Tuesday 5 December 2023

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By email: financialadvice@treasury.gov.au

Dear Ms. Kelly

**Submission: Delivering Better Financial Outcomes package – Reducing red tape and other measures**

The FSC welcomes consultation on the Exposure Draft (**ED**) of the *Treasury Laws Amendment (2023 Measures No. 1) Bill 2024* as a down payment on implementing the Quality of Advice Review (**QAR**) as part of the Delivering Better Financial Outcomes package of reforms to financial advice.

The FSC believes changes are required to the proposed drafting approach to ensure it delivers the best consumer outcomes possible, promotes consumer agency, avoids anti-competitive practices, and ultimately achieves red tape reductions. Absent these changes we would be concerned that this legislation would reduce access to quality financial advice and increase its cost through the introduction of additional red tape.

We support the focus on removing red tape creating barriers to affordable and accessible advice, and the opportunity to get this right. In doing so we recommend the following adjustments to realise these objectives:

- **Recommendation 7**: S99FA (1) should require trustees to deduct advice fees from superannuation where a client consents or directs them to and where the advice is relates to a member's interest in the fund. Final legislation should support this to be verified through adviser attestation and on the consent form should align with implementation of Recommendation 8 - as proposed by the FSC. Existing tax treatment should be preserved and a due diligence defence should be introduced for trustees.
- **Recommendation 8:** The FSC supports standardisation and a mandatory form that is co-designed by industry thorough consultation with government and regulators provided certain issues this submission expands on are addressed. The single consent form should be supported by technology-neutral requirements, cover all fee configurations supported by separate appendices, and adviser attestation and responsibility for the consent. The consent should be valid where a fee recipient changes and a more appropriate civil penalties regime aligned to

penalising conduct which harms consumers should support this new framework. The 150-day renewal period should be abolished to allow greater flexibility.

The FSC supports implementing QAR recommendations to allow facilitate online financial services guides (**FSGs**) to be displayed on a provider's website and to tighten the ban on conflicted remuneration.

We would welcome the opportunity to discuss our submission with Treasury at a suitable time and look forward to the continued progression of legislation implementing the Government's package of reforms.

Yours faithfully,

**Zach Castles**
Policy Director, Advice and Platforms

## How superannuation members pay for personal advice

Superannuation members who are personally advised are typically engaged in their financial futures and by seeking out such advice, are exercising choice. The member's relationship with their financial adviser is a professional one and this relationship, based on the provision of advice, is highly regulated through the existing Australian Financial Services License (**AFSL**) regime. Many superannuation funds and trustees do not provide "in house" personal advice and the fund members are personally advised through an unrelated third-party adviser under a separate Australian Financial Services Licensee.

It is within this relationship that the member agrees to the fee they will pay for the advice and how the fee will be paid. Most members prefer to pay for their advice via deduction from their superannuation account (rather than up front). The choice of how to pay for their advice sits with the member.

Once the adviser and member or client have agreed on the advice fees and how they will be paid, the super trustee (and in many models additional separately licensed superannuation administrators and custodians) facilitate payment of the advice fee in accordance with the members choice and preference. Facilitation includes administering detailed deductions from one or multiple products that make up the members super portfolio of investments. Facilitation occurs based on member consent and direction.

The legislation should recognise and reflect that it is the member and consumer's consent and direction that should be acted upon by the trustee (and related service providers) in as streamlined and efficient a manner as possible, and it is through that lens the FSC makes the recommendations it does with regards to recommendations 7 and 8 of QAR.

## QAR Recommendation 7: Deduction of adviser fees from superannuation

### Recommendation

The FSC recommends the proposed language in s99FA (1) is replaced with simple provisions that permit advice fees be deducted from superannuation if the advice:

- relates to the member's interests in the fund; and
- has been consented to or directed by the Member and charged by the adviser.

