

THE FINANCIAL OMBUDSMAN SERVICE

circular 

ISSUE 4 - DECEMBER 2010

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CHIEF OMBUDSMAN'S MESSAGE

Welcome to the December 2010 edition of the Circular.

The Circular is designed to support dispute resolution by:

- providing practical information, and
- explaining our approach on substantive issues.

We publicise our approach to different types of disputes to ensure all parties are aware of how we assess issues and how we approach resolution of disputes. Our focus is on resolution and we hope the information we provide will be used by members and their clients to resolve issues quickly and early.

The Circular includes dedicated sections to provide you with regular updates about systemic issues; terms of reference matters and our decision making.

In this issue of the Circular, we include guidance around:

- how we apply the monetary limit and compensation caps to claims
- how we assess fairness, and
- our approach to systemic issues

As always, we welcome your feedback. Please let us know what issues you would like us to provide case studies and commentary about so disputes can be resolved fairly and efficiently.



Colin Neave
Chief Ombudsman

TOR: LODGING GI DISPUTES

OBLIGATION TO INFORM CONSUMERS OF THE TIME LIMIT FOR LODGING GENERAL INSURANCE DISPUTES

- FOS'S TERMS OF REFERENCE
- FSPS' OBLIGATION TO INFORM APPLICANT OF TIME LIMIT
- REMINDER TO GENERAL INSURERS

Financial services providers (FSPs) have an obligation to inform applicants about the time limit for lodging disputes with the Financial Ombudsman Service (FOS).

FOS'S TERMS OF REFERENCE

Paragraph 6.2 of our Terms of Reference states the time limits for lodgement of disputes with us. The time limit stated in paragraph 6.2b) applies to general insurance disputes (and various other disputes).

Under paragraph 6.2b), we will consider a dispute if it is lodged 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.

Paragraph 6.2 allows us to consider a dispute lodged after the time limit if we consider that exceptional circumstances apply.

FSPS' OBLIGATION TO INFORM APPLICANT OF TIME LIMIT

When an FSP reviews a matter through its internal dispute resolution (IDR) process, it is required to inform the applicant of the applicable time limit for lodgement with us as well as the steps in the dispute resolution process.

Our Operational Guidelines provide the following guidance on what should be included in an IDR Response (in the guideline to paragraph 6.2):

An IDR Response should include the wording provided below or words having the same effect:

- We have completed our review of your complaint in accordance with our internal dispute resolution process;
- Our final decision in relation to your complaint is:
- You should be aware that because this is our final decision, if you wish to pursue this complaint further by taking it to the Financial Ombudsman Service, you will need to do so within 2 years of the date of this letter.
- The Financial Ombudsman Service is an independent external dispute resolution scheme approved by the Australian Securities and Investments Commission. We are a member of this scheme and we agree to be bound by its determinations about a dispute.

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

REMINDER TO GENERAL INSURERS

Prior to 1 January 2010, the time limit to lodge a general insurance dispute was three calendar months of receiving notice of the IDR decision. This changed on 1 January 2010 when the time limit became the limit stated in paragraph 6.2b) outlined above.

We have noted that some FSPs have failed to amend their final decision letters to reflect the change from three months to two years. This failure to provide the correct information could have an adverse impact on consumers and could amount to a systemic issue.

FSPs are therefore reminded to ensure all final decision letters include the correct information concerning the time limit for lodging disputes with us.

SYSTEMIC ISSUES AND SERIOUS MISCONDUCT

- FOS RESPONSIBILITY
- FOS SYSTEMIC ISSUES PROCESS
- SYSTEMIC ISSUES IN 2010

FOS RESPONSIBILITY

Under ASIC Regulatory Guide 139, FOS is obliged to identify, resolve and report on systemic issues and serious misconduct.

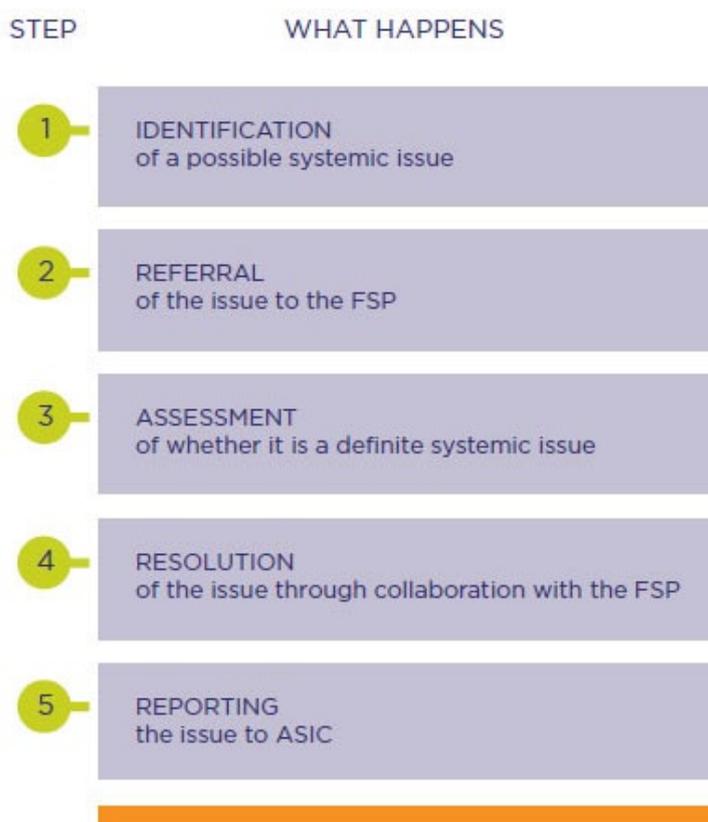
A **systemic issue** is defined in FOS's Terms of Reference as an issue that will have an effect on people beyond the parties to a dispute.

Serious misconduct is defined as conduct that may be fraudulent or grossly negligent or may involve wilful breaches of applicable laws or obligations under the Terms of Reference.

By dealing effectively with systemic issues and serious misconduct, FOS can raise industry standards and help consumers to obtain fair compensation for financial losses.

FOS SYSTEMIC ISSUES PROCESS

FOS has established the following process for dealing with systemic issues:



1. IDENTIFICATION

While FOS is handling a dispute, we consider whether the dispute raises any issues that might be systemic. Identification of a possible systemic issue can occur at any stage of FOS's dispute resolution process.

2. REFERRAL

Once a possible systemic issue has been identified, we refer it to the relevant financial services provider (FSP). We will detail the issue, ask for further information, and invite the FSP to formally respond.

3. ASSESSMENT

We then assess the FSP's response and determine whether the issue is definitely systemic. Investigations are carried out by FOS's systemic issues staff, in consultation with the relevant Ombudsman. If we decide that the issue is not in fact systemic, then the matter is concluded (though FOS may reconsider an issue at a later time in light of new information relevant to the issue). If we decide that it is a systemic issue, then we will manage its resolution in conjunction with the FSP.

4. RESOLUTION

FOS will work with the FSP to resolve the systemic issue. Resolution of the issue will require the FSP, where appropriate, to:

- identify all affected customers
- compensate the affected customers fairly for any financial loss, and
- implement a strategy to prevent the problem from recurring.

5. REPORTING

FOS reports to ASIC quarterly on systemic issues. We report on the numbers of possible and definite systemic issues and on the nature, progress and resolution of definite systemic issues. FSPs are not identified in these reports.

FOS only identifies an FSP in a report to ASIC if the FSP has not dealt with a definite systemic issue to the satisfaction of the relevant Ombudsman.

SYSTEMIC ISSUES IN 2010

BREAK COST METHODOLOGY ON FIXED PRINCIPAL AND INTEREST LOANS

In the course of investigating a number of disputes relating to break costs on fixed principal and interest loans, FOS found that a number of members were not adequately taking into account the present day value discounting required for principal repayments over the remaining term of the fixed rate loan. This was resulting, in some cases, in an incrementally higher break cost for the customer.

In order to resolve this systemic issue, all of the FSPs involved:

- adopted a present day value methodology for all future calculations of break costs on fixed principal and interest loans
- reviewed the break costs charged on all early repayments of fixed principal and interest loans since 1 September 2008 and refunded any variance, and
- agreed to pay interest on the refunds from the date of payment of the break costs to the date of repayment at the rate of 3% per annum.

In one case, the FSP estimated that the issue affected 1,304 accounts and that \$592,000 (including interest) would be refunded to customers.

DISCLOSURE OF MERCHANT FACILITY FEE

One FSP had unilaterally altered the terms of its merchant facility agreement by increasing fees and charges without notice. The FSP indicated that 13,051 merchants using terminals had not received the required notice of the fee change.

