

The Future of the Financial Planning Profession

“The Future Profession”

White Paper of the Financial Planning Association of Australia
May 2014



FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA



The Future Profession

FPA WHITE PAPER | DATE: MAY 2014

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Introduction

The work that the Government has done in reviewing financial services has set the stage for a positive reform agenda that will improve the financial security and maximise the financial outcomes of all Australians, but only if the opportunity for reform is harnessed appropriately.

A disappointing amount of the debate to date has been underscored by ideological distractions that have sought to minimise and condemn the role that professional advice plays in the financial future of many Australians.

The FPA, as the professional association for advice, acknowledges that more should be done to improve consumer protection in financial advice. However, consumer protection should not hinder Australians' access to professional advice.

We are focused on assisting the Government to maximise this opportunity for meaningful and effective reform that improves the financial wellbeing for all Australians.

The regulatory regime relating to financial services and products, including financial advice, is not fundamentally flawed, but it does require fine-tuning to address certain deficiencies. The current regulatory approach involves licensing the providing entity, the establishment of minimum competence and training standards for authorised representatives, the provision for adequate disclosure, requirements to manage conflicts of interest, and the provision of remedies in the case of a breach. Internationally, Australia's regulatory approach is regarded as one of the most comprehensive systems of financial services regulation in the world.

Notwithstanding these qualities, there remain some deficiencies or 'gaps' in the following areas:

- The entry requirements for providers of financial advice are too low, which has led to some incompetent and ill-equipped advisers being able to provide financial advice on sophisticated and risky products;
- The lack of clear differentiation between financial planners, and 'product advisers' and providers of general advice, confuses and misleads consumers in terms of services offered and standards of professionalism;
- The absence of a mandatory professional framework to underpin the difference between financial planners and other providers of financial product advice, the lack of which enables some financial intermediaries to opt out of additional commitments to the detriment of their clients, especially if they find them too expensive or difficult to meet.;
- The lack of a regulatory framework to better support professional bodies in a co-regulatory structure; and
- The absence of direct policy measures to support consumer access to affordable financial advice.

This FPA White Paper outlines a 10 point plan designed to address these gaps.



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FPA's 10 Point Plan - Raising standards in the financial planning profession

1. Raise the minimum criteria so that the term financial planner/adviser is restricted under the Corporations Act, and the individual must:
 - a. Have membership of an ASIC approved professional body; and
 - b. Hold minimum education standards of a relevant university degree, and three years experience over a 5 year period; and
 - c. Maintain minimum continuing professional development of 90 CPD points over a triennium.

2. Amend the law to develop criteria so that ASIC can approve professional bodies, such as those prescribed in the Tax Agent Services Act or the approach proposed by the FSA in the UK.

3. The immediate establishment of a financial planner education-working group (FPEWG) to develop a considered, strategic and holistic financial planner education framework. With the aim of lifting minimum education and experience standards to a relevant university degree and three years experience over a 5-year period.

4. The term 'Commission' to be defined and then banned under the General Advice exemption.

5. General Advice should be re-termed 'general or product information' and be limited to the provision of 'factual information and/or explanations' relating to financial products.

6. The development and implementation of a co-regulatory design, which recognises and facilitates the role of 'approved' professional bodies in assisting ASIC to achieve its consumer protection and confidence mandates.

7. The establishment of a public register which is managed by ASIC, with a requirement for all financial planners/advisers (including employed representatives) who provide personal advice to be individually registered.

8. ASIC should have suspension powers for financial planners/advisers suspected of material and systemic breaches of the best interest duty. ASIC must have a justifiable position and the financial planner/adviser has the right of appeal to AAT.

9. Once the Federal Budget position has been improved, that the Government commence consultation with industry to determine the benefit to have the preparation of an initial financial plan be expressly stated to be tax deductible.

10. A review into lifting the criteria of a sophisticated investor.



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1. Education and Training

Education and competency requirements for providers of advice are set in ASIC *Regulatory Guide 146 - Licensing: Training of financial product advisers* (RG146), which includes “training standards of sets of knowledge and skill requirements that vary depending on the adviser’s activities”. 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.

As detailed in the table below, the FPA requires significantly higher levels of training, education and competency than the requirements of RG146 for a provider to become a member of the FPA. This is based on the professions’ understanding of the minimum competencies needed to provide quality advice to consumers. Once membership has been obtained, FPA members must adhere to the principles of financial planning via professional obligations and continued professional development requirements.

