Quality of Advice Review Secretariat
Financial System Division
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Dear Sir/Madam,

RE: Consultation on Proposals for Reform

Assured Support appreciates the opportunity to provide feedback on the Quality of Advice Review Consultation Paper ("Proposals for Reform") dated August 2022.

Our submission will provide a unique and practical perspective drawn from our direct experience supporting over 120 Australian Financial Services Licensees and over 1700 financial advisers. Our clients are mostly small to medium business owners, so we can provide an informed perspective of the financial services industry that is too often overlooked when laws are reformed.

We believe in the value of advice, and we unreservedly support Treasury's ambition to make advice more accessible and more affordable. We know that good financial advice changes lives and we believe that every Australian should have access to affordable, expert financial advice that can significantly improve their circumstances. We've seen lives transformed by great advice, but, unfortunately, we've also seen others profoundly affected by conflicted advice, *malicious compliance* and misconduct.

While we unequivocally support these regulatory reforms and recognise the pressing need to make advice more accessible and more affordable, we are concerned that the Review, on occasion, seems to prioritise product distribution over advice. In our view some proposals represent a retrograde step for both consumers and the emerging advice profession. We also believe that the Review relies too heavily on anecdotal data and unsupported assertions to misdiagnose problems and propose solutions that are likely to lead to the re-emergence and dominance of the vertically-integrated licensees whose systemic misconduct was exposed by The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. Furthermore, we believe that the accessibility and affordability of advice can be more effectively addressed, and significant benefits achieved, without introducing additional uncertainty or causing consumer detriment.

Before addressing the specific proposals, it appears to us that one of the key limitations of the Review seems to be the failure to properly appreciate context or even recognise the intent, and purpose, of earlier reforms. The current regulatory framework was constructed, incrementally and deliberately, in response to a series of advice and product failures, systemic misconduct, unfettered conflicts and industry dysfunction. It is simply too early to declare that these issues have been resolved so effectively that significant consumer protections can be rolled-back.

As an alternative to imposing more cost and complexity on a fatigued financial sector that has already implemented costly and complex regulatory reforms, we'd suggest making the following changes to make advice less expensive and more accessible:

- consistent with Commissioner Hayne's suggestion, immediately remove the safe harbour steps (s961B(2)(a)-(g)) which are not only counter-productive but also the single largest contributor to the cost of providing advice;
- remove the prescribed form and content of advice documents (s947A, s947B, s947C and s947D); and
- revise the statutory penalties for non-compliance and introduce a broader "safe harbour" for licensees and advisers whose contraventions occur despite their reasonable care and diligence.

About Assured Support

Recognising that the emerging advice profession needed expert advice and support to successfully manage risk, complexity and frequent change, Assured Support was established in 2012 to provide independent, innovative, legal and compliance support to Licensees and advisers.

Now, as an established and well-regarded brand we have provided services to over 120 Licensees and over a seventeen-hundred advisers. Our deep industry knowledge, practical experience and innovative approach led to the development of regulatory technology (reg-tech) that provides a risk-based and conduct-focused approach to compliance supported by a consistent, validated and interrogable compliance platform with granular and contextualised reporting.

Instead of relying on anecdotal data and unsupported assertions about advice quality and process, we rely on proprietary data that encompasses the detailed and contextual review of over **16,629** client files. We represent a large number of small, medium and large licensees whose views are too often overshadowed by the large institutions, product issuers, product-aligned licensees, and superannuation trustees.

Responses to short form proposals

Proposal 1: Regulation of personal advice

> *"They say the uncertainty creates excessive legal risk. They also say that the definition of personal advice is too broad"* [p10]

Based on our review of over 16,629 client files, the data indicates that the classification of "personal advice", and the practical effect of this classification, is well understood by advisers.

In practice, most advisers default to providing personal advice; not because personal advice is necessarily required but rather because of the fear, and consequences, of inadvertently contravening the law. In particular, many believe that providing general advice is a high-risk activity given that many circumstances may create a reasonable expectation that personal advice was provided (and provided in contravention of the retail protection mechanisms).

In our view, all financial advice is personal, but we know that the industry has effectively operationalised the current definitions. Cost, apprehension and complexity could be minimised simply by removing the prescribed form and content of advice documents (repealing s947A, s947B, s947C and s947D) and introducing a "safe harbour" for licensees and advisers whose contraventions occur despite their reasonable care and diligence. The accessibility and affordability of personal advice could be further improved by reducing the importance of "the information [the adviser has or holds] about the client's objectives, needs or any aspect of their financial situation" in favour of emphasising relevance, the provider's best interest duty and their obligations under the Code of Ethics.

In addition to resulting in "fewer defined terms and fewer boundaries", these changes would address the "uncertainty [and] excessive legal risk" about when, and under what circumstances, a "reasonable person" might expect that personal advice was provided.

