

Nicolas Crowhurst  
Legal Counsel (Policy & Litigation)  
Financial Ombudsman Service Limited  
GPO Box 3  
Melbourne VIC 3001

Financial Services Working Group  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By email: [financialservices@treasury.gov.au](mailto:financialservices@treasury.gov.au)

**SUBMISSIONS IN RESPONSE TO CONSULTATION PAPER ENTITLED  
“SIMPLE ADVICE ON CHOICES WITHIN AN EXISTING SUPERANNUATION  
ACCOUNT”**

**Introduction**

1. This submission sets out comments made by the Financial Ombudsman Service (“FOS”) on the proposals in the Consultation Paper entitled *“Simple Advice on Choices within an Existing Superannuation Account”* (May 2008). The comments have been prepared by the office of FOS and do not necessarily represent the views of the board of FOS.

**Information about FOS**

2. FOS is an independent dispute resolution scheme that has been formed through the consolidation of three schemes – the Banking and Financial Services Ombudsman (“BFSO”), the Financial Industry Complaints Service (“FICS”) and the Insurance Ombudsman Service (“IOS”). FOS is approved as an external dispute resolution (“EDR”) scheme by the Australian Securities and Investments Commission (“ASIC”). FOS commenced operations on 1 July 2008.
3. Replacing the schemes previously operated by the BFSO, FICS and the IOS, FOS now provides free, fair and accessible dispute resolution for consumers unable to resolve disputes with financial services providers that are members of FOS. Membership of FOS is open to any financial services provider carrying on business in Australia including providers not required to join a dispute resolution scheme approved by ASIC.
4. It is estimated that FOS covers up to 80% of banking, insurance and investment disputes in Australia. As well as its functions in relation to dispute resolution, FOS has powers to identify and resolve systemic issues and obligations to make certain reports to ASIC.
5. FOS is led by a Chief Ombudsman and governed by an independent board of consumer representatives and financial services industry representatives.

6. The comments in this document draw on the experience of FICS in dealing with disputes concerning superannuation-related advice.
7. The BFSO considered and sought to resolve disputes between Australian financial services providers that were members of the BFSO and their individual and small business customers. It was an alternative to litigation and free to individuals and small businesses. The BFSO's members included Australian banks and their related corporations, Australian subsidiaries of foreign banks, foreign banks with Australian operations and other Australian financial services providers.
8. FICS considered and sought to resolve disputes between consumers and members of the financial services industry relating to life insurance, managed investments, some friendly societies, financial advice, stock broking, investment advice and sales of financial or investment products. It was an alternative to litigation and free to consumers. Its members included life insurers, funds managers, friendly societies, stockbrokers, financial planners, pooled superannuation trusts, timeshare operators and other Australian financial services providers.

#### **Executive summary**

9. FOS supports greater accessibility to low-cost intra-fund advice, but believes that any mechanism by which this could be achieved will have to be carefully considered to prevent a degrading of the quality of advice being given.
10. FOS believes that greater financial education of consumers and industry is the key to moving forward in this area.

#### **Limited availability of low-cost intra-fund advice**

11. As FOS is not a financial services provider, FOS does not believe that it is in a position to comment upon the degree to which any of the listed factors do, or do not, restrict the provision of simple, low-cost intra-fund advice.
12. However, FOS can certainly confirm the existence of some the factors listed in the consultation paper as being barriers to the provision of simple advice.
13. Even amongst established financial planners, an understanding of the need for a Statement of Advice ("SoA"), or indeed the required level of detail in a SoA, is not as pervasive as it should be. FOS frequently deals with disputes from consumers who have not been provided with a SoA when they should have been, or have been provided with a SoA which has been inadequate and unsatisfactory.
14. FOS would agree with the observation contained in the Consultation Paper that the main issue regarding the suitable advice requirement is the lack of education within the general financial industry about what conduct is licensed, requiring an Australian Financial Services ("AFS") License, and what conduct is not. This has mainly been evidenced in complaints against non-AFS License holders, such as some accountants who have over-stepped the line between providing taxation advice and investment advice.
15. The "Know Your Client" rule is perhaps the single greatest cause of financial planning disputes received by FOS. However, unlike the implication in the

