Introduction

This report will discuss the recommendations proposed in the 'Review of the financial system external dispute resolution and complaints framework' (Ramsay Review).[1] The Ramsay Review examines the financial system's current external dispute resolution (EDR) and complaints framework, and it follows the release of the 'Review of the Four Major Banks: First Report' ('Banking Review').[2] I will be focusing on the following particular aspects of the Ramsay Review which have the most relevance for the Consumer Credit Legal Service (WA):

a) the recommendation to create a single EDR body to handle financial disputes;
b) whether this EDR body will take the form of an ombudsman or a tribunal;
c) the membership of 'debt management firms' under the proposed EDR scheme; and
d) the lifting of the current monetary limits and compensation caps.

Current Regulatory Framework

All Australian financial services licensees, credit licensees and credit representatives must:

a) have an internal dispute resolution procedure that complies with the standards or requirements made or approved by ASIC; and
b) be a member of an EDR scheme approved by ASIC.[3]

There are currently two ASIC-approved EDR schemes – the Financial Ombudsman Service (FOS) and the Credit and Investments Ombudsman (CIO). Both FOS and CIO are independent industry ombudsman dispute resolution schemes.

FOS handles complaints against banks, credit unions, foreign exchange dealers, deposit takers, credit providers, mortgage brokers, general insurers, insurance brokers, life insurers, funds' managers, financial advisers and planners, stockbrokers and some superannuation providers.[4] CIO on the other hand handles complaints against credit unions, building societies, non-bank lenders, mortgage and finance brokers, financial planners, lenders and debt collectors, credit licensees and credit representatives.[5]

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[1] Ian Ramsay, Alan Kirkland and Julie Abramson, 'Review of the financial system external dispute resolution and complaints framework' (Report, 3 April 2017). <http://www.treasury.gov.au/~/media/Treasury/Consultations%20and%20Reviews/Reviews%20and%20Inquiries/2016/Review%20into%20EDR/Key%20Documents/PDF/EDR%20Review%20Final%20report.ashx>

[2] House of Representatives Standing Committee on Economics, Parliament of Australia, *Review of the Four Major Banks: First Report* (2016).

[3] *National Consumer Credit Protection Act 2009* (Cth) s 47; *Corporations Act 2001* (Cth) ss 912A(1)(g), 912(2).

[4] House of Representatives Standing Committee on Economics, above n 2, 10.

[5] Ibid.

A single EDR body

The main recommendation proposed by the Ramsay Review is a single EDR body to replace FOS and CIO in handling all financial disputes.[6] This same EDR body will also replace the Superannuation Complaints Tribunal in resolving superannuation disputes.[7] This aspect of the EDR body will not be discussed in this report as superannuation disputes fall outside the scope of CCLSWA's areas of practice.

This recommendation of a single EDR body was also proposed in the Banking Review,[8] and recently approved in the 2017 budget. The Federal Government has announced that a one-stop shop EDR body, known as the Australian Financial Complaints Authority (AFCA), will be established to consider all financial disputes.[9] AFCA will commence from 1 July 2018 and provide consumers and small businesses with free, fast and binding dispute resolution.[10]

Establishing a single EDR body would address a number of shortcomings associated with the current multi-scheme framework: the lack of consistency and outcomes for similar complaints, difficulty in pursuing disputes involving multiple financial firms, consumer confusion, and duplicative costs for industry, the regulator and other stakeholders.[11] Neither the Ramsay Review Panel and Banking Review Panel were convinced that the multi-scheme system was justified on the basis that "competition between schemes leads to innovation to the benefit of consumers, as schemes and regulators are able to benchmark against each other creating an incentive to innovate."[12]

As a volunteer paralegal at CCLSWA I have observed firsthand the failings of the current multi-scheme framework. I recently dealt with a client who alleged that his mortgage broker forged his signature on a loan document. His bank failed to verify his signature and the client, without his knowledge, become subject to several high interest loans. As the mortgage broker and bank were members of CIO and FOS respectively, the client had to lodge two separate complaints. Although both schemes found in favour of the client, there was a failure to coordinate the remedies awarded by each scheme. Both the bank and mortgage broker denied being able to terminate the client's loan agreements; each alleged that this power lay with the other party.

The Ramsay Review reported a high degree of jurisdictional overlap between the two EDR schemes.[13] This appears to arise from the definitions of 'financial services'

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[6] Ramsay, Kirkland and Abramson, above n 1, 120.
[7] Ibid.
[8] House of Representatives Standing Committee on Economics, above n 2, 5 – 9.
[9] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 2017, (Scott Morrison).
[10] Ibid.
[11] Ramsay, Kirkland and Abramson, above n 1, 93.
[12] Ibid 111-117.
[13] Ibid 103.

adopted by the two EDR schemes.[14] The overlap within these definitions does not allow for a mutually exclusive system in which there is a clear delineation between the type of financial service providers to be covered by each EDR scheme.

