



ACCC Inquiry – residential insurance in northern Australia

Financial Ombudsman Service Australia Submission

March 2018

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Executive summary

The Financial Ombudsman Service (FOS) Australia¹ is an ASIC-approved independent external dispute resolution (EDR) scheme that covers disputes across the financial sector.²

We welcome the opportunity to contribute to the ACCC's inquiry into the supply of residential building, contents and strata insurance in northern Australia (Inquiry) by responding to the issues paper released on 24 October 2017 (Issues Paper).

The main focus of the Inquiry is the affordability and availability of insurance. While the jurisdiction of FOS does not extend to considering these broad issues, some of the matters discussed in the Issues Paper arise when we consider individual disputes between consumers and their financial services providers and in our related work on systemic issues.

On 18 December 2017, the Government announced its responses to the final report of the Northern Australia Insurance Premiums Taskforce and the Senate's recent inquiry into the general insurance industry. The taskforce found that mitigation activities to reduce the risk of damage from cyclones are the only way to reduce premiums on a sustainable basis. The Government has accepted this finding and decided not to intervene directly in the insurance market. Instead, the Government is proceeding with reforms recommended by the Senate inquiry, designed to place downward pressure on premiums.³

Matters addressed in this submission⁴ include:

Jurisdiction of FOS

Section 1 provides information about our jurisdiction, including an explanation of some constraints on our ability to consider certain general insurance disputes.

EDR changes

Section 2 notes changes being made to the arrangements for EDR in the financial sector. The new 'one stop shop' for financial complaints – the Australian Financial Complaints Authority – is to commence by 1 November 2018. It will have a broader jurisdiction than the existing EDR bodies.

¹ Information about FOS is set out in full on our website at www.fos.org.au. The Appendix summarises key points.

² FOS is approved by ASIC under its Regulatory Guide 139 *Approval and Oversight of External Dispute Resolution Schemes* ([Regulatory Guide 139](#)).

³ See [media release](#) made by the Minister for Revenue and Financial Services on 18 December 2017.

⁴ This submission has been prepared by the Office of the Chief Ombudsman and does not necessarily represent the views of individual FOS directors. It draws on the experience of FOS and its predecessors in the resolution of disputes about financial services.

Statistics

Section 3 presents recent statistics on the general insurance membership of FOS and disputes about the types of insurance being examined in this Inquiry.

Issues in disputes

Section 4 sets out observations based on our experience in handling general insurance disputes. It illustrates key issues by referring to Determinations of disputes published on our website.

Earlier submissions

Section 5 refers to previous submissions by FOS that could assist this Inquiry.

If FOS can provide further input or assistance, please contact us.

1 Jurisdiction of FOS

The current jurisdiction of FOS⁵ is set out in Section B of our [Terms of Reference](#) and explained in detail in our [Operational Guidelines](#). Our jurisdiction meets standards specified in regulatory guidance issued by ASIC⁶.

FOS may only consider a dispute in relation to a general insurance policy that is:

- a retail general insurance policy
- a residential strata title insurance product
- a small business insurance product or
- a medical indemnity insurance product.⁷

We note that the category of ‘retail general insurance policy’ listed above includes home building and home contents insurance products.

Disputes referred to in paragraph 5.1 of our Terms of Reference are excluded from our jurisdiction. To mention a few examples relevant to general insurance, FOS cannot consider:

- certain disputes about premiums charged
- disputes about rating factors and weightings applied to determine a base premium for general insurance, which is commercially sensitive information

⁵ The section headed ‘EDR changes’ below explains arrangements to expand the EDR jurisdiction.

⁶ See ASIC’s [Regulatory Guide 139](#).

⁷ For further detail, see our [Terms of Reference](#) – in particular, paragraph 4.3 and definitions in paragraph 20.1.

- disputes about decisions to provide insurance cover, other than
 - a dispute that the decision was made indiscriminately, maliciously or on the basis of incorrect information or
 - a dispute pertaining to medical indemnity insurance cover or
- disputes already dealt with in a court, tribunal or another ASIC-approved EDR scheme.

