

THE FINANCIAL OMBUDSMAN SERVICE



ISSUE 9 - AUTUMN 2012

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## CHIEF OMBUDSMAN'S MESSAGE

Welcome to the first issue of *The Circular* for 2012.

The year began with an expansion of FOS's jurisdiction. As of 1 January 2012, we can handle disputes about traditional trustee company services (TTCS), such as estate planning and management. An [article](#) in the previous issue of *The Circular* explained the basics of our approach to TTCS disputes.

Our [Terms of Reference](#) and [Operational Guidelines](#) have been significantly revised to reflect this change to our jurisdiction. The revised versions of these documents, as well as summaries of the amendments to them, are on our website.

The FOS 2012-13 electronic Annual Assessment to calculate members' base levies will be going out to our members in mid March. This year the Annual Assessment will be conducted through the FOS Secure Services Site.

It is important that our members' contact details are up to date and that their Finance contacts are registered for Secure Services before being sent the request to complete the assessment. Contact details can be updated via the 'Manage Contact Details' application in Secure Services. The Secure Services Update in this issue of *The Circular* explains how to register.

This issue also includes an in-depth article about the ePayments Code released by ASIC in September last year. We explain how the ePayments Code differs from the Electronic Funds Transfer Code of Conduct and how we will approach electronic payment system disputes after the ePayments Code comes into force.

You have a chance in this issue to have your say on the proposed topics for the breakout sessions at our 2012 National Conference. We want the conference to be an integral part of your professional development for the year, so we're keen to find out what you think. Please help us out by doing the short survey.

Regards,

Shane Tregillis

## NEW CIRCULAR INDEX

So that you can quickly find articles of interest in old issues of The Circular, we have created an index of all the articles that we have published in The Circular since it was launched in September 2009. The index will be updated each time we release a new issue, so it will always be a complete guide to the content of The Circular.

You can search the index for articles by article name, by topic or by date. For example, you can quickly find all the articles about financial difficulty. The index links to the actual articles, so whenever you find an article you want to read you can click a link to go a web or PDF version of the article.

There is a link to the index on the home page for The Circular: [www.fos.org.au/circular](http://www.fos.org.au/circular).

## HAVE YOUR SAY ON THE TOPICS FOR OUR NATIONAL CONFERENCE

Our 2012 National Conference is being held on 16-17 October in Melbourne.

Our aim is to deliver you a conference that deepens your understanding of best practice in dispute resolution and helps to make your relationships with customers even stronger.

Over the last few months, the FOS conference committee has worked hard on the program, taking into account your feedback about our 2011 conference. The program will consist of two types of sessions:

- plenary sessions for all attendees on major trends in dispute resolution and the financial services industry
- breakout sessions for smaller groups on specialised topics.

Each breakout session will be presented by an expert or experts on the topic and will illustrate FOS's approach to the topic. The sessions will encourage interaction using case studies, questions and answers, role plays, etc.

We want this event to be an important part of your professional development this year, so we are asking for your feedback on the proposed topics for the breakout sessions. Could you please take the time to complete a very short survey.

Please click [here](#) to do the survey.

We are looking for surveys to be completed by Thursday 15 March.

If you have any questions, please email us at [nationalconference@fos.org.au](mailto:nationalconference@fos.org.au).

## UPCOMING EVENTS

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### GENERAL INSURANCE OPEN FORUMS

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**Sydney - 24 April**

**Brisbane - 15 May**

The aim of the Open Forums is to bring together those involved in the industry to discuss FOS Determinations and share insights. Based on members' input at registration, our decision makers, where appropriate, prepare papers for discussion at the forums. These events are very popular, so registration is essential.

See [www.fos.org.au/events](http://www.fos.org.au/events) for further details or email [cbeattie@fos.org.au](mailto:cbeattie@fos.org.au) to register your interest.

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### EFFECTIVE MANAGEMENT OF PROFESSIONAL INDEMNITY DISPUTES AT FOS

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**Brisbane - 11 May**

We are holding a free seminar for professional indemnity insurer claims staff, underwriters, their legal advisors and others interested in our process for resolving professional indemnity disputes.

The seminar offers the opportunity to meet with relevant senior managers from FOS and hear from us, a PI insurer and a PI insurance lawyer about efficient and effective handling of these disputes.

The session will cover procedures, roles and case studies, including:

- The role of FOS
- Our Terms of Reference and monetary limits
- Calculation of loss
- How PI Insurers participate in the FOS process
- Common approaches to common problems – case studies
- Statistics on these disputes.

See [www.fos.org.au/events](http://www.fos.org.au/events) for further details or email [cbeattie@fos.org.au](mailto:cbeattie@fos.org.au) to register your interest.

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### EXTERNAL DISPUTE RESOLUTION (EDR) FORUM

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**Melbourne - 17 May**

The EDR Forum, which FOS is a major contributor to, is an integral part of the calendar for many in the community sector. This year's event canvasses future directions for EDR and includes a number of practical sessions about getting the best out of EDR.

This full-day event featuring Australia's EDR schemes is only available to financial counsellors, consumer advocates and EDR scheme staff.

See [www.financialcounsellingaustralia.org.au](http://www.financialcounsellingaustralia.org.au) for more details and to register.

## NEW TELEPHONE SYSTEM

On Monday 27 February, FOS introduced a new telephone system that has changed the way we communicate with our stakeholders.

Our consumer line (1300 78 08 08) and membership line (1300 56 55 62) now use an Interactive Voice Response (IVR) system. We scripted and structured the Interactive Voice Response (IVR) menus for our 1300 numbers very carefully to make them as clear, simple and short as possible. We have also revised our call-handling processes, run call skills training and developed a new quality assessment framework.

