

## Terms of Reference

1 January 2010 (as amended 1 July 2010)

## Section A: Preliminary Matters

### 1. Introduction

#### 1.1 Purpose of the Service

The Service is conducted by FOS and has been established as an independent forum to resolve Disputes between Applicants and Financial Services Providers. The Service is free of charge for Applicants. The costs of the Service are met by the Financial Services Providers.

#### 1.2 Principles that underpin FOS operations and processes

In dealing with Disputes, FOS:

- a) must do what in its opinion is appropriate with a view to resolving Disputes in a cooperative, efficient, timely and fair manner;
- b) shall proceed with the minimum formality and technicality; and
- c) shall be as transparent as possible, whilst also acting in accordance with its confidentiality and privacy obligations.

#### 1.3 Scope of the Terms of Reference

- a) These Terms of Reference set out who is eligible to lodge a Dispute, the types of Disputes that FOS can consider, how FOS resolves Disputes, the types of remedies that FOS can provide and other related matters. These Terms of Reference are binding upon Financial Services Providers.
- b) The Operational Guidelines to the Terms of Reference are intended to assist understanding of the Terms of Reference and to provide further detail as to how FOS will resolve Disputes.

## 2. FOS Structure

### 2.1 Appointment of Ombudsmen

The Board of Directors of FOS appoints the Ombudsmen including the Chief Ombudsman. In making appointments, the Board will consider candidates' objectivity, qualifications, experience and personal qualities.

### 2.2 Powers and duties of the Ombudsmen

- a) An Ombudsman has the power to exercise all powers and discretions conferred on FOS by these Terms of Reference and to carry out all responsibilities attributed to FOS under these Terms of Reference. An Ombudsman's duties include:
  - (i) making Jurisdictional Decisions;
  - (ii) resolving Disputes by making Determinations; and

- (iii) the chairing of and participation in FOS Panel processes.
- b) In addition to the powers and duties specified in paragraph a), the Chief Ombudsman's powers and duties also include:
  - (i) subject to FOS's Constitution, the day to day management and promotion of FOS and the Service (including the power to appoint and dismiss employees, contractors and agents (other than Ombudsmen and Panel Members) and to incur expenditure consistent with FOS's budget);
  - (ii) the establishment and maintenance of internal systems and procedures to fulfil these Terms of Reference including the creation and modification of the Operational Guidelines;
  - (iii) overseeing FOS's resolution of Disputes;
  - (iv) deciding in accordance with paragraph 8.5c) whether a Determination in respect of a Dispute will be made by an Ombudsman or a FOS Panel (this power may be delegated by the Chief Ombudsman to an Ombudsman either in a specific instance or generally for the types of Disputes that the Ombudsman ordinarily determines); and
  - (v) authorising an employee of or contractor to FOS to:
    - (A) decide whether FOS is able under these Terms of Reference to consider a Dispute and whether FOS should exercise the discretion to exclude the Dispute, other than making Jurisdictional Decisions; and
    - (B) carry out any or all other responsibilities and exercise any or all other powers and discretions conferred on FOS by these Terms of Reference, other than making Determinations,
 either in a specific instance or generally; and
  - (vi) where improvements to the Terms of Reference are identified - making recommendations to the Board of Directors of FOS (including a committee of the Board) for changes to these Terms of Reference.

## 2.3 Appointment of Panel Members

The Board of Directors of FOS appoints the Panel Members. A Panel Member will be a consumer representative, a medical representative (applicable only for medical indemnity insurance Disputes) or an industry representative. In making appointments, the Board will:

- a) consider candidates' qualifications, experience and personal qualities;
- b) where appointing consumer representatives as Panel Members, follow a merit selection process that includes input by relevant consumer groups;
- c) where appointing medical representatives as Panel Members for medical indemnity insurance Disputes, follow a merit selection process that includes input by relevant medical practitioner professional associations; and

- d) where appointing industry representatives as Panel Members, follow a merit selection process that includes input by relevant industry groups.

## **2.4 FOS Panels**

- a) A FOS Panel will be comprised of:
  - (i) where the Dispute pertains to medical indemnity insurance – an Ombudsman, a medical representative and a medical indemnity insurer representative;
  - (ii) for other kinds of Disputes - an Ombudsman and two Panel Members, one of whom is a consumer representative and one of whom is an industry representative.
- b) A FOS Panel has the power to resolve Disputes by making Determinations.
- c) A Panel Member's duties are to participate from time to time, where requested by FOS, in a FOS Panel responsible for resolving a Dispute by making a Determination.

## **3. Transition to new Terms of Reference**

### **3.1 Disputes first lodged with FOS or with a Predecessor Scheme before 1 January 2010**

Where a Dispute was first lodged with FOS, or transferred to FOS by a Predecessor Scheme, before 1 January 2010, then if:

- a) FOS had not closed the matter by 1 January 2010 - FOS will continue to apply the Terms of Reference that applied to the Dispute at the time of lodging with FOS or Predecessor Scheme; and
- b) if FOS had closed the Dispute before 1 January 2010 and after that date FOS decides that it is appropriate to re-open the Dispute - FOS will deal with the re-opened Dispute applying the Terms of Reference previously applied to the Dispute.

