

16 June 2017

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Dear Ms Pai,

**External Dispute Resolution and Complaints Framework – consultation by Treasury on the new dispute resolution framework**

The Westpac Group (**Westpac**) appreciates the opportunity to provide comments to the Government's public consultation on the new dispute resolution framework, including the Treasury Laws Amendment (External Dispute Resolution) Bill 2017 and Treasury Laws Amendment (External Dispute Resolution) Regulations 2017.

Our submission provides commentary on the central elements of the proposed legislative framework with responses to the consultation questions in **Annexure A**.

***Effective and efficient dispute resolution***

As previously expressed through our participation in Treasury's Review of External Dispute Resolution and Complaints Schemes, Westpac considers an accessible, effective, timely and efficient system for dispute resolution is central to the trust and confidence of customers in the banking system. This system comprises both the internal dispute resolution (**IDR**) and external dispute resolution (**EDR**) mechanisms.

Westpac has undertaken a number of specific initiatives to enhance our IDR mechanism and deliver improvements in our standards of practice, service to customers and the management of complaints. We seek to ensure all complaints received are dealt with genuinely, promptly, fairly and consistently and our complaint handling policies and processes are designed to deliver on this objective.

To further strengthen our internal processes, in 2016, Westpac appointed Adrian Ahern as the Westpac Group Customer Advocate. The Customer Advocate will provide an avenue of independent review for retail and small business customers outside of standard review processes. This position enhances Westpac's existing dispute resolution framework and provides an additional level of confidence for customers in ensuring our process is fair and transparent.

In addition to the appointment of our Customer Advocate, our IDR process plays a vital role in delivering to Our Service Promise and we encourage our customers to tell us if they are dissatisfied with any aspect of

their experience. To assist us in addressing customer complaints and resolving disputes satisfactorily, Westpac supports efforts to boost customer confidence in this process by enhancing the transparency of these processes and outcomes. The new reporting requirement for firms to provide IDR dispute data to ASIC will assist in achieving this, however, to ensure the data requested by ASIC is consistent with this intent it is important the legislation clearly establish the focus of this reporting. To ensure consistency in, and the comparability of, the data collected, the legislation should set parameters on what data should be collated and for what purposes it can be used, as well as restricting the publication of this data at an individual financial services provider level. This will ensure that the reporting criteria are well defined and understood, to better facilitate accurate and reliable comparisons between financial services providers.

Where disputes cannot be resolved directly with the customer through the IDR process, Westpac ensures customers are aware of and provided with the necessary information to access EDR forums. Westpac supports the creation of a 'one stop shop' to ensure ease of access for customers to such forums. It is necessary, however, that any improvements to the existing infrastructure of EDR seek to achieve the following principles: independence, fairness, accessibility, accountability, efficiency, effectiveness, timely resolution of matters and simplicity (consumer understanding and awareness).

### ***Proposed legislative framework***

The legislative framework is crucial to the effective operation of the new EDR scheme, the Australian Financial Complaints Authority (**AFCA**). The exposure draft legislation proposes a co-regulatory model with increased ministerial and regulatory oversight. In authorising a scheme, the Minister must have regard to certain matters prescribed in the exposure draft legislation. These include, amongst others, the accessibility, independence, fairness, accountability, efficiency and effectiveness of the scheme. The operation of AFCA will be articulated in its Terms of Reference (**ToR**), which will be approved by the AFCA Board of Directors.

There are matters currently absent from the exposure draft legislation that should be included in the legislation and/or regulations. Importantly, to provide certainty and consistency in decision making and support good consumer outcomes, AFCA should be required to publish its decisions in an anonymised form. Given the intended new jurisdictional limit of \$1 million, the proposal in the exposure draft legislation to allow all parties to a superannuation complaint the right to appeal to the Federal Court on questions of law should be extended to all complaints heard by AFCA. Detail as to why these, and other matters, should be captured in the legislative framework is articulated in our response to Question Three in Annexure A.

