



ASIC

Australian Securities & Investments Commission

Senate inquiry into the scrutiny of financial advice

Submission by the Australian Securities and Investments Commission

December 2014

Contents

Executive summary	3
The regulation of financial advice	3
Current level of consumer protections (TOR 1)	4
ASIC's role in preventing the provision of unethical and misleading financial advice (TOR 2)	4
Appropriateness of existing dispute resolution and compensation mechanisms (TOR 3)	5
Mechanisms to ensure transparency of misconduct (TOR 4)	6
Response by financial services providers and companies to misconduct in the industry (TOR 5)	6
Other reforms to prevent misconduct (TOR 6)	6
A The regulation of financial advice	8
Quality of financial advice	8
ASIC's strategic approach to problems in the industry	9
Financial advice reforms	11
Areas for improvement in the regulatory regime	17
B Current level of consumer protections (TOR 1)	19
Existing consumer protection mechanisms	19
Implications of the FOFA reforms	25
C ASIC's role in preventing the provision of unethical and misleading financial advice (TOR 2)	29
ASIC's role and oversight	29
Implications of the FOFA reforms	35
D Appropriateness of existing dispute resolution and compensation mechanisms (TOR 3)	37
Existing mechanisms within the dispute resolution and compensation framework	37
Compensation through negotiated outcomes	41
Implications of the FOFA reforms	41
E Mechanisms to ensure transparency of misconduct (TOR 4)	43
Adviser register	43
Current mechanisms to ensure transparency	44
F Response by financial services providers and companies to misconduct in the industry (TOR 5)	45
Encouraging self-regulation	45
Life insurance	46
Training and competence	47
G Other reforms to prevent misconduct (TOR 6)	49
Greater scope and flexibility to control licensee conduct	49
Broader infringement notice regime	51
Compensation arrangements and last resort scheme	52
Competence and professionalism	53
Conflicts of interest	54
Appendix: Previous ASIC submissions	57
Key terms	58

Executive summary

The regulation of financial advice

- 1 One of ASIC's three strategic priorities is to promote investor and financial consumer trust and confidence. We want to see a financial advice sector that delivers accessible, high-quality advice in which consumers and financial investors can have trust and confidence. Accessible, high-quality advice can deliver value to consumers, and there are many financial advisers who do provide such advice. However, in our experience, there is still an unacceptable level of poor-quality advice in Australia.
- 2 ASIC has long been concerned about the quality of financial advice provided to consumers. Our concerns reflect broad systemic problems within the financial advice industry, driven by conflicts of interest arising from ownership and remuneration structures and low levels of competence, compounded by weaknesses in the regulatory system. Our concerns arose as a result of our monitoring and surveillance work, reports of misconduct, and market intelligence, and were strongly reinforced by the results of shadow shopping surveillances. This work has also confirmed our belief in the need to raise professional and training standards within the industry.
- 3 ASIC has sought to take a strategic approach to addressing these problems, using existing regulatory tools as well as discussing issues publicly and calling for reform. In particular, our submission to the 2009 Parliamentary Joint Committee on Corporations and Financial Services inquiry into financial products and services in Australia (Ripoll Inquiry) expressed serious concerns about the effect of commission payments and other conflicted payments on the quality of advice.
- 4 In response to the Ripoll Inquiry, the Parliament passed the Future of Financial Advice (FOFA) reforms. These reforms are designed to improve trust and confidence in the industry by addressing many of these problems. The FOFA reforms are an important step in transforming the financial advice sector from a sales-driven distribution network to a professional services industry. It is, however, too early to say how quickly they will impact adviser conduct.
- 5 ASIC has also identified further improvements that can be made to achieve a professional financial advice sector in which investors can place their trust and confidence.
- 6 We have raised our concerns and suggestions for reform in previous submissions to Parliamentary inquiries and Government reviews, such as the Ripoll Inquiry, the Senate Economic References Committee inquiry into the performance of the Australian Securities and Investments Commission

(Senate inquiry into the performance of ASIC), the 2014 Financial System Inquiry (Financial System Inquiry) and the 2014 Parliamentary Joint Committee on Corporations and Financial Services inquiry into proposals to lift the professional, ethical and education standards in the financial services industry (2014 PJC Inquiry). The Financial System Inquiry has recently reported and made recommendations consistent with a number of ASIC's proposals.¹

Current level of consumer protections (TOR 1)

- 7 Consumer protection mechanisms in the *Corporations Act 2001* (Corporations Act) include a licensing system and conduct and disclosure rules. The Corporations Act also includes a system of internal and external dispute resolution, supported by a requirement for Australian financial services (AFS) licensees to hold adequate professional indemnity insurance.
- 8 Consumer protection mechanisms in the *Australian Securities and Investments Commission Act 2001* (ASIC Act) include rules to protect consumers from unfair contract terms for some financial products, unconscionable conduct, and false, deceptive or misleading representations or conduct in relation to financial services. They also give ASIC expanded enforcement powers and penalty and redress provisions for consumers, such as infringement and public warning notices.
- 9 The FOFA reforms should improve consumer protections by raising standards of conduct and disclosure and by enhancing our licensing and banning powers.

ASIC's role in preventing the provision of unethical and misleading financial advice (TOR 2)

- 10 We use a range of regulatory tools to enforce and promote compliance with the laws that ASIC administers and to promote investor and financial consumer trust and confidence. These tools include education, guidance, surveillance and enforcement action.
- 11 These tools serve a range of purposes, and all tools can have a deterrent effect on misconduct. Which tools we use in response to a potential breach of the law depends on the objectives we are seeking to achieve, the nature of the breach, and the available evidence and penalty.

¹ *Financial System Inquiry final report*, report, November 2014.

- 12 ASIC's regulatory role does not involve pre-vetting financial advice or preventing the risk of all consumer losses. It should be remembered that risk is a fundamental component of investment decisions and all investment products carry the risk of loss, especially when there is a market downturn. Even well-advised clients can suffer investment loss.
- 13 In addition, as is the case with other regulators, ASIC cannot bring action in relation to every breach of the laws it administers.
- 14 Nevertheless, ASIC can minimise the risk of unethical and misleading financial advice occurring by using our available tools where they will have the most impact. ASIC has a dedicated team devoted to regulating the financial advice industry. This team has achieved significant outcomes; for example, since 1 July 2013 they have cancelled 13 AFS licences and permanently banned 16 people from providing financial services.
- 15 We make choices about which matters to pursue to a regulatory or enforcement outcome based on a range of factors, including strategic significance, the benefits of pursuing misconduct, issues specific to the case, alternatives to formal investigation and our available resources.
- 16 The licensing, conduct and disclosure reforms introduced by FOFA should lift the quality of advice in the industry, and the enhanced banning and civil penalty provisions should have a deterrent effect on misconduct.
- 17 Additional reforms to enhance ASIC's powers to control AFS licensee conduct and to give ASIC access to more flexible enforcement options would assist us to minimise the risk of misconduct.

Appropriateness of existing dispute resolution and compensation mechanisms (TOR 3)

- 18 The dispute resolution and compensation framework requires AFS licensees to have in place adequate internal dispute resolution (IDR) procedures, be a member of an ASIC-approved external dispute resolution (EDR) scheme and have compensation arrangements, generally in the form of professional indemnity (PI) insurance.
- 19 EDR schemes provide a relatively cost-effective and more accessible alternative to court proceedings to resolve a dispute. By gathering data and intelligence about disputes, EDR schemes provide an opportunity to improve industry standards of conduct. By reporting systemic, persistent or deliberate misconduct to ASIC, the schemes contribute to ASIC's intelligence about the market.

- 20 PI insurance is designed to protect AFS licensees against business risk, not to provide compensation directly to investors and financial consumers. Therefore, it has limitations as a consumer protection mechanism.
- 21 ASIC cannot award or compel the payment of compensation where misconduct has caused loss. However, ASIC can and does obtain consumer compensation through negotiated outcomes in appropriate cases. Examples include \$253 million for Opes Prime and \$136 million for Storm Financial.
- 22 The FOFA reforms should reduce the likelihood of poor advice that can in turn lead to costly disputes and claims on PI insurance.

Mechanisms to ensure transparency of misconduct (TOR 4)

- 23 ASIC has long advocated for an adviser register and the current work to develop one will assist ASIC with oversight of all advisers.
- 24 The register will be consumer friendly and will give consumers access to additional valuable information about advisers that is not currently available.
- 25 ASIC maintains a number of registers; however, the information they contain is of limited use to consumers in selecting advisers or to ASIC in monitoring employee advisers, as the registers do not include information about employee adviser representatives. Therefore, the new register will benefit consumers and industry.

Response by financial services providers and companies to misconduct in the industry (TOR 5)

- 26 ASIC has encouraged and supported industry-led initiatives to try to address collective market problems within the financial advice sector.
- 27 While industry has made some recent attempts to respond to concerns about the high levels of misconduct within the sector, our experience is that these efforts have had limited success to date.

Other reforms to prevent misconduct (TOR 6)

- 28 The FOFA reforms have introduced important new conduct and disclosure requirements, accompanied by new civil penalty provisions in relation to financial advisers, and modified some aspects of the licensing and banning tests.

- 29 This inquiry seeks input on other regulatory or legislative reforms that would prevent misconduct.
- 30 In response, we have identified the following areas for improvement in the regulatory regime that could further assist in preventing misconduct. They are concerned with the following issues:
- (a) *ASIC's ability to control licensee conduct*—for example, by:
 - (i) directing licensees to undertake compliance remediation and compensation actions; and
 - (ii) banning individuals from managing or being involved in a financial services business.
 - (b) *ASIC's ability to take enforcement action that is proportionate to the misconduct*, particularly where the misconduct is of low to medium severity. We have suggested that an infringement notice regime be introduced for less serious misconduct.
 - (c) *Compensation arrangements and uncompensated loss*. We have suggested that an option to address relatively high levels of uncompensated loss is a limited last resort statutory compensation scheme to supplement PI insurance.
 - (d) *Competence and professionalism*. Our proposals on increasing competence include:
 - (i) a mandatory degree qualification in a relevant field for financial advisers who provide personal advice on Tier 1 products;²
 - (ii) a national examination as a means to test whether an individual has attained the required standard of competence; and
 - (iii) mandatory continuing professional development of 30 hours per year, and an initial monitoring and supervision period for new financial advisers of one to two years.
- 31 We have not made any specific suggestions in relation to conflicted remuneration streams; however, we remain concerned about their implications for the quality of advice (e.g. in the life insurance sector).
- 32 These issues have been canvassed in our previous reports and our submissions to other inquiries.
- 33 We note that the Financial System Inquiry has proposed a number of important measures that broadly align with these areas of concern, which we support.

² 'Tier 1' products are all financial products except general insurance products, consumer credit insurance, basic deposit products, non-cash payment products and First Home Saver Account deposit products.

A The regulation of financial advice

Key points

ASIC wants to see a financial advice sector that delivers accessible, high-quality advice in which consumers and financial investors can have trust and confidence. Accessible, high-quality advice can deliver value to consumers and there are many financial advisers who do provide such advice. However, in our experience, there is still an unacceptable level of poor-quality advice in Australia.

ASIC has long been concerned about the quality of financial advice provided to consumers.

ASIC has sought to take a strategic approach to addressing these problems, using existing regulatory tools as well as discussing issues publicly and calling for reform.

The FOFA reforms are designed to improve trust and confidence in the industry by addressing many of these problems. They are an important step in transforming the financial advice sector from a sales-driven distribution network to a professional services industry. It is, however, too early to say how quickly they will impact adviser conduct.

However, there are still areas for improvement in the regulatory system, which ASIC has identified in previous submissions to Parliamentary inquiries and Government reviews.

Quality of financial advice

- 34 One of ASIC's three strategic priorities is to promote investor and financial consumer trust and confidence. We want to see a financial advice sector that delivers accessible, high-quality advice in which consumers and financial investors can have trust and confidence. Accessible, high-quality advice can deliver value to consumers and there are many financial advisers who do provide such advice. However, in our experience, there is still an unacceptable level of poor-quality advice in Australia.
- 35 ASIC has long been concerned about the quality of financial advice provided to consumers. Our concerns arose as a result of our monitoring and surveillance work, reports of misconduct, and market intelligence, and were strongly reinforced by the results of our shadow shopping surveillances in 1998, 2003, 2006 and 2011.
- 36 ASIC's concerns were not limited to a few 'bad apples' (advisers who provide inappropriate advice to clients) in the industry, or even a few bad firms. Instead, they reflected broad systemic problems within the financial advice industry, driven by conflicts of interests arising from ownership and

remuneration structures and low levels of competence, compounded by weaknesses in the regulatory system.

- 37 ASIC has sought to identify and understand the nature and size of the problems through both our shadow shopping surveillances and our more traditional surveillance work.
- 38 The results of our shadow shopping surveillances consistently showed:
- (a) inadequate consideration of clients' needs;
 - (b) inadequate justification or lack of credible reasons for recommending clients switch products; and
 - (c) the impact of conflicted remuneration structures on the quality of advice.³
- 39 ASIC's other regular surveillance work has reinforced our concerns about poor quality and inappropriate advice, and about the role of conflicts of interest in driving those problems. It has also confirmed our belief in the need to raise professional and training standards in the industry.

