

Review into Dispute Resolution and Complaints Framework
The Treasury
Parliament House
Canberra, ACT 2600

7 October 2015

Dear Professor Ian Ramsay,

Consumers look to place their trust and confidence in financial services businesses, for help in securing products with which may be complicated and with which they may be unfamiliar. In doing so, they place significant trust in these professionals. Consumers should have confidence that these gatekeepers are fully complying with their legal obligations. If something goes wrong, it can have a devastating impact on consumers. It is important that financial services businesses act with honesty and integrity.

Gatekeepers perform an important role in the Australian financial system. Their work contributes to the confidence investors have in the financial system. ASIC taking enforcement action against gatekeepers is consistent with community expectations that gatekeepers will act with honesty, diligence, competence and independence in the performance of these functions. An AFS licensee must establish adequate systems and procedures to ensure they meet all the obligations of their licence. Failing to live up to these expectations can have significant ramifications, including permanent banning from providing financial services or imprisonment.

Codes of conduct

Industry codes of conduct play an important part in how financial products and services are regulated in Australia. Where they enjoy the support and commitment of the sponsoring industries, codes can deliver real benefits to both consumers and those who are bound by and must comply with the provisions of the code to which they subscribe (subscribers).

COMPETITION AND CONSUMER ACT 2010 - SECT 51AD

Contravention of industry codes

A corporation must not, in trade or commerce, contravene an applicable industry code.

SECT 51ADB *Orders to redress loss or damage suffered by non-parties etc.*

ASIC believes that codes sit at the apex of industry self-regulatory initiatives. To ASIC, a code is essentially a set of enforceable rules that sets out a progressive model of conduct and disclosure for industry members that are signed up. Codes should therefore improve consumer confidence in a particular industry or industries.

Experience has shown that community confidence in the effectiveness of industry codes is largely reliant on consumers being able to seek redress under the code and, further, that the code is seen to be enforced against non-compliant subscribers.

ASIC position about representations regarding codes or breaking of may result in a contravention of the ASIC Act, and/or the prohibited conduct provisions of Pt 7.10 of the Corporations Act (including the prohibitions against misleading or deceptive conduct, making false or misleading statements and engaging in dishonest conduct).

CORPORATIONS ACT 2001 - SECT 912A

General obligations

(1) A financial services licensee must:

(a) do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly; and

(aa) have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative;

- and
- (b) *comply with the conditions on the licence; and*
 - (c) *comply with the financial services laws; and*
 - (ca) *take reasonable steps to ensure that its representatives comply with the financial services laws; and*
 - (d) *unless the licensee is a body regulated by APRA--have available adequate resources (including financial, technological and human resources) to provide the financial services covered by the licence and to carry out supervisory arrangements; and*
 - (e) *maintain the competence to provide those financial services; and*
 - (f) *ensure that its representatives are adequately trained, and are competent, to provide those financial services; and*
 - (g) *if those financial services are provided to persons as retail clients--have a dispute resolution system complying with subsection (2); and*
 - (h) *unless the licensee is a body regulated by APRA--have adequate risk management systems; and*
 - (j) *comply with any other obligations that are prescribed by regulations made for the purposes of this paragraph.*

Dispute Resolution

Legal and regulatory requirements:

CORPORATIONS ACT 2001 - SECT 912A

General obligations

- (1) *A financial services licensee must:*
 - (a) *do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly; and*
 - (b) *comply with the conditions on the licence; and*
 - (c) *comply with the financial services laws;*
- (2) *To comply with this subsection, a dispute resolution system must consist of:*
 - (a) *an internal dispute resolution procedure that:*
 - (i) *complies with standards, and requirements, made or approved by ASIC in accordance with regulations made for the purposes of this subparagraph; and*
 - (ii) *covers complaints against the licensee made by retail clients in connection with the provision of all financial services covered by the licence; and*
 - (b) *membership of one or more external dispute resolution schemes that:*
 - (i) *is, or are, approved by ASIC in accordance with regulations made for the purposes of this subparagraph; and*
 - (ii) *covers, or together cover, complaints against the licensee made by retail clients in connection with the provision of all financial services covered by the licence.*

ASIC REGULATORY GUIDE 165

RG 165.1 Under the Corporations Act 2001 (Corporations Act), if you are:

- (a) *an AFS licensee (s912A(1)(g) and 912A(2)); or*
- you must have a dispute resolution system available for your retail clients that meets certain requirements.*

RG 165.2 This dispute resolution system must consist of:

- (a) *IDR procedures that:*
 - (i) *comply with the standards and requirements made or approved by ASIC; and*
 - (ii) *cover complaints made by retail clients in relation to the financial services provided;*

Guiding Principle 4.5 (Objectivity)

Each complaint or dispute should be addressed in an equitable, objective and unbiased manner through the complaints or disputes handling process. In responding to complaints or disputes, you should give reasons for reaching a decision on the complaint or dispute and adequately address the issues that were raised in the initial complaint or dispute. We consider that, where practicable, reasons for a decision should be in writing and should refer to applicable provisions in legislation, codes, standards

