AMP

Response to the Consultation on the Corporations Amendment (Future of Financial Advice) Bill 2011 – Exposure Draft

AMP Group

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SUMMARY

AMP welcomes the opportunity to respond to the exposure draft legislation for the Corporation Amendment (Future of Financial Advice) Bill 2011 (the "Bill") which was released for public consultation on 28 August 2011.

AMP has consistently supported the principles underpinning the proposed Future of Financial Advice ("FoFA") reforms aimed at increasing the professionalism of financial advisers and enhancing consumer confidence in the industry.

AMP has led the industry in moving away from upfront and ongoing commissions for advisers on new superannuation, pension and investment business from 1 July 2010 and we are committed to working with the Government and the industry to achieve the right outcomes for our customers and advisers.

Our submission does not seek to address all of the issues identified through review of the Bill and we have limited our comments to those issues to be of most significance. The body of our submission outlines our general observations with the Bill and implications on Government policy. We provide further details in the Appendices, including a comparison of the best interests duty in the Bill against to the policy objectives announced by the Minister in April, and examples highlighting some of the practical issues stemming from the best interests duties and opt-in regime proposed in the Bill.

Of the three areas covered in the first tranche of the Bill, we support the expansion of ASIC's powers and the introduction of a best interests duty for financial advisers. We remain opposed to the opt-in reforms. With regard to the expansion of ASIC's powers AMP supports this initiative and do not provide comment on the drafting.

While supporting the intent of the best interests reform, we have concerns with how this duty has been drafted. Amendments will be required to provide certainty as to how this duty is able to be met by advisers and to ensure that the best interests duty will achieve its key policy objectives.

AMP remains opposed to the opt-in regime and believes the existing provisions allowing customers to opt-out of any ongoing advice arrangements as well as the introduction of the best interests duty and the ban on commissions on investments provide sufficient governance over an adviser charging regime.

Nevertheless, we understand the Government's commitment to this reform and have provided comments in relation to the drafting.

While committed to the reform agenda, AMP remains concerned about the implementation timetable. The package of reforms that FoFA presents are significant and therefore, appropriate and realistic timeframes must be offered in order to ensure the industry is able to comply with their obligations.

Further, there are significant inter-dependencies with the proposed reforms under Stronger Super. These inter-dependencies, and more critically, the timing of those reforms must be considered and aligned as far as possible in order to minimise the impost on customers. There is considerable risk that many customers may be adversely impacted if the FoFA and Stronger Super reforms are considered in isolation.

INTRODUCTORY COMMENTS

AMP supports the introduction of a number of the proposed reforms as outlined by the Minister for Financial Services and Superannuation in the "Future of Financial Advice Information Pack" (the "Information Pack") released in April 2011. In particular, we believe the introduction of a 'best interest duty' and improved powers for ASIC are positive reforms that will assist in increasing the professionalism of the industry and improve consumer confidence in seeking financial advice.

However, AMP believes that the drafting process has resulted in a significant disconnect between the stated objectives – either as set out in the Information Pack or in the draft Explanatory Memorandum (the "EM") – and the Bill.

1. THE BEST INTERESTS DUTY

AMP supports a best interests duty that satisfies the following:

- The duty should be clearly defined and should not impose a duty which is higher than any other profession such as lawyers, doctors or accountants.
- The duty should not impose a 'best advice' or "most appropriate advice" standard, nor require advisers to determine whether there are better alternatives outside the adviser's Approved Product List (APL) or even the adviser's authorisations, which are disclosed to the client in the adviser's Financial Services Guide.
- The duty should apply to all personal advice to retail clients, regardless of whether the advice is intra fund advice, scaled advice, strategic advice or holistic advice.
- Clients and advisers should be allowed to agree on the scope of the advice before the advice is given. This flexibility is necessary and appropriate to promote competition, efficiency, and access to advice. We believe this framework could replace intra fund advice.
- It should be clear as to whether the current law on 'best interests' or fiduciary obligations is relevant to the application of this best interest duty. An adviser that is subject to the best interests duty should not also be subject to the possibility of a common law action for breach of fiduciary obligations.
- There should be a 'safe harbour' provision so that advisers have the confidence in knowing that, having met specific relevant steps to meet the duty, they have met the obligations of the best interests duty.

We have set out in Appendix 1 a table comparing the stated policy objectives from the April 2011 Information Pack and the results achieved in the Bill. It is clear that many of the proposed provisions will not achieve the stated policy objective, and in many cases will be counterproductive to the achievement of those objectives.[1]

In light of our views noted above AMP offers the following comment on the draft legislation.

1.1 The best interests duty needs to be explicitly defined

AMP considers a key objective of the best interests duty is to enable customers to receive consistent and high quality advice from professional advisers. To achieve this objective,

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[1] We note that we have provided Appendix 1 to the Financial Services Council and they have included the table as part of their submission.

clarity of the steps required to satisfy the duty and the removal of unnecessary ambiguity as to compliance with the process is required.

Within the draft legislation the general best interests duty in s961C(1) of the Bill is undefined. Fiduciary obligations and 'best interests' are the subject matter of much case law and other statutory provisions. However, neither the draft provisions, nor the EM, explain whether such law on the meaning of 'best interests' are relevant to interpreting the duty.

Further, it is unclear what additional steps or outcomes an adviser is required to take or achieve to comply with the general best interests duty if the adviser has complied with the specific duties in s961C(2), the appropriateness duty in s961H, and the duties of priority in proposed Subdivision E. Also, the duty is not confined to the chosen subject matter of the advice, implying that the duty is much broader than the engagement for advice agreed with the client.

Recommendation
The best interests duty needs defining within the Bill to enable advisers to act with a greater level of certainty when providing advice.

1.2 Performance of specific duties should provide a 'safe harbour' for advisers

AMP proposes the best interest duty should be satisfied if an adviser has taken reasonable steps to comply. We believe this approach is also consistent with the proposals in the Government's information pack released in April 2011 where it was stated on page 12 that:

> *"The duty would include a reasonable steps qualification so that advisers are only required to take reasonable steps to discharge the duty."*

Neither the general best interests duty in s961C(1) of the Bill, nor the duties of priority in Subdivision E, include a reasonable steps qualification. AMP believes that compliance with the specific steps set out in s961C(2) should operate as a defence or safe harbour for the best interests duty, rather than as a set of additional prescriptive obligations.

Further, on current drafting, compliance with the prescriptive steps would seem to apply even if it would be unreasonable in the circumstances. The requirements should be limited to what would be reasonable in the circumstances. Of course, what is reasonable would depend on the circumstances – for example, complex advice with a high potential impact on the client will require more investigation than simple advice on a low risk subject matter. Some steps may not be required at all in particular cases – for example, if an adviser is engaged to provide strategic advice that does not include a product recommendation, the adviser should not have to investigate the product that might meet the client's objectives.

Recommendation
Compliance with the specific advice steps outlined in S961C(2) should create a safe harbour defence for advisers. This will ensure licensees design an efficient and compliant advice process without the conservatism which has led to lengthy, costly and inefficient advice processes and disclosure documents in the past.

Further, the specific steps should be qualified so that they are only applicable to the extent that they are reasonable in the circumstances and relevant to the subject matter of the advice.

1.3 The current drafting of the best interests duty effectively creates a "best advice" obligation which is beyond the original intent of the Government

In the April 2011 Information Pack the Minister stated that the policy intent behind the formulation of a best interests duty should not be a duty of "best advice". The duty should focus on the process of achieving the advice, rather than the outcome.

AMP has a concern that, through the Bill, this policy intent has been unintentionally eroded given the legislation requires an assessment of alternative advice possibilities and outcomes of the advice.

The legislation requires consideration of whether the client's needs could be better met by alternative means, requiring an assessment of the outcomes of advice. In addition, section 961G(1)(c) appears to set out that a product cannot be recommended from an APL unless the product would achieve the client's objectives or meet their needs. This is tantamount to a product performance guarantee, and does not recognise that client needs and objective may not be realistically achievable. This in effect is a best advice obligation which is beyond the intent of the Government.

We believe a best interests duty should not focus on the outcomes of the advice and equally, advisers should not be responsible for the performance of products they do not issue.

Recommendation
The best interests duty goes beyond how a person has acted in providing advice and effectively creates a best advice duty. This is beyond the Governments stated intent. Legislation should focus on the process of achieving the advice only.

1.4 Scaled advice appears difficult to implement under current drafting

AMP believes the adviser and the client should be able to agree on the subject matter for advice as is currently the case under section 945A of the Corporations Act 2001.

