

THE FINANCIAL OMBUDSMAN SERVICE

circular 

ISSUE 8 - SUMMER 2011

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## CHIEF OMBUDSMAN'S MESSAGE

2010–2011 Annual Review and Comparative Tables

Welcome to Issue 8 of *The Circular*.

This is the last issue for 2011. I hope you all enjoy the upcoming holiday period. Please note that the Financial Ombudsman Service will be open throughout the holiday period, except on public holidays and on Friday 23 December after 12.30pm.

On 12 December we released our 2010–2011 Annual Review and Comparative Tables. You can view them at [www.fos.org.au/annualreview](http://www.fos.org.au/annualreview).

The 2010–2011 year was another extremely demanding but productive one at the Financial Ombudsman Service. Here are a few significant stats from the Annual Review:

- We received 30,283 disputes in 2010–2011, up 27% from the previous year.
- We received 6,102 financial difficulty disputes, up 130%.
- We received 650 disputes related to the Queensland and Victorian floods and storms.
- We resolved 28,286 disputes, up 34%.
- 50% of disputes were resolved within two months, up 12%
- 71% of disputes were resolved by agreement, up 18%.
- We resolved 20 systemic issues that affected more than 83,000 customers.

The Annual Review contains extensive data on the disputes we handled, broken down by product, issue, sales/service channel and outcome. It also includes commentary on every category of dispute, along with Common Problem and Emerging Issue boxes that highlight dispute trends.

FOS undertook several major projects in 2010–2011. To give just two examples, we launched a Secure Services portal on our website that delivers a suite of tools and reports to our members and we developed a Knowledge Management Strategy based on domestic and international best practice. The Annual Review describes these and several other key projects.

The Comparative Tables present disputes data broken down by product and member. The 2010–2011 Comparative Tables have the same format as the 2009–2010 tables, though they are based on a full year of disputes data, whereas last year's tables were based on only six months of data. This year's tables also include a new 'Compare Two FSPs' function, which enables you to quickly compare the disputes performance of two FSPs in all the tables they both appear in.

I hope you can find the time to peruse the 2010–2011 Annual Review and Comparative Tables. And if you would like to learn more about what FOS has planned for the following year, take a look at our 2011–2012 Business Plan: [www.fos.org.au/businessplan](http://www.fos.org.au/businessplan).

Shane Tregillis

Chief Ombudsman

## GENERAL BUSINESS

- TELEPHONY SYSTEM UPGRADE - UPDATE
- KNOWLEDGE MANAGEMENT STRATEGY UPDATE
- 2012 FOS NATIONAL CONFERENCE - SAVE THE DATE

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### TELEPHONY SYSTEM UPGRADE - UPDATE

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As we outlined in the last edition of The Circular, FOS is currently upgrading its telephony system. The upgrade includes a move to Interactive Voice Response (IVR) technology, streamlining our call-handling processes and increasing staff training.

The IVR system is an automated answering system that uses a recorded voice and interactive menus for our membership line (1300 56 55 62) and consumer line (1300 78 08 08).

A successful trial of the technology has been finalised and we have every confidence that it will be fully operational by the end of the first quarter next year.

Staff training and development in the new system and general call-handling skills is progressing well, and FOS policy outlining, among other elements, a quality assessment framework, will be finalised prior to the system going live.

Once the new system is in place, callers to FOS can expect to have their calls answered more quickly and consistently and transferred to the appropriate person in FOS more efficiently.

We are expecting a smooth transition, but we ask for your patience should any teething problems arise.

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### KNOWLEDGE MANAGEMENT STRATEGY UPDATE

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FOS is currently rolling out a best-practice Knowledge Management Strategy that will enable us to fully capitalise on our intellectual assets. Our employees will have the benefit of having access to the resources they need to do the best job they can, and our members and stakeholders will benefit from the increased quality of FOS's work and a reduction in dispute resolution times.

The strategy is improving the way knowledge is passed throughout the organisation. It involves capturing the expertise of our employees, as well as the information stored across FOS, and making it accessible to our whole team.

