



**ASIC**

Australian Securities & Investments Commission

## REPORT 182

# Feedback from submissions to the Financial Ombudsman Service Limited's new Terms of Reference

December 2009

### **About this report**

This report highlights the key issues that arose out of the submissions received on our targeted consultation of the Financial Ombudsman Service Limited (FOS)'s Terms of Reference (TOR) and details our responses to those issues.

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy. Please see Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes* and Regulatory Guide 165 *Licensing: Internal and external dispute resolution*.

# Contents

<b>Overview and consultation process</b> .....	<b>4</b>
Background to FOS Terms of Reference .....	4
About our consultation .....	7
Responses to our consultation .....	8
<b>A Additional data collection and publishing of data and FOS decisions</b> .....	<b>9</b>
Issues requiring additional data collection .....	9
Publication of complaints data .....	13
Publication of recommendations and determinations .....	15
<b>B Adequacy of FOS coverage</b> .....	<b>16</b>
Definition of 'Retail General Insurance Policy' .....	16
Time limit for bringing a complaint to FOS .....	17
<b>C Adequacy of FOS compensation caps</b> .....	<b>20</b>
Loss of indexation of the \$6,000 life insurance monthly income stream cap .....	20
Indexation of the \$3,000 consequential loss cap.....	21
<b>D Legal proceedings commenced by a scheme member before a complaint is lodged at EDR</b> .....	<b>22</b>
Background to TOR 13.1(a)(ii).....	22
Stakeholder consultation on proposed updated TOR 13.1(a)(ii) .....	24
New version of TOR 13.1(a)(ii) .....	26
Updated RG 139.53.....	29
<b>E Additional explanatory information</b> .....	<b>30</b>
'Where a dispute is lodged'.....	30
Deferred establishment fees, unjust or unconscionable consumer credit fees .....	30
Meaning of 'dealt with' .....	31
Process for exclusion of disputes from FOS' jurisdiction.....	31
Qualification of reasonableness .....	32
How interest is calculated .....	32
Expulsion of members for non-compliance .....	33
<b>Appendix 1: Version of the new TOR approved by ASIC</b> .....	<b>34</b>
<b>Appendix 2: Summary of grammatical and drafting changes to the new TOR</b> .....	<b>35</b>
<b>Key terms</b> .....	<b>38</b>
<b>Related information</b> .....	<b>41</b>

## Overview and consultation process

- 1 This report summarises the background and grounds on which we approved the Financial Ombudsman Service Limited (FOS)'s single Terms of Reference (TOR).
- 2 In this report, comments from stakeholders and our responses are grouped around the main issues raised by respondents:
  - (a) issues where we expect FOS will collect additional data so these issues can be more specifically explored when FOS conducts its first independent review, and publishing of certain data more generally and decisions (See Section A);
  - (b) issues relating to the adequacy of FOS coverage – the definition of 'Retail General Insurance Policy' for general insurance brokers and the time limit for bringing a complaint to FOS (See Section B);
  - (c) the adequacy of FOS compensation caps – indexation of the monthly life insurance cap and the consequential loss cap (See Section C);
  - (d) legal proceedings commenced before an EDR complaint is lodged (See Section D); and
  - (e) where further explanation may assist stakeholders to understand how the new TOR will operate (See Section E).

## Background to FOS Terms of Reference

### FOS merger and development of the FOS Terms of Reference

- 3 Under the *Corporations Act 2001* all Australian Financial Service (AFS) licensees who do business with retail clients must belong to an ASIC-approved external dispute resolution (EDR) scheme for disputes they cannot resolve in-house by their internal dispute resolution (IDR) process.
- 4 In March 2008, the Financial Ombudsman Service Limited (FOS) applied to ASIC for approval in accordance with the requirements in Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes* (RG 139). At that time, FOS was a new entity, formed by the merger of the Banking and Financial Services Ombudsman Limited (BFSO), the Financial Industry Complaints Service Limited (FICS) and the Insurance Ombudsman Service Limited (IOS). Each of these EDR schemes had previously been approved by ASIC and each had their own terms of reference.

- 5 On 16 May 2008, ASIC approved the FOS Constitution and FOS as an EDR scheme, subject to certain conditions of approval, including:
- that FOS submit its single set of rules and guidance, or Terms of Reference (TOR), to us by 1 July 2009 for approval so the new TOR can commence by 1 January 2010; and
  - that FOS conducts its first independent review within three years of commencing operations.
- 6 FOS commenced operations on 1 July 2008. On 1 January 2009, two more ASIC-approved EDR schemes joined FOS: the Insurance Brokers Disputes Limited (IBDL) and the Credit Union Dispute Resolution Centre Pty Limited (CUDRC).
- 7 When FOS first formed in March 2008, it provided dispute resolution services for up to 80% of Australian banking, insurance and investment disputes<sup>1</sup>. It is now likely that FOS provides dispute resolution services for closer to 90% of all Australian financial service industry complaints<sup>2</sup>.
- 8 On 3 June 2009, the draft TOR, that consolidate the five separate sets of rules and procedures of the pre-existing five EDR schemes, were submitted to ASIC for approval.
- 9 While the new TOR are with ASIC for approval, each stream of FOS is currently operating according to the pre-existing rules and guidance of each of its relevant predecessor scheme:
- (a) the General Banking stream of FOS, according to BFSO's rules;
  - (b) the General Insurance stream of FOS, according to IOS' rules;
  - (c) the Investments, Life Insurance and Superannuation (ILIS) stream of FOS, according to FICS' rules;
  - (d) the Mutuals stream of FOS, according to CUDRC's rules; and
  - (e) the Insurance Brokers stream of FOS, according to IBDL's rules.
- 10 The five predecessor schemes and their structures will eventually be wound down after the new TOR commence.

### **Consultation process adopted by FOS**

- 11 Before the draft TOR were approved by the FOS Board on 30 May 2009 and forwarded to us, FOS undertook an extensive process to develop the draft TOR in consultation with stakeholders by:

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<sup>1</sup> Minister for Superannuation & Corporate Law Press Release No 45, 10 July 2008.

<sup>2</sup> *EDR scheme merger*, FOS media release(30 August 2007): see

[http://www.fos.org.au/centric/home\\_page/news/media\\_releases.jsp](http://www.fos.org.au/centric/home_page/news/media_releases.jsp); and Productivity Commission's *Review of Australia's Consumer Policy Frameworks*, Transcript of 18 February 2008 (Sydney), p 813.

- (a) releasing an issues paper in August 2008 inviting written submissions and posting the 29 submissions received<sup>3</sup> on its website;
  - (b) releasing draft TOR, with explanatory guidelines in March 2009 inviting written submissions and posting the 38 submissions received<sup>4</sup> and the 23 responses to those submissions made by other stakeholders<sup>5</sup> on its website;
  - (c) undertaking 'town-hall-style' consultation forums with industry and consumer stakeholders across Australia, facilitated by an independent consultant, the Navigator Company Pty Ltd; and
  - (d) holding face-to-face meetings between the Chair of the FOS Board, the Chief Ombudsman (Colin Neave) and the independent consultant.
- 12 At the time the FOS Board approved the draft TOR, the FOS Board comprised of 9 members, who were appointed as 'transitional directors' until 31 May 2009:
- (a) an Independent Chair (Peter Daly);
  - (b) an Independent Representative (Michael Lavarch);
  - (c) 3 representatives from the consumer sector (Fiona Guthrie, Elizabeth Lanyon and Jenni Mack); and
  - (d) 4 representatives from industry (Russell McKimm, Kerrie Kelly, David Squire and Susan Upton).
- 13 From 1 June 2009, the composition of the FOS Board changed to comprise:
- (a) an Independent Chair (Michael Lavarch);
  - (b) 4 representatives from the consumer sector (Catriona Lowe, David Coorey, Jenni Mack and Dennis Nelthorpe); and
  - (c) 4 representatives from industry (Kerrie Kelly, Russell McKimm, David Squire and Brendan French).
- 14 The current industry FOS Board members have a diverse range of expertise and knowledge in the following industry sectors:
- (a) life, general and professional indemnity insurance industries (Kerrie Kelly);
  - (b) stockbroking and financial planning industries (Russell McKimm);
  - (c) life and general insurance, insurance broking and banking industries (David Squire); and

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<sup>3</sup> Copies of submissions to the FOS TOR issues paper can be viewed at:

[http://www.fos.org.au/centric/home\\_page/about\\_us/terms\\_of\\_reference\\_project\\_issues\\_paper\\_submissions.jsp](http://www.fos.org.au/centric/home_page/about_us/terms_of_reference_project_issues_paper_submissions.jsp).

