

Draft Future of Financial Advice Bill Tranche 2

Joint Consumer Submission
(funded by ASIC's Consumer Advisory Panel)



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Joint Consumer Submission

Introduction

1. This is the Joint Consumer Submission in response to the Government's consultation on the Exposure Draft Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011, released 28 September 2011 (draft Bill). A list of individual consumer representatives and consumer organisations (consumer representatives) consulted during the development of this Joint Consumer Submission is set out in paragraphs 36 and 37 below.
2. The consumer representatives welcome the opportunity to comment on the draft Bill. They strongly support the objectives of the Future of Financial Advice reforms, namely, to improve the quality of financial advice, build trust and confidence in the financial planning industry, and facilitate access to financial advice through the provision of simple or limited advice.
3. However, the consumer representatives do have a number of concerns about the draft Bill. In particular, they are concerned about:
 - the limited scope of the ban on asset-based fees on geared funds (see paragraphs 5 – 10 below);
 - the uncertainty and limited scope of the ban on shelf-space fees paid to platform operators (see paragraphs 11 – 15 below); and
 - the breadth of the carve-outs from the definition of 'conflicted remuneration' (see paragraphs 16 – 24 below).

If these issues are not addressed the Future of Financial Advice reforms may not achieve their stated objectives in relation to most consumers.

4. The submission also sets out, in paragraphs 25 – 35 below, a number of other issues that the consumer representatives feel should be addressed in order to ensure that, when

implemented, the Future of Financial Advice reforms deliver real and significant benefits to consumers.

Limited Scope of the Ban on Asset Based Fees

What is the problem?

5. As currently drafted the ban on asset based fees on geared funds, in proposed s964F and 964G,¹ will still allow extensive use of asset based fees by financial advisers to the potential detriment of retail clients. Moreover, the proposed ban does not reflect the policy position announced by the Government. Previously, the Government has said that advisers would be prevented from charging asset based fees if any part of the client's portfolio was geared: see *The Future of Financial Advice: Information Package*, released 28 April 2011.
6. From a consumer perspective asset based fees are objectionable. They bear no relationship to the work actually done by the financial adviser and operate like commissions, ensuring that the financial adviser is paid a certain proportion of the client's assets regardless of the amount of work done by the financial adviser or the quality of that work. Research conducted by Rice Warner Actuaries in May 2011 showed that when an adviser used a commission or asset based fee remuneration model the cost of advice was 3 to 18 times the cost of similar advice provided by an adviser that used a fee-for-service remuneration model.² The higher fees paid by clients whose advisers used a commission or asset based fee remuneration model will obviously erode the wealth of these clients.
7. Asset based fees create conflicts of interests or incentives that may encourage the adviser to give poor quality advice. They bias advice away from strategic advice, such as personal debt reduction, towards recommendations to acquire products from which an adviser can extract an asset-based fee. They do not provide an incentive to provide ongoing services to the client because the financial adviser is paid regardless of the

¹ Unless otherwise stated, all proposed section references are references to provisions in Schedule 1, item 11 of the draft Bill.

² Rice Warner Actuaries, *Value of IFFP Advice – Industry Super Network* (May 2011) available at <http://www.industrysupernet.com/wp-content/uploads/2011/05/ValueofAdvice-ReportMay2011.pdf>

services provided. Asset based-fees have driven business models, such as Storm financial, which lead to poor outcomes for consumers.

8. The consumer representatives understand that the Government may have departed from its announced policy position that advisers would be banned from charging asset based fees if any part of the retail client's portfolio was geared because of a fear that advisers would respond to this ban by creating two portfolios for retail clients, one with geared funds (which would not attract asset based fees) and one with ungeared funds (which could attract asset based fees.) The consumer representatives note that this fear is groundless because the practice of artificially splitting a client's portfolio to avoid the application of the ban on asset-based fees could well be a breach of the anti-avoidance provision in proposed s965. Therefore, advisers are highly unlikely to adopt such a practice and, if they did, ASIC could take action under proposed s965.

What is the solution?

