GUIDELINES TO THE TERMS OF REFERENCE

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INTRODUCTION

The BFSO Scheme

The Banking and Financial Services Ombudsman Scheme ("BFSO" or "the Scheme", formerly known as the Australian Banking Industry Ombudsman Scheme) is an independent dispute resolution service which considers disputes between individuals or small businesses and financial services providers as defined in the Terms of Reference.

The Scheme is an alternative to the courts and our services are free to individuals and small businesses.

BFSO is approved by the Australian Securities and Investments Commission ("ASIC").

Terms of Reference

The structure and operation of the Scheme and the powers and duties of the Ombudsman are set out in the Terms of Reference.

The current Terms of Reference are dated 11 March 2002.

Changes to the Terms of Reference will only be made after the BFSO Board of Directors has consulted with:

- Appropriate individuals and organisations about proposed changes that are not minor in nature; and

- ASIC about all proposed changes (including those identified as minor).

The Ombudsman would generally be involved in any discussions about changes to the Terms of Reference.

Guidelines to the Terms of Reference

Clause 12.6 of the Terms of Reference allows the Ombudsman to *"develop guidelines for the interpretation of these terms of reference"*. In accordance with this clause, we have prepared these Guidelines to the Terms of Reference.

The purpose of these Guidelines is to provide commentary on the application of the Terms of Reference. These Guidelines are designed to assist both disputants and their advisers as well as financial services providers.

The Ombudsman may amend these Guidelines to the Terms of Reference from time to time, if for example, a new development in the law necessitates such a change. However, the Ombudsman must consult with ASIC before doing so.

Structure of these Guidelines

The Guidelines should be read in conjunction with the Terms of Reference.

The Guidelines are divided into 6 main parts:

1. Structure of the Scheme and funding
2. Who can complain to the Ombudsman?
3. What type of dispute can the Ombudsman consider?
4. What type of dispute is the Ombudsman unable to consider?
5. How the Ombudsman makes a decision
6. The Ombudsman's obligations

BFSO Procedures and Policies

In addition to the Guidelines to the Terms of Reference, the Ombudsman publishes a manual called "BFSO Policies and Procedures". This manual is available from our office or our website (www.bfso.org.au).

PART 1

STRUCTURE OF BFSO SCHEME AND FUNDING

Corporate Structure

All member banks have combined to form a company limited by guarantee: the Banking and Financial Services Ombudsman Limited. As with all companies, a Board of Directors has been elected to fulfil both the statutory duties required under relevant legislation and the obligations set out in the Constitution of the Banking and Financial Services Ombudsman Limited.

The Board of Directors

The Scheme is overseen by a Board of Directors which has three industry and three public interest representatives, and an independent Chairperson.

The Board is not involved in considering or reviewing individual disputes, but performs the following tasks:

- appoints the Ombudsman;
- assists the Ombudsman in developing the policies of the Scheme;
- considers the budget submitted by the Ombudsman; and
- manages the process for making changes to the Terms of Reference.

The Board exists to preserve the Ombudsman's impartiality and independence from the funding member banks.

Funding

BFSO is an industry funded scheme. There is no cost for individuals or small businesses to lodge a dispute.

The annual budget is met by contributions from members of the Scheme. Members pay a participation fee and are levied an additional amount based on the number and complexity of disputes considered by the Ombudsman about that member.

PART 2

WHO CAN COMPLAIN?

(Clauses 2.1 –2.5 & 5.9)

"2.1 The Ombudsman may consider a dispute brought by:

(a) an individual; and

(b) a small business;

that:

(i) has received the financial service that is the subject of the dispute; or

(ii) has provided security over a financial service and either the security or the financial service is the subject of the dispute; or

(iii) whose information is the subject of a dispute relating to confidentiality (in the case of both an individual and a small business) and privacy (in the case of an individual)".

This clause sets out who can lodge a dispute with the Scheme. It states that an eligible disputant is either an **individual** or a **small business:**

- that has received a financial service from a financial services provider; or
- that has given security over a financial service; or
- whose information is the subject of a dispute about confidentiality (in the case of both an individual and a small business) and privacy (in the case of an individual).

The meanings of "individual" and "small business" are discussed below in detail.

How is Financial Services Provider Defined? (15.1)

The Ombudsman may consider a dispute against a **financial services provider**. Clause 15.1 of the Terms of Reference defines a financial services provider as a "*Member*", which is a bank, or any "*related body corporate of a Member*".

We are able to consider disputes relating to any employee, agent or contractor of the financial services provider.

A current list of our members is attached, marked Annexure A.

Who is an Individual? (2.1)

An individual is defined in Clause 15.1 of the Terms of Reference as a "*natural person*".

Individuals: Authority to complain

In order to have a dispute considered, an individual must sign an Authority that allows us to obtain information from, and disclose information to, the financial services provider. If the account which is the subject of the dispute is held in joint names, we generally require all account holders to sign the Authority.

What if the authority is not signed by all account holders?

Claims for personal loss:

Because the duties of the financial services provider are owed jointly and severally to the account holders, we will consider a dispute lodged by one joint account holder. For example, one of the joint account holders may wish to lodge a dispute on their own behalf for personal loss arising from the actions of the other account holder and the actions of the financial services provider.

We will consider such a dispute on the general understanding that the appropriate remedy is for the joint account to be "rectified". This means that if the claim is upheld, then the account would be returned to the position that it would have been in had there been no error. This might include:

- returning funds to a joint account where there have been unauthorised drawings; or

- where the claim is about an increase in joint liability, relieving the innocent party of the additional liability.

If there is any dispute about an account holder's entitlement to the balance of the account, then it is appropriate that:

- the account be rectified; and

- an assessment of each account holder's entitlement be made in another forum; unless

- the personal entitlement of the disputant to the compensation is clear, in which case a direct payment should be made to that disputant.

Claims for joint loss:

If a claim for loss is lodged on behalf of all the account holders, it is only in exceptional circumstances that we will accept an Authority that is not signed by all of them. Some examples of "exceptional circumstances" might be:

- mental or physical incapacity of an account holder, although we may require the signature of an authorised representative;

- death of an account holder where no executor or administrator has been appointed to the estate; or

- an account holder cannot be located.

Authorised representatives

The general rule that a disputant must have received the financial service does not prevent that disputant from authorising a third party to lodge the dispute and to deal with this office on their behalf.

See "Disputes lodged by a Third Party" on pages 30-32 for more information.

Ombudsman's Discretion to Refuse to Consider a Dispute from an Individual (2.2)

"2.2 The Ombudsman may, at the Ombudsman's discretion, determine that the Ombudsman should not consider a dispute involving an individual who the Ombudsman considers should not have access to the Scheme because of the assets or wealth, or both, that the individual holds or has."

The Ombudsman has a discretion to refuse to consider a dispute if he/she considers that the disputant should not have access to the Scheme due to their assets and/or wealth.

This paragraph derives from the definition of "retail client" in the *Financial Services Reform Act* which, for the purposes of that legislation, excludes a person who:

- has net assets of at least $2.5 million;

- has a gross income for each of the last two financial years of at least $250,000; or

- is a professional investor.

The Ombudsman would only exercise this discretion in exceptional circumstances and would not exclude an individual solely because they are a professional investor.

What is a Small business? (2.1)

The Terms of Reference relating to businesses, and their ability to lodge disputes, have changed over the years of the Scheme's operation. Different tests are applied to determine whether a particular business is eligible to lodge a dispute, and the tests depend on the date on which the events giving rise to the dispute first occurred.

The Terms of Reference which became effective on 11 March 2002, only set out the business test for events occurring on or after 11 March 2002. However, paragraph 5.9 provides that the tests set out in the previous Terms of Reference are to be applied for events occurring before this date:

"5.9 A dispute relating to an event which occurred before the commencement date of these revised terms of reference (being 11 March 2002), if brought to the attention of the Ombudsman after 11 March 2002 will be dealt with under these revised terms of reference, except that:

(a) the eligibility of the applicant to bring the dispute forward; and

(b) the issue of whether the dispute is within the Ombudsman's jurisdiction,

will be determined in accordance with the terms of reference in force immediately before these terms of reference."

The various tests are as follows.

Events occurring before 6 July 1998

Before 6 July 1998, the Terms of Reference only allowed the Ombudsman to consider disputes from unincorporated businesses that met the general definition of "individual":

> *"… a partnership or other unincorporated body of persons not consisting entirely of bodies corporate but excludes unincorporated statutory authorities".*

Therefore, if a dispute relates to events that first occurred prior to 6 July 1998:

- an unincorporated business can lodge a dispute provided that it does not consist entirely of bodies corporate, and is not an unincorporated statutory authority; and

- an incorporated business cannot lodge a dispute with the Scheme; unless

- the business was not aware of the problem, and could not, with reasonable diligence, have become aware of it until after 6 July 1998 (see clause 5.7).

Events occurring between 6 July 1998 and 10 March 2002

On 6 July 1998, the Terms of Reference were changed to allow incorporated entities meeting the criteria in the Terms of Reference to lodge a dispute with the Ombudsman. This meant that from 6 July 1998 the Ombudsman was able to consider disputes from both incorporated and unincorporated businesses provided that they met the definition of a "small business".

Therefore, if a dispute relates to events that took place between 6 July 1998 and 10 March 2002, we will consider disputes lodged by both incorporated and unincorporated businesses if they can establish that their business was:

- independently owned and managed; and had

- 15 full time equivalent employees or fewer; and

- an annual turnover of $1 million or less,

when the events causing the dispute first occurred.

For the purpose of determining the turnover of a business, we will look at the:

- Annual return lodged with ASIC for an incorporated business for the year the events took place; or

- Tax return for an unincorporated business for the year the events took place.

Disputes from charities, statutory authorities, incorporated associations and companies acting as trustees occurring prior to 11 March 2002

Charitable organisations, statutory authorities, incorporated associations and companies acting as trustees are excluded from the definition of small business, and are not able to lodge disputes with the Scheme relating to events occurring prior to 11 March 2002.

Events occurring on or after 11 March 2002

The revised Terms of Reference, effective from 11 March 2002, contain a new definition of "small business".

For events occurring on or after 11 March 2002, the business (incorporated or unincorporated) must have employed less than:

- 100 full time equivalent employees if the business is or includes the manufacture of goods; or

- 20 full time equivalent employees if the business is of another nature,

when the events causing the dispute occurred.

Disputes from charities, statutory authorities, incorporated associations and companies acting as trustees occurring after 11 March 2002

Charitable organisations, statutory authorities, incorporated associations and companies acting as trustees are able to lodge disputes with the Scheme in relation to events occurring on or after 11 March 2002 provided they meet the employee test. Prior to this date the Ombudsman had no jurisdiction to consider disputes from these entities.

Who Decides What is a Small Business? (2.3)

"2.3 The Ombudsman decides if a disputant is a small business and may consider representations and arguments from the small business disputant and the financial services provider if either wish to make them."

If the eligibility of a business disputant is challenged by the financial services provider, it is ultimately up to the Ombudsman to decide if the disputant meets the relevant test and should be allowed to access the Scheme.

Discretion to Consider Disputes from Businesses that Do Not Meet the Small Business Criteria (2.4)

"2.4 The Ombudsman may, at the Ombudsman's discretion, consider a dispute from a business which is not a small business if the financial services provider concerned agrees."

In some limited circumstances, we may consider a dispute from a business that does not satisfy the relevant small business criteria, if the financial services provider agrees. This may occur where:

- The financial services provider approaches us to request that we consider a particular dispute; or

- The disputant obtains consent to our involvement from a branch or department of the financial services provider. In such circumstances, the disputant should provide the name and contact details of the relevant person so that we can confirm that the financial services provider consents to our involvement in the dispute.

It is ultimately up to the Ombudsman to determine whether a particular dispute should be considered.

Small Business Authorities

Before we can consider a dispute lodged by a small business, the disputant will need to complete and sign an Authority which:

- certifies that the business meets the relevant definition of a small business;

- confirms in writing that the financial services provider may release documents to the Scheme, and authorises the Scheme to disclose information to the financial services provider; and

- identifies the person authorised to resolve the dispute on behalf of the business.

Incorporated small businesses: Authority to complain

We will consider a dispute lodged by an incorporated small business if we are satisfied that a Resolution of the company directors has been passed in accordance with the company's Constitution, which:

- consents to the dispute being lodged with the Scheme; and

- nominates the person authorised to deal with this office.

The Authority must include a copy of the Resolution and an extract from the Constitution setting out how many directors are required to pass a Resolution. We will not consider a dispute if the Resolution has not been passed by the required number of directors set out in the Constitution.

Unincorporated small businesses: Authority to complain

We generally require all of the owners of a small business to sign the Authority.

What if the authority is not signed by all business owners?

Claims for personal loss:

If it is not possible for all of the business owners to sign the Authority, then our ability to consider the dispute will depend on the nature of the loss claimed.

