

10 October 2016

Ms Jenny Peachey
Executive General Manager – Strategic Review
Financial Ombudsman Service
By email: smallbusiness@fos.org.au

Dear Ms Peachey

Expansion of FOS's Small Business Jurisdiction

ANZ welcomes the opportunity to comment on proposals to expand the Financial Ombudsman Service (FOS) small business jurisdiction.

ANZ has also contributed to the Australian Bankers' Association (ABA) submission and endorses the industry position. This letter provides ANZ comments on specific issues raised in the consultation paper.

Proposed Amendments to Monetary limits

The consultation paper proposes amending FOS's terms of reference (TOR) to:

- increase the jurisdiction claim limit for a small business credit facility (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; and
- the term 'small business credit facility' is included in the TOR.

ANZ supports an appropriate increase in current jurisdiction limits to ensure that small businesses have access to a simple, efficient and appropriate dispute resolution process. In nearly all cases we believe we resolve issues either internally, including through the ANZ Customer Advocate, or through FOS. We acknowledge the benefit in expanding access to FOS to ensure small business customers have an alternative to seeking redress through the courts.

Given the potential impact to FOS of the concurrent Ramsay review into external dispute resolution (EDR) and complaints schemes and the review of the Code of Banking Practice, any amendment to the jurisdiction claim limit and compensation cap in relation to small business should, in ANZ's view, await the outcome of those processes. The timing of any change should also be subject to the outcomes of these reviews.

Small business access to EDR

FOS seeks to provide a dispute resolution process for small businesses that would typically have more limited access to financial, legal and accounting advice.

We understand that through this consultation process FOS seeks information and data analysis to help ascertain the appropriate credit facility limit, claim limit and



compensation caps. The ABA submission sets out data on Australian business by size and lending and, based on this information, has put forward a proposal for a small business definition.

The proposed definition sets out four criteria based on number of full-time equivalent (FTE) employees, business turnover, size of loan for business purposes, and total credit exposure of the business group. A business that exceeds any of the criteria would not be considered a small business.

There are a range of operational issues that need to be addressed in finalising definitional changes that could potentially be applied by different bodies. In particular, at what point in business processes (e.g. at origination of the loan, or at time of dispute) the tests for jurisdiction will apply. Banks will have knowledge of loan limits, are likely to have information at the application process on other information (such as revenue or total liabilities), and may or may not have information on employment. Information, other than loan limits, will change as the circumstances of the business will change.

Given these uncertainties, it is important for banks and their customers to be clear about how and when information related to qualifying definitions will be collected and verified, and the respective responsibilities of the bank and customer.

Amending TOR to increase the jurisdiction facility limit

ANZ believes there are few small businesses with a facility limit of \$10 million. There are medium-sized and larger businesses with facilities approaching \$10 million that fall within existing definitions of 'small business' based on employee numbers. However, these are sophisticated businesses that could be expected to have ready access to legal representation and therefore do not require access to FOS.

The 2013 Independent review of FOS highlighted that FOS – which at the time had no limit on facility amount – was being accessed by small businesses, often property developers, with disputes about loans greater than \$5 million. The independent review recommended that FOS be more active in using its discretion to exclude 'large and complex' business disputes. The jurisdictional review process alone can be time consuming and protracted. Documentation needs to be obtained and a review of complex loan arrangements can be required to determine whether the claim is within FOS terms of reference.

Businesses with disputes about larger facilities are generally in a position to seek a resolution to their dispute through the courts or through negotiation with the assistance of professional advisers. FOS should remain a dispute resolution process for genuine small businesses and FOS's resources should not, to the extent possible, be devoted to complex cases more appropriately dealt with in the courts. In view of this, ANZ queries whether the proposed jurisdictional changes will achieve the intended purpose.

The proposed \$10 million facility limit is also well above definitions of small business used elsewhere. For example, the Unfair Contract Terms legislation extended to small business (effective next month) applies only where the loan value is no more than \$1 million.

With no credit facility limit prior to the recent introduction of a \$2 million limit, this meant there were disputes being lodged at FOS where the combined facility limit was tens of millions of dollars. These disputes were often the subject of long delays both in assessing jurisdiction and in conducting the investigation of these complaints. An example of a complex complaint subject to delays in assessing jurisdiction is 311975. This concerned facilities of approximately \$7.5 million and was lodged on 30 January 2013. Jurisdictional issues were still under consideration over a year later due to the complexity of the matter, the difficulties in understanding the complaint and a debt agent.



We welcome the significant improvements FOS has achieved since 2015 in timeframes and that there is now a ToR team which exclusively considers jurisdictional issues. ANZ would be concerned if an increase in requests by members for jurisdictional assessment of complex small business issues were to have a detrimental impact on these positive changes for handling retail customer disputes.

We also support a facility limit cap for total group lending (not a single corporate entity under the current cap). There are instances where the facility may be taken out by one arm of a broader business giving rise to the question as to whether the business in dispute is a small business that the changes are intended to capture. The ABA's proposed four criteria definition includes such a facility limit cap.

Amending ToR to increase jurisdiction claim limit and cap

ANZ supports the increase of claim and compensation limits applied by FOS but is concerned that increasing these limits to \$2 million would require a legally robust process with rights of appeal and the ability to take oral evidence.

