20 February 2014

Law Council
OF AUSTRALIA

General Manager
Retail Investor Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: futureofadvice@treasury.gov.au

Dear Sir / Madam

Streamlining of Future of Financial Advice

I am pleased to enclose a submission prepared by the Superannuation Committee of the Legal Practice Section of the Law Council of Australia.

The Committee would welcome the opportunity to discuss the submission further. In the first instance, please contact:

- Ms Pam McAlister, Chair, Superannuation Committee T: 03 9603 3185 E: pam.mcalister@hallandwilcox.com.au or
- Mr Luke Barrett, Chair, Legislation and Policy Subcommittee T: 03 9910 6145 E: luke.barrett@unisuper.com.au.

Yours sincerely

MARTYN HAGAN
SECRETARY-GENERAL

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

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Streamlining of Future of Financial Advice

The Treasury

Submission by the Superannuation Committee of the Legal Practice Section of the Law Council of Australia

19 February 2014

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About the Law Council of Australia's Superannuation Committee

The Law Council of Australia is the peak national representative body of the Australian legal profession; it represents some 60,000 legal practitioners nationwide. Attachment A outlines further details in this regard.

This submission has been prepared by the Law Council of Australia's Superannuation Committee (the Committee), which is a committee of the Legal Practice Section of the Law Council of Australia.

The Committee's objectives are to ensure that the law relating to superannuation in Australia is sound, equitable and demonstrably clear. The Committee makes submissions and provides comments on the legal aspects of virtually all proposed legislation, circulars, policy papers and other regulatory instruments which affect superannuation funds.

Background

On 20 December 2013, the Assistant Treasurer, Senator the Hon Arthur Sinodinos AO, announced major reforms to the Future of Financial Advice (**FOFA**) provisions contained in Part 7.7A of the Corporations Act and Regulations.

On 29 January 2014, Treasury released exposure drafts of the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 (**Draft Bill**) and the Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014 (**Draft Regulations**) (together, the **New FOFA Reforms**), which are designed to give effect to the 20 December 2013 announcement. At the same time, Treasury also released draft explanatory materials to accompany the Draft Bill and the Draft Regulations and which set out the specific policy objectives the Government is seeking to achieve.

Given the objectives of the Committee, we do not comment on the merits of the Government's specific policy objectives (as reflected in the draft explanatory materials). However, we have identified certain provisions where the New FOFA Reforms are unlikely to achieve the Government's specified objectives. We also draw attention to a range of drafting issues.

'Best interests' obligations, ss 961B, 961E

Section 961B(1) requires a provider of personal advice to act in the best interests of their client in relation to the advice. Section 961B(2) sets out one way (but not the only way) in which a provider of personal advice may satisfy the 'best interests' requirement in section 961B(1). Section 961B(2) says that the 'best interests' requirement is met if the provider takes each of the 7 steps set out in that section.

The 'best interests' requirement is directly relevant for superannuation trustees that provide personal advice to fund members. However, many superannuation trustees do not provide personal advice. Instead, personal advice is often provided to fund members by a service provider. The 'best interests' requirement is therefore also relevant to many fund members.

The New FOFA Reforms are intended to make the following key amendments to the 'best interests' obligations:

- (ss 961E, 961B(2)(f) and 961B(2)(g)): The removal of the 'catch all' provision from the steps that can be taken in order to be deemed to satisfy the 'best interests' requirement. The catch-all provision requires a personal advice provider to prove that they have "taken any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client's relevant circumstances". Advisers will still be required to satisfy the remaining six steps in order to rely on the deemed compliance conferred by section 961B(2). While not commenting on the policy rationale behind the deletion of paragraph 961B(2)(g), the Committee notes that the steps required to take the benefit of the statutory 'safe harbour' would not impact on any common law or fiduciary obligation an adviser may owe to clients.
- (ss 961B(2)(a), 961B(2)(ba), 961B(2), 961B(4A)): Consistent with the Government's policy objective, clients and advisers will be expressly permitted to agree on the scope of any scaled advice provided and advisers will only be required to investigate the client's objectives, financial situation and needs that are relevant to the scaled advice to be provided in discharging their best interests obligations.
- (ss 961B(3), 961B(4)): The amendments are intended to allow an agent or employee of an ADI to rely on the safe harbour if they satisfy only some of the six steps when the subject matter of the advice relates to a basic banking product, general insurance product, consumer insurance product or a combination of these products.

Drafting

Safe-harbour steps

The amendments will delete section 961B(2)(a) leaving the section commencing at paragraph (b). If paragraph (a) is to be deleted, the remaining paragraphs should be renumbered, alternatively, the new paragraph (ba) could replace paragraph (a).

