DISPUTE ASSIST

7 October 2016

EDR Review Secretariat
Financial System Division
Markets Group
The Treasury
Langton Crescent
PARKES ACT 2600
BY EMAIL: EDRreview@treasury.gov.au

Dear Professor Ramsay,

EXTERNAL DISPUTE RESOLUTION REVIEW SUBMISSION

Thank you for the opportunity to make a submission.

By way of background, Dispute Assist has provided dispute resolution services to thousands of consumers with bank disputes Australia wide over the last 15 years. We deal direct with the banks and or with the Financial Ombudsman Service (FOS) and the Credit and Investments Ombudsman (CIO) and provide a fee for service. Many of our clients are aware of FOS when they engage us and many already have disputes lodged with FOS and need help in order to deal with their dispute. Some clients want to handle the matter themselves but want to engage us to help them at various times throughout their dispute, some have had their files closed at FOS and want help to have the file reopened and some clients want guidance as to whether or not to accept FOS Recommendations and Determinations. We have been engaged by solicitors to provide information to the solicitor for their clients in regard to dealing with bank disputes and regarding bank dispute matters before the court and we receive client referrals from accountants, solicitors and others. If consumers do not want a fee for-service agent we refer them to the relevant not for profit organisation and in some limited circumstances when possible we handle exceptional cases free of charge.

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Our clients have included lawyers, supermarket owners, real estate agents, transport companies, farmers and many other businesses, along with home owners/investment property owners, and those who have received inappropriate financial advice – approximately 60% personal and 40% business. Clients engage us for many reasons, usually they are either time poor, too ill and or too stressed to deal with the bank dispute themselves, the majority say they do not trust the bank or FOS and or they do not feel competent to deal with the bank or FOS themselves.

We provide the following submission:

1. On 18 May 2015, we provided submission No 134 (SSCE Submission) to the Senate Standing Committee on Economics – Scrutiny of Financial Advice which raised our concerns regarding EDR, in particular the Financial Ombudsman Service (FOS). Our SSCE submission is relevant to this Review and in order to avoid repeating it we attach below the published version which has parliamentary privilege to form part of our submission to the current Government EDR Review.

   As outlined in our SSCE submission, during our 15 years in dealing with FOS we have seen evidence of:

   ☐ Misleading actions by FOS.

   ☐ Incorrect interpretation of FOS' Terms of Reference.

   ☐ Flawed Recommendations by FOS.

   ☐ Files closed improperly and invalid Jurisdictional Decisions.

   ☐ FOS not acting in a fair, impartial, efficient and effective manner as is required under the ASIC RG 139.

   ☐ Misrepresenting the facts, disingenuously twisting arguments.

   ☐ FOS incorrectly responding to a complaint against FOS staff or failing to respond at all.

   ☐ Ruling a dispute outside FOS's Terms of Reference when FOS knew the Applicants claim was within the Terms of Reference.

   ☐ FOS misleadingly discrediting an agent for the Applicant.

   ☐ Pressuring Applicants to accept inappropriate settlements.

   On 20 August 2015, the FOS responded to the Economics Committee rejecting our allegations. However FOS did not respond to the case examples

evidenced in our SSCE submission. On 11 November 2015, FOS replied to the Economics Committee in regard to one case raised in our SSCE Submission being the Goldie Marketing P/L case. Since our SSCE submission we make the following updates:

a) Misleading file notes - No oversight of FOS – FOS' failure to explain

One very serious matter raised in our SSCE submission pertains to misleading file notes prepared by a FOS Ombudsman in the case of Goldie Marketing P/L (Case example A on page 8). FOS' reply to the Economics Committee stated that the Supreme Court Judgement *"deals with, and comprehensively addresses, the issues raised in submission 134"* and "*All the assertions in Dispute Assists submission.....have been fully and comprehensively addressed in the legal proceedings*". This is completely untrue as the court was not asked to consider the fabricated file notes. Embarrassingly at a PJSC Oversight hearing, ASIC then parroted FOS' mantra that the court dealt with the issues raised. Subsequently, we wrote to ASIC and advised ASIC that it made a mistake because the issue of the misleading file notes prepared by the Ombudsman was not put to the Court. Subsequently ASIC wrote to us and advised that it agreed and that the Court did not deal with the issue of the misleading file notes prepared by the Ombudsman and has since had to advise the PJSC Committee that it made a mistake when giving evidence and that ASIC wishes to correct the record at the next hearing. Of concern is that FOS continues to maintain the position that the court dealt with the misleading file notes which is untrue.

In 2015, Dispute Assist wrote numerous times to the FOS Board in regard to the misleading file notes and other issues. The FOS Board disingenuously maintains the position that the Court dealt with all the matters raised by Dispute Assist.

We are also in possession of a letter from the Legal Services Commissioner whereby it acknowledged that the issue of the misleading file notes was not considered by the Court stating as follows: *"The Court expressly noted that it was not conducting a merits review of the lawyer's internal review decision (**the FOS Decision**) and that there was no basis to look behind the FOS Decision. The alleged preparation of misleading or false file notes by the lawyer was not referred to in the judgment" and "[A]ccordingly, the question of whether the file notes were misleading and fictitious was not considered by the Court..."*

On 16 March 2016, the ABC 7.30 Report covered the story regarding Goldie Marketing and the misleading FOS file notes stating that the Supreme Court did not deal with the discrepancies created in the file notes. Senator Nick Xenophon stated: *"FOS's credibility is being undermined by its insistence that the issue has been "fully dealt with" when it has not. "Unless the FOS gives a thorough explanation of what happened here, then it is basically finished as a credible body to deal with these disputes."*

On 17 March 2016, FOS release a statement implying the Supreme Court addressed the misleading file notes. To date FOS had not provided an explanation in regard to the Ombudsman's misleading file notes and disingenuously continues to maintain the position that the court dealt with the matter.

On 1 April 2016, ABC The Drum published an update on the ABC 7.30 Report regarding the misleading FOS file notes stating as follows: *"The judgement did not deal with the discrepancy between the file notes and what was actually said in conversations"*. The story goes on to state that *"FOS says the matters we raise have been dealt with by the court. But they haven't."*

In summary, this is a very public matter. It is also extremely relevant to the current EDR review as it highlights the culture and systemic imbalance at the very top of the FOS and the lack of accountability. It is apparent to everybody that FOS has been exposed engaging in unethical conduct and has further been exposed misleading the public including the Economics Committee. ASIC has stated in giving evidence at Senate Estimates they have no jurisdiction in regard to serious allegations about FOS such as in this case. Integrity within the FOS is void. FOS has shown complete contempt in this matter by way of the fact they have misled the Economics Committee in such a brazen manner and has failed to correct the record. What we have with the current FOS system is the FOS is its own judge and jury. This is an example of "*Power tends to corrupt, and absolute power corrupts absolutely".* This is a case in point that if there is a problem with a FOS decision, FOS will investigate itself, it will deny the allegations and there is little recourse for consumers. There is no oversight of FOS.

We suggest that in cases of allegations of serious misconduct within FOS that the Terms of Reference be amended to include that full explanations must be provided to a complainant from the person/s to which the complaint is directed by way of Statutory Declaration. Further, we suggest that the FOS Terms of Reference be amended to include that FOS must provide consumers with copies of FOS' internal file notes and telephone calls regarding their matter.

b) Fee For Service Agent

In our SSCE Submission we raised concerns about the amendments to the FOS Terms of Reference which provide FOS sole discretion when an Applicant is represented or assisted by a fee-for-service agent, to refuse to consider the dispute if the agent is engaging in inappropriate conduct.

In summary, the Ombudsman has been exposed making diary notes about Dispute Assist who was acting as a fee for service agent in the Goldie Marketing case. The diary notes are comprised from fictitious events that in no way could be substantiated when compared to the telephone recordings. We lodged a complaint with the FOS regarding the Ombudsman's misleading diary notes and requested a retraction and apology. The FOS has never responded to our complaint in regard to this issue and advised the Economics Committee that the Court dealt with all issues raised by Dispute Assist when the Court did not.

Again this is a case in point that if there is a problem with FOS' decision, FOS will investigate itself, it will deny the allegations and there is no recourse for agents as there is no oversight. If the FOS is to operate effectively and fairly it must provide users the confidence that FOS is accountable.

In cases regarding the FOS' allegation that a fee for service agents is engaging in inappropriate conduct, we suggest that the Terms of Reference be amended to include that full explanations must be provided to the agent from the person making the allegation by way of Statutory Declaration. Further, we suggest that the FOS Terms of Reference be amended to include that FOS must provide the fee for service agent with copies of <u>all</u> FOS' internal file notes and telephone calls relevant to the case matter.

c) Lack of Capacity

In our SSCE Submission we stated that FOS lacked capacity and that FOS had backlogs and problems with timeliness in the FOS process for resolving disputes. The FOS' reply was that it had remedied these issues and advised that it has appropriate resources and processes to deal with anticipated volumes in dispute numbers. Recently we have been advised by FOS staff and other people dealing with the FOS that the FOS' Determinations will take much longer to hand down due to staff shortages. Some matters with FOS are now in excess of one year with no date in sight for completion. The time frame between handing down a Recommendation to when a Determination is handed down has been approximately five months and increasing. Therefore the FOS' lack of capacity to handle the volume of disputes appears to be an issue once again which is concerning given that FOS' statistics report shows a 22% increase in complaints when compared to the same quarter last year. Given that the FOS is funded by the financial industry it is unacceptable that this is a recurrent problem.

d) FOS ruling matters Outside Terms of Reference

In our SSCE Submission we raised concerns about the increase in FOS' ruling matters outside its Terms of Reference, see the Goldie Marketing case example pages 8 - 9 and page 13, paragraph 3 - 4. On two occasions FOS ruled that Goldie Marketing complaint was outside FOS' Terms of Reference. The first instance the FOS reopened the file. On the second occasion the Supreme Court ruled that FOS' decision was invalid and the matter was directed back to FOS. On the third occasion FOS closed the file, the matter was taken to the Court whereby a ruling was made against Goldie Marketing. Goldie Marketing appealed the Courts decision but was forced to close the business and could not continue with the Court case due to liquidity problems. It appears that FOS went to great lengths to close the Goldie Marketing complaint, first due to mistake of fact, second time the court ruled was an invalid reason and the third time was under appeal to which the possible outcome will never be known.

Our SSCE Submission also includes case D on page 18 that was closed by FOS as outside their Terms of Reference. The client was unable to deal with FOS and subsequently engaged us to help her deal with the matter. FOS were subsequently forced reopened the case.

The ruling of matters Outside FOS' Terms of Reference has continued to increase. In 2010-2011, FOS ruled 9% of matter outside their Terms of Reference. Ruling matters outside FOS' Terms of Reference has increased in 2012-2013 to 13% and 2015-2016 to 17%. This represents an increase of 89% from 2010 to 2016. The concern is that there are examples of FOS using this section of the Terms of Reference inappropriately. Therefore there must be scrutiny as to whether these increases are justified and whether or not this section of the Terms of Reference is being used inappropriately. Further there should be some opportunity for independent review if a matter is ruled outside FOS' Terms of Reference.

e) Staff Shortage

In our SSCE Submission we raised concerns about FOS closing a file due to a staff shortage, see page 9, Paragraph 2 and page 11 (ii) – 12, paragraph 2. The Supreme Court ruled in the Goldie Marketing case that closing a file due to a FOS staff shortage is in accordance with FOS' Terms of Reference.

We do not challenge the Courts decision. However, we believe that closing a file due to a staff shortage is unacceptable because FOS evolved from the need for an alternative to legal action for consumers seeking redress against financial industry members and an increasing policy emphasis by government on self-regulation. Cost was a common factor in both trends – the increasing costs to parties of resolving disputes through the courts and the cost of regulation to government.

Further, in order for a bank to hold a licence it must be a member of an EDR scheme and if at stages the FOS can say they have a staff shortage, we say that both banks and FOS are not meeting their obligations to provide EDR to all Australians who fall within FOS' jurisdiction. We suggest that the Terms of Reference be amended to state that FOS cannot exclude disputes due to a staff shortage.

