

## Elements of Industry External Dispute Resolution Schemes (EDR)

The aim of this presentation is not to go through a detailed description of the industry external dispute resolution schemes. However, I want to cover some key characteristics of the schemes, and explain in general terms some of the similarities and differences between various schemes. The aim is to help those of you who are new to this to engage more effectively in today's proceedings, and to understand some of the jargon – and there's a bit of that!

### EDR or ADR?

External Dispute Resolution (**EDR**) or Alternative Dispute Resolution (**ADR**)? I'd like to take this opportunity to settle this once and for all – although this is just my view. While we have used the term ADR over the years, the problem is that ADR is also used to refer to a broad range of dispute resolution processes, including Tribunals, conciliation by Fair Trading agencies, and Court based ADR such as in family law matters. I'm concerned sometimes to hear various general debates about ADR that just don't apply to the industry schemes. With increasing emphasis on industry internal dispute resolution (**IDR**), I think it's time we all started referring to industry EDR (well, I'll try to remember to do this, but I can't promise!).

### Regulatory Underpinning of the Schemes

It's worth noting at this stage that the Superannuation Complaints Tribunal (**SCT**), which is represented here today, differs significantly from the other schemes, and the reason is that the scheme was established by Government - so it is a "regulatory" scheme. It hears complaints about superannuation, annuities and retirement savings accounts. While regulation impacts on other schemes in various ways, they are not actually established by Government.

So, what is the basis of the other schemes?

The Telecommunications Industry Ombudsman (**TIO**) is actually mentioned in the Telecommunications Act, which requires particular telecommunications service providers to become members. Other schemes are not named in legislation, however legislation, or licensing of various businesses requires those businesses to be a member of a dispute scheme that is approved by the regulator.

Energy and water retailers in Victoria and New South Wales (and I assume some other states) are required (either by legislation or as a licensing condition) to be a member of a dispute resolution scheme. In Victoria, for example, the scheme must be approved by the regulator – the Essential Services Commissioner.

Financial services that are licensed by ASIC are required to belong to an ASIC approved dispute resolution scheme. ASIC have a policy (PS139) that outlines the requirements a scheme must meet in order to be approved by ASIC. ASIC also have a policy (PS165) that covers IDR, and both these policies are currently under review.

Generally, membership of a scheme is compulsory for

- deposit taking institutions (such as banks),
- telecommunications providers,

- energy and water providers (in most states).

I was pleased to find out that timeshare companies also have to belong to a scheme.

One large exception is finance brokers and credit providers. However, it is worth noting that many brokers and credit providers (such as GE) are members of a scheme. Other significant members of the Banking & Financial Services Ombudsman are Collection House (debt collection) and Veda Advantage (credit reporting agency).

Most of the financial services schemes have co-operated to create a single, shared phone number that puts callers through to the appropriate scheme – this is done under the name of Financial Services Ombudsman (FOS).

### **Governance**

All the industry schemes are governed by Boards. Apart from the TIO and the Energy and Water Ombudsman NSW, these Boards have equal representatives of industry and consumers. The TIO & EWON have Boards with a majority of industry representation, but a Council with consumer representation. Many consumer advocates have concerns about this structure, and believe that the TIO should combine the Board and Council, as other schemes have done.

It's worth noting that because business can use these schemes, at least one "consumer" representative is likely to represent small business users. These Boards provide a level of independence for the schemes. They do not play a direct, or advisory, role in the complaints handling procedures.

### **Who Can Use the Schemes?**

I won't go through this in detail, only to mention that access to each scheme varies, but in many cases it is quite broad (for example by providing access to small, and often medium sized business). My advice is to check with the scheme if you're unsure. Most, if not all the schemes, have this type of information available on their websites.

Scheme access tends to cover "customers", but in some cases it is broader. For example, EWOV and EWON can hear complaints involving the impact of a decision such as cutting back trees on your property. The BFSO can hear complaints about Collection House or Veda Advantage, in cases where it is most unlikely that the complainant is a "customer" of that business.

However, in relation to insurance there are some gaps – for example consumers who are in dispute with an insurer, where the insurer claims that the consumer caused damage to the insured's vehicle, are not currently entitled to use the Insurance Ombudsman Scheme.

### **No Cost for Consumers**

This is a key feature of all the schemes, including the SCT.

### **Monetary Limits**

All Schemes have Terms of Reference, or Charters, that describe their jurisdiction. Upper monetary limits vary significantly between schemes, and as you can imagine,

these are of great interest to consumer advocates and the consumer directors on the Boards. Again, I refer you to the websites of the schemes.

### Determinations

All schemes have the power to make a Determination. While many schemes rarely, if ever, use this power, it is an important one. There is clear evidence that industry is generally more likely to co-operate if they know that a Determination can be made.

An SCT decision is binding on both parties. However, Determinations by the other schemes are only binding on the industry member (as long as the consumer accepts the Determination). If the consumer doesn't accept the Determination, the consumer can take the matter to a Court or Tribunal. While it is difficult to imagine this happening, our service has done this in one case.

Most schemes base their Determinations (and their approach to conciliation) on the "law, fairness and good industry practice". Exactly how these three should be balanced is a key question. "Good industry practice" means that the schemes can often base a decision on an industry code, even if the business involved hasn't signed up to the code.

Depending on the scheme, the Determination is made by an Ombudsman or by a Panel.

A determination by the SCT can be appealed to the Federal Court on a question of law.

Appeals against other schemes are limited – but there have been a few appeals lodged by industry members. This is another issue that raises concerns for scheme boards. It is unlikely that a consumer would want to appeal as the consumer has the power to reject a Determination.

### Conciliation, and informal processes

All schemes attempt to resolve matters through informal processes, and these processes vary between schemes.

### Reporting of Systemic Issues

I believe you will find that all schemes play a role in reporting systemic issues to the relevant regulator. The requirement to do so is based on an ASIC requirement, and/or as part of the schemes' Charters.

### Reviews

All schemes undertake regular or ongoing reviews, which include consultation with stakeholders, surveys of users and so on. This is a good opportunity for consumer representatives to have input. All the schemes have information about their past or current reviews on their websites, and if you are new to this area, these will provide much food for thought.

Carolyn Bond  
Consumer Action Law Centre  
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Financial Ombudsman Service (FOS) - telephone 1300 780 808 (local call rate).

Banking and Financial Services Ombudsman (BFSO)

Credit Ombudsman Service Ltd (COSL)

Credit Union Dispute Resolution Centre (CUDRC)

Financial Industry Complaints Service Ltd (FICS)

Insurance Brokers Disputes Ltd (IBD)

Insurance Ombudsman Service Ltd (IOS)

Superannuation Complaints Tribunal (SCT)

Financial Co-operative Dispute Resolution Scheme

Energy and Water Ombudsman Victoria (EWOV)

Energy and Water Ombudsman NSW (EWON)

Telecommunications Industry Ombudsman (TIO)