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Ms Sue Vroombout
General Manager, Retail Investors Division
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Dear Ms Vroombout,

Future of Financial Advice (FOFA) reforms

The Australian Bankers' Association (ABA) appreciates the opportunity to provide comments on the Exposure Draft *Corporations Amendment (Future of Financial Advice) Bill 2011* and accompanying Explanatory Memorandum.

1. Opening comments

The ABA supports the Federal Government's efforts to improve the quality of financial advice and the professionalism of the financial planning industry. As part of the FOFA Peak Consultation Group and other discussions, we supported in principle an articulation of a best interests duty noting that many financial advisers (financial planners) have communicated and interacted with their clients on the basis that there is a common law obligation (fiduciary duty) owed to their clients.

However, while the ABA recognises that the intent of the FOFA legislative changes is aimed at this part of the financial services industry (financial planning), we are concerned about the breadth of the proposed provisions and the prescriptive nature of the proposed statutory best interests duty and other changes, especially with regards to the implications for other parts of the industry, including retail banking and business banking.

The ABA strongly advocates that the FOFA legislative changes should not impact on the business of retail banking. With this in mind, we welcome the carve out for basic banking products. Specifically, we note the announcement about the carve out for basic banking products:

> There will be a limited carve-out from the ban on volume payments and best interests duty for basic banking products where employees of an Australian [*authorised*] Deposit-taking Institution (ADI) are advising on and selling their employer ADI basic banking products.[1]

[1] Future of Financial Advice Information Pack. Section 2.8. 28 April 2011.

However, the ABA does not believe that the Exposure Draft is aligned with the stated policy. We consider that applying aspects of the best interests duty to basic banking products is inconsistent with Minister Shorten's policy announcement. There has been no evidence of market failure, consumer detriment or systemic concerns regarding practices by banks in the provision of basic banking products. It is essential for the legislative changes to target areas of concern without imposing unnecessary regulatory requirements and compliance burden across the banking and finance industry.

Therefore, the ABA believes that the carve out for basic banking products must be absolute and clear – the proposed provisions are legally ambiguous and in practice would be operationally difficult to implement. We consider that the law should reflect the stated policy and should not apply elements of the best interests duty or the duty of priority.

The ABA believes that the scope of the proposed legislative changes could have extensive implications for banking groups where advice services are delivered via diverse corporate structures and internal licensee arrangements. In the absence of tightening the application of the legislative changes, we consider there could be significant adverse and unintended consequences for banking competition domestically and the contestability of the banking and finance industry internationally.

The ABA believes that the proposed provisions in the Exposure Draft both contain drafting errors and drafting anomalies where the policy intent is not captured appropriately. Amendments will need to be made to ensure the legislation does not create unnecessary and unreasonable legal uncertainties and administrative complexities and costs for banks and other financial service providers.

2. Specific comments

2.1 Best interests duty

2.1.1 Carve out for basic banking products

It is the ABA's view that the proposed statutory best interest duty should not apply to basic banking products, which is consistent with Minister Shorten's announcement on 28 April 2011. Specifically, we note the commentary about the carve out for basic banking products:

> As these basic banking products are often sold by frontline staff, the carve-out is largely intended to address the more routine activities of frontline staff, such as tellers and specialists. While these employees may provide either general or limited personal advice in relation to these basic banking products, these products are generally easier for consumers to understand, and consumers more readily understand that the frontline employee of the ADI is in the business of selling the employer's product.[2]

The ABA strongly advocates that the law should recognise that the treatment of basic banking products should reflect the basic nature of these products, the simple advice situations associated with the offer of these products, and the expectations of bank customers when interacting with their bank.

[2] Future of Financial Advice Information Pack. Section 2.8. 28 April 2011.

Definition of basic banking product

The ABA notes that proposed section 961F defines a "basic banking product" as a basic deposit product, non-cash payment facility, first home saver account, traveller's cheque, or other product prescribed by regulations.