2. Trust issues

Issues of consumers lack of trust of the FOS were covered in our SSCE submission (page 6, 4th paragraph). Further on a weekly basis we have a constant stream of unhappy consumers that telephone us and state they are unhappy with the FOS. A constant theme is that consumers say that the FOS

is paid for by the banks, the FOS puts pressure and bullies them, the FOS twists their words, ignores relevant facts, the FOS allows the banks to fail to comply with deadlines and the FOS does not obtain all documents relevant to the case as requested by the consumer.

3. Documents

FSP's often refuse to provide or are obstructive to provision of documents during FOS matters. In response the FOS says that in these cases "adverse inferences can be draw". However if a consumer fails to provide documents, FOS says it will close the file. In our experience the FOS always says adverse inferences will be drawn when the FSP's do not provide the requested documents however, later dismiss this and state the documents are irrelevant.

It has been identified by other organisations and, we concur, that front end case managers often have a poor understanding of the facts and legal principles and it has been proven on numerous occasions that the documents were in fact relevant and that the banks have been allowed to avoid provision of relevant documents.

See attached a case example being a complaint lodged with the FOS by Mr Adrian and Mrs Tracey Western about the ANZ Bank which includes but not limited to the non provision of documents. In particular see at 1.2 key findings and page 6 at point 2.3. At the start of the complaint and before the FOS' Recommendation was handed down, the ANZ Bank advised that it was unable to locate documents that the business financials are no longer available and it failed to fully explain its lending decision. However after the FOS' Recommendation, the ANZ Bank responded showing how they assessed serviceability using the undistributed profits of the company and provided supporting documents including the banks internal workings and contemporaneous notes. This is clearly a failure of the ANZ Bank to provide a response to the complaint and documentation. However we believe that in order to prevent the issues described above from occurring, the Terms of Reference should be amended to state the FSP's must provide their response to the complaint with supporting documentation prior to Recommendation stage.

Further, we believe FOS' Terms of Reference should be amended to include a term that there should be a base standard list of documents that the FSP must provide consumers within 14 days of commencement of the complaint

regarding maladministration/irresponsible lending including: loan applications and contracts including any variations, all security documents, all records held in regard to taking guarantees, telephone records, bank statements and all correspondence including file and diary notes, memorandums and emails.

4. Deadlines

The FOS sets timelines and schedules for parties to adhere to. There are many examples and comments by individuals and other organisations where the FOS will allow FSP's to completely disregard deadlines and then submit documents or submissions well past deadlines or indeed when cases are closed. Whereas in the case of the complainant FOS will only allow 1 extension of one week during the complaint and will threaten to close the file if deadlines are not met. We have seen examples where extensions will not be permitted for complainants even where the case manager will be away and the case will not be progressed in any way.

5. Transparency

There are many cases where consumers complain that the FOS has not represented conversations accurately and that the FOS frontline staff has verballed them into accepting positions they do not agree with or understand. This has resulted in facts being misrepresented in the early stages of disputes lodged with FOS and then despite vigorous objection by the complainant they are ignored by the FOS resulting in Recommendations and Determinations being flawed by misstatement of fact with subsequent misconstrued legal assessments in the Determination.

We contend that from recent examples this is a combination of recent changes to the FOS system and resultant culture. We have evidence of senior management who are legally qualified allowing dubious legal and factual arguments to be pressured upon vulnerable complainants who are disadvantaged by ignorance or financially unable to challenge the FSP or indeed the FOS.

We submit that the FOS should amend its Terms of Reference to supply complaints all FOS file notes re their case upon request within a period of 7 days from the request. FOS has or should have a system of storing this information electronically and this would therefore not be a difficult or costly exercise. FOS already records its telephone conversations with complainants

and we submit the FOS should amend its Terms of Reference to supply complainants all FOS telephone records re the case upon request within a period of 7 days from the request. With respect to privacy, both FOS staff and consumers are already advised at the start of telephone calls that telephone calls are being recorded.

None of the above recommendations are either onerous or excessively cost prohibitive and occur in commerce already with the exclusion of a time frame to provide the material.

6. Flawed Recommendations

In our SSCE Submission we raised concerns about flawed Recommendations by the FOS. Case examples B and C are examples of inappropriate financial advice whereby the FOS provided flawed Recommendations. We subsequently sought legal opinion in order to deal with the flawed Recommendations.

Our concerns are:

- That there was pressure from FOS to accept inappropriate settlements.
- Vulnerable consumers do not have the ability to deal with flawed Recommendations believing they have done all they could in the first instance and accept the Recommendation or discontinue the complaint.
- In the Case Examples, the Applicants both say they could not have dealt with the FOS themselves and would have accepted inappropriate settlements.

See attached a further damming case example with the CIO regarding a flawed finding which led Ms Susannah Dyer and Mr Darryl Shiels to drop out of the CIO complaint when in fact they should not have been put in this position. Ms Dyer and Mr Shiels retained the services of LJ Hooker Financial Services to help them with refinance of their loan from CBA to ANZ. Ms Dyer and Mr Shiels were advised there was no break fee but were subsequently charged a break fee. In essence the issue is whether or not the break fee should be charged and if so who was responsible for misleading Ms Dyer and Mr Shiels. Despite this, CIO at point 19 incorrectly state that in order to determine if there is a loss, CIO compared the position the consumers would have been in if they remained in the CBA loan in comparison to the position

they are in now with the new loan with ANZ. The CIO's reasons are flawed. Mr Shiels advised us that he after receipt of CIO's findings he subsequently telephoned CIO who advised him that they would "not be changing their finding" and that "his only option if he wished to take the matter further was to go legal". As a result, Ms Dyer and Mr Shiels did not challenge CIO within the deadline provided by CIO. Nine months later Ms Dyer and Mr Shiels subsequently sought legal assistance to deal directly with LJ Hooker Finance and 18 months after receiving CIO's Review, they requested CIO reopen their case stating "We felt that it's was unfair to calculate losses over the period of the dispute and not at the time of the settlement and also the calculations made". CIO responded stating that they only reopen cases in exceptional circumstances such as due to illness that satisfactorily explains why you were unable to respond. We believe this is an exceptional circumstance whereby the file should be reopened because CIO made a flawed finding, CIO misled the consumers that CIO would not change their finding and their only option was legal action and when the consumer requested the file to be reopened due to how CIO calculated the losses, CIO refused.

We understand that the FOS' Recommendations provide consumers the opportunity to respond and perhaps provide additional information regarding their complaint that may change the Recommendation and we do not have an issue with this. However, we believe there needs to be more scrutiny of Recommendations by FOS and CIO solicitors prior to their release in regard to the legal principles, industry codes and good industry practice in order to maintain a high degree of accuracy in the legal principles contained in the Recommendations in order to reduce/eliminate flawed Recommendations. In the case of CIO, we suggest that the legal principle reasons should be set out at the start of the Review findings.

7. Pressure on Consumers to settle matters

The pressure from FOS to settle matters is relentless and unacceptable. Of concern is that in our experience, case managers are eager to suggest that offers to settle matters should be accepted as they don't believe there is a winnable case, however if at the same time you discuss the merits of the case the case manager will often say they are not across the matter fully or they don't believe FOS will award any more.

As an example, in one particular case, the matter was with FOS for 18 months. The case manager called our office many times pushing for a settlement stating that he has looked at the case and there are no winnable

issues. On one occasion he was on the telephone for over one hour pushing for a settlement. During 18 months that the matter was before the FOS, all case managers that handled the file up and to the day before the Determination was handed down said the same thing – there are no winnable issues. However the Determination subsequently found there was in fact maladministration.

We suggest the FOS needs to change its practice and discontinue apply verbal pressure on consumers to accept settlements in order to protect vulnerable consumers.

8. Wednesbury unreasonableness and 8.2 of Terms of Reference

Over the years there has been considerable disquiet in relation to FOS staff from top to bottom acting unfairly or with bias. The FOS Terms of Reference at 8.2 state, *"FOS will do in its opinion is fair in all circumstances".*

We submit that 8.2 of the Terms of Reference unacceptable as it has led to many episodes exposing FOS' conduct whereby FOS has acted unfairly and exploited its position of power leaving the consumer in the bewildering position to contemplate or pursue legal action against FOS and establish Wednesburys unreasonableness. This places the complainant in a worse position of not only having to muster additional mental strength they must then fund extremely costly litigation against a bank and the FOS. It may be the case that FOS has acted in an unfair manner, however if you wish to challenge this in court you will be required to meet the test of Wednesburys unreasonableness. Therefore with both 8.2 of the Terms of Reference and Wednesburys, a complainant has an extremely limited opportunity to challenge FOS in the Court which is an outrageous abuse of power precluding consumers the right to challenge an unfair FOS decision.

The FOS' Terms of Reference 8.2 must be amended to exclude *"in its opinion"* and read *"FOS will act fairly in all circumstances"*. Fairness principles used in statutory tribunals should be included in FOS' Terms of Reference.

9. Monetary Limit

We do not believe the current monetary limits are fit for purpose and that they are woefully inadequate.

FOS evolved from the need for an alternative to legal action for consumers seeking redress against financial industry members an increasing policy emphasis by government on self-regulation. Cost was a common factor in both trends – the increasing costs to parties of resolving disputes through the courts and the cost of regulation to government. Property prices have escalated dramatically and FOS' monetary limits have not kept in line with metropolitan property prices or indeed the scope of consumer and business borrowings. Therefore it is critical that monetary limits be increased.

As an example, we have seen many clear cases of maladministration, some determined by the FOS whereby the compensation is more than the FOS limit and therefore outside the FOS' jurisdiction. In these cases the consumers had no ability to take their matters to the court and therefore were left to negotiate with the FSP in a weakened position of which the FSP was well aware and takes full advantage. In one particular case we are aware of, the damages claimed were $1.3m and the FSP offered $235k stating take it or leave it. The consumers negotiated so the bank withdrew the offer. The matter subsequently settled for $235k.

We believe the monetary limits should be increased to those suggested at page 12 of the EDR Issues Paper and that these increases should be the same for small business and non small business. However it must be stressed if FOS is to gain increased jurisdiction so too must their accountability and transparency increase.

10. Non payment of compensation – retrospective compensation

Given the large amount of vulnerable people, mainly retirees, affected by inappropriate financial advice, we believe there should be a statutory compensation scheme of last resort and that it should be retrospective.

Conclusion

We make this submission from our experience in dealing with the FOS over a long period since its inception and wish to point out that we have achieved many positive results when dealing with the FOS. However we have been put to task unecessarily by the FOS in many of those successes and strenuosly believe that without our advocate support our clients, as would many others who lodge a complaint with the FOS unasisted, would not get the outcomes they deserve and be denied natural justice and a fair and independent EDR scheme in accordance with ASIC guidlines 139.

We know the FOS has faced increased volumes of complaints as a result of the GFC and other economic events. We have seen the FOS make structural changes to address the increased volumes and delays. However we have observed a simultaneous cultural change in the FOS whereby they have exibited an unhealthy zealousness to close files prematurely or inapproriately and pressure consumers to take inappropriate settlements. We beleive this change is generated by FOS management to ameloriate the volumes and handling times of complaints. There is defineitley an improper balance and the resultant conduct of FOS staff must change.

We trust our submission will assist the Review Panel to identify and address improvements needed.

Yours sincerely,
Bruce Ford
Director

DISPUTE ASSIST

18 May 2015

Committee Secretariat
Senate Standing Committees on Economics – Scrutiny of Financial Advice
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Dear Senators,

We thank the committee for providing us the opportunity to provide this submission.

Executive Summary

This submission provides information collated from our clients and evidence from numerous parties such as the Cameron Ralph Navigator Report (CRN Report)[1], Consumer Credit Legal Centre Report (CCLC)[2] and the Financial Ombudsman Service (FOS) that suggests that existing mechanisms for compensation processes relating to unethical or misleading financial advice are not appropriate.

