DEVELOPING NEW TERMS OF REFERENCE FOR THE FINANCIAL OMBUDSMAN SERVICE

14 August 2008

The purpose of this issues paper is to assist with the development of the Proposed Terms of Reference for the new, merged Financial Ombudsman Service by providing information about the key change issues that will impact the operations of the Service and eliciting feedback from stakeholders regarding the design of the Proposed Terms of Reference.
Message from the Financial Ombudsman Service

In early 2007, in response to a study requested by the Parliamentary Secretary to the Federal Treasurer, the Boards of the Insurance Ombudsman Service (IOS), the Financial Industry Complaints Service (FICS) and the Banking and Financial Services Ombudsman (BFSO) resolved to merge the operations of their three financial sector External Dispute Resolution (EDR) schemes, to form the Financial Ombudsman Service Limited (“FOS”).

The aim of that decision was to retain the advantages of direct industry and consumer involvement in EDR in the financial sector, while at the same time delivering the benefits that consumers, government and financial services provider stakeholders have been seeking from a larger, more professional scheme. These benefits include a higher profile, consistent accessibility and best practice processes and decision-making.

The Board of FOS has committed to the creation of an EDR scheme that builds on strengths of each of the existing schemes but is not limited by their history. Development of the new scheme will include new ideas and will draw from practices used by the best schemes around the world.

The Australian Securities and Investments Commission (ASIC) is taking a close interest in the development of the new scheme’s Terms of Reference and has made it clear that it expects a genuine merger – not just a cobbled together of three distinct ‘silos’ - and that it expects that no consumer will be worse off as a result of the merger. Ultimately, it is ASIC that will approve the operation of the new scheme.

We have a tight timetable, with ASIC expecting the draft Proposed Terms of Reference to be submitted with enough time for ASIC to consider and determine approval late in 2009. Full implementation is expected by 1 January 2010.

There are significant challenges in meeting these deadlines. While there will be time for consultation with stakeholders, the timetable means that this must be completed promptly. The parameters of the merger mean that inevitably, jurisdiction limits will increase for some financial services providers, which will no doubt cause some concerns. At the same time, there will be change for the staff of the schemes and internal systems and structures to harmonise.

At the end of the day, as in all complex change processes, it will not be possible to satisfy all stakeholders in every detail and the Board must take responsibility for making the final decisions.
The status quo is no longer an option and the merger must be successful. We encourage all stakeholders to contribute constructively to this development process. We are confident that the different sectors of the financial industry can demonstrate to consumers, regulators and the government that they are capable of working together in a professional, disciplined way to benefit consumers, the community and industry.

Peter E Daly AM, Chair of FOS

Colin Neave AM, Chief Ombudsman FOS
Contents

1. The Terms of Reference development process ..........................................................4
2. Ways that you can contribute ......................................................................................5
3. How the Proposed Terms of Reference will be approved .............................................6
4. Scope of the new Terms of Reference ........................................................................7
5. Guiding principles and constraints ..............................................................................8
6. Generic EDR disputes processes .............................................................................12
7. New terminology and definitions ..............................................................................13
8. Guide to the consultation issues section ...................................................................14
9. Access to the scheme ...............................................................................................16
10. Types of disputes that FOS can consider .................................................................23
11. Dispute resolution ..................................................................................................32
12. Awarding compensation ..........................................................................................39
13. Appeal procedures and test cases ............................................................................41
14. Reporting externally ..................................................................................................46

Appendix A Proposed Chapters for Proposed Terms of Reference
Appendix B List of questions
1. The Terms of Reference development process

The diagram and table below set out the key steps in the Terms of Reference development process.

As the timetable above shows, considerable allowance has been made for resolving any unforeseen difficult issues in the later stages of the process. Clearly it is in everyone’s interest to finalise the process and obtain ASIC approval as early as possible and every effort will be made to bring implementation forward if possible.
2. Ways that you can contribute

The consultation process is built around four main strands of activity.

1. Written submissions from stakeholders in response to the issues paper
2. Posting submissions on the dedicated FOS Terms of Reference page on the FOS website, to enable commentary
3. “Town hall” style consultative meetings in a number of major centres in which presentations will be made and questions and discussion with industry and consumer stakeholders will be encouraged
4. Face-to-face meetings between the Chair of the Board and the Chief Ombudsman and key stakeholders

You are invited to provide written comments on the questions set out in this Issues Paper. Response need not be limited to these questions – especially if there seems to be an aspect that has not been fully considered or overlooked.

Written submissions should be mailed, faxed or emailed by 10 October 2008 to FOS’ independent consultants to the Project:

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Submissions will be published on our website unless confidentiality is requested. Interested stakeholders are encouraged to read those submissions and post commentary as appropriate. The website address is: http://www.fos.org.au/formcontent.jsp?xcid=565

If you would like to speak directly with the consultants or FOS staff, please indicate this in your written submission – noting that it may not be possible to meet every request.

There will be ‘town hall’ discussion forums convened in a number of major centres during September 2008. The consultation meetings will be attended by a representative of the FOS Board and the Chief Ombudsman and will be facilitated by The Navigator Company Pty Ltd.

A Proposed Terms of Reference will be released for comment in early January – and this will provide another opportunity for written comment.
3. **How the Proposed Terms of Reference will be approved**

The Proposed Terms of Reference must meet the requirements of Regulatory Guide 139 in order to be approved in the first instance by FOS’ Board of Directors and then by ASIC.

The Board will take into account the initial round of feedback and input from stakeholders and initially approve a Proposed Terms of Reference by early January 2009. That Proposed Terms of Reference will be published on the FOS website during January and February 2009 and comments and feedback will be considered by the Board before the Terms of Reference are submitted to ASIC.

As discussed elsewhere, the Board is committed to an inclusive, consultative process, but has the responsibility to make the final decisions about the version that is submitted to ASIC for approval.

Once the ASIC response is received and any final adjustments made to secure their regulatory approval, the Board will approve a Final version of the Terms of Reference – which will be promulgated to participating financial services providers and made available to other stakeholders. At that point, full implementation can begin (no later than 1 January 2010).
4. Scope of the new Terms of Reference

To merge the operations of three EDR schemes is a significant undertaking and to establish a new Terms of Reference is only part of that larger task. In any industry EDR scheme, the Terms of Reference provide the overarching framework – and sensibly, much of the detail of the day-to-day operations remains a matter for the management of the scheme.

The provisions of the new Terms of Reference which will have to be settled will involve:

- FOS' jurisdiction: the types of disputes that FOS can consider, the applicable monetary limits and the exclusions from jurisdiction;
- FOS' decision makers: how decision makers are appointed and their roles and responsibilities;
- FOS' decision making process: a high level overview of how FOS' decision making process will unfold and the principles that guide decision making;
- The powers of FOS decision makers; and
- FOS' responsibilities to ASIC as the industry regulator: the matters that FOS must refer to ASIC.

The FOS Board has made clear its preferences for the new Terms of Reference – see Guidance section below. This includes that it should be as clear as possible about the principles and intent of the provisions, while avoiding unnecessary specificity or detail – allowing for adaptation to future needs, process innovation and responsiveness.
5. Guiding principles and constraints

The Board of FOS has identified some guiding principles and constraints for the development of the new Terms of Reference (ToR) which are important for the consultation phase. These are set out below.

1. The Terms of Reference must meet the expectations of ASIC as the regulator of financial services external dispute resolution schemes.

EDR schemes are seen as an essential element of the overall consumer protection framework in Australia and ASIC continuously monitors and reviews this protection. As an absolute minimum requirement, the new Terms of Reference must satisfy Regulatory Guide 139 (the policy statement governing the approval of Industry EDR schemes) and Regulatory Guide 165 in so far as it refers to EDR schemes.

In parallel with the development of the FOS Proposed Terms of Reference, ASIC is conducting a review of Regulatory Guide 139, which will also potentially affect the operations of FOS in the future.

It is also clear that the regulator expects a genuine merger with genuine potential for improvement – not just a common branding exercise with no real underlying change.

2. Consumers must not be disadvantaged by the merger

The Board has confirmed its commitment that consumer rights and access to the scheme – in particular jurisdictional limits, must be at a minimum at the same standard of the predecessor schemes and that in some cases may be improved. A corollary to this is the requirement that no group of consumers is to be worse off as a result of the change.