Our Terms of Reference set \$500,000 per claim⁸ as the monetary limit of our jurisdiction. We may not consider a claim where the value exceeds \$500,000. This is the 'product value' figure used as part of the retail client definition in section 761G of the *Corporations Act 2001*.

ASIC's Regulatory Guide 139 requires an EDR scheme to operate with a compensation cap. Under this approach, the scheme has jurisdiction to consider a dispute involving an amount larger than the compensation cap, but can only award compensation up to the cap. A compensation cap must be at least \$150,000 for a claim against a general insurance broker and at least \$280,000 for other claims.

Our current compensation cap for most disputes is \$323,500. Other caps apply to disputes about income stream insurance (\$8,700 per month), some disputes against general insurance brokers (\$174,000), and third party motor vehicle insurance claim disputes (\$5,000). A cap of \$3,500 per claim also applies to awards for consequential loss or damage.

The compensation caps are required to be adjusted regularly in accordance with an indexation formula. The latest adjustment occurred on 1 January 2018.

We have discretion to exclude disputes from our jurisdiction in relation to general insurance under paragraph 5.2 of our Terms of Reference. We do not lightly exercise this discretion and must be satisfied it would be inappropriate for FOS to consider the dispute any further. Examples of situations in which we may exercise the discretion include:

- there is a more appropriate forum for the dispute, such as a court and
- the dispute is frivolous, vexatious or lacking in substance.

2 EDR changes

The financial system EDR framework was recently reviewed by an expert panel chaired by Professor Ian Ramsay ([Ramsay Review](#)). In its [final report](#), the Ramsay

⁸ A dispute may contain multiple claims. The meaning of the term 'claim' used in our Terms of Reference is explained in the guideline to paragraph 9.7 in our [Operational Guidelines](#). This is different to an insurance claim, which is an application for benefits under an insurance policy.

Review recommended changes to existing dispute resolution arrangements, designed to build on the proven features of the industry ombudsman model.

In May 2017, the Government accepted all of the recommendations of the Ramsay Review⁹ and then developed legislation to implement the proposed changes. The legislation¹⁰ was passed on 14 February 2018. Key reforms include:

- establish a single EDR scheme to replace FOS and the other two dispute resolution bodies operating at present in the financial sector¹¹, to be called the Australian Financial Complaints Authority (AFCA)
- make increases to EDR claim and compensation limits including these changes affecting general insurance matters¹² –
 - raise the \$500,000 per claim monetary limit to \$1 million
 - raise the \$323,500 general compensation cap to \$500,000 and
 - raise the separate compensation cap for general insurance broker disputes from \$174,000 to \$250,000 and
- enhance access to EDR for consumers including small businesses.

The Government has announced that AFCA will start receiving disputes no later than 1 November 2018.

3 Statistics

3.1 General insurance members of FOS

FOS had some 5,621 licensees and 7,801 authorised credit representatives as members as at 30 June 2017. Our records indicate that, as at 1 January 2018, 77 of our members were general insurers and 603 were general insurance brokers.¹³

3.2 Disputes accepted by FOS in 2016-17¹⁴

FOS accepted a total of 22,475 disputes across our whole jurisdiction in 2016-17. We accepted 8,756 general insurance disputes in 2016-17, which was 28% higher than the number accepted in the previous year.

⁹ See [media release](#) made by the Treasurer on 9 May 2017.

¹⁰ Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017.

¹¹ The three dispute resolution bodies operating at present are FOS, the Credit and Investments Ombudsman and the Superannuation Complaints Tribunal.

¹² Other compensation caps for insurance disputes will also increase. For example, the cap on third party motor vehicle claim disputes will increase from \$5,000 to \$15,000 and the cap on income stream insurance disputes will increase from \$8,300 to \$13,400 per month.

¹³ This information is based on how the financial services providers have described their business to us.

¹⁴ More detailed information, including explanations of terms used, is provided in our [Annual Review 2016-17](#) on pages 90 to 94.