Financial Service Providers (FSP's) cannot be relied upon to adjudicate over themselves as is evident by ASIC's findings of inconsistencies in CBA's compensation for the financial advice scandal. As for the FOS, the case examples provided in this submission evidence misleading actions by FOS, incorrect and flawed Recommendations, incorrect interpretation of its Terms of Reference (TOR), ruling a dispute outside FOS's TOR when FOS knew the Applicants claim was within the TOR,

[1] Cameron Ralph Navigator 2013, Independent Review, (CRN Report), http://www.fos.org.au/custom/files/docs/independent-review-final-CRN Report-2014.pdf
[2] Consumer Credit Legal Centre , Submission to Cameron Ralph Navigator Independent Review of FOS on behalf of 12 not for profit organisations, (CCLC Report), http://financialrights.org.au/wp-content/uploads/2014/03/Joint-consumer-submission-to-Independent-Review-of-FOS-October-2013.pdf

invalid Jurisdictional Decision, misrepresentation of the facts and disingenuously twisting arguments, pressuring Applicants for inappropriate settlements, misleadingly discrediting an agent of the Applicant and incorrect response to a complaint against FOS staff.

In particular Case example A below regarding the misleading file notes of Financial Ombudsman, [redacted] is telling and raises questions as to whether FOS is acting fairly, efficiently and effectively as is required by ASIC RG 139. The Ombudsman's file notes do not remotely resemble the facts they purport to represent. This leads one to seriously question the Ombudsman's conduct, whether she is a fit and proper person to hold the position of Financial Ombudsman and most importantly whether the public can trust the FOS if FOS seek to justify this episode as simply the creation of contemporaneous notes. At this juncture this episode destroys any confidence or trust the public can have in FOS.

Case examples B and C are examples of inappropriate financial advice whereby FOS provided one flawed Recommendation and one incorrect Recommendation, there was pressure from FOS to accept an inappropriate settlement, the Applicants both say they could not have dealt with FOS themselves and would have accepted inappropriate settlements. Cases D, E and F provide examples of conduct mentioned above.

We have been dealing with FOS for 15 years and find it a constant struggle to deal with the issues outlined above and believe that there would be a high number of Applicants that do not receive natural justice as a result. The case examples in this submission are merely a snap shot, however almost every case in which we deal with FOS would include at least one of the issues raised above. Such conduct is unacceptable as people's lives already devastated by the conduct of their FSP are being completely ruined when they realise that FOS seemingly has an agenda to get rid of complaints and will go to any lengths to do so thereby denying Applicants their basic right to access natural justice.

FOS's annual review 2013-2014[3] reveals that from 2010-11 to 2013-14 there has been an increase of 66% in the number of FOS complaints ruled outside FOS's TOR. In Case Example A below the Supreme Court found that FOS ruling the matter as outside their TOR was invalid.

The FOS outlined to the Financial System Inquiry in April 2014 that its mission is to fulfil an important community role by providing an independent dispute resolution

service in which people can place their confidence and trust, the case examples provided suggest that FOS has failed in its mission. The CRN Report also mentions there are trust issues between FOS and the community.

Further, the CRN Report reveals that FOS is seriously overloaded, there are serious concerns regarding FOS's backlog of disputes, the unallocated queues will not be under control until the second half of 2015, the current initiatives to fix the problems at FOS may not be sufficient to overcome the backlog **if new pressures arise** and **there is a risk that the problem may not be fixed at all and instead transferred** providing a workload that the Ombudsman cannot keep up with. FOS's own research reveals that there is a risk of the number of complaint withdrawals because the process is too difficult and the lack of progress or response from FOS. The CRN Report points out that the volume of incoming disputes continues to defy projections and that FOS has **insufficient capacity to deal with large variable dispute volumes**. Clearly FOS has problems coping with the backlog it has and could not cope with the current financial advice scandal that just keeps growing.

Others organisations are critical of FOS. FSP's have complained about FOS inconsistencies in their interpretation of their TOR. The CCLC's survey of financial counsellors found that delay was the biggest concern which led to Applicants dropping out, that delay provided an **environment whereby the Applicants accepted unfavourable offers**, FOS are eager to encourage Applicants into **inappropriate settlement agreements**, it appears that at the first level FOS employees eagerly look for ways to reject a complaint, FOS employees seem to be hostile to complainant, tell complainants that their complaints will not fit with the FOS's TOR and people with valid complaints are being discouraged from pursuing them at the first stage. It also found that FOS is very slow and it allows the banks to be very slow, exceeding their time lines regularly without reason or consequence and that delays are mainly due to the tardiness of responses from the bank involved in the dispute. Our case examples provided below and experience mirrors the issues outlined above by CCLC.

We believe the submission reveals that that existing mechanisms for compensation processes relating to unethical or misleading financial advice are not appropriate and a more fair, efficient and effective options is needed. As the FOS is the major national EDR scheme for the financial service industry, the manner in which FOS is treating Applicants should be urgently addressed. Clearly the FOS is under resourced

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[3] FOS Annual Review 2013-2014 (FOS AR), p48, http://www.fos.org.au/custom/files/docs/20132014-annual-review.pdf

and there has been an unhealthy emergence of brooming out complaints by highly suspect means to clear their decks.

INFORMATION ABOUT DISPUTE ASSIST P/L

For the last 15 years, Dispute Assist has provided dispute resolution services to consumers with bank disputes Australia wide. We are a small company providing a fee for service. As agent for our clients, we deal direct with the banks and or with the Financial Ombudsman Service (FOS), some clients want to handle the matter themselves but want to engage us to help them at various times throughout their dispute, some have had their files closed at FOS and want help to have the file reopened and some clients want guidance as to whether or not to accept FOS Recommendations and Determinations. We have been engaged by solicitors to provide information to the solicitor for their clients in regard to dealing with bank disputes and regarding bank dispute matters before the court and we receive client referrals from accountants, solicitors and others. If consumers do not want a fee-for-service agent we refer them to the relevant not for profit organisation and in some limited circumstances when possible we handle exceptional cases free of charge.

Many of our clients know about FOS when they engage us and some already have disputes lodged with FOS and want help in order to deal with their dispute. Our clients have included lawyers, supermarket owners, real estate agents, transport companies, farmers and many other businesses, along with home owners/investment property owners, and those who have received inappropriate financial advice – approximately 60% personal and 40% business. Clients engage us for many reasons, usually they are either time poor, too ill and or too stressed to deal with the bank dispute themselves, the majority do not trust the bank or FOS and or they do not feel competent to deal with the bank or FOS themselves.

SUBMISSION

This submission is in response to the Senate Standing Committees on Economics Scrutiny of Financial Advice Terms of Reference, in particular:

- Whether existing mechanisms are appropriate in any compensation process relating to unethical or misleading financial advice and instances where these mechanisms may have failed.

- How financial service providers (FSP's) and companies have responded to misconduct in the industry.
- Any related matters.

We have deep concerns that FSP's are presiding over the compensation of the current financial advice scandal. We will not delve so much in this submission regarding relying on FSP to resolve bank dispute as the evidence is in that this approach does not work as ASIC's independent review found failings and inconsistencies in the compensation programme for those caught up in the CBA financial scandal. This is just history repeating itself and in light of the recent global financial crisis one must ask why we have not learnt any lessons. We are not suggesting that complete regulation is the answer. However if an FSP financial advisers are caught out for misconduct and under intense public scrutiny cannot manage to remedy the situation and is caught out again, better compensation measures need to be put in place to take the responsibly away from the FSP. We now have the situation whereby consumers are too scared to get financial advice and the ramification of allowing this situation to remain is calamitous especially given Australia's growing older population.

We also have deep concerns that FSP's are suggesting that consumers can go to the Financial Ombudsman Service (FOS) if they are not happy with the FSP's handling of the dispute. This in our submission would be like jumping from the frying pan into the fire. Recently the CRN Report[4], an independent five year review reveals "that the current FOS organisational model has reached the end of its effective life and to meet those expectations, must move to its next stage of evolution". This raises the questions; how long has FOS been ineffective and how long will it take to evolve to the next stage? During the ineffective and evolving period of time one would not wish to gamble on ones bank dispute being handled at FOS fairly efficiently and effectively as is required under the ASIC RG139. As is outlined in the CRN Report, FOS has a significant backlog of disputes. The "Recommendation and Determination unallocated queue [waiting for allocation to a case manager] will not be under control until the second half of year 2015", there is a concern "this will be too late to have an impact on stakeholder confidence that is needed" and "our sense is that the current initiatives may not be sufficient to overcome the back end (backlog), particularly **if new pressures arise"**.[5] The CRN Report further states that post the GFC, volumes of incoming disputes continue to defy projections, there is concern that "FOS's capacity to [put] through large variable dispute volumes is insufficient"

[4]CRN Report, above n 1, para 2.2, p 8.
[5] CRN Report, above n 1, para 7.5, p 37.

and "for disputes resolved by FOS's Recommendation or Determination apparent dispute resolution capacity has not changed over 3 years despite an increase in staff".[6]

In August 2013 FOS implemented 'Project 500' to reduce the number of disputes in their unallocated Recommendation stage by 500 and to expedite those disputes to the Determination stage and despite this effort there remains a significant backlog to overcome at the decision making stages of the dispute resolution process.[7] The CRN Report states that the backlog "creates its own workload" and "[P]erhaps most importantly this makes for many unhappy Applicants and FSP's."[8] Further, the CRN Report states that FOS's research indicates that there is a further serious risk of the number of withdrawals because the process is too difficult or there is a lack of progress or response from FOS.[9] Whilst there may be some benefits of Project 500, it seems that the backlog in the short term has been transferred from one department to the other, as the CRN Report points out "[T]here is a risk that Project 500 will create a workload that the Ombudsman cannot keep up with as the Recommendation stage will become the Ombudsman backlog."[10]

Clearly FOS is struggling under the weight of a dispute backlog and could not cope with a large influx of complaints such as those resulting from the current financial scandal relating to inappropriate financial advice without experiencing in increase in the current problems highlighted in the CRN Report. There are certainly questions as to whether FOS is currently providing a fair effective and efficient service and it would seem from the evidence that it would be highly unlikely that FOS could provide a fair effective and efficient service going forward if it had an influx of financial advice complaints.

In FOS's submission[11] to the Financial System Inquiry, FOS stated that "[A]t the heart of what FOS deals with in the financial sector is the loss of trust in financial services. We see our role largely as helping restore that trust. FOS's Mission is to fulfil an important community role by providing an independent dispute resolution service in which people can place their confidence and trust."[12] The CRN Report and others all mention there are trust issues between the community and FOS staff. We submit

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[6] CRN Report, above n 1, para 7.4.2, p 31 & 7.4.3, p .31.
[7] CRN Report, above n 1, para 7.2, p 24.
[8] CRN Report, above n 1, para 7.2, p 25.
[9] Ibid.
[10] CRN Report, above n 1, para 7.4.5, p 35.
[11] FOS, Submission to Financial System Inquiry, April 2014, para 2.1, p 5, http://www.fos.org.au/custom/files/docs/fos-submission-to-fsi-inquiry.pdf
[12] Ibid.

that the case examples below, especially Case A, only serves to support the communities mistrust in FOS. Tellingly Case A reveals that the problem goes all the way to the top of the organisation and suggests that misconduct has become the norm.

The CCLC's survey[13] of financial counsellors found that delay was the biggest concern which led to Applicants dropping out, that delay provided an environment whereby the Applicants accepted unfavourable offers.

We are also concerned about the changes to FOS's Terms of Reference on 1 January 2015. In particular where FOS may refuse to consider a complaint where a complainant is represented by a fee-for-service agent.[14]

In regard to the changes regarding fee-for-service agents, when the changes were first announced we were not concerned as we do not act inappropriately. However in light of the case example A provided below that highlights misleading file notes prepared by FOS, this has changed our perspective. It is unacceptable that FOS is judge and jury and in many cases it will come down to being FOS's word against the Agents word. There is much written by FOS, the CRN Report and not for profits that led to the changes and the main view seems to be that Agents are profiting from clients for a service that is free and that if consumers need help they can get that help from solicitors or not for profits. This is a one sided view and does not accord with our experiences as to what clients want as partially outlined in our introduction.

