



PETER BOBBIN

LEGAL BRIEF

What price advice?

New rulings put the onus on financial planners to tread carefully with clients, even those with small sums. Daunting, perhaps, but the alternative could be the firm's reputation.

Who would have thought that the letters ASIC no longer represent Australian Securities and Investments Commission but now stand for ASIC Skewers Insurer Completely.

AMP can now claim alumni membership of a not-too-exclusive club, whose members include Zurich Financial Services, Host Plus, MBF Life, Coles Myer and All the Partners of PKF Victoria. The rules of the club are simple; suffer the angst of ASIC, negotiate your way out of it and agree to whatever it takes to put it behind you.

There are some valuable lessons to be learned from what we can read into the negotiated wording of the AMP/ASIC undertaking. However, it also raises more questions than were answered about compliance and regulation in 2006. Only AMP can explain why it agreed to an undertaking that required it to reassess, rectify, reimburse, relearn, review and recreate its procedures and disclosures over more than two years.

It may have been cheaper for AMP to allow ASIC to drag it through the courts rather than suffer the cost of the six Rs – assuming, of course, it felt it had a reasonable chance of rebutting ASIC's claims. Just why AMP allowed this is anybody's guess. Mine is that it saw a reputation risk that was not worthwhile having aired (and that it did not believe it had a reasonable chance of success on some of the issues).

One of ASIC's claims is that AMP Financial Planning (AMPFP) may have engaged in misleading conduct and thereby contravened sections 12DA(1) and 12DB(1)(e) of the ASIC Act. This is a serious charge if you value your reputation. Where did this reputation risk come from? AMP's website and other material said its planners could do more than AMP in fact allowed them to do – in super-switching terms. If this was found to have been true, the misleading conduct allegation would stick. The most frustrating thing about the website claim is that AMP acknowledged that the planners did more than they were allowed.

LESSON 1 Make sure your website, financial services guide and marketing material all represent what you do and do not do. Don't give the marketers and public relations people free reign with the words that describe you; make them become strange bedfellows with your compliance team and have them both sign off that there is no mismatch. It is also important to make sure distribution is doing what it is told. How? Randomly audit client files – but how many?

LESSON 2 It appears that 10 files per adviser is a reasonable sample size to start with and 20 per cent of the advisers should be adequate. And when designing the random compliance audit, make sure that among the 10 files is at least one family member or close friend – most accidents happen closest to home.

Of some real fascination to me is the claim by ASIC that it was not atypical of dealer groups for 93 per cent of all new investment or superan-

nuation business to be invested in AMP platforms or products. To understand the allegation properly, we really need to know the break-up of the underlying platform products, but we don't. Anyway, does it matter? Since it was an AMP planner does a person really expect them NOT to promote AMP products? What this does not tell me is whether ASIC really understands the difference between a platform and a financial product. It should be the exception that a client investor administration platform is conducted in such a way that it is a financial product.

LESSON 3 Treat a platform as though it is a product, at least for compliance purposes. Much was said of the way AMPFP managed and developed its approved product list, especially the inclusion (for a while) of certain industry super funds.

LESSON 4 Put more effort into making clear to clients that your licence does not cover Australia's investment universe, but that it limits clients to a range of pre-approved financial products.

What do you do if a client has a product not on the list or it is one that is on hold? If ASIC's success in the Federal Court against John Vafiadis, AMP's former Hobart adviser, is any indication, abandon the client unless the value of the advice is worth at least \$1500 to you. In the June 2006 Vafiadis matter, the court ordered by consent that Vafiadis cover each of his five clients for up to \$1500 so that each could get legally compliant financial advice about the recommendation by Vafiadis that clients switch their superannuation from Tasplan to AMP Flexible Lifetime Super.

LESSON 5 The minimum fee for compliant financial planning advice is \$1500. Just where this leaves a large number of Australians who may not be able to afford a one-off payment of \$1500 is ... nowhere!

Life in financial planning is about to get worse. The federal parliamentary joint committee on corporations and financial services has recommended ASIC conduct a shadow shopping survey on super-switching advice in 2007 and publicly name advisers and licensees identified as responsible for repeatedly and seriously breaching the requirement to provide reasonable advice. I am just not convinced that there is a sensible view on what is reasonable advice.

LESSON 6 Abandon the lower-economic value clients. They may be among the most vulnerable and in need of advice but in a compliance context, they are too expensive.

If this is unrealistic, and it is, robust systems are needed with pro forma over-declarations that are signed off by the clients. What form should these take? When designing these, a fine line is needed. No one can afford to provide advice to a client about super switching low



values but everyone acknowledges that advice is needed. Even ASIC appears to acknowledge this in its guide on switching super funds. In June 2005, after the start its review period for the AMP, ASIC said there was no clear answer to the issue of a client who wanted to consolidate a few small super accounts. ASIC even said that it proposed consulting further with industry to see whether there were some general principles that could simplify the job of advisers in this area.

KARL HILZINGER

This is a good thing. It may mean some sense is put back into what has become an explosive area, and financial planning may become affordable or workable for the Australians who really need it.

So where are ASIC and industry up to on this important issue? I haven't heard a thing. Maybe the federal parliamentary joint committee should ask ASIC: "Where are you up to with your proposed consulting with industry on the super consolidation and low-value super switch issue? Have you followed up on your commitment of June 2005?"

From ASIC's guide, we learn its view of a low-value super switch is about \$1500. At least we now have the answer to low-value super switches: charge the client \$1500 for legally compliant financial advice! There. Problem gone.

LESSON 7 If abandoning potential clients is not your idea of a business plan, create pro forma over-declarations that are signed off by the clients that declare what they do not want from fund advice.

When doing this, take care because this is where I believe ASIC became upset with AMP. It felt that AMP set up a system to get around the super-switching requirements of section 947D, and that it did so in a systematic manner. What must be systematic is the communication to clients in very blunt terms, perhaps something along the lines of: *Legally compliant financial advice about moving your super from one fund (industry scheme or not) to another costs around \$1500. Please pay by cheque or credit card. If you do not want this, I can, for a lower fee/commission, tell you about a super fund where you can put your money but the choice for you to do so is yours. Before you do this, please be aware of and compare the projected returns, benefits and costs of continued membership of your current super plan with those of a new one. You should examine the MER, note the death benefit terms, understand the continuation options, be alive to the related body fee and commission payments, understand the binding or discretionary death and disability issues, examine the available investment classes and choice, identify the asset management skill, assess the accessibility of your information and determine whether non-super advice is also available.* Good luck! **Asset**

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