Chapter 3

Annual fee disclosure and the opt-in obligations

3.1 This chapter examines the annual fee disclosure requirements and the two yearly 'opt-in' provisions contained in the first tranche of the FOFA Bills.[1] Three sections follow:

- the first section discusses submitters' concerns with the fee disclosure notices;
- the second section discusses submitters' concerns with the opt-in (renewal) obligations; and
- the third section outlines the committee view.

3.2 The relationship and fee arrangements that exist between financial advisers and their retail clients are unique to the financial advice industry. Clients often do not pay all of the advisers' fees directly and may be charged ongoing fees for services. In terms of the ongoing component, Treasury explained to the committee that:

> In situations where the client pays a substantial proportion of the adviser's remuneration directly (known as 'fee for service') it is common for this remuneration to be ongoing in nature. For example, an adviser might charge a client an ongoing annual fee calculated as a percentage of the client's funds under management (known as an asset-based fee) or a flat dollar amount. This annual fee generally covers a range of advisory services provided to (or available to) clients. As opposed to professions or other occupations that tend to charge for transactional, one-off services or advice, advisers' remuneration structure is partly reflective of the notion that the benefits of financial advice tend to be realised over the medium to long-term, and therefore remuneration structures tend to reflect the ongoing nature of the adviser-client relationship.[2]

3.3 As a result of this unique fee structure, some retail clients may be paying ongoing fees, while receiving little or no service/financial advice. Moreover, some clients may be unaware of the magnitude of the fees (perhaps due to disengagement), or the various other commissions and fees their advisers are being paid by product providers.

3.4 Consequently, the opt-in and fee disclosure obligations contained in the first tranche of the Bills are designed to protect disengaged clients from paying ongoing fees while receiving little or no advice. For clients who are engaged, the opt-in (renewal) requirements will allow them to assess whether they are receiving value for money and to terminate the agreement if they are not satisfied.

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1 Corporations Amendment (Future of Financial Advice) Bill 2011.

2 Treasury, *Submission 22*, p. 5.

3.5 The provisions of the Corporations Amendment (Future of Financial Advice) Bill 2011 (the Bill) provide that where an ongoing relationship exists between a retail client and a financial adviser, and the client is paying an ongoing fee for advice, financial advisers are required to issue two separate notices:

(a) A fee disclosure notice: the financial adviser will need to issue an annual fee disclosure statement outlining all fees and charges if a retail client will receive advice for a period longer than 12 months. These notices will need to outline all ongoing fees paid by the client for the previous 12 months and the forthcoming 12 months.

(a) A renewal notice: if a client is paying ongoing fees for a period longer than 24 months, the financial adviser must provide both an annual fee disclosure notice and a renewal notice every two years. If a client does not renew, or 'opt-in', within a 30 day period, the agreement between the client and the adviser is terminated

3.6 If the above obligations are not fulfilled, the client is not obligated to pay the ongoing fee past the relevant 12 or 24 month period.

3.7 If the client does not respond to the renewal notice, or decides not to renew within the appropriate timeframe, the ongoing agreement terminates.

3.8 A number of products are excluded from the opt-in and fee disclosure obligations:

- where a person is paying an adviser by instalments for advice that has already been provided before the arrangement is entered into (a payment plan);
- the ongoing payment of an insurance premium; and
- the ongoing payment of a product fee.[3]

Submitter's views

3.9 The committee received considerable evidence from industry members suggesting that the financial services sector will be adversely affected by the fee disclosure and opt-in provisions of the Bill.

3.10 Generally, industry participants argued that these measures were not in the original Parliamentary Joint Committee (PJC) recommendations[4] and that the requirements will be expensive and difficult to implement. The Association of Financial Advisers (AFA) argued that:

> The way to get FOFA back on track is reasonably simple. Both the industry and consumers will applaud measures that remove opt-in and strengthen the

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3 Treasury, *Submission 22*, p. 6.

4 For example, see Association of Financial Advisers (AFA), *Submission 66*, p.10; Financial Planning Association of Australia (FPA), *Submission 62*, p. 6.