The primary purpose of the new phone system is to improve the service we provide to the public and our members. Our objective is that callers be directed more quickly to the most appropriate person at FOS – so that they spend less time waiting to speak to someone, and more time speaking to the person who can best help them.

The IVR system has been running successfully since we launched it. Callers have followed the menu options without problems, and call waiting times have been reduced. So we are already seeing indications of the service improvements we were striving for.

## E-PAYMENTS CODE

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- THE EPAYMENTS CODE
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ASIC published the new ePayments Code on 20 September 2011. It regulates electronic payments, including online payments, internet and mobile banking, BPAY ATM, EFTPOS and credit card transactions. It replaces the Electronic Funds Transfer Code of Conduct (EFT Code). Subscribers to the new Code must start complying with it by 20 March 2013.

This article discusses the background to the new Code, the principal changes from the EFT Code, and FOS's approach to disputes to which the new Code will apply.

### THE EFT CODE

The EFT Code gave financial services providers (FSPs) detailed guidance on card and PIN transactions and all forms of electronic banking, including telephone banking and internet banking. It included information about:

- acceptable standards for terms and conditions of use
- how to handle disputes, and
- how to allocate liability for unauthorised transactions.

The EFT Code upheld the long-standing principle of banking law that an FSP requires the mandate of its customer to validly debit an account, and that only in exceptional circumstances can a customer be held liable for unauthorised transactions on their account.

### THE EPAYMENTS CODE

In accordance with its terms, the current EFT Code was the subject of a review by ASIC which commenced on 1 April 2004, and which has resulted in the release of the ePayments Code as the successor to the EFT Code. One criticism of the EFT Code was that it used technical and precise terminology. To ensure that the ePayments Code could be easily comprehended by the layperson, ASIC decided to:

- adopt a new structure and new defined terms for the Code, and
- redraft the Code in plain English.

Importantly, from FOS's perspective, ASIC explained in its Consultation Paper 158, dated May 2011, that "Redrafting the Code in plain English is not intended to diminish the consumer protections afforded by the Code in any way".

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## FEATURES OF THE EPAYMENTS CODE

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Apart from the rewording in plain English, the main changes introduced by the ePayments Code are as follows:

- There is a regime for dealing with mistaken internet payments.
- The separate provisions for consumer stored value facilities and stored value transactions in the EFT Code have been dropped. Instead, the ePayments Code incorporates limited requirements for low value facilities that can hold a balance of no more than \$500 at any one time.
- Merchant agreements must prohibit a merchant from holding a user's pass code (i.e. the PIN) as part of a 'book up' arrangement.
- There are provisions for facilities that have an expiry date.
- There is clarification that a cardholder is liable for losses arising from unauthorised transactions that occur because a user (either the cardholder or someone they have given permission to use their card) contributed to losses by leaving a card in an ATM.

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## HOW FOS WILL APPLY THE TWO CODES

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Subscribers to the ePayments Code must start complying with it by 20 March 2013. Some FSPs might decide to adopt the new Code before this deadline. Until 20 March 2013, we will consider electronic banking disputes in accordance with:

- the EFT Code if the dispute involves an FSP that has not yet adopted the ePayments Code
- the ePayments Code if the dispute involves an FSP that has already adopted the ePayments Code.

After 20 March 2013, we will consider all electronic banking disputes in accordance with the ePayments Code.

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## MISTAKEN INTERNET PAYMENTS

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### IDENTIFYING THE ISSUES

As part of its review of the EFT Code, in January 2007 ASIC released a consultation paper. The main new issue flagged in the consultation paper was whether (and, if so, how) the EFT Code should regulate mistaken payments arising out of internet banking 'Pay Anyone' transactions. ASIC recognised that mistaken internet payments were an emerging consumer issue. Comments made included that:

- Payers are required to enter details of the intended recipient's account number and, in most cases, the intended recipient's name.
- There is no process at either the paying or receiving ADI (authorised deposit-taking institution) for checking the number against the name.
- As funds were transferred on the basis of the account number only, when a mistake in entering the number occurred there might be problems in recovering the funds from the unintended recipient. Ultimately, the funds might not be recovered at all.
- The legal question of where to allocate liability for unrecovered loss after a mistaken internet payment was contentious.
- It was ASIC's understanding that general industry practice, while assisting customers to try to recover funds that had been transferred by mistake, was not to accept liability for mistaken payments.

In inviting comment on how the EFT Code should address the issue of mistaken payments, ASIC listed a number of suggestions for possible regulatory responses. These included prominent warnings for users, requiring receiving institutions to clarify any ambiguity in payment instructions (in relation to BSB and account number), and adopting a form of chargeback that allowed the paying institution to reverse the disputed transaction unless the recipient was able to show they were entitled to payment.

## DEVELOPMENT OF PROPOSALS

The provisions in the ePayments Code resulted from extensive consultation with stakeholders in relation to the underlying issues, proposed solutions and incorporation of provisions into the EFT Code. The final form of the mistaken internet provisions was released in ASIC's Report 218, issued in December 2010, which included all the changes to be made to the EFT Code. In relation to the mistaken payments issue, ASIC's comments included that:

- “The issue of how mistaken internet payments might be dealt with in the EFT Code has proven to be one of the most difficult to resolve in the current review”
- “Stakeholder feedback revealed concerns that were difficult to reconcile, in particular that given that very little industry data is available on the extent and nature of mistaken payments ... but in the absence of data we were not able to accurately assess the true cost impact of allocating liability to either consumers or industry”, and
- “The proposals in this report represent significant compromises by all Mistaken Internet Payments Working Group members to accommodate each other’s concerns and achieve a workable outcome for consumers and industry”.