A comparison of minimum entry levels between RG 146 and the FPA requirements

Status achieved	Requirements
RG146 compliant to provide personal advice on Tier 1 products ¹ .	<p>Has completed courses on the ASIC Training Register that meet the relevant training standards, i.e. they are at the Tier 1 level and cover:</p> <ul style="list-style-type: none">• the generic knowledge relevant to the products you advise on and the markets in which you operate,• the specialist knowledge about the specific products you advise on and the markets in which you operate: and• the relevant skills requirements <p>OR</p> <p>Must be individually assessed by an authorised assessor against the relevant training standards.</p> <p>ASIC does not prescribe a minimum number of hours per year that an adviser should spend on continuing training.</p>

¹ Tier 1 products are all financial products except those listed under Tier 2 which include general insurance products, except for personal sickness and accident (as defined in reg 7.1.14); consumer credit insurance (as defined in reg 7.1.15); basic deposit products; non-cash payment products; FHSA deposit accounts.



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FPA Financial Planner AFP® member	<ul style="list-style-type: none"> • Has completed an approved Degree • Holds Authorised Representative status. • Minimum one (1) year plus approved practitioner experience including Authorised Representative status for the full period. • Minimum of 90 hours Continued Professional Development every three years. • Must comply with FPA's Code of Professional Practice and Code of Ethics.
FPA CERTIFIED FINANCIAL PLANNER® (CFP®) member	<ul style="list-style-type: none"> • An Approved undergraduate degree, Masters degree or Doctorate. • Completion of CFP Certification Programs 1 to 5. • Minimum three (3) years approved practitioner experience including Authorised Representative status for 12 months prior to application. • Minimum of 120 hours Continued Professional Development every three years. • Must comply with FPA's Code of Professional Practice and Code of Ethics

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.

Getting the right education framework in place for a regulated marketplace, such as financial advice, is vital. Determining an appropriate framework for financial planner education is an extremely complex issue which crosses multiple regulators, multiple industries, and impacts on the availability, accessibility and affordability of advice for consumers. Such a framework must consider the practical implications for existing financial planners while not restricting new entrants into the profession, and ensure that consumer protection is enhanced while the accessibility and affordability of advice for consumers is maintained.

It is also important to capture all of the intended educational goals arising from the Government in all of the channels that will impact financial advice.

It is unclear how the education requirements can be improved by a financial advice national exam (a Government proposal currently on hold), especially in the absence of an education framework consisting of key elements such as continuing professional development (CPD). Furthermore, the introduction of the Tax Agent Services Act (TASA) regime provides another challenge in co-ordinating the appropriate training required for financial planners as they register as ‘tax (financial) advisers’.

To aid in this exercise, the FPA has developed a proposed ‘Architecture’ for ASIC, Treasury, and the Tax Practitioner’s Board (TPB) to consider and hopefully clarify the role of the regulators (ASIC and the TPB), the profession (professional associations) and regulated entities (licensees), in the education and development of future financial planners. If these roles are not clearly delineated and complementary,



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the regulatory structure will result in duplication, inefficiencies in the system and ineffective regulation, at significant resource cost to industry, Government and consumers. Most importantly, it will impact on the quality of education outcomes for financial advisers and ultimately, the quality of advice for consumers.

Our proposed architecture for financial planner education creates a tripartite model around education and assessment/testing, with all parties involved playing a vital and distinct role in ensuring the development of competent financial planners:

- *Government (ASIC and the TPB)* – have a responsibility to impose mandatory education, including the knowledge and testing of the regulatory environment, planner obligations under the law, and basic core knowledge.
- *Professional Bodies and Associations* – have a role to foster professionalisation and ensure financial planners are successful in their adherence to professional standards and ethics, professional identification, designations and having oversight of financial advice specialisation accreditations.
- *Licensees* – have an obligation to ensure their financial planners (authorised representatives and employees) are competent to provide financial advice.

This model highlights the role of the regulators, and clarifies which roles within the industry and profession that the regulators are not required to be involved in.

FPA 10 point plan:

Item 3: The immediate establishment of a financial planner education-working group (FPEWG) to develop a considered, strategic and holistic financial planner education framework, with the aim of lifting minimum education and experience standards to a relevant university degree and three years experience over a 5-year period.