In our experience at the coal face over the last 15 years in dealing with bank disputes both with FSP's and the FOS, the evidence is the same in that FSP's cannot be trusted to investigate themselves and resolve disputes. The response is always the same – we have looked at the matter and cannot see any wrongdoing. When disputes are resolved, invariably the bank pays less and the consumer looses out. When bank disputes cannot be resolved with the FSP and the matter is taken to FOS (if the matter is within FOS's limited jurisdiction), we have seen evidence of:

- Misleading actions by FOS.
- Incorrect interpretation of its TOR.
- Incorrect and flawed Recommendations.
- Files closed improperly and invalid Jurisdictional Decisions.

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[13] CCLC Report, above n 2.
[14] FOS TOR (TOR), 6.1(d), http://www.fos.org.au/custom/files/docs/fos-terms-of-reference-1-january-2010-as-amended-1-january-2015.pdf .

- FOS not acting in a fair, impartial, efficient and effective manner as is required under the ASIC RG 139.
- Misrepresenting the facts, disingenuously twisting arguments.
- FOS incorrectly responds to a complaint against FOS staff.
- Ruling a dispute outside FOS's Terms of Reference (TOR) when FOS knew the Applicants claim was within the TOR.
- FOS misleadingly discrediting an agent for the Applicant.
- pressuring Applicants for inappropriate settlements

Examples of the above points are highlighted in the case studies provided below.

Case Examples

A. Goldie Marketing P/L

This particular case provides an example of:

- Mistakes by FOS in closing a file numerous times.
- The creation of misleading file notes.
- Raises serious questions as to whether FOS is acting in a fair, impartial, efficient and effective manner as is required under the ASIC RG 139.

Summary:

On 5 December 2013, Dispute Assist P/L, lodged a complaint on behalf of Goldie Marketing P/L with the FOS against the ANZ Bank. To date FOS have closed the file three times ruling the matter outside their Terms of Reference (TOR), have reopened it twice and in 16 months the matter has not progressed past the jurisdictional stage.

The first occasion FOS was forced to reopen the file was due to FOS' Legal Counsel misstatement of fact.

The second time it was brought to the Financial Ombudsman Mr Philip Field's attention that there was further misstatements of fact and a misinterpretation[15] of

[15] CRN Report, above n 1, para 5.1.3, p119, outlines that FSP's also complain about "inconsistencies in FOS's interpretation of its TOR exclusions".

FOS' Terms of Reference and accordingly we requested FOS to reopen the file. Despite numerous requests, FOS failed to respond to the allegations or explain their actions leaving it open for the bank to commence legal action against Goldie Marketing. Consequently Goldie Marketing was left in a position where they were forced to challenge FOS in Court. On 7 May 2015, the Supreme Court ordered the FOS' decision invalid, to be set aside and returned the matter to FOS for a further Jurisdictional Decision.

On the third occasion, on 22 October 2014, Financial Ombudsman [redacted] advised Dispute Assist during a recorded telephone call that she was closing the file solely due to staff shortages, that in regard to other jurisdictional issues the file was "within scope" and "if the person who had left was still here **I would be ruling the dispute in**"[16]. Again we challenged FOS that their reason for ruling outside their TOR was invalid. Shortly thereafter on 7 November 2014 FOS issued its written Jurisdictional Decision and surprise, surprise, the reasons for ruling outside their TOR now included not just the staff shortage reason but numerous other reasons that were not previously outside their TOR. Goldie Marketing was forced to again challenge FOS's decision and take FOS to court for second time claiming that FOS closed the file for a reason not contemplated by the contract between the parties ie staff shortage. This matter was heard 8-9 April 2015 and is currently awaiting a decision of the Court.

FOS Misleading File Notes:

During the current court case, the court ordered that FOS discover any records in regard to the telephone calls between Ombudsman [redacted] and Dispute Assist's Mr Bruce Ford. FOS subsequently discovered six file notes purporting to be contemporaneous file notes of telephone conversations between [redacted] and Mr Ford. Mr Ford recorded five of the telephone conversations for his legal protection. The telephone recordings are legal and were provided and accepted into evidence by the Court in the current proceedings. When the recordings are compared to the file notes it is clear that the file notes are misleading at best and raise serious questions as to their intended purpose. The specific issue of the misleading file notes is not currently an issue before the Court and the parties in the proceedings accepted the recordings. The ANZ Banks legal counsel, Mr Anastassiou stated:

[16] See excerpts below at p 10-12 or Annexure D.

MR ANASTASSIOU: "…then the best evidence is really the recording and not the notes that were subsequently made by [redacted]

HER HONOUR: Yes.

MR ANASTASSIOU: But rather the actual audio tapes themselves. No doubt it would assist Your Honour to look at the transcript as well because it's an accurate transcription of what was said and recorded.

HER HONOUR: You would urge me to listen to the tapes and have a look at the transcript rather than have regard to the notes?

MR ANASTASSIOU: I would, Your Honour, yes."

(See Annexure 'A' - transcript excerpt of court proceedings pages 72-73)

The Ombudsman's file notes differ so greatly from the actual telephone recordings that it raises serious questions about whether FOS is acting in a fair, impartial, efficient and effective manner as is required under the ASIC RG 139. In this case, if the file notes could not be proven incorrect, the ramifications are vast including the inability to obtain natural justice. All persons that have compared the files notes and the recordings believe the file notes raise serious questions over their credibility and purpose. The misleading issues are between the file notes and two telephone calls in particular dated 21 and 22 October 2014 as follows:

i. On 21 October 2014 the Ombudsman [redacted] in the actual telephone recording said:

> "I still haven't finished making my decision I'm expecting I will probably finish it tonight and I will give you a call tomorrow morning"... "so I won't tell you what the outcome is now"… and "I never like to um to tell people what my decision is before I sleep on it." (Annexure 'B')

In contrast [redacted] file notes for the 21 October 2014 alleges she discussed her decision when in fact she had not finished her decision and would not tell Mr Ford what it was. The file notes for the telephone call (incorrectly dated 20 October 2014) misleadingly states:

> "I said I was doing my heads up call to discuss my preliminary view for my JD [Jurisdictional Decision]. … Rattled off reasons for OTR [outside terms of reference] in JD … complexity, FOS can't compel testimony production, overseas dealings, cross collateralisation, combative delaying tactics of parties…court better forum…" (Annexure 'C')

ii. On 22 October 2014 the Ombudsman [redacted] in the actual telephone recording said (excerpts):

> "Um so I had to make a decision about whether I thought we had the adequate skills here to deal with that level of complexity so I have been talking a lot to our internal banking advisors. If we take the dispute on I want to know that we can actually properly deal with it. Um and I'm not persuaded that we've got the in house knowledge um to deal with the complexity of the dispute so I'm intending to exercise my discretion to knock it out on that ground. But like I've said it's been a knife edge it's something that I have struggled with. Um and which is why I said I wanted to sleep on it because I could have gone either way. Um particularly given that on the other points though I agreed that the claim is within scope I don't think it breaches our monetary threshold and the, your client is a manufacturer so it is within our Terms of Reference. The dispute it all comes down to the complexity of the products cause largely to FOS's internal resources and ability to provide accurate and appropriate and appropriately knowledgeable um advice on the products and and particularly with assessing a loss from the conduct."
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> "We've have had a significant loss of banking advisors in the past six months. We have had two really key people go. So, and there is one in particular who I think, and this is why it was so unfortunate, if it hadn't got caught up in court, if it hadn't been argued every step of the way, it may well be that had one of those individuals who left had still been here we would have given it to him because he was the business banking guru. We haven't got a replacement for him yet."
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> "We are currently struggling on the business banking side of things."
>
> "If anything I may be prejudicing myself by being transparent, but I believe you have got to be transparent with people and explain exactly why you have got to a decision, how I've got to it and the reason why I am uncomfortable with it is I think if we had it, if we had actually been able to look at it as opposed to it getting tied up with all this argy bargy with the FSP when our business banking guy was still here, um we would have taken it on and the dispute has merit in my view**."**
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> "And I've been as transparent as I can in this conversation, I have possibly have said too much but I think if I were in Goldie Marketings position I would want to know exactly why. We are trying to get

someone to replace the banking advisor, because banking advisors have left it is just longer than we had hoped to get that level of skill because those people are few and far between."

"But it's not a decision I have been comfortable in making but if the person who had left was still here **I would be ruling the dispute in**.

(Annexure 'D')

The telephone call reveals that the only reason for ruling the matter outside FOS's Terms of Reference was due to a staff shortage and the dispute met all other criteria. In contrast, [redacted] file notes state that there were other reasons given the day before as to why she ruled the matter outside FOS's Terms of Reference. File notes for the 22 October 2014 telephone call misleadingly state (excerpts):

"2nd part of my "heads up call" to give him my prelim. view – almost got through all reasons for my view earlier in the week."

"Discussed more of the reasons for my prelim view following on from the other day."

(Annexure 'E')

It is inconceivable when one listens to the telephone recordings or reads the transcripts and compares the file notes that a professional in such an important national position could have such a divergence of mind supposedly on the same day or a day later when making the file notes.

The questions raised by the misleading file notes are:

- Why do the Ombudsman's file notes diverge so extremely from what she actually said in the telephone conversations?
- Did FOS attempt to advance their case at all costs?
- Is FOS acting in a fair, impartial, efficient and effective manner as is required under the ASIC RG 139?
- If the telephone recordings were not available, would FOS have been exposed and would natural justice have been served?
- If a consumer has a complaint before the FOS, how can they trust the FOS when the Ombudsman creates files notes that do not remotely resemble the facts of the actual conversation? Will a consumer be

comfortable that they will receive fair, impartial, efficient and effective service from FOS and will they receive natural justice?

- What are the ramifications for Goldie Marketing who has been forced to take two legal actions against FOS where FOS' decision was found by the Court on the first occasion to be invalid and after 16 months their dispute has not commenced investigation?

From the financial years from 2010-11 to 2013-14 there has been an increase from 9% to 15% in the number of FOS complaints ruled outside FOS's Terms of Reference.[17] This represents an alarming increase of 66%. In 2013/14 there were 4,914 cases ruled by FOS to be Outside Terms of Reference.

In this example the Supreme Court ruled that FOS's decision that this matter was outside its Terms of Reference was invalid. FOS's current misleading behaviour shows they have little respect for its Terms of Reference and ASIC's RG 139.

iii) In addition to the misleading aspect of the file notes outlined above, the Ombudsman, [redacted] alleges in her file notes that Dispute Assists Mr Bruce Ford was being evasive, uncooperative, anxious, vague, combative, not attempting to resolve matter and asked for extensions etc. (Annexure 'F'- [redacted] file notes 18 June 2014 and 17 July 2014 and Annexure G- transcript of phone call 18 June 2014)

These allegations are more serious in light of the recent amendments to the FOS Terms of Reference which provide FOS sole discretion when an Applicant is represented or assisted by a fee-for-service agent, to refuse to consider the dispute if the agent is engaging in inappropriate conduct. It is a concern that FOS can form an unsubstantiated view such as in this example and potentially have a file closed or the agent removed. In most cases the agent would not be able to defend themselves unless they had a recording of all conversations and therefore it is highly possible that natural justice would not be served for the Applicant. FOS is looking very much like a kangaroo court.

Further, the Ombudsman [redacted] states in her Determination (which is made public) at point 33 that (Annexure 'G'):

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[17] FOS AR, above n 3, p 48, http://www.fos.org.au/custom/files/docs/20132014-annual-review.pdf

> "The conduct of both of the parties has resulted in the dispute being protracted as requested information has been provided after considerable delay – and extensions of time to provide information, responses and submissions frequently sought. This further bolsters my view that a court is the more appropriate place for the resolution of the dispute."

