FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

25 October 2016

EDR Review Secretariat

The Treasury,

Langton Crescent

Parkes ACT 2600

Phone: +61 2 6263 2111

Email: EDRreview@treasury.gov.au

Re. Review of the financial system external dispute resolution framework

Dear Sir/Madam,

The Financial Planning Association of Australia (FPA) welcomes the opportunity to provide feedback on the financial system external dispute resolution (EDR) framework. We value the work EDR schemes do. The focus of our submission is to identify potential areas for improvement, for example, for schemes to ensure determinations are sufficiently detailed to allow providers and financial planners to improve the standards and practices in their businesses.

If you have any queries or comments, please do not hesitate to contact me at policy@fpa.com.au or on 02 9220 4500.

Yours sincerely

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Policy Manager
Financial Planning Association of Australia[1]

[1] The Financial Planning Association (FPA) has more than 11,000 members and affiliates of whom 9,000 are practising financial planners and 5,500 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of FOFA.
- We have an independent conduct review panel, Chaired by Mark Vincent, dealing with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 24 member countries and the 150,000 CFP practitioners that make up the FPSB globally.
- We have built a curriculum with 17 Australian Universities for degrees in financial planning. As at the 1st July 2013 all new members of the FPA will be required to hold, as a minimum, an approved undergraduate degree.
- CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional bodies, eg CPA Australia.
- We are recognised as a professional body by the Tax Practitioners Board

REVIEW OF THE FINANCIAL SYSTEM EXTERNAL DISPUTE RESOLUTION FRAMEWORK

FPA submission to:
Treasury

25 October 2016

INTRODUCTION

The EDR framework provides a cheaper and faster alternative to resolution than the court system. However, this framework could be improved by ensuring determinations are sufficiently detailed for providers and financial planners to improve the standards in their businesses. In particular, detailed facts and reasons need to be provided (rather than templated decisions), especially for complex cases involving financial advice.

Principles guiding the review

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

We agree that consumers and financial service providers are the primary users of the Australian disputes resolution and complaints framework.

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

We agree with the principles outlined in the terms of reference.

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

Apart from the inquiries mentioned in paragraph 12 of the EDR review's issues paper, we know of no inquiries the recommendations of which should also be taken into account.

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

We agree with the principles outline in the EDR review's issues paper, for assessing whether the needs of users are being met. These are:

- Efficiency: schemes should have adequate coverage, powers and remedies for complaints to be resolved in a timely manner;
- Equity: users should face minimal cost barriers and be able to easily access the system.
- Complexity: schemes should be easy to use for users.
- Transparency: decisions and processes of the schemes should be easily observable.
- Accountability: schemes' final determinations and complaints information should be publicly available, detailed information about schemes should be publicly available, and schemes have a role in reporting systemic issues and misconduct.
- Comparability of outcomes: users who have similar complaints (for example, in relation to similar financial products) should receive similar outcomes.
- Regulatory costs: the framework governing the schemes should impose the minimum amount of necessary costs to ensure effective user outcomes.

However, some of these principles may be competing. For example, there may eventually be a trade-off between complexity and comparability. Rather than attempting to define all outcomes in detail and in advance, we would suggest that the panel limit its review to whether the particular arrangements schemes have chosen fall outside any reasonable interpretation of the above principles. This approach respects the different trade-off decisions schemes have made, which, based on board composition, should reflect the interests of their particular constituency.

Having said that, we think that EDR schemes reporting in a standardised way on how they interpret and meet these principles is likely to be beneficial for users as schemes will be easier to compare.

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?

Anecdotally, Australian consumers generally know that they can complain and who they can complain to. Information about IDR processes is readily available to consumers on the provider's website or through relevant disclosure documents, such as a financial services guide or product disclosure statement.

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

A possible barrier is where the provider doesn't (or doesn't immediately) recognise an issue as a dispute. This might be because the dispute has been raised informally or because there is uncertainty about whether there is any dispute.

