

Financial Ombudsman Service Australia

22 September 2016

By email: smallbusiness@fos.org.au

Dear Sir/Madam

Expansion of FOS's Small Business Jurisdiction – consultation paper

This submission is made in response to the consultation paper on expanding FOS's small business jurisdiction issued by the Financial Ombudsman Service Australia in August 2016.

Submission by the Australian Restructuring Insolvency & Turnaround Association

We have had the opportunity to review the submission by the Australian Restructuring Insolvency and Turnaround Association ('ARITA') and advise we support the contents of ARITA's submission. We provide the following additional comments:

Proposal 1.1 – Increased Monetary limits

We note the service provided by FOS to consumers and small business in relation to dispute resolution with financial service providers. We note the current monetary limits accord with our view of what constitutes a 'small business'. The increase in monetary limits for debt related disputes and prohibition of debt recovery proceedings from \$2 million to \$10 million, in our view, moves too far from the definition of a small business. We query how a business that has incurred \$10 million of debt can still be classified as a small business? In contrast, we note the Australian Taxation Office defines a small business as one which has less than \$2 million in annual turnover. Our experience is that a business turning over less than \$2 million per annum would probably not be able to service a \$10 million debt.

Proposal 1.2 – Dispute Resolution Processes

As insolvency practitioners, we have extensive experience in being compelled as third parties to provide information, whether that be under section 33 notices issued by the Australian Securities and Investments Commission or subpoenas in legal proceedings. Invariably, these result in considering complex legal issues in relation to legal professional privilege and our statutory obligations. We are often required to seek legal advice to address those issues. The cost of responding to these notices and subpoenas can be significant. We share ARITA's concerns that the cost of compulsory insolvency practitioners' participation in any FOS dispute resolution process will be unfairly borne by the unsecured creditors (where there are funds available to distribute) or insolvency practitioners personally (where there are no assets to distribute or where the insolvency practitioner is no longer acting in that capacity). This is to be contrasted with the courts' jurisdiction to award costs to any party who complies with a subpoena.

If you would like to discuss this submission further, please contact us on 03 8623 3333.

Yours faithfully

Mark Korda
Partner