FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

Sue Vroombout
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The Treasury
Langton Crescent
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Email: futureofadvice@treasury.gov.au

16 September 2011

Dear Ms Vroombout,

Future of Financial Advice Bill 2011: Exposure Draft - *Tranche 1*

The Financial Planning Association of Australia (FPA)[1] welcomes the opportunity to provide comments and feedback into the Exposure Draft Legislation (Tranche #1).

The FPA has broadly supported the reform package since they were announced in April 2010 and we continue to support the reforms as they are packaged in this exposure draft. However, though we do not intend to debate policy in this submission, our comments in respect to Division 3 (that is Opt-In) must not be mistaken as anything other then feedback on the detailed draft legislation and not interpreted as support for the actual policy measure .

Overall the FPA is pleased with the exposure draft and the purpose of our submission is to highlight areas of clarification and potential unintended consequences.

In particular the FPA is interested in the application of; ASIC powers; licensee obligations; best interest and scaled advice; liability and obligation in respect to ongoing fees; and transition.

If you have any questions regarding the FPA's submission, please contact me directly on 02 9220 4505 or dante.degori@fpa.asn.au.

Yours sincerely

Dante De Gori
General Manager Policy and Government Relations

[1] The FPA is the peak professional body for financial planning in Australia. The 8,000 individual professional members of the FPA have an enforceable Code of Professional Practice, including the Client First principle. 5,700 of our members have achieved CFP certification, which is the global standard of excellence in financial planning. FPA practitioner members manage the financial affairs of more than 5 million Australians whose investments are valued at $630 billion.

Corporations Amendment (Future of Financial Advice) Bill 2011

Exposure Draft – Tranche 1

A Bill for an Act to amend the law in relation to financial advice, and for related purposes

FPA submission to:
The General Manager
Retail Investor Division
The Treasury

16 September 2011

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Exposure Draft – Tranche 1

INTRODUCTION

As part of our analysis of the exposure draft, the FPA would like to raise with Treasury our expectation on the following key issues:

A Positive Obligation on Licensees

The FPA supports the introduction of best interest obligation for the provision of financial advice on the individual professional 'provider'. However, we are not entirely convinced that Government appreciates the pressure that would likely be generated on the provider who will be forced to navigate between competing duties to their employer/licensee and their duty to their client. The best interest obligation must empower the individual professional to champion the interests of their clients against the commercial interests of the licensee. If the best interest obligation fails to do so, it will serve to undermine the purpose of the best interest duty and its role as a consumer protection measure.

The FPA therefore urges Treasury to give careful consideration to the unintended consequences to the individual provider when they choose to side with the interests of their client, in circumstances where this could challenge the commercial interests of their licensee; or, when the only practical options available to the individual provider are to recommend products that serve the commercial interests of their licensee rather than the client's interests.

Despite the obvious conflict of the commercial interests of the licensee and the provider's interest to provide quality advice referred to under s961L and 961S, as currently drafted the legislation does not include a direct obligation on the licensee to avoid a conflict or give priority to clients. The FPA is concerned about how this failure to resolve the licensee conflicts will impact on the individual provider and their ability to meet their best interest obligations to clients. Ideally, the legislation should encourage and facilitate the provider's interest to align with the client's interest. This is unlikely to be achieved without the inclusion of a positive obligation on licensees to also give priority to the clients (considered as a whole) interest. For example, how does an employed provider give priority to their client above their employer in the absence of a licensee obligation, without the risk of losing their job?

The draft legislation includes defence obligations for the provider under subdivisions F and G in an effort to oblige the licensee. However, a positive licensee obligation would create more pressure on licensees to modify their conflicted behaviour. Consumer protection would be enhanced by encouraging licensees to also align their behaviour more closely to clients needs, and deliver greater transparency in licensee practices. Licensee practices would also be held to greater account.

The FPA recommends a positive obligation on licensees to give priority to their clients (considered as a whole) to be included in the legislation, similar to provider obligations under provision s961K. For example:

> **Conflict between client's interests and those of the licensee**
> If there is a conflict between the interests of the client (considered as a whole) and the licensee interests, the licensee must give priority to the interests of its clients over its own commercial interests in relation to the activities of the licensee which directly influence the quality of advice provided to clients including the construction of the licensee's approved product list, the

arrangements by which it's representatives are remunerated for the provision of advice, and its arrangements for obtaining product research.

Scaled Advice

The Association also supports the need for clarity in the law on the ability to scale advice, and the obligations under the law, to meet the needs and objectives of the client. To deliver true consumer benefits through the best interest obligations there needs to be a balance in the legislation between allowing scaled advice to be provided and the need for adequate and appropriate best interest obligations for more holistic planning advice. There should be no exemptions or 'carve outs' for meeting the best interest obligations.

If it becomes too focused on scaled advice it creates loopholes for holistic advice; if the legislation goes too far the other way there is a risk that Government would be called upon to provide exemptions for the provision of scaled advice. An appropriate balance is needed.

