

# REPORT BY THE LABOR MEMBERS

The Labor members of the Committee maintain their support for the objectives of the FSR Act. These reforms were to:

“...put in place a competitively neutral regulatory system which benefits participants in the industry by providing more uniform regulation, reducing administrative and compliance costs, and removing unnecessary distinctions between products. In addition, it will give consumers a more consistent framework of consumer protection in which to make their financial decisions.”<sup>1</sup>

However, as was stated by Labor when the FSR Bill was debated, the implementation of the new regime needs to be thoughtfully considered by the Government and the impact of the new regime closely monitored. This is particularly important given the large number of people who are likely to be required to be licensed under the *Corporations Act* for the first time.

Following the Committee’s investigations, the Labor members have some concerns with the implementation of the FSR Act, which may affect the achievement of the objectives of the Act. The Labor members in particular wish to note the following concerns.

## Disclosure of Fees and Charges

The Labor members note the evidence given to the Committee by the Australian Consumers Association (ACA), Freehills, the Association of Superannuation Funds in Australia (ASFA) and Rainmaker Information Pty Ltd. All of these organisations raised concerns with how meaningful the OMC would be to consumers and warned of its potential to mislead. These concerns have been summarised in the Chair’s report.

The Labor members note subsequent consumer testing by ASFA which confirmed very poor results for the OMC and its ability to provide a useful tool for consumers. The Labor members also note that the OMC and the disclosure obligations in the relevant regulation had not been subject to consumer testing by the Government.

The Labor members also note the recommendations in relation to the OMC of Professor Ramsay in his report, *Disclosure of Fees & Charges*, released by ASIC on 27 September 2002. However, Professor Ramsay did not conduct any consumer testing on the effectiveness of the OMC.

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<sup>1</sup> Financial Services Reform Bill 2001, Explanatory Memorandum, Parliament of the Commonwealth of Australia, House of Representatives, p.1

The Labor members also wish to record that the relevant regulation prescribing additional disclosure requirements applied to superannuation products, and not to managed funds more broadly. This is inconsistent with the recommendations of Professor Ramsay in his report mentioned above, which supports a consistent and comparable disclosure regime across both superannuation products and managed funds.

The Labor members believe that the objectives of the FSR Act require that the disclosure requirements be consistently applied. Further, if consumers are to be provided with the information they need to make informed decisions, information on fees and charges must be provided to them in a way which is meaningful and allows comparisons across products.

The Labor members support the disallowance of regulations 7.9.10 and 7.9.11 – as decided by the Senate on 16 September 2002. The Labor Members recommend that the Government immediately begin re-drafting those regulations so that consumers receive the information they need to make informed decisions. The amended regulations must be subject to proper consultation and consumer testing before they are finalised.

## **Small Business**

The Labor Members note the impact on small business operators in the financial services sector of the transition to the FSR regime.

An objective of the FSR Act was to reduce administration and compliance costs. It does not appear, however that small business operators are yet reap those benefits. Larger financial organisations do however, seem better equipped to move to the new regime and have raised few issues with the implementation of the FSR Act.

In this regard, the Labor members note the survey conducted by the Financial Planning Association (FPA) which found a very slow rate of transition to the new regime – particularly among small business operators - due likely to the heavy burden in effort, time and money.

The regulations and the implementation of the FSR Act by ASIC must have due regard to the disproportionate impact on small business, subject to not compromising consumer protection.

The Labor members are concerned that the new legislation is being used to unfairly discriminate against multi-agents. ASIC advised the Committee that:

“..it was too early to say what will happen in the multi-agency environment, but certainly our indications are that there will be reluctance

to do ‘cross endorsement’ – as it is referred to – and have multiple consents and endorsements.”<sup>2</sup>

The Labor members also note ASIC’s suggestion that the concerns raised by multi-agents appeared to have a commercial basis, and not relate to regulatory issues.

The Labor members believe that some of the amendments made to the FSR Bill in the Senate – largely as a result of this Committee’s report on that Bill – have provided some multi-agents with alternative and feasible options for operating under the new FSR regime.

The Government should however, consider whether further amendments are needed to deal with the outstanding concerns of some multi-agents. Further, where market power is being used to unfairly terminate a person’s contract, or to force a person to enter the new FSR regime prematurely, it is appropriate that the ACCC investigate such matters and take any relevant enforcement action.

The Labor members are also concerned that the Government has not given sufficient attention to the taxation consequences of moving to the new FSR regime. The FPA advised the Committee that they had begun negotiations with Treasury regarding the impact of capital gains tax when operations restructure to comply with the new regime.

The Labor members however are concerned that legislation has not yet been introduced by the Treasurer, and that the absence of the legislation may be discouraging people moving to the new regime. If this is the case, the time effectively available to transit will be much reduced and ASIC will find itself flooded with late applications for licenses and authorisations. This would not be a good outcome.

