

Chapter 10

The consultation process and implementation timeframe

10.1 The final chapter of this report details the extensive consultation process undertaken by the government on the Future of Financial Advice (FOFA) reforms. It then notes stakeholders' views on the implementation timeframe for the legislation.

The consultation process

10.2 On 26 April 2010, the then Minister for Financial Services, Superannuation and Corporate Law, the Hon. Chris Bowen MP, announced the FOFA reforms.¹ On 28 April 2011, the Assistant Treasurer and Minister for Financial Services and Superannuation, the Hon. Bill Shorten MP, announced further detail on the operation of the reforms.² In providing this detail, Minister Shorten noted:

Since the Government announced the reforms there has been extensive consultation with stakeholders. The Government has carefully weighed and balanced all the feedback provided in consideration of today's announcement. I greatly appreciate the active engagement from industry in the preparation and early implementation of these reforms.³

10.3 The government released draft legislation and a draft Explanatory Memorandum for the first FOFA Bill on 29 August 2011, with Treasury inviting comments on the draft by 16 September 2011. It received 47 submissions.⁴ On 28 September 2011, the government released draft legislation and a draft EM on the

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- 1 The Hon. Chris Bowen MP, 'Overhaul of financial advice', *Media release 36*, 26 April 2010. <http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2010/036.htm&pageID=003&min=ceba&Year=&DocType=0> (accessed 21 February 2012).
 - 2 The Hon. Bill Shorten MP, 'Future of financial advice prioritises consumers', *Media Release No. 64*, 28 April 2011 <http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2011/064.htm&pageID=003&min=brs&Year&DocType> (accessed 27 January 2012).
 - 3 The Hon. Bill Shorten MP, 'Future of financial advice prioritises consumers', *Media Release No. 64*, 28 April 2011 <http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2011/064.htm&pageID=003&min=brs&Year&DocType> (accessed 27 January 2012).
 - 4 Treasury, *Exposure draft—Corporations Amendment Future of Financial Advice Bill 2011*, http://futureofadvice.treasurer.gov.au/content/Content.aspx?doc=consultation/corporations_ame/nd/default.htm (accessed 21 February 2012).

second FOFA Bill and invited submissions by 19 October 2011. Treasury received 48 submissions.⁵

10.4 The Corporations Amendment (Future of Financial Advice) Bill 2011 and the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 were introduced into the House of Representatives on 13 October 2011.

Support for Treasury's role

10.5 In evidence to the committee, Treasury noted that the reforms 'have had a long gestation period' and have involved 'extensive consultation' with industry over the past two years.⁶ Treasury also told the committee that these consultations had led to changes in the government's approach:

During the consultations, the industry's ability to adapt to the change was taken account of in the government's final proposals. That is why you saw the change in the opt-in proposal from 12 months to two years. That was the government's response to issues raised about the impact on the industry.⁷

10.6 Several stakeholders praised Treasury's efforts in consulting with industry on the reforms. ANZ Wealth was asked whether it had had an opportunity to discuss with Treasury some of the implications of the reforms including changes to IT systems and training manuals. ANZ Wealth General Manager, Mr Paul Barrett, responded:

We have had a number of opportunities to consult with Treasury. We have provided them with a fairly detailed breakdown of the impacts on our systems and the number of hours involved, et cetera. I would like to take this opportunity to thank Treasury because they have been incredibly accessible throughout the process and very consultative.⁸

10.7 Mr John Brogden, Chief Executive Officer of the Financial Services Council (FSC), told the committee that:

...Treasury have been faultless through this process and they have been extraordinarily consultative. We are very happy with the access to Treasury. We also say publicly that, despite their best efforts, this has been very

5 Treasury, *Exposure draft—Corporations Amendment Further Future of Financial Advice Bill 2011*, http://futureofadvice.treasury.gov.au/content/Content.aspx?doc=consultation/corporations_further/default.htm (accessed 21 February 2012).

