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CHIEF OMBUDSMAN'S MESSAGE

Welcome to Issue 7 of The Circular.

You will notice one key difference about this Chief Ombudsman's message – me. My name is Shane Tregillis and I became the new Chief Ombudsman at the Financial Ombudsman Service on 12 September. I feel privileged to be stepping into this role and am very grateful to my predecessor, Colin Neave, for the outstanding work he has done at FOS.

I have come from working as a Commissioner at ASIC and before that as Deputy Managing Director (Market Conduct) of the Monetary Authority of Singapore. If you would like to know more about my background, you can find a short biography of me on the Our Ombudsman page of our website (www.fos.org.au/ourombudsmen).

The topics covered in this issue of The Circular include:

- **loss calculation** – how FOS calculates losses in financial advice disputes
- **the slip rule** – how FOS applies it to arithmetical and clerical errors in Determinations and Recommendations
- **agreement with Credit Ombudsman Service Limited** – how FOS and COSL will handle disputes about loans that are part of a securitisation programme
- **time limits for lodging disputes** – a general insurance case study
- **National Credit Code section 94** – responding to a request for postponement of enforcement action
- **financial difficulty** – what is good industry practice for dealing with customers in financial difficulty?
- **disputes involving multiple members** – our approach
- **information from parties to disputes** – procedural fairness, confidentiality and the importance of exchanging information
- **systemic issues** – a summary of the issues we identified in the June quarter.

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

Shane Tregillis

Chief Ombudsman

FINANCIAL DIFFICULTY

WHAT IS GOOD INDUSTRY PRACTICE?

Our approach to financial services providers' (FSPs') obligations under the Code of Banking Practice (CBP) and the National Credit Code (NCC) (formally the Uniform Consumer Credit Code) has been discussed in Bulletins 46, 53 and 60. In Circular 2,April 2010, we covered our approach to disputes involving small businesses in financial difficulty, not regulated by the NCC, the CBP or the Mutuals Code of Banking Practice (MBCP).

In Circular 3, we reiterated that we consider non-CBP subscribers also have obligations to customers in financial difficulty due to their own internal hardship policies and good industry practice. We also confirmed that the CBP and the MBCP reflect good industry practice, and a prudent FSP would conduct itself in the manner contemplated by those codes regardless as to whether it subscribes or not.

BANKING SPECIALIST'S SURVEY

To verify the CBP and the MBCP reflected FSPs' general definition of good practice, our Banking Specialist conducted a survey toselected members who offer non-regulated credit facilities. The purpose was to ascertain if they had a policy that dealt with customers in financial difficulty and whether treatment of hardship cases is different for regulated and non-regulated loans.

Of the fourteen members surveyed,ten members provided substantive responses. All ten respondents advised they have a hardship policy. Most respondents have the same policies for loans regulated by the NCC and for unregulated loans. Those who do not have a formal policy in place have a practice of working with clients on a case by case basis with a view to assessing and formulating suitable arrangements.

BANKING SPECIALIST'S CONCLUSIONS

The Banking Specialist concluded all respondents have either a formal policy or an accepted practice whereby the majority of their clients will be treated substantially the same, whether or not the loan is regulated by the NCC. The respondents are not signatories to the CBP or the MBCP but their responses and policy documents indicate that they have similar approaches to that of CBP signatories. The respondents' information led him to conclude that industry practice in hardship situations is for the FSP to work with their clients along similar lines to the requirements of clause 25.2 of the CBP.

OUR APPROACH TO FINANCIAL DIFFICULTY DISPUTES GOING FORWARD

As members are aware, when deciding a dispute and whether a remedy should be provided, FOS will form an opinion about what is fair in all the circumstances, having regard to:

(a) Legal principles;

(b) Applicable industry codes or guidance as to practice;

(c) Good industry practice; and

(d) Previous relevant decisions of FOS or a predecessor scheme.

In light of the results of the Banking Specialist's survey, when forming an opinion about a financial difficulty dispute involving a non-regulated facility, even though the FSP may not be a subscriber to the CBP or the MBCP, we will have regard to the CBP and MBCP standards as they represent good industry practice.

OUR PROCESS

- CHANGE TO INITIAL RESPONSE TIMEFRAME
- SLIP RULE
- NATIONAL CREDIT CODE SECTION 94

CHANGE TO INITIAL RESPONSE TIMEFRAME

Currently FOS Members have 21 days to provide an initial response to disputes progressed to the Case Management stage. Financial difficulty and legal proceedings previously issued (LPPI) disputes have an initial response timeframe of 14 days.

Over the last 12 months Members have raised concerns about delays in receiving mail from FOS and the difficulties this creates in compiling dispute responses and material within the timeframe. The impact has been an increase in overdue responses and FOS reminders.

As a result, we are temporarily changing the initial Member response timeframe from 21 to 28 days. This will allow an additional five working days for Members to provide their initial response and should account for any postal delays. We aim to make this change time neutral by innovating in other administration and process aspects.

Due to the nature and urgency of financial difficulty and LPPI disputes, the initial response timeframe for these disputes remains 14 days.

This change will take effect on 1 October 2011.

We are developing capacity to accept files and documents electronically. This includes enabling Members to submit dispute responses via the FOS website secure portal. The development work has just begun which means implementation is some time away. However, once this capacity is in place we will revert back to the 21 day response timeframe.

If you any questions please email members@fos.org.au.

SLIP RULE

Occasionally a FOS Determination or Recommendation will contain an arithmetic or clerical error which alters the meaning of the document. In those situations it is necessary to ensure the true position is conveyed to the parties to the dispute. FOS uses the "slip rule" to make the necessary corrections.

The slip rule is a recognised legal principle and has been successfully used within other jurisdictions, such as courts and tribunals, over a number of years to correct an arithmetic or clerical error in judgments or orders.

Paragraph 8.2 of FOS's Terms of Reference provides that FOS will do what in its opinion is fair in all the circumstances, having regard to, amongst other matters, legal principles.

The slip rule is as follows:

"FOS may correct a Determination or Recommendation if it contains –

- a clerical mistake; or
- an error arising from an accidental slip or omission; or
- a material miscalculation of figures or a material mistake in the description of any person, thing or matter; or
- a defect of form.

If a Determination or Recommendation relating to a Dispute requires a correction to address an issue listed above, a party to the Dispute may request the correction in writing. The request should explain the issue to be addressed through the correction.

An Ombudsman will decide whether FOS should make any correction. FOS may correct a Determination or Recommendation relating to a Dispute whether or not a party to the Dispute requests a correction."

