



20 November 2017

Head of Secretariat
AFCA Transition Team, Financial Services Unit
The Treasury
Langton Crescent
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By email afca@treasury.gov.au

Dear Ms Pai

Establishment of the Australian Financial Complaints Authority

The Australian Bankers' Association (**ABA**) welcomes the opportunity to comment on the consultation paper *Establishment of the Australian Financial Complaints Authority* (**consultation paper**).

With the active participation of its members, the ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services. The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.

Scope

The ABA notes that the purpose of this consultation is to obtain input to inform the Transition Team's advice to the Minister on those matters that should be addressed in material provided by companies seeking authorisation as the Australian Financial Complaints Authority (AFCA).

The ABA further notes that:

- This will include key elements of the AFCA, including the terms of reference, governance and funding arrangements
- The advice may also include advice as to the conditions that should be imposed on authorisation
- The Consultation Paper focusses on those aspects of AFCA's operations that will differ from the current arrangements for the Financial Ombudsman Service (**FOS**), Credit and Investments Ombudsman (**CIO**) and Superannuation Complaints Tribunal (**SCT**), and will not address arrangements that will not change.



Issues for discussion

These comments address selected issues.

Guiding principles for AFCA's establishment

The proposed guiding principles for the establishment of AFCA are comprehensive. However, there is an overarching principle that underlies them and could be further emphasised, and that is to provide a streamlined customer experience. The creation of a new external dispute resolution (**EDR**) framework provides an opportunity to improve the efficiency of the process for dispute resolution and to improve the customer experience, from the lodgement of a dispute and its speedy but fair consideration, through to its resolution.

Issue 1: Monetary limits

We note that Section 1052B of the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017* provides ASIC with the power to increase limits on the value of claims. It is critical that ASIC issues guidance as to when they would seek to use that power, the factors they would use in assessing the need for an increase in limits and what mechanism there would be for appeal.

The great strength of an EDR scheme is that it can provide expedient outcomes for cases that are not sufficiently large or complex to warrant court proceedings. However, as claims thresholds increase there is a risk the resolution process will be slowed. There needs to be clear acknowledgement that there is a threshold beyond which the size and complexity of the case means it would be better resolved in a court environment, with testing of evidence by cross-examination and rules of evidence.

Changes to limits may impact the availability and price of professional indemnity insurance, depending on the individual insurance arrangements of financial service providers. This highlights the need for ASIC to consult broadly prior to exercising this power.

Issue 2: Enhanced decision making

The current operational guidelines for FOS provide some appropriate guidance for decision making. This guidance includes the subjective concept that decisions must be ‘fair in all circumstances’ and guided by legal principles, industry codes and good industry practice. We acknowledge and support that this guidance generally allows EDR to be an efficient alternative to court for consumers to resolve smaller and less complex disputes. In this regard a strict focus on the law with appeal mechanisms may dilute a scheme’s efficiency and effectiveness.

Noting this, and with the increase to monetary limits in mind, the ABA would support more detailed guidance in the terms of reference regarding measures to ensure that AFCA decisions are consistent, promote procedural fairness in decision making and that decisions are fair for all users of the scheme, both customers and financial advisers. Published documentation is important to provide clarity in the application of the fairness principles.

Issue 3: Use of panels

The ABA supports the use of expert panels to resolve disputes where appropriate. For complex cases expert panels can provide early clarity and expedite dispute resolution.

The guidelines for using panels need to be clear and transparent, including the circumstances in which panels would be used, how they are constituted and how they make/feed into decision-making processes. Essentially panels should be used in circumstances where the complexity or degree of specialist issues exceeds the ‘in house’ abilities of AFCA. It is in these circumstances in which the use of external expertise would be likely to facilitate a speedier and fairer resolution.



Under FOS' current terms of reference, panels are used for cases on insurance, margin loans and investment advice. With the expanded scope of AFCA and the higher monetary limits across all categories it can be expected that the complexity of lending, small business transactions, guarantor and co-borrower matters will also increase and the use of panels for these cases may well be appropriate. The terms of reference will need to be broadened to provide appropriate coverage. It may be appropriate to set a monetary threshold for claims, e.g. \$500,000, beyond which disputes are referred to panels.