<sup>4</sup> Copies of submissions to the draft TOR and explanatory guidelines can be viewed at:

[http://www.fos.org.au/centric/home\\_page/about\\_us/proposed\\_terms\\_of\\_reference\\_submissions.jsp](http://www.fos.org.au/centric/home_page/about_us/proposed_terms_of_reference_submissions.jsp).

<sup>5</sup> Copies of submissions in reply to other stakeholder's submissions to the draft TOR and explanatory guidelines can be viewed at: [http://www.fos.org.au/centric/home\\_page/about\\_us/proposed\\_terms\\_of\\_reference\\_submissions\\_in\\_reply.jsp](http://www.fos.org.au/centric/home_page/about_us/proposed_terms_of_reference_submissions_in_reply.jsp)

(d) banking industry (Brendan French).

15 On 18 December 2009, the FOS Board, as currently comprised, approved the final version of the TOR. ASIC has approved this as the new TOR (See Appendix 1), so it may commence by 1 January 2010.

## About our consultation

16 Our approval of the new TOR, in the context of the FOS Constitution, is in accordance with our regulatory guidance on dispute resolution, namely the minimum requirements and standards in RG 139, as updated in May 2009.

17 The new TOR may also need to be further updated to incorporate changes for:

- (a) consumer credit and margin lending that may flow from our Consultation Paper 112 – *Dispute resolution requirements for consumer credit and margin lending* (CP 112); and
- (b) trustee companies that provide traditional trustee company services that may flow from a consultation paper we intend to release early next year.

18 During October and November 2009, we corresponded and met with key FOS representatives (Colin Neave (Chief Ombudsman), Philip Field (Banking and Finance Ombudsman) and Alison Maynard (ILIS Ombudsman)) many times to discuss our initial comments and concerns with the view to systematically resolving as many issues as possible.

19 These discussions resulted in an updated version of the submitted TOR being developed, including minor marked-up changes.

20 This version of the submitted TOR (with minor marked-up changes) was circulated to a targeted group of stakeholders inviting comment. The targeted group of stakeholders included:

- (a) consumer representatives on our Consumer Advisory Panel (CAP)<sup>6</sup> and a few other consumer representatives with insurance and consumer credit expertise; and
- (b) industry associations – Australian Bankers Association (ABA), Australian Mutuals (ABACUS), National Insurance Brokers Association (NIBA), Insurance Council of Australia (ICA), Investment and Financial Services Association (IFSA), Financial Planning Association (FPA), Australian Finance Association (AFA) and the Stockbrokers Association of Australia (SAA).

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<sup>6</sup> More information about CAP and its membership is available at our FIDO website: <http://www.fido.gov.au/fido/fido.nsf/byheadline/ASIC%27s+Consumer+Advisory+Panel?openDocument>.

- 21 We held a round table discussion in early November 2009 with consumer representatives to discuss their comments and concerns so we could quickly receive feedback without written submissions having to be made.
- 22 We passed on all feedback to FOS by way of a summary table and further discussion on certain issues with Colin Neave, Philip Field, Alison Maynard and the then recently appointed Insurance Ombudsman, John Price<sup>7</sup>.
- 23 On 25 November 2009, we held a round table discussion with representatives from FOS, the Credit Ombudsman Service Limited (COSL), the Mortgage and Finance Association of Australia (MFAA) and the stakeholders mentioned at paragraph 20 (except for the AFA). At the meeting, attendees specifically discussed and canvassed views on a proposed updated version of paragraph 13.1(a)(ii), submitted TOR and RG 139.53 relating to the interaction between EDR and legal proceedings where a member has already commenced legal proceedings before a complaint is brought to EDR. This issue is discussed in more detail at Section D.

## Responses to our consultation

- 24 We received written submissions from all industry stakeholders except for the AFA.
- 25 We also received a written submission from an individual consumer who expressed concern about loss of indexation of the life insurance monthly income stream cap. This issue is discussed in more detail at Section C.
- 26 By way of general observation, many of the comments received were about fixing grammatical errors or tightening the drafting of the TOR. We have adopted many of these changes, as summarised at Appendix 2.

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<sup>7</sup> *New General Insurance Ombudsman appointed*, FOS media release (5 November 2009): see [http://www.fos.org.au/centric/home\\_page/news/media\\_releases.jsp](http://www.fos.org.au/centric/home_page/news/media_releases.jsp)

## A Additional data collection and publishing of data and FOS decisions

### Key points

Industry associations and consumer representatives raised several issues about accessibility and coverage of FOS.

FOS has agreed to collect data about these issues so they can be more specifically explored when FOS conducts its first independent review of its operations within 3 years from commencing operation (i.e. by 1 July 2011).

ASIC recognises that even if FOS collects data on some of these issues, to gain a better understanding, we may also need to collect data (where possible) from other complementary sources.

FOS has agreed to:

- collect and publish data more generally on a number of specific areas and
- publish its decisions, whether this be for key individual complaints or grouped by issues in bulletins.

### Issues requiring additional data collection

- 27 Industry associations and consumer representatives both raised four issues about the accessibility and coverage of FOS.
- 28 FOS has agreed to collect data about these issues so they may be more specifically explored when FOS conducts its first independent review of its operations within 3 years from commencing operation, that is by 1 July 2011.

#### **Issue 1: \$3,000 compensation cap for third party insurance claims (TOR 4.2(vi))**

- 29 Paragraph 4.2(vi), TOR on which we consulted, specifies a \$3,000 compensation cap for third party insurance claims. This monetary amount was carried over from IOS' terms of reference.
- 30 Consumer representatives expressed concern that this cap is too low and denies consumers reasonable compensation given the nature, extent and value of these types of complaints. Consumer representatives expressed the view that this cap should be at least \$4,000 to better reflect the needs of these consumers.

- 31 FOS has agreed to collect data on the number of complaints where the compensation sought exceeds \$3,000 and the extent to which the \$3,000 cap is exceeded (by comparing against the amount claimed and/or the amount FOS would have awarded if there was no maximum cap), to assess whether this compensation cap adequately covers the vast majority of these types of complaints.
- 32 We expect that this data may assist in reviewing the adequacy of this \$3,000 compensation cap during FOS' first independent review.

**Issue 2: Exclusions for small business insurance complaints (TOR 4.3) and the definition of 'Small Business Insurance Product' (TOR 14.1)**

- 33 Under paragraph 4.3, TOR on which we consulted, FOS can consider a complaint about a small business general insurance policy if the small business general insurance policy meets the definition of 'Small Business Insurance Product' at paragraph 14.1.
- 34 Consumer representatives expressed concern that the definition of 'Small Business Insurance Product' for general insurers excludes a number of types of small business claims from FOS jurisdiction, particularly complaints about 'business interruption'.
- 35 Consumer representatives noted that in the wake of the Victorian bushfires, many small businesses reliant on tourism in areas such as Marysville, Healesville, Alexandra and Yea, lost their business and had to claim on their insurance policy for 'business interruption' and that access to the General Insurance stream of FOS will be denied under the TOR on which we consulted for these types of complaints.
- 36 We note that this exclusion is one that previously existed under IOS' terms of reference.
- 37 FOS has agreed to collect data on the number and types of small business claims excluded under (b) of the definition of 'Small Business Insurance Product' to assess the extent to which FOS adequately covers these types of complaints. We expect that this data may assist FOS in reviewing the adequacy of its coverage during its first independent review.
- 38 We recognise that even if FOS collects data on this issue, it may not give a complete picture of the number of small business insurance complaints that are excluded from jurisdiction. This is because there may be instances where a small business does not lodge a complaint with FOS about a 'Small Business Insurance Product' because they already consider their complaint to be outside FOS jurisdiction.

