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Dear Sir/Madam,

FUTURE OF FINANCIAL ADVICE – RESPONSE TO EXPOSURE DRAFT

I. INTRODUCTION

I am writing to express my appreciation of the general purposes and effect of the proposed reforms to the Corporations Act 2001, set out in the Future of Financial Advice (FOFA) Exposure Draft of Legislation and Explanatory Memorandum.
I have read the proposals augmenting the licensing and banning powers of the Australian Securities and Investments Commission (ASIC) in relation to financial advisers, and I find them both apt to address the problems found by the Ripoll Report and likely to be effective. I have also read the provisions in relation to the biennial 'opt-in' requirements, and these too seem soundly drafted and likely to be straight forward to supervise and enforce.

Alas, I am unable to be as enthusiastic about the Exposure Draft (ED) provisions setting out the proposed duty on financial advisers to act in their clients 'best interests'. This is in respect of:

- The scope of the 'put the client first' conflicts provision (ED S961K & 961L);
- Uncertainty about whether the 'best interests' duty is fiduciary (ED S961C);
- The content and text of the 'best interests' duty itself (ED S961C);
- Uncertainty about the duration of the 'best interests' duty (ED S961C);
- The inter-relationship of the 'best interests' duty with the obligation on financial advisers to have a 'reasonable basis for advice' (S945A CA) and

how this has been mixed up in the text of ED S961C(2), in a fashion that may lead to confusion on enforcement;

- Comments on sanctions and remedies;
- A couple of drafting points in definition and ancillary provisions in the proposed Part 7.7A;
- The relationship of the 'best interests' duty to other initiatives in the FOFA work, to promote the professionalising of financial advisers, and higher standards of financial advice.

To support my views about the BI duty I first set out the features of the financial advisory context that makes it important that there be a clear and enforceable 'best interests' duty. I then suggest some drafting changes to the conflicts provisions. Then I provide detailed reasons for holding the views that I do about the 'best interests' duty in the Exposure Draft, including the relationship of that provision to the existing 'reasonable basis for advice section in S945A Corporations Act (CA). Finally, I give some thought to the sanctions and remedies included in the ED, and the relationship of the proposed changes to other initiatives to move the financial planning industry towards professionalism. Along the way, I make some comments on subsidiary and related provisions. All the suggestions are intended to make it more likely that the purposes and objects of the 'best interests' aspect of the FOFA reforms will be implemented. Where drafting changes have been suggested they are provided in red font and where helpful in track changes mode.

II. FEATURES OF THE FINANCIAL ADVISORY INDUSTRY AND THE FOFA REFORMS WHCH MAKE A 'BEST INTERESTS' DUTY CRUCIAL

Since the conglomeration of financial functions into large entities and groups in the 1980s potential for conflicts of interests has been one of the leading features of financial services firms. These institutional conflicts arise because of the bias towards recommending the products or services of related or associated entities in a financial conglomerate. In many instances there is another set of conflicts parallel with institutional conflicts; these are conflicts present in remuneration arrangements of representatives dealing directly with clients. Commonly in financial advising, both institutional and remuneration conflicts are present together, providing a financial motivation for advisers to recommend products of related entities especially if they also earn greater remuneration. This may distort financial advice. This is by contrast with say doctors, who have very many fewer conflicts influencing the advice they give patients.

The Parliamentary Joint Committee on Corporations and Financial Services' (PJC) Inquiry into financial products and services in Australia recommended two main reforms to address what it found were the distorting effects of conflicts of interest on the quality of financial advice delivered to retail clients in Australia. The first was the prohibition on commissions and volume payments as forms of remuneration for financial advice. The second was the introduction on financial advisers, of a duty to act in the 'best interests' of their retail clients (BI duty). The BI duty, along with a requirement to deal with conflicts of interest, is a duty which demands loyalty to the client. Put another way, it requires the adviser to serve exclusively the interests of the person receiving the advice, and to do so to a standard beyond ordinary care and diligence. It deprives the adviser of the ability to advance their own separate interests, or those of someone else, such as a related or associated corporate entity. It is designed to operate alongside a negligence duty, which still requires ordinary competence, care and diligence in advising. By contrast with financial advisers, doctors whose institutional arrangements and remuneration are less conflicted are largely regulated by a negligence standard. The Government responded by adopting this recommendation of the PJC (and others) on 26 April 2010.

