



Further submission to

The Scrutiny of Financial Advice Inquiry

Financial Ombudsman Service

20 August 2015



1 Overview

FOS refers to the submission by Dispute Assist, dated 18 May 2015, recently published by the Committee. FOS would like to thank the Committee for providing us with the opportunity to make this submission.

We set out below FOS's response to the comments made about FOS in the submission from Dispute Assist.

The Dispute Assist submission makes a number of serious allegations about the conduct, approach and capacity of Financial Ombudsman Service Limited (FOS) in dealing with consumer disputes about unethical and misleading advice by financial services providers (FSPs). In summary, the Dispute Assist submission alleges that FOS:

- does not act in a fair and impartial manner in dealing with disputes;
- deliberately denies applicants natural justice; and
- does not have the capacity to deal with the volume of disputes.

The submission asserts that FOS is not able to provide a mechanism for redress for applicants alleging unethical or misleading advice and should be dismantled and replaced with a government body.¹

FOS rejects these allegations for the reasons which have been addressed below. FOS considers there is no basis for the Dispute Assist contention that alternate mechanisms to FOS for redress for these types of disputes needs to be established.

Contrary to what is submitted, FOS has been objectively assessed against the industry benchmarks for its services. The Independent Review of FOS conducted by CameronRalph Navigator found that FOS was meeting all the benchmarks for industry-based dispute resolution schemes set out in RG139 (Accessibility, Independence, Fairness, Accountability, Efficiency and Effectiveness), with the exception of the Efficiency benchmark which was only partially met.

The finding on Efficiency was due to delays in the process and the backlog of disputes at the time of the review given the significant increase in disputes FOS had received in the preceding years.² Since that time, FOS has:

- eliminated its backlog at all stages of the dispute process; and
- introduced a new streamlined dispute process which will deliver a simpler, quicker process, and improved experience for both FSPs and applicants.

¹ Dispute Assist submission, dated 18 May 2015, pages 3, 23 and 24

² CameronRalph Navigator, *2013 Independent Review of FOS*, 2.1. Performance against the Benchmarks, page 7

FOS has the appropriate capacity, resources and processes to deal with consumer disputes in the financial services industry in a fair and impartial manner, consistent with the principles set out in the FOS Terms of Reference (TOR).

FOS's role and many of the issues raised in the Dispute Assist submission have been the subject of detailed review in the context of the Financial Services Inquiry (FSI) and the Senate Committee Inquiry into the Performance of ASIC. These reviews concluded that external dispute resolution (EDR) is generally working well.

In accordance with the Principles set out in the TOR, FOS is committed to resolving disputes between consumers and Financial Service Providers:

- in a cooperative, efficient, timely and fair manner
- with minimum formality and technicality, and
- as transparently as possible, taking into account our obligations for confidentiality and privacy.

This involves understanding all aspects of a dispute without taking sides, and making decisions based on the specific facts and circumstances of each dispute.

FOS is also committed to working with all our stakeholders to continue to improve the dispute resolution service we provide to the Australian community.

2 Detailed response

The Dispute Assist submission makes reference to several 'Case Examples'. The TOR³ requires FOS to keep all information about a dispute confidential and accordingly, there is an expectation by both consumers and FSPs that FOS will maintain their privacy and confidentiality.

Consequently, FOS generally does not discuss the particulars of any dispute that has been brought before it. However, to the greatest extent possible, we will explain our processes in general terms to help convey how we approach our obligations under the FOS Constitution, FOS TOR and ASIC's Regulatory Guide 139 (RG139).

For ease of reference, whilst Dispute Assist repeats the same concerns throughout its submission, this response groups the issues raised by Dispute Assist together under broad headings and deals with each in turn.

³ FOS TOR paragraph 13.4 states: "FOS must keep confidential all information pertaining to a Dispute that is provided to FOS except:

- a) to the extent reasonably necessary to carry out FOS's responsibilities including under these Terms of Reference or for any incidental purpose; or
- b) as required or permitted by law.

