

This is the submission by the Financial Ombudsman Service ("FOS") in response to the consultation paper released by the Victorian Law Reform Commission in March 2011 *Guardianship* (the "Consultation Paper").

This submission draws on the experience of FOS and its predecessors in the resolution of disputes relating to financial services. The submission has been prepared by the office of FOS and does not necessarily represent the views of the Board of FOS.

Information about FOS

FOS commenced operations on 1 July 2008. It is an independent dispute resolution scheme that was formed through the consolidation of three schemes:

- the Banking and Financial Services Ombudsman ("BFSO");
- the Financial Industry Complaints Service ("FICS"); and
- the Insurance Ombudsman Service ("IOS").

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

- the Credit Union Dispute Resolution Centre ("CUDRC"); and
- Insurance Brokers Disputes Ltd ("IBD").

FOS is an external dispute resolution scheme approved by ASIC. Membership of FOS is open to any financial services provider carrying on business in Australia including providers not required to join a dispute resolution scheme approved by ASIC. Replacing the schemes previously operated by BFSO, FICS, IOS, CUDRC and IBD, FOS provides free, fair and accessible dispute resolution for consumers unable to resolve disputes with financial services providers that are members of FOS.

Members of BFSO, FICS, IOS, CUDRC and IBD are now members of FOS. The members of those schemes included:

- BFSO – credit providers, mortgage brokers, payment system operators, Australian banks and their related corporations, Australian subsidiaries of foreign banks and foreign banks with Australian operations;

- FICS – life insurance companies, fund managers, friendly societies, stockbrokers, financial planners, pooled superannuation trusts, timeshare operators and other Australian financial services providers;
- IOS – general insurance companies, re-insurers, underwriting agents and related entities of member companies;
- CUDRC – credit unions and building societies;
- IBD – insurance brokers, underwriting agents and other insurance intermediaries.

FOS has over 20 years' experience in providing dispute resolution services in the financial services sector and it is estimated that FOS covers up to 80% of banking, insurance and investment disputes in Australia.

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

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

As well as its functions in relation to dispute resolution, FOS has responsibilities to identify and resolve systemic issues and obligations to make certain reports to ASIC.

FOS is a not for profit organisation funded by its members, which are financial services providers. It is governed by an independent board with consumer representatives and financial services industry representatives.

Feedback and comments

Feedback in response to consultation questions and comments on proposals set out in the Consultation Paper are provided below. We are not in a position to respond to many of the consultation questions.

Chapter 6 – Clear and accessible laws

Question 5: Do you agree with the Commission's proposal that Victoria's various substitute decision-making laws be consolidated into one single Act?

We consider disputes relating to substitute decision making regularly. For example, we consider disputes that raise the question of whether the financial services provider should have dealt with the consumer directly or with a substitute decision maker. Considering a single dispute of this type often involves considering various pieces of legislation and regulatory measures. It can be difficult for us to ascertain the obligations of financial services providers and how the legislation and other regulatory measures interact. As this can be difficult for us, we believe it would also be difficult for financial services providers and more difficult for consumers. Confusion about legal obligations may actually cause or contribute to some disputes.

We support action to make substitute decision making laws clearer and more accessible. Consolidation of the laws into one Act would seem to be a solution to the problems described above. We note that the other options examined on page 105 of the Consultation Paper have drawbacks.

Chapter 7 – Supported decision making

Question 20: Should "supporter" or "co-decision maker" arrangements apply to financial matters, or be limited to personal decision making?

On page 133, the Consultation Paper refers to issues raised by supported decision making for financial matters and indicates that they need to be addressed satisfactorily. We agree that this is necessary.

If "supporter" or "co-decision maker" arrangements apply to financial matters, we suggest that steps of the type listed below be taken to reduce disputes:

- ensuring that appointments clearly specify the role and powers of the supporter or co-decision maker; and
- clearly stating, in legislation or other authoritative guidance material, the consequences of a supported decision not being made properly.

