

The FOS Approach to Excluding disputes

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We have created a series of FOS Approach documents, such as this one, to help consumers and financial services providers better understand how we reach decisions about key issues.

These documents explain the way we approach some common issues and dispute types that we see at FOS. However, it is important to understand that each dispute that comes to us is unique, so this information is a guide only. No determination (decision) can be seen as a precedent for future cases, and no FOS Approach document can cover everything you might want to know about key issues.

1 At a glance

1.1 Scope

Under the FOS [Terms of Reference](#) (TOR), we can refuse to consider a dispute that is normally within our jurisdiction, if we decide that this is appropriate in the circumstances.

This document sets out the approach we take in deciding whether to use our discretion to exclude a dispute.

1.2 Summary

The decision to exclude a dispute will be made by FOS. We can decide to exclude a dispute whether or not we have been asked to do so by an FSP.

We will make sure that we have enough information about the facts of a dispute and the issues involved, before making a decision about whether to exclude the dispute.

The TOR sets out five reasons why we may decide to exclude certain disputes, however we do not have to exclude every dispute of this kind. We can also exclude a dispute for other reasons not contained in the TOR.

We will not readily exercise our discretion to exclude a dispute. We will only exclude a dispute in cases where there are convincing reasons to do so.

All decisions to exclude disputes are made by experienced FOS staff at the earliest opportunity, to avoid unnecessary costs and delays.

2 In detail

2.1 Defining the scope of the discretion

What is the scope of our discretion to exclude a dispute?

Section 5.2 of the TOR gives us the discretion to refuse to consider a dispute that is otherwise within our jurisdiction, if we decide that this is appropriate in the circumstances.

Our discretion to exclude a dispute is generally unrestricted. In particular:

- it is for us alone to decide whether it is appropriate to exclude a dispute (although we may ask the parties for their views)
- we can use our discretion, whether or not we have been asked to do so by the FSP

We can decide to exclude a dispute at any time after the dispute has been lodged with us and before we have closed the dispute.

On what basis can we decide to exclude a dispute?

Section 5.2 of the TOR lists five reasons why we might consider it appropriate to exclude a dispute. These are because:

- there is a more appropriate place to deal with the dispute, such as a court, tribunal or another dispute resolution scheme or the Privacy Commissioner
- the applicant is not a retail client as defined in the *Corporations Act 2001 (Cth)*
- the dispute relates to a Financial Services Provider's practice or policy and does not involve any allegation of either Maladministration or inappropriate application of the practice or policy
- the dispute being made is frivolous or vexatious or lacking in substance
- after the dispute is lodged with FOS, the applicant commences legal proceedings against the Financial Services Provider that are related to the dispute.

FOS does not have to exclude every dispute of this kind. In some cases, we may decide that it is appropriate to consider these kinds of disputes. Further information about our approach is set out in Section 2.3 below.

Section 5.2 of the TOR does not limit the possible reasons why we may decide to exclude a dispute. We may decide not to consider certain disputes for reasons other than those set out in Section 5.2.

2.2 Deciding whether to exclude a dispute

How likely are we to exclude a dispute?

If we decide not to consider a dispute, this may permanently deprive an applicant of the opportunity to have their concerns fully considered by an independent body.

Therefore, we will not exercise our discretion to exclude lightly. The discretion will only be used in cases where there are compelling reasons for deciding that we should not consider the dispute.

When will we make the decision to exclude?

We know that time and money can be wasted if inappropriate disputes proceed beyond the initial stages of our dispute process.

We will make sure that where we use our discretion to exclude a dispute, we do so as early as reasonably possible, but first we will make sure that we have all the necessary information. A dispute which appears straightforward at a first glance may raise additional issues when more information is provided. This may be because the applicant has not clearly identified the issues when they lodged the dispute, or has provided incomplete information.

What is the process for excluding a dispute?

