

Operational Guidelines to the Terms of Reference

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Section 1: Introduction



Introduction

The Financial Ombudsman Service & the purpose of these Operational Guidelines

The Financial Ombudsman Service (FOS) aims to be the dispute resolution service of choice for the financial services industry. We seek to serve the community by resolving disputes between consumers and financial services providers (FSPs) in a way people can trust. FOS is an independent organisation and free to consumers.

We can consider disputes about a wide range of investment, insurance, credit payment system and deposit taking products and services sold by a broad range of FSPs. Members of FOS include banks, credit unions, financial planners, general insurers, insurance brokers, life insurers, stock brokers, warranty companies and entities managing investments and making a market. The list continues to expand.

We focus on promoting resolution of customer disputes by FSPs. Early resolution, without the break down of a relationship, is the most effective way to create customer satisfaction and customer retention for members of FOS and is a key desire for customers.

FOS was approved by the Australian Securities and Investments Commission (ASIC) on 16 May 2008 under ASIC's Regulatory Guide 139 and assumes the jurisdiction of its predecessor schemes. FOS operates under Terms of Reference (TOR). New TOR will come into effect on 1 January 2010 and the new TOR will apply to all new disputes coming to FOS from 1 January 2010.

These Operational Guidelines (OG) are designed to assist users of the Scheme to understand how the new TOR operate in practice and to help users assess for themselves how matters may be handled and considered at FOS. Our aim is to promote clarity in relation to our processes and our approach to certain types of matters, so that consumers and FSPs can use the Scheme with confidence.

The OG are a living document which may be amended and expanded from time to time to address points that emerge with the new TOR in operation and to take account of industry developments and other changes including legislative amendments and new case law.

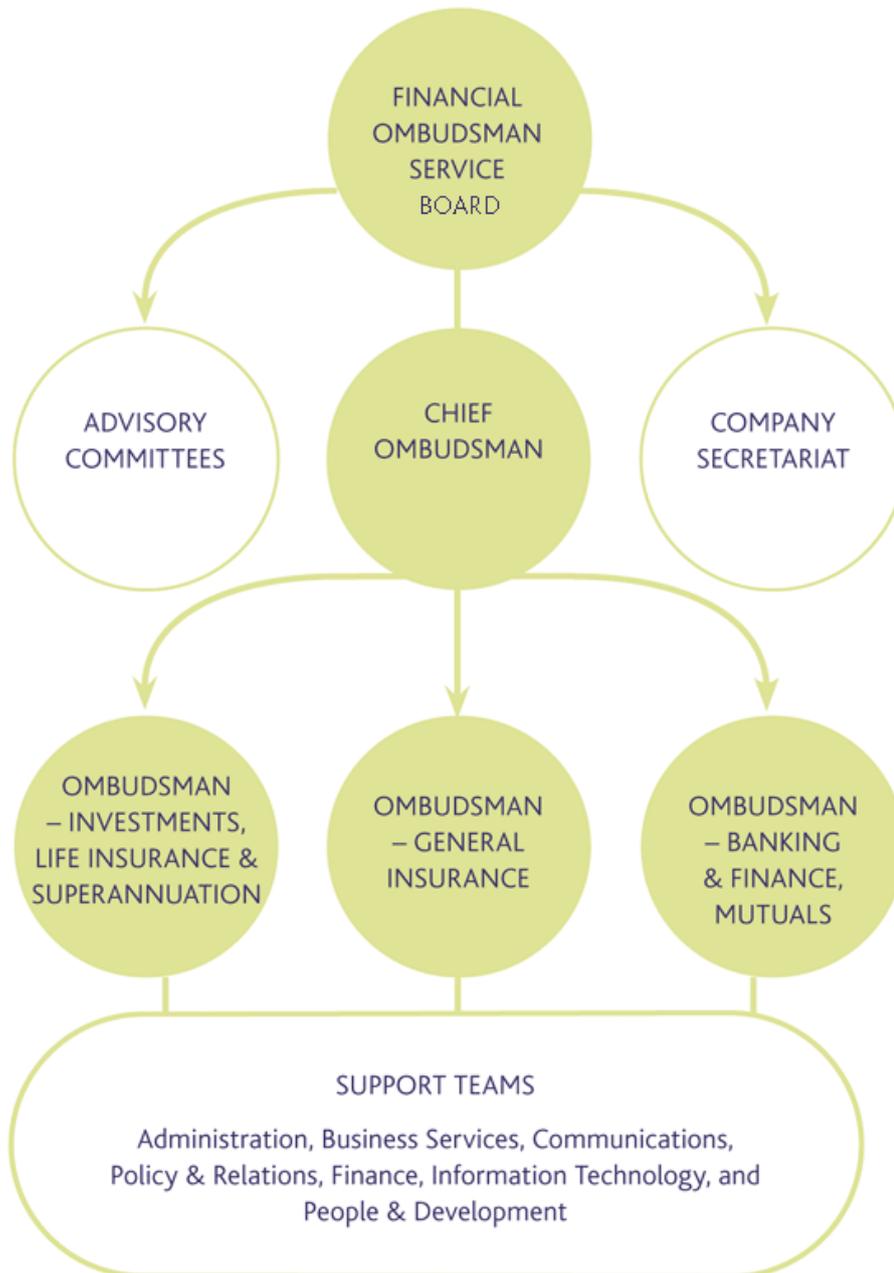
For defined terms used throughout the OG please refer to [Section 20](#).

If you have suggestions about matters which need more clarification, please contact FOS at publications@fos.org.au.

Section 2: Structure



Our structure



The transitional organisation structure has been designed to support the new TOR and our new processes and procedures for 1 Jan 2010 and beyond. Our new processes and procedures set out dispute handling in four stages:



Section 3: Transition to the new Terms of Reference (TOR)

Paragraph 3: Transition to the new Terms of Reference (TOR)

3.1 Disputes first lodged with FOS or with a Predecessor Scheme before 1 January 2010

Where a Dispute was first lodged with FOS, or transferred to FOS by a Predecessor Scheme, before 1 January 2010:

- a) if FOS had not closed the matter by 1 January 2010 – FOS will continue to apply the Terms of Reference that applied to the Dispute at the time of lodging with FOS or Predecessor Scheme; and
- b) if FOS had closed the Dispute before 1 January 2010 and after that date FOS decides that it is appropriate to re-open the Dispute – FOS will deal with the re-opened Dispute applying the Terms of Reference previously applied to the Dispute.

3.2 Disputes lodged with FOS between 1 January 2010 and 31 December 2011

Where a Dispute is lodged with FOS between 1 January 2010 and 31 December 2011,

- a) the maximum amount that may be awarded by FOS in relation to a claim made in the Dispute will be determined in accordance with Schedule 1; and
- b) in all other respects these Terms of Reference will apply.

3.3 Disputes lodged with FOS on or after 1 January 2012

FOS will apply these Terms of Reference to all Disputes that are lodged with FOS on or after 1 January 2012.

The guidelines to paragraph 3 address these issues:

- *Which TOR apply to a Dispute?*
- *Which TOR apply to a Dispute lodged on or after 1 January 2010?*
- *Which TOR apply to a Dispute lodged before 1 January 2010?*
- *How can TOR and guidance material be obtained?*

Determining which TOR apply

The current TOR apply to Disputes lodged on or after 1 January 2010, and earlier TOR apply to other Disputes. A Dispute is lodged on or after 1 January 2010 if it is referred to FOS for resolution on or after that date. Lodgment is explained in the guidelines to paragraph 6.

Disputes lodged on or after 1 January 2010

The current TOR apply to these Disputes. Whether Schedule 1 or Schedule 2 to the TOR applies to a Dispute depends on when the Dispute was lodged, as explained below.

Dispute lodged between 1 January 2010 and 31 December 2011

Schedule 1 to the TOR specifies the maximum total value of the remedies that FOS may award for each claim – the “cap” – in these Disputes. The caps are explained in the guidelines to paragraph 9.7.

Dispute lodged on or after 1 January 2012

Schedule 2 to the TOR specifies the caps for claims in these Disputes.

Disputes lodged before 1 January 2010

The current TOR do not apply to Disputes first lodged with FOS, or transferred to FOS by a Predecessor Scheme, before 1 January 2010. Predecessor Schemes are:

- the Banking and Financial Services Ombudsman (BFSO);
- the Financial Industry Complaints Service (FICS);
- the Insurance Ombudsman Service (IOS);
- the Credit Union Dispute Resolution Centre (CUDRC);
- Insurance Brokers Dispute Limited (IBD); and
- any other ASIC approved external dispute resolution scheme that merges with FOS.

Earlier TOR continue to apply to Disputes lodged with, or transferred to, FOS before 1 January 2010. The earlier TOR include:

- Banking and Finance TOR;
- Investments, Life Insurance and Superannuation TOR;
- General Insurance TOR;
- Mutuels TOR; and
- Insurance Broking TOR.

Some Disputes lodged with FICS were not transferred to FOS because the FSPs in these Disputes did not become members of FOS. The FICS Rules continued to apply to these Disputes, and the TOR referred to above do not apply to them.

Obtaining TOR and guidance material

FOS will ensure Applicants and FSPs continue to have access to applicable TOR and related documents such as guidelines, rules, practice notes and bulletins. These documents will be available electronically on the FOS website – www.fos.org.au – or in hard copy if requested by calling 1300 78 08 08.

Section 4: Disputes within scope of FOS

Paragraph 4: Disputes within scope of the Service

4.1 Eligibility to lodge a Dispute with FOS

FOS may only consider a Dispute if the Dispute is between a Financial Services Provider and:

- a) an individual or individuals (including those acting as a trustee, legal personal representative or otherwise);
- b) a partnership comprising of individuals – if the partnership carries on a business, the business must be a Small Business;
- c) the corporate trustee of a self managed superannuation fund or a family trust – if the trust carries on a business, the business must be a Small Business;
- d) a Small Business (whether a sole trader or constituted as a company, partnership, trust or otherwise);
- e) a club or incorporated association – if the club or incorporated association carries on a business, the business must be a Small Business;
- f) a body corporate of a strata title or company title building which is wholly occupied for residential or Small Business purposes; or
- g) the policy holder of a group life or group general insurance policy, where the dispute relates to the payment of benefits under that policy.

4.2 Types of Disputes that can be considered by FOS

FOS may only consider a Dispute between a Financial Services Provider and an Applicant:

- a) either:
 - (i) that arises from a contract or obligation arising under Australian law; or
 - (ii) where the offer to invest was received in Australia by an Applicant in relation to a recognised Foreign Collective Investment Scheme; and
- b) that arises from or relates to:
 - (i) the provision of a Financial Service by the Financial Services Provider to the Applicant;
 - (ii) the provision by the Applicant of a guarantee or security for, or repayment of, financial accommodation provided by the Financial Services Provider to a person or entity of the kind listed in paragraph 4.1;
 - (iii) an entitlement or benefit under a Life Insurance Policy by a person who is specified or referred to in the Life Insurance Policy, whether by name or otherwise, as a person to whom the insurance cover extends or to whom money becomes payable under the Life Insurance Policy;

- (iv) an entitlement or benefit under a General Insurance Policy by a person who is specified or referred to in the policy, whether by name or otherwise, as a person to whom the policy extends;
 - (v) a legal or beneficial interest arising out of:
 - (A) a financial investment (such as life insurance, a security or an interest in a managed investment scheme or a superannuation fund); or
 - (B) a facility under which a person seeks to manage financial risk or to avoid or limit the financial consequences of fluctuations in, or in the value of, an asset, receipts or costs (such as a derivatives contract);
 - (vi) a claim under another person's motor vehicle insurance policy for property damage to an Uninsured Motor Vehicle caused by a driver of the insured motor vehicle – but only where a valid claim has been lodged by the owner of the insured motor vehicle and any relevant excess has been paid (unless the claim is being made pursuant to section 51 of the Insurance Contracts Act 1984);
 - (vii) where the Financial Service Provider is a mutual – the provision of a Financial Service by a third party through the agency of the mutual to a customer of the mutual;
 - (viii) an investment offered by a Financial Services Provider under a foreign recognition scheme to foreign resident investors unless expressly excluded from access to FOS by the investment offer document; or
 - (ix) a Traditional Trustee Company Service, where the Applicant is entitled to request an Annual Information Return from the Trustee; and
- c) if the Financial Services Provider is a Member at the time that the Dispute is lodged with FOS (even if not a Member at the time of the events giving rise to the Dispute); and
 - d) if the Dispute is otherwise within the jurisdiction of FOS under these Terms of Reference and all other requirements of these Terms of Reference are met.

4.3 General insurance product limitation

FOS may only consider a Dispute in relation to a General Insurance Policy that is a:

- a) Retail General Insurance Policy;
- b) Residential Strata Title Insurance Product;
- c) Small Business Insurance Product;
- d) medical indemnity insurance product.

4.4 Consideration of other Disputes by agreement

Notwithstanding any other paragraph of these Terms of Reference, FOS may consider a Dispute where all parties to the Dispute and FOS so agree. If so, the procedures set out in Section C will apply to the resolution of that Dispute.

The guidelines to paragraph 4 address these issues:

- *Who can use FOS's services? (Eligibility under paragraph 4.1)*
- *What Disputes can FOS consider? (Jurisdiction requirements in paragraph 4.2)*
- *How does FOS decide whether the eligibility and jurisdiction requirements in paragraphs 4.1 and 4.2 are met?*
- *How can a party request FOS to consider a Dispute by agreement under paragraph 4.4?*
- *How does FOS decide whether to consider a Dispute by agreement?*

General guidance on jurisdiction

FOS can consider a Dispute if:

- the prospective Applicant is eligible to use FOS's services under paragraph 4.1;
- the jurisdiction requirements in paragraph 4.2 are met;
- the requirement in paragraph 4.3 for a Dispute about a general insurance policy is met, if applicable;
- the Dispute is not excluded under paragraph 5.1, 5.2 or 6.2; and
- the Dispute has already gone through the FSP's internal dispute resolution process to the extent required under paragraphs 6.3 and 6.4.

In most cases, FOS will only accept a Dispute if the prospective Applicant is eligible under paragraph 4.1 and the Dispute meets the jurisdiction requirements in paragraph 4.2.

In limited special cases, FOS may accept a referral outside the scope of the TOR. Paragraph 4.4 allows FOS to consider a Dispute that is outside the TOR provided FOS and the parties agree.

A prospective Applicant can lodge a Dispute or authorise another person to lodge the Dispute on their behalf. The authorised person could, for example, be a family member, a financial counselor, a lawyer or an accountant. The authorised person does not need to be eligible under paragraph 4.1.

A prospective Applicant can appoint another person to act for them – as a “representative”. FOS will deal with the representative and will expect the FSP to do so too. An Applicant may withdraw a representative's authority at any time.

Eligibility (Who can use FOS's services?)

Any party to a Dispute who is uncertain about whether a prospective Applicant is eligible to use FOS's services should discuss this with FOS by telephone before

referring a Dispute. Paragraph 5.3 sets out the process FOS follows when advising Applicants about decisions on eligibility and reviewing those decisions.

Jurisdiction requirements in paragraph 4.2 (What Disputes can FOS consider?)

FOS can consider a Dispute if it meets the jurisdiction requirements in paragraphs 4a) to d).

Link with Australia (4.2a)

FOS can consider a Dispute if the Dispute:

- arises from a contract or obligation arising under Australian law; or
- relates to an offer to invest that the Applicant received in Australia in relation to a recognised Foreign Collective Investment Scheme.

Contract or obligation under Australian law (4.2a)(i)

FOS can consider a Dispute if:

- the transaction to which the Dispute relates was entered into in Australia; or
- the Financial Service to which the Dispute relates was provided in Australia.

Examples of Disputes that arise from a contract or obligation arising under Australian law include Disputes about:

- use of credit cards outside Australia by Australian citizens or persons usually resident in Australia;
- use of cards outside Australia to access Australian accounts;
- financial facilities established in Australia for overseas residents;
- travel insurance provided in Australia for overseas travel; and
- transfers of funds initiated in Australia or sent to Australia by an Australian financial institution.

Offer in Australia to invest in recognised Foreign Collective Investment Scheme (4.2a)(ii)

FOS can consider a Dispute about an investment in a Foreign Collective Investment Scheme where:

- the offer to invest was received in Australia; and
- the scheme is a recognised Foreign Collective Investment Scheme.

There is a definition of “Foreign Collective Investment Scheme” in paragraph 20.1. This is the definition used in ASIC’s Regulatory Guide 178 *Foreign collective investment schemes*, which contains helpful information about these schemes.

Under paragraph 4.2a)(ii), a Foreign Collective Investment Scheme is recognised if it has relief from obligations imposed by the Corporations Act granted by ASIC under its Regulatory Guide 178.

At 21 December 2011, this includes schemes recognised under the following ASIC Class Orders:

- Class Order 04/526 (for New Zealand and United States schemes, and schemes operating out of Jersey);
- Class Order 07/753 (for Singaporean schemes);

- Class Order 08/506 (for Hong Kong schemes).

A recognised Foreign Collective Investment Scheme will also include any managed investment scheme offered in Australia but issued in another jurisdiction, where the offer is a “recognised offer” for the purpose of Chapter 8 of the Corporations Act.

At 21 December 2011, this includes New Zealand (see Corporations Regulations 8.1.1-8.1.3, and ASIC Regulatory Guide 190 *Offering securities in New Zealand and Australia under Mutual recognition.*)

Subject of Dispute (4.2b)

FOS can consider a Dispute that arises from or relates to at least one of the alternatives listed in paragraphs 4.2b)(i) to (vii).

Financial Service provided to Applicant (4.2b)(i)

The term “Financial Service” is defined in paragraph 14.1. This definition is potentially broader than the definition of “*financial service*” in the *Corporations Act 2001*. Even though FSPs may have joined FOS to satisfy their licensing requirements under the *Corporations Act*, FOS’s ability to deal with Disputes is governed by its TOR and is not necessarily limited to the scope of the *Corporations Act* or any other legislation.

However, certain Disputes, such as industrial or employment disputes with FSPs that do not relate to Financial Services will not be covered unless one of the paragraphs below applies.

Guarantee, security or repayment provided by Applicant (4.2b)(ii)

FOS can consider certain Disputes concerning a guarantee or security for, or repayment of, financial accommodation if:

- the Applicant; and
- the person or entity provided with the underlying financial accommodation each fall within a category in paragraphs 4.1a) to f).

Examples of Disputes that fall within paragraph 4.2b)(ii) include Disputes arising where the complaint includes that:

- a guarantor was not adequately aware of the legal effect of, or the financial exposure under, a guarantee;
- the FSP did not take adequate steps to ensure that a guarantor made an independent and informed decision about giving a guarantee;
- a guarantor did not receive information about any guaranteed account as required by law or a relevant Code of Practice, including copies of statements and any notices issued by the FSP; and
- the FSP increased a loan or overdraft limit or made some other material change to the underlying financial accommodation without the Applicant’s consent or knowledge where this was not permitted by law or under the terms of the guarantee.

Life insurance policy (4.2b)(iii)

Paragraph 4.2b(i) allows FOS to consider a Dispute about a life insurance policy between the FSP and the policy holder. Paragraph 4.2b(iii) extends this and allows FOS to consider a Dispute about a life insurance policy between the FSP and an Applicant who is not the policy holder, provided the Applicant is specified or referred to “by name or otherwise” as a person covered by the policy.

An example of a case within paragraph 4.2b(iii) is a Dispute arising where an employee makes a claim under a group life insurance policy, where the policy holder is an employer or superannuation trustee and the policy provides income protection or total and permanent disability cover to the employee.

General insurance policy (4.2b)(iv)

FOS can consider a Dispute about a general insurance policy even if the Applicant is not a party to the contract of general insurance provided the Applicant is specified or referred to “by name or otherwise” as a person covered by the policy. This includes a person with an entitlement under a policy such as:

- a group personal accident and sickness policy; or
- travel insurance for credit card holders.

Interest in financial investment or risk management facility (4.2b)(v)

FOS can consider a Dispute about investments including securities, managed investments, superannuation funds, life insurance and risk facilities including derivatives not only where the FSP provided them to the Applicant but also where the Applicant has a legal or beneficial interest in them. For example, FOS can consider a Dispute where the FSP deals with securities in a manner inconsistent with a legal or beneficial interest the Applicant claims to have in the securities (even though the FSP does not provide a Financial Service to the Applicant).

Paragraph 4.2b(v) only allows Applicants to lodge Disputes on the basis of a “legal interest” or “beneficial interest” as defined legally.

Motor vehicle insurance (4.2b)(vi)

FOS can consider a Dispute about a claim for damage to an uninsured vehicle caused by a driver of a comprehensively insured vehicle, provided:

- the owner of the insured vehicle has lodged a valid claim; and
- any relevant excess has been paid.

However, if the claim is made under section 51 of the *Insurance Contracts Act 1984*, FOS can consider the Dispute whether or not these requirements are met.

Section 51 applies where:

- there is an insurance policy that covers the policy holder for liability;
- the Applicant has a claim for compensation against the policy holder; and
- the policy holder has died, or cannot be found after making reasonable enquiries.

Third party service through the agency of a mutual (4.2b)(vii)

FOS can consider certain Disputes against a credit union that involve services or products provided by a third party on behalf of the credit union or to its members.

Investment under foreign recognition scheme (4.2b)(viii)

In paragraph 4.2b)(viii), the term “foreign recognition scheme” has the meaning that it has under section 1200A of the *Corporations Act*. Under that section, the following New Zealand legislative provisions amount to a foreign recognition scheme:

- Part 5 of the Securities Act 1978 (NZ); and
- the Securities (Mutual Recognition of Securities Offerings – Australia) Regulations 2008 (NZ).

This means that FOS can consider a Dispute about an investment offered by the FSP under the New Zealand provisions listed above to an investor resident outside Australia, unless the investment offer document expressly excludes access to FOS.

Traditional Trustee Company Services (4.2b)(ix)

Traditional Trustee Company Services are defined in the *Corporations Act 2001* and include:

- acting as:
- trustee of any kind, or administering or managing a trust;
- executor or administrator of a deceased estate;
- agent, attorney or nominee;
- receiver, controller or custodian of property; and
- manager or administrator of the estate of an individual.
- preparation of a:
 - will (i.e. codicil or other testamentary writing);
 - trust instrument;
 - power of attorney; or
 - agency arrangement.
- applying for probate of a will or grant of letters of administration.
- Administering a deceased estate.
- establishing and operating a common fund – where funds or estate money from two or more estates administered by the trustee are pooled together for the purpose of investment.

A person can lodge a Dispute about Traditional Trustee Company Services if they:

- received the services directly from the trustee company: or
- are entitled to request an “Annual Information Return” in respect of the trust (including a trust created by a deceased estate).

An Annual Information Return is a report containing information about a trust, including income earned on its assets, expenses, and the net value of the trust’s assets. The following people can request an Annual Information Return (and on that basis can also lodge a Dispute about Traditional Trustee Company Services provided in respect of the trust).

Deceased estates:

- a beneficiary under the deceased person’s will;

- if the person died intestate – a person who, under a law of a State or Territory, has, is entitled to, or claims to be entitled to, an interest in the deceased person’s estate;
- a person who has commenced a proceeding in a court, under a law of a State or Territory, to seek to be included as a beneficiary of the deceased person’s estate;

Trusts:

- a settlor of the trust;
- a person who, under the terms of the trust, has power to appoint or remove a trustee of the trust or to vary (or cause to be varied) any of the terms of the trust; or
- if the trust is a charitable trust – a person, or a person’s appointed successor, who is named in the instrument establishing the trust as a person who must, or may, be consulted by the trustee or trustees before distributing or applying money or other property for the purposes of the trust;
- if the trust is not a charitable trust – a beneficiary of the trust.

FOS membership (4.2c)

FOS can only consider a Dispute if the FSP is a FOS member when the Dispute is lodged.

Where the Dispute relates to Traditional Trustee Company Services and the trustee company has acted jointly with one or more co-trustees who are not FOS members, then FOS can only consider the Dispute if all the co-trustees consent to FOS dealing with the Dispute: see the definition of “Financial Services Provider” in paragraph 20.1.

How FOS decides whether the eligibility and jurisdiction requirements are met

In deciding whether:

- a prospective Applicant is eligible under paragraph 4.1; and
 - a Dispute meets the jurisdiction requirements in paragraph 4.2
- FOS follows the following process.

Before accepting a Dispute, FOS staff will assess whether a prospective Applicant is eligible and whether the Dispute satisfies paragraph 4.2. FOS may also assess whether a Dispute is within the TOR at later stages of the dispute resolution process should further information become available that suggests the Dispute is not within the TOR.

In complex matters, FOS may seek advice from relevant subject matter experts including supervisors, legal counsel or an Ombudsman.

FOS also considers whether any information that could be supplied by any party to the Dispute might help FOS to assess whether the requirements under paragraphs 4.1 and 4.2 are met. If so, FOS will request the information. FOS will explain any request for information and the reasons for it.

If FOS requests a party to supply information, the party should provide the information within the timeframe specified by FOS. The response need not be elaborate or expressed in technical language. If any aspect of the request requires clarification, the party should, as soon as possible, ask FOS to clarify the request.

If FOS decides it cannot consider a Dispute because the prospective Applicant is not eligible or the Dispute does not satisfy paragraph 4.2, FOS will give written advice of the decision and the reasons for it to the Applicant and any other relevant party to the Dispute.

An unsuccessful Applicant has the right to object to FOS's decision not to deal with the Dispute. This right is explained in paragraph 5.3 and the guidelines to that paragraph.

How party can request FOS to consider Dispute by agreement under paragraph 4.4

Paragraph 4.4 applies notwithstanding any other paragraph of the TOR. It allows FOS to consider a Dispute that it could not otherwise consider under the TOR, provided FOS and the parties agree to FOS dealing with the Dispute.

If FOS considers a Dispute by agreement under paragraph 4.4, the procedures in paragraphs 6 to 10 of the TOR will apply. A party cannot make their agreement for FOS to deal with a Dispute conditional on changes to the FOS procedures.

A party to a Dispute can request FOS to consider the Dispute under paragraph 4.4. Such a request should be made in writing and include:

- a simple explanation of why FOS could only consider the Dispute under paragraph 4.4;
- the reasons for the request; and
- information about the Dispute and the parties to it.

The request need not be elaborate or expressed in technical language, but should be clear.

How FOS decides whether to consider Dispute by agreement under paragraph 4.4

FOS can consider whether to exercise its discretion under paragraph 4.4 whether or not a party requests FOS to exercise the discretion. FOS follows the process outlined below when it decides whether to exercise the discretion.

- FOS ascertains whether all the parties to the Dispute agree to FOS considering the Dispute.
- If they do not agree, FOS will inform the parties that FOS cannot consider the Dispute.
- If all of the parties agree to FOS considering the Dispute, FOS will decide whether it would be appropriate for it to consider the Dispute, taking into account:
 - the reasons for the request;
 - the Dispute;
 - the principles stated in paragraph 1.2 of the TOR;
 - FOS's objectives as set out in clause 2.1 of its Constitution;
 - the requirements of ASIC's Regulatory Guides 139 and 165;
 - any special circumstances or factors relevant to the Dispute.

When FOS decides whether to exercise its discretion, it will inform all of the parties to the Dispute of its decision.

Section 5: Disputes outside the scope of FOS

Paragraph 5.1: Disputes outside the scope of FOS

5.1 Exclusions from FOS's jurisdiction

The Service may not consider a Dispute:

- a) about whether a Financial Services Provider has met confidentiality or privacy obligations unless the Dispute about confidentiality or privacy:
 - (i) is part of a broader Dispute between the Financial Services Provider and the Applicant; or
 - (ii) relates to or arises out of the provision of credit, the collection of a debt, credit reporting and/or the banker-customer relationship;
- b) about the level of a fee, premium, charge or interest rate – unless:
 - (i) the Dispute concerns non-disclosure, misrepresentation or incorrect application of the fee, premium, charge or interest rate by the Financial Services Provider having regard to any scale or practices generally applied by that Financial Services Provider or agreed with that Applicant;
 - (ii) the Dispute concerns a breach of any legal obligation or duty on the part of the Financial Services Provider; or
 - (iii) the Applicant's Dispute is with a medical indemnity insurer and pertains to the level of medical indemnity insurance premium or the application of a risk surcharge (as defined in the Services Contract between the Health Insurance Commission, and the Commonwealth of Australia represented by the Department of Health and Ageing, and medical indemnity insurers);
- c) about the Financial Services Provider's assessment of the credit risk posed by a borrower or the security to be required for a loan – but this does not prevent FOS from considering a Dispute:
 - (i) claiming Maladministration in lending, loan management or security matters; or
 - (ii) about the variation of a Credit Contract as a result of the Applicant being in financial hardship;
- d) about underwriting or actuarial factors leading to an offer of a Life Insurance Policy on non-standard terms;
- e) in the case of a Dispute about a General Insurance Policy – about rating factors and weightings the insurer applies to determine the insured's or proposed insured's base premium which is commercially sensitive information;
- f) about a decision to refuse to provide insurance cover except where:
 - (i) the Dispute is that the decision was made indiscriminately, maliciously or on the basis of incorrect information; or
 - (ii) the Dispute pertains to medical indemnity insurance cover;

- g) about the investment performance of a financial investment, except a Dispute concerning non-disclosure or misrepresentation;
- h) about decisions of the trustees (in their capacity as trustees) of approved deposit funds and of regulated superannuation funds;
- i) relating to the management of a fund or scheme as a whole;
- j) that relates to a decision by a Financial Services Provider as to how to allocate the benefit of a financial product (such as but not limited to a Life Insurance Policy) between the competing claims of potential beneficiaries;
- k) where the Dispute raises the same events and facts and is brought by the same Applicant as a Dispute previously dealt with by FOS or a Predecessor Scheme and there is insufficient additional events and facts raised in the new Dispute to warrant FOS's consideration of the new Dispute;
- l) that has already been dealt with by a court or dispute resolution tribunal established by legislation, or by another external dispute resolution scheme approved by ASIC;
- m) in relation to which the Applicant commenced legal proceedings before the Dispute was lodged with FOS except where:
 - (i) the legal proceedings have been discontinued; or
 - (ii) the relevant statute of limitation period will shortly expire and the Applicant undertakes in writing not to take any further steps in the proceedings while FOS is dealing with the Dispute;
- n) that has already been lodged with, and is being dealt with by, another external dispute resolution scheme approved by ASIC;
- o) where the value of the Applicant's claim in the Dispute exceeds \$500,000;
- p) where the Applicant is a member of a group of related bodies corporate and that group has in excess of 20 employees (or 100 employees in the case of a manufacturing group); or
- q) requiring review of a trustee's exercise of discretion, except to the extent there is an allegation of bad faith, failure to give fair and proper consideration to the exercise of the discretion, or failure to exercise the discretion in accordance with the purpose for which it was conferred.

