10 June 2022

Ms Michelle Levy
Independent Reviewer
Quality of Advice Review
Financial System Division
The Treasury
PARKES ACT 2600

Email: AdviceReview@treasury.gov.au

Dear Ms Levy

Quality of Advice Review – Issues Paper

On behalf of our member banking institutions, COBA appreciates the opportunity to contribute to the Quality of Advice Review.

COBA is the industry body for mutual banks, credit unions and building societies. Collectively, our sector has more than $150 billion in assets and 5 million customers. Customer owned banking institutions account for around two thirds of the total number of domestic Authorised Deposit-taking Institutions (ADIs) and deliver competition and choice in the retail banking market.

Our focus in this submission is on the operation of the financial product advice legislative and regulatory regime in relation to basic banking products[1].

Basic banking products such as savings and transaction accounts, term deposits and debit cards are financial products and are covered by the financial advice regime, with some modifications and exemptions.

COBA is strongly supportive of the explicit recognition in the Review's Terms of Reference "that the costs of compliance by businesses are ultimately borne by consumers."

We are particularly interested in the Review's investigation and examination of:

- opportunities to streamline and simplify regulatory compliance obligations to reduce cost and remove duplication,
- where principles-based regulation could replace rules-based regulation to allow the law to better address fundamental harms and reduce the cost of compliance,
- the safe harbour provision for the best interests duty as it applies to basic banking products, and
- the remaining exemptions to the ban on conflicted remuneration as they apply to basic banking products.

[1] Corporations Act 2001, section 961F

Streamlining, simplifying and reducing the cost of compliance

Basic banking products are simple, low-risk and well understood by consumers. Consumers can easily switch between basic banking product providers without risk of loss. Basic banking products are covered by the Financial Claims Scheme, the government-backed safety net for deposits of up to $250,000 per account holder per ADI.

These factors have been recognised by policymakers in the financial product advice regime in the form of various modifications of the requirements, e.g. no requirement for a Statement of Advice and modifications in relation to the best interests duty and ban on conflicted remuneration.

However, ADIs remain subject to various financial product advice compliance obligations such as training[2], policies and processes, record-keeping and breach reporting depending on how they operate their business as a provider of personal advice, general advice or no advice. There is also the compliance challenge and regulatory tripwire of managing the distinction between general advice and personal advice.

The case for basic banking products to be covered by financial product advice regime to protect consumers has never been compelling and has become less so over time as layer after layer of additional consumer protection regulation has been added in financial services, including retail banking.

These layers include industry codes[3], AFCA's 'fairness'-based dispute resolution scheme and the design and distribution obligations. Consumers are also protected by the obligation on financial services licensees to do all things necessary to ensure that financial services are provided honestly and fairly. ASIC is empowered to promote the confident and informed participation of consumers in the financial system and to enforce the prohibition on misleading or deceptive conduct.

The Review should consider whether the advice regime should apply at all to basic banking products. What is the purpose of applying 'financial planner' regulatory settings to ADI staff or agents providing basic advice to consumers about simple, well-understood products issued by the ADI?

Should the Review decline to recommend removal of basic banking products from the advice regime, COBA's suggested approach to the best interests duty safe harbour and exemptions from conflicted remuneration is outlined below.

Exemptions from conflicted remuneration definition

We note that the Review will consider exemptions from the definition of conflicted remuneration including:

- Monetary benefits for a basic banking product that is part of the remuneration of an agent or employee of an Australian authorised deposit-taking institution (subsection 963D(1)), and
- Non-monetary benefits for a basic banking product that is part of the remuneration of an agent or employee of an Australian ADI (subsection 963D(1)).

COBA recommends that these exemptions should be maintained because there is no evidence their existence is creating any consumer detriment and their removal could create unintended consequences for ADI staff remuneration arrangements.

[2] See ASIC *Regulatory Guide 146: Training of financial product advisers*

[3] Customer Owned Banking Code of Practice, Banking Code of Practice & ePayments Code.

Safe harbour

The modification for basic banking products in the best interests duty safe harbour imposes only three of the seven requirements of section 961B(2) for the safe harbour to apply. If section 961B(2) is removed than relevant advisers would be left with the general obligation to act in the best interests of the customer.

However, in the absence of a clear statement that it is not necessary to consider and evaluate the basic banking products of *other providers* there will be significant uncertainty as to the extent of the obligation to act in the best interests of the customer.

The adequacy of the quality of advice with respect to basic banking products was not the source of the Financial Services Royal Commission recommendation about the safe harbour provision. This is illustrated by the following passage from the Royal Commission's final report (page 177):

> *One option would be to amend the provision to be more prescriptive about how an adviser must pursue the client's best interests. This could be achieved, for example, by requiring advisers to make explicit **in the statement of advice** the comparisons they have made between products, or to make explicit their reasons for any recommendation to switch products. But I do not favour this approach. It would represent a significant expansion of the safe harbour model and, given that the present safe harbour model does not prevent interest from trumping duty, altering the model is unlikely to work. Another option would be to remove the safe harbour provision entirely. In my view, such a change would not be without merit. As I have said, the safe harbour provision currently has the effect that, in practice, an adviser is required to make little or no independent inquiry into, or assessment of, products. By prescribing particular steps that must be taken, and allowing advisers to adopt a 'tick a box' approach to compliance, the safe harbour provision has the potential to undermine the broader obligation for advisers to act in the best interests of their clients.*

The criticisms by the Royal Commission revolve around the conduct of "advisers" who are required to provide a Statement of Advice. ADI staff providing advice about basic banking products and basic general insurance products are not required to provide a Statement of Advice. The Royal Commission was focused on more complex financial products.

As noted above, removal of the modified safe harbour provision applying to basic banking products will create uncertainty. This would be most unwelcome, but particularly so in the current climate of an onerous new breach reporting regime for licensees. There would be the real prospect of an overreaction to this uncertainty as ADIs sought to minimise liability for both the institution and its accountable persons.

Discouraging ADIs from providing advice about low-risk, well-understood products would not be good for consumers.

One of the Review's objectives should be a regulatory framework that maximises choice and flexibility for ADIs to engage closely with their customers about low-risk, well-understood products.

If basic banking products are to remain subject to the financial product advice regime and the safe harbour provision is removed for complex financial products, one option is to amend section 961B(2) to limit the safe harbour to basic banking products and basic general insurance products.

For example:

> *(1) The provider must act in the best interests of the client in relation to the advice.*
> *(2) If:*
> *a. The provider is:*
> *i. An agent or employee of an Australian ADI; or*

ii. Otherwise acting by arrangement with an Australian ADI under the name of the Australian ADI; and

b. The subject matter of the advice sought the client relates only to a basic banking product or basic general insurance product.

(3) The provider satisfies the duty in subsection (1) in relation to the advice given in relation to the basic banking product or basic general insurance product if the provider takes the following steps

a. Identified the objectives, financial situation and needs of the client that were disclosed to the provider by the client through instructions

b. Identified

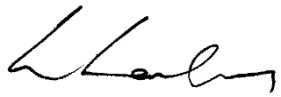
i. The subject matter of the advice that has been sought by the client (whether explicitly or implicitly); and

ii. The objectives, financial situation and needs of the client that would reasonably be considered as relevant to the advice sought that subject matter (the client's relevant circumstances); and

c. Where it was reasonably apparent that information relating to the client's relevant circumstances was incomplete or inaccurate, made reasonable inquiries to obtain complete and accurate information.

Please don't hesitate to contact me at llawler@coba.asn.au if you wish to discuss any aspect of this submission.

Yours sincerely



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