

Financial Services Law Force

Equality of Arms - The Principle

The Australian Attorney General states the following in the paragraph 'Equality':

"...What constitutes a fair hearing will require recognition of the interests of the accused, the victim and the community (in a criminal trial) and of all parties (in a civil proceeding). In any event, the procedures followed in a hearing should respect the principle of 'equality of arms', which requires that all parties to a proceeding must have a reasonable opportunity of presenting their case under conditions that do not disadvantage them as against other parties to the proceedings. The UN Human Rights Committee has found a violation of article 14(1) in a case in which a right of appeal was open to the prosecution but not to the accused..."

The Practice

This is a limited initiative and only applies to Financial Service Provider (FSP) Consumers, Small and medium-sized enterprises (SME) and Farmers that are subject to a legal instrument of an FSP or identity acting on, or for an FSP initiated instrument, it is not and will never be a fix all solution.

At the point of initiating any legal instrument the FSP will be required to make a non-refundable contribution equivalent to the plaintiff's total internal and external legal budget/costs. Any escalation would require further matching contributions from the FSP. The financial service will only be able to recoup their cost from the consumers or SME following an outcome in their favour.

It is proposed the FSP contribution will directly fund a public permanent independent specialist Financial Services Law Force which will, by utilising, working with and funding the contemporary legal aid and community legal centres offer all FSP consumers and SMEs timely, proportional, and equitable legal representation.

Q & A

If a consumer wants to take an FSP to court will the FSP be required to pay the costs? – No, this initiative only applies when an FSP takes any legal action against an FSP consumer, SME or Farmer.

Will this replace Internal and External Dispute Resolution (Mediation, IDR & EDR)? – No, but because there is **Equality of Arms** in the courts it is expected to give added incentive to resolve disputes therefore increasing their effectiveness.

Is it fair to make the FSP pay the cost of consumers they take to court? – It is the FSP and only the FSP that take the consumer to court, FSPs could choose to act more reasonably or use other means to resolve disputes. Unlike indiscriminate levies this initiative only cost FSPs that use the courts, and is proportionate to that action.

Won't this increase costs for FSPs? – Potentially, however if the FSP makes better and fairer use of IDR and EDR, make more frugal choices when choosing counsel, combined with greater efficiency in the court process, potentially costs could reduce. Notwithstanding it will be fairer for the consumer, consequently there is expected to be a significant decrease in legacy cases and a saving of considerable cost that those legacy cases represent going forward.

Will this initiative impact on ASIC and APRA? - Systemic issues will be identified in an independent and timely manner; this intelligence can be shared with the appropriate regulator potentially improving their effectiveness and reducing their costs.

How will this initiative impact on the contemporary legal aid and community legal aid centre systems? - All legal aid and community legal aid centre organisations will be able to assist any and all FSP consumer, SME and Farmer facing legal action in a timely, proportional and equitable manner, knowing that not only funding will be available, but also expert knowledge, support and personnel.

How will the Law Force be managed? - The Law Force should have an oversight board that includes federal government, consumer, legal aid and community legal centre group representation, but no FSP, FDM, EDR, AFCA or private legal sector representation so as to avoid white anting and inappropriate external influence. A separate public federal bar association for public legal practitioners should be considered to ensure further autonomy.