6 Mr Jim Murphy, Executive Director, Markets Group, Treasury, *Committee Hansard*, 24 January 2012, p. 58.

7 Mr Jim Murphy, Executive Director, Markets Group, Treasury, *Committee Hansard*, 24 January 2012, p. 59.

8 Mr Paul Barrett, General Manager, Advice and Distribution, ANZ Wealth, *Committee Hansard*, 24 January 2012, p. 9.

complex and it is an area they have not had expertise in. So there has been a very significant learning period, but access has been exceptional.⁹

10.8 The Industry Super Network (ISN) Chief Executive, Mr David Whiteley, told the committee that the reforms 'are moderate and reasonable and have been developed over a period of years following consultation with all sectors in the financial services industry'.¹⁰ The ISN also noted that the Bill's annual fee disclosure requirement was 'very well canvassed' in Treasury's consultation meetings.¹¹

10.9 The Financial Planning Association told the committee that it has been 'a strong contributor' throughout the development of the legislation and provided 'many hundreds of pages of consultation feedback'.¹² It noted that it had participated in numerous consultation meetings and discussions hosted by Treasury as well as individually with the Minister's office.¹³

Consultation on the annual fee disclosure requirement

10.10 Chapter 3 discussed the issue of annual fee disclosure statements to be sent to all clients by financial advisers. The committee received comment from some stakeholders that the government's consultation on this provision was inadequate.

10.11 Mr Richard Klipin, Chief Executive Officer of the Association of Financial Advisers (AFA), told the committee that:

Fee disclosure statements were never part of the conversation and never part of the consultation. They jumped in at the last minute and are retrospective. They are a redundant item and will just cost endless amounts of time and money and will be one of the reasons why a lot of advisers will focus on the higher value clients at the expense of low and middle income Australians.¹⁴

10.12 The Financial Planning Association criticised the 'retrospective' aspect of the disclosure fee obligation, claiming the consultation process had only discussed applying this requirement to new clients (as per the draft legislation). It claimed that

9 Mr John Brogden, Chief Executive Officer, Financial Services Council, *Committee Hansard*, 23 January 2012, p. 35.

10 Mr David Whiteley, Chief Executive, Industry Super Network, *Committee Hansard*, 24 January 2012, p. 18.

11 Ms Robbie Campo, Manager, Strategy, Industry Super Network, *Committee Hansard*, 24 January 2012, p. 23.

12 Mr Mark Rantall, Chief Executive Officer, Financial Planning Association, *Committee Hansard*, 23 January 2012, p. 41.

13 Mr Mark Rantall, Chief Executive Officer, Financial Planning Association, *Committee Hansard*, 23 January 2012, p. 41.

14 Mr Richard Klipin, Association of Financial Advisers, *Committee Hansard*, 23 January 2012, p. 16.

this change had created confusion among stakeholders.¹⁵ The FSC put the same argument:

With regard to the fee disclosure statement, particularly with regard to the retrospectivity of the statement, that was never discussed in any detail with Treasury, particularly with the peak consultation group. It was never, ever alluded to until it appeared in the legislation which was tabled in parliament. Indeed, in the month just preceding the bill being tabled in parliament, the conversations with Treasury, peak consultation groups and other consultation participants was that the policy was determined and it would be prospective, and therefore no discussion was entered into.¹⁶

10.13 On the other hand, the ISN and the consumer groups defended the government's consultation on the annual disclosure requirement. The ISN was asked whether it—like others—was taken 'by surprise' that the annual fee disclosure requirement is to apply to existing clients. Ms Robbie Campo, Manager of Strategy at the ISN, told the committee:

It took me by surprise that it took anyone by surprise, because I attended all of the consultation panel meetings and that idea had been discussed at the consultation meetings.¹⁷

10.14 Indeed, Choice noted in its submission that the idea of an annual disclosure notice was first discussed at a peak consultation group meeting led by Treasury on 24 January 2011. It observed that the disclosure requirement was raised:

In response to the industry's concerns about annual opt-in consumer groups suggested that if opt-in was required every two years instead of annually then it would be reasonable for consumers to be told the amount they had paid in fees for services in the intervening year.

