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Interim Report on Review of the financial system external dispute resolution and complaints framework

The Australian Financial Markets Association (AFMA) is commenting on selected recommendations of the Interim Report on Review of the financial system external dispute resolution (EDR) and complaints framework (Report) which are relevant to our membership.

AFMA is a member-driven and policy-focused industry body that represents participants in Australia's financial markets and providers of wholesale banking services. AFMA's membership reflects the spectrum of industry participants including banks, stockbrokers, dealers, market makers, market infrastructure providers and treasury corporations.

General observations

While AFMA supports rationalised, efficient and coherent EDR arrangements which are an evolution from the current system we are concerned with the discussion in the Report around increasing powers to gather evidence, increase monetary limits and to introduce the alien concept of a 'small business' jurisdiction. The Financial Ombudsman Service (FOS) and Credit and Investments Ombudsman Scheme have the essential role of providing low cost access to justice in a less legal and adversarial environment in strict relation to relevant investor and credit protection provisions of the Corporations Act. Ombudsman services are very deliberately structured to sit at the other end of the dispute resolution spectrum away from the courts and statutory tribunals. The guiding concept for an ombudsman service is 'fairness'. The idea of 'fair' is what is an objective observer's view of what is a balanced outcome for/in? the interests of both parties to a dispute. Reform proposals which move processes of investigation and evidence gathering towards court like procedures need to be very carefully weighed. If there is a policy desire to go

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in this direction there is a need to also bring the civil procedure protections that should go with them. In turn this also requires a rethink of whether an ombudsman service is the appropriate mechanism or whether a statutory tribunal like the current Superannuation Complaints Tribunal (SCT) is more appropriate. AFMA does not support a move on the spectrum to a tribunal. We believe there needs to be more rigorous and clear thinking about the appropriate role of EDR schemes within the context of the whole spectrum of the dispute resolution system not as an isolated solution in itself and the scope of the Corporations Act rules they are serving.

AFMA's comments are directed to Draft Recommendations 1, 2, 3, 6, 8, 9 and 10.

Combining FOS and CIO

1. *There should be a single industry ombudsman scheme for financial, credit and investment disputes (other than superannuation disputes) to replace FOS and CIO.*

The combination of FOS and CIO could be justified if the business case for the amalgamation can demonstrate that this would:

I. Decrease costs for members of both schemes. FOS financial service provider members should not be liable for higher fees as a result of there being a single industry ombudsman scheme;
II. Reorganisation would increase efficiency over the current two schemes and flexible allocation of resources as priority areas shift;
III. Improve accountability to members of the schemes; and
IV. Increase consistency between the processes and procedures.

Monetary limits

2. *The new Ombudsman scheme should provide consumers with higher monetary limits and compensation caps that are higher than the current caps and subject to indexation.*

AFMA does not support increasing monetary limits. It needs to be borne in mind that EDR schemes are an access to justice mechanism to deal with retail and consumer credit claims. The current claim limit of $500,000 finds a logical basis in the Corporations Act based on the definitional elements of 'retail client' with regard to receiving advice on financial products up to $500,000. The courts have the fundamental role of resolving civil disputes in general and under the Corporations Act framework. Alternative dispute resolution mechanisms like EDR schemes exist to deal with access and cost of justice and are an adjunct to the system.

In a forum where the decision-making body is not bound by formal rules and protections of law, it is not appropriate to increase that body's authority beyond what the Corporations Act determines to be a retail matter. A sense of proportion needs to applied in thinking about monetary limits by reference to court civil claim limits. For example, the NSW Local Court and Victorian Magistrates Court civil claim limit is $100,000, and the

NSW District Court limit is $750,000 and Victorian Supreme Court matter threshold is $200,000 for civil claims. Vesting non-judicial bodies with the capacity to consider large claims and award high compensation amounts is problematic from a rule of law perspective.

Special small business limits

3. *The new Ombudsman scheme should provide small businesses with higher momentary limits and compensation caps than the current schemes. Current monetary limit of $500,000 for the value of claims and $2 million in relation to credit facilities, is seen to be too low and could exclude small businesses from seeking redress through EDR.*

This proposal is not supported. The concept of 'small business' is alien to the Corporations Act which is based on the concepts of retail investor and consumer credit protection. There is no policy rationale for introducing a particular 'small business' concept into EDR if it does not exist in the law in relation to which the scheme is operating. The same points made is relation monetary limits above also apply in response to this proposal.

The view of the Panel that dispute resolution arrangements for small business is inadequate is a significant question for policy law reform not administrative guidance to an industry scheme. AFMA considers that the only appropriate way to address this view is to recommend to the Government that it review the approach to financial services advice in the Corporations Act to determine whether a concept of 'small business' should be incorporated into the law.

Administrative guidance on monetary limit

6. *ASIC's regulatory guidance on the bodies' standards should be revised, to include a regular review and update of its monetary limits and compensation caps so that they remain relevant. This is recommended to be performed by an independent assessor.*

Development of ASIC's guidance must work within the framework of the Corporations Act. Monetary limits and compensation caps have a high regulatory impact on financial service providers who are members of schemes. The current mechanism for raising FOS compensation caps which follows the recommendation of the 2012 review follows a predictable and logical path and allows additional consultation by the FOS Board with financial service provider members. No change to this system is deemed warranted.

Complex disputes

8. *Use of Panels for resolving complex disputes*

FOS already utilises panels for their decision making in complex cases.

IDR Tracking

9. *Financial firms required to publish information and report to ASIC on Internal Dispute Resolution (IDR) activity and outcomes consumers receive in relation to IDR complaints.*

The regulatory benefit in publishing information regarding IDR activity and outcomes has not been made out. ASIC already has adequate oversight by being able to track the number of complaints that proceed to EDR. If a financial service provider's IDR process is failing, this will be reflected in the number of complaints that proceed to EDR.

10. *Schemes should register and track the progress of complaints that are referred back to IDR.*

Taking into account our view on recommendation 9 this is a sensible alternative.

Please contact David Love either on 02 9776 7995 or by email dlove@afma.com.au if further clarification or elaboration is desired.

Yours sincerely

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