

2 March 2016

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Australian Securities and Investments Commission
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Dear Ms Quinn

Re: Consultation Paper 247- Client review and remediation programs and update to record-keeping requirements

In brief:

AIST supports the proposed ASIC guidance. The guidance would benefit from a stronger focus on independence of reviewers, as well as transparency and accessibility. The focus on whether a matter is systemic may provide a disincentive for licensees to positively act on issues that are easily addressed through a regular profiling program.

AIST is pleased to make this submission regarding ASIC's proposed guidance on review and remediation programs conducted by AFS licensees who provide personal advice, together with examining record-keeping requirements. AIST continues to strongly support policies and processes which will help avert poor quality advice, whether personal or general). In addition, we support policies that, in the event that poor quality advice is provided, will provide investors with appropriate remediation.

Environmental context driving the need for guidance

From recent examples, the issues which need addressing are:

- the lack of coverage of all victims of a financial planning scandal
- the lack of independence of who reviews the various issues
- consistency of how various complaints were handled internally
- lack of ownership of the issues internally
- timeliness of providing compensation.

Mitigating – indeed removing – these issues should underpin any guidance in this area.

All of these issues are important when considering guidance regarding review and remediation programs and the transparency and accessibility of consumer's documentation. AIST supports the importance of review and remediation programs. Such programs help achieve handling of identified breaches. Providing consumer redress is of its very nature more cost effective than legal action for consumers.

Our comments are made within the overarching environmental context within which financial planning within Australia operates:

- According to the Customer Owned Banking Association, Australia has the most concentrated banking sector of any G20 country¹.
- Rainmaker notes that the four largest banks, their wealth arms and AMP have coverage of over 55% of all financial planners and 79% of all platform advisers².
- Such conflicts of interest have detrimentally flowed onto consumers in various financial planning scandals, including in recent times the Commonwealth Bank and Macquarie Bank.

AIST notes that while the proposed guidance will provide clarity regarding review and remediation programs, it is structurally difficult to ensure (even with such guidance) that consumers are as fully protected as they should be. This arises from not having a clean separation of banking from wealth management. Additionally, any lack of resourcing within the regulator will impact on the proposal contained within Consultation Paper 247 (CP 247) that the regulator may be involved in the review and remediation program design and implementation. We note that ASIC's resourcing is presently under review.

General comments

We make the general comment at the start that we are concerned that this guidance is designed to apply to licensees with systemic issues. We believe that it would be far better for a positive approach that sampled clients, identified issues and applied appropriate remediation before clients were aware that there were any issues, rather than waiting for issues to become systemic.

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

² Rainmaker's Financial Planning Report, Volume 3, No.1 February 2014

Specific proposals raised in the Consultation Paper

AIST provides the following answers to some of the proposed guidance included within the Consultation Paper. Please note that we do not plan to respond to all questions individually.

B1: AIST considers that paragraphs 31-35 fairly state what a 'review and remediation program is. Page | 3

The key statement in this section is perhaps best understood at paragraph 31, where the operation of such programs are in keeping with the licensees responsibility to operate their financial services efficiently, honestly and fairly. It is vital to ensure that licensees and their representatives are aware of the programs they offer, their scope and circumstances where investors who are adversely affected are able to benefit from such schemes.

However, we also point out that such programs need to be applied positively for investors to benefit properly: It should not be up to investors who may not be aware of having received non-compliant advice that the onus may be on them to advise a licensee prior to entering into review and remediation of their own circumstances. Although we welcome the inclusion of the discussion at paragraph 34 around systemic events, we have deep concerns that problems may end up needing to be regarded as "systemic" before a licensee acts on advice-related issues.

AIST believes that non-compliant advice must be proactively reviewed through a properly configured program. This must occur whether the problems are systemic, or caused by a one-off failure, and must not require customer initiation.

