

Terms of Reference

These Terms of Reference apply as from 1 December 2004. The main change is the increase the jurisdictional limit from \$150,000 to \$280,000 where the event occurs on or after 1 December 2004.

Banking and Financial Services Ombudsman Limited

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These terms of reference have been adopted by Banking and Financial Services Ombudsman Limited (formerly known as The Australian Banking Industry Ombudsman Limited) in accordance with its Constitution.

1 What is the Banking and Financial Services Ombudsman scheme?

Overview

1.1 The Banking and Financial Services Ombudsman scheme is a self-regulatory scheme. It provides an accessible alternative to other remedies, such as court proceedings, for people and businesses who use financial services.

1.2 The Ombudsman's principal powers and duties are to consider disputes within these terms of reference and to facilitate the satisfaction, settlement or resolution of such disputes whether by agreement, by making recommendations or determinations or by such other means as seem expedient. It is not a function of the Ombudsman to provide general information about financial services providers or financial services.

Aim of scheme

1.3 The aim of the scheme is to provide an independent and prompt resolution of the disputes described in 3 having regard to:

- (a) law;
- (b) applicable industry codes or guidelines;
- (c) good industry practice; and
- (d) fairness in all the circumstances.

How is independence maintained?

1.4 The scheme is an incorporated entity, with the Directors of the scheme comprising three Members' Directors, three Consumers' Directors and an independent Chairman, which assists in assuring that the scheme is and remains independent.

1.5 The independence of the scheme is further assured by the fact that the decision makers and employees of BFSO are:

- (a) entirely responsible for the handling and determination of complaints;
- (b) accountable only to the Directors; and
- (c) adequately resourced (pursuant to 1.8) to carry out their respective functions.

What is the effect of a determination by the Ombudsman?	1.6	A determination by the Ombudsman will be binding on a financial services provider only if the disputant accepts the decision. The disputant will always be able to reject a determination of the Ombudsman and to proceed with any other remedy which may be available, such as bringing an action in a court.
What is the cost of the service?	1.7	The scheme is a free service for disputants.
	1.8	Costs of the scheme are met by financial institutions who are Members.
	2	Who can be a disputant?
	2.1	The Ombudsman may consider a dispute brought by: <ul style="list-style-type: none"> (a) an individual; and (b) a small business; that: <ul style="list-style-type: none"> (i) has received the financial service that is the subject of the dispute; or (ii) has provided security over a financial service and either the security or the financial service is the subject of the dispute; or (iii) whose information is the subject of a dispute relating to confidentiality (in the case of both an individual and a small business) and privacy (in the case of an individual).
Wealthy individuals and professional investors	2.2	The Ombudsman may, at the Ombudsman's discretion, determine that the Ombudsman should not consider a dispute involving an individual who the Ombudsman considers should not have access to the Scheme because of the assets or wealth, or both, that the individual holds or has.
Deciding if a disputant is a business disputant	2.3	The Ombudsman decides if a disputant is a small business and may consider representations and arguments from the small business disputant and the financial services provider if either wish to make them.
Business that are not small businesses	2.4	The Ombudsman may, at the Ombudsman's discretion, consider a dispute from a business which is not a small business if the financial services provider concerned agrees.

<p>Disputes relating to guarantees or charges</p>	<p>2.5 If the dispute relates to a guarantee or charge which is given to secure moneys owing by a business, then the Ombudsman must not, unless the financial services provider concerned agrees, consider the claim unless the business that owes the money is a small business. This is regardless of whether the disputant (who may be the guarantor or chargor) is an individual or a small business.</p>
	<p>3 What sort of disputes can the Ombudsman consider?</p>
<p>Financial services Disputes Disputes relating to privacy and confidentiality</p>	<p>3.1 The Ombudsman can, subject to these terms of reference, consider a dispute which relates to: (a) any act or omission by a financial services provider in relation to a financial service in Australia; (b) any act or omission by a financial services provider relating to confidentiality and, in the case of an individual disputant, privacy.</p> <p>3.2 There is more information about the types of disputes the Ombudsman can and cannot consider in 5 below.</p>
	<p>4 What other roles does the Ombudsman have?</p>
	<p>4.1 The Ombudsman can also: (a) if the Ombudsman thinks it is more appropriate for another dispute resolution scheme to deal with the issue, refer a dispute to the relevant specialist dispute resolution scheme approved by ASIC, or if there is no such scheme approved by ASIC, then to any other specialist dispute resolution scheme considered appropriate by the Ombudsman. If a dispute is referred to another dispute resolution scheme then the Ombudsman must obtain the consent of the disputant before forwarding any information to the relevant scheme body; (b) where the Ombudsman considers it appropriate, provide assistance to disputants with translating, lodging or presenting disputes, though not in a way that will jeopardise the Ombudsman’s impartiality; (c) actively promote the scheme; and (d) establish internal systems and procedures to fulfil the requirements of these terms of reference.</p>

