

Dispute resolution processes

- 6.1 An effective scheme of review for decisions or actions by the industry that are disputed by the clients should always be a key feature of a self-regulating system. Dispute resolution processes serve to reinforce the validity and credibility of a self-regulated industry, and provide consumers with an accessible and affordable means of recourse that does not involve expensive, time-consuming litigation via the court system.
- 6.2 This chapter discusses the internal dispute resolution (IDR) and external dispute resolution (EDR) procedures of the general insurance industry. Australian Securities and Investments Commission (ASIC) regulations stipulate that insurers, as Australian Financial Services Licensees, must have IDR processes for complaints as defined in the Australian Standard AS ISO 10002-2006 for Complaints Handling and must also be a member of an accredited EDR system.
- 6.3 Complaints or disputes arising out of an insurance claim – whether it be about denial or adequacy of settlement or conduct of employees – are initially dealt with through the insurer’s IDR process.
- 6.4 Disputes that are unable to be resolved internally can then be referred to EDR for decisions that are binding on the insurer. The Financial Ombudsman Service (FOS) is the ASIC-accredited EDR service for financial service providers, including general insurers. The vast majority of general insurers subscribe to FOS.

Internal dispute resolution

- 6.5 General insurers are required, as a provision of their financial services licence under the Corporations Act, to have an IDR process available to their clients that meets the standards set out by ASIC.
- 6.6 These standards are specified in ASIC Regulatory Guide 165 (RG 165). The General Insurance Code of Practice (the Code) also addresses IDR practices.
- 6.7 The Code divides the IDR process into two tiers – complaints and disputes.¹ Complaints are to be responded to within 15 days where possible, with the response to include information about escalating the complaint to a dispute if the complainant is unhappy with the decision. In the dispute stage, particular employees are assigned to the complainant and a response must be made within 15 days where possible.
- 6.8 IDR is available to all consumers who have a general insurance complaint, but the Committee heard evidence only in the context of natural disasters. Statistics kept by insurers are unclear as to how many internal disputes are related to claims arising from disaster events.²
- 6.9 The Committee encountered concerns about general insurance IDR relating to consumer awareness, timeliness, and general effectiveness in addressing and resolving complaints.

Consumer awareness of IDR

- 6.10 According to the Code, insurers undertake to advise clients of their complaints handling procedures, their IDR procedures, and the free EDR process.³

1 Insurance Council of Australia (ICA), 'General Insurance Code of Practice', pp. 10-11 <<http://www.codeofpractice.com.au/>> viewed 8 December 2011.

2 For example, Australian Securities and Investments Commission notes in a review of internal dispute resolution procedures that insurers demonstrate 'little consistency ... in the collection of an ability to report on information about complaints.' Australian Securities and Investments Commission, 'Review of general insurance claims handling and internal dispute resolution procedures' Report 245, August 2011, p. 33. Also, statistics collected by Financial Ombudsman Service on internal dispute resolution show that of 22 581 disputes for personal and commercial insurance claims, 16 330 related to 'insurance claims', 29 to 'catastrophes and disasters' and 22 to 'other relating to Code'. Financial Ombudsman Service, 'The General Insurance Code of Practice: Overview of the Year 2009/2010', p. 69 <<http://www.fos.org.au/public/download.jsp?id=14819>> viewed 9 January 2012.

3 ICA, 'General Insurance Code of Practice', pp. 10-11.

- 6.11 However, the Code specifies that consumers must be informed of the IDR process only in the event of a claim denial, not at the time of lodging a claim, or even if a claim settlement is disputed. This means that consumers who are unhappy with their treatment, the quantum of an accepted payment, or the claims-handling process in general may be unaware of their right to register a dispute.
- 6.12 The Insurance Council of Australia (ICA) told the Committee that:
- There are many avenues for a customer to pursue a complaint. It is incumbent on the industry to maintain information and awareness of that process so that the consumer can take full advantage of the existing processes – which are at no cost to them.⁴
- 6.13 However, it is clear that not all insurers make this information readily available to their clients. The Committee observed varying degrees of consumer knowledge of their right to dispute claims assessments.
- 6.14 A number of consumers told the Committee that when their insurance claims were rejected, they were not advised in writing of their right to request an internal review. During its travels, the Committee found that many consumers were only made aware of IDR processes after talking to neighbours or legal aid organisations.
- 6.15 Campaspe Shire Council found that their residents ‘were often not aware and were not made aware of the internal dispute resolution process that their insurers may have had’.⁵
- 6.16 Normally a claim does not escalate to a dispute until the claim is processed and the result fails to satisfy the claimant. However, some claims were taking so long (more than 6 months) to be processed that clients did not know where to turn.
- 6.17 The Chairman of the Cassowary Coast Banana Growers Association waited five months for his claim to be processed, but during that time there was ‘no discussion’ of internal dispute resolution options.⁶
- 6.18 The adequacy of any IDR process is necessarily reliant on consumer awareness of its existence.

