

# HENRY DAVIS YORK

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**BY EMAIL EDR@treasury.gov.au**

Manager

Financial Services Unit

Financial System Division

The Treasury

Langton Crescent

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Dear Sir/Madam

## **Improving dispute resolution in the financial system - Submission of Henry Davis York**

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Henry Davis York has one of Australia's leading banking and financial services practices. We express our views on the matters set out in the Consultation Paper issued in May 2017 (**Consultation Paper**) and the Exposure Drafts of the *Treasury Laws Amendment (External Dispute Resolution) Bill 2017* and the *Treasury Laws Amendment (External Dispute Resolution) Regulations 2017* (**Exposure Drafts**).

### **1 Introduction**

HDY is generally supportive of the approach set out in the Consultation Paper and the Exposure Drafts, as well as the objectives of Government in developing a new seamless external dispute resolution (**EDR**) scheme to deal with all financial disputes.

In summary, our submissions are that:

- (a) The outcomes of claims determined by the Australian Financial Complaints Authority (**AFCA**) should be consistent with the outcomes of claims determined by the Financial Ombudsman Service (**FOS**), the Credit and Investments Ombudsman (**CIO**) and the Superannuation Complaints Tribunal (**SCT**), in order for all those schemes to appear fair.
- (b) We support the removal of the obligation for credit representatives to be members of an EDR scheme.
- (c) We note that there may be a number of regulatory impacts of the new EDR framework, such as a requirement to redraft the terms of reference and the

costs involved for financial services and credit providers to adapt their practices to comply with AFCA's processes.

- (d) We support the proposal to increase the caps on monetary and compensation limits to the amounts specified in the submissions of the Australian Bankers' Association dated 1 February 2017 (**ABA Submissions**).
- (e) We consider that the advantages and disadvantages of an internal AFCA appeal mechanism should be explored.

We set out our submissions in more detail under the headings below.

## **2 Response to Consultation Paper issued May 2017 (Consultation Paper)**

### **2.1 Question 4: Are there any additional issues that should be considered to ensure an effective transition to the new EDR scheme?**

It is proposed that there will be a transitional arrangement in which all new complaints made after the date that AFCA becomes operational will be heard by AFCA, whilst all existing complaints as at that date will continue to be heard by FOS/CIO.

We consider it of critical importance that the determinations made by AFCA do not produce unreasonably inconsistent outcomes to determinations made by FOS/CIO. For example, it would appear unjust if applicants with similar issues and applications were granted substantially different determinations because they were required to apply to a different scheme.

We consider that a focus on producing consistent results aligns with the overall aim of the proposed external dispute resolution and complaints framework to establish a "one-stop shop for all financial disputes" and not to revise the decision-making process undertaken by FOS/CIO.

We also support the proposal that there be no statutory obligation for financial services and credit providers to remain a member of FOS/CIO, in circumstances where financial services and credit providers will continue to be contractually bound by determinations of FOS/CIO.

### **2.2 Question 7: Are there any reasons why credit representatives should be required to be a member of an EDR scheme?**

We support the removal of the obligation for credit representatives to be members of an EDR scheme, in circumstances where the licensee is responsible and liable for the conduct of their representatives.

We do not consider there to be any reason why credit representatives should be required to be a member of an EDR scheme.

### **2.3 Question 8: What will the regulatory impacts of the new EDR framework be?**

In addition to the impacts set out in the Consultation Paper, we consider that there will be further regulatory impacts of the new EDR framework as follows:

- (a) There will be a requirement to redraft the terms of reference. The redrafted terms of reference must be fairly comprehensive to account for the larger scope of matters determined by AFCA, whilst adopting similar terms to the existing terms of reference of the separate schemes.
- (b) There may be a high cost involved for financial services and credit providers:
  - (i) to train staff in relation to AFCA's processes;
  - (ii) to respond to the potentially higher volume of complaints being referred to EDR as a result of the higher claim limits; and
  - (iii) to make any potential improvements to internal dispute resolution in response to the potentially higher volume of complaints being referred to EDR.

Such costs may be justified if they result in fewer disputes being referred to EDR and subsequently lower costs being expended in engaging in EDR.

### **3 Other observations**

#### **3.1 New monetary and compensation limits**

In general terms, the relatively low monetary limits (both existing and proposed) reflect the simple, low-value claims which the EDR scheme is designed to address in order to avoid the costs and other inconveniences of Court proceedings.

The proposal to increase the monetary and compensation caps may encourage financial services and credit providers to improve IDR processes to reduce the number of complaints proceeding to EDR, including a review of the common characteristics, vulnerabilities or traits of the complaints.

In terms of the amount of the proposed caps, we support the ABA Submissions which propose a \$1 million limit for both claims and the maximum amount awardable by the EDR scheme in the general jurisdiction.

The proposal to increase the monetary and compensation caps may also provide greater accessibility to EDR for small business. Whilst we are supportive of this outcome, we are also aware that higher caps may also result in more complex matters and/or vexatious litigants proceeding to EDR. As a result, we would envisage that the terms of reference and the training of facilitators/assessors would reflect this potentially elevated level of complexity.

In this regard, we support the ABA Submissions which propose that increased eligibility and monetary thresholds for small business credit disputes be accompanied by a revised test for small business. In this way, a suitable balance may be struck between making EDR accessible for small business while ensuring that the availability of the EDR scheme is limited to less complex disputes.

#### **3.2 Appeal mechanism**

In the proposed Exposure Draft, the avenue for appeal is currently limited to superannuation claims. Currently, FOS does not provide for an internal appeal

mechanism for financial services and credit providers. A FOS decision can only be overturned in Court if it is "*one to which no reasonable tribunal could properly come on the evidence.*"<sup>1</sup> This is a fairly high threshold.

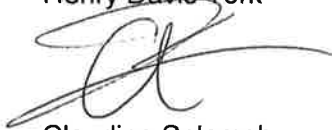
For claims which are not superannuation claims, a 1 tier system by which there is no appeal mechanism within AFCA provides a straightforward procedure for claimants to navigate.

On the other hand, a 2 tier system which provides for an appeal mechanism may improve accessibility as it provides an alternative to commencing Court proceedings, as well as increasing procedural fairness for financial services and credit providers. For example, in Ireland, a claimant may appeal on a merits basis.

In addition, the proposal to increase the monetary and compensation caps may result in more complex matters with higher claim amounts proceeding to EDR. More complex matters may benefit from an internal appeal mechanism.

We do not necessarily suggest that an internal appeal mechanism be made available for all financial claims, however, we consider it a valuable exercise to consider whether one should be provided for in the proposed EDR framework.

Yours faithfully  
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<sup>1</sup> *Cromwell Property Securities Limited v Financial Ombudsman Service Limited & Ors* [2014] VSCA 179 at paragraph 79.