SMART

COMPLIANCE Pty Limited

"Work smarter, not harder"

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INITIAL THOUGHTS

Studies show us that:

- More than ½ the community is functionally illiterate when it comes to financial planning and investment matters
- Most people crave a relationship with a trusted adviser

The financial services industry is built around the following premises:

- Disclosure is the ultimate panacea to conflicts of interest
- Only people who receive no remuneration from a product issuer can be considered truly independent
- Advisers need to have a minimum level of competence before they give advice

Governments continue to say that:

- People need to save more for their retirements and most need advice to achieve a decent one
- Public pensions must become a last resort fall back, not a first choice option for most
- Fees and commissions are OK (because disclosure is the ultimate panacea to conflicts of interest)

The market keeps showing us:

- Volatility is poorly understood/managed by most people
- Pressure to make sales targets can quickly get in the way of client needs
- Disclosure is poorly executed in practice due to fear of litigation for content mishaps
- Reasonable basis is aimed at lowest common denominator measures of appropriateness

RESPONSE TO THE COMMITTEE'S AREAS OF SPECIFIC INTEREST:

1. the role of financial advisers;
2. the general regulatory environment for these products and services;
3. the role played by commission arrangements relating to product sales and advice, including the potential for conflicts of interest, the need for appropriate disclosure, and remuneration models for financial advisers;
4. the role played by marketing and advertising campaigns;
5. the adequacy of licensing arrangements for those who sold the products and services;
6. the appropriateness of information and advice provided to consumers considering investing in those products and services, and how the interests of consumers can best be served;
7. consumer education and understanding of these financial products and services;
8. the adequacy of professional indemnity insurance arrangements for those who sold the products and services, and the impact on consumers; and
9. the need for any legislative or regulatory change.

Re 1. Role of Financial Advisers

Few would disagree that at some point in their lives nearly everyone would be better off getting advice about their financial affairs from someone with suitable qualifications and experience to deliver them a professional opinion.

Advisers, as business operators, have limited scope to help people who cannot pay a reasonable price for the services they offer. Hence the growth in product-issuer initiated/controlled remuneration models.

I suspect most advisers are more than happy to embrace a fee for service model if they are then permitted the freedom to agree with each client precisely how that fee will be paid to them – including by way of products (or administration platforms that are sometimes regulated as products).

I also suspect most advisers are ethical and honest people who are engaged in providing a service via a regulatory framework (including a taxation framework) that makes it more efficient for them (or their clients) for advisers to be paid for their services via a financial product or platform.

Re 2. Regulatory environment

Financial products are the focus of regulation due to the likelihood that most people who seek financial advice will be advised to adopt a position in relation to one or more financial products.

Hence appropriateness and disclosure of remuneration are the key regulatory tools.

If only it was that simple. FSRA has delivered without doubt one of the most complicated and convoluted systems of regulation for financial services delivery.

A small business wishing to operate under its own AFS Licence must display to ASIC a basic mastery of at least the following euphemistically termed "regulatory guides" (hence the prefix "RG"):

RG36	Licensing: Financial product advice and dealing
RG146	Licensing: Training of financial product advisers RG126 – Compensation arrangements
RG165	Licensing: Internal and external dispute resolution
RG166	Licensing: Financial requirements
RG167	Licensing: Discretionary powers
RG175	Licensing: Financial product advisers — conduct and disclosure
RG181	Licensing: Managing conflicts of interest
RG182	Dollar disclosure

This is not an exhaustive list. The above documents constitute many hundreds of pages of pronouncement s from the regulator that are supposed to aid participants in meeting their obligations under the Corporations Act and the ASIC Act – *should they ever find time to read them*.

Chapter 7 of the Corporations Act is the home of most rules impacting on financial advice and financial advisers. Chapter 7 of the Corporations Regulations go into even more detail about the way in which advice givers are to behave and what sort of documentation they are to prepare and provide in order to comply with the law.

All this legislation, all this guidance and we still experience frauds, poor advice and the like.

What does this tell me about the current system? It tells me that the victory of form over substance is just about complete. It tells me that the relatively simple rules set out in pre-FSRA legislation would have been about as effective as the FSRA "enhancements".

