

THE FINANCIAL OMBUDSMAN SERVICE

circular 

ISSUE 6 - WINTER 2011

CONTENTS

CHIEF OMBUDSMAN'S MESSAGE	3
SECURE SERVICES ON THE FOS WEBSITE	4
SYSTEMIC ISSUES ONLINE TRAINING	6
SYSTEMIC ISSUES & SERIOUS MISCONDUCT - UPDATE	7
INFORMATION ABOUT THE FOS EARLY RESOLUTION TEAM	10
CONSULTATION ON PROPOSED CHANGES TO TERMS OF REFERENCE & OPERATIONAL GUIDELINES	12
RISK PROFILING IN FINANCIAL ADVICE DISPUTES	13
ILIS CHANGE OF PROCESS AFFECTING PARTIES' ABILITY TO MAKE MULTIPLE SUBMISSIONS	17
FOS BUSINESS PLAN 2011-2012	19
MEMBERSHIP INVOICES AND CERTIFICATES	20
OPT-OUT CLASS ACTIONS - REQUEST TO PROVIDE INFORMATION	21
FOS EVENTS	24

CHIEF OMBUDSMAN'S MESSAGE

Welcome to Issue 6 of The Circular.


This issue highlights two major enhancements to our website. The first is our new Systemic Issues online learning module. Upon completing this training, members will be more familiar with the FOS approach to Systemic Issues Management and understand how this process can help with their risk management framework. Secondly, members are now able to register and log in to a Secure Services area of our website to view a range of information, including member's contact details, case information and reports.

We also flag the release of our 2011-2012 Business Plan, which summarises what we achieved in 2010-2011 and outlines what we plan to achieve in 2010-2012.

Other topics we cover in this issue include:

- opt-out class actions
- risk profiling
- a change of process affecting parties' ability to make multiple submissions
- systemic issues update.

As always, we welcome your feedback and your suggestions for topics for future issues, please email publications@fos.org.au. The Circular is designed to support dispute resolution by providing practical information and explaining our approach on substantive issues.



Colin Neave

Chief Ombudsman

SECURE SERVICES ON THE FOS WEBSITE

- WHAT SERVICES ARE ON OFFER?
- HOW TO START USING THE SECURE SERVICES AREA
- QUESTIONS AND FEEDBACK

In June 2011 we launched a major new service for our members – a Secure Services area on our website. It is designed to streamline and enhance communication between FOS and its members. We will also be developing Secure Services for our other stakeholders, including consumers and consumer representatives.

Many of our members have already registered for access to the Secure Services area, and we encourage all our members to do so. See the instructions below on how to register.

WHAT SERVICES ARE ON OFFER?

Here are the first four services we are or soon will be offering.

1. MANAGE CONTACT DETAILS – AVAILABLE NOW

A member can review and update their contact details in the Secure Services pages. Any changes they make will feed directly into our membership database.

2. ONLINE REPORTS – AVAILABLE NOW

FOS sends monthly reports on disputes still open and disputes closed to members who have had one or more open disputes during the month. Starting with the July 2011 report, members now receive their monthly reports through Secure Services. They will no longer receive them as attachments to emails.

This new reporting method has several advantages over the previous method:

- **ARCHIVING.** The Secure Services area will serve as an archive of all a member's reports. So members will no longer need to worry about storing (and potentially losing) emails and PDF files. The archive will cover not just July 2011 onwards, but the entire period in which our current Terms of Reference have been operating – that is, from 1 January 2010 onwards.
- **CASE SEARCHING.** Members will be able to search for a particular case or all the cases that meet certain criteria (status, product, issue, date received, date closed, etc.). For example, a member could search for all financial difficulty disputes about home loans that were brought to FOS by one of their customers between 1 July and 30 December 2010.
- **MULTIPLE FORMATS.** Reports can viewed online or downloaded as a PDF or Excel file, so there should be a format to suit every purpose.

3. ONLINE INVOICING – COMING SOON

The next service coming to the Secure Services area is invoicing. Members will be able to view, print and pay invoices online. More information about the new invoicing system will be emailed to members' finance contacts when the service is ready to launch.

4. REPORTING DASHBOARD – COMING SOON

FOS sends to members who have had open disputes a Summary of Dispute Activity report at the end of each quarter. This report is being developed into an interactive Reporting Dashboard that will sit within the Secure Services area.

