

CONSULTATION REPORT

GOVERNING RULES OF THE NATIONAL FINANCIAL OMBUD SCHEME SOUTH AFRICA.

Date: 24 February 2024

1. Background.

The Ombud Council has granted recognition under section 194 of the Financial Sector Regulation Act, 9 of 2017 (FSR Act) to the National Financial Ombud Scheme South Africa (NFO), as an industry ombud scheme on 23 February 2024. The recognition is effective from 1 March 2024. The granting of recognition includes the Ombud Council's approval of the governing rules of the NFO, and the approved rules have also been published on the Ombud Council's website.

Section 214 of the FSR Act provides that, before granting recognition to an industry ombud scheme, the Ombud Council must carry out a public consultation on the scheme's proposed governing rules, allowing a period of not less than thirty days for making submissions. The Act also requires the Ombud Council to submit the draft governing rules to the Financial Sector Conduct Authority (FSCA).

The Ombud Council undertook this consultation on 13 November 2023, by publishing the following required documents on our website:

- The draft governing rules of the NFO Scheme, comprising two documents:
 - The draft Memorandum of Incorporation ("MOI") of the National Financial Ombud Scheme South Africa NPC, being the founding document of the non-profit company housing the Scheme, including key elements of its governance; and
 - The draft Rules of the NFO Scheme, setting out proposed details of the Scheme's jurisdiction, functions and operations.
- A statement explaining the need for, intended operation of, and expected impact of the governing rules; and
- A notice inviting submissions in relation to the governing rules.

The comment period closed on 14 December 2023, although the Ombud Council granted requests for an extension of this period to two commentators.

The Ombud Council has thoroughly considered all comments received on the draft governing rules, which resulted in several amendments to the draft rules being made in consultation with the NFO leadership.

This Consultation Report summarises the comments received, the Ombud Council's response to the comments, and resulting changes to the NFO governing rules.

2. Submissions received.

The Ombud Council received 11 written submissions on the draft NFO governing rules, from the following commentators:

<i>Category</i>	<i>Name</i>	<i>Abbreviation (To be used in the remainder of this report).</i>
Regulatory Authorities (3)	Council for Debt Collectors	CFDC
	Financial Sector Conduct Authority	FSCA
	National Credit Regulator	NCR
Industry Associations (5)	Association of Debt Recovery Agents	ADRA
	Banking Association South Africa	BASA
	Consumer Goods Council South Africa	CGSA
	Credit Bureau Association of South Africa	CBA
	South African Insurance Association	SAIA
Financial Institutions (2)	Discovery Life Limited	Discovery
	MiWay Insurance Limited	MiWay
Private Individual (1)	Mr Ian Middup	Middup

3. Summary of comments received and responses.

The Tables below summarise key comments received and issues raised by the above commentators, and sets out the Ombud Council's responses – including instances where the Clause or Rule concerned has been revised, after engagement with the NFO Scheme leadership, in light of the comment. **Table A** deals with comments on the MOI, while **Table B** deals with comments on the Scheme Rules.

Please note:

- For ease of reference, the Clause / Rule numbering in the Tables follows the numbering in the final approved governing rules, which may differ from the numbering in the draft versions published for consultation.
- The Tables do not reflect verbatim comments received from commentators, unless considered necessary, but summarises the Ombud Council's understanding of the key points raised.
- The Tables also do not reflect editorial, stylistic or grammatical suggestions, or relatively straightforward technical points such as cross-references to other laws, although the Ombud Council is grateful for those suggestions, several of which we have adopted and which have helped to improve the quality of the final approved governing rules.
- References in the Tables to legislative provisions are to provisions of the FSR Act, unless stated otherwise.
- Comments not specifically related to the content of the governing rules, but rather raising general questions about practical processes the NFO intends to adopt, or about future implementation steps, are not addressed in the Tables unless deemed material. These matters are best dealt with through future engagement between the commentator and the NFO itself, although commentators are welcome to contact the Ombud Council on such matters if they wish to and the Council will assist to the extent that we are able to.

Table A:

