26 September 2022

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

By email: AdviceReview@treasury.gov.au

Dear Ms Levy

**Quality of Advice Review**

The Australian Financial Markets Association (AFMA) welcomes the opportunity to make comment on the Quality of Advice Review's consultation on Proposals for Reform.

AFMA welcomes the boldness of the Review's proposals for reform, which proposes to sweep away much of the complex detritus of the current regime. As we noted in our meeting, too often reform projects fail through insufficient ambition; so, we are pleased this is unlikely to be the case with the Review. That said, the challenges of the harder reform road being undertaken, that of a more thoroughgoing rebuild, should not be underestimated.

AFMA's members include:

1) Firms that offer services to self-directed investors - 'online brokers';
2) Bank dealing desks that offer Foreign eXchange (FX) services to Small and Medium Enterprises (SME); and
3) Full-service brokers.

Our member firms accept that the proposals, if implemented, would entail major changes to business models.

AFMA welcomes many of the proposals outright and believes that all the proposals can be developed into an efficient and workable new framework if sufficiently advanced.

While we are supportive of the project, we caution that some of the key reforms, notably the proposed scope of what is 'personal advice' and the criterion of 'good advice' require significant further development to be successful. For our part of the financial sector, the proposals outline a regime that remains a poor fit, with an orientation towards financial

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planning; rather than working well from the start for the well-established categories of transactional service providers.

There is, however, the potential for the progression of some proposals to the original timetable, and AFMA would support these being delivered in a first round of reforms to bring quick wins, build momentum for the project, and spread out the implementation challenge for firms.

For providers of financial planning type personal advice under the current regime, we fully appreciate the advantages of the proposed reforms. However, for providers of general advice that do not wish to provide personal advice, the increase in risk of the proposals could readily drive businesses to endeavour to avoid providing even general information in order to manage the associated risks. The proposals address the financial planning world well, but for transaction services companies, such as our members, the approach is fundamentally unsuitable and is not supportive of the needs of their clients.

The advice regime never made sense for transactional services. There are two elements to our members' services. The primary service is the provision of a transaction service and advice that helps clients navigate these services. This can include information and advice on the spot market and how to navigate it. This information must be immediately responsive to market developments and cannot subject to long processes, as might be appropriate for financial planning.

The secondary service is the information service about financial products – the research service, which provides information about financial products independent of the product issuer. The research is not biased towards or against any security but competes with other research providers in predicting future price movements.

The recommendations flow purely from information about the products themselves (and the wider business environment) and not the individual circumstances of the investor. This is a clearly distinct service, separated by Information Barriers from client trading activities, provided by financial services licenced entities and should recognised as such by the regulations and conceptual approach. It is unreasonable to require this service to face a regime designed for financial planners dealing with clients directly.

The one size fits all model that treated all interactions with investors as a cut down version of financial planning has been proven profoundly misconceived and the Review has yet to address this fundamental fault line. Therefore, conceptual work is required.

We provide our comments below in relation to the Proposals that are relevant to our members. We have considered the consultation questions but note that their framing is not optimally broad for a paper at the proposals stage. AFMA strongly supports consultation at the proposals stage, but to be most effective, those proposals be tentative; potentially subject to substantial change or cancellation and not just considered for refinement.

To sufficiently develop the proposals into optimized solutions will require more time than the Review has available, given its Terms of Reference from the previous Government. AFMA strongly advises the Review to recommend to the current Government that a process be set in place with sufficient time to do so. Various reform processes have been

ongoing for well over a decade and an extra 12 months to ensure a well-developed final position, should be seen in that context.

Recent industry discussions in which AFMA has participated have confirmed that the broad finance industry including superannuation, planners, market participants and other groups have significant work to do to fully understand the proposals, their implications for business models — and only then have a full understanding of any associated problems with the new framework. These need to be fully worked through in a careful way to ensure a successful outcome. Again, the key risk is haste.