The FPA notes Minister Shorten's continued promise to consumers that the FoFA reforms will deliver greater access to scaled advice. However, for the industry to be able to deliver on the Minister's commitment, certainty is required within the law on the ability of financial planners to provide such a service to client's while meeting all the best interest obligations as required in s961C.

The FPA suggests the current drafting of s961C creates uncertainty around the provision of scaled advice, mainly due to the inconsistent use of terminology. For example, the multiple meanings of "subject matter", which in context of certain paragraphs within s961C could mean, 'advice purpose', 'client need' or 'financial product'. The FPA requests that Treasury consider a consistent use for this term and confirm its meaning through the Explanatory Memorandum (the 'EM') or regulation to avoid any doubt.

The best interest duty should apply equally to all personal advice, whether the advice is provided on a comprehensive or scaled basis, restricted to a single issue or subject matter. Whilst the standard of the duty should always remain the same (that is, it cannot be avoided or diluted through informed consent), its application should be limited to the subject matter of the personal advice that is offered and accepted to be given to the client. However, it should also apply to the provider's motivation in limiting any advice provided. Limitation to the advice motivated by the client's needs, or with the client's informed consent should meet the duty. A limitation to the advice which is motivated by the provider giving priority to the provider's interests or the licensee's commercial interests over the client's needs or interests should not meet the duty.

Transition

The FoFA reforms are the most significant changes to the financial planning industry since the introduction of the Corporations Act in 2001. While the policy objectives of the FoFA reforms have been known and hotly debated over the past two years, the detailed legal obligations required by financial planners, authorised representatives and licensees which dictate the business practices needed to comply with the obligations, will not be known until the legislation successfully passes through Parliament. Given the pending adjournment of Parliament over the Christmas period, and the level of stakeholder interest in the FoFA reforms, it is foreseeable that this could take some time with the potential of legislation receiving Royal Assent as late as the autumn sitting in 2012. This would leave only a short period of time for industry to

ensure business processes, systems and practices meet the detailed obligations of the new law by the commencement day of 1 July 2012.

Given the significant change in industry practice, business models, systems and operations for licensees and providers, the FPA recommends an appropriate transition period be provided to ensure compliance with the new obligations can be achieved with as little disruption as possible to the provision of quality advice to consumers.

Similar to the implementation of the Consumer Credit Act, the FPA recommends allowing a 3 to 6 month assisted compliance period in ASIC's regulatory action in relation to potential breaches of the provisions in Corporations Amendment (Future of Financial Advice) Act 2011. During this assisted compliance period, the focus of ASIC action should be to assist industry to comply, except in the case of serious and deliberate breaches which cause consumer detriment.

ASIC Powers

Reference to sections and paragraphs: 913B(1)(b), 915C(1)(aa), 920A(1)(ba), 920A(1)(c), 920A(1)(f) and 920A(1)

The provisions in these paragraphs provide the phrases **"reason to believe"** and **"is likely to contravene"**

The FPA applauds the Government and ASIC for trying to prevent future events and stop issues before they result in consumer detriment, and supports the intent of increasing ASIC's powers. However, the FPA believes a balance is needed between prevention and the ability to take away someone's livelihood prior to committing a breach. The use of the phrases creates very open and flexible powers for the Regulator with minimal obligation on ASIC and permits the Regulator to take action before a breach has occurred.

The FPA recommends there is a need for either the Explanatory Memorandum and/or the Regulations to detail an objective test ASIC would have to meet to show cause for the Regulator to have "reason to believe" that an applicant, licensee or provider is "likely to contravene" its obligations.

This should include a range of actions ASIC could consider taking to address the "likely" contravention. The decision to undertake action based on a "reason to believe" that an applicant, licensee, authorised representative or provider "is likely to contravene" an obligation, should be made by an appropriately qualified and experienced senior/executive ASIC representative.

Penalties
In the "Note" provision of most sections of the draft legislation, it states that the provider may be subject to a banning order if it contravenes its obligations; and the licensee/authorised representative, civil penalties.

While the FPA notes the use of the word "may", the Association is concerned by the lack of detail around the action ASIC would be permitted to take if the Regulator has "reason to believe" a licensee or provider is "likely to contravene" its obligations. ASIC action based on a "reason to believe" that a contravention is "likely" to occur, while preventative, is permitting the Regulator to take action before a breach has actually been committed. Hence, the action undertaken by ASIC must be appropriate for such a "pre-breach" decision. For example, further investigations, an Enforceable Undertaking, education, etc. If such action is not complied with, more severe penalties could then be imposed.

Oversight of ASIC decisions around new powers
While the FPA supports the intent of the enhancement of ASIC powers as previously stated, in order to keep integrity in the system, the FPA would like to see that ASIC are made responsible and held accountable in applying their powers.

Division 2 - Best Interest Obligations

Subdivision A – Preliminary

Section 961 Application of this Division

Paragraph 961(5) *If it is not reasonably possible to identify the individual, or individuals, who provide the advice, the person who provides the advice is the provider for the purposes of this Division.*

The FPA suggests greater clarity is required around the intent and meaning of this provision, in particular to the difference between a 'person' and an 'individual', which appears inconsistent with other provisions.

