

The Financial Ombudsman Service (FOS) is an external dispute resolution (EDR) scheme approved by ASIC. We resolve disputes between consumers (including some small businesses) and financial services providers (FSPs) that are members of FOS. Our service is free to consumers and is an alternative to the courts.

The incidence of disputes involving insolvent consumers or small businesses has been rising. As a result, we have been interacting more with insolvency practitioners. This fact sheet explains our role and our engagement with the insolvency practitioner when a bankrupt or director of a company under external administration lodges a dispute. It does not cover our engagement with insolvency practitioners appointed to an FSP that is a FOS member.

What disputes do we investigate?

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

A dispute can be lodged by an individual, partnership, trustee, club or association. If the entity lodging a dispute (the Applicant) carries on a business, the business must be a Small Business, which is defined in FOS's Terms of Reference as:

“a business that, at the time of the act or omission by the Financial Services Provider that gave rise to the Dispute:

- (a) if the business is or includes the manufacture of goods: had less than 100 employees; or*
- (b) otherwise: had less than 20 employees.”*

We may consider a dispute where the value of the Applicant's claim does not exceed \$500,000, and can award compensation up to \$280,000. If an Applicant's loss is greater than \$280,000, they are required to waive their claim to any excess in settlement of the dispute.

What if the Applicant is insolvent?

We often receive disputes from individuals who are bankrupt and corporate small businesses which are under external administration. In particular, our Banking & Finance area considers disputes from insolvent individuals and companies about:

- (a) their credit provider's response to their prior requests for assistance in financial difficulty; and
- (b) whether their credit provider complied with its obligations to lend responsibly when it granted their loan.

1. We need the consent of the Trustee, Administrator or Liquidator

When an applicant is bankrupt or under external administration, as control of their financial affairs has vested in the Insolvency Practitioner – ie the Trustee, Administrator or Liquidator – we can only consider the dispute if we have the Insolvency Practitioner's consent. If they do not give their consent, we will not consider the dispute and our file will be closed.

An Insolvency Practitioner may lodge a dispute on behalf of the insolvent estate. If a bankrupt or a director of a company under external administration lodges a dispute, we will ask them to obtain the Insolvency Practitioner's consent. We will give them an authority form, on which the Insolvency Practitioner consents to the dispute being lodged at FOS and appoints an agent for us to communicate with during the course of our investigation. The Insolvency Practitioner may appoint the bankrupt or director as their agent, as they may have the requisite knowledge and information we will require to complete our investigation. However, the Insolvency Practitioner may alternatively appoint a member of their staff as their agent, or deal with us directly.

If a company is in receivership, we will consider a claim by the directors of the company that the FSP was not entitled to appoint a Receiver, and this dispute will be investigated without the Receiver's consent. The Ombudsman's Determination is binding on the FSP. While we cannot make any enforceable directions against the Receiver, if the Ombudsman concludes that the FSP was not entitled to appoint the Receiver, we would expect the FSP to appropriately direct the Receiver to retire.

Other than this circumstance, we cannot consider a dispute lodged by a director of a company in receivership without the Receiver's consent.

Similarly, we will consider a dispute brought by a guarantor of a bankrupt or an insolvent company without requiring the Insolvency Practitioner's consent, but our investigation will only consider the guarantor's liability to the insolvent's FSP under their guarantee.

2. We may ask the Trustee or Liquidator to participate in settlement discussions

In most cases, we seek to resolve a dispute by negotiation brokered by the case manager or by a telephone conciliation conference facilitated by one of our trained conciliators.

When a dispute involves a complaint about the FSP's response to the Applicant's request for assistance in their financial difficulty, potential outcomes of negotiations may include the refinancing of a debt or a timetable for the sale of a secured property. For example, a bankrupt and their spouse may seek to refinance their home loan into the name of the spouse only. Alternatively, they may seek time to sell the property.

We may seek the Insolvency Practitioner's participation in any settlement discussions as the claim being negotiated and potentially compromised is an asset of the insolvent estate. For example, if the spouse of a bankrupt wishes to refinance the home loan into their name alone, it may not be sufficient for the spouse to obtain finance to pay out the FSP, as the Insolvency Practitioner may have a claim for the bankrupt's equity in the property. The efforts of the bankrupt's spouse and the FSP may be thwarted if the Insolvency Practitioner does not engage in the discussions and subsequently makes a claim.

If we consider that it would assist settlement discussions if the Insolvency Practitioner was involved, our case manager who is facilitating the negotiations will contact the Insolvency Practitioner to convene a time for a telephone conciliation conference that is convenient to all the parties, including the Insolvency Practitioner. If the Insolvency Practitioner is unwilling to participate in this process, the options available to the FSP and the Applicant (including solvent partners) may be limited. Alternatively, if the Insolvency Practitioner's engagement is necessary to determine the matter, we may not be able to consider the dispute without the Insolvency Practitioner's cooperation, as we cannot compel the Insolvency Practitioner to participate in our process. We may consider that the court is a more appropriate place for deliberation of the dispute, as the court can compel the Insolvency Practitioner's involvement, as a party to the proceeding or by subpoena, in which case we would close our file.

3. Any compensation for financial loss will be paid to the Trustee or Liquidator

As the insolvent's financial estate has vested in the Insolvency Practitioner, the benefit of any award of compensation we make for financial loss due to an error by the FSP vests in the Insolvency Practitioner and the FSP is directed to pay the compensation to the Insolvency Practitioner.

Further information

More details on FOS, our dispute process and our approach to certain types of disputes are available on our website: www.fos.org.au.

If you wish to lodge a dispute on behalf of an insolvent estate you are administering against its FSP, you can use our online dispute form: www.fos.org.au/disputeform.

If you have any queries regarding a particular dispute involving an insolvent estate you are administering, or about a potential claim, you can also contact us on 1300 780808.