



FINANCIAL
OMBUDSMAN
SERVICE
AUSTRALIA

Expansion of FOS's Small Business Jurisdiction Consultation Paper

August 2016

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About FOS

The Financial Ombudsman Service (FOS) Australia¹ is independent external dispute resolution (EDR) scheme, approved by the Australian Securities and Investments Commission (ASIC) that covers disputes across the financial sector.²

About this consultation

On 20 April 2016, the federal government announced that there would be advantages in extending the current jurisdiction of FOS to include a wider range of small business loans, as well as reviewing monetary limits including compensation caps. To facilitate this, the ASIC was asked to work with FOS on an immediate review of the small business jurisdiction under our [Terms of Reference](#) (TOR).

On 8 August 2016, the Minister for Revenue and Financial Services released the terms of reference for the independent review of the financial system's external dispute resolution and complaints framework. Explicitly set out in the terms of reference is that 'the review will take into consideration and consult with ASIC on the current review of the FOS's small business jurisdiction'.³

A range of parliamentary committees, our own analysis of disputes that come to FOS, and discussions with our many stakeholders provide a backdrop to the request to review our small business jurisdiction.

In November 2012 the Senate Economics References Committee's report on the Post-GFC Banking Sector recommended that FOS increase its claim limit and compensation cap to \$2 million for small business disputes.⁴

In a recent inquiry into the Performance of ASIC in June 2014 the Committee again recommended that consideration be given to increasing caps on eligibility and compensation. It highlighted a particular problem for small businesses seeking a resolution to a dispute that may not qualify under our TOR.⁵

Most recently, in May 2016, the Parliamentary Joint Committee on Corporations and Financial Services in its report on the Inquiry into the Impairment of Customer Loans stated that there were significant gaps in the coverage of EDR schemes for disputes about small business loans.⁶

In April this year, in announcing a range of initiatives to make it easier for customers when things go wrong, the Australian Bankers' Association (ABA) publicly supported

¹ Information about FOS is set out in full on our website at www.fos.org.au. Section 1 of Appendix 1 summarises key points.

² FOS is approved by ASIC under its Regulatory Guide 139 *Approval and Oversight of External Dispute Resolution Schemes*, which is available under 'Regulatory Resources' on www.asic.gov.au.

³ <http://kmo.ministers.treasury.gov.au/media-release/072-2016/>

⁴ http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed%20inquiries/2010-13/postGFCbanking/report/index

⁵ http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC/Final_Report/index - page 104, paragraph 7.79

⁶ http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/customer_loans/Report

FOS conducting a review of our TOR with a view to increasing eligibility thresholds for retail and small business customers.⁷

Since 2012, we have had discussions with stakeholders in various forums about monetary limits for small business credit disputes.

We acknowledge that our current TOR, claim limits and compensation caps relating to small business credit facility disputes provide more limited alternative dispute resolution options for small businesses (a business with less than 20 employees or less than 100 employees when the business is involved in manufacturing). And, we know that credit facility amounts can typically extend beyond our current facility limit of \$2 million. Often, if a business is in financial hardship, and receivers are appointed, access to capital to take a dispute through the courts is limited, and accordingly there is an argument that EDR could play a broader role in providing an avenue for redress for small business credit facility disputes.

Any expansion of our small business jurisdiction will need to address a number of important issues such as:

- maintaining a focus on our existing jurisdiction with no detriment to the consumers of retail financial services while expanding our small business jurisdiction
- ensuring adequate resourcing and funding to effectively deliver small business dispute resolution, despite not being able to predict with certainty the number of small business disputes that would be brought to FOS
- anticipating how small business consumers, or the financial service providers of credit facilities to small businesses, will respond to having broader EDR limits and compensation caps. To manage this uncertainty in dispute volumes and the impact this has on planning and deploying resources particularly in the first years of operation, a flexible funding model will be necessary, and
- the limitations we have in compelling a third party to participate in our dispute resolution process. In our experience small business credit facility disputes can be complex, involving multiple issues, facilities, parties and other entities but often, we cannot effectively deal with a dispute without the participation of a relevant third party.

