AUSTRALIAN
RETAIL
CREDIT
ASSOCIATION

SUBMISSION ON ISSUES PAPER: Review of the financial system external dispute resolution framework

12 September 2016

349/1 Queens Road, Melbourne, VIC, 3004 | +61 3 9863 7859 | info@arca.asn.au | www.arca.asn.au | ABN 47 136 340 791

EXECUTIVE SUMMARY

The Australian Retail Credit Association (ARCA) is the peak industry association for organisations involved in the consumer credit reporting system. We were established in 2006 with the purpose of promoting common standards of best practice in credit risk assessment and responsible credit procedures. Our Mission is to deliver a better credit reporting system in Australia.

Membership to ARCA is voluntary and includes nearly all significant bank consumer credit providers, many key finance companies, and all major Australian credit reporting bodies (CRBs). A full list of ARCA Members is included at Attachment A.

Australia's credit reporting system is regulated through Part IIIA of the *Privacy Act 1988* (the Privacy Act), associated regulations, the *Privacy (Credit Reporting) Code 2014* (the CR Code), and additional minor regulatory instruments. The credit reporting system is regulated by the Office of the Australian Information Commissioner (OAIC). Complaints and disputes arising under Part IIIA of the Privacy Act or the CR Code are dealt with by EDRs recognised by the Information Commissioner under section 35A of the Privacy Act. The Financial Ombudsman Service (FOS) and the Credit and Investments Ombudsman (CIO) are both recognised EDRs for this purpose.

As participants in the consumer credit reporting system and as financial services licensees, our Members are required to hold membership with a recognised External Dispute Resolution (EDR) scheme, and hence are members of either the FOS or the CIO. Many of our Members provide financial services and would otherwise be required to be a member of an EDR scheme due to this also.

We have developed this submission with input from our Members after careful consideration of the Terms of Reference guiding this review, as well as the Issues Paper. We have restricted our comments to those matters of relevance to our Members and the ARCA Mission.

PRINCIPLES GUIDING THIS REVIEW

The panel has identified efficiency, equity, complexity, transparency, accountability, comparability of outcomes and regulatory cost as guiding principles in considering whether the financial system's dispute resolution and complaints framework effectively meets the needs of its users.

Confirming EDR jurisdiction under review

In determining whether a scheme effectively meets the needs of users we also think it important to specifically consider the EDR schemes' performance under the power and jurisdiction granted to them by the Information Commissioner under section 35A of the Privacy Act.

Following amendments to the Privacy Act in March 2014 which allowed the collection and disclosure of more comprehensive credit reporting information, the credit reporting system is now largely regulated by Part IIIA of the Privacy Act and the CR Code.

For complaints and disputes about matters under Part IIIA of the Privacy Act or the CR Code, FOS and CIO are EDRs recognised under section 35A of the Privacy Act. Credit providers must

be a member of a recognised EDR scheme to be able to disclose credit information to a credit reporting body.[1]

By recognising an EDR scheme to deal with these complaints, the Information Commissioner aims to avoid fragmenting disputes among multiple resolution bodies, recognising that a consumer's complaint may include both privacy and service-delivery aspects.[2]

FOS and CIO are both recognised EDR schemes for the purposes of considering complaints and disputes that arise under Part IIIA of the Privacy Act or the CR Code. Credit providers are required to be members of a recognised EDR scheme in order to participate in the credit reporting system.[3]

According to their most recent annual review documents, around 6% of complaints accepted by FOS in the reporting year 2015-2016 and 24% of complaints accepted by CIO in the reporting year 2014-2015 likely arose under privacy legislation. We therefore consider it important to consider the EDR schemes' role and performance on these matters as part of this review and our submission addresses that jurisdiction accordingly.

Benchmarks for Industry-Based Customer Dispute Resolution Schemes

It is relevant to note the Benchmarks for Industry-Based Customer Dispute Resolution Schemes, published by the then Department of Industry, Science and Tourism in 1997:

- Accessibility
- Independence
- Fairness
- Accountability
- Efficiency
- Effectiveness

These principles are relied on by both ASIC and OAIC in recognising EDR schemes and were recognised by Treasury in 2015 as "timeless ideals for dispute resolution services."[4]

INTERNAL DISPUTE RESOLUTION

Independent research commissioned by ASIC indicates that timely resolution of complaints, especially at IDR, can be instrumental in consumer satisfaction with the complaints handling process.[5] ASIC recognises[6] – and it is the experience of our Members – that most disputes are resolved quickly and efficiently through IDR without the need to proceed to EDR.

