

Introduction

The Financial Ombudsman Service (FOS) would like to thank the Senate Economic References Committee for the opportunity to make a submission to its “Inquiry into the Performance of ASIC.”¹

Over recent years FOS has made a number of submissions to Parliamentary Inquiries and reviews in relation to financial services matters. These include responses to the Joint Parliamentary Committee on Corporations and Financial Services (PJCCFS) *Inquiry into financial products and services in Australia* in 2009 and the April 2012 *Report on compensation arrangements for consumers of financial services* by Mr Richard St John.

We are not surprised that this Inquiry, like previous inquiries, focuses on difficulties and problems for financial service consumers. Over the last 5 years we have witnessed a dramatic increase in the volume of disputes received and resolved by FOS across all sectors. The increase has arisen from a combination of the fallout from the global financial crisis, the expansion of our jurisdiction under the national credit reforms and the impact of natural disasters, particularly floods in Queensland and elsewhere.²

Although we deal with more than 26,000 disputes every year, we are acutely conscious that there is an individual story behind each and every one of the disputes that we accept. In many cases it is a story of not just financial loss but the consequent human toll of stress, anxiety and ill health which has flow on effects beyond the individuals to the community more generally. To deliver our dispute resolution services in a way people can trust, we seek to understand all sides of a dispute and resolve it fairly and impartially.

How this submission is organised

To help the Committee consider the issues before it, our submission is organised in two parts.

¹ This submission has been prepared by the office of FOS and does not necessarily represent the views of our Board.

² Detailed statistics on our disputes are in our Annual Reviews. See www.fos.org.au under “Publications”.

Firstly in **Part A** we respond to reference d) of the Inquiry's Terms of Reference outlining how external dispute resolution (EDR) and FOS in particular fits within the regulatory architecture for financial services complaints resolution.

Secondly in **Part B** we take the opportunity to provide some general comments in relation to our processes and scheme design which have been the subject of some submissions to the Inquiry.

We also raise in this section some emerging issues on the adequacy of professional indemnity insurance in meeting the requirements for holders of Australian Financial Services Licences (Licensees) to have adequate compensation arrangements in place under the licensing regime.

PART A

1 Terms of Reference

We note that the Terms of Reference for the Inquiry are as follows:

“The performance of the Australian Securities and Investments Commission (ASIC), with particular reference to:

- a) ASIC's enabling legislation, and whether there are any barriers preventing ASIC from fulfilling its legislative responsibilities and obligations;
- b) The accountability framework to which ASIC is subject, and whether this needs to be strengthened;
- c) The workings of ASIC's collaboration, and working relationships, with other regulators and law enforcement bodies;
- d) ASIC's complaints management policies and practices;
- e) The protection afforded by ASIC to corporate or private whistle-blowers; and
- f) Any related matters.”

As noted above, we make this submission mainly in relation to reference d) of these Terms of Reference.

2 The regulatory architecture in relation to financial services complaints resolution

In order to place the role of FOS in the context of this Inquiry it is useful to briefly consider how the current EDR schemes developed and the regulatory arrangements came about.

The original predecessors of FOS were established in the early 1990s. They were industry-based dispute resolution schemes developed to provide a cheaper, quicker and less formal alternative to the courts to resolve certain disputes in the financial sector. The schemes included a banking ombudsman, an insurance dispute resolution scheme and a financial industry scheme. The emergence of these schemes reflected the broader changes taking place in the financial sector and community.

These included fundamental changes in the financial sector following the deregulation in the 1980s, increased awareness by consumers of their rights, and

the recognition within the financial sector industry organisations and firms that consumers needed an independent mechanism as an alternative to the courts to resolve their disputes.

While these schemes existed before the current regulatory arrangements for EDR were implemented in the financial sector, there was often government support for the various industry initiatives in establishing these EDR arrangements.

The current regulatory architecture of the Australian Financial Services System complaints resolution has its origins in the outcomes of the 1996 Inquiry into the Financial System chaired by Mr Stan Wallis (the Wallis Inquiry).

The role of the Wallis Inquiry in establishing the current arrangements for EDR in the financial sector is often not given due weight.