The guidelines to paragraph 5.1 address these issues:

- *What Disputes is FOS not able to consider? (Exclusions under paragraph 5.1)*
- *How does FOS decide whether a Dispute has already been "dealt with"?*
- *How does FOS decide whether a Dispute is excluded under paragraph 5.1?*

Disputes FOS cannot consider (Exclusions under paragraph 5.1)

FOS cannot consider a Dispute that falls within paragraphs 5.1a) to 5.1p). There is a limited exception to this, which is explained above in the guidelines to paragraph 4.4.

Confidentiality and privacy (5.1a))

FOS can consider a Dispute about confidentiality or privacy where the Dispute relates to:

- the provision of credit;
- the collection of a debt;
- credit reporting; or
- the banker-customer relationship;

even if the Dispute is solely about a confidentiality or privacy issue.

If a confidentiality or privacy Dispute does not relate to any of the matters listed above, FOS can only consider the Dispute if it is part of a broader Dispute between the Applicant and the FSP. This means, in the case of Disputes about Financial Services such as insurance and managed investments, FOS will not consider “stand alone” privacy Disputes.

Fees, premium, charge or interest rate (5.1b))

FOS cannot consider a Dispute about the level of a fee, premium, charge or interest rate unless one of the exceptions in paragraphs 5.1b)(i), (ii) or (iii) applies.

FOS can consider a Dispute, even if it is about the level of a fee, provided the Dispute concerns:

- misrepresentation of; or
- failure to adequately disclose, the fee to the Applicant.

FOS can also consider a fee Dispute if it is alleged the fee was incorrectly applied having regard to any scale:

- applied generally by the FSP; or
- agreed between the FSP and the Applicant.

Examples of Disputes within paragraph 5.1.b)(i) FOS can consider include where an Applicant alleges:

- an FSP advised a fee would be a certain amount and then charged a higher fee; or
- they were not told the FSP would charge a fee.

Other Disputes concerning levels of fees FOS can consider include:

- disputes about breaches of legal obligations or duties by FSPs; and
- certain Disputes about medical indemnity insurance premiums.

For example, if an Applicant, required to pay a fee for services offered by the FSP, alleges the FSP did not provide the services to an acceptable standard, the Applicant may seek a total or partial refund of the fees. In that case, the Dispute is not about the level of the fee, even though FOS may decide (if it upholds the Dispute) that the FSP should refund all or part of the fee.

Where a Dispute raises a combination of issues, some of which fall within paragraph 5.1b)(i), (ii) or (iii), FOS can consider the issues within those paragraphs.

Assessment of credit risk (5.1c))

General Guidance on assessment of credit risk

The exclusion of Disputes about assessments of credit risk in paragraph 5.1c) does not prevent FOS from considering a Dispute:

- claiming Maladministration (as defined in paragraph 14.1) in lending, loan management or security matters; or
- about the variation of a Credit Contract (as defined in paragraph 14.1) as a result of the Applicant being in financial hardship.

There was an exclusion similar to paragraph 5.1c) in the former FOS Banking & Finance TOR. The principles followed in applying that exclusion were well developed. They are explained in FOS Bulletins 45 and 50. Paragraph 5.1c) is worded differently to the earlier similar paragraph, to clarify the exclusion and to extend it to Maladministration in loan management. When applying paragraph 5.1c), FOS will build on the principles explained in Bulletins 45 and 50.

Financial hardship (5.1c)(ii)

Even where an FSP may consider it has properly exercised its commercial judgment in accepting or declining a request for assistance because of financial hardship, FOS can review the FSP's response to the request. FOS will consider whether the FSP has met its obligations under the relevant legislation or codes of practice, the FSP's own policy or good industry practice. The relevant code of practice may be the Code of Banking Practice or the Mutual Banking Code of Practice. FOS also assesses whether the FSP has met obligations under Commonwealth and state legislative protections designed to assist Centrelink recipients.

In assessing whether an FSP has met its obligations, FOS will take into account whether the FSP has given genuine consideration to the request, and has responded with reasons referable to the Applicant's particular circumstances. FOS will also consider whether the FSP's response has sufficiently addressed the Applicant's financial difficulty or hardship.

In addition, FOS will take into account:

- whether the FSP started or continued with enforcement action before it considered and responded to the variation application; and
- if the Applicant appointed a representative, whether the FSP respected that appointment; and
- whether the Applicant demonstrated a willingness to work with the FSP – for example, by responding to reasonable requests for information and making payments where possible.

Where FOS concludes the FSP has not met its obligations, FOS has the power to require the FSP to vary the credit contract in order to better address the Applicant's financial difficulty (see also the guidelines to paragraphs 7.1, 9.1, 9.2 and 9.3).

Non standard life insurance (5.1d))

This exclusion refers to a Life Insurance Policy on "non-standard" terms. A Life Insurance Policy may be on non-standard terms if it contains particular exclusions or

conditions that are not standard for the type of policy issued by that insurer. Such a policy may, for example:

- exclude certain medical conditions; or
- have a higher premium because the insured has pre-existing medical conditions.

Refusal to provide insurance cover (5.1f)

Generally, FOS cannot consider a Dispute about a refusal, for commercial reasons, to provide insurance. Exceptions are set out in paragraph 5.1f)(i) and (ii).

Expressed in straightforward terms, the Disputes referred to in paragraph 5.1f)(i) are Disputes about whether decisions to refuse to provide insurance cover were made properly. These Disputes are not excluded by paragraph 5.1f).

Investment performance (5.1g)

FOS cannot consider a Dispute about the investment performance of a financial investment unless the Dispute concerns non-disclosure or misrepresentation. This exclusion does not prevent FOS from considering a Dispute about an investment that has performed poorly, if the subject of the Dispute is an issue other than investment performance, and that issue is within FOS's jurisdiction.

Superannuation trustees (5.1h)

Paragraph 5.1h) only excludes Disputes relating to decisions by the trustees of approved deposit funds or regulated superannuation funds. Disputes relating to the conduct of these trustees other than their decisions are not excluded. Examples of Disputes that may come within FOS's jurisdiction are:

- Disputes about the suitability of financial advice; and
- Disputes about the level of service or information provided to an Applicant.

A Dispute that will usually be excluded by paragraph 5.1h) is a Dispute about a decision made by a trustee of a regulated superannuation fund to deny a fund member a disability benefit arising from a group life insurance policy provided to fund members. However, a Dispute about the life insurer's decision to deny a claim under the policy is not excluded by this paragraph.

The Superannuation Complaints Tribunal ("SCT") can deal with Disputes relating to decisions made by a trustee of an approved deposit fund or regulated superannuation fund. If a party refers this type of Dispute to FOS, FOS will inform the party that the SCT can consider the Dispute and may refer the matter to the SCT.

If a trustee has endorsed an insurer's decision, and the Applicant wishes to pursue a Dispute against the trustee and the insurer, the SCT can deal with the Dispute, because it can deal with decisions of trustees and insurers together. In this situation, FOS could only deal with a Dispute about the insurer's decision.

Fund or managed investment scheme management (5.1i)

A Dispute will generally fall within this exclusion if the subject of the Dispute is a management or commercial matter that:

- concerns the day to day operation of the fund or scheme; and
- applies to or affects all members of the fund or scheme.

Examples of this include:

- investment decisions made by a fund manager; and
- a fund manager's decision to freeze redemptions in a falling market.

A Dispute will also fall within this exclusion if the subject of the Dispute is the management of a common fund. A fund is a "common fund" where funds or estate money from two or more estates administered by the trustee are pooled together for the purpose of investment.

Allocation of benefits between beneficiaries (5.1j)

This exclusion applies where an FSP decides how to allocate the benefit of a Financial Service between potential beneficiaries. This situation may, for example, arise where an FSP makes a payment to one of a group of beneficiaries of a deceased estate and another beneficiary alleges they should have received the payment.

The exclusion does not apply to Disputes about Traditional Trustee Company Services. Those services include acting as a trustee or executor/administrator of a trust or deceased estate, which will frequently involve decisions affecting competing claims of beneficiaries. For more detail on what is a Traditional Trustee Company Service, see the guideline to paragraph 4.2b(ix)). FOS can deal with Disputes about Traditional Trustee Company Services affecting multiple parties, subject to additional requirements and under a separate set of procedures – see Section F (paragraphs 14-19).

Disputes previously dealt with by FOS (5.1k)

FOS cannot consider a Dispute where:

- the Dispute:
 - raises the same events and facts; and
 - is brought by the same Applicant
- as a Dispute "dealt with" earlier by FOS or a Predecessor Scheme; and
- any additional events and facts raised in the Dispute are not sufficient to warrant FOS's consideration of the Dispute.

The reference to a Dispute "dealt with" earlier is explained below.

Additional events and facts raised in a Dispute that go beyond this exclusion and which are sufficient to warrant FOS's consideration of the Dispute arise where:

- the additional events and facts were central to the outcome of the Dispute dealt with earlier (rather than surrounding or peripheral circumstances); and
- it would not be fair in all the circumstances to allow the outcome of the earlier Dispute to stand.

However, FOS will generally consider it fair to leave in place the outcome of a Dispute if it has been in place for 2 years or more.

Disputes dealt with by court, dispute resolution tribunal or other external dispute resolution scheme (5.1l))

Whether a Dispute has already been “dealt with” by a court, a dispute resolution tribunal or another external dispute resolution scheme approved by ASIC is explained below.

Where Applicant commenced legal proceedings before Dispute lodged (5.1m))

If an Applicant commences legal proceedings in relation to a Dispute before lodging the Dispute with FOS, the exclusion in paragraph 5.1m) may apply. An Applicant is taken to have commenced legal proceedings if they have issued the proceedings. The exclusion only applies where the Dispute and the legal proceedings are both between the same parties and raise the same events and facts.

Consistent with the requirements of paragraph 13.1a)(ii), an Applicant who lodges a defence or defence and counterclaim to legal proceedings instituted by the FSP, will not be considered by FOS as commencing proceedings.

Disputes being dealt with by another external dispute resolution scheme approved by ASIC (5.1n))

If an external dispute resolution scheme other than FOS is dealing with a Dispute, an applicant can elect to:

- continue in the other forum; or
- close the Dispute in the other forum and lodge it with FOS.

When deciding whether the same Dispute has been taken to FOS and another scheme, FOS considers whether the Disputes taken to each scheme are between the same parties and raise the same events and facts.

Claims exceeding \$500,000 (5.1o))

The term “claim” is explained in the guidelines to paragraph 9.7.

Applicant that is a member of a large group (5.1p))

This exclusion uses the term “related bodies corporate”. That term has the meaning given to it in the *Corporations Act 2001*.

Review of trustee decision (5.1q))

FOS will only consider a Dispute about a trustee’s exercise of their discretion to the extent that the courts would – that is, to the extent it is alleged the trustee:

- a) acted in bad faith;
- b) failed to give fair and proper consideration to the exercise of their discretion; or
- c) failed to exercise the discretion in accordance with the purpose for which it was conferred.

Otherwise, FOS will not consider a Dispute about how a trustee exercised a discretion they were given under a will or trust deed.

Decisions of trustees of regulated superannuation funds or approved deposit funds are excluded from FOS' consideration altogether. The guideline to paragraph 5.1h) explains this.

A Dispute relating to a trustee's decision could be excluded under paragraph 5.2, which is explained below in the guideline to that provision.

Disputes that have already been “dealt with”

Paragraph 5.1k) excludes Disputes “dealt with” earlier by FOS or a Predecessor Scheme.

Paragraph 5.1l) excludes Disputes “dealt with” earlier by a court, dispute resolution tribunal or other external dispute resolution scheme approved by ASIC.

When deciding whether a Dispute has been “dealt with” earlier by a forum, FOS examines whether:

- the nature and subject matter of the Dispute and the earlier Dispute brought to the forum are substantively the same;
- the Dispute and the earlier Dispute were between the same parties and raised the same events and facts; and
- either:
 - the forum made a final decision or final orders (including a default judgment, consent orders, or legal directions given by a court to a trustee) in the earlier Dispute, or
 - the earlier Dispute was resolved by agreement of the parties using the forum's procedures.

If these criteria are met, FOS will conclude the Dispute has been “dealt with” earlier.

If the earlier Dispute was discontinued, FOS takes the view the Dispute was not “dealt with” (and therefore is not within the exclusions in paragraphs 5.1k) and l)).

How FOS decides whether Dispute is excluded under paragraph 5.1

Before accepting a Dispute, FOS staff will assess whether the Dispute falls within paragraph 5.1. FOS may also assess whether a Dispute is within the TOR at later stages of the dispute resolution process should further information become available that suggests the Dispute is not within the TOR.

In complex matters, FOS may seek advice from relevant subject matter experts including supervisors, legal counsel or an Ombudsman.

FOS also considers whether any information that could be supplied by any party to the Dispute might help FOS to assess whether the Dispute falls within paragraph 5.1. If so, FOS will request the information. FOS will explain any request for further information and the reasons for it.

If FOS requests a party to supply further information, the party should provide the information within the timeframe specified by FOS. The response need not be elaborate or expressed in technical language. If any aspect of the request requires clarification, the party should, as soon as possible, ask FOS to clarify the request.

If FOS decides it cannot consider a Dispute because it comes within an exclusion in paragraph 5.1, FOS will give written advice of the decision and the reasons for it to the Applicant and any other relevant party to the Dispute.

An unsuccessful Applicant has the right to object to FOS's decision not to deal with the Dispute. This right is explained in paragraph 5.3 and the guidelines to that paragraph.

Paragraph 5.2: Discretion to exclude Disputes

5.2 Discretion to exclude Disputes

FOS may refuse to consider, or continue to consider, a Dispute, if FOS considers this course of action appropriate, for example, because:

- a) there is a more appropriate place to deal with the Dispute, such as a court, tribunal or another dispute resolution scheme or the Privacy Commissioner;
- b) the Applicant is not a retail client as defined in the Corporations Act 2001;
- c) the Dispute relates to a Financial Services Provider's practice or policy and does not involve any allegation of either Maladministration or inappropriate application of the practice or policy;
- d) the Dispute being made is frivolous or vexatious or lacking in substance; or
- e) after the Dispute is lodged with FOS, the Applicant commences legal proceedings against the Financial Services Provider that are related to the Dispute.

The guidelines to paragraph 5.2 address these issues:

- *What factors does FOS consider when deciding whether to exclude a Dispute?*
- *What process does FOS follow when deciding whether to exclude a Dispute?*
- *How can an FSP request FOS to exclude a Dispute?*
- *How do paragraphs 5.2a) to e) apply?*

General guidance on the application of paragraph 5.2

In some cases, even though a Dispute falls within FOS's jurisdiction under the TOR, it would not be appropriate for FOS to consider the Dispute. Paragraph 5.2 allows FOS to refuse to consider, or exclude, a Dispute in certain circumstances. If FOS has already started to consider a Dispute, it can still decide, at any point in the process, not to consider the Dispute further.

Paragraphs 5.2a) to e) list examples of factors that may lead FOS to exclude a Dispute. These examples are discussed below.

In addition, FOS can decide a Dispute should be excluded for other reasons. FOS could, for example, exclude a Dispute previously determined to be beyond the monetary jurisdictional limit of FOS or a Predecessor Scheme. FOS could also exclude a Dispute raising issues that a court would refuse to consider. EDR schemes are not expected to deal with such Disputes.

In any of the situations referred to in paragraph 5.2, FOS has the discretion to exclude a Dispute. FOS does not have to exclude the Dispute but it may do so.

FOS will not lightly exclude a Dispute that falls within FOS's jurisdiction under the TOR. It would only exclude if there is a compelling reason for FOS to conclude it would not be the appropriate forum for resolution of the Dispute.

Factors FOS considers when deciding whether to exclude a Dispute

FOS assesses whether it should exercise its discretion to exclude a Dispute after taking into account:

- the nature of the Dispute;
- any special circumstances or factors relevant to the Dispute;
- the principles stated in paragraph 1.2; and
- the requirements of ASIC's Regulatory Guides 139 and 165.

Process that FOS follows when deciding whether to exclude a Dispute

Before accepting a Dispute, FOS staff will assess whether FOS should exercise its discretion to exclude the Dispute under paragraph 5.2. FOS may also assess whether a Dispute is within the TOR at later stages of the dispute resolution process should further information become available that suggests the Dispute is not within the TOR.

In complex matters, FOS may seek advice from relevant subject matter experts including supervisors, legal counsel or an Ombudsman.

FOS also considers whether any information that could be supplied by any party to the Dispute might help FOS to assess whether FOS should exclude the Dispute under paragraph 5.2. If so, FOS will request the information. FOS will explain any request for further information and the reasons for it.

If FOS requests a party to supply further information, the party should provide the information within the timeframe specified by FOS. The response need not be elaborate or expressed in technical language. If any aspect of the request requires clarification, the party should, as soon as possible, ask FOS to clarify the request.

If FOS decides it should exercise its discretion to exclude a Dispute, FOS will give written advice of the decision and the reasons for it to the Applicant and any other relevant party to the Dispute.

An unsuccessful Applicant has the right to object to FOS's decision not to deal with the Dispute. This right is explained in paragraph 5.3 and the guidelines to that paragraph.

How FSP can request FOS to exercise its discretion and exclude Dispute

An FSP may ask FOS to exercise its discretion and exclude a Dispute.

If an FSP wishes FOS to exclude a Dispute under paragraph 5.2, the FSP should send FOS a written request for the exclusion that:

- explains why the FSP considers FOS should exclude the Dispute; and
- includes any information the FSP can supply to help FOS decide whether it should exclude the Dispute.

Paragraphs 5.2a) to e)

More appropriate place to deal with Dispute (5.2a)

In some cases, a court, a tribunal, another dispute resolution scheme, or the Privacy Commissioner may be a more appropriate place than FOS to deal with a Dispute.

For example, if the only way to determine the issues raised by the Dispute would be for a third party to give evidence subject to cross examination, then a court may be a better forum to deal with the Dispute. This may be the case where issues of fact or credibility cannot be determined by assessing the weight of the available information without testing it in court. However, in most cases, the assessment of fact can be made by FOS.

Guardianship issues

Where a Dispute relates to issues involving the actions of a trustee that could be dealt with by a State or Territory court or tribunal under the relevant guardianship laws, then FOS will consider the court or tribunal is a more appropriate forum to deal with those issues. This may occur, for example, where a Dispute concerns the conduct of a trustee company in its capacity as administrator of the financial affairs of a person who lacks the mental capacity to manage their own affairs, and the appointment of the trustee company in that role could be challenged in a court or tribunal.

Disputes about Traditional Trustee Company Services involving more than one beneficiary where one beneficiary is a minor or lacks mental capacity

Where a Dispute relates to Traditional Trustee Company Services involving more than one beneficiary of a trust or deceased estate, and the complainant or another interested beneficiary is a minor or lacks mental capacity, then FOS will consider the courts are a more appropriate forum.

Legal proceedings regarding deceased estates and trusts generally

In Disputes against a trustee company relating to the administration of an estate, if a third party instigates legal proceedings to be added as a beneficiary of that estate, or which would otherwise affect the administration of the estate or the distribution of its

assets, then at least while those proceedings are on foot the courts will be a more appropriate forum.

Examples include where somebody:

- applies to the court to be included as a beneficiary of the estate;
- commences testator's family maintenance proceedings; or
- instigates any other proceedings which could affect the distribution of the estate,

Where a trustee has applied to a court for directions regarding the administration of a trust or an estate before a Dispute has been lodged with FOS, and those directions could overlap with the issues raised in the Dispute, then the court will be seen as a more appropriate forum for the Dispute. Once the court gives directions, to the extent the court's directions resolve the issues in dispute, the Dispute would be excluded under paragraph 5.1l).

However, once a Dispute is lodged against a trustee company who is a FOS member in respect of a trust or deceased estate, the trustee company cannot apply to a court for directions while FOS is dealing with the Dispute. See paragraph 13.1a)(i).

Privacy

FOS considers some Disputes involving privacy. However, it may be more appropriate for the Privacy Commissioner to deal with a privacy Dispute, for example, where the Dispute is not related directly to the provision of a Financial Service.

Applicant not a "retail client" (5.2b)

"Retail client" is defined in sections 761G and 761GA of the *Corporations Act 2001* and in the Corporations Regulations. These definitions have been amended from time to time – most recently on 28 June 2007. When FOS considers whether a person is a "retail client", it applies the definition that was in force at the time of the relevant events.

If an Applicant was not a retail client, FOS will decide whether it should consider the Dispute, after taking into account the purposes of the FOS scheme and any other relevant considerations. Relevant considerations include:

- whether the Financial Service is regulated by the *Corporations Act 2001*; and
- whether the Applicant could cost effectively recover their claim in a court.

Where an FSP asserts FOS should not deal with a Dispute because the Applicant is not a retail client, the FSP should:

- provide information to show the Applicant is not a retail client; and
- explain why it would not be appropriate for FOS to deal with the Dispute.

Dispute about FSP's practice or policy (5.2c)

FOS can exclude a Dispute relating to an FSP's practice or policy that does not involve any allegation of:

- Maladministration (which is defined in paragraph 14.1); or
- inappropriate application of the practice or policy.

A Dispute will not be excluded if the alleged conduct of the FSP would be:

- contrary to law; or
- contrary to good industry practice; or
- in breach of the FSP's contractual obligations to the Applicant, whether or not that conduct was consistent with the FSP's practice or policy.

Disputes that may be excluded include Disputes about banking service issues such as:

- cheque clearance times;
- difficulties in cashing bank cheques;
- down time when ATMs are being serviced; and
- branch closures.

Dispute frivolous, vexatious or lacking in substance (5.2d)

FOS is obliged, under its TOR, to deal with Disputes on their merits. FOS will not lightly exclude a Dispute on the basis it is frivolous, vexatious or lacking in substance. However, FOS has an obligation under paragraph 1.2 to resolve Disputes in a cooperative, efficient, timely and fair manner. If a Dispute is frivolous, vexatious or lacking in substance, it is in the interests of all parties for FOS to identify this early, to save the parties the time and trouble of going through processes to resolve a Dispute that must be dismissed.

Courts have considered the meaning of the terms "frivolous", "vexatious" and "lacking in substance". Helpful points from court decisions are summarised below. FOS takes these points into account when considering the application of paragraph 5.2d).

Frivolous or vexatious

- "Frivolous" may mean "insupportable at law", "disclosing no cause of action" or "groundless".
- Bringing an action is only "vexatious" if done with a particular motive, such as a malicious motive.
- An action is "frivolous or vexatious" if:
 - it is "so obviously untenable that it cannot possibly succeed";
 - it is "manifestly groundless";
 - it is "so manifestly faulty that it does not admit of argument";
 - "useless expense" would be involved in allowing the action to proceed; or
 - the action "discloses a case which the court is satisfied cannot succeed".

Lacking in substance

The test for "lacking in substance" has a lower threshold than the test for "frivolous or vexatious".

“Lacking in substance” has been said to mean:

- in relation to a claim, “a claim which presents no more than a remote possibility of merit and which does no more than hint at a just claim”;
- in relation to a complaint, where “the complainant has no arguable case which should be allowed to be resolved at a full hearing”; and
- in relation to a case, a case depending on “an untenable position of law or fact”.

If on the available information, FOS can conclude a Dispute is frivolous, vexatious or lacking in substance, FOS may exclude the Dispute even if the Applicant argues further enquiries through FOS might elicit further information in support of the claim.

Applicant commences legal proceedings after Dispute lodged (5.2e)

FOS will generally exclude a Dispute if the Applicant commences legal proceedings after the Dispute is lodged. Exceptional situations, in which FOS may consider a Dispute in these circumstances, are where:

- the proceedings commenced by the Applicant have been discontinued; or
- the relevant statute of limitation period will shortly expire and the Applicant undertakes in writing not to take any further steps in the proceedings while FOS is dealing with the Dispute.

Paragraph 5.3: Process for exclusion of Disputes

5.3 Process for exclusion of Disputes

a) Where a Dispute is lodged with FOS and:

- (i) FOS considers that these Terms of Reference exclude the Dispute; or
- (ii) FOS decides to exercise a discretion under these Terms of Reference to exclude the Dispute,

FOS will advise the Applicant (and any other parties that are involved in and have been informed about the Dispute) and provide reasons for this assessment.

b) If, within 30 days of receipt of this advice, the Applicant objects to an assessment made by FOS in accordance with paragraph a), FOS will review the matter if FOS is satisfied that the Applicant’s objection may have substance. If so:

- (i) FOS will inform the other parties involved in the Dispute;
- (ii) all parties will be given an opportunity to provide submissions;
- (iii) all parties will be provided with copies of each other’s submissions; and
- (iv) FOS will review the matter and provide the parties with FOS’s final decision referred to as a Jurisdictional Decision – this will set out the reasons for the decision.

The guidelines to paragraph 5.3 address these issues:

- *When do the requirements in paragraph 5.3 apply?*
- *How does FOS advise an Applicant of an assessment?*
- *How can an Applicant object to an assessment?*
- *How does FOS decide whether an objection may have substance?*
- *How does FOS conduct a review?*

When paragraph 5.3 applies

Paragraph 5.3 sets out the process that has to be followed where FOS decides:

- the TOR exclude a Dispute (under paragraph 4.1, 4.2, 4.3, 5.1 or 6.2) or
- to exercise its discretion under paragraph 5.2 to exclude a Dispute.

These decisions are referred to as “assessments” in paragraph 5.3.

How FOS advises Applicant of assessment

If FOS makes an assessment, FOS provides the Applicant with:

- advice of the assessment;
- the reasons for the assessment; and
- statements explaining:
 - the Applicant could object to the assessment within 30 days after receiving advice of the assessment,
 - the steps the Applicant would need to take to object to the assessment,
 - if these steps need clarification, the Applicant should, as soon as possible, ask FOS to clarify them, and
 - if an objection is made within the 30 day time limit, FOS will conduct a review if it is satisfied the objection may have substance.

How Applicant can object to assessment

After receiving an assessment, an Applicant has 30 days to object to the assessment. The time limit for an objection could be extended. Extensions are provided for in paragraph 7.4 and explained in the guideline to that paragraph.

To object to an assessment, an Applicant must contact FOS by email, letter or telephone within the time limit to:

- state they object to the assessment;
- explain the reason for the objection; and
- provide information and raise arguments to support the objection.

How FOS decides whether objection may have substance

FOS will only review an assessment if satisfied an objection to the assessment may have substance. FOS decides whether it is satisfied an objection may have substance by considering a range of factors including whether the Applicant has:

- provided new and relevant information;
- identified an error in FOS’s assessment; or
- raised a new and relevant argument.

If FOS is satisfied the objection may have substance:

- FOS informs the parties of its decision and that the assessment will be reviewed;
- the parties are given an opportunity to make submissions and receive copies of each other's submissions and documents; and
- FOS reviews the matter and provides the parties with its reviewed decision, with reasons for it.

How FOS conducts review

A reviewed decision about an assessment is a "Jurisdictional Decision", which is defined in paragraph 14.1. This decision may only be made by an Ombudsman.

In a Jurisdictional Decision, an Ombudsman takes into account material including:

- information or submissions considered during FOS's assessment;
- the assessment and the reasons for it;
- the objection and any material provided to support it; and
- any submission made under paragraph 5.3b).

Before commencing a review, an Ombudsman considers whether any other material might assist in the review. If so, the Ombudsman will ask for the material and, if it is obtained, take it into account in the review.

An Ombudsman may be involved in discussions with staff about jurisdiction questions raised by a particular Dispute. Where appropriate in these circumstances FOS will allocate any later Jurisdictional Decision for that Dispute to another Ombudsman.

Section 6: Application process



Paragraph 6.1: Lodging of Disputes

6.1 Lodging of Disputes

- a) A party to a Dispute may lodge the Dispute with FOS by referring the Dispute to FOS for resolution.
- b) FOS may assist Applicants with this process.
- c) A Financial Services Provider that lodges a Dispute with FOS must have obtained the Applicant's prior consent.

The guidelines to paragraph 6.1 address these issues:

- *How is a Dispute lodged?*
- *What is meant by "Registration" and the FSP's opportunity for internal dispute resolution?*
- *What assistance with lodgement does FOS provide?*

How Dispute is lodged

A Dispute is treated as being "lodged" with FOS when it is first referred to FOS for resolution. A Dispute may be referred to FOS:

- by submitting an Online Registration Form or Dispute Form, available on the FOS website www.fos.org.au;
- in writing, using the Registration Form or Dispute Form that an Applicant can download from the FOS website, or by email, fax or letter; or
- in a case where assistance from FOS is needed, by telephone.

To help FOS to deal with a Dispute, the party lodging the Dispute should provide the following information at the time of lodgment or as soon as possible after lodgment:

- name and contact details of prospective Applicant;
- key issues;
- outcome sought;
- if available, FSP's name, relevant details of the Financial Service (for example a policy or account number); and
- the date of any complaint made to the FSP.

If an FSP wants to lodge a Dispute itself, it must first obtain the Applicant's written consent to lodgment and provide a copy of this to FOS at the time of lodgment.

"Registration" and FSP's opportunity for internal dispute resolution

If an Applicant lodges a Dispute with FOS and:

- the Applicant has not previously asked the FSP to remedy the matter; or
- the Applicant has asked the FSP to remedy the matter but the period allowed for internal dispute resolution (IDR) has not expired,

FOS will give the FSP the opportunity to resolve the Dispute internally. This opportunity, the time periods allowed and FOS's ability to extend or reduce these

time periods are explained in paragraphs 6.3 and 6.4 and the guidelines to those paragraphs.

In these circumstances, FOS “registers” the Dispute and forwards the details to the FSP with a request that the FSP try to resolve the Dispute. The effect of registration is to suspend any FOS action on the Dispute until:

- the period allowed for IDR has expired; and
- the Applicant has contacted FOS to ask it to deal with the Dispute.

