Chapter 2

Views on the bill

2.1 As noted in the previous chapter, the bill has been amended since it was last considered by the committee. Changes to the bill include:

- an explicit provision confirming that the general advice exemption from the ban on conflicted remuneration does not permit payments commonly known as commissions;
- amendments to the SOA provisions, consistent with an agreement between the government, the Palmer United Party and the Australian Motoring Enthusiast Party; and
- an extension of the time period within which fee disclosure statements must be provided to a client.

2.2 The views of submitters on these changes are discussed below. As noted in the previous chapter, this report does not address issues covered in the committee's report on the previous version of the bill.

Views on changes to the general advice exemption

2.3 The Financial Planning Association of Australia (FPA) welcomed the amendments to the general advice exemption. In the FPA's view, the bill clearly distinguishes between commission payments and ordinary forms of remuneration 'which pose a more manageable risk of conflicts of interest'.[1]

2.4 The Association of Financial Advisers (AFA) also wrote in support of the changes made to the general advice exemption. These changes would, it argued, help ensure that there was no return to conflicted remuneration for financial advisers who provided personal advice on superannuation and investment products. The AFA also noted that the changes ensured that what is payable on general advice is not a commission and could not be directly linked to the sale of a particular product:

> This is an employee performance bonus mechanism, not a sales commission. Where a benefit might be paid in connection with the provision of general advice it will be clear to the consumer that this is with respect to a product that is directly related to the employer of the general advice provider. Accordingly there should be a reduced risk of the consumer assuming that this was personal advice and that there was no connection between the advice provider and the product.[2]

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1 Financial Planning Association of Australia, *Submission 6*, p. 8.

2 Association of Financial Advisers, *Submission 5*, p. 3.

2.5 The AFA also noted that the general advice exemption had been greatly modified since it was first proposed in January 2014. In light of these modifications, the AFA indicated it was now confident that the exemption was not available to its members, who provide personal advice rather than general advice:

> It is unfortunate, that much of the negative campaigning on this issue was initially directed at financial advisers through an assertion of a linkage between this exemption and financial advisers. We are pleased that the final version of the Bill makes it particularly clear that this is not relevant to financial advisers. In the meantime, much of the commentary has wrongly questioned the integrity of financial advisers and their involvement in seeking this exemption. It is extremely difficult to undo the damage that has been done by the parties behind this campaign of misrepresentation of the facts. The AFA is in no way seeking the re-introduction of commissions for superannuation and investment products.[3]

2.6 The Australian Institute of Superannuation Trustees (AIST) emphasised its opposition to the payments of commissions on advice, and argued that the wording of the legislation was problematic in giving effect to the prohibition on commissions. Specifically, the AIST took issue with the definition of one type of commission as being 'a 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'.[4] The use of the word 'solely', the AIST suggested, qualified the definition in a way that could open the door to commission payments. The AIST noted that the bill establishes that:

> …the use of the word "solely" is used to allow commissions paid where other performance measures are also allowed. This measure could allow frivolous performance measures to be included in a "balanced scorecard" arrangement in order to pay commissions.[5]

2.7 With regard to the AIST's concerns, it is worth noting the Revised Explanatory Memorandum's point that:

> …a payment structured in a manner that, prima facie, is not *solely* because of the general advice may—still—not be permitted. For example, if the payment were in relation to a performance target that would not be seen as reasonable, the payment may be seen to have been made *solely* because of the general advice and thus would not be permitted.[6]

Views on changes relating to Statements of Advice

2.8 As outlined in the previous chapter, as part of an agreement between the government, the Palmer United Party and the Australian Motoring Enthusiast Party,

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3 Association of Financial Advisers, *Submission 5*, p. 3.

4 Revised Explanatory Memorandum, p. 34.

5 Australian Institute of Superannuation Trustees, *Submission 4*, p. 3.

6 Revised Explanatory Memorandum, p. 34.

the bill includes amendments to the SOA provisions in the Corporations Act. These amendments provide for additional disclosure and information in SOAs, and require that SOAs are signed by both the advice provider and the client. The changes would also ensure that any instructions for further or varied advice from a client are documented in writing, signed by the client, and acknowledged by the advice provider.