We have set out an approach and range of proposals in this consultation paper. The FOS Board is interested in feedback from a wide range of stakeholders about how we could effectively expand our jurisdiction, manage the risks in doing so, and overcome some of the challenges an expansion presents. The Board will consider in detail all feedback prior to deciding on the extent and nature of an expanded small business jurisdiction.

⁷ <http://www.bankers.asn.au/media/media-releases/media-release-2016/banks-act-to-strengthen-community-trust>

We are committed to making sure that we can be confident that our TOR provides us with the scope to effectively resolve the types of disputes that will come within an expanded small business jurisdiction.

Some quick facts

The definition of a small business remains unchanged in the proposed changes, as it relates to the size of the entity to which this jurisdiction applies. We do propose a minor wording change to improve consistency of existing small business definitions within our TOR. See section 3.1.

We are consulting on a proposed increase to the limit on a small business credit facility that can be considered (to \$10 million) and an increased compensation cap (of \$2 million) for small business credit disputes, including debt-related small business credit disputes. See section 1.1.

As part of the expansion of our small business jurisdiction, we would establish a dedicated specialist small business unit at FOS, which would be part of our existing Banking and Finance Team. The small business unit would have FOS staff and decision makers that have strong expertise and experience to deal with small business disputes.

Other proposed changes to our TOR

In addition to proposed small business jurisdiction amendments we also propose to make some other amendments to the TOR to improve the consistency and formatting of the TOR and update several provisions.

Commencement date for proposed changes

A decision about the commencement date of the proposed changes to the TOR has not been made, and will be subject to the feedback we receive from this consultation. At this stage, we would envisage commencement mid next year. We are interested in your views about an appropriate commencement date for the small business TOR changes and whether an early to mid-2017 introduction would be feasible.

How to provide feedback on the proposals

This paper sets out consultation questions for each proposed amendment. You can provide feedback by answering one or more of these questions or providing other comments.

To finalise work on the amendments promptly, we need to receive stakeholder feedback by **23 September 2016**.

Feedback can be provided to FOS by emailing a submission to smallbusiness@fos.org.au.

We will publish submissions on our website www.fos.org.au. If you do not want your submission published, please mark both the submission and the covering email as 'confidential'.

If you have any questions about the consultation, please contact Silvia Renda, Senior Manager- Strategic Review on 03 8623 2035 or srenda@fos.org.au.

1 Expanding FOS's jurisdiction for small business credit facility disputes

This section of the paper discusses proposals relating to disputes about a 'small business credit facility' (SBCF). This term is used to refer to:

- a credit facility provided by a financial services provider to a 'Small Business' as defined in paragraph 20 of the TOR or
- a guarantee or security for that credit.

We propose that the definition of a small business remains unchanged as it relates to the size of the entity to which this jurisdiction applies. However, we propose a minor wording change to improve consistency of existing small business definitions within our TOR (see section 3.1 of this paper).

1.1 Monetary limits

Current and proposed monetary limits for the purposes of FOS's jurisdiction for SBCF disputes are set out in the table below:

Small Business Credit Facility (SBCF) element	Description	Current monetary limits	Proposed monetary limits
SBCF Claim Limit	FOS cannot consider a dispute with a claim value above this amount	\$500,000	\$2 million
SBCF Compensation Cap	FOS cannot award compensation that exceeds this cap (excludes compensation for costs and interest)	\$309,000	\$2 million
SBCF limit for debt related disputes	FOS cannot consider a debt related dispute by a small business when the SBCF is above this amount. Debt related disputes include financial difficulty, responsible lending and appointment of receivers.	\$2 million	\$10 million
Prohibition of debt recovery proceedings	Debt recovery against a small business is prohibited while a dispute is being considered by FOS and if it's up to this limit.	\$2 million	\$10 million

The proposed limits and caps would provide significantly greater scope to deal with small business disputes, particularly those that are debt-related such as financial hardship or responsible lending issues. They would also ensure that larger, well-resourced business operators, who often have multiple entities and facilities, are utilising the courts where appropriate.

The proposed \$10 million credit facility limit is based on our analysis of debt-related SBCF disputes previously received by FOS. This showed a clustering of such disputes around the \$8-10 million range. We acknowledge, however, the small size of this sample and that our data only relates to debt-related SBCF disputes previously lodged with FOS.

