



Law Council  
OF AUSTRALIA

*Legal Practice Section*

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The Treasury  
Financial Services Reform Implementation Taskforce  
Langton Crescent  
PARKES ACT 2600

By email: [FOFAGrandfathering@treasury.gov.au](mailto:FOFAGrandfathering@treasury.gov.au)

Dear Sir/Madam

### **LCSC - Ending Grandfathered Conflicted Remuneration**

This submission has been prepared by the Law Council of Australia's Superannuation Committee (**the Committee**),<sup>1</sup> which is a committee of the Legal Practice Section of the Law Council of Australia. The Superannuation Committee makes the following submissions on the exposure draft Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Bill 2019:

- the Bill should deal not only with grandfathered conflicted remuneration given by platform operators but also with grandfathered conflicted remuneration given by those who are not platform operators – in other words, it should deal with all categories of grandfathered conflicted remuneration;
- the Bill should provide that the ban on volume-based shelf-space fees does not apply if the fee is promptly passed on to the platform operator's clients;
- the Bill should set out the rule (or rules) for rebating grandfathered conflicted remuneration, rather than leaving this matter to be dealt with by regulation; and
- the Government should release its legal advice on the constitutionality of the Bill.

The Committee elaborates on each submission, in turn.

#### **1. First submission**

*The Bill should deal not only with grandfathered conflicted remuneration given by platform operators but also with grandfathered conflicted remuneration given by those who are not platform operators – in other words, it should deal with all categories of grandfathered conflicted remuneration.*

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<sup>1</sup> The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

- 1.1. The Committee acknowledges that, currently, grandfathering for conflicted remuneration given by platform operators is dealt with (in the first instance) in the *Corporations Act 2001* (Cth) (although the position is then affected by regulations in Part 7.7A of the Corporations Regulations), while grandfathering for conflicted remuneration given by those who are not platform operators is dealt with wholly through Part 7.7A of the Corporations Regulations. However, the Committee considers that this does not justify dealing with only the first category of grandfathering in the Bill (and, presumably, dealing with the second category of grandfathering by regulation – see [1.6] of the exposure draft Explanatory Memorandum).
- 1.2. The Committee considers it would be much better to deal with both categories of grandfathered conflicted remuneration in the Bill. This could be done very simply by adding a provision to the following effect: 'A regulation made under subsection 1528(2) does not apply to a benefit that is given on or after 1 January 2021'. If this approach were to be taken, then it would not be necessary to amend or repeal regulations 7.7A.15B – 7.7A.16F in order to achieve the intended outcome (although those regulations should still be amended or repealed, at a later time).
- 1.3. The Committee considers this to be a much better approach because it is preferable to deal with the topic comprehensively in the Bill, rather than in a piece-meal fashion (that is, partly in the Bill and partly by regulation). The benefit is that someone wanting to understand the provisions concerning the ending of grandfathering would only need to look at one piece of legislation.

## 2. Second submission

*The Bill should provide that the ban on volume-based shelf-space fees does not apply if the fee is promptly passed on to the platform operator's clients.*

- 2.1. At [186] and [187] of Regulatory Guide 246, Australian Securities and Investment Commission (**ASIC**) sets out its (long-standing) no-action position under which it will take no action if a volume-based shelf-space fee is passed on promptly to the platform operator's clients. The Committee submits that this position should continue to apply, notwithstanding the termination of grandfathering, and that this position should be reflected in the law, rather than being left as an ASIC no-action position.
- 2.2. This recommendation could be achieved by adding the following words at the end of proposed new section 1529(1A), with the timing requirement reflecting the existing ASIC position in RG 246: 'unless the value of the benefit is passed on to clients in full and as soon as practicable but no later than three months after receiving the benefit'.
- 2.3. This recommendation would have the effect of allowing the same outcome in respect of grandfathered volume-based shelf-space fees as the outcome that will apply in respect of grandfathered conflicted remuneration under Part 2 of Schedule 1 to the Bill – that is, the benefit in question will be rebated to the client.
- 2.4. If this recommendation is not implemented, then grandfathered volume-based shelf-space fees will end and fund managers may be unwilling or unable to set up separate funds (or separate unit classes within existing funds) to allow discounted pricing to continue to be made available to platform operators. This would be an anomalous and presumably unintended outcome. That outcome can be avoided by allowing grandfathered volume-based shelf-space fees to continue, provided the platform operator's clients experience the benefit of the discounted fee.

