Stockbrokers Association of Australia
Incorporating SDIA

Senate Economics Legislation Committee

Inquiry into the provisions of the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014

Submission

28 April 2014

Introduction

The Stockbrokers Association of Australia is pleased to provide these comments to the Committee on the *Corporations Amendment (Streamlining of Future of Financial Advice) Bill* 2014.

The Bill (and accompanying Regulation[1]) was generally **welcomed** by the Stockbrokers Association upon its release 29 January 2014. It makes the following reforms to the FOFA provisions of the *Corporations Act 2001*:

- restoring the Accountants' Certificate expiry period to 2 years
- extending the Stamping Fee exemption to investment entities like LICs
- removing the opt-in requirements
- removing the annual fee disclosure requirements for pre-1 July 2013 clients
- removing the 'catch-all' provision from the best interests duty
- explicitly allowing for the provision of scaled advice
- exempting general advice from the ban on conflicted remuneration, and
- broadening the existing grandfathering provisions for the ban on conflicted remuneration.

[1] *Corporations Amendment (Streamlining of Future of Financial Advice) Regulation* 2014

We would like to comment on the following aspects of the reforms:

- Removing the 'catch-all' from the best interests duty
- Conflicted remuneration
- Accountants' Certificates
- Scaled advice

We would also like to raise two other matters relevant to FOFA:

- Review of Retail and Wholesale Client definitions
- Share Registry mining

1. Removal of the 'Catch-all' from the Best Interests Duty (s961B(2)(g))

We are confident that the removal of the 'catch-all' from the best interests duty which has captured the interest of many commentators recently, will not detract from the effectiveness of the best interests duty. The best interests duty in section 961B remains a detailed and robust obligation to ensure that personal advice is suitable for the particular client. The 'catch-all' was only one of seven listed obligations in the best interests duty. Moreover, investor protection is strengthened by the obligation to give appropriate advice (s961G), and to ensure that the interests of the client are paramount (s961J). Accordingly, we strongly disagree with recent commentary that the removal of the 'catch-all' has somehow *removed* the best interests duty, or that it is substantially reduced.

2. Conflicted Remuneration

One of the primary concerns we always had with the conflicted remuneration provisions was the fact that they originally applied to the provision of **both general** and **personal advice**. Expanding the scope of FOFA to general advice unnecessarily complicated the implementation and administration of the regime. Including **general advice** in the FOFA provisions made the scope of the prohibition so broad as to make it unworkable.

In our opinion, the inclusion of general advice went well beyond the original intention behind FOFA i.e. removing the risk of retail clients receiving conflicted advice that may be inappropriate for them due to the fact that the adviser is being paid a commission. By definition, **general advice does not take into account a person's needs or objectives** so it is not appropriate to apply a conflicted remuneration regime when a recommendation is not being made based on the person's individual circumstances.

We support the scope of FOFA being narrowed to its original intent. Financial advisers who are paid commissions in respect of the advice that they provide to their clients are generally (if not always) providing personal advice and in our opinion it is this type of advice that was intended to be addressed by FOFA. The fundamental value proposition of any party that provides personal advice (including stockbrokers and financial planners) is that they provide advice that it **tailored** to the needs of their clients. Consistent with the best interests duty –

which only ever applied to personal advice – we welcome the narrowing of the ban on conflicted remuneration to the provision of **personal advice.**

We also welcome the clarification of the '**client pays**' exception via a new Note to s963A, which will make it clearer that benefits paid by the client includes benefits *authorised* by the client. Clear and specific client authority should remove the risk of conflicted remuneration ever being paid.

3. Accountants' Certificate renewal period restored to 2 years (s761G(7)(c); Reg.7.6.02AF)

The Bill restores the 2 year renewal period for Accountants' wholesale client certificates, which was inexplicably reduced to 6 months by FOFA.

The reduction in the renewal period for Accountants Certificates from 2 years to 6 months was not flagged in the years of consultation leading up to FOFA's commencement on 1 July 2013. There is no policy justification for having a 6 months expiry period for Accountants' certificates in the context of financial advice and 2 years for share offers without a prospectus. The rationale for the certificates has always been the same: they serve as an independent assessment of the superior financial position of a client that can be relied upon in the assessment of their status as wholesale. Such clients do not require all of the disclosure and other obligations owed to a retail client. The certificates serve the same function in the context of advice as they do for share offers. Accordingly, there is no justification for two different renewal periods applying to Accountants' certificates in the two contexts.