Under the existing legislation, a client is protected in receiving scoped advice as the adviser is required to conduct a reasonable investigation of all relevant client circumstances and ensure that the advice given is appropriate having regard to that investigation.

The Explanatory Memorandum to the Corporations Act 2001 states in relation to the application of section 945A (emphasis added):

> *"The providing entity need only obtain and analyse sufficient information about the client to provide the advice **requested** or **proffered**. So, for example, a comprehensive analysis of the client's full financial position may not be necessary where the client has sought personal advice on a specific product."*

We believe that rather than clarifying the ability to provide scaled or scoped advice, the provisions within the Bill make this less clear.

Unlike section 945A, the relevant provisions in the Bill do not allow the adviser to specialise in particular areas of advice. Nor do they allow the adviser and the client to agree on the subject matter of the advice.

The current drafting suggests an adviser must consider all of the client's needs and objectives as are reasonably apparent. Further, an adviser must consider alternatives outside the agreed scope of advice even if neither the adviser nor the client, want to. In addition the drafting states that an adviser must address the subject matter requested by the client, even if the adviser does not offer advice on all of those subject matters.

Advisers would also be required to consider and assess alternative strategies – even those that do not involve financial products. This is an unreasonable requirement.

The outworking is that advisers would need to be trained and competent in a far wider range of subject matters than is reasonable for any professional. The new provisions may also drive advice businesses to only offer a holistic advice model rather than a range of advice models tailored to various customer needs. This would be contrary to one of the fundamental principles of the FoFA reforms to make advice more accessible and affordable for all who seek it.

We believe that the new provisions as currently drafted would amount to mandatory over-servicing as advisers would be required to provide these additional services regardless of whether or not the client wants them or is prepared to pay for them.

Recommendation
Current drafting would suggest that 'scaled advice' is difficult to implement in an efficient manner which will restrict the ability of some customer segments to receive advice. Planner and client should be able to agree on the subject matter of the advice as this would otherwise create significant advice risk and will drive advisers to deliver comprehensive advice only so as to ensure they consider alternatives outside of the current scope.

1.5 Advisers should reasonably be able to limit investigation of products to their Approved Product List

AMP agrees with the intent of the draft legislation that the adviser should not be required to consider all of the financial products on the market to comply with the requirement to conduct a "reasonable investigation" of products.

However, we believe further clarity is necessary so that the adviser is not required to investigate all of the products in a subset of the market (such as "all products that might meet the client's needs and objectives", or "all of products in the class identified for investigation by the client").

As drafted, the ability to limit investigation to the products on the APL is very difficult to apply. The adviser is required to consider alternatives outside the subject matter of the advice, and even outside the market for financial products. This may go beyond the expertise of the adviser and is therefore unreasonable.

Recommendation
Further clarity should be provided to ensure advisers can reasonably limit investigation of products to their Approved Product List. Complying with current drafting is a difficult and onerous process.

1.6 Example of the practical application of best interests duties

In Appendix 2, we have provided a practical example of the difficulties that would arise in a personal advice situation if the current drafting of the Bill was adopted[2].

The example deals with personal advice on general insurance but would equally apply in any other personal advice situation for a retail client. AMP is happy to meet to discuss the

[2] We have provided our Appendix 2 to the Financial Services Council and they have used it as the basis of their submission on best interests duty.

practical application of the drafting of the Bill in other personal advice situations such as intra fund advice, strategic advice (where no product recommendations are made), calculators and other web based technologies, transition to retirement strategies, life insurance, superannuation, retirement planning and investments.

2. OPT-IN RENEWAL OF ADVICE

AMP remains opposed to the Governments proposed legislated obligation for financial advisers and advisers to send a renewal ('opt-in') notice every two years to new clients. We believe that the nature of the relationship between an adviser and their client should be able to be negotiated directly.

With the existing ability for a client to opt-out of any ongoing fee arrangement, we believe a specific obligation to expressly renew ongoing advice arrangements on a two year basis is inefficient and adds unnecessary cost to the industry.

Nevertheless, we understand the Government's commitment to this reform and so have the following specific comments to make in relation to the draft Bill.

We are of the view that the draft Bill and EM require further amendments and flexibility so that the proposed opt-in regime does not add an undue administrative burden on advisers or clients and so that it does not inadvertently become contrary to the best interests of clients.

In an opt-in environment we strongly advocate a renewal mechanism that aligns with the contractual term and nature of the client / adviser relationship and a definition of "ongoing fee arrangement" that links the fee to the advice.

We seek clarification and amendments to the following points identified during our review of the draft Bill and the Explanatory Memorandum.

2.1 It is not clear when the 'ongoing fee arrangements' begin under the current drafting

The drafting around the commencement of the arrangement is unclear. It is open to interpretation whether the arrangement may be linked to the date a financial service is provided or a financial product is issued. AMP believes the commencement of the arrangement should be the date specified in the arrangement (or if none is specified, the date the arrangement is entered into).

Recommendation
In order to clarify when an arrangement is to commence, the drafting should have the effect that the commencement date of the arrangement is the date specified in the arrangement, or if no date is specified, the date the arrangement is entered into.

2.2 Deferred Payments for 'upfront' or 'one off' advice have been unintentionally caught by the opt-in obligations under the current drafting.

The drafting appears to have unintentionally included deferred payments for up-front or one off advice costs within the opt-in regime. Under current drafting, where a adviser and a client agree that an up-front or one off advice fee will be paid by instalments and the adviser provides the advice, the client may opt-out of the deferred fees at any time (or fail to opt-in to the remainder of the deferred fees after two years), meaning the adviser is not remunerated for advice and services already rendered.

The drafting seems to indicate that the advice would have already been given, and therefore won't fall within the opt-in regime. However, as the timing of advice would normally occur prior to a fee being paid, this situation appears to be unintentionally captured.

Recommendation
AMP recommends that the definition of 'ongoing fee arrangement' be amended so that it does not apply to one-off advice or advice for which the authorised representative or licensee has agreed to accept deferred payment.

2.3 The 'ongoing fee arrangement' should be clearly linked to the provision of advice.

Linking the advice to the fee
To be effective, the definition of 'ongoing fee arrangement' needs to make a connection between the fee and the ongoing advice being provided for that fee. The current definition does not appear to do this. For example, the draft legislation appears unclear on whether fees paid to advisers out of insurance premiums are caught. The arrangement should only be captured where the arrangement provides for an ongoing fee to be provided for ongoing advice.

Product issuers providing general advice may be inadvertently caught
In the extreme, where a licensee that is a product issuer provides general advice and the client agrees to pay an ongoing fee (for example a management fee or a member fee), then those sorts of fees are technically caught by the opt-in regime as presently drafted. This would enable a member to "turn off" an administration or member fee, which is clearly not the intent of the reform. By expressing "ongoing fee arrangement" as fees "in relation to" the advice, this would further alleviate definition issues in the drafting which seem to draw in services and products beyond financial product advice and services. It would also be beneficial for it to be made clear in the Explanatory Memorandum that product fees, that is, fees paid to the product issuer (other than for personal advice to be given by the product issuer), are not intended to be caught by the opt-in regime.

Recommendation
The definition of "ongoing fee arrangement" should be linked to the provision of personal financial product advice in order that the regime does not inadvertently capture product manufacturers. Specifically, we recommend amending the definition at s.962A(a) to include "agrees to pay an ongoing fee (however described or structured) in relation to the ongoing provision of personal financial product advice".

2.4 The current drafting on fee disclosure and renewal statements needs to be more flexible with regard to timing and those clients included in the opt-in regime.

The timing for sending out fee disclosure statements is problematic
The current drafting requires that fee disclosure statements are required to be provided 'at least 30 days before' the anniversary date to all clients. The timing of this poses some practical problems in that the fee disclosure statement is required to be provided prior to the full anniversary. This means that the disclosure can only relate to a period of say 11 months up until the date of preparation of the statement in order that the requirement for it to be provided 'at least 30 days before' can be met.

Recommendation
Amending ‘at least 30 days before’ to ‘at least annually’ will provide reasonable flexibility to allow that a fee disclosure statement covering the full 12 month period be provided close to the anniversary date without lessening the consumer protection aspirations of the regime.

2.5 Only those included in the opt-in regime should have to receive a fee disclosure statement

The current drafting requires that all clients be provided with an annual fee statement. It is therefore open to interpretation whether this applies to clients outside the opt-in regime. AMP believes this should be aligned with the application of renewal notices to ‘new clients’ for renewal notices.

Recommendation
In our view, drafting needs to be clarified to apply only to clients captured by the opt-in regime.

