Chapter 7

Opt-in requirement and fee disclosure

7.1 In this chapter the committee considers two amendments. The first involves removing the need for clients to renew their ongoing fee arrangement with their adviser every two years (also known as the 'opt-in' requirement). The second change involves making the requirement for advisers to provide a fee disclosure statement applicable only to clients who entered into their arrangement after 1 July 2013.

Remove the opt-in requirement

7.2 The opt-in requirement means that financial advisers who have an ongoing fee arrangement with a retail client must obtain their client's agreement at least every two years to continue the ongoing fee arrangement. It applies to new clients who enter into an ongoing fee arrangement from 1 July 2013.[1] The bill would:

- remove the renewal notice obligation for fee recipients; and
- make the requirement for providers to provide a fee disclosure statement only applicable to clients who entered into their arrangement after 1 July 2013.

7.3 Under existing legislation, licensees who have an ongoing fee arrangement with a retail client whose ongoing fee arrangement commenced after 1 July 2013 must obtain their client's agreement at least every two years to continue the ongoing fee arrangement (opt-in requirement). If, after receiving the renewal notice, the client decides not to renew or does not respond to the fee recipient's renewal notice, the ongoing fee arrangement terminates.[2] This provision means that the fee recipient is not obligated to provide ongoing financial advice to the client, and the client is not obligated to continue paying the ongoing fee.[3]

7.4 Under the proposed changes, any ongoing fee arrangement continues to exist unless the client or licensee terminates the arrangement. The Explanatory Memorandum notes that under the new law:

> …an 'opt-out' system applies where any ongoing fee arrangement continues to exist unless the arrangement is terminated by either the client or the fee recipient.[4]

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1 *Submission 11*, p. 4.

2 Replacement explanatory memorandum, *Corporations Amendment (Future of Financial Advice) Bill 2011*, paragraph 1.9.

3 Replacement explanatory memorandum, *Corporations Amendment (Future of Financial Advice) Bill 2011*, paragraph 1.9.

4 Explanatory Memorandum 2.20.

7.5 It should be noted that the renewal notice must be sent to the client within 30 days of the end of the two-year period and the client then has 30 days to agree to renew the arrangement.

7.6 The bill repeals sections 962K, 962L, 962M and 962N and subdivision C of Division 3 of Part 7.7A which deal with:

- fee recipient must give renewal notice;
- renewal notice day and renewal period;
- if client notifies fee recipient that client does not wish to renew;
- if client does not notify fee recipient that client wishes to renew; and
- disclosure for arrangements to which Subdivision B does not apply.[5]

Opposition to removing opt-in requirement

7.7 A number of submitters wanted the opt-in provision to remain. They recognised the advantages that such periodic notifications would have for consumers. For example, the ACTU noted that the Explanatory Memorandum does 'not offer or refer to any assessment of the costs involved in implementing the opt-in requirement'. On that basis, it argued that it was unclear how the government reached the conclusion that they were 'unnecessary' relative to the benefits of protecting clients from paying ongoing fees for advice services that are underutilised or not utilised at all'.[6] It explained its concern:

> The introduction of the opt-in requirement under FOFA arose from the fact that in markets for complex financial products and services much consumer behaviour is shaped by low levels of financial literacy and related high levels of inertia. Evidence from behavioural economics clearly shows that when customers are faced with markets characterised by complexity and choice overload they are very likely to make sub-optimal decisions or make no decisions at all. In short, once they have purchased a financial product or service (which may involve paying an ongoing fee) they are unlikely to switch.[7]

7.8 In effect, the ACTU argued that abolishing the opt-in would result in more people paying for advice they do not receive.[8] COTA held a similar view that the requirement for consumers to renew their arrangement with their adviser every two years was an important consumer protection. It stated further:

> We have heard many stories of people who have no contact with their adviser but the fees keep flowing to the advisor from the product vendors.

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5 Items 21 and 22.

6 *Submission 5*, p. 5.

7 *Submission 5*, p. 5.

8 *Submission 5*, p. 5.