ASIC's strategic approach to problems in the industry

- 40 Given the widespread nature of the concerns we had, ASIC sought to take a strategic approach to trying to achieve change in the industry. This involved:
- (a) liaison with and provision of guidance to industry;
 - (b) risk-based surveillance with targeted work on individual firms;
 - (c) enforcement action, including administrative bannings and negotiated settlements such as major long-term enforceable undertakings; and
 - (d) the provision of information for the users of financial advice.
- 41 One element of that strategic approach was to have a significant focus on the larger players in the industry that had the greatest number of authorised representatives. In our view, if their practices and culture could be improved, it would benefit the large number of investors obtaining advice through them.⁴

³ Key findings from these surveillances are set out in Section H of ASIC, *Senate inquiry into the performance of the Australian Securities and Investments Commission: Main submission by ASIC*, October 2013 (ASIC's main submission to the Senate inquiry into ASIC's performance).

⁴ For details of our regulatory action against large industry participants and more recent action, see Section H of ASIC's main submission to the Senate inquiry into ASIC's performance and paragraphs 798–806 of ASIC, *Financial System Inquiry: Submission by the Australian Securities and Investments Commission*, April 2014 (ASIC's main submission to the Financial System Inquiry).

- 42 This focus on large licensees continues today, with current projects looking at the quality of advice, breach reporting and mis-selling of financial products in large vertically integrated businesses.
- 43 We have also released two public reports, Report 251 *Review of financial advice industry practice* (REP 251) and Report 362 *Review of financial advice industry practice: Phase 2* (REP 362). To address issues we had found through our surveillance, our reports recommended that AFS licensees:
- (a) ensure that they effectively manage conflicts of interest in their business models;
 - (b) continue to give training a high priority, because this lessens the risk of poor advice being provided to consumers;
 - (c) ensure their advisers comply with their stated procedures;
 - (d) check references of new advisers to exclude ‘bad apples’;
 - (e) report breaches and demonstrate that remediation plans are in place;
 - (f) retain access to client records at all times;
 - (g) educate clients about risk and return so that their expectations are more realistic;
 - (h) handle complaints well; and
 - (i) ensure that their compensation arrangements (including PI insurance) adequately cover all the products and services they advise on.
- 44 We have also undertaken a significant amount of work to better understand the financial advice industry and the drivers of poor advice, and to work with industry to try to improve the quality of advice provided to consumers. Some examples of this work include:
- (a) In 2002, we reviewed primary production managed investment schemes—see Report 17 *Compliance with advice and disclosure obligations: Report on primary production schemes* (REP 17) (released in February 2003). One of the findings was that there was a correlation between primary production scheme promoters paying high commissions to advisers and those advisers providing inappropriate financial advice when they recommended those products to clients.
 - (b) In late 2004 and early 2005, we reviewed the advice given by financial advisers to more than 260 people thinking of switching superannuation funds—see Report 50 *Superannuation switching surveillance* (REP 50) (released in August 2005). One of our findings was that there was a strong tendency among advisers to recommend switching to a fund related to the licensee. We cautioned that, in these cases, there was an inherent conflict of interest that must be carefully managed to avoid the perception that the advice is inappropriate or not given on a reasonable

basis, or that the interests of the licensee are placed above those of the client.

- (c) In 2007, we worked closely with industry and Standards Australia on a voluntary reference-checking handbook, which was designed to encourage industry to seek and provide reference-checking information. Media Release (07-267 MR) *ASIC teams with industry on reference-checking initiative for financial advisers* (11 October 2007) publicised the reference-checking handbook as well as alerting industry to problems associated with dishonest, incompetent or unethical financial advisers.
- (d) In 2010, we undertook a comprehensive study of access to financial advice in Australia, including examining the barriers to accessing financial advice—see Report 224 *Access to financial advice in Australia* (REP 224) (released in December 2010). One of our findings was that some consumers did not trust financial planners to provide them with unbiased, professional advice and were reticent to seek advice.

45 In ASIC’s submission to the Ripoll Inquiry, we publicly expressed serious concerns about commission payments and we said that these risked distorting the quality of advice provided to clients.⁵

Financial advice reforms

- 46 The current regulatory framework for financial advice has evolved over the past 15 years mirroring the emergence and development of the financial advice industry. Today’s framework is a culmination of a series of reforms that have each prompted and responded to stages of this development and varying levels of maturity of this industry.
- 47 At the time of the 1997 Financial System Inquiry (Wallis Inquiry), financial advisers were regulated in a fragmented way. Investment advisers were regulated separately from others who would typically provide advice on financial products in the course of selling products (e.g. insurance brokers), and there was no clear legal concept of ‘financial product advice’.
- 48 The Wallis Inquiry’s recommendation that all persons responsible for financial advice should be subject to a single licensing regime, along with

⁵ ASIC, *PJC Inquiry into financial products and services in Australia: Submission by the Australian Securities and Investments Commission*, August 2009.

those selling and dealing in products, has been part of the ongoing evolution to professionalise the financial advice industry in Australia.⁶

- 49 The *Financial Services Reform Act 2001* (FSR Act) was introduced to implement a number of the recommendations of the Wallis Inquiry. The FSR Act still forms the basis of the regulatory regime we have today. It introduced a single licensing regime for financial services providers (including financial advice providers), and conduct and disclosure obligations for financial advice.

The FOFA reforms

- 50 In response to the Ripoll Inquiry, the Parliament passed the FOFA reforms. The objectives of the FOFA reforms were to improve the trust and confidence of retail investors in the financial planning sector. They sought to achieve this by increasing the standard of financial advice and removing conflicts of interest, such as commissions.
- 51 The FOFA reforms were introduced by the following legislation:
- (a) the *Corporations Amendment (Future of Financial Advice) Act 2012*; and
 - (b) the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012*.
- 52 The FOFA legislation was passed by the Parliament on 25 June 2012 and commenced on 1 July 2012. For the first 12 months, compliance with the reforms was optional: see Div 7 of Pt 7.7A of the Corporations Act. Compliance has been mandatory since 1 July 2013. Key elements of the FOFA reforms include:
- (a) amendments to the conduct obligations for financial advisers;
 - (b) a prospective ban on conflicted remuneration structures, including commissions and volume-based payments;
 - (c) a requirement to send an annual fee disclosure statement (FDS) to clients with ongoing fee arrangements;
 - (d) a requirement that advisers obtain their client's consent every two years to continue the ongoing fee arrangements ('opt-in'); and
 - (e) enhanced licensing and banning powers for ASIC.

⁶ Wallis Inquiry, *Financial System Inquiry final report*, report, March 1997, <http://fsi.treasury.gov.au/content/FinalReport.asp>.

Amendments to the FOFA reforms

- 53 The Government announced various amendments to the FOFA legislation. To give effect to these amendments, the Government introduced the Corporations Amendment (Streamlining of Future of Financial Advice) Bill (Streamlining FOFA Bill) into Parliament on 19 March 2014.
- 54 Parliamentary amendments were made to the Streamlining FOFA Bill as part of the debate in the House of Representatives. These amendments included changes to the Statement of Advice (SOA) requirements.
- 55 The Corporations Amendment (Streamlining of Future of Financial Advice) Regulation 2014 (Streamlining FOFA Regulation) commenced on 1 July 2014 to implement the majority of the Government's announced changes. The changes to the SOA requirements were implemented through the Corporations Amendment (Statements of Advice) Regulation 2014 (SOA Regulation), which was to commence on 1 January 2015.
- 56 The Streamlining FOFA Regulation was disallowed by the Senate on 19 November 2014, meaning that the FOFA provisions reverted back to their position prior to the commencement of the Regulation. A number of these regulations were reinstated by the Corporations Amendment (Revising Future of Financial Advice) Regulation 2014, which commenced on 16 December 2014. The SOA Regulation was repealed from 16 December 2014 by the Corporations (Statements of Advice) Repeal Regulation 2014.
- 57 At the time of making this submission, the Streamlining FOFA Bill was still before the Senate.
- 58 The description in paragraphs 59–78 reflects the law at the time of making this submission.

Best interests and related obligations

- 59 Advisers who provide personal advice to retail clients are now subject to three new conduct obligations:
- (a) an obligation to act in the best interests of their client in relation to the advice, subject to a 'safe harbour', specifying that the adviser will have met their legal obligations if they meet certain requirements;
 - (b) an obligation to give appropriate advice;⁷ and
 - (c) an obligation to give priority to the interests of clients when there is a conflict between the interests of the client and those of the adviser and various related parties (see Div 2 of Pt 7.7A).⁸

⁷ A similar appropriate advice obligation existed prior to the FOFA reforms. However, it was imposed on the providing entity (i.e. the licensee or authorised representative) and was in a slightly different form.

- 60 These obligations are imposed on the individual advice provider.
- 61 ASIC has provided guidance on meeting the best interests duty and related obligations in Regulatory Guide 175 *Licensing: Financial product advisers—Conduct and disclosure* (RG 175).
- 62 Prior to the FOFA reforms, the Corporations Act did not contain provisions requiring a financial adviser to act in the best interests of their client or to give priority to the interests of the client when providing advice. As long as the advice met the lower standard of being ‘appropriate’, and the necessary disclosures had been made, the adviser was not prohibited by the Corporations Act from giving advice that benefited the adviser rather than the client. Also, these obligations rested solely with the licensee or authorised representative, meaning that there were no obligations directly on the individual advice provider to provide advice that is appropriate for the client.

Ban on conflicted remuneration

- 63 The FOFA reforms also implement a prospective ban on conflicted remuneration structures relating to the distribution of, and advice about, a range of retail investment products.
- 64 ‘Conflicted remuneration’ is any benefit (monetary or non-monetary) given to an AFS licensee or its representative that provides financial product advice to retail clients that, because of the nature of the benefit or the circumstances in which it is given, could reasonably be expected to influence:
- (a) the choice of financial product recommended to clients by the AFS licensee or representative; or
 - (b) the financial product advice given to clients by the AFS licensee or representative (s963A).
- 65 There is a presumption that volume-based benefits—benefits that are wholly or partly dependent on the total number or value of financial products recommended by an AFS licensee or representative to clients, or acquired by clients to whom an AFS licensee or representative provides financial product advice—are conflicted remuneration: s963L.
- 66 The ban does not apply to some products and advice services—for example, general insurance products, some life risk insurance products and basic banking products.

⁸ Div 2 of Pt 7.7A also contains the obligation to give a warning if the advice is based on incomplete or inaccurate information about the client’s relevant personal circumstances: s961H.

- 67 Additionally, the FOFA reforms allow a number of benefits to be ‘grandfathered’, so that the conflicted remuneration provisions do not apply to them. The effect of the grandfathering provisions is that the conflicted remuneration provisions do not apply in many situations where the client invested in the product or platform prior to 1 July 2014. Separate grandfathering rules apply to benefits given under an employee arrangement.
- 68 ASIC has provided guidance on how we will administer the ban on conflicted remuneration in Regulatory Guide 246 *Conflicted remuneration* (RG 246). Appendix 1 of RG 246 provides a detailed summary of benefits that are exempt from the ban on conflicted remuneration.⁹
- 69 While licensees have been subject to a general conflicts management obligation since 1 January 2005 (s912A(1)(aa)), until the introduction of the FOFA reforms, the regulatory system contained no prohibition on advisers receiving conflicted remuneration.
- 70 The FOFA reforms also introduced:
- (a) a ban on asset-based fees charged on borrowed amounts; and
 - (b) a ban on platform operators receiving volume-based shelf-space fees.

FDSs

- 71 The FOFA reforms introduced a requirement that advice providers receiving fees for giving personal advice under an ongoing arrangement with a retail client provide the client with an annual FDS. The FDS must set out information about the fees paid by the client, the services provided to the client and the services that the client was entitled to receive in the previous 12 months.
- 72 FDSs are designed to make fees paid by clients more transparent and to help clients understand whether they are receiving a service from their adviser that is commensurate with the ongoing fees they are paying. ASIC has provided guidance on how and when an FDS should be provided in Regulatory Guide 245 *Fee disclosure statements* (RG 245).

Opt-in requirement

- 73 An AFS licensee or representative who receives fees under an ongoing fee arrangement for the provision of personal financial product advice must give their client a written renewal notice every two years, which requires the

⁹ Since publication of RG 246, a number of additional exemptions to the ban on conflicted remuneration and amendments to grandfathering arrangements were introduced as part of the Corporations Amendment Regulation 2013 (No. 2), the Corporations Amendment Regulation 2013 (No. 4) and the Corporations Amendment Regulation 2013 (No. 5). RG 246 has not yet been updated to reflect these changes.

retail client to opt-in to renew that fee arrangement: s962K. This is known as the ‘opt-in requirement’.

