



Response to ASIC Consultation Paper 282

**Remaking ASIC class orders on financial
counselling licensing relief**

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Financial Counselling Australia (FCA)
is the peak body for financial counsellors in Australia.

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About Financial Counselling Australia

FCA is the peak body for financial counsellors in Australia. We support financial counsellors and provide a voice on national issues. We advocate on behalf of the clients of financial counsellors for a fairer marketplace that will prevent financial problems in the first place.

About Financial Counselling

Financial counsellors provide advice to people experiencing financial difficulty. Working in community organisations, their services are free, confidential and independent.

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1. Corporations Instrument (AFS Licence Exemption)

1.1 Overall Comments

We agree with ASIC that CO 03/1063 “is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework.”

Class Order 03/1063 was amended by CO 2015/992 so that financial counselling agencies could accept payments from the Government for people seeking financial counselling as part of the BSWAT Payment Scheme. This extension has also been effective, allowing this scheme to proceed.

1.2 “Eligibility” for Membership

Both the current and proposed class order require a financial counselling agency to take:

all reasonable steps to ensure that each person who provides the financial services on its behalf is a member of, or eligible to be a member of, a financial counselling association.¹

This part of the exemption has caused considerable debate in the financial counselling sector. The issue is whether the requirement should be for mandatory membership of a financial counselling association,² rather than simply eligibility. FCA’s view is that the current wording should remain.

Arguments for “mandatory” membership

Those arguing that the requirement should be for mandatory membership, point to two main difficulties with the current test.

First, there have been examples of individual financial counsellors in some States refusing to join their relevant financial counselling association. Not surprisingly this has created tension between those financial counsellors and the relevant State association, and potentially the employing agency. If the issue is unable to be resolved, ASIC can be drawn into the dispute, as they may be required to assess “eligibility”.

Second, despite the exemption, there are examples of financial counselling agencies that are reluctant to spend funds on training their financial counselling staff. Mandatory membership of a financial counselling association, where membership requires that financial counsellors obtain 20 points of continuing professional development per year, would help to overcome this.

¹ CO 03/1063 – paragraph (f)(i), proposed new instrument currently (5)(2)(e)(i)

² Financial counsellors join their relevant State financial counselling association.

FCA's view

One of the difficulties with mandatory membership of a financial counselling association is the potential for the abuse of this “power”. Unfortunately, there is a recent example of this from 2014-16: a financial counselling association had a dispute with a financial counsellor in their jurisdiction and withdrew their membership. This led eventually to a dispute with another financial counselling agency. It is unclear whether the association then refused membership to the other financial counsellors in that agency, or whether they refused to join. ASIC was then drawn into the dispute as well as the funding body, when the association made complaints about a breach of the licensing exemptions. In our view, the management committee of the association behaved in a capricious and inappropriate way.

While it is positive that since 2015 there are now agreed national standards for membership and accreditation, compliance by financial counselling associations is voluntary. There is no certainty that individual associations may not move to impose different standards – possibly because they think they should be at a “higher” level or have different views.

There are also still parts of the professional framework for the financial counselling sector that are not yet settled. The most important of these are requirements for what is called “external supervision”. Each financial counselling association has a different policy about what this involves. Through FCA’s Representative Council, which comprises two financial counsellors from each financial counselling association, work has begun on developing a national approach. Based on our experience with other national standards, this may take up to four years before there is agreement – this is how long it took to get agreement on national standards for membership and accreditation as well as the national policy on disciplinary matters.

The requirement for mandatory membership of a professional association would also seem to be an unusual regulatory requirement. We are not aware of any similar approaches for other professions (e.g. financial planners, lawyers).

It is also worth noting that from a practical viewpoint, it will be harder in the future for financial counsellors to refuse to join their State associations. This is because we now have a national registration system – financial counsellors that are members of their local financial counselling association receive a unique National Registration Number. This system is managed via FCA, with the State associations verifying membership and approving access. Over time, creditors will increasingly look for this number so that they can identify a bona fide financial counsellor and will be able to search the NRN database as verification.

On balance, our view is that the retention of the current requirement that a financial counselling agency take all reasonable steps to ensure financial

counsellors are “eligible” for membership of a financial counselling association is preferable to requiring “mandatory” membership.

1.3 Remuneration, Fees or Charges

A fundamental precept of financial counselling is that it is delivered without conflict of interest. This is reflected in the exemption in various clauses prohibiting fees or remuneration of any kind.

ASIC proposes to make slight amendments to the clause around remuneration as follows:

Existing clause

no remuneration (whether by way of commission or otherwise) is payable to or on behalf of the financial counselling agency, their representatives or other associates by any person in relation to any action by or on behalf of the client arising from either the financial service or any other aspect of the financial counselling service;

Proposed clause (our highlighting)

no remuneration (whether by way of commission or otherwise) is payable to, or **for the benefit of**, the financial counselling agency, **its** representatives or associates by any person in relation to any action by or on behalf of the client arising from either the financial service or any other aspect of the financial counselling service;

We support the proposed changes which clarify the intent of this clause.

1.4 Definition of “ financial counselling service”

A “financial counselling service” is defined as:

a counselling and advocacy service provided predominantly for the purposes of assisting individuals who are in financial difficulty.

In providing their services, financial counsellors take into account a person’s objectives, financial situation and needs. In other words, they provide advice. As described in the consultation paper, this is the reason that financial counselling agencies require an exemption from a AFS licence.

It would be a more accurate description of the work of a financial counsellor to explicitly include the word “advice” in the definition of a “financial counselling service”, for example:

a counselling, ~~and~~ advocacy **and advice** service provided predominantly for the purposes of assisting individuals who are in financial difficulty.

This change would reinforce for the profession the importance of delivering high quality services and the need for adequate training.

This change would also need to be made in the exemption relating to rural financial counsellors and the credit law exemption.

1.5 Technical Issues

1.5.1 Money Workers' Association of the Northern Territory

The Money Workers' Association of the Northern Territory Incorporated is in the process of dissolving. Financial counsellors working in the NT are now joining the South Australian Financial Counsellors Association. References to this organisation should therefore be removed.

1.5.2 Typographical

Attachment 1 of the consultation paper includes the draft Corporations Instrument 2017/xx.

Section 5(2) has a numbering error so that "e" is inserted instead of "d".

2. Credit Instrument (Credit Licence Exemption)

2.1 Changes to Clarify Issues around Conflicts

These changes will amend Regulation 20(5) of the National Credit Regulations. The words "or on behalf of" in paragraphs 20(5)(b), (c) and (d) will be omitted and the words "or for the benefit of" substituted. These clauses go to the independence of financial counselling and the proposed changes are meant to ensure they operate as intended.

As outlined in section 1.3 above we support these changes.