9. Proposed s964F(1) should be amended to provide: 'The financial services licensee must not charge an asset based fee if geared funds have been, are or will be used to acquire financial products by or on behalf of the client to which the advice relates. However, the financial services licensee may charge asset based fees if all borrowed funds have been repaid at the time the fee is charged.'
10. Proposed s964G(1) should be amended to provide: 'A representative of a financial services licensee must not charge an asset based fee if geared fund have been, are or will be used to acquire financial products by or on behalf of the client to which the advice relates. However, the representative may charge asset based fees if all borrowed funds have been repaid at the time the fee is charged.'

Uncertainty and limited scope of the ban on shelf-space fees

What is the problem?

11. The consumer groups strongly support the ban on shelf-space fees, that is, payments to platform operators by product providers (ie product issuers or sellers) that are made solely to ensure that products are placed on a platform or that they receive preferential treatment on a platform. Most new investments made by financial advisers on behalf of

clients are made through platforms.³ In this environment, shelf-space fees, which influence the products available through platforms and the treatment of those products, can clearly significantly influence the range of products that are recommended to retail clients by financial advisers and, ultimately, distort financial product advice.

12. Unfortunately, for the following reasons, the draft Bill fails to ban all such distorting shelf-space fees:

- payments to platform operators by unlicensed product providers will not be caught by the ban because, as currently drafted, proposed s964A only deals with benefits paid by a financial services licensee or an RSE licensee. (Product providers will not have an Australian financial services licence if they are relying on the exemption from licensing in s911A(2)(b) *Corporations Act 2001*);
- arguably, payments in relation to products other than managed funds will not be caught by the ban because of the use of the term ‘funds manager’ in proposed s964A and s964B. Financial products, other than managed funds, are sold through platforms. For example, life insurance or debentures may be sold through a platform;
- as currently drafted, the ban is not triggered if financial products are sold, rather than issued, through the platform because of the limited scope of proposed s964A(1)(b)(ii), 964A(1)(b)(c)(ii) and s964B(1(a));
- the ban does not prevent non-volume-based benefits paid to secure placement or preferential treatment on a platform, even though such non-volume-based benefits may be as objectionable as volume-based benefits. Flat fee payments, especially if very large and bearing no relation to the costs of the platform operator, could easily distort product recommendations given to retail clients. For example, the payment of such a fee by a debenture issuer may lead to increased recommendations to acquire the debentures issued by the debenture issuer, in much the same way that, in the past, high commissions have led to recommendations to acquire certain debentures.

³ In 2008, approximately 78% of new investments placed by financial planners was through platforms according to Investment Trends, *2008 Planner Technology Report*, cited on p.38 of ASIC’s submission to the Parliamentary Joint Committee on Corporations and Financial Services’ Inquiry into Financial Services and Products in Australia. Available at http://www.aph.gov.au/senate/committee/corporations_ctte/fps/submissions/sub378.pdf.

13. The consumer representatives also note that it may be difficult for regulators and others to identify which discounts and rebates on amounts paid by platform operators to product providers are banned by proposed s964B and which are permissible. This may lead to uncertainty and inconsistency in the application of the ban on shelf-space fees.

What is the solution?

14. The problems identified in paragraphs 12 and 13 above can be fixed by:
- re-drafting proposed s964A(1)(a) as follows: ‘a monetary or non-monetary benefit is given by an issuer or seller of a financial product (the *product provider*) to a financial services licensee or an RSE licensee (the *platform operator*)’ and changing subsequent references to ‘funds manager’ to ‘product provider’;
 - re-drafting proposed s964A(1)(b)(ii) as follows: ‘a facility through which financial products are issued or sold’;
 - re-drafting proposed s964A(1)(c)(ii) as follows: ‘financial products in which the product provider deals (also the *product provider’s financial products*) are issued or sold through that facility’;
 - including within the scope of banned benefits all shelf-space fees, not just volume-based shelf-space fees. This could be achieved by:
 - amending proposed s964B so that it is a definition of ‘shelf-space fees’;
 - defining shelf-space fees in proposed s964B to include ‘any benefit provided by a product provider to a platform operator, other than:
 - i. fees for services provided by the platform operator which reasonably represents the market value of those services;
 - ii. the purchase price for property which reasonably represents the market value of the property; and
 - iii. genuine education or training benefits’.
 - amending proposed s964C and 964D so that they ban receipt of shelf-space fees;
 - the uncertainty in the application of proposed s964B could be dealt with by requiring that discounts on, or rebates of, amounts payable by platform operators to product providers are only permissible if they are fully passed on to the end consumer of the

financial product. This will allow clear identification of permissible discounts and rebates.