The conceptual underpinning of the Wallis Inquiry's recommendations was an analysis of the various types of **financial sector promises** and the importance for consumer confidence that they could rely on the promises made to them.

The Wallis Inquiry's recommendations led to the current 'Twin Peaks' model of regulation involving the creation of the Australian Prudential Regulation Authority as the prudential regulator and ASIC as the consumer and conduct regulator for the whole financial sector.

The Twin Peaks structure was designed around the Wallis Inquiry's analysis of the differences in the 'intensity' of financial promises. In some limited cases, for reasons set out in the Wallis Report,³ the Inquiry considered prudential style 'safety' supervision was needed, while for less intense promises disclosure and conduct regulation was considered adequate. The Wallis Inquiry recognised that this involved judgments as to where to draw the line and that those judgments could be adjusted over time.

One key component arising from this analysis was instrumental in the establishment of the current regulatory arrangements for EDR in the financial sector and FOS. That is, where a consumer felt that a promise made by a financial firm was not kept, the Wallis Inquiry considered the consumer should have access to a low-cost means to resolve the dispute.

"In the financial system, specialised regulation is required to ensure that market participants act with integrity and that consumers are protected. The financial system warrants specialised regulation due to the complexity of financial products, the adverse consequences of breaching financial promises **and the need for low-cost means to resolve disputes**⁴". (Wallis Report p.175)

The importance of a low-cost alternative dispute resolution mechanism in ensuring consumer confidence was also emphasised in a number of the regulatory, industry

³ <http://fsi.treasury.gov.au/content/FinalReport.asp>

⁴ Our emphasis added.

and consumer submissions made to the Wallis Inquiry.

One of the new functions taken on by the newly created ASIC was the power under the Corporations Regulations 2001⁵ to approve financial sector EDR schemes.

Accordingly, the implementation of the Wallis recommendations by then Treasurer, Peter Costello, combined with a number of the government's reforms on licensing, set the foundations for FOS's current role in EDR for the financial sector that exists today.

2.1 EDR as a cornerstone of Australian consumer protection

EDR is a form of alternative dispute resolution outside of the established court structure.

Central to EDR is a shared commitment from the major participants - in this case consumer organisations, financial sector firms, government and the regulators - to effective mechanisms for non-court based consumer redress.

This is then underpinned by a contract, or in the case of FOS "Terms of Reference", together with formal regulatory arrangements with the key regulator ASIC as outlined below.

Thus there is both a policy underpinning and a practical commitment to EDR. This is critical to appreciating the boundaries and restrictions within which FOS performs its functions.

2.2 The role of FOS

FOS was formed in 2008 from the merger of 3 predecessor schemes organised largely along industry sector lines. The original participants were:

- the Banking and Financial Services Ombudsman
- the Financial Industry Complaints Service and
- the Insurance Ombudsman Service.

On 1 January 2009, two other schemes joined FOS, namely:

- the Credit Union Dispute Resolution Centre and
- Insurance Brokers Disputes Ltd.

FOS is an ASIC approved independent EDR scheme that covers disputes across the financial sector. Our service is free to consumers and is funded through a combination of levies and case fees paid by our members, which are financial services providers.

Our operations are governed by our Terms of Reference that form a contract with our members. The Terms of Reference are available on our website.⁶

⁵ Regulations 7.6.02(4) and 7.9.77(4).

⁶ See www.fos.org.au – Terms of Reference, under "About Us".

FOS and its predecessor schemes have over 20 years' experience in providing dispute resolution services in the financial services sector.

FOS provides services to resolve disputes between member financial services providers and consumers, including certain small businesses, about financial services such as:

- banking
- credit
- loans
- general insurance
- life insurance
- financial planning
- investments
- stock broking
- managed funds and
- pooled superannuation trusts.

As well as its functions in relation to dispute resolution, FOS has responsibilities to identify and resolve systemic issues and obligations to make certain reports to ASIC. FOS also monitors compliance with a number of industry codes of practice. Further details in relation to these activities are outlined in Part B of our submission in response to some of the concerns raised before the Committee.

FOS is governed by a board with an independent chair and:

- four “industry directors” appointed based on their expertise in and knowledge of the financial services industry, independence and capacity and willingness to consult with the industry and
- four “consumer directors” appointed based on their expertise in consumer affairs, knowledge of issues pertaining to the industry, independence and capacity and willingness to consult with consumer organisations.

