



# Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

Submission of the Financial Ombudsman Service

Round 3 Hearings - Low Case Study

8 June 2018



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## Executive Summary

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1. These submissions form the response of the Financial Ombudsman Service (**FOS**) to the following specific and general questions posed in respect of the Low case study as considered by the Commission.

### **Question 1**

*Does the evidence support findings that FOS did not function as an effective mechanism for redress in this case, and that neither the recommendation nor the determination made clear that Jennifer Low could repay the debt under the loan in accordance with her obligations under the loan contract and in priority to the other loans. Further, FOS then told the parties what it considered to be a reasonable period for repayment of the loan, despite Mrs Low's offer to make repayments at the same rate or a higher rate than the existing repayment schedule.*

### **Question 2**

*If a business loan is determined to have been affected by maladministration<sup>1</sup>, should the financial services provider be permitted to require the loan to be repaid within a timeframe shorter than the remaining term of the loan in circumstances where the borrower is willing and able to meet the repayment schedule under the loan?*

### **Question 3**

*Could FOS improve its processes for dealing with loans that are determined to have been affected by maladministration and, if so, how? Should the incoming body, AFCA, adopt a different process?*

2. In summary, for the reasons outlined in these submissions, FOS's responses to the above questions are as follows:
  - (a) The evidence before the Commission does not support findings that FOS did not function as an effective mechanism for redress in Mrs Low's case (the **Low Complaint**).

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<sup>1</sup> Counsel Assisting has referred to "maladministration" in lending. Where a financial services provider does not meet its lending obligations whether for regulated credit or lending to small business, FOS uses the general term "irresponsible lending" – this submission accordingly uses that language. This is not to suggest that responsible lending obligations are the same for regulated credit and lending to small business.

- (b) The effect of FOS's determination in the case was the immediate reduction of Mrs Low's liability to Suncorp of more than \$40,000, and the relief from accrual of any further interest with respect to that loan. This redress represents an appropriate, fair and effective remedy provided to Mrs Low to compensate her for the irresponsible lending by Suncorp.
- (c) The remedy addressed the dispute that was put to FOS by the parties and it was obtained promptly, efficiently and fairly and at no cost to Mrs Low.
- (d) Once there is a determination that a loan has been affected by irresponsible lending, FOS considers it appropriate for the parties to attempt to reach agreement in the first instance as how best to proceed with FOS usually referring the customer to a legal adviser or consumer advocate to assist with the process (as happened in Mrs Low's case). FOS does not consider that it would be appropriate for FOS to guide the negotiation process given that:
- i. it is not readily apparent at that stage whether there will be a dispute between the parties with respect to arrangements for repayment of the outstanding loans, or whether a hardship claim might exist; and
  - ii. a consumer advocate or other adviser is the appropriate person to advocate for a consumer or small business seeking to negotiate a repayment arrangement.
- (e) Accordingly, FOS should be found to have provided Mrs Low with effective redress.
- (f) In any event, given that the factual scenario that transpired in Mrs Low's case was extremely unusual compared to our usual dispute experience, there are considerable limitations in relying on this case study alone to draw any conclusions regarding the effectiveness of FOS more generally.
- (g) FOS accepts that, with the benefit of hindsight, informal guidance provided to Mrs Low and Suncorp in relation to the reasonable period for repayment of the loan was not correct. However as discussed further below this needs to be viewed in the context that the factual scenario was unusual.

- (h) Where a determination finds irresponsible lending and the relevant loan is not in default, the financial services provider (**FSP**) should not require the loan to be repaid in a shorter period of time than the loan term.
- (i) Given the unusual nature of Mrs Low's case, it is difficult to draw general observations regarding how FOS's processes could be improved and whether AFCA should adopt different processes in the future. Having said that, FOS welcomes feedback concerning steps that it can take to improve its processes. In particular, FOS will review its processes and practices to ensure that it makes clear that moneys repaid ought to be applied towards reduction of loans that were responsibly lent (i.e. interest bearing loans) before loans that were irresponsibly lent (i.e. interest free loans).

