

# Review of the financial system external dispute resolution framework

Legal Aid NSW Submission to  
The Treasury

*October 2016*

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## About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the Legal Aid Commission Act 1979 (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners.

Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW Civil Law Division focuses on legal problems that impact most on disadvantaged communities, such as credit, debt, housing, employment, social security and access to essential social services. Customer issues constitute the largest category service for our Civil Law Division.

In 2014-2015 Legal Aid NSW provided 4,887 advice and 5,477 minor assistance services in consumer law matters. More than one quarter of these matters dealt

with credit products, including consumer leases. This submission draws on the casework experience of civil law solicitors in providing these services.

Legal Aid NSW's Mortgage Hardship Service assists people who are in danger of losing their homes because they cannot pay their mortgage or because a guarantee is being enforced against them. If required, the Service also assists people to sell their home to minimise the loss and ensure a favourable outcome to the borrower.

Legal Aid NSW welcomes the opportunity to provide a submission to the Review of the financial system external dispute resolution framework. Our submission follows the numbering of the questions outlined in the Issues Paper.

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## List of Recommendations

### Principles guiding the review

1. Legal Aid NSW recommends that uninsured third party motorists be considered as part of the review.
2. Legal Aid NSW recommends that the terms of reference of the review be expanded to include the principles set out in:
  - a) Regulatory Guide 139
  - b) Regulatory Guide 165
  - c) EDR Benchmarks for Industry-based Customer Dispute Resolution
  - d) Key Practices for Industry-based Customer Dispute Resolution, and
  - e) ANZOA policy statement on competition in EDR schemes.
3. Legal Aid NSW recommends that the Panel should consider a broad range of inquiries from within Australia and international jurisdictions.
4. Legal Aid NSW recommends that a scheme's effectiveness should be defined and measured by:
  - a) How successfully it adheres to the principles set out in Recommendation 2, and
  - b) The extent to which it meets the needs of the most disadvantaged users.

### Internal dispute resolution

5. Legal Aid NSW recommends implementing the following suggestions to improve consumer awareness of IDR:
  - a) Mandatory IDR reporting by traders
  - b) Mandatory requirement to notify consumers of IDR in any initial phone conversation
  - c) Mandatory requirement to notify consumers in writing of outcome if IDR complaint lodged by phone
  - d) Mandatory requirement to notify consumers of IDR even if a consumer withdraws their claim
  - e) Appropriate font size and formatting in letters about the availability of IDR
  - f) Consistency in structure, names and processes across all traders' IDR
  - g) Limit ability to outsource IDR

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- h) Engagement in IDR outreach, for example by appointing Aboriginal Liaison officers to engage Indigenous communities
  - i) Greater regulatory oversight of IDR
  - j) Implement a common definition of long-term financial hardship across the financial services sector. The definition should state that an individual is experiencing long term financial hardship where that individual:
    - o Receives no income or only Centrelink payments (or equivalent amounts)
    - o Possesses assets valued at or below the amounts protected by bankruptcy legislation, and
    - o These circumstances cannot be expected to change within two years.
  - k) Introduction of proactive measures to ensure IDR is brought to the attention of customers early by ensuring IDR is mentioned in telephone calls with consumers and referred to on the signing page of documents, and providing contact details of IDR representatives in multiple formats (telephone, internet and facsimile)
  - l) Promotion of IDR schemes in multiple languages especially on community radio and local newspapers
  - m) Mandatory registration with a telephone interpreting service for assistance lodging an IDR complaint
  - n) Adequate training of IIDR staff to assist persons with disabilities.
6. Legal Aid NSW recommends that the IDR time frames for a trader's response be changed so that the complaint is acknowledged within seven days and a decision is made relation to the complaint within 30 days.
7. Legal Aid NSW recommends that EDR schemes publish decisions identifying traders by name.

#### Regulatory oversight of EDR schemes and complaints arrangements

8. Legal Aid NSW recommends that ASIC improve its oversight by increasing transparency and taking a more active role in investigations of traders' compliance with IDR requirements and systemic issues regarding unresolved disputes and withdrawn claims in insurance.
9. Legal Aid NSW recommends that ASIC's oversight role in relation to the schemes be increased to hold schemes accountable where independent reviews have identified areas for improvement or where the conduct of the schemes falls short of the Benchmarks set out in Regulatory Guide 139.

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10. Legal Aid NSW recommends that the capacity for the schemes to report systemic issues be enhanced by stronger regulatory oversight to ensure that all systemic issues are reported as mandated by Regulatory Guide 139, with greater transparency in the reporting process.
  11. Legal Aid NSW recommends that ASIC provide consistent and effective oversight of all three schemes, including the SCT.

#### Existing EDR schemes and complaints arrangements

12. Legal Aid NSW recommends that EDR schemes remain free, accessible and retain the power to make binding decisions.
13. Legal Aid NSW recommends that the schemes consider how to make EDR accessible to vulnerable consumers.
14. Legal Aid NSW recommends that the schemes take steps to raise their profile and increase awareness of EDR for consumers.
15. Legal Aid NSW recommends that the EDR schemes and the SCT implement mandatory Aboriginal awareness and kinship training for staff.
16. Legal Aid NSW recommends that consumers be able to lodge a dispute with an EDR scheme via telephone.
17. Legal Aid NSW recommends that EDR schemes contact consumers by phone both after the initial complaint is made and before the final decision is made.
18. Legal Aid NSW recommends that EDR schemes have a 'fast track' process to resolve low cost and simple disputes.
19. Legal Aid NSW recommends that the schemes regularly assess internal complaints data and feedback from relevant stakeholders to ensure they respond to market trends and user needs.
20. Legal Aid NSW recommends a review of the monetary limits and compensation caps so that they reflect the increased value of the cost of financial products in Australia, including the cost of home loans and a rebuild on total loss insurance claims.
21. Legal Aid NSW recommends that the schemes be given additional powers to provide consumers with compensation from a statutory compensation scheme where the consumers would otherwise be left uncompensated; increase penalties in respect of breaches of responsible lending obligations; and determine that debt be waived where the consumer is experiencing long-term financial hardship.
22. Legal Aid NSW recommends that FOS' approach, which considers previous decisions (though they are not binding) in the decision making process, be adopted by any EDR scheme.

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23. Legal Aid NSW recommends governance arrangements involving representatives from industry and the consumer sector.
  24. Legal Aid NSW recommends a 'cost-to-serve' model funded by industry which is able to resource increases in dispute numbers.
  25. Legal Aid NSW recommends that staff employed by EDR schemes have a range of skills, and not be exclusively legally qualified.
  26. Legal Aid NSW recommends that there be greater transparency about funding models and that this information be readily available on the EDR schemes' websites.
  27. Legal Aid NSW recommends that trader-specific complaint data be published by EDR schemes quarterly.
  28. Legal Aid NSW recommends that comprehensive and regular surveys be conducted of consumers, consumer advocates and industry to assess the performance of the schemes.

#### Triage service

29. Legal Aid NSW recommends that if a triage service is desirable to the Panel that it should provide assistance to the most vulnerable consumers, including:
  - a) Toll-free telephone triage service
  - b) A dedicated Aboriginal liaison officer
  - c) Free Translating and Interpreting Service (TIS)
  - d) Free Teletypewriter (TTY) relay service
  - e) A call back service for those who cannot connect to the service immediately so as to avoid unnecessary telephone costs while being on hold, and
  - f) An SMS text prior to call back since some consumers routinely do not answer numbers from a private number.
30. Legal Aid NSW recommends that the triage service should:
  - a) Be run by experienced staff with training to guide them in assisting vulnerable consumers
  - b) Not be funded by consumers, and
  - c) Make referrals to community services, such as community legal centres, Legal Aid or financial counsellors, where appropriate.

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## One body

31. Legal Aid NSW recommends that the number and form of financial services ombudsman schemes be decided in consultation with all relevant stakeholders.
32. Legal Aid NSW recommends that one Ombudsman-based scheme be created through integration of CIO and the SCT into FOS.
33. Legal Aid NSW recommends that the FOS model, culture and approach be maintained when integrating the schemes.
34. Legal Aid NSW recommends that the new Ombudsman-based scheme be appropriately funded and resourced and that there be an adequate transition period.
35. Legal Aid NSW recommends that the Panel investigate the FOS UK model should the Panel not favour our preferred model of one Ombudsman-based scheme.
36. Legal Aid NSW recommends that the new Ombudsman-based scheme mirror FOS' current funding model.
37. Legal Aid NSW recommends that ASIC continue to provide regulatory oversight to the new Ombudsman-based scheme.

## An additional forum for dispute resolution

38. Legal Aid NSW recommends that if a tribunal is favoured by the Panel, its jurisdiction should be limited to matters outside of EDR's Terms of Reference.
39. Legal Aid NSW recommends that the tribunal's jurisdiction should not be limited to disputes with providers of banking products.
40. Legal Aid NSW recommends that FOS' approach to the effect of decisions be replicated if a tribunal is desirable.
41. Legal Aid NSW recommends that the tribunal provide adequate support to ensure it is an accessible forum to all consumers.

