

12 October 2016

Ms Jenny Peachey
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Financial Ombudsman Service

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Dear Ms Peachey

Expansion of Financial Ombudsman Service (FOS) Small Business Jurisdiction Submission

The Westpac Group (**Westpac**) appreciates the opportunity to provide comments on the FOS Small Business Jurisdiction Consultation Paper (the **Review**).

Westpac welcomes FOS's Review which is aimed at the scheme better facilitating consumer complaint resolution.

Westpac has also contributed to, and supports, the submission being made by the Australian Bankers' Association (**ABA**).

1. Westpac's commitment to doing the right thing

Westpac considers that both of our banking licences are a privilege (Australian Credit Licence (**ACL**) and Australian Financial Services License (**AFSL**)). Customers have a legitimate expectation that bankers adhere to the highest standards of practice and behaviour. Westpac, and the banking industry more broadly, has a responsibility to earn and maintain the trust of our customers and community by dealing with people fairly and honestly.

Westpac continues to focus on improving our standards to provide better customer service. We have a clear vision to be one of the world's great service companies, helping our customers, communities and people to prosper and grow. This vision is underpinned by a commitment to doing the right thing by our customers, including our approach to resolving customer complaints and issues. This commitment is reflected in:

- Our *Code of Conduct* which governs the behaviour of our people and enshrines the principle of listening and acting on customer complaints;
- Our *Principles for Doing Business* which forms the foundation of our commitment to corporate responsibility and sustainable business practice. These principles include an ongoing commitment to offering banking solutions that are simple, practical and ethical for our customers. We continue to be committed to solving issues fairly and quickly;

- Our *Principles of Responsible Lending* which govern the extension of customer and business credit;
- Our *Service Promise* which supports our focus on improving standards of service and putting the customers at the centre of what we do. This includes a model of empowerment for our people to make decisions deemed to be in the customers' interests; and
- Our core values.

2. The existing dispute resolution framework

Westpac considers that an accessible, effective, timely and efficient system for dispute resolution is central to the trust and confidence of customers in the banking system. Customers must have a 'voice' through adequate forums to have their complaint heard and appropriate avenues for appeal.

As an ACL and AFSL holder, we support the current dispute resolution regime, as prescribed in ASIC's *Regulatory Guide 165: Internal and external dispute resolution (ASIC RG165)* and agree that both an effective internal dispute resolution (**IDR**) and external dispute resolution (**EDR**) mechanism is required.

We also consider that the current dispute resolution framework encompasses:

1. A strong regulator in the form of the Australian Securities and Investments Commission (ASIC); and
2. The Australian court system.

Westpac continues to advocate a "user pays" funding model for ASIC, which will ensure ASIC continues to be appropriately resourced to investigate matters brought to their attention.

In addition, Westpac engaged in ASICs consultation process on *Regulatory Guide 256: Client review and remediation conducted by advice licensees (RG256)*. Westpac is building the key principles of RG256 into our internal policies and procedures, and are extending the application of these principles to advice and financial products more broadly.

3. Westpac comments on the FOS Consultation Paper

Westpac commends the extensive improvements FOS has made over recent years to increase the efficiency and effectiveness of the scheme, including communication processes, responsiveness and implementation of FOS Fast Track.

The FOS Consultation Paper poses a number of questions. Westpac's responses to these questions are set out in **Attachment A**. However, to assist FOS's review of Westpac's response, we offer the following high level comments:

- Support for the underlying principle that FOS should be accessible to retail and small business customers and deliver meaningful compensation where appropriate. We note that FOS is particularly important where customers do not have the resources to utilise the Court process.
- Broad support for an increase in eligibility thresholds and compensation limits, but does

not consider the following changes appropriate:

- An increase of the monetary limit threshold for a Small Business Credit Facility (SBCF) dispute to \$10 million; and
- A prohibition of debt recovery proceedings in respect of facilities up to \$10 million while a dispute is being considered by FOS.
- Rather Westpac proposes the introduction of a new definition of 'small business' (in Attachment A). This definition takes into account a broader range of small business attributes than the current employee (FTE) metric definition;
- Westpac recommends the following monetary limits are increased for a SBCF dispute:
 - Increase jurisdiction claim limits from \$500,000 to \$2 million (for direct financial loss);
 - Increase compensation cap for claims from \$309,000 per claim to \$2 million; and
 - Credit facility limit for a debt related SBCF dispute (in line with the proposed definition of small definition attached) i.e. \$3 million loan facility or \$3 million total credit exposure (increased from current cap of \$2 million).
- Westpac therefore does not support the Review's proposed approach to defining a SBCF; and
- Note that increase to eligibility thresholds and monetary limits will require an increase in funding and the capabilities of the scheme to assess matters (for example, to examine more complex small business lending matters).

Westpac appreciates the opportunity to provide input into this Review and would welcome the opportunity to discuss these issues further. Should you require any further information or to respond to this submission, please contact Sarah Brooks on (02) 8219 8985 or by email at sarah.brooks1@westpac.com.au

| Proposal | Feedback Questions from FOS | Responses to Feedback |
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| Proposal 1 | | |
| <p>Proposal 1.1: Amend the FOS terms of reference ("TOR") to:</p> <ul style="list-style-type: none"> • 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. • Include a definition of "small business credit facility" | <p>Consultation questions for Proposals 1.1 to 1.3:</p> <p>P1Q1: Do you agree with FOS expanding its small business jurisdiction and Proposals 1.1 to 1.3? If not, why not?</p> <p>P1Q2: How would the Proposals affect your organisation or constituents? Wherever possible, could you quantify any costs or benefits anticipated and include examples?</p> <p>P1Q3: Can you provide other information about the effect of the Proposals?</p> <p>P1Q4: Do you suggest changes to the new monetary limits in Proposal 1.1, and if so, what should the limits be and why?</p> <p>P1Q5: 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?</p> | <p>Small Business Credit Facility Disputes</p> <p>1. Definition of Small Business</p> <p>We note there are a number of definitions of "small business" that are currently utilised by the Government, regulators (including ASIC, the Australian Prudential Regulation Authority, the Reserve Bank of Australia) and other bodies (the Australian Taxation Office). These define a "small business" according to various attributes including employee numbers, annual turnover, and contract size.</p> <p>Westpac characterises a small business on the basis of total credit exposure - as an entity or group of related entities with total credit exposure below \$3 million. However, Westpac also complies with its legislative and regulatory reporting obligations in accordance with the applicable definition of small business contained in the relevant legal or regulatory instrument. For example, the definition of a small business standard form contract for the purposes of extending unfair contract terms legislation to small business under the Australian Consumer Law. Accordingly, the definition of a 'small business' differs, even within Westpac, across these differing legal and regulatory obligations.</p> <p>Westpac considers FOS's current definition of "small business" (insofar as it focuses solely on employee numbers) is problematic. For example, staff numbers of small businesses may fluctuate so a business could fall in and out of the definition during the relevant period. Westpac would support a more holistic approach to categorisation of small businesses, specifically the inclusion of metrics involving credit exposure and revenue, which are more determinative characteristics of a small</p> |
| <p>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:</p> <ul style="list-style-type: none"> • Attend a compulsory conference; and • Ensure that a relevant third party also attends the conference. | | |

