

Chapter 1

Introduction

1.1 On 14 September 2017, the Senate referred the Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017 to the Economics Legislation Committee for inquiry and report by 17 October 2017.¹

Conduct of the inquiry

1.2 The committee advertised the inquiry on its website. It also wrote to relevant stakeholders and interested parties inviting submissions by 29 September 2017. The committee received 31 submissions, which are listed at Appendix 1.

1.3 The committee held public hearings in Canberra on 9 October 2017 and in Sydney on 10 October 2017. The names of the witnesses who appeared at the hearings are at Appendix 2.

1.4 The committee thanks all individuals and organisations who contributed to the inquiry.

1.5 Hansard references throughout this document relate to the Proof Hansards. Please note that page numbering may differ between the proof and final Hansards.

Overview of the bill

1.6 The bill's Explanatory Memorandum (EM) states that the bill 'will amend the Corporations Act 2001 (Corporations Act) and other Commonwealth Acts to introduce a new external dispute resolution (EDR) framework and an enhanced internal dispute resolution (IDR) framework for the financial system.'²

1.7 Further, the EM notes that the new EDR framework is intended to allow consumers easy access to a single EDR scheme. As such the bill provides for the establishment of a single body to deal with complaints against financial institutions to be known as the Australian Financial Complaints Authority (AFCA), which will resolve disputes about products and services provided by financial firms.

1.8 The AFCA scheme will replace the Superannuation Complaints Tribunal (SCT) and the existing EDR schemes approved by the Australian Securities and Investments Commission (ASIC)—the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO).

1.9 The new body will be overseen by the Australian Securities and Investments Commission. The bill provides for ASIC to set the AFCA's regulatory requirements and for an increase in the power of supervision by ASIC of internal disputes resolution in financial firms.

1 *Journals of the Senate*, 14 September 2017, pp. 2007–9.

2 Explanatory Memorandum, p. 3.

1.10 The arrangements will be funded from the industry.

Reviews and consultation

1.11 There have been several processes to consider consumer redress in the financial industry. This committee is currently conducting an inquiry into consumer protection in the banking, insurance and financial sector, referred on 30 November 2016 with a reporting date of 30 March 2018. The Parliamentary Joint Committee on Corporations and Financial Services inquiry into Impairment of Customer Loans considered issues of dispute resolution in its report of May 2016. Following this, the Office of the Australian Small Business and Family Enterprise Ombudsman conducted an inquiry into the adequacy of the law and practices with regard to small business loans. The House of Representatives Standing Committee on Economics in its *Review of the Four Major Banks: First Report* in November 2016 made recommendations covering much of the ground covered in this bill.

1.12 The bill is explicitly a response to a more focused review, the Review of the Financial System External Dispute Resolution and Complaints Framework, undertaken by a panel chaired by Professor Ian Ramsay.³ The review was commissioned by the Government in May 2016, and involved extensive consultation and attracted nearly 200 submissions in all.⁴ It reported to government in April 2017.⁵ In the May Budget, the Treasurer announced the establishment of a new Australian Financial Complaints Authority (AFCA).

1.13 The Government released an exposure draft of the bill, an explanatory memorandum, a consultation paper and a fact sheet in May 2017 for comment by 14 June 2017. Submissions to this process were published on 5 October 2017, timing which drew some comment in the hearing on 9 October 2017.⁶

1.14 In July 2017 the Government established a transition team headed by Dr Malcolm Edey (formerly Assistant Governor, Financial Markets, at the Reserve Bank of Australia) initially to advise on structure, funding and terms of reference for the new body, and then, after the legislation is passed, to oversee the new arrangements.⁷

3 Details of the review and access to the report are available at The Treasury, *Review into Dispute Resolution and Complaints Framework*, <https://treasury.gov.au/review/review-into-dispute-resolution-and-complaints-framework/> (accessed 28 September 2017). It is referred to frequently in the Explanatory Memorandum to the bill, for example at page 4.

4 The Treasury, *Review of the financial system external dispute resolution and complaints framework: Final report*, April 2017 (the Ramsay Report), p. 1.

5 An additional term of reference, on compensation schemes, was added in February 2017 and the panel was due to report on it in June 2017.

6 Mr Thomas Beregi, Chief Executive Officer, Credit Corp Group Ltd, *Committee Hansard*, 9 October 2017, pp. 4–5; Mr Raj Venga, Chief Executive Officer and Ombudsman, Credit and Investment Ombudsman, *Committee Hansard*, 9 October 2017, p. 12.

7 The Hon K O'Dwyer MP (Minister for Revenue and Financial Services), 'Overhauling the dispute resolution framework', media release, 26 July 2017, <http://kmo.ministers.treasury.gov.au/media-release/071-2017/> (accessed 28 September 2017).

