The curious case of ASIC v's Dixon Advisory and why an inquiry is needed

The Dixon Advisory scandal is huge with thousands of impacted clients and multiple hundreds of millions of dollars in losses. It will have a substantial impact on the Compensation Scheme of Last Resort. Evidently little has been done to get to the bottom of what really happened. This article addresses the legal action that has been taken against Dixon Advisory, however what it highlights is the need for something more substantial. We are calling for a public inquiry.

ASIC took court action against Dixon Advisory for breaches of the Corporations Act and issued a media release on 19 September 2022, to announce that the Federal Court had awarded a penalty of $7.2 million against Dixon Advisory plus $800,000 in costs. The media release framed this as entirely a financial advice issue, noting that "six representatives failed to act in their clients' best interests and failed to provide advice appropriate to their clients' circumstances".

Further, it noted: "In handing down judgment, Justice McEvoy remarked, 'There is no evidence that the (Dixon Advisory) representatives conducted the necessary reasonable investigations into the recommended financial products or any alternative financial products, nor is there evidence that they considered the personal circumstances of the clients."

The background section to the media release provides important context. It says: "ASIC commenced proceedings in September 2020 (20-207MR), and on 8 July 2021, ASIC and Dixon Advisory entered into a heads of agreement to resolve ASIC's civil penalty proceedings. Dixon Advisory admitted to a number of allegations on 15 October 2021".

This is somewhat remarkable. The Dixon Advisory debacle is so much more than just an advice issue, and only pursuing the advice related issues seems like a miscarriage of justice. The bottom line is that ASIC never took action against any individuals -not the advisers (who have unfairly taken the bulk of the blame), nor the executives, who were ultimately responsible for running the business.

That "Dixon Advisory was also ordered to pay ASIC's legal costs of $800,000 is an important element of the announcement for the financial advice profession. This money should have gone back into the pot, in terms of offsetting the cost of the case which was charged to the financial advice profession under the ASIC Funding Levy.

A public inquiry is essential

What really happened at Dixon Advisory and why so many Australians lost so much money (hundreds of millions) has so far remained a tightly held secret. ASIC has pursued its action, seemingly agreeing to place virtually the entire focus on a group of financial advisers, although they later agreed they would not pursue them further. A resulting class action from Shine (and more about that below) also provided little insight.

The clients of Dixon Advisory deserve better. This has undoubtedly come at a big cost to them, both financially and through the stress that it has caused. The financial advice profession, who will seemingly need to pay as much as $135 million as a result of this scandal, also deserves to know what really happened and to have confidence that everything was done to minimise the cost to them, as well as ensuring that it could not happen again.

This cannot be left where it is.

A public inquiry is essential to get to the bottom of this. There have been public inquiries in cases where the losses have been much less. The Government needs to launch a full inquiry into Dixons, including the operation of the Compensation Scheme of Last Resort (CSLR), to discover exactly what happened, and how the design of the CSLR can be improved to ensure that this never happens again.

Questions that need to be addressed

There are a number of questions about the actions of the regulator and the courts in this case that warrant further consideration, as outlined below.

1. **The Judgement in the Dixon Advisory Case**

The judgement in the Dixon Advisory case makes very interesting reading (ASIC included a link to it in its media release here). The first order is a quite amazing provision that "The plaintiff must not seek to enforce any orders for pecuniary penalties, or any costs order, made against the defendant, without first obtaining leave of the Court to do so".

Why would a regulator complete a prosecution of this nature without the intention of enforcing the penalty and collecting the costs order? Why wasn't this made clear in ASIC's media release on 19 September 2022? ASIC has publicly acknowledged on a number of occasions since, that they do not expect this penalty to be paid. Dixon Advisory was placed into administration some eight months earlier. So why proceed with this case, incurring more costs, if there was never any expectation of the fine being paid? From a financial advisers perspective, why did ASIC continue to incur costs in this matter, if it never expected to recover the costs, when it was the advisers who would pay for it. Financial advisers paid for the action, and yet stood no chance of the costs being recovered to offset the ASIC Funding Levy.

There was much more in this judgement that was of interest (and more on that, later).

2. **The original action and what changed**

The ASIC action against Dixon Advisory started some two years earlier, when ASIC issued a media release on 4 September 2020 to advise that they had commenced proceedings against Dixon Advisory on the grounds that "Dixon Advisory representatives failed to act in their clients' best interests and to provide advice that was appropriate to the clients' circumstances". It also included a further leg of the action based upon the following:

"ASIC also alleges that, in giving the relevant advice, Dixon Advisory representatives knew or ought to have known that there was a conflict between their clients' interests and the interests of entities associated with Dixon Advisory within the Evans Dixon group, and failed to give priority to the clients' interests."

