

**Guidelines to the FOS Terms of Reference
(Investments, Life Insurance and Superannuation)
Dealing with Member breaches of the FOS Rules**

1 July 2008

1. Background

By joining FOS, members agree to be bound by its Constitution and the applicable Terms of Reference made under the Constitution, which form a contract between FOS and its members.

Clause 22 of the Investments, Life Insurance and Superannuation Terms of Reference states

22 Obligations of members to cooperate

Members are required to comply with these Terms of Reference, and to comply with procedures adopted by the Service for the purposes of resolving complaints.

This can be relevant to a large number of situations where a member is not acting in accordance with FOS' procedures and Terms of Reference. The most common situations where a member may be in breach of Clause 22 are:

- Not responding to a complaint as required under Clause 25, or delaying in providing a response/s;
- Failing or refusing to provide information requested by FOS;
- Conduct which undermines FOS' ability to deal with a complaint in accordance with its Rules (for example, issuing legal proceedings in respect of the issues raised by the FOS complaint, or threatening defamation proceedings against the consumer); and
- Repeatedly lodging objections to jurisdiction which are frivolous, vexatious or lacking in substance.

2. Clause 22 Procedure

Where a member is not responding to a complaint or providing information requested by FOS, or is otherwise acting in breach of its obligations under the Investments, Life Insurance and Superannuation Terms of Reference, this will be taken up with the member.

If the member fails to provide the response or information in response to this, and the complaint is at the investigation stage, the complaint will normally be referred to the Panel or Adjudicator without further notice to the member. If the complaint has already been referred to the Panel or Adjudicator, it may be placed before the Panel or Adjudicator for determination on the available information, and it will be open to the Panel or Adjudicator to consider what inferences should be drawn from the member's failure to provide the material in question.

At the same time, FOS will consider whether further action should be taken. When determining whether further actions should be taken, relevant factors that will be considered include:

- The length of any delays caused by the member's conduct;
- The extent to which the member's conduct interferes with FOS' ability to resolve the complaint in accordance with its Rules;
- Whether there have been previous instances of breaches by the member in other cases;
- Whether there are any reasons for the breaches.

If FOS decides that further action should be taken, a letter will be sent to the member seeking an explanation for the breach.

Unless a satisfactory response is received, the question of whether the member should be expelled for its failure to abide by its obligations as a FOS member will be placed before the FOS Board in accordance with Clauses 3.10(a) and 3.11 of the FOS Constitution, and ASIC will be advised of this.

3. Implications of Clause 22 Procedure

Where a member is required to belong to an ASIC-approved EDR scheme (such as FOS) as a condition of its Australian financial services license, expulsion from membership of FOS may place it in breach of its license. For this reason, FOS will advise ASIC both when the Board has been asked to consider expelling the member, and if the member is expelled.

It should be noted that even after the expulsion of the member, FOS will continue to deal with complaints against that member received before it was expelled, and will expect the member to respond to those complaints and abide by the outcome of the FOS process.