



FINANCIAL PLANNING  
ASSOCIATION of AUSTRALIA

15 September 2017

Productivity Commission  
4 National Circuit  
Barton ACT 2600, Australia

Email: [financial.system@pc.gov.au](mailto:financial.system@pc.gov.au)

Dear Sir / Madam

**Re. Competition in the Australian financial system**

The Financial Planning Association of Australia (FPA) welcomes the opportunity to provide input into the Productivity Inquiry into Competition in the Australian financial system.

The FPA supports measure that help deliver the benefits of competition which can enhance innovation, choice, efficiency and quality of services for consumers.

The FPA would welcome the opportunity to discuss with you the issues raised in our submission.

If you have any questions, please contact me directly on [heather.mcevoy@fpa.com.au](mailto:heather.mcevoy@fpa.com.au) or 02 9220 4500.

Yours sincerely

**Heather McEvoy**

*Policy Manager*

Financial Planning Association of Australia<sup>1</sup>

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<sup>1</sup> The Financial Planning Association (FPA) has more than 12,000 members and affiliates of whom 10,000 are practising financial planners and 5,600 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first “policy pillar” is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and super for our members – years ahead of FOFA.
- An independent conduct review panel, Chaired by Graham McDonald, deals with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules required of professional financial planning practices. This is being exported to 24 member countries and 150,000 CFP practitioners of the FPSB.
- We established the Financial Planning Education Council in 2011 as an independent body chartered with raising the standard of financial planning education. The FPEC has built a curriculum with 17 Australian Universities for Bachelor and Master degrees in financial planning. We have built a curriculum with 17 Australian Universities for degrees in financial planning.
- We are the only professional body in Australia licensed to provide the CFP® certification program. CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional designations, such as the Chartered Accountant designation of the Chartered Accountants Australia and New Zealand (CA).
- We are recognised as a professional body by the Tax Practitioners Board



FINANCIAL PLANNING  
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# COMPETITION IN THE AUSTRALIAN FINANCIAL SYSTEM

**FPA submission to  
Productivity Commission**

**15 September 2017**



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## Introduction

There are many factors, both internal and external to the financial system, that impact on competition. Consumer value and outcomes must be the primary consideration when identifying the right balance between forces that exert either positive or negative pressure on competition.

Value to consumers is of paramount concern in order to identify the appropriate level of regulation versus competition in the market.

It is also important to understand and consider the problems facing financial services providers to be able to identify appropriate and effective measures for assessing competition in the market.

Our submission focuses on the Inquiry's stated key segment of fund management and financial advice, and in particular the financial advice market.

Please note, we have not responded to all aspects of the Commission's Terms of Reference or matters raised in the Consultation Paper, at this time.

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## The financial advice market

The FPA notes the 'Key segments of the financial system' detailed in Figure 1 of the Consultation Paper include 'Funds management and financial planning' as one segment.

Consumers seek financial advice to get advice. The primary role of a fund manager is to implement a fund's or client's investment strategy and manage its trading activities. These are two very distinct roles. Financial advice is a standalone market and should be recognised as such by this Inquiry. Financial advice and funds management should not be in the same key segment for this Inquiry.

Separating financial advice from the funds management key segment will enable the Commission to clearly and appropriately identify the issues impacting both the financial advice market and fund managers.

The financial advice market consists of over 2,150<sup>2</sup> Australian Financial Services Licence (AFSL) holders (licensees) and approximately 27,000<sup>3</sup> financial advisers registered on the ASIC Financial Adviser Register, who service the more than 2.4 million Australians<sup>4</sup>. The structure of the advice market is unique - it has a large number of small businesses who hold and operate under their own AFSL (approximately 57% of licensees have 10 advisers or less<sup>5</sup>); but there is also a large number of small business financial planning practices that are authorised and operate under the AFSL of a large dealer group. Such dealer group also usually have employed advisers. Competition is essential to drive improvements in the quality of advice and positive consumer outcomes in this unique market.

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<sup>2</sup> Proposed industry funding model for ASIC: Supporting attachment to the Governments proposals paper, November 2015

<sup>3</sup> ASIC Financial Adviser Register dataset as at 1 August 2017

<sup>4</sup> ASIC Corporate Plan 2017-18 to 2020-21, Focus 2017-18: <http://download.asic.gov.au/media/4439405/corporate-plan-2017-published-31-august-2017-1.pdf>

<sup>5</sup> Based on FAR dataset



### Recommendation

- The structure of the Commission's Inquiry include funds management and financial planning as separate and distinct key segments of Australia's financial system, and be considered independently of each other.

### Different types of financial advice

Financial advice must be in its own category for this Inquiry so the Productivity Commission can differentiate the different types of financial advice; and identify the different competitive issues confronting each financial advice type.

It is important that consumers understand what services and advice they will receive under each type of advice. Similarly, there must be a level playing field for the regulation of all financial advice models to ensure consumer protections are maintained and competitive advantage is not afforded to any type of advice through the regulatory system.

#### **Investment advice**

Investment advice refers to any recommendation or guidance that attempts to educate, inform or guide an investor regarding a particular investment product or series of products. Generally, an investment adviser makes investment recommendations or conducts securities analysis in return for a fee, whether through direct management of client assets or via written publications.

#### **Financial planning advice**

A client's six financial planning needs sit at the heart of financial planning advice.

Financial planners work with clients to identify and consider:

- each client's circumstances including their needs, goals and priorities
- the values, attitudes, expectations and financial experiences of their client, including their risk tolerance
- their client's ability, both financial and in relation to their level of comfort, to tolerate loss of capital
- their client's financial planning needs across the short term, medium term and long term
- non-monetary matters that may affect their client's financial needs and goals





Based on this information, a financial planner will develop a financial plan with appropriate strategies that their client is comfortable with, to help them work towards their life goals.

The financial planning process includes:

1. Defining the relationship
2. Identifying client goals
3. Assessing the client's financial situation
4. Preparing the financial plan
5. Implementing the recommendations
6. Reviewing the plan

Financial planning advice can help with debt management and reduction, budgeting, cash flow management, a savings plan, superannuation, tax planning, home loan repayments, insurance, planning for retirement, as well as investments.

### Intra-fund advice

Intra-fund advice is personal financial advice by superannuation funds, without conducting a full 'know your client' process, provided that the advice relates only to the member's account within that superannuation fund. Intra-fund advice can be provided over the phone, via email or face-to-face.

Examples of this type of advice include providing advice on investment options within the fund, whether to make additional super contributions and the level of insurance cover that are held with the fund. Under the intra-fund advice rules, a superannuation fund cannot provide advice on switching super funds, or advice on financial products outside super, or advice on general retirement planning unless the full 'know your client' process is conducted by a licensed individual.

### Automated advice

Automated advice is technology based and therefore groups consumers based on sample circumstances and provides all consumers in the group with the same advice. This significantly increases the risk of the consumer receiving financial advice that may not be appropriate for their needs and circumstances.

While automated advice can serve a purpose, it presents an inherently increased risk of inappropriate advice for consumers and therefore must be appropriately regulated.

Automated advice should not be labelled general advice. It does not provide product information. It provides financial and investment recommendations based on a collective group of consumers with similar circumstances.

There is a natural linking of automated advice with product manufacturers. Automated advice needs to be distinguished differently to personal financial advice and be regulated appropriately to ensure consumers understand both its benefits and limitations.