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2. Enshrinement of the Term ‘Financial Planner/Adviser’

To strengthen consumer protection and to continue the journey towards creating a true profession, the law must restrict the term financial planner/adviser to only those that have the highest level of education, competency, ethics, and standards, and are a member of a regulator-approved professional body.

Leaving the use of the term financial planner/adviser unregulated is a significant gap in consumer protection. It leaves trusting consumers open to influence by unlicensed and unqualified individuals who misrepresent themselves as financial planners.

During the Parliamentary Joint Committee (PJC) Inquiry into the collapse of Storm Financial, the recommendation of restricting the term financial planner was raised. The Boutique Financial Planning Principals Group (BFPPG) stated:

The public can readily identify other professions: doctors, lawyers etc. by their title. There are, however, thousands of individuals holding themselves out to be financial planners who meet the barest minimum training or ethical requirements. In most cases these people are associated with single product areas of advice or advice that is focused strongly into one type of asset class or investment type. There are real estate agents who call themselves financial planners so that they can offer advice on the investment of excess funds after the purchase or sale of a property. There are property developers who call themselves financial planners so that they can package the sale of their property development into superannuation funds.

The PJC committee acknowledged in their report [5.87]²:

...legitimate concerns about the varying competence of a broad range of people able to operate under the same ‘financial adviser’ or ‘financial planner’ banner. The licensing system does not currently provide a distinction between advisers on the basis of their qualifications, which is unhelpful for consumers when choosing a financial adviser.

There is a high level of confusion in the market, and within industry, media, Government and consumers, about who is qualified to provide financial advice in Australia. The current market for financial advice can include financial planners, financial advisers, financial product salespersons, unlicensed rogue operators, and those who misrepresent their products and services as financial advice and/or financial products. Some incorrectly represent themselves to consumers as financial planners without the appropriate, training, licensing, and professional standing and competency 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 and creates confusion for consumers.

² Parliamentary Joint Committee, ‘Inquiry into financial products and services’, (November 2009) p 90



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The term financial planner is also increasingly being used in marketing and promotional material by persons who provide non-traditional ancillary services, such as realtors, stockbrokers, life insurance agents or brokers, mortgage brokers, property brokers, sales agents of various investment vehicles, accountants, and unlicensed individuals.

The current mis-use of the terms financial planner and financial adviser impacts on consumer trust and confidence in the profession, as a result of the actions of incompetent providers who should not have the legal capacity to call themselves financial planners.

This position is supported by an article in the Canberra Law Review (2011)³:

Trust and confidence in a professional industry is built upon the belief that the professionals working in that industry have special training and knowledge, high standards of accountability and a belief that advice given is in the best interest of the client seeking expert knowledge. Without adequate training and specialist knowledge, it is difficult to see how any of the previously mentioned factors can be fulfilled, as good advice cannot be given by an adviser whom has not been properly trained and lacks specialist knowledge. In order to restore trust and confidence in the financial advice industry, these issues must be addressed.

Furthermore, a closely related matter to this issue that is yet to be implemented is the restriction of the use of the term 'financial adviser' and 'financial planner' to people that have membership to the appropriate professional standards board. Until these issues have been addressed, there will remain significant deficiencies in the implementation of the Ripoll Inquiry recommendations, which will hinder progress in restoring consumer trust and confidence in the financial advice industry.

Australians deserve the best possible advice from the most qualified practitioners, and these practitioners should be bound by a professional framework that goes beyond the law. This framework should require adherence to standards of conduct, ethics and education which are specifically tailored to the provision of quality financial planning advice.

In restricting the use of the term financial planner/adviser, the FPA recommends that the criteria for using the terms financial planner and financial adviser should be linked to membership of a Regulator-approved professional body. This is akin to the existing system for individuals who attain their status as a registered tax agent through membership of a professional tax agent association approved by the Tax Practitioners Board (TPB).

³ Marcus Ap, 'The Future of Financial Advice Reforms: Restoring Public Trust and Confidence in Financial Advisers – An Unfinished Puzzle'. (2011) Canberra Law Review Vol. 10, Issue 3, pp 192-193



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FPA 10 point plan:

Item 1: Raise the minimum criteria so that the term financial planner/adviser is restricted under the Corporations Act and the individual must:

- Have membership of an ASIC approved professional body; and
- Hold minimum education standards of a relevant university degree, and three years experience over a 5 year period; and
- Maintain minimum continuing professional development of 90 CPD points over a triennium.



