

Investments, Life Insurance & Superannuation Practice Note No. 2

PN2 Dispute Handling Processes and Information Exchange

This Practice Note explains how the Financial Ombudsman Service (FOS) deals with complaints under the Investments, Life Insurance and Superannuation (ILIS) Terms of Reference, and the Financial Industry Complaints Service (FICS) Rules.

("Complaint" refers to a dispute, with a FOS or FICS member, which FOS can deal with in accordance with the relevant Terms of Reference or Rules).

General approach to dispute handling

We have an obligation to provide procedural fairness to the parties and our dispute resolution processes and procedures are designed to ensure compliance with that obligation.

We have an obligation to resolve disputes before us in a co-operative, efficient and timely way. Because of this obligation, we take a flexible approach to the handling of disputes, employing those processes which best suit the nature of the dispute and are most likely to result in its timely resolution. The range of processes available for resolving disputes include:

- Investigation and negotiation, in which a case worker works to resolve a dispute by assessing the issues in dispute and facilitating communications and negotiations between the parties;
- Conciliation conferences, conducted by an independent FOS Conciliator, usually by telephone; and
- Arbitration, that is, determination by a Panel or Adjudicator usually following further investigation of the dispute by a Panel Case Manager.

This document discusses the procedures that ordinarily apply in association with each process but because we take a flexible approach to the handling of disputes, certain steps may be unnecessary. For example:

- a dispute that has no prospect of settling by agreement may not be conciliated but referred directly to a Panel Case Manager for investigation and preparation for determination by the Panel or Adjudicator;
- in some circumstances, initial dispute documentation from a consumer and the member's initial response may contain all information necessary for a determination and, subject to the exchange of this material, if the matter does not settle by agreement, it may be ready for arbitration without further investigation by either a Case Manager or a Panel Case Manager; or

- when a dispute is referred for determination by a Panel or Adjudicator, investigation of the file may have been completed by the Case Manager or Conciliator, in which case the dispute may not be handled by a Panel Case Manager.

The Information Exchange and Record-keeping procedures apply to all disputes, irrespective of the dispute resolution processes we use to resolve the dispute.

Information Exchange

Parties are encouraged to provide all information relevant to the complaint, and to allow that material to be made available to the other party.

While a complaint is still being investigated or conciliated, there is a presumption that all material provided by either party will be made available to the other party, unless the party has stated they do not want that information to be provided to the other party, or the case worker considers it inappropriate to make that material available to the other party at that time. If a party does not want information they have provided to be made available to the other party, under Clauses 9.3 and 19.1 of the ILIS Terms of Reference (and FICS Rules 9.3 and 19.1) they must make this clear when they provide that information to us.

If a complaint is referred to the Panel or an Adjudicator for arbitration, information provided by either party must be made available to the other party, to give them a reasonable opportunity to respond to it.

If at this stage a party refuses to allow information to be made available to the other party, that information will also be withheld from the Panel or Adjudicator, as required by Clause 19.4.

If at this stage a party does not wish to withhold the information from the other party altogether, but disagrees with the manner in which we propose to make it available to the other party, then a Panel Chair will be asked to rule on how that information should be made available to the other party if it is to be available to the Panel or Adjudicator, as required by Clauses 19.2 and 19.3.

Receipt of enquiry / complaint

1. When an enquiry is received relating to a potential complaint, the complainant is sent a letter enclosing a Dispute Form for completion and return, and explaining:
 - a. The complainant is expected to provide any information and documents relevant to the issues raised by the complaint and which are available to the complainant.
 - b. The complainant will be taken to consent to the material provided to the Service being made available to the member in its entirety, unless they clearly specify material which should not be provided to the member at that time and give their reasons for objecting to the release of that material.
 - c. If a complaint is referred to the Panel or Adjudicator for arbitration, any material which the member has not been given a reasonable opportunity to address will not be taken into account by the Panel or Adjudicator.

2. When a complaint is received and is considered to be within our jurisdiction, before it is forwarded to the member for response, a case worker will check the complaint and any attached material.

If the complainant has stated they do not want specific material to be provided to the member, that material will be separated from the complaint and stored separately on the complaint file. Where the case worker believes that providing this material to the other party may help to resolve the dispute, they may discuss this with the complainant.

Investigation and conciliation of complaint

3. When a complaint is received and is considered to be within jurisdiction, the member will be notified of the complaint. The letter to the member notifying it that a complaint has been received will:
 - a. Enclose the complaint and all information and documents provided by the complainant, except for material the complainant has clearly stated should not be provided to the member at that time;
 - b. Require the member to provide within 21 days of the letter a response in sufficient detail to function as the member's submission to the Panel should the complaint be referred for adjudication;
 - c. Require the member to provide within 21 days of the letter copies of all material relied upon by the member in its response to the complaint, and all other material relevant to the complaint, including but not restricted to any documents specifically identified by the case worker;
 - d. Require the member to identify any material it does not wish to be made available to the complainant at that time, together with its reasons for objecting to the release of that material;
 - e. Explain that if a complaint is referred to the Panel or Adjudicator for arbitration, any information which has not been made available to the complainant will not be made available to the Panel or Adjudicator.
4. Where the member fails to provide either its response or material requested by FOS by the due date or within such further time as the case worker considers reasonable to allow, the complaint may be referred to the Panel or Adjudicator for determination on the available material, including any inferences which can be drawn from the member's failure to provide the material requested by us, without further notice to the member. Before doing this, the case worker will notify the member in writing that if the member does not provide the requested material within a further limited period (usually 14 days after the original deadline), the complaint may then be referred to the Panel or Adjudicator.
5. If at any time in the course of the complaint either party fails to provide material requested by us within such time as the case worker considers reasonable to allow, the case worker may advise the party that if the requested material is not provided and the complaint goes before the Panel or Adjudicator for determination, the Panel or Adjudicator may draw inferences from the party's failure to provide the material requested by us.

