

Proposed Terms of Reference Changes

Consultation Paper

7 July 2014

Background

Recently, CameronRalph Navigator conducted an independent review of FOS's operations and procedures. Their report, which is available on the [FOS website](#), set out 33 recommendations. Key recommendations include the need for FOS to eliminate its dispute backlogs and reshape its dispute processes in order to improve timeliness and efficiency.

Some recommendations included specific Terms of Reference (TOR) changes. Others contained process changes which require the support of TOR changes.

FOS's Board posted a response to the independent review on 12 March 2014. Contained in this response was a commitment to:

- Introduce a new process to fast-track decisions for simpler and low-value disputes.
- Review the current two-step dispute lodgement process with the aim of introducing a one-step process.
- Adding specialist expertise earlier in the dispute process and reducing the "touch points".
- Consult with stakeholders on FOS's current approach to hardship disputes.
- Introduce plain English drafting to more effectively communicate outcomes to Applicants and financial services providers (FSPs).

We have now implemented a series of initiatives to help us deliver these commitments, which require us to amend parts of the TOR. We have drafted these amendments and now invite stakeholder feedback, in line with the independent review's specific recommendation to amend the TOR in consultation with our stakeholders. This process is also required by our current TOR.

Senate Economics References Committee Report

On 26 June 2014, the Senate Economics References Committee ("the Senate Committee") handed down the final report of its inquiry into the performance of the Australian Securities and Investments Commission (ASIC). Two of its 61 Recommendations referred to FOS and its counterpart COSL (Credit Ombudsman Service Limited).

Most of the recommendations made by the Senate Committee did not relate to jurisdiction. Instead, they focused on suggested enhancements to the way FOS handles disputes and the way it reports systemic issues to ASIC. We will carefully review the report and its recommendations to see what we can do to further improve

the dispute resolution service we provide to consumers in the financial services sector.

One recommendation made by the Committee did relate to our jurisdiction and Terms of Reference (Recommendation 6). This recommendation concerned the indexing of our compensation caps and jurisdictional limit. While our TOR already provide for the indexing of our compensations caps (in paragraph 9.8), this indexing does not cover our jurisdiction limit. As part of our consultation on proposed TOR changes, we are seeking feedback on this TOR issue raised in the Senate Committee report. This issue is included in the [Terms of Reference – Issues for Consideration](#) document.

The TOR's current \$500,000 jurisdiction limit is the limit currently required under ASIC Regulatory Guide 139. It is aligned to the point at which the price of a financial product will normally take it out of the "retail client" area, which is FOS's core jurisdiction (see Corporations Act section 761G(7)(a) and Regulations 7.1.18 and 7.1.19). The amount has not increased since it was introduced in 2002. Any increase to this limit (including by indexation) would require ASIC approval and possibly amendment of the Regulations, and this issue would have implications for the jurisdiction of all ASIC-approved EDR schemes.

The Senate Committee also specifically commented about our time limits to consider a dispute (paragraphs 7.54 and 7.55). Although it was not subject to a specific Recommendation, they asked FOS (and COSL) to consider whether the six year time limit is appropriate.

This comment was based on the belief that our time limit starts from when the events leading to the dispute first began. However, our six year time limit begins from when the applicant first became aware (or should reasonably have been aware) of the loss. This is broadly consistent with the relevant statutes of limitation regarding contract and tort. Therefore, FOS does not consider a TOR change is required in relation to our time limits.

Commercial credit providers

FOS is aware that the Attorney-General's department is consulting on whether commercial credit providers should be required to join an EDR scheme under the Privacy Regulations.

As the consultation is still underway, FOS is not proposing any TOR amendment at this point because such an action would be premature. Instead, FOS will review the Attorney-General's outcome and decide whether the outcome requires an amendment to FOS's TOR. If an amendment is required, we will consult with relevant stakeholders to determine the appropriate amendment.

Purpose of this consultation paper

This consultation paper explains the proposed changes and the reasons for them. We have also put together a [summary table](#) of the proposed changes.

Details of how to make a submission on our draft amendments are on the FOS website www.fos.org.au.

Any proposed changes that FOS implements will have a starting date of **1 January 2015** unless a different date is specified.

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1 Streamlined process for simpler, low value disputes

The independent review recommended that FOS implement a streamlined and less document-dependent process for simpler, lower value disputes.

The Terms of Reference (TOR) currently provide sufficient flexibility as to how FOS handles a dispute to incorporate such a process. However, a TOR change is proposed to create a separate class of decision-maker known as an Adjudicator, to manage and issue decisions on these disputes.

