Ombudsman (Victoria) Limited 2010, *Constitution of Energy and Water Ombudsman (Victoria) Limited (17 May 2010)*, clause 14.2.

78 Ibid, clause 18.

79 *Energy and Water Ombudsman Act 2006*, section 49.

80 Ibid, section 50.

81 Ibid, section 51.

82 Energy and Water Ombudsman (Victoria) Limited 2010, *Constitution of Energy and Water Ombudsman (Victoria) Limited (17 May 2010)*, section 11.

83 Ibid, clause 9.2.

84 Energy and Water Ombudsman Victoria 2016, data provided to EDR Review, 16 November 2016.

85 *Energy and Water Ombudsman Act 2006*, section 65; also Energy and Water Ombudsman Queensland 2016, *Annual Report 2015-16*, page 54.

86 Energy and Water Ombudsman Queensland 2016, *Annual Report 2015-16*, page 55.

87 Ibid, page 54.

88 Ibid, page 54.

EWOV	EWOQ
Membership	
EWOV is the sole Victorian EDR scheme approved under the ESC and is intended to allow electricity, gas and water licensees to satisfy applicable licence conditions, legislative requirements or industry code requirements; ⁸⁹ members of the scheme are bound by the EWOV Constitution and Charter.	Required by the <i>Energy and Water Ombudsman Act 2006</i> and retail authorisation for energy entities.
Number of members as at 30 June 2016	
83 (some operating under the same name in different industries) ⁹⁰	34 ⁹¹
Complaints	
2015-16: 36,152 new cases received (down from 50,437 in 2014-15); and 31,652 finalised. ⁹² Main issues are credit (30 per cent of cases in 2015-16) and billing (41 per cent). Business complaints made up 9 per cent of complaints. ⁹³ 91.1 per cent of complaints closed within 28 days; 98.8 per cent within 180 days. ⁹⁴	2015-16: 8,749 new cases received (down from 11,133 in 2014-15); 8,895 cases closed. ⁹⁵ Billing and credit-related complaints make up more than 70 per cent of case load. ⁹⁶ Five per cent of complaints were made by small business. ⁹⁷ 92 per cent of complaints closed within 28 days; 98 per cent within 60 days; 99 per cent within 90 days. ⁹⁸
Determinations / binding decisions	
Total of 36; latest one in 2003. ⁹⁹	No final orders were issued in 2015-16; 11 were issued in 2014-15 and none in the three years prior. ¹⁰⁰

89 Legislative and other requirements are contained in the *Electricity Industry Act 2000*; *Gas Industry Act 2001*; *Essential Services Legislation (Dispute Resolution) Act 2000*; Victorian LPG Retail Code.

90 Energy and Water Ombudsman Victoria 2016, *2016 EWOV Annual Report*, page 40.

91 Energy and Water Ombudsman Queensland 2016, data provided to EDR Review, 23 November 2016.

92 Energy and Water Ombudsman Victoria 2016, *2016 EWOV Annual Report*, pages 17 and 22-3.

93 Ibid, page 17.

94 Ibid, page 12.

95 Energy and Water Ombudsman Queensland, *2015-16 Annual Report*, page 92.

96 Energy and Water Ombudsman Queensland, 4 October 2016, *Media release: Queenslanders still struggling to pay utility bills*, viewed 23 November 2016, <<http://www.ewoq.com.au/userfiles/files/20161004%20Queenslanders%20still%20struggling%20to%20pay%20utility%20bills.pdf>>.

97 Energy and Water Ombudsman Queensland, *Annual Report 2015-16*, page 7.

98 Ibid, page 9.

99 Energy and Water Ombudsman Victoria, *Binding decisions*, viewed 16 November 2016, <<https://www.ewov.com.au/about/binding-decisions>>.

100 Energy and Water Ombudsman Queensland, *Annual Report 2015-16*, page 92.

Energy and Water Ombudsman Victoria

Improving outcomes for users

A1.113. Documents underpinning systemic improvements include the EWOV Charter (clauses 7.1 and 7.2), the EWOV Constitution, regulatory memoranda of understanding and reporting protocols, and the Benchmarks for Industry-Based Customer Dispute Resolution.

