



The General Manager
Retail Investor Division
The Treasury
Langton Crescent
PARKES ACT 2600
Email: futureofadvice@treasury.gov.au

6 July 2012

Dear Sir/Madam,

Re: Review of compensation arrangements for consumers of financial services - Consultation on final report

The Financial Planning Association of Australia (FPA)¹ welcomes the opportunity to provide comments and feedback on the *Review of compensation arrangements for consumers of financial services - Consultation on final report*.

The FPA wishes to formally acknowledge our support of this report, the thorough review of the process, and the conclusions drawn about the need for a substantial review of the imbalances in regulation before considering a last resort compensation scheme as a solution for retail client compensation.

The FPA has long been concerned that the Australian consumers deserve a substantially improved consumer compensation regime in financial services. We believe that is best achieved by an improved consumer protection regime that protects consumers from poor advice and poor products in the first instance, supported by an improved obligation regime that will deliver better justice and better compensation to consumers in the event of fault.

We welcome the reports recognition that the obligations on the licensed financial advice community has been 'unbalanced' and support the call for a review of the conduct and disclosure as well as compensation obligations of the other parties including product issuers.

As a consequence, we especially support the recommendations to:

- Expand the access to compensation for consumers by clearly identifying product manufacturers and other gate keepers as having compensation obligations and accessible liability
- Strengthen the role of ASIC in the oversight of insurance cover adequacy
- Support the FPA's long held view that Financial Advice Licensees should be able to draw Product Issuers and other 'at fault' parties into compensation schemes on a 'proportionate liability' like arrangement.

¹ The FPA is the peak professional body for financial planning in Australia. The 8,000 individual professional members of the FPA have an enforceable Code of Professional Practice, including the Client First principle. 5,700 of our members have achieved CFP certification, which is the global standard of excellence in financial planning. FPA practitioner members manage the financial affairs of more than 5 million Australians whose investments are valued at \$630 billion.



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Please find attached feedback and comments on the 12 recommendations for further action, as outlined in Chapter 7 of the report.

If you have any questions regarding the FPA's submission, please contact Dr Deen Sanders 02 9220 4516 or deen.sanders@fpa.asn.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Dante De Gori', written over a light blue horizontal line.

Dante De Gori
General Manager Policy and Government Relations



Review of compensation arrangements for consumers of financial services

Recommendations for further action	FPA View
<p>Recommendation 1: Last resort scheme</p> <p>It would be inappropriate and possibly counter-productive to introduce a last resort compensation scheme at this stage.</p> <p><i>Strengthen current compensation arrangements</i></p> <p>In any move to strengthen the regime for the protection of consumers the initial focus, in conjunction with the <i>Future of Financial Advice</i> reforms and other efforts to raise industry standards, should be on developing a more robust and effective system to make licensees responsible for the consequences of their own conduct. Recommendations for changes to strengthen the current compensation arrangements are summarised below.</p> <p>Reference is also made in Chapter 4 to initiatives by industry bodies, brokers and insurers to develop insurance solutions that better cater for the specific obligations on licensees to hold adequate professional indemnity insurance. Initiatives of this kind are acknowledged and should be encouraged.</p>	<p>Support</p>
<p>Recommendation 2.1: Licensees to demonstrate adequacy of their insurance</p> <p>Require licensees to provide ASIC with additional assurance that their professional indemnity insurance cover is current and is adequate to their business needs.</p>	<p>Support</p>
<p>Recommendation 2.2: Licensees to hold appropriate capital resources</p> <p>More attention should be given, on a risk targeted basis and in conjunction with the level of their insurance cover, to the adequacy of licensees' financial resources to enable better management of risks and unexpected costs such as compensation liabilities.</p>	<p>Support</p>
<p>Recommendation 2.3: A more pro-active stance by ASIC</p> <p>ASIC should take a more pro-active approach in monitoring licensee compliance with the requirement to hold adequate professional indemnity insurance cover and any new requirement in regard to financial resources, and in targeting licensees who are most at risk.</p>	<p>Support</p>



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Recommendations for further action	FPA View
<p>Recommendation 2.4: Policing the licensing system in regards to compensation To assist ASIC in playing a more pro-active role in administering the licensing regime with respect to compensation arrangements, consideration should be given to clearer powers to enforce standards and to sanction licensees who do not comply through:</p> <ul style="list-style-type: none"> § powers to deal with phoenix activity, both through licensees establishing new entities or by former directors who re-emerge in the industry as authorised representatives; § ability to deal with disreputable industry participants; and § access to an infringement notice regime. <p>ASIC for its part should be prepared to take action in appropriate cases to enforce its published views of what is required by the licensing conditions on insurance cover or financial resources. In the event that it becomes apparent that the current legal framework provides insufficient basis for effective enforcement action, consideration should be given to clearer legislative backing for regulatory standards on the adequacy of insurance or financial resources.</p> <p>Other matters</p> <p>The following issues relevant to the provision and operation of compensation arrangements and the protection of consumers, referred to in Chapter 4, should be addressed.</p>	<p>Support</p>
<p>Recommendation 2.5.1: Compensation where licensees cease to trade</p> <p>In dealing with licensees who give up their licence or reduce the scope of their licensed activities, ASIC should seek where possible to secure ongoing protection for retail clients including by imposing appropriate conditions in relation to the termination of a licence or the amalgamation or takeover of a licensed business.</p>	<p>Support</p>
<p>Recommendation 2.5.2: Protection from unlicensed providers</p> <p>There are risks to consumers where they deal with financial services providers that:</p> <ul style="list-style-type: none"> § have a licence, but operate beyond the scope of that licence because they provide products or services that are not covered by the licence; or § should be licensed under the Corporations Act but are not, § and accordingly have limited or no compensation arrangements. <p>While acknowledging the difficulties in identifying outlaw activity, the importance of concerted enforcement effort by ASIC to police the boundaries of licensed financial service activities is emphasised. In its approach to the handling of complaints about outlaw activities ASIC should be transparent and provide as much feedback to complainants as possible in order to encourage further assistance.</p>	<p>Support</p>