## MISTAKEN PAYMENTS PROVISIONS IN THE EPAYMENTS CODE

A ‘mistaken internet payment’ is defined as a payment by a user through a ‘Pay Anyone’ internet banking facility where funds are paid into the account of an unintended recipient because the user enters or selects a BSB and/or account number that does not belong to the named recipient, as a result of the user’s error or the user being advised of the wrong BSB and/or account number.

BPay payments are specifically excluded because ASIC considers BPay already has effective procedures in place to ensure that funds do not go astray. Another exclusion, arising out of the definition, is that the Code would not cover the situation where a user mistakenly selects the wrong payee from a pre-existing list of third party payees. In such a case, if the BSB and account number belonged to the named recipient, the user would have to attempt to recover the funds on their own.

Clauses 24 to 34 of the ePayments Code cover mistaken internet payments. In summary:

- (1) Clause 24 requires that terms and conditions for accounts must detail the prescribed processes, including the circumstances in which a subscriber will recover funds and the circumstances in which a holder will be liable for losses.
- (2) Clause 25 requires a clear on-screen warning about the importance of entering the correct BSB and account number and the risks of mistaken internet payments, including that it may not be possible to recover funds from an unintended recipient.
- (3) Clause 26 requires subscribers to have an effective and convenient process for users to report mistaken internet payments.
- (4) Clauses 27 to 32 deal with the remedies available when there is a mistaken internet payment.

Clause 27 requires the sending ADI to investigate whether a mistaken internet payment has occurred and, if satisfied, to send the receiving ADI a request for the return of the funds. The receiving ADI, within 5 business days, has to acknowledge the request and advise if there are sufficient funds in the account of the unintended recipient to cover the payment. The outcome varies according to the time taken to report the mistaken internet payment and whether or not funds are available in the account of the unintended recipient:

(a) Pursuant to clause 28, if

- (i) the user reports the mistake within 10 business days of making the payment, and
- (ii) there are sufficient credit funds available in the account of the unintended recipient, and
- (iii) both the sending ADI and the receiving ADI are satisfied that a mistake occurred,

then the receiving ADI must return the funds to the sending ADI within 5 to 10 business days of receiving the request. The receiving ADI would not have to seek the consent of the unintended recipient, provided that the receiving ADI was satisfied it was a mistaken internet payment;

(b) Clause 29 details the process that must be followed if funds are available and the report is made between 10 business days and 7 months of the transaction. In summary, subject to both sending and receiving ADIs being satisfied of the mistake:

- (i) The receiving ADI must complete its investigation within 10 business days of receiving the request.
- (ii) The receiving ADI must prevent the unintended recipient from withdrawing the funds for 10 further business days.
- (iii) The receiving ADI must notify the unintended recipient that it will withdraw the funds if the unintended recipient does not establish that they are entitled to the funds within 10 business days.
- (iv) If the unintended recipient does not establish that they are entitled to the funds within 10 business days, the receiving ADI must return the funds within a further 2 business days.

(c) Clause 30 details the process that must be followed if funds are available and the report is made after 7 months. In summary, subject to both sending and receiving ADIs being satisfied of the mistake:

- (i) The receiving ADI must seek the consent of the unintended recipient to return the funds.
- (ii) If the unintended recipient consents to the return of funds, the receiving ADI must return the funds to the sending ADI.

The choice of 7 months as a relevant period seems to be based on the fact that statements must be provided to the account holder at least once every 6 months. The user is thus given another month in which to check their statement and report any mistaken internet payments.

The provision that the receiving ADI may return a mistaken internet payment within 10 business days of the transaction date without the consent of the unintended recipient apparently reflects a similar provision in the BECS (Bulk Electronic Clearing Systems) procedures.

Pursuant to clause 31, where the unintended recipient receives income support from Centrelink, the receiving ADI must recover funds in accordance with the Code of Operation for Centrelink Direct Credit Payments.

Clause 32 details the process that must be followed if funds are not available. In summary, if there are not sufficient funds to the full value of the mistaken internet payment, the receiving ADI is only required to use reasonable endeavours to retrieve the funds from the unintended recipient (for example, by facilitating repayment by instalments).

Clause 33 requires the sending ADI to inform the user of the outcome of a reported mistaken internet payment in writing and within 30 business days of the report.

Clause 34 provides that a user who reports a mistaken internet payment can complain to the sending ADI about how the report is dealt with and, if not satisfied with the outcome, can also complain to the sending ADI's EDR scheme.

## FOS'S APPROACH

The supplement to Bulletin 39 that we published in September 2003 said:

“The receiving bank is not, in our view, entitled unilaterally to debit its customer’s account if the funds have been withdrawn, although it is in the best position to seek the recipient’s agreement to repay the funds. It should be remembered that its customer, the recipient, may also have a defence of change of position in good faith.”

If the FSP subscribes to the ePayments Code, we will apply the Code provisions rather than the view expressed in this quotation.

The provisions for automatic return of funds where a report is made within 10 business days of the transaction and the funds remain in the account of the unintended recipient give additional certainty for subscribers about their mutual obligations (over and above their rights and responsibilities as members of the Australian Payments Clearing Association). They also ensure that the payer will have their funds returned within a reasonably short period of time. While the unintended recipient may feel aggrieved about a unilateral reversal of a mistaken payment, they will not have suffered any compensable loss if they were not entitled to the funds in the first place.

