

Advicereview@treasury.gov.au

Ms. Michelle Levy
C/o Quality of Advice Review Secretariat
Financial System Division
The Treasury
Langton crescent
PARKES ACT 2600.

6th July 2022

Dear Ms. Levy,

Re: Quality of Advice Review

Executive Summary:

- From the point of view of Stockbrokers providing Personal Advice to Retail Clients in relation to exchange traded financial products the current regulatory regime, which has been in place for 9 years, is appropriate, subject to allowances being made for the Systems Capability of the Licensee.
- A System Capability is not only a statutory obligation of Financial Services Licensees [by reason of s. 912A (1) (d)] but it is an absolute necessity in order to comply with the current regulatory regime, a fact which has been publically endorsed by both the Federal Court and ASIC, as well as implicitly endorsed by the wholesale withdrawal of the major trading banks from the financial advice sector of the financial services industry.
- The aforementioned Systems Capability, including Client Access with a complete see through capability, enables the content of Statements and Records of Advice to be reduced to the core Basis of Advice relating to the particular Personal Advice provided to a Retail Client.
- The financial planning bias within the Education and Professional Standards of Stockbrokers and Financial Advisers, both the nature of the Bachelor Degree and the content of the Financial Advisers' Examination, must be removed, and the Stockbrokers' professional association, the Stockbrokers and Investment Advisers Association, involved directly in the latter.
- Having regard to the historical development of Stockbrokers, their regulation pursuant to ASIC's Market Integrity Rules and oversight by ASIC's ASX Participants' Supervisory Division and their Complaints record at AFCA, there exists a basis for Stockbrokers to be completely carved out of the Education and Professional Standards regime for Financial Advisers and be subject to their own regime administered by their professional association.

Introduction:

We are Stockbrokers, being a Market, Clearing and Settlement Participant of the Australian Securities Exchange and its Cash and Derivative Markets.

Our primary business is to provide execution, advisory and administrative services in relation to local and international exchange listed financial products.

Being a provider of financial services in Australia we hold an Australian Financial Services License from ASIC. Our regulatory regime is provided by the Corporations Act 2001 and being a Market Participant ASIC's Market Integrity Rules and the oversight of ASIC's ASX Participant Supervisory Division, which has been in place since August 2010.

Bell Potter Securities' Retail Desks provide Personal Advice to Retail Clients in relation to exchange traded financial products. As Bell Potter Securities obtains an Investment Profile for all its Retail Clients - all its advice to such Clients is Personal Advice, in accordance with s. 766B (3) of the Corporations Act.

The Australian financial services industry is a large and multi-sector industry all the participants of which are licensed by ASIC, with those Licenses incorporating Authorisations and Conditions applicable to the particular sector of the industry in which the Licensee operates.

Other sectors of the financial services industry are Financial Planning, Superannuation and Insurance Broking. The separation of the financial services industry into its various completely independent sectors was well recognised with the only common feature being the obligation to be licensed by ASIC.

In the case of Stockbrokers, which are estimated to account for less than 10% of the financial services industry providing personal advice to retail investors, they have enjoyed a long history of self-regulation dating back to 1871, when State Stock Exchanges commenced trading, until ASIC assumed full responsibility for the oversight of ASX's and CBOE's operations in August 2010.

Stockbrokers have one professional association, which is the Stockbrokers and Investment Advisers Association, which represents 8,000 professionals, that is Stockbrokers and Investment Advisers.

Stockbrokers Position in the Financial Services Industry:

It needs to be recognised at the outset that Stockbrokers (and their representative Brokers/Advisers) have always been a distinct and separate sector of the financial services industry on account of their long historical development from being individual members of State Stock Exchanges and being specifically authorised in their financial service Licenses, to utilise the Stockbroker nomenclature. In addition, they have been regulated pursuant to ASIC's Market Integrity Rules and subject to the oversight of ASIC's ASX Market Participant Supervisory Division since 2010 and they operate on ASIC regulated Markets pursuant to those Markets' Operating Rules. ASIC's ASX Market Integrity Rules were adapted from the ASX's Business Rules, pursuant to which Stockbrokers were self-regulated since formation of the Australian Stock Exchange in 1987.

