

**Guidelines to the FOS Terms of Reference
(Investments, Life Insurance and Superannuation)
Post-Determination procedures**

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1. Introduction

Where a complaint is not resolved by agreement, withdrawn, or dismissed, it will ultimately be dealt with by a Determination issued by the Panel or an Adjudicator.

Clauses 36 to 38 of the Investments, Life Insurance and Superannuation Terms of Reference provide:

36 Finality of decisions

36.1 For the purposes of this Clause and Clauses 37-40:

- (a) “Decision” includes a Determination;
- (b) “Determination” means the order, direction or ruling and reasons made by the Panel or Adjudicator in relation to an issue or issues in dispute.

36.2 A Determination of a Panel or Adjudicator is final, and cannot be reopened except as provided for in Clauses 36.3 to 36.9.

- 36.3 A Panel or Adjudicator may correct a clerical or arithmetical mistake or an error arising from an accidental slip or omission in a Determination.
- 36.4 A party to a complaint may request a Panel or Adjudicator to amend or set aside a Determination based on the grounds mentioned in Clauses 36.6 and 36.7.
- 36.5 The request must be made to the Service within one calendar month after the day the Determination was sent to the parties by the Service, or within such additional time allowed by the Investments, Life Insurance and Superannuation Ombudsman or his or her delegate.
- 36.6 A Panel or an Adjudicator may at its own discretion, and subject to the rules of procedural fairness, set aside or amend its Determination if–
- (a) both parties consent to the decision being set aside or amended;
 - (b) the Panel or Adjudicator believes on reasonable grounds that the decision may have been obtained by fraud; or
 - (c) after the request of a party, the Panel or Adjudicator believes on reasonable grounds that a party was not given a reasonable opportunity to address a material issue or consider material evidence provided to the Panel or Adjudicator before it made its Determination; or
 - (d) after the request of a party, the Panel or Adjudicator believes that the order, direction, ruling or reasoning set out in its Determination did not correctly convey the meaning or outcome originally intended by the Panel or Adjudicator.
- 36.7 A Panel Chair may set aside a Determination if the Panel Chair is of the opinion that a Determination by a Panel or an Adjudicator was made as a result of actual bias or a reasonable apprehension of bias.
- 36.8 A Panel or Adjudicator may make a further Determination supplemental to the original Determination:
- (a) to enable the original Determination to be implemented; or
 - (b) to deal with any matters in dispute not fully resolved by the original Determination.
- 36.9 If a decision is to be considered under Clause 36.6 or 36.7, or a supplemental decision is to be made under Clause 36.8, the parties must be notified of this and afforded a reasonable opportunity to make submissions on the issues to be considered by the Panel or Adjudicator.

37 Complainants expected to abide by decisions

- 37.1 The Service expects complainants to abide by the decisions of a Panel or Adjudicator. However, it recognises that complainants are not bound by those decisions and may wish to pursue whatever rights they have against the member in another forum.
- 37.2 A complainant must elect whether or not to accept a decision of the Panel or Adjudicator by informing the Service in writing within one calendar month of the date the decision is sent to the complainant.
- 37.3 The Investments, Life Insurance and Superannuation Ombudsman or delegate can extend the time within which the complainant can accept the decision where there are reasonable grounds for doing so.
- 37.4 Where a complainant elects to accept the decision of the Panel or Adjudicator, the complainant is bound by all aspects of that decision.
- 37.5 If a complainant does not inform the Service within the allowed time, the complainant shall be taken to have elected not to accept the decision.

38 Member bound to abide by decisions

- 38.1 Where the complainant accepts the decision of the Panel or Adjudicator, then subject to Clause 36, the member must implement the decision as soon as practicable after being informed the complainant has accepted it.
- 38.2 Before implementing the decision, the member is entitled to ask the complainant to sign a deed of release, provided that:
- (a) the member forwards the proposed deed of release to the complainant within ten business days after being informed the complainant has accepted the decision of the Panel or Adjudicator; and
 - (b) the proposed deed of release is limited to the matters in dispute in the complaint dealt with by the Panel or Adjudicator.

