Submission to the Senate Economics Legislation Committee

Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017.

September 2017

Contents

Glossary

AFCA	Australian Financial Complaints Authority
ASIC	Australian Securities and Investments Commission
CIO	Credit and Investments Ombudsman
EDR	External Dispute Resolution
FOS	Financial Ombudsman Service
IDR	Internal Dispute Resolution
Ramsay Review	Review of the External Dispute Resolution & Complaints Framework
SCT	Superannuation Complaints Tribunal
TOR	Terms of Reference

Executive Summary

FOS[1] supports the establishment of the new EDR and IDR frameworks for the financial system and the creation of a single EDR scheme based on the key elements of the industry ombudsman model to be known as the AFCA.

We therefore welcome the opportunity to provide this submission to the Senate Economics Legislation Committee (Committee) to assist its review of the *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017* (the Bill).

This submission:

- highlights our consistent support for reforms that help make it easier for consumers and small businesses to access dispute resolution services
- provides commentary about certain aspects of the Bill, and
- draws the Committee's attention to the joint work of the SCT and FOS in progressing design elements to show how AFCA, as an industry EDR scheme, could effectively resolve superannuation and non-superannuation complaints.

FOS will continue to contribute its expertise and work collaboratively and constructively with the Treasury transition team, the other schemes, our members, and consumer and industry bodies to assist in implementing the reforms to the financial services EDR framework as intended by the Bill currently before the Committee.

In our submission to Treasury on the exposure draft of this legislation[2] FOS stressed the importance of having clear transitional arrangements in place for existing disputes, scheme membership, and the assets and key dispute staff from FOS and the CIO to AFCA. Creation of the new scheme and transition arrangements for existing EDR schemes within the proposed timelines will be challenging and the ability to enable a smooth transition will therefore be important. We do not consider keeping FOS in run-off mode is workable.

We are pleased that the current Bill provides some flexibility to enable more streamlined transition arrangements and we will need to work closely with the Treasury transition team once the legislation is passed to ensure the impact of transition on consumers with existing disputes, our members and our staff is well planned and executed.

[1] This submission has been prepared by the Office of the Chief Ombudsman and does not necessarily represent the views of individual FOS directors. It draws on the experience of FOS and its predecessors in the resolution of disputes about financial services.
[2] FOS submission to Consultation Paper- Improving dispute resolution in the financial system p.34

We would be happy to answer any questions the Committee may have about this submission, or the impact of the legislation on consumers who have unresolved disputes with their financial service providers.

Improving dispute resolution in the financial system

This legislation follows an in-depth review of the current financial system EDR arrangements by an expert Panel, headed by Professor Ian Ramsay.

In its final report, the Panel stated that the current framework is a product of history rather than design and, 'in significant areas, reform is needed'.[3] In brief, the Panel found that the existence of multiple EDR schemes with overlapping jurisdictions means:

- it is difficult to achieve comparable outcomes for consumers with similar complaints
- it is more difficult for consumers to progress disputes involving firms that are members of different schemes
- competition between schemes, as currently occurs between FOS and the CIO, creates the risk that schemes compete in relation to benefits provided to financial firms, rather than on achieving better outcomes for consumers
- there is an increased risk of consumer confusion, and
- duplicative costs for industry and for the regulator.

FOS accounts for about 83 per cent of disputes received by the three EDR bodies (FOS, the CIO and the SCT) in the financial sector. Of the two ASIC-approved EDR schemes (FOS and the CIO), FOS accounts for about 88 per cent of all disputes received.[4] Accordingly, our views are based on our experience in dealing with the overwhelming majority of disputes in the sector.

In our submissions to the Ramsay Panel[5], FOS provided analysis and supporting evidence to illustrate the gaps and shortcomings described in the Panel's final report to Government. We also highlighted the many advantages of an industry-based EDR scheme, as proposed in the Bill.

We have consistently supported changes that would make it simpler and easier for consumers and small businesses to access external

[3] Final report of the EDR Review Panel, Chaired by Professor Ian Ramsay: '*Review of the financial system external dispute resolution and complaints framework'*, 3 April 2017, p. 8-9 The Ramsay Review was an extensive process with over 183 submissions and consultation with a wide range of industry stakeholders. Panel members are Ian Ramsay, the Harold Ford Professor of Commercial Law, Alan Kirkland, CEO of CHOICE, Australia's largest consumer organisation and Julie Abramson, a lawyer with over 20 years' experience in regulatory and government roles.

