

ESTABLISHMENT OF THE AUSTRALIAN
FINANCIAL COMPLAINTS AUTHORITY
CONSULTATION PAPER
SUBMISSION TO THE AFCA TRANSITION TEAM

November 2017

EXECUTIVE SUMMARY

1. Thank you for the opportunity to provide this submission to the AFCA Transition Team to assist it to advise the Minister on those matters that should be addressed by a company seeking authorisation as the Australian Financial Complaints Authority (**AFCA**).
2. Our comments follow our submission to the Senate Economics Legislation Committee Inquiry into the Treasury Laws Amendment (putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017 (**the Bill**)¹.
3. We support the decision making criteria proposed in the Bill that AFCA resolve complaints in a way that is 'fair, efficient, timely and independent'. As an alternative to the Courts, we believe it is important that AFCA have the discretion to go beyond the law in formulating its approach to dispute resolution and have flexibility in the design of its processes and systems to ensure it operate in an accessible and user-friendly manner.
4. It's important that the decision making criteria adopted by AFCA are clearly explained in its terms of reference so that its members understand how complaints will be addressed and resolved. AFCA also needs to ensure that its processes are procedurally fair so that both parties to a dispute have a right to be heard and have their dispute resolved in an unbiased and fair way.
5. We accept the recommendation of the Review of the Financial System External Dispute Resolution framework that AFCA adopt panels in its decision making process. In our view the use of Panels could impose significant cost and time burdens and we propose that it be limited to disputes where a Determination will be in excess of \$500,000 or for particularly complex superannuation disputes.
6. We believe the independent assessor will play an important role in AFCA and support the formalisation of the role in the Bill. The role should not extend beyond complaints about the manner in which AFCA has handled a complaint. For example, it should not extend to the merits of a decision.
7. We think it is important that the exclusions which currently exist in the Financial Ombudsman Services' (**FOS's**) terms of reference are maintained in the AFCA terms of reference – particularly the right to exclude disputes on a discretionary basis. The design and structure of this information could be improved to make it easier to navigate and understand.

¹ Available at : https://www.afca.gov.au/Parliamentary_Business/Committees/Senate/Economics/PuttingConsumersFirst/Submissions

8. We support the governance arrangements proposed in the Bill which reflects the existing structure which has worked well for FOS.
9. In respect of funding matters, we support a single scheme operating from 1 July 2018 replacing FOS and the CIO (with all legacy disputes transferring to AFCA and dealt with under the terms of reference in place at the time the dispute was lodged). In terms of superannuation, we understand the need for the Superannuation Complaints Tribunal (**SCT**) to continue to operate to resolve its backlog of complaints but highlight the need for it to receive adequate funding to do so.
10. For legacy disputes, clarification is required as to whether disputes lodged from 1 July 2018 will be dealt with under AFCA's terms of reference, provided the events giving rise to the dispute are 'within time' (i.e. within the previous 6 years or period stipulated in the terms of reference). Consideration ought to be given to as to whether consumers ought to be allowed to lodge disputes with AFCA which have previously been found to be outside FOS' terms of reference where the complaint is still 'within time' under AFCA's terms of reference.

A. TERMS OF REFERENCE

Enhanced decision making

1. The Bill requires AFCA to resolve complaints in a way that is 'fair, efficient, timely and independent'. The concept of fairness is a key criterion in decision making processes of FOS and the CIO² and it is important that it remain so for AFCA.
2. The concept of fairness is important as it distinguishes external dispute resolution schemes from more formal jurisdictions such as Courts and enable the schemes to:
 - Develop accessible processes which can be navigated without legal representation (but nonetheless facilitate a procedurally fair approach);
 - Have a degree of flexibility in the way they operate to respond to new and emerging issues;
 - Refine systems and processes to maintain timely responses in periods of increased demand; and
 - Exercise discretion to form their own views – making them less vulnerable to legal challenge for not interpreting or applying the law in a certain manner.
3. The FOS terms of reference also make it clear that it is not bound by 'any legal rule of evidence'. This enables FOS to facilitate a dispute resolution process which is not weighed down by legal arguments about adducing and admitting particular 'evidence'.
4. AFCA should make clear those factors taken into consideration when reaching a decision. The decision making criteria will form a key part of the contractual relationship between AFCA and its members and a transparent approach is essential to ensuring the scheme enjoys the confidence and support of consumers and industry.
5. We understand the AFCA terms of reference will make reference to the following criteria which, in our experience, have worked well for FOS:
 - Legal principles;
 - Industry codes of practice or guidance as to practice; and
 - Good industry practice (both FOS and CIO apply industry codes or guidelines which reflect good practice even where a firm has not subscribed to that code or guideline).