We are seeking any information on how various lenders structure their lending for small business, or any other information that would assist us determining whether the proposed \$10 million credit facility limit is appropriate.

While the Senate Economics References Committee recommended both a \$2 million claim limit and compensation cap apply, for the reasons set out above, we consider that the credit facility limit should be set at a higher amount than the compensation cap. This is because the majority of our disputes relate to one or more aspects of a credit facility, rather than the facility amount. The difference between the claim limit and the compensation cap is consistent with our existing jurisdiction.

We would like your feedback on whether it would be more appropriate to stagger the introduction of the proposed compensation cap, for example, an initial cap could be set at \$1 million with a review after a year of operation, once SBCF dispute types and volumes are better understood.

Proposal 1.1

Amend the TOR so as to:

- increase the jurisdiction claim limit for a SBCF dispute to \$2 million
- increase the compensation cap for a claim in a SBCF dispute to \$2 million
- increase the credit facility limit for a debt-related SBCF dispute to \$10 million
- prohibit debt recovery proceedings in respect of facilities up to \$10 million while a dispute is being considered by FOS.

Also include in the TOR a definition of the term 'small business credit facility'.

1.2 Dispute resolution processes

SBCF disputes raise commercial issues and can be complex. They may involve multiple issues, facilities, parties and other entities. If the small business jurisdiction

of FOS is expanded as proposed in Proposal 1.1, we will need to implement specialised dispute resolution processes for SBCF disputes.

Our experience in dealing with small business disputes and other complex matters indicates that holding conferences with parties to such disputes, generally conducted by a decision maker, is an effective way to progress and resolve SBCF disputes.

At present, we cannot compel a third party (that is, someone who is not a party to the FOS dispute) to participate in our dispute resolution process. This limits our ability to consider a dispute which affects the rights and obligations of not only the applicant, but also a relevant third party. These third parties may have competing views as to the manner in which the debt is to be repaid, or security assets sold, and may include parties such as:

- representatives of the small business borrower (for example, directors of a company, partners of a partnership, trustees of a trust, office bearers of an association)
- insolvency practitioners of the small business borrower or guarantor (for example, liquidators, receivers and managers, administrators, trustees in bankruptcy)
- proprietors of jointly held security assets or guarantors of a small business debt. FOS Bulletin 53 outlines, however, circumstances where there has been a breakdown in a family relationship, in which case FOS would not require all borrowers to be part of the dispute.

Depending on the complexity of the small business credit facilities, structure, and financial information, it may also be advantageous to require the small business's accountant to attend and explain the financial position of the small business.

We consider that we will be able to handle the anticipated SBCF disputes more effectively if we can require the parties to each dispute, where appropriate, to:

- attend a compulsory conference
- ensure that a relevant third party also attends the conference.

We propose to add such a requirement to the TOR provisions for SBCF disputes. At present, paragraph 7.3 of the TOR allows for FOS to impose particular obligations on parties to a dispute.

If we cannot effectively deal with the dispute without the participation of a relevant third party, we will need to consider whether there is a more appropriate place to deal with the dispute, such as a court.

We would be interested in receiving any suggestions or feedback about approaches we could take to address the limitation on our ability to compel relevant third parties to be joined to or participate in the dispute resolution process.

Proposal 1.2

Provide for paragraph 7.3 to apply to SBCF disputes in a way that allows FOS, when considering such a dispute, to require a party to:

- attend a compulsory conference and
- ensure that a relevant third party also attends the conference.

1.3 Format of TOR

At present, some provisions of the TOR apply only in relation to SBCF disputes. Examples are paragraphs 5.1r) and 13.1d). As these provisions are not grouped together, they may be difficult to identify.

We expect our small business jurisdiction to develop as a specialist, discrete area of jurisdiction and dispute handling. To facilitate this development and make the TOR easier to use, we propose to reformat the TOR so that SBCF provisions are contained in one separate section.

We have considered whether the new separate section should:

- set out in full all TOR provisions that apply to SBCF disputes, or
- set out provisions that apply only to those disputes and incorporate by reference the general dispute resolution process provisions in Section C that apply to all dispute types.