The arguments in favour of the BI duty, and of it working properly, are even more the important because of the limits on other aspects of the FOFA reforms that the Government has announced. The Government has announced that it will allow percentage fees to be earned for advising, on the value of funds under management. So while commissions on particular products will be banned prospectively, advisers may still charge a percentage rate on funds they manage – leaving them with an incentive to do everything they can to persuade a client to invest in new financial products or hand over those they have to be managed. In the absence of an effective BI duty and conflicts rules, this could lead to equally great an incentive to distort financial advice, as commissions. This is because the greater the funds under management, the higher the fees to be earned.

Another argument in favour of the BI duty, and of it working properly, is the absence of any wider inquiry into financial services remuneration, the Government preferring to prohibit by category: commissions, volume payments, soft commissions etc. This limitation means that any remuneration incentives to sell particular services or products that are built into salaries and wages or paid as a dividend or like return on equity, will not be caught by the changes. Further any payments that occur above the level of financial advisory licensee (eg to a platform from an issuer) may take whatever form it likes. Accordingly, it is clear that the changes to commission practices which have been announced and are soon to be confirmed by Exposure Draft of legislation, will not alone be sufficient to remedy the distortion of financial advice to retail investors which was the object of the PJC's recommendations. For all these reasons, having an effective BI duty and requirement on advisers to place the interests of their clients first, is crucial. This is because the BI duty will be a general 'back-stop' or 'safety-net' for the many conflicts and other influences which may distort advice and which will not be caught by the specific provisions in the FOFA proposals.

A third and equally important limit on the Government's reforms is that they will be limited to the conduct of financial advisers. There will not be any best interests duty directly on related and associated entities in conglomerate financial services firms, such as issuers, research houses, credit rating agencies, financial platform providers and account aggregators. These reforms will not apply to fund managers, responsible entities and trustees of superannuation funds. These last three entities may already be subject to a 'best interests' duty under other legislation once investors become fund members, but not during the distribution process when advice is being given. As already noted related and associated entities are commonplace in conglomerate financial services firms. They are very common between related and associated issuers, fund managers and platform providers and their financial advisory distribution networks of licensees and authorised representatives. Even in the absence of direct incentives to skew financial advice such as commissions, there may be in other forms of remuneration equal incentives for preferring to recommend to clients the products and services of related and associated entities. These may not be as fit for purpose or as beneficial for the retail client as those from unrelated issuers or service providers. For this reason too it is important to ensure that the BI duty and related conflicts provisions are as effective as they can be as a 'back stop' or 'safety-net' where specific FOFA reforms do not apply.

III. THE REQUIREMENT TO PRIORITISE THE CLIENT'S INTEREST WHERE THERE ARE CONFLICTS OF INTEREST

The Government's response to the Parliamentary Joint Committee on Corporations and Financial Services' (PJC) *Inquiry into financial products and services in Australia announced on 26 April 2010,* announced *t*he introduction of a 'statutory fiduciary duty so that financial advisers must act in the best interests of their clients'**,** subject to a 'reasonable steps' qualification. Put another way, the Government committed to a duty which would explicitly compel financial advisors 'to place the best interests of their clients ahead of their own when providing personal advice to retail clients.' Put another way still, this duty was to require a higher standard of conduct from financial advisers, than a basic negligence standard.

The ED presents a draft duty on financial advisers to place the interests of their clients ahead of their own, in Sections 961K & 961L. In a further section I will discuss the inter-relationship of the conflicts requirement with the BI duty. Here I wish to draw attention to some changes which are necessary to make the requirement to prioritise the client's interests effective whether or not it is a free-standing duty (as in the draft Subdivision E) or intertwined with the BI duty.

Sections 961K & 961L are notable by their limited scope. They do not address any conflicts of interest between the retail client and any party in the product and services value chain, beyond those of the advisory licensee, authorised representative and individual advisor. As already noted it has been Government policy not to place additional duties and prohibitions on entities involved in retail products or services, beyond the advisory licensee, representative and individual advisor. There is no proposal to place a conflicts or best interests duty on a product manufacturer or issuer, research house, platform or manager. However, it is still quite feasible to require an advisor to take account not only of conflicts between the client and others lower in the advisory chain (as the ED provides) but also those above them in the chain: issuers, managers, platforms etc where those parties are related to or associated with the adviser's licensee or representative. Speaking practically this means that if an advisor wishes to recommend a product issued by an entity related to or associated with the licensee or authorised representative the advisor must be satisfied that the client's interests are being given priority. The same should be the case if the advisor is relying on or recommending research house or platform services related to the advisory entities he or she acts for.