> opt-out provisions, remove the annual fee disclosure statements and remove the ad hoc approach to insurance commission bands inside super for groups. It is important to note that none of these were part of the 2009 PJC report.[5]

3.11 Moreover, witnesses such as Mr Dante De Gori, General Manager of the Financial Planning Association, informed the committee that fee disclosure obligations were not raised during the consultation phase of the reforms:

> The fee disclosure is a case in point; it was not talked about. Our position was settled with respect to the exposure draft and then that changed when we received the actual legislation; it was different. There was no consultation in the middle of that.[6]

3.12 Industry participants argued that the disclosure notice obligations will negate the objective of the FOFA reforms to make financial advice more accessible and affordable for retail clients. The Financial Services Council (FSC) recommended that:

> ...the new Fee Disclosure Statement be a prospective requirement and amended to provide retail client with a pertinent summary of the fees and services noting that retail clients already receive the disclosure this measure is attempting to address.[7]

3.13 The Joint Consumer Groups contested industry views and argued that the opt-in and fee disclosure obligations are necessary to ensure the transparency of the financial services industry and keep clients engaged with their financial advisers.[8]

Fee disclosure notices

3.14 Financial advice industry representatives raised a number of concerns with the FOFA Bills' annual fee disclosure requirement:

- the definition of ongoing fees;
- questions surrounding the benefits of collating already existing information;
- a likely increase in the cost of seeking advice;
- the lack of time to implement the new requirements;
- the lack of consultation;
- the potential for an increase in litigation and complaints by consumers; and

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5 Mr Richard Klipin, Chief Executive Officer, Association of Financial Advisers Ltd., *Committee Hansard*, 23 January 2012, p. 12.

6 Mr Dante De Gori, General Manager, Financial Planning Association *Committee Hansard*, 23 January 2012, p. 44. See also evidence provided by Mr Santucci, President, Boutique Financial Planning Principles Group; Ms Cargakis, General Manager, Associated Advisory Practices; and Ms Petrik, Corporate Development Manager, Professional Investment Services, *Committee Hansard*, 23 January 2012, p. 71.

7 Financial Services Council, *Submission 58*, p. 5.

8 Joint Consumer Groups, *Submission 25*, p. 2.

- the possible retrospective application of fee disclosure requirements.

Issues raised

3.15 The committee received evidence suggesting that the definition of ongoing fees is too broad and should be limited to 'financial product advice', not to the more encompassing 'financial services' as is currently drafted. The Stockbrokers Association argued that the Bill will limit the advice that financial advisers could issue to their clients, particularly in relation to more educational information, which is also captured by the current wording.[9]

3.16 The Stockbrokers Association also argued that the reasonableness of the fees ought to be examined as opposed to their ongoing nature.

3.17 In relation to the disclosure of fees, Burrell Stockbroking and Superannuation argued that financial advisers and product providers already comply with a high standard of fee disclosure.[10] For example, industry members who provide managed discretionary accounts are required to comply with disclosure requirements under the Corporations Act.

3.18 IOOF Holdings Limited detailed for the committee the number of disclosure documents it issues to its retail clients:

> In customer-centric businesses where clients are receiving appropriate service and disclosure, the opt-in requirements would add an unnecessary layer of administration and costs. Clients are already advised of fees and charges at various points/stages of the advice process. For example, advised clients would typically receive a copy of a Financial Services Guide, Terms of Engagement, Statement of Advice, Authority to Proceed and product statements as a minimum.[11]

3.19 Submitters also argued that the reporting date for these reports is 30 June each year and are concerned that compliance with the new provisions will mandate numerous compliance dates. They suggest that it would be more efficient to legislate a standard fee disclosure date, as opposed to having many 'disclosure days' throughout the year.[12]

3.20 In terms of labour and other costs associated with compliance, Burrell Stockbroking and Superannuation argued that the data simply does not exist to enable

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9 Stockbrokers Association of Australia, *Submission 8*, p. 9; Burrell Stockbroking and Superannuation, *Submission 11*, p. 2.

10 Burrell Stockbroking and Superannuation, *Submission 11*, p. 5; Professional Investment Services, *Submission 17*, p. 3.

