

Chapter 2

Financial product advice and financial advisers

2.1 This chapter discusses the committee's consideration of:

- 'general advice' and 'personal advice' as currently defined in the *Corporations Act 2001*;
- the protection of titles such as 'financial adviser' and 'financial planner';
- the register of financial advisers; and
- licensing of financial advisers.

General advice

2.2 In this section, the committee discusses suggestions to change the definitions of 'general advice' and 'personal advice' which are categories of 'financial product advice' defined in the *Corporations Act 2001*.¹ The section also covers current definitions, proposed changes and views from the banks and financial service providers.

2.3 ASIC's Moneysmart website describes 'general advice' and 'personal advice' in the following way:

The type of financial advice you need depends on your life stage, the amount of money you have to invest and the complexity of your affairs...You can get general advice about financial products or investing...General advice does not take into account your particular circumstances, such as your objectives, financial situation and needs. For example, you may receive general advice when you attend a seminar about investing.

If you want a recommendation that takes your personal situation into account, you need personal advice...For this kind of advice, it's important that you only talk to someone who is a licensed adviser...The cost of the advice will depend on the scope and kind of advice you receive.²

Current definitions

2.4 'General advice' and 'personal advice' are types of financial product advice. Financial product advice is defined in the *Corporations Act 2001* as:

A recommendation or a statement of opinion, or a report of either of those things, that:

1 *Corporations Act 2001*, s. 766B.

2 ASIC's Moneysmart website, *Types of financial advice*, <https://www.moneysmart.gov.au/investing/financial-advice/types-of-financial-advice>, (accessed 23 November 2014).

(a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or

(b) could reasonably be regarded as being intended to have such an influence.³

2.5 The *Corporations Act 2001* defines 'personal advice' in section 766B(3) as financial product advice given or directed to a person (including by electronic means) in circumstances where:

- the person giving the advice has considered one or more of the client's objectives, financial situation and needs; or
- a reasonable person might expect the person giving the advice to have considered one or more of these matters.⁴

2.6 'General advice' is defined in section 766B(4) as financial product advice that is not 'personal advice'.⁵

The sales-advice conflict

2.7 The committee's 2009 inquiry into financial products and services in Australia highlighted the sales-advice conflict arising from significant structural tensions that are central to the debate about conflicts of interest and their effect on the advice consumers receive. The committee noted that:

On one hand, clients seek out financial advisers to obtain professional guidance on the investment decisions that will serve their interests, particularly with a view to maximising retirement income. On the other hand, financial advisers act as a critical distribution channel for financial product manufacturers, often through vertically integrated business models or the payment of commissions and other remuneration-based incentives.⁶

2.8 The Financial Services Council (FSC) represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, trustee companies and public trustees. The FSC submitted to the committee that it:

...supports a holistic framework which includes a revised advice framework, removing the ambiguity between personal advice and general advice (proposing the relabelling of general advice to 'general information') and linking competency to the different advice segments.⁷

3 *Corporations Act 2001*, s. 766B(1).

4 ASIC, *Submission 25*, p. 39.

5 ASIC, *Submission 25*, p. 38.

6 Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into financial products and services in Australia*, November 2009, pp 69–70.

7 Financial Services Council, *Submission 26*, p. 3.

2.9 Some submitters and witnesses to the current inquiry informed the committee that problems with the sales-advice conflict are still in existence and need addressing. The Financial Planning Association of Australia (FPA) informed the committee that some consumers mistake the use of the word ‘advice’ to be a standard definition when in fact there is a significant legal and technical difference between ‘general’ and ‘personal’ advice. The FPA also suggested that the definition of ‘financial product advice’ makes it difficult for consumers to distinguish financial advice from marketing material or product sales.⁸

2.10 ASIC's *Report 384 – Regulating Complex Products*, identified similar issues to those described above:

Our research has indicated that marketing information plays a particularly strong role in product distribution and may influence investors’ decision making more than other product disclosure. In particular, when investors approach product issuers or other intermediaries responsible for selling products directly, rather than going through advisers, the information contained or implied in product issuers’ marketing information is often the first, and may be the only, information that investors use to decide whether or not to invest in that product.⁹

2.11 The FSI interim report also reported on issues related to definitions of ‘advice’, noting that:

At times, consumers also lack access to affordable advice. In addition, some submissions question whether general advice is properly labelled and whether consumers understand its nature, given general advice often includes sales and advertising information.¹⁰

2.12 In its final report, FSI confirmed that consumers may misinterpret or excessively rely on guidance, advertising, and promotional and sales material when it is described as ‘general advice’. Additionally the use of the word ‘advice’ may lead consumers to believe the information is tailored to their needs.

