

# Analysis

## Injustice for all?

Lawyer Matthew Bransgrove believes the greatest risk of the NCCP may not be the courts' interpretation of the regulations, but rather the power it gives to EDR schemes



Matthew Bransgrove

What has been overlooked in the NCCP – and is of enormous importance – is the arbitrary power given to external dispute resolution providers. Here I speak of COSL and FOS. Their terms of reference have recently been grossly widened by the publication of Regulatory Guide 139 (ASIC-approved EDR schemes). The effect of these rules is to oust the jurisdiction of the courts from dealing with the enforcement of mortgages.

This is a very strange and unusual state of affairs in the free world. The fundamental underpinning of a free society is the respect for and enforcement of the rights of property and the person through the law courts.

Over hundreds of years, checks and balances have evolved to safeguard the rights of property and person. One of those checks is the restriction of judicial power to the courts and the restriction of the exercise of judicial power to within the framework of the principle of precedent and the right of appeal.

Together, the exercise of judicial power through courts applying earlier decisions, and enforcing precedents through the right of appeal, has resulted in the law being fixed and known. This means that instead of the fate of a person's rights or property being subject to the arbitrary whims of a Commissar, they are instead determined through the application of the fixed and known law. Rights are determined by a judge who, instead of deciding on the basis of what he thinks is fair, is instead a mere technician applying that already laid down and predictable law.

By contrast, under its terms of reference FOS, for example, does not deal with complaints on the basis of the law, but rather on the basis of what *in its opinion is fair in all the circumstances*.

Students of history will remember that wherever a person has been asked to determine property and personal rights based on *what in their opinion is fair in all the circumstances*, rank injustice has always followed.

A state of affairs where property rights are determined according to what is fair by an unknown, unjudicial figure is abhorrent to the basic tenets of the rule of law. The Australian Constitution recognises this principle in article 71, where it states that the judicial power of the Commonwealth is to be vested in federal courts. Based on this it would seem clear that powers assumed by FOS and COSL at the behest of ASIC are unconstitutional.

In its terms of reference FOS says that in deciding in what is "fair in all the circumstances" it will *have regard* to legal principles. This is hardly sufficient, especially

when it is only one of four criteria it says it will use. After all the Soviet show trials of the 1930s *had regard* to legal principles.

Unlike an open court, where everything said and all evidence presented is available for scrutiny and rebuttal, FOS allows the complainant to "provide information" and request that it not be given to the party being complained of. This smacks of the old Star Chamber, where those facing punishment were not allowed to know what the evidence against them was.

The result of all this is that all lenders, with perhaps the exception of the major banks, will find lending a very uncertain thing to do. The anxiety grows for lenders when they become aware that, unlike the courts which must uphold property rights, FOS in its terms of reference, grants itself the power to forgive debts, release security or rewrite contracts. This is already causing many private lenders to exit the market. As more and more lenders have their mortgage enforcement tied up in these arbitrary processes this trend will continue. The exit of lenders from the market is not just a question of competition; it is also a question of liquidity. The credit markets will remain tight and perhaps even grow tighter if non-bank lenders are scared away by Australia preventing mortgage lenders to access the courts to uphold their property rights.

The most significant danger then of the NCCP is not its eventual interpretation by the courts, but rather the ousting of the courts' jurisdiction to hear mortgage matters at all.

### ▶ ASIC's EDR terms of reference require:

- That legal proceedings by scheme members should not be commenced where a complaint or dispute has been lodged with the scheme unless the legal limitations period is about to expire; or there is a test case situation
- That, where a scheme member commences legal proceedings in a test case situation, the scheme member should pay the complainant's or disputant's legal costs
- That, where legal proceedings related to debt recovery proceedings have already commenced and a complainant or disputant takes their complaint or dispute to an EDR scheme, the member is not to pursue the legal proceedings beyond the minimum necessary to preserve its legal rights

▶ ASIC pushes EDRs as the best means of resolving disputes, and prohibits NCCP-based disputes being brought to court. In RG 139, the regulator states: "Commencing legal proceedings in relation to a complaint or dispute lodged at EDR creates the potential for scheme members to undermine the EDR process. There is also the possibility that the same complaint or dispute will be dealt with in two competing forums, wasting time and resources".