FOS will advise the Applicant that if:

- they remain unsatisfied after receiving the FSP’s “IDR Response” as defined in paragraph 14,1 (which is explained below in the guidelines to paragraph 6.2); or
- the period allowed for IDR has expired and no resolution has been reached, they can contact FOS and ask it to deal with the Dispute and provided the Dispute is otherwise within FOS’s jurisdiction, FOS will deal with it.

Assistance from FOS

FOS explains the Dispute lodgment process on its website and in printed brochures that are available to anyone making a request. The FOS staff that handle telephone enquiries are trained to explain how Disputes can be lodged.

FOS prefers Applicants to lodge Disputes in writing but if the need arises, FOS can help Applicants who are only able to lodge by telephone.

Although FOS is impartial and does not act as an advocate for any party, FOS can provide help to Applicants to ensure the following:

- Applicants understand whether they are eligible to lodge a Dispute with FOS;
- Applicants understand what is meant by “lodgement”, “registration” and IDR;
- Applicants know what documents to provide to FOS to support their application;
- the Dispute process flows smoothly and in a timely way; and
- parties are able to put their case to FOS.

FOS can also provide specific assistance with any part of the FOS process to Applicants with special requirements who may be disadvantaged if they do not receive that assistance. For example, FOS can arrange to register Disputes in languages other than English and arrange for them to be translated at no cost to the Applicant (see also the guidelines to paragraph 7.2).

FOS can also refer disadvantaged Applicants to community legal centres, legal aid offices, financial counsellors or other services for assistance after they have lodged their Dispute.

Paragraph 6.2: Time limits

6.2 Time limits

- a) Where a Dispute relates to a variation of a Credit Contract as a result of financial hardship, an unjust transaction or unconscionable interest and other charges under the National Credit Code, FOS will not consider the Dispute unless it is lodged with FOS before the later of the following time limits:
 - (i) within two years of the date when the Credit Contract is rescinded, discharged or otherwise comes to an end; or
 - (ii) where, prior to lodging the Dispute with FOS, the Applicant received an IDR Response in relation to the Dispute from the Financial Services Provider – within 2 years of the date of that IDR Response.
- b) In all other situations, FOS will not consider a Dispute unless the Dispute is lodged with FOS before the earlier of the following time limits:
 - (i) within six years of the date when the Applicant first became aware (or should reasonably have become aware) that they suffered the loss; and
 - (ii) where, prior to lodging the Dispute with FOS, the Applicant received an IDR Response in relation to the Dispute from the Financial Services Provider – within 2 years of the date of that IDR Response.

However, FOS may still consider a Dispute lodged after either of these time limits if FOS considers that exceptional circumstances apply.

The guidelines to paragraph 6.2 address the following issues:

- *What are the time limits for lodging a Dispute?*
- *What are the exceptions to the time limits?*
- *How does FOS assess when an Applicant “should reasonably have become aware” of the loss?*
- *What is an IDR Response?*

Time limits for lodging Disputes

There are two different time limits for lodging Disputes:

- a limit that applies to a Dispute relating to a variation of a Credit Contract as a result of financial hardship, an unjust transaction or unconscionable interest and other charges under the National Credit Code (the special credit time limit); and
- a limit that applies to all other Disputes (the general time limit).

Where the general time limit applies to a Dispute, FOS will consider the Dispute if it is “lodged” (as explained in the guideline to paragraph 6.1) before the earlier of:

- 6 years after the date when the Applicant first became aware, or “should reasonably have become aware” they suffered the loss; and

- if the Applicant received an IDR Response (as defined in paragraph 14.1) from the FSP, 2 years after the date of that response.

The special credit time limit applies to a Dispute about a variation of a contract regulated under the National Credit Code (which is a Credit Contract as defined in paragraph 14.1) that relates to financial hardship, unconscionable conduct or an unjust transaction, including maladministration in lending. Such a Dispute may be lodged if the contract is still on foot or came to an end within the last 2 years, even if the Applicant became aware, or should reasonably have become aware, more than 6 years earlier that they had suffered the loss.

Exceptions to time limits

Paragraph 6.2 allows FOS to consider a Dispute lodged after a time limit if FOS considers that there are exceptional circumstances that warrant an extension of time. This will be assessed on a case by case basis. FOS will not decide that exceptional circumstances apply merely because the time allowed for lodgement has expired and the Applicant is disadvantaged by being unable to use the FOS process.

Paragraph 4.4 also provides an exception to the time limits which is explained in the guidelines to that paragraph.

Awareness of loss

To work out the date when the Applicant “should reasonably have become aware” they suffered the loss, FOS considers when a reasonable person, in the Applicant’s particular circumstances, should have become aware that they suffered the loss. This may require FOS to consider what the Applicant was aware of and what additional inquiries it would have been reasonable for the Applicant to make. For example, if an Applicant received information in a document but did not read it carefully, when determining when they should reasonably have become aware they suffered the loss, FOS may take into account:

- the format of the document;
- how complex the document was;
- how long the Applicant had to read it; and
- whether the Applicant had any warnings or recommendations from the FSP, for instance about the need to obtain independent legal advice in relation to the document.

IDR Response

When calculating the time limit for lodging a Dispute, one important issue is whether the Applicant received an IDR Response as defined by the TOR.

An IDR Response must be a written response from the FSP addressed to the Applicant stating the following:

- the FSP’s IDR (internal dispute resolution) process has concluded;
- the FSP’s final decision about the complaint has been made;
- what the FSP’s final decision is, with the word “final” given prominence;
- the Applicant has the right to take the complaint to FOS;
- the time limits that apply if the Applicant wishes to take the complaint to FOS;
- and

- FOS's contact details.

FOS's contact details are as follows:

Financial Ombudsman Service
GPO Box 3
Melbourne VIC 3001

Telephone: 1300 780808
Fax: (03) 9613 6399
Web: www.fos.org.au
Email: info@fos.org.au

An FSP should:

- ensure that an IDR Response is dated;
- record when the Applicant was sent the IDR Response; and
- keep a copy of the IDR Response.

Paragraph 6.3: Opportunity for internal dispute resolution

6.3 Opportunity for internal dispute resolution

Subject to paragraph 6.4, where an Applicant lodges a Dispute with FOS:

- a) before complaining to the Financial Services Provider; or
- b)
 - (i) within 21 days of the Applicant first requesting a variation of a Credit Contract as a result of financial hardship or postponement of enforcement proceedings, or a further 30 days from the date of any agreement made as a result of that request; or
 - (ii) within 21 days of the Applicant first requesting the Financial Services Provider to remedy the matter where the Dispute involves a default notice; or
 - (iii) where the Dispute relates to a Traditional Trustee Company Service, within 90 days of the Applicant first requesting the Financial Services Provider to remedy the matter;
 - (iv) in all other cases, within 45 days of the Applicant first requesting the Financial Services Provider to remedy the matter but before receipt of the Financial Services Provider's IDR Response,

FOS must notify the Financial Services Provider of the Dispute and give the Financial Services Provider

- c) (if paragraph a) applies) the whole of the period which would have applied under paragraph b); or
 - d) (if paragraph b) applies) the balance of the applicable period;
- to provide an IDR Response.

The guidelines to paragraph 6.3 address the following issue:

- *What period is allowed for IDR?*
- *How does FOS refer a Dispute to an FSP for IDR?*
- *What happens when an Applicant raises new issues?*

General guidance on opportunity for IDR

Applicants usually approach FOS in the following situations:

- they have not yet sent their Dispute to an FSP's IDR process;
- within the period allowed for IDR, but before receiving the FSP's IDR Response;
- after the period allowed for IDR, but before receiving the FSP's IDR Response; or
- after receiving the FSP's IDR Response which has not remedied the matter.

If:

- a Dispute has not yet been through an FSP's IDR process; or
- the period allowed for IDR has not expired,

FOS will usually register the Dispute details and refer it back to the FSP for consideration through the FSP's IDR process.

Before the IDR period ends, FOS will confirm to the Applicant they can contact FOS to progress an unresolved Dispute.

Period allowed for IDR

The periods that paragraph 6.3 usually allows for IDR are:

- in a Dispute involving a request to vary a Credit Contract as a result of financial hardship or to postpone enforcement proceedings
 - 21 days from the date of the request or
 - if an agreement has been made as a result of the request, a further 30 days from the date of the agreement;
- in a Dispute involving a default notice under the National Credit Code, 21 days from the date when the Applicant first requested the FSP to remedy the matter;
- in a Dispute about a Traditional Trustee Company Service, 90 days (unless, during that time, a person applies to the court to be added as a beneficiary or the trustee applies to court for an opinion, advice or direction, in which case time ceases to run until after the court proceedings have concluded and any time allowed for an appeal has passed); and
- in any other Dispute, 45 days from the date when the Applicant first requested the FSP to remedy the matter.

If an Applicant lodges a Dispute without first complaining to the FSP, the IDR periods stated above are allowed. In this situation, the IDR period commences when FOS refers the Dispute to the FSP for IDR.

FOS may extend or reduce the period allowed for IDR as explained in paragraph 6.4 and the guidelines to that paragraph.

How FOS refers a Dispute to an FSP for IDR

FOS refers a Dispute to an FSP by providing the Dispute details to the FSP's nominated contact. Referral will usually be by email, fax or mail, depending on the contact details of the FSP. FOS prefers to refer matters by email where possible. To assist the FSP to more easily identify the Dispute, where possible FOS sends to the FSP:

- name and contact details for the Applicant (including details of the Applicant's representative where one has been authorised);
- a short summary of the issues in dispute; and
- the FSP's reference number (if provided).

What happens when Applicant raises new issues

In some circumstances, FOS may start to consider a Dispute when new issues raised by the Applicant have not been through IDR. In most cases, we will incorporate the new issues into the existing Dispute and provide the FSP with an opportunity to respond to the new issues without opening a new file. This may happen when the new issues are:

- closely related to issues that have been through IDR; or
- so minor that FOS considers they would be unlikely to impact on an IDR Response provided by the FSP.

If the new issues are unrelated to the existing Dispute, FOS will normally refer these new issues back to the FSP to go through IDR before FOS considers the Dispute.

Paragraph 6.4: FOS discretion to vary normal IDR timeframes

6.4 FOS discretion to vary normal internal dispute resolution timeframes

Notwithstanding paragraph 6.3, FOS may:

- a) give the Financial Services Provider a longer period to resolve the Dispute if FOS considers special circumstances exist; or
- b) commence investigating or otherwise progressing the Dispute immediately if FOS considers the matter urgent.

The guidelines to paragraph 6.4 address these issues:

- *When can FOS extend, or reduce, the IDR period for a Dispute?*
- *How can a party request FOS to alter an IDR period?*

Extending IDR period

FOS may extend the IDR period for a Dispute if FOS considers special circumstances exist. Examples of special circumstances include:

- where settlement negotiations are progressing, but taking longer than the IDR period, and both parties agree to continue negotiations without FOS's involvement;

- where an FSP is waiting for a report by an expert or external consultant before providing an IDR Response and FOS considers the resulting delay reasonable; or
- where records an FSP needs to respond to a complaint are old and difficult to retrieve.

Any party may ask for an extension to the IDR period. The request must:

- be in writing;
- be made as early as possible and before the IDR period expires;
- state the period of the extension sought;
- explain the special circumstances considered to warrant the extension; and
- provide copies of supporting documents.

When deciding whether there are special circumstances, as well as considering the circumstances of the relevant Dispute and general principles of fairness, FOS will consider:

- whether the parties to the Dispute agree to the extension of the IDR period;
- whether the Applicant had previously contacted the FSP about the Dispute;
- whether any settlement negotiations are progressing and, if so, how long they are taking;
- whether the FSP is waiting for information to help it to provide an IDR response; and
- whether the length of the extension requested is reasonable.

There is a limit to the extension that FOS may grant in certain credit related Disputes. Where a Dispute involves a request to vary a Credit Contract as a result of financial hardship or to postpone enforcement proceedings, FOS may extend the 21 day period allowed for the FSP to consider the request, but the extension cannot be longer than 14 days.

If FOS decides to extend the IDR period for a Dispute, it will advise both parties of the decision and the reasons for it and confirm the new IDR timeframe.

Reducing IDR period

FOS may start to deal with a Dispute before the IDR period ends if FOS considers the matter urgent. This means FOS may commence investigating or otherwise considering the Dispute. Examples of urgent situations include:

- where the Applicant is in ill health;
- where an FSP is in administration, liquidation or has otherwise ceased trading;
- where delaying investigation would significantly disadvantage a party; and
- where any delay may cause or exacerbate hardship for the Applicant.

Any party to a Dispute may request urgent consideration of the Dispute. The request must:

- be in writing;
- be made as early as possible and before the IDR period expires;
- explain the circumstances considered to warrant reducing the IDR period; and

- provide copies of supporting documents (e.g. medical reports, legal proceedings, default and rescission notices).

In cases where FOS considers it may deal with the Dispute before the IDR period ends, it will discuss the Dispute with the FSP before making a decision. When considering whether it should reduce the IDR period, FOS will assess relevant factors including:

- whether an FSP is in external administration or has ceased trading;
- the Applicant's medical condition if it affects their ability to participate in FOS's consideration of the Dispute (especially if it is delayed);
- legal proceedings against the Applicant by a third party; and
- the requirement for urgent access to funds.

If FOS decides to start dealing with a Dispute before the IDR period ends, it will advise both parties of the decision.

Paragraph 6.5: Disputes lodged with other ASIC approved EDR schemes

6.5 Disputes lodged with other ASIC approved EDR Schemes

For the purposes of these Terms of Reference, where a Dispute is referred to FOS by another ASIC approved external dispute resolution ("EDR") scheme, the time limit for bringing a Dispute to FOS will apply from the date when the Dispute was lodged with the other EDR scheme and the Dispute will be deemed to have been lodged with FOS on the date that it was lodged with the other EDR scheme.

General guidance on Disputes lodged with other schemes

A Dispute may be lodged with an external dispute resolution (EDR) scheme other than FOS and later referred to FOS. If a Dispute is lodged with an ASIC approved EDR scheme, then referred to FOS by that other scheme:

- the time limits for lodgement specified in paragraph 6.2 will apply from the date when the Dispute was lodged with the other scheme; and
- that date will be deemed to be the date of lodgement with FOS.

Section 7:

Dispute resolution methods and related matters

Paragraph 7.1: Dispute resolution methods

7.1 Dispute resolution methods

To resolve a Dispute, FOS may use one or more of the following methods:

- a) negotiation;
- b) conciliation or mediation; or
- c) deciding the Dispute in accordance with the process set out in paragraph 8.5.

The guidelines to paragraph 7.1 address the following issues:

- *How does FOS determine the approach to use to resolve Disputes?*
- *What approach does FOS take to financial hardship matters?*

Approaches to dispute resolution

Paragraph 7.1 permits FOS to use a wide range of methods to resolve a Dispute.

The procedures for resolving a Dispute by a decision (referred to in paragraph 7.1.c)) are dealt with in paragraph 8 and explained in the guidelines to that paragraph.

The terms “negotiation”, “conciliation” and “mediation” are intended to cover the wide range of techniques available to resolve Disputes cooperatively and by agreement rather than prescribing a narrow set of particular approaches to a Dispute.

FOS staff will explore with the parties any dispute resolution methods that may be appropriate for a Dispute. If attempts to resolve a Dispute by agreement are unsuccessful or FOS concludes the available methods to resolve the Dispute by agreement are unlikely to resolve the Dispute, FOS may proceed to the decision making procedures under paragraph 8.5.

In considering the appropriate methods to resolve a Dispute, FOS will take into account:

- the nature of the issues raised by the Dispute;
- the parties to the Dispute, their circumstances, and the nature of their relationship;
- any special circumstances or factors relevant to the Dispute; and
- the principles which commit FOS to:
 - resolving a Dispute in a cooperative, efficient, timely and fair manner;
 - proceeding with the minimum of formality and technicality; and
 - being as transparent as possible while meeting its confidentiality and privacy obligations.

FOS staff will discuss its proposed approach with the parties to ensure they understand what is involved, and agree to it, before proceeding with that approach.

Approach to financial hardship matters

FOS has developed a streamlined process to consider Disputes about financial hardship in an efficient, timely and fair manner. This new process is outlined below.

- Financial hardship Disputes will be identified as soon as FOS receives them.
- FOS will review the FSP's response to the Applicant's request for assistance. At this stage, FOS will decide whether a telephone conciliation conference is appropriate. If FOS requires more information from either the FSP or the Applicant to make this decision, FOS will request the information.
- If FOS decides that a telephone conciliation conference is appropriate, FOS will arrange the conference.
- Before a telephone conciliation conference, FOS may ask the parties to provide information that has not previously been provided. This may, for example, include:
 - details of the debtor's financial position;
 - details of the debt and arrears; and
 - the estimated value of any security.
- Where a telephone conciliation conference is conducted, it is compulsory for both the FSP and the Applicant to attend. A representative of the Applicant may also attend. Each party must have authority to settle the Dispute at the conference.
- If:
 - a Dispute is not resolved at a telephone conciliation conference; or
 - FOS decides that a telephone conciliation conference is not appropriate for a Disputethen the Dispute will be dealt with using the processes referred to in paragraph 7.1 of the TOR. In this situation, FOS can decide to vary the credit contract.

FOS will review the streamlined process for dealing with financial hardship Disputes and may change it from time to time.

Paragraph 7.2: Provision of information by the parties to the Dispute

7.2 Provision of information by the parties to the Dispute

FOS may require a party to a Dispute to provide to, or procure for, FOS any information that FOS considers necessary. That party must comply with FOS' request within the timeframe specified by FOS except where the party satisfies FOS that:

- a) to provide information would breach a duty of confidentiality to a third party and, despite best endeavours, the third party's consent to the disclosure of the information has not been able to be obtained;
- b) to provide the information would breach a Court order or prejudice a current investigation by the police or other law enforcement agency; or
- c) the information does not or no longer exists or is not within the party's reasonable possession or control.

The guidelines to paragraph 7.2 address these issues:

- *What information may FOS request?*
- *How does FOS make requests for information?*
- *How should a party respond to a FOS request for information?*
- *How does FOS decide whether an exception applies?*
- *What assistance can an Applicant obtain from FOS?*

Information FOS may request

FOS adopts an inquisitorial approach to its consideration of a Dispute and may request information it considers "necessary" from a party to a Dispute. In this context, "necessary" means necessary to assist FOS to consider the Dispute.

Examples of information FOS may consider necessary include:

- information relevant to the Dispute in hard copy or electronic form or in audio, video or other recordings;
- records or files relating to the Applicant and the Financial Services provided to the Applicant;
- records kept by agents of the FSP that relate to the matters in dispute and the Financial Service provided to the Applicant;
- statements about the events in question from those involved in them;
- lending or underwriting guidelines of the FSP, relevant to the Dispute;
- reports on the Dispute prepared for the FSP; and
- original files that contain any of the information referred to above.

As well as requiring them to provide information already in their possession, FOS may require an Applicant or FSP to obtain information to support their case from other sources, including where their case is based on information that is in the hands of third parties.

To help FOS to resolve Disputes efficiently and fairly, Applicants and FSPs are encouraged to identify all information relevant to a Dispute and to provide it to FOS at the first available opportunity, rather than waiting for a specific request from FOS for that information.

FOS requests for information

When FOS requests information from a party, FOS informs the party:

- when the information has to be provided;
- that exceptions may apply and what the exceptions are (unless the party is an FSP that does not require this information); and
- that if the party forms the view an exception applies, they should explain the view to FOS in writing and provide material to support the explanation (within a specified timeframe).

Responding to a request for information

An Applicant or FSP must provide information if FOS requests it and must do so within the timeframe specified by FOS. There are very limited exceptions to this. The exceptions apply:

- where the information does not exist or is not within the party's reasonable possession or control;
- where providing the information would breach a duty of confidentiality owed to a third party, and despite best endeavours, the third party's consent to disclose the information has not been able to be obtained; or
- where providing the information would breach a court order or prejudice a current investigation by a law enforcement agency.

If requested to provide information, a party should provide that information within the timeframe specified by FOS. If a party will not be able to provide the information within the timeframe, they should contact FOS immediately to discuss this. Applications for extensions of time are discussed in the guidelines to paragraph 7.4.

If a party forms the view an exception applies, they should take the steps to raise an exception outlined in FOS's request for information. To do so the party will need to explain their view and provide material to support their explanation in the time frame specified in the request for information.

If the party is not sure what to do, they should ask FOS as soon as possible.

Considering whether exception applies

If a party takes the steps required to raise an exception, FOS decides whether it is satisfied the exception applies. To make the decision, FOS considers:

- the explanation provided by the party;
- the supporting material provided by the party; and
- any other relevant information FOS has.

FOS will inform the party of:

- its decision as to whether or not the exception applies;
- the reason(s) for its decision; and
- how the decision affects the process for resolution of the Dispute.

FOS Assistance

FOS can assist disabled or socially disadvantaged Applicants who are required to provide or procure information. These Applicants should tell FOS about their circumstances as soon as possible.

Paragraph 7.3: Other obligations of the parties to the Dispute

7.3 Other obligations of the parties to the Dispute

- a) FOS may require a party to a Dispute to do anything else that FOS considers may assist FOS's consideration of the Dispute. This may include requiring:
 - (i) a party to a Dispute to attend an interview; or
 - (ii) the Financial Services Provider to investigate a Dispute further or to appoint an independent expert to report back to FOS on a matter pertaining to the Dispute.
- b) A party to a Dispute must comply with such a request within the timeframe specified by FOS.

The guidelines to paragraph 7.3 address these issues:

- *What actions can FOS require a party to take?*
- *What happens when FOS asks a party to attend an interview?*
- *How does FOS conduct interviews where a general insurance Dispute involves an allegation of fraud?*
- *When might FOS require an FSP to conduct further investigation or appoint an independent expert to report to FOS?*

Action FOS can require party to take

FOS may require a party to a Dispute to take action to assist FOS to consider the Dispute, including:

- attending an interview;
- investigating a Dispute further; or
- appointing an independent expert to report to FOS.

This is not an exhaustive list.

When deciding whether to require a party to take action, FOS considers questions such as:

- What information or submissions may assist FOS to consider a Dispute?
- Could a party to the Dispute provide the information or submissions?

- If so, what would be the best way for FOS to obtain the information or submissions from the party?

FOS will also take into account the potential costs of requiring a party to take action to assist FOS before making a decision.

Interviews (7.3a)(i))

FOS might require a party to a Dispute to attend an interview where, for example, FOS forms the view:

- material provided in writing by the party is unclear or contradictory;
- the most efficient way for FOS to obtain the information required to consider the Dispute is by asking the party to answer questions face to face; or
- the party may not understand certain questions and FOS needs to ask them, so an interview provides the best opportunity to explain the questions and ensure they are understood and answered.

In an interview, FOS may ask a party to answer questions or to comment on or clarify matters relevant to the Dispute. An interview may be conducted face to face, by telephone or using video conference or similar technology, either by an Ombudsman or another member of FOS's staff.

If FOS requires a party to attend an interview, FOS will contact the party and arrange a time, date and venue for the interview.

FOS will also arrange for an interpreter to assist with an interview of an Applicant who does not have an adequate command of English.

FOS permits an Applicant to bring another party to an interview, for assistance or support, except where the Dispute involves allegations of fraud. In these Disputes, an Applicant will not be allowed to bring another party to the interview.

Interview where general insurance Dispute involves fraud allegation

Where a general insurance Dispute involves an FSP making a fraud allegation, FOS will refer the Dispute to an Ombudsman at an early stage and for Determination. See also guideline to Paragraph 8.5.

The Ombudsman will review the material submitted by the parties and then decide whether to discuss the issues raised with the parties in order to:

- clarify issues;
- ensure the Applicant is aware of the fraud allegations; and
- ensure the parties are aware of the issues raised in the Dispute.

In most general insurance Disputes involving fraud allegations there are different views about the facts so the Ombudsman usually invites the parties to attend an interview. The Ombudsman conducts these interviews informally.

At the interview, parties give information orally and provide any other relevant material to clarify any issue arising from the Dispute.

The Ombudsman usually conducts the interview in the presence of both parties. The party not being interviewed cannot cross-examine the other party.

If the party being interviewed objects to the presence of the other party, the Ombudsman may exercise the discretion to exclude the other party. Where new information is provided in an interview that one party does not attend, the absent party will be given the opportunity to respond to that new information.

Further investigation or appointment of independent expert (7.3a)(ii))

Some of the action FOS may require a party to take under paragraph 7.3 may achieve similar, or the same, outcomes as other action FOS can take. For example:

- requiring an FSP to investigate a Dispute further under paragraph 7.3 may be an alternative to requiring the FSP to provide or procure information under paragraph 7.2; and
- requiring an FSP to appoint an independent expert to report to FOS may be an alternative to FOS itself obtaining an expert report under paragraph 8.3.

Where FOS has to decide between alternative approaches of the kind referred to above, it will decide by considering what would be most appropriate given the circumstances of the Dispute.

An example of a case where requiring an FSP to appoint an independent expert to report to FOS may be more appropriate than FOS obtaining the report itself is where:

- an insurance claims Dispute raises issues (such as medical or engineering issues) that require an expert opinion to resolve;
- it would be reasonable for the insurer to have obtained the opinion as part of assessing the claim; and
- FOS considers it reasonable in the circumstances to require the insurer to obtain the opinion.

When deciding whether to require an FSP to appoint an independent expert to report to FOS, FOS will consider what is reasonable in the circumstances. Factors FOS will take into account may include:

- the extent to which a report on a matter pertaining to the Dispute would be expected to help FOS to consider the Dispute;
- the cost of obtaining the report; and
- delays expected to occur if FOS requires the report.

If FOS decides to require an FSP to appoint an independent expert, FOS will inform the FSP of the decision before requiring the appointment.

Paragraph 7.4: Timeframes

7.4 Timeframes

Nothing in these Terms of Reference or elsewhere restricts FOS's ability to give a party to a Dispute an extension of time (even if the original period, or the period as extended, has ended) should FOS consider this appropriate.

The guidelines to paragraph 7.4 address these issues:

- *How may a party apply for an extension of time?*
- *How does FOS decide whether to grant an extension of time?*
- *Can FOS grant an extension on conditions?*
- *What happens when FOS decides whether to grant an extension?*

General guidance on timeframes

FOS may extend a timeframe even where the timeframe has ended or has been extended before. This power to extend a timeframe applies not only to the timeframes for compliance with requests under paragraphs 7.2 and 7.3, but also to other timeframes set under the TOR or by FOS.

In the course of FOS's consideration of a Dispute, timeframes for the exchange of information and other steps are set by an Ombudsman or another member of FOS's staff. FOS generally allows between 2 and 4 weeks for a party to provide information requested by FOS. When setting the period for provision of information, FOS takes into account:

- the circumstances of the Dispute;
- the nature of the information requested; and
- the source of the information requested.

Applications for extensions

A party to a Dispute may apply for an extension of time by providing to FOS:

- details of the extension sought;
- the reason(s) for the application for an extension; and
- material to support the application.

If FOS requests a party to a Dispute to provide further material to support an extension application, the party should provide a clear response in the way and within the timeframe specified by FOS. The response need not be elaborate or expressed in technical language. If any aspect of the FOS request requires clarification, the party should ask FOS, as soon as possible, to clarify the request.

Decision on whether to grant extension

When considering an application for an extension of time, FOS will decide:

- whether it should grant an extension; and
- if so, the terms of the extension, including its length and any conditions of the extension.

FOS takes the following factors into account when considering an application for an extension of time:

- FOS's obligations to resolve Disputes in a cooperative, efficient, timely and fair manner;
- the reasons for the delay;
- whether the party applying for the extension could take steps to avoid or reduce the delay;
- whether that party has acted promptly and diligently;
- how an extension may affect other parties and the resolution of the Dispute; and
- any other relevant factor.

Extensions granted on conditions

FOS may grant an extension on conditions. For example, an extension of time to provide information may be granted on the condition:

- the information is provided in a particular form that will make it easier to understand or use; and/or
- no further extension is requested.

Decision on whether to grant extension

If FOS decides to grant an extension of time, it informs the parties to the Dispute of:

- the decision (including the terms of the extension);
- the reason(s) for the decision; and
- how the decision affects the processes in place to resolve the Dispute.

If FOS decides not to grant an extension of time, it informs any party informed of the extension application of:

- the decision;
- the reason(s) for the decision; and
- the timeframes that apply.

Paragraph 7.5: Consequences of non-compliance by either party with a FOS request

7.5 Consequences of non-compliance by either party with a FOS request

Where a party to a Dispute without reasonable excuse fails to provide or procure information or to take any other step requested by FOS within the timeframe specified by FOS, FOS may take the steps it considers reasonable in the circumstances.

This may include:

- a) proceeding with the resolution of the Dispute on the basis that an adverse inference may be drawn from that party's failure to comply with FOS's request; or
- b) where the Applicant fails to comply with a FOS request – refusing to continue consideration of the Dispute.

The guidelines to paragraph 7.5 address these issues:

- *What action can FOS take where a party fails to comply with a FOS request?*
- *What approach does FOS follow in this situation?*
- *If a party fails (or may fail) to comply with a FOS request, what should the party do?*
- *How can FOS help parties?*

Action FOS can take where party fails to comply with FOS request

If a party to a Dispute fails to comply with a request made by FOS within the timeframe specified, an important issue is whether there was a reasonable excuse for the failure. If there was not, FOS can take any action it considers reasonable in the circumstances. Examples of the action FOS might take are discussed below. Where an FSP fails to comply with a request, this may also constitute a breach of its membership obligations under the FOS Constitution, and may be referred to the FOS Board for consideration.

Drawing an adverse inference

If a party fails to provide information requested by FOS, FOS might draw an adverse inference, that the information:

- does not favour the party who has failed to provide the requested information; or
- undermines their position.

It is not necessary for FOS to specify, in advance of a failure to comply with a FOS request, exactly what inference FOS will draw from the failure.

Refusing to continue to consider the Dispute

If FOS forms the view an Applicant has information that needs to be made available before FOS could make a decision and the Applicant does not comply with a FOS request to provide the information, FOS might refuse to continue to consider the Dispute.

Progressing the Dispute to Recommendation or Determination

If FOS forms the view an FSP has information that would significantly assist the resolution of a Dispute that is currently being negotiated, and the FSP does not comply with a FOS request to provide the information, FOS might conclude this prevents the Dispute from being resolved fairly in all the circumstances. If so, FOS might take steps to progress the Dispute to a Recommendation or Determination.

