



National Insurance Brokers Association.



NATIONAL INSURANCE BROKERS ASSOCIATION OF AUSTRALIA (NIBA)

SUBMISSION ON CONSULTATION PAPER 214

UPDATED RECORD-KEEPING OBLIGATIONS FOR AFS LICENSEES

October 2013

ABOUT NIBA

NIBA is the voice of the insurance broking industry in Australia. NIBA represents 500 member firms and over 2000 individual Qualified Practising Insurance Brokers (QPIBS) throughout Australia.

Brokers handle almost 90% of the commercial insurance transacted in Australia, and play a major role in insurance distribution, handling an estimated \$16 billion in premiums annually and placing around half of Australia's total insurance business. Insurance brokers also place substantial insurance business into overseas markets for large and special risks.

Over a number of years NIBA has been a driving force for change in the Australian insurance broking industry. It has supported financial services reforms, encouraged higher educational standards for insurance brokers and introduced a strong independently administered and monitored code of practice for members. The 500 member firms all hold an Australian financial services (AFS) licence under the Corporations Act that enables them to deal in or advise on Risk Insurance products.

NIBA appreciates the opportunity to be able to provide feedback on CP 214 which (as relevant to insurance brokers) sets out ASIC's proposals to update the record-keeping obligations for Australian financial services (AFS) licensees when the licensee or its representatives provide financial product advice to retail clients in accordance with the new conduct obligations in Pt 7.7A of the Corporations Act 2001 (Corporations Act).

ABOUT INSURANCE BROKERS

The role of insurance brokers

The traditional role of insurance brokers is to:

- assist customers to assess and manage their risks, and provide advice on what insurance is appropriate for the customer's needs;
- assist customers to arrange and acquire insurance; and
- assist the customer in relation to any claim that may be made by them under the insurance.



In doing the above the insurance broker acts on behalf of the customer as their agent. Insurance brokers offer many benefits to customers and consumers:

- assistance with selecting and arranging appropriate, tailored insurance policies and packages
- detailed technical expertise including knowledge of prices, terms and conditions, benefits and pitfalls of the wide range of insurance policies on the market;
- assistance in interpreting, arranging and completing insurance documentation;
- experience in predicting, managing and reducing risks; and
- assistance with claims and a higher success rate with settlements (about 10 per cent higher than claims made without a broker).

In limited cases insurance brokers may act as agent of the insurer not the insured but where such a relationship exists the customer is clearly advised up front.

EXECUTIVE SUMMARY

NIBA supports good record keeping by members as part of good risk management practice.

NIBA supports ASIC's facilitative approach to compliance.

NIBA is however concerned that certain aspects of the ASIC proposals are likely to give rise to an unnecessary compliance burden, confusion and dispute regarding compliance.

NIBA sets out its concerns below on each proposal.

PROPOSAL B1 RECORD-KEEPING OBLIGATIONS WHEN GIVING PERSONAL ADVICE TO RETAIL CLIENTS

ASIC propose the following:

“We propose to modify the law, by way of class order, to require that, when an AFS licensee or its representatives provide personal advice to retail clients, the licensee must retain a record of the following matters (whether in a material, electronic or other form) for at least seven years from the date that the personal advice is provided:

- (a) the information relied on and the action taken by the advice provider that show the advice provider has acted in the best interests of the client for the purposes of s961B(1);
- (b) if s961B(2) is being relied on to show that s961B(1) has been complied with, the information relied on and the action taken by the advice provider that satisfy the safe harbour steps in s961B(2);
- (c) the advice, including reasons why advice is considered to be ‘appropriate’ within the meaning of s961G;



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- (d) where an advice provider knows, or reasonably ought to know, that there is a conflict between the interests of the client and the advice provider, or one of their specified related parties, the information relied on and the action taken by the advice provider that show the advice provider has given priority to the client's interests when giving the advice for the purposes of s961J;
- (e) any ongoing fee arrangement entered into with the client within the meaning of s962A;
- (f) any assignment of an ongoing fee arrangement;
- (g) a fee disclosure statement given to the client under Div 3 of Pt 7.7A;
- (h) a renewal notice given to the client under Div 3 of Pt 7.7A;
- (i) any notification from a client given under Div 3 of Pt 7.7A that they elect to renew their ongoing fee arrangement; and
- (j) any fees charged after the termination of an ongoing fee arrangement.

We propose that the requirements in B1(a)–B1(c) do not apply to:

- (k) personal advice for which an SOA is not required; or
- (l) personal advice for which a record of the advice is kept in accordance with s946B(3A), as modified by regs 7.7.09 and 7.7.10AE of the Corporations Regulations....

We also note that our proposed record-keeping obligations will not extend to personal advice where the modified best interests duty applies to:

- (a) basic banking products only (s961B(3));
- (b) general insurance products only (s961B(4));
- (c) a combination of basic banking and general insurance products (reg 7.7A.1); and
- (d) a combination of general insurance and other products (reg 7.7A.1).

There are no specific record-keeping obligations in this situation. AFS licensees should refer to our guidance on the record-keeping obligations that apply to personal advice in RG 175: see RG 175.396–RG 175.403.”

B1Q1 Do you agree with our proposed record-keeping obligations for AFS licensees on the new conduct obligations in Pt 7.7A? If not, why not?

NIBA response

NIBA supports the exclusions relating to general insurance from the obligation.

In relation to life risk insurance and the requirements that apply, NIBA notes the risk management value of retaining **appropriate** records.