The Australian Securities and Investments Commission (**ASIC**) will have a directions power enabling it to issue regulatory requirements relating to the performance of AFCA's functions. ASIC will also be able to approve material changes to the scheme's ToR. In accordance with principles of best practice regulation, Westpac anticipates ASIC will issue regulatory guidance on their proposed use of this important power, informed by engagement with industry, consumer advocates and the existing EDR scheme operators. This guidance should clearly establish the type of changes ASIC will deem as 'material' as well as articulating those changes able to be made by the AFCA Board to enable the effective day to day operations of the scheme.

### ***Transition***

Whilst the exposure draft legislation and explanatory memorandum provide detail on the proposed legislative framework, without additional detail on how the Scheme will be formed and authorised for a

commencement date of 1 July 2018, it has been challenging to understand how this transition will occur in practice. Of particular importance is how the scheme will be formed, and whether an existing EDR scheme will be repurposed as AFCA, how AFCA's Board will be appointed and the process by which AFCA's ToR will be drafted. It is vital the Government provides certainty about the intended pathway to 1 July 2018 to enable financial service providers, consumer advocates and the existing EDR scheme operators a smooth transition to the new model.

Westpac, through its engagement in Treasury's Review of External Dispute Resolution and Complaints Schemes, has provided considerable input into how a 'one stop shop' EDR forum could operate in practice. It is important prior work to improve the operation of EDR schemes is not lost, but rather used to inform the design of the AFCA's ToR. Westpac is keen to be engaged as these ToR are developed to support the transition to the new EDR scheme.

Treasury's consultation paper advises that once operational, all new complaints will be handled by AFCA. Complaints made to the Financial Ombudsman Scheme (**FOS**) or the Credit Industry Ombudsman (**CIO**) prior to this will continue to be handled by those schemes. The Superannuation Compensation Tribunal (**SCT**) will remain in operation until 1 July 2020 and consumers will have the option to refer complaints from the SCT to AFCA once operational.

Westpac is concerned this approach may result in consumers receiving inconsistent outcomes during this period depending on the forum in which the complaint is heard, particularly given the proposed increased compensation caps for AFCA.

To ensure consistency in consumer outcomes, Westpac supports the Australian Banking Association's (**ABA**) proposal that existing complaints lodged with FOS, the CIO and the SCT be handled by a specialist team within AFCA once operational. Alternatively, a requirement to consider AFCA's ToR and approach to complaints handling could be imposed on FOS, the CIO and SCT during this period.

### **Monetary limits**

Westpac notes AFCA will have higher monetary limits and compensation caps than FOS and the CIO, and that there will be an unlimited monetary jurisdiction for superannuation complaints. Further, ASIC will have a power to issue a direction that the monetary limit be increased. Regulatory guidance should be issued to clearly articulate how ASIC intends to use this power, including a requirement to support any increase in the monetary limit with data. Further, when an increase in monetary limits is suggested, ASIC should consider whether higher compensation caps will result in AFCA handling disputes that given their complexity would be more appropriately handled through the court process.

Westpac supports AFCA having eligibility thresholds and monetary limits that are higher than FOS's current limits and believes AFCA should be able to deliver meaningful compensation where appropriate. As AFCA's ToR are drafted, it will be important to reflect on the definition of, and eligibility criteria for, small business. Any increase to eligibility thresholds and monetary limits will also require an increase in funding and the capabilities of EDR schemes for example, to examine more complex small business lending matters.

For further Information in relation to any of the matters raised in this submission, please contact Brett Gale, Head of Government Affairs on (02) 02 8253 4159 or [bgale@westpac.com.au](mailto:bgale@westpac.com.au).

