

FINANCIAL SECTOR REGULATION ACT, 9 OF 2017

OMBUD COUNCIL RULES FOR THE OMBUD FOR FINANCIAL SERVICES PROVIDERS, 2024

CONSULTATION REPORT

Date of publication: 1 July 2024

1. PURPOSE

- 1.1. The Financial Sector Regulation Act (Act 9 of 2017) (the FSR Act) requires the maker of a regulatory instrument to publish a consultation report with each regulatory instrument, as part of the broader consultation process required when making such instruments.
- 1.2. The consultation report must include a general account of the issues raised in the submissions made during the consultation; and the maker's response to those issues. (Section 104 of the FSR Act). The consultation report must also be submitted to Parliament when the regulatory instrument is submitted to Parliament in accordance with section 103 of the FSR Act.
- 1.3. As the maker of the Ombud Council Rules for the Ombud for Financial Services Providers, 2024 (the Rules) the Ombud Council has therefore prepared this Consultation Report.

2. DEFINITIONS

In this Report the following terms have the following meanings:

"**FAIS Act**" means the Financial Advisory and Intermediary Services Act, 2002 (Act 37 of 2002);

"**FAIS Ombud**" means the Ombud for Financial Services Providers, established in terms of the FAIS Act;

"**FSR Act**" means the Financial Sector Regulation Act, 2017 (Act 9 of 2017);

"**previous Rules**" means the Rules on Proceedings of the Office of the Ombud for Financial Services Providers, 2003, published under the Financial Services Board's Board Notice 81 in Government Gazette 25299 of 8 August 2003, and amended by Board Notice 100 published under Government Gazette 26844 of 29 September 2004;

"**Rules**" means the Ombud Council Rules for the Ombud for Financial Services Providers, 2024¹.

¹ The Rules were initially published for comment as the draft Ombud Council Rules for the Ombud for Financial Services Providers, 2023. The date in the title has been updated to 2024.

3. SUMMARY OF CONSULTATION PROCESS

3.1. The Ombud Council published a draft of the Rules on its website on 4 September 2023. As required by section 98(1)(a) of the FSR Act, the draft Rules were published together with:

- A statement explaining the need for, intended operation of, and expected impact of the Rules; and
- A notice inviting submissions in relation to the Rules.

The closing date for submissions was 16 October 2023.

3.2. The publication of the draft Rules by the Ombud Council followed a previous round of consultation undertaken by the Financial Sector Conduct Authority (FSCA), in relation to one specific provision: The increase in the maximum compensation amount the FAIS Ombud is empowered to award from R800,000.00 to R3,500,000.00, as now provided for in Rule 4(1)(e) of the Rules. The background to and outcome of that consultation process is set out in the Statement of Need, Intended Operation and Expected Impact published together with the Rules and this Report. For purposes of this Report it can be noted that the FSCA consultation process did not result in any change to the proposed increased compensation limit.

3.3. This Consultation Report summarises the comments received through the Ombud Council consultation process, the Ombud Council’s response to the comments, and resulting changes to the Rules.

3.4. The Ombud Council received 7 written submissions on the draft Rules, from the following commentators:

<i>Category</i>	<i>Name</i>	<i>Abbreviation (To be used in the remainder of this report).</i>
Industry Associations (4)	Banking Association South Africa	BASA
	Financial Intermediaries Association of Southern Africa	FIA
	Financial Planning Institute of Southern Africa	FPI
	South African Insurance Association (SAIA)	SAIA
Financial Institutions (3)	Amalgamated Bank of South Africa Group Limited	ABSA
	Assupol	Assupol
	Momentum Metropolitan Holdings	MMH

The Ombud Council takes this opportunity to thank the above commentators for their submissions.

3.5 This Consultation Report was submitted to Parliament together with the draft Ombud Council Rules and a statement of need, intended operation, and expected impact in terms of Section 103(1) of the FSR Act, for a period of 30 days while Parliament was in session. The documents appeared on Parliament’s Announcements, Tablings and Committee Reports on 10 April 2024. No inputs were received from Parliament. The Parliamentary process was completed when the 30-day period elapsed on 14 May 2024.

4. GENERAL ACCOUNT OF ISSUES RAISED IN SUBMISSIONS

The main issues raised in submissions during the public consultation process were the following:

- 4.1. Several suggestions were made regarding the scope of the matters the Ombud should be permitted to take into account in making determinations, and the types of determinations the Ombud should be empowered to make. These included obliging the Ombud to determine both legal and factual causation; that determinations must be objective and based on the merits of the complaint; and that there should be limitations on the types of relief granted and on the manner in which the quantum of relief is calculated.

The Ombud Council disagrees with these suggestions, for reasons set out in more detail in the Table under paragraph 5 below. The objective of the Ombud includes dealing with complaints informally and equitably (section 20(3) of the FAIS Act). It is appropriate to the nature of an ombud service that a more general, flexible approach is required to the relief it can grant and the awards it can make. It is not appropriate to prescribe the manner in which the Ombud should consider legal principles in dealing with a complaint, or to prescribe the manner in which the Ombud should determine the quantum of a financial award. There are sufficient other provisions in the FAIS Act and the Rules to ensure that the Ombud acts fairly and lawfully, and indicating the factors the Ombud should take into account. The Financial Services Tribunal reconsideration mechanism in the FSR Act provides further protection to ensure that relevant legal principles are properly considered and applied.

- 4.2. A number of comments raised concerns with provisions that are identical to those that have been in the previous Rules for many years. As pointed out in the Table below, the Ombud Council is not aware of these provisions having caused any difficulty in practice and the Ombud, when consulted on the submissions made, has also not indicated that such provisions are problematic.
- 4.3. Some requests were made for the Rules to prescribe specific timelines for certain parts of the complaint handling processes.