1.15 On 14 September 2017, the Minister for Revenue and Financial Services issued a media release, which, among other things, listed ways in which the draft bill had been varied in response to the consultations.⁸

Current consumer complaint handling procedures⁹

1.16 Under various licensing arrangements and/or the *Corporations Act 2001*, most firms in the Australian financial industry are required to operate internal dispute resolution (IDR) schemes, and to be members of an industry based external dispute resolution (EDR) scheme overseen by ASIC. Consumers must first raise a dispute through the IDR, and only if it is not settled do they move on to the EDR—although disputes registered with the EDR are usually referred back for a final, often successful, attempt at internal resolution.

1.17 At present there are two ASIC approved EDR schemes: the Financial Ombudsman Service (FOS), and the Credit and Investments Ombudsman (CIO). These are schemes which meet the key criteria for ombudsman schemes: accessibility, independence, clearly defined jurisdiction, powers to investigate systemic as well as individual complaints, procedural fairness, and accountability.¹⁰ ASIC's Regulatory Guide 139 and Regulatory Guide 165 set out the requirements for EDRs.¹¹ Each scheme operates according to detailed terms of reference, which can be changed only with ASIC's approval. Both schemes are industry funded.

1.18 A third scheme, the Superannuation Complaints Tribunal (SCT), operates under legislation.

1.19 FOS, which deals largely with banking and insurance, was formed in 2008 as a merger of three existing schemes; it was later joined by two more schemes. So there is a history of mergers and rationalisation. FOS is the largest of the three remaining schemes. It had 13,576 members and 351 staff, handling around 34,000 disputes (83 per cent of the total for all schemes) in 2015–16. Of its revenue of \$47 million in 2015–16, 74 per cent was from dispute resolution fees, with 11 per cent each from membership fees and user charges.

8 The Hon K O'Dwyer MP (Minister for Revenue and Financial Services), 'Putting consumers first – improving dispute resolution', media release, 14 September 2017, <http://kmo.ministers.treasury.gov.au/media-release/092-2017/> (accessed 28 September 2017).

9 The following material is drawn from Chapter 4 of the Ramsay Report, except where otherwise indicated.

10 Australia and New Zealand Ombudsman Association, 'Essential Criteria for Describing a Body as an Ombudsman', http://www.ombudsman.gov.au/_data/assets/pdf_file/0015/31434/ANZOA-Essential_criteria_for_describing_a_body_as_an_Ombudsman.pdf (accessed 28 September 2017).

11 ASIC, RG 139 Approval and oversight of external complaints resolution schemes, <http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-139-approval-and-oversight-of-external-complaints-resolution-schemes/>; and RG 165 Licensing: Internal and external dispute resolution, <http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-165-licensing-internal-and-external-dispute-resolution/> (both accessed 28 September 2017).

1.20 The Credit and Investments Ombudsman is a much smaller body, although it has more members. Of its 22,973 members in 2015–16, around 97 per cent were sole traders, partnerships or small businesses. They included lenders (big and small, including mortgage lenders and credit card providers), finance brokers, mutual banks and credit unions, credit reporting schemes and financial planners. It has about 60 employees and received 4760 disputes in 2015–16. Of its \$8 million revenue, 71 per cent came from membership fees and 26 per cent came from complaints fees.

1.21 The Superannuation Complaints Tribunal is funded from a Budget allocation which is then recovered through a financial sector levy by the Australian Prudential Regulation Authority. The levy is set by the Minister and is not linked to the number of disputes. It is also subject to constraints such as the efficiency dividend. The number of staff has been around 45 but fell to 32 in 2015–16. In 2015–16, the SCT received 2368 complaints. These disputes tend on average to be more complex than those received by the other two bodies, and generally take longer to resolve.

1.22 FOS and CIO have a monetary limit of \$500,000 and compensation cap of \$309,000 for individuals and small businesses, with a small business cap of \$2 million on credit facilities. SCT has no limits.

1.23 There is an important distinction in the way the two models operate. Ombudsman schemes are set up to mediate between a powerful and a weak entity. The SCT stands in the place of the trustee and attempts to make the right decision. This means, broadly, that the Ombudsman has a concern with fairness while the SCT has a concern with legality.

International comparisons

1.24 The Interim Report of the Ramsay Review examined several overseas countries' ways of dealing with disputes. No one model seems to predominate.¹²

1.25 According to the Interim Report, the UK has a single statutory ombudsman body to deal with all kinds of cases. There is an independent assessor who can review process, but not the merits or decisions of individual cases. The decisions are subject to judicial review. However, the UK also has a Pensions Ombudsman, and there appears to be some overlap between the two bodies.¹³

1.26 Singapore has a single scheme. Its cap is S\$100,000 (A\$95,000), which suggests a limited jurisdiction in superannuation matters.

1.27 New Zealand has four different schemes. They compete for members, and have a good deal of overlap. They began as specialised bodies, but the specialisation appears to be breaking down.

12 The Treasury, *Review of the financial system external dispute resolution and complaints framework: Interim Report*, 6 December 2016, https://static.treasury.gov.au/uploads/sites/1/2017/06/R2016-002_EDR_interim.pdf (accessed 11 October 2017).

