



Australian Small Business and Family Enterprise Ombudsman Bill 2015

Financial Ombudsman Service Australia Submission

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1 Overview

In this submission the Financial Ombudsman Service Australia (FOS)¹ comments on the exposure draft dated 11 March 2015 of the *Australian Small Business and Family Enterprise Ombudsman Bill 2015* (Bill)².

We welcome the initiative to assist and support small businesses by establishing the Australian Small Business and Family Enterprise Ombudsman (SBFE Agency). We anticipate that the new SBFE Agency will make a valuable contribution through its advocacy and dispute resolution concierge roles.

We also appreciate the opportunity to provide comment on the proposed Bill and to work with Treasury to ensure the intent of the Bill is achieved particularly as it applies to Industry Ombudsman Schemes, such as FOS.

The explanatory memorandum for the Bill emphasises that the role of the SBFE Agency is intended to be complementary to, and avoid overlap with and duplication of, the roles of other Ombudsmen.³ We agree this is important and have suggested some drafting changes to the Bill to ensure this is achieved, particularly in the key areas relating to the roles and jurisdiction of Industry Ombudsman Schemes.

By way of background, over the last 25 years FOS and its predecessor schemes have provided services to resolve disputes between consumers, including small businesses, and their financial services providers. These services form part of the framework for consumer protection under Australia's financial services legislation.

FOS is overseen, and meets standards set by the Australian Securities and Investments Commission (ASIC), and long established systems are in place to ensure we provide a high quality service that is:

- accessible
- independent
- fair
- accountable
- efficient, and
- effective.

The existing dispute resolution arrangements have recently been endorsed by a number inquiries⁴ which have concluded that the existing arrangements for alternative dispute resolution in the financial sector are generally operating well.

¹ Information about FOS, and the disputes we handle, is available on our website www.fos.org.au. Overview information appears in our annual review, which is in "Publications" on the website.

² This submission has been prepared by the Office of the Chief Ombudsman and does not necessarily represent the views of the Board of FOS. It draws on the experience of FOS and its predecessor schemes in the resolution of disputes about financial services

³ See, for example, page 1 of *Explanatory materials – Australian Small Business and Family Enterprise Ombudsman Bill 2015* on www.treasury.gov.au

⁴ See for example, FSI Final Report, Consumer Outcomes, page 193
http://fsi.gov.au/files/2014/12/FSI_Final_Report_Consolidated20141210.pdf

We agree with the intent of the Bill that the role of the SBFE Agency should complement rather than duplicate or impede current dispute resolution arrangements for small business. Under the current drafting of the Bill, we are of the view that some overlaps and duplication in roles and jurisdiction of the new SBFE Agency and Industry Ombudsman Schemes will occur.

The Bill, as currently drafted may also have unintended consequences of undermining some of the fundamental principles of independence, finality of decisions, and confidentiality of dealings with the parties that are central to FOS's role as an independent and impartial Ombudsman for the resolution of financial services disputes within our jurisdiction.

To address these and to ensure that inefficiency, inconsistency, increased costs, reduced access for small business disputes and forum shopping are avoided, we suggest changes to the Bill relating to the definition of agency and the circumstances in which the SBFE Agency may transfer a request for assistance to another agency (sections 8 & 69 respectively).

These amendments are designed to enable the effective transfer of disputes to FOS and other Industry Ombudsman Schemes. We also suggest some changes to ensure that the SBFE Agency does not effectively re-open or act as an Appeal mechanism for a dispute that has already been dealt with by FOS or other Industry Ombudsman Schemes in accordance with their jurisdiction, or duplicate the oversight of FOS by ASIC.

While we have suggested a number of amendments, we would welcome the opportunity to clarify or discuss with Treasury.