This is a minimum expectation of the regulator and it is difficult to see how an argument could be mounted for any group of consumers to be worse off as a result of the change.

This is an important principle because it means that where there are differences in existing provisions, it is most likely that the higher standard will prevail and there will be some increase in EDR disputes jurisdiction for some financial services providers.

Experience with increases in jurisdictional limits is that they often do not result in as much change in disputes volumes as might be expected, however it is important that FOS fully understand what impact these changes may have.
3. **The Terms of Reference will aim for best practice**

The FOS Board does not intend that the new provisions be necessarily limited to adopting one of the three existing standards. Consistent with its intention to move towards best practice, it is open to new ideas or to adopting practice from other schemes from around the world.

Consultants to FOS from The Navigator Company have been conducting an independent case-file review of the dispute-handling and decision-making processes at IOS and FICS and they will also update their knowledge of the BFSO processes. This independent perspective of the three schemes’ existing processes, combined with the consultant’s experience of EDR in other schemes including those in Canada and New Zealand will also help to inform the design process.

4. **The Terms of Reference must help deliver value for money**

The clear intention of the merger is to deliver improved effectiveness and efficiency both for FOS itself and for participants in the disputes handling process.

Improved consistency in approach across industry sectors and products will assist with efficiency, however this will not be followed blindly. Where consistency is not appropriate, differences will be accommodated.

5. **The Terms of Reference must take account of the differences in products and services across the financial industry**

A matter of principle that has been important to financial services providers for many years is that FOS’ disputes handling must cater for a diverse range of consumer disputes.

Of course, disputes can involve quite small sums of money ranging to significant sums of money – for both the consumer and the financial services provider. Different legislation applies to different financial products and services. Disputes can involve issues of particular product or technical complexity – eg. legal, medical or financial - and require advanced industry sector knowledge. Change is a hallmark of the financial services industry as a result of continuous product innovation, systems changes and regulatory changes and dispute handling must keep abreast of current practice.

To meet these challenges, FOS will need to value and support industry specialisation both at the case manager and decision maker level and the Terms of Reference must not restrict this.

6. **The Terms of Reference should be a new design**

The Board has been clear in its commitment to establishing the new organisation as a best practice EDR scheme – only absorbing from pre-existing practice of the three schemes if it is satisfied that it represents best
practice. This philosophy includes the key disputes process steps and the structure and format of the Terms of Reference.

The Board has directed the following design approach to the new Proposed Terms of Reference:

- To the extent possible, the Proposed Terms of Reference should be a clean sheet design – only borrowing from the pre-existing ToRs where that is best practice or is unavoidable;
- The Proposed Terms of Reference should be written in plain English; and
- The Proposed Terms of Reference should be principles-based and avoid unnecessary specificity or detail – allowing for adaptation to future needs, process innovation and responsiveness.

7. Tight timeframes

There is a comparatively tight timetable, with ASIC expecting the draft Proposed Terms of Reference to be submitted to ASIC to consider and determine approval by July 2009. Full implementation is expected by 1 January 2010.

There are significant challenges in meeting these deadlines. While there will be time for consultation with stakeholders, the timetable means that this must be completed promptly. The parameters of the merger mean that inevitably, jurisdiction limits will increase for some financial services providers, which will no doubt cause some concerns. At the same time, there will be change for the staff of the schemes and internal systems and structures to harmonise.

8. The consultation approach

The Board and management of FOS are committed to consulting with stakeholders in the development of the new scheme’s process and Proposed Terms of Reference. The processes and timelines are set out elsewhere in this document. To ensure that there are no unrealistic expectations in the course of the consultation process, this section sets out some parameters for the approach.

- Some decisions have already been taken – which were necessary to establish the basic foundations of the new organisation. For example, the governing Board has been appointed, the key senior executive positions have been decided and some of the terminology that will be used in the new scheme has been agreed. (See section later in Paper.)
- Not every change that may be possible in the eventual Proposed Terms of Reference will be anticipated in this consultation paper. The focus has been on those issues most likely to affect external stakeholders.
• The key issues that will affect stakeholders will be presented as transparently as possible and as soon as they become apparent.

• Where there are genuine options for a design issue, they will be set out and views sought.

• Where there is only limited discretion in design, that will be made clear.

• Where FOS believes there is a more likely or preferable option, that will be indicated.

• While FOS will listen to all input from stakeholders, it cannot, of course, guarantee that all concerns will be satisfied in every detail. Ultimately, the Board is responsible for making the final decisions and seeing them implemented.
6. Generic EDR disputes processes

Most EDR schemes around the world follow the basic steps set out below – with variations as to timelines, decision-making mechanisms, the option of appeals. The three Divisions of FOS have distinct versions of this basic process.
7. New terminology and definitions

There are no guidelines or publications in relation to terminology to describe the consumer/customer/client or the problem/complaint/dispute. ASIC’s RG165.7 states:

“These terms ['complaints’ and ‘disputes’], however, are not applied consistently across the finance sector, and this guide does not prescribe a standard use of these terms. In this guide, we use the term ‘complaint’ to refer collectively to any enquiry, complaint or dispute, however defined, that may be dealt with under a given IDR procedure or by a particular EDR scheme. We will consult further about a standard definition of “complaint” for use across the finance sector.”

One of the key tasks for the merger is to settle on common terminology across all three divisions. This task is not yet complete – and to some extent depends on the decision taken after this consultative phase. The table below shows the terms that are generally used in this paper. Given that the subject matter is often the existing processes or ToR, the use of existing terminology is often necessary to draw important distinctions and to describe generic EDR issues. Hopefully, this will gradually become less of a problem as the merger proceeds.

<table>
<thead>
<tr>
<th>Current Alternatives</th>
<th>In this paper</th>
</tr>
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<tbody>
<tr>
<td>“Enquiry”</td>
<td>Enquiry</td>
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<tr>
<td>“Complaint” – “Dispute”</td>
<td>Dispute¹</td>
</tr>
<tr>
<td>“Complainant”-“Disputant”-“Applicant”-“Consumer”</td>
<td>Consumer</td>
</tr>
<tr>
<td>“Member”-“Financial Services Provider”-“Firm”-“Participating Firm”</td>
<td>Financial services provider²</td>
</tr>
<tr>
<td>“First Level Decision” – “Finding” – “Recommendation”</td>
<td>Written decision</td>
</tr>
<tr>
<td>“Second Level Decision” – “Recommendation” – “Determination”</td>
<td>Appeal</td>
</tr>
<tr>
<td>“Scheme” – “Service” – “FOS”</td>
<td>FOS³</td>
</tr>
<tr>
<td>“Ombudsman”-“Panel”-“Arbitrator”-“Adjudicator”</td>
<td>Ombudsman⁴</td>
</tr>
</tbody>
</table>

¹ Complaints are considered by the financial services provider. Disputes are unresolved complaints and claims for compensation lodged with FOS
² A more neutral term than ‘member’; describes single operator and large corporation;
³ Under the Constitution FOS is the dispute resolution scheme established by Financial Ombudsman Service Limited
⁴ Ombudsman is the generic term for any decision maker with power to make a binding decision
8. Guide to the consultation issues section

Taking into account the guiding principles and practical constraints discussed above, FOS has identified the key design issues it believes need to be resolved as part of the process of preparing new Proposed Terms of Reference. These issues – and some of the options for dealing with them - are set out in the main body of the Paper below. The issues are discussed in order of their emergence in the disputes process – not in order of importance. In general, each section is structured as follows:

### Name of Issues groupings – eg “Access to the scheme”

<table>
<thead>
<tr>
<th>Issue n:</th>
<th>A brief description of the issue or question that arises in developing a single Terms of Reference to cover all expected categories of dispute.</th>
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</table>

#### Background

A brief outline of the relevant background to assist with consideration. In the interests of keeping the paper to a manageable size, this background will be limited to the relevant facts. The provisions that apply to each pre-existing scheme (called ‘Divisions’ hereinafter) will not necessarily be set out exhaustively.

