



FINANCIAL PLANNING  
ASSOCIATION of AUSTRALIA

29 August 2019

ASIC  
Level 5  
100 Market Street  
Sydney NSW 2000

Email: [unsolicited.sales@asic.gov.au](mailto:unsolicited.sales@asic.gov.au)

Dear Sir / Madam

### CP 317: Unsolicited telephone sales of direct life insurance and consumer credit insurance

The Financial Planning Association of Australia<sup>1</sup> (FPA) welcomes the opportunity to provide feedback in response to ASIC's Consultation Paper 317 on unsolicited telephone sales of direct life insurance and consumer credit insurance.

The FPA's feedback in this submission relates to life insurance only.

The FPA strongly supports ASIC's proposal to ban unsolicited telephone sales of life insurance when sold with general advice or no advice.

#### Financial planners and personal advice

The Consultation Paper states that "*financial planners will sometimes provide general advice when selling life insurance, which may be considered a direct method as no personal advice is given*"<sup>2</sup>. If a financial adviser is acting for a life insurance company and sells a product directly to the client with general advice or no advice, the FPA supports ASIC's proposal to treat such activity in the same way as other unsolicited telephone sales of life insurance.

However, the FPA seeks reassurance that the provision of personal advice, including proactive contact with a client pertaining to the provision of personal advice, will not be captured in the proposed ban.

For example, a financial planner may contact a client and provide advice on the importance of having appropriate life insurance, suggesting they obtain personal advice on their life insurance arrangements. It could be that this proactive contact was instigated because the planner noticed the client had reached a certain age or salary level, or there was a change in the regulatory environment, leaving the client with potentially inappropriate insurance for their circumstances, for example. The client agrees to meet with the financial planner for the provision of personal life risk advice. Following the personal advice process, a Statement of Advice (SOA) is provided to the client. The SOA includes recommendations regarding the client's life insurance arrangements. Based on the advice provided,

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<sup>1</sup> The Financial Planning Association (FPA) has more than 14,000 members and affiliates of whom 11,000 are practising financial planners and 5,720 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of FOFA.
- We have an independent Conduct Review Commission, chaired by Dale Boucher, dealing with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 26 member countries and the more than 175,570 CFP practitioners that make up the FPSB globally.
- We built a curriculum with 18 Australian Universities for degrees in financial planning. Since 1st July 2013 all new members of the FPA have been required to hold, or be working towards, as a minimum, an approved undergraduate degree.
- We are recognised as a professional body by the Tax Practitioners Board.

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the client makes an informed decision to apply for life insurance cover. Importantly, the financial planner is acting on behalf of their client, not on behalf of an insurer, and has provided the advice in accordance with their legal obligations and best interests duty under the Corporations Act, the Tax Agent Services Act (TASA) requirements, and the 'Financial Adviser and Financial Planner Code of Ethics' (the Code). Highlighting the need for the client to consider their life insurance arrangements due to a potential change in circumstances or the environment could demonstrate the financial planner is *taking any other steps* in the best interest of their client as required under s961B(2)(g).

Similarly, a referral from an accountant contacting their client to suggest it would be in the client's interest to review their insurance position by seeking personal advice from a licensed financial planner, should not be captured.

ASIC has proposed using its modification power in s992B(1)(c) of the Corporations Act to apply the prohibition on hawking in s992A(3) to the sale of life insurance. Section 992A(3) states:

*(3) A person must not make an offer to issue or sell a financial product in the course of or because of:*

*(aa) an unsolicited telephone call to another person; or*

*(ab) an unsolicited contact with another person in another way that is prescribed by the regulations for the purposes of this paragraph*

The Consultation Paper clearly states ASIC's focus is on the banning of unsolicited contact when such insurance is sold with general or no advice. However, s992A(3) includes the selling or issuing of a product "*because of .....an unsolicited telephone call....or [prescribed] contact*".

The FPA seeks certainty in relation to the above example. The initial contact by the financial planner while unsolicited, specifically related to the need for personal advice, not to sell an insurance product, and the planner was not representing the interests of the insurer. However, the resulting personal advice and the client's application for life insurance was instigated as the result of, or '*because of*', the unsolicited contact.

The FPA therefore seeks reassurance that contact instigated by a financial planner with a client, including highlighting the need for the client to obtain personal advice relating to their life insurance arrangements, will not be captured by the wording of ASIC's extension of the prohibition on hawking. Such contact is based on the client's personal circumstances and is in line with the new Code of Ethics which requires planners to consider their client's long-term interests and likely future circumstances to improve their client's financial wellbeing<sup>3</sup>, the best interest duty in the Corporations Act, and the TASA requirements.

Based on the detail in the consultation paper, the FPA understands the purpose of the proposed ban is to stop unsolicited telephone sales of life insurance *when only general advice or no advice is given*. However, there is a risk that personal advice services could be inadvertently captured due to the confusion around the word 'unsolicited' which is not defined in the Act; and the grey areas between the definitions of personal and general advice.

The FPA recommends the wording of the proposed ban should not prevent financial planners from offering a review of insurance to new or existing clients; or impact other professionals from referring

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<sup>3</sup> Financial Adviser and Financial Planner Code of Ethics, Standard 2, 5 and 6



clients to an adviser or financial planner for personal life risk advice.

