

8-1-1998

ADR in the financial planning industry - the Financial Services Complaints Resolution Scheme

Nicole Arendsen

Recommended Citation

Arendsen, Nicole (1998) "ADR in the financial planning industry - the Financial Services Complaints Resolution Scheme," *ADR Bulletin*: Vol. 1: No. 4, Article 1.

Available at: <http://epublications.bond.edu.au/adr/vol1/iss4/1>

This Article is brought to you by [ePublications@bond](mailto:epublications@bond). It has been accepted for inclusion in ADR Bulletin by an authorized administrator of [ePublications@bond](mailto:epublications@bond). For more information, please contact [Bond University's Repository Coordinator](#).



The ADR Bulletin

The monthly newsletter on dispute resolution

contents

VOLUME 1 NUMBER 4 AUGUST 1998

Industry-based ADR

ADR in the financial planning industry — the Financial Services Complaints Resolution Scheme

Nicole Arendsen

The Financial Services Complaints Resolution Scheme (FSCRS) attempts to provide a non-adversarial environment in which to resolve customer complaints where financial loss is claimed. Members of the Financial Planning Association (FPA) of Australia Ltd are automatically members of the FSCRS and the FSCRS has recently opened its doors to other financial service providers. This article provides information about the FSCRS and answers some commonly asked questions.

History of the FSCRS

The FSCRS is an initiative of the Financial Planning Association of Australia Ltd (FPA) and commenced operations in 1995, handling complaints by customers of financial planners being either Principal Members or representatives of Principal Members of the FPA. The FSCRS was originally called the Complaints Resolution Scheme (CRS).

The rules by which the FSCRS operates are found in the Terms of Reference for the Scheme and these are made by regulation by the FPA. On 19 June 1998, the FPA made Regulation 1/98 that replaces Regulation 1/95 being the Terms of Reference for the FSCRS. The new Terms of Reference apply to all complaints received

by the FSCRS after 1 July 1998.

The main changes to the Terms of Reference made by the new regulation were as follows:

1. Name change to 'Financial Services Complaints Resolution Scheme' (the Scheme).
2. The Scheme will be open to non-Members of the FPA after 1 July 1998. Non-Members of the FPA will enter the Scheme on a contractual basis by signing a Participation Agreement by which they will be bound to comply with the Terms of Reference.
3. For cases commencing after 1 July 1998, stage 2 (conciliation) and stage 3 (adjudication) of the Scheme will be paid for by Members on a user pays basis but stage 1 (negotiation) will be free of charge.
4. A representative nominated pursuant to the Terms of each Memorandum of Understanding signed by the FPA and the FSCRS Council will sit on the FSCRS Council.

The FPA decided to open the Scheme to non-Members of the FPA

The FPA decided to open the CRS to non-Members in circumstances where the Corporations Regulations will require all licensed financial investment advisers to

continued on page 51 ➤



ADR in the financial planning industry

➤ continued from page 49

belong to external dispute resolution schemes from 1 October 1998. Following from the Wallis report, the Regulator is concerned to avoid a proliferation of ADR Schemes and encouraged the FPA to open its Complaints Resolution Scheme to other financial investment advisers rather than having even more ADR Schemes enter the market. This was seen by the FPA as a sign of endorsement of its complaint resolution scheme by the Regulator.

New conditions for licensees providing investment advisory services to retail investors

Amendments to the Corporations Regulations effective on 1 October 1998 require all licensees who provide investment advisory services to retail investors to do three things:

1. To belong to an external Complaints Resolution Scheme which has been approved by the Commission.
2. To have internal complaints resolution procedures which accord with Australian Standard AS 4269:1995.
3. To provide customers with an Advisory Services Guide (ASG). The ASG must contain information to assist retail advisers to identify clearly the licensee or licensee's representative responsible for the advice and to understand clearly the nature of the investment advice service being offered including the nature of charges payable to the licensee. The ASG must also explain the complaints procedures to be followed in the event that there is any dissatisfaction with the advisory services offered.