#### Discussion

The section will discuss the thinking that has gone into this issue so far - in particular, how the main parameters of the design process (eg. ASIC Regulatory Guide 139 and the principles set out by the Board) will apply in this instance.

#### Options

Where there are options for dealing with the issue, these will be set out under this heading – again as briefly as practicable.
Proposal:
Where there is a most likely or preferred option, that will be clearly stated and explained under this heading.

Questions
Under this final heading, stakeholders will be asked some specific questions – in order to ensure that responses cover the key issues needed to consider in the design process. Response need not be limited to these questions – especially if there seems to be an aspect that has not been fully considered or overlooked.
9. Access to the scheme

Issue A: How can FOS simply and clearly define in the new Terms of Reference who is entitled to access the scheme, bearing in mind the need to maintain access for anyone who currently has access to the scheme?

Background

For AFS licensees, it is their retail client base that creates the legislative obligation to be a member of an EDR scheme. This has not limited financial sector EDR schemes to retail consumers. FOS’ three Divisions all currently have a broader reach than just retail client disputes.

- the General Insurance Division provides access to retail consumers and small businesses (Cl.3), and lists the products in respect of which disputes can be lodged with FOS. ‘Retail consumers’ includes small businesses that meet the definition of small business based on the number of employees. ‘Small business’ is separately defined according to an annual turnover test;

- the Investments, Life Insurance and Superannuation Division (“ILIS”) provides access to a person with “dealings or transactions” with a financial services provider participating in the scheme (Cl.7.1) but there is a discretion to exclude disputes by non-retail clients; and

- Banking & Finance provide access to an individual or a small business (Cl.2.1) but there is discretion to exclude disputes by high net worth individuals.

There are, however, mechanisms in place to limit the scheme’s reach beyond the legislative concept of a retail client:

- the ILIS division has a discretion to exclude disputes by non-retail clients – although this discretion has not been used in the year since it was introduced;

- the Banking & Finance division has a discretion to exclude disputes by high net worth individuals – although this has never been used; and

- ILIS and the General Insurance divisions have discretions (discussed later in this paper) that can, for example, be used to exclude certain disputes (generally those that might be characterised as commercial rather than consumer in nature).
Discussion

The FOS Board wants access to the scheme to be defined simply and clearly in the Terms of Reference, to assist consumers with understanding their rights and to avoid the inefficiencies associated with unnecessary jurisdictional disputes. It must also ensure that access to the scheme is not diminished by the new Terms of Reference.

Limiting jurisdiction to retail clients would exclude a range of disputes currently dealt with by FOS. It would exclude the range of general insurance business product disputes currently included in jurisdiction and also investments and Banking & Finance disputes where the discretion to exclude the dispute is currently available but usually not exercised.

At this time, it is not proposed to include any specific discretions for excluding particular classes of consumer – on the basis that the discretions currently available have not been proved to be needed, the other provisions of the Terms of Reference can more than adequately define who may have access and any such provisions will unnecessarily complicate the Terms of Reference. A simple construct is proposed.

Proposal: Description of consumers who can use FOS

The Ombudsman may consider a dispute brought by:
(a) an individual; or
(b) a small business meeting the small business criteria (discussed later)

Questions

1. Are there any impacts of the proposed description of consumers that have access to FOS that have not been adequately considered?

2. Are you aware of any circumstances in which discretions to exclude consumers because of their economic or business status would be essential to FOS operations?
Discussion

A “small business” is defined in the Corporations Act by reference to the number of employees.

As well as utilising this test for the purposes of specifying who has access to the scheme, the General Insurance ToR has an alternative definition that relies on annual turnover rather than employee numbers. For small businesses that fall within the annual turnover test, the General Insurance division currently considers claims disputes that pertain to a business insurance of the type listed in the ToR –non-claims disputes are not, however, considered. In general, ‘commercial’ insurance products are not included in the list of business products.

If the new Proposed Terms of Reference are drafted so as to determine small business access solely on the basis of the employee test, one consequence would be that companies with few or no employees would be eligible to lodge a dispute - even when they are part of a group of companies with a large number of employees.

A simple and commonly understood test would be to define small business as a business entity that, including companies in the same group of companies:

(a) is involved in manufacturing goods and has less than 100 full time or equivalent employees in the group; or
(b) is involved in activities other than manufacturing and has less than 20 full time or equivalent employees in the group.

For general insurance financial services providers, if the new Proposed Terms of Reference permit FOS to consider all small business disputes - claims and non-claims disputes - in relation to both general insurance products as defined in the Corporations Act and the currently listed business products in the General Insurance ToR, this would be an expansion of the current small business jurisdiction. (It should be noted that experience in Australia and overseas suggests that an expansion in the small business jurisdiction often does not change greatly the extent to which small businesses utilise external disputes handling schemes.)

Questions

3. Do you have a view on excluding access to FOS by otherwise eligible small businesses - if they are part of a group of companies that does not meet the eligibility criteria?
4. Do you have examples of small businesses that would be excluded by this provision?

5. Are there compelling reasons to consider different definitions for small business access for different sectors of the financial services industry?

6. For general insurers, what would be the implications if FOS could consider disputes (claims and non-claims) brought by any small business (as defined in terms of Group employees rather than turnover) in relation to one of the listed business insurance products?

7. Are there business products not currently listed in the General Insurance ToR that should be included in the new Proposed Terms of Reference as within FOS’ jurisdiction?
Background

Most financial sector EDR schemes around the world have a requirement that consumers must have been through Internal Disputes Resolution (IDR) prior to being able to lodge a dispute with the EDR scheme. This has been seen as making sure that the financial services participant has had a chance to resolve the matter with the consumer. Over the past few years, a number of schemes around the world have begun to make some exceptions to this rule – for example where there is some evidence that the financial services provider has not dealt with the issue promptly or in good faith – or where as a result of the dispute, the consumer is unwilling to deal with the financial services provider.

The ToRs of the three Divisions currently differ as to whether consumers must access IDR before coming to the scheme.

- General Insurance requires a consumer to first lodge a dispute with a financial services provider, and proceed through the provider’s designated IDR process. The financial services provider has 15 business days to respond to, or resolve the dispute. If the financial service provider either fails to provide an IDR decision within 15 business days or if the consumer is dissatisfied with the IDR decision then General Insurance Division will deal with the dispute. The GI division may also deal with a dispute where a consumer has raised a complaint with a financial services provider and the complaint remains unresolved for a period of 15 days.

- ILIS has no requirement that a dispute must be considered by a designated IDR process before it is lodged. But, before ILIS will consider a dispute, the dispute must have been raised with a financial service provider which has 45 days (sometimes longer) to respond to, or resolve the dispute. After this, when the dispute comes to ILIS, the financial services provider is given a further 21 days to provide ILIS with a response to the dispute.

- The Banking & Finance Division does not have an express requirement that a dispute must be reviewed by a designated IDR process in order for it to be lodged. However, consumers are encouraged to refer disputes to the financial services provider and the designated IDR before lodging.

- In some overseas schemes, dealing with insurance matters, the financial services provider must provide a formal letter of ‘deadlock’ before the EDR scheme can accept the dispute.

Issue C: How can FOS best promote speedy, ready access to the scheme, whilst preserving the important role of IDR?
Discussion

FOS believes that industry and consumers alike benefit where disputes are resolved in-house and so the primacy of robust internal disputes processes should be maintained.

On the other hand, FOS is conscious that internal processes can become extremely prolonged and this can lead to ‘dispute fatigue’ by consumers and legitimate disputes being abandoned.

- In a large organisation, it can be difficult for a consumer to find their way from the relevant business area (for example bank branch) to the designated IDR area.

- For a small financial services provider, a two tiered approach – a first review within the business and second review by a designated IDR officer – may not work from a resourcing perspective and may not add sufficiently to the independence and quality of decision making to warrant the extra time involved.

- From the consumer perspective, the distinction between the IDR area and any other area of the financial services provider is frequently meaningless. A two stage (or even three) internal process is often just a source of further frustration.

Arguably, the ideal scenario for the consumer that has received a ‘No’ from the financial services provider, irrespective of from which area, is that they should be able to lodge a dispute with FOS. The question then, is should FOS then deal with the dispute, and if so, how, if it has not been to the financial services provider’s IDR area. This draws the distinction between accepting a ‘lodgement’ and acting on the dispute.