The ABA believes that the carve out for basic banking products should apply to:

- All types of at-call accounts – it should be clarified in the Explanatory Memorandum that basic banking products specifically includes transaction accounts, savings accounts, and cash management accounts.
- Certain term deposits – it should be clarified in the law that the carve out specifically includes term deposits with a term less than 5 years. (We note that this approach would ensure that banks are able to offer term deposits with a term less than 5 years via bank staff and bank specialists (obviously meeting their other legal obligations in respect of these accounts, including training and disclosure). Bank customers rarely require personal advice on these products, even though the offer of these products can trigger the legal definition of personal advice within the law. Clarifying the application of the carve out for term deposits would mean that if customers seek personal advice, this advice service remains available within the market. Additionally, this would mean that banks are better able to manage their balance sheet, meet their financial obligations, and implement strategies to deal with business exposures, risk and capital management. Banks having ready access term deposits is of paramount importance with the pending implementation of the Basel III reforms.)
- Products designed as a deposit product bundled with non-financial product facility or service – it should be clarified that the carve out specifically includes deposit products with an attached credit facility, e.g. a debit account with an overdraft facility.

The ABA believes that the duty should not impede the provision of basic banking products across different business models and distribution arrangements. It should be clarified in the Explanatory Memorandum that banking channels (e.g. Internet banking, mobile bankers) and financial services (e.g. ATMs, mobile banking) associated with the offer of basic banking products are included in the carve out from the best interests duty (and the conflicted remuneration provisions).

The ABA supports the inclusion of a regulation making power to prescribe additional products as "basic banking products". While we recognise this mechanism as a way to include additional products as basic banking products over time, as the industry and the reforms develop over time, we consider it essential that there should be certainty of scope in the primary legislation itself around the class of products identifiable as basic banking products operating today in the retail banking market. In light of the existing and continued uncertainty, it would be undesirable given the proximity to the commencement date if there was any further delay in understanding the scope and impacts on current activities in retail banking businesses.

Definition of employee

The ABA believes that employees and agents of banks and other ADIs should consist of all staff and representatives, including all employee, agency and franchise arrangements for bank staff. It should be clarified in the Explanatory Memorandum that employees includes bank staff and the bank's contractors and agents, and that agent encompasses franchisees and employees of franchisees. In the absence of this clarification, some banks would not have the benefit of the carve out for basic banking products, which may cause distortions in the banking industry and may have adverse effects for banking competition.

Elements of the best interests duty – basic banking products

The ABA notes that the Exposure Draft contemplates repealing section 945A (requirement to have a reasonable basis for advice) and section 945B (requirement to warn a retail client if advice is based on incomplete and inaccurate information). For this reason, we assume that the proposed elements (a) – (c) in section 961C(2) attempts to identify specific process steps and in doing so generally restate the current know your client, know your product, and appropriateness requirements.

However, the ABA is concerned that the proposed elements would significantly extend the obligations for frontline bank staff to have a reasonable basis for the advice they provide to their customers. While we understand that there is a need for the intent of sections 945A and 945B to be retained, the proposed elements (a) – (c) in section 961C(2) are highly prescriptive, yet legally ambiguous. Furthermore, while the exemption in section 961C(3) provides in effect a defence to the best interests duty for basic banking products, it does not remove the obligation to comply with the steps in section 961C(2).

For example, if a prospective customer provides certain personal information in asking about a bank account, then in practice under the proposed provisions, frontline bank staff (bank tellers and call centre staff) in providing personal advice in response to the customer's inquiry must ask the customer about their objectives, financial situation and needs; identifying the subject matter of the advice requested by the client; and, where it is reasonably apparent that the information given for the previous criteria is incomplete or inaccurate, making further inquiries about the information.

This scenario would impose additional obligations on frontline bank staff over and above the existing reasonable basis for advice test, and thereby add to administrative complexity and compliance burden, and ultimately the cost of retail banking. Currently, a bank will determine the relevant circumstances having regard to information provided by the customer, and ensure the advice given is reasonable. If the adviser knows or ought to know that the information provided by the customer is incomplete or inaccurate, the adviser is to warn the customer that they should consider the appropriateness of the advice.