Subdivision B – Provider must act in the best interests of the client

Section 961C Provider must act in the best interests of the client

The FPA is reasonably pleased with the structure and formulation of section 961C and the best interest duty obligation. The detail and comments speak more to clarification and possible practical implications that we believe need to be considered.

In particular, the implications on those advice providers who are not genuine financial planners and are limited by product and/or their ability to only provide advice on one subject matter.

Paragraph 961C2(d) *where it is reasonably apparent that the client's objectives could be better achieved, or the client's needs better met, if the client obtained advice on another subject matter, either in addition to or in substitution for the advice requested, advising the client in writing of that fact; and*

Paragraph 961C2(e) *assessing whether the provider has the expertise required to give the client advice on the subject matter requested and, if not, declining to give advice;*

***Please note* that the following comments refer to and include comments on Section 961D**

The FPA believes that section 961C does allow for the provision of advice to be scaled to the clients needs and instructions, though it may not be as defined or as clear as it could be. However, the FPA is concerned

that paragraph 961C2(d) and (e) will restrict the ability of some providers to provide advice in a compliant manner.

Paragraph 1.27 of the EM defines 'reasonably apparent' to mean that it 'would be apparent to a person with a reasonable level of expertise in the subject matter of the advice'. Though a provider has expertise in the subject matter that has been identified as required is paragraph 961C2(b) they may not have expertise in other subject matters and therefore it may not be 'reasonably apparent' to them to identify.

In particular the FPA has some concerns with how this will apply to those providers who are limited in their professional obligations (that is they do not have any), their authorisation, their competency and their experience to understand other 'subject matters' and therefore comply with this paragraph and their best interest duty obligation.

While the FPA is raising this as a problem, especially for the objective of delivering scaled advice, the Government should **not** consider providing any exemptions to the best interest obligations under Division 2 for the provision of scaled advice, rather, greater certainty is needed in the Best Interest obligations under 961C around the ability to provide scaled advice.

Paragraph 961C2(g)(i) *conducting a reasonable investigation into the financial products that might achieve the objectives and meet the needs of the client of which the provider is aware and assessing the information gathered in the investigation; or*

Paragraph 961C2(g)(ii) *if another individual has made such an investigation and the provider has access to the results of the investigation—assessing the information gathered in the investigation;*

The FPA supports the intention as outlined in s961E(1), s961G(3) and the relevant paragraph 1.31 in the EM, which states that there is a requirement for reasonable investigation into the products and this does not require the investigation into every available product. The inclusion and recognition of an Approved Product List (APL) is important to help provide clarity for the provider that in some cases a reasonable investigation confined to the products within the APL is possible to still meet their best interest obligations.

The inclusion of the words "such an investigation" in paragraph 961C2(g)(ii) implies that the investigation made by an individual has been done so in relation to the client's needs and objectives as per paragraph 2(g)(i). However, the FPA believes this is unclear and could be misunderstood.

In order to clarify the obligation of the other provider, paragraph 961C(2)(g)(ii) should be amended as follows:

> *if another individual has made such an investigation (as required in paragraph 2(g)(i)) and the provider has access to the results of the investigation—assessing the information gathered in the investigation.*

Paragraph 961C2(h)(i) *assessing the disadvantages (including risk and increased complexity) in acquiring the product;*

This paragraph assumes that a new product will be more complex, which is not necessarily the case. The FPA recommends that for paragraph 961C2(h)(i) the word '**increased'** before complexity be removed – the complexity of the product may not have increased.

Paragraph 961C2(h)(ii) *weighing them against the advantages of not acquiring the product;*

***Please note* that the following comments refer to and include comments on Section 961E**

The FPA agrees with the requirement in 961C2(h)(ii), especially as it is an existing requirement under section 974D of the Corporations Act. However, the super switching requirements have often been impeded by the product providers who have a vested commercial interest for such information to not be provided. Therefore, providers are often limited in the investigations that they can do, particularly on existing products, by the lack of response they receive from product providers. In addition, some product providers will not respond to financial planners, even after completing all requirements set out by them, including when there is written consent from the client.

For a provider to undertake effective and reasonable investigations about a product, either a client's existing product or other products, publicly available information (for example via a PDS) is insufficient.

A positive legal obligation on product providers and fund managers to respond to requests by a provider for information about a product, beyond that publicly available, and in a timely manner, is needed.

In the absence of legislation, the FPA recommends the inclusion in guidance or regulation of an obligation on all product providers to provide information in a timely manner in response to providers' requests to enable effective and reasonable investigation into products so that they can determine that the products are appropriate and in the best interest for the client.

Section 961D When is something reasonably apparent?

Please refer to comments on Section 961C, paragraph 2 (d) and (e)

Section 961E What is a reasonable investigation?