2 Recommendations

2.1 Amendments to the Bill

Part 4 of the Bill provides a mechanism to transfer disputes to Commonwealth, State and Territory agencies. As FOS is not a Commonwealth agency as defined in Section 8 of the Bill and, as presently drafted, the Bill does not provide a mechanism for the SBFE Agency to transfer a dispute to FOS or other Industry Ombudsman schemes. We therefore suggest the following:

- Section 8 of the Bill to provide a broader definition of “agency” to provide for the role of Industry Ombudsman Schemes in dealing with small business disputes
- Modify Section 69 to accommodate the transfer of disputes to approved external dispute resolution (EDR) schemes, such as FOS
- The exclusions from the SBFE Agency’s authority in subsection 67(2) extended to prevent duplication where a dispute has already been dealt with by FOS
- The definition of “small business” in section 5 be replaced with a definition consistent with subsection 761G (12) of the *Corporations Act 2001*, and
- In the name of the organisation established by the Bill, “Australian Small Business and Family Enterprise Ombudsman”, the term “Ombudsman” should be replaced with another term that better reflects its role as an advocate for small businesses.

2.2 Co-operative arrangements

We believe that co-operative arrangements between the SBFE Agency and other organisations could be established, through memoranda of understanding or similar agreements, to ensure that:

- arrangements for the oversight of FOS and other Ombudsman Schemes are clear
- the SBFE Agency works co-operatively with stakeholders, including FOS, if the SBFE Agency
 - researches or inquiries into systemic issues or serious misconduct in financial services, or
 - takes steps to promote best practice in the financial services industry, and
- the SBFE Agency does not act as an advocate in a dispute handled by FOS.

3 Dispute resolution

3.1 Potential overlap

FOS resolves disputes between financial services providers and consumers. The consumers may be individuals or businesses within the definition of “small business” in paragraph 20.1 of our [Terms of Reference](#). This definition reads:

“small business” means a business that, at the time of the act or omission by the financial services provider that gave rise to the dispute:

- if the business is or includes the manufacture of goods – had less than 100 employees, or
- otherwise – had less than 20 employees.

This is the definition of small business used in the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001*.⁵ The ASIC Act contains provisions regulating the conduct of financial services providers in their interaction with small businesses. This definition is also consistent with the definition of a small business contained in the Code of Banking Practice.

The definition above is narrower than the definition of small business in section 5 of the Bill. As outlined above, we have focused on the potential overlap between the roles of the SBF E Agency and FOS. This overlap relates to small businesses within the narrower definition set out above.

Section 2 of our [previous submission](#) explained our jurisdiction in relation to small businesses. Our jurisdiction excludes particular categories of small business disputes. For example, it excludes disputes about debt collection involving a small business where the loan contract exceeds \$2 million.

In our view, it is preferable to use a consistent definition of small business and given that the *Corporations Act 2001* definition is widely used, in our view it is to be preferred.

3.2 FOS is not an agency as currently defined in the draft Bill

While FOS is approved by ASIC and recognised by the Office of the Australian Information Commissioner (OAIC), our jurisdiction arises because of the contract between FOS and the financial services providers who are members of FOS.

In order to ensure that there is no duplication of effort, we recommend that the definition of agency in Section 8 be amended as follows:

⁵ See subsection 761(12) of the Corporations Act and section 12BC of the Australian Securities and Investments Commission Act 2001 (ASIC Act).

Meaning of agency

A body is an **agency** if the body is one of the following:

(1) An agency of the Commonwealth which includes:

- (a) A Department of State of the Commonwealth;
- (b) An agency, authority or body (whether incorporated or not) established for a public purpose by or under a law of the Commonwealth;
- (c) A person holding office, or exercising power, under a law of the Commonwealth.

(2) An agency of a State or a Territory which includes:

- (a) A Department of State of the State or the Territory;
- (b) A local government body of the State or the Territory;
- (c) Any other agency, authority or body (whether incorporated or not) established for a public purpose by or under a law of the State or the Territory;
- (d) A person holding office, or exercising power, under a law of the State or the Territory.

(3) An external dispute resolution scheme approved by an agency of the Commonwealth, a State or a Territory or established pursuant to legislation or an instrument of the Commonwealth, a State or a Territory.

Section 69 of the Bill should also be amended to take into account the changed definition of agency. We suggest subsection 69(1) be altered to read as follows:

Circumstances in which the Ombudsman must transfer a request for assistance to another agency

(1) The Ombudsman must not give assistance in response to a request for assistance in relation to a relevant action, or give further assistance in response to such a request, if:

- (a) the Ombudsman reasonably believes that:
 - (i) the request could have been made to another agency;
 - (ii) the request could be more conveniently or effectively dealt with by the other agency; and
- (b) the other agency has the power or jurisdiction to deal with the request.