The ABA believes that the law should not impose unreasonable and unnecessary obligations on banks with regards to advice about basic banking products – this is both consistent with the Government's announcement in April 2011 and the Government's stated policy of making advice more accessible and affordable ('scaled advice'). These products are simple, well understood financial products and associated with the provision of retail banking services.

The law should encourage banks to offer advice on these products, rather than create legal uncertainties, and ultimately restrict the possibility of 'scaled advice' or indeed result in the further expansion of 'no advice' models (factual information only). Deposits already have a history of different regulatory treatment in financial services regulation and are subject to the guarantee (which banks will pay for via the FCS). Furthermore, the law should not result in a disjointed or haphazard customer experience whereby unnecessary administrative complexity frustrates the provision of factual information or financial product advice to bank customers. In practice, if bank staff are only able to provide advice via a personal advice model, this would require significant restructuring of existing retail banking businesses.

Therefore, the ABA believes that the carve out for basic banking products should be clear and absolute, rather than caveated to require steps to be met towards meeting the best interests duty. Sections 945A and 945B should not be repealed and amended to apply only to basic banking products. Furthermore, it should be clarified that an employee or agent of a bank or other ADI satisfies section 961K and section 961L if they comply with the reasonable basis for advice test.

> The ABA recommends that the existing reasonable basis for advice test should be retained for basic banking products, rather than applying the proposed elements (a) – (c) in section 961C(2).

2.1.2 Elements of the best interests duty – simple financial products, simple advisory situations

The ABA notes that in addition to basic banking products there are other less complex financial products that are typically distributed through bank branches and other distribution channels where it would be unreasonable and unnecessary for all the elements of the best interests duty to be applied, i.e. simple insurance, investment and superannuation products.

In these instances, clients' expectations could range from seeking only factual information or general advice from bank staff or receiving only limited advice or personal advice via readily available banking arrangements and distribution channels. In relation to the former where factual information and general advice only is provided, other remedies may better address any anomalies that may arise, i.e. qualifications to the conflicted remuneration provisions. Whereas in relation to the later where personal advice is provided, it may be appropriate for a carve out to be available in certain circumstances where a limited advice model is used. However, to avoid confusion, these simple financial products should be managed differently to basic banking products.

The law should encourage scaled advice, especially in circumstances where the client contacts their bank via front line bank staff, bank specialist, bank financial planner or their bank's website and simply wants to discuss (factual information or financial product advice) the appropriateness of one or more of that bank's products. Furthermore, the law should encourage innovation and specialisation in the offer of financial products. A regulation making power would provide a mechanism to make appropriate adjustments to the best interests obligation.

> The ABA recommends that a new subsection 961C(4) should be included in the provision to provide a regulation making power to prescribe a class of financial products or sub-class of financial products as defined to meet certain elements of the statutory best interests duty.

2.1.3 Elements of the best interests duty – other financial products

The ABA notes that there are various legal obligations governing personal advice provided to retail clients in relation to financial products. A provider must generally hold an Australian Financial Services Licence (AFSL) or be authorised by an AFSL holder. Additionally, an adviser must have a reasonable basis for advice, and when providing advice must:

1. know their client—determine the relevant personal circumstances and make reasonable inquiries about those personal circumstances;

2. know their product—having regard to information obtained about a client's personal circumstances, consider and conduct an investigation of the subject matter of the advice; and

3. ensure the advice they give is reasonable in the circumstances and appropriate to their client—advice as agreed with their client. The client should be warned if the information provided by the client is incomplete or inaccurate for the purposes of providing the advice.

Furthermore, an adviser must meet other conduct and disclosure requirements, including give their client a SOA (where required) or other disclosures and make sure they have relevant compliance systems covering resources, competencies, etc.

The ABA believes that the proposed best interests duty is too broad in scope and prescriptive in nature. In the absence of a well defined duty, the law will create unnecessary and unreasonable uncertainty as to what is required. Furthermore, it is possible that the courts could interpret the duty as a "best advice" obligation, which is contrary to the Government's policy announcement.

