



Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017

Submission to
Senate Standing Committees on Economics

29 September 2017



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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence. While maintaining our plaintiff common law focus, our advocacy has since expanded to criminal and administrative law, in line with our dedication to justice, freedom and rights.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

¹ www.lawyersalliance.com.au.



Introduction

1. The Australian Lawyers Alliance (ALA) welcomes the introduction of the Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017 to the Parliament, and the opportunity to comment in the Bill in this consultation. The Bill provides for a simpler and broader regime that addresses all financial complaints. We believe that the Bill will enhance consumer confidence in the management and determination of complaints about financial service providers (FSPs).
2. However, there are some aspects of the Australian Financial Complaints Authority (AFCA) scheme which have not been included in the Bill that in our view are critical to the maintenance of the confidence of consumers in the scheme and the effectiveness of the AFCA.
3. In particular, the issue of gaps between jurisdictional limits and compensation caps should be addressed by the Bill. Consumers' rights to representation before AFCA should also be secured. The problem of determinations by AFCA remaining unpaid is not addressed. This is a critical area that requires government intervention. A simple solution would be to require professional indemnity insurers to be members of the scheme and allowing AFCA to bind those insurers to a determination. The right of appeal by consumers on points of law to the Federal Court ought to be expanded to include non-superannuation complaints. However, determinations in favour of consumers should be binding on the financial services provider unless they agree to pay the costs of the appeal regardless of its outcome.
4. We also recommend that the ability for both parties to a determination to be consulted on the appointment of experts to assist with the determination of complaints should be legislated.

Jurisdictional limits and compensation caps

5. In relation to superannuation complaints, the Bill quite properly ensures that no jurisdictional or compensation limits are imposed on those complaints. The Bill is, however, silent in that regard with respect to non-superannuation complaints. The current terms of reference for the Financial Ombudsman Service (FOS) has a discrepancy between the jurisdictional limit for complaints to be heard and the compensation that can be awarded. The jurisdictional limit exceeds the maximum compensation available,



which is a disparity that appears to have no logical basis. It is noted that the Ramsay Review has recommended the raising of the jurisdictional limit to \$1M and the compensation cap to \$500,000.00.² Ramsay recommends that further inquiry be undertaken as to the competition effects of also increasing the compensation cap to \$1M with noted concern about the ability of smaller FSPs to access professional indemnity insurance if the cap is increased.

6. While it is appropriate that the Parliament allow the industry to determine an appropriate jurisdictional limit, the jurisdictional limit should be required to be the same as any compensation cap. This is a critical requirement for consumers to have confidence that their complaint will be dealt with fairly and an appropriate remedy will be available through AFCA. There is simply no sound policy basis to justify an alternative situation.
7. There is little doubt that the industry-based authority will likely seek to limit the compensation able to be awarded by the authority to below its jurisdictional limit, as has been the practice in FOS. The Parliament must ensure that this does not occur, in line with the general considerations in proposed s1051A of the *Corporations Act 2001* (Cth) about the fairness, accountability and effectiveness of the scheme.
8. If further inquiry is required about the impact on professional indemnity premiums the Government should ensure that this occurs as soon as possible.

The role of professional indemnity insurers

9. Most FSPs will have some form of professional indemnity insurance that would respond to, in particular, non-superannuation complaints. Unfortunately there have been an unacceptable level of determinations made by FOS which have not been paid, leaving the consumer without any remedy despite having a favourable determination from that scheme. This issue was highlighted by the FOS in January 2016:

‘Since 1 January 2010:

- 34 FSPs have been unwilling or unable to comply with 136 FOS determinations made in favour of approximately 192 consumers’; and...

² Ramsay et al, ‘Final Report: Review of the Financial System External Dispute Resolution and Complaints Framework’, 3 April 2017 at p149.



- 'the real value of this uncompensated loss remains at [January 2016] \$16,622,513.74.'³
10. There is clearly a real problem with enforcement of determinations made by a scheme like FOS. It follows that AFCA will face a similar problem unless a legislated solution is introduced. A simple remedy to this major problem is to ensure that the professional indemnity insurers of FSPs are required to be members of the AFCA. AFCA should also be given the specific power to join professional indemnity insurers of FSPs to a complaint and bind them to the determination. There is currently no ability for a complainant to even identify whether there is a professional indemnity insurer available, let alone any direct recourse for the complainant against that professional indemnity insurer in the event that a determination remains unpaid. Without legislative intervention this significant problem will persist. This simple solution will also ease the pressure on any compensation scheme of last resort that the government may be contemplating.
 11. It is accordingly strongly recommended that the Bill be amended to allow AFCA to join professional indemnity insurers to a complaint and that determinations of AFCA be binding on that professional indemnity insurer. The Bill gives AFCA power to join other parties including an insurer to superannuation complaints. There is no good policy reason why this power cannot be extended to non-superannuation complaints, particularly given the significant underpayment problem referred to above.
 12. It is further submitted that in order to ensure accountability and transparency in the complaints process that AFCA should administer a register of professional indemnity insurers to their FSP members which is searchable by consumers so that any remedy, where there is insurance available, can be enforced. It would be a relatively simple exercise on the part of AFCA to maintain those records as part of the membership and renewal process. It is appropriate that the legislation be amended to require that a register be maintained and searchable by consumers.

³ Financial Ombudsman Service Australia, *Unpaid determinations update* (January 2016) <https://www.fos.org.au/fos-circular-24-home/fos-news-and-events/unpaid-determinations-update/>.