For example, one or some of the owners may wish to lodge a dispute on their own behalf for loss that they have suffered as an individual. This may be because another of the owners has used business funds or security without authority.

We can consider a claim for such loss on the understanding that the appropriate remedy is for the business account to be "rectified". Any compensation would be paid directly to the business, and an assessment of each of the owner's entitlements would then need to be made in another forum.

There may be exceptional circumstances where the personal entitlement of the disputant to the assets of the business is clear. In such a case, a payment of compensation may be made directly to that disputant.

Claims for joint loss:

If a claim for loss is lodged on behalf of the business, it is only in exceptional circumstances that we will accept an Authority that is not signed by all of the owners.

Examples of such exceptional circumstances might be:

- mental or physical incapacity of an owner although we may require the signature of an authorised representative;

- death of an owner where no executor or administrator has been appointed to the estate; or

- an owner cannot be located.

What Financial Services Can the Ombudsman Consider? (2.1(i))

We can consider a dispute if the financial service complained about was provided directly to the disputant.

Examples where no financial service is provided

There are some cases where a person or business may be affected by dealings with a financial services provider, and may even have a claim for loss, but that person or business did not actually receive a financial service. A common example involves third party cheques.

A third party cheque is a cheque that is deposited into an account operated by someone other than the person named as the payee on the front of the cheque.

In these circumstances, the collecting bank is providing a financial service to the person who presented the cheque for payment. The Ombudsman cannot investigate a complaint made by the payee - or the person otherwise claiming to be the true owner - because the collecting bank did not provide a financial service directly to them.

Another example is where an individual or a business which holds a mortgage over a property has dealings with a financial services provider in its capacity as holder of another mortgage over the same property, and claims that loss has resulted. We could not consider such a dispute because no financial service has been provided to the disputant.

Guarantors and Third Party Security Providers (2.5, 5.6(c))

"2.5 If the dispute relates to a guarantee or charge which is given to secure moneys owing by a business, then the Ombudsman must not, unless the financial services provider concerned agrees, consider the claim unless the business that owes the money is a small business. This is regardless of whether the disputant (who may be the guarantor or chargor) is an individual or a small business."

We can consider a dispute about a guarantee or other security given by a disputant over the debts of either an individual or a small business.

The dispute may be about the security itself or the underlying financial service. We will consider such a dispute provided that the alleged effect of the conduct complained about is an increase in the guarantor's liability or risk under the guarantee.

Where an individual or small business has provided security over a business loan, and seeks to lodge a dispute with the Scheme about the guarantee or charge, we will only consider the matter if the business which is the principal borrower meets the small business definition that applied when the events giving rise to the dispute first occurred. This is regardless of whether the disputant is an individual or a small business.

If the business that owes the money is not a small business, but the financial services provider agrees to our involvement, we may consider the matter.

Types of disputes from guarantors

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- the guarantor was not adequately aware of the legal effect of the guarantee or of their financial exposure under the guarantee;

- the financial services provider did not take adequate steps to ensure that the guarantor made an independent and informed decision about entering into the guarantee;

- the guarantor did not receive information about the guaranteed account/s as requested including copies of statements and any notices issued by the financial services provider;

- an increase to a loan or overdraft limit being made without the guarantor's knowledge or consent; or

- some other material change in the lending arrangements that took place without the guarantor's knowledge or consent.

If we consider that the guarantor's liability under a guarantee has been increased due to an error on the part of the financial services provider, we may recommend that:

- the guarantor's liability be limited to a specific amount;

- the guarantor be released from liability under the guarantee; or

- monies obtained by the financial services provider from realisation of the security provided by the guarantor be reimbursed.

PART 3

WHAT TYPES OF DISPUTE CAN THE OMBUDSMAN CONSIDER?

Clauses 3.1 (a) & (b)

"3.1 The Ombudsman can, subject to these terms of reference, consider a dispute which relates to:

(a) any act or omission by a financial services provider in relation to a financial service in Australia;

(b) any act or omission by a financial services provider relating to confidentiality and, in the case of an individual disputant, privacy."

This paragraph sets out the Ombudsman's broad power to consider a dispute about **any act** or **omission** by a financial services provider relating to:

- a **financial service** in Australia; or
- **confidentiality** and **privacy**.

Any Act or Omission

An act or omission includes offering, withholding, providing and administering a financial service. For example, a disputant may complain about the use or the cost or perhaps the management of a financial service they have received from a financial services provider.

A disputant may also complain about the failure or refusal of a financial services provider to provide a financial service where there is an obligation to do so. That is, the disputant may claim to have suffered a financial loss because they did not receive a particular financial service that the financial services provider agreed or was obliged to provide.

What is a Financial Service? (15.1)

A financial service is defined in Clause 15.1 of the Terms of Reference as a product or service that is **financial in nature**. The definition lists examples, including a loan, credit transaction, deposit, financial investment, insurance contract and foreign currency transaction. This list is not exhaustive, and we interpret the term "financial service" broadly.

Because the product or service which is the subject of the dispute must satisfy the general test of being financial in nature, we cannot consider disputes relating to a financial services provider in its capacity as an employer. Nor can we consider a dispute from a prospective purchaser about the actions of a financial services provider who is selling a property as mortgagee in possession. This dispute would arise from a commercial relationship between the parties, not from the provision of a financial service.

The financial service which is the subject of the dispute must have been provided or agreed to be provided in Australia. We could not, therefore, consider a dispute about a loan granted overseas by a financial services provider which is a member of the Scheme.

However, if the dispute relates to transactions occurring overseas in relation to a product or service which was provided to the disputant in Australia, we may consider the matter. For example, we could consider a dispute relating to unauthorised credit card transactions that were made overseas on a credit card account that is domiciled in Australia.

What is a Financial Services Provider? (15.1)

Clause 15.1 of the Terms of Reference defines a financial services provider as a *"Member"*, which is a bank, or any *"related body corporate of a Member"*.

We are able to consider disputes relating to any employee, agent or contractor of the financial services provider.

A current list of our members is attached, marked Annexure A.

Disputes about Confidentiality and Privacy (3.1(b), 5.2, 5.3)

Both individuals and small businesses may lodge a dispute about a breach of a duty of confidentiality by a financial services provider. An individual may also lodge a dispute about a breach of their privacy.

While the terms "privacy" and "confidentiality" are sometimes used interchangeably, there are important differences between the two concepts. A small business, company or trust does not have a right to privacy under privacy legislation and cannot, therefore lodge a dispute with us about an alleged breach of privacy.

Confidentiality

"5.2 Where the dispute involves a confidentiality issue the Ombudsman may consider it:

(a) if the disputant is a natural person or a small business; and

(b) to the extent that the Ombudsman considers the dispute relates to information which is confidential information."

We can only consider a dispute involving a confidentiality issue if we are satisfied that:

- The disputant is a natural person or a small business; and
- The dispute relates to information which is confidential information**.**

Confidential information is any information to which a duty of confidentiality attaches.

A duty of confidentiality arises from an implied term in the contract between a banker and its customer. In addition, a duty can arise in respect of:

- information which an individual or entity discloses on the understanding that it will be kept confidential; or
- where a contract or relationship between two parties demands information to be kept confidential.

However, we will not usually consider disputes that relate to confidential information in a commercial contract between a financial services provider and a supplier or contractor as the court is likely to be the more appropriate forum for such disputes.

Privacy

"5.3 Where the dispute involves a privacy issue the Ombudsman may consider it:

(a) if the disputant is a natural person; and

(b) to the extent that the Ombudsman considers the dispute relates to information which is personal information."

If the dispute involves a privacy issue, we must be satisfied that:

- The disputant is a natural person; and

- The dispute relates to information which is personal information.

Personal information is defined in Clause 15.1 of the Terms of Reference as:

> *"information or opinion (including information or an opinion forming part of a data base), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can be reasonably ascertained, from the information or opinion."*

The following are examples of personal information:

- An individual's name and address;
- An individual's employment details; and
- An individual's marital status.

Examples of disputes the Ombudsman may consider

The following are some examples of acts or omissions in relation to a breach of confidentiality or privacy that might arise in the financial services sector:

<u>Acts</u>

- Releasing information about a customer, without their knowledge, to a related entity to market a product; and
- Accessing a customer's account details for the purpose of passing on details of that person's financial situation to a third party, such as a former spouse.

<u>Omissions</u>

- Failure of a financial services provider to notify an individual that it has collected information about that person and kept the information. This would breach the Collection principle of the National Privacy Principles;
- Failure to abide by a customer's election not to be contacted for marketing purposes. This would breach the Use principle of the National Privacy Principles because an election in relation to contact for marketing purposes should be taken seriously and acted upon; and
- Failure to keep records, which are in use, up to date. This would breach the Use principle of the National Privacy Principles which requires reasonable efforts to ensure that records are kept up to date.

PART 4

WHAT TYPE OF DISPUTE IS THE OMBUDSMAN UNABLE TO CONSIDER?

Clauses 5.1 – 5.9

Clause 5.1 of the Terms of Reference sets out the types of disputes that the Ombudsman cannot consider. These are summarised below:

- disputes about commercial judgment;
- disputes about general practice and policy;
- disputes that are being, or have been, considered in another forum;
- disputes that are more appropriately dealt with in another forum;
- disputes where the claim for loss exceeds $150,000;
- disputes where a financial services provider issues a test case notice;
- disputes lodged by a party who has not received a financial service;
- disputes that have not first been considered by the financial services provider;
- disputes that are frivolous or vexatious; and
- disputes that the Ombudsman has already considered.

Settlement Already Reached with Financial Services Provider

In addition to the types of disputes excluded by Clauses 5.1 – 5.9 we will not consider a dispute which has previously been settled or compromised, even if proceedings were not issued. For example the same claim has previously been made, the financial services provider has offered a sum in full and final settlement of the claim and the disputant has accepted it. This is because at law any liability of the financial services is discharged by the settlement.

Disputes About Commercial Judgment (5.1(a))

> *"5.1 The Ombudsman can consider any dispute described in 3 except:*
>
> *(a) to the extent the dispute relates solely to a financial services provider's commercial judgment in decisions about lending or security. A dispute will relate to commercial judgment if the financial services provider made an assessment of risk, or of financial or commercial criteria or of character.*

> *The Ombudsman may consider disputes about maladministration in lending or security matters which involve an act or omission contrary to or not in accordance with a duty owed at law or pursuant to the terms (express or implied) of the contract between the financial services provider and the disputant;"*

We cannot consider a dispute that relates solely to a financial services provider's commercial judgment about lending or security. A dispute that alleges maladministration in decisions about lending or security may, however, be within the Ombudsman's jurisdiction.

Definitions

Clause 5.1(a) states that:

- "*commercial judgment*" means an assessment of risk, or of financial or commercial criteria or of character by the financial services provider; and

- "*maladministration*" involves an act or omission contrary to or not in accordance with a duty owed at law or pursuant to the terms (express or implied) of the contract between the financial services provider and the disputant.

The decision to lend

Typically, questions about commercial judgement and claims of maladministration arise in disputes about the financial services provider's decision to lend.

We often receive complaints alleging that a financial services provider did not properly assess the loan application when considering whether or not to loan funds to the disputant. A dispute might arise if a financial services provider either:

- refuses to lend funds as requested by the disputant; or

- lends funds to the disputant where they had no reasonable prospect of repaying the loan.

If the complaint is that the financial services provider has refused to lend and there is no evidence of a pre-existing obligation to lend, then that decision is an exercise of the financial services provider's commercial judgement. It is not something that we can review.

If the refusal to lend was because of discrimination based on race, gender, etc, then the matter may be more appropriately dealt with by the Human Rights & Equal Opportunity Commission.

However, if the complaint is that a financial services provider has provided a loan that is wholly unsuitable given the disputant's circumstances, then this office will need to investigate whether the decision to lend:

- was a proper exercise of the financial services provider's commercial judgement; or

- whether there was maladministration in the making of that decision.

When dealing with disputes against banks, we will have regard to the fact that a bank has a duty under the banker-customer contract "*to exercise reasonable care and skill in carrying out [the bank's] part with regard to operations within its contract with its customer*". The standard of care for a banker is that of "*the reasonable competent banker* acting in *accordance with accepted current practice.*" (*Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555).

The following extract provides a summary about how a financial services provider might exercise its commercial judgement when assessing a loan application:

> *"The ultimate lending decision should be made on an assessment of the ability of the applicant to repay the loan. This will be based on the figures provided by the applicant, supplemented by the banker's own research, and calculated using the bank's credit scoring tables, acceptable ratio limits or whatever other methods are appropriate.*
>
> *However, it is likely that, to some extent, the decision will also be influenced by the 'personal element', which is usually based on the banker's impression formed at the initial interview.*
>
> *This may take into account the personal factors of the individual loan applicant or the business ability..., the technical ability of the loan applicant to properly perform his or her trade or profession, and their administrative skills, but it is important that the banker keeps a flexible view through the interview".*[1]

[1] *Banking and Lending Practice* by PM Weaver & KM Shanahan (3rd edn) (1994) (Serendip Publications) at para 1120, page 225.