4 Mr Robert Whelan, Chief Executive Officer, ICA, *Committee Hansard*, Sydney, 14 October 2011, p. 45.

5 Mr Keith Oberin, Municipal Emergency Response Manager, Campaspe Shire Council, Rochester, *Committee Hansard*, 27 October 2011, p. 2.

6 Mr Mark Nucifora, Chairman, Cassowary Coast Banana Growers Association, *Committee Hansard*, Innisfail, 29 September 2011, p. 13.

Timeliness

- 6.19 RG 165 stipulates that insurers must provide a final response to complainants within 45 days.⁷ Final responses to disputes are to be made in writing, with information on external dispute resolution if the complainant is unhappy with the decision. This timeframe covers the entire process, regardless of the timeframes set by the Code for each tier of IDR.

Box 6.0 Perth Hills fires

The Perth Hills fires in February 2011 destroyed 71 homes and damaged a further 39 homes. In Kelmscott, the Committee listened to stories from residents affected by the bushfires.

The general sentiment was one of anger and frustration with the insurance claims handling process. Residents reported that the insurance claims process had added to the ordeal of the disaster event with one person commenting, 'it is just much too complicated.' Distressed residents reported poor service from insurance companies with some recalling insurance representatives not taking claims seriously and responding in a rude or harsh manner. In the aftermath of a trauma, residents found this type of treatment from insurance companies particularly hard to comprehend and to deal with. One resident cited a lack of professionalism from the insurance company and 'stand offs' at every stage of the claim. Unfortunately, delays with insurance assessors and then with approved builders were overwhelmingly common and this in turn delayed the recovery process for residents.

The City of Armadale recounted some of these difficulties: 'Delays in updates and assessments, some residents are still awaiting decisions and actions six months after the event... Indecision and lack of progress by some insurers has had significant emotional and psychological effects on some residents'.

The vulnerable were particularly affected and there were stories of elderly people who had difficulty communicating with their insurance company, and had no-one that could advocate for them. In many instances, those with the least resources seemed to wait the longest for a resolution.

Compounding the loss after the fires, many residents had to seek alternative accommodation and experienced considerable financial difficulty. One resident recalled the disruptive and demeaning experience of homelessness due to fire. He was forced to live in various motels with his children for several months while pursuing his insurance claim. He had to support his children through the physical loss, and then through the emotional upheaval and uncertainty while waiting for his insurance claim settlement. Frustrated and dismayed with the insurer's lack of action, he commented that 'this goes on and on'.

7 Australian Securities and Investments Commission (ASIC), 'Regulatory Guide 165: Licensing: Internal and external dispute resolution', April 2011, p. 24.

- 6.20 Although the Code provides for 15-day timeframes for responding to complaints and again for disputes, the Code contains the qualification, in both tiers, that 'in cases where further information, assessment or investigation is required we will agree reasonable alternative time frames'.⁸
- 6.21 From the anecdotal evidence received, it is clear that many insurers did not contact complainants to negotiate 'reasonable alternative time frames' and that many consumers experienced lengthy delays in the IDR process.
- 6.22 The Carisbrook Flood Recovery Committee advised that the 'timeframes set out in policy documents appeared not to be adhered to.'⁹ The Central Goldfields Shire Council said in July 2011 that there were still 'residents and businesses processing through IDR. This is unacceptable.'¹⁰
- 6.23 The Caxton Legal Centre advised that, following the January 2011 Queensland floods, 90 per cent of their clients' IDR cases were unresolved as of September 2011 and that:
- Very few IDR responses are returned within the 45 days. Some IDR submissions have been with the insurer for more than 12 weeks. There seems to be particularly long delays associated with body corporate insurers with delays routinely exceeding three months in those matters.¹¹
- 6.24 No information was received from FOS about any identified issues arising from monitoring compliance with Code standards for IDR relating to disaster claims.
- 6.25 Often people who are experiencing such delays in IDR do not know where to turn for recourse. The Caxton Legal Centre commended FOS for 'establishing a registration process for disputes that could be undertaken before or during IDR. Normally disputes are not registered with FOS until after IDR is completed which slows the process slightly at that point.'¹²