COMMENTS ON MEMORANDUM OF INCORPORATION ("MOI") OF THE NFO SCHEME			
Clause No.	Commentator/s	Summary of comments	Ombud Council response
5.2.5	BASA	Queried the type of information about Financial Products and Financial Services that the NFO could share and whether it would be vetted by the financial institution before sharing.	The Clause has been revised to refer to educational information. Ordinary principles of confidentiality will apply, and it is not necessary the MOI to provide for vetting of the information by a Participant.
6.2.	BASA	Suggests that reference should be made to the assurance and governance processes to ensure adherence to the MOI and that powers contained in the MOI are not abused.	The comment is unclear.
9.2	BASA	Noted that the powers of the Initial Board as described are temporary and that this should be articulated in the MOI.	It is implicit in the wording of Clause 9.1 that the purpose of the Initial Board will step down on appointment of the First Residing Board, which has since occurred. The comment is therefore moot. A footnote has however been added to Clause 9 to highlight that clauses 9.1 and 9.2 are retained for record purposes.
9.4.	SAIA	Proposed that at least half the Board must be present.	See the quorum requirements in Clause 14.8.
9.4.1.	BASA	BASA suggests that the term "work" should not only reference formal employment but should also refer to any independent contractor which is not recognised by a formal employment agreement.	The Ombud Council believes that the meaning and intent of the provision is clear.
9.4.2. and 10.4.4.	BASA	BASA suggests that the term of "close family member" is broad and may be open to interpretation. We recommend that provision should also be made for life partners / personal romantic relationships.	Agree that the term is broad, but the Ombud Council believes the intent is sufficiently clear for the purpose of these Clauses. The Directors will be expected to apply their minds appropriately to actual or perceived risks of conflict of interest when making these appointments. The FSR Act does however empower the Ombud Council to make Ombud Council Rules in relation to (among other things) the governance and governance bodies of ombud schemes, should the need for this emerge in the future (s.201(2)(b))
10.4.2	FSCA	Raised concern that the one-year notice period to the Head Ombud as to whether they will be re-appointed is excessive.	The period is in line with recommended best practice and the Ombud Council believes the requirement is appropriate to the significance of the Head Ombud's role and the importance of security of tenure.

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10.4.4.	FSCA	Queried whether it was the intention for an Ombud to be permitted to work or have worked in a financial institution in the preceding three years.	This is not the intention. The Clause has been reworded and clarified.
11.1	SAIA	Requested clarity on the meaning of "transparent", in relation to the process for appointing directors.	The Ombud Council believes the concept is self-explanatory and it is for the Board to apply it appropriately. Also note the explicit requirement for public advertisement.
11.2.	FSCA.	Proposed that the MOI should stipulate the grounds on which a Director may be removed,	Agree. See the grounds now provided for in Clause 11.2.
13.1.	BASA	Suggested that the term "financial assistance" should be defined and proposed a definition.	Disagree. The meaning is clear in the context and when read with other applicable provisions of the MOI relating to permissible payments and support to Directors. The Ombud Council would however have no objection if the Board deemed it necessary to insert a definition in future.
24.2.2.	FSCA	Noted that assets on dissolution of the NFO should not be transferred to an entity external to the RSA; and proposed replacing the reference to "government body" with "public entity", to enable for example a transfer to a statutory ombud scheme. Also noted that the Ombud Council should first and foremost approve any transfer of assets.	Agree. See revisions to the Clause.
General	BASA	Suggest that provision be made for revocation of recognition of an industry ombud scheme as contemplated in sections 199 and 200 of the FSR Act.	It is unclear in what way the MOI should address these processes, which would apply by operation of law. Future consideration will however be given to this comment.
General	Middup	<p><i>The comment is quoted verbatim, as all aspects are responded to:</i></p> <p>As there is no "two tiered" governance structure with the NFO MOI , there being no shareholders or members or independent nominations body and as there is no regulatory body that ensures checks and balances it is suggested that a further level of protection is built into the governance structure. This could be done in various ways for example by ensuring that all board appointments are approved by an independent and recognised body such as the Institute of Directors after public comment. There are many other ways of achieving this – see the UK FOS levels of protection or the Australian AFCA.</p> <p>There is always the danger with boards that are not independently appointed that they tend to be self-perpetuating. This makes the FRB vital and yet the names of this board have not been been disclosed for public</p>	It is unclear what two-tiered governance structure is envisaged. The NFO is governed by a Board, supported by governance Committees, in accordance with the requirements of the Companies Act (including Schedule 1 of that Act relating specifically to NPCs such as the NFO), and standard corporate governance practices. The Ombud Council has no reason to believe that the MOI provisions relating to the appointment, composition and quorum requirements for the Board are inadequate to ensure the Board's independence. In particular, the provision requiring that a majority of the Directors should not be associated with the financial industry, and that a majority of such non-industry associated Directors must participate in a vote for a

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		<p>review. All other recognised schemes governing bodies and ombuds were known to the public at the time of recognition and public comments asked for.</p>	<p>resolution to pass, should be noted; as should the provision requiring public advertisement of Director positions, maximum appointment terms, and Director rotation.</p> <p>The recommendation that future Board appointments should be approved by an external independent body, or that further levels of governance protection be introduced, is therefore not supported.</p> <p>Nevertheless, the FSR Act does empower the Ombud Council to make Ombud Council Rules in relation to (among other things) the governance and governance bodies of ombud schemes, should the need for this emerge in the future (s.201(2)(b)).</p> <p>The comment that there is no regulatory body to ensure checks and balances in relation to the NFO is not understood. The Ombud Council is mandated by the FSR Act to exercise oversight over ombud schemes, using a range of regulatory, supervisory and enforcement powers provided for in Chapter 14 of the Act.</p> <p>Also note that the First Residing Board (FRB) of the NFO is required by the MOI to be selected by an independent Selection Panel, which has occurred. The basis of the apparent concern (if we are understanding the comment correctly) around the independence of the appointment process of the FRB is therefore unclear.</p> <p>There is no requirement in the FSR Act for prior public consultation on ombud scheme governing body appointments, nor has this been done for previous scheme recognition processes. The fact that the names of Board members of predecessor industry schemes were in the public domain when those schemes applied for recognition by the Ombud Council, was because the schemes were already established and operational under the repealed Financial Sector Ombud Schemes Act prior to being recognised by the Ombud Council under the FSR Act. The Ombud Council is not aware whether such consultation took place when these schemes were first recognised many years ago under the repealed law.</p>

