FINANCIAL PLANNING
ASSOCIATION of AUSTRALIA

FOS Terms of Reference changes

FPA SUBMISSION | DATE: 01.08.2014

1 August 2014

Consultation on proposed Terms of Reference changes
c/o Mike D'Argaville
Financial Ombudsman Service
GPO Box 3
Melbourne VIC 3001

Email: mdargaville@fos.org.au

Dear Mr D'Argaville

RE: The Financial Ombudsman Service Consultation on proposed Terms of Reference changes

The Financial Planning Association of Australia (FPA) welcomes the opportunity to provide feedback to the Financial Ombudsman Service (FOS) consultation on proposed changes to its Terms of Reference.

In developing this submission, the FPA has sought the views of its membership, including concerns and suggestions regarding the FOS Terms of Reference changes from members who have had a claim lodged against them with the Ombudsman. The FPA has considered these issues in developing our submission.

Appointment of Adjudicator

The amendment to ToR 2.5 states that the FOS Board will consider the objectivity, qualification, experience and personal qualities of Adjudicator candidates. However, neither the Operational Guidelines Updates, the issues paper, or consultation paper, provide detail as to the appropriate qualification and experience an Adjudicator should have.

The nature of financial planning is multi faceted and complex. It is based around the personal dynamics of the client / planner relationship and is not transactional as is the case with banking and insurance. The delivery and implementation of financial planning advice can involve multiple service providers and the valid and confidential exchange of information about the client. Financial planning disputes can be very subjective and complex because of the nature of the planning process and the complex personal relationships that result from the sharing of private personal and financial information. Financial planning relationships and the financial planning process employed are inherently subjective, and therefore there is always more than one *"right"* answer.

There is a very different application in financial advice disputes than those relating to banking and insurance matters which are based around set contracts and policies. FOS already recognises the differences in the various types of disputes that fall under its Terms of Reference, as evidenced by the specific provisions for general insurance disputes for example.

Those in an Ombudsman, FOS Panel, or an Adjudicator role must be appropriately qualified and experienced inline with the types of dispute they will consider.

FOS Terms of Reference changes

FPA SUBMISSION | DATE: 01.08.2014

The Operational Guidelines should include the minimum relevant qualifications Adjudicator candidates must have attained to be eligible, and the dispute types they would be eligible to consider. Financial planning disputes should only be considered by individuals who have attained the CERTIFIED FINANCIAL PLANNER® designation and have a minimum of 5 years experience in providing financial advice to consumers as an authorised representative or company director (of a small licensee).

The CFP® designation is the peak certification for financial planners globally, with some 150,000 CFP professionals operating in 24 countries around the world. To gain CFP certification, a planner must have completed an undergraduate degree, masters degree or PhD and have successfully completed all of the units of study in the CFP Certification Program. To enter the CFP program, at least three years of financial planning experience is also required. The CFP program is an advanced education program that covers the knowledge a financial planning professional must be able to draw on to deliver financial planning to clients, or when interacting with colleagues or others in a professional capacity.

Ensuring Adjudicators are appropriately qualified and experienced in the specific financial service of the dispute will give confidence to the participants in the process that a properly considered outcome will be reached.

The FPA recommends Adjudicator candidates who consider financial planning disputes must have attained the Certified Financial Planner designation and have a minimum of 5 years experience in providing financial advice to consumers as an authorised representative or company director (of a small licensee).

One-step lodgement and referral process

The FPA supports the encouragement to resolve matters through IDR and the additional benefit this process offers in relation to information gathering for disputes lodged with FOS.

Member feedback indicates that identifying the actual loss an applicant is claiming can significantly slow the disputes process and hinder the applicants understanding of the dispute process.

To ensure applicants fully understand what their potential claim figure is before they start the process, the FPA suggests applicants should lodge the loss they are claiming with the application along with supporting calculations as to how they have arrived at their loss figure. The supporting calculations should also have attached supporting documentation in regard to the figures included in the calculation

Level of FOS's monetary limits and compensation caps

The FPA notes item 4 of the Issues Paper regarding the Senate Economics References Committee's recommendation to increase and index the FOS jurisdictional limits and compensation caps.

As stated in the FOS Issues Paper, both the jurisdiction limit and the compensation caps, including the requirement to index the caps, are set by ASIC in RG139, not FOS. The FPA acknowledges the existing requirement to index the compensation caps every three years in both the FOS Terms of Reference (clause 9.8) and RG139, with the next indexation increase to occur on 1 January 2015.