> The business model of putting all the effort into signing people up for advice and then never reviewing or being in contact again should be a thing of the past with this particular element of the original FOFA package. Winding back this provision allows this model to flourish.[9]

7.9 According to COTA, the opt-in provision was a way of ensuring that providers 'keep in contact with consumers, have up to date contact details' and 'trigger periodic reviews'. The requirement should also encourage consumers to look at their financial goals and seek updated advice when circumstances change. Furthermore:

> It may also give them the impetus to shop around for advice and therefore promote competition and potentially reduce the cost of advice. It may also give an opportunity for people who have taken scaled advice to move to getting more holistic advice.[10]

7.10 COTA did not accept that the opt-in model was onerous on providers or that it carried high compliance costs, but rather it was 'another way of ensuring that providers are continuing to act in the best interests of their clients and optimising the advice'.[11]

7.11 The Governance Institute agreed that the opt-in provision should not be removed from the legislation.[12] It stated that this arrangement provided a strong consumer protection and promoted 'better transparency and accountability for financial advisers'.[13] While cognisant that the opt-in provision created 'an administrative burden for financial advisers', the institute opposed its removal on the basis that:

> …it places the control over the advising relationship in the hands of the financial adviser and provides no capacity for the consumer to assess if the ongoing fee arrangement remains suited to their needs.[14]

7.12 In its view, should the government decided to proceed with the removal of the opt-in requirement then 'an alternative approach should be taken to ensure that a form of consumer protection remains in place'.[15] The Governance Institute recommended that:

> …the removal of the opt-in requirement be tempered with an obligation on the financial adviser to continue to include the proposed fee arrangement in a renewal notice, as currently set out, but for the onus to revert to the client

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9 *Submission 10*, p. 4.

10 *Submission 10*, p. 4.

11 *Submission 10*, p. 5.

12 *Submission 11*, p. 4.

13 *Submission 11*, p. 4.

14 *Submission 11*, p. 4.

15 *Submission 11*, p. 4.

> to terminate the relationship. That is, the renewal notice should set out the same information as is currently required, but provide that the arrangement continues unless the client explicitly elects not to renew the arrangement, and that if the client does not do anything, the arrangement will also continue. This is an opt-out requirement.[16]

7.13 CPA Australia and the Institute of Chartered Accountants Australia stated their continuing support for the mandatory two year opt-in process as an important pillar of the FOFA reforms.[17] Mr Drum argued that this mechanism ensured engagement and transparency for all ongoing advice arrangements—making sure that consumers understand what they are paying for and are comfortable doing so.[18] According to CPA Australia and the Institute of Chartered Accountants Australia:

> The opt-in requirements will assist clients who are actively involved in planning their financial future to assess whether the services they are receiving reflect value for money before they decide to renew an ongoing fee arrangement. In addition, it will encourage clients who are not actively engaged to become involved with their finances and their adviser, an important outcome given the low levels of financial literacy. It is also an opportunity for those financial advisers who do not regularly engage with their clients and seek their ongoing consent to charge advice fees to now demonstrate the real value of their advice.[19]

7.14 These two major accounting bodies also referred to the importance of transparency and integrity, which, in their view, were 'essential elements in a trusted relationship between a financial planner and a client'. They argued that these mandatory ongoing disclosure requirements would uphold the principles of transparency and integrity in all client engagements. To their mind:

> If the industry can begin to effectively communicate the benefit and value of seeking financial advice, the wider community will begin to understand these benefits and this may encourage more people to actively seek advice. This active engagement by clients will be a key element in improving trust and confidence in the industry.

7.15 But CPA Australia and the Institute of Chartered Accountants Australia, believed that the opt-in protection mechanism 'should have been afforded to both existing and new clients'. They noted, however, that a compromise of requiring the provision of an annual fee disclosure statement to all clients would 'assist in ensuring existing clients have the opportunity to make an informed decision whether they are receiving value for the ongoing fees they are being charged'.

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16 *Submission 11*, p. 4.

17 *Submission 14*, p. 4.

18 *Proof Committee Hansard*, 22 May 2014, pp 29 and 31.

19 *Submission 14*, p. 4.

7.16 Consistent with the views of the Governance Institute, they also understood that implementing new regulatory requirements comes at a cost. Nonetheless, they acknowledged that 'a balance must be struck between amending existing obligations and ensuring new rules and regulations are in the consumer's best interests and deliver positive outcomes'.[20]

7.17 Likewise, the Institute of Public Accountants recognised that some financial service providers may need to change their systems to accommodate the need for clients to 'opt-in', which would involve time and in some cases, substantial cost.[21] Even so, the IPA believed that:

> …from a client perspective, it may be preferable to have a regular reminder about the services being provided and to be afforded the opportunity to become involved, even if to just actively 'opt-out'. While for some clients this may be a nuisance; for others it may be an opportunity to improve their financial literacy and become more involved in shaping their financial future.
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> …
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> The information being provided to clients should include what fees they are paying, have paid and for what services. The IPA believes this is an essential part of fulfilling the FoFA objectives of providing accessible and affordable financial advice to consumers.[22]

7.18 AIST objected to the removal of the opt-in requirement, which in its view 'ensured that asset-based ongoing fees could only continue to be charged with clients' express consent'. It acknowledged that at the time the measure was introduced, it formed part of a package designed to ensure that 'money didn't continue to be bled from member accounts unnecessarily'.[23] It explained further:

> 'Trail' commissions paid to advisers or their dealer groups were in the process of being grandfathered, however there was no prohibition on asset-based ongoing fees, such as adviser service fees. We noted at the time this measure was enacted that asset-based ongoing fees could easily continue the role that trail commissions had filled and recommended that these payments stop completely.
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> Without the opt-in requirements, these fees can continue to be charged to clients' accounts indefinitely. [24]
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> The requirement that [advisors] get express consent from clients to opt-in every two years was, effectively, a compromise. We note that industry opposition to this measure had largely proposed maintaining the status quo,

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20 *Submission 14*, p. 4.

21 *Submission 16*, p. 3.

22 *Submission 16*, p. 3.

23 *Submission 22*, p. 9.

24 *Submission 22*, p. 9.

> however we continued to support an environment where investors know what they are paying and what they are getting in return. Removal of the opt-out requirements conceals this vital information.[25]

7.19 It stated clearly that it could not support 'a situation where clients continue to be charged ongoing fees without evidence of any services being provided'. AIST cited similar arrangements outside of financial services, such as 'the notorious difficulty with terminating gym memberships', to support its argument that requiring members to opt-out is 'bad policy'.[26]

7.20 National Seniors argued that removing the opt-in provision was 'unacceptable and clearly inequitable'.[27] It was concerned that without this requirement the burden would fall on the less informed party in the financial advice contract—namely the consumer—and that most would remain inactive.[28] It stated:

> Removing the opt-in requirement pushes the obligation onto consumers to externally monitor the performance of their portfolio and the appropriateness of their current services and fee structure. It is clear that advisers are far better equipped than consumers are to perform this task.
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> …
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> It is a bizarre situation that the Government is proposing to subject the provision of financial advice to less stringent renewal notice requirements than are applied to general insurance arrangements.[29]

7.21 Furthermore, it argued that the opt-in requirement 'sends a message to financial advisers to refocus on consumer engagement'. National Seniors regarded the opt-in requirement as essential given Australian consumers' 'low level of engagement with financial matters', which can result in inadequate investment decisions. In its view, the original opt-in requirement would 'move a step closer to increasing consumer understanding and engagement within financial matters'.[30] It observed:

> Without the opt-in requirement National Seniors believes that advisers have no incentive to keep their clients informed as the fee agreement is automatically renewed with no requirement to attain the client's agreement. The arrangement will significantly compromise the ability of consumers to attain useful information required for decision making and result in major consumer detriment with consumers continuing to pay for services they do not want or need.[31]

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25 *Submission 22*, p. 9.

26 *Submission 22*, p. 10.

27 *Submission 24,* p. 5.

28 *Submission 24*, p. 5.

29 *Submission 24,* p. 5.

30 *Submission 24*, p. 5.

31 *Submission 24*, p. 5.

7.22 In line with other submitters in favour of the opt-in requirement, Industry Super believed that removing the requirement would mean that 'indefinite ongoing advice fees can be charged, with no ongoing requirement to provide financial advice'. Ms Campo, Industry Super, referred to research showing that 'two-thirds of financial planning clients are passive and therefore not actively engaged with their planner'. In her view, this lack of engagement should be taken into account in support of retaining this important measure.[32]

7.23 Dr Marina Nehme supported the removal of the opt-in provision if the cost of applying it was 'too high'. She noted, however, the importance of the current 'opt-in' provision ensuring that 'a dialogue continues between the financial advisers and their clients—dialogue that would stop financial advisers from charging consumers for services they are not receiving'.[33] In this regard, the regulation impact statement recognised that the consumer benefits of the opt-in requirements could not be denied:

> The opt-in requirements were, and are, a paradigm shift in the battle to increase client engagement. By requiring advisers to seek client approval to continue arrangements, opt-in nudges clients into actively considering whether they are receiving service commensurate to the fees that they have paid and thereby raises the service levels of the industry.[34]

7.24 Even so, it went on to acknowledge that the requirement placed a disproportionately large burden on financial advisers.[35] The committee now considers this aspect of the opt-in requirement.

