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Senator Annette Hurley
Chair
Senate Standing Committee on Economics Legislation
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Senator Hurley

Inquiry into the National Consumer Credit Protection Bill 2009 and related bills

The Financial Planning Association of Australia (FPA)[1] welcomes the opportunity to provide a submission in response to the Committee's Inquiry into the National Consumer Credit Protection Bill 2009 and related bills.

The FPA supports the policy objectives of National Consumer Credit Reform and the regulation of margin lending. A uniform national regulatory regime for credit related services is essential to adequately protect consumers, maintain the integrity of the financial system, and to further advance national economic integration and standardization. However, the FPA has fundamental concerns with the impact the legislation would have on Australian Financial Services Licence (AFSL) holders and their clients.

Helping consumers appropriately manage debt and implement savings plans are key components of the financial planning process. These are broadly recognized as important public benefits. We are concerned that this legislation, particularly its provisions on credit reform and responsible lending obligations, will undermine these benefits, as well as those derived from comprehensive financial advice.

Credit licensing

The legislation contains a very broad definition of "Credit Assistance" for the purposes of licensing. In addition to actual opinions and recommendations, the "Credit Assistance" concept would also capture any 'suggestion' relating to credit. It would then attach the equivalent of personal advice obligations to any conduct or words that might be construed as a suggestion to a consumer in relation to a particular loan contract. This has the potential to have a negative effect on the provision of important, useful information and assistance to consumers.

When considering the assets and liability position of a client, a financial planner typically must consider the client's existing debt position, and therefore be aware of which credit products the client already possesses and from whom the loans have been provided. Thus, beneficial suggestions relating to a client's debt position have the potential to be caught within the credit regulatory regime, even if they are merely incidental to the provision of another financial service.

We understand that credit licensing requirements would not apply to general statements to clients. However, if a planner were to suggest that a client repay a specific debt, even it were merely a suggestion to prioritize payment of the debt with the highest interest rate, the suggestion would be caught by the

[1] The FPA is the peak professional organisation for the financial planning sector in Australia. With approximately 12,000 members organised through a network of 31 Chapters across Australia, the FPA represents qualified financial planners who manage the financial affairs of over five million Australians with a collective investment value of more than $630 billion.

regulatory regime. This has the potential to have a negative effect on the provision of valuable advice that should be easily available to clients. A number of other scenarios would also be caught by the proposed regime. Some of these are:

- Where a planner notices a client has a loan with an uncompetitive rate, and suggests the client may want to compare a particular loan offer by a particular bank, but the planner intended to leave it to the bank to assess the client's suitability for that loan.
- Where a planner advises a client to consolidate existing loans to minimise fees, and does no more.
- Where a planner, after assessing a client's needs, suggests the client may wish to consider increasing the limit on an existing loan, or even recommends it, but advises the client to approach a particular credit provider or to seek the assistance of a particular mortgage broker, who can help assess what would suit the client.
- In debt recycling strategies, a planner, after understanding the client's needs, advises on strategy with regard to a client's current loans, but does not get involved in arranging any loans.

We have suggested that there should be an exemption for AFSL holders and authorised representatives when providing advice on credit that is 'incidental' to the provision of a financial service. This might be achieved through applying the legislation through a similar approach to the treatment of lawyers and tax agents in the regulations that accompany the legislation. Also the relevant legislation and regulations should enable financial planners, as AFSL holders or authorised representatives, to make use of the exemption when merely suggesting that a client approach a credit provider or seek the assistance of a broker, to facilitate a credit service.

We would also suggest replacement of the term "suggest" in the definition of 'Credit Assistance'. The term is extremely vague and subject to broad interpretation. Given the obligations of financial planners to know their clients, it is possible that discussing debt with a client could be considered a suggestion of 'a specific product' from 'a particular credit provider'. We recommend that "suggest" be replaced with "expressly recommend" to avoid drawing people unnecessarily into the regulatory regime when they don't actually do more than provide general strategic advice about the use of credit.

We would highlight that we are not suggesting that financial planners should receive a blanket exemption. Where they are acting to provide advice specifically on credit, they should be treated the same as any other market participant engaging in similar activities.

Two separate regulatory regimes

The overarching concern for AFSL holders is the extent to which they will fall subject to the requirements of the National Consumer Credit Protection regime, in addition to those to which they are already subject as AFSLs.

As Australian Financial Services Licence (AFSL) holders or authorised representatives, financial planners are already subject to extensive regulation[2], including requirements to know their clients, provide appropriate advice on a reasonable basis, and meet disclosure requirements.

