

Alternative Dispute Resolution Supplier Survey 2006

DEPARTMENT
OF JUSTICE

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Foreword

Alternative dispute resolution has been applied to an increasing range of disputes over the last few decades, providing quick, low cost, non-adversarial means for resolving disputes. This growing relevance to Victorians of alternative dispute resolution creates new challenges including the need to demonstrate the value of the sector and to address emerging issues for the sector.

The *Alternative Dispute Resolution Supplier Survey* is part of a broader project on alternative dispute resolution being undertaken by the Department. The project provides a means of focusing work within the Department on alternative dispute resolution to address policy commitments on alternative dispute resolution and identify new ways in which alternative dispute resolution can play a part in responding to challenges facing the justice systems.

The release of the *Alternative Dispute Resolution Supplier Survey* consolidates in one place descriptive and statistical data on the structure and operation of a cross section of suppliers.

The contents of the report will contribute to our understanding of the diverse and complex nature of alternative dispute resolution in Victoria, including schemes in the public and private sectors, regulatory agencies and agencies with the primary role of resolving disputes, both within and outside the court and tribunal system.

The survey shows participants in this survey received one million contacts from Victorians that resulted in some 31,000 cases undergoing non-determinative alternative dispute resolution processes during 2005-06.



PENNY ARMYTAGE

Secretary

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Summary of findings

Set out below are the key findings of a survey, conducted by the Department of Justice, of a selected group of providers of alternative dispute resolution services.

- Inquiries to ADR providers can generally be made by email, in writing, over the phone or in person. Complaints can generally be made the same ways, while only ten of the eighteen providers (55%) accept complaints lodged by phone, and the Magistrates' Court only allows in-person lodgement.
- Most respondents (15 or 83%) provide an information service and handle complaints. Fifteen respondents (or 83%) provide conciliation services, eight (44%) provide mediation services, four (22%) said that they provide an arbitration service and seven (39%) said that they can make binding decisions.
- A number of agencies provide other services, such as case management or referral to other services.
- Fifteen providers (83%) can make monetary awards, thirteen can reverse previous decisions (72%), five can order that an apology be made, three can order a refund of monies paid and one can direct that records be amended in the customer's favour.
- Seven schemes impose monetary limits on claims, nine have time limits, six schemes restrict claims to consumers, two schemes allow claims from small businesses, and fourteen have some connection to Victoria, in that at least one party must be Victorian based, or the transaction took place in this state.
- Membership is a licence condition for four industry ombudsman schemes.
- With the exception of Victoria Legal Aid and the AAMI Consumer Appeals Ombudsman (AAMI), all providers receive referrals from multiple sources, with Consumer Affairs Victoria (CAV) being a source of clients for four organisations.
- Five of the providers surveyed said that they regularly refer clients to CAV¹.
- Eight of the eighteen agencies surveyed follow-up in some way to see whether clients actually accessed the agency, they were referred to.
- Where referral audit results were available, these indicated that most clients did contact the agency they were referred to, with one agency, Dispute Settlement Centre Victoria (DSCV) also indicating that 48% of surveyed clients described the referral as helpful or very helpful.
- Ten (59%) agencies receive some form of government funding.
- None of the respondents directly charges for mediation services, although both the Magistrates' Court and the Victorian Civil and Administrative Tribunal (VCAT) charge filing fees. Where parties who are assisted by the Victorian Small Business Commissioner (SBC) chose to proceed to mediation, the mediators charge a fee, however, this is heavily subsidised by SBC.

¹ Although in its response to the survey, CAV cited many more sources of referrals.

- The five industry ombudsman schemes surveyed charge membership fees, with all basing the fee either on the number of complaints received or the stage to which a matter progresses.
- All five industry ombudsman schemes have boards of management comprising a mix of member and consumer representatives.
- ADR providers use a range of mechanisms to ensure their scheme is seen as impartial, including providing appropriate training to practitioners, allowing the parties to choose their own mediator, providing for a right of review, and using client feedback surveys.
- Mechanisms to address the potential power imbalance between the parties include the provision of interpreters, assisting parties to complete forms and allowing parties to have a representative of their choice.
- All 18 agencies use their own websites and use links to other relevant websites to promote their services; all except the Magistrates' Court use brochures, four use presentations, four use a newsletter, six use printed and three use electronic advertising, three use media releases and six have educational programs.
- Eleven agencies (61%) use surveys of some sort to assess public awareness of their service, but only three, the Accident Compensation Conciliation Service (ACCS), the Banking and Financial Services Ombudsman (BFSO) and the Financial Industry Complaints Service (FICS), assess awareness via an independent audit process.
- Not including English, agencies use a mix of 40 community languages to promote their services. The most frequently used languages being Arabic and Chinese (used by 14 agencies or 77% of respondents) followed by Vietnamese (13), and Greek, Italian and Turkish (12).
- Agencies use a range of measures to assess the quality of their performance including call monitoring, data collection and analysis, independent audits, surveys and peer reviews.
- Only four agencies have never conducted client surveys (AAMI, Legal Services Commissioner, Ombudsman Victoria and Victorian Privacy Commissioner).²
- In total, 16 of the 18 agencies handled just over one million enquiries and complaints in the 2005-06 financial year to 30 June 2006 - this does not include the Magistrates' Court of Victoria, as the size and multiplicity of jurisdictions of the Court make it impractical to provide service provision statistics specific to ADR processes.

² The Legal Services Commissioner is a relatively new organisation (see paragraph 2.8 below). Its predecessor, the Legal Ombudsman, did conduct client surveys and the Legal Services Commissioner advises that it may conduct surveys in the near future.

1. Introduction

- 1.1 Alternative dispute resolution (ADR) is now a key feature of the justice landscape. Citizens and businesses are increasingly turning to ADR as a way of avoiding expensive and time consuming court proceedings. Courts and tribunals have also recognised the benefits of ADR and are encouraging litigants and potential litigants to seek resolution of their differences through ADR mechanisms such as mediation and conciliation.
- 1.2 In 2004, the Victorian Government, through the Attorney-General's *Justice Statement*, committed itself to resolving civil disputes earlier. The *Gateways to Justice* initiative provided an integrated approach to dispute resolution to reduce the cost of justice.
- 1.3 In 2006 the Department of Justice included ADR among its strategic priorities.
- 1.4 This report forms part of a larger project on ADR by providing information on ADR services in Victoria.
- 1.5 Participants in the survey comprised selected industry and government providers of ADR services. Not all providers of ADR services to Victorians were included in the study.
- 1.6 Survey responses provide a snapshot of how ADR schemes operate in Victoria. Although the study by no means captured all ADR providers, a good cross-section is represented. Schemes are examined in both the public and private sectors, and a range of services, from pure mediation to arbitration are examined.

2. Methodology

- 2.1 The survey questionnaire was originally distributed to 18 agencies or individuals in October 2006. Seventeen responses were received. In addition, the Accident Compensation Conciliation Service (ACCS), an independent body corporate under the *Accident Compensation Act 1985*, was asked to complete a questionnaire. A list of respondents is at Appendix 3.
- 2.2 The questionnaire was designed by the Department of Justice (the department) in collaboration with Professor Chris Field as a follow-up to qualitative research conducted by Professor Field on behalf of the department. The questionnaire aimed to gather detailed information and data such as service delivery statistics and process descriptions including:
 - the agency's ADR processes
 - scheme scope, coverage and remedies
 - referral pathways
 - funding
 - research on clients and potential clients
 - service delivery statistics
 - quality assurance practices
 - staff qualifications and training.

- 2.3 The questionnaire was distributed by email in September 2006 and designed for electronic completion, however, respondents had the option of completing and submitting a hard-copy response if they wished to do so. A copy of the covering letter and questionnaire are at Appendix 1 and 2 respectively.
- 2.4 Where a questionnaire was completed and submitted, the response was, in most cases compiled by a person other than the individual interviewed by Professor Field. Accordingly, the questionnaire provided an opportunity to update or expand on information provided during the interviews.
- 2.5 A draft of this report was distributed to survey participants in December 2006. Participants were invited to provide feedback and additional data or information where it would improve the accuracy and comprehensiveness of the report.
- 2.6 For the purposes of the report, survey respondents are divided into three categories:
- Non-court regulator ADR:*
- Consumer Affairs Victoria (CAV)
 - Equal Opportunity Commission of Victoria³ (EOCV)
 - Legal Services Commissioner
- Court and tribunal ADR:*
- Magistrates' Court
 - Victorian Civil and Administrative Tribunal (VCAT)
- Non-court ADR:*
- AAMI Consumer Appeals Ombudsman
 - Accident Compensation Conciliation Service
 - Banking and Financial Services Ombudsman
 - Dispute Settlement Centre Victoria
 - Energy and Water Ombudsman (Victoria)
 - Financial Industry Complaints Service
 - Health Services Commissioner
 - Ombudsman Victoria
 - Public Transport Ombudsman
 - Telecommunications Industry Ombudsman
 - Victoria Legal Aid
 - Victorian Privacy Commissioner
 - Victorian Small Business Commissioner
- 2.7 It is important to note that the Legal Services Commissioner (LSC) is a new organisation established on 12 December 2005. Data on the LSC in this report covers the period 12 December 2005 to 30 June 2006. Data provided by the LSC should be seen in this context.

3. ADR processes

- 3.1 Respondents were asked to outline their agency's ADR process, detailing each step from the time an enquiry or complaint/new case was received until a matter is referred to a mediator or to another agency (Q2 and Q3).

³ On 1 January 2007 the Equal Opportunity Commission of Victoria became the Victorian Equal Opportunity and Human Rights Commission. For this report, the former name is used; being the name in existence when the survey was conducted.

3.2 The ACCS described its process as follows:

- request for conciliation received (usually from a worker following an adverse decision by a WorkCover agent or self insurer)
- matter referred to a conciliation officer
- conference conducted between the parties to attempt to resolve their differences
- if unresolved, court action may be required

3.3 Typical of the industry schemes is the Public Transport Ombudsman's (PTO) process:

- complaint received by letter / email / phone
- conciliator determines course of action – calls for scheme member's file and reviews file
- dialogue with member and complainant
- agreed settlement reached – matter may be referred to a formal conciliation hearing if necessary
- where conciliation fails a binding order may be made or the complaint may be dismissed

3.4 Respondents were also asked about their process for assigning matters to an ADR practitioner within the agency. Typically, matters were assigned by the CEO or a senior conciliator to an ADR-practitioner. Consumer Affairs Victoria (CAV) stated:

Complaints received by CAV are processed through CAV's First Line Enforcement Unit. Where a complaint is assessed as meeting CAV's Conciliation Policy it is assigned to CAV's Dispute Resolution Branch (DRB). Once received by DRB a team leader will usually assign the case to a conciliator. This assignment is generally based on the type of complaint and the industry to which it relates as conciliators within CAV's DRB specialise in certain industries, for example, car complaints.

3.5 The Telecommunications Industry Ombudsman (TIO) has a four-tier complaint classification structure:

- Level 1: Referral to TIO member
- Level 2: Settlement attempt
- Level 3: Formal investigation leading to a Determination or Direction
- Level 4: Formal investigation continues leading to a Determination or Direction

3.6 The LSC assigns matters to ADR-practitioners according to case load and expertise. The ACCS assigns matters to conciliation officers on the basis of random allocation.

3.7 Matters in the Magistrates' Court are allocated depending on whether they fall into the General Civil, Industrial Civil / Work Cover, or Family Violence categories.

General Civil: Written complaint filed: notice of defence filed – matter referred to pre-hearing conference (registrar or judicial registrar) or mediation-(registrar or other mediator) – case is resolved (registrar may make final orders by consent at pre-hearing conference – mediator must refer matter back to the court for orders) or is listed for arbitration or hearing.

Industrial Civil and Work Cover Civil: After defence is filed matter is referred to mediation or pre-hearing conference (judicial registrar or registrar) by a magistrate at a Directions hearing. – Case is resolved or is listed for Directions, arbitration or hearing. A small claims procedure under the Workplace Relations Act (Cwth) might apply.

Family Violence: referral process similar to the Industrial process (not pre-hearing conference). Dispute resolved or not resolved. Matter is returned to court for orders or is listed for hearing

- 3.8 Respondents were asked about the options available to persons wishing to lodge a complaint or enquiry with their agency (Q31). Responses are presented in Table 1.

Table 1
Q31 What options are available to persons wishing to lodge a complaint/claim or enquiry to your agency?

Enquiries Accepted By				ADR Agency	Complaints and Claims Accepted By			
Phone	Email	Letter	In Person		Phone	Email	Letter	In Person
REGULATOR ADR								
♦	♦	♦	♦	Consumer Affairs Victoria	♦	♦	♦	♦
♦	♦	♦	♦	Equal Opportunity Commission Victoria	-	♦	♦	♦
♦	♦	♦	♦	Legal Services Commissioner	-	-	♦	-
COURT AND TRIBUNAL ADR								
♦	-	♦	♦	Magistrates' Court	-	-	-	♦
♦	♦	♦	♦	Victorian Civil and Administrative Tribunal	-	♦	♦	♦
NON-COURT ADR								
♦	♦	♦	♦	AAMI Consumer Appeals Ombudsman	♦	♦	♦	-
♦	♦	♦	♦	Accident Compensation Conciliation Service	♦	♦	♦	♦
♦	♦	♦	♦	Banking and Financial Services Ombudsman	♦	♦	♦	♦
♦	♦	♦	♦	Telecommunications Industry Ombudsman	♦	♦	♦	♦
♦	♦	♦	♦	Financial Industry Complaints Service	-	♦	♦	♦
♦	♦	♦	♦	Energy and Water Ombudsman (Victoria)	♦	♦	♦	♦
♦	♦	♦	♦	Public Transport Ombudsman	♦	♦	♦	♦
♦	♦	♦	♦	Health Services Commissioner	-	Note 1	♦	♦
♦	♦	♦	♦	Victorian Small Business Commissioner	♦	♦	♦	♦
♦	♦	♦	♦	Dispute Settlement Centre Victoria	♦	♦	♦	♦
♦	♦	♦	♦	Ombudsman Victoria	♦	♦	♦	♦
♦	♦	♦	♦	Victoria Legal Aid	Not applicable – see footnote ⁴			
♦	♦	♦	♦	Victorian Privacy Commissioner	-	♦	♦	♦
18	17	18	18	Total	10	15	16	15

Table Note 1: Complaints can be sent via email but the Health Services Commissioner will contact the complainant to ask for a signed authorisation before the complaint is accepted.

Making an information inquiry

- 3.9 As Table 1 illustrates, all respondents adopt a highly flexible approach to enquiries with all but one reporting that they are willing to receive information requests by phone, email, letter and in-person.

Lodging complaints or claims

- 3.10 Respondent agencies adopt a slightly less flexible approach to the lodgement of complaints or claims, although the majority accept complaints and claims by email, mail or in-person and over half (10) accept lodgement by phone. The Magistrates' Court will only accept complaints that are lodged in-person.
- 3.11 Unwillingness to accept phone lodgement may be due, in some cases, to a requirement that supporting documentation be supplied by complainants.

4. ADR services

- 4.1 Respondents were asked (Q4) to list the dispute resolution services they provide using six categories, including an "other, please specify" option – Table 2.

⁴ Victoria Legal Aid did not indicate how claims or complaints could be lodged as this question is not directly relevant to the organisation's operations. The question assumed that the organisation is complaint-based, which VLA is not.

- 4.2 The majority of respondents said that they provide a range of ADR services with limited scope for arbitration or binding determinations:
- all respondents, other than VCAT and ACCS, provide an *information* service
 - all respondents, other than VCAT, ACCS and VLA, provide *complaint handling* services
 - all respondents, other than the Victorian Ombudsman, provide a *mediation* or *conciliation* service. Five respondents said that they provide both conciliation and mediation services.

Table 2
Q4: What types of ADR service does your agency provide?

ADR Supplier	Information	Complaint Handling	Mediation	Conciliation	Arbitration	Other
REGULATOR ADR						
Consumer Affairs Victoria	◆	◆	◆	◆	-	◆
Equal Opportunity Commission Victoria	◆	◆	-	◆	-	-
Legal Services Commissioner	◆	◆	◆	◆	-	-
COURT AND TRIBUNAL ADR						
Magistrates' Court	◆	◆	◆	-	◆ Note 1	◆
Victorian Civil and Administrative Tribunal	-	-	◆	◆	◆	-
NON-COURT ADR						
AAMI Consumer Appeals Ombudsman	◆	◆	-	◆	-	-
Accident Compensation Conciliation Service	-	-	-	◆	◆ Note 2	-
Banking and Financial Services Ombudsman	◆	◆	-	◆	-	◆
Dispute Settlement Centre Victoria	◆	◆	◆	-	-	◆
Energy and Water Ombudsman (Victoria)	◆	◆	-	◆	-	◆
Financial Industry Complaints Service	◆	◆	◆	◆	◆	◆
Health Services Commissioner	◆	◆	◆	◆	-	-
Ombudsman Victoria	◆	◆	-	-	-	-
Public Transport Ombudsman	◆	◆	-	◆	-	-
Victorian Small Business Commissioner	◆	◆	◆	◆	◆	-
Telecommunications Industry Ombudsman	◆	◆	-	◆	-	◆
Victoria Legal Aid	◆	-	-	◆	-	◆
Victorian Privacy Commissioner	◆	◆	-	◆	-	-
Total	16	15	8	15	4	8

Table Note 1: The Magistrates' Court may use arbitration to settle civil claims. The Court does not consider this process to be an ADR strategy.

Table Note 2: ACCS indicated that they exercise powers that are closer to arbitration, for example, the power to make directions in matters where there is no arguable case.

- 4.3 The absence of a widely accepted set of definitions for many ADR terms, including "mediation" and "conciliation" made framing Q4 problematic. The National Alternative Dispute Resolution Advisory Council (NADRAC), an advisory body to the Commonwealth Attorney-General, has published a glossary of ADR terms. In NADRAC's view, mediation is a purely facilitative process, whereas conciliation may comprise a mix of processes including facilitation and advice. NADRAC notes, however, that both terms are used to refer to a wide range of processes and that overlap in their usage is inevitable (NADRAC: Dispute Resolution Terms. September 2003).

- 4.4 To assist respondents to differentiate between mediation and conciliation, the questionnaire defined mediation as a process "where the mediator has no advisory or determinative role".

Provision of arbitration services

- 4.5 Only four organisations, the Magistrates' Court, VCAT, the Victorian Small Business Commissioner (SBC) and the Financial Industry Complaints Service (FICS) indicated that they provide "arbitration" services. However, the TIO said that it provides "binding determinations/directions" and the Banking and Financial Services Ombudsman (BFSO) said that it can make determinations that bind members. The

LSC pointed out that if they are not successful in resolving a dispute, arbitration can take place at VCAT. ACCS responded that they can give directions in matters where there is no arguable case.

- 4.6 Arbitration in the Magistrates' Court is a determinative process and gives rise to a final order in a proceeding. Subject to the provisions of s.102(3) of the Magistrates' Court Act 1989, the Court must refer all matters where the value of the amount of a claim in dispute is less than \$10,000.00 to arbitration before a Magistrate. In claims where the amount in dispute is less than \$5,000.00 a Judicial Registrar may arbitrate. An arbitration need not be conducted in a formal manner and the Court (Judicial Registrar or Magistrate) is not governed by the rules of evidence. The Court may exercise any of the powers of the Court that may be exercised at a hearing.
- 4.7 In short the Civil Arbitration process is a determinative one, where a judicial officer makes a final determination/order. It is not considered by the Magistrates' Court to be an Alternative Dispute Resolution strategy.
- 4.8 The varied responses suggest some agencies may have interpreted "arbitration" in a narrow sense, excluding determinative powers held by many industry ombudsman schemes. Alternatively, some agencies may be mindful of the fact that arbitration/determination powers are rarely exercised, for example, The Energy and Water Ombudsman (Victoria) (EWOV) stated that it is very rare for a matter to proceed to the binding decision stage. The BFSO advised that while it has the power to make Determinations they are binding on members only, accordingly it does not engage in arbitration services.