2.6 Renewal notices and fee disclosure statements should be able to be aligned

The current drafting of the Bill requires that renewal notices be provided ‘at least 30 days before’ the second anniversary of the arrangement.

In our view the drafting should provide reasonable flexibility to align the provision of renewal notices with fee disclosure statements. This is not currently achieved, as the trigger for renewal notices is tied to the date the arrangement was entered into, whereas the disclosure notice could be given after 10 months. This would then mean the 2nd year disclosure notice would be due 1 year and 10 months after the ongoing fee arrangement was entered into, however, the renewal notice would be due 24 months after the ongoing fee arrangement was entered into.

Recommendation
The drafting should provide reasonable flexibility to align the provision of renewal notices with fee disclosure statements ‘at least annually’.

2.7 Grace period for opting-in

The current drafting does not make allowance for a ‘grace period’ nor for ‘continuation’ in circumstances where a client is not able to respond (due to illness, travel overseas or other impairment out of their control) but has every intention to renew. In this scenario, it appears that the intention is that an adviser will have to proceed with full termination and full establishment of a new arrangement. In our view, a 30 day grace period would offer a client a degree of flexibility and protection in this regard, and limit the administrative burden of turning off and back on an arrangement that the client never intended to terminate.

Recommendation
If a client fails to respond within a 30 day grace period post the anniversary date, then the client should be deemed to have not opted-in.
This will provide reasonable flexibility to the client whilst still maintaining the consumer protection aims of the regime as within the additional 30 day grace period an adviser is still required to provide services and we envisage would still be bound by the best interests duty.

2.8 Clients should be able to receive and respond to the fee disclosure and renewal statements by other means in addition to "in writing"

The current drafting is unclear on how an authorised representative or licensee may 'give' fee disclosure statement statements and renewal notices.

Recommendation
The drafting should be amended to allow for the fee disclosure statements and/ or renewal notices to be given in line with what is currently required in Part 7.7 of the Corporations Act.

Draft sections 962J and 962K respectively provide that the client must notify the current fee recipient "in writing" of their agreement to an ongoing fee arrangement.

We believe that alternative mechanisms should be permissible to communicate with clients. Indeed, provided the communication means is recordable, we believe communication mechanisms should be agreed between client and adviser.

Recommendation
The drafting should be amended to contemplate any recordable form such as email, phone and other electronic means in line with paragraph 2.31 of the draft EM.

2.9 There are significant unintended consequences of the current drafting of the grandfathering provisions.

We strongly support the intention of the regime to provide clients with choice.

In our view, the grandfathering provisions should apply consistently where a client makes a choice to maintain an existing advice relationship with either their authorised representative, or their licensee.

The Explanatory Memorandum states that opt-in is intended to apply only in relation to "new clients". However, the drafting does not explicitly recognise that a client can receive all their advice from an authorised representative of a licensee, yet consider that the primary client relationship is with the licensee. In these cases, the authorised representative is, in the client's eyes, merely the means by which the licensee meets the client's advice needs.

Given the regime is intended to promote client choice, it follows that where a client makes a choice to stay with a licensee or to stay with an authorised representative, the grandfathering provisions should apply consistently to both scenarios.

We have provided a table in Appendix 3 to show how the grandfathering provisions should work in these different scenarios.

Recommendation
In our view, amendments to draft section 962 are required to affirm that opt-in will only apply to 'new clients' and that sale of a 'book' to a new authorised representative or licensee will only trigger opt-in where the client has not chosen to maintain an existing advice relationship with either the existing authorised representative or the existing licensee.

Applying this at a corporate level, if a financial services business is sold via a share sale, grandfathering will apply, as the client's licensee or authorised representative will not have changed, only ownership of the shares of that business has changed. Conversely, if a financial services business was sold as an asset sale, grandfathering will not apply, as the client's licensee or authorised representative will have changed. This produces an inconsistent result based only on the way in which a transfer is structured, and for that reason, AMP considers that grandfathering should apply equally to both scenarios.

Recommendation
In our view, amendments to draft section 962 are required to clarify that opt-in apply consistently regardless of how the sale of a financial services business is structured.

3. TIMEFRAMES FOR COMPLIANCE WITH THE REFORMS

AMP acknowledges the ambitious agenda and timetable outlined by Minister Shorten in dealing with the FoFA and Stronger Super reforms, and the commitment to provide certainty for industry stakeholders as soon as reasonably possible. However, we have concerns about the time pressures on the industry which are likely to flow from the reforms proposed by the Government.

On the Governments own timetable, the final FoFA legislation will not be passed through Parliament until the end of the first quarter of 2012 with best interests duty and opt-in to commence from 1 July 2012. This means that the industry will have somewhere between 3 to 6 months to ensure they are in a position to comply.

This timeframe is extremely challenging given successful implementation of these reforms require technology, process, education and change management training of advisers (3,300 advisers alone for AMP) who are located nationally. Based on past experience we believe training of this nature will take upwards of 6 – 9 months to go from design phase to national rollout.

We have conducted a detailed internal analysis on the system, process and procedural changes required for the major reforms and these are significant. For example, the introduction of a best interests duty for advisers, will require:

- Systems and documentation changes to our Statement of Advice and Financial Services Guide templates;
- fundamental changes to our training and compliance manuals to include the general duty as well as specific duties;
- design and delivery of a training programme for more than 3300 representatives and their support staff;
- updates to our monitoring and supervision processes and systems to support and embed these changes.

In addition, the implementation of the proposed 'opt-in ' reform will require extensive changes to our IT systems and administration processes to monitor and record the details of every client's portfolio to ensure we comply with the legislation.

Combined with the other reforms proposed both by FoFA and Stronger Super we strongly believe that it will be very difficult to comply with all of these by the proposed start date of 1 July 2012.

We believe the Government should work with the industry to agree an appropriate timetable for these reforms that will enable the industry to make the necessary changes in a timely and

effective manner. Consideration should be given to a two year phased introduction for the proposed reforms (similar to the removal of investment commissions) to allow the industry sufficient time to implement and achieve full compliance with the new obligations.

Recommendation
The Government should propose a phased introduction to the reforms with mandatory compliance by July 2014, providing the industry and advisers sufficient time to make the necessary changes to comply with this legislation.

APPENDIX 1: COMPARISON OF KEY OBJECTIVES FROM THE INFORMATION PACK WITH THE DRAFTING OF THE BILL

Extracts from April 2011 Announcement	Our comments on the draft provision
Compliance with this duty will be measured according to what is reasonable in the circumstances in which the advice is provided. What is reasonable in the circumstances is commensurate and scalable to the client's needs. This means that if the client's needs indicate that only limited advice is necessary, the adviser is not obligated to provide holistic advice. (page 12) AND To facilitate scaled advice, the Government will amend the existing reasonable basis for advice obligation in the Corporations Act to make it clear that this obligation is commensurate and scalable to the client's needs when providing advice. This will help address some concerns identified by industry that the provision of scaled advice is not consistent with their obligations under the Corporations Act. (page 14).	Rather than clarifying the ability to provide scaled or scoped advice, the amendments make this less clear. Currently, as is made clear by the Explanatory Memorandum that accompanied the introduction of s945A, that section allows the adviser to proffer, and/or for the client to request, advice on a specific subject matter. The adviser and the client then agree on the subject matter for the advice, and the investigations are limited to that subject matter. The client is protected, however, because the adviser must conduct a reasonable investigation of all relevant client circumstances and of the subject matter, and ensure that the advice given is appropriate having regard to that investigation. Unlike the current s945A, the draft provisions do not allow the adviser to specialise in particular areas of advice. Nor do they allow the adviser and the client to agree on the subject matter of the advice. The adviser must address the subject matter requested by the client, even if the adviser does not offer advice on all of those subject matters. Further, the adviser must consider all of the clients needs and objectives as are reasonably apparent, and must consider alternatives outside the agreed scope of advice even if neither the adviser nor the client want to do or pay for this service. Advisers are also required to consider and assess alternative strategies – even those that do not involve financial products. Advisers must therefore be trained and competent in a far wider range of subject matters than is reasonable – in fact, the range is limitless because the universe of alternative strategies is limitless. The new provisions will drive advice businesses to a "one size fits all" holistic advice model. This will stifle innovation and specialization (and therefore competition), and will make advice more difficult and expensive for clients to obtain. Adviser will not have certainty over whether the considerations they have made will be sufficient to meet the duties. We believe that the new provisions amount to mandatory over-servicing. Advisers will be required to provide these additional services regardless of whether or not the client wants them or is prepared to pay for them.
The duty should not be interpreted as imposing trustee-style obligations on financial advisers given the differences in roles between a trustee and a financial adviser. (page 12)	The general best interests duty in s961C(1) is undefined. Neither the draft provisions, nor the Explanatory Memorandum, explain whether the cases on the meaning of "best interests" in a trustee context are relevant to interpreting the duty. Further, it is unclear what additional steps or outcomes an adviser is required to take or achieve to comply with the general best interests duty if the adviser has complied with the specific duties in s961C(2), the appropriateness duty in s961H, and the duties of priority in proposed Subdivision E. Also, the duty is not confined to the chosen subject matter of the advice, implying that the duty is much broader than the engagement for advice agreed with the client. The Explanatory Memorandum creates further uncertainty by describing the best interests obligation as being of a "broad nature".
The focus of the duty should be on how a person has acted in providing advice rather than the outcome of that action. (page 12)	A product cannot be recommended from an APL unless the product "would" achieve the client's objectives or meet their needs. Not only should the duty not focus on the outcomes, but equally, advisers should not be responsible for the performance of products they do not issue. Further, the obligations to consider whether the client's needs and objectives could be better met by alternative means effectively create a duty of "best advice".