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			<p>At the time when the NFO governing rules were published for comment, the FRB appointment process, including application for CIPC registration of the new Directors and NFO Board governance processes to hand over leadership of the Company to the FRB, had not yet been completed. It would therefore have been premature and inappropriate to publish the names of the selected Directors at that stage. These processes have subsequently been largely concluded and the Ombud Council understands that the names of the members of the FRB will be shared on the NFO's website when the scheme commences operations on 1 March 2024. Records of those FRB members whose registration by the CIPC has been completed are also publicly available from the CIPC.</p>

Table B:

COMMENTS ON NFO SCHEME RULES			
Rule No.	Commentator/s	Summary of comments	Ombud Council (OC) response
1. Preamble	FSCA	Suggested including the requirement in s.196(3)(b)(iv) of the FSR Act, to the effect that the governing rules must be legally binding on members of the scheme and enforceable by its governing body.	Agree. See rule 1.2.
	BASA, SAIA	SAIA stated that the scheme is legislated, not a contractual relationship; and BASA suggested that the rules are subordinate legislation.	Disagree. Governing rules of an industry ombud scheme do not have the status of a regulatory instrument under the FSR Act nor are they another form of subordinate legislation. Approval of the rules by the OC and the obligation in s.215 to comply with the rules do not alter this status.
	BASA	Proposed that the scheme should stop dealing with a complaint if the complainant approaches the media or posts on social media about the subject matter of a complaint once it has been lodged with the NFO.	Disagree. Such a requirement could be seen to inhibit a Complainant's right to freedom of expression, and it is not the NFO's function to manage potential negative publicity for Participants. The NFO may where appropriate dismiss a Complaint that is being pursued in a vexatious, abusive or unreasonable manner (Rule 9.2.1(b)).

COMMENTS ON NFO SCHEME RULES

Rule No.	Commentator/s	Summary of comments	Ombud Council (OC) response
	BASA	Proposed that it should be mandatory for a Complainant to approach the NFO scheme prior to approaching the court, on the basis that internal remedies should be exhausted before approaching a court. The argument is also made that this is relevant where there is a regulatory body established purely to deal with disputes in a specific sector.	Disagree. Such a provision could be seen to restrict a Complainant's right of access to the courts. The NFO is not a regulatory body.
	BASA	Proposed that the reference to "any other available dispute resolution forum" be replaced with "any applicable and empowered dispute resolution forum."	Partially agree. The term "relevant" has been added to rule 1.5.
	BASA	Proposed that the NFO be able to make a cost award against a Complainant who withdraws a Complaint, depending on the reasons for withdrawal, to compensate for wasted costs incurred by Participants.	Disagree. This would be contrary to best practice principles that ombud services should be free to Complainants, and that Complainants are not bound at any stage to use such services.
2. Definitions, "Complainant"	SAIA	Raised a concern that the definition could be interpreted to include third-party claimants under non-life insurance policies, resulting in such claimants effectively being enabled to enforce claims directly against another party's insurer through the NFO, and that this is likely not the intention.	Agree. See words added to the end of the definition excluding third-party complaints under non-life insurance policies.
	BASA	Raised concerns that the definition is too wide; that the NFO should require mandates or powers of attorney where a Complaint is submitted on behalf of another person; that the Complainant be required to prove and establish an interest in the matter which interest should be substantive and important/significant; and that the definition should be aligned to the corresponding definition in the FSCA's Conduct Standard for Banks.	Disagree that the definition is too wide. It is appropriately and adequately aligned to corresponding (divergent) definitions in other financial sector laws, and to the anticipated definition to be introduced for all financial institutions and ombud schemes in the pending Conduct of Financial Institutions (COFI) Bill. The requirement that a Complainant should have a "direct interest" in the matter is sufficient, and it is not appropriate to the role of an ombud scheme to place additional onerous obligations on a Complainant to prove the level of such interest. It is for the NFO to decide whether a sufficient interest exists. A requirement that a Complainant acting on someone else's behalf should be duly authorised in a manner and form acceptable to the NFO, has been added to the definition.