A1.114. The Ombudsman has the power to make a report to the supplier and to the ESC where the general policy or commercial practices of a supplier have contributed to a complaint or a number of complaints; or have impeded the investigation or handling of a particular complaint.¹⁰¹

A1.115. Identification of systemic issues occurs through the cases and investigations conducted by EWOV. The ongoing focus of this is on data analysis to identify emerging complaint issues and drive improvement.¹⁰²

A1.116. EWOV identified and dealt with 30 potential systemic issues in 2015-16.¹⁰³

Independent reviews

A1.117. EWOV undertakes regular independent reviews of its compliance with the Benchmarks for Industry-based Customer Dispute Resolution. The last review was conducted in 2014 and found that EWOV meets the Benchmarks and is a professionally-run scheme whose staff are highly engaged with their work and committed to continuous improvement. The report made recommendations for 'subtle shifts in balance', and the Board has released its response.¹⁰⁴

Energy and Water Ombudsman Queensland

Improving outcomes for users

A1.118. Systemic issues are identified in a number of ways including: monitoring customer complaints by frontline investigative staff; monitoring and review of complaints by the Policy and Research Team; Systemic Issues Monitoring Committee meetings; advice of the Advisory Council; and collaborative relationships with members, government agencies and ombudsman schemes in other jurisdictions.¹⁰⁵

101 Energy and Water Ombudsman Victoria 2006, *Energy and Water Ombudsman Charter* (30 May 2006), clause 7.2.

102 Energy and Water Ombudsman Victoria 2016, *2016 EWOV Annual Report*, page 38.

103 Ibid, page 38.

104 Energy and Water Ombudsman Victoria, *Our principles*, viewed 18 November 2016, <<https://www.ewov.com.au/about/who-we-are/our-principles>>.

105 Energy and Water Ombudsman Queensland, *Annual Report 2015-16*, page 18.

A1.119. If a systemic issue is identified the relevant member is notified immediately and EWOQ provides advice about how the issue should be resolved. EWOQ notifies the appropriate regulatory agency of any systemic issues that could constitute a breach of legislation, code or licence. Thirty one systemic issues were identified in 2015-16.¹⁰⁶ The process aims to create changes, for example to processes and procedures, to prevent identified issues from recurring.

Independent reviews

A1.120. Independent reviews of EWOQ, assessing against the national benchmarks of accessibility, independence, fairness, accountability, efficiency and effectiveness, were conducted in 2010 and 2013, with the next one planned for 2017.¹⁰⁷

A1.121. The 2013 independent review¹⁰⁸ found that EWOQ was exceeding the benchmarks and operating effectively. While it made 15 recommendations, it noted that due to the effective running of the scheme 'suggestions for enhancement are [...] likely to achieve modest rather than fundamental improvement'. The majority of the recommendations were accepted by EWOQ and the implementation of the recommendations was finalised in 2015-16, with a funding model review completed.

A1.122. The issues identified in the report were that the definition of 'small energy users' was excluding small businesses outside of EWOQ's threshold, those accessing services through bulk on-sellers or wholesalers were unable to utilise EWOQ, the Ombudsman does not have authority to investigate issues identified as such within the industry unless complaints have been received (that is, as soon as the problem becomes evident as opposed to when it manifests) and that emerging technologies were not adequately covered by the scheme.

106 Ibid, page 18.

107 Ibid, page 12; also Energy and Water Ombudsman Queensland, *Reports to stakeholders*, viewed 23 November 2016, <<http://www.ewoq.com.au/stakeholder-reports/>>.

108 The Consultancy Bureau 2013, *Independent review of the Office of the Energy and Water Ombudsman Queensland*, viewed 23 November 2016, <<http://www.ewoq.com.au/userfiles/files/EWOQ-Independent-Review-report.pdf>>.