HOW TO START USING THE SECURE SERVICES AREA

FOS MEMBERS CAN REGISTER NOW FOR ACCESS TO THE SECURE SERVICES AREA (IF THEY HAVEN'T DONE SO ALREADY).

Please note that you must be listed as a contact for your business in FOS's membership database to be able to register. FOS holds the contact details of one or more staff from each member in its membership database. All the contact information in our database has been supplied by our members.

The registration process includes an authorisation step for added security. Use the blue help buttons during registration for guidance.

Once you have registered, you can log in to the Secure Services area of the website with a unique combination of your member number, first name, surname and password.

QUESTIONS AND FEEDBACK

If you have any questions or feedback about the Secure Services facility or you have any trouble registering, logging in or using the Secure Services pages, please email bas@fos.org.au.

SYSTEMIC ISSUES ONLINE TRAINING

A new online learning module is now available on the FOS website. It aims to familiarise learners with the FOS approach to Systemic Issues Management. The Systemic Issues Management Process is used by FOS for handling the identification and resolution of Systemic Issues as required by its obligations to the Australian Securities and Investments Commission.

By completing this online training, participants should be able to:

- provide an overview of Systemic Issues and their impacts
- explain the purpose of the Systemic Issues Management Process
- understand how the FOS Systemic Issues Management Process can help businesses with their risk management framework

CPD points are available upon completion.

Go to the following link to get started: www.fos.org.au/learnsi

You are welcome to share this link with other areas within your organisation.

SYSTEMIC ISSUES & SERIOUS MISCONDUCT - UPDATE

- PROXIMATE DISCLOSURE OF BREAK COST ON SWITCH
- DELAY IN SWITCH CAUSING LOSS
- ERROR IN CREDIT LISTINGS
- CALCULATION OF BREAK COST
- REASONABLENESS OF BREAK COST METHODOLOGY
- DISCLOSURE OF LUMP SUM REPAYMENTS

This is a summary of the systemic issues that we identified during the March quarter of 2011 and reported to ASIC.

This summary does not include details of the outcome or resolution of the systemic issues as they may not yet be resolved and, in any event, outcomes or resolutions to systemic issues are formulated on a case by case basis.

Our systemic issues process is outlined in the [December 2010 Circular \(www.fos.org.au/circular4\)](http://www.fos.org.au/circular4). To learn more about our process you can now access Systemic Issues online training on the FOS website go to the following link: www.fos.org.au/learnsi

The new Systemic Issues online learning module aims to familiarise learners with the FOS approach to Systemic Issues Management. The Systemic Issues Management Process is used by FOS for handling the identification and resolution of Systemic Issues as required by its obligations to the Australian Securities and Investments Commission.

By completing this online training, participants should be able to:

- provide an overview of Systemic Issues and their impacts
- explain the purpose of the Systemic Issues Management Process
- understand how the FOS Systemic Issues Management Process can help businesses with their risk management framework

CPD points are available upon completion.

PROXIMATE DISCLOSURE OF BREAK COST ON SWITCH

FOS considered several disputes related to a financial services provider's (FSP's) process and notification of early repayment fees when a customer switches investment loans from a variable rate to a fixed rate. The issues reviewed as potentially systemic related to whether the FSP had:

- appropriate processes in place to ensure that customers with variable rate home or investment loans were provided proximate disclosure of break cost provisions when switching their loan to a fixed rate, and
- provided misleading information in the documentation given to customers about their liability to pay break costs if they chose to exit their fixed rate home loans before the term had expired.

It appeared from information provided by the FSP during the course of the investigation that it had revised its documentation in an attempt to improve disclosure. However, FOS remained concerned that the amended wording did not provide a sufficiently clear warning to customers of their future liability to pay a break cost.

DELAY IN SWITCH CAUSING LOSS

A number of disputes involving one FSP illustrated that, even though the FSP provided a break cost quote to its customers that was valid for seven days, it was unable to process requests to switch loans to a variable rate during that time frame. As a result, customers could lose money, particularly if they made the switch when interest rates were falling.

The FSP said that it had introduced improvements to its loan switching process in March 2010, resulting in reduced processing times. Nevertheless, it did acknowledge that it had not always been able to process switch requests from customers within the seven days that the break cost quote remained valid and that there may have been a class of customers affected by this issue.