Yours sincerely,



**Brett Gale**  
Head of Government Affairs

ANNEXURE A

Consultation question	Westpac response
<p><b>Question one</b></p> <p>Are there other statutory powers the EDR body will need to resolve superannuation complaints effectively?</p>	<p>Westpac supports AFCA being afforded the appropriate statutory powers to be able to effectively handle superannuation complaints. In addition to the statutory powers provided in the exposure draft legislation, AFCA should also be provided with powers regarding:</p> <ul style="list-style-type: none"> <li>• <i>Costs</i> – Currently, the EDR scheme is funded by industry. Provisions that allow third parties to be joined to proceedings need to include an appropriate framework around costs, including how a third party can apply for costs or security for costs and how a complainant and/or a scheme member can apply for costs from a third party.</li> <li>• <i>Enforcement</i> –Securing judgment against scheme members will be relatively straight-forward, however, appropriate provisions and frameworks around enforcing AFCA decisions against third parties is required.</li> <li>• <i>Evidence and format of fact finding</i> – Reflecting the higher threshold for claims, there should be a tiered approach allowing for evidence in high value claims to be subject to cross-examination, with perhaps modified or scaled evidence rules (within the boundaries of the <i>Evidence Act 1995 (Cth)</i>). This may reduce the number of matters proceeding to the Federal Court on a point of law, which in tribunal matters often centres on evidence and procedural errors.</li> </ul>
<p><b>Question two</b></p> <p>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?</p>	<p>Westpac supports the co-regulatory model proposed by the legislation, noting the enhanced ministerial and regulatory oversight as well as the efficiency benefits in enabling AFCA’s ToR to be materially amended without the need for legislative change. However, as stated above, without clarity on AFCA’s proposed ToR, it is challenging to consider whether the legislation needs to be more prescriptive around certain operational elements, such as the governance and structure of AFCA. Accordingly, it is vital industry, consumer groups and the existing scheme operators are appropriately engaged in the drafting of AFCA’s ToR.</p> <p>Based on the material available to date, matters that should be detailed in the legislative framework include:</p>

Consultation question	Westpac response
<p><b>Question three</b></p> <p>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?</p>	<ul style="list-style-type: none"> <li>• <i>Publication of decisions</i> – The current FOS ToR do not require FOS to publish its decisions. To enhance transparency, AFCA should be required to publish its decisions in an anonymised form.</li> <li>• <i>Review of decision making</i> – AFCA’s decisions should be reviewed on a regular basis by independent experts. As advocated by the Financial Services Council (<b>FSC</b>), ASIC should be granted power to appoint a panel of independent experts to audit a cross section of AFCA’s decisions to review the process by which decisions were made and consistency in consumer outcomes.</li> <li>• <i>Appeals process</i> - Given the intended new jurisdictional limit of \$1 million, the proposal in the exposure draft legislation to allow all parties to a superannuation complaint the right to appeal to the Federal Court on questions of law should be extended to all complaints heard by AFCA. For those complaints that would previously have been dealt with by FOS and the CIO, the existing right for consumers to pursue their claim through the courts for any reason should be maintained and financial services providers should be granted a new right to appeal, but only to dispute a point of law.</li> <li>• <i>ASIC’s power to approve material changes</i> - In exercising its power to approve material changes to AFCA’s ToR, the exposure draft explanatory memorandum states that ASIC must have regard to the same matters the Minister must consider when approving a company as the authorised scheme. ASIC should also be required to consult with industry and consumer advocates prior to any material changes being approved.</li> <li>• <i>Matters previously dealt with</i> – The legislative framework should exclude complaints dealt with under former schemes and/or where the parties and facts are similar to a previous judgment or Determination.</li> <li>• <i>Confidentiality</i> – AFCA’s obligations in relation to the confidentiality of information received in relation to a dispute should be enshrined in the legislation and provide appropriate sanction for breaches. This is particularly relevant when third parties are involved.</li> </ul>

