

Options for regulatory change to shift the balance in favour of retail investors

Term of Reference	Issue	Regulatory change options for consideration by the PJC
Adequacy of licensing arrangements (TOR 5)	<p>Licensing sets a low barrier to entry and this is not understood by investors</p> <p>Licensing focuses on the entity, not representatives, limiting ASIC's ability to control entry or ban individuals</p>	<p>Minor changes to licensing threshold</p> <p><i>Recommendation 1:</i> Amend the Corporations Act (s913B(1)(b)) to require ASIC to refuse an AFS licence where ASIC has reason to believe that a licensee <i>is likely to contravene</i> (rather than <i>will not comply with</i>) its obligations under s912A in the future. This will overcome some of the difficulties faced by ASIC in trying to assess whether an applicant <i>will not</i> comply with their obligations and meet their licence conditions before they have commenced business.</p> <p><i>Recommendation 2:</i> Amend the Corporations Act (s915C(1)(aa)) to enable ASIC to suspend or cancel an AFS licence, after a hearing, where ASIC has reason to believe that a licensee <i>may not comply with</i> or <i>is likely to contravene</i> (rather than <i>will not comply with</i>) its obligations under s912A in the future. This amendment will avoid the difficulties associated with ASIC needing to believe that the applicant <i>will</i> contravene the obligations in the future.</p> <p>'Negative licensing' of individuals</p> <p><i>Recommendation 3:</i> Amend the Corporations Act (s920A) to enable ASIC to ban individuals, after a hearing, on the grounds that they are not a 'fit and proper' person to engage in financial services.</p> <p><i>Recommendation 4:</i> Amend the Corporations Act (s920A) to enable ASIC to ban individuals, after a hearing, on the grounds that ASIC has reason to believe that the person '<i>may not comply with</i>' or are '<i>likely to contravene</i>' a financial services law. There are difficulties with having reasons to believe that an individual will not comply with legal obligations in the future, which make it difficult to remove individuals who may potentially cause investor losses in advance of an actual breach.</p> <p><i>Recommendation 5:</i> Amend the Corporations Act (s920A) to enable ASIC to ban individuals, after a hearing, where a person is 'involved' in a contravention of a financial services law by another person i.e. its authorising licensee or another person. This would enable ASIC to act against an individual whose actions cause loss to investors in circumstances where those actions do not constitute a breach of a financial services law by the individual but result in the breach of such a law by another entity (e.g. the entity's authorising licensee). A situation where this might arise is where an employee of a licensee gives advice on behalf of the licensee and in so doing causes the licensee to breach, say, the suitability requirement.</p> <p>Together these three amendments would increase the range of matters ASIC can take into account at the banning stage and makes the banning power more like a 'negative licensing' power for individuals.</p>

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Role of financial advisers (TOR 1)	<p>Access to advice is limited i.e. not all investors can, or do, obtain advice</p> <p>There are some instances of poor quality advice being given</p>	<p>Fiduciary standard</p> <p><i>Recommendation 6:</i> Amend the Corporations Act (s945A) to expressly require that a person who provides personal financial product advice must act in good faith in the best interests of their clients and, where there is a conflict between their clients' interest and their own interests, to give priority to their clients' interests. (This is similar to the duty imposed on responsible entities of managed investment schemes in s601FC.) This duty should be in addition to the requirement in s945A(1). Any contract that attempts to exclude the operation of this duty should be deemed void.</p> <p>More prominent disclosure of restrictions on advice</p> <p><i>Recommendation 7:</i> Amend the Corporations Act to require providers of personal financial product advice to more prominently disclose the restrictions on the advice they can provide to retail clients in marketing material such as advertisements, shopfronts, letterhead, websites, etc. Restrictions on the advice that should be prominently disclosed include relationships with product issuers and whether the range of products the provider of the personal financial advice can advise on is limited in any way (with reference to where retail clients may access a list of the products the provider can advise on e.g. on the provider's website or on request).</p>
Role of commission arrangements for product sales and advice (TOR 3)	Remuneration structures in the financial advice industry create conflicts of interest which can distort the quality of advice	<p>Remuneration structures for providers of financial product advice</p> <p><i>Recommendation 8:</i> Amend the Corporations Act to prevent the use of remuneration structures by providers of personal financial product advice that may create conflicts of interest that have the potential to adversely affect the quality of the personal financial product advice provided. This would mean that the following forms of remuneration would not be permitted, in relation to personal advice:</p> <ul style="list-style-type: none"> • up-front commissions; • trail commissions; • soft-dollar incentives (e.g. subsidised products and services (such as discounted loans), marketing support and discounted equity or options offered to advisers); • volume bonuses; • rewards for achieving sales targets; and • fees based on a percentage of funds under advice. <p>Consideration should also be given to whether this ban should extend beyond providers of personal advice and also apply to providers of general advice or those who provide execution-only dealing services. Fees paid to other financial services providers, such as fees paid by product manufacturers to platform providers and research houses, should also be reviewed.</p>

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Role of marketing and advertising campaigns (TOR 4)	Advertising campaigns are extremely influential	<p>Mandatory content in advertising</p> <p><i>Recommendation 9:</i> Amend the Corporations Act to give ASIC a specific power to, by legislative instrument, require product issuers to include specific content in their advertising and marketing material. The power should be flexible enough to enable different content (e.g. information about who a product is suitable for, disclosure against key benchmarks, warnings about key risks) to be required in relation to different classes of products. The introduction of a power of this kind would make it clear that it is the intention of the Parliament that ASIC has a proactive role in regulating advertising of products in appropriate cases.</p> <p>Enhance ASIC's Ch 6D stop order power</p> <p><i>Recommendation 10:</i> Amend ASIC's stop order power in Ch 6D of the Corporations Act (contained in s739) (e.g. in relation to the offer or advertising of securities) to make it consistent with the stop order power under Part 7.9 (contained in s1020E) by:</p> <ul style="list-style-type: none"> • requiring a person, on whom a stop order has been served, to take reasonable steps to make other persons who engage in the same conduct aware of the stop order; • specifically prohibiting a person who has been served with a stop order, or persons who have been made aware of the stop order, from engaging in conduct contrary to the stop order; and • ensuring that any conduct engaged in contrary to the stop order would be a contravention of a specified part of Ch 6D if set out in the stop order.
Consumer education and understanding (TOR 7)	Consumers have low levels of financial literacy and understanding	<p>Government and industry action</p> <p><i>Recommendation 11:</i> The Government and industry should fully support initiatives to improve the financial literacy of Australians and support the inclusion of financial literacy in the new curricula to be prepared by the Australian Curriculum and Assessment Authority.</p>
PI insurance (TOR 8)	PI insurance has limitations as a compensation mechanism and these limitations are being exacerbated by the current hardening of the insurance market	<p>Compensation scheme</p> <p><i>Recommendation 12:</i> The Government should review the effectiveness of PI insurance as a compensation mechanism and consider alternatives such as a statutory compensation scheme. Consideration of a statutory compensation scheme will need to cover the relationship between PI insurance and a statutory scheme, funding, and how such a scheme would sit with the current external dispute resolution process, among other matters.</p>