The financial services provider agreed to pay refunds to all affected customers and reset their facility fee back to the level it was at before the unadvised change. It paid 70 refunds totalling \$12,065.13.

FAILURE TO LINK ELIGIBLE OFFSET ACCOUNTS

FOS discovered that one FSP involved in a number of disputes had not always correctly linked its offset home loan feature to an eligible offset account. Over 12 months, the FSP identified all the affected customers and reimbursed about \$11.6 million to those customers. The FSP also fixed and enhanced its system to ensure that the problem did not recur.

MONETARY LIMIT & CAPS

HOW FOS APPLIES THE MONETARY LIMIT AND COMPENSATION CAPS TO CLAIMS

- MONETARY LIMIT
- COMPENSATION CAPS
- NUMBER OF CLAIMS WITHIN DISPUTE
- WHAT IS A CLAIM?
- MULTIPLE PARTIES AND THEIR CLAIMS
- MULTIPLE CAUSES OF ACTION AND CLAIMS
- HOW IS THE AMOUNT OF A CLAIM ASSESSED?
- CONTRIBUTORY FACTORS AND COMPENSATION CAPS

MONETARY LIMIT

Paragraph 5.1.o) of the current FOS Terms of Reference (TOR) provides that FOS can deal with a dispute unless “the value of the Applicant’s claim in the Dispute exceeds \$500,000”. We refer to this as our “monetary limit”.

As with any dispute that falls outside the TOR, FOS can consider a dispute involving a claim for more than \$500,000 if all parties and FOS agree.

COMPENSATION CAPS

Paragraph 9 of the TOR identifies what remedies FOS can award, and the compensation caps applicable to claims made by an applicant – that is, the maximum compensation (not including interest or costs) that can be awarded for each claim. In addition to the overall cap on the compensation that can be awarded, there are specific limits on some types of compensation:

- for consequential financial loss, the limit is \$3,000, and
- for non-financial loss, the limit is \$3,000.

In general insurance cases, FOS cannot award compensation for consequential or non-financial loss if the policy in question expressly excludes liability for such loss.

Schedules 1 and 2 to the TOR set the compensation caps for claims in different types of disputes. Whether Schedule 1 or 2 applies in relation to a dispute depends on when the dispute was lodged.

For disputes lodged from 1 January 2010 to 31 December 2011, Schedule 1 applies and the compensation caps are:

	Type of Claim	Amount per claim
1.	<p>Claim on a Life Insurance Policy or a General Insurance Policy dealing with income stream risk or advice about such a contract.</p> <p>If the claim is in excess of this monthly limit, the monthly limit will apply unless:</p> <ul style="list-style-type: none"> • 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 the amount specified in row 5. <p>If this is the case, then the limit will be the amount in row 5.</p>	\$6,700 per month
2.	Third party claim on a General Insurance Policy providing cover in respect of property loss or damage caused by or resulting from impact of a motor vehicle	\$3,000
3.	Managed investments claims, stockbroking claims, claims made in relation to securities and any derivative products and financial planning claims (other than advice pertaining to a Life Insurance Contract, in which case row 1 or 5 applies whichever is applicable).	\$150,000
4.	Claim against a General Insurance Broker except where the claim solely concerns its conduct in relation to a Life Insurance Policy (in which case row 1 or 5 applies, whichever is applicable).	\$100,000
5.	Other	\$280,000

We have published operational guidelines (OGs) about how the provisions of the TOR operate. See the OGs, particularly the OGs to paragraph 9.7, for a full discussion of the caps (available at www.fos.org.au/og). Information about remedies and compensation caps is also provided in session 3 of our free e-learning modules available at: www.fos.org.au/elearning.

For the purpose of assessing whether a dispute is within the monetary limit and/or the compensation caps set by the TOR, we look at how the monetary limit and/or the compensation caps apply to each claim within the dispute. As we are receiving a number of queries about how we identify a “claim” in practice, set out below is further discussion about how FOS identifies a claim in order to apply the monetary limit and the relevant compensation cap.

NUMBER OF CLAIMS WITHIN DISPUTE

Both the \$500,000 monetary limit and the compensation caps apply in relation to a claim rather than to a dispute or the value of the financial product in question. In any dispute, one claim or multiple claims may be raised by an applicant, depending on the nature of the allegations they have made against the financial services provider (FSP).

In practice, 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 monetary limit and compensation caps specified in Schedule 1 or 2 apply to each claim within the dispute.

WHAT IS A 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.

FOS takes the view that 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. In legal terms, a “claim” may also be described as a “cause of action” arising out of a wrongdoing or set of facts.

FOS does not aggregate a number of claims into one “claim amount” just because the claims all arose from an ongoing relationship between an FSP and an applicant.

Our view accords with the explanation of how an external dispute resolution scheme should interpret and apply the meaning of the word “claim” given by Finkelstein J in *Financial Industry Complaints Service v Deakin Financial Services* [2006] FCA 1805.

MULTIPLE PARTIES AND THEIR CLAIMS

A dispute may have one or more parties involved.

This can arise for instance where an applicant receives financial planning advice. The statement of advice may be written for the applicant and her husband, recommending investments be made by:

- the applicant
- the applicant’s husband
- jointly by them both, and
- their self-managed superannuation fund.

In this situation, the dispute involves four “parties”:

- (1) the applicant has a legal right to bring a claim in relation to the investments in her own name
- (2) the applicant’s husband has a legal right to bring a claim in relation to the investments in his own name
- (3) the husband and wife have a right to bring a claim jointly in relation to the investments made jointly, and
- (4) the superannuation fund has a right to bring a claim in relation to the investments made by the fund.

We measure each party's claim against the monetary limit and the applicable compensation cap to identify whether the remedy for that claim falls within the maximum remedy allowed under the TOR.

For a joint investment, where the recommendation or promise was made to the husband and wife jointly, and the loss is to the value of the jointly held investment, FOS will not permit a claim by two or more people to be "split" and treated as multiple claims, each for a fractional share of the total loss (with a cap applying to each claim).

In the example above, the superannuation fund, rather than the beneficiaries of the fund, has a claim, irrespective of the number of beneficiaries of the fund. It is the fund that has the claim because it is the fund that has suffered the loss, not the individuals who may benefit from the fund.

For banking and finance disputes, we will generally permit a joint account holder to lodge a dispute without the other joint account holder being a party to the dispute. For example, where the dispute involves an unauthorised withdrawal of funds from a joint account, we will regard the claim of the joint account holder to be half of the total value of the alleged unauthorised withdrawals for the purposes of assessing whether the dispute is within our jurisdiction.

MULTIPLE CAUSES OF ACTION AND CLAIMS

Even where there is a single party/applicant and a single product, there may be multiple causes of action (for example, breach of contract and negligence). However, to the extent that each cause of action relates to the same alleged loss, the \$500,000 claim limit and the compensation caps will apply to the loss as a whole.

FOS will not "split" the loss between the different causes of action in this situation. Rather, each cause of action will be treated as a claim for the full amount of the alleged loss, and the maximum that can be awarded in respect of that loss will be limited by the compensation cap.

However, where different causes of action result in different (non-overlapping) losses, then the amount of each claim will relate to the loss attributed to the specific acts or omissions giving rise to that claim.

BANKING AND FINANCE

In the context of banking disputes, it is not the amount of the loan that we look at to determine if a dispute is within our monetary limit or compensation cap. Rather, we consider the amount of the loss which an applicant has suffered as a result of the alleged conduct. Each dispute is different and, therefore, we assess each dispute on a case by case basis. However, some examples are included below.

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.

Alternatively, 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.

In disputes about financial difficulty, the account balance or facility limit is not relevant when assessing jurisdiction. We will look at the amount of loss suffered which may include the "money's worth" of any variation sought, any default margin levied on the contractual interest being charged, enforcement expenses and costs of any receiver or controller appointed over the secured assets.

INVESTMENT ADVICE

In the context of investment disputes, it is not the amount of the investment that we look at to determine if a dispute is within our monetary limit or compensation cap. Rather, we consider the amount of the loss which an applicant has suffered as a result of the alleged conduct.

If there are separate instances of advice having been provided, such as different statements of advice having been provided annually over a period of several years, then an adviser has a duty to fulfil his or her obligations on each occasion. It may be that the first and third pieces of advice were sound, but that does not prevent a breach of the adviser's obligations on any other occasion.

An applicant may have several causes of action or claims for each of several investments made:

- in the same product over a number of years, or
- in different products.