2.1 Processes and decision-making are of high quality

We do not consider the various assertions about FOS's decision making and the performance of its role to be valid. The Dispute Assist submission does not accurately reflect the current operations of FOS.

Many of the issues raised have already been subject to review in public committees or inquiries. Recent findings by the Financial Services Inquiry (FSI), the Senate Committee Inquiry into the Performance of ASIC, and the FOS Independent Review, confirmed the important role that FOS plays in providing consumer redress, concluded that EDR is working well⁴ and noted that the role we play is well supported by industry and consumer organisations.

The FOS Independent Review found that, across all the EDR benchmarks for industry-based EDR schemes required by RG139,⁵ FOS met all of the benchmarks. However, the delays in the process and backlog at the time of the review meant that the reviewers found that FOS only partially met the Efficiency benchmark.⁶ At the time of the review we were already making significant changes to address the concerns about the time taken to resolve disputes. Since that time we have eliminated all backlogs and continued to improve the quality of our service.

We appreciate that in any dispute resolution process, there will often be parties who do not agree with the outcome of a dispute. However, reaching a different view following an in-depth consideration of submissions by both parties and an assessment of the merits of a dispute based on its specific facts and circumstances does not equate to a denial of natural justice to the unsuccessful party.

Further, where our decisions have been challenged in the courts, the courts have generally been supportive of the role of FOS, our approach to our jurisdiction and our decision making processes and have upheld the decisions.

2.1.1 *FOS's decision making affords procedural fairness*

FOS strongly rejects the assertions that FOS has *"an agenda to get rid of complaints and deny applicants natural justice"*.⁷ The Independent Reviewer file review and stakeholder feedback on the quality of decision-making were *"generally supportive of the quality of the investigative process and of FOS Recommendations and*

⁴ Financial System Inquiry, Final Report, page 193

⁵ Accessibility, Independence, Fairness, Accountability, Efficiency and Effectiveness

⁶ CameronRalph Navigator, *2013 Independent Review of FOS*, 2.1. Performance against the Benchmarks, page 7

⁷ The main reason for the OTR decisions was that there was a more appropriate place for the dispute to be heard, such as the Credit and Investments Ombudsman, the Superannuation Complaints Tribunal, an insolvency process, or a Court. The next two most frequent reasons were that the type of dispute was not covered by the TOR and the dispute was being lodged against an entity that was not a current member of FOS.

*Determinations*⁸ and was supportive of the organisation-wide quality assurance process that was in place.⁹

In the case of decisions on whether or not a dispute is within FOS's jurisdiction, the majority of the decisions resulting in the dispute being outside of the Terms of Reference (OTR) are because the matter is more appropriate for another jurisdiction, the type of dispute is not within our TOR or the dispute does not relate to an entity that is a member of FOS.¹⁰

FOS takes its role as an independent and impartial decision maker on disputes in accordance the principles and jurisdiction set out in the TOR very seriously. In accordance with the Principles set out in the FOS TOR, we are committed to resolving disputes between consumers and FSPs:

- in a cooperative, efficient, timely and fair manner
- with minimum formality and technicality, and
- as transparently as possible, taking into account our obligations of confidentiality and privacy.

This involves affording procedural fairness to the parties to a dispute, and we appreciate that making a decision that a dispute is not within our jurisdiction can potentially have significant consequences for the parties involved in a dispute, through denying them an opportunity to have their dispute heard.

As a result, FOS has clear guidelines and processes in place for making a decision about whether a dispute should be ruled OTR or not, including a second review by more senior employee ahead of the Jurisdictional Decision of an Ombudsman and a robust quality assurance process. The FOS Operational Guidelines to the TOR and various approach documents, all of which are published on our website, clearly set out our approach to these types of FOS decisions.

Prior to a dispute being ruled OTR, the relevant FOS staff member seeks the views of both parties and invites submissions about any jurisdictional concerns. An initial assessment as to jurisdiction is then made. If this initial assessment is not agreed to by one of the parties, they can object and have the opportunity to make further submissions before the matter proceeds to a Jurisdictional Decision by an Ombudsman.¹¹ This process ensures natural justice is afforded to both parties.

