

AUSTRALIAN CONSUMER LAW CONSULTATION

SUBMISSION BY FINANCIAL OMBUDSMAN SERVICE ("FOS")

Introduction

This is the submission by FOS to the paper developed by the Standing Committee of Officials of Consumer Affairs, *An Australian Consumer Law: Fair Markets – Confident Consumers* (the "Paper"). The submission has been prepared by the office of FOS and does not necessarily represent the views of the board of FOS.

This submission draws on the experience of FOS and its predecessors in dealing with disputes concerning financial services providers.

Information about FOS

FOS commenced operations on 1 July 2008. It is an independent dispute resolution scheme that was formed through the consolidation of three schemes: the Banking and Financial Services Ombudsman ("BFSO"); the Financial Industry Complaints Service ("FICS"); and the Insurance Ombudsman Service ("IOS"). On January 2009, two other schemes joined FOS, namely the Credit Union Dispute Resolution Centre ("CUDRC") and Insurance Brokers Disputes Ltd ("IBD").

FOS is an external dispute resolution ("EDR") scheme approved by ASIC. Membership of FOS is open to any financial services provider carrying on business in Australia including providers not required to join a dispute resolution scheme approved by ASIC. Replacing the schemes previously operated by BFSO, FICS, IOS, CUDRC and IBD, FOS provides free, fair and accessible dispute resolution for consumers unable to resolve disputes with financial services providers that are members of FOS.

Members of BFSO, FICS, IOS, CUDRC and IBD are now members of FOS. The members of those schemes included the organisations noted below:

- BFSO – Australian banks and their related corporations, Australian subsidiaries of foreign banks, foreign banks with Australian operations and other Australian financial services providers;
- FICS – life insurance companies, fund managers, friendly societies, stockbrokers, financial planners, pooled superannuation trusts, timeshare operators and other Australian financial services providers;
- IOS – general insurance companies, re-insurers, underwriting agents and related entities of member companies;
- CUDRC – credit unions;
- IBD – insurance brokers, underwriting agents and other insurance intermediaries.

It is estimated that FOS covers up to 80% of banking, insurance and investment disputes in Australia. As well as its functions in relation to dispute resolution, FOS

has powers to identify and resolve systemic issues and obligations to make certain reports to ASIC.

FOS is led by me as Chief Ombudsman and governed by an independent board of consumer representatives and financial services industry representatives.

Issues arising from reforms

The Paper explains how the Australian Consumer Law (the "ACL") will be developed. However, it does not explain how certain issues arising from the reforms will be addressed. Comments on these issues are set out below.

Application of ACL and investor protection provisions of Australian Securities and Investments Commission Act 2001(Cth) ("ASIC Act Provisions")

We note that the ACL will not apply in relation to financial services. A distinct legislative framework for financial services will be retained. ASIC will continue to be the primary regulator for financial services and the ACL will be enforced by the ACCC and state and territory consumer regulators. It will be crucial for stakeholders to understand whether, in particular circumstances, the ACL applies or the ASIC Act Provisions apply. We believe that guidance on this matter should be provided.

Amendments of ACL and ASIC Act Provisions

The ACL and the ASIC Act Provisions will be different from the outset. Amendments made to one will not necessarily be made, or made in the same terms, to the other. Also, amendments to the ACL and the ASIC Act Provisions will be made through different processes. It appears that amending the ASIC Act Provisions will be simpler and quicker than amending the ACL. We note, however, that a major goal of the reforms is to promote consistency in all Australian consumer laws and the commitment to consistency between the ACL and the financial services legislation referred to on page 24 of the Paper.

It is not clear from the Paper whether, if an amendment to an ASIC Act Provision with an equivalent in the ACL needs to be made, it will only be possible to make that amendment if an equivalent amendment to the ACL is to be made. If so, the reform may introduce an impediment to amendments of the ASIC Act Provisions. Even if the ACL position has to be merely taken into account whenever the ASIC Act Provisions are amended, significant delays may arise. We anticipate that an agreement to address these issues will be required.

Information for consumers

Attachment A to the Paper states that the Ministerial Council on Consumer Affairs "proposes that the Commonwealth would work in consultation with state and territory governments to develop an enhanced national web-based information tool for guiding consumers to the appropriate dispute resolution body as well as providing other consumer information". Given the complexity of the proposed arrangements for regulation and administration, we consider that this mechanism is necessary. There does not seem to be any reference to this matter in the body of the Paper.

Matters raised in consultation questions

New name for *Trade Practices Act 1974* ("TPA")

We support the proposal to rename the TPA as the *Competition and Consumer Act*. We believe that the name of legislation should make clear its functions and that the proposed name would achieve that result.

Unfair contract terms

The proposed unfair contract terms provisions will operate in respect of certain matters provided for in existing financial services legislation. To give an example of the "overlap", we refer to section 53 of the *Insurance Contracts Act 1984* (Cth), which effectively prevents an insurer from varying a contract to the detriment of a consumer. Any overlapping legislation will need to be taken into account in the development of unfair contract terms provisions to apply in relation to financial services. As there is a commitment to make those provisions consistent with the ACL unfair contract terms provisions, it seems that the overlapping legislation will also need to be taken into account in the development of the ACL.

Whether a contract is a standard form contract will be a central issue under the unfair contract terms provisions. The *Insurance Contracts Regulations 1985* include standard contracts for certain categories of insurance. Presumably, insurance contracts that depart from the forms in the regulations may be standard form contracts for the purposes of the unfair contract terms provisions. This may need to be clarified, however.