[4] Percentages calculated based on 34,095 disputes received by FOS (Annual Review 2015-16, page 22), 4,760 disputes received by CIO (Annual Report on Operations 2015-16, page 2) and 2,368 disputes received by SCT (2015-16 Annual Report, page 34).

[5] FOS submissions to EDR Review & Interim Report.

dispute resolution to promote and foster fair outcomes for consumers. We consider the current legislation will help do so.

Our guiding principles are based on ensuring the new scheme should be:

- simple to use – it is easy for consumers to explain their problems and seek a solution without having to engage expensive and unnecessary representation. People can lodge disputes easily, no matter who they are, where they live or what technology they use
- open and accessible – stakeholder engagement to address barriers to access and consumer redress, including community outreach, is valued, and
- adaptable – responsive to changes in the financial system, changing consumer behaviour and changing products and services.

While understandably some members of the current schemes might be comfortable with the current EDR arrangements, we believe the proposed measures need to be seen through a broader community and consumer lens, and as part of a meaningful package of reforms to rebuild consumer trust and confidence in financial services.

There are a number of public statements (in submissions and the media) about the legislative proposals that we consider are incorrect and not based on any reasonable assessment of the evidence. These have been made by the CIO and some others. Many of them have already been comprehensively reviewed and dealt with by the Ramsay Review Panel in its report and recommendations.

For instance:

- The Ramsay Review Panel comprehensively dealt with the various arguments about the so-called benefits of competition among EDR schemes that continue to be repeated. The Panel made clear, and we agree, that there are no benefits to consumers in having multiple EDR schemes, and they identified competition results in higher costs, greater consumer confusion, and lack of comparability of outcomes, and reduced transparency and accountability.
- There is no reasonable basis for the recent assertion by CIO that AFCA will cost $137 million in its first year of operation. The current combined operating costs of the three schemes (FOS, CIO, and SCT) is approximately $62 million and around 47,000 disputes are received. FOS accounts for around $50 million of this amount as it handles approximately 83 percent of all complaints received by the three schemes. Using our experience of the claims amounts of existing complaints, and factoring in an increase in complaints

arising from higher claims and compensation limits, we could anticipate around a 20 per cent increase in overall complaints and a commensurate increase in overall costs.

- If a user pays principle underpins the AFCA fee model, as it does with the current FOS fee model, any increase in complaint costs arising from a higher volume of complaints, will be met by the firms that have the complaints against them (74 per cent of FOS income is generated directly from its complaint fees). It is proposed that the fee model for AFCA will be subject to consultation with industry. Any changes to its fees and charges will, as a requirement of its authorisation, be reported annually to the Minister.

- For the majority of AFCA members (around 85 per cent) who will have no, or few, complaints lodged against them, they would be unlikely to pay more for EDR than they do today (other than CPI adjustments). The current CIO funding model relies on its smaller members who have no or very few complaints subsidising its larger members who would typically have more complaints.[6]

- AFCA will cover the whole financial services sector and will need to draw on the expertise in existing schemes and have a skills base that is capable of dealing with the full range of complaints it will receive. While FOS does have many large members in the banking, insurance and investments sectors, 85 per cent of its members are in fact small firms and sole traders. Our case workers, decision makers and panel members have backgrounds and skills to understand matters before them from both a consumer and financial firm perspective.

Increased limits for consumer and small business disputes

An important aspect of the Government's reform is the adoption of the Ramsay Review Panel's recommendation for increased claims limits and compensation caps for consumers and small businesses. AFCA will have a monetary limit of $1 million and compensation cap of $500,000 which is a significant increase on existing limits. Moreover, in the case of small business credit facility complaints, a small business will be able to receive compensation of up to $1 million (up from the existing $309,000).

FOS has supported an increase in jurisdictional limits and has conducted significant analysis to back this position. Our decision-makers deal with an array of complex disputes now and increased

[6] Around 71 per cent of CIO income is funded through its membership fees and 26 per cent from complaint fees. And, at least 32 per cent of CIO's income is funded by Authorised Credit Representatives who do not have complaints (compared to 1.9 per cent at FOS).

jurisdictional limits will not necessarily give rise to more complex disputes. Increased jurisdictional limits will, however, provide greater and broader access to free dispute resolution services for consumers and small businesses.