## Developments in overseas jurisdictions and other sectors

42. Legal Aid NSW recommends that every dispute resolution scheme should have a community engagement team to enhance awareness and use of EDR in regional, rural and remote areas, and in particular, in Aboriginal communities. The community engagement team should work in tandem with existing casework services.

## Uncompensated consumer losses

43. Legal Aid NSW recommends the establishment of a compensation scheme of last resort.



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## Principles guiding the review

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

Clause 4.2(vi) of the FOS Terms of Reference states that FOS will only consider a claim for property damage to an uninsured motor vehicle (where the insured person is at fault) if the driver of the insured motor vehicle has lodged a valid claim. Legal Aid NSW submits that this unduly restricts the rights of uninsured third parties who have a genuine dispute, with the outcome that they do not have a cost-effective option to resolve their dispute.

#### Recommendation

Legal Aid NSW recommends that uninsured third party motorists be considered as part of the review.

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

Legal Aid NSW broadly agrees with the principles outlined in the review's terms of reference, however, we recommend that the terms of reference should be expanded to include the principles set out in Regulatory Guide 139. These are accessibility, independence, fairness, accountability, efficiency and effectiveness. These principles are an appropriate framework for the review, as they must be considered by ASIC when approving an EDR scheme.

Legal Aid NSW submits that the review should also consider the principles outlined in:

- ASIC Regulatory Guide 165
- EDR Benchmarks for Industry-based Customer Dispute Resolution (February 2015)
- Key Practices for Industry-based Customer Dispute Resolution, and
- ANZOA policy statement on competition in EDR schemes. We note that the policy statement argues that perceived benefits of competition between EDR schemes can be achieved by using accountability and transparency mechanisms.

#### Recommendation

Legal Aid NSW recommends that the terms of reference of the review be expanded to include the principles set out in:

- Regulatory Guide 139
- Regulatory Guide 165
- EDR Benchmarks for Industry-based Customer Dispute Resolution
- Key Practices for Industry-based Customer Dispute Resolution, and
- ANZOA policy statement on competition in EDR schemes.

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

The Panel should consider a broad range of inquiries from within Australia and international jurisdictions.

Legal Aid NSW submits that the Panel should take into account the following reviews:

- Final Report of the Independent Review into FOS by CameronRalph Navigator (2014)
- Final Report of the Independent Review into CIO by Phil Khoury and Debra Russell (2012)
- Lord Hunt's review into FOS UK entitled "opening up, reaching out and aiming high" (2008), and
- Lucerna Partners' review into the UK Energy Ombudsman (2015).

#### Recommendation

Legal Aid NSW recommends that the Panel should consider a broad range of inquiries from within Australia and international jurisdictions.

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

A scheme's effectiveness should be defined and measured by how successfully it adheres to the principles set out in our response to Question 2.

In our view, the effectiveness of a scheme must be considered by reference to its most disadvantages users and the extent to which the scheme is meeting the needs of those users. To measure this, any assessment of effectiveness should not only catalogue the number of disputes lodged by disadvantaged persons but it should also compare the quality of outcomes between disadvantaged and non-disadvantaged groups.

We note that FOS publishes comparative tables on its website annually, which present dispute statistics about individual traders in respect of the chance of a dispute coming to FOS, the average length of time before resolution and the outcomes reached.

This information should be published by reference to user demographics, such as if the consumer is a Centrelink recipient, an Aboriginal Australian or culturally and linguistically diverse.

#### Recommendation

Legal Aid NSW recommends that a scheme's effectiveness should be defined and measured by:

- How successfully it adheres to the principles as set out in Recommendation 2, and
- The extent to which it meets the needs of the most disadvantaged users.

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## Internal dispute resolution

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

No. Our casework experience assisting consumers, including disadvantaged consumers, shows that it can be difficult to find out about IDR processes when consumers have a complaint. This may be due to:

- *Limited or ineffective promotion:* Many of our clients have little to no knowledge of the existence of IDR.
- *Lack of accessibility:* Our clients are generally not assisted by traders to engage in the IDR process, for example, many traders do not provide IDR contacts on their website and the consumer must search the EDR website to find out this information. Even solicitors at Legal Aid NSW often find it difficult to lodge IDR complaints on behalf of their clients; for example, some traders do not readily accept our third party authority or do not respond to our correspondence.
- *Lack of consistency:* Many of our clients raise IDR complaints on grounds of financial hardship. In our experience, there is a lack of consistency in the treatment of financial hardship applications amongst traders, particularly in relation to long-term financial hardship.

We consider that consumer awareness about IDR could be improved through greater publicity of IDR and a focus on making the IDR process accessible to the most disadvantaged consumers. We suggest implementing the following:

- Mandatory IDR reporting by traders
- Mandatory requirement to notify consumers of IDR in any initial phone conversation
- Mandatory requirement to notify consumers in writing of outcome if IDR complaint lodged by phone
- Mandatory requirement to notify consumers of IDR even if a consumer withdraws their claim
- Use of appropriate font size and formatting in letters about the availability of IDR
- Consistency in structure, names and processes of IDR across all traders
- Limit ability to outsource IDR
- Engagement in IDR outreach, for example by appointing Aboriginal Liaison officers to promote awareness and use of IDR in Indigenous communities
- Introduction of proactive measures to ensure IDR is brought to the attention of consumers early, for example by:

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- Ensuring IDR is mentioned in telephone calls with consumers
  - Ensuring IDR is referred to on the signing page of documents
  - Providing contact details of IDR representatives in multiple formats (telephone, internet and facsimile)
  - Promotion of IDR schemes in multiple languages especially on community radio and local newspapers
  - Mandatory registration with a telephone interpreting service for assistance lodging an IDR complaint
  - Adequate training of IIDR staff to assist persons with disabilities
  - Implementation of a common definition of long-term financial hardship across the financial services sector. The definition should state that an individual is experiencing long term financial hardship where that individual:
    - Receives no income or only Centrelink payments (or equivalent amounts)
    - Possesses assets valued at or below the amounts protected by bankruptcy legislation, and
    - These circumstances cannot be expected to change within two years.

In our view, ASIC could assist in the implementation and success of these changes if it played a greater role in overseeing IDR processes.

#### Recommendation

- Mandatory IDR reporting by traders
- Mandatory requirement to notify consumers of IDR in any initial phone conversation
- Mandatory requirement to notify consumers in writing of outcome if IDR complaint lodged by phone
- Mandatory requirement to notify consumers of IDR even if a consumer withdraws their claim
- Use of appropriate font size and formatting in letters about the availability of IDR
- Consistency in structure, names and processes of IDR across all traders
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- Introduction of proactive measures to ensure IDR is brought to the attention of consumers early, for example by:
    - Ensuring IDR is mentioned in telephone calls with consumers
    - Ensuring IDR is referred to on the signing page of documents
    - Providing contact details of IDR representatives in multiple formats (telephone, internet and facsimile)
  - Promotion of IDR schemes in multiple languages especially on community radio and local newspapers
  - Mandatory registration with a telephone interpreting service for assistance lodging an IDR complaint
  - Adequate training of IIDR staff to assist persons with disabilities
  - Implementation of a common definition of long-term financial hardship across the financial services sector. The definition should state that an individual is experiencing long term financial hardship where that individual:
    - Receives no income or only Centrelink payments (or equivalent amounts)
    - Possesses assets valued at or below the amounts protected by bankruptcy legislation, and
    - These circumstances cannot be expected to change within two years.
  - Greater regulatory oversight of IDR.

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

As discussed at Question 5, a significant barrier to lodging a complaint is the consumer's lack of awareness about IDR. Cultural, technological and financial barriers also prevent access to IDR.

While EDR schemes have taken steps to improve access to justice for disadvantaged consumers, we are concerned that IDR has not made the same improvements. For example, many traders do not provide facilities for non-English speaking consumers to lodge complaints.

We recommend implementing the changes outlined at Question 5 to reduce barriers to lodging a complaint, particularly for disadvantaged consumers.

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

Some traders engage in IDR more effectively than others. For example, certain traders in consumer lease disputes refuse to grant the consumer a refund under any circumstances. If a consumer is entitled to a refund this arguably renders the IDR process meaningless.

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Further, over the past 12 months, Legal Aid NSW solicitors have reported multiple issues in respect of the IDR process of a large bank. The issues include lack of response to correspondence and failure to accept third party authority.

To improve consistency in the way traders engage in IDR, ASIC could play a greater role in providing regulatory oversight to the operation of IDR and in responding to complaints of poor IDR.

We also submit that the mechanism by which EDR schemes charge their members may have a flow on effect on the trader's willingness to resolve dispute at the IDR stage. Legal Aid NSW is concerned that CIO's membership fee-funding model does not properly incentivise traders to resolve their disputes at the IDR stage as there are minimal extra costs incurred if the dispute goes to EDR, by which time the consumer may have lost the motivation or resources to continue.

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

We refer to our responses to Questions 5 and 6 and provide more detail below.

