Report to Board of Financial Ombudsman Service

2013 Independent Review
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1. INTRODUCTION

The Financial Ombudsman Scheme (FOS) is approved by ASIC to provide an external dispute resolution service to financial services providers and their customers.

Under the terms of its approval, FOS must commission regular independent reviews of its operations and procedures. After consultation with ASIC, FOS engaged Cameronralph Navigator to undertake this review. Cameronralph Navigator is a Melbourne based consultancy that, over the past 13 years, has conducted 14 independent reviews of external complaints handling schemes including reviews of the Credit Ombudsman Service Limited, the New Zealand Insurance and Savings Ombudsman and the Canadian Ombudsman for Banking Services and Investments.

This is the first independent review of Financial Ombudsman Service (FOS) post the merger of its predecessor schemes – the Banking and Financial Services Ombudsman, the Financial Industry Complaints Service, the Insurance Ombudsman Scheme, the Insurance Brokers Dispute Facility and the Credit Union Dispute Resolution Centre.

1.1. REVIEW TERMS OF REFERENCE

This Review was provided with a detailed terms of reference – detailed as an Attachment at Section 18.

Broadly, the terms of reference required the Reviewers to consider and report on:

1. progress made by FOS under its single Terms of Reference (merger of prior schemes);
2. changes to its jurisdiction in the past few years;
3. its performance against the requirements of ASIC Regulatory Guide 139 including its reporting to ASIC;
4. its engagement with stakeholders; and
5. a number of specific issues relating to its Terms of Reference.
2. EXECUTIVE SUMMARY

The Review found that the merger process, now five years in, is substantially complete. The FOS brand is well recognised, consumer awareness of the service is much higher than in the days of multiple smaller EDR schemes and FOS is seen as an essential element of consumer/regulatory confidence in the Australian financial system.

While we acknowledge that the issue of consistency always requires attention, we think that it is time to ‘draw a line’ under the merger process and move on.

Our review found significant improvements in key aspects of FOS’s performance – including:

1. Professionalisation of FOS’s operations
2. The clarity and quality of decisions
3. Stronger, more transparent measurement of performance
4. Systematic approach to engagement with stakeholders
5. Lifting the standard of financial, administration and Human Resource management

These achievements are substantial, especially when considering the volatility and difficulty of the environment that FOS has worked in over the past 5 years. Significant increases in volumes of complaints, changes to the law and FOS’s jurisdiction and extensive organisation growth among the challenges. Unfortunately for FOS, much of this achievement is discounted or diminished in stakeholders’ eyes by significant timeliness problems and a view that FOS’s ‘value add’ takes far too long to emerge in the dispute-handling process. This criticism is felt most strongly in feedback from industry but previous Applicants to FOS are also vocal. Consumer representatives were generally the most supportive of FOS, although also quite critical of timeliness.

We think that these issues with timeliness and FOS process are limiting stakeholder ability to reasonably evaluate other aspects of FOS’s performance. From our discussions, we see that there is a level of frustration that is colouring stakeholder relationships with FOS. Despite FOS’s external engagement being widely seen as more professional and systematic, FOS is still perceived by some stakeholders as somewhat bureaucratic, defensive and unresponsive.

It is critical in our view that some of this ground is recovered – in particular because FOS needs the active participation, cooperation and commitment of resources by FSPs in order to make the changes that we see as necessary.

2.1. Performance against the benchmarks

Our review against the detail provisions of the Benchmarks for Industry-based EDR Schemes found that FOS meets all but the timeliness aspects of the requirements.

1. Accessibility - MEETS
2. Independence - MEETS
3. Fairness - MEETS
4. Accountability - MEETS
5. Efficiency – PARTIALLY MEETS (Timeliness in some key respects is the problem under this benchmark)

6. Effectiveness - MEETS

2.2. Analysis of key issues

Our report necessarily gives much less attention to the positives than those areas that we think need improvement. We acknowledge that FOS management effort has been extensive and has achieved significant improvement in consistency, quality and efficiency in many areas. In particular, FOS’s management and organisational sophistication and its infrastructure are significantly improved compared with the FOS of 2008. We were also impressed by the improved quality of decisions – in both brevity and clarity.

That said, EDR in the financial sector is a highly dynamic environment, and for all the improvements in many areas, we found some fundamental aspects of FOS’s performance, which we, and FOS itself, recognise as not meeting stakeholder expectations. Our key conclusion was that the current FOS organisational model has reached the end of its effective life and to meet those expectations, must move to its next stage of evolution.

The primary issue identified by our analysis is the configuration of FOS into a series of discrete ‘production line’ steps, each focusing on a particular dispute resolution technique. This is designed to progressively ‘filter out’ the less complex disputes and to resolve as many disputes as possible by cooperative means, reserving the effort of the most experienced and senior staff for the most complex and most contested disputes – at the end of the ‘production line’.

This approach has produced benefits to early resolution. The downside to this configuration is multiple hand-offs between FOS staff for many disputes, ‘queuing’ of disputes between internal stages, delays in achieving a FOS view of the merits of disputes and some frustration for the parties.

We accept that this configuration was an essential step in FOS’s evolution and was a response to a series of surges in complaint volumes, to an influx of inexperienced staff and to the need to ‘unpick’ pre-merger differences in approach. However, without substantive structural and process change, further incremental improvements are unlikely to be of the scale that stakeholders expect - nor do we think that incremental change will put FOS on a sustainable footing into the future.

We also thought that the traditional EDR dispute resolution approach that FOS takes to financial difficulty disputes does not adequately recognise their unique nature, resulting in an unnecessarily laborious process of coming to grips with the immediate, most pressing issues.

2.3. Focus of recommendations

Our recommendations centre on the FOS process and structures. We argue that the next era for FOS requires a move to smaller, vertically integrated and more flexible teams – but not ‘back’ to the vertical sector silos of the past. The good news is that the significant investment in systems, infrastructure, management skills, tools and staff development puts FOS in a position where the proposed changes are viable – a position it would not have been in even a year ago. FOS now has the management tools and knowledge developed over the past 5 years to be able to drive quality, consistency and efficiency across a more locally autonomous, flexible structure.
The review identified five main imperatives for change.

1. **Timeliness and efficiency**

   This focus has two dimensions – the first is to clear the current dispute queues in the FOS ‘back-end’ areas, with, we think, significant, externally evident progress required by mid 2014. The second is a longer-term effort to improve speed and efficiency through removing low-value-add steps, duplicated effort and through fewer hand-offs and more flexible processes.

2. **Improve user experience**

   An aim of these recommendations is to achieve an earlier FOS view of the merits of a matter, to minimise the hand-offs in the relationship with the parties and to achieve an externally easier to understand process.

3. **Leverage of senior experience**

   As part of the process and structure changes, the aim should be to apply more senior experience earlier in the dispute-handling process – to better direct the best approach to disputes and to bring the reach of senior staff experience closer to junior staff to provide better development and learning.

4. **Engagement/responsiveness with FSPs/industry**

   We think that FOS has done a very good job with its engagement with industry bodies, regulators and consumer representatives and so our focus has been on its more diverse and sometimes difficult relationships with FSPs – relationships that we have observed are heavily coloured by the timeliness and process issues.

   We have suggested that FOS should demonstrate a more evident focus on key problem areas, that FSPs would respond better to a more plain-speaking style from FOS and finally that some more evident emphasis on understanding the challenges facing FSPs in FOS’s public discourse would be helpful.

5. **Revisit Financial Difficulty approach**

   In response to our concerns with the financial difficulty process, after some thought, we have identified what we think would work better, but we are conscious that both FSPs and FOS have been working to learn how best to deal with these relatively new disputes. We have suggested to FOS that they work with stakeholders to rethink the approach to these disputes.

2.4. **Priorities for FOS**

   To address these imperatives, we are proposing:

   **Short term**

   There should be an immediate focus on additional steps to clear the unallocated queues (‘backlog’) within the Specialist Resolution Group (SRG). This is of course building on FOS’s current efficiency initiatives including FOS’s Project 500 (explained later in our Report).
Medium term

We recognise that there will be a significant cost of change associated with a substantial change to FOS’s structures and processes and that FOS cannot allow this to further extend unallocated queues.

In part to provide some ‘space’ to allow this change to be implemented, we have recommended:

1. Changes in the Registration and Acceptance processes, aimed at clearing a significant number of disputes that come to FOS that are essentially settled by FSPs;
2. Further streamlining in the decision-making (Recommendation & Determination) processes; and
3. A new streamlined investigation and decision process for simpler, lower-value claim disputes.

We have recommended that in the medium term, FOS begin the process of redesigning the Financial Difficulty approach and of course, the first stages of the organisational re-design.

Medium to longer term

We see this stage as completing the changes to the Financial Difficulty process and the move to the next era of organisational design.

Part 17 summarises and groups the recommendations made in the course of this Review by theme. Note that the Recommendations vary in significance – from the minor to the key strategic challenges facing FOS. We are also conscious that it is not our task to micro-manage FOS. We fully expect that the FOS Board and Management will need to determine which recommendations they accept, what priority they will place on them – and how accepted recommendations will ultimately be implemented.
3. PROJECT APPROACH

3.1. Review Scope

Our Review scope is specified in Terms of Reference that were agreed between FOS and ASIC. Consistent with this, our key areas of focus have been:

- the progress of FOS in implementing appropriate organisational arrangements and improved dispute handling process and procedures under its single Terms of Reference in light of the merger of the predecessor schemes, the significant increase in volume of disputes and the increased compensation caps effective 1 January 2012;

- an assessment of FOS against the dispute resolution requirements in ASIC Regulatory Guide 139 including the Benchmarks for Industry-Based Customer Dispute Resolution Schemes (the Benchmarks) - and in particular FOS’s efforts to ensure efficient and timely dispute resolution, whilst maintaining consistently high quality decision making and dispute resolution outcomes;

- FOS’s effectiveness in new areas of jurisdiction: national consumer credit disputes and traditional trustee service disputes; and

- the level of engagement by FOS with FSPs, consumers and relevant professional and community organisations.

Our Terms of Reference also asked us to look at some specific FOS scheme coverage issues: the $3,000 consequential loss cap, effectiveness of the $3,000 compensation cap for third party claims by an uninsured driver, the extent to which FOS adequately covers small business complaints and FOS’s “exceptional circumstances” discretion to allow in disputes that would otherwise be outside time. Finally we were asked to report on FOS’s collection and reporting of complaints data and the adequacy of reporting by FOS to ASIC.

We have not reviewed FOS’s Code Compliance role. This is outside the scope of this review.

In course of our review, a number of stakeholders (both industry and previous Applicants) raised with us specific issues pertaining to disputes to which they were a party. This was very helpful and, where the relevant dispute was identified, we reviewed FOS’s records about that dispute. To the extent that general issues emerged from that review, we have discussed those issues in this Report. But where we formed the view that the issue was particular to the relevant dispute, we have not discussed the issue in our Report.

We also do not canvas in this Report some of the views that were raised by stakeholders that collide with ASIC’s requirements of EDR Schemes set out in Regulatory Guide 139. Those views include that Applicants should have to pay a complaint fee, that the lump sum cap of $280,000 is too high and that FOS’s Annual Review should not include FSPs’ complaint “report card”. These issues need to be canvassed with ASIC and are not something within the domain of FOS.

3.2. Methodology

Our work program included:
• review of FOS’s website materials;
• review of FOS’s procedural guidance for its staff and interviews of FOS managers to obtain a detailed understanding of FOS processes;
• staff forums attended by about 100 staff;
• taking into account recent advice and tools developed for FOS by consultants;
• review of about 300 dispute files, 19 systemic issues files and 16 files where complaints were made about FOS;
• telephone interviews of 50 previous complainants;
• consideration of 15 public submissions and 21 confidential submissions (one submission by an industry association, 8 by FSPs, 8 by previous Applicants and 4 by other interested people or organisations);
• interviews of 11 industry stakeholders and participation in 2 forums organised by an industry association;
• review of FOS stakeholder surveys conducted in 2013 and a meeting with the consultants who conducted an extensive qualitative and quantitative survey;
• extensive review of FOS’s data; and
• meetings with FOS Management to clarify issues and discuss our findings.

3.3. Structure of our Report

Our Report begins with an overview of the context within which financial services EDR schemes are currently operating. We then review FOS’s merger implementation progress and the extent to which it is engaging successfully with its stakeholders. Our Report then examines in some detail the key timeliness and process design issues confronting FOS and provides our recommendations as to these and our comments about longer term organisational design issues and FOS resourcing. We then report on the various jurisdictional issues that are specifically raised in our Review Terms of Reference. Lastly, we assess FOS against the dispute resolution requirements in ASIC Regulatory Guide 139 – structuring our comments under the six Benchmark headings of Accessibility, Independence, Fairness, Accountability, Efficiency and Effectiveness.

3.4. Terminology

This Report uses the terminology that FOS uses.

We use the term “FSP” to refer to a Financial Services Participant that is a member of FOS.

A “registered complaint” is a complaint that has come to FOS and has been referred to the FSP for internal dispute resolution (IDR). If the FSP does not satisfy the complainant and the complainant wishes to take the matter further with FOS, the complainant needs to revert to FOS.

A “dispute” that has been “accepted” is a complaint that has come to FOS and has already been considered by the FSP and so is ready for external dispute resolution (EDR) via FOS. The person bringing the dispute to FOS is referred to as the “Applicant”.

An accepted dispute may have previously been registered by FOS but previous registration is not required where the Applicant tells FOS that the Applicant has already contacted the FSP and either received a final response or the relevant IDR timeframe has expired.

This Report refers to FOS’s Registration Teams, Acceptance Teams, Early Case Management Teams, Specialist Resolution Group (SRG) Triage and Case Management Teams. The diagram below (Figure 1) shows how disputes move from team to team – although it must be recognised that many disputes skip stages in the dispute resolution process.

**Figure 1. Simplified FOS disputes process & teams**

The table below (Figure 2) shows the principal way that disputes get resolved within the various FOS teams.

**Figure 2. Principal means of Dispute Resolution by FOS Teams**

<table>
<thead>
<tr>
<th>Team</th>
<th>Way disputes resolved</th>
</tr>
</thead>
<tbody>
<tr>
<td>Registration Team</td>
<td>- Resolved by FSP</td>
</tr>
<tr>
<td>Acceptance Teams</td>
<td>- Resolved by FSP</td>
</tr>
<tr>
<td></td>
<td>- Outside Terms of Reference</td>
</tr>
<tr>
<td>Early Case Management Teams</td>
<td>- Assessment – lacking in merit</td>
</tr>
<tr>
<td></td>
<td>- Negotiation</td>
</tr>
<tr>
<td>Conciliation Team</td>
<td>- Conciliation</td>
</tr>
<tr>
<td>SRG Case Management Teams</td>
<td>- Recommendation</td>
</tr>
<tr>
<td>Ombudsman/ Panel</td>
<td>- Determination</td>
</tr>
</tbody>
</table>

This organisational structure incorporates both industry-based specialisation and what we refer to in this Report as ‘specialisation by dispute resolution technique’.
3.5. Philosophy

As Reviewers, with the best endeavours, we have a short-term, limited window into the FOS organisation. While we have done our best to have our facts and understandings checked by FOS Management, we recognise that there are inevitably nuances that we have not fully mastered.

We also note that FOS Management have not been waiting for the outcomes of our Review and have continued their processes of development and change. Of necessity, our Review must be couched as at a point in time. Our fieldwork was completed primarily in the 1st quarter of the 2013/14 financial year and our observations reflect what we found at that time. For the most part we have relied on data from the financial years 2010/11, 2011/12 and 2012/13. Where subsequent changes have been made or subsequent data has been made available to us, we may refer to it in the text, but we have not attempted to update all analysis, lest we never complete our task.

We also accept that our recommendations are primarily broad directions for FOS Management to pursue. It is FOS Management that have the breadth and depth of knowledge and who must face the practical implementation impacts of our suggestions.

Our approach to making recommendations assumes:

- All management choices have characteristics that are both strengths and weakness;
- There are rarely any ‘silver bullets’ that simply remove problems without consequences;
- The Management dilemmas are about choosing which problems FOS prefers to have;
- In EDR, the challenge is to achieve the right balance between competing demands;
- All Management strategies and choices have a ‘use-by’ date;
- Every correction begets a future counter-correction; and
- Some Review findings – those that pertain to subtle matters of tone and emphasis – are best expressed as observations for Management’s consideration, without specific recommendations being made.

3.6. Acknowledgements

This Review involved considerable detail and multiple layers to almost every avenue of enquiry. A question might require an answer that differed over multiple product types, multiple teams, multiple complaint pathways, multiple FSP types, varied over time, varied over process changes and so forth. We would like to acknowledge the extensive assistance provided by FOS staff in providing initial briefings and in the innumerable follow up queries. We also owe a debt of gratitude to the industry, government and consumer stakeholders who generously gave of their time for interviews.
4. CONTEXT

We have in many places in this report, acknowledged that FOS has been through a period of significant upheaval in the five years since the merger. The new Constitution and Terms of Reference were only the beginning. Significant external impacts from the Global Financial Crisis and restructuring and innovation within the financial sector, the impact of natural disasters, regulatory change, political change and of course, a rapid scaling up of the organisation, changes of key personnel, a major upskilling task, the need to build technological and physical infrastructure, moving buildings – these have all placed considerable demands on the organisation.

For financial external disputes resolution around the world, great change has been a recurring theme. In New Zealand, new financial services legislation radically changed the landscape, with a huge increase in the numbers of Financial Services Providers required to be members of an EDR scheme, new EDR entrants to the field and competition between schemes.

The UK FOS continued to expand to cope with an explosion in dispute numbers driven by the effects of the GFC and local financial product problems – reaching a scale that no other part of the world approaches. For the 12 months to March 31, 2013, the UK FOS reported just over 2 million enquiries and estimates that in the 12 months to March 2014, they will deal with 385,000 matters at a cost of around $500m AUD. The UK FOS also uniquely experiences a very high proportion of its complaints being run on behalf of the consumer by commercial disputes representative firms.

North America experienced large increases in complaint numbers driven largely by the GFC, although the consequences for some disputes resolution services were more life-threatening. The Comptroller of the Currency in the US has been stripped of some complaint-handling jurisdiction over perceived shortcomings and the Ombudsman for Banking Services and Investments (OBSI) in Canada has been under concerted attack from parts of the investments and banking sectors, with increasing numbers of firms simply refusing to comply with decisions and losing coverage of some firms to alternative disputes resolution services provided by legal practices.

In Europe, there has been a continuing expansion of provision of external disputes resolution – especially in former eastern bloc countries that are striving to meet new EU standards for financial consumer protection. A similar dynamic is driving adoption of external disputes resolution in third world and emerging economies – often as a condition of development funding from the likes of the World Bank and/or the IMF.

This environment highlights how comparatively young EDR is as a mechanism for disputes resolution and how its evolution and adaptation continues – often in quite different ways. It also highlights that financial sector EDR is no certain thing – and that its value to community confidence in financial services must be continually tested and defended.

It is timely that this Independent Review should occur when some of the fundamental thinking about the future direction of financial services provision and its regulation is being challenged and tested by the federal government. From our perspective, while there are inevitably improvements that can be made, our conversations with ordinary Australian consumers and financial services providers underscore the importance of the critical service that FOS delivers – and the imperative to continue to refine and improve that service.
5. MERGER IMPLEMENTATION PROGRESS

The merger of FOS’s five predecessor schemes into a single EDR scheme aimed to simplify the consumer interface, leverage best practice from each scheme and create scale that would deliver savings for industry.

FOS was established 1 July 2008, with initial merger work focused on the substantial task of developing new Terms of Reference which took effect from 1 January 2010. The focus then shifted to implementing the merger internally. As many industry stakeholders have recognised, this has been a significant, multi-faceted task. It was a task that was made more difficult by the simultaneous rapid growth in dispute volumes as a result of the Global Financial Crisis, legislative changes, investment collapses and natural disasters.

The challenges faced by FOS during this five year period have been extensively canvassed in FOS’s own Annual Reports, Business Plans and other publications. We acknowledge the depth and difficulty of these challenges and trust that our discussion in this report gives them due weight.

We do however note that such challenges are not unique to FOS. As pointed out to us by stakeholders, similar challenges have been part of life for many of the FSPs that are members of FOS – and for regulators, government agencies and consumer organisations around the financial sector. We also note that there is no guarantee that this tumultuous environment is not going to continue in some different form for the next five years!

5.1. FOS initiatives

To implement the merger internally, FOS has developed its management and reporting systems, worked to improve the quality of its data, instituted significant process and cultural change, documented revised dispute resolution procedures, established a new Human Resources framework and put in place a more comprehensive training and development framework for its staff. This work has included:

- A new leadership structure with enhanced reporting to the leadership group;
- A more structured approach to planning and change management that includes accountability and evaluation procedures;
- Enhancing FOS’s financial reporting systems;
- Establishment of a risk management framework including disaster recovery capability;
- Aligning staff pay scales and conditions and unifying human resources policies and records;
- Moving premises;
- Significant development of FOS’s case management system;
- Developing disciplines about the categorisation of disputes to improve the reliability of the data that FOS produces from its case management system;
- Strengthening of FOS’s workload projection capacity;
- Increasing the number of Ombudsmen and bringing them together as peer group to enhance consistency and quality and to provide technical leadership to other FOS staff;
- Publishing all Determinations on an anonymised basis (previously Banking and Finance Determinations were not all published);
• Co-locating the teams handling Financial Difficulty disputes to achieve efficiencies to manage the increased volume of disputes;

• Bringing together the staff handling systemic issues matters into one group that takes a consistent approach and using the FOS leadership group to supervise these matters;

• Consistency/ best practice measures across industry sectors, for example, introducing conciliation as a dispute resolution option for General Insurance disputes;

• Much new procedural guidance for staff;

• A FOS-wide move away from paper based to electronic communication with the parties to disputes, including the development of the Shared Services portal for FSP provision of information;

• A comprehensive induction program for new staff;

• A quality assurance framework that applies consistently across FOS; and

• Developing new FOS-wide stakeholder engagement processes.

After some experimentation, FOS has largely continued with an industry specialisation approach for its dispute resolution staff in the interests of both quality and efficiency.

5.2. Stakeholder views

FSPs with visibility across the various industry areas encompassed by FOS reported some inconsistencies in FOS approach, for example, in relation to the time given to an FSP to meet a request for the provision of specific additional documents. However, most FSPs operate within one industry area and so are less concerned about whether practices are fully merged and consistent across all of FOS.

On the other hand, the Joint Consumer Submission expressed some disappointment about “significant differences between the different arms of FOS”. In particular, it was noted that Banking and Finance has an Ombudsman-only decision making model, whereas for other types of disputes a Panel option applies. Pre-merger they believed that one model had the advantage of promoting quality in pre-decision processes and the other model had a timeliness advantage, but process and role changes have, they felt, led to a diminution of both of these benefits. The Submission recommended that there should be an independent review of the decision making model with a view to a model that is tailored to the objectives of the scheme and is efficient and ensures the quality and consistency of decision making. The Submission also noted that conciliation has only recently been introduced for General Insurance disputes. Some criticism was also made about the quality of Investments, Life Insurance and Superannuation Recommendations.

Staff reported that there remain procedural differences as between the industry-based FOS teams and that this adds to the complexity of process and hampers efficiency.

5.3. Review findings

We think that FOS has substantially completed the task of developing FOS-wide Management and operational capabilities that provide control and permit sound planning, reporting, financial management, risk management, people management and so on.
We note that an approach that places much emphasis on central control places a heavy load on Management and we think that there is now scope for FOS to move to an organisational approach that reduces overheads and promotes innovation – see Part 8.

We agree with FOS that industry-based specialisation by its staff best achieves quality and efficiency and we do not see this as detracting from merger implementation. After all, quality and efficiency are the prime imperatives. But the result is that work will continue to be needed to promote consistency across the industry-based teams.

Of course, the drive for consistency of process has to be applied with flexibility. Sometimes differences in the nature of disputes will justify differences in process. Our review suggested that FOS has been open to this feedback and has been making adjustments, for example, there has been recognition that issues letters are not needed for many general insurance disputes. Now that FOSSIC data is more mature, we think that there is scope for FOS to mine this data and use its experience to identify where industry sector variations are needed, for example, in relation to timeframes for information collection.

We also acknowledge that some of the delay in moving to more consistent processes across industry sectors has been in persuading FSPs to be comfortable about changes to the way matters are dealt with. An example is the move to the (selective) use of conciliation for General Insurance matters. With no history of use of conciliation in general insurance disputes, it has taken quite some time to provide industry with a degree of comfort with the process.

In relation to the decision-making models, the ‘default’ model across all industry sectors is now the Ombudsman Determination model. There has been a declining use of Panels for Investments, Life Insurance and Superannuation disputes (Figure 3). The same is not true for General Insurance disputes – this has been largely because of the volume of flood insurance disputes over the last couple of years, all of which went to the General Insurance Panel to decide.

**Figure 3.** Changes in the volume of Ombudsman and Panel Determinations over time

Our consultations satisfied us that the General Insurance, Investments and Life Insurance sectors continue to value having a Panel for appropriate cases, as a way of bringing current
industry experience to bear. No concern was expressed to us about FOS’s decisions as to which disputes go to an Ombudsman and which go to a Panel.

Equally FOS’s Ombudsmen who make general insurance, investments, life insurance and superannuation decisions value the existence of the Panel option for disputes where either industry practice is an important issue or that raise very contentious factual issues.

On the other hand, the banking sector has not expressed concern to us that there is not a Panel for their disputes. This is likely because of the sector’s comfort with the Ombudsman model and also because the banking sector does not put as much reliance on Panel members to bring knowledge of banking practice to FOS decision-making. Reflecting long-standing practice, FOS employs full time Banking Specialists – two of whom were recently senior bank employees and one of whom is on secondment from a bank – whose role is to provide advice about industry practice to FOS Case Managers and Ombudsmen. They only bring this expertise and are not directly involved in decision-making.

After examining the issue and given that there is industry support for some of the sectoral differences, we think that these areas of inconsistency of process is of less moment. Rather, we see that the important question is whether both approaches deliver against the Benchmarks and produce decisions that are of high quality and are timely. We discuss these issues later in our Report.
6. ENGAGEMENT WITH STAKEHOLDERS

6.1. FSPs

FOS has developed a multi-faceted Member Engagement Strategy that seeks to build strong relationships with its FSPs including by working on communication, consultation, availability to FSPs, responsiveness to FSP feedback and issues and support for FSPs that are new to FOS.

FOS’s Secured Services portal for FSPs is a vehicle for much of the communication with FSPs and provides information about process changes, upcoming events and so on. Early in 2013, a disputes activity dashboard was added to the portal: this provides a snapshot of the FSP’s disputes, their status and the relevant contact person. Late in 2013, the Secured Services portal was extended to enable it to be the vehicle for information exchange with FSPs in relation to their disputes.

FOS’s education/ information/ consultation initiatives include a National Conference, seminars, webinars, online training modules, in person open-issue forums (for example, the General Insurance open forums) and internal dispute resolution training programs. FOS’s publication *The Circular* is issued quarterly and provides information about FOS’s approach to particular types of disputes, recent Determinations and FOS activities. *The FOS Approach* series is a new initiative, providing detailed explanation of how FOS approaches particular kinds of disputes.

6.1.1. Stakeholder views

FSPs recognised that FOS has enhanced its reporting to FSPs in response to their requests and, for example, now provides more comparative information. An industry association expressed the view that greater reporting flexibility and user friendliness would be appreciated.

FSPs and industry associations clearly value FOS’s willingness to present at their forums. This has been a major contributor to building the relationship with industry. One industry association wanted to have a key contact person at FOS as a way of further building the relationship. There were also calls for greater support for FSPs navigating FOS processes for the first time.

FSPs also clearly value FOS guidance material about its approach to disputes of different types. Some desire was expressed for guidance to be produced in a more timely manner, so that FOS decisions do not surprise. For example, a couple of submissions wanted FOS to produce guidance as to how quickly it expects a licensee to review the files of financial planning clients acquired as a consequence of an authorised representative joining the licensee.

More negatively, in our consultations with FSPs, we heard FOS described as bureaucratic and slow or insufficient in responding to the needs and issues of FSPs. There was some sense that this is starting to change, with a more consultative approach taken recently. But there was clearly a sense that FOS needs to take more seriously and respond more urgently to FSP concern about the complexity and length of the dispute resolution process and the FSP perception that FOS staff need to better understand financial services products and services.

FOS undertook a major piece of stakeholder research in the first half of 2013. This indicated a lesser level of satisfaction with dispute resolution than with communication and the relationship with FOS. Disappointingly for FOS, the survey found that FSPs have not generally perceived a cultural shift in FOS that has made a positive impact on the relationship.
6.1.2. Findings

The FOS 2013/14 Business Plan shows significant effort focused on the issues raised by stakeholders in the recent in-depth research and while we are not in a position to judge its likely impact as yet, we would expect that this effort should begin to gain traction and be recognised by stakeholders over the coming year or two.

It is, however, evident from our discussions with stakeholders that at this point in time FOS's considerable efforts to enhance relationships with its FSPs are being diminished because of concern about FOS's timeframes and dispute resolution processes and the perception and frustration felt by some that FOS is not sufficiently recognising and responding to these concerns.

In our view, having listened to FSPs talk frankly and confidentially about their relationship with FOS, we think that there remains something of a disconnect in the dialogue between FOS and at least some of its member FSPs. At its heart, this disconnect is as much about a general sense that FOS is unfairly (and given its own performance - undeservedly) critical of FSPs' commitment to customers as it is about any particular messages.

We are aware that FOS has recognised some of this and has been at some pains to correct these impressions in both its public and private dialogue with FSPs. We think that more could be done and that FOS's communication would be more successful if it were more open in acknowledging concerns over its performance and more measured in its public statements about its own achievements and in criticising FSP performance.

By way of a small example of a change that we would applaud, we think that the 2013 Annual Review title “Focusing on delivering” establishes a tone that resonates better with industry stakeholders than the 2012 Annual Review title “Building Service Excellence”. We also think that a more evident emphasis on understanding the challenges faced by FSPs in FOS speeches and other contributions to public discourse would make a difference.

6.2. Consumer representative and community organisations

FOS has developed a Consumer Engagement Strategy that places emphasis on consultation, collaboration and education.
A Consumer Liaison Group was launched in July 2012 comprising consumer advocates and representatives from across Australia. This Group has access to an online portal which can be used to share information and ideas between Consumer Liaison Group meetings.

Other FOS initiatives include FOS Forums for financial counsellors, community lawyers and other representatives (in Sydney in 2012 and in Brisbane, Northern Territory and Western Australia in 2013) that provide education and training so attendees better access and utilise FOS on behalf of vulnerable and disadvantaged groups. FOS also participates in and presents at consumer representative events and provides training. An online training module specifically for this sector is currently being developed so as to increase FOS’s reach.

6.2.1. Stakeholder views

FOS’s stakeholder research in the first half of 2013 included surveying of consumer representatives and organisations. This found that consumer representatives have a higher level of satisfaction by with dispute resolution (7.8 mean score) than FSPs do. Satisfaction with FOS communication (7.8 mean score) and the relationship with FOS (8.2 mean score) was also very good. Significantly over one third of respondents believed that their satisfaction rates had increased in the past 12 months.

The views in the Joint Consumer Submission were consistent with FOS’s surveying. This expressed satisfaction with, and the importance placed on, education, training and materials provided by FOS for community advocates to help them assist clients. Like FSPs, they use FOS’s online training modules. The Submission stated that there is good outreach to specialist centres, for example, the Consumer Credit Law Centre NSW and the Victorian-based Consumer Action Law Centre, but less engagement with generalist legal centres and rural community organisations. In particular, there was a call for more training for consumer advocates and community volunteer groups in South Australia and Queensland. Also that FOS send a representative or at least promotional materials to all relevant peak body annual conferences including for financial counsellors and community legal centres.

6.2.2. Findings

We think that FOS deserves commendation for the efforts it has made to engage with consumer representatives and its plans to reach further into the sector by moving on in the next couple of years to also engage with community workers who do not specialise in financial services matters. Of course, FOS will never be able to fulfil every request that it provide a speaker for a forum. Hence the value of FOS’s current project to create community-sector tailored online training materials.
7. TIMELINESS AND PROCESS DESIGN ISSUES

7.1. Context

Timeliness was the major issue raised with us by stakeholders and, we think the most significant issue facing the organisation. Related to this issue is the process design that involves a dispute being passed from FOS Team to FOS Team for the next stage of dispute resolution.

To understand the dynamics of the timeliness issue, it is necessary to understand the context. As already noted, FOS's recent history has been dominated by waves of significant increases in dispute volumes – including the Global Financial Crisis impact, FSP collapses, natural disasters and new areas of jurisdiction – which arrived one after the other over the past 5 years.

The following chart (Figure 5) sourced from FOS, illustrates the dramatic growth in complaints received and the clear lag in FOS’s ability to scale up to resolve them. It is only in 2012/13 that there has been some respite from the year-on-year growth experienced.

Figure 5. Volume of FOS Disputes over time

These volume increases have not arrived to a benign environment of course – they have arrived on top of essential, but productivity-sapping merger activity already described in this Report.

The dispute volume increases have also caused their own growing pains, with

- a significant recruitment workload;
- an influx of new inexperienced staff with a need to house, train and equip; and
- reorganisation of work and supervision arrangements to direct less complex, lower value-add work to the inexperienced and to focus the effort of the (fewer) senior, experienced staff on the most complex work.
Considerable volatility in dispute volumes has also been a factor. Although the worst of a series of peak events (GFC, collapses, natural disasters, etc) seems to have passed, the volatility in dispute volumes continues to be +/- 24% on a month to month basis (Figure 6). Despite significant Management effort aimed at more accurate predictions of volume, including enlisting the assistance of FSPs with large dispute numbers, the incoming dispute volumes continue to defy projections.

7.2. FOS efforts to date

We do not think the timeliness issues are for want of effort on FOS’s part. Our review evidenced extensive Management attention and effort to improve efficiency and timeframes. We saw significant effort and investment in the analysis of causes of delays, in developing tools to measure and manage and in obtaining expert advice.

Refinements, innovation and experimentation with efficiency have been conducted on a range of fronts. Of particular success have been FOS initiatives to ensure that disputes do not wait unallocated for more than 2 weeks during the early dispute resolution stages.

In August 2013, FOS began implementation of ‘Project 500’ - this is aimed at reducing the number of Banking and Finance disputes in the unallocated Recommendation Stage queue by 500 by 30 June 2014, principally by early identification of the disputes that are likely to need a Determination to achieve a resolution and expediting those disputes to the process of writing and settling the Determination. As discussed later, Project 500 is showing promise in piloting possible new procedures/processes to speed resolution of a dispute and reduce the number of FOS staff who from time to time are involved in the handling of the dispute.

Despite this effort, there is a significant backlog to overcome at the decision making stages of the dispute resolution process. As at June 2013, there were over 1100 disputes in unallocated queues at the Recommendation and Determination Stages (Figure 7).
To clear this backlog by the end of the current financial year, assuming current inflows and no change to the resourcing and process paths of last financial year, we estimate would require a productivity improvement of around 28% in the FOS case management ‘back end’. The latest projections provided by FOS, which are based on more up-to-date figures and which assume that ‘Project 500’ continues to meet FOS targets, suggests that a productivity improvement of a further 12-18% would be required to clear this backlog by the end of 2013/14. These are very positive signs, however without further action still leave FOS with a substantial ‘backlog’ for the following financial year.

