



Australian Banking
Association



Quality of Advice Review – Delivering Better Financial Outcomes Tranche 1 – reducing red tape and other measures

The Treasury

6 December 2023

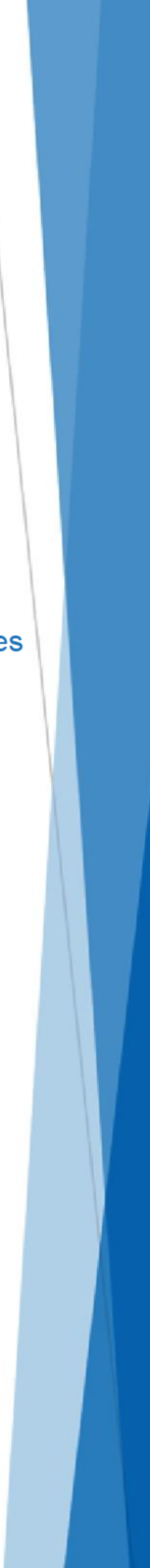




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Key Recommendations

1. **Section 963BB:** Revise the proposed draft s963BB of the Corporations Act 2001 (Cth) to limit its scope to personal advice only, to align with the intentions outlined in the explanatory memorandum and the Quality of Advice Final Report (**QAR Report**).
2. **Schedule 1, Part 5:** Amend the transition period from 3 months to 6 months after Royal Assent to allow for an effective transition of systems and implementation of the new legislation.
3. **Section 963A:** Revise the proposed amendment to s963A of the Corporations Act (Cth) to align with the intention of the QAR Report and the Government's endorsement of those recommendations. If the drafting issues are not addressed, many benefits given by clients for non-advice services will become prohibited.
4. **Financial Services Guide:** Align the approach of the proposed changes to Part 3 of the Treasury Laws Amendment (2024 Measures No. 1) Bill 2024: Quality of Advice Tranche 1 (**FSG Amendments**) with:
 - (a) the intention of the QAR Report recommendation 10 to allow the provider to determine how to provide the FSG;
 - (b) ASIC Corporations (Facilitating Electronic Delivery of Financial Services Disclosure) Instrument 2015/647; and
 - (c) ASIC Regulatory Guide 221: Facilitating digital financial services disclosures.

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About the ABA

The Australian Banking Association advocates for a strong, competitive and innovative banking industry that delivers excellent and equitable outcomes for customers. We promote and encourage policies that improve banking services for all Australians, through advocacy, research, policy expertise and thought leadership.

ABA submission to Treasury regarding the Tranche 1 reforms

The ABA welcomes the opportunity to provide a response to Treasury's consultation on the *Treasury Laws Amendment (2024 Measures No. 1) Bill 2024: Quality of Advice Tranche 1 (Tranche 1 Reforms)*. We make the following observations:

1. Section 963BB – correct drafting error and align with intent of explanatory memorandum and QAR Report recommendations

The current drafting of s963BB would have the effect of imposing the consent requirement on **both personal** and **general** financial product advice. This is due to s963A, which sets out the definition of 'conflicted remuneration', referring to a benefit given to a person who "...provides financial product advice..." As per s766B, 'financial product advice' includes both personal and general advice.

We assume this is an error in the drafting, as this conflicts with the intent of the wording of paragraph 1.197 of the draft explanatory memorandum to the Tranche 1 Reforms, which states that "*New consent requirements are introduced to provide that a person who provides **personal advice** to a retail client about a life risk insurance, general insurance or consumer credit insurance...*" (emphasis added). Further, this does not reflect QAR Report recommendations 13.7, 13.8 and 13.9 which were directed to situations where a financial adviser provides **personal advice**.

This drafting error could be resolved by inserting a qualifier at new sub-section (1) to the proposed s9633BB which could read as follows:

"963BB Informed consent for certain insurance commissions where personal advice provided

- (1) This section applies where a financial services licensee, or a representative of a financial services licensee, provides personal advice to a retail client in relation to consumer credit insurance, a general insurance product or a life risk insurance product and wishes to receive a benefit in relation to that financial product."*

In the absence of the suggested qualification, it will be challenging to implement s963BB. For example, it is common for banks (and other distributors of insurance products) to provide materials on their websites that meet the definition of general advice. It would be impractical and unnecessarily onerous for such entities to seek and obtain customer consent to any commissions in the form proposed or otherwise decline to provide general financial product advice to a particular (non-consenting) customer on their websites. There are sufficient consumer protections in place already in relation to the distribution of these products on a general advice basis and imposing these additional onerous obligations seems at odds with the intent of the reforms.¹

2. Schedule 1, Part 5: Extend the transition period

The transition period for Schedule 1, Part 5 of the proposed legislation should be extended from 3 months to 6 months after Royal Assent. This extension is required to allow sufficient time for the industry to update internal systems and processes effectively to achieve compliance with the new regulations. The proposed extension will assist in minimising potential disruptions and contribute to a smoother transition.