### **3.2 Disputes lodged with FOS between 1 January 2010 and 31 December 2011**

Where a Dispute is lodged with FOS between 1 January 2010 and 31 December 2011,

- a) the maximum amount that may be awarded by FOS in relation to a claim made in the Dispute will be determined in accordance with Schedule 1; and
- b) in all other respects these Terms of Reference will apply.

### **3.3 Disputes lodged with FOS on or after 1 January 2012**

FOS will apply these Terms of Reference to all Disputes that are lodged with FOS on or after 1 January 2012.

## Section B: Jurisdiction of FOS

### 4. Disputes within scope of the Service

#### 4.1 Eligibility to lodge a Dispute with FOS

FOS may only consider a Dispute if the Dispute is between a Financial Services Provider and:

- a) an individual or individuals (including those acting as a trustee, legal personal representative or otherwise);
- b) a partnership comprising of individuals – if the partnership carries on a business, the business must be a Small Business;
- c) the corporate trustee of a self managed superannuation fund or a family trust – if the trust carries on a business, the business must be a Small Business;
- d) a Small Business (whether a sole trader or constituted as a company, partnership, trust or otherwise);
- e) a club or incorporated association – if the club or incorporated association carries on a business, the business must be a Small Business;
- f) a body corporate of a strata title or company title building which is wholly occupied for residential or Small Business purposes; or
- g) the policy holder of a group life or group general insurance policy, where the dispute relates to the payment of benefits under that policy.

#### 4.2 Types of Disputes that can be considered by FOS

FOS may only consider a Dispute between a Financial Services Provider and an Applicant:

- a) that arises from a contract or obligation arising under Australian law; and
- b) that arises from or relates to:
  - (i) the provision of a Financial Service by the Financial Services Provider to the Applicant;
  - (ii) the provision by the Applicant of a guarantee or security for, or repayment of, financial accommodation provided by the Financial Services Provider to a person or entity of the kind listed in paragraph 4.1;
  - (iii) an entitlement or benefit under a Life Insurance Policy by a person who is specified or referred to in the Life Insurance Policy, whether by name or otherwise, as a person to whom the insurance cover extends or to whom money becomes payable under the Life Insurance Policy;
  - (iv) an entitlement or benefit under a General Insurance Policy by a person who is specified or referred to in the policy, whether by name, or otherwise, as a person to whom the policy extends;

- (v) a legal or beneficial interest arising out of:
  - (A) a financial investment (such as life insurance, a security or an interest in a managed investment scheme or a superannuation fund); or
  - (B) a facility under which a person seeks to manage financial risk or to avoid or limit the financial consequences of fluctuations in, or in the value of, an asset, receipts or costs (such as a derivatives contract);
- (vi) a claim under another person's motor vehicle insurance policy for property damage to an Uninsured Motor Vehicle caused by a driver of the insured motor vehicle – but only where a valid claim has been lodged by the owner of the insured motor vehicle and any relevant excess has been paid (unless the claim is being made pursuant to section 51 of the *Insurance Contracts Act 1984*); or
- (vii) where the Financial Service Provider is a mutual - the provision of a Financial Service by a third party through the agency of the mutual to a customer of the mutual; and
- c) if the Financial Services Provider is a Member at the time that the Dispute is lodged with FOS (even if not a Member at the time of the events giving rise to the Dispute); and
- d) if the Dispute is otherwise within the jurisdiction of FOS under these Terms of Reference and all other requirements of these Terms of Reference are met.

#### **4.3 General insurance product limitation**

FOS may only consider a Dispute in relation to a General Insurance Policy that is a:

- a) Retail General Insurance Policy;
- b) Residential Strata Title Insurance Product;
- c) Small Business Insurance Product;
- d) Medical indemnity insurance product.

#### **4.4 Consideration of other Disputes by agreement**

Notwithstanding any other paragraph of these Terms of Reference, FOS may consider a Dispute where all parties to the Dispute and FOS so agree. If so, the procedures set out in Section C will apply to the resolution of that Dispute.

### **5. Disputes outside the scope of FOS**

#### **5.1 Exclusions from FOS's jurisdiction**

The Service may not consider a Dispute:

- a) about whether a Financial Services Provider has met confidentiality or privacy obligations unless the Dispute about confidentiality or privacy:
  - (i) is part of a broader Dispute between the Financial Services Provider and the Applicant; or
  - (ii) relates to or arises out of the provision of credit, the collection of a debt, credit reporting and/or the banker-customer relationship;
- b) about the level of a fee, premium, charge or interest rate – unless:
  - (i) the Dispute concerns non-disclosure, misrepresentation or incorrect application of the fee, premium, charge or interest rate by the Financial Services Provider having regard to any scale or practices generally applied by that Financial Services Provider or agreed with that Applicant;
  - (ii) the Dispute concerns a breach of any legal obligation or duty on the part of the Financial Services Provider; or
  - (iii) the Applicant's Dispute is with a medical indemnity insurer and pertains to the level of medical indemnity insurance premium or the application of a risk surcharge (as defined in the Services Contract between the Health Insurance Commission, and the Commonwealth of Australia represented by the Department of Health and Ageing, and medical indemnity insurers);
- c) about the Financial Services Provider's assessment of the credit risk posed by a borrower or the security to be required for a loan – but this does not prevent FOS from considering a Dispute:
  - (i) claiming Maladministration in lending, loan management or security matters; or
  - (ii) about the variation of a Credit Contract as a result of the Applicant being in financial hardship;
- d) about underwriting or actuarial factors leading to an offer of a Life Insurance Policy on non-standard terms;
- e) in the case of a Dispute about a General Insurance Policy – about rating factors and weightings the insurer applies to determine the insured's or proposed insured's base premium which is commercially sensitive information;
- f) about a decision to refuse to provide insurance cover except where:
  - (i) the Dispute is that the decision was made indiscriminately, maliciously or on the basis of incorrect information; or
  - (ii) the Dispute pertains to medical indemnity insurance cover;
- g) about the investment performance of a financial investment, except a Dispute concerning non-disclosure or misrepresentation;
- h) about decisions of the trustees (in their capacity as trustees) of approved deposit funds and of regulated superannuation funds;

- i) relating to the management of a fund or scheme as a whole;
- j) that relates to a decision by a Financial Services Provider as to how to allocate the benefit of a financial product (such as but not limited to a Life Insurance Policy) between the competing claims of potential beneficiaries;
- k) where the Dispute raises the same events and facts and is brought by the same Applicant as a Dispute previously dealt with by FOS or a Predecessor Scheme and there is insufficient additional events and facts raised in the new Dispute to warrant FOS's consideration of the new Dispute;
- l) that 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;
- m) in relation to which the Applicant commenced legal proceedings before the Dispute was lodged with FOS except where:
  - (i) the legal proceedings have been discontinued; or
  - (ii) the relevant statute of limitation period will shortly expire and the Applicant undertakes in writing not to take any further steps in the proceedings while FOS is dealing with the Dispute;
- n) that has already been lodged with, and is being dealt with by, another external dispute resolution scheme approved by ASIC;
- o) where the value of the Applicant's claim in the Dispute exceeds \$500,000; or
- p) 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).

## 5.2 Discretion to exclude Disputes

FOS may refuse to consider, or continue to consider, a Dispute, if FOS considers this course of action appropriate, for example, because:

- a) there is a more appropriate place to deal with the Dispute, such as a court, tribunal or another dispute resolution scheme or the Privacy Commissioner;
- b) the Applicant is not a retail client as defined in the Corporations Act 2001;
- c) the Dispute relates to a Financial Services Provider's practice or policy and does not involve any allegation of either Maladministration or inappropriate application of the practice or policy;
- d) the Dispute being made is frivolous or vexatious or lacking in substance; or
- e) after the Dispute is lodged with FOS, the Applicant commences legal proceedings against the Financial Services Provider that are related to the Dispute.

### 5.3 Process for exclusion of Disputes

- a) Where a Dispute is lodged with FOS and:
  - (i) FOS considers that these Terms of Reference exclude the Dispute; or
  - (ii) FOS decides to exercise a discretion under these Terms of Reference to exclude the Dispute,

FOS will advise the Applicant (and any other parties that are involved in and have been informed about the Dispute) and provide reasons for this assessment.

- b) If, within 30 days of receipt of this advice, the Applicant objects to an assessment made by FOS in accordance with paragraph a), FOS will review the matter if FOS is satisfied that the Applicant's objection may have substance. If so:
  - (i) FOS will inform the other parties involved in the Dispute;
  - (ii) all parties will be given an opportunity to provide submissions;
  - (iii) all parties will be provided with copies of each other's submissions; and
  - (iv) FOS will review the matter and provide the parties with FOS's final decision referred to as a Jurisdictional Decision – this will set out the reasons for the decision.

## Section C: Dispute Resolution Processes

### 6. Application process

#### 6.1 Lodging of Disputes

- a) A party to a Dispute may lodge the Dispute with FOS by referring the Dispute to FOS for resolution.
- b) FOS may assist Applicants with this process.
- c) A Financial Services Provider that lodges a Dispute with FOS must have obtained the Applicant's prior consent.

#### 6.2 Time limits

- a) Where a Dispute relates to a variation of a Credit Contract as a result of financial hardship, an unjust transaction or unconscionable interest and other charges under the National Credit Code, FOS will not consider the Dispute unless it is lodged with FOS before the later of the following time limits:
  - (i) within two years of the date when the Credit Contract is rescinded, discharged or otherwise comes to an end; or
  - (ii) where, prior to lodging the Dispute with FOS, the Applicant received an IDR Response in relation to the Dispute from the Financial Services Provider - within 2 years of the date of that IDR Response
- b) In all other situations, FOS will not consider a Dispute unless the Dispute is lodged with FOS before the earlier of the following time limits:
  - (i) within six years of the date when the Applicant first became aware (or should reasonably have become aware) that they suffered the loss; and
  - (ii) where, prior to lodging the Dispute with FOS, the Applicant received an IDR Response in relation to the Dispute from the Financial Services Provider - within 2 years of the date of that IDR Response.