Maladministration in the decision to lend

In determining whether there has been maladministration in the decision to lend, the issue of the borrower's ability to repay is critical:

> *"The ability of a customer to repay the loan is obviously crucial to good lending practice. No banker should rely on realisation of assets held as security as the primary source of repayment and the banker must be satisfied that there is a clear repayment source. Preferably this should be under the control of the borrower and the banker should keep this in mind when examining the customer's commitments and assessing the loan amount and term."*[2]

If a loan is approved, and it transpires that the customer had little or no hope of servicing the loan, then a dispute may raise issues of maladministration. This issue is made explicitly relevant to consumer loan transactions by the *Consumer Credit Code.*

We take the view that a financial services provider should act prudently in making a decision about lending, and that the decision should be in accordance with the relevant standard of care.

For further information about how we assess whether the standard of care has been met, see our "BFSO Policies and Procedures" manual.

Disputes About General Practice and Policy (5.1(b))

"5.1 The Ombudsman can consider any dispute described in 3 except:

(b) to the extent that it relates to a practice or policy of the financial services provider (for example, a financial services provider's general interest rate policy or fees and charges policy);

The Ombudsman may consider disputes:

(i) which involve a breach of any obligation or duty; or

(ii) which involve serious misconduct; or

(iii) at the request of the financial services provider;"

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[2] *Banking and Lending Practice* by PM Weaver & KM Shanahan (3rd edn) (1994) (Serendip Publications) at para 1131, page 299.

As a general rule, we cannot consider a dispute about a financial services provider's general practice or policy. For example, a dispute about branch closures, general interest rate policy or fees and charges will be outside the Terms of Reference.

However, we can consider a dispute which relates to a practice or policy if it involves an alleged breach of a duty owed to a customer.

Also, if a disputant claims that a financial services provider has applied a policy or practice in a manner which constitutes serious misconduct, we are able to consider the matter. Serious misconduct is defined in clause 9.3 as conduct which is *"fraudulent, grossly negligent, or involves wilful breaches of applicable laws"* and will almost always involve a breach of an obligation or duty.

If we find that a financial services provider has engaged in serious misconduct, we are obliged, under paragraph 9.1 to report the matter to the Australian Securities and Investments Commission ("ASIC").

We are also able to consider a dispute which would otherwise be excluded from our jurisdiction, if the financial services provider requests us to do so.

Disputes that Are, Were or Become the Subject of Other Proceedings (5.1(c))

"5.1 The Ombudsman can consider any dispute described in 3 except:

> *(c) if a dispute is based on the same event and facts and with the same disputant as any matter which is, was, or becomes, the subject of any proceedings in any court, tribunal, arbitrator, or independent conciliation body or an investigation by a statutory Ombudsman of any jurisdiction unless the parties consent;"*

It is not in the general interest for a dispute to be the subject of multiple proceedings. Therefore, we cannot consider a dispute if it:

- *is;*
- *was;* or
- *becomes*

the subject of proceedings in a court, tribunal, arbitrator, independent conciliation body or an investigation by a statutory Ombudsman, unless the parties consent.

Where the dispute "is" the subject of proceedings in another forum

Proceedings commenced by disputant

If a disputant lodges their dispute with the Scheme when they have already commenced proceedings elsewhere, we will not be able to consider the dispute.

Proceedings commenced by financial services provider

There may be instances where a disputant lodges a dispute with the Scheme after the financial services provider has commenced proceedings against them. This would usually occur where the financial services provider has issued legal proceedings in a court for the recovery of a debt from the disputant.

In cases where it appears that legal proceedings have already been commenced when we receive the dispute, we will write to the financial services provider asking:

- Has it issued legal proceedings against the disputant?
- When were the proceedings issued?
- When were the proceedings served? and
- If they have not been served, does the financial services provider consent to stay the proceedings to enable us to consider the dispute?

Proceedings issued but not served by the financial services provider

We treat legal proceedings as having commenced when the writ or other originating process is filed at the court or other forum, rather than when it is served. Therefore if we receive a dispute after an originating process has been filed in court, but before it has been served, we cannot investigate the dispute without the financial services provider's consent. Unless and until the financial services provider consents we cannot consider the dispute.

Proceedings issued and served

If proceedings have been issued and served we will not be able to consider the dispute unless and until the proceedings are discontinued. This is a matter between the financial services provider and the disputant. The financial services provider is not obliged to discontinue proceedings. In any event the disputant needs to make sure that they protect their interests in the proceedings by seeking appropriate legal advice.

Where the dispute "was" the subject of proceedings in another forum

The Ombudsman has no power to overturn a court judgement or go behind a decision obtained in another forum. Therefore we will not consider a dispute it is has already been considered elsewhere. However, if the previous proceedings were discontinued without either settlement being reached or judgement obtained we would expect the financial services provider to consent to stay the proceedings so that this office could consider the dispute.

If a disputant is not satisfied with the outcome of previous proceedings, they should seek legal advice about the options that are open to them.

Where the dispute "becomes" the subject of proceedings in another forum

Proceedings commenced by financial services provider

Once a dispute has been lodged with us, the financial services provider should not commence legal proceedings before we have closed our file. To do so would defeat the purpose of the Scheme.

If proceedings are commenced by the financial services provider after we have referred the dispute to it for consideration, we require the financial services provider to discontinue the proceedings in the court at its own cost.

In unusual circumstances, if proceedings are issued by the financial services provider after the dispute is received by us but before we have sent it to the financial services provider, the proceedings should be discontinued.

Proceedings commenced by disputant

If a disputant decides to commence proceedings in another forum, after lodging their dispute with us, then they should immediately notify us. The financial services provider should also advise us if they receive notice that the disputant has initiated alternative proceedings.

In this situation, we will immediately cease our consideration of the dispute, and close our file.

If the disputant wants to preserve their right to bring proceedings in an alternative forum, they should obtain independent advice about any applicable limitation periods.

Disputes that are More Appropriately Dealt with in Another Forum (5.1(d))

"5.1 The Ombudsman can consider any dispute described in 3 except:

> *(d) if the Ombudsman thinks 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;"*

We will not deal with a dispute if we consider there is a more appropriate place to deal with the matter, such as:

- a court;
- tribunal;
- another alternative dispute resolution ("ADR") scheme; or
- the Privacy Commissioner.

Our general approach is that disputes should be referred to other forums, particularly the courts, only in limited circumstances. Each dispute will, however, be assessed on its merits.

In some cases, we may start an investigation and receive information which indicates that there is a more appropriate forum to deal with the matter. In these circumstances, we would cease the investigation and advise both parties of the more appropriate forum.

Below are some examples of when we may consider that BFSO is not the most appropriate forum to consider a dispute. These examples are not exhaustive.

Allegations of fraud

Sometimes, a disputant makes an allegation of fraud, conspiracy or theft by an officer of a financial services provider. They may want the Ombudsman to find that an officer has been involved in criminal activity. We will not consider this aspect of a dispute because such an issue is better dealt with by a court.

This does not mean that the Ombudsman cannot consider disputes about lost deposits or mistakes with withdrawals or other disputes to the extent that they raise civil causes of action. If the available information establishes that a document has been altered without authority by an officer, or that a teller has failed to properly credit or debit an account, then we can still make a finding about any loss suffered by the disputant. Our finding will not, however, include any view about whether there has been criminal activity.

Consumer Credit Code

The *Consumer Credit Code ("the Code")* confers on Credit Tribunals and courts the power to impose civil penalties on credit providers where key

requirements of the Code have been breached. These penalties are punitive in nature.

Therefore, if we receive a dispute which indicates that there has been a breach of a key requirement of the Code, we would refer the disputant and the financial services provider to the Credit Tribunal or court in the relevant jurisdiction.

If the dispute involves breaches of the Code, but the breaches do not relate to key requirements, we will continue to consider the matter and apply the appropriate provisions of the Code.

Other ADR schemes

There are a number of alternative dispute resolution ("ADR") schemes in the finance sector. These include schemes that deal with disputes about general insurance, life insurance, investment advice and superannuation. Financial services providers may be members of more than one ADR scheme depending on their business. They may also have affiliates which are members of other specialist ADR schemes.

In some circumstances, where a dispute relates to matters beyond traditional banking services, and specialised knowledge is required, we may conclude that another ADR scheme is a more appropriate forum. We would only form this view if:

- we are sure that the financial services provider is a member of the other scheme; and

- we think it would be in the disputant's best interest to have the dispute considered by that scheme.

Paragraph 4.1 of the Terms of Reference gives the Ombudsman the ability to refer a dispute directly to the more appropriate ADR scheme after obtaining the disputant's consent:

"4.1 The Ombudsman can also :

(a) if the Ombudsman thinks it is more appropriate for another dispute resolution scheme to deal with the issue, refer a dispute to the relevant specialist dispute resolution scheme approved by ASIC, or if there is not such scheme approved by ASIC, then to any other specialist dispute resolution scheme considered appropriate by the Ombudsman.

If a dispute is referred to another dispute resolution scheme then the Ombudsman must obtain the consent of the disputant before forwarding any information to the relevant scheme body;"

Privacy disputes

Both the Federal Privacy Commissioner and the Ombudsman have the power to consider disputes about a financial services provider breaching an individual's privacy. The Terms of Reference give the Ombudsman the power to:

- Award compensation for any direct financial or non financial loss suffered as a result of a breach of privacy; and

- Make the same determinations, awards, declarations, orders or directions that the Federal Privacy Commissioner may make.

When we receive a dispute about an alleged breach of privacy by a financial services provider, we write to disputants to inform them that they have the option of pursuing the matter with the Privacy Commissioner, rather than the Ombudsman.

There may be some limited circumstances, however, where we form the view that the Privacy Commissioner is the more appropriate forum for considering the dispute. This may occur if the dispute is entirely about a breach of privacy, and either of the following applies:

- The Privacy Commissioner's specialised knowledge is required; or

- The dispute relates to a systemic issue which is being investigated by the Privacy Commissioner.

Disputes Where the Claim for Loss Exceeds $150,000 (5.1(e))

"5.1 The Ombudsman can consider any dispute described in 3 except:

(e) if the Ombudsman thinks that the amount the subject of the dispute (irrespective of the size of the facility or transaction):

(i) exceeds $150,000; or

(ii) is part of a larger claim by the disputant against the financial services provider involving more than $150,000; or

> *(iii) is related to another claim which the disputant could make against the financial services provider and the total of the claims would be for more than $150,000.*
>
> *When calculating the amount in dispute, the Ombudsman must not aggregate monetary claims that a disputant may make in respect of separate or unrelated complaints."*

We cannot consider a dispute if we consider that the claim for loss:

- Exceeds $150,000;
- Is part of a larger claim against the financial services provider involving more than $150,000; or
- Is related to another claim against the financial services provider, and the total of the claims exceeds $150,000.

Whether or not a dispute falls within the monetary limit depends on the amount claimed, and not on the monetary value of the underlying financial service. For example, a customer with a loan of $280,000 may have a claim for financial loss of only $1,000. The customer can lodge this dispute with the Scheme.

No Aggregation of Claims

We determine whether a dispute exceeds our monetary limit by assessing the information provided to us by the parties. When calculating the amount in dispute, we will not add separate and unrelated claims together. For instance, a disputant may complain that:

- The financial services provider undersold their property at a mortgagee auction, resulting in a financial loss of $149,000; and
- The financial services provider gave them inaccurate information about the calculation of interest on their term deposit, resulting in a loss of $1,500.

As these two claims do not arise from the same set of circumstances, and are not related in any other way, we would treat the claims as two separate matters, for the purposes of calculating the amount in dispute. This dispute would, therefore, fall within our jurisdiction.

Claim increasing during an investigation

A claim that is below the $150,000 limit when it is lodged with the Scheme, may exceed the limit during the course of an investigation because of interest and other costs that may accrue over time.

We will continue to consider the dispute in these circumstances. However, the disputant must be aware that the Ombudsman can only make a binding determination of up to $150,000. Therefore, even though the loss claimed may have increased to $160,000 because of the accrual of interest, a determination can only be made for $150,000.

No abandonment of excess

A disputant who has a claim exceeding $150,000 may not abandon any excess to bring the dispute within the monetary limit. Nor can they artificially construct a claim for this purpose.

Ultimately the Ombudsman will determine whether a particular claim exceeds $150,000 based on an objective assessment of the available information.

Disputes Where the Financial Services Provider Issues a Test Case Notice (5.1(f), 8.1, 8.2)

"5.1 The Ombudsman can consider any dispute described in 3 except:

(f) if any financial services provider named in the dispute gives the Ombudsman a "Test Case notice" as described in 8;"

We are prevented from considering, or continuing to consider, a dispute, which may otherwise be within the Terms of Reference, if the financial services provider issues a *Test Case Notice.*

A Test Case Notice is issued when a financial services provider decides that the dispute raises novel or important legal issues, or an issue with important consequences for its business or industry, which justifies the referral of the dispute to a court or tribunal.

