

Proposed Changes to the Operational Guidelines – traditional trustee company services and cross-border investments

These changes to the Operational Guidelines give effect to amendments to the Terms of Reference which come into effect on 1 January 2012.

Only the sections of the Operational Guidelines where changes are made have been included. Headings in blue are not part of the text, but are intended to help the reader locate the affected section of the Operational Guidelines.

Changes to existing sections are in red, with the current text in black. Completely new sections are in brown, for ease of reading.

The proposed addition to the text of Operational Guideline paragraph 6.3 is in addition to a set of **separate changes** made to the Operational Guidelines to paragraph 6.

Amendments to the text of Operational Guidelines paragraph 13.1 are based on the text of previous changes to this section of the Operational Guidelines, as set out at **Para 13.1 Operational Guideline** August 2010 edition of the Circular.

OG to 4.2: under the heading “Jurisdiction requirements in paragraph 4.2 (What Disputes can FOS consider?)”

FOS can consider a Dispute if it meets the jurisdiction requirements in paragraphs 4a) to d).

Link with Australia (4.2a)

FOS can consider a Dispute if the Dispute:

- arises from a contract or obligation arising under Australian law; or
- relates to an offer to invest that the Applicant received in Australia in relation to a recognised Foreign Collective Investment Scheme.

Contract or obligation under Australian law (4.2a)(i)

FOS can consider a Dispute if:

- the transaction to which the Dispute relates was entered into in Australia; or
- the Financial Service to which the Dispute relates was provided in Australia.

Examples of Disputes that arise from a contract or obligation arising under Australian law include Disputes about:

- use of credit cards outside Australia by Australian citizens or persons usually resident in Australia
- use of cards outside Australia to access Australian accounts;
- financial facilities established in Australia for overseas residents;
- travel insurance provided in Australia for overseas travel; and
- transfers of funds initiated in Australia or sent to Australia by an Australian financial institution.

Offer in Australia to invest in recognised Foreign Collective Investment Scheme (4.2a)(ii)

FOS can consider a Dispute about an investment in a Foreign Collective Investment Scheme where:

- the offer to invest was received in Australia; and
- the scheme is a recognised Foreign Collective Investment Scheme.

There is a definition of “Foreign Collective Investment Scheme” in paragraph 20.1. This is the definition used in ASIC’s Regulatory Guide 178 *Foreign collective investment schemes*, which contains helpful information about these schemes.

Under paragraph 4.2a)(ii), a Foreign Collective Investment Scheme is recognised if it has relief from obligations imposed by the Corporations Act granted by ASIC under its Regulatory Guide 178.

At 21 December 2011, this includes schemes recognised under the following ASIC Class Orders:

- Class Order 04/526 (for New Zealand and United States schemes, and schemes operating out of Jersey);
- Class Order 07/753 (for Singaporean schemes);
- Class Order 08/506 (for Hong Kong schemes).

A recognised Foreign Collective Investment Scheme will also include any managed investment scheme offered in Australia but issued in another jurisdiction, where the offer is a “recognised offer” for the purpose of Chapter 8 of the Corporations Act.

At 21 December 2011, this includes New Zealand (see Corporations Regulations 8.1.1-8.1.3, and ASIC Regulatory Guide 190 *Offering securities in New Zealand and Australia under Mutual recognition.*)

OG to 4.2: under the heading “Subject of dispute (4.2b)” – add the following new sections at the end of the current text:

Investment under foreign recognition scheme (4.2b)(viii)

In paragraph 4.2b)(viii), the term “foreign recognition scheme” has the meaning that it has under section 1200A of the *Corporations Act*. Under that section, the following New Zealand legislative provisions amount to a foreign recognition scheme:

- Part 5 of the Securities Act 1978 (NZ); and
- the Securities (Mutual Recognition of Securities Offerings – Australia) Regulations 2008 (NZ).

This means that FOS can consider a Dispute about an investment offered by the FSP under the New Zealand provisions listed above to an investor resident outside Australia, unless the investment offer document expressly excludes access to FOS.

Traditional Trustee Company Services (4.2b)(ix)

Traditional Trustee Company Services are defined in the *Corporations Act 2001* and include:

- acting as:
 - trustee of any kind, or administering or managing a trust;
 - executor or administrator of a deceased estate;
 - agent, attorney or nominee;
 - receiver, controller or custodian of property; and
 - manager or administrator of the estate of an individual.
- preparation of a:
 - will (i.e. codicil or other testamentary writing);
 - trust instrument;
 - power of attorney; or
 - agency arrangement.
- applying for probate of a will or grant of letters of administration.

- Administering a deceased estate.
- establishing and operating a common fund – where funds or estate money from two or more estates administered by the trustee are pooled together for the purpose of investment.

A person can lodge a Dispute about Traditional Trustee Company Services if they:

- received the services directly from the trustee company; or
- are entitled to request an “Annual Information Return” in respect of the trust (including a trust created by a deceased estate).

An Annual Information Return is a report containing information about a trust, including income earned on its assets, expenses, and the net value of the trust’s assets. The following people can request an Annual Information Return (and on that basis can also lodge a Dispute about Traditional Trustee Company Services provided in respect of the trust).

Deceased estates:

- a beneficiary under the deceased person’s will;
- if the person died intestate — a person who, under a law of a State or Territory, has, is entitled to, or claims to be entitled to, an interest in the deceased person’s estate;
- a person who has commenced a proceeding in a court, under a law of a State or Territory, to seek to be included as a beneficiary of the deceased person’s estate;

Trusts:

- a settlor of the trust;
- a person who, under the terms of the trust, has power to appoint or remove a trustee of the trust or to vary (or cause to be varied) any of the terms of the trust; or
- if the trust is a charitable trust - a person, or a person’s appointed successor, who is named in the instrument establishing the trust as a person who must, or may, be consulted by the trustee or trustees before distributing or applying money or other property for the purposes of the trust;
- if the trust is not a charitable trust - a beneficiary of the trust.

[OG to 4.2: under the heading “FOS membership \(4.2c\)”:](#)

FOS membership (4.2c))

FOS can only consider a Dispute if the FSP is a FOS member when the Dispute is lodged.

Where the Dispute relates to Traditional Trustee Company Services and the trustee company has acted jointly with one or more co-trustees who are not FOS members, then FOS can only consider the Dispute if all the co-trustees consent to FOS dealing with the Dispute: see the definition of “Financial Services Provider” in paragraph 20.1.

OG to 5.1 – changes/insertions under the following headings:

Fund or managed investment scheme management (5.1i)

A Dispute will generally fall within this exclusion if the subject of the Dispute is a management or commercial matter that:

- concerns the day to day operation of the fund or scheme; and
- applies to or affects all members of the fund or scheme.

Examples of this include:

- investment decisions made by a fund manager; and
- a fund manager's decision to freeze redemptions in a falling market.

A Dispute will also fall within this exclusion if the subject of the Dispute is the management of a common fund. A fund is a “common fund” where funds or estate money from two or more estates administered by the trustee are pooled together for the purpose of investment.