For each of those investments, the applicant might have the following causes of action:

- breach of the service contract
- negligence in respect of a recommendation to invest in an unsuitable product
- breach of statutory duty to provide disclosure documents.

The remedy available for each of these causes of action may be similar or the same, but each is available as a separate cause of action.

In these examples, we would identify the remedy for each of the separate causes of action and determine whether each remedy individually comes under the compensation cap.

STOCKBROKING

Stockbroking relationships may involve a significant number of trades entered into. The basis of disputes about these trades often revolves around the terms of the trading agreement.

If the basis of the dispute is an ongoing breach of contract, even though there are a number of disputed trades, the trades are usually aggregated because there is a single breach. However, if there are a number of alleged breaches, each of which is specific to an individual trade, then each breach may form a separate claim.

INSURANCE

Disputes featuring two or more insurance claims under the same policy may potentially have different claims raised in respect of them. This arises because the bases of the insurer's decisions about each of the claims may give rise to separate causes of action.

In these examples, we would identify the remedy for each of the separate causes of action and determine which compensation cap(s) will apply.

LIFE INSURANCE

Disputes may be broken down into the number of policies. If there are multiple insurance contracts, there are likely to be multiple claims even if the policies have been bundled together, as either the applicable policy wording, the insurer's underwriting or both may vary from policy to policy. Therefore, the compensation cap on remedies applies to each claim/contract.

To explain this, a series of examples is provided below. In each example, it is assumed the dispute is lodged in 2010.

- (1) In a claims dispute under a policy providing a lump sum benefit (eg. death, total and permanent disability (TPD) or trauma benefit):
 - (a) TPD benefit is \$650,000 – FOS cannot consider the dispute (paragraph 5.1o)).
 - (b) TPD benefit is \$350,000 – FOS can consider the dispute, but can only award a maximum of \$280,000 excluding costs and interest (paragraph 9 and Schedule 1 row 5).
 - (c) TPD benefit is \$190,000 – FOS can consider the dispute, and can direct payment of \$190,000 plus costs, interest, and up to \$3,000 each in compensation for consequential or non-financial loss if appropriate (paragraph 9 and Schedule 1 row 5).
- (2) In a claims dispute under a policy providing an income stream benefit (eg. income protection), where the benefit has been denied altogether
 - (a) Benefit is \$9,000 per month and the claim (at the time the dispute is lodged) covers at least the last 5 years and may be ongoing – FOS cannot consider the dispute as the claim amount is already \$540,000 (paragraph 5.1o)).
 - (b) Benefit is \$9,000 per month and the claim (at the time the dispute is lodged) covers the last 2 years and may be ongoing – FOS can consider the dispute, but can only award a maximum of \$6,700 per month (in respect of the period in dispute – FOS will not normally direct payment of future benefits), excluding costs and interest (paragraph 9 and Schedule 1 row 4).
 - (c) Benefit is \$5,000 per month and the claim (at the time the dispute is lodged) covers the last 2 years and may be ongoing – FOS can consider the dispute, and can direct payment of \$5,000 per month plus costs, interest, and up to \$3,000 each in compensation for consequential or non-financial loss if appropriate (paragraph 9 and Schedule 1, row 4).
- (3) In a claims dispute under a policy providing an income stream benefit (eg. income protection), where the benefit has been paid but at a lower rate, then the approach in example 2 above will apply, except that the amount taken into account (to assess the claim amount or the per month compensation rate) will be the amount of that difference, rather than the full benefit amount (ie. full benefit – lower benefit paid x months paid = amount of claim).
- (4) In the case of a life insurance policy with an investment component or surrender value, where the dispute relates to the difference between the surrender value and what the applicant believes the surrender value should be, the claim amount is likely to be the amount of that alleged difference (ie. surrender value as paid – surrender value as claimed = amount of claim).
- (5) In the case of a policy with both a risk component (eg. death benefit) and an investment component or surrender value, the nature of the claim will depend on the nature of the allegations made against the FSP. If it relates to deprivation of a lump sum benefit, the approach in example 1 above will apply. If it relates to a diminution in the surrender value, then the approach in example 4 above will apply.

GENERAL INSURANCE

In a general insurance claim dispute, the amount of a claim will normally be the difference between the amount the applicant says should be paid on the claim, and the amount (if any) actually paid.

To explain this, a series of examples is provided below. In each example, it is assumed the dispute is lodged in 2010.

- (1) Fire damage to a consumer's house is estimated at \$663,000. FSP denies the entire claim - FOS cannot consider the dispute (paragraph 5.1o)).
- (2) Fire damage to a consumer's house is estimated at \$386,000. FSP denies the entire claim - FOS can consider the dispute but can only award a maximum of \$280,000 excluding costs and interest (paragraph 9 and Schedule 1 row 4).
- (3) Storm damage to a business is estimated at \$425,000. FSP accepts the business interruption claim of \$210,000, but denies liability for damage to the business' stock amounting to \$215,000 - FOS can consider the dispute and make an award for all or part of the \$215,000, plus costs and interest (paragraph 9 and Schedule 1, row 4).
- (4) Storm damage to a business is estimated at \$625,000. FSP accepts the business interruption claim of \$210,000, but denies liability for damage to the business' stock - FOS can consider the dispute as the amount of applicant's claim is \$415,000. However, it can only award a maximum remedy of \$280,000 excluding costs and interest (paragraph 9 and Schedule 1, row 4).
- (5) Fire damage to home is estimated at \$550,000. FSP denies liability but offers ex gratia payment of \$75,000. Applicant rejects offer and seeks payment of full claim. FSP does not agree to FOS considering the dispute - FOS cannot consider dispute as amount in dispute is \$550,000 (paragraph 5.1o)).
- (6) An uninsured third party motor vehicle claim is made for \$10,000 where FSP denies liability - FOS can consider the dispute, but can only award a maximum remedy of \$3,000 (paragraph 9 and Schedule 1 row 2).

INSURANCE BROKING

Disputes against an insurance broker may relate to a general or life insurance policy. The approach to establishing the nature and amount of the claim(s) in these disputes will be the same as for general or life insurance disputes, as explained above. However, where the dispute is against a general insurance broker, the amount of the compensation cap will be less than the compensation cap for a claim against a general insurer.

HOW IS THE AMOUNT OF A CLAIM ASSESSED?

Ordinarily, FOS will approach this assessment on the basis of placing the applicant in the position that they would have been in had the alleged wrongdoing not occurred.

In the case of a breach of a duty or negligence in providing a financial product, this may mean returning the applicant to the position that they would have been in if they had never received the financial product or service.

In the case of a breach of contract, this may mean returning the applicant to the position that they would have been in had the contract been fulfilled by the FSP.

In disputes about misleading conduct, the remedy for misleading conduct is not to make the promise come true. Instead the question we ask in determining the claim for loss is how much worse off was the applicant as a result of relying on the representation compared to the position they would have been in had the misrepresentation not been made.

This is the basis upon which we will assess the amount sought in respect of each claim.

CONTRIBUTORY FACTORS AND COMPENSATION CAPS

As part of an assessment of the merits of a dispute, we may consider whether there was any contributory negligence, mitigation of loss and other similar legal concepts to reach a final view about an amount payable as a result of a breach.

UNCANCELLED LINES OF CREDIT

- COMMON SCENARIO
- CUSTOMER'S COMPLAINT
- FOS APPROACH TO THESE SCENARIOS
- MISTAKEN PAYMENTS
- FSP PROCESS FOR IDENTIFYING CANCELLED CREDIT ACCOUNTS THAT ARE STILL OPERATING

We have recently considered a number of disputes brought by customers about their financial services provider's (FSP) failure to close a credit facility.

COMMON SCENARIO

Issues arise where:

- as part of a restructuring of accounts or transfer of facilities from one FSP to another, a credit facility or limit is not closed
- the customer has knowingly, or inadvertently, drawn down on the former credit facility, and
- the customer has then become unable to service their accounts as well as the monies drawn down on the amount which was to be cancelled.

CUSTOMER'S COMPLAINT

In the above scenarios, the customer says:

- the FSP's act or omission in allowing the customer access to the former credit facility constituted maladministration in lending by the FSP, and
- the FSP has failed to deal with them appropriately in their subsequent financial difficulty.

There is a common misconception by the customer that the appropriate remedy should be that they are not required to repay the amount which had accrued on the former credit facility.

