

10 October 2016

Professor Ian Ramsay
Chair, Independent Expert Panel
c/o EDR Review Secretariat
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email EDRreview@treasury.gov.au

Dear Professor Ramsay

Review of External Dispute Resolution and Complaints Schemes

The Australian Bankers' Association (**ABA**) welcomes the opportunity to provide this submission to the Independent Expert Panel's review of the financial system external dispute resolution framework (**Review**)¹ and to respond to the Issues Paper released on 9 September 2016 (**Issues Paper**). We also appreciate the opportunity to have participated in the recent roundtables in Sydney and Melbourne.

With the active participation of 25 member banks in Australia, the ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services. The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and the community, to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.

Introductory comments

The banking industry acknowledges that it can do better in ensuring outcomes that are in the best interests of consumers and that customers have confidence in the culture and conduct of banks. Banks are already taking steps to this end, but more needs to be done.

The first step is to ensure bank practices meet the highest standards of ethical behaviour and that any issues are quickly raised and addressed. The banking industry's reform package announced in April includes various initiatives, including on remuneration structures in retail banking, whistleblowing protections and a review of the Code of Banking Practice to strengthen standards for customers. There is also a review of small business standard contract terms under the Unfair Contract Terms legislation.

The second step is to improve the internal mechanisms for dealing with customer issues. This is being effected through the establishment of a dedicated customer advocate in each bank and improvements to complaint handling and remediation programs.

The third step, explored in this submission, is to improve the external dispute resolution (**EDR**) system. It is to be hoped that improved complaints handling and internal dispute resolution (**IDR**) practices should lead to a reduced need and recourse to EDR. But when it is needed, the EDR system must work as efficiently and quickly as possible to resolve disputes and achieve fair outcomes, and to show that justice has been done.

The simplest and easiest system for customers of all financial institutions – not just banks but also credit unions, building societies, smaller credit providers, insurance providers, superannuation funds – would be a 'one stop shop'. Customers cannot be expected to understand and navigate the complexities of the current arrangements.

¹ <https://consult.treasury.gov.au/financial-system-division/dispute-resolution/>



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The ABA suggests that the choice of EDR body – whether it is an ombudsman, tribunal or another entity – should be principles-based and focused on achieving the best system for customers and small businesses.

It is critical that the EDR arrangements are open to all consumers who cannot readily and fairly access the formal legal system. The banking industry has committed to exploring a widening of access to EDR arrangements for customers and small businesses.

We consider that the process for determining eligibility for EDR can be improved and we propose some modification of the existing terms of reference and the definition of a small business to achieve these outcomes.

It is also critical that a last resort compensation scheme be available so that customers receive restitution and compensation when things go wrong.

Making it right when things go wrong

The banking industry is committed to making it easier for customers when things go wrong. Effective and efficient complaint handling and dispute resolution is at the heart of improving consumer outcomes and increasing community trust and confidence in the financial services sector.

As part of the banking industry's commitment to protect consumer interests, increase transparency and accountability and build trust and confidence in banks, the ABA announced a range of initiatives on 21 April 2016 (see media release at **Attachment A** which contains full detail of the initiatives). These initiatives include:

- Enhancing existing complaints handling processes by establishing a dedicated customer advocate in each bank to ensure that customers and small businesses have a voice, and that complaints are appropriately escalated and responded to in a timely way
- Supporting the broadening and strengthening of external dispute resolution schemes with a view to increasing eligibility thresholds for customers and small businesses
- Working with ASIC in expanding its review of customer remediation programs to cover all types of financial advice and financial products, and
- Evaluating a last resort compensation scheme and identifying an appropriate model.

In aggregate, these initiatives aim to ensure internal and external programs address customer concerns, make it easier for customers when things go wrong, and increase trust and give people confidence that when things do go wrong, banks will do the right thing.

The ABA believes this Review provides a complementary process to improve the EDR framework so that all the avenues for resolution of customer complaints are operating to the maximum benefit of consumers.