Support for removing opt-in requirement

7.25 Pattinson Financial Services was of the view that removing the opt-in requirements was 'an entirely sensible move'.[36] It argued that the financial planning industry would be 'the only profession in the country subject to this ludicrous concept if it were not removed'.[37] It argued:

> Clients have now and have always had the ability to Opt-Out by simply changing advisers. By changing advisers a client doesn't need to incur any additional transaction fees, they simply sign a change form provided by either an investment fund or insurer.[38]

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32 *Proof Committee Hansard*, 22 May 2014, p. 55.

33 *Submission 8*, p. 2.

34 Explanatory Memorandum, paragraph 5.97.

35 Explanatory Memorandum, paragraph 5.98.

36 *Submission 13*, p. [1].

37 *Submission 13*, p. [1].

38 *Submission 13*, p. [1].

7.26 The FPA supported the repeal of the opt-in requirement, arguing that this measure undermined the effectiveness of FOFA.[39] It believed that it detracted from the policy objectives of FOFA by 'adding regulatory burdens with no clear connection to raising the quality or improving the culture of financial advice in Australia'.[40] In its view:

> Opt-in creates an artificial, documentary form of compliance. It also undermines the existing authentic and organic engagement process conducted by professional financial planners, which allows clients to Opt-out at any time. Furthermore, as Opt-in only applies to new clients who sign up to ongoing fee arrangements created from 1 July 2013, clients who pay grandfathered trailing commissions will be unaffected by the Opt-in regime. Lastly, when a client allows an ongoing fee arrangement to lapse under Opt-in, their investments remain in place but unmanaged. This position exposes the lapsed client to significant risk.[41]

7.27 Likewise, Minter Ellison Lawyers was in favour of repealing the opt-in notice requirement.[42] Mr Batten told the committee that the opt-in notice requirement imposes a burden without benefit. The law firm argued:

> Clients should be able to opt out of advice fee arrangements at any time, but forcing the issue just creates the risk that clients cannot receive the advice they need when they really need it.[43]

7.28 The SMSF Professionals' Association of Australia supported the government’s amendments to remove the opt-in requirement on the basis that it would reduce compliance for financial advisers.[44] Menico Tuck Parrish Financial Services also supported the removal of this provision in the legislation. It formed the view that not only was the opt-in requirement very costly to produce and administer but was 'ultimately dangerous'. It explained:

> If a client does not acknowledge they wish to continue receiving services then they are assumed to have 'opted out' and must be removed from our care. In our experience, clients often ignore 'paperwork' (in whatever form) and it takes considerable resources to follow up.
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> The danger is that a client may think we continue to monitor their situation whilst in fact we do not have the authority to do so. Although they may be at fault for not returning the paperwork, the result can be disastrous. This is not in the client’s best interest.

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39 *Submission 15*, p. 8.

40 *Submission 15*, p. 8.

41 *Submission 15*, p. 8.

42 *Submission 18*, p. 2.

43 *Proof Committee Hansard*, 22 May 2014, p. 37.

44 *Submission 21*, p. [1].

> Finally, there is a considerable amount of compliance required when both opening and closing files. Accidental opt out will become a costly exercise.[45]

7.29 The Explanatory Memorandum noted the high implementation and ongoing costs of the opt-in system, which, it stated, were likely 'to be passed through to the consumer'. The costs related to:

> …implementing and maintaining systems, additional staff involvement, other administrative overheads, and are closely linked to the number of customers; as such, these costs are anticipated to increase over time as client numbers increase.[46]

7.30 The AFA also suggested that the opt-in notice provided a very expensive process that would not add value. Mr Michael Nowak, AFA, noted that it was intended for new clients after 1 July 2013 who already receive annual fee disclosure statements so the opt-in notice in his view was a duplication.[47] The AFA maintained:

> An obligation of this nature is not reflected in any other industry or profession in Australia. The financial advice profession is not the only business that puts in place ongoing arrangements to receive client payments. There are many service provision businesses where clients continue to pay in the future based upon an agreement at the commencement of the arrangement. We do not believe that the cost and complexity that came with the Opt-in requirement was warranted.
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> We remain concerned that with the limited timeframe of 30 days to obtain the clients agreement to continue an arrangement, that in many circumstances the client would unintentionally not respond in time.[48]

7.31 It noted further:

> The consequences of not responding within the 30 day deadline are significant, including the full and irreversible termination of the financial advice arrangement.[49]

7.32 The AFA noted the importance of rectifying some misunderstandings about the requirement. It wanted to make clear that the opt-in obligation applied only to new clients after 1 July 2013. Furthermore, they would continue to receive fee disclosure statements and hence be clearly advised of the fees they were paying and have the opportunity to terminate the relationship if they no longer considered it was delivering value. The AFA also noted that some observers thought that opt-in would address those clients who were paying ongoing trail commission to advisers but the client had

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45 *Submission 19*, p. [1].