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3. General advice

Commissions and General Advice

In the current law, conflicted remuneration in connection to both personal and general financial product advice on superannuation and investments is banned. However, the Government has introduced the *Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014*, which removes the ban on conflicted remuneration on general advice. This measure potentially reintroduces commissions into the advice space, especially in connection to superannuation and investment products.

Commissions must not be permitted to be paid under general advice. The return of commissions on investments (including upfront or trail commissions), or in superannuation, should be opposed.

This is consistent with the Government's stated position on the Future of Financial Advice (FoFA) reforms. In an address to the South Australian Liberal Party luncheon on 31 January 2014 the Hon. Senator Arthur Sinodinos stated that:

"The Government remains committed to ensuring that commissions do not provide the basis for mischief and do not have a perverse effect on pricing that ultimately impacts the consumer and the provision of certain products in the market".

It is undeniable that conflicted remuneration has eroded public confidence in our financial system. We note ASIC's contribution to the Parliamentary Joint Committee on Corporations and Financial Services' *Inquiry into financial products and services in Australia*;⁴

"Commission payments can create real and potential conflicts of interest for advisers. They could encourage advisers to sell products rather than give strategic advice (e.g. advice to the client that they should pay off their mortgage), even if the advice is in the best interests of the client and low-risk. Commissions also provide an incentive to recommend products that may be inappropriate but are linked to higher commissions."

Australians have right to expect that the financial services which they use to ensure their financial security should not also be motivated to sell potentially inappropriate products in order to generate commissions and other forms of conflicted remuneration.

Allowing investment commissions to be paid on general advice have the potential to shift licensees and representatives away from the provision of personal advice in order to earn sales commissions, and would therefore make 'personal' financial advice less available. In effect, this proposal would be likely to promote a new stream of 'general advice' licensee businesses and sales advisers who are incentivised by sales commissions.

⁴ At [168]



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Furthermore, general advice is most commonly provided by product manufacturer employees (such as banks and superannuation funds), and is arguably more conflicted than personal advice. There is an inherent lack of accountability for general advice, as there is no paper trail –there are very limited disclosure requirements for providing general advice to consumers.

To facilitate this legislative approach, the FPA recommends the Government clearly define the term ‘commissions’ in relation to conflicted remuneration and ban commissions from all superannuation and investment products. In our Remuneration Policy, the FPA defines commissions as:

“An amount calculated as a percentage value of the consumer’s asset or insurance premium payable by the product provider to the financial planner’s licensee for recommending the product to the consumer. Commissions are not paid directly by the consumer but are paid by the product provider.

A commission cannot be switched off and will be paid until such time as the client withdraws their funds or ceases life insurance cover.”

General Advice Terminology

There is significant confusion in the market, and within industry, media, Government and consumers about the definitions and roles of financial planners/advisers, and those that sell financial products.

Some incorrectly 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 law defines the act of providing financial product advice as well as a distinction between general advice and personal advice:

- Personal advice (s766B) is given when the provider of the “financial product advice” has considered one or more of the consumer’s objectives, financial situation and needs.
- General advice is financial product advice that is not personal advice.

Defining financial product advice on this basis makes it more difficult for investors to distinguish personal financial advice from marketing material or product sales. This risk is confirmed by ASIC’s *Report 384 – Regulating Complex Products*, where the Report states:

“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



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*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.*⁵

Framing general advice as financial advice plays into the behavioural aspects of financial decision-making by giving the impression that the advice has a reasonable basis or is appropriate for the client, and thereby exposes retail investors to decisions made under uncertainty about the regulatory framework for that advice.

According to ASIC licensing data, there are 5,027⁶ Australian Financial Services License holders and 51,147⁷ authorised representatives of AFSL holders who are licensed to provide 'financial product advice' as defined under the Corporations Act. Such people might work as bank tellers, product provider call centre staff, sales people, or fully-fledged financial planners all providing different types of advice services to consumers depending on their training, competency, and authorisation. However, from a consumer perspective there is minimal understanding in the different roles and more importantly restrictions placed on the different providers and the limitations of the advice consumers may be provided.

