

Mutuals

Terms of Reference

Effective 1 January 2009

These Terms of Reference apply to those members of the Financial Ombudsman Service Limited who have been designated as having the Mutuals Terms of Reference as the Applicable Terms of Reference, whether generally or in relation to a particular dispute.

Financial Ombudsman Service Limited

ABN	67 131 124 448
Postal Address:	GPO Box 3 Melbourne Victoria 3001
Telephone:	1300 78 08 08
Fax:	(03) 9613 6399
Email:	info@fos.org.au
Website:	www.fos.org.au

1 Introduction

General scope

- 1.1 These Terms of Reference govern the functions, powers, duties and procedures of the Mutuels division for those Disputants of the Financial Ombudsman Service Limited regarding Complaints made to Mutuels and others who have been designated as having the Mutuels Terms of Reference as the Applicable Terms of Reference.

Review and amendment

- 1.2 The Board may amend these Terms of Reference at any time but such amendments will not take effect until 2 months after Mutuels or Other Suppliers have been notified of the amendments.

2 Definitions and interpretation

Definitions

- 2.1 In these terms the following words have the meanings given unless the contrary intention appears:

“**Agreement**” means an agreement between FOS and a Credit Union or Other Supplier which makes these Terms of Reference applicable to and binding on the Credit Union or Other Supplier;

“**Articles**” means the articles of association of the CUDRC;

“**Board**” means the Board of Directors from time to time of FOS;

“**Commercial Judgment**” means the exercise of financial and commercial risk analysis in decision making;

“**Complaint**” means a complaint by a Disputant to their Relevant Mutual concerning:

- (a) any act or omission by a Mutual in relation to a Mutual Product or Service used or purchased by a Disputant;
- (b) any act or omission by a Mutual relating to confidentiality and/ or personal privacy.

“**Constitution**” means the Constitution of FOS;

“**CUDRC**” means the Credit Union Dispute Resolution Centre;

“**Credit Union Code of Practice**” means the Credit Union Code of Practice published on 21 July 1994 as amended, supplemented or replaced from time to time;

“**Disputant**” means:

- a) an individual when that individual, whether alone or jointly with another individual or individuals (including “**small business**” Disputants),
- i) acquires a Mutual Product or Service from a Mutual or seeks information about a Mutual Product or Service from a Mutual; or
 - ii) acquires from an Other Supplier a product or service that would be viewed as a Mutual Product or Service if the Other Supplier were a Mutual, or seeks information from the Other Supplier about a Product or Service that would be viewed as a Mutual Product or Service if the Other Supplier were a Mutual.
- b) a guarantor of such an individual; and
- c) a person treated by the Relevant Mutual as acting for a Disputant or guarantor or deceased Disputant or guarantor, whether or not the person is legally entitled to do so;

“**Deputy Mutuels Ombudsman**” means the person(s) appointed in accordance with paragraph 4.3;

“**Designated Procedure**” means the procedure, referred to in paragraph 8.4, approved or determined by the Mutuels Ombudsman to be used in dealing with a Dispute in accordance with paragraph 8;

“**Determination**” means a determination made by the Mutuels Ombudsman in accordance with paragraph 9;

“**Dispute**” means a Complaint by a Disputant to the Relevant Mutual concerning:

- (a) A Mutual Product or Service; or
- (b) A privacy issue of the type described in Section 5.

which complaint has not been resolved through the internal dispute resolution process of the Relevant Mutual within 45 days of its receipt by the Relevant Mutual or as to which the Disputant has notified the Relevant Mutual that its formal proposal to resolve the dispute is not acceptable, whichever is the earlier.

“**Dispute Resolution Powers**” means the functions, powers and duties of the Mutuels Ombudsman described in clause 4.1;

“**Electronic Funds Transfer**” (‘EFT’) means an electronic transfer of funds between a Disputant and the Relevant Mutual using an electronic funds transfer terminal, an electronic funds transfer card and a personal identification number (‘PIN’);

“**EFT Code of Conduct**” means the EFT Code of Conduct published in 1 January 1991 as amended, supplemented or replaced from time to time;

“FOS” means the Financial Ombudsman Service Limited ACN 131 124 448;

“Mutual” means a member of FOS which is a Credit Union or an approved deposit taking institution that has a mutual structure;

“Code of Practice” means the Credit Union Code of Practice or the Abucus Mutuals Code of Practice when adopted by the Mutual and any later version of such Codes amended, supplemented or replaced from time to time;

