Law Council
OF AUSTRALIA

10 June 2022

Quality of Advice Review Secretariat
Financial System Division
The Treasury
Langton Crescent
Parkes ACT 2600

Be email: AdviceReview@treasury.gov.au

Dear Sir / Madam

Quality of Advice Review

The Law Council of Australia welcomes the opportunity to make a submission to the Quality of Advice Review (**Review**) in response to the Issues Paper published in March 2022.

This submission has been prepared by the Financial Services Committee of the Business Law Section (**FS Committee**) and the Superannuation Committee of the Legal Practice Section (**Superannuation Committee**) (collectively, the **Committees**).

Responses to specific questions

In the **Annexure**, responses of the FS Committee and the Superannuation Committee to some of the questions in the Issues Paper have been provided. The Committees have only sought to respond to those questions covering topics of which members have relevant knowledge and experience and feel that they are well placed to provide a meaningful response. The Committees have not sought to respond to questions relating to non-legal matters such as estimated business costs.

Additional observations of the FS Committee

The FS Committee also notes that there have been a number of developments which have raised professional standards for the financial advice industry, such as requirements to hold degree qualifications, pass compulsory examinations and comply with a code of ethics. In light of these changes, the FS Committee submits that it would be reasonable to assume that those who have met this higher bar in order to enter, or remain, in the industry are capable of exercising a certain amount of independent professional judgment.

The FS Committee submits that, as the professional standards in the industry have evolved, some thought should be given as to whether the regulatory approach should also similarly evolve – in particular, whether obligations should be more principles-based and less "box-ticking" in nature, so as to allow advisers to exercise their professional judgment and tailor their approach to presenting advice with a view to making it more user friendly and client focused.

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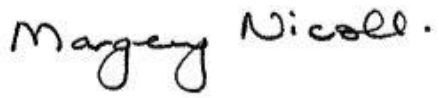
The Committees are happy to be contacted further about this submission. In the first instance please contact Pip Bell, Chair of the FS Committee (pbell@pmclegal-australia.com) or Suzanne Mackenzie, Chair of Submissions for the Superannuation Committee (smackenzie@barchambers.com.au).

Yours sincerely,



Margery Nicoll
Acting Chief Executive Officer

Annexure – Responses to specific questions

Question/s	Response
Section 3	**Framework for Review**
3.1 Quality Financial Advice	
3. Have previous regulatory changes improved the quality of advice (for example the best interests duty and the safe harbour (see section 4.2))? **4. What are the factors the Review should consider in deciding whether a measure has increased the quality of advice?**	While there may have been an improvement in the quality of advice as a result of the many changes to the regime, the FS Committee submits that any improvement has clearly come at the cost of increased compliance costs and complexity, which has led to advice becoming less accessible and less affordable to many Australians. In the FS Committee's view, the Review should carefully balance any potential improvement in the quality of advice against the cost of achieving that improvement in terms of complexity and compliance cost. The clear government and industry objective of providing affordable advice to Australians is not being met where the costs of advice are so high. The FS Committee recommends that the Review consider whether the measure has the effect of not only improving quality but also affordability and accessibility. The Review should also consider the simplicity with which the measure can be understood and implemented by both end consumers and advisers.
3.2 Affordable Financial Advice	
6. What are the cost drivers of providing financial advice? **7. How are these costs apportioned across meeting regulatory requirements, time spent with clients, staffing costs (including training), fixed costs (e.g. rent), professional indemnity insurance, software/technology?** **8. How much is the cost of meeting the regulatory requirements a result of what the law requires and how much is a result of the processes and requirements of an**	The FS Committee considers that the costs of meeting the regulatory requirements is a result of a combination of legal requirements (including overlapping legal obligations) as well as, in some cases, a concern by licensees and advisers about the way that the obligations may be interpreted, which leads to overly conservative and administratively costly positions being taken. This is exacerbated by the fact that liability for remediation is the responsibility of the licensee and a number of licensees have, in recent years, undertaken large and expensive remediation programs. Members of the FS Committee have observed that professional indemnity insurance has become more expensive (in some cases, it has trebled) and difficult to obtain (particularly run-off cover). Increased costs are inevitably passed on to clients, which results in advice becoming more expensive. In some cases, licensees have been unable to continue to hold professional indemnity insurance, their licences have ultimately been cancelled and the advisers who had operated under that licence are forced to become authorised representatives of another licensee. The FS Committee submits that reducing the number of

