



Credit and Investments Ombudsman

PO Box A252
Sydney South NSW 1235

ABN 59 104 961 882

T 02 9273 8480
F 02 9273 8481
raj.venga@cio.org.au

10 April 2017

Ombudsman Review
Small Business Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: sbombudsmanreview@treasury.gov.au

Review of the Australian Small Business and Family Enterprise Ombudsman

The Credit and Investments Ombudsman (**CIO**) welcomes the opportunity to make a submission to the Review.

About CIO

CIO is one of only two ASIC-approved external dispute resolution (**EDR**) schemes in the financial services sector (the other being the Financial Ombudsman Service (**FOS**)).

CIO is an independent industry-funded EDR scheme. It is a not-for-profit organisation established as a public company limited by guarantee. It provides consumers with a free and impartial dispute resolution service as an alternative to legal proceedings for resolving complaints with their financial services providers (**FSPs**).

CIO has more than 23,000 members, about 95% of which are sole traders and small businesses; in other words, they represent the smaller end of town.

CIO operates predominantly in the credit sector. Its membership includes non-bank lenders, mutual banks, credit unions, building societies, finance brokers, debt purchasers and collectors, timeshare providers, financial planners and credit reporting bodies.

In the overwhelming majority of cases,¹ CIO's facilitation results in both the consumer and the FSP agreeing to a mutually acceptable and fair outcome. If the parties are unable to agree on an appropriate outcome, CIO can and will investigate the dispute further and make a decision based on the particular facts of the dispute. The decision is binding on the FSP if the consumer or small business accepts it.

When resolving disputes, CIO has regard to relevant legal principles, industry codes of practice, good industry practice and fairness in all circumstances.

Under CIO and FOS' current terms of reference, both a claim limit of \$500,000 and a compensation cap of \$309,000 per claim applies to each dispute. The compensation cap is also indexed to ensure currency. CIO takes the view that a single dispute can contain more than one claim, with each claim being separately subject to the claim limit and the compensation cap.

If a dispute is made by a small business and the FSP has, before the scheme received the dispute, commenced debt recovery proceedings against the small business, the scheme can only deal with the dispute if the credit facility's credit limit is no more than \$2 million.

Our consistent experience is that only a small proportion of complaints to CIO involve amounts close to our claim limit and compensation cap or the credit limit. These thresholds are consistent with ASIC's Regulatory Guide 139.

Only about 7% of complaints received by CIO are from small businesses unhappy with their treatment from FSPs. The average compensation awarded by CIO in favour of a small business was \$9,465 in the last financial year. The average size of a loan the subject of a complaint from a small business was \$285,982.89.

Ramsay Review

The government commissioned a review last year (**EDR Review**) by a panel led by Professor Ian Ramsay, to see if any changes needed to be made to the dispute resolution architecture in financial services.

¹ In the 2015/16 financial year, this was 60.7%

In its Interim Report, the EDR Review recommended the establishment of a single non-statutory ombudsman scheme to replace CIO and FOS - the so-called small 't' tribunal. The final report has since been provided to the government but has not been publicly released. We assume that the final report will be consistent with the interim report.

Limitations of EDR in relation to small business disputes

CIO and FOS are extremely effective in dealing with 'Mum and Dad' complaints and straight-forward small business disputes. That they do this very well has been acknowledged by consumer advocates, independent reviews conducted in relation to each scheme, and the EDR Review itself.

However, given both CIO and FOS lack the powers of a statutory tribunal, their ability to deal fairly and effectively with more complicated small business disputes is very limited. This is so even if their claim limits and compensation caps were to be increased.

For example, neither CIO nor FOS can subpoena a third party to attend as a witness or produce documents, join third parties or bind them to its decisions, cross-examine witnesses, take evidence on oath, investigate criminal fraud or impose penalties. Only a statutory tribunal can do this.

In the context of small business loans and guarantees, neither CIO nor FOS can compel valuers, investigative accountants or receivers to participate in the EDR process, or bind them to its decisions or enforce any decision made against them.

Importantly, both CIO and FOS can, under their respective terms of reference, decide that a small business dispute is outside their jurisdiction. This may be because the claim exceeds their claim limit or the likely remedy exceeds their compensation cap.

CIO and FOS also can and do decline to deal with a dispute if it is one that is more appropriately dealt with in another forum, such as a court. This may occur if the dispute is complicated or involves a large sum of money or even, as decided in a recent case involving FOS, if the scheme does not have the expertise or relevant staff to deal with the particular dispute.²

² Goldie Marketing Pty Ltd v Financial Ombudsman Services [2015] VSC 292 (19 June 2015)

CIO and FOS can also decline to deal with a small business dispute about a loan if the dispute is subject to farm debt mediation.

Small businesses will be no better off under the single scheme proposed by the EDR Review because, like CIO and FIOS, it will be limited in its ability to deal with more complicated small business disputes or those involving large sums of money.

Furthermore, the proposed single scheme will not be able to deal with a dispute involving a loan from a commercial lender³ because such a lender is not required to be licensed under the National Consumer Credit Protection Act, and so, not obliged to join an ASIC-approved EDR scheme.