It was raised and supported as a good faith attempt by those who strongly supported annual opt-in to find a way to meet the industry's concerns about an annual measure.¹⁸

10.15 Choice drew attention to the government's 28 April 2011 FOFA information pack which stated that the two year 'opt-in' requirement:

...will be supplemented by an intervening annual disclosure notice to be provided to the client detailing fee and service information for the previous

15 Mr Mark Rantall, Chief Executive Officer, Financial Planning Association, *Committee Hansard*, 23 January 2012, p. 41. See also Mr Dante de Gori, General Manager, Financial Planning Association, *Committee Hansard*, 23 January 2012, p. 44–45.

16 Ms Cecilia Storniolo, Senior Policy Manager, Financial Services Council, *Committee Hansard*, 23 January 2012, pp 35–36.

17 Ms Robbie Campo, Manager, Strategy, Industry Super Network, *Committee Hansard*, 24 January 2012, p. 23.

18 Ms Jenni Mack, Chair of Governance Committee, Choice, *Submission 69*, p. 1.

and forthcoming year, informing the client of their right to 'opt-out' at any point in time to an ongoing advice contract.¹⁹

10.16 On 29 August 2011, Minister Shorten's press release stated that 'the 'opt-in' measure requires a financial adviser or planner to send a renewal ('opt-in') notice every two years to new clients, as well as *an annual fee disclosure statement to all clients*'.²⁰

10.17 Choice did acknowledge that the draft legislation relating to disclosure notices did not apply to all clients, as the Minister's press release had indicated. It was subsequently amended such that the measure applies as it was outlined in the government's April 2011 announcement.²¹

10.18 Associate Professor Joanna Bird from the University of Sydney argued that it is reasonable for a consultation process to amend the draft legislation. In her evidence to the committee, she reasoned:

You consult with bodies because you want to get their opinion, and presumably you are going to be prepared to make changes if people make submissions to you that convince you. So we should not be surprised that, through the consultation process, the package of reforms has changed. It has to be said that this very group of consumers put forward a submission that actually argued that it should apply to all existing clients. That, and presumably other information that came to the government, may have convinced them that they needed to modify their legislation in response to it. That is what happens in consultation processes; arguments are made to you and you are convinced by them and you respond to them. If you are not prepared to change anything, do not consult.²²

10.19 Associate Professor Bird also noted that the consultation process on the Bill is ongoing, through the parliamentary committee process. As she told the committee:

...the idea that this is not being consulted on is strange because we are talking about it and we are consulting on it. And there have been something like 68 submissions made to you [the committee] and many of them have raised this issue. So there is ongoing consultation.²³

19 Australian Government, 'Future of Financial Advice—Information Pack', 28 April 2011, p. 8. <http://ministers.treasury.gov.au/Ministers/brs/Content/pressreleases/2011/attachments/064/064.pdf> (accessed 1 February 2012).

20 The Hon. Bill Shorten MP, Minister for Financial Services and Superannuation, 'Future of Financial Advice Reforms— Draft Legislation', *Media Release No. 127*, 29 August 2011 <http://mfss.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2011/127.htm&pageID=003&min=brs&Year=&DocType=0>

21 Ms Jenni Mack, Chair of Governance Committee, Choice, *Submission 69*, p. 1.

22 Associate Professor Joanna Bird, *Committee Hansard*, 23 January 2012, p. 59.

23 Associate Professor Joanna Bird, *Committee Hansard*, 23 January 2012, p. 59.

Committee view

10.20 The committee rejects the suggestion put by some stakeholders that the first FOFA Bill's provision which require annual fee disclosure statements to be prepared for both existing and new clients was not discussed during the consultation process. While it is true that the draft Bill did not contain the requirement for existing clients, the intent to apply disclosure statements to both new and existing clients was publicly announced by the government in April and August 2011. The committee also highlights Treasury's comment that it consulted with stakeholders about the potential cost of the disclosure obligations.²⁴

The implementation timeframe

10.21 As chapter 1 noted, the commencement date for the provisions of the FOFA Bills is 1 July 2012. The committee received mixed evidence on the merit of this starting date.

Opposition to the 1 July 2012 timeframe

10.22 Several witnesses proposed aligning the commencement of the FOFA and MySuper legislation. The AFA, the FPA, the Corporate Superannuation Specialist Alliance the FSC and ANZ Wealth²⁵ all argued for delaying the commencement and implementation of the FOFA reforms until at least 1 July 2013 to synchronise the change with the start of MySuper.²⁶ Beyond this, these groups' views varied on how the implementation of FOFA should proceed.