Any feedback you may have can be directed to gharris@fos.org.au.

NATIONAL CREDIT CODE SECTION 94

RESPONDING TO A REQUEST FOR POSTPONEMENT OF ENFORCEMENT ACTION

Section 86 of the Uniform Consumer Credit Code (UCCC) provided that a debtor, mortgagor or guarantor (collectively "borrower") may within the time specified in a notice of demand, negotiate with the credit provider a postponement of enforcement action. This right has been replicated, and expanded upon, in section 94 of the National Credit Code (NCC).

Section 94 of the NCC provides that, after receiving a default notice, a borrower may within the 30 day default notice period request the credit provider to negotiate a postponement of enforcement proceedings.

We remind credit providers that section 94 of the NCC expands on the requirements of section 86 of the UCCC by:

(1) requiring the credit provider to give written notice of the outcome of the postponement application within 21 days of receiving the application

(2) requiring the credit provider to give additional information if the application is refused. The refusal must state the reasons for the refusal to negotiate, the name of the credit provider's external dispute resolution (EDR) scheme, and the borrower's rights under that scheme.

A failure to comply with section 94 of the NCC is a strict liability contravention which is compensable under section 124 of the NCC. Therefore, we may investigate a dispute regarding a member's failure to comply with section 94, including requesting the Applicant to provide information to show how the debt is to be repaid at the end of the specified postponement period, to ascertain if the Applicant's proposal is realistic and if the Applicant has suffered any loss from the credit provider's failure to consider and respond to their request.

Disputes about non-compliance with section 94 of the NCC may also be referred to FOS's systemic issues team to ascertain whether non-compliance has a wider impact on other persons beyond the parties to the dispute.

SYSTEMIC ISSUES

SYSTEMIC ISSUES UPDATE

- INCORRECT CLAIM DENIAL
- ERROR IN CREDIT LISTINGS

This article summarises systemic issues that FOS identified during the June quarter of 2011 and reported to ASIC. The FOS systemic issues process is outlined in the December 2010 circular (www.fos.org.au/circular4).

To learn more about the FOS approach to Systemic Issues Management, access online training by clicking the following link: www.fos.org.au/learnsi. 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.

INCORRECT CLAIM DENIAL

Following review of a complaint made to FOS, an FSP acknowledged that, in terminating an applicant's income protection benefit and policy, it had incorrectly referred to revised policy wording. It was determined by FOS that the applicant's benefit should not have ceased and the FSP therefore recommenced payment of benefits to the applicant.

The issue reviewed as potentially systemic was whether the FSP had referred to incorrect policy wording when assessing customers' claims for disability benefit thereby incorrectly ceasing payments to other similarly affected customers. The FSP conducted a review of its data relating to disability claims and identified that it had incorrectly terminated disability benefits for three other eligible policy holders.

ERROR IN CREDIT LISTINGS

In each of a number of disputes relating to credit card debts received by FOS, judgement had been obtained in relation to the debts and the debts had been assigned some years later to a particular FSP.

The FSP that purchased the debt then proceeded to list payment defaults on each of the relevant customers' credit files. In FOS's view, the listings were not made properly. The defaults were not, as required, pursuant to the credit agreements.The underlying basis of the debts (the credit contracts) had merged in the judgements. In addition, if the identical debt had been listed by the original credit provider and then relisted by the FSP, such re-listings ought not to occur both as a matter of policy and interpretation. FOS therefore raised this matter as potentially systemic to determine whether other customers of the FSP may have been similarly affected.

Based on information provided, in particular that the FSP had made a large number of listings relating to instances where judgement was obtained prior to the placement of a default listing on an individual's personal credit file, FOS considered that the matter represented a definite systemic issue.

GENERAL INSURANCE CASE STUDY

TIME LIMITS FOR LODGING DISPUTES

- TERMS OF REFERENCE
- CASE STUDY

This article provides a general insurance case study to illustrate how the time limits for lodging disputes under our Terms of Reference (TOR) operate.

TERMS OF REFERENCE

Paragraph 6.2 of the TOR sets time limits for lodging disputes. The parts of paragraph 6.2 relevant for general insurance disputes are as follows:

(b) ... FOS will not consider a Dispute unless the Dispute is lodged with FOS before the earlier of the following time limits:

(i) within six years of the date when the Applicant first became aware (or should reasonably have become aware) that they suffered the loss; and

(ii) where, prior to lodging the Dispute with FOS, the Applicant received an IDR Response in relation to the Dispute from the Financial Services Provider – within 2 years of the date of the IDR Response.

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

CASE STUDY

FACTS

An Applicant, whose building was destroyed by fire on 1 August 2004, lodged a claim with the Financial Services Provider (FSP) the following day. The Applicant understood that the FSP accepted the claim. The FSP requested certain documentation from the Applicant. However, several months later, he still had not provided the documentation. The FSP decided to pay the Applicant an amount it believed to be appropriate in order to settle the claim.

The Applicant, who received the FSP's cheque on 1 June 2005, believed he was entitled to a far greater amount. He unsuccessfully attempted to resolve the matter with the FSP during the subsequent years.

The Applicant lodged a dispute with FOS on 1 March 2011 and received a final decision letter from the FSP on 1 June 2011.

ISSUE

Whether the dispute was lodged within the time limit under our TOR.

OUR ASSESSMENT

To determine the time limit under paragraph 6.2b)(i), FOS needed to establish when the Applicant first became aware (or should reasonably have become aware) that he suffered the loss to which the dispute related. The time limit under paragraph 6.2b)(ii) did not apply because he did not receive an IDR Response before he lodged his dispute with FOS.

While the fire occurred in 2004, that incident only gave rise to a claim under the Applicant's policy. The loss to which the dispute related was the difference between the amount of the cheque that he received on 1 June 2005 and the amount to which he believed he was entitled. He first became aware that he suffered that loss when he received the cheque. There was no suggestion that he should reasonably have become aware, before 1 June 2005, that he suffered that loss.

In our assessment, paragraph 6.2b) allowed the Applicant to lodge the dispute with FOS within six years after 1 June 2005.

CONCLUSION

Since the dispute was lodged within the applicable time limit, FOS was able to consider it.

PROFESSIONAL DEVELOPMENT

- FREE SEMINAR FOR PROFESSIONAL INDEMNITY INSURERS
- FOS IDR WORKSHOPS
- SYSTEMIC ISSUES MANAGEMENT ONLINE TRAINING

FREE SEMINAR FOR PROFESSIONAL INDEMNITY INSURERS

EFFECTIVE MANAGEMENT OF PI DISPUTES AT FOS

FOS is holding a dedicated free seminar for Professional Indemnity Insurer claims staff, underwriters, their legal advisors and others interested in the process for resolving disputes at FOS where professional indemnity insurers are involved in investment disputes.