6. When information is received from either party, and before it is forwarded to the other party for response, a case worker will check the information provided. If the party providing that information has stated they do not want specific material to be provided to the other party, that material will be separated from the complaint and stored separately on the complaint file. Where the case worker believes that providing this material to the other party may help to resolve the dispute, they may discuss this with the party who provided it.

Record keeping

7. Records are to be kept in accordance with the following principles:
 - a. Copies of all documents and information received are to be maintained on the complaint file except as provided for below. Information relevant to a complaint which is received in the course of discussion with parties or witnesses should be recorded as a file note. The extent to which this material has been made available to the parties is to be recorded.
 - b. Copies of all outgoing correspondence are to be maintained on the complaint file except as provided for below.
 - c. Where a party has provided material but has objected to that material being made available to the other party, that material is to be stored separately on the complaint file along with information about which party provided that material, when they provided it, and their objection to making the material available to the other party.
 - d. Where a case worker attempts to resolve a complaint by conciliation conference and a party provides information or documents as part of this process and on the understanding that they will be kept confidential, any records or notes of this are to be clearly marked as such, and are not to be made available either to the other party or to the Panel or Adjudicator without the prior consent of the party.
 - e. Internal communications within FOS, or communications with ASIC or the relevant industry body regarding member conduct, are to be recorded as internal memos and are not to be made available to the parties.

Referral to Panel or Adjudicator – preliminary matters

8. When a complaint is referred to the Panel or Adjudicator, and material received by us has been withheld from either party at the request of the party who provided it to us, the case worker shall write to the party which provided the material:
 - a. identifying the material provided that has not yet been made available to the other party;
 - b. advising them that if the information contained in that material is not made available to the other party, it will not be considered by the Panel or Adjudicator;
 - c. setting out how that information would be made available to the other party; and
 - d. requiring them to advise within 14 days of any objections they have to the release of that material (whether or not such objections were previously made), and the reasons for such objection.

If the case worker considers it appropriate, they may also contact the party who provided the material to discuss their reasons for not wanting the other party to have access to that material, and our policy on information exchange and the reasons for it.

9. If the party who provided the material does not withdraw their objections within 14 days of the case worker's letter, they will be presumed to still object to making that material available to the other party. In those circumstances the material will not be made available to the other party, and will not be made available to the Panel or Adjudicator.

Objections to the manner in which information will be made available to the other party

10. Where a party has objected to the manner in which we propose to make information available to the other party, but wishes that information to be considered by the Panel or Adjudicator in determining the complaint, then that party may set out:
 - a. the manner in which they consider the information should be made available to the other party;
 - b. why that approach is preferable;
 - c. why that approach would satisfy the obligation to make the information available to the other party before it can be made available to the Panel or Adjudicator.

If the party's concerns over how the information they have provided should be made available to the other party cannot be resolved by the case worker, the issue may be referred to a Panel Chair for a ruling.

11. The Panel Chair will rule on the manner in which the information is to be provided to the other party if it is also to be made available to the Panel or Adjudicator. The Panel Chair's ruling may deal with:
 - a. Where the information is contained in a document or submission, and the party providing it wants to withhold all or part of that document or submission from the other party - the manner in which information can be made available to the other party (and to the Panel or Adjudicator) without releasing the whole document;
 - b. Where the party's objection is to the timing of the release of the information to the other party (for example, because they believe premature disclosure would destroy the value of the evidence) – directions on when that information should be made available to the other party.
12. Once the Panel Chair has ruled upon how information should be made available, the party that provided the information is to be given 14 days to consent to its release to the other party on the terms and conditions specified by the Panel Chair. If no consent is given, the material will not be made available to the other party but will also not be made available to the Panel or Adjudicator in determining the complaint. The case worker may advise the party that if the requested information is not made available, the Panel or Adjudicator may be entitled to draw adverse inferences from their refusal to make that information available to the other party and the Panel or Adjudicator.

13. Where information that a party has provided to us is not to be made available to the Panel or Adjudicator, the material in question is to be returned to the party who supplied it without a copy being retained by us. However, we may retain records of the circumstances which led to the material being returned, and sufficiently identifying the nature of that material, to enable us, the Panel or Adjudicator to take into account the withholding of that material when dealing with the complaint.

Referral to Panel or Adjudicator – issues letter, document list and submissions

14. Once any objections to the release of material have been ruled upon and the complaint is referred to the Panel or Adjudicator, the following will usually be provided to the parties by the Panel Case Manager:
 - a. a document list setting out material provided by the parties to us and correspondence between us and the parties;
 - b. a letter (the “Issues Letter”) setting out the issues which the Panel Case Manager handling the file believes have been raised by the dispute, and evidence not yet provided by the parties which Panel or Adjudicator may need to resolve the dispute;
 - c. the anticipated Panel or Adjudication date.

Where the issues have already been clearly articulated by the parties, and in the opinion of the case worker, it is unnecessary to seek further submissions or evidence, the parties will receive a Document List but will not receive an Issues Letter.

Where the parties have received an Issues Letter, they will be required to provide submissions and evidence responding to these documents within 21 days.

The parties’ responses to the Issues Letter will be exchanged and 14 days will be provided for the parties to make any final submissions they wish to make to the Panel or Adjudicator. These responses will be exchanged for information only.

If, in the interests of procedural fairness, the Panel or Adjudicator forms the view that further information or evidence is required from the parties before a determination is finalised, that information or evidence will be sought and exchanged with the other party before a final determination is made.

2 August 2009