Effectiveness

- 6.26 According to RG 165, the objective of IDR is to resolve disputes 'genuinely, promptly, fairly and consistently', and the benefits of effective

8 ICA, 'General Insurance Code of Practice', pp. 10, 11.

9 Carisbrook Flood Recovery Committee, *Submission 49*, p. 2.

10 Central Goldfields Shire Council, *Submission 27*, p. 2.

11 Caxton Legal Centre, *Submission 53*, p. 41.

12 Caxton Legal Centre, *Submission 53*, p. 50.

IDR procedures include ‘the ability to identify and address recurring or systemic problems’.¹³

- 6.27 The Committee found that legal aid organisations are critical of the insurance industry’s IDR procedures. In fact, Caxton Legal Centre stated that:

... most reputable banking institutions are generally much better than insurers at understanding the benefits to all parties in good IDR processes and, correspondingly, at engaging in conciliatory practices at that early stage ... There seems, to the Caxton lawyers, to be an industry wide general aversion to IDR and direct negotiation in the insurance sector. Although initially difficult to see why this would be the case given the time and cost associated with FOS and court, Caxton notes that in a banking dispute, the argument is normally about payment flowing from the customer to the bank, leaving banks at a loss if disputes are protracted. The opposite is true of disputes between insurers and their customers.¹⁴

- 6.28 Legal aid organisations assisted numerous consumers through an IDR procedure, and are able to comment on widespread – rather than individual – IDR practices among insurers in their IDR processes that are not genuine or prompt. Legal aid organisations were dissatisfied about time delays and the ineffectiveness of IDR procedures. For example, Caxton Legal Centre noted that some insurers are ‘treating the IDR stage as a “tick box” process’.¹⁵

- 6.29 The receipt of pro forma responses is a cause for concern about the genuineness of IDR procedures. The ILS submitted that ‘we can write very detailed dispute letters only to have a pro forma letter as a reply’ with no mention of the specific and genuine concerns raised in the dispute letters.¹⁶ Ms Karen Cox, Coordinator, ILS, told the Committee that:

We have engaged in good faith in trying to resolve these issues and in making lengthy submissions to insurance companies’ internal dispute resolution processes. Usually all we get in response is a couple of lines, little more than pro forma. We are

13 ASIC ‘Regulatory Guide 165’, April 2011, p. 21.

14 Caxton Legal Centre, *Submission 53*, p. 48.

15 Caxton Legal Centre, *Submission 53*, p. 39.

16 Insurance Law Service (ILS), *Submission 54*, p. 12.

now considering that that was probably, in all but a few exceptional cases, a waste of time.¹⁷

- 6.30 Caxton Legal Centre even received pro forma letters with incorrect names:

The responses received from the insurer were very similar and in some instances one client's name had been used on both responses. This indicates that the insurer had undertaken a 'copy and paste' approach to their responses.¹⁸

- 6.31 Legal aid organisations also criticise the insurance industry's preference for multi-tiered IDR procedures. In addition to the two tiers of complaints and disputes, in practice many insurers' first-point-of-contact staff try to resolve a complaint themselves within 24 hours before referring the complainant to either tier. These complaints tend to go unrecorded, with responses made verbally rather than in writing.¹⁹ It is unclear, in these instances, how consumers would be aware of their right to formal dispute resolution should they disagree with the verbal advice at point of contact.

- 6.32 Legal aid organisations claim that these multi-tiered IDR processes, unlike direct IDR procedures common in the banking sector, slow down the process and frustrate complainants. Legal Aid NSW notes that:

... a very significant number of consumers experience extensive delays in resolving claims. They are funnelled into a maze of systems and reviews, which become overwhelming and ultimately defeating. Many consumer advocates refer to this multi-tiered IDR as the *IDR black hole*. Legal Aid NSW and other similar organisations have for many years been assisting consumers to navigate their way through it.²⁰

- 6.33 The ILS submitted that there was not a meaningful attempt to resolve disputes as it is in the insurer's interest if complainants withdraw from the process out of fatigue:

There is so little engagement in IDR that it would be fair to say that consumers could reasonably skip IDR and go straight to EDR on the basis that IDR is just a delaying tactic. That said, the

17 Ms Karen Cox, Coordinator, ILS, *Committee Hansard*, Graceville, 27 September 2011, p. 17.

18 Caxton Legal Centre, *Submission 53*, p. 39.

19 ASIC, 'Review of general insurance claims handling and internal dispute resolution procedures' Report 245, August 2011, p. 34.

