

10 November 2009

Ms Ai-Lin Lee
Policy Guidance Officer
Financial Literacy & Consumers and Retail Investors
Australian Securities & Investments Commission
Level 24, 120 Collins Street
Melbourne VIC 3000

By email: ai-lin.lee@asic.gov.au

Dear Ms Lee

Financial Ombudsman Service

- *Terms of Reference* dated 30 May 09 (incorporating changes suggested by ASIC 16 October 09)

The Stockbrokers Association of Australia was formerly known as the Securities & Derivatives Industry Association (SDIA), the change of name having recently taken place on 29 October 2009. The Stockbrokers Association is the peak industry body representing institutional and retail stockbrokers and investment banks in Australia.

We are pleased to provide the following comments on the FOS *Terms of Reference* version dated 16 October 09, incorporating comments of ASIC, which were forwarded by ASIC on 20 October 2009 for comment.

In making these comments, we note the statements in your letter of 20 October 2009 that:

- o ASIC does not intend to re-open the debate on issues raised in earlier consultation (which would include the appropriate amount of monetary limits, and whether a cap or a limit should apply, both have which issues have been resolved by ASIC in favour of the position of the consumer lobby); and

- Further changes may be necessary when the final details of the margin lending legislation is known.

Accordingly, these comments do not address the substantive issues previously raised by our Members¹ in relation to the ASIC policy on complaints resolution and external schemes, and the FOS *Terms of Reference*.

Just before your letter of 20 October, a revised draft of the *Operational Guidelines* (to the *Terms of Reference*) was provided by FOS for comment. We presume that as with other key provisions, the *Terms of Reference* will prevail and that the current consultation will not lead to significant changes.

In relation to the 16 Oct draft of the *Terms of Reference*, we make the following comments in relation only to the marked-up changes therein:

- **Lodgement of disputes:** throughout the *Terms of Reference* 16 Oct 09 (e.g. clause 3.2; 4.2(c), 5.2(e)), the expression '*Where an applicant lodges a dispute*' has been replaced with '*Where a dispute is lodged*'. We fail to see the significance of this change.
- **Time limits** (clause 6.2): a new power to extend time in '*exceptional circumstances*' has been added. This was not in the previous draft. We had previously argued that 2 years was sufficient, so surely 6 years (or 2 years post IDR) is more than sufficient. As with other provisions, there is bound to be an issue in relation to insurance cover for out of date claims². so it should be acknowledged here). There will be issues as to the meaning of '*exceptional circumstances*'. If the issue will be decided on normal legal principles, with discretion in the Ombudsman, this is not an appropriate outcome. FOS is not a legal tribunal, and normal legal principles and protections do not necessarily apply, unless found appropriate. Rules of evidence are a key protection for litigants, but do not apply to FOS.

¹ At the conclusion of consultation, the most important parts of the Association's (and industry's) submissions have been rejected by ASIC and FOS, namely:

- monetary limits v. award caps
- differential sector monetary limits
- retail clients only should have access to FOS
- time limit for IDR
- time limit for making claims (limitation periods), and
- direct financial losses only.

Several less significant parts have been adopted, namely:

- frivolous and vexatious claims able to be rejected
- indexation (adopted in part)
- FOS Recommendation effective in 30 days if both accept (goes to Determination by Ombudsman/Panel if either disagree), and
- Test Case provision should continue.

² In this regard we note that ASIC recently updated RG126 on compensation requirements to remove the requirement for run-off cover: *ASIC Advisory* 09-06 23 Oct 09

- **Deed of Release** (clause 8.8): the addition of the word '*all*' in relation to a member fulfilling its obligations before a deed is effective would appear superfluous, and adds nothing to the provision.
- **Test case provision** (clause 10.1): we would like to raise a drafting point - the term '*Test Case Proceeding*' is used in 10.1(c) instead of '*the Dispute*'. '*Test Case Proceeding*' appears to be a defined term, but is not defined, which may give rise to ambiguity.
- **Expulsion of Member for non-compliance** (clause 13.7): this new provision had existed in the prior FICS rules. However, FICS rules contained appropriate notice provisions, and gave the member the opportunity to be heard. It is a serious matter indeed for a member who is an AFS licensee to be expelled from an EDR Scheme, since it normally triggers a breach of their AFS licence. Accordingly, appropriate notice and the opportunity to be heard prior to expulsion of a member from FOS ought to be incorporated in the *Terms of Reference*.
- **New Defined term - '*Consequential Financial Loss*'** (clause 14.1): this new defined term has been added to the *Terms of Reference*. We have argued unsuccessfully before that consequential financial loss ought not be covered, for reasons including the fact that insurance is unlikely to cover it. While acknowledging that this matter is not up for debate, it is unclear why such an important matter was only inserted in the very last phase of consultation.

Thank-you once again for the opportunity to comment on the latest ASIC requirements. If you require any additional information, please contact me or Doug Clark, Policy Executive by email dclark@stockbrokers.org.au or phone 0417 168 804.

Yours Sincerely,



David W Horsfield MSAA
Managing Director/CEO