Several projects have been completed this year, while ongoing projects include:

- the review and cataloguing of FOS's physical and subscription resources
- the restructure of our computer network
- implementation of an organisation-wide document management system.

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## 2012 FOS NATIONAL CONFERENCE - SAVE THE DATE

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The 2012 FOS National Conference will run for two days from Tuesday 16 October 2012 at the Melbourne Convention and Exhibition Centre.

The conference offers individuals the opportunity to hear from and talk to FOS Ombudsmen and other senior FOS staff, as well as industry experts and other dispute resolution professionals.

We are currently developing the National Conference program and speaker line up. Please save **16 and 17 October 2012** in your calendar and we will be in touch in the first quarter of next year to let you know all the details, including how to register.

If you have any questions about the conference, please email [nationalconference@fos.org.au](mailto:nationalconference@fos.org.au).

We look forward to seeing you next October at the 2012 FOS National Conference.

## SYSTEMIC ISSUES UPDATE

- NEW DEFINITE SYSTEMIC ISSUES
- INVESTIGATIONS

This article summarises systemic issues that we identified during the September quarter of 2011 and reported to ASIC. It also provides an update on some current and recently resolved systemic issue investigations.

The Financial Ombudsman Service's (FOS) systemic issues process is outlined in issue 4 of The Circular [[www.fos.org.au/circular](http://www.fos.org.au/circular)]. The process is used by FOS to handle the identification and resolution of Systemic Issues as required by its obligations to the Australian Securities and Investments Commission.

To learn more about the FOS approach to Systemic Issues Management, you can access our online training by clicking the following link: [www.fos.org.au/learnsi](http://www.fos.org.au/learnsi).

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### NEW DEFINITE SYSTEMIC ISSUES

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#### ERROR IN CREDIT LISTINGS

A dispute was received in which it appeared that the financial services provider (FSP) had made default listings on a customer's personal credit file for the accelerated amount of the debt, rather than the actual amount that was 60 days overdue. It was also noted that the Notices of Demand used by the FSP may not have been compliant with the requirements of the Uniform Consumer Credit Code which was in force at the time. We therefore referred the matter as potentially systemic to the FSP.

The FSP responded by acknowledging that it had made several listings in breach of the requirements of the Privacy Act 1988 (Cth) which it had rectified with the credit bureau. It advised FOS that, as a result of our investigation, it had commenced a process review in order to reduce the likelihood of similar breaches occurring in the future. This process review included introducing amendments to its credit and collections policy and processes, as well as to its Notices of Demand. The Ombudsman Banking and Finance reviewed the information provided and confirmed that, in his view, the matter represented a definite systemic issue.

#### FLOOD DISPUTES: MISLEADING IDR DEFINITION

FOS received a number of disputes where the FSP had denied the applicants' claims for water damage to home contents, on the basis that the applicable policy did not cover damage caused by flood. In its IDR responses to the customers the FSP made comments that we considered to be potentially misleading and inaccurate and could discourage a customer from complaining to FOS. The FSP also failed to inform the customer about the two- year timeframe for lodging a dispute with FOS.

The General Insurance Ombudsman confirmed that this was a definite systemic issue.

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### INVESTIGATIONS

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Some of the ongoing definite systemic issues investigated in the September quarter are summarised below.

#### **METHODOLOGY AND DISCLOSURE OF BREAK COSTS ON FIXED INTEREST LOANS**

A number of investigations into this issue remain on foot. Others have been resolved, resulting in the implementation of revised methodologies, the identification of affected customers and the reimbursement of any loss suffered by those customers.

#### **ERRORS IN CREDIT LISTINGS AND INACCURATE CREDIT FILE ENQUIRIES**

One new definite systemic issue investigation commenced during this quarter relating to this issue. Furthermore, an investigation relating to this issue has been resolved, which has resulted in the removal of a large number of incorrectly made credit listings.

#### **CLAIMS HANDLING PROCESSES AND POLICY INTERPRETATION**

General insurance claims arising from the recent floods highlighted these issues. A new definite systemic issue relating to IDR definitions is being investigated. An investigation of a previously identified issue has been resolved.