Often consumers do not understand their financial adviser’s or mortgage broker’s association with product issuers. This association might limit the product range an adviser or broker can recommend from. Of recently surveyed consumers, 55 per cent of those receiving financial advice from an entity owned by a large financial institution (but operating under a different brand name) thought the entity was independent.¹¹

8 Financial Planning Association of Australia, *Submission 6*, p. 52.

9 ASIC, *Report 384 – Regulating Complex Products*, January 2014, p. 32.

10 Financial System inquiry, *Interim Report*, July 2014, p. xxxii.

11 Financial System Inquiry, *Final Report*, November 2014, p. 271.

Proposals for change

2.13 The Financial Systems Inquiry sought views on renaming 'general advice' as 'sales' or 'product information' and restricting use of the term 'advice' so that it only be used in relation to 'personal advice'. In its final report the FSI recommended that 'general advice' be renamed and that advisers and mortgage brokers be required to disclose ownership structures.¹²

2.14 The Customer Owned Banking Association told the committee that in their view, the boundary between 'personal advice' and 'general advice' is clear legally but very context specific, and that distinguishing between them can be problematic in practice.¹³

2.15 The Insurance Council of Australia supported a comprehensive review of the terminology, with the goal of separating out the disparate elements currently covered by the definition of 'general advice'.¹⁴

2.16 The Self-Managed Super Fund (SMSF) Professionals' Association of Australia (SPAA) informed the committee that they had been advocating the removal of 'general advice' for some time and noted that:

We believe, if you are a personal adviser, you are personally accountable and you should be able to provide professional advice. But we do not believe you should be able to be a provider of information sales product and be able to call yourself an adviser if that is all that you do; you must be a professional adviser in the first instance.¹⁵

2.17 The committee heard that alternative terms for 'general advice' could include:

- 'general information' which could include product information;¹⁶
- 'general or product information' which could be limited to the provision of factual information and/or explanations relating to financial products;¹⁷ and
- 'general financial information' which would include factual information about a product or a service.¹⁸

2.18 The Financial Planning Association of Australia (FPA) recommended that 'personal advice' be renamed 'financial advice' and suggested the following meaning for 'financial advice':

12 Financial System Inquiry, *Final Report*, November 2014, p. 271.

13 Mr Luke Lawler, Acting Head of Public Affairs, Customer Owned Banking Association, *Committee Hansard*, 14 October 2014, p. 26.

14 Insurance Council of Australia, *Submission 18*, p. 5.

15 SMSF Professionals' Association of Australia, *Committee Hansard*, 13 October 2014, p. 5.

16 Financial Services Council, *Submission 26*, p. 4.

17 Financial Planning Association of Australia, *Submission 6*, p. 4.

18 BT Financial Group, *Submission 23*, p. 5.

Any recommendation made personally to a consumer on which that consumer could reasonably be expected to act in relation to an investment or financial decision, including but not limited to, any recommendations relating to shares, debentures, collective investments, futures or options contracts, life insurance, superannuation, property or other financial instruments, transactions or investments.¹⁹

Views of banks and financial service providers

2.19 The FSC submitted to the committee that it supports removing the ambiguity between personal advice and general advice (proposing the relabelling of general advice to 'general information') and linking competency to the different advice segments. The FSC also suggested a third category called 'factual information', which would be distinct from personal advice and general information.²⁰

2.20 The Australian Bankers Association (ABA) acknowledged that 'general advice' is not widely understood to be financial advice by many customers. The ABA submitted that 'there is merit in giving further consideration to different and more appropriate terminology and labels which more closely reflects the true nature of information that is legally termed "general advice".²¹ The ABA suggested that consumer testing and research be undertaken as part of the process to develop alternative terminology.²² The committee notes that while the final report of the FSI recommended that 'general advice' be renamed, it did not suggest a specific term to replace it. Instead it recommended a non-specific 'consumer-tested term', suggesting that:

Consumer testing will generate some costs for Government, and relabelling will generate transitional costs for industry — although these are expected to be small. The Inquiry believes the benefits to consumers from clearer distinction and the reduced need for warnings outweigh these costs.²³

2.21 The Customer Owned Banking Association supported more clarity for customers, but raised some concerns about the proposed changes.