The backlog, of course, creates its own workload. The parties need to be kept informed, necessitating additional emails and calls. The parties become concerned about progress and generate further communication. There is also the necessity to ‘manage the pile’, creating the additional inefficiency of a further process: the FOS Specialist Resolution Group has over 8 staff FTE in a Triage team who review matters in Recommendation Stage unallocated queue, check previous information collection, revisit whether settlement is possible and thereby try to provide some ‘mid queue’ progress.

Perhaps most importantly, this makes for many unhappy Applicants and FSPs. FOS has much higher rates of complaints about its handling of disputes than we have seen in other financial sector EDR schemes. This is discussed further at paragraph 16.2 of this Report.

FOS’s own research indicates that there is a further serious risk – there are significant numbers of Applicant withdrawals because the process is too difficult, or there is a lack of progress or response from FOS. This is discussed further at paragraph 11.5 of this Report.

### 7.3. Other impacts

There are other impacts of the timeliness and process design issues. The stop-start process of handing off the case to another specialised area makes it difficult to keep parties informed. Many of our interviewed parties (both applicants and FSPs) commented on the lack of a single point of contact.

There is the problem, commented upon in submissions to our Review, that often FOS will ask FSPs for documentation that has already been provided – albeit to a different FOS staff member who was handling the dispute at an earlier stage. This creates frustration for the FSP and adds to the FSP’s internal costs and the time they have to spend in dealing with the dispute. It also delays FOS’s assessment of the merits of the dispute.
The process design also distances the FOS staff who undertake the early dispute resolution steps from the FOS staff who draft FOS Decisions (Recommendations and Determinations). We think that this limits the development of the 'front end' staff and manifests itself in weakness of some of the jurisdictional assessments at the 'front end' – see paragraph 15.1 of this Report. It also inhibits the ability of those 'front end' staff to confidently provide the parties with guidance as to the likely result if the dispute were to proceed to a decision or even to understand what information is needed before a decision is possible. This is resulting in re-work by the SRG Triage Teams.

Even in a positive work environment like FOS, staff morale is affected by these problems. Our discussions with staff and FOS's own internal staff surveying show that (amongst generally high job satisfaction) their confidence in their ability to deliver excellent service is rated much lower.

In another area that we comment on separately, the approach by FOS to investigation of possible systemic issues is generally (and, in our view necessarily so) to start after individual disputes are resolved. Accordingly, delay in resolution of individual disputes can much reduce the timeliness and relevance of the systemic enquiry.

7.3.1. Current process illustrations

We have provided two example chronologies (Figure 8 & Figure 9) from case files that we reviewed. It is important to note that they are not 'average' files. Equally, they are not the most extreme examples we saw. Their purpose in this report is to help to illustrate some of the issues that we found with longer running FOS disputes.

Figure 8. Example chronology for dispute that passed through 5 FOS teams

Note that this is a dispute that went through every major FOS process and ultimately to Determination. This is not an 'average' file, nor is it the most extreme example – it is reproduced to illustrate some of the issues that we found with longer running FOS disputes. While these are the most costly of disputes, they are a small proportion numerically (some 3% of total disputes).
Analysis of timeliness is not as straightforward as it might seem. As FOS has found, even the term ‘backlog’ has to be defined carefully. Unallocated queues of files can actually be a valuable

In particular, they illustrate the long periods between productive steps happening with these longer-running matters and the numbers of staff who review each dispute file. Some of the lapse of time is outside of FOS’s control as it awaits responses from the parties. Although there are no available statistics from FOS’s systems, it is however clear from analysis of the chronologies of the files we reviewed, that for long-running matters, by far the greatest proportion of the ‘downtime’ comes from the file awaiting internal FOS action. This includes time awaiting allocation and also the normal delays that occur within a team or an individual’s work management.

This does not of course mean that FSPs have no role to play in speeding turnaround of matters that are before FOS. Clearly a fully effective, timely process depends on the efforts of both FOS and FSPs and we would see this cooperation being a major focus of future process improvement.

### 7.4. Analysis

At a macro level, there is no mystery to FOS’s struggles with timeliness. As the chart at Figure 5. above illustrates, the increase in FOS’s capacity to resolve matters lagged the growth in inflow of disputes for four years running. For the first year in five, in 2012/13 FOS resolved somewhat more complaints than it received.

Unfortunately that is too simple a story and we do not think (nor does FOS) that simply waiting for excess capacity to ‘catch up’ and eat away at the backlog is the answer. In the first place, volatility of this scale is likely to be a feature of FOS’s environment for the foreseeable future and it is not acceptable to simply allow surges of disputes to take years to ‘wash through’ the system. Secondly, a closer analysis of the timeliness evidences issues with both timeliness and efficiency that will not be solved by simply throwing resources at the problem.

Analysis of timeliness is not as straightforward as it might seem. As FOS has found, even the term ‘backlog’ has to be defined carefully. Unallocated queues of files can actually be a valuable
workload management tool, when kept to an acceptable efficient minimum. For example, disputes are generally allocated within 5 days in the Acceptance Teams and 14 days in the Early Case Management Teams. While a shorter period would no doubt be better, we do not see this as a ‘backlog’.

We also observe that in a multi-path, multi-step ‘production line’, the entire line must be managed as a whole. A focus on one or two areas can simply move a workload problem to some other point in the process.

It also worth making the perhaps obvious comment that timeliness and cost-efficiency are not the same thing. While efficiency can no doubt improve timeliness, it is also possible to create a series of highly cost-efficient steps – with long time delays in between.

7.4.1. Effect of volatility

As the diagram at Figure 10 below illustrates, any organisation with highly volatile incoming workload (FOS’s is +/-24%) - must either set its resourcing throughout the production line at the maximum volumes – or face excessive queues (backlogs) as the ‘lumps’ pass through.

Figure 10. Resourcing vs. volatility

This effect is exaggerated in a highly specialised horizontal production line (see Figure 11 below) – queues build at each point along the ‘line’ - unless there is high mobility of resources that are able to be applied flexibly along the production line - to follow the ‘lumps’. This would of course require multi-skilled staff and very flexible team structures.

Figure 11. Effect of multi-step queuing

There are signs that FOS experiences some of this effect, as gains in some areas are not able to be readily translated to benefit other areas that are under workload pressure. The first chart below (Figure 12) shows substantial improvement in FOS files closed in under 30 and 31-60 days – and a cumulative improvement in files closed in under 90 days, but this has not translated into improvements in subsequent bands.
This is partly a lag effect, as it takes some time for gains to work their way through the system, however it is also a work and process design effect. Greater efficiency in earlier stages is not easily re-distributed to other areas and additional closures earlier in the process are not enough to diminish the unallocated queues at the subsequent ‘back end’ steps.

**Figure 12. Percentage of disputes closed by time - by period and cumulative: 2010/11 to 2012/13**

We looked at FOS timeliness data in a number of ways. In the chart above, the vertical columns show the numbers of FOS cases closed within the time bands shown across the horizontal axis. There is a clear improvement over the 3 year period in the quicker files (<30 days, 31-60 days) however a mixed result in longer running matters. The line graph showing the cumulative results (total closed up to the band) reflects this improvement in the quicker matters – and that there has been little improvement overall once the longer running files are taken into account.

### 7.4.2. Work on hand

Another measure of FOS capacity that we examined is the number of open cases on hand (Figure 13). The charts at Figure 14 and Figure 15 show some change in the number of open files at different stages, however we were concerned that the total number open had remained at over 10,000 for the three year period shown. We also noted that the numbers of open matters reduced in the earlier (easier) stages and increased in the later (more difficult) stages. While this may be to be expected as part of the natural lag effect, it also suggests a more difficult, resource intensive mix of work.
During the 2 year period shown (end 2010/11 to end 2012/13), total incoming complaints increased by 19% and then dropped back by 11%. An increase of just over 16% in overall staffing occurred over the same period, which is clearly taking some time to have an impact on this measure of work on hand.

This natural lag in the impact of both reduced incoming complaints and in the ability of new staff to begin to clear work on hand suggests that more improvement can be expected in the year 2013/14. Indications from the latest figures available to FOS are that a positive trend has been maintained into 2013/14 with the total number of open matters continuing to reduce.
While this is good news, we remain concerned that FOS’s capacity to get through large, variable dispute volumes is insufficient.

7.4.3. FOS resolution capacity

The table below (Figure 16) aims to examine the change over time in FOS dispute resolution capacity from another perspective – by simply focusing on matters closed – and for simplicity, excluding those resolved by the FSP. We acknowledge that this does not count some effort by FOS in some of those matters, however for the purposes of comparison over time, we think that the exclusion is valid.

**Figure 16. FOS Dispute resolution capacity over time: Totals.**

<table>
<thead>
<tr>
<th>Disputes</th>
<th>2010/11</th>
<th></th>
<th>2011/12</th>
<th></th>
<th>2012/13</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>%</td>
<td>No.</td>
<td>%</td>
<td>No.</td>
<td>%</td>
</tr>
<tr>
<td>Resolved by FSP</td>
<td>18,388</td>
<td>64%</td>
<td>23,699</td>
<td>66%</td>
<td>18,785</td>
<td>56%</td>
</tr>
<tr>
<td>Resolved by FOS</td>
<td>10,438</td>
<td>36%</td>
<td>12,350</td>
<td>34%</td>
<td>14,988</td>
<td>44%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>28,826</strong></td>
<td></td>
<td><strong>36,049</strong></td>
<td></td>
<td><strong>33,773</strong></td>
<td></td>
</tr>
</tbody>
</table>

Leaving aside those complaints resolved by FSP, the total capacity of FOS to resolve matters appears to have increased substantially over the three year period shown – increasing from some 10,438 to 14,988. However, a closer look shows that this improvement is almost all in relatively ‘easy’ types of resolution – see Figure 17 below.

In the first set of columns shown (“Discontinued/Outside Terms of Reference”), is a substantial increase in the numbers of Outside Terms of Reference decisions which mostly occur at the earliest stages within the Acceptance Team. (Some analysis of this increase can be found at paragraph 15.1.5 of this Report.)

In the second set of columns, (“FOS facilitated agreement”—which mostly occur at the Negotiation, Assessment and Conciliation Stages), there is a significant improvement in disputes shown as resolved by FOS - increasing from 1,821 to 4,851. (Note that this is partly a statistical effect. From November 2012, FOS adopted a stricter (and more correct) definition of “Resolved by the FSP”—that this should only apply in Acceptance Stage. This is partly responsible for the statistical change in relation to the numbers resolved by Negotiation.)

Tellingly, for the most resource-intensive and time consuming matters (Resolved by FOS Recommendation or Determination—in the third set of columns below), apparent dispute resolution capacity has not changed over the three years, despite an increase in staff in the area of around 15%.
Figure 17. FOS Dispute resolution capacity over time: by resolution category

![Chart showing dispute resolution capacity over time]

The chart below (Figure 18) briefly examines what the impact of the increased volumes and staff have had on the per-staff and dollars per dispute ratios.

Figure 18. FOS costs, staffing and staff/cost per closed dispute 2010 to 2013.

![Chart showing costs, staffing, and staff/cost per closed dispute]

* FOS advise that some of 12/13 increase in Annual Expenditure reflects the lag in staff costs from the expansion in staffing during 2011/12.

Increases in staffing in 2011/12 of around 13%, was slightly outpaced by the increase in the number of matters closed, producing a slight drop in the gross per dispute cost of around $3,250 and a 7% improvement in the disputes per FTE figures over the first two years. The ratios improved more substantively in 2012/13; with an 18% improvement in the disputes per FTE and an 8% drop in the gross per dispute cost.
These are promising results and largely reflect the considerable effort put in to improving the efficiency of the FOS ‘front end’. As noted elsewhere, this improvement was rather less in the resource intensive and currently ‘backlogged’ area of FOS Decisions (Recommendations and Determinations), which accounts for around 60% of FOS disputes costs. (This is not a perfect measure, as some of the ‘facilitated’ resolutions are actually done by the staff that draft FOS Decisions. The productivity improvement is therefore a little more evenly spread between areas of FOS than the normal reporting suggests.)

Finally, we have given some consideration to the question of FOS’s overheads, a matter raised with us in some of our stakeholder interviews. A report provided by HUB Consulting to FOS, which provided expert advice on costing FOS activity for different dispute pathways and for different stages of the process, also suggested that FOS’s overheads ratio was higher than they would normally expect from an organisation of its size and type.

From our perspective, we would expect FOS to have somewhat higher than average overheads, reflecting its unique public-purpose role – which includes education, outreach, contribution to public policy - and the investment needed for an expanding organisation. We are not however able to offer comparable experience on standard overhead ratios for an organisation like FOS. EDR schemes are not readily comparable given differences in size, industry environment, scheme mandate and legislative frameworks. Nor do large IDR departments provide a useful point of comparison, performing a somewhat different function and sitting as they do within very, very large organisations. That said, we accept HUB Consulting’s expertise in this area and if there are savings to be had in overheads/indirect costs that can be diverted to disputes resourcing, more is the better.

We also accept that some of the FOS expenditure on non-disputes work is part of FOS’s role and is a matter of judgement by the FOS Board and will change over time in response to the environment. The FOS Board have agreed with Management some public KPIs to ensure that overhead costs are contained in proportion to caseload staff – which we think is sensible.

7.4.4. FOS 2013/14 workload projections

For consistency and reliability, we have generally based our analysis throughout this Report on financial year periods. To illustrate the latest available information, FOS have provided us with some updated workload projections for 2013/14 based on actual results to November 2013 (see Figure 19 below).

**Figure 19. Productivity change to date in 13/14 (new Terms of Reference)**

<table>
<thead>
<tr>
<th></th>
<th>2010-11</th>
<th>2011-12</th>
<th>2012-13</th>
<th>FOS 2013-14 Forecast (at 30/11)</th>
</tr>
</thead>
<tbody>
<tr>
<td>ALL OF FOS</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Dispute FTE</td>
<td>226</td>
<td>256</td>
<td>259</td>
<td></td>
</tr>
<tr>
<td>Unallocated Disputes</td>
<td>2,024</td>
<td>2,289</td>
<td>2,058</td>
<td></td>
</tr>
<tr>
<td>Accepted disputes closed</td>
<td>19,091</td>
<td>24,983</td>
<td>24,968</td>
<td></td>
</tr>
<tr>
<td>Accepted disputes closed per Dispute FTE</td>
<td>84.5</td>
<td>97.6</td>
<td>96.4</td>
<td></td>
</tr>
<tr>
<td>Calculated productivity improvement required to eliminate unallocated queue</td>
<td>11%</td>
<td>9%</td>
<td>8%</td>
<td></td>
</tr>
</tbody>
</table>
The indications are a promising sign of workload management having turned something of a corner – chiefly as a result of the FOS Banking and Finance ‘Project 500’ initiative. The Project has so far achieved good results including 178 Project 500 closures achieved in the first 4 months and a decrease in the Recommendation queue by 253 disputes – all ahead of project estimates.

As a note of caution, we understand that the Project 500 teams are carrying an increase in allocated disputes (work in progress) of some 142 disputes. We also note that the projected total closures for Recommendations and Determinations (the long-running and most difficult processes) look to be unchanged, as is the rate of closure per staff FTE. (We raise this as a reminder that the Unallocated Disputes queue is a proxy only for work backlog and truer measure of progress that will take some time to emerge, is the number of open disputes that are aged more than 90 days.)

**7.4.5. Current FOS process improvement**

As already noted, FOS has not been ‘sitting on its hands’ on the timeliness and process improvement fronts – nor will FOS management find much of what we have to say a surprise. The FOS 2013/14 Business Plan directly addresses many of the issues that we discuss in this report. We have been provided with information about a number of initiatives in this space. These include the establishment of the Workflow and Advice Team to work with the Early Case Management Teams – a team of experienced case managers to enhance the quality of those Teams. Also Project 500 and FOS’s recent development of a dispute profiling tool to more accurately predict how disputes will resolve.

As independent Reviewers, we must be cautious in forming a view about the likely success of the current FOS initiatives. We are conscious that stakeholders and FOS have been disappointed after promising early signs in the recent past. We are also acutely aware that this Review is a once in five years exercise and we would have let FOS and stakeholders down if we were to put our faith in part-complete projects that did not ultimately deliver. Our analysis therefore takes a long view through a deliberately sceptical lens.

1. The creation of the Workflow and Advice Team comprising experienced Case Managers to try and increase senior input at the Early Case Management Stage may well have brought some quality and efficiency improvements, for example, assisted with improved rates of closure of unmeritorious disputes (Assessments) – see paragraph 13.2 of this Report. However, the SRG Triage process (a very significant overhead) still suggests a lack of confidence in information collection/ settlement processes at Early Case Management - ie. as already noted, rework at SRG Triage is still occurring.
2. Project 500 will have a positive impact on FOS clearance rates to the extent that, for simpler Project 500 disputes, FOS is eliminating the issues letter step and moving more quickly to a decision.

3. Project 500 will also have a positive impact on clearance rates to the extent that Project 500 increases decision making resources (additional 5 Case Managers, 2 paralegal staff and use of some excess capacity in Conciliation Team) and expedites disputes to a Determination that are unlikely to resolve through negotiation or a Recommendation. We support the efficiency gain inherent where a Conciliator uses knowledge gained through the conciliation process to draft a Determination for a dispute that does not resolve at conciliation.

4. Expediting to a Determination avoids the double handling of two FOS Decisions for the one dispute ie. a written assessment referred to as a Recommendation and then a Determination. However, the impossibility of complete accuracy in predicting whether a Recommendation will be accepted by the parties means that for some (unknown number) of these disputes, more senior resources (Ombudsmen) are being employed to close these disputes than would otherwise have been applied.

5. For disputes expedited to Determination from the Acceptance Stage, there is also the risk that some early resolution successes that would otherwise have occurred in Early Case Management will have been missed. The fact that some Project 500 disputes, expedited to a Determination, are settling indicates the difficulty of accurately predicting which dispute resolution mechanism will be successful.

6. A multi-path, multi-stage production line with significant work-in-progress always carries a significant risk that work has simply been displaced – ie. having just 'moved the problem'. We acknowledge that this risk is obviously lower where improvements are achieved towards the ‘back end’ of the process. But there is a risk that Project 500 will create a workload that the Ombudsmen cannot keep up with ie. the Recommendation Stage backlog will become an Ombudsmen backlog.

7. The Project 500 strategy has involved an early focus on the 'low-hanging fruit' – trawling through the Recommendation Stage unallocated queue for matters that lend themselves to quicker resolution. The rate of improvement over a whole year may well slow as attention inevitably turns to the more difficult matters.

8. We also note that addressing the continuing outside Terms of Reference quality issues in the Acceptance Team – see paragraph 15.1 of this Report - will have some adverse effect on timeframes.

Project 500 is also a pilot study for a possible future FOS-wide approach and we have also considered its longer-term potential and the benefits of FOS's new dispute profiling tool going forward.

1. In our view, the Project 500 approach for Banking and Finance disputes is unlikely to produce as many dividends in General Insurance and Investments, Life Insurance and Superannuation. General Insurance already has a quasi-Project 500 approach, as Figure 20 demonstrates, and we think that the nature of Investments, Life Insurance and to a lesser extent Superannuation disputes creates a greater imperative to be transparent about the FOS view prior to a Determination - so if not a Recommendation then something similar will often be required.
Figure 20. Specialist Resolution dispute paths: disputes resolved at Recommendation and Determination stages in 2012/13

<table>
<thead>
<tr>
<th>Resolution Route</th>
<th>B&amp;F</th>
<th>GI</th>
<th>ILIS</th>
<th>Total</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Resolved at Recommendation Stage</td>
<td>999</td>
<td>493</td>
<td>259</td>
<td>1,751</td>
<td>42%</td>
</tr>
<tr>
<td>Resolved at Determination Stage after passing through Recommendation Stage</td>
<td>212</td>
<td>252</td>
<td>243</td>
<td>707</td>
<td>17%</td>
</tr>
<tr>
<td>Expedited to Determination Stage, bypassing Recommendation Stage</td>
<td>40</td>
<td>614</td>
<td>109</td>
<td>763</td>
<td>18%</td>
</tr>
<tr>
<td><strong>Disputes that were previously with Early Case Management Team</strong></td>
<td></td>
<td></td>
<td></td>
<td>4,135</td>
<td>100%</td>
</tr>
<tr>
<td>Resolved at Recommendation Stage</td>
<td>31</td>
<td>172</td>
<td>1</td>
<td>204</td>
<td>5%</td>
</tr>
<tr>
<td>Resolved at Determination Stage after passing through Recommendation Stage</td>
<td>14</td>
<td>129</td>
<td>1</td>
<td>144</td>
<td>3%</td>
</tr>
<tr>
<td>Expedited to Determination Stage, bypassing Recommendation Stage</td>
<td>8</td>
<td>535</td>
<td>23</td>
<td>566</td>
<td>14%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>1,304</td>
<td>2,195</td>
<td>636</td>
<td>4,135</td>
<td>100%</td>
</tr>
</tbody>
</table>

Notes: Figure 20 shows the 6 different 'back end' paths for disputes resolved at the FOS Recommendation and Determination Stages (16.5% of disputes by number, 60% by cost). In (pre-Project 500) 2012/13, 77% of disputes passed from Acceptance to the Early Case Management Team before arriving at the Triage Team and then being allocated to a Case Manager - i.e. a minimum of 4 case officers handling the file plus QA reviewers. If there is a conciliation conference or Determination, the ‘touchpoint’ numbers increase further. The Table also shows that many GI disputes are already skipping stages with only 60% passing through Early Case Management and 52% being expedited to a Determination – suggesting to us that the Project 500 approach is effectively already applying within General Insurance. We note, however, that General Insurance dispute patterns during 2012/13, were still heavily impacted by flood matters – there may be some change in what appears to be 'usual' in future.

2. We understand that the early indications are that the profiling tool is proving to be quite successful and that the additional information collection work involved is minimal, however at this stage, we would prefer to retain some caution. We have some concern that the completion of a profiling tool multiple times through the life of all disputes is something of an overhead and - more importantly - any add-on work that is designed to benefit someone else further down the production 'line' can be problematic for maintaining quality, accuracy and value in the long term. Initial enthusiasm and close project attention lapses and the 'overhead' task can become more perfunctory over time.

Our concerns with the profiling tool are much reduced if if the profiling tool is primarily used as an intelligence and case management support mechanism – and is not being depended on to route disputes through the organisational structure to specialised teams that focus on the narrow dispute resolution technique predicted to be most likely to be successful in resolving the dispute.
3. Our more fundamental concerns are about the future sustainability of an organisational model of specialising by dispute resolution technique – which we discuss in some depth at Part 8.

7.5. Conclusions

Overall, we think that Project 500’s prioritisation of reducing the Banking and Finance Recommendation unallocated queue is right, and a pilot approach is right. However, even if the updated projections in Figure 19 hold, the Recommendation and Determination unallocated queue will only be back under control in the second half of calendar year 2015. Our concern is that this will be too late to have the impact on stakeholder confidence that we think is needed.

We are also concerned about the perception we heard from a number of FSPs that FOS is too complacent about its own performance, that it is not listening, is too bureaucratic and is “over managing” process improvements. To regain some of this industry support, FOS cannot afford to miss on its next round of productivity and timeliness targets. While we would be delighted to be proved wrong, our sense is that the current initiatives may not be sufficient to overcome the back end ‘backlog’, particularly if new pressures arise.

In our view, there are also some risks to the Project 500 long-term design, which will take longer to resolve and we are not fully confident that the ultimate target of no excessive FOS unallocated queues will be achieved without further ‘back end’ resourcing and structure and process innovation.

Going forward, we think that more is required to put FOS on a sustainable footing.

7.6. Long-term FOS performance standards

We accept that FOS’s immediate challenge is to meet its current Key Performance Indicators – and we think it is good practice, and concordant with industry demand, for FOS to have publicly committed to these as part of the organisation’s Strategic Plan.

Figure 21. Timeliness Measures: FOS Business Plan 2013/14.

<table>
<thead>
<tr>
<th>Measure</th>
<th>Description</th>
<th>Target</th>
</tr>
</thead>
<tbody>
<tr>
<td>Age profile of open disputes</td>
<td>Percentage of open disputes that are less than or equal to 365 days old</td>
<td>At least 92%</td>
</tr>
<tr>
<td>Time to close recent disputes</td>
<td>This measures the age profile of closed disputes. It tracks disputes received since 1 July 2012. It excludes disputes that were older than 365 days at the start of the year (1 July 2013)</td>
<td>80% within 180 days 95% within 365 days</td>
</tr>
<tr>
<td>Finalisation of old disputes</td>
<td>Percentage of those disputes received before 1 July 2012 that are closed (the backlog at the start of the year).</td>
<td>100%</td>
</tr>
</tbody>
</table>

We do not wish to distract unnecessarily from this immediate challenge, however in the longer-term we do not think that these standards are sufficient to meet stakeholder expectations. Based on hundreds of interviews with applicants and FSPs that we have
conducted over more than a dozen years in Australia, Canada and New Zealand, it is manifestly clear to us that both consumers and FSPs expect much better timeliness from an EDR scheme.

There seems to be a clear, albeit intuitive, community expectation of resolution by an EDR scheme of what they see as a straight-forward financial services matter in 30 to 60 days, resolution of a substantive (but not very complex) dispute in around 90 days and we generally find there is some understanding that a more complex matter may take up to 180 days. Anything outside these limits is generally seen as unfathomable.

Whether that is seen as reasonable or fair by regulators or EDR schemes themselves is really beside the point. Ultimately, unless a financial sector EDR scheme generally meets intuitive, real-world community expectations of timeliness, it will continuously be on the back foot and having to defend its credibility and effectiveness.

### 7.7. Imperatives for timeliness and process design change

We think that FOS Management are right to focus on clearing the Recommendation unallocated queue as a priority over longer-term re-design of the processes and organisation structure. We also acknowledge that the cost of change is high in this environment and a major organisation transformation will inevitably have a short-term impact on productivity and throughput.

The rate of change has to be paced so as to maintain dispute throughput and service standards – and especially to avoid future addition to the backlog problem.

We are also acutely aware that change in one part of the organisation’s operation will have consequential impacts elsewhere – often unanticipated. It is important that proposed changes are validated through evidence/measures or are tested through contained pilots/experimentation.

We understand that information technology has now become a much more critical part of the FOS platform and capability. Significant progress towards a fully electronic case management system has been made, with full electronic document provision made available to FSPs in December 2013. Any substantive change in FOS structures and workflows will require complementary IT support and changes to FOS’s case management system and to desktop equipment and software.

We also note that some of our recommendations, if fully implemented, will have impacts on FSPs. For example, any changes to the front end Registration process that routes more newly received matters to FSPs for consideration will have significant impacts – in particular for large dispute volume FSPs.

We have suggested a short/medium/long term perspective of our proposed changes for FOS – and we understand that to the extent that our propositions are accepted, FOS Management will have to prioritise and sequence implementation taking into account the myriad of real-life considerations and constraints – and of course negotiating new processes with FSPs.
7.8. Clearing current queue

We cannot repeat often enough that the backlog needs dealing with urgently – and we agree with FOS that it must have priority over longer-term reform. We also acknowledge that this makes all other innovation harder.

Project 500 has provided a major process/structure initiative aimed at clearing the ‘backlogs’. For ours, we think that more is needed – not only to ensure clearing the backlog through a multi-pronged approach, but also to provide stakeholders with some clear assurance that FOS is doing everything that it can on this front.

We share FOS’s wariness about big, add-on ‘backlog-busting’ approaches. The experience of this in other EDR schemes has been that it takes a long time to build capacity and expertise, that an ‘add-on’ approach is a huge distraction for management and in the end, much of the learning is lost, leaving the scheme susceptible to future dispute surges creating another round of extensive queues.

We think it is much better to tackle the back end unallocated queues in as integrated a way as possible, with an eye to sustainable practice into the future, making the effort a FOS-wide staff responsibility, and maximising the learning. We have in mind:

1. Introducing additional efficiencies to supplement the Project 500 effort to reduce the unallocated queues – i.e. efficiencies to apply across all of Banking and Finance, General Insurance and Investments, Life Insurance and Superannuation (see Recommendations at paragraph 7.10 and paragraph 7.11.1).

2. Applying additional resources to the ‘backlog’ across all of Banking and Finance, General Insurance and Investments, Life Insurance and Superannuation – using additional temporary staff, use of overtime, weekend projects, etc – which we realise will need to be funded (see our discussion at paragraph 7.9).

3. Wherever possible, divert existing resources to clear the backlog.

   i) Given that Project 500 diverts some work from the Early Case Management Team, we think that it should be possible to move some Banking and Finance resources (eg 3 or 4 Dispute Analysts) from Early Case Management to, say, expand the Project 500 Early Triage Team. It would also be a development opportunity for Dispute Analysts if they were to write Determinations for simple matters under close Case Manager supervision and would move the organisation in the direction of the long term organisational shift that we are recommending (see Part 8 of this Report).

   ii) A temporary (and symbolic) shift of effort from systemic issues, stakeholder education/engagement, project/management activity, etc would we think, also be worthwhile – especially for external consumption (we recognise that not all staff will necessarily be currently skilled to take on dispute resolution work and that there would be some temporary cost to other worthwhile work).
7.9. Additional resourcing

Inevitably, a concerted effort to clear the backlog will involve the need for additional resources. This is doubly important to ensure that there is no actual or perceived reduction in quality simply to achieve volumes. We have assumed - given some of the scepticism we heard from FSPs and other stakeholders and some of the disappointment at the 2012/13 results, and the recent longer-term funding messages from FOS – that FOS would not wish to now ask FSPs to contribute further for a special effort to clear the backlog.

We do not think that this can rule out the option of applying greater resources somehow. The need to get the queues under control is too great for FOS in the current environment. Obviously this is a judgement for FOS, however it is urgent from our perspective.

We do not think that this is as difficult as it might appear initially. The high proportion of dispute fees in the FOS funding framework means that matters closed earlier will also bring some fees cashflow forward. One other possibility open to FOS is that some additional funds for operations could be tapped into by a temporary or longer-term reduction of FOS’s cash reserves.

It is outside our scope to make recommendations about FOS’s risk settings or Reserves policy, but we think that the Board has some room to make some choices about the funding available for operations.

7.10. Streamline Decision Processes

FOS’s Terms of Reference enable the decision making process to involve two steps: first, an assessment in writing referred to as a ‘Recommendation’ that is drafted by a Case Manager and then, if either party so wishes, a Determination made by an Ombudsman or FOS Panel. FOS’s experience is that an increasing percentage of disputes are ‘appealed’ from a Recommendation to a Determination as the following chart (Figure 22) demonstrates.
FOS cannot streamline the decision making process by refusing to allow a dispute to proceed from a Recommendation to a Determination. However, paragraph 8.6 of the Terms of Reference gives FOS a broad discretion to expedite matters to a Determination without a Recommendation first being made. FOS is being active in exercising this discretion where it considers that a Recommendation is unlikely to resolve the dispute - expedited Determinations now make up 32% of matters resolved by FOS decision, that is, either by a Recommendation that is accepted by the parties or by a Determination.

Whilst an expedited Determination avoids the double handling of a Recommendation followed by a Determination, it deprives the parties of an opportunity to respond to FOS’s view. Available FOS statistics show that around one in ten Recommendations rejected by one of the parties are subsequently overturned on Determination. Of these, a little over 60% are overturned because the parties provided new information or argument after the Recommendation.

For matters that proceed by Recommendation then Determination, the Case Manager who drafted the Recommendation does not draft the Determination. Rather the Determination is drafted by a senior FOS lawyer for settling by the Ombudsman or Panel (thereby creating an additional handoff and rework in reading the file and analysing issues) or the Ombudsman drafts the Determination.

7.10.1. Stakeholder views

Whilst FSPs clearly want a shorter timeframe to FOS Determination, there is some disquiet on the part of FSPs about FOS expediting disputes to a Determination and thereby skipping earlier dispute resolution process stages. One submission expressed the view that a non-binding Recommendation provides an opportunity for FOS’s view to be tested and the parties to make further submissions in response to that view. Other FSPs were concerned about disputes that bypass not only the Recommendation Stage but also the Early Case Management Stage and that necessarily incur the Determination Stage case fee as a result - even if the dispute settles prior to a Determination actually being issued.

Consumer submissions made no comment about expedited Determinations.
7.10.2. Findings

We think that FOS should continue to actively use the Terms of Reference paragraph 8.6 discretion to expedite disputes to a Determination without a Recommendation first being made. This will not be appropriate in all cases. There are some types of disputes that are likely to resolve through a Recommendation. Other types of disputes require the full process to enable proper consideration of the issues. But for some disputes, the expedited Determination is efficient and appropriate.

To ensure fairness where the expedited Determination pathway is followed, FOS should generally provide parties with a preliminary view and a chance to make final submissions before the Determination is made. Depending on the complexity and the extent of agreement between the parties as to the factual issues, the preliminary view may be able to be incorporated in the issues letter. But if not, a succinct further letter with FOS’s preliminary view should be provided after FOS reviews the parties’ responses to their issues letter.

Figure 23. Proposed streamlined Decision process

For disputes where a Recommendation is drafted and ‘appealed’ to a Determination, there should not be a handoff to another FOS officer eg. a senior lawyer, to draft the Determination – it would be more efficient if the Case Manager who drafted the Recommendation also drafts the Determination. In this case, ‘fresh eyes’ for the Determination is achieved by the Ombudsman settling the Determination.
Recommendation 2

Where FOS expedites a dispute to a Determination without a Recommendation first being made, FOS should provide FOS's preliminary view to the parties in writing before the Determination is made. This should be done succinctly, for example, it may be possible to extend an issues letter by simply adding a few paragraphs setting out FOS’s preliminary view.

Where a Recommendation is not accepted by either party and the dispute proceeds to Determination, in the interests of efficiency and timeliness, the Case Manager most familiar with the case should prepare the initial draft Determination – in order for a formal decision to be made after review of the issues by the Ombudsman or Panel.

7.11. Simpler, low value disputes

FOS's Terms of Reference do not permit a streamlined process for simpler, low value disputes. For FSPs, it is a source of considerable frustration that in these types of disputes an Applicant is able to refuse to accept a reasonable outcome and instead may persist with the dispute through an extensive, repetitive process.

Costs and time issues can mean that FSPs settle above what is justified by merits. This is a significant drive for the constant re-emergence of calls for Applicants to have to pay some fees.

7.11.1. Findings

We think that FOS should develop a streamlined process for simpler, low value disputes, for example, disputes about credit reporting agency listings. A dollar value should not be completely determinative, nor the only indicator of the type of dispute that is appropriate for the streamlined process. But as a guide, we think that disputes where the aggregate amount claimed is less than $10,000 will often be appropriate for this process.

The streamlined process could include a less document-based process, with a Board appointed Adjudicator in direct contact with the parties, undertaking both the investigation and a single-step decision making (rather than the existing Recommendation/ Determination process). This would, of course, require amendment of FOS’s Terms of Reference.