Benefits of the approach using incorporation by reference include:

- reducing the length and complexity of the amended TOR
- avoiding repetition
- clearly identifying provisions and processes that apply only to SBCF disputes
- allowing future amendments to Section C that apply to all disputes to be made by a single amendment rather than duplicate amendments which are more complex and introduce a risk of inconsistency
- making it easier to include further TOR sections in a similar manner at a later point in time, should this be required.

Proposal 1.3

Create a new section of the TOR to provide for SBCF disputes. In the new section:

- explain how the section applies
- set out provisions of the TOR that only apply to SBCF disputes including –
 - monetary limit provisions within Proposal 1.1 based on existing provisions paragraphs 5.1o), 5.1r), 9.7, 13.1d) and Schedule 2.
 - new dispute resolution provisions within Proposal 1.2
- Incorporate by reference the general dispute resolution process provisions in Section C that apply to all dispute types.

Delete paragraphs 5.1r) and 13.1d), which will be incorporated in the new section.

Consultation questions for Proposals 1.1 to 1.3

- *Do you agree with FOS expanding its small business jurisdiction and Proposals 1.1 to 1.3? If not, why not?*
- *How would the proposals affect your organisation or constituents? Wherever possible could you quantify any costs or benefits anticipated and include examples?*
- *Can you provide other information about the effect of the proposals?*
- *Do you suggest changes to the new monetary limits in Proposal 1.1, and if so, what should the limits be and why?*
- *Do you consider that, if Proposal 1.1 is implemented, FOS will also need to make changes to its processes in addition to Proposal 1.2?*

2 Varying credit facilities**2.1 Jurisdiction & remedies*****Regulated Credit Facilities***

Paragraph 5.1c)(ii) of the TOR allows FOS to consider a dispute about the variation of a contract regulated by the National Credit Code as a result of the applicant being in financial hardship. FOS has jurisdiction in respect of regulated contracts for products such home loans and credit cards.

Unregulated credit facilities

Currently, our ability to provide a remedy and vary business or other unregulated credit facilities in debt recovery disputes is more limited compared with disputes involving regulated facilities. Our approach, when dealing with financial hardship disputes involving unregulated facilities, requires that financial services providers (FSPs) show they have given genuine consideration to requests for assistance.

We have regard to various criteria outlined in paragraph 8.2 of our TOR, including good industry practice and applicable industry codes such as the Code of Banking Practice (CBP) and what is fair in the circumstances. We consider the CBP reflects good industry practice and we consider that FSPs, including those who do not subscribe to the CBP, also have obligations to customers in financial hardship as a result of their own internal hardship policies and good industry practice.

We consider whether an FSP has given genuine consideration to a hardship variation application, whether the FSP gave reasons for rejecting any proposal, and whether those reasons reflect legitimate considerations and can be referred to the particular customer's circumstances. In doing so, we need to be satisfied that an FSP had clear and reasonable internal processes for assessing hardship variation requests and that the FSP has followed those processes.

Over time, many FSPs have accepted that they owe obligations to their customers in financial hardship, regardless of whether the loans were regulated or unregulated and will provide appropriate variations and other options for customers in hardship.

Small business credit facilities

In dealing with an expanded jurisdiction for SBCF disputes, it is important that we also have the ability to vary an unregulated credit facility in appropriate circumstances. While many hardship disputes that we deal with are resolved by agreement and do not require a decision directing an FSP to vary a credit facility, we consider it is appropriate to have scope to vary an unregulated credit facility. This will ensure that appropriate remedies can be provided when dealing with SBCF disputes. It will also provide greater consistency in remedies that can be provided for both regulated and unregulated credit facilities.

Proposed

For this reason, we propose a change to the remedies that FOS may award to include the ability to forgive a debt or vary an unregulated credit facility. As small business credit contracts are unregulated contracts, we propose an amendment to paragraph 5.1c)(ii) to give us full scope to consider variations of both regulated and unregulated credit contracts in cases of financial hardship. Eliminating the limitation on our ability to vary unregulated contracts explained above would complement the proposed expansion of our small business credit facility jurisdiction.

We are not proposing that the amendment be restricted to apply only to small business credit facilities. The proposed amendment would provide FOS with the flexibility and capacity it needs to deal with other unregulated credit contracts in disputes involving individuals in financial hardship.