RG 165.35 Under regs 7.6.02(1) and 7.9.77(1) of the Corporations Regulations, ASIC must take into account:

- (a) *Australian Standard AS ISO 10002–2006 Customer satisfaction—Guidelines for complaints handling in organizations (ISO 10002:2004 MOD), published by SAI Global Limited on 5 April 2006 (AS ISO 10002– 2006);*

RG 165.53 These guidelines and RG 139 set out our dispute resolution requirements

RG 165.46 In respect of complaints resolution, we are mindful of the need to ensure that consumers and investors are treated fairly and consistently by the relevant complaints or disputes handling procedures.

RG 165.47 We consider IDR to be an important and necessary first step in the complaints/disputes handling process, as it gives the financial service provider,the opportunity to hear client concerns and expressions of dissatisfaction and address them genuinely, efficiently and effectively.

IDR Compliance

Financial Service Licensees to all appearances, provide non conforming IDR reply's, and consciously with intent failed to even address the nexus of many IDR complaints or sidesteps major issues, conceivably, one can reasonably assume, that FSP's choose to be *wilfully blind* to many documents existences, or claim they are lost, or the wet copy signature originals have been destroyed, and only poor copy's remain.

FSP make numerous representations and statements in IDR correspondences, that to all appearances constitute false or misleading representations, were misleading or deceptive or is likely to mislead or deceive, amounting to dishonest conduct.

Evidently and with hindsight it is found, no creditable grounds existed, nor foundation underpinning the representations and statements, conduct that was outwardly dishonest, misleading and deceptive, furthermore sought to deflect the FSP culpability, and prolong the lawfully required compensation process.

Arising directly or indirectly out of FSP unconscientious actions *a fortiori*, the client may suffer foreseeable anguish, heartache, considerable time wasting plus further significant, consequential financial losses.

CORPORATIONS ACT 2001 - SECT 912B

Compensation arrangements if financial services provided to persons as retail clients

(1) If a financial services licensee provides a financial service to persons as retail clients, the licensee must have arrangements for compensating those persons for loss or damage suffered because of breaches of the relevant obligations under this Chapter by the licensee or its representatives

The whole point of the above actions is to push the matter into the External Dispute Resolution process (EDR). Were the FSP has outsourced its complaint process, responsibilities and costs.

EDR Dispute Resolution

Here a whole new ball game is in effect and essentially becomes an adversarial forum. Where the FSP '*plays the odds*' and has around a 50/50 chance (FOS Annual reports) of a making any payout.

FOS Annual reports detail by number of complaints resolved as being around a 50/50 in favour of the applicant, however most importantly no statistics are given as to the value of awards and compensation paid to wronged consumers, **it very well could be a fact that, low value disputes are paid, and the majority of high value disputes are depreciated or declined.**

The maximum amounts that are within FOS's terms of reference is a dispute value of \$500,000, and to award is \$285,000 both of which are grossly inadequate and urgently need increasing.

FSP's pay for FOS, have a large influence on policy, '*make the rules*', have ready access. Any statement they make to all respects appears to be taken as the '*whole truth*', while the applicants word is considered with some scepticism and '*in doubt*' or not of the same standing.

FOS is hopelessly understaffed (in non compliance of its licence issued by ASIC), and many complaints take 2+ years to complete.

First up, the consumer is rushed to complete often complex requirements and reply's which have many legal repercussions, at short notice or time frames, or risk the case closing, while submissions and FSP reply's are obtained after a 4-6 months passes.

The consumer then progress to the next department, being investigations, **only to be put in a queue for up to 6 months or more while nothing is done.**

Then consumer again is rushed to complete often more complex requirements and reply's which have many legal repercussions, at short notice or time frames, or risk the case closing, while submissions and reply's FSP are obtained after a 3-4 months passes. On & on the slow process goes.....

There is no apparent hurry or urgency to mitigate any loss the consumer faces or incurs as a result of the FSP misconduct while in the time consuming FOS process, as no consequential losses (apart from the minuscule amount of \$3,000) are within FOS's terms of reference to award. This \$3,000 is grossly inadequate and need increasing to \$200,000 as this will ensure that FSP's settle consumer disputes in IDR.

ASIC considers that the principles of accessibility, independence, fairness, accountability, efficiency and effectiveness, are the guiding principal for remedies offered by the EDR process. FSP and EDR schemes are required to consistently adhere to the concepts honesty of and fairness, use relevant legal principals, Codes of Practice, and industry best practice.

EDR cannot be looked upon seemingly as a adversarial opportunity, to allow the core EDR scheme processes to properly run their course, all the corporate Regulations Laws, Acts and Codes of Practice still apply *in situ* to FSP conduct, however it is systemic practice to act in breach of the corporate Regulations Laws, Acts and Codes of Practice.