Definition

The ABA believes that the statutory best interests duty should contain a comprehensive definition to provide certainty for advisers and consumers as to the obligations of advisers in providing personal advice to retail clients. We consider the proposed elements (a) – (h) in section 961C(2) are extremely broad, yet highly prescriptive. It is essential that the nature of the duty and defence be appropriately contained in the provision – that is, the duty can be satisfied by following specified steps.

The ABA has advocated the introduction of a best interests duty for financial advisers to act in the best interests of their client and to give priority to the interests of the client in the event of a conflict of interest. However, the proposed duty in section 961C(1) has not defined what "best interests" means. The duty must be clearly defined in the law and its application clearly outlined in the Explanatory Memorandum to avoid confusion and incorrect assumptions or interpretations. Furthermore, it should be clarified that if a provider acts reasonably in the circumstances and complies with the elements of the duty contained in section 961C(2) that they are taken to have complied with section 961C(1).

Reasonable steps qualification

The ABA notes that the Government's announcements in April 2010 and April 2011 states that the best interests duty would include a "reasonable steps qualification". The proposed duty does not provide a reasonable steps defense – neither in section 961C(1) – the general duty, or section 961C(2) – the process steps. Furthermore, the proposed duty requires an adviser to not only consider all products available in the market, but to consider products for which the adviser may not be competent or licensed/ authorised to provide advice on.

The ABA believes that the duty must explicitly contain a reasonable steps qualification where the adviser has acted reasonably based upon the information that is available at the time the advice is given and in the circumstances. Furthermore, section 961B should be amended to clarify that where a provider has complied with the best interests duty, it will be deemed that they have complied with their common law obligation (fiduciary duty).

Compliance difficulties

The ABA notes that the proposed duty is likely to have adverse and unintended consequences in terms of compliance, including:

- *Legal uncertainties*: Terminology is unclear in the proposed duty, such as "reasonably apparent" and "reasonable investigation".
- *Limited authorisations*: Authorised representatives may have limited authorisation making aspects of the proposed duty difficult to comply with.
- *Tick-a-box approach*: Prescriptive process steps in the proposed duty may result in a prescriptive approach to compliance – which would be contrary to the Government's stated policy of making advice more client focused.

Scaled advice

The ABA notes that the Government and ASIC are taking measures to facilitate more accessible and affordable advice. However, the proposed duty would impede the ability for banks and other financial service providers to offer 'scaled advice' and discourage innovation and specialisation in the provision of simple and limited advice, and ultimately the ability for advisers to provide clients with cheaper and/or better access to advice services. Furthermore, in the absence of the ability for an adviser and their client to limit the scope of the advice, including the subject matter of the advice, clients would be unable to select the advice service they want and advisers would be hindered in managing costs of the advice service provided.

The ABA believes that the law should recognise the provision of scaled advice and that it is not reasonable or necessary for an adviser to obtain additional information from their client, or provide more than their client has requested, or to consider other products that might also achieve the client's needs and objectives. The duty must explicitly enable scaled advice and its operation clearly outlined in the Explanatory Memorandum to avoid confusion and incorrect assumptions or interpretations.

Intra-fund advice

The ABA notes that the Government's announcement in August 2011 confirmed that the FOFA legislation (second tranche) would contain a definition of "intra-fund advice". To date, consultation on this matter has been limited. We consider that providers of intra-fund advice must comply with the best interests duty. With the exception of the carve out for basic banking products (and our comments above regarding the inclusion of a new subsection 961C(4)), the duty should apply to all personal advice to retail clients, regardless of whether the advice is intra-fund advice, strategic advice or holistic advice.

Calculators and automated advice

It is the ABA's view that the statutory best interest duty should not hinder the ability for banks and other financial service providers to offer advice services via technology solutions, including services through Internet banking, tools and calculators on bank's websites, computer programs and applications on mobile phones, tablet computers, etc.

The ABA believes that the proposed provisions seem to only permit advice to be scaled by the client. However, where technology programs and applications are used to provide advice, the provider must be able to limit the scope of the advice. Additionally, the proposed provisions present a number of practical difficulties in matching a technology solution to the application of the duty. It should be clarified that the duty can apply to the scope of the advice as agreed and to an APL.

