



29 September 2017

Senator Jane Hume
Chairperson
Senate Economics Legislation Committee
P.O. Box 6100
Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

Dear  Senator Hume

RE: INQUIRY INTO TREASURY LAWS AMENDMENT (PUTTING CONSUMERS FIRST – ESTABLISHMENT OF THE AUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY) BILL 2017

Thank you for the opportunity to submit comments to the Inquiry into Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017.

My office has two primary functions – advocating for and assisting small business and family enterprise. In performing the advocacy function, my office reviews key policies and laws which impact on small business, such as this bill creating the Australian Financial Complaints Authority (AFCA).

In 2016 at the request of the Minister for Small Business, my office conducted an inquiry into selected cases from the Parliamentary Joint Committee Inquiry into the Impairment of Customer Loans. My inquiry found that of the cases we examined approximately a third of cases were representative of poor bank practices and possible unconscionable conduct on the part of the banks involved. We made a recommendations to Government to take steps to address these poor practices including providing access to a one-stop shop for external dispute resolution for small business customers which was affordable, efficient and binding and avoided the court system. The Ramsay Review into external dispute resolution (EDR) in the financial industry also recommended a similar one-stop shop. This led the Government to proposing AFCA in the 2017-18 budget.

Despite the welcome step of establishing the AFCA, we believe there are important considerations which are still missing from the proposed authority, namely the role of third party agents (such as valuers, investigating accountants and receivers) from the jurisdiction of the proposed authority. We also have reservations about the interaction with farm debt mediation schemes and lastly the treatment of cases outside the proposed terms of reference for AFCA.

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We have focussed our submission to address issues related to the draft bill which we believe need to be strengthened or added to the bill. This includes:

- the requirement for a maximum timeframe on dispute processing
- an ability to enforce a binding decision
- power to demand information

Lastly, we offer the Committee some areas for consideration including:

- time limits to bring cases forward for consideration
- exclusions to bring cases to AFCA
- the interplay between an institution's internal dispute resolution scheme and AFCA
- promotion of the scheme
- ability for AFCA to include third parties into AFCA disputes
- ability for AFCA to consider cases outside limits

Areas of the Bill to be strengthened

Corporations Act 2001

Part 7.10A—External dispute resolution

Division 1—Authorisation of an external dispute resolution scheme

Subdivision B – Mandatory requirements and general conditions

(4) Operational requirements

(b) ‘...fair, efficient, timely and independent;’

A maximum timeframe for dispute processing

A maximum timeframe (for example of six months) for disputes to be resolved must be set. Our Small Business Loans inquiry found that, during a dispute, a small business borrower will struggle to sustain the day-to-day operations of their business. The small business owner often is the legal department; the administrative staff; the lead manager and the primary decision maker for their business. Not only must they divert their limited time and resources away from running the business but may find they have limited access to their financial facilities as they are in dispute. Not knowing how long the dispute resolution process may continue means the complainant cannot make an informed decision on the risk to the business to allocate resources away from day-to-day operations to raise and defend a dispute. Small business cannot survive with an uncertain future. A small business must know the maximum period of time it will take to benefit from, or take action as a result of, the scheme's determination.

(d) ‘reasonable steps are taken to ensure compliance’

AFCA must be able to enforce a binding decision

The parameter ‘reasonable steps’ is not satisfactory. The ability of AFCA to make binding decisions is null and void if the operator does not follow up compliance. As the many past inquiries into access to justice have revealed, consumers and small businesses cannot afford to go to court. If the operator of AFCA does not enforce

compliance then members can use their depth of resources to take an extended period of time to comply, or worse, simply choose not to comply. To be a genuine avenue for access to justice the operator must not only demand confirmation of compliance, from both parties, but also set a binding, enforceable limit on the time for determinations to be actioned.

Areas of the Bill to be added

Corporations Act 2001

Part 7.10A—External dispute resolution

Division 1—Authorisation of an external dispute resolution scheme

Subdivision B – Mandatory requirements and general conditions

(4) Operational requirements

A power to obtain information and documents

Under the scheme, if the operator believes that a person has, or could take reasonable steps to obtain, information or documents relevant to the dispute, the operator may require that person to provide such information and documents.

This is critical to enable the operator to access the information relied on by members of the scheme and the third parties they engage. For example, where a member engages an investigating accountant to assess the health of the business, the operator will need to have access not only to the report held by the member but the basis on which that report was built.

The draft bill provides AFCA with the power only in relation to superannuation complaints but does not appear to provide a similar capacity for other, non-superannuation complaints. This is important as previous schemes relied on the interplay between the industry code (such as the banking code) and the terms of reference for the EDR scheme with regards to the provision of documentation and information to small business customers. Having an explicit power to render the documents would leave no doubt as to the EDR's ability to obtain information in relation to a dispute.

Key considerations for the AFCA scheme

We understand the Bill provides the legislative framework for the AFCA scheme and does not prescribe the Terms of Reference for the proposed scheme. We would note the following aspects should be considered by the Senate Committee in the context of the final EDR scheme which the Bill is intending to create.

