



Investment & Financial Services Association Ltd

**IFSA Submission on
Developing New Terms of Reference for the
Financial Ombudsman Services**

Dated: 20 October 2008

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PART I – INTRODUCTION

The FOS Investments, Life Insurance and Superannuation section (**ILIS**) currently operates under the Rules previously applying to the former Financial Industry Complaints Service (**FICS**). FICS and its predecessor Schemes, commencing in the 1990s, were designed on the basis of covering most but not all complaints. The scheme has operated successfully on the basis of monetary threshold limits.

The FICS Rules had been subject to extensive consultation and review prior to the merger of the Banking and Financial Services Ombudsman, FICS, and the Insurance Ombudsman Service. While IFSA members accept that certain changes to the Rules that will be reflected in the proposed Terms of Reference applying to ILIS may be necessary for greater FOS efficiency, members expect that efficiency to be translated into greater levels of service to FOS members and their clients who choose to avail themselves of the FOS processes to settle a dispute with a FOS member.

The comments and recommendations made in this submission are limited to the proposed Terms of Reference as they apply to ILIS. It is important to acknowledge that ILIS is an industry funded arrangement that is designed to provide a quick and relatively inexpensive determination of client disputes. It is not intended to be a substitute for the courts although FOS ILIS members have, to date, agreed contractually through their participation in the scheme to forego any rights of appeal to the courts other than in the case of a failure of procedural fairness.

As an industry funded scheme it is appropriate that its members determine the scope and purpose of the scheme. It is not, nor should it be the intention that FOS covers all disputes. The fundamental requirement under section 912A(1)(g) of the *Corporations Act 2001 (Act)* that an Australian Financial Services Licensee must be a member of an external disputes resolution scheme in respect of financial services provided to persons as 'retail clients'. The meaning of 'retail client' is defined at section 761G of the Act.

Members recognise that the 'retail client' definition may introduce a level of complexity that would make the operation of ILIS and the determination of access to the scheme by clients difficult. The compromise to date has been that the industry funded scheme should be available to clients of ILIS members where disputed claims fall below specified monetary thresholds for specific types of financial product or service. FICS was designed, on this basis, to cover the majority of claims made, although not all claims. It continues to be the position of IFSA members that any significant change to the scope of the Rules and monetary limits must be based on solid research data, proper assessment of the impact of the changes and cost/benefit analysis¹.

It should be noted that a number of IFSA members favour limiting the ILIS Terms of Reference to 'retail clients' as defined in the Corporations Act. This would be consistent with the requirements of the Corporations Act, but will limit current access to FOS. A retail investor condition for access will also require additional administration to determine access to FOS.

¹ IFSA Submission to FICS dated 18 September 2007.

PART II - RESPONSES TO ISSUES

Issue A: How can FOS simply and clearly define in the new Terms of Reference who is entitled to access the scheme, bearing in mind the need to maintain access for anyone who currently has access to the scheme?

Access to the scheme must be defined by reference to section 912A of the Act. While it is open to FOS members to widen the scope of the scheme, it is the position of members that the scheme supported by ILIS members be available only to investors with claims within specified monetary thresholds. Where claims are in excess of the specified thresholds they are more appropriately dealt with by the courts.

We note that many claims are satisfactorily dealt with at the Internal Dispute Resolution (**IDR**) stage. To avoid the complexity of establishing whether a client is a retail client, no barrier operates under the Rules to exclude any client where the claim is below the monetary threshold. IFSA members would support a continuation of this approach. However, if monetary threshold are increased without solid data, a proper assessment of the impact of the changes and cost/benefit analysis, IFSA members would seek to limit claims to retail investors. This would be consistent with the requirements and obligations of IFSA members under the Corporations Act.

Issue B: How can FOS simply and clearly define small business access to the scheme?

The concept of 'small business' is clearly defined in section 761G(12) of the Corporations Act.

Issue C: How can FOS best promote speedy, ready access to the scheme, whilst preserving the important role of IDR?

The issue implies that IDR acts as a barrier to the operation of FOS. The fact is that many disputes and concerns are settled at IDR. Additionally, IDR is an opportunity for the financial product/service provider to gather all necessary information for the purpose of reviewing the concerns/claim of the client. This documentation forms the basis of the response where a claim is lodged with FOS.

Some IFSA members have expressed a concern that the initial review process favours the complainant rather than the member. In other words, a "no" from the member when dealing with the complaint in accordance with its internal dispute resolution procedure rarely translates into a "no" from the "tribunal" at the initial review stage.