Financial systems dispute resolution

Simple, accessible and effective EDR plays a valuable role in enabling customers and small businesses to bring and resolve disputes with financial services providers (**FSPs**). EDR offers an important and accessible alternative to the court system as it is free for customers to access, does not require formal legal representation, and resolves disputes in a less adversarial way than the court system.

EDR works best in conjunction with effective complaints handling and IDR programs. IDR programs are an important element of the FSP's overall relationship with its customers and manage a wide variety of complaints, including those that have not resulted in monetary loss. Many customers have their complaints successfully resolved through IDR.



The Code Compliance Monitoring Committee reports that banks recorded 1,226,093 complaints in 2014–15. Banks resolved 92.9% of all recorded complaints in under five business days. Only 1.1% of complaints took more than 45 days to resolve.²

In the same year, FOS accepted 11,913 disputes about banks, indicating that just 0.0097% of complaints about banks were accepted by FOS. FOS operates processes to refer disputes back to the FSP for resolution in certain circumstances.

As a case study, in the last financial year, one major bank received 140,000 complaints from retail and small business customers. This represented 600 complaints per day and 0.03% of total customer interactions. Of the 0.03% of customer interactions that result in a complaint, over 40% of these were resolved at the first point of contact. 80% of the remaining complaints were resolved within five business days by specialist complaints handling teams. Of the initial 140,000 complaints, 705 complaints were accepted by FOS.

We recognise that some customers have not had their complaints properly resolved through either IDR or EDR. In addition to the banking industry initiatives to improve IDR, we strongly support the Government’s review of the EDR system.

Our comments are designed to assist the Independent Expert Panel’s consideration of the following aspects of financial system external dispute resolution:

- Principles for revising the framework of EDR schemes to make EDR simpler, more accessible and more effective
- Expanding the small business jurisdiction of EDR schemes, and
- Supporting the introduction of a last resort compensation scheme for certain uncompensated losses.

We have also set out commentary on a number of technical issues relating to EDR in **Attachment B**.

Revising the framework of EDR schemes

The existing EDR schemes, the Financial Ombudsman’s Service (**FOS**), the Credit and Investments Ombudsman (**CIO**) and the Superannuation Complaints Tribunal (**SCT**) currently play an important role in handling consumer issues and disputes with banks and other FSPs.

We note that consumers are also supported by state-based schemes, including mandatory and voluntary farm debt mediation schemes, consumer protection agencies, small business commissioners, and other ombudsmen responsible for resolving disputes with creditors.

However, there is complexity in having three alternate EDR bodies, some with overlapping jurisdictions, as well as other state-based options for resolving disputes in the financial services sector. This complexity can make EDR difficult for consumers to navigate, may lead to differences in process and decisions for comparable disputes, and duplicates administrative structures, funding models and governance.

We support consideration of a better integrated EDR framework, developed having regard to the principles outlined below.

Guiding principles

Seven key principles and outcomes are proposed to guide the Review – efficiency, equity, complexity, transparency, accountability, comparability of outcomes and regulatory costs.

The ABA supports a principles-based approach. The proposed principles and outcomes are appropriate and comprehensive. However, we suggest that the principle of “equity” be expressed as “accessibility”

² <http://www.ccmc.org.au/cms/wp-content/uploads/2015/11/CCMC-Annual-Report-2014-15-web-version.pdf> p15.



and explained as reflecting other accessibility factors in addition to cost, and that “complexity” be expressed as “simplicity”, embodying the objective of developing a simpler framework.

In terms of determining whether a scheme effectively meets the needs of users, we consider that the Benchmarks for Industry Based Customer Dispute Resolution³ are the appropriate reference point.

The overarching objective of the Review should be to achieve a better integrated EDR framework that provides simple, accessible and efficient dispute resolution for customers and small businesses.