This jurisdictional overlap presents difficulties as the two EDR schemes have different approaches in resolving disputes. As explained by the Ramsay Review:

> *FOS determinations seek to achieve an outcome that is 'fair in all the circumstances', taking into account legal principles (including the common law, important precedents, applicable legislation and the terms of any contacts between the financial firm and the complainant), any applicable industry codes of practice, as well as good industry practice and previous relevant FOS decisions (although FOS is not bound by these). CIO in determining a matter has regard to the relevant legal requirements and rights provided by law to the complainant; applicable codes of practice; good industry practice in the financial services industry; and fairness in all the circumstances.*[15]

The lack of consistency becomes more readily apparent when one examines the approaches adopted by FOS and CIO in relation to particular disputes. To take disputes regarding hardship applications as an example, CIO imposes an obligation on lenders to "consider in good faith whether a financial hardship application is reasonably appropriate, having regard to the borrower's financial circumstances".[16] On the other hand, FOS will consider whether the financial service provider has provided "genuine consideration to a consumer's financial difficulty"[17]. These two tests – 'good faith' and 'genuine consideration' – involve the consideration of overlapping but not identical factors. Furthermore, CIO requires that the borrower be able to establish that he or she is "unable to reasonably to meet their obligations under the credit contract because of illness, unemployment or other reasonable cause";[18] FOS however does not explicitly identify this as a prerequisite to a credit contract variation.[19] In terms of remedies, FOS and CIO have the power to vary

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[14] See Financial Ombudsman Service, *FOS - Terms of Reference* (1 January 2010, as amended 1 January 2015) 37-8 < https://www.fos.org.au/custom/files/docs/fos-terms-of-reference-1-january-2010-as-amended-1-january-2015.pdf>; Credit and Investments Ombudsman, *Credit and Investments Ombudsman Rules 10th Edition* (15 August 2016) 43 <http://www.cio.org.au/assets/1212442/CIO%20Rules%2010th%20Edition%20-%20August%202016%20%282%29%281%29.pdf>

[15] Ramsay, Kirkland and Abramson, above n 1, 104.

[16] Credit and Investments Ombudsman, *Position Statement Issue 2* (3 May 2010, updated February 2011) 2. <http://www.cio.org.au/assets/1212536/Position%20Statement%202%281%29.pdf>

[17] Financial Ombudsman Service, *The FOS Approach to Financial difficulty series: Legal principles, industry codes and good industry practice* < https://www.fos.org.au/custom/files/docs/1_fos_approach_legal_principles_industry_codes_and_good_industry_practice_final.pdf>

[18] Credit and Investments Ombudsman, above 16, 8.

[19] For a list of prerequisites see Financial Ombudsman Service, *The FOS Approach to Financial difficulty series: Our power to vary regulated credit contracts* <

credit contracts and award compensation, but only CIO has the additional power to require the financial service provider to do something or refrain from doing something.[20]

Ombudsman or tribunal?

Another matter of importance is whether the EDR scheme to replace FOS and CIO should take the form of an ombudsman or a tribunal. The Ramsay Review Panel were in favour of an industry based ombudsman model as it would provide: increased flexibility and responsiveness, faster resolution of disputes, a greater focus on consumer education and accessibility, ongoing system-wide improvements, and enhanced and more direct independent and regulatory scrutiny.[21]

In contrast, the Banking Review supported the establishment of a Banking Tribunal. Although acknowledging the concerns raised in the submissions as to the shortcomings of tribunals as a dispute resolution body, the Banking Review Panel was of the opinion that such concerns could be properly addressed by implementing a number of measures. It is however questionable whether these proposals comprehensively see to such concerns so as to justify a Banking Tribunal. Although the Banking Review provided that the Banking Tribunal should be free and operate without lawyers (to the extent possible),[22] none of the proposed measures went more specifically to improving the relative inaccessibility of tribunals to consumers, or to mitigate the tendency of tribunals to operate as courts and apply an inflexible 'black letter law' approach to decision making[23]. Furthermore, if the proposed tribunal were to be governed by legislation, this will render the tribunal unable to dynamically respond to changes in the financial industry. That all being said, the Banking Review did propose that the Banking Tribunal refer potential systemic issues to ASIC for formal investigation, thereby ensuring that the tribunal had a role that went beyond that of individual dispute resolution to one that has the wider objective of industry-wide improvement.

In announcing the establishment of AFCA, Treasurer Scott Morrison very notably did not refer to the AFCA as either an ombudsman or tribunal. In light of the divergence of views between the Banking Review Panel and the Ramsay Review Panel it is therefore currently unclear as to what form the AFCA will take.

Debt management firms

Debt management firms engage in credit repair services, debt agreement administrators, budgeting services and debt negotiation services.[24] These firms are

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https://www.fos.org.au/custom/files/docs/2_fos_approach_our_power_to_vary_regulated_credit_contracts_final.pdf>

[20] Credit and Investments Ombudsman, above 16, 13.

[21] Ramsay, Kirkland and Abramson, above n 1, 102.

[22] House of Representatives Standing Committee on Economics, above n 2, page 9.

[23] This is opposed to the more inquisitorial approach adopted by ombudsmen.

