



**ANZ COMMENTS ON THE INTERIM REPORT,
REVIEW OF THE FINANCIAL SYSTEM EXTERNAL DISPUTE
RESOLUTION AND COMPLAINTS FRAMEWORK**

JANUARY 2017

A. INTRODUCTION

1. ANZ welcomes the opportunity to make a submission to the Interim Report of the Review of the financial system external dispute resolution (EDR) framework.
2. ANZ supports the approach of the Review and believes that the Interim Report provides a thorough and sensible analysis of the current EDR framework.
3. ANZ has contributed to the Australian Bankers' Association (ABA) submission and endorses the industry position. This submission provides supplementary comments on specific issues raised in the Interim Report.

B. A NEW INDUSTRY OMBUDSMAN SCHEME FOR FINANCIAL, CREDIT AND INVESTMENT DISPUTES

4. ANZ supports reducing the complexity of the current system of multiple EDR schemes. The aim of EDR schemes is to provide a simple, efficient and appropriate process for consumers and small business to resolve their disputes with their financial service provider. We support a single pathway for consumers and small business to remove any confusion over jurisdictional coverage and inconsistencies in approach.

C. MONETARY LIMITS AND COMPENSATION CAPS

5. As outlined in our previous submission to the review, ANZ supports increasing access to EDR schemes for small business, providing a lower cost alternative to the courts. ANZ supports the definition of small business put forward by the ABA based on four criteria: number of full-time equivalent employees, business turnover, size of the loan for business purposes, and total credit exposure of the business group.
6. This would likely capture businesses with credit facilities up to \$3 million. It is important to note that more than 98% of ANZ's business customers have credit limits less than the current credit facility limit cap of \$2 million.
7. Businesses with disputes about larger facilities are generally in a position to seek a resolution to their dispute through negotiation with the assistance of professional advisers or through the courts. The Financial Ombudsman Service (FOS) should remain a dispute resolution process for genuine small businesses and FOS's resources should not, to the extent possible, be devoted to complex cases more appropriately dealt with directly by larger businesses.
8. We also support a facility limit cap for total group lending (not a single corporate entity as under the current cap). As we highlighted in our submission to FOS regarding its small business jurisdiction, prior to the introduction of a \$2 million limit, disputes were being lodged at FOS where the combined facility limit was tens of millions of dollars.
9. These disputes were often the subject of long delays both in assessing jurisdiction and in conducting the investigation of these complaints. ANZ believes that in such

cases, the businesses concerned have access to professional advice and are capable of directly negotiating with financial institutions or seeking resolution through the courts.

10. ANZ also supports an increase in the claim and compensation limits to \$1 million. If it were set at this higher limit, it should be for a combined claim, not per claim. Consumer limits should be on par with small business.

D. ADDITIONAL POWERS FOR SCHEMES

11. The Review sought views on whether schemes should be provided with additional powers, particularly in relation to compelling documents.
12. FOS already has the right to request documents from the applicant and from the financial institution that is party to the dispute. Subject to limited exceptions, failure to provide the requested information can result in FOS drawing an adverse inference against the party concerned or refusing to continue its consideration of the dispute. Importantly, the FOS Guidelines to the Terms of Reference (TOR) enable commercially sensitive information to be provided to FOS but only shared with the other party to the dispute in a limited or redacted form.
13. In respect of its members, the TOR permit FOS to take any action it considers appropriate for failure to comply with the TOR including expelling the financial services provider from the scheme. For wilful breaches of obligations under the TOR, FOS has the power to report a member to ASIC for serious misconduct.
14. FOS has a contractual right to enforce its TOR flowing from the financial institution's membership of FOS as an ASIC-approved EDR scheme. ASIC Regulatory Guide 165 requires that Australian financial services (AFS) licensees, unlicensed product issuers, unlicensed secondary sellers, Australian credit licensees (credit licensees) and credit representatives are members of such a scheme.
15. Given the potential serious consequences for failure to comply with a FOS request for documentation, ANZ believes that the existing provisions are sufficiently robust to enable FOS to obtain the documents it requires to conduct its investigations and issue determinations.
16. FOS does not have the powers of a Court and the right to request documents from third party entities which are not party to the dispute. It would be problematic for FOS to compel evidence or subpoena witnesses, or to require parties to a dispute to 'ensure' relevant third parties (such as company directors, insolvency practitioners, and guarantors) attend a conference or otherwise participate in the FOS process.
17. At best, FOS might request that a party use reasonable endeavours to obtain the consent of a third party to co-operate with the FOS process. However, if that consent is not provided, or is subsequently withdrawn, FOS may not be able to enforce its TOR with respect to that individual or entity with a resulting effect on the investigation of the dispute.