Paragraph 9.1b) of the TOR allows FOS to decide that a financial services provider should forgive or vary a debt. Given its broad wording, we consider that this provision enables us to require variations of all types of credit facilities – whether the contracts are regulated or unregulated.

Paragraph 9.1f), which refers specifically to variation in cases of financial hardship, however, is a narrower provision dealing only with variation of a regulated contract. There is no provision to expressly allow FOS to make decisions about variation of an unregulated contract, such as a business or investment loan contract.

We propose amendments to clarify that FOS can decide that regulated or unregulated credit facilities should be varied or forgiven. The amendments are designed to cover loans to small businesses, as well as individuals.

Proposal 2.1

- In paragraph 5.1c) replace ‘Credit Contract’ with ‘credit facility’.
- Reword paragraph 9.1b) so that it refers to the forgiveness of debt or variation of a credit facility.
- Delete paragraph 9.1f).

Consultation questions for Proposal 2.1

- *Do you agree with Proposal 2.1? If not, why not?*
- *Would Proposal 2.1 affect your organisation or constituents? Where possible, quantify any impact anticipated and include examples.*

3 Improving consistency

3.1 Groups of related bodies corporate

A business can be eligible to lodge a dispute with FOS if it is a ‘small business’ within the definition in paragraph 20 of the TOR. This definition includes a business with **less than** 20 employees (or less than 100 employees if the business includes manufacturing). A non-manufacturing business with 20 employees is not a small business for the purposes of the TOR and cannot lodge a dispute.

Paragraph 5.1p) states that FOS cannot consider a dispute where the applicant is a member of a group of related bodies corporate that has **in excess of** 20 employees (or 100 employees in the case of a manufacturing group). This exclusion does not prevent a non-manufacturing group with 20 employees from lodging a dispute.

The approach in paragraph 5.1p) does not accord with the small business definition in the TOR, which prevents a non-manufacturing business with 20 employees from lodging a dispute. We propose an amendment to paragraph 5.1p) to be consistent with the small business definition.

Proposal 3.1

In paragraph 5.1p):

- replace 'in excess of 20' with '20 or more', and
- insert 'or more' after '100'.

Consultation questions for Proposal 3.1

- *Do you agree with Proposal 3.1? If not, why not?*
- *Would Proposal 3.1 affect your organisation or constituents? Where possible, quantify any impact anticipated and include examples.*

4 Operating an expanded small business jurisdiction

4.1 Proposed operating model

As part of the expansion of our small business jurisdiction, we would establish a dedicated specialist small business unit at FOS, which would be part of our existing Banking and Finance Team. The small business unit would have FOS staff and decision makers that have strong expertise and experience to deal with small business disputes.

This organisational arrangement is to ensure we are able to respond to the SBCF disputes as they grow in volume without impacting on our ability to resolve disputes in our existing jurisdiction.

Today, we are not able to predict with certainty the number of small business disputes that would be brought to FOS, but this will change with experience in operating in an expanded jurisdiction. Nor can we accurately anticipate how small business consumers, or the financial service providers of credit facilities to small businesses, will respond to having broader EDR limits and compensation caps.

To manage this uncertainty in dispute volumes and the impact this has on planning and deploying resources, particularly in the first years of operation, a flexible funding model would be necessary, as outlined broadly below.

We favour a broadly self-funded model which will allow us to flex and effectively respond to any changes to dispute volumes and complexity. Our services are predominantly funded by dispute fees and approximately 85% of our operating costs are staffing costs. Dispute income is received on the closure of disputes. This means there is a lag between resource expenditure and the receipt of revenue to fund the resources.

We see benefit in applying our current dispute fees for SBCF disputes in an expanded jurisdiction. In order, however, to manage and respond to dispute volume volatility in the early years of operation (particularly an ability to quickly staff the unit with experts in small business disputes and be able to flex resourcing depending on actual disputes received), a small business charge might need to be levied, somewhat akin to the pre-existing LPPI charge⁸ that applied up until 1 July 2015. We would envisage that this fee would be incurred if a SBCF dispute was accepted in to case management.