This barrier could be reduced by:

- educating staff of providers better
- IDR rules requiring all matters raised with a provider, regardless of formalities, that could reasonably be argued to be a dispute to be referred to a complains management team for review
- EDR schemes educating consumers about how IDRs are expected to operate

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

Consumers may not know what information to include. Submitting 'as much information as possible' may ameliorate this problem. However, guidance from providers about the sort of information they are, realistically, likely to need for the kind of dispute in question may reduce delays. For example, this guidance might be built into online submission forms, with targeted guidance generated based on the category of complaint. Reports by third-parties (e.g. EDR schemes) could promote improvements in IDR by publishing guidance on best practice for IDR schemes based on the cases they handle.

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

We support consumers having to seek to resolve disputes directly with the provider before EDR is available. Further, we understand that EDR schemes generally refer consumers who haven't yet gone through IDR, to the provider. However, there is some anecdotal evidence that EDR schemes approached by complainants are taking over the disputes prematurely. This might be because a consumer has taken (perhaps erroneously) an act or statement from the provider as a decision of the dispute and the consumer disagrees with that decision. We would therefore encourage EDR schemes to ensure all avenues of redress are explored through IDR before accepting a case irrespective of the consumers statements.

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?

We know of no material barriers to escalation from IDR to EDR schemes. We do not have data on how common it is for disputes to move between IDR and EDR, or between EDR schemes. The publication of consolidated information on the life cycle of all financial services complaints, starting at IDR stage, would be useful in assessing the portability of complaints. The information would need to track attempted transfers between IDR and EDR and between EDR schemes and document the reasons for failure. This could be achieved by encouraging EDR schemes to collect complaints data from members as part of their membership process going forward.

Regulatory oversight of EDR schemes and complaints arrangements

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

We would suggest that oversight for the EDR and complaints framework remains limited to: principles-based initial and ongoing approval of EDR schemes; and existing enforcement and intervention powers. Under current arrangements, the board of an EDR scheme makes and amends the rules of the scheme. If approved by ASIC, membership of the scheme satisfies the *Corporation Act 2001* requirement that AFS licensees and credit licensees are members of an ASIC-approved EDR scheme. Further, we believe ASIC should continue not to be involved in EDR hearings or decision-making.

Our position is based on what we understand the purpose of the EDR and complaints framework to be, that is primarily to enforce – with minimal cost and delay – agreements between consumers and providers. Achieving this purpose involves gaining efficiency in the EDR and complaints framework and balancing competing goals (for example, certainty against flexibility and cost), within narrow constraints including managing the imbalance of power and knowledge between providers and consumers.

Unhindered by excessive regulatory oversight, competition and having different schemes for different constituencies promotes efficiency and balance.

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?

We don't support extending ASIC's oversight role. The benefit of the current arrangements is that the interests of different groups of users are reflected in the composition of the boards of FOS and CIO. ASIC's role should continue to be to ensure that providers are meeting their *Corporations Ac 2001* obligations to subscribe to an EDR and inform clients that they can access EDR if they are unhappy with the outcome of IDR.

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)?

Oversight needs to be consistent across EDR schemes, as the principles regulating EDR schemes are intended to be constraints on such schemes rather than one set among many possible options. However, bodies whose decisions are determinative on a party without that party's consent or being a member of the scheme, have a quasi-judicial character, which justifies their independence from political influence.

For these reasons, we would suggest that ASIC continue to be responsible for the oversight of private EDR schemes and that the SCT remain independent of government. ASIC should also be subject to

regular oversight by a relevant committee of the Australian Parliament to ensure ASIC is held accountable for systemic failures in the discharge of its financial services responsibility.

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

Unlike redress through the regulator, these schemes provide a means for dealing with large volumes of complaints in a consistent and streamlined way. In addition, these schemes provide quicker and cheaper resolution of disputes than the court system provides.

However, their role could be enhanced by clarifying the underlying principles for decisions, especially where decisions turn on the scheme's interpretation of fairness and reasonableness. This will help improve the predictability of outcomes and allow both providers, financial planners and consumers to gain from increased certainty.

There is also an argument that in some cases EDR schemes have insufficient expertise to make a proper assessment. For example, unless those deciding a case have direct experience in providing advice, it is difficult for them to assess the appropriateness of advice. While the admission of expert evidence goes some way toward managing this problem, a better way would be to ensure that experienced financial planners are included as decision-makers for disputes about advice. This could involve, for example, the EDR constitution, operating rules or enabling legislation requiring panels of financial planners to be established and maintained, and panellists who are financial planners to be appointed in cases that meet certain objective criteria. We note FOS already appoints financial planners (including CFP® to panels).