Other ADR services

- 4.9 Some respondents indicated that they provide "other" ADR services.

Table 3
Q4: What types of ADR service does your agency provide? – "Other" responses

ADR Supplier	"Other" Services
Banking and Financial Services Ombudsman	BFSO may make a Finding, which can be accepted or rejected by the member or the disputant. If a Finding is not accepted by one or both parties, BFSO can make a Recommendation to the parties, which can be accepted or rejected by either party. If a Recommendation is rejected by a member, BFSO can make a Determination that is binding on the member but the Determination will not bind the disputant.
Consumer Affairs Victoria	Education, coaching businesses on how to deal with problems, ongoing trader liaison, contracted advocacy assistance for vulnerable and disadvantaged consumers, proactive action where trends in industry problems are identified, and policy formulation via legislation and codes of practice, and consumer representative actions at VCAT in cases seen to be in the public interest pursuant to s105 of the <i>Fair Trading Act 1999</i> .
Dispute Settlement Centre Victoria	Assisted settlements. Facilitation service to organisations, for example, local govt
Energy and Water Ombudsman (Victoria)	Referral
Financial Industry Complaints Service	Shuttle negotiation, where the case manager facilitates contact negotiation between the parties to generate resolution to the complaint by mutual agreement. Full day complaint handling workshops for members to educate them on good complaint handling processes, with a view to facilitating early resolution of complaints (prior to escalation to external ADR scheme).
Magistrates' Court	Pre-hearing conference, usually convened by a registrar
Telecommunications Ind Ombudsman	The TIO may make binding determinations/directions and make recommendations.
Victoria Legal Aid	Case management, professional advice, education, referral

5. Remedies

5.1 Question 22 asked respondents to identify the types of remedy available to complainants under their scheme. Three response categories were provided:

- monetary compensation
- reversal of the decision that is the subject of the dispute
- other, please describe.

Table 4

Q22: What are the main remedies available to applicants/complainants?
Q23: Are your agency's decisions legally binding?

ADR Supplier	Monetary	Decision reversal	Other Remedies	Are decisions legally binding?
REGULATOR ADR				
Consumer Affairs Victoria	◆	◆	Refund on money, repairs and action to fix a problem, replacement of goods	Note 1
Equal Opportunity Commission Victoria	◆	◆	Apology. Change to policy. Provision of training. Withdrawal of vilifying publications. Provision of previously denied services. Flexible work arrangements.	◆ Note 2
Legal Services Commissioner	◆	-		◆ some
COURT AND TRIBUNAL ADR				
Magistrates' Court	◆	◆	Injunction, recovery of property and money, directions, and determinations of questions	◆
Victorian Civil and Administrative Tribunal	◆	◆		◆
NON-COURT ADR				
AAMI Consumer Appeals Ombudsman	-	◆	-	-
Accident Compensation Conciliation Service	◆	◆	-	Note 3
Banking and Financial Services Ombudsman	◆	◆	Non-monetary orders, for example, a direction to remove a credit listing	
Telecommunications Industry Ombudsman	◆	◆	Resolve complaints by ordering: compensation, provision of a carriage or other service, that the member not impose a charge, that a directory entry be omitted or amended, undertake corrective work, amend or correct records, or ordering that the member do or cease to do an act.	Note 4
Financial Industry Complaints Service	◆	◆	Change to policy/procedure. Provision of previously denied service. Release from contractual obligation. Refund of fees or other monies paid. Interest on monetary awards. Provision of free independent financial or medical opinions or evidence. Reviews of financial plan or investment advice. Confidential mutually agreed resolutions (at conciliation stage).	Note 5
Energy and Water Ombudsman (Victoria)	◆	◆	Billing adjustments, debt reductions and waivers, fee waivers, apologies, provision of service, for example, special meter reading, establishment of payment plans, payments in recognition of customer service issues	Note 6
Public Transport Ombudsman	◆	◆	May order members to do or refrain from action or service provision	Note 7
Health Services Commissioner	◆	◆	Explanation, including access to expert advice. Apology. Changes to policy or procedure. Refund of fees. Non-case compensation, for example, hospital bed at home	-
Victorian Small Business Commissioner	-	-	Agreed commercial outcome or a specific performance of an obligation	-
Dispute Settlement Centre Victoria	-	-	Refund of money, return of goods, apology, process for future communications	-
Ombudsman Victoria	◆	◆	Apology. Issue addressed. Action expedited. Change to policy, practice or procedure	-
Victoria Legal Aid	◆	-	Resolution of interpersonal family law disputes	Note 8

ADR Supplier	Monetary	Decision reversal	Other Remedies	Are decisions legally binding?
Victorian Privacy Commissioner	♦	-	Change/improve information handling policies or practices. Apology or express regret	-
Total "yes" responses	15	13		4

Table Note 1: Not binding but settlements can be formalised through a written contract

Table Note 2: Under s115 of the *Equal Opportunity Act 1995* a written record of an agreement reached through conciliation may be registered with VCAT, and once registered must be taken to be a VCAT order and may be enforced accordingly.

Table Note 3: ACCS has no enforcement arm, but the parties may take court action.

Table Note 4: Answered "yes" but in Q24 below described an enforcement mechanism that is not legally binding on all parties.

Table Note 5: Answered "yes" but in Q24 below described an enforcement mechanism that is not legally binding on all parties.

Table Note 6: Answered "yes" but in Q24 below described an enforcement mechanism that is not legally binding on all parties.

Table Note 7: Answered "yes" but in Q24 below described an enforcement mechanism that is not legally binding on all parties.

Table Note 8: Not binding but settlements can be formalised through a written contract entered through the parties drafting consent orders, which are then lodged in court

5.2 Almost all respondents said the remedies available to them include monetary compensation and reversal of the decision that instigated the complaint. 5.3 A range of "other" remedies were cited and are summarised in Table 5.

Table 5

Q22: What are the main remedies available to applicants/complainants? - "Other" Responses

Remedy	Agency
Access to expert advice	Health Services Commissioner
Agreement on future communications	Dispute Settlement Centre Victoria
Amendment to records in customer's favour	Banking and Financial Services Ombudsman Telecommunications Industry Ombudsman
Apology	Dispute Settlement Centre Victoria Health Services Commissioner Equal Opportunity Commission Victoria Ombudsman Victoria Victorian Privacy Commissioner
Bill waiver or adjustment	Energy and Water Ombudsman (Victoria) Telecommunications Industry Ombudsman
Donation to charity	Equal Opportunity Commission
In-kind compensation	Health Services Commissioner Equal Opportunity Commission Victoria
Order to do or refrain from doing something	Public Transport Ombudsman Telecommunications Industry Ombudsman
Payment plan	Energy and Water Ombudsman (Victoria)
Procedural change/change to policy	Health Services Commissioner Equal Opportunity Commission Victoria Ombudsman Victoria Victorian Privacy Commissioner
Provision of previously denied service	Equal Opportunity Commission Victoria Telecommunications Industry Ombudsman
Refund of fees or other monies paid	Health Services Commissioner Consumer Affairs Victoria Magistrates' Court
Release from contractual obligation	Financial Industry Complaints Service
Repair or replacement of good	Consumer Affairs Victoria
Return of goods	Dispute Settlement Centre Victoria Magistrates' Court
Withdrawal of offending material/publication	Equal Opportunity Commission Victoria

Are agency decisions legally binding?

5.4 At Q23 respondents were asked about enforcement. Agencies were first asked about whether their decisions could be enforced in a court of law by the applicant. If answered in the affirmative, respondents were next asked (Q24): "How are your agency's decisions enforced?"

- 5.5 A number of respondents answered in the affirmative to Q23, and described a process for enforcement that did not involve a legally binding mechanism. In other words, the decision was binding on members but through a mechanism other than the public law. Whilst there may have been legal implications for the member, such as action by the regulator affecting the member's licence to operate in the industry, the consumer had no enforceable rights. This is explained in more detail in Table 6.
- 5.6 FICS stated that decisions bind the member but not the consumer. This is also the case with other industry-based schemes.
- 5.7 HSC stated that its decisions are not legally binding, but noted that agreements reached by the parties that involve compensation, or refunds of fees, are enforced by release documents. Where a settlement involves procedural changes, the HSC monitors implementation - if it is not satisfied as to the appropriateness of this, it may re-open or investigate the matter.
- 5.8 The LSC stated that some of its decisions are binding. This is where a formal mediation agreement is lodged at the Magistrates' Court.

Table 6
Q24: How are your agency's decisions enforced?

ADR Supplier	How are decisions enforced?
REGULATOR ADR	
Consumer Affairs Victoria	Conciliation outcomes are not enforceable; however, cases may be referred to VCAT for arbitration. Complaints that identify potential breaches of law may be escalated for compliance action. In this regard, the level of detriment to a consumer and the likelihood of further complaints being received are factors in determining whether a case is appropriate for further action.
Equal Opportunity Commission Victoria	Not applicable
Legal Services Commissioner	Through the Magistrates' Court (formal mediation agreement is lodged)
COURT AND TRIBUNAL ADR	
Magistrates' Court	Not answered
Victorian Civil and Administrative Tribunal	Court orders and contempt orders
NON-COURT ADR	
AAMI Consumer Appeals Ombudsman	Not applicable
Accident Compensation Conciliation Service	Not applicable
Banking and Financial Services Ombudsman	Failure of the member to abide by a decision will be reported to ASIC, which may have consequences for the member's licence
Telecommunications Industry Ombudsman	Through the Australian Communications and Media Authority
Financial Industry Complaints Service	Non-compliance may result in expulsion from the scheme. Instigate court proceedings against the member to enforce a Determination or Adjudication or to confirm that a complaint is within jurisdiction. Negotiate with the member to ensure a Determination or Adjudication is fully complied with.
Energy and Water Ombudsman (Victoria)	Failure by a member to abide by a decision is a breach of the scheme requirements and of the licence, legislative or industry code obligations relating to participation in the scheme
Public Transport Ombudsman	Members bound to abide by decision according to Constitution and Charter. Failure to abide by decision could lead to expulsion from scheme
Health Services Commissioner	Agreements between the parties that involve compensation or refunds of fees are enforced by release documents. Agreements regarding policy/procedural changes into the future are reviewed or checked by senior conciliators at the relevant time, often following closure of the matter. If the changes are not implemented to the satisfaction of the complainant and the Commissioner, the matter maybe reopened or investigated by the Commissioner
Victorian Small Business Commissioner	Not applicable
Dispute Settlement Centre Victoria	Agreements are not generally legally binding and provisions on the Evidence Act make it difficult for agreements to be entered in evidence in Court. Parties can make agreements legally binding but all common law requirements for a contract need to be met and parties have to consent to agreement being admissible in Court
Ombudsman Victoria	Not applicable

<i>ADR Supplier</i>	<i>How are decisions enforced?</i>
Victoria Legal Aid	Not applicable
Victorian Privacy Commissioner	Not answered

Appeal processes

5.9 Participants were next asked about appeal processes (Q25).

5.10 Decisions by industry-based ADR agencies in particular are not binding on the consumer-applicant, but bind the scheme member, to varying degrees, and with limited or no right of appeal.

Table 7

Q25: What appeal or process is available to applicants and/or respondents dissatisfied with a decision?

<i>ADR Supplier</i>	<i>Appeal or Review Processes Available</i>
REGULATOR ADR	
Consumer Affairs Victoria	A party who is dissatisfied with CAV can seek review through the internal review process or can lodge a complaint for investigation with the Ombudsman. Where a systemic issue is identified in a complaint CAV will monitor for further complaints of this nature against the respondent and in the industry at large. Detailed statistical reports are generated regularly to help collate such information. Where such are identified CAV will sometimes undertake additional actions, e.g. provide media warnings or develop fact sheets for public distribution.
Equal Opportunity Commission Victoria	Where a matter is not settled through EOCV processes, a party may seek to have the matter referred to VCAT for hearing.
Legal Services Commissioner	If a civil dispute is not resolved by the LSC, the parties are advised of their rights to go to VCAT.
COURT AND TRIBUNAL ADR	
Magistrates' Court	Not applicable
Victorian Civil and Administrative Tribunal	Appeal to Supreme Court with leave
NON-COURT ADR	
AAMI Consumer Appeals Ombudsman	Customer has right of appeal to the industry ombudsman
Accident Compensation Conciliation Service	Not applicable
Banking and Financial Services Ombudsman	A Finding by a Case Manager may be appealed by the applicant or member for a Recommendation by the Ombudsman. If a Recommendation is not accepted by the member, a Determination may be made by the Ombudsman. The applicant may choose to reject a Recommendation and have the matter determined by a Court or Tribunal (if such a forum is available). Although the law in this area is not settled, there may be some scope for appeal by a Member to a Court on the basis of a breach of administrative law principles
Dispute Settlement Centre Victoria	Not applicable
Energy and Water Ombudsman (Victoria)	EWOV's power to make binding decisions has been tested in the Supreme Court. The Court upheld the power.
Financial Industry Complaints Service	Formal Determinations and Adjudications are binding on the member and there is no formal right of appeal. However, there are certain steps available to both the member and complainant where they are dissatisfied with the formal decision made by FICS. They are: the consumer can decline to accept the Determination/Adjudication and pursue their complaint in another forum (for example, a court, but not usually another EDR scheme); In limited circumstances, a review can take place at the request of either the member or complainant. These generally concern areas of procedural fairness; and FICS has its own internal dispute resolution (IDR) process that both parties may access.
Health Services Commissioner	Parties can appeal to the Ombudsman about process. Appeals can be made to VCAT in relation to the Health Records Act.
Ombudsman Victoria	Not applicable
Public Transport Ombudsman	No formal appeal process but either party has the right to seek an internal review
Victorian Small Business Commissioner	Not applicable
Telecommunications Industry Ombudsman	Internal review only. No right of appeal against binding decisions
Victoria Legal Aid	Not applicable
Victorian Privacy Commissioner	Complainant can ask that a matter be referred to VCAT

6. Jurisdictional limitations

- 6.1 Respondents were asked whether there were any restrictions or limits on accessing their service (Q5). Most providers impose some form of limit on using their scheme. Many of the industry schemes have adopted a monetary limit although in some cases, binding determinations can be made up to a certain value, with non-binding determinations applying above that amount.
- 6.2 In all, seven services feature a monetary limit (including all industry ombudsman schemes) and eight impose time limits (including six of those with monetary limits). The Office of the Victorian Privacy Commissioner has a 45-day limit, from the time the complainant became aware of the alleged breach, but applications outside this limit can still be made to VCAT. The ACCS requires that a request for conciliation be lodged within 60 days, although the Senior Conciliator may grant an extension.
- 6.3 Respondents were also asked whether there were other limitations, such as only taking complaints from consumers. Industry ombudsman schemes such as the TIO and EWOV only accept complaints from consumers; however, the BFSO also accepts complaints from small businesses.

Table 8
Q5: Does your agency impose any restrictions or limits on access to your ADR services?
Q6: What geographic area does your agency service?

ADR Supplier	Yes Monetary Limit	Yes Time Limit	Yes – Consumer Applications Only	Service Area – Victoria Only
REGULATOR ADR				
Consumer Affairs Victoria	-	-	-	Note 1
Equal Opportunity Commission Victoria	-	◆	-	◆
Legal Services Commissioner	◆	◆	Note 2	Note 3
COURT AND TRIBUNAL ADR				
Magistrates' Court	◆	-	-	◆
Victorian Civil and Administrative Tribunal	-	-	-	◆
NON-COURT ADR				
AAMI Consumer Appeals Ombudsman	-	-	◆	-
Accident Compensation Conciliation Service	-	◆	-	◆
Banking and Financial Services Ombudsman	◆	◆	Note 4	-
Dispute Settlement Centre Victoria	-	-	-	◆
Energy and Water Ombudsman (Victoria)	◆	Note 5	◆ Note 6	◆
Financial Industry Complaints Service	◆	◆	◆	-
Health Services Commissioner	-	Note 7	◆	◆
Ombudsman Victoria	-	-	-	◆
Public Transport Ombudsman	◆	◆	◆	◆
Victorian Small Business Commissioner	-	-	Note 8	Note 9
Telecommunications Industry Ombudsman	◆	◆	◆	-
Victoria Legal Aid	-	-	-	Note 10
Victorian Privacy Commissioner	-	Note 11	-	◆

Table Note 1: Some extra-territorial power (see paragraph 6.5)

Table Note 2: Civil complaints can be accepted only from consumers but complaints relating to a disciplinary matter can be accepted from anyone.

Table Note 3: Complaints can be accepted from any location, but the practitioner must be Victorian.

Table Note 4: Accepted from small businesses also.

Table Note 5: The EWOV has discretion to take complaints outside the jurisdictional time limits.

Table Note 6: EWOV defines "Consumer" as the direct consumer as well as third parties affected by the member's action.

Table Note 7: Consumer may authorise an agent or a third party, where the consumer is unable to complain.

Table Note 8: One party must have a connection with Victoria.

Table Note 9: One party must be a small business. Restrictions on consumer related and industrial relations matters.

Table Note 10: One party must have a connection with Victoria.

Table Note 11: But discretion to hear if lodged outside limit.

- 6.4 In terms of geographic coverage (Q6), thirteen respondents service Victoria only, or require that there be a connection to Victoria.
- 6.5 CAV, whilst primarily a Victorian body, has extra-territorial jurisdiction under the *Fair Trading Act 1999*. CAV has jurisdiction where the business is based in Victoria or where the good or service is supplied to Victoria, regardless of the consumer's or business's location.
- 6.6 Victoria Legal Aid (VLA), through its Roundtable Dispute Management facility, will allow applications provided that at least one of the parties is eligible for legal aid in Victoria. The other party can reside anywhere else, even in another country.
- 6.7 The jurisdiction of the Victorian Privacy Commissioner is limited to the Victorian public sector, but a complainant need not be resident in Victoria.
- 6.8 The SBC has jurisdiction provided that one of the parties has a connection with the state of Victoria. Similarly, the LSC can accept a complaint from anywhere provided the practitioner is based in Victoria.
- 6.9 Some ADR providers impose other limitations on the service. The Dispute Settlement Centre Victoria (DSCV) assesses each application for suitability for mediation, where the client wishes to progress the matter further.
- 6.10 CAV also screens enquiries before assuming a matter is within its jurisdiction and to determine its suitability for dispute resolution action.

CAV has a Conciliation Policy that details a number of criteria that determine whether a complaint is suitable for further action. These criteria include:

- Is the matter likely to be settled?
- Is the matter within CAV's jurisdiction?
- How serious is the matter?
- Does the matter involve a breach of legislation better dealt with by compliance or enforcement action?
- Are there other or better ways to deal with the matter?

However these criteria are guidelines only. CAV has over-arching goals that allow flexibility and may provide additional grounds for action, for example, its consumer protection, market regulation and public interest roles.

- 6.11 VCAT assesses which cases are suited to ADR before assigning them to a case manager.
- 6.12 Both FICS and the BFSO only accept complaints made against members of the scheme. FICS and the BFSO will not investigate matters already before a court, tribunal, arbitrator, independent conciliation body or a statutory ombudsman, unless all parties consent. Although it indicated that it has never exercised this discretion, the BFSO can also decline applications from "very wealthy individuals".

