

2. Establish a Banking Tribunal

In terms of dispute resolution mechanisms...if there are other mechanisms for people to take their disputes, particularly people without much resources who are in dispute with a very large entity, as a general proposition that really does improve access to justice. *Mr Rod Sims, Chairman of the ACCC*¹

Recommendation 1

- 2.1 **The committee recommends that the Government amend or introduce legislation, if required, to establish a Banking and Financial Sector Tribunal by 1 July 2017. This Tribunal should replace the Financial Ombudsman Service, the Credit and Investments Ombudsman and the Superannuation Complaints Tribunal.**
- 2.2 **The Government should also, if necessary, amend relevant legislation and the planned industry funding model for the Australian Securities and Investments Commission, to ensure that the costs of operating the Tribunal are borne by the financial sector.**
- 2.3 Australia's system of EDR schemes is overly complex and overly legalistic. Too often, consumers and small businesses are not able to access justice.
- 2.4 Currently there are two EDR schemes authorised by ASIC. These are:

¹ Mr Rod Sims, Chairman of the ACCC, *Committee Hansard*, 14 October 2016, pp. 14-15.

- 1 the Financial Ombudsman Service (FOS), which deals with complaints across a diverse range of financial services (including complaints relating to most Authorised Deposit-taking Institutions (ADIs)); and
 - 2 the Credit and Investments Ombudsman (CIO), which broadly handles complaints about some credit unions and building societies as well as a range of non-bank lenders.
- 2.5 In addition to the FOS and CIO, the Superannuation Complaints Tribunal (SCT), an independent government body, handles complaints relating to superannuation funds, annuities, deferred annuities and retirement savings accounts.
- 2.6 This system, given the various schemes' overlapping jurisdictions, can create confusion. For example:
- a customer in a dispute with a major bank would need to approach the FOS;
 - a customer in a dispute with a credit union would need to approach either the FOS or the CIO, depending on which scheme the credit union was a member of; and
 - a customer in a dispute with a bank or a credit union relating to a retirement savings account would generally need to approach the SCT.
- 2.7 In addition to creating confusion for consumers, the existing multi-scheme framework is very duplicative. As noted by ASIC, each EDR scheme currently has its own:
- board of directors;
 - case management systems and support infrastructure;
 - administration and regulatory reporting arrangements for licensees and representatives including members switching schemes; and

- statistical, systemic issues and serious misconduct processes and reporting requirements.²
- 2.8 The CIO have argued that this duplication was justified because the ‘existence of two ASIC-approved EDR schemes allows each scheme to benchmark its performance against the other...[which] produces better outcomes for FSPs [financial services providers], consumers and regulators.’³ The committee does not find this argument persuasive for two reasons.
- 2.9 Firstly, tribunals operating in other industry sectors (and the courts system) manage to deliver good outcomes for consumers without competition between duplicative schemes.
- 2.10 Secondly, given difficulties in comparing and ensuring consistent outcomes for FOS and CIO complainants (due to the use of conciliation and different reporting standards)⁴ – a significant problem in its own right – it is hard to imagine how the benchmarking referred to by the CIO could meaningfully occur.
- 2.11 The scope of existing schemes is also inadequate. For example:
- the FOS and CIO can only consider complaints where the damages are alleged to be \$500,000 or lower. This is a demonstrably inadequate amount given numerous instances where people are alleged to have lost millions as a consequence of poor financial advice;⁵ and
 - not all business lenders have to be a member of an EDR. This can force small businesses to rely on the courts.

² ASIC, *Review of the financial system external dispute resolution framework: Submission by the Australian Securities and Investments Commission*, October 2016, p. 30.

³ CIO, *Credit and Investments Ombudsman’s response to the Issues Paper for the Review of External Dispute Resolution schemes*, October 2016, p. 2.

⁴ ASIC, *Review of the financial system external dispute resolution framework: Submission by the Australian Securities and Investments Commission*, October 2016, p. 29.

⁵ A. Ferguson, ‘Misconduct claims widen in CBA’s planning scandal’, *The Sydney Morning Herald*, 14 June 2014, <<http://www.smh.com.au/business/misconduct-claims-widen-in-cbas-planning-scandal-20140613-3a2wn.html>>, viewed 20 October 2016.

- 2.12 Given the system's shortcomings, the committee endorses the Government's decision to:
- conduct a review, Chaired by Professor Ian Ramsay, of Australia's external dispute resolution and complaints schemes; and
 - have ASIC and the FOS conduct a concurrent review of the FOS's small business jurisdiction.
- 2.13 As these inquiries are ongoing, the committee will not make firm recommendations on appropriate complaint or compensation limits. As a general observation, however, the committee is of the view that both should be increased.
- 2.14 The committee does recommend that the Government replace the three existing EDR schemes with a 'one-stop' Banking and Financial Services Tribunal to handle complaints from consumers and small businesses. It should:
- reduce confusion for consumers;
 - enhance small businesses' EDR scheme coverage;
 - help ensure consistent outcomes for complainants; and
 - improve scheme efficiency by eliminating unnecessary duplication.
- 2.15 The committee is aware of the concerns that a number of consumer groups have with the establishment of a tribunal (though notes that they do support the consolidation of the existing EDR schemes).⁶
- 2.16 In the committee's view it is critical that, if the Government were to proceed with the establishment of a tribunal, these concerns be adequately addressed.
- 2.17 To help address many of the consumer groups' concerns, the committee proposes that the new banking and financial services tribunal have the following features. It should:

⁶ Care Inc et al., *Submission to Review of the Financial System Dispute Resolution Framework – Issues Paper*, 10 October 2016, p. 3.

