

## **SUBMISSION TO PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES**

The Australian Competition and Consumer Commission adopted the following definition of a profession:

A disciplined group of individuals who adhere to high ethical standards and uphold themselves to, and are accepted by, the public as possessing special knowledge and skills in a widely recognised, organised body of learning derived from education and training at a high level, and who are prepared to exercise this knowledge and these skills in the interest of others.

Inherent in this definition is the concept that the responsibility for the welfare, health and safety of the community shall take precedence over other considerations.<sup>1</sup>

We believe that issues repeatedly being raised by the public in their submissions to the inquiry can best be addressed by ensuring that one of the key outcomes of this inquiry is the creation of a new profession - that of the “financial advisor”, a trusted member of the financial services industry whose **principal** concern is the financial well being of those people with whom he has established a advisory relationship.

### **A. Financial Advisers as fiduciaries**

In a speech to the Financial Planners Association Conference on 28 November 2007 Mr Tony D'Aloisio, Chairman Australian Securities and Investments Commission, indicated that a Retail Investor Task Force had been created to look at a number of issues in the financial advice industry. One question that was to be addressed was whether fiduciary duties apply and, if so, what that meant.

At Plan B, we believe that the role of financial advisers to act as a fiduciary for their clients' financial interests. It was for this reason that we have supported and become involved in the introduction of Centre for Fiduciary Excellence (CEFEX) standards into Australia. At our own expense we have sought and been granted its certification against agreed international standards of fiduciary excellence.

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<sup>1</sup> Dr John Southwick, 'Australian Council of Professions' view', Can the professions survive under a national competition policy? Proceedings of a joint conference on competition law and the professions, Perth, April 1997 <<http://www.accc.gov.au/content/index.phtml/itemId/277772> on 20 July 2009>

We understand that the Association of Superannuation Funds of Australia has introduced CEFEX Investment Fiduciary training courses for its membership, which we hope will further enhance the status of the term “fiduciary” and the CEFEX accreditation.

One of the more distressing elements of submissions made to the committee by people who have lost money is that they placed their trust in an adviser and have been badly let down. There is very little we can now say to console these people, however, we believe that if their financial advisers had been trained and were required to act as fiduciaries then the financial devastation inflicted upon them as a result of the poor advice and even poorer advisory practices would have been avoided.

We believe that consumer interests would be best served by ensuring that only people who have an appropriate level of competence, experience and character be allowed to market themselves as financial advisors, financial planners or fiduciaries.

There has been substantial public comment already about the capacity of any person to use the term financial planner or financial advisor to describe the provision or non-provision of financial advice. Given the capacity to mislead the public as to the true nature and quality of services being offered and the capacity for harm to the consumer, we believe that there should be some restriction on the use of the term “financial advisor”, “financial planner” or “fiduciary” linked to qualifications.

### Differentiation of Advice and Product Sales

One theme running through the submissions made to the Committee that we have observed is that there is a clear distinction being drawn between financial product sales and true financial advice, with a strong consensus that many current financial advisers are simply salesmen. The current licensing arrangements lack sufficient discrimination to give clients confidence that the advice they are receiving is appropriate and not simply a sales pitch for a financial product.

In response, we suggest a two tiered scheme. At one level you have a product sales approach wherein the advice is tied to the provision of a financial product. These advisers could be captured under the current authorised representative regime. These advisers are only allowed to sell financial products issued by a product

provider and provide general financial advice. That is, they cannot offer personal financial advice.

At a higher level you have holistic personal financial advice. This higher level approach must provide consumers with confidence that the person providing the advice is competent, of good fame and character and acting solely with regard to the clients' interests. We envisage a regime where these financial advisers would be registered, in a manner similar to registered company auditors. Only registered financial advisers could provide personal financial advice.

The concept of a registered financial adviser would need development with industry to identify minimum levels of competence and experience. It would also imply that membership of an appropriate professional body becomes an entry level criteria and to become registered requires **additional** certification such as the Certified Financial Planner qualification, for example.

### Minimum Education Standards

The need for financial advisors will not decrease in the short or long term. Financial advice is becoming an essential tool to negotiate the increasing complexity of tax, superannuation and investment laws and regulations. It makes for a demanding profession, given we are being asked to provide advice to clients on how they can maximise their wealth in twenty to thirty years time, yet the governing rules can change every year.

The requirement for a highly trained financial advisory workforce is understood and well illustrated by recent losses associated with poor advice covered in the media. The current training arrangements for this workforce are still quite basic with a current training standard as set out in RG146.6 at the highest level of broad equivalence to the "Diploma" level under the Australian Qualifications Framework.

It is our experience that the increasing complexity, competency and responsibility encapsulated by the provision of personal financial advice necessitates training at a Vocational Graduate Diploma level. This is a substantial increase and would represent a barrier to entry for some people. We believe that by lifting the qualifications bar, we enhance the standing of practitioners and provide confidence in the industry.