46 Explanatory Memorandum, paragraph 5.90.

47 *Proof Committee Hansard*, 22 May 2014, p. 10.

48 *Submission 29*, p. 3.

49 *Submission 29*, p. 3.

not seen the adviser for some time. It maintained that this understanding was incorrect as 'these clients were never going to receive an opt-in notice under the current legislation as they were existing clients before 1 July 2013'.[50]

Fee disclosure for new clients only

7.33 Currently, licensees must give *all* retail clients who have an ongoing fee arrangement a fee disclosure statement.[51] The fee disclosure statements provide customers with a single statement that shows, for the previous 12 months, the fees paid by the client, the services the client received, and the services the client was entitled to receive.[52]

Changes to fee disclosure statements

7.34 Under the new law, licensees who have an ongoing fee arrangement with a client must give retail clients who entered into the arrangement *after 1 July 2013* a fee disclosure statement as described above. This amendment is in line with the government's commitment to making annual fee disclosure statements prospective only. The Explanatory Memorandum notes the change is based on the premise that applying the annual fee disclosure statement retrospectively 'imposes large costs on industry, with minimal benefit'.[53]

Opposition to changes to fee disclosure arrangements

7.35 The submitters opposing the changes approached the amendments from the perspective of the consumer—those who entered into arrangements pre 1 July 2013. The ACTU noted that the Explanatory Memorandum offers no specific argument or evidence in support of this proposal to amend FOFA by making the requirement for advisers to provide a fee disclosure statement applicable only to clients who entered into their arrangement after 1 July 2013.[54] In its view:

> We have to assume that the government views the statements currently required by FOFA as constituting a 'burden on business'—albeit one that is unquantified and unproven. The possibility that such statements may provide a benefit to pre-1 July 2013 clients that justifies their requirement is simply ignored.
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> The current FOFA legislation requires such statements because it is clearly in the interests of all retail clients, regardless of when they entered into an advice arrangement, to be able to assess exactly how much they have paid to an advisor. It is a commonplace in all branches of economics that being

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50 *Submission 29*, p. 3.

51 Explanatory Memorandum, paragraph, 2.5.

52 Explanatory Memorandum paragraph 5.101.

53 Explanatory Memorandum, paragraph 2.6.

54 *Submission 5*, p. 6.

> able to readily access clear and comprehensive price-related information is vital to informed consumer choice and the development of efficient markets. This is particularly important in the context of financial products and services where complex pricing structures and forms of payment are commonplace.
>
> Abolishing the requirement for advisors to provide pre-1 July 2013 clients with a consolidated annual statement of fees will entrench already low levels of price-transparency and deprive many clients of information that may lead them to make better choices about who and how they pay for advice.[55]

7.36 The ACTU strongly supported the current requirement that all clients receive a consolidated annual fee disclosure statement.[56] Similarly, Dr Marina Nehme suggested that a change to the fee disclosure statement provisions was not needed. In her view, disclosure was desired as it provided the clients with extra protection. Thus, to her mind, all current retail clients of financial advisers who have an ongoing fee arrangement should receive a fee disclosure statement to promote the transparency of the system and enhance consumer confidence. Improved transparency would also limit abuses in the system. Additionally, Dr Nehme argued that it may be costly and confusing for advisers to keep two separate regimes of disclosure applicable in their organisation.[57] She posed the following questions about limiting the fee disclosure statement to certain people:

- Is the fee disclosure statement valuable and needed? Doubt about the value of the fee disclosure statement may arise in the mind of consumers if only certain investors receive it.
- Why are investors who entered into an arrangement prior to 1 July 2013 not subjected to the same protections as investors who have entered into an arrangement after 1 July 2013? A double standard should not be created and supported by the statute. All investors who have current arrangements with a financial adviser should receive the fee disclosure statement.[58]

7.37 According to Dr Nehme, 'transparency and accountability should be the centre of any reform in the area of financial services and not the interest of businesses'. She contended:

> The legislation should protect the most vulnerable members of our society especially when bad investments generated from bad advice may lead investors to lose their life savings.[59]

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55 *Submission 5*, p. 6.

