

**Response by Financial Ombudsman Service (FOS) to
National Alternative Dispute Resolution Advisory Council's (NADRAC) Issues
paper: Alternative dispute resolution in the Civil Justice System**

Date: 21 May 2009

Introduction

This is the submission by FOS to the issues paper, *Alternative dispute resolution in the Civil Justice System*, developed by NADRAC. The submission has been prepared by the office of FOS and does not necessarily represent the views of the board of FOS.

This submission draws on the experience of FOS and its predecessors in dealing with disputes concerning financial services providers.

This submission is designed to provide information on matters raised in the issues paper.

Financial Ombudsman Service

FOS was incorporated on 16 May 2008 and commenced operations on 1 July 2008. It is an independent dispute resolution scheme that was formed through the consolidation of three schemes:

- the Banking and Financial Services Ombudsman (BFSO);
- the Financial Industry Complaints Service (FICS); and
- the Insurance Ombudsman Service (IOS).

On January 2009, two other schemes joined FOS:

- the Credit Union Dispute Resolution Centre (CUDRC) and
- Insurance Brokers Disputes Ltd (IBD).

Membership of FOS is open to any financial services provider carrying on business in Australia including providers not required to join a dispute resolution scheme approved by ASIC.

Replacing the schemes previously operated by BFSO, FICS, IOS, CUDRC and IBD, FOS provides free, fair and accessible dispute resolution for consumers unable to resolve disputes with financial services providers that are members of FOS.

Members of BFSO, FICS, IOS, CUDRC and IBD are now members of FOS. The members of those schemes included:

- BFSO – Australian banks and their related corporations, Australian subsidiaries of foreign banks, foreign banks with Australian operations and other Australian financial services providers;

- FICS – life insurance companies, fund managers, friendly societies, stockbrokers, financial planners, pooled superannuation trusts, timeshare operators and other Australian financial services providers;
- IOS – general insurance companies, re-insurers, underwriting agents and related entities of member companies;
- CUDRC – credit unions;
- IBD – insurance brokers, underwriting agents and other insurance intermediaries

FOS has almost 20 years' experience in providing dispute resolution services in the financial services sector and it is estimated that FOS covers up to 80% of banking, insurance and investment disputes in Australia. For the year 1 July 08 to date, FOS has received **13,514 complaints** and **FOS employs more than 180 staff to support this ADR activity**.

We provide accessible, fair and independent dispute resolution between consumers, including some small businesses, and participating financial services providers in relation to complaints about financial services including:

- Banking
- Credit
- Loans
- General insurance
- Life insurance
- Financial planning
- Investments
- Stock broking
- Managed funds and
- Pooled superannuation trusts

All participating members of FOS have internal dispute resolution (IDR) processes and FOS becomes involved if the financial services provider and consumer are unable to resolve the dispute through the financial service provider's IDR process. In many cases referral of a complaint by FOS to the member leads to a successful resolution. If the dispute remains unresolved, FOS can then offer conciliation processes or it may investigate the dispute and issue a written decision.

FOS provides guidelines in relation to the assessment of common issues facing a member so that the member is in a good position to assess the likely outcome of a complaint and reach a commercially sensible solution.

In addition to dealing with disputes, FOS:

- addresses systemic issues and
- provides support and training in relation to dispute resolution issues.

FOS is a not for profit organisation governed by an independent board .

ASIC approval of FOS as an EDR scheme

Under s912A(2) and 1017G(2) of the *Corporations Act 2001* (Cth) (Corporations Act), Australian financial services licensees, unlicensed product issuers and unlicensed secondary sellers must have a dispute resolution system that consists of IDR procedures that comply with standards and requirements made or approved by ASIC

and membership of one or more ASIC-approved external dispute resolution (EDR) scheme

As a result of continuing law reforms, an increasing number of industry participants will be, or are likely to be, required to join an ASIC-approved EDR scheme as a condition of carrying on their business.