Section 27(5)(a) of the FAIS Act allows the Ombud to follow any procedure the Ombud deems appropriate in determining complaints. Rule 8 also allows the Ombud to fix, extend and notify parties of time limits for any aspect of the proceedings. This flexibility is appropriate to the informal nature of an ombud scheme and it is not appropriate for the Rules to be unduly prescriptive on these matters.

- 4.4. In relation to the maximum compensation limit in Rule 4(1)(e), one commentator recommended that it be clarified that the limit under the previous Rules (R800,000.00) will apply to complaints received before the new Rules come into operation. For avoidance of doubt, new Rule 13(2) has been inserted, providing that Rule 4(1)(e) applies to complaints officially received in accordance on or after the date on which the new Rules come into operation.

One commentator indicated support for the increased compensation limit, but remarked that they anticipate that the FAIS Ombud will receive a significant increase in complaints, querying whether the Ombud will have capacity to expeditiously resolve the matters.

The FAIS Ombud is already empowered to deal with complaints involving amounts higher than the maximum limit if the complainant abandons the amount in excess of the limit or if the respondent

agrees to the limit being exceeded. The limit increase will therefore not necessarily significantly increase the number of complaints submitted to the Ombud, but will reduce the number of cases where the FAIS Ombud is unable to order fair compensation. To the extent that the amendment may result in an increase in complaint volumes, the Ombud Council believes this would be indicative of the relevance and need for the change. We also point out that the Ombud Council would expect responsible financial services providers to welcome the opportunity to have disputes resolved through an ombud scheme, with the option of applying to the Financial Services Tribunal for reconsideration of the Ombud's decision, rather than facing the prospect of litigation.

No objections and no further substantive comments were submitted regarding the compensation limit, other than some commentators expressing their support for the new limit. The proposed revised compensation limit of R3 500 000.00 is therefore proposed to be retained in the final published Rules.

- 4.5.** Some suggestions were made that the Rules should set out practical matters dealing with the Ombud's recordal of oral complaints.

Although the Ombud Council agrees that it will be necessary for the Ombud to have appropriate processes in place for recordal and record retention of oral complaints, including so that respondents are placed in a position to respond to the complaint properly, we do not believe it is necessary or appropriate for the Rules to be prescriptive with regard to how the Ombud should meet this requirement in relation to oral complaints or complaints generally. Section 29(1) of the FAIS Act adequately requires the Ombud to keep proper files and records in respect of complaints.

- 4.6.** A concern was raised that the grounds set out in Rule 7(2) on which the Ombud can summarily dismiss a complaint without consideration of its merits are too broad. A request was also made that the Ombud be required to provide reasons for a dismissal.

The Ombud Council believes the listed grounds are appropriate to ensure that the Ombud's resources are used effectively. Aside from the addition of the phrase "without consideration of its merits", the dismissal grounds are identical to those contained in the previous Rules and the Ombud Council is not aware of the provision causing difficulties in practice. The reference to dismissal without consideration of the merits was inserted to align with the enabling provision in section 26(1)(a)(vii) of the Act.

The Ombud Council agrees that it is appropriate to require the Ombud to provide reasons for dismissal and a provision to this effect has been added to Rule 7(5).

5. MATRIX OF SUBMISSIONS AND OMBUD COUNCIL RESPONSES

The Table below sets out comments received and issues raised by the commentators listed in paragraph 3, and the Ombud Council's responses – including instances where the Rule concerned has been revised in light of the comment.

Please note:

- For ease of reference, the Rule numbering in the Table follows the numbering in the current proposed version of the Rules, which may differ from the numbering in the draft version published for consultation.
- The Table does 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 instrument.

Table: Matrix of submissions on draft Ombud Council Rules for the Ombud for Financial Services Providers and Ombud Council Responses.

Rule No.	Respondent	Comment	Ombud Council Response
2	FPI	<p>Consider adding 2(4): In disposing of a complaint, the Ombud shall make every reasonable effort to resolve complaints as promptly as possible, taking into consideration the specific circumstances and complexity of each complaint.</p> <p>Perhaps add a section that also states: In disposing of complaints, the Ombud must establish legal and factual causation to ensure that the Ombuds decisions and/or determinations are fair and just.</p>	<p>Not required. Section 20(3) of the FAIS Act already requires the Ombud to deal with complaints expeditiously.</p> <p>Disagree. The objective of the Ombud includes dealing with complaints informally and equitably (section 20(3) of the FAIS Act). It is not appropriate to prescribe the manner in which the Ombud should consider legal principles in dealing with a complaint. It is implicit in the wording of Rule 4(2), viz. that a claim for a monetary award "relate to the redress of financial prejudice or damage suffered or likely to be suffered", that appropriate causation must be present. There are sufficient other provisions in the FAIS Act and the Rules to ensure that the Ombud acts fairly, and the Financial Services Tribunal reconsideration mechanism in the FSR Act provides further protection to ensure that relevant legal principles are properly considered and applied.</p>
2(1)	BASA	<p>In disposing of a complaint, the Ombud must act independently and objectively without fear, favour or prejudice.</p> <p><i>Comment (Why is it a problem?):</i> BASA suggests that it should be stated that determinations are made in an objective manner based on the merits of the complaint.</p> <p><i>Proposed wording / amendments:</i> "In disposing of a complaint, the Ombud must act independently and objectively without fear, favour or prejudice, considering the merits of the complaint."</p>	<p>Not required. Section 20(3) of the FAIS Act already requires the Ombud to have due regard to the contractual arrangement or other legal relationship between the parties, and the Rules provide sufficiently for the parties to submit information they deem relevant. In the event that the Ombud were to consider irrelevant factors, or fail to take relevant factors into account, the Financial Services Tribunal reconsideration mechanism provides further protection.</p>
2(3)	MMH	<p><i>Proposed wording:</i> The services rendered by the Ombud are not to be construed as being similar to those of a professional legal adviser and are confined to the investigation and determination of complaints in terms of the Act and these Rules.</p>	