In fact this historical development, regulatory oversight and market operating controls provide a basis for Stockbrokers to be made the subject of their own regulatory, education and professional development regime.

Regulatory Oversight:ASIC License:

Stockbrokers, like all providers of financial advice, are licensed by ASIC. Australian Financial Service Licensees are authorised by ASIC to provide specific financial services on Conditions set out in the License, in accordance with the single licensing regime introduced in 2002.

Legislation:

Australian Financial Services Licensees operate in accordance with the provisions of the Corporations Act 2001 (and the Anti-Money Laundering & Counter-Terrorism Financial Act 2006).

Section 912A (1) specifies the general obligations of Financial Services Licensees and Section 961 specifies specific obligation of advice providers, i.e. the representative Brokers or Advisers employed by Financial Services Licensees.

Markets:

The Australian Markets on which Stockbrokers conduct transactions in exchange traded financial products in relation to provision of personal advice to Retail Clients are licensed by ASIC and their operation are conducted pursuant to ASIC approved Operating Rules.

Key Regulatory Reforms:

1. 1 July 2013 – Future of Financial Advice Reforms:

These reforms, which have now been operating for 9 years introduced fiduciary type obligations for the advice provider, namely the representative Broker or Adviser of the Financial Services Licensee. These encompass the Best Interest Duty and its associated obligations, along with a ban on conflicted remuneration and the renewal and disclosure of ongoing fee arrangements.

The FOFA reforms represent the Australian Government's response to the Inquiry into financial products and services in Australia by the Parliamentary Joint Committee on Corporations and Financial Services (PJC) in 2009. The Inquiry examined the issues associated with the collapse of Storm Financial Limited, Opes Prime and other similar corporate collapses of financial services businesses post the Global Financial Crisis of mid-2007 to early 2009.

The underlying objective of the reforms was to improve the quality of financial advice while building trust and confidence in the financial advice industry through enhanced standards, which align the interests of the Adviser with the Client and reduce conflicts of interest. The reforms also focused on facilitating access to financial advice, through the provision of simple or limited advice.

2. Mar. 2017 - Corporations Amendment (Professional Standards of Financial Advisers) Act 2017:

This reform was introduced into the Corporations Act 2001, with effect from 2019, with the objective of raising the education, training and ethical standards of financial advisers.

This legislation required those who provide Personal Advice to Retail Clients to hold at least a Bachelor Degree, pass a Financial Advisers (entrance) Examination, meet annual Continuing Professional Development (CPD) requirements and comply with a Code of Ethics.

This education and professional standards regime was initially managed by the Financial Adviser Standards and Ethics Authority (FASEA) which adopted a financial planning bias to the regime. FASEA was disbanded in 2021 when the responsibility for the regime was vested in the Minister for Financial Services. However, as the Minister is yet to exercise his authority in relation to the financial services education and professional standards regime FASEA's financial planning biased regime continues to operate.

3. 13 Mar 2019 – Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019:

The general obligations of financial services Licensees introduced on 2001 lay virtually dormant until very substantial penalties for failing to comply with those obligations were introduced, effective March 2019. As a result these obligations are now practically enforceable by the Regulator.

The new penalty provisions enable ASIC to pursue harsh civil penalties as well as criminal sanctions under all ASIC-administered legislation, including the Corporations Act 2001.

The strengthened penalties apply to contraventions occurring from 13 March 2019 onwards.

The maximum civil penalty for companies is the greater of:

- o 50,000 penalty units (currently \$11.1 million),
- o three times the benefit obtained or detriment avoided, or
- o 10% of annual turnover, capped at 2.5 million penalty units (currently \$555 million).

The value of one penalty unit is prescribed by the Crimes Act 1914 and is currently \$222 for offences committed on or after 1 July 2020.

These new penalties provisions apply to non-compliance with the general obligations of Financial Services Licensees under s.912A (1) of the Corporations Act 201.

Interestingly the Issues Paper for the Quality of Advice Review did not rate these new penalties as a reform included in its Text Box 1 - Timetable of Financial Advice Reforms.