11 IOOF, *Submission 19*, p. 5.

12 Burrell Stockbroking and Superannuation, *Submission 11*, p. 5; Professional Investment Services, *Submission 17*, p. 3.

industry members to comply with the legislation. It argued that it would be costly to install and implement new systems and that these costs will be passed on to clients:

> The issue is once again that Burrell Stockbroking and Superannuation and the industry in general do not have the systems in place to comply with the disclosure requirements. We agree with the general sentiment across the industry that the 'data does not exist' in order to be able to comply with the standard of disclosure expected. The cost of installing and implementing the systems to provide the required disclosure information will be a significant burden on our business and increase the cost of advice and services provided. Further, a major issue is that the information required to calculate these costs would be contained across various platforms which will not always be under our control. It is our opinion that the Committee needs to reconsider their costing analysis, and this needs to be reflected in the legislation.[13]

3.21 In relation to the practice of issuing multiple fee disclosure notices, the Financial Planning Association argued that the new annual fee disclosure statements represent:

> ...a fundamental shift in the way in which the law would be fabricated, because the current obligation is a product obligation. It rests with the product provider. If you use the example of a superannuation fund where the superannuation fund itself believes it has a relationship—a direct relationship, not through an adviser—with that member, the proposal would be that the adviser who might be advising the client on everything else concerning the relationship of financial products needs to somehow insert themselves into this product chain and communication and, by the way, often when the product provider may not want them to because the product provider feels they have a direct relationship. Now they have to send documents across to multiple parties. It has to be collated differently. There is a way of coding material so that it is the same so that it calculates in the same way—all this stuff that, frankly, has not been contemplated much in the industry. I think this is a real challenge. It is not just a simple matter of collating 22 pieces of paper.[14]

3.22 Given these issues, witnesses argued that more time was required to implement the necessary systemic changes to equip advisers and enable them to collate the various pieces of information into one coherent fee disclosure statement.[15]

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13 Burrell Stockbroking and Superannuation, *Submission 11*, p. 5. See also Associated Advisory Practices, *Submission 20*, p. 4.

14 Dr Deen Sanders, Chief Professional Officer, Financial Planning Association, *Committee Hansard*, 23 January 2012, p. 43.

15 See for example, Mr Barrett, ANZ Wealth, *Committee Hansard*, 24 January 2012, p. 5; Mrs Keddie Waller, Policy Adviser, Financial Planning, CPA Australia, *Committee Hansard*, 24 January 2012, p. 51.

3.23 Moreover, it was put to the committee that the collation of fees is not the only difficulty. Witnesses argued that detailing each financial product will also add to costs, making financial advice more expensive. The AFA told the committee that:

> **...**the obligation is not just around providing information on costs. You have got to provide information on services actually provided, services that should have been provided in the last year, services that will be provided and should be provided in the next 12 months. So this is not simply a matter of consolidating costs from different product providers, which in itself would be an administrative effort across a client base of 300.[16]

3.24 The FSC estimated that the implementation of the fee disclosure requirements will be approximately $54 per client prospectively (for new clients) and $98 per client retrospectively (for existing clients).[17]

3.25 The absence of draft regulations and the lack of clarity in the Bills were also raised by witnesses. The Financial Services Ombudsman (FOS), for example, argued that subsection 962F(3) is problematic and could disadvantage consumers.[18] FOS believed that the provisions rendering the refund of fees discretionary will result in an increase in the number of disputes relating to fee refunds, which is already one of the most common areas of complaint.[19]

3.26 Accordingly, FOS argued the need to amend this section so as to better reflect the intent of the FOFA reforms. FOS believed that the Bill prevents clients from seeking refunds where there has been a miscommunication and/or forms have not been returned.[20] It claimed that this is not a fair outcome for consumers and noted that should an amendment not be made, there will be no recourse for consumers and FOS will not be able to assist. Instead, claims will need to be presented in court,[21] providing a significant disincentive to consumers to seek compensation for incurring charges while receiving no advice.[22]

3.27 It was also put to the committee that fee disclosure obligations should be prospective, not retrospective. Submitters raised concerns that the retrospective application of these obligations would be administratively difficult and expensive, particularly in respect to financial products that predate computers.[23]

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16 Mr Philip Anderson, Chief Operating Officer, Association of Financial Advisers Ltd, *Committee Hansard*, 23 January 2012, p. 17.

17 Financial Services Council, *Submission 58*, p. 7; *Committee Hansard*, 23 January 2012, p. 37.

18 Financial Services Ombudsman, *Submission 15*, p. 5.

19 Mr Shane Tregillis, Chief Ombudsman, Financial Ombudsman Service (FOS), *Committee Hansard*, 24 January 2012, pp 41–44.