Scoping advice

New paragraph (ba) is intended to assist advisers in being able to agree the scope of their advice and thereby to allow an adviser to provide advice about limited or single issues. It is not clear that by changing the circumstances to be considered by the adviser from those disclosed "by the client through instructions" (under old paragraph (a)) to those disclosed "by the client" (under proposed paragraph (ba)) will achieve this, particularly given the adviser's duties to make enquiries of the client.

It is also not clear that new section 961B(4A) does so either. It provides "to avoid doubt, nothing in [the steps in section 961B(2)] prevents a client from agreeing the subject matter of the advice sought by the client …". In the Committee's view, this clause should be redrafted so that it is an operative provision rather than what appears to be a rule to assist the interpretation of the previous sub-sections. Further, if it is an operative provision that qualifies section 961B(2) (containing the steps) it should also qualify section 961B(1) (containing the main best interests requirement).

As noted above, the Government's objective is to ensure that the law does not prevent an adviser and their client agreeing to limit the scope of advice, but does not enable an adviser to completely 'contract out' of the 'best interests' obligation. However, while limiting the scope of advice may reduce the enquiries and relevant considerations for the adviser, what is in fact relevant will always depend on the nature of the advice that is being sought and provided. For this reason, the Committee considers that the steps an adviser should take to provide sound advice should follow from the nature of the advice and should not be limited by legislation. However, this may be clearer if the following words were added to the end of new section 961B(4A):

'without limiting the provider's obligation to identify the client's relevant circumstances in respect of the agreed subject matter of the advice'

Consumer credit insurance

As noted above, the amendment to section 961B(3) is intended to extend the limited relief from the 'best interests' steps to consumer credit insurance. However, the amendment does not in fact do so. The final paragraph should say: "the provider satisfies the duty in subsection (1) in relation to the advice given in relation to the basic banking product, the general insurance product, **the consumer credit insurance product or any combination** if the provider takes the steps in ….". The highlighted words have been omitted.

Intra-fund advice

The amendments will include a note at the end of section 960 which will include a description of the meaning of the expression "intrafund advice". The expression is not used in the Corporations Act or Regulations and therefore cannot be used as an aid to interpreting the legislation. It is not clear why the note has been inserted. In the Committee's opinion the note should be deleted. If the expression "intrafund advice" is used in an operative provision of the final regulations then it should be defined in the usual way, not through the device of a note.

Ongoing fee arrangements

Removal of the renewal notice 'opt-in' requirement, ss 960, 962CA, 962K-962N, 962F(1)-(3)

The Committee notes the removal of the renewal notice opt-in provisions but, having regard to its own objectives and the Government's commitment to repeal the provisions, it makes no comment on the proposed repeal.

Fee disclosure statements, ss962R, 962S, table item 22 of s1317E(1), 1317G(1E)(b)(v)

In the same way, the Committee does not make any comment on the proposed amendments to the fee disclosure provisions.

Conflicted remuneration

General advice exemption, ss 963A(a), 963(b)

Under the current law, a benefit (monetary and non-monetary) received in relation to either the provision of personal advice or general advice may be conflicted remuneration.

Under the New FOFA Reforms, the definition of conflicted remuneration will be amended so that benefits relating to the provision of general advice will not be conflicted remuneration and will therefore be exempted from the bans on providing and receiving conflicted remuneration. The Government has stated that it has proposed the change because it considers that the application of the ban on conflicted remuneration risks limiting the availability of general advice and unnecessarily burdens the industry by

capturing staff not directly involved in providing advice to clients. An example of the risk of limiting the availability of general advice is evident when one considers general advice placed on websites which are intended to assist and educate consumers. A number of licensees were preparing to remove, or had removed general advice from their websites in order to ensure that they were not captured by the conflicted remuneration ban.

Given the Government's stated policy objectives, we make the following observations.

The first observation is that the distinction between general and personal advice can be very difficult to determine and is frequently not clearly understood. This is not a new problem, but it could be compounded if the existing lack of clarity interferes with the Government's stated intentions. For example, in a recent opinion piece in the *Australian Financial Review* the Assistant Treasurer referred to the proposal to allow conflicted remuneration to be provided in relation to general advice and said that this would not permit a benefit to be provided in relation to a specific product recommendation. The Committee notes that general advice is frequently a specific product recommendation. An obvious example is an advertisement for a specific financial product. Another example would be general advice given in a call centre about a specific financial product.