The give full effect to this recommendation the FSC recommends:

- **A due diligence defence for trustees:** Any obligation imposed on a superannuation trustee be subject to a 'due diligence' defence along the lines set out in section 1021F (3) for offences in relation to Product Disclosure Statements (**PDSs**) – that is:
    - *A trustee does not contravene this provision if it took reasonable steps to ensure compliance with the provision.*
- **Provisions that merger, divestment and rationalisation activity of a trustee (e.g., successor fund transfer, change of trustee) should not impact the validity of the member's consent:** This provision in the law should states that a change in the party to the consent does not invalidate the consent.
- **Alignment with FSC recommendations for ongoing fee arrangements (Recommendation 8):** The proposed consent form for implementing

Recommendation 7 should integrate cohesively with the implementation of Recommendation 8 for ongoing fee arrangements (**OFAs**), and consultation on the design of the consent forms for both recommendations should be undertaken concurrently. S99FA(1)(d) should be amended so that the consent only covers the consent under Subdivision C (deducting from an account), not Subdivision B (consent covering an arrangement). This will align the treatment of OFAs with non-ongoing fee arrangements, where a consent under s 99FA (2) is about the deduction, not the arrangement itself.

- **S99FA should be amended to avoid an interpretation that the trustee's oversight obligations extend to collecting statements of advice for each advice arrangement.**
- **Adviser attestation:** Section 99FA (3) should be reworded to accommodate an adviser attestation as to the nature and quantum of the fee charged, with the client consenting to such a fee. This should reinforce and not replicate the existing obligations of advice licensees. Under this approach, the adviser remains liable for charging a fee that is appropriate (as required under Standard 7 of the Code of Ethics) and AFS licensees can continue to implement their existing monitoring and supervision activities that are designed in part to validate the validity of fees an adviser charges to their client.
- **Preserve existing tax treatment:** Current tax practice relating to tax deductions on financial advice should be preserved and final legislation should:
  - provide further clarity on Goods and Services Tax (**GST**) treatment (particularly the availability of input tax credits or reduced input tax credits) to be applied in respect of the financial advice fees paid by the superannuation fund.
  - Be expanded to include Pooled Superannuation Trusts (**PSTs**) clarify treatment of superannuation benefits.

To implement Recommendation 7 of the QAR, the ED introduces significant changes to both the Superannuation Industry (Supervision) Act 1993 (**the SIS Act**) and the Income Tax Assessment Act 1997 (**ITAA 1997**). Section 99FA (1) as proposed establishes five requirements that trustees must meet before advice fees are paid:

- The financial product advice is personal advice and wholly or partly about the member's interest in the fund;
- The fee is only paid to the extent the advice relates to the member's interest;
- The trustee charges the cost in accordance with the terms of a written request or consent of the member;
- The trustee has the member's request or consent or a copy of it; and
- Particular requirements for consent and related matters are met depending on whether the advice is under ongoing fee arrangement or other arrangement.

*Impact of the provisions*

In summary the provisions:

- **Deprive consumers of access to advice by inserting a more convoluted process into the existing set of requirements on trustees driving up cost.** This runs against the Government's intent and the QAR to enable members to draw on their superannuation for the purposes of advice.

- **Undermine consumer decision-making capacity to direct advice fees which was against the intention of the QAR.**
- **Entrench anti-competitive behaviour that advantages the models of incumbent players.** The ED's provisions risk privileging certain models (e.g. trustee setting caps on advice fees based on the sole purpose test); underming consumer choice and the value of personal financial advice. This is unnecessary given the significant consumer protection independent licensed financial advisers provide consumers subject to the Code of Ethics and the Best Interests Duty, and would undermine trust between trustees and AFSL holders.
- **Increase red tape by introducing five new requirements.** These will lead to the proliferation of unworkable and cumbersome compliance processes outside the capacity and purpose of superannuation funds in which costs are passed onto consumers.

This runs against the imperative of delivering more advice to consumers and increasing its cost and complicating what is a problematic framework. The FSC makes the following observations:

- **As worded, the ED increases obligations on trustees which duplicate the obligations of advice licensees (AFSLs) and their authorised advisers. In particular:**
  - Section 99FA (1)(a) will be read by trustees as a requirement to form their own opinion on whether the financial product advice is personal advice or not. This is notwithstanding all other mechanisms in place making it self-evident the advice is personal advice – member directions and consents.
  - Section 99FA(1)(b) requires that the amount charged does not exceed the cost of providing financial product advice about the member's interest in the fund. Again, we believe that trustees will need to form their own opinion about the relative cost of the advice in total (where it is only related to the member's interest in that fund) or in part (where the financial product advice is about matters beyond, but including, the member's interest in that superannuation fund.'
- Under this framework:
  - Trustees would be without the expertise to determine the proportion of the fee that relates to the member's interests in the superannuation fund so that, despite their best efforts, could still end up breaching the proposed law.
  - The cost of administering any assessment would be charged back to a fund and members. By contrast professionally, trained financial advisers operating under the AFSL regime already administer the essential requirements of the ED under the Best Interests Duty and the Code of Ethics. It would run against the objective of the legislation and undermine consumer protections to duplicate this responsibility.
  - It is hard to contemplate how a trustee would go about satisfying the requirements of the proposed framework without making some assessment of the Statement of Advice (**SOA**) provided by the AFSL to the fund member, or an Advice Record should the Government proceed with reform of the SOA requirements.
- **The disclosure regime already works against a trustee's capacity to meet the requirements set out in s99FA (1) of the ED.** APRA and ASIC have previously issued guidance to trustees reminding them of their obligations under the sole purpose test and the charging of advice fees against a member's account. This guidance, which provides flexibility, has been followed by trustees through monitoring and oversighting processes and controls. Beyond trustee monitoring and oversight processes and controls, trustees are not able to make an assessment of personal financial advice provided by third party licensed financial advisers.
  - The current drafting of the ED assumes if an adviser provides a couple with joint advice in a single SOA, part of which relates to one members of the couple's superannuation interest in a particular fund. To discharge its obligations as currently drafted, the trustee

would request a copy of that SOA was required to be assessed by that member's superannuation trustee.
    - In accordance with privacy obligations, the adviser (and their Advice Licensee) would generally look to redact any information not related to that superannuation interest. This renders any such assessment highly artificial, adds unnecessary cost and creates delay in the advice fees being deducted and paid. In addition, it makes it difficult for a trustee to form an opinion on the relative cost of the advice.
    - If the trustee was provided with an unredacted version of the SOA and assuming the clients had given consent to its provision (overcoming privacy concerns for the clients and adviser), the trustee would still be required to fully or partially erase the document now information that is not required to perform its obligations.
- **The intent of the QAR was to provide certainty to trustees rather than further complicate their obligations which are already problematic.** For example, in relation to MySuper, the only advice fees allowed to be deducted are intra-fund advice. No ongoing advice fees are allowed even with member consent. This means where there's no "product advice" a MySuper member cannot obtain personal strategic advice and have this advice fee deducted from their account, unless it's intra-fund advice. This leads to those who are least likely to be able to afford advice having to pay for any strategic advice from their own pockets. Relevant strategic advice may include whether they should contribute more to super or pay down debts.
- **Implementation of Recommendation 7 should be consistent with the FSC's recommended approach to implementing Recommendation 8 where one form should capture ongoing fee arrangements (OFAs).** As stated, the requirements of the ED invite *separate* disclosure processes depending on whether the arrangement was an ongoing fee arrangement or not.
    - If this fee is part of an ongoing fee arrangement then this would trigger the requirements of the OFA under the draft bill; OR
    - If it is not part of an OFA however and is separate it would need to go through a separate process of a form that ASIC prescribes which would be mandatory inviting an entirely separate form.

  The ED should support the consideration of a consistent approach to the treatment of non-ongoing fee arrangements.
- **Diminish choice for consumers placing limits or directives on the advice fees** (e.g., monitoring or setting caps on fees a member pays depending how a particular trustee's use of their discretion against the provision is used).
- **Lead to advice limited in scope.** Focusing solely on a member's interests in the fund potentially limits the scope of the advice.

*FSC's proposed solution.*

In summary, the FSC's proposals for implementing Recommendation 7:

- **Promote greater access to advice for consumers and respect the autonomy of members.** The proposal balances the need for consumers to access advice within reasonable limits in acknowledgement of the trustee's obligations.
- **Provides a simple mechanism by which this requirement is administered reducing red tape.** The attestation will be member-directed and simple to administer and verify reducing the need for case-by-case checking or second guessing the obligations of AFSLs; and
- **Ensure competition and a level playing field as advice is opened up to millions more consumers.** The FSC's proposal will deter anti-competitive behaviour arising from the discretion

under the ED's a trustee would have (e.g. cap or refuse advice fees) through a simple and express requirement that is easier to administer.

