



## Compliance Guidance You Can Use

# Locum Adviser Requirements For FAP's

By Tony Vidler



*This guidance note is not an exhaustive explanation of everything to consider with Locum Adviser arrangements, but serves to address the main areas of confusion on this topic in today's market.*

## The Big Questions

*These are the big questions we keep hearing that FAP's are wrestling with:*

- What are the actual rules about having a Locum Agreement?
- What does the FMA actually expect of a FAP and its Locum arrangements?
- Am I in breach of my licence if I don't have a Locum agreement in place?
- Am I in breach of a Class 1 licence when I DO have a Locum Adviser acting on behalf of my FAP?
- How do we "test" the Locum Adviser element of our BCP?

## The Facts

There are no specific rules on this aspect of licencing. To explain:

- **There is no rule or specific piece of law outlining Locum Adviser requirements for FAP's.** There is also no specific requirement (and therefore no specific piece of guidance) from the FMA making Locum Adviser arrangements compulsory. The FMA itself simply says (for Class 1 & 2 FAP's) *"You can employ a locum short term if you need to".*



- **However**, the Standard Conditions which apply to a FAP licence do outline objectives the FAP needs to attain and maintain, and they include some clear objectives which *do* create the requirement to *consider* Locum Adviser arrangements for a FAP.
- The FMA does expect all fully licenced FAP's to have a documented "Business Continuity Plan" (BCP), and a robust BCP should address the central questions of how the business continues to provide its services in the event of a severe disruption. Severe disruptions are generally categorised as either:
  - a) Physical event. Your business premises become physically un-usable (e.g. fire, earthquake, etc) and the business has to operate from an alternative location.
  - b) IT-related event. Your essential IT systems and/or data become inaccessible\* (e.g. hacked/ransomed; loss of IT provider service, OR due to a physical event as per above point). That is; you lose the ability to access and use critical systems and data required to run the practice. This is not necessarily the same thing as a data breach (which this paper does not address).
  - c) Key Personnel loss. The emphasis for BCP planning is *short term*. It is about ensuring there is the ability for the FAP to continue looking after clients interests while longer term succession or replacement arrangements are worked out if necessary.
- Therefore the central premise in considering Locum Adviser arrangements is: *what is the short term arrangement for ensuring client advice can be provided by the FAP in the event of a protracted (but not permanent) loss of it's Adviser/s?*
- **Important note:** it is NOT the general intent of a Locum Adviser arrangement (or this guidance) that it covers the running of a practice on behalf of a FAP which has experienced keyperson loss temporarily. The intent is for there to be an arrangement that ensures suitable advice can be delivered to consumers. The actual management of the FAP and all of its other obligations (e.g. to staff, suppliers, landlords, etc) are not the domain of the Locum Adviser arrangement unless specifically addressed and agreed to by both parties.

*\* Accessibility is the primary concern for this element of BCP planning. Data breach may be a BCP event, but it also may not be as a practice may lose control of data/IT systems but still be able to access or use them. Therefore the BCP concerns itself primarily with the accessibility issue, but the FAP does still need to have cyber-security policies and protocols in addition to its business continuity planning to protect data and IT systems. Cybersecurity*



*and IT-related BCP policies inevitably overlap, but they remain separate issues. The first is about protection and security of sensitive information, the second is about being able to continue using those systems to meet licencing obligations in the event of a significant business interruption.*

The Financial Markets Authority standard licencing conditions for FAP's include some provisions which impact upon the Locum Adviser considerations, namely:

- ☐ Standard Condition 4: Outsourcing. Given that the appointment of a Locum Adviser is a form of outsourcing, the requirements for appropriate experience, competency, licencing status/compliance and controls apply for any Locum arrangement. This includes the arrangement being "contracted".
- ☐ Standard Condition 5: you must have a Business Continuity Plan. It is expected under this licence condition that you will have given consideration to, and implement as necessary, managing the impact of the loss of key staff.
- ☐ Standard Condition 6: maintenance of licence requires the FAP to ensure ongoing capability to deliver service at all times.