It is this statement and the detail set out in the Notice of Filing, that makes it clear that ASIC initially thought that this was bigger than just a pure advice related matter. The Notice of Filing sets out in detail that Dixon Advisory and related entities received fees from the US Masters Residential Property Fund (URF) of approximately $134 million in the three and a half years from 1 January 2015 to 30 June 2018. This was an incredible amount of fees. The coverage of these fees, and what each entity received, made up a significant proportion of this document.

However, the failure to prioritise the interests of the client was strangely dropped from the ultimate outcome. In fact, the 19 September 2022 judgement included the statement that Dixon Advisory "denied any contraventions of s 961J of the Act. ASIC does not press any of the allegations of breach which DASS denies".

Why would ASIC drop this critically important part of the case that goes a long way to explain the reasons for why Dixon Advisory operated this way? It is obvious that the fees from the URF were a critical contributing factor. It is hard not to surmise that, for ASIC, it was easier to focus on the financial advice issues and not what was at the core of what really went on in Dixon Advisory and the broader group.

3. The decision to settle

The decision to settle with Dixon Advisory was set out in a media release by ASIC on 9 July 2021. This relatively brief statement does not provide any context for the decision to drop the pursuit of the breaches of the client priority obligation, and largely focuses on the decision to settle for an amount of $7.2 million, plus $1 million in costs (which was later reduced to $800,000, to the detriment of the financial advice profession, who may have benefited through a reduction in the ASIC Funding Levy as a result).

This ASIC media release included a link to an E&P Financial Group media release of the same day (Evans Dixon changed their name in November 2020 to E&P Financial Group, presumably to distance themselves from the Dixon name). E&P Financial Group, however, included the statement that "ASIC agrees to seek no further declaration of contravention in the proceedings". There was no reference to this in the ASIC media release, and it seems to have been a huge commitment to make given that the scale of the Dixon Advisory scandal, that was becoming much more apparent by that time. Why was no action ever taken against the people in charge and why did ASIC provide this commitment?

And certainly, by the time the matter was finalised in September 2022, the enormous scale of the Dixon Advisory debacle was plain for ASIC to see. It had in fact issued a media release on 3 August 2022 encouraging Dixon Advisory clients to complain to AFCA as a matter of urgency. This call was particularly successful, so much so that by 7 September 2022, AFCA had received a total of 1,638 complaints from Dixon Advisory clients. However, ASIC had seemingly given up the opportunity to take further action.

4. What the Judgement said

Now, back to the 19 September 2022 judgement. This judgement was based on the six advisers and eight example cases. Not the full list of impacted clients by any shot. Some of the facts of the case were set out in Clause 29, which included the following:

"ASIC concluded that reasonable investigations into the recommended financial products or any alternatives to them were not conducted, and that the clients' relevant personal circumstances were not considered, on the basis of the following findings:

(a) in relation to the advice that contained recommendations to acquire or roll over products:

i. there were no records indicating that any reasonable investigations into the financial products or any alternatives to them were conducted or that the relevant personal circumstances of the clients were considered;

ii. the **DASS Investment Committee** determined the recommendations according to standard parameters and a client's DASS risk profile;
iii. the representatives were only given a limited time to review the recommendations determined by the DASS Investment Committee and decide whether they should be overridden;
iv. DASS did not provide the representatives with the relevant documentation to assist with deciding whether or not the recommendation was appropriate to the client and whether or not to override it, or did so only shortly before this decision was due;"

Evidently it was the Dixon Advisory Investment Committee that decided how much each client would invest in each of the URF products and it was the advisers who were directed to implement it. This is certainly not the advice model that we are familiar with and not one that is consistent with the obligations that financial advisers have.

Clearly this was a business model with deep flaws. Importantly, the advisers were not paid any extra for recommending these in-house products, and were only told good news about the URF products.

The judgement devoted a lot of pages to the amount of the penalty. With a total of 53 contraventions, the maximum penalty was $110 million, however the judge agreed to the $ 7.2 million negotiated between ASIC and Dixon Advisory, which was just 6.5% of the maximum. This was based upon only eight clients, when there were thousands who were impacted. They clearly got off very lightly. In the end, maybe it was largely irrelevant, given that it was understood that it would never be paid.

