

Chapter 3

Schedule 2—'Financial planner' and 'financial adviser'

3.1 This chapter provides an overview and background on the operation of Schedule 2 of the bill, and then presents the views of submitters on the proposed changes.

3.2 As noted in chapter 1, Schedule 2 of the bill proposes to restrict the use of the expressions 'financial planner' and 'financial adviser'.

Background and context of the amendments

3.3 The Future of Financial Advice (FOFA) reforms were enacted last year in response to this committee's November 2009 report, *Inquiry into financial products and services in Australia*.¹ The inquiry was initiated in the wake of corporate collapses, notably Storm Financial and Opes Prime.

3.4 The FOFA reforms are 'designed to tackle conflicts of interest that have threatened the quality of financial advice that has been provided to Australian investors'.²

3.5 The reforms were legislated by the *Corporations Amendment (Future of Financial Advice) Act 2012* and the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012*. The reforms will come into effect from 1 July 2013.

3.6 Schedule 2 amends Part 7.6 of the Corporations Act. The amendments define in law the terms 'financial planner' and 'financial adviser'. The amendments make it an offence for anyone to use the terms, or words 'of like import', unless they hold an appropriate licence under the Australian Financial Services Licence (AFSL) regime. The bill enables ASIC to take action against unlicensed persons using the defined terms.³

1 Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into financial products and services in Australia*, November 2009, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=corporations_ctte/completed_inquiries/2008-10/fps/report/index.htm (accessed 9 April 2013).

2 Australian Government, the Treasury, Future of Financial Advice, Overhaul of financial advice, <http://futureofadvice.treasury.gov.au/Content/Content.aspx?doc=home.htm> (accessed 1 May 2013).

3 *Explanatory Memorandum (EM)*, Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2013, pp 27–31.

3.7 Precedents exist under the Corporations Act for restricting the use of terms used by people in the financial services sector, including, 'stockbroker', 'futures broker', and 'insurance broker'.⁴ The Stockbrokers Association noted that '[f]or many years, the stockbroking industry has been subject to strict restrictions in relation to terminology' and that it frequently advised ASIC of apparent breaches of these restrictions.⁵

3.8 The Financial Planning Association of Australia (FPA) noted that Malaysia and Quebec in Canada have enshrined the term 'financial planner' in law and that New Zealand has enacted legislation around financial advisers.⁶

3.9 The EM states that the new measure protects consumers from unlicensed 'product spruikers' and 'complements the FOFA reforms by clearly identifying genuine providers of financial product advice, thereby improving consumer trust in the financial planning and advice industry'.⁷

3.10 During the Second Reading debate on the FOFA reforms on 22 March 2012, the Minister for Financial Services and Superannuation, the Hon. Bill Shorten MP, announced the Government's intention to introduce the provisions in Schedule 2 into Parliament by 1 July 2013.⁸

3.11 On 19 November 2012, Minister Shorten released an exposure draft of the legislation and an EM to define the terms 'financial planner' and 'financial adviser'.

Main provisions of Schedule 2: Amendments relating to the use of the expressions 'financial planner' and 'financial adviser'

3.12 The measures in Schedule 2 restrict the use of the terms 'financial planner' and 'financial adviser' to appropriately licensed persons.

3.13 In order to use the restricted terms, the bill introduces certain criteria, namely that a person either:

- holds a Licence, under which the person can provide personal advice on designated products; or

4 *Corporations Act 2001*, Part 7.6, Division 10, ss. 923B(4)(a).

5 Stockbrokers Association of Australia, *Submission 2*, pp 3–4.

6 Mr Dante De Gori, General Manager, Policy and Government, Financial Planning Association of Australia, *Committee Hansard*, 22 April 2013, p. 34.

7 *Explanatory Memorandum (EM)*, Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2013, p. 27.

8 *Explanatory Memorandum (EM)*, Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2013, p. 27.

- provides personal advice on designated products on behalf of a Licensee, where under that Licence the Licensee may provide personal advice on designated products. [*Schedule 2, item 1, subsection 923C(2)*]⁹

3.14 The bill defines a 'designated financial product' as a financial product *other than*:

a general insurance product (other than a sickness and accident insurance product), a consumer credit insurance product, a basic deposit product, a non cash payment product, or a First Home Saver Account (FHSA) deposit account. [*Schedule 2, item 1, subsection 923C(5)*]¹⁰

3.15 This definition is intended to 'capture more complex types of financial products, or less well understood financial products, which may be associated with greater risks for consumers'.¹¹

3.16 The EM notes that the licence will not be required to specify certain types of financial products, but rather that the licensee 'would be able to provide advice on one or more of these types of products'.¹²

3.17 The exemptions from the requirement to hold a licence contained in subsection 911A(2) of the Corporations Act remain unchanged.¹³

3.18 The EM notes that persons 'authorised only to provide general advice' and persons 'not authorised to provide any form of financial product advice' will not be able to use the restricted terms.¹⁴

Definitions of financial product advice and personal advice

3.19 The Corporations Act defines 'financial product advice', 'personal advice' and 'general advice'.

3.20 Section 766B of the Corporations Act defines financial product advice as:

9 *Explanatory Memorandum (EM)*, Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2013, pp 29–30.

10 *Explanatory Memorandum (EM)*, Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2013, p. 30.

11 *Explanatory Memorandum (EM)*, Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2013, p. 30.

12 *Explanatory Memorandum (EM)*, Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2013, p. 30.

13 *Explanatory Memorandum (EM)*, Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2013, p. 30.

14 *Explanatory Memorandum (EM)*, Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2013, p. 31.

a recommendation or a statement of opinion, or a report of either of those things, that:

- (a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or
- (b) could reasonably be regarded as being intended to have such an influence.¹⁵

3.21 The Corporations Act notes that there are two types of financial product advice: personal and general advice.¹⁶

3.22 Section 766B of the Corporations Act defines personal advice as:

financial product advice that is given or directed to a person (including by electronic means) in circumstances where:

- (a) the provider of the advice has considered one or more of the person's objectives, financial situation and needs (otherwise than for the purposes of compliance with the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 or with regulations, or AML/CTF Rules, under that Act); or
- (b) a reasonable person might expect the provider to have considered one or more of those matters.¹⁷

3.23 The Corporations Act notes that 'general advice is financial product advice that is not personal advice'.¹⁸

Submitter views on Schedule 2

3.24 Of the 15 submissions received by the committee, 14 submissions addressed Schedule 2 of the bill. All but one of these submissions supported the proposed changes. Treasury also noted that there was widespread support for the amendments in the submissions that they received on the draft bill.¹⁹

3.25 However, some submitters expressed reservations about restricting the term 'financial adviser' and other submitters warned that the amendments did not, of themselves, increase the professionalism of advice. These comments are covered in later sections.