2.9 The new requirements elicited a mixed response from submitters. Some submitters, for example, questioned the benefit of the changes for consumers. For example, while the AIST was generally supportive of the SOA requirements as a means of ensuring an SOA was provided to a client, it also suggested the explanatory memorandum had not clearly established how the measures would protect consumers.[7]

2.10 Similarly, the Governance Institute of Australia contended that the SOA measures did not address its concerns about what it regarded as the weakening of consumer protections by the bill.[8] For its part, Industry Super Australia argued that while the SOA measures:

> …represent a genuine attempt to redress the stripping of important consumer protections contained in the original FoFA legislation, they will offer only limited additional protection for consumers, not the least of which because they fail to tackle the conflicted remuneration changes.[9]

2.11 Industry Super Australia expressed further concerns that because the new SOA requirements did not apply to general advice, they would:

> …further exacerbate the regulatory gap between personal and general advice, providing perverse incentives for institutional advice providers to sell complex products through general advice channels and steering consumers away from advice which takes into account their personal circumstances.[10]

2.12 More broadly, Industry Super Australia suggested that the SOA changes were predicated on disclosure being an effective basis for consumer protection. Industry Super Australia questioned this assumption, suggesting research and experience demonstrate that 'disclosure alone is not effective to protect consumers when conflicts of interest are allowed to exist in the financial advice industry'.[11]

2.13 Submitter views on specific elements of the new requirements are summarised below.

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7 Australian Institute of Superannuation Trustees, *Submission 4*, p. 2.

8 Governance Institute of Australia, *Submission 1*, p. 2.

9 Industry Super Australia, *Submission 9*, p. 5.

10 Industry Super Australia, *Submission 9*, p. 5.

11 Industry Super Australia, *Submission 9*, p. 5.

New SOA content requirements

2.14 The amendments include requirements for new content in SOAs, including a statement that the provider of the advice genuinely believes that the advice provided is in the best interests of the client, given the client's relevant circumstances (as defined by section 961B of the Corporations Act).

2.15 The Financial Services Council (FSC) raised concerns about potential confusion in relation to the 'genuinely believes' statement in SOAs. Specifically, the FSC suggested that the Explanatory Memorandum should confirm that the objective of including the phrase 'genuinely believes' is not to give rise to a new test, but 'merely to advise the client that the advice provider has met the best interest duty under s961B [of the] *Corporations Act (2001)*'.[12]

2.16 The Australian Bankers' Association (ABA) noted that there is little guidance in the Corporations Act or general law as to what would constitute evidence that the provider 'genuinely believes' that the advice is in the best interests of the client. For clarity, the ABA proposed that the Explanatory Memorandum sets out that:

> …evidence that the financial adviser has complied with the best interests duty safe harbour steps set out in s961B(2) should be sufficient to prove that the financial adviser genuinely believes that the advice is in the best interest of the client.[13]

2.17 In their joint submission, CPA Australia and Chartered Accountants Australia and New Zealand questioned how effective the new content requirements of the SOA would be:

> Simply by adding a statement in the SOA that the financial adviser is required to provide advice in the client's best interests, that they believe their advice meets this obligation and they have given priority to the client's interests does not mean this is actually the case.
>
> In fact it may even lead to a false sense of comfort for a client, as they may feel they have no need to review the statement of advice in the belief that all recommendations are in fact appropriate for them.
>
> If this measure is adopted, we believe that the required disclosures must be made at the beginning of the SOA in a clear, concise and effective manner to ensure it is both read and understood by the client.[14]

2.18 Industry Super Australia argued it might in fact prove counterproductive to require clients to countersign an SOA which included a statement that the advice provider 'genuinely believed' the advice provided was in the client's best interest. Industry Super Australia reasoned that:

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12 Financial Services Council, *Submission 15*, p. 5.

13 Australian Bankers' Association, *Submission 2*, p. 3.

14 CPA Australia and Chartered Accountants Australia and New Zealand, *Submission 10*, p. 8.

> …clients who have received conflicted or poor quality advice which results in loss may feel as though they are to blame. This ill-founded sense of responsibility is likely to increase where advice providers can produce a copy of the client's SoA in which they have acknowledged receipt of advice which purports to be in their best interests. Accordingly, wherever a client signature is required on a SoA, it should be accompanied by a statement that this is not evidence of the client verifying that the advice is in their best interests.[15]

2.19 Arguing that the new SOA requirements 'add no meaningful protections for consumers', CHOICE also raised concerns that some of the new SOA content requirements would be misinterpreted by consumers:

> For example, the statement that "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 (within the meaning of section 961B)" could lead a reasonable consumer to conclude that an adviser will act in their best interests. This simple conclusion is easy to reach without a thorough understanding of how s961B restricts and adds loopholes to the obligation for an adviser to act in a client's best interest.[16]