Under the draft amendment the distinction between personal advice and general advice will be very important. The main legal difference is that with personal advice an individual's personal circumstances **are** expected to be considered, whereas with general advice they are **not.** In practice, the distinction between general advice and personal advice can be difficult to identify with certainty and this ongoing uncertainty may therefore not serve the Government's policy objective.

The second observation is that using the distinction between general and personal advice as the basis for determining whether the ban on conflicted remuneration applies could raise difficult issues in terms of the anti-avoidance provision in section 965 and future changes in the way that advice is given. Specifically, if a provider of financial product advice provides more general advice in future (as a proportion of all advice provided – general or personal) than they have in the past, they could well be vulnerable to an allegation that they have engaged in impermissible avoidance of the ban on conflicted remuneration. The Committee suggests that the possible anti-avoidance implications should also be dealt with in the legislation to ensure that those who provide more general advice are not penalised.

Other ways to avoid exploitation of the distinction between general and personal advice could be to limit the 'carve out' of general advice to specific forms of general advice that are obviously generic, such as marketing materials and content on websites that is not specific to an individual and, in a one-on-one context, to representatives of licensees who do not provide personal advice to individual retail clients. The Committee would be happy to work with Treasury on drafting a more sophisticated and targeted general advice 'carve-out' from the definition of conflicted remuneration.

Drafting

The drafting of the change could be simplified by changing the existing reference to "who provides financial product advice" to "in relation to the provision of personal advice" in the definition of conflicted remuneration.

Life risk policies, ss 960, 963B(1)(b), 963B(2)-(3)

Under the New FOFA Reforms, benefits paid to licensees or representatives in relation to life risk insurance offered outside of superannuation would continue to be exempt. However, the exemption provided for monetary benefits paid in relation to life risk insurance policies offered inside superannuation would be broadened as long as personal

advice is actually being provided. Monetary benefits paid in relation to life risk insurance for MySuper members would continue to be prohibited.

Drafting

The Committee suggests that the replacement section 963B(1)(b)(i) should be amended slightly by replacing it with the following: "a life risk insurance product in respect of **a** MySuper **member**;". This will ensure that the continued prohibition does not depend on more than one MySuper member being insured under the policy at the relevant time.

Execution-only exemption, ss 963B(3)-(4), 963B(1)(c)

The Committee is not aware of any anomaly arising from the terms in which the amendments have been drafted, save to note that it would be technically possible under the wording of the exemption for representatives of a licensee to be divided into those who provide personal advice (who cannot receive conflicted remuneration) and those who execute the advice (who could receive commissions). Presumably this would be an unintended consequence. The drafting might therefore be improved by adding a third criterion to the effect that the issue or sale of the financial product is not related to advice given by another representative of the licensee in the preceding 12 months.

Education and training exemption, s963C(c)(ii)

The Committee does not see any legal difficulty arising from the change referred to in the heading above.

Basic banking exemption, s 960, 963D

Under the current law, there are exemptions from the definition of conflicted remuneration where the advice in question is given by an agent or employee of an ADI or by someone else acting under the name of an ADI and the benefit and advice are restricted to basic banking products (existing section 963D) or to basic banking and general insurance products (regulation 7.7A.12H). Under the New FoFA Reforms section 963D would be replaced with a broader exemption relating to basic banking products, general insurance products and consumer credit insurance products.

Drafting

The structure of the proposed new section 963D makes it difficult to understand and apply. It is structured by identifying three preconditions and then going on to say that the benefit in question is not conflicted remuneration. The Committee suggests that it would be better from a drafting perspective to reverse the order so that it provides that a benefit is not conflicted remuneration if the circumstances in the balance of the section exist. That is a drafting structure which has been used in most other exceptions to the definition and it is easier to read and understand.

The reference to "consumer creditor insurance" in proposed new section 963D(c)(iii) should be to "consumer credit insurance". Further, if new section 963D is made it would seem that existing regulation 7.7.A.12H should be repealed.

Stamping fees, Reg 7.7A.12B

Having regard to its objectives, the Committee has no comments on the proposed amendments.

Stockbroking-related exemptions, Reg 7.7A.12D

Having regard to its objectives, the Committee has no comments on the proposed amendments.

Balanced scorecard remuneration arrangements, Reg 7.7A.12EB

Proposed new regulation 7.7A.12EB would exempt monetary benefits provided to employees paid under a 'balanced scorecard arrangement' if specified criteria are met.

To the extent that the draft regulation suggests an underlying policy objective of providing an exception of some meaningful operation for benefit entitlements under balanced scorecards, the Committee considers that the draft regulation is unlikely to achieve that policy objective.