Rule No.	Respondent	Comment	Ombud Council Response
		<ul style="list-style-type: none"> • Please define services or be specific as to “determination of complaints” given that the Ombud’s ruling/determination has the same effect as a High Court ruling. • Making an “independent, objective, without fear, favour or prejudice” determination and being “procedurally fair”, will require extensive legal knowledge and need to be based on sound legal principles, due to the complexity of the various applicable pieces of legislation, case law (precedents) and application of common law/contract law (and various aspects and regulations applicable to a specific product). <p>Ombud is a creature of statute and bound by the specific regulations as well other regulations applicable to facts, case law and common law.</p>	<p>The nature of the Ombud's services, and the meaning of the words "investigation and determination of complaints" are clear from the provisions of the Act and the Rules. Definitions or further clarification of these terms are not necessary.</p> <p>The comment is noted.</p>
3	MMH	<p><i>Proposed Wording:</i> Where appropriate, a complainant includes the complainant’s lawful successor in title or the nominated beneficiary of the financial product which is the subject of the relevant complain.</p> <p>Clarification needed based on the following legal considerations and conflict:</p> <ul style="list-style-type: none"> • Being nominated on a policy as a beneficiary (before the death of life assured) does not provide any legal right. Beneficiaries’ rights only vest if policy becomes due and payable i.e. no right before death of life assured (LTA and case law). If not clarified it will create confusion, conflict and prejudice and unfounded entitlement. • Beneficiaries’ rights may also be restricted in terms of contract e.g., legal cession. 	<p>This provision relating to beneficiaries was also contained in the previous Rules and the Ombud Council is not aware of it causing difficulties in practice. The provision indicates that a complainant includes a beneficiary "where appropriate". Section 20(3) of the Act requires the Ombud to have due regard to contractual and legal relationships. Rule 4(2) requires a complaint relating to a monetary award to relate to redress of financial prejudice or damage suffered or likely to be suffered by the complainant. These provisions provide sufficient assurance against unfounded claims being entertained. Also note that the Rules only allow an interested party</p>

Rule No.	Respondent	Comment	Ombud Council Response
		<ul style="list-style-type: none"> • Specific clarification/reference and inclusion of "duly authorized person". Need to submit proof of authorisation/consent. • POPIA regulations e.g. processing of personal information restriction, consent requirements etc. 	to bring a complaint. They do not create or establish any new legal rights. No determination can be issued in favour of a person not entitled to it or information provided to a party not entitled to the information by law.
3.	FPI	<p>Once the COFI Bill is promulgated, this section would serve no purpose.</p> <p>Section 28 (1) (iii) of the FAIS act states that the Ombud may make any other order which a Court may make. The ombud should therefore not be permitted to make any award of interest but only award interest that is in line with the legal prescribed interest rate, as published by the Minister of Justice from time to time.</p>	<p>The comment is noted.</p> <p>This comment appears to relate to provisions of the Act and is therefore not relevant to these Rules. The commentator should note section 28(3) of the Act which stipulates that any interest awarded by the Ombud may not exceed the rate a court would have been entitled to award had it heard the matter.</p>
4(1)(a)	MMH	<p><i>Proposed Wording:</i> The complaint must fall within the ambit of – (i) the Act and these Rules; (ii) an <u>applicable Ombud Council Rule made in terms of section 201(2)(d)*</u> of the Financial Sector Regulation Act; or (iii) a designation made by the Ombud Council to the Ombud in terms of section 211 of the Financial Sector Regulation Act;</p> <p>Clarification needed in relation to relation 4(a)(ii) and exercising mandate in terms of FSRA 201(2): When will it be applicable? - after it has been published and applicable to “new” complaints received after the change.</p> <p><i>*FSRA Section 201(2) Ombud Council rules in terms of subsection (1) may be made on any of the following matters: ... (d) the definition and type of complaints to be dealt with by specified ombud schemes;</i></p>	Any Ombud Council Rule made under section 201 of the FSR Act will stipulate its commencement date and application details.

Rule No.	Respondent	Comment	Ombud Council Response
4(1)(e)	MMH	<p><i>Proposed Wording:</i> The complaint must not constitute a monetary claim in excess of R3 500 000.00 or a particular kind of financial prejudice or damage, unless the respondent has agreed in writing to this limitation being exceeded, or the complainant has abandoned the amount in excess of R3 500 000.00;</p> <p>Please clarify: Monetary claim limit excluding (or including) interest and costs.</p>	<p>Costs and interest are in addition to the monetary award. The R3 500 000.00 limit therefore excludes any costs and interest that may be awarded.</p>
4(1)(e)	ABSA	<p>The compensation limit increase is supported, for reasons outlined in the Statement of Need, as published.</p>	<p>The comment is noted.</p>
4(1)(e)	FPI	<p>Perhaps add a section after (e) that states: Monetary claim of R800 000 as per the previous rules applies to all complaints received before [date that the draft rules comes into effect].</p>	<p>For avoidance of doubt, new Rule 13(2) has been inserted, providing that Rule 4(1)(e) applies to complaints officially received in accordance with Rule 5(1) on or after the date on which these Rules come into operation.</p>
4(1)(e)	SAIA	<p>We welcome the increase in the FAIS Ombud's jurisdictional limit from R800 000.00 to R3 500 000 as the previous amount placed the complainant in a prejudiced position. However, we do anticipate that the FAIS Ombud will receive a significant increase in complaints.</p> <p>Whilst we have no issue with the increase, we are concerned if the FAIS Ombud will have capacity to expeditiously resolve the matters. Currently, it takes some time for matters to be resolved by FAIS (or the insurer to be made aware of same) – which could speak to current capacity constraints.</p> <p>We have however noted Rule 4(1)(a) wherein under expected impact of the provision – it refers to that the Ombud Council would need to ensure that the FAIS Ombud has the necessary capacity to deal with any jurisdictional changes introduced by such rules/regulations before making them.</p>	<p>The comment is noted.</p>