20 Mr Shane Tregillis, FOS, Chief Ombudsman, *Committee Hansard*, 24 January 2012, pp 39–48.

21 Mr Shane Tregillis, FOS, Chief Ombudsman, *Committee Hansard*, 24 January 2012, p. 44.

22 Mr Shane Tregillis, FOS, Chief Ombudsman, *Committee Hansard*, 24 January 2012, pp 39–48.

23 Professional Investment Services, *Submission 17*, p. 6.

3.28 The committee notes that there is uncertainty as to the 'retrospectivity' of the Bill. This uncertainty stems from the obligation that all clients (existing and new) must be sent a fee disclosure notice on the 12 month anniversary of their agreement. The Explanatory Memorandum (EM) states that this notice must contain the fees charged for the previous 12 months and the fees that will be charged for the forthcoming 12 months.[24] However, in relation to existing clients, the time period that needs to be included in the notices remains ambiguous.

3.29 Consequently, the committee sought clarification from Treasury. On notice, Treasury was asked:

> ...if a client entered into a relationship with an adviser on 21 July 2011, does this adviser then need to issue a disclosure notice on 21 July 2012, or the 12 month anniversary of the introduction of the legislation on 1 July 2013?
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> If the answer is the 12 month anniversary of the contract, does the fee notice need to include all fees for the entire previous 12 month period, or is it only applicable to fees charged from the date the legislation takes effect? Using the above example, would the fee disclosure statement only include the fees charged for the period between 1 and 21 July, 2012?[25]

3.30 In response, Treasury informed the committee that:

> Under the provisions in the Bill, fee recipients of existing clients will need to disclose fee and service information for the prior 12 months, even where such information relates to a period before the FOFA reforms came into effect.[26]

3.31 Therefore, to return to the above example (paragraph 3.29), if a client entered into a relationship with an adviser on 21 July 2011, the financial adviser will have to issue a fee disclosure statement on 21 July 2012 (or within the specified 30 day disclosure period), detailing all fees charged for the 12 month period from 21 July 2011 until 21 July 2012, and for the forthcoming 12 months, ending 21 July 2013.

3.32 Some submitters have also expressed concern at the lack of consultation regarding the potential retrospectivity of the fee disclosure obligations. This issue is discussed in chapter 10.

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24 Corporations Amendment (Future of Financial Advice) Bill 2011, *Explanatory Memorandum*, para. 1.20 & 1.21.

25 Treasury, answer to question on notice, 24 January 2012, (received 10 February 2012). http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=corporations_ctte/future_fin_advice/submissions.htm (Accessed 24 January 2012).

26 Treasury, answer to question on notice, 24 January 2012, (received 10 February 2012). http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=corporations_ctte/future_fin_advice/submissions.htm (Accessed 24 January 2012).

3.33 Finally, the Joint Accounting Bodies raised concerns over the requirement to list 'anticipated services' on the fee disclosure notices. At the hearing, Mrs Keddie Waller of CPA Australia informed the committee that the word 'anticipated' allows for too much subjectivity:

> We would say it is too subjective. We would have to try and anticipate the services we are going to provide, as opposed to telling them what we propose to provide and then trying to anticipate on top of that what we will provide. It is too subjective and it is not adding value.[27]

The opt-in provision

3.34 Industry members expressed a number of concerns with the opt-in obligations. These include:

- the consequences should a client neglect to return their forms;
- an increase in the cost of providing advice;
- its necessity, given that clients already have the option to opt-out at any time; and
- the potential for confusion when clients have more than one renewal notice and more than one set of fees being withdrawn from their accounts.

Issues

3.35 A principal concern with the opt-in provision is in cases where a client simply forgets to fill out and/or return their form on time.[28] The committee was told that this is possible where a client is away on holidays or unaware of the renewal notice for any other reason, or neglects to return their forms and a significant financial event occurs that requires action by an adviser. Some witnesses noted that if a relationship is unwittingly terminated, there may be severe financial repercussions for retail clients. The National President of the AFA told the committee:

> Some clients just like the peace of mind of knowing that there is a person they know, understand and have a relationship with to ring when they want advice. They do not necessarily want the annual review. They are happy to pay along the way. I will give you an example of an aged client of ours who is down to his last $35,000 in super. He is in his 80s. He does not want to review his risk profile. He does not want all the other things to help him with his Centrelink, but he did want to talk to me about getting the last ever brand-new car that he is going to get. We withdrew the money and bought him a new car. I earn $14 a year from that client...

