

25 October 2013

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Dear Mr Khoury

Independent Review of the Financial Ombudsman Service (FOS)

Thank you for the opportunity to contribute to the Independent Review of the Financial Ombudsman Service. The following is a joint submission which has been drafted by the Consumer Credit Legal Centre (NSW) (**CCLC**) and the Consumer Action Law Centre (**Consumer Action**) with funding from FOS.

The following organisations and individuals contributed to and endorsed this submission:

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)
Queensland Association of Independent Legal Services

Details about each organisation are in [Appendix A](#).

Summary of submission

Broadly

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.

Key issue: Delay

Delay was by far the biggest concern for contributors to this submission and financial counsellors who responded to the online survey. We acknowledge that FOS is making genuine efforts to reduce delay. We have provided a number of recommendations on this topic.

Terms of Reference 1: Progress made by FOS

The three arms of FOS still operate quite differently, particularly with regard to decision making. We have recommended, among other things, that FOS's decision making processes be independently reviewed.

FOS generally operates in a manner which is cooperative, efficient, timely and fair. However we have recommended changes to simplify FOS's communication with consumers and improve transparency.

Our impression is that FOS is well versed in the new credit laws, but we have made recommendations regarding distinguishing between responsible lending and maladministration disputes.

Terms of Reference 2: FOS's performance against ASIC Regulatory Guide 139

FOS has generally performed well against the requirements in RG139. We have made recommendations for improving accessibility for applicants who will face additional barriers to using FOS. Other accessibility recommendations include that FOS should compare outcomes for assisted and non-assisted applicants, review guidelines for excluding complaints on the basis an agreement was struck between the parties, and collect data on outcomes of disputes resolved at early stages.

Term of Reference 3 and Additional Item 3: Data Collection and Reporting

We have stressed that FOS's role in identifying and seeking to resolve systemic issues is as important as resolving individual disputes. Overall, contributors praised FOS's work in identifying and publicising systemic problems and in particular FOS's guidance on how it responds to common problems. We have recommended that the systemic issue process should be reviewed to ensure accountability and transparency, that FOS should improve how it engages with people who report systemic or serious misconduct, and that FOS should consider publicly naming traders who engage in such conduct.

Term of Reference 4: FOS's engagement with stakeholders

We have recommended that FOS could improve its self promotion by simplifying promotional materials, providing board reports to stakeholders and having consumer directors report through the Consumers Federation of Australia.

FOS needs to do more to promote understanding of the FOS processes. FOS's information brochures and referral processes could be improved.

Additional Item 1: Coverage of the FOS scheme

The \$3,000 compensation cap for third party insurance is too low and we have recommended it be increased to \$15,000. There is a lack of data on how often people request FOS to exercise its 'exceptional circumstances' discretion regarding time limits and how FOS responds.

Additional Item 2: The \$3,000 consequential loss cap

The \$3,000 cap is too low and unnecessarily restricts appropriate awards. The \$3,000 cap for consequential loss should be removed from the FOS Terms of Reference.

Additional consumer advocate concerns

The registration process with FOS pre 45 days and IDR

After the merger FOS changed this process without any consultation of consumer advocates. The current FOS registration process does not represent best practice in access and disadvantages consumers and their access to FOS. We have made recommendations for improving this process and also recommended that all major changes to FOS processes must be the subject of consultation

Credit Repair and other advocates assisting consumers for a fee

FOS should restrict access by paid advocates to exceptional circumstances except where those advocates are lawyers acting in the normal course of their practice or other advocate approved by FOS.

Process for developing this submission

FOS provided funding through the Consumer's Federation of Australia to cover the costs of coordinating and drafting this submission. The funding was provided to CCLC and Consumer Action following a joint expression of interest to CFA.

Once selected to coordinate the joint submission, CCLC and Consumer Action sent invitations to the following individuals and organisations inviting them to contribute to the joint submission:

- members of the Consumer's Federation of Australia;
- members of the FOS Consumer Liaison Group;
- members of the ACCC's Consumer Consultative Committee and ASIC's Consumer Advisory Panel;
- Financial Counselling Australia and all financial counselling state and territory peak bodies.

Consultation with interested consumer representatives included two telephone conferences (one on the issues paper and another on a draft submission), as well as the opportunity for written feedback. We also sought input from Financial Counsellors through an online survey which accepted responses for two weeks from 27 September to 11 October. During that period the survey was started by 161 financial counsellors (being around 17 per cent of the financial counsellors who are currently registered with one of the State or Territory professional associations) and was completed by 136.

Broad view of FOS

The broad view of contributors to this submission is that, while there is room for improvement, FOS is providing an essential service of a high standard and should be congratulated. Contributors to this submission on the whole consider FOS to be a fair, accessible and effective dispute resolution scheme for our clients, though some concerns are raised below.

FOS provides access to justice to people who would struggle to access it otherwise, and it provides an alternative to more formal dispute resolution through the courts. The performance of FOS's Insurance area over the last three years is a case in point—it has provided thousands of people with access to review following natural disaster claims in circumstances where very few

could have accessed the courts. Caxton Legal Centre in Brisbane provided the following summary:

In May 2013, Caxton Legal Centre received the final decision from the Financial Ombudsman Service (FOS) for the last of the 116 flood insurance cases run by the service. All 116 clients were individuals and families affected by the January 2011 floods and who had their initial insurance claims refused.

The 116 Caxton clients were part of a cohort of more than 700 clients who engaged either a Legal Aid or a Community Legal Centre to dispute flood insurance refusals. The other three organisations were Legal Aid Queensland, Legal Aid New South Wales and the Insurance Law Service (a project of the Consumer Credit Legal Centre (NSW)). The collaborative work of the four organisations is (as far as we are aware) the largest casework collaboration between the Legal Aid commissions and Community Legal sector. The project also involved volunteer solicitors and students, and the support of pro bono firms in the early days.

Caxton's assistance resulted in reversals of refusals in nearly 50% of cases and more than 5 million dollars in money returned to the community. In a rare opportunity to quantify the value of CLC work, the \$5 million returned to the community was managed with a total funding to Caxton of just \$350 000 over two years. The collective efforts of the four organisations returned more than \$20 million dollars to flood-affected families.

All cases were resolved by either direct negotiation with insurers or through the External Dispute Resolution process at FOS, making the process both free and very low risk for clients. The flood recovery work also helped change the law relating to flood insurance and precipitated the rewriting of a number of insurance policies.

We also appreciate FOS's willingness to make staff available following the Queensland floods. FOS staff did an outstanding job on site visits and engaging with local advocates.

Contributors also praised FOS's work in identifying and publicising systemic problems and in particular FOS's guidance on how it responds to common problems (such as *The FOS Approach to Financial Difficulty*). In our view the availability of detailed guidance of this kind ultimately creates a more efficient process by helping applicants and advocates prepare applications and gather evidence. It also assists with consistency in decision making.

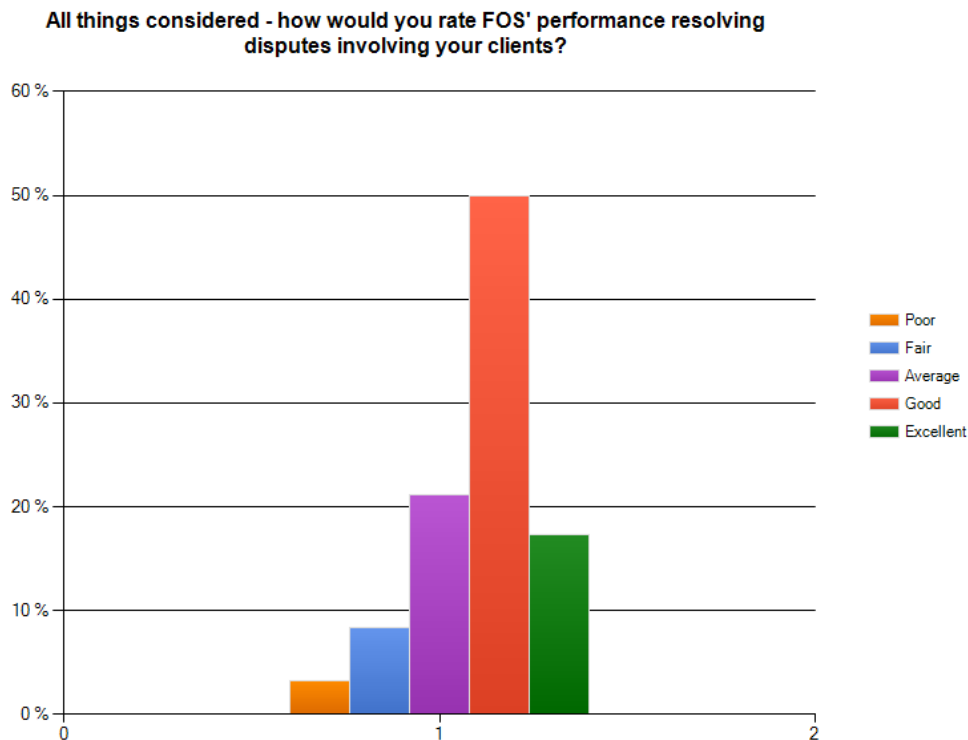
In addition to the good work done by FOS specifically, a good external dispute resolution scheme brings a number of benefits:

- It creates space for calm resolution of a dispute. This is especially important in, for example, cases of debt collection harassment. Debtors can feel that collection processes move very fast, that they are constantly under pressure by the debt collector and what happens is largely out of their control. Once the EDR application is made, the constant contact stops, the debt collector is more likely to respond to requests for information (such as proof of debt) and requests for payment plans. As one financial counsellor remarked "I like working with FOS. The ability to lodge a dispute empowers our clients and makes the creditor take the matter more seriously and usually results in a better outcome."
- Accessible, high quality dispute resolution improves the efficiency of markets generally. Where consumers cannot easily complain about poor treatment and seek redress,

dishonest traders hold a competitive advantage over more responsible traders. Effective dispute resolution reduces the incentives for poor conduct.

While much of this submission focuses on problems with FOS processes or things that can be improved, we could make many more observations about things that FOS does exceptionally well. We hope that the discussion of problems will be received not as a lack of faith in FOS, but as an attempt to improve a system that is already working very well.

A similar view was reflected in the online survey of Financial Counsellors. When asked 'All things considered, how would you rate FOS's performance resolving disputes involving your clients?', responses were very positive: 50 per cent rated FOS's performance as 'good' and 17 per cent as 'excellent'. This total of 67 per cent of above average responses compares to 11 per cent who rated FOS's performance as either 'fair' (8 per cent) or 'poor' (three per cent). Twenty-one per cent responded that FOS's performance was 'average'.¹



The survey also asked Financial Counsellors if they had ever had a problem with:

- FOS's decision-making (that is, Recommendations or Determinations made by FOS);
- the processes through which FOS handles cases; or
- how long it took FOS to handle a case.

Nearly 60 per cent of respondents reported that they had never had a problem with either FOS's decision-making or processes. In both cases, nearly 85 per cent of respondents either said they

¹ 156 financial counsellors responded to this question.

never or 'only rarely' had a problem with FOS on decision-making or process. Responses regarding FOS' timeliness were less favourable. Around 45 per cent of Financial Counsellors said they never had a problem with FOS's timeliness, but thirteen per cent reported having problems with timeliness 'frequently'.²

<i>'Have you ever had problems with FOS'...</i>	Never	Rarely	Occasionally	Frequently
<i>Decision making?</i>	59%	25%	15%	1%
<i>Processes?</i>	57%	25%	15%	2%
<i>Timeliness?</i>	46%	19%	22%	13%

While these responses express a broad vote of confidence in FOS's ability to resolve disputes for our clients, contributors to this submission and responses to the financial counsellor survey have revealed some common concerns about FOS processes, most significantly concerning delay.

Key issue: Delay

Broad remarks

Delay was by far the biggest concern for contributors to this submission and financial counsellors who responded to the online survey.

It is acknowledged that there is delay involved in according procedural fairness to both parties, facilitating dispute resolution, gathering evidence and investigating and determining matters. The comments in this section should be taken in the context that there should be no sacrifice of procedural fairness to achieve reductions in delay.

Many attributed delays to the volume of complaints FOS is required to handle, though it is not possible from the outside to say if that is the reason for delays, or the only reason. We think it is important to acknowledge that FOS is making genuine efforts to get on top of the delay problem and some contributors report that performance has improved of late. However, as this is the most significant concern raised we have still taken the opportunity to report experience of delay from contributors and financial counsellors and make further suggestions.