Our Members strongly agree that effective IDR underpins a strong complaints and dispute resolution framework. In addition, resolution through IDR gives the financial service provider and the consumer the opportunity to hear client concerns and may lead to improved business systems and services. Our Members recognise that strong IDR procedures benefit both the consumer and the financial organisation.

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[1] Section 21D(2)(a)(i)) of the Privacy Act.

[2] Paragraph 1.15 of the OAIC's 'Guidelines for recognising external dispute resolution schemes'.

[3] Section 21D(2)(a)(i)) of the Privacy Act.

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

[5] Paragraph RG165.45

[6] RG 165.69

For those ARCA Members' regulated by AISC, their IDR procedures are required to meet certain standards.[7] These standards are based on Australian Standard ISO 10002-2006, '*Customer satisfaction—Guidelines for complaints handling in organizations*'. For complaints arising under Privacy legislation, our Members' IDR procedures are required to satisfy requirements set out in the Privacy Act.[8]

Members' IDR processes are tailored to carefully comply with ASIC's general and specific requirements (when required) and satisfy the individual organisations' IDR needs taking in to account its size, products, customer base and likely size and complexity of complaints and disputes.

In response to the questions set down in the issues paper we submit that it is easy for consumers to find out about the IDR process and indeed expectations around ease of access and use are clearly set down by ASIC in its regulatory guidance[9].

Our Members use their websites and other appropriate forums to publish up-to-date and easy to understand information about the dispute and complaints process. This information includes details about how to make a complaint to the organisation and IDR procedures as well as necessary details to escalate a complaint to the relevant EDR scheme. We wholly support removing unnecessary barriers to lodging a complaint at IDR or escalating an unresolved dispute to EDR as appropriate, and are not aware of research to support the view that this is a problem in the existing environment.

The benefits of IDR are broad and cannot be overstated. They include:

- the opportunity to resolve complaints or disputes in a timely manner, before parties become entrenched
- a cost efficient and direct method for dispute resolution
- the ability to identify and address recurring or systemic problems (which can prevent further customer impact and may lead to product service or improvements)
- preserving or improving relationships with customers by promoting trust and confidence through direct and efficient resolution
- customer satisfaction.

The existing EDR framework compliments and supports IDR as a primary method of complaints resolution. Any proposed changes to the existing EDR framework must take in to account possible impacts on IDR as the first step to resolution and the most efficient forum for dispute resolution.

We support the existing framework and regulation of IDR and note that our Members consistently strive to improve their IDR processes to ensure the procedures are easy for consumers to identify and navigate.

REGULATORY OVERSIGHT OF EDR SCHEMES AND COMPLAINTS ARRANGEMENTS

Regulatory oversight and the power of review

ASIC's Regulatory Guide 165 *Licensing: Internal and external dispute resolution* gives clear guidance around how ASIC will undertake its responsibility for approving and overseeing the effective operation of EDR schemes, as well as the principles underlying ASIC's approach and practical guidance for EDR schemes.

[7] *Licensing: Internal and external dispute resolution*, RG 165, July 2015.
[8] Part IIIA, Division 5 of the Privacy Act.
[9] RG 165, in particular Appendix 1 which contains detailed guidance.

ASIC's role and powers in relation to recognising and overseeing EDR schemes is clear. However its current role provides high-level oversight and does not allow ASIC to consider issues with specific determinations or approaches taken by the EDR schemes or complaints about individual case management.

We consider the current quarterly reporting requirements (around caseload, age of files, timeliness of resolution etc) are appropriate measures to ensure the schemes are running efficiently. However we are very concerned that there is a lack of regulatory oversight of specific determinations that may have major influence on industry.