4.2 The Ombudsman must, as required by applicable law, these terms of reference and the Constitution, provide reports and recommendations to any regulator (such as ASIC and the Privacy Commissioner).

Can the Ombudsman delegate?

4.3 The Ombudsman may delegate all or any of the Ombudsman's powers and duties to employees of BFSO except:

- (a) the Ombudsman's power to make recommendations or determinations; and
- (b) the Ombudsman's power to delegate.

5 Are there any limits on the types of disputes the Ombudsman can consider?

Commercial judgment

5.1 The Ombudsman can consider any dispute described in 3 except:

- (a) to the extent the dispute relates solely to a financial services provider's commercial judgment in decisions about lending or security. A dispute will relate to commercial judgment if the financial services provider made an assessment of risk, or of financial or commercial criteria or of character.

The Ombudsman may consider disputes about maladministration in lending or security matters which involve an act or omission contrary to or not in accordance with a duty owed at law or pursuant to the terms (express or implied) of the contract between the financial services provider and the disputant;

Practice and policy

- (b) to the extent that it relates to a practice or policy of the financial services provider (for example, a financial services provider's general interest rate policy or fees and charges policy);

The Ombudsman may consider disputes:

- (i) which involve a breach of any obligation or duty; or
- (ii) which involve serious misconduct, or
- (iii) at the request of the financial services provider;

Disputes already considered by another body	(c) if a dispute is based on the same event and facts and with the same disputant as any matter which is, was, or becomes, the subject of any proceedings in any court, tribunal, arbitrator, or independent conciliation body or an investigation by a statutory Ombudsman of any jurisdiction unless the parties consent;
Other forums	(d) if the Ombudsman thinks there is a more appropriate place to deal with the dispute, such as a court, tribunal or another dispute resolution scheme or the Privacy Commissioner;
Amount the subject of the dispute	<p>(e) if the Ombudsman thinks that the amount the subject of the dispute (irrespective of the size of the facility or transaction):</p> <ul style="list-style-type: none"> <li data-bbox="743 816 1084 847">(i) exceeds \$280,000; or <li data-bbox="743 882 1338 978">(ii) is part of a larger claim by the disputant against the financial services provider involving more than \$280,000; or <li data-bbox="743 1022 1373 1159">(iii) is related to another claim which the disputant could make against the financial services provider and the total of the claims would be for more than \$280,000.
Test cases	(f) if any financial services provider named in the dispute gives the Ombudsman a "Test Case notice" as described in 8;
Financial services received by another person	(g) if the dispute is not made by or on behalf of the person who was receiving the financial services complained of;
Dispute to be raised with the financial services provider before the Ombudsman	<p>(h) if the Ombudsman has referred a dispute to the financial services provider concerned, the Ombudsman cannot consider the dispute until:</p> <ul style="list-style-type: none"> <li data-bbox="743 1830 1398 1895">(i) the financial services provider has responded to the dispute; or

When calculating the amount in dispute, the Ombudsman must not aggregate monetary claims that a disputant may make in respect of separate or unrelated complaints;

(ii) 45 days, or any lesser period determined by the Ombudsman, have elapsed,

whichever occurs first other than in exceptional circumstances where delay, in the opinion of the Ombudsman, is undesirable in which case the Ombudsman may consider the dispute earlier;

Frivolous or vexatious claim

(i) if the Ombudsman considers that the dispute being made is frivolous or vexatious; or

New information

(j) if the dispute is based on the same events and facts as a previous dispute by the disputant to the Ombudsman, unless there is new information.