FOS – and any EDR scheme – has two competing needs with respect to the relationship with IDR. In most instances, it is to ensure that a competent IDR process is given every chance to resolve the dispute with the consumer. That can mean providing additional time to the financial services provider’s IDR – extending the time taken for the consumer, but a good investment if there is a reasonable prospect of resolution.

On the other hand, FOS must be able to act decisively to deal with a dispute if the financial services provider is not putting genuine effort into dealing with the matter. In these cases, it is in the consumer’s interest for FOS to be able to commence its investigation and dispute resolution processes as soon as possible after the IDR time limit has expired.

This requires some flexibility within the Proposed Terms of Reference to enable FOS staff to determine, in consultation with the parties, whether IDR has been completed and to exercise judgement as to what the best course of action is. This flexibility may need to be defined through policy guidance.

ASIC’s Regulatory Guide 165 places emphasis upon short timeframes for internal processes and expresses the view that a substantial response should be provided within 45 days save in exceptional circumstances.
Preferred option

A consumer should be able to lodge a dispute with FOS if they have already made a complaint to any area or department of the financial services provider and the dispute remains unresolved. FOS should be able to make a judgement as to referral of such a dispute back to IDR or whether to commence investigation if the time limit for IDR has elapsed.

Questions

8. Should FOS itself refer disputes to the IDR area if the complaint has been raised with any area of the financial services provider and remains unresolved (rather than requiring the consumer to do this themselves)?

9. What steps should FOS take when using its discretion to commence investigation of disputes that have been with IDR for longer than the ASIC-prescribed time limit?
10. Types of disputes that FOS can consider

**Background**

All three Division ToRs specify special types of disputes that can be considered by the Ombudsman that do not arise from a direct customer-service provider relationship. In particular:

- General Insurance – a motor vehicle insurance third party property claim; or
- ILIS – a claim brought by an individual with a beneficial or other special interests in a product or transaction;
- Banking & Finance division - the provision of security for a financial service.

FOS’ primary focus is disputes relating to the provision of financial services. But the Banking & Finance ToR also expressly give the Ombudsman the ability to consider confidentiality and privacy issues.

The ILIS ToR and Banking & Finance ToR limit FOS’ jurisdiction in relation to dealings outside Australia (although somewhat different language is used).

**Discussion**

The FOS Board is committed to ensuring that there is no reduction in the types of disputes that it will be able to consider under the new Proposed Terms of Reference. Consistent with this, the special case provisions in each existing ToR will need to be expressly incorporated or allowed for in the framing of the new provisions.

Another important consideration for the Board is efficiency. Quite often a consumer raises privacy issues at the time of a dispute about the provision of financial services. The Banking & Finance Division’s experience is that there are efficiencies in the scheme being able to deal with privacy issues concurrently with financial services issues, rather than privacy issues separately going through to the Privacy Commissioner. This seems to be a worthwhile addition to the FOS jurisdiction. Note that the Australian Law Reform Commission has also recommended that EDR schemes consider privacy disputes.
FOS does not want to encompass matters that do not have a close nexus with Australia, however the scheme does need to accommodate disputes that pertain to, for example, Australian credit cards or insurance used overseas, or building insurance for an Australian property even if the insured is located overseas at the time of taking out the insurance.

Preferred option

At this stage of thinking, the intention is to:

(a) Require that the financial service must originate from a contract formed or an obligation arising under Australian law;

(b) Combine the special case disputes in the three divisions into a single clause; and

(c) Extend the Ombudsman’s powers to consider confidentiality and privacy disputes that currently apply to the Banking & Finance division to all divisions.

Proposal

The Ombudsman may consider disputes between financial services providers and consumers that arise from a contract formed or an obligation arising under Australian law in respect of:

- the provision of a financial service directly to the consumer;
- the provision of security for a financial service;
- a beneficial or other special interests in the product or transaction;
- a motor vehicle insurance third party property claim; or
- a dispute that relates to the privacy or confidentiality of a consumer in which case the Ombudsman may make any determinations, awards, declarations, orders or directions that the Privacy Commissioner may make under section 52 of the Privacy Act.

10. Are you aware of any disputes that should be within the scheme's jurisdiction in relation to contracts or obligations created outside Australia?

11. Are there any other circumstances in relation to the provision of a banking, investment or insurance product where the dispute should be considered by FOS even though the consumer is not a customer or client of the financial services provider?

12. Are there any difficulties that arise from FOS jurisdiction to consider disputes about privacy or confidentiality in relation to investments or insurance disputes?
Background

For EDR schemes in any sector, there are areas of potential dispute that are sensibly excluded from jurisdiction. First, jurisdiction is limited to financial services providers participating in the scheme. In the financial sector, exclusions are principally aimed at questions of the operations of the competitive market, the application of commercial judgement and the commercial returns achieved.

As in any system of redress, there is also a need to place some limits around timeframes for accessing the scheme.

- The General Insurance ToR refers to the relevant statute of limitations and to a 3-month time limit to lodge a dispute after referral to IDR.
- ILIS ToR excludes disputes where the consumer knew or could reasonably have known all the relevant facts (i.e. sufficient to be aware they had grounds to pursue a dispute) more than 6 years before lodging a dispute.
- The Banking & Finance ToR excludes disputes about events arising more than 6 years before the dispute is first raised.

Discussion

The FOS Board is committed to ensuring that the new Terms of Reference do not close off any consumer access to the scheme that is currently available while also achieving a common set of exclusion rules to apply across all types of disputes that will come to FOS.

Proposal

It is proposed to list the following exclusions in the new Proposed Terms of Reference:

(a) Non-participating financial services providers of FOS – at the time a dispute is received by FOS;

(b) Disputes relating to a financial service provider’s commercial judgment, with the exception of medical indemnity disputes, but including:
i. The management of a fund or scheme as a whole;
ii. A decision as to how to allocate the benefit of a financial product between competing beneficiaries;
iii. The assessment of risk in relation to the provision of a financial service, unless there was maladministration in lending in relation to the provision of a banking service, or an insurance proposal rejection was indiscriminate, malicious or based on incorrect information; and
iv. Variations to a credit contract under the Uniform Consumer Credit Code.

(c) The performance of an investment product, except a dispute concerning non-disclosure or misrepresentation;

(d) The practice or policy of a financial services provider, including general interest rate policy, the level of an insurance premium or fees and charges policy. FOS can consider a dispute about the application of a fee or charge in breach of contract.

In relation to timeframe, the proposal is to set a single time frame of six years from the date of the cause of action or from when the consumer should have reasonably known of all the facts, whichever is later.

13. Do the proposed exclusions from FOS’ jurisdiction in paragraphs (a) to (d) above adequately address those matters that should be excluded?

14. Are there any reasons why a single time frame of six years from the date of the cause of action or from when the consumer should have reasonably known of all the facts, should not apply to FOS?
Background

EDR schemes around the world limit their jurisdiction where the dispute is subject to proceedings in some other forum such as a court or tribunal. There are differences across the FOS Divisions in the existing treatment of prior, concurrent and possible future alternative proceedings. There are also differences in the existing ToRs as to whether the exclusion can be overcome by the agreement of the parties to the dispute.

- The General Insurance ToR exclude a dispute if court proceedings “have been commenced”, or if dispute “is, or is likely to be, the subject of proceedings before any court, tribunal, board or other body or person with jurisdiction to hear any criminal proceedings, or to conduct any coronial inquiry, or any other judicial or administrative inquiry.”

- The ILIS ToR exclude any dispute which has been “dealt with” or is currently being dealt with, by a court tribunal or other EDR scheme.

- The Banking & Finance Division ToR exclude the consideration of any dispute where the subject “is, was or becomes the subject of any proceedings in any court, tribunal, arbitrator, or independent conciliation body or an investigation by a statutory Ombudsman of any jurisdiction unless the parties consent.”

There is also the question of whether FOS should decline to consider disputes where the parties have already reached a settlement. Financial services disputes handling schemes in other jurisdictions decline to re-open settled matters, unless the consumer can show that they were unaware of the availability of the EDR scheme at the time of the settlement.