As an example, FOS recently published a determination (case number 422745) and made subsequent statements to industry around the interpretation of 'repayment history information' for the purposes of the Privacy Act. The FOS view on this issue continues to cause significant concern for industry. ARCA has sought review of the FOS approach to this issue. The review process is not provided for under FOS's TORs but is set out in set out its accompanying guidelines[10]. The internal review process is vague – and strictly read, may apply only to published FOS Approaches, rather than informal approaches set out in single decisions and discussions as is the case here.

Together the lack of published guidance from the OAIC and the lack of jurisdiction by ASIC potentially gives EDRs the power to set policy in interpreting and applying the new legislation around credit reporting. We believe this is inappropriate. ARCA proposes that there is a need to establish a review process for key policy issues such as those highlighted by the recent FOS determination, and that it may be appropriate to include a relevant regulatory body in establishing such a review process.

Regulatory oversight regarding complaints and disputes arising under Part IIIA of the Privacy Act

The credit reporting system is regulated by the Office of the Australian Information Commissioner (OAIC). Complaints and disputes arising under Part IIIA or the CR Code are dealt with by EDRs recognised by the Information Commissioner under section 35A of the Privacy Act. The Financial Ombudsman Service (FOS) and the Credit and Investments Ombudsman (CIO) are both recognised EDRs for this purpose.

Our Members are concerned that there is a lack of familiarity with the credit reporting system and its legislative framework inside EDR schemes.

FOS and CIO handle disputes under recognition from the Information Commissioner under section 35A of the Privacy Act. The OAIC's 'Guidelines for recognising external dispute resolution schemes'[11] sets out processes, expectations and considerations relevant to recognising an EDR scheme under section 35A of the Privacy Act. Regarding regulatory oversight, it requires the EDR scheme to commission an independent review of the EDR scheme's privacy-related complaint-handling, operations and procedures at least once every five years.

At this stage there is little apparent regulatory oversight from the OAIC regarding the EDR schemes' handlings of disputes that arise under Part IIA or the CR Code. We are concerned that the EDRs have inherited, by proxy, power to set policy in interpreting and applying the new

[10] See section 19 A, FOS Guidelines

[11] Available at https://www.oaic.gov.au/resources/agencies-and-organisations/advisory-guidelines/guidelines-for-recognising-external-dispute-resolution-schemes.pdf

legislation around credit reporting. Although the number of disputes is currently relatively small, given the relative youth of the comprehensive credit reporting system, without adequate oversight from the privacy regulator we see a high risk of EDR decisions establishing views on the legislation that potentially have significant unintended consequences.

EXISTING EDR SCHEMES AND COMPLAINTS ARRANGEMENTS

Key benefits of the current EDR framework

By comparison to other mechanisms for dispute resolution, we consider the current EDR schemes provide an effective avenue for resolving consumer complaints. The current arrangements provide many benefits for consumers and industry including:

- Speedy and cost-effective dispute resolution compared to formal mechanisms such as courts or tribunals
- Flexibility in responding to the changing dynamics of the financial system
- Forums with expertise in the specialised and often complex issues that arise in complaints and disputes around financial services
- An emphasis on IDR first, recognising that IDR can be the quickest and most efficient way to resolve disputes.

Accessibility

As noted above, accessibility is a relevant factor in the Benchmarks for Industry-Based Customer Dispute Resolution Schemes, relied on by both ASIC and OAIC in recognising EDR schemes. Both ASIC and OAIC elaborate on the measures of accessibility in their respective guidance, for example OAIC defines accessibility as "(whether) the EDR scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers."[12]

Our Members support the accessibility of EDR schemes. In line with ASIC requirements our Members' IDR procedures have systems for informing complainants or disputants about the availability and accessibility of the relevant EDR scheme.[13]

That said we recognise that from a consumer perspective the EDR process may seem opaque and intimidating. This may happen despite the best efforts of EDR schemes. We are concerned that the 'credit repair' industry identifies and exploits any lack of clarity in this area, often targeting the most vulnerable of consumers including those who speak English as a second language.

ARCA has serious concerns about the activities of so-called credit repair agents and we are working alongside consumer advocates to combat the issues these agents pose to consumers and industry. One way we think EDR schemes can help reduce the opportunity for credit repair agents to prey on consumers is for EDRs to have a stronger consumer-facing presence, including better, easy to understand online resources and better trained staff to deal with preliminary enquires or assist consumer understand the process of EDR.