*The bottom line: It is not mandatory to have a Locum arrangement, but it is mandatory to have considered it and have adequate arrangements in place to ensure a FAP can continue to meet its licencing conditions and provide ongoing service to its clientele.*

*A FAP would be in breach of its licence if it had not made adequate arrangements.*

For example; a Class 1 FAP (with its' single FA) could meet its licence obligations if it had an arrangement in place for another FAP (e.g. another licensee) to simply take over the entire business in the event that the BCP conditions had been triggered. A Locum Adviser agreement might not be the answer, but the triggering of a full succession plan might be.





## Opinion & Guidance

***A Class 1 FAP can only have a single Financial Adviser, so wouldn't the FAP be in breach of the law and licence conditions if another adviser worked for the FAP under a BCP Locum arrangement?***

NO.

It is critical to remember that a Locum Adviser arrangement is only ever meant to be temporary. If it is a temporary arrangement triggered by the BCP then it is conforming to the standard licence conditions, not breaching them.

A permanent addition of another adviser to a Class 1 FAP (e.g. attaching a second FA to the Class 1 FAP on the FSPR) is certainly a breach of licence conditions.

Therefore the key to being compliant in this respect is understanding that this is a temporary arrangement, and as such there should be some controls around the duration of any Locum arrangement, and clear boundaries established under a Locum Agreement as to who is providing regulated advice.

The FMA have advised us (in November 2022):

"Class 1 FAP licences already allow the use of a Locum when the licence holder is unable to perform their own duties. When an FA (who acts as a locum) provides advice to other FAP's retail clients, this is **not** considered as a permanent change in business model that pertains to a licensing consideration, rather, it is an agreement that is activated. You only need to inform the FMA if a locum is activated for a period of 3 continual months or longer. If this is reported to the FMA, we can then consider what impacts the arrangement may have on your licence, on a case-by-case basis."

Therefore, if an Adviser running a Class 1 FAP is in hospital recovering from illness or even heading off on holidays to Europe for 2 months and that is cause to trigger the Locum Agreement there is no obligation to advise the FMA of the agreement being triggered. If the Locum service appears to be staying in force for a longer period than 3 months then there IS an obligation to notify the FMA as that may constitute a more permanent change to the operation of the licenced entity, and the FMA has the right to



review the licencing status when there is the possibility of a long term and/or material change.

***If a Locum Agreement is triggered does the Locum Adviser need to be attached to my FAP on the FSPR?***

NO.

In fact it would actually be a breach of a Class 1 FAP's licence conditions to do that. It would not be a breach for a Class 2 FAP, but it is unnecessary.

Any FAP or FA acting as a Locum Adviser under a BCP arrangement also needs to be mindful that a Financial Adviser can only work for a single FAP unless they have specific permission from the FMA to work for multiple FAP's. Therefore any FA wishing to attach themselves to multiple FAP's on the FSPR would need prior consent from the regulator to operate under multiple FAP's. That process is unnecessary if acting only as a Locum Adviser for a temporary period under a pre-arranged agreement required for Business Continuity Planning purposes.

***Can Financial Institutions whom we have agency agreements with prohibit or prevent a Locum arrangement that a FAP makes?***

Not quite...but they do have some rights.

What is permitted under agency agreements should be covered by the agency agreement itself, and those commercial agreements are not the domain of the regulator to manage or monitor. They are essentially controlled by the institutions themselves. Institutions do not have the legal authority via agency agreements to over-ride the laws or market regulation and prohibit or prevent Locum arrangements being made though.

However, institutions do have responsibilities and rights which go to the heart of their own compliance obligations. That includes (for instance) ensuring that any FA advising upon their products has competency to do so, and is a fit and proper person, and so forth. It is reasonable therefore to expect that institutions have the right to "approve or disapprove" of a particular Locum arrangement, particularly when it comes to the issue of "competency" or ethics. Institutions have a legal obligation to ensure that any representative is adequately trained and competent in the use and application of their



products, and is a suitable person. So institutions certainly have some rights to have a view on Locum Adviser arrangements when it comes to their distributors.

If a FAP did for example 40% of its annual business with the ABC Ltd insurance company, and some 60% of its existing clientele had policies with that same institution, then it is entirely reasonable (and pragmatic for all parties) for ABC Ltd to insist that any FA being appointed under a Locum arrangement to manage that agency in the event of a BCP being triggered would meet the same compliance and competency levels as any other agency holder they might appoint. There are a lot of potentially affected clients in this instance relying upon the competency of any replacement adviser.