So I sincerely hope one outcome of this Inquiry will be the recognition that reams of additional regulation will not improve the quality of advice outcomes being experienced by most investors.

Re 3. Remuneration, conflicts, disclosure etc.

It appears that Government has been satisfied historically in the capacity of most consumers to comprehend likely conflicts of interest that might affect the objectivity of their financial advice givers. Disclosure (like education) has been the pathway chosen rather than any more draconian measure (e.g. banning commission payments).

I note the recent submission made to this Committee by Wayne Leggett and confirm that his views reflect my own.

It is hardly the role of Government to outlaw a remuneration method unless there is evidence of endemic misuse – which there is not.

Commission payments have their commercial and strategic advantages, not just for advisers but also for their clients. Apparently there is a tax advantage to be had in maintaining a remuneration stream out of a financial product as opposed to one that occurs outside of a financial product (e.g. payment of a fee via after-tax monies).

The main objection most often put up in relation to commissions (when the issue is discussed rationally) is that the client usually has no say in their payment.

By adopting Mr Leggett's simple and sensible approach you empower clients (be they individuals, employer-sponsors or others) to opt in or out of commission based remuneration themselves, not at the behest of Government.

Let the market decide which remuneration method it prefers – or make financial advice fees paid direct (i.e. not via a product) as attractive from a taxation perspective as commissions appear to be.

Re 4. Marketing

Marketing is about selling something regardless of its suitability to a specific buyer. It is at its essence about "making the sale". Trade Practices, the ASIC Act and State based laws regulate the extent to which people can be misled about attributes of products and services being offered to them.

If someone is suggesting that we need more regulation in this field I would like to know what they have in mind as, on any reading of the above legislation we have ample rules already in place.

I note that in a submission I made to ASIC in relation to the marketing of debentures (in the aftermath of ACR and other disasters) I made a simple suggestion which was comprehensively ignored in favour of the "if not, why not" school of (still more) disclosure.

My suggestion was a "health warning" that alerted potential investors to the need to either accept the risks inherent in the product being offered (i.e. actually read the offer document and take some personal responsibility) or get some impartial, professional advice as to suitability.

Full and frank disclosure is not necessarily mutually exclusive to marketing hype but I would suggest it's pretty line ball. Persisting with measures to force lawyers and marketing executives to work together is only going to lead to more obtuse and vague legalese interspersed amidst the glossy photos.

If it is true that fewer than 50% of adult Australians have the basic literacy required to read a product disclosure statement or similar then aren't we doing a huge disservice to them in expecting them to read, let alone understand the substance of such a document, then make an informed decision about whether the underlying product or strategy is appropriate to them?

Re 5. Licensing

Licensing is the system by which entry to the market is regulated. If you lack the necessary experience or qualifications to hold your own licence you can (with no experience and basic qualifications) operate under someone else's licence.

I think the current licensing system is complex enough, the vagaries of dealing with ASIC licensing staff too varied to justify any further tinkering.

For better of worse, we now have a licensing system that makes it essential for the business principal to have at least 3 years relevant experience and market relevant qualifications in the absence of significant long term experience (10 years +).

When people suggest we make it more difficult for people to obtain an AFSL I am certain of one thing: the person making the statement has never sought an AFS licence.

My business does so regularly on behalf of others and I can assure Committee members it is not a simple exercise – ever.

Perhaps the fundamental danger posed by the current licensing system is the lack of follow up from the regulator once someone has their AFSL. If I obtain an AFSL today on the basis I wish to operate as a sole practitioner in the suburbs there is nothing to stop me from immediately embarking on a recruitment drive to build a dealership of thousands of advisers, regardless of the capacity of my business systems to control the obvious risks.

Perhaps one enhancement to the current system could be a graduation of licence, from sole trader to SME to dealer, with variations (supported by proof of risk management and compliance systems) required along the way?

To use the drivers licence analogy employed by ASIC, let's give a P plate first, then an Open, then if someone wants to ride a motorbike or drive a 20 wheel semi-trailer, have them seek additional permission through independent testing.