4. Scaled advice

In traditional stockbroking, clients often seek advice on a limited basis, for example, a brief inquiry as to which stock(s) to buy or sell. Clients don't often require a full financial plan or advice on their entire circumstances or portfolio of investments. We were therefore pleased to see further measures in the proposed reforms to accommodate clients and their limited requirements.

ASIC has previously noted that according to surveys around **one-third** of Australians prefer scaled or 'piece-by-piece' financial advice rather than comprehensive or 'holistic' advice.[2] (Our Members would suggest that if this survey were solely conducted in **stockbroking**, the figure would be significantly **higher** than one-third.) Previously, while scaled advice was mentioned in a *Note* to s961B(2)(g), and acknowledged by ASIC in regulatory guidance, the new provisions will allow greater certainty. The adviser and client will be able to agree to limit the scope of advice that is sought so that the client's needs should be better met.

We urge the Parliament to pass the new provisions on scaled advice in their entirety.

[2] ASIC Regulatory Guide 244 *Giving information, general advice and scaled advice* December 2012 at RG 244.6

OTHER MATTERS

Finally, we wish to raise two other FOFA-related issues which appear to have been overlooked in the current reforms:

- the review of the definitions of 'retail' and 'wholesale' investors, and
- Share Registry mining.

1. Review of Retail/Wholesale client definitions

In January 2011, following one of the recommendations of the PJC *Storm Inquiry Report*[3] the Government released an Options Paper in a wide-ranging review of the definition of retail and wholesale clients under the *Act*[4]. In late February 2011, submissions closed. These definitions are crucial the whole structure of the regulation of financial services and financial advice. It is therefore a matter of some concern that, 3 years after submissions closed on the options paper, no final or interim proposals arising from the 2011 review have been released.

2. Share Registry Mining

In 2012, we raised an issue with Government regarding the differential regulation of the permitted uses of share registers[5]. The effect of the current provisions is that licensees which are not market participants can access companies' share registers to solicit business from shareholders. However, market participants are prohibited from doing so. There is no policy or regulatory justification for this ban, and we urgently seek its removal in the current round of reform.

Such an amendment would fit squarely in the spirit of deregulation. It could be achieved by simply deleting the offending paragraph, namely Corporations Regulation 2C.1.03(b).

While the above two matters were not included in the current package of reforms - and time will probably prevent them being included in the current round - we are concerned that they will once again lose priority and may be forgotten in the Government's financial services policy formulation.

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The delay in the introduction of the streamlining amendments has exacerbated uncertainty as to their implementation. Nine months after FOFA's commencement, ASIC is still in the '*facilitative phase*' of implementation, but it may still choose to take enforcement action for

[3] Parliamentary Joint Committee on Corporations and Financial Services *Inquiry into financial products and services in Australia - Report* November 2009
[4] Australian Government *Wholesale and Retail Clients - Future of Financial Advice Options Paper* dated January 2011
[5] Stockbrokers Association *Letter to the Hon Bill Shorten MP Minister for Financial Services and Superannuation Access to Share Registers* dated 7 August 2012

breaches. It remains to be seen whether and if so what action ASIC may take to enforce provisions that may (or may not) be the subject of 'streamlining'. For example, there is uncertainty as to whether Australian Financial Services Licensees (including our Member firms) are required to lodge breach reports for non-compliance with requirements that will be removed if the streamlining amendments proceed. ASIC has already advised that, as usual, members will need to consider the factors listed in section 912D as to whether a matter is reportable to ASIC as a significant breach. For example, if a broker is still relying on 7 month-old Accountants Certificates – which are valid for excluded offers of securities but not for giving advice – to treat a client as Wholesale, is this a significant breach?

Industry has made a long and at times difficult transition to FOFA. Certainty is now needed as to the final position. This is essential for licensees, and their clients. Moreover, ASIC is in a difficult position during this period of uncertainty in relation to its approach to enforcement.

It is unfortunate that, while only a limited number of provisions of the Bill were in dispute, the current impasse has meant that the whole package is effectively in abeyance.

We would be happy to address the Committee further on any of the matters raised in this Submission. Should you require further information, please contact me, or Doug Clark, Policy Executive

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STOCKBROKERS ASSOCIATION OF AUSTRALIA
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