# Chapter 24

## Financial advisers and planners

24.1 As indicated by the Commonwealth Financial Planning Limited (CFPL) case study outlined earlier in the report, issues related to financial advice featured prominently during this inquiry. This was recognised by ASIC, which advised that it 'has long been concerned about the quality of financial advice provided to consumers and about conflicts of interest in the financial advice industry':

> ASIC's concerns were not limited to a few 'bad apples' in the industry, or even a few bad firms. Instead, they reflected broad systemic problems with the financial advice industry, driven by conflicted remuneration structures and compounded by weaknesses in the regulatory system.[1]

24.2 ASIC informed the committee that it continues to have concerns about the sector, which others also share. The 2013 survey of ASIC's stakeholders found that only 23 per cent of respondents agreed that financial advisers act with integrity. In ASIC's view, although the Future of Financial Advice (FOFA) reforms 'should go a considerable way in improving the long-term quality of advice provided to investors', there were still some regulatory gaps that limited ASIC's ability to promote high standards in the industry and fulfil its statutory objectives.[2]

24.3 In its main submission, ASIC outlined certain recommendations that it considered would address these regulatory gaps. This chapter considers these recommendations and other issues related to the regulation of the financial advice industry. The committee's findings are outlined at the end of the chapter.

### Proposal for a national financial adviser examination

24.4 ASIC argued that the current system for training and assessing advisers is inadequate and that standards need to be lifted. ASIC advised that the Corporations Act requires Australian financial services (AFS) licensees to ensure that their representatives are adequately trained and are competent to provide financial services, and that ASIC publishes regulatory guidance on minimum training standards in Regulatory Guide 146 *Licensing: Training of financial product advisers* (RG 146). Despite this, ASIC reported that its surveillances 'have consistently found that many advisers are not adequately trained or competent to deliver financial advice to investors'.[3]

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1 ASIC, *Submission 45.2*, p. 142.

2 ASIC, *Submission 45.2*, p. 153.

3 ASIC, *Submission 45.2*, p. 154.

24.5 The training standards outlined in ASIC's RG 146 specify different requirements depending on whether the adviser gives general or personal advice and the products on which advice is given. RG 146 proceeds on the basis that advisers who provide advice on Tier 1 products (which are, broadly speaking, more complex products) must meet the standards at a different educational level from those advisers who provide advice on Tier 2 products (simpler products).[4] Despite this framework, ASIC advised that there:

> …are numerous and fragmented approaches to interpreting and implementing the requirements in RG 146 and training courses vary significantly in terms of content and quality. There is no consistent measure of adviser competency.[5]

24.6 To help address this issue of competence, ASIC proposed a new framework for the assessment and professional development of advisers based on a national examination. ASIC argued that a national examination would be 'the most transparent and effective' way to demonstrate whether an adviser had met a minimum standard of competency.[6]

24.7 A national exam was first proposed by ASIC in 2011. At a public hearing, Mr Medcraft indicated that the idea was informed by his experience in the United States. After returning to Australia, Mr Medcraft observed that:

> …the training regime here…was really fragmented. Frankly, we should not be micro-managing training. It should not be our job. My view is that we should focus on outcomes…if you get through the national exam, whether you have got there through no study or an e-learning module, or some training course, that is fine; at least you sat that exam. Everyone in America has that confidence that you have sat the series 7 and you have passed a six-hour exam. I learnt more about muni securities than I ever wanted to, but it was really important. You learnt about client account dealing et cetera. That is really where I got the idea of proposing it. I proposed it about four or five years ago. I have been endeavouring to socialise the idea because I do think it is a far more efficient and a far more equitable system.[7]

24.8 ASIC's deputy chairman commented that the national examination proposal seeks to address two key issues regarding competency and educational levels:

> One is: what is the level that needs to be set? The second is: how do you test that? Our proposal, which we have been consulting on with industry very extensively in the last few months, is that there should be a requirement that anyone providing personal advice has a tertiary

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4 ASIC, *Submission 45.2*, p. 154.