We note that the short timetable for response to this consultation paper has also limited our ability to provide comprehensive answers and that our comments should be seen as directional suggestions rather than being comprehensive and definitive.

We thank you for the offer of further dialogue and look forward to contributing to the continued development of the proposals.

Yours sincerely

Damian Jeffree

**Senior Director of Policy**

**AFMA Responses to Proposals**

1. The financial services regime should regulate the provision of 'personal advice'. The definition of 'personal advice' should be somewhat broader so that it is clear it applies whenever a recommendation or opinion is provided to a client about a financial product (or class of financial product) and, at the time the advice is provided, the provider has or holds information about the client's objectives, needs or any aspect of their financial situation.

   This would replace the current definition of 'personal advice' which applies where the provider actually considers the client's objectives, financial situation or needs, or where a reasonable person might expect the provider to have considered any of these matters.

The scope definition along with the definition of 'good advice' are core outcomes of the Review, and they interact with each other. Some issues can be addressed with adjustments to one or the other or a combination.

AFMA members, including those that operate self-directed models, are keen to provide information to clients to assist them use their services and avoid unwanted outcomes. Information for our members in this context is often to support the transactional service.

Retail investors are increasingly inundated with information, so to help them, firms wish to tailor the information they provide to those clients with data firms hold about those clients to that which is most useful to the client. Firms are concerned, however, that this could be unintentionally interpreted as an opinion or recommendation. For example, notifying a client that has previously participated in a capital raising about an upcoming raising that they might otherwise not be aware of, could fall into this category.

Firms are similarly concerned that emails to assist customers in interacting with their platform, could drift into being personal advice.

There are questions here also around whether brokerage is commission (brokerage is treated separately to commissions under RG246 and can be flat rate, stepped rate, or percentage).

AFMA recommends that, consistent with New Zealand practice, the customers and providers be permitted to limit by agreement, the scope of what information must be considered by the provider when providing the advice. This limited scope should then flow through to the good advice test for that interaction.

This will allow firms to continue to meet the priority of clients for efficient, least cost transactions.

Similarly, firms are concerned that above line marketing and the provision of tailored information to investors, including for educational purposes, should not be caught in scope as Personal Advice; even where firms hold personal information about the client.

AFMA also recommends that information provision about a class of financial products, as opposed to specific financial products, be specifically excluded as personal advice. This would be consistent with the approach in New Zealand and would assist with the promotion of financial literacy. We have further queries around whether the exemption for basic banking products extends to payments and cash management products, and to financial products regulated under the ASIC Act.

AFMA recommends that consideration be given to how industry could be empowered to standardise some advice relationships within the flexibility provided by the proposed scheme. Industry standards can assist bringing consistency of practice within practice areas – increasing consistency of outcomes for investors, and significantly reducing risks for firms who can be assured they are meeting an appropriate benchmark. The use of industry standards is far preferable than relying solely on the exposition of the law through litigation outcomes, which is slow and expensive.

Thought should also be given to the reality that ASIC is likely to do the majority of the legislative interpretation and that relevant points of law only rarely come before the courts. Additionally, in the absence of interpretative views, ASIC is often asked for its views, and this tends to have more practical effect than the decisions of the court given the relative volumes. It is also worth noting that courts have often demonstrated they will pay careful attention to ASIC's interpretations even where matters do come before them.

There is much to be resolved about the two limbs of the proposed scope test:

(1) a recommendation or opinion is provided to a client about a financial product (or class of financial product) and,
(2) at the time the advice is provided, the provider has or holds information about the client's objectives, needs or any aspect of their financial situation.

In relation to the first limb, AFMA members believe there should be scope for discussion based on tailored information where there is not an express recommendation or opinion. For licenced entities to be captured, as in scope for advice, there should be a requirement for an overt request for advice on the part of the customer, and there should be limitations on the information that needs to be considered (as to relevancy and good industry practice).