<u>Contraventions</u>

The ABA believes that the civil liabilities and penalties associated with the duty should be proportionate. It should be clarified that licensees are not deemed have done what their authorised representatives have done. Similarly, it should be clarified that advisers (employees and authorised representatives) should have a defence if their contravention was due to a reliance on the directions of their employer.

<u>Warnings and disclaimers</u>

The ABA believes that the law should not require advisers to give additional disclosures to satisfy the requirements of the statutory best interests duty. For example, the existing FSG and SOA documents should be used to provide warnings and disclaimers via standard disclosures.

<u>Proposed elements of the statutory best interests duty</u>

Specifically, the ABA believes that the proposed statutory best interests duty is problematic. It is essential that banks and other financial service providers have certainty regarding their legal obligations. Following, we make a number of high level comments about the proposed elements of the duty.

Identifying the subject matter of the advice

The ABA notes that subsections 961C(2)(a) and 961C(2)(b) could be interpreted as advice can only be limited to the extent the client requests the advice to be limited. This is contrary to the concept of 'scaled advice' and the ability for an adviser to be able to limit advice to the relevant personal circumstances and with reference to the subject matter (e.g. advice only on the bank's products, advice commensurate with the adviser's expertise). Additionally, the concept of subject matter is too wide. While we assume that these elements are intended to restate the existing reasonable basis for advice test in terms of the concepts of know your client and know your product, the proposed provisions are unclear. It is essential that banks and other financial service providers are permitted to offer simple or limited advice to bank customers and their clients.

The ABA believes that subsections 961C(2)(a) and 961C(2)(b) should be amended to make it clear that the duty is limited by reference to the subject matter or the scope of the advice as agreed. We suggest that the duty should replicate more closely the existing obligations regarding suitability.

Reasonable inquiries to obtain complete and accurate information

The ABA notes that subsection 961C(2)(c) could be interpreted as advice can only be provided following consideration of whether the information provided by the client is sufficient and following verification of the information provided by the client by validating against external sources and/or investigating all products. In practice, the proposed provision is unclear in that advisers will not have certainty as to whether their considerations will be sufficient. Additionally, it seems that the adviser is obliged to make reasonable inquiries to obtain complete and accurate information – not just to make reasonable inquiries to obtain information that is sufficiently accurate and complete for the purposes of giving the advice.

Specifically, for frontline bank staff this is beyond existing requirements and would require substantial system and process changes, which would increase compliance costs and administrative burden for banks. More broadly, the proposed provision is unclear in that it goes beyond the existing obligation to warn a client if advice is based on incomplete or inaccurate information to requiring an adviser to obtain and verify information. It is essential that advisers can limit inquiries to that requested by their client and to limit the scope of the advice.

The ABA believes that subsection 961C(2)(c) should be amended to only require an adviser to make reasonable inquiries of the client to obtain information that is sufficiently complete and accurate for the purposes of providing advice on the subject matter.

'Reasonably apparent' and advising on 'alternative subject matter'

The ABA notes that subsections 961C(2)(d) and 961C(2)(f) could be interpreted as advice can only be provided if the adviser considers other subject matters and alternatives that could meet the client's needs and objectives. In practice, if advisers have to consider all subject matters, this would result in advisers having to provide holistic advice in all circumstances. This would make compliance unachievable and in effect make providing advice in any circumstance difficult. It is essential that considerations and assessments should take into account the information and knowledge that was or ought to have been available to the adviser. An adviser should not be required to provide advice on other subject matters and alternatives beyond the scope of the advice requested or potentially beyond the adviser's competencies or authorisation or licensee's business model.

Section 961D defines "reasonably apparent" only by reference to what would be apparent to a "reasonable adviser". As a result, it appears that all needs and objectives which are "reasonably apparent" to a reasonable adviser would need to be considered, even if irrelevant to the advice that the client has requested or the adviser has offered. It is essential that advice is able to be limited to what is relevant to the subject matter of the advice requested and relevant in the circumstances.