This is also referred to further in Part B as our structure and the way we do business is in large part driven by regulatory requirements set down by ASIC.

2.3 How ASIC and FOS work together

As noted previously it is a key component of the financial services consumer redress architecture that the regulator ASIC and the financial services system legal framework (i.e. legislation) support the role of EDR.

This comes about in several ways.

- Firstly, the licensing regime for providers of financial services requires certain licensees to have internal dispute resolution processes and join an ASIC-approved EDR scheme.⁷

⁷ *Corporations Act 2001*, s912A(2) and 1017G(2), *National Consumer Credit Protection Act 2009*, s47.

- Secondly, ASIC has the power under the Corporations Regulations 2001 and the National Consumer Credit Protection Regulations 2010 to approve financial sector EDR schemes.

To do so, ASIC has set out the approval standards for schemes in its Regulatory Guide 139 (RG 139)⁸. These include standards on independence, accessibility, fairness, jurisdiction and requirements to report systemic issues to ASIC. The approval standards also set out governance requirements including commissioning a periodic independent review.

This background is important with reference to some of the concerns that have been raised with the Committee about FOS and its processes, procedures and outcomes it achieves.

PART B

3 Improving the outcomes from financial services dispute resolution processes

As noted previously the financial system, the products on offer, the distribution channels as well as the external environment are far from static and this remains one of the great challenges in this area. FOS has seen a dramatic increase in disputes received and resolved. In order to respond to this increased demand for our dispute resolution services FOS has grown rapidly.

FOS' regulatory structure is a unique one based as it is on a "compact" between the stakeholders referred to previously. Central and critical for the financial service sector as a whole is the need to keep and retain the trust of financial services consumers. To this end FOS is open to how we can improve what we do.

We have already reviewed and continue to review our systems, structure and processes so that we can continue to deliver a service to the standards expected. This has been challenging and remains very much a work in progress for the reasons outlined in this section.

We are at present undertaking an independent review of how well we meet the relevant benchmarks of independence, fairness, efficiency, effectiveness, accountability and accessibility as required by ASIC in RG 139. The review is due to be completed early next year and the results will be published.

4 The consumer submissions made to the Inquiry

We note there are a number of comments about FOS in some of the submissions made to the Inquiry.

⁸ Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes* is available on www.asic.gov.au under "Regulatory Documents".

Prior to commenting further a number of important observations need to be made.

As a general point, a number of the comments, for understandable reasons, are not attributed. This prevents us from ascertaining the circumstances of disputes to which comments relate or even whether the people who made the comments have lodged disputes with us.

More specifically, it would be inappropriate for us to respond to the substance of the comments and allegations in particular submissions. There are a number of reasons for this:

- Firstly, the Inquiry's Terms of Reference are directed to a review of the system and the system architecture in which ASIC plays a key role, rather than focusing on trying to resolve individual disputes.
- Secondly, FOS is bound by confidentiality obligations in respect of particular disputes.
- Finally, financial disputes tend to be based on details, particularly about oral conversations and "who did or said what when". In other words, there is considerable contestability about the facts.

However, we do note that the concerns and issues raised by a number of the submissions broadly fall into two categories; namely process and procedures and what we refer to as scheme design issues. These are dealt with below in general terms for the reasons previously articulated.

We also take the opportunity to deal with some emerging issues which whilst not directly raised, relate to the adequacy of professional indemnity insurance in meeting the requirements for Licensees to have adequate compensation arrangements in place under the licensing regime.

4.1 Process and procedure improvement

4.1.1 Delays in our process for either taking disputes or acting upon them

Some of the feedback in submissions to the Inquiry relates to our processes and timeliness in accepting disputes or processing them. We understand the consumer and broader stakeholder concerns. As noted above, FOS has seen a dramatic increase in the volume of disputes and indeed in the complexity of disputes. This has impacted on our responsiveness. We have been working hard to improve the timeliness of our dispute process and this remains at the forefront of our current efforts to improve what we do.