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27 Mrs Keddie Waller, Policy Adviser, Financial Planning, CPA Australia, *Committee Hansard*, 24 January 2012, p. 51.

28 This issue was raised by Burrell Stockbroking and Superannuation, *Submission 11*, p. 5; Financial Services Ombudsman, *Submission 15*, p. 2; Professional Investment Services, *Submission 17*, p. 5.

> But the issue there is getting someone in their 80s to return the paperwork or getting a busy executive or just someone who is flat-out raising two or three kids to remember to put their signature on the paper and send it back instead of putting it in the bin. Then there is the follow-up and the wife says to the husband, 'Do you know about this?' 'No, I'm not sure. Haven't you got it?' Time ticks along. There are people away, travelling the country in their retirement, who do not get the notice until they get back from their travels and meanwhile they have been ex-communicated from their advice relationship. What do we do then?[29]

'Opt out' option

3.36 Evidence was presented to the committee demonstrating that clients already have the option to opt-out of contracts with their financial planner at any time.[30] Professional Investment Services argued that the opt-in obligations are superfluous and merely create another level of bureaucracy:

> Clients already have the capacity to opt-out and we do not believe that Opt-In benefits the consumer or is necessary but just adds another layer of bureaucracy to the process and unacceptable level of risk to consumers through loss of advice.[31]

3.37 Burrell Stockbroking and Superannuation argued that an opt-out approach would be more appropriate than an opt-in obligation:

> Burrell Stockbroking and Superannuation and the industry in general already allow clients the ability to opt-out at any stage or by complying with a short notice period (our Firm currently requires one month's written notice). We, like many in the industry, believe that opt-in should be removed from the Bill. Alternatively, at the least, opt-out should be adopted. Opt-out provides clients with safeguards while allowing the financial industry to focus on clients and not complying with over burdensome regulatory conditions.[32]

3.38 Associated Advisory Practices argued that additional costs resulting from the opt-in requirement will have to be borne by the consumer:

> Should the client be simply a few days late in responding, this would imply that the adviser and client would need to agree to a totally new fee arrangement, which in reality could only be done by providing a new Statement of Advice. This is a very significant cost and imposition for a late response.[33]

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29 Mr Bradley Fox, National President, Association of Financial Advisers, *Committee Hansard*, 23 January 2012, p. 19.

30 IOOF, *Submission 19*, p. 5.

31 Professional Investment Services, *Submission 17*, p.3 & 5; see also IOOF, *Submission 19*, p. 5.

32 Burrell Stockbroking and Superannuation, *Submission 11*, p. 4.

33 Associated Advisory Practices, *Submission 20*, p. 3.

Cost estimates

3.39 The committee draws attention to the large discrepancies in estimates of the cost of fee disclosure and opt-in requirements. For example, during the hearings, the committee was advised of a number of different figures by witnesses.

3.40 As cited in the EM and the Regulations Impact Statement, Rice Warner Actuaries estimated that the cost of the opt-in requirements would be $11 per client.[34] Burrell Stockbroking and Superannuation dispute this figure, estimating the cost of compliance to be much higher:

> If the legislature believe that all opt-in will require is sending a notice to clients they are mistaken. Opt-in will require meeting with the client to renegotiate contracts and costs. We calculate the time of such a meeting, including preparation, to be more than two hours. As such, the cost of opt-in per client will be around $650 per client. Further, even in the unlikely event that a meeting is not conducted the cost of compliance with opt-in alone would be between $50 and $100. The cost of opt-in is likely to push many independent financial advisers out of the industry. This will lead to less independent advice which is counterintuitive to the Bill's aims.[35]

3.41 The AFA estimated the cost of compliance with the fee disclosure and opt-in obligations to be somewhere between $100 and $120 per client:

> One of the misnomers is that it is going to be simple: our product provider is going to give us the summary and we are just going to post it out to the client. I am not in my business—and many advisers are not—linked to using just one product provider. So, if I want to give that to a client, I may need to get it across some direct investments they hold, perhaps a life imputation bond they hold, perhaps a superannuation policy, perhaps some risk cover. They may all be with different providers. I need to get that information from all providers and bring it to one statement. Our estimate is that it will take three-hours per client over a two-year cycle. If you put an average administration worker's cost against that—perhaps $35 to $40 an hour—we are talking between $100 and $120 to the client.[36]

3.42 The FSC posited a different figure:

> **Senator CORMANN:** Quickly going back to the annual fee disclosure requirements, you mentioned in your submission that it would cost around

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34 Rice Warner's submission to the government citing figures is available at: http://www.ricewarner.com/images/newsroom/1316044106_The%20Cost%20of%20Opt-in_Government%20Submission.pdf. The full report is available at: http://www.industrysupernetwork.com/wp-content/uploads/2011/05/OptInRiceWarner.pdf. The Rice Warner research was commissioned by the Industry Super Network.

