

16 September 2011

General Manager  
Retail Investor Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

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

Dear Sir/ Madam

**Exposure Draft - Corporations Amendment (Future of Financial Advice) Bill 2011**

CPA Australia, the Institute of Chartered Accountants in Australia, and the Institute of Public Accountants (the Joint Accounting Bodies) represent over 180,000 professional accountants in Australia. Our members work in diverse roles across public practice, commerce, industry, government and academia throughout Australia and internationally.

We welcome the opportunity to comment on the Corporations Amendment (Future of Financial Advice) Bill 2011.

The Joint Accounting Bodies support the introduction of a statutory requirement that will ensure the interests of the client remain paramount, above and beyond those of the planner or the licensee.

While supporting this initiative we believe, as drafted, *Subdivision B – Provider must act in the best interests of the client* places additional obligations on the financial planner which may negatively impact the provision of personal financial advice to retail clients. In particular we believe it may continue to deter many financial planners from providing scaled advice, an outcome which does not align with the Government's objective of improving the access to simple, scaled advice.

In addition, it was our understanding that the best interests duty would include a reasonable steps qualification that financial planners could rely on to discharge their duty. However, the Explanatory Memorandum clearly states the steps required under section 916C are not exhaustive and are not intended to operate as a checklist for compliance with the best interests obligation.

We believe that a clear reasonable steps qualification or safe harbour is necessary to provide certainty to financial planners that they satisfy their obligations under this statutory duty.

Further, the Joint Accounting Bodies may have additional comments in regards to the best interests duty and its implications as drafted once the replacement to the accountants' exemption is finalised.

**Representatives of the Australian Accounting Profession**



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The Joint Accounting Bodies support the introduction of a mandatory opt-in renewal process, as we believe transparency is an essential element in a trusted relationship between a financial planner and client.

As reflected in the Explanatory Memorandum in paragraph 2.4, some clients are paying ongoing fees and receive little or no service while others who do receive a service may be unaware of the precise magnitude of the actual fees they are paying. The concept of the compulsory renewal is to protect disengaged clients from paying ongoing financial advice fees where they are receiving little or no service or to provide the client with the opportunity to consider whether the service they are receiving equates to value for money.

We believe that all clients should be provided with this protection and recommend the draft legislation is amended so the opt-in requirements apply to all clients, both new and existing from date of commencement.

If the policy intent is not to include existing clients in this protection mechanism, then at the very least these clients should be provided an annual fee disclosure statement so that they too can be empowered to decide if they are receiving value for money.

Finally, while we support amendments to legislation that will ensure ASIC can effectively regulate the industry we recommend that ASIC, once the legislation is implemented, issue a practice statement setting out how they will interpret 'believe' and 'likely to contravene'.

If you have any questions regarding this submission, please do not hesitate to contact Keddie Waller (CPA Australia) at [keddie.waller@cpaaustralia.com.au](mailto:keddie.waller@cpaaustralia.com.au), Hugh Elvy (the Institute) at [hugh.elvy@charteredaccountants.com.au](mailto:hugh.elvy@charteredaccountants.com.au) or Reece Agland (IPA) at [reece.agland@publicaccountants.org.au](mailto:reece.agland@publicaccountants.org.au).

Yours sincerely



**Paul Drum**  
Head – Business and  
Investment Policy  
CPA Australia Ltd



**Hugh Elvy**  
Head of Financial Planning  
Institute of Chartered  
Accountants in Australia



**Vicky Stylianou**  
Executive General Manager,  
Representation & Innovation  
Institute of Public Accountants

## 1. Best Interests Obligation

The Joint Accounting Bodies understand the policy intent of introducing a best interests obligation was to ensure a financial planner acts in the best interests of the client and places the interests of the client above their own interests and the interests of their employer or licensee.

As drafted, *Subdivision B – Provider must act in the best interests of the client* places additional obligations on the financial planner which may have the potential to negatively impact the provision of personal financial advice to retail clients.

Further, it was our understanding that the best interests duty would also include a reasonable steps qualification to provide clarity to financial planners what reasonable steps they must undertake to discharge their duty. However, the Explanatory Memorandum clearly states the steps required under section 916C are not exhaustive and are not intended to operate as a checklist for compliance with the best interests obligation.