A strength of the schemes' relationships with IDR processes is the ability of a consumer to move from IDR to EDR after a trader has failed to respond within a certain time frame. This relationship makes a trader accountable for delays in its IDR processes.

However, we consider that the current time limit to for a trader to give its final response to an IDR complaint should be reduced from 45 days to 30 days, in line with *Privacy (Credit Reporting) Code 2014* (the Code). Under the Code, the complaint must be acknowledged within seven days and a decision must be made in relation to the complaint within 30 days. We submit that a 30 day time limit strikes the appropriate balance between ensuring disputes are resolved meaningfully and expediently.

EDR schemes could contribute to the resolution of disputes at the IDR stage by publishing their decisions identifying traders by name. This would help consumers assess the value of accepting an offer at the IDR stage compared with spending further time escalating the complaint to EDR.

EDR's ability to refer matters back to IDR has the potential to assist early resolution of disputes between the parties, provided the EDR scheme gives guidance to the parties on how to resolve their matter, perhaps through reference to certain cases or principles.

### Recommendations

Legal Aid NSW recommends that the IDR time frames for a trader's response be changed so that the complaint is acknowledged within seven days and a decision is made relation to the complaint within 30 days.

Legal Aid NSW recommends that EDR schemes publish decisions identifying traders by name.

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

As discussed at Questions 5, 6 and 7, it can be difficult for our clients, who are mainly disadvantaged consumers, to escalate their complaint from IDR to EDR.

Legal Aid NSW does not have any data, beyond anecdotal experience, about how common it is for disputes to move between IDR and EDR, or between EDR schemes.

In our casework experience, we have identified a problem for the consumer when debts are assigned from one trader to another, which is in a different EDR scheme. In this scenario, the second trader may be able to avoid dealing with disputes relating to the creation of the debt with the first trader, depending on the terms of reference of the particular EDR scheme. In our view, this problem would be resolved if a one EDR body was created. More detail can be found at Questions 30 and 38.

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## Regulatory oversight of EDR schemes and complaints arrangements

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

The current level of regulatory oversight for the EDR and complaints arrangements framework generally works well. However, we submit that the effectiveness of regulatory oversight could be improved in the following ways:

#### **(1) Increasing transparency of the regulator**

Consumers and consumer advocates who make a complaint about traders do not generally receive an update as to what, if any, investigations are being undertaken by ASIC, or the outcome of the complaints.

#### **(2) Increasing regulatory oversight of traders' compliance with IDR requirements**

Legal Aid NSW and other consumer advocates raised a number of significant issues with ASIC about one trader's consistently poor compliance with IDR requirements under the National Credit Code and Regulatory Guideline 165. We are not aware if ASIC has taken any steps to ensure the trader complies with its IDR obligations.

#### **(3) Increasing regulatory oversight of systemic issues relating to unresolved complaints and withdrawn claims in insurance:**

In ASIC's Report 245 (REP 245) released in August 2011, the regulator found that, of the eight general insurers representing about 75% of the market, over 7% of claims were withdrawn and only a small percentage of claims were denied. We are not aware of any further regulatory oversight by ASIC about this issue.

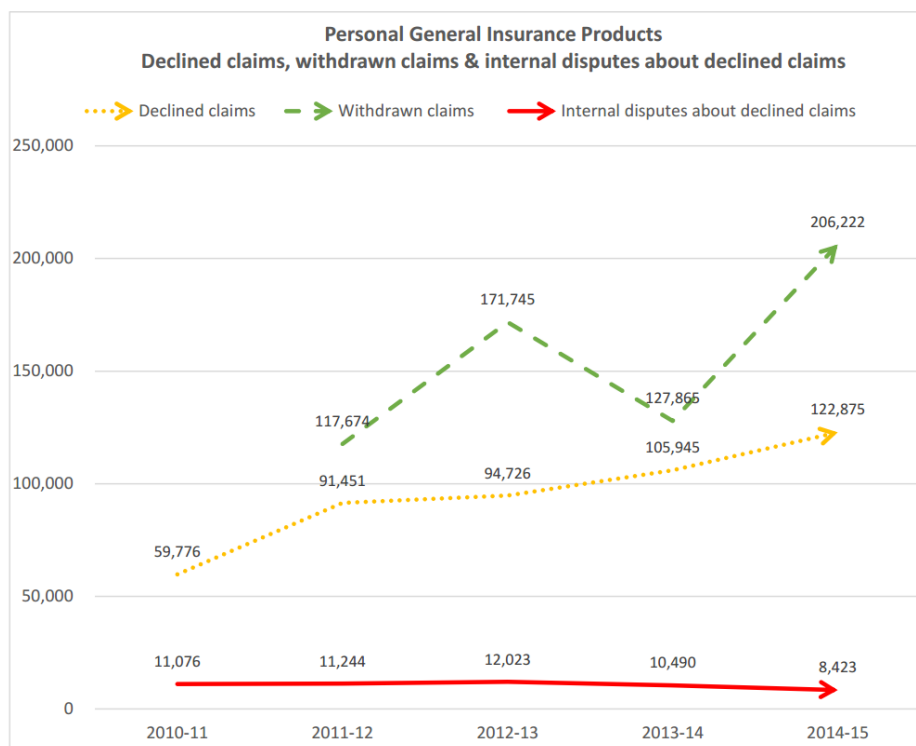
The rates of withdrawn claim have not changed significantly since ASIC's report. According to the latest General Insurance Industry Data Report of 2014-15 released in June 2016, claims withdrawn by consumers have increased by 61% from the previous financial year.

From our casework experience, consumers withdraw their claims upon insurers' advice that the claims will likely be denied. Insurers remind consumers of the benefits of no claim bonuses, and therefore reduce their formal claim denial count. In many cases, our clients are not advised of any IDR or EDR options, and are not provided with formal correspondence by the insurer to confirm the withdrawal of a claim. It is interesting to note that, the number of internal disputes received by the general insurance industry has been falling as the rates of withdrawal and denial of claims have been increasing, as shown in the graph below.



## Graph: Personal Insurance, internal disputes, claims and declined claims – 5 year trends<sup>1</sup>

Graph 1: Personal Insurance: internal disputes, claims and declined claims – 5 year trends



A stronger role by the regulator in the investigation and oversight of withdrawn claims within the general insurance industry is required to address this increasing concern.

### Recommendation

Legal Aid NSW recommends that ASIC improve its oversight by increasing transparency and taking a more active role in investigations of traders' compliance with IDR requirements and systemic issues regarding unresolved disputes and withdrawn claims in insurance.

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

Yes, ASIC's oversight role and powers in relation to FOS and CIO should be increased to better monitor the schemes' performance against the principles set out in Regulatory Guide 139. Currently, schemes are not held accountable by the regulator for not meeting any of these principles. Where independent reviews of schemes have identified areas for improvement, schemes are not required by the regulator to respond to and implement the recommendations.

<sup>1</sup> The General Insurance Industry Data Report 2014-2015, released 2/6/2016, accessed on 26/9/2016 from <http://www.fos.org.au/custom/files/docs/cgc-20142015-industry-data-report.pdf>, at p.33

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For example, the 2011 independent review of the CIO stated:

‘It is important that there is a sufficient body of decided complaints to guide settlement negotiations and to ensure that these produce fair outcomes. Relative to other schemes, [CIO’s] practices presently produce very few detailed written assessments pertaining to complaints that have been fully investigated.’<sup>2</sup>

The independent review recommended that the CIO ‘refine its procedures and staff guidance to reduce the emphasis on settlements where it is likely that an investigation and decision will produce a superior outcome. [CIO] should monitor... the number of Determinations that it makes.’

The independent review noted that of the number of complaints closed in 2010-2011, 10.4% of FOS cases were fully investigated with written decisions, but only 0.001% of CIO cases proceeded to written decisions. This figure has not greatly improved. In CIO’s most recent Annual Report 2014-15, only four determinations were made out of 4979 cases closed, accounting for only 0.08% of CIO cases. Our casework experience accords with this trend, as described in our responses at Questions 17 and 38.

#### Recommendation

Legal Aid NSW recommends that ASIC’s oversight role in relation to the schemes be increased to hold schemes accountable where independent reviews identified areas for improvement or where the conduct of the schemes falls short of the Benchmarks set out in Regulatory Guide 139.

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

Yes, there should be consistent and effective regulatory oversight by ASIC of all three schemes, including the SCT.

We note that some life insurance and superannuation matters, such as disputes against decisions made by insurers of superannuation fund, could fall within the jurisdictions of both FOS and the SCT. Where one scheme has ASIC’s oversight and another scheme doesn’t, these disputes could potentially lead to inconsistent outcomes depending on jurisdiction. Consistent oversight by ASIC of all schemes will lead to more consistent and equitable outcomes for consumers.

We submit that consistent regulation is most efficiently achieved if ASIC oversees one Ombudsman-based scheme, which incorporates all three schemes.