Note: please also refer to comments in Section 961C, paragraph 2 (h)(ii)

Paragraph 961E1 *reasonable investigation into the financial products that might achieve the objectives and meet the needs of the client does not require an investigation into every financial product available.*

Paragraph 961E2 *However, if the client requests the provider to consider a specified financial product, or financial products of a specified class, a reasonable investigation into the financial products that might achieve the objectives and meet the needs of the client includes an investigation into that financial product, or financial products of that class.*

If the client requests the provider to consider a specified financial product, or financial products of a specified class, a ***reasonable investigation*** into the financial products that might achieve the objectives and meet the needs of the client includes an investigation into that financial product, or financial products of that class.

This could imply an investigation into ALL financial products of that class must be undertaken.

The FPA notes the intent of paragraph 961E1, which clearly states that not all products have to be investigated.

The FPA suggests that the same intention should apply to paragraph 961E2. Our explanation is based on our belief that paragraph 2, if applied as a stand-alone provision, would be unworkable without the ability to limit the number of products to be investigated. For example, in the case of superannuation as the class of product, there are 327,513[2] APRA regulated superannuation entities each offering multiple products, as well as Self Managed Superannuation Fund options, to investigate unless there is an ability to limit the number of products required to be investigated.

The FPA recommends paragraph 961E2 be qualified to ensure the ability to limit the number of product required to be investigated by including '***but not every financial product in that class'*** at the end of paragraph 2.

The FPA also requests that either through guidance or regulation, provision be made for the provider of the advice to have made reasonable investigations into a financial product when the product provider is not forthcoming of the information requested or not in a timely manner.

Section 961F What is a basic banking product?

The FPA has no comment on this section.

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[2] *APRA Insight 2007, Special Edition, table 2 page 20*

Section 961G Approved Product List

***Note*: comments on this section are also included in Section 961C, paragraph 2(g) and 961E.**

The FPA has a strong position on the expectations of licensees, as evidenced in a number of submissions made throughout Treasury's consultation process. In respect to the development of an Approved Product List (APL), the FPA believes licensees should be required to warrant to their representatives and their clients (considered as a whole), that the products selected on their APL are suitable in a 'fiduciary' (read best interest) sense to those clients considered as a whole. This warranty might be given around a licensee research process. It might also be limited either as to the proportion of the market reviewed for the supply of a particular type of product, or limited as to the circumstances in which the product is likely to be suitable to the licensee's clients. For example, an equity fund might, due to anticipated exposure to market volatility not be considered suitable to recommend to investors other than growth investors. Licensees should also be required to provide information to providers that enable providers to assess and compare the likely suitability of products on the APL for the provider's particular clients, and between products on the APL and similar products not on the APL. For example, at the licensee APL level, such information could show how a retail superannuation fund is likely to perform across a range of comparators versus the leading industry fund comparator.

A licensee 'fiduciary' warranty would enable providers to select the most competitive and appropriate product amongst similar competing products on their licensee's APL, or if a better product lies elsewhere – to decline to make a recommendation.

The FPA notes the question raised at the Peak Consultation Group meeting about whether the obligations relating to Approved Product Lists in 961G should remain in or be removed from the legislation. If these provisions were removed, the research and assessment of all 16,000 plus products on the market would fall to the individual provider, which is an unworkable outcome that would significantly reduce consumer protection.

With over 16,000 products in the market, the licensee's APL offers a significant first step for providers in assessing the risks, stability, validity, returns, management, governance and relationships associated with the product, in filtering suitable products for clients.

The FPA is concerned that many of the 16,000 products in the market are not subject to adequate oversight before issuance. Hence, limitations of product pool, through the use of an APL, are necessary and beneficial for clients as they include only those products deemed appropriate following extensive due diligence and research. They protect clients by minimising the risk of inappropriate products being recommended and by ensuring that clients with specialised needs get specialised advice that might then deal with specialised products.

If constructed properly, APLs serve a critical purpose and role in the delivery of quality advice and protection of consumers. This view has been muted in the past by both ASIC and the FSA in the UK.

The FPA supports the inclusion of the APL obligations in 961G. However, the Association believes the current obligations do not go far enough. The best interest duty should oblige the licensee to give priority to the interests of its clients (considered as a whole) over its own commercial interests in relation to the construction of the licensee's APL and its arrangements for obtaining product research.

The FPA recommends APL obligations in 961G remain in the legislation. In addition, the FPA recommends the inclusion of positive obligations on licensees and authorised representatives on how APLs are constructed.

A best interest duty should be introduced to ensure the licensee gives priority to the interests of its clients (considered as a whole) over its own commercial interests in relation to the construction of the licensee's approved product list and its arrangements for obtaining product research.

Subdivision C – Resulting advice must be appropriate to the client

Section 961H Resulting advice must be appropriate to the client

Note: please also refer to comments in section 961M and 961N

The FPA supports the justification for the removal of s945A and agrees with the drafters' concerns about overlap. However, the FPA is concerned that drafters have completely shifted from an obligation requirement on the licensee (s945A) to obligation on the individual provider (s961H).