7. Scheme membership

- 7.1 At Q7, respondents were asked whether membership of their scheme is a condition of a licence.
- 7.2 Most industry ombudsman schemes proved to be voluntary with only four respondents indicating that membership was a licensing condition:
- Financial Industry Complaints Service
 - Banking and Financial Services Ombudsman⁵
 - Public Transport Ombudsman Victoria
 - Energy and Water Ombudsman (Victoria)⁶.
- 7.3 Under the *Telecommunications (Consumer Protection and Service Standards) Act 1999* telecommunications industry participants are required to join the TIO scheme.
- 7.4 At Q8 the questionnaire asked respondents, where scheme membership is NOT a licence requirement, to describe any entitlements or benefits enjoyed by scheme members. Only EWOV responded to Q8, saying:

All EWOV scheme participants receive a range of services including: monthly case reports, induction training, invitations to Internal Dispute Resolution training, and invitations to briefings prior to the release of newsletters and Annual Reports. Members also have the right to elect industry directors on the Board.

8. Referral pathways

- 8.1 Question 9 asked respondents about the agencies that refer clients to their service and elicited the wide range of responses summarised in Table 9.

Table 9
Q9: List the names of the agencies that commonly refer clients to your service

Referring Agencies	SBC	EWOV	BFSO	AAMI	VPC	DSCV	HSC	OV	TIO	CAV	LSC	EOCV	FICS	ACCS
ACCC	◆	-	-	-	-	-	-	-	◆	◆	-	-	-	-
Community Groups	-	◆	-	-	-	-	◆	◆	-	◆	-	-	-	-
Community Legal / Advice Centre	-	-	◆	-	-	◆	◆	-	◆	◆	◆	◆	◆	-
Consumer Affairs Dept	◆	◆	◆	-	-	-	◆	-	◆	-	-	-	-	-
Courts/VCAT	-	-	-	-	-	-	◆	-	-	◆	-	-	-	-
Government Dept or Authority	◆	◆	◆	-	◆	-	◆	-	◆	◆	-	◆	-	-
Industry /Prof Body	◆	-	-	-	-	-	◆	-	◆	◆	-	-	-	-
Victoria Legal Aid	-	-	-	-	-	◆	◆	-	-	-	◆	-	◆	-
Local government	◆	-	-	-	-	◆	◆	-	-	◆	-	-	-	-
Members of Parliament	◆	◆	-	-	-	-	◆	◆	-	◆	-	-	-	-
Ombudsman Victoria	-	-	-	-	◆	-	◆	-	-	◆	-	-	-	-
Other Ombudsman /	-	-	◆	◆	-	-	◆	-	-	◆	-	-	-	-

⁵ Financial service providers are subject to a licence condition that requires them to belong to an external dispute resolution (EDR) scheme that is approved by ASIC. There are a number of approved EDR schemes that are applicable to different financial service providers within the broader financial services industry. These include the BFSO, FICS, the Insurance Ombudsman Service, the Credit Ombudsman Service Ltd, the Insurance Brokers Disputes Ltd, the Superannuation Complaints Tribunal and the Credit Union Dispute Resolution Service.

⁶ EWOV advised that scheme membership is a licence requirement for electricity, gas and metropolitan water providers and those non-urban water providers are required by legislation to participate in an approved dispute resolution scheme (EWOV being the appointed body). LPG retailers have a voluntary industry code. Retailers that volunteer to comply with the code are obligated to participate in the EWOV scheme

Referring Agencies	SBC	EWOV	BFSO	AAMI	VPC	DSCV	HSC	OV	TIO	CAV	LSC	EOCV	FICS	ACCS
Complaint Handling Scheme														
Police	-	-	-	-	-	◆	-	-	-	-	-	◆	-	-
Regulator (including ASIC)	-	◆	-	-	-	-	◆	-	◆	◆	-	-	-	-
Legal practitioner														◆
Union														◆
Self referral														◆
Welfare Agency / Financial Advisor	-	◆	◆	-	-	-	◆	◆	-	◆	-	-	◆	-

- 8.2 As this table shows, organisations receive referrals from various sources. Only two organisations, VLA and AAMI, nominated a single referral source. VLA reports that due to the way the organisation operates, all of its referrals come from lawyers. A lawyer will submit an application for legal assistance to the VLA on behalf of their client. VLA applies a means and merit test to determine eligibility, and if appropriate, the matter is then referred to Roundtable Dispute Management. Only one party need be eligible for legal assistance for a referral to be made.
- 8.3 DSCV reported that an increasing number of its clients are self-referred from the internet and directories.
- 8.4 Respondents were also asked to which agencies they commonly refer callers who fall outside their own jurisdiction (Q10).

Table 10
Q10: List the agencies to which you commonly refer clients who fall outside the jurisdiction or scope of your agency (Table Note 1)

Refer To	No of Responses
ACCC	3
ASIC	1
Community Legal Centre or Information Centre	2
Consumer Affairs or Fair Trading Dept	6
Court or tribunal	4
Dispute Settlement Centre Victoria	2
Equal Opportunity Commission Victoria	4
Government department or authority	5
Institute of Arbitrators and Mediators Australia	1
Victoria Legal Aid	2
Local government	2
Ombudsman Victoria	4
Other Ombudsman or complaint handling scheme	6
Regulator	3
Welfare agency/financial advisor	2

Table Note 1: Not all agencies responded to this survey item. Many of those who did respond provided a listing that was broader than “agencies that commonly refer”, that is, all sources of clients were cited including self-referral. Where the information provided is outside the scope of the question it has not been included in the table.

- 8.5 Not surprisingly, there are fewer agencies to which callers are referred, as opposed to the sources of initial enquiries. ACCS does not refer clients to other agencies. VCAT indicated that it does not refer callers to other agencies, with the exception of CAV. An automated switching system diverts callers to CAV who are seeking advice on tenancy or consumer protection.
- 8.6 Looking at the organisations surveyed, CAV was a source of clients and a key referral point for a number of organisations. Further, CAV stated that it refers clients to organisations not participating in this survey, and similarly, receives large numbers of referrals from such bodies. For example, CAV receives significant numbers of

referrals from financial counsellors and contracted advocacy service providers, for example, the Tenants Union of Victoria.

- 8.7 CAV nominated its sources of referred clients to include other State Government departments, the Ombudsman Victoria, VCAT, Members of Parliament, regulators, estate agents and industry bodies such as the Royal Automobile Club of Victoria.
- 8.8 Whilst the survey helped paint a picture of how referrals work amongst a select group of organisations, further research may better illustrate why referrals are made to some organisations and not others.
- 8.9 Question 11 asked respondents whether they checked to see if clients do access an agency to which they have been referred, responses are summarised in Table 11.
- 8.10 Eight agencies said that they do some form of regular or periodic follow-up to determine whether clients act on referrals to other agencies including:
- EWOV who sometimes phone the other agency, explain the customer's issue and ask the agency to call the customer directly
 - the Magistrates' Court which checks referrals periodically through active case management
 - VLA, which follows up those clients where it was necessary for them to access a service as part of the case management process. This would include vulnerable clients; that is, those with low literacy or language difficulties
 - FICS who reports that it follows up referrals, particularly when the client is referred to another ombudsman scheme.

Table 11

Q11: Does your agency follow up to ensure that clients accessed the agency to which they were referred?

ADR Supplier	No	Yes – occasionally/periodically	Yes - always
REGULATOR ADR			
Consumer Affairs Victoria	♦	-	-
Equal Opportunity Commission Victoria	♦	-	-
Legal Services Commissioner	♦	-	-
COURT AND TRIBUNAL ADR			
Magistrates' Court	-	♦	-
Victorian Civil and Administrative Tribunal	♦	-	-
NON-COURT ADR			
AAMI Consumer Appeals Ombudsman	♦	-	-
Accident Compensation Conciliation Service	♦	-	-
Banking and Financial Services Ombudsman	-	♦	-
Telecommunications Industry Ombudsman	♦	-	-
Financial Industry Complaints Service	♦	♦	-
Energy and Water Ombudsman (Victoria)	-	♦	-
Public Transport Ombudsman	♦	-	-
Health Services Commissioner	-	♦	-
Victorian Small Business Commissioner	♦	-	-
Dispute Settlement Centre Victoria	-	♦	-
Ombudsman Victoria	-	♦	-
Victoria Legal Aid	-	♦	-
Victorian Privacy Commissioner	♦	-	-
Total	11	8	0

- 8.11 Agencies that do some form of follow-up on referrals were asked to state the key findings from this process (Q12). Seven agencies responded.

Table 12

Q12: What were the key findings of your most recent follow-up or referrals audit?

ADR Provider	Key Finding of Referrals Follow-up
Banking and Financial Services Ombudsman	74% of telephone enquirers surveyed were referred to their bank or financial service provider's Customer Relations Dept because their enquiry involved a potential dispute. Other callers were "general enquiries". Of those telephone enquirers who were referred to their bank or financial service provider's Customer Relations Dept, 86% of those referred had in fact done so.
Dispute Settlement Centre Victoria	48% of survey respondents described their referral as helpful or very helpful.
Energy and Water Ombudsman (Victoria)	75% reported that their issue had been resolved through the Referral to a Higher Level process. 91% reported satisfaction with the Referral to a Higher Level process. 62% reported that the matter was resolved in 24 hours. Note: scheme participants contact the clients; it is not up to the clients to make contact.
Health Services Commissioner	Most clients moved onto the recommended agency.
Victoria Legal Aid	When LAV's RDM refers a client to a service, it does a 'hot referral'. In 2005, VLA conducted a major referrals research project – the findings are presently being acted upon.
Magistrates' Court	Clients choose their own mediator, except in family violence cases. A client may choose from another source acceptable to the court.
Ombudsman Victoria	Most clients moved onto the recommended agency.

- 8.12 Referrals are the key to the success of many ADR processes and concerns have been expressed that complainants who could potentially benefit from ADR are "falling through the cracks", that is, they are:
- not being referred to an appropriate agency
 - not contacting the agency they have been referred to.
- 8.13 The department's proposed *ADR User Survey* may provide additional insights into the extent of referral dropout and help inform development of strategies to minimise any negative effect.

9. Funding

- 9.1 Respondents were asked seven questions about various aspects of funding, including two questions that applied only to the industry schemes.
- 9.2 Question 13 asked whether applicants pay to use the agency's services and question 14 sought information on any fees charged for services.
- 9.3 All respondents indicated that applicants do not pay to use the agency's services; however, VCAT qualified its response with "not for mediation" as fees are levied for a wide range of VCAT services.
- 9.4 VLA indicated that its Roundtable Dispute Management service does not charge a fee, but VLA may require a contribution fee for legal aid.
- 9.5 The SBC does not charge applicants for using its services. However, where the parties agree to undertake mediation, they make a payment directly to the mediator. The standard fee is \$95 per party (although this may vary if there is travel involved). The SBC pays a subsidy of \$400 to the mediator.
- 9.6 The Magistrates' Court does not charge a fee; however, there are filing fees for civil proceedings (except for family violence) and mediators other than the registrars may charge a fee for their services and venue use.

- 9.7 Participants were next asked whether they received any government funding and the source of that funding (Q15 and Q16). They were also asked whether the funding was for institutional establishment only or for on-going service provision. The ACCS is funded by the Victorian WorkCover Authority, which in turn is funded by premiums paid by businesses.

Table 13

- Q13: Do applicants pay to use your agency's services?
 Q14: What fees do you charge? Please specify \$ amounts for each type of service.
 Q15: Does your agency receive government funding?
 Q16: Indicate the sources of government funding provided to your agency.
 Q17: Indicate the types of funding provided.

ADR Supplier	Yes – clients pay for service	What are fees charged for	Yes – Govt funded	Govt source	Funding type
REGULATOR ADR					
Consumer Affairs Victoria	-	-	◆	Vic	Note 1
Equal Opportunity Commission Victoria	-	-	◆	Vic	On-going
Legal Services Commissioner	-	-	-	-	-
COURT/TRIBUNAL ADR					
Magistrates' Court	-	Filing fee for civil procedures (not family violence)	◆	Vic	On-going
Victorian Civil and Administrative Tribunal	◆	Variable application fees	◆	Vic	On-going
NON-COURT ADR					
AAMI Consumer Appeals Ombudsman	-	-	-	-	-
Accident Compensation Conciliation Service	-	-	-	-	Note 2
Banking and Financial Services Ombudsman	-	-	-	-	-
Telecommunications Industry Ombudsman	-	-	-	-	-
Financial Industry Complaints Service	-	-	-	-	-
Energy and Water Ombudsman (Victoria)	-	-	-	-	-
Public Transport Ombudsman	-	-	-	-	-
Health Services Commissioner	-	-	◆	Vic	On-going
Victorian Small Business Commissioner	◆	Mediation Note 3	◆	Vic	Note 4
Dispute Settlement Centre Victoria	-	Training	◆	Vic	On-going
Ombudsman Victoria	-	-	◆	Vic	On-going
Victoria Legal Aid	◆	Note 5	◆	Cwth	Note 6
Victorian Privacy Commissioner	-	-	◆	Vic	On-going

Table Note 1: Ongoing and cost recovery from both appropriations and various licensing trust funds established under legislation.

Table Note 2: The ACCS received its funding from the Victorian WorkCover Authority.

Table Note 3: The Victorian Government has committed to fund the Victorian Small Business Commissioner until 30 June 2007, however, it is expected that ongoing funding will be approved.

Table Note 4: SBC clients pay a fee of \$95 directly to mediators for mediation service.

Table Note 5: This issue is not clear cut. RDM does not charge for its services, however, the client may be required to pay to use the service, for example, VLA has a client contribution charge that may apply for the grant of legal aid, thus what the client is paying for is not RDM but a contribution for their lawyer's fees. (The client is still represented by their lawyer when they come to RDM.) Where a client is not legally aided, they are fully responsible for their legal fees. Clients are not required to pay a client contribution charge to access the RDM, as it would be a major disincentive for clients to use the service. To encourage clients to use the service, it must be cheaper for a client to use RDM than going to court. There is also a trade-off benefit for VLA – if VLA can resolve the matter through RDM then it saves the organisation money in funding the matter to litigation.

Table Note 6 Commonwealth surplus funds held by VLA

- 9.8 The seven industry ombudsman schemes that are not government funded were asked about fees paid by members (Q18 and Q19).
- 9.9 All but one of these schemes responded that they charge members a fee of some kind, with most fees fixed according to the number of complaints received in relation to each member.
- 9.10 The LSC derives its funding from private statutory funds, that is, interest on client's money in solicitor's trust accounts.

Table 14

Q18: Do industry members of your scheme pay a membership fee?

Q19: Is your membership fee a flat rate or based on the no. of complaints received in relation to a member

Scheme	Membership Fee?	Basis for Fee
Financial Industry Complaints Service	Yes	Combination of annual levy plus fee (both based on member's size) when a complaint is lodged. A higher complaint fee applies the further a complaint progresses
Banking and Financial Services Ombudsman	Yes	Membership fees comprise a combination of an annual levy and a fee for each dispute that is lodged against the member. The fee charged for each dispute increases depending on the stage at which the dispute is resolved.
AAMI Consumer Appeals Ombudsman	Yes	Number of complaints received
Public Transport Ombudsman	Yes	Number of complaints received
Energy and Water Ombudsman (Victoria)	Yes	Number of complaints received
Telecommunications Industry Ombudsman	Yes	Number of complaints received

10. Governance of schemes

10.1 The industry based ombudsman schemes were asked about the governance arrangements for their scheme (Q20 and Q21).

Table 15

Q20: Does your industry scheme have a board of management?

Scheme	Is there a Board of Management	Structure and Appointment of Board
Financial Industry Complaints Service	Yes	Equal number of member and consumer representatives with independent chairperson
Public Transport Ombudsman	Yes	Equal number of member and consumer representatives with independent chairperson
Energy and Water Ombudsman (Victoria)	Yes	The Board has an independent Chairperson (proposed by Board after wide consultation, in particular with the Essential Services Commission, then appointed by vote of General Meeting of Members) plus: 4 industry Directors (2 electricity, 1 gas, 1 water, elected by the members of the relevant industry) 4 consumer Directors (nominated by the Essential Services Commission)
Telecommunications Industry Ombudsman	Yes	Board: 5 directors appointed by members; 2 elected by members, 1 independent appointed by Board. Council: independent chair, 3 appointed and 2 elected member reps, 5 appointed consumer reps.
Banking and Financial Services Ombudsman	Yes	Directors comprise 3 members' directors, 3 consumers' directors and independent Chairman. The Members' Directors may be appointed by a Bank Member. The Consumers' Directors may be appointed by the Directors following a call for nominations and consultation with appropriate individuals and organisations. The Independent Chairman is appointed by the Directors following consultation with industry and peak consumer bodies.

11. User perceptions

11.1 It is important for the integrity of ombudsman schemes and for ADR in general that the schemes are perceived by users as independent and impartial.

- 11.2 The Australian Securities and Investments Commission (ASIC) has developed a practice standard that provides guidance about how ASIC will approve external complaints resolution schemes operating in the financial system. Compliance with PS139 is a licence condition in that sector.
- 11.3 ASIC's standard, *Approval of External Complaints Resolution Schemes (PS139)*, is also seen as the industry benchmark by statutory ombudsman schemes. PS 139 was referred to in a number of interviews conducted by Professor Field for the qualitative research. PS139 states, in part:
- The ASIC Act requires that we strive to promote the confident and informed participation of investors and consumers in the financial system.*⁷
- In respect of complaints resolution, we need to ensure that the relevant procedures treat consumers fairly and consistently. We therefore believe that it would be counter-productive for us to approve schemes without reference to a common set of approval guidelines developed for broad application.*⁸
- 11.4 A number of benchmarks have been established in PS139 encompassing:
- accessibility
 - independence
 - fairness
 - accountability
 - efficiency
 - effectiveness.⁹
- 11.5 All of the ADR providers who participated in this survey stressed their commitment to these principles.
- 11.6 Respondents were asked about the mechanisms they have in place to ensure that users see their scheme as independent and impartial (Q26). A range of tactics have been implemented to protect the integrity of the various schemes – see Table 16.

⁷ PS139.12

⁸ PS139.13

⁹ PS139.151

Table 16

Q26: What mechanisms do you use to ensure that users see the scheme as independent and impartial?

Mechanism	Used by
Appropriate training of mediators / conciliators	Accident Compensation Conciliation Service Dispute Settlement Centre Victoria Victoria Legal Aid Energy and Water Ombudsman (Victoria) Financial Industry Complaints Service Health Services Commission Ombudsman Victoria Victorian Privacy Commissioner
Appropriate training of case officers and case managers	Banking and Financial Services Ombudsman Victoria Legal Aid
Independent auditing and 3-yearly review	Energy and Water Ombudsman (Victoria) Financial Industry Complaints Service Banking and Financial Services Ombudsman
Explanation of role and procedures	AAMI Consumer Appeals Ombudsman Dispute Settlement Centre Victoria Public Transport Ombudsman Consumer Affairs Victoria Energy and Water Ombudsman (Victoria) Financial Industry Complaints Service Health Services Commission Legal Services Commissioner Victoria Legal Aid
Explanation to parties of internal complaint process	Equal Opportunity Commission Victoria Health Services Commission Victoria Legal Aid Banking and Financial Services Ombudsman
Printed decisions	Victorian Civil and Administrative Tribunal Energy and Water Ombudsman (Victoria)
Printed material/website explaining processes and operations	AAMI Consumer Appeals Ombudsman Dispute Settlement Centre Victoria Health Services Commissioner Public Transport Ombudsman Consumer Affairs Victoria Energy and Water Ombudsman (Victoria) Financial Industry Complaints Service Banking and Financial Services Ombudsman
Right of parties to choose own mediator	Magistrates' Court
Right of review	Telecommunications Industry Ombudsman Banking and Financial Services Ombudsman
Separation of roles of enquiries officer and mediator/conciliator	Energy and Water Ombudsman (Victoria) Equal Opportunity Commission Victoria Health Services Commission Victorian Privacy Commissioner Victoria Legal Aid
Statutory independence	Accident Compensation Conciliation Service Health Services Commission Victorian Small Business Commissioner
Good communication with both of the parties	Health Services Commissioner Equal Opportunity Commission Victoria Energy and Water Ombudsman (Victoria) Victoria Legal Aid
Independent Stakeholder Surveys	Accident Compensation Conciliation Service Energy and Water Ombudsman (Victoria) Financial Industry Complaints Service Health Services Commission Telecommunications Industry Ombudsman Banking and Financial Services Ombudsman
Transparent processes	Energy and Water Ombudsman (Victoria) Health Services Commissioner Dispute Settlement Centre Victoria Banking and Financial Services Ombudsman

11.7 Participants were asked about the mechanisms they have in place to address potential power imbalances between the parties, for example, by offering an interpreter service (Q27). ADR processes are no less immune to power imbalances than formal court

proceedings. In fact, the general presumption against legal representation may, in some cases, increase the disadvantage to someone with poor English language skills.