FOS APPROACH TO THESE SCENARIOS

FOS's approach to these disputes includes that:

- the failure by the FSP to close off the former facility may amount to a breach of its implied contractual duty to exercise reasonable care and skill in performing its part of the contract
- the monies accessed by the customer from the former credit facility amount to payments made by mistake to the customer by the FSP because the funds were accessed as a consequence of the FSP's failure to close the line of credit, rather than by any conscious decision by the FSP to renew the customer's former credit facility
- in accordance with the law in relation to mistaken payments, the customer would be required to repay the monies drawn as a result of the FSP's mistake unless they could show that, in good faith, they had changed their position to their detriment
- as a matter of fairness, the FSP should not be entitled to interest on the mistaken payments if the customer can repay the mistaken payment within a reasonable time frame, and
- the principles relating to maladministration should not apply because the FSP:
 - did not intend that the customer should have access to the former credit facility, and
 - has not exercised its commercial judgment, or applied its credit assessment methods to form an opinion about the customer's ability to repay the drawings.

MISTAKEN PAYMENTS

The law in relation to mistaken payments is clear, as between:

- the person who mistakenly makes the payment- the FSP and
- the person who receives it - the customer who has drawn against a line of credit which was intended to be cancelled.

The person who receives the payment (the customer) is obliged to return the funds withdrawn unless:

- in good faith,
- they have changed their position to their detriment (as this is interpreted by case law).

GOOD FAITH

The requirement of good faith means that a customer who knows that there has been a mistake must return the funds, whether or not they have spent the money, and regardless of how the funds have been spent.

An applicant may establish they acted in good faith if they can show there was no reason to suspect that an error had been made. For example, the payment may correspond with a genuine payment expected by the customer.

An applicant who knows they have refinanced an old loan, but continues to draw down on the former credit facility may have some difficulty in establishing that they acted in good faith.

CHANGE OF POSITION

But, even where good faith is established, the customer must have changed their position to their detriment or they would be liable to repay those funds.

It is also a legal principle that there is no detriment if the money received by mistake is used to:

- pay for everyday expenses, or
- reduce a pre existing debt.

Using the funds to pay bills or on general living expenses is not sufficient to amount to a change of position.

INTEREST ON MISTAKEN PAYMENTS

The courts have held that a person who is entitled to recover a mistaken payment is also entitled to recover simple interest on that amount from the time a demand for repayment is made.

They have also recognised the right of FSPs to charge compound interest in certain circumstances, mainly arising when the recipient of the mistaken payments has applied the monies to a venture or investment intended to generate a profit (even if they in fact realise a loss due to an improvident decision).

FOS APPROACH TO INTEREST

In the disputes we see the FSP is not aware of their error until just before, or at the time, the customer lodges a dispute with our office. As a consequence, there has been little opportunity for the FSP to make a demand for repayment of the monies mistakenly made available to the customer, and for interest to accrue.

As a matter of fairness, we consider that interest should not be levied if the customer is able to repay the mistaken payment within a reasonable period.

If repayment is over an extended period of time, interest at a simple rate can exceed the cost of compounding interest on a reducing balance loan. In those circumstances, it may be fairer (and easier for the FSP's systems to accommodate) for interest to be charged at the facility rate.

In any event, the FSP should work with their customer to agree on a repayment arrangement that sees the debt repaid over a reasonable time frame, or if that is not possible, the applicant may be provided a reasonable period of time to sell assets to repay the money.

FSP PROCESS FOR IDENTIFYING CANCELLED CREDIT ACCOUNTS THAT ARE STILL OPERATING

As part of our investigation of this type of dispute, we contacted four FSPs to ascertain:

- if they had any practice or system for detecting an error in failing to close a line of credit and,
- if so, when the fact that the facility was still open would be likely to be detected.

While the surveyed FSPs had in place sophisticated systems to identify whether accounts were operating below their credit limit and other activity, none had a system to detect credit facilities still operating which should have been cancelled.

Our decision making criteria allows us to consider good industry practice and it is our view that a diligent and prudent FSP performing in accordance with good industry practice would have in place a process to ensure that credit facilities that come to an end are actually closed. The value of such a process includes protecting the FSP's credit exposure to its customers.

We encourage FSPs to have such systems in place and to ensure they are adequate to meet these needs.

GI FRAUD DISPUTES

GENERAL INSURANCE: PROCESS FOR DISPUTES INVOLVING FRAUD ALLEGATIONS

- FRAUD DISPUTES
- EXPEDITED PROCESS
- INTERVIEWS
- STEPS AFTER INTERVIEWS

FRAUD DISPUTES

We have developed a special procedure for general insurance disputes in which the financial services provider (FSP) alleges that the applicant's claim involves fraud (Fraud Disputes). Please refer to the flowchart below.

Allegations of fraud are usually made when the FSPs state that applicants have not been truthful and/or frank in some manner. For example, an FSP may state that:

- an applicant's claim did not occur as the applicant stated, or
- an applicant deliberately provided false information to the FSP when arranging the policy (amounting to fraudulent misrepresentation or non-disclosure).

EXPEDITED PROCESS

We expedite all Fraud Disputes. This means that we refer these disputes to determinations without first making recommendations. The process for expedited determinations is explained in paragraph 8.6 of our Terms of Reference (TOR) and the guideline to that paragraph in our Operational Guidelines.

All determinations of Fraud Disputes are made by an Ombudsman.

INTERVIEWS

The Ombudsman reviews the material submitted by the parties and then decides whether to discuss the issues raised with the parties at an interview 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.

The Ombudsman usually invites the parties to a Fraud Dispute to attend an interview because of the serious allegation made.

To arrange an interview, the Ombudsman writes to the party to be interviewed appointing a time, date and venue for the interview. An interview of an applicant is normally conducted in the capital city or major city closest to their home. If an applicant lives in a remote part of Australia, or is overseas, the Ombudsman may decide that a telephone interview is appropriate.

The Ombudsman conducts interviews informally. The parties are expected to cooperate with the interview process. If a party refuses to attend or proceed with an interview, the Ombudsman may

determine the dispute on the basis of the information already provided to us. Paragraph 7.5 of the TOR and the guideline to that paragraph explain the action that we may take if a party, without reasonable excuse, fails to take action that we request.

An interview of an applicant is normally conducted with the FSP present unless the applicant objects. We prefer interviews to be conducted with both parties present, because this helps to achieve procedural fairness.

If the FSP is present, they do not have a right to cross examine the applicant. If the FSP wants to have questions put to the applicant, they have to notify the Ombudsman, who will determine whether the questioning is appropriate in the circumstances. This questioning is strictly controlled to ensure that the applicant is not disadvantaged or intimidated.

The applicant may also seek to have questions put to the FSP representative, using the same approach.

Whilst the applicant can have a person attend the interview with them, legal representation at the interview is not permitted unless there are exceptional circumstances (for example, where the applicant is suffering from a mental disability). If this is the case, the applicant has to request prior approval for representation.

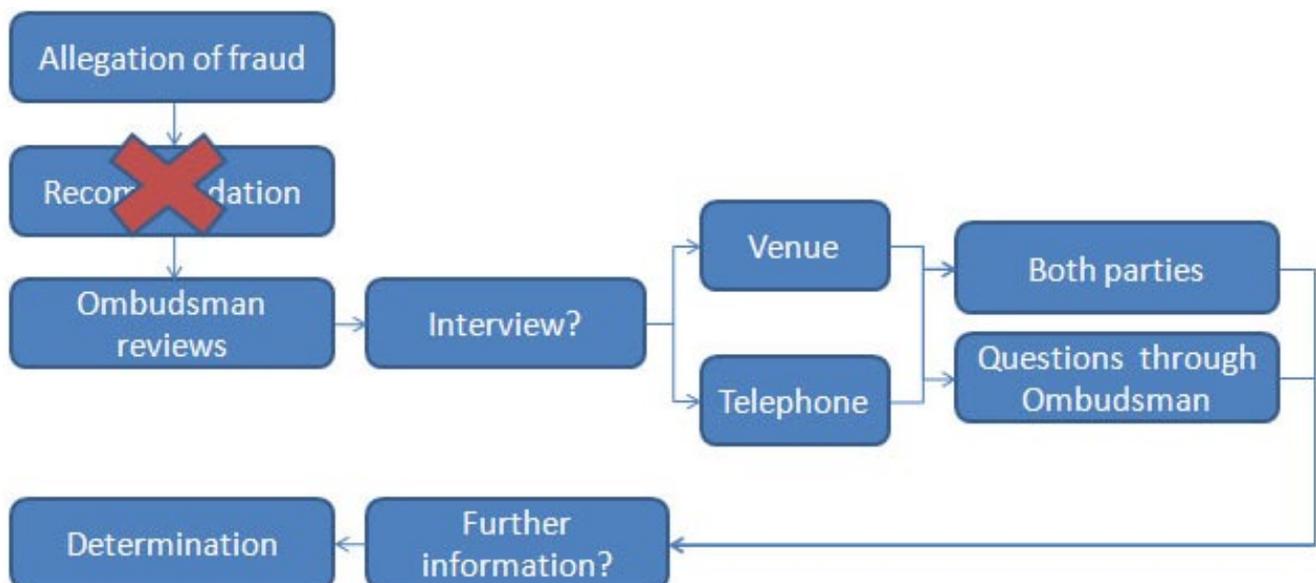
STEPS AFTER INTERVIEWS

After completing an interview, the Ombudsman may decide whether any further interviews are necessary or whether any party will be asked to provide further information.