Re 6. Information appropriateness

Given that most people are apparently incapable of making heads or tails of most disclosure documents it begs the question why this information is being foisted upon them, particularly when they choose to act without any independent advice.

User testing has been the means by which ASIC has encouraged AFSLs to meet their "clear, concise and effective" disclosure obligations but I would venture to guess that the provision of retail consumer disclosure documents (FSGs, SOAs and PDSs) does very little in the way of giving people the clear professional guidance they seek when faced with complex financial questions.

Much like attending a GP with a pain or a lawyer with a gripe, consumers come to financial advisers for some guidance about how they should proceed when faced with complexities they cannot resolve for themselves.

I think the emphasis on core disclosure documents is a distraction for both adviser and client when what is really required is a professional judgement as to what is in the interests of the client.

As a second observation I note ASIC's recent suggestion about limiting the types of investment products retail consumers get to consider. This to me would be a retrograde step and one that reeks of paternalism.

Perhaps instead of prohibiting consumers from investing in certain products ASIC might encourage people to ask a professional for some advice before they make an investment decision about a product they cannot make heads or tails of.

Re 7. Consumer education

This is a long term project that will not stop people making foolish mistakes most of the time. I note that one of the Storm-atised clients who made a submission to this Inquiry suggested that they needed to be "saved from themselves". How true that suggestion seems in light of the recent debacles that have left so many ordinary investors out of pocket and (apparently) bewildered as to why.

Consumer education can take many forms, including point of sale education like warnings that ask the client to take some ownership of the transaction.

I encourage the Committee to consider all the varied forms of education including those (like warnings) that are most simply delivered.

Re 8. PII cover

This involves the capacity of the market to compensate those who are affected by professional negligence. Unfortunately the reality is: how long is a piece of string?

I note that other submissions have suggested a compensation fund to cover any shortfalls in claims.

I also note that industry associations are exploring more innovative ways of providing reliable insurance coverage for their members (e.g. discretionary mutual funds).

It is obvious that the growth in EDR schemes has delivered a higher cost to advice givers in terms of claims and PII premiums and that this pressure is not going to go away anytime soon.

I think the Committee should explore all means at its disposal to make PII coverage more affordable for industry participants so as to ensure that the cost of cover does not create an artificial barrier to entry.

Re 9. Regulatory change

How can you legislate to stamp out greed and stupidity? FSR (as reflected in the Corporations Act) was the most complex and verbose of attempts at instituting a regulatory system to address the gaps that led to the collapses of the late 1990s, just as the Corporations Law attempted to address the gaps that led to the collapses of the 1980s.

The Corporations Act does however contain some provisions (like section 951B) that, if used wisely could enable the regulator to put into effect most reasonable recommendations to flow from this Committee, thus avoiding the need for wholesale re-writing of the law.

So perhaps the "regulatory change" we require is not more legislation but more support for the regulator (ASIC) to be more proactive in its work, to take chances in the way it approaches potential problems rather than adopt the job description of undertaker or coroner.

I note that as recently as this week ASIC's Chair was quoted as saying he felt the regulator might need to have legal reform to enhance its ability to shut down or at least dissuade businesses with suspicious business models rather than wait til the bodies start stacking up.

I encourage the Committee to make it clear to the regulator that they should employ all the (significant) regulatory weapons they currently possess to the pursuit of regulatory goals as they see them rather than seek legislative reform. I also encourage the committee to assure the regulator that they will have the government's complete support in adopting a more aggressive and proactive stance in the prosecution of its consumer protection agenda via its existing regulatory arsenal (e.g. s.951B).

BACKGROUND TO MY SUBMISSION

I have been involved in the financial services industry in one capacity or another since 1991.