This streamlined process would come into effect after initial jurisdiction checking, obtaining the FSP’s response to the dispute and possibly some information collection and early resolution efforts. Rather than a specialised team to undertake this work, we are inclined to think that these disputes would best be integrated into the relevant industry/ product team(s). Creating a separate specialised team risks isolation from the learning in the mainstream. Also the dispute would have to be reallocated to another team if the streamlined process proves not to be appropriate.
Recommendation 3

FOS should commence the necessary consultation steps to amend its Terms of Reference to introduce a streamlined process for simpler, low value disputes. The process could be less document-based and run by a Board appointed Adjudicator who would decide the matter after direct contact with the parties.

FOS should also publish guidance for stakeholders as to the types of disputes that would be appropriate for this streamlined process and how the streamlined process will operate.

7.12. Registration/Acceptance

A dispute enters FOS at the Acceptance Stage, without previous FOS Registration, if the Applicant states that the matter has been to the FSP and either a response is received or the IDR timeframe had elapsed.

As a result, about 70% of the FOS disputes that come in to Acceptance arrive without first going through FOS Registration (involving referral to the FSP).

About 55% of all disputes accepted by FOS are resolved by the FSP – for large FSPs, many of these disputes did not reach the FSP’s IDR area prior to the FOS application (although the dispute was no doubt discussed with the FSP eg. with bank branch staff).

Large FSPs consider that it would be more efficient if FOS immediately referred all lodged disputes to the relevant FSP’s IDR area (without jurisdiction checking by FOS first).

The Joint Consumer Submission would, however, like all disputes to enter FOS’s process at the Acceptance Stage – to avoid Applicants having to (effectively) apply twice to FOS.

7.12.1. Findings

We think that there would be efficiency benefits if FOS were to refer all disputes through to the FSP’s IDR area at the outset, other than disputes where there is clear evidence that it has actually been through IDR, or where the Applicant is vulnerable or in need of extra assistance.

The evidence is that a significant number of these disputes would be settled by FSPs, providing a quicker result for the Applicants, keeping some lower value-add workload out of FOS and saving the FSPs some case fees.

If the Applicant does bring the dispute back to FOS after referral to the FSP, then the FSP Review Stage should be dispensed with and FOS should immediately begin work – checking jurisdiction and then asking the FSP to provide its response to the dispute.

Provided that FOS has confidence that consumers are obtaining fair and timely outcomes from FSPs, the proposed change should be of benefit to consumers, FSPs and FOS.

A similar process in another EDR scheme suggests that this assisted referral process can be very effective. The EDR scheme’s referral process ensures that the complaint reaches the recognised IDR point of contact in the firm and the firm recognises that the complainant is dissatisfied and that the matter is on the EDR scheme ‘radar’ - frequently these factors are
enough to change the outcome. Finally, our contact with consumers in such a regime showed that this was recognised and accepted by them.

Of course, this change will have an impact on Applicants and for some will be an impost. It would be important to assist the Applicant by defining timeframes (both for the FSP to acknowledge the complaint and to provide a substantive answer) and advising the Applicant to revert to FOS if timeframes are not met or the Applicant is not satisfied.

Nor do we underestimate the potential impact on FSPs – in particular those with large volumes of disputes. While there is some enthusiasm for the change in concept, much will depend on how it will work in detail. While our expectation is that there would be savings for most FSPs overall, the change may well require larger FSPs in particular to adjust or reconfigure their resourcing, so discussions with FSPs on implementation and timing would be essential.

Given the FSP interest, it would be useful to seek their cooperation for a substantive assessment over a trial period – and perhaps a system of periodic checking in the long term – to ensure that fair and timely outcomes are being achieved and that all stakeholders have confidence in the process.

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**Recommendation 4**

In consultation with stakeholders, FOS should re-design its Registration and Acceptance processes so that all lodged disputes are referred to the FSP’s internal dispute resolution contact to provide the FSP with a final chance to resolve the dispute. The re-design should include the following elements:

- a commitment by FSPs to timeframes agreed with FOS for the acknowledgement of disputes and provision of a substantive response;

- FOS informing the Applicant of the relevant timeframes and that the Applicant should revert to FOS if those timeframes are not met or if the Applicant is unhappy with the FSP's substantive response to the dispute;

- FSP agreement to an evaluation framework that provides FOS and consumer representative stakeholders with assurance as to the fairness and timeliness of outcomes achieved through this assisted referral process; and

- where the Applicant does bring the dispute back to FOS – FOS should immediately begin its process of jurisdiction checking and information collection without providing the FSP with any further review opportunity.
8. ORGANISATIONAL DESIGN

Our analysis of the timeliness, efficiency, process design and Applicant and FSP interface and expectation issues have, in almost every case, brought us back to the FOS organisational model. The conclusion we have drawn is that FOS’s history (major merger, Terms of Reference that inevitably involved some compromises, the major surge in complaint volumes) combined to produce organisational characteristics that, while right for the times, are no longer the optimum for a multi-sector EDR of the scale and complexity of FOS.

In making our observations, we do not delude ourselves that there is a ‘silver bullet’ solution for FOS. Every management choice brings both positives and negatives – for any organisation it is a matter of searching for optimum balance in the choices made. To illustrate using past FOS choices:

1. The horizontal ‘production line’ process design which involves specialising according to dispute resolution technique – which was needed to disaggregate the old separate ‘silo’ practices – also introduces multiple hand-offs, queuing of disputes between stages and limits flexible movement of resources and responsiveness.

2. The central operational control – needed for managing resources between parts of the production line, driving cultural change, discipline, rigorous analysis, transparency, distinguishing best practice – also limits local initiative, slows the processes of change and loads the senior executive with the need to manage down to a micro level.

3. Low value-add job design at front end – needed to best use new inexperienced staff, clear ‘quick’ matters and preserve experienced staff for the most difficult work – also underuses emerging staff capability, distances experienced coaches/mentors from junior staff and creates frustration for dispute parties waiting for a merits view from FOS.

4. The application of modern, large organisation management approaches – needed to lift standards of rigour and professionalism – also slows ability to respond to change quickly, reduces the potential for innovation and experimentation.

In short, we think that the demands of the past 5 years have driven FOS into an organisational model that is at or near the end of its effectiveness. At some risk of over-simplifying, we think that most of the key timeliness and quality issues confronting FOS are linked to this organisation design issue.

Having achieved ‘One FOS’ and greater management professionalism, FOS now has organisational design choices that would not have been viable previously. For instance:

1. Old ‘silo’ practices are now largely either levelled or required for the nature of the types of dispute;

2. Improved FOS disputes data and process tracking provides stronger transparency and management controls;

3. Cost-to-serve analysis undertaken for FOS by HUB Consulting provides sound costs/productivity measurement basis;

4. Internal projects and analysis has spread knowledge across all types of disputes;

5. Manager and staff development has strengthened organisational capacity with this capacity able to be used to set frameworks, foster and support middle managers, drive innovation, consistency, quality – all at a higher level.
6. Improved reporting and a consistent quality assurance approach provides transparency across a range of possible structures; and

7. Many initially inexperienced but qualified staff taken on during the big growth surge, now have useful experience and training, and are able to take on more responsibility.

8.1. Practical implementation

We recognise that FOS must approach any such re-design in a practical and digestible way. We suggest that some early steps be taken as opportunity arises – in the right direction and that in the medium/longer term a more substantive shift in structure be undertaken.

On the assumption that a combination of measures can, in fact clear the current unallocated disputes queues, we have given some emphasis in our recommendations to the question of organisational design – because we think that elasticity/flexibility is crucial to making FOS resistant to ‘backlogs’ in the future.

1. Any EDR process / job design calls for a mix of knowledge and analysis and process skills, access to tools and a range of drafting skills appropriate to the complexity of the work.

2. The knowledge includes of the products in dispute, legal obligations, regulatory requirements, common and best industry practice, common practical issues, relevant case law – and the dispute resolution skills that might be applied.

3. There is no single way to prioritise or organise around these needs – and every choice brings with it the need for particular monitoring, quality control, and checks and balances.

That said, from our perspective there are characteristics or design principles that we think should be given priority in FOS evolution over next couple of years. These are described below at paragraph 8.2.

8.2. Design principles

We propose the following principles to guide change to the organisational design and its development over the coming years.

Recommendation 5

FOS should adopt the following design principles to guide future organisational design and development:

a) Resilience – maximise the natural resilience of its teams – aiming for the ability to flexibly respond and innovate.

b) Maximise the reach of experience – FOS design philosophy should place the most experienced case officers as close to the less experienced staff as practicable, strengthening development and providing some ‘future-proofing’.

c) Early involvement of senior staff – place senior, experienced input as close to the front end of the process as practicable with input that will give the parties confidence that the merits of the dispute are being engaged with.
d) Minimise hand-offs – aim for an environment where once allocated to a case officer who can substantively deal with the matter, the file stays with them and need only be read by the responsible officer and a supervising senior decision-maker/quality reviewer.

e) Minimise overlays – aim for an environment where resources spent organising the work are minimised (allocating/categorising/reviewing for these purposes) and as much time as possible is spent resolving the dispute.

f) Maximise accountability – aim for a design that maximises individual staff members and local team’s sense of accountability for the end-to-end process.

g) Maximise elasticity of productivity – aim for a design that encourages a natural ramping up and down of productivity as workload ebbs and flows.

8.3. Current organisational design

As discussed earlier, the current FOS organisational design is built around teams that specialise in a particular dispute resolution technique, with sub-teams that specialise according to product sector. This system of cascading filters aims to resolve disputes by the simplest method that is possible, with only the most difficult matters progressing to the ‘back end’ of the system.

Figure 24. Current FOS disputes process & teams

This illustration shows (somewhat simplified) the current FOS team structures, does not include mgmt, admin and support teams or attempt to show the multiple process pathways.

GI – General Insurance BF – Banking and Finance ILIS – Investments Life Insurance and Superannuation
8.4. Possible reconfiguration – front end

As already noted, we support the specialisation by product sector as best promoting efficiency and quality. The extent of specialisation by dispute resolution technique is, we think, more problematic.

Figure 25 below shows a possible variation to the current FOS team structures, aimed at leveraging greater staff experience and reducing hand-offs between FOS staff – with efficiencies permitting more senior staff to move to SRG Case Management. The proposal to refer a greater number of disputes to FSPs at Registration (see paragraph 7.12.1) should further reduce workload at the Acceptance Stage.

Figure 25. Possible reconfiguration of the ‘front end’ teams

This reconfiguration would reduce early resolution steps from two to one ie. have a unitary team (still of 10 to 12 in size – hence 6 teams) responsible for jurisdictional checking, any clarification with the Applicant, obtaining the FSP’s response and its information, obtaining the Applicant’s response to the FSP submission, carrying out an initial merits assessment, and facilitation of shuttle negotiations.

In this configuration, a dispute should be handled by only one case officer in the Early Resolution Team, with a QA reviewer who does Triage Assessment after the FSP’s response and otherwise reviews FOS correspondence as they do currently.

We think the risks are comparatively low, but if needed this change could be piloted with a proportion of the workload – perhaps one-third.

8.5. Possible reconfiguration – all teams

Figure 26 below shows another way to organise FOS to locate all (but for specialists and Ombudsmen) required skills in vertically integrated multi-disciplinary teams. The aim is that all matters are dealt with in-team up to final transfer to Ombudsman/Panel (where applicable). The aim is to allow flexible allocation of work and minimise hand-offs and repetition.
This model would of course require matrix management to ensure consistency, quality, and comparable efficiency across all teams, however we do not think this would be any greater than the current workload management overlays. Our expectation is that this would in fact be much less of an overhead, however this would need to be validated by FOS Management or tested in a pilot stage.

We would expect Ombudsmen and specialists to work across the teams and help to maintain consistency of outcomes across FOS. Other initiatives to promote consistency across teams could include periodic rotation of Team Managers.

**Figure 26. Possible reconfiguration of all disputes teams**

While there would inevitably be teething problems, we think that the proposal is comparatively low risk. The model of operating within the team is essentially the same as any small-scale EDR scheme. It is also similar in concept to the professional services model of a firm made up of ‘many small firms’ where infrastructure, standards, compliance, policy and knowledge sharing is done centrally – with workload managed in a distributed way by partners or directors. We do not suggest that these models are without their problems – but they are well-understood problems that are well within the ken of FOS management.

While the transfer of work from one processing configuration to another will inevitably bring a temporary dip in productivity, there are factors that we think will mitigate the risk for FOS. The scale of FOS means that on initial movement of staff to a fully integrated vertical team of 12-15 staff, existing skills from current teams would be represented by at least one person – often 2 or 3. This would enable each team to have within its membership at least some experience of all pre-existing practice. While this is obviously not the ultimate aim, we think this should ensure a base level of productivity on initial transition.

We have not been able to extrapolate from current information (FOS case management data, FOS financials or tools developed for FOS by Hub Consulting) sufficiently to provide proof of concept confidence based on data – however we understand that FOS Management have been examining similar concepts and the resultant estimates are highly positive. We think that a pilot is probably the only reliable way to be fully confident of the outcome of full implementation.
Testing the proposition against our suggested design principles:

1. A shift to multiple vertically integrated teams is we think the way to achieve organisational resilience and flexibility. It enables disputes to be allocated within the team in a way that matches complexity to skill levels. It would facilitate staff learning to work further up the value-chain – without having to be promoted/ transferred to another team/etc. Additional staff could be quickly applied to writing decisions/ addressing the Recommendation queue.

2. It recognises the efficiency and quality benefits of industry-based specialisation and would permit further specialisation by product or dispute type or temporarily by event or any other sensible aggregation.

3. By concentrating an FSP’s disputes to one or a couple of Teams (depending on the size of the FSP), it would also permit FOS staff to develop a deeper knowledge of that FSP’s business/ products/ policies. This would promote efficiency/ greater timeliness for FOS (and FSP) and address the current FSP frustration that each dispute/ contact with FOS is as if the first time. This could also assist with consistency as between disputes of the FSP and provide greater opportunity for disputes to be discussed between FOS and the FSP in a ‘batch’ discussion, which some FSPs have requested.

4. A vertically integrated team approach also recognises the complementary nature of skills across dispute resolution techniques eg. more sure-footedness in guiding settlements by staff with closer access to and a greater knowledge of the Recommendation or Determination process.

5. More experienced case officers are situated in close proximity and provide supervision to the less experienced case officers – this assists in developing the less experienced case officers and also enables the within-team quality assurance officer to be the point of escalation if transfer of the dispute to a more experienced officer becomes necessary i.e. minimising hand-offs.

6. This maximises accountability and facilitates innovation by permitting comparison of the performance of teams. (We think this may prove to be a significant benefit for FOS Management in the long term.)

7. It is a simple structure that can operate with minimal overlays – eg. only one point of triage when a dispute passes to the team rather than the present ‘front end’ and SRG triage.

Of course, these are our suggestions. We are reviewers with a passing, point in time understanding of the issues confronting FOS. It is FOS Management and the FOS Board that must in the end make the decisions and live with the inevitable trade-offs. We encourage bold thinking in this regard.
9. RESOURCING

Our analysis (and gut feel) suggests that FOS resourcing is approximately right for the task in front of it – however, it is very difficult to be confident that this is so while the ‘back end’ unallocated dispute queues are as lengthy as they are. We have taken the view that FOS should focus on clearing its ‘backlogs’ as a matter of priority and suggested that as a matter of ‘optics’, it should aim to do this from some combination of case fees being brought forward, from current resourcing and by considering drawing on reserves.

This is of course, a short to medium term strategy that, if adopted, will only be successful if our analysis is more or less correct, the timeliness improvements are delivered and no future shocks to the system by way of dramatic changes in disputes volumes or complexity hit FOS in the next couple of years.

We would be remiss if we did not point out that even if we are correct, and FOS is able to move to meet appropriate KPIs within its funding model, future environmental shocks to the system could trigger another round of ‘backlogs’ while FOS tries to scale up to meet demand. The future FOS will be better positioned for this than was the newly merged FOS of 2010/11, with better Management information, better infrastructure and a larger body of skilled staff. We also believe that there will be some greater natural resilience in the process and organisational design directions we have suggested, but we know that all of this will have some limitations.

The ability to scale up rapidly and to manageably reduce resourcing as required will be a critical organisational capability for the future. The bottom line is that it is possible that FOS needs to be resourced at some different level or in some more elastic way than the current model can support.

As a matter of long-term good management, FOS is progressively improving its internal costs information and engages with stakeholders regularly on the adequacy and configuration of its funding model. In our view, once FOS’s timeliness is under control, and its next organisational and process model is implemented, the question of a sustainable funding model may require a fundamental re-visit.
10. JURISDICTION/ SCHEME COVERAGE

Since the commencement of FOS’s new Terms of Reference, there have been a couple of areas of regulatory change that have particularly affected FOS’s jurisdiction.

The National Consumer Credit Protection Act 2009 (NCCP) introduced a statutory responsible lending regime. It also replaced the Uniform Consumer Credit Code with the National Credit Code (NCC) which amongst other things changed financial hardship variation application requirements. In 2011 and 2012, important amendments were made to the NCCP. FOS has provided much training about the NCCP, the NCC and the subsequent legislative changes to its staff, utilising both senior FOS lawyers and external specialist lawyers to provide the training.

In 2011, ASIC revised Regulatory Guide 139 to introduce new requirements for EDR schemes dealing with disputes about traditional trustee company services. To meet these new requirements, FOS amended its Terms of Reference to include new Section F: Dispute Resolution Processes – Traditional Trustee Company Services affecting multiple parties.

The scope of our Review requires us to make an assessment of FOS’s performance in light of these changes. In particular, we looked in some detail at FOS procedures and practices for disputes involving allegations that the lending was not responsible and disputes involving allegations that the lender failed to meet its obligations to give genuine consideration to a financial hardship application. We also reviewed half of the trustee company services disputes that have been accepted by FOS.

We were also asked to look at some particular Terms of Reference issues: FOS’s discretion to allow further time to lodge a dispute, the extent to which FOS adequately covers small business disputes and the adequacy of the cap of $3,000 for uninsured third party motor vehicle claims and for consequential loss claims.

Finally, in this Part of our Report we consider a couple of issues pertaining to FOS’s jurisdiction that were raised by stakeholders.

10.1. Responsible lending

FOS has long been able under its Terms of Reference to consider disputes that raise allegations of maladministration in lending or that the lender has breached an industry code obligation to exercise normal skill and care or responsibility in making lending decisions.

Since July 2010/ January 2011 (depending on the type of lender), statutory responsible lending obligations have applied under the NCCP. In Regulatory Guide 209, ASIC has set out its expectations as to what is required of regulated lenders.

10.1.1. Stakeholder views

The Joint Consumer Submission expressed some concern that FOS has not sufficiently amended its approach to maladministration in lending to take account of the new statutory responsible lending obligations and that standard form letters have not been updated to reflect the changes.

Industry submissions did not raise issues in relation to responsible lending disputes.
10.1.2. Findings

Until quite recently, most of the disputes received by FOS of this type have related to loans that were made prior to the commencement of the NCCP. For these disputes, FOS has quite appropriately continued to apply its pre-NCCP approach.

Issue 5 of The Circular (March 2011) demonstrates that FOS is aware of the changes wrought by the NCCP and, for loans made after the commencement of that legislation, FOS is modifying its approach. Our file review included FOS’s first responsible lending Determination (post NCCP loan). Consistent with the approach described in Issue 5 of The Circular, the Determination refers to ASIC Regulatory Guide 209 and the factors that are relevant for the purposes of determining whether a consumer is able to pay a loan without substantial hardship.

FOS has provided us with the standard paragraphs that it incorporates in its initial case management letter to an FSP where compliance with NCCP responsible lending obligations is in issue: we understand from FOS that these standard paragraphs have been in use since April 2013. The initial case management letter to the Applicant continues to speak in terms of “maladministration in lending”. We think it would be preferable if that language is updated to refer to “lending that does not meet responsible lending obligations”.

We understand from FOS that this template correspondence is being revisited.

10.2. Financial difficulty applications

Since 1 January 2010, FOS’s Terms of Reference have given it the power, in the case of financial hardship, to vary the terms of a NCC regulated credit contract (a credit contract entered into with an individual for predominantly personal, domestic or household purposes or a residential property investment loan).

For banks that are subscribers to the Code of Banking Practice and mutual organisations that are subscribers to the Mutual Banking Code of Practice, FOS’s jurisdiction also includes assessing whether the FSP has complied with its Code obligations to help a co-operating customer (including a small business) to overcome financial difficulties which could, for example, include developing a repayment plan.

As the Chart in Figure 27 shows, FOS’s volume of financial difficulty disputes is large.

Figure 27. Number of financial difficulty disputes accepted by FOS
In anticipation of this volume, the Acceptance, Early Case Management and Case Management Teams handling financial difficulty cases were co-located in 2009, reporting through to the one Manager. The team rapidly expanded.

**10.2.1. FOS processes**

In *The FOS Approach Financial Difficulty Series, April 2013*, FOS explains how it approaches this jurisdiction:

“We will only use this power [to vary regulated credit contracts] in circumstances where a variation will see the repayment of the loan in a reasonable period…. The main thing we look at when considering varying a regulated credit contract is whether the individual can demonstrate an ability to service the loan in the future…

*Even if the credit contract is not regulated, we still expect FSPs to give genuine consideration to request for assistance by an individual.*”

While there is a greater focus by case workers on facilitated outcomes, FOS’s process steps for these disputes are largely the same as for all other disputes. Two exceptions are that FOS imposes shorter timeframes on FSPs where legal proceedings are pending, and that a telephone conciliation conference is usually mandatory.

At the outset of the dispute, the FSP is asked to provide extensive information - to:

- demonstrate that genuine consideration has been given to the Applicant’s current and previous requests for assistance;
- outline monthly repayments and current arrears;
- provide the Statement of Financial Position that was obtained from the Applicant or set out detail of information held as to this;
- demonstrate staff have followed internal hardship assessment processes;
- provide all correspondence with the Applicant about the variation request;
- provide details of collection activity since the date of the variation request;
- provide details of any payment arrangement the lender will accept, with reasons for the decision;
- if the lender is not prepared to accept any payment arrangement, explain why;
- provide any other comments; and
- respond to all other issues raised by the Applicant, for example, maladministration allegations or issues pertaining to fees.

The Applicant is asked to provide a Statement of Financial Position. If, however, the Applicant fails to do so, this is not a bar to the dispute proceeding.

As the chart in Figure 28 demonstrates, a lower proportion of financial hardship disputes result in a FOS decision (Recommendation or Determination) and a higher proportion of these disputes are found to be outside Terms of Reference, than for disputes generally.
10.2.2. FSP views

Considerable concern has been expressed by a number of banks about FOS’s handling of financial hardship disputes.

They have asserted that prolonged FOS timeframes, during which the customer often ceases to make payments, mean that the customer’s position frequently deteriorates significantly to the disadvantage of both parties. Some banks have expressed the view that FOS does not ‘value add’ much in these disputes and does not rein in delaying tactics by Applicants. An industry association has said that, because of these issues, banks often feel compelled to agree to a settlement proposal, although there may be real doubt about the Applicant’s ability to meet the varied repayment terms. There was also complaint by banks about the volume of information required by FOS, with claims that FOS treats each financial hardship dispute as if it is the first dispute of this type that it has received in relation to the FSP and accordingly FOS asks for information that the bank has provided countless times before for the purposes of other disputes.

Given that a financial services customer in financial hardship will often have financial hardship applications with telecommunication companies and utilities as well as lenders, there have also been calls for EDR schemes generally to take a common approach to financial hardship applications.

More positively, our consultations with banks did confirm that FOS’s three way telephone conciliation process (FOS, bank representative and the Applicant) can be helpful in achieving accommodation between the parties.

10.2.3. Consumer views

Consumer representatives expressed strong support for FOS’s role in financial hardship disputes.
The view was expressed that FOS’s processes permit consideration of the individual circumstances of the Applicant, whereas FSPs often have a rigid policy that does not permit tailoring to individual circumstances. Also, as a neutral third party, FOS can help Applicants to come to terms with their financial situation, even if their lender’s response to their financial hardship application is not exactly what they want.

Concern was, however, expressed in the Joint Consumer Submission about FOS’s unwillingness to accept a dispute where a hardship arrangement is entered into that specifies that the arrangement constitutes a full and final settlement.

10.2.4. Findings – FOS’s application of jurisdictional limits

As noted earlier, FOS is excluding a higher percentage of financial difficulty disputes on the basis that they are outside its Terms of Reference, than is the case for disputes generally. The table at Figure 29 (below) sets out the basis on which exclusions are being made.

Paragraph 5.1(l) of the Terms of Reference is the most frequent category of exclusion. It is applied where the FSP has obtained judgement against the Applicant before the dispute is lodged with FOS.

Paragraph 5.2(a) is used primarily to exclude disputes where the original FSP, a FOS member, has assigned the debt to a Credit Ombudsman Service member and it is that entity that is responsible for the financial difficulty application: these disputes are referred to Credit Ombudsman Service.

Paragraph 5.1(k) is used to exclude disputes that have been previously dealt with by FOS. This only occurs where the dispute facts or events are the same. Accordingly, if there is a new hardship event, FOS will consider the dispute even if the debt is payable under a settlement reached through the auspices of FOS. This is consistent with ASIC’s expectations set out in Regulatory Guide 139.216:

“Where a disputant seeks more than one, or several, changes to the terms of the credit contract or lease for hardship during the life of the contract or lease, each dispute relating to a hardship notice must be treated as a new dispute to allow the disputant access to EDR.”
We discuss later in this Report FOS’s outside Terms of Reference processes and identify some problems in reviewed disputes – see paragraph 15.1. Our file review did not, however, identify concerns about financial difficulty Outside Terms of Reference decisions. Of the 33 financial difficulty disputes we reviewed, there were two disputes that were found by FOS to be outside Terms of Reference - in both cases we felt appropriately so. There were a further two disputes where there had been a previous settlement, and so some discussion occurred about whether FOS should exclude the dispute, but in fact in both disputes a new negotiated resolution was achieved.

10.2.5. Findings – Timeframes

We were, however, concerned about the extended timeframes we saw in our file review (in excess of 2 years in one dispute) particularly where other allegations such as maladministration were made. In many disputes, we saw limited engagement by the Applicant with the FOS process and delays in responding to FOS, failure to provide a Statement of Financial Position. Delays by FSPs, particularly at the outset of the dispute, were also evident in a number of disputes. Our file review also provided support for the FSP claims that FOS’s approach is often very passive, allowing time to elapse, with little active steering of the parties towards a realistic solution.

A comparison of the time taken in 2012/13 to close financial difficulty matters with all FOS matters shows only a small positive difference for financial difficulty disputes. This is notwithstanding the shorter FSP timeframes to respond for at least some financial difficulty disputes, the comparatively high number of Outside Terms of Reference decisions and the lower number of disputes that go through to a FOS decision (Recommendation or Determination).

Of concern, timeliness during 2012/13 seemed to be worse than in 2011/12 for all but the very quickest disputes (much of which we think would be explained by the higher proportion of outside Terms of Reference decisions made at the outset of the process). This appears to be
in part explained by the lag effect of the 42% increase in financial difficulty disputes during 2011/12.

Figure 30. Time taken for matter resolution: Financial difficulty disputes cf. all FOS disputes

10.2.6. Findings – Outcomes

Of course, in the financial difficulty jurisdiction, the measure of success is to a large extent whether hardship variations are enabling Applicants to overcome their financial difficulties and meet their obligations to their FSPs. If the opposite is the case, and a hardship variation simply brings about a future default, then the process is not working. Unfortunately, so far as we are aware, there is no data as to this. Nor were we able to reach conclusions from the available FOS data about repeat financial difficulty Applicants. Our telephoning of former Applicants brought to light some situations where FOS outcomes had worked well and were much appreciated. But our sample was neither large enough nor representative enough to permit us to draw broad conclusions. We remain concerned about the anecdotal reports from industry and consumer representatives of settlements reached through FOS that commit the Applicant to payments that the Applicant quickly fails to meet.

10.2.7. Objectives and priorities

In view of these issues, we think that FOS needs to reshape its approach to financial difficulty disputes to take a more assertive approach that produces more timely resolution. This should be done in close consultation with stakeholders. Other EDR schemes could also be consulted to see if greater commonality or co-operation is possible. Our suggestions are:

- Where a financial difficulty dispute also raises allegations of past misconduct, we think that FOS should generally prioritise the current financial difficulty application. After that it is done, FOS should investigate any other issues that remain. The current approach of resolving all allegations simultaneously is complicating and delaying FOS’s investigation. And it was apparent from our file review that sometimes the resolution of the financial...
difficulty issues is what the Applicant most wants and the Applicant is content to allow other issues to fall away if a hardship variation can be achieved.

• If the current financial difficulty application is the initial focus, a more limited information collection exercise is possible. This should reduce FSP delays at the early stages and permit an earlier telephone conciliation conference with the parties.

• There should be earlier and more proactive emphasis (beginning at the conciliation conference) on assessing whether the lender has fulfilled its obligation to give genuine and reasonable consideration to whether a hardship variation is viable. If FOS is satisfied that the lender has made a reasonable (albeit unsuccessful) attempt to accommodate the Applicant, we think that FOS should be moving promptly to close the matter via an Assessment (see paragraph 13.2 of this Report for an explanation of FOS’s Assessment process).

• Notwithstanding what is said in The FOS Approach: Financial Difficulty Series, we think that in practice the files demonstrate that FOS is not being assertive enough in assessing and providing guidance about the viability of a proposed settlement. In our view, this is where the financial difficulty jurisdiction is different from the usual EDR jurisdiction.

• FOS should also be more prepared to refuse to continue to consider a dispute if the Applicant without reasonable excuse fails to provide a Statement of Financial Position or meet other FOS requests. This is allowed under FOS’s Terms of Reference and we think is only fair to the FSP – after all, a financial hardship variation is only viable if the borrower works with the FSP.

• We think that FOS should also be more willing to exercise its discretion to exclude small business financial difficulty disputes that relate to large sums of money and raise complex issues. Paragraph 5.2a) of FOS’s Terms of Reference permit FOS to decide that there is a more appropriate place to resolve a dispute. This is discussed at paragraph 10.5 of our Report.

• In financial difficulty disputes, we think that it is particularly important (and given the relatively straightforward nature of the disputes eminently achievable) to maximise continuity in handling the dispute and minimise transfers of the dispute from person to person in the interests of achieving a speedier resolution: see Parts 7 and 8 of our Report.

We think that these changes should permit FOS to achieve faster average resolution times - including to ensure that there are no open disputes that are more than 12 months old (while the basis of measurement varies, at the time of writing, this was the position at the Credit Ombudsman Service). We recognise, however, that our suggested more-proactive approach – more akin to the Credit Ombudsman Service approach - is likely to require increased resourcing. FOS’s current resourcing means that its financial difficulty dispute staff are expected to achieve a higher dispute throughput than the Credit Ombudsman Service’s staff.

We also think that there is a need for an evaluation framework focused on what practical outcomes are being achieved. We recommend regular surveying by FOS of financial difficulty Applicants to test whether its approach is achieving hardship variations that are sustainable. If the data raises concerns on this account, FOS can refine its approach.
Recommendation 6

In consultation with stakeholders, FOS should reshape its approach to financial difficulty disputes to take a more assertive approach that produces more timely resolution, including:

a) postponing consideration of allegations of past misconduct until after the resolution of the financial difficulty application, thereby simplifying and focusing the initial information collection;

b) greater preparedness by FOS to decline to continue to consider the dispute particularly if:
   - the lender has reasonably fulfilled its obligation to try and accommodate the Applicant;
   - the Applicant without reasonable excuse fails to provide a Statement of Financial Position or meet other FOS requests; or
   - the application is by a small business and relates to large sums of money and raises complex issues that are more suited to resolution in the courts;

c) more proactive assessment by FOS as to whether a proposed hardship variation is likely to be viable, in the interests of ensuring that settlements reached through FOS assist Applicants to move out of hardship and to meet their obligations to their lenders; and

d) FOS should regularly survey previous financial difficulty Applicants to test whether outcomes achieved through FOS are proving to be sustainable and helping the Applicant to overcome their financial difficulty and to meet their obligations to the FSP.

e) FOS should update its materials for FSPs and consumers to ensure full transparency about changes that are made.

10.3. Traditional trustee services

For disputes about traditional trustee company services that affect multiple parties, paragraph 15 of FOS’s Terms of Reference only permits FOS to consider the dispute if all other affected parties have given their consent. This is consistent with the requirements of ASIC Regulatory Guide 139.196.

None of the stakeholder submissions that we received raised issues in relation to this new area of jurisdiction for FOS.

10.3.1. Findings

As the following table in Figure 31 shows, FOS receives few traditional trustee services disputes.
Figure 31. 2012/13 - Trustee Services Disputes Received

<table>
<thead>
<tr>
<th>Dispute type</th>
<th>No. of disputes closed in 2012/13</th>
<th>Outcomes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Registrations</td>
<td>16</td>
<td>In 2 cases, the Applicant reverted to FOS post registration ie. the dispute reached the Acceptance Stage.</td>
</tr>
<tr>
<td>Accepted disputes that had not been previously registered</td>
<td>9 (8 of these related to estate management services)</td>
<td>4 of these were discontinued by the Applicant at the Acceptance or Review Stage 5 of these were found by FOS to be outside its Terms of Reference</td>
</tr>
</tbody>
</table>

We reviewed 5 accepted disputes, each with the trustee of a deceased estate that were either discontinued by the Applicant or found by FOS to be outside its Terms of Reference. Each dispute raised service issues, for example, there were complaints about fees and reporting. It was evident from these disputes that the requirement to obtain consent from all other affected parties is a considerable practical impediment to pursuing a dispute through FOS. To make this jurisdiction work more effectively, we think that FOS’s Terms of Reference should give FOS a discretion to consider a traditional trustee services dispute without the consent of all other affected parties, where FOS is satisfied that their interests would not be prejudiced by doing so.

**Recommendation 7**

FOS should consult with ASIC and other stakeholders with a view to amending its Terms of Reference to allow FOS to consider a traditional trustee services dispute, without the consent of all other affected parties, where FOS is satisfied that their interests would not be prejudiced by doing so.

10.4. Time limits discretion

Paragraph 6.2 of FOS’s Terms of Reference establishes timeframes within which a dispute must be lodged with FOS. FOS may, however, exercise a discretion to consider a dispute lodged outside these timeframes “if FOS considers that exceptional circumstances apply”.

10.4.1. Stakeholder views

One industry submission stated that the existence of this discretion creates potential for inconsistent approaches as between FOS case officers and open-ended liability that is challenging for FSPs to manage and that may impact professional indemnity premiums.

The Joint Consumer Submission expressed some concern that, where a short term loan is entered into or credit is refinanced, the two year timeframe from the end of the contract can be quite limiting. The submission argued that there should be more transparency as to the availability of the exceptional circumstances discretion. It was suggested that there should be public guidelines as to the types of situations when the discretion is likely to be exercise. Also,
where a dispute is rejected as outside time, the Applicant should be informed about FOS’s discretion so that the Applicant can put argument to FOS as to why the discretion should be exercised.

10.4.2. Findings

In 2012/13, there were 133 disputes that were rejected on the basis that they were outside time. FOS does not, however, keep data as to the exercise of its discretion to allow disputes that are outside time, however FOS staff confirmed that the discretion is rarely exercised.

In our file review, there were no files where the discretion was exercised to accept dispute outside time limits. There were three disputes that were ruled by FOS to be outside time and, in one of these, file notes recorded that exceptional circumstances did not exist to justify the exercise of FOS’s discretion to allow in the dispute.