In fact all the other considerations which go into appointing an agency holder are relevant for the institution also (e.g. professional references, criminal history, history of dealing with ABC Ltd itself even...).

So....an institution cannot prevent a Locum Agreement being prepared and agreed to by a FAP with another FAP or FA. It can however prevent that Locum from being able to provide the Locum service simply by refusing to allow access to systems or information for the Locum to be able to exercise their duties if they deem that Locum Adviser to be unsuitable. It would be reasonable for the institution to do so if the Locum Adviser did not meet the usual agency requirements and introduced a compliance risk for the institution itself.

Merely having a documented Locum Agreement does not compel institutions to automatically approve of (and effectively give temporary agency to) someone simply because a FAP made a Locum Adviser arrangement.

### ***What about client privacy and a Locum Adviser having authority to view records?***

This looms as a potentially problematic area for most advisers and their clients, and a hefty dollop of common sense needs to be applied by the industry.

The central issue is whether explicit consent has been obtained from each individual client to share information with a Locum Adviser, or whether there is an existing privacy consent process which enables the sharing of client information with other advisers acting on behalf of the lead adviser who originally obtained consent.



In practical terms privacy consent has generally been obtained from clients for decades now, but equally, most of those privacy consents were quite generic and somewhat limited in scope and most of them are not dated for the current Privacy Act (2020). That is; they only provided *limited* consent for the sharing of information.

Moving forward it would be sensible for FAP's to ensure that a more comprehensive privacy consent was obtained which enabled the sharing of information with locum advisers, regulators and compliance auditors for example (as often the existing consents do not extend this far). The problem with this way forward is that it would take significant effort or many years before explicit and specific consents were obtained from all possible clients for a FAP with a large client base. Inevitably then when a Locum Adviser agreement is triggered there is unlikely to be 100% explicit consent from the entire client base for the sharing of information with the locum specifically.

The FMA has indicated that it is aware of this issue and essentially said that it expects industry to make its best endeavours to obtain appropriate privacy consent as rapidly as is feasible, but to be pragmatic and sensible about the issue along the way too.

The recommendation is therefore to make a concerted effort to obtain up to date privacy consent enabling the sharing of information with other required parties (including any Locum Adviser) from clients. If however one finds that a Locum Adviser agreement is triggered before obtaining consent from each individual client then the practical course of action is for the locum to obtain updated consent with each client interaction while exercising their locum duties.

### ***How can you "test" a Locum Adviser arrangement?***



One should not have to test the replacement adviser themselves or the advice that they might give, but simply test the ability of the Locum Adviser to be able to exercise their duties. The Locum Adviser should after all be a compliant and competent FA in their own right, duly attached to a fully licenced and compliant FAP with its own quality controls in place.





So testing "access" by the Locum Adviser is the essential issue. Can the Locum Adviser access the necessary FAP records and/or client files which are required to deliver compliant advice and policy or product servicing obligations?

Potentially this involves the Locum Adviser either being able to physically access office premises and records (i.e. when hard copy records are being kept in a secure location) or electronically accessing records and systems. Testing physical access is fairly straightforward, and testing electronic records is not much more complicated really. That is simply a matter of testing whether the Locum Adviser can access client records and systems if they have the right passwords and logins.

In practical terms we suggest testing access to be done with a temporary login/password change, with the temporary access information being provided to the Locum Adviser who then literally logs in remotely to test whether they can access the necessary systems and software. If that is done successfully a system password reset can then be done to shut the Locum out again and maintain data security. This should be done at least once per year.

The more challenging aspect here is ensuring that access for a Locum Adviser is arranged without creating confidentiality or data breach possibilities on an ongoing basis. The controls on how the Locum Adviser obtains the necessary passwords/logins (or physical keys/security combinations to enter premises) if the Locum Adviser agreement is triggered is potentially the most important aspect then. Some FAP's are handling this by enabling their IT provider to deliver a login to the system to the Locum, and some are taking the "sealed envelope held by the PA" approach. Some are empowering their trusted colleagues (such as Trustees or fellow directors) to exercise their decision-making ability at the required time. All of these approaches can be effective provided the Locum Adviser and any other parties involved understand precisely how to obtain access, and under what circumstances.