Simplicity

The EDR process should be simple and easy for consumers to access, navigate and understand. A revised EDR framework should have a singular or simple path for resolution of disputes. Alternative processes or legal requirements may apply given the type of customer or nature of dispute, however, these processes should operate in an integrated way, which provides a consistent consumer experience.

This singular or simple path could be achieved through introducing an overarching gatekeeper or ‘one stop shop’ covering the existing schemes, creating a single body, or integrating existing schemes by standardising the way customers and small businesses access the schemes and harmonising internal operating policy and process. A single body, or integration of the schemes should seek to achieve:

- Clarity for consumers on where to go for accessing EDR to resolve a dispute
- More rapid allocation of disputes to the appropriate resolution pathway, ending the transfer of disputes between schemes or forums
- Standardised regulatory oversight and approval of the operation of the EDR scheme(s)
- Standardisation of operating policy and process, leading to improved efficiency, and
- Rationalisation of industry and government funding models and allocation of adequate resources.

Accessibility

The EDR system should be readily accessible to customers and small businesses. Current arrangements to ensure accessibility for customers and small businesses should be reinforced and continuously improved to ensure the following design features:

- *Free for consumers:* EDR should continue to remain free for the customer or small business to access.
- *Remove information asymmetry:* EDR schemes should continue to make available simple information about their processes, provide information to suit consumers with disabilities or languages other than English, and operate community outreach programs and provide information in community languages. FSPs should continuously improve the way they integrate EDR into their complaints handling policies and procedures, and to let customers and small businesses know about their rights to access EDR at key times⁴.
- *Ensure appropriate support for consumers:* The role of ‘for profit financial difficulty companies’ (including debt management firms and credit repair agencies) should be examined to ensure consumers are appropriately represented and protected, including in their representations with EDR schemes but also more broadly.⁵

³http://www.treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2015/benchmarks_ind_cust_dispute_reso/Documents/PDF/benchmarks_ind_cust_dispute_reso.ashx

⁴ The ABA notes that the banking industry commitment to have a Customer Advocate in each bank will provide an avenue for identifying improvements with customer communications about complaints handling and IDR as well as access to EDR.

<http://www.bankers.asn.au/media/media-releases/media-release-2016/new-voice-for-customers-in-complaints-with-banks>

⁵ For more details, we suggest the Panel refer to [ASIC's report 465 Paying to get out of debt or clear your record: The promise of debt management firms](#).



- *Enduring funding for financial counselling services:* Financial counsellors are an essential public service. They provide independent and free advice and information to individuals and families during difficult financial and emotional times and help clients deal with managing multiple debts, including from mainstream financial institutions, other lenders (including payday lenders), other creditors (including retailers, utilities and telecommunications companies). An enduring model of Government funding for financial counselling services is required to ensure the services continue to make a significant difference for many Australians experiencing financial difficulties.

Effectiveness

Resolution of disputes through EDR should be fast, allow flexibility, be supported by appropriately skilled and funded resources and ensure satisfactory resolution of disputes for customers and small businesses.

To enable speedy and satisfactory dispute resolution, a revised EDR framework needs to be designed to ensure the following:

- *Adaptability:* Ability to amend governance structures, revise terms of reference, review operating processes and reallocate resources so that the scheme can continue to evolve and respond to emerging issues.
- *Flexibility:* Allows for a broad range of negotiated (and imposed) outcomes to individual disputes.
- *Capability:* Is equipped with appropriate financial resources and organisational capability to resolve disputes with varied and complex features.

Jurisdiction and monetary limits

The jurisdiction of EDR schemes needs to be sufficiently broad to ensure EDR is accessible to customers and small businesses and compensation is meaningful, taking account of EDR's mandate to resolve less complex disputes.

We support EDR schemes having an appropriate jurisdiction to consider and make determinations in relation to financial products and credit provided by a FSP to a small business.

In addition, we support an increase in the monetary limits of the EDR scheme to ensure the appropriate disputes are heard and compensation is meaningful. We believe:

- Customers and small businesses should be able to bring complaints up to the value of \$1 million, and
- The EDR scheme should be able to make awards up to \$1 million.