35 Burrell Stockbroking and Superannuation, *Submission 11*, p. 2

36 Mr Bradley Fox, National President, Association of Financial Advisers, *Committee Hansard*, 23 January 2012, p. 16.

> $54 per client prospectively and $98 per client retrospectively. Is that going to be a cost that will be passed on as such to the clients?
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> **Ms Storniolo:** That is the opt-in cost, yes?[37]

3.43 Mr Mark Rantall, Chief Executive Officer of the Financial Planning Association, sought to explain these discrepancies to the committee:

> The reality is every practice operates in a different way... So the costing models of all of those groups are individual, because they are basically a small business in private business and private practice. The numbers we can put a foot on, if you like, are these. The investment trends survey, which was an independent survey of advisers, put the cost of opt-in at $132. Conservatively, if you look at 16,000 financial planners looking after an estimated 300 clients each, that comes out to a number of $317 million across the industry per annum. Then if you take the cost of the annual disclosure statement which we talked about before, our members tell us that on average that will cost them $113 per client and, again, on the same basis of 300 clients per average and 16,000 financial planners in the country, that comes to a figure of $542 million. We heard this morning figures around the $750 million on the basis of implementation, and ongoing costs of $350 million. Our figures are coming in around those same sorts of figures, so there is not a huge discrepancy...
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> I think that the Rice Warner $11 was purely on an opt-in, whereas our research is in respect of a number of the FOFA reforms, in particular those two areas...The reality is that no independent impact statement has been done on the cost of this to either participants or consumers, and that is the heart of the matter for this issue.[38]

The need for an opt-in provision

3.44 Another issue raised by submitters was the relevancy of the opt-in obligations. Some submitters argued that the requirement to opt-in is made redundant by the application of the best interests test, the fee disclosure notices and the already existing ability to opt-out at any time. The Financial Planning Association told the committee:

> Therefore, considering that the renewal notice provisions will only apply to new clients coupled with the banning of commissions (including trail) and the introduction of a best interest duty, the FPA strongly believes that opt-in is a redundant policy.[39]

3.45 Mr Craig Meller, Managing Director, AMP Financial Services, also addressed the issue of relevance:

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37 Ms Cecilia Storniolo, Senior Policy Manager, Financial Services Council, *Committee Hansard*, 23 January 2012, p. 37.

38 *Committee Hansard*, 23 January 2012, p. 42.

39 FPA, *Submission 62*, p. 6.

> I think AMP's position has been publicly and privately very clear. We have never seen the need for the opt-in arrangements. We believe it will not add to the quality of the advice or the quality of the relationship between the financial planner and the client, and that it is an unnecessary administrative burden.[40]

3.46 Dr Deen Sanders, Chief Professional Officer of the Financial Planning Association, highlighted the potential for client confusion. He argued that some clients may become confused as to who is withdrawing fees for ongoing services:

> Arguably, there might even be an increasing liability, which is partially our concern as well. A client may cease to engage in the opt-in arrangement with one of those advisers, but the other one might be a commissioned adviser or there might be some sort of legacy structure, and they think they are still paying a commission somewhere, because they get a statement that says that, but it is not actually from the professional adviser that they think they have the relationship with. There is enormous complexity.[41]

3.47 Burrell Stockbroking and Superannuation argued that the Bill should ensure that fees represent value for money. It asserted that targeting on-going fees through the opt-in provisions does not achieve this outcome:

> The focus of the Bill should be on whether fees are reasonable, not the ongoing nature of the fees. In most instances ongoing fees in relation to advisory services provide clients with value for money. By discriminating against ongoing fees Burrell Stockbroking believes the opt-in provisions will not have the desired effect of ensuring clients obtain the best outcome. Opt-in will disengage clients and discourage business models that are value for money. It is Burrell Stockbroking and Superannuation's opinion that opt-in should be removed from the Bill, or at the least the legislature should adopt an opt-out policy.[42]