### [Key terms](#)

The consultation paper defines a financial adviser as “*an advice provider*”, which it further defines as:

*A person to whom the obligations in Div 2 of Pt 7.7A of the Corporations Act apply when providing personal advice to a client. This is generally the individual who provides the personal advice. However, if there is no individual that provides the advice, which may be the case if advice is provided through a computer program, the obligations in Div 2 of Pt 7.7A apply to the legal person that provides the advice (e.g. a corporate licensee or authorised representative)*

However, this definition ignores the restriction on the use of the terms financial adviser and financial planner in s923C of the Corporations Act and the requirements placed on such a person. A financial adviser/planner as defined in the Act, is not the same as an ‘advice provider’ as defined by ASIC in the consultation paper. Division 2 of Pt 7.7A of the Act can apply to a person who does not meet the requirements to use the terms financial adviser/planner under s 923C.

The role of the financial adviser/planner as defined in the Act is to provide personal advice to retail clients in the best interests of the client. It is not to sell insurance products with general or no advice or in the interests of the insurer.

The FPA recommends:

- ASIC define financial adviser as a person who meets the requirements of s923C of the Corporations Act, and that
- Personal advice services offered to a client by a financial adviser/planner who meets the requirements of s923C be expressly excluded from the ban proposed in CP317. This should include proactive contact of a new or existing client suggesting a they seek personal advice on their insurance arrangements.

### [General advice definition](#)

The effectiveness of this proposed ban will be hampered by the ongoing issue of the definition of general advice in the Corporations Act. General advice does not take a consumer’s personal circumstances into account. However, consumers often misunderstand that the ‘advice’ or information provided during a direct sale of a financial product is designed to sell a product to the consumer unconstrained by the person’s personal circumstance. This misunderstanding is not overcome by the provision of the required general advice warning which still permits entities to perform a sales pitch under the guise of the term ‘advice’.

While this measure proposes to ban unsolicited telephone sales of direct insurance when sold with general or no advice and is welcomed by the FPA, uncovering breaches of this measure will be largely dependent on consumer complaints. If consumers misinterpret the information provided at point of sale as advice that is based on their circumstance, they may be less inclined to lodge a complaint.

The Productivity Commission’s Inquiry into Competition in financial services recommended the



renaming of general advice to improve consumer understanding<sup>4</sup>. The Commission found that:

*“General advice, as defined in the Corporations Act 2001 (Cth), is a misleading term and should be renamed. Any replacement must ensure that the term ‘advice’ can only be used in association with ‘personal advice’ — that is, advice that takes into consideration personal circumstances.*

*Consumer testing of alternative terminology is required to ensure that misinterpretation and excessive reliance on this type of information is minimised. Including time for consumer testing and a transition period to enable industry training and adjustment, a new term should be in effect by mid-2020.”*

The Productivity Commission’s recommendations are in line with ASIC research which found that general and personal advice are not concepts that come to mind when consumers think of financial advice.<sup>5</sup>

As detailed in the consultation paper, there is excessive reliance on this type of promotional information, often provided under the guise of ‘general advice’. We therefore recommend consideration be given to the strength of the current regulations of general advice. In particular, the current licensing exemption for financial product issuers providing general advice under regulation 7.1.33H:

*If you are a financial product issuer, you do not need an AFS licence or authorisation to give general advice about the products you issue or the class of products you issue. .... You must:*

- (a) advise the client that you are not licensed to give general advice about your product;*
- (b) recommend that the person obtain a PDS, if appropriate, and read it before making a decision; and*
- (c) if giving advice about the offer, issue or sale of a financial product, notify the client about the availability or otherwise of a cooling-off regime that applies to the acquisition of the product (or product of the same class or interest in the product): reg 7.1.33H(1)(c). (RG 244.41- RG244.42)*

This exemption distorts the market in favour of product issuers and depletes consumer protections. It promotes a sales culture and is counter to and undermines the financial advice best interest duty in the Corporations Act. The Government has spent the last 8 years bolstering consumer protections around the purchasing of financial products through the introduction of the Future of Financial Advice (FoFA) reforms, the new financial adviser professional standards and ethics regime, and the new product design and distribution legislation and enhanced ASIC regulatory powers.

The FPA recommends the removal of the current licensing exemption for financial product issuers under regulation 7.1.33H would further strengthen the consumer protection afforded by the proposed ban on unsolicited telephone sales of direct life insurance and consumer credit insurance.

The removal of the general advice remuneration exemptions under FoFA must also be considered as they encourage an inappropriate sales cultures and create an environment where consumers are at risk of being sold products which may not be appropriate.

The FPA recommends ASIC act on the findings of REP 614 and the Productivity Commission’s

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<sup>4</sup> Recommendation 10.2

<sup>5</sup> ASIC Report REP 614 Financial Advice: Mind the gap, March 2019



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recommendations in relation to the term general advice.

### Property investment

The FPA strongly recommends the prohibition on unsolicited telephone contact should be extended to property investment. The FPA notes that investment property is not considered a financial product under the Corporations Act, however the selling tactics of property spruikers and the devastating impact property investment schemes can have on consumers has been well documented and evidenced. The unsolicited sale of investment property is often connected to a SMSF arrangement and remains unregulated.

We would welcome the opportunity to discuss with ASIC the issues raised in our submission. If you have any questions, please contact me on [REDACTED] 02 9220 4500.

Yours sincerely

**Ben Marshan CFP® LRS®**  
*Head of Policy and Professional Standards*  
Financial Planning Association of Australia