Time limits

The final EDR scheme should set time limits for parties to bring a dispute to the scheme consideration must be given to other terms of reference. Banks can charge additional fees, raise the interest rates or make any other changes to the contract when they consider a small business borrower's circumstances have changed. The small business owner simply does not have the time to lodge a dispute when these changes occur as all their time is spent on trying to meet the changed conditions of the contract to keep the facility, their source of funds, accessible. To enable disputes to be raised when they occur, the Terms of Reference require members to consider

the contract terms in force while a dispute is being considered by the scheme. This would be in effect from the date a complainant lodges a dispute until compliance by the member to the determination reached. If that dispute relates to the facility being deemed to be in default, members must consider the facility as performing while it is being considered by the scheme. This would be in effect from the date a complainant lodges a dispute until compliance by the member to the determination reached.

Exclusions

The only disputes to be excluded should be those settled in court as these decisions are legally binding. Where disputes have been considered by other schemes, but that scheme cannot make a binding determination, the dispute should be eligible for consideration under the AFCA scheme. An example is Farm Debt Mediation (FDM), which aims to mediate an outcome but does not have the power to enforce compliance of an agreed outcome. Reviews of FDM have shown an imbalance of power in favour of financial institutions which, again, utilise their depth of resources to prolong implementation of an outcome which can drive a farmer into insolvency. AFCA should have able to accepted cases which have previously gone to FDM but not resulted in a resolution.

Internal dispute resolution (IDR)

Where a dispute has been through a member's IDR process, the determination made should be considered as the member's position on the dispute. The scheme must immediately commence its investigation. Where a dispute has not been through a member's IDR process it may be better serviced to be referred back to the member. The timeframe allowed for a member to work through its IDR process and advise its position must be considered part of the maximum timeframe.

Promotion of the AFCA Scheme

It is important that the scheme is promoted but it is critical that channels to raise complaints or disputes with financial service providers are promoted as a whole and in plain English. As numerous inquiries have found consumers and small businesses simply do not know they can raise a complaint. If they are aware often they do not know who to take a complaint to. Members should be obligated to provide to their customers a summary of channels to raise complaints. The summary should advise when a complaint should be lodge through its IDR, to its Customer Advocate, to the monitoring body of the Code of Banking Practice, to FDM or directly to AFCA. That summary to provide the key terms of reference that determine the eligibility of a complaint, the maximum time frame for the resolution and how a complaint can be escalated through those channels. Similarly, AFCA should promote its services in context of other channels, external to its members, to raise complaints. The summary could include not only the channels available but how a complaint can be escalated through those channels.

Ability for AFCA to include third parties to disputes

In our inquiry we recommended that any EDR scheme must be expanded to include disputes with third parties that have been appointed by the bank or financial

institution, such as valuers, investigating accountants and receivers. These parties are often involved in aspects of a dispute between a small business customer and the bank either as an agent of the bank or at the bank's direction due to contract clauses in the loan documentation. The Bill provides AFCA with the power to join third parties to superannuation disputes replicating a similar power of the Superannuation Complaints Tribunal. We believe a similar power should be extended to third parties acting as agents of a bank or appointed at the requirement of a bank or financial institution. Worryingly, the omission of being able to include these parties in AFCA's jurisdiction means a range of financial-related disputes will have to find an alternative dispute forum.

Ability for AFCA to consider cases outside its Terms of Reference or limits

We welcome the inclusion in the draft bill of the oversight role of the Australian Securities and Investment Commission (ASIC) with regards to regulating the AFCA scheme. We are pleased to see that ASIC will have the ability to increase limits on the value of claims (under **s1052B - Directions to increase limits on the value of claims**). We would note that this power should be able to be applied more flexibly and allow individual disputes under consideration to be granted increased limits. The current wording does limit the raised limit to only future disputes from the date of ASIC's direction.

Furthermore, we would suggest that ASIC be given the ability to direct AFCA to consider a dispute outside its Terms of Reference. This should be an enshrined process to allow small business customers who fall outside the planned caps on disputes which could be heard. The Ramsay Review recommended the cap being \$1 million in relation to consumer disputes (and small business disputes, other than credit facility disputes), with compensation capped at \$500,000. For small business credit facility disputes, the Ramsay Review recommended small businesses should be able to bring a claim where the credit facility is of an amount up to \$5 million with a compensation cap of \$1 million. We would recommend that these caps be soft barriers and there be a pathway for small businesses to apply to ASIC for a principle based assessment of their case, should they be outside the cap. ASIC should have the ability to direct AFCA to be able to consider the case. Without this, small business that fall outside the cap will continue to have no facility to access justice on financial disputes.

We hope these comments assist the Committee's deliberations. Please feel free to contact either myself or [REDACTED], by telephone [REDACTED] or email [REDACTED]

Yours sincerely,

Kate Carnell AO

Australian Small Business and Family Enterprise Ombudsman