Approach followed by FOS

If a party to a Dispute fails to take action requested by FOS within the timeframe specified, FOS gives the party an opportunity to explain any reasons it has to excuse the failure, and then considers:

- whether the failure is “without reasonable excuse”; and
- if so, what steps (if any) FOS should take.

In assessing whether or not the failure is without reasonable excuse and what steps (if any) FOS should take, FOS takes into account the following factors:

- whether the party that failed to take the requested action provided FOS with any explanation to excuse the failure and, if so:
 - the adequacy of that explanation; and
 - when they provided the explanation;
- information available to FOS that could provide an excuse for the failure;
- whether the party applied for an extension of the timeframe specified by FOS and, if so, when they made the application;
- the circumstances of the failure;
- the impact of the failure on the likely resolution of the Dispute;
- the impact of the failure on the other parties;
- what FOS may achieve by exercising the options available to it; and
- any other relevant considerations such as any past history of failure to cooperate with FOS.

Before making a decision, FOS considers whether any other material might assist it to make the decision. If so, FOS seeks to obtain the material and, if it is obtained, takes it into account.

What non-compliant party should do

As soon as a party to a Dispute becomes aware they may, or will, fail or have failed, to take action requested by FOS within the timeframe specified, the party should take steps to comply, and explain to FOS, in writing or by telephone:

- the circumstances of the failure or anticipated failure;
- the reasons for it, if any; and
- what it is doing to meet its obligations as soon as possible.

The party should also provide to FOS any further material FOS requests to help it to consider the matter, in the way and within the timeframe specified by FOS.

Parties are expected to comply with requests and to talk to FOS if they are having difficulties complying. FOS will consider extensions of time or alternative arrangements but only for parties unable to comply fully with requests – not for parties unwilling to do so.

A non-compliant party should apply for an extension of time under paragraph 7.4 as well as taking the steps explained above in some cases.

Assistance from FOS

FOS may, in certain situations, be able to help an Applicant or FSP to obtain information from a third party. Parties are expected to take responsibility for complying with FOS requests, however. A party should only seek assistance from FOS where:

- the party, despite reasonable efforts, has not been able to comply with a FOS request; and
- FOS's support would significantly help the party to comply with the request.

Paragraph 7.6: “Without prejudice” nature of Service

7.6 “Without prejudice” nature of Service

FOS operates on a 'without prejudice' basis. This means that information obtained through FOS may not be used in any subsequent court proceedings unless required by an appropriate court process.

Section 8: Deciding disputes

Paragraph 8.1: Rules of evidence

8.1 Rules of evidence

FOS is not bound by any legal rule of evidence.

The guidelines to paragraph 8.1 address the following issues:

- *What are FOS's obligations when it carries out the EDR process?*
- *What is FOS's approach to assessing information?*

FOS obligations

FOS is not required to apply the rules of evidence that apply to court proceedings in its consideration and resolution of Disputes. This means FOS does not determine whether to admit each piece of evidence or information. However FOS has an obligation to conduct its inquiries and carry out its consideration and resolution of Disputes in a way that draws out the facts and is fair to the parties. This applies to FOS's informal processes and the weight it gives to types of evidence or information presented to it including documentary evidence or information.

FOS may consider the following:

- expert opinion;
- hearsay;
- tendency or similar fact information; and
- character opinion.

FOS's approach to assessing information

FOS is not a court. FOS does not require parties to give evidence under oath and does not give parties an opportunity to cross examine each other under oath. Notwithstanding this, FOS will investigate a dispute thoroughly and determine the merits of the Dispute.

FOS's obligation to be fair to the parties when assessing information requires it to give due weight to reliable information. For example, when assessing an expert opinion, FOS may consider whether the expert had specialised knowledge or experience. In assessing hearsay, FOS may consider how far removed the information is from the source (ie second or third hearsay).

FOS gives due weight to the information it receives and reaches conclusions based on the balance of probabilities. This means FOS is likely to place more weight on reliable information.

The reliability of documentary information depends on the source and nature of the document and how the party obtained it. Generally, in the absence of any other compelling factors:

- information from an independent source is more reliable than information from a party that has an interest in the outcome of the Dispute;
- information that has controls over its creation and maintenance is more reliable than information without these;

- contemporaneous notes are more reliable than an oral recollection;
- originals are more reliable than copies; and
- information from one source that is consistent with information from another source is more reliable.

Paragraph 8.2: Dispute resolution criteria

8.2 Dispute Resolution Criteria

Subject to paragraph 8.1, when deciding a Dispute and whether a remedy should be provided in accordance with paragraph 9, FOS will do what in its opinion is fair in all the circumstances, having regard to each of the following:

- a) legal principles;
- b) applicable industry codes or guidance as to practice;
- c) good industry practice; and
- d) previous relevant decisions of FOS or a Predecessor Scheme (although FOS will not be bound by these).

The guidelines to paragraph 8.2 address this issue:

- *What amounts to “having regard to” legal principles, industry codes and practice guides, good industry practice and FOS previous decisions?*

“Having regard to” factors

FOS is committed to fairness and consistency in its consideration and resolution of Disputes. When deciding Disputes and making decisions about remedies in order to assist in the identification of what is fair and to support consistency in decision making, FOS has regard to:

- legal principles;
- industry codes, practice guides, and good industry practice; and
- previous FOS decisions.

Legal principles

FOS takes the approach that it should identify relevant legal principles and take these into account in its consideration of a Dispute. “Legal principles” used in this context refers to the law generally including the common law, important precedents and applicable legislation (*eg Corporations Act 2001 or the Insurance Contracts Act 1984*). Further, if there is a contract between an FSP and an Applicant, FOS will consider the terms of the contract.

This does not mean FOS must strictly apply the legal principles. However, FOS will consider these when handling a Dispute and if it is necessary to deviate from those principles to achieve fairness in the circumstances, it will identify its reasons for doing so.

This approach was endorsed, for the similarly worded Financial Industry Complaints Service Rules, in *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd & Ors. [2009] VSC 7*.

Industry codes etc

FOS will also take into account industry codes, practice guides and good industry practice. However, FOS will not necessarily be bound by the minimum standard that may be set in a particular industry code. FOS will try to do what is fair in all the circumstances for both parties to the Dispute and this may involve deciding that an FSP should have met a higher standard than the minimum industry standard set in a particular industry code including good practice expressed by ASIC or other relevant regulators.

Previous FOS decisions

FOS does not treat its previous decisions as precedents. However, FOS is committed to achieving consistent outcomes. There may be circumstances when a previous decision is not applicable because the facts are different or FOS has changed its approach to a particular class of dispute. FOS is also committed to providing information about its decision making to support consistency. This includes continuing to publish case studies and Determinations not identifying parties.

Paragraph 8.3: Specialist input

8.3 Specialist input

- a) When deciding a Dispute, FOS may consult with industry and consumer advisors as FOS thinks appropriate.
- b) FOS may also obtain expert advice including from a legal expert, industry expert, medical practitioner or building expert appointed by FOS. FOS may require the Financial Services Provider to pay or contribute to the cost provided that:
 - (i) the fees of the expert are reasonable, having regard to the complexity of the dispute; and
 - (ii) the fees do not deviate significantly from the usual market rate for such advice; and
 - (iii) the fees do not deviate significantly from the usual market rate for such advice; and
 - (iv) the person has the necessary expertise.

Unless exceptional circumstances apply, FOS will not require the Financial Services Provider to contribute more than \$3,000 per Dispute to the cost of expert advice obtained by FOS.

The guidelines to paragraph 8.3 address these issues:

- *When might FOS consult with advisors?*
- *When might FOS obtain expert advice?*

- *What payments or contributions may FSPs have to make to costs of obtaining expert advice?*

When FOS might consult with advisors

FOS may consult with industry and consumer advisors in its consideration and resolution of Disputes.

FOS might seek industry expertise to help it to better understand industry practice, procedures and products. Examples of issues on which FOS may consult industry advisors include:

- whether a particular investment asset allocation recommended to an Applicant was appropriate and in accordance with good industry practice;
- whether the disclosure of a financial product's risk or costs to an Applicant was consistent with good industry practice; or
- whether an assessment of affordability of a loan was within good industry practice.

FOS might seek the expertise of consumer representatives to help it better understand issues confronted by Applicants, for example, on the extent to which an Applicant's actions or failure to act accords with commonly seen consumer behaviour.

When FOS might obtain expert advice

FOS may obtain expert advice. To decide whether to obtain expert advice, FOS will consider what is reasonable in the circumstances. Factors FOS will take into account may include:

- the extent to which expert advice would be expected to help FOS to resolve the Dispute;
- the cost of obtaining the advice; and
- delays expected to occur if FOS obtains the advice.

When deciding whether to appoint a particular person to provide expert advice, FOS will consider whether the person is an expert in the matter on which advice is to be provided, taking into account, in particular:

- their training and experience and whether it is recent and relevant; and
- whether they are recognised as an expert in that matter.

FOS might, for example, obtain expert advice from:

- a hydrologist in a general insurance Dispute about flood damage;
- a medical specialist in a life insurance Dispute; or
- a forensic document examiner in a banking Dispute about a forged document.

FOS expects expert advice to set out:

- any assumptions on which the advice is based;
- the reasons for the advice; and
- any qualifications to the advice.

Payments or contributions by FSPs

FOS can require an FSP to pay for or contribute to the cost of obtaining expert advice where the requirements of paragraph 8.3b)(i) to (iii) are met. FOS will not require an FSP to contribute more than \$3,000 to the cost of obtaining expert advice for a Dispute unless there are exceptional circumstances.

Exceptional circumstances may exist where a Dispute is particularly complex. A Dispute may be particularly complex because it involves, for example:

- multiple products;
- challenges to the authenticity of multiple documents; or
- substantial financial exposure for the parties having regard to FOS's monetary jurisdictional limits.

In cases where FOS forms the view that exceptional circumstances exist, it will be prudent in exercising its discretion to require a contribution of over \$3,000. Where FOS decides to require such a contribution, FOS will contact the FSP as soon as reasonably practicable after making the decision.

Where FOS requires an FSP to make any contribution to costs of obtaining expert advice, FOS will contact the FSP before requiring the contribution to be made.

Paragraph 8.4: FOS's obligation to provide information to the parties

8.4 FOS's obligation to provide information to the parties

- a) Subject to paragraph b), before making a Determination, FOS must ensure that the parties to the Dispute are provided with access to the documentation, information and material upon which FOS proposes to rely in its Determination.
- b) Notwithstanding paragraph a):
 - (i) FOS is not obliged to make available to the parties any memoranda, analysis or other documents generated by FOS's employees or contractors; and
 - (ii) FOS must not disclose to a party to a Dispute information provided by another party to the Dispute where the party supplying the information has refused consent to this (and, in the absence of a clear statement to the contrary, FOS is entitled to assume that consent is given to the material in its entirety being provided to the other parties to the Dispute).
- c) If a party to a Dispute refuses consent to provide information to another party to the Dispute, FOS is not entitled to use that information to reach a decision adverse to the party to whom confidential information is denied unless FOS determines that special circumstances apply.

The guidelines to paragraph 8.4 address these issues:

- *How can FOS use information withheld from a party?*
- *How does FOS decide whether “special circumstances” apply?*
- *What steps does FOS take to provide access to information where it proceeds with a Determination without first making a Recommendation?*

General guidance on FOS’s obligation to provide information

FOS is committed to affording procedural fairness and expects parties to cooperate with FOS’s efforts to ensure Disputes are resolved fairly. Openness in decision making is one element of fairness. As a general rule, FOS cannot use information withheld from a party to reach a decision adverse to that party. This rule does not apply in “special circumstances” where there is a compelling reason to depart from the general rule.

Use of information withheld from party

A party to a Dispute can withhold information from the other party. However, FOS cannot use information withheld from a party to reach a decision adverse to that party unless there are “special circumstances” (as explained below).

If a party providing information to FOS refuses to consent to FOS disclosing the information to the other party, the refusal must be clearly stated when the information is provided to FOS. Unless this is clearly stated, FOS is entitled to assume consent is given to disclose the information.

Deciding whether special circumstances apply

“Special circumstances” are circumstances in which it is appropriate for FOS to use information not provided to a party to a Dispute to reach a decision adverse to that party.

FOS takes the approach that special circumstances exist in the minority of cases as fairness is not generally served by reaching decisions adverse to a party based on information not available to that party.

FOS will not consider this appropriate unless the information may be rebutted by the party from whom the information is withheld. It may be possible for that party to rebut the information if, for example, they are provided with a copy of a document setting out the information, with confidential material removed from the copy.

Special circumstances may apply in relation to information where, for example:

- the information may harm or embarrass a party if released;
- the information may endanger a third party;
- the information includes commercially sensitive information; or
- it is appropriate to delay the release of the information.

FOS decides whether special circumstances apply in relation to information if:

- one party refuses consent to provide information to another party; and
- FOS might use that information to reach a decision adverse to that other party.

Before making this decision, FOS invites the parties to make submissions and informs them how, and by what time, to make submissions. A submission by the party that provided the information to FOS should:

- suggest a method by which the information could be rebutted;
- explain why that party refused consent to FOS providing the information to the other party; and
- state why the information should be withheld from the other party, but taken into account in FOS's consideration of the Dispute.

FOS assesses whether special circumstances apply in relation to information not provided to a party to a Dispute by deciding whether it is appropriate to use the information to reach a decision adverse to that party, taking into account:

- whether that party could rebut the information;
- any submission made by a party;
- the circumstances of the Dispute and the parties; and
- the principles stated in paragraph 1.2.

When FOS decides whether special circumstances apply, it informs the parties of:

- the decision;
- the reason(s) for it;
- any steps FOS requires a party to take to allow information to be rebutted; and
- any opportunity a party has to rebut information, including an explanation of how, and by what time, the party could make the rebuttal.

If FOS decides special circumstances apply in relation to information, FOS can rely on the information, and any rebuttal of it, in a Determination.

Providing access to material to be used in expedited Determination

If FOS makes a Recommendation in respect of a Dispute, the Recommendation will identify the documents relied upon to reach the decision and both parties will have the opportunity to request copies of any documents which are not in their possession.

If FOS makes a Determination without first making a Recommendation, then before making the Determination FOS will:

- identify documentation, information and material on which FOS proposes to rely in the Determination;
- advise the parties that it proposes to rely on those items; and
- give each party an opportunity to request a copy of any item to which they have not already had access.

Paragraph 8.5: Process for deciding Disputes

8.5 Process for deciding Disputes

Unless paragraph 8.6 applies, the process for deciding a Dispute is as follows.

- a) After giving the parties a reasonable opportunity to make submissions and provide information about the matters in dispute, FOS makes an assessment referred to as a Recommendation.
- b) If both parties accept the Recommendation within 30 days of receiving it, the Dispute is resolved on the basis of the Recommendation.
- c) If, within 30 days of receiving the Recommendation, either:
 - (i) the Financial Services Provider does not accept the Recommendation in relation to the Dispute; or
 - (ii) either party requests FOS to proceed from a Recommendation to a Determination,

FOS will proceed to a Determination by either an Ombudsman or by a FOS Panel (as the Chief Ombudsman or his or her delegate decides is appropriate). Before the Determination is made, the parties will be given a reasonable opportunity to make submissions, and provide any further information, in response to the Recommendation.

The guidelines to paragraph 8.5 address these issues:

- *What is a Recommendation?*
- *How does FOS decide whether a Determination should be made by an Ombudsman or a FOS Panel?*

Recommendations

A Recommendation for a Dispute is a comprehensive assessment that sets out:

- all the relevant facts of the Dispute;
- the information relied on;
- the view reached by FOS about how the Dispute should be resolved; and
- the reasons for that view.

Paragraph 8.5 outlines the full process for deciding a Dispute, including the Recommendation stage. Where a Determination is expedited, the Recommendation stage is bypassed. This is explained in the guidelines to paragraph 8.6.

Deciding whether Ombudsman or FOS Panel should make Determination

An Ombudsman or a FOS Panel (“panel”) may make a Determination. The Chief Ombudsman or their delegate decides whether a Determination should be made by an Ombudsman or a panel. This decision is made after taking into account relevant factors, which include the factors noted below.

FOS uses its best endeavours to ensure each Dispute will be directed to the best suited decision maker for that particular Dispute. Whilst FOS seeks to use its

resources efficiently to ensure it provides timely dispute resolution, it will not direct Disputes based solely on resource considerations.

At the outset of the application of the TOR, it is expected that Disputes will tend to be allocated to Ombudsmen or panels as they were before the TOR applied. Over time, more sophisticated allocation methods are likely to be developed and then reflected in future versions of these guidelines.

Types of Dispute

Insurance

General Insurance

The following categories of general insurance Disputes (other than Disputes lodged against general insurance brokers) will usually be dealt with by a panel where, in the opinion of the Chief Ombudsman or their delegate, the interests of the parties and the scheme require the Disputes to be dealt with by the panel:

- all medical indemnity disputes;
- strata title insurance and small business insurance Disputes (other than Disputes lodged against insurance brokers);
- Disputes relating to claims arising from floods, storms, landslide, and other natural disaster events;
- Disputes raising complex factual questions about medical, engineering, alcohol related, occupancy or earth movement matters;
- Disputes where non disclosure in relation to a General Insurance Policy has been alleged and that might involve complex underwriting issues or insurance practice issues;
- Disputes raising complex and/or important issues involving relevant legislation;
- Disputes involving important issues with respect to the General Insurance Code of Practice and/or the need for guidance as to good insurance practice;
- Disputes raising complex and /or important issues involving the *Insurance Contracts Act 1984*; and
- Disputes that involve similar circumstances to other Disputes where a number of the Disputes could be referred to a panel to provide guidance for future Determinations.

General insurance Disputes that involve an FSP alleging fraud by an Applicant will be dealt with by an Ombudsman. See also guideline to Paragraph 7.3.

Life Insurance

Life insurance Disputes (other than Disputes lodged against insurance brokers, and relating solely to the provision of insurance broking services) will usually be dealt with by a panel where, in the opinion of the Chief Ombudsman or their delegate, the interests of the parties and the scheme require the Disputes to be dealt with by the panel and they:

- involve complex or new financial products;
- raise complex factual questions such as questions about medical, alcohol or drug related matters;
- require expert opinions/reports on the issues in dispute;

- involve allegations of non disclosure/misrepresentation that might involve complex underwriting issues or insurance practice issues (i.e. cases involving a large volume of material, significant factual disputation, or specialist skills);
- raise complex and/or important issues involving relevant legislation;
- involve important issues with respect to the industry codes and/or the need for guidance as to good industry practice;
- concern income stream risk claims;
- concern life insurance policies where fraud has been alleged or a policy has been avoided; or
- involve similar circumstances to other Disputes and a number of the Disputes could be referred to a panel to provide guidance for future Determinations.

Investments

Investment Disputes (whether against an adviser, another intermediary or a product provider) will usually be dealt with by a panel where, in the opinion of the Chief Ombudsman or their delegate, the interests of the parties and the scheme require the Disputes to be dealt with by the Panel and they:

- involve complex or new financial products;
- raise complex and/or important issues involving relevant legislation;
- raise complex factual questions;
- raise issues on which there are expert opinions or reports; or
- involve similar circumstances to other Disputes and a number of the Disputes could be referred to a panel to provide guidance for future Determinations.

Credit

A Dispute about a credit facility will be dealt with by an Ombudsman, but may be referred to a panel if:

- the Dispute relates to a margin loan (unless the Dispute is solely about the imposition of a break fee); or
- the Dispute is mainly about investment advice and the credit facility is ancillary to the investment advice.

Deposit taking

A Dispute that relates solely to the provision or operation of a deposit-taking facility is not considered to be an investment Dispute and will be dealt with by an Ombudsman.

Expertise required

An Ombudsman or panel may have the skill and experience needed to resolve a Dispute. In some cases, an Ombudsman will have particular expertise and the ability to readily access any industry or consumer advice required to resolve a matter. In other cases, it will be important to involve consumer or industry experts in the actual decision making, which can be done by using a panel. An example of this may be where it is not clear what good industry practice should be for the circumstances of a Dispute and it would be more effective to involve an industry representative directly in the decision making.

The significance of the Dispute

The amount of loss and other potential consequences of a Dispute may indicate the significance of a decision about the Dispute. For example, in a Dispute where the loss (and the amount of compensation claimed) is particularly large and the decision is likely to be a “new” decision about the industry standard in a particular context, a final decision by a panel of three with a range of relevant expertise may be appropriate, when the other criteria for referring a Dispute to a panel are taken into account.

Submissions by parties

Although FOS will make the decision, it may take into account any strong preference expressed by a party.

Paragraph 8.6: Expedited process for deciding Disputes

8.6 Expedited process for deciding Disputes

Notwithstanding paragraph 8.5, FOS may proceed to a Determination by either an Ombudsman or by a FOS Panel (as FOS decides is appropriate) without a Recommendation first being made. This expedited process will be followed if FOS considers that this would be appropriate in the circumstances. If so, FOS must advise the parties of this intended course of action and must not make the Determination without first giving the parties a reasonable opportunity to make submissions and provide information about the matters in dispute.

The guidelines to paragraph 8.6 address this issue:

- *How does FOS decide whether to expedite the process for deciding a Dispute?*

How FOS decides whether to expedite the process for deciding a Dispute

Usually, FOS makes a Recommendation before making a Determination of a Dispute. FOS may expedite the process for deciding a Dispute by referring it directly to Determination without first making a Recommendation.

FOS will not invite parties to make submissions on expedition or provide detailed reasons for a decision to expedite a matter.

FOS seeks to make its decisions in a way that promotes the most efficient, effective and fair dispute resolution possible.

When deciding whether to expedite a Dispute, FOS takes into account the circumstances of the Dispute, including:

- urgency;
- the type of product or service;
- the size of the loss involved;
- the age of the matter; and
- technical complexity.

Examples of Disputes FOS may refer directly to Determinations include:

- Disputes that need to be finalised urgently – for example, because the Applicant is experiencing financial hardship; and
- Disputes involving an FSP that has gone into liquidation or administration, ceased trading or failed to respond to the Dispute.

If FOS decides to expedite the process for deciding a Dispute, it will:

- advise the parties of the decision; and
- give the parties a reasonable opportunity to make submissions and provide information about the matters in dispute before FOS makes a Determination.

Paragraph 8.7: Recommendations and Determinations

8.7 Recommendations and Determinations

- a) Each Recommendation and Determination:
 - (i) must be in writing;
 - (ii) may either reach:
 - (A) a conclusion about the merits of the Dispute; or
 - (B) the view that, given the procedures adopted by FOS, it would not be appropriate for FOS to reach any conclusion as to the merits of the Dispute;
 - (iii) must set out reasons for any conclusion about the merits of a Dispute or view of the kind referred to in paragraph 8.7a)(ii)(B);
 - (iv) must specify any remedy, determined in accordance with paragraph 9, that FOS considers fair and appropriate; and
 - (v) must be provided to all parties to the Dispute.
- b) A Determination is a final decision and is binding upon the Financial Services Provider if the Applicant accepts the Determination within 30 days of receiving the Determination.

The guidelines to paragraph 8.7 address these issues:

- *When can an Applicant accept a Determination?*
- *What happens when an Applicant accepts a Determination?*
- *What happens when there is an arithmetic or clerical error in a Recommendation or Determination?*

General guidance on Recommendations and Determinations

Certain aspects of a Dispute may have been resolved before a Recommendation or Determination is made, for example, through negotiation or conciliation. In this situation, a Recommendation or Determination only has to deal with the outstanding aspects of the Dispute.

Time for Applicant to accept Determination

Where an Applicant receives a Determination, they have 30 days to accept it. This time may be extended by FOS as explained in the guidelines to paragraph 7.4.

Effect of accepting Determination

If an Applicant accepts a Determination within 30 days of receiving it, or any extended period granted, then the FSP is bound by that Determination. The FSP, under its contract of membership with FOS, must provide any remedy specified in the Determination within the timeframe specified.

If an Applicant accepts a Determination, they cannot later change their mind and reject it. Paragraph 8.9 explains the situation of an Applicant who does not accept a Recommendation or Determination.

FOS will try to ensure that an FSP complies with a FOS Determination. If an FSP does not comply with a Determination, under its Constitution, FOS can put a resolution to its board to expel the FSP from membership. In these circumstances, the FSP would have the opportunity to make submissions on the expulsion decision. If FOS expels an FSP, it must advise the FSP member and ASIC.

Correction of arithmetic or clerical error

FOS may correct a Determination or Recommendation if it contains:

- a clerical mistake; or
- an error arising from an accidental slip or omission; or
- a material miscalculation of figures or a material mistake in the description of any person, thing or matter; or
- a defect of form.

If a Determination or Recommendation relating to a Dispute requires a correction to address an issue listed above, a party to the Dispute may request the correction in writing. The request should explain the issue to be addressed through the correction. An Ombudsman will decide whether FOS should make any correction. FOS may correct a Determination or Recommendation relating to a Dispute whether or not a party to the Dispute requests a correction.

Paragraph 8.8: Applicant acceptance of a Recommendation or Determination

8.8 Applicant acceptance of a Recommendation or Determination

In order to accept a Recommendation or a Determination, the Applicant must provide the Financial Services Provider (if the Financial Services Provider so requests) with a binding release of the Financial Services Provider from liability in respect of the matters resolved by the Recommendation or Determination. The release must be for the full value of the claim the subject of the Dispute, even if this amount exceeds the amount of the remedy decided upon by FOS. The release shall be effective from the date on which the Financial Services Provider fulfils all of its obligations under the Recommendation or Determination.

The guidelines to paragraph 8.8 address these issues:

- *Are standard form releases available?*
- *What happens where a release is not in a standard form?*

Standard form releases

FOS has produced standard form releases that an Applicant may use to provide an FSP with a release from liability. There are different standard form releases to be used in the following cases:

- where an Applicant accepts a Recommendation or Determination; and
- where a Dispute is resolved by mutual agreement.

The standard form release used in a Dispute where an Applicant accepts a Recommendation or Determination meets the requirements for releases set by paragraph 8.8. It is:

- a binding release of the FSP from liability in respect of the matters resolved by the Recommendation or Determination;
- for the full value of the claim that is the subject of the Dispute; and
- effective from the date on which the FSP fulfils all of its obligations under the Recommendation or Determination.

Releases that are not in a standard form

If an FSP requests an Applicant to provide a release that is not in a standard form, the FSP will have to prepare the release and bear all costs associated with preparing it. FOS will advise the Applicant in this situation to obtain legal advice on the release. FOS may also, under paragraph 9.4, require the FSP to pay costs incurred by the Applicant in obtaining this advice.

FOS will not provide legal advice to any party on the effect of a release prepared by an FSP. FOS will conduct a limited review of such a release, however. If FOS considers the release unacceptable, it will raise its concerns with the FSP and ask it to redraft the release. FOS may consider a release unacceptable because, for example:

- the release does not accord with the Recommendation, Determination or resolution agreement made in respect of the Dispute;

- the requirements for releases set in paragraph 8.8 (which are listed above) are not met;
- the scope of the release is unreasonably wide; or
- the release purports to bind the Applicant before the FSP has complied with its obligations.

Paragraph 8.9: Consequences of an Applicant refusing to accept a Recommendation or Determination

8.9 Consequences of an Applicant refusing to accept a Recommendation or Determination

If an Applicant does not accept a Recommendation or Determination in relation to the Applicant's Dispute, the Applicant is not bound by the Recommendation or Determination and may bring an action in the courts or take any other available action against the Financial Services Provider.

The guideline to paragraph 8.9 addresses this issue:

- *What happens if an Applicant does not accept a Recommendation?*

Failure to accept a Recommendation

If an Applicant does not, or refuses to, accept a Recommendation within the period allowed for acceptance, FOS does not refer the Dispute to Determination. FOS's usual practice is to take no further action on the Dispute.

If the Applicant decides, after the period allowed for acceptance, they want to Accept the Recommendation or request a Determination, they are entitled to seek an extension of time under Paragraph 7.4. The guidelines to paragraph 7.4 explain how a party can apply for an extension of time.

Section 9: Types of remedies



Paragraph 9: Types of remedies

9.1 Types of remedies

Subject to paragraphs 9.2 to 9.8, FOS may decide that the Financial Services Provider or the Applicant undertake a course of action to resolve the Dispute including:

- a) the payment of a sum of money;
- b) the forgiveness or variation of a debt;
- c) the release of security for debt;
- d) the repayment, waiver or variation of a fee or other amount paid to or owing to the Financial Services Provider or to its representative or agent including the variation in the applicable interest rate on a loan;
- e) the reinstatement or rectification of a contract;
- f) the variation of the terms of a Credit Contract in cases of financial hardship;
- g) the meeting of a claim under an insurance policy by, for example, repairing, reinstating or replacing items of property; and
- h) in the case of a Dispute involving a privacy issue with an individual – that the Financial Services Provider should not repeat conduct on the basis that it constitutes an interference with the privacy of an individual or that the Financial Services Provider should correct, add to or delete information pertaining to the Applicant.

The guidelines to paragraph 9.1 address these issues:

- *How does FOS make decisions about remedies?*
- *What remedies are available for financial hardship?*
- *What input on remedies should parties provide?*

General guidance on remedies

Paragraph 9.1 sets out examples of remedies that may be provided to an Applicant. It is not an exhaustive list of remedies although it does set out some limits on the types of remedies FOS can award an Applicant.

Some remedies that may be provided to an Applicant do not involve payment of monetary compensation for loss or damage but rather a remedy with financial value to the Applicant. Examples of such remedies include:

- the discharge of a guarantee considered to be unenforceable; and
- the variation of the terms of a credit contract in a case of financial hardship.

FOS also assesses whether Applicants may be assisted by Commonwealth and state legislative protections designed to assist Centrelink recipients.

How FOS makes decisions about remedies

When deciding whether a remedy should be provided in respect of a Dispute, FOS considers what is fair in all the circumstances, having regard to:

- legal principles;
- applicable industry codes or guidance as to practice;
- good industry practice; and
- previous relevant decisions of FOS or a Predecessor Scheme (although FOS will not be bound by these);

as discussed in the guidelines to paragraph 8.2.