The FPA recommends that Treasury consider amending s961H to be a shared requirement and obligation, providing greater balance and also recognising the role of the licensee in influencing the provider. The obligation to only provide advice to the client if it is appropriate and meets the best interest duty obligations as required in s961C should be inclusive rather then exclusive.

Subdivision D – Where resulting advice still based on incomplete or inaccurate information

Section 961J Resulting advice still based on incomplete or inaccurate information

Note: please also refer to comments in Sections 961C, paragraph 2 (h)(ii) and 961E

The FPA supports this section and has no concerns, however we would again ask Treasury to consider the requirements and expectations of the product providers to facilitate and co-operate with financial planners in providing the information requested (under written permission) by the client.

Subdivision E – Provider to give priority to the client's interests

Section 961K Conflict between client's interests and those of provider

Note: Please also refer to comments provided in the introduction of this submission under 'Positive obligations on licensees.

The FPA supports the inclusion of an obligation on providers to give priority to the client's interest if there is a conflict between the interests of the client and the provider's interests. The absence of this provision would significantly undermine the consumer protections and value of the best interest duty.

However, as previously stated, the FPA recommends a positive obligation on licensees to also give priority to their clients (considered as a whole) to be included in the legislation, similar to provider obligations under provision s961K. A positive licensee obligation would create more pressure on licensees to modify their conflicted behaviour. Consumer protection would be enhanced by encouraging licensees to also align their behaviour more closely to clients needs, and deliver greater transparency in licensee practices. Licensee practices would also be held to greater account.

Section 961L Conflict between client's interests and those of the licensee or authorised representative

Please also refer to comments in Subdivision F, section 961M

Subdivision F – Responsibilities of licensee and authorised representative under this Division

Section 961M Civil penalty provision – sections 961C, 961H, 961J, 961K and 961L

***Please note* that the following comments refer to and include comments on sections 961L, 961N and 961S.**

The FPA is concerned about the unintended consequences of the provisions in sections 961L, 961M, 961N and 961S.

These provisions create a power asymmetry putting the financial planner's reputation and livelihood at risk if they challenge the licensee directly. As these provisions put the earnest on financial planners to identify fault of the licensee, the draft legislation does not create an environment that encourages financial planners to align with the client against the licensee. Rather, these provisions require the financial planner to point the finger at the licensee based on subjective tests and risk potential detrimental and personal implications.

The provisions place requirements on financial planners to meet numerous subjective and evidentiary tests to prove the licensee was at fault. This makes the licensee a party to the liability but not a cause of the breach. It also does not take into account or address the cultural pressure, which can underpin many of the conflicts in the industry that FoFA aims to eradicate. The cultural and conflict pressure placed on financial planners does not commonly leave an evidentiary paper trail. As a result, the legal profession will always try to find and seek a defense against these obligations on behalf of the licensee.

The FPA is seeking to improve these obligations to ensure financial planners align with clients and to deliver better outcomes for consumers. The FPA does not believe this will be achieved by the introduction of 'reasonable steps' provisions as proposed in section 961N. A far more protective measure for consumers would be to include a positive obligation on licensees which creates a risk for licensees and requires them to track, monitor and support their representatives (including employed representatives) in meeting the best interest obligations.

The FPA also believes consideration should be given to circumstances where the financial planner is compromised in their ability to meet their best interest obligations by the licensee. The new legislation should include provisions to permit the financial planner to take civil action against the licensee in such circumstances.

The FPA recommends the inclusion of a positive obligation on licensees to ensure the licensee gives priority to the interests of its clients over its own commercial interests in relation to the activities of the licensee which directly influence the advice provided to retail clients, including the construction of the licensee's approved product list and its arrangements for obtaining product research.

The new legislation should include provisions to permit the financial planner to take civil action against the licensee in circumstances where the licensee compromises the financial planner in their ability to meet their best interest obligations.

Paragraph 961M2(a) A financial services licensee contravenes this section if:

(a) a representative, other than an authorised representative, of the licensee contravenes section 961C, 961H, 961J, 961K or 961L;

The FPA queries why Authorised Representatives are excluded from paragraph 961M2(a).

The exclusion of authorised representatives from this provision significantly reduces the best interest obligations on licensees, who are the authorising license holder and greatly influence the ability of the provider to meet the best interest obligations when providing advice.

The FPA recommends clarification as to why authorised representatives are excluded from paragraph (2)(a) and/or request that the words 'other than an authorised representative' be removed from this paragraph.

Section 961N Licensees must ensure compliance

Note: please also refer to comments in Subdivision B, Section 961G, Subdivision E, Section 961K, and Subdivision F, Section 961M

The FPA supports the obligation intended in this section. Again, the FPA would request Treasury consider expanding on these obligations to require a positive duty on licensees to:

1. give priority to their clients (considered as a whole) interests over the licensees interest when a conflict arises (which is currently absent from the draft legislation); and

2. develop and maintain APLs that are in the collective interests of their targeted client base (this obligation has been expressed in paragraph 1.54 of the EM, however this is not clear under s961N).