1.1 Proposal

Create the role of Adjudicators, as distinct from Ombudsmen.

Although Adjudicators will share similar powers to that of an Ombudsman, their authority will be limited to issuing Determinations and Jurisdictional Decisions on simpler, lower value disputes that will be considered under the proposed streamlined process. The Chief Ombudsman will set limits on the scope of Adjudicators' powers based on FOS's experience with the streamlined process over time.

2 One-step lodgement and referral process

FOS is introducing a more streamlined, one step lodgement process. This new process responds to the independent review recommendation number 4.

We propose that when an Applicant lodges a dispute, the matter will be referred to the financial services provider (FSP) who will be given a final opportunity to resolve it through their internal dispute resolution (IDR) process before FOS considers the dispute.

2.1 Proposal

Amend TOR paragraphs 6.3 and 15.3 and delete paragraphs 6.4 and 15.4, to provide for FOS to refer disputes back to the FSP for resolution within a timeframe that FOS specifies.

FOS will provide clear guidance on specific timeframes in the Operational Guidelines (OGs) and/or relevant publications. The timeframes may vary according to the nature of the dispute and may be changed over time to take into account changing circumstances.

We have recently been consulting on our proposed process changes, including the introduction of a one-step lodgement and referral process. After we have settled the reconfiguration of our dispute process, including the referral timeframe, we will update stakeholders. An update will be provided in the next three months. We will also update the Operational Guidelines in relation to these paragraphs by 1 January 2015.

FOS will continue to communicate and consult extensively with stakeholders about these timeframes and any future changes to them.

3 Outside Terms of Reference (OTR) objection timeframes

If FOS assesses a dispute as being outside jurisdiction, an Applicant has 30 days to object to that decision, and we cannot close the dispute until any objection is reviewed or the full 30 days has passed. FOS can currently extend this deadline but cannot shorten it, even where it is clear FOS cannot deal with the dispute.

As part of our process reforms, we are proposing a TOR change to provide flexibility in the objection timeframe when a dispute is excluded because it is outside FOS's jurisdiction.

This flexibility is particularly useful in disputes that are obviously outside jurisdiction due to a Court judgment. However, there are also other instances where disputes are clearly outside FOS's jurisdiction, and this will not change on the basis of an Applicant's objection.

3.1 Proposal

We propose making these TOR changes:

- a. amend paragraph 5.3 to replace the standard 30 day objection timeframe to one nominated by FOS, and
- b. amend paragraph 7.4 to allow FOS to reduce (or increase) any timeframe imposed by the TOR, in order to provide flexibility to alter the FOS-nominated timeframe if appropriate in an individual case.

The Operational Guidelines will set out the standard timeframes FOS will nominate for different types of disputes. FOS will continue to communicate and consult extensively with stakeholders about these timeframes and any future changes to them.

FOS is considering the following timeframes for disputes assessed as being outside our jurisdiction:

- Where the subject matter of the dispute is also the subject of a judgment and being excluded under paragraph 5.1(l): 7 days.
- Where the reason FOS cannot consider the dispute is clear and straightforward (for example, the FSP is not responsible for the conduct that the dispute is about) and further information is unlikely to alter the assessment: 14 days.

4 Small Business credit disputes

The independent review encouraged FOS to be more ready to exclude small business credit disputes if they relate to large sums of money or if they raise complex issues that would be more appropriately dealt with in the courts.

In our experience, and as referenced by the independent review, businesses that have access to these large credit facilities are often well resourced (eg property developers) and in a position to pursue a dispute in more traditional forums. Also, disputes about large value facilities tend to be more complex and require FOS to devote significant time and resources to their resolution.

As part of our process reforms, we propose to exclude small business disputes involving a credit facility that exceeds \$2 million. This will provide greater consistency and transparency compared with a discretionary exclusion.

This approach is an extension of paragraph 13.1d), which was introduced in January 2014. This paragraph allows FSPs to continue legal proceedings instigated before a dispute is lodged (and therefore effectively excluding the dispute from FOS's jurisdiction) in small business disputes involving a credit facility that exceeds \$2 million.

4.1 Proposal

Amend paragraph 5.1 to specifically exclude disputes lodged by a small business involving a credit facility that exceeds \$2 million.