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<sup>2</sup>[http://www.cio.org.au/cosl/assets/File/Independently%20Review%202012%20\(The%20Navigator%20Group\).pdf](http://www.cio.org.au/cosl/assets/File/Independently%20Review%202012%20(The%20Navigator%20Group).pdf), p.48

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## Recommendation

Legal Aid NSW recommends that ASIC provide consistent and effective oversight of all three schemes, including the SCT.

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

Existing schemes contribute to improvements in the overall legal and regulatory framework in the following ways:

### **(1) Providing an effective ‘filter’ for disputes**

Cases are filtered through so that most cases are resolved by agreement of the parties or determinations of the schemes, and only a small proportion of cases need to be decided through expensive and time-consuming court processes.

### **(2) Identifying systemic issues**

The schemes identify systemic issues that arise out of disputes and address them in a timely manner through discussions with industry. This is a more cost-effective approach than litigation and has the potential to achieve a far-reaching positive outcome for consumers by maintaining good industry practice.

For example, in FOS’ Systemic Issues Process, once a systemic issue has been identified and investigated, FOS will work with the trader to resolve the systemic issue by identifying all affected customers, compensate them fairly for any financial loss and implement a strategy to prevent the issue from recurring.

We note that there is room for improvement in this process. While the schemes identify systemic issues and presumably raise these issues with ASIC as per Regulatory Guide 139, we are not made aware that the issue has been escalated to ASIC, and, if so, what steps ASIC is taking to investigate. We submit that transparency about this process and ASIC’s follow up actions would contribute to good industry practice.

### **Case study: Bulk settlement at CIO and reporting to ASIC**

*Legal Aid NSW recently had 12 matters settle in the early investigation stage of CIO. This process took 1.5 years and although some clients did obtain a very positive result, others ultimately settled for less than satisfactory offers, including gift vouchers. None of the matters proceeded to either the recommendation stage or the determination stage within CIO.*

*Unfortunately, we are not aware if CIO reported this issue to ASIC. A more widespread positive outcome for consumers may have been reached if this issue was reported to ASIC.*

## Recommendation

Legal Aid NSW recommends that the capacity for the schemes to report systemic issues be enhanced by stronger regulatory oversight to ensure that all systemic issues are reported as mandated by Regulatory Guide 139, with greater transparency in the reporting process.

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## Existing EDR schemes and complaints arrangements

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

The existing EDR schemes (FOS and CIO) provide many positive features for consumers who have disputes with traders.

#### **Positive of EDR: Free to consumers**

EDR is funded by industry and is free to the consumer. This is an integral feature of EDR as it ensures access to dispute resolution for all consumers, especially those experiencing financial hardship.

#### **Positive of EDR: Accessible**

The schemes are relatively easy to access, allowing consumers to lodge disputes online or in writing. EDR schemes communicate with consumers through phone calls and written correspondence which is not only more convenient for consumers, but is also less intimidating than a formal court setting.

EDR's informal approach means it is accessible to self-represented consumers who typically have less resources and means than traders to deal with their dispute.

#### **Positive of EDR: Independent**

Consumers have the opportunity to have an independent party review their dispute and help to negotiate a solution. In our experience, EDR schemes broker flexible solutions for consumers, with regard to what is fair in all the circumstances.

#### **Positive of EDR: Certainty of decision-making**

The ability of a consumer to achieve a binding decision against the trader in a no costs jurisdiction cannot be undervalued. Without EDR, many vulnerable and disadvantaged consumers would not have the resources or means to raise a dispute against a trader.

EDR's ability to make a binding decision also contributes to traders' compliance with the law, EDR's terms of reference and good industry practice.

#### **Problems with existing arrangements**

Multiple forums for external dispute resolution in the financial services sector create poor user outcomes. The existing arrangements create confusion for consumers and have given rise to inconsistencies in decision-making.

Further, in our experience, the SCT is a less effective forum for dispute resolution when compared with the EDR schemes.

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We have concerns about:

- *Delay*: It is not uncommon for disputes in the SCT to take one to three years to reach a resolution.
- *Limited ability to improve and innovate*: As the SCT is established by statute, it is a difficult process to make changes to the way it operates.
- *Limited ability to enforce trader compliance*: The SCT does not have the capability to monitor systemic issues or to take enforcement action against a trader where it identifies non-compliance. This is a missed opportunity to have a far-reaching impact on a particular trader's conduct and on the landscape of good industry practice, as shown by the case study below.

### **Case study: Systemic issues with super fund**

*Saha is a single mother who migrated from Indonesia and speaks English as a second language. She has limited writing and reading comprehension skills in English. Saha's husband died in November 2014 from cancer.*

*Saha came to Legal Aid NSW in May 2015 when her late husband's super fund refused to pay out a \$60,000 death benefit to her. On review of the documents, we learnt that Saha's husband had rolled three superannuation policies into one super fund in January 2014.*

*We contacted the super fund to ask why they had not paid out the death benefit at the same time as they paid out the superannuation. The super fund argued that if the deceased knew he was dying or likely to die when he opened his super fund in January 2014 he would not be entitled to the death benefit. The super fund said this provision was in their policy booklet. The super fund could not provide any evidence that they had drawn this provision to the attention of the deceased at the time he relinquished three existing super policies in favour of their policy.*

*The super fund requested medical records from the deceased's doctors. The super fund outsources their document retrieval process to another organisation, which refused our third party authority and insisted on Saha signing their specialised authority. The organisation lost the specialised authority three times, requiring Saha to sign a new one three times.*

*This process took a long time. Due to financial hardship, Saha could no longer afford to live in the place they had been renting as a family and she and her daughter moved into a share house, sharing a bedroom between them.*

*In November 2015, we lodged a complaint with the SCT as our IDR complaint had not progressed. After the complaint was lodged, a complaints officer from the super fund was assigned to the matter in addition to the caseworker. The super fund agreed to pay Saha the benefit, however the super fund paid \$42,000 more than we expected. The super fund has not been able to explain this extra amount to our satisfaction.*

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This matter raises a number of systemic issues relating to the IDR process and trader compliance with the law. The SCT is not in a position to investigate these issues and take appropriate enforcement action.

To remedy the problems identified above, Legal Aid NSW supports the creation of one Ombudsman-based scheme, formed by integrating CIO and the SCT into FOS. Our response at Question 38 provides more detail.

### Recommendation

Legal Aid NSW recommends that EDR schemes remain free, accessible and retain the power to make binding decisions.

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

Legal Aid NSW considers that the EDR schemes are broadly accessible to many consumers. However, the schemes should take steps to raise their profile and increase awareness of EDR in the consumer community. When conducting advice sessions with clients, our solicitors report that consumers are often unaware of the existence of EDR schemes until they make contact with a legal service.

Legal Aid NSW submits that the schemes should also consider how to make EDR more accessible to vulnerable consumers, including those in Aboriginal or culturally and linguistically diverse communities. We understand from our engagement with FOS and CIO that these groups of consumers are relatively unrepresented in their complainant demographics.

To address this underrepresentation, EDR schemes should employ community engagement officers to work to promote awareness and use of EDR in vulnerable communities. It is critical that this project is run alongside established casework services and links in to established networks. EDR schemes and the SCT should also consider implementing mandatory Aboriginal awareness and kinship training for staff. Our response at Question 46 provides more detail.

### Recommendations

Legal Aid NSW recommends that the schemes consider how to make EDR accessible to vulnerable consumers.

Legal Aid NSW recommends that the schemes take steps to increase awareness and use of EDR in the consumer community.

Legal Aid NSW recommends that the EDR schemes and the SCT implement mandatory Aboriginal awareness and kinship training for staff.

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

The EDR process is relatively easy for consumers to navigate.

### **Lodging a dispute**

Legal Aid NSW supports the ability of consumers to lodge disputes in an online or in written format. We recommend that consumers should also be able to lodge a dispute via telephone. This will improve access to EDR for vulnerable consumers who do not have the requisite technology or the ability to communicate in writing.

### **Start of the dispute resolution process**

At the start of the dispute resolution process, the schemes provide a telephone number for consumers to call with questions about their dispute. As discussed above, telephone access assists consumers using the schemes and provides additional support to disadvantaged consumers who may find the dispute resolution process challenging.

Consumers are provided with a case reference number and a case officer to contact directly about their matter. This allows consumers to communicate easily with the schemes and prevents them having to repeat information about their dispute to multiple case officers.

Consumers can also review information on the EDR schemes' websites, or be posted brochures, about the complaint process.

### **Throughout the dispute resolution process**

The schemes regularly communicate with consumers by email, allowing disputes to progress quickly. However, we consider that the schemes should allow consumers the option to communicate via post or verbally by telephone to improve access for those with communication constraints. We encourage EDR schemes to continue to contact consumers over the telephone during the dispute resolution process. This has the dual benefit of the consumer feeling that their complaint has been heard and ensuring that the scheme has all relevant information needed to make an informed decision.

### **Recommendations**

Legal Aid NSW recommends that consumers should be able to lodge a dispute with an EDR scheme via telephone.

Legal Aid NSW recommends that EDR schemes should contact consumers by telephone both after the initial complaint is made and before the final decision is made.

