Your Choice, Your Voice

Manager
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By email : EDR@treasury.gov.au

Improving Dispute Resolution in the Financial System
Consultation Paper May 2017 - FBAA Response

The Finance Brokers Association of Australia Limited (FBAA) is the leading professional body to finance and mortgage brokers across Australia, representing industry and its members through its 7,300 plus members and additionally reaches approximately 13,000 industry stakeholders.

Following is our reply to the Consultation Paper for Improving Dispute Resolution in the Financial System.

Introduction
The FBAA supports the establishment of a single external dispute resolution body.
In voicing our support, our overarching expectations from significant reform of EDR is that it will produce the following outcomes:

- A single EDR body will significantly improve the consistency of decisions. This is extremely important for assisting licensees to better understand their obligations and to modify their conduct, supervision and monitoring in response to published EDR decisions.
- A single EDR body will eliminate confusion for consumers.
- The EDR body will be an independent and impartial adjudicator.
- Members will be treated fairly. The current practice of imposing significant upfront fees on service providers before any validation of a claim takes place should give way to a more equitable model where fees are only charged once the provider has had an opportunity to deal with the complaint through IDR. Where a claim is deemed to be made for non-genuine reasons such as vexatiously, to frustrate a service provider's lawful rights or to inconvenience a service provider and cause them to incur expenses, the scheme should not charge the service provider or alternately should charge the complainant.

Our responses to the specific questions posed in the paper appear following.

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Question 1

Are there other statutory powers the EDR body will need to resolve superannuation complaints effectively?

FBAA Response

We make no submission in response to this question.

Question 2

Do you consider that the Bill strikes the right balance between setting the new EDR schemes objectives in the legislation whilst leaving the operation of the scheme to the terms of reference?

FBAA Response

We provide a joint response to Questions 2 and 3 below.

Question 3

Are there any issues that are currently in the Bill that would be more appropriately placed in the terms of reference or issues that are currently absent from the Bill that should be included in the Bill?

FBAA Response

Overall, we believe the balance between setting objectives through legislation and operational matters through the scheme terms of reference appears reasonable.

We have several concerns with the proposed s47(1)(ha). In summary, these are:

a) We do not support the inclusion of a mandatory obligation to report IDR material to ASIC;
b) We do not support ASIC being given autonomous power to specify the information to be provided; and
c) We do not support the proposed drafting of the obligation as it currently appears in the Bill.

The Exposure Draft currently proposes to impose obligations on credit licensees by reference to obligations set out in s912A of the Corporations Act and which would apply to them were they financial services licensees. Incorporating obligations by reference to other legislation increases the regulatory burden on licensees.

Noting our general position that we do not support including a mandatory reporting obligation, if such an obligation or variation thereof were to be introduced, the proposed s47(1)(ha) should be fully enunciated in the NCCP Act such that s47(1)(ha) would become part of s47(1)(h).

The completed section should read something like (see following page):

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S47(1) A licensee must:
(h) have an internal dispute resolution procedure that:
(i) complies with standards and requirements made or approved by ASIC in accordance with the regulations; and
(ii) covers disputes in relation to the credit activities engaged in by the licensee or its representatives; and
(iii) gives ASIC any information specified by legislative instrument relating to their internal dispute resolution procedures and the operation of their internal dispute resolution procedures.

Opposition to a mandatory IDR reporting obligation

The consultation paper addresses a proposal under the heading "Enhanced Internal Dispute Resolution Reporting". Paragraph 22 of the paper states:

22. *All members of the EDR scheme will be required to have IDR arrangements that comply with ASIC's regulatory guidance and be required to report to ASIC in a standardised form (as determined by ASIC) on their IDR activity. For superannuation complaints, the above requirements will replace those contained in section 101 of the Superannuation Industry (Supervision) Act 1993 (SIS Act).*

The FBAA does not support this proposal.

Credit licensees are already subject to an enormous amount of monitoring and record keeping obligations. Specifically for complaints handling, in addition to handling complaints promptly and fairly, licensees are expected to maintain a complaints register to comply with their obligations under s47 of the Act. The Act is not prescriptive about how licensees must record this information. Record keeping practices for recording complaints and breaches range from simple paper or electronic registers through to dedicated software and custom-built CRMs.