20 Legal Aid NSW, *Submission 57*, p. 7.

outcome that is best for consumers is to have the insurer genuinely engaged in IDR.²¹

- 6.34 In a 2011 report, ASIC noted similar criticism by consumer advocates of the multi-tier system for having ‘the effect of frustrating and ultimately deterring some complainants’.²²
- 6.35 The ILS recommended that ASIC amend its IDR regulatory guides to discourage multi-tiered systems and conduct audits of insurers’ compliance.²³

Committee comment

- 6.36 The Committee has grave concerns about the genuineness of general insurers’ IDR procedures, and questions whether they achieve the objectives set out in RG 165. Given the failure to notify consumers of their IDR rights and the indefinite delays, current IDR practices can hardly be called effective. Moreover, the lack of consistent reporting practices means that objective appraisals cannot be conducted, and insurers cannot monitor significant or recurring problems.
- 6.37 This is highly unacceptable. It is apparent that the current self-regulatory approach has failed to protect consumers by appropriately regulating or monitoring IDR procedures.
- 6.38 The Committee recommends that RG 165 be amended to ensure that insurers advise clients about their IDR procedures up-front at time of claim lodgement and to disallow multi-tiered IDR processes. These recommendations are detailed in Chapter 7.

External dispute resolution

- 6.39 Financial service providers are required by ASIC to be a member of an EDR system accredited by ASIC. For general insurers this EDR system is FOS, which is an amalgamation of various financial service oversight bodies, including the former Insurance Ombudsman Service.

21 ILS, *Submission 54*, p. 12.

22 ASIC, ‘Review of general insurance claims handling and internal dispute resolution procedures’ Report 245, August 2011, p. 34.

23 ILS, *Submission 54*, p. 7.

- 6.40 The EDR system provides consumers with the opportunity for an independent assessment of a dispute that has not been resolved to satisfaction through internal dispute resolution mechanisms. Accessing FOS is free to consumers, as it is paid for by the financial service provider with whom the complainant is in dispute.
- 6.41 It is important to note that FOS adjudicates disputes related to all financial service providers, not just insurers.
- 6.42 In 2010–11, out of a total of 30 283 financial service disputes, FOS adjudicated 5 627 general insurance disputes, of which 650 were related to extreme weather events.²⁴ The recent extreme weather events contributed to a 32 per cent increase in disputes about home building insurance and a 41 per cent increase in contents insurance disputes from the previous year.²⁵ Statistics are not yet available on disaster-related general insurance disputes registered by FOS since 1 July 2011.
- 6.43 The Committee examined consumer awareness of FOS, barriers to participation, the impact of legal aid, and the effectiveness of FOS.

Duty of insurers

- 6.44 According to RG 165, the final response that insurers are required to submit to complainants who enter IDR, must be in writing and must include information about the client's right to EDR and contact details for FOS.
- 6.45 A review of general insurance IDR procedures conducted by ASIC in August 2011 found that, contrary to RG 165, insurers may not always provide final responses, along with information on accessing free EDR through FOS, in writing.²⁶
- 6.46 FOS advised the Committee that in one instance, a consumer received a letter denying the claim without providing information on EDR.²⁷ Anecdotally, many more people who spoke to the Committee did not remember receiving any communication about FOS.

24 Financial Ombudsman Service (FOS), '2010-2011 Annual Review', pp. 20, 36, 51 <http://www.fos.org.au/centric/home_page/publications/annual_review.jsp> viewed 8 December 2011.

25 FOS, '2010-2011 Annual Review', p. 36.

26 ASIC, 'Review of general insurance claims handling and internal dispute resolution procedures' Report 245, August 2011, p. 38.

27 FOS, *Submission 47*, p. 5.

- 6.47 Moreover, the multi-tiered IDR system utilised by many insurers contributes to confusion about what constitutes a 'final response'. As mentioned above, complaints dealt with immediately through first point-of-contact staff are not usually responded to in writing, let alone recorded. Furthermore, complaints at the first tier are also often not responded to in writing; in cases where they are, they mention only the next tier of IDR but not EDR.²⁸ Insurers evidently do not consider a first-tier decision to be a 'final response'. However, in reality, the decision made at the first tier of IDR is the final response for many consumers, if they decide not to pursue the issue. This confusion is not beneficial to policy-holders.
- 6.48 During the course of the inquiry, the Committee encountered similar findings to ASIC, with many witnesses telling the Committee that they were not advised by their insurer of the availability of external dispute resolution. Most had heard about external dispute resolution through a community visit from FOS or via legal advice. The CILS survey found that more than 65 per cent of respondents were not given information about EDR.²⁹
- 6.49 Several financial counsellors identified a lack of knowledge about FOS; one financial counsellor reported that a client 'did not know about FOS until I spoke to him and his insurer at no stage told him about Internal Dispute Resolution or External Dispute Resolution'.³⁰
- 6.50 The FOS advised the Committee that in at least one instance, a consumer received a letter denying a disaster-related claim without providing information on EDR.³¹ The Committee suspects that there were many more instances of this.
- 6.51 The Natural Disaster Insurance Review (NDIR) report also concluded that 'consumer rights to EDR are often not disclosed' by insurers in the IDR process.³²
- 6.52 It is important that consumers are informed about their rights to access EDR and that information about FOS clearly explains the independent and free nature of the service. A community legal centre relayed the story of an elderly client whose claim had been denied, who declined to approach
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28 ASIC, 'Review of general insurance claims handling and internal dispute resolution procedures' Report 245, August 2011, p. 36.