The most important aspect of the provisions regarding cases in which a report is made between 10 business days and 7 months and there are sufficient funds in the account is that the receiving ADI is obliged to prevent the unintended recipient from withdrawing the funds during the 10 business days the unintended recipient has to establish an entitlement to the funds. This provision allows an unintended recipient to seek to establish an entitlement to the funds, but also prevents them from trying to frustrate the recovery process by unilaterally withdrawing the funds once notified of a disputed payment. The requirement to establish entitlement within 10 business days, failing which the funds will be returned, also ensures that the recovery process is relatively brief.

We may receive complaints about the actions of the receiving ADI from unintended recipients who are aggrieved by the return process. However, they would have to establish to our satisfaction that they had an entitlement to the funds, and that they had provided that information to the receiving ADI within 10 business days, before we could find that they had suffered a compensable loss.

When dealing with individual disputes, we will have regard to:

- the prominent warnings routinely given on internet banking screens which alert the sender of a mistaken internet payment that the sending ADI places no reliance on the name entered and will transfer the funds by reference to the BSB/account number only, and
- whether the process for retrieval provided by the Code has been followed.

As we may only consider a dispute that arises from or relates to the provision of a financial service by the FSP to the applicant, we cannot accept a dispute from a sender about the receiving ADI, unless the sender had attempted to send funds to their own account held with the receiving ADI.

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## LOW VALUE FACILITIES

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A 'low value facility' is a facility that is capable of having a balance of no more than \$500 at any one time. The tailored requirements for low value facilities include the following:

- A subscriber to the ePayments Code does not have to give terms and conditions unless it is practical to do so. Otherwise, the subscriber must give consumers a notice that highlights key terms.
- A subscriber does not have to give consumers information about how to report the loss, theft or misuse of a device or breach of pass code security. Instead, subscribers must tell consumers whether they provide a process for doing so.
- A subscriber does not have to give consumers advance notice of changes to terms and conditions unless they know the identity and contact details of the consumer. Otherwise, subscribers must simply publicise this information.
- A subscriber does not have to give consumers receipts. Instead, subscribers must give consumers a process to check their balance and a simplified receipt or a mechanism for the consumer to check their transaction history.
- A subscriber does not have to give consumers statements.
- The rules for allocating liability for unauthorised transactions do not apply to low value facilities.

## FOS'S APPROACH

As ASIC explained in its final report (issued in December 2010) on the review of the EFT Code, it has deliberately designed a 'light touch' regime for low value electronic payment products. ASIC recognised that new and innovative payments products were being introduced but that some of the products were not subject to any industry code or regulation. It wanted to encourage the providers of such products to consider subscribing to the Code without making it too expensive for industry participants to comply with the Code. It settled on a monetary limit of \$500 as a level that balanced consumer and industry interests and that limited the risk to consumers of holding such a product. In doing so, ASIC acknowledged that there may be circumstances where it is not operationally or economically viable for providers to give their customers the ability to notify the loss, theft or unauthorised use of their product, and receive either a refund or a replacement product with the remaining value. In other words, ASIC accepts that the holder of a low value facility runs the risk of losing the value held on the facility, but the loss can be no more than \$500.

Clause 4.4 of the ePayments Code imposes an obligation on providers to give holders of a low value facility at least a notice that highlights any key terms (for example, the fact that the user will forfeit the balance on the facility if they lose a device). Effectively, this requirement means that the holder of a low value facility is being warned that they should treat the product like cash.

Because of the tailored requirements for low value facilities that are written into the ePayments Code, FOS will not be able to require the provider of such a facility to issue a refund to the holder if the facility is lost or stolen.

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## BOOK UP

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A 'book up arrangement' is defined as being:

"Credit offered by merchants for the purchase of goods or services commonly used by Aboriginal people in remote and regional areas of Australia. It is common for merchants to hold a consumer's debit card and/or pass code as part of a book up arrangement".

In order to deal with real or perceived abuses of the book up system, ASIC has inserted the following clause [20.1] into the ePayments Code:

"If a subscriber and a merchant have a merchant agreement, the agreement must prohibit the merchant from holding a user's pass code as part of a book up arrangement".

Clause 20.1 allows that a merchant may retain a user's card. However, by prohibiting the retention of the pass code as well, it is designed to prevent unauthorised access to a user's account without their knowledge and consent.

## FOS'S APPROACH

We acknowledge that ASIC, as a matter of policy, wants to discourage the practice of merchants holding both cards and PINs as part of a book up arrangement. In our view, the fact that a cardholder hands over their card to a merchant does not in itself mean that the cardholder has breached a requirement of the ePayments Code. If we were to receive a complaint about an unauthorised transaction on a card held by a merchant, we would be guided by the fact that the ePayments Code affords some protection to cardholders in the event that a merchant abuses their possession of the card, and knowledge of the PIN, to perform an unauthorised transaction. This is because the ePayments Code carries over from the EFT Code the provision that a cardholder is not liable for loss caused by fraud or negligence by a merchant or their employee or agent (clause 10.1(a)). This provision takes precedence over the fact that the cardholder might otherwise be regarded as having contributed to the loss, and be liable for unauthorised transactions, either by voluntarily disclosing their PIN to the merchant (clause 12.2(a)) or by unreasonably delaying reporting the misuse of their card after becoming aware that the merchant was making unauthorised transactions (clause 11.5)).

In considering any dispute that involves a book up arrangement, we will take into account whether or not the subscriber has complied with clause 20.1 as well as applying the liability clauses in light of the facts of the dispute.

## FACILITIES WITH EXPIRY DATES

The provisions about expiry dates cover both cards that are not reloadable (such as store gift cards) and cards that are reloadable (such as bank-issued travel cards for holding foreign currencies). Reloadable cards are cards that can have further funds deposited on them.

