6 December 2023

Retirement, Advice and Investment Division
Treasury
Langton Cres
Parkes ACT 2600

Submitted via email: financialadvice@treasury.gov.au

Dear Ms Schneider Rumble,

Delivering Better Financial Outcomes – reducing red tape and other measures

Chartered Accountants Australia & New Zealand (CA ANZ), CPA Australia, the Institute of Public Accountants and the SMSF Association (the Joint Associations) welcome the opportunity to provide comments on the draft legislation delivering the first tranche of the Delivering Better Financial Outcomes package of reforms.

The Joint Associations welcome the release of draft legislation to implement the first batch of recommendations from the Quality of Advice Review. However, we do hold a number of concerns regarding the wording of the legislation and make the following recommendations:

- Further consideration be given to how greater consistency and clarity can be achieved in the range of personal advice that superannuation funds provide and how this is disclosed to members.
- Further consultation with the sector is undertaken to design a single standard fee consent form, that will be prescribed, as stated in recommendation 8 of the Quality of Advice Review, and
- Sections 962F(4), 962G(5) and 962WA are not included as civil penalty provisions under section 1317E of the Corporations Act 2001.
- Section 941C(5A)(b)(i) should be amended to:
  'the providing entity offers the client the option to receive a copy of the Financial Services Guide and the client declines this offer'
- 'Advice' be amended to 'financial service' in section 941D(5)(d) to align with the obligation in section 941A of the *Corporations Act 2001*, that a providing entity must provide a FSG when then provide a retail client a financial service, as in section 766A of the *Corporations Act 2001*.
- The proposed term 'relevant product' is removed from section 963BB and the specific insurance products are listed or, where appropriate, the term financial product is used.

Our detailed responses are contained in the Attachment.

For any questions in relation to this submission, please contact Keddie Waller, Senior Manager Public Practice, Financial Planning and Ethics Policy at CPA Australia via email keddie.waller@cpaaustralia.com.au

CHARTERED ACCOUNTANTS AUSTRALIA + NEW ZEALAND
CPA AUSTRALIA
IPA INSTITUTE OF PUBLIC ACCOUNTANTS
SMSF ASSOCIATION

Yours sincerely

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ATTACHMENT

Part 1 – Deduction of adviser fees from superannuation

The Joint Associations support the objective of providing legal certainty to superannuation trustees that they can pay financial product advice fees agreed between a member and their financial adviser from the member's superannuation account and ensure that these fees are not taxable benefits for the member.

The revised section 99FA better targets the provision to prohibiting certain costs being charged against members' superannuation interests, to improve understanding about the range of arrangements covered.

However, we note that superannuation trustees will continue to have discretion as to whether they approve the payment of advice fees, consequently we are concerned that the restrictive nature of the new provisions may act as a deterrent for some superannuation funds to consider such requests.

For example, to be eligible to be claimed as a direct operating cost of the superannuation fund, the advice fee must not be incurred in relation to gaining or producing exempt income or non-assessable exempt income. This potentially restricts the scope of possible financial product advice to only:

- contributions advice, excluding superannuation co-contribution advice
- investment advice, provided the member's interest are in accumulation, and
- death benefit payments to non-dependent children.

Further, where the advice fee may be for multiple matters, the superannuation fund must apportion the advice fee between types of income and only amounts attributable to assessable income can be deducted. This is adding significant complexity.

The current drafting of the provision is very broad, prohibiting the deduction of financial product advice fees relating to the derivation of exempt or non-assessable non-exempt income. We acknowledge that circumstances will arise where this is appropriate and consistent with the operative intent of *Income Tax Assessment Act 1997* (Cth) (ITAA97) section 6-15. Such an example would be where the advice relates to a member interest that is a retirement phase income stream. However, the drafting of ITAA97 subsection 295-490(1) needs to be more nuanced. To illustrate, an example is set out below.