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

Legal Aid NSW strongly supports best practice EDR and considers that EDR is an effective avenue for resolving consumer complaints. Legal Aid NSW is particularly impressed with the FOS model of dispute resolution.

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As discussed at Question 14, the following features of EDR contribute to its effectiveness as a dispute resolution model:

- free, flexible and time-efficient
- accessible to self-represented consumers
- provides an opportunity for the consumer to negotiate with the trader with the assistance of an independent third party, and
- Can lead to a binding decision for consumer.

Through our casework, we have identified certain aspects of the EDR complaints process that could be altered to better user outcomes. Timeframe of disputes could be improved to expedite the process and allow consumers to reach decisions sooner. Legal Aid NSW supports FOS' 'fast track' process for simple and low cost disputes. This model gives consumers and traders the opportunity to settle the dispute quickly yet thoroughly. By contrast, Legal Aid NSW has at times experienced long delays in progressing and resolving matters with both CIO and the SCT.

EDR schemes should be willing to make decisions in disputes where the consumer and the trader have not been able to reach a resolution through negotiation. Parties to a dispute typically have already tried to resolve their dispute through IDR prior to lodging in EDR. Where parties have participated in IDR and have unsuccessfully attempted negotiations at EDR, Legal Aid NSW considers that EDR schemes should make final decisions, even in complex matters, in a timely matter. We refer to our response at Question 11 and note again that Legal Aid NSW has experienced reluctance from CIO to make final decisions or take enforcement action against traders in some disputes. This can lead to significant delays for consumers.

#### **Case study: Delay in resolving Danika's complaint**

*Danika is a single, Aboriginal mum with young children. She is from a remote town in NSW and is solely reliant on her Centrelink benefits for income. She has limited experience reading or understanding contracts.*

*A consumer lease trader made an unsolicited visit to Danika's home and signed her up to rent household goods. Danika asked Legal Aid NSW for some legal advice about her consumer lease contracts. Legal Aid NSW contacted the trader requesting Danika's documents. For many months, the trader did not comply with our request for documents. In response, Legal Aid NSW lodged a complaint with CIO. CIO has also made numerous document requests to the trader but the trader has failed to provide any information, and has instead asked our client to provide information, such as photos and serial numbers of the goods. We understand that CIO has reported this issue to their Systemic Issues team but has not reported it to ASIC.*

We are concerned that the trader's lack of compliance may be due to limited enforcement action from CIO, with the outcome of a significant delay and no resolution yet for a very vulnerable consumer.



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### Recommendation

Legal Aid NSW recommends that EDR schemes have a ‘fast track’ process to resolve low cost and simple disputes.

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

Legal Aid NSW considers that the current arrangements allow the schemes the necessary flexibility to evolve in response to changes in markets or the needs of users.

It is important that the schemes regularly assess trends based on their internal complaints data and consult with relevant stakeholders to monitor change and assess user needs.

We consider that EDR schemes should continue to be subject to independent reviews on a periodic basis.

### Recommendation

Legal Aid NSW recommends that the schemes regularly assess internal complaints data and feedback from relevant stakeholders to ensure they respond to market trends and user needs.

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

Yes, Legal Aid NSW broadly agrees with the jurisdictions of the EDR schemes.

As noted at Question 1, we support FOS’ ‘Third party claim on a General Insurance Policy’.

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

No, the current momentary limits for determining jurisdiction are no longer fit-for-purpose.

Legal Aid NSW runs a disaster response advice service, which assist clients making insurance claims where their homes have been partially or totally affected by a natural disaster. FOS and CIO currently impose a monetary limit of \$500,000 per claim. The current median Australia house price now exceeds \$500,000. This means that many of our clients who have a total loss claim as a result of a natural disaster are precluded from making a claim in EDR because of the monetary limit.

Additionally, consumers that have multiple products with one trader may be precluded from lodging a dispute in EDR, as their total claim would exceed the current monetary limit.

We recommend a review of the monetary limits and compensation caps so that they reflect the increased value of the cost of financial products in Australia, including the cost of home loans and a rebuild on total loss insurance claims.

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## Recommendation

Legal Aid NSW recommends a review of the monetary limits and compensation caps so that they reflect the increased value of the cost of financial products in Australia, including the cost of home loans and a rebuild on total loss insurance claims.

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

No, multiple schemes operating in the same jurisdiction do not lead to consistent or comparable outcomes for consumers. Different outcomes occur due to the different approaches used by the schemes, including the schemes' approach to:

- *Timing:* Consumers are more likely to receive a much quicker outcome in FOS rather than in the SCT, and often CIO.
- *Dispute resolution:* Consumers with disputes in FOS are more likely to receive a decision in their matter where the parties are unable to reach an agreement, rather than being encouraged to continue negotiations.
- *Decision-making:* Where a consumer has a complex legal dispute, FOS is more likely to make a final decision and publish their findings than CIO or the SCT.

Inconsistent outcomes have negative consequences for consumers who have no choice over which schemes they can lodge a dispute with. In contrast, this inconsistency can benefit traders who are able to choose an EDR scheme that is more favourable to their interests.

Traders can be held to different standards on similar issues by the schemes, which risks confusing industry's understanding of what good industry practice is.

More consistent and comparable user outcomes would be achieved if one Ombudsman-based scheme were created. For further detail, please refer to our response at Question 38.

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

Yes, Legal Aid NSW broadly supports the current powers and remedies available to the schemes. We submit that the EDR schemes should be granted the following additional powers:

### **(1) Additional power: Uncompensated losses**

EDR schemes should have powers to grant remedies for consumers with uncompensated losses. Legal Aid NSW supports the establishment of a statutory compensation scheme to assist consumers who are otherwise unable to recover their losses. For further detail, please see our response at Questions 47, 48 and 49.

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## **(2) Additional power: Responsible lending**

Where a trader breaches its responsible lending obligations, a scheme may order the trader to compensate the consumer for the interest, fees and charges attached to a loan. Legal Aid NSW submits that this remedy is insufficient to deter traders from engaging in such conduct. EDR schemes should be given an additional power to impose larger penalties on members who do not engage in responsible lending.

## **(3) Additional power: Debt waiver where consumer is in long-term financial hardship**

We refer to our response at Question 5 where we recommended that traders adopt a uniform definition of long-term financial hardship and practices to address this. EDR schemes should have the power to determine that debt be waived where the consumer is experiencing long-term financial hardship.

### Recommendation

Legal Aid NSW recommends that the schemes be given additional powers to:

- Provide consumers with compensation from a statutory compensation scheme where the consumers would otherwise be left uncompensated;
- Increase penalties in respect of breaches of responsible lending obligations; and
- Determine that debt be waived where the consumer is experiencing long-term financial hardship.

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

Yes, the current decision making criteria appears to be appropriate. We strongly support the schemes consideration of what is fair in all the circumstances when making a decision.

We recommend FOS' approach, which considers previous decisions (though they are not binding) in the decision making process. In our view, this contributes to consistent user outcomes.

### Recommendation

Legal Aid NSW recommends that FOS' approach, which considers previous decisions (though they are not binding) in the decision making process, be adopted.

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

We support the governance arrangements of FOS and CIO, which encourage collaboration between industry, consumers and the schemes and drive positive consumer outcomes. The governance arrangements ensure the EDR schemes are independent and that there is no overt political involvement. The arrangements also assist the schemes to gather current information about trends or market changes in the sector from industry and consumer experts, and respond accordingly to these changes.

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In contrast, the SCT governance model does not have a representative from the consumer sector. The Governor-General appoints the Chairperson and Deputy of the SCT and the remainder of representatives are Ministerial appointments.

### Recommendation

Legal Aid NSW recommends governance arrangements involving representatives from industry and the consumer sector.

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

Legal Aid NSW recommends a 'cost-to-serve' funding model which is able to resource increases in dispute numbers. We support the funding model used by FOS as it provides an incentive to resolve disputes. We have concerns that the current funding and staffing levels in the SCT are inadequate due to its significant delays in resolving disputes.

All EDR schemes should ensure that they engage experienced staff with different skills; lawyers should be employed but not exclusively. This diversity in skills assists in communication with both consumers and traders and may lead to more innovative outcomes.

We consider that EDR schemes need to do more to promote awareness and use of EDR to vulnerable consumers, including consumers in remote Aboriginal communities and culturally and linguistically diverse communities. This could include hiring staff to conduct community engagement. For more detail, please refer to our response at Question 15.

### Recommendations

Legal Aid NSW recommends a 'cost-to-serve' funding model which is able to resource increases in dispute numbers.

Legal Aid NSW recommends that staff employed by EDR schemes have a range of skills, and not be exclusively legally qualified.

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

We do not consider current funding arrangements to be transparent.

We submit that information about the way all EDR schemes are funded and how they set their fees should be more transparent and more readily available on their respective websites. There should be a link on the websites that explains the funding models and fees to make it clearer for users.

### Recommendation

Legal Aid NSW recommends that there should be greater transparency about funding models and that this information should be readily available on the EDR schemes' websites.

