

Senate Economics Legislation Committee
ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates

2015 - 2016

Department/Agency: ASIC

Question: SBT 92-96

Topic: Financial Ombudsman Scheme (FOS)

Reference: written - 30 October 2015

Senator: Xenophon, Nick

Question:

92. ASIC state in ASIC RG 139:

Under the Corporations Regulations and National Credit Regulations, ASIC has the power to approve an External Dispute Resolution (EDR) scheme and vary or revoke that scheme's approval.

RG 139.23 The Corporations Regulations and National Credit Regulations state that we must take the following into account when considering whether to approve an EDR scheme: (a) accessibility; (b) independence; (c) fairness; (d) accountability; (e) efficiency; (f) effectiveness; and (g) any other matter we consider relevant.

RG 139.35we wish to ensure that complaints and disputes handling procedures treat consumers and investors fairly and consistently...

a) How does ASIC satisfy itself that EDR schemes such the Financial Ombudsman Service comply with RG 139.23 and 139.35?

93. On 7 may 2014, the Supreme Court of Victoria in the matter of Goldie Marketing P/L vs the Financial Ombudsman Service made orders that FOS' Jurisdictional Decision dated 7 April 2014 be declared invalid and set aside and be remitted back to FOS for consideration and determination as a final Jurisdictional Decision in accordance with the FOS Terms of Reference.

FOS subsequently closed the complaint a second time and the matter was then taken back to court for a second time. The court ordered the FOS to discover the Ombudsman's file notes regarding telephone conversations that took place between Goldie Marketings' agent, Dispute Assist's Mr Bruce Ford and FOS in relation to Goldie Marketings' complaint.

The FOS' file notes discovered by FOS exhibit an alarming divergence from the transcripts of the recorded telephone conversations. The FOS files notes raise serious questions as to trust and compliance with ASIC RG 139.23. The FOS has yet to account for the divergence from fact in the file notes despite being requested for an explanation.

a) Does ASIC believe the FOS is meeting its obligations under ASIC RG 139.23 and 139.35?

b) Is ASIC aware of consumer complaints regarding lack of fairness or bias within the FOS?

c) Other than litigation against FOS what recourse do consumers have against

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FOS to ensure they are afforded natural justice and that FOS complies to RG139 and 139.35 in particular to be afforded independence, fairness and accountability?

94. In the case of Goldie Marketing P/L vs the Financial Ombudsman Service, the court documents reveal that the Financial Ombudsman, Ms Justi Tonti-Filippini, stated she was ruling a dispute Outside FOS' Terms of Reference because of a staff shortage. The Ombudsman, Ms Justi Tonti-Filippini stated "if the person [staff member] who had left was still here I would be ruling the dispute in."
- a) Is ASIC aware that FOS is denying consumers EDR due to a staff shortage and does ASIC accept that denying consumers EDR due to a staff shortage is acceptable and complies with ASIC RG 139 and 139.35?
 - b) Do such alarming discrepancies in the FOS' file notes meet independence, fairness and accountability obligations of RG139.23 and 139.35?
 - c) Is ASIC aware what if any actions FOS has taken regarding the person/s responsible for the creation of the questionable file notes?
95. Recent amendments to the FOS Terms of Reference (TOR) approved by ASIC allows in cases where an Applicant is represented or assisted by an agent who may receive any remuneration for this service, FOS may in its discretion decline to accept the Dispute if the agent is engaging in inappropriate conduct which is not in the best interest of the Applicant.
Court documents in the Goldie Marketing case reveal the FOS file notes particularise purported adverse behaviour by the agent, Dispute Assist P/L, however the FOS files do not reconcile with the recorded telephone conversations.
- a) Given the divergence from fact exhibited by the FOS file notes to the recorded telephone transcripts, how does ASIC ensure that the FOS complies with their independence and fairness obligations under ASIC RG 139 and 139.35 in these situations and does ASIC believe FOS is acting in accordance with RG 139 and 139.35 in this circumstance without FOS being accountable for their actions?
96. The FOS states that "[A]t the heart of what FOS deals with in the financial sector is the loss of trust in financial services. We see our role largely as helping restore that trust. FOS's Mission is to fulfil an important community role by providing an independent dispute resolution service in which people can place their confidence and trust."
- a) Does ASIC believe that consumers can trust the FOS given the questions raised by the case of Goldie Marketing P/L vs the Financial Ombudsman Service.

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- b) Is ASIC satisfied that if the telephone recordings were not available, the FOS file notes would have been exposed and would natural justice have been served?
- c) Can ASIC explain if a consumer has a complaint before the FOS, how can they trust the FOS when the Ombudsman creates file notes that do not remotely resemble the facts of the actual recorded telephone conversation, and will a consumer be comfortable that they will receive fair, impartial, efficient and effective service from FOS and will they receive natural justice?

Answer:

The above questions relate to a decision of FOS to exclude a dispute made by a small business against ANZ Bank (apparently in relation to bank's action cancelling various commercial facilities - in response to defaults)

The disputant and plaintiff (Goldie Marketing) represented by Dispute Assist (Bruce Ford) challenged FOS' jurisdictional decision in Court.

A decision was handed down in the SC Victoria on 19 June 2015. We note that the QON does not refer to the existence of this judgement.

According to the judgement, (and this is referred to in the QON) Bruce Ford recorded a conversation with the relevant FOS Ombudsman. Via the QON, Bruce Ford makes various allegations about what was the real "reason" behind her subsequent decision to exclude the dispute and also that FOS file notes discovered during the proceedings *exhibit an alarming divergence from the transcripts of the recorded conversations.*

In the QON, various questions are put to ASIC about whether - as a result of the plaintiff's concerns in this case - FOS is meeting various approval requirements set out in RG 139.

The court judgement explicitly considered the issue of the recorded telephone conversation (includes a transcript) and the subsequent FOS decision to exclude it.

In summary, the Court found that:

- (a) the Terms of Reference constitute the entire contract between the parties and the Operational Guidelines to the Terms of Reference dated 1 May 2012 ('the Operational Guidelines') <http://www.austlii.edu.au/au/cases/vic/VSC/2015/292.html> - fn3 do not form part of that contract;
- (b) FOS has a broad discretion to exclude disputes under the Terms of Reference which does not prevent FOS from taking into account staffing or resourcing issues;

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(c) the November Jurisdictional Decision provides comprehensive, rational, cogent and persuasive reasons why FOS should exercise its discretion to exclude the dispute. There is nothing on the face of the November Jurisdictional Decision that would suggest the decision was infected by bad faith, bias or was so unreasonable that no other decision-maker could have arrived at that decision; and

(d) even if the Operational Guidelines form part of the Terms of Reference, the reasons set out in the November Jurisdictional Decision are in accordance with the Operational Guidelines as they are 'compelling'.

ASIC notes that there is a growing body of case law about the circumstances in which a Court may - or not - review or intervene in FOS approach to jurisdiction and/or decisions. Goldie Marketing has exercised its rights to challenge the FOS decision in court. The Victorian Supreme Court found that FOS exercised its discretion to exclude this dispute in accordance with its contractual powers and that the reasoning was compelling.

ASIC's external dispute scheme approval requirements anticipate that there will be disputes that schemes may need to exclude - including on the basis that there is a more appropriate forum. ASIC was not a party to these proceedings and ASIC will not review this matter. The judgement does not suggest that ASIC should be concerned about FOS' conduct or approach.