- 11.8 From the responses received, it is apparent that ADR providers are aware of the potential for disadvantage and have taken steps to ensure an even playing field. Whilst all respondents committed their organisation to this principle, a number of specific measures were mentioned and are listed in Table 17.

Table 17

Q27: What mechanisms do you use to address potential imbalances of power between parties to a dispute?

<i>Mechanism</i>	<i>Used by</i>
Access to advice and information (including in community languages)	Banking and Financial Services Ombudsman Consumer Affairs Victoria Energy and Water Ombudsman (Victoria) Health Services Commissioner Victoria Legal Aid
Alternative methods of lodgement	Banking and Financial Services Ombudsman Energy and Water Ombudsman (Victoria) Health Services Commission
Appropriate training of mediators / conciliators	Consumer Affairs Victoria Dispute Settlement Centre Victoria Energy and Water Ombudsman (Victoria) Health Services Commission Legal Services Commissioner Victoria Legal Aid
Appropriate training of case officers and case managers	Accident Compensation Conciliation Service Banking and Financial Services Ombudsman Victoria Legal Aid
Assistance with completing forms (see Note 1)	AAMI Consumer Appeals Ombudsman Banking and Financial Services Ombudsman Consumer Affairs Victoria Dispute Settlement Centre Victoria Financial Industry Complaints Service Health Services Commission Legal Services Commissioner Ombudsman Victoria Victorian Privacy Commissioner Victoria Legal Aid
Choice of venue	Health Services Commission Victorian Small Business Commissioner Victoria Legal Aid
Direct representation of complainant by service	Consumer Affairs Victoria
Discourage service provider from having legal representation	Energy and Water Ombudsman (Victoria) Financial Industry Complaints Service Health Services Commission Ombudsman Victoria
Exclusion of legal representation	Health Services Commission Victorian Small Business Commissioner (see Note 2)
Flexible scheduling	Equal Opportunity Commission Health Services Commission Magistrates' Court
If imbalance still apparent matter referred direct to litigation	Victoria Legal Aid
Inquisitorial process - parties are not solely reliant on written statements or oral presentation	Banking and Financial Services Ombudsman
Mechanisms for ensuring that one party is not over-represented (which could potentially be intimidating to the other party)	Health Services Commissioner Victorian Privacy Commissioner
Meeting process designed to minimise imbalance (for example, use of "shuttle diplomacy" so parties do not have to confront one-another)	Consumer Affairs Victoria Financial Industry Complaints Service Health Services Commission Victoria Legal Aid

Mechanism	Used by
Other interpreter service	AAMI Consumer Appeals Ombudsman Accident Compensation Conciliation Service Banking and Financial Services Ombudsman Consumer Affairs Victoria Dispute Settlement Centre Victoria Energy and Water Ombudsman (Victoria) Equal Opportunity Commission Victoria Financial Industry Complaints Service Health Services Commissioner Legal Services Commissioner Magistrates' Court Victorian Privacy Commissioner Victorian Small Business Commissioner Victorian Civil and Administrative Tribunal Victoria Legal Aid
Referral to specialist agency	Consumer Affairs Victoria Dispute Settlement Centre Victoria Energy and Water Ombudsman (Victoria) Health Services Commission Telecommunications Industry Ombudsman
Screening process to detect people with special needs	Dispute Settlement Centre Victoria Health Services Commission
Services and office/other venues accessible for people with physical disability	Dispute Settlement Centre Victoria Energy and Water Ombudsman (Victoria) Health Services Commission
Survey of users to gauge perceptions of fairness	Banking and Financial Services Ombudsman Energy and Water Ombudsman (Victoria) Financial Industry Complaints Service Health Services Commission
Survey of users to gauge knowledge of the scheme amongst particular groups	Banking and Financial Services Ombudsman
Telephone interpreter service	Banking and Financial Services Ombudsman Consumer Affairs Victoria Dispute Settlement Centre Victoria Energy and Water Ombudsman (Victoria) Financial Industry Complaints Service Health Services Commission Ombudsman Victoria Telecommunications Industry Ombudsman Victoria Legal Aid (see Note 3)
Users allowed to have support person/advocate of choice	Accident Compensation Conciliation Service (note 4) Banking and Financial Services Ombudsman Dispute Settlement Centre Victoria Energy and Water Ombudsman (Victoria) Equal Opportunity Commission Victoria Financial Industry Complaints Service Health Services Commissioner Magistrates' Court Victorian Privacy Commissioner Victorian Small Business Commissioner Victoria Legal Aid

Table Note 1: EWOV notes that it and some other industry based ombudsman schemes do not require the completion of a form, but where a consumer wishes to make their complaint in writing, assistance is provided in completing this.

Table Note 2: This is at the discretion of the mediator.

Table Note 3: VLA through Roundtable Dispute Management pays for interpreters to appear. Where both clients speak the same language, an interpreter is assigned to each person to ensure client confidentiality.

Table Note 4: Legal representation allowed in certain circumstances.

11.9 The Roundtable Dispute Management model used by VLA actively promotes the involvement of legal representation as an integral component of its ADR model. With the model the lawyer has roles and responsibilities to assist the conference resolution. The model provides for an eight hour grant of assistance. This grant pays for the lawyer to prepare the client prior to a conference, appearance at the conference, and the drafting of consent orders after the conference. This model may be unique to Legal Aid providers.

11.10 Some ADR models permit lawyers to participate, some discourage their involvement. The Roundtable Dispute Management model is a multi-disciplinary service that combines information, education, case management, conciliation and appropriate

referral into a single cohesive ADR model. In addition, it provides clients with various ADR conference formats (for example, shuttle conferences where clients do not have contact with each other). In combination these strategies have a significant impact in dealing with power imbalances between the participants. VLA expressed the view that through Roundtable Dispute Management, it can use ADR in a wider range of matters (that is, matters that would be assessed as inappropriate in other settings). It also provides the clients with a more comprehensive service, and more likely a better outcome.

12. Promotion of the service

12.1 Respondents were asked about the methods they used to promote their service (Q28) and whether an assessment has been made of the level of community awareness of their services and, if so, what means were used to test awareness (Q30).

12.2 All respondents said that they promote their services in some way.

12.3 The most common forms of promotion are:

- agency website
- brochures
- links on other agency’s websites
- print media advertising
- community outreach or education programs.

Table 18
Q28: What methods are used to promote community awareness of your agency/service?

Agency	Agency Website	Brochure	Link to Other Website	Presentations	Newsletter / Bulletin	Print Adverts	Electronic Adverts	Media releases/Articles	Outreach or Education	Other Method/s Used to Promote Service
REGULATOR ADR										
Consumer Affairs Victoria	◆	◆	◆	◆	◆	◆	◆	◆	◆	Promotion by phone advice. Staff participation in public events. School and shopping centre visits. Trader and industry liaison. Promotion via other Govt Depts. Contributions to community magazines. Displays in libraries.
Equal Opportunity Commission Victoria	◆	◆	◆	◆	-	-	-	◆	◆	Speakers provided community engagement.
Legal Services Commissioner	◆	◆	◆	◆	-	-	-	◆	◆	
COURT AND TRIBUNAL ADR										
Magistrates’ Court	◆	-	-	-	-	-	-	-	-	
Victorian Civil and Administrative Tribunal	◆	◆	◆	-	-	-	-	-	-	
NON-COURT ADR										
AAMI Consumer Appeals Ombudsman	◆	◆	◆	-	-	-	-	-	-	
Accident Compensation Conciliation Service	◆	◆	◆	-	-	-	-	-	-	
Banking and Financial Services Ombudsman	◆	◆	◆	◆	◆	◆	-	◆	◆	Annual Report
Telecommunications Industry Ombudsman	◆	◆	◆	◆	◆	-	◆	◆	◆	Annual report Quarterly newsletter (printed and electronic)
Financial Industry Complaints Service	◆	◆	◆	◆	-	◆	-	◆	◆	

Agency	Agency Website	Brochure	Link to Other Website	Presentations	Newsletter / Bulletin	Print Adverts	Electronic Adverts	Media releases/Articles	Outreach or Education	Other Method/s Used to Promote Service
Energy and Water Ombudsman (Victoria)	◆	◆	◆	◆	◆	◆	-	◆	◆	Information printed on utility bills
Public Transport Ombudsman	◆	◆	◆	◆	-	-	-	-	-	
Health Services Commissioner	◆	◆	◆	◆	-	◆	-	◆	-	Radio. Public reports. Expositions. Professional journal articles.
Victorian Small Business Commissioner	◆	◆	◆	◆	-	-	-	◆	◆	Professional journal articles.
Dispute Settlement Centre Victoria	◆	◆	◆	-	-	-	-	◆	◆	Targeted mail out to key referrers
Ombudsman Victoria	◆	◆	◆	-	◆	◆	-	-	◆	Radio talkback. Public reports
Victoria Legal Aid	◆	◆	◆	-	-	-	-	-	-	Targeted training and publications for the legal profession.
Victorian Privacy Commissioner	◆	◆	◆	-	-	◆	-	-	-	Sponsorship and other partnerships

12.4 Almost half of respondents (8 of 18) indicated that they do some form of assessment of public awareness of their services through regular or occasional community or client surveys. Three organisations (ACCS, BFSO, and FICS) have these surveys independently audited.

Table 19
Q30: Does your agency assess the level of community awareness of its services?

ADR Supplier	Yes – By community/client survey	Yes – By independent audit	Yes – By other means
REGULATOR ADR			
Consumer Affairs Victoria	◆	-	Networking
Equal Opportunity Commission Victoria	◆	-	-
Legal Services Commissioner	Note 1	-	-
COURT AND TRIBUNAL ADR			
Magistrates' Court	-	-	-
Victorian Civil and Administrative Tribunal	◆	-	Networking
NON-COURT ADR			
AAMI Consumer Appeals Ombudsman	-	-	-
Accident Compensation Conciliation Service	◆	◆	-
Banking and Financial Services Ombudsman	◆	◆	-
Telecommunications Industry Ombudsman	◆	-	-
Financial Industry Complaints Service	-	◆	-
Energy and Water Ombudsman (Victoria)	◆	-	-
Public Transport Ombudsman	Note 2	-	-
Health Services Commissioner	-	-	Networking
Victorian Small Business Commissioner	◆	-	Networking
Dispute Settlement Centre Victoria	-	-	-
Ombudsman Victoria	-	-	-
Victoria Legal Aid	-	-	-
Victorian Privacy Commissioner	-	-	-
Total	8	3	4

Table Note 1: See footnote 2 on page 2.

Table Note 2: May undertake survey/audit in 2007.

Promotion in languages other than English

12.5 Question 29 sought information from respondents about promotion undertaken in languages other than English.

- 12.6 All respondents except the Public Transport Ombudsman and the Magistrates' Court said that they produce material in community languages. While VCAT and the Victorian Ombudsman indicated that they promote their services in languages other than English, their respective responses did not disclose which languages are used, although the Victorian Ombudsman indicated that materials are produced in eight languages.
- 12.7 The VLA operates the telephone Legal Information Service, which takes about 80,000 calls a year in 14 different languages. The service operates across the whole of the VLA jurisdiction, not just the Roundtable Dispute Management service.
- 12.8 The diversity of community languages used (40 in total, not including English), combined with the response to question 27 (see paragraph 11.9), demonstrates that the respondents are committed to ensuring that their services are accessible to people from non-English speaking backgrounds.
- 12.9 The ACCS, in addition to written material, produces a DVD in eight languages, including English.
- 12.10 What is not known, (and this question was not specifically asked), is whether agencies are engaging staff who have skills in community languages. This would help to further break down the barriers to using ADR and complaint handling services. CAV did advise that it actively seeks staff with foreign language skills, particularly for its Enquiries Branch and Multi Cultural Unit.

Table 20
*Q29: Are any of your promotional materials published in languages other than English?
 If Yes, please list languages in which material is made available*

Language	AAMI	BFSO	ACCS	CAV	DSCV	EOCV	EWOV	FICS	HSC	LSC	SBC	TIO	VLA	VPC	TOTAL
Arabic	◆	◆	◆	◆	◆	◆	◆	◆	◆	◆	◆	◆	◆	◆	14
Chinese ¹⁰	◆	◆	◆	◆	◆	◆	◆	◆	◆	◆	◆	◆	◆	◆	14
Vietnamese	◆	◆	◆	◆	◆	◆	◆		◆	◆	◆	◆	◆	◆	13
Greek	◆	◆	◆	◆	◆	◆	◆	◆	◆	◆		◆		◆	12
Italian	◆	◆	◆	◆	◆	◆	◆	◆	◆	◆		◆		◆	12
Turkish		◆	◆	◆	◆	◆	◆		◆	◆	◆	◆	◆	◆	12
Serbian		◆	◆	◆	◆	◆	◆		◆	◆		◆		◆	10
Spanish			◆	◆	◆	◆	◆		◆	◆	◆	◆		◆	10
Croatian			◆		◆	◆	◆		◆	◆		◆		◆	8
Polish			◆		◆	◆			◆		◆	◆		◆	7
Cambodian (Khmer)					◆	◆			◆		◆			◆	5
Macedonian			◆		◆		◆		◆	◆		◆		◆	7
Russian				◆	◆	◆	◆		◆		◆			◆	5
Indonesian					◆						◆	◆			3
Tagalog (Filipino)					◆				◆		◆	◆			3
Amharic					◆	◆									2
Bosnian					◆	◆	◆								2
Maltese									◆			◆			2
Somali					◆	◆	◆		◆						2
Albanian					◆										1
Assyrian					◆										1
Dari						◆									1
French				◆											1
Hungarian					◆										1
Japanese												◆			1
Kurdish						◆									1

¹⁰ Cantonese and Mandarin

Language	AAMI	BFSO	ACCS	CAV	DSCV	EOCV	EWOV	FICS	HSC	LSC	SBC	TIO	VLA	VPC	TOTAL
Oromo						◆									1
Portuguese									◆						1
Romanian												◆			1
Samoan					◆										1
Thai					◆										1
Tigrinya						◆			◆						1
Urdu					◆										1
Persian							◆								1
Bari									◆						1
Dinka									◆						1
Dutch									◆						1
German									◆						1
Nuer									◆						1
Singh									◆						1

13. Quality assurance and performance measurement

Quality assurance

- 13.1 Respondents were asked to describe the quality assurance methods or systems they have in place. (Q32).
- 13.2 Two of the principles underlying the benchmarks established by ASIC’s PS139 are:
- efficiency - the scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance
 - effectiveness - the scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.
- 13.3 A diverse range of quality assurance methods were cited by respondents to question 32 including:
- call monitoring
 - data collection and analysis
 - independent audits
 - client feedback , surveys or evaluation
 - peer or manager reviews
 - case management
 - documented / mandatory procedures.

A comprehensive listing of the techniques applied is provided in Table 21.

Table 21

Q32: What quality assurance methods/systems does your agency use in relation to its ADR services?

ADR Supplier	Quality Assurance Method
REGULATOR ADR	
Consumer Affairs Victoria	Incorporated components of the “Business Excellence Framework” Weekly, monthly, yearly performance reporting Comprehensive performance reviews including scrutiny of case files Quarterly and annual performance reporting
Equal Opportunity Commission Victoria	Co-conciliation case discussions

ADR Supplier	Quality Assurance Method
Legal Services Commissioner	Auditing Mandatory processes File scrutiny Manager scrutiny of in-coming and out-going mail
COURT AND TRIBUNAL ADR	
Magistrates' Court	Use only accredited mediators Judiciary overviews process
Victorian Civil and Administrative Tribunal	Leadership scrutiny
NON-COURT ADR	
AAMI Consumer Appeals Ombudsman	Maintaining disputes database (type, source, outcome) Identify trends and systemic issues Independent audits of service and staff training
Accident Compensation Conciliation Service	Regular review of outcomes and staff training in all aspects of ADR
Banking and Financial Services Ombudsman	Quality assurance checking of case management by team leaders Findings by case managers are subject to checking by legal counsel Independent review every three years ¹¹ Regular statistical and other reports provided to the FICS Board and ASIC. Membership of other ADR forums such as the Australian and New Zealand Ombudsman Association. Outcomes of IDR process used for continual improvement and quality assurance.
Telecommunications Industry Ombudsman	Independent annual audit call monitoring
Financial Industry Complaints Service	Independent review every three years ⁹ survey of users
Energy and Water Ombudsman (Victoria)	Monthly "exception" reporting to identify cases that contain data anomalies. follow-up of same Random sample of all cases received during month are checked for accuracy, quality and consistency Quality criteria checklist for each case reviewed Auditing of closed complaints and correspondence "Buddy system" for new staff Competency based framework assessment after 2 months and 9 months in employment to assesses ability in all key competencies of their role, and includes review of written correspondence and call observations Employment of a project officer to review existing Quality Assurance Framework.
Public Transport Ombudsman	Senior officers review files Monitoring of statistics Client surveys Members surveyed annually by external consultant
Health Services Commissioner	Client feedback and evaluation forms Monitoring trends and statistics. Reviewing files.
Victorian Small Business Commissioner	Surveys Feedback from participants
Dispute Settlement Centre Victoria	Client feedback and surveys Peer review Mediators complete de-brief check-list Documented quality assurance process Self-assessment forms used for planning and training
Ombudsman Victoria	Process oversight by more senior officer
Victoria Legal Aid	Development and mapping of benchmarks and key performance indicators Training and supervision Enforcement of standards Performance management of staff and chairpersons Random file audits Monthly performance reporting to the VLA Board Monitoring service provision complaints
Victorian Privacy Commissioner	Discussions and debriefings regarding outcome of conciliations

13.5 Many respondents listed staff training or the employment of suitably qualified staff as quality assurance methods.

¹¹ ASIC PS139 requires financial organisations to undertake an independent review at least once every three years.

- 13.6 Respondents were asked whether they conduct surveys of clients or potential clients to determine what they want from the service or whether the service they received met their needs (Q 43).

Table 22

Q43: Has your agency ever conducted a survey of clients to determine what they want from your service or whether the service they received met their needs?