Chapter 8 – Personal appointments

Question 28: Should an online registration system be created for enduring powers?

Page 158 of the Consultation Paper outlines a number of difficulties involved in establishing a register for enduring powers. We acknowledge these difficulties and the need to address them.

We support the proposal to create a registration system because we believe that information from a register could be used to avoid or resolve disputes. We could use this information, for example, to confirm whether a person has the authority to act, or lodge a dispute, on behalf of a consumer.

The Consultation Paper suggests that, if a registration system is established, it should be an online system. We agree that an online system would be more effective than a paper based register. Our records indicate that many consumers prefer to use online facilities. We released an online dispute form on 1 January 2010 and it quickly became the most popular way to lodge disputes with FOS.

If it is not possible to create an online registration system, the alternative of a paper based register for enduring powers may be considered. We would support the creation of such a register because we believe that it could be used to avoid or resolve disputes.

Questions 30 and 31: Should registration be voluntary or compulsory? If registration is compulsory, what effect should this have on unregistered appointments?

To reduce disputes and promote efficient resolution of disputes, we suggest that clear guidance be provided on the effect of failure to register appointments.

Question 33: Who should have access to the register? What safeguards should be put in place to protect an individual's privacy while allowing appropriate people to access it?

Paragraph 8.142 of the Consultation Paper does not indicate whether FOS could access registered information or only obtain it through parties to disputes. Our Terms of Reference allow us to require a party to a dispute to provide or procure for us any information considered necessary to help us to consider the dispute. There are exceptional situations in which the party need not comply with such a requirement. One of these situations is where providing the information would breach a duty of confidentiality owed to a third party and, despite best endeavours, the third party's consent to disclose the information has not been able to be obtained. We submit that, if a register is created, the arrangements should take into account that an external dispute resolution scheme such as FOS may seek to rely on registered information.

Paragraph 8.142 envisages providing access to registered information to certain individuals and organisations who could be parties to financial services disputes, including donors and attorneys. Banks are mentioned specifically, but other financial services providers are not. Consideration may need to be given to wider access arrangements, to reduce disputes and promote prompt dispute resolution.

Chapter 12: The distinction between guardianship and administration

Question 56: Do you agree with any of the suggested ways to manage the overlap between the powers of guardians and administrators? Are there any other ways to manage this overlap?

In our assessment, the most effective suggestion listed in paragraph 12.93 of the Consultation Paper is to provide legislative guidance about whether the decision of a guardian or administrator prevails in the event of a dispute. It may be possible to also implement other suggested measures to prevent disputes arising or help to resolve them.

Chapter 13: Powers of guardians and administrators

Proposals relating to a litigation guardian.

Paragraph 1.2b) of our Terms of Reference require us, in dealing with disputes, to “proceed with minimum formality and technicality”. It is not usually necessary for either party to be legally represented or to have anyone acting on their behalf. FOS can provide assistance to consumers with special requirements who may be disadvantaged if they do not receive that assistance.

Our dispute resolution process is not litigation. However, a consumer needs to take certain steps in the process. For example, they need to lodge a dispute and may need to provide information and make decisions. A litigation guardian could play a useful role in assisting a consumer with impaired decision making capacity in regard to a dispute.

Decisions made by a consumer in a dispute may affect their rights in regard to litigation. If FOS makes a recommendation or determination to resolve a dispute, to accept the recommendation or determination, the consumer must provide the financial services provider with a binding release from liability in respect of the matters resolved. Acceptance of a settlement offer made by a financial services provider may also involve providing a release that prevents the consumer from taking action through the courts. Given the ramifications of certain decisions made in disputes that are not the subject of litigation, such as disputes considered by FOS, a consumer with impaired decision making capacity might need a litigation guardian for these disputes.

Any arrangements made for litigation guardians may need to take into account their possible role in disputes that are not the subject of litigation, including disputes within the jurisdiction of an external dispute resolution scheme such as FOS.