² Currently, FOS' makes its determinations based on 'what in its opinion is fair in all the circumstances' and CIO agrees to 'observe procedural fairness' while having regard to 'fairness in all the circumstances' (amongst other matters).

6. We support the ongoing inclusion of 'good industry practice' as a decision making criterion but emphasize the need for certainty around how 'good industry practice' is determined. To a large extent, it is now reflected in codes and regulatory guidance (which weren't as developed when the FOS terms of reference were first adopted). Where AFCA seeks to rely on a particular standard of good industry practice, not detailed in a code or regulatory guide, that AFCA should explain the evidentiary basis for that standard.
7. In addition, FOS states that it will take into account previous relevant decisions but will not be bound by them. Based on the Government's focus on consistency and comparability of outcomes, including taking into account previous decisions, we assume that a similar provision will be included in the AFCA terms of reference. In practice, we hope this will extend to consistent approaches between individual decision makers, including case managers, when issuing a preliminary view or a recommendation.
8. The ongoing availability of anonymised decisions is important but its usefulness could be enhanced by an easier mechanism for searching decisions.

Use of Panels

9. FOS does not currently use panels within its banking division and ANZ has concerns about their introduction. Our primary concern is that panels can make the decision making process less efficient, slower and more costly. The current FOS model requires a case manager and an Ombudsman to be involved in issuing a Determination. Under a panel model, a case manager would need to brief three Panel Members on the facts and background of a dispute. All the Panel Members would require input into the final decision which would necessitate a degree of discussion and co-ordination. These additional steps would require considerable time and resources.
10. Also, to that extent that external experts in a particular sector are engaged to constitute the panel (such as a 'consumer' or 'industry' experts), these individuals may feel compelled to 'represent' the view or position of either the consumer or the member. This approach is not conducive to independent and fair decision making.
11. Our preference is that panels, to the extent required, consist of senior decision makers within AFCA, at Ombudsman or equivalent level. We anticipate AFCA decision makers, at this level, will be familiar with interpreting and applying the AFCA terms of reference and understand the applicable law, codes and industry practice relevant to the underlying subject matter.
12. To the extent AFCA decision makers require input from consumer or industry bodies, this can be obtained in its assessment of 'best practice' which forms part of its decision making criteria. However, the process for obtaining this input needs to be expedient to avoid impacting on the timeliness of decisions.

13. One option could be to only use a panel for disputes in excess of a particular a monetary threshold. For instance, any Determinations in excess of \$500,000. This will restrict the use of panels, at least initially, to small business disputes.
14. Our comments in respect of panels are limited to banking disputes. We recognise the need for the use of panels in other areas, such as complex superannuation disputes.

Independent Assessor

15. ANZ provided detailed comments in respect of the role of the independent assessor in our response to the Senate Economics Legislation Committee Inquiry into the Bill.
16. In summary, we support an independent assessor in line with the model adopted in the UK and more recently by FOS. Members and consumers should have an avenue of complaint where they have concerns about AFCA's handling of their complaint.
17. To preserve the certainty of decisions and to ensure matters are dealt with in a timely manner, the independent assessor's role in reviewing the handling of complaints should not extend to a review of a decision by AFCA in respect of:
 - The facts or merits of a decision;
 - A decision to accept or exclude a dispute on the basis of its jurisdiction; or
 - A decision to commence a systemic issue investigation or make findings in respect of remediation of a systemic issue investigation.

Exclusions from AFCA's Jurisdiction

18. The FOS terms of reference has a series of exclusions for matters that FOS cannot consider. These matters are set out in 5.1(a)-(u). FOS also has a discretionary right to exclude certain disputes set out in 5.2(a)-(d).
19. In our view, these exclusions, developed and refined over a number of years, are well understood by FOS' members and consumer organisations and do not present unreasonable barriers to accessing the scheme. ANZ hopes the AFCA transition team will draw on the work, expertise and experience which has gone into to developing the current FOS terms of reference when drafting the new terms of reference.
20. Clause 5.2(d) of the FOS terms of reference gives FOS a discretionary power to exclude a dispute which is 'frivolous or vexatious or lacking in substance'. Our experience with FOS shows a reluctance to use this exclusion.
21. This could be utilised more frequently is where there has been no loss incurred by a consumer for which FOS can award compensation. We believe that AFCA should consider, as a threshold issue, whether or not any loss has been incurred by the customer which it would in fact be able to compensate.