Information obtained through an interview of a party will generally be released to the other party if we propose to rely on the information in a determination. If the interviewed party does not want the information released, they may seek to rely on the exception for “special circumstances” explained in the guideline to paragraph 8.4 of the TOR. This is a narrow exception, however.

The Ombudsman may allow parties to make additional submissions within a specified timeframe after an interview.

After the procedure outlined below is completed, the Ombudsman issues a determination as soon as practicable.



INSURANCE CLAIMS - RESPONDING TO FOS

INFORMATION TO PROVIDE TO FOS REGARDING GENERAL INSURANCE DISPUTES

- INFORMATION THAT AN APPLICANT SHOULD PROVIDE
- FSPS RESPONDING TO A GENERAL INSURANCE DISPUTE AT FOS
- REQUESTS FOR EXTENSION OF TIME TO PROVIDE A RESPONSE TO FOS

Applicants may find themselves in a dispute with a financial services provider (FSP) regarding a general insurance policy. This will often involve a claim that has been lodged by the applicant under their insurance policy where the insurer has either:

- denied the claim
- accepted the claim but failed to provide the applicant with what they are seeking, or
- refused to make a decision because it is investigating the claim.

This is a guideline to both applicants and FSPs regarding the information they should provide when the dispute involves a general insurance policy.

Unfortunately, FOS cannot consider all insurance disputes. Some products and issues are beyond our jurisdiction. We have listed some of these on this weblink:

www.fos.org.au/beforelodging

Upon receiving the parties' information, FOS may consider contacting them to see if they would be interested in attempting to resolve the dispute by way of a conciliation conference. FOS has published a guide to conciliation conferences, which is available on this weblink:

www.fos.org.au/public/download.jsp?id=6634

INFORMATION THAT AN APPLICANT SHOULD PROVIDE

There is information on our website regarding how an applicant can lodge a dispute with FOS. This can be found on this weblink:

www.fos.org.au/howtolodge

Before considering a dispute, FOS will normally ask the applicant to complete the Dispute Form that is available on the above weblink. In addition to this, applicants who have a dispute with a general insurer may want to consider including the following documents and/or information with their Dispute Form:

- A summary of the events leading up to the claim;
- Any expert reports supporting their position (e.g. a valuation report for a motor vehicle or a builder's report regarding damage to the home);
- The Certificate of Insurance and the policy.
 - The Certificate of Insurance should be for the period covering the time when the claim arose (e.g. if it involves a motor vehicle accident that occurred on 2/2/10, then this date should fall within the period of cover set out in the Certificate of Insurance);
- Original or colour copies of any relevant photographs (such as the damaged vehicle or damaged parts of the home);
- Copies of all letters received from the FSP; and
- Any other documents considered relevant to the dispute.

This list is not compulsory as some of this information may not be applicable to the dispute. However, where the information and/or documents are available, we would appreciate receiving it as soon as possible as it will assist us in progressing the dispute more efficiently and effectively.

FSPS RESPONDING TO A GENERAL INSURANCE DISPUTE AT FOS

Once the FSP receives the applicant's Dispute Form and accompanying documentation, the FSP has 21 days to either resolve the dispute with the applicant or to provide a response to the dispute to FOS.

The new Terms of Reference do not prescribe a specific form of response but it is important an FSP's response contains all relevant documents, information and submissions in relation to the dispute so that the matter can be handled efficiently, effectively and fairly.

FOS has developed a Guide for Response to Disputes (www.fos.org.au/public/download.jsp?id=12038). This guide is designed to help FSPs to ensure that they include all relevant material in their responses to disputes. This will benefit both parties to the dispute and FOS. The guide also explains that certain information should be included in a letter accompanying the response. For each dispute, the FSP should refer to the guide when preparing a response. We suggest that the items listed in the guide under Materials to Include in a Response be used as subheadings in responses.

REQUESTS FOR EXTENSION OF TIME TO PROVIDE A RESPONSE TO FOS

If an FSP requires an extension of time to provide this response to FOS, it should contact us prior to the expiry of the 21 day timeframe with the following information:

- Details of the extension sought
- Reasons for the extension, and
- Any material to support this request.

Paragraph 7.4 of the Terms of Reference gives FOS the discretion to extend the time limits if appropriate.

When considering whether it should grant an extension and, if so, how long the extension should be, FOS will consider the following:

- FOS's obligations to resolve disputes in a cooperative, efficient, timely and fair manner
- The reasons for the delay
- Whether the FSP could have taken steps to avoid or reduce the delay
- Whether the FSP has acted promptly and diligently
- How the extension may affect the Applicant, and
- Any other relevant factor.

PROFESSIONAL DEVELOPMENT FOR MEMBERS

EDUCATION PROGRAMS

- DISPUTE RESOLUTION PROCESS
- IDR EXCELLENCE PROGRAMME
- BEHAVIOURAL SKILLS
- IDR WORKSHOPS - BASIC AND ADVANCED
- FOS MEMBERS CONFERENCE 2011

DISPUTE RESOLUTION PROCESS

FOS E-LEARNING MODULES

FOS has developed 3 on-line learning sessions which take you through some of the key aspects of the Terms of Reference (TOR) and Operational Guidelines (OGs) as they apply to our dispute resolution process.

Session 1 is a very quick overview of FOS.

Session 2 is about Registration and Acceptance

Session 3 is about Case Management and Outcomes

The sessions are designed for anyone who is interested in understanding how the process, the TOR and the OGs work in practice.

You and your colleagues can work through all of the sessions and/or dip in and out to review a particular aspect of the FOS approach.

Session 1 takes about 20 minutes and sessions 2 and 3 take about 30 minutes each.

There is no limit on how often anyone uses the sessions.

There is no charge for using the sessions.

You can provide the link to the sessions to anyone who needs or wants to understand more about FOS and they can log in - all they need is an email address.

The link to the online learning sessions is: www.fos.org.au/elearning

IDR EXCELLENCE PROGRAMME

FOS PRESENTATIONS

In response to FOS members' feedback and requests, we have developed a new professional development programme focussed on supporting excellence in resolving disputes at IDR and EDR.

Members asked for more information about the characteristics of the most effective IDR and EDR we are seeing and practical information to enhance the delivery of dispute resolution services.

We have developed a programme which has a number of modules aimed at building good working relationships with our members by providing some insight and discussion about:

- What members want from FOS and what we are doing in response
- A summary of the dispute resolution process
- How to respond to a dispute at FOS
- How FOS is funded
- A snapshot of the business imperatives for IDR including FOS's approach to external reporting of comparative data
- An overview of the key challenges for IDR as FOS sees them including systemic issues
- How FOS approaches systemic issues and serious misconduct
- Important steps in the process for achieving a resolution
- Professional dispute resolution behaviours
- Fundamentals of negotiation
- Principles for communicating a decision
- The skill set we look for in a dispute resolver (as opposed to a complaint handler).

Our presentation can be tailored to:

- include those modules which best suit a member's business needs
- spend more time on areas of particular interest
- provide snapshots only.

The key issues for us to correctly tailor our presentation are to know who will be attending and how long they have. The minimum time is 2 hours, the maximum is an all day session.

If you would like to arrange a session, please contact Bae Bastian (bbastian@fos.org.au or ph: (03) 9613 7365).

BEHAVIOURAL SKILLS

FRONTLINE COMPLAINTS VIDEOS AVAILABLE ONLINE

These modules include:

- Complaint Handling Fundamentals
- Dealing with Challenging Customer Behaviour
- Financial Hardship
- Building Rapport with Customers
- Saying No Nicely.