2.20 The Stockbrokers Association of Australia was particularly critical of the new SOA requirements, suggesting they would increase cost and complexity in the service delivery of its members, for little benefit. The Stockbrokers Association was particularly concerned about how the new requirements would operate in relation to the provision by stockbrokers of time-critical market and stock information and advice:

> In stockbroking, in contrast to financial planning, much business is transacted over the telephone. Clients want real-time market and stock information and advice, and want to take action immediately, based on that advice. In relation to Statements of Advice, the law already acknowledges this, by permitting SOAs to be sent to clients up to 5 days after the service is given, in time-critical situations. This allows shares to be bought or sold straight away based on advice so as not to risk market movements during the time it would otherwise take to produce and send the SOA to the client. The current provision is sensible and facilitates timely advice to clients, with no loss of consumer protection. If clients need to sign and return all SOAs prior to trading, it may be contrary to the client's best interests. Moreover, such restrictions could significantly reduce trading volumes in a market whose volumes are already low.[17]

2.21 More broadly, the Stockbrokers Association suggested that the requirements to have SOAs and changes in instructions signed-off by clients would 'not increase

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15 Industry Super Australia, *Submission 9*, pp. 7–8.

16 CHOICE, *Submission 13*, p. 3.

17 Stockbrokers Association of Australia, *Submission 12*, p. 5.

consumer protection, but will detract from retail clients receiving affordable, high quality financial advice, and will create unnecessary and costly red tape'.[18]

2.22 In contrast, the AFA argued that the additional content to be included in an SOA would 'reinforce the obligations of the financial adviser and act to ensure that they are specifically addressed as part of the process of delivering the advice'.[19]

New signature and acknowledgement of receipt requirements

2.23 CPA Australia and Chartered Accountants Australia and New Zealand noted that they had no objection to the requirement for a client to sign an SOA to acknowledge receipt, but questioned the benefit of the measure for consumers:

> There have been previous examples where clients have been requested by their financial adviser to sign the statement of advice to acknowledge the SOA. One such example was Storm Financial, where on reflection it was evident that many clients did not understand the advice they were provided, despite the fact in some circumstances they had signed every page of the SOA.
>
> Further, given the providing entity does not fail to provide an SOA merely because the client does not acknowledge the SOA we again question the relevance of this new provision.[20]

2.24 Similarly, the National Insurance Brokers Association suggested the requirement for a client to sign an SOA to acknowledge receipt 'seems unlikely to have any significant end benefit for the customer whilst increasing compliance costs'.[21]

2.25 The AFA noted several practical issues that it believed could arise as result of the amendments, particularly for financial advisers who conduct a large proportion of their business via phone or email:

> This is likely to be the case for advisers who operate in regional and rural areas, where proximity to clients is an issue. We would like to ensure that the guidance provided around this measure gives particular emphasis to the rural/regional scenario and clearly addresses the options with respect to electronic signatures.[22]

2.26 The FSC noted that the Revised Explanatory Memorandum provides that client and adviser (or advice provider) signatures on an SOA could be either in writing or by electronic signature (as defined in section 10 of the *Electronic Transactions Act*

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18 Stockbrokers Association of Australia, *Submission 12*, p. 6.

19 Association of Financial Advisers, *Submission 5*, p. 3.

20 CPA Australia and Chartered Accountants Australia and New Zealand, *Submission 10*, p. 7.

21 National Insurance Brokers Association, *Submission 3*, p. 9.

22 Association of Financial Advisers, *Submission 5*, p. 2.

1999). The FSC was supportive of this flexibility, but noted that this reference to using electronic signatures only appeared to apply to the SOA amendments, and not to the amendments requiring that a client sign instructions for further or varied advice. The FSC recommended that the reference enabling electronic signatures should also extend to those amendments.[23]

2.27 For the sake of providing further flexibility, the FSC suggested that consideration be given to allowing a client to acknowledge receipt of the SOA over the phone through a voice recording, rather than by written or electronic signature. This option, the FSC argued, would:

> …provide more efficient and effective solutions for clients and advice providers in acknowledging the advice received and would be consistent with the government's objectives of reducing compliance burden.[24]

2.28 Similarly, the ABA suggested that some advisers provide advice to clients by phone, videoconference, online or through other digital technologies, or are seeking to do so. The ABA recommended that:

> …the Bill and the [Explanatory Memorandum] be amended to reflect that a voice recording of the client's verbal acknowledgment or other forms of electronic or digital verification should meet the requirement for a client signature in s946A(2B) and s946A(2E). It is important for the law to accommodate and encourage technology and recognise that financial advice is not always [provided] face to face and through hard copy documentation.[25]