The seminar offers the opportunity to meet with relevant senior managers at FOS and hear from FOS, a PI Insurer and a PI Insurance Lawyer about efficient and effective handling of these disputes. The seminar offers an opportunity to gain insight into improved management of PI claims where the dispute is at FOS.

The FOS session will be presented by:

- Alison Maynard, Ombudsman Investments, Life Insurance and Superannuation
- Michael Ridgway, General Manager Early Resolution
- Alexandra Sidoti (Melbourne) and Melinda Cavalieri (Sydney) Conciliators

This session will cover procedures, roles and case studies including:

- The Role of FOS
- Terms of Reference and monetary limits
- Calculation of loss
- How PI Insurers participate in the FOS process
- Common approaches to common problems – case studies
- Statistics and data about these disputes.

The PI Insurer perspective on the issues will be provided by an industry representative and the lawyer's perspective on representing PI insurers in their dealings with FOS will be presented by Maxine Tills, Special Counsel at Sparke Helmore.

DATE Tuesday 8 November in Sydney or Wednesday 9 November in Melbourne

TIME 9.30am - 1.30pm (morning tea & lunch provided)

VENUE

Melbourne
Melbourne Conference & Training Centre
Level 1, Olderfleet Building
477 Collins St, Melbourne, Vic

Sydney
The Grace Hotel
77 York Street, Sydney NSW

To register for this event in Sydney or Melbourne click here.

If you have any questions please contact Claire Beattie at cbeattie@fos.org.au or 03 8623 2051.

FOS IDR WORKSHOPS

RESOLVING CUSTOMER COMPLAINTS WORKSHOP

FOS, in conjunction with Nina Harding Mediation Services, is running a training program designed to provide customer-facing staff with enhanced skills for managing complaints.

ABOUT THE PROGRAM

SESSION ONE – RESOLVING CUSTOMER COMPLAINTS 1

Topics cover:

- Dispute resolution skills
- Matching to create rapport
- The nature of conflict
- Effective communication/understanding skills
- The elements of a good experience
- Dealing with high needs complainants
- How to avoid, manage and resolve complaints

All participants will receive a workshop manual which contains further information on dispute resolution skills, a simple complaint handling process and a guide on where to find further information.

ABOUT THE PRESENTERS

Nina Harding is a Harvard Law School trained mediator, LEADR Advanced Mediator and former Project Manager at the Centre for Dispute Resolution, London. Nina has:

- Mediated numerous commercial, workplace and development disputes over 14 years. She has a particular interest in large multi-party public issue disputes
- Trained hundreds of people in Australia and Asia Pacific in mediation and negotiation skills
- Conducted postgraduate training courses at numerous universities including University of Sydney, La Trobe University and Hong Kong University.
- Run in-house training for Australian Securities and Investments Commission (ASIC), State Forests, NSW Premier's Department, Aboriginal Land Councils, KPMG, US Aid, United International Pictures and the Financial Industry Complaints Service.

Amie Cousins has worked as a member and then manager of the Financial Ombudsman Service Conciliation Team since January 2007. Her team is responsible for conciliating complex disputes across a varied field, including financial planning, stockbroking, banking, insurance and managed investments. Amie holds an Bachelor of Laws (with honours), a Bachelor of Arts (with honours) and a Masters in Conflict Resolution. Amie is a nationally accredited mediator, and provides mediation training and coaching regularly within FOS and to the financial services industry.

SESSION DETAILS

DATE Tuesday 15 November, 2011 in Surfers Paradise

TIME 9am to 5pm

VENUE Surfers Paradise Marriott Resort & Spa
158 Ferny Avenue, Surfers Paradise QLD 4217
www.marriott.com.au

COST $385.00 (per person, per session, including GST)

To register for this even click here.

If you have any questions please contact Karen Driessen – Team Assistant, Communications at kdriessen@fos.org.au or call (03) 8623 2033.

SYSTEMIC ISSUES ONLINE TRAINING

SYSTEMIC ISSUES MANAGEMENT

To learn more about the FOS approach to Systemic Issues Management, access online training by clicking the following link: www.fos.org.au/learnsi. 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.

GENERAL BUSINESS

- FOS AGM
- TELEPHONY SYSTEM UPGRADE

FOS AGM

The next FOS Annual General Meeting will be held 10 November, 2011 at the FOS offices.

An invite will be sent to FOS members outlining the details closer to the date.

TELEPHONY SYSTEM UPGRADE

FOS is upgrading its telephony system for the first time since it formed in 2008. People calling FOS will benefit from having their calls answered more quickly and consistently and transferred to the appropriate person in FOS more efficiently.

The upgrade includes a move to Interactive Voice Response (IVR) technology – an automated answering system using a recorded voice and interactive menus. The IVR answering system will be used on our membership line (1300 56 55 62) and consumer line (1300 78 08 08).

It is not just a technology upgrade. Our call-handling processes will be streamlined and clearly documented, and all FOS staff will receive training in how the new system works. We will also be developing a quality assessment framework and a clear understanding across the organisation of what represents an ideal "FOS call".

We are currently trialling the new system on our membership line.

FINANCIAL ADVICE AND PLANNING

LOSS CALCULATION

THE APPROACH TO CALCULATING LOSS IN FINANCIAL ADVICE DISPUTES

- INTRODUCTION
- HOW FOS WILL IDENTIFY LOSS IN FINANCIAL ADVICE DISPUTES
- THE PURPOSE OF COMPENSATION
- ASCERTAINING WHAT THE APPLICANT'S POSITION WOULD HAVE BEEN IF A BREACH OF DUTY HAD NOT OCCURRED
- LOSS CALCULATION GUIDANCE IN "INAPPROPRIATE ADVICE" CLAIMS
- LOSS CALCULATION GUIDANCE IN MISLEADING OR DECEPTIVE CONDUCT CLAIMS
- HOW DOES FOS DETERMINE THE "SUITABLE INVESTMENTS"?
- CONTRIBUTORY NEGLIGENCE AND MITIGATION OF LOSS

This article sets out FOS's approach to calculating loss in Financial Advice Disputes.

Financial Advice Disputes include claims about financial planning, stockbroking, managed investments, securities and derivatives.

INTRODUCTION

Losses suffered and claimed by Applicants potentially include:

- direct losses;
- consequential losses; and
- losses that are too remote to result in compensation.