Further, given the cost/revenue lag referred to above we would require some start-up capital ahead of receiving SBCF dispute revenue. Once the extent and nature of an expanded small business jurisdiction is decided, we will consult with our members in more detail about funding options.

At this stage, we are interested in your feedback about an appropriate funding model to apply to small business disputes, including the application of a small business levy.

Proposal 4.1

In terms of the operation of an expanded small business jurisdiction, we propose to:

- Establish a separate business unit within our Banking and Finance area staffed by case workers and decision makers with strong expertise and experience in dealing with small business disputes.
- Implement a funding model that will utilise our existing fee structure but will broadly allow for the small business jurisdiction to be 'self-funding'. This might involve a 'small business levy', especially in the early years of operation.

⁸ A LPPI fee applied to disputes where legal proceedings had commenced by an FSP prior to the dispute being lodged with FOS. An additional fee applied to this type of dispute to cover resourcing to deal with this matter as a priority. The fee is no longer charged as we now address these disputes within our new streamlined dispute processes.

4.2 Commencement date for proposed changes

A decision about the commencement date of the proposed changes to the TOR has not been made, and will be subject to the feedback we receive from this consultation. At this stage, we would envisage commencement mid next year. We are interested in your views about an appropriate commencement date for the small business TOR changes and whether an early to mid-2017 introduction would be feasible.

Consultation questions for Proposal 4.1 and commencement date

- *Do you agree with Proposal 4.1? If not, why not?*
- *Would Proposal 4.1 affect your organisation or constituents? Where possible, quantify any impact anticipated and include examples.*
- *While a decision is yet to be made about the nature and extent of an expanded small business jurisdiction, would you consider a mid-2017 commencement date for changes to the jurisdiction feasible? If not, why not? If not, what date would be more appropriate and why?*

5 Traditional trustee company services

A separate section of the TOR – Section F – provides for certain disputes about traditional trustee company services (TTCS). After explaining which disputes it covers, Section F duplicates the general dispute resolution processes in Section C that apply to all dispute types. The duplicated provisions incorporate additions and modifications to make them apply appropriately for TTCS disputes.

At present, the Section F provisions designed to duplicate Section C are not entirely consistent with Section C. The inconsistency could be eliminated by:

- inserting in Section F provisions equivalent to paragraphs 6.1d), 7.4 and 9.8, which were inserted in Section C in 2015
- increasing the compensation cap in paragraph 18.3a) for consequential loss from \$3,000 to \$3,300 as it was increased in paragraph 9.3a) in 2015
- changing paragraph 18.3b)(ii) so it allows FOS to compensate for injury to the feelings of an ‘Other Affected Party’, to make it consistent with paragraph 9.3b).

The inconsistencies referred to above have prompted us to reconsider the format of Section F.

Section 1.3 of this paper explains that, for the proposed new section of the TOR to provide for small business credit facility disputes, we favour an approach using incorporation by reference. We propose that this approach should also be adopted in the TTCS section so that the style of the two sections is the same.

Other benefits of adopting this approach in the TTCS section include:

- reducing the length and complexity of the TOR
- eliminating repetition
- clearly identifying provisions and processes that only apply to TTCS disputes
- allowing future amendments to Section C that apply to all disputes to be made by a single amendment rather than duplicate amendments which are more complex and introduce a risk of inconsistency
- making it easier to include further TOR sections in a similar manner at a later point in time, should this be required.

Proposal 5

- Retain in Section F a provision explaining which TTCS disputes the section covers.
- Delete from Section F the provisions that duplicate Section C.
- Provide for Section F to incorporate Section C with additions and modifications replicating the additions and modifications currently incorporated in Section F (to maintain existing provisions).

Consultation questions for Proposal 5

- *Do you agree with Proposal 5? If not, why not?*

6 Updates and other amendments

6.1 Application of the TOR

The TOR have applied since 1 January 2010. Different versions of the TOR have come into effect as amendments have been made from time to time.

Paragraph 3 sets out arrangements for the transition to the TOR, which commenced in 2010. Now, more than six years after the transition commenced, there is no need to include the full details of the transitional arrangements in the TOR.

It will be sufficient for paragraph 3 to explain how the lodgement date of a dispute determines which version of the TOR applies to the dispute. Previous versions of the TOR will remain available on our website.