A key focus for FOS is the early and co-operative resolution of disputes and in this regard our own statistics indicate that:

- disputes resolved by agreement between parties for 2012-2013 fell to 70%, down from 74% in 2011-2012
- 55% of disputes were resolved within 60 days, up from 52% in 2011-2012 and
- 73% were resolved within 120 days, up from 71% in 2011-2012.

We are continuing our efforts to engage with financial firms to encourage early resolution and working with consumer advocates and organisations to ensure we remain easy to access.

In 2012-2013, we increased our efficiency through, for example, making key improvements in our case work systems and streamlining our early dispute resolution processes. We aim, over the next few years, to ensure our initiatives translate into achieving a clear reduction in the time taken to resolve dispute across all areas while also improving the quality of our services for both consumers and financial services providers.

Further details of our work to reduce delays and enhance our processes in other ways can be found in publications on our website such as our annual reviews and business plans.⁹

4.1.2 Further steps which can be taken if parties are unhappy with our service

It is also important to note that FOS has an established Complaints and Feedback Process to deal with complaints and feedback about the standard of the service we provide, including any process issues raised about the handling of disputes.

Our website explains how feedback can be provided through this process and how we will address the feedback.¹⁰ We have undertaken considerable work to ensure that the process is user friendly and set out in clear, simple terms. Feedback can be given electronically, by post or by telephone.

The information on our website includes our Complaints and Feedback Policy and Procedure. We handle any complaints about our services as outlined in this document. As it states and emphasises, we take complaints seriously. The policy and procedure are aligned with the Australian standard for complaint handling.¹¹

4.2 Dealing with some fundamental scheme design issues

Some of the submissions to the Inquiry deal with:

- our jurisdiction
- perceptions about independence, accountability and fairness and
- how we deal with systemic issues.

We have termed these “scheme design issues”. Subject to the provisos made previously we make the following comments.

4.2.1 Jurisdiction

Jurisdiction has a number of aspects. The first is the circumstances in which we can take action and secondly our monetary limits. These issues are raised in several submissions.

⁹ See www.fos.org.au under “Publications”.

¹⁰ See www.fos.org.au - Feedback about our service, under “Contact Us”.

¹¹ Australian Standard: Customer satisfaction – Guidelines for complaints handling in organisations (AS ISO 10002-2006).

Some submissions argue, for example, that we should have a broader jurisdiction in regard to disputes lodged against financial services providers that have already commenced debt recovery legal proceedings relating to the matters in dispute (Legal Proceedings Disputes).

(a) Circumstances in which we can take disputes and monetary jurisdiction

Through RG 139, ASIC requires an EDR scheme to operate with a compensation cap. Under this approach, the scheme has jurisdiction to consider a dispute involving an amount larger than the compensation cap, but can only award compensation up to the cap.

At present, a compensation cap must be at least \$150,000 for disputes about general insurance brokers and at least \$280,000 for other disputes. RG 139 requires the jurisdiction of an EDR scheme to cover:

- the vast majority of types of consumer disputes in the relevant industry and
- disputes involving monetary amounts up to \$500,000, which is the value of the retail client test under section 761G of the *Corporations Act 2001*.

Our jurisdiction is set out in Section B of our Terms of Reference and explained in detail in our Operational Guidelines¹².

(b) Legal Proceedings Disputes

Since 1 January 2010 FOS has had a limited jurisdiction to consider Legal Proceedings Disputes. In accordance with RG 139, this jurisdiction provides for us to consider these disputes if they are lodged before the consumer has taken any step in the legal proceedings beyond lodging a defence, or a defence and counterclaim.

In December 2011, ASIC commenced a review of the jurisdiction of EDR schemes in regard to these disputes. It conducted extensive consultation in the review, which involved:

- releasing two consultation papers
- holding informal discussions and a joint roundtable discussion with key stakeholders and
- releasing reports responding to submissions to the consultation papers.

The review generally found the regime to be working as intended but did result in a change to RG 139 that will limit the Legal Proceedings Disputes jurisdiction of EDR schemes. ASIC stated:

“We have updated RG 139 so an EDR scheme’s debt recovery legal proceedings jurisdiction does not need to handle small business credit disputes where the credit limit of the small business credit contract (the subject of the dispute) exceeds \$2 million.

¹² See www.fos.org.au - Operational Guidelines to the Terms of Reference, under “About Us”.