A statutory scheme is required for small business disputes

A small business dispute is more appropriately dealt with by a statutory tribunal where:

- it involves large sums of money or is complicated,
- it involves valuers, investigative accountants or receivers; , or
- it is against a commercial lender.⁴

That is not to say that it is not appropriate to nonetheless increase the current claim limits and compensation caps of CIO and FOS. These are clearly inadequate in the case of, for example, a dispute with a guarantor of a home or small business loan.

As noted in the recent Independent Review Code of Banking Practice:⁵

Typically, a debtor with a dispute with the bank over a home loan is not raising a dispute over the whole amount of the mortgage (it might be over interest or fees, etc.) which means that the EDR scheme jurisdiction limits are not an issue for debtors as often as might be imagined. Because a dispute about a guarantee has the potential to make the guarantee unenforceable, the full amount of the guarantee will often be in issue. In today's market, a dispute about a guarantee to secure a home loan will very often involve more than \$309,000 and so will be outside the EDR scheme's jurisdiction. These

³ which does not also provide consumer credit

⁴ which does not also provide consumer credit

⁵ <http://cobpreview.crkhoury.com.au/wp-content/uploads/sites/2/2017/02/Report-of-the-Independent-Review-of-the-Code-of-Banking-Practice-2017.pdf>

are not unusual sums and certainly not indicative that the guarantor is sophisticated or will have the resources or confidence to litigate in court.

What this could mean for the ASBFEO

CIO advocated to the Ramsay Review that the Australian Small Business and Family Enterprise Ombudsman (**ASBFEO**) or, alternatively, a small business statutory tribunal, should be empowered to investigate and adjudicate small business disputes that are outside the current (or increased) claim limits and compensation caps of CIO and FOS or, alternatively, should be empowered to investigate and adjudicate ALL small business disputes, to the exclusion of CIO and FOS.

This would also be in keeping with the ASBFEO's categorisation as an 'Ombudsman'.

However, the ASBFEO will necessarily have to be stripped of its advocacy role if it were to be transformed into a statutory tribunal, or else its advocacy function would need to be kept entirely separate from its tribunal functions to retain the perception of impartiality.

Curiously, the Ramsay Review rejected CIO's proposal, preferring instead a single non-statutory ombudsman scheme to deal with all small business disputes that fall within a defined jurisdiction. This is despite the fact that such a scheme would not have the appropriate statutory powers to deal fairly and effectively with many small business disputes or impose penalties.

The Ramsay Review's proposed single non-statutory scheme will also be powerless to investigate the root cause of the financial scandals that have graced our front pages for some years now. And it will be incapable of redressing the power imbalance between big banks and small businesses or dealing effectively with larger or more complicated small business claims against banks. Significantly, it will not be able to impose penalties. Only a statutory tribunal can do that.

This is because Ramsay's proposed scheme, like CIO and FOS, will not have the statutory power to subpoena third parties, join third parties or bind them to its decisions.

CIO's proposal that the ASBFEO or a small business statutory tribunal should be empowered to investigate and adjudicate small business disputes that are outside the existing or proposed jurisdictional limits of CIO and FOS is entirely consistent with the recommendation of the Parliamentary Joint Committee Inquiry into the Impairment of Customer Loans.⁶

The Committee quite sensibly recommended that, in order to address the vulnerability of small business and commercial borrowers, the ASBFEO should act as a small business loans dispute resolution tribunal where gaps in the EDR schemes remain.

Triage service

If the evidence suggests that consumers are not able to navigate the various dispute resolution schemes in each of the telecommunications, financial services, energy and utilities sectors where the consumer or small business has a single issue that involves more than one sector ombudsman, a common entry point or triage service is likely to offer the optimum solution.

A single point of entry need not mean a single integrated scheme handling all complaints.

In the Commonwealth context, for example, ASBFEO is charged with, among others, being 'a concierge to help smaller businesses with issues, complaints and disputes find the best organisation to deal with their complaint....'

CIO believes that a consumer-facing common help desk funded by EDR schemes - essentially an online and telephone access point – is the preferred option. It would be able to:

- assist consumers and small businesses at first instance by providing them with information about how to pursue a complaint with the relevant business,
- where appropriate, to refer the consumer or small business to a specialist service, and

⁶http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/customer_loans/Report

- importantly, direct the consumer to the appropriate EDR scheme to handle their complaint.

Some funding would be needed to establish and maintain the common helpdesk, but this would be at the cost of the EDR schemes.

The triage service could be run either:

- (a) out of one of the existing EDR schemes on behalf of all participating schemes, with each participating scheme funding the cost of running the service in proportion to the volume of their enquiries and complaints, or their size, or
- (b) by a separately incorporated body funded directly by participating schemes in proportion with the volume of their enquiries and complaints, or their size.

The triage service would be able to provide consumers and small businesses with referrals to appropriate EDR schemes depending on whether the complaints related to a financial services, telco or a utilities provider.

The appeal of the triage service is that, depending on the nature of the issues presented, it could be tasked with referring consumers and small businesses to other appropriate forums, such as government departments like Centrelink, the ASBFEO, financial counsellors, Lifeline, community legal centres, Legal Aid, State Fair Trading Offices, interpreter services, Law Societies, regulators such as ASIC, OAIC and ACCC, and even peak industry bodies or self-regulating bodies. The referrals would include providing appropriate contact details, including phone numbers.

Sincerely,



Raj Venga
Chief Executive Officer and Ombudsman