56 *Submission 5*, p. 6.

57 *Submission 8*, p. 3.

58 *Submission 8*, p. 3.

59 *Submission 8*, p. 3.

7.38 CPA Australia and the Institute of Chartered Accountants Australia supported the provision of fee disclosure statements to all clients. They were of the view that the mandatory disclosure obligation would ensure the principles of transparency and integrity were upheld in all client engagements, which would result in positive outcomes for not only clients but the wider industry.[60]

> It will also ensure a minimum level of engagement and communication between a financial adviser and a client, while acting as an important consumer protection mechanism for clients who are in an ongoing fee arrangement that is not subject to the mandatory biennial renewal.

7.39 In reference to the burden imposed on industry, CPA Australia and the Institute of Chartered Accountants Australia acknowledged the costs involved in meeting the disclosure obligations, which was a consideration in a commercial environment. Nonetheless, they held the view that 'the immediate benefits of engagement and transparency and the longer term benefits of building trust and confidence if these measures are retained must not be underestimated'.[61] To their minds, annual fee disclosure statements for all clients engaged in an ongoing fee arrangement must be retained.

7.40 CHOICE also opposed the measure that would limit consolidated statement of ongoing fees to new clients. It noted that the proposal to remove the obligation to provide an annual fee disclosure statement to consumers who entered into a contract before 1 July 2013 would 'formalise poor practice across the financial services industry'.[62] It argued:

> It is reasonable for a consumer to receive a summary of fees charged for an ongoing service. Failure to provide a summary of fees charged would be unacceptable for other industries that offer ongoing services such as telecommunications or electricity. Providing a summary of charges is a necessary cost of doing business rather than a burdensome compliance cost.[63]

7.41 In CHOICE's assessment, the repeal of the opt-in provision combined with the removal of the requirement for regular statements would increase 'the likelihood that existing clients would continue to pay for services they don’t use or need'.[64] CHOICE pointed out that many of these clients would likely be unaware of 'passive fees' currently being paid on investments including superannuation.

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60 *Submission 14*, p. 4.

61 *Submission 14*, p. 5.

62 *Submission 7*, p. 12.

63 *Submission 7*, p. 12.

64 *Submission 7*, p. 12.

7.42 The AIST also opposed the changes to the consolidated statement of ongoing fees to existing clients.[65] In agreement with CHOICE and Dr Nehme, AIST suggested that this measure would remove transparency for older clients of advisers entitled to such information following the introduction of the FOFA reforms. It also highlighted the fact that clients who entered into arrangements prior to 1 July 2013 would not know how much they were being charged.[66]

> Furthermore, we believe that this measure, combined with the removal of the opt-in requirements will create a perception that these charges are product related, and therefore unable to be opted-out of easily. This is untenable.[67]

7.43 The discriminatory aspect of the proposed changes also troubled a number of submitters including National Seniors. It was of the firm view that annual fee disclosure statements should be provided to all clients regardless of when they entered into their arrangements.[68] It similarly focused on consumer protection, noting that annual fee disclosure statements allow consumers to view all the fees they have paid and the services received over the past 12 months in an accessible and easy-to-understand format. This measure, according to National Seniors Australia, empowers consumers to make informed investment decisions. It explained:

> Unless annual fee disclosure statements are provided to all consumers, investors will have no way of knowing how much they've paid to product providers and advisers and if the advice received represents value for money.[69]

7.44 National Seniors believed that if the annual fee disclosure statement requirements were limited to post 1 July 2013 consumers, pre 1 July 2013 consumer disclosure would continue to be at the discretion of the financial adviser. This arrangement increased the likelihood of a reduction in the amount, quality and frequency of information, resulting in major consumer detriment.[70] It stated:

> This time-based discrimination will affect many older consumers denying them a fundamental benefit of the FOFA reforms and resulting in pre 1 July 2013 consumers receiving a significantly reduced and less useful level of disclosure.[71]

7.45 Furthermore, National Seniors formed the view that the majority of financial advisers 'already have the information required to develop an annual fee disclosure

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65 *Submission 22*, p. 10.

66 *Submission 22*, p. 10.