- be free for consumers to access;
- have equal numbers of consumer and industry representatives on its board;
- require all firms holding a relevant ASIC or APRA licence (in the case of superannuation/retirement savings account's providers) to be a member;
- operate without lawyers (to the extent possible);
- be funded directly by the financial services industry;⁷
- have the power to refer potential systemic issues to ASIC for formal investigation. For example, this could occur when the tribunal receives a large number of similar complaints over a year; and
- make decisions that are binding on member institutions.

Existing External Dispute Resolution schemes

2.18 Currently, all AFSL holders, unlicensed product issuers, unlicensed secondary sellers, ACL holders and credit representatives are required to have a dispute resolution system that consists of:

- internal dispute resolution (IDR) procedures that meet ASIC standards; and
- membership of one or more ASIC-approved EDR schemes (that is, the FOS or the CIO).⁸

2.19 Additional detail on the three existing EDR schemes is provided in Table 2.1.

⁷ If direct industry funding is not possible, the government should recover any appropriated amounts from the financial services industry. Under such a model, appropriations to the body should respond to the number of cases that the tribunal handles each year.

⁸ ASIC, *Regulatory Guide 165 Licensing: Internal and external dispute resolution*, July 2015, p. 4.

Table 2.1 Overview of Australia's External Dispute Resolution schemes

Scheme	Jurisdiction	Complaint Cap	Compensation Cap
FOS	Handles complaints against banks, credit unions, foreign exchange dealers, deposit takers, credit providers, mortgage brokers, general insurers, insurance brokers, life insurers, funds' managers, financial advisers and planners, stockbrokers and some superannuation providers.	\$500,000	\$309,000 ⁹
CIO	Handles complaints about credit unions, building societies, non-bank lenders, mortgage and finance brokers, financial planners, lenders and debt collectors, credit licensees and credit representatives.	\$500,000	\$309,000
SCT	Handles complaints about superannuation funds, annuities and deferred annuities and retirement savings accounts.	Uncapped	Uncapped

Source: ASIC, FOS, CIO, and SCT

⁹ Separate caps apply for general insurance broking (\$166,000), income stream life insurance (\$8,300 per month) and uninsured third party motor vehicle claims (\$5,000).

The Financial Ombudsman Service

- 2.20 The creation of the FOS provides a useful precedent for the establishment of a 'one-stop' banking tribunal.
- 2.21 On 1 July 2008, the FOS was formed by the merger of three existing ASIC-approved EDR schemes:
- the Banking and Financial Services Ombudsman;
 - the Insurance Ombudsman Service Limited; and
 - the Financial Industry Complaints Service.
- 2.22 Two other pre-existing ASIC-approved EDR schemes also joined FOS:
- the Credit Union Dispute Resolution Centre; and
 - the Insurance Brokers Disputes Limited.
- 2.23 When the FOS was launched, Mr Colin Neave AM (the FOS's inaugural Chief Ombudsman) stated that:

Both industry and consumers will benefit from the creation of the new Financial Ombudsman Service...By simplifying the structure of financial services dispute resolution, the new Financial Ombudsman Service will allow greater consumer awareness of the service and will be more streamlined and efficient and able to respond when there are peaks in demand.¹⁰

- 2.24 These arguments were compelling in 1998. They remain compelling now.

Funding External Dispute Resolution schemes

- 2.25 To ensure that the financial sector has an incentive to minimise complaints, it is critical that EDR schemes are industry funded.
- 2.26 While the FOS, CIO and SCT are all funded by the financial sector they use significantly different models.

¹⁰ Financial Ombudsman Service, 'New National Financial Services Ombudsman Launched', *Media Release*, 10 July 2008, <www.fos.org.au/public/download/?id=3027&sstat=341803>, viewed 28 October 2016.

- The FOS and CIO are funded directly by members (that is, they do not receive a government appropriation). Each member is required to pay regular membership fees, as well as additional fees related to the number of complaints that the EDR receives relating to their operations.
- The SCT is funded by government appropriation. The costs of the SCT are recovered from the superannuation industry by APRA and returned to consolidated revenue. There is no direct link between the SCT's funding and complaints received.

2.27 The committee believes that direct funding is preferable to cost recovery. This is because:

- it is administratively simpler;
- it is more responsive to the number of complaints received (because additional funding does not require a government appropriation); and, for this reason,
- it provides additional incentives for AFSL holders to resolve disputes prior to them being referred to an EDR scheme.

2.28 Timely dispute resolution is critical in situations where consumers may have suffered substantial financial losses. This depends on adequate EDR scheme resourcing. The committee therefore recommends that the proposed Banking and Financial Services Tribunal be funded directly by industry.