Issue 4: Independent reviews

The independent reviews should assess the overall effectiveness and consistency of the dispute resolution process. This should include the ease of lodging a complaint, the time between lodgement and final resolution, customer satisfaction with the overall process, compensation paid, and the outcomes across similar classes of disputes.

Alongside the high level quantitative analysis, the review could include a sample assessment of individual decisions across a selection of topics and complexities to form an opinion as to their fairness and consistency as well as comparability of outcomes. These attributes are fundamental to the effectiveness of AFCA's operations.

The independent reviews should also assess the appropriateness of the funding models (the guidance in the Ramsay Review is largely appropriate) and look at how AFCA applies statutory powers.

Regulatory Guidance 139 provides appropriate high level guidance¹ with the focus on AFCA's performance and requires both a qualitative and quantitative assessment with the outcome available to ASIC and stakeholders.

Independent reviews should also include an assessment of the review mechanism itself, such as jurisdiction and procedural fairness, the effectiveness of such reviews, the outcome, and evidence of implementation of any recommendations for improvement.

We note reviews of whether AFCA is meeting its EDR benchmarks are currently proposed to be every five years, as was the case for FOS and CIO; three years may be more appropriate, in line with independent reviews of ombudsman-type schemes in the financial services sector in the UK and Singapore.

The ABA suggests the reviews should be made public, but with the details of institutions and customers removed.

Issue 5: Independent assessor

The ABA supports the appointment of an independent assessor to review complaints about AFCA's service standards in dispute handling.

The findings should be anonymised to allow the independent assessor to focus on improving the process of dispute resolution.

The independent assessor should be appointed by and report to the AFCA board for a fixed term subject to the usual caveats, such as serious misconduct. The charter of the independent assessor should be referenced in the scheme's terms of reference.

Both customers and financial service providers should have the right to refer disputes to the independent assessor. There should also be consideration of whether industry or consumer bodies and associations should have the right to refer dispute issues on behalf of members.

¹ RG 139.160: The review should include some form of qualitative assessment of the scheme's performance in addition to quantitative measures of a scheme's performance. RG 139.161: The results of the review must be made available to us and to other stakeholders.



In circumstances where the AFCA board disagrees with an independent assessor's decision, the board should publish its decision including the rationale.

Consideration should also be given to requiring the results of the independent assessor's review to be passed onto ASIC. This should include the outcome of the review, any recommendations to take action and any decision by AFCA not to take action². This would promote transparency and accountability.

Issue 6: Exclusions from AFCA's jurisdiction

It is important to ensure access for all legitimate disputes (even if ultimately AFCA finds against the complainant) and to exclude frivolous, vexatious or without substance disputes in a timely manner.

The established exclusions for the FOS (as set out in the FOS terms of reference 5.2(d)) are appropriate and fit for purpose.

Consideration should be given to introducing an 'initial assessment' process where complaints can be quickly assessed and terminated if they lack merit.

Issue 7: Other issues to be addressed in the terms of reference

ABA member banks have well developed internal dispute resolution processes and customer advocates to address customer complaints.

The Ramsay Report recommended, and the Federal Government agreed, that AFCA should refer all complaints back to the financial service provider's internal dispute resolution mechanism for a final opportunity to resolve. The ABA believes this is appropriate and this requirement should be included in the AFCA terms of reference. There should be no levy imposed on banks by AFCA for this referral.

Issue 10: Ensuring that directors have appropriate skills and experience without being simply representative of sectional interests

Directors require a diversity of skills rather than deep technical knowledge – the latter can be achieved through panels where necessary. Developing a board skills matrix would ensure that the board collectively has the requisite skills and experience to enable adequate oversight, and will help guide its future board selection decision making and succession planning.

The ABA considers that it would be appropriate for the corporate governance arrangements to reflect the ASX corporate governance principles.

Issue 11: Board responsibilities

The board of AFCA is there to set strategy and direction, including policy direction and managing risk; directors should not intervene in decisions on individual disputes.

During transition the board may wish to have an advisory committee to report on progress to better customer outcomes.