ADR Supplier	Yes	Comment
REGULATOR ADR		
Consumer Affairs Victoria	◆	Networking
Equal Opportunity Commission	◆	-
Legal Services Commissioner ¹²	-	-
COURT AND TRIBUNAL ADR		
Magistrates' Court	-	-
Victorian Civil and Administrative Tribunal	◆	Networking
NON-COURT ADR		
AAMI	-	-
Accident Compensation Conciliation Service	◆	Extensive annual client survey since 1994
Banking and Financial Services Ombudsman	◆	-
Telecommunications Industry Ombudsman	◆	-
Financial Industry Complaints Service	◆	Regular surveying
Energy and Water Ombudsman (Victoria)	◆	-
Public Transport Ombudsman	◆	-
Health Services Commissioner	◆	-
Victorian Small Business Commissioner	◆	Networking
Dispute Settlement Centre	-	-
Ombudsman Victoria	-	-
Victoria Legal Aid	◆	Client feedback
Victorian Privacy Commissioner	-	-

- 13.7 Table 22 demonstrates that the majority of service providers conduct client surveys, although in some cases they are done infrequently. Victoria Legal Aid follows up with each client seeking feedback on the services provided.
- 13.8 CAV noted that within the last five years it has conducted surveys in the following areas:
- Commonwealth Games evaluation
 - new service delivery evaluation and client profile
 - Perceptions of Justice Study (departmental study)
 - consumer and tenancy enquiry service benchmarking
 - funded agency's client satisfaction
 - stakeholder perceptions
 - consumer awareness
 - residential tenancy inspection service client survey
 - motor car traders client survey

Performance measurement

- 13.9 Participants were surveyed about how they measure their performance, the data collected and whether the key performance indicators are independently audited. (Q36 - 38).
- 13.10 A difficulty in comparing the performance of various ADR schemes and approaches is the lack of consistent and comparable performance measures. This is currently being examined by NADRAC as well as others with an interest in ADR.

¹² See footnote 2 on page 2

13.11 Table 23 outlines the performance measures used by respondents.

Table 23

Q36: List the key performance indicators used by your agency to track the performance of its ADR services.

Q37: What other types of data does your agency collection order to monitor the performance of the service?

Q38: Are the key performance measures independently monitored or audited?

ADR Supplier	Key Performance Indicators used	Other data collected to monitor performance	Independently Audited?
REGULATOR ADR			
Consumer Affairs Victoria	<ul style="list-style-type: none"> - number of complaints received and finalised - number and percentage of cases where parties are advised of option to go to VCAT - percentage of complaints finalised within set timelines - number and percentage of particular complaint outcomes - success rate of conciliations - number of complaints by industry - amount of money recovered for consumers - demographics of consumers and traders - level of complaints escalated for compliance action - response times 	<ul style="list-style-type: none"> - number of matters allocated to each officer - number of matters officer has finalised - timeliness of finalisation - number of matters outstanding - overall quality of complaint handling by the officer (for example, all avenues of enquiry were pursued, all legislative issues addressed, paperwork and correspondence completed to required standard) - stakeholder engagement activities such as trader meetings, speaking engagements) 	Yes
Equal Opportunity Commission Victoria	<ul style="list-style-type: none"> - Processing time - Number of complaints received and finalised - % of complaints finalised within time limits - User satisfaction survey - Performance reviews - Advocacy and legal provider feedback 	<ul style="list-style-type: none"> - Complaint register - Internal register of conciliation outcomes 	
Legal Services Commissioner	<ul style="list-style-type: none"> - number of complaints received and closed - percentage if civil disputes resolved - number of parties referred to VCAT - Service Level Agreement 	<ul style="list-style-type: none"> - number of enquiries - feedback 	
COURT AND TRIBUNAL ADR			
Magistrates' Court	<ul style="list-style-type: none"> - time from defence to pre-hearing conference - time from defence to mediation 	<ul style="list-style-type: none"> - statistics of matters resolved as part of mediation or pre-hearing conference) 	Yes
Victorian Civil and Administrative Tribunal	<ul style="list-style-type: none"> - timeliness - success rate - complaints about service 		
NON-COURT ADR			
AAMI Consumer Appeals Ombudsman	<ul style="list-style-type: none"> - rate of overturn of company decisions 	<ul style="list-style-type: none"> - rate of overturn of IDR - decisions by ind'y ombudsman 	Yes
Accident Compensation Conciliation Service	<ul style="list-style-type: none"> - timeliness of resolutions - percentage of resolutions - cost per dispute 	<ul style="list-style-type: none"> - number of cases conducted - age of matters in conciliation - breakdown of types of matters conciliated 	Yes
Banking and Financial Services Ombudsman	<ul style="list-style-type: none"> - telephone enquiry abandonment rates - response times - new case processing times - time to close case 	<ul style="list-style-type: none"> - audit of decisions reported to Board - statistics in annual report - independent review every 3 years - stakeholder surveys 	Yes
Telecommunications Industry Ombudsman	<ul style="list-style-type: none"> - number of complaints - complaint resolution times 	<ul style="list-style-type: none"> - complaint analysis data to target emerging issues 	
Financial Industry Complaints Service	<ul style="list-style-type: none"> - number of complaints received - time taken to progress complaint through internal processes - time taken to finalise complaint at the Panel or conciliation stage - types of outcomes (for example, in favour of member or complainant) - twice yearly staff performance appraisals 	<ul style="list-style-type: none"> - survey of all participants - statistics published in annual review - independent review every three years including stakeholder surveys - regular meetings with industry associations - meetings with consumer associations 	Yes

ADR Supplier	Key Performance Indicators used	Other data collected to monitor performance	Independently Audited?
Energy and Water Ombudsman (Victoria)	<ul style="list-style-type: none"> - % of enquiries closed within 28 days - cases closed as % of all cases received for the preceding 12 months - % of open complaints aged over 90, 180 and 365 days - % of complaints closed within 28, 60 and 90 days - response time and abandonment - % of calls answered < 20 seconds - % of abandoned calls - proportion of complaints handled by each mediator - total minutes recorded on casework - promptness of notification to scheme participants of new complaints received for full investigation - promptness of return phone calls - regularity of contact with customers and scheme participants during complaint investigations - promptness of notification by enquiries officers of referrals to higher level contacts 	<ul style="list-style-type: none"> - data on outcomes of fully investigated complaints (for example, number of written apologies, value of bill adjustments, payments made, debt reductions/waivers) 	
Public Transport Ombudsman	<ul style="list-style-type: none"> - time taken to resolve matters - complainant and member surveys 	<ul style="list-style-type: none"> - no response 	
Health Services Commissioner	<ul style="list-style-type: none"> - feedback from parties - evaluation forms on closure 	<ul style="list-style-type: none"> - number of cases opened and closed - numbers and where referred - timelines for resolutions 	
Victorian Small Business Commissioner	<ul style="list-style-type: none"> - percentage of successful mediations - volume of matters 		Yes
Dispute Settlement Centre Victoria	<ul style="list-style-type: none"> - dispute resolution advice and conflict coaching provided - disputes received for resolution - public education activities conducted - responses to general enquiries - client satisfaction 	<ul style="list-style-type: none"> - survey of ADR advisory service - post-mediation survey - mediation debriefing forms 	Yes
Ombudsman Victoria	<ul style="list-style-type: none"> - successful outcomes 	<ul style="list-style-type: none"> - number of complaints where ADR used and outcomes 	
Victorian Legal Aid	<ul style="list-style-type: none"> - client and lawyer satisfaction levels - stakeholder and user consultation - number of complaints - % of conferences that fully/partly resolve - random file audits - observation of conferences - turn-around time - % of applications that proceed to conference - number of files held by each mediator 	<ul style="list-style-type: none"> - referral sources - service locations - matters requiring second conference 	
Victorian Privacy Commissioner	<ul style="list-style-type: none"> - performance of the scheme is monitored through the performance management plans of staff 	<ul style="list-style-type: none"> - timeliness of process - adverse feedback - complaint outcomes 	

13.12 As shown in column four of Table 23, eight organisations have their performance measures independently audited.

13.13 Table 24 illustrates which key performance indicators are used by each organisation.

Table 24

Q36: List the key performance indicators used by your agency to track the performance of its ADR services.

Agency	# times original decision overturned	Response times	Processing times	No of complaints received	\$ recovered	% finalised within time limit	Success rate	Client/user satisfaction	# complaints received and finalised	Surveys /evaluations	Complaints about service	Other (including public education, performance plans and file audits)
REGULATOR ADR												
Consumer Affairs Victoria			◆	◆	◆	◆	◆		◆			
Equal Opportunity Commission Victoria										◆		
Legal Services Commissioner				◆			◆					
COURT AND TRIBUNAL ADR												
Magistrates' Court		◆	◆									
Victorian Civil and Administrative Tribunal							◆				◆	◆
NON-COURT ADR												
AAMI Consumer Appeals Ombudsman	◆											
Accident Compensation Conciliation Service		◆	◆			◆						◆
Banking and Financial Services Ombudsman		◆	◆			◆						
Telecommunications Industry Ombudsman				◆		◆						
Financial Industry Complaints Service		◆	◆	◆		◆		◆	◆		◆	◆
Energy and Water Ombudsman (Victoria)		◆	◆	◆	◆	◆		◆	◆	◆	◆	◆
Public Transport Ombudsman			◆							◆		
Health Services Commissioner		◆	◆	◆		◆		◆	◆	◆	◆	◆
Victorian Small Business Commissioner				◆			◆					
Dispute Settlement Centre Victoria				◆				◆	◆			◆
Ombudsman Victoria							◆					
Victoria Legal Aid		◆	◆			◆	◆	◆		◆	◆	◆
Victorian Privacy Commissioner												◆
Total	1	7	9	8	2	8	6	5	5	5	5	8

14. Staff qualifications and training

14.1 Participants were asked about the mandatory qualifications (including accreditation) required of ADR practitioners engaged by their agency. Information on what other qualifications or accreditation most of the practitioners have. They were also asked what additional training (internal or external) is provided to practitioners (Q33, 34 and 35).

Table 25

Q33: What qualifications/accreditation must be completed by ADR practitioners employed by your agency?

Q34: What other qualifications/accreditation do most ADR practitioners in your service have?

Q35: What additional training, internal or external, does your agency provide to its ADR practitioners?

ADR Supplier	Mandatory qualifications and accreditation	Other qualifications and accreditation	Additional training provided
REGULATOR ADR			
Consumer Affairs Victoria	<ul style="list-style-type: none"> - None - In-house conciliation training including the Institute of Arbitrators and Mediators Practitioners Certificate in Mediation and Conciliation, and the "Getting to Yes" negotiation course conducted by CMA Training 	<ul style="list-style-type: none"> - Various including law, and marketing and dispute resolution - Various courses run by DOJ, including Conflict Resolution and Making Presentations 	<ul style="list-style-type: none"> - Department of Justice training courses - in-house training in areas such as legislation and IT
Equal Opportunity Commission Victoria	<ul style="list-style-type: none"> - None 	<ul style="list-style-type: none"> - Legal qualifications 	<ul style="list-style-type: none"> - investigation and conciliation training
Legal Services Commissioner	<ul style="list-style-type: none"> - Legal or mediation qualifications 	<ul style="list-style-type: none"> - law degree 	<ul style="list-style-type: none"> - external and internal ADR training
COURT AND TRIBUNAL ADR			
Magistrates' Court	<ul style="list-style-type: none"> - registrar mediators are trained as part of the LEADR program or by DSCV and a number are appointed and gazetted under the Evidence Act 1958. - Non-registrar mediators must be accredited and recognised by their professional peer organisation. 	<ul style="list-style-type: none"> - registrar mediators must be qualified as court registrars and have significant experience. - Non-registrar mediators normally have to be legally qualified. 	
Victorian Civil and Administrative Tribunal	<ul style="list-style-type: none"> - Mediation training 	<ul style="list-style-type: none"> - Legal qualification or other specialist skills (architecture or planning) 	<ul style="list-style-type: none"> - regular professional development
NON-COURT ADR			
AAMI Consumer Appeals Ombudsman	<ul style="list-style-type: none"> - None 	<ul style="list-style-type: none"> - Some practitioners have legal qualifications 	<ul style="list-style-type: none"> - regular internal and external training (not described)
Accident Compensation Conciliation Service	<ul style="list-style-type: none"> - Conciliators must have undertaken a recognised ADR training program 	<ul style="list-style-type: none"> - Degree qualifications in various disciplines 	<ul style="list-style-type: none"> - Regular ADR training with internal and external organisations including universities
Banking and Financial Services Ombudsman	<ul style="list-style-type: none"> - Tertiary qualification 	<ul style="list-style-type: none"> - Most case managers have law degree and current corporate practicing certificate - Some have accounting degree 	<ul style="list-style-type: none"> - professional development program - seminars and conferences - those with practicing certificates must participate in the appropriate Continuing Professional Development requirements of that qualification
Telecommunications Industry Ombudsman	<ul style="list-style-type: none"> - Tertiary qualifications but no specialist ADR accreditation 		<ul style="list-style-type: none"> - complaint investigation - report writing - management courses

ADR Supplier	Mandatory qualifications and accreditation	Other qualifications and accreditation	Additional training provided
Financial Industry Complaints Service	<ul style="list-style-type: none"> Tertiary qualifications in a relevant field are highly desirable 	<ul style="list-style-type: none"> Case managers and conciliators have training in mediation and conciliation All staff have training in negotiation skills Case managers and panel chairs legally qualified 	<ul style="list-style-type: none"> formal mediation and conciliation training for case managers and conciliators external course on negotiation for all staff
Energy and Water Ombudsman (Victoria)	<ul style="list-style-type: none"> Tertiary qualifications but no specialist ADR accreditation 	<ul style="list-style-type: none"> Half conciliation staff have legal qualification 	<ul style="list-style-type: none"> learning and development program induction for new staff annual performance plan ongoing training in mediation/conciliation skills
Public Transport Ombudsman	<ul style="list-style-type: none"> Tertiary qualification in a relevant field (highly desirable) 	<ul style="list-style-type: none"> At present all conciliators have legal qualifications Training with recognised ADR trainer (all conciliators have LEADR¹³ training) 	<ul style="list-style-type: none"> Law Institute LEADR follow up courses Institute of Public Administration Australia
Health Services Commissioner	<ul style="list-style-type: none"> None 	<ul style="list-style-type: none"> training various tertiary qualifications 	<ul style="list-style-type: none"> conferences internal training and support university or LEADR courses
Victorian Small Business Commissioner	<ul style="list-style-type: none"> None 	<ul style="list-style-type: none"> Qualified mediator Experience in Retail Leases Act and owner drivers and forestry contractors act 	<ul style="list-style-type: none"> training in the Retail Leases Act and Owner Drivers and Forestry Contractors Act. on the job training
Dispute Settlement Centre Victoria	<ul style="list-style-type: none"> Australian Quality Training Framework – units within the Certificate IV of the Community Mediation Training 	<ul style="list-style-type: none"> Range of different skills and qualifications 	<ul style="list-style-type: none"> internal training most mediators are members of an ADR organisation and get training from those organisations
Ombudsman Victoria	<ul style="list-style-type: none"> Recognised course such as LEADR or University of Melbourne 	<ul style="list-style-type: none"> Graduate diploma 	<ul style="list-style-type: none"> in-house training by trained facilitator
Victoria Legal Aid	<ul style="list-style-type: none"> Legal, social work or psychology qualification. 5 years post graduate experience in family law minimum five days ADR training ten hours supervised ADR practice substantial ADR experience Vocational Graduate Diploma in Family Dispute Resolution 	<ul style="list-style-type: none"> core competency qualifications in family violence post graduate qualifications 	<ul style="list-style-type: none"> 5-day training in model used by service 4-days p.a. subsequent training 2 hours training every 6 weeks chairpersons must undertake appropriate Continuing professional development
Victorian Privacy Commissioner	<ul style="list-style-type: none"> None 	<ul style="list-style-type: none"> All staff undertake training and have accreditation through LEADR 	

14.2 One issue identified by all participants in the face-to-face interviews was the lack of a Commonwealth or Victorian scheme for accrediting ADR practitioners or training providers.

14.3 The Commonwealth Government through the 'Community Service and Health Industry Skills Council' has developed a national competency based framework for family dispute resolution (FDR) practitioners, (which includes the work conducted by VLA through Roundtable Dispute Management). This framework includes the development of a number of new competency based qualifications, including a

¹³ LEADR is an organisation that offers training and accreditation for suitably qualified persons. LEADR is listed on the Victorian Supreme Court website as a provider of mediators and is also a registered organisation under the ACT *Mediation Act 1997*.

'Vocational Graduate Diploma in Family Dispute Resolution'. These qualifications have been submitted for formal endorsement.

- 14.4 Section 10G of the *Family Law Act 1975* defines an FDR practitioner as someone accredited under the Accreditation Rules. The Commonwealth Attorney General's Department is currently considering the proposed content of these rules. For example it may require FDR practitioners to complete part or all of the Vocational Graduate Diploma in FDR. Regardless of the Commonwealth's ruling, VLA will require its FDR practitioners to gain accreditation under the Vocational Graduate Diploma in Family Dispute Resolution.
- 14.5 Table 25 illustrates that whilst some ADR service providers tend to engage mediators who have completed recognised courses and are experienced mediators; others such as CAV will provide training for their staff and do not necessarily require them to have mediation experience.

15. Statistical data

- 15.1 The final part of the questionnaire asked respondents to provide data relating to complaints and enquiries (Q40 and 41) including:
- number of contacts (that is, complaints and enquiries)
 - referrals to other agencies (that is, no further action by respondent)
 - number of information enquiries responded to
 - number of cases referred back to original service provider (that is, no further action by respondent)
 - number of cases mediated
 - number of cases determined
 - number of days from lodgement of a complaint till a decision is made to refer to another agency or to the internal process
 - the number of days from the decision to handle internally until final resolution.
- 15.2 The data supplied is summarised in Table 26. Note that the LSC were able to provide limited data only, due to the short time it has been in existence.
- 15.3 Definitional differences across the various organisations were problematic as some agencies define a mediation to include some advisory function, whilst others do not differentiate between mediations, conciliations and arbitrations. There are also definitional differences between complaints and general enquiries, with some organisations not distinguishing between the two.

Table 26

Q40: Please provide the following data in relation to your ADR service for the period 1 July 2005 to 30 June 2006

A ADR Provider	B Reporting period used	C No. of contacts made (includes enquiries and complaints)	D No of matters referred to other agencies	E No of responses to information enquiries	F No of cases referred back to the original service or product suppliers without further involvement by ADR supplier	G No of cases subject to mediation	H No of cases resulting in a determination
REGULATOR ADR							
Consumer Affairs Victoria	Financial Year	588,800 ¹⁴	8,428 ¹⁵	Information not provided ¹⁶	Nil ¹⁷	8,433 ¹⁸	Not applicable
Equal Opportunity Commission Victoria	Financial Year	9,686	Information not provided	7,517	Information not provided	748	Not applicable
Legal Services Commissioner	See Note ¹⁹	3,318	Data not available	2,100	Not applicable	544	21
COURT AND TRIBUNAL ADR							
Magistrates' Court	Financial Year	Data not available	Data not available	Data not available	Data not available	3,254	9,234
Victorian Civil and Administrative Tribunal	Financial Year	88,950 ²⁰	Nil	Information not provided	Information not provided	1,500 (approx) ²¹	88,945 ²²
NON-COURT ADR							
AAMI Consumer Appeals Ombudsman	Financial Year	2,095	1	Data not available	1,015	0	1,080
Accident Compensation Conciliation Service	Financial Year	14,987	Not Applicable	Not Applicable	Not Applicable	8,992	200 (approx)
Banking and Financial Services Ombudsman	Financial Year	39, 885 ²³	3,916 enquiries 1,009 complaints	33,559	21,813 referred back to service provider + 3,651 closed cases that were referred back to the service provider without further involvement by BFSO	0 (See Note ²⁴)	102 by case manager finding 55 by ombud recommendation 0 ombud determinations

Table Notes:

¹⁴ This figure does not include some inquiries, such as liquor licensing or trade measurement. CAV advises that if these additional matters were included the figure would be closer to 700,000.

