

Chapter 1

Introduction

1.1 On 4 September 2014, the Senate referred the Corporations Amendment (Streamlining of Future Financial Advice) Bill 2014 (the bill) to the Senate Economics Legislation Committee for inquiry and report by 30 September 2014.

1.2 An earlier iteration of the bill was referred to the committee on 20 March 2014 for inquiry and report. The committee tabled its report on the earlier version of the bill on 16 June 2014.

1.3 On 28 August 2014, the House of Representatives agreed to seven amendments to the bill proposed by the government. This inquiry considered the amended form of the bill.

Purpose of the bill

1.4 The bill is intended to implement the government's election commitment to reduce compliance costs imposed on the financial services industry by amending Part 7.7 of the *Corporations Act 2001*. Part 7.7A is also referred to as Future of Financial Advice (FOFA). The bill includes the following key amendments to FOFA:

- removing the need for clients to renew their ongoing fee arrangement with their adviser every two years (also known as the 'opt in' requirement);
- making the requirement for advisers to provide a fee disclosure statement only applicable to clients who entered into their arrangement after 1 July 2013;
- removing paragraph 961B(2)(g), the 'catch all' provision, from the list of steps an advice provider may take in order to satisfy the best interests obligation;
- better facilitating the provision of scaled advice; and
- providing a targeted provision that permits benefits on general advice in certain circumstances, but expressly prohibiting payments commonly known as commissions.¹

Recommendations of the previous committee report

1.5 As noted above, the Senate Economics Legislation Committee tabled a report on an earlier iteration of the bill on 16 June 2014. That report found that the proposed amendments achieved a good balance between protecting consumers and providing sound professional and affordable financial advice. The report recommended that the bill be passed, subject to the government considering two other recommendations:

1 Revised Explanatory Memorandum, *Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014*, pp. 4–5.

- (a) Recommendation 1 was that the Explanatory Memorandum include a paragraph that clearly and unambiguously spells out the best interests obligations—sections 961B(1) and (2), 961G, 961J and 961H—and the level of consumer protection they provide; and that the government consider closely how the separate obligations work together and whether any further strengthening is required to ensure that a provider cannot circumvent these best interests obligations.
- (b) Recommendation 2 was that the Explanatory Memorandum make clear that it is not the government's intention to reintroduce commissions; that the government consider the provisions governing conflicted remuneration and redraft them to ensure that there is greater clarity around their implementation; and that the government give consideration to the terminology used in the Explanatory Memorandum and legislation (for example, section 766B), such as 'information', 'general advice' and 'personal advice', with a view to making the distinction between these terms much sharper and more applicable in a practical sense when it comes to allowing exemptions from conflicted remuneration.

1.6 The committee notes that the government has considered and accepted the committee's recommendations, and as such has made appropriate parliamentary amendments to the bill and issued a revised Explanatory Memorandum.

Changes to the bill since the first report

1.7 The Minister's second reading speech in the Senate indicated that the bill:

...takes into account the relevant recommendations of the recent Senate Economics Legislation Committee inquiry into the Bill and makes further improvements to the Statement of Advice provisions, consistent with an agreement reached between the Government, the Palmer United Party and the Australian Motoring Enthusiast Party.²

1.8 In relation to the committee's first recommendation outlined in the previous section, the Revised Explanatory Memorandum includes a section clearly explaining the interaction of the best interest duty established by subsection 961B(1) with other related obligations in the Corporations Act (including sections 961G, 961H, 961J and 961L).³

1.9 With regard to the committee's second recommendation, the Revised Explanatory Memorandum clearly sets out that the general advice exemption from the ban on conflicted remuneration ('the general advice provision') does not allow the

2 *Proof Senate Hansard*, 1 September 2014, p. 77.

3 Revised Explanatory Memorandum, p. 11.

payment of commissions on general advice, and that it was never the government's intention that it should do so.⁴

1.10 Moreover, the bill itself now explicitly establishes that that the general advice provision 'does not permit payments commonly known as commissions'.⁵ The bill now also establishes regulation-making powers that would allow circumstances in which all or part of a benefit is to be treated as conflicted remuneration to be prescribed. As the Finance Minister and Acting Assistant Treasurer, Senator the Hon. Mathias Cormann, explained:

The Government's changes also provide that certain incentive payments related to the provision of general advice are not conflicted remuneration.

This is not and never has been designed to bring back commissions for financial advisers.

The Government is moving to put this absolutely beyond doubt by prescribing that any payment related to the provision of general advice cannot be an upfront or a trailing commission.

That is, the legislation and the regulations will provide an explicit prohibition on:

- Any payment made solely because a financial product of a class in relation to which the general advice was given has been issued or sold to the client; and
- Any recurring payment made because the person has given the general advice.