The FOS approach was most recently considered by the Supreme Court of Victoria. In the judgment, Cameron J stated¹² *"I have given close consideration to the words of the Terms of Reference, the Operational Guidelines and the FOS Approach*

⁸ CameronRalph Navigator, *2013 Independent Review of FOS*, 13.7.3 Findings, page 97

⁹ *Ibid.*, 5.1. FOS Initiatives, page 17

¹⁰ FOS 2013-2014 Annual Review, *Disputes outside our Terms of Reference*, page 49

¹¹ Paragraph 5.3 of the FOS TOR

¹² *Goldie Marketing Pty Ltd v Financial Ombudsman Service Limited and Ors* [2015] VSC 292 at 98

Excluding disputes document” and noted¹³ 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.¹⁴

We note that leave to appeal is currently being sought in that proceeding. As the decision maker, FOS has limited its role in the proceeding to assisting the court and making submissions about its powers and procedures only, under the *Hardiman* principle¹⁵ and as such is not in a position to comment further on that matter.

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.

2.2 FOS has addressed delays and has the capacity to handle the volume of disputes

The Dispute Assist submission refers to a lack of capacity, backlogs and problems with timeliness in the FOS process for resolving disputes. It cites the Independent Review as a source of “*serious concerns regarding FOS’s backlog of disputes*”.¹⁶

FOS has taken decisive action to deal with the findings on timeliness in the Independent Review and concerns expressed by some of our stakeholders. FOS successfully eliminated the backlog at all stages of the dispute process by June 2015. Accordingly, the comments in the Dispute Assist submission regarding the backlog of disputes do not accurately reflect the current situation at FOS.

In addition, since the Independent Review, FOS has introduced a new streamlined dispute process which is delivering a simpler, quicker process and improved experience for both FSPs and applicants. It involves:

- a new process to fast-track decisions for simpler and low-value disputes
- a new registration and referral process
- provision of specialist expertise earlier in the dispute process and the reduction of multiple ‘touch points’ and process stages
- a more efficient financial difficulty dispute process that provides for earlier contact, flexible pathways and consistent decision making, and
- a new format for decisions that more effectively communicates the outcomes of disputes to both applicants and FSPs.

This process has been implemented based on extensive consultation with all our stakeholders including FSPs and consumer organisations.

¹³ *Ibid.*, at 97

¹⁴ *Ibid.*, at 111

¹⁵ *R v Australian Broadcasting Tribunal; Ex parte Hardiman* [1980] HCA 13; (1980) 144 CLR 13

¹⁶ Dispute Assist submission, page 3

FOS has appropriate resources and processes to deal with anticipated volumes, including in the event of unexpected surges in dispute numbers through the implementation of our Significant Event Response Plan.

Accordingly, the comments in the Dispute Assist submission about FOS's lack of capacity to handle the volume of disputes are not valid.

2.3 Stakeholder and community support for the role of FOS

The Dispute Assist submission refers to comments in the Independent Review report and the Joint Consumer Submission to the FOS Independent Review¹⁷ to contend that FOS does not have the support of consumer organisations.

We do not consider this assertion to be based on a complete review of these documents.

ASIC in its various recent submission to the FSI and Parliamentary Committee reviews has been supportive of FOS and EDR schemes in general, noting that EDR schemes *“provide a relatively cost-effective and more accessible alternative to going to court where a dispute about financial services or credit services cannot be resolved by the parties.”*¹⁸

Consumer organisations, while indicating that there are always opportunities for improvement (a view shared by FOS), have been strongly supportive of FOS and the important role that current EDR arrangements perform in providing consumers with access to redress. For example, consumer organisations expressed the view in their joint submission to the Independent Review that:

*“Contributors broadly believe that, while there is room for improvement, FOS is providing an essential service of a high standard and should be congratulated. This view was echoed in responses to the online survey of financial counsellors.”*¹⁹

More generally the Consumer Action Law Centre submission to the Financial Systems Inquiry stated that:

¹⁷ The Joint Consumer Submission was contributed to and endorsed by Care Inc. Financial Counselling Service and the Consumer Law Centre of the ACT, Caxton Legal Centre, CHOICE, Consumer Credit Legal Service (WA), COTA Australia, Financial and Consumer Rights Council, Financial Counselling Australia, Footscray Community Legal Centre, John Berrill, Redfern Legal Centre, Uniting Communities (SA), and Queensland Association of Independent Legal Services.