For disputes involving financial planners, the individual planner is not a party to the dispute unless they are also a financial services provider. This exposes individual financial planners to risks (including reputation risk) from dispute resolution, that are outside their direct influence. In turn, financial planners are incentivised to spend more time testing clients' stated intentions than would otherwise be optimal.

However, better outcomes for consumers and financial service providers are likely if there were no such distortion. For these reason, it may be desirable for financial service providers and financial planners to co-operate. This could be achieved by, for example, appointing financial planners as representatives on the board (or advisory council) of each EDR scheme and allowing financial planners a right to be heard where a dispute relates to their conduct. This could involve, for example, the EDR constitution, rules or legislation requiring a specified number of financial planners to be appointed to the board (or advisory council) in the capacity of representatives of the profession. Again we note FOS has appointed a CFP® to their board, although would further note this does not appear to be a requirement.

Also, EDR schemes could report professional malpractice to the relevant professional association and could work co-operatively with professional associations in developing guidance on best practice. For example, we believe that disputes involving individual financial planners should be referred to the relevant professional association wherever material/significant professional misconduct is identified. Disputes could be handled contemporaneously with FOS or CIO. This arrangement benefits consumers (and financial planners and, in turn, many members of EDR schemes) by improving consumer confidence that the higher standards demanded by professional associations will be honoured.

Finally, the Australian Parliament, through relevant committees could hold ASIC accountable for its progress towards achieving these co-regulatory benefits. There is nothing quite like Parliamentary accountability as a motivator to improve performance.

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?

Complaints are resolved faster and at a lower cost than the court system. However, the reasons for decisions can be unclear, especially where the decision turns on fairness and reasonableness; and with no doctrine of precedent, future decisions lack predictability.

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

As with IDR schemes, the details of EDR schemes should be readily available from members of the schemes.

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

We know of no material barriers to communicating with schemes. However, there may be communication issues where the financial planner is not a party to the dispute between the client and the FSP, particularly where the planner has left an AFS licensee. In these circumstance there may be no imperative to 'do justice' or to find the truth, only an imperative to resolve a dispute in the interests of the consumer. The planner's professional reputation may be undermined, yet they have no right to be heard in disputes.

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

One of the limitations of EDR schemes is that determinations may go unpaid if the claim isn't fully covered by professional indemnity insurance and the member can't pay.

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?

In theory, ASIC's principles-based approach to initial and ongoing approval of EDR schemes allow schemes to develop their own detailed rules and practices so as to respond to market changes and the needs of their users. Rather than detailed rules being dictated, competition and representation of the interests of constituents (consumers and providers) on the EDR's board should align those rules more closely with the needs of users than a centrally directed approach.

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

We understand that EDR schemes provide efficiency gains for all users. However, given that, practically, providers are required by law to be a paying member of an EDR, it is appropriate that FOS and CIO's jurisdiction is properly targeted to those consumers who need it most.

We would suggest that any proposal to expand FOS and CIO's jurisdiction beyond the existing categories (individuals and small business, as currently defined) and dispute and compensation limits would need to be carefully weighed up against the cost to providers and the benefits to consumers who may already be in a position to protect their own interests (with, for example, bespoke private arbitration agreements for their particular contract or through their bargaining power and relationship with the provider).

By contrast, the SCT is a public body. Given this, we'd suggest it is appropriate that the categories of consumers that can make a complaint to the SCT be as broad as it currently is, including consumers and their beneficiaries.

We do question the prudence of excluding self-managed superannuation funds (SMSFs) from the jurisdiction of the SCT. SMSF members and beneficiaries are not necessarily in an especially strong position to protect their interests. Further, arguably the close personal relationships of trustee-members actually means a member is particularly vulnerable to the collective will of the trustee.

We would suggest that consideration should be given on the merits of expanding the SCT's jurisdiction to include SMSFs where the SCT effectively steps in as an independent trustee to resolve trustee disagreements.

