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Response to Delivering Better Financial Outcomes draft legislation

We welcome the opportunity to respond to the draft legislation covering the first tranche of the Delivering Better Financial Outcomes reforms.

While we understand the industry is keen to move quickly on changes that will deliver efficiency, we thank Treasury for its measured approach in ensuring that these changes achieve the desired outcome and are not rushed through with unintended consequences. It's essential to carefully work through how these changes will apply in practice.

Kit Legal is a specialist financial services law firm. We act for over 120 financial services firms around Australia, assisting them to comply with their regulatory obligations. Most of our clients are SMEs that hold their own AFSL.

We have only responded to the draft legislation covering ongoing fee arrangements (Part 2) and financial services guides (Part 3). Other than as set out in our attached submission, we agree with the draft legislation.

Our seven recommendations are:

1. Prescribe a standard consent and renewal form that all account providers must accept (except where it would put them in breach of their obligations).
2. Allow a consent to be signed at any time before the expiry of the renewal period.
3. The obligation for a fee recipient to give written notice to a client that the arrangement has been terminated should not constitute a civil penalty provision.
4. Extend the time frame for providing written notice to a client that the arrangement has been terminated from 10 business days to 30 days.
5. Amend the requirement to give a 'copy' of the FSG to enable the providing entity to give a copy of the information required to be in the FSG when requested by a client.
6. Expand the application of the flexible FSG provisions to providing entities authorised to provide personal advice to retail clients, rather than to when the financial service is personal advice.

7. Remove the obligation to specify the day on which information was prepared or last updated on the website.

We explain our reasoning for these recommendations in the attached submission.

We welcome any queries on our submission and otherwise look forward to seeing the legislation progress through Parliament with our recommended changes incorporated.

Kind regards



The team at Kit Legal



Treasury Laws Amendment (2024 Measures No. 1) Bill 2024: Quality of Advice Tranche 1

Part 2 – Ongoing Fee Arrangements

We see four key issues with the changes to ongoing fee arrangements as drafted that will limit any efficiency gains (and therefore cost savings for consumers) and allow the current confusing consumer experience to continue:

1. The failure to mandate a specific form of renewal and consent doesn't provide sufficient certainty of process across the industry. Consent forms should be accepted by all industry participants if in the prescribed form (unless for instance, the product terms and conditions do not permit the agreed fee to be paid).
2. The proposed changes don't allow sufficient flexibility in when a client can sign the fee consent. The legislation should permit a client to sign a consent and renewal at *any time* before the 150-day renewal period expires to enable fee recipients to streamline their annual renewal process.
3. The requirement to provide a client with notice of termination should not constitute a civil penalty provision.
4. The timeframe for giving written notice of termination should be extended from 10 business days to 30 days.

RECOMMENDATION 1: Prescribe a standard consent and renewal form that all account holders must accept (except where it would put them in breach of their obligations)

One of the practical problems that fee recipients have encountered with the current fee consent regime is that, in many cases, the product issuer will specify the format for the consent and only accept that form.

It follows that if a client holds more than one financial product from different issuers, then their adviser may have to arrange for the client to sign different forms for each issuer. In addition, the fee recipient cannot adopt a uniform approach to using consent forms and arranging signatures, which would drive significant efficiencies.

The current process means that, in some cases, clients are signing multiple forms, often needing clarification as to the fees they are agreeing to pay. Fee recipients may be able to obtain consent electronically for some product issuers but not for others, resulting in a very inefficient process.

These issues were reflected in Recommendation 8 of the Quality of Advice Review Final Report, which stated there should be a single, prescribed consent form for both the fee renewal and consent.

The draft legislation doesn't resolve this issue. Instead, it intentionally retains flexibility for product issuers, perpetuating the existing inefficiencies experienced between advisers and their clients:

- Draft s 962Y provides that the Minister may approve one *or more* forms.

- The Explanatory Memoranda provides that the prescribed form is not mandatory.
- Draft s 962Z doesn't cure this issue because it requires the adviser to work with multiple forms, even if they can be combined into one form.