Upon receipt of a Test Case Notice ("Notice"), our office will stop considering the dispute, provided that the Notice contains all the matters set out in clause 8.1(b) including:

- Reasons why the financial services provider considers that the matter raises important or novel legal issues or may have important consequences for the business;

- An undertaking that if proceedings are commenced within six months of the Ombudsman receiving the Notice, the financial services provider will pay the disputant's costs and disbursements including interim payments, if reasonable to do so; and

- An undertaking that the financial services provider will seek to resolve the dispute expeditiously.

The requirement on the financial services provider to resolve the dispute expeditiously once it has issued a Notice means that if neither the disputant nor the financial services provider has commenced proceedings within six months of the Ombudsman receiving the Notice, we will recommence our consideration of the dispute.

Disputes Lodged by a Third Party (5.1(g))

"5.1 The Ombudsman can consider any dispute described in 3 except:

(g) if the dispute is not made by or on behalf of the person who was receiving the financial services complained of."

We cannot consider a dispute unless it is lodged by, or on behalf of, the person or small business that received the financial service complained about. We can consider a dispute lodged by a third party only if the third party is:

- authorised by the recipient of the financial service to pursue the dispute on his/her/its behalf; or

- is the legal representative of the recipient of the financial service.

Some circumstances in which a third party might seek to lodge a dispute are discussed below.

Spouses/partners/friends

A person can lodge a dispute on behalf of their husband, wife, de-facto, partner, friend etc. However the disputant must consent in writing to the Ombudsman investigating the dispute and also authorise the third person to act on their behalf.

Professionals

Solicitors, accountants, financial counsellors, members of parliament and other advocates may lodge disputes on behalf of disputants. However, the disputant must consent in writing to the Ombudsman investigating the dispute and also authorise the advocate to act on their behalf.

Parents/children

A parent or guardian can lodge a dispute on behalf of a child who is under 18 years of age. Any claim for financial or non-financial damage in relation to an account in a child's name must be the loss or damage suffered by the child.

A person who is over 18 years of age must give their written authority if they want a parent or guardian to pursue the dispute on their behalf.

Trust accounts

Disputes about the operation of a trust account held with a financial services provider must usually be made by the trustee. However, there will be some cases where because of the circumstances, the financial services provider has obligations to a beneficiary, for example, where there is or may be a breach of trust for which the financial services provider is potentially liable. In these circumstances, we will consider a dispute lodged by a beneficiary provided it is otherwise within our jurisdiction. We will not consider the dispute if the court is a more appropriate forum.

Bankrupts

A bankrupt may wish to complain about the financial service provided to them prior to their bankruptcy. Disputes lodged with the Scheme by bankrupts range from allegations of maladministration in granting a loan to claims that a financial services provider has breached its duty of care as mortgagee in possession.

<u>Authority of trustee in bankruptcy required</u>

Because the trustee in bankruptcy has responsibility for the financial affairs of the bankrupt until they are discharged from bankruptcy, a dispute cannot, generally, be considered by the Ombudsman without the authority of the trustee in bankruptcy.

In most cases reviewed by this office, the amount of the debts owed to creditors exceeds the amount of the disputant's claim against the financial services provider so that the bankrupt cannot demonstrate that they suffered a financial loss as a result of the actions of the financial services provider.

The Ombudsman may, therefore, decline to consider a dispute from a bankrupt unless they can show that:

- The acts or omissions of the financial services provider caused a financial loss which exceeds the debts owed in the bankruptcy such that there would be a residual amount owing to which the bankrupt would be personally entitled; or

- If the claim for loss does not exceed the debts owed in the bankruptcy, that payment of the claim would result in a demonstrable benefit to the disputant.

Claims for non financial damage

A claim by a bankrupt for compensation for non financial damage can be made to this office without the consent of the trustee in bankruptcy. We take this approach because s.116(2)(g) of the *Bankruptcy Act* 1966 provides that claims for personal injury or wrong do not form part of the bankrupt's divisible estate.

Incapacity

Disputants suffering from mental incapacity or a disability may be represented by a third party. If an administrator has been appointed because of the mental incapacity of the disputant, then the administrator should lodge the dispute. A person holding a valid power of attorney may also bring a dispute on behalf of a person without capacity. We would require a copy of the power of attorney or the administration order in favour of the person bringing the dispute.

Where we have concerns that the disputant's interests may not be adequately protected, we will ask the person bringing the complaint to make contact with the Public Advocate in the relevant jurisdiction so that an assessment can be made about whether an administration order should be sought from the tribunal or court.

Deceased estates

Disputes about losses caused to a deceased estate must be brought by the legally appointed representative of the estate (either the executor of the will or the administrator of the estate). This is necessary because the Ombudsman needs:

- the appropriate authority to obtain confidential information about the deceased from the financial services provider's files; and

- correct identification of the person to whom any financial compensation should be paid.

We require a copy of the Will or letters of administration in order to verify the legal status of the person lodging the dispute.

We will not consider a dispute lodged by a beneficiary of an estate unless the legally appointed representative authorises the beneficiary to lodge the dispute.

Disputes Not First Considered by the Financial Services Provider (5.1(h))

"5.1 The Ombudsman can consider any dispute described in 3 except:

(h) if the Ombudsman has referred a dispute to the financial services provider concerned, the Ombudsman cannot consider the dispute until:

(i) the financial services provider has responded to the dispute; or

(ii) 45 days, or any lesser period determined by the Ombudsman, have elapsed,

whichever occurs first other than in exceptional circumstances where delay, in the opinion of the Ombudsman, is undesirable in which case the Ombudsman may consider the dispute earlier;"

Our procedures are designed to encourage the parties to resolve disputes between themselves wherever possible. When we first receive a written letter of complaint, we will send it to the financial services provider's customer relations department to see if a resolution can be reached without our further involvement.

Often a disputant will have already tried to resolve the dispute with staff who may have been involved in the problem, for example, specific branch or call centre staff. Our experience shows, however, that a dispute that appears to be at deadlock may still be resolved when it is referred to the financial services provider's head office for assessment.

Paragraph 5.1(h) states that we are unable to consider a dispute until the financial services provider has provided us with a response to the dispute, or 45 days (or lesser period determined by the Ombudsman) have elapsed, whichever occurs first.

Under our current procedures the Ombudsman requires the financial services provider to respond to the dispute within a lesser period, 30 days, unless an extension of time is requested by the financial services provider.

There may be exceptional circumstances where we will start to investigate a dispute before we receive the financial services provider's response or before the 30 days have elapsed. Examples of exceptional circumstances may include where:

- the sale of a security property is imminent; or

- the health of the disputant warrants the matter being fast-tracked.

Frivolous and Vexatious Disputes (5.1(i))

"5.1 The Ombudsman can consider any dispute described in 3 except:

(i) *if the Ombudsman considers that the dispute being made is frivolous or vexatious;"*

If we consider that a dispute is frivolous or vexatious, we may refuse to consider the matter. In assessing whether a dispute is frivolous or vexatious, we will have regard to the case law dealing with frivolous or vexatious litigation and the circumstances of the particular dispute. For example, if the dispute:

- is made for collateral purposes, and not for the purpose of having the Ombudsman assist to resolve a dispute;

- is lodged with the intention of annoying and embarrassing the financial services provider; or

- is clearly untenable or groundless, irrespective of the motive of the disputant;

we may form the view that the dispute should not be considered. We would only make such a decision, however, in exceptional circumstances.

Disputes Already Considered by the Ombudsman (5.1(j))

"5.1 The Ombudsman can consider any dispute described in 3 except:

(j) if the dispute is based on the same events and facts as a previous dispute by the disputant to the Ombudsman, unless there is new information."

We cannot reconsider a dispute that has already been investigated by the Scheme unless new information becomes available. The case would usually only be re-opened if the new information is compelling and has the potential to change the previous decision. The new information must be provided to us within a reasonable time of the closure of the case.

This provision does not prevent us from reconsidering a case which has been previously closed on the understanding that it may be reopened on the happening of some specific event. If that event occurs, we will recommence our investigation of the dispute.

Disputes about Bank Fees or Charges (5.4)

"5.4 The Ombudsman may consider a dispute about a fee or charge being incorrectly applied by the financial services provider having regard to any scale of charges generally applied by that financial services provider."

We can consider a dispute about a fee or charge applied in relation to a financial service. However, paragraph 5.4 limits this power to dealing with disputes about:

- a fee or charge that has been **incorrectly applied** by the financial services provider; having regard to

- any scale of charges generally applied by the financial services provider.

This paragraph should be read in the same spirit as paragraph 5.1(b). That is, the dispute must involve a specific breach of a duty or obligation by the financial services provider in its dealings with the disputant. A general complaint about the fairness of fees and charges or the amount of the fee or charge levied in accordance with the bank's policy and the terms and conditions of the account, is not within the Ombudsman's jurisdiction.

Disputes Outside the Ombudsman's Time Limits (5.5 – 5.8)

"5.5 Subject to 5.6, the event to which the dispute relates must have occurred not more than six years before the disputant first notified the financial services provider in writing of the dispute."

"5.6 The Ombudsman must only consider a dispute in relation to events which first occurred:

(a) on or after the financial services provider became a Member;

(b) on or after 6 July 1998 if the disputant is incorporated; and

(c) on or after 6 July 1998 if the dispute relates to a guarantee or charge in favour of a financial services provider to secure an amount owed by an incorporated entity."

"5.7 If the event first occurred before a time referred to in 5.6 or 5.8 but the disputant was not aware of it, and could not have become aware of it if the disputant had used reasonable diligence, until after the date referred to in 5.6 or 5.8 then the Ombudsman may, subject to these terms of reference, consider the dispute."

"5.8 The Ombudsman cannot consider a dispute between a customer and an entity, the business of which has been acquired by a Member, if that entity was not a financial services provider at the time the events the subject of the dispute occurred."

We can only consider a dispute if it satisfies the relevant time limit tests set out in the Terms of Reference. Different tests apply to particular situations, and these are set out below.

Disputes about member banks (5.6(a))

In order for a dispute against a member bank to be considered, the events giving rise to the dispute must have occurred:

- less than six years before the disputant first wrote to the bank about the dispute; and

- on or after the bank became a member of the Scheme. (A current list of member banks, which includes the dates on which they became members of the Scheme, is attached at Annexure A).

We can, however, consider a dispute that relates to events occurring before the bank became a member of the Scheme if the disputant did not become aware of the problem, and could not, with reasonable diligence, have become aware of it until after the relevant date. This is known as the **reasonable diligence test**.

The only banks to which the reasonable diligence test does not apply are:

- Adelaide Bank Limited;
- AMP Bank Limited;
- BankSA;
- St George Bank Limited; and
- Members Equity Pty Ltd.

The reasonable diligence test does not apply to disputes arising before the above organisations became members of the Scheme under the terms of these organisations' membership of the Scheme.

Disputes about related bodies corporate

Currently, only banks are members of the Scheme. Prior to 11 March 2002, only those bodies corporate nominated by the bank as a designated associate of the bank were under the jurisdiction of the Ombudsman (see list below).

However, from 11 March 2002 all banks' related bodies corporate are subject to the jurisdiction of the Scheme by virtue of the bank's membership. In order for a dispute with a related body corporate to fall within the Ombudsman's jurisdiction, the events giving rise to the dispute must have occurred:

- less than six years before the disputant first wrote to the bank or related body corporate about the dispute; and

- on or after 11 March 2002 (the date on which the Scheme's jurisdiction was extended to cover disputes against related bodies corporate).

The Ombudsman has determined that the reasonable diligence test does not apply to this time limit test.

<u>List of designated associates prior to 11 March 2002</u>
The following organisations were existing designated associates prior to 11 March 2002:

- Advance Commercial Finance Ltd;
- ANZ Savings Bank Ltd;
- BNZ Securities Australia Ltd;
- BNP Pacific (Australia) Ltd;
- Challenge Insurance Services (Agency) Pty Ltd;
- Chase AMP Bank Ltd;
- Chase AMP Acceptances Ltd;
- Citibank Savings Ltd;
- Civic Advance Bank Ltd;

- Commonwealth Life Ltd of Australia;
- Commonwealth Management Services Ltd;
- National Mutual Royal Bank Ltd; and
- National Mutual Royal Savings Bank Ltd.

Business disputes

Incorporated entities (5.6(b))

If the disputant is an incorporated entity, the events giving rise to the dispute must have occurred:

- less than six years before the disputant first wrote to the financial services provider about the dispute; and

- on or after 6 July 1998 (the date on which the Scheme's jurisdiction was extended to cover disputes from incorporated entities).

The reasonable diligence test applies to this time limit test. This means that we could consider a dispute that relates to events occurring before 6 July 1998 if the disputant did not become aware of the problem, and could not, with reasonable diligence have become aware of it until after this date.