When determining whether the \$2 million limit has been reached, the scheme must apply the limit to the credit contract, the subject of the small business credit dispute. This means that where a small business has linked credit contracts, the \$2 million limit must be applied to the credit contract the subject of the dispute.

EDR schemes will need to update their Terms of Reference or Rules, and scheme processes to implement this change by no later than 1 January 2014.”¹³

Shortly, FOS will amend its Terms of Reference to reflect this limitation.

4.2.2 Independence, accountability and fairness

It is inevitable for an industry based dispute resolution scheme that is funded by the industry that aggrieved consumers may perceive scheme decisions to be inherently biased.

However, there are a number of inbuilt mechanisms which ensure that the schemes operate independently and with fairness and accountability. These mechanisms have to meet requirements imposed by RG 139 as explained below.

(a) Independence

RG 139.88 to 109 specifies requirements to ensure that an EDR scheme is independent of the financial services industry which funds the scheme and constitutes its membership.

The requirements include independent decision making processes, constitution of the scheme as a legal entity in its own right, an overseeing body for the scheme (in FOS' case its Board) with equal representation of consumers and industry together with an independent chair as well as a number of other important safeguards.

(b) Accountability

RG 139 116 – 161 specifies requirements to ensure that an EDR scheme is sufficiently accountable.

They require the scheme to:

- handle any systemic issues¹⁴ affecting, or serious misconduct¹⁵ by, scheme members
- report information about disputes received to ASIC on a quarterly basis and through published annual reports and
- undertake regular independent reviews of the scheme's performance, operations and procedures.

FOS meets these requirements and we comment further in Section 4.2.3 about systemic issues and serious misconduct.

¹³ Report 348 *Response to submissions on CP 190 Small business lending complaints: Update to RG 139, page 7* on www.asic.gov.au under “Regulatory documents”.

¹⁴ A systemic issue is an issue that will have an effect on people beyond the parties to a dispute.

¹⁵ Serious misconduct may include fraudulent, grossly negligent or inefficient conduct and wilful or flagrant breaches of law.

(c) Fairness

RG 139.110 – 115 specifies the requirements that ensure that an EDR scheme operates fairly. They require the scheme's procedures, including its dispute handling procedures, to accord with the principles of natural justice.

The central provisions for our procedures are set out in our Terms of Reference and their guidelines¹⁶. The Terms of Reference have been approved by ASIC against the requirements of RG 139.

We also publish comprehensive information about our procedures in a number of documents including our annual review, quarterly publications, approach documents and fact sheets.

4.2.3 Handling Systemic issues and serious misconduct

Under RG 139 an ASIC-approved EDR scheme is required to:

- identify systemic issues and cases of serious misconduct that arise from considering disputes;
- refer these matters to the relevant financial service providers for response and action; and
- report information about the matters to ASIC in accordance with guidelines in RG 139.

To meet the requirements of RG 139, we have a systemic issues process in place. Over the last few years we have taken steps to enhance and improve our internal identification of, and dealing with, systemic issues. We have also worked with our members and consumer organisations to improve awareness in this area as part of our efforts to better share our experience with the aim of reducing the number of consumer disputes.

4.3 Codes of Conduct

Several submissions to the Inquiry raise issues about the current arrangements to ensure compliance with industry codes of conduct. As FOS plays a role in these arrangements, it may be useful for this submission to explain our involvement.

A code of conduct sets standards of good industry practice for financial service providers to follow when dealing with people who are, or who may become, individual or business customers.

Each code subscriber has made a commitment to:

- work to improve the standards of practice and service in their industry
- promote informed decisions about their services and
- act fairly and reasonably in delivering those services.

Code monitoring activities in the banking, mutual banking and general insurance sectors are overseen by code compliance committees consisting of an independent

¹⁶ See www.fos.org.au - Operational Guidelines to the Terms of Reference, under "About Us".

chair, a consumer representative and an industry representative. FOS has a separate business unit to our EDR function which supports the work of these committees. Each of the contractual arrangements with the committees is the subject of a separate funding and service level agreement with the relevant industry body.