If this Bill does not pass the Parliament, the difference in existing jurisdictions between schemes will be amplified should the CIO, which does not support any increase in limits, not adopt the higher jurisdictional limits. Confusion for individual consumers and small businesses would also increase as a result.

The introduction of the new limits for consumers and small businesses is only practicable with a move to a single scheme. It would not be possible for one scheme to do so alone as this would result in arbitrage between schemes based on differences in the jurisdiction.

Given the specialist expertise that would be required for dealing with small business, investments and other more complex disputes, it would be challenging to sustain the expertise across two schemes, would fragment efforts to build expertise in-house and would inevitably see increased costs for industry. More concerning is the fact that if one scheme had limited small business expertise there would be an increased risk to achieving consistency in approach to small business disputes.

FOS comments on aspects of the Bill

The Government, in supporting the 11 recommendations made by the Ramsay Panel, has endorsed the view that an industry ombudsman scheme is the appropriate model for all areas of the financial system and in doing so, its proposed legislation would see a single EDR scheme which has:

- an independent Board, responsible for determining how the scheme is funded and how it will resolve disputes
- operational rules set out in its Terms of Reference (TOR) approved by the Minister as part of the authorisation process, and
- appropriate statutory powers to deal with the complexity of some superannuation disputes.

In June 2017, FOS made a submission to Treasury's consultation paper and Exposure Draft of the Bill.[7] Our feedback sought to improve the clarity of the proposed legislation, remove ambiguity, and ensure the effective operation of the new single EDR scheme. We are pleased that the majority of our concerns have been addressed in this Bill and its Explanatory Memorandum.

We draw the Committee's attention to two issues raised in our submission to Treasury that have not been addressed specifically in this Bill.

Traditional trustee company disputes

We suggest that traditional trustee company disputes should operate under the same framework as superannuation complaints.

Since 1 January 2012, trustee companies providing traditional trustee company services have been obliged to be a member of an EDR scheme[8]. FOS has 19 trustee company members.[9] These disputes frequently involve FOS in reviewing the trustee's exercise of its fiduciary duties. Almost invariably there are multiple parties affected by the outcome of the dispute.

Where a favourable dispute outcome would benefit the estate or trust as a whole (for example, a dispute about trustee fees), FOS resolves the dispute if one beneficiary brings the complaint to FOS. But sometimes, a complaint is about whether the trustee has been fair as

[7] FOS submission to Consultation Paper- Improving dispute resolution in the financial system
[8] Traditional Trustee Company Services are defined in section 601 RAC of the Corporations Act 2001. These services are very specific and distinct from, for example, the operation of a managed investment scheme established as a trust by a responsible entity acting as trustee, which is governed by different legal requirements in a separate part of the Corporations Act.
[9] 19 FOS Members have classified themselves as Trustees in FOS's annual assessment questionnaire. Since January 2012, FOS has received 249 disputes about Traditional Trustee companies.

between beneficiaries. For these types of complaints, FOS has developed special procedures set out in paragraph 15 of its TOR.

Under these procedures, FOS will only consider the dispute if the beneficiaries of the trust or estate form a closed class and all affected parties have given their consent to FOS's role and to be bound by the outcome. This has been necessary because, in the absence of the statutory framework applying to SCT death benefit disputes a resolution would only be effective if all affected parties have agreed to be bound by that resolution.

It is, of course, important for fairness reasons for FOS to provide all affected parties with an opportunity to express their views, where they will be affected by FOS's resolution of the complaint. But the requirement for all affected parties to give their consent creates practical problems. There may be on occasions one or a couple of disengaged beneficiaries who are unresponsive to a request to provide consent to FOS's jurisdiction, to the frustration of the majority of beneficiaries.

By comparison, the statutory framework surrounding the review of superannuation trustee disputes allows the current SCT to review death benefit complaints, even if not all potential beneficiaries have consented to jurisdiction, provided they have been notified of the complaint.

We consider "multiple affected party" traditional trustee company service complaints strongly resemble superannuation complaints about the allocation of death benefits, in that they involve:

- competing claims for a benefit, which the trustee and in turn the EDR scheme must decide between, and
- resolution is only possible if the EDR scheme decision is binding on the trustee and, through the trustee and in the absence of any legal challenge, on third parties.