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Recommendations for further action	FPA View
<p>Recommendation 2.5.3: Third party rights under licensee’s insurance policy</p> <p>(a) Where a licensee (or its administrator or liquidator) does not respond to claims from a consumer or the licensee cannot be contacted after reasonable inquiry, ASIC should be able to provide the consumer with information it has about the insurance policy including the name of the insurer and the policy number. This would assist the consumer to decide whether there is a prospect of recovering compensation should the claim proceed and be successful.</p> <p>(b) The third party rights provisions of the Insurance Contracts Act 1984 should be extended, as was proposed by a review of that Act in 2004, to apply where a consumer cannot recover compensation awarded against the insured and there is capacity to meet that liability from the insured licensee’s professional indemnity insurance policy.</p>	<p>Support</p>
<p>Recommendation 2.5.4: Defence costs</p> <p>ASIC should give further consideration, in its approach to the adequacy of professional indemnity insurance cover, to the treatment of defence costs with a view to striking a reasonable balance between the interests of licensees and insurers on the one hand, and consumers on the other.</p>	<p>In principle support.</p> <p>Subject to further information</p>
<p>Recommendation 2.5.5: External Dispute Resolution scheme processes</p> <p>Given their key role in the regime for the protection of consumers of financial services, and marked increases in their jurisdiction, External Dispute Resolution schemes and ASIC should give more attention to the adequacy of the EDR scheme processes as those schemes grow beyond their origins as forums for small claims. Issues for consideration include: rights of review; transparency; capacity of a member to join in a proceeding other members that might be liable; cost contribution by complainants; liability standards; relevance of regulatory guidance and other operational issues discussed in Chapter 2.</p>	<p>Support</p>
<p>Rebalance responsibilities of licensees</p> <p>Having regard to an apparent imbalance in the responsibilities of product issuers and financial advisers towards retail clients, and the fact that most cases of serious consumer loss relate to the failure of financial products, consideration should be given to measures to enhance the responsibilities of product issuers and the protection offered to retail clients. This would pave the way for possible compensation claims against issuers where their obligations are breached.</p>	<p>Support</p>



Review of compensation arrangements for consumers of financial services

Recommendations for further action	FPA View
<p>Recommendation 3.1: Review regulation of product issuers</p> <p>(a) Subject product issuers to more positive obligations in regard to the suitability of their product for retail clients</p> <p>Such obligations might be applied in particular to managed investment schemes in issuing products to the retail market, and would apply at each stage of a product's life cycle including its distribution and marketing. Amongst other things, the product issuer might be required to state the particular classes of consumers for whom the product is suitable and for whom the product is unsuitable, and the potential risks of investing in the product.</p> <p>A stronger approach by managed investment schemes to the management of risk of fraud, particularly by employees or representatives, might also be sought.</p> <p>(b) Consider the development of standardised product labelling so that financial products, particularly managed investment schemes, are described on a consistent and more meaningful basis.</p> <p>This might apply to such terms as <i>capital guaranteed, capital protected, conservative, balanced, diversified, growth, defensive, fixed interest, or hedged</i>, as well as other like descriptors.</p> <p>(c) While the review has not looked into these matters in any depth, the significance of the role of gatekeepers, such as research houses, should be kept in mind in any strategic consideration of consumer protection in the financial services sector.</p>	<p>Support</p>
<p>Recommendation 3.2: Responsibility of product issuers through EDR schemes</p> <p>Some rebalancing of responsibilities of product issuers and financial advisers towards retail clients could be addressed through changes to the operation of EDR schemes by resolving the inability of EDR schemes to apportion responsibility for misconduct amongst responsible licensees. The operating rules of EDRs should be changed to enable them to make awards that recognise the proportionate liability of product issuers, financial advisers or other licensees.</p> <p>Further, consideration should be given to the clarification of clause 5.1(i) of the terms of reference of FOS which excludes consideration of disputes about the 'management of the fund or scheme as a whole'. The aim would be to remove any doubt about the ability of FOS to deal with consumer disputes in respect of misleading product disclosure statements or other practices of issuers in marketing their products.</p>	<p>Support</p>