



Investment & Financial Services Association Ltd
ACN 080 744 163

20 May 2009

Mr Phil Khoury
The Navigator Company Pty Ltd
C/-Financial Ombudsman Service
Melbourne VIC 3001

Email: phil.khoury@thenavigator.com.au

Dear Mr Khoury

Re: FOS Proposed Terms of Reference – IFSA Comment on Submissions Received

We note that IFSA provided you with a submission in response to the Proposed Terms of Reference and in accordance with Clause 14.2(c) of the FOS Constitution (**the Constitution**) on 20 April 2009.

In accordance with Clause 14.2(d) of the Constitution, the submissions received by FOS (including IFSA's) were published on the FOS website and individuals or organisations were given 30 days to make a submission in reply. The following comments provided by IFSA constitute such a reply.

We also note that the Constitution sets out that the following process is to be followed after submissions in reply are received:

1. The Directors shall consider the submissions and, if they are unable to resolve any outstanding issues, they shall refer the submissions to an appropriate qualified independent person appointed by the Directors (Clause 14.2(e));
2. Within 30 days of the referral, the independent person shall consider the submissions and make a recommendation to the Directors as to whether the Proposed Terms of Reference should be amended (**the Recommendation**) (Clause 14.2(f));
3. Upon receiving the Recommendation, the Directors shall meet to consider whether or not they approved the Proposed Terms of Reference or whether the Proposed Terms of Reference should be amended in accordance with the Recommendation (Clause 14.2(g)).

The aforementioned requirements were advocated by IFSA as one of the key preconditions to IFSA member support for the FOS Constitution.

IFSA's comments on submission received

We have had the opportunity to review the 37 submissions received by FOS and have formulated a table (Attachment A) which provides a summary of the major concerns contained in the submissions received.

Our review of the FOS member submissions identifies a consistency in the concerns raised and, in particular, a lack of support from FOS members who fall under the Investments, Life Insurance and Superannuation Division (ILIS) of FOS for specific proposals. Those matters

include (but are not limited to):

1. Increases in the proposed ILIS monetary thresholds for non-life insurance matters;
2. Monetary cap proposal;
3. The types of disputes and the scope of matters that may be considered by FOS;
4. Types of remedies that can be considered by FOS - privacy;
5. Compensation for consequential damage and non financial loss;
6. Unlimited interest calculation.

The monetary threshold and capping proposal are of particular concern for a number of reasons. We again note that the External Dispute Resolution (**EDR**) scheme that was set up and supported by the industry was designed essentially to determine relatively small claims that were not settled through the internal dispute resolution (**IDR**) process.

The scheme was intended to operate as a low cost efficient mechanism to determine such disputes. To facilitate the operation of EDR in this manner members contractually agree to be bound by the EDR determination and have foregone their rights of appeal from a determination. The monetary threshold proposals in particular bring these matters into question.

We note the Government's moves under the consumer credit protection reforms to introduce a three tiered dispute resolution process involving IDR, EDR and the Federal Magistrates Court (including local courts) for the determination of small consumer credit claims. Decisions of the courts and tribunals are, of course appealable. The proposed FOS monetary thresholds and capping proposal potentially take significant disputes outside of the realm of 'small claims' and outside the intent and scope of EDR. Additionally, the threshold proposals will have a significant impact on the availability and affordability of professional indemnity insurance. In fact, we have been advised that in some instances FOS coverage has been refused under some policies on the basis that FOS decisions are not transparent and there is no right of appeal from a FOS determination.

It appears from the submissions received that there is broad and wide-ranging concern over a number of proposals contained in the Proposed Terms of Reference. We would, therefore, expect to see the process set under the FOS Constitution followed and, any report and recommendations to the FOS Board.

Please feel free to contact me or David O'Reilly should you wish to discuss any of the above.

Yours sincerely



Richard Gilbert
Chief Executive Officer

FOS Draft Terms of Reference

Summary of Major Concerns

TOR ISSUE	KEY CONCERNS
Cl. 4.2 Types of disputes that can be considered by FOS includes matter arising from provision of a "Financial Service"	Definition of a "Financial Service" too vague and should be aligned with Corporations Act definition or Sec 12BAB of ASIC Act. FOS could potentially make binding determinations for services other than "financial services"
Cl 5 Disputes outside the scope of FOS	FOS has reserved for itself wide discretion as to whether to hear complaints from non-retail clients and to continue hearing complaints where applicant has commenced legal proceedings
Cl 6 Application Process for lodging disputes	Explanatory Guidelines suggest that Dispute may not need to be in writing. Non written claims may facilitate fraud and place FOS staff at risk of later action. Denies Member ability to test claims
Cl 8.2 Dispute Resolution Criteria – FOS not bound by previous decisions	Lack of any binding precedent creates uncertainty and inconsistent outcomes.
Cl 9.1 (h) Types of remedies – FOS may direct remedies involving privacy matters	Appropriate remedies already exist through the Privacy Commissioner and may result in forum shopping. Privacy matters should left to specialist tribunals or courts
Cl 9.2 Compensation may be awarded for consequential damage and non financial loss	Such powers should only be exercised in conjunction with laws of evidence and appeal rights to courts. May impact on ability obtain PI insurance
Cl 9.3 Member may be liable to contribute to applicant's legal and other costs	No incentive on behalf of applicant to conduct dispute reasonably. Potentially even an unsuccessful applicant may be able to claim costs.
Cl 9.4 FOS may award interest to an applicant	Previous cap of \$50k has been removed leaving the award unlimited. Some cap needed or at least a limitation on accrual period.
Cl 9.6 Cap on maximum value of remedy	The former monetary limits have been replaced by caps . This has the effect of no disputes being excluded from FOS due to the dispute exceeding the monetary jurisdiction. Potential to significantly increase the number of complaints and create potential PI Insurance issues Increase on remedy cap from \$150k to \$300k a concern – impact on PI Insurance.