5 ASIC, *Submission 45.2*, p. 154.

6 ASIC, *Submission 45.2*, p. 155.

7 Mr Greg Medcraft, Chairman, ASIC, *Proof Committee Hansard*, 19 February 2014, pp. 15–16.

> qualification and that, in addition to that, to help ensure that you have demonstrated your ability to do that, you would sit at a national exam. So there is the level, which is a tertiary qualification, and the exam supporting that.[8]

24.9 Some academics supported the proposal. Professor Dimity Kingsford Smith remarked that the national exam was 'a very good example of a fine, well-thought-out proposal as far as the regulator could do so without really any powers to push that proposal forward—except in a policy proposal'. She remarked further that for no good reason she could discover, the proposal 'came to nothing'. She added:

> My very diligent students have assembled a table…which shows you that every other respectable regulatory jurisdiction has a national exam and some of them have, every three years or so, a renewal of the exam.[9]

24.10 Industry groups did not support the proposal. The Financial Planning Association (FPA) questioned the benefits that would flow from the exam:

> We are not supportive of the proposal for the three-year examination, mainly because we think it is overreach of a regulator to be providing and certifying education which does not happen in any other profession. ASIC's resources are already stretched. We are not sure that they have the expertise or the resources to be able to deliver such an examination.[10]

24.11 CPA Australia also argued against the proposal. Its chief executive officer, Mr Alex Malley, noted that the proposal was based on the model adopted in the US despite there being no evidence that the model 'had been a roaring success':

> In 2011 ASIC proposed a new national exam for all financial planners. It was presented as a concept that would be introduced because it had been adopted in the United States, a market that has not fared well compared to our domestic economy. When quizzed about the reasoning, the process to be followed and the communication plan to be laid out, it became evident there was little substance behind the commentary. Needless to say, it has not been implemented, and ASIC communication has paused for some time.[11]

24.12 Mr Malley added that he has 'no issue in and of itself with exams; it is those who perhaps have no qualification to set them or understand what they are trying to achieve that I have an issue with'.[12]

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8 Mr Peter Kell, Deputy Chairman, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 16.

9 Professor Dimity Kingsford Smith, *Proof Committee Hansard*, 19 February 2014, p. 59.

10 Mr Mark Rantall, Chief Executive Officer, Financial Planning Association, *Proof Committee Hansard*, 19 February 2014, p. 69.

11 Mr Alex Malley, Chief Executive Officer, CPA Australia, *Proof Committee Hansard*, 19 February 2014, p. 43.

12 Mr Alex Malley, CPA Australia, *Proof Committee Hansard*, 19 February 2014, p. 44.

24.13 Although the FPA does not support the proposed national examination, it submitted that planners 'should have to go through proper certification and education and experience'. The FPA subsequently indicated that the minimum education standards set by RG 146 are the problem:

> Under RG146, a person can undertake a short course to gain 'generic knowledge on products and markets' and be able to become an Authorised Representative permitted to provide personal financial advice to consumers.
>
> The minimum standards required under RG146 are inadequate for the delivery of quality advice and therefore create a risk of consumers acting on information provided by providers who are not appropriately or professionally qualified, may not have the skills required to explain complex concepts, and may pass on inappropriate advice without consideration of the principles of financial planning.[13]

24.14 The FPA has recently called for the introduction of a requirement that financial advisers and planners must meet minimum education standards consisting of a relevant university degree and three years' experience over a five year period. It also envisaged minimum continuing professional development requirements. According to the FPA, it is unclear how ASIC's proposed national examination would improve education in the absence of an enhanced education framework.[14] The FPA added that, if an examination was being considered for new entrants, then the exam:

> …should be left to the professions that have the practical knowledge and know-how and are experienced at running educational programs to run them.[15]

24.15 ASIC was questioned about how a national examination would operate. ASIC proposed that the examination would be 'industry-driven':

> The questions are practical and really deal with issues that you would face as an adviser. So it should be driven by the industry. It can be delivered across the country in testing stations at $300 a head. That is what I am envisaging. Frankly, I think it would really help a great deal. For $300, it is well worth it for what we have in terms of the savings of our country.[16]

24.16 Mr Medcraft suggested that a further benefit in introducing a national examination would be in facilitating greater mutual recognition between the US and

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13 Financial Planning Association, *The Future of the Financial Planning Profession: White Paper of the Financial Planning Association of Australia*, May 2014, http://fpa.asn.au, p. 3.

14 Financial Planning Association, *The Future of the Financial Planning Profession: White Paper of the Financial Planning Association of Australia*, May 2014, p. 4.

15 Mr Mark Rantall, Financial Planning Association, *Proof Committee Hansard*, 19 February 2014, p. 70.

16 Mr Greg Medcraft, Chairman, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 16.

Australia 'which would mean it would try and streamline that access between two countries in terms of the US capital markets'.[17]

## Reference checking and employee adviser register

24.17 ASIC argued that there were currently insufficient controls on 'bad apple' or problem advisers that have not otherwise come to ASIC's attention. Two problems related to this were identified. The first stems from inadequate reference checking—ASIC advised that problem advisers 'typically change employment when they are identified, moving from one AFS licensee to another'. According to ASIC, this is achieved because in many cases the new licensee either failed to conduct a proper reference check or the former license did not provide accurate and honest feedback.[18]