Anecdotal evidence shows that it is common for consumers to interpret general advice as personal advice because it is relevant to their circumstances at the time it is provided.

FPA 10 point plan:

Item 4: The term 'Commission' to be defined and then banned under the General Advice exemption.

Item 5: General Advice should be re-termed 'general or product information' and be limited to the provision of 'factual information and/or explanations' relating to financial products.

⁵ ASIC, 'Report 384 – Regulating Complex Products' (January 2014), at [46]

⁶ ASIC figures as at 10 May 2013 as provided to PJC Inquiry, answers to questions on notice 22 April (received 13 May 2013)

⁷ ASIC figures as at 10 May 2013 as provided to PJC Inquiry, answers to questions on notice 22 April (received 13 May 2013)



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4. Consumer access to affordable advice

With the banning of conflicted remuneration, there is an opportunity to amend a current anomaly in respect to the tax deductibility of financial planning fees. This is consistent with the Coalition's election commitment to reduce costs for consumers who access financial advice.

The precedent of tax deductibility of professional fees is already set and allows consumers to deduct fees paid to registered tax agents, BAS agents and lawyers.

Commencing July 2014, financial planners will be required to register with the Tax Practitioners Board as tax (financial) advisers, and adhere to the requirements of the Tax Agent Services Act, along with their tax agent peers. The amendment to the Tax Agent Services Act in 2013 defines a tax (financial) advice service as a type of tax agent service.

Including financial planners in the Tax Agent Services regime, and the banning of commissions on financial advice, set the right environment for the introduction of tax deductibility of financial advice fees.

Concessional tax treatment of expenditure is an efficient Government incentive to influence consumer behaviour. The educational value unlocked for consumers by the provision of advice is well documented and demonstrates that access to affordable financial advice is a critical element of Australia's economic environment. However, research also shows that the cost of delivering advice in Australia is relatively high due in part to the strict regulatory regime, limiting the ability for many Australians to access affordable advice. Many consumers, particularly lower income earners, do not seek professional financial planning advice because of the cost involved.

Consumers are paying for personal financial advice in varying ways which result in disparate tax treatment that does not correspond to any public policy objective. For example, a fee for service arrangement for the preparation of an initial financial plan recommending investments is not tax deductible under section 8-1 of the Income Tax Assessment Act 1997. This is because the ATO does not view it as an expense incurred in producing assessable income.

In the larger picture, public policy initiatives are needed to assist in creating a more affordable advice framework and to ensure consistency in the tax treatment of advice fees for consumers. There are many societal benefits to providing a tax incentive to help consumers pay for financial planning advice.

These include the following:

- Facilitating the greater education of investors about money issues, including savings, retirement planning, social security, tax responsibilities, budgeting and debt management;
- Encouraging more investors to seek professional assistance with their overall savings objectives;
- Greater transparency of advice and financial product costs;



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- Expanding retirement savings beyond mere reliance upon superannuation and Government benefits;
- Engaging consumers on the need for retirement savings; and
- Encouraging competitive pricing of financial advice through fee based charges.

Financial planners provide valuable advice that is important for the long-term economic welfare of Australians. The financial planning profession is uniquely positioned to help Australians build their wealth and plan for a financially independent retirement.

Specifically allowing initial advice fees to be tax deductible would greatly assist consumers' access to affordable financial advice that is beyond mere income tax or of a superannuation nature. While this would involve some additional costs to Government, these costs would be significantly outweighed by the long-term benefits. Including caps on either the size of the tax deduction or an income cap on those able to receive a deduction could control this revenue cost.

FPA 10 point plan:

Item 9: Once the Federal Budget position has been improved, that the Government commence consultation with industry to determine the benefit to have the preparation of an initial financial plan be expressly stated to be tax deductible.



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5. Regulatory design and co-regulation

There is a fundamental need to recognise the role of co-regulation and self-regulation in the regulatory structure of the Australian financial system. Professional bodies, such as the FPA, can perform vital functions within this system in order to maximise its capabilities and improve its efficiency. The Australian financial system depends on a degree of self-reflection and industry engagement in regulation in order to remain focused on efficient and effective solutions for market failures. Furthermore, regulatory structures which facilitate self-regulation, co-regulation, and other collaborative forms of regulation instil professionalism and ethical behaviour in market participants.