### Minimum Experience Requirements

At present there is **no** minimum experience level to provide personal financial advice, just an obligation to meet a minimalist education standard mentioned above. We believe that this is a major impediment to the provision of quality personal financial advice to consumers. Consumers have a right to expect that the person providing them with personal financial advice has the necessary experience to provide contextualised and appropriate advice.

Industry bodies, such as the Financial Planning Association, have lifted the experience bar by making relevant experience a necessary prerequisite for granting their practitioner level qualifications, such as Certified Financial Planner. However, possession of their qualifications is not a mandatory requirement to give personal financial advice.

We believe that any reform of the current regime around personal financial advice should include a relevant experience requirement.

### Character

The last element of a reformed regime around personal financial advice should be to enforce a requirement for registered financial advisors to be people of good character. In recognition that poor quality financial advice has the capacity to inflict substantial harm we believe that the character of people who provide personal financial advice should be of a higher standard than that of the general public.

## **B. Some Issues surrounding organisations that offer financial advice to the public.**

### Complaints management

Complaints levelled against financial advisers with respect to misconduct or incompetence need to be quickly addressed in an equitable manner that maintains public confidence in the industry and which is openly supported by financial advisers and insurers.

There will always be doubts raised about financial adviser internal complaint resolution processes, irrespective of their integrity. It was for this reason that there is a specific legislative requirement to have an external dispute resolution process in

the *Corporations Act (Cth)* 2001. The current main external disputes resolution scheme for the advisory industry is the Financial Ombudsman Service (FOS).

The Draft FOS Terms of Reference dated 30 May 2009 have major flaws within them that are not consistent with the Australian system of jurisprudence. In particular, the Draft Terms of Reference include objectionable terms such as the rules of evidence will not apply and that the concept of precedence may not apply. In addition, there are no appeal rights for the industry against FOS rulings but the complainant is not similarly bound.

A further unusual element of the terms of reference is that FOS reserves the right to provide advocacy services on behalf of complainants and then hear the complaint. We believe that if the external dispute resolution system is permitted to embed a clear conflict of interest, then that provides a poor example to the industry of how to deal with such an important issue as conflict of interest.

Our view is that the current external disputes resolution scheme requirement needs complete reconsideration. Under the *Superannuation (Resolutions of Complaints) (Cth) Act* 1993 the Superannuation Complaints Tribunal (SCT) was established as a mechanism to resolve complaints about decisions and the conduct of trustees of superannuation funds. The legislation makes clear the powers and duties of the tribunal as well as its role.

We see no reason why a similarly constituted tribunal could not be established for the financial advisory industry. We believe that the additional rigour of having a legislatively backed complaints regime will provide transparency and give consumers confidence that when things go wrong, there is an independent, robust and effective complaints resolution system that can quickly come to grips with the circumstances. As is now the case for FOS, industry would be levied to pay for the costs of such a scheme. The outcome would be to provide confidence to **all** parties that complaints made against them will be handled in an impartial, open manner consistent with the practices of the Australian legal system but minimising its formality to the extent practicable.

A revised and appropriate role for FOS could evolve as a financial services consumer advocate.

### Industry levies

We have noted some calls for an industry indemnity fund to be created and a levy to be placed on all financial advisers to finance claims made by consumers. We oppose such calls on the basis they only serve to increase moral hazard. If the consequence to an adviser for giving negligent advice is reduced then the risk of poor advice being given will increase. Another aspect that requires consideration is the equity of asking an innocent party to fund compensation for a negligent act of one of their competitors.

We believe that the insurance industry is an appropriate and experienced source of professional indemnity coverage in relation to such risks and mandated minimum insurance cover is an adequate position from a regulatory perspective.

### ASIC's Quality of Advice Campaign

We have recently been made aware of ASIC developing some "quality" benchmarks for the provision of financial advice. We are particularly pleased to note ASIC's engagement with industry and academia regarding this approach and appreciate the effort they have gone to consult in the development of what constitutes quality financial advice.

Our principal concern with the current "Quality of Advice" campaign is that specifying what represents "quality advice" in a detailed manner could be moving down a path of effectively stipulating what advice is able to be delivered. If this occurs then it seems likely the regulator will find itself embroiled in every instance of poor advice.

However, we believe that a much better use of ASIC's work in this area is to start developing a series of principles based standards, for the provision of personal financial advice, providing guidance as to what is expected of a competent and experienced financial adviser. We note the fiduciary standards promulgated by CEFEX could be adopted as an excellent base in this regard and enclose a copy of the fiduciary standards for the committee's consideration.

Once these standards have been developed and implemented, then a disciplinary mechanism working through the independent tribunal we referred to earlier could deal with the registration of those advisers whose conduct is consistently in breach of the standards.

In conclusion, we believe that by professionalising the industry we will restore public confidence in financial advice.