The FPA and the FSCRS Council are entering into new commercial arrangements to underpin Membership of the FSCRS

The FPA and the FSCRS Council executed a Memorandum of Understanding (MOU) on 27 May 1998 with the ASX. The MOU outlines a framework whereby ASX Members may join the FSCRS so as to satisfy the new licence requirement for licensees to belong to

an external complaints resolution scheme. The FSCRS subsequently sent Participation Agreements to all ASX Members. The Participation Agreements contain the terms and conditions of Membership of the Scheme. One of the essential terms is compliance with the Terms of Reference of the Scheme.

What types of complaints are handled by the FSCRS?

The FSCRS handles complaints about financial loss resulting from an alleged breach of duty by a Member who was providing financial services. The alleged breach of duty must have occurred:

- (a) On or after 1 January 1995, and
- (b) After the date on which the Member became a Member of the Scheme, or
- (c) A prior date where the Member consents;

The Terms of Reference for the FSCRS prevent it from handling claims against Members that exceed \$50,000 unless the Member agrees and, even then, the ceiling on the amount of the claim is \$100,000. The ceiling limit on claims is now considerably less than the Australian Banking Industry Ombudsman and is an issue that the FSCRS Council intends to consider shortly. A substantial percentage of claims fall outside the jurisdiction of the Scheme on the basis that the claim is for over \$50,000 and the Member will not agree to the jurisdiction of the Scheme. Many claims are for over \$100,000 and therefore the FSCRS has no discretion to handle the complaint, even if the Member were to agree. For those matters, the Complainants must resort to legal action or to private forms of alternative dispute resolution, such as mediation.

The adjudicator may not make an award against a Member for more than \$50,000 unless the Member has consented to the Scheme handling a complaint where the claim is up to or equal to \$100,000.

The FSCRS has a three-stage system for resolving complaints.

The first stage of the process of the FSCRS involves assisting the parties to resolve the complaint through negotiation. The FSCRS

requests the complainant to detail the complaint in writing and to provide particulars of the financial loss that is alleged. These details and any supporting documents are then provided to the Member. The Member has an opportunity to provide a response and the FSCRS assists the parties to identify the issues in dispute and to communicate effectively about them. The FSCRS also requires the parties to deal with preliminary matters such as communications with professional indemnity insurers.

Before the first stage is initiated, however, the FSCRS requires the complainant to demonstrate that they have given the Member an opportunity to resolve the complaint using their own internal complaints handling procedures but that the complaint has not been satisfactorily resolved. In practice, the FSCRS has found that Members' internal complaint handling procedures need to be improved and that many complainants experience difficulty dealing directly with the service provider. The FSCRS is currently developing a kit for members to assist them to establish effective internal complaint handling procedures.

If the complaint is not resolved at the first stage, then conciliation is arranged. This is the second stage of the process. All conciliators engaged by the FSCRS have successfully completed training courses with accredited ADR training organisations. The role of the conciliator is to assist the parties to explore the options for resolution of the complaint but not to make a binding decision. The conciliator helps the parties to find their own outcome to the dispute through discussing the likely outcome if the dispute was to be heard by a Court and through exploring the options for resolution.

If resolution does not occur through the conciliation process, then the third stage is adjudication. An adjudicator will be appointed to make a determination that is binding on the Member. The adjudicator must base his or her decision on law, what is fair and reasonable in all the circumstances, any applicable Code or standard approved by the relevant industry body and/or Regulator, and on



"If resolution does not occur through the conciliation process, then the third stage is adjudication. An adjudicator will be appointed to make a determination that is binding on the Member.

The adjudicator must base his or her decision on law, what is fair and reasonable in all the circumstances, any applicable Code or standard approved by the relevant industry body and/or Regulator, and on what is good practice in the industry."

➤ what is good practice in the industry. All adjudicators are appointed by the FSCRS Council, not by the FPA.

The results achieved by the FSCRS are monitored on a quarterly and annual basis. The following figures relate to the 1997 period.