[24] Australian Securities and Investments Commission, *Report 465 Paying to get out of debt or clear your record: The promise of debt management firms* (January 2016) <http://download.asic.gov.au/media/3515432/rep465-published-21-january-2016.pdf>

currently not subject to a uniform regulatory framework.[25] The majority of the services provided by debt management firms do not meet the definition of 'financial services', and thus are not required by s911A of the *Corporations Act 2001* (Cth) to hold an Australian Financial Services Licence and comply with the associated obligations.[26] They also do not satisfy the definition of 'credit assistance'[27] and thereby are not subject to the obligations under the *National Consumer Credit Protection Act 2009* (Cth) (NCCP) such as being a member of an approved EDR scheme (s47(1)(i) NCCP).

Consumers with disputes with debt management firms are therefore left to rely on the misleading and deceptive conduct provisions of either the Australian Consumer Law[28] if the conduct relates to 'goods or services', or the ASIC Act where the conduct relates to 'financial services'.[29]

In recognition of this absence of EDR in relation to debt management firm disputes, the Ramsay Review Panel recommended that debt management firms be required to be members of the proposed single EDR body.[30] The Ramsay Review Panel however was of the opinion that further work is needed to determine what would be the most appropriate mechanism by which to impose this EDR membership requirement.[31] That being said, possible options could include introducing a licencing regime, or adopting the approach of the Financial Conduct Authority (UK) which has implemented a set of conduct rules for debt management service providers.[32]

Monetary limits and compensation caps

FOS and CIO currently have a jurisdictional monetary limit of $500,000 and compensation cap of $309,000. According to the Ramsay Review, these caps have not kept pace with economic indicators (such as the high cost of housing) and the current values of financial products, and thus were preventing wider access to the EDR schemes.[33] The Banking Panel made similar findings.[34] The Ramsay Review

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[25] Ramsay, Kirkland and Abramson, above n 1, 13.
[26] Ibid 198. See s921A of the *Corporations Act 2001* (Cth) for the general obligations of an Australian Financial Services Licencee.
[27] Sections 6 to 8 of the NCCP specifies a number of activities which may be deemed 'credit activities' for the purposes of regulation; the one which relates most directly to debt management firms is 'credit assistance'. However, a debt management firm will only be engaging in credit assistance pursuant to s8 NCCP if they suggest that a consumer take out a debt consolidation loan with a particular lender or, having negotiated an arrangement with an existing lender, suggest to the consumer that they stay in that loan.
[28] This is contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth).
[29] Australian Securities and Investments Commission, above n 24, 39.
[30] Ramsay, Kirkland and Abramson, above n 1, 202.
[31] Ibid.
[32] Financial Conduct Authority, *Detailed rules for the FCA regime for consumer credit Including feedback on FCA QCP 13/18 and 'made rules'* (February 2014) <https://www.fca.org.uk/publication/policy/ps14-03.pdf>
[33] Ramsay, Kirkland and Abramson, above n 1, 154.
[34] House of Representatives Standing Committee on Economics, above n 2, 7.

Panel recommended the setting of a monetary limit of $1 million and a compensation cap of no less than $500,000.

For disputes concerning a guarantee over a primary place of residence, the Ramsay Review recommended that, due to the strong growth in house prices in major capital cities, no monetary limit or compensation cap should apply so as to ensure effective access to EDR.[35] Indeed, I was advised that CCLSWA has had a number of cases where clients were unable to bring their guarantor disputes to either FOS or CIO because of the low jurisdictional caps. From a policy perspective, this removal of caps is justified as a guarantor risks losing what can be his or her only major asset without often having acquired any personal benefit under the guarantee.

More generally speaking, a change in the caps is necessary because without access to EDR, a consumer's only option will be to initiate court proceedings. Aside from the added costs and delays associated with court action, the consumer will be subject to the court's strict adherence to legal principles. By contrast, FOS for example in a guarantor dispute will consider what is fair in all the circumstances, and take into account things like good industry practice and any applicable industry codes such as the Code of Banking Practice.[36] By lifting (or removing) what appears to be the somewhat arbitrary caps, more consumers will undoubtedly be able to benefit from the more flexible and consumer friendly approaches of the EDR schemes.

Conclusion

The Ramsay Review put forward a number of much-needed recommendations for the financial sector's EDR system. The Federal Government has expressed approval of the Ramsay Review however more clarification is needed as to the implementation of the AFCA. In particular, it is still uncertain whether AFCA will adopt an ombudsman or tribunal form, or if the monetary limits and compensation caps will indeed be lifted. In any case, any measures to strengthen the EDR system should be considered as they go towards ameliorating the power imbalance between borrowers and lenders which very much characterizes the financial industry.

[35] Ramsay, Kirkland and Abramson, above n 1, 157-8.
[36] Financial Ombudsman Service, *The FOS Approach to Disputes lodged by guarantors* <https://fos.org.au/custom/files/docs/fos_approach_to_to_disputes_lodged_by_guarantors.pdf>

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