



# **SUBMISSION TO THE FINANCIAL OMBUDSMAN SERVICE AUSTRALIA**

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**Expansion of FOS Small Business  
Jurisdiction**

**Response to Consultation Paper**

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## Introduction

1. Slater + Gordon welcomes the opportunity to provide this submission to the Financial Ombudsman Service (FOS) in relation to the expansion of its business jurisdiction as set out in the Consultation Paper issued by FOS. Specifically, Slater + Gordon is addressing the first two points in proposal 1.1 of that Consultation Paper. That is, whether the Terms of Reference should be amended so as to:
  - a. increase the jurisdiction claim limit for a small business credit facility (SBCF) to \$2 million; and
  - b. increase the compensation cap for a claim in a SBCF dispute to \$2 million.
2. This submission will consider:
  - a. *whether certain disputes, owing to their complexity, are better dealt with by the courts;*
  - b. *whether a material 300% increase of FOS's jurisdictional cap will impact on the efficiency of FOS's workflow; and*
  - c. *whether there are other means of supporting business and improving access to justice for small business.*
3. Slater + Gordon is a leading provider of legal services to consumers and small business in Australia. We have built our reputation by providing specialist services in a range of practice areas including consumer law, commercial litigation, and class actions.
4. Thousands of everyday Australians and businesses contact us each year seeking answers to a variety of legal problems, including small business and consumer law issues. We are, in a real sense, on the front line when it comes to recognising the barriers faced by those individuals and businesses, as they navigate through the justice system every day.
5. This submission advocates for a more considered approach to determining the jurisdiction of FOS that takes into account its strengths, the complexity of matters and the efficiency of the scheme as a whole. As such, Slater + Gordon advocates for an incremental increase of FOS's jurisdiction targeted at disputes that allow it to provide a quick, efficient and cheaper alternative to the courts.

## Current Jurisdictional Caps that apply to FOS

6. The Financial Ombudsman Service (FOS) provides accessible dispute resolution for consumers and businesses that are unable to resolve complaints with member financial service providers internally.
7. FOS operates on a monetary limit meaning that the maximum value per claim under a dispute that can be considered is \$500,000.<sup>1</sup> The Maximum total value of the remedy that may be decided upon by FOS (excluding compensation for costs and interest payments) is \$309,000.<sup>2</sup> However, the scheme includes provisions for considering disputes exceeding this amount. For example, FOS can consider a dispute involving a claim for more than \$500,000 if all parties and FOS agree.<sup>3</sup>

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<sup>1</sup> Financial Ombudsman Service, Terms of Reference 1 January 2015, 5.1 (o).

<sup>2</sup> *Ibid*, schedule 2.

<sup>3</sup> *Ibid*, 4.4.

8. While not directly the subject of this submission, we note that FOS is also currently limited by its terms of reference to exclude debt recovery claims against a Small Business where the contract provides for a credit facility of more than \$ 2 million.<sup>4</sup>

## Extending FOS's Jurisdiction

9. We recognise FOS's concern, that often, if a business is in financial hardship, access to capital to take a dispute through the courts can be restricted, and accordingly there is an argument that external dispute resolution should play a broader role in providing an avenue for redress for small business credit facility disputes.<sup>5</sup>
10. 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.<sup>6</sup> The committee reasoned that, based on evidence it had reviewed, disputes relating to small business easily reached high levels as they were often dealing with high-value assets. The Committee found that these businesses had many competing pressures on available funds so that they were unlikely to institute court proceedings. The view of the Committee was that such businesses should not be restricted from bringing their claims to FOS because of its monetary cap.<sup>7</sup>
11. In June 2014 the same Committee, in the course of an inquiry into the performance of ASIC, again recommended that consideration be given to increasing caps on eligibility and compensation.<sup>8</sup> The Committee did not recommend a specific amount; rather it noted that the caps on eligibility and compensation appeared to be too low.<sup>9</sup>
12. Most recently, in May 2016, the Parliamentary Joint Committee on Corporations and Financial Services reported that there were significant gaps in the coverage of EDR schemes for disputes, specifically in relation to small business loans.<sup>10</sup>
13. It is evident that barriers exist for businesses who are involved in disputes and are not covered by external dispute resolution schemes, and who nonetheless require their matters to be resolved efficiently. Litigation through the court system requires a significant investment upfront and involves financial risk. Despite having meritorious claims, businesses may not be in a position to pursue an action due to a lack of funds.