39 We intend to collect data on this issue from other sources, where possible, to complement the data FOS collects.

### **Issue 3: 'Exceptional circumstances' for the purpose of time limits for bringing a complaint to FOS (TOR 6.2)**

40 Paragraph 6.2, TOR on which we consulted, allows for flexibility in the strict application of the time limits for bringing a complaint to FOS in 'exceptional circumstances'.

41 The time limits that may be modified in 'exceptional circumstances' at paragraph 6.2, are the earlier of the following:

- (a) six years from when the consumer or investor first became aware (or should have reasonably become aware) they suffered **a** loss; and
- (b) within 2 years of the receipt of a final IDR response, where prior to lodging the complaint with FOS, the complainant received a final IDR response.

42 Paragraph 6.2, TOR on which we consulted, including the 'exceptional circumstances' discretion, reflects our minimum requirements in RG 139.174, except to the extent that 'a loss' is referred to instead of 'the loss'. We discuss the 'a' versus 'the' loss issue at Section B.

43 Consumer representatives and industry organisations both expressed concerns about when the 'exceptional circumstances' discretion would be applied by FOS.

44 Consumer representatives expressed concern that even if invoked, the 'exceptional circumstances' discretion would rarely be exercised to allow complainants access to FOS when a strict application of the time limits for bringing a complaint would be unfair or unjust.

45 In comparison, industry associations expressed concern that this exception would cause uncertainty and allow a complaint to be handled significantly after either the 2 or 6 year time limit expires.

46 FOS has agreed to collect data on:

- how often and why the 'exceptional circumstances' exception is invoked;
- how often and why it is, or is not, granted by FOS; and
- how long after the otherwise applicable limitations period complaints are received and handled by FOS under the 'exceptional circumstances' provision.

47 We expect that collection of this data will enable a better assessment of the application and use of the 'exceptional circumstances' discretion when FOS undertakes its first independent review.

**Issue 4: \$3,000 cap for consequential loss (TOR 9.3(a) and (c))**

48 Paragraphs 9.3(a) and (c), TOR on which we consulted, specifies a \$3,000 compensation cap for consequential loss. Consequential loss is defined at paragraph 14.1.

49 Consumer representatives expressed concern that this cap will significantly restrict the amount of compensation FOS can award.

50 FOS expressed concern about the response of Professional Indemnity Insurers if this cap is raised.

51 It should be noted that FOS advise that:

- (a) the \$3,000 consequential loss cap, while not being based on any particular statistical data, has been thoroughly considered by the FOS Board and has been arrived at as a compromise;
- (b) in the past, the BFSO made awards for loss other than direct loss, although there was no specific delineation by way of a separate 'cap' or monetary limit for consequential loss. The BFSO found that the majority of consequential loss matters dealt with generally came in at under \$3,000; and
- (c) while the other predecessor schemes of FOS did not specifically award consequential loss, this was not written into their rules.

52 FOS has agreed to collect data on the number of times and the extent to which the consequential loss cap restricts complainants from receiving:

- the full amount they claim; and
- the full amount that FOS considers would be appropriate to award (where higher than the cap) for the different types of complaints that FOS handles in each industry or industries.

53 We expect that the collection of this data will enable an assessment of the effectiveness of the \$3,000 cap in providing compensation that reflects the vast majority of types of complaints in each industry or industries given the nature, value and extent of consumer transactions in those industries, when it undertakes its first independent review.

## Publication of complaints data

### FOS' publication of complaints data (TOR 12.2)

- 54 Paragraph 12.2, TOR on which we consulted, specifies that FOS will comprehensively summarise and analyse the types of data it will collect in paragraph 12.1 and will report, amongst other things, statistical information about:
- the number of complaints referred to FOS against each FOS member;
  - the number of complaints closed against each FOS member; and
  - the outcome of those complaints against each FOS member.
- 55 Consumer representatives expressed concern that paragraph 12.2 should more specifically state the types of data that FOS will publish to reflect the types of data FOS will collect under paragraph 12.1.
- 56 We note that the types of data FOS states it will publish at paragraph 12.2 is not an exhaustive list.
- 57 We intend to continue to work with FOS on how FOS can improve its data collection and reporting to better meet the needs of stakeholders.
- 58 We expect that as part of FOS' first independent review, it will consult further with key stakeholders on how its reporting is meeting stakeholder needs. In doing so FOS can assess whether this issue should be explored in more detail when FOS undertakes its first independent review.

### Collection and reporting of other data

- 59 FOS has agreed to collect and report data for each year, at least until the time of FOS' first independent review, on three particular issues in addition to the types of data specifically mentioned at paragraphs 12.1 and 12.2:

#### Issue 1: More appropriate forum (TOR 5.2(a))

- 60 Paragraph 5.2(a), TOR on which we consulted, allows FOS a discretion to exclude complaints where there is a more appropriate place to deal with the dispute, that is a court, tribunal, another ASIC-approved EDR scheme or the Privacy Commissioner.
- 61 Consumer representatives expressed concern that it is not easy for consumer representatives to appeal a jurisdictional decision on paragraph 5.2(a) grounds after a decision has been made.
- 62 FOS disagreed that it is difficult to appeal a jurisdictional decision to refer a complaint to another more appropriate forum. FOS has agreed to collect data to report the number of complaints that are excluded under paragraph 5.2(a)

and the more appropriate forums that complaints are referred to, against the total number of complaints handled.

63 We expect that reporting of this data on an annual basis, at least until the time of FOS' first independent review, will assist in giving a more accurate picture of how and to where complainants are redirected.

**Issue 2: The two year time limit for bringing a complaint to FOS from when the final response is given at IDR (TOR 6.2(b))**

64 As discussed at 41, paragraph 6.2(b), TOR on which we consulted, allows a 2 year time limit for bringing a complaint to FOS where a final response is given by the FOS member.

65 Consumer representatives expressed concern that there may be a significant number of complainants who lose access to FOS due to the operation of the 2 year time limit.

66 FOS has agreed to collect data and report on this issue for each year, at least until the time of FOS' first independent review, so the number of complainants who fall outside its jurisdiction because of the 2 year time limit may be better understood.

67 We have also asked consumer credit legal centres (such as CCLC NSW and CALC (Vic)) and Legal Aid to collect data on any instances where the operation of the new 2 year time limit has denied their client access to FOS.

**Issue 3: The number of general insurance complaints made at IDR and the number of complaints handled at EDR (by type of complaint)**

68 IOS, now the General Insurance stream of FOS, used to publish data in its annual report that compared the number and percentage of IDR complaints that are referred to EDR by each scheme member.

69 Consumer representatives expressed concern that this useful method of reporting will be lost for the General Insurance stream, as FOS has not continued to report in this way in its 2008–2009 annual report.

70 FOS has agreed to continue to publish this data on its website.

71 We expect that this reporting may also include a breakdown of complaints to indicate the number and percentage of complaints resolved at IDR *by the end of the next business day on which the complaint is received* under Regulatory Guide 165 *Licensing: internal and external dispute resolution* (RG 165).

72 We do not consider this will be difficult as AFS licensees are required to record the number of complaints resolved *by the end of the next business day on which the complaint is received*.

## Publication of recommendations and determinations

- 73 Consumer representatives expressed concern that the TOR on which we consulted, are silent on how FOS will report its recommendations and determinations. Consumer representatives were of the view that public reporting of FOS recommendations and determinations is crucial to understanding how FOS makes decisions and applies particular laws and principles to certain factual situations.
- 74 The streams of FOS currently report differently:
- (a) the BFSO, now the General Banking stream of FOS, publishes quarterly bulletins that highlight trends in the types of complaints received and how the General Banking stream will generally approach issues when handling complaints that have similar factual circumstances; and
  - (b) the IOS, now the General Insurance stream of FOS and FICS, now the ILIS stream of FOS, publish decisions, although with personal information de-identified.
- 75 FOS has agreed to:
- (a) continue to publish bulletins for the General Banking and Mutuals streams of FOS, because the nature of the types of complaints received by these two streams are most suited to bulletins; and
  - (b) continue to publish recommendations (if relevant) and determinations for the ILIS stream, General Insurance streams of FOS and also for the Insurance Brokers stream of FOS.
- 76 We expect that FOS will consult with us and key stakeholders before they change their policy on publishing recommendations and determinations.