We think that the timeframes for lodging a dispute with FOS should normally be sufficient. Accordingly we think it is appropriate that FOS exercise its discretion only rarely. For this reason, we do not see as a priority the development by FOS of further guidance as to when the discretion is likely to be exercised (and we suspect that any such guidance would necessarily have to be expressed at a level of generality that may not in any event add much).

To facilitate greater accountability and to enable stakeholders to monitor use of this discretion, FOS should collect statistics as to the exercise of this discretion.

Recommendation 8

From the 2014/15 financial year, FOS should commence collecting data so that it can report how often it exercises its discretion to allow an Applicant with an ‘out of time’ dispute to utilise FOS’s service.

10.5. Small business disputes

FOS’s Terms of Reference give FOS jurisdiction in relation to Small Businesses, defined consistently with the Corporations Act as a business that has less than 20 employees (or 100 employees if a manufacturer). In the case of small business general insurance disputes, a further limitation applies. FOS’s jurisdiction is restricted to Small Business Insurance Products as defined in paragraph 20.1 of the Terms of Reference.

In 2012/13, 5% of FOS accepted disputes were small business disputes, primarily credit and payment system disputes as the following demonstrates.

We think that this volume of small business complaints coming to FOS is a quite healthy indicator that the small business sector are increasingly aware of FOS as an avenue to seek redress where they think they have a case against an FSP. This is an area that has long been something of a concern - in particular because many small business owners fall into demographic categories that are considered to be vulnerable or disadvantaged in a retail context (ie. non-English speaking, low levels of education/sophistication, etc).
For this reason, we think that it is every bit as important that FOS’s service to small business is as simple, seamless and easy to understand as its service to retail consumers.

Figure 32. 2012/13 – Type of Small Business Disputes accepted by FOS

10.5.1. FSP views

Two FSP submissions expressed concern about commercial property borrowers accessing FOS. It was argued that typically these Applicants are legally advised at the outset of the loan and they are often well resourced and “more than capable of defending their position in Court”. It was argued that these borrowers are using the FOS process as a way of delaying recovery action and this is diverting FOS’s scarce resources from truly consumer matters.

Concern was also expressed by one FSP about farm debt disputes. These disputes can involve large facilities, urgency (the need to intervene promptly to protect perishable assets (livestock) and the complexities of government intervention, for example, through drought assistance. Further the issues may have already been canvassed in a farm debt mediation process (Victorian and New South Wales legislation make it compulsory for banks and other creditors to offer a structured, independently mediated process to farmers before commencing debt recovery proceedings on farm mortgages). It was said that FOS sometimes uses its general discretion to exclude these matters but does not reliably do so.

FOS’s small business insurance jurisdiction was also the subject of some FSP concern. Whilst some insurers expressed the view that FOS now has the experience to handle disputes in relation to at least some categories of currently excluded products, the industry association submission stated that its members do not support expansion of this jurisdiction and doubted FOS’s technical capability to handle the complexity of business products such as business interruption cover and industrial and special risks. Concern was also expressed about FOS timeframes being negatively impacted by an increase in FOS’s workload.
10.5.2. Consumer views

The Joint Consumer Submission expressed concern that many financial counsellors are not aware of FOS's small business jurisdiction and recommended that FOS promote this more actively. This is discussed further at paragraph 11.1 of our Report.

10.5.3. Findings - small business credit disputes

Our file review confirmed that FOS is being accessed by small businesses, often property developers, that have borrowed large sums: we saw disputes about loans of in excess of $5 million. Sometimes these disputes involve a complex package of loans with a number of parties to the loans. The issues can traverse a number of years and multiple claims such as maladministration in lending, fees and interest rate disputes, financial difficulty and issues pertaining to realisation of security.

Where it is clear that the claim (not the loan) is for an amount in excess of $500,000, FOS will rule the matter outside jurisdiction under paragraph 5.1m) of the Terms of Reference. But often the quantum of the claim is not clear at the outset. Our file review suggests that it is rare for FOS to exclude these types of disputes using the paragraph 5.2a) discretion to decide that the Courts are a more appropriate place to deal with the dispute.

In the case of a Victorian or New South Wales farm debt, FOS will exercise its discretion under paragraph 5.2 of the Terms of Reference to exclude the dispute if the legislatively mandated mediation has occurred. But where, for example, the farmer has rejected the lender’s mediation offer or withdrawn from the mediation process, FOS will accept jurisdiction over the dispute. FOS also accepts jurisdiction if the dispute relates to a debt in another State that does not have farm debt mediation legislation.

We think that FOS should be more active in using its discretion to exclude large and complex business credit disputes. To ensure transparency, FOS should include guidance in its Operational Guidelines (available on FOS’s website) as to the factors that it will take into account in the exercise of this discretion.

Recommendation 9

In the case of large, complex commercial credit disputes, FOS should be more active in exercising its discretions under the Terms of Reference to refuse to consider the dispute if FOS considers this course of action appropriate, for example, because there is a more appropriate place to deal with the dispute such as a Court. To ensure transparency, FOS should develop and publish guidance as to the factors that it will take into account, which could include the number, quantum and complexity of the loans, the number of parties, the complexity of issues involved, whether the parties were legally advised at the time of entering into the loans and whether independently facilitated mediation by a qualified mediator has begun.
10.5.4. Findings – general insurer/ small business policy disputes

FOS data suggests that there is demand from small businesses for broader access to FOS in relation to small business general insurance disputes.

The table below (Figure 33) demonstrates that jurisdictional checking resulted in FOS excluding 14% of small business general insurance disputes. Of course, FOS exclusion data no doubt understates the extent to which small businesses would like to access FOS to pursue small business general insurance disputes. This is because the Corporations Act does not oblige general insurers to direct small business complainants to FOS, unless the dispute concerns a Retail General Insurance Product.

The exclusion of small business continuity insurance has been suggested to be a particularly significant limitation on FOS’s ability to resolve small business disputes.

Figure 33. 2012/13 Small Business General Insurance disputes excluded by FOS

<table>
<thead>
<tr>
<th>Excluded insurance product</th>
<th>Number</th>
<th>% of FOS accepted Small Business GI disputes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Professional indemnity</td>
<td>6</td>
<td>3%</td>
</tr>
<tr>
<td>Contractors All Risk</td>
<td>4</td>
<td>2%</td>
</tr>
<tr>
<td>Industrial Special Risk</td>
<td>2</td>
<td>1%</td>
</tr>
<tr>
<td>Loss of Profits/Business Interruption</td>
<td>7</td>
<td>3%</td>
</tr>
<tr>
<td>Public Liability</td>
<td>12</td>
<td>5%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>31</strong></td>
<td><strong>14%</strong></td>
</tr>
</tbody>
</table>

In addition, as our file review demonstrated, the application of the Terms of Reference small business insurance exclusions can lead to results that appear arbitrary. For example, there was a dispute about insurance of a home under construction that was excluded on the basis that it was a Contractors All Risk policy taken out by the builder, albeit that the claimant was the individual who owned the home.

In our view, FOS’s decision making capabilities – see paragraph 13.8 of this Report - are now of an order that we think would support a modest increase in FOS’s small business jurisdiction to allow it to deal with small business loss of profits insurance disputes and to give FOS some discretion to deal in exceptional circumstances with disputes that are usually excluded. Our analysis of FOS data – see Figure 33– suggests that this would only increase the volume of general insurance disputes by a small number. We agree, however, with industry that this is a lesser order issue than addressing the timeliness issue. So we suggest that the increase in jurisdiction should not take effect until say 1 January 2016.
**Recommendation 10**

FOS should commence the necessary consultation steps to amend the Terms of Reference to expand FOS’s jurisdiction to include loss of profits/business interruption insurance and to include an ‘exceptional circumstances’ discretion so that FOS can, where appropriate, consider a dispute in relation to an excluded category of insurance. To allow time for FOS to first address its dispute resolution timeframes, the jurisdictional expansion should not take effect until 1 January 2016.

**10.5.5. Findings – insurance broker/ small business policy disputes**

In the case of a dispute between a small business and an insurance broker, paragraph 4.3 of the Terms of Reference only permits FOS to consider the dispute if it relates to a Retail General Insurance Policy (defined to be car, home building, home contents, sickness and accident, consumer credit, travel, personal and domestic property or medical indemnity insurance) other than an Excluded Product (defined to be a product that is not a financial product for the purposes of the Corporations Act).

This is a narrower jurisdiction than under the Terms of Reference of the antecedent scheme, the Insurance Brokers Disputes Facility, which extended to a dispute between an insurance broker and a Small Business about any general insurance policy that was not an Excluded Product (defined as per FOS’s Terms of Reference).

We think that it would be appropriate to restore FOS’s jurisdiction to that of the antecedent scheme. FOS should consult with its stakeholders with a view to doing this.

**Recommendation 11**

FOS should commence the necessary consultation steps to amend the Terms of Reference to expand its jurisdiction to disputes between insurance brokers and small businesses about any general insurance policy other than an Excluded Policy (thereby restoring its jurisdiction to that of the antecedent scheme, the Insurance Brokers Dispute Facility).

**10.6. Uninsured third party motor vehicle insurance claims**

Paragraph 4.2b)(vi) of FOS’s Terms of Reference enables FOS to consider a dispute brought against an insurer by an uninsured third party for motor vehicle damage caused by another person. But this is only if the insured driver who caused the damage makes a claim on their insurance and pays any relevant excess under their policy (unless the insured has died or cannot be found). A maximum of $3,000 may be awarded by FOS.
10.6.1. Stakeholder views

The Joint Consumer Submission argued that $3,000 cap should be increased to $15,000 given the cost of repairing a car is invariably more than $3,000.

A more modest increase, to $5,000 was supported by some insurers. On the other hand, one insurer in particular expressed strong opposition to increasing the cap on the basis that uninsured parties make a choice to bear risk and, if FOS’s jurisdiction increases, those who choose to insure will through their insurance premiums have to absorb the additional costs that would be incurred.

10.6.2. Findings

In 2012/13, FOS accepted 412 disputes of this type, but in only 79 disputes (19% of these disputes) did the Applicant receive some monetary compensation. In 164 disputes (40% of these disputes), FOS found that the preconditions to jurisdiction were not met and the dispute was ruled outside Terms of Reference.

Figure 34. 2012/13 Uninsured third party motor vehicle insurance claims

<table>
<thead>
<tr>
<th>Claim Outcomes 2012/13</th>
<th>No.</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assessment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Monetary Compensation in part</td>
<td>1</td>
<td>17</td>
</tr>
<tr>
<td>- No payment or action</td>
<td>16</td>
<td></td>
</tr>
<tr>
<td>Conciliation-Monetary compensation in part</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Decision in Favour of Applicant</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Monetary compensation in full</td>
<td>5</td>
<td>12</td>
</tr>
<tr>
<td>- Monetary compensation in part</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>Decision in Favour of FSP</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- No compensation or action</td>
<td>22</td>
<td>24</td>
</tr>
<tr>
<td>- FSP Offer/ Action confirmed</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Discontinued by Applicant/ Failure to Respond</td>
<td>50</td>
<td></td>
</tr>
<tr>
<td>Negotiation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Monetary compensation in full</td>
<td>1</td>
<td>16</td>
</tr>
<tr>
<td>- Monetary compensation in part</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>- No payment or action</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>- Not disclosed</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>- Partial waver of debt/interest/fees</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>- Other product, service, or commercial resolution provided</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Outside Terms of Reference</td>
<td>164</td>
<td></td>
</tr>
<tr>
<td>Resolved by FSP</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Monetary compensation in full or part</td>
<td>53</td>
<td>127</td>
</tr>
<tr>
<td>- No payment or action</td>
<td>10</td>
<td></td>
</tr>
<tr>
<td>- Not disclosed</td>
<td>48</td>
<td></td>
</tr>
<tr>
<td>- Other product, service or commercial resolution provided</td>
<td>16</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>412</td>
<td></td>
</tr>
</tbody>
</table>


Our file review included 7 uninsured third party motor vehicle claims and we saw from these that the Terms of Reference preconditions often act as an impediment. We interviewed an Applicant who was frustrated that his claim was thwarted by the financial difficulty of the insured, a pensioner, who had made a claim on his insurance policy but was unable to afford the excess payment.

It seems to us that there is a ‘business case’ for a modest expansion of FOS’s jurisdiction. In our view, FOS should be able to consider a dispute where the insured makes a claim but fails to pay the excess. In these circumstances, an award in favour of the uninsured third party should subtract the amount of the excess, leaving the third party to recover this direct from the insured. This would moreover be consistent with some of the thinking in the Court of Appeal case, Calldén Insurance Ltd v Chisholm [2009] NSWCA 398, which concerned a third party claim on the public liability policy of a company in liquidation. The Court stated that the insurer could not avoid its liability under the policy by reason of the insured’s inability to first pay the excess. (We recognise, however, that case was decided on the wording of the policy in question and so do not mean to suggest that it is directly applicable.)

We also think that a slightly higher cap would be appropriate for these types of disputes. The current cap of $3,000 has been in place since before 2008 and is manifestly inadequate for other than minor car accidents. We support an increase to $5,000.

We do not expect that these changes would result in a dramatic increase in the numbers of disputes of this type that are successful at FOS. But we consider that these modest changes would achieve a more complete model.

**Recommendation 12**

FOS should commence the necessary consultation steps to amend its Terms of Reference to expand its jurisdiction in relation to uninsured third party motor vehicle disputes so as to enable FOS:

- to consider the dispute even if the insured driver who caused the damage has failed to pay the excess to their insurer; and
- to make an award of up to $5,000 in these types of disputes (rather than $3,000 as is presently case).

### 10.7. Disputes about insurance premium

Paragraph 5.1e) of FOS’s Terms of Reference excludes from FOS’s jurisdiction disputes “about rating factors and weightings the insurer applies to determine the insured’s or proposed insured’s base premium which is commercially sensitive information”.

#### 10.7.1. FSP views

A couple of general insurers have argued that paragraph 5.1e) is cast too narrowly and that confidential rating factors and weightings are also used to determine excesses or policy conditions.
10.7.2. Findings

We agree with the submissions by general insurers that paragraph 5.1e) should be broadened to fully protect confidential rating factors and weightings.

**Recommendation 13**

FOS should commence the necessary consultation steps to amend its Terms of Reference to add in the words “excess or policy conditions” after the words “base premium” paragraph 5.1(e). This will ensure that confidential rating factors and weightings are protected where they are applied to determine commercial terms other than just the base premium.

10.8. Consequential loss

Paragraph 9.3 of FOS’s Terms of Reference gives FOS the ability to award up to $3,000 consequential loss per claim made in a dispute, other than a general insurance dispute about a contract that expressly excludes this liability.

10.8.1. FSP views

One FSP argued that the current $3,000 cap is appropriate given that FOS is not a Court and consequential loss is in any case rarely awarded.

An industry association argued that the exclusion in paragraph 9.3c) should not be confined to the general insurance context. Rather, the exclusion should apply to a claim for breach of any contract between an FSP and a Applicant that excludes damages for consequential loss.

10.8.2. Consumer views

Whilst consumer representatives agreed that consequential loss issues only rarely arise, the Joint Consumer Submission stated that there is the occasional dispute where the consequential loss cap is a significant disincentive to pursuit of the dispute through FOS. At the least, the cap should be increased to keep pace with inflation. A previous Applicant also argued that this cap had been eroded by CPI increases and needs to be increased.

10.8.3. Findings

We think that it is consistent with the principles of EDR for the primary focus of a scheme to be direct financial loss – as is recognised in ASIC’s Regulatory Guide 130. Accordingly it seems to us that FOS is not the best forum for a dispute where a consequential loss claim is a major aspect of the dispute. Furthermore, our general approach is that, if a cap rarely presents a limitation on FOS making a fair and reasonable judgement, then there is no automatic reason to adjust for CPI.
Our review of FOS data for 2012/13 confirmed that consequential loss awards are only rarely made: only 20 disputes in 2012/13 (see below). Moreover, in the majority of these disputes, the award was of an amount less than the $3,000 cap. Accordingly we think that an increase in the cap is not required at this stage.

Figure 35. 2012/13 – Consequential Loss Awards made by FOS

<table>
<thead>
<tr>
<th>Consequential Loss Awards</th>
<th>Number</th>
<th>% of total decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Recommendations</td>
<td>7</td>
<td>0.4%</td>
</tr>
<tr>
<td>Ombudsman Determinations</td>
<td>11</td>
<td>0.8%</td>
</tr>
<tr>
<td>Panel Determinations</td>
<td>2</td>
<td>0.3%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>20</strong></td>
<td><strong>20</strong></td>
</tr>
</tbody>
</table>

(* In 11 of these disputes less than $3,000 was awarded.)

Nor are we persuaded that the Terms of Reference should be amended to further limit the availability of a consequential loss award. In the case of a general insurance contract, it is a long established principle that it is for the contract to specify the amount payable on a claim or how this should be calculated. This may be a full indemnity or it may be something less than full: the insured’s premium is costed taking into account the extent of cover. Paragraph 9.3c) of the Terms of Reference is consistent with this. The same is not true of other types of FSP contracts.
11. ACCESSIBILITY

The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.

11.1. Awareness of FOS

This is the area of performance where as Reviewers, we expected to see the effect of the merger of multiple schemes into a single recognisable brand and the effect of a much larger scale organisation with the resources and capacity that should come with that.

11.1.1. Stakeholder views

Most stakeholder feedback involved concerns that there are groups in the community who are not as aware of FOS as they should be.

• There was some concern that people from a non-English speaking background, particularly new migrants who may well be most vulnerable, are not accessing FOS.

• One community organisation argued that FOS needs to reach out to a broader range of volunteer community groups (other than financial counsellors and law centres).

• The Joint Consumer Submission expresses concern that FOS is not sufficiently promoting its small business jurisdiction to community organisations with the result that levels of awareness are low.

• The Joint Consumer Submission recommends that FOS should analyse data on Applicants to identify whether any groups are under-represented and if so what can be done about this.

11.1.2. Findings

Our review confirmed FOS research that those consumers who are using FOS are finding their way there readily. Our telephone interviews with FOS applicants indicated that consumers were able to identify FOS as an avenue open to them and get in contact with FOS within one or two steps.

We consider this to be one of the significant successes of the merger of the previous schemes – the single brand ensuring a higher profile and more accurate referral from advisory organisations. We also note that our work in this and other EDR sectors is increasingly showing widespread community recognition of the presence and role of Ombudsman schemes. “I wasn’t sure but I figured there must be some kind of ombudsman”. While this recognition of the role of the Ombudsman is critical, it must also be said that the spread of ‘googling’ in the community is a significant facilitating factor in the next step of actually finding the right place to go.

That said, the question of reach to under-represented or vulnerable/disadvantaged sectors of the community remains the domain of anecdotal evidence. FOS’s approach of relying on connection to organisations that work with the community is standard EDR practice. FOS
have prioritised the larger, more financial-sector focused community-facing organisations in the first year of its program and will extend that outreach to a broader range of community organisations in coming years. This is sensible, however all of these organisations are typically resource-strapped, case driven and can normally only provide FOS with (more) anecdotal evidence of gaps and any problem areas.

To this body of anecdotal evidence, we can add our own experience with interviewing consumers and community organisations about financial EDR over the past dozen years. We have considerable doubts about the effectiveness of EDR with non-English speaking consumers – often encountering what we think, in hindsight, is substantive miscommunication. We also encounter anecdotal evidence of particular community groups that as a general rule are unaware of or even deliberately avoid engagement with any structured mechanism for remediation – be it police, regulators, courts or EDR. There is also no doubt that with the best user-friendly help in the world, to interact with FOS requires a level of education and literacy.

FOS’s practice of publishing the demographic breakdown of applicants who lodge disputes is a good step towards better understanding – but well short of the kind of analysis suggested by the Joint Consumer Submission. The questions of course are whether it is FOS’s role and whether it is best positioned to drive this type of research.

Our view in general is that where the problem or possible problem is a community-wide issue, that FOS should be a supportive party to any research/analysis and of course, to any resolution efforts – but that it cannot reasonably be expected to be the sole driver of it.

In the examples that we can think of, the glaring information gap is the extent to which the community groups are participating in the financial services industry/are customers of FSPs that are part of FOS. This is going to either require the active participation of FSP’s industry associations – and/or costly broad-based community/consumer research. Neither of which are within FOS’s capacity acting alone.

We do not think that this is a reason for no action – but rather support for the argument that FOS should continue to seek out partnerships with industry, regulators, government, public policy groups and academia to continue to build knowledge in this space.

11.2. FOS telephone assistance

FOS runs an enquiries call centre that is typical of good practice we have found in EDR environments. This has been one of FOS’s functions for quite some time, and was run centrally on behalf of a number of EDR schemes prior to the merger of schemes. This experience shows, with appropriate operator knowledge support, technology, training and supervision practices. We reviewed a sampling of recordings of FOS enquiry service calls and found a good standard of response – with the small variations in quality that we would expect to find in any call centre environment.

11.3. FOS explanatory material for consumers

FOS has a responsibility to provide accessible explanatory material for consumers.
11.3.1. Stakeholder views

One submission suggested that FOS should require its FSPs to provide more information to their clients about the extent of FOS’s jurisdiction, for example, the cap on claim amount and on the award amount.

The Joint Consumer Submission expressed the view that the FOS website needs an overhaul to make it more accessible, complaining that the font is too small and the website too ‘busy’. To find information, a user needs to follow a series of links that end in a PDF document. The submission pointed to the UK ombudsman publications as simpler to read and clearer.

11.3.2. Findings

In an environment where legislation mandates information by FSPs to their clients about EDR, we think that it is neither appropriate nor necessary for FOS to overlay these requirements with its own additional requirements. In saying this, we are conscious that FSPs have much to disclose to their clients to meet legal requirements, and an obligation to provide additional detail can serve to make client disclosure less readable and hence less effective.

So far as FOS’s materials for Applicants are concerned, we think that FOS generally meets all the standard expectations of a public purpose organisation in this regard. Most Applicants find the on-line lodgement process reasonably easy to follow and operate. Website guidance and the consumer brochure, “How to resolve your dispute” are clear and published in Arabic, Chinese, Farsi, Greek, Korean, Italian, Spanish, Turkish and Vietnamese as well as English. The quality and simplicity of language is sound.

We recognise that FOS – as with any EDR scheme – has to balance managing users expectations (EDR is not a court of law, there are limits to jurisdiction, etc) with keeping initial information simple and accessible. We think that FOS generally does a good job of striking this balance – but there will inevitably be those who will be disappointed with the outcome of their dispute and will feel that the information available at the outset was inadequate.

Finally, we are satisfied that FOS has methodical processes in place to continually review feedback and improve its information provision. We also note that FOS re-launched its website in December 2013 with a completely new design aimed at improving accessibility, functionality, searchability and content. There are now dedicated member, community and consumer sections with targeted content and information. In the new site, core information is translated into 10 languages.

11.4. Accessibility of FOS’s correspondence

11.4.1. Stakeholder views

The Joint Consumer Submission expressed the view that FOS’s correspondence is sometimes overly legalistic. This was echoed in a couple of the individual consumer submissions received in the course of the Review.

11.4.2. Findings

Whilst our file review found that FOS correspondence is generally pretty accessible, we saw examples in the files of language that would have mystified many Applicants. These typically fell into two categories – internal FOS jargon and legalistic language.
An example of the former was a reference to “de-accelerating” a financial difficulty case because the FSP had failed to respond on time: the letter to the Applicant neither explained what this meant or the ramifications for the Applicant.

Although we found Determinations to be much less legalistic on average than when we last looked at them some 5 years ago, this is not universally so. An Applicant spoke to us about her difficulty in understanding a FOS Determination that found that all the conduct that she had complained about had in fact occurred – but there had been ‘a break in causality’ along the chain of events and compensation was not payable. Without an understanding of the term, the Determination made no sense to her.

Our own observations are consistent with FOS’s surveying in mid 2013 of Applicants. This found good levels of satisfaction with the clarity and ease of understanding of FOS correspondence - 79% of the 1,315 Applicants who completed the online survey form were satisfied with the clarity and ease of understanding written communication (fairly satisfied, very satisfied or extremely satisfied under a 6 point rating scale). But clearly that leaves around one in five Applicants experiencing correspondence that they find difficult to understand.

This underscores the importance of constant vigilance about the clarity and simplicity of written correspondence and decisions. The larger an organisation gets, the greater the risk of assuming that internal terms and distinctions are understood externally. The more complex the internal processes, the more impenetrable they are externally. But equally, the more complex the disputes, the more need to be legally precise in framing the decisions. These are constant tensions for EDR schemes and require periodic refreshing of effort to counter the natural drift to both internal and legal jargon. In particular, FOS’s recent initiative to telephone a sample of Applicants post dispute closure will, we think, enable FOS to monitor its progress in relation to the clarity and accessibility of written communications.

More importantly for us, the issue highlights the critical importance of supplementing written communications with telephone discussions. The EDR schemes we have reviewed that receive noticeably better feedback from consumers are those that make a concerted effort to use the telephone as a matter of policy preference and as backup for selected written communications. Again, we are aware that FOS Management are actively working to increase telephone contact with dispute parties.

11.5. Applicant withdrawal

A dimension of accessibility for applicants is the ease of following the process once it is underway.

11.5.1. Stakeholder views

The Joint Consumer Submission expressed concern that Applicants may not be returning to FOS post-FOS Registration even if their complaint has not resolved to their satisfaction. The submission recommended that FOS survey a proportion of complainants who discontinue post-FOS Registration – in order to confirm the outcome of their matter at IDR.

Concern was also expressed that Applicants are discontinuing their FOS complaint because the process is too long and hard. The Joint Consumer Submission cited 26 financial counsellors (16% of those surveyed) as saying that they had experience of this.
11.5.2. Findings

The FOS 2012/13 data as to discontinuances after FOS accepts a dispute (see Figure 36 below) suggests that over 10% of accepted matters are discontinued by the Applicant. (This does not include discontinuances that are reversed by FOS re-opening the dispute during the same financial year – see paragraph 13.1).

**Figure 36. Numbers of disputes discontinued***

<table>
<thead>
<tr>
<th>Category</th>
<th>Acceptance Team</th>
<th>Early Case Management Team</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discontinued by Applicant</td>
<td>566</td>
<td>122</td>
<td>786</td>
</tr>
<tr>
<td>Failure to respond</td>
<td>1,324</td>
<td>275</td>
<td>1,743</td>
</tr>
<tr>
<td>Total</td>
<td>1,890</td>
<td>397</td>
<td>2,529 *</td>
</tr>
</tbody>
</table>

(* 10.1% of total disputes closed after Registration.)

We are concerned that this may under-report Applicant discontinuances given FOS’s practice of classifying a dispute as “Resolved by the FSP” if, at the outset of the dispute, the FSP responds to the Applicant’s complaint by explaining its reasons for rejecting the complaint and the Applicant makes no response to FOS as to whether or not it is satisfied by that explanation. Our telephone interviewing of admittedly a small number of Applicants in that situation suggested that the Applicant’s failure to respond in these circumstances is much more often a discontinuance, than a change of heart based on the FSP’s explanation. (We suggest later a change to FOS’s classification practices to address this – see paragraph 14.2 of our Report.)

Regardless of this, we think that there is a sufficiently high proportion of discontinuances to cause FOS some concern. Although the table shows the majority of these discontinuances occurring in Acceptance – and therefore not as likely to be influenced by long delays, we are not sure that this is a safe assumption. Our discussions with consumers of EDR services in a range of different schemes suggests that their ‘natural’, intuitive expectation of promptness of service is markedly shorter than the FOS KPIs.

In mid 2013, FOS used external consultants to survey Applicants who had discontinued their dispute (see Figure 37). Survey results were broadly consistent with a smaller survey undertaken by FOS itself in April 2013.

This is an issue that it is difficult to tackle directly – as it is a function of other aspects of the FOS experience for consumers. It is also difficult to identify what a ‘good number’ ought to be. For example a high number in the category “did not expect to obtain outcome sought” could be despair, or it could be a result of sound early advice from FOS helping to manage expectations.
Figure 37. Reasons for discontinuance (from survey by Customer Service Benchmarking Australia for FOS – Sept 2013)

<table>
<thead>
<tr>
<th>Reasons</th>
<th>No. of responses</th>
<th>% of responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did not expect to obtain outcome sought</td>
<td>34</td>
<td>34%</td>
</tr>
<tr>
<td>The dispute was resolved to your satisfaction</td>
<td>23</td>
<td>23%</td>
</tr>
<tr>
<td>FOS dispute process was too difficult/required too much</td>
<td>23</td>
<td>23%</td>
</tr>
<tr>
<td>Nothing happened/No resolution/Ombudsman not responsive</td>
<td>21</td>
<td>21%</td>
</tr>
<tr>
<td>Other reason</td>
<td>4</td>
<td>4%</td>
</tr>
</tbody>
</table>

Total responses 105 *

(* 100 respondents were surveyed.)

There are three changes discussed elsewhere in our Report that we intuitively think should impact on these numbers:

1. A shift to more senior resources at the ‘front-end’ – we think that some of the inclination to give up on the dispute must be linked to the impression that no one at FOS is looking at the merits of the matter in the first few months. An earlier merits assessment should help with this.

2. Action to diminish unallocated file queues later in the process should assist to limit any unwarranted discontinuances occurring later in the FOS process.

3. Greater use of the telephone by FOS staff throughout the process should also assist to put a ‘human face’ to the organisation and to provide some realistic advice about the dispute process.

That said, we are also inclined to think that while FOS timeliness continues to be an issue, it may be difficult to reliably track cause and effect and improvement over time in respect of discontinuances.

We think FOS should focus on other recommendations arising from this Review as a priority. FOS already sends applicant surveys to those who discontinue their disputes and we think it should continue to periodically conduct its own telephone follow-up surveys with a view to tracking and understanding trends in discontinuance numbers.

11.6. Dispute agents

Applicants are able to authorise someone to act on their behalf in dealing with FOS. This can be a relative or friend or it may be a paid agent.

11.6.1. Stakeholder views

The Joint Consumer Submission referred to a dramatic increase in the number of businesses that charge high fees to manage an Applicant’s FOS dispute particularly credit repair, debt negotiation issues and claims – noting that these are sometimes spurious claims. The Submission recommended that FOS restrict access by paid advocates (other than lawyers or other FOS approved advocates) to exceptional circumstances.
A number of FSPs also raised this issue. In addition, the insurance association submission expressed concern about service providers, such as smash repairers, acting as their customer’s representative to bring a FOS dispute against the customer’s insurance company. It was said that the FOS process can be used by service providers to pursue inflated invoices.

11.6.2. Findings

Our analysis of FOS statistics shows only a small increase in the last 12 months in the percentage of FOS Applicants utilising representation (see Figure 38).

**Figure 38. 2012/13 – 2012/13 – Number & type of Representative for Disputes Received (at Registration or Acceptance stage).**

<table>
<thead>
<tr>
<th>Type of representative</th>
<th>No. 2011/12</th>
<th>No. 2012/13</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accountant</td>
<td>73</td>
<td>97</td>
</tr>
<tr>
<td>Company Trust</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Dispute resolution agent</td>
<td>510</td>
<td>736</td>
</tr>
<tr>
<td>Executor</td>
<td>36</td>
<td>38</td>
</tr>
<tr>
<td>Family friend</td>
<td>1,878</td>
<td>2,288</td>
</tr>
<tr>
<td>Financial advisor</td>
<td>305</td>
<td>238</td>
</tr>
<tr>
<td>Financial counsellor</td>
<td>563</td>
<td>543</td>
</tr>
<tr>
<td>Legal guardian</td>
<td>13</td>
<td>8</td>
</tr>
<tr>
<td>Member of Parliament</td>
<td>15</td>
<td>20</td>
</tr>
<tr>
<td>Owner of insurance policy eg super fund trustee</td>
<td>10</td>
<td>15</td>
</tr>
<tr>
<td>Power of Attorney</td>
<td>78</td>
<td>84</td>
</tr>
<tr>
<td>Representative</td>
<td>1,531</td>
<td>566</td>
</tr>
<tr>
<td>Solicitor</td>
<td>1,120</td>
<td>1,118</td>
</tr>
<tr>
<td>Trustee Affected Party</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>6,089</strong></td>
<td><strong>5,716</strong></td>
</tr>
<tr>
<td>% of all Received Disputes</td>
<td>17%</td>
<td>18%</td>
</tr>
</tbody>
</table>

It would, however, seem that there is an increase in the use of representatives classified as “dispute agents” - Figure 38 suggests a 44% increase in a 12 month period albeit that dispute agents still only account for around 2% of total disputes received. This data needs, however, to be viewed with caution. First, there are some concerns that FOS’s data may underestimate the number of disputes where the Applicant has engaged a dispute agent, with some anecdotal evidence that dispute agents are persuading Applicants not to disclose to FOS that they have engaged an agent. Secondly, discussions with FOS confirm that in 2012/13 there was more focus within FOS on classification of type of representative and that in 2011/12 some “dispute agents” were classified under the general catch-all “representative”. As a result, the ‘real’ increase in 2012/13 was considerably less than 44%.
That said, we agree that the system is not intended to encourage the presence of paid agents. In many cases, paid agents are not adding value to the system. Certainly, FOS does not encourage their participation. FOS’s Dispute Form notes that it is a free service for Applicants and there is no need for an Applicant to be represented and that an Applicant will usually have to bear themselves the costs if they choose to be represented by someone who charges for this representation.

This protestation is, however, unlikely to have any significant effect on the extent to which paid agents gain FOS Applicants as clientele. Despite near identical public stance by the UK FOS, the paid ‘dispute agents’ business has grown rapidly in the UK, with a staggering 46.5% (in 2011/12) of UK FOS complaints now being run by paid agents or commercial claims companies – although we note this has been driven by specific product problems rather than general financial complaints.

Nevertheless, at the current numbers, we think it would be difficult to mount a case for proscriptive action. Rather, current long dispute timeframes and a concerning level of Applicant discontinuance could be used as arguments by those seeking expansion of commercial claims activity.

In our view, the paid agent issue is a critical issue for FOS and its stakeholders and should be carefully monitored. We think that this is another issue that requires a broad-based response - including the involvement of industry, regulators and FOS (for example to encourage greater access to free or subsidised financial counselling). There is already evidence in Australia that paid credit repair agents can ‘game’ the system, using the threat of FOS case fees to pressure FSPs to make unmerited corrections to credit listings. The spread of these practices to other claim types would be a much bigger problem.

Similarly FOS and insurers should monitor trends in relation to service providers acting as representative of a customer in dispute with their insurance company, for example, a motor vehicle accident claim. But again, at current numbers, we think it would be difficult to mount a case for action to deny Applicants this choice. Rather we think that FOS should continue to utilise the options available to it under its Terms of Reference, for example, to require an independent assessment of the claim where an insurer’s assessor and an Applicant’s service provider have reached different conclusions as to the extent of damage and cost of repairs. Where an insurer has objective evidence of dishonest conduct by a service provider, to the terms of Reference allow the insurer to produce this to FOS with a request for special circumstances and submit that FOS should utilise its discretion to exclude the dispute.

11.7. Assistance for vulnerable consumers

As part of ‘levelling the playing field’, FOS has an obligation to provide reasonable assistance to consumers who are disadvantaged or vulnerable – and least able to present their case and navigate the FOS dispute processes.