There is a small charge for members to access this information: www.frontlinecomplaints.com

IDR WORKSHOPS - BASIC AND ADVANCED

WORKSHOPS BY NINA HARDING AND FOS

There are two all-day workshops featuring a mix of presentations and practical exercises. The first workshop, Resolving Customer Complaints 1, provides a best practice approach to complaint handling. Resolving Customer Complaints 2, the second workshop, builds on the basic knowledge gained in the first workshop. The modules in each workshop will be tailored to attendees' learning objectives.

The program is highly recommended by those who attend it and features:

- Highly qualified presenters
- A mix of instruction, videos, demonstrations and exercises to make learning easy
- Class takeaways: a manual and factsheets

Compliance with the requirements for Continuing Professional Development points from the Financial Planning Association of Australia Limited (FPA), National Insurance Brokers Association (NIBA) and Finance Brokers Association of Australia (FBAA)..

The training will suit:

- Customer-facing staff who must resolve disputes
- Staff members who are new to dealing with FOS
- Managers looking for a good team-building exercise that will help develop a unified resolution approach.

Workshop Dates

February

16,17 IDR Workshops - Brisbane
23,24 IDR Workshops - Perth

March

16,17 IDR Workshops - Melbourne
30,31 IDR Workshops - Adelaide

May

11,12 IDR Workshops - Sydney

If you are interested in attending, please contact Karen Driessen, Team Assistant, Communications, Policy and Relations at kdriessen@fos.org.au or ph: (03) 8623 2033.

FOS MEMBERS CONFERENCE 2011

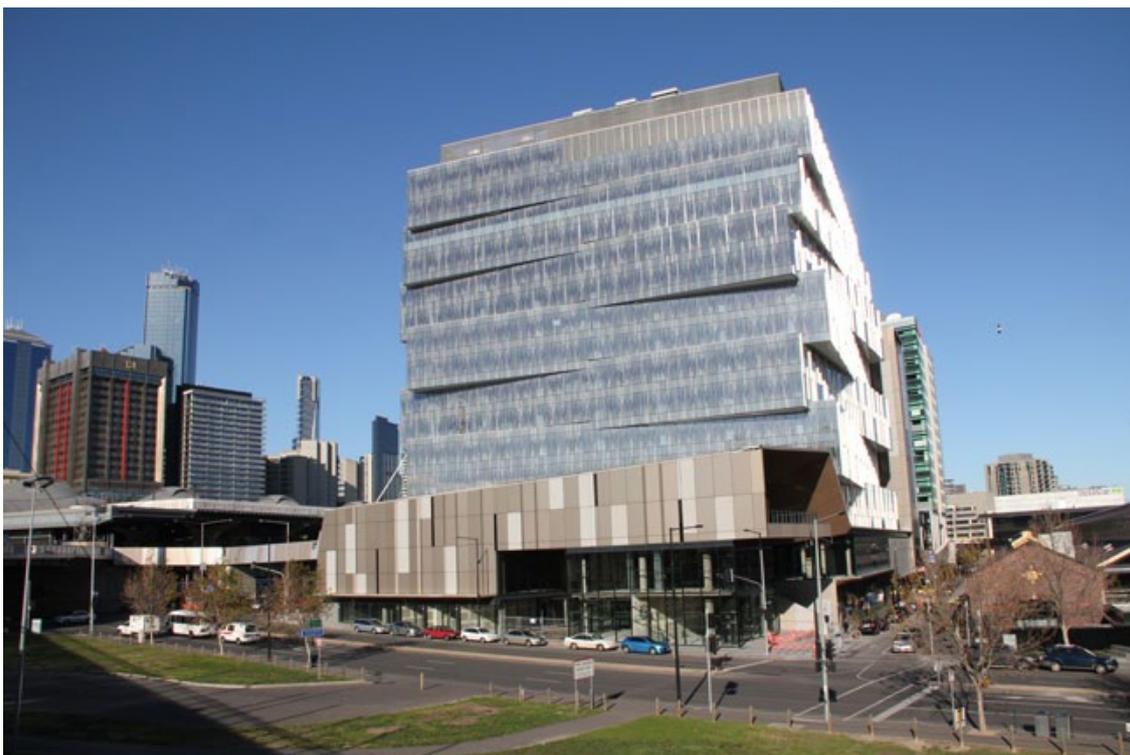
Mark 2 - 3 June, 2011 in your diary for the next FOS Members Conference.

This major event will take place in Melbourne. It aims to showcase best practice across a number of dispute resolution disciplines through workshops, panel discussion and cases studies; as well as explain our role and our processes. A must do for all financial professionals seeking to increase levels of customer service for their business.

FOS MOVE TO 717 BOURKE ST

THE FINANCIAL OMBUDSMAN SERVICE'S NEW OFFICE

FOS moved to a new office on the weekend of 18 and 19 September. We left behind our old home in Queen Street in Melbourne's CBD and moved to a new building at 717 Bourke Street in the rapidly developing Docklands region of Melbourne.



The move is the next step in the integration of FOS's predecessor schemes into a single, cohesive dispute resolution service. At Queen Street, our staff were spread across five floors of the building. In our new building, we occupy just one and a half floors.

Simply put, it is easier to work effectively together when you sit close together. Departments that had been split across two or more floors in the old building have been brought together in one area, and departments that were a long walk away from each other in the old building are now side by side.

As a result, the different departments of FOS are more easily able to share ideas and tackle problems in the most efficient and effective way. Conversations that by necessity were conducted by phone or email in the old building can be conducted face to face in the new building.

The new office space has been designed with the needs of our business in mind. There are eight designated conciliation rooms in which we can hold telephone conciliation conferences. Our new boardroom can seat 60 people, auditorium style, giving us a space for larger meetings, conferences and forums. We have already used the boardroom to hold a one-day seminar for professional indemnity insurers.

The move to our new building ran very smoothly, thanks to the meticulous planning of our Accommodation Working Group, led by our Business Projects Manager, Harry Ganavas. We closed our call centre while we were unpacking on the morning of our first day in the new office, but aside from that there was no interruption to our regular business.

It is an exciting time to be working at FOS. We hope that many of our members and other stakeholders will have a chance to visit us in our new office in the coming months and years.



The Accommodation Working Group

Standing (left to right): Claire Beattie, Kaetrina Trunzo, Justin Bellette, Anthony Mollross, John Davey, Amie Cousins, Laura Faey, Natalie Silaev, Alan Price, Harry Ganavas. Sitting (left to right): Paul Bunker, Maria Romeo, Danielle Samartzis, Margaret O'Keefe, Katie Valentine, Alison Maynard.

FAIRNESS CASE STUDIES

- BANKING & FINANCE CASE STUDY: RECOVERY OF COSTS UNDER A FIXED INTEREST RATE LOAN TO TWO BORROWERS WHERE ONE BORROWER IS REMOVED
- INVESTMENTS CASE STUDY: PAYMENT SYSTEM PROBLEMS AND THE TERMS OF A CONTRACT FOR DIFFERENCE
- GENERAL INSURANCE CASE STUDY: PROVING A THIRD PARTY MOTORIST WAS UNINSURED
- GENERAL INSURANCE CASE STUDY: PROVING PROPERTY WAS DAMAGED BY FIRE

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
- support consistency in decision making

FOS has regard to:

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

While FOS will take into account industry codes, practice guides and good industry practice, 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. This may involve deciding that an FSP should have met a higher standard than the minimum industry standard.

This approach is in accordance with paragraph 8.2 of the FOS Terms of Reference (TOR) which establish FOS's jurisdiction.

As part of their membership, all FOS members agree to be bound by these TOR.

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:

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

In order to provide further clarity around how we apply the principle of fairness to disputes we provide here case studies in:

- Banking & finance
- General insurance, and
- Investments

BANKING & FINANCE CASE STUDY: RECOVERY OF COSTS UNDER A FIXED INTEREST RATE LOAN TO TWO BORROWERS WHERE ONE BORROWER IS REMOVED

THE LOAN

Borrowers A and B entered into a fixed rate loan contract with their financial services provider (FSP). Their partnership came to an end and they wished to go their separate ways. They sorted out their financial position as between themselves and then went to their FSP with the following proposal:

- Borrower A wanted to be released from their obligations under the loan contract and any supporting mortgage
- Borrower B wanted to stay on the same terms as the existing loan contract, and
- Borrower B was able to show they had capacity to service the loan contract without reliance upon any financial contribution from Borrower A.

The FSP treated Borrowers A and B's request to release Borrower A as:

- a termination of the existing loan contract with Borrowers A and B, and
- a request for a new loan contract with Borrower B only.

Because the existing loan contract was being terminated, the FSP sought to charge break costs for early termination of the fixed rate loan from Borrowers A and B.