The FPA supports ASIC's view that:

"...financial services firms deploying algorithms need to make sure their logic is explicable to customers and regulators and that a human being is made responsible for any problems that



might emerge with the code.... The pace of innovation is speeding up and that means that products and services – including financial products – are being delivered using technology often with little or no involvement of human beings....ASIC don't want to see algorithms shifting the risk to consumers or others in society.... For an algorithmic system there must be a person who is responsible for its design and its outcomes.... Given the limited understanding of how software makes decisions, automated decisions must be transparent and explained.”<sup>6</sup>

### General advice

General advice is information not advice. Some consumers incorrectly mistake the use of the word ‘advice’ to be the standard definition meaning guidance. General advice is information about a financial product or class of product, not guidance.

Anecdotal evidence shows that it is common for individuals to interpret general advice or product information as personal advice because it is relevant to their circumstances at the time they receive the information. Framing ‘general advice’ as advice gives the impression to consumers that the information they are receiving is based on that person’s personal circumstances and that the product is appropriate for them.

The definition of general advice in the Corporations Act makes it difficult for consumers to distinguish personal financial advice from marketing material or product sales. The existing general advice definition in the Corporations Act and the exemptions from the important conflicted remuneration and best interest obligations for general advice providers, creates a competitive advantage to some providers over others. There is a need to clearly separate the provision of financial advice from product selling.

### Recommendation

- The Commission establish a new standalone key segment of financial planning, and clearly identify and consider the unique issues impacting competition across all types of financial advice.

### Criteria for measuring competition in the financial advice market

The last 25 years have been a period of enormous transformation in the financial services sector. The marketplace has seen a marked shift from domestic firms engaged in distinct banking, securities, and insurance businesses to more integrated financial services conglomerates offering a broad range of financial products across the globe. These fundamental changes in the nature of the financial service markets has created a blurring of product lines across sectors and tests the efficacy of the regulatory structures and supervisory oversight.<sup>7</sup> This is of particular relevance in the financial advice market.

<sup>6</sup> ‘Algorithm ate my homework’ not on, James Eyres, The Australian Financial Review, Monday 11 September 2017, pg 19

<sup>7</sup> The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace, The Group of Thirty, Washington DC, 2008



It is of critical importance that regulatory frameworks accommodate and keep pace with dramatic changes and innovation in financial systems. As financial markets and institutions evolve, so too must the regulatory systems that oversee them.

Australia is renowned for its Twin Peaks approach to regulation - a form of regulation by objective, is one in which there is a separation of regulatory functions between two regulators: one that performs the safety and soundness supervision function (ie. APRA) and the other that focuses on conduct-of-business regulation (ie. ASIC). The Integrated Approach, on the other hand, is one in which a single universal regulator conducts both safety and soundness oversight and conduct-of-business regulation for all the sectors of financial services business. Research has seen a move away from the functional and institutional approaches to regulation both of which are seen as suboptimal given the evolution of financial services.<sup>8</sup>

We believe the following issues of the current regulatory system significantly impact market competition in the advice space:

- Chapter 7 of the Corporations Act sets the legal framework that governs the provision of financial advice to consumers in Australia. Under this system, ASIC is tasked with the oversight of financial advice providers under the so called twin peaks model. However as discussed below, financial planning advice is also subject to the regulatory oversight of 7 other regulators including the Tax Practitioners Board, AUSTRAC, the Information Officer (Privacy), APRA, ATO, and the new Financial Adviser Standards and Ethics Authority (FASEA).
- The regulatory framework's reliance on financial products, rather than a clear separation of products and financial advice – for example, the legal requirements for the provision of financial advice is based on the primary definition of financial product advice; and the secondary definition of personal and general advice. Exemptions are provided based on the type of financial products the advice relates to.
- Inconsistencies in the regulations do not reflect changes in business models and service offerings provided in the advice market particularly over the past 5 years since the introduction of the Future of Financial Advice (FoFA) reforms and other regulatory changes, and importantly changes in consumer expectations. (See Regulatory Burden section below for more detailed issues.)

However Australia's financial advice regulatory environment is also considered world leading and offers significant benefits in consumer protections. When assessing the appropriateness of the current system and its impact on competition, consideration must be given to, for example:

- Consumer protection outcomes
- Regulatory costs to business
- Increase in the cost of services for consumers
- Concentration of the advice market
- Supply side cost of regulation

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<sup>8</sup> The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace, The Group of Thirty, Washington DC, 2008



To ensure the regulatory system can deliver the consumer benefits of a competitive advice market, we suggest there is also a need to ensure appropriate criteria is used to assess what consumers' value versus what the regulatory regime is delivering and the impact of the regime on competition and consumer outcomes.

For example, anecdotal research indicates financial planning advice clients want value for money and quality service from their financial planner. However what is considered value for money differs amongst consumers depending on:

- their needs and reasons for seeking financial advice
- their financial circumstances, experiences and attitudes
- the type of advice service sought, and
- importantly, the outcomes they would like to achieve from the advice and whether the advice received meets these expectations

Traditionally, consumer outcomes have been measured using criteria such as consumers' improved understanding for financial affairs, greater confidence in their ability to make financial decisions, comfort about their ability to achieve financial goals and the structure of their financial affairs, and being in a better financial position because of the advice.

However criteria to assess consumer outcomes should also encompass consumer values, consumer satisfaction and, importantly, consumer well-being. The vast majority of those consumers currently advised have indicated an improvement in financial wellbeing since engaging a financial planner (79.1%)<sup>9</sup>.

The concept of measuring well-being is not new. It has informed policy development in Australian and globally for well over a decade.

The Australian Bureau of Statistics believes well-being can be measured using people's subjective evaluation of themselves, based on their feelings, or by collating any number of observable attributes that reflect on their well-being; and that well-being might best be assessed subjectively, as it is strongly associated with notions of happiness and life satisfaction.<sup>10</sup>

"While such measures can be difficult to interpret, subjective measures, as with other statistics, can be aggregated and monitored over time, and, in theory, provide a picture of the nation's view"<sup>11</sup> which would be an invaluable aspect of measuring the competitiveness of Australia's financial system, and in particular the financial advice market.

The Organisation for Economic Co-operation and Development believes that for well-being measures to start making a real difference to people's lives, they have to be explicitly brought into the policy-making process:

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<sup>9</sup> FPA Brand Research 2017, Core Data, May 2017

<sup>10</sup> Measuring Wellbeing: Frameworks for Australian Social Statistics, 2001 (updated 2006), Australian Bureau of Statistics

<sup>11</sup> Measuring Wellbeing: Frameworks for Australian Social Statistics, 2001 (updated 2006), Australian Bureau of Statistics



*“Subjective well-being data can provide an important complement to other indicators already used for monitoring and benchmarking performance, for guiding people’s choices, and for designing and delivering policies.”<sup>12</sup>*

The OECD suggests that being able to measure people’s quality of life is fundamental when assessing the progress of societies, and has produced Guidelines which outline why measures of subjective well-being are relevant for monitoring and policy making.<sup>13</sup>

From a consumers’ perspective their financial situation is fundamental to their actual and desired quality of life. According to the Australian Centre on Quality of Life, quality of life includes subjective perceptions of well-being, which can be measured through questions of satisfaction directed to people’s feelings.<sup>14</sup>

The Commission on the Measurement of Economic Performance and Social Progress recommends quantitatively measuring subjective aspects of individuals’ well-being via evaluations of one’s life, happiness, satisfaction, positive emotions of pride and joy, and negative emotions of pain and worry.<sup>15</sup>

The purpose of financial advice is to help individuals and families achieve their life goals through proper management of their finances. Hence well-being indicators are particularly well-suited to measure the consumer outcomes of the different types of advice services, and the impact of competitive issues in the advice market.