## B Adequacy of FOS coverage

### Key points

Stakeholders raised two issues about the adequacy of FOS coverage:

- changing the definition of 'Retail General Insurance Policy' so where a general insurance broker acts as agent for a general insurer, access to FOS for the types of complaints against a general insurance broker will be limited to the types of complaints against a general insurer; and
- the time limit for bringing a complaint to FOS.

### Definition of 'Retail General Insurance Policy'

- 77 NIBA, the peak industry body representing general insurance brokers, requested that the definition of 'Retail General Insurance Policy' at paragraph 14.1, TOR on which we consulted, be amended so the definition of 'Retail General Insurance Policy' is consistent with the definition of 'Retail General Insurance Product'.
- 78 We understand that this change would limit the range of policies in relation to which complaints can be brought against general insurance brokers, who act as the agent of the insurer, to the same range of policies in relation to which complaints can be brought against a general insurer.
- 79 If this were to happen, FOS coverage would be lost for small business insurance policy complaints. This is because these types of complaints can currently be brought to the General Insurance Brokers stream of FOS (previously IBDL), although not to the General Insurance stream of FOS (previously IOS).
- 80 We have decided not to adopt this change because when FOS invited submissions to its TOR in its August 2008 issues paper, it set clear parameters around the development of the draft TOR, including that they:
 

'must at a minimum [be] at the same standard of [its] predecessor schemes and that in some cases may be improved'.

See: FOS Issues Paper, 14 August 2008, p 8.
- 81 If NIBA's requested change was adopted, for complaints involving small business policies, where a general insurance broker is involved, FOS would not be able to handle the types of complaints that relate to small business insurance policies as listed in (b) of the definition of 'Small Business

Insurance Product'. We consider that this would be a loss of coverage that is currently available.

## Time limit for bringing a complaint to FOS

- 82 When we updated the time limits for bringing a complaint to EDR in RG 139 in May, the time limit for bringing a complaint to EDR at RG 139.173 was:
- (a) six years from the date that the consumer or investor became first aware (or should reasonably have become aware) that they suffered the loss; or
  - (b) two years from when the financial service provider provides a 'final response' at IDR,
- unless 'exceptional circumstances' apply.
- 83 We acknowledge that our drafting of our minimum requirements in RG 139.173 could be improved. We intend to tighten the drafting of RG 139.173 to clarify that the minimum time limit for bringing a complaint to EDR will be the earlier of either:
- (a) six years from the date that the consumer first became aware (or should have reasonably become aware) that they suffered the loss; and
  - (b) two years from when the financial service provider provides a 'final response' at IDR,
- unless 'exceptional circumstances' apply.
- 84 We also intend to clarify in RG 139 that where no 'final response' is given, or a final response is given in a manner which does not meet the minimum requirements in RG 165, the 6 year time limit will apply.
- 85 We note that FOS at paragraph 6.2, TOR on which we consulted, seeks to replace the words 'the loss' with 'a loss' so the six year time limit will be *six years from the date that the consumer first became aware (or should have reasonably become aware) that they suffered a loss*.
- 86 We understand that FOS' key reasons for this preference in wording are:
- (a) to ensure that the 6 year time limit is aligned with law, particularly where a cause of action will arise even without there being loss (for example, in the case of a breach of contract) and in the case of tort or misleading conduct from the date that loss or damage is incurred—not the loss or damage, just loss or damage, even if the plaintiff was unaware of the tort, let alone the damage; and

- (b) to clarify that time starts ticking at the earliest point, not when the complainant is able to describe the full extent of their loss, that is down to the last dollar and cents, which may only be possible at a later point in time under 'the loss' (for example where a complainant sees a lawyer who assesses the precise nature of their loss) or not at all in cases where:
  - (i) a complaint relates to a salary continuance insurance claim and the period of alleged disability has not come to an end; or
  - (ii) the extent of the full loss is not yet realised in investment disputes, due to market movement.

- 87 Consumer representatives expressed concern that this seemingly small change in drafting from 'the' to 'a' loss results in a shorter timeframe than currently required by RG 139.173. This would have the effect of excluding access to FOS when the 6 year time limit would not have otherwise expired.
- 88 We are of the view that whichever words are adopted that is 'a loss' or 'the loss', issues may still arise depending on how either set of words are interpreted and applied.
- 89 FOS' stated intention to model its approach to time limits for bringing a complaint on the approach to time limitations at law provides guidance on the issue.
- 90 The law in relation to when a cause of action arises (that is accrues) is highly technical and complicated, and depends on which type of cause of action is in question. This makes it difficult to generalise about the law in this area.
- 91 FOS has agreed to adopt the words 'the loss', but clarify that 'the loss' means:  
when a head of damage is able to be identified and described, although the full extent of the damage need not be fully particularised at the time the complaint is lodged.
- 92 Under this approach, the 6 year time limit will start to run once the complainant is able to identify and describe a head of loss, or should be reasonably able to do so. However, the complainant need not be able to fully state their precise amount of loss.
- 93 We have adopted this approach because:
- (a) it addresses FOS' concern at 86(b);
  - (b) we disagree with FOS' interpretation of how the words 'a loss' will apply, compared with the words 'the loss' as an overly narrow interpretation of 'a loss' (that is time starts to run from the date *any* loss is suffered, no matter how trivial and no matter whether it can be particularised or quantified). Such an interpretation is likely to exclude certain types of complaints which we consider should be able to be

handled by FOS, so as not to be inconsistent with the general approach to limitation periods at law. For example, under the law:

- (i) for misleading and deceptive conduct, time starts to run (that is the cause of action accrues) only from when the loss is ascertainable;
- (ii) for breach of contract, time starts to run when the breach is committed (whether or not damage is quantifiable). Where there is a failure to perform a continuing obligation, every daily breach gives rise to a separate cause of action. Where more than one breach occurs, for example where a contract is a loan payable by instalments, every failure to pay a due instalment gives rise to a separate cause of action; and
- (iii) for torts that require proof of damage (e.g. negligence) - if there is more than one head of damage caused by an event, a separate cause of damage accrues each time damage is suffered; and

94 We consider that in applying the 6 year time limit, FOS should generally adopt a broad approach consistent with that the courts adopt in applying such time limits.

## C Adequacy of FOS compensation caps

### Key points

An individual consumer raised concerns about loss of indexation of the \$6,000 life insurance monthly income stream cap that has already been agreed to by FICS.

Consumer representatives expressed concern about the low monetary amount of \$3,000 for the consequential loss compensation cap and that this cap would not be indexed under the TOR.

We require that both compensation caps be appropriately indexed.

### Loss of indexation of the \$6,000 life insurance monthly income stream cap

- 95 Item 1 of Schedules 1 and 2 of the TOR on which we consulted, provides that the life insurance monthly income stream cap will be \$6,000 from 1 January 2010 until it is indexed by the higher of CPI or Male Average Total Weekly Earnings (MATWE) from 1 January 2015 and every 3 years thereafter.
- 96 We understand that the \$6,000 life insurance monthly income stream limit was set at \$6,000 in 2002 and has not been increased since then.
- 97 We received a written submission from an individual consumer who expressed concern that the \$6,000 life insurance policy monthly income stream cap would remain until 2015 despite paragraph 58, of the 1 July 2008 FICS Rules stating that FICS will index its \$6,000 life insurance monthly income stream amount by the increase in CPI every 3 years from 1 July 2010.
- 98 We note that paragraph 58 of the 1 July 2008 FICS Rules was developed after extensive stakeholder consultation when FICS released a consultation paper on *Review of the FICS Monetary Limits* in May 2007. At the time, FICS noted that if the \$6,000 monthly limit was adjusted for the increase in CPI, it would be \$6,750 per month on 31 March 2007 and \$7,000 on 30 June 2008.
- 99 The individual consumer who brought this issue to our attention noted that:
- (a) FOS set clear parameters around the development of the draft TOR, in its issues paper, including that the TOR:

must at a minimum [be] at the same standard of [its] predecessor schemes and that in some cases may be improved.

