THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: BLC:JvdPsb230922

23 September 2022

Secretariat, Quality of Advice Review
Financial System Division
Treasury
Langton Cres
Parkes ACT 2600

By email: advicereview@treasury.gov.au

To whom it may concern,

Quality of Advice Review

The Law Society of NSW appreciates the opportunity to make a submission in response to the Proposals Paper for the *Quality of Advice Review*. The Law Society's Business Law Committee has contributed to this submission.

Personal Advice

The Consultation paper sets out the current legislative regime introduced by the *Financial Services Reform Act 2001* (Cth) (**FSRA**) and the *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth) (**FOFA**). The relevant provisions are now found in the *Corporations Act 2001* (Cth) (**Corporations Act**).

The obligations on advisers and product issuers when providing personal financial advice to retail clients currently falls into two categories:

1. the FSRA obligations, introduced in 2001, to provide information disclosures to retail clients, including product disclosure statements (**PDSs**); financial services guides (**FSGs**); and statements of advice (**SoAs**); and
2. the FOFA obligations, introduced in 2012.

As outlined in the Consultation Paper, the FOFA obligations were introduced after the Parliamentary Joint Committee on Corporations and Financial Services' *Inquiry into financial products and services in Australia* (**Ripoll Inquiry**)[1] concluded that the FSRA disclosures were insufficient to protect retail clients from harmful advice, as demonstrated by the losses suffered by investors in the cases of Storm Financial and Opes Prime.

[1] Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into financial products and services in Australia* (Report November 2009) (**Ripoll Inquiry**).

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au
T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au
Law Council OF AUSTRALIA
CONSTITUENT BODY

As a result, the FOFA obligations included:

- a ban on conflicted remuneration, such as commissions and volume-based payments;
- opt-in fee structures that require advisers to renew their clients' agreement to ongoing fees every two years;
- provision of annual fee disclosures; and
- the duty for financial advisers to act in the best interests of their clients.

The consultation paper makes four proposals which directly address the obligations for providing Personal Advice:

a) **Proposal 3** changes the obligation of an adviser to '*act in the best interest of a client*' to an obligation to provide '*good advice*';
b) **Proposal 8** removes the requirement to provide a fee disclosure statement so long as annual written consent is obtained from clients to deduct advice fees;
c) **Proposal 9** removes the requirement to provide SoAs so long as the adviser maintains complete records of the advice they provide and would provide a written record of the advice to a client on request;
d) **Proposal 10** provides that an FSG would not need to be provided if the information contained in the FSG is made available to the client on the provider's website.

The Proposals Paper suggests that each of these proposals would serve to reduce regulatory complexity and burden and thereby improve the quality of advice by advisers.

Proposals 8,9 and 10

We support in principle Proposals 8, 9 and 10, to change the FSRA disclosures.

The Ripoll Inquiry showed that detailed SoAs, FSGs, and PDSs (**FSRA documents**) did not protect consumers from bad and conflicted financial advice. ASIC reported to the Inquiry that many investors lacked the financial literacy to understand the FSRA documents.[2] It was also observed that the provision of FSRA documents, particularly SoAs, did not lead to good advice if the adviser did not act in the best interests of the client. In the case of Storm Financial, for example, many individuals received "cookie-cutter" advice, which contained common clauses, irrespective of to whom the advice was being issued.[3]

FSRA documents provide retail clients with some understanding of the advice given to them, but they do not prevent the harm of bad advice. Retail clients place reliance on the trusted position occupied by their advisers, and generally will not review the FSRA documents to see if the advice is in fact in their interests.

Proposal 3

The Ripoll Inquiry recommended that advisers should be required to act in their client's best interest when providing advice and went so far as to suggest the imposition of a fiduciary duty, noting that there is 'no reason why advisers should not be required to meet this professional standard, nor is there any justification for the current arrangement whereby advisers can provide advice not in their client's best interests'.[4] Ultimately, the FOFA introduced duties that fell short of fiduciary duties. As set out in the Proposals Paper at 2.2,

[2] Ibid., 99 [5.125].
[3] Ibid., 27 [3.33].
[4] Ibid.,110 [6.28].

the FOFA introduced the ‘best interest’ obligation, but it was not fiduciary as it did not prohibit an adviser acting in their own interests.

Proposal 3 suggests removing the best interest obligation and replacing it with the obligation to provide 'good advice’. 'Good advice' is defined by the Proposals Paper as ‘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’.

We do not support Proposal 3. To state that an obligation to provide ‘good advice’ can act as a replacement for ‘best interest of the client’ is a mischaracterisation. ‘Good advice’ is in effect already obligated under s 961G of the Corporations Act, which contains the requirement that the adviser has a duty to provide appropriate advice. This obligation of appropriate advice is distinct to the best interest obligation under s 961B of the Corporations Act. As was said in *Australian Securities and Investments Commission v NSG Services Pty Ltd* [2017] FCA 345 at [21]:

> It was common ground that, while s 961B is concerned with the process or procedure involved in providing advice that is in the best interests of the client, s 961G is concerned with the content or substance of that advice.