These provisions can be summarised as:

- Consumers are required to accept a Determination before it will bind the member;
- If a consumer accepts a Determination, they are also bound by it;
- In some limited circumstances, a Determination can be amended or set aside;
- Members are entitled (subject to some limitations) to ask a consumer to sign a Deed of Release.

FOS actively monitors member compliance with Determinations, and will follow up with the parties to ensure Determinations are implemented in accordance with the directions of the Panel or Adjudicator.

2. Acceptance of Determinations

Under Clause 37, the consumer has the choice of whether or not to accept the Determination.

If the consumer does not accept the Determination, the member is not bound by the Determination and does not need to implement it.

If the consumer accepts the Determination, then both the consumer and the member are bound by the decision.

Once the consumer has accepted the decision, they cannot later decide to reject it. Equally, if they reject the Determination, they cannot later decide to accept it.

3. Time limit to accept

The consumer is required to advise FOS in writing whether or not they accept the decision, within a calendar month of being sent the Determination. This is intended to allow consumers sufficient time to make a decision, while bringing the complaint to a conclusion within a reasonable time.

If the consumer does not advise FOS within that month, they are automatically deemed by Clause 37.5 to have rejected the Determination, and it will not bind the member.

The only exception is if a decision is made to extend the time within which the consumer may accept the decision.

4. Extensions of time – relevant factors

The time to accept a Determination can be extended by a delegate of the Chief Executive Officer under Clause 37.3. There must be reasonable grounds to extend time.

Extensions requested before the deadline

Requests for extensions of time received before the deadline will be dealt with as quickly as possible, so the consumer still has time to accept the Determination if an extension is refused.

An extension of time will be given if the reasons for needing more time outweigh the need to finalise the complaint and to give the parties certainty.

Examples may include:

- The consumer did not receive the Determination for a considerable time after it was sent to them, and did not have an opportunity to consider it;
- The consumer needs more time to obtain legal or other advice about the effect of the Determination, or about their options, before making a decision.

This is not an exhaustive list, and each request will be considered on its individual circumstances.

If there is a delay in responding to a request for an extension of time, this may justify a short extension to compensate for that delay, even if there is no other reason to extend time.

Extensions after the deadline, to allow late acceptance

If an acceptance is received after the deadline, time can be extended until the date of receipt. If time is extended and the decision is accepted, the acceptance is valid and the decision will bind the member.

In deciding whether or not to extend time and allow the consumer to accept the Determination, FOS will consider:

- a) The length of time since the deadline for acceptance passed;
- b) The reasons given, and whether they relate to events beyond the consumer's control;
- c) The reasonableness of the delay;
- d) The extent of any prejudice to the member if time is extended.

An extension of time will only be given if the reasons for the delay outweigh the need to finalise the complaint within a reasonable time and to give the parties certainty.

5. Extensions of time - procedure

If a consumer requests an extension of time to accept the Determination, they will be asked (except in urgent cases) to put the request and the reasons for wanting the extension in writing.

If the request is made after the deadline for acceptance has passed, the member will have been advised that the consumer had not accepted the

Determination, and that the member is not bound. Allowing the consumer a further opportunity to accept the determination may prejudice the member.

In those circumstances, a decision will not be made to extend time without first contacting the member. If the member objects to the extension, they will be given an opportunity to provide submissions on why it should not be granted before a decision is made.

A decision will be made on whether or not to reinstate the complaint after considering the reasons given for the delay and any submissions or evidence provided by either party.

6. Clause 38.2 and Deeds of Release

Under Clause 38, once a Determination has been accepted by the consumer, it becomes binding on the member, who must implement it.

Under Clause 37.4, the consumer is also bound by the Determination once they accept it.