29 ILS, *Submission 54.1*, p. 49.

30 Choice, the Consumer Action Law Centre, Financial Counselling Australia and the Footscray Community Legal Centre (Choice et. al.), *Submission 35*, p. 3.

31 FOS, *Submission 47*, p. 5.

32 The Treasury, 'Natural Disaster Insurance Review: Inquiry into flood insurance and related matters' September 2011, p. 11.

FOS as mentioned in the final response letter because 'he and his wife could not afford a lawyer or the cost of legal proceedings'.³³

Barriers to participation in EDR

- 6.53 Lack of consumer awareness of the right to free, independent EDR services is a key barrier to consumer participation in EDR and obviously to the effectiveness of an EDR system. Low awareness of the EDR must then cast doubt on FOS statistics of disputes as any measure of the general insurance industry's performance and consumer satisfaction.
- 6.54 Where insurers neglect their obligation to inform consumers of their right to EDR, consumers need to be able to access this knowledge through other means. Thus, the onus of informing consumers about FOS has fallen to FOS, consumer and legal advocates and local governments.
- 6.55 Unfortunately, general awareness of FOS as an EDR scheme for insurance disputes is low. A recent FOS survey showed that only about a quarter of respondents knew that if they have a dispute with their insurance company, they should take it to FOS.³⁴ Mr Price, Ombudsman General Insurance, admitted to the Committee that 'people are ignorant about the existence of [FOS]'.³⁵ This is especially the case in rural areas, where some people 'feel isolated and do not know how to proceed in disputes'.³⁶
- 6.56 In 2010-11, FOS staff participated in events to raise awareness of the organisation, with the geographical spread of the events roughly in line with the distribution of the Australian population.³⁷ However, the general public comprised only one per cent of the audience members represented at these events, although consumer advocates constituted eight per cent of the audience members. FOS also engaged in media promotion, produced flood-specific fact sheets, and established a dedicated natural disasters hotline which received between 103 and 181 calls per month from January to June 2011.³⁸

33 Choice et. al., *Submission 35*, p. 4.

34 Mr John Price, Ombudsman General Insurance, FOS, *Committee Hansard*, Canberra, 15 September 2011, p. 6.

35 Mr Price, FOS, *Committee Hansard*, Canberra, 15 September 2011, p. 6.

36 FOS, *Submission 47*, p. 20.

37 FOS, '2010-2011 Annual Review', p. 59.

38 FOS, '2010-2011 Annual Review', p. 65.

6.57 Additionally, FOS partnered with legal aid organisations to improve community awareness. The ILS told the Committee that these activities were well received³⁹ and Legal Aid Queensland said:

The eight or nine seminars we did with [FOS] had upwards of 1 200 people attend. The extra 25 community forums we did following that had another probably 1 200 or 1 500 people in attendance.⁴⁰

6.58 Local governments, such as the North Grampians Shire Council, Buloke Shire Council and Somerset Shire Council, invited FOS to their localities.⁴¹ During the course of the inquiry it was revealed that other areas had little knowledge of FOS, so FOS then conducted public meetings in those areas.

6.59 The restrictive Terms of Reference that FOS operates under are another barrier to participation. That is, FOS can only accept cases that fall within its Terms of Reference, which preclude certain types of products, such as livestock.⁴² FOS only accepts general insurance disputes for retail general insurance policies, residential strata title insurance products, and small business insurance products.⁴³

6.60 This means that those who have farm insurance disputes with their insurer are unable to access FOS for EDR. Similarly, FOS does not adjudicate on business-interruption insurance.⁴⁴

6.61 In addition, there is a monetary barrier. FOS can only adjudicate cases involving values up to \$500 000, with a compensation limit of \$280 000.⁴⁵ Mr Price acknowledged that this is 'an issue in particular for home and content type insurance. \$280 000 is barely sufficient to cover the rebuilding of a home these days.'⁴⁶

39 Ms Cox, ILS, *Committee Hansard*, Graceville, 27 September 2011, p. 17.

40 Mr Paul Holmes, Senior Lawyer (Consumer Advocate), Consumer Protection Unit, Legal Aid Queensland, *Committee Hansard*, Graceville, 27 September 2011, p. 21.