In order for the exception to apply, the benefit must relate to a financial product to which none of a series of specified provisions apply (proposed regulation 7.7A.12EB(1)(a)). The specified provisions themselves provide exceptions to the definition of conflicted remuneration, for example one of them is section 963B(1)(a) concerning benefits referable to general insurance. In this way, the specified provisions apply to benefits; they do not apply to financial products. This anomaly in proposed regulation 7.7A.12EB(1)(a) will need to be fixed if the exception is to do any work.

Another requirement to be satisfied in order for the exception to apply is that the weighting attributed to the "sales" criteria must be "outweighed or balanced by the weighting attributed to other matters". The Committee submits that this requirement would be very difficult to apply in practice. It simply begs a question as to what is meant by "outweighed or balanced". The idea of making exceptions depend on relative weightings attributed to various matters had been used before in the "buyer of last resort" exception (see regulation 7.7A.12EA(c)(ii)). That exception has been very difficult to apply in practice precisely because it turns on the difficult idea of the attribution of relative weightings. In the Committee's view the Government should consider whether the need for flexibility is more important than certainty for the industry.

Another requirement is that the benefit is given in circumstances that are likely to encourage the giving of personal advice that is in the client's "best interest" (presumably this should be a reference to the client's "best interests"). The Committee questions the rationale for this requirement. If "best interests" in this context is meant to mean the same thing as in section 961B, it would appear to be superfluous. If not, it begs the question as to what it does mean. In any event, if the requirement is directed at the influence that the benefit may have on the advice provided, it would be a very odd requirement to have in an exception to the main definition of conflicted remuneration.

Permissible revenue exemption, Reg 7.7A.12HA

Proposed new regulation 7.7.12HA would provide that a benefit is not conflicted remuneration where the amount or value of the benefit is calculated by reference to another benefit that is not conflicted remuneration, or which is conflicted remuneration but which is not banned (most obviously because it is grandfathered).

Comment: The purpose of this provision is unclear. The draft explanatory statement does not identify the mischief at which it is directed. The Committee submits that the specific mischief should be clearly articulated before any decision is made to make the regulation, whether in its current form or in any amended form. Otherwise, the Committee is concerned that the making of the regulation could reduce the scope of the ban on conflicted remuneration far beyond the Government's stated policy objectives.

The scope of the exemption is extremely broad. Indeed, it could be difficult to conceive of many benefits that are not calculated by reference to benefits that are not conflicted remuneration. A good example is premium for an insurance policy – it is not conflicted remuneration and, because of this provision, commission payable by the insurer based on a percentage of that premium would not be either. The same analysis could apply to a management fee paid for an investment product and commissions calculated by reference to those fees or to the amount invested.

The Committee assumes that the regulation is not intended to provide such a broad exemption. If amendments are made to narrow the potential operation of this regulation, care will need to be taken to ensure that its boundaries are clear and certain and that it does not have unintended consequences.

Grandfathering

Proposed regulations 7.7A.16A(5A) and 7.7A.16B(4A) both state: "A person who purchases a business has the same rights under this regulation that the seller of the business would have had if the seller had not sold the business".

A key problem with these proposed regulations is that they are intended to preserve grandfathering entitlements notwithstanding a sale of business, yet regulations 7.7A.16A and 7.7A.16B impose grandfathering limitations, they do not confer grandfathering entitlements. In this way, there are no "rights under this regulation" of the relevant kind. The primary grandfathering entitlements are, instead, conferred under section 1528 and regulation 7.7A.16. Those are the entitlements which, it would seem, the Government wishes to preserve.

Assuming the key problem identified above is addressed in the final regulations, a further issue is that the drafting assumes that, if the seller had not sold the business, nothing else would have happened that could have brought a grandfathering entitlement to an end. Consideration could be given to making that an express assumption for the purposes of applying the provision.

Proposed amendments to regulation 7.7A.16F, which provides an exception to conflicted remuneration for specified 'pass through' benefits, are directed at limiting the circumstances in which the passed through benefit must be given under a pre-commencement arrangement. The Committee notes that the reference to "paragraph 7.7A.16F(b)" in proposed new regulation 7.7A.16F(2) should be a reference to "paragraph 7.7A.16F(1)(b)".

Technical changes and clarification of interpretation

Volume-based shelf-space fees, ss 964(1)-(2), 964A

Under the current law a platform operator is prohibited from accepting volume-based shelf-space fees from a funds manager. The existing law presumes that benefits that are wholly or partly dependent on the total number or value of the funds manager's financial products which relate to platform arrangements are volume based shelf-space fees. There are specific exemptions from the presumption where the benefit relates to scale efficiencies or is paid as a fee for services provided by the platform operator.