¹⁸ ASIC, Submission to the *Financial Systems Inquiry*, page 184 at 737

¹⁹ Joint Consumer Submission to the Independent Review of FOS, dated 25 October 2013, *Summary of Submission*, page 1. The online survey was conducted by the authors of the submission of 136 registered financial counsellors.

“It is our view that the accessibility, coverage and operation of these schemes (industry EDR schemes) is perhaps one of the most significant and important developments in credit and financial services regulation in recent times.”²⁰

In addition, the Independent Review findings on consumer satisfaction,²¹ which draw from stakeholder satisfaction surveys conducted in 2013, found that consumer representatives have a higher level of satisfaction with dispute resolution than FSPs do, and that satisfaction with FOS communication and the relationship with FOS were also very good and had improved over the previous 12 months. These findings were consistent with the Joint Consumer Submission to the Independent Review.

2.3.1 FOS has a formal process for dealing with complaints

The Dispute Assist submission, in its Case Example F, also alleges that FOS has inappropriately responded to a specific complaint about its conduct.

In response, it should be noted that FOS has a published Complaints and Feedback Process which is followed whenever an expression of dissatisfaction about our service is received. The Independent Review noted that *“FOS has a more robust and systematic process for logging and responding to complaints against it than any other EDR scheme we have seen.”²²*

Dispute Assist claims that FOS incorrectly advised that it had the power to compel an FSP to provide certain information in accordance with the *Privacy Act*. In response, FOS advised that FOS *“do(es) not request information from Financial Services Providers under the Privacy Act but rather in accordance with our Terms of Reference that members are bound to.”*

FOS further noted that the TOR: *“state we can request that FSP’s provide information and they do not say we can compel a FSP. However, FSP members are formally bound to comply with our process and TOR, this includes any request for information we consider necessary.”*

2.3.2 Fee for Service agents

As required by RG139, the FOS process is free to consumers. While the FOS process is intended to be user-friendly enough that it can be used by most people without help, or with the assistance FOS is able to provide, FOS does not prevent the use of a person acting as a representative to assist an applicant in appropriate circumstances. FOS acknowledges the value of the assistance provided to Applicants in difficult situations by financial counsellors, community legal centres and legal aid services and we work closely with these organisations

²⁰ Consumer Action Law Centre submission to the Financial Systems Inquiry, dated 31 March 2014, Section 1.1(a), page 2

²¹ CameronRalph Navigator, 2013 *Independent Review of FOS*, 6.2.1. Stakeholder views, page 22

²² CameronRalph Navigator, 2013 *Independent Review of FOS*, 16.2.2. Findings, page 132

The Operational Guidelines to the TOR²³ sets out how FOS will address the issue of Applicants who wish to use representatives to assist them through the FOS process.

Unfortunately, there is evidence that some paid representatives inappropriately utilise EDR services. This can damage the integrity of the FOS process, and is not in the best interests of the Applicant.

The recent changes to the FOS rules were intended to ensure that fee charging representatives do not act in ways inconsistent with the role of FOS as a free alternative dispute resolution service for consumers in the financial sector.

The new rules enable FOS to limit the use of fee-charging representatives in a dispute, where to do so or their conduct is inconsistent with the cooperative, efficient, timely and fair resolution of the Dispute – for example, where the representative has a conflict of interest.

3 Conclusion

The Dispute Assist submission makes a number of serious allegations about the conduct, approach and capacity of Financial Ombudsman Service Limited (FOS) in dealing with consumer disputes about unethical and misleading advice by financial services providers (FSPs).

FOS rejects these allegations. We consider there is no basis for the contention that an alternate statutory mechanism for redress for applicants in these types of disputes needs to be established.

²³ Paragraph 6.1, page 48