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AFS licensee, superannuation trustee, platform operator or ASIC? **9. How much is the cost of meeting the regulatory requirements a result of what the law requires and how much is a result of the processes and requirements of an AFS licensee, superannuation trustee, platform operator or ASIC?**	licensees is likely to restrict competition (which can also have an impact of driving up the fees charged to clients). In the FS Committee's view, to truly alleviate the regulatory burden, there must be a combination of: • removing complexity and duplication in the regulatory regime; and • ensuring that the obligations are clearly articulated so that advisers and licensees can feel comfortable in providing advice. Examples of complexities include: • the new breach reporting regime - which has proved to be very costly to practically implement because of the complex and broad net of the regime, which now, amongst other things, requires licensees to report a breach of a civil penalty provision to the Australian Securities and Investments Commission (**ASIC**), regardless of the significance of the incident or the impact on the client; • the fee disclosure statement (**FDS**) regime - which has no materiality threshold and has been rigidly applied. This regime has been implemented such that an FDS which misdescribes fees by a few cents will have the effect of ending the ongoing fee arrangement and requires the switching off of fees and the signing of a new agreement. This has led some in the industry to move to annual agreements. The introduction of a materiality threshold (which would need to be met in order for an ongoing fee arrangement to be terminated) would be significant in allowing advisers flexibility in the way that they provide advice to clients (by way of an ongoing fee arrangement or an annual agreement) without concern that a minor misdescription in the FDS would end the ongoing fee arrangement; and • ability to provide advice which is limited in scope – while this is permitted by the *Corporations Act 2001* (Cth) (**Corporations Act**), and as ASIC has confirmed in regulatory guidance, there is still some concern in the industry as to the regulatory requirements that apply when providing scoped advice. In particular, there appears to be concern about the way that the best interests duty (**BID**) will be applied with respect to scoped advice. The FS Committee is of the view that there is considerable benefit to Australians in receiving scoped advice, and that therefore the legislative framework should make it clear that scoped advice is permitted and that the BID and related obligations apply in the context of the articulated scope of the advice. The FS

Question/s	Response
	Committee believes that is likely to encourage more Australians to seek advice as it would become more affordable. Examples of overlap of provisions include: • aspects of the current BID and related obligations – the FS Committee's comments on this are set out below in our responses to questions raised in section 4.2 of the Issues Paper; and • the Financial Planners and Advisers Code of Ethics 2019, which overlaps with the Corporations Act and, in respect of the provisions relating to conflicts of interest, goes further than the current provisions of the Corporations Act. The FS Committee submits that reducing complexity and overlap by streamlining provisions and providing more certainty for the industry would significantly assist in reducing the cost of advice.
11. Could financial technology (fintech) reduce the cost of providing advice? **12. Are there regulatory impediments to adopting technological solutions to assist in providing advice?**	The FS Committee is of the view that there are situations where fintech can be used to deliver advice to a greater number of clients at a more affordable price – for example, where the scope of the advice is clearly confined to a single topic. The FS Committee submits that the law has been designed on the assumption that humans provide the advice and the BID is fiduciary in nature, which involves one human being in a position of trust vis-à-vis another human. Therefore the FS Committee believes that, if there is a policy objective of facilitating more technology driven and cost effective advice, adjustments should be made to the BID (as contemplated below in our responses to questions raised in section 4.2 of the Issues Paper).
3.3 Accessible Financial Advice	
15. What are the barriers to people who need or want financial advice accessing it? **16. How could advice be more accessible?**	The FS Committee submits that the complexity of the regime, partly as a result of the significant compliance burden and the consequential high costs of advice collectively represent barriers to access to advice for people who need or want it. Obtaining lower cost scoped advice also has limited accessibility. The FS Committee submits that the length of the documentation (which has developed partly as a defensive measure by the industry) and rigid approaches to enforcement (for instance, in respect of the FDS regime) have also created barriers to accessibility.