Regulatory overview

In 2001, the Government introduced the Financial Services Reform Act to overhaul the regulation of financial services in Australia. Since then, financial advice has been regulated under the Corporations Act 2001, the Corporations Regulations 2001, and relevant ASIC regulatory guides and Class Orders. Chapter 7 of the Corporations Act and related regulations detail licensing conditions, disclosure and documentation obligations, and research requirements on both the client and subject matter of the advice, reporting requirements, minimum education standards, dispute resolution, consumer compensation measures, and other relevant matters regarding financial product advice. The regime imposes regulatory obligations on the licensee who is responsible for ensuring its own compliance and that of its Authorised Representatives. Market participants are also subject to requirements of common law and trade practices law.

Under the Corporations Act the ASIC grants AFS Licences to companies. In line with licence conditions, the licensee is permitted to grant Authorised Representative status to companies and individuals. Under this licensing structure, a licensee has significant power in negotiation with product providers and in the regulation of its Authorised Representatives, and through this mechanism, in the past, could impact commissions and soft dollar arrangements. Licensees are responsible for their Authorised Representatives' compliance with legal obligations. All monies, including advice client fees and charges, are generally collected by the AFS Licensee and paid to the Authorised Representatives and practitioners.

A model of regulation that delegates responsibility for compliance of individual professional participants to a corporate entity with its own business imperatives places unnecessary compliance pressure on the entity and discourages innovation of practise. Though we acknowledge the efficiency of this regulatory model, it has diminished individual professional obligations that represent the third leg of good regulatory practise.

Better integration and recognition of professional obligations in the regulatory system will achieve better consumer, marketplace, and regulator outcomes. Properly implemented, it would provide greater clarity in the relationship between Government and professional regulation. While a mutually supportive relationship now exists, Government and the profession should work together to better leverage their respective strengths for greater regulatory efficiency, and to ultimately achieve greater consumer protections and professionalism in the industry.



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Regulatory Design

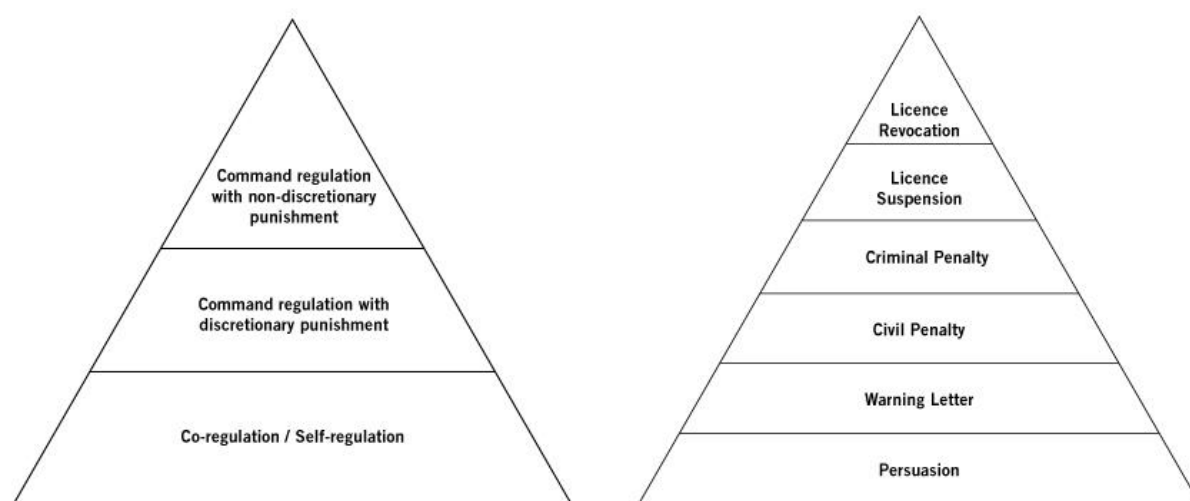
There is a fundamental need to recognise, in the regulatory design of the Australian financial system, the role professional bodies can play in maximising the capabilities of the system as a whole, and to improve overall consumer protection.

Professional obligations serve to assist Government in protecting consumers by raising the bar of accountability, ethical obligations and education of its members, beyond the requirements of the law.

Professional obligations complement and reinforce the legal obligations regulated by ASIC. It is in the public interest for the Government to encourage and support the adherence to professional obligation through effective and efficient regulatory design which facilitates co-regulation, restricts the use of the terms financial planner/adviser and the requires membership of a Regulator prescribed professional body, particularly in the financial services sector which influences the financial wellbeing of all Australians.