¹⁵ CAV advises that this figure excludes matters referred to VCAT and to contracted CAV advocacy providers. The figure relates primarily to telephone enquiries where callers were advised to pursue a matter with another agency prior to any actual complaint being lodged. The figure also excludes referrals of written complaints.

¹⁶ CAV did not differentiate between enquiries relating to disputes compared to enquiries on other matters.

¹⁷ Each compliant received by CAV is actioned in some way. None is referred back to the original service or product supplier without further involvement by CAV whether that be full conciliation or basic provision of advice to a consumer then monitoring.

¹⁸ This comprised 4763 general conciliations (see p26 of Annual Report); 957 BACV conciliations (see p28 of Annual Report); 927 EARS conciliations (see p28 of Annual Report); 1786 conciliations by regional offices (see p34 of Annual Report). In its response CAV indicated that it does not mediate matters. CAV's response in column G was effectively zero, as "CAV does not currently have a binding adjudicative role, however, CAV gave advice in all cases accepted for conciliation", therefore, the number of general conciliation complaints finalised was included in column G (p27 of Annual Report).

¹⁹ Initial operating period was 12 December 2005 to 30 June 2006.

²⁰ Applications lodged (page 4 of VCAT Annual Report 2005-06).

²¹ Approximately 1000 matters are settled at or before mediation. 41% of matters were resolved at mediation (page 11 VCAT Annual Report 2005-06).

²² Matters finalised (page 4 of VCAT Annual Report 2005-06).

²³ 33,559 telephone inquiries 6,326 new cases by mail or online communication.

²⁴ BFSO does not provide mediation service (as defined for this survey), however, 85 cases were closed through negotiated settlement and 7 cases through conciliation – for both types BFSO engaged in an advisory and/or determinative role.

A ADR Provider	B Reporting period used	C No. of contacts made (includes enquiries and complaints)	D No of matters referred to other agencies	E No of responses to information enquiries	F No of cases referred back to the original service or product suppliers without further involvement by ADR supplier	G No of cases subject to mediation	H No of cases resulting in a determination
Dispute Settlement Centre Victoria		13,923	Not applicable	948	Not applicable	1,398	Not applicable
Energy and Water Ombudsman (Victoria)	Financial Year	17,763	874	1,245	5,020 + 5,277 complaints referred to higher-level reps at member companies	4,728	0 ²⁵
Financial Industry Complaints Service	Calendar year ²⁶	14,369	Data not available	1,165 (written complaints received)	7,180 (approx)	172	434
Health Services Commissioner		10,824	1,645	8,667		283 (conciliated)	Not applicable
Ombudsman Victoria		14,967	11,587	8,000 (approx)	5,000 (approx)	Records not kept	1,800 (approx)
Public Transport Ombudsman		1,225	Information not provided	Information not provided	Information not provided	Information not provided	0
Victorian Small Business Commissioner		70,383	Data not available	5,860	0	905	0
Telecommunications Industry Ombudsman	Financial Year	107,601	Data not available	20,008	80,000	Not applicable	7
Victoria Legal Aid	Financial Year	386 conferences ²⁷	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
Victorian Privacy Commissioner		2,548	1,540	2,446	213	46 (of 82 complaints)	36

²⁵ EWOV advises that only 36 matters have been determined in the history of the scheme.

²⁶ Data provided is drawn from 2005 Annual Review.

²⁷ VLA has provided data for the 2006 calendar year. It conducted 558 conferences. 87% were fully or partly settled.

Table 27

Q41: What is the average number of days taken by your agency to complete the following processes?

Q42: Do the measures given in response to Q41 refer to business days or calendar days?

ADR Supplier	No of days from lodgement of a complaint to a decision on what action to take	No of days from decision on how matter will be handled by agency to the final resolution of the case	Calendar or Business Days Used as Measure
REGULATOR ADR			
Consumer Affairs Victoria	2-4	30 (approx)	Business days
Equal Opportunity Commission Victoria	60 (statutory timeframe)	< 90 (68%) 90-180 (24%) 180-365 (18%)	Calendar days
Legal Services Commissioner	Not Applicable	<30 – Note 2	Calendar Days
COURT AND TRIBUNAL ADR			
Magistrates' Court	21	If ADR settlement – 8 wks If not settled – up to 26 wks	Calendar Days
Victorian Civil and Administrative Tribunal	Varies according to List – Note 1	Not Applicable	-
NON-COURT ADR			
AAMI Consumer Appeals Ombudsman	1	5	Business Days
Accident Compensation Conciliation Service	40	35	Calendar Days
Banking and Financial Services Ombudsman	7 (approx)	58 (median)	Calendar Days
Telecommunications Industry Ombudsman	Immediate	1-16 (depending on issue)	-
Financial Industry Complaints Service	1-2	< 60 (21.5%) 61-180 (10%) >180 (68.5%)	Calendar Days
Energy and Water Ombudsman (Victoria)	Immediate	Within 2 days (71%) Within 7 days (75%) Within 14 days (78%) Within 28 days (83%) Within 90 days (95%)	Business Days
Public Transport Ombudsman	14 (maximum)	14 (maximum)	Calendar Days
Health Services Commissioner	84 (maximum)	Depends on issue	Calendar Days
Victorian Small Business Commissioner	<1	70	Calendar Days
Dispute Settlement Centre Victoria	Immediate	40	Calendar Days
Ombudsman Victoria	7 (majority)	Within 90 (85%)	Calendar Days
Victoria Legal Aid	Not Applicable	Not Applicable	-
Victorian Privacy Commissioner	<7 – Note 2	No statistics kept	-

Table Note 1: Information provided in the Annual Report does not differentiate between different stages of the process.

However, in the Anti-Discrimination List approximately 38% of matters were finalised in 7-56 days.

Table Note 2: LSC advises that these figures may not be representative, because of the newness of the organisation.

Table Note 3: No statistics kept but all matters registered as formal complaints must be referred to conciliation within 90 days.

Appendix 1: Letter to participants

Mr XXX

Dear Mr XXX

Thank you for participating in the research being conducted by the Department of Justice (the Department) into Alternative Dispute Resolution (ADR) in Victoria.

I appreciate your generosity of time in recently undertaking an interview with Chris Field as part of this research. As discussed at the interview, the research will also involve a short questionnaire to be completed by each participating agency. This questionnaire will enable the collection of a range of information about the ADR services provided by your agency.

Information gathered in the course of the questionnaire process will be used only for the purposes of the Department's ADR Strategic Priority. It is not intended that individual stakeholders will be identified in any reports arising from this study, without the prior agreement of the individuals and agencies concerned.

The questionnaire is attached to this letter. I would be grateful if the questionnaire could be completed and returned within three weeks. The questionnaire will be emailed separately to you to allow for it to be completed electronically, if this is more convenient. Accordingly, the due date for the questionnaire is Friday 20 October. The questionnaire should be returned to me. If you require further information in relation to the questionnaire please contact Russell Bancroft, Senior Policy Adviser, Department of Justice on 8684 6480.

Thank you for your assistance in this important project.

Yours sincerely

Paul Myers
Director
Alternative Dispute Resolution Strategy
Department of Justice

Appendix 2: Survey questionnaire

Alternative Dispute Resolution Strategy 2006 Stakeholder Survey

Purpose of Survey

This questionnaire is designed to assist the Victorian Department of Justice to better understand alternative dispute resolution (ADR) service provision in Victoria.

The Department's ultimate aim is to promote best practice, accordingly, the questions cover:

- the way matters are progressed within your agency;
- the types of matters dealt with;
- the types of services provided, for example, complaint handling, mediation, other types of determination;
- how services are funded;
- how services are promoted;
- approaches to quality assurance and performance measurement.

We also ask you to share some data with us. We are aware of definitional problems so we have endeavoured to use terminology that is as precise as possible.

As we may need to follow up some of your answers, we ask you to include details for a suitable contact person within your organisation.

Contact Point at Department of Justice

If you encounter problems with the questionnaire, or you wish to clarify any aspect of the survey, please contact Russell Bancroft on 03 8684 6480 or send an email to russell.bancroft@justice.vic.gov.au.

Instructions

The questionnaire has been e-mailed to allow for electronic completion and return. Please select the "Print Layout" option from the VIEW menu so that you can see the footnotes to the questionnaire.

You will be able to complete some questions by marking one or more checkboxes like this . To mark your preferred box, place your mouse pointer on the box and **double** click – a dialogue box will open. Next, point and double click on the radio button to the left of the "Checked" option and then click the OK button. The check box will now look like this - if you check the wrong box please use the "Undo Typing" option on the EDIT menu.

You should select one checkbox in response to questions which offer checkbox responses except where you are asked to *Check all relevant boxes*.

For some questions we ask you to type a response. You can do this by clicking inside the response box before your commence typing – the box will automatically expand to take your full answer. A completed answer will look like this:

This is my answer to question fifty six.

Several questions apply only to industry ombudsman schemes. These questions are marked with a ♦ symbol. Please select "Not Applicable" if you believe that the question is not applicable to your organisation.

Returning You Completed Questionnaire

We would be grateful if you would return your completed questionnaire by **20 October 2006**. The email address for questionnaire return is russell.bancroft@justice.vic.gov.au.

If you wish to return the questionnaire by post please address it to:

Paul Myers
Director Alternative Dispute Resolution Strategy
Department of Justice
GPO Box 123A
Melbourne VIC 3000

Questionnaire²⁸

Agency Identification

1. Please provide the full name of your agency or ADR service.

Your Agency's ADR Process

2. Please outline the key steps in your agency's ADR process. For example, this could include: Written complaint received → matter referred to case officer → case officer determines course of action → referred to other agency OR referred to mediator → etc.

3. What is your process for assigning matters to ADR practitioners within your agency?

Coverage of the Scheme

4. What types of ADR services does your agency provide? *Check all relevant boxes.*

- Information provision in response to enquiries
- Complaint handling
- Mediation – i.e. where the mediator has no advisory or determinative role
- Conciliation
- Arbitration
- Other ... please describe in the box below

5. Does your agency impose any restrictions or limits on access to your ADR service? *Check all relevant boxes.*

- No
- Yes – there are limits on the \$ value of matters we can deal with
- Yes – there are time limits
- Yes – we only accept claims/complaints from consumers
- Yes – other ... *Please describe in the box below*

6. What geographic area does your agency service? *Check one box only.*

- Victoria only
- Australia-wide
- Other *Please describe in the box below*

7. Is membership of your service a condition of licence in your industry? *Check one box only.*

- Yes – go to Q9
- No
- Not applicable – go to Q9

8. If membership of the scheme is not a licence requirement, is there some other entitlement for members of the scheme? *Check all relevant boxes.*

- No other entitlement
- Use of scheme logo
- Access to training programs
- Other *Please describe in the box below*

Referral Pathways

9. Please list the names of the agencies that commonly refer clients to your service?

10. Please list the names of agencies to which you commonly refers clients who fall outside the jurisdiction or scope of your agency.

11. Does your service follow-up to ensure that clients accessed the agency to which they were referred by you? *Check one box only.*

- No – go to Q13

²⁸ Reproduced here in smaller font size than was used for the version distributed to the survey audience.

- Yes – periodically or occasionally (e.g. by sample surveys, case studies or independent audits)
- Yes - always

12. What were the key findings of your most recent follow-up or referrals audit? For example, are most clients moving on to the recommended agency?

Funding

13. Do applicants pay to use your agency's services? *Check one box only.*

- No – Go to Q15
- Yes

14. What fees do you charge for services? Please specify \$ amounts for each service type of service.

15. Does your agency receive government funding? *Check one box only.*

- No – go to Q18
- Yes

16. Please indicate the source/s of government funding provided to your agency. *Check all relevant boxes.*

- Victorian Government
- Commonwealth Government
- Other State or Territory Government

17. Please indicate the type/s of funding provided. *Check all relevant boxes.*

- Establishment funding
- Ongoing funding for operations (full or partial)
- Other

18. Do industry members of your scheme pay a membership fee? *Check one box only.*

- No – go to Q20
- Yes
- Not applicable – go to Q20

19. Is your membership fee: (*Check one box only*)

- A flat rate
- Based on the number of complaint received in relation to each member

Governance – For Industry Ombudsman Schemes Only

20. Does your industry scheme have a board of management? *Check one box only.*

- No – go to Q22
- Yes

21. Please outline the structure of your board of management and the method of appointment.

Remedies

22. What are the main remedies available to applicants/complainants? *Check all relevant boxes.*

- Monetary compensation
- Reversal of the decision that is the subject of the dispute
- Other – *please describe in the box below*

23. Are your agency's decisions legally binding? *Check one box only.*

- No
- Yes – go to Q26

24. How are your agency's decisions enforced?

25. What appeal process is available to applicants and/or respondents who are dissatisfied with a decision?

User Perceptions

26. What mechanisms do you use to ensure that users see the scheme as independent and impartial?

27. What mechanisms do you use to address potential imbalances of power between the parties to a dispute? For example, are the parties given access to an interpreter service?

Promotion of the Service

28. What methods are used to promote community awareness of your agency/ service? Check all relevant boxes.
- Agency website
 - Links or content on other's websites
 - Printed brochures
 - Print media advertising
 - Electronic media advertising
 - Other ... please describe in the space below

29. Are any of your agency's promotional materials published in languages other than English? Check one box only.
- No
 - Yes – please list the languages in which material is made available

30. Does your agency assess the level of community awareness of its services? Check all relevant boxes.
- No
 - Yes, by community surveys
 - Yes, by independently conducted audits
 - Yes, by other means – please describe the methods used

31. What options are available to persons wishing to make a complaint/claim or enquiry to your agency? Check all relevant boxes.
- Information enquiries may be made by telephone
 - Information enquiries may be made by email and/or online via the website
 - Information enquiries may be made by letter
 - Information enquiries may be made in person at our business premises
 - Complaints/claims may be lodged by telephone
 - Complaints/claims may be lodged by email and/or online via the website
 - Complaints/claims may be lodged by letter
 - Complaints/claims may be lodged in person at our business premises

Quality Assurance & Staff Training

32. What quality assurance methods/systems does your agency use in relation to its ADR services?

33. What qualification/accreditation must be completed by ADR practitioners employed by your agency?
- None – go to Q35
 - All require ... please specify compulsory accreditation/qualification

34. What other qualifications/accreditation do most ADR practitioners in your service have?

35. What additional training, internal and/or external, does your agency provide to its ADR practitioners?

Performance Measurement

36. Please list the key performance indicators used by your agency to track the performance of its ADR services.

37. What other types of data does your agency collect in order to monitor the performance of the service?

38. Are the key performance indicators independently monitored or audited? Check one box only
- Yes
 - No – go to Question 40

39. Please attach the results from the most recent audit of your performance indicators.

- Audit results will be attached to completed questionnaire & emailed
- Audit results will be posted separately
- Audit results are not available

Statistical Data

40. Please provide the following data in relation to your ADR service for the period 1 July 2005 to 30 June 2006

- A. If your agency does not record data on a financial year basis please provide data for the most recent 12-month period and indicate here the period to which the data applies.
- B. Number of contacts made (includes enquiries & complaints received):
- C. How many matters were referred to other agencies i.e. no further action was taken by your agency?
- D. How many information enquiries were responded to?
- E. How many cases were referred back to the original service or product supplier (i.e. the other party to the dispute) without further involvement by your service?
- F. How many cases were subject to mediation - i.e. cases where no advisory or determinative role was adopted?
- G. How many cases resulted in a *determination*²⁹ by your agency?

41. What is the average number of days taken by your agency to complete the following processes:

- A. The number of days from lodgement of a complaint to a decision on what action to take i.e. referral to another agency or referral to agency's internal ADR processes.
- B. The number of days from the decision on how the matter will be handled within your agency to the final resolution of the case.

42. Do the measures given in response to Q41 refer to business days *or* calendar days? *Check one box only.*

- Business days
- Calendar days

Research

43. Has your agency ever conducted a survey of clients or potential clients to determine what they want from your service or whether the service they received met their needs?

Contact Point At Your Agency for Follow-up

44. Please provide the following details for the person at your agency we can contact if we need to clarify any information provided on this questionnaire.

Name:	<input type="text"/>
Position Title:	<input type="text"/>
Email Address:	<input type="text"/>
Telephone No:	<input type="text"/>

²⁹ "Determination" includes situations where the dispute resolution practitioner has an advisory or determinative role.

Appendix 3: Survey participants

A response to the survey was received from the following agencies:

1. Accident Compensation Conciliation Service
2. AAMI Consumer Appeals Ombudsman
3. Banking and Financial Services Ombudsman Ltd
4. Consumer Affairs Victoria (Department of Justice)
5. Dispute Settlement Centre Victoria (Department of Justice)
6. Energy and Water Ombudsman (Victoria)
7. Equal Opportunity Commission Victoria
8. Financial Industry Complaints Service Limited
9. Legal Services Commissioner
10. Office of the Health Services Commissioner
11. Office of the Victorian Privacy Commissioner
12. Ombudsman Victoria
13. Magistrates' Court
14. Public Transport Ombudsman (Victoria)
15. Victorian Small Business Commissioner Victoria
16. Telecommunications Industry Ombudsman Scheme
17. Victoria Legal Aid – Roundtable Dispute Management
18. Victorian Civil and Administrative Tribunal

A response to the survey was not received from the Insurance Industry Ombudsman.

The following individuals/agencies participated in the qualitative phase of the Supplier Study but were not asked to complete a survey questionnaire:

- Professor Tania Sourdin, La Trobe University
- John Griffin, Executive Director – Courts, Department of Justice
- Elizabeth Eldridge, Executive Director – Legal and Equity, Department of Justice
- Greg Tilse, Legal and Equity, Department of Justice
- Neil Taylor, Consumer Affairs, Department of Justice
- Dr David Cousins, Director, Consumer Affairs Victoria

Appendix 4: Disputes in Victoria and ADR services

Issue	ADR Provider	Mediation	Conciliation	Other	Are Outcomes Binding?
Banking and Financial Services	Banking and Financial Services Ombudsman	◆		Arbitration	Yes - on member up to \$250,000.
Funerals	CAV (see Note 30)		◆		No - but consumer protection laws apply
Consumer Goods and Services	CAV		◆		No - but consumer protection laws apply
Motor Vehicles	CAV		◆		No - but consumer protection laws apply
Domestic Building	CAV and Building Commission via <i>Building Advice and Conciliation Victoria</i>		◆		No - but building and consumer protection laws apply
Retirement Villages	CAV (see Note 31)		◆		No - but consumer protection laws apply
Real Estate	CAV - Estate Agents Resolution Service		◆		No - but consumer protection laws apply
Credit Unions	Credit Union Dispute Resolution Centre	◆		Arbitration	Yes - on CU up to \$100,000. Recommendation above \$100,000 but CU can seek referral to independent arbitrator.
Neighbourhood Issues	Dispute Settlement Centre Victoria	◆			No
Workplace Relations	Dispute Settlement Centre Victoria	◆			No
Utilities	Energy and Water Ombudsman (Victoria)		◆	Determination	Yes - on member up to \$20,000. Non binding up to \$50,000.
Investment, Financial Advice, Stockbroking, Life Insurance	Finance Industry Complaints Service	◆	◆	Arbitration	Yes - on member
Health	Health Services Commissioner	◆ Note 32	◆ Note 33		Yes - on provider
Insurance Broking	Insurance Brokers Disputes Limited	◆		Arbitration	Yes - but no jurisdiction if complaint involves > \$50,000
Insurance	Insurance Ombudsman Service	◆		Arbitration	Binding determinations up to \$150,000. Non-binding up to \$290,000. Only binds member company
Legal Practitioners	Legal Services Commissioner	◆	◆	Determination	Yes - on legal practitioner
Private Health Insurance	Private Health Insurance Ombudsman	◆		Arbitration	Yes - on member
Public Transport	Public Transport Industry Ombudsman	◆	◆		Yes - on member
Business to Business Disputes	Victorian Small Business Commissioner	◆			
Owner Drivers and Forestry Contractors	Victorian Small Business Commissioner	◆			
Retail Tenancy	Victorian Small Business Commissioner	◆			
Superannuation	Superannuation Complaints Tribunal		◆	"Reviews"	Yes - on provider
Telecommunications	Telecommunications Industry Ombudsman	◆	◆	Arbitration	Yes - on provider

Table Notes:

30: Section 49 of the Funerals Act 2006 at requires a funeral provider to establish a complaints handling mechanism. The Director of Consumer Affairs can prescribe the type of mechanism.

