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Whose choice — yours,

LEGAL BRIEF

Choice guides are practical, but so are the rules around providing good advice

On behalf of all of us — regulators and government included — I have been engaging in a little introspection; who really is to blame for the current woes that depress those of us who have the best interests of the financial services industry at heart?

In an epiphany not seen since the Road to Damascus, it became blindingly, obviously clear: the fault lies with the client.

The financial services industry would be much better off without the bleating demands of clueless clients. If clients could just get their act together, this industry would be able to provide a consistent and confident service that would be the envy of financial planning markets across the world.

Inspiration came to me after reading ASIC's *Guide for Advisers: Super-Switching Advice: Questions and Answers*.

At the time, I had just finished the other riveting read outlining the compliance approaches of the Australian Taxation Office, APRA and ASIC; *Choice of Superannuation Fund — Meeting Your Obligations*. That was when it occurred to me that clients are to blame because they have unreasonable expectations of the financial services industry. In their guides, the regulators have set down some directions for the manner in which advisers must deal with clients. I just wonder what clients would think of this prescription.

Don't get me wrong, I am not totally against the guides. Most of what has been written is common sense. Indeed, large parts of it can be summarised in the simple goals of courtesy, respect and care. The guides must also be praised for the language they adopted — simple, colloquial, concise and, in my experience, effective in confusing some parts of the financial services industry.

THE LANGUAGE OF CHOICE

I wonder who wrote the guide, particularly the *Super-Switching Advice* guide. The simplicity of language is to be applauded but I am afraid it provides little guidance to advisers in real-life situations. The number of clients who know about their superannuation is inversely proportional to the number and complexity of superannuation laws. Australians have become much more aware. There was a time when if you asked "How much super do you have?", the response would have been "I filled up yesterday". Today, the same person would answer "Not much", "Not enough" or "I am not sure".

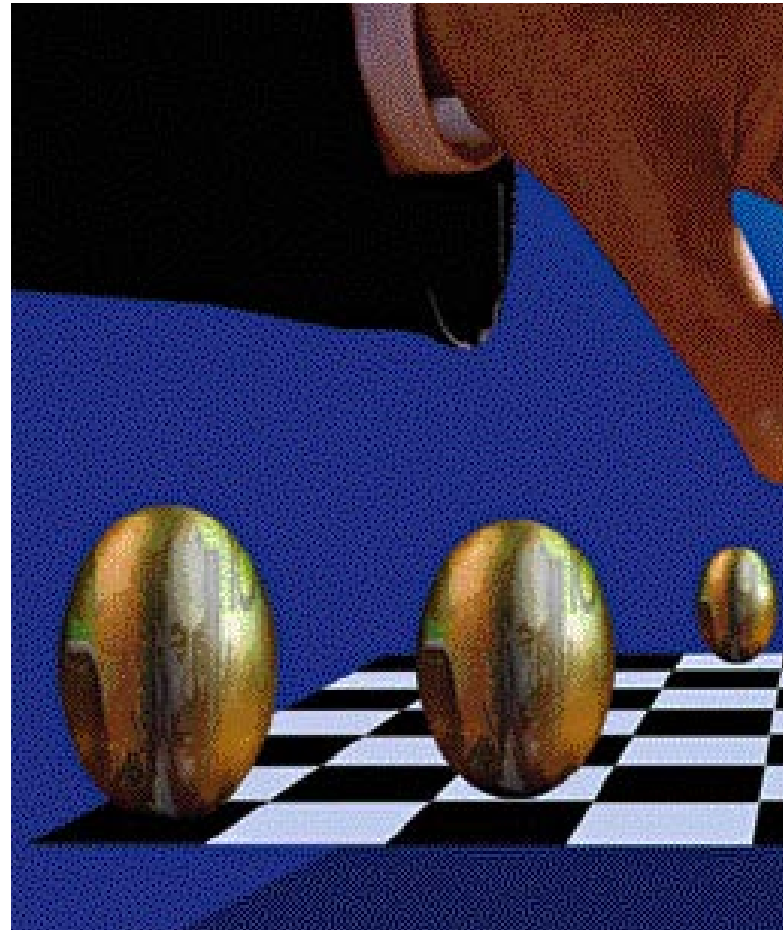
Use of the "To Fund" and "From Fund" description is a welcome innovation. Recognition that a "To Fund" recommendation is not super switching is a practical relief. I even applaud those parts of the guide that in effect say, "You cannot dodge your responsibilities by making your SOA look like a "To Fund" advice when it is not, and don't think you can hide behind a disclaimer; this won't work