We have provided more information on changes to jurisdiction and increases of monetary limits in **Attachment B**.

Farm debt mediation

Farm Debt Mediation (**FDM**) is a specialised mediation process that allows a farmer and their FSP to negotiate a better financial outcome. Mediators are trained to understand the unique and complex circumstances affecting farming operations and agri-business lending.

The ABA believes that FDM should remain a separate EDR scheme. We support the implementation of a nationally consistent farm debt mediation model across Australia and have been working with the Australian Government and agricultural organisations on legislative options.



The banking industry's preferred model is for national farm debt mediation legislation based on the NSW legislation. The NSW Farm Debt Mediation Act was introduced in 1994 and provides a mechanism for the efficient and equitable resolution of farm debt disputes, without acting as a constraint on agri-business lending in NSW.

Last resort compensation scheme

The banking industry recognises that some consumers of financial services and products have suffered losses because of inappropriate advice or poor conduct and where a financial adviser or particular product issuer has failed, not maintained adequate compensation arrangements and/or their business has become bankrupt or insolvent.

While bank customers would not need to seek redress from a last resort compensation scheme and we acknowledge the recommendations of the St John Report⁶, we consider a scheme is important to build trust and confidence in the financial services sector and ensure consumers of financial products are treated fairly, have adequate information, and avenues for redress and protections.

The ABA is continuing to work with banks on evaluating the establishment of the scheme and the various operational details, and this has not yet been completed. However, the ABA supports a scheme with the following design principles:

- *Limited liability scheme*: The scheme should pay compensation (capped) to consumers of financial products and services (retail clients as defined by the law) where professional indemnity (PI) insurance is insufficient to meet claims (e.g. where fraud is a policy exemption), the business is bankrupt or insolvent (and run off cover is unavailable) and where an approved EDR body determination is made. The scheme is not intended to cover market-linked investment losses.
- *Priority of claims*: The scheme must be a last resort, and alternative compensation arrangements should be pursued initially, including resorting to the financial resources or capital reserves of the AFS licensee.
- *Industry-wide and mandatory*: The scheme should require all AFS licensees who offer a financial product to a retail client to be a member and contribute to the scheme, as a condition of their licence (with the exception of deposits and general insurance which are covered by the Financial Claims Scheme (FCS)). A number of options for establishing the scheme are available, including delegated legislation, regulation rather than statute, licensee conditions, and/or a combination⁷.
- *Prospective*: The scheme should cover consumers of financial products who receive an approved EDR body determination in their favour. We do not support a scheme applying retrospectively.

The ABA also recognises that additional operational details will need to be worked through, including eligible claims, compensation cap, scheme funding model and calculation factors (i.e. the risk profile of the AFS licensee's operating model), governance arrangements for the scheme, and penalties and disincentives for AFS licensees availing of the scheme.

In addition to the design principles, the ABA supports a scheme being accompanied by other reforms to improve the quality of financial advice and consumer protections. We believe improvements should include:

- *Professionalisation of financial advice*: The new framework to raise education, ethical and professional standards should be introduced as an important underpinning of ethical behaviour across the financial services sector.

⁶ Australian Government, *Compensation arrangements for consumers of financial services*, April 2012.

http://futureofadvice.treasury.gov.au/content/consultation/compensation_arrangements_report/downloads/Final_Report_CACFS.pdf

⁷ The ABA notes that one member bank holds the view that only AFS licensees that are judged not to be able to meet claims from their own financial resources should fund the scheme.



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- *PI insurance*: The cost, availability and coverage of PI insurance should be expanded, including run-off cover, insolvency, fraud and other misconduct.
- *Disclosure and financial literacy*: The scheme should be well understood by consumers of financial products so that it is clear that the scheme is a last resort and not intended to cover investment losses (i.e. product failure or market conditions).
- *Regulation and regulatory activities*: ASIC should require an annual assurance statement from all AFS licensees that they meet their licence obligations, including compliance with ASIC's *Regulatory Guide 126: Compensation and insurance arrangements for AFS licensees* [RG126] and *Regulatory Guide 166: Licensing: Financial requirements* [RG 166].