1991-1992	ASC Investigator – Spedley Special Investigation (focused on $35M Futures Losses)
1992-1994	ASC Investigator and licensing analyst – Retail investment advice industry (NSW) Adviser surveillance audits; dealer and adviser licensing assessments
1994-1998	FPA Manager (Compliance, Technical Policy) – supporting 10,000+ members Member ASC/FPA Shadow Shopping Panel (twice)
1998-2000	Financial Adviser (Bridges PIS then McIntosh Financial Planning) Compliance Consultant www.fsi.net.au
2000-date	Compliance and Risk Management consultant – AFSL specialist Expert witness in civil litigation regarding advice quality and compliance generally DFP8 assignment assessor (to 2002)
2003	Launched AFSL risk management tool "VRM" www.fsi.net.au/vrm
2006	Launched Independent Advice research campaign Launched website www.independent-advice.com.au
2009	Launched website www.smartcompliance.com

WHAT THE INDUSTRY LOOKS LIKE TO ME

During my time in the industry I have met a variety of business operators, some of whom have been subsequently banned from the industry but most of whom have run efficient and helpful financial advisory businesses that in my view add significant value to the lives of their many clients.

From a regulatory perspective I have seen an explosion in black letter law (particularly since Wallis) that has mandated documentation and disclosure but ultimately failed to make it more difficult for unscrupulous operators to (i) gain market entry and (ii) do damage once there.

I have also seen the impact of PII market gyrations (e.g. post-HIH collapse and in the wake of Storm and similar disasters) on the many smaller business AFSLs I know.

All in all I think (i) the last attempt at re-jigging the regulatory landscape (i.e. FSR reforms of 2002) has been a failure and that (ii) we are living with the consequences of that failure today.

To illustrate the prevailing view of most people with daily exposure to the advisory market I refer the Committee to an article written by Annette Sampson that appeared in the Sydney Morning Herald on Saturday 18/4/2009, titled "Uphill battle to rebuild trust in advisers".

Like most financial services industry participants Annette despairs at the victory of form over substance. 5 years of FSR have not delivered much in the way of better advice if the litany of advisory failures she rolls out is deemed indicative.

Of course they are not (really) indicate of the vast majority of successful adviser/client relationships but the stain of these collapses in advisory/client trust, along with repeated problems with conflicts of interest and lack of appropriateness identified in shadow shopper reviews and the like does make you wonder what it will take to bridge the credibility gap between financial advisers and their target audience.

Criminalising almost every conceivable aspect of an AFSL business doesn't appear to have stopped large scale failure to give appropriate advice in the best interests of clients.

Likewise, it seems to me that the steady stream of complex and heavily qualified regulatory interpretation from the ASIC provides cold comfort to those who have lost their life savings.

The current system fails to deliver the core regulatory objectives of (i) conflict transparency and (ii) appropriate advice to the extent that some AFSLs are able to comply with form requirements whilst fundamentally forgetting/ignoring the needs of their clients.

It is clearly time to rationalise the rules so participants don't need a lawyer to review every piece of advice they deliver.

It is time also to bring the product issuers who reap so much of the margin from the product sales they encourage into the liability equation.

But perhaps more than anything else, it is time to accept that most consumers have little or no idea what they are buying, selling, holding or refraining from buying and so rely enormously on professional advisers to select products that suit their needs.

By all means make consumers who "go it alone" sign off that they accept the attendant risks but if they do their shopping for financial solutions using a licensed adviser they should be able to claim reasonable reliance on that adviser as their fiduciary (or similar) and also expect that any product issuer who encourages their adviser to sell them a specific product or strategy will be there to help if it turns out they were sold a dud.

MY RECOMMENDATIONS:

1. Eliminate rules mandating written advice but give consumers the option (set out in the FSG) to request a written explanation of the basis for advice they receive.

2. Create a requirement for any remuneration received by an adviser (be it product-linked or not) to be tied to a written service offering that has been accepted by the client.

3. Institute mandatory "Government point of sale warnings" for consumers to accept prior to any transaction (in PDSs, prospectuses, IDPS Guides, MDA contracts etc) – with an "opt out" where a licensed adviser not linked by ownership or undue influence to the product issuer has recommended that transaction.

4. Create a rule of vicarious responsibility vested in product issuers for advice given by anyone that product issuer remunerates for effecting sales into that product.

5. Empower the client (via the annual statement they receive from each product issuer) to cease any product-linked payments to the nominated adviser if they wish to do so.