3.48 It was put to the committee that the expectations of clients need to be clearly articulated on opt-in notices and that there needs to be clear regulations stipulating the expectations that ought to be included on the renewal forms.[43]

Committee view

3.49 The committee acknowledges the various views presented. Above all, however, on the annual fee disclosure requirement and opt-in obligation, the

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40 Mr Craig Meller, Managing Director, AMP Financial Services, *Committee Hansard*, 23 January 2012, p. 5.

41 Dr Deen Sanders, Chief Professional Officer, Financial Planning Association, *Committee Hansard*, 23 January 2012, p. 46.

42 Burrell Stockbroking and Superannuation, *Submission 11*, p. 3.

43 Mr Shane Tregillis, Chief Ombudsman, Financial Ombudsman Service, *Committee Hansard*, 24 January 2012, pp 43–44.

committee emphasises that the fee disclosure provisions and the opt-in obligation will make financial advice more transparent.

3.50 As Treasury explained:

> The concept of compulsory renewal of ongoing advice fees, requiring the active renewal by the client to ongoing fees, is designed to protect disengaged clients from paying ongoing financial advice fees where they are receiving little or no service. For those clients that are not disengaged, the renewal requirement will provide them with an opportunity to consider whether the service they are receiving equates to value for money.[44]

3.51 Essentially, the proposed legislation seeks to impose obligations to have an appropriate level of communication between financial advisers and retail clients. This will help ensure that clients remain engaged with the financial services they are paying for, thereby helping to protect retail clients from dishonest financial practices.

3.52 The committee considers that both the opt-in and annual fee disclosure obligations will help to engage clients and allow for more transparent communication between financial advisers and their retail clients. Associate Professor Joanna Bird explains that:

> ...the renewal notice—or the opt-in, as it is called—is crucial to the protection of disengaged clients...[W]ithout this reform there is great danger that industry will replicate all the negative features of the existing commission system through the use of non-transparent, ongoing, asset based fees...
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> The problem is that even with the best-interests duty and even with the ban on commissions and other forms of conflicted remuneration it will still be possible for advisers to charge asset based fees on an ongoing basis. Those fees will operate much like commissions. In other words, if I enter into that sort of relationship I will have a certain percentage taken out of my funds under advice every year, on an ongoing basis, possibly indefinitely.
>
> Without the opt-in and without the fee disclosure notice, it is possible I will not realise that is happening, I will not know that is happening and I will not have made an informed decision for it to happen, and I certainly will not have made an informed decision for it to happen on an ongoing basis. We see the opt-in as crucial to protecting disengaged clients who get into the position of paying fees without realising that they are doing so. We see the fee disclosure statement as essential for that large group of clients who will not get the opt-in. Basically, we do not see any reason why you should not actually get a statement from your professional adviser on a yearly basis setting out the fees they are charging you.[45]

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44 Treasury, *Submission 22*, p. 5.

45 Assoc. Prof. Joanna Bird, representing the Australian Shareholders' Association, the Australian Investors Association, Choice, Consumer Action Law Centre, Council on the Ageing and the National Information Centre on Retirement Investments, *Committee Hansard*, 23 January 2012, pp 57–58.

3.53 The committee agrees with the Joint Consumer Groups, who argue that:

> The fee disclosure statement ensures that clients are aware of the ongoing fees they are paying and the services they receive in return for those fees. This information enables clients to make an informed decision about whether they want to continue paying those fees. Importantly, the fee disclosure statement gives clients information that they do not receive from current financial services disclosure documents.[46]

3.54 In terms of the opt-in provisions, the committee supports the comments made by the Joint Consumer Groups, who informed the committee that:

> The renewal notice requirement ensures that disengaged retail clients do not pay ongoing fees for little or no service. Current remuneration models in the financial advice industry mean that clients often pay for advice on an ongoing basis (that is, indefinitely until they take an active step to stop payment) in a manner which requires them to take no active steps to effect payment. That is, payment is not transparent to the clients. Disengaged clients are very vulnerable to exploitation through such remuneration models. The renewal notice requirement will force clients to take an active step once every two years.[47]