Information that is easily identifiable

NIBA has no significant concern with an insurance broker having to retain easily identifiable information in order to meet the condition e.g (c) information relied on in forming a view or why the insurance broker considers the advice to be “appropriate” within the meaning of s961G. This is



because these are matters the insurance broker can form a view on as they relate to its decisions and actions.

NIBA is however concerned that there is no qualifier regarding what level of information must be recorded. The information relied on can be substantial in certain cases. It may not be reasonably practicable or cost effective to record *all* such information relied on and yet this is the obligation.

Without any qualifier, the administrative burden imposed may result in advisers seeking to avoid the personal advice model. The omission of some non- material/non-significant information from the records that was relied on could give rise to a breach.

The above may also favour larger participants over small to medium size participants without the resources or capacity to record the minutia.

Where possible there should at the very least be a qualifier inserted in relation to non-material/non-significant information (or on some other reasonable basis). If an issue arises, the adviser will be required to support its reliance under the safe harbour provisions in any case.

Information that is not easily identifiable

In relation to information that is not easily identifiable e.g (a) the action taken by the advice provider that **show** the advice provider has acted in the best interests of the client for the purposes of s961B(1), the end position is that the broker will not know if it has or has not complied with the requirement, only that it thinks it has.

It will retain records it **considers** meets the obligation but ASIC can easily take a contrary view.

We do not believe that this approach is likely to clarify matters as ASIC suggests. It will simply be another way in which a dispute/prosecution can arise separate to the actual FOFA requirements.

The same problem arises in (b) re the safe harbour and in (d) regarding conflicts of interest.

A **considers** obligation of the type in (c) would appear to avoid this issue and be a reasonable approach.

At present the way it is drafted would make prosecutions by ASIC easier and be likely to create confusion regarding actual compliance.

B1Q2 Will our proposed record-keeping obligations require AFS licensees to significantly change their existing record-keeping practices? If so, please describe the changes and the likely costs involved.

NIBA Comment

Not for general insurance brokers.



For life insurance brokers see issues raised above.

B1Q3 Are there any practical problems with the implementation of our proposal? Please provide details.

NIBA Comment

See comments above

B1Q4 We propose to update our guidance in Section E of RG 175 and Section C of RG 245 to reflect the updated record-keeping obligations. Do you think we should provide any further guidance on our proposed record-keeping obligations? If so, please provide details.

NIBA Comment

See comments above

B2 RECORD-KEEPING OBLIGATIONS IN RELATION TO CONFLICTED REMUNERATION

We propose to modify the law, by way of class order, to require that, when an AFS licensee or its representatives provide financial product advice to retail clients, the licensee must retain a record of the following matters (whether in a material, electronic or other form) for at least seven years from the date that the advice is provided:

(a) any arrangement, or any change to an arrangement, on the basis of which the licensee considers that the conflicted remuneration provisions in Divs 4 and 5 of Pt 7.7A do not apply to the licensee or its representatives because of the transitional provisions in s1528–1531 of the Corporations Act and the regulations made under those sections;

(b) any payments made or accepted under arrangements to which the conflicted remuneration provisions in Divs 4 and 5 of Pt 7.7A do not apply to the licensee or its representatives because of s1528–1531 of the Corporations Act and the regulations made under those sections; and

(c) where the licensee relies on the exemptions in s963B or 963C of the Corporations Act, or Div 4 of Pt 7.7A of the Corporations Regulations, to form the view that a monetary or non-monetary benefit that is given to the licensee or its representatives is not conflicted remuneration, records demonstrating the circumstances on which this reliance is based.

B2Q1 Do you agree with our proposed record-keeping obligations for AFS licensees on the new conduct obligations in Pt 7.7A? If not, why not?

In relation to general insurance or exempt life risk insurance the fact that the advice is provided on the product should be sufficient proof of the operation of the exemption regarding conflicted



remuneration in s963B. NIBA questions whether this requirement is of any real use and believes it may impose an unnecessary additional burden (ie red tape) and could lead to confusion.

The same issue arises in relation to the exemption in s963C for non-monetary conflicted remuneration.

(a) Do you think there is a more cost-effective way to ensure that AFS licensees comply with the conflicted remuneration provisions in Divs 4 and 5 of Pt 7.7A? Please provide details.

NIBA Comment

NIBA does not believe that any obligation should be imposed in this regard concerning the reliance on the exceptions.

(b) Do you think it is appropriate to require AFS licensees to keep records to demonstrate the circumstances on which it relies to form the view that a monetary or non-monetary benefit is not conflicted remuneration because of the exemptions stated in Proposal B2(c)? If not, why not?

NIBA Comment

See above.

B2Q2 Will our proposed record-keeping obligations require AFS licensees to significantly change their existing record-keeping practices? If so, please describe the changes and the likely costs involved.

NIBA Comment

See above.

B2Q3 Are there any practical problems with the implementation of our proposal? Please provide details.

NIBA Comment

See above.

B2Q4 We propose to update our guidance in Section B of RG 246 to reflect our updated record-keeping obligations. Do you think we should provide further guidance on our proposed record-keeping obligations? If so, please provide details.

NIBA Comment

It will depend on the position taken by ASIC in response to the above NIBA submissions.



ASIC Facilitative approach

NIBA supports the ASIC facilitative approach to compliance with the FOFA reforms until 30 June 2014.

If you have any queries or require further information do not hesitate to call.

Dallas Booth

Chief Executive Officer

National Insurance Brokers' Association of Australia