Bell Potter Securities Commentary on the Key Regulatory Reforms:

Bell Potter Securities believes the provision of quality Personal Advice to Retail Clients is the joint responsibility of the Government, the Regulator, the Professional Associations, the Licensees and the Licensee's representative Brokers or Advisers.

1. Future of Financial Advice Reforms:

Bell Potter Securities has no issue with the legislative obligations of a Financial Services Licensee or its representative Advisers /Brokers pursuant to either the General Obligations of Financial Services Licensees under s.912A (1) or the Best Interest Duty and its associated obligations owed by individual advice providers under s, 961; or the prescriptive Safe Harbor Steps in relation to the Best Interest Duty under s. 921(2). However, a significant Systems Capability is very definitely needed to meet these statutory obligations and make Personal Advice in relation to financial products easily provided to and therefore easily accessible by Retail Clients.

The core feature of the Best Interest Duty and its associated obligations is that the obligations apply to the individual advice provider. The Corporations Act's Best Interest Duty converted the fiduciary duty of Licensees at Common Law into a statutory obligation which enabled ASIC to take administrative action, including making Banning Orders, for compliance failures by individual Brokers/Advisers.

Having regard to the role of individual advisers in the high profile advice failures post the GFC, the application of these obligations to individual advice providers is understood. Unfortunately, the Hayne Royal Commission did nothing to dispel the need for a continuation of these obligations on the part of the individual advice providers, at least within the Financial Planning sector of the financial services industry. The Hayne Royal Commission into Misconduct in the Banking, Superannuation and Financial Service Industry did not find it necessary to consider the Stockbroking sector of the financial services industry.

Accordingly, post the introduction of the FOFA Reforms there was a shared responsibility for the provision of quality advice by Licensees on the one hand, on account of their long standing general obligations under s.912A (1), and individual advice providers on the other hand, on account of the Best Interest Duty and its associated obligations under

s. 961, the latter of which the Hayne Royal Commission found no basis for discharging in relation to the financial planning sector of the financial services industry, although it queried the steps to the safe harbour. As mentioned the discharge of these Licensee and Advice Provider responsibilities necessitated the development and maintenance of a significant System Capability, which was recently highlighted by the Federal Court in ASIC v Westpac. Both the Federal Court and ASIC have used this case to illustrate the Systems Capability that is required to discharge the compliance obligations of Chapter 7 of the Corporations Act.

Following the announcement of the FOFA Reforms Bell Potter Securities set about computerising the Systems and Processes, and as a result developed the good governance, of an execution and advisory service for the provision of Personal Advice in relation to exchange traded financial products and its associated markets that met the requirements of the prevailing legislation.

Bell Potter Securities commenced the development of a comprehensive Client Relationship Management System in 2012 with Client Investment Profiles, Statements and Records of Advice. Over the following years development of the System has focused on Broker productivity, efficiency, compliance risk management and the provision of tools to allow Brokers to monitor and manage Client Portfolios and identify and

eliminate potential issues in accordance with regulatory requirements. The objective of our Client Relationship Management System is to have a highly developed computerised solution to cater for the needs of Bell Potter Securities, being a Stockbroker Licensee, its representative Advice Providers (Brokers) and their Retail Clients and to automate the provision of all the information to enable the Advice Provider to provide Personal Advice in relation to exchange listed financial products in the most efficient and productive way possible within the prevailing statutory and regulatory framework.

The System provides a range of tools and functionality that allows Bell Potter Securities' Brokers to build their businesses to meet Retail Clients' Needs in relation to exchange traded financial products in accordance with regulatory requirements. System Updates which are released on a fortnightly release cycle allows the Company to react quickly to developing Market and Regulatory circumstances.

From Account Opening, to Account Trading and Account Oversight, in accordance with regulatory requirements, Bell Potter Securities' Client Relationship Management System provides a complete picture of a Client's financial product holdings and values and relevant circumstances. The System also monitors and regulates the designation of the service provided to a Client, whether it be as a Retail Investor or as a Wholesale Investor and as a result Brokers are never in any doubt as to what type of Client is being serviced. With regard to the way in which Statements of Advice are provided to Retail Clients, where the Client has email Statements of Advice are provided by Portable Document Format (PDF) and where the Client hasn't email they are provided by Paper and land-mail. However, Bell Potter Securities is working towards developing the capacity to make Statements of Advice available by HTML in a Portal for the Client to access. Increasing the digitalisation of the systems and processes utilised in providing Personal Advice in relation to exchange traded financial products to Retail Clients is ongoing as Bell Potter Securities continues developing its Client Relationship Management System.

