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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CORPORATIONS AND CONSUMER LEGISLATION AMENDMENT
(CONSUMER FINANCIAL PROTECTION) BILL 2012

DRAFT EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Financial Services
and Superannuation, the Hon Bill Shorten MP)

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
Bill	Corporations and Consumer Legislation Amendment (Consumer Financial Protection) Bill 2012
Corporations Act	<i>Corporations Act 2001</i>
FOFA	Future of Financial Advice
Licence	Australian Financial Services Licence
Licensee	Australian Financial Services Licensee
Regulations	<i>Corporations Regulations 2001</i>

General outline and financial impact

Defined terms for financial advice

The Future of Financial Advice (FOFA) reforms – of which the *Corporations Amendment (Future of Financial Advice) Act 2012* and the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* form part – improve the trust and confidence of Australian retail investors in the financial planning sector. They are designed to tackle the conflicts of interest that have threatened the quality of financial advice provided to Australian investors by financial advisers.

This measure supports the FOFA reforms, by empowering consumers of financial services to identify genuine providers of financial product advice.

Schedule 2 of the Corporations and Consumer Legislation Amendment (Consumer Financial Protection) Bill 2012 (the Bill) amends the *Corporations Act 2001* (the Act) to define the terms ‘financial planner’ and ‘financial adviser’ and to restrict the use of those terms.

Date of effect: The restriction on use of the defined terms takes effect from the day after the Royal Assent.

Proposal announced: On 22 March 2012, during the second reading debate on the FOFA legislation, the Minister for Financial Services and Superannuation, the Hon Bill Shorten MP, announced the Government’s intention to ‘introduce legislation into parliament by 1 July 2013 that will enshrine the term “financial planner” or “financial adviser” in law’.

Financial impact: This Bill has no significant financial impact on Commonwealth expenditure or revenue.

Human rights implications: This Schedule does not raise any human rights issue. See *Statement of Compatibility with Human Rights* — Chapter 2, paragraphs 2.3 and 2.4.

Compliance cost impact: This Schedule will have a minor impact on businesses or the not-for-profit sector, and accordingly no Regulation Impact Statement has been prepared.

Chapter 1

Defined terms for financial advice

Outline of chapter

1.1 This chapter explains the amendments to Part 7.6 of the Act to restrict the use of the terms ‘financial planner’ and ‘financial adviser’.

Context of amendments

1.2 On 26 April 2010, the then Minister for Financial Services, Superannuation and Corporate Law, the Hon Chris Bowen MP, announced the FOFA reforms.

1.3 The FOFA reforms represent the Government’s response to the 2009 Inquiry into Financial Products and Services in Australia by the Parliamentary Joint Committee on Corporations and Financial Services (PJC Inquiry), which considered a variety of issues associated with corporate collapses, including Storm Financial and Opes Prime. The *Corporations Amendment (Future of Financial Advice) Act 2012* and the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* implement the FOFA reforms.

1.4 This measure supports the FOFA reforms, by empowering consumers of financial services to identify genuine providers of financial product advice. On 22 March 2012, during the second reading debate on the FOFA legislation, the Government announced its intention to ‘introduce legislation into parliament by 1 July 2013 that will enshrine the term “financial planner” or “financial adviser” in law’.

1.5 Consumers of financial services are protected from unfair practices by a number of laws, most notably in Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001* (the ASIC Act). The ASIC Act prohibits misleading or deceptive conduct in relation to financial services, and prohibits certain false or misleading representations. Further, section 911C of the Act prohibits holding out that a person holds or is exempt from holding an Australian financial service licence (a licence), or acts on behalf of another person when providing financial services, if that is not the case. However, there is no specific restriction on using the terms ‘financial adviser’ or ‘financial planner’ in circumstances where financial advice or planning services cannot be provided by the person.

1.6 A number of terms are defined and restricted in the Act for similar purposes. For example, use of the terms ‘independent’, ‘impartial’ and ‘unbiased’ is restricted, as is use of terminology such as ‘stockbroker’, ‘futures broker’ and ‘insurance broker’. Restricting terms in this way is intended to signal to consumers certain information about the person using them – for example, that the person does not accept commissions or is authorised to act as a stockbroker. The addition of ‘financial adviser’ and ‘financial planner’ to these terms is intended to improve outcomes for consumers of financial advice services, by providing clarity in the type of financial service being offered and by preventing particularly misleading conduct with respect to financial advice services.

Summary of new law

1.7 A person must not use the terms ‘financial adviser’ or ‘financial planner’, in relation to a financial services business or a financial service, unless the person is able under the Australian Financial Services Licence regime to provide personal financial advice to retail clients on designated financial products.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Use of the terms ‘financial adviser’ and ‘financial planner’ is restricted to those persons able to provide personal advice to retail clients on designated financial products.	No restriction on the use of ‘financial adviser’ or ‘financial planner’. A general prohibition on misleading or deceptive conduct in relation to financial services.

Detailed explanation of new law

1.8 The Bill places restrictions on the use of the terms ‘financial adviser’ and ‘financial planner’. It is an offence for a person to use one of the terms – or a term of like import – without meeting the statutory criteria for their use.