15 *Corporations Act 2001*, Part 7.1, Division 4, ss. 766B(1).

16 *Corporations Act 2001*, Part 7.1, Division 4, ss. 766B(2).

17 *Corporations Act 2001*, Part 7.1, Division 4, ss. 766B(3).

18 *Corporations Act 2001*, Part 7.1, Division 4, ss. 766B(4).

19 Mr Bede Fraser, Manager, Intermediaries and Regulatory Powers Unit, Retail Investor Division, Markets Group, Treasury, *Committee Hansard*, 22 April 2013, p. 38.

Evidence of misuse of the terms 'financial planner' and 'financial adviser'

3.26 There was consensus among some submitters that the terms financial planner and financial adviser had been misused to the detriment of consumers, and that there was very little that regulators were able to do about these types of breaches of the law.²⁰

3.27 Under questioning from the committee, Mr Richard Webb, Policy and Regulatory Analyst at the Australian Institute of Superannuation Trustees (AIST), and Mr Bradley Fox, Chief Executive Officer of the Association of Financial Advisers (AFA), acknowledged that under current law, if a person were to provide financial advice without an AFSL (and without an exemption), they would be breaching the law.²¹

3.28 However, Mr Bede Fraser of the Intermediaries and Regulatory Powers Unit in the Retail Investor Division at the Treasury pointed out that while the current law includes 'provisions covering misleading and deceptive conduct, it can be very difficult for regulators to take action'. Mr Fraser added that the new amendments would make pursuing breaches of the law easier:

The new amendments will make it easier to take action against unauthorised advisers and that is consistent with the approach that has been adopted for a number of other important professions including stockbrokers.²²

3.29 In a further exchange with the committee, Mr Webb and Mr Fox also conceded that they did not have direct evidence of the misuse of the terms 'financial planner' and 'financial adviser', but both observed that anecdotal evidence surfaced periodically in the media.²³

3.30 However, Mr Mark Rantall, Chief Executive Officer of the Financial Planning Association of Australia (FPA), told the committee that there was concrete evidence of misrepresentation and noted that in the 12 months to 31 December 2012, 'over 12

20 See Stockbrokers Association of Australia, *Submission 2*, p. 4; Australian Institute of Superannuation Trustees, *Submission 3*, [p. 1]; Financial Planning Association of Australia, *Submission 5*, [p. 1].

21 See the exchanges between Mr Paul Fletcher MP and Mr Richard Webb, Policy and Regulatory Analyst, Australian Institute of Superannuation Trustees, *Committee Hansard*, 22 April 2013, pp 17–18; Mr Paul Fletcher MP and Mr Bradley Fox, Chief Executive Officer, Association of Financial Advisers, *Committee Hansard*, 22 April 2013, p. 24.

22 Mr Bede Fraser, Manager, Intermediaries and Regulatory Powers Unit, Retail Investor Division, Markets Group, Treasury, *Committee Hansard*, 22 April 2013, p. 38.

23 See the exchanges between Mr Paul Fletcher MP and Mr Richard Webb, Policy and Regulatory Analyst, Australian Institute of Superannuation Trustees, *Committee Hansard*, 22 April 2013, pp 17–18; Mr Paul Fletcher MP and Mr Bradley Fox, Chief Executive Officer, Association of Financial Advisers, *Committee Hansard*, 22 April 2013, p. 24.

per cent of ASIC's financial services enforcements related to matters against unlicensed participants'.²⁴

3.31 Despite different views on the nature of the evidence about the misuse of terms, Mr Webb, Mr Fox and Mr Rantall stated that the key point was consumer confusion, and that the bill would provide consumers with clarity and protection on who to approach to receive authorised financial advice.²⁵ Mr Fox stated that:

The issue from our point of view is to try to help consumers differentiate between where to go to seek personal financial advice. At the moment they are unclear on it. They are unclear as to who can provide it and who cannot. There is anecdotal evidence that suggests they assume that similar professions, like accountants, can provide financial advice—when they actually cannot. By narrowing the focus of who can and who cannot provide financial advice, by using only two terms to describe them, we think it can help the consumer and help the marketplace to communicate to the consumer where to go to get personal financial advice. That is a differentiator. It is about leading the market towards a narrower solution rather than leaving them guessing, as they currently do, as to a winder part of the market than is realistically able to help them.²⁶

3.32 Questioned as to whether the amendments would 'dissuade a consumer from going to see an accountant on the expectation of being able to get personal financial advice', Mr Fox replied:

It may not dissuade them. We see ample examples where the accountant is in fact the conduit to help a consumer to go and get personal financial advice from a licensed adviser. The issue here would be twofold. One, it would help the accountant to be reminded of where their authorisation starts and stops; and, two, it would help the accountant have the conversation with a consumer to say, 'You do need this sort of help, by the look of it. Here is someone who can actually help you'. This is the occupation you need to talk to.²⁷

3.33 Mr Philip Anderson, Chief Operating Officer at the AFA, also pointed out that the financial advice industry was suffering reputational damage when the media aired

24 Mr Mark Rantall, Chief Executive Officer, Financial Planning Association of Australia, *Committee Hansard*, 22 April 2013, p. 29.

25 Mr Richard Webb, Policy and Regulatory Analyst, Australian Institute of Superannuation Trustees, *Committee Hansard*, 22 April 2013, p. 18; Mr Bradley Fox, Chief Executive Officer, Association of Financial Advisers, *Committee Hansard*, 22 April 2013, p. 20; Mr Mark Rantall, Chief Executive Officer, Financial Planning Association of Australia, *Committee Hansard*, 22 April 2013, p. 29.