When it decides on a remedy, an aim FOS frequently seeks to achieve is to, as nearly as possible, either:

- place the Applicant in the position they would have been in if the conduct of the FSP had not caused the loss; or
- compensate the Applicant for their loss to the extent FOS holds the FSP responsible for the loss.

A remedy may be designed to compensate an Applicant for loss for which the FSP is responsible or to rectify conduct of the FSP (or to prevent it from recurring if the Dispute involves a privacy issue).

Where a remedy requires the Applicant to take action to facilitate a fair outcome (for example, to co-operate in a claims assessment process which the FSP is directed to carry out, or to transfer an asset to another party in return for a payment of compensation), then FOS may direct the Applicant to undertake that course of action.

Financial hardship remedies

In addition to other remedies, FOS can also vary a consumer credit contract. Such a variation may include, but is not limited to:

- extending the period of the contract and reducing the amount of each repayment due under the contract;
- postponing repayments due under the contract for a specified period;
- establishing a short or long term repayment arrangement; or
- any reasonable alternative contractual arrangement that may help the Applicant to overcome their financial difficulty.

Input on remedies parties should provide

When an Applicant lodges a Dispute with FOS, it is helpful if the Applicant can explain:

- the loss suffered;
- how it was caused by the FSP;
- the remedy sought; and
- why that remedy is appropriate.

The FSP should provide comments to FOS on any assertions made by the Applicant and the desired remedy. The comments will not be taken to be an admission of liability or responsibility.

Paragraphs 9.2 & 9.3: Compensation for direct financial loss or damage & other compensation

9.2 Compensation for direct financial loss or damage

Subject to paragraph 9.7, FOS may decide that the Financial Services Provider compensate the Applicant for direct financial loss or damage.

9.3 Other compensation

- a) Subject to paragraph 9.3c) and paragraph 9.7, FOS may decide that the Financial Services Provider compensate the Applicant for consequential financial loss or damage up to a maximum amount of \$3,000 per claim made in the Dispute.
- b) Subject to paragraph 9.3c) and paragraph 9.7, FOS may decide that the Financial Services Provider compensate the Applicant for non-financial loss but only where:
 - (i) an unusual degree or extent of physical inconvenience, time taken to resolve the situation or interference with the Applicant's expectation of enjoyment or peace of mind has occurred; or
 - (ii) in the case of a Dispute pertaining to an individual's privacy rights – injury has occurred to the Applicant's feelings or humiliation has been suffered by the Applicant.

The maximum amount of compensation for non-financial loss will be \$3,000 per claim made in the Dispute.

- c) Notwithstanding paragraphs 9.3a) and b), FOS will not provide compensation for:
 - (i) consequential financial loss; or
 - (ii) non-financial loss,in a Dispute arising as a result of a claim on a General Insurance Policy that expressly excludes such liability.
- d) The cap on liability in paragraph 9.3a) does not in any way restrict FOS's ability to make an interest award under paragraph 9.5.

The guidelines to paragraphs 9.2 and 9.3 address these issues:

- *What factors does FOS consider when deciding on compensation for loss?*
- *What approach does FOS take in relation to non-financial loss?*
- *What approach does FOS take in relation to compensation for financial hardship Disputes?*

General guidance on compensation for loss

FOS may decide an FSP should compensate an Applicant for:

- financial loss (which may be direct or consequential loss); or
- non-financial loss.

The concepts “consequential loss” and “non-financial loss” are discussed below.

FOS will not provide compensation for consequential loss or non-financial loss in a Dispute arising from a claim on a general insurance policy that expressly excludes liability for such loss.

Compensation is capped as explained in paragraph 9.7 and the guidelines to that paragraph. Additional caps apply to compensation for consequential loss and non-financial loss. For each of those forms of loss, there is a \$3,000 per claim cap on compensation. The meaning of “claim” is also explained in the guidelines to paragraph 9.7. The amount of the cap will be indexed every 3 years (see paragraph 9.8).

Factors FOS considers when deciding on compensation for loss

When deciding on compensation for loss, FOS does what it considers fair 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 or a Predecessor Scheme (although FOS will not be bound by these)

as discussed in the guideline to paragraph 8.2.

Particular factors taken into account by FOS in decisions on compensation are outlined below.

FSP responsibility

FOS will only award compensation if satisfied that loss is caused by an FSP’s conduct.

For example, if an Applicant suffers loss as a result of a vendor not providing them with goods or services they paid for with a bank cheque and the Applicant lodges a Dispute with FOS on the basis the FSP incorrectly told them the bank cheque could be stopped, then the loss has not been caused by the actions of the FSP. Rather, it has been caused by the vendor failing to comply with its contract with the Applicant.

Substantiation of losses

FOS will require an Applicant to provide information to support a claim for losses alleged to have been suffered as a result of an FSP’s actions. FOS will not award compensation for losses which are purely speculative.

Legal principles

FOS will have regard to established legal principles in regard to the recoverability of loss.

For example, FOS will not award compensation for losses caused by a breach of contract where the losses are too remote. In determining whether the loss caused by

a breach of contract is too remote, FOS will take into account established legal principles which provide that a loss is not too remote if:

- it may fairly and reasonably be considered either as arising naturally (that is, accordingly to the usual course of things from the breach of contract itself); or
- it may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach.

Applicant responsibility to mitigate

FOS will also take into account whether the Applicant was partly responsible for a loss. FOS expects Applicants to take reasonable steps to minimise or mitigate their own losses. If they have not done so, FOS may reduce the amount of compensation to take into account that the Applicant could have avoided some or all of the loss suffered.

For example, an FSP may have failed to inform an Applicant that their investment had been rolled into a non-interest bearing account. If the Applicant was later informed and took no action to move the investment for some time, FOS may award compensation for the loss prior to the FSP informing the Applicant but take the view the Applicant was responsible for losses after that date.

Insurance contracts

FOS will apply the terms of an insurance contract when deciding the amount to be paid in response to a claim. However, there may be some cases where FOS considers the insurer has responded to a claim so unreasonably it should compensate the Applicant for loss they incurred due to the delay in payment of the claim – even if the contract does not provide for this. For example:

- where an insurer has taken an undue length of time to consider and respond to a claim and or deal with a Dispute and, as a consequence, the Applicant suffers loss, then provided the Applicant can substantiate the loss, FOS may consider compensation in excess of the scope of the policy; or
- where an insurer has incorrectly denied a claim and an Applicant has incurred costs to obtain an expert opinion to demonstrate their entitlement under the policy, FOS may consider this to be a direct financial loss.

Direct and consequential loss

FOS can award compensation for direct loss or consequential loss. There is a \$3,000 cap on each claim for compensation for consequential loss. There may be more than one claim for consequential loss in a Dispute.

Direct losses are losses, such as out of pocket expenses or other liabilities, which are caused directly as a result of the FSP's conduct.

Consequential losses are losses which are indirectly caused by the FSP's conduct.

Whether a loss is a direct, or a consequential (indirect), loss will be considered on a case by case basis and will depend on all of the circumstances of the Dispute.

For example, an Applicant may complain that due to an unreasonable delay in the provision of a loan by an FSP, they have suffered, or become liable to pay, expenses such as penalty costs and legal fees. The Applicant may also claim they have suffered consequential loss, such as loss of profit if the funds were intended to be used to purchase a business. The \$3,000 cap would apply to the claim for loss of profits.

FOS takes the approach that an award of interest is the usual remedy for delay by an FSP.

Approach taken in relation to non-financial loss

Compensation for non-financial loss is limited. FOS may decide an FSP should compensate the Applicant for such loss only where:

- there has been an unusual amount of:
 - physical inconvenience,
 - time taken to resolve a situation, or
 - interference with the Applicant's expectation of enjoyment or peace of mind; or
- in a privacy Dispute, the Applicant has suffered humiliation or injured feelings.

FOS takes a conservative approach to compensation for non-financial loss. It is unlikely to decide a substantial amount of monetary compensation should be paid. It may decide a non-financial remedy, such as a letter of apology, should be provided.

Inconvenience is a form of non-financial loss. FOS considers compensation should not be provided where an Applicant merely suffers inconvenience that is a normal part of doing business. FOS expects an Applicant to:

- be moderately robust and bear the normal degree of inconvenience experienced when a problem occurs; and
- take reasonable steps to reduce inconvenience.

An example of a situation in which FOS may decide an FSP should compensate an Applicant for non-financial loss is where, due to a mistake made by the FSP, the Applicant's credit card is cancelled while they are on holiday, severely limiting their ability to make the most of the holiday.

Compensation in financial hardship Disputes

Where FOS concludes that there has been a breach of the FSP's obligations to assist consumers in financial hardship, FOS will consider whether any loss, financial or non-financial, has been suffered by the Applicant. Financial loss might include unnecessary default charges or enforcement costs that could have been avoided if the FSP complied with its obligations. Non-financial loss might include compensation if there has been unnecessary stress or inconvenience.

Paragraph 9.4: Applicant's costs in pursuing the matter

9.4 Applicant's costs in pursuing the matter

FOS may decide that the Financial Services Provider contribute to the legal or other professional costs or travel costs incurred by the Applicant in the course of the Dispute. Unless exceptional circumstances apply, FOS will not require the Financial Services Provider to contribute more than \$3,000 to these costs.

The guidelines to paragraph 9.4 address these issues:

- *When might FOS require an FSP to contribute to the Applicant's costs?*
- *How can an Applicant seek a contribution to costs?*

General guidance on contributions to costs

FOS provides a service that is free for Applicants. It is not usually necessary for either party to be legally represented. If an Applicant chooses to be represented, they will usually have to cover their legal fees themselves. Lawyers acting for Applicants should make this clear to the Applicants.

FOS usually advises an Applicant they must cover any legal costs they incur in the course of running their Dispute through FOS. If an Applicant might want to seek contributions to legal costs, they should discuss the matter with FOS before incurring the costs. FSPs are unable to pass on their legal costs of dealing with a FOS Dispute.

When FOS might require FSP to contribute to Applicant's costs

An Applicant can seek a contribution from the FSP to professional or travel costs the Applicant incurred in the course of the Dispute. FOS decides whether the FSP should make such a contribution by considering what is fair in the circumstances. FOS makes this decision taking into account:

- the complexity of the Dispute;
- for legal costs, whether the Dispute raised legal issues on which, notwithstanding FOS's involvement, the Applicant reasonably needed advice;
- for finance professional costs, whether the Dispute involved complex financial data on which, notwithstanding FOS's involvement, the Applicant reasonably needed advice; and
- whether the Applicant incurred costs because they genuinely required expert assistance.

Examples of cases in which FOS may form the view it would be fair for the FSP to contribute might include where the Applicant incurs:

- travel costs when attending an interview FOS requires the Applicant to attend;
- costs of presenting expert information to respond to an argument raised by the FSP; and/or
- professional costs to establish their case (for example, to present expert information).

FOS will not require an FSP to contribute more than \$3,000 to the professional or travel costs of an Applicant unless there are exceptional circumstances.

Exceptional circumstances may exist where a Dispute is particularly complex because it involves, for example:

- multiple complex financial calculations by the Applicant;
- challenges to the authenticity of multiple documents;
- complex legal issues in areas where there is uncertainty in the law; or
- substantial financial exposure for the parties having regard to FOS's monetary jurisdictional limits.

In cases where FOS forms the view that exceptional circumstances exist, it will be prudent in exercising its discretion to require a contribution of over \$3,000. Where FOS decides to require such a contribution, FOS will contact the FSP as soon as reasonably practicable after making the decision.

Where FOS requires an FSP to make any contribution to professional or travel costs incurred by an Applicant, FOS will contact the FSP before requiring the contribution to be made.

How Applicant can seek contribution to costs

If an Applicant thinks it would be fair for an FSP to contribute to professional or travel costs the Applicant incurred in the course of the Dispute, they should, as promptly as possible, provide to FOS:

- details of the contribution sought;
- a brief explanation of why the Applicant thinks that contribution would be fair;
- documents showing the costs the Applicant incurred; and
- any information required to explain the costs and why the Applicant incurred them.

Applicants should not wait for the outcome of a Dispute before claiming costs.

FOS will only require an FSP to contribute to costs after it has received proof of the amount of costs incurred and payment by the Applicant.

Paragraph 9.5: Interest

9.5 Interest

- a) Subject to paragraph 9.5 b) FOS may decide that the Financial Services Provider pay interest on a payment to be made by the Financial Services Provider to the Applicant.
- b) When deciding an award of interest:
 - (i) if the Insurance Contracts Act 1984 applies – FOS will calculate interest in accordance with that Act; and
 - (ii) otherwise:
 - (A) FOS will calculate interest from the date of the cause of action or matter giving rise to the claim; and
 - (B) FOS may have regard to any factors it considers relevant, including the extent to which either party's conduct contributed to delay in the resolution of the matter.

The guideline to paragraph 9.5 addresses these issues:

- *How does FOS make decisions about interest?*
- *If FOS awards interest on compensation, how will FOS calculate the interest?*

Decisions about interest

If FOS decides an FSP is required to pay compensation to an Applicant, FOS has the discretion to require the FSP to also pay interest on that compensation.

A decision on interest involves deciding:

- whether the FSP should pay interest on an award of compensation; and
- if so, the interest rate that should apply and the period for which interest should be paid.

Factors FOS takes into account in decisions about interest include:

- the type of Financial Service that is the subject of the Dispute;
- whether any legislation could be used as guidance on interest rates and periods;
- whether a contract provides for interest;
- what would be fair in all the circumstances; and
- if time has elapsed, how to maintain the real value of the compensation.

Calculation of interest

FOS will not impose a standard rate when making interest awards and will not have one rate for all cases. FOS will try to impose a rate that will maintain the real value over time of any award of compensation. FOS has discretion to apply a rate that best fits the circumstances and may apply a rate that replicates what a court might do or align with a statutory rate (where such a rate exists).

FOS will calculate the time period over which interest should be paid by taking into account factors such as:

- when the Applicant lodged the Dispute;
- any delays caused by the parties;
- the extent to which the conduct of either party contributed to a delay in resolving the Dispute; and
- the parties' conduct in the course of FOS dealing with the Dispute to arrive at a position that would be fair in all the circumstances.

Insurance contracts

If, in a Dispute relating to a contract of insurance as defined in section 10 of the *Insurance Contracts Act 1984*, FOS decides that the FSP should pay interest on compensation, FOS will use section 57 of that Act to determine the interest rate and the period for which interest should be paid.

Other cases

FOS will also take into account the following:

- If another legislative provision applies to the issues in dispute and specifies a particular rate of interest, FOS may award interest at that rate.
- If the contract to which the Dispute relates sets out a particular rate of interest, FOS may award interest at that rate.
- If there is no legislative or similar requirement that should be taken into account in the calculation, FOS will consider what interest rate would be fair in all the circumstances of the Dispute and particularly what rate would maintain the real value of the compensation awarded to the Applicant.

Paragraph 9.6: Other types of damages

9.6 Other types of damages

Punitive, exemplary or aggravated damages may not be awarded.

Paragraph 9.7: Cap on maximum value of remedy

9.7 Cap on maximum value of remedy

- a) The maximum total value of the remedy decided upon by FOS for a claim must not exceed:
 - (i) where paragraph 3.2 applies – the amount specified in the Schedule 1 as applicable to the type of claim; or
 - (ii) where paragraph 3.3 applies – the amount specified in Schedule 2 (as in force at the time of the lodging of the Dispute) as applicable to the type of claim.
- b) When determining the total value of a remedy under paragraph a):
 - (i) monetary compensation and any remedy where the value can readily be calculated, such as the waiving of a debt, are included; and
 - (ii) compensation for costs and interest payments are excluded.

The guideline to paragraph 9.7 addresses these issues:

- *What are the compensation caps?*
- *How is the total value of a remedy calculated?*
- *Can there be more than one claim in a Dispute?*
- *What does “claim” mean?*
- *Is an insurance Dispute against the insurer or the insurance broker?*

Compensation caps

Schedules 1 and 2 to the TOR set compensation caps by specifying maximum values of remedies for claims in Disputes. Whether Schedule 1 or 2 applies in relation to a Dispute depends on when the Dispute was lodged.

Disputes lodged between 1 January 2010 and 31 December 2011

Schedule 1 sets the compensation caps for claims in these Disputes. The caps are noted below.

- *Income stream risk insurance policy or advice claim*

The cap for a claim on an insurance policy dealing with income stream risk or advice about such a policy is \$6,700 per month. If the claim is in excess of this monthly limit, the monthly cap will apply unless:

 - the total amount payable under the policy can be calculated with certainty by reference to the expiry date of the policy and/or age of the insured; and
 - that total amount is less than \$280,000.

If the two exceptions above apply, then the cap will be \$280,000.
- *General insurance third party motor vehicle claim*

The cap for a claim by a third party on a General Insurance Policy providing cover for property loss or damage caused by or resulting from the impact of a motor vehicle is \$3,000.

- *Investment claim*
The cap for managed investments claims, stockbroking claims, claims made in relation to securities and any derivative products and financial planning claims (other than advice on a life insurance policy) is \$150,000.
- *Claim against General Insurance Broker*
The cap for a claim against a General Insurance Broker is \$100,000, except where the claim solely concerns its conduct in relation to a Life Insurance Policy – in which case it will be \$6,700 per month in respect of an income stream policy, or \$280,000 otherwise.
- *Other claims*
The cap for all other claims is \$280,000.

Disputes lodged on or after 1 January 2012

Schedule 2 sets the compensation caps for claims in these Disputes. The caps are noted below.

- *Income stream risk insurance policy or advice claim*
The cap for a claim on an insurance policy dealing with income stream risk or advice about such a policy is \$7,500 per month. If the claim is in excess of this monthly limit, the monthly cap will apply unless:
 - the total amount payable under the policy can be calculated with certainty by reference to the expiry date of the policy and/or age of the insured; and
 - that total amount is less than \$280,000.
 If the two exceptions above apply, then the cap will be \$280,000.
- *General insurance third party motor vehicle claim*
The cap for a claim by a third party on a General Insurance Policy providing cover for property loss or damage caused by or resulting from the impact of a motor vehicle is \$3,000.
- *Claim against General Insurance Broker*
The cap for a claim against a General Insurance Broker is \$150,000, except where the claim solely concerns its conduct in relation to a Life Insurance Policy – in which case it will be \$7,500 per month in respect of an income stream policy, or \$280,000 otherwise.
- *Other claims*
The cap for all other claims is \$280,000.

How total value of remedy is calculated

The caps limit the total value of a remedy for a claim. This total value is calculated by:

- including monetary compensation and “any remedy where the value can readily be calculated”, such as the waiving of a debt; and
- excluding any compensation for costs and interest payments.

FOS will calculate the value of a remedy as at the date on which FOS decides on the remedy.

Number of claims within Dispute

A compensation cap applies in relation to a claim rather than a Dispute. In any Dispute, one claim or multiple claims may be raised by an Applicant. Where an

Applicant raises multiple claims against an FSP, FOS usually deals with all of the claims together as a single Dispute because this is more efficient for dispute resolution and administration. However, the caps specified in Schedule 1 or 2 will apply to each claim within the Dispute.

The meaning of “claim”

FOS takes the view that for the purposes of the TOR, the expression “claim” refers to the set of facts that, put together, give an Applicant the right to ask for a remedy. This means a set of separate events or separate facts that lead to the alleged losses. FOS does not aggregate a number of claims into one claim just because the claims all arose from an ongoing relationship between an FSP and an Applicant.

FOS will not permit a joint claim in contract or tort to be “split” and treated as multiple claims (with a cap applying to each claim).

The expression “claim” under the TOR should not be confused with an “insurance claim” which refers to the actual application for benefits under an insurance policy.

In some circumstances an Applicant may be unsure whether the facts that give them the right to ask for a remedy lead to one claim or multiple claims. Examples to illustrate how FOS may determine whether an Applicant has one claim or multiple claims are noted below.

Advice

Where an Applicant has been to an FSP that gives financial advice and over a period of time has had a number of dealings with the FSP, resulting in the Applicant losing money in circumstances where the FSP is liable to pay compensation because the advice was unsuitable, FOS will consider the circumstances carefully to determine whether there has been one claim or multiple claims.

Scenario 1

If an FSP has given a statement of advice recommending a number of investments and the Applicant disputes the suitability of this investment advice, FOS is likely to treat this as one claim because there is one set of facts and circumstances giving rise to the Dispute claim, that is, the FSP providing the statement of advice.

Because there is only one claim, a cap applies in relation to that claim and the Applicant may not “split” the claim into separate components to avoid or reduce the impact of the cap. The Applicant cannot make a separate claim for each recommended investment.

Scenario 2

However, if the FSP has given advice recommending an investment and then given separate advice recommending another investment and the Applicant disputes the suitability of both sets of advice, FOS is likely to treat this Dispute as involving two claims with the effect that a cap applies in relation to each claim. This is so because there are two sets of facts and circumstances giving rise to the Dispute.

Banking

Scenario 1

Where an Applicant claims an FSP granted them a number of loans over a period of time in error, FOS is likely to treat the credit decision for each loan as a separate claim and will not aggregate the claims. This is because each credit decision is a separate event and is based on different facts.

Scenario 2

If an Applicant claims an FSP allowed a third party to access funds from one account without the proper authority of the account holder, FOS is likely to treat this as one claim and will aggregate all the unauthorised withdrawals. This is because the withdrawals all arose from the same set of circumstances, that is, the FSP allowing the third party unauthorised access to funds in the account.

Claim against insurer or insurance broker

Applicants may not be sure whether their Dispute is with their insurance broker or their insurer if the Applicant used an insurance broker. Claims about an insurance policy will usually be against the insurer. Claims about the advice to take out the insurance cover will usually be against the broker unless the broker is acting under a binder agreement. If a broker is acting under a binder agreement, this means they act as an agent of the insurer for that transaction. As explained above, the compensation caps for claims against insurers are different to the compensation caps for claims against insurance brokers.

Paragraph 9.8: Review of monetary value of remedies

9.8 Review of monetary value of remedies

- a) On 1 January 2015 and every 3 years thereafter, the monetary amounts specified in paragraph 9.3a) and Schedule 2 (as then in force) will be adjusted by the higher of the percentage increase in:
 - (i) the Consumer Price Index, weighted average of eight capital cities, for the 3 year period ending with the September quarter in the previous year; and
 - (ii) the Male Total Average Weekly Earnings for the 3 year period ending with the September quarter in the previous year,with rounding to the \$100.00, in the case of paragraph 9.3a) and where the monetary amount represents a monthly limit, or otherwise to the nearest \$500.00.
- b) In addition to these adjustments, the Board of FOS will, in consultation with Financial Services Providers and other stakeholders including key consumer, community and industry organisations, periodically review the limits in the Schedule and the Board will change these limits as it considers appropriate.

Section 10:

Test case procedures

Paragraph 10: Test case procedures

10.1 Notice of intended Test Case

If a Financial Services Provider wishes a Dispute to be treated as a test case, the Financial Services Provider must give FOS a notice in writing containing:

- a) a statement, with reasons, why the Financial Services Provider is of the opinion that the Dispute involves or may involve:
 - i) an issue which may have important consequences for the business of the Financial Services Provider or Financial Services Providers generally; or
 - ii) an important point of law; and
- b) an undertaking that, if within 6 months after FOS receives the notice, either the Applicant or the Financial Services Provider institutes proceedings in any superior court or tribunal which has the ability to make a binding determination of the issue or point of law in respect of the Dispute, the Financial Services Provider will:
 - i) pay the Applicant's costs and disbursements (if not otherwise agreed, on a solicitor and own client basis) of the proceedings at first instance and any subsequent appeal proceedings commenced by the Financial Services Provider (except by way of respondent's notice, cross appeal or other similar procedure); and
 - ii) make interim payments of account of such costs and disbursements if and to the extent that it appears reasonable to do so; and
- c) an undertaking that the Financial Services Provider will institute the proceedings within 6 months of the date of the notice and seek to prosecute the test case proceedings expeditiously.

10.2 FOS discretion to stop considering the Dispute

If after receiving a notice under paragraph 10.1 of these Terms of Reference, FOS is satisfied that it would be inappropriate to deal with the Dispute, FOS must inform the Applicant in writing that:

- a) FOS has received the notice;
- b) the date of the notice;
- c) FOS will cease considering the Dispute for so long as the Financial Services Provider complies with the undertakings in the notice; and
- d) the effect of this upon the Applicant.

The guideline to paragraph 10 addresses the following issues:

- *How can an FSP ask FOS to treat a Dispute as a test case?*
- *What does the requirement to prosecute test case proceedings expeditiously mean?*
- *How does FOS decide whether to treat a Dispute as a test case?*
- *What happens if an FSP does not comply with its undertakings?*

- *What is the relevance of a court decision in relation to a test case to other Disputes at FOS?*

Asking FOS to treat Dispute as test case

If an FSP wants a Dispute to be treated as a test case, the FSP must give FOS a notice in writing.

If the FSP considers the Dispute involves an issue that may have important consequences for the FSP's business or FSPs generally, the notice must explain:

- the issue; and
- why the issue may have these consequences.

If the FSP considers the Dispute raises an important point of law, the notice must explain:

- the point of law; and
- why it is important.

Any relevant legal advice should be attached to the notice.

Further, any notice must also contain the undertakings that paragraphs 10.1b) and c) require the FSP to give, to:

- institute test case proceedings within 6 months of the date of the notice and seek to prosecute the proceedings expeditiously; and
- pay the Applicant's legal costs and disbursements – and, where reasonable, settle these payments on an interim basis so the Applicant is not out of pocket.

Requirement for FSP to prosecute test case proceedings expeditiously

Through the undertakings referred to above, an FSP is required to prosecute test case proceedings expeditiously. To meet this requirement, FOS expects an FSP to, for example:

- issue proceedings within 6 months of FOS advising the FSP of its decision not to deal with the Dispute; and
- conduct those proceedings, to decide the point of law raised by the Dispute, with maximum efficiency and no or minimum delays.

Where, due to the nature of the Dispute, a test case should be initiated by the Applicant, FOS would expect the FSP to do everything reasonable to cooperate with this, and in particular, to not seek to delay the outcome unduly or defend the proceedings on grounds that would prevent the court from dealing with the substance of the test case.

Deciding whether to treat Dispute as test case

If FOS receives a notice from an FSP that meets the test case requirements, FOS considers whether it is satisfied it should not deal with the Dispute.

If FOS decides a Dispute should be dealt with by the courts as a test case and therefore FOS should not deal with the Dispute, it informs the FSP of the decision and informs the Applicant of the following points in writing:

- that FOS received the notice;
- the date of the notice;
- that FOS will not be dealing with the Dispute for as long as the FSP complies with its undertakings;
- how this will impact on the Applicant;
- the process followed when a Dispute is treated as a test case;
- the Applicant's rights; and
- the FSP's obligation to pay the Applicant's legal costs.

Compliance with undertakings

FOS may decide not to deal with a Dispute (and therefore it should be treated as a test case) but later form the view the FSP is not complying with one of its undertakings.

For example, if an FSP has not issued legal proceedings to deal with the Dispute within 6 months of FOS advising the FSP of its decision not to deal with the Dispute, or pursues or defends the proceedings on a technical point which would prevent the relevant point of law from being decided, FOS may form the view the FSP was not prosecuting the test case proceedings expeditiously. In this situation, FOS may recommence consideration of the Dispute.

Other Disputes

When a test case has been decided, FOS takes the decision into account when considering any other Disputes that raise an issue addressed in the test case. FOS may defer consideration of Disputes raising similar issues pending the outcome of the test case.

Section 11: Reporting to ASIC and other bodies

Paragraph 11: Reporting to ASIC and other bodies

11.1 Provision of reports

FOS may provide reports and recommendations and release information about a Financial Services Provider to:

- a) any regulator such as ASIC, the Privacy Commissioner or a regulated securities exchange; or
- b) a disciplinary body that FOS has a written agreement with for release of such information.

11.2 Systemic issues

- a) A systemic issue is an issue that will have an effect on other persons of the kind listed in paragraph 4.1 of these Terms of Reference, beyond the parties to the Dispute.
- b) FOS must identify systemic issues and refer these to the relevant Financial Services Provider for remedial action. In each case, FOS must obtain a report from the Financial Services Provider as to the remedial action undertaken and continue to monitor the matter until a resolution has been achieved that is acceptable to FOS.
- c) FOS must report systemic issues to ASIC in accordance with its obligations under ASIC Regulatory Guide 139.

11.3 Serious misconduct

FOS must also report all serious misconduct to ASIC. Serious misconduct is conduct which may be fraudulent, grossly negligent or involve wilful breaches of applicable laws or obligations under these Terms of Reference.

The guideline to paragraph 11 addresses these issues:

- *What is a systemic issue?*
- *How does FOS identify a systemic issue?*
- *What steps does FOS take after a systemic issue is identified?*
- *How does FOS resolve a systemic issue?*
- *How does FOS report systemic issues to ASIC?*

What a systemic issue is

A systemic issue is one which has been raised in a Dispute or several Disputes, or otherwise identified by information obtained by FOS, which will affect a class of persons beyond the person who lodged the Dispute.

Several Disputes of the same type or a single Dispute may raise a systemic issue provided that the effect of the issue clearly extends beyond the parties to the Dispute.

Examples of issues that may be considered systemic include:

- inadequate disclosure;
- technical or process problems; or
- breaches of privacy.

How FOS identifies a systemic issue

When it receives a Dispute, FOS will consider whether it raises an issue which is possibly systemic. Most possible systemic issues are identified when FOS accepts a Dispute, although identification can occur at any stage throughout the process.

Some examples of characteristics that may assist in identifying a possible systemic issue are:

- receipt of a number of new Disputes about the same issue;
- where the issue that affected the particular parties to the Dispute, could have affected others in a similar way;
- where the person raising the Dispute with FOS claims the issue affected others in a similar way; or
- where the FSP indicates it has internally identified that the issue raised affected others in a similar way.

Steps taken after systemic issue identified

If FOS considers a Dispute raises a possible systemic issue, FOS will send a letter to the FSP:

- detailing the possible systemic issue raised by the Dispute;
- seeking further information; and
- inviting the FSP to make submissions in response.

Upon receipt of the FSP's response, FOS will make a decision as to whether the issue is definitely systemic in nature.

Following identification of a definite systemic issue, FOS staff will identify other Disputes which may be affected by the systemic issue.