While still satisfying a trustee's obligations under the sole purpose test, an express requirement where the advice relates to a member's interest in the fund and a member has consented to direct the payment, will prevent duplication, cost and respect the agency and choice of the member. This is ultimately in line with the government and Levy's intent to promote greater access to advice under appropriate safeguards. In implementing the FSC's proposed approach to Recommendation 7 outlined above, the FSC notes:

- **A due diligence defence and the proposed revision to s99FA (1), as the FSC recommends, will support trustees to meet their obligations while ensuring millions more consumers can access financial advice.**
- **The proposed consent form for implementing Recommendation 7 should be consulted on with industry to ensure an appropriate design and integrate with the FSC's proposal for implementing Recommendation 8.** This is because the services provided by a financial adviser under an on-going fee arrangement that may all relate to a member's interest in their superannuation fund may not all be "personal advice" as defined but would still be appropriate to charge against the member's balance. Examples may include where a financial adviser provides a range of factual information to a client (for example about changes to superannuation laws, rates etc) but which are not intended to influence the member to make a decision at that point in time. While we recognise the ED does not cover the specifics of the design, the surrounding requirements are material to its effective implementation. To that end we would expect consultation on that design to consider a design which includes but is not limited to:
    - Attestation by the adviser that the advice is personal advice – noting it is the adviser best placed to confirm this; and
    - that that fee to be charged is in relation to the member's interest in that fund only.

- **Attestation by the adviser would support the implementation of Recommendation 7**: **The** client would provide their consent to that fee being deducted from their account and paid to the financial adviser. If the trustee of the fund receives a duly completed form in this manner, with these attestations, they should be entitled to rely upon it. In this regard, the current wording of the currently proposed Section 99FA (3) could be reworded to:

    *the trustee has received:*

    *an attestation from the relevant provider that the fee is for advice to the member.*

    *an attestation from the relevant provider that the fee is related only to the member's interest in that superannuation fund; and*

    *consent from the client for the fee to be charged to their interest in the superannuation fund and paid to the relevant provider.*

  We believe existing penalties under the Corporations Act are appropriate for dealing to situations where an adviser provides an attestation that proves to be false or misleading.

*GST treatment of financial advice fees*

The ED contains amendments that provide appropriate clarity on the income tax aspects of the changes.

However, there is a notable omission of any provisions to clarify the Goods and Serviced Tax (**GST**) treatment of *all* financial advice fees paid by the superannuation fund. The absence of clarification under the rules, including confirmation of an acquisition by the fund and the reduced input tax credit status and applicable percentage, would give rise to significant GST uncertainty for superannuation funds associated with the proposed changes as it would be unclear whether current GST treatment would change.

The introduction of GST uncertainty arising from the ED is likely to result in the following negative outcomes for consumers:

- result in increased disputes;
- pricing of risk into fees
- an increased cost of providing advice to members, whether due to cost of disputes, loss of entitlement to reduced input tax credits or otherwise.

This would detract from the stated objective of Recommendation 7 to provide certainty on the charging of advice fees.

Further clarity should be provided in the context of the GST treatment (particularly the availability of input tax credits or reduced input tax credits) to be applied in respect of the financial advice fees paid by the superannuation fund. In part this is because:

- The amendments do not address the issue of the contractual arrangements regarding provision of the advice and payment of the fees. In the proposed amendment to sub-section 295-490(1) Item 5 paragraph (a) it is made clear that the deduction is available to the fund "regardless of whether that cost was incurred by the provider, the member or another entity".
- In paragraph 1.58 it is said "the cost can be incurred by the fund, or, incurred by the member and subsequently paid by the fund". This could potentially lead to inconsistent GST treatments for the same economic transaction.
- proposed new sub-section 99FA(5) of the SIS Act states that "if the cost of providing financial product advice in relation to a member is charged in accordance with subsection (1), the cost is taken to be a direct cost of operating the fund" but this is limited to being for the purposes of the SIS Act and Regulations.

An appropriate amendment to the GST provisions to clarify that the superannuation fund is the acquirer of the supply of the financial advice services and is entitled to an appropriate input tax credit or reduced input tax credit would ensure that Recommendation 7 of the QAR is implemented in line with what was intended.

