# Chapter 7

## The matter of carve-outs: basic banking, stockbroking and the timeshare industry

7.1 A number of submitters have requested further clarity on, and suggested amendments to, the existing carve-out for employees or agents of Authorised Deposit-taking Institutions (ADI) that are providing advice on basic banking products.

7.2 The proposed carve-out for stockbrokers, intended to be addressed in regulations, was also discussed. The need for the Bill to be amended so that the timeshare industry is precluded from the bans on conflicted remuneration was also canvassed. These matters are discussed below.

### Carve-out for basic banking products

7.3 Treasury argued that the carve-out for basic banking products has been provided on the basis that provision of advice on basic banking products is deemed a low risk to consumer detriment:

> Basic banking products and general insurance are recognised as being simple in nature and are more widely understood by consumers. This means that there is a lower risk of consumer detriment in relation to the provision of advice on these products. For this reason, exclusion from the obligation to give priority to the interests of the client more appropriately balances the benefits to consumers with the compliance costs to providers.[1]

7.4 The carve-out for employees or agents of an ADI that are providing advice on basic banking products is conditional on the agent not providing financial product advice on financial products other than basic banking products, either in combination with or in addition to advice provided on basic banking products.[2] The Bill defines a basic banking product as:

> (a) a basic deposit product;
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> (b) a facility for making non-cash payments (see section 763D) that is related to a basic deposit product;
>
> (c) an FHSA product of a kind mentioned in subparagraph (c)(i) of the meaning of FHSA in section 8 of the First Home Saver Accounts Act 2008 (first home saver accounts);
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> (d) a facility for providing traveller's cheques;

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1 Treasury, *Supplementary Submission 22*, p. 5.

2 Treasury, *Submission 22*, p. 8.

(e) any other product prescribed by regulations for the purposes of this paragraph.[3]

7.5 Treasury outlined that the bans are not intended to target sub-sections of the industry:

> The ban on conflicted remuneration structures is not designed to target certain industries, or sub-sections of the financial advice industry. The focus of the ban is removing conflicts of interest that may cause bias, or the potential for bias, in financial advice due to payments from product providers to those providing advice.[4]

7.6 The Australian Securities and Investments Commission (ASIC) divides banking products into Tier 1 and Tier 2 (see Table 7.1). ADI employees that offer advice on the lower level Tier 2 products may receive lower levels of training than those that advise on Tier 1 products.

**Table 7.1: Tier 1 and Tier 2 products**

| **Products** | | |
|---|---|---|
| Tier 1 | All financial products except those listed under Tier 2 | |
| Tier 2 | • | General insurance products except for personal sickness and accident (as defined in reg 7.1.14)<br>Note: Travel insurance products and included in Tier 2, even where the product covers losses arising due to sickness or accident while travelling |
| | • | Consumer credit insurance (as defined in reg 7.1.15)<br>Note: Consumer credit insurance products are included in Tier 2, even where the product covers consumer credit liabilities that cannot be paid due to sickness or accident |
| | • | Basic deposit products |
| | • | Non-cash payment products |
| | • | FHSA deposit products<br>Note: First Home Saver Account (FHSA) deposit accounts are FHSAs issued by an ADI. Other types of FHSAs are Tier 1 products: see RG 146.45-RG 146.46. |

Source: Australian Securities and Investments Commission, *Regulatory Guide 146: Licensing: Training of financial product advisers*, December 2009, p. 17.

7.7 Abacus – Australian Mutuals welcomed the carve-out for ADI employees assisting consumers with basic banking products. However, it was concerned that the carve-out does not go far enough. Abacus argued that imposing any new regulations

3 Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011, s961F.

4 Treasury, *Future of Financial Advice Frequently Asked Questions*, 'How will the ban on conflicted remuneration structures affect stockbrokers?', http://futureofadvice.treasury.gov.au/content/Content.aspx?doc=faq.htm#Q3_2 (accessed 10 February 2012).

on people who advise on basic banking products 'is a clear case of excessive coverage' and 'is likely to reduce the availability of advice to consumers'.[5]

7.8 The Australian Bankers' Association (ABA) suggested that the scope of the FOFA reforms should target identified market failures and 'should not impose unnecessary and inappropriate obligations on banks and banking groups'. The ABA recommended that the Bill reflect the stated policy intent[6] and the carve-out for basic banking products must be absolute:

> Regulation should target identified market failures. However, we are not aware of any identified market failures, consumer detriment or systemic concerns regarding practices by banks in the offer of basic banking products or the provision of general advice by bank staff. We consider that the legal risks, regulatory burdens and compliance costs that will be imposed on banks as a result of the broad scope of the FOFA legislative package are unnecessary and inappropriate.[7]

7.9 The ABA highlighted numerous legal and regulatory obligations 'to ensure banks are managed prudently' and bank products and services are transparent, accessible and delivered responsibly. It argued that the FOFA reforms will result in unnecessary compliance costs for banks which in turn will increase consumer costs. In addition, it argued that consumers may be adversely affected if banks withdraw the availability of 'simple' advice, general or 'scaled' advice in response to the FOFA reforms.[8] The ABA went on to state:

> ...banks that provide bank customers with financial advice may be required to restructure their business and/or alter their distribution model – this could result in no financial advice being provided through bank branches and call centres, and possibly result in a reduction of products and providers in the market. We consider this an undesirable outcome and would be contrary to the policy intent of the FOFA legislative package to broaden the availability of simple advice for consumers or for financial advice to be scalable to the needs of consumers as well as contrary to the efforts of the Government to ensure competition within the banking industry.[9]

7.10 The CEO of the ABA elaborated on this argument in his evidence to the committee:

> Given the training that is already required of bank staff, given their obligations under existing legislation, I do not see providing advice to a

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5 Abacus – Australian Mutuals, *Supplementary Submission 14*, p. 8.

6 There will be a limited carve-out from the ban on volume payments and best interests duty for basic banking products where employees of an Australian [authorised] Deposit-taking Institution (ADI) are advising on and selling their employer ADI basic banking products. (Future of Financial Advice Information Pack. Section 2.8. 28 April 2011).

7 Australian Bankers' Association Inc, *Submission 67*, p. 3.

8 Australian Bankers' Association, *Submission 67*, pp 2, 5.

9 Australian Bankers' Association, *Submission 67*, p. 5.

> customer who has come into the bank to go away and think about is necessarily a dangerous thing. In fact, one of our fears is of creating a situation where the customer walks into the bank branch and all the bank can say to them is 'Here's a form to fill in for a term deposit.' We know what customers are looking for in banks. One of the things banks are very conscious of is that customers sometimes feel we do not deliver a sense of it being a partnership between the customer and the bank where the bank can work with the customer to try and make the right decision. Our concern is that tellers and other bank staff are already under existing operations and adding these further obligations is just going to complicate things. In fact, we have already seen some banks pull out of providing anything that looks remotely like advice.[10]

7.11 ANZ Wealth argued that the Australian Prudential Regulation Authority (APRA) regulation of ADI remuneration policies is adequate, and further regulation of Tier 2 accredited employees is unnecessary:

> ANZ recommends that the second tranche legislation be amended to classify certain benefits given by an employer to an employee or contractor relating to the recommendation of any financial product as not being conflicted remuneration if the employee or contractor is only Tier 2 Accredited and the ADI can demonstrate that its risk and remuneration policies respond to the relevant APRA standards and guidance on remuneration. That is, existing APRA Prudential Standards provide adequate safeguards in respect of Tier 2 Accredited employees and contractors of banks, who are also subject to ASIC Regulatory Guide, and should therefore be carved out.[11]

7.12 ANZ also suggested that front-line banking staff should be entitled to remuneration for financial products other than basic banking products, and that a balanced scorecard approach to incentivising staff should be allowed as it provides appropriate safeguards against the mis-selling of products:

> Remuneration arrangements for frontline banking staff rewards out-performance while ensuring avoidance of inappropriate risk. This is done by utilising a balanced scorecard framework, aligned to role specialisation and capability, customer satisfaction and advocacy and a strong compliance management framework that includes risk gateways and where necessary reduction of or ineligibility for incentives for inappropriate behaviour. Even if an employee out-performs in relation to their financial metric, where value or volume based targets are used, they can still fall short of receiving an incentive payment if they have not met their other non financial performance objectives.[12]

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10 Mr Steve Münchenberg, Chief Executive Officer, Australian Bankers' Association, *Committee Hansard*, 23 January 2012, p. 22.