We suggest that s 962Y be amended to mandate the prescribed form across the industry and that product issuers be required to accept a form unless the prescribed fee contravenes the product terms and conditions. This is necessary to:

- Provide certainty of process, leading to greater efficiencies for advisers (and associated cost savings); and
- Create greater simplicity and understanding for clients who only need to consider a single set of terms.

We recommend that draft section 962Y be amended by removing the words 'one or more forms' and replacing them with 'a form'. In addition, the Note to draft section 962Y should be amended to add the words 'where required for the sole purpose of the account provider complying with its legal obligations with respect to the account' at the end of the Note.

RECOMMENDATION 2: Allow a consent to be signed at any time before the expiry of the renewal period to cover an ongoing fee arrangement

Our clients also report a loss of efficiency (and client confusion) caused by the requirement that a new consent and renewal can only be signed once the anniversary date has passed. In practical terms, this arises in two situations:

- A client may come to see an adviser in the weeks before the anniversary date, and because of the rigid timeframes for signing the renewal and consent, the client cannot sign the document when meeting with the adviser.
- Some licensees wish to streamline their consent process by 'batching' the forms i.e. by sending out all consent renewal forms at the same time or at set times throughout the year. This is only possible under the current regime if all anniversary dates are the same, which is rarely the case as the anniversary date depends on when the client enters into the ongoing fee arrangement.

The anniversary date can currently only be set/reset when the client signs the ongoing fee arrangement (ASIC Information Sheet 256). Therefore, even if a licensee acts to align all its existing clients, new clients will have to sign an ongoing services agreement when they commence with the licensee and then a further agreement at the standardised consent date, which creates considerable confusion for the client.

The draft legislation removes some roadblocks to efficiency in the current regime by removing the need for the FDS to disclose fees in the previous 12 months and streamlining the timeframe for the renewal period.

However, it still limits licensees from adopting a more efficient process because:

- Draft s 962E doesn't allow a consent for an existing ongoing fee arrangement to be signed at any time other than within the renewal period, as a consent will only cover an ongoing fee arrangement if it's within the period specified in the table (draft s 962E(f)); and

- The draft legislation does not appear to provide any mechanism for re-setting the anniversary date.

To increase efficiency, we therefore suggest that consent for an existing ongoing fee arrangement should be able to be given at any time before the end of the renewal period. While this extends the period a consent may cover, in our view the resulting risk to clients is relatively low and is controlled, at least in part, by the requirement for the consent to specifically state the period covered by the consent and the right for the client to terminate the arrangement at any time.

We recommend that Item 2 in the table in draft s962E is amended to state ‘at any time before the last day of a renewal period for an arrangement’.

RECOMMENDATION 3: The obligation for a fee recipient to give written notice to a client that the arrangement has been terminated should not constitute a civil penalty provision

Licensees provide notice or confirmation of termination of an ongoing arrangement as good business practice and to manage the risk that the client believes an advice relationship may still be in place.

However, an obligation to do so, characterised as a civil penalty provision, will result in increased cost and inefficiencies in reporting every one-off breach to ASIC under the breach reporting regime. Failure to give this notice at all or on time does not have a significant detrimental impact on consumers. Failure to comply with this provision should be reported to ASIC if the failure constitutes a reportable situation on any other limbs (rather than a breach of a civil penalty provision).

We recommend that draft sections 962F(4), s962G(5) and s962WA (4) do not constitute civil penalty provisions.

RECOMMENDATION 4: Extend the time frame for providing written notice to a client that the arrangement has been terminated from 10 business days to 30 days

Giving sufficient time for a fee recipient to process fee consents and determine the ongoing arrangements that have been terminated is important to avoid errors and manage workload.

In our view, more than ten business days are needed to do this, and there is no reason for this level of urgency. Extending this timeframe to 30 days will give the fee recipient time to prepare and send notices in an orderly way, and won't result in any consumer detriment.

We recommend that the reference to 10 business days in draft sections 962F(4), s962G(5) and s962WA(4) be extended to 30 days.

Part 3 – Financial Services Guide

We agree that legislating for flexibility in how the information contained in an FSG can be provided to a client is good for both adviser and client.

The efficiencies gained by the ability to include the information required to be in the FSG on the providing entity's website will not be realised if a separate version of an FSG document must be maintained in parallel. This will result in two sets of information to be maintained and updated with version control.