26 Mr Bradley Fox, Chief Executive Officer, Association of Financial Advisers, *Committee Hansard*, 22 April 2013, p. 25

27 See the exchange between Mr Paul Fletcher MP and Mr Bradley Fox, Chief Executive Officer, Association of Financial Advisers, *Committee Hansard*, 22 April 2013, p. 25.

stories about malpractice by people holding themselves out to be financial advisers when in fact they were not authorised to do so.²⁸

Support for the bill

3.34 Mr Peter Kirk, Managing Director of Quill Group Financial Planners, stated that the bill was a 'key outstanding consumer protection measure' of the FOFA reforms and that:

A lack of restriction on the use of the term financial planner/adviser is, among other things, a significant gap in consumer protection.²⁹

3.35 Mr Kirk drew attention to the increasing risks for consumers as the misuse of the terms financial planner and financial adviser become more prevalent:

It leaves trusting consumers open to influence by unprofessional and inappropriately qualified individuals portraying to provide advice, especially unsolicited advice from people with whom consumers may/may not have a relationship with. The term financial planner/adviser is increasingly being used in marketing and promotional material by persons who provide non-traditional ancillary services, such as realtors, stockbrokers, financial counsellors, life insurance agents or brokers, mortgage brokers, property brokers, sales agents of various investment vehicles, and unlicensed advisers, increasing the risk for consumers to be misled.³⁰

3.36 The FPA argued that the bill would inform, protect and empower consumers, and improve consumer outcomes by:

- Providing consumers with a legal definition and hence a better understanding of who and what a 'financial planner' or a 'financial adviser' is, and the role they can be expected to play;
- Supporting and protecting consumers who need and want to get financial advice from a trusted participant in the industry and hence reducing the risk of them being misled by unlicensed or scrupulous individuals;
- Ensuring 'truth in labelling' when it comes to the provision of financial planning advice as it has a profound impact on an individual's and the community's financial well-being; and

28 Mr Philip Anderson, Chief Operating Officer, Association of Financial Advisers, *Committee Hansard*, 22 April 2013, pp 21–22.

29 Mr Peter Kirk, Managing Director, Quill Group Financial Planners Ltd, *Submission 1*, [p. 1].

30 Mr Peter Kirk, Managing Director, Quill Group Financial Planners Ltd, *Submission 1*, [p. 1]. The submissions from Mr Peter Kirk and Ms Lee Henderson (*Submission 9*) were very similar to the submission from the Financial Planning Association of Australia.

- Supporting the FOFA reforms by empowering consumers of financial services to identify genuine providers of financial advice.³¹

Tying the use of the terms to authorisations under an AFSL

3.37 The Stockbrokers Association particularly welcomed the fact that the use of the restricted terms was tied to authorisation under an AFSL rather than being linked to membership of an industry body.³² This position was supported by the AFA,³³ and the AIST, both of which noted that the AFSL regime provided a good regulatory framework.³⁴

3.38 By contrast, the FPA does support linking use of the terms to 'an approved code of professional conduct or an approved professional body'. Mr Rantall said that such a link 'would accelerate the profession by light years...[and] would have provided maximum consumer protection'.³⁵

Equivalence of the terms 'financial planner' and 'financial adviser'

3.39 Mr Fox of the AFA stated that the terms 'financial planner' and 'financial adviser' were equivalent and interchangeable.³⁶ The AIST also pointed out that in terms of the provision of personal financial advice, the terms were treated the same under current law.³⁷

3.40 Mr Rantall accepted that the terms were used interchangeably throughout the industry, but pointed out that the FPA had a different perspective:

We believe financial planners are more involved in a holistic approach to financial advice. We think financial advisers are more product advisers.³⁸

31 Financial Planning Association of Australia, *Submission 5*, [p. 2].

32 Stockbrokers Association of Australia, *Submission 2*, p. 4.

33 Mr Bradley Fox, Chief Executive Officer, Association of Financial Advisers, *Committee Hansard*, 22 April 2013, p. 20.

34 Mr Richard Webb, Policy and Regulatory Analyst, Australian Institute of Superannuation Trustees, *Committee Hansard*, 22 April 2013, p. 17.

35 Mr Mark Rantall, Chief Executive Officer, Financial Planning Association of Australia, *Committee Hansard*, 22 April 2013, p. 32.

36 Mr Bradley Fox, Chief Executive Officer, Association of Financial Advisers, *Committee Hansard*, 22 April 2013, p. 21; The Association of Financial Advisers Limited, *Submission 8*, p. 1.

37 Mr Richard Webb, Policy and Regulatory Analyst, Australian Institute of Superannuation Trustees, *Committee Hansard*, 22 April 2013, p. 16.

38 Mr Mark Rantall, Chief Executive Officer, Financial Planning Association of Australia, *Committee Hansard*, 22 April 2013, p. 30.

3.41 Mr Dante De Gori, General Manager of Policy and Government relations at the FPA noted that some jurisdictions saw the terms 'financial planner' and 'financial adviser' as interchangeable, while others did not.³⁹

Concerns over the inclusion of the term 'financial adviser' in the legislation

3.42 Submitters supported the Government's objectives to improve consumer trust and ensure greater consumer protection. Some, however, had concerns about confusion the legislation may cause, and specifically about the inclusion of the term 'financial adviser' in the legislation.

3.43 CPA Australia and the Institute of Chartered Accountants Australia (ICAA) conceded that restrictions on the use of the term 'financial planner' may be beneficial:

...restricting the term 'financial planner' to only those individuals who are appropriately licensed to provide financial product advice may be in the public interest.⁴⁰

3.44 However, CPA Australia and the ICAA did not support the restrictions proposed for the term 'financial adviser':

...we do not support restricting the use of the term 'financial adviser' and any other word or expression that is of like import. We believe this is unnecessary and overly restrictive. In addition, it would add complexity to consumers' understanding.