An important reason for having a statutory requirement to put the client's interests first is the inadequacy of the existing conflict rules which can be excluded by disclosure to and consent from the client. These ED provisions limit the degree to which the adviser can get the client to consent to excluding the protections of conflicts duties. Instead of complete exclusion, the client can only agree to the adviser taking some benefit from the relationship, if the adviser still puts the client's interests first. Sections 961K&L of the ED should make it clear that disclosure to and consent from the client is still required for the adviser to take any benefit, subordinated though it may be. With these encouraging changes, it would be an unfortunate irony if the new statutory provisions made no advance because they simply left out an entire class of conflicts that are centrally material to the conduct of advisors making recommendations. A statutory provision that places the client's interests before those of all of these parties in the value chain should be adopted and could be drafted like this:

S961K Conflict between client's interests and those of provider

As drafted in the existing Exposure Draft

S961L Conflict between client's interests and those of licensee, authorised representative and any other persons

If the provider knows, or reasonably ought to know, that there is a conflict between the interests of the client and the interests of:

(a) a financial services licensee of whom the provider is a representative; or

(b) an authorised representative of whom the provider is an employee; or

(c) any other person (including any related or associated product issuers or financial services providers)

the provider must give priority to the client's interests when giving the advice.

IV. THE 'BEST INTERESTS' PROVISION

Having criticised the draft conflicts provision for being too narrow, my first point in relation to the BI duty, is to say that it is too wide. The BI duty in the ED does not limit itself to *financial* best interests. Even in the more fluid judge made law the BI duty is limited to financial best interests. It is true that the implementation of the BI duty must have regard for the wider needs and purposes of the client, and true again that many of these may be personal, domestic or household in nature. The work of the financial adviser is however to devise a financial strategy that promotes and advances the *financial* interests of the client so that they can realise their wider needs and purposes. The statutory wording should reflect this, and the drafting changes to the BI duty I suggest below include this change.

The second point is that the ED does not clarify whether the statutory version of the BI duty is fiduciary or not – it is silent on this point and so is the Explanatory Memorandum. This point will be crucial in the practical effectiveness of the duty.

It is not even clear except for conflicts of interest that any of the other obligations making up fiduciary duties, are even fiduciary in character. In *Breen v Williams* (1996) 186 CLR 71 at 133, the High Court stated that in the fiduciary's obligation, the only true proscription was not to take unauthorised benefits from a conflicted relationship. Thereafter, there are no positive legal duties on a fiduciary to act in the interests of the person to whom the duty is owed. On this view there would be no fiduciary obligation in judge-made law to act to the utmost for the client – no BI duty. There are however other decisions, in which a best interests duty is recognised as imposing affirmative best interest obligations: *Cowan v Scargill* [1985] 1 Ch 270 and *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd* (2006) 198 FLR 302. On 27 July 2011 this last decision was affirmed by the NSW Court of Appeal in *Manglicmot v Commonwealth Bank Officers Superannuation Corporation* [2011] NSWCA 204. It is important that the statutory text, or the Explanatory Memorandum is clear as to whether the new duty is intended to be fiduciary or not. Otherwise the implementation of the duty will be subject to argument about these difficult questions, rather than the enforcement of higher standards of adviser conduct. This point is reflected in the inclusion of sub-section (6) in the draft BI duty below. The Explanatory Memorandum should expressly elaborate the non-fiduciary nature of the new statutory duty, its aims and objectives and the problems it is designed to meet. It should expressly state that a standard of conduct higher than a negligence standard is what is intended, to meet the conflicted circumstances of the contemporary institutional and remuneration arrangements of the Australian market in retail client financial advice, as the PJC recommended.

The third point is this. There are a number of places where statutory analogues of the BI duty have been created of pre-existing fiduciary duties from judge-made law: for trustees (S52(c) SIS Act), for directors (S181 Corps Act) and for responsible entities (S601FC & FD Corps Act). In each of these instances the statutory BI duty has been interpreted according to fiduciary principles while respecting aspects of the statutory reform – eg that the statutory BI duty cannot be excluded, or applies more widely than the pre-existing judge made law. In each of these instances it has taken many years before the relationship between the judge made fiduciary law and the statutory analogue has been settled by case law on the interpretation of the provisions. In all these instances there was a direct correspondence in the relationships before and after the legislative change, making it easier for judge made fiduciary principles to be used as interpretive baselines for the statutory provisions.