The initial decision to exclude a dispute will be made a senior FOS staff member with appropriate expertise. In the case of disputes which raise complex issues, staff may seek guidance from an Ombudsman.

If we decide to exclude a dispute, we will send the parties a letter telling them about our decision and the reasons for it. If the applicant objects to our decision, the dispute will be reviewed. If we consider the applicant's objections do not have any substance, we will confirm our initial decision to exclude the dispute.

If we consider that the applicant's objection has substance, we will give both parties the opportunity to provide submissions as to whether or not the dispute should be excluded. The dispute will then proceed to an Ombudsman for a formal jurisdictional decision.

There are cases where a dispute may appear to have little merit but potentially raises other issues (such as issues of fairness). These kinds of disputes may go straight to a formal (usually short-form) decision by an Ombudsman or an adjudicator.

What are the consequences of excluding a dispute?

If we decide to exclude a dispute, we will not make a decision about the dispute itself.

This will not necessarily stop us from investigating a 'systemic issue' or serious misconduct raised by the dispute. A systemic issue is a problem which might affect more people than just the applicant.

We have obligations under the TOR and ASIC Regulatory Guide 139 to report any systemic issues, persistent or deliberate misconduct by an FSP.

This could occur, for example, where we decide to exclude a dispute because the applicant has not suffered any loss, but the dispute raises broader issues about the conduct of the FSP.

2.3 Excluding certain types of disputes

How do we apply the specific examples set out in Section 5.2?

How do we apply the specific examples set out in Section 5.2?

This section provides further information about how we consider each of the five situations listed in the TOR.

Is there a more appropriate forum?

Under Section 5.2(a) of the TOR, we may decide to exclude a dispute because there is another, more appropriate, place for it to be dealt with (for example, a court, a tribunal, another dispute resolution scheme or the Privacy Commissioner).

We consider the following factors when deciding whether to exclude a dispute on this basis:

Factor	Details
Nature of alternative forum	We consider the potential advantages and disadvantages to each party of having the dispute determined by FOS, or in another forum. These may include the time and expense involved, as well as each party's ability to obtain and/or enforce a decision.
Process	We consider whether the FOS process is appropriate to resolve the dispute, as compared to the process adopted in other forums. In doing so, we consider, the consequences for each party of the alternative processes available.

Factor	Details
Issues outside FOS jurisdiction	We will generally exclude a dispute which raises issues which are partly within and partly outside our jurisdiction. However, we may decide to consider a dispute which raises significant issues which are within our jurisdiction, where those issues can be dealt with separately from the issues which are outside our jurisdiction.
Complexity	Complexity is relevant, but is not a sufficient reason alone to exclude a dispute.

Is the applicant a ‘retail client’?

Under Section 5.2(b) of the TOR, we may decide to exclude a dispute because the applicant is not a ‘retail client’ as defined in the Corporations Act 2001 (Cth), however ASIC has encouraged external dispute resolution schemes such as FOS to accept disputes from a broader range of applicants than ‘retail clients’.

In line with this guidance, we will not normally exclude disputes just because the applicant is not a retail client.

Does the dispute relate to a practice or policy of the FSP?

Under section 5.2(c) of the TOR, we may decide to exclude a dispute which relates to an FSP’s practice or policy, and does not involve any allegation that the FSP has breached its legal obligations to the applicant or has applied the practice or policy inappropriately.

We will usually exclude disputes which are only about the way in which an FSP has applied its practice or policy if the FSP has conducted itself in a way which is consistent with that practice or policy - for example, banking disputes about the time taken for cheques to clear or the unavailability of ATMs while they are being serviced.

Disputes relating to broader policy decisions by an FSP (such as the decision to close particular branches) will also be excluded on this basis.

We will not exclude a dispute relating to a practice or policy where the applicant says that the FSP has acted in a way which is contrary to law or good industry practice (even if the FSP’s conduct was consistent with its practice or policy).

Is the dispute “frivolous, vexatious or lacking in substance”?