Our specific comments are as follows:

### **Section 961 Provider must act in the best interests of the client**

As a general comment, the term 'subject matter' should be appropriately defined to ensure there is no inconsistency with other terms such as 'scope of advice'.

#### **(C)(1)**

While it appears the intention of this section is to act as an overarching statement, we believe it is too broad and should be qualified.

#### **(C)(2)(a)(b)**

This section should be drafted to more closely reflect the current requirements of section 945A(1).

For example, the focus should shift from relying on the client to disclose information to requiring the providing entity to only provide advice where they have determined the relevant personal circumstances and made reasonable inquiries in relation to those personal circumstances.

#### **(C)(2)(b)**

As drafted this section relies on the client to identify the subject matter of the advice.

In practice, it is typically the financial planner who will identify the subject matter of the advice once the client has advised of their financial situation, needs and objectives.

This section should be redrafted to reflect the provider identifying the scope of the advice that will be provided following the identified needs and objectives from s961C(2)(a).

This should also clearly link to the scope of advice that the financial planner is licensed to provide financial product advice on.

#### **(C)(2)(d)**

The Joint Accounting Bodies support the concept that where possible a financial planner should alert the client to other areas in which they may benefit from seeking advice. However, as drafted, this obligation is too broad and may have unintended consequences.

The section should be qualified to ensure the provider is only obliged to identify further areas which are within the scope of financial planning advice that the provider is licensed to provide advice.

### **(C)(2)(f)**

It appears the intention of this section may be to require the provider to consider other strategies before recommending to invest in a financial product, such as paying down debt or for a high net worth client to self insure.

However, as drafted, this section places an unreasonable expectation on the provider of the advice to consider alternative strategies that may be out of their area of expertise or the scope of advice in which they can provide advice.

This may have unintended consequences, such as impeding the provision of advice for fear this obligation cannot be reasonably satisfied.

### **Section 961J**

Where the statement of advice is the means by which the advice is provided, consideration should be given to requiring the warning is prominent and near the beginning of the statement of advice

## **2. Charging ongoing fees to clients**

Our specific comments are as follows:

### **Section 962 Application of this Division**

#### **(3)(a)(b)**

The Joint Accounting Bodies believe it is unclear whether Division 3 will apply to all clients, new clients or existing clients.

While we believe the intention is all clients who are currently not receiving ongoing advice from the providing entity from the date of commencement, it currently reads more broadly than this and potentially captures any client who has previously received any financial product advice.

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

Where a client clearly states they do not wish to renew their ongoing fee arrangement within the renewal period, the agreement is terminated upon receipt of this notification.

The financial planner should have no further obligations in respect of the client, with the exception of ensuring that any payment arrangements are also ceased.

We therefore recommend that this section is redrafted to reflect the arrangement terminates at the end of the renewal period and the only further obligation the financial planner has is to ensure any payment arrangements are ceased within an appropriate administrative period following the termination date.

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

The same principle applies in this situation.

We therefore recommend that this section is redrafted to reflect the arrangement terminates at the end of the renewal period and the only further obligation the financial planner has is to ensure any payment arrangements are ceased within an appropriate administrative period following the termination date.

### **3. Enhancements to ASIC's licensing and banning powers**

The Joint Accounting Bodies believe that if ASIC is to be provided additional powers as set out in the draft legislation, that serious consideration be given to ensure that there are rigorous rules around ASIC's use of such powers. While we appreciate the difficulty that ASIC has where it believes a person may breach their requirements and limitations of the current law, it is also important that procedural fairness is protected.

Therefore, we are of the opinion that ASIC be required to set out in a practice statement how it intends to use the new powers. In particular, how ASIC will interpret 'believe' and 'likely to contravene'. These are broad terms and therefore have the capacity for misuse. While we believe that ASIC has no intention to misuse such powers, in order to generate confidence in the new system ASIC must set out how it will interpret the law and how it will implement them.

We do not have any specific comments in relation to the amendments as proposed.