The Judge however based this outcome on a few critical conclusions:

- 54(b) – "However, ***the conduct also did not involve dishonesty or wilful contravention of the law***".
- 54(c) - "While the contraventions had ***the potential to cause serious adverse financial impacts*** to the clients, all the entitlements have since been paid out in full, and ***there is no evidence of any detriment arising to any of the clients from the conduct***."
- 63 – "Further, a significant reduction from the prescribed maximum is warranted due to the fact that the contravening conduct did not involve any dishonesty or wilful contravention of the law by either DASS or the representatives. ***If the conduct were to be considered on a spectrum, it would not be at the most serious end***."
- 66 – "I have considered the changes made to the senior personnel in the Evans Dixon Group, and the steps already taken to facilitate future compliance with the civil penalty provisions."

But in the context of one of the biggest financial scandal in Australia in the past decade, with total losses in the multiple hundreds of millions of dollars, it is hard not to draw a somewhat different conclusion. The business model did facilitate wilful contraventions of the law. It was the investment committee that circumvented the obligations of the adviser. To suggest that there is no evidence of client detriment is remarkable, however maybe Dixon Advisory compensated the eight sample clients, but then ignored the rest.

For one of the biggest financial scandal in a decade, it is difficult to see how it was possible to conclude that it was not at the serious end of the spectrum. And finally, if this was just an advice issue, as the contraventions suggest, then why was the change of senior personnel relevant? If they did the wrong thing, then why wasn't action taken against them?

This is not a criticism of the Judge who made these statements, however he should have been better advised by the participants to the action, and most particularly the regulator who pursued this case. By mid 2022, the scale of this issue was fundamentally obvious, and certainly should have been to ASIC who had been pursing them for years.

5. Class actions against Dixon Advisory and others

On 4 November 2021, E&P Financial Group issued a media release to advise that a representative proceeding had been commenced against Dixon Advisory, E&P Financial Group and Alan Dixon. This action was being undertaken by the legal firm Piper Alderman. The media release went on to say:

In the Statement of Claim, the Applicants make certain allegations including that:

- the DASS representative failed to act in the best interests of the Applicants and the group members and therefore contravened section 961B(1) of the Corporations Act;
- DASS failed to ensure that its representatives complied with s 961B;
- DASS and its representatives owed the Applicants and the group members a fiduciary duty to avoid a conflict of interest and not to improperly use their position to gain an advantage for themselves or other group companies;
- DASS and the representatives engaged in misleading or deceptive conduct; and
- the knowledge and actions of certain former executives of the group in their roles within the group is imputed to EP1 and that EP1 knowingly induced or procured DASS to breach its fiduciary duty to the Applicants and the group members and was involved in DASS's alleged failures as described above.

Finally, it seemed, there was recognition of the real issues. This looks like they really wanted to get to the bottom of what happened at Dixon Advisory and the involvement of other parts of the group and the executives within the business. A court action of this nature was going to get to the bottom of what happened.

Subsequently on 22 December 2021, Shine Lawyers filed a competing Class Action against Dixon Advisory, E&P Financial Group, Mr Dixon and an additional director of Dixon Advisory. Evidently, as a result the Court later ordered that the Piper Alderman's Class Action be stayed until the resolution of Shine's Class Action

Unfortunately, we did not get to see the Shine Class action play out in the court either, and instead it was settled. On 17 April 2024, the Federal Court of Australia made orders approving the settlement sum of no less than $16 million in the Dixon Advisory Class Action. The Court concluded that the proposed settlement was fair and reasonable for all Group Members.

In a media release on 14 November 2023 to acknowledge the conditional settlement of representative proceeding filed by Shine Lawyers, the statement was made that "If the settlement is approved by the Federal Court, the Shine Proceeding will be dismissed against E&P, Mr Alan Dixon and Mr Christopher Brown, and permanently stayed against DASS, ***without admission of any liability***". In that same statement the E&P Financial Group revealed that $12 million of this settlement came from the PI insurer, and the cost to the E&P Financial Group was just $4 million, which they had already provided for back in 2022. There is no doubt there are thousands of financial advisers in Australia who are appalled by this outcome.

A public inquiry is essential

There is no reason why what really happened at Dixon Advisory and why so many Australians lost so much money, should remain such a tightly held secret. It is not clear why ASIC pursued an action that placed virtually the entire focus on a group of financial advisers, who it also agreed never to pursue further. Unfortunately, after showing some real promise, the class actions provided little insight either.

This can't be left here. A public inquiry is essential to get to the bottom of this.

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