The term 'financial adviser' is recognised and used in broader terms by professionals other than those licensed to provide financial product advice to retail clients. This includes professional accountants and financial institutions such as investment banks that provide financial advice both in Australia and internationally. It is also widely used by other professional advisers who provide financial product advice to wholesale clients.⁴¹

3.45 Furthermore, CPA Australia and the ICAA warned that the legislation could cause confusion if persons authorised to give personal advice on a limited range of financial products were still allowed to use the restricted terms such as:

- drafted licensees with authorisations to give personal advice on agricultural MIS;
- product issuers, for example issuers of timeshare schemes, horse racing schemes, property schemes;

39 Mr Dante De Gori, General Manager, Policy and Government, Financial Planning Association of Australia, *Committee Hansard*, 22 April 2013, p. 30.

40 CPA Australia and the Institute of Chartered Accountants Australia, *Submission 7*, p. 1.

41 CPA Australia and the Institute of Chartered Accountants Australia, *Submission 7*, p. 2.

- limited licensees advising on only investment life and/or life risk products; and
- some superannuation trustees with authorisations to advise on their superannuation scheme and possibly insurance.⁴²

CPA Australia and the ICAA argued that:

Allowing individuals with a limited scope of advice to call themselves a 'financial planner' or 'financial adviser' would not be in the public interest. These terms should apply to individuals who provide comprehensive financial advice. This must be addressed if the regulation is going to achieve its intended policy objectives of improving consumer trust and confidence.⁴³

3.46 The committee notes that the suggestion by CPA Australia and the ICAA appears at odds with the definition in the Corporations Act which defines financial product advice (and therefore someone licensed to provide such advice) in relation to a particular financial product or class of financial products rather than necessarily comprehensive financial advice.

3.47 Mr Fox of the AFA disagreed with the concerns that restricting the term 'financial adviser' would be detrimental:

If there are specialists in a particular area, they still cannot provide personal financial advice unless they are authorised. If they are authorised, then they would be welcome to use one of the approved terms and they would be welcome to use other descriptors of their role. A financial adviser and an international investment expert can coexist, but the point that we would be looking for is for a consumer to understand, if they are seeing someone that has the term 'financial adviser' or 'financial planner', that that is someone licensed to provide them with personal financial advice.⁴⁴

3.48 Questioned by the committee about the concerns voiced by CPA Australia and the ICAA, Mr Bede said that Treasury recognised that the terms 'financial planner' and 'financial adviser' were used interchangeably in the industry and that it would be 'very hard for the government to restrict just financial planners and not financial advisers given that there is that sort of common usage'.⁴⁵

42 CPA Australia and the Institute of Chartered Accountants Australia, *Submission 7*, p. 2.

43 CPA Australia and the Institute of Chartered Accountants Australia, *Submission 7*, p. 2.

44 Mr Bradley Fox, Chief Executive Officer, Association of Financial Advisers, *Committee Hansard*, 22 April 2013, p. 23.

45 Mr Bede Fraser, Manager, Intermediaries and Regulatory Powers Unit, Retail Investor Division, Markets Group, Treasury, *Committee Hansard*, 22 April 2013, p. 38.

Concerns over the phrase 'of like import'

3.49 The phrase 'of like import' is already used in the Corporations Act in relation to restricted terms. Section 923B(4) of the Corporations Act uses the phrase 'of like import' in relation to restrictions on the use of terms that include stockbroker, sharebroker, futures broker, and insurance broker.⁴⁶

3.50 Suncorp Group Limited raised concerns about the phrase 'of like import' in connection with 'financial adviser'. Suncorp pointed out that they have staff that provide personal advice on general insurance products only and are typically titled 'customer service advisers'. Suncorp also has authorised representatives 'who provide personal advice. These representatives are generally identified as 'advisers' or 'insurance advisers'.⁴⁷

3.51 Although Suncorp agreed that the term 'financial adviser' should be restricted, it noted that the bill as currently worded raises compliance issues for their advisers:

The ban as currently worded would result in these staff attempting to explain they are trained and licenced to provide financial advice on general insurance, but are not 'financial advisers'. This presents a compliance challenge as use of the word 'adviser' and similar terms represent natural language when describing the services our staff provide.⁴⁸

3.52 Accordingly, Suncorp sought reassurance that under the proposed legislation that there would be sufficient flexibility in the bill to allow their advisers to operate without breaching the legislation:

Suncorp believes it is vital that providers of non-designated financial product advice are provided ample flexibility to explain their offering in natural language using the term 'adviser' without breaching the 'of like import' ban. We seek clarity that the 'of like import' ban does not extend to use of the term 'adviser' more generally.

Suncorp would also welcome clarification regarding how providers of advice on non-designated products may refer to themselves in a way that both distinguishes them from 'financial advisers' and conveys that they are licenced to provide financial advice.⁴⁹

3.53 The Australian Bankers' Association (ABA) also sought clarification that the phrase 'of like import' would not capture well understood terms within the banking profession.⁵⁰

46 *The Corporations Act 2001*, Part 7.6, Division 10, ss. 923B(4).

47 Suncorp Group Limited, *Submission 12*, pp 1–2.

48 Suncorp Group Limited, *Submission 12*, p. 2.

49 Suncorp Group Limited, *Submission 12*, p. 2.

50 Australian Bankers' Association, *Submission 14*, p. 5.

3.54 From a consumer perspective, Mr Webb of the AIST argued that the phrase 'of like import' was necessary to ensure that consumers were not misled by preventing unauthorised persons from using terms that could convey the impression they were qualified to provide advice on financial services products:

This bill is to make sure that customers do not get the wrong idea when they go in to see financial services professionals. If a mortgage broker, for example, is not authorised to provide advice on a financial services product, if they are merely there to be a salesperson of lending products, I am uncertain as to why they would need a term like that in the first place.⁵¹

Treasury response to the intent of the phrase 'of like import'

3.55 Treasury explained the scope of the phrase 'of like import' and the rationale for its inclusion in the legislation:

As the Committee is aware, the Bill inserts definitions of the terms 'financial planner' and 'financial adviser' into the Corporations Act 2001 (Corporations Act), and restricts the use of those terms and terms of similar importance.

A person is taken to assume or use a word or expression if it is being used as part of another word or expression, or in combination. As noted at the Committee hearing, the terms 'financial planning adviser' and 'financial advising agent' would be considered to be of like import and are specifically identified in the Explanatory Memorandum to the Bill.

