

17 December 2014

Manager  
Financial Services Unit  
Financial System and Services Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Email: [adviserregister@treasury.gov.au](mailto:adviserregister@treasury.gov.au)

Dear Sir/Madam,

**Re: Enhanced register of financial advisers**

*The Australian Institute of Superannuation Trustees is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public-sector funds.*

*As the principal advocate and peak representative body for the \$600 billion not-for-profit superannuation sector, AIST plays a key role in policy development and is a leading provider of research.*

*AIST provides professional training, consulting services and support for trustees and fund staff to help them meet the challenges of managing superannuation funds and advancing the interests of their fund members. Each year, AIST hosts the Conference of Major Superannuation Funds (CMSF), in addition to numerous other industry conferences and events.*

**In brief:**

AIST welcomes these draft regulations as vital to consumers of financial advice. AIST supports the need for an enhanced register of financial advisers. However, we recommend that this be made through legislation rather than by regulation, given the seriousness of lack of proper prescription to protect consumers. We believe that additional information should be required to assist investors, and would support the inclusion of Financial Services Guides (FSGs) as part of the register.

AIST supports the creation of an enhanced register of financial advisers. We believe that this tool is vital to providing consumers with transparency, as well as lifting the standards of financial advisers.

We note also, that in his press release of Friday 24 October, the Acting Assistant Treasurer, Senator Cormann committed to ensuring that the register contains the following information:

- The adviser's name, registration number, status, and experience;
- The advisers' qualifications and professional association memberships;
- The adviser's licensee, previous licensees/authorised representatives and business name;
- What product areas the adviser can provide advice on;
- Any bans, disqualifications or enforceable undertakings; and
- Details around ownership of the financial services licensee and disclosure of the ultimate parent company where applicable.

### The measures go some way to better protecting consumers

AIST believes that this measure will go a great distance towards supporting increased standards across the profession, and will better identify where investor needs may be conflicted.

However, we also believe that this will assist regulators in ensuring that Australia's financial services industry is able to better service the need of Australia's superannuation members, a good portion of who rely on financial advisers to point them in the direction of a superannuation fund. And, with the size of Australia's superannuation assets growing closer to \$2 trillion, we believe that providing Australians with better assurances and oversight of adviser quality is well overdue as key planks of consumer protection.

AIST also supports the statement by the Minister which clarifies that the enhanced register will be required to carry the qualifications of a financial adviser, as well as professional memberships. However, as explained later on in this submission, we believe that additional information could be provided to better assist investors.

### AIST believes the current level of consumer protection is insufficient so more needs to be done

The gaps in current consumer protection mechanisms drive the need for both further legislation, as well as the need to include additional matters in the Register. Even the recent FoFA amendments do not address:

- The need for standardised education levels for financial planners.
- The need for transparent, prescriptive standards of ethics.
- The impacts of the structural conflicts of interest.
- The lack of resources within the regulators.

We also note that financial advice in Australia is heavily concentrated. We have previously noted that:

- According to the Customer Owned Banking Association, Australia has the most concentrated banking sector of any G20 country<sup>1</sup>.
- Rainmaker notes that the four largest banks, their wealth arms and AMP have coverage of over 55% of all financial planners and 79% of all platform advisers<sup>2</sup>.
- Of the approximately 18,000 financial planners, less than one-third are certified financial planners<sup>3</sup>, which among other things requires an approved tertiary degree.
- Such conflicts of interest have detrimentally flowed onto consumers in various financial planning scandals, including in recent times the Commonwealth Bank and Macquarie Bank.

We believe that environment must inform the crafting of these draft regulations. In addition, the current work being carried out by ASIC, Treasury and the Tax Practitioners Board to improve standards must be considered in order to ‘future proof’ this measure for the benefit of Australians.

We note that registers are in place for other professionals with whom Australians do business, and applaud this initiative from the Government. We note, in particular, that the infrastructure for this register is already in place at ASIC, taking into account requirements for AFSL responsible managers as well as authorised representatives. This means that the costs of implementation will be low, compared to the extremely high potential rewards to investors.

Finally, AIST notes and supports the G20 High Level Principles on Financial Consumer Protection<sup>4</sup>, with particular reference to the OECD report on the work to support these Principles. AIST draws attention to the following in the context of financial planning advice to members:

- The oversight bodies should include having clearly defined powers, operational independence and accountability for their actions.
- Consumers should be treated fairly.
- Disclosure and Transparency Principle. The OECD report notes that consumers can be at a particular disadvantage when purchasing financial products or services, as they are widely marketed but purchased infrequently. AIST continues to endorse the disclosure of any conflicts of interest, opt in to costs on a regular basis, and ensuring that at all times, the members’ best interest is put first – as is recognised within the recent FoFA amendments.