*Amounts paid by pooled superannuation trusts (PSTs): Proposed Sub-section 295-490(1) Item 5:*

- Under the proposed amendment, the deduction will only be available to the superannuation provider for a superannuation fund. However, for superannuation funds that invest in and are administered by pooled superannuation trusts, PSTs it may arise that the financial product advice provided to the member may be paid for by the PST or the life insurance company. Consideration should give to expanding the proposed amendment to include

amounts paid by PSTs and to incorporating a deductibility provision similar to the proposed sub-section 295-490(1) Item 5 into Division 320 of the ITAA 1997.

- The proposed amendment applies to an amount that is for a cost incurred because of the provision of "personal advice" (within the meaning of Chapter 7 of the Corporations Act) where the amount is paid at the request, or with the consent, of the member. However, paragraph 1.59 of the Draft EM says that a deduction under this new section could be for amounts charged against other members' interest ('intra-fund' advice). It is submitted that introducing the term "intra-fund" advice in this context is potentially confusing. The term "intra-fund advice" is not defined by law and is used inconsistently to refer to several types of advice (see ASIC Article "Clarifying intra-fund advice", published 4 December 2020). It may cover both "general advice" and limited or scaled "personal advice". General advice may not be personal advice (see ASIC RG 244 at paragraph 244.43). To the extent that the relevant amount paid by the superannuation provider is in respect of intra-fund advice which is "general advice" (which may be collectively charged across the superannuation fund's membership) such amounts would not be deductible under the proposed provision. The EM should clarify the section applies to the cost of providing relevant forms of personal advice but does not extend to the cost of general advice, which should normally be deductible under section 8-1 ITAA 1997.
- The proposed new amendment relates to personal advice about the "member's interest" in the fund. The term "member's interest" is not defined. For example,
    - Superannuation interests: The EM is unclear has to whether this is reference to "superannuation interest" (defined in section 995-1 ITAA 1997 to mean "an interest in a superannuation fund").
        - For example, does an "insurance-only" member have a "member's interest" and is it intended that the deduction include the cost of advice concerning a member's insurance benefits where the insurance coverage relates to death benefits and total and permanent disability benefits, which would not be assessable income to the superannuation fund upon receipt from the insurance company. Further clarification of what "member's interest" is intended to cover would be of assistance.
- The proposed amendment replicates the negative limb of section 8-1 ITAA 1997 to preclude a deduction if the amount is incurred in relation to gaining or producing exempt income or non-assessable, non-exempt (**NANE**) income of the superannuation fund. This leaves open some of the uncertainty that currently exists under section 8-1 ITAA 1997 regarding the extent to which a financial advice fee may relate to the circumstances of an individual member and thereby falls within the exclusion. For example, if the advice relates to an appropriate asset allocation to be held to support the member's income stream in retirement, presumably if the member is already in the retirement phase deriving an income stream, then the fee is probably not deductible. However, if the same advice about asset allocations to support a future retirement income stream (when the income from the assets may be exempt to the fund) is provided when a member is still in accumulation or TTR phase, it is unclear this deductible. The discussion in the Draft EM on the deduction exclusion seems to imply that it is intended to apply an apportionment methodology similar to that described in Taxation Ruling TR93/17 (i.e. proportionate disallowance of the deduction at the fund level, rather than analysis of the circumstances surrounding any particular advice fee paid). For segregated funds, presumably the intention would be that advice fees paid in respect of members in retirement phase will not be deductible, whereas for those in accumulation and TTR phases, they would be deductible. It would be helpful to clarify more specifically how this exclusion is intended to operate, noting that if the intention is to have regard to the nature of the advice for each member's particular circumstances, this would be a highly impractical exercise.

- As a general observation, some of the language in the Draft EM is inexact, conflating the advice fees charged to the member's account with the fees that are paid to the financial adviser. For example, in paragraph 1.50 of the Draft EM it is stated that the amendments are "to ensure that financial advice fees charged under section 99F of the SIS Act are tax-deductible to the fund". A similar statement is made in paragraph 1.51.

