



16 September 2014

Senator Edwards
Chair
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By Email: economics.sen@aph.gov.au

Dear Senator Edwards,

**Amendments to the Corporations Amendment (Streamlining of Future of Financial Advice) Bill
2014**

Thank you for the opportunity to provide comments on the amendments included in the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014.

The Financial Services Council represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, trustee companies and public trustees.

The Council has over 125 members who are responsible for investing more than \$2.2 trillion on behalf of 11 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the third largest pool of managed funds in the world.

The Financial Services Council ("FSC") promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

Please find our feedback enclosed. If you have any questions regarding the FSC's submission, please do not hesitate to contact me

Yours sincerely,

BIANCA RICHARDSON

SENIOR POLICY MANAGER



FSC SUBMISSION

Senate Economics Legislation Committee

**Amendments to the Corporations Amendment
(Streamlining of Future of Financial Advice) Bill
2014**

16 September 2014

1. Executive Summary

The Financial Services Council (“FSC”) welcomes the opportunity to provide feedback on the proposed amendments to the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014.

The FSC has previously submitted, and again reiterates, its support for the intent of the Future of Financial Advice (FoFA) reforms which is to improve the quality of financial advice and ensure the ‘availability, accessibility and affordability’¹ of financial advice.

Whilst these are the objectives of FoFA, given that many critical legislative elements were only enacted as late as Saturday 29 June 2013 (with the regime commencing 1 July 2013) many unintended consequences and practical complexities were contained within the legislation. This has the potential to thwart the objectives of delivering affordable and accessible advice.

With this in mind the Government provided a commitment to make a number of amendments to improve FoFA whilst retaining important consumer protections such as the Best Interest Duty, duty to prioritise the client’s interests in a situation of conflict and ensuring a ban on conflicted remuneration for personal advice.² These amendments were included in the initial Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 (‘Bill’) which have already been referred to the Senate Economics Legislation Committee (Senate Committee) for inquiry and report.

The FSC provided a submission to the Senate Committee dated 5 May 2014 and provided support for the proposed amendments. The proposed changes remove important legal ambiguity created by the safe harbour requirement without removing the duty to act in the Best Interests of the client; they provide legal certainty that a client and adviser can agree the subject matter of the advice and include many other important changes to improve FoFA.

These changes are important for enabling the provision of affordable and accessible financial advice. Following inquiry and report, the Senate Committee found overall that the proposed amendments achieve the appropriate balance between providing consumer protection and sound and affordable financial advice.³

These changes are included in the Bill currently before the Senate Committee together with additional government amendments that have not been reviewed by the Senate Committee. The feedback included within this paper therefore relates to the additional government amendments which were included in the Bill passed by the House of Representatives on the 28th of August 2014 (referred to as the ‘proposed amendments’). Should the Senate Committee however have any questions with regard to the FSC’s position on the initial Corporations Amendment proposals, please refer to our submission dated 5 May 2014 which has been attached for your reference.

Our feedback in relation to the proposed changes are outlined below. The FSC makes a number of suggestions for how the proposed requirements can be clarified and assist with removing ambiguity.

¹ Media Release issued by Senator the Hon Arthur Sinodinos (20 December 2013)
<http://axs.ministers.treasury.gov.au/media-release/011-2013/>

² Media Release issued by Senator the Hon Arthur Sinodinos (20 December 2013)
<http://axs.ministers.treasury.gov.au/media-release/011-2013/>

³ Page 2 Supplementary Explanatory Memorandum Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014.

The FSC notes that these proposed amendments have been included together with the initial FoFA amendments, which are collectively designed to increase access and affordability of financial advice whilst maintaining consumer protections.

We believe these are important objectives and look forward to the finalisation of the FoFA amendments to provide consumers and advice providers [with](#) certainty.

2. Amendments to Statement of Advice requirements and requirements relating to client instructions

A number of changes have been proposed to the SoA requirements (in *s946A and s947B of the Corporations Act 2001*) which require;

- The SoA to be signed by the providing entity or individual acting on behalf of the providing entity, and be acknowledged by the client (in the form of a signature);
- Providing clarity that the client may seek further or varied advice and if this is sought, the client's instructions must be confirmed in writing, signed by the client and acknowledged by the adviser; and
- Amending content requirements of the SoA.⁴

Signature Requirements

It is important for clients to clearly understand their rights regarding the advice they receive which is one of the objectives of the SoA amendments. In relation to the requirement for the client and adviser (or advice provider) to sign the Statement of Advice, the Revised Explanatory Memorandum *Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014* (Revised EM), provides 'a signature can include a written signature or an electronic signature (as defined by section 10 of the *Electronic Transactions Act 1999*'.⁵ We support the flexibility of options enabling signatures to be included in both written and electronic form. We note, however that this reference only applies to the SoA amendments and not seeking changes to instructions for seeking further or varied advice. We believe that the electronic delivery of signatures should apply equally in relation to client instructions (referred to in *s946A(2)(2E)*) and this should be clarified.