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

#### 6.3 Opportunity for internal dispute resolution

Subject to paragraph 6.4, where an Applicant lodges a Dispute with FOS:

- a) before complaining to the Financial Services Provider; or
- b) (i) within 21 days of the Applicant first requesting a variation of a Credit Contract as a result of financial hardship or postponement of enforcement proceedings, or a further 30 days from the date of any agreement made as a result of that request; or

- (ii) within 21 days of the Applicant first requesting the Financial Services Provider to remedy the matter where the Dispute involves a default notice; or
- (iii) in all other cases, within 45 days of the Applicant first requesting the Financial Services Provider to remedy the matter;

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

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

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

to provide an IDR Response.

#### **6.4 FOS discretion to vary normal internal dispute resolution timeframes**

Notwithstanding paragraph 6.3, FOS may:

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

#### **6.5 Disputes lodged with other ASIC Approved EDR Schemes**

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

### **7. Dispute resolution methods and related matters**

#### **7.1 Dispute resolution methods**

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

- a) negotiation;
- b) conciliation or mediation; or
- c) deciding the Dispute in accordance with the process set out in paragraph 8.

#### **7.2 Provision of information by the parties to the Dispute**

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

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

### **7.3 Other obligations of the parties to the Dispute**

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

### **7.4 Timeframes**

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

### **7.5 Consequences of non-compliance by either party with a FOS request**

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

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

### **7.6 "Without prejudice" nature of Service**

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

## **8. Deciding Disputes**

### **8.1 Rules of evidence**

FOS is not bound by any legal rule of evidence.

## **8.2 Dispute resolution criteria**

Subject to paragraph 8.1, when deciding a Dispute and whether a remedy should be provided in accordance with paragraph 9, FOS will do what in its opinion is fair in all the circumstances, having regard to each of the following:

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

## **8.3 Specialist input**

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

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

## **8.4 FOS's obligation to provide information to the parties**

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

- c) If a party to a Dispute refuses consent to provide information to another party to the Dispute, FOS is not entitled to use that information to reach a decision adverse to the party to whom confidential information is denied unless FOS determines that special circumstances apply.

## **8.5 Process for deciding Disputes**

Unless paragraph 8.6 applies, the process for deciding a Dispute is as follows.

- a) After giving the parties a reasonable opportunity to make submissions and provide information about the matters in dispute, FOS makes an assessment referred to as a Recommendation.
- b) If both parties accept the Recommendation within 30 days of receiving it, the Dispute is resolved on the basis of the Recommendation.
- c) If, within 30 days of receiving the Recommendation, either:
  - (i) the Financial Services Provider does not accept the Recommendation in relation to the Dispute; or
  - (ii) either party requests FOS to proceed from a Recommendation to a Determination,

FOS will proceed to a Determination by either an Ombudsman or by a FOS Panel (as the Chief Ombudsman or his or her delegate decides is appropriate). Before the Determination is made, the parties will be given a reasonable opportunity to make submissions, and provide any further information, in response to the Recommendation.

## **8.6 Expedited process for deciding Disputes**

Notwithstanding paragraph 8.5, FOS may proceed to a Determination by either an Ombudsman or by a FOS Panel (as FOS decides is appropriate) without a Recommendation first being made. This expedited process will be followed if FOS considers that this would be appropriate in the circumstances. If so, FOS must advise the parties of this intended course of action and must not make the Determination without first giving the parties a reasonable opportunity to make submissions and provide information about the matters in dispute.

## **8.7 Recommendations and Determinations**

- a) Each Recommendation and Determination:
  - (i) must be in writing;
  - (ii) may either reach:
    - (A) a conclusion about the merits of the Dispute; or
    - (B) the view that, given the procedures adopted by FOS, it would not be appropriate for FOS to reach any conclusion as to the merits of the Dispute;

- (iii) must set out reasons for any conclusion about the merits of a Dispute or view of the kind referred to in paragraph 8.7a)(ii)(B);
  - (iv) must specify any remedy, determined in accordance with paragraph 9, that FOS considers fair and appropriate; and
  - (v) must be provided to all parties to the Dispute.
- b) A Determination is a final decision and is binding upon the Financial Services Provider if the Applicant accepts the Determination within 30 days of receiving the Determination.

## **8.8 Applicant acceptance of a Recommendation or Determination**

In order to accept a Recommendation or a Determination, the Applicant must provide the Financial Services Provider (if the Financial Services Provider so requests) with a binding release of the Financial Services Provider from liability in respect of the matters resolved by the Recommendation or Determination. The release must be for the full value of the claim the subject of the Dispute, even if this amount exceeds the amount of the remedy decided upon by FOS. The release shall be effective from the date on which the Financial Services Provider fulfils all of its obligations under the Recommendation or Determination.