Issue 12: Funding matters for consideration as part of authorisation

The increases to eligibility thresholds and monetary limits are likely to necessitate a lift in the capabilities of AFCA, for example, to examine more complex small business lending matters. This may require a commensurate increase in funding.

The ABA is broadly supportive of the design principles laid down for AFCA. In particular, the ABA endorses the importance of ensuring there is no cross-subsidisation amongst sectors or members.

² The explanatory memorandum of the Bill at para 1.48 states: "if the assessor determines that the complaint was not handled satisfactorily, the assessor may recommend that AFCA take certain actions"



The ABA supports the publication of future estimated costs of operation and suggests this should be over a three year horizon to assist with institutions' forward financial planning and system development.

Issue 13: Interim funding arrangements

The ABA acknowledges that it may take time to settle on a final funding model for AFCA and that in the interim a temporary funding model will be required. This will allow AFCA to be resourced sufficiently to receive and handle complaints effectively from commencement on 1 July 2018, and meet costs associated with establishing the AFCA board between authorisation and commencement.

In the shorter-term, there is a risk that overall industry costs and required funding will be higher, to the extent that some elements of the pre-existing EDR schemes such as resolution of legacy disputes are run in parallel with AFCA. The ABA is strongly of the view that close attention must be paid to minimising duplication of costs to industry during this transition period.

The interim funding arrangements may need to differ between CIO, FOS and the SCT.

The ABA notes that FOS had net assets of \$23 million at end June 2017. Clarity on the future use of these funds is required.

The ABA understands the SCT will continue to operate until 30 June 2020 to resolve its existing backlog of complaints. It needs to be clarified whether complainants will be able to choose to continue to progress their dispute with the SCT during the transition period, or withdraw it and instead have it considered afresh by AFCA. If complainants have this choice there may be an impact on costs and funding and the potential for inconsistent outcomes for comparable disputes.

Issue 14: Transparency and accountability

The framework as proposed is adequate. The ABA in particular notes the importance of transparency in relation to funding arrangements and the need for regular independent reviews to ascertain integrity and fairness of the model to all members.

Issue 16: Dealing with non-superannuation legacy disputes

The handling of legacy disputes from the three existing EDR schemes following the commencement of operations of AFCA is one of the most critical transitional issues to be resolved.

One issue is to determine the appropriate time of origin of the dispute and whether the old schemes' or AFCA's rules apply.

One option is to 'date' the dispute from the time of the transaction/event to which the dispute relates. This would ensure that all disputes that originated at a given time would be subject to the same EDR eligibility and compensation limits. The difficulty is that such grandfathering may lead to old disputes being considered by AFCA under old rules well after it commences operation.

The alternative is to 'date' the dispute from the time it was first notified to the respective EDR scheme. That would mean that disputes notified after 1 July 2018 would be subject to new AFCA guidelines irrespective of the date on which the dispute arose. There would need to be a prohibition on "regime shopping", that is, customer's lodging a dispute again under the more generous AFCA thresholds in circumstances where their dispute had been ruled outside the predecessor scheme's terms of reference. Customers should only have one opportunity to lodge a particular dispute for external dispute resolution.

Disputes raised through predecessor schemes should be managed under the predecessor terms of reference by run-off teams operating within AFCA. This would be preferable to continuing with four separate schemes operating in parallel. The run-off teams working on legacy issues would need to be properly resourced with appropriate skills. Legacy issues would need to be expedited as a matter of priority.



Strong banks – strong Australia

The guiding principle should be to ensure procedural fairness and equitable treatment for customers with contemporary comparable disputes and also certainty on the resolution parameters for affected institutions.

The ABA suggests the ‘live’ legacy disputes from the predecessor schemes should be transferred to AFCA on 1 July 2018.

Closing

The ABA believes there would be benefits for the industry and for AFCA from ongoing stakeholder consultation, including with member institutions, as the details of the AFCA operational mandate continue to be determined and evolve. This will assist in the promotion and support of AFCA as well as limit any unintended consequences for customers and members.

I would be happy to discuss these matters further.

Yours sincerely

Signed by

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