Extracts from April 2011 Announcement	Our comments on the draft provision
The duty would include a reasonable steps qualification, so that advisers are only required to take reasonable steps to discharge the duty. (page 12)	Neither the general best interests duty in s961C(1), nor the duties of priority in Subdivision E, include a reasonable steps qualification. Compliance with the specific steps set out in s961C(2) should operate as a defence or safe harbour for the best interests duty, rather than as a set of additional prescriptive obligations. Further, the prescriptive steps apply regardless of whether compliance will be reasonable in the circumstances.
A person giving personal advice will not be required to broke the entire market or a subset of the market of all available financial products to find the best possible product for the client, unless this service is offered by the adviser or requested by the client and subsequently agreed to by both parties" (page 12)	While it is clear that the adviser is not required to consider all of the financial products on the market to comply with the requirement to conduct a "reasonable investigation" of products, there is nothing that makes it clear that the adviser is not required to investigate all of the products in a subset of the market (such as "all products that might meet the client's needs and objectives", or "all of products in the class identified for investigation by the client"). As drafted, the ability to limit investigation to the products on the APL can never apply. The adviser is required to consider alternatives outside the subject matter of the advice, and even outside the market for financial products, which goes beyond the expertise of the adviser and is unreasonable. Finally, none of these limitations apply to the general best interests duty in s961C(1).
Individual advisers will not be held financially liable for any breach of the duty. (page 13)	Advisers who are employed by authorised representatives will be liable for civil penalties. There is an inconsistency in the treatment of advisers who are employed by authorised representatives compared to advisers employed by licensees.

APPENDIX 2: PRACTICAL APPLICATION OF BEST INTERESTS DUTY

1. Introduction

1.1 This appendix looks at a simple, practical advice scenario and highlights some of the issues that will arise in applying the proposed duties in relation to that scenario.

1.2 The structure of this Appendix is as follows:

(a) Part 1 is an overview of this Appendix

(b) Part 2 sets out the fact situation.

(c) Part 3 looks at the whether the proposed duties allow scoped advice;

(d) Part 4 looks at the application of the specific steps set out in s961C(2) and related provisions;

(e) Part 5 considers the appropriateness test in section 961H;

(f) Part 6 looks at the duty of priority in subdivision E;

(g) Part 7, returns to section 961C to consider the general best interests duty; and

(h) Part 8 looks at the potential consequences of a breach for the adviser and the licensee.

Text Boxes

> The text boxes contain our suggestions for resolving the issues identified. However, even if Treasury disagree with our suggested solution, we urge Treasury to consider alternative solutions to the issues identified.
>
> If Treasury does not consider that the issues identified are valid, we would ask that additional text be added to the Explanatory Memorandum to clarify the intended operation of the provisions.

2. Sample fact situation

2.1 Consider an adviser who is an employee of a business operating as an authorised representative. The business specialises in providing personal advice on general insurance products. The FSG discloses that they only advise on general insurance products and only recommend insurance from a specified list of insurers. A client wants advice on building insurance for their home and their investment property. During the fact finding process, it emerges that both the client's home and their investment property are mortgaged (the mortgagee's interest must be noted on the policy).

2.2 It is important to note that although the example relates to general insurance advice, the issues raised by the example are not confined to general insurance – these and other issues will apply to any type of personal advice. The example merely serves to illustrate some of the difficulties that will arise in the practical application of the proposed provisions as currently drafted – even in relatively simple cases.

2.3 AMP is happy to meet to discuss the practical application of the drafting of the Bill in other personal advice situations such as intra fund advice, strategic advice (where no product recommendations are made), calculators and other web based technologies, transition to retirement strategies, life insurance, superannuation, retirement planning and investments.

3. Scoping the subject matter of the advice

3.1 In our example, the adviser is seeking to limit the scope of the advice provided to general insurance only. From a policy perspective, this seems appropriate given that the adviser can specialise in that area and give clients access to cheaper and/or better advice on that issue as a result. It also means that both planner and client can negotiate and will be clear about what services will be provided. Further, the opt-in provisions effectively require an adviser's terms of engagement to define the types of advice that the adviser and the client agree will be provided.

3.2 However, the best interests duties prevent advisers from focussing only on a specific subject matter if the client also has needs or potential alternatives in other areas. On current drafting of the best interests duties, the subject matter that the adviser must address is driven solely by the client's needs. Different types of advisers will be able to address different client needs. For example, one adviser may address particular general insurance needs of a client. Another adviser may address superannuation and insurance needs of the same client and, even within those areas, there may be a need for advice on a particular sub category without having to cover the entire set of client needs in an area of advice. (See the recommendation in paragraph 3.6)

3.3 Later in this appendix we explain our reasoning for these conclusions in more detail, but examples of the way in which the draft provisions prohibit scoped advice include:

(a) in sub-paragraph 961C(2)(c)(i), the adviser must consider whether the information supplied by the client is sufficiently complete to advise on the requested subject matter, even if the actual subject matter is more expansive or more limited than that which was originally requested;

(b) paragraphs 961C(2)(d) and (f) require the adviser to consider other subject matters and alternatives beyond the scope of the requested advice,

(c) in paragraph 961C(2)(e), the adviser must decline to advise where the requested subject matter is outside the adviser's expertise, even where the adviser and the client have agreed to a more limited subject matter that is entirely within the adviser's expertise;

(d) in paragraph 961C(2)(g), the adviser must investigate products that might meet the clients needs and objectives, but this is not limited to those needs that the client and planner agree are to be addressed;

(e) sub-section 961C(3) does not apply if the client requests advice on products which are not basic banking products, or if the client is not specific about the types of products that the client is requesting advice on – even if the client ultimately agrees that they only want advice on basic banking products; and

(f) section 961D defines "reasonably apparent" by reference to the reasonable expertise necessary to advise on the requested subject matter, even if a narrower subject matter has been agreed.

The provisions should be amended to make it clear that the client and adviser can agree to limit the scope of the subject matter for the advice.

3.4 Accordingly, on current drafting, it is not permissible for the adviser to seek to have the client agree that the adviser need only consider a subject matter if that subject matter that is narrower than the client's full range of needs and objectives.

3.5 Section 960A makes a provision of a contract void if the provision seeks to exclude any of the duties. In the case of the general insurance adviser, this would seem to apply to their offer to consider only general insurance. Accordingly, the provision setting out the agreed scope of the services to be provided is void. In turn, this means that the key provision of the contract which entitles the client to services is void.

The provisions should only make a condition of a contract or arrangement void to the extent that the provision seeks to exclude the duties.

3.6 Further, the various duties should apply only to the extent relevant to the subject matter of the advice, and only to the extent that the client's needs, objectives, financial circumstances and interests are relevant to that subject matter. This should be a general principle that applies across all of the duties for the reasons outlined earlier in this submission and detailed later in this Appendix.

A new section should be added that applies across all of the duties in Division 2 of Part 7.7A that explicitly recognises that those duties apply only to the extent that they are relevant to the subject matter of the advice, and require the adviser to investigate and consider only those client needs, objectives, financial circumstances and interests as are relevant to that subject matter.

3.7 There appears to be a concern that allowing advisers and clients to agree on the scope of the subject matter will result in clients not receiving the advice they need, or in clients receiving advice that is inappropriate or not in their interests. We believe this fear is unfounded, because advisers would still have to consider all of the client's circumstances as are relevant to determining whether the recommendation ultimately given is appropriate and in the client's interests. This is currently the case under s945A of the Corporations Act 2001, as expanded upon in the EM. Advisers currently scope advice to particular subject matter. The EM makes it clear that the subject matter of advice could be a single product. By way of example, a general insurance adviser is not required to look to needs other than general insurance needs and can agree with the client as to the particular general insurance needs that will be addressed in the advice.