We understand anecdotally from consumer advocates that staff who deal with early-stage disputes or preliminary consumer enquiries are often not able to give reliable information about timeframes and jurisdiction. For this reason, we understand that consumer advocates rarely

[12] Guideline
[13] RG 165.62

refer their clients to the enquiries line of the EDR services. We submit that a more accessible front end presence and stronger communication would assist consumers understand the process, clarify issues in dispute from the outset, reduce the opportunities for credit repair agencies to exploit consumers and may result in early resolution of some complaints.

Criteria to make decisions

A review and comparison of annual review documents from both FOS and CIO indicates that the nature of members and complaints considered by each scheme has some core differences.

CIO and FOS set out the criteria upon which they will make their decisions in their Rules and Terms of Reference respectively.

CIO Rules state that:

> *23.2 The Ombudsman will generally make his or her determination based upon:*
> *(a) the complaint;*
> *(b) the financial services provider's response;*
> *(c) the complainant's reply; and*
> *(d) information and documents the scheme has received during the CIO process, including any advice from suitably qualified people.*
>
> *2 3.4 A determination will be in writing and include the Ombudsman's reasons for making the determination.*

Paragraph 8 of the FOS Terms of Reference relevantly state:

> *8.1 Rules of evidence*
>
> *FOS is not bound by any legal rule of evidence.*
>
> *8.2 Dispute resolution criteria*
>
> *Subject to paragraph 8.1, when deciding a Dispute and whether a remedy should be provided in accordance with paragraph 9, FOS will do what in its opinion is fair in all the circumstances, having regard to each of the following:*
> *a) legal principles;*
> *b) applicable industry codes or guidance as to practice;*
> *c) good industry practice; and*
> *d) previous relevant decisions of FOS or a Predecessor Scheme (although FOS will not be bound by these).*
>
> *...*
>
> *8.7 Recommendations and Determinations*
>
> *a) Each Recommendation and Determination:*
> *(i) must be in writing;*
> *(ii) may either reach:*
> *(A) a conclusion about the merits of the Dispute; or*
> *(B) the view that, given the procedures adopted by FOS, it would not be appropriate for FOS to reach any conclusion as to the merits of the Dispute;*
> *(iii) must set out reasons for any conclusion about the merits of a Dispute or view of the kind referred to in paragraph 8.7a)(ii)(B);*

(iv) must specify any remedy, determined in accordance with paragraph 9, that FOS considers fair and appropriate; and
(v) must be provided to all parties to the Dispute.

b) A Determination is a final decision and is binding upon the Financial Services Provider if the Applicant accepts the Determination within 30 days of receiving the Determination.

ARCA holds some concerns with the criteria upon which the EDR schemes decide their disputes, including how the relevant criteria and respective weight is explained in reasons for determinations.

We note the Code of Banking Practice and other industry codes and guidance set down requirements and expectations that are often higher than the legal standard. We support consideration of these industry codes as appropriate.

Our concerns therefore relate to:

- The vague and significant power of the schemes to base its determinations on "*what in its opinion is fair in all the circumstances"* – in particular how FOS is utilising this power.
- Insufficient weight being afforded to legal principles.

These concerns are amplified in circumstances where FOS determinations may lack clear and comprehensive reasons for decisions.

What is fairness?

The notion of fairness is not strictly defined but we support fair outcomes from EDR determinations.

To ensure the integrity of EDR determinations and protect the flexibility around what is "fair" depending on all circumstances, we think it vital that *procedural* fairness is strictly upheld and that the concept of fairness and its influence on the outcome of each dispute or complaint (particularly balanced against other factors) is appropriately explained to parties.

It is also relevant that fairness is a relevant matter in the Benchmarks for Industry-Based Customer Dispute Resolution Schemes, relied on by both ASIC and OAIC in recognising EDR schemes. The ASIC and OAIC Guidelines elaborate on what "fairness" means as follows:

(The EDR 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.