67 *Submission 22*, p. 10.

68 *Submission 24*, p. 3.

69 *Submission 24*, p. 6.

70 *Submission 24*, p. 6.

71 *Submission 24*, p. 6.

report'. It reasoned it would, therefore, not be difficult for the adviser to create such reports. National Seniors argued that in contrast, it was 'difficult, if not impossible, for consumers to determine this information for themselves'.[72]

Support for changes to fee disclosure arrangements

7.46 The FPA supported the removal of retrospectivity from the fee disclosure statement regime, arguing that this measure undermined the effectiveness of FOFA.[73] It believed that a mandatory fee disclosure statement for pre 2013 clients would 'detract from the policy objectives of FOFA by adding regulatory burdens with no clear connection to raising the quality or improving the culture of financial advice in Australia'.[74] It stated:

> …applying the regime retrospectively is a limited, formalistic procedure that does not enhance the adviser-client relationship. Further, the policy intent of the FDS requirement was to improve the disclosure of commissions and assist in phasing out trail commissions. However, commissions are not required to be disclosed in a FDS.[75]

7.47 The SMSF Professionals' Association supported the 'move to implement fee disclosure statements in a non-retrospective fashion'. It argued that this measure would reduce the compliance burden of the FOFA reforms'.[76] Similarly, Pattinson Financial Services suggested that making fee disclosure statements prospective was the only practical option:

> Unlike large advice businesses owned by the banks or supported by Industry Super Funds, small independently owned Financial Advice Businesses do not have the resources to interrogate and report on all legacy products our clients hold. In many cases these legacy products have excessive fees to exit. To service the clients' best interest the advice business will ask a client to retain a product but in doing so would have created an expensive administrative burden that would ultimately by passed on to the client.[77]

7.48 The Association of Independently Owned Financial Professionals was of the view that the opt-in and pre July 2013 fee disclosure created an unnecessary burden with little benefit to consumers.[78] Menico Tuck Parrish Financial Services Pty Ltd wanted the proposed legislation to go even further, arguing that the restriction to apply

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72 *Submission 24*, p. 6.

73 *Submission 15*, p. 8.

74 *Submission 15*, p. 8.

75 *Submission 15*, p. 8.

76 *Submission 21*, p. 7.

77 *Submission 13*, p. [1].

78 *Submission 26*, p. 4.

these to clients from 1st July 2013 should be removed altogether.[79] It explained further:

> We had been prepared to send out the statements as per the legislation on 1st July 2013 however ASIC granted a six month period under which the appropriate systems could be developed, delaying the implementation date to 1st January.[80]
>
> The shock came during the training period for the new software and legislative obligations. The amount of time needed to prepare such a statement is more than anyone thought—I had previously costed out the process at $110 per client per annum. Our experience to date indicates that this will be much higher as every statement has to be individually processed. Again, these costs will have to be passed onto the client. [81]

7.49 Menico Tuck Parrish Financial Services noted that the client receives disclosure of our ongoing fees in a range of documents:

- statement of advice;
- record of advice (relating to ongoing advice and service); and
- product provider statements which are sent to the client anywhere between quarterly to annually. Adviser service fees are clearly outlined in these.[82]

7.50 From a legislative and policy perspective, the IPA agreed that any legislation or regulatory requirement which imposed a burden on those affected 'should be prospective and not retrospective'. Apart from the practical difficulties which this created, the IPA believed that legislation should not be retrospective unless it benefits consumers/taxpayers. The IPA concluded that it was unaware of any sound reason to diverge from this long-standing approach.[83]

Timing of implementation

7.51 The FPA raised concerns about the wording of section 1531D, which in its view 'may circumvent the intended starting date for the FDS regime (1 July 2013) by resetting the date to the commencement day of the current bill. It argued that:

> This would effectively create a period of uncertainty between the original FDS starting date of 1 July 2013 and the commencement of the Bill, potentially making the FDS requirement apply retrospectively during this period.[84]

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79 *Submission 19*, p. [1].

80 *Submission 19*, p. [1].

81 *Submission 19*, p. [2].

82 *Submission 19*, p. [2].

83 *Submission 16*, p. 3.

84 *Submission 15*, pp 8–9.