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	Steps that the FS Committee recommends be taken to make advice more accessible include: • as set out above, reducing the complexity and overlap in provisions in the regime; • ensuring that the obligations are clearly articulated so that advisers and licensees can feel comfortable in, for example, providing scoped advice. While legislative changes are not strictly necessary, the uncertainty about legal obligations means that the industry would benefit from a regime that provides greater clarity as to the manner in which scoped advice can be provided; and • encouraging an industry wide approach to reducing the length of the documentation required to provide advice. Clients are currently required to sign a significant number of documents in order to obtain, and implement, advice. The FS Committee believes that having industry standard wording for some documentation may assist in this regard.
Section 4	**Regulatory Framework**
4.1 Types of Advice	
General and Personal Advice	
1. **Is there a practical difference between financial advice and financial product advice and should they be treated in the same way by the regulatory framework?** 2. **Are there any impediments to a financial adviser providing financial advice more broadly, e.g. about budgeting, home ownership or Centrelink pensions? If so, what?** 3. **What types of financial advice should be regulated and to what extent?** 4. **Should there be different categories of financial advice and financial product advice and if so for what purpose?**	In the FS Committee's view, the Review should consider the breadth of the definition of "personal financial product advice" and the subsequent comments in the High Court's decision in *Westpac Securities Administration Ltd & Another v Australian Securities and Investments Commission* [2021] HCA 3 (**Westpac Decision**) which indicate the ease with which an adviser may stray into personal advice with all of the additional compliance obligations that come along with personal advice. The FS Committee submits that inadvertently crossing the line between general and personal financial product advice could occur very easily, because all that is required to meet the definition of personal financial product advice in the second limb of subsection 966B(3) of the Corporations Act is that "a reasonable person might expect the provider to have considered one or more of those matters" (being a person's objectives, financial situation and needs). This became evident in the Westpac Decision. On the view expressed by Gordon J in the Westpac case, advice given to a client may constitute personal financial product advice because the relevant licensee has information on file in relation to that particular client, if the

Question/s	Response
5. **How should the different categories of advice be labelled?**	client might reasonably expect that those circumstances have been taken into account. As a result, where the licensee already has some personal details of the customer, there is a risk that a customer could reasonably expect all of those circumstances to be taken into account and therefore, advice provided could be characterised as personal financial product advice (irrespective of the intentions of the provider of the advice). Members of the FS Committee believe that this has had the effect of causing hesitance in the industry to provide general financial product advice (which could be a low cost measure of providing important advice to consumers) because of the fear of inadvertently providing personal financial product advice. FS Committee members believe that the very fine line between general and personal financial product advice can in some situations make it difficult for advisers to be sufficiently cognisant as to the kind of advice they are providing, and, as a result, what obligations they need to comply with. Therefore, the FS Committee recommends that the boundaries between general and personal financial product advice should be more clearly defined so that advisers are better able to recognise when they are providing, or are expected to provide, personal rather than general financial product advice.
Intra-Fund Advice	
28. Should the scope of intra-fund advice be expanded? If so, in what way? **29. Should superannuation trustees be encouraged or required to provide intra-fund advice to members?**	The Superannuation Committee is of the view that: • the scope of intra-fund advice should not be expanded; and • there is a live question whether superannuation trustees should be providing personal advice of any kind, including intra-fund advice, for the following reasons: Traditionally, the role of a superannuation trustee has been to receive and invest contributions and to pay retirement and other benefits. In discharging that role the trustee owes duties to the fund members as a group and, in some respects, to classes of members, but the trustee does not owe a duty to act in the best interests of any individual member. However, providing personal advice to a retail client attracts the duty to act in the best interests of the client imposed by subsection 961B(1) of the Corporations Act. Therefore, if a trustee provides personal advice to a fund member, the trustee creates a tension between