Three types of general insurance of particular interest in the current Inquiry are home building, home contents and residential strata title insurance. The table below indicates numbers of disputes relating to these types of insurance accepted by FOS in the five years from July 2012 to June 2017 in which the applicants resided in northern Australia.¹⁵

Type of insurance	2012-13	2013-14	2014-15	2015-16	2016-17
Home building	107	86	75	96	99
Home contents	28	20	12	18	13
Residential strata title	6	6	3	-	-
Total	141	112	90	114	112

4 Issues in disputes

This section sets out observations based on our experience in resolving general insurance disputes. It seeks to highlight issues associated with remote locations and/or weather events more likely to occur in northern Australia and provides examples of disputes about insurance of residences in areas prone to cyclones.

4.1 Delays in repairing damage after extreme weather events

General insurance disputes arising from catastrophes indicate that there can sometimes be long delays between an extreme weather event and repairs commencing. Factors contributing to the delays include:

- extensive damage being sustained across a wide area
- limited availability of assessors, repairers and repair materials and
- adverse weather conditions continuing after an extreme event.

Although extreme weather events can occur anywhere in Australia, some of these events are more common in northern Australia. In particular, that area is frequently affected by cyclones and other severe storm events.

¹⁵ These statistics may not include every dispute of interest to the Inquiry. For example, our records may not allow us to identify a dispute about insurance over a northern Australian residence lodged by a person who resided outside that area.

Example 1: Cyclone Oswald – delay in repairs

[FOS Dispute 340647](#) related to property damage caused by Cyclone Oswald. Our Determination found that there were considerable delays in the claims handling process, which significantly impacted the customer’s peace of mind, triggering symptoms of anxiety and depression.

4.2 Additional difficulties in repairs

In areas where extreme weather events occur, buildings need to meet additional requirements. Repairs in those areas, which may present additional difficulties, have been the subject of disputes considered by FOS.

The ongoing exposure of properties to severe weather events means that inadequate repairs may result in significant additional damage.

Example 2: Cyclone Oswald - inadequate repairs

[FOS Dispute 458054](#) related to property damage caused by Cyclone Oswald. Our Determination found that the insurer’s repairers failed to adequately rectify moisture issues caused by the storm, which resulted in the proliferation of mould throughout the property.

4.3 Use of cash settlements

Most residential insurance policies will provide the insurer with the discretion to settle a claim by either:

- repairing the damaged property or
- paying the consumer an amount equal to the estimated cost of repairs.

FOS expects insurers to exercise this discretion fairly and reasonably. The overuse of cash settlements can result in the following negative outcomes for consumers:

- The cash settlement amount may be insufficient because it is based on quotes provided by the insurer’s panel builders, which include volume discounts and rebates.
- Consumers may be required to manage complex repairs projects where they do not have the knowledge and experience required to do so.
- Consumers are deprived of the life time guarantee available where repairs are completed by the insurer’s contractors and therefore bear the risk of any subsequent problems.

Example 3: Cash settlement – unfair outcome

[FOS Dispute 419147](#) related to damage caused by a tropical cyclone in February 2015. In our Determination we concluded that the cash settlement offered by the financial services provider was not fair because it transferred all the risk to the consumer, did not make sufficient allowance for possible variations which could be required as part of the building works and did not adequately provide for temporary accommodation costs.

4.4 Pre-existing issues with property

In some cases where a property is impacted by a significant weather event, the insurer will seek to argue that the damage occurred as a result of pre-existing issues with the property.

Insurers may also seek to deny various aspects of the damage, on the basis they were not caused by the event but by long-term factors such as wear and tear or a lack of maintenance.

Example 4: Extent of damage caused by cyclone

[FOS Dispute 446693](#) related to damage caused by a tropical cyclone in April 2014. The insurer accepted the claim for storm damage to some of the property but denied cover for the veranda. In our Determination, we found that the cyclone had contributed to the damage to the veranda (even though it was in less than ideal condition prior to the storm). Accordingly, we required the insurer to pay 50% of the repair costs.

5 Earlier submissions

Previous submissions on insurance issues made by FOS could assist the current Inquiry. They include submissions to:

- the Treasury discussion paper *Addressing the high cost of home and strata title insurance in North Queensland* ([FOS submission June 2014](#))
- the Parliamentary Inquiry into the Operation of the Insurance Industry during Disaster Events ([FOS submission August 2011](#))
- the Treasury issues paper for the National Disaster Insurance Review ([FOS submission July 2011](#)).

