



FINANCIAL PLANNING
ASSOCIATION of AUSTRALIA

8 November 2021

Senator Anthony Chisholm
Chair
Senate References Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Email: economics.sen@aph.gov.au

Dear Senator Chisholm

Inquiry into Sterling Income Trust

The Financial Planning Association of Australia¹ (FPA) welcomes the opportunity to provide input into the Senate Economics References Committee's Inquiry into Sterling Income Trust.

The FPA supports the Federal Parliament's decision to call on the Senate Economics References Committee to undertake an Inquiry into the collapse of Sterling Income Trust.

Terms of Reference – a. the Australian Securities and Investments Commission's oversight of the Sterling Income Trust;

The FPA understands concerns about Sterling Income Trust were first raised around 2017, with Regulator investigations and action still ongoing. Due to the significant amount of time the product continued to be available on the market, it has led to a detrimental impact on a large number of consumers, the majority of whom are retirees.

The FPA is not in a position to comment on Regulator action in relation to this matter, however we are concerned that these types of highly complex products continue to be marketed directly to consumers exposing Australians' retirement funds to significant risk. This is why the FPA had been calling for production regulation and ASIC intervention powers over many decades.

¹ The Financial Planning Association (FPA) is a professional body with more than 12,000 individual members and affiliates of whom around 8,500 are practising financial planners and 5,207 are CFP professionals. Since 1992, the FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of the Future of Financial Advice reforms.
- The FPA was the first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices.
- We have an independent Conduct Review Commission, chaired by Dale Boucher, dealing with investigations and complaints against our members for breaches of our professional rules.
- We built a curriculum with 18 Australian Universities for degrees in financial planning through the Financial Planning Education Council (FPEC) which we established in 2011. Since 1 July 2013 all new members of the FPA have been required to hold, or be working towards, as a minimum, an approved undergraduate degree.
- When the Financial Adviser Standards and Ethics Authority (FASEA) was established, the FPEC 'gifted' this financial planning curriculum and accreditation framework to FASEA to assist the Standards Body with its work.
- We are recognised as a professional body by the Tax Practitioners Board.

Product provider obligations to investigate and compensate

The FPA supports calls from investors and consumer representatives that victims of the collapse should be appropriately compensated for the financial loss and damage caused by any wrong doing in relation to Sterling Income Trust.

The FPA believe all financial product and services should be compelled to investigate and compensate misconduct that may have occurred under their licence through the new breach reporting regime in the Corporations Act.

Section 912EB of the Corporations Act requires Australian Financial Services Licensees (AFSL) to investigate reportable situations that may affect clients, and to notify and compensate the affected client where there are reasonable grounds to believe a client has suffered loss or damage as a result of the reportable situation. These obligations apply when:

- the licensee, or a representative of the licensee, provides or has provided personal advice to a retail client in relation to a relevant financial product, and
- certain reportable situations occur - a significant breach of a 'core obligation', gross negligence or serious fraud, and
- the client has suffered, or will suffer, loss or damage, and
- the client has a legally enforceable right to recover the loss or damage.

However, these requirements only apply where personal financial advice has been provided to a retail client on relevant financial products.

Financial product providers are exempt from s912EB. This creates a gap in the ability for consumers to be fairly and appropriate compensated for wrong doing and failures by product providers.

As s912EB is tied to the requirement to report a breach or likely breach to ASIC, it significantly reduces the consumer detriment as the issues that cause such losses to consumers are likely to be identified and addressed at a much earlier stage. It also ensures the requirement to notify, investigate and compensate consumers is tied to the systems, processes, and compliance checks and audits necessary to embed the breach reporting requirements into the operations of the product licensee and its related entities.

The new breach reporting regime significantly reduces the risk that breaches, likely breaches and misconduct will go undetected. Hence, there is the potential for misconduct, such as the breaches reported in relation to Sterling Income Trust and the entities involved with the product, to be identified and addressed before widespread and significant consumer detriment occurs.

Another benefit of the investigation and compensation requirements in s912EB is that the investigation and compensation is paid for by the 'at fault' entity, rather than these costs being covered by other industry participants through AFCA, ASIC or compensation scheme of last resort levies.

The FPA strongly advocated for the provisions in s912EB to extend to product providers throughout the development of the breach reporting legislation due to the experience financial advisers have had with clients impacted by past product failures. This is a significant shortcoming of the new regime. Product providers should be held accountable.

The FPA recommends the Corporations Act be amended to apply the client notification, investigation and compensation obligations in s912EB to all product providers, including Managed Investment Schemes.

Terms of Reference – c. access to justice and redress for victims of the Sterling Income Trust Collapse

Compensation scheme of last resort

Reports indicate that compensation and redress for victims of Sterling Income Trust has not been forthcoming from ASIC to date. The FPA also understands that at this stage many victims have been unable to access compensation or redress through the Australian Financial Complaints Authority (AFCA) as their complaint falls outside the EDR scheme's jurisdiction and that AFCA have paused complaints in relation to Sterling Income Trust until the scope of government's proposed compensation scheme of last resort (CSLR) is known.

The Government has now tabled in Parliament the Financial Sector Reform (Hayne Royal Commission Response No. 3) Bill 2021 to establish a CSLR. While changes have been made to the legislation since the consultation Exposure Draft, the scheme proposed in the Bill has significant short comings and would not assist victims of Sterling Income Trust.