In passing, we note that these schemes have the potential to be both more cost-effective and prompt than legal action especially where the amount of claims are in excess of external dispute resolution maximums. But we take this opportunity to point out that these programs must not be viewed as a substitute for regulatory action against licensees or their representatives.

B2: Whilst AIST welcomes the discussion of what is a systemic issue, we disagree that a focus of review and remediation programs should be on systemic issues. We believe that a proactive approach to customer care in place at a licensee would prevent issues becoming "systemic". We note that this underpins the observation in paragraph 39, which notes the role regular compliance checks or audits of advisers can play. We strongly believe that such regular checks should be embedded in a licensees risk management framework.

Notwithstanding, we generally agree with the classification provided in CP 247 of what is a "systemic issue".

We would recommend that a key driver of systemic issues be expressly noted as conflicted remuneration, having been identified in a number of high-profile cases thus far.

However, we also note that the OECD and G20³ have recommended that a quantitative system should be used to track specific sets of alerts based upon the frequency and types of complaints.

B3: We note that the scope of the guidance has been limited to circumstances where personal advice has been provided (paragraph 42). Whilst we agree that the guidance is best applied to those circumstances, it is possible that the examples of events that have been listed in paragraph 42 could also feasibly apply in cases where general advice has been provided.

We would support the application of the scope of this guidance to general advice.

We note that at paragraph 44, the guidance is explained as being similarly to, but not necessarily applicable to programs run by superannuation trustees and others. It is possible that that this may create the impression that trustees were not covered by this guidance, which is not optimal, given that representatives of some licensees who are superannuation trustees provide personal advice services to their members.

We recommend that this be clarified in the guidance.

C1: Although the general triggers for establishment of a program are well explained here, we reiterate that reliance on affected clients to reactively lodge complaints through IDR and EDR processes is inferior to a positive approach that identified issues and offered remediation in a more proactive fashion.

Reliance on reactive processes such as IDR and EDR necessarily ignores clients who are not aware that there is an issue. In addition, these processes can be time-unfriendly, as well as potentially being complex for users to negotiate.

We would welcome preventative programs which sought to prevent these issues escalating as we believe that this would be key to minimisation of reputation risk.

C2: AIST welcomes the guidance as to how review and remediation programs may interact with IDR and EDR processes and believes that this is sensible.

C3: As previously explained, we support the emphasis on licensees acting efficiently, honestly and fairly. AIST also supports the guidance noting that the licensees are required to have adequate resources to provide financial services.

AIST agrees with paragraph 68 that systemic issues will also often be considered a significant breach for the purposes of breach reporting obligations. However, we also note that a systemic

³ OECD, (2014). *Effective approaches to support the implementation of the remaining G20/OECD high-level principles on financial consumer protection*. [pdf] Paris: Organisation for Economic Co-operation and Development, p.11, para. 25. Available at: <http://tinyurl.com/jg7waqv> [Accessed 1 Mar. 2016].

issue is not a pre-requisite for a breach to be regarded as significant. For this reason, we consider it appropriate that licensees should continue to consider assessment on a case-by-case basis.

We recommend that care be taken in this regard to ensure that licensees do not conflate systemic issues with significant breaches. However, we also recommend that if an issue is serious enough to warrant a review and remediation program (as defined in this guidance) the issue should automatically be reported to ASIC.

AIST notes the text at paragraph 73, which asks whether compensation payments can, in the opinion of licensees, assist in providing remediation to clients. We consider that this could be worded more strongly to ensure that licensees consider whether compensation is adequate in providing remediation to clients.

Additionally, AIST would prefer that compensation arrangements are explicit in what consumers will receive and when. That is, clarity must be provided to clients regarding not only the timing of resolution, but also of compensation payments (and their quantum) where these are required.

C4: We welcome the proposed involvement of ASIC in reviewing the design and implementation of programs. However, we note that program design and implementation may still happen independently of ASIC involvement. We recommend that all programs be reported to ASIC from the time that they are established, regardless of ASIC's involvement in design or implementation.