#### **POLICIES FOR DEALING WITH CUSTOMERS IN FINANCIAL DIFFICULTY**

An FSP is continuing a complete review of its processes and procedures for dealing with customers in financial difficulty to ensure they comply with their obligations. A number of issues relating to financial difficulty policies have been raised with other FSPs.

## FOS TO HANDLE NEW DISPUTE CATEGORY

- WHAT ARE TRADITIONAL TRUSTEE COMPANY SERVICES?
- A FEW EXAMPLES OF TTCS DISPUTES
- TTCS DISPUTES MAY INVOLVE MULTIPLE PARTIES
- MULTIPLE PARTIES WILL BE BOUND BY THE OUTCOME
- TRAINING
- AMENDMENTS TO THE TERMS OF REFERENCE

From 1 January 2012, FOS will assume jurisdiction for disputes relating to Traditional Trustee Company Services. A working group of FOS staff has been preparing for these new disputes.

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### WHAT ARE TRADITIONAL TRUSTEE COMPANY SERVICES?

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Traditional trustee company services (TTCS) include:

- Estate management functions such as acting as trustee of a trust or as executor or administrator of a deceased estate
- Preparing a will, trust instrument, power of attorney or an agency arrangement
- Applying for probate of a will or a grant of letters of administration, or administering a deceased estate
- Establishing and operating common funds.

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### A FEW EXAMPLES OF TTCS DISPUTES

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FOS might receive TTCS disputes about, for example:

- fees and charges, or the level of service, associated with the administration of a deceased estate or a trust
- the distribution of personal chattels under a will
- the time taken to apply for probate or administer a deceased estate.

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### TTCS DISPUTES MAY INVOLVE MULTIPLE PARTIES

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The most important difference between TTCS and usual FOS disputes, for the FOS dispute process, is that TTCS disputes may involve multiple parties. In addition to co-trustees, the other parties (referred to in the Terms of Reference as 'Other Affected Parties') are people whose interests are affected by the decisions of the Trustee, (for example, other beneficiaries under a will) and they may want a different resolution to the applicant.

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### MULTIPLE PARTIES WILL BE BOUND BY THE OUTCOME

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Where a dispute affects multiple parties, FOS will deal with the dispute under a separate set of procedures, to ensure all affected parties are treated fairly. To achieve this, the amended Terms of Reference will require an important preliminary step. That is, all parties to the dispute must consent to FOS dealing with the dispute and agree to be bound by the outcome.

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## TRAINING

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Training for relevant staff commenced in early November, with tailored training for, Registration and Dispute Officers, as well as nominated Dispute Analysts, Case Managers and Ombudsmen. (Matters referred for Recommendation or Determination will be dealt with by the ILIS Decisions team.)

Initial training is focussed on areas of law relevant to TTCS disputes on the themes of estate planning, estate management and trusts.

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## AMENDMENTS TO THE TERMS OF REFERENCE

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Following a consultation period with stakeholders and ASIC, the FOS Board approved the necessary amendments to the Terms of Reference at its meeting on 10 November 2011. Amendments to the Operational Guidelines will explain these changes in more detail.

The Terms of Reference include a further amendment, to clarify the jurisdiction of FOS to deal with disputes regarding cross-border investments.

These amendments will take effect from 1 January 2012, and will apply to all disputes that are first lodged with FOS on or after that date.

FOS can only deal with a dispute about a TTCS that is **first lodged with FOS after 1 January 2012**. It is important that applicants only lodge a relevant dispute **after 1 January 2012**, otherwise we will not be able to deal with it at all.

For more information about the amendments to the Terms of Reference, see the FOS webpage [Amendments to the Current Terms of Reference](#).

## FLOOD DETERMINATIONS

In an effort to help consumers and industry better understand the trends in flood-related disputes, we have brought together a selection of relevant Determinations that highlight common topics.

The FOS Circular Flood Edition focuses on three main areas:

- whether the consumer was clearly informed of policy coverage
- whether the consumer had received all pertinent documentation
- the use and analysis of Hydrology Reports as well as the application of exclusion clauses

The summaries provided as examples relating to these three areas are top-line guides to the Determinations, and in all instances the original Determinations should be read in order to properly understand the findings.