However, in response to the questions asked in the FOS issues paper, the FPA would be concerned about any increase to the jurisdictional limit or the compensation cap in the absence any actuarial evidence

demonstrating a clear need for the increase. Publicly available data shows that there has been no dispute which has involved a compensation payout of the amount of the current cap of & $280,000, or even close to the current cap.

Any proposed increase of the monetary limits or compensation cap should be fully justified including undertaking claims research, developing a cost/benefit analysis, or preparing a Regulatory Impact Statement or business case study. This process would be considered standard and sound business practice and due diligence process for Government and business, and should be a fundamental requirement for making such decisions.

The FPA does not believe an evidential case has been provided to justify any monetary limit or cap increase. As stated in previous submissions, such an increase will have a significant impact on professional indemnity insurance and significantly threaten the existence of smaller financial planning firms.

Financial planners are disadvantaged by the lack of competitive, commercially available professional indemnity insurance which the Corporations Act compensation regulations rely on.

The 2012 increases, along with other factors such as market conditions, played a role in the significant increases in professional indemnity insurance premiums experienced by financial planners. The FPA is particularly concerned about the impact on professional indemnity insurance premiums and the subsequent threat to small licensees. The impact of rising professional indemnity insurance premiums poses a significant threat to the financial survival of these businesses and could lead to greater consolidation in the industry and reduced competition in the financial advice market, which would be detrimental for all stakeholders, especially consumers. If the monetary limits or compensation caps increase further, it would inevitably increase the annual professional indemnity premiums for providers.

For example, a small practice that is self licensed with a family member as the administration manager, has never had any Authorised Representatives and since commencing the financial planning business in 1987 has not received a formal complaint of any type, has provided the following data on the PII premium increases.

Period Commenced	***$ Premium***
31/03/2009	$3,642
31/03/2010	$4,620
31/03/2011	$6,948
31/03/2012	$7,903
31/03/2013	$8,884
31/03/2014	$10,092

Another small licensee with 15 representatives providing advice under his license, again with no claims lodged against his business, has recently had his PI premiums increased to $49,000. These examples demonstrate the significance of the PI costs to small financial planning businesses.

FOS Terms of Reference changes

FPA SUBMISSION | DATE: 01.08.2014

Hence, the FPA recommends any increase to the jurisdictional limit or the compensation cap should only be undertaken with the provision of clear justification for the increase, backed by impact statements and research.

Splitting claims

The FPA acknowledges the current FOS Operational Guidelines to the Terms of Reference indicate FOS's policy in relation to splitting claims related to financial advice disputes. However, feedback from FPA members indicates a lack of clarity exists in relation to what is considered one claim versus multiple separate claims in relation to ongoing advice. From a relationship and professional standards perspective, financial planners must continuously review their client's financial plan if an ongoing service has been agreed to by the client. It is a continuous process based on one financial plan. However, the scenarios in the FOS Operational Guidelines could be interpreted that each meeting with a client is a separate piece of advice, and therefore could be a separate claim.

This is a significant issue which runs counter to the EDR benchmark of fairness. The splitting of an advice dispute into multiple claims eradicates the EDR maximum claim limit. At some point, the total value of the claims becomes so great that it can bankrupt the AFSL or the financial planner, with neither having the ability to have the merits of the claim tested in a proper Court. This in turn impacts the compensation available to the client.

The FPA has been provided with examples where FOS applicants have deliberately split their claim into multiple small claims (all related to one financial plan provided by one financial planner) in order to access the free consumer complaints service FOS offers, as their overall dispute exceeded the FOS limit fourfold. The splitting of a FOS claim is particularly common in disputes involving two family members such as a husband and wife, where the total claim against the one financial plan and advice service provided to the 'couple' totals in excess of $1million.

To ensure fairness in the system, the FOS Terms of Reference should be amended to explicitly state that the FOS monetary limit applies to any one claim or multiple of claims against a financial planner from a single applicant. If FOS continues to allow the practice of breaking an applicant's claim against a financial planner into multiple claims (each with its own PII excess payment) the FOS monetary limit must also be imposed as the total value of 'any set of claims' which can be made against a financial planner, through the FOS process. Many financial planners perceive a sense of unjust that they cannot have the claims tested in an open court for such large amounts of money which can not only bankrupt either or both of the AFSL and the financial planner, but as one dispute about the one financial plan falls outside the FOS jurisdictional limit.