See: FOS Issues Paper, 14 August 2008, p 8;

- (b) the draft TOR, with guidelines that FOS released for consultation in March 2009 had the life insurance monthly income stream cap at \$7,500 from 1 January 2012; and
- (c) a number of key stakeholders, including the ICA and the Consumer Action Law Centre, in their submissions to FOS also endorsed the goal that the TOR should leave no consumer worse off compared to the outcome they would have been under the existing five separate sets of terms of reference

- 100 FOS has agreed to update the TOR on which we consulted, at Item 1 of both Schedules 1 and 2 to reflect this indexation, so the life insurance policy monthly income stream cap will be:
- \$6,700 from 1 January 2010 (at Item 1, Schedule 1); and
  - \$7,500 from 1 January 2012 (at Item 1, Schedule 2).
- 101 The \$7,500 cap will also be indexed by the higher of the increase in CPI or MTAW from 1 January 2015 and every 3 years thereafter.

## Indexation of the \$3,000 consequential loss cap

- 102 The TOR on which we consulted, at paragraph 9.3(a), provides that FOS may award consequential loss up to a maximum of \$3,000.
- 103 We note that this cap will not be indexed by the higher of the increase in CPI or MTAW from 1 January 2015 and every 3 years thereafter under paragraph 9.8, because it is not included in Schedule 2.
- 104 Consumer representatives expressed concern that this cap should be indexed, even though its effectiveness will be the subject of review when FOS undertakes its first independent review (See paragraphs 48 to 51).
- 105 FOS has agreed to index the consequential loss cap by updating paragraph 9.8, so it clarifies that the consequential loss cap at paragraph 9.3(a) will also be indexed by the higher of the increase in CPI or MTAW from 1 January 2015 and every 3 years thereafter.

## D Legal proceedings commenced by a scheme member before a complaint is lodged at EDR

### Key points

Paragraph 13.1 reflects updated RG 139.53 and requires a FOS member to not pursue legal proceedings instituted prior to the lodging of a complaint with FOS, save to the minimum extent necessary to preserve their legal rights.

Industry organisations such as the ABA and ABACUS expressed strong concerns about paragraph 13.1, TOR on which we consulted, because it would create uncertainty, increase member costs and there would be no guarantee that FOS' handling of a complaint would achieve an outcome.

Consumer representatives on the other hand, expressed strong views that consumer access to FOS be retained.

We consulted more broadly on paring back paragraph 13.1 and RG 139.53 to more appropriately balance all competing stakeholder concerns.

After much negotiation and compromise, a new paragraph 13.1 was developed and will be included in the new TOR.

ASIC intends to update RG 139.53 to better reflect a pared back version of paragraph 13.1 which will commence from 1 January 2010.

### Background to TOR 13.1(a)(ii)

106 When we updated RG 139 in May 2009, we had in mind the imminent transfer of responsibility for credit to the Australian Government. This led to the inclusion in RG 139 of paragraph 139.53 that states:

Where legal proceedings have already commenced and a complainant takes their complaint to an EDR scheme, the terms of reference must require the member to not pursue the legal proceedings beyond the minimum necessary to preserve its legal rights.

107 Paragraph 13.1, TOR on which we consulted, reflects RG 139.53 and requires that:

*(a) Subject to paragraph (b), where an Applicant lodges a complaint with FOS, the Financial Service Provider:...*

*(ii) must not pursue legal proceedings instituted prior to the lodging of the Dispute with FOS save to the minimum extent necessary to preserve the Financial Service Provider's legal rights and, in particular, must not seek judgment in the proceedings...,*

*while FOS is handling the complaint.*

- 108 Before the update of RG 139 in May 2009, we were silent on the issue of access to EDR once legal proceedings had commenced. Such access occurred with COSL, where the complaint involved financial hardship<sup>8</sup>, but there was no such access to FOS (or any of its predecessor schemes). Complainants were excluded from accessing FOS' predecessor schemes where legal proceedings had already commenced.
- 109 In making the change to RG 139, we were responding to the situation in consumer credit under the *Uniform Consumer Credit Code* whereby in Victoria and NSW, complainants can take a hardship application to the relevant state Tribunal (that is the Victorian Civil and Administrative Tribunal (VCAT) or the Consumer Trader and Tenancy Tribunal (CTTT) in NSW), even where the lender has already commenced legal proceedings in a Court to recover an outstanding debt or recover possession of an asset provided as security for a loan. The Court proceeding will be stayed whilst VCAT or the CTTT exercises its exclusive jurisdiction to deal with the hardship issues<sup>9</sup>.
- 110 Consumer representatives were particularly keen to retain an equivalent right at EDR, given the loss of access to these Tribunals under the National Consumer Credit regime, and particularly because many consumers do not realise they have a problem, nor do they seek assistance until they are served with a writ or statement of claim.
- 111 During our consultation on the TOR, a number of industry organisations, in particular ABACUS and the ABA, raised strong concerns about paragraph 13.1:
- (a) paragraph 13.1 will create uncertainty, increase member costs and will cause problems where the complaint goes through the FOS process and FOS is unable to resolve the complaint (ABACUS); and
  - (b) paragraph 13.1 will increase member costs, cause undue delay (as FOS can take more than 6 months and up to 3 years to handle a complaint) and should be amended to entitle members to institute legal proceedings to obtain any necessary injunctions or interim orders necessary to preserve its assets which would otherwise be lost or diminished in value without court orders (ABA)<sup>10</sup>.

<sup>8</sup> Under Rule 34(n), 5<sup>th</sup> edition of COSL's Rules (effective 20 August 2009), COSL is able to exclude complaints from COSL's jurisdiction where the member has already commenced legal proceedings, unless: (1) the complainant is reasonably seeking to vary a loan agreement on hardship grounds; (2) the legal proceedings have been discontinued; or (3) both the complainant and member consent in writing to the complaint being considered by COSL.

<sup>9</sup> See for example: *Wade v GE Mortgage Solutions Ltd* [2006] VCAT 1649 (16 August 2006); and *Zaparenkov v Perpetual Trustees Vic Ltd* [2006] VCAT 2147 (26 October 2006).

<sup>10</sup> The ABA's submission to ASIC's consultation on the FOS TOR (19 November 2009), p 10.

- 112 On reflection, we consider that when we updated RG 139 in May 2009, RG 139.53 was drafted too broadly. However, we are of the view that there is still a need for limited access to EDR in the very early stages of debt recovery proceedings.
- 113 This need is confirmed by statements in the explanatory memoranda to the National Consumer Credit legislation that stress that wherever possible and appropriate complaints should be resolved at IDR and EDR, rather than at court<sup>11</sup>.

### Stakeholder consultation on proposed updated TOR 13.1(a)(ii)

- 114 On 25 November 2009, stakeholders met to discuss a proposed new paragraph 13.1(a)(ii), developed by FOS which stated that:

*(a) Subject to paragraph (b), where an Applicant lodges a complaint with FOS, the Financial Service Provider:...*

*(ii) must not pursue legal proceedings instituted prior to the lodging of the Dispute with FOS save to the minimum extent necessary to preserve the Financial Service Provider's legal rights and, in particular, must not seek judgment in the proceedings. Where the Applicant has taken no steps beyond lodging a defence (however described) in the proceedings, and there is no other reason for FOS to refuse to consider the Dispute, FOS will consider the Dispute. Where the Applicant has taken steps after lodging a defence in the proceedings, FOS may consider the Dispute or exercise its discretion under paragraph 5.2 and refuse to consider the Dispute;...*

*while FOS is dealing with the Dispute.*

- 115 Table 1 summaries the key comments and concerns expressed by attendees at the 25 November 2009 meeting about the version of paragraph 13.1(a)(ii) at 114.