Question/s	Response
	the duty under subsection 961B(1) and the trustee's traditional duties to act in the best interests of members as a whole and/or classes of members of the fund. The Superannuation Committee notes that subsection 29E(5A) of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act)** provides: "An additional condition is imposed on each RSE licence held by an RSE licensee that is a body corporate. The condition is that the RSE licensee must not have a duty to act in the interests of another person, other than a duty that arises in the course of: (a) performing the RSE licensee's duties, or exercising the RSE licensee's powers, as a trustee of a registrable superannuation entity; or (b) providing personal advice." The Superannuation Committee submits that one inference arising from paragraph 29E(5A)(b) is that providing personal advice does not, in the ordinary course, form part of the role of a superannuation trustee; were it otherwise, paragraph (b) would not be necessary. The Superannuation Committee also submits that a further inference is that the Parliament considered: • the paragraph 52(2)(c) covenant, namely, to perform the trustee's duties and exercise the trustee's powers in the best interests of the beneficiaries; and the subsection 961B(1) duty, namely, to act in the best interests of a particular member receiving personal advice from the trustee, to be, or as likely to be, inconsistent. The Superannuation Committee notes that both are duties to do something in the best interests of another (or others), and the first duty is owed to the fund beneficiaries as a whole while the second duty is owed to an individual member (where personal advice is given to them). Giving personal advice to an individual member carries with it considerable risk for the trustee, including the potential for liability which, in turn, may have to be satisfied from fund assets, to the detriment of other members. The Superannuation Committee submits that there is a separate policy question as to whether superannuation trustees should be encouraged or required to provide arrangements with third parties under which members have *access* to intra fund advice (which may be provided by related or unrelated licensed financial advisers), the cost of which the trustee

Question/s	Response
	pays from the fund and does not allocate to the individual member's account. The Superannuation Committee does not wish to comment on this policy issue.
30. Are any other changes to the regulatory framework necessary to assist superannuation trustees to provide intra-fund advice or to more actively engage with their members particularly in relation to retirement issues?	If the preferred policy position is that superannuation trustees should be encouraged or required to provide *access* to intra fund advice (as opposed to the trustees *themselves* providing intra fund advice), which the trustee pays for from the fund's general assets (and does not allocate to the individual member), the Superannuation Committee considers that some changes to the regulatory framework may be desirable to support that policy position. Relevant changes would include clarifying that use of a fund's general assets to pay for intra fund advice for individual members, and to pay for member communications regarding retirement income products, are consistent with the trustee's covenants in subsection 52(2) of the SIS Act.
Limited Scope Advice	
32. Do you think that limited scope advice can be valuable for consumers? **33. What legislative changes are necessary to facilitate the delivery of limited scope advice?** **34. Other than uncertainty about legal obligations, are there other factors that might encourage financial advisers to provide comprehensive advice rather than limited scope advice?**	As set out above, the FS Committee considers that limited scope advice can be very valuable for consumers. While legislative changes are not strictly necessary, the uncertainty about legal obligations means that the financial advice industry would benefit from having a regime that provides clarity as to the manner in which scoped advice can be provided.
4.2 Best Interests and Related Obligations	
43. Do you consider that the statutory safe harbour for the best interests duty provides any benefit to consumers or advisers and would there be any prejudice to either of them if it was removed?	At the time of the introduction of Part 7.7A of the Corporations Act in 2013, many participants in the financial advice industry lobbied for the safe harbour steps to be included in the legislation so that there was some degree of certainty for advisers that, if they followed a particular process, the BID would be met. This arose from a concern that the BID in

Question/s	Response
44. If at all, how does complying with the safe harbour add to the cost of advice and to what extent? **45. If the safe harbour was removed, what would change about how you would provide personal advice or how you would require your representatives to provide personal advice?** **46. To what extent can the best interests obligations (including the best interests duty, appropriate advice obligation and the conflicts priority rule) be streamlined to remove duplication?** **47. Do you consider that financial advisers should be required to consider the target market determination for a financial product before providing personal advice about the product?**	subsection 961B(1) of the Corporations Act was too vague to interpret and for advisers to be able to safely implement. The FS Committee believes that the BID and, in particular, the operation of the safe harbour steps has become quite fraught in recent years. This has been the result of a number of factors including: • the breadth of the catch all provision in paragraph 961B(2)(g), which the FS Committee believes reduces the utility of the steps as a safe harbour; • the consequent nervousness in utilising the steps, especially when providing scoped advice, digital advice and intrafund- advice; • the view taken in some parts of the industry that failure of a single safe harbour step is a failure of the BID (even though this is not legally correct); and • the concern raised at the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry that the safe harbour steps have become a “tick the box” exercise. The FS Committee is of the view that there is utility and benefit to advisers and consumers in retaining some of the safe harbour steps so that the matters which an adviser needs to have regard to in satisfying the BID are clear. The FS Committee proposes that the steps should be streamlined to: • first, remove the catch all provision in paragraph 961B(2)(g); • secondly, make it clear in paragraph 961B(2)(b) that: o advice can be scoped; and o the scoping can be performed by either the adviser or the client (rather than the current provision in subparagraph 961B(2)(b)(i), which can be read as inferring that only the client can scope the advice). The FS Committee submits that allowing the adviser to scope the advice is more in line with the advice process in practice and would also allow advisers to clearly define the scope of the services they provide (as other professions currently do); • thirdly, remove the obligation in paragraph 961B(2)(c) which puts the onus on the adviser to make further enquiries as to the accuracy of the information provided by the client; and