### ***Who is liable for the advice being given under a Locum Adviser agreement?***

This is a tough question without a definitive answer. Remembering that it is legally "the FAP" giving advice, not an individual Financial Adviser, then the answer to the question rests with which party the Locum Adviser agreement is made with and what is agreed to by those 2 parties it would seem.

In the absence of a specific and legal arrangement to the contrary the FAP which has lost its key person (but is retaining its licence and using a Locum Adviser to provide service) would continue to be the party responsible for any advice given to its clients.





However, it would seem reasonable to assume that if the 2 FAP's involved in formulating the Locum Adviser agreement both agreed that each would be responsible for the advice it gives, regardless of which entities clients they are giving advice to, then they have agreed to draw a clear line on liability. This interpretation is untested of course, so it sits firmly in the realm of one party's opinion.

However, supporting that interpretation is the fact that any FAP is responsible for the advice it gives to any consumer regardless of whether that consumer is a fee/revenue generating customer of theirs or not. The law is clear on this element. The consumer does not have to be "a client of yours" for you to be liable for the advice you give them.

It is also clear that any FAP can give advice to any consumer in the land (provided the FAP stays within their area of competency, etc), even if that consumer has engaged with other FAP's. In fact any consumer can engage with multiple FAP's any time they wish to, and the consumers do so daily in the ordinary course of doing business. In the typical consumers world it is already normal for them to work with multiple FAP's and for each FAP to be responsible for the advice it gave them.

For example: the bank FAP is responsible for its advice to the same client the insurance broker is working with, who is responsible for their own insurance advice, as is the sharebroker working with the same client, and so on. When the consumer has a complaint about the bank they do not try to hold the sharebroker responsible, and nor does the regulator or a DRS. Any legal attempt to hold the sharebroker responsible for the banks advice to their mutual client would be ridiculous.

So it also seems reasonable to conclude that one can not logically be held liable for advice that one never gave.

Therefore it seems likely that if a Locum Adviser agreement specifies that the Locum Adviser (their FAP) is assuming responsibility for the advice it delivers to other FAP's clients then liability and responsibility lines are clearly drawn and agreed to.

## **Conclusion**

There remains considerable uncertainty (particularly for Class 1 FAP's) on how to implement a totally compliant Locum Adviser arrangement. The most difficult element for some time will be the matter of ensuring client privacy is protected and that any Locum Adviser is meeting the requirements of the Privacy Act 2020 in this respect primarily.



While this element of licencing continues to develop it is clear that the market regulator is adopting a pragmatic and sensible approach to the issues which arise, which should give comfort to the sector.

We recommend the [Locum Financial Advice Arrangements Guide](#) published by the Financial Services Council as a resource in formulating a plan as it highlights a number of business management issues which should be considered alongside the compliance aspects, and is an excellent planning tool.

## Locum Agreement Key Considerations

- ☐ **Suitability:** does any replacement have basically the same competencies, supplier knowledge, and professional expertise? Are they to be trusted with your most valuable business resource (client relationships, income)? Will their style and behaviour reflect well upon your brand?
- ☐ **Agreement Triggers:** what triggers the agreement, and how can it be unwound/terminated?
- ☐ **Services:** what are the extent of services being agreed to? Is the Locum assuming a reactive servicing role, or actively reviewing clients, or actively promoting services? Does it include any management or staff management responsibilities? Is the Locum responsible for maintaining compliance functions for the other FAP?
- ☐ **Client Ownership Rights:** can clients change FAP's? Is some sort of ongoing split expected?
- ☐ **Confidentiality, Record-Keeping and Privacy:** What are the expectations for the Locum to keep records of their advice in your system? Are the 2 FAP's protecting the IP and confidentiality of each others businesses? How is privacy consent going to be tackled?
- ☐ **Responsibility & Liability:** Does the Locum use their own processes, or yours? Which FAP is advice being given under? Where do complaints get lodged?
- ☐ **Remuneration:** Hourly rate? Split commissions? Share of trail/renewal? How is the Locum being paid, and for what?



**DISCLAIMER!**

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