## **8.9 Consequences of an Applicant refusing to accept a Recommendation or Determination**

If an Applicant does not accept a Recommendation or Determination in relation to the Applicant's Dispute, the Applicant is not bound by the Recommendation or Determination and may bring an action in the courts or take any other available action against the Financial Services Provider.

# **9. Remedies**

## **9.1 Types of remedies**

Subject to paragraphs 9.2 to 9.8, FOS may decide that the Financial Services Provider undertake a course of action to resolve the Dispute including:

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

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

## **9.2 Compensation for direct financial loss or damage**

Subject to paragraph 9.7, FOS may decide that the Financial Services Provider compensate the Applicant for direct financial loss or damage.

## **9.3 Other compensation**

- a) Subject to paragraph 9.3 c) and paragraph 9.7, FOS may decide that the Financial Services Provider compensate the Applicant for consequential financial loss or damage up to a maximum amount of \$3,000 per claim made in the Dispute.
- b) Subject to paragraph 9.3 c) and paragraph 9.7, FOS may decide that the Financial Services Provider compensate the Applicant for non-financial loss but only where:
  - (i) an unusual degree or extent of physical inconvenience, time taken to resolve the situation or interference with the Applicant's expectation of enjoyment or peace of mind has occurred; or
  - (ii) in the case of a Dispute pertaining to an individual's privacy rights - injury has occurred to the Applicant's feelings or humiliation has been suffered by the Applicant.

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

- c) Notwithstanding paragraphs 9.3 a) and b), FOS will not provide compensation for:
  - (i) consequential financial loss; or
  - (ii) non-financial loss,in a Dispute arising as a result of a claim on a General Insurance Policy that expressly excludes such liability.
- d) The cap on liability in paragraph 9.3 a) does not in any way restrict FOS's ability to make an interest award under paragraph 9.5.

## **9.4 Applicant's costs in pursuing the matter**

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

## **9.5 Interest**

- a) Subject to paragraph 9.5 b) FOS may decide that the Financial Services Provider pay interest on a payment to be made by the Financial Services Provider to the Applicant.

- b) When deciding an award of interest:
  - (i) if the Insurance Contracts Act 1984 applies - FOS will calculate interest in accordance with that Act; and
  - (ii) otherwise:
    - (A) FOS will calculate interest from the date of the cause of action or matter giving rise to the claim; and
    - (B) FOS may have regard to any factors it considers relevant, including the extent to which either party's conduct contributed to delay in the resolution of the matter.

## **9.6 Other types of damages**

Punitive, exemplary or aggravated damages may not be awarded.

## **9.7 Cap on maximum value of remedy**

- a) The maximum total value of the remedy decided upon by FOS for a claim must not exceed:
  - (i) where paragraph 3.2 applies - the amount specified in the Schedule 1 as applicable to the type of claim; or
  - (ii) where paragraph 3.3 applies - the amount specified in Schedule 2 (as in force at the time of the lodging of the Dispute) as applicable to the type of claim.
- b) When determining the total value of a remedy under paragraph a):
  - (i) monetary compensation and any remedy where the value can readily be calculated, such as the waiving of a debt, are included; and
  - (ii) compensation for costs and interest payments are excluded.

## **9.8 Review of monetary value of remedies**

- a) On 1 January 2015 and every 3 years thereafter, the monetary amounts specified in paragraph 9.3a) and Schedule 2 (as then in force) will be adjusted by the higher of the percentage increase in:
  - (i) the Consumer Price Index, weighted average of eight capital cities, for the 3 year period ending with the September quarter in the previous year; and
  - (ii) the Male Total Average Weekly Earnings for the 3 year period ending with the September quarter in the previous year,with rounding to the \$100.00, in the case of paragraph 9.3a) and where the monetary amount represents a monthly limit, or otherwise to the nearest \$500.00.
- b) In addition to these adjustments, the Board of FOS will, in consultation with

Financial Services Providers and other stakeholders including key consumer, community and industry organisations, periodically review the limits in the Schedule and the Board will change these limits as it considers appropriate.

## **10. Test case procedures**

### **10.1 Notice of intended Test Case**

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

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

### **10.2 FOS discretion to stop considering the Dispute**

If after receiving a notice under paragraph 10.1 of these Terms of Reference, FOS is satisfied that it would be inappropriate to deal with the Dispute, FOS must inform the Applicant in writing that:

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

## Section D: FOS Reporting Obligations

### 11. Reporting to ASIC and other bodies

#### 11.1 Provision of reports

FOS may provide reports and recommendations and release information about a Financial Services Provider to:

- a) any regulator such as ASIC, the Privacy Commissioner or a regulated securities exchange; or
- b) a disciplinary body that FOS has a written agreement with for release of such information.