Importantly, the adviser would still be required to investigate and consider the client's entire financial situation, needs and objectives as are relevant to the agreed subject matter and to ensure that the advice given is appropriate for the client.

Because the adviser must consider all relevant personal circumstances of the client, it would not be possible for an adviser to narrow the scope of the advice in such a way as to produce a compliant yet unsuitable recommendation.

Even if the scope of the advice is on a single product, the adviser must investigate and consider all client circumstances that are relevant to determining whether that product is suitable (including, if relevant, products already held) and must place the client's interests first when they do so. If those investigations lead to the conclusion that the product is unsuitable, the adviser would be prohibited from recommending the product.

In this way, the provisions would provide maximum flexibility and competition among various adviser business models, yet still protect the client from recommendations that are not in their interests.

3.8 In fact, forcing advisers to go beyond the agreed subject matter means that clients will not be able to address specific needs without addressing all needs – meaning that specific needs will be left unaddressed until the client has the time and money necessary to seek and obtain holistic advice.

Allowing the subject matter to be limited by agreement between the client and the adviser better serves the interests of consumers and encourages innovation and competition in the industry. It also promotes ready access to the advice a client wants and for which they are prepared to pay.

4. Specific steps in s961C(2)

Paragraphs (a) and (b)

4.1 In this example, paragraphs (a) and (b) of s961(2) are not problematic in themselves.

Paragraph (c)

4.2 For paragraph (c), the adviser must (among other things) obtain instructions from the client as to the replacement value of the buildings. However, the replacement value of the buildings is not accurately known by the client. The adviser collects information from the client about the building's construction, size, and any site specific issues such as whether the block is steeply sloping. From this information, the adviser estimates the likely cost of replacing the building.

4.3 However, the adviser's obligation is to make reasonable enquiries to obtain complete and accurate information – not just to make reasonable enquiries to obtain information that is sufficiently accurate and complete for the purposes of giving the advice. In this case, the steps taken would only ever produce an estimate, and is based on the client's description of the premises, which may be incomplete. Strictly speaking, then, the adviser has not met their obligation to take reasonable steps to ensure accuracy and completeness. The adviser would seem to be obligated to go to the time and expense of arranging a formal building valuation, which is unreasonable in the circumstances.

S961C(2)(c) should only require the adviser to make reasonable enquiries to obtain information that is sufficiently complete and accurate for the purposes of providing advice on the subject matter.

4.4 The Financial Services Council submission recommends that the adviser should only be required to make reasonable enquiries of the client. We agree that if

information is supplied to the adviser by a client, the adviser should not have to verify that information from other sources. However, where information is not known by the client at all or with reasonable accuracy and completeness, we believe that further investigation from other sources may sometimes be reasonable, depending on the extent to which that information will affect the appropriateness of the advice and whether the information is readily available from other sources. For example, if the client does not know the balances and features of their existing products, it may be reasonable for the adviser to check the client's balances and investment or insurance options with the client's existing product or platform providers. It may also be necessary to check the adviser's own files for information held about the client. Accordingly, we suggest a test that simply requires "reasonable enquiries", rather than limiting the obligation to "reasonable enquiries of the client".

Paragraph (d)

4.5 Under paragraph (d), the adviser must consider whether it is reasonably apparent that the client's needs and objectives could be better achieved by obtaining advice on a different subject matter.

4.6 It is not clear what needs and objectives are relevant here, nor how far afield the adviser must go in exploring potential alternative subject matters. Paragraph (d) is not qualified by reference to the subject matter of the advice as is section 945A, so it seems that (at least) any needs and objectives that are "reasonably apparent" must be considered, and a determination made as to whether it is "reasonably apparent" that those needs or objectives "could" be better met by obtaining advice on a different subject matter.

4.7 The adviser appears obligated to give considerations outside of the requested subject matter, and beyond the adviser's expertise.

4.8 In the present case, for example, does the adviser need to consider:

(a) whether the client should consider life insurance to help pay off the mortgages if the client dies or cannot work, even though this was not requested by the client?

(b) whether the client "could" be better off selling the investment property and instead investing in a diversified portfolio of investments, say through superannuation?

4.9 Does the adviser need to tailor the advice about other potential subject matters to the client's specific needs and objectives, or is it enough to provide pro-forma disclosure about what will not be covered by the advice, with a recommendation that the client consider whether they should obtain advice in those areas?

4.10 How is the adviser to determine what other subject matters could better achieve the client's needs and objectives without fully exploring those other subject matters?

4.11 How likely does it need to be that the client's needs or objectives would be better achieved in order for the adviser to need alert the client that they "could" be better met? Is a mere possibility that the client could be better off sufficient to trigger the requirement?

4.12 If there are two or more other subject matters that could better achieve client objectives, does the adviser need to identify all of them, or only the best one? Does this paragraph therefore effectively require the adviser to identify the best possible

subject matter for the client to obtain advice on? Does this include subject matters that go beyond the adviser's authorisation, expertise or APL?

4.13 Does this paragraph effectively prevent scalability of advice because of the requirement to consider these alternatives?

4.14 In effect, does this paragraph require the adviser to provide holistic advice to the client and identify the best advice for the client?

Paragraph (f)

4.15 Similar questions arise in paragraph (f) as arise for paragraph (d). For example, in our general insurance example, does the adviser have to consider whether the client would be better off:

(a) selling the investment property to pay off the mortgage on the client's home?

(b) selling the investment property or home and buy another one in a safer location?

(c) buying a different type of investment, such as art or commodities?

4.16 In addition, unlike paragraph (d), paragraph (f) is not qualified by reference to a "reasonably apparent" test.

4.17 Further, paragraph (f) does not merely require the adviser to consider whether the client should obtain advice on the alternative means of satisfying the client's needs and objectives, it actually requires the adviser to assess any alternative strategy that "could" meet the client's needs and objectives.

4.18 In effect, this will require advisers to become experts in areas that they are not currently required or able to advise on, such as real property, and also require advisers to speculate as to whether non-financial product alternatives "could" meet the client's needs and objectives.

In their practical application, paragraphs (d) and (f):

- Prevent advisers and clients from agreeing to limit the subject matter of the advice to a particular scope
- Require advisers to develop expertise in areas outside their authorisations and business models
- Have no boundaries as to what the other subject matters have to be considered
- Require advisers to identify the best possible scope of advice rather than an agreed scope, in effect the best advice
- Require advisers to consider subject matter that the client has not asked them to consider
- Require clients to pay for advice and adviser time for matters they have not requested

For these reasons, paragraphs (d) and (f) should be deleted.

Paragraph (g)

4.19 Paragraph (g) is also too broad in that it is not limited to the needs and objectives relevant to the subject matter of the advice. In our general insurance example, this means that the adviser must consider what financial products might meet the client's investment needs – the adviser is aware that the client has investment needs and objectives because they are aware of the investment property.

4.20 Also, personal advice does not always involve product recommendations. In some cases, advisers will advise on broad strategies, or (for example) about the type and amount of superannuation contributions or life insurance required, but without making a specific product recommendation. Paragraph (g) requires an investigation of products in every case, and so is inappropriate in such cases.

Paragraph (g) should be amended so that it only requires the adviser to assess products that might meet the needs and objectives relevant to the subject matter of the advice, and then only where product recommendations are to be made.

Section 961E

4.21 The requirements under paragraph (g) are affected by s961E.

4.22 While subsection s961E clearly states that a reasonable investigation of financial products does not require an investigation into every available financial product, it does not clarify that the adviser is not required to investigate every financial product that might meet the client's needs and objectives.

4.23 For example, while our general insurance adviser is clearly not required to investigate, say, car insurance, it is not clear that the adviser is not required to look at all building insurance products on the market.

S961E(1) should be amended to clarify that the adviser is not required to investigate all products that might meet the client's needs and objectives.

4.24 If the client asks the adviser to consider "building insurance products" as a class (which is, by implication, almost necessarily the case), s961E(2) applies. The word "However" in subsection (2) seems to suggest that subsection (2) is a qualification or exception to subsection (1) – which arguably means that the client's request means that the adviser must consider all building insurance products.

S961E(2) should be amended to clarify that the adviser is not required to investigate all products in the class requested by the client.