Allocation of benefits between beneficiaries (5.1j)

This exclusion applies where an FSP decides how to allocate the benefit of a Financial Service between potential beneficiaries. This situation may, for example, arise where an FSP makes a payment to one of a group of beneficiaries of a deceased estate and another beneficiary alleges they should have received the payment.

The exclusion does not apply to Disputes about Traditional Trustee Company Services. Those services include acting as a trustee or executor/administrator of a trust or deceased estate, which will frequently involve decisions affecting competing claims of beneficiaries. For more detail on what is a Traditional Trustee Company Service, see the guideline to paragraph 4.2b(ix)). FOS can deal with Disputes about Traditional Trustee Company Services affecting multiple parties, subject to additional requirements and under a separate set of procedures – see Section F (paragraphs 14-19).

Review of trustee discretion (5.1q) – new heading and section [insert after the section discussing 5.1p]

Review of trustee decision (5.1q)

FOS will only consider a Dispute about a trustee's exercise of their discretion to the extent that the courts would – that is, to the extent it is alleged the trustee:

- a) acted in bad faith;
- b) failed to give fair and proper consideration to the exercise of their discretion; or
- c) failed to exercise the discretion in accordance with the purpose for which it was conferred.

Otherwise, FOS will not consider a Dispute about how a trustee exercised a discretion they were given under a will or trust deed.

Decisions of trustees of regulated superannuation funds or approved deposit funds are excluded from FOS' consideration altogether. The guideline to paragraph 5.1h) explains this.

A Dispute relating to a trustee's decision could be excluded under paragraph 5.2, which is explained below in the guideline to that provision.

5.1 “Dealt with”

Disputes that have already been “dealt with”

Paragraph 5.1k) excludes Disputes “dealt with” earlier by FOS or a Predecessor Scheme.

Paragraph 5.1l) excludes Disputes “dealt with” earlier by a court, dispute resolution tribunal or other external dispute resolution scheme approved by ASIC.

When deciding whether a Dispute has been “dealt with” earlier by a forum, FOS examines whether:

- the nature and subject matter of the Dispute and the earlier Dispute brought to the forum are substantively the same;
- the Dispute and the earlier Dispute were between the same parties and raised the same events and facts; and
- either:
 - the forum made a final decision or final orders (including a default judgment, consent orders, or legal directions given by a court to a trustee) in the earlier Dispute, or
 - the earlier Dispute was resolved by agreement of the parties using the forum's procedures.

If these criteria are met, FOS will conclude the Dispute has been “dealt with” earlier. If the earlier Dispute was discontinued, FOS takes the view the Dispute was not “dealt with” (and therefore is not within the exclusions in paragraphs 5.1k) and l).

OG to 5.2– changes/insertions under the following headings:

General guidance

General guidance on the application of paragraph 5.2

In some cases, even though a Dispute falls within FOS's jurisdiction under the TOR, it would not be appropriate for FOS to consider the Dispute. Paragraph 5.2 allows FOS to refuse to consider, or exclude, a Dispute in certain circumstances. If FOS has already started to consider a Dispute, it can still decide, at any point in the process, not to consider the Dispute further.

Paragraphs 5.2a) to e) list examples of factors that may lead FOS to exclude a Dispute. These examples are discussed below.

In addition, FOS can decide a Dispute should be excluded for other reasons. FOS could, for example, exclude a Dispute previously determined to be beyond the monetary jurisdictional limit of FOS or a Predecessor Scheme. **FOS could also exclude a Dispute raising issues that a court would refuse to consider. EDR schemes are not expected to deal with such Disputes.**

In any of the situations referred to in paragraph 5.2, FOS has the discretion to exclude a Dispute. FOS does not have to exclude the Dispute but it may do so.

FOS will not lightly exclude a Dispute that falls within FOS's jurisdiction under the TOR. It would only exclude if there is a compelling reason for FOS to conclude it would not be the appropriate forum for resolution of the Dispute.

Factors FOS considers when deciding whether to exclude a Dispute

FOS assesses whether it should exercise its discretion to exclude a Dispute after taking into account:

- the nature of the Dispute;
- any special circumstances or factors relevant to the Dispute;
- the principles stated in paragraph 1.2; and
- the requirements of ASIC's Regulatory Guides 139 and 165.

5.2(a) "more appropriate forum"

More appropriate place to deal with Dispute (5.2a)

In some cases, a court, a tribunal, another dispute resolution scheme, or the Privacy Commissioner may be a more appropriate place than FOS to deal with a Dispute. For example, if the only way to determine the issues raised by the Dispute would be for a third party to give evidence subject to cross examination, then a court may be a better forum to deal with the Dispute. This may be the case where issues of fact or credibility cannot be determined by assessing the weight of the available information without testing it in court. However, in most cases, the assessment of fact can be made by FOS.

Guardianship issues

Where a Dispute relates to issues involving the actions of a trustee that could be dealt with by a State or Territory court or tribunal under the relevant guardianship laws, then FOS will consider the court or tribunal is a more appropriate forum to deal with those issues. This may occur, for example, where a Dispute concerns the conduct of a trustee company in its capacity as administrator of the financial affairs of a person who lacks the mental capacity to manage their own affairs, and the appointment of the trustee company in that role could be challenged in a court or tribunal.

Disputes about Traditional Trustee Company Services involving more than one beneficiary where one beneficiary is a minor or lacks mental capacity

Where a Dispute relates to Traditional Trustee Company Services involving more than one beneficiary of a trust or deceased estate, and the complainant or another interested beneficiary is a minor or lacks mental capacity, then FOS will consider the courts are a more appropriate forum.

Legal proceedings regarding deceased estates and trusts generally

In Disputes against a trustee company relating to the administration of an estate, if a third party instigates legal proceedings to be added as a beneficiary of that estate, or which would otherwise affect the administration of the estate or the distribution of its assets, then at least while those proceedings are on foot the courts will be a more appropriate forum.

Examples include where somebody:

- applies to the court to be included as a beneficiary of the estate;
- commences testator's family maintenance proceedings; or
- instigates any other proceedings which could affect the distribution of the estate,

Where a trustee has applied to a court for directions regarding the administration of a trust or an estate before a Dispute has been lodged with FOS, and those directions could overlap with the issues raised in the Dispute, then the court will be seen as a more appropriate forum for the Dispute. Once the court gives directions, to the extent the court's directions resolve the issues in dispute, the Dispute would be excluded under paragraph 5.11).

However, once a Dispute is lodged against a trustee company who is a FOS member in respect of a trust or deceased estate, the trustee company cannot apply to a court for directions while FOS is dealing with the Dispute. See paragraph 13.1a)(i).

Privacy

FOS considers some Disputes involving privacy. However, it may be more appropriate for the Privacy Commissioner to deal with a privacy Dispute, for example, where the Dispute is not related directly to the provision of a Financial Service.