74 ASIC has the power to exempt a person or class of persons from complying with the opt-in requirement if we are satisfied that the person is, or persons of that class are, ‘bound by a code of conduct approved by ASIC’: s962CA. There are currently no codes approved for the purposes of s962A; however, as at the time of making this submission we have one application.

75 Before the introduction of the FOFA reforms, there was no requirement for advisers to obtain their clients’ consent to continue their ongoing fee arrangement. The purpose of the opt-in requirement is to ensure that disengaged clients do not have fees taken out of their assets for services they do not want.

Enhanced ASIC licensing and banning powers

76 ASIC’s powers were enhanced by legislative amendments made through the FOFA legislation, including amendments to when ASIC may:

- (a) grant, suspend or cancel an AFS licence; and
- (b) ban a person from providing financial services.

77 Before the amendments, ASIC could only refuse, suspend or cancel a licence or ban a person from providing financial services if there was a reason to believe that an applicant, licensee or person ‘will not comply’ with its obligations. This was a very difficult threshold to satisfy. The new licensing test allows ASIC to refuse a licence, cancel a licence or ban an individual if a delegate determines an applicant, licensee or person ‘is not likely to comply’ with its obligations in future. Further, an ASIC delegate may now ban a person from providing financial services if they have reason to believe the person is not of good fame or character, or the person is not adequately trained or is not competent to provide the service. See Sections B and G for further detail on ASIC’s licensing powers.

Other measures introduced by FOFA

78 Another measure introduced by the FOFA reforms was the removal of the licensing exemption for ‘recognised accountants’ when providing advice on the establishment of a self-managed superannuation fund (SMSF).¹⁰ The exemption ends on 1 July 2016. From 1 July 2013, accountants (and others) have been able to apply for a ‘limited AFS licence’ and seek authorisations to provide financial advice on SMSFs and class of product advice¹¹ about:

¹⁰ This measure was implemented by the Corporations Amendment Regulation 2013 (No. 3).

¹¹ ‘Class of product advice’ is financial product advice about a class of products but does not include a recommendation about a specific product in the class: see reg 7.6.01BA(3).

- (a) superannuation products;
- (b) securities;
- (c) simple managed investment schemes as defined in the Corporations Regulations 2001 (Corporations Regulations);
- (d) general and life insurance; and
- (e) basic deposit products.

Financial adviser register

- 79 In response to Recommendation 44 of the Senate inquiry into ASIC's performance,¹² the Australian Government formed an industry working group to consider the best way to establish a public register of financial advisers.¹³ The Government announced the details of the public register on 24 October 2014¹⁴ and draft regulations were released for comment on 27 November 2014.

Areas for improvement in the regulatory regime

- 80 The regulation of financial advice is aimed at ensuring consumers receive high-quality advice in circumstances where consumers are not well placed to judge the quality of advice themselves before acting on that advice. As noted in paragraph 50, the FOFA reforms were aimed at improving trust and confidence in the financial advice sector through a number of measures designed to raise the standard of advice. These measures are discussed in paragraphs 59–78.
- 81 The FOFA reforms are an important step in increasing the standard of advice and transforming the financial advice sector from a sales-driven distribution network to a professional services industry. While the regulation has strengthened in relation to the provision of financial advice, we consider that there are still some areas for improvement in the broader regulatory regime that could be addressed to minimise misconduct and poor-quality advice in the future.
- 82 Fully achieving the outcomes envisaged by the FOFA reforms relies on:

¹² Senate Economic References Committee, *Performance of the Australian Securities and Investments Commission*, final report, June 2014.

¹³ Senator the Hon Mathias Cormann, Minister for Finance and Acting Assistant Treasurer, Media Release, *Establishing an enhanced public register of financial advisers*, 17 July 2014, <http://mhc.ministers.treasury.gov.au/media-release/031-2014/>.

¹⁴ Senator the Hon Mathias Cormann, Minister for Finance and Acting Assistant Treasurer, Media Release, *An enhanced public register of financial advisers*, 24 October 2014, <http://mhc.ministers.treasury.gov.au/media-release/044-2014/>.

- (a) advisers being sufficiently competent to provide appropriate recommendations to clients;¹⁵
- (b) financial advice businesses having the right systems, processes and people in place to adequately monitor and supervise the advice being provided to clients;
- (c) transparency about the services consumers are receiving and any inherent conflicts that may exist;
- (d) appropriate compensation arrangements for consumers; and
- (e) ASIC having greater scope and flexibility to control licensee conduct, including a broader infringement notice regime.

83 The Financial System Inquiry made a number of recommendations in its final report, which broadly align with the areas for reform in paragraph 82, to:

- (a) better align the interests of financial advice firms with those of consumers (Recommendation 24);
- (b) raise the competency standards of advisers and introduce a register of advisers (Recommendation 25);
- (c) require advisers to disclose their ownership structures to consumers (Recommendation 40); and
- (d) enhance ASIC's powers to enable the banning of individuals from engaging in management roles (Recommendation 24).¹⁶

84 Section F contains a discussion of these matters, along with suggestions for further reforms. We have raised our concerns and suggestions for reform in previous submissions to Parliamentary inquiries and Government reviews: see Table 4 in the appendix. Our suggestions for reform focus on the broader areas identified in paragraph 82 that will build further on the FOFA reforms to create cultural change and work towards developing a professional financial advice sector. Achieving this outcome will greatly assist in preventing unethical and misleading financial advice.

¹⁵ The Financial System Inquiry recommended the raising of competency standards of advisers and that a register of advisers be established: *Financial System Inquiry final report*, report, November 2014, Recommendation 25.

¹⁶ *Financial System Inquiry final report*, report, November 2014.

B Current level of consumer protections (TOR 1)

Key points

TOR 1 focuses on the implications of the FOFA reforms, with particular reference to the current level of consumer protections.

Consumer protections in the Corporations Act include protection given through regulation of licensing, conduct and disclosure. Additional consumer protections include requirements for retail clients to have access to internal and external dispute mechanisms.

A range of consumer protection mechanisms are also located within the ASIC Act.

The FOFA reforms should improve consumer protections.

Existing consumer protection mechanisms

- 85 Consumer protection mechanisms are found within the Corporations Act and the ASIC Act.
- 86 Mechanisms in the Corporations Act include:
- (a) a licensing system to control who can operate within the industry, and if they do not meet conduct standards, exclude them by licence cancellation or individual banning (see paragraphs 90–96);
 - (b) conduct rules aimed at ensuring industry participants behave with honesty, fairness, integrity and competence (see paragraphs 97–100); and
 - (c) disclosure rules designed to overcome the information asymmetry between industry participants and investors by requiring disclosure of information needed to facilitate informed decisions by investors (see paragraphs 101–110).
- 87 These mechanisms promote consumer protection. However, it should be noted that the licensing system and conduct rules are not solely consumer protection mechanisms. Wholesale providers are required to be licensed and a number of conduct obligations apply equally to wholesale and retail providers.
- 88 The Corporations Act also requires a system of internal and external dispute resolution, which provides a free, accessible, fair and efficient dispute resolution process for consumers, and a requirement for licensees to have compensation arrangements: see paragraphs 111–115.

- 89 The ASIC Act include rules to protect consumers from:
- (a) unfair contract terms (but not in relation to all financial products);¹⁷
 - (b) unconscionable conduct; and
 - (c) false, deceptive or misleading representations and conduct.

Licensing

- 90 An AFS licence is required to conduct a financial services business in Australia, unless an exemption applies.
- 91 ASIC assesses applications for AFS licences as part of our role as a regulator of the financial services industry. When we assess a licence application we consider whether the applicant:
- (a) is competent to carry on the kind of financial services business specified in the application;
 - (b) has sufficient resources to carry on the proposed business—unless they are regulated by the Australian Prudential Regulation Authority (APRA); and
 - (c) can meet the other obligations of an AFS licensee.
- 92 Individual representatives of AFS licensees do not need to be licensed or otherwise approved by ASIC. However, provided certain criteria are met ASIC can ban individuals from providing financial services: s920A.
- 93 The licensing process is a point-in-time assessment of the licensee, not of its owners or employees. Holding an AFS licence does not provide a guarantee of the probity or quality of the licensee's services.
- 94 ASIC must grant a licence if a business shows it can meet basic standards such as training, compliance, insurance and dispute resolution. The business is responsible for maintaining these standards.
- 95 The licensing regime provides a screening process to exclude persons who do not have the appropriate skills, experience and qualifications to provide services with honesty, integrity and competence, or who are not of good fame and character, from operating within the financial services industry.
- 96 The Corporations Act establishes basic standards of conduct for AFS licensees to meet to obtain and keep a licence. ASIC has given extensive guidance on how we will interpret and administer these standards. For example, the financial resource requirements the various types of licensees must meet (unless they are regulated by APRA, in which case they must

¹⁷ The unfair contract terms provisions do not apply to insurance products and there is uncertainty about their application to investment products.

meet APRA's financial requirements) are set out in Regulatory Guide 166 *Licensing: Financial requirements* (RG 166), and the standards by which we assess the competence of licensees are described in Regulatory Guide 105 *Licensing: Organisational competence* (RG 105).

Conduct

- 97 Financial services conduct regulation includes rules aimed at ensuring industry participants behave with honesty, fairness, integrity and competence. The licensing system controls who can operate within the industry and, if they do not meet the conduct standards, excludes them by licence cancellation. General conduct obligations are imposed on all licensees. For example, all licensees must ensure that their representatives are adequately trained and competent to provide the financial services covered by their licence: see s912A(1)(f).
- 98 Additional conduct obligations are imposed on financial advisers who provide personal advice to retail clients—namely, obligations to:
- (a) act in the best interests of the client;
 - (b) provide the client with appropriate advice; and
 - (c) where there is a conflict with their own interests, or those of one of their related parties, prioritise the interests of the client (Div 2 of Pt 7.7A).
- 99 As noted above, these advice conduct obligations were introduced as part of the FOFA reforms described in paragraphs 59–62 and replaced the conduct obligations that were previously imposed on AFS licensees and their authorised representatives, including the requirement to have a reasonable basis for personal advice: s945A.
- 100 The best interests duty and related obligations operate in conjunction with the ban on conflicted remuneration, which is described in paragraphs 63–70.

Example

In September 2014, ASIC banned Michael Irwin, a Rockhampton-based former financial adviser, from providing financial services for five years after reviewing a number of pieces of Mr Irwin's advice.

ASIC banned Mr Irwin on the basis that he did not have a reasonable basis for the advice that he provided and that he failed to provide SOAs that disclosed the basis on which his advice was given. In particular, Mr Irwin failed to:

- take into account clients' existing insurance arrangements when recommending clients take out insurance products; and
- adequately disclose to clients why the asset portfolio implemented departed from the asset allocation set out in the SOAs.

Mr Irwin's conduct demonstrated a clear failure to act in the best interests of clients and to ensure that clients were in an informed position when acting on the advice.

Disclosure

101 The financial services regime's disclosure requirements are designed to overcome the information asymmetry between industry participants and investors by requiring disclosure of information needed to facilitate informed decisions by investors.

Financial Services Guide and SOA

102 The disclosure obligations that apply to the provision of personal advice to retail clients include requirements to prepare and provide:

- (a) a Financial Services Guide (FSG) (s941–943);¹⁸ and
- (b) an SOA (s946A–947E).

103 These obligations apply to the 'providing entity'—that is, the AFS licensee or authorised representative that provides the financial advice.

104 These disclosure documents provide the consumer with information about what financial services are being provided and who is providing them. An FSG is intended to ensure that a retail client is given sufficient information to enable them to decide whether to obtain financial services from the providing entity and an SOA is intended to assist a retail client to understand, and decide whether to rely on, personal advice. ASIC expects these documents to be set out in a clear, concise and effective manner, and we have provided guidance for when these documents must be provided and what information they should include in RG 175.

105 If an adviser recommends that a retail client acquire a financial product, the client will also receive a Product Disclosure Statement (PDS) for that financial product. The obligation to provide the PDS is on the providing entity.

Example

In 2012, ASIC became aware that FTS, a Queensland-based AFS licensee, was providing double gearing advice to clients regardless of their personal circumstances. The advice left many consumers worse off for having received the advice. ASIC undertook a wide-scale surveillance of FTS's business. As a result of ASIC action, FTS stopped providing double

¹⁸ The obligation to prepare and provide an FSG applies to providing entities that provide both personal advice and general advice, as well as providers of other financial services.

gearing advice to consumers and made a number of changes to its advice process.

ASIC also suspended FTS's licence for six weeks commencing on 30 June 2014. The suspension of FTS's licence sent a strong signal to the market that there are very real consequences associated with providing poor advice to consumers. The suspension meant that FTS was unable to provide financial advice to clients.

FDS

106 In addition to the FSG and the SOA, financial advisers who enter into or have an ongoing fee arrangement with retail clients must provide their retail clients with an FDS on an annual basis. In contrast to the obligation to provide an FSG and an SOA, the obligation to provide a FDS applies to the 'fee recipient'—that is, the AFS licensee or a representative of the AFS licensee who will receive the ongoing fee.

