

Senator David Bushby
Chair
Senate Economics References Committee
Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

14 June 2012

Dear Senator

**Senate inquiry into the post-GFC banking sector
Response to comments about Financial Ombudsman Service**

We have been invited to respond to comments about the Financial Ombudsman Service ("FOS") in a submission to the inquiry dated 27 May 2012 made by Mr Ken Winton. This letter sets out our response.

Information about FOS

FOS 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 1 January 2009, two other schemes joined FOS, namely:

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

FOS is an external dispute resolution ("EDR") scheme approved by ASIC. 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 – credit providers, mortgage brokers, payment system operators, Australian banks and their related corporations, Australian subsidiaries of foreign banks and foreign banks with Australian operations;
- 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 and building societies;
- IBD – insurance brokers, underwriting agents and other insurance intermediaries.

FOS and its predecessor schemes have over 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.

FOS provides services to resolve disputes between member financial services providers and consumers, including certain small businesses, about financial services such as:

- banking;
- credit;
- loans;
- general insurance;
- life insurance;
- financial planning;
- investments;
- stock broking;
- managed funds; and
- pooled superannuation trusts.

As well as its functions in relation to dispute resolution, FOS has responsibilities to identify and resolve systemic issues and obligations to make certain reports to ASIC. FOS also monitors compliance with a number of industry codes of practice.

FOS is a not for profit organisation that provides services free to consumers. FOS is funded by its members, which are financial services providers. A significant proportion of our funding is from case fees, and the fees paid by a financial services provider reflect the number of disputes in which it is involved and the stages to which they progress.

FOS is governed by a board with an independent chair and:

- four “industry directors” appointed based on their expertise in and knowledge of the financial services industry, independence and capacity and willingness to consult with the industry; and
- four “consumer directors” appointed based on their expertise in consumer affairs, knowledge of issues pertaining to the industry, independence and capacity and willingness to consult with consumer organisations.

Response

The comments about FOS in Mr Winton’s submission include:

- criticisms of our decisions that two disputes were outside our jurisdiction;
- suggestions that the two disputes indicated that systemic issues existed and FOS did not take adequate action in relation to those issues;
- allegations that FOS is not independent; and
- a statement that our website does not record “prosecutions and determinations” for all complaints lodged.

The first two comments above are based on our handling of specific disputes and alleged systemic issues. It is not appropriate for us to comment on particular disputes or possible systemic issues that we consider. We can respond to the first two comments by referring to our processes, however. Our response to the four comments are set out below under the headings “jurisdiction”, “systemic issues”, “independence” and “website”.

A central point explained in this response is that FOS meets standards imposed under legislation to ensure that it is independent of the financial services industry and provides high quality dispute resolution services. The standards dictate our organisation’s structure and many aspects of our processes.

FOS is approved by ASIC to operate as an EDR scheme under the *Corporations Regulations 2001* and the *National Consumer Credit Protection Regulations 2010*. Those regulations require ASIC to take the following considerations into account when deciding whether to approve an EDR scheme:

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

ASIC's Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes*¹ ("RG 139") explains the requirements that an EDR scheme has to meet to obtain and maintain ASIC's approval. FOS meets the requirements under RG 139. To continue to operate, FOS has to continue to meet these requirements and maintain ASIC's approval.

This response refers frequently to the Terms of Reference under which we operate. They are available on our website, www.fos.org.au under "About Us". The Terms of Reference were approved by ASIC after an assessment against the requirements of RG 139.

Jurisdiction

RG 139 includes requirements to ensure that an EDR scheme is efficient and effective. For example, RG 139 requires an EDR scheme to:

- be able to consider a dispute where the value of the applicant's claim is up to \$500,000²; and
- adopt the time limits for lodgement of disputes specified in paragraphs 216 to 219 of RG 139³.

We may decide that we cannot consider a dispute on the basis that it is outside our jurisdiction which is governed by our Terms of Reference. This may be, for example, because in our assessment the value of the applicant's claim in the dispute exceeds \$500,000 or the dispute was not lodged within the applicable time limit. Before we assess any dispute to be outside our jurisdiction, we consider it carefully.

If we make such an assessment, we follow the procedure stated in paragraph 5.3 of our Terms of Reference. This includes providing the applicant with:

- advice of the assessment;
- the reasons for the assessment; and
- an explanation of the applicant's right to object to the assessment.

If an applicant objects to an assessment, we only review the assessment if satisfied that the objection may have substance. To decide whether we are satisfied of this, we consider a range of factors including whether the applicant has:

- provided new and relevant information;
- identified an error in our assessment; or
- raised a new and relevant argument.