11.7.1. Stakeholder views

The Joint Consumer Submission expressed concern about consumers who are not represented and their ability to navigate the FOS process and stay engaged for a lengthy period of time. Their submission recommended specialist case workers for those who face additional barriers, for example, non-English speaking, acrimonious relationship separation where joint debt etc.
11.7.2. Findings

It has long been a concern that financial services EDR is a system that serves middle-class, educated consumers well, but proves to be a difficult process for less ‘paperwork-capable’ consumers.

This was an issue that we tested through our file review and interviewing of Applicants. Generally we felt that FOS does seek to identify and support vulnerable consumers. Of course, for these Applicants, improved FOS timeframes and better case officer continuity would be particularly significant – see Part 7 of our Report.

We were also interested to understand the impact of non-representation and so compared the outcomes achieved by represented (all categories) and unrepresented Applicants in 2012/13 (Figure 39). This analysis showed that unrepresented Applicants were twice as likely to accept monetary compensation offered by the FSP at the Acceptance Stage and much less likely to continue their dispute through to a FOS decision. Discontinuance rates and Outside Terms of Reference rates were similar as between the two groups.

**Figure 39. 2012/13 – Outcomes at FOS for Represented & Unrepresented Applicants**

<table>
<thead>
<tr>
<th>Outcome (excluding disputes closed at Registration Stage)</th>
<th>Represented Applicants</th>
<th>% of Total Represented Applicants</th>
<th>Unrepresented Applicants</th>
<th>% of Total Unrepresented Applicants</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assessment - no payment or action</td>
<td>160</td>
<td>3%</td>
<td>893</td>
<td>4.6%</td>
</tr>
<tr>
<td>Conciliation - Monetary compensation in full or part</td>
<td>114</td>
<td>2.1%</td>
<td>254</td>
<td>1.3%</td>
</tr>
<tr>
<td>FOS decision</td>
<td>991</td>
<td>18.4%</td>
<td>1,974</td>
<td>10.1%</td>
</tr>
<tr>
<td>- in favour of Applicant</td>
<td>496</td>
<td>9.2%</td>
<td>896</td>
<td>4.6%</td>
</tr>
<tr>
<td>- in favour of FSP</td>
<td>495</td>
<td>9.2%</td>
<td>1,078</td>
<td>5.5%</td>
</tr>
<tr>
<td>Discontinued</td>
<td>483</td>
<td>9%</td>
<td>2,049</td>
<td>10.5%</td>
</tr>
<tr>
<td>Negotiation - monetary compensation in full or part</td>
<td>214</td>
<td>4%</td>
<td>893</td>
<td>4.6%</td>
</tr>
<tr>
<td>Outside Terms of Reference</td>
<td>863</td>
<td>16%</td>
<td>3,032</td>
<td>15.5%</td>
</tr>
<tr>
<td>Resolved by FSP - monetary compensation in full or part</td>
<td>457</td>
<td>8.5%</td>
<td>3,542</td>
<td>18.1%</td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td>47.5%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>5,380</td>
<td>100%</td>
<td>19,572</td>
<td>100%</td>
</tr>
</tbody>
</table>

In our view, these results are cautionary rather than of dramatic concern. But clearly these trends should be kept under close scrutiny.

At this stage, we think that FOS should work to simplify its processes and improve its timeframes – rather than engage specialist internal case workers to assist vulnerable
consumers as suggested by the Joint Consumer Submission. To do otherwise could reduce FOS’s ownership of its obligation to provide additional assistance to vulnerable consumers. It would also blur the distinction between advocacy for consumers and the neutrality required for EDR. Finally there would be risk that in time specialist internal case workers would lose their supposed ‘independence’ or that they may not be utilised sufficiently by the scheme.

11.8. Regulatory Guide 139 compliance

<table>
<thead>
<tr>
<th>Summary of Benchmark Key Practices and additional RG139 requirements (latter indicated by italics)</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Awareness/ promotion</td>
<td>FOS launched a new Consumer Engagement Strategy in June 2012 – see paragraph 6.2. This framework encompasses FOS’s education initiatives for consumer representatives to build their knowledge of the scheme and hence to assist disadvantaged consumers to access FOS. FOS also makes efforts to promote itself in the media, for example, issuing a media release to publicise its participation in MoneySmart Week. Other consumer promotional activities include the hosting of stands at public events. FOS’s website includes information about its jurisdiction and processes – see discussion in paragraph 11.3. FOS can be nationally accessed by calling FOS on its 1300 number. FOS’s enquiry service operates with a strong customer service focus. As publicized on FOS’s website, the interpreter service or National Relay Service may be utilized. FOS’s website includes an online form that can be used to lodge a dispute. FOS’s Terms of Reference permit it to accept disputes from either party (although an FSP can only do so with the Applicant’s consent). FOS’s Terms of Reference clearly set out FOS’s jurisdiction and high level approach to dispute resolution. * They restrict the FSP’s ability to take enforcement action or to actively pursue debt recovery legal proceedings, after a complaint has been lodged with FOS, as required by RG139. FOS is the process of amending its Terms of Reference so that from 1 January 2014 its debt recovery legal proceedings jurisdiction will be limited to debts exceeding $2 million as required by</td>
</tr>
<tr>
<td>The scheme seeks to ensure all customers of the relevant industry are aware of the scheme and it promotes itself in the media or by other means. The scheme must develop a communications strategy to improve consumer awareness. It must seek to promote its existence to groups that are under-represented. The scheme produces readily available explanatory material about the scheme and its timelines. The scheme requires scheme members to inform their customers about the scheme and that information about the scheme is available through scheme members.</td>
<td></td>
</tr>
<tr>
<td>Access</td>
<td>FOS can be nationally accessed by calling FOS on its 1300 number. FOS’s enquiry service operates with a strong customer service focus. As publicized on FOS’s website, the interpreter service or National Relay Service may be utilized. FOS’s website includes an online form that can be used to lodge a dispute. FOS’s Terms of Reference permit it to accept disputes from either party (although an FSP can only do so with the Applicant’s consent). FOS’s Terms of Reference clearly set out FOS’s jurisdiction and high level approach to dispute resolution. * They restrict the FSP’s ability to take enforcement action or to actively pursue debt recovery legal proceedings, after a complaint has been lodged with FOS, as required by RG139. FOS is the process of amending its Terms of Reference so that from 1 January 2014 its debt recovery legal proceedings jurisdiction will be limited to debts exceeding $2 million as required by</td>
</tr>
<tr>
<td>The scheme seeks to ensure nation-wide access and appropriate facilities and assistance for disadvantaged complainants. This may include scheme communication in languages other than English, Braille, large font or in audio format depending on the demographics. The scheme must be capable to accepting complaints from a member where there is an intractable complaint. This may be particularly important for disputes regarding hardship applications. Initial contact with the scheme can be oral or in writing but the complaint must ultimately be reduced to writing. Terms of Reference must be clear. They must specify how legal proceedings can be brought where a complaint has been lodged with the scheme and restrict the member’s right to continue debt recovery court proceedings or to commence new legal proceedings to test cases and to situations where the statute of limitations is about to expire. They must provide access to retail clients and consumer credit customers and</td>
<td></td>
</tr>
<tr>
<td>ASIC by recent amendment to RG139.) • They provide access to individuals or Small Businesses subject to some exclusions – see discussion at paragraph 15.1.</td>
<td></td>
</tr>
<tr>
<td>---</td>
<td></td>
</tr>
<tr>
<td>Cost No charge to customers.</td>
<td></td>
</tr>
<tr>
<td>FOS provides a free service to Applicants.</td>
<td></td>
</tr>
<tr>
<td>Staff Assistance Scheme’s staff are able and adequately trained. Scheme’s staff provide complainants with simple explanation of how the scheme operate. Communications need to be in plain English and user friendly for complainants. Scheme’s staff assist complainants to put complaint in writing where this assistance is required.</td>
<td></td>
</tr>
<tr>
<td>FOS provides structured induction training and extensive ongoing training for its staff including legal, mediation and communications training. It is currently developing a new program of management training for its aspiring leaders. FOS’s website states that its staff can “talk [an Applicant] through how to fill in the forms”. The website also asks Applicants to let FOS know if they have special needs. FOS’s enquiry service will, where needed by the Applicant, commit to writing details provided by the Applicant orally. Our sample of recorded calls suggested that FOS’s enquiry service staff are helpful and provide clear information. Paragraph 11.4 discusses the accessibility of FOS written communications.</td>
<td></td>
</tr>
<tr>
<td>Use The scheme’s processes are easy for complainants to understand and use. Complainants may be supported by another person.</td>
<td></td>
</tr>
<tr>
<td>It is easy to lodge a dispute with FOS: its online dispute form is easy to complete. FOS’s often lengthy processes are not, however, easy for Applicants: see paragraph 11.5. Applicants may use a representative: see paragraph 11.6.</td>
<td></td>
</tr>
<tr>
<td>Non-adversarial approach The scheme uses appropriate techniques including conciliation, mediation and negotiation to settle complaints. Proceedings are informal, discouraging legalism.</td>
<td></td>
</tr>
<tr>
<td>The scheme uses shuttle negotiation, conciliation and arbitration to resolve disputes – see paragraphs 0 and 0. Proceedings are informal.</td>
<td></td>
</tr>
<tr>
<td>Legal Representation The scheme generally discourages legal representation, but allows both parties to be legally represented where one chooses this representation and if the member chooses to be legally represented the member must pay the complainant’s legal costs.</td>
<td></td>
</tr>
<tr>
<td>FOS’s website section entitled “Frequently Asked Questions” indicates that legal representation is not required but is possible – although at the complainant’s cost. FOS does not restrict the parties from being legally represented, although its Operational Guidelines discourage this. The Terms of Reference give FOS the ability to decide that the FSP should contribute to the Applicant’s legal costs, although usually this is restricted to $3,000. FOS’s Operational Guidelines provide guidance as to factors that FOS will take into account when deciding whether the FSP is to contribute to the Applicant’s costs. There is no absolute rule that the FSP must pay the Applicant’s legal costs if the FSP chooses to be legally represented.</td>
<td></td>
</tr>
</tbody>
</table>
12. INDEPENDENCE

The decision-making process and administration of the scheme are independent from scheme members.

12.1. Ombudsmen

12.1.1. Background

Paragraph 2.1 of the Terms of Reference specifies that FOS’s Board of Directors appoint the Ombudsmen. In doing so, the Board is required to consider candidates’ objectivity, qualifications, experience and personal qualities.

12.1.2. Stakeholder views

A submission by a previous Applicant stated that there should be more transparency about who may dismiss an Ombudsman, the period of time they are contracted and how the quality of their decisions is monitored.

12.1.3. Findings

Paragraph 2.2 of FOS’s Terms of Reference gives the Chief Ombudsman responsibility for the day to day management of FOS and overseeing of FOS’s resolution of disputes. The Terms of Reference specifically state that whilst the Chief Ombudsman has the power to dismiss employees, this power does not extend to Ombudsmen. The clear implication is that the right of dismissal vests in the Board.

FOS’s website specifies the names of the two Lead Ombudsmen, the names of the other Ombudsmen and provides short biographical details. In our view, the focus should be on FOS as an organisation rather than the Ombudsmen as individuals. Accordingly there is no need for further transparency.

The Ombudsmen work closely as a group with peer review of decisions before they are released. The Chief Ombudsman works closely with the Lead Ombudsmen who have particular responsibility for maintaining quality of decision making. In our view, the controls are sound.

12.2. Board transparency

12.2.1. Stakeholder views

The Joint Consumer Submission seeks greater transparency as to the FOS Board’s activities and states that Board reports should be provided to consumer advocates and industry after each meeting. Also FOS’s consumer directors should report on FOS Board activities through the Consumers’ Federation of Australia.
12.2.2. Findings

As required by its Constitution, FOS’s Board has equal numbers of directors with industry experience and community experience. This composition is intended to bring a balance of perspectives and experience to the table. Directors are required to act in the best interests of FOS in fulfilling its mandate: they are not on the Board to represent or advocate for particular users of FOS. As is the case for other companies, the Board’s proceedings are and should be confidential. This best promotes an open dialogue within the Boardroom, allows Management to be as frank as possible with the Board and permits more rigorous and probing scrutiny of Management.

12.3. Regulatory Guide 139 compliance

<table>
<thead>
<tr>
<th>Summary of Benchmark Key Practices and additional RG139 requirements (latter indicated by italics)</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decision-maker and staff&lt;br&gt;The scheme has a complaints decision-maker who is appointed for a fixed term. Neither the decision maker nor scheme staff are directly selected by scheme members or answerable to or having a relationship with them.&lt;br&gt;Where the overseeing body appoints a person to manage the day-to-day operations, that person should appoint, supervise and dismiss the scheme’s staff.</td>
<td>FOS has Ombudsmen who are appointed by FOS’s Board for a fixed term. The Chief Ombudsman is responsible for the appointment, overseeing and dismissing staff. Ombudsmen are not answerable to FSPs for the way in which they carry out their dispute resolution.</td>
</tr>
<tr>
<td>Overseeing entity&lt;br&gt;There is a separate entity overseeing the scheme’s operation including the budget process, receipt of complaints about the scheme and receiving information and actioning systemic industry problems referred to it by the scheme.&lt;br&gt;The overseeing entity has a balance of consumer and industry representatives and an independent Chair. The Constitution must specify how consumer representatives are appointed including consultation requirements.&lt;br&gt;The scheme must be an incorporated entity.</td>
<td>FOS is a company limited by guarantee. FOS’s Board is comprised of four industry representatives, four consumer representatives and an independent Chair. FOS’s Constitution specifies that the Board appoints the consumer representatives after consultation with key consumer and community organisations.&lt;br&gt;The Board approves FOS’s budget, receives reports about the scheme’s operations and decides whether to make changes to the Terms of Reference.</td>
</tr>
<tr>
<td>Funding&lt;br&gt;The scheme has sufficient funding to enable its caseload and other relevant functions necessary to fulfill its terms of reference to be handled in accordance with the benchmarks.&lt;br&gt;The Board must monitor the adequacy of resources and management of the scheme’s caseload.</td>
<td>We discuss the sufficiency of FOS’s funding in Part 9. FOS’s Board monitors the adequacy of FOS’s funding and is currently consulting with stakeholders about a fees increase.</td>
</tr>
<tr>
<td>Changes to the Terms of Reference&lt;br&gt;Terms of Reference changes are made in consultation with relevant stakeholders</td>
<td>FOS’s Board has the power to change its Terms of Reference in consultation with stakeholders – ASIC, FSPs and key consumer, community and</td>
</tr>
</tbody>
</table>


including scheme members, industry and consumer organisations and government. The members must not have a power of veto where changing the Terms of Reference or Constitution. Industry organisations. FOS’s FSP members do not have a power of veto over changes.
13. FAIRNESS

The scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.

13.1. Re-opening of closed disputes

13.1.1. Stakeholder views

Some FSP submissions expressed concern about what they saw as an increasing tendency by FOS to re-open closed disputes. One submission urged that, in the absence of reasonable explanation or new evidence, FOS should not re-open a matter that had closed on the basis that the Applicant had previously failed to respond to FOS.

Consumer submissions did not discuss this issue.

13.1.2. FOS processes

In 2012/13, FOS re-opened 1,409 disputes. In 1,041 of these cases, the dispute had closed because the Applicant failed to meet a FOS request and then was re-opened when the Applicant met that request. In the balance of these cases, FOS considered that it had made an error in closing the dispute.

FOS’s Operational Guidelines state at page 119 that FOS will advise an Applicant who fails to comply with a FOS request that:

- they have a final opportunity to provide the information requested,
- the dispute will be closed if they do not meet the request; and
- the dispute will only be re-opened if there are exceptional circumstances.

In practice, however, FOS does not insist on exceptional circumstances.

13.1.3. Findings

We agree with FSPs that the number of re-opened disputes is higher than would be ideal. We acknowledge the frustration and inefficiency that result where this occurs.

We think that this is another issue where FOS’s prolonged timeframes and stop and start processes play a factor in exacerbating the problem. These can mean that Applicants lose track of what is happening with their dispute and can make it more difficult for Applicants to respond promptly to FOS requests. By way of example of the problems, our Applicant interview process identified a dispute that had been closed - but the Applicant wrongly believed that the dispute was still in a holding queue at FOS.
Until FOS has resolved its backlog issues, we think that FOS needs to err on the side of a willingness to re-open a dispute that has been closed because of Applicant non-response – albeit this is frustrating for FSPs.

This does not, however, mean that FOS should be prepared at the Applicant’s request to re-open any dispute that was closed on the basis of the Applicant’s non-response. We think that FOS does need to query the Applicant as to the reason for their earlier non-response and exercise its discretion appropriately.

Recommendation 14

When deciding whether to exercise its discretion to accede to an Applicant’s request that FOS re-open a dispute that was closed on the basis of the Applicant’s previous failure to respond to a FOS request, FOS should take into account the following factors:

• the reasons for the Applicant's previous failure to respond to FOS's request, for example, difficulty in managing FOS's process, for example, where FOS's timeframe had become prolonged, significant personal problems or problems locating information requested by FOS;

• the time that has elapsed since the dispute was discontinued; and

• the extent of prejudice to the FSP if the dispute is re-opened, for example, an impending date after which court action is barred.

13.2. Unmeritorious disputes

Paragraph 5.2 of the Terms of Reference gives FOS a discretionary power to refuse to consider disputes.

“5.2 FOS may refuse to consider, or continue to consider a Dispute, if FOS considers this course of action is appropriate, for example, because:

....

d) the Dispute being made is frivolous or vexatious or lacking in substance”.

FOS relies both on the introductory words of para 5.2 and on paragraph 5.2d) to refuse to consider unmeritorious matters.

FOS relies on the general discretion conferred by the introductory words of paragraph 5.2 of the Terms of Reference where, for example, there is no remedy that FOS is in a position to provide or the FSP has made an offer that FOS considers adequately compensates the Applicant. In these types of matters, FOS issues the Applicant with an Assessment (this is usually in writing but can be telephone guidance where FOS judges this appropriate). (FOS also occasionally relies on the introductory words of paragraph 5.2 to provide advice to the
FSP that the Applicant’s case is clear-cut and the FSP should meet the Applicant’s requested solution to the dispute.)

Where FOS relies on paragraph 5.2d) of the Terms of Reference, this is usually on the basis that there is no substance to the complaint. FOS’s Operational Guidelines state that a claim is lacking in substance “which presents no more than a remote possibility of merit and which does not more than hint at a just claim” or where “the complainant has no arguable case which should be allowed to be resolved at a full hearing” or a case “depending on a an untenable position of law or fact”. Where paragraph 5.2d) is relied upon, FOS provides a letter stating that the dispute is outside Terms of Reference.

13.2.1. Stakeholder views

One FSP submission argued that FOS’s discretion to exclude disputes that are frivolous, vexatious or lacking in substance should be expanded to include disputes where the remedy sought by the Applicant is unable to be awarded by FOS: for example, termination of the employment of an FSP staff member, a personal apology by the FSP’s CEO or the removal of a legislatively- required notification to the Written-Off Vehicles Register.

A number of FSP submissions expressed concern that FOS takes too long to recognise and close unmeritorious disputes. This can mean that debt collection is delayed and recoverability prejudiced. FOS case fees are incurred that escalate as the dispute resolution process progresses. In addition, FSPs have higher internal costs in managing the dispute and responding to FOS requests. There are also professional indemnity insurance premium ramifications whilst the dispute remains open. To manage these issues, they say that undeserved settlements are often made.

Consumer submissions did not raise issues in relation to FOS’s unmeritorious disputes closure practices.

13.2.2. FOS processes

FOS has put in place a number of controls to constrain and assure its processes for closing unmeritorious disputes.

Whereas a paragraph 5.2d) decision (that the dispute is frivolous, vexatious or lacking in substance) is able to be made by any of FOS’s dispute handling staff, FOS only permits its dispute handling staff in its Early Case Management and Case Management Teams to decide to close a dispute by exercise of the discretion in the introductory words in paragraph 5.2 (issuing an Assessment). This means that an Assessment does not occur until after the initial collection of information.

Both a written Assessment and a paragraph 5.2d) letter always informs the recipient of their ability to raise new information for FOS to consider. The standard wording is:

“If you disagree and have any new information you believe may change my assessment, please write to me within 30 days and provide details, including any relevant documentation.”

Both a written Assessment and a paragraph 5.2d) letter are always checked before being issued by another more experienced FOS employee as part of FOS’s quality assurance process.
If the recipient of a FOS Assessment or paragraph 5.2d) letter objects to FOS’s decision to close the dispute, a more senior FOS employee will review the objection and, if the view is formed that the objection may have substance, FOS will continue to consider the dispute (or at very least refer trigger the Jurisdictional Decision process described at paragraph 15.1 of this Report). Consistent with the standard wording above, the focus of the review is to see whether there is new and relevant information that has been raised by the objecting party.

In 2012/13, FOS issued 1,274 Assessments with following outcomes.

**Figure 40. 2012/13 – FOS Assessment Outcomes.**

<table>
<thead>
<tr>
<th>Assessment outcomes</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Apology</td>
<td>5</td>
</tr>
<tr>
<td>Monetary Compensation in Full</td>
<td>70</td>
</tr>
<tr>
<td>Monetary Compensation in part</td>
<td>84</td>
</tr>
<tr>
<td>No payment or action</td>
<td>1,053</td>
</tr>
<tr>
<td>Not Disclosed</td>
<td>20</td>
</tr>
<tr>
<td>Other product or service</td>
<td>23</td>
</tr>
<tr>
<td>Policy/contract altered/voided/cancelled</td>
<td>19</td>
</tr>
<tr>
<td><strong>Total Assessments</strong></td>
<td><strong>1,274</strong></td>
</tr>
</tbody>
</table>

In 2012/13, FOS also ruled 46 disputes outside Terms of Reference on the basis of para 5.2d) ie that dispute is frivolous or vexatious or lacking in substance.

**Figure 41. 2012/13 – Disputes ruled Frivolous/Vexatious/ etc. (TOR 5.2(d)) by FOS.**

<table>
<thead>
<tr>
<th>Stage Assessed as Frivolous etc.</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acceptance Team</td>
<td>19</td>
</tr>
<tr>
<td>Early Case Management Team</td>
<td>5</td>
</tr>
<tr>
<td>Case Management Team</td>
<td>22</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>46</strong></td>
</tr>
</tbody>
</table>

FOS’s use of these pathways has increased as the following table (Figure 42) demonstrates.
Figure 42. Last 3 Years – Percentage of Assessments and TOR Para. 5.2(d) Rulings among all closed Disputes (excluding those closed at Registration Stage).

<table>
<thead>
<tr>
<th>Year</th>
<th>Assessments</th>
<th>TOR Para. 5.2(d)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010/11</td>
<td>2.0%</td>
<td>0.1%</td>
</tr>
<tr>
<td>2011/12</td>
<td>3.1%</td>
<td>0.3%</td>
</tr>
<tr>
<td>2012/13</td>
<td>5.1%</td>
<td>0.2%</td>
</tr>
</tbody>
</table>

13.2.3. Findings

We think that it is in the interests of Applicants as much as FSPs for an unmeritorious dispute to be recognised at an early stage and brought to a close. Accordingly we support FOS’s greater activism in doing this.

Moreover we think that the controls in place for the issuing of Assessments are adequate and are being well implemented. We reviewed 15 disputes closed via an Assessment and were satisfied that the outcomes achieved in those disputes were fair. In some matters, we felt that it should have been possible to reach that outcome at an earlier stage. (We discuss at paragraph 15.1 of our Report some concerns in relation to the outside-Terms of Reference letter process.)

It is, however, evident that FOS’s stakeholders do not fully understand these processes – or even that FOS does close disputes where there is no remedy that FOS is in a position to provide.

We have raised with FOS our concern about a lack of clarity as to the two processes (paragraph 5.2d) exclusions and Assessments) – and in fact whether there should be two different routes to close an unmeritorious dispute. We are pleased that FOS is involving Ombudsmen in a review of these processes with a view to clarifying its approach.

We also have some concerns about the rigour of the FOS review process where an objection is made to an Assessment or an outside Terms of Reference letter. Our file review suggested that the review can be fairly perfunctory and may be by someone who has played a role in the decision under review. We would encourage FOS’s review to address this aspect of their process as well.

**Recommendation 15**

FOS should revisit its processes for closing unmeritorious disputes with a view to streamlining its processes, ensuring that its controls are adequate to achieve fairness and ensuring that where an objection is made to the closure decision that this is fairly considered.

FOS’s Operational Guidelines should be updated to enhance transparency about these processes.
13.3. Information collection processes

13.3.1. Stakeholder views

Whilst not a key focus in FSP submissions, there were some FSP complaints about lack of fairness and transparency in FOS’s information collection processes.

There were assertions that FSPs are sometimes not given access to or opportunity to review the information provided to FOS by the Applicant, with FOS instead providing “vague directions” as to the issues to be addressed.

An industry submission expressed concern about FOS’s ability to use confidential information to make adverse findings against the party denied the information, if special circumstances apply. The submission stated that FOS’s Operational Guidelines should articulate the special circumstances exhaustively and FOS should have to explain in its decision why it found special circumstances applied.

An FSP was critical of an instance where FOS advised that the Panel Chair would exercise his discretion as to whether to accept late submissions that, the FSP stated, were necessitated because the Applicant changed the basis and scope of dispute late in the process.

There were also a number of FSPs who submitted that FOS timeframes for the provision of information can be unrealistic, with a “one-size fits all approach” and insufficient recognition of situations where the issues are complex and more time is required. It was pointed out that FOS’s recent practices of grouping several rounds of information collection from the Applicant can increase the burden for the FSP in responding to the information. By way of example, one case was drawn to our attention where there were over 100 double-sided pages of documentation and only 8 business days between date of receipt of the material from FOS and the due date of the response to FOS. Discomfort with tight timeframes was also exacerbated by an awareness that FOS’s own timeframes are very long and by instances of high handedness in FOS’s letters to FSPs about timeframes (examples of which we saw in our file review). But with some FSP exceptions, FSPs generally agreed that FOS took a reasonable approach to the provision of extensions of time to FSPs to respond to FOS.

The Joint Consumer Submission stated that FOS does not make it clear enough to Applicants why information requests are made and the importance of these, nor that the FSP is being interrogated as well. More guidance should be provided to the Applicant as to what sort of information would be accepted. Finally the Joint Consumer Submission argued that, where information is available from both the Applicant and the FSP, the FSP should be the preferred source.

13.3.2. Findings

In our file review, we did not see any situations where FOS refused to provide Applicant correspondence or documents to the FSP. Nor did we see situations where FOS relied upon confidential information to make findings that were adverse to the party not provided with the information. The FOS Approach: Special Circumstances includes examples of the circumstances in which FOS will exercise its discretion to rely upon information that is not provided to the other party. But we understand from FOS Ombudsmen that this occurs extremely rarely.

We did, however, see in our file review a couple of situations where there was inadvertent failure to provide a party with documents, for example, one instance where there was a failure
to provide an FSP with documents prior to a Recommendation being made and one instance where there was a failure to provide an Applicant with the FSP submission prior to the Applicant withdrawing. But we were satisfied that these failures in process were relatively rare. A better dispute resolution process that involves less passing of the dispute from one FOS employee to another would, however, in our view be less prone to these problems - see our recommendations in Part 8 of this Report as to this.

In our file review, we also saw the occasional dispute where, for example, the Applicant was asked by FOS to evidence property damage and the Applicant provided photos and other material but was quite obviously unclear as to what kind of substantiation FOS was looking for. We think that in these types of situations FOS has a responsibility to provide some further guidance to the Applicant. Generally, however, our file review left us satisfied that FOS explains to the Applicant both its information collection requests and that information is also sought from the FSP.

Recommendation 16

Where FOS asks an Applicant to evidence assertions (ie FOS's information request is unspecific as to the documentary evidence to be provided), FOS should use its telephone contact with the Applicant to check that the Applicant understands the reason for the request and the kinds of evidence that could be provided.

13.4. Negotiation and conciliation processes

13.4.1. Stakeholder views

A couple of FSP submissions raised concern that at times FOS appears to expect an FSP to settle a matter even where the FSP makes it clear that it does not want to do this, but rather that it wants FOS to decide the dispute. This is said to be particularly the case where the dispute is in conciliation.

Other FSPs made suggestions that were directed to promoting settlements. It was said that where conciliation fails to produce an outcome, there is opportunity for more active facilitation by FOS post-conference. Another FSP expressed the view that an FSP’s ability to offer a settlement in an investments dispute is hindered by FOS’s practice of delaying the collection from the Applicant of substantiation of loss until after the dispute has progressed to the Recommendation Stage.

On the other hand, the Joint Consumer Submission urged that FOS needs to do more to ensure that Applicants, especially unrepresented Applicants, are not accepting unfair settlement offers, particularly where there have been previous similar disputes involving that FSP that are suggestive of a pattern of misconduct.

The Submission stated that feedback from Applicants is that they have felt rushed at a Telephone Conciliation Conference to accept a settlement offer by the two hour conference
timeframe and that the Telephone Conciliation Conference process can be intimidating. The Submission recommended that FOS monitor the fairness of early resolution settlements.

13.4.2. Findings

Our process review and telephone interviews with Applicants and FSPs satisfied us that FOS conducts Telephone Conciliation Conferences well. In particular, we felt that the FOS timeframe of two hours, implemented by FOS with some flexibility, strikes a reasonable balance between efficiency, momentum and opportunity for resolution.

We examined the outcomes achieved through shuttle negotiation and conciliation by reviewing some 60 disputes that were resolved by FOS using these techniques. We also conducted telephone interviews with a third of these Applicants. These steps did not identify outcomes that were unfair. But we agree with the Joint Consumer Submission that it is important that FOS maintains an ongoing watch to ensure the fairness of negotiated and conciliated outcomes. FOS's quarterly review of closed disputes, carried out by team leaders and experienced staff, achieves this ongoing monitoring (see paragraph 15.4 of this Report).

Our file review did, however, identify some process weaknesses.

There were a number of disputes where settlement was promptly achieved once FOS engaged with the parties about the merits of the dispute, but this did not occur until more than 6 months (in one case more than a year) into the dispute resolution process.

There was just the occasional dispute file that we felt bore out the FSP claim of undue pressure to settle, particularly one dispute where an internal FOS assessment suggested that the FSP had a strong case and yet file notes recorded that the FSP had been reminded that its case fees would escalate if the FSP did not settle the dispute.

There was one negotiated settlement where an Applicant (who was unrepresented in the FOS process) told us that he felt FOS provided insufficient guidance or assistance in relation to the calculation of his loss. Consistent with this, the dispute file included a letter from FOS to the Applicant asking him to quantify his losses, without providing guidance or assistance as to how to do this. Where this occurs, it places the fairness of a settlement at risk.

Contrary to the FSP view referred to earlier, the reviewed files did not suggest that FOS can be too quick to bring negotiations to a halt. Rather, our file review suggested the need for FOS to progress disputes more quickly to decision-making, where negotiations fail to achieve a resolution.

We do, however, support the FSP view referred to earlier that where settlement negotiations appear promising, FOS should facilitate the provision of information to the FSP about the Applicant’s financial loss.

Recommendation 17

FOS should revisit its early resolution processes to achieve much earlier engagement by FOS with the parties about the merits of the dispute, so that this can inform settlement negotiations.
Where negotiations appear promising, FOS should facilitate the collection of information from the Applicant as to the loss that was incurred.

For complex matters, or where the Applicant does not have the skills to quantify their loss, FOS should assist the Applicant with quantification of loss.

Recommendation 18

Settlement guidance provided by FOS should be informed by FOS’s views of the merits of the case. FOS should leave it to the parties to factor in their own practical considerations, for example, the value for an Applicant of early access to a monetary settlement or the importance for FSPs of avoiding the higher case fees incurred if the dispute escalates to a FOS decision.

13.5. Basis for decision making

As is usual for EDR schemes, paragraph 8.1 of FOS’s Terms of Reference state that FOS is not bound by any legal rule of evidence.

When deciding a dispute, FOS has the ability to obtain expert advice – paragraph 8.2 of the Terms of Reference - and to require the FSP to contribute $3,000 (or more if exceptional circumstances apply).

13.5.1. Stakeholder views

Some FSP submissions (but no consumer submissions) raised issues about FOS’s approach to accepting and weighing information relevant to the dispute.

An industry association submission expressed concern about whether FOS is able to adequately test claims made by Applicants, given that disputes are considered “on the papers” without the parties being heard orally. An insurance company questioned the appropriateness of FOS considering cases where the insurer alleges fraud, given the parties’ inability to cross examine witnesses. Another FSP submission criticised FOS for not weighing factual issues appropriately and, for example, placing too much emphasis in investment advice disputes on missing FSP file notes that might have established what risk advice the advisor provided.

An industry association submission considered that there is insufficient guidance available as to FOS’s approach to evidence. It suggested that FOS should clearly explain in its decisions where it deviates from the rules of evidence. The industry association also expressed concern about FOS’s ability to obtain expert advice at the FSP’s cost.
13.5.2. Findings

In insurance disputes where fraud is alleged by the insurer, the Ombudsman deciding the dispute interviews the Applicant and makes an assessment of credibility. The insurer is able to be present at this interview. This is a well-established process. With the exception of one submission, we heard no complaint from insurers about this process. Further our file review did not highlight any concerns.

For other types of disputes, FOS typically does not hear from the parties in person. Rather, as is usual EDR practice, FOS relies on documentary information to assess assertions by the parties. We consider that FOS’s Operational Guidelines provide appropriate clarity as to FOS’s approach to assessing information. The Guidelines provide:

“FOS does not determine whether to admit each piece of evidence or information. However FOS has an obligation to conduct its inquiries and carry out its consideration and resolution of disputes in a way that draws out the facts and is fair to the parties.” “FOS gives due weight to the information it receives and reaches conclusions based on the balance of probabilities. This means FOS is likely to place more weight on reliable information. The reliability of documentary information depends on the source and nature of the document and how the party obtained it.”

Various examples are given in the Guidelines, including that contemporaneous notes are more reliable than an oral recollection.

Our review of 69 disputes where FOS made a Recommendation or a Determination satisfied us that FOS does in fact carefully consider whether the available information lends support to the assertions made by the parties. We recognise, however, that there will always be instances where different perspectives legitimately exist as to the weighing of conflicting information and assessment of the reliability of information.

In none of our reviewed files did FOS obtain expert evidence. We understand from FOS that this occurs relatively rarely and that only senior staff are delegated the power to approve this. From time to time, forensic document examiners are used in Banking and Finance cases (the costs are usually under $3,000 and are passed on to the FSP). FOS has also engaged an engineer in an earthquake damage case and actuaries in life insurance cases. Here the FSP’s contribution will be capped at $3,000 as per the Terms of Reference, unless an Ombudsman considers that exceptional circumstances exist that warrant a larger contribution by the FSP. We consider that these procedures ensure that costs are not incurred lightly or passed to an FSP without due consideration.

13.6. Decision making criteria

Consistent with ASIC Regulatory Guide 139 requirements, paragraph 8.2 of FOS’s Terms of Reference provides that, when deciding a dispute, FOS is to do what is in its opinion is fair in all the circumstances, having regard to legal principles, applicable industry codes or guidance as to practice, good industry practice and previous relevant decisions of FOS or a predecessor scheme (although FOS is not bound by these).