107 The obligation to provide a FDS was introduced as part of the FOFA reforms and is described in paragraphs 71–72.

Warnings

108 Licensees and their representatives must give a general advice warning to a retail client when they give general advice to that client: see s949A.

109 The objective of the general advice warning is to alert the client to the fact that the advice is general in nature and does not take into account their objectives, financial situation or needs. If the warning is not given, there is a risk that the client will consider that the advice is appropriate to their relevant circumstances.

110 The advice provider is also required to give a warning if the personal advice is based on incomplete or inaccurate information about the client's relevant personal circumstances: see s961H. The purpose of the warning is to alert clients to the fact that the advice may not be appropriate given their objectives, financial situation and needs.

Dispute resolution and compensation framework

111 The Corporations Act includes some additional investor protections to help address situations where consumers are likely to be at a particular disadvantage relative to industry participants where the law is breached.

112 All AFS licensees that provide financial services to retail clients must have:

- (a) a dispute resolution system that includes IDR procedures and membership of an ASIC-approved EDR scheme; and
- (b) compensation arrangements, generally in the form of PI insurance.

- 113 The system of IDR and EDR provides a free, accessible, fair and efficient process for retail investors and financial consumers: see Section D.
- 114 This system recognises that retail investors and financial consumers face considerable barriers to pursuing disputes through the court system, given the significant costs and the asymmetry in information and resources that generally exist between financial services providers and their retail clients. In many cases, legal action would be uneconomic for investors and financial consumers, because of the amount of the losses claimed. The dispute resolution framework provides an alternative for consumers who might otherwise find it difficult to resolve disputes.
- 115 The obligation to maintain adequate PI insurance is intended to ensure that licensees are in a position to provide financial redress to consumers for loss incurred as a result of their conduct, and conversely to reduce the risk as far as possible that consumers go uncompensated where a licensee has insufficient financial resources to meet claims by their clients.
- 116 PI insurance can provide a valuable source of funds to assist a licensee to fully compensate for loss suffered by their customers, but it has significant limitations as a compensation mechanism: see paragraphs 178–179.

Australian Consumer Law

- 117 The consumer protection provisions in Div 2 of Pt 2 of the ASIC Act prohibit unconscionable, misleading or deceptive conduct connected to the provision of financial services.
- 118 Some of these provisions were amended in 2010 by the introduction of the Australian Consumer Law Acts¹⁹ to ensure consistency between the general consumer protection regime and the ASIC Act.
- 119 The new provisions extended ASIC’s jurisdiction, which now includes:
- (a) the power to deal with unfair contract terms (subject to some limitations); and
 - (b) expanded enforcement powers and penalty and redress provisions for consumers, such as:
 - (i) pecuniary penalties;
 - (ii) disqualification orders;
 - (iii) substantiation notices;

¹⁹ The *Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010* amended the ASIC Act by introducing provisions to address unfair contract terms in relation to financial services and products. It also provided for new penalty, enforcement and redress provisions. The *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010* amended some of the consumer protection provisions of the ASIC Act and the Corporations Act to maintain consistency with the generic consumer protection regime.

- (iv) redress for non-party consumers;
- (v) infringement notices; and
- (vi) public warning notices.

120 The type of regulatory response ASIC takes will depend on the particular provision that has been breached and the seriousness of the contravention and its consequences.

121 These additional regulatory tools are important to ensure ASIC is proactive in our regulatory approach and that we can address poor practices or problematic conduct at an early stage.

Example

As a result of an ASIC surveillance, SuperHelp Australia Pty Ltd (SuperHelp) paid a \$10,200 infringement notice penalty²⁰ after making potentially misleading statements about the cost of setting up an SMSF using SuperHelp's administration services.

ASIC's concerns related to a SuperHelp advertisement that ran in October 2013.

The representations were that fund setup was free and that pension fund setup was free, subject to 'conditions*'. No conditions were disclosed in the advertisement.

ASIC was concerned that, although advertised as free, the conditions for fund setup required investors to pay \$475 upfront—half the annual administration fee—to be eligible for 'free' fund setup. There were also restrictions on the number of members a fund could have and how many investments could be made.

ASIC was also concerned that pension fund setup was not free under any circumstances for investors under 60 years of age.²¹

Implications of the FOFA reforms

122 As described in Section A, the FOFA reforms are intended to improve the quality of financial advice, strengthen investor protection and improve trust and confidence in the financial advice industry. Measures such as the best interests duty and related obligations, the ban on conflicted remuneration, disclosure obligations aimed at fee transparency and new civil penalty provisions are an important and welcome step in achieving these objectives.

²⁰ Penalties for infringement notices are set by the ASIC Act at \$10,200.

²¹ Media Release (14-051MR) *SuperHelp Australia Pty Ltd pays infringement notice in relation to FREE SMSF fund setup claims* (18 March 2014).

- 123 ASIC recently released Report 407 *Review of the financial advice industry's implementation of the FOFA reforms* (REP 407) which sets out the findings from a review of the implementation of the FOFA reforms by a sample of 60 AFS licensees. The purpose of this work was to assess how the advice industry had adapted to the new requirements, to ensure industry was making necessary changes to their business practices, and to assist industry with areas of uncertainty.
- 124 REP 407 did not evaluate the quality of the advice provided or the impact of the reforms on investor protection, but it did note efforts by AFS licensees to change their business and process operations to ensure compliance with the new regime. At this early stage of the regime it is too early to assess how quickly these efforts will yield the intended results.
- 125 A recent ASIC review of life insurance considered advice from before and after the implementation of the FOFA reforms. It found that the post-FOFA advice complied with the law at a marginally higher rate than the pre-FOFA advice. However, we do not think it is appropriate to draw definitive conclusions on the impact of the FOFA reforms from this one surveillance project: see Report 413 *Review of retail life insurance advice* (REP 413).
- 126 Our 2014–15 Strategic Outlook identifies that gatekeeper conduct in financial services will be an important area of ASIC's focus over the next 12 months.²² We will be conducting proactive risk-based surveillances, concentrating on compliance in large financial institutions, and advice and dealing activities by the largest financial advice institutions to test how they comply with the law. An objective of this work will be to see the effect of the FOFA reforms on addressing conflicts of interest.

Licensing

- 127 Under the FOFA reforms, ASIC's licensing and banning powers were enhanced, including an amendment to the licensing test. A summary of these changes is at paragraphs 76–77.
- 128 While ASIC welcomes the changes to our licensing and banning powers, we think ASIC's ability to control licensee conduct could be enhanced: see paragraphs 213–224.

²² ASIC, *ASIC's Strategic Outlook 2014–15*, October 2014, p. 9.

Conduct reforms

- 129 The new conduct obligations for advisers under FOFA should go a considerable way in improving the quality of advice provided to investors, including by ensuring that advisers prioritise the needs of their clients and by removing some of the key conflicts of interest that may result in investors receiving poor-quality advice. However, as described in Section A, there are some exclusions and exceptions to these provisions that limit the extent of the consumer protection impact of the reforms.
- 130 For example, the FOFA reforms did not extend the ban on conflicted remuneration to individual life insurance sales under personal advice. Our recent review of life insurance advice (advice from both before and after the implementation of the FOFA reforms) found that 37% of consumers received advice that failed to meet the relevant legal standard that applied when the advice was given and that the way the adviser was paid had a significant bearing on the likelihood of their client receiving advice that did not comply with the law: see REP 413.
- 131 Of the 202 files in our sample, we found that where the adviser was paid under an upfront commission model, the pass rate was 55%, with a 45% fail rate. Where the adviser was paid under another commission structure, the pass rate was 93%, with a 7% fail rate.
- 132 We recognise that the review was undertaken over a period when compliance with the FOFA reforms became mandatory, and that the life insurance industry and advisers would have been adjusting to the new best interests duty and the obligation to prioritise clients' interests. Despite this, our findings indicate that conflicts of interest do have an impact on the quality of life insurance advice and that it is an industry-wide problem.
- 133 REP 413 made a number of recommendations for insurers, AFS licensees, advisers and their professional associations, including a focus on:
- (a) incentive models;
 - (b) training and competence of advisers giving life insurance advice;
 - (c) business models and how they can best facilitate good-quality advice on life insurance;
 - (d) how to ensure client interests are met; and
 - (e) balancing the issue of affordability versus cover.

Disclosure

- 134 The new obligation under the FOFA reforms for a financial adviser to provide those retail clients with whom they have an ongoing fee arrangement with an FDS on an annual basis should enhance transparency and assist

clients to establish if the services with which they are being provided are commensurate with the fees they are paying.

Dispute resolution and compensation framework

135 The implications of the FOFA reforms for the dispute resolution and compensation framework are discussed in paragraphs 182–185.

C ASIC's role in preventing the provision of unethical and misleading financial advice (TOR 2)

Key points

TOR 2 focuses on the implications of the FOFA reforms, with particular reference to the role of, and oversight by, regulatory agencies in preventing the provision of unethical and misleading financial advice.

We use a range of regulatory tools to enforce and promote compliance with the laws that ASIC administers and to promote investor and financial consumer trust and confidence.

These tools serve a range of purposes, and all tools can have a deterrent effect on misconduct.

ASIC does not pre-vet financial advice, nor can we prevent the risk of all consumer losses. ASIC cannot bring action in relation to every breach of the law we administer.

Nevertheless, ASIC can minimise the risk of unethical and misleading financial advice occurring by using our available tools where they will have the most impact.

The licensing, conduct and disclosure reforms introduced by FOFA should lift the quality of advice in the industry, and the enhanced banning and civil penalty provisions should have a deterrent effect on misconduct.

Additional reforms to enhance ASIC's powers to control licensee conduct and to give ASIC access to more flexible enforcement options would assist us to minimise the risk of misconduct.

ASIC's role and oversight

136 ASIC strives to promote investor and financial consumer trust and confidence. We do this by using a range of regulatory tools to enforce and promote compliance with the laws that ASIC administers, as well as to improve consumer understanding and decision making.

Regulatory tools

137 The regulatory tools available to ASIC are set out in Table 1.

Table 1: Regulatory tools available to ASIC

Education	ASIC undertakes educational activities to promote investors' and financial consumers' understanding of financial markets and market risk through our financial literacy work (e.g. ASIC's MoneySmart website and the MoneySmart Teaching program). Through education and surveillance (see below), we engage with our regulated population and with the community as a whole. ASIC's visibility and presence in the market increases awareness of the law and may deter individuals from engaging in misconduct.
Guidance	ASIC provides guidance about how we will administer the law to provide clarity to industry participants about their obligations. This is achieved by issuing regulatory guides, consultation papers, reports and information sheets. For example, ASIC issued a suite of regulatory guides to assist industry to understand their obligations under the FOFA reforms. These included an update to RG 175 for the best interests duty and related obligations, Regulatory Guide 244 <i>Giving information, general advice and scaled advice</i> (RG 244), RG 245 and RG 246.
Surveillance	ASIC conducts surveillances by gathering and analysing information on a specific entity or range of entities, a transaction, a specific product or issue of concern in the market to test compliance with the laws we administer and look at consumer and investor outcomes. Following a surveillance, we may publish our findings to inform the market and/or take further action, such as commencing an investigation with a view to carrying out enforcement action. We may also give guidance to industry to assist them to address issues identified in our surveillance. For example, Report 337 <i>SMSFs: Improving the quality of advice given to retail investors</i> (REP 337) contains a number of practical tips for advice providers to consider when recommending that a client establish a SMSF. REP 413 sets out a list of factors for advisers to consider when giving life insurance advice.
Enforcement action	ASIC undertakes investigations, which may lead to enforcement action such as: <ul style="list-style-type: none"> • criminal action; • civil action, such as civil penalty proceedings (e.g. for breach of directors' duties), corrective action (e.g. to correct misleading disclosure) and compensatory action (e.g. to recover compensation on behalf of consumers); • administrative action (e.g. cancelling a licence, banning or disqualifying persons from the financial services industry); and • negotiated outcomes (which may arise from surveillances or from investigations), including enforceable undertakings. An enforceable undertaking is a written undertaking given to ASIC that an entity or person will operate in a certain way. It is a flexible and effective remedy in improving compliance with the law and, in particular, driving a change of behaviour in a large institution. It may be enforced through the courts. Regulatory Guide 100 <i>Enforceable undertakings</i> (RG 100) provides more information on ASIC's approach to enforceable undertakings.

138 The range of available sanctions is determined by the legislation ASIC administers. For example, for breach of the obligations in s912A by a licensee, the only available sanctions are administrative or negotiated outcomes.