18. In our experience, there are many instances where it will not be practical or achievable to ensure the participation of a third party. This is particularly the case where personal relationships between the party to the dispute and the third party concerned, perhaps a former co-director or marital partner, have disintegrated. In some instances, such as those involving insolvency practitioners, the practitioner would need to ensure that involvement with the FOS process was consistent with their statutory obligations.
19. ANZ agrees that it is vital for FOS to have access to all available information necessary to reach a determination, subject to the limitations currently specified in its TOR. However, where this information is held by third parties to the dispute, it is difficult to envisage an enforceable power for FOS to compel provision of this information.
20. ANZ supports the inclusion of a positive obligation for parties to use reasonable endeavours to 'facilitate' third party participation in the FOS process where FOS deems it appropriate.

E. COMPLAINTS REPORTING

21. The Review sought views on the internal dispute resolution measures that should be reported and whether ASIC should publish details of non-compliance or poor performance.
22. ANZ currently reports publicly on the following internal dispute resolution measures in our Corporate Sustainability Review:
 - Volume of customer complaints
 - Escalation of complaints to ANZ's Customer Advocate
 - Cases resolved by ANZ's Customer Advocate and the split of decisions in favour of the customer or the bank
 - Escalation of complaints direct to EDR (not viewed by ANZ's Customer Advocate).
23. These measures highlight the trend in complaint numbers received by ANZ and our effectiveness to resolve matters through our internal dispute resolution process.
24. Separately, banks subscribing to the Code of Banking Practice provide data to the Code Compliance Monitoring Committee (CCMC) on dispute resolution times and the CCMC reports on the proportion of complaints that banks resolve immediately (same day) and within 5 working days.
25. ANZ would support reporting on a combination of these metrics to highlight whether a bank's internal dispute resolution process is functioning effectively for the consumer.
26. ANZ notes the related publication of EDR information. FOS publishes dispute statistics quarterly and comparative tables annually. Total disputes received by product line, the status of disputes received and outcomes. Comparative tables

show the chance of a dispute coming to FOS, by product and financial services provider, the average length of time in resolution and outcomes of the resolution process.

27. ANZ supports in principle ASIC publishing details of non-compliance or poor performance of internal dispute resolution. The CCMC already reports on non-compliance with clause 37 of the Code of Banking Practice, which requires banks to have systems and processes in place to deal with disputes in a “genuine, fair and prompt manner”. The Code of Banking Practice also sets out minimum standard timeframes for internal dispute resolution.

F. APPLYING THE NATIONAL CONSUMER CREDIT PROTECTION ACT TO SMALL BUSINESS

28. The Interim Report requests information on whether the National Consumer Credit Protection law (NCCP) should be extended to small business. This is raised in the context of the gap that exists in small business access to EDR, where lenders who do not provide consumer credit are not required to hold an Australian credit licence and therefore, not required to be part of an EDR scheme.
29. ANZ supports increasing access to EDR schemes for small business, however achieving this through extending the NCCP to include small businesses will have broader implications for the provision of small business credit. The key areas covered by the NCCP are:
 - hardship
 - enforcement, collection and dispute resolution
 - notices
 - responsible lending criteria
 - licensing
 - disclosure and documentation.
30. As a provider of consumer credit, ANZ already extends aspects of the NCCP to our small business customers, including our approach to hardship and access to dispute resolution.