Guarantees or charges (5.6(c))

If a dispute is about a guarantee or charge given to secure the debt of an incorporated entity, the event giving rise to the dispute must also have occurred:

- less than six years before the disputant first wrote to the financial services provider; and

- on or after 6 July 1998.

The reasonable diligence test also applies to this time limit test.

Disputes about acquired entities (5.8)

If the financial services provider complained about has, since the dispute arose, been acquired by a member of the Scheme, the dispute will only be considered if the acquired entity was also a member of the Scheme, or a related body corporate of a member of the Scheme at the time the dispute arose. The reasonable diligence test applies to this test.

However,if the events took place before 11 March 2002, we will only consider a dispute with an acquired entity if the acquired entity was a member of the Scheme or a designated associate of the Scheme.

Disputes about privacy

Financial services providers have obligations relating to credit information and personal information under the *Privacy Act 1988* (Cth). The obligations concerning personal information only arise from 21 December 2001. Therefore, we will only consider disputes about privacy and personal information if the events giving rise to the dispute first occurred:

- less than six years before the disputant first wrote to the financial services provider about the dispute; and

- on or after 21 December 2001.

The reasonable diligence test does not apply to this time limit test.

Where appropriate, we may still consider a dispute, in so far as it relates to credit information under the *Privacy Act* or a duty of confidentiality, if the events occurred prior to 21 December 2001.

Transitional Paragraph (5.9)

"5.9 A dispute relating to an event which occurred before the commencement date of these revised terms of reference (being 11 March 2002), if brought to the attention of the Ombudsman after 11 March 2002 will be dealt with under these revised terms of reference, except that:

(a) the eligibility of the applicant to bring the dispute forward; and

(b) the issue of whether the dispute is within the Ombudsman's jurisdiction,

will be determined in accordance with the terms of reference in force immediately before these terms of reference".

These Terms of Reference take effect from 11 March 2002. They replace the previous Terms of Reference valid from 6 July 1998. This means that from 11 March 2002, all new disputes will be dealt with in accordance with these Terms of Reference.

The only exception to this rule is where we need to refer to the previous Terms of Reference to determine if a disputant is eligible. This will arise only in the following situation:

- a business disputant or guarantor of a small business loan seeks to lodge a dispute **after** these Terms of Reference come into effect; and

- the events that gave rise to the dispute took place **before** these Terms of Reference came into effect.

In such a situation, we would refer to the previous Terms of Reference and apply the small business definition that applied when the events that gave rise to the dispute occurred.

See page 7-9 for more information about small business definitions.

PART 5

HOW THE OMBUDSMAN MAKES A DECISION

The Ombudsman's Procedures

"6.1 The Ombudsman can decide, having regard to these terms of reference:

(a) the procedure to be followed when considering a dispute or deciding whether to consider a dispute; and

(b) whether a dispute falls within these terms of reference."

The Terms of Reference contain clauses about how the Ombudsman should reach a decision about a dispute, and what procedures should be followed in reaching a decision. The Terms of Reference also give the Ombudsman discretion to set additional procedures, as he/she sees fit.

The Scheme's procedures, which are modified and updated from time to time, are contained in the Procedures section of the BFSO Policies and Procedures manual. These deal with everything from lodging a dispute to response timeframes and details of the investigation process.

The following is a brief summary of the procedures we follow after we have received a written letter of complaint from a disputant.

Receipt of Dispute

When we receive a written dispute, we try to establish whether it is within our Terms of Reference. However, this is not always possible. For example, in some cases, the size of the claim cannot be established until we have reviewed the relevant information, or conducted an investigation of the dispute.

If we are unsure whether the dispute falls within our jurisdiction, we will still refer the dispute to the financial services provider, but advise both parties that there is a query whether the dispute is within the Terms of Reference.

Disputes Outside the Terms of Reference

If we decide that a dispute is outside the Terms of Reference, then we will explain this to the disputant in writing. If the disputant wants us to reconsider our decision, then they may make a submission setting out why they consider that the dispute falls within the Terms of Reference.

Where there is a difference of opinion about a jurisdictional issue, it is ultimately the Ombudsman who has the power to decide whether a particular dispute falls within the Terms of Reference.

Whilst we endeavour to make decisions about jurisdiction as early as possible, sometimes, it is not until we have started an investigation that we find a dispute is outside the Terms of Reference. In this situation, we will cease our consideration of the dispute and inform both parties in writing.

Challenge to Jurisdiction by Financial Services Provider

A financial services provider should not make any comment to a disputant about the application of the Ombudsman's Terms of Reference or unilaterally advise a disputant that their dispute is outside the Terms of Reference. This is a matter for our office to determine. If a financial services provider wishes to challenge our jurisdiction to consider a particular dispute, then it should make a submission, as soon as possible after receiving the dispute, setting out the reasons for its view.

Dispute Referred to Financial Services Provider

If a dispute is considered to be within our Terms of Reference, or likely to be within our jurisdiction, we send the dispute to the financial services provider's customer relations department or equivalent. We do this to give the parties an opportunity to resolve the dispute without our further involvement.

Often a disputant may have already tried to resolve the dispute with a specific branch or department. We understand that in some cases, the disputant may be reluctant for the dispute to be referred back to the financial services provider, however, our experience shows that a dispute which appears to be at deadlock may still be resolved when it is referred to the department which is responsible for dealing with customer complaints.

Clause 5.1(h) of the Terms of Reference states that a financial services provider has a maximum of 45 days to either resolve the dispute or to respond to us about it. However, the Ombudsman has the power to set a shorter time limit and our procedures currently allow the financial services provider 30 days in which to try to resolve a dispute before we will investigate the dispute.

If the customer relations department has already investigated the dispute, we generally require a response from the financial services provider within two weeks.

The financial services provider may request an extension of time to provide its response, but must give reasons for the request. If we consider that the request is reasonable, we may agree to an extension of time. We will confirm any extension of time to both the financial services provider and the disputant.

There may be exceptional circumstances where we will start to investigate a dispute before we receive a response from the financial services provider, or before the 30 days have elapsed. Examples of exceptional circumstances may include where:

- the sale of a security property is imminent; or
- the health of the disputant warrants the matter being fast tracked.

Resolved Disputes

Where the financial services provider advises us that the dispute has been resolved, we write to the disputant to establish whether they also consider the matter to be resolved. If it is resolved, we will close our file. If the disputant is not satisfied with the response, they have 30 days to write to us to explain why the response has not resolved the dispute.

In some cases, if it appears that the matter may be able to be resolved fairly quickly, we will refer the case to the financial services provider again for further consideration.

Unresolved Disputes

If:

- the financial services provider is unable to resolve the dispute directly with the disputant; and
- the financial services provider has responded to us and presented its position to the Ombudsman rather than to the disputant; or
- the disputant regards the dispute as unresolved,

the dispute will be investigated by a case manager. The various methods of resolving disputes after they have been investigated are discussed on pages 54 –58.

OUR INVESTIGATION PRINCIPLES

Inquisitorial Approach

"6.2 The Ombudsman may require a financial services provider named in a dispute to provide, or procure the provision of, any information the Ombudsman considers necessary to consider a dispute."

"6.3 A financial services provider must comply with a request under 6.2 as soon as reasonably practicable except:

(a) if the financial services provider certifies that to provide information would breach a duty of confidentiality to a third party; and

(b) the financial services provider has used best endeavours to obtain consent to the disclosure of the information."

Our dispute resolution procedures are inquisitorial. This means that we ask questions of the parties and require information from them.

Disputants and financial services providers need to be prepared to answer questions about their claims or views, and to provide supporting information wherever possible.

In all cases, the parties must provide us with information relevant to the dispute, and not just those documents that may seem favourable to their claim. We expect the parties to act in good faith in the resolution of the dispute.

Information from financial services provider

When we receive a written dispute, we ask disputants to sign an authorisation form which authorises the financial services provider to provide information relating to the dispute to our office. Once the financial services provider receives this form, it should be prepared to provide its entire original file(s) to our office if requested. This would include:

- All files held at branch and/or regional level, or located elsewhere; and
- Any computer records of diary notes, or other electronically stored information.

If the financial services provider has a particular reason for not wishing to provide original documents, then the file may be forwarded, by arrangement with us, to a branch near our office, where the files may be inspected.

Cost of providing documents

It may be necessary for a financial services provider to locate old account records from its archives, or copies of cheques or statements. If these documents are relevant to the dispute, it is not appropriate for the financial services provider to seek payment from the disputant for its administrative costs in locating the documents.

Third party information

Paragraph 6.3 provides that a financial services provider may refuse to provide information to the Ombudsman if:

- It certifies that to provide the information would breach a duty of confidentiality to a third party; and

- The financial services provider has used best endeavours to obtain consent to the disclosure of the information.

Information about a third party may, depending on the case, be directly relevant to the dispute and its resolution. For example, a complaint may be that:

- A bank paid a cheque where a third party had forged the disputant's signature; or

- A third party stole the disputant's ATM card and withdrew money from their account.

Our office acknowledges that financial services providers have obligations to third parties under the National Privacy Principles, and there may be some circumstances where providing information to our office, without obtaining a third party's consent, would breach a third party's privacy. However, in the following circumstances, we would not consider the financial services provider to be breaching a third party's privacy, and we would expect the financial services provider to provide information, even if it related to a third party.

<u>De-identified documents</u>

Where the name of a third party is not relevant to the dispute, the financial services provider should black out or delete the name from any correspondence or other information forwarded to this office. In this way, important information about the circumstances surrounding the dispute can still be provided to our office without the third party's privacy being breached.

Joint account holders

If one joint account holder lodges a dispute, we do not consider that a financial services provider would breach the other joint account holder's privacy if it disclosed information about the account to us for the purpose of dispute resolution. Our view is that joint account holders or other third parties such as guarantors or principal borrowers would reasonably expect that such information might be disclosed, even if they are not specifically informed of the dispute.

Investigation and reporting of unlawful activity

The National Privacy Principles allow organisations to use or disclose personal information, including third party information, without consent, when it has reason to suspect that unlawful activity has been, is being, or may be engaged in, and the use or disclosure is a necessary part of its investigations, or occurs in the context of reporting its concerns to relevant persons or authorities.

"*Relevant persons or authorities*" to which organisations may report unlawful activity include self-regulatory authorities such as BFSO.

Therefore, if a dispute concerns unlawful activity, such as allegations of forgery and unauthorised transactions on an account by a third party, we would expect the financial services provider to disclose information about the third party to us.

Legal Professional Privilege

In certain circumstances, a financial services provider may claim that legal professional privilege attaches to a document such that the financial services provider does not have to produce that document to this office.

As legal professional privilege is not merely a procedural right, but a right conferred by law to protect confidential communications falling within the privilege from compulsory disclosure, this office will not compel a financial services provider to provide confidential communications which this office is satisfied were made for the dominant purpose of that financial services provider obtaining legal advice or for use in existing or contemplated litigation. The types of communications covered by the privilege include communications between:

- The financial services provider and its internal or external legal advisers, or the agents of either or both of those parties;

- The financial services provider's legal advisers and a third party (for example, the financial services provider's solicitor obtaining an assessor's report for use in a legal advice to the financial services provider); and

- The financial services provider and a third party (for example, the financial services provider arranging for an assessor to advise the financial services provider directly, in order for the financial services provider to obtain legal advice on the assessor's report).

It remains open for the financial services provider to waive the privilege, but the financial services provider cannot be compelled to do so. It is also open for the financial services provider to provide the communication on the basis that it be kept confidential by this office.

Any information provided to this office by a financial services provider will not be treated as confidential, unless the financial services provider specifically makes such a request.

"Without Prejudice" Information

The Scheme provides a forum where disputes may be able to be resolved without the need for litigation. Information is sought and supplied by both parties to facilitate resolution if possible. However, if a dispute is not resolved, then the legal rights of the disputant and the financial services provider are not affected, and court proceedings may commence.

The parties should be aware that any admissions made by either party during the course of the consideration of a dispute by this office are made on the understanding that they are made without prejudice and are privileged from admission into evidence in any later proceedings.

In addition, the consideration of the dispute by this office and any documents created in the course of that review are confidential to the disputant, the financial services provider and the Ombudsman.

Failure to Provide Information

If a financial services provider fails to respond to our request for information within a reasonable time frame then it runs the risk that the case will proceed based only on the information that is available to us.

If a disputant chooses not to provide specific information that we ask for, then this may mean that we cannot continue to investigate the dispute. The disputant may need to pursue the matter in another forum.

Confidentiality of Information Provided (6.4, 6.6)

"6.4 If any party to a dispute supplies information to the Ombudsman and requests it be treated confidentially, the Ombudsman must not disclose that information to any other party to the dispute or any other person, except with the consent of the person supplying the information or as required by law.

If consent is not given, the Ombudsman is not entitled to use that information to reach a decision adverse to any party to whom confidential information is denied."