2.29 The FSC further suggested that a client could acknowledge receipt of a SOA when receiving online advice by clicking 'accept'.[26] BT Financial Group made the somewhat broader suggestion that these obligations should be able to be discharged 'in a manner that is technology neutral'. It suggested that this would be:

> …consistent with other obligations in the *Corporations Act 2001* and the recent Financial System Inquiry Interim Report which makes several observations about the benefits of adopting a technology neutral approach – including that it can provide flexibility to adapt to the future and reduce the need for constant regulatory change.[27]

2.30 The Australian Financial Markets Association (AFMA) wrote that the requirements for SOAs to be signed by clients and returned to the advice provider would prove:

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23 Financial Services Council, *Submission 15*, pp. 4–5.

24 Financial Services Council, *Submission 15*, pp. 4–5.

25 Australian Bankers' Association, *Submission 2*, pp. 1–2.

26 Financial Services Council, *Submission 15*, p. 5.

27 BT Financial Group, *Submission 7*, p. 2. Also see Stockbrokers Association of Australia, *Submission 12*, p. 6.

> …impracticable and administratively burdensome. SOAs are rarely (if ever) issued 'on the spot'. They require detailed and lengthy effort to prepare and are generally sent to the client some time after the adviser and client have met face-to-face. As such, the client must sign the document and send it back to the adviser – yet another document the client must sign and despatch after completing a raft of engagement documents such as application forms, banking authorities, transfer forms and so on.[28]

2.31 The AFA also argued there is a need for clarification regarding the obligations of a financial adviser should a client refuse to sign an SOA, particularly in instances where the client has declined to accept the advice provided:

> This should not be an unlimited obligation in the circumstances where the financial adviser has taken all practical steps, but the client still refuses to sign the SoA. In many cases it would be impractical to enforce a client to sign for the receipt of an SoA, where that client declines to accept that advice.[29]

2.32 The Stockbrokers Association of Australia also argued that the implications of a client not signing an SOA required further consideration:

> A very practical issue that needs to be considered in any provision requiring documents to be signed or acknowledged by clients is what happens if a client fails to sign and/or return them to the licensee. Traditionally, the return rate for such an exercise can be low. Does the advice lapse? Should there be a time limit? What if the client cannot be contacted? In rapidly changing market conditions, stockbrokers are not able to guarantee future price movements in stocks that are the subject of an SOA, and therefore should not be bound by the advice contained in an SOA for an unreasonable time into the future. This is a very problematic area, and could lead to great uncertainty for clients and advisers alike – and unnecessary complaints - unless it is properly constructed.[30]

2.33 AFMA noted the Explanatory Memorandum's point that in signing an SOA a client was not agreeing to or accepting the SOA; rather, the client would be acknowledging the receipt of the document. However, AFMA suggested that the client will need to have this distinction explained to them:

> This will no doubt lead to misunderstandings, given that any signature on a document is usually associated with a binding agreement or contract. SOAs are not contractual documents. An SOA is the provision of advice which the client may choose to ignore in whole or part, or indeed, act in contradistinction to the contents. Furthermore, any perception that the client

28 Australian Financial Markets Association, *Submission 11*, p. 2.

29 Association of Financial Advisers, *Submission 5*, p. 2.

30 Stockbrokers Association of Australia, *Submission 12*, pp. 6–7.

> has agreed to the advice may give pause to a client wishing to seek redress because of poor advice (in as much as 'but I agreed to the advice').[31]

2.34 The ABA proposed that the requirement for the client to sign an SOA only apply when the client agreed to proceed with the implementation of the advice:

> It is current industry practice for the providing entity to ensure the client signs the SOA or an alternative document known as an Authority to Proceed (ATP) where the client has chosen to proceed with the advice. This clarification will codify existing industry practice, providing better consumer protection in circumstances where the client will be implementing the advice, without resulting in a substantial and potentially costly change to current industry practice.[32]

2.35 While supportive of the requirements for an adviser to obtain signed instructions with respect to a client seeking further or varied advice, the AFA sought clarification on what an adviser should do in situations where an adviser has acted on a client's verbal instructions and the client subsequently refused to put this in writing.[33]

Documenting further or varied advice

2.36 The FPA expressed concern about the introduction of the terms 'further advice' and 'varied advice' into the Act without a legislative framework to support them. It suggested that there is a need for further guidance on the circumstances in which the proposed documentation requirements for further or varied advice would apply. Specifically, the FPA pointed to a need for guidance as to whether:

> …this new disclosure obligation reflects existing practice to update the advice as the circumstances, needs, and objectives of the client change, or if it applies in other cases as well.[34]

2.37 The FSC, meanwhile, suggested that if the intent of the requirement that a client provide documented instructions for further or varied advice was that it should only apply to further or varied personal advice (as FSC assumed it was), and not to general advice or advice that did not require a SOA, this should be expressly stated.[35] The ABA made similar points in its submission; it suggested that the requirement should not extend to general advice or advice that would not require an SOA. The ABA further argued that if the requirement was to extend to further or general advice following the provision of personal advice, this would be:

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31 Australian Financial Markets Association, *Submission 11*, pp. 2–3.

32 Australian Bankers' Association, *Submission 2*, p. 2.

33 Association of Financial Advisers, *Submission 5*, pp. 2–3.

34 Financial Planning Association of Australia, *Submission 6*, p. 5.

35 Financial Services Council, *Submission 15*, p. 5.

> …problematic as the providing entity will need to create new processes for recording and storing the instructions given that detailed records of general advice are generally not maintained in connection with general advice. Such processes would drive substantial inefficiency in the provision of general advice.[36]

2.38 The ABA questioned the application of the requirement for documentation of further or varied advice, and in particular how this requirement would operate in a time critical situation:

> The [Explanatory Memorandum] at [paragraph] 4.13 provides an example of a 'market crash' where either time critical advice or further market related advice might be given. In respect of time critical advice, we propose that the requirement to document, sign and acknowledge the instructions applies (and a SOA be given as required by current law), however, in respect of further market related advice where a relevant SOA has already been provided and there is an established relationship with the client, the requirements to document, sign and acknowledge the instructions should not apply. For further market-related advice, the consumer is protected by the requirement to record the client's instruction and basis for any advice in a Record of Advice (ROA). ROA processes have generally been well systematised and allow for the efficient provision of market related advice which is often time sensitive and given very frequently.[37]

Views on changes to the fee disclosure statement timeframe

2.39 As noted in the previous chapter, the bill would change the time period in which advisers are required to send a fee disclosure statement to a client in an ongoing fee arrangement. Whereas the current law requires that a fee disclosure statement be provided to a retail client within 30 days of the anniversary of the day the ongoing arrangement was entered into, the bill would extend this to 60 days.

2.40 The AIST argued that the original 30 day timeframe was sufficient, and opposed the change.[38] In contrast, the AFA expressed strong support for the amendment to the timeframe for the provision of fee disclosure statements from 30 days to 60 days. The AFA argued:

> The requirement to issue FDS's within 30 days places significant pressure upon financial advice practices which could negatively impact the provision of advice to clients of the practice. There is often a significant delay in the provision of information from product providers to licensees and thus individual advice practices, which places huge and unnecessary pressure on the whole process. For advisers who would prefer to deliver an FDS in a face to face manner, it may not be possible or convenient for clients to attend an appointment in the limited window of opportunity that exists at

36 Australian Bankers' Association, *Submission 2*, p. 2.

37 Australian Bankers' Association, *Submission 2*, p. 3.

38 Australian Institute of Superannuation Trustees, *Submission 4*, p. 3.

> the end of this 30 day period. Extending this deadline by a further 30 days will not have any impact upon consumer protection, will be more convenient for clients and will enable businesses to operate the FDS process more efficiently. In fact a delay is likely to mean greater accuracy in the statements.[39]

Committee view

2.41 The committee welcomes the new measures in the bill and text in the Explanatory Memorandum putting beyond doubt that it is not the government's intention to reintroduce commissions. The committee is satisfied that the bill, as it is now drafted, makes it very clear that the general advice exemption from the ban on conflicted remuneration does not permit commission payments.

2.42 The committee notes that some stakeholders have expressed concerns about the new SOA requirements. While the committee is generally satisfied that the apparent intent of the new measures is sound—that is, to reinforce the obligations of financial advisers and enhance client awareness of these obligations—the committee nonetheless believes the government will need to carefully monitor the implementation of the new requirements to ensure they operate efficiently and effectively in realising this intent.

2.43 While this report does not consider the entire bill, the committee maintains that the central finding of the committee's previous report on the earlier version of the bill still holds—that is, the proposed amendments to FOFA strike a proper balance between providing adequate consumer protection and sound professional and affordable financial advice.

Recommendation

2.44 The committee recommends that the Senate pass the bill.

Senator Sean Edwards
Chair

39 Association of Financial Advisers, *Submission 5*, p. 4.