#### Recommendation

- The Commission include well-being measures as criteria for assessing competition in the financial advice key segment.

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## ISSUES IMPACTING COMPETITION IN THE FINANCIAL ADVICE MARKET

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Research shows that 30% of consumers who have not sought financial advice and do not intend to seek advice in future have stated that the high cost of advice is a key reason for why they have not sought the advice.<sup>16</sup> There are particular issues that impact the financial advice market that heavily influence the fees advice providers charge for their services, including:

- regulatory burden
- inconsistent treatment of professionals across financial services
- product manufacturer accountability

These issues (discussed in detail below) create a significantly larger burden for small licensee businesses that have the least capacity to absorb the resulting costs. Though there will also be impacts

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<sup>12</sup> <http://www.oecd.org/statistics/oecd-releases-first-comprehensive-guidelines-on-measuring-subjective-well-being.htm>

<sup>13</sup> <http://www.oecd.org/statistics/oecd-releases-first-comprehensive-guidelines-on-measuring-subjective-well-being.htm>

<sup>14</sup> <http://www.acqol.com.au/>

<sup>15</sup> Sen, A., Stiglitz, J. E., & Fitoussi, J.-P. (2009). Report by the Commission on the Measurement of Economic Performance and Social Progress. Paris, France: The Commission on the Measurement of Economic Performance and Social Progress.

<sup>16</sup> Investment Trends, ‘FPA Member Satisfaction Report’ (December 2014)



on larger financial advice licensee businesses, they have greater scope to manage such costs through the economies of scale of their business operations.

The impacts to the advice market include:

- Price competition - Small licensee businesses often don't have the capacity to absorb the costs created particularly by the regulatory demands on licensees, and can be forced to pass these costs on to consumers at a much higher fee level than those charged by large licensee. This makes small licensee businesses less price competitive than their counterparts who are aligned to large licensee businesses. There is a risk that small licensees will be priced out of the market.

This issue is exacerbated by the pass through of regulatory costs by other financial service businesses in the financial advice value chain via business-to-business fees. For example, stockbrokers, credit rating agencies, fund managers, etc, charge subscription and brokerage fees to financial planners. While it is accepted that this is a cost of doing business, these costs vary depending on the size of the licensee - the larger licensees get discounted fees as they generate more business – making it more difficult for smaller licensees to be price competitive.

- Barrier to entry - The costs in particular create a barrier to entry for small and single-adviser licensees, and financial planners will be more likely to remain with large financial institutions.

By way of example, in a 2015 FPA member survey regarding the proposed ASIC funding model, respondents indicated the following impact of this additional regulatory expense:

- 46% would cost the levy directly into the fees charged to clients
- 29% would not be able to employ new people
- 20% would potentially reduce staff numbers
- 54% said they would restrict business growth
- 37% said they would have to restrict their client offering
- 7% said their business would become unprofitable/unviable
- 7% would cancel their license and join a dealer group

2017 feedback from FPA members shows that this cost is substantial for small licensees, making it almost prohibitive to establish a business under a new AFSL.

- Number of advisers - a potential reduction in the number of advisers.
- Cost of advice - Most concerning is that ultimately these issues drive up the cost of financial advice for consumers, impacting the perception of the value for money gained from the services they receive and consumers' willingness to engage with financial advice, creating demand side pressures on competition.

Issues that impact on the cost of financial advice for consumers directly influence consumer value, well-being and therefore competition in the advice market.



### Recommendation

- When considering appropriate measures for competition, we urge the Commission to consider the impact that the problems affecting the affordability of financial advice for consumers and the sustainability of financial planning businesses have on the advice market.

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## Regulatory burden

The Commission should be aware that the regulatory requirements in the financial advice space significantly impact on market competition and the ability to leverage innovative solutions to regulatory compliance to enhance the services provided to consumers. This is particularly an issue for smaller businesses who do not have the benefits of economies of scale to overcome the issues associated with regulatory burden.

An increase in the regulatory burden placed on both financial planners and licensees, particularly over the past 5 years, has seen an increase in fees charged to consumers, changing adviser numbers, and many sole traders, small licensees and medium licensees forced to move to a general advice only model, reduce client numbers or turn in their license altogether and join a large licensee

We suggest that it is important to understand and consider the problems facing financial advice providers in order to identify appropriate measures for assessing competition and innovation in the advice market.

## Cumulative impact of Government's cost recovery approach to regulation

The FPA is concerned about the cumulative impact on individual businesses, market competition, consumers, availability of advice products and services, and the Australian economy more broadly, of the Government's cost recovery approach to regulation

Proposed new costs that financial advice providers will incur commencing July 2017 include:

- ASIC cost recovery
- Adviser Code monitoring scheme
- Privatising ASIC Register – loss of income for ASIC and increased costs for industry
- Funding the new Financial Advice Standards and Ethics Authority
- Financial advice entry exam
- Cost of meeting new education requirements

Ongoing existing costs for the financial advice market include:

- Tax Practitioners Board (TPB) – registration fees and education requirements apply for re-registration
- AUSTRAC (small business exemption applies)
- EDR Scheme
- Training
- Research



- Annual audit
- Compliance
- Software
- Professional association membership
- PI insurance

The cumulative impact of the introduction of multiple new cost recovery measures include:

- Unavoidable increase in cost of advice for consumers
- Restriction of trade and negative impact on the ability of small licensees to compete in the advice market.
- Reduction in license authorisations restricting client service offerings
- Restriction of business growth
- Reduction in the number of advisers as some businesses would not be able to employ new advisers / appoint new authorised representatives, or may need to reduce adviser numbers
- Small licensees become unviable and join conglomerate dealer groups

Further, many financial planning practices will be forced to spend one day away from servicing clients to complete their compliance requirements<sup>17</sup>. This reduction in the hours available to service clients will reduce their capacity to grow or even maintain client numbers and reduce income.

The cumulative effect of all the new regulatory costs to be incurred by financial planners is a significant addition to the operating costs for many businesses. This significantly impacts on competition in the advice market.

#### Recommendation

The Commission consider the implications of the cumulative effect of regulatory costs on competition in the advice market.

Consideration be given to measures that offer relief for small businesses to stimulate market competition.

#### Multiplicity of regulators

In the near future one piece of personal financial advice will be regulated by 7 regulators - ASIC, TPB, AUSTRAC, Information Officer (Privacy), APRA, ATO, and the new Financial Adviser Standards and Ethics Authority (FASEA) - all administering Acts and regulatory requirements using different language and imposing different compliance requirements on financial planners. In addition, the same piece of advice will have oversight and interpretation by the Courts, the new Australian Financial Complaints Authority (AFCA), Australian financial service licensees and professional bodies such as the Financial Planning Association.

This creates a significant risk that the regulatory and compliance requirements under one Act and Regulator may differ to those of others, leaving financial planners at risk of breaching one regulation in

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<sup>17</sup>FPA member roundtable on Industry funding model for ASIC December 2016



order to meet the requirements of another set of regulatory requirements. Financial planners must interpret how each different set of regulatory requirements for each different Regulator differ from other regulators to ensure they do not inadvertently breach requirements. This has a significant impact on costs and efficiencies, particularly on small licensees who do not usually have the in-house expertise or economies of scale to meet the regulatory demands.

Even small differences in requirements, such as the need to provide different documentary evidence to different regulators for the same type of regulatory activity such as CPD/CPE<sup>18</sup>, significantly drives up process and compliance costs for businesses, ultimately impacting on the cost of providing advice to consumers and the sustainability and competitiveness of each business.