22. In the same vein, it may also be worthwhile for AFCA to have a separate dispute resolution process for small amount disputes where the loss incurred is unlikely to exceed \$500. Often these disputes are resolved in the consumer's favour by financial firms in order to avoid the cost of the dispute proceeding at FOS and incurring fees which may be well in excess of \$5,000. It would be beneficial for AFCA to give consideration to a lower cost process for resolving small amount disputes so that they are resolved on a more meritorious basis.
23. We also point out the importance of AFCA maintaining discretion to exclude particular disputes. It is important that, in order to defend the exclusion of disputes which do not meet its jurisdictional requirements, AFCA has a broad discretion to exclude disputes for the reasons currently included in clause 5.2 of the FOS terms of reference. Without a right to exercise discretion AFCA will be more vulnerable to legal challenge – particularly from businesses with significant resources who may utilise FOS as a 'safe harbour' to avoid recovery action by a bank³.
24. We are also concerned that exclusions are retained which ensure that AFCA's jurisdiction does not extend to 'class action' style claims. The following exclusions in particular serve this purpose:
- Disputes about the investment performance of a financial investment, except a dispute concerning non-disclosure or misrepresentation (5.1(g));
 - Disputes about decisions of the trustees (in their capacity as trustees) of approved deposit funds (5.1(h)); and
 - Disputes relating to the management of a fund or scheme as a whole (5.1(i));
25. The importance of excluding class action style claims is heightened by the potential introduction of a last resort compensation scheme. To the extent that access to a last resort compensation scheme is based on access to AFCA, these provisions prevent large numbers of claims based on the same, or similar, events. Claims on this scale are more appropriately dealt with by a Court.

B. SUPERANNUATION

Additional matters related to superannuation

26. We support the 1 July 2018 cut-off date for all new superannuation complaints to go to AFCA.

³ Paragraph 13.1(iii) of the FOS terms of reference provide that 'where an Applicant lodges a Dispute with FOS, the Financial Services Provider... must not take any action to recover a debt the subject of the Dispute, to protect any assets securing that debt or to assign any right to recover that debt, while FOS is dealing with the Dispute'.

27. In terms of the remaining backlog of superannuation complaints, we stress the importance of adequate funding being made available for the Superannuation Complaints Tribunal (**SCT**) to resolve these complaints. This is particularly so where complaints which have been in progress for some time - as these are often more complex and take longer to resolve. It is important that these funding requirements are not overlooked in the process of establishing AFCA.
28. Where possible, we hope that the transition to AFCA can be managed in such a way as to avoid transferring existing cases to new case managers or having new rules apply to a case already under consideration by the SCT. This will minimise consumer confusion and avoid duplication of work which could unnecessarily expose the SCT to additional costs.

C. GOVERNANCE

Board

29. ANZ supports the proposed structure of the AFCA Board set out in section 1051(3)(d) of the Draft Bill.
30. A Board with equal consumer and banking skill and experience, with an independent chair, is a structure that has worked well for FOS ensuring confidence in FOS from consumer and industry groups alike and provided longevity and stability to the organisation.

D. FUNDING

Funding matters for consideration as part of authorisation

31. We support separate funding for superannuation and non-superannuation disputes given their have distinct decision making frameworks and requirements.
32. In terms of the funding arrangements adopted by AFCA, we point out that ANZ, like all large financial firms, has completed its forward financial planning for the next financial year. In order to ensure consistency, our expectation is that AFCA adopt, at least in the short term, the same funding model as FOS. Particularly given that AFCA's larger jurisdiction will already result in increased costs for its members (in terms of more disputes and larger awards of compensation).

E. OTHER ISSUES

Non-Superannuation Legacy Disputes

33. We support the transfer of legacy disputes from FOS and CIO to AFCA to be resolved under the originating scheme's terms of reference rather than having multiple schemes operating concurrently.

34. It would be useful to clarify whether disputes lodged from 1 July 2018 will be dealt with under AFCA's new Terms of Reference, including accessing its higher limits, regardless of when the events giving rise to the dispute occurred. We support this approach to avoid AFCA applying two separate terms of reference at the same time.
35. However, we recognise the need to ensure fair and consistent access to AFCA for consumers. Consideration ought to be given to enable consumers to lodge disputes with AFCA, which were previously ruled by FOS as outside its terms of reference (due to claim or compensation limits only), where their complaint is still 'within time' under the AFCA jurisdiction.
36. We appreciate that AFCA members who may have considered these complaints 'resolved', however, consumers would likely still have had an entitlement to take these matters to Court and so the 'risk' of further action was still present.

ENDS