There needs to be an increased discretion and power for those making the initial assessment to, on the papers, make a determination that the claim has no merit. At present, and again this is a general observation which does not apply in all circumstances, if a no is given it is on the basis of jurisdiction not necessarily merit.

This is a process issue which does need to be addressed.

Issue D: How can FOS simply and clearly define in the new Terms of Reference the types of disputes FOS can consider, bearing in mind the need to maintain at least its current scope of jurisdiction?

The current FICS Rules, in so far as they define what FOS can and cannot hear, together with the Monetary limits, forms the best basis for simple and clear definition of the types of disputes that FOS can hear.

Issue E: What exclusions from jurisdiction – including exclusions on the basis of timeframe – should be specified in the new Terms of Reference, bearing in mind the need to maintain FOS’s current scope of jurisdiction?

IFSA members continue to support the requirements under the Rules as a jurisdictional basis for the operation of ILIS.

Issue F: When should FOS decline to consider a dispute on the basis of alternative proceedings in another forum? How can FOS best achieve consistency of approach to this across all disputes?

The initiation of proceedings in another forum should disqualify an application to FOS unless both parties agree to submit to FOS and to the determination of the matter by FOS ie. the complainant agrees that in consideration of submitting to FOS it will be bound by the FOS determination.

Anyone who has been charged with a criminal offence relevant to the complaint, or in the event of a conviction – including where fraud issues are involved – FOS should not have jurisdiction to deal with the complaint until the court matters are complete. These are legal issues that are better dealt with in a court (rules of evidence etc).

Issue G: What should be the monetary limits to FOS jurisdiction? How can FOS best achieve consistency of approach to this matter across the divisions?

IFSA members continue to support the current monetary thresholds. As previously advised to FICS, members support the periodic review of the monetary thresholds for disputes involving financial planning, managed investments and stockbroking claims relative to movements in the Consumer Price Index².

As stated in the IFSA submission to FICS dated 20 July 2007, indexation of monetary thresholds is not appropriate for and should not be applied to life insurance risk products. The thresholds should nevertheless be reviewed periodically (2, 3, or 5 years). Increases in the proposed monetary thresholds should be determined having regard to the level of coverage of retail clients.

Issues H

We believe that FOS should develop and publish (on website) a Guidelines document (per BFSO Guidelines) which provides more definition to process and approach, and which provides members with the context within which FOS can take action and make decisions. Such a document will prevent misinterpretation of terms of reference and ensures accountability.

Issues I to M.

No IFSA member comments received.

² IFSA Submission to FICS dated 18 September 2007.

PART III - RESPONSES TO QUESTIONS

Question 1: Are there any impacts of the proposed description of consumers that have access to FOS that have not been adequately considered?

We believe the EDR process is to enable consumers without ready access to legal means of resolution an opportunity to have their complaints addressed by an independent third party. Broadening access to the EDR process to consumers with the means to raise complaints through the legal system may increase the number of cases lodged with FOS and impede quick resolution of complaints by those without other methods of recourse.

In relation to the use of the term "individual" in the proposed description of consumers who can use FOS, we note that under the current FICS Rule 7.1 to have access to the scheme the individual must have a legal or beneficial interest in a dealing or transaction.

We also note that under FICS Rule 14.2 discretion existed to the effect that FICS could decide not to deal with a complaint by a **person who was not a "retail client"** as defined under the Corporations Act. IFSA would support the inclusion of a similar provision in the FOS Terms of Reference.

Question 2: Are you aware of any circumstances in which discretions to exclude consumers because of their economic or business status would be essential to FOS operations?

We are of the view that certain individuals/entities should be excluded on the basis that their personal or corporate resources allow them readily to seek remedy via other means (e.g. the courts or professional mediation). For instance (and as suggested above) those who are of high net worth or professional or wholesale investors or those who are running investment companies with sizable assets are well situated to solve their own issues. EDR schemes were established as 'access to justice' mechanisms – to assist 'normal consumers' who otherwise suffer a negotiation or resource imbalance of power.

Question 3: Do you have a view on excluding access to FOS by otherwise eligible small businesses – if they are part of a group of companies that does not meet the eligibility criteria?

We do not support the extension of FOS ILIS jurisdiction to deal with small businesses that are not retail clients or that otherwise have access to resources. Where an otherwise eligible small business is part of a group of companies that does not meet the eligibility criteria the small business could access other legal forums to address their complaint. We, therefore, believe they should not have access to ILIS.

FOS is not designed for, nor intended to service, entities that otherwise are well situated to address their own concerns (and/or afford representation).