Consultation Paper, it is frequently inadequate investigation of a client's circumstances that gives rise to the dispute, rather than too much information being obtained. Beyond indicating that there is a widespread misunderstanding of this rule in the industry, it is anticipated by FOS that the barrier referred to in the Consultation Paper was that the cost of satisfying the "Know Your Client" rule was prohibiting simple advice being provided.

16. Similarly to the misunderstanding of the "Know Your Client" rule, it is the experience of FOS that when faced with uncertainty between personal and general advice, the majority of financial planners involved in disputes at FOS provide advice anyway, rather than adopt the cautious approach implied by the Consultation Paper. In these instances, the position advanced by the planner in the subsequent dispute is that they thought they were providing general advice, not personal advice. Again, whilst not directly on point, FOS submits that its experience is indicative of a lack of education within industry in this regard.
17. FOS, through the publishing of its determinations and through industry workshops, is more than willing to assist, where appropriate, in greater financial education. FOS also notes the transfer of power from the Financial Literacy Foundation to ASIC and welcomes the move by the regulator towards a greater emphasis on heightening understanding of the financial services sector. Whilst the focus of the new powers is consumer oriented, it is submitted that the financial services industry should be encouraged to take steps to develop along similar lines.

#### **Options for change**

18. Proposal one, being the provision of further clarification and guidance by ASIC, should be the foundation of the new strategy. Whatever proposal is adopted, clarification and guidance will inevitably need to be given and therefore, at a minimum, proposal one should be undertaken to clearly explain the current situation. Similar clarification and guidance is already successfully being provided by way of ASIC's Regulatory Guides, and as such it would appear that legislative amendment would not be necessary.
19. Given the existing lack of clarity in the financial services industry regarding what advice may or may not be provided by an employee or authorised representative of an AFS License holder, allowing Tier 2-trained employees such as call centre operators to provide simple advice may save money in the short-term, but increases the potential exposure of the Licensee in the event that such an employee does not stick to the approved script. It would perhaps be easy for such an employee to move, even unintentionally, off the script with a simple statement to the effect of giving a recommendation.
20. Proposal two is therefore supported by FOS on the condition that adequate training and supervision is provided to relevant Tier 2-trained employees, and it is made very clear that the ultimate responsibility is that of the Licensee.
21. FOS has no comment to make regarding proposal three, except to observe that the alternative approach to extend relief for FSGs to be provided via a website is in keeping with other initiatives regarding disclosure in the financial services industry.

## **General feedback**

22. FOS considers that the greatest barrier to the provision of simple intra-fund advice is the lack of education of consumers and industry generally.
23. If the Government made the proposed changes, then the following risks can be readily identified by FOS:
  - a. If proposal two were to be adopted, the inherent risk is that a Tier 2-trained employee will, under pressure to meet the demands of his or her position, seek to encourage a consumer to accept a given product with personal recommendations. In the context of having been given financial advice in accordance with a pre-prepared script, a consumer may believe that the employee has more experience than is the case and rely upon the statements being made, perhaps to their detriment. Adequate training and supervision is the best method for addressing this increased risk;
  - b. If the alternative approach to proposal three were to be adopted, then there is a risk that consumers who are simply referred to an on-line FSG will not undertake that research. This problem is faced for every "incorporation by reference" approach, and has no easy solution. However, the provision of a hard copy of a disclosure document is no guarantee that the consumer will read the document either. This problem will only be addressed through the education of consumers and through increasing the accessibility of core disclosure documents.

NICOLAS CROWHURST  
Legal Counsel (Policy & Litigation)  
Financial Ombudsman Service Limited

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