

The FOS Approach to Misleading Conduct

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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

FOS often receives disputes from applicants saying that a financial services provider (FSP) has misled them.

This document sets out our approach to assessing disputes about misleading conduct.

1.2 Summary

Misleading conduct is conduct that leads, or is likely to lead, a person into error. It is prohibited by Australian law.

It can occur through statements, acts, omissions or silence, even if there is no intention to mislead.

When assessing disputes about misleading conduct, FOS will:

- ask applicants and FSPs to supply relevant information
- consider all the available information to conclude what is most likely to have happened
- do what, in our opinion, is fair in all the circumstances, bearing in mind legal principles.

If FOS finds that an FSP has engaged in misleading conduct, the remedy is not to make the misrepresentation come true. Rather, FOS will compensate an applicant for any loss which they have suffered by relying on the misrepresentation. FOS may reduce the amount of any compensation if we believe an applicant did not take reasonable care to protect their own interests.

2 In detail

2.1 Understanding the general principles

What is misleading conduct?

Conduct is misleading when it leads, or is likely to lead, someone into error or to believe something that is false.

Misleading conduct can happen when an FSP:

- says something that is wrong
- acts in a way that misleads an applicant
- does not say or do something when it should.

Misleading conduct can occur even if the FSP did not mean to mislead or the applicant could have found out the true position by looking into the matter further.

However, if applicants do not take reasonable care to protect their own interests, FOS might:

- find that a representation was not a 'real inducement' to enter into a contract
- reduce the amount of compensation we award (see 2.4).

Which laws apply?

For financial services, section 12DA of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and section 1041H of the *Corporations Act 2001* both prohibit misleading conduct.

Section 12DA of the ASIC Act states:

A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

2.2 Identifying types of misleading conduct

Can 'silence' be misleading?

In certain circumstances, an FSP might mislead a customer by staying silent when it should say something.

Legally, bankers and lenders (unlike insurers) have no general duty of disclosure (although they are obliged to disclose some information under laws like the National Credit Code). For example, a lender is not usually required to draw a customer's attention to a particular term in a contract.

However, where in all the circumstances a customer has a reasonable expectation that the lender will disclose certain information, its failure to do so might be misleading conduct by silence.

Take loan break costs, for instance. If the customer asks the FSP directly about the cost to break a fixed-rate loan but the FSP remains silent or gives an incomplete response, the FSP's conduct might be considered misleading and it might be liable to pay compensation.

There is also a reasonable expectation that relevant facts will be disclosed by:

- financial advisers in their advice processes
- FSPs in their product disclosure statements for financial products.

What about predictions and opinions?

A prediction or opinion is not necessarily misleading if it turns out to be incorrect.

However, a person making a representation about a future matter, such as a profit or investment forecast, must have reasonable grounds for doing so and present evidence of these.

Without evidence, FOS will assume the person did not have reasonable grounds to make the representation.

2.3 Assessing misleading conduct disputes

What information does FOS need?

When assessing a misleading conduct dispute, FOS looks at all the circumstances of the case. We consider two main questions:

- Did the FSP mislead the applicant?
- If so, did the applicant suffer a loss by relying on the FSP's misleading conduct?

We usually request the following information:

| Party | Information |
|-----------|--|
| FSP | A statement outlining the relevant officer's recollection of what was said. (If the officer no longer works for the FSP, we expect the FSP to make reasonable efforts to contact them for a statement.) |
| | A copy of any file notes recording conversations with the applicant. |
| Applicant | Any records made of the alleged representation. |

We will also look at the case's context. For example, if the misleading conduct relates to text in a brochure, we will review the whole brochure.

How do we reach a view in these disputes?

FOS is not a court of law. We cannot take or test evidence on oath, or require third parties to give evidence. Instead we consider:

- available documents
- the recollections of the parties
- all relevant circumstances, including the applicant's conduct.

We give more weight to written records created when the alleged conduct took place because they are more likely to accurately reflect what was said.

If there are no records, we will decide what is most likely to have occurred based on the information we receive. If there are conflicting recollections and these are evenly weighted, we may find that an applicant's claim cannot be established.

2.4 Awarding compensation

What is the remedy for misleading conduct?

We may award compensation when we find an applicant has suffered loss by relying on an FSP's misrepresentation. We will not ask the FSP to make the representation come true.

To assess compensation, we consider how much worse off the applicant is. We compare the applicant's current position with their likely position had there been no misrepresentation.

Put another way, we ask applicants what they would have done differently. Was the expected benefit available elsewhere in the market? Did they lose the chance to gain that benefit?

When will FOS not award compensation?

We will not award compensation if the applicant:

- cannot show that they relied on the misleading conduct and suffered loss as a result
- would have suffered the loss regardless of the misleading conduct
- would not have been able to gain the benefit or take up the opportunity elsewhere.

The available information must support the applicant's claim.

What happens if the applicant has not acted reasonably?

FOS may reduce the compensation if the applicant's loss was caused by both:

- the FSP's misleading conduct, and
- the applicant's own failure to take reasonable care.

We will consider how much the applicant contributed to the loss.

However, if the FSP acted fraudulently or with the intent to cause loss and damage, we will not reduce the applicant's compensation.

3 Context

3.1 Case studies

Case 1: Misrepresentation about property finance pre-approval

Over 12 years, the applicant, a property development company, had bought numerous properties at auction based on verbal funding pre-approval from an officer at the FSP.