Question 4: Do you have examples of small business that would be excluded by this provision?

No comment.

Question 5: Are there any compelling reasons to consider different definitions for small business access for different sectors of the financial services industry?

We do not consider there are reasons for different definitions provided the aim of restricting access to the majority of consumers who cannot readily access other legal forums is achieved by a common definition. For the purpose of ILIS, access should be limited to consumers within the monetary thresholds who are defined as retail clients.

Question 6: For general insurers, what would be the implications if FOS could consider disputes (claims and non-claims) brought by any small business (as defined in terms of Group employees rather than turnover) in relation to one of the listed business insurance products?

No comment

Question 7: Are there business products not currently listed in the General Insurance TOR that should be included in the new Proposed Terms of Reference as well as within FOS' jurisdiction?

No comment

Question 8: Should FOS itself refer disputes to the IDR area if the complaint has been raised with any area of the financial services provider and remains unresolved (rather than requiring the consumer to do this themselves)?

FOS should not lodge a complaint unless it has first been through the financial services provider's IDR process. Consumers should not be able to go directly to the Ombudsman. It is part of AFSL conditions that the licensee directs consumers to the IDR process and a failure to do so would result in a breach. Such a requirement did not previously exist when the existing scheme terms of reference were developed.

Lodgement by the Ombudsman of a complaint prior to it being through the company's IDR process results in high administration costs. It is also important for the financial services provider to have the opportunity to resolve the complaint and enhance its relationship with the customer. ASIC Guidance Note 165 currently allows a period of 45 days and a shorter period is not justified.

The BFSO charges significant fees to the financial services provider for lodging complaints which are then resolved entirely by the financial services provider. The IOS and FICS do not charge the financial services provider where customers are referred to them for resolution of a complaint. The IOS and FICS arrangements are, in this respect, preferable.

On page 20 of the Issues Paper there is a comment that "ILIS has no requirement that a dispute must be considered by a designated IDR process before it is lodged". We are of the view that FICS Rule 8.1 indicates an IDR is required before a complaint can be accepted as an EDR at FOS. IDR and EDR represent sequential stages in reviewing and resolving a complaint.

We are also of the view that it is not unreasonable for the customer to be the one to lodge a complaint with the IDR department, rather than FOS. There is scope for confusion, double-handling and loss of consumer confidence in the financial institution.

Question 9: What steps should FOS take when using its discretion to commence investigation of disputes that have been with IDR for longer than the ASIC-prescribed time limit?

Given the complexity of some products and services and therefore the complaints associated with them, and the need for third party assessment in some cases, the ASIC-prescribed IDR time limit may be insufficient in some cases. The member should notify the complainant if the IDR process will take longer than the prescribed time limit, provide them with an anticipated timeframe for resolution and the opportunity to escalate the matter to FOS if they are unhappy with this.

If the consumer takes the opportunity to escalate the matter to the EDR scheme at that time, we believe FOS should liaise with the member to determine whether the particular complaint requires a longer period for resolution through the IDR process and whether the member is genuinely actioning the complaint. We propose that FOS give the member 14 days to provide the reasons for the delay and an indicative time-frame for resolving the complaint. If the reasons support a longer period for investigation and consideration and the member is genuinely attending to the complaint, FOS should support the member in their efforts to resolve the complaint through the IDR process.

Where fraud has been identified or claimed (by the consumer, in relation to advice or actions of financial planners), 45 days is insufficient to allow members to fully investigate issues and determine an appropriate outcome. A timeframe of 90 days would be more reasonable in these situations.

Question 10: Are you aware of any disputes that should be within the scheme's jurisdiction in relation to contracts or obligations created outside Australia?

No

Question 11: Are there any other circumstances in relation to the provision of a banking, investment or insurance products where the dispute should be considered by FOS even though the consumer is not a customer or client of the financial services provider?

If there is no contract/agreement that exists between the member and the complainant FOS should not consider the matter unless the complainant is deceased or incapable of initiating a review by FOS and the person can show a beneficial interest in a policy or financial product. For example (and as reflected by Section 48A of the *Insurance Contracts Act (Cwlth) 1984*) in circumstances where any money that becomes payable under a life policy to a third party, that third party should have access to FOS even though they are not a party to the contract of life insurance.

Question 12: Are there any difficulties that arise from FOSs jurisdiction to consider disputes about privacy or confidentiality in relation to investments or insurance disputes?