Section 961G(3)

4.25 Paragraph (g) of s961C(2)(g) and s961E are also affected by s961G(3).

4.26 If our general insurance adviser has an APL and the APL contains a product that **would** meet the needs of the client, s961G(3) does not apply. This is because s961G(1)(c) or s961G(2)(c) (whichever applies) is not satisfied. This means that there is nothing in the provisions that makes clear that the adviser's reasonable investigation of products can be limited to the APL.

The substance of paragraphs 961G(1)(c) and 961G(2)(c) should be moved into s961G(4) – subject to the amendments suggested later in this submission.

Paragraph (h)

4.27 The Explanatory Memorandum says that paragraph (h) is intended to apply where the adviser is recommending the substitution of a product or the acquisition of product that is substantially similar to a product already held. The draft provisions do not fully reflect the "substantially similar" qualification.

4.28 In our general insurance example, paragraph (h) would apply even if the client had no existing building insurance. This is because the client almost certainly has another financial product, such as a bank account.

Paragraph (h) should be amended so that it only applies to a recommendation to substitute a financial product or acquire a product in cases where a product already held by the client could meet the client's needs and objectives relevant to the subject matter of the advice.

4.29 If the client did have existing building insurance and the adviser is considering whether to replace the insurance, paragraph (h) requires the adviser to weigh the disadvantages of replacing the insurance against the advantages of using the existing insurance. In other words, the adviser seems to be required to weigh the disadvantages of acquiring the product against each other. What seems to be missing is a consideration of the advantages of acquiring the product and of the disadvantages of not acquiring the product.

Paragraph (h) should be amended to require the adviser to weigh the advantages of acquiring the product against the disadvantages of acquiring the product.

Paragraph (i)

4.30 The Explanatory Memorandum states that the duties of priority do not prohibit the adviser from pursuing the adviser's (or another person's) interests where they do not conflict with the client's interests. However, paragraph (i) requires all judgements to be based on the needs and objectives of the client. Accordingly, even if the cost and features of two alternative products are identical, the adviser will not be able to choose one product over the other on the basis of the adviser's own interests (or the interests of the licensee or other third party).

Paragraph (i) should be deleted as it seems to override the intended operation and limitations of the duties of priority

Section 961G

4.31 If the general insurance adviser has an APL, then section 961G applies. The effect of the section is that the adviser cannot recommend a product on the APL unless the product "would" meet the needs and achieve the objectives of the client.

4.32 Clients typically have needs and objectives that conflict with each other. For example, our general insurance client would have the objective of obtaining maximum coverage for their properties, but would also have the objective of not paying more than a specified limit. However, more coverage typically means higher premiums. This being the case, how is the adviser going to be able to find a product that "would" achieve both those objectives? In reality, the adviser will need to exercise a judgement in balancing competing client objectives – the provisions should be drafted to reflect this.

4.33 Advisers also meet client needs by combining products. For example, an investment client would want to diversify their investments to reduce risk – but the adviser should not be restricted to having to satisfy that need through one product only.

4.34 Clients needs and objectives may also be subjective or unachievable. For example, if our general insurance client's property was in a flood-prone area where no insurers provide flood coverage, can the adviser recommend any products? What if there is a specialist insurer that does provide flood coverage for a very high premium? What if that specialist insurer is not on the APL – is the adviser required to investigate insurers outside the APL in order to determine whether any insurers offer flood cover?

4.35 Finally, even if there is a need or objective that is not in conflict with another need or objective, the "would achieve" test inappropriately focuses the test on the outcome of the advice rather than on the reasonableness of the process and the requirement to give priority to client's interests. Whether an objective "would" be achieved is usually subject to future contingencies beyond the control of the adviser (or anyone).

4.36 For all of these reasons, the requirement that a product cannot recommended unless it "would" achieve the client's needs and objectives is inappropriate.

Paragraphs 961G(1)(c) and 961G(2)(c) (as moved into s961G(4)) should be amended so that the test is whether it would be reasonable to conclude that a product on the APL would be appropriate for the client, within the meaning of section 961H. If not, the adviser must not recommend a product on the APL. This recognises that client's needs and objectives are not always all achievable.

4.37 We also note that (on current drafting) s961G(4) applies where the adviser concludes that no product on the APL "would" meet the clients needs and objectives, but then requires the adviser to tell the client that there is no product on the APL that "might" meet their needs and objectives.

4.38 More importantly, if the adviser refrains from recommending a product on the list as required by s961G(4)(b), what is the purpose of requiring the adviser to make the disclosure in s961G(4)(a)?

Paragraph 961G(4)(a) should be deleted.

5. The appropriateness test in s961H

5.1 The general insurance adviser would then need to ensure that the advice meets the appropriateness test in section 961H.

5.2 Currently, section 945A explicitly ties the appropriateness of the advice to the investigation of the subject matter or the client's circumstances. It does so by requiring the advice to be appropriate "having regard to" those enquiries and investigations. This element is missing from 961H.

S961H should be amended to ensure that appropriateness is tested "having regard to the information that the provider knows, or would have known if the provider had satisfied the duty under s961C".

6. The duties of priority in Subdivision E

6.1 The adviser then needs to satisfy the duties of priority in Subdivision E.

6.2 It is not clear whether the duties of priority would be breached if the adviser fails to give priority to an interest of the client of which the adviser was unaware. Does the duty extend to interests that the adviser should have been aware of had the adviser complied with their other duties? Does the duty extend to client interests that are not "reasonably apparent"?

The duties of priority should only apply to interests of the client that the adviser either was aware of, or interests which the adviser would have been aware of had they complied with the other duties.

7. The general duty to act in the client's best interests in s961C(1)

7.1 We return now to s961C(1), the general duty to act in the client's best interests. This duty is not qualified by reference to s961C(2), nor by the appropriateness test, nor by duties of priority, nor is there a safe harbour or reasonable steps defence as previously announced.

7.2 Further, because the general best interests duty in section 961C(1) is not defined or qualified, its meaning is (to say the least) very uncertain. In particular:

(a) if the specific steps in section 961C(2) have been complied with (including that all judgements have been based on client needs and objectives), and the advice is appropriate for the client (s961H), and the adviser has given priority to the client's interests (Subdivision E), what additional steps or outcomes does the adviser need to take or achieve to satisfy the general duty? The rules of statutory interpretation will require a court to find additional content in the general duty, over and above the requirements in the other sections. What is that additional content intended to be?

(b) a number of the other requirements have been carefully qualified or limited to avoid unintended consequences. Given that those other requirements do not qualify or limit the general duty, do those limitations also apply in relation to the general duty? For example, in complying with the general duty:

(i) is it enough if only "reasonably apparent" inaccuracies or gaps in information are investigated?

(ii) is it enough if only "reasonably apparent" alternative subject matters are considered?

(iii) is it enough to merely advise the client of potentially better subject matters for the advice, or does the adviser actually have to investigate those other subject matters?

(iv) does the investigation of products need to involve investigation of every product available, and can this be limited by reference to the APL?

(v) must the advice only be “appropriate”, or does the advice have to be “best advice”?

(vi) does the general duty allow the adviser to pursue their own interests where they do not conflict with the client’s interests, as per the duty of priority?

(c) does the general duty require "best advice"? What does the word "best" mean in "best interests"?

(d) does it include a duty of care, or is it enough that the adviser genuinely acts with only the client's interests in mind, even though their advice was inappropriate?

(e) can the adviser pursue its own or another person's interests if they are not inconsistent with the client's interests? The Explanatory Memorandum says that this is not prohibited by the duty of priority, but does not say that this not prohibited by the general best interests duty.

(f) to what extent must the adviser challenge or revisit client objectives that the adviser does not agree with?

(g) does the adviser satisfy the duty if they advise in accordance with a client’s wish to take a high risk? For example, to obtain only minimal insurance cover and risk that the property will not be fully covered for the key risks, or to take a non-insurance example, to advise in accordance with a client’s wish to invest aggressively in high risk investments in order to pursue high returns? Or must the adviser only recommend a conservative and prudent approach, giving priority to protecting the client’s existing position, as is typically done by trustees?

(h) is the best interests duty limited in scope to the subject matter of the advice and/or to the needs and objectives relevant to that subject matter? For example, if our general insurance adviser considers direct property to be a poor or risky investment, can the adviser recommend any insurance to the client without also recommending that the client sell their property?

(i) to what extent is the case law on “best interests” in the life company and trustee contexts actually relevant and applicable to the general duty in s961C(1)? Advisers are in a very different position to trustees and life companies – advisers have a personal relationship with the client and must take into account individual needs and objectives, whereas a trustee or life company typically needs to consider the interests of the beneficiaries and policyholders only to the extent that those interests arise in their capacity as beneficiaries or policyholders.