To enable you to easily read relevant findings, hyperlinks have been inserted within the publication that link directly to each Determination.

Please click [HERE](#) to access The Circular Flood Edition, which will be regularly updated as new Determinations are made and new trends appear.

## SECURE SERVICES ON THE FOS WEBSITE

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

In June 2011 we launched a Secure Services area on our website. The purpose of the Secure Services area is to enhance efficiencies in the exchange of information between us and our stakeholders in order to make our service even more effective. We are regularly adding new tools and features to Secure Services, and we wanted to give you an update.

Currently we only offer Secure Services to our members. Secure Services streamline and enhance communication between FOS and members by:

- enabling members to easily administer their memberships
- giving members powerful tools for analysing the disputes they have been involved in
- serving as a secure repository of up-to-date disputes data, member contact details and invoices
- reducing the volume of letters and emails passing between FOS and its stakeholders.

We are also developing Secure Services for our other stakeholders, including consumers and consumer representatives.

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### WHAT SERVICES ARE ON OFFER?

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Here are the services we already offer or soon will be offering through Secure Services.

#### 1. CONTACT DETAILS – AVAILABLE NOW

A member can review and update their contact details and contact types. Any changes they make will feed directly into our membership database and link to our case management system.

#### 2. DISPUTE REPORTS – AVAILABLE NOW

FOS sends monthly reports on disputes still open and disputes closed to members who have had any open disputes during the month. Members now receive these monthly reports through Secure Services. This new reporting method has significant benefits for members:

- **Archiving.** The Secure Services area serves as an archive of all a member's reports. So members no longer need to worry about storing (and potentially losing) emails and PDF files. The archive covers the entire period in which our current Terms of Reference have been operating – that is, from 1 January 2010 onwards.
- **Multiple formats.** The reports can be viewed online or downloaded as a PDF or Excel file, so there should be a format to suit every purpose.

#### 3. CASE SEARCHING TOOL – AVAILABLE NOW

Members can 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 its customers between 1 July and 30 December 2010.

The information for the case search tool is updated from our case management system every night. Members can get information about their active cases as well as historical information about closed cases. The results include contact details for the applicant and what stage the case is at within our process.

#### 4. MEMBERSHIP CERTIFICATE - AVAILABLE NOW

Members can download their certificate each year after paying their annual levy.

#### 5. INVOICING - AVAILABLE NOW

Members can now pay invoices online by credit card. They can view the status of all their invoices, so they can see what is unpaid at any time, and they can print invoices (both paid and unpaid). There are also fact sheets explaining our funding model, case fees and user charge.

#### 6. SYSTEMIC ISSUES REPORTS - AVAILABLE THIS MONTH

Members who have had open systemic issues receive a report on these issues at the end of each month. Starting with the December 2011 reports, we will be delivering systemic issue reports through Secure Services.

#### 7. DISPUTES 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 disputes dashboard that will sit within the Secure Services area.

#### 8. CONSUMER REPRESENTATIVE SERVICES - COMING SOON

Legal aid workers and other consumer representatives who regularly represent clients in disputes at FOS will soon be offered their own suite of services. They will be able to update their contact details and get online information about cases. They will also be able to fill out an online dispute form that is linked to their contact details, so they will not need to repeat their information for each dispute they lodge.

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### HOW TO START USING THE SECURE SERVICES AREA

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Many of our members have already registered for access to the Secure Services area, and we encourage all our members to do so.

Go to [www.fos.org.au/register](http://www.fos.org.au/register) to obtain a username and password. You must be listed as a contact for your business in our membership database to be able to register. FOS holds the contact details of one or more staff from each member in its membership database.

For more detailed information on how to register, please refer to our Guide to Secure Services: [www.fos.org.au/guide](http://www.fos.org.au/guide).

If you have any trouble registering for or using Secure Services, please email [bas@fos.org.au](mailto:bas@fos.org.au).

## INCREASE IN THE AMOUNTS WE CAN AWARD

In accordance with the requirements of ASIC Regulatory Guide 139, the new Financial Ombudsman Service Terms of Reference were introduced on 1 January 2010 following an extensive consultation process.