Whether or not a facility with an expiry date is covered by the ePayments Code will depend on whether the issuer subscribes to the Code. At the moment, store cards with expiry dates may not be covered because no issuer is currently a subscriber to the EFT Code. However, bank-issued travel cards with expiry dates are covered.

The minimum expiry dates specified by the ePayments Code are:

- for non-reloadable facilities, the expiry date must be at least 12 months from the date the user activates the facility, and
- for reloadable facilities, the expiry date must be at least 12 months from the date the user last reloads the facility.

Other provisions with regard to expiry dates are that:

- the issuer must not unilaterally bring forward the expiry date
- the issuer must give users a way to check the expiry date
- if a card is used to access the facility, the expiry date must be disclosed on the card, or
- if the issuer cannot ascertain the expiry date because it depends on the date of activation or last reload, the period during which transactions can be made must be disclosed on the card.

## FOS'S APPROACH

We note that there is no mention in the ePayments Code of what should happen to the balance remaining on a facility at the expiry date. Therefore, the fate of the balance depends on the terms and conditions for the facility. In many cases this would mean that the balance on expiry is forfeited to the issuer.

Some FSPs issue reloadable travel cards that have an expiry date. Each FSP provides that the card is unusable after the expiry date, but that the holder may apply for a refund of the balance up to 12 months after the expiry date. However, any balance remaining at the expiration of 12 months after the expiry date is forfeited to the FSP.

In considering disputes about facilities with expiry dates, particularly with regard to any balance that is forfeited to the issuer, we will be concerned to ensure that the issuer has complied with the particular provisions in clause 18 about minimum expiry dates, as well as with the general disclosure requirements in clause 4 to prepare clear and unambiguous terms and conditions for facilities. There is clearly an obligation on subscribers to ensure that their customers are fully informed about both the advantages and the disadvantages (including forfeiture of an unclaimed balance) of a facility with an expiry date.

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## CARDS LEFT IN AN ATM

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Pursuant to clause 11.4, a cardholder will be liable if a user leaves a card in an active ATM. The clause states:

“The holder is liable for losses arising from unauthorised transactions that occur because a user contributed to losses by leaving a card in an ATM, as long as the ATM incorporates reasonable safety standards that mitigate the risk of a card being left in the ATM”.

An accompanying note explains that:

“Reasonable safety standards that mitigate the risk of a card being left in an ATM include ATMs that capture cards that are not removed after a reasonable time and ATMs that require a user to swipe then remove a card in order to commence a transaction”.

## FOS'S APPROACH

When a card user withdraws cash from an ATM in Australia, they are usually required to take their card before the cash is dispensed. Therefore, in order to perform a second transaction after withdrawing cash, the user must reinsert the card and re-enter the PIN. This routine is designed to minimise the possibility of cards being left in ATMs.

However, a different routine applies when a user performs a non-cash transaction such as a balance enquiry, transfer of funds between accounts or deposit. After such transactions, ATMs in Australia are usually programmed to remain active to permit another transaction. After the non-cash transaction, the ATM remains active and the user is asked whether or not they want to make another transaction. The user is required to respond ‘Yes’ or ‘No’ to the question. If they choose ‘Yes’, the next transaction can be made without re-entering the PIN. If they choose ‘No’, the card is ejected.

This is a reasonable procedure given that the most common non-cash transaction is a balance enquiry, after which the user might often decide to withdraw cash. However, if a user becomes distracted, they might take their balance enquiry receipt, walk away and leave the card in the ATM while the on-screen message is asking whether or not they want to make another transaction. When this happens, the next person to approach the ATM may be in a position to answer ‘Yes’ and make another transaction, including a withdrawal. To minimise the risk of this happening, an ATM may be programmed to either shut down or retain the card after a certain period of time has elapsed. However, if the next person arrives at the ATM within a short period, they would be able to make an unauthorised withdrawal.

We have received disputes about such unauthorised withdrawals, which fall between the gaps of the EFT Code. While the withdrawal transaction was unauthorised, the ATM was active was as a result of an authorised transaction.

On the other hand, it has not been clear that the user contributed to the losses in EFT Code terms because it would be hard to argue that there was voluntary disclosure of the PIN, and the concept of ‘acting with extreme carelessness’ does not apply to the card itself but only to the security of the PIN. Nevertheless, it has been our practice for many years that the account holder should bear the liability for such unauthorised transactions.

We recognise that the purpose of the EFT Code is to limit an account holder's liability for unauthorised transactions to certain specified situations where the user has contributed to losses. We also recognise that the EFT Code imposes very few obligations on a user with regard to card and PIN security. The rationale for our usual practice of allocating liability to the account holder for a card left in an active ATM is that:

- The user is completely in control of the card while using an ATM.
- It is fair and reasonable that the account holder should be liable for the consequences of the user's carelessness with the card.
- It would be unfair and unreasonable for the FSP to suffer a loss because of the user's carelessness with the card.

We have considered each dispute on its merits, of course, and in some cases have asked an FSP to refund money to an account holder if we were satisfied that the user was unfamiliar with the usual ATM routine, or that the ATM remained active for an overlong period of time, or, in the case of an overseas ATM, if the routine followed by the ATM was markedly different from the routine of an Australian ATM.

However, for transactions to which the ePayments Code applies, we will apply clause 11.4 and will only consider whether the ATM incorporated reasonable safety measures to mitigate the risk of a card being left in an ATM.