ASIC has information gathering powers it can exercise to obtain data from licensees when required. Imposing a mandatory, regular reporting obligation of IDR activity to ASIC imposes further regulatory burdens on licensees. In addition to discharging their current IDR obligations and record keeping obligations, the framework contemplates ASIC dictating the form and content of information to be periodically prepared and delivered. This would result in licensees having to re-engineer their complaints recording systems and in many cases, would likely result in licensees having to create new processes to record data in a format deemed suitable for ASIC's purposes.

A more equitable and transparent approach is to have ASIC use its information gathering powers to obtain such information. Such an approach is more deliberate – requiring ASIC to form a view that it needs the information for a specific purpose rather than merely having access to it. This activity is also subject to parliamentary oversight.

Question 4

Are there any additional issues that should be considered to ensure an effective transition to the new EDR scheme?

FBAA Response

Adequate funding must be a priority. The transition will be complex and will take considerable time. The new body must be sufficiently funded to allow smooth transition. There needs to be overlap of coverage between the schemes to ensure consumers have full recourse. If timeframes are too ambitious there is a risk that consumers may find themselves caught between schemes. CIO and FOS must continue to fully resource their current matters through to conclusion.

Question 5

Would moving immediately to a compensation cap of $1 million have significant impacts on the availability/price of professional indemnity insurance?

FBAA Response

Our understanding is that such a move would not alter the requirement for credit licensees who are required to hold PI insurance to have minimum cover of $2 million. The existing level of cover does not need to be increased.

Ultimately this is a question the professional indemnity insurers must answer however it is likely that any increase in potential liability for an insurer will be reflected in an upward adjustment of their premiums. ASIC should monitor insurer behaviour post any changes.

In considering the appropriate monetary thresholds, it is important to maintain perspective about the purpose of EDR. EDR is a service to ensure consumers have a free and independent mechanism for the review of disputes with service providers. EDR is not encumbered by the rigours of legal proceedings which can often overwhelm consumers and dissuade them from pursuing their rights. Disputes between consumers and service providers may at times involve substantial sums of money, be highly complex and require considerable amounts of evidence to be compiled. EDR should not be viewed as a free alternative to court or a service that supports outcomes in favour of consumers where such claims would not stand up to the scrutiny of evidential burdens. Claims involving large sums of money are more appropriately dealt with through the courts. The danger in raising compensation thresholds too high is that protections afforded to service providers in the way of standards of proof and admissibility of evidence, may be lost on claims that should be dealt with through the courts.

Question 6

Are the existing sub-limits for different insurance products still required?

FBAA Response

We make no submission in response to this question.

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Question 7

Are there any reasons why credit representatives should be required to be a member of an EDR scheme?

FBAA Response

No. We support removing the requirement for credit representatives to be individual members of an EDR scheme. As with the FSR regime, credit licensees are responsible for the conduct of their representatives and licensees are required to hold EDR membership.

Question 8

What will the regulatory impacts of the new EDR framework be?

FBAA Response

Licensees will need to amend websites, printed material and all other material that references their membership to EDR. The impact of this should not be underestimated. The inconvenience was significant when Credit Ombudsman Limited ('COSL') changed its name to Credit and Investments Ombudsman Limited ('CIO'). A lengthy transition period should be offered to enable licensees to continue using printed material that cannot be altered and which complies in all respects except with the name of the EDR scheme.

We have some concerns that the wording of s1047(b) is too broad. Proposed section 1047(b) currently reads:

1047 Scheme functions of an external dispute resolution scheme

For the purposes of paragraph 1046(2)(a), the following are the scheme functions:

a) to make membership of the scheme open to every entity that is required, under a law of the Commonwealth or under the conditions of a licence or permission issued under such a law, to be a member of an external dispute resolution scheme authorised under this Part;
b) to ensure that the complaints mechanism under the scheme is accessible to any persons dissatisfied with members of the scheme;
c) …….

EDR is not currently available to "any person dissatisfied with members of the scheme". EDR is only available to consumers where they have a valid complaint that is not resolved to a consumer's satisfaction at IDR. A complaint is more than mere dissatisfaction. It is defined in AS ISO 10002–2006 as:

An expression of dissatisfaction made to an organisation, related to its products or services, or the complaints handling process itself, where a response or resolution is explicitly or implicitly expected.

We recommend making the drafting of s1047(b) more precise to align with the accepted definition of a complaint.

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Thank you for the opportunity to submit our response to this consultation paper.

Yours faithfully

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