Interview with Philip Field, Lead Ombudsman – Banking and Finance, Financial Ombudsman Service

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Philip Field

The 2015-2016 FOS Annual Review discloses that 47% of accepted disputes were credit disputes, mainly concerning consumer credit. It is reported that there had been a 30% reduction in financial difficulty disputes from the previous year. What do you think contributed to the 30% reduction in that year? Has the trend continued into this year?

The low interest rate environment and the significant changes in the way the big four banks have been approaching financial difficulty have contributed to the reduction. There has been a cultural change within the banks with an increased focus on working with customers in financial difficulty. The banks are having more meaningful conversations with their customers and entering into arrangements to assist customers during periods of financial hardship. That means they are getting a better recovery rate at less cost, so it's a win for the customer, a win for the bank and a win for FOS because less disputes arise.

Are there any issues that FOS is focusing on at the moment in terms of banks' practices?

There are a number of systemic issues that are being investigated with individual banks and that's always an ongoing activity. One issue that has been on our radar for some time is banks charging legal fees to a customer for responding to a FOS dispute. FOS is free to consumers and financial service providers (FSPs) should not pass on the costs of dealing with a dispute. Another issue concerns the fact that FSPs were not always passing on to their customers Reduced Input Tax Credit on enforcement expenses incurred. We have raised this issue with a number of FSPs and it remains on our radar.

The Parliamentary Joint Committee Impairment of Customer Loans Report, May 2016, refers to a comment you made in October 2015 to the effect that, in consumer cases involving financial hardship, credit providers had improved the way they deal with customers, but FOS was not seeing the same level of improvement in relation to small business customers. Have you observed any improvements in this space since 2015?

I think that there is still a lot of work to do in the way credit providers interact with their small business customers in financial difficulty. It's certainly a focus of the Parliamentary Joint Committee and other reports and I still think there's work to be done.

What are credit providers doing well during EDR with small businesses?

Greater participation in conciliation conferences. We have had significant success in getting resolution through the conciliation process and those banks that are willing to participate in that really do themselves a service. It is good for a number of reasons. One is that it causes them to concentrate their mind on where they need to make concessions (if they have made an error), but it also allows conversation about the issue, the way forward and how to solve it. The conciliation process can often deliver positive outcomes in a timely manner which can be more cost effective than the alternatives.

Is there anything in particular credit providers can be doing better in the small business space?

I have seen a number of small business disputes come to FOS because a business customer had a particular relationship manager who leaves and was replaced by someone new who has not yet built the same level of trust with the customer. I think banks could improve their communication and processes around replacement of relationship managers with a focus on avoiding disruption to the relationship.

Additionally, small business collection teams often engage in an exit strategy rather than a strategy to help the customer overcome their financial difficulty, which is the Code of Banking Practice obligation. What the banks are doing for their consumers in hardship is not always replicated in the small business area. I think there is a mindset that needs to change in relation to small business hardship. If the review of the Code of Banking Practice is implemented, that will go a long way to improving this situation.

The *Review of the financial system external dispute resolution and complaints framework* (Ramsay Review) interim report, December 2016, recommends that there be a single industry ombudsman scheme for financial, credit and investment disputes to replace FOS and CIO. In February 2017, FOS confirmed its support for a single ombudsman scheme. However, the CIO has rejected the Ramsay Review interim report saying that "*a single scheme would see the loss of the benefits the existing two schemes currently provide: price competition, service quality comparison, pressure to keep costs down, and innovate with better processes and services*". How does FOS respond to CIO's assertion?

Competition between any industry ombudsman scheme does not drive these outcomes. Innovation and service quality are driven by a scheme's desire to provide the best possible service to all stakeholders. FOS supports the position on competition between schemes released by the Australia New Zealand Ombudsman Association, the peak body for ombudsmen in Australia, which is that competition between schemes is not something that is in the interests of consumers. It doesn't lead to more efficient outcomes, instead it may in fact lead to different standards and more of a focus on its members rather than considering all stakeholders.

Can stakeholders expect to experience disruption to processes and timeframes during the implementation of the single ombudsman scheme, if this goes ahead?

If this proceeds, it will be approached carefully so that disruption is minimised and people continue to get good service, both members and consumers. We will continue to focus on business as usual. There may be some disruption, but we hope to keep that to a minimum.

In terms of processes and approaches to disputes, it is hard to say how they will differ because there are a number of steps to implement a merger. How we approach particular disputes is probably something that's a fair way down the list in terms of what you need to do to embed a merger. What stakeholders could expect to find from a single scheme is that 'approach' documents will be published from time to time, so people will have some idea of the consistency of approach to various types of disputes. It's the different experiences and views of the people involved that help build those 'approach' documents, so that will happen over time following a merger.

FOS's response to the Ramsay Review contained a proposed transition plan which would see the new scheme become operational by 1 July 2018 assuming collaboration and engagement between CIO and FOS. In light of the CIO's position, is it reasonable to anticipate difficulties with early collaboration between FOS and CIO, should a single ombudsman scheme be adopted?