This prohibition comes on top of requirements that:

- The person providing the general advice has to be an employee of the financial product provider and be transparently operating under the name, trademark or business name of the product provider; and
- The person did not provide personal advice (other than in relation to basic banking, general insurance or consumer credit) to any retail client over the previous 12 months; and
- The general advice can only be provided in relation to products issued or sold by the provider, or under the name, trade mark or business name of the provider.

To put absolutely beyond doubt how serious the Government is about not permitting commissions in these circumstances, we also intend to put in place regulation-making powers that may prescribe circumstances in which all or part of a benefit is to be treated as conflicted remuneration.

Therefore, if—contrary to our clear expectation and our intention not to bring back conflicted remuneration—developments in the market warrant

4 Revised Explanatory Memorandum, p. 27.

5 Revised Explanatory Memorandum, pp. 30–31.

our intervention, we could and would address this issue very quickly through regulations. We do not believe this will be necessary.

The above changes are consistent with our long stated policy intent not to bring back commissions for financial advisers and go further than the relevant recommendations of the Senate Economics Legislation Committee inquiry recommendation.⁶

1.11 Pursuant to the agreement reached between the government, the Palmer United Party and the Australian Motoring Enthusiast Party, the bill also includes amendments to the Statement of Advice (SOA) requirements. Specifically, the amendments:

- provide for additional disclosure and information in the SOA in relation to existing rights of the client and obligations of the provider of advice (as explained in greater detail below);
- ensure that any instructions for further or varied advice from the client are: documented in writing; signed by the client; and acknowledged by the providing entity, or an individual acting on behalf of the providing entity; and
- require that the SOA be signed by both the provider of the advice and the client.⁷

1.12 As the Revised Explanatory Memorandum sets out, the bill would require that advisers include the following statements and information in SOAs to ensure clients are aware of their existing rights and their adviser's obligations under the Corporations Act:

- the provider of the advice is required to provide the advice in accordance with the best interests duty (section 961B);
- the provider of the advice genuinely believes that the advice given is in the best interests of the client, given the client's relevant circumstances; the term 'relevant circumstances' is given meaning by section 961B of the Act;
- the provider of the advice is required in circumstances specified under section 961J to give priority to the client's interests when giving the advice;
- information on fees that have been, or may be, charged to the client in relation to the advice;
 - This includes fees by the providing entity; a related body corporate of the providing entity; a director or employee of the providing entity or a related body corporate; an associate of any

6 Senator the Hon. Mathias Cormann, Minister for Finance and Acting Assistant Treasurer, Media Release, 'The way forward on financial advice laws', 20 June 2014, <http://mhc.ministers.treasury.gov.au/media-release/020-2014/>.

7 Revised Explanatory Memorandum, p. 5.

of the above; or any other person in relation to whom the regulations require the information to be provided.

- if the client enters into an ongoing fee arrangement with the providing entity to which Division 3 of Part 7.7A applies, that the providing entity must give the client a fee disclosure statement each year in relation to the ongoing fee arrangement;
- if the providing entity recommends that the client acquire a financial product, a statement advising the client that they may have the right to return the product under Division 5 of part 7.9 within a cooling off period; and
- that the client may seek further or varied advice from the providing entity at any time.⁸

1.13 Along with changes to the bill made in response to the committee's recommendations and through negotiations with the Senate, the bill also seeks to lengthen the period of time within which advisers are required to send a fee disclosure statement to a client. Currently, a fee disclosure statement must be provided to clients where an ongoing financial relationship exists within 60 days; the bill would change this to 30 days.⁹

Scope and conduct of this inquiry

1.14 The committee advertised the inquiry on its website and wrote to relevant stakeholders and other interested parties inviting submissions by 15 September 2014. The committee received 17 submissions, listed at the Appendix. The committee did not hold any public hearings.

1.15 The committee's inquiry and report on the earlier version of the bill gave extensive consideration to the key issues raised by the bill. The committee received 36 submissions to the earlier inquiry, and held a public hearing in Canberra on 22 May 2014. Notwithstanding the abovementioned changes to the bill and the Explanatory Memorandum, the bill in its current iteration remains fundamentally the same in its intent and effect as the earlier version of the bill. As such, the committee holds that the central finding from the previous inquiry applies equally to the current bill: that is, that the proposed amendments achieve an appropriate balance between providing consumer protection and sound professional and affordable financial advice.¹⁰

1.16 This report does not revisit issues addressed in the committee's earlier report. Instead, this report should be read in conjunction with the earlier report. At the same

8 Revised Explanatory Memorandum, pp. 45–46.

9 Revised Explanatory Memorandum, p. 20.

10 Senate Economics Legislation Committee, *Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 [Provisions]*, June 2014, pp. 95–96.

time, the committee notes that a number of organisations used their submissions to the current inquiry to state or reiterate their views on issues covered in the previous committee report.

Acknowledgements

1.17 The committee thanks all who made a submission to the inquiry.