



**Credit &
Investments
Ombudsman**

External Dispute Resolution

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About CIO

- Requirement of AFSL to have both IDR & EDR (s 912A(1)(g))
- So in your interest to satisfy the client at IDR if possible
- Almost 25,000 members
 - 384 AFSL members
- Inquisitorial forum, not adversarial
 - NOT effectively a different legal forum – alternative
 - Impartial: not industry body and not consumer advocate
 - Obligation in our Rules to assist consumers preparing their complaints if necessary
 - Eg fees
 - Ensure the complaint is assessed, not just technicality

About CIO (cont)

- Not a punitive forum (although potential report to ASIC)
- Regard to 4 things
 - Relevant law
 - Applicable codes of practice
 - Good practice in the financial services industry
 - Fairness in all the circumstances
- Background

Complaints

- ASIC RG 175 says advice does not have to be perfect (RG 175.227)
 - No “improvements” after the fact
 - Obligations
 - Best interest duty (s 961B) 7 “safe harbour” steps
 - Appropriate (s 961G)
 - Incomplete/inaccurate information warning (s 961H)
 - Prioritise interests of client (s 961J)
 - AND.....“likely to be in better position” (including fees)
- Not expected to be fortune tellers
 - product failure vs advice
- RG 175 cannot avoid obligations via disclosure, notice, disclaimer (RG 175.209) – **advice must inherently satisfy your obligations**

Complaints (cont)

- Your word vs client, we don't give greater weight to one party over the other. BUT.....
- Greater requirement on **ADVICE PROVIDER/AFSL** to keep records (ASIC Pro Forma 209 and Class Order 14/923 inserting s 912G)
- Effectively client's word vs your file
- Contemporaneous information far better
- So may have kept SoAs, fact finds, FSGs etc, but may still be missing bits that "connect the dots". If file has other information to support, much better chance of successfully defending claim.....

Complaints (cont)

- **FILE NOTES!**
- Law says both planner and AFSL “jointly & severally” liable for loss
- But EDR requirement for AFSL only, not planner
- Planners generally not members
- So as far as EDR is concerned, a complaint about your advice is complaint about **AFSL**
- May not have opportunity to expand on defence
- So needs to already be in the file

Complaint example – full advice

- Client 22 yo single male, no dependants
- Income \$70,000 plus \$50,000 bonus
- Lifestyle \$50,000 pa
- Risk profile 90/10 (highest)
- (Recognise that “risk profiling” isn’t perfect, but.....)
- Existing managed funds \$300,000 “Balanced” 65/35 (carrying existing capital loss)
- Goals
 - Wealth accumulation
 - Tax minimisation
 - Protect against inflation
 - Were these really “client’s” goals?

Complaint example – full advice (cont)

- Advice
 - sell down existing portfolio & re-gear \$500,000 via margin loan (into dealer group's product)
 - \$116,000 agri, fully financed
- Client claims
 - Crystallisation of CGT loss on selling down existing portfolio
 - Loss on new recommended portfolio
 - Agri advice was inappropriate

Complaint example – full advice (cont)

- Crystallisation of CGT loss
 - Risk profile 90/10 (most aggressive available)
 - Existing allocation 65/35 across various funds: 0/100, 35/65, 80/20 and 90/10
 - No issue with selling defensive funds
 - What about existing 80/20 and 90/10 funds?
 - Planner reasons: performance, variety of choice
 - Using “performance” generally weak
 - Variety – moved to 90/10 anyway?
 - Don’t accept – simply to move to dealer group product
 - But 90/10 in existing vs 90/10 in new fund: no change to end performance
 - No fee loss
 - And crystallised capital loss itself doesn’t create actual loss
 - At worst, breach with no loss

Complaint example – full advice (cont)

- Appropriateness of gearing
 - Age 22, no dependants
 - Risk profile 90/10 – highest available
 - Goals wealth accumulation & inflation hedge
 - Affordable
 - No issue with this advice
 - What could have been better?
 - “sniff test” on bonus (\$70k base + \$50k “bonus”)
 - 22 yo, 2nd job out of university – likely?
 - But planner entitled to act on information provided
 - Ultimately gearing was affordable even at \$70,000
 - Overall, matched stage in life, risk profile, goals, affordable
 - Simply market performance

Complaint example – full advice (cont)

- Appropriateness of agri
 - Income \$70,000
 - Question mark about \$50,000 “bonus”
 - Already geared \$17,000 pa repayments
 - Recommendation \$116,000 agri fully financed
 - Considerations
 - Significant increase to asset allocation
 - Even without gearing, why so much?
 - Assume this was to 0% MTR (< \$6k)
 - But only saving 15% MTR \$6,000 - \$34,000, 30% MTR \$34,000 to \$80,000, 40% MTR \$80,000 to \$120,000
 - And already recommended gearing
 - And “bonus” uncertain

Complaint example – full advice (cont)

- Appropriateness of agri
 - Considerations
 - What have we achieved?
 - Even assuming \$50,000 bonus, \$34,000 tax saved (gearing roughly tax & cashflow neutral)
 - Spent \$116,000 to get \$34,000 tax saving (roughly 30%)
 - Not investment where you can take money back out, even at maturity – typically no secondary market
 - Only value future returns
 - Now needs to return a further 70% to break even
 - And ignores finance costs, timing of returns
 - No indication planner even understands

Complaint example – full advice (cont)

- Appropriateness of agri
 - What could have been better?
 - INDEPENDENT research demonstrating investment was expected to achieve this
 - Ratings house?
 - Maybe. But remember requirements:
 - Obligation to keep records to demonstrate (to independent third party based purely on file)
 - Inherently satisfy obligations despite any disclaimer or disclosure etc

Complaint example – full advice (cont)

- Appropriateness of agri
 - Not enough to say “you have told us you specifically want a tax effective investment in alternative assets” (while I get 10% commission)
 - More than just ratings house

Complaint example – full advice (cont)

- End result
 - No reason to sell existing & buy new.....but no loss
 - Gearing fine (despite bonus)
 - No reasonable basis for agri
 - Even more rigorous hurdle under FoFA: “likely to be in better position”
 - Result of each claim decided by looking at all claims as a whole

Complaint example – insurance

- Existing \$100,000 life in industry super
- Advice to cancel existing & \$500,000 life + TPD + CI + IP with retail

- Good:
 - Discussion
 - Why do they have existing?
 - What do they want to see happen in the event of death, TPD, CI etc
 - Demonstration of process used to arrive at recommendations
 - Justification for not keeping existing
 - S 947D requirements for replacing product: fees/charges, benefits lost, other consequences etc

Complaint example – insurance (cont)

- Existing \$100,000 life in industry super
- Advice to cancel existing & \$500,000 life + TPD + CI + IP with retail

- But what we often see:
 - Existing \$100,000 life in industry super
 - Cancel & take out \$500,000 life with retail “because you told us you wanted xyz specific feature of new policy”
 - No prior indication of “desire”
 - No discussion of requirements
 - No justification for recommended cover amount
 - Not believable or realistic



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Thank you

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