5 Traditional Trustee Company Service (TTCS) disputes

5.1 Multiparty disputes and getting consent of all parties

If a dispute is about a TTCS, FOS can consider it even though it affects parties other than the Applicant and the FSP – but only if all “Other Affected Parties” (as defined by the TOR) are contacted, consent to FOS dealing with the dispute and agree to be bound by the outcome.

The independent review recommended that FOS dispense with the need to gain the consent of all “Other Affected Parties” where their interests would not be adversely affected by the outcome of the dispute.

5.2 Specific exclusions

A number of other changes have been proposed to clarify aspects of FOS's jurisdiction over TTCS disputes. These changes include automatically excluding these types of disputes:

- where at least one beneficiary is a minor or lacks mental capacity

- where a complaint about the service provided may be made under any of the laws listed in Schedule 8AC of the Corporations Regulations 2001 (various State and Territory laws about guardianship of minors and people under a disability)
- where a complaint involves the service provided to a person lacking mental capacity by a trustee who was appointed by a court
- where a complaint involves the alleged capacity of the testator to make a valid will.

Currently, the TOR gives FOS the discretion to exclude the first three of these, as explained in the Operational Guidelines to paragraph 5.2.

We propose making these exclusions mandatory to provide greater transparency and clarity about FOS's jurisdiction in these circumstances.

5.3 Other changes

Currently, paragraph 5.1j) prevents FOS from dealing with a dispute about allocating a benefit between competing claimants *“unless the dispute relates to a Traditional Trustee Company Service”*.

It seems that this phrase is unnecessary. Any trustee company decision about allocating a benefit between competing claimants may be excluded anyway, under paragraph 5.1q) (disputes about the exercise of a trustee's discretion). If all such decisions involve the exercise of a trustee's discretion, then removing the phrase would not reduce FOS's jurisdiction over multi-party TTCS disputes.

FOS is seeking comment on whether this phrase can be removed without inappropriately reducing FOS's jurisdiction over multiparty TTCS disputes.

5.4 Proposals

1. Amend paragraphs 15.7 and 20.1 to remove the need for FOS to obtain the consent of all “Other Affected Parties” where we are satisfied their interests would not be adversely affected by an outcome.
2. Amend paragraph 5.1 to automatically exclude disputes:
 - where at least one beneficiary is a minor or lacks mental capacity
 - where a complaint about the service provided may be made under any of the laws listed in Schedule 8AC of the Corporations Regulations 2001 (various State and Territory laws about guardianship of minors and people under a disability)

- about the service provided to a person lacking mental capacity by a trustee who was appointed by a court
 - about the alleged capacity of a testator to make a valid will.
3. Consult on whether the phrase “unless the dispute relates to a Traditional Trustee Company Service” at the end of paragraph 5.1j) is unnecessary and should be deleted.

6 Small Business insurance disputes

Unlike other areas of financial service, FOS’s jurisdiction over general insurance is limited to certain types of insurance products only – particularly in the case of small business insurance.

The independent review recommended that FOS should return the scope of its small business general insurance broking jurisdiction to pre-2010 levels.

Prior to 2010, jurisdiction for insurance broking disputes was not limited to retail general insurance policies, but covered all general insurance policies except for “Excluded Products” (policies which have been excluded from the definition of “financial product” under the Corporations Act).

The independent review also recommended that FOS should, from 1 January 2016:

- expand its small business general insurance jurisdiction to include loss of profits and business interruption insurance, and
- allow FOS to consider disputes about an excluded category of small business insurance in exceptional circumstances.

6.1 Proposal

Amend the TOR to remove the word “Retail” from the definition of “Small Business Insurance Product”, as it relates to insurance broking disputes.

Amend the TOR, with effect from 1 January 2016, to:

- expand FOS’s jurisdiction to include loss of profits/business interruption insurance, and
- include an ‘exceptional circumstances’ discretion so that FOS can, where appropriate, consider a dispute in relation to an excluded category of insurance.

The Operational Guidelines will explain when FOS will consider “exceptional circumstances” apply.

Prior to this small business jurisdiction commencing on 1 January 2016, FOS will provide further information and guidance in the Operational Guidelines and other publications about how it will deal with these disputes. This will include information on how we will use specialist and appropriate industry expertise to deal with issues raised in these disputes (such as loss of profits).

7 Uninsured third party motor vehicle disputes

The independent review recommended that FOS expand its jurisdiction in relation to uninsured third party motor vehicle disputes:

- to allow FOS to consider the dispute even if the insured driver who caused the damage has failed to pay the excess to their insurer, and
- to increase the maximum award FOS can make in these disputes from \$3,000 to \$5,000.