Under the Corporations Regulations 2001, ASIC has the power to approve an EDR scheme.

ASIC has approved FOS as an EDR scheme. This means that FOS complies with ASIC's Regulatory Guide 139 (RG139), which sets out a number of matters relevant to NADRAC's consideration of alternative dispute resolution. RG 139 provides a common set of approval guidelines to:

- give guidance about what characteristics a scheme that applies for approval should have; and
- promote minimum standards across EDR schemes to achieve parity of schemes and equal treatment of complaints.

RG139 is therefore a powerful tool for ensuring the standards of approved EDR schemes are consistent and high.

Promoting public awareness of ADR

FOS data suggest there is a lack of awareness about ADR in certain sections of the Australian community which may nevertheless be vulnerable.

FOS is guided by the requirements of RG 139 which requires us to:

- Effectively promote EDR through a wide range of channels, including the media
- Be conscious, when preparing our promotions strategy, that there may be some classes of complainants who, for geographic, economic or other reasons, are not accessing the scheme in proportion to their use of financial products and services.
- Actively promote our existence, particularly to those complainants that are under-represented in the breakdown of people who access the scheme
- Publish and promote details about our complaints resolution procedures
- Develop communications strategies to improve our communication with complainants about our processes, decisions and role
- Have regard to plain language principles, ensuring that information is easy to access, user-friendly, practically relevant and disseminated at key stages of the dispute resolution process
- Ensure that scheme communications are made available in different languages, in Braille or large font and in audio format, depending on the demographics and special needs of complainants

In addition, FOS invests in:

- Market research to determine levels of consumer awareness of EDR and consumers' understanding of, and comfort with, the FOS process

- Programs of awareness targeted at often underrepresented groups including youth, indigenous and rural consumers.

In the event specific communication initiatives are developed to promote ADR to the Australian public, FOS would be keen to be involved and included to build broad consumer awareness of its ADR services for financial products and services.

Provision of ADR Services

The advantages of an industry based scheme regulated by ASIC include that:

- There is a defined and consistent accreditation system for the scheme and
- Clear standards

Failure to meet those standards means the EDR scheme is not accredited. This clear process contributes to stakeholder confidence that the EDR provided by an ASIC approved EDR scheme is credible and trustworthy and this promotes confidence in the ADR scheme and the likelihood of resolutions being achieved.

The standards are established by the Corporations Regulations which state that ASIC must take the following into account when considering whether to approve an EDR scheme:

- accessibility;
- independence;
- fairness;
- accountability;
- efficiency;
- effectiveness; and
- any other matter ASIC considers relevant:

The purpose of the standard is to ensure that complaints handling procedures treat consumers and investors fairly and consistently across the different industry sectors of the Australian financial system. ASIC and FOS also apply the DIST benchmarks and underlying principles: The DIST benchmarks underpin and are reflected in some of the approval criteria listed above. (see appendix 2)

Ensuring compliance with these standards is undertaken through a number of mechanisms including:

- a quality assurance system for case management usually conducted by legal counsel
- independent audits of FOS files to test compliance with procedures and policies to achieve fair results
- independent reviews of FOS processes
- surveys of members and disputants
- dedicated personnel to manage membership files
- reviews of potential systemic problems by the systemic issues manager.

Compliance with these standards is critical for consumer access to justice through ADR to be a reality.

Referral and assessment

FOS is involved with tertiary institutions and legal groups to promote awareness of FOS as an alternative to the courts. (see appendix 1)

This is an ongoing area of work to ensure that legal professionals are familiar with the operation of ADR especially at FOS such that they more pro-actively explore resolution using FOS.

In the event specific educational initiatives are developed to promote ADR to the legal profession, FOS would be keen to be involved and included to build broad awareness of and confidence in its ADR services for financial products and services.