3.3 Disputes already dealt with by FOS

Sections 67 and 68 provide for exclusions from the SBFE Agency's authority to deal with a request for assistance. Even if the definition of agency is changed, the mandatory exclusions in section 67 would not cover a request for assistance about a dispute that FOS has already dealt with. When considering whether assistance is warranted in such a case under subparagraph 68(1) (b) (iv), the SBFE Agency could take into account that an agency had already dealt with the dispute. However, it is not clear that the SBFE Agency would decline, or have the ability to decline, to deal with the request.

It would be preferable to include a specific provision in either section 67 or 68 that the SBFE Agency would not consider a dispute if it has already been dealt with by another agency. We consider that a mandatory exclusion under section 67 would be the simplest and most effective solution.

The exclusion in paragraph 68(1) (c) applies where a request must be transferred to another agency. We note that this provision may not apply to a dispute already dealt with by FOS because the dispute may be outside the jurisdiction of FOS, due to paragraph 5.1k) of our Terms of Reference⁶.

4 Advocacy in disputes handled by FOS

We understand from the explanatory memorandum that the SBFE Agency will be an independent advocate who will act as a conduit for, and representative of, issues that small businesses are facing at the national level. This in practice means that the SBFE Agency has the power to conduct inquiries in a range of areas including policies and practices on small business.

We do not understand this to mean that the SBFE Agency will act as an advocate/representative (effectively becoming a party to a dispute) for a small business in a specific dispute at FOS.

We do not consider having a government entity directly involved as the agent for one party to a dispute being considered by a non-government independent alternative dispute resolution body such as FOS is desirable. We consider this could create negative perceptions and undermine the independence and role of both organisations.

We would suggest that it would be useful for further clarification to be provided in the explanatory memorandum, under the advocacy function section, that the SBFE Agency is not intended to act as the agent or representative of a small business in a specific dispute being considered by a non-government independent Industry Ombudsman Scheme.

⁶ FOS Terms of Reference at this [link](#).

5 Research and inquiries

5.1 Systemic issues and serious misconduct

To maintain ASIC's approval to operate as an EDR scheme, FOS must handle systemic issues and serious misconduct in accordance with requirements set in ASIC's Regulatory Guide 139.⁷

Part 3 of the Bill provides for the SBFE Agency to conduct inquiries and research into legislation, policies and practices affecting small businesses. Such research and inquiries could include matters that FOS addresses through its work on systemic issues and serious misconduct. This work was outlined in section 4.3 of our previous submission⁸.

Again, we are keen to work with Treasury to avoid overlap or duplication in this area. A way to do this would be to establish a mechanism for the referral of systemic issues and serious misconduct investigations in the financial services sector by the SBFE Agency to ASIC.

5.2 Oversight of FOS

FOS is overseen by ASIC under its Regulatory Guide 139. Operations of FOS are also overseen by the OAIC under the *Privacy Act 1988*. We have obligations to both regulators, including requirements relating to reporting, the handling of systemic issues and periodic independent reviews.

We consider important the role of the SBFE Agency under Part 3 not to duplicate current arrangements for oversight of FOS by ASIC and the OAIC.

We understand, from the explanatory memorandum for the Bill and our discussions with Treasury, that the Bill is not intended to alter or duplicate the current arrangements for oversight of FOS by ASIC or the OAIC, as Government Agencies.

We would suggest it would be useful to clarify this further in the explanatory memorandum, by noting that any oversight of FOS would be the responsibility of ASIC and OAIC's (as appropriate), in accordance with existing arrangements and that the role of the SBFE Agency is not intended to replace or duplicate current oversight arrangements.

This would still provide scope for the SBFE Agency's role as it would be able to directly engage with ASIC on issues relating to small business disputes and related matters under the Corporations Law, including ASIC oversight of FOS as an ASIC approved External Dispute scheme in the financial sector. Similar comments apply to the OAIC.