"6.6 Where a party to a dispute supplies information and asks that it be treated confidentially, the Ombudsman must return it as soon as practicable after the dispute is resolved or withdrawn. If the dispute is sent to another forum then the Ombudsman must obtain the consent of the relevant party before forwarding any information to the new forum."

A disputant or a financial services provider may choose to provide information or documents to us on a confidential basis. We will respect a request for confidentiality and will not disclose the information or documents to the other party without the express consent of the party who provided the information.

We are, however, unable to rely on that confidential information to reach an adverse decision against the other party. This would be contrary to the principles of transparency and natural justice, because it means that we would be unable to provide full reasons for a decision made about the dispute. However, we may rely on it to reach a decision favourable to the other party.

There may be some exceptional circumstances in which we will rely on information that is not available to all of the parties.

For example, we may take into account knowledge of a financial services provider's security measures without disclosing specific details of these measures to the disputant. This might arise in relation to a dispute about the security measures used to protect, for example, a security deposit box held by a financial services provider.

Where information has been provided on a confidential basis, we return that information to the disputant or the financial services provider as soon as our file is closed. Copies of the information will not be retained on our file.

Access to Information (6.5)

"6.5 Subject to 6.4, all documentation should be provided to all parties to a dispute. However, it is not necessary for documents and information used by the Ombudsman to be provided to both parties as long as the Ombudsman's written reasons clearly identify the documents or information relied on and the identified documents or information are provided on request."

The process of an investigation is a transparent one. In order to facilitate resolution of a dispute, the dispute is sent to the financial services provider and it is required to respond to the matters complained about to the disputant and/or this office.

If the financial services provider responds to this office but not to the disputant, we will advise the disputant of the basis of the response.

Our reasons for reaching a view in a Finding, Recommendation or Determination are provided to both parties and any documents relied upon in reaching a particular view are listed. Both parties are entitled to copies of these documents on request.

A disputant may also be entitled to obtain access to additional information held on our file if they satisfy the criteria set out in the National Privacy Principles. For further information see our Privacy Policy, available on our web-site.

"Fishing" for information

We request and receive information for the purpose of investigation and resolution of a dispute. We do not assist disputants or financial services providers to obtain information for some other purpose (such as future legal proceedings against the other party).

If we consider that a party is using our services for the sole purpose of "fishing" for information, we may cease our consideration of the dispute.

Rules of Evidence (6.7)

"6.7 The Ombudsman shall not be bound by any legal rule of evidence."

The Ombudsman must take the law into account when making a decision about a dispute, however, he/she is not bound by any legal rule of evidence.

The Ombudsman cannot take evidence on oath nor cross-examine the parties

Our procedures are not the same as those of a court and we do not have the power to take evidence on oath. In practice, this means that *information* rather than *formal evidence* is supplied to us by disputants and financial services providers, because neither party can be examined or cross-examined about the facts in dispute.

This does not mean that we are unable to thoroughly investigate a dispute or assess the merits of a claim. The Ombudsman is entitled to draw inferences and conclusions based on the information supplied. In most cases, we can reach a conclusion about a dispute by assessing what may have happened based on the balance of probabilities on the information available.

Statutory declarations

We sometimes receive information in the form of a statutory declaration. At law, a person who makes a declaration which they know to be false is liable to penalties imposed for perjury.

While we may give some additional weight to a matter detailed in a statutory declaration, our general principles about how we assess information will still apply. This is because we cannot sanction anyone who provides a false statutory declaration, nor can we test the information supplied by examining that person under oath.

Subpoenas

It is often suggested that we should subpoena documents from third parties. Because a subpoena may only be issued by a court, in relation to a matter before the court, we do not have the power to subpoena documents to assist in our investigations.

Previous Decisions (6.8)

"6.8 The Ombudsman will not be bound by any previous decision by him/her or by any predecessor in the Ombudsman's office."

While an Ombudsman is not bound by previous decisions that they, or another Ombudsman has made, we are committed to consistency in decision making.

We have developed systems to promote consistent decision making. These include an electronic Thesaurus, a Knowledge Management System, and a review and quality assurance procedure for letters expressing a view on the merits of the dispute. We also hold regular meetings to discuss significant cases.

Our approach to particular types of disputes may be modified over time by changes to the law or standards of industry practice, and by developments in the financial services sector. Where necessary, such changes will be reflected in the publication of new and updated Policies and Bulletins.

DECISION MAKING CRITERIA (1.3, 7.1)

"1.3 The aim of the scheme is to provide an independent and prompt resolution of the disputes described in 3 having regard to:

(a) law;

(b) applicable industry codes or guidelines;

(c) good industry practice; and

(d) fairness in all the circumstances."

"7.1 Subject to 6.7, when deciding what the appropriate determination should be, the Ombudsman must take into account the criteria of:

(a) law;

(b) applicable industry codes or guidelines;

(c) good industry practice; and

(d) fairness in all the circumstances."

At all stages during our consideration and investigation of a dispute, we will assess the issues raised in the dispute, and reach any views or decisions based on these four criteria.

The Law

When considering a dispute, we observe any applicable rule of law or relevant judicial authority.

Both the financial services provider and the disputant are entitled to make submissions on any legal principles they consider are relevant to the dispute.

Both financial services providers and disputants may be legally represented if they wish. However, there is no disadvantage in not having legal representation because we use internal or external legal counsel to give advice about issues raised by the dispute where necessary.

While the Ombudsman would generally follow the advice given by his/her legal counsel, that advice will be considered in the context of our other decision making criteria.

Applicable Industry Codes or Guidelines

There are a number of self-regulatory Codes and industry guidelines that influence the way that financial services providers operate. These include:

- the Code of Banking Practice;
- the Electronic Funds Transfer Code of Practice;
- the Set of Principles for Banks and Small Businesses Working Together; and
- the Code of Operation: Centrelink Direct Credit Payments.

These Codes and guidelines are developed in consultation with relevant interest groups such as consumer organisations, industry bodies and government agencies. In some cases, the Code or guideline will set standards of industry conduct that exceed those required at law. They may also establish standards where none previously existed.

Where a financial services provider subscribes to or warrants in contractual documents that it is a signatory to a particular Code or guideline, we will assess any relevant dispute by reference to the applicable Code.

Good Industry Practice

We treat the criterion of "good industry practice" as a broad model of corporate behaviour in the financial services sector.

It can refer to the manner in which a financial services provider should process transactions, handle information, communicate with customers and generally conduct its business in any given set of circumstances.

There is no comprehensive definition of what constitutes good industry practice for all situations that might arise in the financial services sector. And the requirement of good industry practice relevant to a particular case may raise the standard of care beyond that which a financial services provider owes at law.

Because we consider disputes involving banks, as well as their related bodies corporate, what constitutes good industry practice will depend on the nature of the business conducted by the financial services provider. For instance, if a dispute involves a bank, we take into account the criterion of "good banking practice".

However, if the dispute involves a related body corporate which provides financial advice, we would apply the standards of "good financial planning practice" when we consider the dispute.

The Ombudsman's Banking Adviser (7.2)

"7.2 In determining the principles of good banking practice, the Ombudsman must consult within the industry as the Ombudsman thinks appropriate."

The Scheme employs an adviser, seconded from the banking industry, for a term of 12 months. We refer questions about industry practice to the banking adviser for his/her consideration.

The banking adviser may seek advice from within the relevant industry if he/she has questions about what constitutes good industry practice.

Fairness

The criterion of fairness allows us to temper a strict application of the law with considerations of equity and good conscience. It does not mean that we disregard the law, Codes or industry practice. However, it does mean that we may make a decision that:

- takes into account the specific circumstances of a case which may justify not applying the law rigidly;

- allows for the balancing or weighing up of the available information;

- recognises that in some circumstances a higher standard of care may be owed by a financial services provider because of the requirements of good industry practice;

- may excuse one or both parties for minor breaches which might otherwise lead to harsh results in the circumstances; and

- takes account of any uncertainty in the facts, the law or good industry practice as they apply to a particular case.

HOW ARE DISPUTES RESOLVED? (7.3 – 7.13)

The Terms of Reference allow the Ombudsman to resolve disputes in a number of ways.

"7.3 The Ombudsman may, while the Ombudsman is considering the dispute, suggest that:

a) the dispute be withdrawn; or

b) the dispute be settled

by agreement between the parties in full and final settlement of the dispute."

Negotiated Settlement

We encourage the parties to resolve their dispute at any time during the investigation process. We do this by facilitating communication between the parties, clarifying the issues in dispute, and pointing out the strengths and weaknesses of each party's position.

Conciliation Conference

Another option for resolving a dispute is a conciliation conference between the disputant and the financial services provider. This may be convened by

the case manager and/or the Ombudsman. This is an informal meeting in which we try to assist the parties to resolve the dispute.

Not all cases are suitable for a conference, and it is our decision whether or not to hold a conference in a particular case.

Finding

"7.5 The Ombudsman must set procedures for the investigation of disputes which lead to a recommendation. The procedures must ensure that:

a) the reasons for any conclusion about the merits of a dispute must be provided on request to the parties to the dispute; and

b) in response to any such conclusion, the parties to the dispute have an opportunity to make further submissions before a recommendation may be made by the Ombudsman."

A case manager may set down in writing their views about the merits of the dispute. This is known as a Finding. The Finding includes:

- A summary of the dispute and the financial services provider's response;
- A summary of the issues raised by the dispute;
- The case manager's analysis of the case; and
- The case manager's conclusion about how the matter should be resolved.

Neither party is bound to accept the views set out in the Finding, however, if a disputant or financial services provider wishes to respond to the Finding, they ought to provide compelling new information, or explain that the views expressed in the Finding, or the information relied upon, were incorrect.

Recommendation

"7.4 If the parties do not agree to this, then the Ombudsman may continue to consider the dispute and may make a recommendation at the conclusion of the Ombudsman's considerations."

"7.6 The Ombudsman must give at least one month's notice to all parties about the Ombudsman's intention to make a recommendation. This notice must be in writing."

"7.7 The recommendation must:

(a) be in writing;

(b) include the reasons for the recommendation;

(c) include in detail the terms of the settlement or what the Ombudsman recommends. If the recommendation includes that the financial services provider pay the disputant an amount of money, this amount must be assessed using the criteria in 7.1;

(d) include any documentation necessary to complete the withdrawal or settlement; and

(e) state the date for acceptance of the recommendation by the parties to the dispute and the consequences of them failing to respond in time"

"7.8 The time for acceptance must be no more than one month except in exceptional circumstances as determined by the Ombudsman."

If a dispute is not resolved by way of a negotiated settlement, conference or Finding, then the Ombudsman may proceed to issue a Recommendation which sets out how the Ombudsman considers the dispute should be resolved.

The Recommendation will be in writing. It will detail the Ombudsman's views on the merits of the dispute, and his/her suggested resolution.

Notice

The Ombudsman will give the disputant and the financial services provider one months' notice of his/her intention to issue a Recommendation.

Following their receipt of the notice, the parties have one month in which to make any further submissions to the Ombudsman about the matters in dispute.

Time to accept or reject a Recommendation

Both parties have one month in which to accept or reject the Recommendation.

Parties do not need to accept Recommendation

Neither the financial services provider nor the disputant is bound by the Recommendation, and both parties have one month within which to accept or

reject the suggested resolution. If the disputant rejects the Recommendation, however, there is no further right of appeal, and the Ombudsman cannot assist the disputant further. The disputant may still pursue the matter in another forum such as the courts.

If the disputant accepts the Recommendation, but the financial services provider does not, the Ombudsman will issue a Determination.

Determination

"7.9 If the Ombudsman has made a recommendation which has been accepted by the disputant within one month but not the financial services provider, then the Ombudsman can make a determination against the financial services provider."

"7.11 The Ombudsman's determination must identify the amount the Ombudsman considers is fair and appropriate to compensate the disputant for any loss or damage the disputant has suffered because of the conduct of the financial services provider in relation to the event the subject of the dispute."

"7.12 The determination must:

(a) be in writing;

(b) state the terms of the determination including any monetary amount to be paid;

(c) provide a summary of the reasons for the determination; and

(d) state that, if within one month after its issue the disputant agrees to accept it in full and final settlement of the subject matter of the dispute, the determination shall be binding on the disputant and the financial services provider (as a result of the financial services provider's undertaking to the Banking and Financial Services Ombudsman) against which it is made."

"7.13 The Ombudsman must give a copy of the determination to the disputant and the financial services provider. The Ombudsman must also give the disputant a form addressed to the Ombudsman and the financial services provider providing for acceptance of the determination by the disputant in full and final settlement of the dispute."

If the disputant accepts the Recommendation, but the financial services provider does not, the final step in the dispute resolution process is the issuing of a Determination by the Ombudsman.

A Determination is in writing and includes:

- A summary of the dispute and the financial services provider's response;
- A summary of the issues in dispute;
- The Ombudsman's analysis of the case; and
- The Ombudsman's conclusion about how the matter should be resolved.