## Redress in the Low Dispute

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### Question 1

*Does the evidence support findings that FOS did not function as an effective mechanism for redress in this case, and that neither the recommendation nor the determination made clear that Jennifer Low could repay the debt under the loan in accordance with her obligations under the loan contract and in priority to the other loans. Further, FOS then told the parties what it considered to be a reasonable period for repayment of the loan, despite Mrs Low's offer to make repayments at the same rate or a higher rate than the existing repayment schedule.*

### **FOS functioned as an effective mechanism for redress in Mrs Low's case**

3. The evidence before the Commission does not support findings that FOS did not function as an effective mechanism for redress in this case when the outcome is considered in all of the circumstances.
4. The Low Complaint was unusual.<sup>2</sup> Unlike most cases that come before FOS, the Low Complaint resulted in an outcome where the customer was able to repay all of her interest bearing loans, leaving only the interest free loan remaining.<sup>3</sup>
5. The ultimate and primary redress afforded to Mrs Low was an effective and appropriate remedy. Neither Counsel Assisting the Commission, nor any

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<sup>2</sup> T:2551.38.

<sup>3</sup> T:2551.39.

other party argues otherwise. The remedy provided Mrs Low with significant relief and a strong starting position from which to negotiate a conclusion with Suncorp. The relevant FOS determination was about whether Suncorp acted irresponsibly when it approved the relevant loans or acted unconscionably when it provided those loans.<sup>4</sup> FOS determined those issues. In the absence of FOS, Mrs Low would not have had access to an external redress mechanism other than costly Court proceedings.<sup>5</sup> At the time of the determination, FOS had not been requested to determine how Mrs Low could repay the debt. The scope of the dispute was confirmed with the parties.<sup>6</sup>

6. Due to the unusual nature of the Low Complaint, there are also considerable limitations in relying on this case study to draw any conclusions regarding the effectiveness of FOS generally.
7. Before turning to the specific facts of the Low Complaint, it is useful to provide some general background in relation to FOS and its handling of complaints, and in particular its handling of small business irresponsible lending complaints, in order to contextualise the way in which the Low Complaint proceeded.

## General information about FOS

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8. FOS is an ASIC-approved external dispute resolution (**EDR**) scheme that handles disputes across the financial sector between consumers and FSPs. FOS provides a substantial service to the general community by offering a free-of-charge forum to consumers to resolve disputes between them and FSPs.<sup>7</sup> FSPs are required to be members of an EDR scheme such as FOS.<sup>8</sup>
9. FOS seeks to offer a fair, independent and accessible dispute resolution service for consumers who may otherwise be unable to resolve disputes with FSPs. The cost of the dispute resolution service is met by FSPs.

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<sup>4</sup> Exhibit 3.85, Witness Statement of Philip Field Part B dated 18 May 2018 [11-12], Exhibit FOS-21 [FOS.0028.0001.3074] at 3075.

<sup>5</sup> T:2000.6-21.

<sup>6</sup> Exhibit 3.85, Witness Statement of Philip Field Part B dated 18 May 2018 [13(d)], Exhibits FOS-23 [FOS.0028.0001.0599] and FOS-24 [FOS.0028.0001.0587].

<sup>7</sup> Exhibit 3.84, Witness Statement of Philip Field Part A dated 18 May 2018, Exhibit FOS-4 [FOS.006.0001.9084 at 9087].

<sup>8</sup> *Corporations Act 2001* s 912A.