24.18 The second problem related to practical difficulties ASIC experiences in tracking problem advisers. ASIC argued that its current financial services registers should include all individuals authorised to give personal advice on Tier 1 products, not just AFS licensees and authorised representatives. The following reasoning was provided:

> Under the current financial services regulatory regime, authorised representatives must be registered with ASIC; however, there is no central register for employee representatives. This means that ASIC has no direct oversight of employee adviser representatives, including those who provide personal advice, and must rely on licensees to ensure the competence and integrity of these representatives. This can result in very real difficulties in ASIC's ability to locate and take action against bad apples in the financial services industry…ASIC has had considerable practical difficulties in tracking problem advisers, following the collapses of several financial planning businesses. Where the advisers have moved to new financial planning businesses as employee representatives, we are unable to track them because they do not appear on our register.[19]

24.19 ASIC also noted that the lack of such a register makes it difficult for investors to ensure that that they are dealing with properly authorised advisers:

> Given the complexities of the financial services industry, it is important that ASIC can emphasise certain consumer messages. One of our traditional messages has always been that investors should only obtain advice from properly licensed or authorised advisers. Before the commencement of the *Financial Services Reform Act 2001*, we could tell investors that before dealing with a purported adviser, they should check the person's name on the licensees and representatives register.

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17 Mr Greg Medcraft, Chairman; Mr Peter Kell, Deputy Chairman, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 16.

18 Or did not agree to provide feedback at all—ASIC noted that this is 'sometimes out of apprehension of liability for making defamatory statements'. ASIC, *Submission 45.2*, p. 156.

19 ASIC, *Submission 45.2*, p. 158.

> This simple message is no longer possible. Investors cannot easily check whether someone holding themselves out as a financial adviser is properly able to do so. They may be an employee of a licensee and the only person that can verify that is the relevant licensee.[20]

24.20 Mr Medcraft remarked that he believed 'industry very much welcomes the idea of, say, having a national register of all employer representatives'.[21] Mr Medcraft added that the US equivalent provides an effective means of tracking advisers and holding them accountable; he noted that the US register receives 16 million hits a year from consumers and employees.[22]

24.21 ASIC's evidence was generally supported by other witnesses. For example, the CBA argued that ASIC and AFS licence holders should:

> …have visibility at all times of where licensed financial planners are practising. CFP believes there is a risk that financial planners who do not adhere to appropriate standards of advice enter the industry, or move within it between [AFS licence] holders, and for professional misconduct not to be taken fully into account.[23]

## Recognition of financial advisers and planners

24.22 The FPA argued that the regulatory system should be designed 'to encourage the establishment of professional bodies to impose appropriate and enforceable professional standards that exceed the law, on financial product providers, research houses, and other industries in the gatekeeper space'.[24] It noted that financial planners should be subject to 'a series of inter-locking obligations' based on regulatory requirements, licensee requirements and professional requirements. The FPA has binding professional obligations through a code of conduct and rules of professional conduct, supported by a public complaints system, an investigation process and an active professional disciplinary panel.[25] Even so, it argued that:

> Without formal recognition and encouragement of adherence to professional obligations, there is a gap in the regulatory design as applied to individual providers of financial services to consumers, and consumer

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20 ASIC, *Submission 45.2*, p. 159.

21 Mr Greg Medcraft, Chairman, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 15.

22 Mr Greg Medcraft, Chairman, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 16.

23 CBA, *Submission 261*, p. 16. As another example, Mr Mark Rantall of the Financial Planning Association stated that 'We think that having a register of advisers is important—there is not one at the moment…' Mr Mark Rantall, Chief Executive Officer, Financial Planning Association, *Proof Committee Hansard*, 19 February 2014, p. 69.

24 Financial Planning Association, *Submission 234*, p. 31.

25 Financial Planning Association, *Submission 234*, pp. 33, 35–37.

> protection becomes reliant on the limitations of regulatory and licensee obligations alone.[26]

24.23 Accordingly, the FPA maintained that the terms 'financial planner' and 'financial adviser' should be restricted to 'only those that have the highest level of education, competency, ethics and standards, and are a member of a regulator prescribed professional body'. It argued that this would strengthen consumer protection and facilitate a more effective regulatory framework 'based on cooperative co-regulation'.[27] The FPA noted that a precedent for this exists, as the use of the terms stockbroker, futures broker, insurance broker, general insurance broker, and life insurance broker are currently restricted under section 923B of the Corporations Act. In the FPA's view:

> …it is unclear why some expressions are restricted by s923B and not others. Why do such terms carry more weight under law than that of financial planner/adviser considering the role financial planners play in assisting consumers with vital financial matters?

