Law Council
OF AUSTRALIA

Legal Practice Section

24 April 2019

The Treasury
Financial Services Reform Taskforce
Langton Crescent
PARKES ACT 2600

By email: FOFAGrandfathering@treasury.gov.au

Dear Sir/Madam

Ending Grandfathered Conflicted Remuneration – Submission on ED Regulations

1. The Superannuation Committee (**the Committee**)[1] of the Law Council of Australia makes a number of submissions, as set out in this letter, on the exposure draft *Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Regulations 2019*. The Committee's submissions follow on from its earlier submissions on the exposure draft *Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Bill 2019* (a copy of which is attached).

2. In its earlier submissions, the Committee said that 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. Having now reviewed the exposure draft Regulations, the Committee is even more certain than before that the matter should be dealt with in the Bill, not by regulation. The rules in the exposure draft Regulations are unnecessarily detailed and, as detailed below, they create problems.

3. The Committee therefore repeats its earlier suggestion 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.

4. The Committee also repeats its earlier submission that it would be preferable to include, in the Bill, a provision which embodies this principle (or some similar principle) and that detailed prescription be avoided.

[1] 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.

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639 • *Email* mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra • 19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

5. In the event that that submission is rejected, and rebating grandfathered conflicted remuneration will be dealt with by prescription in regulation, the Committee makes the following comments.

6. The key proposed regulations are regulations 7.7A.15AL and 7.7A.15AM. Regulation 7.7A.15AL will apply where the grandfathered conflicted remuneration to be rebated relates to a single retail client while regulation 7.7A.15AM will apply where the grandfathered conflicted remuneration to be rebated relates to multiple retail clients.

7. The regulations are in these terms:

   7.7A.15AL Obligation of covered person where conflicted remuneration can be attributed to a particular client.

   …

   (2) The covered person must pay the amount of the conflicted remuneration to the client no later than 10 business days after the day by which the covered person is legally obliged (disregarding Subdivision C of Division 4 of Part 7.7A of the Act) to give the conflicted remuneration to another person (see paragraph 963M(a) of the Act).

   7.7A.15AM Obligation of covered person where conflicted remuneration relates to a group of clients.

   …

   (2) The covered person must pay, or provide a monetary benefit to, each of the clients referred to in sub-regulation 7.7A.15AJ(2) no later than:

   (a) for a payment—10 business days after the day (the remuneration day) by which the covered person is legally obliged (disregarding Subdivision C of Division 4 of Part 7.7A of the Act) to give the conflicted remuneration to another person (see paragraph 963M(a) of the Act); or

   (b) for a monetary benefit other than a payment—1 year after the remuneration day. …

8. Regulation 7.7A.15AL will apply where, for example, a superannuation trustee pays a grandfathered investment trail commission (attributable to a single fund member) to an advice licensee. Regulation 7.7A.15AM will apply where, for example, a superannuation trustee pays a grandfathered volume rebate (attributable to multiple fund members) to an advice licensee.

9. In the Committee's view, the differences between a grandfathered investment trail commission and a grandfathered volume rebate do not account for (or justify) the main difference between the regulations. Regulation 7.7A.15AL requires a rebate to be in the form of a payment to the client. By comparison, regulation 7.7A.15AM allows a rebate to be in the form of a payment to the client or in the form of a 'monetary benefit', which, it appears, may be something other than a payment to the client.

10. In a superannuation context, both options need to be available under both regulations. A superannuation trustee cannot pay a cash rebate (for a grandfathered investment trail commission) to a fund member. Instead, the superannuation trustee needs to be

able to rebate the relevant amount to the member's account in the fund. Indeed, a superannuation trustee could, in practice, pass the benefit of the grandfathered investment trail commission to the fund member in either of two ways – lowering the fee from which the commission would otherwise be funded, or else continuing the fee at the same level as before but then rebating the relevant part of the fee after the event. If regulation 7.7A.15AL is amended in the manner suggested by the Committee, both of these possibilities will be catered for.

11. To assist, the Committee has set out below some suggested amendments to regulation 7.7A.15AL:

7.7A.15AL Obligation of covered person where conflicted remuneration can be attributed to a particular client.

…

(2) The covered person must either:

(a) pay the amount of the conflicted remuneration to the client no later than 10 business days after the day (the remuneration day) by which the covered person is legally obliged (disregarding Subdivision C of Division 4 of Part 7.7A of the Act) to give the conflicted remuneration to another person (see paragraph 963M(a) of the Act); or

(b) provide some other monetary benefit, of an equivalent value to the amount of the conflicted remuneration, to the client no later than 1 year after the remuneration day.

12. Having set out these suggested amendments, it is useful to refer to the exposure draft Explanatory Statement, which includes the following statement about regulation 7.7A.15AM(2)(b) (concerning benefits attributable to multiple clients):

A monetary benefit must be provided no later than 1 year after the date by which the covered person is legally obliged (disregarding the ban) to give the conflicted remuneration to another person. This 1 year limit allows a non-monetary benefit to be provided by means of a reduction in a product-based fee, which are frequently charged on an annual basis (paragraph 7.7A.15AM(2)(b), item 1, Schedule 1).

13. In the Committee's view, the need to allow a 'benefit to be provided by means of a reduction in a product-based fee' applies just as much to a grandfathered investment trail commission as it does to a grandfathered volume rebate.

14. Another problem with the rules in the exposure draft Regulations is that they refer to the covered person being 'legally obliged' (disregarding Subdivision C of Division 4 of Part 7.7A of the Act) to give the conflicted remuneration. However, not all cases of grandfathered conflicted remuneration may involve a legal obligation to provide it. In some cases, grandfathered conflicted remuneration may be paid under an arrangement entered into before 1 July 2013 even though there is no clear legal obligation to do so. The Committee suggests that the concept may need to be expanded to 'legally obliged or otherwise able' (or something similar). This problem would not arise under the alternative approach to rebating that was outlined by the Committee in its earlier submission.

Contact

15. 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:

- Mr Luke Barrett

  Chair, Superannuation Committee

  T: 03 8831 6145

  E: luke.barrett@unisuper.com.au

- Ms Lisa Butler Beatty

  Deputy Chair, Superannuation Committee

  T: 0477 753 941

  E: BeattyLi@cba.com.au

Yours sincerely

Jonathan Smithers
Chief Executive Officer