By contrast, there are virtually no cases in Anglo-Australian jurisprudence, where the concept of best interests has been applied to the facts of a financial adviser. There are some cases where it has been held that stock brokers are fiduciaries, but these have been almost exclusively where the conflicts aspect of the fiduciary principle has been applied, not the BI duty. My concern is that if the statutory BI duty is silent about whether it is fiduciary or not, it will be interpreted in the same fashion as the other statutory BI duties. There is serious reason to be concerned that this will lead to much greater uncertainty and frequency of litigation because the BI duty is quite undeveloped in its application to financial advisors. Attempts will be made to mould the cases developed for the trustees' duty of BI, but these may well miss the target. This is because trustees' BI duty requires them to preserve and augment the trust estate. Not all financial advisers have in their hands the continuous management of the client's assets, but give advice periodically which someone else implements.

For the BI duty to be effective it will need to be clear to the full range of financial services dispute resolution venues (FOS, the Superannuation Complaints

Tribunal, self-regulatory disciplinary tribunals such as the FPA's Conduct Review Commission and the courts) what it means. It will also need to be clear to compliance personnel and individual advisers. Most importantly, ASIC will not relish beginning civil penalty proceedings if win or lose, it pays high costs in proceedings protracted by these interpretive questions. Being clear whether the BI duty is fiduciary and about its content is crucial to its effectiveness in implementation.

The next point about the BI duty is related. The ED does not specify what 'best interests' means, and this leaves it open to be interpreted according to the judge made principles of fiduciary law which may not even apply, and which have an uncertain fit with the advisory context. In the drafting suggestions for the BI duty made below 'to act in the best interests of a client' is given the meaning 'to act to promote and advance the financial interests of the client'. By this is meant, not that the adviser has to ensure that the best possible outcome is realised for the client, but that the adviser must rise to his or her best efforts in researching, formulating, giving and implementing the advice. This is by contrast with the negligence standard which governs advisers at present, and which the PJC found was not sufficient to protect retail clients. The negligence standard is insufficient because the general standard against which conduct is measured is not high in the financial advice industry. It is also insufficient because of the pervasive influence of conflicts of interest in the advisory context.

To act in a client's best interests advisors may have to deepen and broaden their research (of client and products), even to recommending an approach which does not involve the acquisition of financial products (eg pay off your mortgage). They may have to demonstrate independence of mind where there are material influences to depart from the client's interests – eg the temptation to switch investments to increase assets under management. Obviously advisors must manage conflicts by preferring the client's interests, not just over their own interests, but over *any* others. Advisers must also strictly follow the client's financial mandate (derived from analysing their needs and purposes) congruent with client risk preferences.

Instead of setting a conduct standard for what 'best interests' means, the Exposure Draft sets out a procedural check-list (S961C(2)) that is not exhaustive. As well as leaving dispute resolvers and compliance personnel with little guidance as to the *standard* of behaviour required (as opposed to procedural steps) it may encourage a 'tick-a-box' approach to compliance which has become familiar with the negligence standard. The current drafting may also give the impression that the BI duty applies only at the inception of the client relationship, which would not sufficiently protect the client.

The final point is that the BI duty to 'promote and advance' the financial interests of the client, includes a number of elements: putting the client first, faithfully following the client's mandate, observing the client's risk preferences, considering different investment terms and these are reflected in the following drafting suggestions:

Section 961C – Best Interests - provider must promote and advance the financial interests of the client

(1) The provider must act in the best interests of a client which duty shall be satisfied if the requirements of this section are satisfied.

(2) In giving advice and providing related financial services to the client the provider must

(a) comply with sub-sections (3) and (4) and any applicable financial services laws; and

(b) promote and advance the financial interests of the client.

(3) The provider must identify the needs and objectives of the client and provide advice that promotes and advances the financial interests of the client in a way that is best likely to meet those needs and objectives;

(4) In promoting and advancing the financial interests of the client the provider must

(a) where there is a conflict between the duty to the client under this section and the provider's interests or duties, give priority to the duty to promote and advance the client's financial interests;

(b) where there is a conflict between the duty under this section to the client and the interests or duties of any other person (including the provider's licensee or authorised representative and related or associated product issuers or service providers) give priority to the duty to promote and advance the client's financial interests;

(c) not make a financial product recommendation if the client's needs and objectives would be better met other than through the acquisition of financial products;

(d) not make a recommendation to switch to a another financial product if the client's needs and objectives would be as well or better met continuing to hold a financial product they have already; and

(e) consider all of the matters which a skilled and diligent adviser would reasonably consider including but not limited to:

(i) the benefits of any financial product recommendation on the client's financial interests in the short, medium and long term; and

(ii) the risks of any financial product recommendation on the client's financial interests in the short, medium and long term;

(iii) any other matter that would be likely to have a material effect on the financial welfare of the client.