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Rule No.	Commentator/s	Summary of comments	Ombud Council (OC) response
	CGSA	Warned that acceptance of Complaints from persons acting on behalf of a Complainant could be abused through entities that style themselves as “financial well-being services” and, after charging a fee, refer complaints to ombud schemes on behalf of often vulnerable customers who are entitled to access ombud services for free. Recommended that consideration be given to constraining the types of persons who may act on behalf of Complainants; and prohibiting entities who receive fees from customers for purposes of financial assistance or advice from acting on behalf of Complainants.	<p>The Ombud Council and the NFO share this concern. However, it is challenging at this stage for the NFO itself to adopt the types of measures proposed by the CGSA without risking unintended exclusion of legitimate support to Complainants, particularly where a power of attorney or similar authorisation is produced. The NFO will however take steps to explain to financial customers when they become aware of such cases that the NFO’s services are free and that there is no need to pay third parties for complaint assistance.</p> <p>The Ombud Council intends to engage further with the CGSA on this concern, to explore future options for mitigating risks of this type of abuse, potentially through making appropriate Ombud Council Rules. In the interim, the definition of “complainant” now includes a requirement for a person submitting a Complaint on someone else’s behalf to be duly authorised in a manner and form acceptable to the NFO.</p>
2. Definitions, “Complaint”	BASA	Raised concerns that the definition is too wide, and proposed a revised version that would remove several elements of the definition.	Disagree that the definition is too wide. It is appropriately and adequately aligned to corresponding (divergent) definitions in other financial sector laws, and to the anticipated definition to be introduced for all financial institutions and ombud schemes in the pending Conduct of Financial Institutions (COFI) Bill.
	SAIA	Raised concern that the definition is too wide and that it allows for complaints by persons other than Complainants as defined and in relation to topics not related to Financial Products; that aspects of the definition will require a subjective test which is likely to require a hearing; and that certain aspects are better placed with the FAIS Ombud.	<p>Disagree that the definition is too wide. It is appropriately and adequately aligned to corresponding (divergent) definitions in other financial sector laws, and to the anticipated definition to be introduced for all financial institutions and ombud schemes in the pending Conduct of Financial Institutions (COFI) Bill.</p> <p>Some aspects of the comment are not understood. The definition of Complainant refers to a person who submits a Complaint (as defined), so it is not possible for a Complaint to be submitted by someone other than a Complainant. The definition intentionally is not limited to Complaints about Financial Products, and includes Complaints about Financial Services as defined, and Complaints about related and ancillary benefits offered by Participants. Complaints that are within the FAIS Ombud’s jurisdiction are excluded from the jurisdiction of the NFO in accordance with Rule 4.2.1.</p>

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2. Definitions, "Financial Service" and "Participant" <i>(Note: Descriptions of products and services activities previously included in the definition of "Participant" have been moved to the definitions of "Financial Product" and "Financial Service" respectively, and refined.</i>	CBA	Requested the deletion of references to the provision of credit information listed on a credit bureau, pointing out that credit bureaux will not be Participants in the NFO.	See paragraph (b)(i) of the definition of "Financial Service" in the Rules, and the explanatory footnote, clarifying that the intent is to include Complaints relating to the provision of credit information to a credit bureau by the Participant, not complaints against the credit bureau itself.
	CFDC, ADRA	Raised concerns that the inclusion of "debt collection" in this definition, and hence the activity's inclusion in the NFO's complaint handling jurisdiction, is problematic to the extent that it includes debt collectors as defined in the Debt Collectors Act. The concern is that this will result in dual regulation and duplication of functions between the NFO and the CFDC, arguing that such debt collectors should be regulated solely by the CFDC. Deletion of the reference to "debt collectors" was therefore requested.	<p>The Ombud Council has subsequently engaged with the CFDC, the FSCA, the National Treasury and the NFO leadership on the concerns raised, and a way forward has been agreed.</p> <p>Complaints relating to persons performing "a debt collection service" were included in the draft governing rules due to this being an activity explicitly included in the definition of "Financial Service" in the FSR Act, and due to the fact that the Credit Ombud has historically dealt with certain such complaints. The Ombud Council is of the view that Complaints against debt collectors (including CFDC-registered debt collectors) should be appropriately accommodated in the financial ombud system as soon as feasible. However, we recognise that the regulatory framework governing the respective roles of the CFDC, the FSCA and the Ombud Council in the debt collection space is still evolving; and that including Complaints regarding "debt collection services" in the scope of the NFO at this stage without further qualification may therefore have unintended consequences.</p> <p>The NFO governing rules will provide that Complaints relating to debt collection are covered by the scheme, but only in respect of debt collection by or on behalf of an NCR-registered credit provider. Complaints against a credit provider collecting its own debts were already covered by the former Credit and Banking Ombuds, but the coverage of such Complaints by the NFO will be confirmed for avoidance of doubt. In addition, it will be made clear that, where the scheme receives a Complaint against a debt collector (including a CFDC-registered debt collector), and the scheme establishes that the debt is being collected on behalf of a credit provider that is a Participant in the scheme, the matter will be dealt with as a Complaint against the credit provider concerned.</p> <p>See paragraph (b)(ii) of the definition of "Financial Service" in the rules and the explanatory footnote.</p>