24.24 The FPA provided additional reasoning to support its case for legislative amendments to restrict the use of the terms financial planner and financial adviser:

> The terms financial planner/advisers are increasingly being used in marketing and promotional material by persons who provide non-traditional ancillary services, such as realtors, property spruikers, sales agents of various investment vehicles, and other unlicensed advisers. Consumers are continuing to be influenced by advice provided by those outside the Regulator's reach. This issue has become evident in the SMSF sector with many property spruikers influencing the use of SMSFs to purchase property. It has also been exacerbated by the commentary on financial matters provided by media outlets who are exempt from licensing obligations under section 911A(2) of the Corporations Act yet play a highly influencing role in consumer decision making.
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> A lack of restrictions on the use of the terms financial planner/adviser is, among other things, a significant gap in consumer protection. It leaves trusting consumers open to influence by individuals incorrectly representing themselves to consumers as financial planners/advisers without holding the specific competency, training, license, professional standing required. This significantly erodes consumer protection. The lack of constraint on individuals calling themselves financial planners puts consumers at risk of receiving poor advice from incompetent providers. A key role of effective regulatory design should be to enable consumers to be able to clearly identify providers they can trust in the marketplace.[28]

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26 Financial Planning Association, *Submission 234*, p. 8.

27 Financial Planning Association, *Submission 234*, p. 14.

28 Financial Planning Association, *Submission 234*, pp. 14–15.

24.25 Further, the FPA noted that ASIC was already relying on professional associations to improve training and competence in the sector, at least among the members of these associations:

> RG146 states that ASIC has 'set minimum training standards only and encourage industry and professional associations to build on the training standards. [ASIC] recognise[s] industry's important role in the development and promotion of best practice relating to training and competence'. The fact that ASIC's minimum standards are intended to drive the financial sector to establish higher standards gives further support to the recommendation to make membership of a professional body mandatory for financial planners.[29]

24.26 In 2013, the previous government introduced a bill that would have restricted the use of these terms or terms of like import 'in relation to a financial services business or a financial service, unless the person is able under the licence regime to provide personal financial advice on designated financial products'.[30] The explanatory memorandum identified property spruikers who represent that they are genuine providers of financial product advice as a group that would be targeted by the amendments.[31] However, the bill lapsed at the end of the 43rd Parliament.

## ASIC's licensing tests

24.27 A matter related to raising standards in the financial advice industry is the licensing process. ASIC argued that one of the regulatory barriers or gaps it faces were the tests currently in legislation for determining whether an AFS licence or credit licence must be granted. As ASIC issues AFS and credit licenses, it is understandable that the licensing powers should enable the regulator to, as ASIC put it, 'prevent those that do not warrant [public] trust from operating within the industry'. Licensing regimes will not prevent all undesirable businesses or individuals from operating, particularly those that demonstrate competence but 'go rogue'. However, in ASIC's view licensing processes should:

> …provide an effective screening process to exclude persons who do not have the appropriate skills, experience and qualifications to provide services with honesty and integrity, or who are not of good character, from operating within the financial services and credit industries.[32]

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29 Financial Planning Association, *The Future of the Financial Planning Profession: White Paper of the Financial Planning Association of Australia*, May 2014, p. 4.

30 Replacement Explanatory Memorandum, Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2013, paragraph 2.9.

31 Replacement Explanatory Memorandum, Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2013, paragraphs 2.8, 2.11.

32 ASIC, *Submission 45.2*, pp. 164–65.

### *Recent developments*

24.28 During the 2009 Parliamentary Joint Committee on Corporations and Financial Services (PJCCFS) inquiry into financial products and services, ASIC raised concern about its ability to protect consumers by restricting or removing from the industry participants who might cause or contribute to investor losses. It informed the PJCCFS that once a licence was granted, ASIC only had the power to suspend or cancel a licence in limited circumstances. At that time, ASIC could only suspend or cancel a licence immediately on application by the licensee or where the licensee was insolvent, ceased to carry on the business, was convicted of serious fraud, or was incapacitated. ASIC could suspend or cancel a licence after a hearing where:

- the licensee had not complied with its obligations;
- ASIC had reason to believe the licensee would not comply with its obligations in the future;
- ASIC was no longer satisfied that the licensee was of good fame or character;
- a banning order was made against the licensee or a key representative of the licensee; or
- the application was materially false or misleading or omitted a material matter.