6.3. Opportunity for internal dispute resolution – under the heading “Period allowed for IDR”.

Period allowed for IDR

The periods that paragraph 6.3 usually allows for IDR are:

- in a Dispute involving a request to vary a Credit Contract as a result of financial hardship or to postpone enforcement proceedings
 - 21 days from the date of the request or
 - if an agreement has been made as a result of the request, a further 30 days from the date of the agreement;
- in a Dispute involving a default notice under the National Credit Code, 21 days from the date when the Applicant first requested the FSP to remedy the matter;
- in a Dispute about a Traditional Trustee Company Service, 90 days (unless, during that time, a person applies to the court to be added as a beneficiary or the trustee applies to court for an opinion, advice or direction, in which case time ceases to run until after the court proceedings have concluded and any time allowed for an appeal has passed); and
- in any other Dispute, 45 days from the date when the Applicant first requested the FSP to remedy the matter.

If an Applicant lodges a Dispute without first complaining to the FSP, the IDR periods stated above are allowed. In this situation, the IDR period commences when FOS refers the Dispute to the FSP for IDR.

Where the Applicant requested the FSP to remedy the issues in dispute before lodging a Dispute with FOS, the IDR period commences on the date of the expression of dissatisfaction to the FSP, whether in writing or by any other means. This will usually be the date when the Applicant contacts the FSP outlining the issues in dispute. The IDR period commences on the date when the Applicant first contacts the FSP and expresses dissatisfaction, not when the expression of dissatisfaction reaches any internal department of the FSP set up to deal with Disputes.

FOS may extend or reduce the period allowed for IDR as explained in paragraph 6.4 and the guidelines to that paragraph.

[OG to Paragraph 9 – remedies – under the heading “How FOS makes decisions about remedies”](#)

How FOS makes decisions about remedies

When deciding whether a remedy should be provided in respect of a Dispute, FOS considers what 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 will not be bound by these);

as discussed in the guidelines to paragraph 8.2.

When it decides on a remedy, an aim FOS frequently seeks to achieve is to, as nearly as possible, either:

- place the Applicant in the position they would have been in if the conduct of the FSP had not caused the loss; or
- compensate the Applicant for their loss to the extent FOS holds the FSP responsible for the loss.

A remedy may be designed to compensate an Applicant for loss for which the FSP is responsible or to rectify conduct of the FSP (or to prevent it from recurring if the Dispute involves a privacy issue).

Where a remedy requires the Applicant to take action to facilitate a fair outcome (for example, to co-operate in a claims assessment process which the FSP is directed to carry out, or to transfer an asset to another party in return for a payment of compensation), then FOS may direct the Applicant to undertake that course of action.

[13.1 Debt recovery or other proceedings \(text under the heading “General Guidance on legal proceedings...”\)](#)

General guidance on legal proceedings and other action by FSPs

The TOR stop FSPs from taking certain legal proceedings and other action against Applicants.

In disputes about Traditional Trustee Company Services, the TOR also stop FSPs from taking certain legal proceedings and other action against Other Affected Parties. The meanings of “Traditional Trustee Company Service”, and “Other Affected Party” are explained in the guidelines to paragraphs [4.2b\)\(ix\)](#) and [14.1](#)

While FOS is dealing with a Dispute lodged with it, the FSP must not:

- instigate proceedings against the Applicant relating to the subject of the Dispute;
- pursue legal proceedings relating to debt recovery instituted before lodgement (unless the Applicant has taken a step in those proceedings beyond lodging a defence or a defence and counterclaim); or
- take action to recover a debt that is the subject of the Dispute, to protect assets securing that debt or to assign any right to recover that debt.

There is an exception to the stop outlined above. With our agreement, and on such terms as we may require, the FSP may:

- issue proceedings for which the limitation period will expire shortly; or
- exercise rights to preserve the assets the subject of the Dispute.

Most of the guidance provided in this section relates to paragraph 13.1a)(ii), which stops FSPs from pursuing debt recovery proceedings instituted before lodgement. Other matters covered in this section are:

- what amounts to “debt recovery” action for the purposes of paragraph 13.1;
- the process followed where an FSP seeks to rely on the exception to the stop;
and
- the ACCC and ASIC debt collection guidelines.

Section F: Dispute Resolution Processes – Traditional Trustee Company Services affecting multiple parties

14. Application of this section

14.1 Disputes relating to Traditional Trustee Company Services will be dealt with under this section of the Terms of Reference if and only if their outcome may affect the interests of Other Affected Parties. All other disputes will be dealt with under the dispute resolution processes set out in section C of the Terms of Reference.

The guidelines to paragraph 14.1 address these issues:

- *When does Section F apply?*
- *Who is an “Other Affected Party”?*

When Section F applies

Paragraph 14.1 refers to “Traditional Trustee Company Services”. That term is explained in the guidelines to paragraph 4.2b)(ix).

Some Disputes relating to Traditional Trustee Company Services may affect people other than the Applicant and the FSP. It would be inappropriate for FOS to deal with these Disputes unless the other people - referred to as “Other Affected Parties” - are also given the opportunity to take part in the FOS process. Section F sets out special dispute resolution processes that give Other Affected parties this opportunity.

Section F only applies to a Dispute if its outcome may affect an Other Affected Party. Section C sets out the processes that apply in all other cases.

Other Affected Party

An Other Affected Party is a person who can request an Annual Information Return, which is a report containing information about a trust, including income earned on its assets, expenses, and the net value of the trust’s assets. The guideline to paragraph 4.2b)(ix) explains who can request an Annual Information Return.

15. Application process

15.1 Lodging of Disputes

- a) A party to a Dispute may lodge the Dispute with FOS by referring the Dispute to FOS for resolution.
- b) FOS may assist Applicants with this process.

- c) A Financial Services Provider that lodges a Dispute with FOS must have obtained the Applicant's prior consent.

The guidelines to paragraph 15.1 address these issues:

- How is a Dispute lodged?*
- What is meant by "Registration" and the FSP's opportunity for internal dispute resolution?*
- What assistance with lodgement does FOS provide?*

How a Dispute is lodged

A Dispute is treated as being "lodged" with FOS when it is first referred to FOS for resolution. A Dispute may be referred to FOS:

- *by submitting an Online Dispute Form, available on the FOS website www.fos.org.au;*
- *in writing, using the Registration Form or Dispute Form that an Applicant can download from the FOS website, or by email, fax or letter; or*
- *in a case where assistance from FOS is needed, by telephone.*

To help FOS to deal with a Dispute, the party lodging the Dispute should provide the following information at the time of lodgment or as soon as possible after lodgment:

- *name and contact details of prospective Applicant;*
- *key issues;*
- *outcome sought;*
- *if available, FSP's name, relevant details of the Financial Service (for example a policy or account number); and*
- *the date of any complaint made to the FSP.*

If an FSP wants to lodge a Dispute itself, it must first obtain the Applicant's written consent to lodgment and provide a copy of this to FOS at the time of lodgment.

"Registration" and FSP's opportunity for internal dispute resolution

If an Applicant lodges a Dispute with FOS and:

- *the FSP has not previously been asked to remedy the matter by the Applicant or an OAP; or*
- *either the Applicant or an OAP has asked the FSP to remedy the matter but the period allowed for internal dispute resolution (IDR) has not expired,*

FOS will give the FSP the opportunity to resolve the Dispute internally. This opportunity, the time periods allowed and FOS's ability to extend or reduce these time periods are explained in paragraphs 15.3 and 15.4 and the guidelines to those paragraphs.