13.6.1. FSP views

Whilst most submissions did not raise any issues in relation to FOS’s decision making criteria or the application of these, one FSP submission expressed concerns about the subjectivity of “fairness” and stated that this should be based on legal principles such as common law and
equity and be fair to all parties to the dispute including the FSP. Another submission stated that “fair and reasonableness” should not take precedence over legal principles including contract law. Another FSP submitted that FOS decisions need to consider legal issues more comprehensively.

An industry association submission suggested that FOS’s Operational Guidelines should establish a hierarchy of importance being the law, then applicable industry codes and then past FOS decisions. Also that FOS should offer more thorough explanation when it deviates from the law or its own precedents or when it applies a standard that is higher than applicable industry standards, and this should be explicitly required by FOS’s Operational Guidelines. The same submission took exception to the Operational Guidelines’ reference to the possibility of FOS deciding that an FSP should meet “a higher standard than the minimum industry standard set in a particular industry code including good practice expressed by ASIC or other relevant regulators”. It was stated that FOS should offer a thorough explanation if it finds an FSP must follow a higher standard than that imposed by an industry code.

13.6.2. Consumer views

A submission by a previous Applicant argued that the current decision making criteria is too uncertain and open to different interpretations by the various Ombudsmen and Panels.

13.6.3. Findings

We consider that FOS’s Operational Guidelines provide appropriate clarity as to how the decision-making criteria will be applied. They specify that FOS’s obligation to have regard to legal principles includes the common law, legislation and the contract between the FSP and Applicant. They state:

“This does not mean FOS must strictly apply the legal principles. However, FOS will consider these when handling a dispute and if it is necessary to deviate from those principles to achieve fairness in the circumstances, it will identify its reasons for doing so.”

Our review of FOS decisions satisfied us that FOS decisions are consistent with this approach and that fairness to both parties is explicitly considered. Relevant legal principles are explained and, where FOS considers fairness considerations are paramount, the reasons are set out for this.

We are also satisfied as to the appropriateness of FOS bringing ASIC good practice guidance into its consideration of fairness. We agree with FOS that its obligation to consider industry practice does not and should not constrain FOS to disregard ASIC guidance in the unusual situation that an industry code sets a lower standard.

13.7. Quality of decision making

13.7.1. FSP views

Some submissions by FSPs or industry associations expressed concerns about the consistency in quality of FOS decisions. This was attributed to the variable quality of case managers, the extent of their understanding of industry products and practices and sometimes their focus on obtaining outcomes for consumers. Whilst one industry association submission argued for more comprehensive decisions, another industry association submission thought that too
much work is sometimes put into decisions, that the level of investigation can be excessive and decisions can be overly lengthy.

A number of FSPs provided us with details of disputes that they felt were not well decided. But there was no commonality across submissions as to the issues of concern.

### 13.7.2. Consumer views

The Joint Consumer Submission was generally supportive of the quality of FOS decision making, although some criticism was expressed about case manager understanding of the law and industry practice relevant to investments and life insurance matters. The submission also recommended that complex or lengthy decisions should be accompanied by a one page summary covering the key aspects of the decision.

A few issues were, however, raised with us by previous Applicants to FOS. One submission expressed concern about FOS’s selection of the industry expert for a Panel. He gave the example of a stockbroking dispute where a financial planning expert, rather than a stockbroking expert, was used on a Panel. There was also concern by a couple of previous Applicants that Applicants do not have a review avenue if they believe that a Determination contains an error. One Applicant suggested that the Terms of Reference should be amended to remove the statement that a Determination is a final decision if accepted by Applicant – he argued that to change this would open access to review by the Courts, if the Applicant believes that there is an error in the Determination. Another submission wanted FOS to follow the UK model and have an Independent Assessor who can review specific decisions where the Applicant is unhappy with the decision – with ability to publish annually details of the Individual Assessor’s views about the reviewed cases.

### 13.7.3. Findings

FOS has a multi-pronged approach to developing consistent quality in its decision making. FOS’s dispute handling staff are well qualified and many have relevant previous experience. FOS has made a significant investment in developing guidance for its employees, including a detailed Financial Advice Manual and Life Insurance Manual. FOS has also committed time and effort to induction and ongoing training. We saw training materials prepared internally and others prepared by external legal firms with specialist expertise. FOS case manager workshops are held, attended by Ombudsmen, that discuss significant recent FOS decisions and ensure a shared understanding. FOS Recommendations are quality reviewed before being released to the parties.

We think that these practices are working. Our file review and stakeholder feedback were generally supportive of the quality of the investigative process and of FOS Recommendations and Determinations. Whilst there were some calls for more comprehensive examination in Determinations of the relevant legal and factual issues, there were also some concerns about overwork and the accessibility of decisions. We are aware that in the past FOS’s very long decisions were quite inaccessible and consider that an appropriate balance is currently being struck. To further improve accessibility, FOS has very recently begun including a summary at the start of its Determinations. We support this initiative.

Our review did highlight some issues where particular FSPs have a strong view that FOS is not taking a correct view of the law and where the issue has the potential to repeat in multiple disputes. We think that it is important for a review mechanism to be available for these types of issues, not to re-open an already decided Determination, but rather to guide future
Determinations that raise the same issue. This is something that FOS has recently put in place – see paragraph 13.12 of our Report.

We also think that it is important that FOS places high importance on building its knowledge of current ‘good industry practice’. In the course of our Review, some FSPs told us that they would like to participate in programs for FOS to help staff build this expertise. It is also important that FOS continues to recruit from industry. Whilst FOS’s staffing profile is not particularly different from that of other EDR schemes with which we have worked, we tend to urge more rather than less industry experience to all schemes.

**Recommendation 19**

FOS should work with its FSP members to develop programs whereby FOS staff can build their industry expertise.

FOS should also continue to use recruitment opportunities to bring in staff with current industry experience. Where there are industry skills and experience gaps, then FOS should look at the possibility of secondments from the insurance and investments industry (as is done in Banking and Finance).

13.8. Direct financial loss awards

Paragraph 9.7 of FOS’s Terms of Reference restricts the maximum total value of the remedy that may be provided for direct financial loss. This cap applies on a “per claim” basis, consistent with ASIC Regulatory Guide 139.185.

FOS explains in its Operational Guidelines the meaning of “claim”:

“the expression “claim” refers to the set of facts that, put together, give an Applicant the right to ask for a remedy. This means a set of separate events or separate facts that lead to the alleged losses. FOS does not aggregate a number of claims into one claim just because the claims all arose from an ongoing relationship between an FSP and an Applicant.

FOS will not permit a joint claim in contract or tort to be “split” and treated as multiple claims (with a cap applying to each claim).

The expression “claim” under the TOR should not be confused with an “insurance claim” which refers to the actual application for benefits under an insurance policy.”

13.8.1. Stakeholder views

An industry association submission expressed concern about the lack of clarity as to what constitutes one claim versus multiple separate claims, where the dispute arises in the context of an ongoing relationship such as financial advice. In particular, issue was taken with FOS’s Operational Guidelines commentary:
“If the FSP has given advice recommending an investment and then given separate advice recommending another investment and the Applicant disputes the suitability of both sets of advice, FOS is likely to treat this Dispute as involving two claims with the effect that a cap applies in relation to each claim. This is so because there are two sets of facts and circumstances giving rise to the Dispute.”

The submission argued that, where a financial planner is required to continuously review a client’s financial plan, each meeting with the client should not be regarded as a separate piece of advice. The concern was that FOS’s approach has the capacity to significantly increase the adviser’s exposure, with implications for the adviser’s next professional indemnity premium. Accordingly it was argued that the Terms of Reference should explicitly state that the monetary limit applies to the total value of any sets of claims made against the financial planner.

General insurers also raised the issue of what constitutes a claim. They stated that FOS’s practice is to separate risks covered by a single policy so as to bring the claim within FOS’s monetary limit. For example, loss of a building and loss of building contents will be regarded as two claims notwithstanding that a single claim is made by the insured for one event under a single policy.

No consumer submission addressed this issue.

13.8.2. Findings

We think that FOS’s Operational Guidelines appropriately interpret paragraph 9.7 of the Terms of Reference. The Guidelines set out the principles to be used to determine the number of claims, whilst recognising that these principles need to be applied to the particular facts of each dispute. Our review of disputes did not identify any matters of concerns in relation to this.

In the case of general insurance disputes, we agree with FOS that under its Terms of Reference a “claim” does not equate to a single insurance policy. Nor is it determinative whether the insured is given one claim number or multiple claim numbers when claiming under an insurance policy. The “set of facts” that are relevant to the question of whether there is one or multiple claims include whether different aspects of the insurance cover attract different excesses and whether different exclusions apply to different categories of cover. Whilst we recognise that factual situations are not always easy to categorise, our review of disputes did not identify any matters of concerns in relation to this application by FOS of its Terms of Reference and Operational Guidelines.

13.9. Non-financial loss awards

Paragraph 9.3b) of FOS’s Terms of Reference enables FOS to compensate an Applicant for non-financial loss but only where “an unusual degree or extent of physical inconvenience, time taken to resolve the situation or interference with the Applicant’s expectation of enjoyment or peace of mind has occurred” or in the case of a privacy issue where “injury has occurred to the Applicant’s feelings or humiliation has been suffered by the Applicant”.

Paragraph 9.3c) of FOS’s Terms of Reference specifies that FOS cannot make an award for non-financial loss in relation to a general insurance dispute where the contract between the Applicant and the FSP excludes this.
13.9.1. Stakeholder views

Most FSP submissions appeared to accept the appropriateness of paragraph 9.3b) of the Terms of Reference. One FSP did, however, question whether FOS should have this power and also urged the need for more transparency as to awards. Other FSPs were concerned about an increasing tendency by FOS to make non-financial loss awards, even where the Applicant did not request compensation on this basis and where the FSP has not been provided with an opportunity to make submissions as to the appropriateness or otherwise of this type of award.

An industry association submission argued that paragraph 9.3c) should be broadened so that it prevents a non-financial loss award when excluded by any contract between the FSP and Applicant (not just a general insurance contract). The submission also urged that there should be more guidance as to what constitutes “unusual degree or extent of physical inconvenience”.

On the other hand, the Joint Consumer Submission suggested that a higher cap of $10,000 should apply to non-financial awards. Submissions from a couple of previous Applicants have argued that more flexibility should be shown by FOS in relation to the substantiation of income that is foregone because of the FOS dispute.

13.9.2. FOS practices

FOS’s Operational Guidelines state:

“FOS takes a conservative approach to compensation for non-financial loss. It is unlikely to decide a substantial amount of monetary compensation should be paid. It may decide a non-financial remedy, such as a letter of apology, should be provided.

Inconvenience is a form of non-financial loss. FOS considers compensation should not be provided where an Applicant merely suffers inconvenience that is a normal part of doing business. FOS expects an Applicant to:

• be moderately robust and bear the normal degree of inconvenience experienced when a problem occurs; and

• take reasonable steps to reduce inconvenience.”

Our file review included three disputes where awards were made for non-financial loss. There were two financial difficulty disputes where awards were made - $1,500 and $2,000 respectively - for unusual anxiety and distress as a result of the FSP’s failure to give proper consideration to the hardship variation application. There was also a motor insurance dispute where an elderly and unwell Applicant was very unhappy with the FSP’s claim handling and $150 was awarded on the basis that she had suffered stress, inconvenience and delays because she had to wait over 2 months for payment for her vehicle and over 6 months for payment for emergency transport costs and basic errors were made by the FSP throughout the claims process.

FOS data for 2012/13 confirms that non-financial loss awards are made in a minority of cases.
Figure 43. 2012/13 – Non-financial Loss Awards made by FOS

<table>
<thead>
<tr>
<th>Dispute Type where non-financial loss awarded</th>
<th>Total No.</th>
<th>No. of Decisions awarding non-financial losses</th>
<th>% of total decisions awarding non-financial losses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Banking &amp; Finance</td>
<td>50</td>
<td>11</td>
<td>2.4%</td>
</tr>
<tr>
<td>General Insurance</td>
<td>32</td>
<td>2</td>
<td>16.7%</td>
</tr>
<tr>
<td>Investments, Life Insurance &amp; Superannuation</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

**Recommended Approaches**

Recommendations

<table>
<thead>
<tr>
<th>Decisions in favour of the Applicant</th>
<th>Total No.</th>
<th>No. of Decisions</th>
<th>% of total decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decisions in favour of the Applicant</td>
<td>806</td>
<td>62</td>
<td>7.6%</td>
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</table>

Ombudsman Determinations

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<thead>
<tr>
<th>Decisions in favour of the Applicant</th>
<th>Total No.</th>
<th>No. of Decisions</th>
<th>% of total decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decisions in favour of the Applicant</td>
<td>617</td>
<td>103</td>
<td>16.7%</td>
</tr>
</tbody>
</table>

Panel Determinations

<table>
<thead>
<tr>
<th>Decisions in favour of the Applicant</th>
<th>Total No.</th>
<th>No. of Decisions</th>
<th>% of total decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decisions in favour of the Applicant</td>
<td>328</td>
<td>8</td>
<td>2.4%</td>
</tr>
</tbody>
</table>

**Notes:**
1. In 212/13, Banking & Finance accounted for 61% of accepted disputes, General Insurance 30% and Investments, Life Insurance and Superannuation 9%.
2. In 139 of the 173 decisions, an amount of less than the $3,000 cap was awarded.

**13.9.3. Findings**

We have already noted our view that EDR is primarily about direct financial loss. But equally, we think that it is appropriate that FOS has the ability to make modest awards for non-financial loss where special circumstances apply. In our view, paragraph 9.3(b) of the Terms of Reference appropriately constrains the circumstances in which FOS can compensate for non-financial loss.

The Terms of Reference recognise that general insurance premium calculations require certainty as to the maximum liability of the insurer – and for this reason FOS cannot award non-financial loss where a general insurance contract excludes any payment for non-financial loss. We consider that this is a special situation and paragraph 9.3(c) of the Terms of Reference should not be broadened to exclude the making of a non-financial loss award in other situations.

Given that there were only 39 disputes in the last financial year where a non-financial loss award of $3,000 was made, we are not persuaded that there is a need for an increase in the cap at this stage. Further the effect of inflation as an eroding force on the value of these awards is a less compelling issue where a non-financial loss award is made, than is the case where an award provides compensation for actual loss.

We are, however, concerned that the propensity to award non-financial loss appears to differ according to the stage of decision-making and whether an Ombudsman or Panel is making the decision (see Figure 44). We think that this is something that FOS needs to investigate with a view to promoting consistency of approach. It would also be worthwhile to investigate whether there is consistency of approach across industry sectors – albeit that we think that...
Figure 44 presents less cause for concern on this account. Further guidance in the Operational Guidelines may be needed.

**Recommendation 20**

FOS should undertake an internal review comparing the approach to non-financial loss awards in Recommendations, Ombudsman Determinations and Panel Determinations and across industry sectors, with a view to enhancing the guidance that is provided as to the kinds of circumstances in which awards of this type should be made.

### 13.10. Legal costs

Paragraph 9.4 of FOS’s Terms of Reference gives FOS the ability to decide that the FSP contribute to the legal costs of the Applicant (amongst other costs). The contribution amount is capped at $3,000 unless exceptional circumstances apply. FOS’s Operational Guidelines state:

“FOS provides a service that is free for Applicants. It is not usually necessary for either party to be legally represented. If an Applicant chooses to be represented, they will usually have to cover their legal fees themselves…

FOS decides whether the FSP should make such a contribution by considering what is fair in the circumstances. FOS makes this decision taking into account:

- the complexity of the Dispute;
- for legal costs, whether the Dispute raised legal issues on which, notwithstanding FOS’s involvement, the Applicant reasonably needed advice;…

FOS will only require an FSP to contribute to costs after it has received proof of the amount of costs incurred and payment by the Applicant.”

#### 13.10.1. Stakeholder views

An industry association expressed concern about FOS’s ability to require an FSP to contribute more than $3,000 to the legal or other costs of the Applicant, if exceptional circumstances apply.

A former Applicant submitted that FOS should be able in appropriate cases to approve funding for legal costs in advance of the costs being incurred. He argued that otherwise there is a risk that the Applicant will be left with a costs bill that FOS will decide the FSP need not reimburse. This risk can discourage Applicants from obtaining the advice that they need to put forward complex legal argument. It was said that FOS needs to be able to do this as part of its “levelling of the playing field” as between the Applicant and the FSP, given that an FSP will likely have recourse to considerable legal resources.
13.10.2. Findings

We consider that the Operational Guidelines establish an appropriately conservative approach to the awarding of legal costs. Whilst we understand that Applicants will be concerned about incurring legal costs when they do not know whether they will be able to recover these from the FSP, we think that it is not part of an EDR scheme’s role to fund an Applicant’s legal costs. Nor would it be fair to require an FSP to fund an Applicant’s legal costs if, in fact, the FSP’s position is ultimately vindicated. As FOS states in its Operational Guidelines, it should not normally be necessary for an Applicant to obtain legal advice and if the Applicant chooses to do this, the Applicant needs to bear the risk that recovery will not ultimately be made. The Operational Guidelines encourage an Applicant who might want to seek contribution to legal costs to discuss the matter with FOS before incurring the costs. We think that this is as much as FOS can reasonably do in these circumstances.

13.11. Interest awards

Paragraph 9.5 of FOS’s Terms of Reference gives FOS the ability to make an award of interest and specifies:

“b) When decided an award of interest:

(i) If the Insurance Contracts Act 1984 applies – FOS will calculate interest in accordance with that Act; and

(ii) Otherwise:

(A) FOS will calculate interest from the date of the cause of action or matter giving rise to the claim; and

(B) FOS may have regard to any factors it considers relevant, including the extent to which either party’s conduct contributed to delay in the resolution of the matter.”

FOS’s Operational Guidelines state:

“FOS will not impose a standard rate when making interest awards and will not have one rate for all cases. FOS will try to impose a rate that will maintain the real value over time of any award of compensation. FOS has discretion to apply a rate that best fits the circumstances and may apply a rate that replicates what a court might do or align with a statutory rate (where such a rate exists).”

13.11.1. Stakeholder views

An industry association stated that to provide additional predictability and transparency, the Guidelines should state: “FOS will apply a rate that replicates what a relevant court of jurisdiction would apply, unless the circumstances warrant otherwise. In such situations, FOS will explain why it has deviated from the norm.”

FSP submissions also addressed the period during which interest is payable. One submission argued that interest should not have to be paid from the date of the cause of action, where the Applicant delays in lodging with FOS and then FOS delays in resolving the matter. Another submission argued that interest should be awarded from the date on which loss first accrued, rather than the date of the breach. Several insurers were concerned that FOS’s lengthy process can result in significant interest awards – at the above-market rate specified in the
Insurance Contracts Act - and that these are taken into account in the actuarial costing of policies and so serve to increase premiums.

Consumer submissions did not address this issue.

13.11.2. Findings – Insurance disputes

As a general policy matter, we think that it is appropriate that FOS determine interest awards consistent with the Insurance Contracts Act. This Act prescribes both the rate of interest and the period during which interest is payable. We understand, however, the frustration for FSPs where the amount of interest is high because the FOS dispute resolution process has been unduly prolonged. This frustration arises both because the Insurance Contracts Act imposes an above-market interest rate and because of the flow on effects for costing of new premiums. This issue serves to underscore yet again the importance of FOS improving its timeframes. Our Report makes recommendations designed to achieve this – see Parts 7 and 8. Whilst we (and FOS) expect this should be achievable, if this proves not to be the case, fairness to insurers would suggest that FOS’s Terms of Reference should be amended to introduce more discretion in the making of interest awards to ensure that interest awards do not unfairly penalise an FSP where FOS has caused undue delay.

13.11.3. Findings – Other types of financial products and services

In relation to other financial products and services, we think that the breadth of these and range of factual possibilities prevent prescription as to the basis for determining the interest rate or the period during which interest should be payable. Rather it is appropriate that FOS has discretion as to these matters.

We understand from FOS that the date of the cause of action will usually be the key date for conduct disputes, such as inappropriate advice disputes, but that funding arrangements and other factors may vary this. We think that it would promote transparency if FOS were to extend its Operational Guidelines to address these issues.

Recommendation 21

FOS should add to its Operational Guidelines by explaining its approach to determining from what date an award of interest should be payable. Some examples would assist.

13.12. Review/ appeal mechanism

FOS has very recently established a process whereby an industry body or consumer organisation can request that FOS review an approach that has been applied by FOS decision makers to a type of disputes. The review process does not re-open the decision that triggered the review request, but it can lead to FOS agreeing that a different approach may be appropriate in a future dispute that raises the issue.
Before the new process is invoked, the issue of concern is expected to be raised with the Lead Ombudsman, Chief Ombudsman or in the regular FOS industry and consumer meetings as per The Circular Issue 15 Spring 2013. The industry body or consumer organisation is also expected to have written legal advice that confirms its view that FOS made an error in interpreting or applying the law.

If these preconditions are met and the issue is of significance, the industry body or consumer organisation can request the Chief Ombudsman to put in place review steps. The Chief Ombudsman has a discretion to decide whether this is appropriate and if so the appropriate process for the review - this may include seeking an opinion from Senior Counsel.

Where a review is undertaken at the request of an industry body, it must enter into a Costs Contribution Agreement with FOS.

FOS developed this new procedure in consultation with stakeholders and has committed to implementing it in a practical and co-operative way with stakeholders. It will be kept under review as experience with the procedure emerges.

13.12.1. Stakeholder views

Several FSPs gave their view that the review mechanism should be able to be triggered by individual FSPs without industry body endorsement.

Within the insurance industry in particular, the view has also been expressed that in limited, constrained circumstances, it should be possible for an FSP to appeal a Determination ie. to re-open the decision that was made by FOS.

Whilst appeal rights were not canvassed in the Joint Consumer Submission, we are quite sure that consumer representatives would consider that, if FSPs were to have the ability to appeal a Determination, fairness would require that Applicants would have to be provided with the same right.

13.12.2. Findings

In our view, the fairness/ efficiency balance does not support the introduction of an appeal right (no matter how constrained by reference to administrative law review-type criteria). As extensively discussed in our Report, there is significant concern by both FSPs and consumers about already prolonged FOS timeframes. An appeal mechanism would of course further extend timeframes. Moreover, given the quality of FOS decision making – see paragraph 13.7 – we do not consider that there is a compelling case for an appeal avenue from a fairness perspective.

We are, however, strongly supportive of the review mechanism that FOS has established. This provides an avenue for challenge of a FOS view that is likely to be relevant in future disputes. In our view, FOS should further extend this mechanism to allow an individual FSP to apply to FOS to institute a review. We suggest this because we agree with FSPs that there could be issues that have particular ongoing importance to an FSP that may not be issues that the FSP’s industry body would want to devote resources to pursuing. It is even possible that an industry body could be constrained by an awareness that its FSP members’ competitive interests differ.

That said, we agree that there should be appropriate safeguards. FOS should retain a discretion as to whether to agree to the request, so it could ensure that the review
mechanism is not abused. The requesting FSP would, of course, have to meet the other preconditions, including obtain a written legal opinion in support of its position and entry into a costs contribution agreement with FOS.

**Recommendation 22**

FOS should expand the review procedure so that a review request may be made by an FSP that can demonstrate that the relevant issue is of significant ongoing importance to the FSP. The other review preconditions applicable to an industry body or consumer organisation must also be met by the FSP.

### 13.13. Test case procedure

Paragraph 19 of FOS’s Terms of Reference provides a procedure whereby an FSP can refer to the Courts a dispute that raises a significant issue or important point of law. To ensure fairness, the FSP must pay the Applicant’s costs of the legal proceedings and prosecute the test case proceedings expeditiously.

This procedure provides a way for an FSP to challenge a FOS legal position, provided the FSP acts before FOS entrenches its legal position via a Determination. It is not, however, being utilised by FSPs.

#### 13.13.1. Stakeholder views

Clearly the expense associated with the test case procedure is a barrier. Also, we heard some concern that FOS’s Terms of Reference give FOS a discretion to stop considering a dispute where the test case procedure is invoked – rather than an absolute obligation to do so.

#### 13.13.2. Findings

To provide FSPs with more certainty, we think that FOS should be obliged to stop considering a dispute where the FSP issues FOS with a notice that the test case procedure is being invoked. As is the case at present, the FOS process should only be halted whilst the FSP complies with the undertakings required to be set out in the notice ie undertakings to pay the Applicant’s costs and to prosecute the test case proceedings expeditiously.

**Recommendation 23**

FOS should commence the necessary consultation steps to amend its Terms of Reference to oblige FOS (rather than to give FOS a discretion) to stop considering a dispute where FOS has been provided by the FSP with a complying test case procedure notice – but only so long as the FSP complies with the undertakings in that notice.
13.14. Compliance with settlements and awards


When we interviewed former Applicants to FOS, four interviewees claimed that the FSP had not complied with the settlement agreement or a FOS decision. One Applicant suggested that to address this problem, settlement agreements and FOS decisions should specify timeframes for compliance and next steps.

13.14.2. Findings

We noted in our file review that the more recent FOS decisions were more specific as to the timeframe within which the FSP must carry out the remedial action than used to be the practice. We support this development. In addition, we think that FOS needs to be clear to Applicants that they can revert to FOS, if the FSP does not comply with a settlement agreement reached through FOS or with a FOS decision.

It is also important that FOS undertake some monitoring of FSP compliance with settlement agreements and FOS decisions. The telephone surveying of a sample of Applicants post-resolution of their dispute that FOS is planning to commence as part of its new Quality Framework could be used as a vehicle for this.

Recommendation 24

Where an Applicant enters into a settlement agreement through FOS or FOS makes a decision in favour of the Applicant, FOS should ensure that there is clarity as to the timeframe within which the FSP must carry out remedial action.

The Applicant should be advised that they can revert to FOS if the remedial action does not occur within the specified timeframe.

FOS should undertake sample monitoring of FSP compliance with settlements and awards through its planned telephone surveying of Applicants whose dispute has closed.

Lastly there is the issue of FSP failure to comply with FOS Determinations because of insolvency. Since 1 January 2010, there have been 19 FSPs that have been unable to comply with a total number of 100 Determinations with an aggregate value of in excess of $8 million plus interest. Most of these FSPs are financial advisors and all are in the investments industry. 3 of these FSPs are in Administration, 7 are in liquidation and 9 have advised FOS that they have insufficient funds to meet their obligations. For a range of reasons, the FSPs’ legislatively required professional indemnity insurance has not been available to meet the FSP’s obligation.

FOS is taking this issue very seriously and is planning to release a discussion paper this year examining what options are available to address this problem. We commend this enquiry.
### 13.15. Defamation protection

Paragraph 13.3 of FOS’s Terms of Reference prevents an FSP from instigating defamation action against an Applicant for allegations they make to FOS about the FSP.

#### 13.15.1. Stakeholder views

An industry association expressed concern that paragraph 13.3 might be misunderstood as protecting an Applicant who makes defamatory allegations about the FSP to media outlets or others.

#### 13.15.2. Findings

We think that FOS’s Operational Guidelines already address this concern. These state:

“FOS’s approach is to encourage each Applicant to provide information and express their views freely when lodging a Dispute. The TOR support this by preventing an FSP from taking defamation action against an Applicant in respect of allegations made to FOS by the Applicant about the FSP. Paragraph 13.3 does not provide protection from defamation action in respect of allegations about an FSP made to a party other than FOS even if the same allegations were also made to FOS.”

### 13.16. Regulatory Guide 139 compliance

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<tr>
<th>Summary of Benchmark Key Practices and additional RG139 requirements (latter indicated by italics)</th>
<th>Comments</th>
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<tr>
<td><strong>Determinations</strong>&lt;br&gt;The decision-maker bases determinations on what is fair and reasonable having regard to good industry practice, relevant industry codes of practice and the law.</td>
<td>FOS’s Terms of Reference entrench these criteria.</td>
</tr>
<tr>
<td><strong>Procedural fairness</strong>&lt;br&gt;Complainants are told of their right to access the law at any stage.&lt;br&gt;Complainants are told why a complaint is outside jurisdiction or is otherwise excluded.&lt;br&gt;Both parties can put their case, are told the arguments of the other party and can rebut these and are told the reasons for determinations.</td>
<td>FOS’s Terms of Reference acknowledge the Applicant’s right to decline to accept a FOS decision and to institute legal proceedings.&lt;br&gt;Complainants are told why a complaint is outside jurisdiction. Paragraph 13.2 discusses the closing of unmeritorious disputes and paragraph 15.1 discusses the closing of disputes on the basis that they are otherwise outside jurisdiction.&lt;br&gt;FOS provides both parties with an opportunity to put their case, to be told the other party’s arguments and to rebut these.&lt;br&gt;Reasons are provided for determinations – paragraph 13.77 discusses the quality of decisions.</td>
</tr>
<tr>
<td><strong>Provision of information and confidentiality</strong>&lt;br&gt;Complainants are encouraged but not compelled to provide information relevant to the complaint.&lt;br&gt;Members can be required to provide relevant information unless confidentiality or legal reasons</td>
<td>FOS’s Terms of Reference enable FOS to require the parties to provide information or documents, unless confidentiality or legal reasons intervene. Information collection practices are discussed in paragraph 13.3.</td>
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The scheme should not rely on information that is not available to all parties. The scheme preserves confidentiality. Parties agree not to disclose information gained during the process to a third party unless required by law to do so.

FOS preserves confidentiality. Its Terms of Reference provide that it will not use confidential information provided by a party to make an adverse finding against any other party unless FOS determines that special circumstances apply. FOS’s Terms of Reference state that FOS operates on a “without prejudice” basis and accordingly information obtained through FOS may not be used in subsequent court proceedings unless required by an appropriate court process.
14. ACCOUNTABILITY

The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems.

14.1. Decision making transparency

For a long time, all General Insurance, Investments and Life Insurance Determinations have been posted on the website. All Banking and Finance Determinations are now also published on that basis.

Guidance by FOS’s predecessor schemes was provided in a periodic publication called the Bulletin and in Practice Notes. FOS now produces a periodic publication called The Circular.

FOS also publishes Case Studies that illustrate how FOS deals with commonly occurring issues. A more recent initiative has been The FOS Approach series, for example, the edition in April 2013 dealt with financial difficulty disputes.

14.1.1. Stakeholder views

A previous Applicant requested that for Panel Determinations FOS should publish a minority view where a Panel does not reach a unanimous view. In practice, however, Panels continue discussing matters until they reach a view that all Panel members are comfortable with. Minority views do not, therefore, occur.

The Joint Consumer Submission expressed the view that the product/issue type search facility for Determinations does not enable ready identification of relevant previous disputes. Further, it becomes difficult over time to locate guidance that has been provided in past editions of The Bulletin or The Circular.

14.1.2. Findings

FOS is clearly committed to providing much public guidance about its approach to decision making. As a consequence, there is a wealth of material on its website. It is to be commended for publishing all Determinations.

It can, however, be difficult to locate material on FOS’s website. We think that it would be preferable if decision making-related guidance in The Circular is extracted and filed by topic on FOS’s website. Ideally guidance in The Bulletin that is still of relevance would be similarly extracted. Better website search functionality would also assist. FOS is working on this as part of its website redevelopment project referred to earlier.
Recommendation 25

As part of its website redevelopment, FOS should extract significant ongoing guidance that was or is released via its periodic publications and file this on its website by topic. This will enhance ongoing access to this material.

14.2. Annual Review

FOS releases a detailed Annual Review (108 pages this year) that provides statistical and other information about its dispute resolution and other activities. This is available on FOS’s website.

14.2.1. Stakeholder views

An industry association submission thought that the Annual Review should provide more insight into the nature of disputes.

The Joint Consumer Submission considered that the Annual Review should include more information about dispute outcomes including the type of outcomes being achieved through negotiation and conciliation.

14.2.2. Findings

Clearly FOS’s Annual Review is a vital accountability mechanism and provides important insights for stakeholders. It contains a wealth of information about how FOS is organised and how it engages with its stakeholders, as well as detailed statistical information about the types of Applicants to FOS, dispute issues (by industry sector) and how FOS handled disputes.

The Annual Review needs to be a manageable length and this involves judgements about what information is most critical to include and what can be left out. We think that FOS has generally achieved a good balance of information. In particular, it seems to us that there is already quite a lot of space dedicated in the Annual Review to analysis of the issues giving rise to disputes. We think any further detail about this is likely to be of sectoral rather than general interest and so is best provided outside the ambit of the Annual Review. There are, however, a couple of enhancement opportunities that we suggest for FOS’s consideration.

We agree with consumer representatives that more information in the Annual Review about the outcomes achieved would be desirable and some revisiting of the ways in which outcomes are classified.

To date, FOS has provided information to the public about the outcomes of disputes received – for 2012/13, this meant that the percentage results were significantly affected by 8,805 disputes that were closed by the FSP at the Registration Stage. This serves to mask trends such as the increase in numbers of disputes closed as Outside Terms of Reference. We think that outcome information should only take account of disputes that are closed at the Acceptance or later stage in FOS’s process.

The 2012/13 Annual Review classified Assessments as a species of “Resolved by agreement”. The Annual Review states that outcomes here can include apology, monetary compensation in
full or part, no payment or action etc. In fact, Assessments are not always by agreement and, as discussed in paragraph 13.2 of our Report, are primarily a vehicle for FOS to close the dispute on the basis that it is unmeritorious. This does not emerge from current reporting.

As discussed at paragraph 11.5.2 of our Report, we are also concerned about FOS’s practice of classifying a dispute as “Resolved by the FSP” and accordingly a species of “Resolved by agreement” if, at the outset of the dispute, the FSP responds to the Applicant’s complaint by explaining its reasons for rejecting the complaint and the Applicant makes no response to FOS as to whether or not it is satisfied by that explanation. We think that these disputes should be classified as discontinuances.

Where a FOS decision is made, FOS’s practice is to classify the outcome as “in favour of the Applicant” whenever the Applicant is awarded anything, no matter how minor. We reviewed disputes and spoke to Applicants who clearly considered that they had “lost” their dispute and yet whose dispute was categorised as in favour of the Applicant. To this extent, we think that FOS reported outcomes overstate Applicant results.

We would also like to see in the Annual Review more public accountability regarding FOS’s resolution timeframes. FOS’s Annual Review for 2012/13 disclosed that 19% of disputes took more than 180 days to close. More granularity should be provided as to the timeframes of these disputes.

This year, for the first time, FOS included timeliness KPIs in its published Business Plan. Accordingly, reporting against these KPIs should also be included in next year’s Annual Review.

**Recommendation 26**

To increase the transparency of the Annual Review, FOS should:

- provide information about dispute outcomes on the basis that disputes closed at the Registration Stage are excluded;
- classify as “Discontinued” a dispute where:
  - the FSP responds to the Applicant’s complaint by explaining its reasons for rejecting the complaint; and
  - the Applicant makes no response to FOS as to whether or not it is satisfied by that explanation;
- information about Assessments should not be classified in the Annual Review under the heading “Resolved by Agreement”;
- FOS decisions should be categorised as “in favour of the Applicant” only if the Applicant is awarded substantively most of the remedy the Applicant was seeking;
- further information should be provided as to numbers of disputes falling into the various subcategories of dispute outcomes disclosed on pages 42 and 43 of the 2012/13 Annual Review (some grouping of some of these subcategories may be appropriate);
• further information should be provided as to the timeframe of disputes that are closed in a period that exceeds 180 days, for example, the numbers of disputes closed in 181 to 364 days, the number of disputes closed in 365 to 729 days and the number of disputes closed in more than 730 days; and

• FOS should report its performance against its timeliness KPIs.