11 ANZ Wealth, *Supplementary Submission 29*, p. 4.

12 ANZ Wealth, *Supplementary Submission 29*, p. 4.

7.13 ANZ noted that the EM 'appears to recognise the balanced scorecard approach as an acceptable remuneration arrangement'.[13] However, ANZ suggested that greater clarity is required on how 'it can be proved' that the remuneration could not 'reasonably be expected to influence' the advice.[14]

7.14 The ABA asserted that the terminology of 'reasonably be expected to influence' the advice is too subjective and that it 'should not be assumed that all incentive structures result in negative outcomes for consumers'. It argued that the conflicted remuneration definition should be limited to a negative influence and should only consider distortions to remuneration, which misalign the best interests of the client and the adviser.[15]

7.15 The Joint Consumers Group (JCG), however, opposed the carve-outs for ADIs. It claimed that there is no clear rationale for the carve-out of employees or agents of ADIs providing advice on basic banking products. Accordingly, the JCG argued that the carve-out should be removed:[16]

> The consumer representatives do not accept that the argument that basic banking products are simple, well-understood products justifies this carve-out. The consumer representatives note that (unlike insurance products) there is no need to encourage sales of basic banking products and that basic banking products, which can include term deposits of up to 5 years, can and have been mis-sold to consumers.[17]

### *Committee view*

7.16 The committee believes that the carve-out from the conflicted remuneration bans for ADIs providing advice on basic banking products is sufficient to allow for current performance-based remuneration structures in ADIs to continue. However, the committee acknowledges requests from industry that further clarity be provided on how it can be proven that the remuneration could not 'reasonably influence' advice.

### Recommendation 12

**7.17 The committee recommends that the Australian Securities and Investments Commission (ASIC) provide regulatory guidance material on how Australian Authorised Deposit-taking Institutions (ADIs) can prove that remuneration does not 'reasonably influence' advice.**

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13 See Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011, p. 28.

14 ANZ Wealth, *Supplementary Submission 29*, p. 4.

15 Australian Bankers Association, *Submission 67*, pp 22–23

16 Joint Consumer Groups, *Supplementary Submission 25*, p. 8.

17 Joint Consumer Groups, *Supplementary Submission 25*, p. 7.

### *General insurance*

7.18 In contrast to ASIC's division of financial products, general insurance is not grouped within the list of basic banking products in the Bill (see table 8.1 above). The exception for ADI employees advising on basic banking products will not apply where advice on a non-basic banking product is provided in combination, or in addition to that advice. The EM outlines that the intent of this provision is to 'encourage customer service specialists, who wish to continue receiving volume of sales bonuses, to focus on providing advice on basic banking products only'.[18]

7.19 While general insurance is not subject to the broader ban on conflicted remuneration, Abacus expressed concern that precluding general insurance from the definition of basic banking products in the Bill creates a risk of unintended outcomes. In addition, it appears that an ADI employee providing advice about general insurance would become ineligible for the basic banking carve-out as advice on basic banking products cannot be provided in combination with other financial products. Abacus argued that in this case:

> It reduces consumer choice and diversity in retail financial services distribution and it has a direct impact on the potential earnings of frontline ADI staff. These ADI employees are not highly paid "financial planners". Customers will not wish to be referred to separate staff if they wish to talk about other simple products, such as general insurance, in addition to basic banking products.[19]

7.20 ANZ also noted that ADI employees will be unable to provide advice on general insurance products in conjunction with basic banking products. As a consequence, ANZ argued that this will have a detrimental outcome for consumers:

> If a bank employee is in the process of opening a transaction account for a customer and uncovers a need for building insurance to protect against natural disaster, the bank employee may need to refer the customer to a different member of staff to deal with the insurance matter. This would be required in order to preserve the "non conflicted remuneration" treatment of the basic banking product transaction. ANZ has a number of smaller branch sites where there would not be a different staff member to deal with the insurance matter.[20]

7.21 Abacus recommended that the ban on conflicted remuneration for ADI employees advising on basic banking products be amended to allow for advice categorised as Tier 2 in ASIC Regulatory Guide 146 (see Table 8.1 above).[21]

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18 Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011, p. 33.

