FINANCIAL OMBUDSMAN SERVICE

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13 November 2008

Ai-Lin Lee
Consumers & Retail Investors
Australian Securities & Investments Commission
GPO Box 9827
MELBOURNE VIC 3001

Dear Ai-Lin Lee

Consultation Paper 102
Dispute Resolution – Review of RG 139 & RG 165

I refer to the above consultation paper and now enclose submission to that Review made by the office of the Financial Ombudsman Service.

The submission does not necessarily reflect the views of the Board of Financial Ombudsman Service Ltd.

Yours sincerely

Colin Neave
Chief Ombudsman

enc.

REVIEW OF ASIC DISPUTE RESOLUTION POLICY

SUBMISSION BY FINANCIAL OMBUDSMAN SERVICE ("FOS")

Introduction

This is the submission by FOS to ASIC's "Consultation Paper 102: Dispute Resolution – review of RG 139 and 165" ("CP102"). The submission has been prepared by the office of FOS and does not necessarily represent the views of the board of FOS.

This submission draws on the experience of FOS and its predecessors in dealing with disputes concerning financial services providers.

Information about FOS

FOS commenced operations on 1 July 2008. It is an independent dispute resolution scheme that has been formed through the consolidation of three schemes: Banking and Financial Services Ombudsman ("BFSO"); Financial Industry Complaints Service ("FICS"); and Insurance Ombudsman Service ("IOS"). BFSO, FICS and IOS have, under new names, become divisions of FOS.

Replacing the schemes previously operated by BFSO, FICS and IOS, FOS now provides free, fair and accessible dispute resolution for consumers unable to resolve disputes with financial services providers that are members of FOS. It is an External Dispute Resolution ("EDR") 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.

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

FOS is led by a Chief Ombudsman and governed by an independent Board of consumer representatives and financial services industry representatives.

As a preliminary matter, we would like to clarify the statements about the FICS monetary limits in paragraph 33 of CP102. The $250,000 limit on life insurance lump-sum claims dates back to 1991, but the $6,000 limit on income stream risk products and the $100,000 limit on all other complaints do not. The first limit on income stream products was set in 1995 and was set at $4,000 per month and the $100,000 limit for all other complaints was not introduced until 1999.

Approach taken in this submission

For a twelve to eighteen month transition period from 1 July 2008, the three divisions of FOS will conduct dispute resolution processes in accordance with Terms of Reference and other procedure documents very similar to the documents that governed the operations of BFSO, FICS and IOS. FOS is currently conducting a consultation process to develop a single set of Terms of Reference, guidelines, policies and procedures to be put in place by 1 January 2010.

An issues paper to assist in the consultation process was released on 14 August 2008. This paper raises some of the issues raised in CP102. It is anticipated that the two processes – the development of the single Terms of Reference and the review of RG 139 and 165 – will be complementary. The FOS board has not met to decide on its preferred direction in relation to the areas of overlapping consultation and therefore FOS will not pre-empt the board's decisions by responding to proposals in CP102 that overlap with the FOS consultation. The proposals in CP102 that overlap with the FOS consultation are:

- Proposals E2 to E5, on monetary limits;
- Proposal F2, on commencement of legal proceedings;
- Proposal F3, on time limits; and
- Proposal F4, on complaints dealt with in another forum.

Executive summary

Our responses to the proposals in CP102 may be summarised as follows:

- we agree with Proposals C1, C3, D2, D3, E1, F5, G1, G2 and G3;
- we agree with aspects of Proposals C2, D1 and F1 and explain our views in relation to those proposals;
- we provide feedback in relation to Proposals E7 and F6;
- we do not respond to Proposals E2, E3, E4, E5, F2, F3, and F4 because they overlap with the FOS consultation referred to above; and
- we do not provide feedback in relation to Proposal E6 or comment on Proposal G4, for reasons explained below.

Responses to proposals

The responses of FOS to the proposals in CP102 other than Proposals E2 to E5 and F2 to F4 are set out below.

Proposal C1

One of the objectives of the review of ASIC's dispute resolution policy is to reflect the introduction of AS ISO 10002. Given this objective, we agree with Proposal C1. The definition of "complaint" in AS ISO 10002 appears to us to be adequate and workable.

Proposal C2

To achieve the objective referred to above, it is necessary to update RG 165 to refer to AS ISO 10002 instead of AS 4269, which has been superseded. For the reasons outlined in paragraph 56 of CP 102, we agree that ASIC should require compliance with specified provisions of AS ISO 10002 rather than every provision in that standard.

Paragraph 45 of CP102 states that ASIC proposes to update RG 165 to require financial services providers to comply with certain aspects of AS ISO 10002 that ASIC believes are equivalent to the Essential Elements in AS 4269. To do this, it seems to be necessary to include Section 8.6 of AS ISO 10002 in the list of provisions

specified in Proposal C2. The Appendix to CP102 indicates that Section 8.6 is equivalent to the Essential Element "Reviews" in AS 4269. In our assessment, the matters addressed in that Essential Element are not addressed in any other provision specified in Proposal C2.

We note that the Guiding Principles address matters addressed by provisions in AS ISO 10002 with which compliance will not be required under Proposal C2. There is a risk that financial services providers with a superficial approach to compliance may ignore matters addressed in provisions with which they need not comply (even though, to fully satisfy the Guiding Principles, those matters would need to be taken into account). In our view, RG 165 will need to explain the requirements very carefully to minimise this risk.