### **3. Third submission**

*The Bill should set out the rule (or rules) for rebating grandfathered conflicted remuneration, rather than leaving this matter to be dealt with by regulation.*

- 3.1. The Committee does not support the approach taken in Part 2 of Schedule 1 to the Bill to rebating grandfathered conflicted remuneration to clients.
- 3.2. That approach is, in effect, to leave the matter to another day, to be dealt with by regulation. The Committee considers that such an approach should not be taken. The Bill should include all of the provisions relating to the ending of conflicted remuneration. If and when the Bill is passed, superannuation trustees should have before them a complete set of provisions concerning the ending of grandfathering. Piece-meal rule-making in this area should be avoided wherever feasible.
- 3.3. In addition, the Committee is concerned by the level of prescription that appears to be intended. The Committee is of the view that there is unfortunately nothing in the history of the Future of Financial Advice (**FoFA**) provisions to suggest that such prescription (by way of regulation) will be well executed. On the contrary, the Committee suggests that detailed prescription is unlikely to assist in achieving the intended policy outcome. This approach was taken in regulations 7.7A.15B – 7.7A.16F. The complexity with which those regulations are drafted makes them very difficult to understand and very difficult to apply.
- 3.4. The Committee suggests that the relevant principle can be stated reasonably simply. Where, before grandfathering ends, a benefit was given on a regular or ongoing basis, the benefit ceases to be given as a result of grandfathering ending and the cost of giving the benefit was funded from an amount or amounts attributable to a retail client or retail clients, then the cost saving associated with the benefit must be passed on, to the applicable retail client or applicable retail clients, in full and as soon as practicable but no later than three months after receiving the benefit.
- 3.5. The Committee suggests that it would be preferable to include, in the Bill, a provision which embodies this principle (or some similar principle) and detailed prescription be avoided. The Committee assumes the rationale for the proposed detailed prescription is to ensure that the rebating requirement is not, somehow, avoided. If the Committee's assumption is correct, the Committee suggests that the concern is likely to be misplaced and, to the extent it is not misplaced, it would be better dealt with by giving ASIC the task of ensuring that the principle is implemented in accordance with its terms and purpose.

### **4. Fourth submission**

*The Government should release its legal advice on the constitutionality of the Bill.*

- 4.1. The existing FoFA provisions concerning conflicted remuneration and other banned benefits were drafted in a way that suggests a concern that they may contravene section 51(xxxi) of the Commonwealth Constitution. By comparison, the provisions in the Bill are drafted in a way that suggests that section 51(xxxi) would not apply.
- 4.2. The difference between the approach previously taken in the FoFA provisions, and the approach now taken in the Bill, has not been explained.

- 4.3. The Committee's concern does not go to whether there is, or is not, a constitutional law concern. The Committee's concern goes to the absence of any explanation for the apparent change between the view of the Government in 2011/2012 and the view of the Government today. We expect that, on each occasion, the Government formed its view with the benefit of legal advice. The question then becomes – has the legal advice changed and, if so, in what respect or respects?
- 4.4. If the Bill is passed, then superannuation trustees who cease paying grandfathered conflicted remuneration on the strength of the new provisions face the risk of being sued by advice licensees. If the current Government considers that such claims would be likely to fail, because the constitutional invalidity argument would be weak, the Government should be clear on the point and release its legal advice. If the current Government does not consider the constitutional invalidity argument to be weak, then a Bill (such as this one) that does not include constitutional law savings provisions (and which, indeed, removes the existing constitutional law savings provisions) cannot be justified.

### Contact

The Committee would welcome the opportunity to discuss its submission further and to provide additional information in respect of the comments made above. In the first instance, please contact:

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Yours sincerely



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