“Mutuals Ombudsman” or **“Ombudsman”** means person appointed by the Board pursuant to clause 4.1 of these Terms of Reference to fulfil the external dispute resolution requirements of the Credit Union Code of Practice, the Mutuals Code of Practice and the EFT Code of Conduct and to perform certain functions and duties of the Board in accordance with these Terms of Reference and the Constitution and where the context requires includes a Deputy Mutuals Ombudsman;

“Mutuals Ombudsman Service” means the dispute resolution service provided under these Terms of Reference;

“Mutual Product or Service” means a deposit, loan or other facility, product or financial service provided by a Mutual to a Disputant;

“Other Supplier” means any of the following which has entered into an Agreement:

a) Cuscal Limited;

b) any body corporate related (within the meaning of that term under the Corporations Law) to Cuscal Limited; and

c) any other person who is not a Mutual and who, in the opinion of the Board, would be viewed by consumers of their products or services as supplying products or services that are Mutual Products or Services;

“Privacy Act” means the Privacy Act 1988 (Cth).

“Recommendation” means a recommendation made by the Mutuals Ombudsman in accordance with paragraph 9;

“Relevant Mutual” means a Mutual including a Mutual with whom the Relevant Mutual has merged or Other Supplier to whom a Complaint has been made or who becomes a party to a Dispute;

“Small business” means a business, which at the time the events relating to the dispute occurred, had:

(a) if the business is or includes the manufacture of goods – less than 100 full time (or equivalent) employees; or

(b) if the business is of another nature – less than 20 full time (or equivalent) employees.

“Terms of Reference” means this document and all other documents, attachments and schedules to it or incorporated into it by reference, as amended from time to time.

Interpretation

- 2.2 References to paragraphs are references to paragraphs of these Terms of Reference, and the whole includes any part.
- 2.3 The definition of Complaint in par. 2.1 is to be interpreted as enabling a dispute which involves a connected series of transactions both prior to and after 1 November 1996 to be considered in its entirety.

3 Obligations to refer Disputant's Complaints and Disputes to FOS

- 3.1 A Mutual has an obligation to advise Disputants that they have a right to have their Complaint or Dispute dealt with by FOS if they are dissatisfied with the outcome of a complaint
- (a) at the time the Complaint arises;
 - (b) at the time the Complaint is dealt with by the Mutual's internal dispute resolution process;
 - (c) at the time the Mutual advises the Disputant of the outcome of the Complaint; and
 - (d) whenever any decision or action adverse to the Disputant is taken or made.
- 3.2 Advice to a Disputant referred to above should:
- (a) include the FOS brochure;
 - (b) if there is any doubt about the Disputant's ability to understand the brochure, be made available in a more accessible form either in another language, or by use of an interpreter.

4 Functions, powers and duties of the Mutuals Ombudsman

Appointment of Mutuals Ombudsman

- 4.1 The Mutuals Ombudsman is that person appointed from time to time by the Board.
- 4.2 The functions, powers and duties of the Mutuals Ombudsman are contained generally in these Terms of Reference and include:
- (a) provision of the Mutuals Ombudsman Service established by the Terms of Reference;
 - (b) considering Disputes; and
 - (c) facilitating using any available dispute resolution means which the Mutuals Ombudsman considers in his or her absolute discretion to be appropriate for the satisfaction, resolution or withdrawal of Disputes by agreement between the parties; and

- (d) in the absence of agreement between the parties, making Recommendations and Determinations in accordance with the powers conferred by these Terms of Reference.

The Mutuels Ombudsman must at all times act in a manner which is fair, reasonable and consistent with the dispute resolution powers referred to in paragraphs (b) to (d).

Appointment of Deputy Mutuels Ombudsman

- 4.3 The Board may at any time, in consultation with and having regard to any recommendation of the Mutuels Ombudsman, appoint one or more persons in the capacity of Deputy Mutuels Ombudsman to assist the Mutuels Ombudsman properly to fulfil the functions, powers and duties of the Mutuels Ombudsman. The functions, powers and duties of each Deputy Mutuels Ombudsman will be as delegated by the Mutuels Ombudsman in accordance with paragraph 4.4.

Power of delegation

- 4.4 If the Board has appointed a person to act in the capacity of the Mutuels Ombudsman, the Mutuels Ombudsman may delegate all or any of the functions, powers and duties of the Mutuels Ombudsman to a Deputy Mutuels Ombudsman.

Removal and replacement of Mutuels Ombudsman

- 4.5 The Board may remove or replace a Mutuels Ombudsman or Deputy Mutuels Ombudsman if at any time the Board considers that the Mutuels Ombudsman or a Deputy Mutuels Ombudsman is unable or unfit to perform the functions, powers or duties of their appointment.