15. If the Government does not make the changes referred to in paragraph 14 above, or if the Government decides to further restrict or abandon the ban on shelf-space fees, the Government should, at least:
 - ensure that there is on-going, public disclosure (eg on a publicly accessible website) of all payments by product providers to platform operators; and
 - provide that discounts on, or rebates of, amounts payable by platform operators to product providers are permissible only if they are fully passed on to the end consumer of the financial product.

Breadth of carve-outs from ‘conflicted remuneration’

What is the problem?

16. As currently drafted, some of the carve-outs from the definition of ‘conflicted remuneration’ will significantly undermine the ban on receipt of conflicted remuneration and, consequently, retail clients may still receive financial product advice tainted by conflicted remuneration.
17. The carve-out for information technology software or support provided by product providers, in proposed s963B(d), is excessively broad. It covers software or support services that are ‘related’ to advice in relation to the product provider’s products. ‘Related’ is a very broad concept and, therefore, as currently drafted, the carve-out might allow the provision to financial advisers of, for example, Microsoft Office, expensive practice management and advice expert software like COIN which is not product or platform specific (<http://macquarie.com.au/mgl/au/advisers/grow-business/planning-software/coin>) and all routine information technology support services.
18. The carve-out, in proposed s963C(b), for monetary or non-monetary benefits given to employees of ADIs as remuneration for work done when recommending basic banking products may encourage mis-selling of basic banking products. There is no clear rationale for this carve-out. The consumer representatives do not accept that the argument that basic banking products are simple, well-understood products justifies this

carve-out. The consumer representatives note that (unlike insurance products) there is no need to encourage sales of basic banking products and that basic banking products, which can include term deposits of up to 5 years, can and have been mis-sold to consumers.⁴

19. Whilst the consumer representatives do not support the payment of commissions in relation to financial products, they acknowledge that the Government has decided to permit commissions in relation to general and most life risk insurance products. The consumer representatives, however, wish to stress that they have strong reservations about the decision to permit commission payments in relation to consumer credit insurance (CCI). Numerous studies have shown persistent and significant mis-selling of CCI.⁵ The most recent study, ASIC Report 256 *Consumer credit insurance: A review of sales practices by authorised deposit-taking institutions* (October 2011), identifies the following sales practice deficiencies:

- consumers not being aware that they have purchased CCI or that CCI is optional;
- consumers not being asked whether or not they wish to purchase CCI;
- consumers not being eligible to claim on all components of the CCI they have purchased;
- the potential for consumers to be pressured or harassed by sales staff; and
- consumers not understanding the cost or duration of the CCI policy.⁶

Commissions paid to those who sell CCI are significant. ASIC Report 256 found that commissions were close to, but not more than, 20% of the premium for the CCI product.⁷ It is reasonable to conclude that commissions are one of the drivers for such mis-selling.⁸ In light of this, the consumer representatives are concerned that the decision to allow financial advisers to continue to receive benefits in relation to CCI is likely to lead to continued misconduct in relation to this product.

⁴ For information about practices in the term deposit market that lead to consumer detriment see ASIC Report 185 *Review of term deposits* (February 2010).

⁵ The most recent study is ASIC Report 256 *Consumer credit insurance: A review of sales practices by authorised deposit-taking institutions* (October 2011). See also the studies referred to in footnote 2 of that report.

⁶ ASIC Report 256 *Consumer credit insurance: A review of sales practices by authorised deposit-taking institutions* (October 2011), p.18.

⁷ ASIC Report 256 *Consumer credit insurance: A review of sales practices by authorised deposit-taking institutions* (October 2011), p.17. The maximum commission payable is capped at 20% by the National Credit Code.

⁸ See, for example, ACCC *Consumer Credit Insurance Review: Final Report* (July 1998), especially Section 3.