Superannuation benefits

- The amendments propose to insert a new s.307-10(e) so that the amount paid by the superannuation fund will not be a superannuation benefit where the fund can deduct an amount under s.295-490(1) Item 5. Final legislation should clarify whether:
  - If there is no deduction to the extent that the payment is incurred in relation to the fund's exempt income/NANE that this exclusion to "superannuation benefit" will not apply.
  - For example, if the advice fees were paid by a segregated fund in respect of members in retirement phase, no deduction would be available to the fund, with the implication that s.307-10(e) is not met so the payment may be viewed as a superannuation benefit.

**QAR Recommendation 8: Ongoing fee arrangements**

**Recommendation**

Final legislation should support:

- **Industry co-design of the single consent form and thorough consultation between government, regulators and industry ahead of and post commencement of the legislation.** The objective of this consultation should be to standardise compliance with the requirements across the industry through a form that fully reflects the range of fee types and interactions currently and in the future. The FSC supports standardisation of fee consent requirements that should be become mandatory provided only that its inherent design issues are fully addressed. These issues include but are not necessarily limited to:
  - **Adviser responsibility and attestation:** The professionally qualified and licensed financial adviser should be responsible for securing the member's consent to deduct fees and attesting this to the trustee or product issuer – a fundamental change that should accompany the introduction of a single consent form. The ED should provide for attestation product issuers can rely on and responsibility for this should sit with advisers.
  - **Coverage of all fee configurations**: The form should cover consent to deduct fees for multiple products and should apply to all types of fee arrangements (e.g. fixed term arrangements ongoing fee arrangements (including renewals), and one-off fee arrangements).
  - **Appendices being used to maintain consumer privacy and implement consent:** Product information should be provided in appendices (or by other means) to the single consent form, maintaining the privacy of client information in the form while ensuring a product issuer can meet their obligations without driving unnecessary disclosure into the consent form that is a problem with the current framework. The form should be as consumer centric as possible and deter voluminous fee information from being included.

  - **Electronic provision and technologically neutral legislation:** The legislation should expressly provide for the form to be provided digitally or electronically and coded by digital advice operators and allow the requirements under the proposed amendments to the Corporations Act and the SIS Act under the Electronic Transactions Act 2000.
  - **Allow for changes to the fund for situations such as Successor Fund Transfers (SFTs).** In addition to the current flexibility provided by ASIC Corporations and Superannuation (Amendment) Instrument 2023/512 for changes to member or fee recipient name, the law should allow for circumstances where the name of the fund changes to account for circumstances such as SFTs.
  - **Be considered alongside the consent form for non-ongoing fee arrangements:** While the FSC acknowledges the Minister is not prevented by the ED from ensuring the form can cover non-ongoing fee arrangements, we recommend final legislation permit, and this consultation on the design of a form should not limit its applicability to non-ongoing fee arrangements.
- **A more proportionate civil penalties regime:** The penalties for failing to provide a written termination notice that fees have terminated within 10 days is unreasonable and should be replaced with a penalty on the licensee or adviser continuing to charge fees beyond the date of content. In general, the proposed civil penalties regime should have greater regard to penalising clear and genuine consumer harm than technical or minor procedural breaches.
- **Remove renewal periods to allow a consent to be signed and agreed within a 15-month period:** The existing renewal period is arbitrary and not reflective of different consumer circumstances adding unnecessarily complexity into the fee consent process and should be removed.

Resolving the issues in the ED and their integral impact on the design issues we raise, and their ultimate resolution, will support the policy intent of Recommendation 8 of a simpler advice process to administer for consumers when for consenting to deduct fees. The current requirements:

- Drive poor consumer outcomes by creating an unnecessarily complex process for communicating services and fees to consumers (e.g. the fusion of the Fee Disclosure Statement with existing consent obligations;
- Do not reflect the "chain" of licensed financial services providers that interact to administer a personally advised member's choices and generate red tape and friction between separately licensed advisers, trustees, and product issuers;
- See costs shifted between different intermediaries overall that are ultimately worn by consumers through variation in different forms, formats, and processes for handling fee consent; and
- In the absence of standardisation, indirectly promote anti-competitive behaviour through individualised fee consent forms because the law fails to offer a level regulatory playing field.