Detriment caused by extended delay

Cost

² The decision making and process question was answered by 136 financial counsellors, the timeliness question by 135.

Delay can have a significant consumer detriment. Two common examples of consumer detriment caused by delay are:

- Interest continues to accrue on debts which are the subject of the dispute. Where an applicant is in financial hardship, the slowly increasing debt is exacerbating hardship and where a home loan is involved, the accrual of interest is eroding the consumer's equity. Accrual of interest is particularly exasperating for consumers and their advocates where the credit facility in question was provided irresponsibly in the first instance. It is acknowledged that FOS does specifically warn consumers about the debt increasing and the importance of making payments. However, making repayments does not necessarily cover the ongoing loss during the dispute.
- In insurance disputes, the consumer can be without a car or have a house that is uninhabitable while they are waiting for the insurance dispute to be resolved. This can cause significant hardship including difficulties getting to work and even homelessness. The financial cost of these significant impositions will not necessarily be recovered even if the complainant is successful (due to limitations on consequential loss) and any damage caused by pressure on health, productivity and relationships cannot be reversed

Uncertainty and extension of hardship

A long delay also extends a period of uncertainty, anxiety, and frequently financial hardship while an applicant awaits an outcome.

One financial counsellor provided the following case study:

I had a case that was with the Ombudsman for one and a half years and not resolved at the point when I left [the agency]. It involved a woman who was 8 months pregnant on maternity leave and in a violent relationship. She had a personal loan and car loan which were provided based on the husband's income. Although the relationship ended—he was violent to her physically and emotionally—an additional loan was taken out in his name as she was desperate but of the belief they would both be liable and that they should pay it back equally. She had been on Centrelink for two years by the time at the time I ended working at [the agency]. The Ombudsman took so long and she kept struggling paying all 3 loans and I thought it was unfair. We had to produce so much paperwork to them and never ever had any decent answer back from the bank justifying how they gave the loan—it seemed so imbalanced.

Other financial counsellors commented in the survey that:

Took up to a year for a case to go to conciliation stage. This is too long when a family is on edge not knowing if they will lose their home.

I currently have a case which was lodged in March 2013. Disability pensioner and mortgage. Case went to investigation. FOS has verbally advised they probably won't get to it until 2014. Meanwhile, my client is on food boxes to make ends meet.

Often we contact FOS in very urgent circumstances where our client is under imminent threat of enforcement action. Complaints to FOS are meant to forestall enforcement, but often it's not clear that FOS have taken the necessary action to advise the FSP to halt all enforcement action. Nor is it clear if the FSP have actually halted enforcement action. Finally, it should be made clear to all parties what happens (i.e. what will FOS do) if enforcement action is not halted.

It takes too long for FOS to investigate a case. For vulnerable clients, this adds to their stress and suffering, and means there is a risk we will lose contact before the case resolves. FOS should keep stats on case resolution times, and have benchmark processing times. Timeliness = Justice. Industry should be forced to resource FOS to the standard required. Otherwise we have FOS that is not really FOS.... just token FOS.

Dropouts

The prospect of a debt slowly increasing or sheer exhaustion with the process can lead an applicant to drop out of the process and seek to come to an arrangement with the FSP outside of FOS. It also creates a greater incentive for an applicant to accept an unfavourable offer from the FSP rather than wait for an uncertain result. Where this occurs, the result for applicants is much the same as if they had been prevented from accessing FOS at all.

Delay can also lead to applicants dropping out of the process because they feel disempowered or simply exhausted by the process. One contributor noted that

For financial counsellors here that have assisted clients in conferences to resolve disputes they were positive about the process and that FOS took time to make sure both sides were heard. However (again) it can take quite some time to get to the conference itself. One concern we have is that while we can assist clients, there are going to be many more people who either don't know about FOS or can't engage with the process (particularly if it's drawn out)

Financial counsellors also commented through the online survey that they sometimes lose track of clients during long delays if the clients' contact details change.

Clients drop out of contact, as it is hard to follow up with extra information within the given time, then you have to submit the claim from scratch

It appears to us that the rate of dropouts caused by delay (or simply a long investigation process) might be reduced by systems to ensure applicants understand how their case will progress and the likely timeframes that give applicants the ability to quickly receive a status update (we make a recommendation below). Financial counsellors report through the online survey that it was difficult to get progress updates from FOS:

We have a matter currently with FOS in which I have rung four times in two weeks and left messages and got no response. We are also currently assisting a client with their own complaint to FOS and they are also having difficulty. They have telephoned and left messages, and sent emails and have still had no response to what is quite an urgent question.

It can be a month or more of no contact and then when we email we do not get a response. But this has only happened for a couple of clients cases.

However, another financial counsellor said the opposite:

I had a very complex case through FOS. It took time but at all stages FOS keep me informed of what was happening.

Nature of the delay experienced

Stories of delays reported to us tended to fall into three broad categories:

- delays in assigning cases to a case manager due to high caseloads;
- delays caused by parties; and
- delays caused by failures of FOS staff.

Delays in assigning cases to case managers

The most frequent reports of delays involve a long delay between lodgement of an application and assigning a case to a case manager. It appears that it is not unusual for this allocation to take up to 12 months.

For example, Financial Counselling Australia provided correspondence from FOS to a financial counsellor who lodged on behalf of their client. The email stated that 'due to high case loads' the complaint (which was lodged in August 2012)

...is currently awaiting allocation to a Case Manager for investigation. Our office is unable to provide you with an exact date as to when the dispute will be allocated to a Case Manager. However at this stage we estimate that the dispute will be allocated by July 2013.

The letter went on to explain that allocation of the case could be expedited for 'special circumstances (such as serious health concerns or imminent legal proceedings by a third party)' and that the financial counsellor was invited to write to FOS requesting the case be given priority if it was urgent.

Financial counsellors related similar experiences through the online survey.

11 months to assign a case officer is just embarrassing for everyone. Clearly there's a resource issue that is not being appropriately dealt with. This has been an ongoing issue for years but is not getting the attention it deserves. I'm sure creditors are angry, as well!

A financial counsellor also noted through the survey that FOS's online dispute resolution process

...has presented challenges both in trying to provide the information required for some clients and in the length of time it takes post lodgement for FOS to respond. One of our biggest concerns is that consumers unsupported in the process by a financial counsellor or other worker, they may just give up and not continue; this is also a possibility when there are long delays in responding to other aspects of a complaint.

It seems to us that delays of up to 12 months before a case is even allocated can only be explained by inadequate resources. While processes to expedite urgent cases may relieve some of the problem for some people, this is far from a complete solution. It is not clear what kind of evidence an applicant would have to produce to establish that special circumstances

exist, but it may not be easy for an unassisted applicant to make this case. It is also not clear how quickly cases could be heard even after they are expedited if the standard case takes up to 12 months to be allocated.

Related to this issue is the process employed by FOS to manage disputes prior to allocation to a case manager. From our experience matters pass through all the following stages:

- Registration and referral back to IDR for up to 45 days (if IDR not complete already)
- Jurisdictional assessment
- Referral back to member again for a second crack at settling at IDR (21 -28 days)
- Allocation to Dispute Analyst who asks lots of questions in order to try to settle the matter but may have limited expertise in the actual area
- Limbo (the time between early dispute resolution stage and the allocation of a case manager)
- Allocation of a Case Manager

Obviously this process may vary if the dispute settles along the way or is referred for conciliation.

There appear to be a number of problems with this process:

- Consumers are told up to 3 times in routine correspondence that their dispute has been passed to the member—once when the dispute is lodged, once when they get the reminder to get back to FOS if the dispute is not resolved and then they get another letter saying “The next step we take is to try and resolve a dispute is to provide details of the dispute to [Member].” This is very confusing for consumers and gives the impression FOS is a bit of a waste of time.
- The second crack at IDR for complainants who have just spent 45 days at IDR appears a completely pointless waste of time. Where the complainant has ticked that they have been to IDR it makes sense for FOS to ensure that the dispute has been considered by IDR at a senior level. However, where FOS has registered the dispute and sent it to IDR (presumably to the correct place) and given them 45 days to consider the dispute with the full knowledge that it is likely to be considered by FOS if not resolved, then IDR should not need another opportunity to review the dispute a week or two later.
- The Dispute Analyst phase appears to mimic the Case Manager phase but the person asking the questions and promoting settlement may have no idea of the merit of the respective arguments. Consumers could be led to thinking they have no hope and should settle even where their case is strong.
- As noted above, the length of the process alone is dispiriting. The fact that a Case Manager comes along after 10-12 months from lodgement and practically starts again asking questions and requiring further information pushes some consumers over the edge. This is often the first time the dispute is considered by someone with any real expertise.

Case Study

Our client in a funeral insurance matter had been at FOS for 10 months. There had been a 3 month period (including the 45 days at IDR) before the dispute was allocated to a Dispute Analyst, then an excruciating process of questions (requiring further instructions) and settlement negotiations early on followed by a limbo period of 3-4 months. Then the questions and submission began again. CCLC had invested a lot of resources in reviewing transcripts and seeking counsel's advice but the client settled at conciliation for a very low ball offer because it has just gone on for too long and the client's impression was that no-one at FOS was sympathetic to his cause.

We appreciate that some of the steps in the above process have no doubt been adopted to encourage settlements while FOS is waiting for someone with appropriate expertise to be available to look at the matter. Of course, saving your most knowledgeable staff for the most entrenched disputes seems logical but not if disputes are settling purely as a result of process fatigue or because of the perceived opinion of the Dispute Analyst. Further, it appears possible that a step which was introduced to mitigate the effects of long delays may in fact now be contributing to that very delay.

Recommendation

We recommend that FOS review whether the current number of steps in the dispute process is necessary, especially given that complaint numbers are stabilising, and consider getting disputes (especially those with complex issues) to staff with greater expertise involved earlier in the process

Delays caused by parties

A number of financial counsellors made the point through the survey that delay was not always the fault of FOS. Financial counsellors commented that

FOS is a great service/ back up mechanism but it's very slow and allows the banks to be very slow as well, exceeding their time lines regularly without reason or consequence

[delay is] mainly due to the tardiness of responses from the bank involved in the dispute

A contributor to this submission noted that they have experience of Financial Service Providers asking for extra time to respond to a FOS application only to eventually make the same offer which prompted the FOS application in the first instance. FOS itself has also indicated that delays in its post statement of claim jurisdiction are mostly caused by members who fail to meet the timelines of the expedited process that generally applies.³

Another financial counsellor commented that they had experienced delays when dealing with FOS but 'only when the client is tardy too'.

Paragraph 7.5 of FOS's Terms of Reference permits FOS to make adverse inferences or discontinue consideration of a dispute if a party fails to provide information or take a step requested by FOS within a timeframe specified.

³ Cited in ASIC report 308 *Response to Submissions on CP 172 Review of EDR Proceedings (debt recovery legal proceedings)*, at paragraphs 55-56.

Recommendation

FOS should consider whether further use of the 'adverse inference' power in particular may reduce common types of delay caused by parties. However, we also stress that FOS should not be hasty to use this power where a party delay is caused by disadvantage. FOS should also consider publishing (for example, in The Circular) some case studies on when and how it uses this power.

Delays caused by failures of FOS staff post allocation

The following comments were both made through the online survey.

Current case: Applied to FOS in February 2013. Now October 2013 and they advised yesterday that the current case manager is not going to assist and it needs to be 'allocated' to another case manager, but it won't be during the calendar year 2013 but some time after. This is completely unacceptable. No outcome has been achieved through FOS. I'm not sure why they haven't assisted in a more timely way.

I was lodging a dispute against a broker and also against a financier (the financier was COSL subscribed), and even though I had a very solid complaint against the broker, FOS ummed and ahhed about lodging a dispute against him while there was a dispute about the financier going through COSL (they would have been separate investigations). This went on for EIGHT MONTHS. Both the financier and the broker had acted in breach of legislation. [FOS staff member] kept telling me he was looking at the issue and going to call me back but he never did. Complete failure of process. You're lucky the financier paid out big time for the client through COSL or my clients were thinking of going to the media.

Contributors also have experience of FOS staff creating delays by failing to forward submissions from member parties to the consumer in a timely manner.

Case Study

FOS case managers appear to delay the delivery of their correspondence to consumers or their advocates. For instance, we have had at least one matter where FOS wrote to our office and required a response within the so-called '14 days' when in fact, by the time we received FOS' letters, we had a mere 7 days left to take instructions as well as respond. This shortened time frame then necessitates our writing to FOS and requesting an extension. In our view, this is a rigmarole that wastes time for all concerned.