The Privacy Commissioner is the subject matter expert on privacy matters and should retain jurisdiction of disputes on such matters to ensure they are handled appropriately. The Privacy Commissioner has recently been provided with additional resources that should enable them to handle privacy complaints more effectively. If complaints are entirely based on a breach of privacy, they should be heard by the Privacy Commissioner.

Additionally, privacy disputes involve awards for non-financial loss and we do not support FOS increasing their jurisdiction to make awards for this, as discussed below. To allow privacy matters to be heard and provided with such awards would be inconsistent. It would

also require specialised skills or referral to specialists in Privacy Law and would give rise to increased numbers of complaints, both of which would slow the processing of other cases and impede efficiency.

We note that confidentiality requirements are different to privacy and a breach of confidentiality may involve financial loss. However, these matters would be difficult to investigate and decide and therefore may compromise efficiency.

Question 13: Do the proposed exclusions from FOS' jurisdiction in paragraphs (a) to (d) above adequately address those matters that should be excluded?

We do not have any concerns with the proposed exclusions. However, we believe that FOS should consider the addition of a further exclusion for 'vexatious or frivolous' disputes. This would be consistent with other EDR schemes and allow FOS to focus on genuine disputes rather than devoting resources to disputes which clearly do not have merit. Guidance for FOS officers on what disputes should be excluded on this basis should be provided in operating guidelines. FOS may also wish to consider contacting the provider involved for their views on whether the dispute should be excluded on this basis where the circumstances warrant this.

Many other EDRs include the following:

- (a) the complaint is frivolous or vexatious or was not made in good faith;
- (b) the complainant does not have a sufficient interest in the subject matter of the complaint; or
- (c) an investigation, or further investigation, is not warranted.

(From the Telecommunication Ombudsman Constitution)

We would also recommend the exclusion of :

- underwriting or actuarial factors leading to offer of insurance on non standard terms;
- frivolous or vexatious complaints;
- complaints lacking in substance;
- claims related or subject to criminal conduct or charges;
- complaints that are out of time; and

consider that the Terms of Reference need to include the exclusions current FICS Rules 14.1 (i), (l), (m), (n), and (o).

Question 14: Are there any reasons why a single time frame of six years from the date of the cause of action or from when the consumer should have reasonably known of all the facts, should not apply to FOS?

Given the regular and comprehensive disclosure requirements that apply to the financial services sector there is no reason a consumer should not be aware of an event, or all the facts concerning an event, that gives rise to a cause of action well before 6 years has elapsed. We strongly believe that a consumer should lodge complaints as soon as possible, both to the applicable IDR and EDR schemes, as delays in doing so give rise to prejudice and circumstances that hamper investigation and resolution of disputes. This is particularly the case in relation to complaints regarding insurance products as assessors, experts and witnesses to the event, damage or injury may no longer be contactable and damage and injuries/illness may have been exacerbated by the passing of time. We understand that FOS will not reduce the time limits currently available for lodgement and therefore do not support any changes to the current time limits for lodging complaints with FOS.

We believe that after closure of a complaint at FOS, consumers should not be able to reopen the matter after a reasonable (and specifically designated) period of time has elapsed - we suggest 12 months.

It has been noted that the Banking Terms of Reference has a clearer statement of how this applies than the ILIS Terms of Reference. The Banking Terms of Reference (clauses 5.5 and 5.7) say the complainant must notify FOS within 6 years of the event to which the dispute relates (In advice claims, this would be the date of the advice). However, the Ombudsman may consider it if the claimant was not aware of the event and could not have discovered it using reasonable diligence. The ILIS Terms of Reference say a complaint won't be heard if the complainant knew or should reasonably have known of all the relevant facts 6 years before notifying the service." "Relevant facts" isn't defined, and could be interpreted more broadly than the events that gave rise to the dispute. We recommend for clarity, adopting Banking Terms of Reference clauses 5.5 and 5.7.

Question 15: Are there any circumstances in which FOS should be prepared to re-open a dispute where the parties have agreed to settle?

We believe that due care and consideration should have been given to the terms of settlement prior to agreement being reached and actioned. We, therefore, do not consider that FOS should have the power to re-open disputes that have been settled.

Question 16: Should the ToR provide jurisdiction if there is agreement from the parties to consider the dispute?

There may be instances where a member elects to have a matter referred to and/or investigated by FOS where no jurisdiction otherwise exists. This should be entirely at the direction/agreement of the member concerned.

Question 17: Are there any reasons why the Ombudsman should not have the power to decline to consider a dispute if in his/her view there is a more appropriate forum?