FSP EDR responses should be honest and professional, relevant and non-emoive, focus on the facts not the personalities, obtain all relevant information/documents, weigh up the information and assess objectively.

It is systemic practice of FSP's not providing copies of all relevant/requested documents, or not addressing all the allegations and issues raised by an applicant, and/or undertaking dishonest conduct, and /or misleading or deceptive conduct. ALL is considered as unacceptable behaviour.

It is a requirement, if in all probability FSP error/mistake has occurred, acknowledge and propose appropriate resolution, be open and co-operative, what is a fair and reasonable, effective and commercially appropriate outcome. This means that a complainant should be compensated for any direct or consequential loss or damage caused by any breach of any obligation owed in relation to the provision of any financial product or service. It is systemic practice of FSP's to delay the EDR process to determination.

ASIC to all respects has continually failed to properly assess whether the EDR framework is working efficiently and effectively, however ASIC claims that EDR framework part of their key priority to ensure consumers have an honest, fair and accountable avenue for complaining or seeking help when they may most need it. ASIC see the EDR's as a dumping ground for complaints and consumers, and a medium to side step its regulatory mandates.

CORPORATIONS ACT 2001 - SECT 1041G

Dishonest conduct

(1) A person must not, in the course of carrying on a financial services business in this jurisdiction, engage in dishonest conduct in relation to a financial product or financial service.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: Failure to comply with this subsection may also lead to civil liability under section 1041I.

(2) In this section:

"dishonest" means:

(a) dishonest according to the standards of ordinary people; and

(b) known by the person to be dishonest according to the standards of ordinary people

"Misleading or deceptive conduct" is a term of major importance in relation to all businesses' dealings with other parties. Its prohibition can be found in s12DA ASIC Act 2001, s1041H Corporations Act 2001, s18 of the Australian Consumer Law, which prohibit businesses from engaging in misleading or deceptive conduct in trade or commerce.

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 2001 - SECT 12DA
Misleading or deceptive conduct

(1) 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.

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 2001 - SECT 12BA
Interpretation

(2) In this Division:

- (a) a reference to engaging in conduct is a reference to doing or refusing to do any act, including:
 - (i) making, or giving effect to a provision of, a contract or arrangement; or*
 - (ii) arriving at, or giving effect to a provision of, an understanding; or**
- (b) a reference to conduct, when that expression is used as a noun otherwise than as mentioned in paragraph (a), is a reference to doing or refusing to do any act, including:
 - (i) making, or giving effect to a provision of, a contract or arrangement; or*
 - (ii) arriving at, or giving effect to a provision of, an understanding; or**
- (c) a reference to refusing to do an act includes a reference to:
 - (i) refraining (otherwise than inadvertently) from doing that act; or*
 - (ii) making it known that that act will not be done;**

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 2001 - SECT 12DB False or misleading representations

(1) A person must not, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services:

- (a) make a false or misleading representation that services are of a particular standard, quality, value or grade; or*
 - (e) make a false or misleading representation that services have sponsorship, approval, performance characteristics, uses or benefits; or*
 - (g) make a false or misleading representation with respect to the price of services; or*
 - (h) make a false or misleading representation concerning the need for any services; or*
 - (i) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including an implied warranty under section 12ED); or*
 - (j) make a false or misleading representation concerning a requirement to pay for a contractual right that:
 - (i) is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy (including an implied warranty under section 12ED); and*
 - (ii) a person has under a law of the Commonwealth, a State or a Territory (other than an unwritten law).**
- Note: Failure to comply with this subsection is an offence (see section 12GB).*

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 2001 - SECT 12GB Offences against Subdivision D

(1) A person who:

- (a) contravenes; or*
 - (b) aids, abets, counsels or procures a person to contravene; or*
 - (c) induces, or attempts to induce, a person whether by threats or promises or otherwise, to contravene; or*
 - (d) is in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of; or*
 - (e) conspires with others to contravene;*
- a provision of Subdivision D (sections 12DA to 12DN) other than section 12DA, is guilty of an offence punishable on conviction:*
- (f) in the case of a person who is not a body corporate--by a fine not exceeding 2,000 penalty units; or*
 - (g) in the case of a person who is a body corporate--by a fine not exceeding 10,000 penalty units.*

It reasonably appears that FSP's via their legal departments, concoct an innumerable number of statements or representations without basis nor foundation knowing them to be patently untruthful, or via omissions, which are misleading or likely to deceive, furthermore it exposes and reveals unconscientious actions of a company's, who apparently ignore legal and ethical requirements without apparent compunction.

The actual consequences of the FSP's EDR conduct being that, ordinary reasonable persons place reliance upon the misstatements and representations, and furthermore subsequently induce numerous fundamental errors to be made, by ordinary reasonable persons undertaking, the all important FOS Recommendation's or the FOS Determinations.

Yours faithfully,

Deborah Smith