Proposal C3

In our opinion, the Schedule to RG 165 is useful and should be updated. We believe that financial services providers require guidance on how the standards apply and that the table format in the current schedule is the clearest format for such guidance. From our experience, financial services providers need to have some of their obligations in relation to IDR stated plainly. For example, certain financial services providers have, from time to time, been slow to respond to complaints due to inadequate resources. In our view this suggests that guidance on the application of requirements in respect of resources (in Section 6.4 of AS ISO 10002) would be necessary.

We note that the annexes to AS ISO 10002 provide material that may assist financial services providers – especially small businesses. We think that RG 165 should draw attention to this material or particularly relevant parts of it. It may be appropriate to incorporate guidance based on this material in an updated schedule to RG 165.

Paragraph 65 of CP102 expresses a view that financial services providers "will be able to comply with" provisions of both AS 4269 and AS ISO 10002. We understand that Proposal C2 is a proposal to replace requirements to comply with provisions of AS 4269. Our comments assume that this understanding is correct.

Proposal D1

We agree that financial services providers should be encouraged to respond more promptly to complaints. We are not sure that Proposal D1 would result in prompter responses, however. If a period of 30 days is specified, that may become the target for financial services providers that presently have stricter targets. Where it is apparent that more time is required to gather the required information, this should be identified at an early stage and any possible delay communicated to complainants.

Proposal D2

We agree with Proposal D2. We believe that a consumer's right to access EDR should not be affected by the fact that an IDR procedure is multi tiered. It would be unsatisfactory if IDR procedures could be designed to disadvantage consumers who use those procedures.

Proposal D3

We agree with Proposal D3, because it would result in clarification of an important point that needs to be clear to financial services providers and other stakeholders.

Proposal E1

We agree that it should be made clear that RG 165.34(a) refers to types of complaints. Paragraph 102 of CP102 states that it became clear during the 2007 review of FICS monetary limits that different stakeholders had vastly differing views about what "the majority" referred to in RG 165.34(a) was. Proposal E1 is to clarify that this provision refers to types of complaints. If the term "majority" is to remain in the provision, it seems that it will also be necessary to clarify its meaning.

Proposal E6

We believe that insurers and financial services providers are best placed to provide the feedback requested in relation to professional indemnity insurance.

Proposal E7

Based on our experience, we believe that there would be no point in providing for referrals to EDR by financial services providers in any case where the consumer has not consented to the referral. A consumer who does not consent may, for example, not want to pursue his or her complaint, or be uncooperative in EDR processes. As referrals with consumer consent have been made in the past to predecessors of FOS, and referrals without consumer consent are not advisable, there may be a need merely for clarification rather than change.

Proposal F1

We agree that it would be desirable to require all EDR schemes to have harmonised provisions for jurisdiction in respect of complaints about financial services providers that go into external administration or cease to carry on business. In some cases, positive outcomes have been achieved, particularly where the administrator or liquidator has co-operated in the resolution of the dispute. However, our experience also indicates that it is not always appropriate for EDR schemes to devote resources to considering such complaints. As acknowledged in paragraph 161 of CP102, an EDR decision may not serve any purpose. It may be appropriate - again, to ensure that resources are allocated well – to suspend consideration of such complaints until the company's situation is clearer. This may be the case, for example, where a company is under administration, but has prospects of recovering. Accordingly, if the type of requirement referred to in Proposal F1 is introduced, we believe that EDR schemes should have the discretion to not consider, or suspend the consideration of, the complaints.

Proposal F5

We agree with Proposal F5 for the reasons stated in paragraphs 188 to 190 of CP102.

We note that paragraph 187 refers to the constitution of the ILIS division of FOS. This division does not have a constitution. Members of FICS had the veto power discussed, under Clause 29.3 of the FICS Constitution, but there is no equivalent provision in the FOS Constitution.

Proposal F6

FOS understands that, to operate an efficient and effective dispute resolution scheme, it needs to communicate clearly with complainants and members about the role, process and decisions of FOS. In deciding how it should communicate with these parties, FOS takes into account material that includes the research findings discussed in paragraphs 192 to 196 of CP102. In our view, there is no need for ASIC's policy to impose a requirement for clear communication of the type canvassed. We believe that EDR schemes are already subject to such a requirement and aware of research findings that may indicate how the requirement should be met. It may, however, be helpful for ASIC to reinforce the requirement through its policy.

Proposal G1

We agree with Proposal G1 for the reasons stated in paragraph 197 of CP102. The principle that a decision by an EDR scheme does not bind the consumer should be made clear. We think that Proposal G1 could be effected either by means of a statement in RG 139 or through a requirement for approval.

Proposal G2

We agree with Proposal G2 because we agree with the points advanced to support the proposal in paragraphs 203 to 211 of CP102.

Proposal G3

We agree with Proposal G3 for the reasons set out in paragraphs 212 to 223 of CP102.

Proposal G4

FOS would not itself decide to publish a report of the type referred to in Proposal G4 without first consulting stakeholders. As we have not consulted stakeholders on the proposal, we are not in a position to comment on it.

We note difficulties in the interpretation of the word "upheld". If Proposal G4 is implemented, we believe that guidance will need to be provided on the meaning of that word. For example, if a consumer receives compensation, but much less than the extent or quantum of his or her claim, would the claim be considered to be "upheld"?