13 Pensions Ombudsman, <https://www.pensions-ombudsman.org.uk/>; Financial Ombudsman Service, http://www.financial-ombudsman.org.uk/publications/technical_notes/pension-complaints-our-jurisdiction.html (both accessed 11 October 2017).

1.28 Canada has several different schemes. Two are operated by national industry bodies. At least one is operated by the provincial government of Québec. The two major schemes appear to have a fairly clear but not mandated division of labour: one deals with banking and the other with general insurance.

Findings of the Ramsay Review

1.29 The Ramsay Review concluded that there were overlaps and gaps among the various disputes bodies, and some confusion among consumers as to where to direct their complaints. The different operating styles of the bodies made it difficult to ensure the same outcome for similar complaints. Some disputes could involve several financial service providers, and they could be members of different schemes. The existence of several schemes imposed extra costs on industry and on the regulator. There were some gaps in coverage: debt management schemes were not required to be members; and there was some overlap: both credit licensees and credit representatives were required to be members when membership by a credit licensee provided the necessary coverage.¹⁴

1.30 Not surprisingly, the SCT's performance has been poor:

Although SCT has a highly professional staff and Chairperson, it is unable to resolve disputes quickly, in contrast to FOS and CIO. In 2015–16, for disputes that reached determination, it took an average of 796 days [that is, over two years] for a dispute to be resolved.

The problems facing SCT can be attributed to chronic underfunding and a lack of flexibility in its funding—there is no link between SCT funding and the level of complaints it receives—as well as outdated governance arrangements and limited flexibility to determine its dispute resolution process. There is a lack of focus on achieving system-wide improvements and the existing accountability mechanisms are passive and indirect.¹⁵

1.31 The Ramsay Report applauds the independence, flexibility and responsiveness of the ombudsman model. It valued the unlimited monetary jurisdiction, the broad jurisdiction to review trustee decisions, and statutory provisions such as the ability to join third parties to a dispute and to require the production of information of the SCT model.¹⁶

1.32 The report recommends the establishment of a single ombudsman-style body to hear complaints, with special features of the superannuation jurisdiction to be retained in legislation. The body would be a company limited by guarantee, overseen by ASIC, and operating under terms of reference devised by a Board and agreed by ASIC.

1.33 The body would have the following features, set out on p. 11 of the report.

14 Ramsay Report, pp. 8–9.

15 Ramsay Report, p. 9.

16 Ramsay Report, p. 10.

Governance, funding and membership

1.34 The new body will be set up as follows:

- It will be governed by a board with an independent chair and equal numbers of directors with industry and consumer backgrounds.
- It will be funded by industry through a transparent process.
- It will require compulsory membership through a licensing condition (or equivalent requirement) for financial firms (including superannuation funds).

Key features

1.35 The single EDR body would have the following key features:

- **Accessibility:** it would be free to consumers when they lodge a complaint.
- **Accountability:** it would be subject to strengthened accountability mechanisms, including regular independent reviews (with the reports and the body's responses to recommendations reported publicly) and would have an 'independent assessor' to review how disputes are handled (but not to review the outcome of individual disputes).
- **Enforceability:** firms would be required to comply with its determinations as a condition of membership and it would report firms that fail to comply to the appropriate regulator. The body would have the power to expel firms that fail to comply.
- **Improving industry practice:** it would monitor, address and report systemic issues to the appropriate regulator.
- **Expertise:** it would use panels to resolve disputes in specific circumstances, such as complex disputes, and would provide clear guidance and transparency to users on when a panel would be used.
- **Community engagement:** it would engage in outreach activities to raise awareness amongst consumers (in particular vulnerable consumers) and financial firms.

Other recommendations

1.36 The report recommended higher monetary limits (with no limits for superannuation); funding on the basis of need; and full operational autonomy.¹⁷

1.37 It also recommended closer supervision and reporting by ASIC of IDR processes, and simpler methods to deal with the identified gaps and overlaps.¹⁸

17 Ramsay Report p. 12.

18 Ramsay Report p. 12.

Transition arrangements

1.38 The Government announced the creation of the new scheme in the 2017–18 Budget. The scheme is to operate from 1 July 2018. The Superannuation Complaints Tribunal is to be wound down and will no longer operate from 1 July 2020.¹⁹

1.39 On 26 July 2017, the Government announced the creation of a transition team, headed by Dr Malcolm Edey, the former Assistant Governor (Financial System) of the Reserve Bank of Australia. The transition team is to advise the Government on AFCA's terms of reference, governance and funding arrangements. It will also make recommendations on the authorisation process for AFCA and the transitional arrangements required to settle the cases currently before the three existing schemes.²⁰

19 Commonwealth of Australia, *Budget Measures: Budget Paper No. 2 2017–18*, 'A More Accountable and Competitive Banking System—improving external dispute resolution', p. 162.

20 The Hon Kelly O'Dwyer, Minister for Revenue and Financial Services, 'Overhauling the dispute resolution framework', Media Release, 26 July 2017, <http://kmo.ministers.treasury.gov.au/media-release/071-2017/> (accessed 4 October 2017).