⁷ ASIC's *Regulatory Guide 139 Approval and oversight of external dispute resolution schemes* is available on www.asic.gov.au under "Regulatory Documents".

⁸ FOS Submission to the Small Business and Family Enterprise Ombudsman Discussion Paper: <http://fos.org.au/custom/files/docs/fos-submission-to-the-small-business-and-family-enterprise-ombudsman.pdf>

6 Promotion of best practice

Section 64 permits the SBFE Agency to take steps to promote best practice in a broad range of interactions in the financial services sphere.

The current explanatory memorandum makes it clear that in doing so the SBFE Agency will work with other relevant Commonwealth, State and Territory Agencies. While we understand that it is also intended that the SBFE Agency will engage more broadly with a wide range of stakeholders, this is not referred to in the relevant section of the explanatory memorandum.

We consider important, should the SBFE Agency seek to promote best practice in the financial services sector (including codes of practice), that it does engage with a broad range of industry stakeholders and consumer stakeholder groups, including Industry Ombudsman Schemes.

We would suggest it would be useful to clarify this in the explanatory memorandum in the relevant section relating to promoting best practice.

7 Title of SBFE Agency

In our previous submission, we outlined our concerns about describing the body as an “Ombudsman”, given its advocacy role. We also said that the SBFE Agency did not meet the “Essential criteria for describing a body as an Ombudsman” as set out by the Australian and New Zealand Ombudsman Association.⁹

We support ANZOA’s submission on the Bill, which addresses this matter in further detail.

⁹ Available on www.anzoa.com.au.

Appendix 1- About FOS

FOS is an independent external dispute resolution scheme that handles consumer disputes, across the financial sector. FOS provides services to resolve disputes between financial services providers (that are FOS members) and consumers, including certain small businesses.

This appendix provides some information in summary form. We would be happy to provide any additional information required.

- FOS is a company limited by guarantee, Financial Ombudsman Service Limited
- The [constitution](#) of FOS outlines its purpose and objects
- FOS operates in accordance with its [Terms of Reference](#), which provide for matters including:
 - who can lodge a dispute (eligibility)
 - types of disputes FOS can consider (jurisdiction)
 - how FOS resolves disputes, and
 - types of remedies FOS can provide.

We draw attention to the fact that the Terms of Reference specify the jurisdiction of FOS. FOS does **not** have powers conferred by legislation as Commonwealth, State and Territory agencies do.

- FOS is approved to operate as an EDR scheme by ASIC under its [Regulatory Guide 139](#).

The *Corporations Act 2001* and the *National Consumer Credit Protection Act 2009* require a licensed financial services provider or credit licensee to:

- have internal dispute resolution procedures that meet standards set by ASIC, and
- be a member of an ASIC-approved EDR scheme.

These arrangements afford consumer protection by giving consumers with complaints access to high quality internal complaints handling procedures and, for complaints not resolved by the parties, access to high quality EDR. To maintain approval from ASIC, an EDR scheme must continue to meet the extensive requirements set in ASIC's Regulatory Guide 139.

If a financial services provider is a member of FOS because it needs a licence for the provision of financial services to consumers or individuals, we can consider a dispute about the provision of financial services to a small

business because of provisions in our Terms of Reference, and not because the FSP is licensed.

- FOS satisfies the *Benchmarks for Industry-based Customer Dispute Resolution Schemes*¹⁰, which were recently reviewed by the Commonwealth Consumer Affairs Advisory Council. These benchmarks set standards in regard to accessibility, independence, fairness, accountability, efficiency and effectiveness. ASIC considers criteria based on the benchmarks when it decides whether an EDR scheme should obtain or maintain approval under Regulatory Guide 139
- FOS is a recognised EDR scheme under the *Privacy Act 1988*. This recognition signifies that FOS meets standards in accessibility, independence, fairness, accountability, efficiency and effectiveness (based on the industry scheme benchmarks mentioned above) and additional requirements for handling privacy complaints¹¹, and
- FOS and its predecessors have provided high quality dispute resolution services for about 25 years.

¹⁰ The benchmarks are available on www.ccaac.gov.au.

¹¹ These standards are set through *Guidelines for recognising EDR schemes under s35A of the Privacy Act* available on www.oaic.gov.au.