Existing rules require disclosures, particularly through the provision of the Financial Services Guide (FSG) and Statement of Advice (SOA), that set out the advice, explain the basis for the advice, give details about the provider, remuneration, and any interests that may influence the recommendations, and additional information in particular circumstances.

[2] The applicable requirements are set out in Part 7.7 of the Corporations Act.

The new credit regime would potentially add an additional set of regulation on these same matters, resulting in unnecessary costs and additional complexity in dealing with clients. The additional costs would be passed on to clients, making advice even more expensive.

We suggest that there should be a review of the rationale for applying these requirements to AFSL holders, and consideration of how the two systems might be rationalised to ensure a joint approach to the provision of client fact-finding, disclosure, and provision of advice.

'Reliance' in credit and margin lending

Where information is provided directly to credit providers, providers are required to make reasonable inquiries and take reasonable steps to verify the information. However, when the information is passed through a planner, both the credit and margin lending requirements would allow the credit provider to rely on the information provided by a credit assistant or financial planner, for the purposes of undertaking the responsible lending assessment, without further verification of the information. We are concerned that this opens a significant gap where relevant information or client circumstances, on which the original advice was made, may change.

The legislation should recognize that clients may provide incomplete or inaccurate information, as envisaged in s945B of the Corporations Act. The legislation should be clarified to ensure that providers would consider whether they are reasonably satisfied with the information on which suitability assessments would be made, before using such information.

The situation that has emerged with Storm Financial should be example enough to demonstrate the failures that would continue to exist if the provider was relying purely on advice provided through financial planners. The FPA can elaborate further on this particular matter, if it would be helpful.

The legislation also envisages the ability for the margin lending providers to rely on information provided in statements of advice prepared for financial planning clients, where SOAs were prepared no more than 90 days before the start of the relevant margin lending contracts. We suggest that the provision of SOAs to providers is an inappropriate mechanism for information transferral.

The relationships between financial planners and their clients operate on the basis of trust. Accordingly, financial planners may have access to extensive personal and sensitive information about their clients, which may go beyond clients' financial positions and may also fall subject to provisions of the Privacy Act. When making recommendations, planners may need to refer to personal information in the SOA. Indeed, the SOA may include significant quantities of information irrelevant to the provision of margin loans, particularly where estate planning and insurance issues form part of the advice provided.

The SOA is conceived as a client-oriented document. The law should not require the provision of information of a private nature which will not in fact provide any relevant information to a credit provider, particularly where it is subject to the protection afforded by privacy laws. There are also issues of commercial sensitivity in sharing an SOA between financial services companies that are potentially competitors.

We encourage the adoption of a more focused approach, based on specific information. The FPA would welcome an industry solution whereby the movement of such information was facilitated efficiently, without compromising consumer protection or privacy.

Notifications of margin calls

We welcome the additional safeguards the legislation offers to ensure that arrangements to receive notifications through agents are only effected on client request. However, the sole notification of agents may be inappropriate in some circumstances. While the use of agents may be helpful in steady market conditions, it may be less appropriate at times of unusual market volatility, when agents may face a high volume of margin notifications, thus increasing the potential for delays in passing notifications on to clients. Where a quick response is required, it would be more appropriate for both client and agent to be informed. In any case, the client should always be the primary receiver of information about margin calls. The involvement of an agent provides an additional safeguard, but it should remain only supplementary. This allows the client to retain the discretion to ignore the notification and rely on the agent, should the client so wish, on the basis of an informed decision.

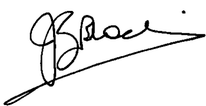
Again, there is ample evidence in the Storm Financial situation to support the FPA's position. In a number of cases margin calls were made without the client's knowledge, thereby preventing possible preventative or mitigating action. There is still considerable confusion as to who should have been responsible for the margin call notifications. Such a situation does not assist consumers in any way.

Definition of financial situation

We also encourage the Committee to amend the legislation to provide a clearer definition of the term "financial situation." To the extent that a "financial situation" may be found to consist of income and expenditure, assets and liabilities, these matters would be addressed in the SOA. However, as this term is not defined, the requirement may be interpreted far more broadly, resulting in extensive and unnecessary fact checking that would be primarily compliance-focused whilst offering no improvement in consumer protection. A clear definition would provide further guidance as to the extent of the enquiries an adviser would be expected to undertake to meet the requirements of the law.

If you would like further information on the issues raised in this submission, please contact Gerard Fitzpatrick, General Manager, Policy and Government Relations (02 9220 4505; gerard.fitzpatrick@fpa.asn.au).

Yours faithfully,



Jo-Anne Bloch

Chief Executive Officer