Case Study

FOS received a settlement agreement from an FSP on 30 Aug 2013. FOS advised our office of this but did not provide the agreement to our office until the afternoon of 12 Sept 2013, despite our many requests by email and telephone right up to 11 Sept 2013. The FSP required that the agreement be executed by our client by 16 Sept 2013. Our office was not aware of this deadline beforehand.

Aside from the tight deadline—caused by FOS's delay—the solicitor working on the file had been out of the office and her 'out of office' automated reply stated that she would not return to work until 18 Sept 2013. The solicitor referred all email senders to send their email messages to our alternate email address. FOS appeared to ignore the reply and advice. Therefore, FOS's email was left unattended to. The deadline of 16 Sept 2013 expired. Our office pleaded with the FSP directly for an extension of time for our client to execute the

agreement.

FOS's lack of attention to the tight deadline and to the solicitor's absence could have prejudiced our client and compromised the outcome.

Case Study

Mrs D, an aged pensioner on a low income agreed to help one of her sons in financial difficulty by taking out a mortgage over her previously unencumbered home. The son organised a broker to arrange the transaction and the deal was that he would pay the loan that was taken out in his mother's name. The son stopped paying and the lender issued a default notice to our client.

CCLC lodged in COSL against the broker and later in FOS against the Lender. The complaint against the lender was on the basis that its conduct was not consistent with responsible lending practices or industry standards, specifically section 76 NCC and section 7 Contracts Review Act, and the Code of Banking Practice. The facts of the matter are complex.

The matter has since progressed very slowly in FOS. At one stage the lender made a counter offer to settle through FOS dated 8 April 2013 which FOS did not pass on until 22 May 2013. The offer was unsuitable and was rejected by the client, but should have been communicated expeditiously to the client.

Response to questions in the Issues Paper

The issues paper invites comments on the impact that an increased volume of disputes may have had on the service provided by FOS.

Before responding to those specific questions, we would make the general point that an increase in the amount of complaints is not a problem in itself—it is only a problem to the extent that it compromises outcomes. We encourage FOS and the reviewers to consider questions of resourcing and process not simply on changes in the numbers of disputes but on consideration of whether FOS is delivering its service adequately.

i. is FOS adequately funded to meet increased complaint volumes?

The stories above of clients waiting up to 12 months for a case to be allocated to a case manager can in our view only be explained by a lack of case managers. The delays described above create detriment for our clients and limit FOS's ability to provide access to justice. If more funding is needed to provide more case management resources, it should be provided.

ii. has increase in volume of disputes created unacceptable delay?

It is not clear to us whether increased volume of disputes is directly causing delays, though this is widely assumed to be the case. Some contributors have reported an increase in the time taken to allocate cases or while a case is in progress. We reiterate our point above that not all delay, however, is due to FOS.

iii. does increased volume of disputes lead to pressure on parties to settle on a basis they are not comfortable with?

Delays will increase the likelihood that applicants will end up with an unsuitable outcome (for example, where delay prompts applicants to drop out of the process) though we couldn't say

definitively that an increased volume of disputes is directly causing this to happen. We reiterate that FOS should consider increasing resources or changing processes to deal with delays whether demand is increasing or not.

Twenty-six financial counsellors reported through the survey that they had had experience of clients dropping out of the FOS process because it took too long.⁴ One respondent commented that:

The time length issue is the main problem. People can't handle not knowing what's going to happen to them for two plus years, and just decide to sell their family houses because of the impact on their mental health. It seems no one is thinking of the heavy impact on clients for how long they have to wait to be assisted.

Problems other than delay may also be leading to dropouts. Contributors argued that FOS's process which presumes complaints have been settled if the applicant does not make contact again may lead clients to unwittingly drop out of the process. This issue has been discussed in greater detail below.

Recommendation

We recommend that FOS survey at least a proportion of complainants that discontinue after registration to confirm the outcome of their matter at IDR, and whether the consumer was satisfied. FOS should publish the results of these surveys to encourage confidence in the registration process.

iv. has increased volume of disputes compromised quality of dispute resolution?

There are mixed views on whether the increased volume of disputes is directly affecting quality. However, an increased caseload does create the risk of poorer outcomes for applicants if:

- it reduces the level of support that FOS staff can provide to applicants. We have concerns that in many cases FOS simply directs applicants to forms and written guidance rather than providing support where it is needed. This will lead to the most vulnerable applicants dropping out of the process (though should not in most cases deter clients who are assisted by a lawyer or financial counsellor); or
- it increases pressure to resolve disputes quickly, and there is no regular process for ensuring that those disputes are still receiving just outcomes.

v. how can FOS better handle its workload while still providing a fair service?

Many contributors and respondents to the online survey felt that FOS had already taken successful steps to better manage its workload which were not compromising quality. However, we also make the following recommendations, based on points we have discussed above:

Recommendation

FOS should consider how to improve the expedited process for cases where the

⁴ This represents around 16 per cent of all financial counsellors responding to the survey and almost 40 per cent of all who reported that their clients dropped out for one reason or another.

consumer will suffer significant detriment due to delay. We are aware that an expedited process is offered to consumers (as discussed above) but it is not clear to us how FOS assesses requests to expedite claims or what type of evidence is required. We suggest that a process such as this designed to assist highly vulnerable consumers will not work if it relies only on the applicant to apply for the expedited process and produce significant amounts of evidence to prove their claim. A policy for how FOS considers these requests should be developed and published online, and if a consumer appears to be in significant detriment, they should automatically be placed in an expedited process or at least encouraged and supported to apply.

Recommendation

FOS should set benchmarks for the time it takes to respond substantively to applications and report on performance. It is not acceptable for cases to wait 12 months before they are allocated to a case manager. We submit that FOS should publicly commit to benchmarks for responding substantively to applications and commit sufficient resources to ensure this target can be met. FOS should report on performance against this benchmark and if it lacks the resources to meet reasonable response times, this should be made clear.

Recommendation

FOS should improve systems for communicating status and timelines of ongoing cases. Feedback indicates that applicants and their advocates are frustrated by the lack of communication regarding the progress of delayed cases. We recommend that FOS consider introducing systems to ensure applicants are kept up to date. Some options could include:

- a requirement to make regular contact with applicants or their advocates to update on the progress of ongoing cases. We note that the General Insurance Code of Practice requires insurers to update customers regularly while a claim is being considered. FOS could consider adopting a similar requirement, though we would caution against a process which results only in uninformative standard form letters being sent at regular intervals.
- a central information point (whether an online portal or a hotline) where an applicant could enter their claim details and access brief information on current status and expected timelines without having to speak to the claims manager. We understand FOS is currently trialling an online portal.
- introducing systems which recognise that some clients will be more adversely affected by delay and so more in need of regular updates.

Recommendation

Reduce incentives for parties to delay. Consider amending paragraph 7.5 of the Terms of Reference to allow FOS to apply monetary penalties to industry parties for unreasonable delay. FOS should also be prepared to eject a member from FOS if they repeatedly fail to meet deadlines and cooperate with the EDR process.

Recommendation

Collect and report data on the impact of delay: FOS should collect and report data which will show the extent to which delay leads to applicants dropping out of the process and give an indication of which applicants may require more support or are more likely to need an expedited process. It is understood that FOS does collect data on delay but it is also important that it is publicly reported and particularly reported to the Consumers Federation of Australia for the information of consumer advocates.

Recommendation

Collect data on whether existing processes to improve efficiency are adversely affecting fairness and effectiveness. Similar to the point above, processes currently in place to improve efficiency should be regularly reviewed to ensure they are not compromising effectiveness or fairness. For example, we are aware that the Energy and Water Ombudsman Victoria commissioned independent 'fair and reasonable' reviews of two of its case handling processes which are designed to improve efficiency.⁵ Ideally, FOS should also publicly release findings of any such reviews, or at least high level findings (whether the processes are meeting requirements, what is being done if not).

TOR 1: Progress made by FOS

Term of Reference 1: The progress made by FOS in implementing appropriate organisational arrangements and improved dispute handling process and procedures under its single Terms of Reference (TOR) in light of the following factors:

- a. formation in 2008 from merger of predecessor schemes**
 - i. Does FOS operate consistently under its single ToR for banking, general insurance and investments and life insurance?**
 - ii. if FOS is not consistent, are those differences an appropriate response to market/dispute differences?**

The three arms of FOS still operate quite differently. This is of some concern given it is now over 4 years after the merge occurred.

The merger provided a great opportunity to implement best practice across the whole of FOS in dispute resolution. It should not matter which arm of FOS the dispute is in, the dispute resolution practice should be very similar. Unfortunately, consumer advocates report ongoing significant differences between the different arms of FOS. This is a poor result for consumers as the process should be predictable and of the same quality across all of FOS.

The main areas of difference include:

⁵ See *EWOV Connect* newsletter, Spring 2013, p10, Accessed 4 October 2013 from http://www.ewov.com.au/__data/assets/pdf_file/0009/9369/Connect-Spring-Issue-2013-.pdf

- 1) decision making
- 2) collecting evidence and communications with the consumer
- 3) dispute resolution techniques

Decision making (where differences are an appropriate response to dispute differences)

A key problem appears to be that while the processes have been changed to parallel one another more closely across the organisation, some of the advantages of the different decision-making models have been lost in the process. One of the perceived advantages of Panel decision-making was often that it was faster. Now consumers have to go through all the steps identified in the earlier section on Delay before the matter is referred to the Panel, eliminating any advantage afforded by faster decision-making once it reaches the Panel. Similarly, a perceived advantage of the Ombudsman model was that the integrated Ombudsman was present to supervise and develop staff at all levels of the process, thereby increasing the quality of the complaint handling and preliminary decision-making at all levels of the organisation. Where panels have been retained, but case managers and other staff have enhanced roles, the quality control and improvement does not flow in the same way, leading to the impression that steps have been added to the process without adding in any way to improving quality and outcomes. More on this is included below under consistency and quality.

Another advantage of the Ombudsman process was that all necessary information was usually elicited from the consumer before the matter went to a decision. While there is some evidence that Case Managers are eliciting more information from consumers before submitting to the Panel, we continue to see Panel decisions that refer to information relevant to the decision not being available. This does not seem to happen with the same frequency in the Banking section where the decision-making and case management are co-located.

Collecting evidence and communications with the consumer

It cannot be stressed enough how important evidence is for consumers in running their dispute in FOS. A concern is that this process seems to vary across the three arms of FOS. It should not vary and should be harmonised. Consumers consistently do not understand how important evidence is to the outcome of the dispute. It is acknowledged that FOS does ask questions and request information from consumers, but this process needs to be improved.

There are two parts of the process that are important:

1. Communicating about evidence and requesting evidence: The FOS letters do not provide clear information about why providing evidence is important. This would assist consumers to understand why they need to provide the evidence. Consumers also need to know that FOS is requesting evidence from the FSP. Often consumers feel like they are being interrogated, worn down and being asked impossible questions. The consumer may feel like FOS is against them and is not being as inquisitorial with the FSP.
2. Gathering evidence: When gathering evidence:
 - the consumer needs to understand why the evidence is required if this is not clear;

- if the evidence can be obtained from the FSP instead of from the consumer then it should be (as the FSP is more likely to understand the request and have documents to hand); and
- the consumer needs to know how to get the evidence and how to get assistance in getting the evidence.

Dispute resolution techniques

It is only recently that conciliation has been introduced into the insurance arm of FOS. This has been an excellent improvement and should be further developed. The concern here is that this development took so long. Consumer advocates are also concerned that conciliation has not been integrated rigorously across the whole of FOS.

The Investments, Life Insurance and Superannuation (**ILIS**) arm is the subject of some criticism by consumer advocates. While recommendations in the Banking section are generally very well reasoned and reflect a good understanding of the law, good industry practice and the evidence, some advocates are less complimentary about the recommendations of ILIS and would in some cases prefer the matter went straight to a panel. The case management process prior to submission to the panel can be lengthy and off-putting, with some case managers appearing to have limited understanding of the arguments proposed. Further, some of the staff appear to have patchy knowledge of the law and good industry practice. One advocate claimed that the recommendation process added at least 12 months to the process without adding value and was more likely to wear complainants down than encourage meritorious disputes to proceed.

Case Study

This was a Dispute about a decision of a life insurer to deny a disability claim and avoid the life insurance policy for non-disclosure pursuant to Section 29(3) of the Insurance Contracts Act 1984.

The Dispute included an argument by the complainant that the insurer could only avoid a policy under Section 29(3) of the Act if it could show that it would not have offered any policy of life insurance, not just the life insurance policy he applied for. This argument was consistent with a Queensland Court of Appeal decision in Schaeffer v Royal & Sun Alliance Limited.