Dispute Assist did not delay the provision of information and did not request extensions of time to provide information. It was the ANZ Bank that continually sought to make additional claims that the Goldie Marketing matter was outside their TOR, when one attempt failed the ANZ Bank commenced another. See Annexure 'H' which is a spreadsheet listing all deadlines stipulated by FOS which shows that after [redacted] took over the file, all deadlines were met by Dispute Assist and there were no delays in providing information, responses and submissions to FOS. During the 16 months the matter was before FOS, only one extension of one week was requested by Dispute Assist. Therefore it is clearly misleading to say that this view was formed and bolstered [redacted] view that a court was a more appropriate place for the dispute.

The allegations in the file notes and the Determination are incorrect and unfounded. The notes cannot be substantiated when compared to the recorded telephone conversations and correspondence between Mr Ford, the ANZ Bank and FOS.

Questions raised by the allegations in the file notes are:

- Why do the Ombudsman's file notes diverge so extremely from what was actually said in the telephone conversations?
- For what purpose did FOS denigrate Mr Ford's actions and character?
- Is FOS acting in a fair, impartial, efficient and effective manner as is required under the ASIC RG 139?
- If an Applicant/Agent has a complaint before the FOS, will they be comfortable that they will receive fair, impartial, efficient and effective treatment from FOS?
- What are the ramifications for the Applicant and the Agent?

The CCLC Report found FOS is very slow and it "allows the banks to be very slow, exceeding their time lines regularly without reason or consequence" and "delay is mainly due to the tardiness of responses from the bank involved in the dispute".[18]

B. This matter is confidential due to a settlement agreement, therefore will be referred to as Case B.

Case B is a complaint regarding inappropriate financial advice that was lodged with FOS and provides an example of:

- A flawed FOS Recommendation that forced the Applicant to obtain legal advice thereafter.
- The pressure the FOS place on Applicants to accept offers when FOS do not have the capacity to be doing so, especially when the Applicants are vulnerable and are so far out of their depth when making decisions in regard to their matter.
- The Applicant say they would have accepted an inappropriate settlement if they did not have an Agent acting on their behalf.
- An incorrect FOS Recommendation could potentially lead to vulnerable Applicants accepting inappropriate settlements and therefore they may not receive a just outcome.

Summary

Dispute Assist lodged a complaint for inappropriate financial advice with the FOS early 2013. The Applicants are in their 60's, Mr X completed second year at high school, became a timber cutter and later a small holding dairy farmer and Mrs X completed third year at high school and worked for 18 months as a mail person/receptionist and subsequently as a mother. The financial adviser was a representative for the FSP and had a large law firm acting on his behalf.

On 24 February 2014, a measly offer of settlement was received by the Applicant and was rejected. FOS exerted pressure to accept the offer of settlement making negative statements such as "I don't think your case is as cut and dry as you think" however later in the same conversation admitted

[18] CCLC Report, above n 2, p 11.

that "I haven't got all the information, I have to go through the file".[19] This is unacceptable behaviour at any time and even more so when dealing with extremely vulnerable Applicants. In the reverse if we ask FOS for any feedback or information regarding a matter they always say they are not be in a position to do so until they are fully across the matter and therefore cannot give an answer. This highlights a flaw in that FOS are prepared to give advice to accept settlement offers and make statements about the case but in any other instance they are not prepared to do so because they are not fully across the case.

On 19 June 1014, FOS issued a flawed Recommendation finding that the financial adviser had provided inappropriate financial advice, however FOS incorrectly found that the advice did not cause the Applicants any loss because they accepted the advice.

The Applicants were forced to obtain legal advice as to how best to respond to FOS' Recommendation. The legal advice was that the FOS' Recommendation was flawed because as sure as night follows day, if there is inappropriate financial advice then damages automatically flow.

The Applicants subsequently received several offers from the financial adviser's lawyers which included argument against the Applicants. On 3 October 2014, the Applicants and the financial advisor settled the matter independently of FOS.

The Applicants had a complete inability to deal with FOS and say they would have either not been able to deal with the FOS matter on their own or would have accepted an inappropriate settlement if they were dealing with the case on their own.

C. Mr and Mrs M & J Cumming. (Annexure 'I')

This is a financial advice complaint that was lodged with FOS and provides an example of:

- FOS provided an incorrect Recommendation that forced the Applicant to obtain legal advice thereafter.
- FOS has no jurisdiction to compel payment of compensation.

[19] CCLC Report, above n 2, p 43, survey of financial counsellors found that FOS employees "are eager to encourage them [Applicants] into inappropriate settlement agreements".

- The Applicant would have accepted an inappropriate settlement if they did not have an Agent acting on their behalf.
- An incorrect Recommendation can lead to vulnerable Applicants accepting incorrect settlements and therefore they do not receive natural justice.

Summary:

On 21 September 2012, Dispute Assist lodged a complaint for Mr and Mrs Cumming against NAB with the FOS pertained to imprudent lending to Mr and Mrs Cumming on the advice of their financial adviser, [redacted] Shortly thereafter, Mr and Mrs Cummings new financial adviser lodged a second complaint with the FOS against their previous financial adviser [redacted] for inappropriate financial advice. Mr and Mrs Cumming are retired, Mr Cumming was 81 at the time of lodging the complaints with FOS and Mrs Cumming was 76.

On 16 January 2014, FOS issued a Recommendation in the [redacted] matter and found that the financial adviser provided inappropriate financial advice and awarded damages. Mr and Mrs Cumming did not accept the Recommendation and on 30 April 2014 the matter proceeded to a Determination which they accepted. [redacted] subsequently failed to pay damages to Mr and Mrs Cumming by 30 May 2014 as required under the Determination and FOS advised Mr and Mrs Cumming that [redacted] disputed FOS' Determination. On 7 July 2014, FOS confirmed that it had sent letters and emails to the FSP and no replies were received. (Annexure "I")

On 22 August 2014, FOS issued a Recommendation in the NAB matter and found that NABs decision to lend was imprudent and awarded damages to Mr and Mrs Cumming (Annexure 'I'). FOS incorrectly found that as part of the damages had already been awarded in the [redacted] case, those damages could not be awarded in the NAB case. Mr and Mrs Cumming did not accept the Recommendation as they had not received payment of damages awarded in the [redacted] case. FOS failed to advise Mr and Mrs Cumming in the Recommendation that if it remains that they do not received payment of damages they could claim the set off damages from NAB. Mr and Mrs Cumming were forced to obtain legal advice as to how best to respond to FOS. Dispute Assist wrote to FOS requesting that FOS correct a "defect in

form" and that both the NAB matter and [redacted] matter be considered jointly. (Annexure 'I')

On 18 November 2014, FOS issued a Determination in the NAB matter finding that the FOS Recommendation incorrectly set off damages awarded in the [redacted] case and that Mr and Mrs Cumming could in fact recover the set of amount of damages from NAB as they had not received payment from [redacted]

It is a concern that as FOS handled both the NAB and [redacted] cases, FOS was aware that [redacted] rejected FOS' Determination, that Mr and Mrs Cumming had not received payment from [redacted] that FOS failed to advise Mr and Mrs Cumming in its Recommendation that if they did not receive payment of losses from [redacted] they could claim the full damages from NAB. Further, incorrect Recommendations can lead to vulnerable Applicants accepting incorrect settlements and therefore they do not receive natural justice.

Mr and Mrs Cumming had a complete inability to deal with FOS and say they would have either not been able to deal with FOS on their own or would have accepted an inappropriate settlement if they were dealing with the case on their own.

It is most distressing that after almost two years that Mr and Mrs Cummings was with FOS that they will not received a cent from the Financial Advisor in regard to the financial advice issue that FOS awarded in their favour. [redacted] have closed shop and had their licence revoked. However we now understand the owner [redacted] is now operating through [redacted], is an equity owner and has a credit representative licenc [redacted]

D. Mr and Mrs R & M Jacques. (Annexure 'J')

This particular case provides an example where:

- FOS made an assessment that the complaint was outside their TOR because FOS alleged that the damages claimed exceeded their $500k jurisdictional limit for remedies.
- FOS misrepresented that Mrs Jacques had requested debt waiver as a remedy.

- Regardless, FOS knew that debt waiver was not a remedy that was available and closed the file.

Summary:

On 20 August 2012, Mr and Mrs Jacques lodged a complaint with FOS against Bankwest for a fraudulent loan application and claimed improper lending. The complaint lodgement as part of the remedy requested "a discussion on the 100% discharge of the mortgage".

On 12 November 2012, FOS wrote to Mr and Mrs Jacques and acknowledged that Mr and Mrs Jacques were seeking "a discussion on the 100% discharge of the mortgage". FOS further stated that if it did find there was improper lending that it would "not find that a debt must be waived". Despite this, FOS go on to state that the remedy sought ie debt waiver will exceed FOS' $500k limit and that FOS can no longer consider the dispute.[20 & 21] FOS are twisting words as Mr and Mrs Jacques only requested a discussion in regard to debt waiver, they did not seek a debt waiver. FOS should have clarified the details further and properly explained the remedies open to the Applicant, rather it elected to say it can no longer consider the dispute.(Annexure "J")

Mr and Mrs Jacques were unable to deal with FOS's incorrect assessment and engaged Dispute Assist to respond to FOS on their behalf. On 21 November 2012, Dispute Assist wrote to FOS outlining that the Mr and Mrs Jacques no longer sought debt waiver as a remedy and only requested the correct remedies available for improper lending (Annexure "J").

On 26 November 2012, FOS wrote to Dispute Assist advising the complaint will be now allocated to a case manager for further investigation. Mr and Mrs Jacques handled the complaint thereafter.

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[20] CRN Report, above n 1, para 7.3, p26, found that FOS staff who undertake early dispute resolution steps are distanced from FOS staff who draft FOS Recommendations and Determinations and there was a feeling that this "…manifests itself in weakness in some of the jurisdictional assessments at the front end."

[21] CCLC Report, above n 2, p 48, a survey of financial counsellors found that "It appears that at the first level, FOS employees eagerly look for ways to reject a complaint", "…FOS employees seem to be hostile to complainants…" and "…tell complainants that their complaints will not fit with the FOS's TOR" and "…people with valid complaints are being discouraged from pursuing them at the first stage".

E. This matter is confidential due to a settlement agreement, therefore will be referred to as Case E.

Case E provides an example of:

- FOS eager to close a file improperly.
- FOS misrepresent and twist an argument.

Summary:

Early 2012, Dispute Assist lodged a complaint with FOS against the FSP regarding numerous issues including improper lending, collusion etc. On 7 May 2012, FOS wrote to Dispute Assist stating that if they do not hear from Dispute Assist after 17 May 2012 they will assume the dispute has been resolved.

On 22 May 2012, Dispute assist responded to FOS advising that the "dispute is unresolved as at today's date however we are currently in settlement discussions at present and suggest that an outcome may be known within 2 weeks."

Despite the fact that the dispute remained unresolved, on 27 May 2012, FOS closed the file. FOS did not advise Dispute Assist that it closed the file and it was not until the FSP issued demands in January 2013 and Dispute Assist contacted FOS on 30 January 2013 that FOS advised that the file had been closed some seven months earlier. During these seven months Dispute Assist provided documents to FOS and was never advised that the file was closed. During the seven months, Dispute Assist justifiably thought that the file was progressing in the cue for a case manager, instead the file was close. In January 2013, FOS reopened a new case file.

A complaint was raised with FOS that the file was improperly closed. FOS responded to the complaint on 30 September 2013 and attempted to twist Dispute Assists words by stating incorrectly that Dispute Assist advised FOS that settlement discussions continued and an outcome 'would be' known in approximately two weeks. Regardless, FOS closed the file knowing the last correspondence from Dispute Assist advised that the dispute had not resolved. FOS also incorrectly stated that as it did not receive the requested information so it closed the file. FOS was advised clearly and was advised

prior to closing of the file, however FOS chose to close the file regardless and when FOS was challenged it twists the argument by disingenuously misrepresenting what was advised in writing and makes false statement.[22]

Ultimately FOS admitted their oversight which was something akin to pulling teeth.

This matter settled independently of FOS.

