

***SUBMISSION ON CONSULTATION PAPER:  
Expansion of FOS's Small Business Jurisdiction***

**22 September 2016**

## EXECUTIVE SUMMARY

The Australian Retail Credit Association (ARCA) is the peak industry association for organisations involved in the consumer credit reporting system. We were established in 2006 with the purpose of promoting common standards of best practice in credit risk assessment and responsible credit procedures.

Membership to ARCA is voluntary and includes nearly all significant bank consumer credit providers, many key finance companies, and all major Australian credit reporting bodies (CRBs). A full list of ARCA Members is available at Attachment A.

As participants in the consumer credit reporting system, our Members are required by the Privacy Act to hold membership with a recognised External Dispute Resolution (EDR) scheme and many of our Members are members of the Financial Ombudsman Service (FOS).

The FOS consultation paper purports to relate to the expansion of FOS's *small business jurisdiction*, however we are concerned that some of the proposals would also expand FOS's jurisdiction over *consumer* disputes. We submit that any alteration to FOS's Terms of Reference (TORs) that may expand its jurisdiction or powers relating to retail disputes requires appropriate consultation and should not be attempted through this consultation process.

We have developed this submission after careful consideration of the consultation paper and with input from our Members. Our submission relates only to the impact of FOS's proposed amendments to its TORs as they may impact FOS's retail jurisdiction.

## FEEDBACK ON SPECIFIC PROPOSALS

### ***Submission on Proposal 1.2***

FOS proposes to amend Paragraph 7.3 of its TORs to give it the power to require a third party to attend a compulsory conference.

The current Paragraph 7.3 applies to all FOS jurisdictions (i.e. both small business and consumer disputes).

Notably, Proposal 1.3 in the consultation paper suggests all paragraphs in the TORs that relate to small business disputes only, be grouped together. However Proposal 1.3 does not suggest the amended Paragraph 7.3 be moved to the proposed new, small business specific, section of FOS's TORs. We are therefore concerned that FOS intends the proposed expansion of its powers over third parties to apply to its consumer dispute jurisdiction.

We are concerned that such an amendment, if made under the current consultation paper 'Expansion of FOS's Small Business Jurisdiction', would expand FOS's consumer dispute jurisdiction without proper consultation with relevant stakeholders, including our Members. We understand that our Members are concerned by this proposal, if it is in fact intended to apply to FOS's consumer jurisdiction.

### ***Submission on Proposal 2.1***

FOS proposes to expand its jurisdiction and powers on disputes relating to financial hardship. This Proposal explicitly refers to expanding FOS's jurisdiction on consumer disputes and again, we emphasise that this consultation on 'FOS's Small Business Jurisdiction' is not the appropriate channel for proposals concerning FOS's consumer jurisdiction.

We do not agree with this proposal and note that it would have a significant impact on our Members.

We do not agree with the proposal to expand FOS's jurisdiction to allow it to consider disputes concerning financial hardship when the applicant is party to any credit facility, rather than strictly a credit contract regulated by the *National Credit Code*.

Part 4, Division 3 of the *National Credit Code* sets out procedures for applicants and credit providers to follow if the consumer identifies as experiencing financial hardship. Even for disputes concerning contracts that are regulated by the *National Credit Code*, the nature of financial hardship means relevant disputes can be very complex. The proposal to consider disputes concerning financial hardship on credit facilities not regulated by the *National Credit Code* raises more questions than it answers: what is financial hardship and what are a consumer and credit providers' obligations if the consumer identifies as experiencing financial hardship?

FOS also proposes to amend its TORs to "clarify" that it has power to decide that any credit facility (whether regulated by the *National Credit Code* or not) should be varied or forgiven. This proposal explicitly intends to apply to FOS's powers on consumer disputes.

The current TORs clearly allow FOS to:

- decide that a debt should be forgiven (paragraph 9.1(b)); and, separately
- decide that a credit contract (i.e. a credit contract regulated by the *National Credit Code*) should be varied in cases of financial hardship (paragraph 9.1(f)).

These remedies are distinct, and we question whether FOS currently has the power to decide that any credit facility should be varied or forgiven. We consider that FOS's proposal to remove Paragraph 9.1(f) and reword Paragraph 9.1(b) would be an expansion of FOS's existing powers, not a clarification of its powers as suggested in the consultation paper.

We have strong concerns with FOS's current positioning of the laws around payment arrangements, and arrangements where a consumer is in financial hardship. Until these issues are resolved, any expansion of FOS's jurisdiction in this area would be premature.

Even after the current issues are settled, we would expect more details and reasoning behind FOS's proposal to expand its jurisdiction in this area to all credit facilities, including what definitions and processes are to be considered for disputes involving facilities not regulated by the *National Credit Code* and therefore not covered by the financial hardship provisions set out in Part 4, Division 3 of the *National Credit Code*.

Our Members have strong concerns about any proposal to expand FOS's jurisdiction and powers in this area. We again suggest any expansion to FOS's powers on consumer disputes be considered via a separate consultation process rather than as part of a consultation concerning the expansion of FOS's small business jurisdiction.

## CONCLUSION

While some of the proposals in the consultation paper explicitly intend to apply to FOS's consumer jurisdiction, other proposals are unclear in their ambit. Regardless, ARCA is very concerned about the transparency and propriety of any expansion to FOS's consumer dispute jurisdiction proposed under a consultation paper on its small business jurisdiction.

ARCA Members have strong concerns about proposals to expand FOS's jurisdiction and powers and ARCA considers it appropriate that any expansion to FOS's powers on consumer disputes

be considered via a separate consultation process rather than as part of a consultation concerning the expansion of FOS's small business jurisdiction.

Due to the highly complicated nature of disputes involving financial hardship, we would also support more reasons and clarity in putting forward any proposal to expand FOS's jurisdiction or powers on these matters.

## **Attachment A: List of ARCA Members**

As at 13 September 2016

American Express

Australia and New Zealand Banking Group

Bank of Queensland Limited

Bendigo and Adelaide Bank

Citibank

Commonwealth Bank of Australia

Credit Union Australia

Customer Owned Banking Association (COBA)

Dun & Bradstreet

Experian Australia

HSBC Bank Australia

ING Direct

Latitude Financial Services

Macquarie Leasing

ME Bank

Momentum Energy

MoneyPlace

National Australia Bank Limited

RateSetter Australia

Suncorp

Toyota Finance Australia Ltd

Veda

Volkswagen Financial Services

Westpac Banking Corporation