1.9 A person can contravene the provision if the person carries on a financial services business or provides a financial service, or another person provides a financial service on behalf of the first person, and the

first person assumes or uses a restricted word or expression in relation to that business or service. *[Schedule 2, item 1, subsection 923C(1)]*

1.10 A person assumes or uses a word or expression when, for example, it includes the word or expression in its advertising material, business listings, or in communication with consumers. A person is still taken to assume or use a word or expression even if the word or expression is being used as part of another word or expression, or in combination with other words, letters or symbols. *[Schedule 2, item 1, paragraph 923C(4)(b)]*

1.11 The restricted words or expressions are ‘financial adviser’, ‘financial planner’, any word or expression prescribed by regulation, or any word or expression of like import to ‘financial adviser’, ‘financial planner’ or a prescribed word or expression. *[Schedule 2, item 1, paragraph 923C(4)(a)]* It is important that provision be made to prescribe words or expressions by regulation, as persons wishing to escape the application of this measure are likely to invent new terms to describe themselves, which terms may be just as misleading to consumers.

1.12 A person does not contravene the provision if the statutory criteria are met. Those criteria are that the person either:

- holds a licence, under which the person can provide personal advice to retail clients on designated products; or
- provides personal advice on designated products to retail clients on behalf of a licensee, where under that licence the licensee may provide personal advice on designated products to retail clients. *[Schedule 2, item 1, subsection 923C(2)]*

1.13 A ‘designated financial product’ is 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) product. *[Schedule 2, item 1, subsection 923C(5)]* A ‘general insurance product’ is defined in paragraph 764A(1)(d) of the Act as a contract of insurance that is not a life policy (with certain exceptions). A sickness and accident insurance product is defined by regulations made for the purposes of subparagraph 761G(5)(b)(iv) of the Act. Regulation 7.1.14 of the *Corporations Regulations 2001* (the Regulations) defines a sickness and accident insurance product. A ‘consumer credit insurance product’ is defined by regulations made for the purposes of subparagraph 761G(5)(v) of the Act. Regulation 7.1.15 of the Regulations defines a consumer credit insurance product. A ‘basic deposit product’ is defined in section 761A of the Act. A non-cash payment product is a facility through which, or through the acquisition of which, a person makes

non-cash payments [*Schedule 2, item 1, subsection 923C(5)*]. An ‘FHSA product’ is defined in section 761A of the Act as an FHSA within the meaning of the *First Home Saver Accounts Act 2008*.

1.14 The intention of the definition of ‘designated financial products’ is to capture more complex types of financial products, or less well-understood financial products, which may be associated with greater risks for consumers. It is appropriate that only those authorised to provide advice on this more sophisticated set of financial products be able to use the terms ‘financial adviser’ or ‘financial planner’. It is not a requirement that the licence include a condition specifying certain types of financial products. It is enough that, under the terms of the licence, the licensee would be able to provide advice on one or more of these types of products.

1.15 A person must hold a licence to carry on a financial service business, including a business providing financial product advice to retail clients. The requirement to hold a licence does not apply where the person is subject to an exemption (outlined in subsection 911A(2) of the Act). ‘Financial product advice’ is defined in subsection 766B(1) of the Act as a recommendation or statement of opinion intended to influence a decision in relation to a financial product or class of products. ‘Personal advice’ is defined in subsection 766B(3) of the Act as financial product advice directed to a person in circumstances where the adviser has considered the person's objectives, financial situation and needs. A ‘retail client’ is defined in section 761G of the Act.

1.16 Persons authorised only to provide general advice will not be able to call themselves ‘financial advisers’ or ‘financial planners’. Persons not authorised to provide any form of financial product advice will not be able to call themselves ‘financial planners’ or ‘financial advisers’.

1.17 The consequence of this measure is that, when a consumer is presented with a representation from a person carrying on a financial services business using the term ‘financial adviser’ or ‘financial planner’, the consumer will know that the person is able to provide personal advice as regulated by Chapter 7 of the Act. Those who are not able to provide personal advice on designated products under this regime will not be able to use the terms, and will contravene section 923C if they do.

1.18 A contravention of subsection 923C(1) is an offence. A person who uses a restricted term without meeting the criteria commits an offence on the first day of contravention, and on each subsequent day of contravention. [*Schedule 2, item 1, subsection 923C(3)*] An offence against subsection 923C(1) is punishable, on conviction, by a penalty not

exceeding 10 penalty units for each day, or part of a day, in respect of which the offence is committed. *[Schedule 2, item 2; section 1311 of the Act]*

Application and transitional provisions

1.19 The amendments in Schedule 2 commence on the day after the Act receives the Royal Assent.

Chapter 2

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Corporations and Consumer Legislation Amendment (Consumer Financial Protection) Bill 2012: Schedule 2—Amendments relating to the use of the expressions financial planner and financial adviser:

2.1 This Schedule is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

2.2 This Schedule restricts the use of the terms ‘financial adviser’ and ‘financial planner’ to persons able to provide personal advice on designated financial products to retail clients. Only those able to provide a certain level of financial advice will be able to use the terms in relation to a financial service or business.

Human rights implications

2.3 This Schedule does not engage any of the applicable rights or freedoms.

Conclusion

2.4 This Schedule is compatible with human rights as it does not raise any human rights issues.

The Hon Bill Shorten MP, Minister for Financial Services and Superannuation