Given the constant regulatory changes administered by each of these seven regulators, businesses have become paranoid about the plethora of regulatory requirements making them less inclined to invest capital or be innovative.

It also makes it more challenging for consumers to comprehend, trust and engage with the financial system, and understand their rights and the consumer protection mechanisms available to them.

The plethora of regulatory requirements from all the Regulators, professional bodies, and licensees, and the lack of stability in the financial advice regulatory environment, are overwhelming particularly for providers of financial planning advice who must understand and adhere to all the requirements. The systems and processes required to meet these obligations can be extremely costly and time consuming, particularly for small businesses. The costs associated with the implementation of changing requirements and the ongoing compliance of many of the regulatory obligations have impacted the costs involved in providing advice and created barriers to entry and business growth, resulting in higher advice fees for consumers and restricted service offerings from some providers.

It is recognised that genuine multiplicity of regulators may offer regulatory benefits for consumers and the regulated population as it can reduce the chances of a single approach to the administration of the laws, each of which serve a specific purpose in Australian society. It is also recognised that the laws administered by each of these seven regulators applies to a significantly broader regulated population than just financial advice providers.

To make a true assessment of the impact of this issue on competition in the advice market, consideration must be given to the extra complexity and cost associated with having multiple regulators, compared with the pros and cons of a monopolistic regulator for financial advice.

We suggest the Commission draw on data from comparable foreign jurisdictions and compare costs in jurisdictions with a monopolistic regulator with jurisdictions with competing regulators, to assess whether the benefits offered by a multi-regulator approach outweigh the extra complexity and cost associated with having seven regulators overseeing each piece of financial advice.

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<sup>18</sup> This is the case with the CPD requirements placed on financial planners by licensees, professional bodies, the Tax Practitioners Board and soon the new standards setting body, FASEA.



### Recommendations

- The Commission compare costs in jurisdictions with a monopolistic regulator with jurisdictions with competing regulators, to assess whether the benefits offered by a multi-regulator approach outweigh the associated costs and complexity, and identify any effects on competition in the advice market.
- All regulators should be required to develop a considered Regulatory Impact Statement including careful consideration and consultation on how proposed new laws and regulations impact on other legal requirements, compatibility with other existing requirements in other laws, the ability of other regulators to fulfill their role, and ultimately the impact on businesses and whether the full impacts of the proposed new requirements put consumers in a better position.
- The establishment of a central body to check that new financial advice laws and regulations are integrated prior to the introduction of new legislation into parliament, the registration of new regulations, or the issuance of new guidance or policies by a Regulator.
- All relevant regulators of should work together to ensure regulatory requirements are consistently applied to the provision of financial advice in a clear, comprehensive and complementary manner.
  - Regulators should be required to consult with other regulators to ensure there is a consistent approach taken when developing regulatory guidance, legislative instruments and other policies that impact on the administration of the Acts they are responsible for. Joint Regulator and industry forums should be considered for this process.
  - Joint regulatory guidance should be also be considered. (The recent publication of AUSTRAC's Privacy Guidance, developed by AUSTRAC with the Information Officer, is a good example of the benefits of joint guidance.)

### Regulatory inconsistencies across the advice market

The Future of Financial Advice (FoFA) reforms were introduced in 2014 and have been implemented by industry with significant expense, time, effort and stress. The exemptions afforded to some advice providers, particularly the carve-out from the ban on certain conflicted remuneration and best interest duty obligations in the Corporations Act, have resulted in a significant reduction in consumer protections with instances of personal advice being provided under the guise of general advice.

These exemption are only meant to apply with regard to the provision of factual information and not 'advice'. Sometimes this can be a very fine line and there are many cases when the factual information given is definitely trying to influence the client the take action to invest in a product.

For example, financial planners have seen instances where annuities (for large sums of money) have been 'sold' to consumers for effectively 90-100% of a client's portfolio that was otherwise to be held in term deposit style investments, with minimal advice provided. Products are being sold as a 'basic product' with commissions still being paid. However annuities are not simple financial products and



should only be recommended if they are in the best interest of the client via personal financial advice. They should not be 'sold' to consumers.

We question whether the exemptions from the best interests obligations and conflicted remuneration provisions afforded to certain advice providers and types of advice, are exacerbating the risk of mis-selling for consumers. It is unquestionable that the carve outs have created a noticeable competitive disadvantage for advice models doing the right thing and adhering to all the legal and consumer protection requirements.

These regulatory exemptions make 'personal' financial advice less competitive. Regardless of the legal boundaries of personal and general advice definitions, it is the consumers interpretation of the advice that ultimately determines whether they are being provided general product facts or information that relates to their own circumstances. Anecdotal evidence shows that it is common for individuals to interpret general advice as personal advice because it is relevant to their circumstances at the time it is provided. This is where incentives to sell products can result in misleading consumers.

ASIC's *Report 384 – Regulating Complex Products* states:

*“Our research has indicated that marketing information plays a particularly strong role in product distribution and may influence investors’ decision making more than other product disclosure. In particular, when investors approach product issuers or other intermediaries responsible for selling products directly, rather than going through advisers, the information contained or implied in product issuers’ marketing information is often the first, and may be the only, information that investors use to decide whether or not to invest in that product.”<sup>19</sup>*

The consumer influence of general advice significantly impacts on the competition in the broad advice market, particularly personal advice providers who bear the full burden of the regulatory requirements.

The conflicted remuneration and best interest exemptions for general advice incentivise sales-oriented corporate cultures, limiting motivation to innovate.

The provision of general advice is also exempt from many of the onerous and costly disclosure requirements in the law. It is advice for which there is no paper trail as there are no Statements of Advice or disclosure requirements when providing general advice.

The cost disparity between general and personal advice created by the regulatory environment significantly distorts the advice market. For this reason, consideration of the impact of conflicted remuneration measures are having on competition across the financial services industry is important to consider.

Overseas jurisdictions regulate the provision of financial advice under regulatory frameworks unique to each country's legal and economic systems. Data on the strengths and weaknesses of comparable foreign jurisdictions with single regulatory models (on the one hand) with differentiated regulatory models (on the other) would provide valuable insights into identifying appropriate and effective regulation that encourages market competition and innovation for all types of financial advice and advice providers, while maintaining vital consumer protections and delivering consumer outcomes.

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<sup>19</sup> ASIC, 'Report 384 – Regulating Complex Products' (January 2014), at [46]



The following jurisdictions may offer valuable data for identifying appropriate measures for assessing valid competitive pressures in the advice market.

### United Kingdom

The United Kingdom has a differentiated regulatory model with different licensing requirements, definitions and conditions for different types of providers.

- Independent advisers - are advisers or firms that provide independent advice and are able to consider and recommend all types of retail investment products from all firms across the market, and have to give unbiased and unrestricted advice.
- Restricted advisers - are advisers or firms that can only recommend certain products, product providers, or both; and must clearly explain the nature of the restriction and cannot describe the advice they offer as 'independent'. Restricted advice includes where:
  - the adviser works with one product provider and only considers products that company offers
  - the adviser considers products from several – but not all – product providers
  - the adviser can recommend one or some types of products, but not all retail investment products
  - the adviser has chosen to focus on a particular market, such as pensions, and considers products from all providers within that market
- Guidance - general information about one or more investment products, or explanations about products or related terms, is defined as guidance rather than advice and cannot involve a product recommendation. This is sometimes also called an information only or non-advice service.

However there are carve outs from the regulatory requirements for advice related to particular types of products.