No. It is general practice that Ombudsmen have the right to decline to consider a dispute. This faculty exists in all ombudsman charters/constitutions etc.

Question 18: Do you support a common monetary limit for lump sum disputes across the FOS jurisdiction?

We strongly believe that the technical differences and values involved with different products and services across the industry warrant specific approaches in relation to monetary limits. We note that the limits have been thoroughly reviewed in 2007 and increases, where justified, have been implemented. A copy of the IFSA submission setting out the position of IFSA members is attached ([Attachment A](#)). The current limits allow access to the majority of consumers based on an analysis of those consumers and the products and services concerned.

Consistency is valuable where it reduces confusion for consumers and enhances the efficiency of the scheme. In this instance, confusion can be limited by providing clear information on the lump sum monetary limits for each product and service in information on the FOS website and in other published material. Additionally, efficiency is not enhanced by consistency in this area as increasing the limit, by almost double in some cases, will result in

a larger number of disputes being lodged, slowing processing for the majority of consumers. We therefore do not support any changes to the current monetary limits.

Question 19: If a common monetary limit is not applied for FOS disputes jurisdiction, what policy basis should be used to establish and maintain differential limits for sectors or products?

As set out in IFSA's submission in response to FICS Discussion Paper on the review of monetary limits in 2007 we would support:

1. The periodic review of monetary thresholds for disputes involving financial planning, managed investment and stockbroking claims relative to movements in the Consumer Price Index; and
2. An increase reflecting CPI increases every three years.

As stated in the IFSA submission dated 20 July 2007, indexation of monetary thresholds is not appropriate for and should not be applied to life insurance risk products. The thresholds should nevertheless be reviewed periodically (2, 3, or 5 years). Increases in the proposed monetary thresholds should be determined having regard to the level of coverage of retail clients.

Question 20: Should there be a fixed ratio between the lump sum monetary limit and the monthly income stream limit? If not, what should be the basis for fixing the monthly income stream limit?

We believe extensive input into this specific issue has already occurred during 2007 and we reject that this now be a subject for consideration under the new Terms of Reference. It was rejected by the Industry and the rejection was accepted by FICS (see IFSA submission dated 20 July 2007 – Attachment B).

The current limit for monthly income stream claims should be fixed. This should be the case as fraud is often a factor in such claims and is difficult to prove without the benefit of cross examination and rules of evidence applied to cases in the judicial system. The proposal to increase the limit to almost double the current limit will significantly impact providers and is inappropriate, given the majority of such cases involve technicalities that are best addressed through the judicial system where consumers seeking more than the limit should be able to pursue these claims.

Question 21: What are the reasons why consumers should or should not be allowed to 'opt-in' to the FOS monetary jurisdiction?

Consumers should not be able to opt-in and effectively 'shop around'. FOS should seek the quantum of the dispute up front. If the quantum is beyond the jurisdictional limits, the dispute should not be heard by FOS. This is a longstanding principle used in civil law.

The other problem with the 'opt-in' model is the potential that some consumers may elect to use FOS as a 'dry run' for court proceedings (e.g. a customer with a \$500,000 complaint may reduce it to \$279,000 and have the matter investigated by FOS. If FOS issues a Finding in favour of the consumer, he or she could then reject the Finding and go to the courts – with the FOS Finding in hand. This would make FOS a 'free discovery' service which, clearly, it is not intended to be.)

Again, as set out in IFSA's submission in response to FICS Discussion Paper on the review of monetary limits in 2007 if an 'opt-in' system is proposed IFSA members believe it would need to be supported by:

- solid research data;
- a proper assessment of the impact of behaviour and approach to disputes that removal of jurisdictional monetary thresholds will have; and
- a costs/benefit analysis

before it can be seriously considered.

There is, we believe, existing evidence under current arrangements to suggest that, depending on the amount of a claim, complainants may for a variety of reasons use FOS as a dry run. By way of example, an IFSA Member has advised that it is aware of at least three matters which arose in 2007 where a complainant has initiated legal proceedings requesting that the matter be held in abeyance while the matter is heard by an EDR scheme. Their assessment is that this appears to be a developing trend which is likely to be significantly fuelled by any opt-in proposal.

It needs to be noted that claims coming to FOS have already been through Internal Dispute Resolution procedures of licensees. Matters going to FOS involve a further cost to licensees and FOS does not afford the protections that are available to Members through the litigation process, particularly in claims which can be considered as significant.

Question 22: If either a 'cap' system of limiting the Ombudsman's power to award, or a discretion to the consumer to 'opt-in' were used, what would the impact be? What measures would be required to manage that impact?

