



INSURANCE
CONSTRUCTION &
ENGINEERING
RESOURCES
CORPORATE
COMMERCIAL
PROPERTY
LITIGATION &
DISPUTE
RESOLUTION
AVIATION

2015 rings in changes to the FOS Terms of Reference

Michael Bath, Partner - Sydney

Thomas Byrne, Associate - Sydney
(Admitted in England and Wales
and not admitted in Australia)

Introduction

Following stakeholder consultation during 2014, the board of the Financial Ombudsman Service (**FOS**) has amended its Terms of Reference (**TOR**). The majority of the amendments took effect on 1 January 2015, with corresponding amendments to the FOS Operational Guidelines (**Operational Guidelines**) providing further guidance and assistance.

This article provides a summary of some of the key amendments.

Appointment of Adjudicators

FOS has created the new role of Adjudicators to assist in managing disputes. They share similar powers to the Ombudsman, although their authority is currently limited to issuing determinations and jurisdictional decisions on 'Fast Track' disputes. Under the Operational Guidelines, 'Fast Track' disputes typically:

- a. contain well defined and straight forward issues only – typically a single issue;
- b. are within TOR; and
- c. involve a lower claim amount.

The Chief Ombudsman is to set limits on the scope of Adjudicators' powers based on FOS's experience with the new process moving forward.

Small business general insurance disputes – business interruption

Currently FOS can only consider general insurance disputes relating to retail, residential strata title, small business or medical indemnity insurance products. Paragraphs 4.3 and 20.1 of TOR have expanded FOS's jurisdiction to include claims arising from profit / business interruption insurance for general insurance disputes lodged after 1 January 2016.

Small business general insurance broking disputes

FOS has restored its jurisdiction to that of the antecedent scheme, the Insurance Brokers Facility. The amendments appear to widen the scope of disputes between a small business and a broker that can be dealt with by FOS, including insurance broking disputes involving all General Insurance Policies other than '*Excluded Products*'.¹ Previously FOS only had jurisdiction in respect of '*Retail General Insurance Products*'.

In order to provide brokers with sufficient time to organise suitable insurance arrangements, these changes take effect for disputes lodged after 1 January 2016.

Disputes lodged by agents charging a fee for service

A new paragraph 6.1 has been inserted into the TOR which allows FOS to refuse to accept a dispute if the applicant is represented by a fee-for-service agent and the agent:

- a. is engaging in inappropriate conduct which is not in the applicant's best interests; or
- b. fails to provide information required by FOS.

The Operational Guidelines suggest that inappropriate conduct is that which is inconsistent with the co-operative, efficient and timely and fair resolution of a dispute. Paid agents encouraging applicants to conceal their involvement is '*unacceptable*' and FOS can refuse to continue considering a dispute if an applicant fails to provide information about any assistance they are receiving.

Discretion to allow an asset to be sold

Paragraph 13.1 of the TOR has been amended to give FOS the discretion to allow a financial service provider (**FSP**) to sell an asset that is subject of a dispute. Previously, FOS had the discretion to either allow an FSP to freeze or preserve an asset which was the subject of a dispute.

The Operational Guidelines provide the following

examples of circumstances where the sale of an asset will be permitted:

- a. if the asset is a motor vehicle which has been seized by the FSP and would be unavailable to the applicant during the course of the dispute, is depreciating daily, and is incurring daily storage costs, FOS will consider allowing the sale to reduce the potential debt in a dispute; or
- b. if the FSP is already in possession of a property, or a sheriff has been appointed to enforce possession before a dispute is lodged, FOS will not prevent the FSP from selling the property unless there are exceptional circumstances.

At this stage, decisions to allow the sale of an asset can only be made by an Ombudsman.

Disputes involving accountants

FOS recognises that accountants provide a variety of services some of which may fall within the scope of the TOR. Paragraph 5.1(u) of the TOR has therefore been amended to clarify FOS's powers in disputes involving accountants. While '*professional accounting services*' may fall within the definition of Financial Services,² FOS will not consider a dispute against an accountant³ that involves '*professional accountancy services*' unless those services were provided in connection with a '*financial service*',⁴ '*credit activity*',⁵ or '*tax (financial) advice services*'.⁶

When considering what amounts to '*professional accounting services*', FOS will take into account:

- a. the nature of the service;
- b. how the professional accounting services are defined by the relevant professional association and any standards issued by the Accounting Profession and Ethical Standards Board; and
- c. any other relevant information.