#### 11.2 Systemic issues

- a) A systemic issue is an issue that will have an effect on other persons of the kind listed in paragraph 4.1 of these Terms of Reference, beyond the parties to the Dispute.
- b) FOS must identify systemic issues and refer these to the relevant Financial Services Provider for remedial action. In each case, FOS must obtain a report from the Financial Services Provider as to the remedial action undertaken and continue to monitor the matter until a resolution has been achieved that is acceptable to FOS.
- c) FOS must report systemic issues to ASIC in accordance with its obligations under ASIC Regulatory Guide 139.

#### 11.3 Serious misconduct

FOS must also report all serious misconduct to ASIC. Serious misconduct is conduct which may be fraudulent, grossly negligent or involve wilful breaches of applicable laws or obligations under these Terms of Reference.

### 12. Collection of information by FOS

#### 12.1 Data collection

FOS must collect and record comprehensive information pertaining to its Dispute resolution, for example:

- a) the number of Disputes and enquiries;
- b) demographics of the Applicants (where practicable);
- c) details of Disputes which were not considered by FOS and why;
- d) the outcome of Disputes that were resolved by FOS;
- e) the current caseload including the age and status of open cases;

- f) the time taken to resolve Disputes; and
- g) a profile of Disputes that identifies:
  - (i) type and purpose of Financial Service;
  - (ii) type of Financial Service Provider;
  - (iii) the cause of the Dispute; and
  - (iv) any systemic issues or other trends.

## **12.2 Publication of data**

FOS must produce a report at least every twelve months for publication and provision to ASIC, the Financial Services Providers and the public. This report must be a comprehensive summary and analysis of the data collected. Amongst other things, it will include the following statistical information about each Financial Services Provider:

- a) the number of Disputes referred to FOS;
- b) the number of Disputes closed; and
- c) the outcome of those Disputes.

## Section E: Legal Proceedings and Other Matters

### 13. Legal proceedings and other matters

#### 13.1 Debt recovery or other proceedings

- a) Subject to paragraph b), where an Applicant lodges a Dispute with FOS, the Financial Services Provider:
  - (i) must not instigate legal proceedings against the Applicant relating to any aspect of the subject matter of the Dispute;
  - (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 a defence and counterclaim (however described); or
  - (iii) must not take any action to recover a debt the subject of the Dispute, to protect any assets securing that debt or to assign any right to recover that debt,while FOS is dealing with the Dispute.
- b) Notwithstanding paragraph a), with FOS's agreement and on such terms as FOS may require, the Financial Services Provider may:
  - (i) issue proceedings where the relevant limitation period for such proceedings will shortly expire - but those proceedings may not be pursued beyond the minimum necessary to preserve the Financial Services Provider's legal rights; or
  - (ii) exercise any rights it might have to freeze or otherwise preserve assets the subject of the Dispute.
- c) If the Dispute is subsequently decided by FOS and becomes binding upon the Financial Services Provider, the Financial Services Provider will abandon any aspect of proceedings against the Applicant that are inconsistent with that decision.

#### 13.2 Settled proceedings

Where a Dispute has been lodged with FOS and is subsequently resolved by agreement between the parties, the Financial Services Provider will not instigate or continue legal proceedings to the extent that those proceedings are inconsistent with that agreement.

#### 13.3 Defamation protection

A Financial Services Provider shall not instigate defamation action of any kind against an Applicant in respect of allegations made to FOS by the Applicant about the Financial Services Provider.

#### **13.4 FOS's confidentiality obligations**

FOS must keep confidential all information pertaining to a Dispute that is provided to FOS except:

- a) to the extent reasonably necessary to carry out FOS's responsibilities including under these Terms of Reference or for any incidental purpose; or
- b) as required or permitted by law.

#### **13.5 Immunity from liability**

FOS, the Ombudsmen, Panel Members, any person authorised by the Chief Ombudsman to carry out any responsibilities or exercise any powers or discretions of FOS or the Chief Ombudsman and FOS employees, contractors and agents shall not be liable to a party to a Dispute for any loss or damage arising directly or indirectly in the course of carrying out FOS functions.

#### **13.6 Change to Terms of Reference**

The Board may amend these Terms of Reference from time to time following consultation with ASIC, the Members and other stakeholders including key consumer, community and industry organisations.

#### **13.7 Non-compliance with these Terms of Reference**

Where a Financial Services Provider fails to meet its obligations under these Terms of Reference, FOS may take any action it considers appropriate including expelling the Financial Services Provider from membership of FOS in accordance with the FOS Constitution.

## Section F: Interpretation of Defined Terms

### 14. Interpretation

#### 14.1 Defined terms

The following words have the following meanings where they appear in these terms of reference:

"Applicant" means a person who has a Dispute that has been lodged with FOS and who, under paragraph 4.1, is eligible to use the Service;

"ASIC" means the Australian Securities & Investments Commission.

"Australia" includes the external territories.

"Consequential Financial Loss" means indirect financial loss or damage.

"Chief Ombudsman" means the person appointed by the Board of FOS to be the Chief Ombudsman in accordance with FOS's Constitution.

"Credit Contract" means a contract regulated by the Uniform Consumer Credit Code or such other federal credit legislation as may replace it;

"Determination" means a decision by FOS about a Dispute in accordance with paragraph 8 (which may include a decision as to remedy under paragraph 9);

"Dispute" means an expression of dissatisfaction with a Financial Services Provider.