Section 961P Civil action for loss or damage

Please note that the following comments refer to and include comments on Section 961Q.

The FPA believes all consumers should have the right to access and be fairly compensated for loss suffered for inappropriate advice. However, the FPA is concerned that the provisions in sections 961P and 961Q will not provide any improvements in outcomes for consumers but remain reliant on the limitations and failings of the current system.

As detailed in the FPA's submission to Richard St John's review of the compensation system, many financial service providers and the cause of the loss (such as fraud) currently fall outside the existing consumer compensation system. The opportunity to improve consumer compensation should be considered in the context of improving the link between causal responsibility (fault) and the remedies that should be available to consumers (both in terms of justice and compensation). When supported by an improved obligation regime that attaches responsibility for compensation to the parties with a causal link to the fault and captures all financial services providers, a better compensation can be delivered to consumers and positive reform to the industry.

Therefore, the inclusion in the Corporations Act of the obligations under 961P will significantly impact on the availability of affordable professional indemnity insurance for providers and increase litigation costs for consumers, with no tangible benefits for consumers deserving of compensation.

The FPA recommends that Treasury give consideration to:

- the implications of the provisions within sections 961P and 961Q;
- the interaction of these provisions with the pending recommendations from Richard St John's review of the compensation system; and
- the interaction of these provisions with the External Dispute Resolution requirement not to proceed with legal action.

Paragraph 961P2 *An action under subsection (1) may be begun at any time within 6 years after the day on which the cause of action arose.*

The FPA would like clarification on the application of paragraph 961P2 in the following scenario:

A client has been provided financial advice to achieve long-term objectives, the client/provider relationship is discontinued under opt-in and the client changes to a less skilled adviser, or tries to manage their long-term plan by themselves, and suffers subsequent loss – who is liable if the original provider has been denied the ability to manage and conduct ongoing reviews of the advice?

The FPA recommends that clarity around whether provision 961C(1) *The provider must act in the best interests of the client when giving the advice,* will ensure the liability of the original provider would be based on the client's circumstances and the provider's compliance with the law at the time the advice was given.

Section 961Q Additional powers of court to make orders

Please refer to comments on Subdivision F, Section 961P

Section 961R Responsible licensee

The FPA has no comment on this section.

Subdivision G – Responsibilities of authorised representatives

Section 961S Civil penalty provision – sections 961C, 961H, 961J, 961K and 961L

Paragraph 961S1 *An authorised representative of a financial services licensee contravenes this section if the authorised representative contravenes section 961C, 961H, 961J, 961K or 961L.*

Paragraph 961S2 *Subsection (1) does not apply if:*

(a) the licensee had provided the authorised representative with information or instructions about the requirements to be complied with in relation to the giving of personal advice; and

(b) the authorised representative's failure to comply with section 961C, 961H, 961J, 961K or 961L occurred because the representative was acting in reliance on that information or those instructions; and

(c) the representative's reliance on that information or those instructions was reasonable.

***Note**: please refer to comments on Subdivision F, Section 961M*

The FPA supports the inclusion of paragraph 961S(2) and the role it will play in ensuring the best interest obligations are meet by both providers, and their licensee in their capacity to support and direct the provider in giving advice to clients and the protection this provision offers providers in giving priority to their clients. However, the FPA questions why this provision is limited to authorised representatives, and not extended to all representatives of the licensee when giving advice to clients.

The FPA also requests clarification as to why all representatives of the licensee are not covered by and included in Subdivision G. The FPA requests Treasury consider amending Subdivision G to apply to all representatives of licensees and not restrict the provision to authorised representatives.

Division 3 - Charging Ongoing Fees to Clients (Opt-in)

Section 962 Application of this Division

The main area of clarification required is in respect to paragraph 3. The FPA recommends that clarification be provided for providers and licensees in the application of this division for when there has been a sale or transfer of a financial planning 'advice practice' under the following scenarios:

- From one licensee to another (ie. licensee purchasing another licensee);
- From one licensee to another (ie. as a result of the financial planner changing licensees);
- From one financial planner to another (within the same licensee); and
- From one financial planner to another (different licensees).

It is the FPA's understanding that it is not the intention of division 3 to capture the above scenarios, however clarification is required to provide certainty and stability for financial planning practices and their licensees as to the application of the obligations relating to ongoing fees to clients and renewal notices.

Section 962A Ongoing fee arrangement, ongoing fee and fee recipient

In order to clarify any confusion as to the definition of 'ongoing fee' for the purposes of Division 3, the legislation should be amended to reflect that it is for ongoing advice services and not intended to capture payment plans for payment of the initial advice and/or other fees related to product and platform costs.

The intention is clear in paragraph 2.10 of the EM, however this is not so clear in section 962 of the draft legislation.

Section 962B Client may terminate arrangement at any time

The FPA has no comment on this section.

Section 962C Client not liable to pay fee if this Division not complied with

Note: Please also refer to comments in Section 962E, paragraph 2(c) and 2(d).