FOS currently forms its views on the weight of available information and there is no power to subpoena relevant documentation or appearances from third parties in line with the court process. FOS also has limitations in its ability to assess the legitimacy of documentation and credibility of parties as is possible within a court process.

We also note that the proposed award limit of \$2 million appears to be well above what similar ombudsman services in other jurisdictions apply:

- UK Financial Ombudsman Service – the maximum money award is GBP150,000 (excluding interest and costs);
- Canadian Ombudsman for Banking and Investment Services – the maximum compensation is CAD350,000;
- NZ Insurance and Financial Services Ombudsman and Banking Ombudsman Scheme – NZD200,000 applicable upper limit on claims as well as compensation across all of the EDR schemes.

We support the ABA proposal to increase the claim limit to \$1 million. If it were to be increased to \$2 million, we think it should be for a combined claim, not per claim.

Prohibit debt recovery proceedings in respect of facilities up to \$10 million while a dispute is being considered by FOS

ANZ has concerns about the proposal to limit debt recovery proceedings up to \$10 million while a dispute is being considered by FOS. This means that debt recovery on a very significant facility could be stalled due to the most minor fee issue on a facility held by the same entity. Ultimately this could be to the customer's detriment resulting in loss in equity and the ability to recover value from a security increasing the customer's debt.

Under the current ToR the financial services provider must not take any action to recover a debt the subject of the dispute, to protect any assets securing that debt or to assign any right to recover that debt. ANZ's current practice is to stop collections activities on all facilities related to a debt that is in dispute on the basis that a holistic view should be given to a dispute. It would assist if clarification could be given to the obligations to stop collections activity in relation to business facilities that might not be the "subject of the dispute".

Customers can deal with company securities to the bank's detriment whilst the bank is prohibited from taking recovery action. Whilst there are provisions under the ToR enabling ANZ to seek consent to freeze, preserve or sell assets this can add an additional layer of complexity to a dispute and this type of request requires documentation, quick



assessment and effectively what might be injunctive relief if it were obtained through the courts. As the facility limit increases, this type of exposure for the bank increases and this aspect should be taken into account.

Further, a minority of customers also re-lodge disputes multiple times even when a dispute has been ruled by FOS to be OTR. Each time this occurs a further jurisdictional assessment has to be undertaken. As the limits increase, the risk of delays in assessing jurisdiction carries a greater risk for both parties.

ANZ recommends that FOS conduct detailed research into small business cases that have been ruled outside TOR based on the current limits and on the cases that were received and ruled OTR prior to the change to the credit facility limit of \$2 million. As a start, these cases should be reviewed to determine whether the businesses involved would genuinely have limited access to advice and the courts.

Dispute resolution processes

Recognising the complexities of small business disputes, FOS is proposing that parties to a dispute:

- Attend a compulsory conference; and
- Ensure that a relevant third party also attends the conference.

ANZ agrees there is a benefit to parties to a dispute attending a compulsory conference.

ANZ also agrees that it would be beneficial for FOS to have access to all information necessary to reach a determination and that some of this information would be held by third parties to the dispute. However, we think it would be problematic for FOS to place a requirement for parties to a dispute to 'ensure' relevant third parties (such as company directors, insolvency practitioners, and guarantors) attend a conference. In our experience there are many instances where this will not be practical. In some instances, such as those involving insolvency practitioners, this requirement may be at odds with their statutory obligations.

ANZ recommends having a positive obligation for parties to a dispute to 'facilitate' third party attendance where appropriate.

Operating model

ANZ supports the proposal to establish a separate specialist small business unit within FOS's banking and finance area. This unit should be adequately staffed to ensure that an increase in FOS jurisdiction does not hinder FOS's capacity to continue to deal with its broader case load effectively and expeditiously.

The ToR team would also need sufficient resourcing to deal with an increase in disputes lodged by small businesses. ANZ has concerns that the proposed expanded jurisdiction would require the FOS ToR team to handle an increased number of high value complex small business disputes. This could in turn impact FOS's ability to assess its jurisdiction to consider retail disputes in a timely way.

ANZ also recommends that a specialist small business ombudsman is appointed within FOS and that the new small business unit is staffed by people with expertise in small business disputes with current and proven industry practice, knowledge of lending practices and credit-related disputes. In ANZ's experience, lending and guarantees form the basis of the vast majority of small business disputes.

Finally, we agree that the small business unit within FOS should be largely self-funding so as to minimise the risk of these more costly disputes detracting FOS from its core



program. ANZ does not favour any proposed levy calculated in a similar way to the LPPI charge that operated until 1 July 2015. The LPPI charge was raised on every case set at \$1,000 per complaint. For banks with 30 to 50 small business complaints per month, the cost of running the unit could be substantial.

It would be helpful for there to be more analysis of the likely cost of the proposed small business unit so members can have a better understanding of the funding requirements and how this could be fairly shared amongst users of the scheme.

Please feel free to contact Tom Westcott, Senior Manager Government and Regulatory Affairs (thomas.westcott@anz.com) or Marco Kohne, Head of Customer Resolution Delivery (marco.kohne@anz.com) if you wish to discuss any of the matters raised in this submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Rob Lomdahl', written over a horizontal line.

Rob Lomdahl