(5) The provider's duty to promote and advance the financial interests of the client applies throughout the entire duration of the client relationship.

(6) *The objects and purposes of sub-sections (1) to (5) above and of this Part 7.7A are to improve the quality of financial advice for retail customers. Subsections (1) to (5) above should be interpreted to promote those objects and purposes and not as if they codify fiduciary law.*

V. INTER-ACTION BETWEEN THE 'BEST INTERESTS' PROVISION AND THE REQUIREMENT TO HAVE A REASONABLE BASIS FOR ADVICE

The current draft of the BI duty in the Exposure Draft (S961C) does not as noted above, express a statutory standard of conduct. Instead it sets out a list of procedures, and then in S961H it requires that the advice resulting from following the procedure is 'appropriate'. The language of the list in S961C and the requirement in S961H reintroduces the negligence standard that the PJC concluded was insufficient.

As discussed the draft duty is silent about whether the standard required is fiduciary, except that it uses the undefined term 'best interests' which is heavily laden with fiduciary meaning. As presented in the Exposure Draft the BI duty contains mixed textual signals and will leave the Court and other interpreters not only with uncertainty about whether the BI duty is fiduciary or not, but whether the standard demanded by the new section is negligence or something higher, and if so what, since no standard is clearly stated.

In addition to those just mentioned, the kinds of language in the Exposure Draft which suggest that a negligence standard is to apply, are (in Section 961C) 'reasonably apparent' and 'reasonable inquiries' or 'reasonable investigation'. Further much of the language of the current section 945A of the Corporations Act, has been incorporated into draft Section 961C(2). Section 945A requires advisors to have 'reasonable grounds' for advice, and is a standard wholly based in negligence. Those familiar with the existing section 945A would immediately think that the new 'best interests' duty adopts that standard, not the higher fiduciary one. Another signal in the direction of a negligence standard is on page 10 of the draft Explanatory Memorandum, where it is said that 'reasonably apparent' is an objective standard which grows in stringency as advice becomes more complex and technical in nature. As we have seen the draft Section 961H which directs the adviser to provide only advice which is 'appropriate to the client' also picks up the current wording of existing Section 945A and would also suggest a negligence standard.

In my view the most appropriate course is to leave Sections 945A and S945B in the form they are now (though it may be appropriate to limit the criminal consequences of these contraventions to wilful or dishonest conduct). The first mandates a negligence standard which is lower than the BI duty, the second mandates a warning. Neither of these should interfere with the BI duty, which requires either a higher standard of conduct than s945A or different conduct in the case of S945B. It is also my view that the draft conflicts duty (ED S961K&L) should stand independently of the BI duty, regardless of the fact that there are conflicts elements to the latter. It is inevitable that there will be overlaps between these duties, but in a retail investor protection statute, that is better than gaps through which harmful conduct may fall. Finally, if this course were taken, then it would not be necessary to have ED S961H requiring advice to be appropriate. The same goes for ED S961J.

VI. SANCTIONS AND REMEDIES

This aspect of the reforms, is like much of the rest of the package other than the BI duty, likely to be effective. The civil penalty sanctions articulate readily with pre-existing civil penalty provisions in Part 9.4B Corporations Act. The civil action for loss and damage in ED S961P should be amended so that ‘loss and damage’ includes profits made by the breaching party. This would bring the provision in line with ‘loss and damage’ in S1317HA(2) Corporations Act. Then the same measure of loss and damage would be available to a person whether or not compensation was sought in court under a civil penalty provision, or in another forum, such as FOS.

Reconsideration should also be given to the terms of ED S961S(2)(c). Making the representative’s reliance on instructions effective to deflect liability if reasonable, reintroduces the negligence standard to provisions which seek to introduce a higher standard of conduct. ED S961S(2)(c) would be more effective to induce conduct that does not conflict with the client’s interests and promotes and advances those interests, if it were redrafted to read:

(c) The representative’s reliance on that information or those instructions was in the client’s best interests as defined in Section 961C(2).