41 Northern Grampians Shire Council, *Submission 37*, p. 4; Buloke Shire Council, *Submission 45*, p. 11; Cr Graeme Lehman, Mayor, Somerset Regional Council, *Committee Hansard*, Ipswich, 27 September 2011, p. 17.

42 Mr Price, FOS, *Committee Hansard*, Canberra, 15 September 2011, p. 11.

43 FOS, 'Terms of Reference', p. 8 <<http://www.fos.org.au/public/download.jsp?id=17224>> viewed 6 January 2012.

44 Mr Noel Roberts, Owner, Ace Computer World, *Committee Hansard*, Ipswich, 27 September 2010, p. 22.

45 Mr Price, FOS, *Committee Hansard*, Canberra, 15 September 2011, p. 10.

46 Mr Price, FOS, *Committee Hansard*, Canberra, 15 September 2011, p. 11.

Box 6.1 Victoria floods—inequity and frustration for rural residents

Bridgewater, Charlton and Rochester in regional Victoria were severely affected by the floods that ravaged more than 100 towns and inundated 30 per cent of the state in late 2010 and early 2011. As part of the inquiry, the Committee travelled to these areas and listened to the stories of residents.

The extent of the Victorian floods and scope of property devastation were similar to the Queensland floods, but Victoria received much less media attention. This added to the trauma experienced by residents. Some Loddon Shire residents 'feel that they have been neglected due to their rural location or distance from major centres, and that larger towns and more vocal groups were given a higher priority'. Central Goldfields Shire residents queried whether the 'lack of publicity affected the willingness of insurance companies to come to the party'. Some residents met with further disadvantage due to their rural locations: vouchers provided by insurers for replacing house contents could only be used at designated retailers out of town, some more than 70km away.

These hard-hit communities also lacked the legal aid assistance and government compassionate funds that had been galvanised in Queensland. Even compared to the Victorian bushfires, 'the floods just have not attracted that level of community sympathy'. Instead, distressed families faced 'insinuation that ... somehow we were to blame for choosing where we live' even though all houses had council approval.

Residents' stories of frustration with their insurance companies echoed that of other victims of natural disasters. Although there were positive experiences, even those 'who have had success with some sort of payout have still had quite negative experience because they were initially confronted with a wall'.

Impact of legal aid

6.62 As discussed above, there can be many difficulties for consumers in achieving a satisfactory result with IDR processes, and legal aid organisations have been important in guiding and supporting consumers, at no cost, through the process. Legal aid organisations are able to advise and assist consumers in their dealings with FOS.

6.63 The Victorian Legal Assistance Forum (VLAF) stated that:

Our experience clearly confirms that the availability of free legal services enhances people's access to EDR, and helps individuals realise the benefits they are entitled to under their insurance policies.⁴⁷

47 Victorian Legal Aid Forum (VLAF), *Submission 50*, p. 5.

- 6.64 Caxton Legal Centre submits that legal aid is important to consumers in ‘facilitating timely access to FOS decision makers, including the Ombudsman, in relation to a range of matters for the purposes of interim decisions and guidance’.⁴⁸
- 6.65 The Queensland Government praised community legal centres for their contribution to assisting victims of the floods and cyclones with insurance issues.⁴⁹
- 6.66 However, there are concerns that access to legal aid is limited. The Committee’s online survey found that almost three-quarters of respondents were unaware that free legal advice was available for insurance claims advice.⁵⁰
- 6.67 The National Pro Bono Resource Centre commented that:
- Recent Australian experience of disasters has shown that people do not necessarily identify insurance issues as legal issues and will not seek legal assistance for an insurance problem unless they are effectively referred from another service.⁵¹
- 6.68 Even so, following the Victorian and Queensland floods, legal aid organisations were overwhelmed by the volume of clients seeking assistance with their insurance claims and in particular with dispute processes relating to insurance claims.
- 6.69 Legal practitioners who offer legal advice and representation for a fee often are unaware of the free services of FOS that clients can be referred to. Moreover, FOS noted that ‘there is ignorance within the legal fraternity about how beneficial something like FOS can be’,⁵² perhaps because FOS does not usually award legal costs.⁵³
- 6.70 Such a possibility leads NIBA to caution that ‘those promoting legal solutions may not be advising their clients of the availability of a free, independent dispute resolution process that is binding on the insurer’.⁵⁴
- 6.71 FOS notes that few consumers have legal representation before FOS, and that ‘while consumers are not disadvantaged if not represented, legal representation will often assist in the identification of the issues in