Implementation Recommendation 8 in line with the FSC's proposed approach will deter different operators reading in a range of detail across different forms by:

- Delivering for a simplified process and presentation of fees consumers understand;
- Ensure standardisation across the industry achieved by thorough consultation to ensure the legislative requirements can be comprehensively complied with across industry; and

- Deter anti-competitive behaviour and friction across the industry as a result of a standard form.

To achieve these improved outcomes, the FSC expands on its recommended approach to implementing Recommendation 8:

- **Industry co-design of the single consent form with regulators and government will ensure effective legislative implementation.** The ultimate design of the requirements will hinge on the legislative scheme supporting it. The lack of alignment between industry, government and regulators ahead of the existing requirements coming into effect proved highly problematic in 2021. This consultation should address the issues and design features we recommend above.
- **The ED should provide for attestation product issuers can rely on and responsibility for this should sit with advisers. The member's professionally qualified and licensed financial adviser should be responsible for securing the member's consent to deduct fees and attesting this to the trustee or product issuer(s) – a fundamental change that should accompany the introduction of a single consent form.** Now, positive client consent has been interpreted to mean that the trustee must receive, and sight signed forms from clients. In practice this has meant the adviser is required to obtain the signed form and submit this to the trustee along with a client ID that contains a client signature for comparison. This has created onerous obligations on the adviser and the trustee to manage and significant inefficiencies. While a digital client consent option has been developed, the vast majority of advisers and clients do not take this option up. Such a form will support those organisations working with advisers in the background engaging with product issuers. An impact of the existing requirements would be to entrench the multiplicity of different forms.
- **Displaying product information in appendices (or by other means) will address the privacy implications of single consent form covering multiple products.** For example, rather than having to redact information when using a single consent form for multiple accounts having the consent captured on a standardised form with the different account information in appendices would address privacy issues and be more efficient (and less risky) than having to redact. Allowing product information to be provided via appendices (or by other means) will have several benefits:
    - maintain the privacy of consumers when consenting to the deduction of fees across multiple products;
    - product issuers can have confidence that they have the information within the member consent that they need to facilitate payment of the correct advice fee through their product; and
    - support a consistent approach not currently apparent across the industry that is feasible.

  While technical non-compliance with the rules may attract a penalty, it should not invalidate the consent as this would have adverse consequences for product issuers who rely on the consent to pay advice fees.
- **Electronic consent to deduct fees should be supported by both the SIS Act and the Corporations Act**. For example, the SIS Act is carved out of the Electronic Transaction Act, whereas the Corporations Act provides more flexibility to permit the electronic signing of documents. Final legislation should ensure revised fee consent requirements under both Acts can be met via the consent form. Final legislation should support trustees need to be able to send and receive the consents on the same basis (e.g., electronically). Some other points to consider about the operation of the existing law:
    - The substituted Section 99FA (2) outlines the written request or written consent requirements for advice fees under an arrangement other than an ongoing fee arrangement. Section 99FA (2)(e) refers to the consent containing the member's signature. For some operators, a consent form requires a member's signature. However,

the proposed regulation is silent on whether written consent to provide electronic consent in a different way (i.e., through a tick box on a web page) is permitted. Final legislation should clarify this point.

- **Primary law should only provide a baseline set of data fields that a consent form should require and not prescribe vague or ambiguous terminology that leads to variation in the industry. This can be resolved in the design of the form in consultation with industry.** We question the import of two ASIC legislative instruments[1] prescribing the data fields (e.g., name and contact details). This uses existing language that has led to different interpretations across the industry. The form would need to be specific about the data fields required either in the form it approves following consultation and where necessary supported by guidance. For example, 'contact details' would need to be specified.
    - Some operators consent forms include a small number of 'non-prescribed' fields such as the member's address, mobile, email. These data points are used as part of the member verification as a risk mitigation measure to provide comfort that the member providing the form, is truly the member. It also assists in ensuring we have the right form for the right member. This will be simplified by the process afforded through attestation we propose but this example is equally relevant to ensuring primary law is not unduly prescriptive where required data fields are concerned.
- **Clarity in the law that a consent is valid when a licensee or adviser changes should be retained, and applying a similar provision for changes to the fund such as including Successor Fund Transfers (SFTs):** ASIC Corporations and Superannuation (Amendment) Instrument 2023/512 enables that where a member's name, or the name and contact details of a financial product advice provider change, a new written consent does not need to be obtained from the account holder or member provided that no other information in the written consent has changed. The law and any form that is created should continue to provide this flexibility.