7.52 In its view, the starting date for the FDS regime should remain as intended by the original FOFA reforms—that is 1 July 2013.[85]

7.53 The Association also expressed its concern that the generation of the FDSs could be complicated in several ways:

> Some information required by the FDS, such as advice fees, may rely on data generation from a third party, and this information sourcing process may be time consuming and prone to delay. For example, where the advice fee is related to asset pricing, data may need to be gathered from multiple third parties, with each being beyond the control of the planner and licensee. This raises the risk of non-compliance with the 30 day period for production of the FDS in subsection 962G(2).[86]

7.54 The FPA recommended:

- an amendment to section 1531D of Division 2 of the bill making the commencement date for fee disclosure statements requirement 1 July 2013, to reflect the original intent of the bill to apply to new clients from 1 July 2013; and
- the legislation be amended to provide financial planners and licensees with either greater flexibility to comply with the FDS 30 day disclosure period where the delay is due to reasons beyond their control or amend the 30-day disclosure period to 60 days.[87]

7.55 In a similar vein, Minter Ellison Lawyers submitted that the amendment to remove the requirement to provide yearly fee disclosure statements to existing clients should apply from I July 2013, the date this obligation commenced. They were concerned that if this change were not made retrospective, advisers and licensees would 'have the uncertainty of being subject to a requirement that was in force for a short period of time'.[88] They stated further:

> …it was reasonable for licensees who had been unable to comply fully with the obligation before the election to not take further steps to comply with it after that time given its imminent repeal. We are aware that licensees have in fact relied on this position, as well as ASIC's no action positions in relation to FDSs and its facilitative approach to compliance in the initial period after FOFA commencement. We submit that in these circumstances it is not appropriate for licensees and advisers to be subject to possible penalty or liability for failure to give an FDS or any breach of the FDS obligations in this period.[89]

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85 *Submission 15*, p. 9.

86 *Submission 15*, p. 9.

87 *Submission 15*, p. 9.

88 *Submission 18*, p. 6.

89 *Submission 18*, p. 6.

7.56 The FSC supported the suggestion that 'the repeal of the requirement to provide a fee disclosure statement to existing clients should take effect retrospectively to the date of the announcement (20 December 2013) or 1 July 2013'. It argued:

> Advisers and licensees should be given certainty that no penalty or liability can arise where they were not able to comply with the Fee Disclosure Statement requirements for clients who entered arrangements pre FoFA law applied – that is pre 1 July 2013, including where they have been relying on the Government's promise to remove this requirement.[90]

7.57 The committee suggests that the government take account of the reasons put forward by the FPA, Minter Ellison Lawyers and the FSC regarding the commencement date for the fee disclosure statements and the 30 day deadline to obtain a client's agreement to continue an arrangement.

Committee view

7.58 The committee supports the removal of the opt-in requirement. The committee understands that clients are able to opt out of their advice fee arrangement at any time and that they receive an annual fee disclosure statement. It also notes that under current arrangements if, for whatever reason, a client allows their ongoing fee arrangement to lapse, their investment remains in place but unmanaged—which is clearly not in the client's best interest. As the FPA noted, such a situation exposes the lapsed client to significant risk.

7.59 Also, while there is no doubt that the repeal of the opt-in requirement would remove an opportunity for client engagement, there are numerous other measures whereby advisers keep in contact with their clients—for example through annual fee disclosure statements.

7.60 Furthermore, the current opt-in arrangement imposes a compliance burden on financial service providers for little gain. Similarly, the requirement to provide a fee disclosure statement to pre 1 July 2013 clients places a significant regulatory burden on industry.

Conclusion

7.61 The dominant concern throughout this report has been to achieve a proper balance between providing adequate consumer protection and sound professional and affordable financial advice. Overall, the committee found that the proposed amendments strike that right balance—that the best interests duty remains robust and comprehensive and that clients can receive scaled advice without diminishing their consumer protections. The committee also concluded that the expanded exemptions to the conflicted remuneration redressed the problem of legislative overreach created by

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90 *Submission 27*, p. 32.

the original FOFA reforms. Furthermore, the exemptions were not intended to bring back commissions in any form. Even so, the committee accepts that much scope remains to bring greater clarity to these provisions and certainty that commissions will not be allowed.

7.62 Finally, the committee formed the view that while removing the opt-in requirement and limiting the fee disclosure statements to post July 2013 would reduce the opportunities for client engagement, other avenues remained open for advisers to keep in touch with their clients. These measures would also lower the significant compliance burden on financial service providers.

Recommendation 3

7.63 The committee recommends that after the government gives due consideration to recommendations 1–2, the bill be passed.

Senator David Bushby
Chair