5 Limits to the Dispute Resolution Powers

- 5.1 The Dispute Resolution Powers are limited in the manner set out in paragraphs 5.2 and 5.3.
- 5.2 The Mutuels Ombudsman may not exercise any of the Dispute Resolution Powers:
- (a) if the Dispute involves the exercise by a Relevant Mutual of Commercial Judgment in decisions about lending or security;
 - (b) if the Dispute relates to a Relevant Mutual's general interest rate policy;
 - (c) if the Mutuels Ombudsman considers that it is more appropriate for the Dispute to be dealt with by a court or other tribunal, other means of dispute resolution, or the Privacy Commissioner;
 - (d) if the Mutuels Ombudsman is satisfied that, at the time a Complaint becomes a Dispute:
 - (i) the amount in Dispute exceeds \$280,000; or
 - (ii) the Dispute is part of or relates to a larger claim which the Disputant has made or may be entitled to make, and the aggregate of the Disputant's claims and possible claims exceeds \$280,000. (Nothing in this paragraph 5.2(d)(ii) excludes or limits the Mutuels

Ombudsman's powers under these Terms of Reference to make a Recommendation);

- (e) if the Dispute relates to a practice or policy of a Relevant Mutual which does not alone (as opposed to by its implementation) give rise to a breach of any obligation or duty owed by the Relevant Mutual to the Disputant;
- (f) if the act or omission to which the Dispute relates took place more than 6 years before the date on which the Disputant made their Complaint;
- (g) if the event occurred before the Relevant Mutual became a member of FOS or CUDRC, whichever is the earlier;
- (h) if the dispute is between a Disputant and an entity, the business of which has been acquired by the Relevant Mutual, and if that entity was not a financial services provider at the time the events the subject of the dispute occurred;
- (i) if the subject-matter of the Dispute has previously been considered by the Mutuals Ombudsman or CUDRC, unless the Dispute relates to new evidence relating to the earlier Dispute;
- (j) unless the Relevant Mutual and Disputant otherwise agree, if the subject-matter of the Dispute is also the subject-matter of a separate proceeding, claim, action or dispute before any court, tribunal, arbitration or conciliation body or is the subject of any investigation by a statutory ombudsman or other State, Territory or Federal Government body;
- (k) if the subject-matter of the Dispute has already been the subject-matter of:
 - (A) a proceeding, claim, action or dispute before any court, tribunal, arbitration or conciliation body; or
 - (B) is the subject of any investigation by a statutory ombudsman or other State, Territory or Federal Government body, which has been determined or reported on;
- (l) unless the Disputant and all other persons to whom the Relevant Mutual owes a duty of confidentiality in relation to the Dispute have waived their rights of confidentiality to the extent necessary to permit the Mutuals Ombudsman to have access to and to consider otherwise confidential information in the exercise of the Mutuals Ombudsman's powers and duties;
- (m) if the Dispute involves a confidentiality issue the Mutuals Ombudsman may consider it to the extent that the Mutuals Ombudsman considers the dispute relates to information which is confidential information
- (n) if the Dispute involves a privacy issue the Mutuals Ombudsman may consider it to the extent that the Mutuals Ombudsman considers that the dispute relates to information which is personal information.

- (o) unless the Mutuels Ombudsman is satisfied that the Disputant has brought a Dispute in a bona fide manner and is not pursuing it for frivolous or vexatious reasons.
- 5.3 The Mutuels Ombudsman has an absolute discretion to decide whether a Dispute exists, and if so, whether to exercise its, his or her Dispute Resolution Powers.
- 5.4 The Mutuels Ombudsman may, at the Mutuels Ombudsman's discretion consider a dispute from a business which is not a small business if the Relevant Mutual agrees.
- 5.5 Notwithstanding clauses 5.2(j) or (k), the Mutuels Ombudsman may in the Ombudsman's discretion, consider a Dispute based on the same subject matter as a Dispute lodged with CUDRC.