19 Abacus – Australian Mutuals, *Supplementary Submission 14,* p. 6.

20 ANZ Wealth, *Supplementary Submission 29,* p. 6, see also *Proof Committee Hansard*, 24 January 2012, pp 6–7.

21 Abacus – Australian Mutuals, *Supplementary Submission 14*, p. 6.

7.22 The ABA highlighted that banks provide an important 'one-stop-shop' for consumers on a variety of products that are regulated by an array of legislation including the Corporations Act and the *National Consumer Credit Protection Act 2009*. The ABA asserted that the restriction to provide advice 'solely' in relation to basic banking products presents difficulties, using general insurance as an example:

> Bank staff may provide information or advice to a customer on a basic banking product (e.g. savings account) and also on a non-basic banking product (e.g. general insurance product). Even though the general insurance product is carved out of the conflicted remuneration provisions, as currently drafted, the fact that the employee gave information or advice also on a non-basic banking product means this would result in the full best interests duty obligations applying and the employee not being able to receive an annual performance bonus or a payment relating to the offer of the basic banking product or the general insurance product.[22]

7.23 The ABA recommended that paragraph 963D(b) should be amended so that access to the benefit is dependent on the licensee/representative recommending a basic banking product, but *not solely* in relation to a basic banking product.[23]

7.24 ANZ asserted, however, that amendments to legislation or regulations to accommodate numerous products across the banking industry would be a complex approach. It requested that government consider a carve-out of superannuation products comparable to MySuper products prior to the MySuper start date of 1 July 2013.[24]

7.25 The ABA recommended that the EM be amended to define basic banking products to include other exempt products, such as general insurance and other exempt products made by regulations.[25]

### *Definition of 'basic banking product'*

7.26 The ABA welcomed the ability to prescribe additional products as basic banking products by regulation.[26] However, it recommended that the EM be amended to broaden the exemption for basic banking products to include all types of at-call accounts, term deposit accounts (with a term less than five years), basic banking products offered along with other exempt products and non-financial products (for

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22 Australian Bankers' Association, *Submission 67*, p. 8.

23 Australian Bankers' Association, *Submission 67*, p. 8.

24 ANZ Wealth, *Supplementary Submission 29*, p. 7.

25 Australian Bankers' Association, *Submission 67*, p. 7.

26 The EM notes that the definition of basic banking product in the Bill 'provides flexibility to add additional products in the future if it is considered appropriate...given the constant rate of development in the financial product market'. *Explanatory Memorandum*, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011, p. 15.

example credit products) and financial services associated with the offer of basic banking products.[27]

7.27 Abacus voiced concerned that any effective narrowing in the category of deposits in the 'basic deposit product' will have significant implications for ADIs and consumers. Abacus noted that ADIs are the most highly regulated entities in the financial sector, and that deposits are the safest and simplest form of financial product.[28]

7.28 In November 2011, ASIC released *Consultation Paper 169: Term deposits that are only breakable on 31 days' notice: Proposals for relief*. Following the Basel III international liquidity reforms on the banking sector, term deposits that are only breakable on 31 days' notice could fall outside the definition of basic deposit product and therefore be considered a Tier 1 product. ASIC proposed relief for ADI requirements in relation to certain term deposits and whether they qualify as 'basic deposit products'. It claimed that term deposits of up to two years that can only be broken on 31 days notice should be subject to the same regulatory requirements as 'basic deposit products'.[29]

7.29 Abacus and the ABA recommended that the proposed relief for the basic product definition be clarified to include term deposits of up to two years where early withdrawal is at the discretion of the ADI. Further, it proposed that the definition of basic deposit product includes term deposits of up to five years, where early withdrawal is at the discretion of the depositor, with a notice of withdrawal period of up to 31 days.[30]

### *Consumer credit insurance*

7.30 Consumer credit insurance (CCI) is a combination of life and general insurance under one insurance contract and is typically jointly issued by a life company and a general insurer. ANZ requested clarification on how CCI fits with the proposed exemptions, and whether it is deemed a general or a life insurance product. It requested that CCI be defined as being a general insurance product.[31]

7.31 The JCG argued that the Bill does not consider incentives for CCI as conflicted remuneration, noting 'strong reservations' about this decision. It highlighted recent studies showing cases of mis-selling of CCI where:

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27 Australian Bankers' Association, *Submission 67*, p. 7.

28 Abacus – Australian Mutuals, *Supplementary Submission*, pp 6, 8.

29 Australian Securities and Investments Commission, *Consultation Paper 169: Term deposits that are only breakable on 31 days' notice: Proposals for relief*, November 2011, p. 9.