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?

Answering this question properly, requires a clear determination of which groups of consumers (e.g. those unlikely to have the resources to protect their own interests) are intended to be protected and whether the limits appropriately target those groups. Limits should be based on how well they target the selected groups. This is an empirical question. Similarly, any difference in monetary limits between products should be based on the goal of appropriately targeting the groups intended to be covered. It is possible, on this criterion, that monetary limits should vary between products, however, again, this should be based on an empirical study.

There may also be an argument that the Court system should be facilitating alternative dispute resolution and modified access to justice solutions. The aim would be to retain the rigour, which is ultimately necessary, of the court system while achieving efficiency gains. Such solutions would be especially useful for disputes outside of EDR limits, or which are unresolved through EDR.

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?

Where the reasons for decisions are unclear or where they are heavily dependent on the factual context of the case, the system lacks comparability. For example, determinations on complex disputes such as those involving financial planning may be particularly difficult to compare. This is a negative feature of

current arrangements as certainty and predictability provides benefits to both parties to an agreement. A solution is to provide tailored determinations rather than following a template format.

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

We believe existing EDR schemes and complaints arrangements possess sufficient powers to settle disputes.

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

We believe EDR schemes should focus on applying the legal principles (and principles from the relevant codes of ethics) that exist independently of the scheme. If additional criteria based on fairness and reasonableness are to be applied, indicia of these criteria need to be developed and articulated in decisions. These issues are raised time and time again by our members.

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

For private EDR arrangements, we support governance arrangements that ensure the interests of users are considered in making or amending the rules constituting the scheme. Of course, this comes at the cost of independence of ombudsmen, who require a high degree of independence to discharge their duties impartially. For this reason, it is crucial that there are arrangements in place to protect ombudsmen, for example, tenure or fixed-term contracts.

For public EDR arrangements, we support the operation of the dispute resolution function being independent of politics. The rules that constitute these schemes (including the advisory council, which is composed in such a way to represent the interests of providers and consumers) and the appointment of the chairperson, deputy chairperson and members, already reflect the interests of potential users through our system of representative democracy. However, adjudicators are and should be independent.

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

We don't have data to support a response to this question. However, the latest FOS annual report suggests they are sufficiently resourced to respond to current demand.

Even so, we would highlight that we would expect a net benefit from all EDR schemes being well-resourced with high quality legal expertise. Industry and consumer-related knowledge and expertise is highly valuable. However, this knowledge and expertise should support the coherent development of decisions. Such development is primarily a legal function, requiring legal skills and knowledge.

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

While FOS is funded primarily from dispute fees, and CIO is funded primarily from membership fees, they both have clear funding models. By contrast, the SCT is allocated funding from ASIC and the methodology for determining the quantum of the allocation is not clear. The funding model for the SCT

could be improved by government funding the tribunal directly based on a publicly observable, objective funding model or levying industry directly.

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

The composition of the EDR schemes boards (or advisory council) is such that the different interests of providers and consumers should be represented. We believe this is appropriate for what is essentially a third-party EDR service provided by industry, that needs to be constrained by public interest considerations. However, in addition, the interests of financial planners should be represented on the boards for the reasons discussed at question 13.

The rules that constitute the SCT (including the advisory council, which is composed in such a way to represent the interests of providers and consumers) and the appointment of the chairperson, deputy chairperson and members, reflect the interests of potential users through our system of representative democracy. We believe this appropriate for a public body providing EDR services.

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?

All schemes provide useful guidance on these areas. However, reporting by EDR schemes needs to be more detailed in order to provide greater certainty about what is expected of providers. Further, we would like to see a resource that seeks to discern the underlying principles (and approaches to characterisation of facts) that apply across the EDR schemes. This would help to develop a coherent jurisprudence for financial services dispute resolution and promote certainty and predictability in decision-making, which will benefit both consumers and providers.

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

Performance should be assessed on:

- average cost and duration (and distribution thereof) for consumers and providers for different categories of dispute
- certainty and predictability of outcome

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?