The Labor members urge the Treasurer to advise as soon as possible how the ATO is to treat capital gains that may arise when operations have to restructured to comply with the new FSR regime.

## **Basic Deposit Products**

This Committee has examined before the treatment of basic deposit products under the FSR regime.

The Labor members continue to believe that basic deposit products have already received significant concessions under the new regulatory regime . The Labor members further believe that there will be significant benefits to consumers from requiring providers of basic deposit products to be competent to provide those services.

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<sup>2</sup> Committee Hansard, 7 August 2002, pp.277-278.

The Labor members do not therefore support any recommendation to exempt providers of deposit products from licensing under the Bill by excising deposit products from the definition of “financial product”.

The Labor members do have some support for the Chair’s alternate recommendations that ASIC review the training requirements in PS 146 and consider amending PS 146 in the manner recommended by the Chair, subject to not compromising consumer protection. The Labor members however, want to acknowledge the importance and benefits of a consistent standard for staff training across the financial services industry.

Under this heading, the Labor members also want to comment on two further matters in relation to basic deposit products. First, the Labor members want to reiterate their support for the full disclosure of all benefits and incentives that counter staff may receive or be offered in relation to the sale of financial products.

Second, the Labor members note the evidence obtained by the Committee in relation to the potential for staff dealing in basic deposit products to provide financial product advice when answering the questions of customers. The Labor members believe it is important that consumers receive financial product advice only from people qualified to provide that advice.

## **Accountants**

The Committee has also previously examined the position of accountants under the FSR Act. Accountants who provide financial product advice should not be exempt from the operation of the FSR Act.

However, the Labor members believe it is appropriate to now consider how the implementation of the FSR Act is affecting the provision of accounting services.

It is clear that there is considerable uncertainty among accountants as to which of their services are subject to regulation under the FSR Act. The current drafting of regulation 7.1.29, in particular the subsection (2) of that regulation, does not assist accountants in their understanding.

The Labor members recommend that the Government redraft regulation 7.1.29 clearly identifying those activities which do not constitute financial product advice. Members of the Committee discussed some of those activities with the accounting professional bodies and that discussion should be utilised in determining those activities.

The Labor members are concerned that the Department advised the Committee on 7 August that:

“At the moment the ball is largely in the accounting bodies’ court. We are basically waiting for guidance from them about the sorts of specification and description of the types of activities they feel should be excluded.”<sup>3</sup>

The Labor members hope that all parties can work constructively to provide certainty to the affected accountants. The Labor member further recommend that the Parliamentary Secretary to the Treasurer personally put in place a process for reaching an outcome as soon as possible. This will permit those accountants who may be required to be licensed or otherwise comply with the FSR regime to have the maximum possible time to transit to the new regime.

The Labor members also wish to make comment on the position of lawyers under the FSR Act. The statutory provision dealing with lawyers is subject to any activities that may prescribed in the regulations as constituting financial product advice.

Given the losses suffered by many investors in mortgage scheme previously operated by lawyers and supervised by law societies, the Government must maintain a vigilant oversight of what services lawyers are offering and where appropriate make regulations. In this regard, the Labor members draw to the Government’s attention to the growing trend for solicitors to consider commission arrangements with suppliers of services to client, particularly loans and other financial arrangements.<sup>4</sup>

## **Miscellaneous**

The Labor members note that the FSR Act was amended to regulate the times for, and manner of, unsolicited marketing by telephone of financial products. This was an amendment moved by Labor and has the continued support of the Labor members of this Committee.

The Labor members however, do not support the regulation specifying the hours for making unsolicited telephone calls. The breadth of the regulation is so broad as to undo considerably the intention of the statutory provision. The Labor members also do not accept that the hours for tele-marketing of financial products should be the same hours as for any other type of product.

Accordingly, the Labor members recommend that the Government amend the hours for making unsolicited telephone calls. As the disallowance motion dealing with this regulation has now been considered by the Senate, the Labor members will await the tabling of the amended regulation by the Parliamentary Secretary to the Treasurer.

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<sup>3</sup> Committee Hansard, 17 August 2002, pp. 260-261

<sup>4</sup> NSW Law Society Journal, February 2002

The Labor members also note the Chair's comments on spread betting. The Labor members do not wish to make any comment on the desirability or otherwise of spread betting.

However, the Labor members do not believe that the intention of Parliament in defining the word "derivative" in the FSR Act – and authorising ASIC to license providers of derivatives - was to override all State laws dealing with gambling. If that has been done, the Government should consider whether it is appropriate to amend the FSR Act to clarify the operation of the State laws.

**Mr Alan Griffin MP**

**Senator Penny Wong**

**Mr Anthony Byrne MP**

**Senator Stephen Conroy**