### USA

In the USA, there are federal and state based regulatory frameworks governing the provision of financial advice, depending on the jurisdiction and type of advice that is provided. Primarily, firms are regulated as investment advisers, broker-dealers or insurance agents. Banks and accountants are exempt from the requirement to register with the SEC under the Investment Advisers Act of 1940<sup>20</sup>.

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<sup>20</sup> Regulation of Investment Advisers, U.S. Securities and Exchange Commission, March 2013



### Summary of Key Statutes and Regulations that may apply to financial planners in USA:

	Investment adviser	Broker-dealer	Insurance agent
<b>Applicable federal and state laws</b>	Federal: • Investment Advisers Act of 1940 and rules from SEC	Federal: • Securities and Exchange Act of 1934 and rules of SEC and FINRA	
	State: • State securities law	State: • State securities laws	State: • State insurance laws
<b>Financial planning service covered by regulation</b>	• Advice about securities, including advice given in conjunction with product recommendations and advice about non-securities	• Recommendations for specific securities products • Purchase or sale of securities products	• Recommendations for specific securities products • Purchase or sale of securities products
		• Sale of variable insurance (variable annuities, variable life insurance)	
<b>Federal and state regulators enforcing laws</b>	Federal: • SEC	Federal: • SEC and FINRA	
	State: • State securities agencies	State: • State securities agencies	State: • State insurance agencies

### Hong Kong

Financial advisors and insurance agents in Hong Kong are regulated by the Securities and Futures Commission (SFC), Confederation of Insurance Brokers (CIB) or Professional Insurance Brokers Association (PIBA). The term 'Independent Financial Advisor' is regulated, with specific requirements for determining independence.

### Singapore

In Singapore, financial advisers are regulated by the Financial Advisers Act. It determines that financial advisers must be licenced corporations, or individuals appointed by licenced corporations, with certain minimum capital requirements and which must report their finances to the Monetary Authority (MAS). Licenses are granted to financial advisory firms judged by the MAS to have adequate expertise and compliance capabilities.

#### Recommendations

- The Commission collect and compare data on the strengths and weaknesses of comparable foreign jurisdictions with single regulatory models for financial advice, with differentiated regulatory models, to identify appropriate and effective regulation that encourages market competition and innovation for all types of financial advice and advice providers, while maintaining consumer protections and delivering desired consumer outcomes.
- All types of financial advice must be required to comply with the requirements in the Corporations Act, particularly the conflicted remuneration and best interest obligations. Current exemptions to these requirements should be removed.
- General Advice be re-termed 'general or financial product information' and be limited to the provision of 'factual information and/or explanations' relating to financial products:



- General or financial product information should be regulated with a warning similar to the existing general advice warning. This warning should make it clear that the information is not financial advice, it is information about a financial product or a class of financial products.
- Licensing and all the other forms of regulation which currently apply to general advice should apply to the provision of general or financial product information.
- Personal Advice be re-termed 'Financial Advice' and have the following meaning:  
*Any recommendation made personally to a consumer on which that consumer could reasonably be expected to act in relation to an investment or financial decision.*
- The Corporations Act be amended to remove reference to and reliance on products in relation to financial advice.
- The provision of 'financial advice' should only be permitted by those who meet the legal requirements for using the terms financial planner and financial adviser, and are listed on the ASIC Financial Adviser Register (and meet the "relevant service provider" requirements from 1 July 2019).
- The term 'commission' be defined in the Corporations Act and be explicitly banned on the provision general advice.

### Regulatory stability

The continually changing financial advice regulatory environment significantly decreases confidence of both consumers and financial planners reducing their interest and capacity to be innovative. The cost of complying with the unsettled regulatory requirements impacts on the competitiveness of licensees depending on the scale of their business and its capacity to absorb such costs. The capital investment required to utilise innovative artificial intelligence solutions to reduce the compliance burden on both licensees and financial planners, can be inhibitive.

The time required to meet the ever changing regulatory demands for providing advice detracts from the financial planner's ability to focus on listening to clients and improving the quality of advice for consumers. The systems needed to meet the complex compliance requirements and have effective risk management, greatly decrease the ability to be innovative and customise client outcomes. The level of red tape forces mergers or selling of license, reducing market competition.



### Recommendations

- Allow regulatory changes in the financial advice space to commence, be fully implemented, settled, and their impact appropriately tested against the policy intent of the law.
- Introduce depreciated tax concessions to assist financial planning businesses to utilise innovative artificial intelligence solutions to reduce the impact of regulatory compliance requirements, and to improve the benefits of competitive pressure in the financial advice space for consumers.

### Product comparison

It is becoming increasingly more difficult for financial planners to compare products to meet their best interest obligations in the Corporations Act for each client. This requirement is placed on the planner in relation to each client, who cannot rely on software innovation or the licensee to undertake this assessment. While the requirement to undertake a thorough product comparison is supported, the lack of comparable information from product providers significantly increases the regulatory burden of this measure for financial planners. With an increasing proportion of consumers investing in products directly with the product provider, it is vital for all products, including new innovative products, to be true to label and comparable so consumers can understand the product features and appropriately assess the risks when making decisions.

Given the plethora of financial products available and the lack of transparency about purported performance objectives and comparable product information, financial planners commonly rely on the licensee's Approved Product List (APL) to compare products in order to meet their best interest obligations. Each licensee's APL is developed under a research framework to determine which products are 'fit for purchase' by clients within their adviser networks. However the development of the APL is also reliant on the information made publicly available by the product provider and / or research house.

Representations made and warranties given about the product by the provider or research house must be fair and accurate, and sufficient to enable accurate comparisons to be made with other products. Such measures would assist financial planners and licensees to make more accurate evaluations and comparisons of a provider's products to the market of potentially suitable products relevant for a particular client. Financial planners require such information to enable them to appropriately assess and compare whether different products will perform true to label under different market conditions.

The absence of such information significantly impacts on the time and cost incurred by financial planners to meet their best interest duty in the Corporations Act. This increases the cost differential between providing financial planning advice versus some other advice types, which significantly impacts particularly on the sustainability of small licensees to compete.



### Recommendations

- The Commission consider supply-side issues in identifying appropriate measures to assess competition in the financial advice market.
- Introduce public policy initiatives to improve the comparability, availability and transparency of product information for investment and insurance products. For example:
  - additional product feature disclosure standards be introduced to ensure products are properly comparable
  - a data feed standard be introduced to ensure financial planners are able to properly research and compare products against each other.

### Client documentation

The Statement of Advice (SOA) is key financial advice disclosure document for consumers. However it can also be an inhibitor to efficiency in the provision of financial advice. The availability of innovative software to aid in the production of the SOA has not improved delivery efficiencies or enhanced the information provided to consumers.

The financial advice obligations in Chapter 7 of the Corporations Act were established in 2001. Since this time there has been countless amendments to the requirements, including the following significant changes:

- Introduced in 2012, the Future of Financial Advice (FoFA) Reforms banned financial advice commissions on superannuation and investment products; introduced a best interest duty for the provision of financial advice; and set a requirement to send a renewal notice every two years and an annual fee disclosure statement to clients that have signed an ongoing fee arrangement.
- In March 2015, the Government established the ASIC Financial Adviser Register (FAR), requiring individuals to be authorised and registered on the Register to be able to provide personal financial advice to consumers.
- In February 2017, the Federal Parliament passed a Bill that requires all “relevant service providers”, including financial planners to hold a relevant degree (or degree equivalent), pass an exam, maintain CPD, and adhere to a Code of Ethics, to be listed on the FAR and be authorised to provide personal financial advice. This Bill established a national professional standards and education framework, to be set by a new Commonwealth statutory company – the Financial Adviser Standards and Ethics Authority<sup>21</sup> - in line with other occupations such as legal practitioners, medical practitioners and accountants. While the Corporations Act require financial planners to disclose to clients in an SOA, other financial services professionals, such

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<sup>21</sup> <http://kmo.ministers.treasury.gov.au/media-release/033-2017/>



as accountants are not held to the same disclosure requirements, creating a competition disadvantage in the advice market.

