

20 November 2017

Head of Secretariat  
AFCA Transition Team  
Financial Services Unit  
The Treasury Langton Crescent  
PARKES ACT 2600  
By email: [afca@treasury.gov.au](mailto:afca@treasury.gov.au)

Dear AFCA Transition Team

**Establishment of the Australian Financial Complaints Authority consultation paper November 2017**

Thank you for the opportunity to provide feedback on the matters raised in the consultation paper.

Most customer owned banking institutions, i.e. 71, currently use FOS to meet their EDR obligations while 18 customer owned banking institutions use CIO. COBA urges the transition team to pay close regard to the risks to accountability due to ADIs losing their choice of EDR scheme.

These risks are described in the economic analysis attached to CIO's response to the Ramsay Review interim report:

"A monopoly ombudsman is likely to have bloated costs which will lead to higher membership and complaint fees, and will also be able to exercise monopoly power which will separately lead to higher fees. Large financial institutions will be able to absorb these fees much more easily than small players like fintechs who operate on fine margins. Large financial institutions, who already have a competitive advantage over their smaller rivals, will therefore gain even more of a competitive advantage.


"Furthermore, a monopoly ombudsman is unlikely to be as rigorous in assessing the merits of complaints as an ombudsman that operates in a competitive setting. For large financial institutions, settlement of complaints of dubious merit is likely to be shrugged off as a cost of doing business, which they can afford especially given the public relations costs to them of unsettled complaints in the light of recent well-publicised cases. In contrast, the cost to small financial institutions of unmeritorious complaints will be high.

"These are risks that occur in any dispute resolution system but the risks are heightened in a monopoly system. In a competitive system, in contrast, the performance of the ombudsmen is under more scrutiny and they have more incentive to make correct decisions."

Comments of a COBA member bank on some of the issues outlined in the consultation paper are included below.

I can be contacted on 02 8035 8448 to discuss any aspect of this submission.

Yours sincerely,



**Luke Lawler**  
**Director - Policy**

*Issue 1 Monetary Limits*

The benefits of increasing dispute limits needs to be weighed against the additional costs to be incurred by industry with respect to higher insurance limits or contingent funding requirements.

*Issue 2 Enhanced decision making*

The background of AFCA staff should include persons with relevant industry experience (as well as knowledge).

AFCA'S decision-making process should take into account issues including the broader conduct of a complainant and the relationship the complainant has had with the FSP including past history and conduct in order to help contextualize the IDR outcome and any basis for EDR escalation.

*Issue 3 Use of panels*

In order to balance the advantages of using panels against efficiency and service implications, we suggest that a charter/rules should be enacted with KPIs in terms of time spent and decision outcomes. Panels should be balanced and not biased in either direction. Industry participants should ideally have actual industry experience.

*Issue 4 Independent reviews*

Independent Reviews should be conducted every 3 years not every 5 years.

*Issue 5 Independent assessor*

An independent assessor is a good idea. Either party in a dispute should be able to make a complaint to the independent assessor. The independent assessor should have guaranteed direct access to the AFCA board. It would be appropriate for AFCA to publish any findings from the independent assessor on an anonymous basis. Any disagreement or challenge by AFCA of a decision or recommendation made by independent assessor should require board approval as to the rationale behind the disagreement.

*Issue 6 Exclusion from AFCA's jurisdiction*

Existing exclusions do not present any unreasonable barriers to accessing the schemes. In fact if anything, the ability for a FSP to argue for a matter to be excluded due to falling outside terms of reference is quite restrictive.

More can be done so that complaints which lack substance are excluded from being dealt with by AFCA. There is zero incentive for a complainant to discontinue any dispute and complainants bear negligible risk in terms of time and money to resolve unnecessary, frivolous and vexatious disputes. There should also be a higher burden of

proof from a complainant to establish that a case warrants consideration – and also with respect to escalating a matter within the levels of AFCA. If it can be established that the matter of dispute has essentially been resolved then such dispute should be excluded from AFCA consideration

#### *Issue 10 Directors skills and experience*

The proposed board number of 9-11 directors seems a little high.

The background of AFCA board should include persons with relevant industry experience (as well as knowledge).

An independent nominations committee should be installed to ensure appropriate board appointments occur without conflicts of interest.

Constitution/rules should make the director's role clear and provide appropriate restrictions of other allowable activities to ensure independence and remove conflict of interest issues (e.g. board member of AFCA cannot also be a board member of an entity which may create an actual or perceived conflict of interest).

#### *Issue 11 Board responsibilities*

Board responsibilities should be separate from the operational decision making responsibilities of AFCA. Constitution should not enable a director to direct a decision maker with regard to the outcomes of a particular dispute or class of disputes.

#### *Issue 12 Funding matters for consideration as part of authorisation*

Funding model to ensure that operational budget is finite and does not formulate the fee structure of participants to fit the operational budget of AFCA. Rather it should be the other way around with appropriate measures to ensure AFCA is obliged to operate within finite budget constraints.

Separate funding models should be considered which gives appropriate reflection of the volume of complaints from particular FSPs/industry sectors to avoid subsidization by smaller FSPs/sectors who contribute much lower complaints volumes. As a proposition, the 'fixed cost' component of AFCA's operational budget could be borne by major banks/insurance companies while smaller entities who have a negligible number of referred complaints might only make fees contribution by way of a case fee for each case that has been escalated. (Such case fees of course should reflect the actual cost of considering the complaint).

In terms of the proposition of higher fees being levied with respect of complex disputes, the rules or TOR should also reflect that a complaint should only be able to be further considered or escalated within AFCA if there is justification for doing so. The concept of 'fairness' in terms of the fundamental basis of the Authority is inherently challenged if a complainant sustains zero financial impediment for referring or escalating a matter to AFCA irrespective of the merit or futility of the complaint or dispute.

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