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<sup>11</sup> 'Wherever possible, parties will be encouraged to resolve disputes without resorting to litigation. It is expected that courts would generally only be utilised where IDR and ER processes have not resolved the matter, or where EDR is considered inappropriate': Explanatory Memoranda to the National Consumer Credit Protection Bill, introduced to Parliament on 25 June 2009, at 4.9.

**Table 1: Key comments and concerns about proposed new paragraph 13.1(a)(ii)**

No	Issue about paragraph 13.1	Key comments and concerns
1	Scope of paragraph 13.1(a)(ii)	<p><b>Consumer representatives:</b></p> <p>Paragraph 13.1(a)(ii) should apply broadly, not just to consumer credit, as there are instances where financial advisers sue to recover fees before a complainant can complain to FOS.</p> <p>Paragraph 13.1(a)(ii) is also critical in the consumer credit context given the loss of access to Tribunals under the National Consumer Credit regime.</p> <p><b>ICA:</b></p> <p>It should be clarified that paragraph 13.1(a)(ii) is limited to credit.</p> <p><b>ABA:</b></p> <p>Paragraph 13.1(a)(ii) should be limited to consumer credit regulated by the National Consumer Credit Protection Act (NCCP Act) (that is not apply to short-term lending, small business loans, etc).</p> <p><b>COSL and MFAA:</b></p> <p>Paragraph 13.1(a)(ii) should also cover responsible lending.</p> <p><b>COSL:</b></p> <p>COSL is currently able to handle hardship complaints where the lender has already initiated legal proceedings up until judgment. In COSL's experience:</p> <ul style="list-style-type: none"> <li>• one in three complaints that are lodged with COSL concern borrowers who are experiencing severe mortgage stress or who are losing their homes. It is anticipated that this trend will continue for some time.</li> <li>• complainants in financial hardship that come to COSL do not have the confidence nor funds to pursue a hardship application in court and often are in denial of their predicament and do not seek assistance until they have been served with a default notice or statement of claim.</li> <li>• in over 80% of financial hardship applications received by COSL, legal proceedings have been commenced.</li> <li>• COSL is able to deliver positive outcomes for all parties in approximately 40% of all hardship cases received. There is also virtually no incidence of borrowers defaulting again after a hardship arrangement has been agreed to using COSL.</li> </ul>
2	Costs to members	<p><b>ABA and ABACUS:</b></p> <p>Members will have to bear the costs of legal proceedings if a complainant is able to complain to FOS at any stage of the legal proceedings.</p> <p><b>Consumer representatives:</b></p> <p>There will be no cost to industry because costs can be addressed as part of the handling of the complaint at FOS.</p>

No	Issue about paragraph 13.1	Key comments and concerns
3	Certainty for members	<p><b>ABACUS:</b></p> <p>ABACUS members seek certainty and this could be achieved by agreeing on a cut off point in the legal proceedings at which a complainant will not be able to access FOS.</p> <p>This cut off point could be where the complainant has filed a defence.</p> <p><b>Consumer representatives:</b></p> <p>The cut off point for access to FOS would need to be after the filing of a statement of claim as eight out of ten clients who receive assistance from Legal Aid Queensland and who are issued with a statement of claim are not aware they can complain to FOS.</p> <p>Agencies such as CCLC NSW or Legal Aid assist complainants to file a defence to ensure that a default judgment is not issued. So the cut off point should be after filing a defence.</p> <p><b>COSL:</b></p> <p>The cut off point should be up to judgment, which is how COSL currently operates.</p>

## New version of TOR 13.1(a)(ii)

- 116 As a result of the 25 November 2009 meeting, most attendees, except for the ABA, who advised that they would need to consult further with their members, agreed to an updated version of paragraph 13.1(a)(ii).
- 117 This updated version of paragraph 13.1(a)(ii) would be limited to where a scheme member initiates 'legal proceedings relating to debt recovery' in court and where a complainant takes no step beyond lodging a defence.
- 118 The new paragraph 13.1(a)(ii) would state that:
- (a) Subject to paragraph (b), where an Applicant lodges a complaint with FOS, the Financial Service Provider:...*
- (ii) must not pursue legal proceedings relating to debt recovery instituted prior to lodging of the Dispute with FOS save to the minimum extent necessary to preserve the Financial Service Provider's legal rights and, in particular, must not seek judgment in the proceedings, provided that the Dispute is lodged before the Applicant takes a step in the legal proceedings beyond lodging a defence (however described);*
- or...*
- while FOS is dealing with the Dispute.*

- 119 Whilst not all of its members necessarily agreed with the broad scope of new paragraph 13.1(a)(ii), after consulting with them, the ABA sought some additional parameters around how new paragraph 13.1(a)(ii) will operate.
- 120 By the end of our negotiations on paragraph 13.1(a)(ii), these additional parameters primarily related to:
- (a) clarifying that ‘legal proceedings relating to debt recovery’ 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) clarifying that FOS will consult with stakeholders on developing appropriate procedures to enable the early identification of paragraph 13.1 complaints where legal proceedings have already been commenced by a scheme member;
  - (c) clarifying that once FOS becomes aware that legal proceedings relating to debt recovery are on foot, FOS will treat the complaint as urgent and expedite the complaint handling process;
  - (d) clarifying that where appropriate, a senior FOS staff member must satisfy themselves that the complaint is within FOS’ jurisdiction; and
  - (e) clarifying that FOS 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.
- 121 FOS has agreed to adopt the additional parameters at (a) to (e) of 120 (inclusive) and will discuss these additional parameters in more detail in its Operational Guidelines.

### **Review of the operation of new 13.1(a)(ii)**

- 122 The ABA also suggested that scheme members and FOS collect data between 1 January 2010 and 31 December 2010 and forward this data to ASIC, so an independent review of the operation of paragraph 13.1(a)(ii) may be conducted from 1 January 2011.
- 123 FOS has agreed to collect data from 1 April 2010, as this is the earliest time from which their new database system may be updated to collect data on the following:
- (a) the number of cases brought to FOS under new paragraph 13.1(a)(ii);
  - (b) the total number of days files are open with FOS that relate to new paragraph 13.1(a)(ii), and the time FOS takes to handle the new paragraph 13.1(a)(ii) complaint until FOS assesses the complaint as within jurisdiction;

- (c) whether new 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 assess as being outside its jurisdiction on the basis they were more appropriately dealt with in another forum.

124 FOS has also agreed to continue to collect the data mentioned at 122 until the end of 30 June 2011.

### **Situations where a defence and counterclaim are filed by the complainant**

125 As a defence and counterclaim are often filed simultaneously by a complainant in response to a writ or statement of claim, we sought to clarify with FOS that paragraph 13.1(a)(ii) will also include these situations.

126 Following further discussions with ASIC, FOS agreed to update paragraph 13.1(a)(ii), so it is clear that a complainant may also access FOS where they have lodged a defence and counterclaim, not just a defence in respect of the legal proceedings relating to debt recovery proceedings.

127 In order to make this workable, FOS has agreed to clarify in its Operational Guidelines that if the complainant lodges a defence and counterclaim, they will not be excluded from FOS jurisdiction under paragraph 5.1(m).

### **Where a 'step' has been taken**

128 FOS has also agreed to 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.

129 This clarification was needed because a court will often require the parties to attend a directions hearing and the complainant may need to agree to consent orders to, for example, to file a defence within a specified time limit where they have not already done so, or in relation to the staying of the proceedings.