If there was evidence that terms like 'private wealth adviser' were being used by unlicensed individuals in an attempt to convince consumers that they were licensed to provide financial advice then the Government has regulation making powers to restrict usage of such terms. This will provide consumers with certainty that a person using a restricted term is authorised to do so under an Australian Financial Services Licence (AFSL).⁵²

Concerns over the impact on the wholesale sector

3.56 The committee notes that in paragraph 2.53 of 'ASIC Regulatory Guide 2: AFS Licensing Kit: Part 2-Preparing your AFS licence or variation application', (RG 2:53), a person must select the type of financial product advice that he or she would like to be authorised to provide under an AFSL:

Provide Financial Product Advice—this authorisation will cover both personal and general advice to both wholesale and retail clients; or

Provide General Financial Product Advice Only—this authorisation will cover general advice to both wholesale and retail clients (i.e. it does not cover personal advice); or

51 Mr Richard Webb, Policy and Regulatory Analyst, Australian Institute of Superannuation Trustees, *Committee Hansard*, 22 April 2013, p. 16.

52 Treasury, answer to question on notice, 22 April 2013 (received 9 May 2013).

Provide General Financial Product Advice Only To Wholesale Clients—this authorisation will only cover general advice to wholesale clients (i.e. it does not cover personal advice or general advice to retail clients).

3.57 The committee notes that the type of authorisation selected would depend on the nature of the services that a person would be providing, either personal and/or general financial advice, and financial advice to retail and/or wholesale clients.

3.58 The committee sought clarification on how the legislation would impact on people operating in the wholesale sector. Reading RG 2:53 in conjunction with the bill 923C(2) (that specifies the need to hold or operate under an AFSL and be licenced to provide personal advice on a designated financial product in order to be able to use the restricted terms), the committee understands that those persons currently licenced under an AFSL to provide general financial product advice solely to wholesale clients would not be able to use the restricted terms. Only those persons currently operating in the wholesale sector under an AFSL that are authorised to provide personal financial advice would be able to use the restricted terms. This understanding was confirmed by Treasury in correspondence to the committee.

Exemptions from holding an AFSL

3.59 Noting that some submitters had expressed concern about people providing wholesale financial advice that may get caught by the amendments, the committee was keen to clarify whether a person who was exempt from holding an AFSL would still be able to call themselves a 'financial planner' or a 'financial adviser'.

Response from Treasury

3.60 Treasury clarified the circumstances in which a person would be able to use the restricted terms including in the wholesale arena. Treasury also signalled legislative changes that will apply to recognised accountants from 1 July 2013:

The exemption from holding an AFSL granted under section 911A(2) of the Corporations Act is only available to individuals in specific situations and many of these situations which section 911A(2) identifies do not warrant the need for an AFSL.

Whether the person could call themselves a financial planner would also depend on the specific situation, for example:

- the person is not providing financial product services, such as performing the duties of a receiver or liquidator - unable to call themselves a financial planner under this exemption;
- the person is providing a service where they are a representative of someone who has an AFSL - able to call themselves a financial planner if they were meeting the relevant licensing conditions;
- the person providing advice is doing so in a general nature to a broad audience, for example providing general advice in the media - unable to call themselves a financial planner under this exemption;

- the person is not providing advice to retail clients - able to call themselves a financial planner if licensed to provide advice to wholesale clients. The Bill does not restrict licensees providing advice to wholesale clients from using the restricted term.

Several other exemptions from holding an AFSL exist in the corporations law. For example, under Corporations Regulation 7.1.29A, a recognised accountant i.e. a member of the CPA Australia, the Institute of Chartered Accountants in Australia or the Institute of Public Accountants is able to provide advice on the acquisition or disposal of a self managed superannuation fund without an AFSL. The Government has announced that it will replace this exemption with a new limited AFSL requirement from 1 July 2013 which allows accountants (and others) to provide advice on matters related to self managed superannuation fund and general product advice - a person holding a new limited licence will also be able to call themselves a financial planner.⁵³

3.61 The committee sought information from ASIC and from the FPA on the numbers of people that operate with an AFSL, operate as a representative of a company that holds an AFSL, operate without an AFSL under exemptions in section 911A(2) of the Corporations Act, and operate without an AFSL without a section 911A(2) exemption.

3.62 The FPA provided the committee with the following figures relating to their members:

FPA members operating with an AFSL:

From data collected in 2009 prior to the removal of principal (licensee) membership from the association, the number of practitioners that operated with their own AFSL was around 50. Though we are unable to provide you with more updated figures, it would still only represent a minority of our practitioner membership.

FPA members operating as a representative of a person / firm with an AFSL:

The FPA has around 7,500 practitioner members. As mentioned previously all practitioner members must provide proof of their authority to provide personal financial advice via their 'representative status' as a requirement for membership on the application. This would include practitioners that operate as 'self-employed' representatives as well as 'employed' representatives.

It should be noted that there is a very small number (estimated to be around 1%) within the 7,500 practitioner membership that are no longer 'practicing' and are either retired or operating in a mentoring/supervisory role. This includes Academics lecturing at Universities. All of these members are still required to maintain their Continuing Professional Development (CPD) training if they wish to remain as member.

53 Treasury, answer to question on notice, 22 April 2013 (received 9 May 2013).

FPA members operating without an AFSL under section 911A of the CA:

Based on our understanding of section 911A of the Corporations Act, the majority of our 7,500 practitioner members would be operating under sub-section 911A(2)(a)(i). That is they would be exempt from holding a license because they provide the service as a representative of a second person who carries on a financial services business and who holds an AFSL.

It should also be noted that the note in sub-section 911A(2) states that: However, representatives must still comply with section 911B even if they are exempt from this section by this paragraph. Section 911B refers to 'Providing financial services on behalf of another person who carries on a financial services business'.

The FPA is unaware of any practitioner member operating under any other sub-section within 911A. We believe that this question would be more appropriately directed at ASIC.

FPA members operating without an AFSL without this exemption:

It is our understanding that it would be unlikely that any practitioner member operates without an AFSL without this exemption.⁵⁴

3.63 ASIC provided the committee with the following data on the numbers of entities holding an AFSL and the numbers of authorised representatives of AFSL holders:

As at 10 May 2013, there were 5, 027 entities that hold AFSLs.