10. FOS operates pursuant to Terms of Reference (**TOR**), which have the effect of a tripartite contract between FOS and each of the parties to the dispute.<sup>9</sup>
11. Pursuant to its TOR, in dealing with disputes FOS must:
  - (a) do what in its opinion is appropriate with a view to resolving disputes in a cooperative, efficient, timely and fair manner;
  - (b) proceed with the minimum formality and technicality; and
  - (c) be as transparent as possible, whilst also acting in accordance with its confidentiality and privacy obligations.<sup>10</sup>
12. In the resolution of disputes FOS is required to do what in its opinion is fair in all the circumstances, having regard to legal principles, industry codes or guidance, good industry practice, and relevant FOS decisions.<sup>11</sup>
13. FOS is approved by ASIC under the *Corporations Regulations 2001* (Cth) to be an EDR scheme for FSPs under ASIC's Regulatory Guide 139 (**RG 139**).<sup>12</sup> When considering whether to approve an EDR scheme, ASIC must take into account a range of factors, including the effectiveness of the dispute resolution scheme.<sup>13</sup> The assessment of effectiveness is determined as follows.<sup>14</sup>

<i>Effectiveness</i>	<i>The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.</i>
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14. FOS's services are utilised by a range of consumers either directly or through consumer advocates. FOS's services have been described in evidence before this Commission in positive terms by:
  - (a) consumer advocates, including that FOS provides a professional and efficient way in which to resolve disputes in a manner that is fair and reasonable for consumers;<sup>15</sup> and

<sup>9</sup> *Mickovski v Financial Ombudsman Service Ltd* (2012) 36 VR 456.

<sup>10</sup> FOS Terms of Reference, Exhibit 3.84, Witness Statement of Philip Field Part A dated 18 May 2018, Exhibit FOS-2, [FOS.0033.0001.0002] at 0005.

<sup>11</sup> T:2541.1.

<sup>12</sup> Exhibit 3.84, Witness Statement of Philip Field Part A dated 18 May 2018, Exhibit FOS-4 [FOS.006.0001.9084 at 9087].

<sup>13</sup> ASIC Regulatory Guide 139, RG 139.23-139.24.

<sup>14</sup> ASIC Regulatory Guide 139, RG 139.23-139.24 and Appendix.

<sup>15</sup> T:2054.42.

(b) consumers, including as follows:

*“How did you find dealing with FOS?---FOS – they’re a really good organisation. They were very helpful. Nothing was too much work for them or too hard for them to do. They listened to everything. And, you know, helpful in actually making the claim to start with, giving directions and things like that. And every time I had to ring somebody, they were – they were wonderful. Wonderful people.”<sup>16</sup>*

15. In the year ending 30 June 2017, FOS received 39,479 disputes. 22,475 disputes were accepted by FOS during that year. Accepted disputes are those which the FSP and consumers fail to resolve after being referred by FOS to the FSP for internal dispute resolution. They then progress to case management at FOS. In the year ending 30 June 2017, 39,481 disputes were closed. The majority of these (23,625 disputes or 60%) were resolved by agreement of the parties. 3,135 disputes or 8% were resolved by a preliminary view or assessment.<sup>17</sup> 2,787 disputes, or 7%, were resolved by a decision of the Ombudsman.<sup>18</sup>
16. From 1 November 2018, the Australian Financial Complaints Authority (**AFCA**) will provide a new EDR scheme to deal with complaints from consumers in the financial system. AFCA will replace the three existing EDR schemes, being FOS, the Credit and Investments Ombudsman and Superannuation Complaints Tribunal, so that consumers have access to a single EDR scheme. AFCA will effectively provide a “one-stop-shop” for all consumer complaints with respect to the financial system.<sup>19</sup>

## **Small business irresponsible lending complaints**

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17. Where a business asserts that a lender should not have provided a loan because the business never had the ability to repay the loan, FOS’s general approach is as set out in the FOS Approach Responsible Lending Series.

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<sup>16</sup> T:2186.14-18.

<sup>17</sup> Exhibit 3.84, Witness Statement of Philip Field Part A dated 18 May 2018 [10].

<sup>18</sup> The remainder are disputes that were not within FOS’s jurisdiction or which were discontinued by the applicant.

<sup>19</sup> Exhibit 3.84, Witness Statement of Philip Field Part A dated 18 May 2018 [11].