FOS can only award compensation for losses in accordance with its Terms of Reference. In Disputes lodged on or after 1 January 2010, FOS may award up to $150,000 compensation **per claim**[1] to an Applicant for "direct financial loss"[2] and up to $3,000 for "consequential financial loss".[3] From 1 January 2012, the compensation cap for direct financial loss will increase to $280,000.[4]

However, FOS may not award more than a total of $150,000 or $280,000 per claim (as the case may be)

for direct and consequential financial loss combined.

HOW FOS WILL IDENTIFY LOSS IN FINANCIAL ADVICE DISPUTES

When considering a Financial Advice Dispute, FOS will:

- Ask the Applicant to identify the amount of the loss claimed and to provide particulars of each item of loss that forms part of the overall loss claimed;
- **Where the FSP has breached a duty and/or contract (but has not engaged in misleading or deceptive conduct)** – identify which items of loss are too remote by applying a "foreseeability" test;
  - Where there has been a breach of duty, a loss is said to be foreseeable if it is one that was reasonably foreseeable by an ordinary person in the same position as the FSP possessing the FSP's knowledge and experience at the time of the breach.
  - Where there has been a breach of contract, a foreseeable loss is of the type a reasonable person in the FSP's position would have realised was likely to result from the breach of contract in light of the information available to the FSP at the time the contract was entered into.

  A loss that was not foreseeable is too remote. FOS cannot award any compensation for a loss that is too remote.
- Identify whether items of compensable loss are direct or consequential;

  FOS considers a "direct" financial loss to be a loss that naturally flows in the usual course of things as a result of the FSP's breach of duty and/or contract. The Terms of Reference define "consequential financial loss" as "indirect financial loss or damage."[5] FOS considers an indirect financial loss to be a loss that does not naturally flow in the usual course of things as a result of the FSP's breach.
- **Where the FSP has engaged in misleading or deceptive conduct** – assess whether the conduct materially contributed to each item of loss claimed.
  - If the misleading or deceptive conduct did not materially contribute to the loss claimed, FOS cannot award compensation for the loss.
  - If the misleading or deceptive conduct did materially contribute to the loss claimed, it is a direct loss for which FOS can award compensation.

THE PURPOSE OF COMPENSATION

The objective of compensation where there has been a breach of duty (including misleading or deceptive conduct) is to place the Applicant in the position they would have been in if there had been no breach of duty. Loss is therefore measured by comparing the Applicant's position after suffering the breach of duty with the Applicant's position if the breach had not occurred (subject to the compensation caps).

Where there has been a breach of contract, the objective of compensation is to place the Applicant in the same position they would have been in if the contract had been performed. The loss will usually be the difference between the Applicant's position following the breach of contract and the position the

Applicant would have been in had the contract been performed (subject to the compensation caps).

ASCERTAINING WHAT THE APPLICANT'S POSITION WOULD HAVE BEEN IF A BREACH OF DUTY HAD NOT OCCURRED

Where there has been a breach of duty, to calculate the Applicant's loss, FOS has to ascertain what the Applicant's position would have been if the breach had not occurred.

This will be a relatively simple matter in some types of claims, for example where an Applicant had received inappropriate advice causing them to acquire an unsuitable portfolio of investments. In claims of this kind, FOS will usually consider the Applicant would have acquired a suitable portfolio of investments but for the FSP's breach.

In claims where it is not clear what position the Applicant would have been in but for the FSP's breach of duty, FOS may consider factors including the following to determine the issue:

- how the Applicant's capital was invested immediately prior to the disputed investment;[6]
- whether the Applicant was satisfied with the investments held immediately before the disputed investments;[7]
- whether the Applicant actively sought the FSP's advice or responded to an unsolicited invitation to obtain advice;
- if the Applicant sought the FSP's advice – the reason why the advice was sought;
- whether the Applicant had communicated an investment preference to the FSP.

LOSS CALCULATION GUIDANCE IN "INAPPROPRIATE ADVICE"[8] CLAIMS

The direct loss in an inappropriate advice claim is typically calculated by comparing the performance of the unsuitable investments with the performance of the suitable investments.

If the unsuitable investments performed worse than the suitable investments would have, then the difference (after an offsetting of income paid by the disputed investments with income that would have been received from the suitable investments) is the direct loss suffered by the Applicant.

On the other hand, if the suitable investments performed worse than the unsuitable investments, then the Applicant has not suffered a loss. In fact, the Applicant has received a benefit.

The following illustrates the above principles:

- If an Applicant lost $20,000 as a result of unsuitable investments, but would have only lost $10,000 with suitable investments, the direct loss would be $10,000.
- If an Applicant lost $20,000 as a result of unsuitable investments, but would have gained $5,000 with suitable investments, the direct loss would be $25,000.
- If an Applicant gained $10,000 as a result of unsuitable investments, but would have gained $15,000 with suitable investments, the direct loss would be $5,000.
- If an Applicant lost $20,000 as a result of unsuitable investments, but would have lost $25,000 with suitable investments, the Applicant has not suffered any loss.
- If an Applicant gained $10,000 as a result of unsuitable investments, but would have only gained

$5,000 with suitable investments, the Applicant has not suffered any loss.

LOSS CALCULATION GUIDANCE IN MISLEADING OR DECEPTIVE CONDUCT CLAIMS[9]

The amount of the loss will depend on whether the claim is a "no transaction" or a "different transaction" claim.

A "no transaction" claim arises where it appears the Applicant would not have entered into the disputed investments or any other investment if they had not been led into error by the FSP's conduct.

This means the direct loss in a "no transaction" claim, where the investment capital was sourced from cash, is the difference between the price paid for the disputed investments and their "end value". If the disputed investments were the result of advice to switch from existing investments, the direct loss will be the result of a comparison between the performance of the original investments and the performance of the disputed investments.

A "different transaction" claim arises where it appears the Applicant would have entered into different investments than the disputed investments if they had not been led into error by the FSP's conduct. The direct loss will usually be the difference between how the alternative investments performed in comparison with the performance of the disputed investments.

A "different transaction" claim may also arise where the Applicant would still have acquired the disputed investments but less of them had they not been led into error by the FSP's conduct. The calculation of the direct loss in such a claim would usually require a comparison between the performance of the disputed investments acquired and the performance of a lesser quantity of the disputed investments.

HOW DOES FOS DETERMINE THE "SUITABLE INVESTMENTS"?

As seen above, the direct loss is calculated by reference to the performance of suitable investments in comparison with the performance of the unsuitable (disputed) investments.