6. Make it mandatory for product issuers to reduce their ongoing remuneration (i.e. their annual management fee or similar) in direct proportion to any reduction in adviser remuneration occurring as a result of the exercise of a discretion as described in point 5., above.

These may appear fairly radical recommendations but they are collectively aimed at (i) empowering clients, (ii) linking all adviser remuneration to tangible service delivery and (iii) removing the capacity of product issuers to adopt an "all care, no responsibility" approach to sales.

Regarding 1.

Eliminate rules mandating written advice but give consumers the option (set out in the FSG) to request a written explanation of the basis for advice they receive.

I suspect that in the vast majority of cases clients rely heavily upon the author of their advice to "explain the main points" so that can feel comfortable before they make an investment decision.

In my opinion mandatory written advice (in its current form) tends to be of most use to clients when they take a complaint before an external disputes resolution scheme, not when they are trying to decide whether to undertake a financial transaction.

Given ASIC's own studies which have revealed more than half the adult population are functionally illiterate when it comes to reading or comprehending the content of FSGs, SoAs and PDSs it seems fairly pointless to impose a requirement (with criminal penalties for any omission) for advice to be presented in writing – even allowing for the 5 day provision window.

I believe that this focus on form is to the detriment of the delivery of objective and reasonably thought out strategy.

I suggest it is better to eliminate the need for this effort up front and impose an obligation to provide written reasons for recommendations when (and if) a forum such as an EDR scheme requests it – or if a particular client wishes to have such information at any other point in their relationship with the adviser.

If advisers are required instead to execute a service agreement with each client that sets out the remuneration arrangements that will apply then the other core regulatory objective (conflict transparency) is achieved, and in a way that is likely to maximise client understanding of the costs and potential conflicts at play.

Regarding 2.

Create a requirement for any remuneration received by an adviser (be it product-linked or not) to be tied to a written service offering that has been accepted by the client.

Historically product issuers have paid intermediaries (advisers) a portion of the product issuer's annual management fee in the form of a "trail commission". This commission has been described to me as not a cost to the client but as a benefit flowing from product issuer to the adviser.

This is a neat distinction but not one neat enough to exclude trails from disclosure to clients as a pecuniary conflict of interest.

It is interesting to observe that in practice the introduction of an adviser as intermediary has usually also meant that the client has been spared the upfront cost of a product issuer entry fee (or at least a reduction).

(Bizarrely in the Storm case it appears this upfront fee was retained (and shared) even though an intermediary was involved.)

But what is the purpose of the trail commission?

It appears to be a payment aimed at ensuring advisers only favour those products that pay them. That is, it is not a simple bribe per se. It is an institutionally accepted means of ensuring adviser business value is inextricably tied to the value of funds under management with products issuers who pay a trail.

Trails are a creature of the traditional "retail" product culture that pre-dates the more sophisticated "platform" culture (see below). For that reason some have argued that they are a fairly benign phenomenon but, given that a sizeable minority of client monies are still poured into retail products each year (reports suggest about 20% of investment flows are still to retail products) it seems a little premature to say trails are not an issue begging some sort of regulatory intervention.

My suggestion is simple. Let trails remain if they must but make it mandatory to link their receipt to the execution of a written service agreement between the adviser and the client. And, where product issuers are found to have exerted undue influence on an adviser to push clients to their products, make them vicariously responsible for the quality of that recommendation.

Given the pervasive growth of administration platforms in the delivery of packaged services to most clients (studies suggest more than 80% of investment flows are now via the instruments) it is also necessary to examine what they have done to the "trail commission" culture.

Here's a publicly available insight of the split of remuneration between product issuer, adviser and others (published in AFR in 2007 and sourced to product issuer Credit Suisse) via an IDPS (Investor Directed Portfolio Service) :

A	B	C	D	E	F
Custody	Asset Management	Administration	Marketing/servicing	Dealerships	Distribution
0-5%	30-70%	20-40%	20-40%	5-10%	35-55%
Scale, service	Brand, performance	Service, scale	Brand, distribution	Product access, administration	Access to customer base

According to the AFR analysis of the Credit Suisse data between 110 and 220 basis points (1.1% and 2.2%) of asset value is shaved off client portfolios annually to meet the platform costs A to F.