Proposal 2: General Advice

As we previously stated, we believe that all advice is personal; the only difference is the depth of analysis, the scope of investigation and the degree to which facts are reconciled to individual circumstances. Despite this view, and notwithstanding our general agreement with the proposals for reform, we submit that the distinction should be maintained to assist consumers (and regulators) to clearly differentiate professional advisers from transactional services and product issuers.

Proposal 3: The obligation to provide good advice

We respectfully submit that, based on our direct experience and granular data, it would be imprudent to replace the Best Interest Duty (s961B), The Client Priority Rule (s961J) and the obligation to provide Appropriate Advice (s961G) with a "duty to provide good advice". We will address our reasoning in some detail but, in summary, we consider that this proposal will unwind significant progress, undermine the emerging advice profession and lead to consumer detriment.

Before we proceed, we must strongly refute the assertion that "as a practical matter [the duty of priority] is largely ignored". This assertion does not accord with either our data or our experience. In our view, providers have made no submission on the Client Priority Rule (s961J) because the obligation is clear, intuitive and well-established in the wake of the Hayne Royal Commission. Further, the introduction of the Code of Ethics (specifically Standard 3) created a clear expectation that has, generally, been embraced by the industry. This duty does not require the complete absence of self-interest, but simply the prioritisation of the clients' interests and the prioritisation of their duty to their client before their own interests.

With respect to "good advice", it is our opinion that the vocal opposition to the "Best Interest Duty" (BID) misrepresents or ignores relevant matters. The BID reflected in s961B(1) did not create a responsibility to provide the "best advice" but simply a fiduciary-like duty and an obligation for advice providers to consider their motivations and influences and the likely outcome of their recommendations when providing advice and services. The safe harbour steps (s961B(2)) were never identified as the only way to satisfy the BID but rather offered as a partial defence to alleged contraventions of the duty; unfortunately, they have over time, been transformed into mandatory procedural requirements by licensees seeking to industrialise their advice processes and minimise their liability.

s961B(1) of the Corporations Act provides that "the provider must act in the best interests of the [retail] client in relation to the [personal] advice.' Further, sections s961B(2)(a)-(g) of the Act contain several "safe harbour" steps which, if performed, will deem that the provider has acted in the client's best interests. It is important to acknowledge that explicitly demonstrating that all the safe harbour steps have been performed is not the only way to discharge the Best Interests Duty. In fact, these steps are not, and were not intended to be, an exhaustive and mechanical checklist of what it is required to act in the best interests of the client. This interpretation is affirmed by ASIC Regulatory Guide 175 which notes that "*Showing that all of the elements in s961B(2) have been met is one way for an advice provider to satisfy the duty in s961B(1). However, it is not the only way.*"

We think that confusing the steps with the duty is mischievous, as is limiting the duty to the advice, instead of recognising that it also applies to the provider's conduct ("*in relation to the advice*").

In practice, most professional advisers satisfy the BID by considering, or reflecting upon, their intent, their process and the likely outcome of their recommendations. Whether intuitively or methodically, they exercise care in objectively assessing the client's circumstances (dispassionately and free from conflicts of interest and duty) and assessing whether their client would, reasonably, be in a better position if they implemented the advice. Although professional advisers already limit their consideration to "relevant matters" we endorse the Review's observation that providers should only need to consider "the information they have about [their client] .. to the extent that it is relevant". The law should explicitly reinforce this expectation.

To be clear, we agree with Treasury's observation that complying with the prescriptive safe harbour steps (s961B(2)(a)-(g)) has led to significant costs and inconvenience. However, based on our data, it has only done so for those licensees and advisers who failed to recognise that compliance with s961B(2) is neither essential nor sufficient. Those that focused on the duty itself, rather than the safe harbour steps, easily navigated the transition to the higher standard.

Consistent with the observations contained in the Proposals for Reform, we agree that the prescriptive safe harbour steps are counter-productive and inconsistent with both professional practice and principles-based legislation. Nevertheless, while we agree that Section 961B(2) should be deleted, the broad ethical and professional obligation represented by the Best Interest Duty (s961B(1)) should be maintained. Prior to FOFA, advisers were obliged to ensure that their advice was reasonable and that their retail clients were "no worse off" as a result of their advice. The introduction of the best interest duty had, and continues to have, a profound impact on adviser conduct; it effectively demarcated advice from product sales and created the conditions necessary for the emergence of an advice profession. Our data confirms that the introduction of the duty (and the subsequent introduction of the FASEA Code) has improved the quality of advice provided to retail clients.