Finally, there is the issue of whether FOS should have a discretion to decline to consider a dispute where FOS believes that another forum would be more appropriate. This currently applies in the Banking & Finance Division. A discretion of this kind could be used to exclude disputes that are more appropriately decided by another EDR scheme. This is consistent with the current exclusion in the ILIS ToR (Cl.14.1(i)) concerning decisions made by trustees of approved deposit funds and regulated superannuation funds which are dealt with by the Superannuation Complaints Tribunal.
Discussion

FOS does not have the power to overturn a court judgment and does not consider matters where there has already been a court judgment or a ruling of a tribunal or proceedings of this kind have been commenced.

It is less clear whether a consumer who has been involved in an independent conciliation process such as that offered by state government consumer affairs departments, should be able to lodge a dispute with FOS if the conciliation process does not resolve the dispute.

Where proceedings have not been commenced, it would seem inappropriate for a financial services provider to avoid FOS’ jurisdiction by contemplating possible future proceedings.

Proposal

It is proposed that FOS will not consider a dispute where:

(a) proceedings are underway in a Court or Tribunal or another EDR scheme in relation to the dispute;
(b) the dispute was the subject of an arbitration or a decision of a Court, Tribunal or another EDR scheme;
(c) the parties have agreed to a settlement of the dispute; or
(d) FOS considers another forum more appropriate.

This would enable consumers to lodge a dispute with FOS if they were unable to resolve the dispute through any negotiation or conciliation processes.

Questions:

15. Are there any circumstances in which FOS should be prepared to re-open a dispute where the parties have agreed to settle?

16. Should the ToR provide jurisdiction if there is agreement from the parties to consider the dispute?

17. Are there any reasons why the Ombudsman should not have the power to decline to consider a dispute if in his/her view there is a more appropriate forum?
Background

Currently FOS can consider a dispute involving an amount of up to $280,000 per claim, except that the ILIS Division applies a limit of $6,000 per month (based on the face value of the policy) to income stream life insurance disputes, and $150,000 to disputes that do not pertain to life insurance.

The Federal Court decision in *FICS v Deakin* interpreted “claim” (the term used in the ILIS Division ToR) as equivalent to a cause of action. The Banking & Finance ToR requires the aggregation of claims for the purposes of the monetary limit if they are related.

As a requirement of their ToRs, both ILIS and General Insurance review their monetary limits every three years, in ILIS’ case there is automatic indexing in accordance with the CPI. The BFSO Board resolved to review its jurisdictional limit every three years.

At the moment, the Divisions’ ToR do not expressly allow consumers to ‘opt-in’ by reducing their claim to the amount of a monetary limit and effectively abandon a claim to any amount in excess of that limit. This is something that some schemes in other jurisdictions permit.

Discussion

The FOS Board is committed to ensuring that the new Proposed Terms of Reference do not close off access to the scheme that is currently available.

There is also a strong preference for aligning, to the extent possible, the monetary limits applicable to the three FOS Divisions. From a consumer perspective, it is the extent of financial loss that is generally significant, rather than the type of financial service or product that resulted in the loss. Also, the costs of justice barriers for the consumer pursuing legal avenues of recovery are essentially the same across financial services. From a consumer perspective, there is little basis for distinguishing between the FOS Divisions for the purposes of defining monetary limits.

FOS recognises that smaller financial services providers have rather less ability to absorb and/or amortise dispute-related losses than larger providers – and that smaller providers are more common in some sectors of the financial services industry. It is also true that some financial services providers derive very low levels of income from transactions that may have proportionally much larger potential for loss, although the retail client professional indemnity insurance requirements that commenced on 1 July 2008 may change the equation somewhat.

| Issue G: What should be the monetary limits to FOS jurisdiction? How can FOS best achieve consistency of approach to this matter across the Divisions? |  |
In any event, it is not clear that the current differentials actually reflect the size of the financial services providers in a particular sector, or the capacity to absorb loss or the typical size of disputes. There is clearly a significant component of the differences that could simply be put down to history. In addition the proportion of disputes that are anywhere near the monetary limits are a relatively small proportion of all complaints. In Australia and other jurisdictions, the experience is that although they attract a great deal of attention, adjustments to upper monetary limits have only a marginal impact on numbers of disputes admitted to jurisdiction.

The possibility of abandoning jurisdictional limits as currently apply and replacing them with a cap (or caps) on FOS’ power to make an award shows some potential for simplifying the jurisdiction tests and providing some efficiency. Under this system, there is no monetary limit to admitting a dispute – however the consumer must accept that FOS has limited power to make an award. Where the dispute involves an amount above that limit, if the consumer accepts a decision in their favour, they will forego that excess amount.

Note also that the current ILIS monetary limit ($150,000) is equivalent to (almost) two years of payments of the current monthly income stream monetary limit of $6000 per month. This is not by design but offers the option of fixing that ratio as a simplified way of keeping monetary limits in step.

There are five elements to designing the monetary limits for the Proposed Terms of Reference.

(a) The quantum of the limits and whether they are the same across all products;
(b) Whether compulsory aggregation of related claims is necessary;
(c) The ratio between the lump sum limit and a monthly income stream limit;
(d) Whether there should be an ‘opt-in’ mechanism; and
(e) The method of periodic adjustment of the monetary limits

Options

Some of the example combinations of options that might be adopted include:

(a) Retain the current differential monetary limits for disputes about different financial services and establish a common method of periodic adjustment.
(b) Adjust the monetary limits across the Divisions to simpler limits with the largest increases applicable to the financial sectors that currently operate under a lower monetary limit – bringing the limits closer to alignment but retaining some differential. For example, the new monetary limits could be $200,000 for an investment dispute, $300,000 for banking or lump sum insurance dispute and $10,000 per month for income stream insurance disputes.
(c) A version of both of the above might be to commit to a single monetary limit to all disputes – but to progressively move to that over time by a series of annual adjustments that bring the limits closer together.

(d) Apply a single monetary limit to all disputes equating to the current highest limit of $280,000 (or some increased amount) and fix an equivalent ratio for the monthly income stream limit to 24 months of payments (eg. $280,000 /24 = $11,650 per month approx). Establish a common method of periodic adjustment.

Questions:

18. Do you support a common monetary limit for lump sum disputes across the FOS jurisdiction?

19. If a common monetary limit is not applied to FOS disputes jurisdiction, what policy basis should be used to establish and maintain differential limits for sectors or products?

20. Should there be a fixed ratio between the lump sum monetary limit and the monthly income stream limit? If not, what should be the basis for fixing the monthly income stream limit?

21. What are the reasons why consumers should or should not be allowed to ‘opt-in’ to the FOS monetary jurisdiction?

22. If either a ‘cap’ system of limiting the Ombudsman’s power to award, or a discretion to the consumer to ‘opt-in’ were to be used, what would the impact be? What measures would be required to manage that impact?

23. Should the monetary limit(s) be required to be reviewed by the Board every three years or automatically indexed to CPI every three years?
11. Dispute resolution

**Background**

Although the dispute resolution steps are broadly similar, FOS’ three predecessor schemes have had different models for decision making:

- Under the General Insurance model, a Case Manager prepares a draft determination for consideration by the appropriate decision maker – the Adjudicator where the dispute is under $5,000 or a 3 person Panel where the dispute is in excess of $5,000. In addition, there is a Referee who considers matters where fraud is alleged and has the power to follow a somewhat different decision making process. The current Panel Chairs are also appointed as Adjudicators and Referees. No right of appeal exists.

- Under the ILIS model a Panel Case Manager prepares a draft document outlining the matters for consideration by the appropriate decision maker – the Adjudicator for disputes under $30,000, or a 3 person Panel for disputes over $30,000. The Panel or Adjudicator then reviews the whole of the file, with the draft document being an aid in this process. The Panel Chair, in consultation with the Panel Members, or the Adjudicator, then prepares and finalises the Determination for issue. The Panel Chairs are also appointed as Adjudicators. A limited right of review exists in the ILIS model.

- Under the Banking & Finance model, a Case Manager issues a Finding. If either party is dissatisfied with the Finding, they may ask for the matter to be considered by the Ombudsman (the Ombudsman’s decision is referred to as a Recommendation). This may be appealed by the financial services provider in which case the Ombudsman reconsiders the matter with a view to making a binding decision (referred to as a Determination). In practice, financial services providers do not exercise this ‘second’ appeal right (no Determination has been made in over 12 years).