Confidentiality and Privacy disputes

5.2 Where the dispute involves a confidentiality issue the Ombudsman may consider it:

(a) if the disputant is a natural person or a small business; and

(b) to the extent that the Ombudsman considers the dispute relates to information which is confidential information.

5.3 Where the dispute involves a privacy issue the Ombudsman may consider it:

(a) if the disputant is a natural person; and

(b) to the extent that the Ombudsman considers the dispute relates to information which is personal information.

Disputes about fees and charges

5.4 The Ombudsman may consider a dispute about a fee or charge being incorrectly applied by the financial services provider having regard to any scale of charges generally applied by that financial services provider.

Time limits

5.5 Subject to 5.6, the event to which the dispute relates must have occurred not more than six years before the disputant first notified the financial services provider in writing of the dispute.

5.6 The Ombudsman must only consider a dispute in relation to events which first occurred:

- (a) on or after the financial services provider became a Member;
- (b) on or after 6 July 1998 if the disputant is incorporated; and
- (c) on or after 6 July 1998 if the dispute relates to a guarantee or charge in favour of a financial services provider to secure an amount owed by an incorporated entity.

Awareness of dispute

5.7 If the event first occurred before a time referred to in 5.6 or 5.8 but the disputant was not aware of it, and could not have become aware of it if the disputant had used reasonable diligence, until after the date referred to in 5.6 or 5.8 then the Ombudsman may, subject to these terms of reference, consider the dispute.

5.8 The Ombudsman cannot consider a dispute between a customer and an entity, the business of which has been acquired by a Member, if that entity was not a financial services provider at the time the events the subject of the dispute occurred.

Transitional provisions

5.9 Where a change is made to the Terms of Reference, a dispute relating to an event which occurred before the commencement date of the change, if brought to the attention of the Ombudsman after the commencement date of the change will be dealt with under the changed terms of reference, except that:

- (a) the eligibility of the applicant to bring the dispute forward; and
- (b) the issue of whether the dispute is within the Ombudsman's jurisdiction,

will be determined in accordance with the terms of reference in force immediately before the change to the terms of reference.

6 What procedures does the Ombudsman follow when considering a dispute?

Ombudsman to develop procedures

6.1 The Ombudsman can decide, having regard to these terms of reference:

- (a) the procedure to be followed when considering a dispute or deciding whether to consider a dispute;

and

Deciding if the dispute is within the terms of reference

(b) whether a dispute falls within these terms of reference.

Provision of information

6.2 The Ombudsman may require a financial services provider named in a dispute to provide, or procure the provision of, any information the Ombudsman considers necessary to consider a dispute.

6.3 A financial services provider must comply with a request under 6.2 as soon as reasonably practicable except:

(a) if the financial services provider certifies that to provide information would breach a duty of confidentiality to a third party; and

(b) the financial services provider has used best endeavours to obtain consent to the disclosure of the information.

Treatment of information

6.4 If any party to a dispute supplies information to the Ombudsman and requests it be treated confidentially, the Ombudsman must not disclose that information to any other party to the dispute or any other person, except with the consent of the person supplying the information or as required by law.

If consent is not given, the Ombudsman is not entitled to use that information to reach a decision adverse to any party to whom confidential information is denied.

6.5 Subject to 6.4, all documentation should be provided to all parties to a dispute. However, it is not necessary for documents and information used by the Ombudsman to be provided to both parties as long as the Ombudsman's written reasons clearly identify the documents or information relied on and the identified documents or information are provided on request.

Return of information

6.6 Where a party to the dispute supplies information and asks that it be treated confidentially, the Ombudsman must return it as soon as practicable after the dispute is resolved or withdrawn. If the dispute is sent to another forum then the Ombudsman must obtain the consent of the relevant party before forwarding any information to the new forum.

Rules of evidence

6.7 The Ombudsman shall not be bound by any legal rule of

evidence.