IFSA is of the view that there would be significant impact and for this reason opt-in should not be allowed. Please refer to the answer provided to Question 21 above.

We believe a 'compensation cap' or 'opt-in' proposal would increase the number of applications and include numerous complaints intended to be dry runs, which would reduce the efficiency of the system..

Additionally, claims with values that exceed the monetary limits will often involve complex issues and technicalities that may best be addressed through the judicial system. It is also likely that such consumers are able to access the judicial system more readily than others. We, therefore, believe providers should be required to consent to FOS addressing complaints where consumers wish to 'opt-in'. This measure, in addition to that suggested above will ensure frivolous claims and those that are best addressed through the judicial system are excluded from the FOS scheme and do not compromise the efficiency of the scheme for other members and consumers.

Question 23: Should the monetary limit(s) be required to be reviewed by the Board every three years or automatically indexed to CPI every three years?

As set out in our response to Question 19 above, the monetary limits should be automatically indexed by CPI every 3 years. Indexation of monetary thresholds is not appropriate for and should not be applied to life insurance risk products. The thresholds should nevertheless be reviewed periodically (2, 3, or 5 years). Increases in the proposed monetary thresholds should be determined having regard to the level of coverage of retail clients.

Question 24: If an Ombudsman model is adopted rather than a Panel model, what arrangements would best give the Ombudsman access to industry/consumer expertise?

We do not support the elimination of the panel model.

Should a hybrid or Ombudsman system be adopted, the current system whereby case managers access technical advisers should be reviewed. It may be that specialists from members and consumer groups are available to provide advice to FOS.

Question 25: If you have experience of both systems, do you think that the Ombudsman model or the Panel model would best deliver fair and consistent decision making in the most time and cost efficient manner?

While FOS' comments regarding costs associated with the panel model are acknowledged, it is believed that the Ombudsman Model may involve similar amounts where complex matters require referral to industry specialists. Similarly, while it may appear more efficient, the referral to a technical specialist may take some time, following the initial consideration and determination that a referral is required. Considerably more time would be involved should the process then involve escalation to the Ombudsman.

While FOS may seek to employ case managers that would give fair consideration to cases and refer complex matters when necessary, recruitment of such individuals is not guaranteed and training may not eliminate the risk that case managers do not refer complex matters when appropriate or give them due consideration. The Panel Model ensures that a technical/industry and consumer representative considers the dispute and brings their experience and knowledge to the assessment with mediation by a Panel Chair. This approach therefore provides more confidence of a balanced assessment and reduces the risk of a bias or lack of action by a single individual tasked with the management of the dispute and therefore should be available when required.

To ensure efficiency and consistency in decision making for the majority of cases of small value or where the issues are not complex, an Ombudsman model may be best practice. We propose a hybrid model which combines elements of the Ombudsman and the FOS (FICS) panel.

In our proposed approach the FOS Case Manager would receive submissions from the member and the consumer. If the matter is straight forward and the case officer feels able to, they should then make a recommendation to both parties. If both parties accept the recommendation then the matter is resolved, otherwise the matter should either be taken to conciliation or sent to the adjudicator or panel for a determination.

If upon receiving the submissions the Case Manager determines that a recommendation is not appropriate but that a conciliation meeting has a high chance of resolving the complaint, they should have the power to refer the case immediately to conciliation or the adjudicator or panel. In cases where it appears that the parties are diametrically opposed (i.e. the consumer wants \$100K and the member is offering \$0) then the matter should be referred immediately to a decision by the adjudicator or panel.

In relation to the references to adjudicator or panel, we suggest that a monetary limit and assessment of complexity determine which of these is appropriate in the circumstances of the dispute. We would seek to make separate recommendations on an appropriate threshold amount. Amounts over the adjudicator's threshold would go to the panel. Adjudicators should be technically qualified in the areas in which they hear cases to ensure confidence in their decisions. Regardless of monetary limits, a provider should be able to request panel consideration of a matter if the technicalities of the dispute are particularly complex.

Question 26: Should there be a different dispute resolution process for General Insurance fraud disputes?

We believe that all insurance product disputes involving fraud require particular attention and, given the nature of the issues involved should not be decided solely on the basis of documented case histories and accounts. We therefore support development of a different process.

