

Senator the Hon. Nick Sherry
Minister for Superannuation and Corporate Law

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Dear Minister,

Submission in respect of FICS

This submission is in response to your invitation at the April 2008 FPA Small Principals Conference and its purpose is:

- to outline why some AFS Licensees would prefer to go to court than FICS; and
- to recommend action that may restore AFS Licensees' confidence in FICS.

Input for this submission has been sought from many small AFS Licensees so as to meaningfully advance the dialogue that commenced at the FPA Small Principals Conference.

In the interest of brevity, this submission purposely neither discusses issues in detail nor provides supporting information. We hope that this submission will lead to further dialogue in which you will clarify areas of agreement and disagreement so that we can focus on resolving any differences of opinion.

The major issues identified are outlined below.

- **Fairness and accountability** – While there is general acceptance of the need for an external complaints resolution scheme such as described in ASIC's RG 139, there is concern amongst many AFS Licensees that FICS is not operating in accordance with RG 139.151. In particular, it is not seen to be operating fairly and it seems to be unaccountable for its decisions.
- **Market losses and product failure** – While we believe the Government did not intend that compensation would be awarded for market losses or for product failure, FICS has repeatedly made determinations against AFS Licensees for such losses.
- **Appropriateness of advice** – While the Corporations Act 2001 s 945A(1)(c) requires that "the advice is appropriate", there is currently a wide range of views in respect of what is appropriate and what is not. The law on this issue is subjective and thus open to interpretation. There is the view that FICS has sometimes unreasonably deemed advice to be inappropriate without proper basis or discussion and then ordered compensation based on market losses and product failure.
- **No recourse or appeal process** – There is no protection for AFS Licensees from unfair decisions or unfair processes. For example, decisions in respect of appropriateness of advice and breach of duty of care are not subject to any standards or review. Also, there is no opportunity to cross examine.
- **Uneven playing field** – While a complaint to FICS is just an ongoing cost of doing business for a large AFS Licensee, it can cause severe disruption for small AFS Licensees. This is because small AFS Licensees do not have in-house solicitors and other staff to deal with FICS on matters that can run for a year or two before resolution. For a small business, liaising with FICS can create a huge drain on the licensee's resources not only in terms of any compensation, but also in terms of management time and emotional energy. This contributes to an uneven playing field. (Some unevenness may be inevitable and may help to weed out corrupt and incompetent AFS Licensees, but when coupled with unfairness it may cause unwarranted damage to good AFS Licensees.)

- **Impact on industry** – FICS has had a profound impact on the manner in which AFS Licensees conduct their businesses. In particular, the focus on “covering one’s backside” seems to dominate the industry. This is reflected in the length of SOAs, the wording of documentation, the growth of the compliance industry, and topics at conferences. It is also contrary to the Government’s intention of increasing efficiency and reducing paperwork.

Principles of Fairness in Compensation

We suggest the following are reasonable principles.

1. Where a client has suffered a financial loss that is the direct result of the financial planner’s action/inaction (e.g. fraud) the financial planner should compensate for that loss in full.
2. Where financial planners have failed to deliver a service in accordance with the standard described in their FSG, SOA, or any other documentation, the client should be compensated either by the service being promptly provided or by a refund of the relevant portion of any fees that have been paid in advance.
3. Where a client has suffered financial loss that was not directly caused by the financial planner, but which was contributed to by the financial planner’s negligence, etc. the financial planner should be liable to pay compensation based on the nature and extent of the action/inaction by the financial planner and the facts available at the time and without reference to the actual loss suffered. That is, if financial planners are deemed to have done something wrong (e.g. breach of duty care, negligent, reckless, deceptive, false or misleading information) they should pay compensation that is consistent with their “crime”, but they should not be held accountable for events that are outside of their control (e.g. market fluctuations, product failure, etc.).
4. Where a client has suffered financial loss due to circumstances the financial planner did not directly cause (e.g. market fluctuations, product failure, etc.) the financial planner should not be held responsible for that loss.
5. Where a client has suffered a loss in respect of one component of a portfolio, this component should not be seen in isolation, but rather this loss should be seen in the context of all the advice provided by the financial planner and compensation should not be given in cases where the portfolio in aggregate has performed reasonably.

Recommendations for the Future

1. FICS should be instructed to abide by the above Principles of Fairness.
2. FICS should be instructed to include in its written determinations the basis for its decisions such that the reader can understand why FICS has reached its decision.
3. AFS Licensees should have the right to seek a review of a FICS determination by an independent review process.
 - a. This panel would consist of financial planners and consumer representatives.
 - b. This review would be public.
 - c. Although not necessarily binding on future decisions, the findings of the panel could be used to establish boundaries around what financial planners and consumers regard as appropriate advice.

If you have been unaware of our views in respect of FICS it may be because:

- many small AFS Licensees are not aware of the way FICS operates and therefore have no reason to feel concerned, and
- those small AFS Licensees who are aware of the way FICS operates lack the resources to lobby as effectively as large licensees.

The reality is that many small licensees have never had a single complaint. This suggests that most of us are doing the right thing. However, we are currently faced with the prospect of having to defend ourselves against a process that seems unfair, largely unaccountable, and which after a year or two of quasi-legal proceedings may result in compensation of up to \$150,000 to a client even though the losses suffered by the client were due to market fluctuation and product failure which we obviously did not cause. This risk is not reasonable and contributes directly to the cost of our advice.

We look forward to knowing your views on the above and the ongoing opportunity to resolve any differences of opinion.

Yours sincerely,

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