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| <p>Proposal 1.3: 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"> o Monetary limit provisions within proposal 1.1 based on existing provisions paragraphs 5.10, 5.1r, 13.1d and Schedule 2 • Incorporate by reference the general dispute resolution process provisions in Section C that apply to all dispute types | | <p>business. This definition could be used consistently across Government, regulators and the industry.</p> <p>Westpac proposes that a business be defined on an exclusionary basis i.e. if it is “too big” on the basis of key attributes being met. Westpac recommends the following definition in line with the Australian Bankers’ Association submission:</p> <p>A business is not a small business if one of the following conditions is met:</p> <ul style="list-style-type: none"> • The number of employees is 20 people or more, or 100 people or more if the business is or includes the manufacture of good (full-time equivalent); or • Annual business turnover is \$5 million or more; or • Size of loan for business purposes is \$3 million or more; or • Total credit exposure of the business group, including related entities, to all credit providers is \$3 million or more. <p>This definition will ensure that larger businesses are appropriately excluded from the definition of small business. For example, we do not consider a large corporate borrower who employs all of its staff via a separate standalone services company, and yet has, potentially billions of dollars of assets should be regarded as a small business.</p> <p>Westpac recommends the FOS TOR should be established in line with this definition i.e. to determine whether an applicant’s credit dispute should be considered by the scheme in accordance with its TOR.</p> <p><i>b) Proposed definition of ‘small business credit facility’</i></p> <p>We note that, while FOS proposes to define “Small Business Credit Facility”, it has not included a proposed definition in the consultation paper. We also note there is no proposal in the Consultation Paper to amend the definition of “small business”. Westpac therefore assumes the following definition of “small business credit facility”</p> |

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| | | <p>is being proposed:</p> <ul style="list-style-type: none"> • Small business limb: a business that, at the time of the act or omission by the FSP that gave rise to the dispute: <ul style="list-style-type: none"> ○ had less than 100 employees (if the business is or includes the manufacture of goods); ○ otherwise, had less than 20 employees. • Credit facility limb: “Credit Facility” of a “Small Business” (noting that this is not currently defined by FOS nor is it defined in the National Credit Code (Schedule 1 of the National Consumer Credit Protection Act 2009) or the <i>Corporations Act 2001</i>). <p>In line with the comments above, Westpac does not consider the current FOS definition of ‘small business’ (based solely on an employee metric) is appropriate.</p> <p>In addition, Westpac does not support replacing “credit contract” (which aligns with the definition in the National Credit Code with “credit facility” in paragraph 5.1c of the TOR (Proposal 2.1 of the Consultation Paper). The Consultation Paper does not explain the basis of the proposed change nor provide a definition for “credit facility” (Proposal 2.1). Westpac supports the ABA’s request for further clarification of the reason for the proposed change.</p> <p>If “credit contract” is replaced with “credit facility”, this term will require definition – either within the TOR or by reference to statute or instrument. We note that “credit facility” is:</p> <ul style="list-style-type: none"> • not currently defined in the National Credit Code (however, does contain a definition of “consumer credit product” which includes any form of facility for the provision of credit); and • is described by a non-exhaustive list of financial products and service under the Corporations Regulations 2001 (Cth). <p>In addition, it is unclear why FOS is unable to deal with situations of financial hardship under both regulated and unregulated credit contracts, or why the existing TOR requires change.</p> |

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| | | <p>The redrafting of TOR 9.1b may have significant impact and Westpac supports the ABA's request for further clarification of proposal 2.1 to better determine the potential impact of the proposal.</p> <p>c) Monetary Limits</p> <p>Westpac recommends the following monetary limits are increased for a SBCF dispute:</p> <ul style="list-style-type: none"> • Increase jurisdiction claim limits from \$500,000 to \$2 million (for direct financial loss); • Compensation caps for claims from \$309,000 per claim to \$2 million; and • Credit facility limit for a debt related SBCF dispute (in line with the proposed definition of small definition above) i.e. \$3 million loan facility or \$3 million total credit exposure (increased from current cap of \$2 million). |
| Proposal 2 | | |
| <p>Proposal 2.1:</p> <ul style="list-style-type: none"> • In paragraph 5.1c, replace "Credit Contact" with "credit facility" • Reword paragraph 9.1b so that it refers to the forgiveness of debt of variation or a credit facility • Delete paragraph 9.1f. | <p>Consultation questions for Proposal 2.1:</p> <p>P2Q1: Do you agree with Proposal 2.1? If not, why not?</p> <p>P2Q2: Would Proposal 2.1 affect your organisation or constituents? Where possible, quantify any impact anticipated and include examples.</p> | |
| Proposal 3 | | |