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## TRAINING OPPORTUNITIES

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We can run workshops for FSPs to explain how we interpret and implement the EFT Code in our decisions and how we will approach disputes under the ePayments Code. If you would like more details or would like to arrange a training session, please call our member line 1300 56 55 56 or email [membership@fos.org.au](mailto:membership@fos.org.au).

## LENDER'S MORTGAGE INSURANCE

- OUR TERMS OF REFERENCE AND LMI POLICY CLAIMS
- PREVIOUS COMMUNICATION ABOUT LMI POLICY CLAIMS
- TERMS OF SETTLEMENT

FOS receives a number of disputes in which the applicant is in financial difficulty, the sale of a property securing their loan from the financial services provider (FSP) does not repay the loan in full and an unsecured shortfall debt remains. If there is a lender's mortgage insurance (LMI) policy in place, the FSP may have made, or may intend to make, a claim on the policy after settlement of the sale of the security property.

This article outlines FOS's view on an FSP's obligations in dealing with a customer in financial difficulty when the FSP has made a lender's mortgage insurance claim or may potentially do so after the sale of the customer's property.

### OUR TERMS OF REFERENCE AND LMI POLICY CLAIMS

Under paragraph 13.1(a)(iii) of our Terms of Reference (TOR), an FSP:

“must not take any action to recover a debt the subject of the Dispute, to protect any assets securing that debt or to assign any right to recover that debt, while FOS is dealing with the dispute”.

The act of claiming on an LMI policy does not in itself constitute recovery action. However, if a claim is made and paid then an assignment will occur for the purposes of – and in breach of – paragraph 13.1(a)(iii). This is because, pursuant to the terms of the LMI policy or as a matter of equity, the insurer is subrogated to the rights of the lender.

The doctrine of subrogation was described as follows by Walton J in *Burston Finance Ltd v Speirway Ltd* [1974] at p 1652:

“simply that where A's money is used to pay off the claim of B, who is a secured creditor, A is entitled to be regarded in equity as having had an assignment to him of B's rights as a secured creditor”.

Subrogation was recently considered by the Supreme Court of Western Australia in *Saraceni v Mentha* [2011] WASC 94. In that case, the court noted that the right of subrogation is akin to an equitable assignment.

FOS regards the transfer of rights from an FSP to an insurer under an LMI policy, whether under a right of subrogation or by assignment, as prohibited by paragraph 13.1(a)(iii) of our TOR. This is because it involves the transfer or assignment of the right to recover the debt to the insurer.

Therefore, an FSP may not make an LMI policy claim while FOS is considering a dispute.

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## PREVIOUS COMMUNICATION ABOUT LMI POLICY CLAIMS

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In Issue 2 of The Circular, in the article '[Secured debts and shortfall issues](#)', we set out our approach in relation to financial difficulty and a shortfall debt on the sale of a property. We consider that entering into an LMI policy with an insurer does not override the duties or obligations that a FSP has to its customer, including the obligation to give genuine consideration to a customer experiencing financial difficulty. We can review what steps the FSP has taken to assist its customer with any financial difficulty they are experiencing in repaying the shortfall debt. If an FSP merely follows the direction of its insurer and does not form its own view on the customer's ability to repay the residual debt under a repayment arrangement, it may be unable to demonstrate that it has met its obligation to genuinely consider a hardship variation. If we conclude the FSP has not met its obligations, we can require the FSP to vary the credit contract in order to better address the applicant's financial difficulty.

An award for non-financial loss may be made under our TOR if an FSP is found to have breached its obligations under 25.2 of the Code of Banking Practice or under the Mutual Banking Code of Practice (Codes) or good industry practice.

### RECENT CHANGES

Since the article in Issue 2 of The Circular was published, the National Credit Code has been introduced. It requires all FSPs, including insurers, to be a member of an external dispute resolution (EDR) scheme. As a result of this, we have reviewed our approach to LMI policy claims.

How we handle a dispute will depend on where the debt resides. If the debt is currently with the FSP, then in most cases we will raise the dispute against the FSP and we will expect the FSP to take no further steps in making an LMI policy claim until the dispute has been finalised.

If the FSP has made an LMI policy claim before the applicant lodges the dispute with FOS but the claim is yet to be paid by the insurer, we will not prevent the insurer from continuing to assess and process the claim. However, we will require documentation from the FSP to show that the claim was raised with the insurer before the dispute and we will still continue to consider the dispute against the FSP.

If the claim is approved, the dispute against the FSP will come to an end. The applicant can lodge a new dispute against the insurer with the relevant EDR scheme. If the applicant did lodge a new dispute, the insurer would have to cease all collection activity or recovery action while the EDR scheme is considering the dispute.

Alternatively, if the insurer declines the claim then the FSP must continue to respond to the dispute.

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## TERMS OF SETTLEMENT

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As with any request for financial difficulty assistance, where resolution is reached between the parties, any terms of settlement between the FSP and the applicant must comply with the FSP's obligations under either Code or follow good industry practice. It is therefore not appropriate for terms of settlement to provide that the shortfall debt, when known, be immediately referred to the insurer. This is because the passage of time between the date the terms of settlement are agreed and the settlement date of the sale of the security property may result in a change to the applicant's financial circumstances. The FSP should genuinely consider the customer's ability to pay the shortfall debt when it becomes due. A repayment arrangement may be more appropriate than any claim on the LMI policy at the relevant time.

For an FSP to meet its obligations in this regard, we consider that it should:

- (1) obtain a revised statement of the applicant's financial position at the time that the shortfall debt is known
- (2) consider any realistic repayment proposals from the applicant
- (3) if the repayment proposals are unsuitable, suggest any alternate arrangements, and
- (4) clearly communicate the outcome of the assessment to the applicant.