This process should involve an oral hearing to ensure the decision maker, be that a panel, adjudicator, case manager or Ombudsman, speaks to the consumer directly regarding the particular issues in the case. We wish to point out that the current system applied to general insurance fraud cases, particularly in relation to oral hearings, is deficient in some areas. The ability of consumers to prevent providers from attending oral hearings is biased and does not allow the provider fair access to all of the information on which the dispute will be decided. Additionally, the current system does not provide confidence that consumers' honesty is assured. While we acknowledge that honesty can never be totally assured, we believe a requirement for truthfulness (e.g. by requiring that information be provided under a statutory declaration) and adverse implications for a party if they are proven to have been dishonest should be imposed.

We note that cross examination and other processes associated with a court hearing are inappropriate in the context of an EDR scheme. However, we suggest that a system where the Ombudsman, case manager or panel can ask questions of consumers, providers and relevant experts and witnesses with a requirement for honesty should be implemented. Both parties should be given access to this hearing. Where there is a subsequent finding of dishonesty, any decision based on that should be reversed and the matter reconsidered as a matter of course. This process should be developed and applied to life and income protection insurance in addition to general insurance matters involving allegations of fraud.

Question 27: Do you have any comments about the general principle of limiting the amount of procedural detail in the proposed Terms of Reference?

IFSA supports FOS in its statement that it does not wish to set out the detail of its processes in the Terms of Reference (p. 36 of Issues Paper). Whilst we believe that some reference should be made in the Terms of Reference to FOS operating manuals and guidelines, IFSA is of the view that the model of the BFSO in providing its operating guidelines on a website would be an appropriate course of action.

Question 28: Do you have any comments about the FOS dispute resolution procedures described in (a) – (e) above?

The proposed procedures appear appropriate and to reflect best practice. In particular we support FOS' proposal to attempt initial resolution of disputes through negotiation and conciliation.

In terms of FOS not being bound by previous decisions, it would be appropriate for FOS to provide communication and/or guidelines in regard to this issue. It should be clear that FOS aims for consistency and, while each case has its own facts and issues, FOS intends that a similar approach will be adopted in respect of certain recurring issues (see Issue H above).

Question 29: If you have any experience with more than one FOS Division, are there advantages or disadvantages from your perspective to common dispute resolution procedures as described?

We believe that consistency across the divisions will improve efficiency. While we do not support consistency where this will compromise the aims of the system, such as imposing common monetary limits across the divisions, we do believe a consistent approach to processing the disputes will reduce confusion among consumers and enhance the transparency of the system. We note, however, that within the broad framework proposed there should be specific guidelines for cases that warrant particular processes, such as insurance fraud disputes, as discussed above.

Question 30: Should FOS have the ability to award compensation for non-financial loss?

Consideration of amounts required to compensate for non-financial loss would involve subjective assessments of individual circumstances. Given the process does not use the rules of evidence associated with the court system, the inclusion of such compensation would be inappropriate and give rise to inconsistent decisions. In the interests of efficiency and consistency in decision-making we believe non-financial loss should not be considered by FOS.

IFSA members support the retention of FICS Rule 33.4.

Courts hear evidence on the nature of non-financial loss and have some experience in determining appropriate amounts. This is a very complicated situation, and it is not appropriate for a forum such as FOS to make a decision in situations where which hears evidence only on the papers, doesn't have witnesses and there is no opportunity for cross-examination.

Question 31: Should FOS have the ability to award compensation for consequential loss?

Consideration of consequential loss would also be subjective and involve the impacts discussed above. A decision as to whether this flows directly from the conduct complained of is a complex one and can involve a degree of speculation. The awarding of consequential loss is not appropriate for a forum which works on papers etc, and is intended to be short and inexpensive for both parties. Therefore, we do not support FOS having the power to award compensation for consequential loss.

Question 32: Should there be any limits specified in the proposed Terms of Reference as to the amount that can be awarded by FOS in relation to these types of losses?

Monetary limits should include all amounts that may be awarded. This includes legal costs, interest and awards for the claim itself, including for non-financial or consequential loss should they be included as a result of this review. Where interest is included, members should not be liable for delays by the consumer in lodging with FOS, or through the period in which FOS considers the matter. It may be difficult to identify and exclude all such periods but, where possible, we encourage FOS to consider this as a means of encouraging efficiency in the lodgement of disputes and commitment to an efficient resolution process.

IFSA members do not support FOS having an ability to award compensation for indirect loss, non-financial loss or punitive damages.

Question 33: When calculating the amount being claimed for the purposes of the monetary limit, should claimed non-financial losses and interest be included?

Current FICS Rule 34 should continue to apply. As provided in our response to Questions 30 to 32, FOS (ILIS) should not have an ability to award compensation for non-financial or consequential loss.