24.29 At that time, ASIC was of the view that the government should assess whether the following modifications to ASIC's licensing and banning power would enhance ASIC's ability to protect investors:

- minor changes to the licensing threshold so that ASIC can refuse or cancel a licence where a licensee may breach (rather than will breach) its obligations;
- clarification that ASIC can ban individuals who are involved in a breach of obligations by another person; and
- 'negative licensing' of individuals so that ASIC can ban individuals who are not fit and proper and may not comply with the law.[33]

24.30 The PJCCFS noted ASIC's concerns and recommended that:

- section 920A of the Corporations Act be amended to provide extended powers for ASIC to ban individuals from the financial services industry; and
- sections 913B and 915C of the Corporations Act be amended to allow ASIC to deny an application, or suspend or cancel a licence, where there was a reasonable belief that the licensee 'may not comply' with their obligations under the licence.

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33 ASIC *Submission 378* to the PJCCFS Inquiry into Financial Products and Services in Australia, August 2009, p. 24.

24.31 The then government supported both recommendations and in April 2010 indicated that it would introduce a reform package to strengthen ASIC's powers in relation to the licensing and banning of individuals from the financial services industry. In announcing proposed legislative changes, the then government stated:

> In relation to licensing, ASIC will be able to take into account a broader range of matters when determining whether to issue a licence, or whether to cancel or suspend a licence. ASIC's powers to remove persons from the industry will also be enhanced, as it will be able to take into account a wider range of matters at the banning stage.[34]

24.32 The legislation implementing this reform received the royal assent on 27 June 2012. In summary, the new law made the following amendments to ASIC's licensing and banning powers:

- the licensing threshold was changed so that ASIC can refuse or cancel/suspend a licence where a person is likely to contravene (rather than will breach) its obligations;
- the statutory tests were extended so that ASIC can ban a person who is not of good fame and character or not adequately trained or competent to provide financial services (in essence they are not a fit and proper person);
- ASIC can now consider any conviction for an offence involving dishonesty that is punishable by imprisonment for at least three months, in having a reason to believe a person is not of good fame and character for licensing and banning decisions.
- the banning threshold was changed so that ASIC can ban a person if they are likely to (rather than will) contravene a financial services law; and
- it was clarified that ASIC can ban a person who is involved, or is likely to be involved, in a contravention of obligations by another person.[35]

24.33 It should be noted that ASIC's powers remain subject to:

> …the broader principles of administrative law that would underpin the exercise of its powers. This includes that the decision must be within its power, and that only relevant considerations must be taken into account. Further, the exercise of ASIC's powers must be for a proper purpose and not in bad faith, with facts based on sufficient evidence, and any decision taken by ASIC must be reasonable and with procedural fairness afforded.[36]

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34 The Hon Chris Bowen MP (Minister for Financial Services, Superannuation and Corporate Law), 'Overhaul of Financial Advice', *Media Release*, no. 36 of 2010, 26 April 2010.

35 Revised Explanatory Memorandum, Corporations Amendment (Future of Financial Advice) Bill 2012, paragraph 1.26.

36 Revised Explanatory Memorandum, Corporations Amendment (Future of Financial Advice) Bill 2012, paragraph 1.28.

24.34 The committee is aware that many of the cases contained in submissions predate the enactment of the FOFA reforms that enhanced ASIC's banning powers.

24.35 While ASIC welcomed the amendment made by the FOFA reforms, it outlined the problems it sees with the 'negative assurance test' that requires ASIC to grant a licence unless it has material 'that would form the basis for ASIC having the necessary belief about future misconduct by the applicant':

> The legislation does not provide significant guidance to allow us to take into account all relevant factors in coming to this belief about the applicant. An important aspect of our licensing assessment involves consideration of whether the applicant and its responsible officers are of 'good fame or character'. Section 913B(3) sets out some of the matters that are relevant to considering whether an applicant is of good fame or character. While a non-exhaustive list, it nominates convictions, suspensions or cancellations of a licence or banning or disqualification order against the person as being relevant to consider.
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> However, often we may have concerns about an applicant that do not relate to recorded convictions, cancellations or banning orders, but to their past conduct more broadly, particularly their involvement in financial services businesses where misconduct has occurred—for example, as an employee representative with a significant role in the business, or otherwise as a manager, director or officer of the licensee. Nevertheless, without the legislation indicating an intent that such matters are relevant for consideration in the licensing process, our decision to refuse a licence according to such criteria may be more likely to be reversed on merits review.[37]

24.36 These issues could also be relevant to credit licences, as ASIC noted that the tests in place for credit licences under the *National Consumer Credit Protection Act 2009* are very similar to the tests for AFS licences.[38]

24.37 ASIC outlined a number of changes that could strengthen its licensing tests. These included:

- changing the 'no reason to believe' test to one where ASIC grants a licence where it is 'satisfied' that the applicant would not be likely to contravene the AFS/credit licensee obligations;[39]

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37 ASIC, *Submission 45.2*, pp. 165–66.