Indexation of compensation caps

The compensation caps specified in Schedule 2 of TOR have been increased and the following caps apply to all new disputes lodged from 1 January 2015:



a. Income stream	-	\$8,300;
b. Broker disputes	-	\$166,000 (save where it involves life cover);
c. Consequential loss	-	\$3,300;
d. All other disputes	-	\$309,000;
e. Non financial loss	-	\$3,000 (this remains unchanged).

The amendments do not increase FOS's claim limit of \$500,000. According to the Operational Guidelines, an applicant may not abandon any excess to bring a claim within the limit, nor artificially construct a claim for that purpose.

Joining additional parties

Either at the request of a party or of its own volition, FOS can now join a FSP to a dispute (so long as the FSP is a member of FOS at the time it is joined) if it would lead to a more efficient and effective resolution. This amendment applies to all open disputes from 1 January 2015 onwards and is targeted at streamlining the dispute process and to allow for apportioning liability where more than one FSP has contributed to the same loss.

Under the Operational Guidelines, FOS may join another FSP to a dispute if it considers the

dispute is about a loss which the applicant claims was caused by one FSP and:

- an applicant's claim may succeed;
- an applicant may have a claim against the second or subsequent FSP in respect of some or all of the same loss; and
- it would be fair in the circumstances to consider the contribution of both (or all) FSPs to the applicant's loss within one dispute.

Useful links

<http://www.fos.org.au/custom/files/docs/summary-of-fos-terms-of-reference-changes-december-2014.pdf>

<http://www.fos.org.au/custom/files/docs/fos-terms-of-reference-1-january-2010-as-amended-1-january-2015.pdf>

<http://www.fos.org.au/custom/files/docs/operational-guidelines-as-at-1-january-2015.pdf>

¹ 'Excluded Product' means a product that is not a 'financial product' for the purposes of Part 7.1, Division 3 of the *Corporations Act 2001* (Cth).

² As defined at paragraph 20.1 of the TOR.

³ Defined at paragraph 20.1 of the TOR as being a member of CPA Australia, the Institute of Chartered Accountants in Australia or the Institute of Public Accountants.

⁴ Within the meaning of s 766A of the *Corporations Act 2001* (Cth) or s 12BAB of the *ASIC Act 2001* (Cth).

⁵ Within the meaning of the *National Consumer Protection Act 2009* (Cth).

⁶ Within the meaning *Tax Agent Services Act 2009* (Cth).

Authors



Michael Bath

Partner - Sydney

P: (02) 9241 6808

E: mbath@carternewell.com



Thomas Byrne

Associate - Sydney

(Admitted in England and Wales and not admitted in Australia)

P: (02) 9241 6808

E: tbyrne@carternewell.com

Professional Guides



If you would like to receive a copy of any of our publications, please email newsletters@carternewell.com to request a hard copy. Alternatively, the Guides can be viewed on our website at www.carternewell.com.

Please note that Carter Newell collects, uses and discloses your personal information in accordance with the Australian Privacy Principles and in accordance with Carter Newell's Privacy Policy, which is available at www.carternewell.com/legal/privacy-policy. To tell us what you think of this newsletter, or to have your contact details updated or removed from the mailing list, please contact the Editor at newsletters@carternewell.com. If you would like to receive newsletters electronically, please go to www.carternewell.com and enter your details in CNJNewsletter signup.

The material contained in this newsletter is in the nature of general comment only, and neither purports nor is intended to be advice on any particular matter. No reader should act on the basis of any matter contained in this publication without considering, and if necessary, taking appropriate professional advice upon their own particular circumstances.

© Carter Newell Lawyers 2015

Brisbane

Level 13, 215 Adelaide Street
Brisbane QLD Australia 4000
Phone +61 7 3000 8300

Sydney

Level 6, 60 Pitt Street,
Sydney NSW Australia 2000
Phone +61 2 9241 6808

All correspondence to:

GPO Box 2232, Brisbane QLD 4001
www.carternewell.com
ABN 70 144 715 010