There are a number of possible methods FOS can use to identify suitable investments, including:

- suitable investments the Applicant has switched to (where the Applicant has switched from the unsuitable investments);
- the suitable benchmark asset allocation used by the FSP;
- the suitable industry benchmark asset allocation;
- suitable investments that were actually recommended by the FSP to the Applicant; or,
- other investments or indices that represent the suitable investments.

In every Dispute, the party submitting that FOS should take into account the performance of suitable investments when assessing the amount of loss must provide evidence in support of the submission.

CONTRIBUTORY NEGLIGENCE AND MITIGATION OF LOSS

Applicants who fail to take reasonable care of their own interests may be regarded by FOS as contributing to their own loss. If FOS considers an Applicant has failed to take care of his or her own interests and that failure is a cause of the loss suffered, it will reduce the amount of compensation it will award. The extent of the reduction will depend on how far the Applicant had deviated from the standard of care a reasonable person in the Applicant's position would have taken.

Applicants also have a duty to act reasonably to avoid or minimise losses caused by the FSP's breach of duty or contract. FOS considers the Applicant's obligation to mitigate will arise after the FSP has breached its duty or contract and the Applicant was either aware of the FSP's breach or should reasonably have been aware of the breach.

When deciding whether or not an Applicant has suffered a loss they should have avoided or minimised, FOS will look at:

- when the FSP's breach of duty or contract occurred;
- when the Applicant became aware of the FSP's breach or should have become aware;
- whether there was any action(s) the Applicant could have taken to avoid or minimise the consequences of the FSP's breach;
- whether the action(s) was one a reasonable person in the Applicant's position would have taken.

1. A Dispute may contain more than one claim: see "Monetary Limits & Caps" in Issue 4 of the Circular.
2. Paragraphs 9.2 and 9.7 of the FOS Terms of Reference.
3. Paragraph 9.3 a) of the Terms of Reference.
4. Paragraphs 3.3, 9.7 and Schedule 2 of the Terms of Reference.
5. Paragraph 14.1 of the Terms of Reference
6. If FOS has reason to believe the Applicant would have continued to hold the original investments, we may compare the performance of the original investments with the performance of the disputed investments as the means to calculate the direct loss suffered.
7. If FOS has reason to believe the Applicant was satisfied with the original investments, we may compare the performance of the original investments with the performance of the disputed investments as the means to calculate the direct loss suffered.
8. Breach of subsection 945A(1) of the Corporations Act
9. Subsection 12DA(1) of the Australian Securities and Investments Commission Act and section 1041H of the Corporations Act

DISPUTE HANDLING

AGREEMENT WITH CREDIT OMBUDSMAN SERVICE LIMITED

- BACKGROUND
- APPROPRIATE EDR SCHEME
- PROCESS
- HOW FOS MEMBERS WHO ACT AS TRUSTEES IN SECURITISATION PROGRAMMES CAN ASSIST

The Financial Ombudsman Service Limited ('FOS') and the Credit Ombudsman Service Limited ('COSL') are external dispute resolution schemes approved by the Australian Securities and Investments Commission. Both FOS and COSL receive complaints against financial service providers ('FSP') who are members of their respective schemes.

In a securitisation programme, the programme funder or servicer (also known variously as programme manager, fund manager, wholesale lender or wholesale funder) may be a member of one scheme while the securitisation trustee may be a member of the other scheme. To facilitate the efficient consideration of a dispute regarding a loan which is part of a securitisation programme, FOS and COSL have entered into an agreement in relation to the handling of a dispute received by one scheme but more appropriately dealt with by the other.

BACKGROUND

In a securitisation programme, the trustee is the lender of record, but under the servicing agreement between the trustee and the programme funder ('counter-party'), the day-to-day administration of the programme and other management responsibilities are discharged by the counter-party. Issues which are strictly the responsibility of the trustee are almost always delegated to the counter-party, such that the counter-party will accept complaints about, among other things, debt-collection, legal proceedings, unjustness or financial hardship applications on behalf of the lender.

Furthermore, such trustees are exempt from the licensing and responsible lending provisions of the National Consumer Credit Protection Act on the basis that the counter-party will perform the obligations or exercise the rights of the trustee.

(Some counter-parties do not deal directly with the borrower (that is, until the loan falls into arrears), and rely instead on a mortgage manager to manage the loan by, for example, issuing statements, monitor repayments and making enquiries about arrears.)

Macquarie Bank (as funder of the PUMA programme) is unique in this regard. They will accept complaints and disputes if the matter relates to them as a programme funder or servicer, but where the matter relates to an Originator/Manager in the PUMA program (invariably members of COSL), the complaint or dispute is referred to COSL (in some cases the Originator/Mortgage Manager will deal directly with COSL and in others, Macquarie will liaise with COSL on behalf of the Originator).

APPROPRIATE EDR SCHEME

In light of this background, FOS and COSL have agreed on the following:

(1) A complaint or dispute about a credit facility which has as its lender of record a securitisation trustee ('securitised loan') should, as a general rule, be directed by the scheme which receives the complaint or dispute to whichever scheme the counter-party belongs to.

(2) FOS and COSL have agreed that the proper scheme to consider a complaint or dispute about a securitised loan, is as follows:

Trustee is a member of:	Counter-party is a member of:	Proper scheme will be:
FOS	FOS	FOS
COSL	COSL	COSL
COSL	FOS	FOS
FOS	COSL	COSL
FOS and COSL	FOS	FOS
FOS and COSL	COSL	COSL

If a scheme receives a complaint or dispute which is not the proper scheme to consider the dispute, the scheme will transfer the documents comprising the complaint or dispute as well as supporting material upon the complainant or applicant consenting to this.

(3) The complaint or dispute will be referred back to the scheme to which the trustee is a member if the counterparty is unable or unwilling for any reason to deal with a complaint or dispute which involves:

(a) An application to vary or set aside a credit contract on the grounds of financial hardship;

(b) An application to postpone enforcement proceedings;

(c) An allegation that the loan or the fees are unjust or unconscionable; or

(d) An allegation that the credit contract is "unsuitable".