38 ASIC, *Submission 45.2*, p. 166.

39 According to ASIC, this 'would place the onus on applicants to provide ASIC with sufficient material to satisfy us that they will have appropriate people, systems and resources at their disposal in order to ensure that they will provide financial services or credit services efficiently, honestly and fairly, and otherwise comply with their obligations as licensees. This change would provide greater facility to ASIC to refuse applicants where these elements of the business are not up to standard…' ASIC, *Submission 45.2*, p. 166.

- amending the licensing test to insert additional criteria to the 'good fame and character' test, such as whether ASIC has a reasonable belief that the applicant held a material role in the management of a financial services business that:
  - had its licence cancelled; and
  - did not pay determinations made by an approved external dispute resolution scheme of which it was a member;
- replacing the 'ASIC *must* grant a licence if…' test to an ASIC *may* grant a licence test, or otherwise providing ASIC with the discretion not to grant a licence.[40]

## Banning and disqualification

24.38 In some cases, the reports of corporate wrongdoing made to ASIC are of such a serious nature that deferring action could result in further harm to investors and consumers. A quick and effective means of putting a stop to corporate misconduct or the availability of unsafe products is to suspend or ban the wrongdoer or the product. The committee has referred to ASIC's slowness in responding to problems. There are many instances, especially from the perspective of the retail investor, where ASIC should have stepped in much sooner to prevent consumer losses. ASIC has a range of administrative actions available to it, including powers to:

- ban a person from acting as a director for up to five years;
- ban (including permanently ban) a person from providing financial or credit services;
- issue a stop order for defective disclosure documents (e.g. prospectuses and Product Disclosure Statements); and
- give a direction to a market to suspend dealing in a financial product if it is necessary or in the public interest.[41]

24.39 In this section, the committee considers the options for banning a financial service provider.

24.40 A number of submitters referred to the harm caused by rogue advisers. For example, Mr Peter Francis, who works as an expert witness in stock markets and market related transactions, cited a particular case where people had lodged complaints with ASIC about a particular adviser but did not receive a satisfactory response. He explained that about ten years ago he started to get cases about this

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40 ASIC noted that an alternative drafting approach would be to include a catch-all discretion under the 'must grant a licence' requirement, such as 'ASIC must grant a licence if the following conditions are met…unless there is any other reason which in ASIC's reasonable opinion justifies the refusal of the application'. ASIC, *Submission 45.2*, p. 166.

41 ASIC, *Submission 45.2*, p. 118.

adviser, which over the next years amounted to over 50 cases from more than ten different lawyers. According to Mr Francis:

> In that time this advisor had moved from Epic Securities to Macquarie Securities to BNP Paribus to Citigroup Wealth Management to Tricom Securities…From these 50+ cases, all were eventually settled by the Defendants once the correct documentation was discovered and an Expert Opinion produced.[42]

24.41 He informed the committee that the adviser was subsequently found guilty of fraud and convicted. Mr Francis noted, however, that:

> …over the six years many 1,000s of people had lost a good proportion of their savings or superannuation funds in some instances as a result of this one advisor.[43]

24.42 This case was not an isolated one. The committee has referred to the financial planners at CFPL, who continued to practice in the industry even after ASIC became aware of their wrongdoing. With regard to the unscrupulous conduct of a financial adviser or planner, ASIC was asked about its powers to stop them from working in the industry. In response, ASIC outlined the banning powers it currently has, although to ban someone it must establish proof and conduct a hearing. The hearing, which includes the cross-examination of witnesses, allows the adviser or planner to be heard and respond to the evidence.[44] ASIC was asked about the merits of it being given the power to suspend a financial planner immediately where substantial evidence of wrongdoing existed. Mr Medcraft did not think the suggestion was unreasonable, subject to natural justice.[45] Mr Medcraft noted that the law already reflects situations where protective action is necessary to stop damage to individuals.[46]

24.43 In a written question on notice, ASIC was asked to reflect further on this proposal. ASIC responded by observed that there 'would clearly be benefits for consumers if ASIC had the ability to quickly remove advisors that were engaging in serious misconduct, most particularly in preventing further loss or damage'. ASIC added, however, that there were a number of complicating factors when considering such a power, including:

- a person's right to be heard before a significant decision is made;
- the need to carry out information gathering and investigative work and then adequately brief a person authorised to exercise ASIC's powers, a process that would affect 'the immediacy with which the power could be exercised'; and

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42 Ocean Financial Pty Ltd, *Submission 248*, p. 2.