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

Legal Aid NSW supports ASIC regulatory role and we would like ASIC to do more when problems are identified in EDR schemes. Regular independent reviews of EDR schemes are crucial and ASIC could have a greater role in ensuring EDR schemes respond to and implement any recommendations from the reviews.

There should be greater transparency in the naming of particular traders that are referred to the schemes' systemic issues teams or to ASIC. This would improve outcomes for consumers by encouraging stricter compliance by traders.

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

The current reporting arrangements by EDR broadly assist users to understand how the schemes operate, what the key themes in decision-making are and relevant systemic issues. This is achieved through the publication of Annual Reports, terms of reference, rules, decisions, issues papers, circulars, position statements and commentaries. We note that the SCT does not engage in reporting to the same standard as the EDR schemes.

Some UK-based Ombudsman schemes publish trader-specific complaint data quarterly and we recommend this approach. Publishing complaints data has the dual benefit of sharing information about the causes of complaints to assist industry improve customer service and helping consumers make an informed choice when making a purchase. This can also be achieved by mandatory reporting of systemic issues by the EDR schemes. For more detail, please refer to our response at Question 46.

Recommendation

Legal Aid NSW recommends that trader-specific complaint data be published by EDR schemes quarterly.

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

Measures such as comprehensive, regular surveys of consumers, consumer advocates and industry could be used to assess the performance of EDR schemes and complaints arrangements. Annual reports and reviews, including the survey results, should continue to be published. In addition, details about the number of disputes, the outcomes and the time frames within which matters are resolved should be published and readily available.

Recommendation

Legal Aid NSW recommends that comprehensive and regular surveys be conducted of consumers, consumer advocates and industry to assess the performance of the schemes.

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## Gaps and overlaps in existing EDR schemes and complaints arrangements

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

Gaps are created in dispute resolution services due to the monetary limits used by EDR schemes. For more detail, please refer to our response at Question 20.

Overlaps occur under the current arrangements where a consumer is required to make multiple claims in different forums. For example, this may occur when a debt is sold from one trader to another and the second trader is a member of a different EDR scheme.

### **Case study: One transaction leading to two disputes in two different schemes**

*Fernando incurred a \$20,000 debt to Big Bank, who is a member of FOS. Big Bank sold the debt to Debt Collection Inc., who is a member of CIO. Debt Collection Inc. commenced legal proceedings against Fernando to recover the debt. Fernando lodged a complaint with CIO on hardship grounds. After obtaining legal advice, Fernando wished to lodge a dispute in relation to the creation of the debt. This dispute must be lodged with FOS. Fernando faces the situation of having two disputes in two different EDR schemes.*

While we recognise that the current EDR schemes arrangements allow for the transfer of disputes between schemes, we consider that situations like Fernando's case study are better addressed by having one Ombudsman-based scheme. For more detail, please refer to our response at Question 38.

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

No, we submit that multiple dispute resolution schemes do not lead to better outcomes for users.

It is often confusing for consumers to identify which EDR scheme to approach and this difficulty can operate as a barrier to consumers engaging with EDR at all. The challenge is further compounded when the consumer is from a culturally and linguistically diverse background, has difficulty navigating a website or lives in a remote or regional community with limited services. For more detail, please refer to our response at Questions 14, 15 and 38.

While we recognise that multiple dispute resolution schemes necessarily creates competition, we do not agree with the argument that competition is the sole driver for innovation in EDR. In our view, improvements in EDR are motivated by independent review, technological advancements and feedback from relevant stakeholders, including consumers, consumer advocates, ASIC and industry.

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

Yes, based on our casework experience and feedback from clients, the current arrangements lead to consumer confusion. We recommend creating one Ombudsman-based scheme, formed by integrating CIO and the SCT into FOS. For more detail, please refer to our response at Question 38.

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

We do not have any comment about this question.

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

We do not have any comment about this question.

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## Triage service

### 35. *Would a triage service improve user outcomes?*

A triage service applied to the current arrangements may improve user outcomes. However, we do not consider a triage service to be the best use of resources to achieve this aim, for the following reasons:

- A triage service may add another barrier to access to dispute resolution, particularly for vulnerable consumers without strong communication abilities
- LawAccess NSW is an existing triage service for legal assistance in NSW. The creation of another triage service may cause confusion for NSW-based consumers.
- Existing schemes already cross-refer in a timely and appropriate manner in most cases.

As discussed at Question 38, our preferred approach is to create one-Ombudsman based scheme.

However, if this approach is not desirable and the Panel wishes to pursue the triage service model, Legal Aid NSW suggests that the service include appropriate facilities to provide assistance to the most vulnerable consumers, such as:

- Toll-free number
- A dedicated Aboriginal liaison officer
- Free Translating and Interpreting Service
- Free Teletypewriter relay service
- A call back service for those who cannot connect to the service immediately to avoid unnecessary telephone costs while the consumer is on hold, and
- An SMS text prior to call back since some consumers routinely do not answer calls from a private number.

### Recommendation

Legal Aid NSW recommends that if a triage service is desirable to the Panel that it should provide assistance to the most vulnerable consumers, including:

- Toll-free number
- A dedicated Aboriginal liaison officer
- Free Translating and Interpreting Service
- Free Teletypewriter relay service



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- A call back service for those consumers who cannot connect to the service immediately to avoid unnecessary telephone costs while being on hold, and
  - An SMS text prior to call back since some consumers routinely do not answer calls from a private number.

36. *If a 'one-stop shop' in the form of a new triage service were desirable:*

- *Who should run the service?*

The triage service should be run by experienced staff who are familiar with disputes relating to financial services. These staff should have training to guide them in assisting disadvantaged and vulnerable consumers.

- *How should it be funded?*

Consumers should not fund the triage service as this would create a barrier to accessing the service.

- *Should it provide referrals for issues other than that related to the financial firm?*

Yes. For example, the triage service should make referrals to community legal centres and Legal Aid Commissions for free legal advice and to free financial counsellors, where appropriate.

#### Recommendation

Legal Aid NSW recommends that the triage service should:

- Be run by experienced staff with training to guide them in assisting vulnerable consumers;
- Not be funded by consumers; and
- Make referrals to community services, such as community legal centres, Legal Aid Commissions or financial counsellors, where appropriate.

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## One body

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

No. The number and form of financial services ombudsman schemes should be decided in consultation with all relevant stakeholders, including consumers, consumer advocates, the existing dispute resolution schemes and regulatory bodies.

### Recommendation

Legal Aid NSW recommends that the number and form of financial services ombudsman schemes be decided in consultation with all relevant stakeholders.

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

Yes. We strongly support the creation of one, Ombudsman-based scheme, formed by integrating CIO and the SCT into FOS.

### **Ombudsman scheme rather than statutory tribunal**

Our preferred model is an Ombudsman-based scheme, formed by integrating CIO and SCT into FOS. In forming this view, we have considered the benefits of EDR over a statute-based tribunal, as outlined at Questions 14 to 18. Our view aligns with comments made by the Productivity Commission in their Access to Justice Arrangements Interim Report that:

‘Ombudsmen are highly accessible, compared to other methods of dispute resolution such as tribunals or courts, because they are free, can be accessed remotely by phone or internet, provide interpreter services and guide complainants through the process without the need for professional advocates’.<sup>3</sup>

In integrating the existing arrangements, it is preferable that the SCT becomes a non-statutory based scheme. However, as the SCT is established by the *Superannuation (Resolution of Complaints) Act 1993* (Cth), we understand that this may raise a constitutional issue with integrating the SCT into one, Ombudsman-based scheme. We recommend that the Panel obtain further advice about this issue.

### **Why one Ombudsman scheme and why FOS?**

As outlined at Question 17, we are impressed by the FOS model in providing expert dispute resolution assistance to consumers. FOS’ experience of successfully merging five predecessor schemes in 2008 gives us confidence that the scheme can effectively manage dispute resolution across multiple sectors and products in the financial services industry.

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<sup>3</sup> Productivity Commission, Access to Justice Arrangements Interim Report, p.332

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We acknowledge that creating one body removes competition between the schemes and we note the argument that this may lead to a reduction of innovation in EDR. In our view, innovations in EDR are motivated by a number of sources - not just competition between the schemes - including consumer advocacy, law reform, technological advancements and regulatory oversight. We submit that the benefits in creating one body significantly outweigh the risks that removing competition may pose.

### **Merits of integration: Accessibility**

Under the current system, it can be difficult for consumers to determine which forum is the appropriate place to raise their dispute. To find out this information, a consumer must call one ombudsman scheme with the risk of being referred to the other, or go online to do a search of the members' directory on one or both of the ombudsman schemes' websites. For vulnerable consumers with limited access to technology or reduced abilities to communicate, the confusion about which forum to raise their dispute in creates a significant barrier to accessing EDR. One body for financial services disputes would remove this barrier.

Multiple bodies dilute the promotion of dispute resolution services to consumers. It can also be very difficult for advocates to explain to their clients the differences between the bodies and which one is the correct one to raise a dispute with. Creating one body would encourage a consistent and strong communication strategy to raise the profile of the body. This would increase consumers' understanding of, and therefore access to, the body.