Recommendation 1: The FSC recommends that the reference enabling electronic signatures should be extended to client instructions for further or varied advice (*s946A(2)(2E)*).

There may be circumstances however where further flexibility is required in relation to the requirement to obtain a signature. For example, where advice is provided over the phone, obtaining either a written or electronic signature within an SoA, in order to acknowledge the advice received over the phone, may be difficult.

Within a phone based advice delivery model, consent to the advice is given on the phone. This could be resolved by expanding the scope of acceptable methods of signing. For example, by acknowledging receipt of the SoA through voice recording (rather than by written or electronic signature). This would be subject to the advice provider retaining the requisite proof (by keeping the voice recording on file). This option would provide more efficient and effective solutions for clients

⁴ Paragraph 4.5, Page 43 Revised Explanatory Memorandum Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014.

⁵ Paragraph 4.10, page 45, Revised Explanatory Memorandum Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014.

and advice providers in acknowledging the advice received and would be consistent with the government's objectives of reducing compliance burden.

A similar issue arises with on-line advice where a client may click "accept" or "consent" to agree to an SoA. We ask that the scope be expanded to be clear that consent indicated by any electronic means would be a "signature" for these purposes.

Recommendation 2: The FSC recommends expanding the scope for acceptable methods of signing to include acknowledging receipt of the SoA through voice recording and by clicking "accept" when receiving online advice. The FSC recommends that these changes are reflected in the Bill.

The SoA requirements also propose that instructions for further or varied advice be documented in writing and signed by the client (s946A(2)(2E)). Given that the preceding subsection explicitly states a retail client who is given an SoA may seek further or varied advice, we understand the subsequent subsection to mean that instructions for further or varied advice to be documented would only relate to further or varied personal advice.

If this is the intent, it would be helpful if this could be expressly clarified. Also, we would not envisage that the requirement to document further or varied advice would extend to circumstances that are exempt from the requirement to provide an SoA and it would be helpful if this could be clarified.⁶

Recommendation 3: the FSC recommends that clarification be provided that the requirement for further or varied advice be documented & signed by the client only apply to personal advice.

Content Requirements

The SoA proposes to require information on fees that have been, or may, be charged to the client in relation to the advice. This includes fees by a providing entity, directors or employee of the providing entity; a director or employee of the providing entity or a related body corporate; or any other person in relation to whom the regulations require the information to be provided. The Revised EM has provided important clarification in paragraph 4.17 that the 'Fees to be included in the SoA are those in relation to providing the advice; product fees are not intended to be included in the SoA.'⁷ The FSC welcomes this important clarification, particularly in light of the fact that product fees are clearly disclosed in Product Disclosure Statements.

The SoA also proposes to include in s947B(2)(c)(cb) a statement that the advice provider genuinely believes that the advice given is in the best interests of the client...(within the meaning of section 961). We understand that the intent of including the statement 'genuinely believes' is to confirm the advice provider's belief that they have satisfied the best interest duty within the meaning of s961B. To ensure that genuinely believes does not give rise to a "new" test, in and of itself (given that all the necessary requirements are already included in the best interest duty), it would be helpful if the EM could confirm that the objective of including 'genuinely believes' is not to give rise to a new test and merely to advise the client that the advice provider has met the best interest duty under s961B *Corporations Act (2001)*.

⁶ s946AA and s 946B, *Corporations Act 2001*.

⁷ Paragraph 4.17, Revised Explanatory Memorandum Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014.

Recommendation 4: The FSC recommends that further clarification be given in the Explanatory Memorandum that merely including a statement of 'genuinely believes' within the SoA (pursuant to s947B(2)(c)(cb)) does not give rise to a new test and that for the avoidance of doubt, satisfaction of the best interest duty (s961B) is the relevant test.

3. Transition Period

A transition period has been provided for the SoA provisions until 1 January 2015. We welcome the inclusion of the transition period. It is important to ensure that industry has the required time to implement changes to systems and processes, including changing word templates and education staff/advisers, to enable compliance with the new requirements. In relation to the transition timeframe, we note that 1 January 2015 may not be an adequate timeframe between the finalisation of the proposed changes and the time to implementation. Businesses will need several months from finalisation of the Bill/Act to incorporate relevant amendments into relevant documentation. Should the Bill be significantly delayed amendments to the transitional period may be required or alternatively ASIC provide a facilitative compliance approach to enable industry sufficient time to make necessary changes.

Recommendation 5: The FSC recommends that the transition period be extended to enable advice providers and licensees with the appropriate time to incorporate new changes.