Where a client receives financial product advice that recommends that they cease an interest in one fund, and rollover those benefits to another superannuation fund (one better suited to their needs), the fee would not be tax deductible for both superannuation funds. The strict application of the proposed amendments to ITAA97 section 295-490(1) alongside existing sections 6-15 and 306-5, will operate to prevent the tax deduction of the advice fees, with the rollover classed as non-assessable and non-exempt (NANE) income.

The policy rationale for the treatment of the rollover in this way is to ensure the rollover by the receiving fund is not assessable income. For the rollover amount itself, there needed to be certainty to ensure that a rollover is treated as simply the movement of capital from one superannuation fund to another. However, what is not contemplated is the need for advice on a particular interest, that is generating assessable income, the associated replacement product advice which would also result in the generation of assessable income.

Rollover advice inherently includes a consideration of the taxation consequences arising in the superannuation fund interest from the transaction. This includes the impact of capital gains tax on the realisation of investments, and the impact this will have on the rollover amount. Similarly, this level of taxation advice is needed where a member obtains advice in relation to their accumulation interest and seeks to rollover to a retirement phase pension. While the rollover itself is classed as NANE it is inherently linked to the derivation of taxable income. The associated advice fees should therefore be tax deductible.

We acknowledge that some superannuation funds currently do and will continue to approve the payment of advice fees outside of this scope and not claim the tax deduction, which is a great benefit to their members. However, we are concerned that some superannuation funds may consider the requirements to satisfy the new provisions, particularly the requirement to apportion costs between the types of income that can be attributable to assessable income where the advice fee may be for multiple matters, outweigh the benefit of claiming the tax deduction and as a result, decline any member requests. We are also concerned about the many different interpretations that superannuation funds will apply to these proposed provisions. We believe consistency and clarity are essential.

Recommendation:

The Joint Associations recommend that further consideration must be given to how greater consistency and clarity can be achieved in the range of personal advice that superannuation funds provide and how this is disclosed to members.

Part 2 – Ongoing fee arrangements

The Joint Associations support the implementation of recommendation 8 of the Quality of Advice Review to remove the current requirement for a financial adviser to provide a fee disclosure statement to their client as part of an ongoing fee arrangement.

We also welcome moves to consolidate and streamline consent obligations into a single form where a client enters or renews an ongoing fee arrangement and authorises the ongoing advice fees to be deducted from their financial products.

However, if the form is not prescribed the proposed new provisions will fail to address the current issues of duplication and unnecessary complexity for both the client and their financial adviser.

The Joint Associations recommend further consultation with the sector is undertaken to design a single standard form that will be prescribed, as stated in recommendation 8 of the Quality of Advice Review.

Where an ongoing fee is terminated by a client, we support the proposed provision that the fee recipient must not continue to charge the ongoing fee and doing so would result in a civil penalty.

However, we do not support that if the fee recipient fails to provide the client with written notice of the termination within 10 business days that this should also result in a civil penalty provision. We believe a civil penalty is not a commensurate penalty for failing to execute what is an administrative task which will not result in financial loss or harm to the client.

Given this, the Joint Associations recommend sections 962F(4), 962G(5) and 962WA are not included as civil penalty provisions under section 1317E of the *Corporations Act 2001*.

We also note the incorrect provisions have been stated for inclusion in subsection 1317E(3), where the reference to sections 962G(4) and (5) should be to sections 962G(5) and (6) and the substituted section in paragraph 1317GA(1)(a) should be subsection 962G(3) not (5).

Recommendations:

The Joint Associations recommend:

- further consultation with the sector is undertaken to design a single standard form that will be prescribed, as stated in recommendation 8 of the Quality of Advice Review, and
- sections 962F(4), 962G(5) and 962WA are not included as civil penalty provisions under section 1317E of the Corporations Act 2001.

Part 3 – Flexibility for FSG requirements

The Joint Associations support the implementation of recommendation 10 of the Quality of Advice Review to provide flexibility how a client can be provided the information that must be included in a Financial Services Guide (FSG).

However, we believe that the record keeping obligations to retain copies of the information that was on a providing entity's website, possibly across multiple pages, to a client at the time of providing the financial service will be more onerous for a providing entity than having an FSG ready to physically or electronically provide to the client and record on their client's file.