Financial services provider bound by Determination

The Determination is given to both the disputant and the financial services provider. However, only the disputant has the option of accepting or rejecting it. The disputant has one month in which to decide. If the disputant accepts the Determination, then it is binding on the financial services provider. If the disputant rejects the Determination, the Ombudsman will be unable to assist the parties further.

Full and final settlement

If the financial services provider agrees to pay some financial compensation to resolve the dispute, the disputant may be required to execute a document called a Confirmation of Settlement form releasing the financial services provider from any further action in relation to the dispute. This is mandatory where the compensation is being paid as a result of a view expressed by the Ombudsman in a Recommendation or Determination.

A Confirmation of Settlement form is generally sent by this office to a disputant after a negotiated settlement has been reached, or where a Finding, Recommendation or Determination has been issued. In some cases, the financial services provider may request that the disputant sign an additional Release which has been prepared by its legal department. Occasionally, a financial services provider will request that a disputant keep the settlement confidential as a condition of settlement. Financial services providers should be aware that this is not a condition we impose on disputants and it is entirely a matter for disputants whether they agree to a confidentiality condition.

A disputant should seek independent advice before they sign the Confirmation of Settlement or Release.

We will treat a settlement as full and final, which means that we will not reconsider the same matter.

What Can the Ombudsman Require a Financial Services Provider to do? (7.10, 7.11, 7.14)

"7.10 A determination can include:

a) a sum of money which does not exceed $150,000;

b) where the dispute involves a privacy issue, any other non-monetary requirement as described in 7.14 that the Ombudsman thinks is appropriate; and

c) an order for the provision of information relating to the subject matter of the dispute."

"7.11 The Ombudsman's determination must identify the amount the Ombudsman considers is fair and appropriate to compensate the disputant for any loss or damage the disputant has suffered because of the conduct of the financial services provider in relation to the event the subject of the dispute."

"7.14 In addition to the Ombudsman's other powers, if the dispute relates to privacy then the Ombudsman may make any determinations, awards, declarations, orders or directions that the Privacy Commissioner may make under section 52 of the Privacy Act."

The Terms of Reference give the Ombudsman the power to:

- require a financial services provider to pay a sum of money to a disputant for any loss or damage the disputant has suffered as a result of the conduct of the financial services provider, up to a maximum of $150,000;

- where the dispute involves a privacy issue, make any determination, award, declaration, order or direction that the Privacy Commissioner may make under section 52 of the *Privacy Act* 1988 (Cth); and

- order the financial services provider to provide information relating to the subject matter of the dispute.

These powers are discussed below.

Compensation for any loss or damage

The Ombudsman may require a financial services provider to pay a sum of money, up to a maximum of $150,000 to compensate a disputant for any loss or damage they have suffered as a result of the conduct of the financial services provider. Compensation may take the form of an actual cash payment, or its equivalent.

The equivalent of such a payment may include the waiving of a debt, the reconstruction of a loan, or the reduction of an interest rate on a loan.

Loss or damage

Any compensation which the Ombudsman awards must:

- be fair and appropriate; and

- compensate the disputant for any loss or damage suffered because of the conduct of the financial services provider.

The phrase "any loss or damage" includes both financial and non financial loss or damage caused by the financial services provider's act or omission.

Identifying and quantifying the loss

A disputant does not need to quantify the loss that they may have suffered in order to lodge a dispute. However, they should be able to identify the nature of the loss, and explain how the loss was caused. For example, a disputant may say that due to the financial services provider unreasonably delaying in the settlement of a loan, they were charged penalty interest by the vendor of a property.

In some cases, where it appears that the claim may exceed our monetary claims limit, determining the size of the claim becomes a critical issue. If the claim exceeds $150,000, then we cannot consider it. Alternatively, if there is no claimable loss, but this is not identified early, there is a risk that the disputant's expectation about a payment may be unrealistically raised. Quantifying any loss that a disputant may have suffered is, therefore, a routine and important part of our investigation process.

Accrual of arrears during an investigation

Interest and default charges will not cease to accrue to an account while we are considering a dispute. If a disputant chooses to stop making payments to an account that is in dispute, then they must bear the financial consequences if the investigation results in a decision in the financial services provider's favour. For example, if payments are not made during the period of investigation, the debt at the conclusion of the investigation will have increased and the disputant may not be in a position to repay the arrears on the loan or account.

In these cases, the financial services provider should make sure that their customer is aware that interest and charges will continue to accrue.

Non Financial loss

In some circumstances, the Ombudsman may award a disputant compensation for "non financial loss". Examples of non financial loss include:

- personal inconvenience;
- anxiety; and
- stress

caused by the financial services provider's conduct.

Assessing claims for non financial loss

We will generally only award compensation for non financial loss in limited circumstances. And an award for such loss is unlikely to be substantial.

When we are assessing a claim for non financial loss we take into account:

- any physical inconvenience experienced by the disputant;
- the time it took for the disputant to remedy the situation;
- the extent to which the disputant's expectation of enjoyment or peace of mind was interfered with; and
- where the financial service was supplied in a travel-related situation, we will specifically consider whether the disputant suffered distress which substantially reduced the enjoyment of recreational activities planned.

We do expect, however, that a disputant will be moderately robust in the way they deal with a problem. We also expect that a disputant will bear the ordinary degree of inconvenience involved in correcting an unexpected problem, and take reasonable steps to minimise any inconvenience suffered.

Stress and inconvenience

If a disputant specifically claims to have suffered stress and inconvenience, we will assess the claim based on an assessment of how the "objective" or "reasonable" person would have responded in the disputant's particular circumstances.

These cases are assessed conservatively and a claim, for example, of simple inconvenience would not be sufficient to warrant compensation.

The Ombudsman does not award compensation in respect of the time spent by a disputant pursuing their dispute.

Consequential medical loss

Sometimes a disputant claims that, as a consequence of the conduct of the financial services provider, they have developed a clinical illness or an existing condition has been aggravated and they should be compensated accordingly. In order to prove such a claim, medical evidence would be required. Because we cannot test an expert's opinion by cross-examination under oath, it is our view that these claims are best dealt with in a court. A pre-existing condition which was known or ought to have been known to the financial services provider may, however, be taken into account in other ways. For example in:

- assessing the level of stress suffered by the disputant; or

- assessing whether legal principles to do with unconscionable conduct apply.

Case Studies

Following are some examples of situations in which a claim for non financial loss may be made.

Holiday travel cases

> *A customer's credit card is stopped in error and the customer is stranded overseas and unable to obtain funds in the short term to allow them to continue their trip as planned.*

These cases are relatively straightforward to assess because there is clearly a loss of enjoyment and inconvenience which can be observed as an objective matter. The cost of a replacement ticket, or the cost of preferred accommodation or transport alternatives, may, in some circumstances, represent appropriate compensation.

Embarrassment

> *A customer is denied access to their funds in a retail shop because of an error in a financial services provider's electronic funds transfer system.*

These cases may be relatively easy to assess , if only because the cause and effect are fairly clear. However, any compensation awarded will be relatively small.

Wrongful dishonour of cheques

> *A customer's cheque is dishonoured in error.*

A claim for non financial loss because a cheque has been wrongfully dishonoured, is essentially a claim of embarrassment or of defamation.

A disputant is entitled to be compensated for the breach of the financial services provider's contract to honour the cheque. However, a personal account holder would need to prove special circumstances to recover more than nominal compensation.

A small business may be entitled to recover more substantial compensation if the dishonour was found to be defamatory. However, because this is a matter usually left to a jury to determine, we are not the appropriate forum to consider such a claim. A claim for compensation for defamation should be distinguished from that claimed for "injured feelings". The latter does come within our jurisdiction.

Financial hardship

> *A customer is denied access to funds in an account because of an error in the electronic funds transfer system. The funds are need to pay for essentials such as food and accommodation which the customer cannot otherwise afford.*

This would attract a higher level of compensation because of the physical inconvenience experienced by the disputant, and the level of interference with their peace of mind.

Recovering Dispute Resolution Costs

The Scheme is a free service for disputants. It is not usually necessary for either party to be legally represented when using the Scheme.

If a disputant chooses to be represented, then that will usually be at their own cost. Legal representatives should ensure that they make disputants aware of this fact.

In some limited cases the Ombudsman may require a financial services provider to reimburse the reasonable fees charged by a legal or other financial adviser.

To assess whether these professional costs might be recoverable, we will take into account the complexity of the dispute and in particular, whether:

- the dispute raised legal issues that reasonably required expert legal advice to the disputant;

- the dispute involved complex financial data and the expert advice of an accountant or other financial adviser was reasonably required; and

- the fees were incurred in good faith in the belief that expert assistance was required because of the complexity of the issues in dispute.

Other professional fees may be recompensed in some limited circumstances. For example, claims for the cost of valuation fees may be appropriate in some cases.

A financial services provider's legal costs are paid by the financial services provider and may not be passed on either directly or indirectly to a disputant.

As a general rule, a disputant will not be compensated for their own time spent pursuing the dispute.

Consequential losses and opportunity costs

The High Court decision of *Hungerfords v Walker* (1989) 84 ALR 119 summarises the principles applied by this office to determine whether a disputant is entitled to damages for the loss of use of their money as a result of a financial services provider's error.

A disputant may claim that as a result of the error, they have suffered a loss which is in the form of an "opportunity cost" or an opportunity for profit foregone.

Opportunity cost is an economic term. It means that when a particular resource (such as money) is allocated to a particular use (say, making payments to a home loan) there is necessarily a "cost" involved. This cost is represented by the opportunity foregone because the money cannot be used in the next best alternative (say, investing on the sharemarket).

What the next best alternative is will differ from individual to individual and from small business to small business.

A claim for loss based on opportunity cost may arise where, in breach of contract, the financial services provider:

- withholds money which is due to the disputant; or

- pays away the disputant's money; or

- causes the disputant to be deprived of money which would otherwise have been paid to them.

If the loss was reasonably foreseeable when the breach occurred or was reasonably contemplated by the parties to the contract, and the disputant has actually sustained the loss, then in principle they can be compensated for the loss of use of that money. If this is the case, compensation:

- may be assessed as interest on the sum whose loss of use is in question;

- may extend to consequential losses such as the opportunity cost of not having had the money; or

- may be for the expenditure incurred by the disputant because they did not have access to the money.

This office will consider claims for compensation for consequential loss of this nature.

Rate of interest

Where it is appropriate to consider the interest on the sum whose loss of use is in question, the usual measure of damages adopted by this office is the term deposit rate for the amount of money which the disputant has been denied access to for the period in relation to which they were denied access.

Powers to Resolve a Dispute about a Breach of Privacy

Where a dispute involves a privacy issue, the Ombudsman may, in addition to requiring the financial services provider to:

- pay compensation for any loss or damage; and

- produce information relating to the subject matter of the dispute,

make the same non-monetary orders as the Privacy Commissioner is entitled to make under section 52 of the *Privacy Act* 1988 (Cth):

- that the financial services provider has engaged in conduct constituting an interference with the disputant's privacy, and should stop such conduct;

- that the financial services provider should perform an act or course of conduct to redress any loss or damage suffered by the disputant;

- that the financial services provider should pay compensation for injury to the disputant's feelings, or for humiliation;

- that the financial services provider should reimburse the disputant for expenses they reasonably incurred in connection with the lodging of the dispute and the investigation of the dispute;

- that the financial services provider should arrange for an appropriate correction, deletion or addition to a record, credit information file or credit report; or

- that the financial services provider should arrange for a statement provided by the disputant of a correction, deletion or addition sought by the disputant, to be attached to a record, credit information file or credit report.

Orders for the Provision of Information

In all cases, the Ombudsman may also order a financial services provider to provide information relating to the subject matter of the dispute. For instance, if we consider that the disputant is entitled to:

- copies of account statements, loan contracts or mortgage documents; or

- a printout of the fees charged to their account over a certain period,

we may require the financial services provider to provide these to the disputant, free of charge.

PART 6

THE OMBUDSMAN'S OBLIGATIONS

The Ombudsman's core function is dispute resolution. In addition to this central role, however, the Ombudsman is required to perform a number of tasks, as specified in the Terms of Reference.

Reporting to Regulatory Bodies

"4.2 *The Ombudsman must, as required by applicable law, these terms of reference and the Constitution, provide reports and recommendations to any regulator (such as ASIC and the Privacy Commissioner).*"

"9.1 *The Ombudsman must report all systemic issues and serious misconduct to ASIC as described in 9.2 and 9.3.*"

"9.2 *In broad terms, a systemic issue is an issue which will have a material effect for individuals or small businesses beyond the parties to the dispute. Some examples of systemic issues are:*

(a) poor disclosure or communications;

(b) administrative or technical errors;

(c) product flaws; and

(d) inaccurate interpretation of standard terms and conditions."