We additionally note in paragraph 76, that guidance around ASIC's decision to be involved in programs appears to be general, talking about the size of programs, or the nature of misconduct. We believe that this guidance would benefit from additional examples, such as the number of clients affected, or the amount of losses.

D1: AIST generally supports the factors identified, which may determine the scope of a program. We consider that the changes brought about by the FOFA reforms to remove conflicted remuneration present an excellent opportunity for a thorough investigation of advice provided. We believe that the Regulatory Guide should identify this in the interests of determining whether there has been misconduct and propose specific items for comparison. Some of these comparisons could include:

- Whether there were any trends in advice prior to the removal of commissions that have not been replicated after their removal, that could be explained by the quantum of commissions available; and
- Whether there were changes in advice designed to preserve commissions such as recommendations to hold, compared to sell or switch recommendations.

We take the opportunity to remind ASIC that the removal of conflicted remuneration does not mean that advice which was provided prior to the FOFA reforms became automatically compliant. Investigation of all advice should form part of the scope of programs.

D2: AIST welcomes this guidance and in particular, agrees with paragraph 92 which notes that licensees cannot rely on inviting clients to express interest in having their advice reviewed.

However, we continue to make the point that where the licensee is already aware of quantifiable losses (or other non-financial damage) as the result of financial advice, we believe that several steps should be skipped in order to ensure that remediation can be provided as promptly as possible. In other words, the onus should be on licensees to ensure that immediately identifiable consequences of non-compliant advice are rectified, with involvement by affected clients rendered unnecessary or passive.

E2: AIST generally supports the proposed guidance that sets out how processes for the program should be designed, however, as explained earlier, we agree that ASIC should be involved from the outset. Consequently, we welcome the details of this involvement as provided in paragraph 106.

E4: We note that the programs have been recommended to have independent oversight, which via (from paragraph 133) an independent expert, or internally, with the example provided in CP 247 as being from the organisation's internal audit function.

AIST would prefer that this section only refer to independent experts who have been appointed from outside the organisation. We consider it likely that issues may have arisen as a result of a failure of internal audit functions, however, further to this, we note widespread dissatisfaction with the way the investigation at the Commonwealth Bank has been handled by internal staff⁴. We believe that these doubts, alone are enough to support this recommendation.

E7: We agree that advice licensees should report on review and remediation programs publicly, as well as to ASIC. We believe that this will ensure accountability.

G1: As with our response to proposal C2, we agree that the interaction between programs and EDR arrangements should form part of the guidance. Part of this is the role that EDRs can play in the event that an aspect of the program, or of a decision is unacceptable to a client.

G2: AIST does not support any restrictions being allowed in settlement deeds regarding who a client may talk to. We note that the recent problems at the Commonwealth Bank may have

⁴ Wilkins, G. (2016). Victims of Commonwealth Bank financial planning scandal and consumer group Choice question scheme's independence and reach. *The Sydney Morning Herald*. [online] Available at: <http://tinyurl.com/heyvqc8> [Accessed 1 Mar. 2016].

remained concealed if it wasn't for whistle-blowers and the media. Allowing any restrictions is inconsistent with the notion of transparency.

H1: We note that ASIC plans to amend Class Order 14/923 [CO 14/923] to ensure that advice licensees are able to access records retained by others, and support this. AIST would further support that this be strengthened by a legislated power in the hands of licensees to ensure that licensees are able to access files as necessary, particularly where they are responsible for advice that has been provided. Delays in investigating non-compliant advice have the potential to inflate losses, reduce consumer confidence. It is fundamentally in the interest of all parties to ensure a speedy resolution.

If you have any further questions regarding this submission, please contact Richard Webb, Policy & Regulatory Analyst, on (03) 86773835 or at rwebb@aist.asn.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Tom Garcia', is written over a light blue horizontal line.

Tom Garcia
Chief Executive Officer

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