Consultation question	Westpac response
	<ul style="list-style-type: none"> <li>• <i>Application of the law</i> – The legislation and/or regulations should specify that AFCA is bound to follow applicable laws. FOS currently makes decisions by reference to legal principles, industry codes or guidance, industry best practice and precedent decisions. This current approach may lead to uncertainty for financial service providers and also to inconsistent outcomes for consumers.</li> </ul>
<p><b>Question four</b></p> <p>Are there any additional issues that should be considered to ensure an effective transition to the new EDR scheme?</p>	<p>As detailed above, Westpac is concerned there is a risk consumers may receive inconsistent outcomes depending on the forum in which the complaint is heard. Accordingly, Westpac supports the ABA’s proposal that existing complaints lodged with FOS, the CIO and the SCT be handled by a specialist team within AFCA once operational. Alternatively, a requirement to consider AFCA’s ToR and approach to complaints handling should be imposed on FOS, the CIO and SCT during this period.</p> <p>Also, FOS has been approved by the Office of Australian Information Commissioner (<b>OAIC</b>) to consider disputes relating to privacy or credit reporting where the financial services provider is a member of FOS. The OAIC should consider extending this approval to AFCA.</p>
<p><b>Question five</b></p> <p>Would moving immediately to a compensation cap of \$1 million have significant impacts on the availability / price of professional indemnity insurance?</p>	<p>The increased compensation caps will likely increase the incidence of complaints being heard and determined by AFCA, as well as the potential amounts claimed. To what extent this may impact the availability and price of professional indemnity insurance would depend on the individual insurance arrangements of financial service providers.</p> <p>It is important to note that in addition to the initial increase in compensation caps, there is also the potential for monetary limits to be increased at ASIC’s direction. This may also impact the availability and price of professional indemnity insurance and highlights the need for ASIC to consult broadly prior to exercising this power.</p>
<p><b>Question six</b></p> <p>Are existing sub-limits for different insurance</p>	<p>At commencement, AFCA will have a minimum \$500,000 compensation cap for non-superannuation consumer disputes with consultation to occur on whether the compensation cap for disputes relating general insurance products should increase to \$1 million. It is important the existing FOS ‘per month’ cap for income stream claims is considered in this context. This initial</p>

Consultation question	Westpac response
products still required?	consultation should be revisited and the monetary limits reviewed once AFCA's ToR have been substantially finalised.
<p><b>Question seven</b></p> <p>Are there any reasons why credit representatives should be required to be a member of an EDR scheme?</p>	<p>Westpac notes there are other instances in which credit representatives may be required to be members of an EDR scheme. For instance, ASIC Class Order 03/388 provides relief from the requirement to hold an AFSL to intermediaries and product issuers providing, or advising on, offset accounts as part of mortgage package. This relief is only available to financial services providers that belong to an ASIC-approved EDR scheme.</p>
<p><b>Question eight</b></p> <p>What will the regulatory impacts of the new EDR scheme?</p>	<p>Given the close correlation between the legislative framework and AFCA's ToR in informing how the scheme will operate and handle complaints, it will only be possible to determine the total regulatory impact when detail of this is made available. For instance, it is not yet known how Recommendation 9 of the Ramsay Review – the referral of complaints back to the financial firm (or superannuation trustee) - which was supported by the Government will be included in AFCA's ToR and operate in practice. This requirement, however, could increase the regulatory impact by increasing the number of times a matter is considered through the IDR process.</p> <p>Based on the information available to date, known areas of regulatory impact include:</p> <ul style="list-style-type: none"> <li>• <i>Multiple forums during the transition period</i> - Depending on whether existing complaints are able to be transferred to AFCA during the transition period financial firms may be required to respond to disputes through multiple forums i.e. CIO / FOS / SCT and AFCA.</li> <li>• <i>IDR reporting</i> - Under the enhanced IDR framework, ASIC will have the power to determine the form and content of the IDR reports. Depending on what the reporting criteria requires, there may be additional costs in needing to either collect new categories of data or re-format existing reporting into the prescribed form.</li> <li>• <i>Process and collateral updates</i> – AFCA members will be required to update existing systems and process to respond to AFCA's ToR and update relevant collateral with any new information required by AFCA. Training for staff will also be required.</li> </ul>