Australian Financial Service Licensees have a statutory obligation to have available adequate resources, including technological resources, to provide their licensed financial services [s. 912A (1) (d)] and it is ASIC's responsibility to see that Licensees have those technological resources, by way of a Systems Capability, to discharge their statutory obligation.

The Federal Court in ASIC v Westpac [2022] FCA 515 has formerly endorsed the need for financial services licensees to have such a Systems Capability. ASIC Deputy Chair Sarah Court said, *'the breaches found by the Court in these six cases demonstrate a profound failure by Westpac over many years and across many areas of its business to implement appropriate systems and processes to ensure its customers were treated fairly. Westpac, like all licensees, has an obligation to be honest and fair in its provision of financial services. Despite this, Westpac failed to prioritise and fund the Systems upgrades necessary to help fulfil this obligation'*.

ASIC Deputy Chair Court went on to say *'Consumer harm caused by Systems failures is unacceptable. Financial institutions must invest in Systems that allow them to meet their obligations to customers. ASIC expects the industry to do this work quickly and efficiently. Consumers are entitled to be confident that the compliance systems of the financial services firms they trust with their financial security are up to standard'*. Unfortunately it is not practical to build a Systems Capability to cater for the provision of personal advice in relation to exchange traded financial products quickly, which the wholesale withdrawal of the four leading trading banks from the financial services advisory sector seems to endorse. Bell Potter Securities has been developing its Client Relationship Management system for the last 9 years and it is an ongoing project. Where a Systems Capability provides a recipient of personal advice a complete look through of all the data held for the Retail Client in accordance with statutory and regulatory requirements then it will be possible to cut down the content of the Statement of Advice and the Record of Advice to their bare essentials, namely just the Basis of the Advice for the particular transaction which is the subject of the Personal Advice. The System can not only hold all the required information, including the Client's relevant circumstances, brokerage and fees and any disclosable conflicts of interest, but it can remind the Client of the availability of such information, allow updating of it and record the Client's access to it.

In summary, a Systems Capability, which incorporates comprehensive Client Access, will enable a very significant reduction in documentation created or provided to Retail Clients in relation to the provision of Personal Advice on exchange traded financial products, which will both reduce the cost of the provision of such advice and significantly improve its availability. Scaled Personal Advice in relation to exchange traded financial products can be provided to a large Retail Clientele with the right Systems Capability.

Licensees with such a Systems Capability incorporating comprehensive Client Access should be able to obtain regulatory relief from providing documentation when digital client information records are available. If the provision of Personal Advice to Retail Clients is dependent on manual processes it will be limited and as a result will be expensive and not readily accessible by Retail investors. However, it is a statutory general

obligation of Financial Services Licensees to have the technological resources, i.e. the System Capability, to provide the financial service covered by their License. Therefore ASIC must take particular account of System Capability when both issuing and overseeing Financial Services Licensees.

If there is complaint from providers of Personal Advice in relation to exchange traded financial products about the regulatory regime which has now been in place for 9 years it suggests that the complainants haven't been prepared to invest in the necessary Systems Capability for such a regulatory regime, which must raise the issue of their suitability to hold an Australian Financial Services License to provide Personal Advice to Retail Clients in relation to exchange traded financial products.

2. Corporations Amendment (Professional Standards of Financial Advisers) Act:

Unreasonable restrictions on experienced representative Brokers/Advisers of Financial Service Licensees continuing, and new representative Brokers/Advisers of such Licensees commencing, to provide Personal Advice to Retail Clients will definitely restrict the general availability of such advice.

The foregoing is estimated to reduce Bell Potter Securities' Advisory Desks servicing Retail Clients by 25%, which will certainly impact on the accessibility of Retail Clients to Personal Advice in relation to exchange traded financial products.