In *Australian Securities and Investments Commission v Dixon Advisory & Superannuation Services Ltd* [2022] FCA 1105, McEvoy J commented on the distinction between the obligation of “best interest” and the obligation of “appropriate advice”, noting at [27]:

> on 28 occasions advice was provided to [the Licensee’s] clients in contravention of s 961B(1) of the Act by virtue of the process undertaken by the representatives. In particular, the failure to take specific steps when determining whether it was appropriate to provide the relevant advice to the clients in the context of their circumstances. Additionally, on 25 occasions advice was provided in contravention of s 961G of the Act by virtue of the substance of the advice.

It was determined that there were four circumstances where there were breaches to “best interest” without breaches to “appropriate advice” (and one circumstance where there was a breach of “appropriate advice” without a breach to “best interest”). This reinforces the view that the obligation to act in the client’s best interest is not identical to the obligation of providing advice which is appropriate and/or good.

Advice can be substantively good, but in the process of formulating that advice the adviser may still have considered interests other than the client’s best interest. The removal of the best interest obligations thus risks a recurrence of cases similar to those of Storm Financial and Opes Prime. We therefore do not support the removal of the best interest obligation and submit that its removal poses significant risk to consumers and also to public confidence in the financial services/advisory industry.

General Advice

Proposal 2 provides that ‘general advice’ should no longer be regulated as a financial service and the definition of ‘general advice’ should be removed, together with the obligation to give a general advice warning. We support this proposal.

Currently s 766B of the Corporations Act defines General Advice as ‘financial product advice that is not personal advice’.

Financial Product Advice is defined in s766B as a recommendation or a statement of opinion, or a report of either of those things, that:

a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or
b) could reasonably be regarded as being intended to have such an influence.

Personal Advice is defined in 766B as financial product advice that is given or directed to a person (including by electronic means) in circumstances where:

a) the provider of the advice has considered one or more of the person's objectives, financial situation and needs (…); or
b) a reasonable person might expect the provider to have considered one or more of those matters.

However, the acts of asking for information solely to determine whether a person is in a target market (…) for a financial product, and of informing the person of the result of that determination, do not, of themselves, constitute personal advice.

These various definitions would suggest that 'general advice' is merely general information about financial products or financial services. This was the conclusion made in the Proposal Paper (at 1.7). The fact that the provision of general information about financial products attracts regulation as a financial service means that the provider of that information is required to hold an AFSL. This has the paradoxical effect of creating barriers for people to freely provide information on financial products and thereby restricts consumer access to financial product information.

The proposal to allow general information on financial products to be provided without an AFSL, subject to general consumer protections, is likely to improve consumer access to financial product information and reduce the risk of consumers receiving poor advice.

Superannuation Funds Trustees

Proposals 5, 6, and 7 suggest a regime whereby:

5. Superannuation Fund Trustees would have discretion on the provision of financial advice to their members and the manner in which such advice is to be charged;
6. Superannuation Fund Trustees are allowed to charge members collectively to provide for "intra-fund" financial advice; and
7. Superannuation Fund Trustees can charge financial advisers fees to the account of the member that received personal advice.

We support Superannuation Fund Trustees being able to facilitate the provision of financial advice to their members. This would not seem to require legislative change as superannuation funds currently provide their members access to financial advice and employ financial advisers.

The substantive change is permitting superannuation fund trustees to have the discretion to charge members collectively to provide financial advice. We do not support this proposal. The Proposals Paper suggests that the only advice that would be permitted under this proposal is intra-fund advice, an industry term for financial product advice given by or on behalf of a superannuation fund trustee to a member of the fund about their interest in the fund. This is personal advice, and thus the risk of this proposal is members paying for advice that does not individually help them at all. It is very hard to contemplate a proposal for

collective fees for financial advice that would also meet the Proposal Paper's objectives that such a regime be in 'the best financial interests of members, treat members fairly, promote members' financial interests, allocate costs between members fairly and reasonably' (at 3.4).

We support that members of superannuation funds have the right to elect to pay for financial advice using monies preserved in their superannuation account, so long as the disclosures and best interest obligations are complied with. Given the high financial barrier for receiving financial advice of around $3,500 per annum, this proposal would provide an avenue for fund members to access financial advice that would improve their retirement financial outcomes.

We have enclosed a completed copy of the Template Questions to this submission.

If you have any questions about this submission, please contact Sophie Bathurst, Policy Lawyer, at Sophie.Bathurst@lawsociety.com.au or on (02) 9926 0285.

Yours faithfully,

Joanne van der Plaat
President

Encl.