The case officer disagreed with the interpretation of Section 29(3) of the Act and said that the insurer need only establish that it would not have accepted the contract of insurance proposed and not a contract of insurance. No detailed analysis was undertaken of the relevant section of the Act and no reasons given as to why a Court of Appeal decision directly on point should not be accepted as the relevant law or how it could be distinguished in this case.

More extraordinarily, the case manager determined that the Dispute was frivolous, vexatious or lacking in substance and dismissed it pursuant to Rule 5.2(d).

How it could be said that a Dispute that relied upon and was on all fours with a favourable Court of Appeal decision was at best 'lacking in substance' and therefore should not be dealt with by FOS, is incomprehensible. It is one thing for the case manager to disagree with the

interpretation of a statute: it is quite another for a finding that the Dispute has no merit, reasonable prospects of success or was lacking in substance.

Case Study

This was a Dispute about the denial of a claim for a mortgage protection insurance benefit. The complainants applied to increase existing mortgage protection insurance cover. The insurer accepted payment of the premium for the full five year policy period. However, due to an admitted administrative error, the insurer did not process the insurance application in a timely manner and when they did, the male applicant had just been diagnosed with cancer and they denied the application.

The complainants lodged a Dispute with FOS complaining about the rejection of the application for insurance and the entitlement to the benefit. They were not represented in the Dispute.

FOS refused to deal with the Dispute on the basis that it was a complaint about an underwriting decision pursuant to Rule 5.1(f).

However, FOS failed to acknowledge that the Dispute involved assertions that:

- by accepting the complainants' premiums a contract had in fact been completed;
- the insurer's delay in processing the application meant that the denial of cover was not fair in the circumstances;
- the insurer's delay in processing the application meant that the assertion that the interim cover had expired was unfair in the circumstances.

All the above assertions were within jurisdiction and the Dispute should never have been dismissed.

Recommendation

The decision making processes should be reviewed independently and recommendations made to implement a decision making model across the whole of FOS that is tailored to the objectives of the scheme. In doing this review consideration should be given to:

- 1) efficiency of the process; and
- 2) ensuring that the decision making meets quality and consistency benchmarks across the whole of FOS.

Recommendation

Put systems in place to ensure that no case gets to a decision maker (panel or ombudsman) where the consumer was not clear about how and what evidence was required, and no decisions are made where the consumer's dispute fails due to a lack of evidence without the consumer being expressly warned about this possibility.

Consumer advocates commend FOS for its effort to have a consistent approach to code compliance across the three main industry codes in its jurisdiction (Code of Banking Practice, Mutual Banking Code of Practice, and the General Insurance Code of Practice). FOS has one code compliance monitoring body across these separate codes, and it takes a consistent approach to identifying and recording compliance issues.

Consumer advocates underscore the importance of the sharing of information between FOS EDR and FOS Code Compliance. FOS Code Compliance, in its code monitoring role, requires data about actual and potential code breaches in a timely way. Given that consumers themselves are unlikely to fully appreciate the difference between FOS's dispute resolution and code monitoring role, it should not be expected that there would be many complaints of code breaches directed to FOS Code Compliance by consumers. Further, it is appropriate that consumers direct their disputes to FOS EDR, who will be able to provide an outcome to the dispute which FOS Code Compliance is unable to do. For these reasons it is important that there is a close working relationship and that data about potential code breaches is shared—co-locating FOS Code Compliance with FOS EDR should ensure that this information is provided. Consumer groups do not have a strong sense about the relationship between FOS Code Compliance and FOS EDR and would encourage the reviewers to consider whether the relationship is such that information about potential and actual code breaches are being provided to FOS Code Compliance in a timely and responsive way. FOS could also consider about the ways it might be more transparent about this function.

Some ongoing problems include:

1. It is unclear on the website how to make a complaint to Code Compliance. It appears there is one email for the whole of Code Compliance (not a different contact in relation to each code) being info@codecompliance.org.au. This is confusing for consumers.
2. FOS staff are confused about referrals to Code Compliance. CCLC is aware of a number of occasions where consumers have called FOS and the staff were not able to give information on accessing, contacting and complaining to Code Compliance.
3. It remains unclear what Code breach matters actually get referred to the Code Compliance Monitoring Committee by FOS. Consumer advocates often mention breaches of Codes in complaints, yet there is no evidence that these complaints are referred. We have discussed this further and made recommendations on this point below in our response to Term of Reference 3 and Additional Item 3.

b. principles underpinning FOS dispute resolution:

- i. FOS must do what in its opinion is appropriate with a view to resolving disputes in a cooperative, efficient, timely and fair manner.**

In writing this submission consumer advocates have come across many examples of cases that proceed in a cooperative, efficient, timely and fair manner. Below are several case studies to illustrate this trend.

| Case Study

CCLC acted for a prisoner who had received a statement of claim, whilst incarcerated, for possession of his home. His daughter (who was the holder of his Power of Attorney) was residing in the property—they initially came to CCLC because the lender would not recognise the Power of Attorney. His wife and daughter were both in receipt of Centrelink and could not afford the repayments. He had used all his superannuation prior to his incarceration (during the criminal trial) to pay the mortgage. He had a set release date and a plan to either sell or get a job and pay the mortgage. CCLC lodged in FOS and the matter was expedited.

The matter was handled efficiently and quickly. The Case Manager gave some extensions where required to accommodate the difficulty in CCLC obtaining instructions whilst our client was incarcerated. The initial conciliation was aborted due to difficulties in him attending and arranging the phone link up. The conciliation resulted in a positive outcome and our client felt he was treated with dignity and respect.

In the course of dealing with FOS, the initial dispute resolution officer was sometimes a bit bullish in his dealings with the offers we made—often because he misinterpreted what it said. At the conciliation a different conciliator was used as the original one was ill. The second conciliator was excellent and the conciliation was conducted very professionally and efficiently. From lodging to the final settlement being reached, the matter progressed in 3 months. The conciliation took into account the difficult circumstances of my client and I being in separate places, as he was incarcerated at the time and his daughter (and POA) being present with me by telephone.

Case Study

CCLC acted for a young African woman who got caught up in a complicated property scam in Western Sydney.

To pay for her mortgage she incurred significant credit card debt. The mortgage matter was in a protracted dispute in the Supreme Court and she received a statement of claim over the credit card.

CCLC lodged in FOS before the expiry of the statement of claim. The matter progressed to a conciliation conference; the conciliation was scheduled for 5 months after the initial FOS dispute was lodged. The client was looking to reduce the amount and repay it in instalments until the Supreme Court matter finalised. The client was happy with the outcome, the debt was reduced to her actual spend, interest fees and charges refunded and a repayment arrangement taking into account the finalisation of the Supreme Court matter and her employment status (on maternity leave and looking to return to part time employment). The statement of claim was discontinued. The conciliation was quick and efficient.

Case Study

A client of Consumer Action Law Centre entered into two loans with an FSP totalling around \$150,000. At the time of entering into the loans, our client was working only intermittently and was suffering from mental health problems. He alleges he was placed under undue pressure by a relative to take out the loans, using his home as security. The bank did not make appropriate inquiries into the adequacy of our client's income. Eventually he ran out of loan funds to service the loans, and the FSP threatened to repossess his home.

Throughout the process the relevant case managers showed an awareness of the fact that the client's mental illness made him more vulnerable to the pressure applied by his relative to enter the loan and the failures by the FSP to properly assess his capacity to pay. There was also appropriate consideration given to the present vulnerability of the client and his children, for whom he is the sole carer, when seeking a fair outcome.

The settlement reached allowed the client and his children will be able to stay in his home and make affordable repayments on the loan. The total loan amount over the life of the loan was reduced considerably, saving the client around \$100,000.

A financial counsellor commented through the online survey that:

Very professional and courteous staff: understood when I requested extensions and gave me sufficient time to make more submissions

Although there are many positive examples of FOS resolving disputes in a cooperative, efficient, timely and fair manner, there is still some room for improvement in each other these areas. As discussed above, timeliness or delay has been one of consumer advocates' biggest concerns regarding FOS dispute resolutions. As we have discussed this above we will not make those points again here. Similarly there are sections that discuss 'fairness' and 'cooperation' in Term of Reference 2 below.

principles underpinning dispute resolution:

ii. FOS shall proceed with the minimum formality and technicality

Balancing sound legal reasoning and procedural fairness with the need for minimum formality and technicality is a constant challenge for EDR schemes.

In general, consumer advocates are very supportive of the quality of FOS' decision-making. However, there is some concern that communication with consumers is at times overly legalistic. This is especially a problem for unrepresented consumers that are taking a dispute through FOS (for example, insisting that the complainant establish a *cause of action*).

These sentiments are reinforced by this comment by a financial counsellor:

It is also hard for us to get all the documentation we have to FOS, and costly. FOS needs to have mandatory requests to the bank and information sent to FOS should also be sent to the client. We do not know what FOS is actually making the decisions on. We are also concerned about the inequality between a banks resources both legal and administration compared to that of a financial counsellor if they are assisting and also worse if a client is trying to do it alone. It is not supposed to be a legal process and yet bank lawyers do get involved and can obviously look at all the bank paperwork.

Consumer advocates note that we are generally unaware of the experience of unrepresented consumers taking a dispute through FOS, although some feedback is received from clients (often telephone advice clients) who are in the process of trying to use the EDR scheme, or who have already been rejected (file closed or out of jurisdiction) or dropped out.

principles underpinning dispute resolution:

iii. transparent, while also acting in accordance with confidentiality and privacy obligations

Transparency is very important and should be considered as fundamental to FOS's entire decision-making processes. In particular, we believe the following areas need to be improved in terms of transparency:

- a) The FOS process;
 - b) FOS' approach to decisions;
 - c) Early resolution;
 - d) Decisions;
 - e) Website; and
 - f) Systemic issues.
-
- a) The FOS process needs to be clear. Consumers advise that the process can be confusing. It should be independently reviewed and tested with consumers, particularly (as outlined above under the 'delay' section) communication with consumers about FOS's processes. We note that a simpler process (with less steps) would be easier to communicate to users.
 - b) The FOS approach to decisions should be clear. The FOS approach to common complaints should be published in a searchable online document. The bulletins and circulars need to be merged. This is discussed in more detail below.
 - c) Early Resolution. A key transparency issue is early resolution and conciliation, as both of these processes are completely opaque. Consumer advocates believe that more needs to be done to ensure that uninformed consumers aren't accepting unfair offers from FSPs, particularly where the complaint involves a contract type, practice or a member which is known to raise particular problems for consumers. While this would include complaints relating to systemic issues previously identified by FOS, it should not be limited to those matters. For example, this could include the financing of products which are known to be sold using high pressure selling techniques, insurance claims relating to a product which has a particularly high rejection rate, a member which has been recently subject to enforcement action by the regulator or a member which targets its products to more vulnerable, or low income, consumers.

One issue which arises in relation to some of these matters is that the legal issues are complex, and the consumer may be unaware of the outcome to which he or she may be legally entitled. For example, the consumer may be unaware of the fact that a similar contract has previously been found to be unjust or unenforceable, or that particular conduct (for example debt collection practices) might breach legislation. In such cases the consumer's complaint may seek an outcome which is less than he or she may be entitled to under the law.

Consumer advocates regularly receive feedback from clients that without assistance through the conciliation process they would either have felt pressured to accept an

unsuitable outcome because they felt the process was intimidating and rushed. At times there is more than one representative from the FSP at a conciliation and in one case we are aware of there were four FSP representatives. In that case, the clients were aware that the conciliator was trying to keep the conciliation within the two hour preferred time frame and stated that they felt pressured by this deadline.

Consumer advocates are aware that internally FOS has conducted satisfaction surveys of participants regarding early resolution and conciliation. Satisfaction is one aspect, and we recommend that FOS publishes these survey results when the survey process is completed. However, we also believe that FOS should regularly review or publish statistics about outcomes achieved at an early stage resolution. We also think that FOS should review its processes to identify matters early that might not be appropriate for a conciliated resolution or at least require closer oversight (for example, where conciliation involves members who have engaged in unfair conduct in the past, or particular products or practices which are regarded as at high risk of causing detriment).