In these circumstances, FOS "registers" the Dispute and forwards the details to the FSP with a request that the FSP try to resolve the Dispute. The effect of registration is to suspend any FOS action on the Dispute until:

- *the period allowed for IDR has expired; and*

- *the Applicant has contacted FOS to ask it to deal with the Dispute.*

FOS will advise the Applicant that if:

- *they remain unsatisfied after receiving the FSP’s “IDR Response” as defined in paragraph 20.1 (which is explained below in the guidelines to paragraph [15.2](#)) ; or*
- *the period allowed for IDR has expired and no resolution has been reached,*

they can contact FOS and ask it to deal with the Dispute and provided the Dispute is otherwise within FOS’s jurisdiction, FOS will deal with it.

Assistance from FOS

FOS explains the Dispute lodgment process on its website and in printed brochures that are available to anyone making a request. The FOS staff that handle telephone enquiries are trained to explain how Disputes can be lodged.

FOS prefers Applicants to lodge Disputes in writing but if the need arises, FOS can help Applicants who are only able to lodge by telephone.

Although FOS is impartial and does not act as an advocate for any party, FOS can provide help to Applicants to ensure the following:

- *Applicants understand whether they are eligible to lodge a Dispute with FOS;*
- *Applicants understand what is meant by “lodgement”, “registration” and IDR;*
- *Applicants know what documents to provide to FOS to support their application;*
- *the Dispute process flows smoothly and in a timely way; and*
- *parties are able to put their case to FOS.*

FOS can also provide specific assistance with any part of the FOS process to Applicants with special requirements who may be disadvantaged if they do not receive that assistance. For example, FOS can arrange to register Disputes in languages other than English and arrange for them to be translated at no cost to the Applicant (see also the guidelines to paragraph [16.2](#)).

FOS can also refer disadvantaged Applicants to community legal centres, legal aid offices, financial counsellors or other services for assistance after they have lodged their Dispute.

15.2 Time limits

FOS will not consider a Dispute under this section unless the Dispute is lodged with FOS before the earlier of the following time limits:

- (i) within six years of the date when the Applicant first became aware (or should reasonably have become aware) that they suffered the loss; and
- (ii) where, prior to lodging the Dispute with FOS, the Applicant received an IDR Response in relation to the Dispute from the Financial Services Provider - within 2 years of the date of that IDR Response.

However, FOS may still consider a Dispute lodged after either of these time limits if FOS considers that exceptional circumstances apply.

The guidelines to paragraph 15.2 address the following issues:

□ What are the time limits for lodging a Dispute?

□ What are the exceptions to the time limits?

- How does FOS assess when an Applicant “should reasonably have become aware” of the loss?

□ What is an IDR Response?

Time limits for lodging Disputes

FOS will consider the Dispute if it is “lodged” (as explained in the guidelines to paragraph 15.1) before the earlier of:

- *6 years after the date when the Applicant first became aware, or “should reasonably have become aware” they suffered the loss; and*
- *if the Applicant received an IDR Response (as defined in paragraph 20.1) from the FSP - 2 years after the date of that response.*

Exceptions to time limits

Paragraph 15.2 allows FOS to consider a Dispute lodged after a time limit if FOS considers that there are exceptional circumstances that warrant an extension of time. This will be assessed on a case by case basis. FOS will not decide that exceptional circumstances apply merely because the time allowed for lodgement has expired and the Applicant is disadvantaged by being unable to use the FOS process.

Paragraph 15.4 also provides an exception to the time limits which is explained in the guidelines to that paragraph.

Awareness of loss

To work out the date when the Applicant “should reasonably have become aware” they suffered the loss, FOS considers when a reasonable person, in the Applicant’s particular circumstances, should have become aware that they suffered the loss. This may require FOS to consider what the Applicant was aware of and what additional inquiries it would have been reasonable for the Applicant to make. For example, if an Applicant received information in a document but did not read it carefully, when determining when they should reasonably have become aware they suffered the loss, FOS may take into account:

- *the format of the document;*
- *how complex the document was;*
- *how long the Applicant had to read it; and*
- *whether the Applicant had any warnings or recommendations from the FSP, for instance about the need to obtain independent legal advice in relation to the document.*

IDR Response

When calculating the time limit for lodging a Dispute, one important issue is whether the Applicant received an IDR Response as defined by the TOR.

An IDR Response must be a written response from the FSP addressed to the Applicant stating the following:

- *the FSP's IDR (internal dispute resolution) process has concluded;*
- *the FSP's final decision about the complaint has been made;*
- *what the FSP's final decision is, with the word "final" given prominence;*
- *the Applicant has the right to take the complaint to FOS;*
- *the time limits that apply if the Applicant wishes to take the complaint to FOS; and*
- *FOS's contact details.*

FOS's contact details are as follows:

Financial Ombudsman Service

GPO Box 3

Melbourne VIC 3001

Telephone: 1300 780808

Fax: (03) 9613 6399

Web: www.fos.org.au

Email: info@fos.org.au

An FSP should:

- *ensure that an IDR Response is dated;*
- *record when the Applicant was sent the IDR Response; and*
- *keep a copy of the IDR Response.*

15.3 Opportunity for internal dispute resolution

Subject to paragraphs 15.4 and 15.5, where an Applicant lodges a Dispute with FOS:

- a) before a complaint was made to the Financial Services Provider by the Applicant or an Other Affected Party requesting the Financial Services Provider to remedy the matter; or
- b) within 90 days of the Applicant or an Other Affected Party first requesting the Financial Services Provider to remedy the matter;

and before receipt of the Financial Services Provider's IDR Response;

FOS must notify the Financial Services Provider of the Dispute and give the Financial Services Provider:

- c) (if paragraph a) applies) the whole of the period which would have applied under paragraph b); or
- d) (if paragraph b) applies) the balance of the applicable period;

to provide an IDR Response.

15.4 For the purposes of paragraph 15.3b), where:

- a) a person commences legal proceedings to be added as beneficiary of the estate or trust to which the complaint relates, and the outcome would affect the handling of the complaint; or
- b) a Financial Services Provider, in its capacity as manager or administrator of trust property, applies to a court for an opinion, advice or direction in order to reasonably handle the complaint;

the 90 day period ceases to run from the commencement of the relevant proceedings, and does not start to run again until the court determines whether the person should be added as a beneficiary, or provides its opinion, advice or direction, and the time to lodge any appeal has passed.

The guidelines to paragraph 15.3 and 15.4 address these issues:

- What period is allowed for IDR?*
- How can legal proceedings affect the IDR period?*
- What happens when one party affected by an FSP's decision makes a complaint and another affected party disagrees with the FSP's response to the complaint?*
- How does FOS refer a Dispute to an FSP for IDR?*
- What happens when an Applicant raises new issues?*

General guidance on opportunity for IDR

Applicants usually approach FOS in the following situations:

- *they have not yet sent their Dispute to an FSP's IDR process;*
- *within the period allowed for IDR, but before receiving the FSP's IDR Response;*
- *after the period allowed for IDR, but before receiving the FSP's IDR Response; or*
- *after receiving the FSP's IDR Response which has not remedied the matter.*

If:

- *a Dispute has not yet been through an FSP's IDR process; or*
- *the period allowed for IDR has not expired,*

FOS will usually register the Dispute details and refer it back to the FSP for consideration through the FSP's IDR process.

