

FINANCIAL OMBUDSMAN SERVICE



AIOFP Gold Coast 2011 Conference

19-21 October 2011

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Today – FOS Update

- FOS Basics
- What is a claim?
- How does FOS calculate loss?
- Myth-busters – Statistics
- Case Study – If we have time

FOS Basics

- External Dispute Resolution Scheme
- Approved by ASIC (RG139)
- Condition of AFSL if dealing with retail client
- Independent/accessible/fair/accountable/efficient and effective
- Free to consumers
- Paid for by industry via fees and levies
- Resolves disputes by negotiation, advice and conciliation
- Makes decisions binding on Financial Service Providers.

FOS Basics

- RG139 Requirements for an EDR Scheme include:
 - Independent & fair
 - Accessible
 - Free to Applicants
 - Able to make binding decisions
 - Obligation to accept disputes up to \$500,000
 - \$280,000 compensation cap by 1 January 2012

FOS Basics

Financial Service Provider's (FSP) Obligations

- Constitution/ Terms of Reference/ Membership Agreement
- Must have compliant IDR process (RG165)
- Must advise complainants that they may complain to FOS
- Must cooperate with process
- Must observe timeframes
- Must comply with Determination if accepted by Applicant
- Must pay fees/levies.

What is a claim at FOS

For the purposes of the monetary limit/cap?

- A set of facts when put together give the Applicant a right to ask for a remedy (cause of action)
- FOS cannot aggregate claims just because they arise out of an ongoing relationship between the Applicant and the Financial Services Provider
- FOS interpretation based on Finkelstein J. in *Financial Industry Complaints Service v Deakin Financial Services* [2006] FCA 1805.

What is the practical effect?

- Multiple parties – e.g. husband, wife, husband and wife jointly, SMSF – will all be entitled to make a separate claim
- Multiple separate instances of advice (usually evidenced by separate Statements of Advice) may also give rise to separate claims.

NB: FOS looks at the amount of the loss, not the total amount invested.

How does FOS calculate loss in financial advice disputes?

LOSS

- Direct
- Consequential (limit \$3,000)
- Too remote

OBJECT

- To put the Applicant in the position they would have been in, but for the breach of duty.

How does FOS calculate loss in financial advice disputes?

Direct loss usually calculated by reference to the performance of suitable investments in comparison with the performance of the unsuitable (disputed) investments.

FOS may look at:

- Suitable investments the Applicant has switched to (where the Applicant has switched from the unsuitable investment);
- The suitable benchmark asset allocation used by the FSP;
- The suitable industry benchmark allocation;
- Suitable investments that were actually recommended by the FSP to the Applicant; or
- Other investments or indices that represent suitable investments.

Contributory Negligence and Mitigation of Loss

Compensation awarded may be reduced where Applicants fail to take reasonable care of their own interests and are regarded as contributing to their own loss.

The compensation awarded will be reduced to the extent that the Applicant has deviated from the standard of care a reasonable person in the Applicant's position would have taken.

FOS will look at

- When did the FSP's breach of duty or contract occur?
- When did the Applicant become aware of the FSP's breach or should have become aware?
- Were there any actions the Applicant could have taken to avoid or minimise the consequences of the FSP's breach?
- Were the actions what a reasonable person in the Applicant's position would have done?

Myth-busting Statistics

| Disputes Received | 2009 | 2010 | 1/1/11-30/6/11 |
|-------------------|------|------|----------------|
| Investments | 1913 | 2136 | 806 |
| Margin Loans | 160 | 54 | 34 |
| TOTAL | 2073 | 2190 | 840 |

Investments & Margin Lending Disputes

Disputes Resolved 1 Jan 2010 – 30 Jun 2011

| Disputes Resolved | % |
|---------------------------------|-------------|
| Outside Terms of Reference | 334 (15) |
| Discontinued | 484 (22) |
| Agreed Resolution | 961 (41) |
| Decision in favour of Applicant | 230 (10) |
| Decision in favour of FSP | 156 (7) |
| Other | 54 (2) |
| TOTAL | 2,219 (100) |

Outcome Amounts

Outcome Amounts for decisions in favour of Applicants (1/1/10- 30/6/11)

| | |
|--------------------------|-----|
| 0-50,000 | 134 |
| 50,000 – 100,000 | 32 |
| 100,000 – 150,000 | 20 |
| 150,000 – 200,000 | 4 |
| 200,000 – 250,000 | 1 |
| 400,000 – 400,000 | 1 |
| No Claim Amount recorded | 24 |
| TOTAL | 216 |

* Excludes 14 margin loan disputes not included in table

Case Study- No: 202417

“What not to do” Agricultural Investments

- In April 2008 Applicants 30 and 31 advised to invest in 2 x Great Southern Investments
- Investments wholly funded by 2 loans (\$120,000 total)
- Investments would be ‘cash neutral’ with costs funded through tax credits and income
- Interest rate 12%, monthly payments \$1,200
- Application forms signed on 5 June, late at night at Applicants’ home.
- Great Southern placed in administration May 2009
- Feb 2010 Receiver advises winding up.

Case Study- No: 202417

“What not to do” Agricultural Investments

Applicants position

- The advice did not take into account their circumstances in 2008 which were that the husband ceased full time employment and the birth of a child
- No Statement of Advice given
- They told their adviser that they were financially stretched
- Costs associated with the investment were not disclosed to them
- The adviser was driven by the commission on the product.



Case Study- No: 202417

“What not to do” Agricultural Investments

FSP

- Investment consistent with Applicants desire to build long term portfolio
- There was no urgency
- The Applicants had surplus income with which to make payments
- The loss arose from unexpected failure of Great Southern
- The Applicants have claimed a deduction of over \$150,000
- Applicants would have invested anyway even if there was no SOA (which FSP claims was given – but FSP has no copy)
- The bank should be 50% liable
- Did not provide statement from adviser who had left the firm.



Case Study- No: 202417

“What not to do” Agricultural Investments

Panel’s Findings

- FSP could not substantiate claims the investment was researched
- Advice inappropriate in view of the Applicants’ objectives, financial situation and needs
- No SOA was provided
- Failure by FSP to adequately disclose risks
- Applicants would not have invested but for the adviser’s breach of his obligations
- Loss = \$132,000 calculated by adding loan break costs and repayments made, less taxation benefits received.

Questions?

Thank You