The ABA notes that our remarks on a last resort compensation scheme are based on consideration of the existing EDR system, and if this were to fundamentally change, this would likely impact on the efficacy of this proposed scheme.

Closing remarks

The ABA and our member banks are strongly committed to making sure the EDR system is improved and works well now, and into the future.

The ABA would welcome the opportunity to discuss these issues further with the Panel.

In the meantime, if you have any questions in relation to this submission, please do not hesitate to contact me or Diane Tate, Executive Director – Retail Policy on (02) 8298 0410 or dtate@bankers.asn.au.

Yours sincerely

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Attachment A – Industry announcement: Banks act to strengthen community trust

Sydney, 21 April 2016: Australia's banks will today begin to implement comprehensive new measures to protect consumer interests, increase transparency and accountability and build trust and confidence in banks.

"This package aims to address consumer concerns about remuneration, the protection of whistleblowers, the handling of customer complaints and dealing with poor conduct," Australian Bankers' Association Chief Executive Steven Münchenberg said.

"Customers expect banks to keep working hard to make sure they have the right culture, the right practices and the right behaviours in place.

"That's why the banks will immediately establish an independent review of product sales commissions and product based payments, with a view to removing or changing them where they could result in poor customer outcomes," he said.

"Banks will also improve their protections for whistleblowers to ensure there is more support for employees who speak out against poor conduct.

"This plan delivers immediate action to make it easier for customers to do business with banks, including when things go wrong. For example, improved complaints handling and better access to external dispute resolution, as well as providing compensation to customers when needed," he said.

The plan, parts of which are subject to regulatory approval or legislative reform, will be overseen by an independent expert.

"We recognise the importance of having an impartial third party to oversee this process," Mr Münchenberg said.

"The industry has appointed Gina Cass-Gottlieb, Gilbert + Tobin Lawyers, to lead the work on establishing the governance arrangements around the implementation of the plan, the review process, public reporting, and the selection of an independent expert to oversee implementation of this initiative.

"The banks also support the Federal Government's review of the Financial Ombudsman Service, who is the independent umpire for customer complaints, to ensure it has the power and scope required to deal with a variety of issues that currently fall outside its thresholds," he said.

"Trust is at the centre of banking and is critical for the stability of our financial system. The strength of our banking sector got us through the global financial crisis. Since then banks have done a lot of work in improving customer satisfaction, strengthening their balance sheets, and making it easier for customers to do their banking wherever and whenever they want.

"The plan also responds to a range of expert reports and public inquiries that have identified key areas of reform, including the Financial System Inquiry.

"Banks recognise the importance of the community discussion about the delivery of banking and financial services, and are pleased to put forward this plan," Mr Münchenberg said.

A copy of the industry statement is below. For more information visit betterbanking.net.au

Contact: Stephanie Arena 0477 470 677 or Nic Frankham 0435 963 913



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Industry Statement

Australia's banks understand that trust is critical to a strong and stable banking and financial services sector. We acknowledge that we have a privileged role in the economy. Our customers, shareholders, employees and our communities rightly expect the behaviour of banks to meet high ethical standards as we look after their financial needs.

For some years now banks have been responding to community feedback to improve customer service and our industry's contribution to the community more broadly. This has been largely successful. While all banks have customer satisfaction ratings above 80%, we acknowledge there is more to do. We continue to implement wide ranging reforms that have already been agreed through the inquiries, reviews and consultations undertaken over recent years.

Subject to regulatory approval, we are committing to a further six actions to make it easier for customers to do business with us and to give people confidence that when things go wrong, we will do the right thing.