For SME FX products, there should not be a requirement to consider products outside of those provided by the bank.

In relation to the second limb, some entities do not have information and could avoid providing advice through this mechanism. We note that while these parties (such as 'finfluencers') might not be able to pick up conflicted remuneration under the proposals, they could be remunerated by website advertising and potentially other models. Getting the correct balance is important as these parties can be of genuine assistance to increasing financial literacy. We suggest more work is required to understand the best delineation between who should require a financial services licence (e.g. potentially those providing recommendations and 'operating as a business').

In relation to the second limb, large providers will have information that is not accessible to particular business units for good reasons – for example, the banking history of a stockbroking client should not be captured. For firms seeking FX services, a bank might have access to significant payment history data but, requiring the bank to make use of all this data to provide a simple FX forward will only increase the costs for the client. As noted above, this should be able to be scoped out by agreement. The logic of corporate groups and the rules around them needs more exploration.

In this context, financial information about a client has not always been collected for the purposes of providing financial advice and therefore might not be appropriate to use this information for advice purposes – for example, a licensee may not have a complete picture of a client's financial situation based on the financial information they have. A partial view provided by the available information collected for another purpose could well be misleading, or where planning type advice is sought, if the information does not cover the client's needs and objectives– this may also create difficulties.

To be relevant information about a client's objectives or needs, this should be information communicated by the client or authorised to be used for the purposes of receiving financial advice.

We are aware that there is an understanding that Research reports should be out of scope. AFMA strongly supports alteration of the scope test to this end. Research reports are not designed to be tailored to cater for a particular client's objectives, financial situation or needs. However, advice providers may have aspects of a client's financial situation or other personal information available to them.

We suggest further that research reports form part of a continuum of communications received by retail clients and that careful consideration should be given to a typical range of these communications. In the product advice space these have a valuable function in informing investors about market developments but are often required to be done promptly to respond to market events.

As a general comment, while we understand the need to capture bad actors, the proposed definition of scope is currently too broad and should be narrowed. For licenced transactional businesses, an agreement to provide advice should be a key part of the scoping test.

2. The regime should no longer regulate 'general advice' as a financial service and the definition should be removed together with the obligation to give a general advice warning.

   What is currently general advice (but would not be covered under the proposed definition of personal advice) should continue to be subject to general consumer protections, in particular the prohibition against engaging in misleading or deceptive conduct in connection to the supply of financial services. The conflicted

remuneration provisions would also need to be adjusted so that they continue to apply to conduct which is currently general advice.

AFMA does not oppose removing the category of 'general advice'.

We note that DDO would need to be further considered – as general advice is a significant part of what was covered. If general advice is removed, this could push more or all responsibility back onto the issuer. Previously the distributor would be responsible for selecting distribution channel etc. This would need to be further explored.

3. The financial services regime should require a person who provides personal advice to provide 'good advice'. 'Good advice' is advice that would be reasonably likely to benefit the client, having regard to the information that is available to the provider at the time the advice is provided.

   The obligation to provide 'good advice' would replace the best interests duty, the appropriate advice duty, the duty to warn the client and the duty of priority in Chapter 7 of the Corporations Act.

AFMA supports increasing the availability of advice.

The two clauses in the 'good advice' definition that require further elaboration are:

1. "reasonably likely to benefit the client"; and
2. "having regard to the information that is available to the provider at the time the advice is provided"

In relation to the second, we understand this "information" will be with regard to both (1) the client, their needs etc. and (2) the relevant products.

The term 'available' is broad and could be read widely to any information about the product or the client that was potentially able to be gained at the time. For client information, this could imply an exhaustive search which would not be suitable for product advice providers unless it is scaled by agreement or industry standard (or some combination thereof). We suggest it should be limited to relevant information held by the entity (with clauses to prevent gaming this limitation) and within scope for consideration according to the agreement with the client.

In relation to the product information it may set the bar very high. Assuming this was not limited to the information that was readily to hand, a diligent advisor could always find more information to better inform their advice.