Our concern isn't with overlaps, which we believe provide useful competitive pressures. By contrast, gaps are potentially of concern. For example, if some consumers whose cases aren't covered by any of the schemes, don't have the resources to protect their own interests through other means (such as settlement or court action), this might suggest the current EDR framework is failing. In this regard, areas that might be worth investigating are investment and loan disputes above the relevant limit and disputes when the consumer is larger than a small business as defined under the scheme rules (noting the

Government's proposed redefinition of small business for tax purposes in the 2016/17 Budget measures).

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

We believe having multiple private EDR providers leads to better outcomes through commercial tensions, as providers can choose the arrangement that benefits them the most (and consumers can choose the provider based on its choice of EDR scheme).

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

If IDR disclosures are working properly, the consumer should be aware of which EDR scheme to consult and there shouldn't be any confusion. However, if there is a problem, this could be managed by introducing a triage service (as discussed below).

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

Private EDR schemes will expand their small business jurisdiction if this makes commercial sense. For example, FOS has already proposed to expand its small business jurisdiction.

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?

Extension of the unfair contracts legislation to small business means that EDR schemes will apply existing legal principles to a wider range of cases. This means there will be pressure to scale back other services or to increase funding. We note that FOS has sought feedback on a funding model, including introducing a small business levy, for its proposed expanded small business jurisdiction.

Triage service

35. Would a triage service improve user outcomes?

Potentially, a triage service would assist user outcomes. For example, a consumer who has a choice of EDR schemes could be directed to the more/most appropriate one based on their circumstances. Further, perhaps the court system should be included in the triage because of the jurisdictional overlap.

A triage service could create efficiencies by reducing search time for consumers. On the other hand, the delay caused by adding an extra administrative layer may outweigh the savings in search time, especially considering that the details of a provider's EDR scheme should be readily available to consumers through a properly functioning IDR and disclosure regime.

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

- **who should run the service?**

- **how should it be funded?**
- **should it provide referrals for issues other than that related to the financial firm?**

It might make commercial sense for the service to be run by a new body collectively owned and funded by the EDR schemes. We'd suggest leaving it up to the EDR schemes to decide whether the new body provides referrals for issues other than those related to the financial firm.

The triage service could also refer disputes to relevant professional bodies. For example, disputes involving financial planners could be referred to the relevant professional association.

One body

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

We believe that industry should be left to determine the number and form of the financial ombudsmen schemes. Consumers can help drive industry's choices through their choice of provider and through consumer representation on the boards of EDR schemes.

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

We think it unlikely that integration would be desirable as it would involve delimiting the choices available without dealing with any stated problem (e.g. lack of scale of existing EDR schemes). We therefore believe integration will reduce the benefits of choice for providers and, indeed, consumers.

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)?

As already mentioned, we don't support a 'one-stop shop' (beyond at most a triage service which is not necessary if IDR disclosure is working effectively). However, if a 'one-stop shop' were adopted, we believe it should be applying the legal principles (and principles from the relevant codes of ethics) that exist independently of the scheme. We believe that the development of additional criteria that seeks to protect either party at the expense of the other, would be better dealt with by existing competitive arrangements.

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

As already mentioned, we don't support a 'one-stop shop'. Any consolidation efforts should be limited to gaining efficiencies through sharing some service costs, e.g. the proposed triage service; and should allow existing schemes to otherwise maintain their independence.

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

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

- **what should its jurisdictional limits be?**
- **how should it be funded?**
- **what powers should it possess?**
- **what regulatory oversight and governance arrangements would be required?**

Following on from our answer to question 40, we'd suggest that any consolidation efforts retain the independence of existing EDR schemes and share only those services where scale efficiencies could be gained. The shared services could be a new entity collectively owned by the EDR schemes, with services charged at an agreed rate. There need not be any change to jurisdictional limits, powers or oversight/governance arrangements.

An additional forum for dispute resolution

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

We don't support the introduction of a new tribunal. A new forum adds complexity and reduces certainty and predictability, which goes against the fundamental purpose of the dispute resolution framework.