We understand the importance of independence and transparency. To ensure this, the industry has appointed Gina Cass-Gottlieb, Gilbert + Tobin Lawyers, to lead the work on establishing the governance arrangements around the implementation of the plan, the review process, public reporting, and the selection of an independent expert to oversee implementation of this initiative. This initial stage will take a month. We will publish public quarterly reports on our progress, with the first report within three months of this announcement.

We believe these actions will further lift standards and transparency across the banking and financial services sector and bolster the existing strength of the regulatory framework.

1. Reviewing product sales commissions

- Building on the 'Future of Financial Advice' reforms, we will immediately establish an independent review of product sales commissions and product based payments with a view to removing or changing them where they could lead to poor customer outcomes. We intend to strengthen the alignment of remuneration and incentives and customer outcomes. We will work with regulators to implement changes and, where necessary, seek regulatory approval and legislative reform.
- Each bank commits to ensure it has overarching principles on remuneration and incentives to support good customer outcomes and sound banking practices.

2. Making it easier for customers when things go wrong

- We will enhance the existing complaints handling processes by establishing an independent customer advocate in each bank to ensure customers and small business have a voice and customer complaints directly relating to the bank, and the third parties appointed by the bank, are appropriately escalated and responded to within specified timeframes.
- We support a broadening of external dispute resolution schemes. We support the Government's announcement to conduct a review into external dispute resolution, including the Financial Ombudsman Service conducting a review of its terms of reference with a view to increasing eligibility thresholds for retail and small business customers.
- We will work with ASIC to expand its current review of customer remediation programs from personal advice to all financial advice and products.



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- We will evaluate the establishment of an industry wide, mandatory last resort compensation scheme covering financial advisers. We support a prospective scheme being introduced where consumers of financial products who receive a FOS determination in their favour would have access to capped compensation where an adviser's professional indemnity insurance is insufficient to meet claims.

3. Reaffirming our support for employees who 'blow the whistle' on inappropriate conduct

- We will ensure the highest standards of whistleblower protections by ensuring there is a robust and trusted framework for escalating concerns. We will standardise the protection of whistleblowers across banks, including independent support, and protection against financial disadvantage. As part of this, we will work with ASIC and other stakeholders.

4. Removing individuals from the industry for poor conduct

- We will implement an industry register which would extend existing identification of rogue advisers to any bank employees, including customer facing and non-customer facing roles. This will help prevent the recruitment of individuals who have breached the law or codes of conduct.

5. Strengthening our commitment to customers in the Code of Banking Practice

- We will bring forward the review of the Code of Banking Practice. The Code of Banking Practice is the banking industry's customer charter on best practice banking standards, disclosure and principles of conduct. The review will be undertaken in consultation with consumer organisations and other stakeholders, and will be completed by the end of the year.

6. Supporting ASIC as a strong regulator

- We support the Government's announcement to implement an industry funding model. We will work with the Government and ASIC to implement a 'user pays' industry funding model to enhance the ability for ASIC to investigate matters brought to its attention.
- We will also work with ASIC to enhance the current breach reporting framework.

ENDS

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[bankers.asn.au](https://www.bankers.asn.au)



Attachment B – Technical considerations

In approaching the review of the EDR framework, we suggest there are a number of technical aspects requiring close consideration.

Overseas models

The United Kingdom Financial Ombudsman Service (**UKFOS**) was established under the *Financial Services and Markets Act 2000*.⁸ Its statutory function is to resolve – quickly and with minimum formality – disputes between financial businesses and their customers, as an alternative to the courts.

The company that administers the scheme, Financial Ombudsman Service Limited, takes the form of a company "limited by guarantee and not having a share capital". The powers and functions of the scheme operator are set out in company's legal constitution.

An example of a 'one-stop shop' scheme, UKFOS has successfully brought together several voluntary complaint schemes to be the mandatory EDR body for the UK financial services sector.

UKFOS covers all firms and activities that are authorised by the Financial Conduct Authority and includes firms holding a consumer credit licence in what was formerly the consumer credit jurisdiction. UKFOS is a compulsory statutory scheme rather than a voluntary sign up scheme. Ombudsman decisions are binding on the business but not the consumer – consumers remain free to take court proceedings.

