

## TOWNSENDS BUSINESS & CORPORATE LAWYERS

GENERAL COMMERCIAL | FINANCIAL SERVICES | FRANCHISING & BUSINESS EXPANSION | DISPUTE MANAGEMENT | ESTATE PLANNING | SUPERANNUATION



- ▶ HOME
- ▶ ABOUT US
- ▶ E-FORMS
- ▶ SMSF GEARING
- ▶ ADVICE GUIDES
- ▶ SEMINARS
- ▶ NEWSLETTERS



REGISTER HERE  
for our BS&E Seminars

### BLB NEWSLETTERS | BUSINESS LAW BRIEF

LATEST ISSUE - BLB NEWSLETTER - JANUARY 2010

### FINANCIAL SERVICES

## FOS BEATS RIPOLL IN RAISING THE STANDARD

I love the FOS Determination 18959 also known as the Basis Capital Case. Determination 18959 came as somewhat of a shock to the industry in the way that it outlined a higher standard of care required of financial planners than many thought was the case. It did so six months before the Ripoll Inquiry purported to do so.

Is Determination 18959 good law? Well it's actually not law at all. FOS after all is not a court. But because it is the decision of the largest approved external dispute resolution scheme in Australia it tells its members what standard FOS expects them to achieve if they are to avoid a binding compensation award of up to \$150,000 (\$280,000 after December 2011).

And although FOS is not a court, it cannot ignore the law as expressed by the courts, particularly in cases which have interpreted and given substance to legislative and common law principles. The Basis Capital Case therefore grounds much of its finding on existing case law. To the extent that it has a slightly different slant on things than a court (which FOS is entitled to do under its constitution as a private complaints resolution service) it reflects industry best practice. Such practice would be admissible in a court to inform of how an adviser's performance should be measured.

So why did it provoke claims that civilization as we know it was coming to an end as a result of the decision? When you think you're doing a good job and someone points out that actually you are not, it can be a bit of a shock.

The facts of the case are long and detailed but can be summarised for our purposes like this. The complainant ('C') sought advice in his capacity as trustee of his SMSF. The planner sent him to an external risk assessor. The planner had C sign a standard contract which outlined what the planner would provide including "regular ongoing monitoring of ... investments". The planner recommended the Basis Yield Fund which was on the planner's licensee's approved investments list. He gave C a copy of the PDS. He reviewed the portfolio every six months. The Basis Yield Fund failed. C claimed compensation from the planner on the basis that the recommendation was not appropriate and for breaching s.945A of the Corporations Act.

We cannot review here every finding of FOS's 49 page decision but we can summarise some of the more interesting.

- Advisers cannot abdicate their responsibility for assessing products to research houses or their licensees. The adviser must get a real personal understanding of the products they recommend.
- Advisers cannot comply with s.945A by simply outsourcing the risk profiling of their clients to a third party. The consideration of the risk profiler's report is just one more piece of the investigation that the adviser needs to conduct if it is to 'know the client' to the necessary level.



SUPERCentral is an automatic SMSF document management service that saves time and money. [more...](#)

### NOTICE BOARD

- Sep 30, 2010 - HOW TO SPEAK 'NU ZILLAND'
- Sep 30, 2010 - DISPUTE RESOLUTION CLAUSES
- Sep 30, 2010 - NEW DEVELOPMENTS IN SMSF GEARING
- Sep 30, 2010 - SPECIAL DISABILITIES TRUST UPDATE
- Sep 30, 2010 - EMPLOYER'S CONSIDERATIONS ON REDUNDANCY

- Advisers must exercise their own judgement in discerning good products from bad and cannot transfer that obligation to their licensee. In particular the fact that the product is on the licensee's approved product list does not relieve the adviser from any responsibility to investigate the product thoroughly.
- Advisers should not state that they are "monitoring" investments unless they are in fact doing considerably more than conducting regular reviews. There is no point in an adviser saying that they have met the required standard of care by following industry practice of reviewing portfolios six monthly if they have promised the client something more – that they will 'monitor' the product.
- Advisers need to read third party reports carefully and be sure they understand them properly and implement them effectively. The Planner organised the wrong risk profile (namely of the individual rather than the client in their capacity as trustee of the SMSF), did not fully understand the report and applied and implemented an incorrect risk profile. He also did not understand the research and was not able to advise the client effectively as a result.
- Advisers must explain products to their clients clearly so that the client can provide informed consent. The adviser cannot rely on the fact that all the relevant information may be contained in the product's PDS. It is well known that clients are not able to effectively read and understand a standard PDS and the adviser's role is to assist the client in that task by understanding it themselves and fully explaining the issues to the client (including both the product's risks and whether the product is therefore within the client's risk profile). To the extent that the adviser fails to properly advise and explain they remain liable to the client.

Where Ripoll will take us is anyone's guess but currently Determination 18959 provides a good outline of what is required of a Planner.

For further information regarding the Ripoll Enquiry or your obligations as an Adviser, please contact Peter Townsend of **TOWNSENDS BUSINESS & CORPORATE LAWYERS** on **(02) 8296 6222**.

[>>Back](#)