Standard form contracts are used widely in the financial services industry at present. The proposed unfair contract terms provisions might prompt financial services providers to reduce their use of such contracts. If they do, we would expect the number and complexity of disputes to increase. Increases of this kind would have implications for the resourcing of dispute resolution services.

Definition of "consumer"

FOS provides dispute resolution services to certain small businesses as well as individual consumers. The predecessors of FOS also provided dispute resolution services to small businesses. In our experience, the small businesses that access our services generally are in no better position than individual consumers in disputes with financial services providers. This suggests to us that those small businesses should have the same degree of protection as individual consumers.

Whether an individual or a business has access to the dispute resolution services provided by FOS is determined by Terms of Reference ("TOR"). As previously mentioned, FOS was formed recently through a consolidation of EDR schemes. It is currently in a transitional phase in which it operates in accordance with modified versions of the TOR of its predecessors, while developing TOR for the new organisation.

The modified versions of the TOR of the predecessors of FOS do not have uniform provisions governing access by small businesses. It is convenient for present purposes to focus on the BFSO provisions. They provide access to an individual or "small business" meeting stated criteria and define "small business" to mean -

- "a business, which at the time the events relating to the dispute occurred, had:
- (a) if the business is or includes the manufacture of goods – less than 100 full time (or equivalent) employees; or
- (b) if the business is of another nature – less than 20 full time (or equivalent) employees."

The process of developing TOR for the merged organisation of FOS has involved extensive consultation. One aspect of the consultation has been to determine access to FOS, which, in essence, hinges on the question of who should be treated as a consumer. The TOR have not yet been finalised. When they are finalised, the access provisions could be taken into account in the development of the ACL definition of "consumer". In our view, it is desirable to make the provisions as consistent as possible. If the provisions were consistent, the group afforded consumer protection under the ACL and the corresponding financial services legislation would also be the group with access to the EDR services of FOS.

Door-to-door trading and telemarketing

Sales practices in relation to financial services are regulated pursuant to the *Corporations Act 2001* (Cth) (the "Corporations Act"). If provisions to regulate door-to-door trading and/or telemarketing are to be included in the ACL, to honour the commitment to consistency referred to above, consistent provisions will need to be included in financial services legislation. In the development of those provisions, the existing Corporations Act regime to regulate sales practices will need to be taken into account. It seems that this regime will also need to be taken into account in the development of the ACL door-to-door trading and/or telemarketing provisions.

Based on our dispute resolution experience, we agree with the statement on page 67 of the Paper that, in telemarketing and door-to-door sales, the consumer may be subject to actual or perceived pressure and may not have the opportunity to compare alternative offers. In our view, the measures imposed to address these issues should include a reasonably substantial cooling off period.

Many purchases of financial products made over the telephone are paid for by credit card. From disputes that arise from such purchases, it seems that questions about the propriety of the transactions, such as whether a purchase was made due to pressure, are rarely raised between the time of purchase and the receipt of the credit card statement that refers to the purchase. A 14 day cooling off period may expire before a relevant credit card statement is received. However, a cooling off period long enough to allow for receipt of a monthly credit card statement may be unjustifiably long from a business perspective due to, for example, the uncertainty that would result.

Disclosure

Questions on pages 91 and 92 of the Paper ask whether the ACL should include certain disclosure provisions. Observations about disclosure based on our experience

in the resolution of disputes concerning financial services, including credit, are set out below. We believe that the observations are relevant to the discussion about what disclosure provisions the ACL should include given the commitment to maintain consistency between those provisions and the financial services legislation.

- Many consumers do not read disclosure documents due to their length and complexity or because they look as though they are too difficult to understand. We therefore support steps to make disclosure documents shorter, simpler or more readable.
- Current laws prohibiting misleading or deceptive conduct do not ensure that all disclosure documents for products adequately highlight all of the important information about the products. It may be necessary to impose more specific requirements to make clear negative aspects of products. To expand this point, there are notes below reflecting conclusions drawn from disputes concerning margin loans and “break costs” (costs incurred by consumers with fixed rate loans who vary the loan terms). In our view, if disclosure requirements were altered to address the issues outlined, numbers of complaints and disputes would be likely to fall.

Margin loans

From margin loan cases, it is apparent that consumers and salespeople tend to focus on the advantages and growth opportunities of a product in a rising market. A common scenario is that risks associated with margin loans are fully and accurately disclosed, but the consumers do not appreciate them. To address the positive bias referred to above, it may be necessary to require particular attention to be drawn to the possibility of negative outcomes.

Break costs

As in margin loan cases, a common scenario is that break costs are fully and accurately disclosed, but the consumers are not aware of their possible liabilities. Again, the tendency to focus on advantages in a rising market has been evident. Formulas and other devices to calculate costs may be difficult to understand and, even if they are not, may appear to be complicated or confusing. So many consumers do not read this material, and consumers who do read it may not understand it. This type of material may need to be summarised in simplified terms or made especially prominent to be conveyed effectively.

Paragraph 1013D(1)(g) of the Corporations Act requires a product disclosure statement for a product to include information about the dispute resolution system that covers complaints by holders of the product and how that system may be accessed. Access to dispute resolution is an important element of consumer protection. We submit that, when disclosure requirements for documents not subject to the Corporations Act product disclosure statement regime are considered, thought should be given to including a requirement along the lines of paragraph 1013D(1)(g).

The first question on page 92 of the Paper concerns disclosure of a supplier’s address. The most crucial contact details for a consumer in a financial services

transaction may be contact details of the issuer of a financial product or of an authorised representative. An address may not be particularly useful. We refer to paragraph 1013D(1)(a) of the Corporations Act, which states the requirements to provide names and contact details in product disclosure statements.