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<sup>1</sup> Williams, M. (2014). Too-big-to-fail banks getting bigger. *AB+F*. [online] Available at: <http://tinyurl.com/pvbdmfl> [Accessed 5 Dec. 2014].

<sup>2</sup> Rainmaker’s Financial Planning Report, Volume 3, No.1 February 2014

<sup>3</sup> Ferguson, A. (2014). New battle looms as Treasury waters down financial adviser register. *The Age*. [online] Available at: <http://tinyurl.com/m82xtre> [Accessed 5 Dec. 2014].

<sup>4</sup> G20 High-level Principles on Financial Consumer Protection. (2011). 1st ed. [pdf] Paris: Organisation for Economic Co-operation and Development (OECD). Available at: <http://tinyurl.com/lcklllz> [Accessed 5 Dec. 2014].

- Responsible Business Conduct of Financial Services Providers and their Authorised Agents. This includes that organisations should:
  - Be accountable and responsible for the actions of their agents.
  - Have properly trained and qualified staff.
  - Agents should endeavour to avoid conflicts.
  - Ensure their remuneration structures are designed to encourage fair treatment of consumers.
- Protect consumers against fraud and misuse.
- Consumers should have access to an adequate complaints handling and redress mechanism that is accessible, independent, fair, accountable, timely and efficient.

AIST sees these regulations as harmonious with the FoFA reforms, and welcomes these draft regulations. We would now like to turn our attention to the draft regulations, themselves.

### International best practice

The US, UK and Canada all require financial advisers to be registered centrally.

Bateman and Kingston<sup>5</sup> considered the regimes in place in the US, UK and Canada and made the following observations:

- The legislation in the UK distinguishes between restricted (limited to the products of a particular provider) and independent (not confined to a particular list of solutions) advice.
- Bateman and Kingston provide the following comment: “[In reference to Australia] Following the UK, financial advisers should be required to identify themselves as offering either restricted or independent advice.” “(I)gnorance about quality can drive out high-quality goods and services.”

The US Securities and Exchange Commission (SEC) says<sup>6</sup> that consumers should ask a planner what experience the planner has; the qualifications they hold; what licences are held; what products and services are offered; if - offering only a limited range of products and services – why; types of payment received; if the advisor or firm has ever been disciplined by the regulator; and - for registered advisers - ask for their ADV form which sets out the advisers’ business, whether they have had problems with the regulator or clients, and the advisors services, fees or strategies.

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<sup>5</sup> Bateman, H. and Kingston, G. (2014). *Regulating Financial Advice: Lessons from the United States, the United Kingdom, and Canada*. [online] Sydney. Available at: <http://tinyurl.com/oxmh4y2> [Accessed 16 Dec. 2014].

<sup>6</sup> US Securities and Exchange Commission, (2014). *Investment Advisers: What You Need to Know Before Choosing One*. [online] www.sec.gov. Available at: <http://tinyurl.com/bj2nm8o> [Accessed 17 Dec. 2014].

AIST believes that this information could better inform the market by being contained centrally in a register.

In 1996, the USA Congress required that the SEC establish a readily accessible electronic process to respond to public enquiries about investment advisers (coming under Federal jurisdiction) and their disciplinary information. A public website is accessible which addresses this and (because it accesses the ADV form) includes:

- Those who have been registered.
- Any convictions recorded.
- Whether they have been subject to civil actions.
- Check the firm's or adviser's current registration status.
- Check professional background and conduct.
- Hours of business.
- If a sole trader, full residential address.
- Website address.
- Name of compliance officer contact.
- A statement that the advisor maintains all books and records required by law and where they are kept.
- What 'type' of advisor you are – e.g. investment advisor, pension consultant, newly formed advisor, multi-state advisor.
- Form of the organisation, e.g. corporation, sole, limited liability etc.
- How many employees.
- How many clients during the most recent financial year.
- Categories of clients (individuals, high net worth, institutions, etc.).
- Remuneration style, e.g. percent of assets under management, hourly, fixed fees, performance-based fees, etc.
- Whether they participate in a wrap fee program.
- Financial industry affiliations and advisory affiliates (e.g. brokers, lawyers).