UKFOS embodies features which meet some of the principles outlined in the Issues Paper, including:

- *Simplicity (or lack of complexity)*: UKFOS amalgamated eight previous EDR schemes into a single 'one stop shop' for consumers, small businesses, charities and trusts. The Financial Conduct Authority's handbook sets out jurisdiction and how UKFOS (and businesses) should handle complaints.
- *Transparency*: Through its website and annual review, UKFOS publishes significant information about its activities. Following a review of its strategy in 2008, UKFOS publishes a significant amount of information about how it handles cases and makes decisions, including technical information about its approach.
- *Equity*: The service is free to consumers and provides a readily accessible alternative to the courts.

We believe UKFOS provides an appropriate benchmark for rationalisation of the Australian EDR schemes.

Scheme features

Structure – Ombudsman Service or Tribunal?

Both Ombudsmen's services and Tribunals are useful mechanisms for alternative dispute resolution. In assessing the preferred structure of an EDR scheme for financial system external dispute resolution, we believe the following considerations should be taken into account:

- *Adaptability*: The structure should allow for the ability to readily amend governance structures, revise terms of reference, review operating processes and reallocate resources so that the scheme can continue to evolve and respond to emerging issues.

⁸ Further information on the underpinning of statutory functions and powers can be found here: <http://www.financial-ombudsman.org.uk/about/official-documents.html>



- *Flexibility:* The structure should allow the arbiter discretion for a broad range of negotiated (and imposed) outcomes to individual disputes as well as discretion to exclude complaints for various reasons, subject to clearly articulated criteria. For example, the complaint may lack substance or be vexatious, or the unique circumstances of the case mean may mean that it should be addressed in other ways, such as via the court system.
- *Complexity of underlying legal arrangements:* The underlying legal arrangements for a tribunal generally require legislation and can be more complex than those required for an ombudsman. The time that will be required to set up each structure, including parliamentary and government processes, should be considered to ensure any new arrangements are available to consumers as quickly as possible.
- *Effect of determinations:* The structure may impact the effect of determinations and how they bind the parties. The ABA sees merit in the current FOS/CIO approach.
- *Funding model:* The structure should ensure fair, transparency and flexible funding to ensure adequate allocation of resources. The ABA recognises an FSP user pays model is more effective.
- *Place in Administrative Law framework and rights of appeal:* The ultimate goal of the EDR system should be to satisfactorily resolve disputes. The structure may affect whether, and how, determinations could be review or appealed.
- *Regulatory approval and oversight:* The structure may affect who will oversee and approve the EDR scheme(s). Options include reporting through parliamentary committees or regulatory approval and regulatory oversight. We suggest that regulatory oversight, such as the current FOS/CIO arrangements is appropriate.

The ABA notes there has been support expressed in some quarters for a banking tribunal. The ABA would welcome further engagement on the form of external dispute resolution body that would best deliver simple, accessible and efficient dispute resolution for customers and small business.

Integration of existing structures

The ABA believes there may be merit in considering a partial rationalisation of the existing framework, merging the ASIC approved ombudsmen (FOS and CIO) into one body alongside the SCT on a statutory basis. This would recognise the overlaps in the corporate governance, funding and type of disputes processed by the Ombudsmen and the different set up and ambit of the SCT. There are certain differences in the empowerment, structure and effect of determinations between FOS/CIO and the SCT that would be complex to resolve. We note this reform would continue the consolidation of schemes, which has occurred in the past 15 years. We also note that FOS has an organisational structure with a chief ombudsman and lead ombudsman covering banking and finance, general insurance and investment and advice.