COMMENTS ON NFO SCHEME RULES

Rule No.	Commentator/s	Summary of comments	Ombud Council (OC) response
			<p>It follows that the NFO will not have jurisdiction over the third party debt collector itself, but the hope is that by making it clear that credit providers will be held to account by the NFO for the conduct of the debt collectors they appoint, it will deter the use of poor quality outsourced debt collection services. Also note that, where debts are collected by an entity that has “bought” a book of debts, the entity becomes a credit provider in its own right and is eligible to fall under the NFO scheme as a Participant.</p> <p>Provision has also been made for the NFO to share information with the CFDC in relation to Complaints against debt collectors it has an interest in. (See Rule 13.5.1).</p> <p>As a future step, the Ombud Council plans to engage with the CFDC and other relevant stakeholders regarding the longer term approach for appropriately including debt collection related complaints in the financial sector ombud system.</p>
	FSCA	Noted that it may be problematic to include debt collection in the scope of the NFO at this stage as the FSR Act does not defined the activity; and noted that the application of s.211(3) may be premature at this stage where the intention is to further develop demarcations between the FSCA and CFDC in relation to debt collection services.	Agree in relation to debt collection by CFDC-registered debt collectors. See response immediately above.
3.1.2	FSCA	Suggested replacing references to “Consumers” with “Financial Customers”.	Agree. The term Financial Customer is better aligned with relevant legislation. This change has been made throughout the Rules.
3.1.5	BASA	Recommended that Rulings be published in an anonymised format.	Disagree. Although the identity of a Complainant must be protected when Rulings are published, it is an appropriate accountability measure for Participants (who have not successfully appealed a Ruling) to be identified in published Rulings. Note that the word “selected”, which appeared in the draft rules, has been deleted for consistency with Rule 14.2.
4.1	BASA	Suggested that the NFO’s jurisdiction be limited to Financial Products and Financial Services as defined in the FSR Act.	The definition of Complaint, read with the definitions of Financial Product and Financial Service, already cross-refers to the relevant FSR Act definitions.

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4.2.1	BASA	Asked various questions (also related to other provisions of Rule 4.2) regarding the practical implementation of these provisions.	These questions are most appropriately addressed to the NFO itself in due course. Note that a requirement has been included that, where a statutory ombud declines to deal with a Complaint in its jurisdiction and agrees that the NFO should do so, the Complainant must agree that the Complaint be dealt with by the NFO.
4.2.2(b)	BASA	Raised case law arguments in support of the proposed removal of the NFO's discretion to deal with a Complaint that has been part of other ADR processes in which an outcome has been reached, where the Ombud is of the view that the Participant did not act in good faith in securing the resolution.	Disagree. It is consistent with the NFO's equity-based jurisdiction for it to have the discretion to deal with such Complaints in appropriate circumstances, where the previous process did not achieve a fair outcome due to the Participant's conduct.
4.2.2(d)	BASA, Discovery	Discovery raised a concern that the NFO's discretion in this instance could result in a Complaint being dealt with in two forums. BASA proposed that the NFO only consider a Complaint in this scenario if the subject matter of the Complaint is clearly distinguishable from the litigation	Disagree. The NFO is only expected to use its discretion to deal with a matter that has been the subject of legal proceedings, in exceptional cases. For example, there have been cases where a court order has been based on faulty proceedings and rescission is pending or might be appropriate.
4.2.2(e)	SAIA, BASA	Argued that this provision is inconsistent with the Prescription Act. BASA raised an additional argument that the framing of the Ombud's discretion in this Rule would entail a subjective test and that the provisions of the Prescription Act should apply.	Agree that the rules cannot override the Prescription Act and disagree that the provision is inconsistent with that Act. This provision serves a different purpose and will apply in circumstances where prescription may not be relevant. It is consistent with the NFO's equity jurisdiction and informal processes for it to have the discretion to deal with Complaints in these circumstances. Also see response on Rule 6.
4.3.1	BASA	Proposed replacing "earliest reasonable opportunity" with a specific timeframe, and inclusion of additional process steps.	It is consistent with the informal nature of ombud proceedings, particularly recognising the wide range of Complaints, Complainants and Participants that the NFO will deal with, to allow reasonable flexibility regarding timelines and detailed processes – in relation to this Rule and others. See however new Rule 7.9, providing for the NFO to adopt appropriate administrative procedures and timeframes, consistent with its rules.
	FSCA	Proposed adding a timeframe within which a party may object to the NFO's jurisdiction decision.	Agree. Rule 4.3.2 has been inserted providing for a 30 day period within which a party can object to a jurisdiction decision.