10.23 The Chief Executive Officer of the FPA, Mr Mark Rantall, told the committee that 'there should be a two-year transition and implementation time frame for the FOFA reforms similar to those that apply to FSR'.²⁷

24 Mr Jim Murphy, Executive Director, Markets Group, Treasury, *Committee Hansard*, 24 January 2012, p. 63; Dr Richard Sandlant, Manager, Financial Advice Reform Unit, Retail Investor Division, Treasury, *Committee Hansard*, 24 January 2012, p. 67.

25 Mr Richard Klipin, Association of Financial Advisers, *Committee Hansard*, 23 January 2012, p. 18; Mr Mark Rantall, Chief Executive Officer, Financial Planning Association, *Committee Hansard*, 23 January 2012, p. 49; Mr Douglas Latto, President, Corporate Superannuation Specialist Alliance, *Committee Hansard*, 23 January 2012, p. 76; Mr John Brodgen, Chief Executive Officer, Financial Services Council, *Committee Hansard*, 23 January 2012, p. 35; Mr Paul Barrett, General Manager, Advice and Distribution, ANZ Wealth, *Committee Hansard*, 24 January 2012, p. 2.

26 Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011. At the time of writing, the committee was inquiring into the provisions of this bill for report by 13 March 2012. The committee is aware there are a further two tranches of the MySuper legislation. The Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012 was introduced into the parliament on 16 February 2012.

27 Mr Mark Rantall, Chief Executive Officer, Financial Planning Association, *Committee Hansard*, 23 January 2012, p. 41.

10.24 The FSC drew the committee's attention to the costs of IT implementation and training, noting that its members need 'at the very least' a six- to nine-month period before they can start implementing the FOFA reforms. Mr John Brodgen, the Chief Executive Officer of the FSC, noted that in waiting 12 months to implement FOFA, 'the industry will be better prepared to provide best interest advice and adhere with this legislation'.²⁸

10.25 The Corporate Superannuation Specialist Alliance told the committee that the FOFA legislation 'should not be delivered in numerous separate tranches as this makes it almost impossible for the financial services industry to plan appropriately for and to cost-effectively implement the changes'.²⁹

10.26 The Stockbrokers' Association of Australia told the committee that with the July 2012 commencement date, its members 'will not have enough time to make the systems, policy and procedural changes which will be necessary for their implementation'. The Association sought a further transition period 'of at least 12 to 18 months, from July 2012 to the end of 2013'.³⁰

Support for the 1 July 2012 commencement date

10.27 The Joint Consumer Groups (JCG) told the committee that the proposed transition provisions are 'actually quite generous'. It noted that under the intended arrangements, there will be no opt-in notice required until July 2014 and for new clients, the first fee disclosure statement will not be required until 1 July 2013.³¹

10.28 In its submission to the inquiry, ANZ Wealth set out its recommended approach to FOFA compliance deadlines. It proposed that the following aspects of the legislation should be implemented by 1 July 2012:

- the 'opt-in' requirement for new clients (which will not actually commence until 1 July 2014);
- the annual disclosure fee requirement (providing it is only prospective for new clients);
- the soft dollar ban;
- the Australian Securities and Investments Commission's (ASIC) new powers;
- the ban on conflicted remuneration as it applies to volume bonuses;

28 Mr John Brodgen, Chief Executive Officer, Financial Services Council, *Committee Hansard*, 23 January 2012, p. 35.

29 Mr Douglas Latto, President, Corporate Superannuation Specialist Alliance, *Committee Hansard*, 23 January 2012, p. 76.

30 Mr David Horsfield, Managing Director and Chief Executive Officer, Stockbrokers' Association of Australia, *Committee Hansard*, 23 January 2012, p. 50.