The FPA has some concern with this section and asks for clarification in respect to the interaction with the 'previous' and 'another fee recipient' as stipulated in paragraphs 1 and 3. In particular we would like clarification as to what extent the responsibility can be held to the current fee recipient as a result of the actions of the previous or another fee recipient failing to comply with this section.

Further paragraph 2.24 in the EM confirms the intent when a fee recipient has changed, however, it is unclear as to why the new fee recipient is not entitled to be in receipt of a ongoing advice fee as a result of actions that clearly were out of their control.

Section 962D Fee recipient must give fee disclosure statement

Paragraph 962D1 *the current fee recipient must, at least 30 days before the disclosure day, give the client a fee disclosure statement.*

Please refer to comments on Section 962G

Paragraph 962D2 *the regulations may provide that paragraph (1) does not apply in a particular situation.*

The FPA is concerned about the ability of fee recipients to provide the fee disclosure statement and service the needs of clients if a crisis situation occurs in the lead up to the 30 days prior to disclosure day.

The FPA recommends that, as permitted in paragraph 962D2, an inclusion be made in the Regulations for the ability to extend the timeframe in a crisis situation.

Section 962E Fee disclosure statements

Paragraph 962E2(b) *the amount of the fee that the current fee recipient anticipates that the client will pay in the 12 months beginning on the disclosure day, expressed in Australian dollars unless an alternative is provided in the regulations*

The FPA is concerned with the fee recipient's ability to state with certainty what the client 'will' pay in the coming 12 months. The FPA notes the inclusion of the word "anticipates", however suggests the use of the word "will" is too definitive for this provision. For example, what if client decides not to receive an ongoing service half way through the next 12 months?

The FPA recommends changing 'will pay' to 'may' pay. Hence the amended provision for paragraph 2 would read: *the amount of the fee that the current fee recipient anticipates that the client may pay in the 12 months beginning on the disclosure day, expressed in Australian dollars unless an alternative is provided in the regulations*

Paragraph 962E2(c) *details of the services that the client was entitled to receive from the current and any previous fee recipient under the arrangements during the 12 months immediately preceding the disclosure day; and*

Paragraph 962E2(d) *details of the services that the client received from the current and any previous fee recipient during the 12 months immediately preceding the disclosure day*

Note: Please also refer to comments in section 962C

The FPA is concerned that the obligation on the new fee recipient to disclose detailed services of the previous fee recipient creates a liability on the new fee recipient, which the new fee recipient cannot control.

The FPA questions whether it is reasonable (not to mention fair and even possible) for a new fee recipient to know and be able to provide details of the services the client was entitled to receive and did receive from 'any previous fee recipient' ('any' implying there may be multiple fee recipients). While the new fee recipient would face penalties if the disclosure of the previous fee recipient were inadequate to meet the requirements of this provision, the previous fee recipient has no responsibility to adequately disclose such information to the new fee recipient or the client and does not, under current drafting, face any penalties for non-compliance.

The FPA recommends including a provision requiring the previous fee recipient to provide the information required for a fee disclosure statement as per s962E(2) both to the client upon completion of their arrangement and a copy, if applicable, to the new fee recipient.

Section 962F Disclosure Day

Please refer to comments on Section 962H

Section 962G Fee recipient must give renewal notice

***Please note* that the following comments refer to and include comments on paragraph 962D(1)**

Paragraph 962G1 *the current fee recipient must, at least 30 days before the renewal notice day for an ongoing fee arrangement, send the client a renewal notice and a fee disclosure statement in relation to the arrangement.*

The FPA notes that the renewal period (962H(2)) commences on the day the fee disclosure statement and renewal notice are to be given to the client, meaning these documents are intended to be given together every two years.

Requiring the fee disclosure statement and the renewal notice to be provided "at least 30 days before" the relevant due dates, effectively shortens the period of the arrangement to 11 months.

The FPA is concerned that the requirement on fee recipients to provide the annual disclosure statement at least 30 days prior to the disclosure day will result in the disclosure day becoming misaligned with the renewal notice day. This will result in a messy and time-consuming management of consumer communication requirements in order to comply with these measures.

Flexibility in the timeframes for giving the fee disclosure document and the renewal notice would ensure the alignment of the disclosure day and the renewal notice day and simplify compliance.

The FPA recommends 962D(1) and 962G(1) be amended to allow the fee disclosure statement and the renewal notice to be provided within 12 months of the previous anniversary date (that is one year for fee disclosure; two years for the renewal notice).

Section 962H Renewal notice day and renewal period

***Please note* that the following comments refer to and include comments on paragraph 962F**

Paragraph 962H1 *the **renewal notice day** for an ongoing fee arrangement means:*

*(a) if the arrangement has not previously been renewed—the second anniversary of the day on which the arrangement was entered into; **and***

(b) if the arrangement has previously been renewed, the second anniversary of the last day on which the arrangement was renewed.

The FPA recommends the use of the word "**and**" in this instance is not correct. Amend provision 962H(1) to read (a) "or" (b) (that is, not (a) "and" (b)).