All FOS stakeholders are reminded that the Terms of Reference provide for increases in the maximum value of the remedy that can be decided upon by FOS. This change takes effect from 1 January 2012.

Schedule 2 of the FOS Terms of Reference outlines these increases, which includes the following important changes (summarised):

	<b>From 1/1/10</b>	<b>From 1/1/12</b>
Investment Disputes	150,000	280,000
General Insurance Broking Disputes	100,000	150,000
Income Stream Risk	6,700 per month	7,500 per month

Please go to the FOS website to download the updated Terms of Reference ([www.fos.org.au/tor](http://www.fos.org.au/tor))

## TERMS OF SETTLEMENT

- SOME GENERAL PRINCIPLES
- CONSEQUENCES OF DEFAULT
- DEFAULT JUDGEMENT
- RESTORING DISCONTINUED LEGAL PROCEEDINGS

FOS seeks to resolve disputes in a cooperative, efficient, timely and fair manner. An important part in achieving this goal is to ensure that agreed resolutions between Applicants and financial services providers (FSP) bring finality to disputes.

FOS has released Operational Guidelines in relation to the Terms of Reference. The guideline to paragraph 8.8 of the Terms of Reference provides as follows:

### STANDARD FORM RELEASES

FOS has produced standard form releases that an Applicant may use to provide an FSP with a release from liability. There are different standard form releases to be used in the following cases:

- where an Applicant accepts a Recommendation or Determination; and
- where a Dispute is resolved by mutual agreement.

The standard form release used in a Dispute where an Applicant accepts a Recommendation or Determination meets the requirements for releases set by paragraph 8.8. It is:

- a binding release of the FSP from liability in respect of the matters resolved by the Recommendation or Determination;
- for the full value of the claim that is the subject of the Dispute; and
- effective from the date on which the FSP fulfils all of its obligations under the Recommendation or Determination.

### RELEASES THAT ARE NOT IN A STANDARD FORM

If an FSP requests an Applicant to provide a release that is not in a standard form, the FSP will have to prepare the release and bear all costs associated with preparing it. FOS will advise the Applicant in this situation to obtain legal advice on the release. FOS may also, under paragraph 9.4, require the FSP to pay costs incurred by the Applicant in obtaining this advice.

FOS will not provide legal advice to any party on the effect of a release prepared by an FSP. FOS will conduct a limited review of such a release, however. If FOS considers the release unacceptable, it will raise its concerns with the FSP and ask it to redraft the release. FOS may consider a release unacceptable because, for example:

- the release does not accord with the Recommendation, Determination or resolution agreement made in respect of the Dispute;
- the requirements for releases set in paragraph 8.8 (which are listed above) are not met;
- the scope of the release is unreasonably wide; or
- the release purports to bind the Applicant before the FSP has complied with its obligations.

The purpose of this article is to provide further guidance to Applicants and FSPs about what items are appropriate to include in terms of settlement documents when the settlement modifies the Applicant's obligations in respect of a disputed debt, and the FOS standard form release document is not used and the FSP requires a different terms of settlement document.

Agreement to settle disputes can be oral or in writing. An oral agreement can be binding as a settlement. However, where any agreement is not reduced to writing there is a risk of a dispute occurring as to the terms agreed and whether or not agreement was actually reached.

For this reason FSPs often require an Applicant to enter into formal terms of settlement to document an agreed resolution. On occasions, an agreed resolution between an Applicant and an FSP can be jeopardised due to disputes that arise as to the content of those written terms of settlement.

