



The record of advice serves as vital evidence

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The FAIS Ombud plays a significant role in guiding the financial services industry and financial services providers should embrace every opportunity to learn from it.



Since the inception of the Financial Advisory and Intermediary Services Act, 2002 (FAIS Act) until the end of March 2006 the total number of complaints received by the Office of the FAIS Ombud amounts to 3 672. Therefore, apart from the Act *not* making provision for the Ombud's Office to offer legal advice to financial services providers one can easily understand why the FAIS Ombud is focusing on the job at hand rather than spending time on "training or guiding" the financial services industry on FAIS related matters.

In view of the aforementioned I do believe that when financial services providers get the rare opportunity to listen to a presentation by the FAIS Ombud,

Charles Pillai, they should grab every opportunity to learn from the case studies discussed during such sessions. One such opportunity was the Retail Financial Services Africa Conference hosted by the Institute for International Research in Johannesburg in March 2006. During his address Pillai re-confirmed a number of vital principles that financial services providers just cannot afford to miss. In my view the most significant issues highlighted by him include the following:

Ways to reduce risk of complaints

- Make excellence your hallmark;
- Thoroughly know the FAIS Act and comply;
- Be committed to life-long learning;
- Build rewarding relationships with your

client through espousing the principles of *ubuntu*. (Also see article on p 10.)

What is the essence that the FAIS Ombud's Office look for when evaluating cases?

• The contractual or other legal relationship between the parties

This is consistent with the required application by the FAIS Ombud in terms of sections 20(3) of the Act and 3(1)(d) of the General Code of Conduct (among others);

• The provisions of the FAIS Act

In other words, did the financial services provider comply with the Act and its subordinate measures in general, but with specific reference to:

- (a) Seeking relevant and available information in order to determine the financial needs and objective(s) of the client¹.
- (b) Conducting an analysis².

It must be clear that the adviser applied his/her mind in the interest of the client.

- (c) Identifying appropriate financial products that serve the interests of the client².
- (d) Adequate disclosures of relevant and material information⁴ in a manner that will enable clients to make well-informed decisions⁵ and that will avoid misrepresentation.

Non-disclosure is one of the main reasons for non-compliance with the Act.

- (e) Keeping adequate records⁶.

Pillai said: "Cases are won or lost based on facts. If we have the right evidence, chances are slim for us to find against the financial services provider. Poor record-keeping is at the centre of our determinations".

What is equitable in all the circumstances?

Once again, this aspect is consistent with the required application in terms of section 20(3) of the Act.

It is what we learn from the message of the FAIS Ombud and how we implement the solutions based on the message that will determine our success or failure under FAIS. I believe that one of the most important messages that we should listen to very carefully is the fact that poor record-keeping is at the centre of the FAIS Ombud's determinations. The only conclusion I can come to is that, as an industry, our records of advice as prescribed in the Act⁷ and the General Code of

Conduct⁸ currently offers little or no substance.

A provider must ... maintain a **record** (*put in writing or other legible shape, represent in permanent form, report of proceedings before court⁹ written account, of something that is kept so that it can be looked at and used in the future, keep account, to keep a permanent account of facts or events by writing them down, filming them, storing them in a computer*)¹⁰ **of the advice** (*any recommendation, guidance or proposal of a financial nature regarding a financial product*)¹¹ furnished to a client, ... which record must reflect the basis on which the advice was given,¹² **and in particular-** (a) a **brief summary** (*a brief account, ¹³ short statement that gives only the main points of something, not the details*)¹⁴ **of the information** (*what is told, items of knowledge¹⁵ facts or details about something*)¹⁶ **and material** (*important, essential, ¹⁷ things that are needed in order to do a particular activity*)¹⁸ **on which the advice was based;** (b) the **financial products**¹⁹ which were considered; (c) **the financial product or products²⁰ recommended** (*advised, course of action, that thing should be done, ²¹ to advise a particular course of action*)²² **with an explanation** of why the product or products selected, is or are likely to satisfy the client's identified needs and objectives

A critical analysis of the "Client Advice Record" or Advice Record

After analysing as many "Advice Records" generally used by financial services providers as I could find I simply have to place the following on record:

- Beware of depending on a mere tick-box template and a free-hand document that does not offer any substance;
- if there is one document that could offer you the biggest protection under FAIS, this is the one and for this reason you are advised not to take any short cuts here; and
- take the time and effort to implement the best solution here, not the easiest.

What should be contained in the summary of the information and material on which the advice was based?

In my view a record of advice cannot merely be an index of activities. It is supposed to serve as *prima facie* evidence of relevant and material²³ information disclosed to the client to enable him/her to make a well-informed decision. The following framework within the advisory and

intermediary services process should be regarded as relevant and material and should therefore be included in the report or proposal:

1. The financial objective(s)²⁴

2. The key features of the recommended financial product(s)²⁵

This is nothing new. Financial services providers have been disclosing product features and benefits to clients forever. Many of these benefits are usually contained in the quotations provided by the product suppliers. Since the introduction of the FAIS act the following statutory disclosures have to be made with specific reference to product features:

- A reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transaction to a client, and generally make full and frank disclosure of any information that would reasonably be expected to enable the client to make an informed decision²⁶.
- whenever reasonable and appropriate, provide to the client any material contractual information and any material illustrations, projections or forecasts in the possession of the provider²⁷.
- in particular, at the earliest reasonable opportunity, provide, where applicable, full and appropriate information of the following²⁸:
 - (i) Name, class or type of financial product concerned;
 - (ii) nature and extent of benefits to be provided, including details of the manner in which such benefits are derived or calculated and the manner in which they will accrue or be paid;
 - (iii) where the financial product is marketed or positioned as an investment or as having an investment component-
 - (aa) concise details of the manner in which the value of the investment is determined, including concise details of any underlying assets or other financial instruments;
 - (bb) separate disclosure of any charges and fees to be levied against the product, including the amount and frequency thereof and, where the specific structure of the product entails other underlying financial products, in such a manner as to enable the client to determine the net investment amount ultimately invested for the benefit of the client; and
 - (cc) on request, information concerning the past investment performance of the

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