6 Exercise of the Dispute Resolution Powers by the Mutuels Ombudsman

Passing of documents and correspondence

- 6.1 As soon as a Complaint becomes a Dispute, the Relevant Mutual must:
- (a) advise the Disputant that the Complaint has become a Dispute, and request the Disputant's written consent to forward to the Mutuels Ombudsman a copy of all documents and correspondence concerning the Dispute; and
 - (b) if the Relevant Mutual receives the Disputant's written consent as requested in clause 6.1(a), forward to the Mutuels Ombudsman a copy of all documents and correspondence concerning the Dispute; and
 - (c) notify the Disputant who made the Complaint:
 - (i) of the functions, powers and duties of the Mutuels Ombudsman;
 - (ii) of the rights of the Disputant to have their Complaint dealt with by the Mutuels Ombudsman as a Dispute;
 - (iii) of any publications by the Mutuels Ombudsman concerning Dispute handling procedures; and
 - (iv) of the information which may be requested and received by the Mutuels Ombudsman and provided to other persons, and of the Disputants right to require any information which they provide to be treated as confidential information.
- 6.1.1 If the Relevant Mutual fails to perform its obligation under par. 6.1(a) above, the Disputant may notify the Mutuels Ombudsman that he or she claims there is a dispute. The Mutuels Ombudsman may then request the Relevant Mutual to carry out these functions. If the Relevant Mutual does not do so, the Mutuels Ombudsman may do whatever the Mutuels Ombudsman considers necessary, subject to the Terms of Reference, to resolve the dispute.

Representations to Mutuels Ombudsman concerning powers and duties

- 6.2 In making a decision pursuant to paragraph 5.3, the Mutuels Ombudsman must:
- (a) consider any submissions made by the Relevant Mutual and Disputant; and

- (b) if required to do so by the Relevant Mutual or Disputant, give written reasons for a decision pursuant to paragraph 5.3.

Determination of Dispute resolution procedures

- 6.3 The Mutuals Ombudsman must determine, prepare, publish, and has an absolute discretion from time to time to amend, dispute resolution procedures which will apply to Disputes, provided they are consistent with and promote the Dispute Resolution Powers and are not inconsistent with these Terms of Reference.
- 6.4 Details of the Dispute resolution procedures published by the Mutuals Ombudsman must be provided by Relevant Mutuals to Disputants on request, and whenever the Disputant is notified in accordance with paragraph 6.1.

Supply of information

- 6.5 The Mutuals Ombudsman may request both the Relevant Mutual and the Disputant to provide information which the Mutuals Ombudsman reasonably considers necessary for, or of assistance in, exercising the Dispute Resolution Powers.
- 6.6 The Relevant Mutual must provide to the Mutuals Ombudsman any information required in accordance with paragraph 6.5 unless:
 - (a) it certifies in writing that after all reasonable efforts it has been unable to obtain any waiver of confidentiality necessary to enable it to release the information; or
 - (b) the information relates to a physical or electronic security measure employed by the Relevant Mutual.
- 6.7 A Disputant is not obliged to provide any information to the Mutuals Ombudsman. However, unless the Mutuals Ombudsman considers that it would be unreasonable to do so, Disputants should be encouraged to provide any information requested by the Mutuals Ombudsman pursuant to para. 6.5.
- 6.8 If, as a minimum, information of the kind specified in the schedule to these Terms of Reference is made available or authorised to be made available to the Mutuals Ombudsman by or on behalf of the Disputant, the Mutuals Ombudsman may decide that the Mutuals Ombudsman is unable fairly and reasonably to exercise the Dispute Resolution Powers, and may notify the Relevant Mutual and the Disputant that the Mutuals Ombudsman does not intend to further exercise the Dispute Resolution Powers.
- 6.9 The Relevant Mutual and the Disputant may each request that information provided to the Mutuals Ombudsman is treated by the Mutuals Ombudsman as confidential. The Mutuals Ombudsman may not, unless released from the Mutuals Ombudsman's duty of confidentiality, disclose that information in a manner inconsistent with that duty. If consent is not given the Mutuals Ombudsman is not entitled to use the information to reach a decision adverse to any party to whom confidential information is denied.

Requests for information held by the Mutuals Ombudsman

- 6.10 Subject to 6.9, all documentation should be provided to all parties to a dispute. However, it is not necessary for documents and information used by the Mutuals Ombudsman to be provided to both parties as long as the Mutuals Ombudsman's

written reasons clearly identified the documents or information relied on and the identified documents or information are provided on request.

Return of information

- 6.11 If a Dispute is resolved, or the Mutuels Ombudsman determines not to continue to exercise the Dispute Resolution Powers, then at the request of the Relevant Mutual or Disputant the Mutuels Ombudsman must return any information provided by the requesting party. Nothing in this paragraph requires a Mutuels Ombudsman to provide any materials or documents created by them in the course of dealing with the Dispute.
- 6.12 Nothing in paragraph 6.11 prevents the Mutuels Ombudsman from retaining and making for its own records and for other purposes set out in these Terms of Reference copies of the information, including any confidential information.