Appendix 2: Consultation

The Panel received 137 submissions to the EDR Review Issues Paper, 46 of which were marked as confidential and 1 anonymous. The list of non-confidential submissions is contained below.

AMP

ANZ

Association of Securities & Derivatives Advisers of Australia (ASDAA)

Association of Superannuation Funds of Australia (ASFA)

Australian and New Zealand Ombudsman Association (ANZOA)

Australian Bankers' Association (ABA)

Australian Collectors & Debt Buyers Association (ACDBA)

Australian Finance Conference (AFC)

Australian Institute of Superannuation Trustees (AIST)

Australian Retail Credit Association (ARCA)

Australian Securities and Investments Commission (ASIC)

Australian Securities and Investments Commission (ASIC) - supplementary submission

Australian Timeshare and Holiday Ownership Council

Barrett Janine

Beamond, Adrian

Beslic, Damien

beyondblue

Brown, Ross

Cadwallader, Greg

Cashmore, Jean

Code Compliance Monitoring Committee (CCMC)

Chandler, Brett

Coburn, Niall

Cole, Mike

Commercial Asset Finance Brokers Association of Australia Limited (CAFBA)

Cooper, Haydn

Corporate Superannuation Association

Cosstick, John

Credit and Investments Ombudsman (CIO)

Credit Corp

Cumming, Malcolm and Joan

Customer Owned Banking Association (COBA)

Davis, Noel

Dispute Assist

Downes, Brendan

Dun & Bradstreet

Elliot, Alison

Farley, John

Field, Susan

Finance Industry Delegation (FID)

Financial Ombudsman Service (FOS)

Financial Planning Association of Australia (FPA)

Financial Services Council (FSC)

Florek, Stan

Fraser, Veronika

Goddard Thomas and Philippa

Harris, Leanne

Heslop, Graham

Hodder, Michael Ellis

Hooper, Dave

IAG

Industry Super Australia (ISA)

Insurance Council of Australia (ICA)

Joint Consumer Groups
Jones, Gretel Mary
Juda, Scott
Law Council of Australia
Legal Aid NSW
Legal Aid Queensland
Little, Sean
Matheson, Michelle
Maurice Blackburn
McFarlane, Duncan
Mitchell, Adrian
Mortgage & Finance \
ssociation of Australia (MFAA)
Moss, Kelley
Murray, Pauline
National Australia Bank (NAB)
National Insurance Brokers Association of Australia (NIBAA)
Nicholson, Afrovite
Offenhauser, Craig
Office of the Australian Information Commissioner
O'Reilly, Steve
PayPal
Phillips, Sandy
Pinhorn, Antony
Pioneer Credit
Private Mortgage Funding & Management
Public Interest Advocacy Centre
QBE
QSuper
Sapienza, Joseph

Schumlow, Andy
Smith, Deborah
Superannuation Complaints Tribunal (SCT)
Thearle, Anthony
Wall, Joanne
Westpac
Williams, Paul
Xenophon, Nick

ROUNDTABLES

The Panel held a number of roundtables, summarised below.

Event	Date held	Venue
Consumer roundtable	5 September 2016	Sydney, Melbourne, Canberra
Industry roundtable	5 September 2016	Sydney, Melbourne, Canberra
Roundtable with individuals that have suffered financial loss	21 September 2016	Sydney, Melbourne, Canberra
Roundtable with advocates/representatives of individuals that have suffered financial loss	21 September 2016	Sydney, Melbourne, Canberra
Superannuation roundtable	14 November 2016	Sydney, Melbourne, Canberra

MEETINGS

The Panel members¹⁰⁹ held a range of meetings, which are summarised below.

Stakeholder category	No. of meetings
Bodies under review	5
Government	4
Other	5

VISITS TO THE EDR BODIES

The Panel also undertook site visits of each of the bodies: CIO (14 September 2016); FOS (16 September 2016) and SCT (16 September 2016).

¹⁰⁹ The majority of meetings were attended by all three Panel members.