Australian Finance Conference ABN 13 000 493 907 Level 8, 39 Martin Place, Sydney, 2000
Telephone: (02) 9231-5877 Facsimile: (02) 9232-5647 e-mail: afc@afc.asn.au www.afc.asn.au

25 January 2017

Independent Expert Panel
EDR Review Secretariat
Markets Group
The Treasury
Langton Crescent
Parkes ACT 2600

By email: EDRreview@treasury.gov.au

Dear Panel,

FINANCIAL SYSTEM EXTERNAL DISPUTE RESOLUTION FRAMEWORK REVIEW

Thank you for the opportunity to provide feedback on the Interim Report, *Review of the financial system external dispute resolution and complaints framework* (**Interim Report**) issued on 6 December 2016.

The Australian Finance Conference (AFC) was formed in 1958 and is a non-institutionally based association of financiers large and small. Our Member companies include finance companies, banks, specialist equipment financiers and general financiers providing consumer and commercial credit facilities. For our Members who are Australian Credit License holders, EDR membership is split between FOS and CIO.

Based on Member experience our 7 October response to the Panel's Issues Paper argued against the merger of the current two EDR schemes and urged that, whether combined or separated, the present EDR framework be strengthened with meaningful rule of law safeguards, both in terms of appeal rights and greater balance in the Principles.

Rule of law concerns

At present a financial system EDR scheme can reach a decision which is contrary to the law. This is because compliance with the law is only one consideration which must be taken into account by an EDR scheme under its terms of reference. EDR scheme decision makers, who are not required to be legally trained, may also lack sufficient knowledge to identify when they are erring in an application of the law. Such a decision is effectively not subject to legal review. Over time it may become the default position of the scheme.

The practical effect is that EDR schemes can re-write the law since financial service provider members are required to comply with the scheme's view. For example, FOS requires without legal justification that non-ADI financial service providers comply with the Code of Banking Practice notwithstanding that they are not a party to the Code, they are not contractually bound to their customers to apply the Code, and they have had no say in the development of the Code.

A number of submissions to the Panel highlighted the absence of "a legal safety net" except for decisions that "have a total lack of plausible justification",[1] "the inability … to have FOS decisions reviewed [which] creates a level of uncertainty",[2] the desirability of "appeals to the Federal Court on questions of law"[3] etc.

As noted in our earlier submission, the history of the predecessors of the present two schemes (ABIO and COSL) were industry initiatives in the then state-based mixture of credit laws, administration and complaint mechanisms (via Consumer Affairs and Fair Trading Departments). Importantly, membership of those Ombudsmans was voluntary with credit providers able to assess whether to trade-off their legal and contractual rights in the light of their own IDR outcomes and their customers' experience. When in 2009, consumer credit law was taken over by the Commonwealth, this diminution of credit providers' rights became permanent and compulsory, with the term "membership" connoting only a choice between schemes.

The Interim Report failed to recommend any changes to fix this evident structural failing in the framework.[4]

Establishing an Appeal Mechanism

The Interim Report notes several failings of Tribunals, as compared to Ombudsman schemes. However AFC understands that contemporary alternate dispute resolution practices of organisations like the *Queensland Civil and Administrative Tribunal (***QCAT***)* or the AAT have very good reputations.

Tribunals, such as QCAT, exist to "actively resolve disputes in a way that is fair, just, accessible, quick and inexpensive".[5] The average cost of taking a complaint to QCAT is a mere $630, it enjoys a 71% satisfaction rating, and less than 2% of decisions are appealed.[6] The purpose and operation of these Tribunals is, broadly, the same as that of the existing financial system Ombudsman EDR schemes. However, Tribunals have one significant advantage: Tribunals must make decisions in accordance with the law and their decisions can be appealed if they aren't.

The AFC considers that a Tribunal better balances the competing considerations of ease of access, low cost, dispute resolution focus, speed of resolution and legal accountability than an enlarged single Ombudsman scheme. This is particularly so given, as noted by the Panel,[7] many of the design features of this Tribunal (eg funding, free access to consumers etc) are also a feature of its proposed enlarged single Ombudsman scheme, but with the benefit of legal safeguards.

A future alternative given the likely build-up of expertise could be the mooted Banking and Financial Services Tribunal recommended by the House of Representatives Standing Committee on Economics. Failing the Tribunal route credit providers should have a right of appeal from scheme(s)' decisions, to the Federal Court.

---

[1] Submission by Senator Nick Xenephon.
[2] Submission of Customer Owned Banking Association (COBA) to FOS, attached to COBA's submission to the Panel.
[3] Para 87, submission SME Committee of the Law Council of Australia.
[4] The role of proposed assessor, for example, is to look at issues related to the EDR schemes administration of disputes not to review the legal merits of decisions. This mooted role is similar to that of the Inspector-General of Taxation, who does not consider the legal correctness of ATO interpretations.
[5] Page 8, QCAT Annual Report 2014-15.
[6] Pages 2 and 16, QCAT Annual Report 2014-15.
[7] Page 21, Executive Summary, Interim Report.

Smaller financial services businesses' concerns overlooked

The particular concerns of smaller financial service providers, as articulated in submissions to the Panel, are primarily:

- the likely inability in practice of an enlarged single Ombudsman scheme to apply the nuanced approach needed for resolving disputes arising in different segments of the financial services market;[8] and

- the likely increased cost of an enlarged single Ombudsman scheme which, whilst perhaps absorbable by larger financial service providers with pricing power, can be less readily absorbed by more cost sensitive businesses.[9]

The Panel appears to have paid little regard to those concerns. For example, concerns of added costs raised by one smaller financial services business were glossed over in the Interim Report because at a system level there is a duplication of functions.[10] But, "at the entity level" of the smaller business who provides financial services to its customers there is no duplication of functions or of costs. Financial service providers are not required to be members of both EDR schemes. They only have to pay the fees of one EDR scheme. For them there is no duplication removal, only the prospect of a net cost increase from an enlarged single Ombudsman scheme.[11] At a system level those greater regulatory costs for smaller competitors serve as a "barrier to entry" in Australia's highly concentrated financial services industry

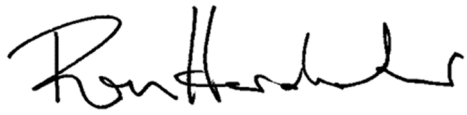
Conclusion

The current two Ombudsman scheme provides for market segment industry specialisation and differentiated cost structures. FOS tends to specialise in banks, larger financial service providers and some particular smaller market segments eg accountants.[12] It is a relatively high-cost EDR scheme as reflects its market segment focus. CIO tends to specialise in smaller market segments, eg mortgage brokers,[13] and is a relatively low-cost EDR scheme.

This segmentation should be retained and importantly, a right of appeal to the AAT, to another appropriate Tribunal or to the Federal Court, should be included to fix the current rule of law structural failing.

If you have any queries in relation to the AFC submission please do not hesitate to contact me on (02) 9231 5877 or Paul Stacey, Associate Director – Policy on (02) 9225 3810.

Yours truly,



Ron Hardaker
Executive Director

[8] See, for example, the submission of Commercial Asset Finance Brokers Association of Australia (CAFBA).
[9] See, for example, the submission of Mortgage & Finance Association of Australia (MFAA).
[10] Paras 5.38 to 5.40, Interim Report.
[11] FOS is a relatively high cost EDR scheme. CIO is a relatively low cost EDR scheme. There will a benefit as certain scheme costs are amortised across a larger base. But, that benefit is likely to be outweighed by the detriment of extending FOS high cost approach to previous CIO members.
[12] Para 5.41, Interim Report.
[13] See MFAA submission.