7 Rules of evidence and the application of laws and codes

- 7.1 The Mutuels Ombudsman is not, in exercising the Dispute Resolution Powers, bound by any common law or statutory rules of evidence.
- 7.2 In considering a complaint and in making any Determination or Recommendation while exercising the Dispute Resolution Powers the Mutuels Ombudsman must:
- (a) observe any applicable rules of law, or relevant judicial authority or precedent;
 - (b) have regard to applicable industry codes including the Credit Union Code of Practice, the Mutual Code of Practice and the EFT Code of Conduct;
 - (c) have regard to good industry practice; and
 - (d) have regard to what is fair and reasonable in all the circumstances.
- 7.3 Subject to paragraph 7.2, the Mutuels Ombudsman is not otherwise bound by authority or precedent, whether judicial or otherwise.

8 Power to facilitate settlements or make Recommendations and Determinations

Promotion of Dispute resolution

- 8.1 The parties may, within 14 days of a Complaint becoming a Dispute, notify the Mutuels Ombudsman of their proposed dispute resolution procedure for dealing with the Dispute. Within 14 days of receiving the parties' notice, the Mutuels Ombudsman must notify the parties that their proposed dispute resolution procedure is approved either as notified, or with such amendments as the Mutuels Ombudsman determines, in consultation with the parties, are necessary to achieve the most effective and likely successful means of Dispute resolution consistently with any procedures and other materials published in accordance with paragraph 6.3.
- 8.2 If a Dispute resolution procedure is not either proposed or approved as provided in paragraph 8.1, the Mutuels Ombudsman must, consistently with any procedures and other materials published in accordance with paragraph 6.3, notify the Relevant Mutual and the Disputant of:

- (a) the particular Dispute resolution procedure to be applied to their Dispute, having regard to the particular facts and circumstances of the Dispute; and
 - (b) the actions which are required of the Relevant Mutual and the Disputant in order to comply with the Dispute resolution procedure.
- 8.3 The parties may, within 48 hours of receiving a notification in accordance with paragraphs 8.1 or 8.2, request an amendment to the Dispute resolution procedure proposed or agreed to by the Mutuels Ombudsman.
- 8.4 Within 48 hours of receiving a request in accordance with paragraph 8.3, the Mutuels Ombudsman must, in consultation with each party, make a final decision and issue a final notice to each party of the Dispute resolution procedure. The final Dispute resolution procedure notified to the parties in accordance with this paragraph 8.4, and the Dispute resolution procedure otherwise proposed and agreed to by the Mutuels Ombudsman in accordance with paragraphs 8.1 to 8.3 inclusive, constitute the 'Designated Procedure'.

Notification of intention to make Recommendation or Determination

- 8.5 If the Dispute is not either resolved by agreement or withdrawn within the period specified in the Designated Procedure, or if no period is specified, then within 30 days of commencement of the Designated Procedure, then the Mutuels Ombudsman must notify the parties in writing that within 30 days of the date of that notice (unless earlier notified in writing by both parties that the Dispute has been resolved by agreement or withdrawn) the Mutuels Ombudsman will make a Determination or Recommendation in accordance with paragraph 8.

9 Making of Recommendation or Determination

Making of Determination by agreement

- 9.1 Where the parties reach a settlement of a Dispute by agreement, the Mutuels Ombudsman may make a Determination. Any such determination must be in accordance with the parties' agreement. The Determination:
- (a) must be in writing;
 - (b) must be notified to the parties; and
 - (c) will be legally binding on and enforceable by the parties as a binding agreement in any court of competent jurisdiction.

Making of Determination without agreement

- 9.2 If the Mutuels Ombudsman is satisfied on the basis of facts and materials provided by the parties that:
- (a) the Relevant Mutual should take action
 - i) which does not involve the payment or making of any valuable consideration to the Disputant; or
 - ii) which involves the payment or making of valuable consideration to the Disputant of less than \$280,000; or

(b) the Disputant must pay any money to the Relevant Mutual

then the Mutuals Ombudsman must make a Determination in accordance with paragraph 8.4.

9.3 If the Mutuals Ombudsman makes a Determination specified in paragraph 9.2, the Determination:

- (a) must be in writing and must state the reasons for the Determination;
- (b) must be notified to the parties and the Board;
- (c) must specify in detail the nature of the Determination being made;
- (d) must specify the action which the Disputant must take in order to accept the Determination;
- (e) will, if accepted by the Disputant under clause 9.4, be:
 - (i) legally binding on the Relevant Mutual and the Disputant; and
 - (ii) enforceable in any court of competent jurisdiction by the Disputant as a binding agreement; and
 - (iii) may not be appealed against by the Relevant Mutual.