Rule No.	Respondent	Comment	Ombud Council Response
4(1)(g)	MMH	<p><i>Proposed Wording:</i> The complaint must relate directly or <u>indirectly</u> to a financial service rendered by a person authorised as a financial services provider or by a person acting on behalf of such a person.</p> <p>Clarification needed regarding “indirectly”. How will it be determined? Objective criteria.</p>	<p>Ordinary legal principles of causation will apply. The provision seeks to accommodate the various contractual and legal relationships that arise between FSPs and the services they offer to clients. No new rights or services are created by this phrase. Any complaint will be adjudicated in terms of the Act and the Rules.</p>
4(2)	MMH	<p><i>Proposed Wording:</i> A complainant may <u>seek any relief relating to the subject matter</u> of the complaint, but a complaint <u>constituting a claim for a monetary award</u>, must <u>relate to the redress of financial prejudice or damage suffered or likely to be suffered by the complainant</u>.</p> <ul style="list-style-type: none"> • Clarification needed regarding “any relief relating to the subject manner...” there are and should be limitations to the relief requested “relating to”. • Clarification needed ... “relate to the redress of financial prejudice or damage suffered or likely to be suffered...”. Damages must be determined(able) and quantifiable using objective criteria and calculations based on the facts relating to the claim. 	<p>The wording of Rule 4(2) is identical to that of Rule 4(b) of the previous Rules and the Ombud Council is not aware of it causing difficulties in practice. The Ombud Council disagrees that it is necessary to limit the types of non-monetary relief that may be sought and believes it is appropriate for the Ombud to have discretion in this regard.</p> <p>The objective of the Ombud includes dealing with complaints informally and equitably (see section 20(3) of the FAIS Act). It is not appropriate to prescribe the manner in which the Ombud should determine the quantum of a financial award. It is implicit in the wording of Rule 4(2), viz. that a claim for a monetary award must "relate to the redress of financial prejudice or damage suffered or likely to be suffered", that appropriate causation must be present, and ordinary legal principles of causation will apply.</p>

Rule No.	Respondent	Comment	Ombud Council Response
		<ul style="list-style-type: none"> Clarification needed in relation to 9(2) “... <i>and inconvenience caused to a party...</i>” implies punitive reward based on arbitrary and subjective criteria. 	<p>Disagree that the provision allows for arbitrary and subjective criteria to be applied. It is appropriate to the nature of an ombud service that a more general, flexible approach is required to the relief it can grant and the awards it can make. The wording of Rule 9(2) is identical to that of Rule 9(e) of the previous Rules and the Ombud Council is not aware of it causing difficulties in practice. The FSR Act entitles a person aggrieved by a costs award (including if they believe the relief or ward is unlawful and exceeds the Ombud's powers) to apply for reconsideration of such award by the Financial Services Tribunal. Also see response to specific comments on Rule 9.2 below.</p>
5(1)	BASA	<p>Subject to Rule 7, the Office must receive any complaint that is within the Ombud’s jurisdiction in terms of the Act and Rule 4, where the complaint is submitted in any manner which reasonably conveys the complaint in comprehensible form, including orally.</p> <p><i>Comment(Why is it a problem?):</i> Cognisant of the low levels of literacy amongst the vulnerable in SA, it is important that in receiving an oral complaint – the essence of the complaint must be recorded, captured as per the intention of the complainant and must be transcribed by a FAIS Ombud staff member. There must be a recordal system in place to record all oral complaints to appropriately ensue transcription, recordal and where necessary translation of such complaints in a structured manner. Further, it is our view that a transitional period should be provided and until this capability is fully in place, all complaints must be in writing, and/or the client must be assisted by the Ombud or a representative of the Ombud to reduce the complaint to writing.</p> <p><i>Proposed wording / amendments:</i> BASA proposes that the clause be reworded as follows: <i>Rule 5 (1:)</i></p>	<p>Agree that it will be necessary for the Ombud to have appropriate processes in place for recordal and record retention of oral complaints, including so that respondents are placed in a position to respond to the complaint properly. Section 29(1) of the FAIS Act requires the Ombud to keep proper files and records in respect of complaints. It is not however necessary for the Rules to be prescriptive with regard to how the Ombud should meet this requirement in relation to oral complaints or complaints generally.</p>

Rule No.	Respondent	Comment	Ombud Council Response
		(1) Subject to Rule 7, the Office must receive any complaint that is within the Ombud's jurisdiction in terms of the Act and Rule 4, where the complaint is submitted in any manner which reasonably conveys the complaint in comprehensible form, including orally, subject to the proviso that in instances where a complaint is submitted orally (a) a complete transcript and record of any oral complaint is retained, unaltered and in its original form, for a period of five years by the Office and (b) remains readily retrievable at all relevant times.	
5(2)(b)	SAIA	<p>The suggested amendment may cause confusion amongst respondents on the expected timeframe for feedback from complainants, which might cause unnecessary follow-ups to the Ombud or even delays in finalising complaints.</p> <p>In order to ensure effective support and resolution of complaints it is suggested for the Ombud to inform the respondent of these timelines as well.</p>	Section 27(5)(a) of the Act allows the Ombud to follow any procedure the Ombud deems appropriate in determining complaints. Rule 8 also allows the Ombud to fix, extend and notify parties of time limits for any aspect of the proceedings. This flexibility is appropriate to the informal nature of an ombud scheme and it is not appropriate for the Rules to be unduly prescriptive on these matters.
5(2)(c)	FPI	"...is entitled to submit further <u>relevant</u> facts, information..."	The insertion is not necessary. The Ombud will assess the relevance of the submitted information.
6(1)	MMH	<p><i>Proposed wording:</i> The respondent must as soon as reasonably possible after receipt of a complaint send to the complainant a written acknowledgment of the complaint with contact references of the respondent.</p> <p>Add to 6(1) or add additional section confirming duty of respondent to acknowledge receipt to the Ombud.</p>	Disagree. Rule 6(1) deals with correspondence between the complainant and the respondent prior to the complaint being referred to the Ombud.