- Percentage F is what gets paid to the adviser
- Percentage E is what gets paid to the AFS licensee (where they are big enough to demand it)
- Percentages C & D get paid to the IDPS operator
- Percentage B gets paid to the underlying product issuers and asset managers
- Percentage A gets paid to the AFSL that provides custody services in the structure

Debate has raged in recent years about the extraction of additional margin by dealerships (these have been called "shelf space fees") but this simply reflects the relative distribution strength (i.e. access to ready clients) each of the players has.

Compared with retail product pricing the platform pricing structure can appear somewhat expensive however the administration benefits that sit within most platforms (consolidated reporting, taxation reconciliation etc.) are generally proposed as the reason for any increased costs.

Some commentators point to the platform fee arrangement as a means of overcoming the trail commission dilemma – this is true to an extent as the structure generally uses wholesale financial products which do not pay a trail. The platform fee gets split between the players and the adviser gets more say in how much they get paid.

So the IDPS consumer appears to avoid the "no service" problem often associated with trail arrangements. And their adviser avoids the stigma of being a commissioned sales agent.

The platform fee is levied for a series of services provided by a variety of players.

But ASIC still regulates IDPSs as products insofar as the recommendation to use one is concerned.

To that extent the adviser fee is still a trail commission on a product and must be disclosed.

The description of this fee as an "adviser service fee" or similar (as opposed to a sales commission) is in my opinion invalid to the extent that there is no written advisory services agreement between client and adviser.

Interestingly it seems to have been until recently all but impossible for a consumer to access a platform product/service without a licensed adviser as intermediator. Hence, far from eliminating the trail the "platform revolution" appears to have institutionalised intermediation and the payment of a trail (or something that looks suspiciously like one).

Does this really matter? Can't people just pick and choose how they pay?

Of course they can - if they understand the options available to them. Unfortunately the industry itself is still grappling with the purpose of product-linked remuneration, with (e.g.) the CEO of Australia's largest "dealer group" recently stating (MM bulletin 11/5/2009) that product-linked remuneration paid by larger balance customers actually subsidises the provision of service to lower balance clients.

Grahame Evans of PIS was quoted as saying:

"The current model, which sees those with larger superannuation balances predominantly subsidise those with smaller balances makes it reasonable from a cost perspective to obtain advice and service for all."

I can't imagine that many "larger balance" clients have explicitly agreed to support provision of such service to others regardless of the social utility achieved in doing so.

As I said above, debate rages. But mandating a linkage between delivery of service and the receipt of remuneration (be it commission, asset-based fee or something else) will quickly eliminate the need for this debate.

Regarding 3.

Institute mandatory "Government point of sale warnings" for consumers to accept prior to any transaction (in PDSs, prospectuses, IDPS Guides, MDA contracts etc) – with an "opt out" where a licensed adviser not linked by ownership or undue influence to the product issuer has recommended that transaction.

I have consistently called for point of sale warnings that give consumers one last chance to reconsider a transaction where they do not have the benefit of a truly disinterested adviser to help.

This will help not only those consumers who might avoid a pitfall they might otherwise feel pressured to jump at (e.g. due to sales hype, blind greed etc.), it will assist legitimate product issuers (by confirming client buy-in) and hopefully assist in weeding out the rest.

My suggested template for the POS warning appears in the schedule to this submission.

Regarding 4.

Create a rule of vicarious responsibility vested in product issuers for advice given by anyone that product issuer remunerates for effecting sales into that product.

In the same way that credit providers and others are now being asked to accept "responsible lending" as a guiding business principle I believe financial product issuers must also assume some responsibility for the way in which advisers they pay a trail commission to (not just tied agents) recommend their acquisition.

One consequence of this will hopefully be the alleviation of some of the weight currently loaded onto advisers in the form of higher PII costs but the primary objective will be to create a sales culture that puts client need before everything else.