### **Final agreed wording of new paragraph 13.1(a)(ii)**

130 The final agreed wording of new paragraph 13.1(a)(ii) is that:

*(a) Subject to paragraph (b), where an Applicant lodges a complaint with FOS, the Financial Service Provider:...*

*(ii) must not pursue legal proceedings relating to debt recovery instituted prior to lodging of the Dispute with FOS save to the*

*minimum extent necessary to preserve the Financial Service Provider's legal rights and, in particular, must not seek judgment in those legal proceedings, provided that the Dispute is lodged before the Applicant takes a step in those legal proceedings beyond lodging a defence or a defence and counterclaim (however described); or...*

*while FOS is dealing with the Dispute.*

## **Updated RG 139.53**

131 From 1 January 2010, we clarify that new RG 139.53 will be:

*Where legal proceedings have already commenced that relate to debt recovery proceedings and a complainant takes their complaint to an EDR scheme, the Terms of Reference must require the member not to pursue those legal proceedings beyond the minimum necessary to preserve its legal rights.*

*Such complaints should be accepted by the scheme at least up until the point where the applicant has taken no step beyond lodging a defence or defence and counterclaim (however described), unless otherwise excluded from the scheme's jurisdiction under the Terms of Reference.*

*For the avoidance of doubt, the complainant will not be considered to have taken a 'step' if they attend a directions hearing or agree to consent orders of a procedural nature only being filed in those legal proceedings.*

## E Additional explanatory information

### Key points

There were a number of issues where the nature of feedback from stakeholders made it clear that further clarification as to how the TOR will operate would be of assistance.

FOS is developing Operational Guidelines to help explain how the new TOR will operate in practice.

This additional explanatory information will help reduce stakeholder confusion about the intended operation of the new TOR.

### 'Where a dispute is lodged'

- 132 The SAA noted that throughout the TOR on which we consulted, the expression '*Where an applicant lodges a dispute*' has been replaced with the expression '*Where a dispute is lodged*'. The SAA expressed the view that it did not see the significance of this change.
- 133 This change reflects a new requirement in the May 2009 update of RG 139. From 1 January 2010, a scheme member will be able to lodge a complaint with an EDR scheme in limited circumstances where:
- (a) the complaint has gone through the scheme member's IDR process, but has been unable to be resolved, and the complaint is also unable to be resolved at EDR because the complainant has not progressed their complaint to EDR; and
  - (b) the scheme member has sought the consent of the complainant to forward the complaint to their EDR scheme (See RG 139.49- RG 139.50).
- 134 The expression '*where a dispute is lodged*' is sufficiently broad to allow a member to lodge a complaint with FOS.

### Deferred establishment fees, unjust or unconscionable consumer credit fees

- 135 Paragraphs 5.1(b)(i) and (ii), TOR on which we consulted, provides for circumstances when FOS may handle complaints about the level of a fee, premium, charge or interest rate, particularly:

- (a) where a complaint concerns non-disclosure, misrepresentation or incorrect application of the fee, premium, charge or interest rate... having regard to any scale or practices generally applied by the AFS licensee (paragraph 5.1(b)(i)); or
  - (b) concerns a breach of any legal obligation or duty on the part of the AFS licensee (paragraph 5.1(b)(ii)).
- 136 Consumer representatives expressed concern that paragraphs 5.1(b)(i) and (ii) would exclude complaints involving deferred establishment fees and unjust fees and other charges, which are covered under the National Consumer Credit Protection (NCCP) Act.
- 137 FOS has advised that where a fee is contrary to a statutory provision or the NCCP Act, FOS will consider the complaint under paragraph 5.1(b)(ii).

## Meaning of 'dealt with'

- 138 Paragraph 5.1(1), TOR on which we consulted, provides that a complaint will be excluded where it has *already been dealt with by a court or dispute resolution tribunal established by legislation, or by another external dispute resolution scheme approved by ASIC*.
- 139 The ABA expressed concern that the meaning of 'dealt with' is unclear and FOS should decline to hear a dispute if a court appeal is intended, has been filed or is in the course of proceedings.
- 140 The May 2009 update of RG 139 included a definition of 'dealt with' in another forum to clarify that 'dealt with' means *a decision on the merits having been made* has already been given or should have been given by a court, tribunal or other ASIC-approved EDR scheme (See RG 139.151(a)).
- 141 FOS has advised that 'dealt with' is intended to reflect that once a matter is finalised in another forum, the matter is outside FOS' jurisdiction. This could conceivably include where an appeal of a legal proceeding is on foot or about to commence. Given RG 139.151(a) and FOS' additional information, a definition of 'dealt with' has not been included in the TOR.

## Process for exclusion of disputes from FOS' jurisdiction

- 142 Paragraph 5.3, TOR on which we consulted, sets out a process for when FOS may review a decision to exclude a complaint from its jurisdiction.
- 143 Some consumer representatives expressed concern that the process set out in paragraph 5.3 does not specify whether an independent person will review jurisdictional decisions. Other consumer representatives were of the view

that paragraph 5.3 should clarify that jurisdictional decisions will be reviewed by an Ombudsman. It was also noted that FICS allowed its Panel Chair to review these types of decisions.

- 144 We understand that the Operational Guidelines will discuss this issue in greater detail and clarify that an Ombudsman will review jurisdictional decisions under paragraph 5.3.

## Qualification of reasonableness

- 145 The ABA suggested that a number of requirements in the TOR on which we consulted, ought to be qualified by reasonableness, in particular:
- (a) paragraph 7.2, so it is clear that for example, a FOS request for information or for parties to attend interview, should be made reasonably;
  - (b) paragraph 7.3, so it is clear that *FOS may require a party to a Dispute to reasonably do anything else that FOS considers may assist FOS' consideration of the Dispute*;
  - (c) paragraph 7.5, so it is clear that *where a party to a Dispute without reasonable excuse fails to provide or procure information or to take any other step reasonably requested by FOS...*;
  - (d) paragraph 8.3, so it is clear that when FOS seeks external expertise to provide a report or view, the incurring of costs should be reasonable; and
  - (e) paragraph 9.4, so it is clear that a scheme member will pay legal or other professional costs incurred by a complainant if they are reasonable.
- 146 These changes have not been adopted because the terms of reference of the pre-existing schemes did not include qualifications of 'reasonableness'. FOS was concerned that to do so would significantly lengthen the TOR.
- 147 The Operational Guidelines will also clarify that FOS will generally turn its mind to reasonableness when doing any of the things in paragraphs 7.2, 7.3, 7.5, 8.3 and 9.4.

## How interest is calculated

- 148 Paragraph 9.5, TOR on which we consulted, allows FOS to award interest for a complaint in addition to the compensation caps for direct loss and consequential loss.

149 Both the FPA and the ABA expressed concern that formulas as to how FOS will calculate interest are not included in the TOR on which we consulted.

150 We note that:

- the Operational Guidelines will discuss how FOS will calculate interest in more detail; and
- FOS will generally look at what is an appropriate method of calculation in each particular industry, given the financial product and circumstances of the case.

151 We anticipate that FOS will develop its approach over time and that the Operational Guidelines may be developed to reflect FOS' approach.

## **Expulsion of members for non-compliance**

152 A number of industry organisations expressed concern that paragraph 13.7, TOR on which we consulted, does not include examples of the types of actions FOS may take against a member that FOS 'considers appropriate', other than expulsion under the FOS Constitution, when a member fails to meet its obligations under the TOR.

153 FOS has advised that it will update its Operational Guidelines to include examples, including:

- (a) dealing with the non-compliance as a possible systemic issue or serious misconduct under paragraph 11 of the TOR; and
- (b) taking any necessary action (including legal action) to enforce a decision by FOS that the Applicant has accepted. This may include seeking specific performance of the agreement to abide by the new TOR.

## **Appendix 1: Version of the new TOR approved by ASIC**

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## Appendix 2: Summary of grammatical and drafting changes to the new TOR

No	Requested change	Stakeholder who requested the change	Reason for adopting the change
1	<p><b>Paragraph 4.1(a):</b></p> <p>The word 'whether' should be replaced with 'including those', so the paragraph reads:</p> <p><i>FOS may only consider a Dispute if the Dispute is between a Financial Service Provider and:</i></p> <p><i>(a) an individual or individuals (including those acting as trustee, legal personal representative or otherwise)</i></p>	Consumer representatives	This change is intended to clarify that a complaint will still be handled by FOS if an individual or individuals has the Dispute with the Financial Service Provider.
2	<p><b>Paragraph 4.1(g):</b></p> <p>The paragraph should be updated to say:</p> <p><i>a policy holder of a group life or group general insurance policy...</i></p>	Consumer representatives	<p>This will help clarify that policy holders of both types of group insurance policies may lodge disputes with FOS.</p> <p>For:</p> <p><u>Group life insurance policies</u> this may be super fund trustees or employees; and</p> <p><u>Group general insurance policies</u> this may be employers, sporting organisations, industry associations, etc</p>
3	<p><b>Paragraph 5.1(d):</b></p> <p>The paragraph should be updated to insert 'a' before 'Life Insurance Contract', so the paragraph reads:</p> <p><i>The Service may not consider a Dispute: (d) about underwriting or actuarial factors leading to an offer of a Life Insurance Policy on non-standard terms</i></p>	Consumer representatives	This is a grammatical change.