The ABA believes that the various duties should apply only to the extent relevant to subject matter of the advice as agreed. The duty should be amended to make it clear that the adviser and their client can agree to limit the scope of the subject matter for the advice – that is, based on "relevant personal circumstances" and which is "reasonable in the circumstances". Subsections 961C(2)(d) and 961C(2)(f) should be deleted.

'Assessing expertise'

The ABA notes that subsection 961C(2)(e) could be interpreted as requiring the adviser to assess whether they have the expertise required to give advice. This appears to be contrary to existing licensee obligations and regulatory guidance on training and competence. Subsection 961C(2)(e) should be amended to relate to the scope of the advice as related to the relevant authorisation and competencies.

Reasonable investigation

The ABA notes that subsection 961C(2)(g) could be interpreted as advice needs to be provided that is not just limited to the needs and objectives relevant to the subject matter of the advice. In practice, an adviser would be required to consider financial products (or non-financial products) beyond the scope of the advice as agreed between the adviser and their client.

Section 961E defines a "reasonable investigation" as not requiring an investigation into every financial product available, but into the products that might achieve the client's needs and objectives. As a result, it appears that an investigation would require an adviser to consider products within a class of financial products, and potentially products which are not the banking group's products or on the APL.

The ABA believes that the various duties should only require an adviser to assess products that might meet the needs and objectives relevant to the subject matter of the advice, and only where product recommendations are to be made. It should be clarified that an adviser is not required to investigate all products that may meet the client's needs and objectives.

'Financial product in substitution'

The ABA notes that subsection 961C(2)(h) could be interpreted as advice should be provided only in a manner that considers the disadvantages of substituting a product. In practice, it seems that the proposed provision does not give regard to the advantages of acquiring the product or the disadvantages of not acquiring the product.

The ABA believes that subsection 961C(2)(h) should be amended to apply only where an adviser knows or ought reasonably to know that a product already held by the client could meet the client's needs and objectives relevant to the subject matter of the advice.

'Basing all judgements'

The ABA notes that subsection 961C(2)(i) could be interpreted as advice should be provided only in a manner where all judgements are based on the client's needs and objectives. In practice, if the cost and features of two alternative products are identical, the adviser will not be able to choose one product over the other on the basis of the adviser's own interests (or the interests of the licensee or other third party). This is contrary to the Explanatory Memorandum which indicates that the duty of priority does not prohibit the adviser from pursuing the adviser's (or another person's) interests where they do not conflict with the client's interests.

The ABA believes that subsection 961C(2)(i) should be deleted as it seems to override the intended operation and limitations of the duty of priority.

The ABA recommends that the proposed best interests duty must be amended to adopt a principles-based approach and clarify the scope and nature of the duty. We note the submission prepared by the Financial Services Council and we support the specific recommendations to address concerns with the proposed best interests duty.

2.2 Approved product list

The ABA notes that section 961G(3) could require bank staff or an adviser to conduct a reasonable investigation into all financial products beyond the bank's products or available on the APL. This is contrary to previous Government announcements and does not reflect the manner in which banks provide basic, retail banking products and services. It would be unreasonable and impractical for bank staff (bank tellers, call centre staff or bank financial planners) to be required to investigate products available across the market or to recommend products of a competitor bank or banking group.

For example, if a customer seeks a 6 month term deposit with the highest interest rate, how can the proposed duty be met where the term deposit on the APL offers 5.5%, but the highest market rate is 6.5%. Does the adviser need to be aware of all products in the market (or sub-set of the market) in order to satisfy the duty? If this is the case, then section 961G(3) will be of little benefit.

The ABA believes that sections 961G(1)(c) and 961G(2)(c) should be amended so that the test is whether it would be reasonable to conclude that a product on the APL would be appropriate for the client, within the meaning of section 961H. If not, the adviser must not recommend a product on the APL and in doing so recognises that the client's needs and objectives are not always achievable. The adviser should be permitted to be able to inform the client verbally if they do not have a suitable product.

2.3 Appropriateness test

The ABA notes that section 961H could require a bank in practice to only provide holistic advice. Currently, section 945A explicitly relates appropriateness of the advice to the investigation of the subject matter which is reasonable in the circumstances.