(4) Each of FOS and COSL will refer to the other a complaint or dispute received by it about a securitised loan under a PUMA programme funded by Macquarie Bank (and will transfer the documents comprising the complaint as well as supporting material if the complainant or applicant has consented to this), as follows:

Trustee is a member of:	Subject-matter of complaint relates to:	Proper scheme will be:
FOS and/or COSL	Macquarie Bank (member of FOS)	FOS
FOS and/or COSL	Originator/Mortgage Manager (member of COSL)	COSL

PROCESS

FOS and COSL have agreed on the following approach:

(1) On receipt of a complaint or dispute, the receiving scheme will identify if the complaint or dispute is a loan which forms part of a securitisation programme and, if so, take steps to identify the counterparty as soon as possible. (As this may involve referral to the trustee, there may be a short delay in identifying the appropriate scheme to deal with the complaint or dispute;

(2) If it is determined that the other scheme ("the transferee scheme") is the more appropriate forum, the complaint or dispute will be transferred to the transferee scheme within three business days, and the consumer will be informed in writing that their complaint or dispute has been transferred and the reason for that transfer;

(3) The transferee scheme will provide a written acknowledgement to the consumer that they have received the complaint or dispute within three days of the receipt of the transferred file and will otherwise deal with the complaint or dispute as soon as practicable according to its own Terms of Reference or Rules.

(4) Where a dispute or complaint is referred to the transferee scheme by the receiving scheme, the time limit for bringing the dispute or complaint to the transferee scheme will apply from the date it was lodged with the receiving scheme and the dispute or complaint will be deemed to have been lodged with the transferee scheme on the date it was lodged with the receiving scheme. Any recovery action, including legal proceedings, which occurs after the date of lodgement with the receiving scheme is to be discontinued;

(5) Both schemes will at all times and in cooperation with the consumer ensure that there are open lines of communication in accordance with each scheme's procedures.

(6) If the authorised representatives cannot agree which scheme should deal with the complaint or dispute, or if any other issue arises which cannot be managed or resolved by the authorised representatives, they will refer the matter to the Ombudsman of their respective scheme for resolution.

The FOS Ombudsman and the COSL Ombudsman can agree to amend these arrangements as occasion demands.

HOW FOS MEMBERS WHO ACT AS TRUSTEES IN SECURITISATION PROGRAMMES CAN ASSIST

When a dispute is first processed by us, an e-mail notification is usually sent within an hour to the FSP nominated by the applicant as the FSP that the dispute concerns. Where a dispute relates to a loan provided under a securitisation programme, and the dispute is lodged by an applicant against the trustee, it is unlikely that this will come to our attention immediately.

If you work for a financial services provider that acts as a securitisation trustee and you receive a notification from us about a dispute that you believe should be dealt with by COSL on the basis that the counter-party is a member of COSL, please contact us to let us know. To make this easy for you and to avoid any confusion, we have designed an electronic form (in Excel format) that can be completed and e-mailed to us in these circumstances. The form can be downloaded here. When we receive a completed form from you, we will ensure that the dispute is transferred to COSL and that you do not incur a cost in relation to the dispute.

If you have any questions or feedback in relation to the process, please contact Jack Furphy (Manager – Registration) on 03 9613 7314.

DISPUTES INVOLVING MULTIPLE MEMBERS

- MULTIPLE FSPS WHERE NO RELATIONSHIP EXISTS
- MULTIPLE FSP DISPUTE WHERE A RELATIONSHIP EXISTS BETWEEN THE FSPS
- ASSIGNED DEBTS
- IMPACT ON MEMBERS
- CONCLUSION

Our Terms of Reference (TOR) provide that in dealing with disputes we must do what in our opinion is appropriate to resolve disputes in a cooperative, efficient, timely and fair manner.
As more financial services providers (FSPs) become FOS members, we have noticed an increase in disputes involving two FOS members.

In this article we provide information about the approach we have adopted to ensure that disputes involving multiple members are dealt with in the most efficient manner possible. Please note that this information only relates to disputes involving FOS members.

The following types of disputes may involve more than one FOS member:

(1) disputes about the actions of two members where issues in dispute may be linked, but no relationship exists between each FSP and each FSP provides a separate financial service (e.g. delay in settlement involving incoming and outgoing credit providers)

(2) disputes involving FSPs who have a business relationship or connection (e.g. original credit provider and an assignee of the debt, a mortgage manager and credit provider).

MULTIPLE FSPS WHERE NO RELATIONSHIP EXISTS

Where there is no relationship between the FOS members and they have provided a separate financial service, the normal course is to open two separate disputes. Examples are set out in the table below:

Financial advice/ service provided over a period of time, when the adviser providing the advice was with more than one FSP	• We will consider a dispute against each FSP if the applicant is disputing the advice/service that was provided by more than one FSP. For example, if an applicant is disputing two instances of financial advice provided by a financial advisor, and the advisor was an authorised representative of a different FSP on each occasion, then a dispute will be considered against each FSP in respect of the advice for which it is responsible. • if the applicant complains about inappropriate advice, and claims loss that arises after the adviser moves to another FSP, a dispute will be considered against the second FSP to consider whether loss may have arisen due to a failure to review the original advice in a timely manner.
Life insurance advice across more than one broker	• We will consider a dispute against each relevant FSP if the applicant is disputing advice that was provided by more than one FSP. The key consideration is what advice allegedly led to the claimed loss.
Life insurer and financial adviser that provided advice to take out life insurance	• If an applicant is disputing both the operation of their insurance policy (e.g. a denial of claim) and the advice that was provided by a financial planner to take out the policy, then we will consider a dispute against each FSP. • If an applicant is not disputing the insurance policy operation (e.g. is not disputing a denial of claim), but is disputing the advice provided to enter into the policy, then we will consider only one dispute – against the FSP responsible for the advice.
Multiple funds managers acting on behalf of funds manager or lender	• We will consider a dispute for each fund manager if more than one fund manager is the responsible entity/fund manager for the funds in dispute. The issues in each dispute will need to relate to the conduct/actions of the relevant fund manager.
Dispute against an FSP about inappropriate financial advice concerning a managed investment, and a dispute against the responsible entity of the managed investment	• If the adviser is an authorised representative of the responsible entity, we will consider one dispute against the responsible entity. • If the adviser was not a representative of the responsible entity, we will consider a dispute in respect of the advice against the FSP the adviser was representing and a dispute against the responsible entity in respect of its conduct.

Dispute against multiple FSPs involved in the transfer of investment funds, where delays/ problems with the transfer have caused financial loss	• We will consider a dispute against each FSP involved in the transfer/ transaction of the investment funds.
Broker and insurer	• If the applicant is complaining about both the conduct of the broker and the conduct of the insurer, we will consider a dispute against each FSP. Where the broker acted as the insurer's agent, the dispute against the insurer will include a review of the insurer's responsibility for the broker's conduct. • If the applicant is only complaining about the insurer's conduct (e.g. a denial of claim) then only one dispute will be considered against the insurer.
Two insurers	• This may occur where there is one event and two claims, e.g. a dispute about which insurer is liable for the event where the applicant has two separate policies. In this case a dispute will be considered against each FSP.
Dispute against two members where no relationship exists between them (generally)	• Where there is clearly no relationship and the dispute relates to the provision of clearly separate financial services, we will consider a dispute against each FSP and each FSP will be asked to respond to the issues raised that relate to its conduct.