ERROR IN CREDIT LISTINGS

A number of disputes received at FOS illustrated that the FSP may have listed a credit default against its customer even though a demand for payment was made after the listing was made. The FSP explained that problems arose when it used a third party to assist with debt collection. It also provided a copy of its policies and procedures for notifying account holders of a default and warning them of a possible listing. It confirmed that its policy is to report defaults in accordance with applicable laws and regulations. Nevertheless, it acknowledged that it had received 12 other similar complaints about the actions of its third party agent in 2010. It appeared, therefore, that there were customers other than those who complained to FOS that had been affected by this issue.

CALCULATION OF BREAK COST

FOS considered a substantial number of disputes involving one FSP that illustrated that the break cost charged by the FSP may have been unreasonable. In each of the disputes, following review by FOS's Banking Adviser and comparison with the FOS method for calculating break costs, we found the break cost charged to be unreasonable.

The issues reviewed as possibly systemic included the FSP's method for calculating break costs and the contractual disclosure of the calculation method in its fixed rate contracts.

Following an independent review of its calculation method, the FSP acknowledged that it had identified a cash flow error in its method. It agreed to identify customers affected by the error and to recalculate their break costs and reimburse them if they were charged too much.

REASONABLENESS OF BREAK COST METHODOLOGY

Following receipt of a number of disputes involving one FSP, FOS identified a potentially systemic issue relating to the FSP's break cost calculation method prior to 1 October 2010. The method included a credit spread at either end of the calculation of the break cost.

In its response to FOS, the FSP acknowledged that, while on average its hedging was adversely affected by credit spreads, the magnitude of the spread was variable and it was unable to make an accurate assessment of its costs in that regard. It had nevertheless agreed to formulate a new break costs method that excluded credit spreads from 1 October 2010. Even though FOS was pleased with the FSP's decision to revise its break cost method from 1 October 2010, its view was that the FSP should be identifying all affected customers from 1 September 2008 and reimbursing them with the differential (if any) between the break cost charged to them by the FSP and the break cost that would have been charged if the FSP used the new method for calculating break costs, including interest on the reimbursement.

DISCLOSURE OF LUMP SUM REPAYMENTS

FOS considered a dispute regarding the FSP's apparent practice of calculating a break cost following lump sum repayments to the loan on the anniversary of the loan's commencement, in some cases up to a year after the break cost event occurred. The issues being reviewed as potentially systemic were whether the FSP provided adequate information disclosure in its loan contracts about how it accounts for lump sum repayments and whether its method for calculating a break cost liability in these circumstances represents a fair and reasonable estimate of its loss.

In particular, FOS was concerned that calculating and charging the break cost fee on the anniversary date of the loan may result in a calculation that is not a fair and reasonable estimate of loss. This would be of particular concern in a falling interest rate environment because the break fee payable at the time of the prepayment (when the loss is crystallised) would be less than on the subsequent anniversary.

The FSP agreed to review its break cost calculations data for the period 1 September 2008 to date:

- To establish how many, if any, customers made lump sum repayments to their fixed rate home loans that resulted in a break cost calculation being performed on the anniversary date of the loan; and
- To determine whether break cost fees paid by these customers were higher than if the calculation had been made on the date the lump sum repayment was made.

INFORMATION ABOUT THE FOS EARLY RESOLUTION TEAM

- ERT REGISTRATION TEAM
- ERT ACCEPTANCE TEAMS
- ERT EARLY CASE MANAGEMENT TEAM
- ERT CONCILIATION TEAM

The FOS Early Resolution Team (ERT) deals with disputes up to the point of referral for a Recommendation or Determination. The ERT is responsible for the Registration, Acceptance and Early Case Management stages of our dispute resolution process.

The ERT handles all incoming calls to FOS, registers all new disputes that have not been through internal dispute resolution with a Financial Services Provider and conducts initial assessment of jurisdiction on all new disputes. The ERT is also responsible for resolving disputes in early case management through negotiation, conciliation and assessment.

The primary objective of the ERT is to resolve disputes by agreement between the parties in a timely and effective manner, through negotiation, conciliation and early merits assessment. In the last 12 months, 85% of disputes dealt with by the ERT were finalised without requiring a Recommendation or Determination to be made by FOS.

Disputes that are not resolved through Early Case Management by the ERT are referred to one of the three FOS Decisions Teams – Banking and Finance, General Insurance and Investments, Life Insurance and Superannuation - for further investigation and decision making.

