

MEDIA STATEMENT

FAIS Property syndication complaints: Ombud Council comment

The Ombud Council has noted recent media coverage of the FAIS Ombud's decision to close its files on several historic property syndication complaints and to advise the complainants that the matters would be more appropriately dealt with by the courts.

We confirm that the FAIS Ombud, Advocate Simpson, has kept the Ombud Council informed of developments in this matter, including his reasons for adopting this approach. We have also noted recent decisions by the Financial Services Tribunal upholding the dismissal decisions.

Background - a long and regrettable history

These cases arose from the high-profile failure, over a decade ago, of several property syndication investment schemes. The failures triggered significant losses for many investors, often pensioners who had invested their retirement savings. Thousands of complaints against the financial advisers who had recommended the investments were submitted to the FAIS Ombud's office. Previous Ombuds made determinations against some of the advisers, ordering them to compensate the investors. However, almost all of these determinations were overturned on appeal to the Financial Services Appeal Board (predecessor of the current Financial Services Tribunal) and in litigation in the High Court.

It became clear from the appeal decisions that the factual and legal disputes in these cases were particularly complex and required both factual and expert evidence. Cases were referred back to the Ombud's office for reconsideration, and complaint backlogs mounted, without any legal certainty or reasonable prospects of success for the complainants emerging. This culminated in the current remaining backlog of approximately 1000 complaints not yet resolved, with previous judgments suggesting that even if the FAIS Ombud were to process them, the likely outcome would not be in favour of the complainants.

Against this background, the current FAIS Ombud has concluded that the only feasible next step is to dismiss the outstanding matters as being more appropriately dealt with by the courts.

The Ombud Council has deep sympathy for the investors who have for many years hoped for a favourable outcome to their complaints, to no avail.

Role of the Ombud Council

The Ombud Council was established through the Financial Sector Regulation Act and started operating in 2021. Its objective is to assist financial customers to have access to affordable, effective, independent and fair alternative dispute resolution when they have complaints about financial institutions and their financial products and services.

The Ombud Council does not handle customer complaints itself but oversees all financial sector ombud schemes as their regulatory authority. The Ombud Council has a range of rule-making, supervisory and enforcement powers over ombud schemes aimed at ensuring that the schemes comply with financial sector laws governing them, and generally at enhancing the effectiveness of the ombud system.

Importantly, it is not the Ombud Council's role, nor does it have the power to become involved in, or review or reconsider the outcome of any specific complaints handled by ombud schemes. This would be inconsistent with our mandate to protect the independence and impartiality of ombuds. The Ombud Council therefore does not express a view on the individual decisions taken by the FAIS Ombud to dismiss the property syndication complaints.

Complainants should note the FAIS Ombud's recommendation to obtain legal advice, where possible, and note that they have the right to approach the Financial Services Tribunal for reconsideration of the Ombud's decision.

Lessons learnt

It should never take so long to reach this point.

The purpose of the ombud system is to provide affordable, effective, independent, accessible, and fair alternative dispute resolution processes to financial customers who believe they have been failed by financial institutions. In particular, ombud schemes aim to ensure that complaints are resolved expeditiously, relatively informally, and cheaply (typically at no cost to the complainant), as compared to the courts.

In the large majority of cases, this aim is achieved. Ombud schemes can and do conduct thorough investigations, balance opposing factual claims, and apply both equitable and legal considerations when considering complaints. This allows them to resolve a high proportion of complaints through mediation and conciliation, rather than through formal determinations.

Regrettably, the unusual and complex combination of factors that led to the property syndication investment losses, make this one of the rare situations where the ombud system is not best equipped to resolve the dispute. This should have been determined much earlier, so that the affected investors could consider their options.

The Ombud Council will work with the FAIS Ombud and other ombud schemes, to ensure that they have workable "early warning" systems in place to identify and refer cases that should best be dealt with in other forums, such as relevant regulators, other dispute

resolution forums, or the courts, within a reasonable time. A balance needs to be struck however to ensure that ombud schemes do not shy away from difficult cases that they can and should deal with.

Processes to identify complaint trends, fluctuations in complaint volumes, slippage against turnaround time targets, and emerging sector-wide conduct risks, are essential tools to monitor the effectiveness of the ombud system. The Ombud Council is currently consulting with all the ombud schemes it oversees on proposed complaint data reporting requirements, aimed at more consistently identifying and mitigating the risks of poor customer outcomes - such as those starkly demonstrated in this case.

Please visit www.ombudcouncil.org.za for more information about the Ombud Council.



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