Financial product advice is a recommendation, or something that the consumer perceives to be a recommendation, about a financial product. So the very legal definition of financial product advice is selling something. You could change that. We do not oppose the idea of making things a little clearer. But just how you do that and stick with the current architecture for the way the whole thing is put together is problematic.²⁴

19 Financial Planning Association of Australia, *Submission 6*, p. 53.

20 Financial Services Council, *Submission 26*, pp 4, 6.

21 Australian Bankers Association, *Submission 27*, p. 7.

22 Australian Bankers Association, *Submission 27*, p. 8.

23 Financial System Inquiry, *Final Report*, November 2014, p. 272.

24 Mr Luke Lawler, Acting Head of Public Affairs, Customer Owned Banking Association, *Committee Hansard*, 14 October 2014, pp 27–28.

Committee view

2.22 The majority of the evidence received by the committee supports a change to the term 'general advice' to ensure that it more closely describes the nature of the information communicated which as the FSI report highlights, often contains sales and advertising information. The committee notes that industry associations including the FPA, FSC, ABA and SPAA have acknowledged the need for change. Increased consumer awareness of the fact that they are being sold a product may act as a defence against unwittingly accepting marketing as advice, thereby playing a valuable role in the system of defences.

2.23 The committee therefore recommends that there should be a change to the term 'general advice' to make the nature of the information communicated clearer to consumers and investors. The committee considers that the term 'product sales information' would more closely reflect the nature of the advice that is currently given under the term 'general advice'.

Recommendation 1

2.24 The committee recommends that the term 'general advice' in the *Corporations Act 2001* be replaced with the term 'product sales information' to better reflect the nature of that information.

2.25 The committee also notes the suggestion by the FPA that 'personal advice' be renamed as 'financial advice' with the following meaning:

Any recommendation made personally to a consumer on which that consumer could reasonably be expected to act in relation to an investment or financial decision, including but not limited to, any recommendations relating to shares, debentures, collective investments, futures or options contracts, life insurance, superannuation, property or other financial instruments, transactions or investments.²⁵

2.26 The committee has not received a significant body of evidence on the proposal to change 'personal advice' to 'financial advice'. However, the committee considers that the proposal is likely to provide a clearer system for consumers and therefore is worthy of further consideration by the government.

Recommendation 2

2.27 The committee recommends that the term 'personal advice' in the *Corporations Act 2001* be replaced with 'financial advice' to better reflect the nature of that advice.

Recommendation 3

2.28 The committee recommends that to provide 'financial advice' an individual must be registered as a financial adviser.

25 Financial Planning Association of Australia, *Submission 6*, p. 53.

Financial advisers, financial planners and a register of financial advisers

2.29 This section discusses proposals to restrict the use of the terms 'financial adviser' and 'financial planner' as a way of signalling competence to consumers. Alternative defences are also discussed, including establishing a register of financial advisers.

Proposal to protect the titles 'financial adviser' and 'financial planner'

2.30 Bankers Trust Financial Group (BT) advocate that the terms 'financial advice' and 'financial adviser' should be clearly linked to the provision of 'personal advice'.²⁶ BT supports limiting the use of the term 'financial adviser' to those who provide 'personal advice' and who meet the relevant training and competency standards to provide 'personal advice'. BT suggested that:

Individuals who either do not provide Personal Advice, or who do not meet the relevant professional standards, would be unable to hold themselves out as Financial Advisers. This would strengthen the distinction drawn above by clearly labelling the title of the individual providing the information or advice, and ensuring only a qualified and authorised individual is able to hold themselves out as being a financial adviser.²⁷

2.31 The FPA submitted that it is common for individuals to interpret 'general advice' as 'personal advice' because it is relevant to their circumstances at the time it is provided. The FPA suggested that to ensure consumers can easily distinguish between the various roles and services in the financial services sector, providers of general or product information should be prevented from using the titles 'financial planner' or 'financial adviser'.²⁸

2.32 The Australian Bankers Association also supported consideration of the legal meaning of the terms 'financial planner' and 'financial adviser' and more clearly linking the term 'financial adviser' with the provision of 'personal advice'.²⁹

2.33 Mr Paul Moran drew the committee's attention to the difference between stewards who act on behalf of their clients and agents who may serve a third party:

There needs to be a recognition of the differences between those financial planners who act as stewards on behalf of their clients, and those financial advisers who act as conflicted agents serving both their client and a third party financial product provider – and the public should know how to recognise these different players.³⁰

2.34 Mr Robert Brown submitted that statutory separation of product sales from 'personal advice' is flawed unless it ensures that legislatively endorsed 'financial