Acceptance of Determinations by Disputant

9.4 If the Mutuals Ombudsman notifies the parties of a Determination, the Disputant may, within 30 days of receiving the notice notify the Mutuals Ombudsman that the Disputant:

- (a) accepts the Determination as a full and final settlement of the Dispute, in which case the Determination becomes binding on each of the parties in accordance with paragraph 9.3(e); or
- (b) rejects the Determination, in which case the Mutuals Ombudsman must notify the Disputant of the Disputant's rights to pursue the Dispute by other available legal means, including by reference to any State, Territory or Federal courts, tribunals or other bodies having jurisdiction to deal with the Dispute.

Failure to advise of acceptance or rejection within 30 days of receiving the notice will be taken as a rejection, except in exceptional circumstances as determined by the Dispute Mutuals Ombudsman.

Making of Recommendations

9.5 If the Mutuals Ombudsman is satisfied on the basis of facts and materials provided by the parties that the Relevant Mutual should pay or give valuable consideration to the Disputant in excess of \$280,000, the Mutuals Ombudsman must make a Recommendation in accordance with paragraph 9.6.

9.6 If the Mutuals Ombudsman makes a Recommendation specified in paragraph 9.5, the Recommendation:

- (a) must be in writing and must state the reasons for the Recommendation;
 - (b) must be notified to the parties and the Board;
 - (c) must specify in detail the nature of the Recommendation being made;
 - (d) must specify the action which the Relevant Mutual must take.
- 9.7 If the Mutuals Ombudsman notifies the parties of a Recommendation, the Relevant Mutual must, within 30 days of receiving notice of the Recommendation, either notify the Mutuals Ombudsman that it:
- (a) accepts the Recommendation, in which case the Recommendation becomes a binding Determination and will, subject to acceptance by the Disputant under clause 9.10, be:
 - (i) legally binding on the Relevant Mutual and the Disputant; and
 - (ii) enforceable in any court of competent jurisdiction by the Disputant as a binding agreement; and
 - (iii) may not be appealed against by the Relevant Mutual; or
 - (b) rejects the Recommendation and does or does not wish to have the Dispute independently arbitrated.
- 9.8 If the Relevant Mutual does not notify the Mutuals Ombudsman within the period specified in paragraph 9.7, the provisions of paragraphs 9.7 (a)(i), (ii) and (iii) apply.
- 9.9 The Mutuals Ombudsman must notify the Disputant of the content of the Relevant Mutual's decision pursuant to 9.7(a) or (b) within 14 days of its receipt.
- 9.10 If the Relevant Mutual has accepted the Recommendation then the Disputant may, within 30 days of receiving the notice, notify the Mutuals Ombudsman that the Disputant:
- (a) accepts the Recommendation as a full and final settlement of the Dispute, in which case the Recommendation becomes binding on each of the parties in accordance with paragraph 9.7(a); or
 - (b) rejects the Recommendation, in which case the Mutuals Ombudsman must notify the Disputant of the Disputant's rights to pursue the Dispute by other available legal means, including by reference to any State, Territory or Federal courts, tribunals or other bodies having jurisdiction to deal with the Dispute.

Failure to advise of acceptance or rejection within 30 days of receipt of the notice will be taken as rejection except in exceptional circumstances as determined by the Mutuals Ombudsman.

- 9.11 If the Relevant Mutual has rejected the Recommendation, and the Relevant Mutual requests independent arbitration, then the Mutuals Ombudsman must seek the Disputant's agreement to have the Dispute independently arbitrated.
- 9.12 If the Disputant agrees to the Dispute being independently arbitrated, the Mutuals Ombudsman must refer the parties to local and national organisations which offer suitable arbitration services following which the Mutuals Ombudsman will have no further responsibility with respect to the Dispute.

Enforcement of Determinations and accepted/deemed accepted Recommendations

- 9.13 The Relevant Mutual must complete any action required and make any due payments in accordance with any Determination, or accepted/deemed accepted Recommendation within the period or by any due date specified in the Determination or accepted/deemed accepted Recommendation, and if no period or due date is specified, within 30 days of receiving the Determination, or accepting or being deemed to have accepted the Recommendation.
- 9.14 FOS may take any necessary action (including legal action) to enforce a Determination. If the Relevant Mutual does not comply with the Mutuals Ombudsman's Determination, its membership of FOS may be terminated. FOS must consult with ASIC prior to the termination process taking place.