COMMENTS ON NFO SCHEME RULES			
Rule No.	Commentator/s	Summary of comments	Ombud Council (OC) response
5.1	BASA	Suggests that the rule should stipulate the minimum required information which needs to be contained in a Complaint.	Disagree. Overly rigorous and inflexible rules in this regard could present barriers to Complainants, particularly vulnerable Complainants. See however new Rule 7.9, providing for the NFO to adopt appropriate administrative procedures and timeframes, consistent with its Rules.
5.2	FSCA	Noted that for this rule to be fair, a Complainant's attention should be drawn to the rules, and they should be explained.	Agree. See addition to Rule 5.2 requiring NFO to take reasonable and appropriate steps in this regard.
6.1.	NCR, BASA	Raised concern that this provision purports to override the provisions of the Prescription Act.	Note that this Rule is aligned to the language of s.216 of the FSR Act, which explicitly provides that Complaints to an ombud scheme interrupt prescription under the Prescription Act or in other circumstances. The Rule therefore does not purport to override a legislative provision. A cross-reference to s.216 has been inserted for avoidance of doubt.
6.2	FSCA	Noted that for purposes of determining suspension of prescription, it should be clear what constitutes receipt of a Complaint for purposes of this rule.	Agree. See new Rule 6.2, confirming that a Complaint is received on the date of receipt through one of the submission methods referred to in Rule 5.1.
7.	BASA	Requested more process detail to be added to this Rule regarding various aspects of the complaint handling process.	Disagree. See response for Rule 4.3.1.
7.4.2	BASA	Suggested that Participants only be required to submit information to the NFO that is not legally privileged, competitively sensitive, subject to intellectual property protection, or is not the personal information of another party who has not consented to its disclosure.	Refer to Rule 13 which provides extensive confidentiality safeguards and protections for privileged information.
	FSCA, SAIA	FSCA pointed out that the reference to "the usual timeframe" is unclear. SAIA requested that shortening of timeframes should occur in consultation with the Participant.	Agree with FSCA. See revised Rule 7.4.2 which provides for the NFO to stipulate a timeframe, which timeframe must take reasonable account of the urgency of a matter. In practice, the NFO would typically engage with the parties in relation to timeframes in urgent matters, in line with the reasonability requirement.
7.5.2	FSCA	Suggested that the decision to consider new information should be made by an Ombud.	Agree. References to NFO replaced with references to an Ombud in this Rule.

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7.6.	Discovery, MiWay, SAIA, BASA.	Several concerns were raised regarding the fairness, reasonableness, unknown costs, and practical implications of the provision that the NFO may require the Participant to carry or contribute to the costs of an expert appointed by the NFO.	Agree with some of the concerns. Rule 7.6 now provides for consultation and agreement with the Participant in relation to the costs of appointing an expert.
7.7.	BASA	Requested that the Participant also be permitted to make oral submissions.	Agree. See revised Rule 7.7 which allows either party to make oral submissions where the NFO considers this appropriate.
7.8.2.	BASA	Requested a provision that the Complaint will be “granted in favour of the Participant” where the un-cooperative party is the Complainant.	Disagree. Lack of cooperation by one party does not necessarily mean that a decision in favour of the other party is fair or appropriate.
8.1.1.	BASA	Suggested that the NFO processes should be subject to all laws and practices regarding admissibility of evidence; and fair and reasonable administrative action and practices.	Disagree that NFO should be subject to laws of evidence. This would defeat the purpose of an ombud scheme being an informal dispute resolution alternative to the courts. Agree that the NFO is required to apply administrative fairness. The NFO would in any event be subject to judicial review of the administrative fairness of its processes. A reference to administrative fairness has been added to Rule 8.1.1.
8.2.3 to 8.2.5	SAIA, BASA	Suggested deletion of these clauses, arguing that a “trial procedure” is inappropriate for the NFO due to costs and timelines. BASA added that Complaints involving a dispute of fact should be dismissed as being better suited to a court of law and due to other procedural concerns.	Disagree that these Rules are equivalent to a “trial procedure”. Although the NFO would typically only infrequently conduct a hearing, the discretion to do so is necessary to avoid Complainants having to resort to the courts in instances where it is reasonable and appropriate for a dispute of fact to be determined by the NFO, using a less formal procedure than the courts. However, also note Rule 9.2.1(c), which allows the NFO to dismiss a Complaint where it appears it would more appropriately be dealt with by a court of law.
9.1	BASA	Recommend that reasons should be provided for a Recommendation, and that timelines should be stipulated for adjudication of Complaints generally.	Partially agree. A requirement for a Recommendation to include reasons has been added to this Rule. Regarding stipulation of timelines, see response for Rule 5.1 and note new Rule 7.9.
9.2.1.	BASA	Recommend additional grounds for dismissal, being referral of a Complaint by the Complainant to the media or social media.	Disagree. See response to the similar comment on the Preamble.
9.2.1(d)	FSCA	Noted that there are examples of financial institutions legitimately exercising commercial judgment unfairly and prejudicially and proposed that elements of reasonableness and fair treatment be introduced to this Rule.	Agree and partially accommodated. A reference to “ <u>reasonable and legitimate</u> ” exercise of commercial judgment has been inserted.