Rule No.	Respondent	Comment	Ombud Council Response
6(1)	SAIA	<p>The suggested amendment may prove problematic to execute with respect to complaints submitted orally, especially where complainants do not have access to written communication facilities.</p> <p>The suggested amendment may further place an additional administrative burden on respondents, especially with regards to complaints which are finalised within a couple of days from receipt.</p> <p>In light of the proposed Rule 5(1) allowing oral complaints submission and in order to ensure effective complaints resolution, it is suggested to allow verbal acknowledgement of receipt of complaints, or confirmation that "written" has the same meaning as assigned in the General Code of Conduct for Authorised Financial Services Providers and Representatives (Notice 80 of 8 August 2003).</p>	<p>Rule 5(1) refers to receipt of complaints by the Ombud's office, not by respondents. Rule 6.1 on the other hand refers to receipt of complaints by respondents, prior to the complaint being referred to the Ombud. There is currently no requirement obliging respondents to receive oral complaints, although it is expected that such a requirement will be introduced with the passage of the Conduct of Financial Institutions Bill in due course. It will at that stage be open to the Financial Sector Conduct Authority to issue appropriate conduct standards or guidance for handling of oral complaints by financial institutions, should they deem it necessary.</p>
6(3)	FPI	<p>The ombud must advise the respondent <u>as soon as reasonably possible</u> -</p>	<p>See amended Rule 6.3. which provides that "The Ombud must <u>as soon as reasonably practicable</u> advise the respondent -".</p>
6(3)	MMH	<p><i>Proposed Wording:</i> The Ombud must advise the respondent - ...</p> <p>Add in section confirming time frame for response to the Ombud by respondent.</p>	<p>Disagree. Rule 8 allows the Ombud to fix, extend and notify parties of time limits for any aspect of the proceedings. This flexibility is appropriate to the informal nature of an ombud scheme and it is not appropriate for the Rules to be unduly prescriptive on these matters.</p>
7(1)	MMH	<p><i>Proposed Wording:</i></p> <p>The Ombud may determine whether a complaint falls within the ambit of Rule 4 and must dismiss a complaint which falls outside the ambit.</p> <p>Please refer to the comments relating to section 4 above, certain sections need clarification.</p>	<p>See above responses to comments on Rule 4.</p>
7(2)	FIA	<p>A concern is raised around the broad drafting provisions which allows for the Ombud to dismiss complaints without</p>	<p>Disagree with the view that the scope of summary dismissal grounds is too broad. The listed grounds are appropriate to ensure</p>

Rule No.	Respondent	Comment	Ombud Council Response
		consideration of its merits. Further consideration should be provided. The aim should be to ensure that matters are heard fairly and expeditiously, not only for the integrity of the financial services sector, but also for the protection of all parties.	that the Ombud's resources are used effectively. It would be impractical to require the Ombud to investigate a complaint or ask questions where all the necessary information on which to make a dismissal decision is already available and clear. Aside from the addition of the phrase "without consideration of its merits or", the dismissal grounds are identical to those contained in Rule 7(b) of the previous Rules and the Ombud Council is not aware of it causing difficulties in practice. The reference to dismissal without consideration of the merits was inserted to align with the enabling provision in section 26(1)(a)(vii) of the Act. A party aggrieved by the Ombud's decision to summarily dismiss a complaint has access to the Financial Services Tribunal for reconsideration of the decision.
7(2)(f)	MMH	<p><i>Proposed wording:</i>...the complaint or relief sought is of the nature that the Ombud can be of no assistance to the complainant.</p> <p>Please refer to 4(2) and clarification or limitation required regarding "<u>any</u> relief relating to the subject matter..."</p>	See above response to comment on Rule 4(2).
7(5)	ABSA	<p>Dismissal of Complaints: Respondents are not provided with the reasons for the dismissal of a complaint but are informed that the Ombud file has been closed after the dismissal. This does not allow for Respondents to understand the reasons for the dismissal and whether the dismissal is in light of submissions made by the Respondent or other. Lessons may still be learned from the Ombud's interpretation of matters where the complaint is dismissed, either in confirming that the approach followed by the Respondent in rendering the advice or that disclosures made by the Respondent are correct. Providing the Respondents with the reasons for dismissal would also be in line with the approach followed by other Ombud schemes.</p> <p>Accordingly, the following amendment is proposed for the Ombud Council's further consideration:</p>	Agree. See new Rule 7(5): "The Ombud must in a manner deemed appropriate, inform the parties of any dismissal of a complaint referred to in this Rule, <u>and must provide reasons for the dismissal</u> ". This insertion is in line with the Ombud's current practice.

Rule No.	Respondent	Comment	Ombud Council Response
		(5) The Ombud must in a manner deemed appropriate, inform parties <u>the complainant and the respondent</u> of any dismissal of a complaint referred to in this Rule, <u>including reasons thereof</u> .	
7(5)	BASA	<p>(5) The Ombud must in a manner deemed appropriate, inform parties of any dismissal of a complaint referred to in this Rule.</p> <p><i>Comment (Why is it a problem?):</i> BASA notes that Respondents are not provided with the reasons for the dismissal of a complaint but are informed that the Ombud file has been closed after the dismissal. This does not allow for Respondents to understand the reasons for the dismissal and whether the dismissal is due to submissions made by the Respondent or other. Lessons may still be learned from the Ombud's interpretation of matters where the complaint is dismissed, either in confirming that the approach followed by the Respondent in rendering the advice or that disclosures made by the Respondent are correct. Providing the Respondents with the reasons for dismissal would also be in line with the approach followed by other Ombud schemes.</p> <p><i>Proposed wording / amendments:</i> Accordingly, the following amendment is proposed for the Ombud Council's consideration: (5) The Ombud must in a manner deemed appropriate, inform parties the complainant and the respondent of any dismissal of a complaint referred to in this Rule, including reasons thereof.</p>	<p>Agree. See new Rule 7(5): "The Ombud must in a manner deemed appropriate, inform the parties of any dismissal of a complaint referred to in this Rule, <u>and must provide reasons for the dismissal</u>". This insertion is in line with the Ombud's current practice.</p>
8(1)	MMH	<p><i>Proposed wording:</i> Time limits for any aspect of the proceedings in connection with a complaint <u>may be fixed by the Ombud</u> and must be honoured by the parties to the complaint.</p> <p>Please refer to 6(3). Consider adding a standard response time limit whereby the respondent needs to respond (comparable with section 6(2)). This will provide clarity and set standard.</p>	<p>Disagree. Rule 8 allows the Ombud to fix, extend and notify parties of time limits for any aspect of the proceedings to ensure flexibility. This flexibility is appropriate to the informal nature of an ombud</p>