Before the IDR period ends, FOS will confirm to the Applicant they can contact FOS to progress an unresolved Dispute.

Period allowed for IDR

The period that paragraph 15.3 usually allows for IDR is 90 days. The 90 day period may cease to run if legal proceedings are commenced after the FSP is requested to remedy the complaint.

If an Applicant lodges a Dispute without first complaining to the FSP and no Other Affected Party has asked the FSP to remedy the matter as at the date of lodgement, the IDR period stated above is allowed. In this situation, the IDR period commences when FOS refers the Dispute to the FSP for IDR.

Where the Applicant or an Other Affected Party requested the FSP to remedy the issues in dispute before the Applicant lodges a Dispute with FOS, the IDR period commences on the date of the first expression of dissatisfaction to the FSP, whether in writing or by any other means. This will usually be the date when the Applicant or Other Affected Party contacts the FSP outlining the issues in dispute.

FOS may extend or reduce the period allowed for IDR as explained in paragraph [15.5](#) and the guidelines to that paragraph.

How legal proceedings can affect the IDR period

If, during the 90 day IDR period allowed under paragraph 15.3b), legal proceedings referred to in paragraph 15.4a) or b) are commenced, the 90 day period ceases to run from when the proceedings commence until they are decided and the time to lodge any appeal has passed.

Where one party affected by an FSP's decision makes a complaint and another affected party disagrees with the FSP's response to the complaint

If a complaint relates to a trust with multiple beneficiaries, the IDR response to the complaint may satisfy the beneficiary who made the complaint but aggrieve another beneficiary. In this situation, rather than requiring the second beneficiary to lodge a fresh complaint with the FSP (requiring a second IDR process to resolve an issue already considered by the FSP), the second beneficiary (who becomes the Applicant) can lodge a Dispute with FOS in respect of the IDR response to the complaint by the first beneficiary (who then becomes an Other Affected Party to the FOS Dispute).

This will only apply where the issues raised in the Dispute lodged with FOS are substantially the same as those dealt with in the complaint. If the second beneficiary wishes to pursue a Dispute about an unrelated issue, they will need to make a complaint to the FSP and allow the relevant IDR period.

How FOS refers a Dispute to an FSP for IDR

FOS refers a Dispute to an FSP for IDR by providing the Dispute details to the FSP's nominated contact. Referral will usually be by email, fax or mail, depending on the contact details of the FSP. FOS prefers to refer matters by email where possible. To assist the FSP to more easily identify the Dispute, where possible FOS sends to the FSP:

- name and contact details for the Applicant (including details of the Applicant's representative where one has been authorised);
- a short summary of the issues in dispute; and
- the FSP's reference number (if provided).

What happens when Applicant raises new issues

If an Applicant who lodges a Dispute with FOS has previously been through IDR with the FSP, but later raises new issues in the Dispute, FOS will normally refer these new issues back to the FSP to go through IDR before FOS considers the Dispute.

In some circumstances, however, FOS may start to consider a Dispute when new issues raised by the Applicant have not been through IDR. This may happen when the new issues are:

- closely related to issues that have been through IDR; or
- so minor that FOS considers they would be unlikely to impact on an IDR Response provided by the FSP.

15.5 FOS discretion to vary normal internal dispute resolution timeframes

Notwithstanding paragraph 15.3, FOS may:

- a) give the Financial Services Provider a longer period to resolve the Dispute if FOS considers special circumstances exist; or
- b) commence investigating or otherwise progress the Dispute immediately if FOS considers the matter urgent.

The guidelines to paragraph 15.5 address these issues:

- When can FOS extend, or reduce, the IDR period for a Dispute?
- How can a party request FOS to alter an IDR period?

Extending IDR period

FOS may extend the IDR period for a Dispute if FOS considers special circumstances exist. Examples of special circumstances include:

- where settlement negotiations are progressing, but taking longer than the IDR period, and all parties agree to continue negotiations without FOS's involvement;
- where an FSP is waiting for a report by an expert or external consultant before providing an IDR Response and FOS considers the resulting delay reasonable; or

- *where records an FSP needs to respond to a complaint are old and difficult to retrieve.*

Any party may ask for an extension to the IDR period. The request must:

- *be in writing;*
- *be made as early as possible and before the IDR period expires;*
- *state the period of the extension sought;*
- *explain the special circumstances considered to warrant the extension; and*
- *provide copies of supporting documents.*

When deciding whether there are special circumstances, as well as considering the circumstances of the relevant Dispute and general principles of fairness, FOS will consider:

- *whether the parties to the Dispute agree to the extension of the IDR period;*
- *whether the Applicant or an Other Affected Party had previously contacted the FSP about the Dispute;*
- *whether any settlement negotiations are progressing and, if so, how long they are taking;*
- *whether the FSP is waiting for information to help it to provide an IDR Response; and*
- *whether the length of the extension requested is reasonable.*

If FOS decides to extend the IDR period for a Dispute, it will advise all of the parties of the decision and the reasons for it and confirm the new IDR timeframe.

Reducing IDR period

FOS may start to deal with a Dispute before the IDR period ends if FOS considers the matter urgent. This means FOS may commence investigating or otherwise considering the Dispute. Examples of urgent situations include:

- *where the Applicant or an Other Affected Party is in ill health;*
- *where an FSP is in administration, liquidation or has otherwise ceased trading;*
- *where delaying investigation would significantly disadvantage a party; and*
- *where any delay may cause or exacerbate financial hardship for the Applicant or an Other Affected Party.*

Any party to a Dispute may request urgent consideration of the Dispute. The request must:

- *be in writing;*
- *be made as early as possible and before the IDR period expires;*
- *explain the circumstances considered to warrant reducing the IDR period; and*
- *provide copies of supporting documents (e.g. medical reports, legal proceedings, default and rescission notices).*

In cases where FOS considers it may deal with the Dispute before the IDR period ends, it will discuss the Dispute with the FSP before making a decision. When considering whether it should reduce the IDR period, FOS will assess relevant factors including:

- whether an FSP is in external administration or has ceased trading;*
- the medical condition of the Applicant or an Other Affected Party if it affects their ability to participate in FOS's consideration of the Dispute (especially if it is delayed);*
- legal proceedings against the Applicant or an Other Affected Party by a third party; and*
- the requirement for urgent access to funds.*

If FOS decides to start dealing with a Dispute before the IDR period ends, it will advise all of the parties of the decision.

15.6 Disputes lodged with other ASIC Approved EDR Schemes

For the purposes of these Terms of Reference, where a Dispute is referred to FOS by another ASIC approved external dispute resolution (“EDR”) scheme, the time limit for bringing a Dispute to FOS will apply from the date when the Dispute was lodged with the other EDR scheme and the Dispute will be deemed to have been lodged with FOS on the date that it was lodged with the other EDR scheme.