Scheme governance

To ensure the EDR scheme operates effectively and efficiently, and to ensure transparency and accountability, we suggest the EDR scheme governance arrangements take account of the following:

- *Performance and reporting:* We suggest clear performance benchmarks and key performance indicators (**KPIs**) should be set alongside a simple, public, reporting framework so FSPs, consumers and the government can be reassured that EDR is meeting its objectives in a cost effective and efficient manner. These KPIs should include efficiency and productivity measures and the principles in ASIC's *Regulatory Guide 139: Approval and oversight of external dispute resolution schemes* [RG139]⁹.

⁹ <http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-139-approval-and-oversight-of-external-complaints-resolution-schemes/>



- *Clarity, transparency and consistency:* Provisions should be made for publication of determinations and case studies on how the EDR has assessed and applied its jurisdiction.
- *Third party stakeholders:* The terms of reference should enable EDR schemes to involve and request available information from relevant third parties, where the information is relevant to proper determination of the case. Separately, the terms of reference should also allow for consideration of third party stakeholder interests, such as other customers and employees.
- *Funding model:* We suggest a funding model based on FSP user pays.

Internal processes and continuous improvement

To ensure the EDR scheme continues to meet the needs of consumers, we suggest the EDR scheme design takes account of the following:

- Regular internal hindsight reviews of case handling and determinations, including assessing alignment with terms of reference, precedent, jurisdiction and operating policy and process. The ABA suggests the findings should contribute to continuous improvement.
- Enhanced guidance for stakeholders on the rationale behind decisions, including greater transparency on the facts and considerations, the consideration of precedent to help ensure consistency of remediation outcomes and improve stakeholder understanding.
- Ensuring sufficient technical expertise in all areas including capacity to adapt to developments in products and services.
- Enabling a cooperative and efficient approach on matters where legal action has already commenced.
- Increased use of digital communications.

Jurisdiction

The ABA supports EDR schemes having an appropriate jurisdiction to consider and make determinations in relation to financial products and credit provided by a FSP to a small business. The standing of a small business should be assessed against a clear definition of 'small business' that takes into account:

- The number of employees;
- Business turnover;
- Size of the loan or investment for business purposes, and
- Total credit exposure of the business group.

The ABA suggests that a test is important to assess if the size of the business and its financial position mean the court system is better placed to adjudicate the dispute. This will improve the efficiency and access to EDR for small businesses and reflects the intention that EDR is an alternative dispute resolution process for disputes, other than those that are more suited to be heard in court.

There are a number of small business tests used for legal and commercial purposes. For this purpose, the ABA's submission to FOS on expanding the small business jurisdiction, proposes the following small business test.



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A business is not a small business if one of the following conditions is met:

- The number of employees is 20 people or more, or 100 people or more if the business is or includes the manufacture of good (full-time equivalent); or
- Annual business turnover is \$5 million or more; or
- Size of loan for business purposes is \$3 million or more; or
- Total credit exposure of the business group, including related entities, to all credit providers is \$3-\$5 million or more.

The ABA is seeking the opportunity to discuss this proposal further with FOS, in particular an appropriate total credit exposure condition.

The ABA's submission to FOS is available upon request.

Eligibility thresholds and monetary limits

The ABA supports an increase to the eligibility thresholds and monetary limits of EDR schemes to ensure EDR is accessible to customers and small business and compensation is meaningful, taking account of EDR's mandate to resolve disputes other than those that are more suited to be heard in court. We believe:

- Customers and small businesses should be able to bring complaints up to the value of \$1 million, and
- The EDR scheme should be able to make awards up to \$1 million.

The rationale for monetary limits on both the size of claims (eligibility threshold) and amounts of compensation (compensation cap) reflects the intention that EDR is an alternative dispute resolution process for small disputes. It has always been accepted that it is appropriate for larger disputes to continue to be resolved through the court system or private mediation.

Any move to increase the monetary limits should be taken with care and after due consideration of the effect of the existing limits. There is also a risk that higher monetary limits lead to more complexity, increased likelihood of adversarial approaches from the parties, and more risk for all parties in the event of error.

The ABA believes the eligibility thresholds and monetary limits proposed above strike the right balance.