18. In accordance with FOS's approach, FOS undertakes its own calculation of the affordability for the small business of the loan as at the time of lending utilising the information held by the lender at the time of the loan decision as adjusted in light of any red flags (FOS refers to this calculation as a retrospective serviceability calculation).
19. If the retrospective serviceability calculation leads to a conclusion that the loan was not affordable at the time of lending, FOS's aim is to restore the parties to the position that they would have been in but for the loan, to the extent that this is practical and fair in the circumstances.<sup>20</sup>
20. FOS's approach to calculating loss is set out in its published FOS Approach document, entitled "How we work out a consumer's loss." That document states as follows:<sup>21</sup>

*The FSP is liable for the credit risk of its lending decision. Generally it is not liable for the consumer's investment risk in how the consumer uses the loan funds. Therefore, if the consumer used the loan funds for investments such as shares or for their business, usually the consumer will have to repay at least the principal amount the FSP lent to them, even if the value of the investment has gone down. In those cases the consumer's loss is usually only the interest and fees they paid to the FSP.*

*If we decide that an FSP has not lent responsibly we will consider what amount of the loan the consumer is liable to repay. Consumers who believe their FSP did not make a responsible decision to lend to them often say their debt should be written off, which means that they would not have to repay the loan. However, we do not take that approach.*

21. Accordingly, FOS's approach is to determine the liability of the parties, thereby resolving the dispute that has been brought before FOS. FOS then allows the parties to agree repayment arrangements. If a small business has a loan that is in arrears that is affected by irresponsible lending, FOS expects the lender to try and help the small business borrower with its financial

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<sup>20</sup> T:2544.45.

<sup>21</sup> Exhibit 3.86 FOS Responsible Lending Series, How We Assess Customer Loss [FOS.0006.0002.0407], at 0408 to 0410.

difficulty by endeavouring to reach an agreed repayment arrangement. Typically, FOS will direct that this should occur within 30 days. Most banks have an obligation under the Code of Banking Practice to work with their customer to help overcome any financial difficulty.<sup>22</sup> The Code of Banking Practice specifically contemplates that this could lead to a repayment plan.<sup>23</sup> For lenders that are not subscribers to an industry code that creates an obligation to assist customers in financial difficulty, FOS considers that this is nevertheless necessary in order to meet good industry practice.

22. This approach permits the small business in its negotiations with its lender to pursue its priorities which might include prioritising some assets for sale over others, whether this is for taxation or other reasons. It enables the small business and the lender to consider what repayment timeframe is realistic in the circumstances including the timeframe required to obtain full value for sold assets. These negotiations occur in the context of the ongoing banker-customer relationship that exists between the parties and provides them with an opportunity in the first instance to resolve matters to their mutual satisfaction.<sup>24</sup>
23. If, however, the small business and the lender are not able to agree a mutually acceptable repayment arrangement or if an arrangement is reached but subsequently fails, the small business is able to complain to FOS by bringing a financial difficulty dispute.<sup>25</sup> This will be treated by FOS as a fresh complaint that FOS will try and resolve through its financial difficulty processes.

## The Low Complaint

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24. The Low Complaint concerned various loans obtained through a broker by Mrs Low and her late husband from Suncorp in 2013 and 2014 (**Loans**). The Loans had been obtained in order to refinance existing debts and provide additional credit for business purposes. The Loans included:<sup>26</sup>

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<sup>22</sup> T2547.16-18.

<sup>23</sup> Clause 28.2.

<sup>24</sup> T:2548.43 – 2549.2.

<sup>25</sup> T:2549.16.

<sup>26</sup> Exhibit 3.85, Witness Statement of Philip Field Part B dated 18 May 2018 [6].