The ERT is currently comprised of the following teams, which handle disputes during the different stages of our dispute resolution process:

ERT REGISTRATION TEAM

The Registration Team processes all new disputes received by FOS and handles all of the incoming calls to our 1300 780 808 number. New disputes that have not yet been raised directly with a Financial Services Provider are registered by the Team and the details are sent to the Financial Services Provider.

After a dispute has been registered and referred to the Financial Services Provider, if the Applicant subsequently contacts FOS and advises that their dispute has not been resolved, the dispute is progressed to Acceptance stage of our dispute resolution process.

ERT ACCEPTANCE TEAMS

FOS has four Acceptance Teams, which deal with all of the different dispute types handled by FOS. The Acceptance Teams are responsible for assessing jurisdiction on disputes received by FOS that have been through internal dispute resolution. The Acceptance Teams also refer disputes to the Financial Services Provider for an initial response.

If a new dispute does not come within our Terms of Reference, an Acceptance Team Dispute Officer will advise the Applicant in writing and will provide details of any organisation that may be able to assist the Applicant. The Acceptance Teams also obtain additional information from Applicants that will assist FOS to consider and resolve disputes.

ERT EARLY CASE MANAGEMENT TEAM

FOS has four Early Case Management Teams, which deal with all of the different dispute types handled by FOS. If disputes are not resolved after they are initially referred to Financial Services Providers for a response, Dispute Analysts in the Early Case Management Teams are responsible for then conducting the initial investigation and consideration of the disputes, and they resolve disputes primarily through negotiation and early merits assessment.

ERT CONCILIATION TEAM

The ERT Conciliation Team is responsible for conducting conciliation conferences on all of the different dispute types handled by FOS, except for financial difficulty disputes. Financial difficulty disputes are conciliated by the Financial Difficulty Case Management Team, which is part of the FOS Banking and Finance specialist Team.

Most of the conciliation conferences conducted by Conciliators in the ERT Conciliation Team are done by teleconference. In the last 12 months 75% of disputes conciliated by the Team have been resolved by agreement.

CONSULTATION ON PROPOSED CHANGES TO TERMS OF REFERENCE & OPERATIONAL GUIDELINES

- CONSULTATION ON PROPOSED TOR CHANGES (TTCS)
- CONSULTATION ON PROPOSED CHANGES TO PARAGRAPH 4.2 OF THE TERMS OF REFERENCE AND OPERATIONAL GUIDELINES (CROSS-BORDER INVESTMENTS)

CONSULTATION ON PROPOSED TOR CHANGES (TTCS)

As a result of amendments to the Corporations Act 2001 and ASIC's Regulatory Guide 139, FOS is required to modify its current TOR by 1 January 2012, after consultation with relevant stakeholders, to enable it to deal with disputes about Traditional Trustee Company Services ("TTCS").

FOS has developed a set of proposed amendments to meet these requirements. They involve a number of changes to FOS' jurisdiction to accommodate TTCS disputes, and a separate procedure for dealing with those disputes if they affect multiple parties.

FOS is now seeking stakeholder input on the proposed changes. Submissions on the changes can be made to FOS by 30 August 2011. A more detailed explanation of the proposed changes, and how to participate in the consultation, is on our website at www.fos.org.au/ttcs.

For more information about the consultation, or to make a submission on the changes, please contact Mike D'Argaville at mdargaville@fos.org.au.

CONSULTATION ON PROPOSED CHANGES TO PARAGRAPH 4.2 OF THE TERMS OF REFERENCE AND OPERATIONAL GUIDELINES (CROSS-BORDER INVESTMENTS)

As an ASIC-approved External Dispute Resolution scheme, FOS is required to provide a forum for disputes about financial services.

Paragraph 4.2 of the Terms of Reference, as currently drafted, may not give FOS sufficiently clear jurisdiction to deal with "cross-border" investments to the extent required by ASIC. These are investments in overseas managed investment schemes (or their equivalent) by Australian investors, and in Australian managed investment schemes by overseas investors.

Minor amendments to these paragraphs, and to the Operational Guidelines, have been developed to remove all doubt about the extent of FOS' jurisdiction.

FOS is now seeking stakeholder input on the proposed changes. Submissions on the changes can be made to FOS by 30 August 2011. A more detailed explanation of the proposed changes, and how to participate in the consultation, is on our website at www.fos.org.au/cbi.