139 ASIC also provides public messages about areas of focus and concern through speeches and other public statements, many of which are published on our public website. For example, between 1 July 2014 and 1 December

2014, ASIC Commissioners have given 13 published speeches highlighting concerns in areas such as breach reporting and the SMSF sector.²³

- 140 The regulatory tool or tools ASIC chooses to use in response to a potential breach of the law will depend on the objectives that ASIC is seeking to achieve, the nature of the breach and the penalty available under the law. These include:
- (a) punishment;
 - (b) improving compliance;
 - (c) protecting the public;
 - (d) compensation for investors; and
 - (e) deterrence.²⁴
- 141 Which tools we use is also affected by the available evidence and our resources.
- 142 These objectives, and the regulatory tools that are used to achieve them, are summarised in Table 2.

Table 2: Regulatory objectives and the regulatory tools used to achieve them

Objective	Regulatory tools
Punishment	Includes criminal action, civil penalty action and infringement notices.
Improving compliance	Includes surveillance, guidance to industry, targeted campaigns (such as ASIC's recent campaigns targeting unlicensed credit providers) and education programs (such as the MoneySmart Rookie campaign), imposition of licence conditions, and enforceable undertakings.
Protecting the public	Includes ASIC's administrative powers to make banning orders or cancel or suspend licences. May also include ASIC's powers to obtain court orders for corrective disclosure (i.e. correcting misleading information that has previously been published) and the use of public warning notices.
Compensation for investors	Includes taking action to recover compensatory damages on behalf of a person, which ASIC is empowered to do if in the public interest and enforceable undertakings (which can include remediation programs).
Deterrence	When ASIC chooses to use our regulatory tools, deterrence is always an underlying objective.

²³ Speeches are available on ASIC's website: www.asic.gov.au/about-asic/media-centre/speeches/.

²⁴ For more detail on ASIC's approach to compliance and enforcement, and specific examples of how we have used our regulatory toolkit, see Sections B and F of ASIC's main submission to the Senate inquiry into ASIC's performance and paragraphs 286–304 and 798–806 of ASIC's main submission to the Financial System Inquiry.

ASIC's ability to deter and minimise unethical and misleading advice

- 143 ASIC's regulatory role does not involve pre-vetting financial advice or preventing the risk of all consumer losses. Risk is a fundamental component of investment decisions and all investment products carry the risk of loss, especially when there is a market downturn. Even well-advised clients can suffer investment loss.
- 144 In addition, as is the case with all regulators, ASIC cannot bring enforcement action in relation to every breach of the laws we administer or, indeed, in relation to every breach of the laws of which we are aware. Regulators make choices about which matters to pursue to a regulatory or enforcement outcome against a background of finite resources.
- 145 ASIC's ability to deter and minimise unethical and misleading advice depends in part on how we use our regulatory and enforcement toolkit to maximise the deterrent effect on corporate wrongdoing and provide incentives for compliance with the law.
- 146 Ultimately, the objective is to use our regulatory tools to take action for breaches of the law, to deter others from engaging in similar behaviour in the future and to create cultural change in the industry; this in turn benefits consumers in the long term.
- 147 When deciding whether to take enforcement action we generally consider the four issues listed in Table 3.

Table 3: Issues considered when deciding whether to take enforcement action

Strategic significance (e.g. what is the extent of the harm or loss?)	We consider the seriousness of the alleged misconduct and particularly its market impact, which includes the impact on confidence of investors and financial consumers. We also look at the consequences of the misconduct for investors and others—for example, the amount of money involved and the impact of that loss on the people affected.
Benefits of pursuing misconduct (e.g. is enforcement cost effective?)	In considering the regulatory benefits of pursuing misconduct, we consider whether it is widespread or part of a growing trend, and whether taking enforcement action will send an effective message to the market.
Issues specific to the case (e.g. what evidence is available?)	These cover a range of factors, such as: <ul style="list-style-type: none"> • the seriousness of the misconduct; • the time since the misconduct occurred; • whether the misconduct was isolated or is continuing; and • whether we have available credible, reliable, admissible evidence.
Alternatives to formal investigation	We are less likely to investigate matters that could better be addressed by another agency (e.g. federal and state police forces) or by private dispute resolution between the parties.

- 148 Information Sheet 151 *ASIC's approach to enforcement* (INFO 151) explains how we approach our enforcement role and why we respond to particular types of breaches of the law in different ways. A discussion of how ASIC determines whether to take enforcement action and the types of action we can pursue is set out at paragraphs 427–443 of ASIC's main submission to the Senate inquiry into ASIC's performance.
- 149 Since 1 July 2013, ASIC enforcement action in the advice space has resulted in:
- (a) five criminal convictions;
 - (b) 16 people banned permanently from providing financial services;
 - (c) nine people banned temporarily;
 - (d) five advisers entering into enforceable undertakings with ASIC, requiring three to permanently cease providing financial services and two temporarily;
 - (e) ASIC cancelling 13 AFS licences;
 - (f) two AFS licensees entering into enforceable undertakings with ASIC, requiring them to improve their compliance procedures;
 - (g) ASIC imposing additional licence conditions on three AFS licensees;
 - (h) five AFS licensees reaching an agreement with ASIC requiring them to review and improve their advice provision;
 - (i) an AFS licensee requesting we cancel their licence after action by ASIC;
 - (j) ASIC suspending two AFS licences; and
 - (k) seven infringement notices paid.
- 150 Some examples of where we have taken criminal action against financial advisers are set out below.

Examples

Thanh Quoc Tu, a former financial adviser employee of Patersons Securities Limited, advised the Brisbane Magistrates Court on 28 November 2013 of his intention to plead guilty to 54 fraud charges, including 33 counts of fraud and 21 counts of fraudulent falsification of records. It is alleged that Mr Tu misled 18 clients to invest a total of \$9,179,073. His alleged conduct included providing false documents such as certificates of investment.²⁵

²⁵ Media Release (14-319MR) *Former financial adviser faces charges over \$9 million fraud* (28 November 2014).

Brian William Veitch, a former authorised representative for WealthSure Pty Ltd, was sentenced to six years and two months imprisonment, with a four-year non-parole period, after pleading guilty to:

- 21 counts of using false withdrawal requests to cause the fraudulent transfer of funds (totalling approximately \$500,000) from seven clients' accounts without their knowledge or authority for his own purposes; and
- one count of providing a client with a false portfolio statement, causing the client to believe that \$300,000 was still in their account when, in fact, it was not.²⁶

Kevin Maxwell George Whitting, a former authorised representative of Kedesco Pty Ltd and employee of Shelbourne Financial Services Pty, pleaded guilty to five charges of providing inappropriate advice (s945A)²⁷ to five investors who collectively invested over \$684,000 in a managed investment scheme that collapsed in 2010, and five charges of providing false and misleading statements (s1041E) to three of the five investors. Mr Whitting was convicted of all 10 offences, ordered to pay back the money and fined \$5000.²⁸

Ian John Weaver, a former authorised representative of Enhance Capital Pty Ltd and The Salisbury Group Pty Ltd, pleaded guilty to:

- two counts of providing personal advice without first making reasonable inquiries in relation to personal circumstances (s945A(1)(a));
- one count of providing personal advice without giving reasonable consideration to relevant personal circumstances (s945A(1)(b)); and
- one count of making misleading statements likely to induce a person to apply for a financial product (s1041E).²⁹

151 In relation to some of the major collapses that have occurred in recent years, ASIC has taken various enforcement action to remove and punish unscrupulous participants, and recover compensation for affected consumers. Some examples are set out below.³⁰

Examples

Storm Financial: ASIC took civil action against former directors, Emmanuel and Julie Cassimatis, for breach of directors' duties (these proceedings are ongoing), civil compensation proceedings against the Commonwealth Bank of Australia, the Bank of Queensland, Macquarie Bank and Senrac, and intervened in the application for court approval of an agreed settlement of \$82.5 million in the Richards class action.

²⁶ Media Release (14-145MR) *Former WealthSure financial adviser jailed for \$500,000 fraud* (1 July 2014).

²⁷ After the introduction of the FOFA reforms there is no criminal penalty available for inappropriate advice.

²⁸ Media Release (13-321MR) *Former financial adviser convicted and ordered to pay back money* (28 November 2013).

²⁹ Media Release (12-50AD) *ASIC brings criminal charges against banned financial adviser* (14 March 2012).

³⁰ ASIC's main submission to the Financial System Inquiry provides further examples of enforcement actions in relation to major collapses (Table 24), and compensation obtained for investors and financial consumers (Table 25).

Opes Prime Stockbroking Ltd: ASIC took part in settlement negotiations between ASIC, ANZ, Merrill Lynch and the liquidators of Opes Prime, entered into enforceable undertakings against ANZ and took criminal action against three former directors of Opes Prime (Julie Smith, Laurie Emini and Anthony Blumberg).

Trio Capital: ASIC took criminal action against Shawn Richards (a former investment manager of the Astara Fund) and Tony Maher, entered into enforceable undertakings with five former Trio directors, planning firm Killara Financial Solutions and Tony Maher, and suspended the licence of financial planners Seagrims (the licence was later cancelled at the company's request).

Westpoint: ASIC took part in:

- 19 civil compensation proceedings;
- criminal actions against Graeme Rundle (former Westpoint Chief Financial Officer), Neil Burnard (a former promoter of Westpoint products), an unlicensed adviser and a financial planner; and
- administrative action, including the banning of 23 licensed advisers and enforceable undertakings from three KPMG partners.

Implications of the FOFA reforms

Changes to ASIC's licensing and banning powers

- 152 ASIC's powers in relation to licensing and banning were enhanced by legislative amendments made through the FOFA legislation. However, ASIC's ability to minimise misconduct by controlling licensee conduct is still limited. A further discussion of this issue and suggestions to enhance our powers in this area, some of which have also been recommended by the Financial System Inquiry, are described at paragraphs 213–224.

Enforcement powers

- 153 Achieving enforcement outcomes that act as a genuine deterrent to future misconduct assists ASIC's ability to minimise and deter unethical and misleading advice.
- 154 The key FOFA reforms are accompanied by civil penalty provisions. This has given ASIC greater enforcement options where there is a breach of Pt 7.7A: see s1317E.
- 155 ASIC's ability to respond to less serious misconduct in a prompt and efficient manner would be assisted by additional enforcement options. These are described at paragraphs 225–229.

Conduct obligations

- 156 The conduct obligations introduced by FOFA (e.g. the best interests duty) apply to the individual who provides the advice. Previous obligations under s945A were placed on the licensee or authorised representative. This shift places a greater focus on the person who bears the obligation to act in the client's best interests.
- 157 As noted above, the conduct obligations are also accompanied by new civil penalty provisions. It is too early to say how quickly the combined effect of greater focus on the advice provider and new civil penalty provisions will minimise the risk of future misconduct.

D Appropriateness of existing dispute resolution and compensation mechanisms (TOR 3)

Key points

TOR 3 focuses on the compensation framework, with particular reference to whether existing mechanisms are appropriate in any compensation process relating to unethical or misleading financial advice, and instances where these mechanisms may have failed.

The dispute resolution and compensation framework requires AFS licensees to have in place dispute resolution systems and compensation arrangements, generally in the form of PI insurance.

EDR schemes provide a relatively cost effective and accessible alternative to court proceedings to resolve a dispute. The schemes also gather data about disputes and report systemic, persistent or deliberate conduct to ASIC. This intelligence can assist ASIC by providing us with valuable information.

PI insurance is designed to protect licensees against business risk, not to provide compensation directly to investors and financial consumers. Therefore, it has limitations as a consumer protection mechanism.

ASIC does not have the direct power to award or compel the payment of compensation where unethical or misleading advice has caused loss. However, ASIC can obtain consumer compensation through negotiated outcomes in appropriate cases.

The FOFA reforms should reduce the likelihood of poor advice, which can in turn lead to costly disputes and claims on PI insurance.

Existing mechanisms within the dispute resolution and compensation framework

- 158 The current dispute resolution and compensation framework for financial services requires AFS licensees to have in place:
- (a) a dispute resolution system that complies with the relevant legislative requirements; and
 - (b) adequate compensation arrangements, generally in the form of PI insurance.

Dispute resolution

- 159 All AFS licensees (including fund managers and financial advisers) that provide services to retail clients must have a compliant dispute resolution

system. This dispute resolution system must be able to cover complaints about the licensee's authorised representatives.³¹

- 160 The dispute resolution system must consist of both:
- (a) IDR procedures that meet ASIC's approved standards and requirements; and
 - (b) membership of an ASIC-approved EDR scheme.³²

Internal dispute resolution

- 161 Effective and timely IDR procedures are the first element of an effective dispute resolution system, as the AFS licensee is generally best placed to deal with complaints from its own retail clients. A licensee's IDR procedures must comply with standards for IDR made by ASIC in Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG 165).

External dispute resolution

- 162 AFS licensees must be a member of one or more ASIC-approved EDR schemes that cover complaints made by retail clients in relation to the financial services provided (other than complaints that may be dealt with by the Superannuation Complaints Tribunal).
- 163 ASIC provides detailed guidance on the dispute resolution requirements and our approval of EDR schemes in RG 165 and Regulatory Guide 139 *Approval and oversight of external complaints resolution schemes* (RG 139).