Emerging from the recommendations of the Hayne Royal Commission, the Government's proposed compensation scheme of last resort (CSLR) is simply too narrow in scope, provides inadequate coverage to consumers and does not address the underlying causes of unpaid determinations.

The scope of the CSLR in the Bill does not include all financial products – Managed Investment Schemes (MIS) or Real Estate Income Trusts (REITs) and other complex products are exempt. It is restricted to personal financial advice to retail clients, dealing in securities and engaging in credit activities. This is because the Bill is based on historic unpaid determinations data when product issuers were not required to be a member of an EDR scheme and complaints about financial products and providers fell outside the jurisdiction of AFCA's predecessor schemes.

Should the Bill be passed unchanged, victims of the Sterling Income Trust misconduct will not have access to the CSLR and will be at risk of being uncompensated for the detrimental loss they have suffered. This will not only have a significant impact on the wellbeing and financial security of those individuals, it will also place pressure on the social security system as victims will be forced to rely on the Aged Pension.

Providing compensation for unpaid AFCA determinations has long been an issue for consumers and industry alike. It's reasonable to expect that those who are responsible pay those who are affected. It's just and fair.

It is important to note that in its February 2020 submission in response to the Treasury Discussion Paper - Establishing a Compensation Scheme of Last Resort, AFCA also called for the expansion of the proposed CSLR based on the risks the EDR scheme sees to consumers - and Sterling Income Trust is yet another example of this risk. AFCA states:

The types of firms who have unpaid determinations extends past financial advisers who provide personal and general financial advice to include; credit providers; managed investment scheme operators; finance brokers; mortgage brokers; securities dealers and derivatives dealers. In our view, all firms are responsible for restoring trust in financial services and ensuring that their EDR obligations are met.

In our view, it is important that the CSLR also covers managed investment schemes (MIS). This is due to:

- the potential for unpaid determinations and consumer detriment to flow from this group;*
- the involvement of other financial firms or their subsidiaries in the funding, distribution or other arrangements with MIS, and*
- funding contributions to a scheme across the whole 'value chain' would support increased accountability of all participants, including MIS operators.²*

Since our commencement there have been more than 40 AFCA determinations awarding compensation to consumers that have not been paid due to the insolvency of the financial firms involved.

Limited data exists relating to unpaid AFCA determinations given that AFCA only started receiving complaints from 1 November 2018.³

The FPA recommends consumers and industry need confidence in the Compensation Scheme of Last Resort reforms. This can be achieved through:

- A broad based scheme - Consumers need protection through a CSLR covering the broad range of all financial services and products that are within the jurisdiction of AFCA.**
- Fair share – Contributions to fund the CSLR should be made from every financial service and product within the jurisdiction of AFCA, based on that sector's current risk to the scheme.**
- Independent umpire - AFCA as an independent umpire, should not also be in charge of the purse strings. Independent oversight and administration are key to ensuring those responsible for the complaints are the ones who pay.**

² AFCA submission in response to the Treasury Discussion Paper - *Establishing a Compensation Scheme of Last Resort*, February 2020, pg 3

³ AFCA submission in response to the Treasury Discussion Paper - *Establishing a Compensation Scheme of Last Resort*, February 2020, pg 4

- **Overdue lookover - A CSLR isn't the only way to reduce unpaid AFCA determinations. To make sure the scheme truly is one of last resort, a long overdue review of Professional Indemnity (PI) insurance coverage needs to be undertaken to ensure consumers are protected and industry has the security it needs.**

Terms of Reference – f. any related matters.

Seminars and the provision of general advice

The FPA is concerned that highly complex, high risk products like Sterling Income Trust continue to be marketed directly to consumers through seminars, targeted advertising and general advice. While the new anti-hawking measures protect consumers from unsolicited sales tactics, there is still a significant consumer protection gap due to the current regulatory settings for general advice.

Evidence clearly shows that consumers are confused about the difference between personal advice and general advice and often misunderstand what they are receiving. Multiple reports (including the Financial Systems Inquiry final report, the Joint Parliamentary Committee on Corporations and Financial Services inquiry into proposals to lift the professional, ethical and education standards in the financial services industry; and the Productivity Commission's Inquiry into Competition in the Australian Financial System) have recommended that the term "general advice" be changed to something that more accurately reflects what is being offered under this category - information that does not consider a consumer's specific circumstances.

ASIC has also reported on this problem (ASIC Report 614) and has started consulting on an alternative term to replace "general advice". The FPA strongly supports this work continuing and the term "general advice" being replaced.

Where general advice is given, the consumer must also be given a standard warning about the nature of that advice. In its current form, the warning has proven to be ineffective at protecting the consumer's interests. The warning should be amended to more specifically state that general advice does not consider personal circumstances and that the consumer might benefit from seeking advice that does consider their personal circumstances from a financial planner.

The FPA recommends the law be changed to rename the term 'general advice' to 'product information' and 'strategy information', which better reflects the definitions and is less misleading to consumers. Any replacement must ensure that the term 'advice' can only be used in association with 'personal advice' — that is, advice that takes into consideration personal circumstances.

The general advice warning should be amended to include a statement that the recipient may benefit from advice which takes account of their personal circumstances and they should consider seeking advice from a financial planner. The warning should be mandatory at financial product seminars.

At an appropriate point after renaming 'general advice' and amending the general advice warning, the Government should review the use of general advice to

determine whether general advice is being provided in appropriate circumstances and if consumer interests are being protected.

We would welcome the opportunity to discuss with the Committee any matters raised in our submission.

Yours sincerely

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Financial Planning Association of Australia