26 BT Financial Group, *Submission 23*, p. 5.

27 BT Financial Group, *Submission 23*, p. 6.

28 Financial Planning Association of Australia, *Submission 6*, pp 52–53.

29 Australian Bankers Association, *Submission 27*, p. 8.

30 Mr Paul Moran, *Submission 1*, p. 1.

planners/advisers' cannot receive any form of ethically conflicted remuneration including commissions, 'asset fees' and any other forms of product bonuses and incentives.³¹

2.35 The Professional Standards Councils (PSC) undertook a survey on the current role of professionalism in the financial services industry and found that there was no common understanding of the terms 'financial adviser' and financial planner':

...certain interviewees differentiated between types of financial advisers – those who had completed specific training requirements, and those who had not. Some respondents believed that financial advisers are professionals, but financial planners are not, whilst others saw the reverse. Still others believed both financial planners and financial advisers are professionals. Whilst a significant proportion of interviewees believed that neither financial planners or financial advisers constitute a profession.³²

2.36 The PSC informed the committee that as part of the regulation of professions, legislative protection of a title or term is often sought by those qualified to assist consumers in distinguishing between professionals and non-professionals.³³ The PSC also noted that there was an active campaign by some associations to encourage government to legislate for 'protection of title' (financial planner and/or financial adviser), but that in their view, there is no agreement amongst the industry as to whether it is appropriate or warranted.³⁴

Alternatives to the protection of title

2.37 While the above discussion has focussed on protection of title for 'financial adviser' and 'financial planner', the PSC also drew the committee's attention to an alternative approach called 'protection of function'. The PSC argued that:

In the spectrum of regulation governments typically prefer the 'protection of function' approach because it does not confer titled benefit but does influence the individuals (through education and standards) that can be authorised to perform a function or service. It might be argued that [the] Corporations Act takes this approach with regard to financial advice by stipulating the education and oversighting requirements for the function of financial advice to be performed. It might also then be argued that the current concerns of the government and public indicate that this approach may have failed.³⁵

31 Mr Robert Brown, *Submission 21*, p. 1.

32 Professional Standards Councils, *Submission 35*, Attachment 1, *White Paper Professionalisation of Financial Services*, p. 11.

33 Professional Standards Councils, *Submission 35*, Attachment 1, *White Paper Professionalisation of Financial Services*, p. 21.

34 Professional Standards Councils, *Submission 35*, Attachment 1, *White Paper Professionalisation of Financial Services*, p. 23.

35 Professional Standards Councils, *Submission 35*, Attachment 1, *White Paper Professionalisation of Financial Services*, p. 22.

2.38 The committee was advised of industry led approaches designed to allow consumers to identify qualified financial advisers, including the use of the Certified Financial Planner (CFP) designation, an internationally recognised designation held by 150 000 financial planners in 24 countries. The FPA submitted that:

To gain CFP certification, a planner must have completed an undergraduate degree, masters degree or PhD and have successfully completed all of the units of study in the CFP Certification Program. To enter the CFP program, at least three years of financial planning experience is also required.³⁶

2.39 The Commonwealth Bank of Australia and AMP have announced that they will require some financial advisers to be Certified Financial Planners.³⁷ The committee noted that in New Zealand individuals who provide advice on high risk and/or long term investment products (including financial planning) have to be registered, and also separately 'authorised' by the Financial Markets Authority under the *Financial Advisers Act 2008*.³⁸

Committee view

2.40 The committee notes that the PSC has recommended the clear separation of professional and non-professional roles, including differentiated titles (protection of title) and obligations for providing professional advice (protection of function).³⁹

2.41 The committee considers that both approaches are complementary defences and would assist consumers better understand the nature of the information and advice that they are receiving, and that only suitably qualified people could legally provide financial (personal) advice.

2.42 The committee is concerned about problems that have occurred in the financial advice industry and the lack of progress in addressing the problems since the committee's previous inquiry in 2009. The committee considers that the government should bring forward legislation to protect the titles 'financial adviser' and 'financial planner'. The legislation should provide that 'financial adviser' is a recognised title and that in order for an individual to be eligible to use the title that individual must:

- be providing 'personal advice' (or 'financial advice' as recommended above) under the provisions of an AFS licence regulated by ASIC as set out currently in the *Corporations Act 2001*; and
- be a member of a professional body operating under a Professional Standards Scheme approved by the Professional Standards Councils. Advisers may choose to be a member of more than one professional association as is

36 Financial Planning Association of Australia, *Submission 6*, p. 62.

37 Superannuation Consumers' Centre, *Submission 11*, p. 9; AMP, *Submission 12*, p. 2.

38 New Zealand Companies Office, Financial Service Providers Register, *What is the FSPR?*, <http://www.business.govt.nz/fsp/about-the-fspr/what-is-the-fspr>, (accessed 23 November 2014).