General guidance on Disputes lodged with other schemes

For guidance on paragraph 15.6, refer to the guideline to paragraph [6.5](#) and read its reference to paragraph 6.2 as a reference to paragraph 15.2.

15.7 Identification of Other Affected Parties

Where the time allowed under paragraphs 15.3 and 15.4 to provide an IDR Response has already elapsed, FOS will notify the Financial Services Provider of the Dispute and require it to:

- a) identify all Other Affected Parties to the extent possible;
- b) provide FOS within 14 days with
 - (i) a list of the names and contact details of the Other Affected Parties reasonably known to the Financial Services Provider at the time; and
 - (ii) a statement that all Other Affected Parties have been identified and their details provided, or (if one or more Other Affected Parties could not be identified) a statement as to why this has not been possible.

15.8 Notification of Other Affected Parties

FOS will not consider a Dispute under this section unless all of the following requirements have been met:

- a) all Other Affected Parties have been identified under paragraph 15.6;
- b) the Applicant has been informed of the process under which FOS would deal with the Dispute and their right to obtain independent legal advice before doing so, and has within 28 days of receiving this information provided FOS with their consent to FOS dealing with the Dispute, and to be bound by the outcome.
- c) FOS has sent a notice to each Other Affected Party -
 - (i) informing them that the Dispute has been lodged, that if FOS deals with the dispute their interests may be affected by the outcome, and that they have a right to obtain independent legal advice before deciding whether to consent to FOS dealing with the dispute; and
 - (ii) asking them to advise FOS whether or not they consent to FOS dealing with the dispute, and to be bound by the outcome; and
- d) within 28 days of being given the above notice, all Other Affected Parties have advised FOS they consent to FOS dealing with the dispute and to be bound by the outcome.

The guidelines to paragraphs 15.7 and 15.8 address these issues:

What must FOS do before it considers a multiple party Dispute?

- *What happens where all Other Affected Parties are not identified?*
- *Why is consent important?*

What FOS must do before it considers a multiple party Dispute

The outcome of a multiple party Dispute dealt with under Section F may affect not only the Applicant and the FSP, but also Other Affected Parties. Because the Dispute involves parties other than the Applicant (who has effectively agreed to the FOS process by lodging the Dispute) and the FSP (which is bound by the FOS process as a condition of its membership of the FOS scheme), FOS cannot in fairness deal with the Dispute until and unless it is satisfied that all Other Affected Parties have:

- *been identified and informed of the Dispute: and*
- *consented to FOS dealing with the Dispute and to be bound by the outcome.*

As the Other Affected Parties and the Applicant are all equally consumers of the Traditional Trustee Company Service provided by the FSP, in the interests of equity, FOS may not deal with the Dispute unless the Applicant has also agreed to be

bound by the outcome. This is a key difference between the multiple party process in Section F and the Applicant-FSP process in Section C of the TOR.

Where all Other Affected Parties are not identified

FOS relies on the FSP in a Dispute to identify all Other Affected Parties.

Sometimes, it is not possible to identify all Other Affected Parties. For example, an estate or trust may provide for members of a class of beneficiaries. Membership of that class may include (potentially) people who cannot be identified because they have not yet been born, or have not yet met the relevant criteria for membership. In these circumstances, FOS cannot deal with the Dispute because the Other Affected Parties cannot all be contacted, or asked to give their consent.

If FOS starts to deal with a Dispute after having contacted all known Other Affected Parties and obtained their consent, and an Other Affected Party is later identified, FOS must stop dealing with the Dispute until and unless that Other Affected Party is also contacted and provides their consent to FOS dealing with the Dispute.

Why consent is important

FOS cannot deal with a Dispute involving Other Affected Parties unless they, and the Applicant, have consented to FOS dealing with the Dispute in accordance with its processes under the TOR, and to be bound by the outcome.

Consent, once validly given, cannot be rescinded. Therefore, FOS will ensure that an Applicant or Other Affected Party is informed of their right to obtain legal advice before deciding whether to give their consent.

16. Dispute resolution methods and related matters

16.1 Dispute resolution methods

To resolve a Dispute, FOS may use one or more of the following methods:

- a) negotiation;
- b) conciliation or mediation; or
- c) deciding the Dispute in accordance with the process set out in paragraph 17.

For guidance on paragraph 16.1, refer to the guidelines to paragraph [7.1](#).

16.2 Provision of information by the parties to the Dispute

FOS may require a party to a Dispute to provide to, or procure for, FOS any information that FOS considers necessary. That party must comply with FOS' request within the timeframe specified by FOS except where the party satisfies FOS that:

- a) to provide information would breach a duty of confidentiality to a third party and, despite best endeavours, the third party's consent to the disclosure of the information has not been able to be obtained;
- b) to provide the information would breach a Court order or prejudice a current investigation by the police or other law enforcement agency; or
- c) the information does not or no longer exists or is not within the party's reasonable possession or control.

For guidance on paragraph 16.2, refer to the guidelines to paragraph [7.2](#). The obligations of Applicants and Financial Services Providers to provide information apply equally to Other Affected Parties.

16.3 Other obligations of the parties to the Dispute

- a) FOS may require a party to a Dispute to do anything else that FOS considers may assist FOS's consideration of the Dispute. This may include requiring:
 - (i) a party to a Dispute to attend an interview; or
 - (ii) the Financial Services Provider to investigate a Dispute further or to appoint an independent expert to report back to FOS on a matter pertaining to the Dispute.
- b) A party to a Dispute must comply with such a request within the timeframe specified by FOS.

For guidance on paragraph 16.3, refer to the guidelines to paragraph [7.3](#). Apart from the obligation to investigate a dispute further, these obligations also apply to Other Affected Parties.

16.4 Timeframes

Nothing in these Terms of Reference or elsewhere restricts FOS's ability to give a party to a Dispute an extension of time (even if the original period, or the period as extended, has ended) should FOS consider this appropriate.

For guidance on paragraph 16.4, refer to the guidelines to paragraph [7.4](#).

16.5 Consequences of non-compliance by a party with a FOS request

Where a party to a Dispute without reasonable excuse fails to provide or procure information or to take any other step requested by FOS within the timeframe specified by FOS, FOS may take the steps it considers reasonable in the circumstances. This may include:

- a) proceeding with the resolution of the Dispute on the basis that an adverse inference may be drawn from that party's failure to comply with FOS's request; or
- b) where the Applicant fails to comply with a FOS request - refusing to continue consideration of the Dispute.

For guidance on paragraph 16.5, refer to the guidelines to paragraph [7.5](#). The consequences of non-compliance (apart from those which apply to Applicants only) also apply to Other Affected Parties.

16.6 "Without prejudice" nature of Service

FOS operates on a "without prejudice" basis. This means that information obtained through FOS may not be used in any subsequent court proceedings unless required by an appropriate court process.

17. Deciding Disputes

17.1 Rules of evidence

FOS is not bound by any legal rule of evidence.

For guidance on paragraph 17.1, refer to the guidelines to paragraph [8.1](#).

