

2 May 2016

Dr Kathleen Dermody
Committee Secretary
Senate Economics References Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Dr Dermody

Inquiry into penalties for white collar crime

I refer to your letters of 18 and 20 April 2016 and thank the Committee for the opportunity to respond to the submissions the Committee has received that comment adversely on the Financial Ombudsman Service Australia (FOS).

Preliminaries

The Terms of Reference (TOR)¹ require FOS to keep all information about a dispute confidential and accordingly, there is an expectation by both consumers and FSPs that FOS will maintain their privacy and confidentiality.

Consequently, FOS generally does not discuss the particulars of any dispute that has been brought before it. However, to the greatest extent possible, we will explain our processes in general terms to help convey how we approach our obligations under the FOS Constitution, FOS TOR and ASIC's Regulatory Guide 139 (RG139).

Issues raised about FOS

As at the date of writing, three submissions to the Inquiry have made adverse allegations about the service provided by FOS and the conduct of FOS employees.

These allegations broadly assert that FOS fails to hold financial service providers to account in an appropriate manner including through being inconsistent with the

¹ FOS TOR paragraph 13.4 states: "FOS must keep confidential all information pertaining to a Dispute that is provided to FOS except:

- a) to the extent reasonably necessary to carry out FOS's responsibilities including under these Terms of Reference or for any incidental purpose; or
- b) as required or permitted by law.

law or applying it incorrectly, being biased towards the financial services providers, and having a lack of transparency about how we conducts our operations.

Our response

FOS rejects all of the allegations contained within the three submissions. Many of the issues raised have already been subject to review in recent public committees or inquiries. Recent findings by the Financial Services Inquiry (FSI), the Senate Committee Inquiry into the Performance of ASIC, and the FOS Independent Review, confirmed the important role that FOS plays in providing consumer redress, concluded that EDR is working well and noted that the role we play is well supported by industry and consumer organisations.

We provide below more information, and context, about how we perform our role, focusing upon three main areas:

- the source of FOS funding,
- the mechanisms through which we preserve our independence from industry; and
- the manner in which we resolve disputes.

The source of FOS funding

FOS is a not-for-profit organisation which charges industry for the costs of the service we provide through a mixture of annual membership charges and fees based upon the volume and complexity of disputes.

Dispute Fees are designed to encourage financial services providers to consider early resolution of a consumer's dispute. Financial Service Providers make payment of these fees regardless of the outcome of individual disputes. The Senate Standing Committee on Economics, in its final report into the Performance of ASIC, stated that:

The funding arrangements for the EDR schemes are appropriate and should not in any way compromise their independence. The equal number of consumer representatives on the boards should also provide assurances that the schemes are independent of industry.²

FOS does not receive any funding from government, nor do we charge consumers for our service. Accordingly, any assertion that FOS charges consumers fees directly or indirectly is incorrect.

Mechanisms for independence

The *Corporations Act 2001* (the Act) uses the term 'Members' for entities which are part of a company and so this is the term used in the FOS' Constitution. However, there are no connotations attached to the term 'member' beyond this.

² At 7.26, page 91

FOS exists as an impartial, independent entity to provide a fair forum for the resolution of disputes between financial services providers and their customers.

The regulatory framework which applies to FOS, Regulatory Guide 139 (RG139), was developed by ASIC in consultation with all stakeholders, both consumer and industry based, and is based upon the Department of Industry, Science and Technology *Benchmarks for Industry-based Consumer Dispute Schemes*.

The accountability framework set out in RG139 ensures that FOS:

- operates independent of industry
- acts impartially and fairly in its decision-making
- is governed by a Board of Directors (comprised of equal numbers of consumer and industry directors and an independent Chair)
- reports regularly to its stakeholders and publicly on its performance
- reports systemic issues and serious misconduct to ASIC; and
- undertakes periodic independent reviews

The last independent review was conducted in 2013 by CameronRalph Navigator (the 2013 Review). The 2013 Review found that there were no concerns regarding the independence of FOS or in respect of the accountability of FOS for its functions.