COMMENTS ON NFO SCHEME RULES			
Rule No.	Commentator/s	Summary of comments	Ombud Council (OC) response
9.2.2 and 9.2.3	BASA	Suggested that a Complainant should be liable for wasted costs where their objection to a jurisdiction decision proves to be unfounded.	Disagree. This would be contrary to best practice principles that ombud services should be free to Complainants.
	FSCA	Proposed adding a timeframe within which a party may object to the NFO's dismissal decision.	Agree. Rule 9.2.2 has been inserted providing for a 30 day period within which a party can object to a jurisdiction decision.
9.3.1.	FSCA	Suggested providing a time period within which a Recommendation must be accepted.	Agree. See revised Rule 9.3.1 providing for acceptance of a Recommendation, or compliance with a Recommendation, within a timeframe stipulated in the Recommendation, failing which a Ruling will be made.
9.3.2.	BASA	Requested deletion of the option to issue a provisional Ruling.	Disagree. This option may assist in resolving Complaints prior to a Ruling in appropriate cases.
9.3.6.	BASA	Suggested that the Participant should also have the options in this Rule, being to appeal the Ruling or pursue it in another forum.	The Participant does have the right to appeal a Ruling, as provided for in rule 10.2. This Rule deals with the situation where a Complainant has accepted a Ruling and the Participant has not exercised its right to appeal, in which case the Ruling becomes binding on the Participant.
9.4.1(e)	SAIA	Proposed deletion of the Rule or limitations on the time periods for which or rates of interest the NFO may determine.	Discretion in relation to interest awards is consistent with the NFO's equity jurisdiction, and allows for flexibility to take into account the circumstances of each Complaint, including the causes for any delays and any applicable contractual interest rates. The complaint handling process allows the Participant opportunities to express a view on interest awards, where applicable, and a Participant aggrieved by a Ruling on an interest award also has the right to appeal.
9.4.1(g)	SAIA	Argued that Complaints in essence relate to breaches of contract, and an award of compensation for material inconvenience or distress would be contrary to case law in relation to non-patrimonial damages for breach of contract.	Disagree. A key feature of the equity-based jurisdiction of an ombud scheme is its ability to look beyond strict legal or contractual considerations. See the decision-making criteria in Rule 8.1.1. This type of award also aligns with Financial Institutions' obligations under the FSCA's Treating Customers Fairly framework to provide financial customers with customer service of a quality they have been led to expect, and to ensure their customers can have confidence in their fair treatment culture.

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Rule No.	Commentator/s	Summary of comments	Ombud Council (OC) response
10	FSCA	Suggested changes to the sequence of sub-rules, and deletion of the term “designated”, to improve clarity of Rule 10.	Agree. The Rule has been restructured to improve its flow and the reference to the Tribunal as a whole being “designated:” has been removed.
10.2	BASA	Recommended that a definition of “Days” be provided.	Agree. A definition has been added to Rule 2.
11.1.3	BASA	Recommend deletion of the NFO’s discretion to publish a Participant’s non-compliance with a Ruling or a decision of the Appeal Tribunal, arguing that this poses reputational risk; or alternatively that a Ruling “on an overturning” also be published.	A Participant’s failure to comply with an NFO Ruling (that it has not appealed) or with an appeal decision, is a serious contravention of its obligation to comply with the Scheme Rules, and thus also a serious contravention of s.215 of the FSR Act. It is in the public interest for such contraventions to be publicised unless there are compelling justifications for the non-compliance. The Participant’s reputational risk in this regard is best managed by it complying with its obligations to the NFO. The relevance of “publishing an overturning” is not understood in this context. Note that Rulings against a Participant are only published if not substantially overturned on appeal (Rule 14.3).
11.2	BASA	Requested that a specific time period within which a Participant may make representations against publication of non-compliance be inserted.	Agree. A time period of 10 days has been provided for.
12.	BASA	Requested clarity on specific procedures relating to this Rule, and proposed that further detail of processes be provided for.	Disagree. See response for Rule 4.3.1. and new Rule 7.9.
13.1.	BASA, SAIA	Raised concerns that the Rule as drafted could have unintended consequences by conferring privilege on information where this was not the intention; and that a failure to confer privilege where intended could be a deterrent to co-operating with the NFO.	Agree. See revised Rule 12.1 which details the types of information in connection with the Complaint that will be regarded as privileged.
13.5.1.	BASA	Suggested providing that the NFO must only provide information to the NCR specifically regarding Complaints related to the National Credit Act.	Partially agree. A requirement for the regulator concerned to have an interest in the Complaint or the type of subject matter to which the Complaint relates has been added.
16.	BASA	Noted that the Rule should also reference the Promotion of Access to Information Act.	Agree. Reference added.
19.	BASA	Argued that the provisions regarding reporting of systemic issues are too wide, particularly the reference to “potential” systemic issues, and that the provisions are ultra vires s.217(3)(b) which only enables reporting to the FSCA.	Disagree. The Scheme Rules are not subordinate legislation, but impose contractual obligations on Participants. They are not required to be limited in this respect to the scope of s.217(3)(b). Note however that the inclusion of a “potential” systemic matter

