



### Message from the Chief Ombudsman

#### Continued increase in disputes

In the first five months of 2009, the Financial Ombudsman Service has continued to see significant increases in the number of new disputes coming in. We experienced an overall average **43.8%** rise in new disputes across our different groups to **31 May 2009**, compared to the same period in 2008. This includes substantial rises in new disputes within Investments, Life Insurance & Superannuation (72.1%) and Banking & Finance (50.7%), as well as a 6.3% rise in new General Insurance disputes. The most significant rises were in financial planning, managed investments, housing finance and home insurance (both building and contents).

As the troublesome global financial circumstances continue, I would again ask all financial services providers to continue to invest in your staff and your own internal dispute resolution systems so that you can respond to complaints effectively and so minimise the number of disputes which come to us.

#### Successful National Conference

On 11-12 June our inaugural National Conference was held at Crown Promenade Hotel and I am pleased to report it was a great success. It was terrific to see so many of you there, with over 400 attendees (including some staff). I hope it provided some insight and understanding into the Financial Ombudsman Service and the broad industry that we all work together in.

The theme of our conference was *Financial Services - The Changing Landscape* and we were very fortunate to have an excellent program of presenters, including representatives from industry, government, regulatory agencies and the consumer movement.

We were particularly pleased to have the newly appointed Assistant Treasurer Senator the Hon. Nick Sherry in what appears to have been his first public event in his new role.

He spoke about the government's enthusiasm for the merger of the predecessor schemes into the Financial Ombudsman Service and that this had proceeded smoothly and efficiently for consumers and members. He provided a brief update on the new legislation designed to streamline the regulation of credit and margin lending both of which have an impact on our role.

A key aspect of the programme was to highlight the diverse points of view operating in the financial services industry which create a healthy tension. It is our role to understand these views and to take an impartial and balanced approach to the issues as they affect dispute resolution.

There was considerable comment about the impact of the global financial crisis on ordinary Australians. Consumer advocacy groups and financial counsellors reported high workloads. Member and industry representatives provided insights into the many well developed approaches being taken to assist those in financial difficulty as well as identifying opportunities to do more in certain sectors of the financial services industry.

The responses from feedback forms have been positive and helpful. We will use them to inform our development of future events such as this. For those of you who weren't able to attend the conference, and those who wish to revisit some presentations, many of the presentations can be found as PDFs on our website at [www.fos.org.au/conference](http://www.fos.org.au/conference)

#### New Board

On 28 April 2009 a special Board meeting was held to elect the new Financial Ombudsman Service Board. At this meeting, Professor the Hon Michael Lavarch was appointed as Chair of the Board, taking the baton from Peter E Daly AM who has retired from the position of Chair.

You can see the members of our new Board at [www.fos.org.au/governance](http://www.fos.org.au/governance)

On behalf of the Financial Ombudsman Service, I would like to take this opportunity to welcome Michael as our new Chair and to thank Peter for his enormous contribution to our organisation, especially his role in guiding us through our recent amalgamation.

#### Farewell Sam

Sam Parrino, Ombudsman – General Insurance, has resigned from the Financial Ombudsman Service. Sam spent 16 years building the Insurance Enquiries & Complaints Ltd/Insurance Ombudsman Service into a leading dispute resolution service and worked hard to help us create the Financial Ombudsman Service over the last year. He has now decided to further his career interests outside of the Financial Ombudsman Service. We are grateful to Sam for his hard work and dedication over the years and wish him well in his future endeavours.

On an interim basis, I have assumed responsibility for the role of Ombudsman – General Insurance, ably assisted by senior management in the General Insurance group. It has been business as usual and we have now advertised the role with a view to finding a new Ombudsman within the next three months.

#### International Ombudsman Conference

The International Network of Financial Services Ombudsman Conference took place in June and I have been appointed the Chair of the International Network which supports the development of best practice in external dispute resolution.

**Colin Neave**  
Chief Ombudsman

## Good practice in debt recovery

One of the issues the current financial downturn raises is the possibility of an increase in recovery action and/or legal proceedings commenced by financial service providers to recover debt. It is therefore timely to ensure members' processes reflect good industry practice and the requirements that underpin the effective operation of the Financial Ombudsman Service as an alternative to the courts.