In product advice the 'reasonably likely to benefit' could become a requirement to get such calls right with a reasonable likelihood. The most successful traders globally might

get trades right 60 to 70 percent of the time. Even a modest edge of 5% above even chance can equate to significant gains over time.

As discussed in the recent meeting, it is important that if 4 firms have a buy on a security, 1 is neutral and 5 have a sell, that (setting aside concerns about negligence etc.) those respective recommendations can be given to clients of each without undue risk, and to all be 'good advice', even though many of them will turn out to be not of benefit.

'Reasonably likely to benefit', an objective test, may not be intended to be applied with the benefit of hindsight through the 'available…at the time' clause, but it could certainly be open to those for whom the intended benefit failed to accrue to recreate an available knowledge scenario that should have resulted in the opposite recommendation. Whether the drafting provides sufficient protection for parties acting in good faith, is still an open question. AFMA also notes that benefit and harm in the test both require further exploration to consider issues such as neutral advice, and whether the creation of potential 'harm' needs to be undertaken to scale advice.

AFMA sees more benefit in exploring whether the test should be based more around reasonable endeavours, potentially generally, but particularly in relation to product advice. Where the advice is provided by a licenced entity and is separated appropriately from knowledge of client activities; we suggest this is a poor fit for the 'good advice' test.

4. A provider of personal advice should be a 'relevant provider' where the provider is an individual and the client pays a fee for the advice, the provider (or the provider's authorising licensee) receives a commission in connection with the advice, there is an ongoing advice relationship between the adviser and the client, or the client has a reasonable expectation that such a relationship exists. The professional standards would not apply to a body corporate nor to an individual who is not a relevant provider.

   A 'relevant provider' must (as they do now) comply with the professional standards (education and training standards and the Code of Ethics), noting the Government is separately considering the professional standards. This would replace the existing requirement that any individual who provides personal advice to a retail client be a relevant provider.

As noted above questions around what is captured as commission should also be explored, including whether margin or spread costs could be inadvertently captured.

5. No response.
6. No response.
7. No response.

8. Providers of personal advice should obtain annual written consent from their client to deduct ongoing advice fees from a financial product. The consent form should explain the services that will be provided and the fee the adviser proposes

to charge over the course of the upcoming 12 months. Where advice fees are deducted from more than one product, a single consent form should cover each of the products issued by a product issuer.

This would replace the current requirements for advisers to annually give clients a fee disclosure statement, seek their agreement to renew fee arrangements and obtain their clients' signed consent to deduct fees from financial products.

AFMA agrees with this proposal.

9. Providers of personal advice should be able to determine what form of advice would best suit their clients. Providers should be required to maintain complete records of the advice they provide and to provide a written record of advice to a client on request. This would replace the current requirement for advisers to provide a statement of advice or record of advice.

AFMA agrees in principle. However, we note that as drafted 'complete records' there may be an increased record burden. We expect this is not intended and stand ready to assist in redrafting.

10. Providers of personal advice should either continue to give their clients a copy of the financial services guide or, make information available to their clients on their website about their remuneration and other benefits they receive, their internal dispute resolution procedures and AFCA. This information should be available at the time the advice is provided. This would offer advisers increased flexibility in how they provide information to their clients.

AFMA agrees with this proposal.

11. The reporting requirements under the design and distribution obligations regime should be simplified by requiring relevant providers to only report to the product issuer where they have received a complaint in relation to a financial product.

    Providers of personal advice who would no longer be required to be relevant providers, would continue to be subject to the current reporting requirements under the design and distribution obligations regime.

AFMA agrees with this proposal.

12. There should be an adequate transition period for implementing these changes. Consideration should also be given to allowing providers to 'opt in' early.

AFMA agrees with this proposal. We note that the transition should align with the educational requirements currently under consultation and allow for roll out of programs (even where the provider does not have to be a relevant provider).