Template Questions

1. **Do you agree that advisers and product issuers should be able to provide personal advice to their customers without having to comply with all of the obligations that currently apply to the provision of personal advice?**

   For the reasons cited above, we support the FSRA obligations being relaxed, but do not support an amendment that relieves advisers from the obligation to act in the best interests of a client.

2. **In your view, are the proposed changes to the definition of 'personal advice' likely to:**

   a. **reduce regulatory uncertainty?**

   b. **facilitate the provision of more personal advice to consumers?**

   c. **improve the ability of financial institutions to help their clients?**

   The Proposals Paper has recommended changes be made to the definition of 'personal advice' but merely indicated the changes should be minor and involve broadening the definition of personal advice. We cannot form any view on these questions until exposure draft is available.

3. **In relation to the proposed de-regulation of 'general advice' - are the general consumer protections (such as the prohibition against engaging in misleading or deceptive conduct) a sufficient safeguard for consumers? If not, what additional safeguards do you think would be required?**

   We support the proposed changes to 'general advice' as per the comments above.

4. **In your view, what impact does the replacement of the best interest obligations with the obligation to provide 'good advice' have on:**

   a. **the quality of financial advice provided to consumers?**

   b. **the time and cost required to produce advice?**

   We do not support the proposed changes to remove the 'best interest' obligations as per our comments above. While we consider the relaxing of the FSRA and disclosure obligations will have a significant and direct impact on reducing the time and costs required to produce advice, we consider the removal of the 'best interest' obligations will have a negligible effect of time and cost, but a negative effect on the quality of advice provided.

5. **Does the replacement of the best interest obligations with the obligation to provide 'good advice' make it easier for advisers and institutions to:**

   a. **provide limited advice to consumers?**

   b. **provide advice to consumers using technological solutions (e.g. digital advice)?**

   We do not support the proposed changes to remove the 'best interest' obligations. As there is currently no definition of 'limited advice', we are unable to form a view as to the impact the removal of the 'best interest' obligation would have on advisers and institutions in this regard. As the 'best interest' obligation is not about the form in which advice is provided, we do not believe removing it would have any impact on providing advice to retail clients using technology.

6. **What else (if anything) is required to better facilitate the provision of:**
    a. **limited advice?**
    b. **digital advice?**

    We refer to our comments at 5 above.

7. **In your view, what impact will the proposed changes to the application of the professional standards (the requirement to be a relevant provider) have on:**
    a. **the quality of financial advice?**
    b. **the affordability and accessibility of financial advice?**

    We refer to our comments above. We do not support any removal of the 'best interest' obligation which is not likely to improve the affordability and accessibility of financial advice, but risks poor advice being provided and a loss of confidence in the financial advice industry.

8. **In the absence of the professional standards, are the licensing obligations which require licensees to ensure that their representatives are adequately trained and competent to provide financial services sufficient to ensure the quality of advice provided to consumers?**
    a. **If not, what additional requirements should apply to providers of personal advice who are not required to be relevant providers?**

    We do not support the proposal that a relevant provider/representative does not need to meet professional and educational standards. Whether the professional and educational standards that are set are adequate will depend on details to be provided in any Exposure Draft.

9. **Will the proposed changes to superannuation trustee obligations (including the removal of the restriction on collective charging):**
    a. **make it easier for superannuation trustees to provide personal advice to their members?**
    b. **make it easier for members to access the advice they need at the time they need it?**

    We refer to our comments above. We support improving consumer access to superannuation by way of allowing preserved benefits to be deducted to pay for relevant financial advice, noting that preserved benefits are currently already permitted for other financial products e.g. Life Insurance. We do not support collective charging which would risk exposing consumers to 'fee-for-no-service'.

10. **Do the streamlined disclosure requirements for ongoing fee arrangements:**
    a. **reduce regulatory burden and the cost of providing advice, and if so, to what extent?**
    b. **negatively impact consumers, and if so, how and to what extent?**

    We refer to our comments above and support the streamlining of the disclosure requirements.

11. **Will removing the requirement to give clients a statement of advice:**
    a. **reduce the cost of providing advice, and if so, to what extent?**
    b. **negatively impact consumers, and if so, to what extent?**

    We refer to our comments above and support the relaxing of the requirement as to Statements of Advice.

12. **In your view, will the proposed change for giving a financial services guide:**
    a. **reduce regulatory burden for advisers and licensees, and if so, to what extent?**
    b. **negatively impact consumers, and if so, to what extent?**

    We refer to our comments above and support the relaxing of the requirement as to Financial Services Guides.

13. **What impact are the proposed amendments to the reporting requirements under the design and distribution obligations likely to have on:**
    a. **the design and development of financial products?**
    b. **target market determinations?**

    We are unable to form any views until we can review any exposure draft that implements this change.

14. **What transitional arrangements are necessary to implement these reforms?**

    We are unable to form any views until we can review any exposure draft which sets out the transitional arrangements.

15. **Do you have any other comments or feedback?**

    No