7.3 In our view, these and other questions mean that the application of the general duty is extremely uncertain in practice. It will be some time before court decisions emerge to give clarity to industry and regulators on these issues. In the meantime, the costs of providing advice will have increased as advisers seek to manage their

risks. Professional indemnity insurers are also likely to raise premiums to offset the increased risk and uncertainty.

The best interests duty should:

- be defined in the legislation itself along the lines described in the Explanatory Memorandum, namely that acting in the best interests of the client means "making the interests, objectives, financial situation and needs of the client in relation to the subject matter of the advice paramount", and
- expressly state that the duty is focussed on the process and considerations that the adviser must follow and focus on, rather than on the quality or outcome of the advice. The quality of the advice should be left to be tested under s961H.
- be qualified by a reasonable steps defence or safe harbour as previously announced by both Minister Bowen and Minister Shorten. The defence or safe harbour should apply if subsection (2) is complied with; and
- expressly clarify that the adviser and the client can agree a subject matter of the advice and that the consideration of the client's financial situation, needs, objectives, interests, products and alternative strategies (including the specific steps in subsection (2)) are limited so that the adviser need only consider them to the extent that they are relevant to that agreed subject matter.

In our view, these measures will provide industry, regulators and clients with the required level of protection and certainty.

8. What if there is a breach?

8.1 Because our general insurance adviser is an employee of an authorised representative of a licensee, the adviser must also be an authorised representative of that licensee (see s911B). Because the proposed duties apply to the provider (being the employee in this case), and because s769B(7) does not apply, the effect of s769B is that if there is a breach, both the adviser and the adviser's employer will have committed the breach. This in turn means that both the employee and the employer both contravene s961S, which in turns means that both the employer and the employee are liable for the civil penalties that may be imposed.

8.2 However, if the adviser had instead been employed by a licensee, the effect of s961M(2) is that only the licensee is subject to the civil penalty.

The treatment of employed advisers should be consistent regardless of whether the adviser is employed by an authorised representative or by a licensee. In both cases, it is the employer that should be liable for the penalty. Section 961S should be amended accordingly.

Subsection 769B(7) should also be amended to include reference to the new Division 2 of Part 7.7A to ensure that licensees are not deemed to have done what their authorised representatives have done for the purposes of the new Division 2 of Part 7.7A.

To avoid inconsistencies in the application of opt-in grandfathering, we do not recommend the application of s769B(7) beyond Division 2 of Part 7.7A.

8.3 Authorised representatives have a defence to the civil penalties if they act in reasonable reliance on the directions or guidance of the licensee. There is no defence for employees of licensees or authorised representatives in relation to their contraventions. Even though employees are not (intended to be) liable for civil penalties, they will still be subject to regulatory action against them as individuals.

> Employees of licensees and authorised representatives should have a defence if their contravention was a result of reliance on the directions or guidance of their employer. The defence should not be limited to "reasonable" reliance, as it would be unreasonable to require employees to "second guess" the legality of their employer's instructions.

8.4 The existing civil penalty provisions provide that a court may order a pecuniary penalty only if (broadly speaking), the contravention materially prejudices a person that the relevant provision is designed to protect, or is otherwise a serious contravention. However, the civil penalty provisions for the proposed duties do not include this requirement.

> Proposed section 1317G(1E) should include a requirement that the Court can only order payment of a pecuniary penalty if the contravention materially prejudices the interests of the relevant client, or is serious. This will make the provision consistent with existing subsections (1) and (1A) of s1317G(1E).

8.5 Section 961P provides for civil liability to compensate clients for loss or damage caused by a contravention of the duties. In determining wither the duties are drafted appropriately, it is necessary to closely consider the civil liability consequences of a breach.

8.6 In our example, what if the general insurance adviser fails to:

(a) advise the client to consider obtaining advice on life insurance to cover the client's mortgage (which would appear to be a breach of s961C(2)(d) on current drafting), and the client later dies without life insurance?

(b) advise the client to consider obtaining advice on investing in something other than direct real property (which would appear to be a breach of s961C(2)(d) on current drafting), and the client subsequently loses money because they weren't sufficiently diversified?

(c) assess whether the client should sell their investment property to pay off their home mortgage, or to instead invest in an alternative non-financial product investment (which would appear to be a breach of s961C(2)(f) on current drafting), and the client later realises that the return would have been better had the client done so?

(d) ensure that the product recommended from the APL "would" meet the client's needs and objectives (which would appear to be a breach of s961g(4) on current drafting), and the product does not cover flood because no insurer on the APL offered this, and the property floods?

8.7 What is the measure of damages that the licensee would have to pay the client? Is this level of liability fair and reasonable given that the client was only seeking, and the adviser was only offering, advice on building insurance?

The civil liability consequences of a contravention should be closely reviewed. On current drafting, some aspects of the new duties could impose a disproportionate level of civil liability on the licensee, for losses that are outside the scope of advice agreed between the client and the adviser.

APPENDIX 3: OPT-IN GRANDFATHERING

In our view, amendments to draft section 962 are required to clarify that opt-in will only apply to 'new clients' and that sale or transfer of a 'book' to a new authorised representative or Licence will only trigger opt-in where the client has not chosen to maintain an existing advice relationship.

Consider a case where an authorised representative moves from one licensee to another. A client could either:

- Choose to stay with the existing licensee and be serviced by a new authorised representative of that licensee; or
- Choose to move with the authorised representative to the new licensee.

In the first case, the client chooses to maintain an existing relationship with the licensee, and the client is not a new client of the licensee. In the second case, the client chooses to maintain a relationship with the authorised representative, and the client is not a new client of the authorised representative. Therefore, opt-in should not apply in either of these cases.

Further, if an authorised representative of one licensee sells their "book" to another authorised representative of the same licensee, the client can choose to stay with the existing licensee and have their advice needs met via the new planner, in which case opt-in should not apply.

In contrast, if a client commences with a new licensee, or a new authorised representative of a licensee, and neither the licensee nor the authorised representative have previously provided advice to the client, then clearly the client is a new client and opt-in should apply.

However, the current drafting of the grandfathering provisions do not necessarily reflect this intended position. The current drafting of section 962(3) should be clarified so it is clear that opt-in will apply irrespective of whether the financial services licensee or the authorised representative of that licensee has provided advice to the relevant client.

The following table sets out how the grandfathering provisions should work in these different scenarios to produce a consistent result where the client chooses to maintain an existing advice relationship with either the authorised representative or the licensee.

Key/assumptions

Ongoing fee arrangements (OFAs) are tri-partite (client, AR, licensee)

All transactions take place after 1 July 2012 (the commencing day)

Both limbs of test need to be satisfied for opt-in to apply.

Scenario	Client chooses AR or licensee?	Advice limb satisfied for opt-in to apply?	Fee arrangement limb satisfied for opt-in to apply?	Outcome
AR 1 has no OFAs in place. AR 1 sells register to AR 2. Both are ARs of same licensee.	*Client chooses not to move to new AR (assumes finds new planner outside of licensee)*	Yes. "New" AR and new licensee, and neither have given advice before commencing day, therefore first limb	No. "New" AR has no ongoing fee arrangements in place, therefore second limb of opt-in test not satisfied.	Opt-in applies, but only once "new" AR enters into OFAs with those clients. No grandfathering (if enter into OFAs)

		of opt-in satisfied.		
	Client chooses to stay with existing licensee (and have AR 2 provide the financial services)	No. Existing licensee has given advice before commencing day (due to application of deeming provision in 769B(1) of Corps Act), therefore advice limb of opt-in not satisfied.	No. No OFAs in place, therefore second limb of opt-in test not satisfied.	No opt-in as client has been provided with advice by licensee before commencing day. Grandfathering applies.
AR 1 has OFAs in place pre 1 July 2012. AR 1 sells register to AR 2. Both are ARs of the same licensee.	*Client chooses not to move to new AR (assumes finds new planner outside of licensee)*	Yes. "New" AR and new licensee, and neither have given advice before commencing day, therefore advice limb of opt-in satisfied.	No. "New" AR has been assigned AR 1's rights under OFAs (as per 962(2)). But client entered into OFA before 1 July 2012, therefore second limb of opt-in test not satisfied.	Opt-in applies, but only once AR 2 enters into OFAs with those clients. No grandfathering (once enters into OFAs)
	Client chooses to stay with existing licensee (and have AR 2 provide the financial services)	No. Existing licensee has given advice before commencing day (due to application of deeming provision in 769B(1) of Corps Act), therefore advice limb of opt-in not satisfied.	No. AR 2 has been assigned AR 1's rights under OFAs (as per 962(2)). But client entered into OFA before 1 July 2012, therefore second limb of opt-in test not satisfied.	Opt-in does not apply as advice has been provided before the commencing day. Grandfathering applies.
AR 1 has OFAs in place post 1 July 2012. AR 1 sells register to AR 2. Both are ARs of the same licensee.	*Client chooses not to move to new AR (assumes finds new planner outside of licensee)*	Yes. "New" AR and new licensee, and neither have given advice before commencing day, therefore advice limb of opt-in satisfied.	Yes. "New" AR has been assigned AR 1's rights under OFAs (as per 962(2)), which were entered into after 1 July 2012, therefore second limb of opt-in test satisfied.	Opt-in applies. No grandfathering
	Client chooses to stay with existing licensee (and have AR 2 provide the financial services)	No. Existing licensee has given advice before commencing day (due to application of deeming provision in 769B(1) of Corps Act), therefore advice limb of opt-in	Yes. AR 2 has been assigned rights under OFAs (as per 962(2)), which were entered into after 1 July 2012, therefore second limb of opt-in test satisfied..	Opt-in does not apply as advice has been provided before the commencing day. Grandfathering applies.