48 Caxton Legal Centre, *Submission 53*, p. 37.

49 Queensland Government, *Submission 13*, p. 6.

50 Committee survey.

51 National Pro Bono Resource Centre, *Submission 15.1*, p. 15.

52 Mr Price, FOS, *Committee Hansard*, Canberra, 15 September 2011, pp. 6–7.

53 FOS, *Submission 47*, p. 20.

54 National Insurance Brokers Association, *Submission 36*, p. 7.

dispute.⁵⁵ However, Mr Price advised the Committee that legal representation can add to delays, saying that 'there are matters where I have completed site visits on that I just want to resolve, but I am waiting for Legal Aid to put in their further information.'⁵⁶

- 6.72 Legal aid organisations have expressed concern that consumers need legal assistance to cope well with the EDR system at FOS. Mr Paul Holmes, senior consumer advocate lawyer, Legal Aid Queensland, told the Committee that their clients know that they can pursue EDR without legal representation to avoid delays, but only two clients opted for this course of action. Mr Holmes said that this:

... suggests that insurance is far too complicated for the ordinary consumer to feel comfortable in dealing with it. That is particularly reinforced with me when we had a lawyer ring up the other day seeking our assistance with their own claim.⁵⁷

- 6.73 Caxton Legal Centre informed the Committee that it does not have the resources to provide legal assistance to clients beyond the IDR process, and noted that:

There have been many clients who have required extensive reassurance and support to decide to continue their matter [to FOS] unrepresented. Caxton lawyers are very concerned about how a lot of these clients will fare as self-represented complainants in FOS.⁵⁸

- 6.74 Consumer advocates raised concerns in their submission about the effectiveness of FOS in cases where consumers lack legal representation:

Insurance is an extremely complex area of law and insurance cases are challenging even for solicitors. It is unlikely that an unsupported consumer will be able to bring all relevant facts and law to the attention of the decision-maker in an insurance dispute.⁵⁹

- 6.75 In addition to limited access to free legal assistance, the resources of legal aid organisations and community legal centres are over-stretched for the workload that follows wide-scale natural disasters.

55 FOS, *Submission 47*, p. 21.

56 Mr Price, *FOS Committee Hansard*, Canberra, 15 September 2011, pp. 7-8.

57 Mr Holmes, Legal Aid Queensland, *Committee Hansard*, Graceville, 27 September 2010, p. 18.

58 Caxton Legal Centre, *Submission 53*, p. 55.

59 Choice et. al., *Submission 35*, p. 6.

- 6.76 The ILS, the only free specialist legal service in Australia, has recurrent funding of \$70 000 per year from the Australian Government until 2013, and one-off funding of \$130 000 from Legal Aid NSW for the 2011–12 financial year.⁶⁰
- 6.77 In the wake of the Victorian bushfires in 2009, a number of legal aid organisations and community legal centres established the temporary Bushfire Legal Help project which, apart from \$220 000 from the Australian Government, was ‘largely unfunded and was resourced by its members by the reallocation of existing resources and goodwill’.⁶¹
- 6.78 The Australian Government also provided one-off funding of \$200 000 to Legal Aid Queensland after the Queensland floods and cyclones of 2010, and the Insurance Council of Australia contributed a further \$250 000. These funds ‘enabled LAQ and Caxton Legal Centre to devote the time of their lawyers to helping people affected by floods and cyclones’.⁶²
- 6.79 In Western Australian, no government or industry funding was provided for insurance difficulties following the bushfires of February 2011, but WA Legal Aid coordinated insurance specialist volunteers to provide pro bono insurance advice.⁶³
- 6.80 Similarly, legal aid organisations in Victoria did not receive additional funding from governments or the insurance industry after the 2010 and 2011 flood events.
- 6.81 This lack of funding for specialist insurance legal assistance meant that the legal aid network was unable to adequately meet the demands of consumers following recent natural disasters around the country.
- 6.82 The VLAf submits that this places consumers at a disadvantage:
- The limited funding for civil legal aid by governments over the past 15 years causes injustice when those who cannot afford robust legal representation are seeking to assert their rights against well resourced insurers.⁶⁴

60 ILS, *Submission 54*, p. 15.

61 VLAf, *Submission 50*, p. 8.

62 Queensland Government, *Submission 13*, p. 5.

63 Mr Justin Stevenson, Director, Civil Law, Legal Aid Western Australia, *Committee Hansard*, Kelmscott, 2 August 2011, p. 9.