Many submissions provided by consumers to the Senate Inquiry into the Performance of ASIC indicated that ASIC was unable to assist them in relation to their complaint. In part, this is due to the inability of ASIC to dedicate resources to minor regulatory offences. This highlights the misalignment between the consumer perception of the role ASIC should play in assisting them when things go wrong, versus what ASIC can actually deliver.

This is where the role of professional bodies is most important. The following diagrams demonstrate the 'regulatory pyramid' approach to regulatory design⁸.



⁸ Ayres and Braithwaite, 1992, p 35



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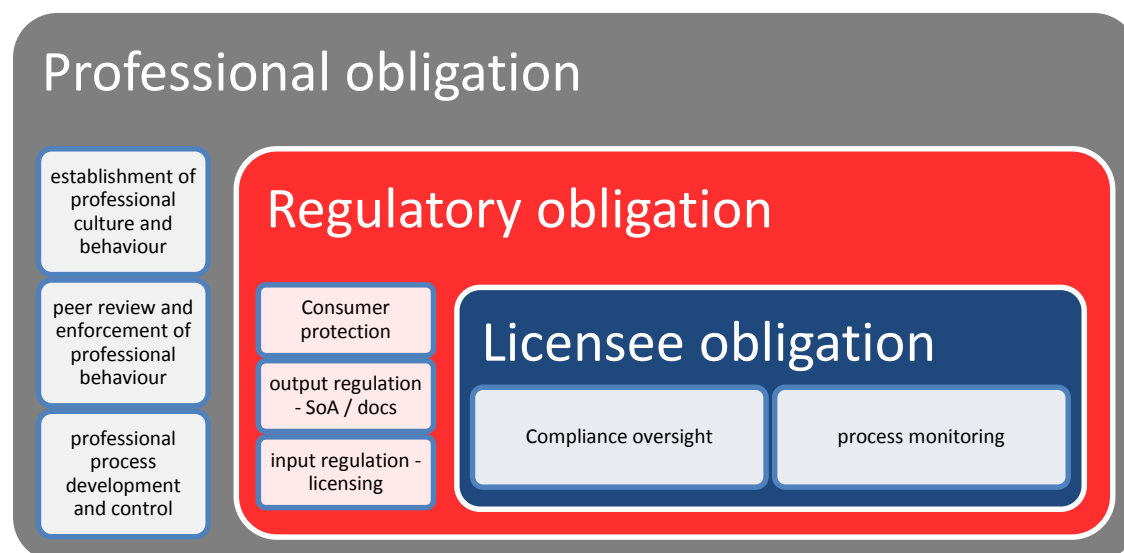
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Regulatory design is not just about responding to complaints or acting when things go wrong. Setting standards, education, and guidance, among other regulatory components, are vital parts of effective regulatory design. These base sections of the pyramid offer a vital avenue for identifying, monitoring and responding to emerging trends of market behavior and practice that impact on consumers.

Setting performance measures concerning the bottom half of the regulatory pyramid will help ASIC to appropriately resource allocation decisions between its current focus on high end enforcement activity versus capacity building to complement and encourage the development of relationships with professional bodies at the lower tiers of the pyramid.

In the medium to long term, investment in these systems of regulatory power is likely to prove far more cost effective and be a more responsive mechanism for consumer protection.

The best solution for implementing this regulatory design is a system which reflects dynamic interaction between the legal requirements imposed by Government, compliance practices imposed by licensees, and the expectation of professional participants as codified in professional obligations. This model is based on the 'best practice' Accountable Governance approaches proposed by O'Brien (2010) and Sanders (2010) and also the Australian government's Office of Best Practice Regulation Handbook 2007, all of which emphasise the regulatory benefits of the separation of complementary roles between the Regulator, the regulated, and the professional bodies.



To encourage improvements in individual planner behaviour, the regulatory design must be effective for all three areas of obligation - regulatory, licensee and professional. 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 protection becomes reliant on the limitations of regulatory and licensee obligations alone.