39 Professional Standards Councils, *Submission 35*, Attachment 1, *White Paper Professionalisation of Financial Services*, p. 26.

currently the case. Only one such body (to be nominated by the adviser) will have the role of providing oversight of professional obligations and associated advice to ASIC in respect to initial registration and ongoing compliance. An adviser sanctioned by that professional association having oversight should not be able to seek registration via a different professional association. ASIC decisions in relation to refusing registration or deregistering financial advisers should be subject to appropriate merits review by the Administrative Appeals Tribunal (refer to the report overview and Chapter 4 for the committee's recommendations to require membership of a body and approval by the PSC); and

- be registered as a financial adviser through listing on the register of financial advisers, and continue to meet all the requirements to be on the register as a professional adviser.

2.43 The committee also considers that the same legislative or regulatory power should be used to protect the title 'financial planner' through preventing its use. The committee is of the view that to prevent confusion for consumers, there should only be one term in used in Australia, and that is the term 'financial adviser'. While the committee acknowledges that there are other terms in use in overseas jurisdictions, including the internationally recognised designation 'Certified Financial Planner' (see earlier discussion at paragraph 2.37), clarifying and protecting the title 'financial adviser' will be another measure designed to protect consumers. Consequently, the committee view is that to provide financial advice in Australia a person must be registered as a 'financial adviser'. The committee notes that attaining certification as a Certified Financial Planner represents a level of education and experience and does not conflict with the requirement to use the title 'financial adviser' in the domestic context.

Recommendation 4

2.44 The committee recommends that the government should bring forward legislation to protect the titles 'financial adviser' and 'financial planner' and require that to be eligible to use the title 'financial adviser', an individual must be registered as a financial adviser.

Register of financial advisers

2.45 This section discusses the development of a public register of financial advisers, and the role that such a register could play in ensuring that financial advice provided to consumers and investors is only provided by suitably qualified professionals. A register of financial advisers provides protection of function and would operate as a complementary defence to the protection of titles.

2.46 The committee has considered evidence to suggest that there is a high degree of support for the creation of a register of financial advisers.⁴⁰ Industry Super Australia and the Australian Institute of Superannuation Trustees suggested that:

Such a register will provide ASIC and consumers with transparency about advisers' qualifications and employment history. The register will not only enhance ASIC's capacity to monitor financial advisers (including employee advisers) but will enable the benchmarking of key metrics in financial planning in its progress towards professionalism.⁴¹

2.47 The Finance Sector Union submitted that having a list of financial planners available to the general community which details all currently 'licenced to practice' financial planners would assist consumers to make educated choices and would serve as a way of monitoring regulatory training expectations.⁴²

2.48 The FPA informed the committee that an adviser register would assist consumer awareness of the qualifications held by individual financial planners and financial advisers.⁴³ The FPA further submitted that:

The development of the new Adviser Register (as per the Government's commitment) will deliver a superior outcome with more certainty than developing a list of advisers via a national exam. The Government has proposed its Adviser Register will be a legal requirement for all representatives, employed and authorised representatives, not just limited to those who sit an exam.⁴⁴

2.49 The development of the register of financial advisers is supported by banking institutions including BT Financial Group.⁴⁵ The Financial Services Council submitted that a national public register of personal advice providers could be leveraged to record competency and training.⁴⁶ The ABA informed the committee that:

...a new financial adviser register should enable consumers to be able to validate the details of a financial adviser. A register should also enable improved practices for industry and better oversight of financial advisers by ASIC.⁴⁷

40 Industry Super Australia and the Australian Institute of Superannuation Trustees, *Submission 22*, p. 2; Finance Sector Union, *Submission 5*, p. 8; Financial Planning Association of Australia, *Submission 6*, p. 9.