We note that the information requirements contained in this regulation requires a fraction of this information. Our comments in this submission should be viewed in this context.

### The need for prescription and strong consumer protection

As noted by the Directorate-General for Internal Policies to the European Parliament<sup>7</sup>, ‘mis-selling of financial products has (also) resulted in significant consumer harm. Considering the significant potential detriment that financial services can cause to individual consumers ..., consumer protection policy needs to properly focus on this area. Improved transparency and better informed transactions resulting from such policy will lead to better solutions for consumers and greater market efficiency.’ ‘“(M)ost consumers buy only infrequently new financial products and services. Therefore, when buying a new financial product or service, they do not have much past knowledge or experience to rely on for taking decisions. ... (M)any financial products and services can be rather complex.’

‘Strong consumer protection in financial markets is required because consumers are often not capable of understanding the complexity and risks of certain financial products, are poorly equipped to identify cases where they are deliberately mis-sold inappropriate financial products and often, for a variety of reasons, do not properly assess or understand the potential financial consequences for them when things do not turn out as expected or planned.’

### What the Register needs to disclose to better protect consumers

Necessary to protect consumers	Detail	What the Register needs to disclose
Standardised education levels	Tertiary qualifications (preferably relevant degree) when giving personal advice Passing of a national exam for new and existing financial planners with mandatory competencies, including ethics and conduct. Mandatory Continual Professional Development.	Qualifications  Date passed exam  Points against required points
Transparent, prescriptive standards of ethics	Prescription, non-self-regulated e.g. ASIC regulatory guide	Breaches, bans, disqualifications, enforceable undertakings, etc.
Need to deal with structural conflicts of interest	Draw the distinction between aligned financial planners and independent financial planners.	Whether the planner is aligned or independent, and who they are aligned with, if

<sup>7</sup> Directorate-General for Internal Policies to the European Government, (2014). *Consumer Protection Aspects of Financial Services Study*. [online] Available at: <http://tinyurl.com/oarj5hw> [Accessed 17 Dec. 2014].

	This also assists with the consumer knowing which products and services the planner is offering and how 'independent' they are from the company with the products and services.	applicable.
Style and quantum of remuneration		How paid, e.g. flat fee, details of any commission rates for insurance, etc.

These items should – as a bare minimum – be listed in the register.

In addition to this, with these additional requirements comes the need to ensure that ASIC is appropriately resourced to administer this register.

### General observations

AIST notes that these are draft regulations, and not an exposure draft of a bill. However, we note that the regulations will create “implied” legislation to be read in conjunction with the *Corporations Act 2001* (“the Act”), with the additions to Division 9 of Part 7.6 of the Act.

We wish to point out that this is a clumsy way of implementing what would be generally regarded as a non-controversial measure, and would have preferred that these changes be made by way of an amendment to the Act. We recommend that this be fixed as soon as possible by an amendment bill.

In addition, we welcome the approach taken by this paper in that the focus is on entities that provide personal advice as relevant providers, both at an Australian Financial Services Licensee (“AFS licensee”) level, and at a representative level. We note, however, that an auxiliary function of this register is to provide a method for compliance with the *Tax Agent Services Act 2009* for registered tax (financial) advisers and strongly recommend that the needs of the Tax Practitioners Board (TPB) be considered to be highly important.

### Relevant financial products exemption

AIST does not support the exemption in the proposed section @922C, which excludes personal financial advice in basic banking products, general insurance products, consumer credit insurance or a combination of any of those products from this regime.

Although these are considered by some to be relatively simple financial products, it is feasible that during the advice process, a financial adviser may identify that more complex financial products would be in the clients best interest. However, under the modified best interest test that applies to agents or employees of ADIs at section 961B(3) of the Act, there is no requirement

for an adviser to decline to provide advice if the initial advice is sought for a basic banking product. A similar issue exists for general insurance in subsection (4).

This removes the consumer protection aspect of the register, based upon the initial enquiry of an investor. With no requirement to decline to provide advice or refer the investor on to an adviser who can provide the necessary advice, this means that the investor is effectively stranded with advisers who are not on the register and who have no duty to refer the client onwards.

We accordingly recommend the removal of this exemption.