either". This is true, but even this is not practical enough.

The simple fact is that many clients cannot describe their "From Fund". But after having found out things such as age, dependants, intended retirement age and so on, an adviser cannot then say, "Oh, I can't give you any super advice until I have done a thorough examination of the "From Fund" that you don't seem to know about". If the know-your-client obligation reveals information that urges a recommendation (and most do), it is necessary that the adviser gives timely advice. In fact, it is negligent if the adviser does not. The only thing that might save the adviser is that the feared risk does not occur.

THE PRESSURE OF TO-FUND ADVICE

Practical experience tells me that the most common form of advice an adviser must give will be "To Fund"-only advice. This is because timing requires an adviser to act quickly, and the SOA will need



mine or theirs?

a disclaimer based on clients' lack of knowledge of their super. Anything less may constitute negligence.

This leads me to the conclusion that ASIC is going to be very busy. The *Super-Switching Advice Guide* gives the compliance tip that ASIC will be looking closely at the files of advisers who seem to have a number of clients who only want advice about the "To Fund". ASIC will also be interested in advisers who regularly give limited advice warnings. But it seems to me that many advisers will need to do exactly this.

Look at a simple client fact-finding interview: "You have told me that you are a 43-year-old married professional with three school-age children, you have a mortgage/car loan of \$210,000 and your wife works part-time. You have superannuation but it is 'not much', maybe \$50,000. And that is all you can say about your super fund."

ASIC suggests that you cannot ignore the "From Fund", but

neither can you compare it to a "To Fund". In my view, however, a more important detail must be immediately addressed. A further fact-find analysis specific to a "From Fund" may come later, but the client needs to be told how to fulfil any need. There will be actionable negligence if this client were to suffer a disability or die while waiting the adviser's data collection, analysis and SOA about funds.

We should expect that many adviser files will have "To

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Fund"-only advice with a limited advice warning, because of the importance of the know-your-client rule. ASIC is going to be busy.

Advisers cannot send a client away without providing "To Fund" advice. You may not be able to make a recommendation to switch because you cannot help the client make an informed decision on a cost-benefit basis of their "From Fund". But there is actionable negligence if you do not give the client "To Fund" advice. The disclaimer will be needed to ensure that the advice is not misconstrued as super-switching advice when it is not.

When giving this "To Fund" advice, I also believe it is appropriate to include material that will allow clients to make a comparison between their existing super and the new fund. This may be in the form of a table of costs and benefits that describe the "To Fund" and facilitate a client's completion of the comparative information. This client-friendly "tool" will allow the client to make an informed decision, which is the goal of all financial planning.

In the scenario described above, the client needs life insurance protection. Neither the client nor the adviser is aware of the level and extent of life insurance cover in the client's existing superannuation fund. That is the point: the adviser cannot risk that the client does not have enough.

In such a situation, it would be necessary to advise the client that life insurance is an important part of their financial plan, and that an effective way of securing this financial security is through superannuation. This is just one example of the need for "To Fund"-only advice, delivered quickly.

The regulator guides should not be taken seriously. If adopted literally, risk will be incurred by the client, not their adviser. When the actions of the client and the adviser are to be reviewed, it will not be against the backdrop of a regulator guide, it will be in the context of the law — and not just the know-your-client principles of section 945A and B of the Corporations Act but, more important, against the fiduciary standards of professional advice.

Asset



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