Appendix - About FOS

1. Overview

FOS is an ASIC-approved independent EDR scheme that covers disputes across the financial sector. Our service is free to consumers and is funded through a combination of levies and case fees paid by our members, which are financial services providers.

Our operations are governed by our Terms of Reference that form a contract with our members. The Terms of Reference are available on our website.

FOS and its predecessor schemes have over 25 years' experience in providing dispute resolution services in the financial services sector. FOS provides services to resolve disputes between member financial services providers and consumers, including certain small businesses, about financial services such as:

- banking
- credit
- loans
- general insurance
- life insurance
- financial planning
- investments
- stock broking
- managed funds and
- pooled superannuation trusts.

As well as its functions in relation to dispute resolution, FOS has responsibilities to identify and resolve systemic issues and obligations to make certain reports to ASIC.

A separately operated and funded team at FOS provides secretariat services to code monitoring and compliance committees for five industry codes of practice:

- the Code of Banking Practice
- the Customer Owned Banking Code of Practice
- the Life Insurance Code of Practice
- the General Insurance Code of Practice and
- the Insurance Brokers Code of Practice.

FOS is governed by a board with an independent chair and:

- four 'industry directors' appointed based on their expertise in and knowledge of the financial services industry, independence and capacity and willingness to consult with the industry and
- four 'consumer directors' appointed based on their expertise in consumer affairs, knowledge of issues pertaining to the industry, independence and capacity and willingness to consult with consumer organisations.

More information can be found on our website www.fos.org.au and in our [Annual Review 2016-17](#).

2. Dispute resolution processes

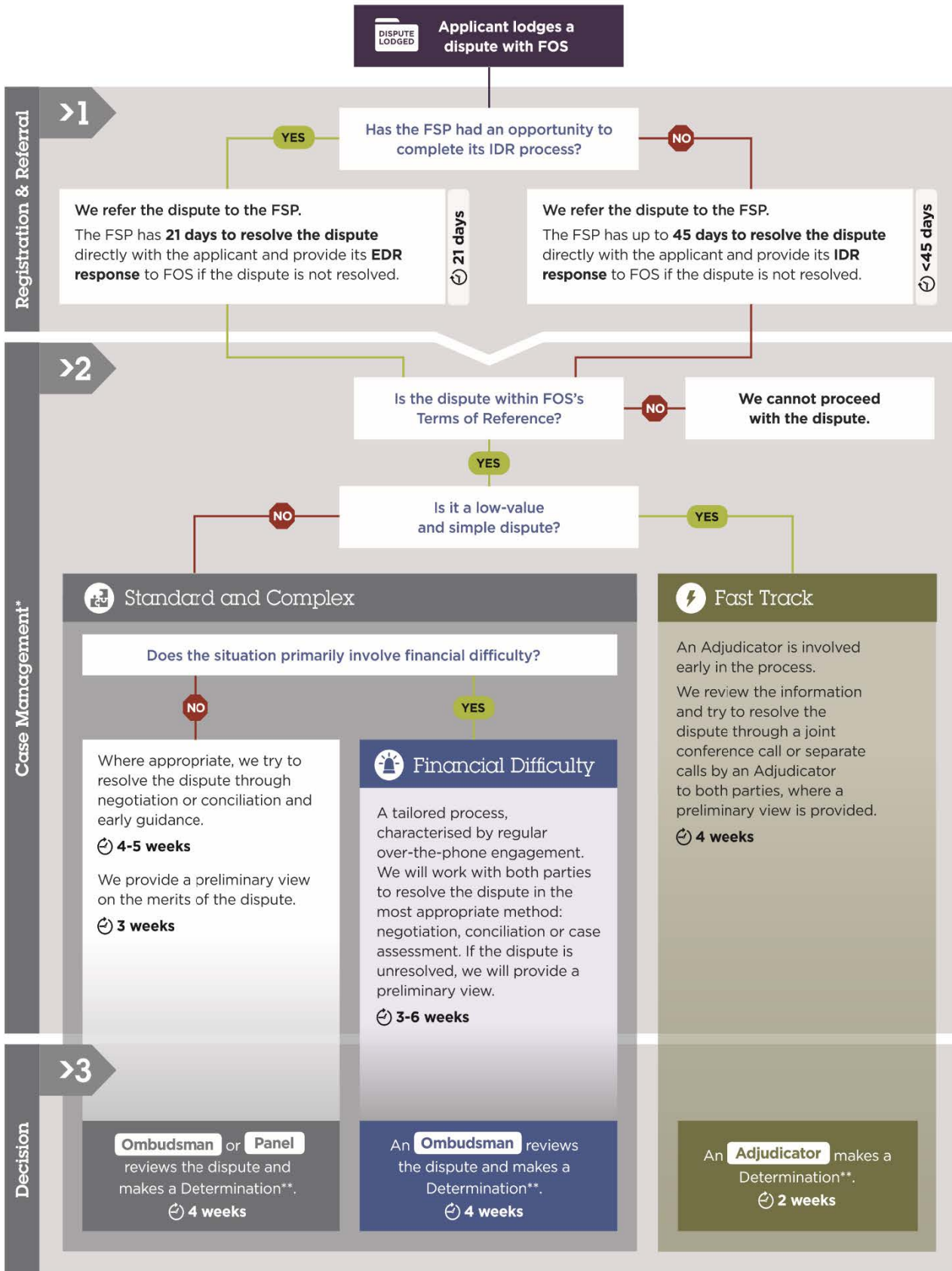
Our dispute resolution processes are explained fully on our website. Information about the processes can be accessed easily through the 'Resolving Disputes' and 'Consumers' tabs on our home page.