Consumer organisations, while indicating that there are always opportunities for improvement (a view shared by FOS), have been strongly supportive of FOS and the important role that current EDR arrangements perform in providing consumers with access to redress. For example, the Consumer Action Law Centre submission to the Financial Systems Inquiry stated that:

“It is our view that the accessibility, coverage and operation of these schemes (industry EDR schemes) is perhaps one of the most significant and important developments in credit and financial services regulation in recent times.”³

The Final Report of the Financial Systems Inquiry stated:

“In making its recommendations, the Inquiry has deliberately focused on the issues of most concern and has not suggested changes to current arrangements that are generally working well, such as alternative dispute resolution systems. The Inquiry recognises the importance of continuing to have an adequate consumer dispute resolution system”.

The Final Report of the Inquiry into the Performance of ASIC also observed:

“Effective external dispute resolution schemes free up ASIC to concentrate on the most serious transgressions and system-wide problems that have much broader implications for the financial services industry and

³ Consumer Action Law Centre submission to the Financial Systems Inquiry, dated 31 March 2014, Section 1.1(a), page 2

consumers. The EDR schemes are a key part of any successful consumer protection framework".⁴

Dispute resolution methodology

Finally, we would like to address the assertions that FOS 'blames' consumers, provides an unfair forum and lacks transparency.

Liability of consumers

We appreciate in any dispute resolution process, there will often be parties who do not agree with the outcome of a dispute. However, reaching a different view following an in-depth consideration of submissions by both parties and an assessment of the merits of each dispute based on its specific facts and circumstances does not equate to a denial of natural justice to the unsuccessful party.

Where our decisions have been challenged in the courts, the courts have generally been supportive of the role of FOS, our approach to our jurisdiction and our decision making processes and have upheld the decisions.

Fair forum for dispute resolution

In accordance with the principles set out in the TOR, FOS is committed to resolving disputes between consumers and Financial Service Providers:

- in a cooperative, efficient, timely and fair manner
- with minimum formality and technicality, and
- as transparently as possible, taking into account our obligations for confidentiality and privacy.

This involves understanding all aspects of a dispute without taking sides or assigning blame, and making decisions based on the specific facts and circumstances of each dispute.

In 2014-2015, FOS received 31,895 disputes and closed 34,714.⁵ The disputes received were lodged against only 868 financial services providers out of our total membership of 14,107. This means that only 6.15% of FOS members received one or more disputes against them in 2014-2015 – over 27,000 disputes were received against only 54 financial services providers.

Transparency of process

FOS publishes, via its website and in brochures, its constitution, Terms of Reference, Operational Guidelines, approach documentation and a range of other information which explains how we will handle disputes and common issues which come before us. Further, determinations made by FOS are published on the FOS website in a de-identified format, so that the approach taken to the issues in dispute can be understood by anyone with a similar dispute.

⁴ At 7.78, page 103

⁵ FOS Annual Review 2014-2015: <http://www.fos.org.au/publications/annual-review/>

Conclusion

FOS has been objectively assessed against the industry benchmarks for its services. The 2013 Review found FOS was meeting all the benchmarks for industry-based dispute resolution schemes set out in RG139 (Accessibility, Independence, Fairness, Accountability, Efficiency and Effectiveness), with the exception of the Efficiency benchmark which was only partially met due to workload issues at the time.

Since that time, FOS has introduced a new streamlined dispute process which delivers a simpler, quicker process, and improved experience for both FSPs and applicants. FOS also remains committed to engaging positively with consumers through our extensive liaison with the consumer sector and broad consumer and community outreach initiatives and submissions to inquiries and consultations.

While this submission and those outreach engagements discuss issues in a necessarily general manner, none of these activities however prohibits any user of our service from contacting us directly to discuss specific concerns about how we operate or about how their dispute has been handled. This can be done either informally, or through our Complaints and Feedback Process.⁶

Yours sincerely

Nicolas Crowhurst
Company Secretary
Financial Ombudsman Service Australia

⁶ <https://forms.fos.org.au/Feedback>