41 Industry Super Australia and the Australian Institute of Superannuation Trustees, *Submission 22*, p. 14.

42 Finance Sector Union, *Submission 5*, p. 8.

43 Financial Planning Association of Australia, *Submission 6*, p. 9.

44 Financial Planning Association of Australia, *Submission 6*, p. 51.

45 BT Financial Group, *Submission 23*, p. 6.

46 Financial Services Council, *Submission 26*, p. 13.

47 Australian Bankers Association, *Submission 27*, p. 9.

2.50 The Financial Ombudsman Service (FOS) supported the concept of a register and noted that similar registers have been implemented in Asia.⁴⁸

2.51 On 27 November 2014, the government released an exposure draft of regulations to implement the register through the *Corporations Amendment (Register of Relevant Providers) Regulation 2014*. An associated consultation process invites feedback from stakeholders. The regulations amend the *Corporations Regulation 2014* to enable ASIC to establish and maintain a public register of financial advisers and for Australian Financial Service licensees to collect and provide information to ASIC concerning financial advisers that operate under their licence.⁴⁹

Committee view

2.52 The evidence received by the committee is generally in favour of the establishment of a register of financial advisers, albeit predominantly in the context of increasing transparency as opposed to protecting function. The committee is of the view that a register can perform both functions. The committee notes the government announcement on 24 October 2014 that an enhanced register of financial advisers will be established by March 2015. The register will include:

- 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.⁵⁰

2.53 The committee is suggesting that an adviser who has had their membership of a professional association withdrawn because of a failure to meet continuing professional development obligations would be listed on the register for the purposes of transparency as a suspended adviser. An adviser who has membership of the association withdrawn due to breaches of the code of conduct or who has been sanctioned by ASIC for breaches of the provisions of the AFS licence, would be listed as banned. The scope of an adviser's competence to provide financial advice may also be listed on the basis of advice from the professional association, the AFS licence holder or ASIC.

48 Financial Ombudsman Service, *Submission 33*, p. 4.

49 The Treasury, *Enhanced register of financial advisers*, <http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2014/Enhanced-register-of-financial-advisers>, (accessed 27 November 2014).

50 Senator the Hon Mathias Cormann, Finance Minister and Acting Assistant Treasurer, media release, *An Enhanced Public Register of Financial Advisers*, 24 October 2014.

2.54 The committee considers that the register of financial advisers is another element in the systems approach to ensuring consumer protection, as discussed in Chapter 1 in relation to the James Reason model. The register of financial advisers will provide members of the public with access to information about financial advisers and public accountability, which will work in conjunction with other elements to help reduce the risk of adverse outcomes for consumers.

2.55 The committee considers that as the register is designed to be part of a broader system intended to strengthen the standard of advice to consumers, removing elements of the register, or not fully implementing it will reduce its effectiveness. In particular, the committee considers that for the register to deliver adequate public accountability, the register must include information about any bans, disqualifications or enforceable undertakings against a financial adviser. The status of an adviser (practising, suspended or banned) should also be clearly stated to provide transparency for members of the public and for legal clarity for the adviser and potential AFS licence holders who may be considering employing the individual.

2.56 The committee further considers that the register should act as part of the defence of function, in that being registered is a requirement to practice as a financial adviser. In order to maximise the effectiveness of the register and its operation with other parts of the system to protect consumers, the register should include all of the elements originally proposed in the government's announcement of the register on 24 October 2014, and discussed earlier in this chapter. The committee considers that ASIC should be responsive to advice received from a professional association in relation to their oversight of an individual adviser. ASIC should be provided with sufficient powers so that an adviser can only be added to the register on advice from the relevant professional association that the adviser has completed the Finance Professionals' Education Council approved professional year and registration exam consistent with the information and criteria as set out in the recommendation below.

Recommendation 5

2.57 The committee recommends that the register of financial advisers:

- **include the information fields detailed in the government's announcement of the register on 24 October 2014;**
- **have a unique identifier that follows every individual adviser throughout their career;**
- **only list financial advisers on the register when a professional association (which has been approved by the Professional Standards Councils) advises that the adviser has completed the requirements of the Finance Professionals' Education Council approved professional year and passed the registration exam;**
- **record any higher qualification awarded by a professional body to the adviser;**

- **annotate any censure or limitation placed on a financial adviser by a professional body, Australian Securities and Investments Commission or Australian Financial Service Licence holder; and**
- **highlight that an adviser is no longer authorised to provide financial advice if the adviser has their membership of the nominated professional body suspended or revoked.**

Licensing of financial advisers

2.58 This section discusses the committee's consideration of proposals to:

- change licensing arrangements for financial advisers so that each financial adviser has an individual license; and
- increase fees to organisational licensees to reflect the scale of their financial advice operations.