Rule No.	Respondent	Comment	Ombud Council Response
		Provide discretion to shorten the time limit should the circumstances of the claimant and/or facts relating to claim, warrant such a consideration (e.g., client approaches Ombud directly for complaint vs complainant first approached the respondent and claim was not addressed to the satisfaction of the claimant and the unsatisfactory response is submitted in support of the complaint).	scheme and it is not appropriate for the Rules to be unduly prescriptive on these matters. The situation differs from that in Rule 6(2), which relates to communications between the complainant and respondent prior to referral to the Ombud, and where the Ombud therefore cannot use discretion to impose a time limit under Rule 8.
8(3)	ABSA	Rule 8(3) provides that in the discretion of the Ombud, if a party has in a particular case not responded within a reasonable time, or otherwise failed to comply with these Rules, the Ombud may proceed to dispose of a complaint on the available facts and information. It is recommended that the Ombud Council notifies the party in default that it will be proceeding to determine the matter in terms of Rule 8(3).	Disagree. Although it is open to the Ombud to notify the party concerned of its intention to proceed in accordance with Rule 8(3), it is not appropriate for the Rules to make such notice mandatory. In practice, it is likely that the Ombud will typically resort to the Rule 8(3) procedure in instances where efforts to communicate with the party have already been made and the party has been unresponsive.
8(3)	BASA	<p>(3) If in the discretion of the Ombud a party has in a particular case not responded within a reasonable time, or otherwise failed to comply with these Rules, the Ombud may proceed to dispose of a complaint on the available facts and information. We note that the Rule does not provide for the notification of the disposal of the complaint on account of a party not having responded within a reasonable time or having otherwise failed to comply with the Rules.</p> <p><i>Proposed wording / amendments</i> BASA recommends that the Ombud Council notifies the party in default that it will be proceeding to determine the matter in terms of Rule 8(3).</p>	Disagree. Although it is open to the Ombud to notify the party concerned of its intention to proceed in accordance with Rule 8(3), it is not appropriate for the Rules to make such notice mandatory. In practice, it is likely that the Ombud will typically resort to the Rule 8(3) procedure in instances where efforts to communicate with the party have already been made and the party has been unresponsive.

Rule No.	Respondent	Comment	Ombud Council Response
8(3)	FIA	Proposal to insert an additional clause – A party must be notified that, in the event that he/she/they have not responded with information or documentation as required by the Ombud, that the Ombud will proceed to dispose of the complaint. The party must be given a final opportunity to respond within a timeline set by the Ombud.	Disagree. Although it is open to the Ombud to notify the party concerned of its intention to proceed in accordance with Rule 8(3), it is not appropriate for the Rules to make such notice mandatory. In practice, it is likely that the Ombud will typically resort to the Rule 8(3) procedure in instances where efforts to communicate with the party have already been made and the party has been unresponsive.
9(1)	BASA	<p>(1) When making a final determination in terms of section 28 of the Act, the Ombud may grant costs against the respondent or, in the circumstances contemplated by section 28(2)(b)(iii) of the Act, against the complainant, in either case in favour of the other party to the complaint or in favour of the Office.</p> <p><i>Comment (Why is it a problem)?:</i> As stated in 3.1.1 in the “Statement of Need, Intended Operation and Expected Impact”, references to “the Office” will no longer be used, as distinct from the ‘FAIS Ombud’.</p> <p><i>Proposed wording / amendments:</i> “When making a final determination in terms of section 28 of the Act, the Ombud may grant costs against the respondent or, in the circumstances contemplated by section 28(2)(b)(iii) of the Act, against the complainant, in either case in favour of the other party to the complaint or in favour of the FAIS Ombud office”.</p>	Agree. For the reasons set out in the Statement of Need, Intended Operation and Expected Impact, all remaining references to the Office have been replaced with references to the Ombud.
9(1)	MMH	<p><i>Proposed wording:</i> When making a final determination in terms of section 28 of the Act, the Ombud may grant costs against the respondent or, in the circumstances contemplated by section 28(2)(b)(iii) of the Act*, against the complainant, in either case in favour of the other party to the complaint or in favour of the Office.</p> <p>Please refer to 4(1)(e). Clarification required (explicit wording) regarding the maximum monetary claim amount and the inclusion or exclusion of cost and interest.</p>	See response above to comment on Rule 4(1)(e).