| Proposal | Feedback Questions from FOS | Responses to Feedback |
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| <p>Proposal 3.1: In paragraph 5.1p: <ul style="list-style-type: none"> • Replace “in excess of 20” with “20 or more”; and • Insert “or more” after “100”. </p> | <p>Consultation questions for Proposal 3.1: P3Q1: Do you agree with Proposal 3.1? If not, why not? P3Q2: Would proposal 3.1 affect your organisations or constituents? Where possible, quantify any impact anticipated and include examples</p> | <p>We refer to our comments in response to proposal 1 concerning the definition of “small business”, and additionally seek consideration of the definition of “small business” to ensure that businesses which seek to resolve disputes by way of FOS are truly small businesses.</p> |
| Proposal 4 | | |
| <p>Proposal 4.1: In terms of the operation of an expanded small business jurisdiction, we propose to: <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 </p> | <p>Consultation questions for Proposal 4.1 and commencement date: P4Q1: Do you agree with Proposal 4.1? If not, why not? P4Q2: Would proposal 4.1 affect your organisations or constituents? Where possible, quantify any impact anticipated and include examples. P4Q3: 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?</p> | <p>Westpac considers that a mid-2017 commencement date for changes to the jurisdiction would <u>not</u> be feasible. Westpac is also considering the Government review of External Dispute Resolution schemes, and resulting TOR, which will be completed by March 2017 (EDR TOR review). As part of the EDR TOR review, Westpac will be required to consider policy, procedure and infrastructure changes necessary to implement the EDR TOR, which will likely impact Westpac’s internal dispute resolution in addressing FOS claims. Given these timings, Westpac supports the ABA’s submissions that FOS defers the date to ensure that all issues that affect commencement are clearly resolved and allow sufficient time for our members to make any necessary changes.</p> |
| Proposal 5 | | |

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| <p>Proposal 5:</p> <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) | <p>Consultation questions for Proposal 5:</p> <p>P5Q1: Do you agree with Proposal 5.1? If not, why not?</p> | <p>Westpac does not propose to respond to proposal 5 at this time and has no further comments.</p> |
| Proposal 6 | | |
| <p>Proposal 6.1:</p> <ul style="list-style-type: none"> • Replace paragraph 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>Consultation questions for Proposals 6.1 - 6.5:</p> <p>P5Q1: Do you agree with Proposals 6.1 - 6.5? If not, why not?</p> | <p>Westpac makes the following comments:</p> <ul style="list-style-type: none"> • Proposal 6.1: Westpac supports a proposal to explain that different versions of the TOR apply to disputes depending on when they were lodged. This will likely provide further clarity in circumstances when the TOR has been amended numerous times in recent years. • Proposal 6.2: Westpac repeats its comments regarding eligibility thresholds and compensation limits in response to proposals 1 – 3. • Proposal 6.3 Westpac has no comments concerning the replacement of: <ul style="list-style-type: none"> ○ “Privacy Commissioner” with “Officer of the Australian Information Commissioner” or ○ “Uniform Consumer Credit Code” with “National Credit Code” or “applicable credit legislation”. • Proposal 6.4: Westpac has no objection to amendments necessary to make references to “FOS” consistent within the TOR. |
| <p>Proposal 6.2:</p> <ul style="list-style-type: none"> • 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. | | |

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| <p>Proposal 6.3:</p> <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”. | | <ul style="list-style-type: none"> • Proposal 6.5: Westpac has no comments on the proposed amendment. |
| <p>Proposal 6.4:</p> <ul style="list-style-type: none"> • Refer to FOS consistently throughout the TOR using the abbreviation “FOS” unless the pronoun “we” is more appropriate. | | |
| <p>Proposal 6.5:</p> <ul style="list-style-type: none"> • In paragraph 6.1d, replace “accept the” with “consider any”. | | |

