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16 September 2011

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Dear General Manager

**Corporations Amendment (Future of Financial Advice) Bill 2011**
**Comments on the Exposure Draft Legislation and Draft Explanatory Material**

We refer to the draft Bill and draft explanatory material (**"EM"**).

This letter sets out our comments on the Bill. Our comments are limited to technical and drafting issues.

**1 Limiting section 961(2)(i) to subject to the provider's knowledge**

1.1 Section 961C(2)(a) requires a provider to identify the objectives, financial situation and needs of the client "that are disclosed to the provider". In the circumstances set out in section 961C(2)(c), the provider must make reasonable enquiries to obtain complete and accurate information. However, the final step that the provider must take in section 961C(2)(i) requires "basing all judgements in advising the client on the objectives, financial situation and needs of the client". The requirement is expressly not limited to the objectives, financial situation and needs of the client "that are disclosed to the client" in the same way as they are under section 961C(2)(a).

1.2 The EM states that identifying the objectives, financial situation and needs of the client *as disclosed* to the provider, together with identifying the subject matter of the advice requested by the client are the starting points for the provider to provide their advice (paragraph 1.24). These steps are intended to accommodate the provider to scale their advice (paragraph 1.29).

1.3 If section 961C(2)(i) is not limited to those matters which are disclosed to the provider, it may effectively mean that a provider will not be able to rely on the steps set out in sections 961C(2)(a) and (c). If this is not intended, section 961C(2)(i) should be amended in the following way to be consistent with section 961C(2)(a):

> *(i) basing all judgements in advising the client on the objectives, financial situation and needs of the client* <u>*that are disclosed to the provider.*</u>

## 2 ADI representatives

2.1 The exemption for basic banking products under section 961C(3) applies only where the provider is an "agent or employee" of an Australian ADI. In many cases an ADI may use staff which are seconded from other group entities, or indeed provided by external parties (for example, where an agency is used to provide contract staff). These staff will not be an "employee", and may not be an "agent" in a strict legal sense. However, they are likely to be "representatives", and may well be authorised representatives, as defined in section 910A of the Act.

2.2 We consider that the relief should apply to representatives more generally.

2.3 If the policy intention is different, for example, that the exemption apply only to a provider who is an individual, or who carries out duties which are similar to those carried out by persons who are in fact staff or agents, then that could be made clear.

## 3 Approved product lists

3.1 The drafting of section 961G is not clear and does not appear to achieve its stated objective in some circumstances.

***It is unclear when the limit on reasonable investigations in section 961G(3) will apply***

3.2 Section 961G(3) is currently drafted as follows:

> *The requirement that the provider conduct a reasonable investigation into the financial products that might achieve the objectives and meet the needs of the client does not require the provider to investigate products that are not on the list.*

3.3 The objective of this provision is to remove the obligation on the provider to consider products that are not on an approved product list ("**APL**"). The EM states (at paragraph 1.31):

> *In situations where the range of products that a provider can consider is limited by the imposition of an approved product list, the provider may still be able to comply with the reasonable investigation obligation even though they limit their investigation to the products on the list, but they must not recommend a product on the list if it does not meet the needs and objectives of the client.*

3.4 The drafting issue is that section 961G(3) will apply only in very limited circumstances. This is because paragraphs (1)(c) and (2)(c) of section 961G provide that the section only applies only in circumstances where "it is reasonably apparent that there is no product on that list that would achieve the objectives and meet the needs of the client". As a result, where an adviser conducts a reasonable investigation in accordance with section 961C, limits that investigation to the products on the APL and then recommends products on the APL (because the APL contains appropriate products), the adviser will not have the protection of section 961G(3). This appears contrary to the EM.

***The obligation under section 961G(4)***

3.5 Assuming section 961G(3) is clarified to address the point raised above, section 961G(4) should be expressed to apply only where there is no product on the approved product list that would achieve the objectives and meet the needs of the client.

**4 Termination costs**

We are concerned that the restriction under section 962B(2) could give rise to some uncertainty. We understand the intention is to permit the recovery of administrative costs and consider this should be made clear. It would be preferable to specifically allow for the recovery of administrative costs, including the average or estimated average reasonable costs for a class of clients. This would also improve consistency between termination costs permitted under the Bill and those allowed under the National Credit Code.

**5 The two-limb definition of "ongoing fee arrangement" in section 962A(1)**

5.1 "Ongoing fee arrangement" is defined in section 962A(1). The definition as currently drafted raises two practical issues.

5.2 First, the first limb under section 962A(1)(a) is very broad. It appears, on the current drafting, that the fee does not necessarily have to relate to the provision of the financial product advice. Further it is not limited to personal advice. For example, where a financial product issuer provides general product advice to a product holder and charges an ongoing fee (eg for managing the product), that arrangement would appear to be caught by the definition. This appears to be inconsistent with the 28 April 2011 Information Pack which refers to an "ongoing advice fee".

5.3 Secondly, the second limb under section 962A(1)(b), excludes from the definition of an "ongoing fee arrangement", arrangements under which the fees can reasonably be characterised as relating to advice that, at the time the arrangement is entered into, has already been given. We understand that generally most (if not all) advice will be given after an ongoing fee arrangement is entered into. It is difficult to see what, if any, application this carve-out could have. The second limb in section 962A(1)(b) seems inconsistent with its description in the EM which refers to "a fee which does not relate to advice that has already been given".

**6 Timing and operational difficulties arise from the prescribed content of fee disclosure statements**

6.1 We suggest a review of the drafting of sections 962D(1) and 962E(2). As drafted, the Bill provides that:

(a) the current fee recipient must, **at least 30 days before the disclosure day** give the client a fee disclosure statement, (section 962D(1)); and

(b) the amount of the fee paid by the client **in the 12 months immediately preceding the disclosure day** expressed in Australian dollars unless an alternative is provided in the regulations, (section 962E(2)(a)).

6.2 On the face of the Bill, this cannot be strictly complied with as there is a timing mismatch between the two sections. It is not possible to know in advance how much a client will actually **pay** in the following month even when the amount that is payable is certain. We suggest that content requirements for fee disclosure statement contents be redrafted to disclose:

(a) the amount of the fee paid **or payable** by the client up to the date of the fee disclosure letter (or some earlier date to allow for the amount to be calculated before the date the letter is dated); and

(b) an estimate of fees anticipated by the provider to be payable in respect of the remaining days up to the disclosure day.

If you have any queries please contact Jim Boynton.

Yours faithfully

Mallesons Stephen Jaques