

**Guidelines to the FOS Terms of Reference  
(Investments, Life Insurance and Superannuation)  
Clause 14.2 - Complaints by non-retail clients**

1 July 2008

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Clause 14.2 of the Investments, Life Insurance and Superannuation Terms of Reference provides

- 14.2 The Service may at its discretion decide that it will not deal with a complaint by a person who is not a “retail client” as defined under the Corporations Act 2001.

**1. Discretion to exclude**

Unlike the monetary limits and the exclusions in Rule 14.1, a decision not to deal with a complaint under Rule 14.2 is discretionary. This means that complaints by wholesale clients are not automatically excluded. FOS will deal with a complaint by a wholesale client until and unless a decision is made under Rule 14.2.

If a member considers that a consumer is not a retail client and their complaint should be excluded from FOS, the member should raise this with FOS as soon as possible after being notified of the complaint. The member should provide:

- Proof that the consumer is not a “retail client” as defined in the *Corporations Act 2001* and associated regulations, including an explanation of the relevant part of the definition and any supporting evidence;
- Reasons why the complaint should be excluded.

## 2. Definition of “retail client” and “wholesale client”

Whether a client is a “retail” client or a “wholesale” client is dealt with in the *Corporations Act 2001* sections 761G-761H and the Corporations Regulations 2001, regulations 7.1.11-7.1.28. It will depend upon a number of factors, including:

- The nature, value and price of the product (or service) provided;
- The nature and circumstances of the client.

The date at which the retail or wholesale status of the consumer should be assessed is when the events in question took place (that is, when the relevant service was provided or when the relevant product was acquired), rather than when the complaint is received by FOS. If the consumer was a retail client at the time of their dealings with the member, they are entitled to the protections of a retail client, including access to a scheme such as FOS to resolve any complaints about those dealings.

For similar reasons, to the extent that there have been any changes in the definition over time, the definition that applied at the date of the events should be applied. For example, subsections 761G(1) and (6) were amended, and section 761GA introduced, with effect from 28 June 2007; those amendments will only apply to events after that date.

If a member asks FOS to exclude a complaint under Clause 14.2, it should set out in detail why the consumer is not a retail client, including the relevant parts of the Corporations Act or Regulations and why they apply.

## 3. Whether the complaint should be excluded

The mere fact that a complaint is by a non-retail client is not automatically enough to justify excluding that complaint from FOS.

When deciding whether or not to exclude a complaint under Clause 14.2, FOS will take into account among other factors the following considerations, to the extent they are relevant:

- The principles to which FOS must have regard under the Rules;
- The purpose and function of FOS as set out in the Constitution;
- The requirements of ASIC Regulatory Guides 139 and 165.

Other relevant factors will vary from complaint to complaint.

#### **4. Procedure for deciding whether to exclude a complaint**

The requirements of procedural fairness apply to a decision on whether or not to exclude a complaint. If a complaint may be excluded under Rule 14.2, FOS will first contact the consumer and advise them of the member's request to exclude their complaint, the effect of Rule 14.2, and any considerations that may be relevant.

The consumer will be given them the opportunity to:

- Provide evidence or submissions that they are in fact a retail client
- Provide any submission they wish to make on why FOS should continue to deal with their complaint.

The parties will be advised of the decision once it is made, together with the reasons for that decision.

#### **5. If FOS deals with a complaint by a wholesale client**

Any complaint must be dealt with on its merits including the relevant law and industry standards.

If the consumer is a wholesale client, but FOS continues to deal with the complaint, then the merits of the complaint will be dealt with according to the law and practice governing wholesale clients, rather than retail clients.