Rule No.	Respondent	Comment	Ombud Council Response
		<p>Please refer to 4(2). Please clarify “damages” in relation to costs. Costs have a very specific meaning in the law and must be objectively quantified. Also refer to section 28(3) of the Act (not referenced in the proposes rules): “Any award of interest by the Ombud in terms of subsection (2) may not exceed the rate which a Court would have been entitled to award, had the matter been heard by a Court”.</p> <p>28(2) (b) The Board may by rule determine - (i) the maximum monetary award for a particular kind of financial prejudice or damage; (ii) different maximum monetary awards for different categories of complaints; (iii) the granting of costs, including costs against a complainant in favour of the Office or the respondent if in the opinion of the Ombud - (aa) the conduct of the complainant was improper or unreasonable; or (bb) the complainant was responsible for an unreasonable delay in the finalisation of the relevant investigation: Provided that an amount payable under a cost award bears interest at a rate and as from a date determined by the Ombud.</p>	<p>Rule 9(2) requires the Ombud to quantify a costs award and prescribes the factors to be taken into account when doing so. Rule 1(2) stipulates that the Rules must be read together with applicable provisions of the FAIS Act and the Financial Sector Regulation Act. It is not necessary for references to specific provisions of the FAIS Act to be included in the Rules unless the context requires this.</p>
9(2)	MMH	<p>Please refer to 4(2). Please clarify “damages” in relation to costs. Costs have a very specific meaning in the law and must be objectively quantified. Also refer to section 28(3) of the Act (not referenced in the proposes rules): “Any award of interest by the Ombud in terms of subsection (2) may not exceed the rate which a Court would have been entitled to award, had the matter been heard by a Court”.</p> <p>28(2) (b) The Board may by rule determine - (i) the maximum monetary award for a particular kind of financial prejudice or damage; (ii) different maximum monetary awards for different categories of complaints;</p>	<p>Rule 9(2) requires the Ombud to quantify a costs award and prescribes the factors to be taken into account when doing so. Rule 1(2) stipulates that the Rules must be read together with applicable provisions of the FAIS Act and the Financial Sector Regulation Act. It is not necessary for references to specific provisions of the FAIS Act to be included in the Rules unless the context requires this.</p>

Rule No.	Respondent	Comment	Ombud Council Response
		<p>(iii) the granting of costs, including costs against a complainant in favour of the Office or the respondent if in the opinion of the Ombud -</p> <p>(aa) the conduct of the complainant was improper or unreasonable; or</p> <p>(bb) the complainant was responsible for an unreasonable delay in the finalisation of the relevant investigation:</p> <p>Provided that an amount payable under a cost award bears interest at a rate and as from a date determined by the Ombud.</p> <p>Proposed wording:</p> <p>Any costs award by the Ombud must be quantified by the Ombud with due regard to the nature of the complaint, the time spent on the complaint, the expense <u>and inconvenience</u> caused to a party, the conduct of a party in resolving the complaint <u>and any other factor deemed by the Ombud to be appropriate.</u></p> <ul style="list-style-type: none"> • Please refer to 4(2) <u>“a claim for a monetary award, must relate to the redress of financial prejudice or damage suffered or likely to be suffered by the complainant.”</u> • The inclusion of “inconvenience” in determining of a “cost award” is problematic and not consistent with 4(2). • The inclusion of “inconvenience” in determining of a “cost award” is problematic as it (potentially) allows for punitive damages or “special damages”. In general claims are based on “general damages”, i.e. they arise naturally according to the usual course of things from the breach itself. Should the consumer claim damages, the measure of damages is well-known – the consumer must be placed in the position they would have been had the contract been properly performed (which can be objectively quantified). When it comes to a claim for special damages (e.g. inconvenience and mental suffering etc.) the (case) law and applicable criteria are complex and application limited. • “inconvenience” and “any other factor deemed appropriate” should not be included to ensure consistent, objective quantification of claims. 	<p>The wording of Rule 9(2) is identical to that of Rule 9(e) of the previous Rules and the Ombud Council is not aware of it causing difficulties in practice. The comments appear to confuse the factors the Ombud may take into account when determining a costs award under Rule 9(2) with the basis for a monetary award in accordance with Rule 4(2).</p> <p>The relevant enabling provision, section 28(2)(b)(iii) allowing for Rules to be made granting costs orders, does not limit the Ombud's discretion when making a costs order against a complainant to a consideration of objectively quantifiable expenses. There is therefore no reason why under the Rules the discretion to award a costs order against a respondent (or against either party) should be so limited. This would not be consistent with the Ombud's objective to consider among other things what is equitable in all the circumstances (section 20(3) of the Act).</p> <p>Expecting a party to use other remedies in these cases would be inconsistent with the purpose of the Ombud.</p>

Rule No.	Respondent	Comment	Ombud Council Response
		<ul style="list-style-type: none"> • Making a cost determination based on quantifiable expenses and cost of time spent on a complaint are quantifiable. • Should a party's conduct aggrieve the other part, other remedies are available to the parties. Inappropriate conduct by the respondent (or the representative) can be referred to the FSCA Enforcement by the Ombud. 	
9(3)	MMH	<p><i>Proposed wording:</i> Any award of interest and costs forms part of the relevant final determination of the Ombud.</p> <p>Please refer to section 28(3) of the Act (not referenced in the proposed rules): "Any award of interest by the Ombud in terms of subsection (2) may not exceed the rate which a Court would have been entitled to award, had the matter been heard by a Court".</p>	<p>Rule 1(2) stipulates that the Rules must be read together with applicable provisions of the Act and the Financial Sector Regulation Act. It is not necessary for references to specific provisions of the Act to be included in the Rules unless the context requires this.</p>
10(1)	ABSA	<p>Provides that the Ombud must advise the Authority of any material contravention of these Rules or any persistent or material failure to co-operate with the Ombud by a financial services provider or representative, either generally or in relation to a particular matter, to enable the Authority to consider appropriate action. It is recommended that the Ombud notifies the financial services provider or representative of its intention to refer the contravention or material failure to co-operate to allow the financial services provider or representative the opportunity to respond before the referral to the Authority.</p>	<p>Disagree. Rule 10(1) is aligned with section 217(3)(a) of the FSR Act, which obliges an ombud scheme to report contraventions of financial sector laws by financial institutions to the FSCA, and does not require the ombud scheme to advise the financial institution of such report. Although it is open to the Ombud to notify the party concerned of its intention to proceed in accordance with Rule 10(1), it is not necessary for the Rules to make such notice mandatory. In practice, it is likely that the Ombud will typically resort to the Rule 10(3) procedure in instances where efforts have already been made to secure co-operation but have proven unsuccessful. Once the Ombud has identified a material contravention or lack of co-operation, it is not the Ombud's role to consider any arguments the provider or representative may wish to raise in its defence, but that of the FSCA. The provider or representative will be granted an opportunity to state their case to the FSCA before that authority proceeds to take regulatory action, in accordance with applicable provisions of the FSR Act.</p>