"9.3 *Serious misconduct is conduct which may be fraudulent, grossly negligent or involve wilful breaches of applicable laws.*"

Systemic issues and cases of serious misconduct

The Australian Securities and Investments Commission's (ASIC's) Policy Statement 139 sets out guidelines which we follow when dealing with systemic issues and cases of serious misconduct. According to these guidelines, we have three main obligations:

- To identify systemic issues and cases of serious misconduct that arise from our consideration of disputes;

- To refer these matters to the financial services provider for response and action; and

- To report information about systemic issues and serious misconduct to ASIC.

What is a systemic issue?

A systemic issue is one which has been raised in a dispute or several disputes to BFSO which will affect a class of people in addition to those who have complained to us.

Several disputes of the same type may indicate a systemic problem, however, an issue may be identified out of consideration of one single dispute because the effect of the issue will clearly extend beyond the parties to the dispute.

Examples of systemic issues

Factors causing systemic problems might include:

Inadequate disclosure:	Financial services provider fails to disclose the ability to overdraw on a savings account, but charges default interest and unarranged overdraft fees when a customer overdraws the account.
Technical problems:	A particular ATM consistently shortchanges customers by $50.
Breaches of privacy:	The financial services provider gives customers' names and telephone numbers to a telemarketer when many of the customers have silent numbers or have elected not to disclose information to related entities.

What is serious misconduct?

"Serious misconduct" is a broad term that includes fraudulent conduct, grossly negligent or inefficient conduct, and wilful or flagrant breaches of relevant laws and codes of practice.

Some examples are:

- A bank officer witnessing a fraudulent signature;

- Extortion, blackmail or other criminal conduct towards a customer; or

- Repeated failure to comply with BFSO decisions, procedures or timeframes.

How do we identify and collect information about systemic issues and serious misconduct?

The words "systemic issues" below cover both systemic issues and serious misconduct.

We aim to identify possible systemic issues as early as possible, with most issues being identified when new complaints are received. All possible systemic issues are referred to the Ombudsman's Systemic Issues Manager who records the details in a register. Staff are then notified about the details of the problem to ensure that all complaints about the issue are centralised.

The matter is then referred to the financial services provider concerned for a response. We usually ask for information to be provided which will assist us in determining whether a systemic problem does, in fact, exist.

If, after considering the response, we are satisfied that the problem is systemic in nature, a "notable case code" is created on our internal case management database for all cases which raise the issue.

How are systemic problems remedied?

We work with the financial services provider to ensure that:

- All customers affected by the problem are identified and appropriately compensated for financial loss (if any); and

- A strategy is put in place to prevent the problem from recurring.

For complicated matters, the following principles are usually included in the strategy to remedy the systemic problem:

- An agreement that the financial services provider will demonstrate commitment to ensuring equitable and fair treatment to all affected customers;

- The parameters for identifying the group of past and existing customers who are entitled to compensation are identified;

- The extent of any compensation is identified or the basis for calculation of a person's right to compensation is identified;

- Where appropriate, an opportunity cost may be payable. If it is, the dates and the method for calculating the opportunity cost are outlined;

- If appropriate, advertisements are placed in certain newspapers at agreed regular periods with words to an agreed script in order to promote contact with all affected customers;

- If appropriate, a 1800 toll free number is established to take calls in response to advertisements about the issue;

- A letter is sent to affected customers explaining the situation, advising that the solution has been approved by the Ombudsman. The wording of such a letter is discussed and agreed upon between the financial services provider and the Ombudsman;

- The financial services provider agrees that the Ombudsman's office will operate as an avenue of appeal for customers who claim they have particular rights or circumstances which mean that they are entitled to be treated otherwise than in accordance with the general principles which have been established;

- In relation to appeals, the financial services provider agrees to be bound by the Ombudsman's decision in accordance with the BFSO Terms of Reference;

- A time frame is established in which the financial services provider agrees to set up systems to deal with the group of affected customers; and

- It is a fundamental principle of the arrangements between the financial services provider and the Ombudsman's office that regard for the independence of the Ombudsman will be reflected in all references by the financial services provider to the Ombudsman in any of the communications, and in any subsequent litigation, between the financial services provider and any person who forms part of the group of affected customers.

Reporting to ASIC

We are obliged, under Policy Statement 139 and the Terms of Reference, to report systemic issues and cases of serious misconduct to ASIC. The following guidelines explain this obligation:

1. If, after BFSO staff have consulted with the financial services provider, the matter is rectified and, in the Ombudsman's view, is

unlikely to recur, the Ombudsman will include the matter in a report which will be sent to ASIC on a quarterly basis. The report will not identify the financial services provider, but will include details of the nature of the issue, and the numbers of each type of systemic issue that have been found, investigated and rectified; or

2. If the financial services provider does not rectify the systemic issue to the Ombudsman's satisfaction, the Ombudsman will:

(a) Notify the financial services provider that BFSO believes that a report, identifying the provider, should be made to ASIC. Ten working days will be allowed for a response as to why the matter should not proceed; and

(b) If the matter is not rectified, or there is no response, or the response is not sufficient to satisfy the Ombudsman that the matter has been rectified or will not recur, the Ombudsman must make a report to ASIC containing:

(i) The identity of the financial services provider;
(ii) The details of the systemic issues involved;
(iii) Action taken by BFSO; and
(iv) The response from the financial services provider.

Other Reports to ASIC

The Ombudsman is also obliged under Policy Statement 139 to provide ASIC with a quarterly statistical report which summarises the number and age of disputes, the time taken to resolve disputes, the profile of disputants and the details of disputes considered to be outside the Terms of Reference.

Reports to the Privacy Commissioner

The *Privacy Act* 1988 (Cth) makes provision for Code Adjudicators to be appointed under Privacy Codes approved by the Privacy Commissioner.

If the Ombudsman is acting as a Code Adjudicator under a Privacy Code approved under the *Privacy Act* 1988 (Cth), the Ombudsman must provide reports about disputes relating to breaches of privacy by financial services providers covered by the Code to the federal Privacy Commissioner.

Collection of information (10.1)

"10.1 The Ombudsman must collect and record the following information:
(a) the number of disputes and enquiries;
(b) demographics of the disputants (where practicable);
(c) details of cases which were thought to be outside the scheme and why;
(d) the current caseload including the age and status of open cases;
(e) the time taken to resolve disputes; and
(f) the profile of disputants which identifies:
(i) type of financial product or service;
(ii) product or service provider;
(iii) purpose for which the product was obtained;
(iv) the underlying cause of the dispute; and
(v) any systemic issues or other trends."

BFSO has developed its own Case Information Management System ("CIMS"). This is the data base from which all case related information is extracted and reports generated.

CIMS data includes information about:

- the disputant, including whether sensitive information is held;
- the financial services provider;
- the dispute - a short written summary with codes for the product and problem complained about;
- the status of the dispute, for example, whether the dispute is inside or outside the Terms of Reference or where the case is in the resolution process;
- relevant dates in the resolution process;
- whether there is a notable feature of the case or whether the case belongs to a particular group of cases;
- the location of the file in the office, for example, with the banking adviser, legal counsel, or the Ombudsman;
- case actions – this is an electronic record of all activity on the file including all correspondence and telephone calls in and out;
- whether third party information is held on file; and
- whether interpreter services are required and the language spoken.

We record the following information about telephone contacts:

- The product and problem if the dispute is within the Terms of Reference;
- A code to identify the reason why a dispute is outside the Terms of Reference;
- Who referred the caller to BFSO;
- The post code of the caller;

- The gender of the caller; and
- Whether the caller is an individual, an unincorporated business or an incorporated business.

Reports to Financial Services Providers (10.2)

"10.2 The Ombudsman must also produce a report every twelve months for publication and provision to the Members. This report must be a comprehensive summary and analysis of this information."

Reports providing statistical information about the numbers and types of disputes and the stage in the dispute resolution process are issued to financial services providers monthly, quarterly, half-yearly and yearly. Requests for specific information can be provided at any time.

We also produce an Annual Report which contains detailed analysis of statistics about disputes received and considered by the Ombudsman. The Annual Report is available to financial services providers and the general public.

Promotion of the Scheme (4.1, 11.1, 11.2, 11.3)

"4.1 The Ombudsman can also…:

(b) where the Ombudsman considers it appropriate, provide assistance to disputants with translating, lodging or presenting disputes, though not in a way that will jeopardise the Ombudsman's impartiality;

(c) actively promote the Scheme,"

"11.1 The Ombudsman must ensure that the existence of the Scheme is actively promoted."

"11.2 In particular, any groups (such as rural areas or people with non-English speaking backgrounds) which are under-represented in the information collected should be targeted by the promotion."

11.3 The Ombudsman must publish and promote details about how the scheme works. This should include:

(a) how a dispute can be lodged;
(b) assistance which is available to disputants; and
(c) the time frames which are imposed on the procedure."

The Ombudsman is committed to promoting the existence of the Scheme to the public at large. He/she holds regular information sessions around Australia for consumers, and speaks with all sections of the media.

Brochures outlining the Scheme's services and procedures are provided to all members, and are available to consumers on request. Our website *www.bfso.org.au* also provides detailed information about the Scheme, and has a facility for disputants to lodge disputes on-line.

The Ombudsman is particularly interested in targeting under-represented groups of the community, such as people living in rural areas, or people with non-English speaking backgrounds. Information collected on our case management database assists us in identifying these under-represented groups.

If disputants are experiencing problems lodging their dispute due to language problems or disability, the Ombudsman's staff are able to assist in a number of ways:

- By meeting with disputants to identify the grounds of their complaint;
- Providing translation services; and
- Assisting with writing the initial letter of complaint.

Confidentiality (12.4, 12.5)

12.4 Except as required by law or these terms of reference or the Constitution, the Ombudsman must not disclose any information relating to a dispute."

12.5 Paragraph 12.4 does not prevent the Ombudsman from disclosing any information to any employee, consultant, independent contractor or agent of BFSO to the extent that such information is reasonably required by that person for the purpose of performing his or her duties to BFSO. The Ombudsman must report to the financial services provider concerned any threat to staff or property of which the Ombudsman becomes aware in the course of the Ombudsman's duties and which the Ombudsman considers to be serious."

The Ombudsman will not disclose information relating to a dispute from which the disputant or a financial services provider might be identified except where the law or the Terms of Reference require it. In addition BFSO complies with the National Privacy Principles. Our commitment to privacy is explained in detail in the BFSO Privacy Policy which is available from our office or on our website.

Day to Day Management (12.1 - 12.3, 13.1)

""12.1 The Ombudsman is responsible for the day to day management and conduct of the business of BFSO (including, without limitation, the power to appoint and dismiss employees, independent contractors and agents and to determine their terms of employment).

"12.2 The Ombudsman has the power to incur expenditure on behalf of BFSO consistent with the budget approved by the Directors.

"12.3 The Ombudsman cannot exercise any power which the Constitution expressly assigns to the Directors or any other person.

"13.1 The Ombudsman must:

(a) prepare an annual business plan for the scheme, together with a proposed budget (including a total funding figure); and

(b) submit both the budget and the annual business plan to the Directors at least 60 days before the start of the relevant financial year,

and must, on request, consult with the Directors (including any committee of the Directors) about a proposed business plan and budget."

Paragraphs 12 and 13 of the Terms of Reference set out a number of administrative obligations of the Ombudsman:

- To manage the day to day business of BFSO;
- To incur expenditure on behalf of BFSO within the budget approved by the Board of Directors; and
- To prepare an annual business plan and proposed budget for each financial year.

ANNEXURE A

BFSO MEMBERS LIST

• Adelaide Bank Limited	1 January 1994
• AMP Bank Limited	1 July 1998
• Arab Bank Australia Limited	1 August 1995
• ANZ Banking Group Limited	1990*
• Bank of China	1 March 1995
• Bank of Cyprus	11 March 2002
• Bank of Queensland Limited	1 January 1995
• Bank of Western Australia Limited	1990*
• Bendigo Bank Limited	1 August 1995
• BNP Paribas	1990*
• Citibank Limited	1990*
• Commonwealth Bank of Australia	1990*
• HSBC Bank Australia Limited	31 October 1994
• ING Bank	1 July 1996
• Macquarie Bank Limited	1 July 1994
• Members Equity Pty Ltd	23 July 2001
• National Australia Bank Limited	1990*
• Primary Industry Bank of Australia Limited	1 November 96
• St George Bank Limited	1 July 1992
• SUNCORP-METWAY Limited	1 January 1995
• Westpac Banking Corporation	1990*

*These banks were inaugural members of the Scheme. Although they formally joined the Scheme in 1990, the Ombudsman's jurisdiction to consider disputes about these banks extends back to 10 May 1989 when the commencement of the Scheme was announced.

Related Bodies Corporate

The Scheme can also consider disputes about any related bodies corporate of the above Members provided that:

- The bodies corporate are incorporated in Australia; and

- The dispute relates to an act or omission that first occurred on or after 11 March 2002.

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