Current licensing arrangements

2.59 To provide financial advice in Australia a financial adviser must hold an AFS licence or be authorised as a representative of another person who holds an AFS licence. The licensing process is a point-in-time assessment of the licensee, not of its owners or employees.⁵¹

2.60 The committee has considered arrangements for licensing of financial advisers in a number of international jurisdictions. In most cases, organisations are required to hold licences. Requirements for every financial adviser to be individually licenced are less common. Some examples of the financial adviser licensing arrangements in overseas jurisdictions appear below.

2.61 In New Zealand, organisations or individuals who provide financial advice have to be registered on the Financial Service Providers Register:

People who provide advice on high risk and/or long term investment products (including financial planning) will have to be registered on the FSPR, and also separately 'authorised' by the Financial Markets Authority under the *Financial Advisers Act 2008*.

Authorisation ensures the individuals are suitably qualified and experienced. Advisers will apply for authorisation at the same time as they submit an application for registration online.⁵²

2.62 In most Canadian provinces, there is no legislated standard in place for financial advisers. With the exception of Quebec, people who call themselves financial planners are not required to obtain any credentials.⁵³

51 ASIC, *AFS licensees*, <http://www.asic.gov.au/for-finance-professionals/afs-licensees/>, (accessed 16 December 2014).

52 New Zealand Companies Office, Financial Service Providers Register, *What is the FSPR?*, <http://www.business.govt.nz/fsp/about-the-fspr/what-is-the-fspr>, (accessed 23 November 2014).

2.63 Financial planners in the United States are regulated as 'investment advisers' under the *Investment Advisers Act of 1940* ('Advisers Act'). Firms that are investments advisers for the purposes of the Advisers Act must be registered.⁵⁴

2.64 In Singapore, for a person to act as a financial adviser, they must be authorised to do under a financial adviser's licence. Employees who provide financial advice are required to be representatives of the licensed corporation.⁵⁵

Licensing individual advisers

2.65 The committee has considered the possibility of requiring that all individual advisers be licensed before they are able to provide financial advice.

2.66 Professor Justin O'Brien and Dr George Gilligan suggested that the framing of professional obligation must take into account empirical evidence concerning the failure of existing codes of conduct, and the dangers associated with the licensing regime limited to entities rather than attaching to individual advisers.⁵⁶

2.67 Dr George Gilligan informed the committee that in his view:

...there is a certain imbalance between the privileged position that participation in the financial sector allows through the mechanism of the licence—which is a gift of the state—and what might be termed the civic duties and obligations that potential carries with it. We think the balance has shifted too far towards an almost automatic expectation of assuming a licence. This has been compounded because of the organisational context—many of the financial planners and advisers in Australia are employed by large organisations, so there is a diminution of accountability and transparency in relation to the activities of individuals who are selling products or recommending products to consumers.⁵⁷

2.68 Chartered Accountants Australia and New Zealand supported considering the possibility of individual licensing for financial advisers, but noted concerns that individual compliance costs may act as a disincentive for individual licensees.⁵⁸ CPA Australia expressed similar concerns.⁵⁹

53 Financial Planning Standards Council, *About Financial Planning Standards Council*, <http://www.fpssc.ca/about-fpsc>, (accessed 23 November 2014).

54 U. S. Securities and Exchange Commission, *Regulation of Investment Advisers*, March 2013, pp 1, 8, 17.

55 Singapore, *Financial Advisers Act*, revised edition 2007, s. 6, 23C.

56 Professor Justin O'Brien and Dr George Gilligan, *Submission 8*, p. 7.

57 Dr George Gilligan, Private capacity, *Committee Hansard*, 13 October 2014, p. 45.

58 Mr Hugh Elvy, Financial Planning Leader, Chartered Accountants Australia and New Zealand, *Committee Hansard*, 13 October 2014, p. 22.

59 Mr Paul Drum, Head of Policy, CPA Australia, *Committee Hansard*, 13 October 2014, p. 22; See also Ms Diane Tate, Policy Director, Retail Policy, Australian Bankers' Association, *Committee Hansard*, 14 October 2014, p. 10.