- (a) four facilities obtained in 2013 (**2013 Loans**); and
  - (b) a further facility obtained in 2014 (**Business Loan B**).
25. On 23 February 2017, FOS issued a determination with respect to the Low Complaint (**Low Determination**).<sup>27</sup> The Low Determination concluded, amongst other things, that Suncorp had acted irresponsibly when it approved Business Loan B. The Low Determination also concluded that Suncorp had not acted irresponsibly in approving the 2013 Loans and that Mrs Low remained liable with respect to the 2013 Loans.<sup>28</sup>
26. Consistent with FOS's usual approach to remedying loss, FOS determined that due to Suncorp's conduct in irresponsibly making Business Loan B, Suncorp must:
- (a) reduce Business Loan B by the amount of \$40,066.71 (the sum of the interest and fees that had already been paid by the small business); and
  - (b) cease charging any further interest and fees accrued on Business Loan B.<sup>29</sup>
27. The effect of FOS's determination was that the total amount outstanding on Business Loan B:
- (a) was reduced by more than \$40,000; and
  - (b) interest was no longer payable (and ceased accruing) with respect to Business Loan B.<sup>30</sup>

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<sup>27</sup> Exhibit 3.85, Witness Statement of Philip Field Part B dated 18 May 2018, Exhibit FOS-21 [FOS.0028.0001.3074].

<sup>28</sup> IBID.

<sup>29</sup> Exhibit 3.85, Witness Statement of Philip Field Part B dated 18 May 2018 [11-12].

<sup>30</sup> T:2547.11.

28. This redress represents an appropriate, fair and effective remedy provided to Mrs Low to compensate her for the irresponsible lending by Suncorp. The remedy was obtained promptly,<sup>31</sup> efficiently and fairly and at no cost to Mrs Low and was responsive to the scope of the dispute agreed to by the parties. Accordingly, FOS should be found to have provided Mrs Low with effective redress.

## Terms of repayment

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29. The Low Determination included the following direction (**Direction**).<sup>32</sup>

*Having regard to FOS's expectations of the parties set out in section 3.4 of the Recommendation, the Applicant should provide the FSP with a proposal for repayment of the 2013 Loans and the Revised Debt. This proposal may be to pay the debts by sale of the security property, refinance, or a reasonable payment arrangement accompanied by a Statement of Financial Position and supporting documents. The FSP is to work with the Applicant to attempt to agree on a reasonable arrangement to repay the debts.*

*If the parties are unable to reach an agreement for repayment of the debts within 30 days of the Applicant's proposal, or if no proposal is provided, the FSP may be entitled to commence recovery action with respect to the debts once the FOS dispute is closed. This may include taking possession of and selling the Home and Investment Property.*

30. The Direction is a relatively standard direction given by FOS in determinations of this nature.<sup>33</sup>
31. The intention of the Direction was to encourage the parties to come to a mutually acceptable arrangement to repay the loans as reduced by the determination. This provided Mrs Low with the opportunity to explore the possibilities of full or partial re-finance, sale of assets and repayment

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<sup>31</sup> The Low Complaint was commenced on 16 May 2016 and the Low Determination was issued on 23 February 2017; Exhibit 3.85, Witness Statement of Philip Field Part B dated 18 May 2018 [8], [13(a)].

<sup>32</sup> Exhibit 3.85, Witness Statement of Philip Field Part B dated 18 May 2018 [11-12], Exhibit FOS-21 [FOS.0028.0001.3074] at 3076-3077.

<sup>33</sup> T:2549.46.

arrangement. As a signatory to the Code of Banking Practice, Suncorp had an obligation to work with Mrs Low to help overcome any financial difficulty and to achieve an appropriate outcome.<sup>34</sup>