No	Requested change	Stakeholder who requested the change	Reason for adopting the change
4	<p><b>Paragraph 5.1(p):</b></p> <p>The word 'part' should be replaced with the words 'a member' to reflect s50, Corporations Act, so the paragraph reads:</p> <p><i>where the Applicant is a member of a group of related bodies corporate and that group has in excess of 20 employees (or 100 employees in the case of a manufacturing group).</i></p>	ABA	FOS intends to reflect the test in the Corporations Act.
5	<p><b>Paragraph 7.2(c):</b></p> <p>The paragraph should be updated so there is another sub-matter for where the information is not reasonably within the party's possession or control, so the paragraph reads:–</p> <p><i>the information does not or no longer exists or is not within the party's reasonable possession or control.</i></p>	Consumer representatives	<p>Parties will be expected to make a reasonable attempt to source documents and if they do not, FOS may draw adverse inferences.</p> <p>This change clarifies that a document will not be required to be provided where it is not within a party's reasonable possession or control.</p>
6	<p><b>Paragraph 8.8:</b></p> <p>The word 'of' should be inserted after the word 'all', so the last sentence of the paragraph reads:</p> <p><i>The release shall be effective from the date on which the Financial Services Provider fulfils all of its obligations under the Recommendation or Determination.</i></p>	NIBA	This is a grammatical change.
7	<p><b>Paragraph 10.1(c):</b></p> <p>This paragraph appears to use a defined term, 'Test Case Proceedings', when this term is not defined in the definitions section. These words should be replaced with 'test case proceedings'.</p>	SAA	This is a grammatical change.

No	Requested change	Stakeholder who requested the change	Reason for adopting the change
8	<p><b>Paragraph 10.1(c):</b></p> <p>The word 'and' should be included so the paragraph reads;</p> <p><i>an undertaking that the Financial Service Provider will institute the proceedings within 6 months of the date of the notice and seek to prosecute the...</i></p>	ICA and NIBA	This is a grammatical change.
9	<p><b>Paragraph 14.1 – definition of 'Consequential Financial Loss':</b></p> <p>Insert the word 'financial' so the definition reads:</p> <p><i>indirect financial loss or damage</i></p>	ICA	This will clarify the meaning of consequential loss.
10	<p><b>Paragraph 14.1 – definition of 'General Insurance Broker':</b></p> <p>Delete the quotation mark at the end of the definition.</p>	NIBA	This is a grammatical change.
11	<p><b>Paragraph 14.1 – definition of 'Small Business Insurance Product':</b></p> <p>at (a) include 'as' and a comma so the definition reads:</p> <p><i>where the Dispute is between a Small Business and a General Insurance Broker (excluding a General Insurance Broker when acting as agent of an Insurer), in which case (b) below applies), a Retail General Insurance Policy other than an Excluded Product</i></p>	NIBA	This is a grammatical change.

## Key terms

Term	Meaning in this document
ABA	Australian Bankers Association, the peak industry body representing banks
AFA	Australian Finance Association, one of two peak industry bodies representing financial planners and advisers
AFS licensee	An individual or entity having an Australian financial services licence under Part 7 of the Corporations Act
ASIC	Australian Securities and Investments Commission
ASIC-approved EDR scheme, EDR scheme or scheme	An external dispute resolution scheme approved by ASIC under RG 139 (see s912A(2)(b) and s1017G(2)(b), Corporations Act)
BFSO	Banking and Financial Services Ombudsman – an ASIC-approved EDR scheme which will be wound down in due course
CALC (Vic)	Consumer Action Legal Centre (Vic)
CAP	ASIC's Consumer Advisory Panel, formed in 1998 to inform ASIC of consumer representative concerns and issues
CCLC NSW	Consumer Credit Legal Centre NSW
compensation cap	The maximum monetary amount of compensation that FOS can award in respect of a particular type of loss
complainant	A person or company that has lodged a complaint with a scheme about a scheme member that falls within the scheme's Terms of Reference or Rules
Corporations Act	The <i>Corporations Act 2001</i> (as amended by the FSR Act) and includes regulations made for the purposes of the Act
COSL	Credit Ombudsman Service Limited, an ASIC-approved EDR scheme
CUDRC	Credit Union Dispute Resolution Centre, an ASIC-approved EDR scheme which will be wound down in due course
draft TOR	The version of the TOR developed in consultation with stakeholders by FOS
FICS	Financial Industry Complaints Service, an ASIC-approved EDR scheme which will be wound down in due course
FOS	Financial Ombudsman Service Limited, an ASIC-approved EDR scheme

Term	Meaning in this document
FPA	Financial Planning Association, one of two peak industry bodies representing financial planners and advisers
IBDL	Insurance Brokers Disputes Limited, an ASIC-approved EDR scheme which will be wound down in due course
ICA	Insurance Council of Australia, the peak industry body representing general insurers, life insurers and professional indemnity insurers
IDR	internal dispute resolution
IFSA	Investments and Financial Services Association
ILIS	Investments, Life insurance and Superannuation stream of FOS
IOS	Insurance Ombudsman Service Limited, an ASIC-approved EDR scheme which will be wound down in due course
MFAA	Mortgage and Finance Association of Australia, the peak industry body that represents mortgage brokers
NIBA	National Insurance Brokers Association, the peak industry body representing general insurance brokers
NCCP Act	National Consumer Credit Protection Act 2009, including the National Consumer Credit Code
new TOR	FOS' single set of rules and procedures or Terms of Reference that consolidate the 5 separate sets of rules and guidance of FOS' predecessor schemes (the BFSO, IOS, FICS, IBDL and CUDRC), approved by ASIC.
Regulations	Corporations Regulation 2001
retail client	A client defined under s761G and Chapter 7 Part 7.1 Division 2 of the Regulations
RG 165	ASIC's Regulatory Guide 165 <i>Licensing: internal and external dispute resolution</i>
RG 139	ASIC's Regulatory Guide 139 <i>Approval and oversight of external dispute resolution schemes</i>
SAA	Stockbrokers Association of Australia, the peak industry body representing stockbrokers
scheme member or member	An industry participant who is a member of an ASIC-approved EDR scheme
submitted TOR	The version of the TOR submitted to ASIC for approval on 3 June 2009

<b>Term</b>	<b>Meaning in this document</b>
TOR on which we consulted	The version of the TOR on which we consulted, incorporating minor marked-up changes following consultation with FOS
UCCC	The Uniform Consumer Credit Code

## Related information

### Headnotes

Dispute resolution requirements; Financial Ombudsman Service Limited; FOS; EDR scheme

### Class orders and pro formas

Class Order [CO 09/340] *External dispute resolution schemes*

### Regulatory guides

Regulatory Guide 126 *Compensation and insurance arrangements for AFS licensees*

Regulatory Guide 165 *Licensing: internal and external dispute resolution*

Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes*

### Legislation

Corporations Act 2001 (Cth), Ch 7, 912A, 1017G(2)

National Consumer Credit Protection Act 2009 (Cth)

### Cases

*Australian Timeshare and Holiday Ownership Council Limited v Australian Securities and Investments Commission* [2008] AATA 62 (23 January 2008)

### Consultation papers and reports

Consultation Paper 102 *Dispute resolution – review of RG 139 and RG 165*

Consultation Paper 112 *Dispute resolution requirements for consumer credit and margin lending*

### Media and information releases

09-262AD ASIC grants approval to the Financial Ombudsman Service Limited for its new single terms of reference