ASIC's approval and ongoing oversight of EDR schemes

- 164 ASIC has a statutory role to approve EDR schemes. Currently, there are two EDR schemes approved by ASIC—the Financial Ombudsman Service (FOS) and the Credit and Investments Ombudsman (CIO).
- 165 ASIC-approved EDR schemes operate independently of ASIC. Each approved EDR scheme has its own constitution and rules. The rules of each scheme establish the scheme's jurisdiction, operational procedures and decision-making processes.³³
- 166 While the schemes operate independently, ASIC nevertheless has a direct and ongoing oversight role in relation to the approved schemes. ASIC sets standards, requires regular reporting from schemes about dispute statistics and systemic and serious issues (see paragraph 173), and must also approve

³¹ The requirement to have a compliant dispute resolution system applies even to product issuers and product providers that deal with retail clients, but do not require an AFS licence for various reasons (e.g. a legislative licensing exemption).

³² ASIC's main submission to the Senate inquiry into the performance of ASIC sets out the legislative requirements for IDR and EDR (Table 29), and ASIC's current policy and guidance on those requirements (Table 30).

³³ RG 139 contains guidelines for initial and ongoing approval of EDR schemes, including reporting obligations to ASIC.

ongoing scheme jurisdiction. ASIC also requires approved EDR schemes to commission an independent review of their operations at least every five years. These reviews identify any issues and areas for improvement in the schemes' operation.

167 As noted in ASIC's main submission to the Senate inquiry into the performance of ASIC, while EDR schemes have faced challenges in recent years with the rapid expansion of their jurisdiction and volume of disputes, these mechanisms provide an opportunity for continual improvement in the important role played by the schemes.³⁴

EDR scheme remedies

168 The remedies available to EDR schemes are not limited to making awards for financial compensation. For example, in resolving a dispute a scheme can require:

- (a) the payment of a financial award in accordance with the scheme's rules;
- (b) the waiver, variation or repayment of a fee or interest rate on a loan;
- (c) the forgiveness or variation of a debt or release of a security;
- (d) the reinstatement or rectification of a contract;
- (e) the payment, variation or review of a claim under an insurance policy; and/or
- (f) amendments to policy wordings, disclosure documents or advertising materials.

The importance of EDR schemes in the compensation process

169 EDR schemes provide a relatively cost effective and accessible alternative to going to court when a dispute about financial services cannot be resolved by the parties.

170 Without the EDR schemes, consumers would be more likely to:

- (a) pursue legal action, although often this is not economically viable;
- (b) seek direct assistance from ASIC or other government or community agencies; or
- (c) abandon their claim altogether.

171 Importantly, EDR schemes also provide an opportunity to improve industry standards of conduct. The schemes gather data and intelligence about disputes and, by maintaining close connections with industry, they can assist

³⁴ ASIC's main submission to the Senate inquiry into the performance of ASIC, Appendix 2.

in improving market conduct, product features and standards of disclosure to reduce the risk of future disputes arising.

172 The effective functions that the EDR schemes perform in resolving individual matters mean that, consistent with our statutory role, ASIC can focus on broader, systemic issues and serious misconduct.

173 Schemes are also required to report any systemic, persistent or deliberate conduct to ASIC. Systemic issues generally have implications beyond the immediate actions and rights of parties to the complaint or dispute. Several complaints or disputes at the same time may indicate a systemic issue. A systemic issue may also be identified from a single complaint or dispute. By reporting systemic issues, serious misconduct and data on complaints and disputes to ASIC, the EDR schemes also assist ASIC by providing valuable intelligence.

The requirement to have adequate compensation arrangements (PI insurance)

174 The Corporations Act provides that AFS licensees must have adequate arrangements for compensating retail clients and consumers for loss or damage due to breaches of the financial services laws.

175 The Corporations Regulations mandate that the key form of compensation a licensee must have is adequate PI insurance.

176 Regulatory Guide 126 *Compensation and insurance arrangements for AFS licensees* (RG 126) explains the key features a PI insurance policy must have for it to be ‘adequate’.

177 Generally, licensees’ PI insurance must:

- (a) be adequate, considering the licensee’s business (the volume of business, the number and kinds of clients or consumers, the kind of business and the number of representatives) and the maximum liability to compensation claims that realistically might arise;
- (b) cover EDR scheme awards;
- (c) cover fraud or dishonesty by directors, employees, other representatives and other agents of the licensee; and
- (d) have a limit of at least \$2 million for any one claim and in the aggregate for licensees with total revenue from financial services provided to retail clients and consumers of \$2 million or less. For licensees with total revenue greater than \$2 million, minimum cover should be approximately equal to actual or expected revenue from financial services provided to retail clients up to a maximum limit of \$20 million.

The limitations of PI insurance

- 178 Given the role PI insurance plays in the Australian dispute resolution and compensation framework for the financial services industry, it is important to recognise its limitations as a consumer protection mechanism. PI insurance is designed to protect licensees against business risk, and not to provide compensation directly to investors and financial consumers. It is a means of reducing the risk that a licensee cannot pay claims because of insufficient financial resources, but has some significant limitations, including where there are insolvency issues or multiple claims against a single licensee.
- 179 The shortcomings of PI insurance as a compensation mechanism have been raised in a number of government inquiries and reviews.³⁵ The issue of uncompensated loss is discussed further at paragraphs 230–237.

Compensation through negotiated outcomes

- 180 ASIC does not have the direct power to award or compel the payment of compensation where non-compliant, unethical or misleading advice has caused loss.
- 181 However, ASIC frequently deals with market misconduct by negotiating an outcome with an entity or individual as part of our broader enforcement process. Through negotiating outcomes, such as enforceable undertakings, in appropriate cases we can obtain compensation for consumers that may not otherwise be obtained in a timely and cost-effective manner. Examples include \$253 million for Opes Prime and \$136 million for Storm Financial.³⁶

Implications of the FOFA reforms

- 182 At this early stage of the FOFA reforms, the implications for dispute resolution and the cost and availability of PI insurance are unknown.
- 183 The FOFA reforms are intended, among other things, to improve the quality of advice provided to consumers. This should in turn reduce the incidence of poor advice leading to costly disputes. However, we are not in a position yet to assess the impact, if any, of these changes on the number or types of:

³⁵ For example, see R St John, *Review of compensation arrangements for consumers of financial services*, independent review, April 2012,

http://futureofadvice.treasury.gov.au/content/Content.aspx?doc=consultation/compensation_arrangements_report/default.htm

³⁶ Significant compensation outcomes achieved for consumers by ASIC are set out in Table 3 of ASIC's main submission to the Senate inquiry into the performance of ASIC.

- (a) complaints made by consumers or investors to EDR schemes; or
- (b) complaints that trigger a claim on a licensee's PI insurance made by consumers or investors to licensees.

184 We are also not able to assess whether these changes will affect the cost, availability or adequacy of PI insurance cover. Discussions with some insurers prior to the commencement of the FOFA reforms indicated that the ban on conflicted remuneration should have a positive effect on claims by reducing conflicts of interests; however, it would take some time to see whether claims activity changes.

185 ASIC's Financial Advisers team has commenced a project to understand the current market for PI insurance for financial advisers and, in particular, the extent to which adequate PI insurance is available and affordable. This project may also give us an indication of whether the FOFA reforms are having an impact on the cost, availability and adequacy of PI insurance in the market.

E Mechanisms to ensure transparency of misconduct (TOR 4)

Key points

TOR 4 focuses on the implications of the FOFA reforms, with particular reference to mechanisms, including a centralised register, that would ensure transparency for both the sector and consumers about financial planners found to have breached any law or professional standards in their employment.

ASIC has long advocated for an adviser register and the current work to develop one will assist ASIC with oversight of all advisers.

The register will be consumer friendly and will give consumers access to additional valuable information about advisers that is not currently available.

Adviser register

- 186 On 24 October 2014, the Government announced that it was delivering on its commitment to establish an enhanced, industry-wide public register of financial advisers.³⁷
- 187 ASIC has long advocated for a register of financial advisers that would capture information on all individuals authorised to give personal advice on Tier 1 products, and we welcome this development.
- 188 We see this as a very important reform that will benefit consumers and assist ASIC with our oversight of all advisers.
- 189 The primary objective of the register is to improve transparency and help consumers to choose their financial adviser. Secondary objectives include assisting licensees to improve recruitment practices and manage risks, and to assist ASIC to identify, track and monitor financial advisers.
- 190 As the register is also designed to be consumer friendly, it is more likely to be used by consumers than existing registers. It will also provide additional information not currently available on existing registers that is of value to consumers, such as employment history. It is hoped that this additional information will create demand-side pressure to improve the quality of advice.

³⁷ Senator the Hon Mathias Cormann, Minister for Finance and Acting Assistant Treasurer, Media Release, *An enhanced public register of financial advisers*, 24 October 2014, <http://mhc.ministers.treasury.gov.au/media-release/044-2014/>.

Information available on the adviser register

- 191 Based on the Government's announcement, the register of financial advisers will include:
- (a) the adviser's name, registration number, status and experience;
 - (b) the adviser's qualifications and professional association membership;
 - (c) the adviser's licensee, previous licensees and/or authorised representatives and business name;
 - (d) what product areas the adviser can provide advice on;
 - (e) any bans, disqualifications or enforceable undertakings; and
 - (f) details around the ownership of the AFS licensee and disclosure of the ultimate parent company where applicable.
- 192 ASIC is working to ensure the register is in place by 30 March 2015.

Current mechanisms to ensure transparency

- 193 The limitations of our existing registers highlight the importance of the new adviser register. ASIC currently maintains the following registers:
- (a) the AFS licensee register;
 - (b) the authorised representative register;
 - (c) the enforceable undertaking register; and
 - (d) the banned and disqualified registers.
- 194 We also issue a media release when we take enforcement action against an adviser, to alert the public to potential issues with that adviser.
- 195 Authorised representatives must be registered with ASIC;³⁸ however, there is no central register for employee representatives. This means that ASIC has no record of employee adviser representatives, including those who provide personal advice. This can result in very real difficulties in ASIC's ability to locate and take action against bad apples in the financial services industry.
- 196 ASIC has had considerable practical difficulties in tracking problem advisers, following the collapses of several financial planning businesses. Where the advisers have moved to new financial planning businesses as employee representatives, we are unable to track them because they do not appear on our register.

³⁸ An 'authorised representative' is a natural person or corporate entity to which an AFS licensee gives an authorisation to provide financial services on its behalf. An authorised representative may be structured as a separate business from the licensee. 'Representative' is a broader term, incorporating all persons that act on a licensee's behalf, including employees, directors and authorised representatives.

F Response by financial services providers and companies to misconduct in the industry (TOR 5)

Key points

TOR 5 focuses on the implications of the FOFA reforms, with particular reference to how financial services providers and companies have responded to misconduct in the industry.

ASIC has encouraged and supported industry-led initiatives to try to address collective market problems within the financial advice sector.

While industry has made some recent efforts to respond to concerns about the high levels of misconduct within the sector, our experience is that these efforts have had limited success to date.

Encouraging self-regulation

- 197 ASIC has encouraged industry to take a lead on addressing collective market problems, where possible.
- 198 While industry has made some recent efforts to respond to concerns about the high levels of misconduct within the sector, these efforts have been limited and we think industry can do more to respond to misconduct and enhance consumer trust and confidence in the financial advice sector.
- 199 Self-regulation has been described as a regulatory model where industry, sometimes in conjunction with government, voluntarily develops, administers and enforces its own solution to a particular issue, and where no formal oversight by the regulator is mandated. Examples of self-regulation include:
- (a) the introduction by industry participants of an industry-wide regulatory code or professional body's code of conduct;
 - (b) industry service charters, guidelines and standards; and
 - (c) industry-based accreditation and complaint-handling schemes.³⁹
- 200 A self-regulatory system is likely to be more effective where an industry has sufficient resources to:

³⁹ For details of ASIC's views on self-regulation or co-regulation in the financial advice industry, see paragraphs 39–60 of ASIC, *PJC Inquiry into proposals to lift the professional, ethical and education standards in the financial services industry: Submission by the Australian Securities and Investment Commission*, September 2014 (ASIC's submission to the 2014 PJC Inquiry).

- (a) implement the system;
- (b) monitor and enforce compliance with standards, on an ongoing basis; and
- (c) apply sanctions to members, including removing them from industry where necessary.

201 Paragraphs 202–212 set out recent attempts at self-regulatory initiatives within the financial advice sector.

Life insurance

202 ASIC has long held concerns about problems with the sale of life insurance and voiced these concerns publicly. Before we commenced our recent review of life insurance advice, we identified the following kinds of problematic advice:

- (a) replacement of a client’s life insurance policy with little or no demonstration under s947D of why the new policy is an improvement on the old policy;
- (b) replacement of client life policies with more expensive life policies with little or no additional coverage;
- (c) evidence that the client’s personal circumstances were not considered when new policies were recommended; and
- (d) examples where advisers falsified client information when assisting them to change policies.⁴⁰

203 Many of these issues arose from misalignment of incentives. Payment of commission by insurers to advisers creates incentives for sales over and above compliant advice. In some cases, this leads to ‘churning’, the excessive switching of clients between life insurance policies by financial advisers. In 2012, industry sought to deal with churning by developing a self-regulation strategy that involved addressing the incentives for advisers to churn their clients. However, this attempt to establish a self-regulatory regime was ultimately unsuccessful.