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

- the ban on conflicted remuneration as it applies to workplace employer defaults (provided there is no enforcement activity for one year after 1 July 2012);
- the ban on conflicted remuneration as it applies to non-corporate super; and
- the best interests duty (with a three month grace period on enforcement in light of the final shape of the duty not being known and in recognition that systems changes will need to occur so that the duty is appropriately applied to adviser activities).³²

10.29 ANZ Wealth argued that if the disclosure requirement applies to existing clients, the commencement date should be 1 July 2013. It also argued that the ban on conflicted remuneration as it affects Authorised Deposit-taking Institutions (ADIs) should wait until 1 July 2013, as should the ban on adviser commissions in group insurance arrangements.³³

10.30 In terms of its own industry, ANZ Wealth drew the committee's attention to the 'substantial legacy systems and products' of many fund managers. In addition, it noted that there are current products that will fall into the legacy category as a result of the reforms.³⁴

10.31 The ISN told the committee that there are in some cases substantial changes to be made to the operating systems of large institutions. Mr Whiteley suggested that the regulator should be aware of these transitional issues:

I have certainly got sympathy that elements of some of these reforms mean that institutions are going to have very substantial system changes if they are required. I am not an expert on the system changes that are required, but certainly the evidence is suggesting from some of the major institutions a substantial amount of change is required and that the regulator, ASIC, should be sensitive to the implementation process.

...on the particular points around probably certain volume rebates and some of the complex areas around platforms, we are very much of the view that [the] regulator should be taking a constructive, sympathetic and I think the term is soft approach to that first year of implementation, to be respectful of and sympathetic to the fact that timelines are probably at little bit more pushed out and people might have expected and the industry does need to have the capacity to do this implementation.³⁵

32 ANZ Wealth, *Submission 29*, pp 5–7.

33 ANZ Wealth, *Submission 29*, pp 5–7.

34 ANZ Wealth, *Submission 29*, p. 4; Mr Paul Barrett, General Manager, Advice and Distribution, ANZ Wealth, *Committee Hansard*, 24 January 2012, p. 2.

35 Mr David Whiteley, Chief Executive, Industry Super Network, *Committee Hansard*, 24 January 2012, p. 24.

10.32 Treasury argued along similar lines. In evidence to the committee, Executive Director of Markets Group, Mr Jim Murphy, noted:

...for the major companies we appreciate that major systems changes have to take some time. There are ways of doing that. You can commence legislation but have a very light touch from ASIC, more an educational role. That is one way and not so much stringent enforcement. There are various ways of approaching that.³⁶

10.33 In its supplementary submission to the inquiry, the ASIC noted that it had announced it will adopt a 'facilitative compliance approach' for the first 12 months of the implementation of the FOFA reforms. As an ASIC official explained:

...provided industry participants are making reasonable efforts to comply with the FOFA reforms, ASIC will adopt a measured approach where inadvertent breaches result from a misunderstanding of requirements or systems issues. However, where ASIC finds deliberate and systemic breaches we will take stronger regulatory action.³⁷

10.34 In evidence to the Senate Economics Legislation Committee on 16 February 2012, Treasury noted that various representations had been made by the industry on the implementation timetable and a final decision was 'still with the minister'. This included whether to synchronise the starting date for the implementation of the MySuper and FOFA reforms. Mr Murphy did note that there will need to be 'quite important changes to back officers in terms of education of financial planners'.³⁸

Committee view

10.35 The committee is cognisant that at the same time as it is preparing this report, the Minister is conducting ongoing consultations with the industry on the implementation timeframe for the FOFA Bills. The committee largely agrees with ANZ Wealth that the vast majority of the FOFA provisions should commence on 1 July 2012. The industry has been properly consulted and has known of the FOFA Bills' provisions for some time. The annual fee disclosure for new clients and the 'opt-in' requirement will commence in 12 months and two years respectively. The fee disclosure requirement for existing clients relates only to the client arrangements negotiated for the previous 12 months and as such, should not be onerous.

10.36 The committee does recognise, however, that where institutions face substantial systems changes, ASIC should show a measured approach to inadvertent

36 Mr Jim Murphy, Executive Director of Markets Group, Treasury, *Committee Hansard*, 24 January 2012, p. 64.

37 Australian Securities and Investments Commission, *Supplementary Submission 28*, p. 3. See also, Mr John Price, Senior Executive Leader, Strategy and Policy, ASIC, *Committee Hansard*, 24 January 2012, p. 76.