Previous decisions

6.8 The Ombudsman will not be bound by any previous decision by him/her or by any predecessor in the Ombudsman's office.

7 What determination, recommendation or settlement can the Ombudsman make?

Criteria for determinations

7.1 Subject to 6.7, when deciding what the appropriate determination should be, the Ombudsman must take into account the criteria of:

- (a) law;
- (b) applicable industry codes or guidelines;
- (c) good industry practice; and
- (d) fairness in all the circumstances.

Withdrawal and settlement of disputes

7.2 In determining the principles of good industry practice, the Ombudsman must consult within the industry as the Ombudsman thinks appropriate.

7.3 The Ombudsman may, while the Ombudsman is considering a dispute, suggest that:

- (a) the dispute be withdrawn; or
- (b) the dispute be settled.

by agreement between the parties in full and final settlement of the dispute.

7.4 If the parties do not agree to this, then the Ombudsman may continue to consider the dispute and may make a recommendation at the conclusion of the Ombudsman's considerations.

Investigation of disputes

7.5 The Ombudsman must set procedures for the investigation of disputes which lead to a recommendation. The procedures must ensure that:

- (a) the reasons for any conclusion about the merits of a dispute must be provided on request to the parties to the dispute; and

(b) in response to any such conclusion, the parties to the dispute have an opportunity to make further submissions before a recommendation may be made by the Ombudsman.

Procedure when making a recommendation

7.6 The Ombudsman must give at least one month's notice to all parties about the Ombudsman's intention to make a recommendation. This notice must be in writing.

Form of recommendation

7.7 The recommendation must:

- (a) be in writing;
- (b) include the reasons for the recommendation;
- (c) include in detail the terms of the settlement or what the Ombudsman recommends. If the recommendation includes that the financial services provider pay the disputant an amount of money, this amount must be assessed using the criteria in 7.1;
- (d) include any documentation necessary to complete the withdrawal or settlement; and
- (e) state the date for acceptance of the recommendation by the parties to the dispute and the consequences of them failing to respond in time.

7.8 The time for acceptance must be no more than one month except in exceptional circumstances as determined by the Ombudsman.

Recommendations not accepted by financial services provider within one month

7.9 If the Ombudsman has made a recommendation which has been accepted by the disputant within one month but not the financial services provider, then the Ombudsman can make a determination against the financial services provider.

Types of determination

- 7.10 A determination can include:
- (a) a sum of money which does not exceed \$280,000;
 - (b) where the dispute involves a privacy issue, any other non-monetary requirement as described in 7.14 that the Ombudsman thinks is appropriate; and
 - (c) an order for the provision of information relating to the subject matter of the dispute.

7.11 The Ombudsman's determination must identify the amount the Ombudsman considers is fair and appropriate to compensate the disputant for any loss or damage the disputant has suffered because of the conduct of the financial services provider in relation to the event the subject of the dispute.

Form of determination

- 7.12 The determination must:
- (a) be in writing;
 - (b) state the terms of the determination including any monetary amount to be paid;
 - (c) provide a summary of the reasons for the determination; and
 - (d) state that, if within one month after its issue the disputant agrees to accept it in full and final settlement of the subject matter of the dispute, the determination shall be binding on the disputant and the financial services provider (as a result of the financial services provider's undertaking to the Banking and Financial Services Ombudsman) against which it is made.

7.13 The Ombudsman must give a copy of the determination to the disputant and the financial services provider. The Ombudsman must also give the disputant a form addressed to the Ombudsman and the financial services provider providing for acceptance of the determination by the disputant in full and final settlement of the dispute.

How does the determination etc differ if the dispute relates to privacy?

7.14 In addition to the Ombudsman's other powers, if the dispute relates to privacy then the Ombudsman may make any determinations, awards, declarations, orders or directions that the Privacy Commissioner may make under section 52 of the Privacy Act.

8 How does a Test Case notice work?

When a notice can be given?