Making of a Determination or Recommendation not to be used in subsequent legal proceedings

- 9.15 Subject to paragraph 9.16, the action of the Mutuals Ombudsman in making a Determination or Recommendation and the content of any such Determination or Recommendation including but not limited to the matters to be notified to the parties in accordance with this paragraph 9 and any materials and documents created by the Mutuals Ombudsman in dealing with the Dispute, may not be used as evidence in any subsequent claims, proceedings or actions of any nature brought by either the FOS, the Relevant Mutual or the Disputant in any court, tribunal or other body of competent jurisdiction.
- 9.16 Where, in accordance with paragraphs 9.4(a) or 9.10(a), the Disputant notifies acceptance of a Determination or Recommendation respectively, the making of that Determination or Recommendation and its contents may be used in any subsequent proceedings to enforce the Determination or Recommendation against the Relevant Mutual.

10 Ability to permit the conduct of 'test cases'

Notice of intended 'test case'

- 10.1 The Relevant Mutual may, at any time before the Mutuals Ombudsman makes a Determination or Recommendation, give notice (a 'Test Case Notice') to the Mutuals Ombudsman that the Dispute is being treated by the Relevant Mutual as a test case ('Test Case').

Content of Test Case Notice

- 10.2 A Test Case Notice must be in writing and contain:
- (a) a statement that in the Relevant Mutual's opinion the Dispute involves or may involve:

- (i) an issue which has important consequences for the business of the Relevant Mutual or Mutuels generally; or
 - (ii) an important or novel point of law; and
- (b) a statement that the Relevant Mutual intends bringing or defending (as the case may be) the Test Case in a court or tribunal of competent jurisdiction within six months of the date on which the Test Case Notice is received by the Mutuels Ombudsman; and
- (c) an undertaking that if the Relevant Mutual brings the Test Case in a court or tribunal of competent jurisdiction within six months of the date on which the Test Case Notice is received by the Mutuels Ombudsman, the Relevant Mutual will:
- (i) pay the Disputant's costs and disbursements involved in pursuing the Test Case at first instance and on any appeal brought by the Relevant Mutual either on an agreed basis, or if no agreement is reached, on a solicitor and own client basis; and
 - (ii) make interim payments to reimburse the Disputant costs and disbursements actually incurred in accordance with the obligations in this paragraph 10.

Action by the Mutuels Ombudsman on receipt of the Test Case Notice

- 10.3 Upon receipt of the notice, the Mutuels Ombudsman must cease to consider the complaint.
- 10.4 The Mutuels Ombudsman must, after receiving a Test Case Notice, inform both parties:
- (a) of the fact that the Test Case Notice has been received;
 - (b) the date on which it was received;
 - (c) the parties' rights and obligations to have legal representation under clause 12; and
 - (d) the parties' rights and obligations in clauses 10.2(c) and 11 concerning the costs of legal representation.

11 Costs of Dispute Resolution

- 11.1 Subject to paragraph 11.3, all costs associated with the conduct and resolution of a Dispute in accordance with these Terms of Reference must be borne by the FOS and the Relevant Mutual, in accordance with general payment procedures and cost arrangements determined by the Board and notified to all Mutuels by the Board.
- 11.2 The Disputant may not be charged (even if a Complaint or Dispute is dismissed) for any professional or administrative costs, and must be reimbursed for reasonable travel and accommodation costs (if any) associated with the conduct and resolution of the Dispute.
- 11.3 If the Disputant or the Relevant Mutual is permitted, in accordance with paragraph 12.1, to be legally or separately represented or assisted in any manner in relation to the Designated Procedure, the costs associated with that representation and

assistance must be met by the Disputant or Relevant Mutual and may not be included as part of any Determination or Recommendation of the Mutuals Ombudsman and may not be pursued by either party in any further or separate proceedings before any court or tribunal of competent jurisdiction. In determining the payment procedures and cost arrangements for a Test Case, the Mutuals Ombudsman must do so on the basis that all costs will be borne by the Relevant Mutual.

12 Legal or other separate representation and assistance

- 12.1 Unless otherwise agreed by the Mutuals Ombudsman, and subject to any authorisation to the contrary by a mediator or other person engaged by the Mutuals Ombudsman to conduct any part of the Designated Procedure, the parties may only represent themselves or be represented by an employee representative who is not legally qualified in any activities relevant to the Designated Procedure or the Dispute. Notwithstanding the above, the parties have the right to be legally represented if the Dispute is to be conducted in accordance with paragraph 10 as a Test Case.
- 12.2 The use of legal representatives before the Mutuals Ombudsman is to be discouraged.
- 12.3 If the Relevant Mutual is the first party to request legal representation and the request is granted, the Relevant Mutual shall pay the costs of legal representation for the Disputant, such payment not exceeding the legal costs incurred by the Relevant Mutual in connection with the dispute after the dispute has been referred to FOS.
- 12.4 The costs of legal representation involved in a Test Case must be borne by the Relevant Mutual in accordance with paragraphs 10 and 11.