Each of the four codes monitored either has been reviewed recently or is being reviewed currently. The codes are:

- the Code of Banking Practice
- the Mutual Banking Code of Practice
- the General Insurance Code of Practice and
- the Insurance Broker's Code of Practice.

More detailed reports on the work of the Code Compliance and Monitoring unit of FOS are available on our website.

4.4 Emerging issues

Whilst this Inquiry's Terms of Reference refer to the performance of ASIC, we would encourage the Committee to also be aware of the growing number of circumstances where a financial services provider is unable to meet either a FOS or Court determination due to insolvency.

This is a problem confined to the non-prudentially regulated sector and smaller financial planning firms.

4.4.1 Uncompensated loss

The problem of non-payment to a consumer of an award of compensation raises an important point as it goes to the efficacy of the current regulatory architecture to resolve financial services complaints. This is particularly important as Australia undergoes significant demographic change with baby boomers moving into retirement and the de-accumulation phases of their superannuation and investment products.

For an older generation of Australians who suffer financial loss in later or retirement years there is very little prospect of rebuilding, or time to rebuild, savings. The losses suffered by uncompensated complainants are therefore not without cost to the community generally. Rather it is merely "hidden" with Centrelink, other government benefits and the charitable sector providing assistance to aggrieved financial service clients often in quite parlous circumstances.

Under the Corporations Act, Licensees are required to have adequate compensation arrangements including for the purposes of meeting EDR awards of compensation. To date the primary mechanism has been by means of professional indemnity (PI) insurance policies.

However, FOS experience highlights that PI insurance is not by itself an adequate response to these problems. PI insurance of the type required to meet the minimums prescribed by ASIC guidance is either not available or very costly for small firms to obtain. It has also not proved an adequate compensation mechanism for consumers.

Accordingly, we consider there is a market failure that needs an appropriate policy response from industry and government.

4.4.2 Previous policy responses to this issue

Uncompensated loss is not a new concern and was examined recently by the PJCCFS *Inquiry into financial products and services in Australia* following a number of collapses in the financial sector in 2009.

That committee recommended that “the Government investigate the costs and benefits of different models of a statutory last resort compensation scheme for investors.”¹⁷

Accordingly, in 2012 Mr Richard St John delivered after consultation in 2011 a report on compensation for consumers of financial services¹⁸. That report, which was wide ranging, did not support a scheme of last resort at that time, preferring other approaches.

However, as recent experience continues to highlight the limitations in availability and efficacy of PI insurance to meet the legislative requirements for adequate compensation, in our view the issue of uncompensated loss should be considered again in any broader review of financial sector issues. In this context FOS continues to be an advocate for a Financial Services Compensation Scheme of last resort as the most appropriate and cost effective solution to this market failure

FOS remains ready to work with government, industry professional bodies and consumer groups to consider possible cost-effective solutions to current market failure in the provision of adequate compensation arrangements in the financial sector.

5 Conclusion

The confidence of financial consumers in our financial system and its regulators is critical to our prosperity and development as a country.

The Chair of FOS, Professor the Honourable Michael Lavarch AO, made this observation in our most recent annual review:

“FOS celebrated its 5th Anniversary in June 2013. The story of the last five years is of an organisation that has had to change, adapt and innovate in response to the many challenges we have faced: a recurring theme in the history of external dispute resolution schemes in the financial sector over the last 20 years.

At the time FOS was formed we anticipated there would be many challenges in successfully bringing together the predecessor organisations of FOS.

What none of us expected was the Global Financial Crisis and the series of natural disasters across Australia that, combined with the expansion of our jurisdiction under

¹⁷ Recommendation 10

¹⁸ *Report on Compensation Arrangements for Consumers of Financial Services by Richard St John April 2012.*

the national credit law and increased financial difficulty jurisdiction, would lead to such a dramatic increase in the number of disputes lodged.”¹⁹

At FOS we are committed to working with all our major stakeholders to improve what we do. We want to ensure that we have the processes, skills and structure to continue to adapt and evolve so that FOS can provide an important community service in resolving financial sector disputes in a way all our stakeholders can have confidence in and trust for the future.

Thank you for the opportunity to make this submission. We would be pleased to provide any further information as required.

¹⁹ See www.fos.org.au – 2012-2013 Annual Review, page 4, under “Publications”.