



23 September 2016

By email: smallbusiness@fos.org.au

Financial Ombudsman Service
GPO Box 3
MELBOURNE VIC 3001

Dear Sir / Madam

Expansion of the Financial Ombudsman Service's (FOS) Small Business Jurisdiction

Financial Counselling Australia (**FCA**), Consumer Action Law Centre (**Consumer Action**) and Financial Rights Legal Centre (**Financial Rights**) welcome the opportunity to respond to the *Expansion of FOS's Small Business Jurisdiction – Consultation Paper*.

About the Contributors

Financial Counselling Australia

FCA is the peak body for financial counsellors. Financial counsellors provide information, support and advocacy for people in financial difficulty. They work in not-for-profit community organisations and their services are free, independent and confidential. FCA is the national voice for the financial counselling profession, providing resources and support for financial counsellors and advocating for people who are financially vulnerable.

Consumer Action Law Centre

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Financial Rights Legal Centre

Financial Rights is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and

representation to individuals about a broad range of financial issues. Financial Rights operates the Credit & Debt Hotline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. Financial Rights took over 25,000 calls for advice or assistance during the 2014/2015 financial year.

General comments

We are supportive of FOS's proposed expansion of its small business jurisdiction.

Financial counsellors assist low income and disadvantaged consumers. This includes clients that have debts arising from the operation of small businesses and who are often struggling to make repayments under small business loans.

Community lawyers at Financial Rights and Consumer Action are not currently funded to assist small businesses. However, lawyers do receive calls from small business owners who are desperate for advice and cannot afford a solicitor. It also follows that many small businesses cannot afford to take their dispute to court. We note that the Small Business and Family Enterprise Ombudsman is unable to make binding determinations. Access to FOS therefore may be the only affordable justice available to a small business in hardship.

Access to affordable dispute resolution through FOS has led to an improvement in the conduct of financial institutions for consumers. Access for a wider range of customers is likely to further improve the quality of the financial services provided to small businesses and the industry response when disputes arise. We believe that it is harmful to the reputation of financial institutions when small business owners lack the resources to pursue a dispute against their financial institution.

We wish to raise two additional concerns that are not covered by the consultation paper.

Small business lenders not covered by FOS

We are aware that some small business lenders are not members of FOS or any ASIC-approved external dispute resolution (**EDR**) scheme. This may be confusing for small businesses, particularly if the proposed changes to FOS's Terms of Reference are widely publicised.

We recognise that mandatory membership of EDR by all small business lenders would require legislative reform. However, at a minimum, FOS will need an effective communication strategy to clearly warn small businesses about the risk that their lender may not be, or may cease to be, a member of FOS.

Jurisdictional limits and compensation caps for consumer disputes

The jurisdictional limits and compensation caps for consumer disputes must be reviewed and raised significantly. Consumer advocates have consistently raised concerns that the current limits and caps for consumer disputes are too low.

We regularly speak with people who have disputes that fall well outside of the monetary and compensatory limits. Indeed, many mortgages on the family home will now fall outside FOS's limits. Worse, the vast majority of personal guarantee disputes for home loans will now be outside FOS's

jurisdiction as the cost of housing continues to increase. Generally, we are not able to assist these clients and advise that they contact a private solicitor in order to take their dispute through the court system.

A common jurisdictional problem involves insurance disputes relating to claims on Home Building or Home Building and Contents insurance policies. Given building and repair costs have increased significantly, many consumers are unable to access EDR and instead have to navigate the court system.

Another common problem arises when uninsured drivers pursue an insured driver who was at fault in the accident. The current monetary limit of \$5,000 is too low given the rising costs of car repair. Uninsured drivers tend to be the most vulnerable of consumers with many experiencing financial hardship when their car is damaged.

It would be sensible and fair for the same limits to apply to consumer and small business disputes. This would also simplify FOS's jurisdiction and avoid further confusion for consumers. FOS's jurisdiction is already difficult to understand, particularly for unrepresented applicants.