17.2 Dispute resolution criteria

Subject to paragraph 17.1, when deciding a Dispute and whether a remedy should be provided in accordance with paragraph 18, FOS will do what in its opinion is fair in all the circumstances, having regard to each of the following:

- a) legal principles;
- b) applicable industry codes or guidance as to practice;
- c) good industry practice; and
- d) previous relevant decisions of FOS or a Predecessor Scheme (although FOS will not be bound by these).

For guidance on paragraph 17.2, refer to the guidelines to paragraph [8.2](#). References to the parties in those guidelines should be seen as also applying to Other Affected Parties, as appropriate.

17.3 Specialist input

- a) When deciding a Dispute, FOS may consult with industry and consumer advisors as FOS thinks appropriate.
- b) FOS may also obtain expert advice including from a legal expert, industry expert, medical practitioner or building expert appointed by FOS. FOS may require the Financial Services Provider to pay or contribute to the cost provided that:
 - (i) the fees of the expert are reasonable, having regard to the complexity of the dispute; and
 - (ii) the fees do not deviate significantly from the usual market rate for such advice; and
 - (iii) the person has the necessary expertise.

Unless exceptional circumstances apply, FOS will not require the Financial Services Provider to contribute more than \$3,000 per Dispute to the cost of expert advice obtained by FOS.

For guidance on paragraph 17.3, refer to the guidelines to paragraph [8.3](#). References to the parties in those guidelines should be seen as also applying to Other Affected Parties, as appropriate.

17.4 FOS's obligation to provide information to the parties

- a) Subject to paragraph b), before making a Determination, FOS must ensure that the parties to the Dispute are provided with access to the documentation, information and material upon which FOS proposes to rely in its Determination.
- b) Notwithstanding paragraph a):
 - (i) FOS is not obliged to make available to the parties any memoranda, analysis or other documents generated by FOS's employees or contractors; and
 - (ii) FOS must not disclose to a party to a Dispute information provided by another party to the Dispute where the party supplying the information has refused consent to this (and, in the absence of a clear statement to the contrary, FOS is entitled to assume that consent is given to the material in its entirety being provided to the other parties to the Dispute).
- c) If a party to a Dispute refuses consent to provide information to another party to the Dispute, FOS is not entitled to use that information to reach a decision adverse to the party to whom confidential information is denied unless FOS determines that special circumstances apply.

For guidance on paragraph 17.4, refer to the guidelines to paragraph [8.4](#).

17.5 Process for deciding Disputes

Unless paragraph 17.6 applies, the process for deciding a Dispute is as follows.

- a) After giving the parties a reasonable opportunity to make submissions and provide information about the matters in dispute, FOS makes an assessment referred to as a Recommendation.
- b) If all parties accept the Recommendation within 30 days of receiving it, the Dispute is resolved on the basis of the Recommendation.
- c) If, within 30 days of receiving the Recommendation, any party does not accept the Recommendation in relation to the Dispute or requests FOS to proceed from a Recommendation to a Determination, FOS will proceed to a Determination by either an Ombudsman or by a FOS Panel (as the Chief Ombudsman or his or her delegate decides is appropriate). Before the Determination is made, the parties will be given a reasonable opportunity to make submissions, and provide any further information, in response to the Recommendation.

For guidance on the role of Recommendations, and on when a Determination will be made by an Ombudsman and when it will be made by a Panel, refer to the guidelines to paragraph [8.5](#).

17.6 Expedited process for deciding Disputes

Notwithstanding paragraph 17.5, FOS may proceed to a Determination by either an Ombudsman or by a FOS Panel (as FOS decides is appropriate) without a Recommendation first being made. This expedited process will be followed if FOS considers that this would be appropriate in the circumstances. If so, FOS must advise the parties of this intended course of action and must not make the Determination without first giving the parties a reasonable opportunity to make submissions and provide information about the matters in dispute.

For guidance on paragraph 17.6, refer to the guidelines to paragraph [8.6](#). References to a party suffering financial hardship apply to Other Affected Parties as well as to the Applicant.

17.7 Recommendations and Determinations

- a) Each Recommendation and Determination:

- (i) must be in writing;
 - (ii) may either reach:
 - (A) a conclusion about the merits of the Dispute; or
 - (B) the view that, given the procedures adopted by FOS, it would not be appropriate for FOS to reach any conclusion as to the merits of the Dispute;
 - (iii) must set out reasons for any conclusion about the merits of a Dispute or view of the kind referred to in paragraph 17.7a)(ii)(B);
 - (iv) must specify any remedy, determined in accordance with paragraph 18, that FOS considers fair and appropriate; and
 - (v) must be provided to all parties to the Dispute.
- b) A Determination is a final decision and is binding upon the Applicant the Financial Services Provider and all Other Affected Parties.

General guidance on Recommendations and Determinations

Certain aspects of a Dispute may have been resolved before a Recommendation or Determination is made, for example, through negotiation or conciliation. In this situation, a Recommendation or Determination only has to deal with the outstanding aspects of the Dispute.

18. Remedies

18.1 Types of remedies

Subject to paragraphs 18.2 to 18.8, FOS may decide that the Financial Services Provider, Other Affected Party or Applicant undertake a course of action to resolve the Dispute including:

- a) the payment of a sum of money;
- b) the forgiveness or variation of a debt;
- c) the release of security for debt;
- d) the repayment, waiver or variation of a fee or other amount paid to or owing to the Financial Services Provider or to its representative or agent including the variation in the applicable interest rate on a loan;
- e) the reinstatement or rectification of a contract;
- f) the variation of the terms of a Credit Contract in cases of financial hardship;
- g) the meeting of a claim under an insurance policy by, for example, repairing, reinstating or replacing items of property; and

- h) in the case of a Dispute involving a privacy issue with an individual - that the Financial Services Provider should not repeat conduct on the basis that it constitutes an interference with the privacy of an individual or that the Financial Services Provider should correct, add to or delete information pertaining to the Applicant or an Other Affected Party.

The guidelines to paragraph 18.1 address these issues:

- How does FOS make decisions about remedies?*
- What input on remedies should parties provide?*

General guidance on remedies

Paragraph 18.1 sets out examples of remedies that may be provided to an Applicant or Other Affected Party. It is not an exhaustive list of remedies although it does set out some limits on the types of remedies FOS can award.

Some remedies that may be provided do not involve payment of monetary compensation for loss or damage but rather a remedy with financial or even non-financial value to the Applicant or Other Affected Party. Examples of such remedies include:

- *redistribution of personal chattels from a deceased estate.*

FOS also assesses whether Applicants or Other Affected Parties may be assisted by Commonwealth and state legislative protections designed to assist Centrelink recipients.

How FOS makes decisions about remedies

When deciding whether a remedy should be provided in respect of a Dispute, FOS considers what 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 will not be bound by these);*

as discussed in the guidelines to paragraph 17.2 and 8.2.