For more information about the consultation, or to make a submission, please contact Mike D'Argaville at mdargaville@fos.org.au.

RISK PROFILING IN FINANCIAL ADVICE DISPUTES

- PURPOSE
- WHAT IS RISK PROFILING?
- THE CONSEQUENCE OF INADEQUATE OR POOR RISK PROFILING PRACTICES AND PROCEDURES
- FOS'S APPROACH TO INVESTIGATING THE ADEQUACY OF RISK PROFILING PRACTICES AND PROCEDURES
- HAS THE FSP ADDRESSED LIMITATIONS IN THE RISK PROFILING TOOL USED?
- FOS'S OBSERVATIONS OF RISK PROFILING PRACTICES AND PROCEDURES
- ARE THE FSP'S RISK PROFILING PRACTICES AND PROCEDURES ADEQUATE?

PURPOSE

This article explains the approach FOS takes when determining whether the risk profiling practices and procedures of a financial services provider (FSP) are adequate.

The aim of risk profiling includes the FSP obtaining a client's informed acceptance of their risk profile and the possible investment implications that may arise from the outcome of the risk profiling process.

WHAT IS RISK PROFILING?

FSPs that provide personal financial advice to retail clients are obliged to ensure the financial products they recommend are suitable having regard to each client's objectives, financial situation and needs.¹ An important part of an FSP's assessment of a client's objectives, financial situation and needs is the knowledge of the client's tolerance to risk.²

Most FSPs who provide personal financial advice to retail clients have developed practices and procedures, known as "risk profiling", which are designed to identify their clients' understanding and tolerance to risks.

There is no mandated method of risk profiling and a number of methods have been developed by FSPs, including:

- risk profile questionnaires;³
- the risk tolerance line method;⁴
- the life-cycle approach;⁵ and
- the sensitivity analysis approach.⁶

It is important to remember that whatever method is used it is only a tool for FSPs to use as part of the process of determining clients' tolerance to risk.

FOS also recognises that skilled advisers can secure their clients' informed consent without using risk profiling tools.

Regardless of whether risk profiling tools are used or not, FSPs must keep detailed records that show they secured their client's informed consent about the level of risk required to achieve their objectives. Without these records, FSPs have greater difficulty defending claims involving the adequacy of their risk profiling practices and procedures.

THE CONSEQUENCE OF INADEQUATE OR POOR RISK PROFILING PRACTICES AND PROCEDURES

The probable consequence of inadequate or poor risk profiling is a client making investments that are not suitable for their objectives, financial situation and needs⁷ and the FSP breaching its duty to have a reasonable basis for its advice.

FOS'S APPROACH TO INVESTIGATING THE ADEQUACY OF RISK PROFILING PRACTICES AND PROCEDURES

FOS will look at the FSP's practices and procedures as a whole when investigating and making decisions about the adequacy of a FSP's risk profiling practices.

This is likely to include a consideration of whether the FSP has:

- addressed the inherent and specific limitations in the risk profiling tool used;
- risk profiling practices and procedures that address both the client's attitude to risk and capacity for loss;
- determined the risk profile for each spouse or partner;
- determined the risk profile of the client in each of the capacities the client acts (e.g. as an individual, in the client's capacity as a trustee of a SMSF or company director etc);
- conducted a transparent risk / reward trade off where clients do not have sufficient financial resources to meet their stated objectives in the timeframe they have identified and having regard to their stated appetite for risk;
- sought to actively understand their clients' concerns and objectives; and,
- sought to educate their clients about risk and reward.

HAS THE FSP ADDRESSED LIMITATIONS IN THE RISK PROFILING TOOL USED?

FOS expects FSPs to be aware that all risk profiling methods have some limitations and have in place adequate measures to address them. FOS notes the following general limitations in the risk profiling methods used in the industry.

The Risk Tolerance Line tool is notoriously inaccurate as clients tend to understate how low any low risk tolerance is and how high any high risk tolerance is. This tends to result in most clients indicating a moderate risk tolerance.

The Life Cycle Approach would have all clients in the same age group holding the same financial products and does not account for personal circumstances which could alter the asset allocation.

While the Sensitivity Analysis Method addresses clients' financial capacity to absorb capital loss and volatility, it ignores clients' subjective tolerance to capital loss.