- d) FOS needs to provide searchable decisions. Consumer advocates often complain about the lack of publicised Ombudsman decisions/recommendations (in the credit and banking area). We have also recommended below that FOS needs a database of decisions (among other things) which can be easily searched by a variety of key words and phrases. FOS's view on different systemic issues should also be contained in a central database and easily searched.
- e) The FOS website needs an overhaul. We understand that this is a project FOS is currently undertaking. It needs much more accessible information about FOS's approach to common issues. Additionally, participants, advocates, members and the general public should be able to access things like historic annual reports in order to research trends.

One consumer advocate commented

The website itself is very 'busy' and not user friendly. Clients are put off by the small font and condensed nature of the information.

As an example of a more transparent website, the UK ombudsman uses simple publications on its website to show consumers and members how it approaches matters.⁶ This helps increase transparency of the entire scheme. In contrast, some of the current FOS guidelines are long and overly detailed. In order to find similar information on the FOS website you need to follow a series of links which end in a PDF document. We encourage FOS to consult with website users in the redevelopment of its website.

- f) Transparency in relation to systemic issues is discussed in detail below in Term of Reference 3. Consumer advocates remain concerned that the systemic issues investigation process for actual complaints remains unclear and unaccountable.
- g)

⁶ <http://www.financial-ombudsman.org.uk/publications/technical.htm>

Recommendation

FOS should review and “consumer test” understanding and transparency of the process for consumers, and publish participant survey results.

Recommendation

Review at least a sample of early resolution settlements to see if they are workable , coherent and fair. If the sampling reveals problems then a regular review of early settlements should be occurring.

Recommendation

FOS should collect data and report on outcomes of disputes that are resolved through negotiation, conciliation or mediation and compare them to outcomes of similar cases resolved by determination and consider whether there are significant differences in outcomes. We understand that FOS currently collects this data but it is not publicly reported.

Recommendation

FOS should review its processes to identify matters early that might not be appropriate for a conciliated resolution or at least require closer oversight (for example, where conciliation involves members who have engaged in unfair conduct in the past, or particular products or practices which are regarded as at high risk of causing detriment).

Recommendation

FOS should publish a complete and searchable online document on the FOS approach to common complaints.

Recommendation

The FOS banking ombudsman should publish recommendations in searchable format.

Recommendation

Overhaul the FOS website to make it more accessible and transparent, as discussed above.

c. introduction of the national credit regime

- i. Has FOS provided sufficient support to new members in this area?**
- ii. Has FOS developed the necessary expertise in this area?**

It is difficult for consumer advocates and financial counsellors to comment on support provided to new members. With regard to expertise in the new credit regime, our impression is that FOS is well versed in the requirements of the new laws, as evidenced by their general handling of these matters and the recent decision in relation to leased household goods and responsible lending.⁷

One issue that has arisen is that FOS still continues to consider responsible lending disputes in the same way as maladministration in the decision to lend disputes. Although the law around these matters shares some similarities there are also a number of significant differences including:

1. detailed regulatory guidance, for example RG209 for responsible lending and only common law guidance on maladministration; and
2. the availability of compensation.

FOS's banking needs to ensure that the new laws are properly integrated into its new process. FOS' form letter correspondence also continues to refer only to maladministration when a complaint has clearly been pleaded as responsible lending. This is annoying and gives the impression that FOS is not aware of the new requirements even though we as regular advocates know that they are. The terminology should match the complaint or complainants have no faith that they are being heard or that FOS is across the latest legal developments

Recommendation

FOS should ensure that staff are trained on distinguishing between maladministration and responsible lending laws

Recommendation

FOS should publish detailed guidance on its approach to responsible lending disputes.

Recommendation

FOS should avoid using standard form correspondence which is poorly matched to the actual complaint

d. introduced compensation caps from 1 January 2012

We contend that there still needs to be a regular review process in place for compensation caps. When the new terms of reference for FOS was created, consumer advocates suggested that compensation caps should be subject to CPI. This has not been adopted, but we believe they should be subject to CPI from 1 January 2012 to ensure that the real value of the compensation cap is maintained.

e. additional jurisdiction over traditional trustee activities

⁷ See the determination in case 266568, 25 February 2013.

As this section is about traditional investment trustees and there have been very few complaints that we are aware of, we have no comments.

f. significant increase in volume of disputes handled

This has been discussed above in the section on delay.

Term of Reference 2: FOS performance against RG 139

An assessment of FOS against the dispute resolution requirements in ASIC's Regulatory Guide 139 including, in particular:

- a. consistent with the need to resolve disputes in a cooperative and fair manner, FOS's efforts to ensure the efficient and timely dealing of disputes given the significant increase in dispute volumes;*
- b. FOS's processes to ensure consistency and high-quality decision making and of dispute resolution outcomes, in accordance with its obligation under the TOR in resolving an applicant's dispute on its merits, to do what in its opinion is fair in all the circumstances, having regard to each of the following:*
 - legal principles;*
 - applicable industry codes or guidance as to practice;*
 - good industry practice; and*
 - previous relevant decisions of FOS or a Predecessor Scheme (although FOS will not be bound by these); and*
- c. identification of any potential areas for improvement*

The section above on delay discusses FOS' efforts to respond to increases in dispute volumes.

FOS has generally performed well against the requirements in RG139. Our comments on areas for improvement appear below.

Accessibility

Accessibility to new migrants and consumers from a non-English speaking background

In our view, FOS will necessarily struggle to make itself accessible to new migrants and people from a non-English speaking background. People in these groups will face considerably more difficulty understanding that they have rights to challenge conduct by FOS members, in being aware of FOS, making an application and navigating the process. Even when non-English speakers are made aware of FOS by an advocate, contributors advise that there can be a challenge in simply explaining what an 'ombudsman' is.

This is all the more problematic given that these groups are also more vulnerable to trader misconduct.

| Case Study

Wyndham legal service assisted a Burmese client with a complaint against a car dealer. The client had arrived in Australia as a refugee and could neither read English nor understand verbal representations made to her in the transaction with the car dealer.

Our client's brother, who understands basic English, initially attended a car dealer and spoke to a representative about our client's intention to purchase a car. A representative at a car dealer verbally represented to the brother that our client could purchase a car for \$15,999 subject to a loan that would span over 36 months. This sale representative did not tell the brother what the interest rate would be but he said to the brother that "I'll give you the best deal".

After talking to the brother, the sale representative then asked the brother to wait for him at the dealership and he went to our client's house and drove our client to the office of the financial services provider. When the sale representative drove our client there, she was brought into a room with a representative of the FSP while the sale representative waited outside.

While in a room, our client was asked to sign the contract without the assistance of an interpreter or anyone who spoke her language. Consequently, the terms of the loan contract were not explained or interpreted to her before she signed.

When our client attended our legal clinic she had been making monthly payments of \$582.24 in the last 34 months. Our client was of the impression that the Loan Contract was for a fixed term of 36 months because this was what the sale representative represented to the brother. It was only recently that our client learned that the Loan Contract was for a fixed term of 60 months.

Our client paid a \$5,000 deposit for purchase of the car after signing the Contract for Sale of Used Motor Vehicle. Hence, our client only required a loan for \$10,999. Furthermore, it was only recently that our client learned that the annual percentage rate for the loan term is fixed at 29.95%. Based on this rate, our client would need to pay a total of \$34,934.4 over 60 months period for what was a \$10,999 loan.

Wyndham Legal Service wrote to the FSP informing them of our client's intention to file a complaint with FOS alleging unjust transaction pursuant to section 76 of the National Credit Code, misleading and unconscionable conduct pursuant to the Australian Consumer Law on the part of the sale representative and that of the FSP. The FSP quickly offered to resolve the matter by way of waiving the remaining payments on the loan, though without admitting any wrongdoing.

While the outcome in this case was a positive one, it is not one the client could have possibly achieved without free legal assistance. We accept that reaching clients such as these will always be challenging, but it is critical that FOS makes efforts to do so. One method could be by taking on specialist caseworkers who are from communities that FOS has difficulty reaching. Footscray Community Legal Centre reports, for example, that taking on an Iranian case worker allowed them to increase the number of advices to the Iranian community tenfold within two years (an increase from 18 cases in the year before the caseworker started to 180 two years after).

Accessibility for other client groups

Further to the above, contributors mentioned that specialist caseworkers may assist other client groups to stay engaged in the process. For example, having a case referred from the Early Dispute Resolution Team to one of the Banking, Finance, General Insurance or ILIS, can be stressful to some clients with mental health issues and prompt dropouts or disengagement, especially if the process to that point has taken a long time. In this case, a specialist mental health caseworker or team would have awareness of the different obstacles to these clients and help maintain engagement, particularly if the applicant is not supported by an advocate.

Other areas where specialist knowledge is helpful includes cases where there is a separation; and communication between parties is limited which can make getting documents or responses difficult. This is an issue where there is a joint debt and an acrimonious split and particularly if there is disclosed or suspected domestic violence. It cannot be overstated how important it is that the handling of such cases is done with appropriate training and sensitivity to the issues involved.

Recommendation

FOS should consider how it can improve accessibility for applicants who face additional barriers to using FOS, particularly newly arrived or non-English speaking consumers. It is likely that this will require specialist caseworkers and a face-to-face capacity.

Access: Jurisdiction to hear complaints after member has commenced legal proceedings

We continue to strongly support the jurisdiction to hear disputes which are lodged after a member has commenced debt recovery proceedings (as required by ASIC RG 139.72-74). Our reasons are discussed in detail in the joint submission to ASIC Consultation Paper 172⁸, but briefly they are that:

- removing the jurisdiction will erode access to justice by referring consumers to a court process which is demonstrated to be inaccessible;
- retaining the jurisdiction is consistent with Government policy on dispute resolution and consumer credit;
- removing the jurisdiction would leave consumers with less access to dispute resolution than before the enactment of the *National Consumer Credit Protection Act 2009* (Cth), which is contrary to the purpose of that Act;
- removing the jurisdiction would allow traders to launch collection proceedings purely to avoid EDR complaints; and
- the jurisdiction is used widely and responsibly by consumers.

Data on accessibility for disadvantaged or vulnerable consumers

RG 139.54 encourages EDR schemes to be 'conscious, when preparing its promotions strategy' that some groups of consumers may be under-represented in their use of the scheme, and that the scheme's services should be actively promoted to those groups.

⁸ The submission can be accessed here: <http://consumeraction.org.au/wp-content/uploads/2012/04/ASIC-Consultation-Paper-172.pdf>

Recommendation

FOS should analyse data on applicant characteristics to identify whether any groups are under-represented.

As well as considering whether FOS' promotion activities could be tailored to these groups, we recommend that FOS consider:

- why these groups are under-represented. For example, is it because they are less likely to be a consumer of products offered by FOS members, or the products they do access lead to less disputes reaching FOS, or because the FOS members they use do not promote EDR as well as they should?
- whether people in these groups are more likely to abandon applications when they do make them, and whether there is any tailored assistance that FOS could offer to assist people in these groups to make applications to FOS?

Accessibility of determinations

Some contributors have raised concerns that lengthy and technically worded determinations make FOS's decisions less accessible to consumers and non-specialist advocates. On the other hand, other contributors support FOS providing detailed determinations where required as it demonstrates that the decision-makers have properly considered the arguments raised and explains how they came to their decision.

We do not want to discourage FOS from providing lengthy determinations where detail is required. However, summaries should be made available to improve accessibility.

Recommendation

Where published determinations are complex or lengthy they should be accompanied by a one page summary covering the key aspects of the determination.

Independence

Maintaining impartiality while also supporting vulnerable complainants is a difficult balance to strike. We suggest FOS look for continual improvements on how it can support advocates who will then assist complainants, and ensuring it collects the right data to identify which clients may need more support.

Assisting advocates

FOS should strive to continually improve the level of support it provides to advocates, for example through training, sharing resources and providing direct points of contact. While this places demands on FOS's resources, it may create efficiencies by ensuring that applicants are

better supported and prepared when they make applications. We go into more detail on FOS's engagement with advocates in our response to Term of Reference 4.

Assisted and unassisted applicants

Recommendation

FOS should collect data comparing the outcomes and experience of applicants who are supported (for example by a solicitor or financial counsellor) to those who are not. We would expect that the supported applicant will have more success, but the comparison could find useful data on what creates problems for unsupported applicants and what could be improved to further level the playing field.

Fairness

The importance of a level playing field

Phil Khoury and Debra Russell's 2011 review of the Credit Ombudsman Service, observed that an EDR scheme should not be narrowly oriented simply towards 'resolving disputes' but should be seen as a part of the broader consumer protection framework.⁹ Khoury and Russell went on to argue that, while an EDR scheme must determine disputes neutrally,

true neutrality in an EDR context is about appropriately 'levelling the playing field' so that consumers are in a position to obtain fair outcomes where they have a dispute with a service provider. It is not advocating for the consumer or for the member, but it is recognising what is required for fairness.¹⁰

This position is consistent (though cast more broadly) with statements at RG 139.101 regarding the need to provide resources to assist applicants to draft their complaints or disputes:

This does not amount to scheme staff advocating for complainants or disputants, and should not jeopardise the impartiality of the complaints resolution process.