The very sharp decline in total adviser numbers within the whole financial services industry since 2018 endorse that the Education and Professional Standards prescribed by the above legislation require adjustment in order to at least stem, if not reverse, the exodus of Brokers/Advisers from the total financial services industry. As those Educational and Professional Standards relate purely to those providing Personal Advice to Retail Clients and not to other sectors of the financial service industry the impact on the provision of Personal Advice to Retail Clients is particularly significant.

After the Stockbroking sector of the financial services industry having developed, having been both self and Government regulated and having operated in distinct Markets for almost 150 years, completely separately from all other sectors of the financial services industry, the Corporations Amendment (Professional Standards of Financial Advisers) Act 2017, seeks to make the Stockbroking sector subject to Educational and Professional Standards designed for the Financial Planning sector, which has developed over only the last 30 years. Needless to say, the fit is not right.

With the exception of the failure to take any account of experience, Bell Potter Securities has no issue with the basic principles of the Education and Professional Standards incorporated in the above legislation, namely a Bachelor Degree for new entrants, an Entrance Examination, annual CPD requirements and a Code of Ethics – although adjustments are required to those basic principles.

Both the Bachelor Degree and Entrance Examination requirements have been oriented by the now disbanded FASEA to the Financial Planning sector. We believe the necessary adjustments to correct this bias can be made very easily, through the following:

- a) Requiring any new *relevant provider* to hold a Bachelor Degree from any (ASIC) approved University, but in any discipline acceptable to the Australian Financial Service Licensee (Licensee) employing the relevant provider.

- b) Requiring all *relevant providers* to join an (ASIC) approved professional association, which covers the particular financial services discipline (Financial Planning, Stockbroking, Insurance Broking or whatever) the *relevant provider* is currently working in or proposes to enter.
- c) Only for *relevant providers* on the Financial Advisers Register at 1.1.2019, exempting, first, those with at least 10 years continuous experience in acting as a *relevant provider* from the necessity to hold a Bachelor Degree and second, those with at least 7 years continuous experience in acting as a *relevant provider* who have been employed by a Licensee, which has been directly subject to ASIC's ASX Market Integrity Rules and the oversight of ASIC's ASX Participant Supervisory Division, from the necessity to
- d) hold a Bachelor Degree and hold a Master Practitioner Membership of the Stockbrokers Association, from the necessity to hold a Bachelor Degree.
- e) Allow the Professional Associations to conduct (ASIC) approved Financial Advisers Examinations, which apply to the particular financial service disciplines that the Professional Association covers and provide that both existing Brokers/Advisers and new entrants (who have not already passed the Financial Advisers Examination) must pass a Financial Advisers Examination that pertains to the service covered by the Professional Association and is conducted by the Professional Association.

The 'grandfathering' allowance, or recognition of 10 and 7 years' experience in lieu of a Bachelor Degree, is restricted to those on the Financial Adviser's Register at 1.1.2019, and is therefore a one-off temporary concession.

As the Minister now has the authority to correct what FASEA has done in only approving limited Bachelor Degrees and requiring Financial Planning courses to be included in those approved degrees without any legislative authority to do so, hopefully these missteps, as well as recognising the experience of those Stockbrokers on the Financial Advisers Register as at 1 January 2019 in lieu of a Bachelor Degree, will be corrected. This will increase Retail Clients accessibility to Stockbrokers' Personal Advice in relation to exchange traded financial products.

We believe ASIC has better things to do than conduct Financial Adviser Examinations; sure, control them through an "approval" process, but leave their conduct to the Professional Associations.

Finally, to professionalise *relevant providers* within the financial services industry you need to involve the Professional Associations and this can be done by allowing the Professional Associations to participate in the conduct of providing the Financial Advisers Examination applicable to the sector of the financial services industry which the Professional Association covers. Currently, the professional body of Stockbrokers plays no formal role in Stockbrokers provision of Personal Advice to retail clients.

3. Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act:

The attachment, with effect from March 2019, of substantial penalties to the general obligations of Financial Services Licensees for the first time since these general obligations were implemented close to 20 years ago changes the whole complexion of the regulatory regime behind the provision of Personal Advice to Retail Clients.