7.1 Proposal

Amend paragraph 4.2 to provide for FOS to consider third party motor vehicle disputes, where the insured driver has not yet paid the excess.

Increase the compensation cap for third party claims on a General Insurance Policy (Row 2 of Schedule 2) from \$3,000 to \$5,000. This increase applies immediately *after* the automatic indexation of Schedule 2 Row 2 (scheduled for 1 January 2015 under paragraph 9.8), so indexation will not increase this amount further until 2018.

8 Disputes involving rating factors

Currently, paragraph 5.1e) excludes General Insurance disputes about rating factors and weightings used to determine an insured's base premium, where this is commercially sensitive. The independent review recommended extending this exclusion to cover rating factors and weightings used to determine policy conditions and excesses.

FOS is consulting on whether paragraph 5.1e) should be amended as recommended by the independent review, and if so

- what aspects of this issue should be excluded from FOS's jurisdiction, and
- how (and with what wording) this should best be achieved.

8.1 Proposal

The discussion of this issue in the [Terms of Reference – Issues for Consideration](#) document includes one possible form of words for proposed paragraph 5.1e).

However, FOS is seeking input from stakeholders given the likely divergent views on how this exclusion should operate to ensure a fair balance is struck between:

- preserving the FSP's confidentiality of the ratings factors and weightings it applies to offers of insurance, which are commercially sensitive information, and
- avoiding any inappropriate expansion of this paragraph that has the effect of restricting FOS's jurisdiction to review disputes it is clearly meant to consider.

9 Disputes lodged by agents charging a fee for service

The independent review acknowledged concerns about the possible growth of paid dispute agents (such as credit repair agents). There is already evidence that some fee-for-service agents use external dispute resolution services inappropriately.

To address this, FOS intends to include a provision in the TOR that will enable it to refuse to accept a dispute at the time of lodgement where an Applicant:

- is represented or assisted by an agent who may receive any remuneration for its service (fee-for-service agents), and
- fails to provide information with the Dispute as required by FOS.

FOS will provide guidance – either through our quarterly publication ‘the Circular’, our ‘FOS Approach’ resource documents, or our Operational Guidelines – about how and when this provision will apply and what information needs to be provided. This will enable us to:

- deal more effectively and efficiently with fee-for-service disputes and collect more effective data on the extent of the issue, and
- take steps to discourage the inappropriate conduct of such agents (if appropriate in a given dispute) as early as possible.

To ensure all fee-for-service arrangements are identified, the change will cover all disputes where an Applicant is represented or assisted by someone who will or may receive remuneration for this service.

While FOS has concerns about particular fee-for-service agents due to their approach to the FOS process, this will not lead to an automatic exclusion of these or other applicant representatives. For example, FOS recognises the value community financial counsellors, legal aid and community legal centres can play in representing Applicants, particularly where an Applicant is vulnerable or requires special assistance (eg if they experience language difficulties, mental health issues or social and economic barriers).

9.1 Proposal

Amend paragraph 6.1 of the TOR to enable FOS to refuse to accept a dispute where an Applicant is being assisted by a fee-for-service agent unless information requested by FOS is provided at the time they lodge a dispute.

FOS will provide guidance as to when it will seek specific information in these circumstances and what type of information it will require for the purposes of this provision.

10 Jurisdiction over income stream insurance claims disputes

The life insurance industry has previously raised concerns about the mismatch between FOS's \$500,000 lump-sum jurisdiction limit and the monthly nature of income stream insurance disputes.

FOS's experience suggests it may be appropriate to restrict income stream insurance claims disputes by reference to the monthly benefit (rather than just a lump sum amount). If this was followed through, it would align closely with the previous jurisdictional provisions that applied to income stream insurance disputes prior to 2010. However, depending on the way it is worded, such a change could reduce FOS's jurisdiction in this area.

10.1 Proposal

Rather than recommending a specific amendment, we are consulting on whether there should be a TOR change and what form it might take. The [Terms of Reference – Issues for Consideration](#) document sets out three possible approaches to the issue for discussion, as well as a number of specific questions for comment.

11 Discretion to allow sale of an asset

Currently FOS has discretion under paragraph 13.1 to allow an FSP to freeze or preserve an asset the subject of a dispute. However, this paragraph does not provide discretion to allow an FSP to sell an asset.