32. FOS separately suggested to Mrs Low that she contact the Consumer Action Law Centre for assistance through this process,<sup>35</sup> which she in fact did.<sup>36</sup>
33. FOS's approach to loan repayment in the Low Complaint was consistent with its usual approach whereby FOS determined the liability of the parties and resolved the dispute that had been brought before it. The determination of that dispute does not otherwise alter the existence or nature of the banker-customer relationship that exists between the parties. It is also not readily apparent at that stage whether there will be a dispute between the parties with respect to arrangements for repayment of the outstanding loans, or whether a hardship claim might exist. FOS therefore considers it appropriate for the parties to attempt to reach agreement in the first instance as to how best to proceed, without FOS providing additional guidance.<sup>37</sup>
34. Due to FOS's independent role, in its view, a consumer advocate or other appropriate adviser is the appropriate person to advocate for a consumer or small business seeking to negotiate a repayment arrangement. In the Low Complaint, Mrs Low had assets available to her other than the family home which could have been used to repay the outstanding loans.<sup>38</sup> It was appropriate to allow Mrs Low the opportunity to consider her options including prioritising the sale of some assets over others for taxation or other reasons (in consultation with relevant advisers) and then seek to negotiate with Suncorp to reach agreement on an acceptable outcome.
35. If the parties are unable to reach agreement, or if an arrangement is reached but subsequently fails, then it is open for the parties to come back to FOS to seek further assistance.<sup>39</sup>

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<sup>34</sup> T:2549.7.

<sup>35</sup> Exhibit 3.85, Witness Statement of Philip Field Part B dated 18 May 2018, Exhibit FOS-18 [FOS.0028.0001.3435 at 3483].

<sup>36</sup> T:2486.24.

<sup>37</sup> T:2548.43 – 2549.2.

<sup>38</sup> Exhibit 3.73, Witness Statement of Rein Peter Low dated 23 May 2018, Exhibit RL-1 [SUN.0603.0002.1923].

<sup>39</sup> T:2549.16.

36. FOS considers this approach to be the most appropriate way for the parties to reach agreement, at least in the first instance, in disputes of this type.

### **Order of repayment**

37. Senior Counsel Assisting submitted that the evidence before the Commission supported a finding “that neither the recommendation nor the determination made clear that Jennifer Low could repay the debt under the loan in accordance with her obligations under the loan contract and in priority to the other loans.”<sup>40</sup>
38. As outlined above, in a dispute of this type, FOS does not typically provide guidance in a determination as to how repayment should be effected, or the order of repayment, of any outstanding loans.
39. While the proposition in paragraph 37 is factually correct, FOS submits that providing guidance in a determination with respect to repayment arrangements was not necessarily appropriate in this case given that Mrs Low had assets available to her other than the family home which could have been used to repay the outstanding loans<sup>41</sup> such that it was appropriate for Mrs Low to consider her options with her advisors to determine how to proceed.
40. The outcome suggested by Senior Counsel Assisting would not, in any event, have been favourable to Mrs Low. In particular, by reason of the determination, interest had ceased to accrue on Business Loan B. On the other hand, interest continued to accrue on the 2013 Loans, and would continue to do so until the 2013 Loans were repaid.
41. In those circumstances, it would not have been in the interests of Mrs Low to repay Business Loan B in priority to the 2013 Loans. Rather, the best outcome for Mrs Low would have been to repay the 2013 Loans as soon as possible (which is what she did), and for Business Loan B to be repaid in accordance with its terms after the reductions awarded in the Low Determination.

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<sup>40</sup> T:3042.46-3043.02.

<sup>41</sup> Exhibit 3.73, Witness Statement of Rein Peter Low dated 23 May 2018, Exhibit RL-1 [SUN.0603.0002.1923].

42. The order of repayment of loans that occurred in Mrs Low's case was consistent with FOS's usual position that, in circumstances where there are multiple loans, not all of which have been irresponsibly lent, the lender must allow payments by the debtor to be made against the interest-bearing loans before the loans affected by irresponsible lending. In the case of credit card debt (some of which was lent responsibly and some of which was not), FOS expects the lender to facilitate this outcome.
43. FOS considers this position to be appropriate when considering the burden that is otherwise placed on the consumer. Specifically, by reason that it is the interest-bearing loans which impose the greatest burden on the consumer, it is therefore most appropriate and fair for those loans to be reduced first.<sup>42</sup>