Further, we believe that the proposed civil penalties provisions for failing to provide a client a copy of the FSG within 10 business days after receiving the request or ensuring the website is kept readily up to date, including date stamped, are too severe for non-compliance and will further act as a deterrent for taking advantage of this option.

It is highly likely that new financial planning clients will likely not be familiar with what an FSG is or the obligation to have access to this information before receiving a financial service. Therefore we believe that section 941C(5A)(b)(i) should be amended to place the obligation on the providing entity to offer the client a copy of the FSG, rather than on the client to not request of a copy of the FSG.

We also note that ASIC *Corporations (Disclosure of Lack of Independence) Instrument 2021/125 – Requirements for disclosure of lack of independence* states that

> (2) The statement:
>
> (a) must appear on the first substantive page of the Financial Services Guide that contains the statement
>
> (b) must appear within a box under a bold heading that includes the phrase "Not Independent", "Lack of Independence", or another phrase of like import
>
> I must be in a font size that is at least the same font size as that predominantly used for other text (if any) in the Financial Services Guide; and
>
> (d) must not appear in a footnote.

If the proposed provisions are implemented, the instrument will need to be amended.

Recommendations:

The Joint Associations recommend:

- Section 941C(5A)(b)(i) should be amended to
  - the providing entity offers the client the option to receive a copy of the Financial Services Guide and the client declines this offer, and
- 'Advice' be amended to 'financial service' in section 941D(5)(d) to align with the obligation in section 941A of the *Corporations Act 2001*, that a providing entity must provide a FSG when then provide a retail client a financial service, as in section 766A of the *Corporations Act 2001*.

Part 4 – Conflicted remuneration

The Joint Associations generally support the proposed amendments, including the removal of the exception for agents or employees of Australian authorised deposit-taking institutions from receiving conflicted remuneration tied to the sale of a financial product.

Part 5 – Standard consent requirements for certain insurance commissions

The Joint Associations support the recommendation that a client should provide informed consent before the advice provider can receive a commission tied to the sale of the financial product. This provides a genuine and real opportunity for the client to make an informed decision before deciding to be issued or sold a certain insurance product.

However, we do not support the introduction of the term 'relevant product' as part of these reforms.

Section 910A of the *Corporations Act 2001*, defines relevant financial products to mean financial products other than:

a) basic banking products; or

b) general insurance products; or

c) consumer credit insurance; or

d) a combination of any of those products

Proposed section 963BB defines a relevant product as a financial product that is general insurance product, a life insurance product, or consumer credit insurance.

We believe that the proposed definition of a relevant product will create confusion given the overlap between the two definitions. Further, we believe it is unnecessary to introduce this new term and recommend that instead the three relevant insurance products are referenced instead, being general insurance product, a life insurance product, or consumer credit insurance.

We also note that in proposed section 963BB (1)(a) the term 'relevant financial product' has been used incorrectly, further evidencing the issues with using such like terms.

Recommendation:

The Joint Associations recommend that the proposed term 'relevant product' is removed from section 963BB and the specific insurance products are listed or, where appropriate, the term financial product is used.

Other Comments

Glossary

We note that in the draft Explanatory Materials that the abbreviation 'FSG' – 'Financial Services Guide' is repeated in the glossary after 'SIS Act' and should be removed.

Consistent use of defined terms

The draft Explanatory Materials and draft Bill use the terms 'financial advice' and 'financial product advice' interchangeably. However, the term 'financial advice' is not defined. Therefore to ensure consistency and clarity in the new provisions, we recommend that 'financial product advice' is used, as defined in section 766B(1) of the *Corporations Act 2001*.

We also recommend the defined term 'financial adviser', as defined in section 923C of the Corporations Act 2001, and not 'adviser is used where the specific provision applies only to a financial adviser.

We note that the draft Explanatory Materials also use 'financial services licensee' and AFS licensee interchangeably and recommend for consistency AFS licensee is used.