Under the New FOFA Reforms the central definition of the kind of benefits that are banned would be changed. The ban would apply to a benefit that, because of the nature of the benefit or the circumstances in which it is given, could reasonably be expected to influence the platform operator:

- to increase the total number or value of the funds manager's financial products in relation to which the platform operator is prepared to provide custodial arrangements; or
- to give preferential treatment to the funds manager's financial products in providing custodial arrangements.

Comment

Both of the alternative elements of the new central definition require some kind of relative assessment to be conducted. In the first case, it is an assessment of the likelihood of an increase in the total number or value of the funds manager's financial products. In the second case, it is an assessment of the likelihood of giving "preferential treatment".

The relative assessments demanded by these elements of the new definition may be difficult to conduct in practice. What is the benchmark against which any likely "increase" is to be assessed? If it is the current number or value of the funds manager's financial products and a shelf-space fee has previously been paid, it might be unlikely that any "increase" could be expected because of a shelf-space fee paid today. What is "preferential treatment"? Is it treatment that is preferential compared with:

- the funds manager's current position;
- the position of other funds managers in respect of whom the platform operator provides custodial arrangements;
- the position of other funds managers in respect of whom the platform operator does not provide custodial arrangements;
- some combination of the above?

It is easy to see that different results could follow depending on which of the above benchmarks is the right one.

The Committee does not quarrel with the policy objective of introducing into the definition of volume-based shelf-space fee an 'influence test' of the kind that forms part of the main definition of conflicted remuneration. The Committee is merely concerned to ensure that the words used to implement the Government's policy objective are likely to achieve that policy objective. The Committee is concerned that some of the uncertainties arising from the text of the proposed amendments (as identified above) may undermine that objective and that the impermissible influence on the platform operator may need better definition. Given the difficulties that have arisen from the existing approach to defining volume-based shelf-space fees, the Committee is particularly concerned to ensure that the present opportunity to introduce a workable definition is not lost.

We also note that ban does not merely apply where the fee is "volume-based". To avoid any doubt about the nature of the benefits that might be banned by this section, the Committee considers that it would be better to use the term "shelf-space fee" rather than "volume-based shelf-space fee".

Client-pays exemption, s 963A (note)

Under the current law, certain benefits paid by a client to a licensee or representative are exempt from the ban on conflicted remuneration. However, there is uncertainty as to when a benefit can be considered to be given by a retail client. ASIC has said in RG 246 at [61]-[66] that benefits given by the client may include benefits that have been authorised by the

client. In ASIC's view, a benefit has been authorised by a client if it is given at the client's direction or with their clear consent. ASIC's view is that consent is 'clear' if it is genuine, express and specific. Mere knowledge of the benefit, or agreement to proceed with financial services in light of a disclosure about the benefit, is not clear consent. In ASIC's view, the exemption only applies if the client has authorised passing on the benefit and an AFS licensee or its representative that passes the benefit on does not have any discretion over the portion of the benefit that is passed on.

The New FOFA Reforms would insert a note to the definition of conflicted remuneration in terms that 'giving a benefit includes a reference to causing or authorising it to be given' as per section 52 of the Corporations Act.

Comment

The note does assist in the interpretation of the 'client-pays' exemption (section 963B(1)(d)), because it points the reader to another relevant provision of the Act. Further, the Draft Explanatory Memorandum provides that "in order to satisfy the exemption the client must cause or authorise the benefit to be given. The benefit may be given directly by the client or given by another party, for example, by a trustee of a superannuation fund. Where the benefit is given by another party, it must be given at the direction of the client with the client's clear consent." This is consistent with section 52 and ASIC's views. However, the draft EM then goes on to say: "the mere fact that a client consents to a benefit to be paid does not mean that the benefit is caused or authorised by the client." This statement appears to directly contradict the paragraph immediately preceding it and which is extracted above. In the Committee's opinion this sentence should be deleted or, if something additional is required to satisfy the exemption, it should be included in the legislation itself. For example, if it is intended to suggest that the benefit must be given from the client's money or money to which the client is beneficially entitled, that requirement should be expressly inserted.

The Committee would welcome the opportunity to discuss its submission further and to provide additional information in respect of the comments made above. In the first instance, please contact:

- Ms Pam McAlister, Chair, Superannuation Committee T: 03 9603 3185 E: pam.mcalister@hallandwilcox.com.au or
- Mr Luke Barrett, Chair, Legislation and Policy Subcommittee T: 03 9910 6145 E: luke.barrett@unisuper.com.au.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.