F. Mr and Mrs G & S Heywood (Annexure 'K')

This particular case provides an example of:

- FOS made an unsubstantiated allegation that Mr and Mrs Heywood had the same complaint in two forums and therefore would close the file.
- FOS misleadingly advised that it has the power to compel an FSP to provide personal information when it did not.

Summary:

On 10 December 2012, Dispute Assist lodged a complaint with FOS against NAB as NAB mistakenly deposited proceeds to Mrs Heywood's savings account and failed to close a loan account as provided for in the loan contract. Mrs Heywood subsequently spent the funds.

Dispute Assist requested copy of NAB's file notes relative to the complaint. NAB didn't provide the documents and FOS were particularly unhelpful in obtaining any relevant documents.

Dispute Assist lodged a request for Mrs Heywood's personal information via Office of the Australian Information Commissioner (OAIC) and advised FOS of same.

On 6 March 2012, FOS wrote to Dispute Assist and stated that it appears that the OAIC is also considering a dispute about the same issues that you have raised with FOS. FOS requested a copy of the documentation lodged with OAIC and stated that if the issues are the same the file will be close. There was nothing put before FOS to lead it to believe the issues could be the same

[22] CRN Report, above n 1, para 7.2, p 25, states that FOS has much higher rates of complaints about its handling of disputes that we have seen in other financial EDR schemes.

especially given OAIC handles privacy matters and the complaint lodged with FOS pertained to NAB failing to close a loan account – it was a long bow that FOS had drawn from thin air and one has to question what was really going on.

On the same day, Dispute Assist responded to FOS advising FOS that "Mrs Heywood is seeking to obtain her personal information that NAB has failed to provide" and that FOS is incorrect as OAIC is not considering a dispute the same as FOS. It is common knowledge that OAIC does not consider complaints about banking misconduct.

On 16 March 2012, FOS wrote to dispute Assist incorrectly stating that Dispute Assist had said it had evidence that the NAB was aware of the error it made and "this is the subject" of the "proceedings lodged with the OAIC".

On 20 March 2012, Dispute Assist wrote to FOS stating that FOS had completely misrepresented its advice to FOS and lodged a complaint about the conduct of FOS. FOS' Team Manager-Credit, [redacted] handled the complaint for FOS and advised Dispute Assist that FOS had jurisdiction to compel a FSP to provide personal information. Dispute Assist advised FOS that this is "incontrovertibly incorrect and is unacceptable." On 6 October 2011, FOS's [redacted] advised Dispute Assist that FOS "can't compel anyone to provide information we can only request it".

On 22 March 2012, FOS's [redacted] wrote to Dispute Assist advising that [redacted] advice of 6 October 2011 was incorrect.

FOS response to the complaint on 22 March 2012 is incorrect as FOS cannot compel production of information from the parties. Under FOS' Terms of Reference[23] "FOS may require a party to a dispute to provide to, or procure for, FOS any information that FOS considers necessary" and where a party to a dispute without reasonable excuse fails to provide or procure information, FOS may draw adverse inferences from the parties failure to comply or refuse to consider the dispute.[24] There is no ability for FOS to compel production of information such as is the case with a subpoena. The above shows serious incompetence at a senior level in FOS and misrepresenting the facts in a self serving manner. To this day FOS has not rectified their misleading advice.

[23] TOR, above n 14, 7.2.
[24] TOR, above n 14, 7.5.

Dispute Assist provided Mr and Mrs Heywood's OAIC application for personal information to FOS and contrary to FOS advice on 22 March 2012 this proved FOS to be misguided and could not close the file as threatened.

FOS was unsuccessful at getting the originating documents from NAB regarding the borrower's loan.

We successfully obtained the borrowers personal information via OAIC and proved to FOS that NAB knew about its mistake. FOS issued a Determination that NAB reimburse Mrs Heywood all interest and fees.

Conclusion

This submission provides case examples and information from numerous parties such as the CRN Report, CCLC Report and FOS that aims to prove that it is not a viable option to rely on FSP's and FOS to compensate matters relating to unethical or misleading financial advice.

There is evidence of misleading actions by FOS, incorrect and flawed Recommendations, incorrect interpretation of its TOR, ruling a dispute outside FOS's TOR when FOS knew the Applicants claim was within the TOR, invalid Jurisdictional Decision, misrepresentation of the facts and disingenuously twisting arguments, pressuring Applicants for inappropriate settlements, misleadingly discrediting an agent of the Applicant and incorrect response to a complaint against FOS staff.

The CRN Report reveals that FOS's is overloaded and the current initiatives to fix the problems at FOS may not be sufficient to overcome the backlog if new pressures arise and that the problems may not be fixed at all just transferred from one department to another. Further, the volume of incoming disputes continue to defy projections and that FOS has insufficient capacity to deal with large variable dispute volumes.

Accordingly, we believe the submission reveals that that existing mechanisms for compensation processes relating to unethical or misleading financial advice are not appropriate and a more fair, efficient and effective options is needed. As the FOS is the major national EDR scheme for the financial service industry, the manner in which FOS is treating Applicants should be urgently addressed. Clearly the FOS is under resourced and there has been an unhealthy emergence of brooming out disputes by highly suspect means to clear their decks.

Recommendations:

- A separate independent compensation process be provided for victims of the financial scandal.
- Last resort compensation scheme for those since the GFC that are unable to recover damages resulting from inappropriate financial advice.
- FOS be dismantled and replaced with a government body.
- That any person who has received compensation for inappropriate financial advice via the FOS in the last six years be provided the opportunity to have their compensation reassessed.
- To help restore community trust: there be a Senate Inquiry plus Annual Review and Annual Reporting by FOS of:
  - FOS's OTR rulings - whether this section of the TOR is being utilised appropriately.
  - FOS's rulings that an Agent is acting inappropriately - whether this section of the TOR being utilised appropriately.
- ASIC investigate the behaviour of the FOS as mentioned in this submission regarding whether FOS is acting fairly, efficiently and effectively as is required by ASIC RG 139, in particular but not limited to the Ombudsman, [redacted] misleading file notes.
- FSP's provide more funding in order to reduce the backlog at FOS and going forward to enable FOS to deal with variable volume of disputes in a fair, efficient and effective manner.
- Legislation put in place to prevent the owner of a business with an AFS licence whose licence has been revoked from obtaining a credit representative licence.

Yours sincerely,
Bruce Ford.
Director.

Determination

FINANCIAL OMBUDSMAN SERVICE AUSTRALIA

Case number	385500
Applicants	Mr Adrian Western and Mrs Tracey Western
Financial Services Provider	Australia and New Zealand Banking Group Limited

Determination

FINANCIAL OMBUDSMAN SERVICE AUSTRALIA

Case number: 385500 **27 November 2015**

1 Overview

1.1 Dispute

In December 2008, the Financial Services Provider (FSP) provided the following loans to the Applicants:

Loan amount	Account no. ending in	Security	Purpose	Balance as at 19 Nov 2015
$1.52 m (**the 64 Loan**)	7232	Mortgage over the Applicants' property at number 64 (**No. 64**)	To consolidate existing FSP debts	Repaid and closed on 14/12/2011 after the sale of No. 64
$1.76 m (**the 66 Loan**)	9527	Mortgage over the Applicants' property at number 66 (**No. 66**)	To construct a new home at No. 66 for the Applicants' occupation	$1,796,603.62

The Applicants claim that the FSP acted irresponsibly when it approved and advanced the 66 Loan because they could not afford it.

In July 2015, FOS delivered a Recommendation in which it concluded the FSP acted irresponsibly in advancing the 66 Loan because on the available information, and at the time of the Loan's advance, there was a significant shortfall between the Applicants' monthly income and their monthly expenses. The FSP rejected the Recommendation. It said the Applicants had substantial financial resources and income available from companies in which they had an interest. Therefore, at the time they obtained it, the Applicants could afford to repay the 66 Loan without substantial hardship.

1.2 Issues and key findings

When assessing serviceability for the 66 Loan, was it appropriate for the FSP to have regard to the Applicants' corporate interests?

The FSP acted in accordance with standard industry practice when it took into consideration in assessing serviceability the Applicants' entitlement to income from a company they controlled.

Did the FSP lend irresponsibly when it advanced the 66 Loan?

The Applicants could afford to service and repay the 66 Loan without significant hardship when it was advanced. Although their financial circumstances changed subsequently, the FSP's lending decision in December 2008 was sound.

Did the FSP respond appropriately to the dispute prior to the delivery of the Recommendation?

The FSP failed to explain fully its lending decision in relation to the advance of the 66 Loan prior to the delivery of the Recommendation. As a result, the Applicants incurred unnecessary legal costs for which the FSP should compensate them.

1.3 Determination

This Determination is partially in favour of the Applicants.

The FSP is required to compensate the Applicants for their legal costs thrown away by reason of its inadequate explanation of its lending decision. Within 14 days of the Applicants' acceptance of this Determination, the FSP ought to refund to the Applicants $2,000 plus interest at loan rates from 31 August 2015. It should do so by crediting that amount to the 66 Loan.

Upon closure of the FOS file, the FSP is entitled to take recovery action in relation to the 66 Loan.

2 Reasons for Determination

2.1 When assessing serviceability for the 66 Loan, was it appropriate for the FSP to have regard to the Applicants' corporate interests?

The Applicants had interests in various companies and other entities

In late 2008, the Applicants' principal business interests were located in and around north Queensland and mostly involved the construction and sale of land subdivisions, commercial property investments, and real estate sales and management. They were directors and shareholders of companies which included, relevantly:

- NPD Pty Ltd – engaged in property development and land subdivision
- R Pty Ltd – engaged in real estate sales and management
- W C Pty Ltd – engaged in mobile telephone sales
- W Pty Ltd – engaged in the sale of house and land packages/property development.

W Pty Ltd is also the trustee of a family trust of which the Applicants are beneficiaries.

Details of the Applicants' interests in the companies as at December 2008 are set out at 3.1, below.

It is standard practice to take into consideration individual borrowers' corporate interests

It is standard practice for financial services providers to:

- group together accounts held by individual borrowers and their related bodies corporate
- consider and assess for serviceability purposes the income flows within the corporate group, particularly where the relevant borrower controls the income flow and the primary purpose of the group structure is to distribute income in a tax effective way.

Consistent with this standard practice:

- the FSP grouped together as the "NPD Group" the Applicants' personal lending with their related bodies corporate business lending
- the FSP's business banking section and the personal banking section each assessed and approved the advance of the 66 Loan having regard to the Applicants' income disclosed in their personal tax returns and the undistributed profit of a company which they controlled.

The FSP properly relied on the Applicants' entitlement to corporate income when assessing serviceability

It was appropriate for the FSP when assessing serviceability for the 66 Loan to have regard to the Applicants' personal income tax returns for the year ended 30 June 2008 and to the financial position of the companies whose income flows the Applicants controlled.

The Applicants had been FSP customers since 2004 and their corporate and financial interests were well known to it. By late 2008, they had a track record of buying and subdividing land, building, and selling. When considering their application for the 66 Loan, it was necessary for the FSP, acting prudently, to assess the income available to the Applicants from the companies under their control.

In late 2008, the male Applicant was the sole director of W C Pty Ltd and a company the Applicants owned and controlled, W Pty Ltd, was its sole shareholder The Applicants therefore controlled W C Pty Ltd and its income distribution. When assessing serviceability for the 66 Loan, the FSP acted appropriately and indeed conservatively by:

- considering for the financial year ending 30 June 2008 the undistributed profits of W C Pty Ltd only (and not the undistributed profits of the other companies which the Applicants did not control 100%)
- including in Mr Applicant's income 50% of these undistributed profits.

A summary of the FSP's current explanation of its December 2008 assessment is set out at 3.2, below.

2.2 Did the FSP lend irresponsibly when it advanced the 66 Loan?

The law and Code of Banking Practice (CBP) set the lending standard

At common law there is an obligation implied into a financial services provider's relationship with its customer that it will exercise the care and skill of a diligent and prudent banker. The ability of a customer to repay their loan is crucial to good lending practice.