Relevantly this explanation highlights that EDR procedures and decisions must be fair and must be *seen* to be fair. ARCA Members have expressed some concern around the lack of transparency around FOS determinations, particularly around the concept of "fairness" and how it influences these determinations, and taking into account other relevant factors. Consequently, ARCA would support the requirement for EDR schemes to publish more comprehensive reasoning where it relies on the principle of fairness to support its decisions.

Regard to Legal Principles

To better understand how FOS says it reaches its determinations, we refer to FOS's Operational Guidelines to the Terms of Reference[14] which elaborate on what amounts to "having regard to" certain factors for the purposes of paragraph 8.2 of FOS's TORs:

Regarding "having regard to" legal principles, the Operational Guidelines state:

> *FOS takes the approach that it should identify relevant legal principles and take these into account in its consideration of a Dispute. "Legal principles" used in this context refers to the law generally including the common law, important precedents and applicable legislation (eg* Corporations Act 2001 *or the* Insurance Contracts Act 1984*). Further, if there is a contract between an FSP and an Applicant, FOS will consider the terms of the contract.*
>
> *This does not mean FOS must strictly apply the legal principles. However, FOS will consider these when handling a Dispute and if it is necessary to deviate from those principles to achieve fairness in the circumstances, it will identify its reasons for doing so.*
>
> *This approach was endorsed, for the similarly worded Financial Industry Complaints Service Rules, in* Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd & Ors *[2009] VSC 7.*

Whilst we note that FOS is not required to apply strict legal principles and may consider the concept of fairness in its decision making, nonetheless we think it is important that FOS clearly identifies and demonstrates an understanding of the relevant legal principles in each case, and specifically notes why principles might not apply to the circumstances of the case when it is relying on the fairness principle instead.

Legal principles have often evolved over many years, and they provide firm guidance to industry practice. Where there are factors that lead FOS to deviate from applying those principles in its decisions, it is important for the integrity of EDR that FOS identifies those relevant factors and explains how those factors interplay with the relevant legal principles in the circumstances of the case.

Additionally, while the Operational Guidelines state that FOS will identify reasons for deviating from legal principles where appropriate, it is our Members' experience that those reasons are often not clearly or adequately expressed. Determinations that deviate from legal principles without adequate explanation undermine the value of publishing FOS decisions, which industry should be able to rely on to understand FOS's views and apply that understanding to future practices as appropriate.

Regard to previous determinations

The Operational Guidelines also explain that FOS does not treat its previous decisions as precedents, however to support consistency in outcomes it may have regard to previous determinations as relevant.

ARCA supports consistency in outcomes and agrees that previous determinations which consider similar facts or principles can be relevant to determining disputes. For this reason it is critical that EDR determinations provide clear and comprehensive reasoning in publishing their decisions. Reasons for determinations are important to allow industry to understand the EDR scheme's views, and to ensure outcomes are consistent and somewhat predictable. This is another reason that we would support more comprehensive reasoning in EDR determinations.

[14] Available at https://www.fos.org.au/custom/files/docs/operational-guidelines-as-at-1-january-2015.pdf

Whether it is appropriate to publish draft determinations

We recognise the insight that industry can gain from EDR determinations and support transparency and accountability in dispute and complaints handling. To that end we appreciate the current practice around publishing final (and de-identified) determinations on the FOS website. However the criteria for a "final" determination set out in paragraph 8.7 of FOS's TORs and provided for under RG 139.217 clearly states that a determination is only final once the applicant accepts the determination (within 30 days of receiving the determination). We have been alerted to at least one determination currently available on the FOS website which was not accepted by the applicant. In these circumstances, we understand that under the TORs and ASIC Guidance, the determination is not final and we therefore do not think it appropriate for publication.

Funding Arrangements

Our Members have raised concerns with the fee structure of FOS and we suggest that it may impact the independence and accountability of the scheme, and may provide scope for exploitation by credit repair agencies.

In circumstances where disputes or complaints are not resolved through IDR, timely resolution remains a priority for all parties. However FOS's fee structure calculates costs according to the complexity of issue and point of resolution (e.g. we are advised that an initial case management the fee is $500, whereas resolution through determination can result in a fee between $3,500 and $8,500). We are concerned that this fee structure:

- does not incentivise FOS to pursue early resolution at EDR
- dissuades FOS members from pursuing legitimate disputes, due to commercial influences
- is open to exploitation by the credit repair industry.