20. The consumer representatives acknowledge that the life insurance market is very competitive and that life risk insurance products are constantly being reviewed and improved. In these circumstances, a financial adviser's recommendation to move a client into a new life risk insurance product may well be in the client's best interests. Nevertheless, the consumer representatives believe there is some mis-selling and churning of life risk insurance. They are concerned that the carve-out for life risk insurance commissions, in proposed s 963A(1)(b), may exacerbate this problem, especially as, after the commencement of the draft Bill, life risk insurance will be the product that is most likely to provide financial advisers with commission income.

What is the solution?

21. The carve-out for information technology software or support provided by product providers, in proposed s963B(d), should be modified so that proposed s963B(d)(ii) reads 'the benefit is integral or essential to the provision of financial product advice to persons as retail clients in relation to the financial products issued or sold by the benefit provider only.' The Explanatory Memorandum should further explain that this carve-out does not allow the provision of standard information technology software and support used in the operation of any financial advice business.
22. The carve-out, in proposed s963C, for monetary or non-monetary benefits given to employees of ADIs as remuneration for work done when recommending basic banking products, should be deleted.
23. The Government should consider removing benefits paid in relation to CCI from the carve-out in proposed s963A(1)(a) and 963B(a).
24. The Government has said that it will introduce a 'claw-back provision enabling life insurance companies to recover some or all of the commission paid if a policy turns over early': The Hon Bill Shorten MP, *Future of Financial Advice Reforms – Draft Legislation* Media Release No 127, 29 August 2011. However, this claw back provision not yet been released and so, at this stage, it is difficult to assess the extent to which it will prevent mis-selling and churning of life risk insurance. The consumer representatives note that they support this proposed claw-back provision and believe that

the Government should consider expanding this provision to enable ASIC and clients to seek a remedy in any case of mis-selling of life insurance and, possibly, CCI.

Other Issues

Ban on conflicted remuneration

25. **(Use of term ‘investments’)** Section 963(2)(c) refers to benefits which are dependent on the total value of ‘investments’ made by a retail client. The provision should be amended to refer to ‘financial products’ rather than ‘investments’. ‘Investments’ is a narrower term and would not cover risk products, such as derivatives, or facilities for making non-cash payments.

Ban on benefits from product issuers or sellers

26. **(Breadth of the carve-out for fees for services in s964(2)(a))** The carve-out from the ban on benefits given by product providers in proposed s964(2)(a) is very broad. Traditional commission payments could be characterised as fees for distribution of financial products and permitted under this carve-out. The consumer representatives recognise that, given the breadth of the ban on payments by product providers, some sort of carve-out for fees for services is necessary. Nevertheless, the consumer representatives ask that the Explanatory Memorandum be amended to specifically state that proposed s964(2)(a) is not intended to permit the continued payment of traditional commissions by characterising them as fees for distribution.

Ban on asset based fees on geared funds

27. **(Inherently geared products)** The ban on asset based fees does not set out how the ban will apply to inherently geared financial products such as warrants. The ban should be amended so that it is clear that it applies if these sorts of products are acquired by the retail client. (If, contrary to the suggestion in paragraphs 9 and 10 above, the ban only applies to the proportion of the client’s portfolio that is geared, then the ban should be amended so that it is clear that asset based fees can only be charged by reference to the client’s equity in inherently geared products.)
28. **(Definition of asset based fee)** An asset based fee is defined as ‘a fee that is dependent on the amount of funds used or to be used to acquire financial products by or on behalf of

the client’: see proposed s964H. This definition is too narrow and will not capture asset based fees that are calculated by reference to the value of the client’s investment at the time the fee is charged (as opposed to the value of the client’s investment at the time of first acquisition). The definition should be broadened to include ‘a fee that is dependent on the value of the client’s assets’.

29. **(Fees charged by representatives other than authorised representative)** As currently drafted the ban does not apply if the fee is charged by a representative other than an authorised representative. Although it is unusual for representatives other than authorised representatives to directly charge fees, this may occur. Therefore, proposed s964G should be widened to refer to fees charged by any representative. If considered necessary representatives other than authorised representatives could be given a defence if they were directed to charge the fee by their licensee and an obligation could be imposed on licensees to take reasonable steps to ensure that their representatives (other than authorised representatives) do not charge asset based fees on geared investments.