The ABA believes that section 961H should be amended to ensure that appropriateness is tested having regard to the information that the adviser knows or would have known if the adviser had satisfied the duty under s961C.

2.4 Opt-in obligation

The ABA believes that the opt-in obligation as contained in the Exposure Draft is inconsistent with the Government's policy announcement. The opt-in obligation is intended to apply only to the provision of personal advice to retail clients and to be flexible and allow an adviser to renew their arrangements with their retail client at any point so long as it is no more than two consecutive years between each renewal. It should be clarified in the law and the Explanatory Memorandum that this is the policy intent and the application of the provisions.

The ABA notes that the proposed opt-in obligation includes a renewal notice requiring a client to opt-in to continue to receive a service that the client agreed to pay and to pay for that advice service as well as a fee disclosure statement.

The ABA believes that the proposed opt-in obligation is too broad and ambiguous. The renewal notice provisions are inflexible. The annual disclosure requirement is highly prescriptive. The proposed opt-in obligation is likely to result in increased administrative complexities and costs. Therefore, we consider that the opt-in obligation should:

- Apply only to new clients of the adviser. In practice, the grandfathering provisions and the definition of client will need to be clarified, in particular to address the multiple capacities in which an individual may seek advice. (We note that the grandfathering provisions should reflect contractual practices that occur today so that the provisions are clear in application. Additionally, the provisions should not constitute that the sale or transfer of an 'advice business' is a new ongoing arrangement.)

- Not apply across financial services, but should be connected to the provision of personal advice to retail clients and ongoing fee arrangements. For example, ongoing account keeping or service fees applicable to the provision of basic banking products, retail banking services, and other financial products should be explicitly excluded. These product fees and charges can relate to financial services and non-financial services, and not limited to advice services.

- Allow an adviser to implement the opt-in process in a way that suits the manner in which the adviser and their client currently communicate and interact. Sections 962D and 962G should be amended so that an adviser is not limited to give their client the renewal notice at least 30 days before the renewal period. In practice, the obligation should apply at least annually and no less frequently than once during a two year consecutive period (from the commencement/establishment of the ongoing fee arrangement).

- Adequately address the consequences if a client fails to opt-in. It seems that the adviser would have to terminate their agreement and commence a new agreement. It is also unclear the extent of liabilities carried by the adviser if the client has not made a decision to end an arrangement (during the "grace period"). Section 962K should be amended so that an adviser is able to continue to receive any ongoing fees or remuneration to the end of the further period of 30 days after the end of the renewal period, especially given that an adviser will continue to have to act in the best interests of the client and take actions/client instructions during this period. Furthermore, the client should be deemed not to have opted in at the end of the grace period, unless client instructions have been received.

- Adequately address the consequences of the death of a client. It is unclear how an adviser would continue to manage arrangements dealing with advice and estate planning for the client and their family. Section 962 should be amended so that if a client dies, who is a natural person, the estate of the client is taken to be the client during a reasonable period following the death of the client. We suggest a reasonable period would be 6 months during which time the client's spouse and/or dependents would be treated as the client for the purposes of the ongoing fee arrangement.

- Allow an adviser and their client to agree their arrangements. Section 962J should be amended so that if a client makes a decision to end an arrangement (as opposed to merely not responding to a renewal notice), the adviser's liability and right to receive any ongoing fees or remuneration can be specified where agreed with, or notified to, the client to end earlier than at the end of a further period of 30 days after the end of the renewal period. Furthermore, the adviser should be provided with at least 30 days notice of termination by their client.

- Allow an adviser to provide the renewal notice and fee disclosure statement in methods other than just "in writing". Advisers should have the flexibility to utilise technologies to meet the opt-in obligation.

The ABA recommends that the proposed opt-in obligation must be amended to better accommodate a flexible approach for advisers and their clients. Additionally, ongoing fees and charges not limited to advice services should be explicitly excluded. We note the submission prepared by the Financial Services Council and we support the specific recommendations to address concerns with the proposed opt-in obligation.

2.5 ASIC powers

The ABA supports enhancing ASIC's powers to refuse and revoke licences and to ban individual advisers from the financial services industry.