Generally as part of a loan assessment process, a financial services provider should:

- request documentation to support the loan application
- make further enquiries where there are obvious inconsistencies in the information
- ensure sufficient information and supporting documentation is provided to show capacity to service the loan.

The FSP did not act irresponsibly when it advanced the 66 Loan in December 2008

In assessing whether the FSP's conduct in advancing the 66 Loan was irresponsible, I have had regard to the advice and calculations of FOS's Banking Adviser. The Banking Adviser has had extensive experience in the banking and financial services industry and regularly provides advice as to what is standard industry practice, and performs serviceability calculations.

The FSP's contemporaneous notes show it primarily approved the advance of the 66 Loan on the basis that the Applicants could service and repay it from their income as disclosed in their tax returns and available to them as distributions from W C Pty Ltd. The FSP was privy to the NPD Group's income streams and had an intimate knowledge of the Applicants' income sources. It correctly assessed the Applicants'

debt servicing capacity from personal income and from the distribution of business income as adequate to repay the 66 Loan.

The FSP's secondary exit strategy in the event the Applicants' expected income was not achieved was the sale of the security property, since the 64 and 66 Loans were advanced at 80% of the market values of Nos. 64 and 66. This approach was appropriate in the circumstances and was consistent with standard industry practice.

The FSP approved the 66 Loan manually, after its business banking and personal banking areas had assessed the application and tested serviceability. The approval was not automated or "scorecard assessed" and represented the FSP's commercial decision after it had considered and tested the credit risk associated with the proposed lending and satisfied itself of the repayment sources.

A timeline of the FSP's approval is set out at 3. 3, below.

Serviceability was evident when the 66 Loan was approved

Critical to FOS's decision as to whether on balance, and at the time it was approved, a borrower could afford disputed lending are

- the borrower's financial position at the time of application, and
- the financial services provider's assessment of the borrower's capacity to service and repay the proposed debt without substantial hardship.

In order to conclude that disputed lending is irresponsible, FOS must be satisfied that serviceability was not evident at the outset.

FOS's serviceability summary based on the Applicants' personal income tax returns for the financial year ending 30 June 2008 show they could not afford the 66 Loan.

However, FOS's serviceability summary based on the Applicants' signed Statements of Financial Position dated in December 2009 which incorporated their income as disclosed in their 2008 personal income tax returns **and** a conservative distribution of W C Pty Ltd's profits for the 2008 tax year demonstrates a monthly surplus. Since for the reasons explained above it was not inappropriate for the FSP to include 50% of W C Pty Ltd's 2008 undistributed profits in its December 2008 serviceability calculations, the Applicants could therefore afford to repay the 66 Loan without substantial hardship when it was approved. The FSP's advance of the 66 Loan was not irresponsible.

This conclusion is further supported by FOS's serviceability summary based on the Applicants' personal income tax returns for the financial year ending 30 June 2009. These demonstrate a monthly surplus. The Applicants' personal tax returns show that it was not until the financial year ending 30 June 2011 that the Applicants' personal income reduced significantly.

FOS's serviceability summaries are set out at 3.4, below.

The Applicants' financial position after the 66 Loan approval is not relevant to assessing serviceability

The Applicants say the FSP's lending decision is flawed because the mere fact they held shares in private companies does not mean they were entitled to make drawings

against the companies. Further, they say the companies' assets including retained profits were not necessarily liquid and available to be drawn upon demand. They say that although, over time, large deposits were made by their bodies corporate to the account from which Loan 66 repayments were made, these deposits were largely the product of asset sales which they were forced to make to meet repayments.

There is no doubt the Applicants' financial position changed after the advance of Loan 66 (and the fallout from the Global Financial Crisis took hold in north Queensland and elsewhere). However, the critical time to assess the propriety of the FSP's lending decision is at approval of the 66 Loan. The FSP understood the Applicants' corporate structure and income distribution and based its credit decision on that understanding and the Applicants' signed statements of financial position. FOS's serviceability summaries demonstrate that in December 2008, the Applicants could afford the 66 Loan. They continued to make repayments until mid-2014. Although the FSP noted "softening" in the property market at the time of the advance, it could not be expected to know the extent of the future fall in the market or how it would affect the Applicants. They were, in any event, experienced property investors and developers who made their own assessment of the investment risk.

2.3 Did the FSP respond appropriately to the dispute prior to the delivery of the Recommendation?

The FSP initially failed to explain fully its lending decision

Prior to delivery of the Recommendation, the FSP said its manager had verified the Applicants' income as disclosed in their December 2008 statements of financial position from their personal and business tax returns for the last two years. It said it was unable however to locate copies of the documents, and the business financials "are no longer avaible".

These latter statements are incorrect. In response to the Recommendation, the FSP provided details of the bodies corporate in which the Applicants held interests, explained how it had assessed serviceability by reference to the Applicants' entitlement to undistributed profits of a company they controlled, and provided significant supporting information, including its business banking section's internal workings and contemporaneous notes.

The FSP's failure to respond appropriately caused the Applicants loss

The Applicants retained lawyers to represent them in this dispute. FOS's usual position is that since applicants do not generally need to be legally represented to bring a dispute, a financial services provider ought not be required to compensate applicants for their legal costs even if we are satisfied they have suffered loss as a result of the provider's conduct.

The Applicants have, however, been put to additional legal costs beyond those they would likely have incurred had the FSP responded appropriately to the dispute and in particular, had explained from the outset its disputed lending decision. In particular, if the FSP had provided information from its business banking section in a timely way, the Applicants may have accepted, on balance, that its lending was not irresponsible.

Even if they did not do so, they would have been able to respond in a more meaningful and better-informed way to the FSP's position prior to the delivery of the Recommendation.

The Applicants' legal costs from September 2015 arise from considering and responding to the FSP's rejection of the Recommendation and its belated additional explanation of its lending decision by its personal and business banking sections. Having decided to retain lawyers in the matter, the Applicants would likely always have incurred these costs and it is not appropriate to require the FSP to refund them.

The FSP ought, however, to reimburse the Applicants for their legal costs associated with reviewing and responding to its initial inadequate explanation of its lending decision. On the basis of my review of their lawyers' tax invoices, I estimate the costs "thrown away" in relation to this matter between April and August 2015 at $2,000. Many of the costs incurred during this time relate to the Applicants responding to FOS's questions about the disputed lending, and in particular, assessing their costs in relation to the lending. The Applicants were required to provide this information as part of FOS's investigation of the dispute irrespective of the FSP's position.

Within 14 days of their acceptance of this Determination, the FSP ought to refund $2,000 plus interest at loan rates from 31 August 2015 to the Applicants by crediting that amount to the 66 Loan.

2.4 What is an appropriate outcome to this dispute?

The FSP has considered the Applicants' financial difficulty

Prior to lodging this dispute, the Applicants lodged a dispute at FOS alleging they were experiencing financial difficulty. On 19 December 2014, FOS delivered a Jurisdictional Decision in that dispute to the effect that the FSP had met its financial difficulty obligations to the Applicants and there was no basis for it to continue to consider the dispute. On 29 December 2014, the Applicants lodged this dispute.

The FSP is entitled to recover the 66 Loan debt

As at 19 November 2015, the balance of the 66 Loan was $1,796,603.62. The Applicants last made a payment to the 66 Loan account on 4 July 2014 and the arrears are $155,308.24. The Applicants provided a statement of financial position in June 2015 in which they disclosed their monthly income at $2,720 and their monthly expenses (excluding loan repayments) at $4,330. They provided no repayment proposal in relation to the 66 Loan for the FSP to consider. The parties have had discussions to settle the dispute, but no resolution has yet been reached.

In the circumstances, and upon closure of the FOS file, the FSP is entitled to take recovery action in relation to the 66 Loan debt.

3 Supporting information

3.1 The Applicants' bodies corporate

The Applicants' interests in the relevant bodies corporate in December 2008 were as follows:

Company	Directors	Shareholders
NPD Pty Ltd	• Mr App (9/10/03 – 24/02/11) • Mr M (also secretary) • Mr S	• W Pty Ltd 33% • Mr M's company 33% • Mr S's company 33%
W C Pty Ltd	• Mr App sole director (14/10/97 – 11/07/14) (Mr App was secretary for these dates)	• W Pty Ltd 100%
W Pty Ltd	• Mr App (04/01/93 – 10/07/14) (Mr App was secretary 04/11/09 – 10/07/14) Mrs App (04/01/93 – 10/07/14) (Mrs App was secretary 04/01/93 – 04/11/09)	• Mr App 50% • Mrs App 50%
R Pty Ltd	• Mr App director (from 09/10/03) (Mr App secretary from 03/05/04) Mrs M	• W Pty Ltd • Mr M's company • Mr S's company

3.2 The FSP's current explanation of its December 2008 serviceability assessment

The Applicants completed and signed two Statements of Financial Position dated 22 December 2008. Their disclosure of income and expenses in each was identical. The income recorded in the joint Statement of Financial Position reflects:

- the Applicants' taxable income disclosed in their 2008 personal tax returns
- for Mr Applicant, 50% of the 2008 undistributed profits retained by W C Pty Ltd as trustee for the Applicants' Family Trust. (The undistributed profit after tax is $257,118.23. This equates to $21,426 per month, and the FSP allowed 50% of this - $10,770 – for Mr Applicant).

The net monthly income for Mr Applicant for the purpose of assessing loan serviceability was therefore:

W C Pty Ltd (undistributed profit)	$10,770.00
PAYG income	$11,079.23
Total	$21,849.23

Further, the FSP's contemporaneous notes record it was the Applicants' intention, following completion of No. 66, to commence residing there and to sell No. 64 to their Family Trust to either on-sell, or to rent out. On the basis that No. 64 would be sold, it was not intended that the repayments would remain at the same level for the 66 Loan term. Therefore, although it verified the Applicants' capacity to make the higher repayments, the proposed sale of No. 64 would reduce the repayments and ought to "be considered akin to a bridging loan".

3.3 Timeline of the FSP's approval of the 66 Loan

The FSP's lending file, including its contemporaneous processing notes and email, show the following timeline of its approval of the 66 Loan

Date	Event
28/11/08	• Applicants sign building contract for No. 66
10/12/08	• FSP commences processing Applicants' application • "Income Verification Checklist for RM controlled groups seeking Mortgage products" completed • Business banking relationship manager creates diary note, explaining methodology used to calculate Applicants' income (ie, income as disclosed in their 2008 personal tax returns, plus 50% of the monthly undistributed profit after tax for W C Pty Ltd)
15/12/08 – 17/12/08	• Personal banking processes the application which it declines on the basis it requires input from business banking
17/12/08	• Email exchanges between personal banking and business banking FSP staff. Business banking supports approval of personal borrowing.
18/12/08 – 22/12/08	• Email exchange between business banking units to amend the NPD Group draft Credit Memorandum
22/12/08	• Applicants sign Statement of Financial Position. Business banking confirms Applicants' income as disclosed in Statement of Financial Position, but application is declined because of serviceability concerns
24/12/08	• Credit Memorandum for the NPD Group. The Credit Memorandum is very detailed and considers the financial position of each of the Applicants' bodies corporate

30/12/08	• Application is recommenced. Notes show the Applicants' income figures had previously been loaded incorrectly and are now loaded correctly. • Application is recommended for approval subject to review of the most recent Credit Memorandum for the NPD Group of accounts. FSP's Credit area states it needs to understand how the income has been confirmed and how the increased income is substantiated
31/12/14	• Following review of the most recent Credit Memorandum which confirms Applicants' business interests, FSP approves proposed lending • FSP's letters of offer for 64 and 66 Loans
05/01/09	• Applicants accept letters of offer

3.4 FOS's serviceability summaries

Serviceability Summary – based on Applicants' personal income tax returns for the financial year ended 30 June 2008

Income Type	$(Net)	Expense Type	$
Mr App	$ 10,932.94	No. 64 Loan	$ 10,840.59
Mrs App	$ 4,575.70	No. 66 Loan	$ 12,676.77
Proposed rental income	$ 1,950.00	Credit Cards	$ 3,153.00
		HPI Living Expenses	$ 2,755.38
Total	$ 17,458.64		$ 29,425.74
Surplus [Deficiency]		-$ 11,967.10	