As at 10 May 2013 there were 51,147 authorised representatives of AFSL holders with a total of 59,564 links to AFSL holders (the higher number for links is due to the fact that some are authorised representatives of more than one licensee).

ASIC holds no data on entities that fall within the provisions of s911A(2) of the Corporations Act, as entities falling within the exemptions are not required to register with ASIC.⁵⁵

3.64 While ASIC was able to provide the numbers of persons authorised to provide personal financial advice to retail clients, there is less clarity about the numbers of entities that may be able to use the terms 'financial planner' and 'financial adviser':

As at 2 April 2013 (the most recent data ASIC has interrogated) there were 39,782 authorised reps with a total of 44,024 links to AFSL holders authorised to provide personal financial advice to retail clients.

54 Financial Planning Association of Australia, answer to question on notice, 22 April 2013 (received 3 May 2013).

55 Australian Securities and Investments Commission, answer to question on notice, 22 April 2013 (received 13 May 2013).

The only information that ASIC holds that indicates whether entities offering personal financial advice to retail clients may call themselves 'financial advisers' or 'financial planners' is the 'main business activity' descriptor selections which can be selected by an AFSL applicant during the completion of their application form.

The selections of the main business activity of 'adviser' and 'financial planner' are voluntary selections elected by the applicant from a list of descriptors in the AFSL Application Form. The selections are not contingent upon, linked or connected to any suite or combination of financial product or services authorisations. The selections are not reflected or displayed in any external fashion and do not appear on any public register or in any term or condition of the AFSL certificate. The selections are made at the time of the lodgement of the initial application for an AFSL.

This information is set out below:

AFSLs authorised to provide personal advice to retail clients	2736
AFSLs authorised to provide general advice to retail client	770
AFSLs selecting the main business activity of 'adviser'	1839
AFSLs selecting the main business activity of 'financial planner'	1228
AFSLs selecting both 'financial planner' and 'adviser'	581 ⁵⁶

Concerns over the professionalism of the industry and the effectiveness of the bill

3.65 Concerns were raised that, in practice, the bill will not improve consumer protection because it does not address key areas of consumer risk. Some submitters expressed the view that the amendments, while a worthwhile step, did not in themselves constitute an improvement in the professionalism of financial advice. The SMSF Owners' Alliance supported the measures, but noted that the measures would 'not guarantee the quality of advice offered'.⁵⁷

3.66 The Industry Super Network strongly supported the measures in Schedule 2, but, over time, would also support 'increasing the minimum requirements associated with use of these restricted terms, for instance in relation to minimum qualification requirements of those using the term'.⁵⁸

3.67 The SMSF Professionals' Association of Australia (SPAA) felt strongly that improving adviser competency was the key element in consumer protection and better consumer outcomes:

56 Australian Securities and Investments Commission, answer to question on notice, 22 April 2013 (received 13 May 2013). The dates at which these figures are current are provided in Appendix 3, Answers to questions on notice.

57 SMSF Owners' Alliance, *Submission 13*, p. 2.

58 Industry Super Network, *Submission 15*, [p. 1].

We strongly believe that improving the skills and competencies of financial advisers is the most important facet of increasing the professionalism of financial advice and giving consumers more protection. Increased competencies of advisers will ensure the best outcomes for consumers of financial advice.⁵⁹

3.68 Mr Robert Brown, Fellow of the Institute of Chartered Accountants, had strong reservations about the effectiveness of the bill. He based his argument on the premise that the recent FOFA reforms were compromised because they failed to sufficiently restrict all forms of conflicted remuneration:

While I accept that FOFA may lead to some improvements in the way in which the industry operates (time will tell), that legislation contains significant political compromises for which the industry fought hard. These include allowing the continuity of widely-used forms of conflicted remuneration such as commissions paid on individual life insurance policies, trailing commissions on existing arrangements and percentage-based asset fees on investment products. The latter are often misleadingly referred to by the industry as 'professional fees for service', but in reality they are commissions paid by clients (akin to real estate agents' commissions).⁶⁰

3.69 Mr Brown therefore pointed out that the bill might have the unintended effect of misleading consumers as to the nature of the advice that they may be receiving:

My concern is that should the restrictions in this Bill become law, consumers of financial services are likely to incorrectly conclude that by consulting what amounts to a 'government-endorsed' licensed 'financial planner' or 'financial adviser' that they will be dealing with a professional person who can be relied upon to act in their interests without the improper influence of conflicted remuneration.

[...]

My point here is that proper consumer protection is not achieved from what a licensed person is called (or not called) in legislation. It is achieved by professional practitioners adopting the highest ethical (conflict-free) standards, developed and enforced through self-regulation (my strong preference) or imposed by law. It is misleading to suggest that consumers should trust the advice of financial planners and financial advisers who use a legislatively restricted descriptor (implying trust and professionalism) while allowing those same planners/advisers to continue to receive commissions, percentage-based asset fees and other forms of conflicted remuneration.⁶¹

59 SMSF Professionals' Association of Australia, *Submission 4*, p.3.

60 Mr Robert Brown, Fellow of the Institute of Chartered Accountants in Australia, *Submission 11*, [p. 1].

61 Mr Robert Brown, Fellow of the Institute of Chartered Accountants in Australia, *Submission 11*, [p. 1].

3.70 Mr Brown concluded by arguing that the key element was conflicted remuneration, and that only by addressing conflicted remuneration along with the issue of restricted terms could the bill achieve adequate levels of consumer protection:

If the government is determined to place legislative restrictions on the terms 'financial planner' and 'financial adviser', an effective measure from a consumer protection viewpoint would be to legislate so that those terms may ONLY be used by licensed persons who do not receive any form of conflicted remuneration. Then, at least, consumers could have the confidence and trust that licensed financial planners and financial advisers with whom they consult are what they claim to be, that is, un-conflicted professional advisers whose interests are clearly and unambiguously aligned with their clients' best interests.⁶²

3.71 The AFA agreed with measures to improve the professionalism of the industry including education, membership of professional associations, and extending the coverage of codes of conduct.⁶³ However, it did not see the measures in the bill as appropriate for the pursuit of increased professionalism.⁶⁴ Mr Fox argued that the 'best interest duty' enshrined in the FOFA reforms was a key element in driving professionalism, and that this change needed time to work before considering other measures.⁶⁵

3.72 By contrast, the FPA distinguished between industry associations and professional associations. Mr Rantall said that the FPA held itself to be a professional association and that professional associations were characterised by firstly, a globally recognised 'professional framework which incorporates standards, ethics, compliance and practice' and secondly, by a world-class certification program. As noted earlier, Mr Rantall argued that linking use of the term 'financial planner' to membership of a professional body would significantly increase the professionalism of the industry.