Once the jurisdictional limits and compensation caps are raised, they should continue to be reviewed regularly to ensure that FOS's coverage is sufficient in accordance with Regulatory Guide 139.

Proposal 1.1 – Increase to monetary limits

Financial counsellors assist low income and disadvantaged consumers, including some who have debts arising from a small business. It is unlikely that financial counselling clients would be involved in disputes that exceed the current limits in the FOS Terms of Reference.

However, we are aware that many small businesses, including farmers, have disputes that exceed the current cap and may not have the capacity to pay for the dispute to be heard by a court. These financial disputes can have a severe impact on the individual or family owner of the small business, as well as on the families of employees.

This proposal is supported, subject to our comments above in relation to the limits and caps for consumer disputes. If Proposal 1.1 is adopted, the unfairness of the current consumer limits will be exacerbated by comparison to the new small business limits. It would be inequitable if a small business could receive compensation of \$2 million but an individual consumer could receive only \$309,000.

Proposal 1.2 – Compulsory conferences and third parties

Compulsory conciliation is often a very effective way to settle a dispute. An experienced decision maker can assist to clarify the issues for the parties and to reach an agreement. We agree that the inability to require third parties to provide information will provide a significant challenge for FOS. It will be important to minimise the disruption to third parties while still obtaining the information required. We would encourage FOS to adopt a process that is as flexible as possible to allow third parties to take part (if they are prepared to do so). This could include:

- permitting third parties to provide information or attend by telephone;
- permitting third parties to answer relevant questions in writing; and

- recognising that small businesses in financial hardship may need to pay the third party to attend and may need time to raise that money.

Even with this flexibility, there will be situations where third parties are required but refuse to attend or assist. In light of FOS's inability to compel third parties, another forum may be more appropriate in those small business disputes. We encourage FOS to update its Approach to Excluding Disputes to give clear and specific guidance on its approach to these situations.

Proposal 2.1 – Remedies for unregulated credit contracts

This proposal is strongly supported. The ability to make determinations on hardship variations in regulated credit contracts has been transformative. The change has driven improved industry practice for financial hardship. Many people have avoided legal action and the loss of assets due to improved industry practice, or where FOS has facilitated a settlement or determined a matter. It has also meant countless consumers maintained a good relationship with their credit provider having resolved a period of temporary hardship.

Consumers and small businesses with unregulated contracts should also have access to the benefits that have been enjoyed by consumers with regulated credit contracts. This may resolve the anomalous and unhelpful situation faced by many small business owners in hardship where their lender provides a hardship variation on their personal loans but not on their business loans. It is hoped this change will drive an improved and cooperative approach to financial hardship with better outcomes for all parties.

Proposal 4.1 – Proposed operating and funding model

It is vital that any expansion of FOS's small business jurisdiction does not disadvantage individual consumers or impact FOS's ability to resolve disputes within its existing jurisdiction. We therefore support the proposals to establish a dedicated specialist small business unit at FOS and to implement a funding model that will allow the unit to be self-funding.

Proposal 6.1 – Application of the Terms of Reference

Transitional arrangements are confusing for all parties. It is understood that this may be necessary but FOS should give consideration on how to minimise the confusion.

Proposal 6.3 – Terms used in the Terms of Reference

It would be preferable to use "applicable credit legislation" and not "National Credit Code". The National Credit Code is located in schedule 1 of the *National Consumer Credit Protection Act 2009* (Cth). To be precise the reference should be to the Act.

In addition, the Terms of Reference should continue to refer to the "Privacy Commissioner". The Privacy Commissioner is a separate title that sits within the Office of the Australian Information Commissioner.

More broadly, we encourage the ongoing efforts to simplify the Terms of Reference and associated guidance.

We support the remaining proposals in the Consultation Paper.

Please contact Policy Officer Cat Newton on 03 9670 5088 or at cat@consumeraction.org.au if you have any questions about this submission.



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