We submit that s961B(2) should be repealed to reframe focus on the broad professional duty. In contrast to the prescriptive safe-harbour steps, it should be made clear that compliance with duty is a matter of professional judgment that can be confirmed or validated by a contextual and objective consideration of the provider's intent, process and the likely outcomes of the recommendation. Another significant benefit of removing s961B(2) is that it minimises the "*undesirable*" possibility that a provider could satisfy "*the Chapter 7 best interests obligations but not the Code of Ethics*".

We appreciate that the duty to provide "good advice" is another approach to reconciling providers' obligations in respect to conflicts, processes and appropriateness, but we believe it is an unnecessary (and undesirable) change. While it may not be intended "to permit poorer quality of advice", we believe that will be the outcome, and we are already seeing advisers providing less-tailored personal advice in anticipation of the proposed changes.

While a duty to provide "good advice" might not appear to be substantively different from the duty to act in a client's best interest, we recommend against the change for the following reasons:

- the Duty to act in a client's best interest is not limited to the advice but extends to the provider's conduct and activity "in relation to the advice";
- the creation of a fiduciary-like obligation was, and based on our data is, critical to the idea of an advice profession divorced from product-distribution and institutional conflicts;
- returning to lesser standard, more aligned to the pre-FOFA obligation that consumers should be "no worse off" after receiving financial advice, will allow a diminution of standards that will disadvantage those who would most benefit from advice (and who are often most vulnerable to the provider's advice and conduct).

We suggest that replacing the current obligation with a demonstrably lower standard would be imprudent. We also respectfully submit that it is the provision of advice on which another may rely to their detriment, and not an ongoing advice relationship, that imposes an obligation on the provider to act in their clients' best interest.

Proposal 4: requirement to be a relevant provider

Although we agree that advice should be more accessible and more affordable, we believe that anyone that provides financial advice on which another may rely to their detriment is a relevant provider who has an obligation to act in their clients' best interest. It is neither the payment of a fee nor the ongoing advice relationship that creates this obligation but rather the unequal relationship between the parties and the vulnerability of the client to the advice they receive. This duty should exist irrespective of how advice is delivered. Algorithms, trustees and product issuers who provide advice to those that who act or rely on it should not otherwise be exempted from these requirements. To be clear, we believe that exempting these providers would both increase the risk of significant client detriment and "expose consumers to the risk of poorer quality advice".

Proposal 5: personal advice to superannuation fund members

We submit that Superannuation Fund Trustees should be able to provide personal advice to their members on the same terms, and under the same conditions, as other relevant providers.

Proposal 6: collective charging of advice fees

We support the proposal to improve the access of superannuation fund members to the advice from which we believe they would benefit.

Proposal 7: Fees for advice provided to members about their superannuation

We support the proposal to improve the access of superannuation fund members to the advice from which we believe they would benefit. We also suggest that Trustees should be required to implement consistent, and consistently applied, processes to ensure that members can choose to engage the relevant provider that they believe best suits their needs and preferences.

Proposal 8: Ongoing fee arrangements and consent requirements

We do not support the proposal to substitute member statements for FDS.

A fund statement may identify payments made to relevant providers but fund statements are unlikely to reconcile these payments against the services contracted and those provided. Given the fee-for-service issues highlighted by Commissioner Hayne, we submit that this element of the proposal would lead to a lack of transparency and, consequently, significant consumer harm.

We do, however, agree that the FDS process could be, and should be, amended to improve efficiencies and reduce costs.

Proposal 9: Statements of Advice

Based on our experience and data, we strongly reject the assertion that the Statement of Advice has no utility and does not "provide any real consumer benefit". Notwithstanding the deficiencies of these documents, Statements of Advice (and to a lesser degree Financial Services Guides) are important consumer warranty documents; file-notes are useful as contemporaneous accounts from the provider's perspective but, since they are not generally provided to clients, they do not assist a consumer to understand, or confirm, what they were told, what they can expect or what the advice or services will cost.

For these reasons, while we recommend the amendment or removal of the more prescriptive requirements of s947A, s947B, s947C and s947D, we strongly recommend that the requirement to confirm advice in writing is maintained. Further, regardless of the format, they must contain "the level of detail .. a …. client would reasonably require to make a decision about whether to act on the advice." (consistent with s947B(3) and s947C(3)). Indeed, irrespective of the form, content and format of the advice, the provider must still be "reasonably satisfied" that the client understands the advice and the benefits, costs and risks of the recommended products (Standard 6).

To be clear, we strongly support those recommendations that we are confident will simplify the provision of advice without compromising consumer interests. We wholeheartedly concur with the proposal to remove the prescriptive elements of s947A, s947B, s947C and s947D with a principles-based approach that focuses on consideration an understanding. As it stands, the current Statement of Advice spectacularly fails to satisfy either goal; documents are bloated, generic and largely incomprehensible disclosure documents that are also expensive and time consuming to produce.