VII. OTHER DRAFTING SUGGESTIONS REGARDING THE DEFINITIONS AND PROVISIONS ANCILLIARY TO THE ‘BEST INTERESTS’ DUTY

Section 961H: although it is my view that this section should not be included at all (see Part V above) if it does proceed then it requires drafting changes. It is difficult to understand how the entire scheme of Part 7.7A to this point is about a higher standard (ie ‘best interests’) and then the adviser is instructed to ensure the advice is ‘appropriate’ – a lower negligence standard. So from the perspectives of legal and ordinary logic, and to make sure it adequately protects investors it may be better if the section reads:

Section 961H Resulting advice must be appropriate and in the client’s best interests
The provider must only provide the advice to the client if the advice is appropriate to the client, and in the best interests of the client.

VIII. INTER-ACTION BETWEEN THE ‘BEST INTERESTS’ DUTY AND OTHER FOFA INITIATIVES TO PROFESSIONALISE LEGAL ADVISERS AND PROMOTE HIGHER STANDARDS OF FINANCIAL ADVICE

As part of the campaign to raise the quality of Australian financial advice, there have been initiatives at a number of levels to improve advisor conduct. These concentrate on raising standards of competence and encouraging more professional and ethical standards of conduct towards clients. The latter initiatives are mainly at the self regulatory level: for example the Code of Conduct issued by the Financial Planning Association and the deliberations of the Advisory Panel on Standards and Ethics for Financial Advisers which is considering what more can be done at this level.

Neither the BI duty, nor these moves towards more ethical, fairer treatment of clients, will work alone. The BI duty should provide a clear public normative standard, from which self regulatory initiatives can find their professional and ethical compass. The BI duty will be ineffective if it is only observed by fear of enforcement. Instead it must be seen as a legitimate and respected standard of conduct that financial advisers will eventually observe as a matter of course. In short, the BI duty needs the professional pressures for its internalisation by advisers as much as professionalization initiatives need the firm legal hook of the BI duty to give their activities legitimacy.

These facts about professions and adoption and enforcement of professional codes of conduct provide perhaps the most important reason of all for clarity, certainty and enforceability of the BI duty. To be adopted by individuals in a wide industry group which is trying to raise its standards partly by persuasion and modelling of conduct means that advisers must be able to understand what is required by the BI duty in most circumstances. If the BI duty and the other self regulatory moves towards a standard higher than negligence are to be successful, then the BI duty must be drafted clearly to require a higher standard of conduct than what is now required. Further, it is crucially important that the Explanatory Memorandum to the new legislation be clear about the problems the new section is designed to address, and the objects and purposes that it is intended the BI duty should achieve, so that it might be interpreted according to the directions in Section 15AA of the Acts Interpretation Act 1901.

IX. CONCLUSIONS

The recommendations of the Government in the FOFA program for improving the quality of financial advice are admirable and over-ripe for implementation. The PJC recommended adopting a duty which imposes a higher standard than negligence on financial advisers. This is to meet the difficulties of generally low conduct standards and professionalism amongst financial advisers, and the distorting effects on advice of conflicts of interest from financial conglomeration and remuneration practices. This submission concentrates on the contribution of the BI duty to the FOFA reforms and the longer term self-regulatory work of raising conduct standards in the financial advice industry. Although the submission concentrates on legal arguments about the interpretation and implementation of the BI duty, the main reason for this is the wider one of having the BI duty support more general moves to professionalization of financial advisers.

The objections in this submission to the drafting of the BI duty (and corresponding drafting suggestions) seek to address long standing habits of judicial and other legal interpreters who look to pre-existing case law to give meaning to new statutory provisions. This can derail the objects and purposes of the reforms by subjecting them to needless litigation in the process of enforcement.

Further shortcomings have arisen because the ‘best interests’ duty in the Exposure Draft seems to have been drafted in a fashion that mixes the signals between a duty higher than negligence, and negligence. The consequences of this are in my view very grave, for the effectiveness of the duty as a regulatory tool and consumer-investor remedy.

Thank you for giving me the opportunity to address these concerns in this submission. I hope they can be considered in the light of the drafting changes I have suggested, and through those suggestions, give the ‘best interests’ duty the best chance of being effective in helping to raise the standard of financial advice in Australia.

Yours sincerely,

Dimity Kingsford Smith