In other countries, the Ombudsman model is the most common model, most operating in a similar way to the Banking & Finance Division.
Discussion

The FOS Board takes the view that there is nothing sacred about either an Ombudsman model or an Adjudicator/Panel model for decision-making. Equally, models of conciliation have their place in EDR. All of them are perfectly valid methods of decision-making and should be able to be used where most appropriate. The important thing is to use the most effective and efficient models for the type of complaint and circumstance.

Although FOS has chosen the terminology of “Ombudsman”, this should not constrain the decision-making models available to it. A panel of decision-makers can act as an ‘ombudsman’ through its Chair.

The following description is not intended as an in depth consideration of all the issues and there can be significant variations to the general rule - each of the decision-making models have characteristic strengths and weaknesses.

The Panel system can provide greater initial stakeholder confidence in the objectivity of the decision-making – as Panels are typically made up of an independent Chair and an industry and a consumer representative.

The Panel system can be made to operate quite quickly and given the larger number of people involved in the decision-making, is better suited to a no-appeal regime. On the other hand, there is typically numbers of hand-offs in the process, with each step having to come up to speed on the facts of the matter, potentially significantly slowing the pre-panel process. These processes are quite costly to administer and require significant support staffing.

Panel systems have the advantage of bringing multiple perspectives to bear on an individual matter, however for that reason and because of the composition of Panels, may be less consistent in decision-making over the medium to long term.

An Ombudsman system is more like a modern management system and less like a court. The processes of investigation and decision-making lend themselves to techniques such as supervisor and peer review and where there is a system of appeal/review, the feedback from the more senior decision-maker filters down to case managers producing, over time, a self-generating improvement in consistency of decision-making.

Workload is managed more easily, as there are no external, independent decision-makers to coordinate. They are typically less costly, however care needs to be taken to prevent timeframes gradually extending over time (as processes are enhanced and added to) and to ensure that thinking is challenged and refreshed from time to time.

Although there is a great deal more work to be done to analyse the detail of procedures that might apply in an integrated process, some issues that apply to the Board’s principles for the Proposed Terms of Reference are set out below:

- Whether it is more sensible and efficient for a first-level decision to be formed and drafted by the case manager who conducts the initial information gathering, investigation and any attempts at conciliation or negotiation.

- Whether it is appropriate to divide disputes between a single decision maker or a 3 person Panel based solely on the value of the dispute or claim.
• Whether a consistent decision making model across banking, investments and insurance complaints would seem desirable - whether this is a single person decision making model, a 3 person Panel model or something in between.

• Product and sector expertise will be important – not only for quality decision-making but also for stakeholder confidence. Whatever the model – specialisation will need to be a key feature.

• The special fraud processes in place in General Insurance have developed to meet particular needs, however they are not used for example by the New Zealand Insurance and Savings Ombudsman. Are they necessary into the future?

• Whether the policy of publishing Determinations, Guidelines to the Terms of Reference and Bulletins should continue?

Options

(a) Ombudsman model

Under this model, senior FOS staff would analyse the merits of a complaint and provide both parties with a written assessment setting out the findings as to fact and the compensation that should be paid (if any). FOS staff could obtain expert advice from industry advisers, consumer advisers or legal counsel where appropriate.

If either party wished to do so, this assessment would be reviewed by a single person decision maker - an Ombudsman - who could issue a determination binding upon the scheme financial services provider.

There would be a number of Ombudsmen appointed each of whom would have to be independent of industry and the consumer movement and appointed by the Board. For example, the current Panel Chairs could all be appointed as Ombudsmen.

(b) Panel model

Under this model, matters would not be decided by an Ombudsman but rather by a 3 person Panel comprising an independent Chair, a consumer representative and an industry representative.

(c) Mixed model

At some cost to simplicity and the aim of a single process, it may be necessary to have a mixed model of decision-making for the medium term at least – to allow for the development of shared knowledge of the different types of disputes and for best practice to evolve. This could operate by directing disputes to a single Ombudsman or panel. The panel would operate as they do currently but with the decision being signed off by the panel chair as Ombudsman.
Questions

24. If an Ombudsman model is adopted rather than a Panel model, what arrangements would best give the Ombudsmen access to industry/consumer expertise?

25. If you have experience of both systems, do you think that the Ombudsman model or the Panel model would best deliver fair and consistent decision making in the most time and cost efficient manner?

26. Should there be a different dispute resolution process for General Insurance fraud disputes?
Background

Currently each of the three FOS Divisions investigate disputes, attempt to resolve disputes by negotiation and determine disputes. If FOS cannot deal with a dispute, it will advise the parties and provide reasons for its conclusions.

FOS ensures that all information and documentation provided by the parties to a dispute or obtained by FOS in the investigation of the dispute is provided to all parties to a dispute. The exception is where any party to a dispute supplies information with a request of confidentiality - then FOS must not disclose that information without consent to any other person except as required by law. If consent is not given, FOS does not use that information to reach a decision adverse to any party to whom confidential information is denied, except in special circumstances as prescribed by the General Insurance Terms of Reference.

In determining disputes, FOS must have regard to the:

- law;
- applicable industry codes or guidelines;
- good industry practice; and
- fairness in all the circumstances.

Consistent with external schemes in other jurisdictions, FOS is not bound by any legal rule of evidence or by any previous decision it makes.

Discussion

Whilst at this high level, the three FOS Divisions follow the same approach, there are significant differences in detail in their processes.

Proposed approach

As discussed elsewhere, FOS does not wish to set out the detail of its processes in the Terms of Reference. To do so would be to unduly restrict FOS – in continuous improvement endeavours and in the flexibility required to encompass additional financial

| Issue I: FOS wants its Terms of Reference to offer the flexibility to encourage continuous improvement and to enable FOS to cover additional financial services in the future. Given this to what extent should the Terms of Reference specify the dispute resolution processes to be followed by FOS? |
services. FOS’ management should be accountable to the FOS Board for developing and implementing detailed procedures that ensure that FOS provides a continuously improving disputes handling service for the benefit of FOS’ financial services providers and consumers alike. Of course, it will often be appropriate to consult with industry and consumer representatives in the course of developing and improving those detailed procedures.

It is intended that the following simple provision would be sufficient to be adopted in the Proposed Terms of Reference to describe the Disputes Resolution Procedures.

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**Proposal**

(a) **Dealing with a dispute**

When FOS receives a dispute it will investigate the matter and attempt to resolve the dispute by negotiation, conciliation, recommendation or determination.

If FOS cannot deal with a dispute it will advise the parties and provide reasons for its conclusions.

(b) **Exchange of information & confidential information**

All information and documentation provided by the parties to a dispute or obtained by FOS in the investigation of the dispute, will be provided to all parties to a dispute.

If any party to a dispute supplies information to FOS and requests it be treated confidentially, FOS must not disclose that information to any other party to the dispute or any other person, except with the consent of the person supplying the information or as required by law.

If consent is not given, FOS is not entitled to use that information to reach a decision adverse to any party to whom confidential information is denied.

(c) **Criteria for decision making**

In making any decision in relation to a dispute FOS must have regard to the:

i) law;

ii) applicable industry codes or guidelines;

iii) good industry practice; and

iv) fairness in all the circumstances.

(d) **Rules of evidence**

FOS shall not be bound by any legal rule of evidence.
(e) Previous decisions

FOS is not be bound by any previous decision made by it.

Questions

27. Do you have any comments about the general principle of limiting the amount of procedural detail in the Proposed Terms of Reference?

28. Do you have any comments about the FOS dispute resolution procedures described in (a) – (e) above?

29. If you have experience with more than one FOS Division, are there advantages or disadvantages from your perspective to common dispute resolution procedures as described?
12. Awarding compensation

Issue J: How can FOS best achieve consistency in its approach to awarding compensation across the Divisions?

Background

Currently all three FOS Divisions award compensation for direct economic loss but there are differences between the Divisions as to the availability of other types of compensation.

- The Banking & Finance ToR provide that compensation should be “fair and appropriate to compensate the disputant for any loss or damage the disputant has suffered because of the conduct of the financial services provider in relation to the event the subject of the dispute” (Cl 7.11).