Resolution of systemic issue

Where FOS determines an issue is definitely systemic in nature, FOS works with the FSP to ensure:

- all affected customers are identified and appropriately compensated for financial loss, if any, in a fair manner; and
- a strategy is put in place to prevent the problem from recurring.

FOS may request further information from the FSP to:

- identify the specific matter that caused the systemic issue;
- identify the affected customer group (both past and existing);
- agree upon a formula or approach to calculate and reimburse the financial loss of the affected customer group;
- agree upon a time frame within which the identification and reimbursement process will be completed; and
- ensure the FSP rectifies the systemic issue so it does not occur in the future.

The resolution of the systemic issue may also include steps such as:

- the FSP placing advertisements in certain newspapers at agreed intervals to promote contact with all affected customers;
- the FSP establishing a dedicated toll free number to take calls relating to the systemic issue; and/or
- the FSP sending a letter to affected customers explaining the situation and that FOS has approved the solution.

Any arrangements between the FSP and FOS must take into account FOS's independence and this must be reflected in all references to FOS in any communications and in any subsequent litigation between the FSP and any affected customer.

FOS will also operate as an avenue of appeal for affected customers who claim they have particular rights or circumstances which mean they are entitled to be treated differently from other affected customers. In relation to such appeals, the FSP will be bound by FOS's decision in accordance with its TOR.

Reporting of systemic issues to ASIC

FOS is obliged, under RG 139 and its TOR, to report systemic issues to ASIC. FOS's reports do not identify FSPs but do include statistical information regarding possible and definite systemic issues identified together with details of the nature, progress and resolution of the definite systemic issues.

If the FSP does not rectify a definite systemic issue in accordance with FOS's requirements, FOS will take the following action:

- FOS will notify the FSP that it believes a report, identifying the FSP, should be made to ASIC;
- FOS will give the FSP time to make submissions regarding the lodging of an identifying report with ASIC;
- if there is no response or the response does not satisfy FOS that the FSP has adequately rectified the definite systemic issue, FOS will lodge a report with ASIC. The report will contain the identity of the FSP, the details of the systemic issue and the action taken by FOS and the response from the FSP, if any.

Section 12: Collection of information by FOS

Paragraph 12: Collection of information by FOS

12.1 Data collection

FOS must collect and record comprehensive information pertaining to its Dispute resolution, for example:

- a) the number of Disputes and enquiries;
- b) demographics of the Applicants (where practicable);
- c) details of Disputes which were not considered by FOS and why;
- d) the outcome of Disputes that were resolved by FOS;
- e) the current caseload including the age and status of open cases;
- f) the time taken to resolve Disputes; and
- g) a profile of Disputes that identifies:
 - (i) type and purpose of Financial Service;
 - (ii) type of Financial Service Provider;
 - (iii) the cause of the Dispute; and
 - (iv) any systemic issues or other trends.

12.2 Publication of data

FOS must produce a report at least every twelve months for publication and provision to ASIC, the Financial Services Providers and the public. This report must be a comprehensive summary and analysis of the data collected. Amongst other things, it will include the following statistical information about each Financial Services Provider:

- a) the number of Disputes referred to FOS;
- b) the number of Disputes closed; and
- c) the outcome of those Disputes.

The guideline to paragraph 12 addresses the following issue:

- *How does FOS report on data collection?*

How FOS reports on data collection

FOS is required to report to ASIC about complaints and Disputes it receives on a quarterly basis. FOS must also produce an annual report to ASIC that contains a comprehensive summary and analysis of the data FOS has collected during the year. This report will include statistical information on each FSP.

FOS must also report any systemic, persistent or deliberate conduct to ASIC. The types of conduct or issues that might be reported to ASIC fall into two broad categories:

- systemic issues; and
- serious misconduct.

While FOS is not required to identify the FSP member or members in reports to ASIC, it may do in appropriate cases. Further, ASIC has the power to compel FOS to provide information identifying a scheme member.

FOS's annual and other reports will analyse relevant information required by the TOR about the issues that Applicants raise with FOS and from FOS Determinations. In doing this, FOS:

- ensures that information is accurate;
- presents the information in the appropriate context, for example by categorising member information according to industry sector and the size of business; and
- fulfills FOS's objective to be transparent.

Section 13: Legal proceedings and other matters

Paragraph 13.1: Debt recovery or other proceedings

13.1 Debt recovery or other proceedings

- a) Subject to paragraph b), where an Applicant lodges a Dispute with FOS, the Financial Services Provider:
- (i) must not instigate legal proceedings against the Applicant relating to any aspect of the subject matter of the Dispute;
 - (ii) must not pursue legal proceedings relating to debt recovery instituted prior to the lodging of the Dispute with FOS save to the minimum extent necessary to preserve the Financial Services Provider's legal rights and, in particular, must not seek judgment in the proceedings provided the Dispute is lodged before the Applicant takes a step in those legal proceedings beyond lodging a defence or a defence and counterclaim (however described); or
 - (iii) must not take any action to recover a debt the subject of the Dispute, to protect any assets securing that debt or to assign any right to recover that debt,
- while FOS is dealing with the Dispute.
- b) Notwithstanding paragraph a), with FOS's agreement and on such terms as FOS may require, the Financial Services Provider may:
- (i) issue proceedings where the relevant limitation period for such proceedings will shortly expire – but those proceedings may not be pursued beyond the minimum necessary to preserve the Financial Services Provider's legal rights; or
 - (ii) exercise any rights it might have to freeze or otherwise preserve assets the subject of the Dispute.
- c) If the Dispute is subsequently decided by FOS and becomes binding upon the Financial Services Provider, the Financial Services Provider will abandon any aspect of proceedings against the Applicant that are inconsistent with that decision.
- d) Paragraph 13.1(a)(ii) does not apply to legal proceedings relating to debt recovery against a small business where the contract provides for a credit facility of more than \$2,000,000.

The guideline to paragraph 13.1 addresses the following issues:

- *When must an FSP (financial services provider) stop pursuing legal proceedings relating to debt recovery?*
- *How does paragraph 13.1a)(ii) operate?*
- *How does FOS identify Disputes where legal proceedings relating to debt recovery have been commenced?*
- *How does FOS handle these Disputes?*
- *What steps must an FSP take when notified of such a Dispute?*
- *When must an FSP set aside a judgment?*

- *How can an FSP raise questions about FOS's jurisdiction to consider a Dispute?*
- *What actions must an FSP take to stay or discontinue any proceedings?*
- *What is the expedited dispute resolution process for Disputes within FOS's jurisdiction?*
- *What happens if an FSP fails to comply with the time frames under the expedited process?*
- *What happens if an FSP fails to comply with FOS's requirements for stays, discontinuance or setting aside of court proceedings?*
- *What happens if an Applicant fails to comply with FOS's requests?*
- *When may an FSP reinstate proceedings?*
- *Can FOS consider Disputes about legal costs associated with legal proceedings relating to debt recovery?*
- *To what type of debt recovery action does paragraph 13.1a) apply?*
- *What is the exception to paragraph 13.1a)?*
- *What limits might FOS impose on debt recovery action?*
- *How are the ACCC and ASIC debt collection guidelines taken into account?*

General guidance on legal proceedings and other action by FSPs

The TOR stop FSPs from taking certain legal proceedings and other action against Applicants.

In disputes about Traditional Trustee Company Services, the TOR also stop FSPs from taking certain legal proceedings and other action against Other Affected Parties. The meanings of "Traditional Trustee Company Service", and "Other Affected Party" are explained in the guidelines to paragraphs [4.2b\)\(ix\)](#) and [14.1](#).

While FOS is dealing with a Dispute lodged with it, the FSP must not:

- instigate proceedings against the Applicant relating to the subject of the Dispute;
- pursue legal proceedings relating to debt recovery instituted before lodgement (unless the Applicant has taken a step in those proceedings beyond lodging a defence or a defence and counterclaim); or
- take action to recover a debt that is the subject of the Dispute, to protect assets securing that debt or to assign any right to recover that debt.

There is an exception to the stop outlined above. With our agreement, and on such terms as we may require, the FSP may:

- issue proceedings for which the limitation period will expire shortly; or
- exercise rights to preserve the assets the subject of the Dispute.

Most of the guidance provided in this section relates to paragraph 13.1a)(ii), which stops FSPs from pursuing debt recovery proceedings instituted before lodgement. Other matters covered in this section are:

- what amounts to "debt recovery" action for the purposes of paragraph 13.1;
- the process followed where an FSP seeks to rely on the exception to the stop; and
- the ACCC and ASIC debt collection guidelines.

Guidance on paragraph 13.1a)(ii)

When an FSP must stop pursuing legal proceedings relating to debt recovery

When a Dispute is lodged, paragraph 13.1a)(ii) prevents the FSP from pursuing legal proceedings relating to debt recovery that were instituted before the Dispute was lodged. The limitation applies from the time of lodgement – not from the time when FOS notifies the FSP of the Dispute.

Paragraph 13.1a)(ii) states that, in particular, FSPs must not seek judgment in the legal proceedings. As explained below, if an FSP contravenes this provision by obtaining judgment after a Dispute is lodged, the FSP must apply to set aside the judgment at no cost to the Applicant.

While paragraph 13.1a)(ii) requires that an FSP must stop the legal proceedings from the time the dispute is lodged, from a practical viewpoint, we regard the obligation on an FSP to refrain from taking any further steps in the legal proceedings commences from when an FSP is notified by FOS that a dispute has been lodged.

Therefore, if an FSP contravenes this provision innocently, because it is unaware that a dispute has been lodged with FOS, this will not of itself constitute “serious misconduct” under paragraph 11.3 of the Terms of Reference. Paragraph 11.3 requires that FOS report all serious misconduct to ASIC.

Exception to the ban on legal proceedings relating to debt recovery – small business loans exceeding \$2 million

Paragraph 13.1d) provides an exception to the ban on continuing legal proceedings under paragraph 13.1a)(ii). The exception applies when the proceedings relate to debt recovery, the Applicant is a Small Business, and contract (not including linked credit contracts) provides for a credit facility of more than \$2 million. A credit facility may include a loan, lease, related guarantee or other debt instrument which may give rise to a repayment obligation.

This means that FOS will not consider the dispute of a Small Business Applicant involved in legal proceedings with the FSP where the documented amount of the credit facility (based on the contract or other variation documentation) exceeds \$2 million and it will therefore be excluded under paragraph 5.2 a) of our Terms of Reference. The Small Business Applicant will need to defend the legal proceedings and bring a counterclaim if it wishes to pursue its claim against the FSP. Lodging a dispute with FOS will not prevent the FSP from entering judgment if the Small Business Applicant has not taken steps to protect their position in the court proceedings.

Scenarios for the application of 13.1d):

Where the Applicant is a Small Business and the FSP had issued debt recovery legal proceedings against the Small Business prior to the Dispute being lodged with FOS, excluding the Dispute under 13.1(d) will not apply in the following situations:

- Documented credit facility of less than or equal to \$2 million (even if the balance owing is currently greater than \$2 million);
- Original credit facility was greater than \$2 million, but a more recent variation contract has reduced the facility to less than or equal to \$2 million;

- Where there are 2 documented credit contracts less than or equal to \$2 million even if the combined balance owing to the facilities is greater than \$2 million

If the dispute falls within jurisdiction FOS will require the FSP to refrain from pursuing the legal proceedings.

FOS will not require the FSP to halt legal proceedings, and the Dispute will instead fall *outside* jurisdiction, in the following situations:

- Documented credit facility is greater than \$2 million (even if the balance owing is currently less than or equal to \$2 million or the credit limit has since been cancelled)

Where the Applicant is a guarantor of a small business facility and the FSP had instigated debt recovery legal proceedings prior to the dispute being lodged with FOS against the Small Business and the guarantor, excluding the dispute under paragraph 13.1(d) will not apply where the credit facility is less than or equal to \$2 million.

Where the dispute is lodged by a guarantor of a small business facility and the FSP has issued proceedings against the guarantor but not the business because the business is under external administration, excluding the Dispute under 13.1(d) will not apply in the following situations:

- Documented credit facility of less than or equal to \$2 million;
- The guarantor wishes to reduce their liability under the guarantee by the amount of a claim the small business may have against the FSP, and the documented credit facility is less than or equal to \$2 million;
- The documented credit facility is greater than \$2 million, but the remaining debt is under \$280,000 and the guarantor says they are not liable because the guarantee is for some reason unenforceable.

How paragraph 13.1a)(ii) operates

The phrase “legal proceedings relating to debt recovery” means a proceeding commenced in a court by an FSP to obtain judgment for a debt, or for recovery of possession of an asset provided by a debtor or guarantor as security for a credit facility.

An Applicant who lodges a defence or a defence and counterclaim and subsequently lodges a Dispute with FOS, will not be excluded from FOS’s jurisdiction unless the Applicant takes a further step in the proceeding. However, FOS will require the Applicant to provide an undertaking to stay any counterclaim they have filed. If this is not possible, then the Applicant will need to discontinue the counterclaim at their own cost.

If an Applicant does take a further step in the proceedings beyond lodging a defence or a defence and counterclaim, then FOS will consider that the court is a more appropriate place to deal with the dispute under paragraph 5.2a) of the Terms of Reference and the dispute will be outside of FOS’s jurisdiction.

An Applicant will not be regarded as having taken a “step” in the legal proceedings relating to debt recovery if they attend a directions hearing or agree to consent orders of a procedural nature only being filed in those proceedings.

Identifying Disputes where legal proceedings relating to debt recovery have been commenced

FOS seeks to identify Disputes where legal proceedings relating to debt recovery have been commenced prior to the Dispute being lodged by:

- asking the Applicant in the online Dispute Form whether (to their knowledge) the FSP has issued legal proceedings against them in a court; and
- where a Dispute Form is not completed at the time a Dispute is lodged, reviewing the information and documentation provided to identify whether legal proceedings appear to have been issued.

In the usual course, FSPs should receive notification that a dispute has been lodged with FOS by an Applicant within several hours of lodgement if the dispute is lodged online or telephone and, generally, within two to three business days if it is lodged in writing.

If an Applicant or FOS identifies that legal proceedings appear to have been commenced by an FSP, FOS treats the Dispute as urgent and an expedited process applies.

If it is not apparent from the information and/ or documentation provided to FOS at the time of lodging the Dispute that legal proceedings have been commenced, the Dispute will be handled in accordance with our standard dispute resolution process. In these circumstances, the FSP must inform FOS as soon as possible after being notified by FOS that a Dispute has been lodged that legal proceedings relating to debt recovery have been commenced. This action is required to ensure that the expedited process applies.

FOS approach to handling Disputes where it appears legal proceedings relating to debt recovery have been commenced

When FOS becomes aware that legal proceedings relating to debt recovery have been commenced, it will expedite the dispute resolution process. The steps of the expedited process include:

- FOS will provide email notification to the FSP that the Dispute has been lodged (‘notification of the Dispute’);
- where appropriate, a senior FOS staff member will consider whether the Dispute is within FOS’s jurisdiction; and
- unless the matter is clearly outside FOS’s jurisdiction, FOS will refer the Dispute to the FSP for a response (‘referral of the Dispute’). Details of the Dispute will be provided at that time.

Steps to be taken by the FSP as soon as possible upon receiving notification of the Dispute

Upon receiving notification of the Dispute, the FSP should have a process in place which ensures that no further steps are taken as soon as possible (with time being of the essence).

Setting aside a judgment

As the critical date is the date of lodgement of the Dispute with FOS, any judgment obtained after that date must be set aside by the FSP at no cost to the Applicant. Within 14 days of the referral of the Dispute, the FSP must apply to set aside the judgment.

The requirement to set aside the judgment applies even if the Dispute is subsequently considered to be outside of FOS's jurisdiction. This is because an Applicant may not have entered an Appearance or Defence because they had lodged a dispute with FOS. The Applicant should therefore be provided with an opportunity to do so once our file is closed.

Where the FSP must apply to set aside any default judgment, the FSP must confirm with FOS that it has made such an application. In appropriate cases, FOS may require the FSP to provide:

- a copy of the application within 14 days of the referral of the Dispute; and
- a copy of any subsequent order setting aside the judgment within 14 days of receiving the order from the court.

Raising questions about jurisdiction

If the FSP considers the Dispute to be outside FOS's jurisdiction, it should make a written submission to FOS within 14 days of the referral of the Dispute. FOS will consider this submission promptly and if a decision is made to exclude a Dispute, then the process for excluding Disputes contained in paragraph 5.3 of the TOR will apply. This includes providing an Applicant with 30 days to object to an assessment about our jurisdiction to consider the Dispute during which time our file will remain open.

Where an FSP has obtained judgment against an Applicant for repayment of a debt or possession of a security property prior to the date the Dispute is lodged, FOS is unable to consider a dispute about the FSP's entitlement to recover the debt or the security under paragraph 5.1(l) of the Terms of Reference.

FOS will require FSPs to provide copies of legal documents to establish that the FSP has obtained judgment against the Applicant in relation to the debt(s) or property(ies) in dispute. This would include a copy of the Statement of Claim and judgment.

Further, if the court documents are not clear about the accounts the legal proceedings related to, we may require an FSP to provide information to show that the legal proceedings actually related to the debt in dispute.

Importantly, FOS expects that an FSP will not take any steps to enforce a judgment until after our file is closed. If an FSP takes a step to enforce a judgment while our file is open, we may report this to ASIC as "serious misconduct".

However, parties should be aware that FOS has no power to stop a sheriff from executing an order or judgment. Therefore, lodgement of a dispute will not result in a sheriff being prevented from taking enforcement action. Nor will FOS require an FSP to withdraw an instruction already communicated to a sheriff to enforce a judgment

or court order. In these circumstances, the applicant should seek urgent legal advice about any options which may be available to them.

Staying or discontinuing proceedings

If the Dispute is within FOS's jurisdiction, the FSP must stay the proceedings, at no cost to the Applicant. The stay must apply until our file is closed. If a hearing date has been set down, the FSP must adjourn the hearing date from time to time until our file is closed.

A formal order staying the proceedings, where this is not required by the relevant court rules, is not necessary if the FSP provides an undertaking to FOS to take no further steps in the proceedings. Within 14 days of the referral of the Dispute, the FSP must provide to FOS an undertaking in writing not to take a further step in the proceedings until our file is closed.

If a stay, adjournment or undertaking is not possible due to relevant court rules, the proceedings must be discontinued at no cost to the Applicant.

The Applicant must consent to a stay, adjournment or discontinuance of legal proceedings. If the Applicant does not consent, then our file will be closed.

Some court rules provide that when a Notice of Discontinuance is filed, the defendant can apply for costs. Where FOS requires the FSP to discontinue the proceedings and the FSP must file a Notice of Discontinuance, the Applicant must first agree that they will not seek costs from the court. This does not prevent the Applicant from claiming costs incurred in the legal proceedings as part of the Dispute lodged with FOS. If the Applicant does not agree to this requirement, then we will close our file.

In addition, paragraph 13.1a) (ii) does not prevent an FSP from complying with a court order requiring an interlocutory step to be taken by the FSP (for example, filing an affidavit of documents) as long as that step does not require the Applicant to take another step in the proceedings. See also the section below under the heading 'Exceptions to stop on debt recovery action' which outlines actions that may be allowed by FOS in exceptional cases.

Serving proceedings

An FSP must not serve proceedings unless an FSP considers it is necessary to preserve its legal rights. In these circumstances, we would require the FSP to request FOS's consent to serve the proceedings and to provide reasons to support its submission that it is necessary to serve the proceedings in order to preserve the FSP's legal rights. If FOS agrees for the proceedings to be served, the FSP will need to communicate to the Applicant that:

1. The dispute will continue to be considered by FOS but the FSP considers that service of the proceedings is a necessary step to preserve the FSP's legal position;
 2. The FSP will not enter default judgment while FOS's file is open and the Applicant will not be required to take any steps in response to the proceedings;
- and

3. After FOS's file is closed, the FSP will provide the Applicant with the same amount of time that is provided under the relevant court rules to lodge a defence after FOS closes its file. The FSP will consent to any application to the court required to give effect to this requirement

This information will avoid confusion for Applicants about whether they need to take any action in response to the proceedings or seek legal advice.

Dealing with Disputes within jurisdiction

The FSP must provide a written response addressing the issues in dispute within 14 days of either:

- the referral of the Dispute, where no submissions have been made about jurisdiction; or
- FOS's decision that the Dispute is within jurisdiction where submissions have been made about jurisdiction.

The Dispute will be reviewed and a conciliation conference by telephone will be set down as a matter of priority in an attempt to facilitate a timely and efficient resolution of the Dispute. Participation in the telephone conciliation will be compulsory for all parties to the Dispute. Where the Applicant has appointed an agent, both the Applicant and agent must attend. Where the Applicant will not participate in the telephone conciliation, our file will be closed. Where the FSP will not participate in the telephone conciliation, the Dispute will no longer be expedited.

If the Dispute is not resolved within seven days of the date of the conciliation conference, the Dispute will be investigated by a FOS caseworker as a matter of priority and a decision on the merits will be reached. The response timeframes for both the FSP and the Applicant during the investigation will be shorter than the timeframes which apply to a Dispute that is not expedited.

FSP's failure to comply with the time frames under the expedited process

If the FSP:

- fails to comply with the timeframes for the provision of a response; or
 - requests an extension of time to respond to FOS,
- the Dispute will no longer be dealt with using the expedited process. In such cases, the Dispute will be dealt with in accordance with the usual dispute resolution process and standard timeframes will apply.

FSP's failure to comply with FOS requirements for stays, discontinuance or setting aside of court proceedings

If the FSP:

- fails or refuses to stay, adjourn or discontinue the proceedings when FOS notifies the FSP that a dispute has been lodged by the applicant;
- breaches an undertaking to FOS to stay, adjourn or discontinue the proceedings;
- fails or refuses to set aside a judgment obtained after lodgment but before notification of the Dispute;
- proceeds to enter judgment even though it has received notification of the Dispute; or

- seeks to reinstate the proceedings while our file is still open; or
- seeks to serve proceedings without FOS's consent;
- seeks to enforce judgment after FOS notifies the FSP that a dispute has been lodged by the Applicant;

then FOS may:

- report the FSP to ASIC for serious misconduct under paragraph 11.3 of the TOR; and/or
- cancel the FSP's membership of FOS; and/or
- require the FSP to discontinue the legal proceedings.

Applicant's failure to comply with FOS requests

Where an Applicant fails to comply with FOS timeframes for the provision of information or a response, FOS will notify the Applicant that:

- they have a final opportunity to provide the information requested;
- if the information is not provided, we will close the file;
- we will only re-open the file if there are exceptional circumstances and
- FOS will also close the file if, in the opinion of the Ombudsman, the Applicant is not acting in good faith by seeking to delay the consideration of the dispute by FOS or not complying with FOS's dispute resolution process.

Reinstatement of proceedings when our file is closed

When we close our file because the Dispute is not within our jurisdiction or because the Applicant does not:

- attend the compulsory conciliation conference;
- provide requested information after receiving a final warning; or
- respond to a Recommendation or accept a Determination pursuant to section 8 of the TOR;

the FSP can continue with the legal proceedings which were commenced prior to lodgement of the dispute. If the Applicant intends to defend the proceedings, they should obtain legal advice as soon as possible about what options are available to them to protect their interests in the legal proceedings.

We will incorporate a warning to Applicants about an FSP's entitlement to continue with legal proceedings in our letters to Applicants advising them that we will be closing the file on a certain date. We will also encourage them to seek legal advice.

Where our file has been closed because an Applicant has not complied with our dispute resolution process or because the Ombudsman has formed the opinion that the Applicant is not acting in good faith, our file will not be re-opened, unless there are exceptional circumstances.

Legal costs

Where an issue in dispute is:

- the FSP's contractual right to recover the cost of legal proceedings from the Applicant (for example, whether the FSP's legal costs were reasonably and properly incurred); or
- whether the Applicant should not have had to incur legal costs as a result of legal proceedings being issued,

FOS may deal with these issues as part of its investigation of a Dispute.

FOS is unable to consider a dispute about legal costs which have already been awarded by a court. This is because FOS does not have the power to overturn a court judgment. However, we may consider a dispute that the costs charged to an Applicant's account exceeded the costs awarded by the court and were not reasonably and properly incurred. This is because, to the extent that the FSP is seeking more for costs than the amount awarded by the court, it does so pursuant to a contractual provision which is subject to an implied limitation that such costs are reasonably and properly incurred.

However, the FSP will not be entitled to recover legal costs at any time (whether pursuant to the contractual right, court order or otherwise) for:

- staying, adjourning or discontinuing the proceedings;
- setting aside any default judgment;
- making submissions about FOS's jurisdiction to consider the Dispute; or
- dealing with the Dispute; or
- an application for leave by the Applicant to file a defence or defence and counterclaim where the time limit for filing of these court documents was after the date that on which the Applicant lodged the Dispute.

This is because these costs were incurred by the FSP in dealing with a dispute lodged with FOS and, as a service which is free to consumers, should not be passed on to consumers.

Debt recovery action to which paragraph 13.1a) applies

Paragraph 13.1a) applies to action to recover a debt including:

- debt recovery through the court system;
- non court debt recovery processes;
- informal collection activities such as telephone calls;
- threatening to take legal proceedings to recover a debt;
- conducting repossession activities;
- seeking judgment for a debt or pre-judgment remedies such as orders to prevent the removal of property from the jurisdiction;
- issuing a letter of demand;
- assigning a debt; and
- making a credit listing with a credit reporting agency.

The stop on debt recovery action extends to action by an agent, employee or other person on behalf of an FSP. FOS treats debt recovery action taken on behalf of an FSP as action taken by the FSP.

The exception to paragraph 13.1a) – action that FOS may allow

There is an exception to the stop discussed above. We will allow an FSP to take two forms of action if FOS agrees and in accordance with any requirements imposed by FOS.

The two forms of action allowed under the exception are:

- issuing proceedings where the relevant limitation period will shortly expire (which may only be pursued as far as necessary to preserve the FSP's legal rights); and
- preserving assets that are the subject of the Dispute.

In addition, where the proceedings relate to debt recovery and have been issued before the Dispute was lodged, and the Applicant has taken steps in those proceedings (beyond lodging a defence, or a defence and counterclaim) before the Dispute was lodged, the FSP will be allowed to continue those legal proceedings. If an FSP wants to take action to preserve its legal rights or assets relying on the exception to the debt recovery stop, it should write to FOS:

- requesting FOS to agree to the action;
- explaining why the FSP considers the exception applies; and
- providing any information that might assist FOS to consider the request.

Before deciding whether to agree, FOS considers whether any other material might assist it to make the decision. If so, FOS seeks the material and, if it is obtained, takes it into account.

If FOS agrees to the FSP taking action, FOS will inform the FSP and the Applicant in writing that it agrees and of any requirements that FOS imposes.

If an FSP issues proceedings and FOS ultimately makes a Determination that, for example, the Applicant is not liable for money sought by the FSP in the proceedings, then, when assessing the Applicant's loss and the remedies available, FOS can take into account the Applicant's costs of defending the proceedings.

Limits on debt recovery action

As FOS is only likely to agree to debt recovery action to maintain the status quo, FOS may require the FSP not to take any further steps in the legal proceedings while FOS deals with the Dispute. In particular, FOS will not approve an FSP taking any steps towards obtaining judgment in a debt recovery action.

Where FOS has allowed an FSP to commence a limited recovery action and FOS then makes a decision on the Dispute, the FSP must not proceed with any part of the issued proceedings if to do so would undermine the FOS decision. For example, if FOS considered whether the Applicant owed the FSP money as part of the Dispute and decided that they did not owe the money, the FSP would not be able to continue to try to recover that money.

ACCC and ASIC debt collection guidelines

In applying paragraph 13.1, FOS takes into account section 23 of the Debt Collection Guideline issued by ASIC and the ACCC (see ASIC Regulatory Guide 96). That guideline urges creditors and debt collectors to ensure their systems and practices allow external dispute resolution in regard to debt collection to operate effectively. The ACCC and ASIC guideline states:

- an FSP must suspend collection activity relating to a Dispute referred to an EDR scheme while the scheme considers the Dispute;

- an FSP should not sell or pass on a debt to an external agent for collection while a scheme is considering a Dispute involving the debt; and
- if an FSP assigns the debt, the FSP should seek to:
 - unwind the debt assignment; and
 - ensure the assignee does not undertake collection activity or start legal proceedings until the scheme has resolved the Dispute (and then only if the scheme confirms the liability).

Paragraph 13.2: Settled proceedings

13.2 Settled proceedings

Where a Dispute has been lodged with FOS and is subsequently resolved by agreement between the parties, the Financial Services Provider will not instigate or continue legal proceedings to the extent that those proceedings are inconsistent with that agreement.

The guideline to paragraph 13.2 addresses the following issue:

- *On what date are Disputes resolved by agreement taken to have been resolved?*

Where a Dispute lodged with FOS is resolved by agreement between the parties, the FSP must not take any action inconsistent with that agreement. For example, if the agreement between the parties dealt with a debt, the FSP would not be able to issue proceedings to deal with the debt in a court or tribunal (although it could take proceedings to enforce the agreement if there was a breach).

When applying paragraph 13.2, FOS takes the view a Dispute resolved by agreement between the parties is resolved on the following date:

- if the agreement involves the Applicant signing a release from liability – on the date the Applicant signs the release; or
- if the agreement does not involve the Applicant providing a release from liability – on the date the agreement takes effect.

Paragraph 13.3: Defamation protection

13.3 Defamation protection

A Financial Services Provider shall not instigate defamation action of any kind against an Applicant in respect of allegations made to FOS by the Applicant about the Financial Services Provider.

The guideline to paragraph 13.3 addresses the following issue:

- *What defamation action does the TOR prevent an FSP from taking?*

FOS's approach is to encourage each Applicant to provide information and express their views freely when lodging a Dispute. The TOR support this by preventing an

FSP from taking defamation action against an Applicant in respect of allegations made to FOS by the Applicant about the FSP. Paragraph 13.3 does not provide protection from defamation action in respect of allegations about an FSP made to a party other than FOS even if the same allegations were also made to FOS.

FOS takes the approach that “defamation action” includes:

- defamation proceedings through the court system;
- threatening to take defamation proceedings; and
- issuing a letter of demand.