By sales culture I refer to the ongoing work of product issuers to educate advisers about how their products work and what sort of client is best suited to them. Introducing a stricter vicarious liability will help to reduce the reasonable basis deficit by charging producer and intermediary with a joint task of finding the right fit for each client.

Regarding 5 & 6.

Empower the client (via the annual statement they receive from each product issuer) to cease any product-linked payments to the nominated adviser if they wish to do so.

Make it mandatory for product issuers to reduce their ongoing remuneration (i.e. their annual management fee or similar) in direct proportion to any reduction in adviser remuneration occurring as a result of the exercise of a discretion as described in point 5., above.

In the past I have suggested the introduction of these types of measures so as to eliminate the significant amount of product-linked adviser remuneration that is not specifically tagged to some sort of service obligation.

The main obstacle appears to be product issuer insistence on retaining the trail component themselves if the client elects to cease the payment to the adviser.

Obviously assigning a right to clients to terminate a payment they don't initiate will be problematic, as will convincing product issuers to "pass on" the benefit they would otherwise choose to retain for themselves.

Perhaps the solution lies in the work being done by FPA to remove the product linkage in remuneration arrangements but I note that (i) not every AFSL or adviser is an FPA member and (ii) so-called "legacy" products are likely to be subject of a carve out request from the product issuer lobby.

OTHER ISSUES

1. **We need to define what a commission is – the Law is silent on what constitutes a commission, even though provisions such as s.923A (regulating the use of terms like "independent", "unbiased" and "impartial") use the term.**

2. **If the rebate of a commission is to enable the person doing the rebating to claim independence we need to ensure that the method of rebating reflects commercial reality – e.g. a set-off. ASIC's interpretation of s.923A (see ASIC's QFS38) is overly restrictive and in my view goes beyond the ordinary meaning of the words used in the section ("**commissions (apart from commissions that are rebated in full to the person's clients)"). **I am of the view that any attempt by ASIC to enforce the view set out in its QFS38 would be deemed ultra vires.**

Thank you for the opportunity to contribute to this inquiry.

Yours truly,

Brett Walker
Director
SMART Compliance Pty Ltd

ANNEXURE REGARDING MANDATORY GOVERNMENT WARNING:

Note: issuer not to accept $ without A. or B. completed

GOVERNMENT WARNING – How much $ can you afford to lose?

You risk losing some or all of your **capital** when you invest in most financial products.

Investing a large part of your savings into ONE investment (apart from a very low risk one*) means you are exposing those savings to the risk of that investment failing to repay **ALL** of your capital.

*For maximum **security of capital** you should consider lower risk options like bank, credit union or building society term deposits.

REMEMBER: Seeking higher income rates than (say) term deposit interest rates will usually mean putting some or all of your capital at risk.

If you are investing without first getting some advice (from a qualified adviser) about the suitability of this product to your situation you are required to read and sign the investor declaration below marked "A.". The product issuer is not allowed to accept your application unless (i) you have completed that declaration or (ii) a qualified adviser has completed the adviser declaration marked "B".

Remember, if you don't understand the contents of the attached product brochure – especially any section about "risks" associated with investing in the product - you should consider getting some professional advice before you sign anything.

For further information go to www.fido.gov.au or call 1300 300 630.

(If this page is not attached to a financial product brochure - prospectus or PDS - please do not sign it)

A. INVESTOR DECLARATION

I, __________________________ [print your name] acknowledge this warning, confirm I have not received any personal advice to invest in this investment from anyone not linked to the product issuer and still wish to proceed with my investment.

Signed _______________

Date ____/____/________

B. ADVISER DECLARATION

I, ________________________ [print your name], a representative of

____[AFSL Name]

AFSL Number __________________ [AFSL Number] declare the following:

I have assessed the appropriateness of this financial product to _____________________________ [print name of investor] and advised them about it based on that assessment. My advice is that they invest. My advice is detailed in a Statement of Advice (SoA). I am not associated with the product issuer by ownership links to me, my AFSL or an associate of either me or my AFSL (hereafter referred to as "us"). Full details of remuneration (if any) being paid to us by the product issuer or their associate/s are set out in the above SoA.

Signed _______________

Date ____/____/________