“Loss or damage” is interpreted in the same way as the courts and includes non-financial loss and consequential loss. Non-financial loss claims arise particularly in disputes about a breach of privacy or confidentiality. The Banking & Finance ToR Guidelines (available on BFSO website – www.bfso.org.au under Publications) explain the approach taken to compensation.

- ILIS can award compensation for any financial or economic loss or damages but not for indirect/punitive damages or claims for pain and suffering.

All three FOS Divisions can award interest on monetary claims, and can award compensation for legal and other costs incurred by a consumer in a dispute. Each Division has a different basis used to calculate the amount of any interest awarded. ILIS also has a $2,500 cap on legal and other such costs.

Banking & Finance and General Insurance include any interest or costs claimed by a consumer in the claim amount for the purposes of their monetary limits. The ILIS monetary limits do not apply to any interest claimed or awarded.

Discussion

The FOS Board is committed to ensuring that the new Proposed Terms of Reference do not reduce the scope of the remedies that the scheme is currently able to provide. There is also a strong preference for aligning, to the extent possible, the three FOS Divisions’ approach to providing remedies.
FOS is also mindful that ASIC Regulatory Guide 139 establishes an expectation that claims for opportunity costs and for non-financial loss will be considered where appropriate.

On the other hand, FOS’ procedures do not permit the testing of evidence under cross examination and so it is not possible to explore in detail the ramifications for an consumer of problems caused by the consumer’s financial services provider. Because of this, FOS – like other external disputes handling schemes in Australia and other jurisdictions – typically only provides fairly nominal awards for non-financial loss or opportunity costs in Banking & Finance disputes.

**Preferred option**

The Proposed Terms of Reference should give FOS broad compensation powers. So as to create certainty for financial services providers and to ensure that consumer expectations are appropriately constrained, FOS should set out detailed guidance as to its approach in awarding compensation for non-financial loss.

**Questions:**

30. Should FOS have the ability to award compensation for non-financial loss?

31. Should FOS have the ability to award compensation for consequential loss?

32. Should there be any limits specified in the Proposed Terms of Reference as to the amount that can be awarded by FOS in relation to these types of losses?

33. When calculating the amount being claimed for the purposes of the monetary limit, should claimed non-financial losses and interest be included?
13. Appeal procedures and test cases

**Issue K:** Should FOS offer the parties to a dispute the opportunity to ask for the decision to be re-visited?

**Background**

The General Insurance Division of FOS use a Panel and Adjudicator system for decision-making and its existing ToR does not offer an avenue for appeal to either consumer or financial services provider. The ILIS Division also uses a Panel and Adjudicator system for decision-making and does provide limited grounds for review of a decision, including where a decision is obtained by fraud, or a party has not been provided with a reasonable opportunity to address a material issue or information prior to a decision. The Banking & Finance Division offers both parties an internal right of appeal.

- If either party is dissatisfied with a Banking & Finance Division Finding (a detailed written assessment by a Case Manager that is not binding upon the parties), they may ask the Ombudsman to revisit the decision and substitute his/her Recommendation for the earlier Finding. Both parties have an opportunity to make submissions. (The Ombudsman's Recommendation is still not binding upon the parties.)

- The financial services provider may ask the Ombudsman to reconsider a Recommendation with a view to making a binding decision (referred to as a Determination). In practice, financial services providers do not exercise this second appeal right (no Determination has been made for 12.5 years).

Many other Ombudsman schemes, including the New Zealand Insurance and Savings Ombudsman, provide an internal appeal mechanism – ie. the Ombudsman will, on request, revisit a written decision made by a Case Manager, however this is only where there is some new information provided.

**Discussion**

An external complaints handling scheme exists to provide a speedy but fair resolution for the parties. Resource-intensive appeal mechanisms, for example, involving multiple levels of decision makers, are clearly not consistent with this remit. It would also be inefficient if appeals became a matter of course for participants, making the first stage decision ineffective and adding time and cost unnecessarily.

That said, the experience of many EDR schemes is that the option of an internal appeal mechanism is well regarded by financial services providers and consumers – even when the statistics show that the appeal decision comparatively infrequently overturns the original decision.
An internal appeal mechanism can also provide another avenue for quality assurance, feedback and communication of standards for decisions between levels of staff in the EDR scheme.

It seems clear that the two levels of appeal available to financial services providers (but never used) under existing Banking & Finance ToR is an unnecessary complication.

If FOS introduces a first level decision that can be appealed by both parties to the dispute, the following is an indication of the provisions that will apply.

**Proposal**

(a) If a dispute cannot be resolved by negotiation or conciliation FOS may make a Recommendation to the parties to the dispute.

(b) **Form of Recommendation**
   The Recommendation must:
   a) be in writing;
   b) include the reasons for the recommendation; and
   c) include details of how the dispute should be resolved.

(c) **Effect of Recommendation**
   If either party to a dispute notifies FOS within one calendar month that it does not accept a recommendation FOS may continue to consider the dispute and may make a determination.

(d) **Determinations**
   If a dispute is not resolved by a recommendation an Ombudsman may make a Determination.

(e) **Form of a Determination**
   A Determination must:
   a) Be in writing;
   b) Include the reasons for the Determination; and
   c) Include details of how the dispute should be resolved.

(f) **Effect of a Determination**
   A consumer is free to accept or reject a Determination. A Determination is only binding on a financial services provider if a consumer accepts a Determination. If a consumer rejects a Determination the consumer may proceed with any other remedy which may be available, such as bringing an action in a court.
(g) **Time limits and extensions of time**

FOS has the discretion to modify any time limit set out in these Terms of Reference or the Guidelines to these Terms of Reference provided neither party is prejudiced by the modification of time.

**Questions**

34. What would be the advantages or disadvantages of allowing both parties an opportunity to make submissions where a Recommendation was appealed to Determination stage?
Background

The purpose of the “test case” provision in the ToR is to provide an avenue for matters of great significance to be considered by a court, rather than being decided by FOS.

The three Divisions have similar criteria for matters that could be treated as a “test case”.

- the General Insurance ToR requires an important issue of law of general application;
- the Banking & Finance ToR requires either an issue which may have important consequences for the business of the financial services provider or financial services providers generally or an important or novel point of law; and
- the ILIS ToR requires a matter of such significance that it should not be dealt with by the Service.

There are differences in the procedures and allocation of costs for a “test case”. All current ToR require the financial services provider to undertake to pay the consumer’s costs in any subsequent legal proceedings, but the General Insurance ToR specify party/party costs while the others specify solicitor/client costs, and the Banking & Finance ToR require the proceedings to be instituted within 6 months (the other ToR are not time limited).

Discussion

Whilst the “test case” process is undoubtedly important, FOS is conscious that this process can diminish access to the scheme if the provision is invoked at an early stage in the dispute resolution process and before a decision is made by FOS. Accordingly it is important that there are appropriate bounds around this process and the legal cost payment arrangements are fair to consumers. FOS also has a strong preference for establishing a single approach across the Divisions to the “test case” situation.

| Issue L: How should the “test case” process be structured so that consumers are not disadvantaged by the lack of access to FOS? |
Preferred option

Provided that an appeal stage is built in to the processes, a financial services provider may give notice of a “test case” in response to an initial written decision (Recommendation) by FOS. The criteria for the test case would be:

(a) an issue which may have important consequences for the business of the financial services provider or financial services providers generally; or

(b) an important or novel point of law.

The financial services provider will pay the consumer’s costs in relation to the initial proceedings and any appeal on a solicitor/client basis.

Questions:

35. Does this approach to the “test case” process appropriately balance financial services providers interests in ensuring that really significant matters are determined by the Courts and fairness to consumers given that they may be deprived of access to FOS if process invoked before the decision is made?
14. Reporting externally

**Issue M.** Regulatory Guide 139 requires FOS to include in its Terms of Reference its procedures for identifying, addressing and reporting systemic issues and serious misconduct. Whilst detail will be set out in supporting procedures, how can FOS best meet ASIC’s expectations and provide clarity for its financial services providers as to what FOS will do in this area?