When entering into terms of settlement, the parties need to ensure that the future treatment of any shortfall debt arising from the sale of the property is clearly set out and accords with the FSP's obligations as set out above. As outlined in the article '[Financial difficulty: What is good industry practice?](#)' in Circular Issue 7, when we form an opinion about a financial difficulty dispute involving a non-regulated facility, irrespective of whether the FSP is a subscriber to either Code, we will take into account the relevant Code standards, as they represent good industry practice.

## SECURE SERVICES SITE

- SERVICES FOR CONSUMER REPRESENTATIVES
- SERVICES FOR MEMBERS
- HOW TO START USING SECURE SERVICES

We are regularly adding new tools and features to our Secure Services Site, and we wanted to give you an update.

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### SERVICES FOR CONSUMER REPRESENTATIVES

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We have developed a prototype Secure Services Site for legal aid workers and other consumer representatives who regularly represent clients in disputes at FOS.

In February and March, we are trialling the prototype with staff from Legal Aid NSW. After the trial, we will launch the site and encourage all consumer representatives who engage with FOS to register.

As we have done for members, we will progressively add new services for consumer representatives. Initially, consumer representatives will be able to register their contact details with FOS and fill out an online dispute form that has been pre-populated with their contact details. In future, they will be able to view the current status of their dispute(s).

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### SERVICES FOR MEMBERS

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Here are the services for members we already offer or soon will be offering through Secure Services.

#### 1. CONTACT DETAILS – AVAILABLE NOW

A member can review and update their contact details and contact types. Any changes they make will feed directly into our membership database and link to our case management system.

#### 2. DISPUTE REPORTS – AVAILABLE NOW

FOS sends monthly reports on disputes still open and disputes closed to members who have had any open disputes during the month. Members now receive these monthly reports through Secure Services. This new reporting method has significant benefits for members:

- **Archiving.** The Secure Services Site serves as an archive of all a member's reports. So members no longer need to worry about storing (and potentially losing) emails and PDF files. The archive covers the entire period in which our current Terms of Reference have been operating – that is, from 1 January 2010 onwards.
- **Multiple formats.** The reports can be viewed online or downloaded as a PDF or Excel file, so there should be a format to suit every purpose.

### 3. CASE SEARCHING TOOL – AVAILABLE NOW

Members can search for a particular case or all the cases that meet certain criteria (status, product, issue, date received, date closed, etc). For example, a member could search for all financial difficulty disputes about home loans that were brought to FOS by one of its customers between 1 July and 30 December 2010.

The information for the case search tool is updated from our case management system every night. Members can get information about their active cases as well as historical information about closed cases. The results include contact details for the applicant and what stage the case is at within our process.

### 4. MEMBERSHIP CERTIFICATE – AVAILABLE NOW

Members can download their certificate each year after paying their annual levy.

### 5. INVOICING – AVAILABLE NOW

Members can now pay invoices online by credit card. They can view the status of all their invoices, so they can see what is unpaid at any time, and they can print invoices (both paid and unpaid). There are also fact sheets explaining our funding model, case fees and user charge.

### 6. SYSTEMIC ISSUE REPORTS & CASE SEARCH TOOL – AVAILABLE NOW

Members who have had open systemic issues receive a report on these issues at the end of each month. The Secure Services Site serves as an archive of all a member's systemic issues reports. It also includes a case search tool like the one for disputes (see above).

### 7. DISPUTES DASHBOARD – COMING SOON

We are developing a disputes dashboard for external dispute resolution (EDR) managers. The dashboard will give the EDR manager of each of our members a summary of their organisation's disputes (both open and closed), including data on how long disputes have been open for.

So that we can tailor the dashboard to the needs of EDR managers, we are currently trialling a prototype with nine of our members. Based on their feedback, we will refine the dashboard and then release it to all our members.

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## HOW TO START USING SECURE SERVICES

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Many of our members have already registered for access to Secure Services, and we encourage all our members to do so.

Go to [www.fos.org.au/register](http://www.fos.org.au/register) to obtain a username and password. You must be listed as a contact for your business in our membership database to be able to register. FOS holds the contact details of one or more staff from each member in its membership database.

For more detailed information on how to register, please refer to our Guide to Secure Services: [www.fos.org.au/guide](http://www.fos.org.au/guide).

If you have any trouble registering for or using Secure Services, please email [bas@fos.org.au](mailto:bas@fos.org.au).

## SYSTEMIC ISSUES UPDATE

- NEW DEFINITE SYSTEMIC ISSUES
- INVESTIGATIONS

This article summarises systemic issues that we identified during the December quarter of 2011 and reported to the Australian Securities and Investments Commission (ASIC). It also provides an update on some current and recently resolved systemic issue investigations.

The FOS process for identifying and resolving systemic issues was outlined in [Issue 4](#) of The Circular. The process is in line with our obligations to ASIC.

To learn more about our approach to systemic issues, you can do our [online training module](#).

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### NEW DEFINITE SYSTEMIC ISSUES

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#### RECOVERY FROM APPLICANT OF COSTS OF DEALING WITH FOS

The applicant in a dispute claimed that the Financial Services Provider (FSP) had not adequately explained the legal and enforcement fees it had asked the applicant to pay to bring his home loan up to date. During our investigation of the dispute, we noticed that the FSP had levied charges against the applicant for services performed by solicitors the FSP had engaged.

We wrote to the FSP and referred to paragraph 1.1 of our Terms of Reference. It states that the dispute resolution service provided by FOS is free of charge to applicants and is paid for by FSPs. We also referred to ASIC Regulatory Guide 165: Licensing: Internal and external dispute resolution (RG 165) and the principle that customers should not have to pay to use internal dispute resolution services.