Proposal 6.1

Replace paragraphs 3.1 to 3.3 with a statement to explain that different versions of the TOR apply to disputes depending on when they were lodged.

6.2 TOR application dates

Paragraph 9.7 sets the compensation caps for claims in disputes. Paragraph 9.7a) distinguishes the position for disputes lodged between 1 January 2010 and 31 December 2011 from the position for disputes lodged after this date.

It is no longer necessary for paragraph 9.7a) to specify compensation caps for claims in disputes lodged before January 2012. It will be sufficient for paragraph 9.7a) to explain that the compensation caps for a claim in a dispute are stated in the schedules to the TOR in force on the dispute's lodgement date.

Paragraph 3 specifies the TOR applicable to a dispute and will continue to do so if amended as proposed above. If it is necessary in future to consider a dispute lodged before January 2012, paragraph 3 will provide a reference back to the applicable TOR.

Proposal 6.2

Amend paragraph 9.7a) so that it simply explains that the maximum total value of the remedy awarded by FOS for a claim in a dispute must not exceed the compensation cap for the claim stated in the schedules to the TOR in force on the dispute's lodgement date.

6.3 Terms used in the TOR

The TOR uses terms that now need to be updated, namely 'Uniform Consumer Credit Code' and 'Privacy Commissioner'.

Proposal 6.3

- Where 'Uniform Consumer Credit Code' appears in the TOR, replace it with 'National Credit Code' or 'applicable credit legislation'.
- Where 'Privacy Commissioner' appears in the TOR, replace it with 'Office of the Australian Information Commissioner'.

6.4 References to FOS

Some provisions in the TOR refer to FOS as the 'Service', which is a term defined in paragraph 20. We consider that the TOR would be easier to read if all references to FOS were made consistent.

Proposal 6.4

Refer to FOS consistently throughout the TOR using the abbreviation 'FOS' unless the pronoun 'we' is more appropriate.

6.5 Paid agents

Paragraph 6.1d) of the TOR is designed to ensure that paid agents of applicants act in their best interests and provide the required information when a dispute is lodged. The provision was added to the TOR on 1 January 2015. Paragraph 6.1d) provides that FOS may decline to accept a dispute if an agent is engaging in inappropriate conduct that is not in the interest of the applicant or the dispute is not accompanied by information required by FOS.

Paragraph 6.1d) uses the term 'accept' in relation to a dispute, reflecting that acceptance was a distinct step in the dispute resolution process of FOS when the provision was developed. As FOS no longer has a separate acceptance step, the wording of paragraph 6.1d) may not be sufficiently clear. For example, in a case where a dispute is lodged without adequate information, it may appear to an agent to have been 'accepted' until we exercise our discretion to decline to consider the dispute.

To address this issue, we propose to make a minor amendment to the wording of paragraph 6.1d) so that it provides that FOS may decline to 'consider' a dispute where an agent is engaging in inappropriate conduct or is not providing necessary information.

We also propose to amend the wording of 6.1d) to provide discretion, where appropriate, not to consider any dispute lodged by a particular paid agent that engages in inappropriate conduct or is not providing necessary information. This change will more effectively address situations where a paid agent is lodging or has lodged multiple disputes with FOS and is engaging or has engaged in inappropriate conduct or has not provided necessary information.

Proposal 6.5

In paragraph 6.1d), replace 'accept the' with 'consider any'.

Consultation question for Proposals 6.1 to 6.5

- *Do you agree with Proposals 6.1 to 6.5? If not, why not?*

7 Reformatting

7.1 Order of TOR sections

The separate TOR section dealing with TTCS, Section F, does not immediately follow Section C at present. We propose that it be brought forward to immediately follow Section C, relabelled as Section D and that its paragraphs be renumbered.

We have proposed a new separate TOR section dealing with small business credit facilities (SBCF) in Proposal 1.3 above. We propose to insert this section as Section E so that it immediately follows the section for TTCS.

If the sections for TTCS and SBCF become Sections D and E, existing sections of the TOR will need to be moved and relabelled as follows:

- existing Section D will become Section F
- existing Section E will become Section G
- existing Section G will become Section H.