However, the ABA believes that the proposed changes will potentially have unintended consequences.

Firstly, the meaning of 'likely to breach' is unclear. Arguably, all AFSL holders and their authorised representatives may breach or may indeed be in non-compliance (for which the breach reporting requirements are designed to attend). For this reason, we consider that the law and the Explanatory Memorandum should refer to "likely to contravene". We assume that all due diligence and evidentiary processes would be undertaken by ASIC, natural justice would be afforded to individuals subject to action under the enhanced ASIC powers, decisions would be reviewable, and objective criteria would be outlined and guidance would be provided on what "likely to contravene" means.

Secondly, the definition of 'provider' makes the individual who gave the advice responsible for the advice. While we recognise that the licensee or the authorised representative is still legally liable for the advice, we assume the expanded 'provider' definition is designed to make it clear that ASIC can take action against an individual adviser, e.g. by way of banning order, as well as civil penalty action against the licensee or authorised representative. For this reason, we consider that it is essential for the best interests duty to include a reasonable steps qualification.

2.6 Transitional arrangements

In previous submissions and representations to Treasury, the ABA has expressed concern about the implementation pressures associated with the FOFA reforms – this is particularly concerning for retail banking and business banking where the impact of the FOFA reforms is still uncertain, despite the fact that the reforms are intended to target areas of concern – financial planning. Systems, processes and procedural changes required to implement the FOFA reforms will be significant and comprehensive – for example, changes will need to be made across all operational areas, i.e. technology systems, documentation, training, compliance procedures, monitoring and supervision arrangements, etc.

The ABA is concerned that the final FOFA legislation will not likely be passed through Parliament until towards the end of the first quarter 2012, with the best interests duty and opt-in obligation to commence from 1 July 2012. This means that the financial services industry will have only around 3 to 6 months to comply with the new legislative obligations. Banks and banking groups are facing considerable pressure from the cumulative effect of regulatory changes, i.e. Basel III reforms, G-20 reforms (financial services and markets regulation), consumer credit reforms, banking competition reforms, superannuation reforms, insurance reforms, etc.

The ABA requests that the Government consider either extending the proposed commencement date or permitting a transitional period to give industry sufficient time to make the necessary changes to comply with this new legislation – this is particularly important for retail banking and business banking.

3. Concluding remarks

The ABA believes that the policy intent of the FOFA reforms is directed at the business of financial planning and the provision of advice by financial planners to retail consumers. Bank customers regularly shop around for basic banking products and assess money management and account options, payment facilities, interest rates, loan and finance options, etc. Consumers understand that each bank will only provide information or advice on, or sell, the bank or banking group's own products. Consumers do not expect to receive independent advice on basic banking products available throughout the entire market. Banks have adopted distribution strategies for basic banking and financial products seeking to exploit different distribution channels and business models to ensure that customers can access products and services in ways convenient to them.

The ABA supports the introduction of the FOFA reforms as confirmed by Minister Shorten's announcement in April 2011. However, we are concerned that the proposed provisions do not reflect the policy intent outlined in this announcement, and in fact could be counterproductive to improving the quality of financial advice and the professionalism of the financial planning industry.

Specifically, the FOFA legislation (first tranche) could:

- Inappropriately stifle product and service innovation in retail banking – this will increase the costs of banking and decrease the availability of simple, low cost advice on basic banking and financial products, thereby impeding competition. Extending the reforms to the business of banking and finance would provide little incremental value to consumers, but would increase administrative complexity and compliance costs for banks. Eventually, these costs will be passed on to bank customers. Therefore, we consider that the proposed provisions should be targeted to the business of financial planning.

- Unnecessarily hinder the availability of financial advice to many Australians – the cumulative effect of the additional compliance costs and regulatory burden as well as the uncertain liabilities on advisers is likely to result in banks and other financial service providers implementing conservative compliance systems (which would increase the cost of financial advice) and/or restructuring business models (which would decrease the availability of financial advice). Therefore, we consider that the proposed provisions should adopt a principles-based approach, rather than the highly prescriptive approach contained in the Exposure Draft.

Yours sincerely

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Diane Tate