3.55 The committee disagrees with the view that adequate fee disclosure is already provided to clients by financial advisers and product providers. The fee disclosure statements that are currently issued are disparate and fragmented. As witnesses highlighted during the hearings, clients may have purchased up to eight or more products. Currently, these clients would receive statements from each product provider and from their financial adviser at different times throughout the year. This information is highly fragmented and the committee believes that most retail clients would not have the time or the capacity to collate this information. Associate Professor Joanna Bird provided these comments:

> If a client had 18 products, I would have to sit there and collate the 18 products. The periodic statements will come in at different times. I am going to have to collate them all to figure out what I am paying my adviser...[48]
>
> The periodic statements that I get are lengthy and complex. And actually it would be a task that would be beyond most consumers to go through those and collate the information that you are talking about.[49]

3.56 Therefore, the fee disclosure notices are an important and simple source of information for clients, which details in a clear and succinct format the fees and charges they are paying for financial advice.

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46 Joint Consumer Groups, *Submission 25*, p. 2.

47 Joint Consumer Groups, *Submission 25*, p. 2.

48 Associate Professor Joanna Bird, *Committee Hansard*, 23 January 2012, p. 60.

49 Associate Professor Joanna Bird, *Committee Hansard*, 23 January 2012, p. 61.

3.57 Moreover, the committee believes that the opt-in obligation empowers the less-financially literate clients to say 'no' and encourages them to think about the services they are receiving and the fees they are being charged for those services. Provided that renewal notices are clear and concise, the potential for false expectations on behalf of both retail clients and financial advisers will be minimised.

3.58 It was also put to the committee that clients already have the option to opt-out at any time and that the opt-in provisions are a waste of time and money. However, the committee believes that this ability does not negate the need for the opt-in obligations because many customers do not know they have this option, or are disengaged. By ensuring that they regularly review their contracts, clients are prompted to remain engaged and aware of the services they are/are not receiving.

3.59 It was put to the committee that the 'best interest' test will negate the need for fee disclosure and opt-in notices (see paras 3.44–3.45). However, the committee does not regard the best interest obligations as sufficient for the provision of information to the client and for assisting client engagement. The best interest test is there to assist financial advisers to recommend the best product for their clients, not for helping clients evaluate whether or not they are receiving value for money.

3.60 With this in mind, the committee acknowledges that there is room for clarification in the provisions. Clients and advisers need to be clear as to what is expected of them in the relationship and advisers need to be transparent about the fees they are charging. As such, the committee believes that FOFA regulations need to provide clarification in regards to the minimum information that is required in the fee disclosure and the opt-in notices.

3.61 Moreover, the committee believes that the EM should be amended to provide clear guidance as to when annual fee disclosure notices need to be provided to existing clients. The Consumer Groups raised this issue with the committee:

> We agree that the legislation needs to be clarified as to when the fee disclosure statement would first be required for existing clients. That bit is unclear.[50]

3.62 The provisions relating to subsection 962F(3) should be revised. In particular, the provision stating that a fee recipient is not obliged to refund money where there is a failure to comply with the renewal obligation by the fee recipient.

3.63 The committee agrees with FOS and believes there could be unintended consequences for retail clients by restricting their access to recourse and/or arbitration. It also appears to provide a disincentive for financial advisers to follow up clients. If a client does not respond to a renewal notice, and continues to pay a fee for no service, the problem that FOFA is seeking to address continues. Moreover, another difficulty

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50 Associate Professor Joanna Bird, *Committee Hansard*, 23 January 2012, p. 61.

for customers is added: financial providers are not obligated to refund this money. This does not appear to be consistent with the intent of FOFA.

Recommendation 1

3.64 The committee recommends that subsection 962F(3) of the Corporations Amendment (Future of Financial Advice) Bill 2011 be reviewed with a view to providing access to recourse for consumers who have had fees wrongfully deducted.

Recommendation 2

3.65 The committee recommends that 'minimum disclosure' guidelines be included in the regulations of the Corporations Amendment (Future of Financial Advice) Bill 2011 for fee disclosure and opt-in notices, stipulating a standard for communication between financial advisers and their retail clients.

Recommendation 3

3.66 The committee recommends that the Explanatory Memorandum to the Corporations Amendment (Future of Financial Advice) Bill 2011 be amended to better explain the annual fee disclosure obligations for existing retail clients.