13 Systemic Issues and Serious Misconduct

- 13.1 The Mutuals Ombudsman must report all systemic issues and serious misconduct to ASIC and the Board as described in 13.2 and 13.3.
- 13.2 A systemic issue is one which will have a material effect which will clearly extend beyond the parties to a complaint. Some examples of systemic issues are: poor disclosure or communications, administrative or technical errors, product flaws, and improper interpretation or application of standard terms.
- 13.3 Serious misconduct is conduct which may be fraudulent, grossly negligent, or involve wilful breaches of relevant laws.

14 Collection of Information

- 14.1 The Mutuals Ombudsman must collect and record the following information:
- (a) the number of complaints received;
 - (b) the number of enquiries received;

- (c) demographics of complainants (where practicable);
- (d) the number of complaints received that fall outside the Terms of Reference (with reasons) of the Mutuels Ombudsman Service;
- (e) the current caseload of the Mutuels Ombudsman Service including the age and status of the open cases;
- (f) the time taken to resolve complaints; and
- (g) a profile of complaints to enable identification of:
 - (i) the type of financial product or service involved;
 - (ii) the product or service provider;
 - (iii) the purpose for which the financial service or product was obtained;
 - (iv) the underlying cause of the complaint; and
 - (v) any systemic issues or other trends.

14.2 The Mutuels Ombudsman must also produce a report every twelve months for publication and provision to Mutuels. The report must be a comprehensive summary and analysis of this information.

14.3 In preparing reports the Mutuels Ombudsman must have regard to the obligations imposed by the Privacy Act on the handling of personal information.

15 Promotion of the Mutuels Ombudsman Service

15.1 The Mutuels Ombudsman must ensure that the existence of the Mutuels Ombudsman Service of FOS is actively promoted.

15.2 In particular, the Mutuels Ombudsman Service should be promoted to Disputants which are under-represented in the information collected on the Service (including, for example, Disputants in rural areas or from non-English speaking backgrounds).

15.3 The Mutuels Ombudsman must publish and promote details about how the Mutuels Ombudsman Service works. This should include: how a dispute can be lodged, assistance which is available to Disputants, and the time frames which are imposed on the procedure.

16 Miscellaneous powers and duties of Mutuels Ombudsman

Conduct of business and administration

16.1 The Mutuels Ombudsman has, and must properly exercise, all of the administrative, functional and operational powers vested in the Mutuels Ombudsman by these Terms of Reference and by the Board.

Attendance at FOS meetings

16.2 The Mutuels Ombudsman must, as notified by the Board:

- (a) attend meetings of the Board; and

- (b) provide the Board on request with any information and assistance which the Mutuels Ombudsman is authorised to provide to them.

Preparation of Annual Report of the Board

- 16.3 The Mutuels Ombudsman must prepare or arrange to be prepared and submit for approval to the Board by a date fixed by the Board, an annual report for the Mutuels Ombudsman Service which:
 - (a) shows its compliance with these Terms of Reference;
 - (b) contains details of the operation of the scheme and compliance of the Mutuels Ombudsman with these Terms of Reference; and
 - (c) includes any other matters which the Mutuels Ombudsman and the Board agree should be contained in the annual report.
- 16.4 The annual report must be published and made available to the public on request.

Schedule to Terms of Reference for the Mutuals Ombudsman

Minimum information required to be provided by Disputant (paragraph 6.9)

Information for Disputes involving the EFT Code of Conduct

1. Credit Card type and account number relevant to Dispute;
2. Name and address of Disputant;
3. Principal card and additional cards as relevant to the Dispute;
4. whether card has been signed;
5. whether card has been lost or stolen, and if so:
 - date of loss and time;
 - reporting details (including time, date and method);
6. PIN details relevant to Dispute, including
 - recording method of PIN;
 - where PIN record was kept;
 - whether PIN record lost or stolen; and if so
 - date and time of loss;
 - whether PIN has been disclosed to any other person;
7. Details of transactions to be investigated as forming part of, or being relevant to the Dispute;
8. Details of any;
 - circumstances surrounding the loss of or theft of the credit card or record of the PIN and the reporting of the loss or theft; or
 - steps taken to ensure the security of the credit card or PIN which the Disputant considers relevant to their liability concerning an EFT transaction.

Information for Disputes other than those involving the EFT Code of Conduct

1. Credit Card type and account number relevant to Dispute;
 2. Name and address of Disputant;
 3. PIN details relevant to Dispute;
 4. Details of transactions to be investigated as forming part of, or being relevant to the Dispute;
 5. other minimum information requirements determined and issued in writing by the Mutuals Ombudsman from time to time.
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