

## **SME Committee, Law Council of Australia – Feedback to the Financial Ombudsman Service Australia (FOS) Consultation on small business jurisdiction paper- September 2016**

### **Introduction**

The Law Council of Australia is the peak national body representing the legal profession in Australia.

The Small and Medium Enterprise Committee of the Business Law Section of the Law Council of Australia (***SME Committee***) makes this submission in response to FOS Consultation on small business jurisdiction paper - September 2016.

The SME Committee has as its primary focus the consideration of legal and commercial issues affecting small businesses and medium enterprises (***SMEs***) in the development of national legal policy in that domain. Its membership is comprised of legal practitioners who are extensively involved in legal issues affecting SME's.

### **Response**

Thank you for the opportunity to provide feedback on the FOS Consultation on small business jurisdiction paper - September 2016. We have sought to respond to each of the questions listed in the paper.

The SME Committee notes that FOS is a privately established and funded external dispute resolution body that certain licensed financial services providers are members of and required to use as a condition of their regulatory licence. ***The Committee considers that in extending its dispute resolution processes to better cater for small business financial services disputes, the FOS should consider including a representative of small business as a member of its Board.***

### **Proposals -**

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

##### **1.1 Monetary limits**

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

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 Terms of Reference (TOR)

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 –
  - o monetary limit provisions within Proposal 1.1 based on existing provisions paragraphs 5.1o), 5.1r), 9.7, 13.1d) and Schedule 2.
  - o 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?

#### **Feedback:**

***The SME Committee agrees with expanding the small business jurisdiction of FOS, supports each item proposed under Proposal 1.1, in theory supports the approach looking to be taken in Proposal 1.2, and supports Proposal 1.3.***

How would the proposals affect your organisation or constituents?

#### **Feedback:**

***Expanding the small business jurisdiction of FOS would benefit small businesses as it would provide them with a forum to have disputes dealt with that currently would need to be taken to a more formal and expensive forum, such as a court.***

Wherever possible could you quantify any costs or benefits anticipated and include examples?

#### **Feedback:**

***From the experience of members of the SME Committee, any addition of a low cost external dispute body mechanism for small business disputes will be cheaper than having to take action in a court, which should result in small businesses accessing FOS where appropriate for financial disputes.***

Can you provide other information about the effect of the proposals?

**Feedback:**

***The SME Committee notes that as FOS is a privately established and funded external dispute resolution body that certain licensed financial services providers are members of and required to use as a condition of their regulatory licence. As such FOS's ability to require third party participants in its dispute resolution processes is not a legal obligation of those third parties. This makes it difficult for FOS to improve its processes by having the participation of such third parties made compulsory without a change to relevant legislation or regulations (as was done some years ago with regard to insurers of members of superannuation funds under the Superannuation Complaints Tribunal legislation).***

Do you suggest changes to the new monetary limits in Proposal 1.1, and if so, what should the limits be and why?

**Feedback:**

***The SME Committee considers that although the monetary limits appear reasonable, perhaps increasing to \$5 million may be more appropriate to allow for practical value financing to be included.***

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?

**Feedback:**

***If Proposal 1.1 is implemented, as set out above, the SME Committee notes the legal inability for FOS to require third parties to participate in its dispute resolution process and the potential need for legislative or regulatory change to require them to participate.***

**2. Varying credit facilities**

**2.1 Jurisdiction & remedies**

- 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).

***Consultation questions for Proposal 2.1***

Do you agree with Proposal 2.1? If not, why not?

**Feedback:**

***The SME Committee agrees with Proposal 2.1***

Would Proposal 2.1 affect your organisation or constituents? Where possible, quantify any impact anticipated and include examples.

**Feedback:**

***From the experience of members of the SME Committee the changes proposed under Proposal 2.1 are appropriate and would enable small businesses to better avail themselves of FOS's dispute resolution processes.***

**3. Improving consistency**

**3.1 Groups of related bodies corporate**

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?

**Feedback:**

***The SME Committee agrees with the changes proposed by Proposal 3.1 as they reflect the number of employees used to determine whether a business is a 'small business' in other legislation, such as for the extension of unfair contract term prohibitions that will apply under the ASIC Act to apply from mid November 2016.***

Would Proposal 3.1 affect your organisation or constituents? Where possible, quantify any impact anticipated and include examples.

**Feedback:**

***The SME Committee is not in a position to provide feedback on this question.***

**4. Operating an expanded small business jurisdiction**

**4.1 Proposed operating model**

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

**4.2 Commencement date for proposed changes**

### **Consultation questions for Proposal 4.1 and commencement date**

Do you agree with Proposal 4.1? If not, why not?

#### **Feedback:**

***The SME Committee supports Proposal 4.1.***

Would Proposal 4.1 affect your organisation or constituents? Where possible, quantify any impact anticipated and include examples.

#### **Feedback:**

***Proposal 4.1 would affect small businesses choosing to access FOS's dispute resolution processes, although so long as the costs to small businesses are kept at a level to share with the financial service providers the costs of funding for FOS's resources and process, the Committee does not consider that such cost will result in small businesses not choosing to access the FOS dispute resolution process. Perhaps FOS could consider refunding costs to a small business where the dispute resolution process finds in its favour.***

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?

#### **Feedback:**

***The SME Committee considers mid-2017 an acceptable timeframe for making these changes, subject to any timing requirements for legislative changes that might need to be made to require third parties to participate.***

## **5. Traditional trustee company services**

- 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?

#### **Feedback:**

***The SME Committee agrees with Proposal 5.***

## **6. Updates and other amendments**

### **6.1 Application of the TOR**

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**

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**

- 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**

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

### **6.5 Paid agents**

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?

### **Feedback:**

***The SME Committee agrees with Proposals 6.1 to 6.5.***

## **7. Reformatting**

### **7.1 Order of TOR sections**

### **7.2 Title of Section C**

### **Further discussion**

The SME Committee would be happy to discuss any aspect of this feedback.