43. If a tribunal were desirable:

- **should it replace or complement existing EDR and complaints arrangements?**
- **should it be more like a court (judicial powers, compulsory jurisdiction, adversarial processes and legal representation)?**
- **should it be more like current EDR schemes (relatively more flexible, informal decision-making and processes)?**
- **how should the jurisdiction of the tribunal be defined?**
- **should its jurisdiction only extend to small business disputes or other disputes?**
- **should its jurisdiction only be available in the case of disputes with providers of banking products?**
- **should monetary limits and compensation caps apply?**
- **should its decisions be binding on one or both parties and what avenues of appeal should apply?**
- **should it be publicly (taxpayer) or privately (industry) funded?**
- **should its focus only be on providing redress or should it take on a role to prevent future disputes, for example, by advocating for changes to the regulatory framework, seeking to improve industry behaviour?**
- **what type of representation and other support should be available for persons accessing the tribunal?**

If a tribunal were adopted, it should merely complement existing EDR and complaints arrangements, and not compete directly with existing EDR arrangements. The tribunal would be like a court, having judicial powers, compulsory jurisdiction, adversarial processes and legal representation; and decisions should be binding on both parties with appeal to the courts for errors of law or on the grounds of unreasonableness. Legal representation would be allowed or encouraged and the body would be for

adjudication and not advocacy. The aim would be to (as far as possible) reproduce – and, in practice, replace - the court system at a lower cost to users due to increased efficiency (e.g. due to the expertise of panel members). The body would also provide a final determination (subject to judicial review) of a matter. For these reasons, the body should be publicly funded.

Of course, court-like functions come at a cost and they leave room for more informal arrangements (such as EDR) to provide faster and more timely solutions. The new arrangement would merely give consumers an intermediate court-like forum without displacing the current arrangements. Importantly, consumers who don't accept their FOS or CIO ruling would be able to seek that the dispute be heard by the proposed tribunal. In addition, either party to a dispute decided by the SCT would be able to raise an appeal with the proposed tribunal on questions of law. This should provide a faster and cheaper second-tier adjudication than the court system.

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 would prefer that private EDR schemes have a chance to consider their responses to small business.

Developments in overseas jurisdictions and other sectors

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

We refer the panel to Appendix C and Appendix D of *Compensation arrangements for consumers of financial services* (2012), a report prepared by Richard St John.

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?

We refer the panel to *Compensation arrangements for consumers of financial services* (2012), a report prepared by Richard St John.

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?

We understand that uncompensated losses from FOS determinations is currently around $16.6 million and for CIO about $400,000.

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

Alternative frameworks to address uncompensated consumer losses include:

- compensation scheme of last resort (CSLS)
- improved regulator surveillance and stronger professional indemnity insurance (PI) requirements

The CSLS framework is problematic because it introduces a moral hazard, as consumers, financial planners, providers and regulators will take excessive risk. On the other hand, the following arrangements reduce the extra risk:

- loss-sharing between the CLSL and complainant
- industry funding where each provider's levy is based on their particular risk rating

Improved regulator surveillance and stronger PI requirements should reduce uncompensated losses, however such losses are unlikely to be eliminated completely. There is an argument that professional standards legislation at the commonwealth level, that limits a professional's civil liability in return for improved risk management at the practice level and improved standards of conduct, may make the PI insurance market more competitive. This might drive improvements in the quality and price of PI cover, and, in turn, reduce uncompensated consumer losses at the EDR level.

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?

We are strongly opposed to a statutory CSLS as we are concerned that, in practice, all taxpayers would be required to subsidise the scheme. Even with risk mitigation strategies, risk wouldn't be fully priced into the market. In turn, it seems likely that market participants and regulators would take on extra risk. Further, there would be no competitive pressures to drive efficiencies.

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

The introduction of a statutory CSLS would be expected to increase the risk of PI claims. Assuming the CSLS has appropriate recovery powers against PI insurers and providers or that eligibility to claim from the CSLS is limited to situations where both the loss isn't covered by the PI policy and the provider can't pay, the PI insurance market would effectively transfer risk to the CLSL for situations where the provider can't pay. This might be dealt with by legislation.

Also, PI insurers might place other further restrictions on cover to account for increased risk exposure in the PI market due to the introduction of the CSLS. This will increase a provider's uninsured exposure to liability. Alternatively, PI insurers might raise premiums, which might price some providers and financial planners – especially small financial planning businesses that are independently owned – out of the market.