### Collection and recovery action

When a dispute is lodged with the Financial Ombudsman Service, collection activity and recovery action relating to the account(s) in dispute must be suspended whilst we consider the dispute and until our file is closed.

Collections activity includes telephone calls and letters requesting payment of a debt, default notices, letters of demand and credit listings. Recovery action includes taking possession of a security property for sale by the financial services provider.

This approach is consistent with the 2005 Debt Collection Guideline issued by the ACCC and ASIC. The Financial Ombudsman Service takes into account the Guideline when considering disputes about debt collection matters. For more information about our approach to the Guideline see our Banking & Finance Bulletin 47 at [www.fos.org.au/publications](http://www.fos.org.au/publications)

### An exception: S80 notice and early release of superannuation

Where a disputant is applying to the Australian Prudential and Regulation Authority (APRA) for early release of superannuation in order to repay a debt in part or in full, APRA may require that a default notice under section 80 of the Uniform Consumer Credit Code is issued by the financial services provider.

As the section 80 default notice is issued with the consent of the disputant, as part of a strategy to resolve a dispute, we would not consider the issuing of a section 80 notice in these circumstances to be a breach of the Guideline. However, no further action should be taken on the expiry of the section 80 default notice while our file remains open.

### Legal proceedings

Once a dispute has been lodged with us, the financial services provider should not commence legal proceedings against its customer in respect of the same subject matter.

As a member of the Financial Ombudsman Service, the member consents to us being the forum for consideration of a matter brought by its customer that falls within our terms of reference.

If proceedings are commenced by a financial services provider after we have informed it that we have received a dispute from the disputant or after we have referred the dispute to the financial services provider for its consideration, the financial services provider must discontinue the proceedings at its own cost.

If proceedings are issued by the financial services provider after the dispute is received by us and before we have informed the financial services provider that we have received the dispute, the issue of whether this is at the cost of the financial services provider will be considered on a case by case basis. We will take into account all of the circumstances of the case including whether such costs are able to be passed on to the borrower under the relevant contract and whether the costs have been reasonably and properly incurred.

Equally, if a disputant commences legal proceedings in another forum, after lodging a dispute with us, we will not be able to consider the dispute. This is because the Financial Ombudsman Service is an alternative to the courts.

## Avoiding, Managing & Resolving Complaints Workshops

Our next one-day Avoiding, Managing & Resolving Complaints workshops will be held in Sydney on 13 August, Perth on 1 October, and Melbourne on 18 November.

These workshops are designed to provide our members with skills and information on how to avoid, manage and resolve complaints using their own internal dispute resolution process, thus avoiding the need (and cost) of referral to the Financial Ombudsman Service.

You can access the workshop programs and registration forms at [www.fos.org.au/events](http://www.fos.org.au/events)

## Gearing strategy issues

Gearing strategies are strategies in which money is borrowed in order to build wealth. In recent years, these strategies became more popular and were more widely recommended by financial advisers. In particular we have seen an increase in the use of margin lending, where existing collateral is used to obtain a line of credit for the purposes of purchasing additional securities, as a vehicle used by more investors.

Gearing has the potential to amplify both gains and losses, depending upon the direction that the market is travelling. Consumers and businesses are now experiencing financial hardship as a result of their use of gearing strategies leading into the global financial crisis.

### Obligations under the Corporations Act 2001

The Investments, Life Insurance & Superannuation group is receiving many disputes relating to geared investments where a central issue is compliance with obligations under the *Corporations Act 2001*.

Under the Act the obligations when providing personal advice are to make reasonable enquiries to ascertain the personal circumstances of the client, as well as conduct reasonable investigation and consideration of the subject matter of the advice.

Once these steps have been completed, the advice should be assessed to ensure that it is appropriate for the client, given the investigations and considerations that have been completed. Gearing strategies, inherently, will require personal advice to be given and the above steps will have to be undertaken.

