

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

29 May – 31 May 2012

Question: BET 70

Topic: Trio & FoFA Reforms

Hansard Page: Tuesday 29 May 2012, page 99

Senator SHERRY asked:

CHAIR: Just one final point. In terms of Trio—and I do not seek an answer now—the FoFA reforms that have gone through the House of Representatives obviously have to go through the Senate. Could you take on notice how you would believe those FOFA reforms that are in process, assuming they go through the Senate, would assist with respect to a Trio or a Trio-like episode? They are not totally relevant, but I know certainly some of them are.

Answer:

The FoFA reforms will bring important changes to the financial advice sector, and some of those reforms could have assisted in preventing or addressing some instances of advisor misconduct connected with Trio.

For example, in its report on Trio, the Committee noted there was evidence to suggest that advisers' recommendations were influenced by the high commissions paid by Trio. Had the FoFA ban on conflicted remuneration, including commissions, applied at the time, this source of potential conflict may not have been present. Additionally, the introduction of a best interests duty will provide a clearer standard of conduct than is presently set out in the law, and provide ASIC with further means through which to take action against inappropriate advice.

Some Trio investors were advised by accountants in relation to their self-managed superannuation funds. Due to the fact that an AFS licensing exemption is currently provided for advice by accountants on the establishment and closing of self-managed superannuation funds, ASIC had little jurisdiction to review accountants' conduct in relation to Trio. As it is proposed that this exemption will be removed under the FoFA reforms, ASIC will have more scope to monitor and review accountants' advice.

Additionally, the FoFA reforms will provide ASIC with greater scope to take action in relation to misconduct in financial services. Amendments to the Corporations Act mean that ASIC may now suspend or cancel an AFS licence on the basis of anticipated future conduct if ASIC has reason to believe that the licensee *is likely to* contravene their AFS obligations. Previously, ASIC could only suspend or cancel an AFS licence if we had reason to believe that the licensee 'will not comply with' a financial services law. The new test makes it clear that a likelihood of a future breach is sufficient grounds to cancel or suspend an AFS licence.

Other legislative amendments mean that ASIC may also now make an order banning a person from providing financial services if we have reason to believe that the person *is likely to* contravene their legal obligations. The former provisions required ASIC to have reason to believe that the person 'will not comply with' those obligations. The changes clarify the test in the same way as the test for suspending or cancelling a licence. ASIC has also been given the power to make a banning order if we

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have reason to believe that a person is not of good fame or character. The legislation sets out a range of factors ASIC must consider in deciding whether to make a banning order on this ground. These reforms to ASIC's powers will provide more flexibility in enforcing the law.

However, as noted by the Chair, the FoFA reforms could not have entirely prevented or addressed the Trio matter, including because it included instances of deliberate fraud. It is very difficult for any regulatory system to entirely guard against intentional misconduct.