AN IMPROVED FRAMEWORK FOR DISPUTE RESOLUTION

ARCA notes the recent comments by the Prime Minister in support of a banking tribunal[15]. It is not clear to ARCA whether the proposed tribunal would be an addition to the current dispute resolution framework, or whether this proposed tribunal is to replace the current three EDR schemes under review.

We note above the concerns we hold with the operation of the current schemes, and ARCA believes these concerns should be addressed with the EDR system regardless of any decision on the creation of a banking tribunal.

ARCA sees real risks that would need to be managed in the event that the government proceeds with a proposal to roll the existing three EDR schemes into one tribunal (as either a statutory body or other arrangement) including delayed dispute resolution, less flexibility in responding to the dynamics of the financial system, less opportunity for qualified staff to refine their areas of expertise, less innovation and reduced opportunities for schemes to strive for excellence in efficiency and outcomes.

Benefits of the current multi-scheme framework include:

[15] http://www.pm.gov.au/media/2016-10-07/transcript-interview-fiveaa-breakfast

- each scheme can benchmark and compare its performance against the other, including on matters such as service levels and timeliness to resolve a dispute, costs and quality of guidance
- schemes must be responsive to their stakeholders – this is particularly important given financial firms are required to hold membership to an EDR
- where appropriate, multiple independent schemes allows professional discussion among the schemes on contentious or complex issues.

ARCA Members support easy access to dispute resolution services for consumers, and accordingly are concerned that a new tribunal may add another layer of bureaucracy for handling disputes. If gaps can be identified on the current framework, where disputes may fall outside the existing ombudsman schemes then we support further investigation of those gaps – with the intention of providing positive consumer outcomes for dispute resolution.

ARCA also notes our support for a wider communications and education role for the current EDR schemes – including the creation of a triage service.

Depending on the arrangements for the proposed tribunal – as noted above – the triage service would need to be run and funded by EDR schemes jointly (recognising the EDR schemes are industry funded). The independence of each EDR scheme would need to be ensured, so that the dispute and complaints framework could continue to realise the benefits of a multi-scheme arrangement.

We envision the triage service's main role would be as a customer-facing help desk to help guide the consumer through their dispute or complaint. The triage service could explain the dispute and complaints process to the consumer and make a preliminary assessment of the complaint against a jurisdictional check-list before referring the complaint on to the relevant EDR (or to IDR if the consumer has not already sought to resolve the dispute through IDR). We expect the triage service could provide fact sheets on procedures and common complaint issues which would help the consumer moving forward (whether to IDR or EDR). In this regard the triage service could assist those consumers who currently feel it necessary to engage credit repair companies to assist them in the complaints process.

CONCLUSION

ARCA supports a robust, efficient and transparent complaints and dispute resolution framework in the financial system. We support IDR as a primary forum for dispute resolution, as well as easy access to EDR where necessary.

ARCA holds concerns in relation to the operation of the current EDR arrangements, particularly in relation to the new credit reporting system. We are concerned that given the relative youth of the comprehensive credit reporting system, without adequate oversight from the privacy regulator we see a high risk of EDR decisions establishing views on the legislation that potentially have significant unintended consequences.

ARCA notes the recent comments by the Prime Minister in support of a banking tribunal, however until further details are released on such a tribunal it is not clear whether the proposed tribunal would be an addition to the current dispute resolution framework, or whether this proposed tribunal is to replace the current three EDR schemes under review. We support full and effective EDR coverage, and where gaps can we identified we support steps to close those gaps.

Attachment A: List of ARCA Members

As at 10 October 2016

American Express

Australia and New Zealand Banking Group

Bank of Queensland Limited

Bendigo and Adelaide Bank

Citibank

Commonwealth Bank of Australia

Credit Union Australia

Customer Owned Banking Association (COBA)

Dun & Bradstreet

Experian Australia

HSBC Bank Australia

ING Direct

Latitude Financial Services

Macquarie Leasing

ME Bank

Momentum Energy

MoneyPlace

National Australia Bank Limited

RateSetter Australia

Suncorp

Toyota Finance Australia Ltd

Veda

Volkswagen Financial Services

Westpac Banking Corporation