Paragraphs 13.4, 13.5, 13.6 & 13.7: Confidentiality obligations; Immunity from liability; Change to Terms of Reference; and non-compliance with Terms of Reference

13.4 FOS’s confidentiality obligations

FOS must keep confidential all information pertaining to a Dispute that is provided to FOS except:

- a) to the extent reasonably necessary to carry out FOS’s responsibilities including under these Terms of Reference or for any incidental purpose; or
- b) as required or permitted by law.

13.5 Immunity from liability

FOS, the Ombudsmen, Panel Members, any person authorised by the Chief Ombudsman to carry out any responsibilities or exercise any powers or discretions of FOS or the Chief Ombudsman and FOS employees, contractors and agents shall not be liable to a party to a Dispute for any loss or damage arising directly or indirectly in the course of carrying out FOS functions.

13.6 Change to Terms of Reference

The Board may amend these Terms of Reference from time to time following consultation with ASIC, the Members and other stakeholders

13.7 Non-compliance with these Terms of Reference

Where a Financial Services Provider fails to meet its obligations under these Terms of Reference, FOS may take any action it considers appropriate including expelling the Financial Services Provider from membership of FOS in accordance with the FOS Constitution.

Non-compliance with Terms of Reference

Under the FOS Constitution, FOS’s Terms of Reference form a binding contract between each FSP and FOS. Each FSP is therefore bound to comply with its obligations under the TOR.

FOS’s response to member non-compliance with its obligations will depend on the circumstances of each individual case, and include the power to expel the FSP for

non-compliance. The power and procedures of the FOS Board to expel a member are set out in clauses 3.10 and 3.11 of the FOS Constitution.

Section 14: Application of this Section



Paragraph 14.1: Application of this Section

14. Application of this section

14.1 Disputes relating to Traditional Trustee Company Services will be dealt with under this section of the Terms of Reference if and only if their outcome may affect the interests of Other Affected Parties. All other disputes will be dealt with under the dispute resolution processes set out in section C of the Terms of Reference.

The guidelines to paragraph 14.1 address these issues:

- *When does Section F apply?*
- *Who is an “Other Affected Party”?*

When Section F applies

Paragraph 14.1 refers to “Traditional Trustee Company Services”. That term is explained in the guidelines to paragraph 4.2b)(ix).

Some Disputes relating to Traditional Trustee Company Services may affect people other than the Applicant and the FSP. It would be inappropriate for FOS to deal with these Disputes unless the other people – referred to as “Other Affected Parties” – are also given the opportunity to take part in the FOS process. Section F sets out special dispute resolution processes that give Other Affected parties this opportunity.

Section F only applies to a Dispute if its outcome may affect an Other Affected Party. Section C sets out the processes that apply in all other cases.

Other Affected Party

An Other Affected Party is a person who can request an Annual Information Return, which is a report containing information about a trust, including income earned on its assets, expenses, and the net value of the trust’s assets. The guideline to paragraph 4.2b)(ix) explains who can request an Annual Information Return.

Section 15: Application process



Paragraph 15.1: Lodging of Disputes

15. Application process

15.1 Lodging of Disputes

- a) A party to a Dispute may lodge the Dispute with FOS by referring the Dispute to FOS for resolution.
- b) FOS may assist Applicants with this process.
- c) A Financial Services Provider that lodges a Dispute with FOS must have obtained the Applicant's prior consent.

The guidelines to paragraph 15.1 address these issues:

- *How is a Dispute lodged?*
- *What is meant by "Registration" and the FSP's opportunity for internal dispute resolution?*
- *What assistance with lodgement does FOS provide?*

How a Dispute is lodged

A Dispute is treated as being "lodged" with FOS when it is first referred to FOS for resolution. A Dispute may be referred to FOS:

- by submitting an Online Dispute Form, available on the FOS website www.fos.org.au;
- in writing, using the Registration Form or Dispute Form that an Applicant can download from the FOS website, or by email, fax or letter; or
- in a case where assistance from FOS is needed, by telephone.

To help FOS to deal with a Dispute, the party lodging the Dispute should provide the following information at the time of lodgment or as soon as possible after lodgment:

- name and contact details of prospective Applicant;
- key issues;
- outcome sought;
- if available, FSP's name, relevant details of the Financial Service (for example a policy or account number); and
- the date of any complaint made to the FSP.

If an FSP wants to lodge a Dispute itself, it must first obtain the Applicant's written consent to lodgment and provide a copy of this to FOS at the time of lodgment.

"Registration" and FSP's opportunity for internal dispute resolution

If an Applicant lodges a Dispute with FOS and:

- the FSP has not previously been asked to remedy the matter by the Applicant or an OAP; or
 - either the Applicant or an OAP has asked the FSP to remedy the matter but the period allowed for internal dispute resolution (IDR) has not expired,
- FOS will give the FSP the opportunity to resolve the Dispute internally. This opportunity, the time periods allowed and FOS's ability to extend or reduce these

time periods are explained in paragraphs 15.3 and 15.4 and the guidelines to those paragraphs.

In these circumstances, FOS “registers” the Dispute and forwards the details to the FSP with a request that the FSP try to resolve the Dispute. The effect of registration is to suspend any FOS action on the Dispute until:

- the period allowed for IDR has expired; and
- the Applicant has contacted FOS to ask it to deal with the Dispute.

FOS will advise the Applicant that if:

- they remain unsatisfied after receiving the FSP’s “IDR Response” as defined in paragraph 20.1 (which is explained below in the guidelines to paragraph [15.2](#)); or
- the period allowed for IDR has expired and no resolution has been reached, they can contact FOS and ask it to deal with the Dispute and provided the Dispute is otherwise within FOS’s jurisdiction, FOS will deal with it.

Assistance from FOS

FOS explains the Dispute lodgment process on its website and in printed brochures that are available to anyone making a request. The FOS staff that handle telephone enquiries are trained to explain how Disputes can be lodged.

FOS prefers Applicants to lodge Disputes in writing but if the need arises, FOS can help Applicants who are only able to lodge by telephone.

Although FOS is impartial and does not act as an advocate for any party, FOS can provide help to Applicants to ensure the following:

- Applicants understand whether they are eligible to lodge a Dispute with FOS;
- Applicants understand what is meant by “lodgement”, “registration” and IDR;
- Applicants know what documents to provide to FOS to support their application;
- the Dispute process flows smoothly and in a timely way; and
- parties are able to put their case to FOS.

FOS can also provide specific assistance with any part of the FOS process to Applicants with special requirements who may be disadvantaged if they do not receive that assistance. For example, FOS can arrange to register Disputes in languages other than English and arrange for them to be translated at no cost to the Applicant (see also the guidelines to paragraph [16.2](#)

FOS can also refer disadvantaged Applicants to community legal centres, legal aid offices, financial counsellors or other services for assistance after they have lodged their Dispute.

Paragraph 15.2: Time limits

15.2 Time limits

FOS will not consider a Dispute under this section unless the Dispute is lodged with FOS before the earlier of the following time limits:

- (i) within six years of the date when the Applicant first became aware (or should reasonably have become aware) that they suffered the loss; and
- (ii) where, prior to lodging the Dispute with FOS, the Applicant received an IDR Response in relation to the Dispute from the Financial Services Provider – within 2 years of the date of that IDR Response.

However, FOS may still consider a Dispute lodged after either of these time limits if FOS considers that exceptional circumstances apply.

The guidelines to paragraph 15.2 address the following issues:

- *What are the time limits for lodging a Dispute?*
- *What are the exceptions to the time limits?*
- *How does FOS assess when an Applicant “should reasonably have become aware” of the loss?*
- *What is an IDR Response?*

Time limits for lodging Disputes

FOS will consider the Dispute if it is “lodged” (as explained in the guidelines to paragraph 15.1) before the earlier of:

- 6 years after the date when the Applicant first became aware, or “should reasonably have become aware” they suffered the loss; and
- if the Applicant received an IDR Response (as defined in paragraph 20.1) from the FSP – 2 years after the date of that response.

Exceptions to time limits

Paragraph 15.2 allows FOS to consider a Dispute lodged after a time limit if FOS considers that there are exceptional circumstances that warrant an extension of time. This will be assessed on a case by case basis. FOS will not decide that exceptional circumstances apply merely because the time allowed for lodgement has expired and the Applicant is disadvantaged by being unable to use the FOS process.

Paragraph [15.4](#) also provides an exception to the time limits which is explained in the guidelines to that paragraph.

Awareness of loss

To work out the date when the Applicant “should reasonably have become aware” they suffered the loss, FOS considers when a reasonable person, in the Applicant’s particular circumstances, should have become aware that they suffered the loss. This may require FOS to consider what the Applicant was aware of and what additional inquiries it would have been reasonable for the Applicant to make. For example, if an Applicant received information in a document but did not read it

carefully, when determining when they should reasonably have become aware they suffered the loss, FOS may take into account:

- the format of the document;
- how complex the document was;
- how long the Applicant had to read it; and
- whether the Applicant had any warnings or recommendations from the FSP, for instance about the need to obtain independent legal advice in relation to the document.

IDR Response

When calculating the time limit for lodging a Dispute, one important issue is whether the Applicant received an IDR Response as defined by the TOR.

An IDR Response must be a written response from the FSP addressed to the Applicant stating the following:

- the FSP's IDR (internal dispute resolution) process has concluded;
- the FSP's final decision about the complaint has been made;
- what the FSP's final decision is, with the word "final" given prominence;
- the Applicant has the right to take the complaint to FOS;
- the time limits that apply if the Applicant wishes to take the complaint to FOS; and
- FOS's contact details.

FOS's contact details are as follows:

Financial Ombudsman Service GPO Box 3 Melbourne VIC 3001
Telephone: 1300 780808
Fax: (03) 9613 6399
Web: www.fos.org.au
Email: info@fos.org.au

An FSP should:

- ensure that an IDR Response is dated;
- record when the Applicant was sent the IDR Response; and
- keep a copy of the IDR Response.

Paragraphs 15.3 and 15.4: Opportunity for internal dispute resolution

15.3 Opportunity for internal dispute resolution

Subject to paragraphs 15.4 and 15.5, where an Applicant lodges a Dispute with FOS:

- a) before a complaint was made to the Financial Services Provider by the Applicant or an Other Affected Party requesting the Financial Services Provider to remedy the matter; or
- b) within 90 days of the Applicant or an Other Affected Party first requesting the Financial Services Provider to remedy the matter;

and before receipt of the Financial Services Provider's IDR Response;

FOS must notify the Financial Services Provider of the Dispute and give the Financial Services Provider:

- c) (if paragraph a) applies) the whole of the period which would have applied under paragraph b); or
- d) (if paragraph b) applies) the balance of the applicable period; to provide an IDR Response.

15.4 For the purposes of paragraph 15.3b), where:

- a) a person commences legal proceedings to be added as beneficiary of the estate or trust to which the complaint relates, and the outcome would affect the handling of the complaint; or
- b) a Financial Services Provider, in its capacity as manager or administrator of trust property, applies to a court for an opinion, advice or direction in order to reasonably handle the complaint;

the 90 day period ceases to run from the commencement of the relevant proceedings, and does not start to run again until the court determines whether the person should be added as a beneficiary, or provides its opinion, advice or direction, and the time to lodge any appeal has passed.

The guidelines to paragraph 15.3 and 15.4 address these issues:

- *What period is allowed for IDR?*
- *How can legal proceedings affect the IDR period?*
- *What happens when one party affected by an FSP's decision makes a complaint and another affected party disagrees with the FSP's response to the complaint?*
- *How does FOS refer a Dispute to an FSP for IDR?*
- *What happens when an Applicant raises new issues?*

General guidance on opportunity for IDR

Applicants usually approach FOS in the following situations:

- they have not yet sent their Dispute to an FSP's IDR process;

- within the period allowed for IDR, but before receiving the FSP's IDR Response;
- after the period allowed for IDR, but before receiving the FSP's IDR Response; or
- after receiving the FSP's IDR Response which has not remedied the matter.

If:

- a Dispute has not yet been through an FSP's IDR process; or
- the period allowed for IDR has not expired,

FOS will usually register the Dispute details and refer it back to the FSP for consideration through the FSP's IDR process.

Before the IDR period ends, FOS will confirm to the Applicant they can contact FOS to progress an unresolved Dispute.

Period allowed for IDR

The period that paragraph 15.3 usually allows for IDR is 90 days. The 90 day period may cease to run if legal proceedings are commenced after the FSP is requested to remedy the complaint.

If an Applicant lodges a Dispute without first complaining to the FSP and no Other Affected Party has asked the FSP to remedy the matter as at the date of lodgement, the IDR period stated above is allowed. In this situation, the IDR period commences when FOS refers the Dispute to the FSP for IDR.

Where the Applicant or an Other Affected Party requested the FSP to remedy the issues in dispute before the Applicant lodges a Dispute with FOS, the IDR period commences on the date of the first expression of dissatisfaction to the FSP, whether in writing or by any other means. This will usually be the date when the Applicant or Other Affected Party contacts the FSP outlining the issues in dispute.

FOS may extend or reduce the period allowed for IDR as explained in paragraph [15.5](#) and the guidelines to that paragraph.

How legal proceedings can affect the IDR period

If, during the 90 day IDR period allowed under paragraph 15.3b), legal proceedings referred to in paragraph 15.4a) or b) are commenced, the 90 day period ceases to run from when the proceedings commence until they are decided and the time to lodge any appeal has passed.

Where one party affected by an FSP's decision makes a complaint and another affected party disagrees with the FSP's response to the complaint

If a complaint relates to a trust with multiple beneficiaries, the IDR response to the complaint may satisfy the beneficiary who made the complaint but aggrieve another beneficiary. In this situation, rather than requiring the second beneficiary to lodge a fresh complaint with the FSP (requiring a second IDR process to resolve an issue already considered by the FSP), the second beneficiary (who becomes the Applicant) can lodge a Dispute with FOS in respect of the IDR response to the

complaint by the first beneficiary (who then becomes an Other Affected Party to the FOS Dispute).

This will only apply where the issues raised in the Dispute lodged with FOS are substantially the same as those dealt with in the complaint. If the second beneficiary wishes to pursue a Dispute about an unrelated issue, they will need to make a complaint to the FSP and allow the relevant IDR period.

How FOS refers a Dispute to an FSP for IDR

FOS refers a Dispute to an FSP for IDR by providing the Dispute details to the FSP's nominated contact. Referral will usually be by email, fax or mail, depending on the contact details of the FSP. FOS prefers to refer matters by email where possible. To assist the FSP to more easily identify the Dispute, where possible FOS sends to the FSP:

- name and contact details for the Applicant (including details of the Applicant's representative where one has been authorised);
- a short summary of the issues in dispute; and
- the FSP's reference number (if provided).

What happens when Applicant raises new issues

If an Applicant who lodges a Dispute with FOS has previously been through IDR with the FSP, but later raises new issues in the Dispute, FOS will normally refer these new issues back to the FSP to go through IDR before FOS considers the Dispute. In some circumstances, however, FOS may start to consider a Dispute when new issues raised by the Applicant have not been through IDR. This may happen when the new issues are:

- closely related to issues that have been through IDR; or
- so minor that FOS considers they would be unlikely to impact on an IDR Response provided by the FSP.

Paragraph 15.5: FOS discretion to vary normal internal dispute resolution timeframes

15.5 FOS discretion to vary normal internal dispute resolution timeframes

Notwithstanding paragraph 15.3, FOS may:

- a) give the Financial Services Provider a longer period to resolve the Dispute if FOS considers special circumstances exist; or
- b) commence investigating or otherwise progress the Dispute immediately if FOS considers the matter urgent.

The guidelines to paragraph 15.5 address these issues:

- *When can FOS extend, or reduce, the IDR period for a Dispute?*
- *How can a party request FOS to alter an IDR period?*

Extending IDR period

FOS may extend the IDR period for a Dispute if FOS considers special circumstances exist. Examples of special circumstances include:

- where settlement negotiations are progressing, but taking longer than the IDR period, and all parties agree to continue negotiations without FOS's involvement;
- where an FSP is waiting for a report by an expert or external consultant before providing an IDR Response and FOS considers the resulting delay reasonable; or
- where records an FSP needs to respond to a complaint are old and difficult to retrieve.

Any party may ask for an extension to the IDR period. The request must:

- be in writing;
- be made as early as possible and before the IDR period expires;
- state the period of the extension sought;
- explain the special circumstances considered to warrant the extension; and
- provide copies of supporting documents.

When deciding whether there are special circumstances, as well as considering the circumstances of the relevant Dispute and general principles of fairness, FOS will consider:

- whether the parties to the Dispute agree to the extension of the IDR period;
- whether the Applicant or an Other Affected Party had previously contacted the FSP about the Dispute;
- whether any settlement negotiations are progressing and, if so, how long they are taking;
- whether the FSP is waiting for information to help it to provide an IDR Response; and
- whether the length of the extension requested is reasonable.

If FOS decides to extend the IDR period for a Dispute, it will advise all of the parties of the decision and the reasons for it and confirm the new IDR timeframe.

Reducing IDR period

FOS may start to deal with a Dispute before the IDR period ends if FOS considers the matter urgent. This means FOS may commence investigating or otherwise considering the Dispute. Examples of urgent situations include:

- where the Applicant or an Other Affected Party is in ill health;
- where an FSP is in administration, liquidation or has otherwise ceased trading;
- where delaying investigation would significantly disadvantage a party; and
- where any delay may cause or exacerbate financial hardship for the Applicant or an Other Affected Party.

Any party to a Dispute may request urgent consideration of the Dispute. The request must:

- be in writing;
- be made as early as possible and before the IDR period expires;

- explain the circumstances considered to warrant reducing the IDR period; and
- provide copies of supporting documents (e.g. medical reports, legal proceedings, default and rescission notices).
- In cases where FOS considers it may deal with the Dispute before the IDR period ends, it will discuss the Dispute with the FSP before making a decision. When considering whether it should reduce the IDR period, FOS will assess relevant factors including:
 - whether an FSP is in external administration or has ceased trading;
 - the medical condition of the Applicant or an Other Affected Party if it affects their ability to participate in FOS's consideration of the Dispute (especially if it is delayed);
 - legal proceedings against the Applicant or an Other Affected Party by a third party; and
 - the requirement for urgent access to funds.

If FOS decides to start dealing with a Dispute before the IDR period ends, it will advise all of the parties of the decision.

Paragraph 15.6: Disputes lodged with other ASIC Approved EDR Schemes

15.6 Disputes lodged with other ASIC Approved EDR Schemes

For the purposes of these Terms of Reference, where a Dispute is referred to FOS by another ASIC approved external dispute resolution ("EDR") scheme, the time limit for bringing a Dispute to FOS will apply from the date when the Dispute was lodged with the other EDR scheme and the Dispute will be deemed to have been lodged with FOS on the date that it was lodged with the other EDR scheme.

General guidance on Disputes lodged with other schemes

For guidance on paragraph 15.6, refer to the guideline to paragraph 6.5 and read its reference to paragraph 6.2 as a reference to paragraph 15.2.

Paragraphs 15.7 and 15.8: Identification of Other Affected Parties; Notification of Other Affected Parties

15.7 Identification of Other Affected Parties

Where the time allowed under paragraphs 15.3 and 15.4 to provide an IDR Response has already elapsed, FOS will notify the Financial Services Provider of the Dispute and require it to:

- a) identify all Other Affected Parties to the extent possible;
- b) provide FOS within 14 days with
 - (i) a list of the names and contact details of the Other Affected Parties reasonably known to the Financial Services Provider at the time; and
 - (ii) a statement that all Other Affected Parties have been identified and their details provided, or (if one or more Other Affected Parties could not be identified) a statement as to why this has not been possible.

The guidelines to paragraphs 15.7 and 15.8 address these issues:

- *What must FOS do before it considers a multiple party Dispute?*
- *What happens where all Other Affected Parties are not identified?*
- *Why is consent important?*

What FOS must do before it considers a multiple party Dispute

The outcome of a multiple party Dispute dealt with under Section F may affect not only the Applicant and the FSP, but also Other Affected Parties. Because the Dispute involves parties other than the Applicant (who has effectively agreed to the FOS process by lodging the Dispute) and the FSP (which is bound by the FOS process as a condition of its membership of the FOS scheme), FOS cannot in fairness deal with the Dispute until and unless it is satisfied that all Other Affected Parties have:

- been identified and informed of the Dispute: and
- consented to FOS dealing with the Dispute and to be bound by the outcome.

As the Other Affected Parties and the Applicant are all equally consumers of the Traditional Trustee Company Service provided by the FSP, in the interests of equity, FOS may not deal with the Dispute unless the Applicant has also agreed to be bound by the outcome. This is a key difference between the multiple party process in Section F and the Applicant-FSP process in Section C of the TOR.

Where all Other Affected Parties are not identified

FOS relies on the FSP in a Dispute to identify all Other Affected Parties.

Sometimes, it is not possible to identify all Other Affected Parties. For example, an estate or trust may provide for members of a class of beneficiaries. Membership of that class may include (potentially) people who cannot be identified because they have not yet been born, or have not yet met the relevant criteria for membership. In

these circumstances, FOS cannot deal with the Dispute because the Other Affected Parties cannot all be contacted, or asked to give their consent.

If FOS starts to deal with a Dispute after having contacted all known Other Affected Parties and obtained their consent, and an Other Affected Party is later identified, FOS must stop dealing with the Dispute until and unless that Other Affected Party is also contacted and provides their consent to FOS dealing with the Dispute.

Why consent is important

FOS cannot deal with a Dispute involving Other Affected Parties unless they, and the Applicant, have consented to FOS dealing with the Dispute in accordance with its processes under the TOR, and to be bound by the outcome.

Consent, once validly given, cannot be rescinded. Therefore, FOS will ensure that an Applicant or Other Affected Party is informed of their right to obtain legal advice before deciding whether to give their consent.

Section 16: Dispute resolution methods and related matters

Paragraph 16.1: Dispute resolution methods

16.1 Dispute resolution methods

To resolve a Dispute, FOS may use one or more of the following methods:

- a) negotiation;
- b) conciliation or mediation; or
- c) deciding the Dispute in accordance with the process set out in paragraph 17.

For guidance on paragraph 16.1, refer to the guidelines to paragraph 7.1.

Paragraph 16.2: Provision of information by the parties to the Dispute

16.2 Provision of information by the parties to the Dispute

FOS may require a party to a Dispute to provide to, or procure for, FOS any information that FOS considers necessary. That party must comply with FOS' request within the timeframe specified by FOS except where the party satisfies FOS that:

- a) to provide information would breach a duty of confidentiality to a third party and, despite best endeavours, the third party's consent to the disclosure of the information has not been able to be obtained;
- b) to provide the information would breach a Court order or prejudice a current investigation by the police or other law enforcement agency; or
- c) the information does not or no longer exists or is not within the party's reasonable possession or control.

For guidance on paragraph 16.2, refer to the guidelines to paragraph [7.2](#). The obligations of Applicants and Financial Services Providers to provide information apply equally to Other Affected Parties.

Paragraph 16.3: Other obligations of the parties to the Dispute

16.3 Other obligations of the parties to the Dispute

- a) FOS may require a party to a Dispute to do anything else that FOS considers may assist FOS's consideration of the Dispute. This may include requiring:
 - (i) a party to a Dispute to attend an interview; or
 - (ii) the Financial Services Provider to investigate a Dispute further or to appoint an independent expert to report back to FOS on a matter pertaining to the Dispute.
- b) A party to a Dispute must comply with such a request within the timeframe specified by FOS.

For guidance on paragraph 16.3, refer to the guidelines to paragraph [7.3](#). Apart from the obligation to investigate a dispute further, these obligations also apply to Other Affected Parties.

Paragraph 16.4: Timeframes

16.4 Timeframes

Nothing in these Terms of Reference or elsewhere restricts FOS's ability to give a party to a Dispute an extension of time (even if the original period, or the period as extended, has ended) should FOS consider this appropriate.

For guidance on paragraph 16.4, refer to the guidelines to paragraph [7.4](#).

Paragraph 16.5: Consequences of non-compliance by a party with a FOS request

16.5 Consequences of non-compliance by a party with a FOS request

Where a party to a Dispute without reasonable excuse fails to provide or procure information or to take any other step requested by FOS within the timeframe specified by FOS, FOS may take the steps it considers reasonable in the circumstances. This may include:

- a) proceeding with the resolution of the Dispute on the basis that an adverse inference may be drawn from that party's failure to comply with FOS's request; or
- b) where the Applicant fails to comply with a FOS request – refusing to continue consideration of the Dispute.

For guidance on paragraph 16.5, refer to the guidelines to paragraph [7.5](#). The consequences of non-compliance (apart from those which apply to Applicants only) also apply to Other Affected Parties.

Paragraph 16.6: “Without prejudice” nature of Service

16.6 “Without prejudice” nature of Service

FOS operates on a “without prejudice” basis. This means that information obtained through FOS may not be used in any subsequent court proceedings unless required by an appropriate court process.

Section 17: Deciding disputes



Paragraph 17.1: Rules of evidence

17. Deciding Disputes

17.1 Rules of evidence

FOS is not bound by any legal rule of evidence.

For guidance on paragraph 17.1, refer to the guidelines to paragraph [8.1](#).

Paragraph 17.2: Dispute resolution criteria

17.2 Dispute resolution criteria

Subject to paragraph 17.1, when deciding a Dispute and whether a remedy should be provided in accordance with paragraph 18, FOS will do what in its opinion is fair in all the circumstances, having regard to each of the following:

- a) legal principles;
- b) applicable industry codes or guidance as to practice;
- c) good industry practice; and
- d) previous relevant decisions of FOS or a Predecessor Scheme (although FOS will not be bound by these).

*For guidance on paragraph 17.2, refer to the guidelines to paragraph [8.2](#).
References to the parties in those guidelines should be seen as also applying to Other Affected Parties, as appropriate.*

Paragraph 17.3: Specialist input

17.3 Specialist input

- a) When deciding a Dispute, FOS may consult with industry and consumer advisors as FOS thinks appropriate.
- b) FOS may also obtain expert advice including from a legal expert, industry expert, medical practitioner or building expert appointed by FOS. FOS may require the Financial Services Provider to pay or contribute to the cost provided that:
 - (i) the fees of the expert are reasonable, having regard to the complexity of the dispute; and
 - (ii) the fees do not deviate significantly from the usual market rate for such advice; and
 - (iii) the person has the necessary expertise.

Unless exceptional circumstances apply, FOS will not require the Financial Services Provider to contribute more than \$3,000 per Dispute to the cost of expert advice obtained by FOS.

*For guidance on paragraph 17.3, refer to the guidelines to paragraph [8.3](#).
References to the parties in those guidelines should be seen as also applying to Other Affected Parties, as appropriate.*

Paragraph 17.4: FOS's obligation to provide information to the parties

17.4 FOS's obligation to provide information to the parties

- a) Subject to paragraph b), before making a Determination, FOS must ensure that the parties to the Dispute are provided with access to the documentation, information and material upon which FOS proposes to rely in its Determination.
- b) Notwithstanding paragraph a):
 - (i) FOS is not obliged to make available to the parties any memoranda, analysis or other documents generated by FOS's employees or contractors; and
 - (ii) FOS must not disclose to a party to a Dispute information provided by another party to the Dispute where the party supplying the information has refused consent to this (and, in the absence of a clear statement to the contrary, FOS is entitled to assume that consent is given to the material in its entirety being provided to the other parties to the Dispute).
- b) If a party to a Dispute refuses consent to provide information to another party to the Dispute, FOS is not entitled to use that information to reach a decision adverse to the party to whom confidential information is denied unless FOS determines that special circumstances apply.

For guidance on paragraph 17.4, refer to the guidelines to paragraph [8.4](#).

Paragraph 17.5: Process for deciding Disputes

17.5 Process for deciding Disputes

Unless paragraph 17.6 applies, the process for deciding a Dispute is as follows.

- a) After giving the parties a reasonable opportunity to make submissions and provide information about the matters in dispute, FOS makes an assessment referred to as a Recommendation.
- b) If all parties accept the Recommendation within 30 days of receiving it, the Dispute is resolved on the basis of the Recommendation.
- c) If, within 30 days of receiving the Recommendation, any party does not accept the Recommendation in relation to the Dispute or requests FOS to proceed from a Recommendation to a Determination, FOS will proceed to a Determination by either an Ombudsman or by a FOS Panel (as the Chief Ombudsman or his or her delegate decides is appropriate). Before the Determination is made, the parties will be given a reasonable opportunity to make submissions, and provide any further information, in response to the Recommendation.

For guidance on the role of Recommendations, and on when a Determination will be made by an Ombudsman and when it will be made by a Panel, refer to the guidelines to paragraph [8.5](#).

Paragraph 17.6: Expedited process for deciding Disputes

17.6 Expedited process for deciding Disputes

Notwithstanding paragraph 17.5, FOS may proceed to a Determination by either an Ombudsman or by a FOS Panel (as FOS decides is appropriate) without a Recommendation first being made. This expedited process will be followed if FOS considers that this would be appropriate in the circumstances. If so, FOS must advise the parties of this intended course of action and must not make the Determination without first giving the parties a reasonable opportunity to make submissions and provide information about the matters in dispute.

For guidance on paragraph 17.6, refer to the guidelines to paragraph [8.6](#). References to a party suffering financial hardship apply to Other Affected Parties as well as to the Applicant.

Paragraph 17.7: Recommendations and Determinations

17.7 Recommendations and Determinations

- a) Each Recommendation and Determination:
 - (i) must be in writing;
 - (ii) may either reach:
 - (A) a conclusion about the merits of the Dispute; or
 - (B) the view that, given the procedures adopted by FOS, it would not be appropriate for FOS to reach any conclusion as to the merits of the Dispute;
 - (iii) must set out reasons for any conclusion about the merits of a Dispute or view of the kind referred to in paragraph 17.7a)(ii)(B);
 - (iv) must specify any remedy, determined in accordance with paragraph 18, that FOS considers fair and appropriate; and
 - (v) must be provided to all parties to the Dispute.
- b) A Determination is a final decision and is binding upon the Applicant the Financial Services Provider and all Other Affected Parties.

General guidance on Recommendations and Determinations

Certain aspects of a Dispute may have been resolved before a Recommendation or Determination is made, for example, through negotiation or conciliation. In this situation, a Recommendation or Determination only has to deal with the outstanding aspects of the Dispute.