We strongly support the notion that fair outcomes can only be achieved in some cases if EDR schemes are willing to intervene to 'level the playing field' by using processes that allow both parties to obtain fair outcomes. Where a consumer is at a disadvantage because they are less capable of bringing their case than their opponent, this would require schemes to offer assistance or use processes which level the playing field. For example, this may involve:

- providing extra assistance to consumers to identify the relevant issues in their complaint;
- resolving disputes by determination rather than by other options like conciliation where power imbalances have more impact; and
- providing education, training and materials for community advocates to help them assist clients to bring cases (FOS does this now).

⁹ Phil Khoury and Debra Russell (May 2012), *Independent Review: Credit Ombudsman Service Limited*, The Navigator Company Pty Ltd, p 13.

¹⁰ At page 13.

Declining to hear complaints because of settlements struck between parties

Contributors have raised concerns about FOS declining to hear complaints:

- if one element of the complaint was settled, even if another element was not; or
- a hardship arrangement previously entered by the parties prevents the consumer seeking hardship in future

In the first example, an applicant makes an application on two grounds, for example that a credit provider failed to respond to a hardship application and that the credit provider did not meet responsible lending requirements. It is the experience of some contributors that FOS will consider the matter resolved if a settlement is reached on the hardship matter—that is, the responsible lending matter remains unresolved. This can lead to:

- relevant issues not being ventilated and possibly systemic issues not being identified; and
- where the irresponsible lending led to the hardship in the first place—that problem not being resolved and leading to further hardship at a later time.

The second example refers to experience with a particular lender who granted hardship variations on the condition that the arrangement was full and final settlement and that borrower could not apply for another hardship variation in future. The experience of one contributor was that FOS declined to hear the complaint because of the existence of the prior settlement.

In both cases, the lender uses a position of power to prevent disputes being settled through FOS, limiting access to and fairness of the forum. We are not aware if these examples are widespread.

Recommendation

FOS should review their internal guidelines for excluding complaints because an agreement has been struck between the parties to ensure that it does not compromise fairness or access to the forum.

Term of Reference 3 and Additional Item 3: Data Collection and Reporting

Term of Reference 3: The adequacy of reporting by FOS to ASIC about general dispute information, systemic issues and serious misconduct

Additional item 3: Whether FOS needs to improve its collection and reporting of complaints data under para 12.1 and 12.2 of the FOS ToR, and if so, how.

The importance of identifying, reporting and responding to systemic issues

Resolving individual disputes is obviously central to the role of an EDR scheme, but over the long term we believe it is just as important that schemes identify and seek to resolve systemic issues.

Not every consumer who has a problem with a FOS member will be able to bring that dispute to FOS, or even to the member's IDR process.¹¹ We accept that in some of these cases, complaints will not be made because the individual considers them to be unsubstantial. But there are undoubtedly others that have not been brought because the consumer is not aware that there are free avenues through IDR and EDR to make complaints. Others may begin making a complaint but drop out of the process because it is too difficult and they cannot access free support.

There will be others again who have a substantial complaint but will not make a complaint because they are in hardship and have too many other problems requiring attention. Someone who is, for example, going through a family breakup, or has a seriously ill family member or is about to lose their home is simply not in a position to make a complaint about even serious misconduct by a trader.

A focus on systemic issues ensures that problems are addressed for all consumers, not only those who make complaints. More importantly, responding to systemic issues helps to solve problems before they occur by improving the way that industry relates to its customers. . In our view the best way for FOS to achieve managing caseloads without compromising quality of service is to help prevent disputes occurring in the first place. FOS' access to large amounts of complaint data and its ability to influence industry practice means it is better suited than almost any other organisation to do so.

Reporting and Transparency

On the whole, FOS is to be commended on its public discussion of systemic issues. We particularly welcome that FOS includes a systemic issues update each quarter (through the Circular) rather than merely meeting the RG 139 minimum standard of once every 12 months.

We suggest three ways to improve current reporting:

- holding regular reviews of process for dealing with systemic issues;
- engaging better with those who report systemic issues; and
- consider identifying members who engage in serious or systemic misconduct.

Regular review of process

It is critical that systemic issues have some transparency and accountability while preserving the integrity of the process. Currently, the systemic issues process is conducted in a small department in FOS. The affected consumer knows nothing about the investigation, and the

¹¹ For example, In 2006, Consumer Affairs Victoria (CAV) reported that approximately four per cent of revealed consumer detriment in Victoria is reported to it and smaller percentages are reported to other agencies, such as ombudsman. Consumer Affairs Victoria, *Consumer detriment in Victoria: a survey of its nature, costs and implications*, October 2006.

outcomes are not reported. If an outcome is reported and published in the annual report, there has been no independent review of the negotiated outcome to ensure it is fair and reasonable in the circumstances.

It is acknowledged that this is a complex area but we contend that it is essential that FOS introduces some transparency and accountability to systemic issues investigations.

Recommendation

The FOS systemic issue process should be reviewed with consultation with relevant stakeholders (including ASIC) to introduce measures to ensure some accountability and transparency.

Engaging with people who report systemic issues

In our experience FOS needs to improve communication with advocates who report serious or systemic misconduct to FOS for consideration. Contributors report that when they report systemic issues to FOS they receive no feedback or even acknowledgement of the communication. This is counter-productive. Providing feedback encourages advocates to continue to provide useful intelligence on industry problems—FOS would not only be encouraging further reporting but would give advocates information on which issues FOS considered to be significant. More broadly it would maintain faith in the ability of FOS to respond to serious or systemic issues.

Recommendation

Subject to the review above we suggest that FOS procedure should require that all reports of potential serious and systemic issues are acknowledged and feedback is provided to update the parties making the report on FOS' view of the problem and what action, if any, it intends to take.

Recommendation

All possible systemic breaches reported to FOS should be referred to the FOS Code Compliance. If FOS does not wish to refer the breach, it should advise the person making the original report how to do so themselves.

Recommendation

FOS should invite comment from parties reporting serious or systemic misconduct on whether its proposed response is appropriate, and be open to consider different responses. We accept that FOS is required already to report this information to ASIC and that it may not be appropriate to report it publicly. However, engaging with those who made the original complaint would in our view improve the process.

Recommendation

FOS should publicly report on referrals of Code breaches to FOS Code Compliance.

Consider identifying members engaged in systemic or serious breaches

While there were mixed views between contributors on whether FOS should be required to name members, a number of arguments were put in favour:

- FOS already reports the number of complaints made against each member and the results of those complaints in its comparative tables. It is consistent that FOS would also list whether those members had engaged in serious or systemic misconduct and the outcome;
- Consumers should be given the opportunity to know if particular members have engaged in systemic or serious misconduct when they are choosing between providers.
- The public reporting of a comprehensive response to resolve a systemic issue could be good public relations for the member in some circumstances.
- Knowing that systemic issues identified by FOS will be reported gives an added incentive to FSPs to resolve systemic issues as quickly as possible (prior to FOS identification).

On the other hand, concerns were raised that it may make it more difficult for consumers or advocates to negotiate with members with the threat of public reporting.

Recommendation

FOS should consider publicly naming members who have engaged in serious or systemic misconduct.

TOR 4: FOS' engagement

Term of Reference 4: The level of engagement by FOS with Financial Services Providers, consumers and relevant professional and community organisations.

a. How well does FOS promote awareness of itself?

Overall, consumer advocates contend that if a consumer does not have a dispute with a financial services provider, then they should not need specific awareness of FOS. Instead consumers should be able to find information about FOS when they need it. The requirement that EDR details be included on credit default notices has been extremely effective at raising awareness of EDR exactly when it is required. The General Insurance Code of Practice also requires notification about EDR at important points in their consumer interaction, including when rejecting a claim. This type of targeted promotion should be expanded to all other industry areas where opportunities for timely notification are available.

A particular problem appears to exist in relation to financial planning matters. When things go wrong potential complainants may have trouble contacting the relevant planner at all, let alone getting timely notification of the availability of FOS.

Training of key referral points in the community is also important. There has been at least some training for financial counsellors from FOS (for example in Victoria at FCRC conference, at diploma level and consultation regarding online training), but we query whether this outreach is getting out as far as it needs to. For example, FOS was not present at the Financial Counsellors of NSW (FCAN) conference this past spring while other dispute resolution schemes were.

The experience of some advocates is that new financial counsellors (and even some experienced financial counsellors) don't have a clear sense about how FOS operates, and the range of disputes they can consider. Consumer advocates from both South Australia and Queensland commented that more training is needed in those states. Other advocates have commented that some workers have completed the FOS online learning sessions and found them useful. The general consensus is that FOS's interaction and engagement with financial counsellors has to be ongoing. FCA reports that 57 per cent of financial counsellors have worked in the sector for five years or less and knowledge of EDR among new financial counsellors can be patchy. It is important that FOS is continually engaging with this sector.

After consulting with other consumer representatives, we submit that FOS currently engages well with specialist organisations (like CCLC and Consumer Action), but they are less engaged with generalist legal centres and rural community organisations. We recognize that FOS has limited resources and is not able to engage with every community organisation in Australia, but there is concern that FOS does not do enough to promote itself among vulnerable communities like new migrants. Promotional materials in other languages would be very useful for advocates working with new migrants. Additionally, a simpler explanation of what FOS does that are less wordy and don't rely on words like 'ombudsman' would do a lot to raise awareness of FOS's services. Consumer advocates commented repeatedly that the word 'ombudsman' is not well-understood in all communities, especially among non-western migrants. This is also discussed above in TOR 2 in regards to 'accessibility'.

More important than promoting itself in a general sense is perhaps making sure that complainants who have located FOS are supported to remain in the process. Some clients who have been to EDR independently report that it was pointless because they did not understand how the process worked or could not easily comply with the requests for further information or documents.

Reporting

A concern for consumer advocates is that reporting from the Board of FOS is very minimal (if non-existent). Consumer advocates are very interested in the strategic direction of FOS and would like to hear reports from the consumer directors. None of this reporting occurs. Previously board reports were sent out via the Consumers' Federation of Australia, but this has stopped. Also previously, consumer directors reported on their actions on the Board of FOS, but this has not occurred in some years.

Consumer advocates should know what is happening in the governance of FOS. It is conceded that some parts of the business of the FOS Board should remain confidential. However, it is hard to explain the role of consumer directors when there is no reporting. Good reporting means that consumer advocates (and the public) can be well informed on the actions of FOS. This is a key part of transparency.

Recommendation

FOS should try to send a representative, or at least promotional materials to all relevant peak body annual conferences, including annual conferences for financial counsellors and community legal centres. Continuous engagement with this sector is important.

Recommendation

FOS should publish simple promotional materials (in several languages) that explain dispute resolution in very basic terms. Such materials should be developed with diverse communities and unrepresented EDR participants in mind.

Recommendation

FOS should provide board reports to consumer advocates (and industry) after each board meeting.

Recommendation

Consumer directors of FOS should provide reports on the FOS Board activities through the Consumers' Federation of Australia. The reports should include information on major activities, ongoing issues and the overall objectives of the consumer directors.

b. How well does FOS educate financial service providers about their responsibilities?

FOS should ensure that FSPs are familiar with the legislative requirements of responsible lending and other relevant legislation. We believe such an education would help to circumvent the merry-go-round approach that some FSPs have to hardship requests. For example, some banks agree to grant a hardship variation for three months but then require the client to pay back all arrears outstanding—which is almost certain to lead to further hardship.

Nonetheless, consumer advocates recognise that FOS is not a regulator, and is not responsible for ensuring the compliance of its members. Such an approach might cause a loss of confidence by industry members. We also recognise that FOS is currently struggling to maintain its core dispute resolution activities with its current resources, and would be hard pressed to actively monitor FSP compliance with their responsibilities to consumers.

c. How well does FOS promote understanding of FOS processes?

Consumer advocates strongly contend that FOS needs to do more to promote understanding of the FOS processes. We have commented on this extensively above in Term of Reference 1(b).

FOS's Terms of Reference (for example time and jurisdictional limits) are hard to understand for unrepresented applicants. This prevents unrepresented applicants from getting into FOS or having the necessary knowledge to dispute jurisdiction or to present their complaint in the most favourable light. As discussed in the self-promotion section above, FOS should consider whether there is a need for plain English guides for unrepresented applicants and non-specialist community workers.