The effectiveness of Risk Profile Questionnaires –the tool most commonly used by advisers – will often depend on the quality of the questions asked and the appropriateness of the grading and weighting of the client's responses.

A questionnaire may not be effective if, for example, it:

- asks questions that contain complex concepts which assume a high level of financial literacy on the part of the client; or
- uses vague or ambiguous language.

FOS expects FSPs using these risk profiling methods to be aware of these limitations and have in place adequate measures to address them.

FOS asks FSPs to be aware of limitations in tools they use and use measures to mitigate those limitations. FOS may also analyse risk profiling tools, identify limitations relevant to the Dispute and ask the FSP to make submissions on the relevance of the limitations together with submissions and evidence on mitigation strategies employed by the FSP.

FOS'S OBSERVATIONS OF RISK PROFILING PRACTICES AND PROCEDURES

FSPs are unlikely to adequately meet their obligation to have regard to a client's objectives, financial situation and needs by only relying on a risk profile tool.

The reasons for this include:

- (1) Most risk profiling tools have inherent limitations that can only be overcome by FSPs putting in place techniques that address the limitations (this may be as simple as testing the client's responses to a questionnaire and their understanding of questions).
- (2) Risk profiling tools offer an opportunity for FSPs to educate clients on the relationship between risk and reward in terms the client is likely to understand. FSPs who do not take this opportunity to educate clients are at risk of not obtaining the client's informed acceptance of the risk profile and its possible investment implications.
- (3) Risk profiling tools should be used by FSPs to identify gaps between a client's financial resources, their appetite for risk and the timeframe to achieve their objectives. Where gaps do exist, the FSP must undertake a transparent trade-off process where the FSP can either ask the client to consider:
 - investing more funds;
 - taking on board more risk to achieve a higher possible return; or
 - modifying future goals so that they are more in line with the client's financial resources and the timeframe to achieve the client's objectives.

The above process is also highly relevant to the client's informed acceptance of the risk profile and its possible investment implications.

ARE THE FSP'S RISK PROFILING PRACTICES AND PROCEDURES ADEQUATE?

FSPs seeking to establish their client's tolerance to risk should not view the risk profiling process as only a means to establish the suitability of investments they recommend but also as an important part of securing the client's informed consent to make the recommended investments and/or employ the recommended investment strategy.

If the FSP can demonstrate the client's informed acceptance of the risk profile and the possible investment implications that may arise from the outcome of the risk profiling process, it is less likely that FOS will find the FSP had breached its obligations in this regard.

FOS's view is the usefulness of any risk profiling methods used lays in the opportunities those methods give FSPs to open meaningful discussions with clients that could identify gaps between their objectives, the timeframe to achieve the objectives and their appetite for risk and, if gaps exist, undertake a transparent trade-off process.

It is more likely that FOS will consider an FSP's risk profiling practices and processes to be adequate if they are likely to result in securing a client's informed consent about the level of risk they will need to take to achieve their objectives.

FOOTNOTES

- (1) Subsection 945A(1) of the Corporations Act
- (2) ASIC's Regulatory Guide 175 (issued May 2009) at RG175.118
- (3) This tool uses a series of questions designed to examine the client's reaction to different financial outcomes. Each response is graded in some manner and the total score is assessed against a series of risk profile categories, usually ranging from conservative to aggressive profiles.
- (4) This tool asks the client to indicate a preferred place on a scale (usually a five or ten point scale) starting from a low-risk tolerance ending at a high-risk tolerance.
- (5) This approach is based on the life stage of the client and assumes a younger client's focus is on wealth accumulation and older clients' are more concerned with income. A younger client would usually be considered to have a more aggressive risk profile than older clients.
- (6) This tool tests how different outcomes would affect the financial capacity of the client by essentially asking: "How would the financial capacity of the client be affected if they suffered capital loss or expected benefits were not delivered?"
- (7) *Paige v FPI Limited* [2001] NSWSC 627 at paragraphs 18 and 190

ILIS CHANGE OF PROCESS AFFECTING PARTIES' ABILITY TO MAKE MULTIPLE SUBMISSIONS

- PREVIOUS PROCESS - ISSUES LETTER
- NEW PROCESS

MAKE YOUR BEST CASE EARLY!

Our Investments, Life Insurance and Superannuation (ILIS) team has recently changed some of its processes, to ensure that we deal with disputes as quickly and efficiently as possible.