43 Ocean Financial Pty Ltd, *Submission 248*, p. 2.

44 Mr Greg Kirk, Senior Executive Leader, Strategy Group, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 19.

45 Mr Greg Medcraft, Chairman, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 19.

46 Mr Greg Medcraft, Chairman, ASIC, *Proof Committee Hansard*, 19 February 2014, p. 19.

- the type of conduct the power should be used for—ASIC noted that the power could be useful for misuses of client funds, but less useful 'where the conduct involved complex factual and legal questions about whether advice provided was above or below the necessary legal standard'.[47]

24.44 Clearly concerned about the impact individual rogue advisers can have on public perceptions of the overall financial advice/planning industry, the FPA recently called for ASIC to be given a suspension power:

> ASIC should have suspension powers for financial planners/advisers suspected of material and systemic breaches of the best interests duty. ASIC must have a justifiable position and the financial planner/adviser has the right to appeal at the AAT.[48]

### *Banned advisers remaining active in the industry*

24.45 One particular aspect of ASIC's banning powers that the committee believes warrants closer attention goes to banned advisers continuing to be involved in businesses providing financial advice.

24.46 Concern about financial advisers remaining active in financial services while banned is not a new issue. In June 2012, in response to a question about the activities of Peter and Anne-Marie Seagrim, Mr Kell informed the PJCCFS that the couple had been banned from providing financial services for a period of three years. He acknowledged that there had been some media commentary around the couple, for example, describing their business as operating in a manner that was 'business as usual'. He explained that from ASIC's perspective the ban was currently in force and the Seagrims were banned from providing financial advice to clients or dealing in financial products on behalf of clients. They had lodged an appeal. Mr Kell emphasised that although the ban was in place in relation to their ability to provide financial advice or deal in financial products, the law did not prevent them from acting as directors.[49] He went on to state, however, that:

> …the Corporations Act does not prevent the Seagrims from acting as directors of a corporate authorised representative of a financial services licence holder. In that capacity they may still undertake activities. However, we have been very clear that business as usual certainly does not mean that they are able to provide that financial advice or deal in financial products on behalf of clients.[50]

24.47 This matter of a banned adviser still allowed to manage a company was raised during this current inquiry. For example, Professor Dimity Kingsford Smith noted:

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47 ASIC, answer to question on notice, no. 12 (received 21 May 2014), p. 56.

48 Financial Planning Association, *The Future of the Financial Planning Profession: White Paper of the Financial Planning Association of Australia*, May 2014, p. 19.

49 *PJCCFS Committee Hansard*, 22 June 2012, p. 8.

50 *PJCCFS Committee Hansard*, 22 June 2012, p. 7.

> Even if a person is banned they may continue to be influential in a licensed firm as a director, officer or a significant shareholder. The tests for bans and director/officer disqualification are different, and consideration should be given to prohibiting a banned person acting as a director or officer. Similarly, consideration should be given to empowering ASIC to exclude from management a shareholder who is banned. ASIC should have express power to consider the fitness for a license of a firm where a banned person has a significant shareholding.[51]

24.48 The committee asked ASIC whether any impediments existed to extending the ban on advisers to being a director of, or a person occupying a position of influence in, a financial services company. ASIC informed the committee that while it has powers to cancel an AFS license or credit licence, or to ban a person from providing financial services or credit services, 'a missing element was a power to prevent a person from having a role in managing a financial services business or credit business'.[52] It explained that the law as currently drafted means that ASIC can have 'difficulty in removing these managing agents who do not themselves provide a financial service but are integral to the operation of a financial services business'. ASIC explained that it had:

> …seen instances where we cancel the AFS licence of an advisory business due to poor practices or other misconduct, but those responsible for managing the business move to another licensee's business, or apply for a new licence with new responsible managers.
>
> If such managers are not themselves directly providing financial services or credit services in that new role, ASIC may not be able to prevent them from continuing to operate in the industry, even where there were serious failings in the previous business.[53]

24.49 In its main submission, ASIC recommended amending the law to provide ASIC with the power to ban a person from managing a financial service business or credit business. The FPA advised that it supports this recommendation. It provided the following reasoning:

> If you have been banned as a financial planner there are usually very good reasons for it, and if you were then to be supervising and managing financial planners or a financial planning company were would see it as inappropriate—depending on the circumstances, of course. Obviously it would need to be a serious breach, not a minor breach.[54]

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51 Professor Dimity Kingsford Smith, *Submission 153*, p. 8.