64 VLAf, *Submission 50*, p. 7.

- 6.83 FOS stated that ‘experience with the Queensland flooding confirms the need to ensure that community and legal services are adequately funded and resourced’.⁶⁵
- 6.84 One of the recommendations of the NDIR report was that ‘Commonwealth and State governments provide funding for legal advice and assistance with insurance disputes following natural disasters’.⁶⁶
- 6.85 However, legal aid organisations stress that it is not just additional funding that is required in times of catastrophes, but an on-going investment in free specialist insurance legal services for consumers. Ms Jenny Lawton, Professional Support Lawyer, Victoria Legal Aid, told the Committee that ‘if we do not have funding to build that capacity and if we cannot maintain that capacity, then even throwing funds in after a disaster is not enough’.⁶⁷
- 6.86 NSW Legal Aid recommended more funding for the ILS as well as funding for specialist insurance legal services to be established in each state and territory.⁶⁸ Choice concurred with this recommendation.⁶⁹

Effectiveness of dispute resolution

- 6.87 In January 2012, FOS indicated that 50 per cent of insurance disputes relating to the January 2011 Queensland floods had not been resolved.⁷⁰ Disputes are still being registered with FOS as new information becomes available or internal disputes escalated. It is thus too early to comment with any reliability on the effectiveness of external dispute resolution. Moreover, the Committee only heard evidence about general insurance disputes, not all the disputes that FOS deals with.
- 6.88 The barriers to participation mentioned above, do lessen the effectiveness of FOS insofar that its reach and remit are reduced.
- 6.89 A joint submission from consumer advocacy groups recommended that FOS consider establishing a consumer advisor position – along the lines of existing industry advisors – for assisting applicants with managing their

65 FOS, *Submission 47*, p. 22.

66 The Treasury, ‘Natural Disaster Insurance Review’ September 2011, p. 17.

67 Ms Bridget Lawton, Coordinator, Consumer Law Service, Caxton Legal Centre, *Committee Hansard*, Bridgewater, 26 October 2011, p. 12.

68 Legal Aid NSW, *Submission 57*, p. 32.

69 Choice et. al., *Submission 35*, p. 9.

70 T Thompson, ‘Insurers jack up Rates as Victims struggle on’, *Courier Mail*, 9 January 2012, p. 5.

disputes, and that FOS report more comprehensively and transparently on its investigations of systemic issues.⁷¹

Committee comment

- 6.90 Overall, the Committee heard some positive feedback about FOS from consumers, insurers and consumer advocates. However, the Committee is highly concerned that many people who would benefit from taking their claim to FOS decided not to pursue that option due to ‘complaint fatigue’.
- 6.91 The Committee is completely appalled that some consumers may not have pursued EDR because they were not informed of it by their insurer. While FOS may provide satisfactory EDR processes, the EDR system cannot realistically be viewed as effective given the barriers to participation. Again, this is an unacceptable failing of industry self-regulation and, to a certain degree, FOS for not sufficiently promoting its services. Consequently, as with IDR, the Committee concludes that RG 165 should be amended to ensure that information about claimants’ rights to EDR is required to be provided at the time of claim lodgement.
- 6.92 In addition, knowledge about FOS is low and this contributes to poor representation and protection for consumers. There is a need for FOS to be more widely-known, responsive and visible. Accordingly, the Committee recommends in the strongest terms that FOS implement the following:
- a name change to ‘Insurance and Financial Ombudsman Service’, which could assist in raising the profile of the service and also make the role more apparent to consumers;
 - commit to developing a disaster-response plan that provides an ongoing physical presence in affected areas for three months following a disaster event; and
 - remove the monetary limit on disputes that may be considered by FOS.
- 6.93 Further, the Committee considers that expanded availability of, and access to, free legal assistance and consumer advice would be of great assistance to claimants, particularly following disaster events where claims may be complex. Legal assistance should be freely available to all those affected by a disaster event, regardless of financial circumstances.
- 6.94 In the concluding chapter, the Committee provides its recommendations for enhancing the effectiveness of the external dispute resolution system through a more systematic and comprehensive regulatory approach.
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71 Choice et. al., *Submission 35*, pp. 7, 8.