Representation

13. The Bill is silent in relation to the ability of consumers to be represented before AFCA. The *Superannuation (Resolution of Complaints) Act 1993* (Cth) specifically allowed for representation in certain circumstances. FSPs are well resourced and will have effectively unlimited access to legal advice and assistance throughout any complaint process. Failing to secure a consumer's right to equal representation would be a significant flaw in the AFCA. The Bill ought to be amended to ensure that consumers can be represented by any person of their choice, including lawyers. The *Superannuation (Resolution of Complaints) Act 1993* (Cth) provided for representation to be permitted within certain circumstances and with the permission of the Superannuation Complaints Tribunal (SCT). A similar filter on the appropriateness of representation can be provided to AFCA but fundamentally a consumer's right to representation ought to be enshrined in the legislation to ensure that the likely imbalance between FSPs and individual consumer's access to legal advice is rectified.
14. The Bill is also silent in relation to the recovery of costs incurred by a consumer in bringing a complaint. Costs were not recoverable via the SCT which was a significant impediment to consumers' ability to pursue superannuation complaints in an effective and efficient manner. It meant that more consumers were unrepresented. Unrepresented complainants typically lack an adequate understanding of the financial product complained of, the nuances of a complaints resolution process and the law which applies with respect to these matters.
15. Having legal representation can have a number of positive impacts on the efficiency and effectiveness of the AFCA. For example, where consumers are able to recover costs they will more readily seek advice from lawyers prior to lodging complaints, which will naturally filter out complaints that are either unworthy or have limited prospects of success. Lawyers focus on the real issues that will determine a claim and the evidence required to prove it. Their expertise will mean the process is run as efficiently as possible, reducing the material produced for and time taken to deal with a complaint. If the Bill genuinely seeks to put consumers first, they ought to be put on the same footing as the FSP that they are complaining against by ensuring they have access to quality legal advice.
16. As is the case in the courts, where a party is successful in pursuing a complaint they are awarded appropriate reimbursement of the costs incurred. It is a fundamental principal of the Australian legal system that costs ought to follow the event. Making costs



recoverable will also financially motivate FSPs to take an interest in resolving complaints at an early stage. This incentive should not be underestimated. Appropriate caps and limits can be placed on the recovery of costs comparable to the jurisdictional limit. The rights to recover costs and to representation are fundamental to the integrity of the AFSA, however, and should be enshrined in the legislation.

Appeals on points of law

17. The Bill preserves the current status quo in relation to superannuation complaints which allows for an appeal on a matter of law to the Federal Court. Non-superannuation complainants should also have that option.
18. It can be seen by the leading decisions in the area that court supervision of FOS or the Credit and Investments Ombudsman (CIO) has been very limited. See for example *Mickovski v FOS Ltd & Anor* [2012] VSCA 185 and *Goldie Marketing & Ors v FOS Ltd & Australian and New Zealand Banking Group Ltd* [2015] VSC 292.
19. Putting consumers first requires that consumers be on equal ground with FSPs, regardless of whether their complaint relates to superannuation or not. All users of FSPs' products ought to have this fundamental right available to them. This is particularly important given that the Bill exempts AFCA from judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (see the Bill, Sch 1, pt2, cl11).
20. It is noted that a 28-day appeal period is provided for in the Bill. In most cases, consumers using AFCA will be unrepresented. The 28-day appeal period is too short a time for a consumer to engage a legal representative, enable that representative enough time to consider the available evidence and take instructions on matters which may have been long standing and complex and then prepare and issue appeal proceedings. It is recommended that the appeal period be extended to at least 35 days to enable consumers, or FSPs if they are the appellant, enough time to properly engage legal representation and ensure that any appeal is properly researched and prepared before the resources of the court are engaged.

Operational requirements – availability of expert evidence

21. The Bill proposes insertion of s1051(4)(c) into the *Corporations Act 2001* (Cth), which would impose an operational requirement that appropriate expertise be available to deal with complaints. Both superannuation and non-superannuation complaints



commonly involve significant complexity and technicality. The availability of independent experts who have the confidence of both parties would go a long way towards resolving disputes in a timely and effective way.

22. It is recommended that the Bill be expanded to require AFCA to consult the parties to a complaint and take into account their preferences as to the nature and even the identity of the expert(s) to be engaged. The mechanism as to how that might work in practice can be left to AFCA, but the Bill should leave AFCA in no doubt that the parties ought to be heard and their positions considered when it comes to the gathering of expert opinion about complaints.

Recommendations

23. The ALA makes the following recommendations:
 - a. legislation should require that any jurisdictional limit be matched by any compensation limit, to ensure fairness to consumers;
 - b. professional indemnity insurers should be required to be members of AFCA;
 - c. AFCA should be able to join professional indemnity insurers to complaints and such insurers should be bound by its determinations where appropriate;
 - d. the right for complainants to be represented before AFCA by a person of their choice, including a lawyer, should be enshrined in legislation;
 - e. costs should be recoverable by complainants throughout the process;
 - f. appeals by the consumer to the Federal Court should be provided for where appropriate, especially given the exclusion of these claims from the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*;
 - g. the appeal period should be extended from 28 days to at least 35 days, to enable appellants to engage legal representation and ensure that any appeal lodged is properly researched and prepared before the resources of the court are engaged; and
 - h. AFCA should be required to consult the parties to a complaint and take their expert engagement requests into account: the Bill should leave AFCA in no doubt that the parties ought to be heard and their positions considered when it comes to the gathering of expert opinion about complaints.