"Excluded Product" means a product that is not a financial product for the purposes of Part 7.1, Division 3 of the *Corporations Act 2001*

"Financial Service" means a product or service that:

- a) is financial in nature including a product or service which is or is in connection with:
  - (i) a loan or any other kind of credit transaction (including a credit card used overseas) and guarantees or charges to secure any moneys owing;
  - (ii) a deposit including a term deposit, a fund management deposit or a retirement savings account;
  - (iii) an insurance policy;
  - (iv) a financial investment (such as life insurance, a security or an interest in a registered managed investment scheme or a superannuation fund);
  - (v) a facility under which a person seeks to manage financial risk or to avoid or limit the financial consequences of fluctuations in, or in the value of, an asset, receipts or costs (such as a derivatives contract or a foreign currency contract);

- (vi) a facility under which a person may make, or cause to be made, a non-cash payment (such as a direct debit arrangement or a facility relating to cheques, bills of exchange, travellers cheques or a stored value card);
  - (vii) leasing and hire purchase arrangements; or
  - (viii) financial or investment advice; or
- b) is a custodial service.

“Financial Services Provider” means a provider of a Financial Service that is a Member. A reference to the Financial Services Provider includes any employee, agent or contractor of the Financial Services Provider including any person who has actual, ostensible, apparent or usual authority to act on behalf of the Financial Services Provider or authority to act by necessity in relation to a financial service.

“FOS” means Financial Ombudsman Service Limited ACN 131 124 448

“FOS Panel” means a panel that has been formed by FOS in accordance with paragraph 2.4 for the purposes of making a Determination in relation to a Dispute.

“General Insurance Broker” means the holder of an Australian financial services licence granted pursuant to section 913B of the *Corporations Act 2001* (Cth) whose licence has a condition authorising them to assume or use the expression “insurance broker” or “insurance broking” or “general insurance broker” in relation to general insurance products.

“General Insurance Policy” means a contract of general insurance within the meaning of that expression in the *Insurance Contracts Act 1984* or part of such a contract.

“IDR Response” means a communication in writing from the Financial Services Provider to an Applicant advising:

- a) the Financial Services Provider’s final position in relation to the Applicant’s complaint after the conclusion of the Financial Services Provider’s internal dispute resolution process; and
- b) the Applicant’s right to take the complaint to FOS and the timeframe for doing so and FOS’s contact details.

“incorporated” means being registered under the *Corporations Act 2001* or under the incorporated associations legislation of a jurisdiction within Australia.

“individual” means a natural person.

“Jurisdictional Decision” means a final decision under paragraph 5.3b) as to whether, under these Terms of Reference, FOS is able to consider a Dispute or whether FOS should exercise its discretion to exclude a Dispute.

“Life Insurance Policy” includes any product or service offered by a life insurance company.

“Maladministration” means an act or omission contrary to or not in accordance with a duty or obligation owed at law or pursuant to the terms (express or implied) of the contract between the Financial Services Provider and the Applicant.

“Member” means a person who is a Member of FOS as defined in FOS’s Constitution.

“Ombudsman” means a person appointed to the position of Ombudsman under paragraph 12 of FOS’s Constitution and includes the Chief Ombudsman.

“Operational Guidelines” means the Guidelines developed by FOS in relation to these Terms of Reference and made publicly available via FOS’s website.

“Panel Member” means a person appointed to the position of Panel Member under paragraph 13 of FOS’s Constitution.

“Predecessor Scheme” means the Banking and Financial Services Ombudsman Limited, the Financial Industry Complaints Service Limited, the Insurance Ombudsman Service Limited, Credit Union Dispute Resolution Centre Pty Limited and Insurance Brokers Dispute Limited and any other ASIC approved external dispute resolution scheme which merges with FOS;

“Recommendation” means an assessment by FOS about a Dispute in accordance with paragraph 8 of these Terms of Reference;

“related body corporate” has the meaning given in the *Corporations Act 2001*.

“Residential Strata Title Insurance Product” means an insurance policy insuring the body corporate of a strata title or company title building that is wholly occupied for residential or small business purposes including:

- a) Strata Building;
- b) Common Contents;
- c) Personal Accident or Sickness for voluntary workers in or about the strata building or common property;

but excluding:

- a) Professional Indemnity;
- b) Public Liability;
- c) Workers Compensation.

“Retail General Insurance Policy” means:

- a) an insurance product specified in section 761G(5)(b) of the *Corporations Act 2001*;
- b) where an Applicant (other than a Small Business) has a Dispute with a General Insurance Broker pertaining to a product that includes an insurance product specified in section 761G(5)(b) of the *Corporations Act 2001* - also includes any other insurance cover provided by that product, with the exception of cover under an Excluded Product.

“Service” means the dispute resolution scheme described in these Terms of Reference.