Under section 5.2(d), we may exclude a dispute which is “frivolous, vexatious, or lacking in substance”.

We will also exercise our broader discretion under Section 5.2 to exclude a dispute on the basis that it is lacking in merit if:

Financial Ombudsman Service

- the applicant's position is based on a position which is unsupported by fact or law
- even if the applicant's arguments are interpreted favourably, they only have a remote possibility of success
- it is clear there has not been any error or inappropriate conduct by the FSP

Generally we will only take the view that a dispute is lacking in merit where there is no potential for ambiguity in the meaning or application of the provisions of the relevant law, contract, policy or other document which governs the FSP's obligations (and the document does not allow for the exercise of any discretion by the FSP).

Even in these cases, we will not exclude a dispute where the applicant has raised other issues which may give rise to fairness considerations or which may otherwise complicate the dispute.

In deciding whether to exclude a dispute, we will also consider whether the applicant has suffered any loss. We will exclude disputes where it is clear that there has been an error or breach by the FSP but:

- the applicant has not suffered any financial or non-financial loss as a result
- the FSP has made an offer which fully compensates the applicant for their loss
- the applicant is unlikely to receive any more than the amount already offered by the FSP if we were to make a decision (e.g. because of our jurisdictional limits)

There is no practical possibility of recovering the funds (e.g. where the FSP is in liquidation and there is no possibility of accessing professional indemnity insurance).

Section 3 below contains examples of cases where we will decide to exclude disputes on the basis that they are lacking in merit.

Are there other features which make it appropriate to exclude the dispute?

There are some types of disputes that it may be appropriate to exclude due to their features, including:

- the number of FSPs and other parties involved (particularly where some of the parties are not members of FOS)
- the need to assess conflicting expert evidence on technical matters
- the fact that certain parts of the dispute may be outside FOS's jurisdiction for other reasons.

We will exercise our discretion to exclude these types of disputes if we consider that they are more appropriately dealt with by a court or some other process.

A decision to exclude such disputes will only be made after input from an Ombudsman.

3 Context

3.1 Case studies

Case 1: General insurance

The applicants lodged a claim under their motor vehicle insurance policy for damage to their vehicle and trailer, after they were rear ended by another vehicle.

The FSP accepted the applicants' claim for damage to the vehicle but denied their claim for damage to the trailer on the basis that the policy expressly excluded cover for damage to trailers.

The applicants disputed the FSP's decision and said that the FSP should cover the damage to the trailer because motor vehicle policies offered by other insurers covered this type of damage.

FOS decided to exclude the dispute as the damage claimed by the applicants was outside the scope of the policy, which contained a clear and unambiguous exclusion for damage to trailers. The applicants had not raised any other issues which gave rise to fairness considerations – for example, they did not claim that the FSP had misrepresented the scope of cover or had mishandled the claim.

Case 2: Banking & Finance

On 1 September 2014, the applicants notified the FSP that they disputed a transaction made using their credit card on 1 April 2014. After the FSP advised the applicants that it was unable to process the disputed transaction as a chargeback, the applicants lodged a dispute with FOS.

The conditions of use for the applicants' credit card stated that they were required to notify the FSP of a disputed transaction within 90 days of the transaction being made. The applicants' delay in notifying the FSP meant that the FSP was no longer able to exercise its chargeback rights against the merchant under the rules of the credit card scheme.

FOS decided to exclude the dispute, as the credit card conditions of use clearly set out the time period within which the applicants were required to notify the FSP of the disputed transaction. The applicants had not provided any explanation for the delay in doing so.

3.2 References

Definitions

Term	Definition
Applicant	individual or small business that has lodged a dispute with FOS
FSP	financial services provider, a business that has chosen FOS as its external dispute resolution scheme and provides a financial service
ASIC	Australian Securities and Investments Commission

Useful links

Document	Link
FOS Terms of Reference	http://www.fos.org.au/tor