Section 912A (1) of the Corporations Act provides an extremely comprehensive listing of a Financial Services Licensee's obligations, from providing licensed services, "*efficiently, honestly and fairly*", to "*complying with the financial services laws*" and "*taking reasonable steps to ensure the Licensee's Representatives comply with the financial services laws*", to having "*adequate resources (financial, technical and human resources) to provide the financial services covered by the License*", to "*maintain(ing) the competence to provide those financial services*" and "*ensur(ing) that its Representatives are adequately trained*".

The Federal Court has already used the “efficiently, honestly and fairly” obligation as a basis for imposing substantial financial penalties on Licensees for compliance failures since the new penalties were attached to the financial services licensee general obligations, and it is certain that the other general obligations will be utilised by ASIC to underpin other disciplinary action against Licensees.

We have always felt that more effective License management by ASIC is integral to lifting the quality of Personal Advice provided to Retail Clients. The award or granting of a Financial Services License is a privilege and ASIC needs to be kept informed of how the Licensee is being utilised and ASIC needs to monitor such utilisation. If ASIC had been made aware of Storm Financial’s utilisation of its License it would have intervened and terminated that on-going extra-curricular utilisation and avoided many, many millions in Retail Client losses.

The power of Licensees to appoint Corporate Authorised Representatives is tantamount to giving Licensees their own financial services licensing authority and constitutes a diminution of this critical centralised regulatory authority by government. The ability to appoint Corporate Authorised Representatives should be discontinued so that every financial services business is directly licensed by ASIC. It is not necessary to directly license every advice provider.

Carve our Stockbrokers Completely from the Professional Standards of Financial Advisers legislation:

It is acknowledged that Bell Potter Securities can only speak from a position of being a Stockbroker providing Personal Advice to Retail Clients in relation to exchange traded financial products, rather than providing general financial services as a Financial Planner provides.

Given that, in the view of Bell Potter Securities, Stockbrokers can operate under Chapter 7 of the Corporations Act, including the Best Interest Duty and its associated obligations in that it has spent the last 9 years and many millions of dollars developing the Systems Capability to facilitate this and the only impediment to it providing quality Personal Advice to Retail Clients is the financial planning oriented Education requirements currently prevailing, a practical alternative may be to carve Stockbrokers completely out of the Education and Professional Standards for Financial Advisers legislation and let this stand for Financial Planners only.

The basis for such a carve-out are as follows;

- Stockbroking has been subject to over 150 years of historical development all of which apart from the last 12 years has been substantially self-regulated, whereas Financial Planning has developed out of Life Insurance Broking over the last 30 years,
- Stockbrokers account for less than 10% of the financial services industry providing personal advice to Retail Clients,
- Stockbrokers have been regulated by ASIC’s Market Integrity Rules and the oversight of ASIC’s ASX Participant Supervisory Division since August 2010,
- Complaints in relation to stockbrokers at AFCA are miniscule,
- Stockbrokers are subject to capital adequacy ten times greater than that applicable to the Financial Planning sector.
- Stockbrokers have their own National Guarantee Fund to meet certain claims which arise from dealings with participants of the ASX and CBOE (formerly Chi-X) and, in limited circumstances, participants of ASX Clear Pty Limited.

Conclusion:

Bell Potter Securities accepts the responsibility for providing Personal Advice to Retail Clients in relation to exchange trade financial products in accordance with Chapter 7 of the Corporations Act.

Over the last 9 years Bell Potter Securities has developed the Systems Capability to meet its statutory and regulatory obligations. That capability has the capacity through an expanded Client Access facility to be developed to be close to a Digital Advice service, save for there being human advice provider involvement.

There are compelling grounds for Stockbrokers and their representative brokers/advisers to be completely carved out of the Educational and Professional Standards which currently have a very obvious financial planning bias and have similar, but adjusted, requirements imposed by Stockbrokers' professional association, failing which easy adjustments need to be made to the existing Educational Standards to properly accommodate Stockbrokers.

Yours faithfully

A handwritten signature in cursive script that reads "Lewis Bell". The signature is written in black ink and is positioned to the right of the typed name.

Lewis Bell
Director