3.73 In its submission to the exposure draft legislation, the FPA outlined the initial and ongoing requirements for achieving certification as a Certified Financial Planner:

To gain CFP certification, a financial planner must complete an undergraduate degree, Masters degree or PhD and have successfully completed all of the units of study in the CFP Certification Program. To achieve the CFP certification, at least three years of financial planning experience is also required. The CFP program is a postgraduate education program that

62 Mr Robert Brown, Fellow of the Institute of Chartered Accountants in Australia, *Submission 11*, [p. 2].

63 Mr Philip Anderson, Chief Operating Officer, Association of Financial Advisers, *Committee Hansard*, 22 April 2013, p. 23.

64 The Association of Financial Advisers Limited, *Submission 8*, p. 2; Mr Bradley Fox, Chief Executive Officer, Association of Financial Advisers, *Committee Hansard*, 22 April 2013, p. 21.

65 Mr Bradley Fox, Chief Executive Officer, Association of Financial Advisers, *Committee Hansard*, 22 April 2013, p. 28.

covers the knowledge a financial planning professional must be able to draw on to deliver financial planning to clients, or when interacting with colleagues or others in a professional capacity. A detailed capstone assessment is part of the program.

CFP professionals must also adhere to the FPA Code of Professional Practice which includes the Code of Ethics, Rules of Professional Conduct and Practice Standards; and undertake at least 120 hours of quality on ongoing Continuing Professional Development (CPD) every three years. This requirement is for all CFP professionals whether they are actively providing personal financial advice to clients or not.⁶⁶

3.74 The FPA also explained what is occurring globally to increase the professionalism of the financial planning industry. Mr De Gori and Mr Rantall noted that the Financial Planning Standards Board, of which the FPA is a member, has 23 members internationally, and is discussing with the International Organization of Securities Commissions (IOSCO) and with regulators that are members of IOSCO moves to have the term 'financial planner' enshrined in law. Mr De Gori advised that Malaysia and Quebec in Canada have enshrined the term 'financial planner' in law and that New Zealand has enacted legislation around financial advisers.⁶⁷

3.75 The distinction between selling financial products and providing unaligned financial planning advice is central to the FPA's position, and also addresses concerns expressed by some submitters about the extent to which the bill would actually address the professionalism of the industry. Mr De Gori expressed the FPA's belief that the bill would help address consumer confusion, but would not differentiate between those focused more on selling financial products and those providing financial planning:

The confusion around those who just sell financial products and those who provide financial planning services, as we were discussing earlier, is probably the original step that the FPA was looking for. In the absence of that, regarding the confusion between those operating outside of the regime versus those inside the regime, this legislation will help with that. This will rule out the property spruikers and real estate agents—those who are trying to mislead consumers that they are able to provide some form of financial advice.⁶⁸

66 Financial Planning Association of Australia, *Submission*, Exposure Draft—Legislative amendments relating to the use of the expressions 'financial planner' and 'financial adviser', p. 4; see also Mr Mark Rantall, Chief Executive Officer, Financial Planning Association of Australia, *Committee Hansard*, 22 April 2013, p. 31.

67 Mr Mark Rantall, Chief Executive Officer, and Mr Dante De Gori, General Manager, Policy and Government, Financial Planning Association of Australia, *Committee Hansard*, 22 April 2013, pp 33–34.

68 Mr Dante De Gori, General Manager, Policy and Government, Financial Planning Association of Australia, *Committee Hansard*, 22 April 2013, p. 35.

3.76 The AFSL system is premised on service providers demonstrating professionalism and acting in the best interest of the client. An AFSL pertains to a business and not necessarily to an individual because a person may be authorised to provide financial advice on behalf of a licence holder. Treasury stated that a licence holder is responsible for monitoring their authorised representatives. Mr Fraser also pointed out that the broader FOFA reforms placed obligations on licensees and authorised representatives to act in the best interest of their client and placed restrictions on conflicted remuneration.⁶⁹

3.77 Treasury further noted that:

Any person advising on financial products must be licensed to do so by ASIC or operate under the licence of a licensee i.e. an authorised representative.

Under the licensing regime, the licensee is responsible for ensuring their authorised representatives are adequately trained and competent to provide the services covered by the AFSL's licence. Under the Corporations Act, licensees must adequately train and supervise their representatives, and must themselves be competent.

The knowledge, skill and educational level requirements vary depending on the representative's advice activities. That is, they vary depending on whether the adviser gives general or personal advice and what products the adviser gives advice on. Where the adviser provides advice on products that are more complex and not generally understood, a higher standard of knowledge, skill and educational level is required.⁷⁰

Time-frame for commencement of penalties

3.78 The AFA had reservations around the timeframe for the commencement of penalties, particularly those related to passive breaches such as signage rather than active breaches such as emails and face-to-face communication.⁷¹ Mr Webb from the AIST supported the idea of a transition period.⁷²

Recommendation 2

3.79 The committee recommends that ASIC consult with key stakeholders in the financial advice sector to implement a grace period to ensure that in the

69 Mr Bede Fraser, Manager, Intermediaries and Regulatory Powers Unit, Retail Investor Division, Markets Group, Treasury, *Committee Hansard*, 22 April 2013, p. 40.

70 Treasury, answer to question on notice, 22 April 2013 (received 9 May 2013).

71 The Association of Financial Advisers Limited, *Submission 8*, p. 2; Mr Bradley Fox, Chief Executive Officer, Association of Financial Advisers, *Committee Hansard*, 22 April 2013, p. 21.

72 Mr Richard Webb, Policy and Regulatory Analyst, Australian Institute of Superannuation Trustees, *Committee Hansard*, 22 April 2013, p. 17.

short-term, passive breaches of the new provisions will not be prosecuted. ASIC should engage with the financial advice sector to discuss the time that practitioners will need to ensure that signage is changed.