- 8.1 If a financial services provider wishes a dispute to be treated as a "test case" the financial services provider must give the Ombudsman a notice in writing containing:
- (a) a statement, with reasons, why the financial services provider is of the opinion that the dispute involves or may involve:
 - (i) an issue which may have important consequences for the business of the financial services provider or financial services providers generally;
 - (ii) an important or novel point of law; and
 - (b) an undertaking that, if within 6 months after the Ombudsman receives the notice, either the disputant or the financial services provider institutes proceedings in any court or tribunal which has the ability to make a binding determination of the issue or point of law in respect of the dispute, the financial services provider will:
 - (i) pay the disputant's costs and disbursements (if not otherwise agreed, on a solicitor and own client basis) of the proceedings at first instance and any subsequent appeal proceedings commenced by the financial services provider (except by way of respondent's notice, cross appeal or other similar procedure); and
 - (ii) make interim payments of account of such costs if and to the extent that it appears reasonable to do so.
 - (c) an undertaking that the financial services provider will seek to resolve the dispute expeditiously.
- 8.2 When the Ombudsman receives this notice the Ombudsman must stop considering the dispute. The Ombudsman must

	<p>then inform the disputant in writing that: (a) the Ombudsman has received the notice; (b) the date of the notice; and (c) the effect of the notice upon the disputant.</p>
	<p>9 Systemic Issues and Serious Misconduct</p>
<p>What does the Ombudsman have to report to ASIC? What is a systemic issue? What is serious misconduct?</p>	<p>9.1 9.2 The Ombudsman must report all systemic issues and serious 9.3 misconduct to ASIC as described in 9.2 and 9.3. In broad terms, a systemic issue is an issue which will have a material effect for individuals or small businesses beyond the parties to the dispute. Some examples of systemic issues are: (a) poor disclosure or communications; (b) administrative or technical errors; (c) product flaws; and (d) inaccurate interpretation of standard terms and conditions. Serious misconduct is conduct which may be fraudulent, grossly negligent or involve wilful breaches of applicable laws.</p>
	<p>10 What information must the Ombudsman collect?</p>
	<p>10.1 The Ombudsman must collect and record the following information: (a) the number of disputes and enquiries; (b) demographics of the disputants (where practicable); (c) details of cases which were thought to be outside the scheme and why; (d) the current caseload including the age and status of open cases; (e) the time taken to resolve disputes; and (f) a profile of disputants which identifies:</p>

<p>What should be done with this information?</p>	<p>(i) type of financial product or service; (ii) product or service provider; (iii) purpose for which the product was obtained; (iv) the underlying cause of the dispute; and (v) any systemic issues or other trends. The Ombudsman must also produce a report every twelve months for publication and provision to the Members. This report must be a comprehensive summary and analysis of this information.</p> <p>10.2</p>
	<p>11 How is the scheme to be promoted?</p>
	<p>11.1 The Ombudsman must ensure that the existence of the scheme 11.2 is actively promoted. In particular, any groups (such as people 11.3 living in rural areas or people with non-English speaking backgrounds) which are under-represented in the information collected should be targeted by the promotion. The Ombudsman must publish and promote details about how the scheme works. This should include: (a) how a dispute can be lodged; (b) assistance which is available to disputants; and (c) the time frames which are imposed on the procedure.</p>
	<p>12 What other powers and duties does the Ombudsman have?</p>
	<p>12.1 The Ombudsman is responsible for the day to day 12.2 management and conduct of the business of BFSO (including, without limitation, the power to appoint and dismiss employees, independent contractors and agents and to determine their terms of employment). The Ombudsman has the power to incur expenditure on behalf of BFSO consistent with the budget approved by the Directors.</p>

	12.3 12.4 12.5 12.6	The Ombudsman cannot exercise any power which the Constitution expressly assigns to the Directors or any other person. Except as required by law or these terms of reference or the Constitution, the Ombudsman must not disclose any information relating to a dispute. Paragraph 12.4 does not prevent the Ombudsman from disclosing any information to any employee, consultant, independent contractor or agent of BFSO to the extent that such information is reasonably required by that person for the purpose of performing his or her duties to BFSO. The Ombudsman must report to the financial services provider concerned any threat to staff or property of which the Ombudsman becomes aware in the course of the Ombudsman's duties and which the Ombudsman considers to be serious. The Ombudsman may develop guidelines for the interpretation of these terms of reference.
	13	Annual business plan and budget
Draft business plan and budget to be prepared by Ombudsman	13.1	The Ombudsman must: (a) prepare an annual business plan for the scheme, together with a proposed budget (including a total funding figure); and (b) submit both the budget and the annual business plan to the Directors at least 60 days before the start of the relevant financial year, and must, on request, consult with the Directors (including any committee of the Directors) about a proposed business plan and budget.
	14	Changes to terms of reference and guidelines
Terms of reference	14.1 14.2	The Ombudsman may make recommendations to the Directors (including a committee of the Directors) for changes to these terms of reference. The Ombudsman must, on request, consult with the Directors (including any committee of the Directors) about proposed changes to these terms of reference