The applicant's directors said that the officer verbally pre-approved funding for another purchase at a meeting in 2009.

Believing that finance was unconditionally approved, the applicant then bought a property at auction. However, on the evening before settlement, the FSP officer advised that finance had been declined. The sale contract had no 'subject to finance' clause.

The directors sought compensation for costs of \$16,541.48 because of the FSP's misleading conduct. The FSP disputed that the officer had given pre-approval, but it could not supply notes from the meeting.

FOS found that:

- the FSP officer had led the directors to believe that the FSP had approved finance before the auction
- the directors had then relied on this representation to enter into the purchase contract
- the FSP's misleading conduct caused financial loss of \$8,388.38 (see table), which it should compensate.

| Consideration | | Amount |
|---------------|---|-------------------|
| Loss | Vendor fee for delaying settlement | \$10,000 |
| | Conveyancer fee for renegotiating and refinancing the purchase | \$275 |
| | Lost rental income from delayed settlement | \$2,777 |
| Benefit | Loan repayments the applicant avoided by not obtaining a loan before settlement | - \$4,663.62 |
| Total | | \$8,388.38 |

FOS did not support the directors' claim for credit card interest costs. This was because they could have withdrawn from the purchase when the FSP declined funding, avoiding these extra costs.

Case 2: Misleading conduct by silence over construction funds

The applicants applied to the FSP for low doc loans to buy two blocks of land, which they intended to build on. The FSP was aware of their plans at the time.

However, when they later applied for finance to develop the blocks, the FSP declined their application.

The FSP's loan file included a handwritten note to the lending officer saying it could not provide a low doc loan for construction. Its policy also stated that low doc loans were not available for property development. Yet the FSP did not communicate this to the applicants when they applied for the original loans.

FOS found that the applicants had a reasonable expectation that the FSP would disclose its inability to fund construction as it was aware they were:

- buying the blocks as investments and intended to build on them
- likely to need funds for future development.

By remaining silent, the FSP misled the applicants and needed to compensate them.

This meant the FSP should take possession of the blocks, pay the costs of selling them and keep the proceeds. The FSP should then extinguish the applicants' loans and:

- refund all repayments the applicants had made to the loans
- pay the applicants' costs for obtaining the loans and purchasing the blocks (including deposits, stamp duty and legal costs)
- pay their costs for owning the land (including council rates, water rates and pre-building costs)
- pay \$4,000 for stress and inconvenience.

Case 3: Apportionment of loss for loan break costs

In 2008, the applicants took out a five-year fixed rate loan with the FSP. The applicants paid out the loan about one year later with a break cost of \$32,795.

They told FOS they had expected this break cost to be no more than \$3,000 based on phone conversations they had with FSP officers before entering into the loan contract.

FOS found it was more likely than not that the FSP discussed a break fee of around \$3,000 but did not tell the applicants that a break cost might also apply based on falling interest rates.

We took into account that the applicants clearly and consistently recalled the conversations, while the FSP officers neither recalled nor recorded them.

We were satisfied that the applicants were misled, because any discussion about fees for ending a fixed rate contract early must be comprehensive. It must include both the known fees and the possibility that other fees might apply if interest rates fall.

However, we reduced the amount of compensation for the applicants by 70% because:

- the FSP wrote to the applicants after their conversations to explain that a break cost might apply if the loan was prepaid and that it could not be calculated until it was actually prepaid
- the applicants did not clarify the letter with the FSP, even though it went against what they had previously been told
- they had always planned to sell their property and break the loan after 12 months, so they should have fixed it for 12 months rather than five years.

FOS found the FSP should repay the applicants 30% of the break cost paid – \$9,838.70 – plus interest on this amount at the variable loan interest rate.

Case 4: Misrepresentation about policy coverage

The applicants were moving house and asked the FSP about their contents insurance while they were in transit to their new address.

The FSP's consultant told them they would be covered but did not say this was limited to two events: fire and motor vehicle accident.

When the applicants' contents were damaged by both rain and the removalists, the FSP denied their claim because these were not insured events.

FOS found that the FSP consultant's unqualified response was misleading by omission. The consultant should have told the applicants that the cover was limited or referred them to the policy document.

So it was reasonable that they assumed the same level of cover applied during the move as would have applied if the contents had been damaged at their home.

FOS also accepted the applicants relied on the misrepresentation given that they:

- asked the consultant a specific question
- were entitled to expect the consultant to be familiar with the policy
- were given an unqualified response.

The fact that the applicants had a copy of the policy did not help the FSP given the specific misrepresentation occurred at almost the same time as the loss.

However, we only accepted the rain-damaged items as the applicants' loss because their contents policy did not include accidental damage or the actions of removalists.

3.2 References

Definitions

| Term | Definition |
|-----------|--|
| applicant | individual or small business that has lodged a dispute with FOS |
| FOS | Financial Ombudsman Service Australia |
| FSP | financial services provider, a business that has chosen FOS as its external dispute resolution scheme and provides a financial service |

Useful documents

| Document type | Title |
|--------------------|---|
| Terms of Reference | https://www.fos.org.au/public/download.jsp?id=4040 |
| Legislation | <i>Australian Securities and Investments Commission Act 2001</i> <i>Corporations Act 2001</i> |