When large claims which exceed the FOS monetary limit are split in order to access the scheme rather than being considered though the court system, PII insurers consider the total amount of the overall claim. Such claims can result in Licensees being denied PII or experience crippling premium increases.

The FPA notes that this issue is not addressed in the proposed changes to the FOS Terms of Reference.

The FPA recommends the FOS Terms of Reference be amended to explicitly state that the FOS monetary limit applies to 'any one claim or multiple of claims from one applicants against a financial planner involving

the provision of financial advice relating to the one financial plan', to remove the ability of applicants to split one dispute into multiple claims in order to fall within the EDR monetary jurisdictional limits.

Amendments to clause 5.1 – Accountants

With the recent commencement of the Tax Agent Services regime for financial planners, the professional is now co-regulated by ASIC and the Tax Practitioners Board (TPB). The FPA is concerned about how disputes jurisdictions are identified as a result of this move to co-regulation.

Similarly, accountants are regulated by ASIC, the TPB and will also be subject to sanctions by the Accounting Professional and Ethical Standards Board (APES Board) further complicating dispute jurisdictional ownership identification for this group.

The reality of this is that a claim of negligence could presumably be prosecuted by a client in three separate and distinct manners where the complaint is related to application of a tax law. A complaint could be made to ASIC who could commence criminal negligence proceedings. The TPB could deal with the same complaint and seek civil penalties, whilst FOS could require compensation payments to be made.

We understand that ASIC and the TPB are addressing this issue by signing a Memorandum of Understanding (MOU) which will cover how cross-jurisdictional complaints (amongst other things) will be dealt with.

The FPA recommends FOS enter into an MOU with both ASIC and the TPB to address how cross-jurisdictional complaints involving financial planners or accountants will be dealt with and dispute jurisdictions are identified.

Amendment to clause 6.3 and 15.3

The FPA acknowledges the benefits in referring all complaints to the FSP for IDR response and possible resolution. It provides extra support and an additional opportunity to resolve the dispute through the IDR process, which should be encouraged. It also facilitates the gathering of dispute information from the parties.

The FPA supports the change to clauses 6.3 and 15.3 to encourage the resolution of disputes through the internal dispute resolution (IDR) process.

Amendment to clause 13.1

The FPA supports the proposed amendment to clause 13.1 which states that the Ombudsman or Adjudicator may close a dispute if they feel that the Applicant is not acting in good faith and delaying the process by failing to comply with FOS timeframes for the provision of information or a response (as detailed in the Operational Guidelines Update).

FPA member feedback would support the notion that there has been occasions where an apparent deliberate delay in response from applicant has occurred which has delayed the FOS dispute process. The amount of time taken to resolve a dispute impacts on the effort and work required by all parties, including FOS, and can increase the cost of the dispute which is 100 percent borne by the FSP, regardless of whether FOS found in favour of the applicant or the FSP.

FOS Terms of Reference changes

FPA SUBMISSION | DATE: 01.08.2014

This in turn impacts on the availability and cost of professional indemnity insurance cover for all FSPs. Financial planning licensees experience premium increases even if they have never had a dispute against them as PI insurers assess the risk of the cover based on the aggregated claims data for all financial planning disputes.

The FPA supports the amendment to clause 13.1 in the Operational Guidelines Update.

If you have any questions, please contact me on 02 9220 4500 or dante.degori@fpa.asn.au.

Yours sincerely

Dante De Gori
General Manager Policy and Conduct
Financial Planning Association of Australia[1]

[1] The Financial Planning Association (FPA) represents more than 10,000 members and affiliates of whom 7,500 are practising financial planners and 5,500 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- We banned commissions and conflicted remuneration on investments and superannuation for our members in 2009 – years ahead of FOFA.
- We have an independent conduct review panel, Chaired by Professor Dimity Kingsford Smith, dealing with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 24 member countries and the 150,000 CFP practitioners that make up the FPSB globally.
- We have built a curriculum with 17 Australian Universities for degrees in financial planning. As at the 1st July 2013 all new members of the FPA will be required to hold, as a minimum, an approved undergraduate degree.
- CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional bodies, eg CPA Australia.
- We are recognised as a professional body by the Tax Practitioners Board.