“Small Business” means a business that, at the time of the act or omission by the Financial Services Provider that gave rise to the Dispute:

- a) if the business is or includes the manufacture of goods: had less than 100 employees; or
- b) otherwise: had less than 20 employees.

“Small Business Insurance Product” means:

- a) where the Dispute is between a Small Business and a General Insurance Broker – a Retail General Insurance Policy other than an Excluded Product;
- b) for other types of Disputes involving a Small Business - a policy or part of a policy that provides insurance cover (whether or not the cover is limited or restricted in any way) in respect of one or more of the following:
  - (i) Computer and Electronic Breakdown;
  - (ii) Fire or Accidental Damage – but, in a Dispute about an insurance claim that has been made by the Applicant, only to the extent that the insurance cover relates to a Specified Defined Event;
  - (iii) General Property;
  - (iv) Glass;
  - (v) Land Transit;
  - (vi) Machinery Breakdown;
  - (vii) Money; and
  - (viii) Theft,but excluding cover in relation to any of the following:
  - (ix) Contractors All Risks;
  - (x) Fidelity Guarantee;
  - (xi) Legal Liability (including Public Liability and Products Liability);
  - (xii) Loss of Profits/Business Interruption;
  - (xiii) Professional Indemnity; and
  - (xiv) Industrial Special Risks.

“Specified Defined Event” means events (however described) as follows:

- a) Fire/Lightning/Explosion;
- b) Storm/Tempest/Rainwater; Flood;
- c) Water from leaking pipes/water systems;
- d) Impact;
- e) Earthquake;
- f) Riot and Civil Commotion or Industrial Disputes;
- g) Malicious Damage;
- h) Fusion;
- i) Spoilage of refrigerated goods.

“Uninsured Motor Vehicle” means a motor vehicle that is not covered by current comprehensive insurance.

## **14.2 General**

- a) A reference to the doing of an act includes, where the context allows, a reference to a refusal or failure to do or cessation of the act. Accordingly a reference to the provision of Financial Services includes, where the context allows, a reference to their non-provision and to their cancellation.
- b) A reference to the singular include the plural and vice versa.
- c) The words “including”, “such as” or “for example”, when introducing an example, does not limit the meaning of the words to which the example relates, that example or examples of a similar kind.
- d) Where a term is used in these Terms of Reference that is not defined in paragraph 14.1, the term is to be interpreted as having its everyday meaning and usage, unless the context otherwise requires.
- e) References to paragraphs are to paragraphs of these Terms of Reference.
- f) A reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them.
- g) Headings are inserted for convenience only and do not affect the interpretation of these Terms of Reference.

# Schedule 1

## Applicable to all new Disputes lodged with FOS between 1 January 2010 and 31 December 2011

The table below specifies according to type of claim the maximum total value of the remedy that may be decided upon by FOS (excluding compensation for costs and interest payments).

	Type of Claim	Amount per claim
1.	<p>Claim on a Life Insurance Policy or a General Insurance Policy dealing with income stream risk or advice about such a contract.</p> <p>If the claim is in excess of this monthly limit, the monthly limit will apply unless:</p> <ul style="list-style-type: none"> <li>the total amount payable under the policy can be calculated with certainty by reference to the expiry date of the policy and/ or age of the insured; and</li> <li>that total amount is less than the amount specified in row 5.</li> </ul> <p>If this is the case, then the limit will be the amount in row 5.</p>	\$6,700 per month
2.	Third party claim on a General Insurance Policy providing cover in respect of property loss or damage caused by or resulting from impact of a motor vehicle.	\$3,000
3.	Managed investments claims, stockbroking claims, claims made in relation to securities and any derivative products and financial planning claims (other than advice pertaining to a Life Insurance Contract in which case row 1 or 5 applies whichever is applicable).	\$150,000
4.	Claim against a General Insurance Broker except where the claim solely concerns its conduct in relation to a Life Insurance Policy (in which case row 1 or 5 applies, whichever is applicable).	\$100,000
5.	Other	\$280,000

## Schedule 2

### Applicable to all new Disputes lodged with FOS on or after 1 January 2012

The table below specifies according to type of claim the maximum total value of the remedy that may be decided upon by FOS (excluding compensation for costs and interest payments).

	Type of Claim	Amount per claim
1.	<p>Claim on a Life Insurance Policy or a General Insurance Policy dealing with income stream risk or advice about such a contract.</p> <p>If the claim is in excess of this monthly limit, the monthly limit will apply unless:</p> <ul style="list-style-type: none"> <li>the total amount payable under the policy can be calculated with certainty by reference to the expiry date of the policy and/ or age of the insured; and</li> <li>that total amount is less than the amount specified in row 4.</li> </ul> <p>If this is the case, then the limit will be the amount in row 4.</p>	\$7,500 per month
2.	Third party claim on a General Insurance Policy providing cover in respect of property loss or damage caused by or resulting from impact of a motor vehicle	\$3,000
3.	Claim against a General Insurance Broker except where the claim solely concerns its conduct in relation to a Life Insurance Policy (in which case row 1 or 4 applies, whichever is applicable).	\$150,000
4.	Other	\$280,000