204 It is therefore not surprising that our recent review of life insurance advice found that industry needs to improve the quality of advice in this area and ensure that the interests of consumers are given priority. In REP 413, ASIC made a number of recommendations for insurers, licensees, advisers and their professional associations, including a focus on how to ensure client

⁴⁰ REP 413 identified further areas of problematic advice, such as inappropriate scaling of advice, lack of strategic life insurance advice, weak rationales for product replacement advice and failure to consider the relationship between life insurance and superannuation.

interests are met and how to balance the issue of affordability versus cover. We are now taking follow-up action in certain cases. We also note that the Financial Services Council and the Association of Financial Advisers have formed a working group to arrive at an industry-led response.

Training and competence

- 205 ASIC has long held concerns that the level of training standards for advisers is too low. We expressed these concerns in submissions to various Government inquiries.⁴¹
- 206 In 2009 and 2010, ASIC also consulted with industry on proposals to improve training standards, including introducing a national examination.⁴²
- 207 Responses from industry to both increased training standards and a national exam were mixed, with significant opposition to both.
- 208 The main reasons for opposition to a national examination were either the view that a particular segment of the industry should be exempt or that an examination was not a sufficiently sophisticated mechanism for assessing competence, particularly in the area of skills.
- 209 The main reasons for opposition to increased training standards were broadly around the level at which the revised educational standard should be set (a degree qualification), implementation issues and costs.⁴³
- 210 To address competence concerns within the financial advice sector, in 2013 the Financial Planning Association announced that financial planners would not be able to join the Association without a degree qualification.
- 211 More recently, a number of large licensees have announced changes to training standards they will require of their financial advisers. These announcements are welcome and show efforts by industry to address a widespread issue. However, these industry initiatives are not a complete solution. In particular:
- (a) the announced changes are voluntary;
 - (b) the proposed higher training standards differ from licensee to licensee;
 - (c) the new arrangements involve extensive grandfathering provisions;

⁴¹ See ASIC, *PJC Inquiry into financial products and services in Australia: Submission by the Australian Securities and Investments Commission*, August 2009, and ASIC's main submissions to the Senate Inquiry into ASIC's performance and the Financial System Inquiry.

⁴² See Consultation Paper 153 *Licensing: Assessment and professional development framework for financial advisers* (CP 153) and CP 212 *Licensing: Training of financial product advisers—Update to RG 146* (CP 212).

⁴³ For details of ASIC's proposals to increase training standards and industry's response, see Section B of ASIC's submission to the 2014 PJC Inquiry.

- (d) the higher training standards do not cover the whole advice industry;
and
- (e) it is unclear how compliance with the announced higher training standards will be monitored and enforced.⁴⁴

212 We look forward to seeing if industry can arrive at a common response to issues around sale of life insurance and raised levels of training and competence.

⁴⁴ The Government's industry working group on the establishment of the register of financial advisers is also considering then issue of adviser competence: Senator the Hon Mathias Cormann, Minister for Finance and Acting Assistant Treasurer, Media Release, *An enhanced public register of financial advisers*, 24 October 2014, <http://mhc.ministers.treasury.gov.au/media-release/044-2014/>.

G Other reforms to prevent misconduct (TOR 6)

Key points

TOR 6 seeks input on other regulatory or legislative reforms that would prevent misconduct.

The FOFA reforms have introduced important new conduct and disclosure requirements, accompanied by new civil penalty provisions in relation to financial advisers, and modified some aspects of the licensing and banning tests. We welcome these reforms.

This inquiry seeks input on other regulatory or legislative reforms that would prevent misconduct.

In response, we have identified the following areas for improvement in the regulatory regime that could further assist in preventing misconduct. They concern:

- ASIC's ability to control licensee conduct;
- ASIC's ability to take enforcement action that is proportionate to the misconduct, particularly where the misconduct is of low to medium severity;
- compensation arrangements and uncompensated loss;
- competence and professionalism; and
- conflicts in the financial advice industry.

Set out in this section are an outline of the above issues and our suggested reforms to address the issues. These issues have been canvassed in our previous reports and our submissions to other inquiries.

Greater scope and flexibility to control licensee conduct

- 213 The reforms to ASIC's licensing and banning powers described in paragraphs 76–77 enhance our ability to refuse a licence or ban an individual.
- 214 However, there are further improvements that could be made to enhance ASIC's ability to control licensee conduct. In particular, ASIC has limited ability to:
- (a) direct licensees' conduct, including to direct them to undertake compliance, remediation and compensation actions; and
 - (b) remove a licence.
- 215 ASIC's power to direct licensees' conduct is currently primarily exercised through our power to impose conditions on, suspend or cancel a licence. These powers are read narrowly to ensure that ASIC is exercising them for a

protective (and non-punitive) purpose. As a result, our ability to exercise our powers effectively and in the public interest is limited.

216 For example, where serious misconduct or systemic misconduct over time has occurred within a licensee's business, if the immediate source of the harm has been removed (e.g. if the conduct is old or a particular adviser has left the industry), there are doubts about whether we could use our powers to impose conditions on the licensee to improve its practices or to produce a general deterrent effect in the market, as these might not be considered 'protective' purposes.

217 Specific recommendations for change to provide ASIC with greater certainty and flexibility are set out in ASIC's main submission to the Financial System Inquiry at paragraphs 92–94.

Controlling those who control the compliance culture in a financial services business

218 ASIC's licensing powers allow us to suspend or cancel a licence or ban an individual from providing a financial service; our powers do not extend to banning individuals from having an integral role in a financial services business or to attribute liability to managers. An extension of ASIC's powers in these areas will allow us to more effectively regulate licensee businesses and those who manage them.

Banning individuals from being involved in, or responsible for, a financial services business

219 ASIC should have the ability to ban an individual from managing, or being involved in (e.g. as a compliance officer, owner or director) a financial services business. ASIC's banning powers in s920A allow us to ban an individual from providing a financial service; ASIC does not have the ability to ban individuals who do not themselves provide a financial service, but are integral to the operation of the business and setting the compliance culture.⁴⁵

220 The ability to ban those involved in managing, or being involved in, a financial services business will enable ASIC to effectively target those who set the compliance culture within a business, and provide a strong incentive for these individuals to create good compliance cultures. This proposal was also recommended by the Financial System Inquiry.⁴⁶

⁴⁵ For further detail see ASIC, *Financial System Inquiry interim report: Submission by the Australian Securities and Investment Commission*, August 2014, paragraphs 179–182.

⁴⁶ *Financial System Inquiry final report*, report, November 2014, Recommendation 24.

Attributing liability of a licensee to its managers

- 221 When taking action against a licensee under a civil penalty provision, the liability lies solely with the licensee, not the individuals within the licensee who had a key role in the decisions that led to the breach. The civil penalty provisions in the Corporations Act do not allow the licensee's liability to be attributed to one or more of a licensee's managers.
- 222 The civil penalty provisions in the Corporations Act should be extended to enable the attributing of failings in compliance and breaches of the law of a licensee to those responsible for the licensee's significant decisions and management.

Licence applications

- 223 The FOFA reforms also introduced changes to ASIC's licensing powers. These changes are described at paragraphs 76–77.
- 224 Specific recommendations for changes that could be considered to further strengthen these tests are set out in ASIC's main submission to the Senate inquiry into ASIC's performance at paragraphs 615–623.

Broader infringement notice regime

- 225 ASIC requires a broad, effective range of enforcement remedies to enable us to respond to the full range of misconduct, from less grave to more serious breaches.
- 226 At present, in many cases, when an AFS licensee does not comply with its obligations, ASIC's only available enforcement remedy is to suspend or cancel an AFS licence. Such a remedy is not appropriate for the vast majority of cases where misconduct is of low to medium severity, and where suspending or cancelling a licence would have significant adverse consequences for the licensee, its clients, employees and other representatives, and would be disproportionate with the nature of the breach. Suspending or cancelling an AFS licence is also not achievable in such cases. This is because it is an administrative discretionary remedy that can only be made if it is in the public interest. It is not considered in the public interest to take such action for lower level misconduct.
- 227 Given that licence suspension is neither appropriate nor achievable for the vast majority of cases, ASIC does not have the means to respond effectively and in a timely manner to less serious misconduct. It is important that ASIC has power to deal with less serious misconduct because repeated incidences of misconduct contribute to a poor compliance culture, which could escalate into more serious breaches.

- 228 In the context of Ch 7, an infringement notice regime would be useful for breaches of certain obligations, such as the obligation to:
- (a) notify ASIC of certain matters (s912D);
 - (b) give an FSG to retail clients (s941A and 941B);
 - (c) give a client an SOA (s946A and 947C); and
 - (d) give a client an FDS (s962G and 962S).
- 229 As set out in ASIC’s main submission to the Financial System Inquiry, we consider that introducing a broader infringement notice regime would assist ASIC to respond to less serious misconduct in a prompt and efficient manner: paragraphs 180–182.⁴⁷ This may both prevent the misconduct from escalating and deter future misconduct.

Compensation arrangements and last resort scheme

- 230 The shortcomings of PI insurance as a compensation mechanism have been raised in a number of Government inquiries and reviews. FOS recently reported that, between 1 January 2010 and 30 September 2014, 25 financial services providers have been unable to comply with 114 determinations with a value close to \$11 million. Unpaid determinations represent around 27% of all determinations issued in the area of investments, life insurance and superannuation, and 68% of these relate to disputes in the financial advice sector and are concentrated in the small-to-medium advisory services sector.⁴⁸
- 231 The limitations of PI insurance are felt most acutely where a consumer suffers loss, receives a decision or determination in their favour and the licensee is unable to meet that decision or determination.
- 232 Uncompensated loss in the regulated financial services sector can happen for a number of reasons, including where the consumer has suffered loss but cannot access an EDR scheme because their loss exceeds current monetary limits and they cannot afford to take legal action.
- 233 Within the EDR scheme jurisdiction, PI insurance can also fail to adequately compensate consumers and investors when it is needed most—that is, when a licensee’s misconduct is so serious or systemic that it affects a medium to large number of clients at the same time and causes the licensee to become insolvent.

⁴⁷ See also paragraphs 646–650 of ASIC’s main submission to the Senate inquiry into ASIC’s performance.

⁴⁸ Financial Ombudsman Service, *FOS circular*, issue 19, November 2013, www.fos.org.au/the-circular-19-home/.

- 234 Growing levels of uncompensated loss arising out of unpaid EDR determinations threaten to erode trust and confidence in the financial services sector and the effectiveness of the dispute resolution system. The concentration of these unpaid determinations in the small-to-medium advisory services sector potentially also places these licensees at a competitive disadvantage to larger AFS licensees, who are more likely to be able to ensure compensation (through self-insurance) for their clients. This may cause consumers to favour the services of larger, vertically integrated licensees.
- 235 Measures to address the issue of uncompensated loss, such as tightening capital adequacy requirements or introducing additional requirements that expand mandatory PI coverage, may impose additional costs and regulatory burden while failing to adequately address the problem. This is because PI insurance and capital adequacy requirements are not intended nor designed to be comprehensive compensation mechanisms for retail consumers and investors of financial products. Capital adequacy and PI insurance requirements will never be at the level required to cover situations of medium to serious systemic loss.
- 236 An option to address the relatively high levels of uncompensated loss in the financial advice sector is a limited last resort statutory compensation scheme to supplement PI insurance and the formal determination of claims by EDR schemes.
- 237 Such a scheme would only provide compensation where all other options have truly been exhausted. Without such a scheme, we consider that there will continue to be consumers and investors entitled to compensation who are unable to recover their loss.

Competence and professionalism

Adviser competence

- 238 ASIC has long maintained that the competence and training of financial advisers requires significant improvement. We consider that reforms to increase the competence and professionalism of financial advisers would reduce misconduct in the industry and improve the quality of advice.
- 239 The need to raise the competency standards of financial advisers was also the conclusion of a number of recent inquiries, including the Ripoll Inquiry, the Senate inquiry into the performance of ASIC, and the Financial System Inquiry.