31: The Retirement Villages (Records and Notices) Regulations 2005 prescribe a procedure for recording complaints.

32: Mediation between traders where Commissioner believes this in public interest.

33: For disputes concerning goods and services.

Appendix 5: ASIC Policy Statement 139

Approval of external complaints resolution schemes

What this policy statement is about

This policy statement gives guidance about how we will approve external complaints resolution schemes operating in the financial system.

This policy statement:

- A provides information about our role in relation to external complaints resolution schemes;
- B explains which schemes will need to obtain approval from us;
- C identifies the guidelines by which we will assess a scheme for approval, and provides information about how we will interpret and apply the guidelines; and
- D explains how a scheme should apply for our approval and outlines how we will liaise with schemes.

A ASIC'S ROLE IN RELATION TO EXTERNAL COMPLAINTS RESOLUTION SCHEMES

[PS 139.2] We have the express function of monitoring and promoting market integrity and consumer protection in the Australian financial system. Within this framework, we are responsible for overseeing the effective operation of external complaints resolution schemes, and approving these schemes as required.

[PS 139.3] We believe that industry-supported schemes play a vital role in the broader financial services regulatory system. The existence of these schemes has provided:

- (a) a forum for consumers to resolve complaints that is quicker and cheaper than the formal legal system; and
- (b) an opportunity to improve industry standards of conduct and to improve relations between industry participants and consumers.

[PS 139.4] Recent law reforms and current law reform proposals mean that an increasing number of industry participants will be, or are likely to be, required to join a scheme that is approved by us as a condition of carrying on their business. This policy statement contains detail about the guidelines against which we will assess a particular scheme for approval.

[PS 139.5] The approval guidelines should promote the harmonisation of minimum standards across complaints schemes operating in the financial system. This is consistent with the approach to regulation adopted by the Government in its response to the Financial System Inquiry.

[PS 139.6] The application of the policies contained in the policy statement will nevertheless recognise legitimate differences between industries or between schemes. Therefore, a consistent approach to regulation does not imply identical standards in all cases.

[PS 139.7] We also seek to improve communication with each of the schemes to promote industry and consumer confidence in the financial system. We acknowledge and support the schemes' core business, which is the effective resolution of consumer complaints, and intend that our policy contributes to the strength of the complaints resolution sector.

B WHO THIS POLICY APPLIES TO

Our policy

[PS 139.8] This policy applies to any external complaints resolution scheme operating in the financial system that requires or seeks our approval.

Underlying principles

[PS 139.9] This policy contains guidance about the characteristics a scheme that applies for approval should have. To ensure that there are consistent standards across schemes considering complaints in the financial system, we believe it is appropriate that this policy is capable of broad application.

[PS 139.10] The Australian financial system is increasingly characterised by a convergence in the nature and delivery of financial products and services. We nevertheless recognise that there remain important distinctions between industry participants and the financial products and services in which they deal, and this policy contains sufficient flexibility to accommodate these distinctions where necessary.

[PS 139.11] We believe that the formulation of a broadly based policy statement also makes good regulatory sense, having regard to the proposals for a single licensing regime contained in the CLERP 6 consultation paper.

Explanations

[PS 139.12] The ASIC Act requires that we strive to promote the confident and informed participation of investors and consumers in the financial system.

[PS 139.13] In respect of complaints resolution, we need to ensure that the relevant procedures treat consumers fairly and consistently. We therefore believe that it would be counter-productive for us to approve schemes without reference to a common set of approval guidelines developed for broad application.

[PS 139.14] Our responsibility to approve schemes currently derives from a number of sources including through our licensing of industry participants and our approval of industry codes of practice.

For more information about the current regulatory regime, see the table at [PS 139.17].

[PS 139.15] The CLERP reforms propose a single licensing regime which would greatly simplify and clarify our approval role. However, in the short term, the absence of a unified approval framework should not prevent us from:

- (a) promoting the adoption of minimum standards; and
- (b) seeking to establish better communication with the schemes.

[PS 139.16] We therefore believe that a broad, outcomes-based approach to the approval of schemes is appropriate and would sit well within a financial system characterised by a single licensing regime.

Further examples

[PS 139.17] The following table illustrates the circumstances in which some different industry participants might currently join an external complaints resolution scheme.

Industry participant Scheme membership

Licencees (who provide investment Required to join an approved scheme advice to retail investors) as a condition of their licence *Refer to Corporations Regulation 7.3.02B(4)*

Responsible entities (of managed Required to join an approved scheme investment schemes) as a condition of their licence *Refer to our Policy Statement 130 [PS 130]*

Life insurance companies and brokers The voluntary Life Insurance Code of Practice requires that subscribing participants join a scheme that is approved by ASIC.

Person carrying on a prescribed class It is an offence under s13 of the of general insurance business Insurance Act if the person is not a party to a code of practice that has been approved by ASIC for that purpose. We cannot approve a code of practice unless we are satisfied that it contains appropriate procedures for complaints resolution.

Banks The voluntary Code of Banking Practice, which we monitor, requires that subscribing banks have available a free external complaints resolution process.

C THE APPROVAL GUIDELINES

[PS 139.18] The guidelines for alternative dispute resolution contained in s12FA of the ASIC Act form the basis of this policy statement. Whilst these guidelines relate to our express power to approve industry codes of practice, there is no compelling reason why we should develop another competing set of approval guidelines for the purpose of this policy.

[PS 139.19] We are satisfied that the approval guidelines encompass the key principles contained in the DIST Benchmarks.

These key principles are:

- (a) accessibility;
- (b) independence;
- (c) fairness;
- (d) accountability;
- (e) efficiency; and
- (f) effectiveness.

[PS 139.20] A summary of the principles underlying the DIST Benchmarks is contained in Attachment 1.

[PS 139.21] We reserve the discretion to introduce additional guidelines for the purpose of assessing a scheme for approval, for example, where the features of a product from a particular industry make additional considerations relevant. We will consult with stakeholders about the introduction or reliance on any additional guidelines not contained in the ASIC Act.

Interpreting and applying the guidelines

[PS 139.22] The remaining part of this chapter provides guidance about how a scheme might satisfy the approval guidelines. The information does not provide an exhaustive explanation of the approval guidelines. It does, however, provide guidance about the outcomes we are seeking to achieve through the approval process.

[PS 139.23] The headings contained in this chapter are based on the key issues contained in the approval guidelines. The s12FA approval guidelines are contained in Attachment 2.

Independence of the scheme

[PS 139.24] A scheme must be independent of the industry or industries that provide its funding and constitute its membership. In practice, this means that the decision-maker(s) and/or the staff of the scheme are:

- (a) entirely responsible for the handling and determination of complaints;
- (b) accountable only to the scheme's overseeing body; and
- (c) adequately resourced to carry out their respective functions.

[PS 139.25] The principle of independence means that a scheme should be a legal entity in its own right: that is, it should be an incorporated entity. See [PS 139.123] for information about a possible transition period for schemes that are not yet incorporated.

The overseeing body

[PS 139.26] A scheme should have an overseeing body with responsibility to oversee the operations of the scheme, and to preserve the independence of the scheme and of the dispute resolution processes. In order to ensure that a scheme is clearly perceived to be independent, the membership of the overseeing body should comprise:

- (a) equal numbers of consumer and industry representatives; and
- (b) an independent Chair.

[PS 139.27] A scheme's Terms of Reference should include details about how consumer representatives will be appointed, including any requirements for consultation with appropriate individuals and/or organisations.

[PS 139.28] Where the Terms of Reference indicate the participation of the Federal Minister responsible for consumer affairs in the appointment of consumer representatives, the Minister's role should be to appoint consumer representatives to the scheme; subject to the Minister agreeing to this role.

[PS 139.29] Another option is that responsibility for appointing consumer representatives could be given to the scheme or to another organisation or individual. See [PS 139.124] to find out why there will be no ASIC appointment to the overseeing body of a scheme.

Functions of the overseeing body

[PS 139.30] The minimum functions of a scheme's overseeing body should include:

- (a) appointing the scheme's decision-maker(s);
- (b) agreeing the scheme's budget with relevant industry representatives;
- (c) recommending and promoting consultation about proposed changes to the scheme's Terms of Reference;
- (d) receiving and considering complaints about the operation of the scheme;
- (e) monitoring general trends and issues arising from the complaints that are lodged with the scheme, including those that fall outside the Terms of Reference;
- (f) monitoring the reporting of systemic issues and/or serious misconduct by the scheme; and
- (g) monitoring the scheme's ability to manage its caseload and to perform other promoted functions.

[PS 139.31] Where the overseeing body appoints a person to manage the scheme's day-to-day operations, then that person should be responsible for appointing, supervising and dismissing the scheme's staff.

Resources available to the scheme

[PS 139.32] A scheme's overseeing body should monitor whether the scheme is adequately resourced to carry out its promoted functions. This should include monitoring how the scheme manages its caseload over time.

[PS 139.33] A consideration of resourcing should include provision to assist complainants to draft and lodge their complaints. This does not amount to scheme staff advocating for complainants, and should not jeopardise the impartiality of the complaints resolution process.

Coverage of the scheme

[PS 139.34] A scheme's coverage should be sufficient to deal with:

- (a) the majority of consumer complaints in the relevant industry (or industries) and the whole of each complaint; and
- (b) consumer complaints involving monetary amounts up to a specified maximum that is consistent with the nature, extent and value of consumer transactions in the relevant industry or industries.

[PS 139.35] This broad expression identifies two primary factors that act to limit or define a scheme's coverage. These are the monetary claims limit and the scheme's approach to the classification of "consumer complaints". As a starting point, we take the view that a scheme should be able to consider any complaint where the complainant has suffered a direct financial loss.

[PS 139.36] Before approving a particular scheme, we will need to make an assessment about whether the scheme's monetary claims limit satisfies the objective contained in [PS 139.34]. For example, our Policy Proposal Paper released in February 1999 sought public comment on the appropriate monetary claims limit for complaints about retail investment advice and the conduct of a responsible entity.

[PS 139.37] A monetary claims limit will apply on a "per claims" basis. This means that separate claims by the same complainant cannot be aggregated by the scheme for the purpose of determining a maximum claim. Further, a scheme's monetary claims limit will be subject to review by us.

[PS 139.38] A scheme should also collect and record information about the complaints it receives that are judged to be outside the Terms of Reference. This information should identify why particular complaints have been excluded from the scheme's procedures.

Changes to the terms of reference

[PS 139.39] A scheme should consult with industry and consumer organisations, and other relevant stakeholders, prior to implementing any proposed changes to its Terms of Reference. This means that a scheme should not rely on consulting only with its overseeing body prior to implementing any changes.

[PS 139.40] There may be some proposed changes to a scheme's rules or procedures that are "minor" in nature. It may be unnecessary for a scheme to consult publicly about such changes.

[PS 139.41] A scheme should consult with us about all proposed changes to the Terms of Reference, and should identify those changes which it considers to be "minor" in nature and which will not be the subject of broader consultation.

[PS 139.42] A new scheme should also consult with all stakeholders about its Terms of Reference, before they are implemented.

Cost to the complainant

[PS 139.43] To promote equitable access, a scheme should provide its procedures free of charge to any complainant whose complaint falls within the scheme's jurisdiction.

[PS 139.44] This core principle should not unreasonably prevent a scheme from substantially extending its jurisdiction or operations in special circumstances. However, if a scheme does introduce a limited charging policy, then it should collect and record information about:

- (a) the number of complainants unwilling to proceed when notified of the charge;
- (b) the number of complainants that request a waiver of the charge;
- (c) the terms and application of any waiver policy; and
- (d) some assessment of the level of charges as against the cost incurred by the scheme in processing relevant complaints.

[PS 139.45] A scheme should consult publicly with industry and consumer organisations and with us about any proposal to introduce charges, before the proposal is implemented.

Scheme decision-making

[PS 139.46] In the interest of ensuring that parties to a complaint are treated fairly, a scheme should provide written reasons for any decision made about the merits of a complaint, including when a complaint is judged to be outside the scheme's Terms of Reference. We understand that there will be some circumstances in which a complaint may be resolved without providing reasons in written form.

[PS 139.47] In reaching a decision about a complaint, a scheme should not be entitled to rely on information that is not available to all parties.

[PS 139.48] We believe, however, that the effective and timely resolution of a complaint does not necessarily depend on the physical exchange of all relevant documents or information between the parties. This is the case, for example, when:

- (a) written reasons about a scheme's decisions clearly identify the documents or information relied on; and
- (b) the identified documents or information can be provided to the parties on request.

[PS 139.49] There may be some limited exceptions to the requirement that a scheme provide documents or information to all parties to a complaint. These circumstances might include where the release of information would endanger a third party or where it would compromise a scheme member's general security measures.

Compliance with scheme decisions

[PS 139.50] A scheme's effectiveness relies on its ability to ensure that members abide by its decisions and by its rules. Typically, scheme members will contract to be bound by the scheme's Terms of Reference as a condition of their membership.

[PS 139.51] A scheme should establish its own internal procedures for dealing with the non-compliance by a scheme member with a decision or rule of the scheme. These procedures should be detailed in the scheme's Terms of Reference.

[PS 139.52] We suggest that in the event of non-compliance, a scheme might issue a "notice to comply" which:

- (a) describes the act of non-compliance;
- (b) allows the scheme member a reasonable time, say five working days, to comply; and
- (c) notifies the scheme member of the implications of failing to comply.

[PS 139.53] A scheme should notify us if it terminates the membership of a non-compliant scheme member.

[PS 139.54] Where a scheme member is required, by virtue of a licence granted by us, to join an approved external complaints resolution scheme, then a scheme should inform us of any proposal to terminate that licensee's membership. The scheme should not unilaterally terminate the membership of a licensee. *See [PS 139.128] for information about possible action we may take against a non-complying member that is licensed by us.*

Available remedies

[PS 139.55] The remedies offered by a scheme should be consistent with the remedies available under the relevant laws that apply to the arrangements between the scheme member and its customers.

[PS 139.56] By this we mean that a scheme should, as a minimum, compensate a complainant for any direct loss or damage caused by a breach of any obligation owed in relation to the provision of a financial product or service. This excludes an award for punitive or exemplary damages.

[PS 139.57] In determining the extent of loss or damage suffered by a complainant, the scheme should have regard not only to relevant legal principles but also to the concept of fairness and to relevant industry best practice.

[PS 139.58] A scheme must also be able to make appropriate non-monetary orders obliging a scheme member to take (or not take) a particular course of action in order to resolve a complaint.

Reporting to ASIC

[PS 139.59] The s12FA approval guidelines state that a scheme should provide for “any systemic, persistent or deliberate conduct” to be reported to us. For the purpose of this policy statement we have classified the types of conduct or issues that might be reported to us into two broad categories:

- (a) systemic issues; and
- (b) serious misconduct.

[PS 139.60] The broad application of this policy precludes us from providing an exhaustive set of examples about what might constitute reportable conduct in each of the areas within our jurisdiction. Working definitions of both systemic issues and of serious misconduct are contained in Part III of this chapter, *Explanation of the guidelines*: see [PS 139.122]. See [PS 139.81] and [PS 139.82] for more information about how we will tailor reporting requirements to match the business of a particular scheme.

[PS 139.61] We will review the reporting guidelines contained in this policy statement after two years, as part of the general review of the guidelines contained in this policy statement.

Responsibilities of the scheme

[PS 139.62] It is the responsibility of a scheme to:

- (a) identify systemic issues and cases of serious misconduct that arise from the consideration of consumer complaints; and
- (b) refer these matters to the relevant scheme member or members for response and action; and
- (c) report information about the systemic issue or serious misconduct to us, in accordance with these guidelines and with any thresholds agreed with us.

[PS 139.63] There is a general presumption that reports made to us about systemic issues and serious misconduct should identify the relevant scheme member or members.

[PS 139.64] We understand that there will be some systemic issues which relate to general industry practice or trends, and which do not permit or warrant identification of and referral to a particular scheme member or members. These issues should be reported to us without reference to the names of individual members.

Identification of reportable issues

[PS 139.65] In order to effectively identify systemic issues arising from complaints or enquiries, a scheme should have an appropriate “systemic focus”. In particular, a scheme should collect and record information in a manner which enables the:

- (a) identification of trends and patterns in complaints; and
- (b) simple retrieval of sorted data.

[PS 139.66] A scheme should also have the infrastructure to support effective case management and information collection.

[PS 139.67] A scheme should identify who is responsible to report systemic issues and serious misconduct to us. This responsibility should not be left only to the overseeing body.

[PS 139.68] Scheme staff who deal with complaints should be alert to conduct or issues which should be referred to scheme members and/or reported to us. Staff should also be made aware of the terms of any reporting guidelines that are agreed with us.

Reporting systemic issues involving a single scheme member

[PS 139.69] Some systemic issues will arise in relation to the conduct of an individual scheme member. In these circumstances, the scheme should refer the matter to the scheme member for appropriate remedial action, in accordance with procedures set out in the Terms of Reference. Within a reasonable period, the scheme member should provide a concise report or “audit” to the scheme that details the member’s response to the referral.

[PS 139.70] The report should be made available to us as soon as practicable after it is received by the scheme. There will be some circumstances in which a scheme should advise us that it has identified and referred a particular matter to a scheme member, prior to the report being made available.

Reporting systemic issues involving multiple scheme members

[PS 139.71] Some systemic issues will involve the conduct of multiple scheme members. This may include general trends that might not implicate individual scheme members, but might reflect, for example, the need for a change in our policies.

[PS 139.72] The scheme should generally follow the same referral and reporting procedures described in [PS 139.69] and [PS 139.70].

Dealing with inter-scheme systemic issues

[PS 139.73] Some systemic issues may involve the conduct of multiple industry participants who are not members of the same scheme.

[PS 139.74] In some circumstances, these issues may only be identified by us through the information provided by different schemes about particular intra-scheme conduct. These issues might also be identified through informal discussions with schemes either individually or in a joint forum such as the Complaints Scheme Roundtable.

Reporting serious misconduct

[PS 139.75] A scheme should report to us information about the serious misconduct, or alleged serious misconduct, of a scheme member. We will agree appropriate reporting thresholds with each scheme that is approved by us. However our broad objective is to ensure that we are informed about market activities that seriously compromise consumer confidence through contraventions of the law.

[PS 139.76] A scheme should establish its own reasonable internal procedures for dealing with possible cases of serious misconduct. Such procedures should not be allowed to unduly delay the act of reporting to us.

[PS 139.77] We understand that there will be some circumstances in which a scheme may be uncertain about whether to report to us. We encourage schemes to discuss with us the application of the guidelines to those circumstances on a "no-names" basis.

Immunity for reporting

[PS 139.78] There is concern that a scheme may be liable to an action in defamation if it reports information about alleged cases of serious misconduct to us.

[PS 139.79] We agree that a scheme should not be exposed to legal action merely because it is complying with our regulatory requirements. We are discussing with the government the possibility of amendments to the ASIC Act which will provide an appropriate level of protection to schemes complying with this policy statement.