Anti-avoidance provision

30. **(Guidance)** The consumer representatives believe that the anti-avoidance provision is a crucial component of the Future of Financial Advice reforms. Given the novelty of the provision in financial services regulation, industry should be given clear guidance on what might constitute a breach of the provision. The Explanatory Memorandum should be amended to include examples of conduct that will constitute an anti-avoidance scheme (eg splitting a client’s portfolio to avoid the ban on asset based fees; making banned payments through third parties). Further, ASIC should publish regulatory guidance on its approach to enforcement of the anti-avoidance provision and examples of conduct it considers will breach the anti-avoidance provision. This guidance is likely to have a significant impact on industry behaviour.
31. **(Subsection (b) and ability to act to prevent schemes)** Proposed s965(b) should be deleted. The effect of this provision is that a breach of proposed s965 will only be committed when the avoidance scheme has achieved its purpose. This provision will make it difficult for ASIC to take appropriate action to prevent an avoidance scheme being carried out. (The second part of proposed s965(b) (ie ‘apart from this section,

would achieve, that purpose’) is, as the provision is currently drafted, otiose because the anti-avoidance provision has no effect on validity or effectiveness of an avoidance scheme. Even if the recommendation in paragraph 32 below is accepted and proposed s965 does affect the validity of an avoidance scheme, proposed s965(b) should still be deleted because it assumes that a breach does not occur until that point in time when the purpose of the avoidance scheme has been or (subject to the effect of the anti-avoidance provision) would have been achieved.)

32. **(Effect of breach of anti-avoidance provision)** Proposed s965 should, subject to necessary protections for innocent third parties, render void schemes entered into for the purpose of avoiding the Future of Financial Advice reforms. This amendment would prevent parties to such schemes enforcing them.
33. The consumer representatives note that the changes referred to in paragraphs 30 – 32 above should be made to the anti-avoidance provision in the Corporations Amendment (Future of Financial Advice) Bill 2011 introduced into Parliament on 13 October 2011 and the accompanying Explanatory Memorandum.

General drafting issues

34. **(Giving and accepting)** Throughout the draft Bill reference is made to giving or accepting benefits. This language is too narrow as it may be interpreted as requiring knowing giving or acceptance of the benefit. It would be preferable to use broader, passive language, such as ‘give, provide or otherwise make available’ and ‘accept, receive or obtain’.
35. **(Related parties)** The draft Bill does not cover:
 - the provision of banned benefits by related parties of the relevant product provider, nor
 - the receipt of banned benefits by related parties of the relevant financial adviser or platform operator.

However, in many circumstances such benefits may distort the quality of advice. Each relevant provision of the draft Bill should be amended to capture payments by or to such

related parties where they negatively affect the quality of advice. Alternatively, the anti-avoidance provision could be drafted to explicitly recognise that the provision of benefits:

- by related parties of product providers; or
- to related parties of licensees or representatives that provide financial product advice or platform operators,

that may either:

- influence the financial product advice given to retail clients; or
- lead to preferential treatment of financial products by platform operators,

are also banned.

Organisations and Representatives Consulted

36. The following consumer organisations have been consulted in the development of this Joint Consumer Submission and endorse its contents:

- Australian Investors Association
- Australian Shareholders' Association
- CHOICE
- Consumer Action Law Centre
- COTA Australia
- National Information Centre on Retirement Investments Inc

Information about each of these consumer organisations is set out in Table 1 at the end of this submission

37. The following individuals have contributed to the content of the submission:

- Stephen Duffield, Consumer representative FOS (Panel)
- David Leermakers, Policy Officer, Consumer Action Law Centre
- Jenni Mack, Chair ASIC's Consumer Advisory Panel, Chair CHOICE
- Wendy Schilg, Member ASIC's Consumer Advisory Panel, Chief Executive Officer, National Information Centre on Retirement Investments Inc