### 14.3. Comparative Tables

ASIC Regulatory Guide 139.152 requires EDR schemes to publish information about complaints and disputes received and closed, with an indication of the outcomes, against each scheme member. This reporting must be in the scheme’s Annual Report.

Consistent with this, FOS reports its FSPs’ dispute records via Comparative Tables released at the same time as its Annual Review and also available on FOS’s website.

#### 14.3.1. Stakeholder views

One industry association doubted the benefit of the Comparative Tables and thought that FOS should ask ASIC to relieve it of this “unnecessary annual impost”. But as noted at the start of our Report, this is outside the scope of our review.

Another industry association argued that the Comparative Tables format and complexity do not support consumer understanding and an FSP stated that the Tables do not explain the impacts of relevant events, for example, one or a couple of insurers may be particularly affected by a natural disaster. Concern was expressed about FOS’s measurement “Average resolution length” of a dispute: the FSP suggested that FOS’s implication is that a lower average is good when in fact a higher average suggests rigorous IDR process. There is a concern that FOS’s delays in decision making reflect poorly (and unfairly) on the FSP. The FSP argued that FOS needs to revisit the Comparative Tables with stakeholders.

A couple of submissions by former Applicants argued that the Comparative Tables should be more prominently displayed, in order to promote use by consumers.

#### 14.3.2. Findings

We are aware that FOS has in the past worked extensively with FSPs to ensure that the Comparative Tables present information in a way that is fair to FSPs and is not misleading for consumers. That there has been relatively little objection to FOS’s presentation of information is, we think, a credit to that process. In our view, FOS has gone to some effort to explain the benefits and limitations of the Tables and to present the information fairly.

In relation to the “average resolution length” - we understand from FOS that this measures for each FSP the average number of stages within FOS’s dispute resolution process that the FSP’s disputes traverse (not the average elapsed period of time of the FSP’s disputes). Of course, a FOS backlog of work primarily impacts the length of time of each stage in the dispute resolution process – not the number of stages that the dispute traverses. To that extent, FOS’s backlog of work does not unfairly impact the picture that is presented in the
Comparative Tables of FSPs’ “average resolution length”. At the moment, however, the Comparative Tables do not explain how “average resolution length” is calculated. This detail is in the Comparative Tables Glossary, a document that is available on FOS’s public website. But it would assist readers if the Tables themselves included at least a summary explanation of what is meant by “average resolution length”.

The Comparative Tables are released at the same time as the Annual Review with FOS’s media release referring to both documents. We think that FOS has made the information sufficiently accessible. Better website search functionality (see paragraph 11.3.2 of this Report) will also assist interested consumers to find this information.

Recommendation 27

FOS should include in the Comparative Tables information about how an FSP’s “Average Resolution Length” for disputes is calculated.

14.4. ASIC reporting

We have been asked as part of our review to report about the adequacy of reporting by FOS to ASIC about dispute resolution, systemic issues and serious misconduct.

FOS provides very comprehensive quarterly reports to ASIC. The statistical detail is very extensive. We were satisfied with the adequacy of this reporting.

14.5. Regulatory Guide 139 compliance

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<th>Summary of Benchmark Key Practices and additional RG139 requirements (latter indicated by italics)</th>
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<tr>
<td><strong>Determinations</strong>&lt;br&gt;The scheme regularly provides anonymised written reports of determinations to educate members and consumers and to demonstrate consistency and fairness in decision-making.</td>
<td>FOS publishes all determinations on its website. These do not reveal the identity of the individuals or companies referred to.&lt;br&gt;FOS also publishes case studies by way of guide to its approach.</td>
</tr>
<tr>
<td><strong>Public reporting</strong>&lt;br&gt;The scheme publishes a detailed and informative annual report with statistical and other data about its performance including information about how the scheme works, the number and type of complaints and their outcomes, time taken to resolve complaints, systemic problems, representative case studies, information about how equitable access is ensured, a list of members with changes during the year, the names of</td>
<td>FOS publishes on its website an Annual Review that addresses the matters listed in the Benchmark and RG139. Opportunities to enhance public reporting are discussed in paragraph 14.2.</td>
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members who do not meet their obligations (if the terms of reference permit this) and new developments or key areas in which policy or education initiatives are required. A report must also contain a comprehensive summary and analysis and include information about each member’s complaints.

The annual report is distributed to members.

**Reporting to ASIC**

The scheme:

- uses effective case management infrastructure to collect and record information in a way that enables it to identify systemic issues and serious misconduct,
- refers these matters to the member for written response to the scheme and for action, and
- reports these matters to ASIC (a copy of the member’s written response must also be available to ASIC).

The scheme must identify a person for reporting to ASIC – this should not be left to the overseeing body.

The scheme provides ASIC with quarterly information about complaints and enquiries including numbers and types received, demographics of persons, numbers outside jurisdiction and why, timeliness, outcomes and systemic issues and serious misconduct (ASIC encourages schemes to name the scheme member involved in the systemic issue or serious misconduct).

FOS has a case management system that cross references a dispute to other disputes in relation to that FSP, thereby helping to identify systemic issues. FOS’s practices in relation to systemic issues are discussed at paragraph 16.1. FOS’s Chief Ombudsman provides ASIC with comprehensive quarterly reports – see paragraph 14.4. Systemic issues and serious misconduct are reported on a no-names basis.

**Practice notes or guidance**

Schemes are encouraged to publish practice notes or guidelines which identify any problems or issues of interest.

FOS has a quarterly publication “The Circular” that includes information about recent developments of general interest.
15. EFFICIENCY

The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.

15.1. Disputes outside Terms of Reference

Whilst FOS’s Terms of Reference cover the vast majority of complaints made to FOS’s FSP Members, the Terms of Reference contain a number of jurisdictional exclusions. These exclusions have been vetted by ASIC and found to be appropriate.

Where an FSP receives a complaint from a retail client and fails to provide a resolution that is satisfactory to the complainant, the FSP is required by law to provide the complainant with FOS’s contact information. This is the case even if the FSP knows that the complaint falls within a jurisdictional exclusion under FOS’s Terms of Reference. This means that there will inevitably be considerable numbers of disputes that come to FOS that need to be excluded by FOS.

The process under the Terms of Reference is that, where FOS considers a dispute to be outside its jurisdiction, FOS informs the Applicant of this. Paragraph 5.3b) of the Terms of Reference provides that, if an Applicant objects to this assessment, the Applicant has 30 days to tell FOS this. FOS then considers whether the objection “may have substance” and, if this hurdle is met, the parties are given an opportunity to make submissions and then an Ombudsman makes a formal Jurisdictional Decision.

15.1.1. Number and basis on which disputes are excluded

As is apparent from Figure 44 below, there is an increasing percentage of disputes that are being closed by FOS on the basis that they are outside Terms of Reference.

Figure 44. Recent Years – Number of Disputes deemed outside TOR by FOS

<table>
<thead>
<tr>
<th>Year</th>
<th>Disputes deemed outside TOR (% of Closed Disputes)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010/11</td>
<td>13.8%</td>
</tr>
<tr>
<td>2011/12</td>
<td>15.8%</td>
</tr>
<tr>
<td>2012/13</td>
<td>17.6%</td>
</tr>
</tbody>
</table>

(*Excluding those closed at Registration Stage.*)
Note: These numbers exclude disputes that are closed by Assessment (a process that relies on the Terms of Reference paragraph 5.2 general discretion - see paragraph 13.2 of this Report).

Almost all of the heads of exclusion in FOS's Terms of Reference are invoked in these closure decisions as the following table in Figure 45 demonstrates.

**Figure 45. 2013 - Heads of exclusion invoked for outside TOR decisions**

<table>
<thead>
<tr>
<th>Outside Terms of Reference Categories</th>
<th>No. in 2012/13</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.1 Applicant not Eligible</td>
<td>265</td>
</tr>
<tr>
<td>4.2(a) Dispute not Under Australian Law</td>
<td>8</td>
</tr>
<tr>
<td>4.2(b) Type of Dispute Outside ToR</td>
<td>496</td>
</tr>
<tr>
<td>4.2(c) Not a Current FOS Member</td>
<td>660</td>
</tr>
<tr>
<td>4.3 Excluded GI Policy</td>
<td>286</td>
</tr>
<tr>
<td>5.1(a) Privacy Only</td>
<td>14</td>
</tr>
<tr>
<td>5.1(b) Level of Fee/Premium/Charge</td>
<td>113</td>
</tr>
<tr>
<td>5.1(c) Credit Risk Assessment</td>
<td>125</td>
</tr>
<tr>
<td>5.1(d) Underwriting/Actuarial Factors leading to offer of Non Standard Life</td>
<td>5</td>
</tr>
<tr>
<td>5.1(e) GI Premium Ratings/Weightings</td>
<td>25</td>
</tr>
<tr>
<td>5.1(f) Insurance Cover Refusal</td>
<td>27</td>
</tr>
<tr>
<td>5.1(g) Investment Performance</td>
<td>5</td>
</tr>
<tr>
<td>5.1(h) Trustee Decision</td>
<td>54</td>
</tr>
<tr>
<td>5.1(i) Management of Fund as Whole</td>
<td>75</td>
</tr>
<tr>
<td>5.1(j) Allocation of Benefit</td>
<td>1</td>
</tr>
<tr>
<td>5.1(k) Dispute Previously Dealt With by FOS</td>
<td>108</td>
</tr>
<tr>
<td>5.1(l) Deal With by Court/Tribunal/Scheme</td>
<td>564</td>
</tr>
<tr>
<td>5.1(m) Legal Proceedings Previously Commenced before lodgement</td>
<td>9</td>
</tr>
<tr>
<td>5.1(n) Lodged With Other EDR Scheme</td>
<td>2</td>
</tr>
<tr>
<td>5.1(o) Claim Exceeds 500K</td>
<td>92</td>
</tr>
<tr>
<td>5.1(p) Related Body Corporate &gt;20/100</td>
<td>4</td>
</tr>
<tr>
<td>5.2 General Discretion</td>
<td>322</td>
</tr>
<tr>
<td>5.2(a) More Appropriate Place</td>
<td>776</td>
</tr>
<tr>
<td>5.2(b) Non-Retail Client</td>
<td>3</td>
</tr>
<tr>
<td>5.2(c) FSP Practice/Policy</td>
<td>162</td>
</tr>
<tr>
<td>5.2(d) Frivolous/Vexatious/Lacking Substance</td>
<td>46</td>
</tr>
<tr>
<td>5.2(e) Legal Proceedings Commenced</td>
<td>11</td>
</tr>
<tr>
<td>6.2(a) Outside 6 Year Time Limit</td>
<td>104</td>
</tr>
<tr>
<td>6.2(b) Outside 2 Year IDR Time Limit</td>
<td>29</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>4,391</strong></td>
</tr>
</tbody>
</table>
We have discussed earlier in our Report some particular issues pertaining to some of these exclusions (see paragraph 10.5.3 re: large commercial debts, paragraph 13.2 re: excluded general insurance products and paragraph 13.1 re: frivolous/ vexatious/ lacking in substance).

### 15.1.2. FOS processes

Recognising that it is important for both the Applicant and the FSP to be told as soon as possible if FOS considers that a dispute is outside Terms of Reference, FOS places emphasis on early checking of jurisdiction. So it is FOS's Acceptance Team that makes the outside Terms of Reference decision in the vast majority of these disputes.

**Figure 46. 2013 - Heads of exclusion invoked to place disputes outside TOR**

<table>
<thead>
<tr>
<th>Outside TOR Decisions</th>
<th>No. in 2012/13</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acceptance Teams</td>
<td></td>
</tr>
<tr>
<td>Acceptance Stage</td>
<td>3,044</td>
</tr>
<tr>
<td>Before Review Stage</td>
<td>200</td>
</tr>
<tr>
<td>Review Stage</td>
<td>300</td>
</tr>
<tr>
<td>Early Case Management Teams</td>
<td></td>
</tr>
<tr>
<td>NCA Stage</td>
<td>235</td>
</tr>
<tr>
<td>Case Management and Legal Counsel Teams</td>
<td></td>
</tr>
<tr>
<td>Recommendation Stage</td>
<td>100</td>
</tr>
<tr>
<td>Determination Stage</td>
<td>16</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>3,895</strong></td>
</tr>
</tbody>
</table>

Given the significance of a decision to close a dispute on the basis that it is outside Terms of Reference, advice is sometimes sought from a senior lawyer before this occurs. In addition, FOS has a quality review process for all outside Terms of Reference letters to Applicants. The review is usually undertaken by the Team Manager or a more senior person in the Team.

Whilst there is a considerable number of disputes where the Applicant objects to the decision that it is outside Terms of Reference, in most cases, FOS takes the view that the objection does not meet the test that it "may have substance". As a result, few of these objections are referred to an Ombudsman for a Jurisdictional Decision under Terms of Reference paragraph 5.3b), as the next table demonstrates.
15.1.3. FSP views

FSPs and industry associations expressed a number of concerns about FOS’s jurisdictional ambit and processes.

An industry association pointed to the breadth of the definition of “financial services” in FOS’s Terms of Reference and argued that FOS should only extend beyond the Corporations Act definition of “financial services” in exceptional circumstances and, if so, should explicitly explain why it is appropriate to do this.

There were allegations of inconsistencies in FOS’s interpretation of its Terms of Reference exclusions. There was particular concern about FOS’s exercise of jurisdiction in relation to large commercial credit matters (see paragraph 10.5.3 of this Report).

There was dissatisfaction with the process available to the FSP to challenge FOS jurisdiction. One FSP complained about a statement in FOS correspondence that “FOS has the power to determine its own jurisdiction and I note that it is not open to the Financial Service Provider [FSP] to continue to challenge FOS’s jurisdiction”. An industry association submission stated that FOS should seriously consider submissions by FSPs that a dispute is outside jurisdiction and should involve experienced, senior staff in the decision-making process at the outset. There was also dissatisfaction with the 30 day period available to an Applicant to object to an OTR decision and allegations that FOS is being accessed by large commercial borrowers for the sole purpose of winning a reprieve from enforcement action for the period of FOS’s initial jurisdiction assessment and then the period of the objection process.

15.1.4. Consumer views

The Joint Consumer Submission also made some criticisms of FOS’s jurisdiction assessment process. The Submission stated that at early stages in the dispute resolution process: “FOS employees eagerly look for ways to reject a complaint”. Various case examples were given of jurisdictional decisions of concern including an exclusion of a matter because of a prior settlement when actually the settlement addressed only one element of the matter and not the matter in the subsequent dispute.

15.1.5. Findings

We would be reluctant to see FOS adopt the very legalistic approach of defining its jurisdiction by reference to the Corporations Act and other relevant legislation such as the National Credit Code. We think that the current Terms of Reference approach is more accessible,
with its broad definition of “Financial Service” capturing all financial products and services, and carve outs achieved through an (albeit extensive) raft of exclusions.

Having analysed the categories of excluded matters, we are not greatly concerned by the increase over the last couple of years in the percentage of disputes closed as Outside Terms of Reference. Two of the largest categories of exclusions “Not a current FOS Member” and “More Appropriate Place” have increased because of the movement of several debt buyer FSPs from FOS to the Credit Ombudsman Service and the increase in disputes about assigned or securitised debts. We also note that as FOS’s public profile continues to increase, there will inevitably be attempts by Applicants to use FOS for disputes that not are not appropriate for FOS – something that FOS should resist. We discuss earlier in this Report large, complex commercial credit disputes – see paragraph 10.5.3.

We reviewed 43 disputes that were closed on the basis that they fell within an exclusion (this number does not encompass disputes closed under Terms of Reference paragraph 5.2 via an Assessment). Of these 43 disputes, there were 14 disputes where we had concerns either about the decision, the stated basis for the closure decision or the timing of the decision.

There were disputes where we felt that the decision to exclude the dispute misunderstood the application of the Terms of Reference to the dispute.

There were disputes where we felt that more inquiry was required to understand the factual situation and test whether or not the dispute was outside Terms of Reference.

In other disputes, we felt that the decision to exclude the dispute was correct, but that the wrong Terms of Reference exclusion was relied upon for that decision.

There were also some disputes where, from the outset of the dispute, all of the information to make the outside Terms of Reference decision was available, and yet the issue was missed until months into the process.

Our file review was, therefore, supportive of the concerns expressed by stakeholders about FOS’s application of the categories of exclusion.

It seems to us that these problems are symptomatic of the ‘front end’ expertise problem raised earlier in our Report and the limitations of the current quality review process at that ‘front end’. We think that these problems are best addressed by a restructure that provides FOS employees who work at the ‘front end’ of the dispute resolution process with closer proximity to and supervision by the more experienced employees who typically work as case managers at the ‘back end’ of the dispute resolution process (see Recommendation 5).

There were also process matters of concern in relation to the outside Terms of Reference dispute files that we reviewed. Our review included disputes that were excluded many months into the dispute resolution process, at a point when the Applicant would have had a legitimate expectation that FOS had accepted the dispute into jurisdiction. And yet, when the decision was made that the dispute was outside jurisdiction, there was no telephone call made to the Applicant in advance of the outside Terms of Reference letter. Further many outside Terms of Reference letters were far too brief in their explanation to be meaningful for the Applicant.

We have made a recommendation below addressing this issue of communication with Applicants. In some aspects, we are simply asking for more thorough completion of the current FOS template letter to the Applicant and in others we are suggesting the additional
We recognise that the net effect will be to add to FOS effort on outside Terms of Reference decisions and that there will be a higher resource demand.

We also have process concerns in relation to jurisdictional objections by Applicants or FSPs. In our file review, we saw disputes where the Applicant objected to the outside Terms of Reference decision and the Applicant’s objection was quite summarily dismissed. In none of the reviewed files did the objection result in a Jurisdictional Decision by an Ombudsman. Rather a senior Team member (possibly the person who quality reviewed the original letter) rejected the objection on the basis that there had been “no new and relevant information or argument or identified error in FOS’s assessment”. We think that FOS has a responsibility to have a fresh look at any objection, to err on the side of consulting an Ombudsman about whether the matter should go to a formal Jurisdictional Decision by the Ombudsman and, if an objection is rejected without a Jurisdictional Decision, to respond in a way that makes clear that the objection has been carefully considered and that gives full transparency to FOS’s reasons for regarding the matter as outside jurisdiction.

We are conscious that a more cautious approach to jurisdiction checking could sometimes mean a short delay while, for example, consultation occurs with an Ombudsman about an objection to an outside Terms of Reference decision. We also accept, as one FSP asserted, that there will be the occasional large business or other clearly-excluded Applicant that will use the FOS process including the 30 day objection process to win an enforcement reprieve from its FSP. However, an outside Terms of Reference decision is of such significance that there must be a proper opportunity for Applicant objection. This is a case where the process construct cannot focus on the occasional ‘illegitimate’ Applicant but rather has to protect the majority of ‘legitimate’ Applicants.

Finally there is the issue of the process that should apply where an FSP challenges FOS’s jurisdiction. Here again we are concerned about summary dismissal of objections. Although the Terms of Reference do not prescribe a process that must be followed where an FSP objects to jurisdiction, we think that FOS needs to take a fresh look at any objection and to err on the side of consulting an Ombudsman to ensure that the Terms of Reference are being appropriately applied.

**Recommendation 28**

FOS should strengthen the process where it writes to an Applicant to say that the Applicant’s dispute is outside Terms of Reference. The letter should more comprehensively set out the relevant facts, identify and explain in accessible language the exclusion being relied upon and explain why the exclusion is applicable to the Applicant’s dispute. Where a dispute has progressed beyond the Acceptance stage, FOS should telephone the Applicant to provide oral explanation as well.
Recommendation 29

Where an Applicant objects to an outside Terms of Reference decision or an FSP asserts that a dispute is not within Terms of Reference, FOS should take a fresh look at the matter and should err on the side of consulting an Ombudsman. The response to the Applicant or FSP should make it clear that the objection has been carefully considered and should give full transparency to FOS's reasons for its view on jurisdiction.

15.2. Referral to other fora

15.2.1. Stakeholder views

No issues were raised by FSPs in relation to the FOS's mechanisms and procedures for referring disputes to more appropriate fora.

The Joint Consumer Submission pointed to an instance where a consumer with a dispute with a Credit Ombudsman Service member had inadvertently come to FOS instead and this contact failed to direct the consumer to the Credit Ombudsman Service. The Submission recommended that a seamless process be developed to refer Applicants between EDR schemes.

15.2.2. Findings

FOS has put in place mechanisms so that disputes that are properly for the Credit Ombudsman Service are promptly referred to them.

For the 1300 78 08 08 service, a ‘warm’ referral to the Credit Ombudsman Service will be made if the enquiry relates to one of its Members.

FOS’s Registration Checklist directs staff responsible for the initial processing of a complaint to consider whether the FSP is a FOS Member and if not whether a Credit Ombudsman Service Member. In these circumstances, the complainant is to be referred to the Credit Ombudsman Service.

Whilst we accept that isolated process failures are always a possibility, we were satisfied that there is a focus within FOS on assisting complainants to take their complaints to the Credit Ombudsman Service where it is the appropriate forum.

15.3. Contact with the parties

15.3.1. Stakeholder views

Whilst we did hear some praise about FOS’s communication efforts, there was considerably more stakeholder criticism than praise. There were reports that FOS is not proactive in providing dispute updates and also complaints about tardiness or failure to respond to phone call messages and emails to FOS. This criticism was expressed by an industry association, FSPs,
consumer representatives and Applicants alike. A couple of FSPs also expressed their dislike of the use by some FOS Teams of the generic info@FOS email address – we understand that it can take up to a day for the allocation of emails that come into that address. The Joint Consumer Submission also referred to delays in forwarding FSP correspondence including an instance where a settlement offer had a looming acceptance deadline.

These criticisms were consistent with FOS's surveying mid this year of Applicants which found 33% of the 1,315 Applicants who completed the online survey form were dissatisfied with the extent to which FOS kept them informed about the progress of their dispute (on a 6 point rating scale, they were fairly dissatisfied, very dissatisfied or extremely dissatisfied).

15.3.2. Findings

FOS is trying to improve its communications with dispute parties. Use of the telephone to contact the parties is greatly encouraged. Email rather than postal letter is now FOS's preferred method of communication. We strongly support these initiatives. In addition, we think that all FOS Teams should cease the use of the info@FOS email address and instead personal FOS email addresses should be used.

In large part, however, we consider that the complaints about communication are a function of the timeframes, the backlog and the stop-start nature of the dispute resolution process. Our review of dispute files showed that often a party to a dispute would request an update at a time when there was no update to make because the file was in abeyance – in a formal or informal queue waiting to be actioned. Whilst we support FOS's recent practice of sending a 'progress update' to the parties to a dispute that is in the Recommendation Stage unallocated queue (the 'progress update' states that the dispute is still waiting to be allocated), we think the far more important issue is how to reduce backlogs and speed up timeframes so that these 'pile management' techniques are not needed – see Part 7 of this Report.

Recommendation 30

Rather than using the info@FOS email address, an email sent to a dispute party should be sent from a FOS personal email address. This will increase the recipient's confidence that a reply to the email will in fact reach the intended recipient.

15.4. Quality assurance processes

15.4.1. FOS processes

As referred to earlier in this Report, FOS has developed a Quality Framework that both builds in peer or more senior input throughout the dispute resolution process and establishes a robust auditing regime.

1) During the dispute resolution process
FOS encourages staff to request advice where they are unsure how to progress a dispute or what to do next step. In our file review, we saw many disputes where an internal file note with advice was provided, for example, by a senior lawyer or Team Leader.

In addition, FOS has strict protocols as to what correspondence must be reviewed before it is dispatched. New staff generally have all correspondence reviewed for 3 to 6 months. Regardless of the level of experience, all Assessments (see paragraph 13.2 of this Report), outside Terms of Reference letters (see paragraph 15.1 of this Report), Recommendations and Determinations are quality reviewed before being dispatched.

To facilitate this review, each FOS employee is allocated a person who will perform this quality assurance for them – usually a more senior person in their team.

2) Auditing

In the General Resolution Group, Team Managers and the more experienced staff undertake monitoring of telephone calls and dispute records on a sample basis. For example, the Managers of the Acceptance Teams review five telephone calls per Dispute Officer per quarter.

In addition, there is now a FOS-wide quarterly audit of closed files that is conducted by some of FOS’s most experienced staff. The June 2013 quarter results are summarised in the table below.

**Figure 48. June 2013 – Audit of Closed Files at FOS**

<table>
<thead>
<tr>
<th>TEAMS</th>
<th>June 2013 Quarter Results</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acceptance Team (38 files)</td>
<td>18% where dispute claim amount not recorded accurately on FOSSIC</td>
</tr>
<tr>
<td></td>
<td>13% where failure to use standard paragraphs in correspondence</td>
</tr>
<tr>
<td></td>
<td>6 files commended for being very efficient eg. closed within or shortly after 1 month</td>
</tr>
<tr>
<td>Early Case Management Team (45 files)</td>
<td>22% where failure to use standard paragraphs in correspondence</td>
</tr>
<tr>
<td></td>
<td>18% delayed internally</td>
</tr>
<tr>
<td></td>
<td>16% with defects in FOSSIC recording</td>
</tr>
<tr>
<td></td>
<td>5 files commended for being very efficient eg dealt with by Dispute Analyst within 90 days</td>
</tr>
<tr>
<td></td>
<td>1 file commended for very good Assessment provided by telephone</td>
</tr>
<tr>
<td>Case Management Team (25 files)</td>
<td>In 4 disputes there was delay in identifying/ dealing with the issue</td>
</tr>
<tr>
<td></td>
<td>24% delayed – mostly because of time in queue waiting for allocation to a Case Manager</td>
</tr>
<tr>
<td></td>
<td>16% where instances of serious misconduct not referred to Systemic Issues Team</td>
</tr>
</tbody>
</table>
4 files commended for being very efficient eg resolved within 5 months of Acceptance or 1 month from allocation to the Recommendation
1 file commended for very good use of phone

15.4.2. Findings

FOS is putting considerable effort into quality assurance and, in our view, this is contributing to the professionalism of correspondence.

In our file review, however, we found instances of correspondence that simply followed the template and failed to acknowledge or address views, information or questions by the addressee in their previous correspondences to FOS. Where this occurs, it contributes to the parties’ sense that their correspondence is not read or they are not being heard. To address this, we think that, where correspondence to be sent is quality reviewed, the review needs to encompass perusal of recent correspondence from the addressee, not just the letter to be sent by FOS. We understand that this is not currently a required part of standard practice.

As discussed earlier in our Report, our file review also raised concerns about outside Terms of Reference letters and the need for these letters to be quality reviewed by the more experienced employees who typically work as case managers at the ‘back end’ of the dispute resolution process (see Recommendation 5).

Recommendation 31

Quality review of a draft letter should encompass perusal of the file to ensure that the letter does not simply follow the template but rather is tailored to the relevant circumstances and engages appropriately with previous correspondence from the addressee.

15.5. Other process efficiency issues

15.5.1. FSP views

A number of FSPs complained about FOS processes that are inefficient for both the FSP and for FOS and that add to the dispute resolution timeframe. There were complaints that FOS’s online lodgement form could better help Applicants to identify the company within a corporate group with which they are in dispute. Several FSPs complained that FOS fails to carry through what it learns about an FSP in one dispute to subsequent disputes. For example, a fresh copy of a bank’s hardship policy will be sought for each financial difficulty dispute. Also there were complaints that FOS will ask for information that is of limited value without regard to the practicalities for the FSP.
15.5.2. Findings

It was apparent from our discussions with FOS and review of FOS material that FOS is trying to improve the efficiency of its processes and in particular its FSP communication systems and processes. We discuss in paragraph 6.1 of this Report FOS’s Secured Services platform. It seems to us that the ‘next generation’ is for FOS to work with FSPs to enable them to establish a repository of their policies, disclosure documents etc. on this platform so that the FSP can simply point FOS to the relevant material on a dispute by dispute basis – rather than the current approach whereby all relevant information must be provided for each dispute regardless of whether FOS already holds that information. We recognise, however, that system developments of this type take time and budget to implement. We think it best to leave it to Management to progress this – and the FSP proposed enhancements of the online dispute form - when feasible.

We also understand FSPs’ desire for a more responsive FOS that is able to build knowledge of an FSP and carry this from one dispute to the next dispute. We think that the current organisational model makes this difficult. We discuss in Part 8 alternative models that would better facilitate this.

Lastly to the complaints about impractical information requests: our file review provided us with some examples - such as a very recent request that a bank provide FOS with a statement from a Loans Officer (not named) as to their recollection of a discussion with the Applicant 8 years previously. Even if the relevant Loans Officer had been able to be identified and was still with the Bank or could be located, it would have been extremely unlikely that the person would have an accurate memory (or even any memory) of a routine discussion that occurred so long ago. We think that FOS training needs to emphasise (and keep on emphasising) the importance of thinking critically about the practicality and necessity for information requests in the interests of resolving disputes as efficiently as possible.

**Recommendation 32**

Training provided to FOS staff should emphasise how important it is that they critically consider whether an information request proposed to be made is practical and necessary. In situations where it is difficult to know how to gather the necessary factual information, FOS should discuss the information gap with the relevant party to the dispute with a view to identifying the most efficient way to address the issue.
### 15.6. Regulatory Guide 139 compliance

<table>
<thead>
<tr>
<th>Summary of Benchmark Key Practices and additional RG139 requirements (latter indicated by italics)</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Appropriate process or forum</strong></td>
<td>FOS provides opportunity for IDR procedures to be utilised, and checks to ensure that a dispute is within jurisdiction, before FOS commences considering the complaint. Where appropriate, FOS refers complainants to more appropriate fora including the Credit Ombudsman Service. Whilst FOS does not have formal arrangements with the ACCC or Offices of Fair Trading for the referral of disputes, FOS employees provide contact details of those organisations where relevant. FOS’s Terms of Reference meet RG139 requirements as to the date of lodgement for a dispute lodged with another ASIC approved EDR scheme. Whilst FOS’s Terms of Reference do not meet RG139 requirements as to inter-scheme arrangements involving credit representatives, FOS’s MOU with Credit Ombudsman Service does address this. The MOU also addresses inter-scheme arrangements involving a securitisation body. Possible systemic issues are referred to the relevant FSP as discussed at paragraph 16.1. FOS’s Terms of Reference give it a discretion to exclude vexatious and frivolous matters.</td>
</tr>
<tr>
<td>The scheme deals only with complaints that are within its terms of reference, have not been dealt with by another dispute resolution forum and where opportunity has been given to the member’s IDR procedures to resolve the complaint. The scheme has mechanisms and procedures for referring complaints to other more appropriate fora. A National Credit Act approved scheme must work collaboratively with the ACCC and State and Territory Offices of Fair Trading to develop disputes handling and referral processes where disputes involve linked credit provider and fair trading issues. Where a referral is made from one EDR scheme to another, the date of lodging with the first EDR scheme is the date for determining whether the matter is within the time limit for a complaint. The scheme’s Terms of Reference or Constitution must meet RG139 requirements as to inter-scheme arrangements for complaints involving credit representatives and complaints involving a securitisation body (in latter case ASIC can agree to a MOU being the vehicle for this). The scheme has mechanisms and procedures for referring systemic industry problems to relevant members. The scheme has a discretion to exclude vexatious and frivolous matters.</td>
<td></td>
</tr>
<tr>
<td><strong>Tracking of complaints</strong></td>
<td>FOS’s timeframes are discussed in Part 7. FOS’s Management have given considerable attention to improving FOS data and better monitoring complaints as discussed at paragraph 7.2. Paragraph 15.3 discusses the extent to which FOS keeps parties informed of progress of complaints.</td>
</tr>
<tr>
<td>The scheme has reasonable time limits for its processes and facilitate speedy resolution with quality. The scheme has mechanisms to monitor timeframes and track complaints. The parties are kept appraised of progress of complaints.</td>
<td></td>
</tr>
<tr>
<td><strong>Monitoring</strong></td>
<td>FOS’s timeliness performance targets are discussed at paragraph 7.6. FOS has a comprehensive case management system that captures developments in relation to disputes. FOS engaged KPMG in 2011 to review its structure and aspects of its performance and</td>
</tr>
<tr>
<td>The scheme sets objective targets to assess its performance. The scheme keeps systematic records of all complaints and enquiries, their progress and outcomes. The scheme conducts regular performance reviews and seeks periodic feedback from the</td>
<td></td>
</tr>
</tbody>
</table>
The scheme reports regularly to its overseeing body about the results of its monitoring and review. It has also conducted targeted Management reviews of aspects of its performance. This year, it engaged DBM Consultants to conduct a large quantitative and qualitative survey of FSPs and community and consumer representatives: see paragraph 6.1.1.
16. EFFECTIVENESS

The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.

16.1. Systemic issues

16.1.1. Background

Paragraph 11.2 of FOS’s Terms of Reference obliges FOS to identify systemic issues and refer these to the relevant FSP for remedial action. Paragraph 11 also obliges FOS to report systemic issues and serious misconduct to ASIC. These obligations are consistent with the requirements of ASIC Regulatory Guide 139.

In 2012, FOS brought the staff who were dealing with systemic issues into one team and increased the team from 3 to 6 staff. FOS committed in its 2012/13 Business Plan to the further development of its systemic issues and serious misconduct function.

16.1.2. FOS processes

FOS depends upon its dispute handling staff to report through potential systemic issues to the Systemic Issues Team. FOS’s Management emphasise the importance of this. For example, there is a screen saver reminder that refers to this as a key part of FOS’s commitment to excellence. Also FOS’s Quality Assurance processes incorporate a review as to whether this has occurred.

The Systemic Issues Team reviews the referred matters and conducts an initial filtering process. A potential systemic issue may only be referred to an FSP after consultation with the Chief Ombudsman, Lead Ombudsman or Executive General Manager Specialist Resolution Group: this consultation process inevitably leads to some further filtering without referral to the FSP. If a matter is referred to an FSP as a potential systemic issue, the consulted Ombudsman or Executive Manager remains involved in the matter until its resolution.

In addition to its investigative work, the Systemic Issues Team provides training and development sessions for FOS staff, FSPs and consumer representatives. It also undertakes the reporting about this function to ASIC.

16.1.3. FSP views

Some FSPs have told us that the systemic issue investigation process operates well. Other FSPs have expressed concern about the increase in size of the Systemic Issues Team and have asserted that there has also been an increase in the number of potentially systemic issues being referred to FSPs. They have claimed that often the issues are minor and could have readily been sorted out by a phone call. Complaint is also made about the timeframes allowed by FOS for a response to potentially systemic issues.
Concern was also expressed by one FSP that, when the FSP objected to a timeframe to respond to a FOS request for information in relation to a dispute, they were told that if they failed to meet the required deadline, they could be subjected to an investigation by the FOS’s Systemic Issues Team for acting in a manner constituting serious misconduct.

16.1.4. Consumer views

The Joint Consumer Submission argued the critical importance of FOS’s systemic issues jurisdiction, that it achieves compensation for consumers who for a variety of reasons do not make a complaint and enables FOS to manage its disputes volumes by preventing disputes.

