Sonnie Bailey
C/- Level 1, 224 Queen Street
MELBOURNE VIC 3000

15 September 2011

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

By email: futureofadvice@treasury.gov.au

Dear Sir/Madam,

RE: Submission in relation to the first tranche of FOFA draft legislation (the *Corporations Amendment (Future of Financial Advice) Bill 2011*)

1. I am a lawyer and work at the firm *Holley Nethercote Commercial Lawyers*. The majority of my work relates to financial services law, and of the clients I regularly deal with, many provide general and personal advice to retail and wholesale clients. Naturally, I have been following the Future of Financial Advice reforms with great interest.

2. This submission is made in my personal capacity and not on behalf of *Holley Nethercote Commercial Lawyers*. The views I express are not necessarily shared by *Holley Nethercote Commercial Lawyers*.

"Likely" contraventions of s 912A is an inappropriate basis for framing ASIC's powers

3. In relation to many of the proposed changes to sections 913B(1)(b), 915C(1)(aa), 920A(1) of the *Corporations Act 2001*, the key consideration is whether ASIC has reason to believe a contravention of s 912A or the financial services is **likely**.

4. By way of example, s 913B(1)(b) as proposed would read that ASIC must grant an applicant an AFSL if (and must not grant such an AFSL unless) "ASIC has no reason to believe that the applicant is likely to contravene the obligations that will apply under section 912A if the licence is granted".

5. I believe further consideration needs to be given to how this power is framed. The key consideration should not solely be whether a contravention is likely.

6. Section 912A(1)(c) states that a financial services licensee must "comply with the financial services laws". "Financial services law" as defined by s 761 of the Act includes many sections of the Act as well as other legislation. These laws are myriad and in many cases complex.

7. My view is that almost any licensee is likely to contravene one of the financial services laws at one time or another. This test, taken to its logical end, would

prohibit ASIC from granting any AFSLs, in the reasonable belief that any licensee is likely to contravene a financial services law (and therefore s 912A). ASIC would therefore need to step outside of its legal authority to grant an AFSL.

8. By way of example, ASIC's recently published *Report 251: Review of Financial Industry Practice*, states that the 20 largest Australian financial services licensees that provide financial product advice to retail clients reported 5,236 breaches in 2008 and 4,681 in 2009. It is safe to believe that all of the licensees surveyed would have had breaches that contributed to this total.

9. The proposed changes are less likely to impact AFS licensees that are at risk from having their AFSL suspended or cancelled under s 915C. This is because section 915C(1)(a) already allows ASIC to suspend or cancel an AFSL if "the licensee has not complied with their obligations under section 912A". My view is that the existing legislation is too broad. I question whether it should be expanded to relate to any potential future contraventions, without being further qualified.

10. Particularly in relation to s 913B, I understand why ASIC's power should be widened. ASIC's power to refuse to grant an AFSL should be broader than is currently allowed under s 913B(1)(b).

11. However, I believe Treasury and the Government should give more consideration and perhaps allow for more specific consultation in relation to ASIC's powers in this respect.

12. A more appropriate direction, for example, might be that ASIC should consider whether it has reason to believe the applicant or licensee is likely to fail to take proper care in relation to adhering to s 912A. Alternatively, the test could relate to whether the applicant is likely to unsatisfactorily contravene the obligations.

Steps involved with acting in the best interests of a client

13. The proposed section 961C(2) provides for "steps that the provider must take in acting in the best interest of the client".

14. I believe that proposed section 961C(2)(g)(ii) "assessing the information gathered in the investigation" needs to be fleshed out.

15. In particular, an important consideration should be the manner in which the information is gathered. It could read, for example, as "assessing the information gathered in the investigation, including the manner in which the information was gathered".

16. Admittedly, 961C(2) states that the list of steps is not exhaustive, and a reasonable interpretation of 961C(2) would require an adviser to consider this.

17. Without fleshing this out, however, there is a greater risk that a given adviser would accept an investigation provided by another entity without considering the reasonableness of the investigation.

18. The explicit steps will be influential and are likely to be the main focus for advisers and licensees. It would be prudent to explicitly require an adviser to consider the manner in which the information was gathered.

Suggestions in relation to the ongoing fee arrangements clauses

The temporal requirement set out in s 962E(2)(a)

19. This section requires a fee disclosure statement to include information about "the amount of the fee paid by the client in the 12 months immediately preceding the disclosure day".

20. However, s 962D(1) requires a current fee recipient to give the client a fee disclosure statement "at least 30 days before the disclosure day".

21. If the fee disclosure statement needs to be prepared and given to the client at least 30 days before the disclosure day, it is impossible for a fee recipient to accurately provide this information.

22. While this may be clarified in regulations anticipated by s 962E(3), this is sufficiently problematic that it should be addressed directly in the legislation.

23. Section 962E(2)(a) could be drafted to refer to the 12 months immediately preceding the preparation of the fee disclosure statement, or to anticipate that an element of the 12 month figure up to the fee disclosure day will be estimated.

The method by which a client can renew an ongoing fee arrangement

24. Section 962G(2)(a) read in conjunction with s 962K suggests that all that is required for a client to renew an ongoing fee arrangement is to communicate this to the fee recipient in writing.

25. An alternative approach is to require the client to **clearly communicate** its consent to the ongoing fee arrangement. While still requiring the client to actively renew the ongoing fee arrangement (ie, "opt-in" to the arrangement), this will provide more flexibility to, and arguably reduce costs for, advisers.

26. For example, allowing for a client to "clearly communicate" would enable the client to complete a form on a website that confirms their agreement to renewing, without having to arbitrarily write "yes" or "I agree". It would also allow for a client to communicate their agreement orally.

27. (Of course, in the event of a dispute, the onus will be on an adviser to demonstrate that the renewal was clearly communicated.)

The manner in which fee disclosure statements and renewal statements are to be provided to clients

28. There is some ambiguity and inconsistency in relation to the manner in which fee disclosure statements and renewal statements must be provided to a client.

29. Section 962D(1) requires a fee recipient to "**give** the client a fee disclosure statement" "at least 30 days before the disclosure day".

30. Regardless of whether it is clear at law, at a practical level, many advisers and licensees will be unclear when a fee disclosure statement will be deemed to have been given. For example, some may interpret it to mean it is not given until the client has actually received the statement. For others, they will deem the statement to have been given once they have sent it via mail or e-mail.

31. Section 962G(1), on the other hand, requires a fee recipient to "**send** the client a renewal notice and a fee disclosure statement" "at least 30 days before the renewal notice day".

32. As well as introducing ambiguity, the current drafting of these two clauses is inconsistent. Even in relation to the renewal notice, there is inconsistency as s 962H(2) refers to the renewal period as being the "period of 30 days beginning on the day on which the current fee recipient **gives** the client a renewal notice and a fee disclosure statement".

33. Given that these time frames will be very important, and the consequences also important, I think that the same term should be used consistently through the proposed sections. What this term is supposed to mean should also be set out for the purpose of clarity.

Thank you for taking the time to consider this submission. If you have any enquiries in relation to this submission, please contact me via sonnieb@hnlaw.com.au or via 03 9670 8200.

Regards

Sonnie Bailey