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## SOME GENERAL PRINCIPLES

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In order to prevent disputes over the form of such settlement documentation ‘derailing’ an agreed resolution, it is our view that terms of settlement that resolve FOS disputes should comply with the following principles:

- (1) The terms of settlement should bring finality to the dispute.
- (2) The terms of settlement should reflect the agreement between the parties and not introduce new terms.
- (3) Every endeavour should be made to draft the terms of settlement in plain English.
- (4) The terms of settlement should expressly deal with the consequences of non-compliance with the settlement. However it should not allow the FSP to seek to recover a sum greater than the compromised / settlement sum plus recovery costs except where:
  - (a) the debt has not been disputed, or
  - (b) the Applicant is free to raise its defences to the initial claim.
- (5) The terms of settlement should, as a general rule, provide that the Applicant is given seven days notice of any default within which to remedy that default, prior to any action to enforce the terms of settlement.
- (6) The terms of settlement should not bar an Applicant from contesting whether they or the FSP complied with the terms of settlement.
- (7) The terms of settlement may provide for discontinued legal proceedings to be restored or reinstated upon default. Where this occurs, the proceedings may need to be amended to reflect that there has been a settlement agreement which has not been complied with.
- (8) The terms of settlement should not require the Applicant to consent to judgment.

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## CONSEQUENCES OF DEFAULT

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FOS expects that when parties resolve a dispute that the agreed resolution should bring finality to the dispute. The documenting of that settlement by way of terms of settlement is not an opportunity to revise the agreed resolution. An issue that regularly derails a settlement is that the consequence of non-compliance with the settlement agreement is not agreed upon at the time the dispute is resolved. It is important that the parties consider this issue at that time.

The general principle applicable to the settlement of a dispute is that the settlement agreement constitutes a new contract that effectively replaces the party’s rights under the previous arrangements subject to the dispute. The usual remedy for breach of the settlement agreement is to sue for breach of that agreement.<sup>1</sup>

## WHERE THE APPLICANT DISPUTES THE DEBT

Regularly settlement of FOS disputes will involve an Applicant who disputes liability and then compromises their dispute in consideration of paying a reduced amount to the FSP than would otherwise be payable under the contract subject to dispute. Where this occurs, and the Applicant fails to make the required payments, the usual legal remedy is that the FSP can recover the compromised settlement sum plus recovery costs. In such cases, where there is a disputed debt, recovery of a sum greater than the compromised sum plus costs (e.g. the amount originally payable under the contract) can contravene the doctrine of penalties.<sup>2</sup>

This is because that greater sum was never an accepted debt and the Applicant compromised their rights in opposition to that sum being payable.

## WHERE THE APPLICANT DOES NOT DISPUTE THE DEBT

The above analysis should be contrasted to cases where the Applicant does not dispute the debt but seeks what is sometimes referred to as an 'indulgence' by way of a revised payment plan.

In such cases the Applicant accepts the amount claimed by the FSP is owing as the debt and no defences have been compromised in consideration of a payment of a lesser sum. In that situation the settlement agreement can allow for the full amount of the debt (not just the compromised sum) to be payable upon the Applicant's default in making the agreed settlement payments.

## AGREEMENT THAT SETTLEMENT IS NOT TO REMAIN IN PLACE

A further scenario can apply where the settlement agreement is reached on the basis that the FSP and Applicant agree that the settlement will not remain in effect unless the Applicant performs its obligations under the settlement, usually the requirement to make specified repayments. In that situation, the failure to make the required settlement payments results in the settlement never being fully executed, rendering it ineffective. This means that the FSP and Applicant return to their original positions existing prior to the settlement being entered into and the FSP can enforce its original rights and the Applicant raise its initial defences.

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## DEFAULT JUDGMENT

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Where an Applicant fails to comply with terms of settlement then the FSP is entitled to obtain a court judgment for breach of the terms of settlement. However, it is not appropriate that terms of settlement provide that an Applicant consents to judgment. An Applicant should be permitted to contest that judgment on the basis that they did comply with the terms of settlement. To afford the Applicant this opportunity, the FSP should, as a general rule, give the Applicant at least seven days notice of any default in the terms of settlement.



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## RESTORING DISCONTINUED LEGAL PROCEEDINGS

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Sometimes, disputes lodged at FOS have been the subject of legal proceedings which have been issued but not yet determined. FOS's Terms of Reference require, in certain circumstances, that the FSP must not pursue those legal proceedings while the dispute is being considered by FOS.