If we are satisfied that an objection may have substance:

- we inform the parties of that fact and that the assessment will be reviewed;
- we give the parties an opportunity to make submissions and receive copies of each other's submissions and documents; and

¹ Available on www.asic.gov.au under "Publications".

² Paragraph 5.1o) of our Terms of Reference reflects this requirement.

³ Paragraph 6.2 of our Terms of Reference adopts these time limits.

- we conduct the review and provide the parties with our reviewed decision, with reasons for it.

Our processes for deciding whether disputes fall within our jurisdiction meet all legal and regulatory requirements and we believe the processes operate well. Nevertheless, we have a procedure in place to consider complaints about the processes.

We explain how any complaints about our service may be made and how we handle such complaints on our website under “Contact us” and “Feedback about our service”. Complaints about our service are handled in accordance with our Complaints and Feedback Policy, which is also on our website. This policy is aligned with Australian Standard: Customer satisfaction – Guidelines for complaints handling in organisations (AS ISO 10002-2006) and with RG 139.

Systemic issues

RG 139 imposes on FOS extensive obligations in regard to systemic issues. They include obligations to:

- identify systemic issues that arise from the consideration of disputes;
- refer these issues to the relevant financial services providers for response and action; and
- report information about the issues to ASIC, in accordance with guidelines stated in RG 139.

Our obligations are stated in paragraph 11.2 of our Terms of Reference and explained in our Operational Guidelines.⁴ Our Annual Review provides further information about our systemic issues work.⁵

To respond to Mr Winton’s submission, we draw attention to these considerations:

- our work in relation to a systemic issue is independent of any action in relation to a related dispute;
- we address a systemic issue directly with the relevant financial services provider; and
- a consumer involved in a dispute may not be aware of action we take in relation to a systemic issue related to the dispute.

We provide comprehensive reports to ASIC on systemic issues. We report to ASIC quarterly on the numbers of possible and definite systemic issues and the nature, progress and resolution of definite systemic issues. Financial services providers are not identified in these reports. We only identify a financial services provider in a report to ASIC if the provider has not dealt with a definite systemic issue to the satisfaction of the relevant Ombudsman or if it is a case of serious misconduct.

⁴ See our Operational Guidelines on www.fos.org.au under “About us”.

⁵ See our Annual Review on www.fos.org.au under “Publications”.

Independence

RG 139 includes requirements to ensure that an EDR scheme is independent of the industry that funds the scheme. Examples of the requirements to ensure independence are:

- the decision making processes and administration of a scheme must be independent of the industry;
- a scheme must be a legal entity in its own right;
- a scheme must have an overseeing body with responsibility to oversee the operations of the scheme and to preserve the independence of the scheme and of the dispute resolution processes;
- a scheme's overseeing body must ensure that the scheme has sufficient resources to perform its functions;
- membership of a scheme's overseeing body should comprise –
 - equal numbers of consumer and industry appointees and
 - an independent chair;
- a scheme must not allow members a power of veto in relation to amendments to its constitution or Terms of Reference; and
- a scheme must consult with stakeholders about the development of its Terms of Reference and proposed amendments to them.

We meet the requirements for independence in RG 139. This is a key criterion for approval of an EDR scheme by ASIC. Our decision making in disputes is independent of industry.

Mr Winton's submission refers to two disputes lodged with us and points out that:

- one dispute was against the employer of one of our directors; and
- the other dispute was against an organisation in the industry in which another one of our directors works.

Our Board does not manage or get in any way involved in decisions relating to particular disputes or systemic issues. Our Chief Ombudsman is responsible for these matters.

The Board appoints the Chief Ombudsman. If the Board is informed directly of a concern about our services, the chair refers the concern to the Chief Ombudsman for investigation and response. The Chief Ombudsman provides information regularly to the Board to allow it to monitor general trends and issues arising from any complaints about our services and disputes lodged with us, amongst other things.

Website

Mr Winton's submission states that our website does not record "prosecutions and determinations" for all complaints lodged. We agree with this statement. We do not undertake any work that could be described as "prosecution", and the vast majority of disputes lodged with us do not result in determinations.

Disputes may be resolved in a variety of ways and have outcomes other than determinations, such as being resolved by agreement or discontinued. In the year ending 30 June 2011, of the 28,826 disputes resolved, 3,012 were resolved by FOS decision. Our Annual Review, which is on our website, provides detailed information about outcomes of disputes.

Further information

Thank you for giving us an opportunity to respond to comments in Mr Winton's submission. We have kept our response quite brief. If you would like more information, we would be happy to provide it.

Yours sincerely

Shane Tregillis
Chief Ombudsman