The Review is correct to identify that the form and content of advice documents needs to reviewed and, in our view, be profoundly changed. Making these changes will explicitly enable providers to make their own determination about the form and content of the advice they provide. This reform should encourage innovation and remove significant barriers to the provision of advice and consumers engagement with the advice process.

Our position, supported by academic research and ASIC Report 632, is that disclosures and warnings are often ineffective tools, and sometimes perversely counter-productive strategies, for influencing either providers' conduct or consumers' behaviour. Furthermore, in respect of complex products and strategies, disclosure is particularly ineffective and can contribute to consumer detriment. If the purpose of disclosure is to ensure that clients make informed and considered decisions about the recommendations presented to them, then disclosure is an inelegant and inadequate solution.

In 2019, ASIC's Report 632 "Disclosure: Why it shouldn't be the default" drew on international research to confirm the expert view that disclosure has real and undeniable limitations as a consumer protection mechanism. However, for reasons of pragmatism, philosophy and convenience, disclosure became broadly acceptable to most stakeholders; it protected and empowered retail clients, provided businesses with an alternative to heavy-handed regulation and facilitated informed participation in the market. Unfortunately, disclosure didn't deliver these results and our industry's reliance on disclosure has resulted in formal compliance, risk-aversion and disclaimers being prioritized over substantive conduct, client understanding and informed consent.

As acknowledged by ASIC in Regulatory Guide 90 "The purpose of an SOA is to communicate to the client important and relevant information about the advice being provided to enable the client to make an informed decision about whether to act on the advice". Although always intended to be a consumer-friendly warranty and engagement tool, risk-aversion and increasingly prescriptive conventions transformed the SOA into an expensive, inaccessible and occasionally incomprehensible risk-management device. This Review should address these deficiencies by removing the prescriptive elements that drove providers to this end.

Proposal 10: Financial Services Guides

Our responses demonstrate our unwavering support for those recommendations we believe will simplify the provision of advice without compromising consumer interests. However, while we believe that the Financial Services Guide should be able to be provided in any written format, we submit that the provider must have an active duty to ensure that is provided to a retail client in a manner and format that reflects their clients' instructions or preferences before any services are provided. Flexibility should be encouraged, but providers should not be permitted to assume that clients can access information in a particular manner or format. However, providers should be able to rely on the FSG published on their website to communicate incremental or immaterial changes to their FSG.

Proposal 11: Design and distribution obligations and reporting requirements

We fully support the proposal which we believe reflects current industry practice. The regulatory burden and associated cost of this obligation could be significantly reduced if the product issuers implemented consistent reporting formats and timetables.

Proposal 12: Transition arrangements

We fully support the recommendation that there should be an adequate transition period and we recommend that Treasury consider implementing these reforms in stages to minimize the cost and inconvenience to the industry. In our view, they do not need to occur simultaneously.

While we would recommend the immediate removal of s961B(2), s947A, s947B, s947C and s947D, and the introduction of a reasonable care and diligence defence, the industry should be supported to adapt to these changes over a reasonable period of time. In the alternative, we'd submit that Treasury should delay any significant change (likely to increase the risk of consumer detriment) until the Australian Law Reform Commission's Review of the Legislative Framework for Corporations and Financial Services Regulation is complete.

In conclusion

As compliance professionals, we have always focused on "quality" over compliance but, in our experience, quality is a function of intent, process and outcome. As Commissioner Hayne recognised, our industry's preference for deifying process has undermined professionalism and created a punitive and box-ticking compliance culture. Prioritising process over intent and outcome may have retarded the emergence of an advice profession, but to entirely reject the importance of process would lead to a similarly sub-optimal outcome (and one perhaps more detrimental to predictability and consumer confidence).

We've always been strong advocates of principles-based regulation, and we broadly support the proposals for reform. We acknowledge Treasury's willingness to address impediments to the provision of affordable and accessible advice. However, we believe that it is naïve to ignore the reality that businesses traditionally react to equivocal regulation (with significant consequences for non-compliance) with conservatism, risk-aversion and timidity. While competent participants' fear of regulatory sanction might be irrational, but it's pervasive. Paradoxically, it's been their pursuit of certainty that led to increased complexity and compromised principles. In our view, unless Treasury also addresses this issue, any reform will simply repeat the cycle. For these reasons, we urge Treasury to revise the statutory penalties for contraventions and introduce a broader "safe harbour" for licensees and advisers whose contraventions occur despite exercising reasonable care and diligence.

Thank you for the opportunity to provide our perspective on the proposals for reform. We commend you on your review and your stated commitment to making financial advice more accessible and more affordable without either sacrificing consumer protections or reversing the positive and significant changes that have already been made by licensees and advisers.

Should you require additional information, please contact me directly.

Sincerely

Sean Graham
Managing Director
Assured Support Pty Ltd