Serviceability Summary – based on Applicants' signed Statements of Financial Position dated 22 December 2008 and incorporating M C Pty Ltd income distribution

Income Type	$(Net)	Expense Type	$
Mr App	$ 21,739.00	No. 64 Loan	$ 10,840.59
Mrs App	$ 4,634.00	No. 66 Loan	$ 12,676.77
other	$ 1,821.00		
Proposed rental income	$ 1,950.00	Credit Cards	$ 3,153.00
		HPI Living Expenses	$ 2,755.38
Total	$ 30,144.00		$ 29,425.74
Surplus [Deficiency]		$ 718.26	

Serviceability Summary – based on Applicants' personal income tax returns for the financial year ended 30 June 2009

Income Type	$(Net)	Expense Type	$
Mr App	$ 16,392.79	No. 64 Loan	$ 10,840.59
Mrs App	$ 12,311.85	No. 66 Loan	$ 12,676.77
Proposed rental income	$ 1,950.00	Credit Cards	$ 3,153.00
		HPI Living Expenses	$ 2,755.38
Total	$ 30,654.64		$ 29,425.74
Surplus [Deficiency]		$ 1,228.90	

These assessments were made on the following bases and assumptions:

- It is reasonable to include commission in the Applicants' personal income. Commission is a normal part of a real estate agent's income, and the Applicants had received such income consistently over time. It was therefore appropriate for the FSP to consider it would be ongoing. The Applicants concede they had received commission from at least 2004 and continued to do so until 2013
- It is reasonable to include proposed rental income from either No. 64 or No. 66. The FSP's valuations indicate a rental income of $600 per week for each property. The FSP was entitled to include rental income from at least one of the properties since it was expected the Applicants would, on the completion of No. 66, rent out No. 64. FOS has included rental income of $600 per week (discounted to 75% in line with the FSP's policy for assessing rental income), equating to $1,950 per month. Of course, if No 64 were sold there would be no rental, but the loan would be repaid or significantly reduced.
- The Applicants' approximate living expenses are calculated based on the Henderson Poverty Index for a couple plus two children for June 2008. (This Index was published on 14 October 2008, prior to the 66 Loan approval). This Index equates to $2,755.38 per month, including a buffer of 15%. While FOS ordinarily adopts a 10% buffer, we adopt a 15% buffer where a borrower's lifestyle dictates this. It is appropriate to do so here

- FOS's usual approach when assessing loan repayment obligations is to adopt an interest buffer of 1.5% per annum and amortize the loan over the contract term for which principal and interest repayments are to be made. This accords with generally accepted industry practice. The contract for the 64 Loan provides for 12 months of interest-only payments, followed by 29 years' of principal and interest repayments. The FOS debt servicing calculation therefore includes an expense for loan repayments over a 29 year term. The contract for the 66 Loan requires interest-only payments to be made during construction, converting thereafter to principal and interest repayments for the remaining term, with a maximum overall loan term of 30 years. The account statements show the 66 Loan was fully drawn in October 2010, 20 months after the first drawdown. Adopting a conservative approach, the Banking Adviser has amortized the 66 Loan over 28 years and included this expense in the debt servicing calculation
- FOS's usual approach when assessing credit card payment obligations is to calculate payments at 3% of the limit for each credit card account. This accords with generally accepted industry practice which requires minimum monthly repayments of between 2% and 3% of the outstanding balance. Once again taking a conservative approach, the Banking Adviser calculated the minimum monthly repayment on the limits of each credit card account the Applicants disclosed during FOS's investigation (but not in their Statements of Financial Position made in December 2008). These credit card payment calculations are set out below:

Applicants' credit card accounts	Monthly repayment amount used in FOS serviceability assessments
W credit card with limit of $42,300	$1,269
W credit card with limit of $21,800	$654
S credit card with limit of $20,000	$600
FSP credit card with limit of $5,000	$150
FSP credit card with limit of $16,000	$480
Total	$3,153

3.5 Summary of the Applicants' legal costs

Tax invoice	Brief summary of work performed	Amount
22/4/15 (26/3/15 – 16/4/15)	• Review of FSP's initial response to dispute • Preparation of detailed submission (14/4/15)	$9,222.03
30/6/15 (4/5/15 – 30/6/15)	• Preparation of response to FOS's issues letter (9/6/15) • Preparation of further response to FOS's issues letter – re costs and expenses (16/6/15)	$3,900.06
31/8/15 (6/8/15 – 28/8/15)	• Settlement discussions with FSP • Discussion with barrister • Reviewing FSP's rejection of Recommendation	$1,925.00
19/10/15 (11/9/15 – 8/10/15)	• Responding to FSP's rejection of Recommendation (6/10/15)	$7,238.00
29/10/15 (19/10/15 – 29/10/15)	• Settlement discussions with FSP	$1,617.00

Philip Field
Lead Ombudsman – Banking and Finance
Financial Ombudsman Service

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Case Management
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25 March 2014

Consumers:

Ms Susannah Dyer and Mr Darryl Shiels
2100 Mt Mee Road
MOUNT PLEASANT QLD 4521

Financial Services Provider:
LJ Hooker Financial Services Pty Limited
191 Botany Road
ALEXANDRIA NSW 2015

Our Ref: 12/2230
Contact: Lisa Trass

Review

1. Based on our review of the information provided by the parties to this complaint, we find that we do not have jurisdiction to consider this complaint further because the consumers have not suffered a loss.

Background to complaint

2. On or about June 2011, the consumers obtained the Financial Services Provider's (**the FSP**) services to assist them with a refinance of their loan from Commonwealth Bank of Australia (**CBA**) to Australia and New Zealand Banking Group Limited (**ANZ**).

3. By email of 9 June 2011, the FSP queried the amount of any fixed rate break cost (also known as an early repayment adjustment) (**FRBC**) with CBA, if the loan was to be refinanced to another lender. CBA replied:

> "No ERA apparently".

4. By email of 10 June 2011, the FSP forwarded CBA's response to the consumers and informed them that:

> "Looks like there are no extra penalties if you pay out your fixed rate."

5. In their emails to the FSP of 15 June 2011, the consumers made it very clear to the FSP that:

   (i) the refinance would only be feasible if they could use funds under the new ANZ loan to repay their $20,000 overdraft in full; and

   (ii) they did not have any personal funds to apply towards reduction of their overdraft. Accordingly, all funds needed to come from the new ANZ loan.

6. By email of 22 July 2011, the FSP informed the consumers that the ANZ loan had been approved and that loan documents would be sent to the consumers. The FSP also informed the consumers that:

"Once these are signed and returned back to the bank, they will then proceed to settle with CBA. So this is when we have the ability to control the settlement time so that we can clear the OD. But its up to you. Depending on what your CBA payout is on the day, if there is not $20k exactly to clear the OD, then basically you can reduce it down to as much as you can."

7. On 16 August 2011, the discharge request form was faxed to CBA.

8. By emails of 17 August 2011, ANZ informed the FSP that CBA had not yet received the discharge request form. The FSP told ANZ that:

"Discharge was sent only on Friday. So perhaps try booking in by end of the week."

9. ANZ confirmed that they had:

"... diarised to follow up 24/08".

10. The FSP says that on 26 August 2011, they telephoned ANZ for an update regarding the booking of settlement and ANZ informed the FSP that CBA was not yet ready to settle.

11. The FSP then says that on 29 August 2011, they telephoned ANZ again for an update regarding settlement. ANZ told the FSP that nothing was booked in the system and that they would send a notice to the file owner to advise when settlement could be expected.

12. The refinance settled on 30 August 2011, without prior notification to either the consumers or the FSP.

13. The consumers were unexpectedly charged a FRBC of $12,265.96 by CBA. As a result, the consumers were unable to repay their overdraft in full, but rather only had $4,014 to apply towards the overdraft.[1]

Consumers' claims and preferred outcome

14. As we understand it, the consumers are claiming that the FSP did not arrange the new ANZ loan in accordance with their objectives, because they had to unexpectedly pay the FRBC and consequently were unable to repay their overdraft.

15. In resolution of the complaint, the consumers would like the FSP to compensate them for the unexpected FRBC and interest that has continued to accrue on the overdraft account.

FSP's position

16. On 24 October 2012, the FSP provided its response to COSL in which the FSP defended its position in relation to the complaint as follows:

(i) CBA had failed to inform the FSP (or more importantly the consumers) what the FRBC was, once calculated; and

(ii) ANZ ordinarily advises the FSP of the settlement date in advance of settlement. This was not done in this case, and therefore the FSP missed out on the opportunity to request an updated FRBC from CBA.

[1] This is in accordance with the consumers' letter of 10 September 2012.

Our review

17. We consider that in its email correspondence to the consumers, the FSP could have further qualified to the consumers the risks involved with the refinance. In particular, we consider that the FSP should have emphasised:

    (i) the fluctuating nature of the FRBC; and

    (ii) advised the consumers to request regular updates of the FRBC from CBA.

18. Notwithstanding the above, our Rules only permit us to deal with a complaint where it can be shown that the complainant suffered a loss.[2]

19. To understand whether the consumers suffered a loss, we have compared the position that the consumers would have been in if they had remained in the CBA loan (**the original position**) to the position that they are now in under the ANZ loan (**the new position**).

20. This analysis only required us to consider the differences between the CBA loan and the ANZ loan, because the overdraft loan remained the same under both positions.

21. In order to conduct this analysis, on 7 February 2014 we requested from the consumers the following information:

    (i) monthly account statements for the overdraft account for the period: 1 July 2011 to 7 February 2014; and

    (ii) monthly account statements for the ANZ home loan account for the period: 31 August 2011 to 7 February 2014.

22. The consumers provided this information to COSL on 20 February 2014 (although we note that the consumers were only able to provide ANZ account statements for the period ending 30 August 2013).

23. The consumers had previously provided to COSL on 24 April 2013, a copy of the CBA loan contract and account statements for the periods from 3 June 2011 to 30 August 2011, and a copy of the new ANZ loan agreement.

24. Upon review of the information provided by the consumers, we attach an excel spreadsheet comparing the original position to the new position.

25. Our analysis evidences that although the consumers had to pay the FRBC to CBA in order to refinance their loan from CBA to ANZ, the consumers have not suffered any loss by moving from the original position to the new position. Rather, it appears that the consumers have received the following benefits from refinancing:

    (i) a total interest saving in the amount of $17,841.03. If you deduct the CBA costs associated with refinancing (including the FRBC) from this amount, the consumers still received a net benefit in the amount of $4,475.07 from refinancing; and

[2] Rules 10.1(j) and 9.7, COSL Rules – 8th Edition.

(ii) lower monthly repayments of $3,700 compared to $4,200 (i.e. $24,693.97 less in total), thereby freeing up this money to apply towards reduction of the overdraft,

(please refer to the attached excel spreadsheet for calculation of these amounts. Please note that the calculation is for the period from 30 August 2011 to 28 February 2014).

Closing the complaint

26. In view of the above, we consider that the consumers have not suffered any loss. Consequently, we are unable to consider this complaint further.

27. If the consumers have any further information to indicate that the complaint should remain open, we ask that it be provided to us by **Tuesday, 8 April 2014**.

28. If we do not receive a response from the consumers within this time, the complaint will be closed. Please note that once a complaint is closed, it may only be reopened in exceptional circumstances.

29. The consumers may be able to seek legal assistance from:

    (i) the Caxton Legal Centre, who may be contacted on 07 3214 6333; or

    (ii) Legal Aid QLD, who may be contacted on 1300 651 188.

30. The consumer's concerns about the conduct of the FSP may be a matter that can be looked into further by the Australian Securities and Investments Commission (**ASIC**), who is the regulator for the financial services industry. ASIC can be contacted on 1300 300 630

Please do not hesitate to contact me on (02) 9273 8472 or by email to lisa.trass@cosl.com.au if you wish to discuss this case further.

Sincerely,

Lisa Trass
Case Manager