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<sup>4</sup> Financial Ombudsman Service, Terms of Reference 1 January 2015, 5.1 (r).

<sup>5</sup> Financial Ombudsman Service, Consultation Paper 'Expansion of FOS's Small Business Jurisdiction' (August 2016), 4.

<sup>6</sup> Senate Economics Reference Committee, 'The Post-GFC Banking Sector' (November 2012), recommendation 9.3, 167.

<sup>7</sup> Ibid, 167.

<sup>8</sup> Senate Economics Reference Committee, 'Performance of the Australian Securities and Investments Commission' (June 201), [ 7.79].

<sup>9</sup> Ibid.

<sup>10</sup> Parliamentary Joint Committee on Corporations and Financial Services, 'Impairment of Customer Loans' (May 2016).

## The role of FOS in relation to consumer and small business disputes

14. Slater + Gordon recognises the important role that FOS plays in providing accessible dispute resolution for small businesses and commends FOS for its effectiveness in providing access to justice in circumstances where meritorious claims would otherwise be unviable due to the high cost of litigation.
15. Most importantly the role of FOS is to assist complainants where the amount in dispute would be disproportionate to the cost of pursuing a claim in the courts. In our view, such claims are the first priority of FOS. FOS fills a critical role by dealing with relatively uncomplicated matters and as such, is able to limit time and costs for the complainant. Its role is not to replace other tribunals or the court system in more complex matters where such forums are in a better position to deal with the dispute by reason of the ability to receive and adjudicate upon evidence. A secondary priority for FOS being larger meritorious claims which are nonetheless prevented from being pursued through the courts because no funding is available to that business.
16. In our view an inquiry into the jurisdiction of FOS should first and foremost ensure access to justice to those complainants in the category identified as FOS's first priority. That is because, for such claims, no other avenue of resolution exists. The claims identified as FOS's secondary priority should be incorporated into FOS's jurisdiction to the extent that such incorporation does not hinder the efficiency and equity of the system as a whole.

## Efficient and fair resolution of claims

17. Slater + Gordon is concerned that a rapid expansion of FOS's jurisdiction will have the potential to impact overall efficiency of FOS. We note that FOS's Terms of Reference include a discretion for FOS to decline to take on dispute, where such disputes are likely to impact the efficiency of the scheme. In considering whether FOS should play a greater role to help small business to protect their interests, Slater + Gordon recommends careful consideration be given to the types of disputes it covers and clearer guidelines to be issued as to FOS's jurisdiction. FOS's Terms of Reference should be extended in proportion to the resources available to it.
18. In May 2016, the Parliamentary Joint Committee on Corporations and Financial Services warned of dispute backlogs and recommended that FOS reshape its dispute processes to reduce the time taken to resolve new disputes.<sup>11</sup>
19. In our view the right balance must be struck between efficient throughput of claims under FOS's current jurisdiction and potential claims arising as a result of a broadened jurisdiction. Where FOS identifies the right kind of claims, it can deal with such matters fairly and efficiently. Slater + Gordon propose that an incremental increase of FOS's jurisdiction as well as a targeted Terms of Reference will allow FOS to identify the right balance rather than by expanding its jurisdiction in one go, by 300%. We propose a staged approach to increasing the jurisdictional monetary limit with an

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<sup>11</sup> Cameron Ralph Navigator, Report to the Board of the 'Financial Ombudsman Service' 2013 Independent Review' 8-10.

immediate increase from \$500,000 to \$1 million on 1 January 2017 and a further increase from \$1 million to \$2 million on 1 January 2019.