RECOMMENDATION 5: The requirement to give a 'copy' of the FSG be amended to enable the providing entity to give a copy of the information required to be in the FSG when requested by a client

This would enable the providing entity to choose whether to maintain two versions of the 'FSG' or, if a client requests the information in the FSG, to provide them with an extracted copy of website pages where the information required to be included in the FSG is contained.

We recommend that draft sections 941D(5)(c) and 943G(2) be amended by removing the words '*the Financial Services Guide*' and replacing them with the words '*a copy of the information required to be in the Financial Services Guide*'. The Note to draft transitional section 941F should be amended by removing the words '*A Financial Services Guide*' and replacing them with '*A copy of the information required to be in the Financial Services Guide*'.

RECOMMENDATION 6: Expand the application of the flexible FSG provisions to providing entities that are authorised to provide personal advice to retail clients, rather than to when the financial service is personal advice

As stated above, the intended efficiencies in having information available on a website rather than a separate FSG document will only be realised if the FSG document is not required at all. The same process should apply to general advice and dealing services as to personal advice.

A providing entity should have flexibility to choose the process it wishes to adopt and adopt it uniformly across its services. If it's sufficient for clients receiving personal advice to receive disclosure information this way, it should also be sufficient for clients receiving only general advice or dealing services from those providing entities.

This recommendation reflects the intended subject of these reforms, i.e. licensees authorised to provide personal advice to retail clients, while ensuring efficiencies can be realised across all aspects of the licensees' services.

We recommend that section 941C(5A)(a) be removed and a new section 941C(5A)(b)(iii) be inserted that reads, '*the providing entity is authorised to provide personal advice to retail clients on relevant financial products; and*'. The draft transitional section 941F(1)(b)(i) should be removed and replaced with '*is authorised to provide personal advice to retail clients on relevant financial products; and*'.

RECOMMENDATION 7: Remove the obligation to specify the day on which information was prepared or last updated on the website

Our understanding of the draft legislation is that ‘the information’ specified by sections 942B or 942C must be shown on the website, but there’s no requirement that it be all in one place or presented in a single document as per a traditional hardcopy (or electronic equivalent) FSG. This is based on the references to ‘each web page’ in various sections e.g. draft sections 941C(5A)(c) and 943H(2).

Strictly read, any time information specified in sections 942B or 942C appears on the website, that page must be accurately dated with the date the information was last updated or prepared. Sections 942B and 942C include various types of information that would be used frequently on the website e.g. the name of the providing entity (s 942B(2)(a)) and the authorised services (s 942B(2)(c)). These types of information are likely to appear on every page of the licensee’s website, therefore triggering the obligation to keep the page up-to-date and displaying the relevant date.

We believe this obligation will impose significant operational inefficiencies. In addition, it is not clear how this benefits consumers.

The potential practical implementation issues we foresee include:

- Websites are updated for various reasons beyond updating an FSG and, depending on how a website is developed, it may be that the date last updated will reflect updates unrelated to the FSG.
- These changes will also be difficult to track if the website is managed by an external IT consultant, which is commonly the case.
- A page could end up displaying multiple dates, creating confusion rather than clarity.
- Websites are subject to technological glitches that traditional hardcopy (or electronic equivalent) FSGs are not.

We agree that it’s important that clients have access to up-to-date information.

In our view, the intention of the law could be achieved by having a simplified obligation to ensure that the information is kept up to date at all times and that the providing entity keep its own records of updates to the FSG-related information.

If the dating requirement is to remain, an alternative means of addressing our identified concerns would be to require ‘the information’ specified in sections 942B or 942C to be displayed on a webpage (or webpages) prominently designated as ‘*Financial Services Guide*’. It should follow that only this webpage (or webpages) would require specification of the preparation or update date.

We recommend that:

- **Draft section 941C(5A)(c)(ii) and transitional section 941F(2)(b)(ii) are amended to remove the words ‘*and specifies the day on which it was prepared or last updated*’; and**
- **Draft section 943H(2)(b) is amended to remove the words ‘*(including specifying the day on which it was prepared or last updated)*’; or**

- Alternatively, the date of preparation or last update of the required information should only be required for the '*Financial Services Guide*' webpage(s).