MULTIPLE FSP DISPUTE WHERE A RELATIONSHIP EXISTS BETWEEN THE FSPS

Here are some examples of how we approach dispute involving FSPs who are in a contractual relationship:

Dispute about credit licensee and/or one of its authorised credit representatives (ACR)	• We will consider a dispute against the credit licensee and ask the licensee to respond to the issues raised against it and its ACR. • If the credit licensee provides information asserting that the subject contract is not regulated by the National Consumer Credit Protection Act 2009 and the ACR was not its agent when dealing with the applicant, we may also consider a dispute against the ACR. A key consideration will be whether the ACR was, in any event, the credit licensee's agent at law.
Dispute about lender and mortgage manager (MM)	• We will consider a dispute against the MM. • If the MM is not a member of an EDR scheme, but the lender is a FOS member, the dispute will be considered against thelender. The lender may appoint an agent (e.g. the MM) to deal with FOS on its behalf, in which case the file will remain in the name of the lender only and an agent authority/letter from the lender appointing the MM as agent will be required.
Dispute involving an assigned debt	• If the dispute relates solely to the conduct of the original credit provider prior to the assignment of debt, and the assignee is no longer pursuing the debt as it has been repaid, we will consider the dispute against the original credit provider, who will be asked to respond to the issues raised by the applicant. • If a dispute relates solely to the assignee's conduct (including debt collection practices, allocation of payments, etc.), we will consider the dispute against the assignee, who will be asked to respond to the issues raised by the applicant. • If the dispute relates to a request for assistance because of financial difficulty, we will consider the dispute against the assignee. • If the dispute relates to a combination of: (a) an event which occurred prior to the assignment of the debt by the credit provider to the assignee (such as a claim of maladministration, a dispute about credit listing or a dispute about whether the debt was incurred by the applicant); and (b) the assignee is continuing to pursue the applicant for the debt, then the dispute will be considered against the assignee. The process for our investigation is outlined below.

ASSIGNED DEBTS

Our approach to disputes involving assigned debts has changed significantly from the approach taken before 2008.

Previously, disputes involving assigned debts were referred to the member whose conduct has been queried. Accordingly, if the conduct of the original credit provider was in issue, such as a maladministration claim, the dispute would be referred to the credit provider. If the conduct of the assignee was in question, such as debt collection activity, the dispute would be referred to the assignee. If the conduct of both was in question, two cases would be created and referred off to both members. If the dispute was only referred to the original credit provider, we would contact the assignee and advise them that a dispute has been lodged and we would require them to hold any recovery action until we reviewed the dispute against the original credit provider.

This approach has been significantly revised, as follows:

- If a dispute is lodged about the conduct of the original credit provider and the debt has been assigned and the assignee is no longer pursuing the applicant (e.g. debt may have been repaid to stop further action), we will consider the dispute lodged against the original credit provider.
- If the dispute relates solely to the conduct of the assignee (e.g. a claim of financial difficulty or a dispute about debt collection practices), we will consider and refer the dispute to the assignee.
- If the dispute relates to a combination of:
  (a) an event which occurred prior to the assignment of the debt by the credit provider (such as a claim of maladministration, a dispute about credit listings or a claim that the debt was not incurred by the applicant) and
  (b) the assignee is continuing to pursue the debt,

  the process will be as follows:
- We will refer the dispute to the assignee.
- The assignee will put a hold on debt collection activity, legal or enforcement proceedings in respect of the debt that forms part of the dispute.
- The assignee may elect to
  - consider the dispute, including the issues raised against the original credit provider, or
  - refer the dispute to the original credit provider, in which case the assignee must undertake:
    (1) to comply with our Terms of Reference and Operational Guidelines, notwithstanding that the assignee is not a party to the dispute, and accept any terms of settlement entered into between us, the applicant and the credit provider to address repayment of the debt; and
    (2) to be bound by our decision on the merits of the dispute if the decision is accepted by the applicant; and
    (3) not to pursue any legal or enforcement proceedings while our file remains open.

The assignee and the original credit provider need to decide how the dispute will progress. Until the original credit provider confirms that it is taking carriage of the matter, the dispute will proceed against the assignee and the assignee will be expected to provide a response to all issues raised. This means the assignee is obliged to notify the original credit provider and forward all relevant correspondence received from us concerning the dispute.

When we receive confirmation that the original credit provider is to take carriage of the matter, we will transfer the dispute into the original credit provider's name and it will be responsible for all case costs.

IMPACT ON MEMBERS

Members may be affected by the changes to our approach in a number of ways. They might need to develop systems to manage the disputes and the efficient exchange of information between members.

ASSIGNEES

Members that purchase assigned debts will now receive disputes requesting that they respond to the issues raised about the original credit provider's conduct as well as their own. If they wish to refer the dispute to the original credit provider to respond to us, they may do so but we will not record the dispute against the original credit provider until the original credit provider has confirmed in writing that it will take carriage of the matter.

Members that have purchased assigned debts will have to develop procedures to ensure that FOS correspondence about a dispute is referred when appropriate to the original credit provider.

While there may be an agreement between the members as to costs, it is not a matter for FOS. The member that the dispute is lodged against when the file is closed is the member that will be invoiced for the case cost.

A dispute may be registered against the original credit provider if an applicant registers a dispute online. But if the debt has been assigned and remains outstanding, we expect that the original credit provider will notify the assignee of the dispute. If the matter remains unresolved and the applicant wishes to progress the dispute, we will lodge the dispute against the assignee in the Acceptance stage. If the assignee has not been provided with the 45 day IDR period (or 21 day period if the dispute concerns postponement of enforcement action or financial difficulty) previously but the original credit provider has (through the Registration process), we will not require the dispute to be registered. Instead we will accept the dispute and refer it to Case Management.

ASSIGNORS (ORIGINAL CREDIT PROVIDER)

While a dispute about an assignor's conduct prior to selling a debt will not be referred to the assignor in the first instance, the assignor can expect that the assignee will seek to either return the debt to it so that it can respond to all issues, or ask for it to act on the assignee's behalf and respond to all issues, including agreeing to an appropriate repayment arrangement with the applicant.