When it decides on a remedy, an aim FOS frequently seeks to achieve is to, as nearly as possible, either:

- *place the parties in the position they would have been in if the conduct of the FSP had not caused the loss; or*
- *compensate a party for their loss to the extent FOS holds the FSP responsible for the loss.*

A remedy may be designed to compensate an Applicant or Other Affected Party for loss for which the FSP is responsible or to rectify conduct of the FSP (or to prevent it from recurring if the Dispute involves a privacy issue).

Where the remedy requires not only the FSP but also the Applicant or an Other Affected Party to take action to facilitate a fair outcome, then FOS may direct the Applicant or Other Affected Party to undertake that course of action.

Input on remedies parties should provide

When an Applicant lodges a Dispute with FOS, it is helpful if the Applicant can explain:

- the loss suffered;*
- how it was caused by the FSP;*
- the remedy sought; and*
- why that remedy is appropriate.*

All parties should provide comments to FOS on any assertions made by any other party about the desired remedy. The comments will not be taken to be an admission of liability or responsibility by the party in question.

18.2 Compensation for direct financial loss or damage

Subject to paragraph 18.7, FOS may decide that the Financial Services Provider compensate the Applicant or an Other Affected Party for direct financial loss or damage.

18.3 Other compensation

- a) Subject to paragraph 18.3 c) and paragraph 18.7, FOS may decide that the Applicant, the Financial Services Provider or an Other Affected Party compensate the Applicant or an Other Affected Party for consequential financial loss or damage up to a maximum amount of \$3,000 per claim made in the Dispute.
- b) Subject to paragraph 18.3 c) and paragraph 18.7, FOS may decide that the Applicant, the Financial Services Provider or an Other Affected Party compensate the Applicant or an Other Affected Party for non-financial loss but only where:
 - (i) an unusual degree or extent of physical inconvenience, time taken to resolve the situation or interference with the Applicant's or Other Affected Party's expectation of enjoyment or peace of mind has occurred; or
 - (ii) in the case of a Dispute pertaining to an individual's privacy rights - injury has occurred to the Applicant's feelings or humiliation has been suffered by the Applicant or an Other Affected Party.

The maximum amount of compensation for non-financial loss will be \$3,000 per claim made in the Dispute.

- c) Notwithstanding paragraphs 18.3 a) and b), FOS will not provide compensation for:

- (i) consequential financial loss; or
- (ii) non-financial loss,

in a Dispute arising as a result of a claim on a General Insurance Policy that expressly excludes such liability.

- d) The cap on liability in paragraph 18.3 a) does not in any way restrict FOS's ability to make an interest award under paragraph 18.5.

18.4 Applicant's costs in pursuing the matter

FOS may decide that the Financial Services Provider contribute to the legal or other professional costs or travel costs incurred by the Applicant or Other Affected Party in the course of the Dispute. Unless exceptional circumstances apply, FOS will not require the Financial Services Provider to contribute more than \$3,000 to these costs.

For guidance on paragraph 18.4, refer to the guidelines to paragraph 9.4. FOS may direct the FSP to pay the costs of Other Affected Parties as well as those of the Applicant.

18.5 Interest

- a) Subject to paragraph 18.5 b) FOS may decide that the Financial Services Provider pay interest on a payment to be made by the Financial Services Provider to the Applicant or an Other Affected Party.
- b) When deciding 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.

For guidance on paragraph 18.5, refer to the guidelines to paragraph 9.5. FOS may direct interest on amounts paid to Other Affected Parties.

18.6 Other types of damages

Punitive, exemplary or aggravated damages may not be awarded.

18.7 Cap on maximum value of remedy

- a) The maximum total value of the remedy decided upon by FOS for a claim must not exceed the amount specified in Schedule 2 (as in force at the time of the lodging of the Dispute) as applicable to the type of claim.
- b) When determining the total value of a remedy under paragraph a):
 - (i) monetary compensation and any remedy where the value can readily be calculated, such as the waiving of a debt, are included; and
 - (ii) compensation for costs and interest payments are excluded.

The guideline to paragraph 18.7 addresses these issues:

- What are the compensation caps?*
- How is the total value of a remedy calculated?*
- Can there be more than one claim in a Dispute?*
- What does “claim” mean?*

Compensation caps

Schedule 2 to the TOR sets compensation caps by specifying maximum values of remedies for claims in Disputes. The cap for a claim in any Dispute relating to Traditional Trustee Company Services is \$280,000.

How total value of remedy is calculated

The caps limit the total value of a remedy for a claim. This total value is calculated by:

- *including monetary compensation and “any remedy where the value can readily be calculated”, such as the waiving of a debt; and*
- *excluding any compensation for costs and interest payments.*

FOS will calculate the value of a remedy as at the date on which FOS decides on the remedy.

Number of claims within Dispute

A compensation cap applies in relation to a claim rather than a Dispute. In any Dispute, one claim or multiple claims may be raised by an Applicant or Other Affected Party. Where an Applicant or Other Affected Party raises multiple claims against an FSP, FOS usually deals with all of the claims together as a single Dispute because this is more efficient for dispute resolution and administration. However, the cap specified in Schedule 2 will apply to each claim within the Dispute.

The meaning of “claim”

FOS takes the view that for the purposes of the TOR, the expression “claim” refers to the set of facts that, put together, give an Applicant or Other Affected Party 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 or Other Affected Party.

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.

19. Test case procedures

19.1 Notice of intended Test Case

If a Financial Services Provider wishes a Dispute to be treated as a test case, the Financial Services Provider must give FOS a notice in writing containing:

- a) a statement, with reasons, why the Financial Services Provider is of the opinion that the Dispute involves or may involve:
 - i) an issue which may have important consequences for the business of the Financial Services Provider or Financial Services Providers generally; or
 - ii) an important point of law; and
- b) an undertaking that, if within 6 months after FOS receives the notice, the Applicant, an Other Affected Party or the Financial Services Provider institutes proceedings in any superior court or tribunal which has the ability to make a binding determination of the issue or point of law in respect of the Dispute, the Financial Services Provider will:
 - i) pay the Applicant’s and all Other Affected Parties’ costs and disbursements (if not otherwise agreed, on a solicitor and own client basis) of the proceedings at first instance and any subsequent appeal proceedings commenced by the Financial Services Provider (except by way of respondent’s notice, cross appeal or other similar procedure); and
 - ii) make interim payments of account of such costs and disbursements if and to the extent that it appears reasonable to do so; and
- c) an undertaking that the Financial Services Provider will institute the proceedings within 6 months of the date of the notice and seek to prosecute the test case proceedings expeditiously.

19.2 FOS discretion to stop considering the Dispute

If after receiving a notice under paragraph 19.1 of these Terms of Reference, FOS is satisfied that it would be inappropriate to deal with the Dispute, FOS must inform the Applicant and all Other Affected Parties in writing that:

- a) FOS has received the notice;
- b) the date of the notice;
- c) FOS will cease considering the Dispute for so long as the Financial Services Provider complies with the undertakings in the notice; and
- d) the effect of this upon the Applicant and all Other Affected Parties.

For guidance on of paragraphs 19.1 and 19.2, refer to the guidelines to paragraphs 10.1 and 10.2. Reference to the Applicant in those guidelines also apply to Other Affected Parties.