

# HUGGINS LEGAL

## LITIGATION AND REGULATORY RISK UPDATE

EDITION 4 – 7 FEBRUARY 2023

### THE GENERAL ADVICE CLIENT

Welcome to the fourth edition of Litigation and Regulatory Risk Update – a newsletter for AFSL holders about developments in litigation risk (both in a Court and at AFCA) and regulatory risk.

1. **What has happened?**

An issue that often arises in AFCA complaints is whether a retail client has been given general or personal advice. AFCA almost invariably finds that personal advice was provided which puts the AFSL holder in a difficult position both with respect to defending the complaint and with respect to regulatory issues.

2. **What do I need to know about this?**

Some AFSL holders operate on the basis that they treat some retail clients as only receiving general advice and others as receiving personal advice. Other AFSL holders operate on the basis that they only provide general advice to clients (that is, they do not provide personal advice to any clients).

It is, of course, possible to only provide general advice to retail clients but this type of business model works best when clients are only receiving generic (that is the same document is provided to every client) written communications (the most obvious example being a Research Report) that clearly do not take account of a particular client's objectives, financial situation and needs. When advisers are speaking to clients or otherwise communicating with them by text or e-mail (specifically addressed to the client) it is much more difficult to establish that only general advice has been provided.

The reason for this is that the threshold as to whether personal advice has been provided is very low – where a reasonable person might expect the adviser to have considered one or more of the client’s objectives, financial situation and needs. As a practical matter, where an adviser has multiple interactions with a client over an extended period, AFCA will draw the inference that personal advice has been provided because during these interactions the adviser has consider one or more of the client’s objectives, financial situation and needs and has provided advice in that context. This is an inference that is generally drawn by AFCA but it will be bolstered where, for example:

- (1) there are long telephone calls between an adviser and a client (in the usual case call records will be produced by the adviser or the AFSL holder that show the duration of calls) – if an adviser has spoken to a client for 20 minutes AFCA will inevitably draw the conclusion that personal advice was provided during the call;
- (2) there is documentary evidence such as texts or e-mails that make statements that could be interpreted as amounting to personal advice; or
- (3) the client makes the allegation that they thought that they were receiving personal advice and relied upon what they were told (this is often a spurious allegation based upon a reconstruction of events but without documentary evidence to the contrary, it can be difficult to refute).

Issues about whether personal advice has been provided (when the AFSL holder says that only general advice was provided) make it much more difficult to defend AFCA complaints in that:

- (1) AFCA tends to incorrectly run together regulatory issues and issues about the quality of advice – that is, when AFCA forms the view that personal advice was provided in contravention of the Corporation Act it will draw the conclusion that the advice was inappropriate (even though these are separate issues – non-compliance with the Corporations Act about the provision of personal advice does not turn what was otherwise good advice into bad advice);
- (2) once issues about non-compliance with the Corporations Act are raised, AFSL holders can be pressured into settling a matter (that they might have otherwise defended) so as to avoid the risk that AFCA will issue a Determination that states that the AFSL holder has failed to comply with the Corporations Act; and
- (3) issues about whether a client was actually a retail client can lead to a wider dispute about whether the AFSL holder was managing a portfolio of assets (rather than providing advice on an investment by investment basis) which, in turn, can have significant implications for the potential value of the complaint – for example, the complaint initially concerns a dispute about one investment but the debate then shifts as to whether the AFSL holder has failed to properly manage a portfolio of investments over a lengthy period.

### 3. **What should I do?**

From a purely risk management perspective, a business model that involves the provision of general advice to retail clients (unless that advice is provided solely in a written form on a generic basis) has a very high level of risk associated with it and should therefore be avoided. However, from a commercial perspective this type of business model has significant advantages in terms of the lower costs that are associated with it (and it is preferred by clients who do not wish to go through the process that is required to provide compliant personal advice). In this regard, some ways of managing this risk are as follows:

- (1) **accept that over time general advice clients will become personal advice clients and treat them as personal advice clients at that time** – initially, it may be possible for an adviser to only provide general advice to a client but over time this becomes increasingly more difficult to do (as inevitably the adviser will become aware of the client's objectives, financial situation and needs and AFCA will form the view that personal advice has been provided to the client). AFSL holders should treat a client as being a personal advice client as soon as any issue could arise as to whether personal advice has been provided;
- (2) **don't rely upon general disclaimers** – some AFSL holders rely upon general disclaimers in FSGs or other documents that are given to clients to the effect that only general advice will be provided. These types of disclaimers are of no practical use – general disclaimers will not alter what has occurred – if personal advice has been provided that is what has occurred and a general disclaimer will not alter that fact;
- (3) **be careful in written communications** – AFCA largely decides matters on the basis of documentary evidence – advisers need to be careful to not make statements in e-mails or text messages that could amount to the giving of personal advice; and
- (4) **advisers need to understand what is general advice and what is personal advice and the context in which this issue arises** – in my experience many advisers are unaware as to how low the threshold actually is for personal advice to be provided in circumstances where they don't appreciate that disgruntled clients will inevitably allege that personal advice has been provided and will reconstruct what has occurred so as to suit this narrative – for example, by alleging that they were an unsophisticated investor who was reliant on the adviser to make investment decisions.

If you would like to discuss any of the issues raised in this Update please, of course, don't hesitate to contact me.

Regards,

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## **HUGGINS LEGAL**

### **CAPABILITY STATEMENT**

Huggins Legal has expertise in the following areas:

1. AFCA complaints concerning financial planning, stockbroking, finance broking, irresponsible lending, insurance and superannuation.
2. Financial services related litigation including disputes with advisers and disputes concerning financial services related commercial transactions.
3. Management of issues concerning adviser misconduct including breach reporting.
4. Management of issues concerning client complaints including providing advice about internal dispute resolution, breach reporting and remediation.
5. ASIC investigations.
6. AFS licensing.
7. Financial services related compliance including issues concerning the ASIC Market Integrity Rules and drafting/reviewing SOAs, FSGs and PDS'.
8. Financial services related commercial work.
9. AML/TF advice and reviews.

Huggins Legal acts for clients across Australia.