How many complaints and how quickly were they resolved?

Of the 116 cases that fell within the terms of reference of the FSCRS in 1997, 86 per cent were resolved in stage 1 of the process. The average time taken to resolve complaints was 72 days. Factors causing delays in the process included Members' discussions with PI insurers and legal advisers, and protracted negotiations between the parties.

In addition to the 116 written complaints within terms of reference received in 1997, the FSCRS dealt with ten complaints received in 1996 that were carried over.

How many complaints were within terms of reference?

Only 52 per cent of complaints referred to the FSCRS in 1997 were within the terms of reference of the Scheme, the other 48 per cent being either over the monetary limit of \$50,000 or before the relevant date of 1 January 1995. Contributing to this high percentage of cases that were outside terms of reference were several cases where the Principal Member had either gone into liquidation or had their dealer's license revoked. In such cases, as the company was not formally a Principal Member of the FPA, the complaint was technically outside terms of reference. The FSCRS reported these circumstances to the ASIC (formerly the ASC).

The FSCRS encourages members to accept the jurisdiction of the Scheme where the loss claimed is between \$50,000 and \$100,000 or where the alleged breach of duty occurred before 1 January 1995, but cannot compel the Member to allow the complaint within the scheme in these circumstances. Unfortunately there has been a high incidence of Members rejecting the jurisdiction of the scheme. It is not known whether those disputes ended up in litigation.

Reason for complaints

Complaints relating to investment planning made up 49 per cent and complaints relating

to retirement planning 20 per cent. The high figure relating to investment advice probably reflects the fact that consumers are becoming more aware of the broad range of options there are for investment.

The most common reason for complaints was inappropriate advice, representing 28 per cent, followed by 16 per cent of complainants claiming problems associated with billing for financial planning services.

In 1997 there were more complaints about inappropriate advice than in previous years. This highlights the need for financial planners to conduct adequate investigation into the consumers' needs, goals and the strategy and product being recommended. The gap between consumer expectations and requirements and the product or service actually delivered needs to be closed.

Nine per cent of complainants were about poor explanations of the investment products.

The FSCRS provides a range of member benefits

The FSCRS takes a proactive stance in resolving customer complaints. The staff are trained in conflict management and provide over the phone assistance to Members to deal with complaints or difficult customers.

In addition, the FSCRS is assisting its Members to design and implement their own internal complaint handling procedures. A kit for Members is currently being developed. Licensees will be required to have such procedures in place by 1 October 1998.

An important aspect of the work of the FSCRS is the quarterly statistical reports prepared by FSCRS, which amongst other things identify the main causes of complaints, by consumers. These reports, which are on a 'no names' basis, are made publicly available and assist Regulators to identify and rectify systemic complaints in the financial services industry.

How much does membership of the FSCRS cost?

The cost of annual Membership of the FSCRS is \$1125 and there is a once-off joining fee of \$500. If one company in a group of companies is a member of the FPA then no joining fee for the other companies will apply, but annual Membership fees will be payable. ➤



➤ The annual fee covers the cost of stage 1 of the Scheme. For complaints that are not resolved at stage 1 of the Scheme, Members will be invoiced for the costs of stages 2 and 3 on a user pays basis.

Why is there a user pays system for stages 2 and 3?

Members who are not breaching rules of ethics or professional conduct should not have to subsidise Members who are in breach of the rules. Almost 90 per cent of complaints are resolved at stage 1, so the vast majority of Members are not affected by the user pays costing structure for stages 2 and 3.

In the event that the complaint is not resolved in stage 1 or stage 2 but no finding is made against the Member by the adjudicator then no costs are payable. If however, the complaint is not resolved by stage 1 but is resolved before stage 3 then the Member is required to pay the costs and charges which have been incurred in stages 2 and 3.

How much will stages 2 and 3 cost?