Rule No.	Respondent	Comment	Ombud Council Response
			Rule 10(1) now provides that the Ombud must notify the financial services provider or representative that their conduct has been reported to the FSCA.
10(1)	BASA	<p>(1) The Ombud must advise the Authority of any material contravention of these Rules or any persistent or material failure to co-operate with the Ombud by a financial services provider or representative, either generally or in relation to a particular matter, to enable the Authority to consider appropriate action.</p> <p><i>Comment (Why is it a problem?):</i> We note that the Rule does not provide the financial services provider or representative the opportunity to respond before the referral to the Authority.</p> <p><i>Proposed wording / amendments:</i> BASA proposes that the Ombud notifies the financial services provider or representative of its intention to refer the contravention or material failure to co-operate to allow the financial services provider or representative the opportunity to respond before the referral to the Authority.</p>	See response immediately above.
Previous draft Rules: 12	BASA	<p>When making a final determination in terms of section 28 of the Act, including a decision to dismiss a complaint, the Ombud must advise all parties concerned that a person aggrieved by the Ombud's decision may apply to the Financial Services Tribunal established in terms of the Financial Sector Regulation Act for reconsideration of that decision, in accordance with section 230 of that Act, and must provide the relevant contact details of the Financial Services Tribunal.</p> <p><i>Comment (Why is it a problem?)</i> Clarity is sought on whether the provisions of section 28(5) and (6) are going to be repealed.</p> <p><i>Proposed wording / amendments</i> In the absence of any such repeal, BASA proposes that Rule 12 be redrafted to align to the provisions as noted currently in sections 28(5) and 28(6) of the FAIS Act as set out below.</p>	<p>Rule 12 of the version of the draft Rules published for comment has been deleted, and the Rules are renumbered accordingly.</p> <p>The procedure for reconsideration of FAIS Ombud decisions is already addressed in Chapter 16 of the FSR Act, read with applicable provisions of the FAIS Act (including those cited by the commentator) and the Rules of the Financial Services Tribunal made under the FSR Act. After further consideration, the Ombud Council believes there is therefore no need to deal with the matter in the Rules.</p> <p>The Ombud Council also notes that the proposed Conduct of Financial Institutions (COFI) Bill will repeal the FAIS Act, and that proposed consequential amendments to Chapter 14 of the FSR Act will replace and reframe the FAIS Act provisions dealing with the</p>

Rule No.	Respondent	Comment	Ombud Council Response
		<p>28(5) A determination – (a) or a final decision of the board of appeal, as the case may be, is regarded as a civil judgment of a Court, had the matter in question been heard by a Court, and must be so noted by the clerk or registrar, as the case may be, of that Court; (b) is only appealable to the board of appeal - (i) with the leave of the Ombud after taking into consideration (aa) the complexity of the matter; or (bb) the reasonable likelihood that the board of appeal may reach a different conclusion; or (ii) if the Ombud refuses leave to appeal, with the permission of the chairperson of the board of appeal. (6)(a) A writ of execution may, in the case of a determination or a final decision of the board of appeal amounting to a monetary award, be issued by the clerk or the registrar referred to in subsection (3) and may be executed by the sheriff of such Court after expiration of a period of two weeks after the date of the determination or of the final decision of the board of appeal, as the case may be. (b) Any other determination must be given effect to in accordance with the applicable procedures of a Court after expiration of a period of two weeks after the date of the determination or of the final decision of the board of appeal.</p>	<p>Ombud for Financial Services Providers, including the provisions relating to reconsideration of the Ombud's decisions by the Financial Services Tribunal. Deletion of such provisions in the Rules therefore also mitigates the risk of inconsistency with the future post-COFI FSR Act framework. The Ombud Council will consider the need for any further amendments to the Rules once the future framework is finalised.</p>
<p>Previous draft Rules: 12</p>	<p>FPI</p>	<p>It is noted that complainants who are aggrieved by the Ombuds decision, may apply to the Financial Services Tribunal for reconsideration of the Ombuds' decision. This now also includes complaints that were dismissed (at any point in time, including summarily dismissed complaints). It is recommended that the Ombud ensures that robust quality assurance processes are in place to prevent unnecessary costs and delays in complaints being resolved. (e.g., the Peter Harten case).</p>	<p>For reasons set out in the comments immediately above, Rule 12 of the version of the draft Rules published for comment has been deleted, and the Rules are renumbered accordingly.</p> <p>However, an aggrieved party's ability to refer the Ombud's decision to dismiss a complaint to the Financial Services Tribunal is not a new provision. This has been the case since the Tribunal became operational, in accordance with the definition of "decision" in section 218(d) of the FSR Act. The reference to dismissals that was included in the previous draft Rule 12 was merely for</p>

Rule No.	Respondent	Comment	Ombud Council Response
			<p>avoidance of doubt. Such dismissal decisions remain subject to reconsideration by the Tribunal, where the requirements for reconsideration are met.</p> <p>The recommendation in the comment is noted.</p>
General	ABSA	There are no objections to all other draft Ombud Council Rules for the Ombud for Financial Service Providers.	The comment is noted.
General	Assupol	We confirm receipt of the draft Ombud Council Rules of 04 September 2023. Assupol has no further submissions or comments.	The comment is noted.

OMBUD COUNCIL