Accordingly, we recommend that the proposed statutory framework for superannuation complaints within AFCA should be extended to also apply to traditional trustee service complaints.

This would require an amendment to the Bill to bind potential beneficiaries of a traditional trustee company dispute in a manner which mirrors the ability to bind potential beneficiaries of a death benefit as long as they have been notified of the complaint.

Privacy

The public interest is best served by all parties to a dispute receiving all relevant information provided to the decision-maker. This approach is enshrined in the TOR of EDR schemes.

The scheme should have the benefit, however, of an exemption from the privacy access requirements that is similar to section 47C of the FOI Act – one that preserves internal working documents containing opinions, advice, recommendations and consultation notes that are part of an EDR decision making process.

At the moment, under Australian Privacy Principle 12.2, the SCT as a government agency is able to refuse to give an individual access to information where the agency is required or authorised to refuse access under the FOI Act. Section 47C of the FOI Act provides an exemption for deliberative matter i.e. opinion, advice, recommendation, and consultation as part of the deliberative purposes of the agency. The exemption does not include operational information or purely factual material.

In the course of performing that function, an EDR scheme will be provided with information by the parties. Where the scheme intends to rely on the information, it would be required under its TOR to exchange that information with the other party unless consent is reasonably refused. The FOS TOR, however, provides that FOS is not obliged to provide any memoranda, analysis or other documents generated by FOS's employees or contractors.

An EDR Scheme should be able to properly examine, and test the submissions put by the parties without fear that the considerations may be released to a party and used against one of the parties to the dispute or the EDR scheme in the future. This has been termed a 'jeopardy to candour' in the FOI Guidelines.

As an independent decision-making body subject to procedural fairness obligations, it is important that decisions can be based on robust internal deliberations and advice and that all material documents to a decision are exchanged with the parties as part of the decision process.

Transition arrangements

In our submission to Treasury on the exposure draft of this legislation[10] FOS stressed the importance of having clear transitional arrangements in place for existing disputes, scheme membership, and the assets and key dispute staff from FOS and the CIO to AFCA. Creation of the new scheme and transition arrangements for existing EDR schemes within the proposed timelines will be challenging and the ability to enable a smooth transition will therefore be important.

We do not consider keeping FOS in run-off mode is workable. We are pleased that the current Bill provides some flexibility to enable more streamlined transition arrangements and we will need to work closely

[10] FOS submission to Consultation Paper- Improving dispute resolution in the financial system p.34

with the Treasury transition team once the legislation is passed to ensure the impact of transition on consumers with existing disputes, our members and our staff is well planned and executed.

Joint work of the SCT and FOS

Following the Government's acceptance of the 11 recommendations made by the Ramsay Panel, FOS and the SCT formed a joint working group (JWG) for a prudent, preliminary examination of the issues that could flow from the creation of a single EDR body.

The group has been very mindful of not pre-empting the outcomes of the parliamentary review of the proposed legislation, however if the legislation passes, we are very aware of the amount of detailed work required to achieve the Government's policy objective of a 1 July 2018 commencement.

Our joint work has focussed on three areas:

- Development of possible AFCA Rules (TOR)) – a working draft has been produced and is progressively being refined through a series of internal (FOS and SCT) workshops with key subject matter experts and external expert consultants.
- Design of a complaint's process to incorporate superannuation disputes – a high level analysis of the existing complaint resolution processes of FOS and the SCT has been completed and issues for further review and refinement identified as the focus for continuing workshops.
- Early work focussed on forecasting future complaint volumes, types and complexity as the basis for building and costing a resourcing model to guide options for an appropriate fee structure.

While all of the work of the JWG is subject to change following the planned broader consultation with industry and consumer stakeholders, and with ASIC, the purpose of advising the Committee about this work is to demonstrate the following:

- We have been able to show how the proposed legislation and the single scheme's TOR can be structured for the effective operation of AFCA for all types of financial services complaints, including superannuation complaints. This work has included the mapping of the substantive provisions of the Superannuation (Resolution of Complaints Act) 1993 against our draft AFCA Rules and the Bill.
- Similarly, it is possible to have a generally consistent single complaint process that can incorporate the Ramsay Panel recommendations (particularly recommendation 9 requiring the new EDR body to refer all complaints back to IDR before the scheme considers the complaint).