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			is consistent with the wording of s.217(3)(b), which refers to cases where there has “or may have been” an activity or action by a financial institution that has an effect on financial customers other than the Complainant.
20.1.	BASA	Suggests that complaints about the NFO’s service should be dealt with by an “independent service area” within the NFO to ensure impartiality; and suggested or queried several other procedural aspects for implementation of this Rule.	Impartiality is ensured by the provisions relating to an Independent Assessor (Rules 20.2 to 20.7). Note that the Independent Assessor’s processes will be governed by separate rules set by the NFO Board.
21.1.4	SAIA	Observed that the Rule is inconsistent with the Policyholder Protection Rules (PPRs) issued by the FSCA, which provide for disclosure on an insurer’s website “and / or” on its website, and requests alignment with the PPRs.	Partially agree. The Ombud Council does not support the approach in the PPRs, which makes disclosure on the website optional, as we believe the NFO’s contact details should always appear on a Participant’s website. We accept however that disclosure at physical premises may not necessarily be effective and can present implementation challenges. The Rule has been amended to require disclosure on the website, and preferably also at the Participant’s premises.
21.2.	BASA	Are of the view that 6 months is too short a period to comply with this Rule and propose a period of 12 to 18 months.	Disagree. The Rule does not require proactive communication with all existing customers, but only in new point of sale documentation and relevant periodic communications that are produced in the normal course; and on websites and (preferably) at premises. (See revised Rule 21.1.4). The Ombud Council does not believe 6 months is an unreasonable period.
22.	CGSA	Raised concerns that the “case fee” element of the NFO’s funding model may cause practical challenges if charged on a case-by-case basis; recommended proportionality and consultation on such case fees; and pointed out that they may impose a cost burden on smaller entities who already pay regulatory fees to various regulatory authorities, which authorities already deal with complaints without charging additional fees for doing so.	<p>It should be noted that the “case fees” are not intended to be charged on a case-by-case basis but are invoiced annually, together with the participation fee, but based on the actual number of Complaints against the Participant in the prior year. The Ombud Council agrees that the principles of transparency and proportionality must be applied in determining the NFO funding model and that adequate consultation with Participants should take place.</p> <p>It should be borne in mind that not all regulatory authorities deal with customer Complaints in the normal course. The FSCA does not typically deal with Complaints unless they relate to a contravention of a financial sector law, in which case the focus is on enforcement action rather than redress for the customer. The NCR does have a complaint handling mandate, but the National</p>

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			Credit Act gives customers the choice of having their complaints dealt with by the NCR or a recognised ombud. In practice, the NCR refers complaints it receives against ombud scheme Participants to the ombud scheme.
	BASA	Recommended public consultation regarding the NFO funding model. Also proposed a reference to the funding model being “as prescribed”.	The Ombud Council will consider the suggestion regarding public consultation going forward. Disagree with the proposed reference to “prescribed”, the Scheme Rules do not constitute subordinate legislation and are not prescribed.
Schedule A	BASA	Recommended that the Complainant be able to abandon a portion of the claimed amount to align to the monetary jurisdiction level. Also suggested replacing references to “private individual” with “natural person”.	This is already provided for. Agree. See revised drafting.
Schedule A	Discovery	Noted that limits may result in Complainants having to approach the courts.	Noted. It is however appropriate for an ombud scheme to have compensation limits set at an appropriate level to ensure access for the substantial majority of ordinary retail Complainants. Note too that a Complainant does have the option to limit their Complaint to the jurisdictional limit, or the Participant may agree to the limit being exceeded in a particular case.
Schedule A (2.3)	Discovery	Commented that the limit increase may result in additional costs; and that as it is unclear what would constitute an unnecessary delay, it is unfair to “punish” a Participant for delays in the absence of clear timeframes.	It is unclear what limit increase is being referred to. It is not appropriate to the NFO’s equity jurisdiction to be unduly prescriptive regarding the types of delays that could trigger this award. The Complaint handling process in the Rules is such that a Participant will in practice be well aware of expected timeframes, and will also have opportunities to make representations regarding a proposed award under this provision; or ultimately appeal a Ruling.