If a member wants the additional certainty of having the consumer sign a Deed, FOS does not object to this provided the member complies with the requirements of Clause 38.2.

Clause 38.2 does not allow for an extension of time to send the Deed of Release. If a member fails to send a Deed of Release (limited to the matters in dispute in the complaint dealt with by the Panel or Adjudicator) within 10 business days of being informed the consumer has accepted the decision, then it forfeits the right to do so.

7. What content is acceptable in a post-Determination Deed of Release?

If a dispute is resolved by agreement and a Deed of Release is signed, the terms of the Deed are normally a matter for agreement between the parties.

This is not the case when a complaint has been determined by the Panel or Adjudicator. In those circumstances, the Deed of Release must not only comply with Clause 38.2, it must not seek to alter the rights of the parties under the Determination or under the FOS Rules.

FOS cannot offer legal advice to the parties on the legal effect of an individual Deed of Release. However, in the event of a dispute about whether a Deed of Release is acceptable to FOS, FOS can and will advise the parties whether it considers the wording of that Deed complies with the Rules and the relevant Determination.

FOS has identified a number of issues out of its experience with Deeds of Release to date. While each Deed will be considered individually, the following will normally apply.

- The scope of the release should be limited to the dispute that went before the Panel/Adjudicator. Expressions such as “related to” or “arising out of the subject matter of the complaint” are normally acceptable. Expressions such as “any and all claims past or future” are not acceptable.
- If the Determination includes an award of interest “to date of payment”, the settlement sum in the Deed should be expressed in the same terms as the Determination (e.g. the amount awarded, plus interest calculated at 5% compound per annum from date X until date of payment). Alternatively, if a Deed specifies a lump sum calculated to include any interest payable, it must include interest calculated to 14 days after the Deed is sent to the consumer (to allow them a reasonable period of time to consider whether or not to sign it). A settlement sum calculated to include interest only to the date the Deed of Release is sent to the consumer is not acceptable.
- If the Deed of Release imposes obligations on the consumer, for example not to disclose the content of the Deed, those obligations should apply equally to the member.
- Any requirement in the Deed not to disclose the details of the complaint should ideally be limited to the obligations under Rules 20 and 21 of the 2007 Rules, i.e. the obligation not to disclose information received during the course of the complaint to third parties. Also, to the extent that the contents of the Deed cannot be disclosed, there should be at least the following exceptions –
 - (a) Where required by law;
 - (b) To enforce the terms of the deed.
- If the complaint was upheld against the member in respect of the actions of agents, authorised representatives or employees for which the member was liable, it is normally reasonable for the release to extend to those third parties as well. This is because the efficient and effective resolution of the complaint would be undermined by allowing the consumer to “double dip” by pursuing the same compensation claim a second time against the agent, employee or authorised representative. Normally, however, it should not go beyond the above in protecting third parties.
- If the Determination awarded a specific sum of money (or a specific sum plus interest), the member should be expected to pay within 14 days of receiving the signed deed of release. A term allowing the member longer than this to pay would normally be unacceptable.

- A statement indicating the member continues to deny liability is unacceptable. Given that the Panel or Adjudicator has found the member liable by awarding compensation, this is inconsistent with the Determination.

8. What are the implications of consumer not signing a Deed of Release?

If the only reason the member has not complied with a Determination is the consumer's refusal to sign a Deed at the member's request, then FOS will consider (among any other relevant factors) whether the Deed complies with Clause 38.2, and whether it is consistent with the terms of the Determination and the relevant provisions of the Investments, Life Insurance and Superannuation Terms of Reference.

If the Deed of Release complies with Clause 38.2 then FOS would not normally take any enforcement action against the member if the consumer has refused to sign the Deed.

If the Deed of Release does not comply with Clause 38.2, or is inconsistent with the terms of the Determination or the Terms of Reference, the member's request for the consumer to sign that Deed is inconsistent with the member's obligation to comply with the Determination. Under those circumstances, FOS would consider enforcement action against a member who refused to comply with the determination until the consumer signed the Deed.

