

21 April 2009

Mr Phil Khoury  
The Navigator Company Pty Ltd  
c/- Financial Ombudsman Service  
GPO Box 3  
MELBOURNE VIC 3001

By email: [phil.khoury@thenavigator.com.au](mailto:phil.khoury@thenavigator.com.au)

Dear Mr Khoury

**Re: Financial Ombudsman Scheme Proposed Terms of Reference**

The Energy and Water Ombudsman (Victoria) (EWOV) congratulates the Financial Ombudsman Scheme (FOS) on its proposed Terms of Reference. In general, the Terms of Reference are to be commended for providing a workable basis on which FOS's predecessor schemes can merge into a coherent and forward looking single scheme. However, there are two points on which we would like to comment because we believe that in developing the terms of reference, opportunities to follow best practice may have been overlooked. These two points are:

- allowing 45 days for internal dispute resolution before FOS will take up a matter, and
- who determines the choice between a single Ombudsman determination or a Panel decision.

**45 days for Internal Dispute Resolution (6.3 of the Terms of Reference)**

EWOV of course absolutely agrees that there must be adequate opportunity for the financial service provider (FSP) to resolve the issue internally. That is fundamental. However, we disagree strongly with an automatic allowance of 45 days. We note that it is consistent with the guideline of the Australian Securities and Investment Commission, but that is a minimum standard and we believe FOS could and should be aiming to be more responsive to its customers and to be putting more pressure on FSPs to have efficient and effective internal dispute resolution.

At EWOV we use the measure of how many contacts a customer reports having had with the relevant provider. Where they have made two or more attempts to resolve

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the matter directly, their matter qualifies to be investigated, if they choose. They can also choose to go back to a higher level at the provider for a final opportunity for direct resolution. We believe this makes a better balance between the consumer's desire to have the matter progressed and the provider's right to have an opportunity to resolve the matter internally than automatically allowing 45 days, regardless of the complexity or simplicity of the matter. We have an added safeguard to make sure the provider is given ample opportunity to resolve directly: where a customer rings us and it transpires the matter is already in progress at the provider, we refer the customer back to the person to whom they last spoke at that provider.

Where there is an automatic allowance of 45 days, the provider has less incentive to respond promptly and efficiently. The consumer becomes frustrated by having to wait a month and a half and there is a danger that the positions of the consumer and the provider have become more entrenched in that period. An even greater danger is that the consumer will become fatigued by the process and drop the complaint.

Reducing the allowance from 45 days to say 30 would be an improvement, but EWOV strongly recommends moving away from an automatic time limit to a method that better reflects the efforts both consumers and providers are making to resolve the matter. We are concerned for the standing of FOS if consumers' initial experience is to be told that they must wait for the balance of the 45 days. If FOS's action once the 45 days is up is to refer the matter back to the FSP, it is possible that consumers will perceive it to be either slow and ineffective or even 'on the side of' the FSP'.

#### **Hybrid model of decision making (Terms of reference 2.2(b)(iv))**

EWOV notes the commentary on page 45 of the Proposed FOS Terms of Reference:  
*The Board is committed to a hybrid model that includes a Panel option – only Ombudsmen and FOS Panels ... will have the power to make Determinations. The Chief Ombudsman will decide whether a particular Dispute will go to an Ombudsman or a FOS Panel – applying the considerations set out in the Explanatory Guidelines.*

This statement seems at odd with a provision of the proposed Terms of Reference at 2.2(b)(iv), where it says the power to decide whether a Determination in a particular dispute will be made by an Ombudsman or a FOS Panel

*may be delegated by the Chief Ombudsman to an Ombudsman either in a specific instance or generally.*

So in the former situation the decision as to the decision-making model rests with the Chief Ombudsman, in the latter it can be delegated as a general matter to an Ombudsman. This discrepancy is significant. If this decision is generally delegated to Ombudsmen, the situation is set up for 'business as usual' for the predecessor organisations of FOS. That is, the Ombudsman, Banking and Finance, based on the previous practice of that scheme, may tend to prefer the individual decision-maker approach. The Ombudsman, General Insurance and the Ombudsman, Investments, Life Insurance and Superannuation will prefer the Panel model because that was how they each operated prior to the establishment of FOS. There is little incentive to move towards a single model of decision-making (which could still be hybrid). EWOV believes it is important that the decision as to whether to use a single Ombudsman or a

FOS Panel must be based on the characteristics of the particular dispute, not on what was the ordinary way of proceeding prior to the establishment of FOS, and that therefore this decision needs to be located in a single place to ensure that it is made consistently – with the Chief Ombudsman.

We recognise that it is a burden on the Chief Ombudsman but we would recommend caution about generally delegating this power to Ombudsmen unless a culture has been engendered whereby the divisions of FOS have moved to the same criteria for deciding which of the choices in the hybrid model to use, regardless of their previous practice. This point is very important if FOS is to become genuinely a single organisation, applying similar decision making models to all similar disputes, regardless of which division is handling that dispute.

The proposed Terms of Reference are vital for the successful operation of an integrated Financial Ombudsman Service which works to best practice for industry ombudsman schemes. EWOV wishes FOS well in its work but believes best practice demands a different approach to the 45 day allowance for internal dispute resolution. We also believe best practice requires the Chief Ombudsman to retain the decision as to whether a particular dispute should go to an individual Ombudsman or a Panel.

We thank you for the opportunity to make these comments. If there are queries, please contact Frances Wood, Acting Manager Public Affairs and Policy on (03) 9649 7599 or at [frances.wood@ewov.com.au](mailto:frances.wood@ewov.com.au).

Yours sincerely



**Fiona McLeod**  
**Energy and Water Ombudsman (Victoria)**