The change in process is that once your dispute is referred to a Case Manager* in the ILIS decision team, you won't necessarily be invited to provide another submission before a Recommendation is prepared and issued.

So, our message to you is: Make your best case early!

Parties should provide:

- comprehensive submissions; and
- all relevant material

at the start of our process, that is, when the dispute is with the Early Resolution Team.

PREVIOUS PROCESS - ISSUES LETTER

Previously, within the FOS ILIS area, your Dispute Analyst referred disputes that did not resolve at case management or conciliation in the Early Resolution Team to a Panel Case Manager (now Case Manager) for further review and investigation, before we issued a Recommendation.

In a letter known as an "Issues Letter", the Panel Case Manager would write to the parties:

- about the issues in dispute;
- request further evidence; and
- invite the parties to make further submissions or comments.

NEW PROCESS

Now, for most cases proceeding from case management or conciliation in the Early Resolution Team to Recommendation, our Case Managers in the decisions team will no longer send "Issues Letters" to the parties.

We may still write to the parties and ask them to provide more information before we issue our Recommendation but we will not necessarily invite the parties to make their own further submissions or comments.

In summary, parties should be aware that:

- they should provide all comments about a dispute as early as possible in our process; and
- once our team decides that a dispute is unlikely to resolve by agreement, parties may not have an opportunity to make further comments before we issue a Recommendation.

If you have any questions about our new process, please contact your Case Manager in the ILIS decisions team.

** previously called Panel Case Managers*

FOS BUSINESS PLAN 2011-2012

The Financial Ombudsman Service's Business Plan 2011-2012 (www.fos.org.au/businessplan) is now available on our website. The Business Plan summarises what we achieved in 2010-2011 and outlines what we plan to achieve in 2010-2012.

The theme for this year's Business Plan is **Enhance, Advance**. This reflects the stage FOS has reached in its history. In the first three years after FOS formed in 2008, we developed integrated rules, systems and processes. This development work is now largely done, so FOS is focused on enhancing the service we provide to all our stakeholders.

Our major objectives for 2011-2012 are to:

- eliminate and prevent dispute backlogs
- strengthen the culture of the organisation
- build knowledge
- enhance relationships with stakeholders
- grow business intelligence as the organisation grows
- develop our people.

The Business Plan briefly outlines the strategies we are using to achieve each of these objectives.

MEMBERSHIP INVOICES AND CERTIFICATES

Invoices for membership of FOS for the 2011/12 financial year were emailed to the Finance contact at the end of June 2011 and were due for payment by 31 July 2011.

If you have not received your base levy invoice please contact us at accounts@fos.org.au, 1300 56 55 62 or 03 9613 6348.

Should you require a membership certificate, once your base levy invoice has been paid please email membership@fos.org.au.

OPT-OUT CLASS ACTIONS – REQUEST TO PROVIDE INFORMATION

- OPT-OUT CLASS ACTIONS
- FOS'S CONCERN
- REQUEST TO PROVIDE INFORMATION
- DISPUTES INVOLVING SEVERAL CLAIMS

OPT-OUT CLASS ACTIONS

Over the past few years there has been a number of opt-out class actions commenced in the Supreme Court of Victoria or the Federal Court of Australia, by investors against financial services providers (“FSPs”). These actions have been a consequence of the global financial crisis.

In an opt-out class action, the class taking action may include members who have not consented expressly to joining the action. This is in contrast to the position in other Australian courts where class members must give their express consent to join a class action.

In opt-out class actions the court will require the representative plaintiff to send an opt-out notice to all known class members who have the same interest in the class action. The class members must inform the court if they do not wish to be part of the opt-out class action by returning the opt-out notice to the court by a date set by the court.

If class members do not return the opt-out notice by the set date, they are deemed to be members of the class action, even if they did not receive a copy of the opt-out notice and were unaware of the existence of the class action.

FOS'S CONCERN

Paragraph 5.2 a) of our Terms of Reference allows us to refuse to consider a dispute if there is a more appropriate place to deal with the dispute.¹

We may decide that it is more appropriate for the court hearing a class action, rather than FOS, to deal with a dispute if the dispute and the class action:

- are both against the same FSP; and
- both relate to the same facts and circumstances.

We are concerned about the possibility of a dispute being excluded from our jurisdiction under paragraph 5.2a) where the applicant:

- is included in a class action due to failure to opt out; and
- did not receive an opt-out notice.