The SOA requirements have not kept pace with these significant regulatory changes, particularly the restrictions on conflicted remuneration. ASIC's recent example SOA for life insurance advice places remuneration as the first item in the SOA, demonstrating the lack of recognition of the changes in the law and in the remuneration practices across the financial planning profession.

While the law may appear quite straight forward regarding disclosure requirements for the SOA, ASIC requirements and moreover ASIC action have resulted in the production of lengthy SOAs to minimise the real and perceived liabilities faced by both licensees and financial planners. This significantly restricts the ability of financial planners to be innovative in providing more client-friendly and meaningful advice documentation.

The cost of meeting the Chapter 7 requirements for providing financial advice, including the SOA are significantly discourage competition in the financial advice market and only serve to reinforce the status quo, at a time when the benefits of competition must be encouraged to help drive improvements in the quality of financial advice for consumers. Market competition is needed to challenge the status quo and drive the cultural change the Government, ASIC and consumers are calling for. As stated by ASIC Chairman, Greg Medcraft:

*"Culture is one of the major root causes of misconduct"<sup>22</sup>*

The regulatory requirements create a significantly larger burden for small licensee businesses that have the least capacity or scale to absorb such costs across their business operations.

#### Recommendations

- The Commission consider well-being measures to assess whether client documentation regulatory obligations deliver favourable consumer outcomes.
- Government conduct a review of disclosure and client documentation requirements in Chapter 7 of the Corporations Act 2001, to consider whether the existing requirements remain appropriate given technology advancements, changes in consumer behaviour, and the current day regulatory standards of 2017, particularly the requirements related to information to be disclosed in a Statement of Advice.
- Consideration be given to facilitate innovative client-focused advice documentation in relation to both financial planning advice and automated advice, provided in the best interest of the client.

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<sup>22</sup> Speech by Greg Medcraft, Chairman, Australian Securities and Investments Commission at the AHRI Senior HR Leaders Forum Luncheon (Sydney, Australia), 5 April 2017



## Sophisticated / wholesale investor definitions

The current definitions of retail, sophisticated, and wholesale investors in the Corporations Act:

- are based on the wealth of the investor, rather than a qualitative and/or quantitative measure of their financial literacy
- do not incorporate behavioural elements into the categorisation or basic understanding of how consumers make decisions or engage with financial products and services
- assume (wrongly, in our view) that client wealth is a good proxy for financial literacy
- removes judgement and discretion from financial intermediaries regarding their conduct towards clients with differing degrees of financial capability, and
- do not consider distinctions based on risk and the complexity of the client's needs, the complexity of the advice sort by the client, and the complexity of different financial arrangements and financial products.

When paired with a disclosure-based system of regulation, these definitions encourage documentary compliance with little consumer protection benefit, improvement in financial capability or opportunity, or in the quality of advice. They also create disparity in the costs and time involved in meeting regulatory requirements depending on which investor category each client falls into, based on their wealth rather than the complexity of the needs of the client or advice they require, or their financial capability.

This significantly impacts on competition within the advice market based on the investor type of the financial planner. The need to control costs to compete in this market and can drive some providers to limit their client base to sophisticated and wholesale investors, limiting the availability of financial planning advice to retail investors.

### Recommendation

- The Government review the effectiveness and value of the retail, sophisticated, and wholesale investor definitions in the Corporations Act, and their impact on competition in Australia's financial services.
- This should include the development of a definition based on a risk framework and the complexity of the client's needs, the complexity of the advice sort by the client, and the complexity of different financial arrangements and financial products, and consumer financial capability.
- An appropriate test would need to be developed to assess financial capability, and conflicts of interest would need to be carefully assessed, disclosed and managed.



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## Consistent treatment across professions

Regulations should not afford any commercial benefit or competitive advantage to one type of financial services professional over another. Laws and Regulator policies and practices that provide an advantage to one professional operating in the financial advice space (such as accountants and lawyers) and their clients, should also be extended to financial planners to ensure there is symmetry in the system for clients using financial services professionals.

The following issues in particular provide an unfair competitive advantage to lawyers and accountants and their clients, over financial planners:

- Authorising witness status for statutory declarations
- Professional privilege
- Tax deductibility of fees.

## Witnessing consumers' statutory declarations

The Financial Planning Association (FPA) asks for our members to be given the same standing as members of other tax practitioner professional bodies such as the CPA Australia (CPA), Chartered Accountants Australia and New Zealand (CAANZ), Institute of Public Accountants (IPA) and National Tax and Accountants Association (NTAA) when it comes to being included as 'authorised witnesses' for Commonwealth Statutory Declarations.

Commonwealth Statutory Declarations are currently governed by the Statutory Declarations Act 1959 and the Statutory Declarations Regulations 1993.

Under current legislation only a person listed in Schedule 2 to the Statutory Declarations Regulations 1993 is a person before whom a statutory declaration can be made. Financial planners are not currently included on the list.

These Statutory Declarations can be used:

- In conjunction with the administration of any Department of the Commonwealth (i.e. ATO, ASIC, etc.)
- For the purposes of a law of the Commonwealth (i.e. Tax, Super, Social Security)
- In connection with any matter arising under a law of the Commonwealth.

## *Application with other Acts*

The Statutory Declarations Act 1959 only authorises a person to witness a Commonwealth statutory declaration. Under the Regulations, this list includes a person who is authorised to witness a statutory declaration of a particular State (or Territory) where it is made in that State (or Territory).

Individuals who can witness Commonwealth statutory declarations cannot automatically witness a State (or Territory) declaration. Only where the State (or Territory) also lists the specific occupation, or deems the Commonwealth Regulations, can they also sign the State (or Territory) based declaration. Currently there is one state and one territory that deem occupations listed under the Commonwealth Regulations.



Other Acts, such as the Anti-Money Laundering and Counter-Terrorism Act 2006, deem persons listed under the Statutory Declaration Regulations 1993 to qualify as persons that can certify copies of documents [see the definition of certified copy under paragraph 1.21 of Instrument 2007 (No. 1)].

The AML/CTF Rules allow financial planners to certify documents if they are an authorised representative of an AFSL license, and have two or more years of continuous service with one or more licensees.

We note that the Statutory Declarations Regulations is currently under review by the Attorney-General's Department. While we have made a submission to the Department's review of the Regulations, a final decision not expected until mid-2018.

### *Consumer need*

The benefits of using a financial planner have been recognised by many people. In 2015, 2.4 million Australians were actively using a financial planner and a further 1.1 million intended to start using one in the next two years.<sup>23</sup>

Financial planners help people simplify their finances and set achievable financial goals, particularly in relation to complex matters such as superannuation, debt management, insurance, investments, retirement and estate planning. This involves putting appropriate structures and arrangements in place, which often require documentation to be witnessed by an authorised witness.

Financial planners are not currently included in Schedule 2 of the Statutory Declarations Regulations. This means clients must find an authorised witness in order to finalise the documentation necessary to implement their financial plan (often at additional unnecessary expense plus significant inconvenience), and restricts the ability of financial planners to service their clients on a daily basis and gives a competitive advantage to other financial services professionals.