At FOS we are committed to working with all stakeholders in implementing the recommendations while minimising any disruptions to consumers. We look forward to working constructively across government, other regulators and existing EDR schemes.

The Ramsay Review interim report recommends the new industry ombudsman scheme have higher monetary limits and compensation caps than current arrangements for small business. FOS has conducted an analysis which supports a broader small business jurisdiction, suggesting the credit facility limit could be up to $5m and compensation cap be up to $1m, capturing 98% of small business disputes. FOS also suggested the definition of small business be amended to mean a business with less than 100 full time employees (increase from 20).

If this all comes to fruition, by how much could dispute numbers rise? And will the single scheme have sufficient resources to ensure performance standards don't deteriorate?

That is a difficult question to answer for a number of reasons. It's hard to get data on what potential pool of disputes may come to FOS. Also, just because you have higher limits does not mean all small businesses will avail themselves of the opportunity to make a complaint. Having said that, I would expect that they will rise. I anticipate we would make our best guess based on past experience, even though the external world is volatile and dispute numbers can rise or fall suddenly.

Being able to project the volatility in dispute numbers is one of the great challenges of any ombudsman scheme, but we would gear up for an increase. We have got some capacity in the short term and we would keep an eye on things as we move through. If necessary, we could recruit externally, either permanently or just having some expertise available on tap. There are some very experienced people that we could call on at short notice if required.

The Ramsay Review interim report highlights that the *National Consumer Credit Protection Act 2009* does not apply to loans for business purposes. Further, credit providers who don't

provide consumer credit are not required to hold an Australian credit licence and, therefore, not required to belong to an EDR scheme.
Small businesses in dispute with lenders who aren't required to be a member of an EDR scheme do not have the benefit of access to EDR. FOS has proposed that the gap could be addressed by amending the Act to extend to small businesses.

Does FOS hold any statistics on what percentage of small businesses are being excluded from EDR as a result of them borrowing from lenders who don't hold an Australian Credit Licence?

No, we do not have any statistics. If someone is a member of FOS, whether because they hold a credit licence and are required to be a member of a scheme or whether they have volunteered to be a member, we will accept their small business disputes. It's those lenders that lend exclusively to small businesses and aren't a member of an EDR scheme where their members will not have access. I'm aware of a number of subsidiary companies that would fit that bill that aren't members of FOS in their own right and there would be a range of other lenders out there.

We understand the Phase 2 Consumer Credit Reforms in 2012/2013 initially included a proposal to extend the Act to small businesses but those reforms were dropped in response to objections by small business groups. A concern was that intensive regulation of business credit may reduce access to credit for small business. Does FOS consider there to be any merit to these previous concerns?

I understand a balance needs to be struck between, on the one hand, the need to have credit made available, and on the other hand, improving practices in dealing with small businesses including what information is provided when they borrow, how they're treated when they're in financial difficulty and how guarantors are dealt with. A lot of these things are dealt with in the National Credit Code for consumers and if we are serious about wanting to address a lot of the concerns that are being raised in various committees concerning small businesses then you've got to look at a number of those provisions around responsible lending obligations, disclosure, how you treat guarantors and people in financial difficulty at the very least. There might be some provisions in the National Credit Code or the Act that you don't need to import. If this exercise isn't done, then while the Code of Banking Practice assists with lending from banks, anyone borrowing from a non-subscriber doesn't have the same level of protection.

If you have a greater level of protection, then some small businesses may not get access to credit. However, it may also mean that we prevent people getting into avoidable financial difficulties.

It has been suggested that small business lending requires more flexibility during credit approval. For example, a start-up small business might not have a proven financial track record and so you know the bank has to make a judgment call. If there is intensive regulation then banks might be less flexible and some start-up businesses may never get off the ground.

FOS has issued decisions saying that was an entirely appropriate decision to take a flexible approach.

I don't see why you can't have responsible lending and flexibility. We see it already in the consumer space with ASIC Guide RG209 which attempts to deal with some of these issues. I think it is entirely appropriate for a lender to say "we don't have all the information that we would like, but we have enough. We have taken into account the borrower's character and we are prepared to lend." What I think is important is that the lender tells the customer that while they don't have all the information that they would like, the lender is prepared to go ahead and sets out the reasons why in some detail. Then the customer can make a decision about whether they still want to go ahead. If they do, then the customer is going in with their eyes open and that is what is important.

If the customer comes back later saying the bank should never have given them the money because the business failed, it can be argued it was still a valid credit decision for the reasons recorded by the bank in its initial credit assessment.

You have had experience with a previous merger in 2008 when FOS was first established. In your experience, what is likely to be the biggest challenge in the first 12 months of introduction of a single ombudsman scheme, if the recommendation is adopted?

I think that the biggest challenge will be building on the expertise that exists across both organisations to ensure a common culture that is based on an understanding of resolving disputes fairly.

Another challenge will be making sure that all stakeholders, members, consumers and consumer representatives understand that the move towards a single scheme will build on expertise and they will still have their disputes resolved in a fair and proper manner.

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