Data evaluation and research

Complaints information

To comply with ASIC requirements under RG 139, FOS collects, records and reports on information about:

- the number of complaints and inquiries received
- demographics of complainants (where practicable)
- the number of complaints received that fall outside the scheme's Terms of Reference (with reasons)
- the scheme's current caseload including the age and status of open cases;
- the time taken to resolve complaints
- the profile of complaints to enable identification of:
 - (i) the type of financial product or service involved
 - (ii) the product or service provider
 - (iii) the purpose for which the financial product or service was obtained
 - (iv) the underlying cause(s) of the complaint
 - (v) any systemic issues or other trends and
- the number of complaints closed and an indication of outcome of each closed complaint.

There is a significant investment in the infrastructure to support this high level of data capture, analysis and reporting. FOS has a case management system that enables this information to be recorded.

The system:

- tracks activity on cases from receipt to closure
- records incoming, outgoing and internal communications (telephone/letters/emails)
- provides a classification system for complaints including product and problem codes

- allows for cross referencing of similar cases

From 1 January 2010, schemes must also publish information about complaints received and closed, with an indication of the outcome, against each scheme member in their annual report.

The value of the data collection and reporting is that it drives improved industry practices which are a significant benefit for all consumers of financial services.

Service and program evaluation

FOS commissions an independent review of its operations and procedures every three years.

FOS subscribes to the view that regular, independent reviews of an EDR scheme's performance and procedures provide valuable feedback about how the scheme should evolve and about any areas that should be changed or improved.

From 1 January 2010, an EDR scheme must commission an independent review of its operations and procedures:

- three years after its initial approval by ASIC; and
- thereafter every five years, unless ASIC specifies a shorter than five-year time frame.

The results of the review must be made available to ASIC and to other stakeholders.

The objectives of the reporting are to contribute to:

- (a) improving industry practice and communication;
- (b) remedying financial loss suffered by consumers (not all of whom may have complained about the conduct or problem);
- (c) preventing foreseeable loss to consumers and, more generally, ensuring that 'high-risk' issues might be effectively dealt with before problems develop;
- (d) minimising the risk of the conduct or problem recurring;
- (e) efficiently dealing with multiple complaints about a single incident or problem;
- (f) reviewing the circumstances in which a particular scheme member (licensee) should continue to conduct their business; and
- (g) sending a signal to the market about what constitutes acceptable market behaviour.

Conclusion

The focus of our response is to highlight to NADRAC, the significant regulation external and internal that operates within an ASIC approved EDR scheme to deliver ADR in the Australian financial services context, so that NADRAC can actively consider this framework as it deliberates about the most appropriate frameworks for other areas of ADR.

APPENDIX 1

Examples of work by FOS with legal and tertiary organisations

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| Practical effects of the Merger | Financial Services Reform: Third Year Anniversary Conference by Macquarie and Monash Universities |
| ADR in Operation | Victoria Law Foundation |
| Banking Law Issues | Minter Ellison |
| Issues in Banking Disputes & the role of the Ombudsman | UNSW Sydney |
| FOS and EDR Processes | RMIT University Bachelor of Commerce / Bachelor of Economics Business Law module |
| Sort It | Vic Law Foundation Law Talks Schools |
| Introduction to FOS | Vic Law Foundation Law Talks Community |
| Introduction to FOS | Minter Ellison |
| Banking & Finance Law Update Seminar | UNSW |
| Elderly Issues | NSW State Legal Conference |
| Intro to dispute resolution– O/v of FOS re maladministration & financial difficulty | Law Access NSW |
| Introduction to FOS | Madgwicks Financial Services Forum |
| Sort It workshop | Law Week presentation |
| Current issues concerning financial difficulty | Consumer Action Round Table Legal Aid |

APPENDIX 2

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| Accessibility | The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers. |
| Independence | The decision-making process and administration of the scheme are independent from scheme members. |
| Fairness | The scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based. |
| Accountability | The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems. |
| Efficiency | The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance. |
| Effectiveness | The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance. |

From the *Benchmarks for Industry-based Customer Dispute Resolution Schemes*, published by the then Department of Industry, Science and Tourism in 1997.