In some cases where:

- (a) previous legal proceedings have been discontinued: and
- (b) the FOS dispute has been subsequently settled: but
- (c) the Applicant has not complied with that settlement,

the FSP may seek to restore or reinstate those previous legal proceedings. This can occur provided such a right is reserved in the terms of settlement. FOS acknowledges that this is an acceptable approach as it saves in court costs which may ultimately be passed on to the Applicant if the proceedings were required to be reissued.

However, where this occurs it is important to ensure that the Applicant is advised of the default so as to allow the Applicant an opportunity to raise any defence it may have to that default.

1. See *McDermott v Black* (1940) 63 CLR 161, *Osborn & Bernotti v McDermott* [1998] 3 VR 1 and *Masters v Cameron* (1954) 91 CLR 353

2. See *Zenith Engineering Pty Ltd v Queensland Crane & Machinery Pty Ltd* [2000] QCA 221 and *Duffy Bros. Fruit Market (Campbelltown) Pty Ltd v Gumland Property Holdings Pty Ltd* [2007] NSWCA 7

## ELECTRONIC COMMUNICATION OF INSURANCE POLICIES

### WHETHER THE FINANCIAL SERVICES PROVIDER (FSP) HAS NOTIFIED THE CONSUMER OF THE POLICY PROVISIONS.

- ISSUE
- INSURANCE CONTRACTS ACT 1984 (ICA)
- PROPOSED LEGISLATIVE AMENDMENTS
- OUR DECISION MAKING
- WHERE AN FSP RELIES ON ELECTRONIC COMMUNICATION

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#### ISSUE

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The Financial Ombudsman Service (FOS) is dealing with an increasing number of disputes involving FSPs relying on electronic transmission to provide insurance policies to consumers. Electronic transmission is either via the internet or email.

This is particularly prevalent in relation to travel insurance policies, but also occurs in relation to other types of policies.

This raises an issue of whether consumers have been notified of the policy provisions, as required under legislation.

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#### INSURANCE CONTRACTS ACT 1984 (ICA)

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ICA provisions relevant to the issue described above are listed below with notes.

- **Section 35** - To meet requirements under section 35, an FSP may need to prove that it clearly informed a consumer in writing of provisions of a contract before the contract was entered into. An FSP generally informs a consumer of provisions of a contract by giving the consumer a copy of the policy document that incorporates the provisions.
- **Section 69** - Where the ICA provides for information to be given in writing before the date when a contract was entered into (as in section 35), section 69 allows the information to be given in writing within 14 days after that date in certain circumstances.
- **Section 77** - This provision sets out how notices or other documents, which are required or permitted to be given under the ICA, may be given. Section 77 only allows documents to be given to a natural person either personally or by post to that person at their last known address.

Subsection 35(1) requires a minimum amount of cover to be provided by insurers for prescribed policies including motor vehicle, home building, home contents, sickness and accident, consumer credit and travel policies. The prescribed minimum amount of cover for each prescribed policy is set out in the Insurance Contracts Regulations 1985.

Subsection 35(2) states that subsection 35(1) does not have effect if the insurer proves specified matters. So that it can rely on subsection 35(2), an FSP may seek to prove that, before a contract was entered into:

- the FSP clearly informed the consumer in writing or
- the consumer knew, or a reasonable person in the circumstances could be expected to have known that
- the contract provides cover for less than the minimum amount and what the amount is or
- the contract provides no cover for a 'prescribed event'.

To prove one of the matters specified in subsection 35(2), the FSP may need to establish it clearly informed the consumer of the terms of the cover provided. Issue 3 of our Circular outlines the minimum information we expect when an FSP is required to prove dispatch of documents.

Where an FSP has not provided sufficient information to establish, on the balance of probabilities, that the policy documentation was given to the consumer prior to a loss, we will conclude that the FSP has not proved that matter. In cases where subsection 35(1) has effect, the consumer is entitled to the prescribed minimum amount of cover.

Generally, an FSP can clearly inform a consumer by merely providing them with a policy document. There are circumstances where the mere provision of a policy document is not sufficient, however. One example is where the document does not plainly indicate that the policy contains a significant limit to cover.

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## PROPOSED LEGISLATIVE AMENDMENTS

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Section 9 of the Electronic Transactions Act 1999 provides that, if a Commonwealth law requires or permits information to be given in writing, it may be given by electronic means if certain requirements are met. However, section 9 does not apply to the ICA.