THE COMPLAINT

Borrowers A and B complained to FOS that the FSP ought not to have the right to charge break costs because Borrower B had been willing and able to abide by the terms of the existing loan contract, including honouring repayments as they fell due during the remainder of the fixed interest rate period.

THE FSP'S RESPONSE

The FSP said:

- The terms of the loan contract disclosed that Borrowers A and B may be required to pay break costs if they repaid ahead of time all or part of their loan during a fixed interest rate period
- Its systems would not allow for a change to the names of borrowers without the account being closed and a new account being created, and
- Its policy would not allow a variation to a loan to remove one of the borrower's names, as its policy stipulated that, in relation to any amendment to a contract, the loan must remain in exactly the same name/s as the original parties to the loan.

FOS APPROACH

As Borrower A wished to be released from the loan, in strict legal terms the contract could be said to be terminated as the parties to the contract would not remain the same. However, in many ways the underlying transaction was unaffected as the opportunity to maintain the loan and the return on investment remained on foot for the FSP if Borrower B was ready, willing and able to meet their obligations.

APPLICATION COSTS

FOS accepted that in these circumstances, the FSP needed to assess the ability of Borrower B to service the loan without Borrower A's financial assistance. Therefore, the FSP was entitled to payment of those costs. The costs included:

- the FSP's costs of assessing Borrower B's application for a loan in their name only (the application fee)
- the costs of discharging the mortgage given by Borrowers A and B, and
- the costs of preparing a new mortgage in Borrower B's name alone.

These items constituted reasonable costs the FSP would incur by releasing Borrower A.

BREAK COSTS

FOS's view was the break costs did not constitute a reasonable loss that the FSP would incur. We took this view because:

- the FSP did not need to re-invest the loan monies
- the loan monies could remain lent on the same terms to Borrower B
- the FSP had a duty to mitigate its loss arising from the "termination" of the contract and this duty could be fulfilled by lending to Borrower B, and
- the FSP had an obligation to act fairly and reasonably in its dealings with Borrowers A and B.

LIMITATIONS OF FSP'S SYSTEMS

FOS accepted that the FSP's systems may not allow for a change of names of borrowers. However, FOS's view was that this system limitation did not make any difference to what could fairly be charged to Borrowers A and B.

RELEVANCE OF THE FSP'S POLICY

FOS's view is that FSP policies and guidelines are intended to ensure an FSP's staff:

comply with legal requirements
apply what the FSP considers to be good industry practices to protect its commercial interests, and
provide a professional service to its customers.

However, they are not mandatory and may be departed from (usually with sign-off by senior management) when individual circumstances warrant an exception to be made.

The FSP said that its policy would not allow the removal of one borrower from the loan.

We considered what interest the FSP was reasonably protecting in applying the strict requirements of its policy to Borrowers A and B's request.

Our assessment was that there was no justifiable right or interest the FSP could show it was protecting (such as the remaining borrower's inability to service the loan). We took the view that the FSP could have acceded to the request to remove Borrower A's name from the loan, and that it was unfair not to do so.

Again, if new documentation was required (such as a new mortgage in the name of Borrower B) the FSP was reasonably entitled to recover these costs as well as a reasonable charge for assessing serviceability by Borrower B.

CONCLUSION

The FSP's reasonable loss recoverable from Borrowers A and B were its costs of assessing serviceability by Borrower B and the costs of documenting the new loan with Borrower B.

INVESTMENTS CASE STUDY: PAYMENT SYSTEM PROBLEMS AND THE TERMS OF A CONTRACT FOR DIFFERENCE

THE TRANSACTION

- On the evening of 21 January, Ms V held open CFDs with more than \$13,000 equity
- Owing to market volatility, on the morning of 22 January, Ms V's equity was reduced to \$1,300
- Ms V noticed the decline in equity and transferred \$2,000 to her account by credit card using the FSP's online trading platform
- The FSP, via its online trading platform, issued Ms V with a transaction ID and authorisation code for the transaction
- After the credit card transaction was completed, Ms V noticed that her account showed a negative equity of \$300
- Ms V telephoned the FSP and spoke with Mr J and told him:
 - the credit card payment had been made
 - her account had a negative equity position despite the credit card payment
 - she had not received a margin call from the FSP
- Mr J told Ms V:
 - her account was in a negative equity position
 - her account did not show that \$2,000 had been deposited
 - the FSP's credit card facility was not working properly
 - the FSP had to manually input a credit card transaction which would take longer than usual
- Ms V expressed her concern that the FSP might liquidate her open CFD positions if her credit card payment was not processed quickly enough
- Mr J told Ms V if her open CFD positions were liquidated, she could be reinstated "if the payment was made" but this was done "on a case by case basis".

Shortly after the telephone call was terminated, the FSP liquidated Ms V's open CFD positions without making a margin call. Ms V's \$2,000 deposit was allocated to her account five minutes after her positions were liquidated.

THE COMPLAINT

Ms V sought to have her open positions reinstated, but the FSP refused.

THE FSP'S POSITION

The FSP said it wasn't liable for Ms V's losses because it had acted in accordance with its contract with Ms V.

The FSP said the contract provided:

- funds deposited into Ms V's account had to be cleared funds
- it had an absolute discretion as to whether it allowed Ms V time to provide cleared funds to meet margin requirements
- Ms V could only be allowed to maintain open positions on the basis of cleared funds in her account
- it was the responsibility of Ms V to monitor the amount of margin deposited in her account and to have regard to the time it would take for her to remit sufficient cleared funds to her account
- it was not obliged to make margin demands, and
- Ms V's liability to pay margin accrued throughout the term of the contract and regardless of whether or not a margin demand was made.

The FSP also noted:

- its Product Disclosure Statement and Terms of Business alerted Ms V to the possibility of her positions being liquidated:
 - before she had the opportunity to deposit additional funds, and
 - before additional funds that had been deposited in response to a margin call became cleared funds, and
- its online trading system warns its clients that online credit card payments may take up to 30 minutes to be applied to accounts.

FOS INVESTIGATION

During the course of the FOS investigation, the FSP acknowledged:

- it had no specific protocols in place in the event of a "system issue" which affected the electronic application of credit card payments where a client was in margin and a liquidation order had been triggered
- its system for issuing margin calls was also inoperative at the time of Ms V's transaction, and
- it would have been prudent for Mr J to inform Ms V during the telephone call that her open positions were due to be liquidated.

FOS ASSESSMENT

FOS considered the critical issue to be assessed was that if the FSP:

- knew its system for electronically allocating online credit card payments was inoperative and causing delays, and
- had been informed by Ms V that she:
 - had made an online credit card deposit
 - had the necessary transaction ID and authorisation code to verify the deposit, and
 - had not received a margin call notice,

should it have directed its dealing operators to prevent the liquidation of Ms V's open positions until at least 30 minutes after Ms V had made her deposit.

FOS accepted that the contract appeared to authorise the liquidation of Ms V's CFD positions on 22 January. However, it was concerned about the fairness of the liquidation in the circumstances.

In assessing whether the FSP's actions were fair, FOS took into account:

- Mr J had failed to alert Ms V to the imminent liquidation of the open positions
- that failure appeared to be due to a lack of protocols when there was a failure in the electronic application of credit card payments and the client's account was in margin
- the FSP's reliance on the contractual obligation placed on Ms V to ensure she allowed sufficient time to deposit additional funds to her account in response to a margin call was misplaced as no margin call had been made
- there was nothing in the contract about taking up to 30 minutes for credit card payments to be processed, and
- the FSP failed to explain how funds it had received through its own online payment system could be regarded as "in transit" or "promised".

FOS DECISION

FOS reached the conclusion that:

- the manner in which the FSP's business systems operated on 22 January was not efficient
- the FSP's failure:
 - to stop the liquidation of Ms V's open CFD positions on 22 January after Ms V had advised Mr J of her \$2,000 deposit and had raised her concerns at having her positions liquidated, and
 - to reinstate Ms V's CFD positions;
- amounted to a breach of the FSP's duty to provide financial services efficiently, honestly and fairly as required by s912A(1)(a) of the Corporations Act.

GENERAL INSURANCE CASE STUDY: PROVING A THIRD PARTY MOTORIST WAS UNINSURED

THE CLAIM

- Ms F had parked her car
- Mr W collided with Ms F's parked car and pushed it into another parked car
- Even though Mr W left the scene of the accident, Ms F managed to obtain Mr W's name, address and registration number
- She also obtained a copy of the police incident report for the collision
- Mr W was prosecuted by the police for his driving which led to the damage to Ms F's car

Ms F tried to discover whether Mr W was insured against the damage caused to her car. She unsuccessfully attempted to obtain this information from the police and the prosecution.