- 240 The Financial System Inquiry noted that ‘[t]he benefits of improving the quality of advice are significant’,⁴⁹ recommending an increase in the competence of financial advice providers providing advice on Tier 1 products.⁵⁰
- 241 The Government’s industry working group on the establishment of the register of financial advisers is also considering the issue of adviser competence.⁵¹
- 242 In ASIC’s submission to the 2014 PJC Inquiry we set out the following proposals on competence:
- (a) It should be mandatory for financial advisers who provide personal advice on Tier 1 products to hold, at a minimum, a degree qualification in a relevant field.
 - (b) We support the introduction of a national examination as a means to test whether an individual has attained the standard of competence required.
 - (c) We consider that there should be mandatory continuing professional development of 30 hours per year, and an initial monitoring and supervision period for new financial advisers of one to two years.⁵²

Conflicts of interest

Vertical integration

- 243 Vertically integrated businesses, which combine product manufacturers with advice groups, have always been a feature of the financial advice industry. Vertical integration is common in the financial system, particularly in the banking and funds management industries. There are some benefits to vertical integration—for example, the wealth of these businesses means they are more able to ensure compensation for their clients when there is a determination against the business.
- 244 There is no requirement in Australia for advisers to offer independent advice, or for advice groups to be structurally separate from product manufacturers. While required to act in the best interests of clients when providing personal advice, and to prefer the interests of the client over their own interests or those of related parties, advisers are not required to review

⁴⁹ *Financial System Inquiry final report*, report, November 2014, p. 224.

⁵⁰ *Financial System Inquiry final report*, report, November 2014, Recommendation 25.

⁵¹ Senator the Hon Mathias Cormann, Minister for Finance and Acting Assistant Treasurer, Media Release, *Government response to Senate inquiry into the performance of ASIC*, 24 October 2014, <http://mhc.ministers.treasury.gov.au/media-release/043-2014/>

⁵² ASIC’s submission to the 2014 PJC Inquiry, paragraphs 61–82.

all products available in the market before making a recommendation and are not restricted from advising on a limited range of house products under an approved product list.⁵³

- 245 The inherent conflict of interest created by vertical integration may not be readily apparent to clients, particularly if the product manufacturer and advice parts of the business operate under separate licences and business names. Roy Morgan Research found that 55% of surveyed consumers receiving financial advice from an entity owned by a large financial institution, but operating under a different brand name, considered it to be independent—in contrast, only 14% of consumers considered financial planners working under the brand of the same financial institution to be independent. This was also an issue identified by the Financial System Inquiry, which recommended that advisers be required to disclose ownership structures of the advice firm to consumers.⁵⁴
- 246 Better informing clients about the nature of vertically integrated business models and their implications for financial decision making will go some way to increasing consumers' understanding of these issues. This could be done through requiring:
- (a) advisers to provide a prominent, simple statement about the relationship of the adviser to the issuer, and the limited range of products that the adviser is able to recommend, before the advice is provided; or
 - (b) an advice business that is tied to an issuer to call itself a 'restricted advice' (or similar terminology) business.
- 247 The register of financial advisers will include details around the ownership of the AFS licensee and disclosure of the ultimate parent company where applicable: see paragraph 191.
- 248 ASIC's Investment Managers and Superannuation team is conducting a surveillance project looking at conflicts of interests in vertically integrated structures and how those conflicts are managed. This project is expected to operate until June 2015, with a report of our findings being released shortly thereafter.
- 249 ASIC's Financial Advice team is currently focusing on the quality of advice, breach reporting and mis-selling of financial products in the large vertically integrated advice businesses.

⁵³ The AFS licensing obligations include a requirement to manage conflicts of interest: see Regulatory Guide 181 *Licensing: Managing conflicts of interest* (RG 181). Some AFS licensees that are also regulated by APRA may also be required to meet APRA's prudential standards for managing conflicts of interest.

⁵⁴ *Financial System Inquiry final report*, report, November 2014, Recommendation 40.

Conflicted revenue streams

- 250 Many industry participants continue to receive conflicted remuneration, despite the introduction of the FOFA reforms, because there are exemptions and grandfathering arrangements. While these remuneration structures are legal, they may have a negative effect on the advice provided to consumers.
- 251 Our recent review of life insurance advice found that many advisers giving advice after the implementation of the FOFA reforms may prioritise their own interests in earning commission income ahead of the interests of the client in getting good-quality advice. A more detailed discussion of these findings is at paragraphs 130–132.
- 252 The Financial System Inquiry also raised concerns in relation to the high upfront commissions for life insurance advice and the impact they have on the quality of advice. The inquiry recognised that imposing a remuneration model that is not sustainable would create the ‘risk that providers may exit the market, making it more difficult for consumers to obtain life insurance advice’.⁵⁵ The Inquiry recommended that the law require that upfront commissions be no greater than ongoing commissions to reduce the incentives for churning and to improve the quality of advice on life insurance.⁵⁶
- 253 The Financial System Inquiry also highlighted concerns with the impact of ‘grid’ commission structures,⁵⁷ which have the potential to create a conflict of interest between the adviser and the client.⁵⁸
- 254 The Inquiry recommended that ASIC undertake a review of current stockbroking remuneration structures and the effect on the quality of consumer outcomes, and that ASIC advise Government on the need to remove the stockbroker-related exemptions from the ban on conflicted remuneration if the review raises significant concerns.⁵⁹

⁵⁵ *Financial System Inquiry final report*, report, November 2014, p. 220.

⁵⁶ *Financial System Inquiry final report*, report, November 2014, Recommendation 24.

⁵⁷ A ‘grid’ commission is where the benefit is received soon after advice is given and is calculated by reference to the revenue attributed to the individual adviser and the benefits attributable to different revenue brackets. Generally, the higher the revenue bracket, the higher the benefit paid to the adviser.

⁵⁸ *Financial System Inquiry final report*, report, November 2014, p. 219.

⁵⁹ *Financial System Inquiry final report*, report, November 2014, Recommendation 24.

Appendix: Previous ASIC submissions

255 ASIC has addressed many of the matters in this submission in previous submissions made to Parliamentary inquiries and Government reviews. These inquiries and reviews are identified in Table 4.

Table 4: Previous ASIC submissions

Inquiry	Subject area	Reference
Ripoll Inquiry August 2009	Adequacy of licensing arrangements	Section C
	Disclosure of restrictions on advice	Paragraphs 144–158
	PI insurance	Section I
Senate inquiry into the performance of ASIC October 2013	EDR in the financial regulatory system	Paragraphs 387–393
	ASIC's approach to compliance and enforcement	Section F
	ASIC's response to market problems in the financial advice industry	Section H
	Licensing tests	Paragraph 615–623
	Penalties	Paragraphs 632–653
	Compensation and dispute resolution requirements in the financial services industry and credit industry	Appendix 2
Financial System Inquiry (main submission) April 2014	Lifting standards in financial advice	Paragraphs 75–94
	Penalties	Paragraphs 163–187
	ASIC's work as a regulator	Paragraphs 286–304
	Investors and financial consumers	Section H
	Financial advisers	Section I
	Options to address regulatory gaps	Appendix 1
	ASIC's regulatory work	Appendix 2
Financial System Inquiry (submission on interim report) August 2014	Financial advice	Paragraphs 138–157
	Register of financial advisers	Paragraphs 175–178
	Banning powers	Paragraphs 179–182
	Consumer loss and compensation	Paragraphs 183–198
2014 PJC Inquiry September 2014	Self-regulation and co-regulation	Paragraphs 39–60
	Competence of financial advice	Section B

Key terms

Term	Meaning in this document
2014 PJC Inquiry	2014 Parliamentary Joint Committee on Corporations and Financial Services inquiry into proposals to lift the professional, ethical and education standards in the financial services industry
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A.
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIC-approved EDR scheme, EDR scheme or scheme	An external dispute resolution scheme approved by ASIC under RG 139
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
ASIC's main submission to the Financial System Inquiry	ASIC, <i>Financial System Inquiry: Submission by the Australian Securities and Investments Commission</i> , April 2014
ASIC's main submission to the Senate inquiry into ASIC's performance	ASIC, <i>Senate inquiry into the performance of the Australian Securities and Investments Commission: Main submission by ASIC</i> , October 2013
ASIC's submission to the 2014 PJC Inquiry	ASIC, <i>PJC Inquiry into proposals to lift the professional, ethical and education standards in the financial services industry: Submission by the Australian Securities and Investment Commission</i> , September 2014
authorised representative	A person authorised by an AFS licensee, in accordance with s916A or 916B of the Corporations Act, to provide a financial service or services on behalf of the licensee Note: This is a definition contained in s761A.
best interests duty	The duty to act in the best interests of the client when giving personal advice to a client as set out in s961B(1) of the Corporations Act
Ch 7 (for example)	A chapter of the Corporations Act (in this example numbered 7), unless otherwise specified

Term	Meaning in this document
CIO	Credit and Investments Ombudsman
client	A retail client as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of Ch 7 of the Corporations Regulations
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
EDR	External dispute resolution
FDS	Fee disclosure statement
financial adviser	A natural person who provides financial product advice to a retail client and is: <ul style="list-style-type: none"> • an AFS licensee; or • a representative of an AFS licensee
financial product	A facility through which, or through the acquisition of which, a person does one or more of the following: <ul style="list-style-type: none"> • makes a financial investment (see s763B); • manages financial risk (see s763C); and • makes non-cash payments (see s763D) <p>Note: This is a definition contained in s763A of the Corporations Act: see also s763B–765A.</p>
financial product advice	A recommendation or a statement of opinion, or a report of either of those things, that: <ul style="list-style-type: none"> • is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or • could reasonably be regarded as being intended to have such an influence. <p>This does not include anything in an exempt document</p> <p>Note: This is a definition contained in s766B(1) of the Corporations Act.</p>
Financial System Inquiry	The 2014 Financial System Inquiry
FOS	Financial Ombudsman Service
FSG	Financial Services Guide
FSR Act	<i>Financial Services Reform Act 2001</i>

Term	Meaning in this document
Future of Financial Advice (FOFA)	The Future of Financial Advice reforms introduced by the Australian Government in response to the recommendations of the Ripoll Inquiry and implemented by the <i>Corporations Amendment (Future of Financial Advice) Act 2012</i> and the <i>Corporations Amendment (Further Future of Financial Advice) Act 2012</i>
general advice	Financial product advice that is not personal advice Note: This is a definition contained in s766B(4) of the Corporations Act.
IDR	Internal dispute resolution
IDR procedures, IDR processes or IDR	Internal dispute resolution procedures/processes that meet the requirements and approved standards of ASIC under RG 165
limited AFS licence	An AFS licence that only includes authorisations to provide one or more limited financial services
personal advice	Financial product advice given or directed to a person (including by electronic means) in circumstances where: <ul style="list-style-type: none"> the person giving the advice has considered one or more of the client's objectives, financial situation and needs; or a reasonable person might expect the person giving the advice to have considered one or more of these matters Note: This is a definition contained in s766B(3) of the Corporations Act.
PDS	Product Disclosure Statement
PI insurance	Professional indemnity insurance
Product Disclosure Statement (PDS)	A document that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act Note: See s761A for the exact definition.
Pt 7.9 (for example)	A part of the Corporations Act (in this example numbered 7.9), unless otherwise specified
reg 7.6.04 (for example)	A regulation of the Corporations Regulations (in this example numbered 7.6.04)
REP 413 (for example)	An ASIC report (in this example numbered 413)

Term	Meaning in this document
representative of an AFS licensee	Means: <ul style="list-style-type: none"> • an authorised representative of the licensee; • an employee or director of the licensee; • an employee or director of a related body corporate of the licensee; or • any other person acting on behalf of the licensee <p>Note: This is a definition contained in s910A of the Corporations Act.</p>
RG 246 (for example) means	An ASIC regulatory guide (in this example numbered 246)
Ripoll Inquiry	2009 Parliamentary Joint Committee on Corporations and Financial Services inquiry into financial products and services in Australia
s912A (for example)	A section of the Corporations Act (in this example numbered 912A), unless otherwise specified
safe harbour for the best interests duty	The steps set out in s961B(2) of the Corporations Act. If an advice provider proves they have taken these steps, they are considered to have met their obligation to act in the best interests of their client
Senate inquiry into ASIC's performance	2014 Senate Economics References Committee inquiry into the performance of the Australian Securities and Investments Commission
SMSF	Self-managed superannuation fund
SOA	Statement of Advice
SOA Regulation	Corporations Amendment (Statements of Advice) Regulation 2014
Streamlining FOFA Bill	Corporations Amendment (Streamlining of Future of Financial Advice) Bill
Streamlining FOFA Regulation	Corporations Amendment (Streamlining of Future of Financial Advice) Regulation 2014
Tier 1 products	All financial products except those listed under Tier 2
Tier 2 products	General insurance products, except for personal sickness and accident (as defined in reg 7.1.14); consumer credit insurance (as defined in reg 7.1.15); basic deposit products; non-cash payment products; and First Home Saver Account deposit accounts
TOR	Terms of reference

Term	Meaning in this document
training course	Means: <ul style="list-style-type: none"> • any education or training course, program, subject, unit or module of varying duration; • a combination of education or training subjects, units or modules on a similar topic; or • an education or training course or program delivered by various methods
training standards	Minimum sets of knowledge and, where personal advice is given, skill requirements, which are assessed at particular educational levels depending on the type of financial product for which advice is provided, and set out in RG 146
Wallis Inquiry	1997 Financial System Inquiry