### **Merits of integration: Consistency**

One body will ensure that consumers experience consistency in process and outcomes when raising a dispute. In our casework experience, we observe significant differences in the approach that FOS, CIO and the SCT take to addressing and resolving consumer disputes. For further detail, please refer to Question 21.

We are concerned that variations between the individual schemes mean that consumers are treated in a materially different way, either procedurally or substantively. This inequity can lead to a worse outcome, particularly as consumers do not have the ability to choose which forum to raise a dispute in.

### Timing

In our experience, FOS' fast-track complaints process means that disputes are generally addressed and resolved faster than disputes filed in CIO and the SCT.

### **Case study: Delay in resolving Catriona's complaint in the SCT**

*Catriona is a young, Aboriginal girl. Her father passed away leaving a death benefit. The matter was filed in the SCT and conciliation was scheduled for six months later. Delays on the part of the client and Legal Aid NSW added an additional 1-2 months, and conciliation was finally listed for 12 months after the initial filing. The matter did not settle and the estimated date for a review hearing is an additional 12 months away.*

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Catriona is of high school age and has been made homeless as a result of the combined lack of financial support from her late father and the emotional toll. The delay through the SCT process has come at a crucial time in Catriona's life and education and she would have benefited greatly from a more timely settlement process.

### **Case study: Delay in resolving Agnes' complaint in CIO**

*Agnes is an Aboriginal woman with mental health issues, including depression and anxiety. Her income source is Centrelink payments.*

*In December 2015, Legal Aid NSW lodged a complaint with CIO on behalf of Agnes, which had the effect of staying a statement of claim filed by the trader against Agnes in court.*

*The trader and Legal Aid NSW, with CIO's assistance, tried to settle the matter between December 2015 and February 2016. These negotiations were unsuccessful and we decided to proceed with the CIO complaint. At that point, CIO advised that they would now undertake a review to decide if the complaint was within their jurisdiction. We did not receive any correspondence from CIO from February 2016 until September 2016 when they advised that it appears that CIO has jurisdiction to hear the dispute.*

*CIO took seven months to just decide if the complaint appeared to be within their jurisdiction, let alone make a decision about the substance of the complaint. The delay had a significant impact on Agnes who feels worried by the unresolved legal proceedings stayed in the court list.*

### Accessibility of decisions

FOS regularly publishes its decisions online. By providing access to decisions, consumers are able to review FOS' approach to a particular dispute, frame their complaint accordingly and understand the likely outcome. Publishing decisions online also increases the transparency of FOS' dispute resolution process.

### **Merits of integration: Efficiency**

There are efficiency gains in creating one body to address disputes relating to financial services. For example, improvements could be made to infrastructure, complaints handling procedures and resource availability.

We note that the Productivity Commission commented that 'there may be scope to improve the efficiency of service provision by redirecting some complaints or redrawing the boundaries of some schemes'<sup>4</sup> and recommended that 'Governments should consider whether certain high-cost, low-volume complaints services could be more efficiently and effectively incorporated into another body rather than as stand-alone services'.<sup>5</sup>

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<sup>4</sup> Productivity Commission, Access to Justice Arrangements Interim Report, p.335

<sup>5</sup> Productivity Commission, Access to Justice Arrangements Interim Report, p.336

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## Merits of integration: Compliance

Under the current system, if a trader is expelled from one scheme due to non-compliance, that trader can apply to become a member of the other scheme. Creating one body will increase the risk of non-compliance for a trader, as they will no longer have the safety net moving to an alternative scheme.

One body will ensure consistency in approach to identifying and addressing systemic issues with respect of trader non-compliance. We recommend FOS' approach to systemic issues, which is resourced by a systemic issues and code compliance monitoring team. In addressing systemic issues, FOS engages regularly with Legal Aid NSW and the IDR officers of its members to build relationships, gather information and provide feedback about patterns of conduct.

### Recommendation

Legal Aid NSW recommends that one Ombudsman-based scheme be created through integration of CIO and the SCT into FOS.

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

One Ombudsman scheme is capable of effectively dealing with the different sectors and products of the financial system. In support, we refer to the current FOS model, which successfully merged five predecessor schemes in 2008 to address multiple financial products and sectors in its jurisdiction.

How the FOS model operates in practice is largely internal organisational knowledge and we are unable to comment on this in detail. However, through our casework experience, we understand that FOS uses specialist teams to address particular financial products and that its structure encourages consistency, skill sharing and best practice across the organisation. We are aware that FOS provides secondment-style opportunities for employees of its members to work in FOS' specialist teams. This is a practical way to share information about the different sectors and products of the financial system and we recommend that the one scheme formed employ similar practices.

### Recommendation

Legal Aid NSW recommends that the FOS model, culture and approach be maintained when integrating the schemes.

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

We strongly support the creation of one Ombudsman-based scheme, formed by integrating CIO and the SCT into FOS. In forming one body, it is important that the culture and approach taken by FOS is maintained. To ensure this, we recommend that the body is appropriately funded and resourced and that there be an adequate transition period. Further detail is provided at Question 38.

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## Recommendation

Legal Aid NSW recommends that the new Ombudsman-based scheme be appropriately funded and resourced and that there be an adequate transition period.

*41. If a 'one-stop shop' in the form of a new single dispute resolution body were desirable:*

- *Should it be an ombudsman or statutory tribunal or a combination of both?*

Our preferred model is an Ombudsman-based body, formed by integrating CIO and the SCT into FOS.

Should the Review not favour this approach, we recommend that the Panel investigate the FOS UK model.

## Recommendation

Legal Aid NSW recommends that the Panel investigate the FOS UK model should the Panel not favour our preferred model of one Ombudsman-based scheme, formed by integrating CIO and the SCT into FOS.

- *What should its jurisdictional limits be?*

We refer to our response at Question 20.

We recommend a review of the monetary limits and compensation caps so that they reflect the increased value of the cost of financial products in Australia, including the cost of home loans and a rebuild on total loss insurance claims.

- *How should it be funded?*

Legal Aid NSW recommends a 'cost-to-serve' funding model which is able to resource increases in dispute numbers. This could mirror the FOS funding arrangement as outlined in the Issues Paper, that is:

- No upfront payment by complainants; and
- Funded by industry, via a combination of membership fees, user charges and dispute fees, where dispute fees comprise approximately 75 per cent of funding.

We note the Productivity Commission's comments 'that per-complaint fee structures send the right signals to service providers so that complaints can be resolved more efficiently and effectively'.<sup>6</sup>

- *What powers should it possess?*

We support the current FOS powers, established in the FOS Constitution, and note our response at Question 22 in relation to additional powers.

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<sup>6</sup> Productivity Commission, Access to Justice Arrangements Interim Report, p.339

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We refer to our comments above regarding the constitutional issue that may be raised in integrating the SCT into an Ombudsman scheme. Further detail is provided at Question 38.

- *What regulatory oversight and governance arrangements would be required?*

We support the current EDR governance arrangements. More detail is provided at our response to Question 24.

ASIC should continue to provide regulatory oversight to the one body. We recommend that ASIC should provide greater transparency about its systemic issues investigations in financial services, including providing the names of traders.

#### Recommendations

Legal Aid NSW recommends that ASIC continue to provide regulatory oversight to the new Ombudsman-based scheme.

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## An additional forum for dispute resolution

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

No. For the reasons outlined in Question 14, the creation of a tribunal would not improve the user experience or outcomes.

In summary, we have concerns that a tribunal does not meet some of the essential features of EDR, which lead to good consumer outcomes, including:

- *Accessibility*: Most tribunals are not free, with the SCT being the exception. Most tribunals require the completion of application forms to raise a dispute, which is a more complex process than online or telephone lodgement in EDR.
- *Flexible and dynamic*: The culture and practice in a tribunal is more court-like than EDR's inquisitorial processes. For example, the NSW Civil and Administrative Tribunal sets out civil procedure rules, which closely align with courts. We also note the Productivity Commission's comments about 'creeping legalism' with tribunals being seen by users as increasingly formal bodies<sup>7</sup>.
- *Fairness in all the circumstances*: Most tribunals apply a 'black letter law' approach to decision-making. Whilst the SCT applies a 'fairness' test, this is less flexible than the test used in EDR, which includes good industry practice and Codes of Practice.
- *Consistency in decision-making and specialisation*: Consumers who use EDR do not need to know the details of the (often complex) law that applies to protect their rights. Instead, consumers can expect the expert decision makers to know and apply correct provisions of the law.

In support of our position, we note that a recent report commissioned by Consumer Action Law Centre found that there are 'very substantial barriers that inhibit people from accessing justice at the Victorian Civil and Administrative Tribunal (VCAT)'.<sup>8</sup> The Report evaluated VCAT against EDR scheme benchmarks including accessibility and the ability to resolve disputes informally and in a timely manner. The report found that VCAT failed to meet EDR benchmarks.

43. *If a tribunal were desirable:*

- *Should it replace or complement existing EDR and complaints arrangements?*

A tribunal should not replace EDR. Our preferred model is one Ombudsman-based body, formed by integrating CIO and the SCT into FOS.