Further review and communication

[PS 139.80] This part of the policy statement has provided a basic framework that an approved scheme should operate within to satisfy the reporting guideline. This framework will be the subject of further review over time. We will hold regular meetings between scheme staff and our staff to discuss the operation of the reporting guidelines and other relevant issues.

[PS 139.81] We will establish more detailed reporting guidelines, including thresholds for reported conduct, with each scheme that is approved. These guidelines will be tailored to the membership and complaints profile relevant to the scheme, and will be developed and agreed with the assistance of scheme staff.

[PS 139.82] Details of the reporting guidelines will be published in the approval letter that is granted to the scheme.

Complaints information

[PS 139.83] In order to comply with our policy requirements, particularly those relating to reporting, a scheme should collect and record information about:

- (a) the number of complaints and enquiries received;
- (b) demographics of complainants (where practicable);
- (c) the number of complaints received that fall outside the scheme's Terms of Reference (with reasons);
- (d) the scheme's current caseload including the age and status of open cases;
- (e) the time taken to resolve complaints; and
- (f) the profile of complaints to enable identification of:
 - (i) the type of financial product or service involved;
 - (ii) the product or service provider;
 - (iii) the purpose for which the financial product or service was obtained;
 - (iv) the underlying cause(s) of the complaint; and
 - (v) any systemic issues or other trends.

[PS 139.84] A scheme should provide us with updated complaints information, as described above, on a quarterly basis.

[PS 139.85] A comprehensive summary and analysis of this information should be contained in each annual report published by a scheme. We encourage schemes to also publish "practice notes" or "guidelines" which identify any problems or issues of interest as they arise during a reporting year.

Internal dispute resolution time frames

[PS 139.86] A scheme member should substantially respond to a complainant, under its internal procedures, within a maximum of 45 days. We interpret the 90 day period referred to in the approval guidelines as applying only in exceptional circumstances, where the scheme member cannot reasonably respond to the complaint within the shorter period.

[PS 139.87] If a scheme member is unable to respond to a complaint within 45 days, or any shorter time frame as detailed in the scheme's Terms of Reference, then the scheme member should inform the complainant of the reasons for the delay.

[PS 139.88] A scheme should establish its own reasonable procedures about the circumstances in which an extension is warranted, and the ability of a complainant to appeal an extension. A scheme should also monitor its members' compliance with time frames relating to internal dispute resolution.

Promotion of the scheme

[PS 139.89] A scheme should actively promote its existence, particularly to those complainants that are under-represented in the break down of people who access the scheme. For example, complainants from a non-English speaking background or who reside in rural areas.

[PS 139.90] A scheme should also publish and promote details about its complaints resolution procedures including:

- (a) how a complaint can be lodged with the scheme;
- (b) assistance available to complainants; and

(c) the time frames imposed under the procedures.

[PS 139.91] Scheme members should refer consumers to the relevant scheme if deadlock is reached in relation to a complaint.

Independent reviews

[PS 139.92] A scheme should commission an independent review of its operations and procedures every three years. This time frame should not preclude a review occurring sooner if appropriate.

[PS 139.93] The overseeing body of a scheme should consult with us about the:

- (a) terms of the independent review; and
- (b) appointment of the independent reviewer.

The review should include some form of qualitative assessment of the scheme's performance.

[PS 139.94] The results of the review should be made available to us and to other stakeholders.

PART II: UNDERLYING PRINCIPLES OF THE GUIDELINES

Independence

[PS 139.95] The decision-making processes and the administration of a scheme must be independent of those sectors of industry which fall within its jurisdiction and which provide its funding. Our policy includes requirements about the membership and functions of the scheme's overseeing body, with a focus on ensuring:

- (a) independent decision-making by scheme staff and the decision-maker(s);
- (b) effective consultation about any changes to the scheme's Terms of Reference;
- (c) an appropriate balance of representation on the overseeing body; and
- (d) that the scheme has adequate resources to perform its functions.

Coverage of the scheme

[PS 139.96] The extent of a scheme's coverage affects not only the volume of complaints it receives, but also community perceptions about its effectiveness.

[PS 139.97] Whether a scheme has a sufficiently broad coverage will be assessed by us on a case by case basis. However, determining an appropriate level of coverage will always involve a degree of compromise as some complainants will be denied access to the scheme's procedures.

[PS 139.98] As part of the approval process we will seek to ensure that there is consistent coverage across schemes that:

- (a) consider complaints about similar products and services; or
- (b) have a common membership.

Changes to the Terms of Reference

[PS 139.99] Public consultation about proposed changes to a scheme's Terms of Reference should result in a greater degree of understanding and acceptance about the scheme's operations.

[PS 139.100] We must be consulted about all proposed changes to a scheme's Terms of Reference.

Cost to the complainant

[PS 139.101] It is a fundamental principle of our policy that consumers of financial products and services have free access to the complaints resolution procedures offered by a scheme. We strongly support this principle.

[PS 139.102] However we also recognise that charging may be appropriate in some limited circumstances. For example, where the scheme seeks to extend its jurisdiction beyond the consideration of "consumer" or appropriate "small business" complaints, or where a scheme seeks to provide its services for a fee where the complaint is clearly outside the scheme's jurisdiction.

[PS 139.103] Charging for access to a scheme's complaints resolution procedures is inappropriate if it is applied as a barrier to entry, or otherwise intended as an unreasonable disincentive to the complainant.

Scheme decision-making

[PS 139.104] A scheme's complaints resolution and other procedures should accord with the principles of natural justice.

[PS 139.105] There is a general presumption in our policy that a scheme member does not have the discretion to withhold documents or information from a complainant. We recognise, however, that there may be some limited circumstances where the scheme member might appeal to the scheme to withhold certain information.

Compliance with scheme decisions

[PS 139.106] We view non-compliance by a scheme member with a decision or rule of a scheme to be a serious breach of their terms of membership.

[PS 139.107] However, because it is in the interests of consumers, industry and regulators that industry participants remain within the schemes, a scheme should not terminate the membership of a non-compliant member without first allowing them opportunity to comply.

[PS 139.108] A scheme should not unilaterally terminate the membership of a scheme member that is licensed by us. This action would place the licensee in breach of a licence condition.

Available remedies

[PS 139.109] Our policy contains a broad framework of remedies that should be available to a scheme.

[PS 139.110] This framework anticipates the consideration of claims for opportunity costs and for non-financial loss where appropriate. It does not require the decision-maker(s) of a scheme to adopt a particular approach to the determination of remedies.

Reporting to ASIC

[PS 139.111] A report should be made to us with at least one of the following objectives:

- (a) improving industry practice and communication;
- (b) remedying financial loss suffered by consumers (not all of whom may have complained about the conduct or problem);
- (c) preventing foreseeable loss to consumers and, more generally, ensuring that “high-risk” issues might be effectively dealt with before problems develop;
- (d) minimising the risk of the conduct or problem recurring;
- (e) efficiently dealing with multiple complaints about a single incident or problem;
- (f) reviewing the circumstances in which a particular scheme member (licensee) should continue to conduct their business; and
- (g) sending a signal to the market about what constitutes acceptable market behaviour.

[PS 139.112] As a general principle, reports provided to ASIC should identify the relevant scheme member or members. We will consider further action if the scheme member or members have been uncooperative or otherwise failed to take appropriate remedial action.

[PS 139.113] Early and effective action by scheme members in response to reportable conduct should reduce the costs of dealing with multiple complaints. There can be no general disadvantage to industry where such issues are addressed in a timely and comprehensive manner.

[PS 139.114] We will not “penalise” a scheme for failing to identify reportable conduct. However, we strongly encourage schemes to approach us if they have queries about the application of the reporting guidelines.

Complaints information

[PS 139.115] The collection of information about complaints is crucial to a scheme’s effective operation in a dynamic financial environment. Our policy contains a list of information that a scheme should collect and report on, and which we believe is consistent with what would be ordinarily required for the scheme to effectively conduct its business.

Internal dispute resolution time frames

[PS 139.116] The effectiveness of external complaints resolution relies on scheme members also having appropriate internal procedures which govern how they deal with consumer complaints. Timeliness in responding to complaints is a key element of successful internal complaints handling.

[PS 139.117] Australian Standard AS4269-1995 “Complaints Handling” requires that organisations should establish reasonable target time limits for the internal resolution of complaints. The pursuit of “best practice” procedures should result in time frames shorter than 45 days being regularly achieved.

Promotion of the scheme

[PS 139.118] The effective promotion of a scheme through a wide range of channels, including the media, is an integral part of making sure that it is widely accessible.

[PS 139.119] A scheme should be conscious, when preparing its promotions strategy, that there may be some classes of complainants who, for geographic, economic or other constraints, are not accessing the scheme in proportion to their use of financial products and services.

Independent review

[PS 139.120] The regular, independent review of a scheme’s performance and procedures provides valuable feedback about how the scheme should evolve and about any areas that should be changed or improved. We are aware that many schemes operating in the financial system already conduct such reviews.

[PS 139.121] Because we are concerned that there may be an over-emphasis on quantitative measures of a scheme’s performance, these reviews should explicitly incorporate a qualitative assessment of the scheme’s performance.

PART III: EXPLANATION OF THE GUIDELINES

Independence

[PS 139.122] If a scheme is not separately incorporated, there may be a perception that it is not independent of the industry members with which it is affiliated. This perception may arise, for example, in circumstances where the membership base of a scheme expands, but the scheme remains legally affiliated with a particular industry association or with a subset of the industry.

[PS 139.123] We understand that incorporation has historically taken place as part of the evolution of schemes operating in the financial system. We are therefore prepared to consider transitional arrangements for individual schemes to establish their independent status. Such arrangements would involve an assessment of the relative costs and benefits of incorporation for a particular scheme.

No ASIC representative on the overseeing body

[PS 139.124] Although the guidelines refer to a regulatory appointment to the overseeing body of a scheme, we have decided after consultation with stakeholders that it is not appropriate that a representative be appointed from or by ASIC. This reflects a consideration of the appropriate balance of membership on the overseeing body and the potential for a conflict of interest to arise with such an appointment.

Coverage of the scheme

[PS 139.125] We understand that consideration of an appropriate monetary claims limit for a particular scheme has implications for scheme members who require professional indemnity insurance to meet any claims.

[PS 139.126] We also note that the CLERP 6 consultation paper proposes that licensees who provide services to retail clients must have adequate arrangements for compensating clients for losses suffered and that these arrangements must be approved by us.

Compliance with scheme decisions

[PS 139.127] Our policy about the treatment of non-compliant licensees means that we are responsible to consider referrals of non-compliance from a scheme.

[PS 139.128] There are a number of administrative responses available to us following a referral of non-compliance by a licensee with a decision or rule of a scheme. Subject to holding a hearing we might, for example:

- (a) impose or vary the licence conditions, including imposing a condition that requires on-going compliance with an approved scheme's rules and decisions;
- (b) in the case of securities dealers or investment advisers, pay any losses, including losses incurred by investors or the scheme itself, out of the \$20,000 security bond held by us;
- (c) make other orders such as allowing sufficient time for the non-compliant licensee to join another approved scheme; and
- (d) as a last resort suspend or revoke a licence for the failure of the licensee to conduct business efficiently, honestly and fairly.

[PS 139.129] The implementation of the CLERP 6 single licensing regime will determine the number of industry participants who are licensed by us, and who are required to maintain membership of an approved scheme for the duration of their licence.

Available remedies

[PS 139.130] Our policy recognises that in some cases, a scheme must be able to make non-monetary orders to achieve resolution of a complaint. Examples of non-monetary orders that a scheme might make following the consideration of a complaint are:

- (a) releasing the complainant from a contract and refunding any monies paid plus interest;
- (b) varying the terms of the contract with the customer, provided any third party rights are not affected; and
- (c) releasing documents and/or information relating to the customer that are under the control of the product or service provider.

REPORTING TO ASIC

Systemic issues: guidelines

[PS 139.131] At a broad level, systemic issues can be distinguished from those issues that have no implications beyond the immediate actions and rights of the parties to the complaint.

[PS 139.132] Whilst several complaints of the same type may indicate a systemic problem, for the purposes of this policy we do not believe that it is sufficient to define or classify a systemic issue by reference only to the number of complaints a scheme may have received.

[PS 139.133] A systemic issue may be identified out of the consideration of a single complaint. This is because the *effect* of the particular issue will clearly extend beyond the parties to the complaint. An example is where there is a flaw in the design of a financial product. Alternatively, a systemic issue may only arise after the scheme has received multiple complaints which are similar in nature. For example, where a particular intermediary has mis-sold financial products to a number of consumers. *Factors causing systemic conduct or problems in the financial system might include poor disclosure or communication, administrative or technical errors, product flaws and improper interpretation or application of standard terms. The effects of systemic conduct (which by definition would be felt by more than one person) might include financial loss and loss of consumer confidence in the relevant financial service provider or intermediary or in the relevant financial product or service.*

Serious misconduct guidelines

[PS 139.134] A definition of the concept of serious misconduct might include fraudulent conduct, grossly negligent or inefficient conduct, and wilful or flagrant breaches of relevant laws.

[PS 139.135] The Corporations Law provides a positive description about what constitutes "good" conduct by a licensee, contained in the requirement that a licensee act at all times honestly, efficiently and fairly. Other legislation that we administer

provides information about what constitutes proper behaviour in the financial services marketplace, for example, by prohibiting misleading and deceptive conduct.

[PS 139.136] We believe that there will be cases of misconduct which, by their nature, clearly warrant referral to the regulator for further action. This might include the general category of misconduct referred to in [PS 139.134]. There is, however, a considerable “grey area” including cases of misconduct in which the need to refer is not so straightforward.

[PS 139.137] As with the consideration of systemic issues, we need to determine thresholds for reportable conduct and to consider whether a common threshold can be effectively applied to all schemes operating within our jurisdiction.

Complaints information

[PS 139.138] We understand that schemes may encounter practical difficulties in obtaining some information about complaints, particularly demographic information about complainants. We nevertheless expect that a scheme will have a case management system that enables this information to be recorded where available. Demographic information provides an invaluable guide about a scheme’s accessibility.

Internal dispute resolution time frames

[PS 139.139] In clarifying the approval guidelines about internal dispute resolution procedures, we want to also emphasise the importance of timeliness.

Promotion of the scheme

[PS 139.140] There are many ways in which a scheme might promote its existence and procedures.

[PS 139.141] There are also some regulatory requirements that scheme members must comply with to promote the availability of external complaints resolution procedures. For example, licensees who provide an Advisory Services Guide to their retail clients must include details of their scheme membership in that document.

D THE APPROVAL PROCESS AND ONGOING LIAISON - HOW TO LODGE AN APPLICATION FOR APPROVAL

[PS 139.142] A scheme that requires or seeks our approval should lodge a written application addressing each of the guidelines contained in Chapter C of this policy statement. Applicants should read the information contained in all three parts of Chapter C before completing their application.

What information should be included in an application

[PS 139.143] An application for approval should include the following information:

- (a) why the scheme is seeking approval;
- (b) how the scheme meets the guidelines set out in our policy;
- (c) current and projected membership details;
- (d) current Terms of Reference (and details of any proposals to amend these terms);
- (e) articles of association (or equivalent) of the overseeing body;
- (f) details of the membership of and appointment to the overseeing body;
- (g) details of contracts with scheme members; and
- (h) a summary of the complaints information the scheme collects and records.

[PS 139.144] A scheme must provide us with any other information that we consider is necessary to complete our assessment of the application.

The approval letter

[PS 139.145] We will provide a formal approval letter to each scheme that is approved under this policy statement.

[PS 139.146] The approval letter will be a public document and will contain details of any conditions under which the approval is granted. The approval letter will also contain information about the agreed guidelines under which the scheme will report information about systemic issues and serious misconduct to us.

[PS 139.147] In order for an approval to remain in force, a scheme must continue to comply with the guidelines contained in this policy statement, and with any new or additional guidelines that are introduced in accordance with our regulatory objectives.

How we will liaise with schemes and other stakeholders

[PS 139.148] We will liaise with each of the schemes operating in the financial sector on an ongoing basis. This will take place through:

- (a) quarterly Complaints Scheme Roundtable meetings;
- (b) a program of regular meetings agreed individually with each of the schemes; and
- (c) our regular formal and informal liaison with industry, consumer and government stakeholders.

Review of this policy

[PS 139.149] We will review the approval guidelines contained in this policy statement after two years. We will consult with stakeholders about the review.

Key terms

[PS 139.150] In this policy statement, a reference to:

“ASIC Act” means the Australian Securities & Investments Commission Act 1989; “complainant” means a person or company that has lodged a complaint with a scheme about a scheme member that falls within the scheme’s Terms of Reference; “CLERP 6” refers to the sixth phase of the Government’s Corporate Law Economic Reform Program dealing with an integrated framework for financial products, service providers and markets. In early 1999 Treasury released a Consultation Paper entitled “Implementing CLERP 6”;

“DIST Benchmarks” means the Benchmarks for Industry-Based Customer Dispute Resolution Schemes published by the Department of Industry, Science and Tourism in August 1997;

“financial product” and “financial service” have the meanings ascribed to them in s12BA of the ASIC Act;

“scheme member” means an industry participant who is a member of an external complaints resolution scheme;

“scheme” means an external complaints resolution scheme in the financial system that is funded by industry participants and has the principal function of resolving complaints about scheme members;

“systemic issues” means both systemic conduct by financial service providers and intermediaries and systemic problems that arise in relation to financial products and financial services; and

“Terms of Reference” is that document which sets out the scheme’s jurisdiction and procedures, and to which scheme members agree to be bound. In some circumstances it might also be referred to as the scheme’s “rules”.

Attachment One

[PS 139.151] - The benchmarks and their underlying principles

1 Accessibility

The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.

2 Independence

The decision-making process and administration of the scheme are independent from scheme members.

3 Fairness

The scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.

4 Accountability

The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems.

5 Efficiency

The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.

6 Effectiveness

The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.

Attachment Two

[PS 139.152] - ASIC Act approval guidelines

The guidelines contained in s12FA(2), Part 1, Schedule 2 of the ASIC Act require that alternative dispute resolution procedures:

- (a) do not permit a complaint or dispute to be considered unless it has first been lodged with the relevant scheme member and:
 - (i) has been resolved by the scheme member, but not to the satisfaction of the complainant; or
 - (ii) has not been resolved by the scheme member and 90 days have elapsed since the complaint or dispute was lodged;
- (b) provide for any systemic, persistent or deliberate conduct to be reported to us;
- (c) operate free of charge to the complainant;
- (d) cover a sufficiently broad range of complaints, with the terms of reference of the scheme to be determined after consultation with consumer organisations and us;
- (e) provide for independence from the parties to the complaint;
- (f) are overseen by a body which includes consumer representation (appointed or approved by the Minister with responsibility for consumer affairs) and a person appointed by us;
- (g) accord with the principles of natural justice (including that information used by the decision-maker is provided to the complainant unless prohibited by law, and that reasons for decisions are given in writing);
- (h) provide for decisions to be made by reference to what is fair in all the circumstances, observing applicable law and relevant judicial authority and having regard to good practice in the relevant industry;
- (i) have appropriate published procedures, including suitable standards of timeliness;
- (j) include arrangements for appropriate promotion of the procedures;
- (k) are supported by adequate resources, including staff whose responsibility is to assist consumers in making their complaints, if necessary by investigating the conduct of a financial services provider;
- (l) decisions made under the procedures will be observed by the relevant scheme members;
- (m) provide adequate remedies;
- (n) provide for the maintenance and publication of appropriate statistics on its operations; and
- (o) provide for the provision to us and the relevant industry associations, details of the decisions made in respect of all complaints, or a representative selection of complaints, including the reasons for the decisions but excluding any information that would identify any of the parties to the complaint.

DEPARTMENT
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