We asked the FSP to ascertain how many, if any, of its other customers had been charged for legal and enforcement costs regarding complaints handling. We also asked it to provide further information about its complaints handling policies and procedures.

The FSP responded by acknowledging that, despite its policy providing that any costs incurred relating to accessing FOS must be borne by the FSP, it had identified other instances where legal costs had erroneously been charged to a customer's loan account. We reviewed the information provided by the FSP and decided that the matter was definitely systemic.

In order to resolve the systemic issue, we requested that all costs erroneously charged to the affected customers be refunded in full, together with interest payable at the relevant loan rate. We also requested that the FSP remind its lawyers of its dispute management policy, with specific reference to the fact that FOS is a free service for consumers and that lawyers should produce separate invoices for legal costs relating to disputes lodged with FOS to reduce the likelihood of similar errors occurring in future.

#### ERROR IN CREDIT LISTING

We handled a number of disputes in which the applicant alleged that the FSP had made default listings on its personal credit files for amounts that were not 60 days overdue. It appeared that the FSP was listing amounts equivalent to the accelerated amount of the debt, thus depriving applicants of the opportunity to remedy the default prior to listings being made.

In addition, we had concerns about the adequacy of the default notice used by the FSP. The apparent faults included the inaccuracy of the amount in arrears, the FSP's failure to warn applicants that the remaining loan balance was payable if they failed to rectify the default within 35 days and its failure to specify the amount of the remaining loan balance as required by paragraph 89(1) (b) of the Uniform Consumer Credit Code (UCCC). Further, the notice did not mention the possibility that a report could be made to a credit reporting agency or that a default listing might follow if payment was not made within a specified time.

Lastly, we had concerns that the FSP had not complied with subsection 173 (1) of the UCCC, which sets out that a notice is taken to be given on the date it would have been delivered in the ordinary course of post and that the 30 day period runs from this date. The FSP appeared to treat the remaining loan balance as payable 30 days from the date of its notice.

The FSP responded by confirming that, while it had a policy designed to ensure that debts were not listed before they were 60 days overdue, there may have been a period when defaults may not have been accelerated correctly and, as a result, the accelerated amount of the debt was listed too early. It stated that it would conduct a full audit of its default listings since 2005 and that it would correct any found to have been made in error.

We reviewed the information provided and decided that the matter was definitely systemic due to the FSP's acknowledgement that it had listed a number of defaults incorrectly and also because of our concerns with its credit listing policy and default notice. In order to rectify the systemic issue, the FSP was asked to correct the incorrect listings and to amend both its notice and the policy.

#### FAILURE TO ADVISE CUSTOMERS ABOUT FOS

We received two disputes in relation to an FSP's accidental damage and theft protection plan product. In one dispute, the FSP issued a letter to the applicant after its initial review of the applicant's complaint. The letter stated that if the applicant was dissatisfied with the FSP's decision she could refer her dispute to the next step in its internal dispute resolution (IDR) process and that "you may refer this to a formal legal process such as the courts, mediation or arbitration".

In the other dispute the IDR response letter to the applicant stated that, if still dissatisfied "you may refer your dispute to a formal legal process such as the courts, mediation or arbitration".

These statements were raised with the FSP as a possible systemic issue because the FSP was not notifying customers of their right to refer their disputes to FOS, the timeframe for lodging a dispute with FOS and FOS's contact details. RG 165 requires an FSP to take these steps if a dispute has been through the IDR process but remains unresolved or is not resolved within the applicable time limits:

- inform the customer they have a right to pursue the dispute with an external dispute resolution scheme, and
- provide details about how to access that scheme.

The FSP reviewed the complaints about the protection plan and identified a number of customers who were not informed about their right to refer their disputes to FOS at the conclusion of the IDR process.

The FSP agreed to contact those customers.

## POLICY INTERPRETATION – DEFINITION OF ‘RENT’

We received a dispute arising from a claim lodged under a residential strata insurance policy administered on behalf of the FSP by its underwriting agency.

The applicant lodged a claim for the loss of 10 weeks rent. The applicant disputed the FSP’s deduction of commission from the rental monies payment under the policy. However, the FSP maintained it was entitled to make the deduction because the applicant was only entitled to the actual rental monies received, and that he would be profiting by being paid the commission.

We considered the dispute and determined that the policy terms and conditions did not authorise the FSP to deduct a commission (or any other amounts payable to a third party) from the payment due under the claim. We determined that the matter was a definite systemic issue.

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## INVESTIGATIONS

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Some of the ongoing definite systemic issues investigated in the December quarter are summarised below.

### METHODOLOGY AND DISCLOSURE OF BREAK COSTS ON FIXED INTEREST LOANS

Two investigations remain on foot but are now close to resolution. No new possible systemic issues relating to this matter were identified during the December quarter.

### ERRORS IN CREDIT LISTINGS AND INACCURATE CREDIT FILE ENQUIRIES

This continues to be an area that raises systemic issue enquiries, particularly in relation to serious credit infringement listings.

### RECOVERY OF COSTS OF DEALING WITH FOS FROM AN APPLICANT

This issue has been confirmed as definitely systemic in relation to at least one FSP. Other FSPs are being reviewed for possible systemic issues in relation to this matter.

### FAILURE TO ADVISE CUSTOMERS ABOUT FOS

There have also been disputes which illustrate that FSPs in some instances have failed to advise customers about FOS or have failed to provide correct information about FOS. As explained above, FSPs have to provide certain information about FOS in IDR responses.