The client's ability to tolerate the use of credit to finance investment is not one that can be appropriately assessed without an in-depth knowledge of the client's personal circumstances.

### Common issues that we are seeing

While each case is determined on its own merits, some common issues are emerging in disputes around gearing. These issues are not unusual as regards how we assess the appropriateness of investment advice, but the principles are worth restating here given the unusually high number of cases we are receiving and the fact that they raise similar issues. Our approach to these cases proceeds based on the following principles:

1. If the investor had little or no ability to resource the loan facility, aside from investment proceeds, it may be difficult to establish that the adviser's recommendation was reasonable;
2. If the adviser's recommendations could only be achieved through the use of gearing and were in conflict with the investor's stated aims, it may be difficult to establish that the recommendation was reasonable;
3. If the loan was secured over the primary residence with few other liquid assets in the investor's portfolio, it may be difficult to establish that the recommendation was reasonable;
4. If the recommendation to enter into a gearing strategy was based upon general or limited advice only, it may be difficult to establish that the facility was fairly entered into.



## Terms of Reference update

### New Terms of Reference approved

Our new Terms of Reference (TOR) have been approved by the Financial Ombudsman Service Board.

Having considered the Proposed TOR, submissions (including submissions in reply), and the revised draft TOR (incorporating changes recommended after consideration of all submissions), the Board approved the revised draft TOR on 30 May 2009.

This approval is subject to ASIC signing off the TOR before 1 January 2010. If approved by ASIC before 1 January 2010, the TOR (as changed in accordance with any request made by ASIC) will take effect from 1 January 2010. This means from 1 January 2010 we will proudly have in place a single set of rules, procedures and definitions for handling financial services disputes across Australia.

The Approved TOR can be found on our website at [www.fos.org.au/torsettled](http://www.fos.org.au/torsettled)

### Development of Operational Guidelines

The Financial Ombudsman Service plans to engage with stakeholders in a facilitated process leading to the development of Operational Guidelines supporting the TOR.

The Operational Guidelines are designed to act as user guides to assist Financial Ombudsman Service users to feel confident about the approach we will take to the application of the TOR. They will act as sign posts in relation to process issues, but will not extend the effect of the TOR.

The expectation is that as a result of the engagement process, we will gain from stakeholders information about what issues want clarification; what the pressing issues are; and what additional matters of particular stakeholder interest need to be considered when drafting the Operational Guidelines.

We will be consulting with consumer and industry representatives in August, facilitated by Phil Houry, Director, The Navigator Company Pty Ltd.

## Registration of disputes

Over the past twelve months the Banking & Finance group has received a record number of complaints which has led to a review of processes upon initial receipt of a dispute.

On 10 March 2009, the Banking & Finance group implemented an early referral and registration process to facilitate early resolution of a dispute directly with a member.

### Revised process for banking & finance disputes

Upon receipt of any written dispute with a member, a case number is allocated to the matter and the disputant is informed that their name and contact details have been provided to the member. The consumer is encouraged to discuss the complaint with their financial services provider if they are contacted in an attempt to resolve the dispute. A new 'pre-registration' status has been created and an email is automatically generated and sent to the member on the same day to register the dispute.

This gives members the chance to contact their customers directly, before this office has assessed any jurisdictional matters or addressed any of the issues raised. If the member is able to resolve the dispute before it is allocated to a case officer and formally referred to the member, the cost to the member is substantially reduced.

### Benefits

The new process is aimed at saving both time and money for members, while helping to promote better relations with their customers. For consumers, it offers the chance to resolve disputes as early and as quickly as possible using the members' own IDR processes.

While the process is in its infancy, we trust that registration of a dispute will promote timeliness and efficiency in the resolution of disputes at an early stage.

## Advancing dispute resolution through submissions

At the Financial Ombudsman Service we are always looking at how we can contribute to better dispute resolution, both at a regulatory and practice level.

We identify current regulatory issues that affect financial service providers and/or alternative dispute resolution organisations. Submissions are made, for example, to:

- contribute to clarification or development of laws
- identify, discuss or address issues that are known to have given rise to disputes, or
- suggest ways to resolve deficiencies in legislation or regulatory arrangements.