Ms F held a third party property motor vehicle insurance policy. She claimed for her motor vehicle damage under her uninsured motorist extension.

THE FSP'S POSITION

The FSP declined the claim on the basis Ms F had not proved Mr W was uninsured for Ms F's loss. The specific policy term required her to satisfy the FSP

“...that the owner or driver of the other vehicle is not insured against that cost”.

The FSP was also unable to verify whether Mr W was uninsured against this damage.

FOS INVESTIGATION

The main issue in dispute was whether Ms F could satisfy the FSP that Mr W was uninsured.

The investigation revealed that Mr W had committed at least two criminal offences leading to the damage to Ms F's car. One offence was that the accident was the result of a “burnout”.

Mr W had also failed to stop at the scene; failed to provide his details and been uncooperative with the police.

FOS ASSESSMENT

FOS took the view that if Mr W had held standard insurance cover for his vehicle, it was likely that a burnout would be an excluded event under the policy. This assumption was consistent with the standard motor vehicle exclusions under the Insurance Contracts Regulations 1985. This would mean the damage caused to Ms F's car as a result of the burnout would not be covered by a standard insurance policy in Mr W's name.

FOS also noted that a number of insurance policies have exclusion clauses regarding the third party's activities, such as failing to stop at the scene, provide/obtain relevant details or assist police at the scene of the collision. As Mr W had failed to stop at the scene; failed to provide his details and been uncooperative with the police, FOS was of the view that Mr W would not have been insured for the cost incurred by Ms F even if a policy was in place.

FOS DECISION

FOS decided Ms F had done all she could reasonably be expected to do to satisfy the terms of the policy as she had obtained all the relevant particulars. The FSP therefore could not rely on the policy exclusion as to do so would be unfair when all of the circumstances supported the view that Mr W was not insured. Even if he was insured, his policy would not cover him since he breached a number of standard exclusion clauses.

The determination also sounded a word of caution to the FSP that, by requiring Ms F to obtain information regarding Mr W's insurance contract, the FSP was encouraging Ms F to obtain personal information in possible breach of the privacy legislation. As such, the relevant provision may be struck down because it offends public policy.

GENERAL INSURANCE CASE STUDY: PROVING PROPERTY WAS DAMAGED BY FIRE

THE CLAIM

- Ms P operated a business
- A coffee machine at the business was damaged in a fire
- Ms P's business was insured with the FSP for various risks
- She lodged a claim under her policy for replacement of the coffee machine

THE FSP'S POSITION

The FSP denied the claim on the basis Ms P had breached the policy terms by:

- disposing of the coffee machine prior to lodging the claim and
- being unable to provide any documentation of its purchase.

FOS INVESTIGATION

Ms P provided the following:

- An explanation as to why the coffee machine was disposed of
- A more detailed repairer's report, which confirmed there was fire damage to the machine, and
- A statement from the person who sold the original machine to her business, which verified its authenticity, its model details and its approximate purchase date and price.

While the FSP expressed doubts about the competency of the local authorised repairer, it provided no information in support of its assertion.

FOS DECISION

FOS decided Ms P had done all she could reasonably be expected to do to satisfy the terms of the policy by obtaining all the relevant particulars. It would therefore be unfair for the FSP to rely on the policy exclusion when all of the circumstances supported the view that Ms P had owned a coffee machine which had been damaged by fire.

FOS determined the FSP should reimburse Ms P the cost of a new coffee machine, less the GST component.

COMPARATIVE TABLES

- PUBLICATION OF DISPUTES DATA ABOUT INDIVIDUAL MEMBERS
- THE VALUE OF THE DATA
- INNOVATIVE APPROACH
- THE PREPARATION PROCESS

PUBLICATION OF DISPUTES DATA ABOUT INDIVIDUAL MEMBERS

As part of its 2009–2010 Annual Review, FOS will be publishing disputes data about individual members. This is in accordance with new rules in ASIC Regulatory Guide 139: Approval and Oversight of External Dispute Resolution Schemes. Section 139.143 of this guide states that, ‘From 1 January 2010, schemes must also publish information about complaints and disputes received and closed, with an indication of the outcome, against each scheme member in their annual report’.

FOS will be publishing this new data in a series of comparative tables on our website. We identified 21 product groups that cover all the various types of product and service that our members provide. There will be a comparative table for 20 of these 21 product groups. This is because there is insufficient data to produce a table for one of the groups, professional indemnity insurance.

So that the data we publish is statistically meaningful, each comparative table will only list the members with five or more disputes brought to FOS over 12 months in that product group. For this year’s Annual Review, we are only using data relating to a six month period, January to June 2010 (in line with ASIC Regulatory Guide 139). Consequently, this year’s data will be annualised to give us numbers that are equivalent to a full year’s results. In future Annual Reviews we will be working with data from 12 months, so we will not need to annualise the data.

THE VALUE OF THE DATA

Publication of the disputes data should benefit both our members and consumers.

Members will be able to see how their disputes performance compares to that of other financial services providers (FSPs). They will be able to set targets to improve their performance and check their progress in future sets of comparative tables. The comparative tables will be published each year as part of our Annual Review and will also form part of our quarterly reports to members.

One of FOS’s company objects, as stated in our Constitution, is to ‘protect, promote and advance the Industry’s dispute resolution procedures and standards’. We hope that the publication of disputes data about individual members will act as a stimulus and a benchmarking tool for FSPs aiming to improve their internal dispute resolution systems.

Consumers will be able to find out how likely other consumers were to bring a dispute to FOS about a particular product or service provided by a particular FSP. They will also be able to see the outcomes of disputes at FOS. So the data will help inform consumers about which businesses they may wish to buy products from and bringing a dispute to FOS.

INNOVATIVE APPROACH

We consulted our members and other stakeholders in the first half of 2010 while we developed our approach to the publication of the data. Our members will be providing us with some data on their businesses to help us to contextualise the disputes data. The approach we have arrived at is quite innovative and, we believe, very fair, transparent and useful. Two key aspects of our approach are worth emphasising.

WE ARE DISPLAYING THE DATA IN PRODUCT GROUPS

FOS will not be providing a global picture of the disputes performance of particular members. We are publishing tables for specific product groups. We believe this is the fairest and most meaningful way of presenting the information.

Some FSPs operate across many product groups, and their disputes performance may be excellent in some product groups and less impressive in others. These FSPs – and their customers – will learn a lot more from seeing the data for specific product groups than from seeing global totals that may hide variation across product groups.

WE ARE RELATING DISPUTE NUMBERS TO BUSINESS SIZE

We are not specifying the number of disputes brought to FOS for individual members in a product group. We are giving the number of disputes for an FSP in that product group relative to the size of the FSP's business in that product group. This approach ensures that fair comparisons can be made between FSPs of different sizes.

The size of an FSP's business will be measured in terms of the number of accounts or policies the FSP held for all products in a product group at the start of the reporting period (30 June 2009).

THE PREPARATION PROCESS

The publication plan for the tables, which showed the intended design and the explanatory text that will accompany them, was sent to our members in early September. Since then, we have extracted the raw data for the tables from our databases and identified which of our members will appear in which comparative tables.

In October 2010 we emailed the members who will appear in any of the tables and asked them to provide data about the size of their business in the relevant product group/s. The data is the number of relevant accounts or policies the member has for all of the products in the product group. We have set up an online form to make it easy for members to supply the data. Members supplied this data in November 2010.

Once we have received all the business size data from members, we can complete the tables. In December we will send our members copies of the tables that they will appear in to review. These members will be required to keep the tables and the data they contain confidential until they are published by FOS.

We are planning to publish the comparative tables, as part of our full Annual Review, in January 2011.

PRIVACY & THE ELDERLY

BALANCING OBLIGATIONS TO PROTECT A PERSON'S PRIVACY AND TO LIMIT THE FINANCIAL ABUSE OF VULNERABLE ELDERLY

Please go to www.fos.org.au/public/download.jsp?id=11909 for a copy of a letter from the Office of the Privacy Commissioner to the Office of the Public Advocate. The letter sets out the Privacy Commissioner's views about balancing obligations to protect a person's privacy and to limit the financial abuse of vulnerable elderly. The Office of the Privacy Commissioner also explains its recommendations that financial services providers consider:

- developing procedures for using and disclosing personal information for investigating and reporting suspected unlawful activity, meeting legal requirements and assisting enforcement bodies
- implementing training for front line employees to assist in identifying financial abuse and responding appropriately
- making a senior person responsible for deciding to release information.