### Eventual owner

AIST supports the need for disclosure of the “eventual owner” of a dealer group. However, we would like to see stronger provisions built in to ensure that the certain corporate structures do not water down the effectiveness of this measure. We have considered the examples below:

- Where complicated cross shareholdings inside a corporate conglomerate results in no entity satisfying the 50% ownership figure, even though there is an entity at the heads of the group which is in effective control; and
- Where an entity which is publicly listed, it may be that only a minority of shareholder votes are required to exercise effective control due to small shareholders declining to vote. In this instance, there may be no entity satisfying the eventual owner definition, even though only a minority of votes may be required for effective control.

We recommend that certain provisions be made for these (and other) scenarios.

In addition, we re-iterate our call to have aligned and non-aligned advisers disclosed. Although it is possible that the ‘eventual owner’ requirement will provide some transparency here, we believe that this should go further, and allow investors to note where, in the absence of an eventual owner, a provider is aligned with a larger financial services entity.

Further to this, we believe that an additional field that specifies whether an adviser is aligned or not, could also specify whether a relevant provider meets a definition of ‘independent’ that is acceptable to ASIC.

### Relevant provider

We note in the draft explanatory statement (ES) that the intention of the draft regulations is to extend this measure only to entities that provide advice to retail clients. AIST makes no recommendation here, other than to point out that we do not accept that consumer protections should be withdrawn from Australians on the arbitrary grounds of the number of dollars being invested. We also point to recent news events where clients were advised to indicate in signed

statements that they were “sophisticated” investors in order for an entity to escape certain consumer protection obligations.

AIST has also supported enshrining the terms “financial planner” and “financial adviser” into law. We believe that the term “relevant provider”, whilst relevant to the legislation, is both dry and non-descriptive for the purposes of laypersons reading the draft regulations. We would prefer that these draft regulations contained “financial advice provider” and “financial adviser” in the place of this term. We believe that this provides an excellent opportunity to re-commence work on this important measure.

**Information about a relevant provider who is a financial services licensee (proposed section @922E) and information about a relevant provider who is not a financial services licensee (proposed section @922F)**

We welcome the requirement at the proposed subsection @922E(f) to provide details of what the licensee is authorised (under their licence) to provide in the way of financial product advice. However, we also note that, even though an entity may be authorised in their AFS licence to provide financial product advice in certain products or classes of financial products, it is possible that a licensee chooses not to provide certain services that they are otherwise licensed to provide.

We note that the equivalent proposed subsection @922F(1)(i) contains a requirement (at (ii)) to provide details of what their licensee authorises relevant providers to provide advice on.

We believe that one of the functions of the enhanced register should be to better allow consumers to connect with entities who provide the services that they are after. Allowing them to see entities that are licensed to provide services that they may not (yet) provide would not necessarily be considered to be helpful. AIST recommends that an additional subparagraph (iii) be inserted in @922E(f) to require specification of the service that the licensee actually provides, specifically noting the classes of products that the licensee actually does provide advice on (as opposed to those which it is licensed to advise on). Such a requirement is conceptually similar to that contained in the proposed section @922F(1)(i)(ii).

In addition to services provided, we note that RG 146 is presently in the process of being updated. RG 146 describes a variety of specialisation areas, where ASIC prefers that a certain level of training has been met prior to providing advice in these areas. For the benefits of future proofing the register, we believe that an excellent idea would be to list the specialist areas in RG 146 that a licensee or their representative is capable of providing advice services in the proposed sections @922E and @922F.

We note that the relevant provider of certain advice services to investors may only be the licensee, and not a representative in certain instances. For example, the provision of web-based

advice, where a limited type of personal advice is provided algorithmically may fall into this category. For this reason, we recommend that the requirements of the proposed section @922E match those in @922F as closely as possible.

#### **Inclusion of information normally included in a Financial Services Guide (FSG)**

We note that a considerable portion of information that is required to be included is available already as part of FSGs that must be provided by advisers.

We believe that the relevant financial services guide (FSG) of the licensee or the representative should also be appropriate to be also available as part of the register. This could either be inserted as a hyperlink, rather than a physical document, or via the inclusion of all required FSG fields, including how the relevant providers are remunerated.

Inclusion of this information would have the following benefits:

- Complete transparency to ensure a properly informed market;
- Easy to access and up to date information for survey and statistical purposes; and
- Ease of comparability between financial services providers.

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If you have any further questions regarding this submission, please contact Richard Webb, Policy & Regulatory Analyst on 03 8677 3835 or at [rwebb@aist.asn.au](mailto:rwebb@aist.asn.au).

Yours sincerely,



Tom Garcia  
**Chief Executive Officer**