In some disputes, it is in the interests of both parties for the asset to be sold to avoid holding costs or a deterioration in the value of the asset. This is particularly the case with motor vehicles or livestock. However, we do not intend to restrict our discretion regarding the type of asset. Rather, the discretion will be exercised in limited circumstances and when, in our view, it is in the interests of both parties that the seized asset be sold before the dispute is finalised.

The current discretion to allow the freezing or preservation of an asset is normally exercised by senior FOS staff (such as Legal Counsel). FOS proposes to restrict the discretion to allow the sale of an asset to be used only by an Ombudsman for the first 12 months after the amendment is implemented. This will allow FOS to settle on appropriate criteria for applying the discretion (based on dispute experience), to ensure that discretion is applied appropriately and consistently and in line with its purpose and principles.

The Operational Guidelines will contain information on when FOS may or may not apply its discretion. By way of guidance:

- It is highly unlikely FOS will allow the sale of a primary place of residence while a dispute is open with us.
- If the asset is a motor vehicle which has been seized by the FSP, would be unavailable to the Applicant during the course of the dispute, is depreciating daily, and is incurring daily storage costs for the FSP, FOS would consider allowing the sale to reduce the potential debt in dispute.

11.1 Proposal

Amend paragraph 13.1 to give FOS the discretion to allow an FSP to sell an asset that is the subject of a dispute.

12 Accountants joining FOS

From 1 July 2016, accountants need to hold a financial services licence and join a dispute resolution scheme such as FOS in order to provide advice on self managed superannuation funds. FOS's definition of "financial services" is broad enough to capture a range of accounting services disputes that it can consider, as well as a range of services for which FOS is not an appropriate forum.

FOS's current practice is to exclude such disputes on a case-by-case basis, depending on the nature of the services the dispute relates to.

FOS is consulting with the relevant accounting professional bodies and ASIC on how it might best define the scope of its jurisdiction over disputes relating to accountants. This includes the possibility of a TOR change and the form it might take.

12.1 Proposal

The discussion of this issue in the [Terms of Reference – Issues for Consideration](#) document includes one possible form of words for proposed paragraph 5.1(u). However, FOS is seeking input on how best to strike a balance between retaining the jurisdiction we should have, and not being asked to deal with disputes about traditional accounting services.

13 Indexation of compensation caps

The Senate Committee made a specific recommendation that the TOR be amended to allow the compensation caps to be indexed. This is not required for the following reasons.

The amount of the compensation caps in Schedule 2, and the cap on consequential loss under paragraph 9.3a), are all due to be indexed on 1 January 2015. This is not a change but rather the result of indexation under the current TOR paragraph 9.8.

As this indexation is due to come into effect on the same day FOS is seeking to implement most of the proposed TOR changes, we consider it appropriate to draw this to stakeholders' attention.

The previous cap amounts will continue to apply to disputes lodged before the indexation occurs.

To ensure the applicable cap amounts can be identified for disputes lodged both before and after the indexation occurs, FOS proposes to:

- retain the current table in Schedule 2 for disputes lodged from 1 January 2012 to 31 December 2014
- insert a new table in Schedule 2 for disputes lodged from 1 January 2015 onward (the amounts in the draft table are estimates, pending the release of the relevant Consumer Price Index and Male Total Average Weekly Earnings figures in September this year)
- create a new Schedule 3 to set out the applicable caps on compensation for consequential loss, and amend paragraph 9.3a) to refer to this Schedule.

These are format rather than content changes, and do not affect the rights of the parties to a FOS dispute.

14 Indexation of Jurisdictional Limit

The Senate Committee specifically recommended that FOS consider amending its TOR to increase and index the jurisdictional limit in line with the consumer price index.

Unlike the compensation caps, the current TOR do not provide for any indexing of the jurisdictional limit. To facilitate the Senate Committee's Recommendation, FOS would be required to amend the TOR.

14.1 Proposal

We are consulting on whether there should be a TOR change and what form it might take. The [Terms of Reference – Issues for Consideration](#) document sets out the areas for discussion, as well as a number of specific questions for comment.

15 How to make a submission on these proposals

If you would like to comment on the proposed changes to FOS's Terms of Reference, please email your submission to Mike D'Argaville at mdargaville@fos.org.au by **Friday 1 August 2014**.

We will publish submissions on our website. If you do not want your submission published, please mark both the submission and the covering email as "confidential".

If you have any questions about the consultation, please contact Mike D'Argaville on (03) 8623 2004 or mdargaville@fos.org.au.