FOS' brochure on the dispute resolution process looks like a clear process but most consumer advocates report a process that is a bit different including multiple trips to IDR.

More could be done to ensure that referrals are made to other EDR schemes where appropriate. For example, a solicitor at CCLC commented that he had one client who had a dispute with an FSP who was not a member of FOS but was a member of another EDR scheme. The client was told that FOS had no jurisdiction but was not referred to another EDR scheme. It wasn't until the client was referred to CCLC many months later that CCLC was able to refer him to the correct EDR scheme. He had spent the intervening months frustrated and unaware of how to escalate the dispute. It would have been much better if a warm referral had been made so that his dispute could have been referred directly to the relevant EDR scheme.

Others have found that speaking with FOS representatives regarding cases prior to lodging complaints always gives good direction to deal directly with creditor when in doubt. This often has prevented having to lodge any complaint.

Recommendation

FOS' brochure which explains the dispute resolution process needs to be improved to match the actual FOS process

Recommendation

A seamless process should be developed to refer applicants between EDR schemes

d. How well does FOS provide information about outcomes in relation to commonly occurring complaints?

Consumer advocates welcome the FOS newsletter which already includes one common dispute each edition. This is a simple way to provide information about outcomes in relation to commonly occurring complaints at FOS.

As stated above, it is essential that common approaches to complaints should be merged into one single searchable document on the FOS website. Specific measures should be introduced to ensure more banking ombudsman decisions are published.

Additional item 1: The coverage of the FOS scheme

a. effectiveness of the \$3,000 compensation cap for third party insurance: paragraph 4.2(vi) of the FOS TOR

Consumer advocates submit that the \$3000 compensation cap for third party insurance claims is too low, and is a concern among caseworkers.

Appendix C reproduces a study from carsguide.com.au which showed that the average cost of car repairs for the most minor accidents in a small car can be well above \$3,000. Of nine small cars considered, only one could be repaired with less than \$3,000 after a front or rear bumper collision. The rest would cost anywhere between \$6,000-14,000.¹² This demonstrates that the current cap is completely unrealistic and would only cover car accidents in a very small minority of situations.

Recommendation

The FOS compensation cap should be increased to \$15,000

b. extent to which FOS adequately covers small business complaints given exclusions in the TOR: paragraph 4.3 and 20.1 of the FOS ToR

According to the online survey of financial counsellors, over 50 per cent of survey respondents have small business clients, but very few have assisted any to make a claim through FOS. Most of those financial counsellors who have small business clients but have never assisted them through FOS indicated that they have not needed to use FOS because disputes of their small business clients were settled in other ways. However it is of some concern is that more than one in five financial counsellors that have business clients did not know that FOS handled small business complaints. FOS should consider better promoting this service among financial counsellors.

c. the use and operation of the exceptional circumstances discretion regarding time limits: paragraph 6.2 of the FOS ToR

There is a lack of data on how often people request the time limit to be extended and how FOS responds. Very few financial counsellors reported that they had clients excluded on the basis of missing time limits.

¹² Source: Vlad Manu (26 July 2012) 'Small bingle can cost 70 per cent of car's price', *Carsguide.com.au*. http://www.carsguide.com.au/news-and-reviews/car-news/small_bingle_can_cost_70_per_cent_of_cars_price

There are a number of areas where time limits tend to expire and it will often be in relation to loans that are refinanced regularly. An example of this is small amount credit contracts. The consumer only has 2 years from the date the contract ends to lodge in FOS. CCLC finds that consumers are often excluded from FOS due to the refinanced loan occurring more than 2 years ago. FOS needs to have systems in place to ensure the consumer is aware that they can apply for the exceptional circumstances exemption in those cases. FOS should also break down their “out of jurisdiction” data to indicate whether matters are rejected because they are out of time.

Recommendation

FOS should ensure that consumers rejected on the basis of time limits are informed about the exceptional circumstances possibility

Recommendation

FOS should develop and publish guidelines on the application of exceptional circumstances discretion.

Additional item 2: \$3,000 consequential loss cap

The extent to which the \$3,000 consequential loss cap restricts complainants from receiving appropriate awards under paragraph 9.3(a) and (c) of the TOR

Consumer advocates strongly contend that the \$3,000 cap is too low and unnecessarily restricts appropriate awards. It is acknowledged that the drafting of the section means that it is arguable that the cap applies to each loss and accordingly it could be argued that greater compensation is payable. However, this is not clear to either FSPs or consumers.

Case Study

A consumer had made a claim with a major insurance company. The Insurance Law Service was acting for the consumer. Despite the Insurance Law Service clearly acting for the consumer, the insurance company repeatedly harassed the consumer. A complaint was made. The insurance company then harassed the consumer again. Arguably this ongoing harassment is just one arguable \$3000 cap compensation. The insurance company noted this in the response that one claim for compensation could be made. Accordingly, the insurance company could continue to harass the consumer with the knowledge that the total amount they could be charged was \$3000.

Case Study

I spoke to a person on our insurance advice line. He told me that he had experienced significant damage to his house.

The caller was told by the insurer that it was safe for his family to stay in the house while the house was being repaired. He queried their assessment but they insisted it was safe and

refused to pay for caller and his family to stay elsewhere. The repairs were delayed. The caller believed this was the insurer's fault.

Over the following months the caller's family got sick. The insurer did another inspection of the premises and determined that it wasn't safe for them to be in there and it hadn't been safe since the damage occurred many months before. The insurer then put them into accommodation.

They acted quickly to settle the claim after that but the caller was yet to accept and he wanted to know what his rights were to seek compensation for the losses of him and his family. I advised that he could seek consequential and non financial losses up to \$3000. He felt this was insufficient as his losses amounted to a lot more than that. I advised about court action and the risk of costs. He felt that going to court was his only option.

Financial counsellors through the online survey made similar remarks

When a FOS application goes over a long period of time I think the amount should be increased especially if the bank is causing the delays. Also if the financial loss is great e.g. \$100,000, \$3,000 is not enough but the clients usually go through FOS because they can not afford lawyers and a court case. Non financial loss should look at more closely how it has affected the client. The pressure it puts on relationships, marriage, children, the clients ability to cope with every day life while they are being held in limbo all need to be taken into consideration. We find people are close to break ups if they don't break up and children really suffered.

Often the consequential or non-financial loss suffered by a client is significantly higher than \$3,000.

I believe that 3k is a minimal amount when taking into account the detrimental effects suffered by our clients.

A dispute lasting for 3 years of which nearly two years at FOS awaiting a decision, then when a decision was made and all loan papers had to be rewritten the Bank in question sent the wrong paperwork three times. The waiting caused anguish stress and anxiety affected the health of my client.

\$10,000 to bring it in line with similar (but not identical) state/territory laws seems appropriate. non financial loss can frequently be more than \$3000 particularly where the client has an exacerbation of a mental health problem due to the stress of the processes involved ; hence return to work is protracted; the need to purchase other services to manage the illness etc

Recommendation

The \$3000 consequential cost cap should be removed from the FOS Terms of Reference. FOS should be able to award compensation as it sees fit given the circumstances and overall caps.

Additional issue: The registration process with FOS pre 45 days and IDR. The registration process

Prior to the merger in 2008 of the three schemes, the banking arm (being FOS) had a clear process in place of registering all disputes. This meant that if a consumer complained to FOS the dispute was registered and sent back to the FSP's IDR for consideration regardless of whether the consumer had been through the FSP's IDR process. This process was modelled on the process of the UK Financial Services Ombudsman.

This process is arguably best practice policy for access to EDR. It has a number of benefits for consumers:

1. they get directed to the high level IDR of the FSP;
2. they are assured their dispute will be considered;
3. they cannot drop out of the process easily;
4. It measures effectiveness of IDR processes; an
5. It does not require the consumer to understand the intricacies of RG165 and the varying days for IDR.

The Credit Ombudsman Service continues to use this process.

After the merger FOS changed this process without any consultation of consumer advocates. The change is a significant step back for access to EDR for consumers. FOS changed the process so that if a consumer indicated they had not raised their complaint with the FSP, it was referred back to the FSP for IDR but consumers would receive a letter stating that they now had to respond by a certain date (if the dispute was not resolved) to remain in FOS. If the consumer failed to respond by that date then they dropped out of FOS and FOS closed its file..

For example, FOS' standard reply when an applicant registers a complaint notes that

You will need to contact us again and we will progress your dispute if:

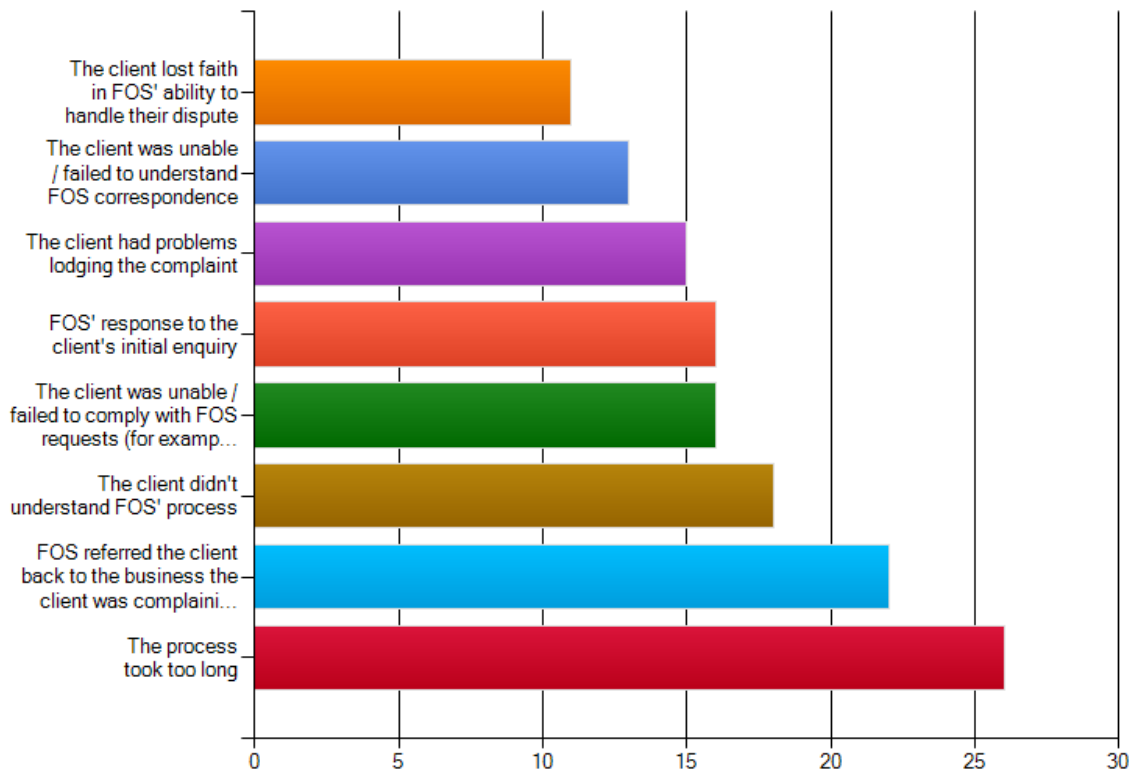
- you receive a final response in writing from [FSP] and this does not resolve the dispute, or
- you do not receive a response within 45 days of the date that you first made a complaint.

...

If we do not hear from you after [specific date], we will assume that your dispute has been resolved. If you want to progress your dispute after [specific date], please contact us.

We are concerned that this kind of approach—that is, that applicants are effectively required to apply twice before FOS considers their complaint—will lead to some applicants dropping out of the process. For example, 16 financial counsellors indicated through the online survey that clients had dropped out of the FOS process because of 'FOS' response to the client's initial inquiry' and 13 experienced dropouts because 'the client was unable / failed to understand FOS correspondence'.

Have you had clients who were excluded from FOS, or dropped out of making a claim to FOS, because of the following?



The following comments were also made through the online survey:

It appears that at the first level, FOS employees eagerly look for ways to reject a complaint. At the first level, FOS employees seem to be somewhat hostile to complainants and are eager to encourage them into inappropriate settlement agreements and tell complainants that their complaints will not fit with the FOS's Terms of Reference. Once you get past this stage, and deal with a more senior investigator, however, complainants are treated very well. The difference in attitude and service between the first and second stage should be addressed, as people with valid complaints are being discouraged from pursuing them at the first stage.

