



Australian Small Business and Family Enterprise Ombudsman Bill 2015

Financial Ombudsman Service Australia Submission

July 2015



1 Overview

In this submission the Financial Ombudsman Service Australia (FOS)¹ comments on the *Australian Small Business and Family Enterprise Bill 2015* (Bill), which is being examined in an inquiry by the Senate Legal and Constitutional Affairs Committee.

We thank the Committee for giving us an opportunity to make this submission. We would be pleased to discuss the issues and suggestions outlined in the submission.

FOS is an independent dispute resolution scheme that handles consumer disputes across the financial sector. We provide services to resolve disputes between financial services providers (that are members of FOS) and consumers, including certain small businesses.

FOS is approved by the Australian Securities and Investments Commission (ASIC) to operate as an external dispute resolution (EDR) scheme² and is recognised by the Office of the Australian Information Commissioner. However our jurisdiction to deal with disputes is based on our contracts with our members and is not conferred by, or based on, legislation.

FOS has participated in discussions and made written submissions in response to the discussion paper released in April 2014³ and the exposure draft of the Bill dated 11 March 2015⁴ relating to the establishment of the Australian Small Business and Family Enterprise Ombudsman (New Ombudsman). The key point made in our last submission was that the legislation should ensure all disputes that are referred to the New Ombudsman, but fall within our jurisdiction, can efficiently be transferred to FOS.

We appreciate that the Bill has been modified in a way that provides a response to our key point about transfers of disputes. However, we seek further modifications because:

- the amended provisions in Division 2 of Part 4 do not provide fully for transfers to FOS, and
- the amended definition in section 8 of ‘agency of the Commonwealth, a State or a Territory’ may have unintended consequences for FOS that could adversely affect EDR arrangements for financial services.

¹ Information about FOS, and the disputes we handle, is available on our website www.fos.org.au. Overview information appears in our annual review, which is in “Publications” on the website. This submission has been prepared by the Office of the Chief Ombudsman and does not necessarily represent the views of the Board of FOS. It draws on the experience of FOS and its predecessors in the resolution of disputes about financial services.

² FOS is approved pursuant to ASIC’s Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes*, which is available on www.asic.gov.au under “Regulatory Resources”.

³ Use this link to access our **submission** in response to the discussion paper.

⁴ Use this link to access our **submission** in response to the exposure draft.

Our submission explains these issues and suggests solutions. The following provides a summary of the suggested solutions:

Suggested solution	Details
Insert new definition of 'agency' for the purposes of the legislation, separate from section 8	<p>In a new section (which could be section 8A):</p> <ul style="list-style-type: none"> define 'agency' to mean a body (whether incorporated or not) prescribed for the purposes of the legislation and provide that the legislation applies to a prescribed body as it applies to an agency of the Commonwealth, a State or a Territory, as specified when the body is prescribed. <p>Add a note to the new section explaining that prescribing a body for the purposes of the legislation is not an indication that the body should be considered a public agency for any other purposes or to be carrying out a public function.</p>
Amend paragraph 70(2)(b)	Adopt a drafting approach in paragraph 70(2)(b) consistent with paragraphs 69(1)(b) and 69(2)(b).
Amend subsections 69(7) and 70(5)	Amend subsections 69(7) and 70(5) to eliminate issues they could create in transfers of disputes to FOS.

The suggested insertion of a new definition of agency would need to be taken into account in other relevant sections. In particular, the new section would need to be drafted so that provisions applying to an agency of the Commonwealth, a State or a Territory would also apply to an agency within the new definition.

2 Issues and suggested solutions

2.1 Transfers of disputes to FOS

To meet licensing obligations imposed by Commonwealth legislation⁵, certain financial services providers must be members of an ASIC-approved EDR scheme. As FOS is an EDR scheme approved by ASIC, members of FOS hold their memberships to satisfy the licensing obligations imposed by legislation.

The Terms of Reference of FOS⁶ specify our jurisdiction. Our Terms of Reference operate as contracts between FOS and our members. The High Court decision *Griffith University v Tang*⁷ indicates that, because contracts form the basis of our authority, the obligation imposed by legislation to hold EDR scheme membership is

⁵ *Corporations Act 2001* and *National Consumer Credit Protection Act 2009*.

⁶ Use this link to access our [Terms of Reference](#).

⁷ [2005] HCA 7. See Gleeson CJ at paragraph 12 and Gummow, Callinan and Heydon JJ at paragraphs 162-163.

not enough to make the legislation the basis for our power to resolve disputes. The power is based on contracts - not on legislation.

Recent amendments to the Bill partly address this issue. The exposure draft of the Bill permitted a dispute to be transferred to a body only if the body had power, conferred by legislation, to deal with the dispute. The Bill now incorporates changes that would permit disputes to be transferred to FOS even though its power to deal with disputes is not conferred by legislation. These changes have been made in paragraphs 69(1)(b) and 69(2)(b). However, equivalent changes have not been made in other provisions referring to power conferred by legislation including paragraph 70(2)(b) and subsections 69(7) and 70(5).

