

11 November 2015

Committee Secretariat
Senate Standing Committees on Economics – Scrutiny of Financial Advice
PO Box 6100
Parliament House
Canberra ACT 2600

BY EMAIL: economics.sen@aph.gov.au

Dear Dr Dermody,

**Further response to Dispute Assist submission
Dated 18 May 2015**

Thank you for your letter and for the opportunity to respond specifically to Case Example A in Dispute Assist's submission of 18 May 2015 (Submission 134).

FOS has already addressed the other comments raised in Submission 134 in its response of 20 August 2015.

Substantive issues

Submission 134 makes serious allegations as to FOS's conduct in a dispute lodged with FOS by Goldie Marketing Pty Ltd (**Goldie**) against the ANZ Bank. The complaint is referred to in the Submission as Case Example A. This matter relates to a dispute involving various financial facilities provided by ANZ to Goldie in excess of \$8 million.

At the time Submission 134 was lodged with the Committee, the Supreme Court of Victoria trial in *Goldie Marketing Pty Ltd v FOS and ANZ*¹ had been conducted, but the Court's judgment had not yet been handed down. The trial concerned a challenge by Dispute Assist's client to FOS's decision to exclude that complaint from its service.

These legal proceedings also dealt with the issues referred to by Dispute Assist on page 9 onwards and in Case Example A. FOS's decision was upheld by the Court in the judgment that was handed down on 19 June 2015.

¹ *Goldie Marketing Pty Ltd v Financial Ombudsman Service Ltd* [2015] VSC 292 (**Goldie Marketing v FOS**).

We consider that the judgment deals with, and comprehensively addresses, the issues raised in Submission 134.

In the judgment, Justice Cameron found that the reasons for the Jurisdictional Decision were contained in the written reasons issued in November, and further held (at paragraph 15) that:

- The Jurisdictional Decision was ‘comprehensive, rational, cogent and persuasive’ as well as being ‘compelling’.
- There was nothing in the Jurisdictional Decision *“that would suggest that the decision was infected by bad faith, bias or was so unreasonable that no other decision-maker could have arrived at the decision”*.

Her Honour upheld FOS’s jurisdictional decision in this matter. The judgment found no evidence that FOS failed to act in a fair, impartial, efficient and effective manner as required by Regulatory Guide 139 during the provision of services to the parties or to Dispute Assist.

FOS notes:

1. The parties during the Supreme Court proceedings, including Applicant’s counsel, acknowledged that the file notes reflected the practice of this ombudsman², were a mixture of comment, observation and notation and were something other than a verbatim record of the phone conversation between herself and Dispute Assist.³
2. The decision made by the Ombudsman was valid and consistent with FOS’s obligations - in the judgment, Justice Cameron stated⁴

“I have given close consideration to the words of the Terms of Reference, the Operational Guidelines and the FOS Approach excluding disputes document”

and noted⁵ that the language used was *“clear, unequivocal and user-friendly”* before finding that the Jurisdictional Decision made by FOS was valid and should not be disturbed.⁶

3. Her Honour also found the reasons given and decision made by the Ombudsman in the November Jurisdictional Decision

“are “compelling” within the Terms of the Operational Guidelines. They are convincing, rational, logical, reasoned and comprehensive.”⁷

² Supreme Court of Victoria, Transcript of Proceedings, page 69.

³ Supreme Court of Victoria, Transcript of Proceedings, pages 66, 72

⁴ *Goldie Marketing v FOS* at 98

⁵ *Ibid.*, at 97

⁶ *Ibid.*, at 111

⁷ *Ibid.*, at 109.

4. There was no evidence of bias by the Ombudsman in her deliberations or that she acted in bad faith. In finding FOS's decision to exclude the dispute valid, Her Honour found that:

*"[t]here is no evidence before me that FOS acted in bad faith, was biased, or that the decision was so unreasonable that no other decision maker could have come to that decision."*⁸

5. There is no evidence to support the conclusion that the Ombudsman used or created the file notes to mask the reasons for her decision. Any concern by Dispute Assist to the contrary is inconsistent with submissions made by Goldie's own counsel during the proceedings:

"we don't say there is fraud, dishonesty or lack of good faith⁹."

6. The content of the file notes had no bearing on the jurisdictional decision made. In the decision, Her Honour concluded that:

"I do not consider that the 22 October 2014 conversation is relevant to the determination of the issues in this proceeding."

We consider it is important to note that FOS occupies a very particular position as a party to the type of proceedings brought by Goldie before the Supreme Court. As the decision maker in the dispute, FOS is bound by law to limit its role in the proceedings to assisting the Court and making submissions going to its powers and procedures. FOS limited its role in these proceedings in that fashion.

For those reasons FOS did not file evidence or make submissions to support the decision that was under challenge.

Internally, there is a focus on continuous improvement through our organisation-wide quality assurance, internal audit review, and peer review processes. We remain committed to enhancing our role as an independent and impartial EDR service in response to stakeholder concerns, where appropriate.

Conclusion

In FOS's view, the Dispute Assist Submission, in effect, calls on the Committee to investigate and determine that the decision by FOS in relation to Goldie and ANZ Bank was made without regard to its Terms of Reference (meaning in breach of those Terms of Reference). Whether the decision was made in accordance with the Terms of Reference is the very matter that the Court was required to determine in the proceedings that were then underway.

All the assertions in the Dispute Assist Submission relating to Case Example A have been fully and comprehensively addressed in the legal proceedings brought by Dispute Assist's client. The decision of the Victorian Supreme Court upheld FOS's approach to, and decision in, this matter.

⁸ Ibid., at 94.

⁹ Supreme Court of Victoria, Transcript of Proceedings, page 99 at line 31.

Should you wish to discuss, or if there is any further information that FOS can assist with, please do not hesitate to contact me on _____ or via email at _____

Yours sincerely

**Nicolas Crowhurst
Company Secretary
Financial Ombudsman Service**