The Joint Consumer Submission commended FOS on its public discussion of systemic issues including the update in each edition of The Circular. However, more transparency was sought about the investigation process, for example, an independent review of negotiated outcome to ensure that these are fair and reasonable in the circumstances and better communication about outcomes to advocates who report serious or systemic misconduct. FOS was also asked to consider publicly naming FSPs who have engaged in serious or systemic misconduct.

16.1.5. Findings

Our review of dispute files satisfied us that FOS staff are actively looking out for disputes that are symptomatic of broader problems rather than one-off failures and that there is a good flow of issues through to the Systemic Issues Team. There is good capture of data via the FOSSIC Systemic Issues module. The systemic issues supervision system is also impressive: the involvement of a very senior person from the outset of the matter and the consistency of that person’s involvement through to the resolution of the matter.

The table below (Figure 49) confirms FSPs’ sense that there has been an increase in the number of matters referred to FSPs in the last couple of years.

**Figure 49. 2010-13 – Matters referred to FSPs**

<table>
<thead>
<tr>
<th></th>
<th>210/11</th>
<th>2011/12</th>
<th>2012/13</th>
</tr>
</thead>
<tbody>
<tr>
<td>Systemic issues referred to Team</td>
<td>N/A</td>
<td>N/A</td>
<td>1,250</td>
</tr>
<tr>
<td>Possible Systemic Issues</td>
<td>114</td>
<td>184</td>
<td>128</td>
</tr>
<tr>
<td>Found not to be systemic</td>
<td>72</td>
<td>78</td>
<td>47</td>
</tr>
<tr>
<td>Systemic Issues Resolved</td>
<td>20</td>
<td>31</td>
<td>37</td>
</tr>
<tr>
<td>Serious Misconduct</td>
<td>0</td>
<td>3</td>
<td>5*</td>
</tr>
</tbody>
</table>

(*All these related to failure to comply with FOS Terms of Reference.)

We understand from FOS that the spike in referrals in 2011/12 occurred because the increase in team size allowed a backlog of matters to be cleared. Also this was a result of improved procedures. FOS has told us that more recently the number of referrals have declined as FOS has become better at categorising matters internally. The number of found systemic issues has, however, risen slightly.
The table at Figure 50 sets out the key outcomes that FOS has obtained.

**Figure 50. Recent Years – Numbers of Systemic Issues Identified by FOS**

<table>
<thead>
<tr>
<th></th>
<th>2010/11</th>
<th>2011/12</th>
<th>2012/13</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>No. of Systemic issues resolved</strong></td>
<td>20</td>
<td>31</td>
<td>37</td>
</tr>
<tr>
<td><strong>Key remediation</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Approx. 83,700 customers affected</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>$3.6m paid or set aside to compensate customers</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>71,203 inaccurate credit listings were corrected or removed</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>New automated systems created, product terms and conditions amended, processes improved, staff training programs implemented</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Approx. 30,000 customers affected</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>$12m paid or set aside to compensate customers</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>At least 15,000 inaccurate credit listings were corrected or removed</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>More than 13,600 customers affected</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>$2m paid or set aside to compensate customers</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>At least 14,000 inaccurate credit listings were corrected or removed</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Improvements to policies, processes and procedures including greater disclosure to customers, updating of templates, rectification of system errors, training improvements.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Clearly FOS has obtained some important outcomes as a result of its systemic issues investigations. Our review of 19 systemic issues files satisfied us that FOS is pursuing these matters vigorously and, where the issues are significant, FOS is insisting upon meaningful outcomes.

We are less convinced, however, that FOS’s increased resourcing of the Systemic Issues Team has greatly enhanced the outcomes obtained. Our file review included some recent fairly minor matters, for example, which led to small wording changes being made to FSP internal procedural documents as a result of FOS’s intervention.

Our file review also demonstrated that the effectiveness of the systemic issues jurisdiction can be diminished by time delays in the resolution of disputes. We saw matters that may have had a systemic implication, but the time lag since the events that gave rise to the triggering dispute meant that, because of overtaking developments, the systemic dimension was no longer relevant by the time that it was raised with the FSP by FOS.

Because of these issues, we think that there would be merit in FOS temporarily diverting a couple of Systemic Issues Team case managers from the Systemic Issues Team to work with case managers to help reduce the unallocated queue at the Recommendation Stage. This should be for no more than 12 months. It should not be viewed as a reduction in commitment to systemic issues investigation, but rather as a practical (and symbolic) part of FOS’s commitment to clear the ‘backlog’, to improve its dispute resolution times and as an investment in more timely systemic issues investigations in the future.
Finally we think that FOS’s public reporting about systemic issues is good. Through The Circular, FOS provides early public information about the systemic issues it finds. Further reporting occurs in the Annual Review. We think that if FOS were to name the FSPs implicated in a systemic issue, this would probably make FSPs more defensive and less co-operative in remediating issues. And after all, FOS’s mandate as an EDR scheme is remediation not punishment.

**Recommendation 33**

FOS should for a limited period of time move a couple of its Systemic Issues Team case managers to its SRG Case Management Team to help them reduce the unallocated queue at the Recommendation Stage so as to improve its dispute resolution timeframes. This should be seen as an investment in more timely systemic issues investigations in the future.

16.2. Complaints about FOS

FOS has a Complaints and Feedback Policy & Procedure that is published on its website. This commits to acknowledging a complaint within 7 days and endeavouring to respond fully within 28 days of the acknowledgement. Generally a complaint will be handled by the FOS Team involved in the complaint, but where the complainant is not happy with this, a manager handles the complaint.

FOS maintains a database of feedback about its service. A FOS employee receiving negative feedback is expected to log the matter in FOS's database. Negative feedback is categorised either as an expression of dissatisfaction (if the matter is capable of being resolved immediately or within a few days) or as a complaint (if the matter will require investigation and so a quick response is not possible).

16.2.1. Stakeholder views

One FSP has brought to our attention two instances where complaint was made about the approach taken by FOS in a Determination (on the basis that the issue was likely to arise again in future disputes) and no reply was received from FOS until several months later.

A couple of former Applicants also raised concerns about FOS's handling of their complaints about FOS's performance. One submission expressed concern about the FOS Board practice of referring complaints to the Chief Ombudsman (especially if the complaint is about the Chief Ombudsman). Another submission referred to FOS's unpreparedness to engage with the complainant and to provide a full explanation.

16.2.2. Findings

FOS has a more robust and systematic process for logging and responding to complaints against it than any other EDR scheme we have seen. This is partly a function of its scale, but
also reflects, we think, a genuine concern that an EDR scheme must have a good-practice system in place for receiving and handling complaints about its own performance.

Our review of 16 complaints about FOS satisfied us that generally complaints are logged, appropriately investigated and responded to in a professional and timely fashion. To this end, the Complaints Manager tracks complaints and each response to a complaint is quality reviewed by a FOS Manager. A quarterly complaints report is provided to the FOS Senior Leadership Group that analyses trends and highlights any delays in responding to complaints. In future, a version of this report will be included in the quarterly report to the Board (in our view the Board’s responsibility to oversee complaints requires the Board to oversee trends and general complaint performance but not to engage with the specifics of individual complaints).

Despite these efforts, as the examples drawn to our attention by an FSP and former Applicant show, occasional process breakdowns can occur. Also, in the course of our review of dispute files, we did identify a few exceptions ourselves. In one case, the complaint was repeated and logged at a later date. Where this occurs, we think that FOS should counsel the person who failed to log the original complaint, so as to promote an appropriate complaints culture within FOS (being in the business of complaints, FOS is, of course, expected by its stakeholders to meet the high standards of complaints management that it espouses).

We also noticed in our review of a couple of complaints that defensiveness can creep into FOS’s response. We would encourage FOS to be more open about any failings that are detected and to be willing to offer an apology where warranted. By way of example, we saw one complaint by an FSP whose financial difficulty settlement agreement with an Applicant was de-railed by FOS inadvertently sending the Applicant another Applicant’s (more generous) financial difficulty settlement agreement. FOS’s response was that it had followed its internal privacy procedures for where mail is incorrectly sent to the wrong party. We felt that an apology would have been appropriate in this case.

We are aware that FOS is active in training and reminding its staff about procedures and expectations where complaints are made about FOS. This current program of activity provides the forum for FOS to act upon our comments.

Of greater concern, however, is the high volume of complaints that FOS receives. Smaller schemes with which we have worked typically receive only a handful of complaints per year – at most. FOS on the other hand typically logs 2 instances of negative feedback each working day. Of course, FOS has far greater overall disputes volumes than the schemes we are comparing it with. Unfortunately, this does not entirely explain the difference. We are extremely wary of attempting to compare data across schemes – as inevitably we would not be comparing like with like, however as a rough calibration, our best estimate, taking into account differences in dispute volumes, is that FOS is receiving something like ten times the rate of complaint that we see in smaller schemes.

As shown in the table in Figure 51 below, the majority of complaints are made by Applicants.
Figure 51. Recent Years – Complaints about FOS received.

<table>
<thead>
<tr>
<th>Source of Complaint</th>
<th>Expressions of Dissatisfaction</th>
<th>Complaints</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Applicant</td>
<td>58</td>
<td>286</td>
</tr>
<tr>
<td>- FSP</td>
<td>21</td>
<td>63</td>
</tr>
<tr>
<td>- Third Party</td>
<td>-</td>
<td>67</td>
</tr>
<tr>
<td><strong>2011/12 total</strong></td>
<td><strong>79</strong></td>
<td><strong>416</strong></td>
</tr>
<tr>
<td>- Applicant</td>
<td>93</td>
<td>294</td>
</tr>
<tr>
<td>- FSP</td>
<td>22</td>
<td>66</td>
</tr>
<tr>
<td>- Third Party</td>
<td>-</td>
<td>61</td>
</tr>
<tr>
<td><strong>2012/13 total</strong></td>
<td><strong>115</strong></td>
<td><strong>421</strong></td>
</tr>
</tbody>
</table>

Process issues, particularly delay and disagreement with FOS’s decision to discontinue consideration of a dispute, were most commonly complained about in 2012/13, as the table at Figure 52 demonstrates.

Figure 52. 2012/13 – Distribution of Complaints about FOS.

<table>
<thead>
<tr>
<th>2012/13 Issues*</th>
<th>Expressions of Dissatisfaction</th>
<th>Complaints</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Determinations</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Bias</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>- Breach of procedural fairness</td>
<td>2</td>
<td>10</td>
</tr>
<tr>
<td>- Failure to take into account relevant information</td>
<td>2</td>
<td>27</td>
</tr>
<tr>
<td>- Incorrect assessment of law</td>
<td>10</td>
<td>28</td>
</tr>
<tr>
<td>- Incorrect information</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>- Misunderstanding of dispute</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>- Unable to understand Determination</td>
<td>-</td>
<td>4</td>
</tr>
<tr>
<td><strong>Determinations Sub-total</strong></td>
<td><strong>20</strong></td>
<td><strong>88</strong></td>
</tr>
<tr>
<td><strong>Process Issues</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Biased process</td>
<td>8</td>
<td>37</td>
</tr>
<tr>
<td>- Breach of privacy or confidentiality</td>
<td>0</td>
<td>7</td>
</tr>
<tr>
<td>- Delay</td>
<td>36</td>
<td>82</td>
</tr>
<tr>
<td>- Disagree with FOS decision to discontinue dispute</td>
<td>11</td>
<td>45</td>
</tr>
<tr>
<td>- Failure to follow process</td>
<td>7</td>
<td>24</td>
</tr>
<tr>
<td>- Failure to keep parties informed of progress</td>
<td>9</td>
<td>44</td>
</tr>
<tr>
<td>- Incorrect or insufficient information provided</td>
<td>1</td>
<td>28</td>
</tr>
<tr>
<td>Issue</td>
<td>Subtotal</td>
<td>2012</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>----------</td>
<td>------</td>
</tr>
<tr>
<td>Pressure to settle</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td>Unable to understand information or process</td>
<td>21</td>
<td>11</td>
</tr>
<tr>
<td>Process Issues Sub-total</td>
<td>297</td>
<td>83</td>
</tr>
<tr>
<td>Other service issues</td>
<td>25</td>
<td>2</td>
</tr>
<tr>
<td>(Incorrect of misleading information in FOS publication or on website, technical website issues, phone queues, etc.)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Staff related</td>
<td>97</td>
<td>22</td>
</tr>
<tr>
<td>(Discourteous, failure to reply to calls or correspondence, lack of expertise, etc.)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Membership/Finance Related</td>
<td>35</td>
<td>5</td>
</tr>
<tr>
<td>TOTAL</td>
<td>542</td>
<td>132</td>
</tr>
</tbody>
</table>

Once again, this data demonstrates the compelling need for FOS to improve its processes and to reduce its timeframes. Until that occurs, FOS will inevitably continue to receive high volumes of complaints (and incur the inefficiency of having to devote resources to investigating and responding to complaints about its own performance).

16.3. Regulatory Guide 139 compliance

<table>
<thead>
<tr>
<th>Summary of Benchmark Key Practices and additional RG139 requirements (latter indicated by italics)</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Coverage</strong></td>
<td>FOS’s Terms of Reference are consistent with RG139 requirements as to the timeframe for lodging a dispute with FOS.</td>
</tr>
<tr>
<td>The scheme timetables for lodging complaints meet RG139 requirements.</td>
<td>FOS’s scope and powers are clear and permit it to provide sufficient coverage.</td>
</tr>
<tr>
<td>The scheme’s scope and powers of decision-maker are clear. These are sufficient to deal with the vast majority of complaints.</td>
<td>FOS’s monetary amount and compensation cap meet RG139 requirements. As well as direct financial loss, awards are possible for consequential loss – see paragraph 0 – and non-financial loss – see paragraph 13.9.</td>
</tr>
<tr>
<td>The decision-maker has power to make monetary awards of sufficient size and other awards as appropriate.</td>
<td>FOS’s Terms of Reference permit an award of interest – this amount is not included when applying the compensation cap.</td>
</tr>
<tr>
<td>The monetary limit is consistent with the nature, extent and value of customer transactions. The scheme must be able to deal with complaints up to the value of $500,000 and from 1 January 2012 must be able to award compensation per claim of up to $280,000 (or $150,000 in the case of general insurance brokers) – the cap to be increased every 3 years in accordance with CPI or MTAWE movements. A complainant may be required to waive their entitlement to amounts in excess of the compensation cap.</td>
<td>FOS’s Terms of Reference permit FOS to vary a debt, release security, release the Applicant from a contract or undertake some other course of action.</td>
</tr>
<tr>
<td>The scheme must be able to compensate for direct loss. Claims for opportunity costs and for non-financial loss should be considered where appropriate.</td>
<td>Applicants have the right to decline to accept a FOS determination.</td>
</tr>
<tr>
<td>The scheme must be able to award interest or</td>
<td></td>
</tr>
</tbody>
</table>
In determining the extent of loss or damage suffered by the complainant, the scheme should have regard to relevant legal principles, fairness and industry best practice. The scheme must also be able to make appropriate non-monetary orders. A complainant should have a choice as to whether to accept a compensation award.

### Particular types of complaints

For traditional services complaints involving multiple beneficiaries, the scheme’s Terms of Reference must state that all persons with a reasonable interest in the outcome of the complaint must first agree to the scheme having jurisdiction and all beneficiaries must be informed of their right to obtain independent legal advice.

Where there are multiple complaints from a complainant about hardship variation, each complaint must be treated as a new complaint.

Whilst not purporting to overturn a default judgement, the scheme must be able to assist complaints the subject of a default judgement to access legal agencies that can assist with making application to set aside a default judgement and must deal with post default judgement complaints eg harassment.

### Systemic problems

The scheme has mechanisms for referring systemic industry problems to the overseeing body for appropriate action.

FOS reports systemic issues to ASIC, with copies of these reports also going to FOS’s Board.

### Scheme performance

The scheme has procedures for receiving complaints about the scheme and referring these to the overseeing body.

The scheme responds to recommendations of the overseeing body in a timely way.

The Board is provided with reports about complaints about FOS. Processes are discussed in paragraph 16.2.

No issues have been raised by the Board with us about the scheme’s failure to respond to its recommendations.

### Member obligations

The scheme requires members to set up IDR mechanisms and has the capacity to advise members about these. Members must have a dedicated telephone number and where possible fax number, postal and email address to handle hardship applications. These details should also be available from the scheme’s website.

IDR must be timely. A scheme should have procedures about the circumstances in which more time will be allowed for IDR and complainants must have the ability to appeal.

FSPs have legal requirements to have IDR mechanisms. FOS provides advice to FSPs about effective IDR.

FOS’s website includes the contact details for each FSP that is a member. The dedicated telephone number for financial hardship is not listed. Instead FOS’s website states that a person with a financial difficulty issue should ask the FSP to refer them on to the FSP’s specialised Financial Difficulty contact.

FOS’s Terms of Reference provide a timeframe for IDR procedures that is consistent with...
|------------------------|------------------------------------|---------|

<table>
<thead>
<tr>
<th><strong>Compliance</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>The scheme has mechanisms to encourage members to abide by scheme Terms of Reference. The scheme must have a discretion to cancel membership and/or to handle complaints about the member if the member ceases to carry on business or be licensed or becomes insolvent. The scheme must consider complainant interests in exercising this discretion. The scheme’s procedures for dealing with non-compliance must be in the scheme’s Terms of Reference. Where a scheme member is required by licence or registration condition to be a member of an ASIC-approved EDR scheme, the scheme must inform ASIC before terminating the membership. Determinations are binding on members if accepted by the complainant.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Independent review</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>The scheme is independently reviewed every 3 years (1st review to be after 3 years and then 5 yearly thereafter). The results of the review must be available to ASIC and stakeholders. The review is undertaken in conjunction with stakeholder consultation and includes the scheme’s progress in meeting the benchmarks, the appropriateness of its scope, member and complainant satisfaction, whether dispute resolution processes are just and reasonable, the degree of equitable access to the scheme and the effectiveness of the terms of reference. The results of the review are made available to relevant stakeholders.</td>
</tr>
</tbody>
</table>

| **RG139** | If it appears from the information provided by the Applicant that the FSP’s IDR timeframe has expired, FOS always accepts the dispute. FOS’s Terms of Reference provide a discretion to bypass IDR if FOS considers the matter urgent. FOS’s Constitution meets RG139 requirements as to cancellation of membership. FOS’s Terms of Reference restrict enforcement action for so long as FOS is handling the complaint. |

<table>
<thead>
<tr>
<th><strong>FOS’s Constitution</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>FOS’s Constitution enables FOS’s Board to expel an FSP if the FSP refuses or neglects to comply with FOS’s Constitution or Terms of Reference or with a binding decision made by FOS. Consistent with ASIC’s suggestion, the FSP is provided with an opportunity to give reasons which it should not be expelled, before expulsion may occur. The Constitution requires ASIC to be informed when an FSP is expelled. FOS has exercised these powers, expelling over 1,000 FSPs (includes 360 Authorised Credit Representatives) – 4 of these FSPs were expelled for failing to comply with a FOS decision and the balance for non-payment of fees. Determinations are binding on FSPs if accepted by the Applicant.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>This independent review</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>This independent review is the first review since FOS’s new Terms of Reference and the timing was agreed with ASIC. Stakeholder consultation is an important aspect of this review. The review report will be published on FOS’s website.</td>
</tr>
</tbody>
</table>
17. LIST OF RECOMMENDATIONS

This section provides a summary of all Recommendations made throughout the Report. In this section, they are loosely grouped with thematically similar Recommendations. For ease of reference to the supporting text, they retain the number given to them in the body of the Report – which in some cases will not be in number order.

17.1. Timeliness & efficiency

**Recommendation No. 1**
FOS should apply additional resources to reducing the Specialist Resolution Group unallocated disputes queues using a combination of additional temporary staff, use of overtime and weekend projects and diverting of staff with appropriate expertise from other areas within FOS including from the Early Case Management Teams.

**Recommendation No. 3**
FOS should commence the necessary consultation steps to amend its Terms of Reference to introduce a streamlined process for simpler, low value disputes. The process could be less document-based and run by a Board appointed Adjudicator who would decide the matter after direct contact with the parties.

FOS should also publish guidance for stakeholders as to the types of disputes that would be appropriate for this streamlined process and how the streamlined process will operate.

**Recommendation No. 4**
In consultation with stakeholders, FOS should re-design its Registration and Acceptance processes so that all lodged disputes are referred to the FSP's internal dispute resolution contact to provide the FSP with a final chance to resolve the dispute. The re-design should include the following elements:

- a commitment by FSPs to timeframes agreed with FOS for the acknowledgement of disputes and provision of a substantive response;
- FOS informing the Applicant of the relevant timeframes and that the Applicant should revert to FOS if those timeframes are not
met or if the Applicant is unhappy with the FSP’s substantive response to the dispute;

- FSP agreement to an evaluation framework that provides FOS and consumer representative stakeholders with assurance as to the fairness of outcomes achieved through this assisted referral process; and

- where the Applicant does bring the dispute back to FOS – FOS should immediately begin its process of jurisdiction checking and information collection without providing the FSP with any further review opportunity.

Recommendation No. 32

Training provided to FOS staff should emphasise how important it is that they critically consider whether an information request proposed to be made is practical and necessary. In situations where it is difficult to know how to gather the necessary factual information, FOS should discuss the information gap with the relevant party to the dispute with a view to identifying the most efficient way to address the issue.

Recommendation No. 33

FOS should for a limited period of time move a couple of its Systemic Issues Team case managers to its SRG Case Management Team to help them reduce the unallocated queue at the Recommendation Stage so as to improve its dispute resolution timeframes. This should be seen as an investment in more timely systemic issues investigations in the future.

17.2. Organisational Design

Recommendation No. 5

FOS should adopt the following design principles to guide future organisational design and development:

a) Resilience – maximise the natural resilience of its teams aiming for the ability to flexibly respond and innovate.

b) Maximise the reach of experience – FOS design philosophy should place the most experienced case officers as close to the less experienced staff as practicable, strengthening development and providing some ‘future-proofing’.

c) Early involvement of senior staff – place senior, experienced input as close to the front end of the process.
as practicable with input that will give the parties confidence that the merits of the dispute are being engaged with.

d) Minimise hand-offs – aim for an environment where once allocated to a case officer who can substantively deal with the matter, the file stays with them and need only be read by the responsible officer and a supervising senior decision-maker or QA.

e) Minimise overlays – aim for an environment where resources spent organising the work are minimised (allocating/ categorising/ reviewing for these purposes) and as much time as possible is spent resolving the dispute.

f) Maximise accountability – aim for a design that maximises individual staff members and local team’s sense of accountability for the end-to-end process.

g) Maximise elasticity of productivity – aim for a design that encourages a natural ramping up and down of productivity as workload ebbs and flows.

17.3. Quality & Fairness

Recommendation No. 2

Where FOS expedites a dispute to a Determination without a Recommendation first being made, FOS should provide FOS’s preliminary view to the parties in writing before the Determination is made. This should be done succinctly, for example, it may be possible to extend an issues letter by simply adding a few paragraphs setting out FOS’s preliminary view.

Where a Recommendation is not accepted by either party and the dispute proceeds to Determination, in the interests of efficiency and timeliness, the Case Manager most familiar with the case should prepare the initial draft Determination – in order for a formal decision to be made after review of the issues by the Ombudsman or Panel.

Recommendation No. 6

In consultation with stakeholders, FOS should reshape its approach to financial difficulty disputes to take a more assertive approach that produces more timely resolution, including:

a) postponing consideration of allegations of past misconduct until after the resolution of the financial difficulty application,
thereby simplifying and focusing the initial information collection;

b) greater preparedness by FOS to decline to continue to consider the dispute particularly if:

- the lender has reasonably fulfilled its obligation to try and accommodate the Applicant;
- the Applicant without reasonable excuse fails to provide a Statement of Financial Position or meet other FOS requests; or
- the application is by a small business and relates to large sums of money and raises complex issues that are more suited to resolution in the courts;

c) more proactive assessment by FOS as to whether a proposed hardship variation is likely to be viable, in the interests of ensuring that settlements reached through FOS assist Applicants to move out of hardship and to meet their obligations to their lenders; and

d) FOS should regularly survey previous financial difficulty Applicants to test whether outcomes achieved through FOS are proving to be sustainable and helping the Applicant to overcome their financial difficulty and to meet their obligations to the FSP.

FOS should update its materials for FSPs and consumers to ensure full transparency about changes that are made.

Recommendation No. 14

When deciding whether to exercise its discretion to accede to an Applicant’s request that FOS re-open a dispute that was closed on the basis of the Applicant’s previous failure to respond to a FOS request, FOS should take into account the following factors:

- the reasons for the Applicant’s previous failure to respond to FOS’s request, for example, difficulty in managing FOS’s process, for example, where FOS’s timeframe had become prolonged, significant personal problems or problems locating information requested by FOS;
- the time that has elapsed since the dispute was discontinued; and
- the extent of prejudice to the FSP if the dispute is re-opened, for example, an impending date after which court action is barred.
Recommendation No. 15

FOS should revisit its processes for closing unmeritorious disputes with a view to streamlining its processes, ensuring that its controls are adequate to achieve fairness and ensuring that where an objection is made to the closure decision that this is fairly considered.

FOS’s Operational Guidelines should be updated to enhance transparency about these processes.

Recommendation No. 17

FOS should revisit its early resolution processes to achieve much earlier engagement by FOS with the parties about the merits of the dispute, so that this can inform settlement negotiations.

Where negotiations appear promising, FOS should facilitate the collection of information from the Applicant as to the loss that was incurred.

For complex matters, or where the Applicant does not have the skills to quantify their loss, FOS should assist the Applicant with quantification of loss.

Recommendation No. 18

Settlement guidance provided by FOS should be informed by FOS’s views of the merits of the case. FOS should leave it to the parties to factor in their own practical considerations, for example, the value for an Applicant of early access to a monetary settlement or the importance for FSPs of avoiding the higher case fees incurred if the dispute escalates to a FOS decision.

Recommendation No. 19

FOS should work with its FSP members to develop programs whereby FOS staff can build their industry expertise.

FOS should also continue to use recruitment opportunities to bring in staff with current industry experience. Where there are industry skills...
and experience gaps, then FOS should look at the possibility of secondments from the insurance and investments industry (as is done in Banking and Finance).

**Recommendation No. 20**

FOS should undertake an internal review comparing the approach to non-financial loss awards in Recommendations, Ombudsman Determinations and Panel Determinations and across industry sectors, with a view to enhancing the guidance that is provided as to the kinds of circumstances in which awards of this type should be made.

**Recommendation No. 21**

FOS should add to its Operational Guidelines by explaining its approach to determining from what date an award of interest should be payable. Some examples would assist.

**Recommendation No. 22**

FOS should expand the review procedure so that a review request may be made by an FSP that can demonstrate that the relevant issue is of significant ongoing importance to the FSP. The other review preconditions applicable to an industry body or consumer organisation must also be met by the FSP.

**Recommendation No. 23**

FOS should commence the necessary consultation steps to amend its Terms of Reference to oblige FOS (rather than to give FOS a discretion) to stop considering a dispute where FOS has been provided by the FSP with a complying test case procedure notice – but only so long as the FSP complies with the undertakings in that notice.
Recommendation No. 24

Where an Applicant enters into a settlement agreement through FOS or FOS makes a decision in favour of the Applicant, FOS should ensure that there is clarity as to the timeframe within which the FSP must carry out remedial action.

The Applicant should be advised that they can revert to FOS if the remedial action does not occur within the specified timeframe.

FOS should undertake sample monitoring of FSP compliance with settlements and awards through its planned telephone surveying of Applicants whose dispute has closed.

Recommendation No. 28

FOS should strengthen the process where it writes to an Applicant to say that the Applicant’s dispute is outside Terms of Reference. The letter should more comprehensively set out the relevant facts, identify and explain in accessible language the exclusion being relied upon and explain why the exclusion is applicable to the Applicant’s dispute. Where a dispute has progressed beyond the Acceptance stage, FOS should telephone the Applicant to provide oral explanation as well.

Recommendation No. 29

Where an Applicant objects to an outside Terms of Reference decision or an FSP asserts that a dispute is not within Terms of Reference, FOS should take a fresh look at the matter and should err on the side of consulting an Ombudsman. The response to the Applicant or FSP should make it clear that the objection has been carefully considered and should give full transparency to FOS’s reasons for its view on jurisdiction.

17.4. Jurisdiction & coverage

Recommendation No. 7

FOS should consult with ASIC and other stakeholders with a view to amending its Terms of Reference to allow FOS to consider a traditional
trustee services dispute, without the consent of all other affected parties, where FOS is satisfied that their interests would not be prejudiced by doing so.

Recommendation No. 8

From the 2014/15 financial year, FOS should commence collecting data so that it can report how often it exercises its discretion to allow an Applicant with an ‘out of time’ dispute to utilise FOS’s service.

Recommendation No. 9

In the case of large, complex commercial credit disputes, FOS should be more active in exercising its discretions under the Terms of Reference to refuse to consider the dispute if FOS considers this course of action appropriate, for example, because there is a more appropriate place to deal with the dispute such as a Court. To ensure transparency, FOS should develop and publish guidance as to the factors that it will take into account, which could include the number, quantum and complexity of the loans, the number of parties, the complexity of issues involved, whether the parties were legally advised at the time of entering into the loans and whether independently facilitated mediation by a qualified mediator has begun.

Recommendation No. 10

FOS should commence the necessary consultation steps to amend the Terms of Reference to expand FOS’s jurisdiction to include loss of profits/business interruption insurance and to include an ‘exceptional circumstances’ discretion so that FOS can, where appropriate, consider a dispute in relation to an excluded category of insurance. To allow time for FOS to first address its dispute resolution timeframes, the jurisdictional expansion should not take effect until 1 January 2016.

Recommendation No. 11

FOS should commence the necessary consultation steps to amend the Terms of Reference to expand its jurisdiction to disputes between insurance brokers and small businesses about any general insurance policy other than an Excluded Policy (thereby restoring its jurisdiction to
that of the antecedent scheme, the Insurance Brokers Dispute Facility).

**Recommendation No. 12**

FOS should commence the necessary consultation steps to amend its Terms of Reference to expand its jurisdiction in relation to uninsured third party motor vehicle disputes so as to enable FOS:

- to consider the dispute even if the insured driver who caused the damage has failed to pay the excess to their insurer; and
- to make an award of up to $5,000 in these types of disputes (rather than $3,000 as is presently the case).

**Recommendation No. 13**

FOS should commence the necessary consultation steps to amend its Terms of Reference to add in the words “excess or policy conditions” after the words “base premium” paragraph 5.1(e). This will ensure that confidential rating factors and weightings are protected where they are applied to determine commercial terms other than just the base premium.

**17.5. Ease of use & accessibility**

**Recommendation No. 16**

Where FOS asks an Applicant to evidence assertions (i.e., FOS’s information request is unspecific as to the documentary evidence to be provided), FOS should use its telephone contact with the Applicant to check that the Applicant understands the reason for the request and the kinds of evidence that could be provided.
Recommendation No. 25

As part of its website redevelopment, FOS should extract significant ongoing guidance that was or is released via its periodic publications and file this on its website by topic. This will enhance ongoing access to this material.

Recommendation No. 30

Rather than using the info@FOS email address, an email sent to a dispute party should be sent from a FOS personal email address. This will increase the recipient’s confidence that a reply to the email will in fact reach the intended recipient.

Recommendation No. 31

Quality review of a draft letter should encompass perusal of the file to ensure that the letter does not simply follow the template but rather is tailored to the relevant circumstances and engages appropriately with previous correspondence from the addressee.

17.6. Transparency & engagement

Recommendation No. 26

To increase the transparency of the Annual Review, FOS should:

- provide information about dispute outcomes on the basis that disputes closed at the Registration Stage are excluded;
- classify as “Discontinued” a dispute where:
  - the FSP responds to the Applicant’s complaint by explaining its reasons for rejecting the complaint; and
  - the Applicant makes no response to FOS as to whether or not it is satisfied by that explanation;
- information about Assessments should not be classified in the Annual Review under the heading “Resolved by Agreement”;
• FOS decisions should be categorised as “in favour of the Applicant” only if the Applicant is awarded substantively most of the remedy the Applicant was seeking;

• further information should be provided as to numbers of disputes falling into the various subcategories of dispute outcomes disclosed on pages 42 and 43 of the 2012/13 Annual Review (some grouping of some of these subcategories may be appropriate);

• further information should be provided as to the timeframe of disputes that are closed in a period that exceeds 180 days, for example, the numbers of disputes closed in 181 to 364 days, the number of disputes closed in 365 to 729 days and the number of disputes closed in more than 730 days; and

• FOS should report its performance against its timeliness KPIs.

Recommendation No. 27

FOS should include in the Comparative Tables information about how an FSP’s “Average Resolution Length” for disputes is calculated.
18. REVIEW TERMS OF REFERENCE

This Review was provided with a detailed terms of that required the Reviewers to consider and report on:

1. The progress made by FOS in implementing appropriate organisational arrangements and improved dispute handling process and procedures under its single Terms of Reference (TOR) in light of the following factors:

   a. formation of FOS in 2008 from the merger of the predecessor schemes;

   b. the principles underpinning FOS processes and procedures that, in dealing with disputes, FOS:
      • must do what in its opinion is appropriate with a view to resolving disputes in a cooperative, efficient, timely and fair manner;
      • shall proceed with the minimum formality and technicality; and
      • shall be as transparent as possible, whilst also acting in accordance with its confidentiality and privacy obligations;

   c. introduction of the national consumer credit regime;

   d. increased compensation caps, effective 1 January 2012;

   e. additional of jurisdiction over traditional trustee activities;

   f. significant increase in volume of disputes handled by FOS since its formation.

2. An assessment of FOS against the dispute resolution requirements in ASIC’s Regulatory Guide 139 including, in particular:

   a. consistent with the need to resolve disputes in a cooperative and fair manner, FOS’s efforts to ensure the efficient and timely dealing of disputes given the significant increase in dispute volumes;

   b. FOS’s processes to ensure consistency and high-quality decision making and of dispute resolution outcomes, in accordance with its obligation under the TOR in resolving an applicant’s dispute on its merits, to do what in its opinion is fair in all the circumstances, having regard to each of the following:
      • legal principles;
      • applicable industry codes or guidance as to practice;
      • good industry practice; and
      • previous relevant decisions of FOS or a Predecessor Scheme (although FOS will not be bound by these); and

   c. identification of any potential areas for improvement;

3. The adequacy of reporting by FOS to ASIC about general dispute information, systemic issues and serious misconduct; and
4. The level of engagement by FOS with financial services providers, consumers and relevant professional and community organisations.

In addition, the Independent Review should specifically consider and report on a number of issues identified during the finalisation of the current FOS Terms of Reference in December 2009:

5. The coverage of the FOS scheme, in particular:

   a. the effectiveness of the $3,000 compensation cap for third party insurance at paragraph 4.2(vi) of the TOR;

   b. the extent to which FOS adequately covers small business complaints given the types of small business complaints excluded under paragraph 4.3 and the definition of “Small Business Insurance Product” at paragraph 20.1 of the TOR; and

   c. the use and operation of the “exceptional circumstances” discretion for the purpose of time limits for bringing a complaint to FOS at paragraph 6.2 of the TOR;

6. The extent to which the $3,000 consequential loss cap restricts complainants from receiving appropriate awards under paragraph 9.3(a) and (c) of the TOR; and

7. Whether FOS needs to improve its collection and reporting of complaints data under paragraphs 12.1 and 12.2 of the TOR, and if so how.