2.69 CPA Australia and Chartered Accountants Australia and New Zealand identified barriers to individual licensing including:

- the breadth of the AFS licence framework which limits the capacity to tailor obligation to particular types of financial services;
- complexity and cost of compliance;
- the length of product disclosure documents and statements of advice;
- the cost of professional indemnity insurance; and
- the overlap with other regulatory requirements such as tax and anti-money laundering.⁶⁰

2.70 CHOICE indicated that it was comfortable with retaining licensing at an organisational level, so long as a register of individual advisers is implemented.⁶¹

2.71 The Association of Financial Advisers informed the committee that moving to individual licensing would be a fundamental change to the *Corporations Act*:

With the best interest duty, there are now obligations at the adviser level. So we have seen some transition in that direction. But we are conscious that the benefits of the licensee model are a group that is held accountable for the conduct of advisers within that group and that then ensures that consumers have better access to a larger organisation to pursue complaints. So there are many arguments for and against it. Changing the whole construct of the *Corporations Act* at this point in time is probably not something that we are supportive of.⁶²

2.72 The Department of the Treasury informed the committee that there are some advantages to licensing entities, including that they have many more mechanisms to compel good behaviour and are closer to consumers, which reduces the compliance costs on the system.⁶³

Committee view

2.73 The committee has examined suggestions that each financial adviser be individually licensed rather than licensing organisations. The committee notes that the key objective of this suggestion is increased individual accountability. Whether the AFS licence holder is an individual or an organisation, the key issue is compliant and ethical conduct by both the individual and the management of the organisation. The committee is of the view that the dual oversight of an adviser by a professional

60 CPA Australia and Chartered Accountants Australia and New Zealand, *Answers to questions on notice*, 13 October 2014, (received 3 November 2014).

61 Mr Alan Kirkland, Chief Executive Officer, CHOICE, *Committee Hansard*, 14 October 2014, p. 4.

62 Mr Philip Anderson, Chief Operating Officer, Association of Financial Advisers Ltd, *Committee Hansard*, 14 October 2014, p. 16.

63 Mr Meghan Quinn, General Manager, Financial Systems and Services Division, Treasury, *Committee Hansard*, 13 October 2014, p. 40.

association (with the power to advise ASIC to suspend or ban the adviser for breaches of the code of professional conduct) and ASIC through the AFS licence provisions will provide accountability for individual conduct. The committee notes that implementation of FSI recommendation 24, providing ASIC with the power to ban management for not creating a culture of compliance with AFS licence provisions,⁶⁴ will provide additional defences in the system.

2.74 The committee also notes that licensing at the organisational level, with arrangements for individual advisers to act as representatives of the licensee, is a common approach in overseas jurisdictions.

2.75 The committee considers that the costs of moving to compulsory individual licensing at this time are not justified given the implementation of systemic defences such as the register of financial advisers and other recommendations made in this report have the potential to address relevant issues currently experienced in the industry.

2.76 The committee notes however, that should these measures fail to improve standards, future consideration should be given to individual licensing as a further defence of consumer outcomes from financial advice.

Licence fees

2.77 The committee considered limited evidence in relation to the cost of fees associated with AFS licenses. ASIC provided information on the current AFS licence fees:

The fees to apply for an AFS licence are set out in the Corporations (Fees) Regulations 2001. Effective from 1 July 2014, it costs \$1567 for a body corporate, partnership or non-body corporate trustee to apply for an AFS licence. It costs \$871 for a natural person to apply for an AFS licence.⁶⁵

2.78 Dr George Gilligan suggested to the committee that the costs of participating in the financial advice industry should reflect the scale within the market. He suggested that an individual practitioner in western New South Wales, for example, should not be expected to pay the same amount as a major bank or a major insurance company operating in an urban centre.⁶⁶ This view was supported by CHOICE.⁶⁷

Committee view

2.79 While the committee has not received a large body of evidence on proposals to alter fees associated with licenses, it considers that the idea is worthy of further consideration, as it would better reflect the cost of regulating those financial advice activities.

64 Financial System Inquiry, *Final Report*, November 2014, p. 217.

65 ASIC, *Answers to questions on notice*, 14 October 2014, (received 7 November 2014).

66 Dr George Gilligan, Private capacity, *Committee Hansard*, 13 October 2014, p. 46.

67 Mr Alan Kirkland, Chief Executive Officer, CHOICE, *Committee Hansard*, 14 October 2014, p. 5.

2.80 The committee notes that the FSI considered fees imposed by ASIC, as well as calls for a broader review of ASIC's fees to better reflect the cost of regulating parts of the financial service industry. The committee notes that the final report of the FSI recommended providing ASIC with stronger regulatory tools.⁶⁸

Recommendation 6

2.81 The committee recommends that the government consider proposals to increase fees for organisational licensees to reflect the scale of their financial advice operations, in the context of a broader review of ASIC's fees and charges.

68 Financial System Inquiry, *Final Report*, November 2014, p. 250.