		not satisfied.		
AR 1 has no OFAs in place. AR 1 sells register to AR 2. AR 1 and AR 2 have different licensees.	*Client chooses to move to AR 2 and new licensee*	Yes. Neither AR 2 nor licensee has given advice before commencing day, therefore first limb of opt-in test satisfied.	No. No ongoing fee arrangements in place, therefore second limb of opt-in test not satisfied.	Opt-in applies, but only once AR 2 enters into OFAs with those clients. No grandfathering (once enters into OFAs)
	Client chooses not to move to AR 2 and to stay with current licensee (and have a new AR of the licensee appointed as their adviser)	No. Existing licensee has been given advice before commencing day (due to application of deeming provision in 769B(1) of Corps Act), therefore advice limb of opt-in not satisfied.	No.	Opt-in will not apply because advice was given before the commencing day. Grandfathering applies.

AR 1 has OFAs in place pre 1 July 2012. AR 1 sells register to AR 2. AR 1 and AR 2 have different licensees.	*Client chooses to move to new AR 2 and new licensee*	Yes. Neither AR 2 nor licensee has given advice before commencing day, therefore first limb of opt-in test satisfied.	No. AR 2 has been assigned Planner A's rights under OFAs (as per 962(2)). But client entered into OFA before 1 July 2012, therefore second limb of opt-in test not satisfied.	Opt-in once AR 2 enters into OFAs with those clients. Grandfathered until that time. (But consider AR 2 obligations to clients)
	Client chooses not to move to AR and to stay with current licensee (and have a new AR of the licensee appointed as their adviser)	No. Existing licensee has given advice before commencing day (due to application of deeming provision in 769B(1) of Corps Act), therefore advice limb of opt-in not satisfied.	No. New AR of same licensee has been assigned AR 1's rights under OFAs (as per 962(2)). But client entered into OFA before 1 July 2012, therefore second limb of opt-in test not satisfied.	Opt-in does not apply as advice has been provided before the commencing day. Grandfathering applies.
AR 1 has OFAs in place post 1 July 2012. AR 1 sells register to AR 2. AR 1 and AR 2	*Client chooses to move to new AR 2 and new licensee*	Yes. AR 2 has not given advice before commencing day, therefore first opt-in limb satisfied.	Yes. AR 2 has been assigned rights under OFAs (as per 962(2)).	Opt-in applies from the date of transfer. AR 2 must comply with opt-in obligations, including disclosure statements and

have different licensees.		(Deeming provision has no application, as different licensees).		renewal notices.
	Client chooses not to move to AR 2 and to stay with current licensee (and have a new AR of the licensee appointed as their adviser)	No. Existing licensee has given advice before commencing day (due to application of deeming provision in 769B(1) of Corps Act), therefore advice limb of opt-in not satisfied.	Yes.	Opt-in will not apply because advice was given before the commencing day. Grandfathering applies.

AR has no OFAs in place. AR moves to a new licensee.	*Client chooses to move with AR to new licensee*	No. AR has given advice before commencing day, therefore first limb of opt-in test not satisfied.	No. AR has no ongoing fee arrangements in place, therefore second limb of opt-in test not satisfied.	Opt-in will not apply when the AR becomes an AR of new licensee. Grandfathering applies.
	Client chooses not to move to new licensee and to stay with current licensee (and have a new AR of the licensee appointed as their adviser)	No. Existing licensee has given advice before commencing day (due to application of deeming provision in 769B(1) of Corps Act), therefore advice limb of opt-in not satisfied.	No. No ongoing fee arrangements in place, therefore second limb of opt-in test not satisfied.	Opt-in will not apply because advice was given before the commencing day. Grandfathering applies.
AR has OFAs in place pre 1 July 2012. AR moves to a new licensee.	*Client chooses to move with AR to new licensee*	No. AR has given advice before commencing day, therefore first limb of opt-in test not satisfied.	No. AR has OFAs in place But client entered into OFA before 1 July 2012, therefore second limb of opt-in test not satisfied.	Opt-in will not apply because advice was given by AR before the commencing day. Grandfathering applies.
	Client chooses not to move to new licensee and to stay with current licensee (and have a new AR of the licensee appointed as	No. Existing licensee has given advice before commencing day (due to application of deeming provision in 769B(1) of Corps	No. New AR of same licensee has been assigned AR 1's rights under OFAs (as per 962(2)). But client entered into OFA before 1	Opt-in does not apply as advice has been provided before the commencing day. Grandfathering applies

	their adviser)	Act), therefore advice limb of opt-in not satisfied.	July 2012, therefore second limb of opt-in test not satisfied.	
AR has OFAs in place post 1 July 2012. AR moves to a new licensee.	*Client chooses to move with AR to new licensee*	No. AR has given advice before commencing day, therefore first opt-in limb not satisfied.	Yes. AR has been assigned rights under OFAs (as per 962(2)).	Opt-in will not apply because advice was given before the commencing day. Grandfathering applies.
	Client chooses not to move to new licensee and to stay with current licensee (and have a new AR of the licensee appointed as their adviser)	No. Existing licensee has given advice before commencing day (due to application of deeming provision in 769B(1) of Corps Act), therefore advice limb of opt-in not satisfied.	Yes. OFAs between licensee and clients, therefore second limb applies.	Opt-in will not apply because advice was given before the commencing day. Grandfathering applies.

APPENDIX 4: OVERVIEW OF THE AMP GROUP

AMP is a leading wealth management company in Australia and New Zealand, with an evolving banking business in Australia and selective investment management activities in Asia. In March 2011, AMP merged with the Australian and New Zealand businesses of AXA Asia Pacific Holdings Limited (AXA) to create a new competitive force in wealth management.

AMP has two separate business units: AMP Financial Services and AMP Capital Investors. Each business unit operates in Australia and New Zealand, with AMP Capital Investors also undertaking selective investment management activities internationally, with a focus on Asia.

AMP has 5,900 employees located in Australia, New Zealand and in our offices in Asia. AMP now has over four million customers and around 1 million shareholders.

AMP today holds the number one ranking across key market segments in Australia. We have Australia's largest network of aligned financial advisers[3] and are Australia's largest superannuation provider[4] AMP has a range of market-leading products and platforms, including the highly rated AMP Flexible Super range, award winning AMP Flexible Protection and AXA Elevate risk products, one of the industry's largest and most efficient mastertrust platforms, and the highly rated wrap platform, North.

In addition, AMP has a number of highly rated investment funds, a strong multi-manager capability in both AMPCI and ipac, and a broad and growing SMSF offering which includes Multiport, Personalised Portfolio Service and SuperIQ.

Adviser numbers

AMP has the largest aligned and employed financial planner network in Australia, with 2,997 financial planners and advisers as at July 2011[5]. AMP's aligned and employed financial planner networks offer financial advice under multiple brands to provide choice to both customers and advisers.

AMP financial advice brands include AMP Financial Planning and Hillross while the recently acquired AXA brands include Charter Financial Planning, AXA Financial Planning, ipac, Tynan McKenzie & IPAC Equity Partners.

[3] Largest number of authorised representatives – Money Management 'Top 100 Dealer Groups' July 2011
[4] Largest market share by assets under management at aggregate level for super - Plan for Life, March 2011
[5] Numbers based on publication in the Money Management 'Top 100 Dealer Groups', July 2011