The Insurance Contracts Amendment Bill 2010 includes amendments that would cause section 9 and other provisions of the Electronic Transactions Act to apply to the ICA. This Bill has not been passed, however. This means that the ability of FSPs to utilise electronic communication with consumers remains restricted.

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## OUR DECISION MAKING

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When we decide a dispute and whether a remedy should be provided, we are obliged to do what in our opinion is fair in all the circumstances, having regard to:

- legal principles
- applicable industry codes or guidance as to practice
- good industry practice, and
- previous relevant decisions of FOS or one of our predecessors (although they are not binding).

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## WHERE AN FSP RELIES ON ELECTRONIC COMMUNICATION

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We consider disputes relating to insurance offered over the internet. These disputes may hinge on whether the FSP proves that it clearly informed the consumer of policy provisions, or that the consumer knew of those provisions.

To meet our obligation to do what is fair when making decisions about these disputes, we consider all of the circumstances of the disputes. For example, we consider matters such as:

- how the insurance was arranged
- whether the consumer ‘ticked all the boxes’ on the FSP’s website in response to the FSP’s questions or directions
- where the FSP sent the consumer information electronically, whether the FSP informed the consumer that it had done so
- whether the consumer asked to receive documentation electronically, and
- whether the consumer received a copy of the policy, either by email or by printing a copy.

We note that consumers are obliged to read a policy when they receive it and ascertain whether the cover is right for them.

As explained above, the ICA still provides for documents be given to a natural person by being handed to them or by post. Issue 3 of our Circular <insert link> provides guidance for FSPs seeking to prove that they gave consumers documents in one of these ways.

Electronic communication is not straight forward. The requirements for proof in a particular case will often be determined by its facts and circumstances. We will generally conclude that an FSP does not, simply by putting information on its website, convey the information to a consumer unless there is a clear indication that the consumer received the information.

## INFORMATION PROVIDED BY PARTIES ON COMPACT DISCS (CDS)

- ISSUE
- INFORMATION THAT CANNOT BE ACCESSED
- ENSURING THAT INFORMATION CAN BE ACCESSED

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### ISSUE

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Financial Services Providers and some Applicants provide information to the Financial Ombudsman Service (FOS) on CDs. This approach works well in most instances. However, FOS or parties to disputes may not be able to access some information on CDs. This article addresses that issue.

We have not been able to access, for example, certain telephone recordings provided on CDs recently where codecs were applied or formats were incompatible with our systems. If we cannot access information, we cannot use it in the dispute resolution process.

Our obligation under paragraph 8.4a) of our Terms of Reference is important in this context. Paragraph 8.4a) requires us, before making a determination in a dispute, to ensure that the parties are given access to the documentation, information and material on which we propose to rely in the determination. If a party is not given access to information on a CD due to its format, we cannot rely on the information in a determination.

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### INFORMATION THAT CANNOT BE ACCESSED

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If, in relation to a dispute, we receive information on a CD that we, or a party to the dispute, cannot access, we may request that the information be provided in another format within a specified timeframe. Factors for us to take into account when deciding whether to make such a request include our obligations under the Terms of Reference such as:

- paragraph 8.2, which requires us to do what is fair in the circumstances of a dispute; and
- paragraphs 8.5 and 8.6, which require us to give the parties to a dispute a reasonable opportunity to make submissions and provide information before we make a recommendation or determination.

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### ENSURING THAT INFORMATION CAN BE ACCESSED

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As explained above, the resolution of a dispute may be delayed or complicated if information provided on a CD by a party to the dispute cannot be accessed by FOS or the other party. To facilitate dispute resolution, we request parties to ensure that any information provided on a CD is in an accessible format. As a general rule, more widely used formats are more likely to be accessible.

For instance, audio recordings in widely used formats such as MP3 and WAV can be accessed by FOS. However, we cannot access audio recordings in less widely used formats and paragraph 8.4 of the Terms of Reference may prevent us from relying on them. We also note that we will not accept a transcript of an audio recording without the recording itself.