38 Mr Jim Murphy, Executive Director of Markets Group, Treasury, *Proof Committee Hansard*, Senate Economics Legislation Committee, Senate Estimates, 16 February 2012, p. 50.

breaches in the first year of the legislation. The committee commends ASIC for its 'facilitative compliance approach' but urges the regulator to adopt a stricter approach 12 months after the commencement of the FOFA provisions.

Cost of implementing FOFA

10.37 The FSC stated in evidence to the committee that based on modelling from the industry, the full implementation cost of FOFA will be \$700 million. Mr Brogden added that on top of this cost, there will be an annual compliance cost of \$375 million across the industry.³⁹ These estimates have been widely cited.

10.38 The \$700 million implementation estimate was put to Treasury for its comment during Senate Estimates in February. Mr Murphy replied:

I am very sceptical of that estimate...We are examining it...As well as that, we look at what other people say. From what I can glean from all the various estimates that have come out, it is going to have a marginal impact on the financial planning industry.⁴⁰

The regulations

10.39 There was some concern that industry will have very little opportunity to see the regulations accompanying the legislation prior to the commencement date of 1 July 2012. Mr Brogden of the FSC told the committee:

...this will not go through parliament or through the House of Representatives until March, April or May...

...once the legislation goes through, Treasury will have to provide the regulation. If we are lucky, we will know what the law says on 30 June 2012 for an implementation one minute later.⁴¹

10.40 However, the committee notes Treasury's comment that it expects the draft regulations will be available for public consultation during March 2012. This will give the industry at least three months in which to comment on the draft regulations and know of their final form.⁴²

39 Mr John Brogden, Chief Executive Officer, Financial Services Council, *Committee Hansard*, 23 January 2012, p. 30.

40 Mr Jim Murphy, Executive Director, Markets Group, Treasury, *Proof Committee Hansard*, Senate Economics Legislation Committee, Senate Estimates, 16 February 2012, p. 53.

41 Mr John Brogden, Chief Executive Officer, Financial Services Council, *Committee Hansard*, 23 January 2012, p. 35.

42 Ms Sue Vroombout, General Manager, Retail Investor Division, Treasury, *Committee Hansard*, 24 January 2012, p. 64.

Concluding comments and a final recommendation

10.41 The FOFA Bills represent a significant reform of the financial advice industry in Australia. The impetus for the legislation was the committee's 2009 inquiry into financial products and services in Australia. That inquiry was in turn a response to the financial collapses of Storm Financial and Opes Prime, among others. As in the 2009 inquiry, the committee's principal interest in examining the FOFA legislation is to ensure better outcomes and protections for consumers of financial products and services. It believes that the legislation will achieve that aim.

10.42 The FOFA Bills will not only enhance consumer protections, but promote the professionalism of the financial advice industry. For too long, the industry's standards have suffered from lax regulation and an inadequate focus on the needs and interests of clients. The FOFA reforms will significantly address these inadequacies, principally through the annual fee disclosure, opt-in and conflicted remuneration provisions. The costs of implementation and compliance for the industry will be far outweighed by the benefits to consumers from high quality advice and transparency in charging fees.

10.43 The committee does appreciate that the next 18 months to two years will be a time of significant adjustment for many in the financial advice industry. It recognises that ASIC will take a measured approach to inadvertent breaches in the first year of implementation. As this report has noted, it is also important that ASIC assist with this compliance through publishing clear regulatory guidance detailing what is expected of industry.

10.44 Moreover, the committee believes that in the interests of identifying problems with compliance and implementation, the government should commission an independent review of the FOFA reforms. The reporting of this review should be staggered to allow an initial assessment of the annual fee disclosure requirement and the industry's early adaptation, followed by a more complete assessment to consider the opt-in provisions and ASIC's use of its new powers.

Recommendation 15

10.45 The committee recommends that there should be an independent review of the application of the Future of Financial Advice (FOFA) legislation. The review should be timed to comment constructively on how stakeholders have complied with, and interpreted the FOFA provisions. To this end, the committee recommends that an initial report should be given to government by the end of 2013 and a further report by the end of 2014.

Mr Bernie Ripoll, MP

Chair