



**ASIC**

Australian Securities & Investments Commission

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Our Reference: FOS TOR

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18 December 2009

Michael Lavarch  
Chair, FOS Board  
Financial Ombudsman Service  
L5, 31 Queen Street  
Melbourne VIC 3000

Dear Michael,

**Financial Ombudsman Service – Approval of the new Terms of Reference**

The Australian Securities and Investments Commission has assessed the Financial Ombudsman Service (FOS)'s submitted Terms of Reference (TOR) against the minimum requirements in the May 2009 update of Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes* (RG 139) and Regulatory Guide 165 *Licensing: internal and external dispute resolution* (RG 165) and approves the version of the TOR approved by the FOS Board on Friday 18 December 2009 (attached).

Approval of the TOR is subject to the following conditions:

1. FOS reviews the following as part of its first independent review of its operations:
  - (a) the effectiveness of the \$3,000 compensation cap for third party insurance at paragraph 4.2(vi);
  - (b) the extent to which FOS adequately covers small business complaints given the types of small business complaints excluded under paragraph 4.3 and the definition of "Small Business Insurance Product" at paragraph 14.1;
  - (c) the use and operation of the "exceptional circumstances" discretion for the purpose of time limits for bringing a complaint to FOS at paragraph 6.2;
  - (d) the extent to which the \$3,000 consequential loss cap restricts complainants from receiving appropriate awards under paragraphs 9.3(a) and (c); and
  - (e) whether FOS needs to improve its collection and reporting of complaints data under paragraphs 12.1 and 12.2, and if so how.

2. FOS collects data and makes it publicly available for each year, at least until the time of their first independent review, on the following:
  - (a) the number of complaints that are excluded from FOS because there is a more appropriate forum and the more appropriate forum that these complaints are referred to, against the total number of complaints handled under paragraph 5.2(a); and
  - (b) the number of complaints that fall outside FOS jurisdiction because of the operation of the 2 year time limit for bringing a complaint to FOS under paragraph 6.2(b).
3. FOS publishes annually on its website, data on the number and percentage of internal dispute resolution (IDR) complaints that are progressed to FOS in relation to each General Insurance stream member.
4. FOS publishes regular bulletins for the General Banking and Mutuals stream of FOS and recommendations (if relevant) and determinations for the Investments, Life Insurance and Superannuation (ILIS), General Insurance and Insurance Broker streams of FOS.
5. Item 1 of Schedule 1 is \$6,700 from 1 January 2010 and Item 1 of Schedule 2 is \$7,500 from 1 January 2012 so the life insurance monthly income stream cap is appropriately indexed.
6. The \$3,000 consequential loss cap is indexed by the higher of the increase in CPI or MTAW from 1 January 2015 and every 3 years thereafter under paragraph 9.8.
7. The words "a loss" are replaced with the words "the loss" at paragraph 6.2(a) so the six year time limit for bringing a complaint to FOS reads *FOS will not consider a Dispute unless the Dispute is lodged with FOS: (a) within six years of the date when the Applicant first became aware (or should reasonably have become aware) that they suffered the loss.*
8. Paragraph 13.1(a)(ii) reads, *Subject to paragraph b), where an Applicant lodges a Dispute with FOS, the Financial Services Provider:... (ii) must not pursue legal proceedings relating to debt recovery instituted prior to the lodging of the Dispute with FOS save to the minimum extent necessary to preserve the Financial Services Provider's legal rights and, in particular, must not seek judgment in those legal proceedings provided the Dispute is lodged before the Applicant takes a step in those legal proceedings beyond lodging a defence or defence and counterclaim (however described); ... while FOS is dealing with the Dispute.*
9. As early as possible in 2010, FOS consults with its stakeholders on appropriate procedures FOS will put in place to enable the early identification of complaints under paragraph 13.1 where legal proceedings have already commenced.

10. As early as possible in 2010, FOS consults with its stakeholders on the development of its Operational Guidelines explaining paragraph 13.1(a)(ii) -- where a scheme member has initiated legal proceedings relating to debt recovery and a complainant subsequently lodges a complaint with FOS.

As part of its Operational Guidelines on paragraph 13.1(a)(ii), FOS will:

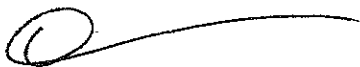
- (a) reflect a definition of "legal proceedings relating to debt recovery" that means *a proceeding commenced in court by a financial service provider to obtain a judgment for a debt, or for recovery of possession of an asset provided by the debtor or guarantor as security for a credit facility;*
  - (b) clarify that where it becomes aware that legal proceedings relating to debt recovery are on foot, it will treat the complaint as urgent and expedite the complaints handling process;
  - (c) require that where appropriate, a Senior FOS staff member must satisfy themselves that the complaint is within FOS' jurisdiction;
  - (d) clarify that it may address the issue of legal costs incurred by the scheme member in resolving the complaint where the financial service provider's contractual right to recover those costs or the amount of those costs becomes an issue in dispute;
  - (e) clarify that where a complainant lodges a defence and counterclaim and brings a complaint to FOS under paragraph 13.1(a)(ii), the complainant will not be excluded from FOS jurisdiction under paragraph 5.1(m); and
  - (f) clarify that a complainant will not be regarded as having taken a "step" in the legal proceedings relating to debt recovery if they attend a directions hearing or agree to consent orders of a procedural nature only being filed in those legal proceedings.
11. FOS collects data on paragraph 13.1(a)(ii) between 1 April 2010 and 30 June 2011 and provides this to ASIC by no later than Friday 15 July 2011 so an independent review can be undertaken of the operation of paragraph 13.1(a)(ii).

In particular, FOS will provide ASIC with data on:

- (a) the number of cases brought under paragraph 13.1(a)(ii);
  - (b) the total number of days files are open with FOS that relate to paragraph 13.1(a)(ii), and the time FOS takes to handle the paragraph 13.1(a)(ii) complaint from when the complaint is lodged with FOS until FOS assesses the complaint as being within jurisdiction;
  - (c) whether the paragraph 13.1(a)(ii) complainant is an individual or small business; and
  - (d) the number and types of paragraph 13.1(a)(ii) complaints FOS assesses as being outside its jurisdiction on the basis they were more appropriately dealt with in another forum.
12. As early as possible in 2010, FOS updates its Operational Guidelines to include examples of the types of actions FOS may take against a member that FOS "considers appropriate" under paragraph 13.7.
  13. FOS makes any other necessary changes to the new TOR as RG 139 and RG 165 are updated, including for consumer credit, margin lending and trustee companies that provide traditional trustee company services.

The approval of the FOS TOR means that the FOS TOR may commence operating from 1 January 2010 and the structures of FOS' predecessor schemes, the Banking and Financial Ombudsman Service, the Insurance Ombudsman Service, the Financial Industry Complaints Service, the Credit Union Dispute Resolution Centre and the Insurance Brokers Disputes Limited may be wound down in due course.

Yours sincerely,



Delia Rickard  
Senior Executive Leader, Financial Literacy & Consumers and Retail Investors  
ACT Regional Commissioner  
ASIC