



National Commercial Law Seminar Series Consumer and Small Business Protection

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Our current small business jurisdiction

- ▶ The Financial Ombudsman Service (FOS) Australia can consider disputes between financial services providers and some small businesses, including:
 - ▶ sole traders
 - ▶ small businesses constituted as a company, partnership, trust or otherwise
 - ▶ partnerships of individuals – if the partnership carries on a small business
 - ▶ clubs or incorporated associations – if the club or incorporated association carries on a small business.
- ▶ We can consider disputes from business that have less than 20 employees, or where the business is or includes the manufacture of goods, has less than 100 employees.
- ▶ If the dispute relates to debt recovery legal proceedings the loan contract involved must be less than \$2,000,000
- ▶ FOS considers many different types of disputes including: banking, credit cards, mortgages, general and life insurance (including small business insurance products), financial planning and investment advice.

FOS is consulting on expanding its small business jurisdiction

- ▶ FOS is consulting with interested stakeholders on expanding its small business jurisdiction
- ▶ The present proposal is to increase:
 - ▶ the contract limit from \$2,000,000 to \$10,000,000 in relation to debt recovery legal proceedings
 - ▶ The compensation limit from \$309,000 to \$2,000,000
- ▶ A copy of the consultation paper is available at:

<http://www.fos.org.au/custom/files/docs/fos-small-business-consultation-paper.pdf>

Legal Proceedings to be put on hold

- ▶ When a dispute is lodged with FOS, the FSP must stop recovery action
- ▶ If legal proceedings have been commenced, but have not gone beyond a defence and/or counterclaim, the legal proceedings must be put on hold
- ▶ The proceedings can be adjourned from time to time, but if the refuser refuses an adjournment then the FSP must discontinue the proceedings

Our process is informal and not adversarial

- ▶ In dealing with a dispute FOS will try and assist the parties reach a negotiated outcome through:
 - ▶ Negotiation
 - ▶ Conciliation
 - ▶ Investigation and decision
- ▶ A decision by FOS is not binding on the consumer/small business
- ▶ However, if a consumer/small business accepts the FOS decision, it is binding on the FSP

How we decide disputes

- ▶ Under the Terms of Reference, when deciding a dispute, FOS must do what it considers to be fair and reasonable in all of the circumstances, having regard to:
 - ▶ Legal principles
 - ▶ Applicable industry codes or guidance as to practice
 - ▶ Good industry practice, and
 - ▶ Previous relevant decisions of FOS (although FOS will not be bound by these)

How is this different from the courts?

- ▶ One example of how this approach differs from the courts is in relation to a failure by a bank to comply with the provisions of clause 31 of the Code of Banking Practice
- ▶ This clause sets out the process to be followed when a bank is taking a guarantee.
- ▶ The Banking Code provisions about taking guarantees are quite prescriptive. For example:
 - ▶ clause 31.2 starts 'We may only accept a guarantee if...'
 - ▶ clause 31.4 starts 'We will do the following things before we take a guarantee from you...' and
 - ▶ clause 31.5 starts 'We will not ask you to sign a guarantee, or accept it, unless...'

How is this different from the courts?

- ▶ Some recent court decisions have held that while the Code forms part of the banker-customer contract, a breach of clause 31 does not necessarily mean the guarantee is unenforceable
- ▶ See for example
 - ▶ Doggett v Commonwealth Bank of Australia [2015] VSCA 351 (17 December 2015)
 - ▶ National Australia Bank Ltd v Rose [2016] VSCA 169 (21 July 2016)
- ▶ Given the wording of the provision of Clause 31, it is our view that non-compliance should mean that the guarantee is unenforceable.
- ▶ Not only does this outcome accord with the strong words used in the code. It also helps to ensure that bank staff comply with the provisions and keep records of their compliance, rather than taking the view that compliance is optional because the guarantee would have been signed anyway.
- ▶ FOS adopts this approach in resolving disputes. We have determined that guarantees that breach the Banking Code are unenforceable.

Further Information

▶ See our website at

▶ www.fos.org.au