## Cases where the courts provide a more appropriate avenue to resolve disputes

20. In an Independent Review in 2013, it was recommended that, in cases involving large sums of money and raising complex legal issues, FOS should take a more active role in declining such disputes as they are more suited to resolution in the courts.<sup>12</sup>
21. Slater + Gordon agrees with the recommendation of the Independent Review. It recognises that certain cases will benefit from the expertise of a lawyer. In our view, where the losses of a claimant reach at or around \$2 million, the dispute is likely to involve difficult legal issues and require expert advice. As such, Slater + Gordon doubts that an increase to FOS's jurisdiction to such a high level is the most effective means for furthering access to justice.
22. Litigation in the courts may bring the following additional benefits:
  - a. A FOS determination may be more difficult to enforce against a party<sup>13</sup> and doesn't carry with it the same level of authority as a determination of a court;
  - b. There may be a public interest element in running certain financial disputes in the courts. In some cases it may be more appropriate for a court judgment to set a precedent. This will assist in developing the law.
  - c. Where a determination made by FOS is not accepted by a claimant and is followed by litigation, or where a determination made by FOS is appealed due to an error of law,<sup>14</sup> the legal costs may be higher overall. (The increase in the amount at stake may increase the prospects of such steps being taken.)

## Improving Existing avenues to justice through litigation funding

23. Through case management and court annexed dispute resolution programs such as mediation, courts strive to manage litigation so as to achieve a just, expeditious, efficient and economical resolution of disputes.<sup>15</sup> However, Slater + Gordon recognises that businesses may still be barred from initiating proceedings due to the high cost of litigation, which may be required to be paid up front.
24. Slater + Gordon is leading the way in recognising the role for litigation funding in order to enable more effective access to justice to those who otherwise would be prevented from seeking redress due to financial constraints. The provision of litigation services to consumers and small businesses through conditional fee arrangements and/or litigation funding agreements can facilitate access to justice where the same would otherwise lack the financial resources to bring meritorious claims. Slater + Gordon, works closely with clients to provide them with workable and affordable avenues to pursue their claims, including where appropriate, through litigation funding, or other alternate funding models.

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<sup>12</sup> Ibid, 61.

<sup>13</sup> Financial Ombudsman Services, Circular, 'Unpaid Determinations', Special Issue, (April 2014).

<sup>14</sup> *Financial Ombudsman Services Limited v Pioneer Credit Acquisition Services Pty Ltd* [2014] VSC 172.

<sup>15</sup> See Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, (ALRC Report No 89 2000) 76-88,390.

25. As the market for litigation funding matures and additional funders enter the space, we anticipate that funding options will increase in scope and will become more widely adopted. This will, in turn, increase the competitiveness of the market overall.

## Conclusion

26. Slater + Gordon commends FOS on the positive role it plays in the financial market by holding companies accountable for breaches of the law where, in many cases, meritorious disputes would otherwise have been abandoned. Significantly, FOS is the only option for disputes that are otherwise unviable to pursue because the damages in those disputes are disproportionate to the cost of litigation.

27. Any expansion of FOS's jurisdiction claim limit should be staged so as to maintain a focus on FOS's existing jurisdiction with no detriment to the consumers who rely on FOS as their only avenue of dispute resolution. An expansion of FOS's jurisdiction claim limit will also need to be accompanied by adequate resourcing and funding to effectively deliver effective dispute resolution for small businesses.

28. It is difficult to predict the number of claims that would be brought to FOS as a result of the expansion of its jurisdiction. As such, we propose incremental increases in order to gauge the market need and the capacity of FOS and to ensure a scheme that runs smoothly and effectively.

29. Slater + Gordon is confident that a collective effort to affect access to justice evinced in the above proposals will ensure that the external dispute resolution framework can adapt to a rapidly changing and dynamic financial industry and provide fair and efficient assistance to all categories of financial disputes.