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<sup>7</sup> Productivity Commission, Access to Justice Arrangements Interim Report, p.13

<sup>8</sup> Research Report: Review of Tenant's and Consumer's Experience of VCAT, August 2015



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Should the Panel favour the creation of a tribunal, we submit that its jurisdiction should be limited to matters outside EDR's terms of reference. These matters could include where court is a more appropriate forum or where the claim is higher than EDR's jurisdictional limits.

- *Should it be more like a court (judicial powers, compulsory jurisdiction, adversarial processes and legal representation)?*
- *Should it be more like current EDR schemes (relatively more flexible, informal decision-making and processes)?*

The form of a tribunal may depend on the type of decision that it is required to make. On simpler matters, an EDR-like approach may be appropriate. On more complex matters that involve the need to cross-examine witnesses, for example, judicial type powers may be more appropriate.

We note that insurance fraud disputes were, at one stage, considered beyond the remit of EDR for the reason that court was the more appropriate forum to hear these disputes. However, over time, FOS and its predecessor schemes developed processes that were appropriately tailored to resolve insurance fraud disputes.

FOS has a sound reputation in dealing with insurance fraud disputes and a particular expertise that is possibly beyond the role of most courts in identifying common themes that revolve around fraud, both from the consumer and insurer perspective. This type of flexibility and specialisation is in the best interests of complainants and should form part of any dispute resolution body.

- *How should the jurisdiction of the tribunal be defined?*

If a tribunal is favoured by the Panel, we submit that its jurisdiction should be limited to matters outside of EDR's terms of reference. Please see our response at bullet point one of Question 43 for further detail.

### Recommendation

Legal Aid NSW recommends that if a tribunal is favoured by the Panel, its jurisdiction should be limited to matters outside of EDR's terms of reference.

- *Should its jurisdiction only extend to small business disputes or other disputes?*

No. Higher value disputes or disputes more appropriately heard in person should be within the tribunal's remit. Please see our response at Question 20 for further detail.

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

No. There is no proper basis to limit the tribunal to banking products. General insurance disputes, which make up the second highest type of dispute at FOS, require the same type of service response.

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## Recommendation

Legal Aid NSW recommends that the tribunal's jurisdiction should not be limited to disputes with providers of banking products.

- *Should monetary limits and compensation caps apply?*

We recommend a review of the monetary limits and compensation caps so that they reflect the increased value of the cost of financial products in Australia, including the cost of home loans and a rebuild on total loss insurance claims.

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

We recommend that the FOS model in respect to the effect of decisions be replicated, that is:

- The decision is binding on the trader if accepted by the consumer; or
- If the consumer does not accept the decision, it is not binding on the consumer and the consumer has the right to raise their dispute with a court.

We note that FOS decisions can be appealed to a court in very limited circumstances, such as where the decision was not made in good faith or where the decision is a product of bias or dishonesty.

We submit that this approach is well balanced between the need for certainty of the EDR decision and appeal rights, and that it recognises the disparity in resources, funding and specialisation weighted towards the trader in most consumer disputes.

## Recommendation

Legal Aid NSW recommends that FOS' approach to the effect of decisions be replicated.

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

We take no formal position in respect of this question.

We note that, based on our casework experience, the privately funded EDR schemes have proven that they can be resourced appropriately to respond to the number of disputes received.

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

A notable strength of EDR is its ability to engage with industry on dispute trends and systemic issues and through its Code administration role and Code compliance obligations.

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We refer to our response at Question 14 and note again that it is difficult to see how a statutory scheme, even with clear intent from Parliament, could perform that role to the same standard. However, we consider that this is an important role for any dispute resolution scheme to fulfil.

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

Any tribunal should be accessible to a consumer without the need for a legal representative. However, we recognise that the most disadvantaged consumers may need some assistance to lodge a dispute, make submissions or provide evidence in support of their claim. The tribunal should provide adequate support to ensure that it is an accessible forum to all consumers.

#### Recommendation

Legal Aid NSW recommends that the tribunal provide adequate support to ensure it is an accessible forum to all consumers.

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

We make no comment in response to this question.

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## Developments in overseas jurisdictions and other sectors

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

### **FOS UK**

FOS UK is a body corporate established by statute, which appears to operate in a similar way to FOS Australia, but with some differences.

We note that Lord Hunt's 2008 Review<sup>9</sup> of FOS UK stated that there were significant barriers to access to justice. Since the Review, we understand that improvements have been made to accessibility, such as implementing:

- A web chat service
- Instant, over the phone interpreting service and software that allows the FOS UK website to be translated
- A rule that traders are required to attach a brochure informing consumers about FOS UK in a final IDR letter
- An outreach program to regional communities, and
- Free, practical complaint workshops for traders.

However, despite these improvements to accessibility, we are concerned that some barriers remain. For example, FOS UK appears to still require a 'letter of deadlock' to be provided before it will consider a dispute<sup>10</sup>.

### **Ombudsman Services UK**

Ombudsman Services, which handles complaints about the energy, communications, property and copyright sectors in the UK, publishes quarterly statistics about the complaints it accepts and resolves in the energy sector. Ombudsman Services also provides a breakdown for the largest energy companies (based on consumer base) about complaints received and resolved.<sup>11</sup> We note that FOS UK also releases complaint data about individual traders. For new cases, it publishes the name of the trader, the total number of cases received and the types of complaints received.<sup>12</sup> FOS UK also publishes statistics on resolved cases, including the name of the trader and the percentage of complaints resolved.

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<sup>9</sup> Lord Hunt "Opening up, Reaching out and Aiming high – an agenda for accessibility and excellence in the Financial Ombudsman Service"

<sup>10</sup> <http://www.which.co.uk/consumer-rights/advice/how-to-take-a-complaint-to-the-financial-ombudsman-service>

<sup>11</sup> <http://www.ombudsman-services.org/complaints-data.html>

<sup>12</sup> <http://www.ombudsman-complaints-data.org.uk/>

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Publishing complaints data has the dual benefit of sharing information about the causes of complaints to assist industry improve customer service and helping consumers make an informed choice when making a purchase.

Some Australian Ombudsman schemes, like FOS and the Telecommunications Industry Ombudsman, publish complaints data annually, usually in their annual report. To mirror Ombudsman Services approach, we recommend that trader-specific complaint data be published quarterly on the Ombudsman's website.

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

Some Ombudsman schemes have programs where they travel to meet particular communities in person. For example, the Energy and Water Ombudsman NSW (EWON) has an Aboriginal engagement officer who visits regional and remote Aboriginal communities in NSW, often accompanied by the Ombudsman. Consumers in those communities have an opportunity to raise issues about their water or energy services when EWON visits them, rather than having to access EWON by phone or in writing. Legal Aid NSW has worked in partnership with EWON, running 'Bring your bills' days to alleviate energy hardship in disadvantaged and regional areas in NSW. Legal Aid NSW also has a direct referral relationship with EWON for clients in severe energy hardship.

In our view, EWON's Aboriginal engagement program has:

- Increased EWON's reach beyond the usual city and high population regions and increase their remote and regionally based and Aboriginal consumer engagement
- Increased connectivity with other services like Legal Aid Commissions, Community Legal Centres and financial counsellors in remote and regional locations, and
- Assisted disadvantaged people in remote locations to overcome geographical disadvantage.

We recommend that the financial services dispute resolution scheme has a community engagement team or officer tasked with attending events around the country to enhance awareness of EDR in regional, rural and remote areas, and in particular, in Aboriginal communities. It is important that this team works in tandem with existing casework services and links in to established networks to promote awareness and use of EDR by Aboriginal communities.

### Recommendation

Legal Aid NSW recommends that every dispute resolution scheme should have a community engagement team to enhance awareness and use of EDR in regional, rural and remote areas, and in particular, in Aboriginal communities. The community engagement team should work in tandem with existing casework services.

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## Uncompensated consumer losses

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

Legal Aid NSW does not have internal data necessary to answer this question.

We note that FOS stated in its submissions to the Inquiry into Scrutiny of Financial Advice in 2015 that between 1 January 2010 and 31 March 2015, 126 determinations remain unpaid. The total amount from 120 these determinations amounted to \$12,862,911.

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

Currently government policy is that compensation is provided by recourse to claims made on Professional Indemnity policies ("PI"). However, the disadvantages of relying on PI are:

- PI may not been taken out at all and self-certification often means that this is only discovered after the trader is insolvent
- PI may be inadequate in its level of coverage
- The PI policy may not always cover the conduct for which an EDR scheme awards compensation, and
- The amount of compensation awarded against a trader may be below the excess under their insurance policy.

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

Yes, we strongly support the establishment of a compensation scheme of last resort. We consider that the scheme should operate both prospectively and retrospectively.

We endorse the design suggestions contained in the joint consumer advocate submissions to the Inquiry into Scrutiny of Financial Advice.

### Recommendation

Legal Aid NSW recommends the establishment of a compensation scheme of last resort.

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

We have no comment in response to this question.