Section 18: Remedies



Paragraph 18.1: Types of remedies

18. Remedies

18.1 Types of remedies

Subject to paragraphs 18.2 to 18.8, FOS may decide that the Financial Services Provider, Other Affected Party or Applicant undertake a course of action to resolve the Dispute including:

- a) the payment of a sum of money;
- b) the forgiveness or variation of a debt;
- c) the release of security for debt;
- d) the repayment, waiver or variation of a fee or other amount paid to or owing to the Financial Services Provider or to its representative or agent including the variation in the applicable interest rate on a loan;
- e) the reinstatement or rectification of a contract;
- f) the variation of the terms of a Credit Contract in cases of financial hardship;
- g) the meeting of a claim under an insurance policy by, for example, repairing, reinstating or replacing items of property; and
- h) in the case of a Dispute involving a privacy issue with an individual – that the Financial Services Provider should not repeat conduct on the basis that it constitutes an interference with the privacy of an individual or that the Financial Services Provider should correct, add to or delete information pertaining to the Applicant or an Other Affected Party.

The guidelines to paragraph 18.1 address these issues:

- *How does FOS make decisions about remedies?*
- *What input on remedies should parties provide?*

General guidance on remedies

Paragraph 18.1 sets out examples of remedies that may be provided to an Applicant or Other Affected Party. It is not an exhaustive list of remedies although it does set out some limits on the types of remedies FOS can award.

Some remedies that may be provided do not involve payment of monetary compensation for loss or damage but rather a remedy with financial or even non-financial value to the Applicant or Other Affected Party. Examples of such remedies include:

- redistribution of personal chattels from a deceased estate.

FOS also assesses whether Applicants or Other Affected Parties may be assisted by Commonwealth and state legislative protections designed to assist Centrelink recipients.

How FOS makes decisions about remedies

When deciding whether a remedy should be provided in respect of a Dispute, FOS considers what is fair in all the circumstances, having regard to:

- legal principles;
- applicable industry codes or guidance as to practice;
- good industry practice; and
- previous relevant decisions of FOS or a Predecessor Scheme (although FOS will not be bound by these);

as discussed in the guidelines to paragraph [17.2](#) and [8.2](#).

When it decides on a remedy, an aim FOS frequently seeks to achieve is to, as nearly as possible, either:

- place the parties in the position they would have been in if the conduct of the FSP had not caused the loss; or
- compensate a party for their loss to the extent FOS holds the FSP responsible for the loss.

A remedy may be designed to compensate an Applicant or Other Affected Party for loss for which the FSP is responsible or to rectify conduct of the FSP (or to prevent it from recurring if the Dispute involves a privacy issue).

Where the remedy requires not only the FSP but also the Applicant or an Other Affected Party to take action to facilitate a fair outcome, then FOS may direct the Applicant or Other Affected Party to undertake that course of action.

Input on remedies parties should provide

When an Applicant lodges a Dispute with FOS, it is helpful if the Applicant can explain:

- the loss suffered;
- how it was caused by the FSP;
- the remedy sought; and
- why that remedy is appropriate.

All parties should provide comments to FOS on any assertions made by any other party about the desired remedy. The comments will not be taken to be an admission of liability or responsibility by the party in question.

Paragraphs 18.2, 18.3, 18.4: Compensation for direct financial loss or damage; Other compensation; Applicant's costs in pursuing the matter

18.2 Compensation for direct financial loss or damage

Subject to paragraph 18.7, FOS may decide that the Financial Services Provider compensate the Applicant or an Other Affected Party for direct financial loss or damage.

18.3 Other compensation

- a) Subject to paragraph 18.3 c) and paragraph 18.7, FOS may decide that the Applicant, the Financial Services Provider or an Other Affected Party compensate the Applicant or an Other Affected Party for consequential financial loss or damage up to a maximum amount of \$3,000 per claim made in the Dispute.
- b) Subject to paragraph 18.3 c) and paragraph 18.7, FOS may decide that the Applicant, the Financial Services Provider or an Other Affected Party compensate the Applicant or an Other Affected Party for non-financial loss but only where:
 - (i) an unusual degree or extent of physical inconvenience, time taken to resolve the situation or interference with the Applicant's or Other Affected Party's expectation of enjoyment or peace of mind has occurred; or
 - (ii) in the case of a Dispute pertaining to an individual's privacy rights – injury has occurred to the Applicant's feelings or humiliation has been suffered by the Applicant or an Other Affected Party.

The maximum amount of compensation for non-financial loss will be \$3,000 per claim made in the Dispute.

- c) Notwithstanding paragraphs 18.3 a) and b), FOS will not provide compensation for:
 - (i) consequential financial loss; or
 - (ii) non-financial loss,in a Dispute arising as a result of a claim on a General Insurance Policy that expressly excludes such liability.
- d) The cap on liability in paragraph 18.3 a) does not in any way restrict FOS's ability to make an interest award under paragraph 18.5.

18.4 Applicant's costs in pursuing the matter

FOS may decide that the Financial Services Provider contribute to the legal or other professional costs or travel costs incurred by the Applicant or Other Affected Party in the course of the Dispute. Unless exceptional circumstances apply, FOS will not require the Financial Services Provider to contribute more than \$3,000 to these costs.

For guidance on paragraph 18.4, refer to the guidelines to paragraph [9.4](#). FOS may direct the FSP to pay the costs of Other Affected Parties as well as those of the Applicant.

Paragraph 18.5: Interest

18.5 Interest

- a) Subject to paragraph 18.5 b) FOS may decide that the Financial Services Provider pay interest on a payment to be made by the Financial Services Provider to the Applicant or an Other Affected Party.
- b) When deciding an award of interest:
 - (i) if the Insurance Contracts Act 1984 applies – FOS will calculate interest in accordance with that Act; and
 - (ii) otherwise:
 - (A) FOS will calculate interest from the date of the cause of action or matter giving rise to the claim; and
 - (B) FOS may have regard to any factors it considers relevant, including the extent to which either party's conduct contributed to delay in the resolution of the matter.

For guidance on paragraph 18.5, refer to the guidelines to paragraph [9.5](#). FOS may direct interest on amounts paid to Other Affected Parties.

Paragraphs 18.6 and 18.7: Other types of damages; Cap on maximum value of remedy

18.6 Other types of damages

Punitive, exemplary or aggravated damages may not be awarded.

18.7 Cap on maximum value of remedy

- a) The maximum total value of the remedy decided upon by FOS for a claim must not exceed the amount specified in Schedule 2 (as in force at the time of the lodging of the Dispute) as applicable to the type of claim.
- b) When determining the total value of a remedy under paragraph a):
 - (i) monetary compensation and any remedy where the value can readily be calculated, such as the waiving of a debt, are included; and
 - (ii) compensation for costs and interest payments are excluded.

The guideline to paragraph 18.7 addresses these issues:

- *What are the compensation caps?*
- *How is the total value of a remedy calculated?*
- *Can there be more than one claim in a Dispute?*
- *What does “claim” mean?*

Compensation caps

Schedule 2 to the TOR sets compensation caps by specifying maximum values of remedies for claims in Disputes. The cap for a claim in any Dispute relating to Traditional Trustee Company Services is \$280,000.

How total value of remedy is calculated

The caps limit the total value of a remedy for a claim. This total value is calculated by:

- including monetary compensation and “any remedy where the value can readily be calculated”, such as the waiving of a debt; and
- excluding any compensation for costs and interest payments.

FOS will calculate the value of a remedy as at the date on which FOS decides on the remedy.

Number of claims within Dispute

A compensation cap applies in relation to a claim rather than a Dispute. In any Dispute, one claim or multiple claims may be raised by an Applicant or Other Affected Party. Where an Applicant or Other Affected Party raises multiple claims against an FSP, FOS usually deals with all of the claims together as a single Dispute because this is more efficient for dispute resolution and administration. However, the cap specified in Schedule 2 will apply to each claim within the Dispute.

The meaning of “claim”

FOS takes the view that for the purposes of the TOR, the expression “claim” refers to the set of facts that, put together, give an Applicant or Other Affected Party the right to ask for a remedy. This means a set of separate events or separate facts that lead to the alleged losses. FOS does not aggregate a number of claims into one claim just because the claims all arose from an ongoing relationship between an FSP and an Applicant or Other Affected Party.

FOS will not permit a joint claim in contract or tort to be “split” and treated as multiple claims (with a cap applying to each claim).

The expression “claim” under the TOR should not be confused with an “insurance claim” which refers to the actual application for benefits under an insurance policy.

Section 19: Test case procedures

Paragraphs 19.1 and 19.2: Test case procedures; Notice of intended Test Case

19. Test case procedures

19.1 Notice of intended Test Case

If a Financial Services Provider wishes a Dispute to be treated as a test case, the Financial Services Provider must give FOS a notice in writing containing:

- a) a statement, with reasons, why the Financial Services Provider is of the opinion that the Dispute involves or may involve:
 - i) an issue which may have important consequences for the business of the Financial Services Provider or Financial Services Providers generally; or
 - ii) an important point of law; and
- b) an undertaking that, if within 6 months after FOS receives the notice, the Applicant, an Other Affected Party or the Financial Services Provider institutes proceedings in any superior court or tribunal which has the ability to make a binding determination of the issue or point of law in respect of the Dispute, the Financial Services Provider will:
 - i) pay the Applicant's and all Other Affected Parties' costs and disbursements (if not otherwise agreed, on a solicitor and own client basis) of the proceedings at first instance and any subsequent appeal proceedings commenced by the Financial Services Provider (except by way of respondent's notice, cross appeal or other similar procedure); and
 - ii) make interim payments of account of such costs and disbursements if and to the extent that it appears reasonable to do so; and
- c) an undertaking that the Financial Services Provider will institute the proceedings within 6 months of the date of the notice and seek to prosecute the test case proceedings expeditiously.

19.2 FOS discretion to stop considering the Dispute

If after receiving a notice under paragraph 19.1 of these Terms of Reference, FOS is satisfied that it would be inappropriate to deal with the Dispute, FOS must inform the Applicant and all Other Affected Parties in writing that:

- a) FOS has received the notice;
- b) the date of the notice;
- c) FOS will cease considering the Dispute for so long as the Financial Services Provider complies with the undertakings in the notice; and
- d) the effect of this upon the Applicant and all Other Affected Parties.

For guidance on of paragraphs 19.1 and 19.2, refer to the guidelines to paragraphs [10.1 and 10.2](#). Reference to the Applicant in those guidelines also apply to Other Affected Parties.

Section 19A:

Mechanisms to review approach taken by FOS in Determination

Mechanisms to review approach taken by FOS in Determination

Section 19A of the guidelines addresses these issues:

- *What is the informal review mechanism?*
- *What are the general requirements for use of the formal review mechanism?*
- *What additional requirements apply if an FSP seeks to use the formal review mechanism?*
- *What are the steps in the formal review mechanism?*
- *What are Costs Contribution Agreements?*
- *How does FOS decide whether a formal review is warranted?*

General guidance – open and transparent decision making

FOS is committed to being open and transparent about the approach it takes when deciding Disputes. This commitment reflects the principles of cooperative dispute resolution and transparency stated in paragraph 1.2 of the TOR, which underpin all of the processes and operations of FOS.

FOS seeks to promote openness and transparency in its decision making in a number of ways:

- Since early 2013, FOS has been releasing “FOS Approach” documents to explain, in easy to understand terms, the approach FOS takes to particular types of Disputes. Previously, the approach was explained in other documents published by FOS and its predecessors such as bulletins and practice notes.
- FOS publishes all of its Determinations. It also publishes articles about its decisions in the quarterly online publication, *The Circular*.
- FOS gives stakeholders regular opportunities to obtain information about, discuss and provide input on how FOS approaches particular types of Disputes – for example, when FOS holds open forums and in its regular meetings with stakeholders.

This guideline sets out the informal and formal review mechanisms that FSPs, industry bodies or consumer organisations can use to raise any significant concerns about the underlying approach taken by FOS in one or more Determinations. The review mechanisms are intended to enable review of FOS’s approach in its Determinations to assess whether FOS should continue to take that approach or modify it for future Disputes.

It is important to note that the review mechanisms are not to be used by Applicants or FSPs to appeal and reopen an individual Determination or change its outcome. Under the TOR, Determinations are final decisions on specific Disputes, which remain binding.

Informal review mechanism

FOS encourages any FSP, industry body or consumer organisation that has a significant concern about the approach taken by FOS in its Determinations to raise the concern directly with the Chief Ombudsman or a Lead Ombudsman using the informal review mechanism. The steps in the informal review mechanism are:

- Step 1: A stakeholder explains a concern about the approach taken by FOS in one or more Determinations in:
- an email or a letter to, or a conversation with, the Chief Ombudsman or a Lead Ombudsman; or
 - an open forum or a stakeholder meeting.
- Step 2: The relevant Lead Ombudsman or the Chief Ombudsman discusses the concern with the stakeholder.
- Step 3: FOS internally reviews whether it should change its approach for future Disputes and explains the basis of its views to the stakeholder when the review is completed.
- Step 4: Where appropriate, FOS sets out its views in writing in response to the concerns raised by the stakeholder.
- Step 5: If FOS proposes to change its approach as a result of the issues raised by the stakeholder, FOS sets out and explains the change in its regular publications and also in its regular meetings with interested stakeholders.

Although not always essential, it will generally be helpful for a stakeholder seeking an informal review to set out any concern in writing. This will make clear the nature and basis of the concern. If a concern relates to how a law should be interpreted or applied, FOS encourages the stakeholder to provide, during Step 1 or 2, any written legal advice they have obtained on the interpretation or application of the law.

If the stakeholder that sought an informal review is not satisfied with the outcome, they can consider using the formal review mechanism.

General requirements for use of the formal review mechanism

FOS has a formal review mechanism that an industry body (on behalf of its members) or consumer organisation (on behalf of consumers more generally) may use to pursue a concern about the approach taken by FOS in a Determination. The mechanism can be used if all the requirements below are met:

- The concern was raised through the informal review mechanism, but the industry body or consumer organisation is not satisfied with the outcome.
- The industry body or consumer organisation has legal advice concluding that, in a Determination, FOS made an error in interpreting or applying the law (“Error of Law”).

FOS could make an Error of Law if, for example, it bases a Determination on an incorrect understanding of the law.

- The industry body or consumer organisation considers that, given the Error of Law, there would be a significant adverse impact on consumers, the industry or a particular FSP or group of FSPs if FOS does not change its approach.
- Where an industry body seeks to use the formal review mechanism, it undertakes to enter an agreement with FOS for the body to contribute to certain costs that FOS or a consumer organisation may reasonably incur by taking steps in the review (“Costs Contribution Agreement”).

Any advice or opinion on whether FOS made an Error of Law must take into account the role of FOS as an ASIC-approved EDR scheme and not a court or tribunal exercising judicial functions. The role of FOS under the TOR, when making a Determination, is to do what is fair in all the circumstances, having regard to:

- legal principles;
- applicable industry codes or guidance as to practice;
- good industry practice; and
- previous relevant decisions of FOS or its predecessors.

The formal mechanism is not intended to be used:

- to review an approach that has already been, or is being, reviewed by other means;
- where it is considered the issues would be more appropriately dealt with by a court, regulator, a change in government policy or by some other organisation; or
- as an appeal from a specific Determination, which remains binding on the FSP once accepted by the Applicant.

Request for use of formal mechanism by an individual FSP

The formal review mechanism is designed to be used primarily by an industry body on behalf of its members or a consumer organisation on behalf of consumers. However, FOS is open to considering a request by an individual FSP to use the formal review mechanism where the FSP can demonstrate that an issue would have a significant impact on its operations but, due to the unique nature of its products or terms and conditions, would not impact other FSPs in the sector.

FOS will consider a request from an individual FSP to use the formal review mechanism if the relevant industry body confirms the points listed below. It is a matter for an industry body to decide what arrangements it needs to put in place to deal with these points:

- The issue would not impact members of the industry body other than the individual FSP.

- Members of the industry body do not have conflicting views about the issue.
- The industry body considers that a formal review could resolve the issue in a co-operative manner.

If FOS agrees to an individual FSP using the formal review mechanism, any reference to an industry body in the guidelines providing for the mechanism should be read as a reference to the FSP. This means, for example, that the FSP can only use the mechanism if:

- The approach to be reviewed was the subject of an informal review but the FSP was not satisfied with the outcome.
- The FSP has legal advice concluding that, in a Determination, FOS made an Error of Law.
- The FSP considers that, given the Error of Law, there would be a significant adverse impact on the FSP if FOS does not change its approach.
- The FSP undertakes to enter a Costs Contribution Agreement.

Steps in formal review mechanism

Step 1: The industry body or consumer organisation seeking a review provides to the Chief Ombudsman, in writing:

- legal advice from external counsel that
 - concludes that, in a legal challenge, a court would be highly likely to find that FOS made an Error of Law in a Determination and
 - sets out, in full, the reasons for that conclusion;
- a submission that
 - establishes that, given the Error of Law, there would be a significant adverse impact on consumers, the industry or a particular FSP or group of FSPs if FOS does not change its approach and
 - specifies the nature of the adverse impact and the evidence indicating it would occur;
- details of any relevant consultation conducted and its outcome; and
- where an industry body seeks the review –
 - authorisation from the relevant FSP for FOS to discuss with the body the Determination and the Dispute to which it relates and
 - the body's undertaking to enter a Costs Contribution Agreement with FOS.

If FOS considers that it has only received part of the material described above, because material received is incomplete or deficient, FOS:

- explains the issue to the stakeholder seeking the review; and
- requests that stakeholder to address the issue within a specified timeframe.

If a request from FOS is not complied with, FOS need not take any further steps.

- Step 2: If the review is sought by an industry body, FOS gives a consumer organisation that deals with the area of law at issue:
- an opportunity to comment on the legal advice and submission within a specified timeframe; and
 - any information about the Costs Contribution Agreement that the organisation may need.

If the review is sought by a consumer organisation, FOS gives an industry body that operates in the area to which the Determination relates an opportunity to comment on the legal advice and submission within a specified timeframe.

Step 3: The Chief Ombudsman:

- takes into account information and material including the legal advice and submission and any comments on them that FOS received within the timeframe specified for comments; and
- considers
 - whether a court or other organisation is a more appropriate place than FOS to consider issues that the review would raise and
 - whether the review is warranted, given the obligation of FOS under paragraph 1.2a) of the TOR to take action to resolve Disputes in a cooperative, efficient, timely and fair manner.

If the Chief Ombudsman decides either that a court or other organisation is a more appropriate place or that a review is not warranted, the Chief Ombudsman provides an appropriate explanation to:

- the stakeholder that sought the review; and
- any stakeholder given an opportunity to comment in Step 2.

Step 4: If the Chief Ombudsman decides a review is warranted, the Chief Ombudsman establishes an appropriate process for the review. This process may include, for example:

- before deciding whether external advice is required, requesting an initial review from one or more senior FOS Ombudsmen with specialist expertise relevant to the issue raised and who have not been directly involved in the Determination;
- referring issues to a panel of Ombudsmen or external experts in industry and consumer issues or a combination of Ombudsmen and external experts;
- requiring further consultation with relevant stakeholders; or
- obtaining an opinion as to whether FOS made an Error of Law. This opinion would come from a Senior Counsel who is independent of FOS and has extensive experience in the area of law at issue.

A review process must seek to ensure that the party or parties undertaking the review clearly understand the views of the stakeholder seeking the review and all other interested stakeholders, and that these views can be fully considered in a co-operative rather than adversarial manner.

Any assessment of whether FOS made an Error of Law must take into account:

- the role of FOS as an EDR scheme rather than a tribunal or court exercising judicial powers;
- the obligation of FOS, when making a Determination, to do what is fair in all the circumstances having regard to specified factors, one of which is legal principles.

When establishing an appropriate process, the Chief Ombudsman may take into account:

- whether a Costs Contribution Agreement has been entered; and
- if so, its terms.

Step 5: If a review is undertaken, the Chief Ombudsman reviews the handling of current Disputes affected by the review and, where appropriate and to the extent practical, seeks to put these on hold until the review is conducted. In doing so the Chief Ombudsman seeks to balance the interests of the stakeholder seeking the review with any detriment to an Applicant arising from a delay in having their Dispute considered by FOS.

Step 6: If the review indicates that FOS made an Error of Law, FOS uses the outcome of the review as the basis for discussions with stakeholders about what, if any, changes to its approach are warranted taking into account its role as an EDR scheme. Where FOS changes its approach, this:

- is explained in a published FOS Approach document or other publicly available document; and
- underpins decisions made by FOS after the change.

Costs Contribution Agreements

Costs Contribution Agreements are intended to provide a flexible mechanism to address the cost issues that arise. A Costs Contribution Agreement allows FOS to require an industry body to contribute to certain costs incurred by FOS or a consumer organisation. Where an industry body seeks a review using the formal mechanism, the Costs Contribution Agreement may require the body to, for example, cover reasonable costs incurred by a consumer organisation in commenting on the body's legal advice. A Costs Contribution Agreement could be structured for an individual matter or as a standing arrangement. FOS would be open to exploring other potential methods to ensure the costs incurred by FOS in any formal review are appropriately met.

Deciding whether a formal review is warranted

In Step 3 of the formal review mechanism, the Chief Ombudsman considers whether a review is warranted. Examples of factors that indicate a review is not warranted include:

- the approach under review reflected unusual circumstances relating to a Dispute and would only be followed in limited situations;
- reverting to the informal review mechanism is likely to be able to address the concerns of stakeholders on the issues that have been raised for review;
- there is a more effective alternative mechanism to address issues raised.

Section 20: Interpretation



Paragraph 20: Interpretation

Section G: Interpretation of Defined Terms

20. Interpretation

20.1 Defined terms

The following words have the following meanings where they appear in these Terms of Reference:

“Applicant” means a person who has a Dispute that has been lodged with FOS and who, under paragraph 4.1, is eligible to use the Service;

“ASIC” means the Australian Securities & Investments Commission.

“Australia” includes the external territories.

“Consequential Financial Loss” means indirect financial loss or damage.

“Chief Ombudsman” means the person appointed by the Board of FOS to be the Chief Ombudsman in accordance with FOS’s Constitution.

“Credit Contract” means a contract regulated by the Uniform Consumer Credit Code or such other federal credit legislation as may replace it;

“Determination” means a decision by FOS about a Dispute in accordance with paragraph 8 (which may include a decision as to remedy under paragraph 9);

“Dispute” means an expression of dissatisfaction with a Financial Service Provider.

“Excluded Product” means a product that is not a financial product for the purposes of Part 7.1, Division 3 of the Corporations Act 2001

“Financial Service” means a product or service that:

- a) is financial in nature including a product or service which is or is in connection with:
 - (i) a loan or any other kind of credit transaction (including a credit card used overseas) and guarantees or charges to secure any moneys owing;
 - (ii) a deposit including a term deposit, a fund management deposit or a retirement savings account;
 - (iii) an insurance policy;
 - (iv) a financial investment (such as life insurance, a security or an interest in a registered managed investment scheme or a superannuation fund);
 - (v) a facility under which a person seeks to manage financial risk or to avoid or limit the financial consequences of fluctuations in, or in the value of, an asset, receipts or costs (such as a derivatives contract or a foreign currency contract);
 - (vi) a facility under which a person may make, or cause to be made, a non-cash payment (such as a direct debit arrangement or a facility

relating to cheques, bills of exchange, travellers cheques or a stored value card);

- (vii) leasing and hire purchase arrangements; or
- (viii) financial or investment advice; or
- (ix) Traditional Trustee Company Services; or

b) is a custodial service.

“Financial Services Provider” means

- a) a provider of a Financial Service that is a Member; or
- b) for the purposes of disputes relating to a Traditional Trustee Company Service only, “Financial Services Provider” also means all co-trustees whose joint conduct is the subject of the dispute, provided at least one co-trustee is a Member and all other co-trustees have consented to FOS dealing with the Dispute

A reference to the Financial Services Provider includes any employee, agent or contractor of the Financial Services Provider including any person who has actual, ostensible, apparent or usual authority to act on behalf of the Financial Services Provider or authority to act by necessity in relation to a financial service.

“Foreign Collective Investment Scheme” means either:

- a) a managed investment scheme under section 9 of the Corporations Act 2001 (Cth); or
- b) a foreign investment company,

where the operator is incorporated (or is a foreign company that is formed) in a foreign jurisdiction and is regulated in that jurisdiction for the operation of the scheme or company.

“FOS” means Financial Ombudsman Service Limited ACN 131 124 448

“FOS Panel” means a panel that has been formed by FOS in accordance with paragraph 2.4 for the purposes of making a Determination in relation to a Dispute.

“General Insurance Broker” means the holder of an Australian financial services licence granted pursuant to section 913B of the *Corporations Act 2001* (Cth) whose licence has a condition authorising them to assume or use the expression “insurance broker” or “insurance broking” or “general insurance broker” in relation to general insurance products.

“General Insurance Policy” means a contract of general insurance within the meaning of that expression in the Insurance Contracts Act 1984 or part of such a contract.

“IDR Response” means a communication in writing from the Financial Services Provider to an Applicant advising:

- a) the Financial Services Provider’s final position in relation to the Applicant’s complaint after the conclusion of the Financial Services Provider’s internal dispute resolution process; and

- b) the Applicant’s right to take the complaint to FOS and the timeframe for doing so and FOS’s contact details.

“incorporated” means being registered under the Corporations Act 2001 or under the incorporated associations legislation of a jurisdiction within Australia.

“individual” means a natural person.

“Jurisdictional Decision” means a final decision under paragraph 5.3b) as to whether, under these Terms of Reference, FOS is able to consider a Dispute or whether FOS should exercise its discretion to exclude a Dispute.

“Life Insurance Policy” includes any product or service offered by a life insurance company.

“Maladministration” means an act or omission contrary to or not in accordance with a duty or obligation owed at law or pursuant to the terms (express or implied) of the contract between the Financial Services Provider and the Applicant.

“Member” means a person who is a Member of FOS as defined in FOS’s Constitution. For the purposes of paragraph 4, where a dispute relates to a Traditional Trustee Company Service only, all co-trustees whose joint conduct is the subject of a dispute will be deemed to have been be current Members at the time the dispute was lodged, provided at least one co-trustee was at that time a current Member of FOS as defined in FOS’s Constitution, and all other co-trustees have consented to FOS dealing with the Dispute.

“Ombudsman” means a person appointed to the position of Ombudsman under paragraph 12 of FOS’s Constitution and includes the Chief Ombudsman.

“Operational Guidelines” means the Guidelines developed by FOS in relation to these Terms of Reference and made publicly available via FOS’s website.

“Panel Member” means a person appointed to the position of Panel Member under paragraph 13 of FOS’s Constitution.

“Predecessor Scheme” means the Banking and Financial Services Ombudsman Limited, the Financial Industry Complaints Service Limited, the Insurance Ombudsman Service Limited, Credit Union Dispute Resolution Centre Pty Limited and Insurance Brokers Dispute Limited and any other ASIC approved external dispute resolution scheme which merges with FOS.

“Recommendation” means an assessment by FOS about a Dispute in accordance with paragraph 8 of these Terms of Reference;

“related body corporate” has the meaning given in the Corporations Act 2001.

“Residential Strata Title Insurance Product” means an insurance policy insuring the body corporate of a strata title or company title building that is wholly occupied for residential or small business purposes including:

- a) Strata Building;
- b) Common Contents;
- c) Personal Accident or Sickness for voluntary workers in or about the strata building or common property;

but excluding:

- a) Professional Indemnity;
- b) Public Liability;
- c) Workers Compensation.

“Retail General Insurance Policy” means:

- a) an insurance product specified in section 761G(5)(b) of the Corporations Act 2001;
- b) where an Applicant (other than a Small Business) has a Dispute with a General Insurance Broker pertaining to a product that includes an insurance product specified in section 761G(5)(b) of the Corporations Act 2001 – also includes any other insurance cover provided by that product, with the exception of cover under an Excluded Product.

“Service” means the dispute resolution scheme described in these Terms of Reference.

“Small Business” means a business that, at the time of the act or omission by the Financial Services Provider that gave rise to the Dispute:

- a) if the business is or includes the manufacture of goods: had less than 100 employees; or
- b) otherwise: had less than 20 employees.

“Small Business Insurance Product” means:

- a) where the Dispute is between a Small Business and a General Insurance Broker – a Retail General Insurance Policy other than an Excluded Product;
- b) for other types of Disputes involving a Small Business – a policy or part of a policy that provides insurance cover (whether or not the cover is limited or restricted in any way) in respect of one of more of the following:
 - (i) Computer and Electronic Breakdown;
 - (ii) Fire or Accidental Damage – but, in a Dispute about an insurance claim that has been made by the Applicant, only to the extent that the insurance cover relates to a Specified Defined Event;
 - (iii) General Property;
 - (iv) Glass;
 - (v) Land Transit;
 - (vi) Machinery Breakdown;
 - (vii) Money; and
 - (viii) Theft,

but excluding cover in relation to any of the following:

- (ix) Contractors All Risks;
- (x) Fidelity Guarantee;

- (xi) Legal Liability (including Public Liability and Products Liability);
- (xii) Loss of Profits/Business Interruption;
- (xiii) Professional Indemnity; and
- (xiv) Industrial Special Risks.

“Specified Defined Event” means events (however described) as follows:

- a) Fire/Lightning/Explosion;
- b) Storm/Tempest/Rainwater; Flood;
- c) Water from leaking pipes/water systems;
- d) Impact;
- e) Earthquake;
- f) Riot and Civil Commotion or Industrial Disputes;
- g) Malicious Damage;
- h) Fusion;
- i) Spoilage of refrigerated goods.

“Uninsured Motor Vehicle” means a motor vehicle that is not covered by current comprehensive insurance.

20.2 General

- a) A reference to the doing of an act includes, where the context allows, a reference to a refusal or failure to do or cessation of the act. Accordingly a reference to the provision of Financial Services includes, where the context allows, a reference to their non-provision and to their cancellation.
- b) A reference to the singular include the plural and vice versa.
- c) The words “including”, “such as” or “for example”, when introducing an example, does not limit the meaning of the words to which the example relates, that example or examples of a similar kind.
- d) Where a term is used in these Terms of Reference that is not defined in paragraph 14.1, the term is to be interpreted as having its everyday meaning and usage, unless the context otherwise requires.
- e) References to paragraphs are to paragraphs of these Terms of Reference.
- f) A reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them.
- g) Headings are inserted for convenience only and do not affect the interpretation of these Terms of Reference.