3. Section 963A – correct drafting error and align with intent of QAR Report recommendations

The proposed amendment to s963A should not require that the benefit be given in relation to financial product advice, to align with recommendations of the QAR Report, as endorsed by the Government.

¹ See generally Corporations Act 2001 (Cth), National Consumer Credit Protection Act 2009 (Cth), Australian Securities and Investments Commission Act 2001 (Cth).



As the QAR Report describes in 9.3 and recommendations at 13.1 and 13.2, the “*conflicted remuneration provisions are intended to and do prohibit a product issuer providing a benefit...*”. However, the QAR Report makes it clear at 9.3.2 that the Corporations Act 2001 (Cth) should be amended “*to clarify that both monetary and non-monetary benefits given by a client to an AFS licensee or a representative, for any reason, are not conflicted remuneration*” (emphasis added).

The exposure draft aims to achieve this via the QAR Report’s initial suggestion that would involve amending the definition of conflicted remuneration in s963A. However, the proposed drafting differs by restricting the exemption (in proposed ss963A(1)(b)) to only situations where a benefit is given in relation to financial product advice. Contrary to the intent of the QAR Report, the proposed drafting will therefore still require the retention of the other exemptions proposed to be removed at recommendation 13.3.

This could be resolved by deleting all the words after “by a retail client” in the proposed draft of s963A(1)(b) as follows:

“963A Meaning of conflicted remuneration – general

- (1) **Conflicted remuneration** means any benefit, whether monetary or non-monetary, given to a financial services licensee, or a representative of a financial services licensee, who provides financial product advice to persons as retail clients that:
 - (a) because of the nature of the benefit or the circumstances in which it is given:
 - (i) could reasonably be expected to influence the choice of financial product recommended by the licensee or representative to retail clients; or
 - (ii) could reasonably be expected to influence the financial product advice given to retail clients by the licensee or representative; and
 - (b) is not given to the licensee or representative by a retail client ~~in relation to financial product advice given by the licensee or representative to the client.~~

Without this clarification, the proposed drafting does not align with the intent of the QAR Report recommendations and risks inhibiting legitimate activity. For example, product fees paid by the customer for a basic banking product may be prohibited if the bank provides any general advice about their own products (as s963B(1)(d) is proposed to be removed). Another example of unintended impact is that a licensee may no longer be able to receive customer paid fees for dealing in a third party’s product if that licensee provides general advice about those products elsewhere.

Downstream payments to representatives based on benefits given by clients should also be exempt.

4. Financial Services Guide – align approach with the intent of QAR Report recommendation and existing law / regulatory guidance

The proposed FSG Amendments do not achieve their objective of increasing the flexibility of satisfying the FSG requirements as they create a new obligation to provide an FSG upon request. We note this is contrary to section 8.4.4 of the QAR Report which proposed that providers of personal advice have the flexibility to decide how they disclose the information required in an FSG. The drafting of the FSG Amendments should be revised to align with the QAR Report.

The option for providers to comply with FSG requirements by making information available on their websites exists under current law because of the ASIC Corporations (Facilitating Electronic Delivery of Financial Services Disclosure) Instrument 2015/647 (**ASIC Instrument**) and ASIC Regulatory Guide 221: Facilitating digital financial services disclosures (**ASIC RG 221**). It is not clear how the changes in the FSG Amendments are intended to interact with this ASIC Instrument or ASIC RG221, however, we assume they are intended to supplement the existing framework.

Under the ASIC Instrument and ASIC RG221 (which does not distinguish between personal or general advice), providers can disclose FSGs (among other documents) by publishing them on their website (or other electronic means) without express consent, subject only to providing:



- notification to the client; and
- a seven day opt out period, during which the client may elect to receive the information in the traditional form.

The intention of recommendation 10 of the QAR Report was to increase flexibility by removing these latter requirements for personal advice providers. We note that there is no proposed requirement to notify under the proposed FSG Amendments. However, a key tenet of recommendation 10 of the QAR Report is that flexibility will be enhanced by putting the decision on how to provide information in the hands of the advice provider. Adding a new requirement to provide an FSG when requested either before or after the service is given, and making non-compliance a civil penalty provision, is inconsistent with recommendation 10 and undermines the flexibility it seeks to promote.

To achieve greater flexibility and consolidate the effect of the ASIC Instrument and ASIC RG221, the change should apply to all circumstances where an FSG is required to be provided (including where general advice is provided), with no mandatory requirement to provide a copy separately on request.

We note that there are existing exemptions from providing an FSG where general advice is given or there is a dealing in or advice on basic banking products (s941C(4)&(6) of the Corporations Act (Cth)). However, these require that certain information in the FSG be provided to the customer. It should be sufficient for this additional information to be included in the published FSG.

The proposed FSG Amendments, as drafted, would have little impact on flexibility, undermining the intent of recommendation 10.