The FPA is concerned about how the renewal notice day anniversary will work in practice, particularly in relation to the provision of advice reviews. For example, the provider as part of the service the client requests conducts a review of the advice for the client eight months prior to the anniversary of the renewal notice day. To deliver a more efficient and convenient service to the client, the provider gives the client the renewal notice and fee disclosure statement at the time of the advice review, which is then agreed to by the client (that is, the client opts-in). Does the giving of the renewal notice eight months prior to the anniversary of the renewal notice day reset this anniversary date into the future?

The FPA believes it creates an unintended consequence for both clients and providers if it is the intention that providers who fulfill their opt-in obligations in advance of the anniversary day would be required to 'reset' the disclosure day and renewal notice day anniversaries. This would discourage a more efficient and client friendly approach to the provision of these documents to clients at the time of the advice review, and hence create unnecessary inconvenience for clients.

It is the FPA's view that the resetting of the disclosure day and renewal notice day anniversaries in these circumstances would create an extremely difficult system of multiple dates for providers to manage. The resetting of the anniversary dates in these circumstances would equate to unfair administrative penalties for providers who are trying to provide an efficient ongoing service to clients.

Requiring the anniversary dates to be reset will create administrative confusion for clients and providers, and reduce the providers' ability to engage with their clients when it is best suits their client. Rather, the legislated renewal day would dictated when advice review services can be provided.

The FPA appreciates the intention of this provision is to ensure the provision of the fee disclosure statement and the renewal notice is not to be artificially extended beyond the legislated one year and two years (respectively). However, in other service contract arrangements such as mobile phones, council rates, private health insurance, agreeing to continue to remain with a provider early does not 'reset' your anniversary or renewal dates on these contracts.

The FPA recommends that in situations where clients agree to renew prior to the renewal date, this should not 'reset' the renewal notice day anniversary date.

Section 962J If client notifies fee recipient that client does not wish to renew

Please refer to comments on Section 962K

Section 962K If client does not notify fee recipient that client wishes to renew

***Please note* that the following comments refer to and include comments on paragraph 962J**

Though the FPA acknowledges the intention of the 30-day grace period in this section and s962J, the unintended consequences of the way it has been drafted means that the 30-day timeframe of the renewal period may create significant liabilities for providers.

For example, if a fee recipient receives no notification before the renewal date (ie. before the commencement of the 30-days) and finalises the termination of payment arrangement within 14 days of the 30-day grace period, the inflexible/definitive 30 day renewal period creates a liability period for the provider of the remaining 16 days, even though the provider will not be charging the client or receiving payment.

If a provider is paid via a third party, the provider must carry out a process in order to terminate the arrangement. As this takes time, the provider must cancel ongoing fee arrangements by notifying a third party (such as a licensee), which would cancel the arrangement for the provider from the date of notification / receipt of the cancellation by the third party. However, the liability would continue under the current draft legislation until the completion of the 30-day period.

These liabilities are not clarified or removed by the provision of 962M.

The FPA recommends that amendments be made in both s962L and s962K in respect to the grace period - the "further period of 30 days after the end of the renewal period" be redrafted to ensure the liabilities for the provider cease at the time the provider acts to switch off the arrangement.

For example, "up to 30 days to allow the fee recipient to negotiate with the client an agreeable date to terminate the arrangement and liability for the fee recipient".

Section 962L Civil penalty provision – charging ongoing fees after termination under section 962J or 962K

***Please note* that the following comments refer to and includes comments on sections 962J and 962K**

If an ongoing fee arrangement terminates under section 962J or 30 962K, the current fee recipient must not continue to charge the ongoing fee.

The FPA seeks clarity from Treasury for circumstances, which are outside the control of the fee recipient. For example, if the client payment arrangements are via a third party such as direct debit, platform or product where the fee recipient is reliant on the third party, or client themselves, to 'switch off' the payment. What happens if fee is paid by direct debit, which can only be switched off by the client? While the fee recipient has not charged an ongoing fee, and has taken all reasonable steps to 'switch off' the payment, there are situations where the payment is still made by or on behalf of the client. The FPA seeks clarifications of the liabilities and remedial action permissible in such circumstances.

There are circumstances where fee recipients cannot control the switching off of payments, such as payment from platforms, product providers, or direct debit.

The FPA recommends that it is appropriate to have some explanation in the EM regarding switching off payments in such circumstances, and expect ASIC to employ reasonableness in its consideration of such instances.

Section 962M Effect of termination

To avoid doubt, if, under an ongoing fee arrangement, the continued provision of a service to the client by the fee recipient is dependent on the continued payment of an ongoing fee, on termination of the ongoing fee arrangement, the obligation to continue to provide the service also terminates.

The Explanatory Memorandum states (at para 2.37) that the obligation to continue to service ceases in most cases if the client has not opted in. This is inconsistent with this clause of the draft legislation

The FPA recommends the words "in most cases" be deleted from paragraph 2.37 in the Explanatory Memorandum to ensure it is consistent with provision 962M of the legislation.