If the assignor receives a Registration or Acceptance notification about a dispute where it is apparent the debt has been assigned, then it should refer the matter to the assignee that is responsible for the debt. Alternatively, if the assignor wishes to repurchase the debt, this is a matter for the assignee and assignor to resolve.

If the assignee elects to consider the dispute about all the issues raised, including the original credit provider's conduct, we would ask the assignor to respond promptly to the assignee's request for information. We may contact the assignor requesting that the information be provided to the assignee if we are aware that it is overdue.

CREDIT PROVIDER (LOAN MANAGED BY A MORTGAGE MANAGER)

If a member previously received disputes as the credit provider, it will no longer do so unless the mortgage manager is not a member of FOS or another external dispute resolution scheme. In those circumstances, we will refer the dispute to the credit provider and require it to provide a response, which may include a claim about the conduct of the mortgage manager.

MORTGAGE MANAGER

The mortgage manager for a loan facility will now receive disputes from us whether the dispute is lodged against it or the credit provider.

If a dispute is registered against the credit provider, but the mortgage manager manages the loan, we expect that the credit provider will notify the mortgage manager of the dispute. If the matter remains unresolved and the applicant wishes to progress the dispute, we will lodge the dispute against the mortgage manager in the Acceptance stage. If the mortgage manager has not been provided with the 45 day internal dispute resolution period (or 21 day period if the dispute concerns postponement of enforcement action or financial difficulty) previously but the credit provider has (through the Registration process), we will not require the dispute to be registered. Instead we will accept the dispute and refer it to Case Management.

A different process applies in the case of certain securitized loans, please see the article in this Circular regarding the FOS and COSL agreement regarding handling of disputes.

CONCLUSION

We hope the procedures outlined above will assist in giving certainty to members and applicants about how a dispute will be processed. If you have any queries, please do not hesitate to contact membership@fos.org.au.

INFORMATION FROM PARTIES TO DISPUTES

- DISPUTE RESOLUTION AND PROCEDURAL FAIRNESS
- FAIR HEARING AND PROVISION OF INFORMATION
- CONFIDENTIALITY OF EXCHANGED INFORMATION
- CONSEQUENCES OF OUR INABILITY TO RELY ON INFORMATION
- ESTABLISHING "SPECIAL CIRCUMSTANCES"
- CONSEQUENCES OF FAILURE TO PROVIDE INFORMATION

Over recent months, we have experienced an increasing tendency by parties to a dispute to claim confidentiality over the information they provide to FOS. We provide this timely reminder about our Terms of Reference (TOR) and procedures regarding the provision of information, any request for confidentiality and the consequences of any fetter on our ability to exchange and rely upon information.

DISPUTE RESOLUTION AND PROCEDURAL FAIRNESS

Pursuant to paragraph 7 of the TOR, we may resolve a dispute by negotiation, conciliation or deciding the dispute in accordance with the process set out in paragraph 8.

We are not bound by any legal rule of evidence, but observe the principles of procedural fairness. The basic principles of procedural fairness, as applied to FOS, are:

- we will give a fair hearing to a person with sufficient interest in a decision, namely the Applicant and the Financial Services Provider (FSP)
- we will not be, or appear to be, biased
- there must be some information upon which the decision can be based.

FAIR HEARING AND PROVISION OF INFORMATION

To ensure that the parties to a dispute are given a fair hearing, we provide each party with:

- sufficient opportunity to present their point of view
- submissions made by the other party and relevant information (to allow the first party to respond to that material).

Therefore, in the standard FOS dispute form completed by an Applicant and in our initial letters to each of the parties, we advise that, unless you tell us otherwise, we will assume you agree that the information supplied to FOS may be provided to the other party where we consider it is relevant. The onus rests with the party providing information to identify information over which confidentiality is claimed.

CONFIDENTIALITY OF EXCHANGED INFORMATION

FOS operates on a "without prejudice" basis. Information obtained by a party during the course of our dispute resolution process is confidential and cannot be relied upon in any subsequent court proceedings unless required by court order or rules. We consider that the full and frank exchange of information facilitated by the confidential circumstances in which the information is provided assists the parties in trying to resolve the dispute. As the exchange of information benefits the parties in this way, we expect each of them to honour the confidential nature of the information they obtain.

CONSEQUENCES OF OUR INABILITY TO RELY ON INFORMATION

Pursuant to paragraph 8.4 of the TOR, if we propose to rely upon information to form a decision about the merits of a dispute, we must, before making a decision, provide the parties with access to that information. The party against whom that information may be used to form an adverse conclusion should have the opportunity to respond before we form a concluded view.

Paragraph 8.4c) provides:

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

When a party refuses to consent to information being provided to another party that would be adverse to the other party's position, without special circumstances being established, we will return the information to that party and are unable to make reference to it to accept the party's view on the issue in dispute.

ESTABLISHING "SPECIAL CIRCUMSTANCES"

Fairness is not generally served by reaching decisions which are adverse to one party on relevant information where that party has not had the opportunity to provide feedback or comment. Therefore, we will only consider there are special circumstances in very limited situations, such as:

- where the information may endanger a third party
- where the information may harm or embarrass a party if released
- where the information is commercially sensitive, or
- if it is appropriate to delay the release of the information.

An FSP's file will not be considered commercially sensitive even though it may contain information about the FSP's assessment of the customer's credit or insurance risk or creditworthiness. Information may be treated as commercially sensitive if its disclosure would adversely affect the FSP's business if obtained by a competitor.

If a party does not consent to information it provides to FOS being given to the other party, it should:

- clearly identify the information over which it claims confidentiality
- explain why the information should not be disclosed to the other party, but still taken into account by FOS in considering the dispute, and
- suggest a method by which the other party could respond to the content of the information provided without having access to it (such as responding to a de-identified or masked copy).

Note, "Private and Confidential", "Without prejudice" or similar notations stamped or endorsed on a document is insufficient to establish "special circumstances" and we will exchange relevant information marked in this way as we consider appropriate without prior consultation with the party that provided it.

If we consider parts of documents provided may be sensitive, we may mask the sensitive information or refer to and rely on extracts of information which we do not consider to be sensitive or confidential.

CONSEQUENCES OF FAILURE TO PROVIDE INFORMATION

Pursuant to paragraph 7.5 of the TOR, if a party fails to provide information without a reasonable excuse, FOS may draw an adverse inference that the information does not favour the party who has failed to provide it. That is, we may conclude that, in the absence of the information, the party failing to provide the information may not succeed on the issue under consideration. Alternatively, if an Applicant fails to provide requested information without a reasonable excuse, we may refuse to continue to consider the dispute.