Question/s	Response
	• finally, combine the obligations in paragraphs 961B(2)(e) and (f) so that the obligation imposed on the adviser is to conduct a reasonable investigation into relevant financial products and make decisions based on the client's relevant circumstances. The FS Committee submits that this approach would provide the following advantages: • allowing the safe harbour steps to become less administratively onerous and have less of a tick the box nature while still providing adequate protection for consumers and guidancefor advisers on the more nebulous wording in subsection 961B(1); • making the safe harbour steps similar to those in subsection 961B(3) which apply to authorised deposit-taking institutions who provide advice on relatively simple products; • providing more certainty to the industry that: o single topic advice or scoped advice is acceptable; o the BID can accommodate this; and o the BID is scoped according to the scope of the advice; and • assisting with some of the challenges that currently exist with respect to digital advice. The FS Committee notes that documents provided to clients which have been prepared with a heavy focus on meeting compliance obligations can be lengthy and this makes them less useful to the end user – the client. The FS Committee is of the view that while, overall, greater emphasis should be placed on the content of the actual advice and its appropriateness to the client's circumstances, there is nonetheless a role for the BID and (as proposed above) revised safe harbour steps. The FS Committee also notes that, in addition to meeting the legal requirement of the BID, it is important, from the client's perspective, that the advice is clearly explained so that the client understands how they may benefit if they proceed to implement the recommendation.
4.4 Charging Arrangements	
62. How do the superannuation trustee covenants, particularly the obligation to act in the best financial interests of members, affect a trustee's decision to deduct ongoing advice fees from a member's account?	The Superannuation Committee submits that the covenant to act in the best financial interests of members in paragraph 52(2)(c) of the SIS Act is unlikely to bear on the deduction of ongoing advice fees from individual members' accounts. As noted above in response to questions 28 and 29, that covenant applies in relation to the fund members as a group and, in some respects, in relation to classes of members, but not in relation to any individual member. The more relevant provisions are likely to be the care, skill and diligence covenant in paragraph 52(2)(b) and the 'sole purpose test' in section 62 of the SIS Act.

Question/s	Response
4.5 Disclosure Documents	
63. How successful have SOAs been in addressing information asymmetry? **64. How much does the requirement to prepare a SOA contribute to the cost of advice?** **65. To what extent can the content requirements for SOAs and ROAs be streamlined, simplified or made more principles-based to reduce compliance costs while still ensuring that consumers have the information they need to make an informed decision?** **66. To what extent is the length of the disclosure documents driven by regulatory requirements or existing practices and attitudes towards risk and compliance adopted within industry?** **67. How could the regulatory regime be amended to facilitate the delivery of disclosure documents that are more engaging for consumers?** **68. Are there particular types of advice that are better suited to reduced disclosure documents? If so, why?** **69. Has recent guidance assisted advisers in understanding where they are able to**	In the FS Committee's view, it is important to simplify and reduce the length of the documentation that is provided to clients, as well as the number of documents that clients are required to sign to obtain advice and implement it. The legislation does not dictate a length for an SOA and has only a limited number of matters that must be included in an SOA. As set out above, the excessive length of many SOAs has developed partly as a defensive measure by the industry. In the FS Committee's view, encouraging an industry wide approach to reducing the length of the documentation required to provide advice would assist in both the usefulness of the documentation to clients and with the costs of compliance. In addition, the FS Committee submits that clarification of the circumstances in which an ROA can be provided instead of an SOA would also be helpful and would reduce the length of documentation provided to clients. While ASIC has released some guidance on when advisers can provide an ROA when moving between licensees, the FS Committee submits that there would be significant benefit if the circumstances in which an ROA can be provided were more clearly and simply defined.

Question/s	Response
use ROAs rather than SOAs, and has this led to a greater provision of this simpler form of disclosure?	