30 Abacus – Australian Mutuals, *Supplementary Submission 14*, p. 8; Australian Bankers' Association, *Submission 67*, p. 8.

31 ANZ Wealth, *Supplementary Submission 29*, p. 7.

- consumers have not been aware that they have purchased CCI or that CCI is optional;
- consumers have not been asked whether or not they wish to purchase CCI;
- consumers have not been eligible to claim on all components of the CCI they have purchased;
- there has been potential for consumers to be pressured or harassed by sales staff; and
- consumers have not understood the cost or duration of the CCI policy. [32]

7.32 The JCG also noted that CCI commissions are significant:

> ASIC Report 256 found that commissions were close to 20% of the premium for the CCI product. It is probable that commissions are one of the drivers for such mis-selling. In light of this, the consumer representatives are concerned that the decision to allow financial advisers to continue to receive conflicted remuneration in relation to CCI is likely to lead to continued misconduct in relation to this product.[33]

7.33 The Insurance Council of Australia argued, however, that the ASIC report cannot be used as a case for CCI to receive differential treatment under the FOFA reforms:

> The ASIC review did not identify CCI remuneration practices as contributing to current sales practices and the report makes no recommendations in this regard. There is no basis within this report upon which to single out CCI for differential treatment in relation to conflicted remuneration.
>
> Furthermore, the proposal by the Joint Consumer Submission to subject CCI to a ban on conflicted remuneration would create inconsistencies with other insurance products of comparable complexity, particularly since CCI (along with almost all general insurance products) is considered a Tier 2 product for training purposes under ASIC's Regulatory Guide 146.
>
> We therefore submit that CCI should receive the same treatment under the FOFA reforms as that given to all other general insurance products.[34]

*The committee's view*

7.34 Noting the comments of ANZ and the JCG, the committee sought advice from Treasury about how CCI fits with the proposed exemptions from the Bill's conflicted remuneration provisions, and whether it is deemed a general or a life insurance product. Treasury responded that it is 'exploring this issue with industry'.[35] The

32 Joint Consumer Groups, *Supplementary Submission 25*, p. 7.

33 Joint Consumer Groups, *Supplementary Submission 25*, p. 7.

34 Insurance Council of Australia, *Supplementary Submission 39*, p. 4.

35 Treasury, answer to question on notice, 24 January 2012, (received 10 February 2012), p. 1.

committee considers that it is important that Treasury does provide guidance on this issue. It is also important that in determining whether to allow CCI an exemption from the Bill's conflicted remuneration provisions, careful consideration is given to the evidence that CCI has been mis-sold in the past and thereby poses a threat to consumer welfare if a ban is not applied.

### *Extending the carve out to non-ADI representatives*

7.35 The FSC and AMP Financial Services suggested that the carve-out for basic banking products should not be limited to representatives of an ADI, and that the 'simplicity of the product and the advice should not be complicated by who is giving the advice'.[36]

7.36 Treasury argued that the carve-out is limited to ADIs as basic banking products are usually sold by ADI frontline staff, and consumers are aware that ADI's will be selling the employer's product:

> As these basic banking products are often sold by frontline staff, the carve-out is largely intended to address the more routine activities of frontline staff, such as tellers and specialists.
>
> While these employees may provide either general or limited personal advice in relation to these basic banking products, these products are generally easier for consumers to understand, and consumers more readily understand that the frontline employee of the ADI is in the business of selling the employer's product.[37]

## Stockbroking carve-out

7.37 The EM refers to a carve-out that will be provided to exclude certain stockbroking activities from being considered conflicted remuneration, with the precise breadth of the carve-out being subject to further consultation.[38]

7.38 It is proposed that the receipt of 'stamping fees' from companies for capital-raising on those companies' behalf not be considered 'conflicted remuneration' where the broker is advising on and/or selling certain capital-raising products to the extent that they are (or will be) traded on a financial market.[39] Minister Shorten has stated:

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36 AMP Financial Services, *Submission 43*, p. 21; Financial Services Council, *Submission 58*, p. 77.

37 Treasury, *Future of Financial Advice Frequently Asked Questions*, 'Why is there a carve-out for basic banking products?', http://futureofadvice.treasury.gov.au/content/Content.aspx?doc=faq.htm#Q3_11 (accessed 3 February 2012).

38 Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011, p. 30.

39 Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011, p. 30.