As previously stated, precedent for permitting financial planners to witness documents has been set in the AML/CTF Rules which allows financial planners to certify documents. Consumers often question our members asking why financial planners are not included in the statutory declaration regulations when they can certify identification documents under AML/CTF laws.

### *Consistency*

Like CPA, CAANZ, IPA and NTAA, the FPA is a recognised professional body by the Tax Practitioners Board and continues to meet the requirements set by the Regulator for all tax practitioner bodies. However, the FPA is the only professional body to have received ASIC approval of a Code of Conduct for its members to sign up to under s1101A of the Corporations Act.<sup>24</sup>

Introduced in 2012, the Future of Financial Advice (FoFA) Reforms banned financial advice commissions on superannuation and investment products; introduced a best interest duty for the provision of financial advice; and set a requirement to send a renewal notice every two years and an annual fee disclosure statement to clients that have signed an ongoing fee arrangement.

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<sup>23</sup> Investment Trends 2015 Direct Client Report

<sup>24</sup> Under s1101A of the Corporations Act, ASIC has the power to approve codes of conduct that relate to the activities of AFS licensees, their authorised representatives or product issuers.



In March 2015, the Government established the ASIC Financial Adviser Register (FAR), requiring individuals to be authorised and registered on the Register to be able to provide financial advice to consumers.

In February 2017, the Federal Parliament passed a Bill that requires all financial planners to hold a relevant degree (or degree equivalent), pass an exam, adhere to a Code of Ethics, and maintain CPD, to be listed on the FAR and be authorised to provide financial advice. This Bill has established a national professional standards and education framework, to be set by a new Commonwealth statutory company – the Financial Adviser Standards and Ethics Authority<sup>25</sup> - in line with other occupations such as legal practitioners, medical practitioners and accountants.

In addition, the Bill restricts the use of the terms financial planner and financial adviser to those who meet the new education and professional standards and are registered on the ASIC Financial Advice Register. A new Life Insurance Framework also received Royal Assent, restricting remuneration when recommending life insurance solutions to consumers.

Since July 2014, financial planners have also been required to register with the Tax Practitioners Board as tax (financial) advisers, and adhere to the requirements of the Tax Agent Services Act and Code, along with their tax agent peers such as accountants. The amendment to the Tax Agent Services Act defines a tax (financial) advice service as a type of tax agent service.

Certified Financial Planner<sup>®</sup> professionals meet initial and ongoing competency, ethics and practice standards and abide by professional conduct rules and ongoing competency and practice requirements. The global CFP<sup>®</sup> standards and certification requirements are based on empirical research of the abilities, professional skills and knowledge needed to practice financial planning.

FPA's Financial Planner AFP<sup>®</sup> members must hold an undergraduate degree or higher, have at least 1 years' supervised experience in a financial planning related role, and adhere to our professional obligations.

The FPA would like to see financial planners, including our CFP<sup>®</sup> and AFP<sup>®</sup> members, given the same standing as members of other professions and professional bodies such as the CPA, ICAA, IPA and NTAA, and be included as 'authorised witnesses' for Statutory Declarations, to eliminate this competition anomaly.

#### Recommendations

- Certified Financial Planner<sup>®</sup> and Financial Planner AFP<sup>®</sup> members of the Financial Planning Association of Australia be included on the *list of other persons before whom a statutory declaration may be made*, in Schedule 2 of the Statutory Declarations Regulations.
- Financial planners who meet the new professional and education requirements for registration on the ASIC Financial Advice Register and are also registered with the TPB as tax (financial) advisers or tax agents, should be included in the list of occupations before whom a statutory declaration may be made.

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<sup>25</sup> <http://kmo.ministers.treasury.gov.au/media-release/033-2017/>



## Professional privilege for financial planners

Legal professional privilege (“LPP”) is a right attaching to qualifying communications between lawyers and their clients. In its basic form, LPP applies to communications for the dominant purpose of:

- Obtaining or giving legal advice (“advice privilege”) or
- Preparing for anticipated litigation (“litigation privilege”).

This privilege is considered a right of the client rather than the (legal) professional, and it has its roots in the notion that fairness and public interest require a client being able to make full and frank disclosures to their professional adviser without the risk of prejudice and damage by subsequent compulsory admission.

### *Extending professional privilege to tax practitioners*

It is widely viewed that LPP is necessary to ensure proper administration of justice. However, under common law, LPP only extends to the client-lawyer relationship.

In 2007 the Australian Law reform Commission (ALRC) delivered a report, “*Privilege in Perspective: Client Legal Privilege in Federal Investigations*”, which reviewed LPP in the context of federal investigatory bodies, including the ACCC, ASIC, ATO, APRA, AFP and Royal Commissions of inquiry.

One of the major recommendations of the ALRC report was that privilege be extended, in defined circumstances, to include tax advice provided by accountants. This extension would formalise the accountant’s exemption (see below) and would bring Australia into line with the position in the US, UK and NZ.

### *The Tax Commissioner vs. professional privilege*

Under Sections 263 and 264 of the Income Tax Assessment Act 1936 (ITAA 36) the Commissioner has broad powers enabling the ATO to have access to buildings and documents in pursuit of their legal aims. This provision captures the two primary Tax Acts, plus parts of the Taxation Administration Act 1953, which together contains the powers dealing with objections, reviews and appeals and the collection and recovery of income tax.

Since the decision of *Baker v Campbell* (1983) 153 CLR 52, communications and documents under LPP have not been available for inspection by the Commissioner under sections 263 and 264.

### *The accountant’s exemption*

In the 1980’s the accounting lobby successfully argued that the ability of lawyers to claim LPP gave them a competitive advantage over the accounting profession when providing taxation advice. In response the ATO issued the ‘Access and Information Gathering Manual’ guidelines recognising that “*taxpayers should be able to consult with their professional accounting advisers on a confidential basis*” and created self-imposed limits on ATO access to accountant’s papers.

This exemption provides different concessions for differing types of documents, such as source documents (i.e. records of transactions), restricted source documents (i.e. advice documents) and non-source documents (i.e. other advice documents).



As previously mentioned, financial planners have been required to fall under the registration and governance of the Tax Practitioners Board, with progressive registration since 1 July 2014. This change recognises that financial planners provide advice on taxation matters that clients rely on to make informed financial decisions.

While there is scope<sup>26</sup> for the ATO to lift the accountant's exemption, there remains a competitive advantage with accountants having access to this exemption while financial planners do not.

It was noted in the 2007 ALRC report that the fact that the same advice can be given by accountants and lawyers on taxation matters as the crucial factor in their push for the extension of privilege to taxation advice. On the same basis this should also extend to financial planners providing the same advice.

In 2011 the ALRC provided a submission in response to the Discussion Paper on "*Privilege in relation to Tax Advice*". This submission covered a number of areas, including the extension of the proposed Privilege to BAS agents. The ALRC response was that BAS agents may be included under any extension within their limit to provide advice with respects to taxation law under section 90-10 of the Tax Agent Services Act 2009.

Further, the ALRC made a general observation that it is the lawful provision of advice with respect to particular laws that provides the foundation for applying the rationale to other professionals.

The FPA shares the same interpretation that would see the financial planners captured within any law created to extend the provision of LPP (in defined circumstances).