Public education campaign

3.80 The AIST recommended that advisers 'be required to display the title 'financial planner' or 'financial adviser' publicly'.⁷³ The FPA agreed that this proposal 'would be very useful' and recommended teaming it with a display of a licence number. Mr De Gori noted that this recommendation would help distinguish financial planners from 'authorised representatives'.⁷⁴

3.81 The AIST encouraged ASIC to initiate a public education campaign on the matter to 'ensure that the public is aware of who can provide personal financial advice by looking for financial planners/financial advisers for their advice needs'.⁷⁵ The AFA also saw ASIC's *MoneySmart* website as an appropriate avenue for a public education campaign.⁷⁶

3.82 CPA Australia and the ICAA argued that an education campaign by government and industry was essential to convey the benefits of receiving licensed financial advice:

For this measure to be successful, it would also require both the government and industry to work together to deliver an education campaign that provides consumers with a clear understanding on who can provide licensed financial planning advice and importantly, the very real benefits of seeking such advice.⁷⁷

3.83 The FPA remarked that it has a \$200 advertising levy in addition to its \$800 membership fee, and that it has run an advertising campaign over the last two years 'promoting the benefits of seeking out a professionally qualified financial planner'. Mr Rantall added that, should the bill pass, they would run further advertising campaigns promoting the idea of seeking advice from a 'professionally qualified, certified

73 Australian Institute of Superannuation Trustees, *Submission 3*, [p. 2]; see also Mr Richard Webb, Policy and Regulatory Analyst, Australian Institute of Superannuation Trustees, *Committee Hansard*, 22 April 2013, p. 16.

74 Mr Mark Rantall, Chief Executive Officer, and Mr Dante De Gori, General Manager, Policy and Government, Financial Planning Association of Australia, *Committee Hansard*, 22 April 2013, p. 37.

75 Australian Institute of Superannuation Trustees, *Submission 3*, [p. 2].

76 Mr Bradley Fox, Chief Executive Officer, and Mr Philip Anderson, Chief Operating Officer, Association of Financial Advisers, *Committee Hansard*, 22 April 2013, p. 28.

77 CPA Australia and the Institute of Chartered Accountants Australia, *Submission 7*, p. 3.

financial planner'.⁷⁸ Mr De Gori expressed the hope that 'ASIC would also assist in the consumer campaign around promoting this new piece of legislation, should it pass'.⁷⁹

3.84 Mr Rantall also saw 'a massive role for education in the school system'. He noted that financial literacy was a compulsory subject in Thailand. Mr Rantall explained that financial literacy encompassed very basic money management skills:

It is just about how you manage your credit card properly or your phone account properly. It is as simple as that—staying away from debt that is going to cause you any grief and living within your means. It is as simple as that.⁸⁰

Industry size and membership

3.85 The committee questioned industry representatives about the size of their industry, their membership coverage, and the proportion of Australians currently receiving personal financial advice. The committee heard that only two in 10 Australians currently have an active advice relationship with a financial adviser, and that the AFA currently has about 2 000 individual members and about 8 000 advisers through the licensee network. Noting that the legislation may result in an increase in the number of people seeking advice from authorised financial advisers, the committee asked industry representatives whether there would be enough financial advisers to meet the potential increase in demand.⁸¹

3.86 Mr Fox outlined some of the steps that the AFA was taking to address workforce issues:

It is a challenge that the market could face. There is the combined issue here about being able to successfully establish that trust along with being able to deliver advice that a consumer readily attaches to receiving that type of advice, which has been a challenge well highlighted through the FOFA debate over the last three years. The AFA started work on bringing younger advisers into the marketplace through initiative called GenXt several years ago. That has seen the demographic of advisers changing. There are younger, newer advisors coming through, but we have an old workforce. The average age of an adviser is still in the mid-50s. So as they retire we do have a challenge to top up from the bottom and in fact grow the capability

78 Mr Mark Rantall, Chief Executive Officer, Financial Planning Association of Australia, *Committee Hansard*, 22 April 2013, p. 31.

79 Mr Dante De Gori, General Manager, Policy and Government, Financial Planning Association of Australia, *Committee Hansard*, 22 April 2013, p. 35.

80 Mr Mark Rantall, Chief Executive Officer, Financial Planning Association of Australia, *Committee Hansard*, 22 April 2013, p. 36.

81 See the exchange between the Chair, Ms Deborah O'Neill MP and Mr Bradley Fox, Chief Executive Officer, Association of Financial Advisers, *Committee Hansard*, 22 April 2013, p. 22.

of the market to continue to deliver personal advice as opposed to just general advice.⁸²

Recourse to the law

3.87 The bill would enable ASIC to take action against a person that had breached the law on use of the restricted terms. However, SPAA believed that the bill could be strengthened by giving consumers recourse to the law in the event that they had suffered loss as a result of the fraudulent use of the terms:

To strengthen the proposed amendments, and deliver better consumer protection, we believe that the amendments should provide for a person that has illegally held themselves out to be a financial planner/adviser to compensate consumers that suffer a loss due to their advice/actions. This could be administered and enforced by ASIC as part of their administration and enforcement of the restricted use of financial planner/advisor. We believe providing consumers with recourse for fraudulent or incompetent advice would be an important addition to the amendments and provide real consumer protection.⁸³

Committee view

3.88 While the amendments regarding use of the terms 'financial planner' and 'financial adviser' by those offering personal financial advice are welcome and should ensure that those persons are operating under a relevant licence, the amendments will only work as part of the broader package of FOFA reforms that address issues of conflicted remuneration and acting in the best interest of the client.

Recommendation 3

3.89 The committee recommends that ASIC clearly sets out on its *MoneySmart* website the changes that the bill makes to inform consumers about what they can expect when they receive a service from a 'financial planner' or a 'financial adviser'.

82 Mr Bradley Fox, Chief Executive Officer, Association of Financial Advisers, *Committee Hansard*, 22 April 2013, p. 22.

83 SMSF Professionals' Association of Australia, *Submission 4*, p.3.

Recommendation 4

3.90 The committee recommends that the bill be passed.

Ms Deborah O'Neill MP

Chair