Table 1: Consumer Organisations endorsing the Joint Consumer Submission

No	Consumer Organisation	Description
1	Australian Investors Association (AIA)	<p>The AIA was formed by a small group of investors in 1991.</p> <p>It is an independent not-for profit organisation focused on delivering investor education so Australian individuals can become better long-term investors.</p> <p>The AIA offers a range of education services to its members including investment conferences, seminars, information email bulletins, discussion groups and website information covering a diverse range of topics (i.e. equities, derivatives, managed funds, property and self-managed superannuation funds).</p> <p>The AIA is also involved in policy work and campaigns through its engagement with the media, Government and other regulatory bodies.</p> <p>For more information about the AIA see: http://www.investors.asn.au</p>
2	Australian Shareholders' Association	<p>The Australian Shareholders' Association (ASA) was established as a not-for-profit organisation in 1960 to protect and advance the interests of investors. It is a membership-based organisation, funded by member subscriptions.</p> <p>The ASA continues to press for improvements in transparency and accountability in relation to company performance, executive remuneration, treatment of minority shareholders, risk management and dividend policy.</p> <p>The ASA liaises with other bodies such as regulators, lawmakers, industry groups and accounting bodies and represents member views on a number of accounting and financial industry bodies.</p> <p>The ASA holds regular members' meetings all across the country, and also conducts adult education workshops aimed at improving members' financial literacy.</p> <p>For more information about the ASA see: http://australianshareholders.com.au</p>
3	CHOICE	<p>CHOICE first began in 1959 when the first female member of the WA Parliament's upper house, Ruby Hutchison, and her husband ran informal meetings on ways for consumers to protect themselves.</p>

		<p>CHOICE is the public face of the Australian Consumers' Association (ACA). It is an independent, not-for profit organisation, with over 200,000 subscribers.</p> <p>CHOICE, as part of its core work:</p> <ul style="list-style-type: none"> • provides independent consumer information, advocacy and advice to consumers on a diverse range of consumer goods and services; • conducts scientific product reviews; and • is an active advocacy group that is constantly agitating government and industry groups to ensure consumer rights are protected and running campaigns against unjust consumer policies and practices. <p>For more information about CHOICE see: http://www.choice.com.au</p>
4	Consumer Action Law Centre (CALC)	<p>CALC is a campaign-focused consumer advocacy, litigation and policy organisation.</p> <p>It was formed in 2006 by the merger of the Consumer Law Centre Victoria and the Consumer Credit Legal Service and is jointly funded by Victoria Legal Aid and Consumer Affairs Victoria.</p> <p>It provides a range of services including:</p> <ul style="list-style-type: none"> • as a community legal centre - free legal advice and representation to vulnerable and disadvantaged consumers across Victoria; • legal assistance and professional training to community workers who advocate on behalf of consumers; and • as a policy and research body – input to law reform agendas and Government bodies across a range of consumer issues, and also through the media, and community. <p>For more information about CALC see: http://www.consumeraction.org.au</p>
5	COTA Australia	<p>COTA Australia was established in 1951 to protect and promote the well-being of Australian seniors.</p> <p>It is an independent consumer organization with both individual and senior organizational members Australia-wide.</p> <p>COTA Australia has particular regard for the vulnerable or disadvantaged and seeks to give a voice to senior Australians.</p> <p>COTA Australia's main focus includes:</p> <ul style="list-style-type: none"> • developing and formulating policy positions to assist

		<p>Government and regulators;</p> <ul style="list-style-type: none"> • promoting active ageing and a positive image of ageing; • representing the interests of all older people; • provide assistance to seniors who seek re-employment; and • collecting, interpreting and providing information to individuals. <p>For more information about COTA Australia see: http://www.cota.org.au</p>
6	National Information Centre on Retirement Investments Inc (NICRI)	<p>NICRI is a free, independent, confidential service which aims to improve the level and quality of investment information provided to people with modest savings who are investing for retirement or facing redundancy.</p> <p>NICRI gives general information on investing and how to complain, information about the financial planning industry (e.g. how to find an adviser, their fee structures, etc) and provides a telephone information service for consumers wishing to know about investment products, how to improve their financial situation and where else to go to get assistance.</p> <p>NICRI also has a role in government policy making with respect to investment issues.</p> <p>For more information about NICRI see: http://www.nicri.org.au</p>