9. Finality of Determinations

A decision of the Panel or Adjudicator on a complaint, once made, is final.

The Panel or Adjudicator can make supplementary Determinations if these are required either to deal with any remaining issues, or to clarify how the original Determination should be implemented. Supplementary Determinations will not change the outcome of the original Determination.

This is consistent with FOS' obligations under both its Terms of Reference and ASIC Regulatory Guide 139 to resolve disputes efficiently and effectively, and in a timely manner. Therefore, Determinations can only be altered if there are compelling reasons for doing so, and the Terms of Reference allow it.

9. Clause 36 – grounds to set aside a Determination

Under Clause 36 of, there are limited circumstances in which a Determination may be set aside or amended.

A Determination is “set aside” if the complaint is re-opened to allow a fresh decision to be made on the same issues. The fresh decision will replace the original decision. A determination is “amended” if a part of that decision is changed without re-opening the complaint.

A Determination can only be set aside or amended for one of the grounds set out in Clause 36:

- (a) by consent of all the parties;
- (b) the Panel or Adjudicator believes on reasonable grounds that the decision may have been obtained by fraud;
- (c) the Panel or Adjudicator believes on reasonable grounds that a party was not given a reasonable opportunity to address a material issue or to consider material evidence provided to the Panel or Adjudicator before it made its Determination;
- (d) if the Panel Chair is of the opinion that a determination by a Panel or an Adjudicator was made as a result of actual bias or a reasonable apprehension of bias;
- (e) to correct a clerical or arithmetical mistake, or an accidental error or omission;
- (f) if the Panel or Adjudicator believes that the order, direction, ruling or reasoning set out in its Determination did not correctly convey the meaning or outcome originally intended.

Grounds (b)-(d) all require there to have been a serious defect in the procedure by which the decision was reached, which materially affected the outcome.

Grounds (e)-(f) are limited to ensuring that the written decision accurately reflects what the Panel or Adjudicator intended, and cannot be used to change the decision or the outcome.

None of these grounds allows a Determination to be set aside or amended simply because one party disagrees with the merits of the decision, or the reasons for that decision.

10. Time limit for request to set aside

Under Clause 36.5, a party may request that a Determination be set aside or amended. The request must be made within one calendar month of the Determination being sent to the parties. A request is “made” when it is received by FOS.

This time limit is to ensure the dispute is finalised within a reasonable time of the Determination being issued, to provide certainty to the parties.

Extensions of time to seek review of a Determination can be granted under Clause 36.5. However, an extension will not be granted lightly, particularly if it is requested after the deadline.

In deciding whether or not to extend time, FOS will consider:

- (a) The length of the extension requested and/or the length of time since the deadline for acceptance passed;
- (b) The reasons given for needing additional time for making the request, and whether they relate to events beyond the control of that party;
- (c) The reasonableness of the delay;
- (d) The extent of any prejudice to the other party;
- (e) The extent to which the request for review appears to be supported by the available material.

An extension of time will only be given if the reasons for doing so outweigh the need to finalise the complaint within a reasonable time and to give the parties certainty.

For example, legal advice would normally be available within the month in which the parties can apply under Clause 36. Therefore, a request for additional time to obtain legal advice will not normally be sufficient to justify an extension of time.

11. Extensions of time - procedure

If a party requests an extension of time to request the Determination be set aside, they will be asked (except in urgent cases) to put the request and the reasons for wanting the extension in writing.

If the request is made after the deadline has passed, the other party will have an expectation that the Determination will not be reviewed internally.

In those circumstances, a decision will not be made to extend time without first contacting the other party. If they object to the extension, they will be given an opportunity to provide submissions on why it should not be granted before a decision is made.

If time is extended, a decision may then be made immediately on whether or not to set aside or amend the decision. When making the decision, FOS will take into account the submissions provided by both parties.