### Recently we have made submissions on matters including:

- transfer of responsibility for consumer credit regulation to the Commonwealth
- Australian Consumer law reform to create uniform national consumer protection laws.
- review of ASIC's regulatory guidelines that deal with external dispute resolution schemes, and
- the National Alternative Dispute Resolution Advisory Council's enquiry into alternative dispute resolution.

For more information about submissions, please contact Carolyn Bruns at [cbruns@fos.org.au](mailto:cbruns@fos.org.au)



## Bushfire and flooding relief hotline

In response to the double disaster of the Victorian bushfires and the flooding in Queensland, the Financial Ombudsman Service established a dedicated Bushfire and Flooding Relief telephone hotline on 12 February 2009. This hotline also had a supporting email address.

Between 12 February and 31 May 2009, we received 138 contacts related to the Victorian bushfires and Queensland floods. The vast majority of calls related to the Victorian bushfires, with 82 (59%) of the contacts raising specific matters concerning an insurer.

59% of these insurer related questions were about the amount of cover provided under policies and the extent of cover.

# Case studies

The following cases have recently been added to our case study archive at [www.fos.org.au/casestudies](http://www.fos.org.au/casestudies). Case studies may be based on recent determinations or prepared specially for recurring cases or cases of particular interest.



## Financial planning and the aged pension

Mr and Mrs A had several financial assets and approached their bank for some financial advice on how to rearrange their money so Mrs A could qualify for the maximum aged pension. They followed the given advice but Mrs A was only able to receive half the full pension...



## Travel insurance and an exclusion for "insurrection"

Mr B was stranded in Thailand when Phuket airport was closed due to an anti-government protest. Mr B had to purchase new flight tickets and incurred additional costs. When it came to claim these on his travel insurance, Mr B's claim was denied...



## Superannuation and how far the obligation to advise extends

Mr and Mrs D made contributions to a super fund on the recommendation of a superannuation consultant. The super rules at the time permitted them to withdraw their contributions without being taxed, but several years later, when they wanted to withdraw their money, new rules prevent them withdrawing their contributions without incurring tax/penalties...

## One organisation, many specialisations

One of the aims of our merger last year was to become one organisation with many specialisations. To ensure that the wealth of knowledge and experience from the previous individual scheme boards was not lost, Board Advisory Committees were appointed by the Board.

The primary objective of each committee is to assist the Board in addressing matters which may have an effect on our various financial service providers and consumers, according to category.

Reporting directly to Financial Ombudsman Service Board, our advisory committees comprise:

- Banking & Finance Advisory Committee
- Financial Planning Advisory Committee
- General Insurance Advisory Committee
- Insurance Broking Advisory Committee
- Investments, Life Insurance & Superannuation Advisory Committee
- Mutuals Advisory Committee

You can find out more about these committees on our website at [www.fos.org.au/aboutus](http://www.fos.org.au/aboutus)

# Community news and events

Resolving thousands of disputes each year gives us some good insight into disputes that arise in the financial services sector. We use this knowledge to help increase the financial literacy of consumers and raise industry standards - by giving talks, hosting workshops and making submissions on issues concerning financial services to consumers, community agencies, scheme participants and government.

If you have an event coming up you think we should be involved in, please email [publications@fos.org.au](mailto:publications@fos.org.au) or call our Community Program Manager Robyn McCutchan on (03) 9613 6392.

11 Aug	General Insurance Industry Liaison – Sydney
13 Aug	Avoiding, Managing & Resolving Complaints Workshop – Sydney
23 Sept	Introduction to FOS for Indigenous Youth – Wellington
1 Oct	Avoiding, Managing & Resolving Complaints Workshop – Perth
2-4 Oct	Home Buyer Show – Melbourne
31 Oct – 1 Nov	Home Buyer Show – Sydney
18 Nov	Avoiding, Managing & Resolving Complaints Workshop – Melbourne
18 - 20 Nov	Financial Planning Association 2009 National Conference – Melbourne

More information about coming events can be found at [www.fos.org.au/events](http://www.fos.org.au/events)



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