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At present, professional obligations only apply to those who choose to accept those obligations through professional membership, which is voluntary. Core obligations such as those set out in the law must be supplemented by a culture of professionalism to ensure that meeting legal obligations is not seen merely as a matter of compliance but more as a commitment to best practice in providing services to clients. The significance of this professional decision is strongly evidenced in the quality of market participants and in the reduced instance of enforcement action against FPA members and CERTIFIED FINANCIAL PLANNER® professionals.

Financial Year	ASIC financial adviser bans	Those banned whom were Certified Financial Planners
2009/10	22	0
2010/11	22	3
2011/12	19	2
2012/13	12	1
2013/14*	10	0
Total	85	6

(*Current as at 30 April 2014)

Whilst FPA members account for over 50% of all financial planners in Australia, over a five year period CERTIFIED FINANCIAL PLANNER® professionals represent only 7% of ASIC enforcement actions.

The Government already recognises the important role of professional obligations in the regulatory framework for other sectors and in the provision of consumer protections. With reference to tax agents, the Tax Agent Services Act (2009) requires membership of a professional body, approved by the Tax Practitioners Board (TPB), that is not-for-profit, has higher than the minimum standards for competency, academic, and experience for entry, maintains ongoing professional development requirements, has enforced codes and rules of conduct for the profession, operates a disciplinary process for breaches, offers a complaints mechanism for its members' clients, and follows annual reporting procedures.

The FPA's professional obligations and activity are focused on the part of the financial services sector to which the FPA belongs, that is the financial planning profession. Our obligations and activity are specifically designed to govern the conduct of our members in the provision of financial planning services to consumers, and in turn the needs of the consumers seeking the services of our members. Therefore, they have a significant impact on the conduct of our members and the consumers they serve.

To incorporate professional obligations within the broader regulatory framework and improve consumer, market, and regulatory outcomes, the law should be amended to require professional membership for all people operating as "financial planners".

[ASIC's Role in a Co-Regulatory Design](#)



The Future Profession

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Notwithstanding the need for professional bodies to take greater responsibility for the regulation of financial advice in Australia, ASIC and the federal Government continue to play a vital role in this sector. For example, the higher tiers of the regulatory pyramid require supervision and enforcement on a scale that is unfeasible for professional bodies. Co-regulation between ASIC and approved professional associations allows ASIC to focus on the higher tiers of the regulatory pyramid, and also opens up new opportunities to improve the financial system.

Professional bodies can work together with ASIC to assist the Regulator in establishing and maintaining a national register of AFS Licensees and their Authorised Representatives. At the moment, consumers do not have access to a register of all AFS Licensees and their Authorised Representatives, nor a register of banned operators. ASIC only offers the capacity to search the status of particular providers. Access to a list of all AFS Licensees and Authorised Representatives with their licence status (e.g. banned or compliant; enforceable undertaking) and their professional affiliation would assist consumers in researching and selecting appropriate providers.

The collaboration between ASIC and professional bodies on a national registry can also facilitate the recording and harmonisation of enforcement measures. In the past, some individuals banned by the FPA have remained licensed by ASIC, either as an Authorised Representative or a licensee. Such an approach would improve consumer protection and ensure inappropriate behaviour is identified and addressed through a tripartite mechanism of regulatory, licensee, and professional procedures, and recorded on the registry in a timely manner.

Lastly, the closer collaboration between ASIC and professional bodies on a co-regulatory basis permits joint policy development and would help to identify future areas for reform. For example, collaboration between ASIC and professional bodies would help to identify weaknesses in key financial regulatory concepts, such as the distinction between retail and sophisticated investors. Co-regulation through joint policy development would facilitate closer attention to how this legal distinction influences practical outcomes for the profession and for consumers.

In order to facilitate co-regulation into the regulatory framework, ASIC needs the power to approve professional associations, as well as criteria and obligations for facilitating and maintaining the co-regulatory relationship between ASIC and approved professional associations.

FPA 10 point plan:

Item 2: Amend the law to develop criteria so that ASIC can approve professional bodies such as those prescribed by the Tax Agent Services Act, or the approach proposed by the FSA in the UK.

Item 6: The development and implement of a co-regulatory design, which recognises and facilitates the role of 'approved' professional bodies in assisting ASIC to achieve its consumer protection and confidence mandates.

Item 7: The establishment of a public register which is managed by ASIC, with a requirement for all financial planners/advisers (including employed representatives) who provide personal advice to be individually registered.



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Item 8: 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.

Item 10: A review into lifting the criteria of a sophisticated investor.