'[w]here brokers undertake financial planning activities, the ban on product commissions will of course still apply, ensuring there is no gap in protection for consumers'.[40]

7.39 The Stockbrokers Association of Australia (SAA) noted that the intention is that there will be no material change for traditional stockbroking services under the FOFA reforms:

> For the traditional stockbroking service, buying and selling shares on the market, it appears that the carve-out means that there will be no material change. It will not be impacted unduly, I think the minister said. We are waiting for details of what that means. But in stockbroking there are a range of business models, as you would appreciate. Within large stockbroking firms with retail clients there are financial planning divisions. All of them have financial planners. So all of the issues facing financial planners which relate to buying and selling managed funds, conflicted remuneration, fee disclosure and opt-in will apply to stockbrokers in terms of the advice on those products.[41]

7.40 SAA commented, however, that it would seek clarification on whether the carve-out applies to both authorised representatives and employee stockbrokers.[42]

7.41 ANZ suggested that absolute clarity on the scale of the carve-out from conflicted remuneration as it applies to stockbroking should be included in the Bill and the EM in relation to the execution-only services exemption. It also recommended that 'Treasury develop with industry a comprehensive list of what specific stockbroking activities are considered capital-raising and are thus exempted'.[43]

7.42 Treasury informed the committee that issues pertaining to stockbrokers will be best addressed in the forthcoming regulations.[44] Treasury have provided an outline of some of the issues being considered in relation to stockbrokers:

> There are various considerations and concerns being considered in relation to how the reforms may impact the activities of stockbrokers. For example, Treasury is aware that a typical charging model for stockbrokers may involve a payment, commonly referred to as a 'commission', from the client to the broker that is typically charged as a percentage of the value of a certain transaction or a fee per transaction. These arrangements are being

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40 The Hon. Bill Shorten, MP, Minister for Financial Services and Superannuation, 'Future of Financial Advice Reforms – Draft Legislation', *Media Release* 127, 29 August 2011.

41 Mr Doug Clark, Policy Executive, Stockbrokers Association of Australia, *Committee Hansard*, 23 January 2012, p. 51.

42 Mr Doug Clark, Policy Executive, Stockbrokers Association of Australia, *Committee Hansard*, 23 January 2012, p. 52.

43 ANZ Wealth, *Supplementary Submission 29*, p. 8.

44 Ms Sue Vroombout, General Manager, Retail Investor Division, Treasury, *Committee Hansard*, 24 January 2012, p. 65.

> explored, however it is not the intent that a transparent and product neutral regime with a client-paid fee would be subject to the ban, unless it is an asset-based fee relating to geared products or investments amounts.
>
> Treasury also understands that brokers do not always divide their fees into an advice component and a transaction brokerage component and is exploring the implications of this in relation to the reforms. The nature of payments between market-linked brokers and 'white label-brokers', as well as any payments between structured product providers and brokers are also being considered.
>
> Treasury is undertaking further targeted consultation with industry on what types of payments will be permissible, while having regard to the principles the Government has announced in its reform package. Legislation will have the capacity to carve out specified payments if unintended payments are captured, or unintended consequences occur.[45]

## The timeshare industry

7.43 The timeshare industry provides vacations to members through a managed investment scheme structure. Members can earn Vacation credits which are deemed financial products under the *Corporations Act*.[46] The Australian Timeshare and Holiday Ownership Council (ATHOC) expressed concern that their business models have been unintentionally caught in the regulatory design of the proposed FOFA reforms.[47]

7.44 Several members of the timeshare industry have argued that the reforms will remove the possibility for timeshare issuers to remunerate sales representatives and will either jeopardise the industry[48] or make it unviable.[49] Gold Coast Tourism argues that if the timeshare industry is not exempted from the Bill 'there could be substantial and material negative impact on the timeshare industry and tourism in Australia'.[50]

7.45 Timeshare industry participants have supported a carve-out on the basis that a timeshare product differs from other financial products. Classic Holidays highlighted some of the key differences:

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45 Treasury, *Future of Financial Advice Frequently Asked Questions*, 'How will the ban on conflicted remuneration structures affect stockbrokers?', http://futureofadvice.treasury.gov.au/content/Content.aspx?doc=faq.htm#Q3_2 (accessed 10 February 2012).