### **Guidance by FOS as to repayment**

44. As noted above, the factual scenario in Low Complaint was extremely unusual. In the ordinary course of most complaints to FOS:
  - (a) the consumer will have few (if any) assets available (other than, perhaps, the family home);
  - (b) the loans will be in arrears or in default; and
  - (c) the consumer will take all steps available to them in order to retain the family home.
45. Contrary to the ordinary course, Mrs Low chose to sell the family home in order to use the proceeds to repay the 2013 Loans, leaving only Business Loan B outstanding.<sup>43</sup> Full repayment of the 2013 Loans was effected following settlement of the sale of the family home.<sup>44</sup> Suncorp ultimately applied the surplus funds from the sale of the family home against Business Loan B.<sup>45</sup>
46. The effect of this was that Mrs Low's only obligation to Suncorp following the full repayment of the 2013 Loans was the balance of Business Loan B which, contrary to most cases seen by FOS, was not in default.<sup>46</sup>

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<sup>42</sup> T:2551.2.

<sup>43</sup> T:2478-2479 [Evidence of Rien Low].

<sup>44</sup> T:2488.6 [Evidence of Rien Low].

<sup>45</sup> T:2519.44 [Evidence of David Carter].

<sup>46</sup> T:2547.21.

47. From time-to-time, FSPs and consumers (and their advocates) contact FOS seeking informal guidance as to what would be an appropriate time within which to repay loans owed by consumers.<sup>47</sup> In providing such informal guidance, FOS considers the circumstances of the relevant case, including matters such as:
- (a) whether or not the consumer is in arrears;<sup>48</sup>
  - (b) the payments being proposed;<sup>49</sup>
  - (c) the consumer's ability to service the debt; and
  - (d) the age of the consumer.<sup>50</sup>
48. In the context of the Low Complaint, informal guidance was sought from and provided by Mr Field. Mr Field gave evidence to this Commission that, in providing that informal guidance, he did not specifically focus on the unusual nature of the Low Complaint, but instead gave informal guidance in the context of an ordinary FOS complaint.<sup>51</sup> That informal guidance, particularly having regard to Mrs Low's age, was that 12 to 18 months would be a reasonable period in which to repay Business Loan B, with 5 years being the outer limit.<sup>52</sup> Mr Field reasonably accepted in his evidence before the Commission that, with the benefit of hindsight, his informal guidance was not correct.<sup>53</sup>
49. The result of Mr Field's informal guidance has not, however, resulted in Mrs Low being required to repay the balance of Business Loan B within 12 to 18 months, nor even within 5 years. FOS recognises that negotiations between Suncorp and Mrs Low in relation to Business Loan B are continuing and acknowledges Mr Low's evidence that this process has been stressful.<sup>54</sup>

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<sup>47</sup> T:2552.1.

<sup>48</sup> T:2549.25.

<sup>49</sup> IBID.

<sup>50</sup> T:2551.44.

<sup>51</sup> T:2551-2552.

<sup>52</sup> T:2552.13.

<sup>53</sup> T:2552.26.

<sup>54</sup> T:2492.45 [Evidence of Rien Low].

## Question 2

*If a business loan is determined to have been affected by maladministration, should the financial services provider be permitted to require the loan to be repaid within a timeframe shorter than the remaining term of the loan in circumstances where the borrower is willing and able to meet the repayment schedule under the loan?*

50. Where a determination varies a contract due to irresponsible lending and there is no default, the answer to the above question is no. The FSP should not require the loan to be repaid in a shorter period of time than the loan term.<sup>55</sup> This is the situation in the Low Complaint which, as previously indicated, is an unusual factual scenario.
51. Given that cases like the Low Complaint are extremely rare in our dispute experience, FOS does not have a settled position in relation to what is fair in all the circumstances regarding the remedy to be provided in the determination in such cases. If a similar situation were to arise in the future (that is, a loan with an extended term, that was affected by irresponsible lending, and that is not currently in default), FOS would seek submissions from the parties in accordance with FOS's procedural fairness obligations about what would be an appropriate remedy.