**Background**

ASIC’s Regulatory Guide 139.62 requires FOS to identify systemic issues and cases of serious misconduct, refer such matters to the financial services provider for response and action and report information about systemic issues or serious misconduct to ASIC. RG 139.69 requires procedures for dealing with systemic issues and serious misconduct to be set out in the ToR.

**Discussion**

ASIC places emphasis in Regulatory Guide 139 on a scheme’s role in the identification, reporting and addressing of systemic issues and serious misconduct. In order for FOS to maintain its status as an ASIC approved scheme, FOS needs to meet these expectations.

**Preferred option**

The new Proposed Terms of Reference should oblige FOS to:

- use its complaints handling experience to identify possible systemic issues and serious misconduct;
- raise identified matters with the financial services providers concerned and investigate to determine the extent of any problems;
- report systemic issues and serious misconduct to ASIC.

The ToR will define terms consistent with the terminology in Regulatory Guide 139:
• a systemic issue is an issue which will have a material effect for individuals or small businesses beyond the parties to the dispute;

• serious misconduct is conduct which may be fraudulent, grossly negligent or involve wilful breaches of applicable laws or a failure to comply with the Terms of Reference and supporting guidelines and procedures of FOS.

Questions:

36. Would the inclusion of examples assist in the understanding of what constitutes systemic issues? The examples that ASIC gives in RG139 are: poor disclosure or communication, administrative or technical errors, product flaws and improper interpretation or application of standard terms.

37. Is the definition of ‘serious misconduct’ sufficiently clear and the ambit appropriate? What can be done to minimise the “grey area” as to what is reportable and what is not?
Appendix A - Proposed Chapters for Proposed Terms of Reference

Chapter 1: The Service

Aim
Independence
Cost to Consumers
Obligations of financial services providers
Reference to obligation to comply with TOR or a Determination in accordance with the Constitution

Chapter 2: The Board

Overseeing the Scheme/Service
Ensuring adequate funding
Amending TOR
No power to override a Determination
Appointment of Chief and Panel/Ombudsmen

Chapter 3: The Chief Ombudsman

Powers and Duties – Chief Ombudsman
Procedures for dispute handling and other internal functions
Development of Guidelines to the TOR
Day to day operations
Budget
Information gathering
Promotion of the Scheme/Service
Delegations

Chapter 4: The Ombudsman/Panel

Powers and Duties – Ombudsman/Panel
Broad power to deal with disputes – conciliate, resolve, issue Determinations
Appointment of Ombudsman and Panel

Chapter 5: Jurisdiction of the Ombudsman

Disputes within jurisdiction: Who can complain and which disputes
List of required features covering status of person, status of financial services provider, time frames, type of claim (eg privacy), product, amount of claim
Disputes outside jurisdiction: Who cannot complain and which disputes
Frivolous, vexatious, no loss, lacking in substance
Chapter 6: Dispute Resolution

Power of FOS to conciliate, resolve disputes at all stages of dispute process
Procedures as established by Chief Ombudsman
Obligations regarding provision of information
Decision making criteria
Recommendations
  FOS may make a Recommendation about the dispute, form of
  Recommendation and reference to appeal process for Determination
Determinations
  Binding decision
  Process for acceptance of Determination
Awards
  What sorts of awards can be made – include reference to loss including
  money, act by financial services provider, non financial loss and cross
  reference to monetary limits as required

Chapter 7: Test cases

Chapter 8: Systemic Issues and Serious Misconduct

Chapter 9: Changes to the TOR

Chapter 10: Transitional Provisions

  Include issues re timing, monetary limits, disputes already with existing Service,
  no option to re-open closed cases

Chapter 11: Interpretation
Appendix B – List of Questions

1. Are there any impacts of the proposed description of consumers that have access to FOS that have not been adequately considered?

2. Are you aware of any circumstances in which discretions to exclude consumers because of their economic or business status would be essential to FOS operations?

3. Do you have a view on excluding access to FOS by otherwise eligible small businesses - if they are part of a group of companies that does not meet the eligibility criteria?

4. Do you have examples of small businesses that would be excluded by this provision?

5. Are there compelling reasons to consider different definitions for small business access for different sectors of the financial services industry?

6. For general insurers, what would be the implications if FOS could consider disputes (claims and non-claims) brought by any small business (as defined in terms of Group employees rather than turnover) in relation to one of the listed business insurance products?

7. Are there business products not currently listed in the General Insurance ToR that should be included in the new Proposed Terms of Reference as within FOS’ jurisdiction?

8. Should FOS itself refer disputes to the IDR area if the complaint has been raised with any area of the financial services provider and remains unresolved (rather than requiring that the consumer to do this themselves)?

9. What steps should FOS take when using its discretion to commence investigation of disputes that have been with IDR for longer than the ASIC-prescribed time limit?

10. Are you aware of any disputes that should be within the scheme’s jurisdiction in relation to contracts or obligations created outside Australia?

11. Are there any other circumstances in relation to the provision of a banking, investment or insurance product where the dispute should be considered by FOS even though the consumer is not a customer or client of the financial services provider?
12. Are there any difficulties that arise from FOS jurisdiction to consider disputes about privacy or confidentiality in relation to investments or insurance disputes?

13. Do the proposed exclusions from FOS’ jurisdiction in paragraphs (a) to (d) above adequately address those matters that should be excluded?

14. Are there any reasons why a single time frame of six years from the date of the cause of action or from when the consumer should have reasonably known of all the facts, should not apply to FOS?

15. Are there any circumstances in which FOS should be prepared to re-open a dispute where the parties have agreed to settle?

16. Should the ToR provide jurisdiction if there is agreement from the parties to consider the dispute?

17. Are there any reasons why the Ombudsman should not have the power to decline to consider a dispute if in his/her view there is a more appropriate forum?

18. Do you support a common monetary limit for lump sum disputes across the FOS jurisdiction?

19. If a common monetary limit is not applied to FOS disputes jurisdiction, what policy basis should be used to establish and maintain differential limits for sectors or products?

20. Should there be a fixed ratio between the lump sum monetary limit and the monthly income stream limit? If not, what should be the basis for fixing the monthly income stream limit?

21. What are the reasons why consumers should or should not be allowed to ‘opt-in’ to the FOS monetary jurisdiction?

22. If either a ‘cap’ system of limiting the Ombudsman’s power to award, or a discretion to the consumer to ‘opt-in’ were to be used, what would the impact be? What measures would be required to manage that impact?

23. Should the monetary limit(s) be required to be reviewed by the Board every three years or automatically indexed to CPI every three years?

24. If an Ombudsman model is adopted rather than a Panel model, what arrangements would best give the Ombudsmen access to industry/consumer expertise?
25. If you have experience of both systems, do you think that the Ombudsman model or the Panel model would best deliver fair and consistent decision making in the most time and cost efficient manner?

26. Should there be a different dispute resolution process for General Insurance fraud disputes?

27. Do you have any comments about the general principle of limiting the amount of procedural detail in the Proposed Terms of Reference?

28. Do you have any comments about the FOS dispute resolution procedures described in (a) – (e) above?

29. If you have experience with more than one FOS Division, are there advantages or disadvantages from your perspective to common dispute resolution procedures as described?

30. Should FOS have the ability to award compensation for non-financial loss?

31. Should FOS have the ability to award compensation for consequential loss?

32. Should there be any limits specified in the Proposed Terms of Reference as to the amount that can be awarded by FOS in relation to these types of losses?

33. When calculating the amount being claimed for the purposes of the monetary limit, should claimed non-financial losses and interest be included?

34. What would be the advantages or disadvantages of allowing both parties an opportunity to make submissions where a Recommendation was appealed to Determination stage?

35. Does this approach to the “test case” process appropriately balance financial services providers interests in ensuring that really significant matters are determined by the Courts and fairness to consumers given that they may be deprived of access to FOS if process invoked before the decision is made?

36. Would the inclusion of examples assist in the understanding of what constitutes systemic issues? The examples that ASIC gives in RG139 are: poor disclosure or communication, administrative or technical errors, product flaws and improper interpretation or application of standard terms.
37. Is the definition of ‘serious misconduct’ sufficiently clear and the ambit appropriate? What can be done to minimise the “grey area” as to what is reportable and what is not?