Our dispute resolution process map, noting timeframes, is set out at the end of this section. The process map shows that determinations may be made by an Ombudsman, an adjudicator or a panel. The guideline to paragraph 8.5 of our Terms of Reference explains factors we consider when deciding who should determine a dispute.

In some cases, an Ombudsman or adjudicator will have particular expertise and the ability to readily access any industry or consumer advice required to resolve a matter. In other cases, it will be important to involve consumer or industry experts in the actual decision making, which can be done by using a panel. An example of this may be where it is not clear what good industry practice should be for the circumstances of a dispute and it would be more effective to involve an industry representative in the decision making.

ASIC's Regulatory Guide 139 requires FOS to undertake an independent review every 5 years and specifies how the reviews must be conducted. Independent reviews, which assess an EDR scheme's performance in qualitative as well as quantitative terms, are designed to provide feedback on how the scheme should evolve and highlight any need for change or improvement.

FOS dispute resolution process map



These are average expected timeframes.

*A single case worker will manage the dispute wherever possible.

**A financial services provider is bound by a determination if an applicant accepts it.

3. Systemic issues

FOS has an obligation to ASIC as an EDR scheme to identify, resolve and report on systemic issues and to notify cases of serious misconduct. A systemic issue is defined in our Terms of Reference as an issue that will have an effect on other people beyond the parties to the dispute. Several disputes of the same type may indicate a systemic problem; however, issues may also be identified out of the consideration of one single dispute where it is clear that the effect of the problem will extend beyond the parties to the dispute. Serious misconduct is defined as conduct that may be fraudulent or grossly negligent or may involve willful breaches of applicable laws or obligations.

To ensure that we continue to grow the trust, credibility, consistency and confidence required to perform our systemic issues function for financial services providers and for ASIC, we have established clear processes to deal with:

- identification of possible systemic issues
- referring a possible systemic issue to the financial services provider for comment
- assessing whether a matter represents a definite systemic issue and
- if definite –
 - through collaboration, resolving the issue identified as systemic and
 - reporting de-identified systemic issue investigation agreed outcomes to ASIC.

The aim of a systemic issue investigation is to achieve an agreed outcome between FOS and the financial services provider. This includes, where appropriate, action to ensure that:

- the financial services provider identifies all affected consumers
- all identified affected consumers are compensated fairly for losses
- the problem is rectified so that it does not occur again in the future and
- any other consumers affected will be compensated for losses in the same way as identified affected consumers.