#### Recommendations

- The FPA requests as an interim measure that financial planners are included in the ATO's self-imposed 'accountants exemption' to ensure there is no commercial advantage where the same advice is being provided by the two different professions.
- Longer term, the FPA requests statutory provisions to ensure all financial services professionals, including CFP<sup>®</sup> and Financial Planner AFP<sup>®</sup>, receive professional privilege, in defined circumstances, relevant to the areas of law they provide financial advice in (i.e. taxation, superannuation, social security, estate planning, etc)

#### Tax deductibility of advice fees for consumers

The precedent of tax deductibility of professional fees is already set and allows consumers to deduct fees paid to registered tax agents, BAS agents and lawyers. There is now an opportunity to amend a current anomaly in respect to the tax deductibility of financial planning fees. This is consistent with the Coalition's election commitment to reduce costs for consumers to access financial advice<sup>27</sup>.

<sup>26</sup> *White Industries Aust v Commissioner of Taxation* (2007) 66 ATR 306

<sup>27</sup> The Hon Senator Arthur Sinodinos AO, Delivering affordable and accessible advice (20 December 2013), available at <<http://axs.ministers.treasury.gov.au/media-release/011-2013/>>



Since 2014, financial planners have been required under the Tax Agent Services Act to be registered with the Tax Practitioners Board. As registered tax (financial) advisers, financial planners must comply with the same regulatory requirements of the TASA Code as tax agents, therefore there should be symmetry in the benefits extended to clients of both the accounting and financial planning professions. The legal requirements should not provide a commercial advantage to one type of tax professional over another.

Including financial planners in the Tax Agent Services regime, and the banning of commissions on financial advice through the Future of Financial Advice reforms, has set the right environment to introduce tax deductibility of financial advice fees.

Currently, a fee for service arrangement for the preparation of an initial financial plan is stated by the Australian Taxation Office<sup>28</sup> to be not tax deductible under section 8-1 of the *Income Tax Assessment Act 1997*.

Tax Determination TD 95/60 differentiates between a fee for drawing up a financial plan and a management fee or annual retainer fee. The determination states that the ATO is of the opinion that the expense incurred in drawing up a plan is not deductible for income tax purposes because the expenditure is not incurred in the course of gaining or producing assessable income, but rather is an expense that is associated with putting the income earning investments in place. This is in contrast to the tax deductions available for professional fees incurred when purchasing an investment property, and the legal fees associated with establishing a trust.

Taxation Ruling IT39 states that where expenditure is incurred in 'servicing an investment portfolio' it should properly be regarded as being incurred in relation to the management of income producing investments and thus as having an intrinsically revenue character.

Consumers are paying for personal financial advice in varying ways that result in different taxation treatments for no apparent public benefit. This variety of treatment appears to be contrary to the ATO's obligation under the Taxpayers Charter it adopted in November 2003 to treat tax payers consistently.

The inability to claim a tax deduction for the fees associated with an initial financial plan acts as a disincentive for people to take the first step towards organising their finances on a strategic basis. This has widespread cost implications, both for the individuals and the community as a whole. Encouraging the use of professional financial planning advice results in a more financially literate community, and benefits society overall.

Quality financial advice can:

- reduce financial and social exclusion for consumers and help them navigate the financial marketplace and learn how to better manage their finances providing them with dignity and peace of mind throughout their life;
- deliver significant consumer benefits including changes in savings behaviour, setting proper budgets, following a plan for paying off debt, and organising finances and building wealth;

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<sup>28</sup> Refer to ATO Taxation Determination TD 95/60



- change people's behaviour and habits of managing their financial affairs by teaching them sensible and simple practices that can be used in their everyday lives to prepare for their future financial needs; and
- improve the financial capability of consumers, enabling them to make informed judgments and effective decisions about the use and management of money throughout their lives.<sup>29</sup>

Research commissioned by the FPA has found that 30% of those who have not used financial advice and do not intend to seek advice in future have stated that the high cost of advice is a key reason for why they have not sought the advice.<sup>30</sup> Public policy initiatives to improve access to affordable advice for all Australians, particularly those most in need of assistance in managing their finances, will reduce the cost of advice for consumers while maintaining consumer protections and advice quality.

Making financial advice more affordable for consumers supports the Coalition's superannuation policy *"[t]o encourage as many Australians as possible to actively plan and save for their retirement, to take full advantage of the benefits the superannuation system provides and to work toward a self-funded retirement."*<sup>31</sup>

It also assists Government to fulfil its obligation to address the substantial issues of financial and social exclusion by helping consumers gain access to expertise to help them navigate the financial marketplace and learn how to better manage their finances.

Rice Warner research<sup>32</sup> identified clear societal benefits of financial advice;

- reduced debt - increases disposable income for more productive purposes;
- higher rates of return on investments over long periods - building wealth;
- insurance protection - prevents people from relying on welfare;
- higher levels of savings – reduces reliance on government benefits during and after retirement;
- a financially literate and conscientious society that would make better long-term decisions.

Financial planners provide valuable advice that is important for the long-term economic welfare of Australians. The financial planning profession is uniquely positioned to help Australians build their wealth and plan for a financially independent retirement.

Specifically legislating for initial advice fees to be tax deductible would greatly improve consumers' access to affordable financial advice. While this would involve some additional costs to Government, these costs would be significantly outweighed by the long-term benefits. To control the cost to revenue,

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<sup>29</sup> FPA Value of Advice Research, Rice Warner Actuaries, February 2008.

<sup>30</sup> Investment Trends, 'FPA Member Satisfaction Report' (December 2014)

<sup>31</sup> Brian Loughnane, 'The Coalition's Policy for Superannuation' (September 2013), available at <  
[http://parlinfo.aph.gov.au/parlInfo/download/library/partypol/2717533/upload\\_binary/2717533.pdf;fileType=application%2Fpdf#search=%22library/partypol/2717533%22](http://parlinfo.aph.gov.au/parlInfo/download/library/partypol/2717533/upload_binary/2717533.pdf;fileType=application%2Fpdf#search=%22library/partypol/2717533%22)>

<sup>32</sup> Above n 4.



the Government could include caps on either the size of the tax deduction or an income cap on those able to receive a deduction.

This issue significantly impacts on the accessibility and affordability of advice for consumers, and in turn the competitiveness of financial planning advice versus other types of advice and financial services professionals.

#### Recommendations

- The FPA recommends that the Government engage the Productivity Commission to examine the short-term and long-term position of the Budget if the preparation of an initial financial plan and ongoing fees were tax deductible. This report should be robust to a variety of different solutions, such as means-tested or capped tax deductions.
- The FPA recommends the preparation of an initial financial plan, and ongoing management fees or annual retainer fees, be expressly stated to be tax deductible.

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### **Product manufacturer accountability**

The lack of regulatory oversight of financial products has historically resulted in financial advice providers being held responsible for client losses stemming from products failing to meet their stated outcomes. In some instances, this may have been the result of poor product performance. While not failing, the product may not have performed in the expected or promoted manner. Where there is a legitimate failure of the product to meet its stated objectives due to mismanagement or fraud, additional consumer protections should be introduced to better support consumers for any losses they have born.

We recognise the Government's current consideration of introducing design and distribution obligations for product manufacturers, and product intervention powers for ASIC. However until such measures are introduced the additional regulatory burden created for financial planners by the lack of accountability of product manufacturers remains a significant inhibitor of innovation in the financial advice space.

The lack of accountability on product manufacturers for products that do not meet their stated objectives, combined with the availability of comparable product information and the cost of the regulatory burden of providing financial advice, significantly impacts on licensees ability to compete within the market due to the ever increasing pressure this places on professional indemnity insurance premiums, particularly for small business.

#### Recommendations

- Product manufacturers should be called as co-defendants in EDR claims against advice providers where product failure or mis-performance are the cause of the complaint or consumer detriment.