Rather than consider action after a financial counsellor has endeavoured to negotiate a dispute on behalf of a client without success, The FOS requires that the Consumer recommence negotiation with the financial institution and if then unsuccessful will intervene. Whereas it would be more appropriate too intervene when the consumer has exhausted all their avenues to rectify the dispute.

We do note however that there were many other comments from financial counsellors praising the helpfulness of FOS staff.

I often call FOS with general enquiries prior to making claims - the staffs are always helpful and provide relevant and useful information and direction.

[FOS] staff really do care and help out when needed

Have found speaking with FOS reps regarding cases prior to lodging complaints always gives good direction to deal directly with creditor when in doubt. This often has prevented having to lodge any complaint.

A client had a complex case against a financial adviser. FOS was excellent and provided as much assistance as they were able to. I could always contact them about the case and met with very professional help.

We accept that FOS has limited resources and cannot follow up every discontinued matter. However FOS should acknowledge that the way it communicates with applicants and the practice of requiring applicants to make contact a second time to continue the dispute may lead to vulnerable applicants dropping out of the process.

To add further difficulty for consumers, the FOS dispute form requires a date the consumer raised the dispute with the FSP. Most consumers would take this to mean that the dispute in IDR must have been raised in writing. This is clearly incorrect pursuant to RG165. So if the consumer cannot come up with a date they end up in a FOS registration pre IDR process even if they have already been through IDR.

The FOS dispute form does not make it clear that the dispute can be raised with anyone in the FSP. If a response is received there is no need to wait 45 days. None of this is clear. The consumer would be confused. More importantly, this process is setting up consumers to go through IDR twice.

Access is a key right for consumers. The current FOS registration process disadvantages consumers and their access to FOS. It makes it difficult to remain in FOS. It makes many consumers do IDR twice. This also sets a poor standard on access to IDR as consumers are being misled into believing that IDR is a particular person or department in an FSP when this is inconsistent with RG165.

Recommendation

All major changes to FOS processes must be the subject of consultation.

Recommendation

The registration process should be amended so that it is simple for consumers who have been referred back to IDR to come back to FOS should their dispute not be resolved. At the very least, FOS should survey a proportion of consumers who have been referred back to IDR who do not return to FOS to determine whether the complaint has been resolved or the consumer discontinued or dropped out of the complaint process.

Recommendation

The FOS dispute form is changed to remove the date the dispute was raised and instead a prominent box is included to tick that the consumer has expressed their dissatisfaction to the FSP. A side box can be included to give estimated date details.

Additional issue: Credit Repair and other advocates assisting consumers for a fee

In recent years, consumer advocates have noticed the dramatic increase of businesses that consumer advocates describe as predatory quasi-financial services. These businesses have found profitable means to exploit consumers going through financial difficulty by offering services that at best include outcomes that could have been achieved for free from an ombudsman or financial counsellor, and at worst actively cause additional hardship and consumer detriment. These services include for example, credit repair, debt negotiation services and paid claims agents.

We are particularly concerned about these services abusing the EDR processes to the detriment of the scheme, their members and ultimately consumers. They are hurting consumers in the short term in many cases by charging for services the consumer could obtain for free – especially when those consumers are in no position to afford those services because they cannot pay their existing creditors. In the long term they are also hurting consumers by adding additional pressure to complaint numbers and compromising the integrity of the EDR process with spurious claims, pressure that threaten to undermine one of the most important consumer protections mechanisms available for consumers. The original intention of EDR is that it is accessible without the need for a lawyer or advocate. While we are the first to argue that disadvantaged and vulnerable consumers need the support of community lawyers and financial counsellors to run their cases, non-for-profit services have no motivation to run cases without merit. We do not profit from doing so. Lawyers and financial counsellors also have professional and ethical obligations and accountability mechanisms that these other advocates do not.

Recommendation

FOS should restrict access by paid advocates to exceptional circumstances except where those advocates are lawyers acting in the normal course of their practice or other advocate approved by FOS. Financial counsellors, family and friends who are not paid should not be affected. At the very least FOS should examine its policies and procedures to address the threat posed by the growth in the paid advocacy sector.

Conclusion

We would be pleased to discuss further if you require further information. If you have any questions about this submission please contact Gerard Brody (Chief Executive Officer, Consumer Action Law Centre, gerard@consumeraction.org.au; 03 9670 5088) or Karen Cox (Coordinator, CCLC, Karen.Cox@cclcnsw.org.au; 02 8204 1340).

Appendix A: About the Contributors

Care Inc. Financial Counselling Service & the Consumer Law Centre of the ACT

Care Inc. Financial Counselling Service (Care) has been the main provider of financial counselling and related services for low to moderate income and vulnerable consumers in the ACT since 1983. Care's core service activities include the provision of information, financial counselling casework and advocacy for consumers experiencing problems with credit and debt. Care also has a Community Development and Education program, makes policy comment on issues of importance to its client group and has operated the ACT's first No Interest Loan Scheme since 1997. In late 2002, Care was selected as the host agency for the Consumer Law Centre of the ACT (CLC). The CLC was officially opened in January 2003 and offers a range of legal services including information, representation and litigation in relation to consumer law issues. In addition to casework, Care and the CLC advocate on behalf of the ACT's consumers, providing policy comments on issues of significance to its client group and striving to improve legal protection and awareness of consumer rights in the ACT.

Caxton Legal Centre

Caxton Legal Centre is an independent, non-profit community organisation providing free legal advice, social work services, information and referrals to low income and disadvantaged people. Caxton operates a wide range of programs including the Seniors Legal and Support Service and the Consumer Law Service.

CHOICE

CHOICE exists to unlock the power of consumers. Our vision is for Australians to be the most savvy and active consumers in the world.

As a social enterprise we do this by providing clear information, advice and support on consumer goods and services; by taking action with consumers against bad practice wherever it may exist; and by fearlessly speaking out to promote consumers' interests – ensuring the consumer voice is heard clearly, loudly and cogently in corporations and in governments.

Consumer Action Law Centre

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Consumer Credit Legal Centre

We are a community legal centre that specialises in helping consumer's understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial services and we advocate for law reform and government policy development that benefits consumers in these areas.

Consumer Credit Legal Service (WA)

Consumer Credit Legal Service (WA) Inc. (CCLSWA) is a not-for-profit charitable organisation which provides legal advice and representation to consumers in WA in the areas of credit, banking and finance. CCLSWA also takes an active role in community legal education, law reform and policy issues affecting consumers.

CCLSWA is active in community legal education. Through the use of the media, seminars and publications, we aim to raise general public awareness of consumer rights in the area of credit, banking and financial services.

CCLSWA provides a consumer voice in Western Australia in relation to policy issues and proposed reforms of Western Australian legislation, and nationally on issues such as reforms to the National Consumer Credit Code. Other key policy activities are directed at lobbying for changes to unfair industry practices. In such policy activities, CCLSWA aims to work with other consumer groups to present a consolidated consumer voice.

COTA Australia

COTA Australia is the national policy arm of the eight State and Territory Councils on the Ageing (COTA) in ACT, NSW, Northern Territory, Queensland, South Australia, Tasmania, Victoria and Western Australia. COTA Australia has a focus on national policy issues from the perspective of older people as citizens and consumers and seeks to promote, improve and protect the rights of all older Australians; promote and protect their interests; and promote effective responses to their needs.

Financial and Consumer Rights Council

The Financial and Consumer Rights Council Inc (FCRC) is the peak body for Financial Counsellors in Victoria. The FCRC actively supports Financial Counsellors by promoting the needs of those experiencing financial hardship. We provide resources and support to financial counsellors and the wider community. We work with government, the banking, utilities, debt collection and with many other sectors and organisations that impact upon those who do it tougher.

Footscray Community Legal Centre

Footscray Community Legal Centre and Financial Counselling Service is a non-profit, community managed incorporated association. The Centre has a Legal Service and a Financial Counselling Service. Our purpose is to address systemic injustice by providing free legal and financial counselling services on an individual level and more broadly through community education, law reform and advocacy. We assist people who live, work or study in the City or Maribyrnong. Our service gives priority to those who cannot afford a private lawyer and/or do not qualify for Legal Aid.

Financial Counselling Australia

Financial Counselling Australia (FCA) is the peak body for financial counsellors in Australia. FCA's members are each of the State and Territory financial counselling associations in Australia. Financial counsellors assist consumers in financial difficulty. They work in community organisations and their services are free, independent and confidential. There are over 900 financial counsellors in Australia. Each year, financial counsellors assist many consumers to

pursue disputes through FOS and are well placed to comment on the organisation's performance.

Uniting Communities (SA)

Uniting Communities (SA) is a not-for-profit organisation providing vital services to individuals, families and communities across South Australia, through more than 90 community service programs. Financial and Legal services provided include; financial counselling, Central Community Legal Service, NILS (No Interest Loans Scheme) and energy assistance services.

Queensland Association of Independent Legal Services Inc

Queensland Association of Independent Legal Services Inc (**QAILS**) is the peak body representing funded and unfunded community legal centres (**CLCs**) across Queensland. CLCs are independently operating not-for-profit, community-based organisations that provide free legal services to the public, focusing on the needs of people experiencing disadvantage and marginalisation.

Redfern Legal Centre

Redfern Legal Centre (RLC) is an independent, non-profit, community-based legal organisation with a prominent profile locally and across NSW.

RLC has a particular focus on human rights and social justice. Our specialist areas of work are domestic violence, tenancy, credit and debt, employment, discrimination and complaints about police and other governmental agencies. By working collaboratively with keypartners, RLC specialist lawyers and advocates provide free advice, conductcase work, deliver community legal education and write publications and submissions. RLC works towards reforming our legal system for the benefit of the community.

RLC identifies economic rights as important in the attainment of a just society. RLC has long recognised that, without theability to exercise their economic rights, people are unable to maintain other rights. Economic rights are essential to effective and productive participation in society, including keeping families together, safe housing, jobs, and freedom. For this reason, RLC has continued to emphasise casework delivery topeople in relation to banking, credit and debt problems. RLC provides specialist credit and debt face-to-face and telephone advice services.

RLC also provides a support service to financial counsellors in NSW, whereby financial counsellors are able to call or email our credit and debt solicitors to obtain legal information and assistance as they need it.

Appendix B: Glossary of acronyms and abbreviations

ASIC	Australian Securities and Investments Commission
ACCC	Australian Competition and Consumer Commission
CALC	Consumer Action Law Centre
CCLC	Consumer Credit Legal Centre (NSW)
CFA	Consumers Federation of Australia
CLC	Community Legal Centre
COSL	Credit Ombudsman
CP or C/P	Credit Provider
EDR	External Dispute Resolution
FC	Financial Counsellor
FSP	Financial Services Provider
FCA	Financial Counsellors of Australia
FCAN	Financial Counsellors' Association of NSW
FOS	Financial Ombudsman Service
ICA	Insurance Council of Australia
IDR	Internal Dispute Resolution
ILIS	Investment, Life Insurance and Superannuation
ILS	Insurance Law Service
LC	Local Court
POA	Power of Attorney
RG	Regulatory Guide (from ASIC)
TIO	Telecoms Industry Ombudsman
TOR	Term of Reference

Appendix C: Cost of small car front and rear bumper collision repairs¹³

Small car front and rear bumper collision tests results			
Type of vehicle	Front and rear bumper repair costs	Repair costs as percentage of purchase price	Vehicle recommended retail price
Holden Barina 5 door hatch - automatic	\$2,574	14.3%	From \$17,990
Nissan Micra ST-L 5 door hatch - automatic	\$6,056	35.6%	From \$16,990
Ford Fiesta LX 5 door hatch - automatic	\$8,850	42.2%	From \$20,990
Suzuki Swift GL 5 door hatch - automatic	\$8,929	48.6%	From \$18,390
VW Polo 77TSI Comfortline 5 door hatch – automatic	\$11,037	51.4%	From \$21,490
Hyundai i20 Active 3 door hatch - automatic	\$9,031	53.2%	From \$16,990
Mazda2 Maxx 5 door hatch - automatic	\$11,320	58.5%	From \$19,340
Honda Jazz VTi 5 door hatch - automatic	\$13,754	69.5%	From \$19,790
Toyota Yaris YRS 5 door hatch - automatic	\$13,440	70.8%	From \$17,990

¹³ Source: Vlad Manu (26 July 2012) 'Small bingle can cost 70 per cent of car's price', *Carsguide.com.au*. http://www.carsguide.com.au/news-and-reviews/car-news/small_bingle_can_cost_70_per_cent_of_cars_price