PROTECTIONS FOR COMMERCIAL CUSTOMERS

31. Protections for bank customers, and related obligations of bankers to their customers, are not widely understood and arise under legislation, common law and contract.
32. As a subscriber to the Code of Banking Practice, which applies to our individual and small business customers, ANZ complies with clause 27 of the Code which requires that “we will exercise the care and skill of a diligent and prudent banker in selecting and applying our credit assessment methods and informing our opinion about your ability to repay the credit facility”. Courts have found that provisions of

the Code of Banking Practice are incorporated into contracts between banks and customers covered by the Code.

33. For commercial customers, a banker providing credit is also subject to legal obligations designed to protect the interests of the customer. Under statute, this includes sections 12CB and 12DA of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) as well as the extension of unfair contract terms laws to small business under Part 2 Division 2 Sub-division BA of the ASIC Act. Significant penalties arise for breaches of these protections.
34. Unless specifically requested by the customer, a banker providing credit to a commercial customer is generally not being engaged to provide advice to a business customer on their business interests or financial strategy. Businesses will often engage and pay for advice from accountants or consultants for that purpose to the extent it does not amount to tax advice.

APPLICATION OF CONSUMER RULES TO BUSINESS

35. We would be concerned with a proposal that seeks to apply a responsible lending regime to small business in the same way as it applies to consumer credit contracts. Certain characteristics of small business lending would make it inappropriate to apply the expectations and policy positions reflected in the ASIC Regulatory Guide 209 to small business lending.
36. The consumer regime requires lenders to do the following:
 - Ensure that credit contracts are not unsuitable for the borrower, both in the sense of being (1) consistent with their requirements and objectives and (2) affordable.
 - In order to make this assessment, lenders are required to:
 - Make reasonable inquiries into the borrower’s requirements and objectives and financial situation, and
 - Take reasonable steps to verify their financial situation.
37. A general expectation for consumer lending is that a lender will inquire into, and verify, past income to determine the consumer’s current financial situation and capacity to repay the credit contract in the future.
38. Small business lending will often require consideration of projected income as direct evidence of previous income is not always available or relevant. This is obviously the case for financing of start-up businesses. A lender’s ability to rely on projected income would be vital to the continued availability of credit to this segment.
39. The types of inquiries and verification steps used for small business lending will depend on the source of income that will service the facility and the type of borrower. Applying an assessment process similar to that used for consumer credit assessment is not possible.

40. Collection of individuals' income and living expenses, regarded as a minimum step for consumer lending, may not be relevant for small business lending. A lender may collect a personal statement of position and collect income documents from a sole trader applicant but will focus primarily on collection and analysis of financial statements where the income to service the facility is being generated by the business itself.
41. There are limited means by which a lender can verify income that is proposed to support a small business facility. Lenders will make more use of information already held or contained in financial statements (which can be over 12 months old) to verify income or cash flow of a business that is being used to service the facility. It may be difficult for lenders to produce evidence of such inquiries and verification steps in a standard and consistent format (compared to, for instance, a statement of position, payslip or bank statement).
42. Small business lending is, by its nature, more 'judgmental' and arguably takes into consideration a wider range of discretionary factors as part of the credit assessment process than consumer lending. These may include the relevant industry and economic outlook, the organisation of the business, management experience, and projected growth.
43. As noted above, ANZ supports increasing access to EDR schemes for small business. We do not consider however that achieving this by applying the NCCCP regime to small business will necessarily be in the interest of small businesses. We suggest that a more targeted or alternative approach be considered to ensure that there are no gaps in small business coverage of EDR schemes.

G. LAST RESORT COMPENSATION

44. ANZ supports the introduction of a last resort compensation scheme. FOS and the Australian Bankers' Association on behalf of the industry have engaged Oliver Wyman to develop a model for a last resort compensation scheme. This process is currently underway.
45. The scheme would aim to pay compensation to retail consumers who have suffered losses because of inappropriate advice or poor conduct from a financial adviser. The scheme of last resort would award capped compensation when alternative compensation arrangements have been exhausted. All AFS licensees who provide financial advice to retail clients would be required to contribute to the scheme as a condition of their licence. ANZ supports a scheme that applies prospectively once in place.