We are concerned that Division 2 of Part 4, as amended, may not provide fully for transfers to FOS, as is intended. For example, paragraph 70(2)(b) appears to prevent the New Ombudsman from entering into an arrangement with FOS for the two organisations to work cooperatively together to deal with transfers.

Suggestion to amend paragraph 70(2)(b)

In paragraph 70(2)(b), we suggest changing 'under the law of the Commonwealth or of a State or a Territory, the other agency has the power' to 'the other agency has the legal power to'.

As subsections 69(7) and 70(5) are not drafted appropriately for FOS, parts of the provisions for transfers and cooperative arrangements do not apply to FOS. The wording of the subsections may raise doubt about whether any part of sections 69 and 70 apply to FOS.

The wording of subsection 69(7) could cast doubt on whether section 69 requires transfers to FOS, or complicate such transfers. Also, even if paragraph 70(2)(b) is amended as suggested above, subsection 70(5) could cast doubt on whether section 70 provides for cooperative arrangements between FOS and the New Ombudsman, or complicate such arrangements.

Suggestion to amend subsections 69(7) and 70(5)

We suggest amending subsections 69(7) and 70(5) as follows:

- in paragraph (a), delete 'under the law of the Commonwealth, State or Territory under which the other agency has power to deal with the request, or the aspect of the request (however described under that law)'
- in paragraph (b), delete 'under that law'.

2.2 Definition of agency

Current court decisions confirm that FOS is a private body rather than a public agency. This characterisation as a private body is an important element of EDR arrangements for the financial services sector that have been in place, and operated effectively, for over twenty years.

Court decisions involving FOS and its predecessor bodies establish that FOS is not exercising a public function, rather it is a private decision-maker operating under authority derived from contract.⁸

For example, *Cromwell Property Securities Limited v FOS and Radford* [2014] VSCA 179 confirmed the status of FOS as a private contractual decision-maker with authority to determine disputes derived from contract.

If FOS is prescribed as an agency of the Commonwealth, a State or a Territory for the purposes of paragraph 8(1)(d), the prescription may be taken to be an indication that FOS should be considered a public agency and could have unintended consequences detrimental to EDR in the financial services sector. We propose an alternative approach below.

We also consider that inserting a separate section to prescribe a body that is not a Commonwealth, State or Territory agency makes clearer the potential different character and basis of legal power for any such prescribed organisations to deal with relevant disputes. As explained above, in FOS's case our ability to deal with relevant disputes within our jurisdiction arises as a matter of contract with our members and not from a Commonwealth, State or Territory statute.

Suggestion to alter approach for prescribing FOS as an agency

We suggest inserting a new section that:

- defines 'agency' for the purposes of the legislation to mean a body (whether incorporated or not) prescribed under the new section for the purposes of the legislation, and
- provides that the legislation applies to a prescribed body as it applies to an agency of the Commonwealth, a State or a Territory, as specified when the body is prescribed.

We also suggest adding a note to the new section explaining that prescribing a body for the purposes of the legislation is not an indication that the body should be considered a public agency for any other purposes or to be carrying out a public function.⁹

⁸ See *National Mutual Life Association of Australasia Ltd (trading as AXA Australia) v Financial Industry Complaints Service and Mr Kevin Day* [2006] VSC 121, *Financial Industry Complaints Service v Deakin Financial Services Pty Ltd* [2006] FCA 1805, *Mickovski v FOS and Metlife* [2011] VSC 257; [2012] VSCA 185, *Cromwell Property Securities Ltd v FOS and Radford* [2014] VSCA 179.

⁹ Alternatively, the explanatory memorandum could make a statement to this effect.

The suggestion above assumes that, when a body is prescribed, the prescription specifies whether the legislation is to apply to the body as it applies to an agency of the Commonwealth, a State or a Territory. The suggested new section could replace paragraphs 8(1)(d) and 8(2)(e) if it makes them unnecessary.

In our view, the suggestion above is consistent with and supports the amendments to paragraph 70(2)(b) and subsections 69(7) and 70(5) suggested in section 2.1 of this submission, which would remove references to powers under Commonwealth, State or Territory laws.

If the drafting suggestion above presents any problems, our alternative suggestion (which may make paragraphs 8(1)(d) and 8(2)(e) unnecessary) would be to:

- delete “of the Commonwealth, a State or a Territory” from the title of section 8
- insert a new subsection 8(3) stating that a body is an agency for the purposes of the legislation if the body is prescribed to be an agency for those purposes, and
- add a note to section 8 explaining that prescribing a body for the purposes of the legislation is not an indication that the body should be considered a public agency for any other purposes or to be carrying out a public function.¹⁰

If it is not possible to implement either of the suggestions outlined above, we suggest the Bill be amended to provide for transfers of disputes to FOS to be made under a contractual arrangement, such as a memorandum of understanding, instead of transfer provisions in the legislation. We understand that the Bill only permits transfers to occur under sections 69 and 70 at present.

¹⁰ See previous footnote.