- Guidelines** 14.3 The Ombudsman must consult with ASIC about any
15 changes to the guidelines. **Interpretation** The following
15.1 words have the following meanings where they appear in
these terms of reference: "BFSO" means Banking and
Financial Services Ombudsman Limited (ABN 48 050 070
034). "ABN" means Australian Business Number as defined
in the *A New Tax System (Australian Business Number) Act*
1999 (Cth).

"ASIC" means the Australian Securities & Investments Commission. "Australia" includes the external territories. "business" includes every trade, occupation and profession continuously carried on, whether or not for profit and whether or not incorporated. "Constitution" means the Constitution of BFSO. "Directors" means the Directors of BFSO. "disputant" means a person bringing a dispute before the Ombudsman. "dispute" means a disagreement in relation to: (a) a financial service between a financial services provider and a customer of that financial services provider which has not been resolved by the parties; and (b) a privacy issue of the type described in 5.2.

"financial service" means a product or service provided by a financial services provider which: (a) is financial in nature including a product or service which relates to: (i) a loan or any other kind of credit transaction (including, without limitation, credit card use overseas);

(ii) a deposit (such as a term deposit, a fund management deposit or a retirement savings account);

(iii) a financial investment (such as a security or an interest in a registered managed investment scheme);

(iv) a facility under which a person seeks to manage financial risk or to avoid or limit the financial consequences of fluctuations in, or in the value of, receipts or costs (such as an insurance contract, a futures contract, a foreign currency transaction or derivative);

(v) a facility under which a person may make, or cause to be made, a non-cash payment (such as a direct debit arrangement or a facility relating to cheques, bills of exchange, travellers cheques or a stored value card);

(vi) leasing and hire purchase arrangements;

(vii) guarantees or charges in favour of the financial services provider given or created by:

(A) an individual not carrying on a business; or

(B) a small business;

to guarantee or secure any moneys owing to the financial services provider by any other individual or small business under any advance or analogous facility; and

(b) a custodial service.

“financial services provider” means a:

- (a) Member; or
- (b) related body corporate of a Member within the meaning of the *Corporations Act 2001* (Cth) which is incorporated in Australia. A reference to the financial services provider includes any employee, agent or contractor of the financial services provider including any person who has actual, ostensible, apparent or usual authority to act on behalf of the financial services provider or authority to act by necessity in relation to a financial service.

“guidelines” means guidelines developed by the Ombudsman in relation to these terms of reference.

“including”, “such as” or “for example”, when introducing an example, does not limit the meaning of the words to which the example relates, that example or examples of a similar kind.

“incorporated” means being registered under the *Corporations Act 2001* (Cth) or under the incorporated associations legislation of a jurisdiction within Australia.

“individual” means a natural person.

“Member” means a person who is a Member of BFSO as defined in the Constitution.

“personal information” means information or opinion (including information or an opinion forming part of a data base), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can be reasonably ascertained, from the information or opinion.

“Privacy Act” means the *Privacy Act 1988* (Cth).

“related body corporate” has the meaning given in the *Corporations Act 2001* (Cth).

“small business” means a business, which at the time the events relating to the dispute occurred, had:

- (a) if the business is or includes the manufacture of goods - less than 100 full time (or equivalent) employees; or
- (b) if the business is of another nature - less than 20 full

time (or equivalent) employees.

“**scheme**” means the dispute resolution scheme described in these terms of reference.

15.2 References to the provision of financial services include, where the context allows, references to their non-provision.

15.3 References to the singular include the plural and vice versa.

15.4 References to paragraphs are to paragraphs of these terms of reference.

15.5 A reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them.

15.6 Headings are inserted for convenience only and do not affect the interpretation of these terms of reference.