The costs and charges of stages 2 and 3 include the cost of investigation by the Scheme, the Scheme's operating and administrative costs and charges applicable to stages 2 and 3, the cost of any expert or legal advice, the cost of any conciliation including conciliators' travel and related expenses, the adjudicator's costs and all other costs and charges associated with stages 2 and 3.

The costs and charges of stages 2 and 3 respectively are a fixed scale of costs and charges set by the FPA after consultation with the FSCRS Council and any other party to a Memorandum of Understanding with the FPA, such as the ASX.

What if the claim is frivolous or vexatious or has no grounds?

The manager of the FSCRS has discretion under the Terms of Reference of the Scheme to dismiss claims that are frivolous or vexatious or have no grounds. This discretion is exercised where necessary to preserve the integrity of the Scheme with Members and to deter vexatious claimants who do not have valid claims.

To what extent is the FSCRS independent from the FPA?

The Scheme was established in 1995 by FPA and originally the staff had a multi-functional role, dealing with not only complaints against Members but also disciplinary breaches, compliance and professional standards.

An external review of the CRS (as it was then called) in 1996 suggested that CRS needed to be independent of FPA. A number of measures have since been taken to establish its independence. The Scheme staff are accountable to a Council which oversees the Scheme and comprises representatives from industry, the Regulator, Consumer representatives and so on. The ASX have nominated a representative onto the Council.

Rules of Conduct with the FPA have been established to ensure that the FPA has no ability to influence the conduct of a complaint by the Scheme or the determination of an adjudicator. Furthermore the conciliation process is conducted on a confidential basis.

The Scheme is neutral to each of the parties and its staff are dedicated to resolution of complaints against Members and are impartial.

Complaints are good for business

There are many advantages that flow from soliciting complaints and dealing with them appropriately. A complaint is an expression of dissatisfaction. If it is not resolved it has the potential to become a dispute. Disputes have the ability to disrupt business and cause harm to relationships. Handling complaints appropriately provides an opportunity to improve the business relationship with the customer. A number of surveys have found that customers who make a complaint which is dealt with fairly increase their loyalty to the organisation and feel more confident about the business relationship. Service providers who do not provide customers with an opportunity to complain are missing out on relevant feedback on the performance of their businesses.

Further information

For a copy of the Terms of Reference of the FSCRS and the Participation Agreement or if you require information about the Scheme please telephone Nicole Arendsen, Manager of the FSCRS on (03) 9614 2944.

(Information current as at 23 July 1998).

Subscription order form

YES! I wish to subscribe to **The ADR Bulletin** for one year at \$345.

Name: _____

Title: _____

Organisation: _____

Address: _____

Postcode: _____

Tel: _____

Fax: _____

Please find my cheque/money order for \$_____ enclosed (payable to Prospect Media Pty Ltd)

OR Please invoice me

OR Please debit my: Amex Visa

Diners Bankcard Mastercard

Card No:

Cardholder: _____

Expiry date: / / Today's date: / /

Signature: _____

For a free sample issue of one of the following newsletters, please tick:

- Australian BANKING & FINANCE Law Bulletin
- Australian CONSTRUCTION Law Bulletin
- CONSTITUTIONAL LAW & POLICY Review
- EMPLOYMENT Law Bulletin
- Australian ENVIRONMENT Review
- FRANCHISING Law & Policy Review
- Australian HEALTH Law Bulletin
- INHOUSE COUNSEL
- INTERNET Law Bulletin
- Australian INSURANCE Law Bulletin
- Australian INTELLECTUAL PROPERTY Law Bulletin
- INVESTMENT & TAXATION Bulletin
- Australian PRODUCT LIABILITY Reporter
- Australian PROPERTY Law Bulletin
- PRIVACY LAW & POLICY Reporter
- RETIREMENT AND ESTATE PLANNING
- Australian SUPERANNUATION Law Bulletin
- TELEMEDIA
- Australian & NZ TRADE PRACTICES Law Bulletin

Send to:

Subscriptions

Prospect Media Pty Ltd
Level 1, 71-73 Lithgow St,
St Leonards NSW 2065.

Fax: (02) 9439 4511