In the situation described above, the applicant might not be aware, at crucial times, of the class action and/or how it could affect their ability to access external dispute resolution through FOS.

In a case where a dispute lodged with FOS relates to the same facts and circumstances as an opt-out class action, FOS may not be aware of the class action. In these cases, we will depend primarily on the FSPs to inform us of the existence of any relevant opt-out class actions and request FSPs and applicants to provide information as explained below.

REQUEST TO PROVIDE INFORMATION

FSPs

FOS requests an FSP to provide information to FOS where:

- the FSP becomes aware of an opt-out class action commenced against them; and
- a dispute against the FSP relating to the same facts and circumstances as the class action (a dispute “relevant to” the class action) has been lodged with FOS.

When this situation arises, the FSP should:

- immediately inform FOS of the class action; and
- as soon as practicable, provide FOS with the Application, the Statement of Claim and a list identifying all disputes lodged with FOS that are relevant to the class action.

On an ongoing basis, the FSP should:

- keep FOS informed about the class action;
- identify to FOS any dispute relevant to the class action lodged after the action commenced; and
- give FOS any information that the FSP receives about whether applicants in relevant disputes have opted out of the class action.

To keep FOS informed of the class action, the FSP should, as promptly as possible:

- notify FOS of any direction or order of the court for the plaintiff to send opt-out notices to potential class members; and
- provide FOS with a copy of –
 - the court’s direction or order
 - the opt out notice and
 - any orders relating to the finalisation of the class action.

The FSP need not provide FOS with copies of all of the court documents and orders that relate to the class action.

APPLICANTS

FOS requests an applicant who receives an opt-out notice for a class action relevant to their dispute to:

- provide a copy of the notice to FOS; and
- inform FOS of whether they have opted out of the class action.

FOS may provide information about class actions obtained from FSPs to applicants in relevant disputes. When it provides this information, FOS may suggest that the applicants seek independent legal advice on:

- whether they could be members of the class taking action; and
- if so, whether they should join the class action or opt out of it and continue with external dispute resolution through FOS.

An applicant can decide whether to opt out of a class action up until the opt-out date. An applicant may also be able to opt out after that date with leave of the court.

Where FOS provides information about an opt-out class action to an applicant, FOS may request information from the applicant. FOS may ask the applicant to inform FOS of whether they:

- opt out of the class action;
- join the class action; or
- form the view that they are not a member of the class taking action (and if so, the basis of that view).

DISPUTES INVOLVING SEVERAL CLAIMS

Where the dispute raises claims other than those to be determined by the class action, FOS will not exclude the dispute from its jurisdiction but may:

- decide not to investigate the claim that is subject to the class action; and
- continue to investigate and determine the other claims raised by the applicant against the FSP.

FOOTNOTES

- (1) Paragraphs 5.1 m) and 5.2 e) of the Terms of Reference would not apply unless the applicant “commenced” the class action. To “commence” a class action, the applicant must be the representative plaintiff.

FOS EVENTS

- FOS NATIONAL CONFERENCE
- EXTERNAL DISPUTE RESOLUTION FORUM

FOS NATIONAL CONFERENCE



On 2 and 3 June 2011, the Financial Ombudsman Service held its National Conference for Members at the Melbourne Convention and Exhibition Centre. The conference was attended by 284 delegates from our members and approximately 160 FOS staff. All the presentations and handouts from the conference are available on our website at www.fos.org.au/conference.

The conference received wide coverage in the media, including SBS News, Sunday Sunrise, 2GB (Ross Greenwood), 2UE Legal Matters, The Age Money section (cover story), Insurance News and Australian Broker.

We would like to thank all our members whose staff attended the conference. The conference was a wonderful opportunity for FOS staff and members to meet face to face and share ideas and concerns.

Thank you also to those members who responded to our conference feedback survey. We received very positive feedback, along with some great suggestions for improvements. Our National Conference is now becoming an annual event, and we have begun planning the 2012 conference.



EXTERNAL DISPUTE RESOLUTION FORUM

FOS also played a major role in organising the External Dispute Resolution Forum hosted by Financial Counselling Australia (FCA), the peak body for financial counsellors in Australia. The forum was held in Sydney on May 20. FOS provided several speakers for the forum. All the presentations from the forum can be found on the FCA's website: www.financialcounsellingaustralia.org.au.