46 Wyndham Vacation Resorts Asia Pacific Pty Ltd, *Submission 46*, p. 3.

47 Australian Timeshare and Holiday Ownership Council, *Submission 45*.

48 Accord Vacation Club, *Submission 54*, p. 4.

49 Classic Holidays, *Submission 36*, p. 1; Australian Timeshare and Holiday Ownership Council, *Submission 45*, p. 5; The Holiday Club, *Submission 47*, p. 1; Accommodation Association of Australia, *Submission 63*, p. 1.

50 Gold Coast Tourism Corporation Ltd, *Submission 35*, p. 1; Queensland Tourism Industry Council, *Submission 56*, p. 2.

- timeshare only sells a single product and there is little likelihood for conflict or consumer confusion and resultant consumer harm;
- holiday interests are not distributed through dealer groups or advisors, but are sold directly through sales offices, therefore volume-based payments have no wider impact on competition in the financial planning industry; and
- holiday interests are an in-house product and not provided by a financial product manufacturer.[51]

7.46 Further, ATHOC emphasised that timeshare is a lifestyle product and not a personal financial investment, and this is made clear to consumers before purchase:

> Timeshare is not sold or offered as a financial investment, it is not designed or sold to improve a consumer's financial wellbeing any more than the purchase of a car or other discretionary purchases and is not designed or represented to hold its value upon resale. Sales staff do not provide advice to customers or potential customers about different ways of investing their money, only advice as it relates to purchasing this holiday product. Our product, timeshare, just happens to be regulated as a financial product under the Corporations Act. Indeed, in most jurisdictions timeshare is regulated as a real estate, not as a financial product.[52]
>
> In all of our disclosure documents and compliance plans it quite clearly states that this is not an financial investment. We have this in an owner understanding that we go through with a consumer that decides to buy before they purchase to make sure that they fully understand that there is no financial gain, that the product will not increase in value, and that this is not a financial investment, that it is an investment in their lifestyle.[53]

7.47 ATHOC argued that the 'best interests' duty proposed in the Bill would prevent a timeshare representative advising a consumer to purchase a larger amount of time share than would be in the client's best interest.[54] Moreover, ATHOC emphasised that timeshare representatives adhere to a specific set of regulations and disclosure requirements designed to protect consumers:

> The industry and even some of the legislative bodies have openly said that we are very highly regulated. All through the process there are consumer protection measures, even going to the last aspect. If someone buys, they have a seven-day cooling off period. But before they get to that stage, when they say, 'We would like to buy this product and we have understood what has been said here today,' we have a one-page owner understanding form that goes through and highlights specific points that we are governed by.

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51 Classic Holidays, *Submission 36*, p. 1.

52 Mr Barry Robinson, CEO, Australian Timeshare and Holiday Ownership Council Ltd, *Committee Hansard*, 24 January 2012, p. 33.

53 Mr Barry Robinson, CEO, Australian Timeshare and Holiday Ownership Council Ltd, *Committee Hansard*, 24 January 2012, p. 34.

54 Australian Timeshare and Holiday Ownership Council Ltd, *Submission 45*, pp 3–4.

> One is that this is not a financial investment. They have to initial against that. The second part says, 'You are not going to get a return on this. This is a lifestyle investment. Please sign.' They get a cooling-off period statement that they have to acknowledge, and we keep a record that they have received it and they can send it back to us if they wish to renege on it within seven days.[55]

7.48 Finally, ATHOC argued in its submission that the rationale behind the basic banking product exemption for ADIs could also be applied to the timeshare product:

> Like ADIs, timeshare companies generally arrange their sales teams by means of a sales office such that consumers appreciate that the representatives they purchase their timeshare from are employed by the timeshare company and their job is to sell the product. In our opinion, the situation is exactly analogous to that of the ADI employee.[56]

### *Committee view*

7.49 The committee recognises the intent of the FOFA reforms was not to capture the Timeshare industry given it is not offering a financial services product. Therefore, the committee recommends that the Timeshare industry is carved out from the bans on conflicted remuneration.

### Recommendation 13

**7.50 The committee recommends that the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 be amended so that the Timeshare industry is precluded from the bans on conflicted remuneration.**

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55 Mr Barry Robinson, CEO, Australian Timeshare and Holiday Ownership Council Ltd, *Committee Hansard*, 24 January 2012, p. 37.

56 Australian Timeshare and Holiday Ownership Council Ltd, *Submission 45*, p. 4.