52 ASIC, *Submission 45.2*, p. 160 and answer to question on notice, no. 12 (received 21 May 2014), p. 13.

53 ASIC, *Submission 45.2*, p. 160.

54 Mr Mark Rantall, Financial Planning Association, *Proof Committee Hansard*, 19 February 2014, p. 69.

## Committee view

24.50 The committee recognises that steps need to be taken to improve standards in the financial advice sector and perceptions about that sector. Doing so would provide several benefits. Higher barriers to entry and better mechanisms for dealing with problem advisers will assist ASIC in its regulation of the sector. In turn, the improved reputation of the sector that should result will encourage more Australians to seek financial advice; encouraging investors to become more informed about their circumstances and investment options appropriate to them will assist ASIC to achieve its statutory objectives.

24.51 The committee emphasises two points. Firstly, to ensure the measures are as effective as possible, they should be developed by ASIC working closely with industry. Secondly, the measures for improving standards should be funded by the industry and to the extent possible operated by the industry. The committee notes that the national examination would require amendments to the Corporations Act that stipulate that representatives of AFS licensees must have passed the national examination to be deemed competent.

24.52 The committee appreciates ASIC's evidence about the need to ensure that the licensing tests specified in legislation set an appropriately high bar to entry. A licensing process that works as effectively as is reasonably possible to prevent people from entering the financial services and credit industries who should not be in these industries is clearly a desirable regulatory goal. The changes proposed by ASIC would make ASIC more responsible for carefully screening people seeking to enter these industries. The changes would also provide ASIC with a better chance of meeting existing community expectations about the people that should be trusted with such licences.

24.53 ASIC's proposed amendments to the AFS and credit licensing tests were not addressed in detail in the evidence the committee received from key stakeholders. The committee is of the view that the government should assess these proposals and initiate a targeted public consultation process limited to this issue, ideally with draft legislative amendments available for stakeholders to comment on.

24.54 The committee considered a proposal for ASIC's powers to be strengthened to immediately suspend financial advisers and planners suspected of egregious misconduct causing widespread harm to clients. This report has identified that ASIC is often slow to react and to exercise the powers it already has. The CFPL matter is a stark, but not isolated, example. The committee is also mindful of the need to ensure procedural fairness. Sound decision-making usually requires the decision-maker to have both sides of the story; enabling ASIC to make a decision that prevents an adviser or planner from working without providing them with the opportunity to respond to the evidence would be a significant departure from current practice. On the other hand, the current options for preventing a problem adviser from causing continued harm may be deficient.

24.55 Should ASIC be given the power to suspend an adviser suspected of malfeasance that, if allowed to continue, would cause detriment to his or her clients or potential clients, the committee believes that robust safeguards must be in place. The committee considers that the suspended adviser or planner would:

- need to be informed of the complaint against them;
- have the right to reply to the complaint;
- have the right to appeal ASIC's decision to the AAT;
- the suspension would not be publicised until a subsequent banning order was made; and
- the decision to issue the suspension would be taken at a senior level in ASIC.

24.56 The power should also only be available in limited cases that do not involve complex questions of law, such as where client funds are clearly being misused.

**Recommendation 42**

**24.57 The committee recommends that financial advisers and planners be required to:**

- **successfully pass a national examination developed and conducted by relevant industry associations before being able to give personal advice on Tier 1 products;**
- **hold minimum education standards of a relevant university degree, and three years' experience over a five year period; and**
- **meet minimum continuing professional development requirements.**

**Recommendation 43**

**24.58 The committee recommends that a requirement for mandatory reference checking procedures in the financial advice/planning industry be introduced.**

**Recommendation 44**

**24.59 The committee recommends that a register of employee representatives providing personal advice on Tier 1 products be established.**

**Recommendation 45**

**24.60 The committee recommends that the *Corporations Act 2001* be amended to require:**

- **that a person must not use the terms 'financial adviser', 'financial planner' or terms of like import, in relation to a financial services business or a financial service, unless the person is able under the licence regime to provide personal financial advice on designated financial products; and**

- **financial advisers and financial planners to adhere to professional obligations by requiring financial advisers and financial planners to be members of a regulator-prescribed professional association.**

**Recommendation 46**

**24.61 The committee recommends that the government consider whether section 913 of the *Corporations Act 2001* and section 37 of the *National Consumer Credit Protection Act 2009* should be amended to ensure that ASIC can take all relevant factors into account in making a licensing decision.**

**Recommendation 47**

**24.62 The committee recommends that the government consider the banning provisions in the licence regimes with a view to ensuring that a banned person cannot be a director, manager or hold a position of influence in a company providing a financial service or credit business.**

**Recommendation 48**

**24.63 The committee recommends that the government consider legislative amendments that would give ASIC the power to immediately suspend a financial adviser or planner when ASIC suspects that the adviser or planner has engaged in egregious misconduct causing widespread harm to clients, subject to the principles of natural justice.**