## Improving processes

### Question 3

*Could FOS improve its processes for dealing with loans that are determined to have been affected by maladministration and, if so, how? Should the incoming body, AFCA, adopt a different process?*

52. Given the unusual nature of Mrs Low's case, it is difficult to draw general observations regarding how FOS's processes could be improved and whether AFCA should adopt different processes in the future. Having said that, FOS welcomes feedback concerning steps that it can take to improve its processes. FOS accepts that it did not make clear to Suncorp and Mrs Low

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<sup>55</sup> T:2549.29-42.

that, in its opinion, any moneys repaid by Mrs Low ought to have been applied towards reduction of the loans that were responsibly lent (i.e. the interest-bearing loans) before the loans that were irresponsibly lent (i.e. the interest free loans). FOS will review its processes to ensure we communicate the position more clearly in the future.

53. More generally, the Commission's public hearings have raised a number of issues that are pertinent to FOS and AFCA's future handling of these types of disputes. Whilst FOS considers that its current approach for dealing with small business loans that have been affected by irresponsible lending provides a good base position, FOS is committed to ensuring that its approach is appropriate and will review its practices. This is consistent with FOS's commitment to review and evolve its approach as new issues emerge and industry practice changes.
54. Public submissions to the Commission and the Commission's findings will also assist FOS and AFCA, when it is operational, with any review of its approach to responsible lending and small business loans.

## Conclusions

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55. In the circumstances, the evidence before the Commission does not support findings that either the handling or the outcome of the Low Complaint resulted in a failure by FOS to function as an effective mechanism for redress with respect to the Low Complaint.
56. On the contrary, FOS submits that the determination by FOS that Business Loan B had been made irresponsibly and that, consequently, Mrs Low was not required to pay to Suncorp any interest or fees associated with it was a significant remedy awarded in favour of Mrs Low. The effect of that determination was the immediate reduction of Mrs Low's liability to Suncorp of more than \$40,000, and the relief from accrual of any further interest with respect to that loan.
57. In measuring the "effectiveness" of EDR, regard must be had to the regulatory and contractual framework in which EDR operates. Specifically, that term is defined by RG 139, as having in place appropriate and comprehensive terms

of reference and periodic independent reviews of its performance. As an ASIC-approved EDR scheme, FOS has a detailed governance structure, compliance systems and quality framework in place to ensure that it is able to meet those obligations and, consequently, ensure that it is operating effectively. As stated above, it is the experience of repeat users of FOS (including Legal Aid NSW), that FOS has provided a professional and efficient way in which to resolve disputes in a manner that is fair and reasonable for consumers.

58. In assessing the concept of effectiveness in a broader sense, it is also important to consider the nature of the work undertaken by FOS and the outcomes it achieves. FOS has in place a broad range of mechanisms to ensure that it achieves its stated aims as set out above. FOS does so in circumstances where it handles many thousands of disputes each year.
59. In our submission, the Low Determination was not made in error. Rather, while in hindsight it is apparent that better guidance could have been given by FOS with respect to the order of and timing for payment of Business Loan B, it remains the case that the primary redress awarded, being the reduction of Business Loan B and the relief from interest and fees, was appropriate, fair and effective and responsive to the scope of the dispute agreed to by the parties. For the reasons set out above, the evidence before the Commission does not support findings that FOS did not function as an effective mechanism for redress.
60. FOS welcomes feedback concerning steps that it can take to improve its processes and practices. These practices include providing general guidance to FSPs with respect to the application and order of payments, which will aim to avoid situations such as those the subject of this case study from arising. FOS looks forward to the findings of the Commission as an opportunity to learn and improve the dispute resolution service provided to consumers, small business and FSPs. In the future, AFCA will also benefit from the important work and insights of the Commission.

**8 June 2018**