Question 34: What would be the advantages and disadvantages of allowing both parties an opportunity to make submissions when a Recommendation was appealed to Determination stage?

We believe that members and consumers should be encouraged to accept Recommendations and appeal to the Determination stage in only significant cases. Where this occurs, both parties should be given the opportunity to provide written statements in response to the Recommendation.

Advantages are:

- provides an ability to respond to a recommendation;
- should allow the admission of new evidence;
- may result in earlier finalisation of the issue.

Disadvantages are:

- may delay the final determination of issue;
- may make the first stage of negotiation and conciliation less important (a precursor to the second).

Given the ability of consumers to not accept a determination under any outcome, ILIS members would seek a right to appeal a determination. Certainly, at a minimum FICS Rule 36.3 should be replicated in the Terms of Reference.

Question 35: Does this approach to the “test case” process appropriately balance financial services providers interests in ensuring that really significant matters are determined by the Courts and fairness to consumers given that they may be deprived of access to FOS if process invoked before the decision is made?

We believe that the proposed grounds for removing a case to the judicial system as a ‘test case’ will ensure appropriate cases are treated as such. However, we believe providers should be able to give notice of a ‘test case’ at any stage of the FOS dispute resolution process and not only as an appeal process. Allowing test cases to be elevated to the judicial system as soon as possible will ensure they do not compromise the efficiency of the FOS process for other cases.

The approach adopted in Rule 18 of the FICS Rules is the preferred approach of ILIS members. That approach provides both appropriate barriers to misuse and safeguards in relation to costs.

Question 36: Would the inclusion of examples assist in the understanding of what constitutes systemic issues? The examples that ASIC gives in RG139 are: poor disclosure or communication, administrative or technical errors, product flaws and improper interpretation or application of standard terms.

FOS is currently required to report providers they consider have systemic issues. ASIC is currently reviewing the Regulatory Guides that pertain to EDR schemes and has indicated that schemes often do not disclose the names of providers they report for this. ASIC proposes to include measures in the Regulatory Guides to compel EDR schemes to disclose providers

who they consider have systemic issues and to publicly report on the number of these issues and reports to ASIC. Given this proposal and the broad nature of the definition, we strongly believe that examples should be provided. These may be in detailed guidelines supporting the Terms of Reference or the Terms of Reference itself.

Further, we believe FOS should give the provider notice and an opportunity to discuss the issue FOS may propose to report as systemic prior to their contact with ASIC. This will enable the provider to clarify the situation and any measures they have taken to address the issue.

Question 37: Is the definition of 'serious misconduct' sufficiently clear and the ambit appropriate? What can be done to minimise the "grey area" as to what is reportable and what is not?

We acknowledge the difficulties in including prescriptive measures in the Terms of Reference and support the principles-based approach, as discussed above. However, we believe the definition of 'serious misconduct' is not sufficiently clear, given the consequences of a finding of this nature. We believe examples should be provided, as above. We also believe FOS should engage with the provider regarding actions they consider to be serious misconduct prior to contacting ASIC, for the reasons discussed above.

PART IV – OTHER MATTERS

On 24 July, IFSA made a submission to the Ombudsman for the Investment, Life Insurance and Superannuation Division, Alison Maynard, in relation to FOS members' voting power under the FOS Constitution.

Under the Constitution each FOS member has one vote for each dollar paid by way of levies and case costs. This provision has the undesirable effect that those FOS members who have had more complaints made against them in any financial year will have more voting power on resolutions that are put to a poll.

As noted in IFSA's submission, our members consider the departure from votes being based on membership category to votes being based on dollars paid, to be a significant governance issue. While we note that the practical effect on voting may be insignificant, IFSA considers that the current provisions of the FOS Constitution regarding voting sends the wrong message to industry and consumers.

We note FOS' response to our submission indicated that the issue of voting rights under the Constitution would be reviewed in 2010 with such review having regard to:

- Experience of current voting arrangements from 1/7/08 to 31/12/09;
- Feedback from Stakeholders in relation to current voting arrangements received 1/7/08 to 31/12/09;
- Feedback received from the relevant Board Advisory Committees; and
- New levy and case cost structure adopted from 1/10

IFSA looks forward to working with FOS in its proposed review of voting rights under the FOS Constitution in 2010.

Attachment A

IFSA Submission dated 18 September 2007 on *Review of the FICS Monetary Limits – Discussion Paper*

Attachment B

IFSA Submission dated 20 July 2007 on *Review of the FICS Monetary Limits – Consultation Paper*