

**Guidelines to the FOS Terms of Reference
(Investments, Life Insurance and Superannuation)
Clause 17 – Inappropriate complaints**

1 July 2008

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1. The Terms of Reference and dismissing complaints

FICS is required under its Terms of Reference to deal with complaints on their merits. If a complaint falls within FICS' jurisdiction under the Terms of Reference, it should not lightly refuse to deal with that complaint, as to do so would be to deny the consumer access to a forum to resolve that complaint.

However, there will be exceptional cases where, due to circumstances surrounding the complaint, FOS should not deal with the complaint even though it falls within FOS' jurisdiction.

Clause 17 of the Terms of Reference allows the Panel Chair to dismiss a complaint if it would be inappropriate for FOS to deal with that complaint.

2. The dismissal process

Because dismissing a complaint deprives the consumer of the FOS scheme as a forum for dealing with their dispute, it will not be done lightly.

Therefore, not only is the threshold to dismiss a complaint high, two separate decision-makers must be satisfied the complaint should be dismissed.

Firstly, the consumer is given an opportunity to argue why the dispute should not be dismissed. The Investments, Life Insurance and Superannuation Ombudsman (or her delegate) must then be satisfied the complaint should be referred to the Panel Chair to consider its dismissal.

Both parties are then given the opportunity to make further submissions on the issue. The complaint will only be dismissed if the Panel Chair is satisfied that it would be inappropriate for FICS to deal with the complaint.

3. How the relevant test should be applied

Factors which may be relevant to whether FICS should deal with a complaint include:

- FICS' purpose and role, as defined by its Constitution and Rules. It may also be useful to refer to ASIC Regulatory Guides 139 and 165;
- The nature of the individual complaint and the circumstances surrounding it;
- The extent to which FICS could effectively carry out its functions given the circumstances of the complaint.

This procedure should not be used to dismiss a complaint on the grounds that it lacks merit. There is a separate procedure for dismissing complaints that are frivolous, vexatious, or lacking in substance, under Clause 16 of the Investments, Life Insurance and Superannuation Terms of Reference.

4. Examples

The question of whether a complaint is inappropriate for FOS to deal with will always depend on its individual facts and circumstances. However, the Investments Life Insurance and Superannuation Division of FOS is effectively a successor to the Financial Industry Complaints Scheme ("FICS"), and the wording of Clause 17 is the same as Rule 17 of the FICS Rules.

There have been a number of decisions by the FICS Panel Chairs interpreting and applying Rule 17 (and its predecessors), and these rulings may shed some light on when a complaint might be dismissed as inappropriate under Clause 17 of the Investments Life Insurance and Superannuation Terms of Reference.

Please note:

- The following are summaries of the reasons for decision. The detailed reasons for the rulings in each case can be found on the FICS website at www.fics.asn.au by searching using the complaint number.
- As decisions on individual complaints must be made on the basis of their individual facts and circumstances, the following examples are not, and should not be seen as, binding precedents.

The FICS Panel Chair has ruled it would be inappropriate for FICS, or the Panel, to deal with a complaint in the following circumstances:

- Where there would be insufficient material available for the Panel to determine the matter, for example because of the age of the complaint - complaints 14656 and 16217. (Normally, this will only apply if the complaint is at least 6 years old, in which case the complaint may also be excluded under Clause 14.1(p) of the Terms of Reference.)
- Where the content of the complaint overlaps with current legal proceedings – complaints 12143, 12937, and 13240. (Note: The overlap will need to be sufficiently complete for the complaint to be dismissed – see complaint 16036. Attempts by a member to issue

- proceedings, after being notified of the complaint to FICS, may be in breach of Rule 23 of the 2007 Rules. Where proceedings were instigated by the consumer, the complaint may also be excluded under Clause 14.1(n.)
- Where the complaint related to the conduct of third parties, who would not be bound by a decision of the Panel or Adjudicator (and where there may be a more appropriate forum such as a professional or disciplinary body), and for which the member was not directly responsible - complaint 13272.
- Where the subject matter of the dispute had been dealt with by another ASIC-approved scheme and was covered by a deed of settlement – complaint 01-10699.
- Where the complaint had been resolved by binding agreement and the consumer subsequently sought to pursue an additional claim in respect of the same complaint – complaint 14643.
- Where the complaint was in effect an attempt by one potential beneficiary to further their claim to the benefit of an estate administered by the member ahead of the competing claims of other potential beneficiaries who were not parties to the complaint – complaint 15391 (Note: under the Investments Life insurance and Superannuation Terms of Reference, this complaint would fall outside jurisdiction under Clause 14.1(k).)

The FICS Panel Chair has refused to dismiss complaints as inappropriate in the following circumstances:

- Where the member alleged the dispute “could not be satisfactorily resolved” - complaint 12649.
- Where the complaint involved issues arising out of the same relationship as a previous complaint, but those issues were not covered by the release signed in respect of the previous complaint - complaint 12649.
- Where the complaint involved issues arising out of the same relationship as a previous complaint, but the issues were not so integrally linked to the previous complaint that they should have been raised at the same time - complaint 12649.
- Where the member sought to rely on want of prosecution by the consumer (the Panel Chair held the prejudice to the consumer if he were not allowed to proceed outweighed the prejudice to the member) – complaint 11676.
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- Where the consumer could pursue the complaint in another forum which (according to the member) was more appropriate - complaint 14977.
- Where a consumer has stayed but not abandoned legal proceedings relating to the same subject matter in order to pursue a complaint before FICS - complaint 13873.
- Where the consumer had a claim against the member, but the member asserted that the complaint was about the conduct of third parties, and should be pursued against those third parties instead of the member - complaint 15521.