All of the paragraphs of existing Sections D to G will need to be renumbered.

7.2 Title of Section C

Section C sets out the dispute resolution processes that apply to disputes generally. Its title at present is 'Dispute Resolution Processes'.

If the proposed amendments are made, the separate sections for TTCS and SBCF will each provide for certain Section C provisions to apply differently. To reflect that Section C contains the general process provisions – but not all of the process provisions – we propose to change its title to 'Dispute Resolution Processes – General'.

While the proposed reformatting outlined above would not affect FOS's jurisdiction, we welcome any feedback from stakeholders on the proposals.

Appendix- Summary of Proposals

Proposal No.	Proposal
1.1	<p>Amend the TOR so as to:</p> <ul style="list-style-type: none"> • increase the jurisdiction claim limit for a SBCF dispute to \$2 million • increase the compensation cap for a claim in a SBCF dispute to \$2 million • increase the credit facility limit for a debt-related SBCF dispute to \$10 million • prohibit debt recovery proceedings in respect of facilities up to \$10 million while a dispute is being considered by FOS. <p>Also include in the TOR a definition of the term 'small business credit facility'.</p>
1.2	<p>Provide for paragraph 7.3 to apply to SBCF disputes in a way that allows FOS, when considering such a dispute, to require a party to:</p> <ul style="list-style-type: none"> • attend a compulsory conference and • ensure that a relevant third party also attends the conference.
1.3	<p>Create a new section of the TOR to provide for SBCF disputes. In the new section:</p> <ul style="list-style-type: none"> • explain how the section applies • set out provisions of the TOR that only apply to SBCF disputes including – <ul style="list-style-type: none"> ○ monetary limit provisions within Proposal 1.1 based on existing provisions paragraphs 5.1o), 5.1r), 9.7, 13.1d) and Schedule 2. ○ new dispute resolution provisions within Proposal 1.2 • Incorporate by reference the general dispute resolution process provisions in Section C that apply to all dispute types. <p>Delete paragraphs 5.1r) and 13.1d), which will be incorporated in the new section.</p>
2.1	<ul style="list-style-type: none"> • In paragraph 5.1c) replace 'Credit Contract' with 'credit facility'. • Reword paragraph 9.1b) so that it refers to the forgiveness of debt or variation or a credit facility. • Delete paragraph 9.1f).

Proposal No.	Proposal
3.1	<p>In paragraph 5.1p):</p> <ul style="list-style-type: none"> • replace 'in excess of 20' with '20 or more', and • insert 'or more' after '100'.
4.1	<p>In terms of the operation of an expanded small business jurisdiction, we propose to:</p> <ul style="list-style-type: none"> • Establish a separate business unit within our Banking and Finance area staffed by case workers and decision makers with strong expertise and experience in dealing with small business disputes. • Implement a funding model that will utilise our existing fee structure but will broadly allow for the small business jurisdiction to be 'self-funding'. This might involve a 'small business levy', especially in the early years of operation.
5	<ul style="list-style-type: none"> • Retain in Section F a provision explaining which TTCS disputes the section covers. • Delete from Section F the provisions that duplicate Section C. • Provide for Section F to incorporate Section C with additions and modifications replicating the additions and modifications currently incorporated in Section F (to maintain existing provisions).
6.1	<p>Replace paragraphs 3.1 to 3.3 with a statement to explain that different versions of the TOR apply to disputes depending on when they were lodged.</p>
6.2	<p>Amend paragraph 9.7a) so that it simply explains that the maximum total value of the remedy awarded by FOS for a claim in a dispute must not exceed the compensation cap for the claim stated in the schedules to the TOR in force on the dispute's lodgement date.</p>
6.3	<ul style="list-style-type: none"> • Where 'Uniform Consumer Credit Code' appears in the TOR, replace it with 'National Credit Code' or 'applicable credit legislation'. • Where 'Privacy Commissioner' appears in the TOR, replace it with 'Office of the Australian Information Commissioner'.
6.4	<p>Refer to FOS consistently throughout the TOR using the abbreviation 'FOS' unless the pronoun 'we' is more appropriate.</p>
6.5	<p>In paragraph 6.1d), replace 'accept the' with 'consider any'.</p>