> *"(7) For the purposes of paragraph (1)(e), a consent is taken to meet the requirements of paragraph (2)(c) if the consent includes the name of the fund from which the cost of the advice is requested to be paid at the time the member signs the written request or written consent and the member's interest is later transferred to a successor fund."*

In the ED the main change to section 99FA is to:

- *replace the current language "must not directly or indirectly pass on the cost of providing financial product advice" with "must not charge against a member's interest in the fund the cost of providing financial product advice" to clarify the prohibition against charging such costs against the members' interests; and*
- *clarify that a trustee is not required to agree to the member's request to charge the relevant costs even when the requirements are satisfied.*

The requirements for the consent require the name of the fund from which the ASFs will be deducted to be specified on the consent form. In an SFT scenario this will change post the SFT, so the section is problematic and would be resolved implementing the FSC's recommendation. Final legislation and the design of the form should ensure that where the name of the fund changes due to a change in trustee and/or SFT the consent continues under the new fund and a new written consent does not need to be obtained.

[1] ASIC Corporations (Consent to Deductions—Ongoing Fee Arrangements) Instrument 2021/124
ASIC Superannuation (Consent to Pass on Costs of Providing Advice) Instrument 2021/126

- **The integration with the civil penalties' regime should be proportionate to misconduct and genuine consumer harm.** The ED integrates what are new requirements with the current civil penalties regime that in our view should be more holistic and omit onerous penalties for minor breaches or administrative oversight. It does this in several ways:
    - Fee recipients are subject to penalty provisions if written notice is not provided the arrangement, they entered into with a client has been terminated.
    - Even if a client exercises their right to terminate an agreement, a fee recipient fails to provide a written notice after the termination, the fee recipient is subject to the civil penalty provisions.
    - Minor administrative breaches or overpayments are subject to mandatory reporting.

  If the intent is to ensure the adviser has confirmed or actioned the cessation of fee deduction from the product provider, and therefore if a penalty is necessary, it should be aligned to the behaviour that the licensee or authorised representative to ensure they communicate or confirm the cessation has happened (i.e., the product manufactures wont charge any more fees). Treasury might consider as it finalises legislation, how civil penalties in analogous regimes apply to achieve consistency. As such:

    - To the extent that Treasury consider that the provisions remain civil penalties, the provisions should be carved out of 'deemed' significance under the breach reporting regime (for example, a failure to given written notice in 10 business days, without a charging of the fee, while oral notice was given; or the giving of notice within 11 business days).
    - To reduce red tape and the collection of information, account providers do not require a copy of the notice given by a fee recipient to the client notifying that the consent has been withdrawn or ceases to have effect. The notification provisions should be relaxed so that fee recipients only need to notify the account provider, rather than prescribe the form of that notification, to achieve the primary intention of ceasing the deduction of further fees from a client's account.

- **Removing the renewal period will allow flexibility for advisers and consumers:** The current 150-day renewal period is an arbitrary requirement on advisers only allowing them to renew and agreement after the anniversary date, and not reflective of different consumers. Advisers may wish to meet clients out of cycle and in advance for a variety of reasons (e.g., if the client is travelling overseas). Removing 'renewal period' and allow consents to run for 15 months from when the consent was given. This would give advisers the flexibility to reset the annual review, but each time for a period of up to 15 months. A timeframe of 15 months is also simpler than 150 days to manage (given the changing days in a month).

**QAR Recommendation 10: Financial Services Guides (FSGs)**

**Recommendation**
Final legislation should clarify that an advice provider need not notify a client the FSG has been updated and that a provider need only indicated the date it was updated on their website. Australia Financial Complaints Authority (**AFCA**) rules and other tools of regulatory enforcement should update their practices from examining whether clients were given an FSG to reflect that these can be made available on company websites.

The FSC welcomes the ED's provisions to support the provision of a FSG on a company website. We question the provision requiring the guide to be provided in the event that a client requests it. This would create an added compliance focus to the advice experience when the objective of such a reform is to allow greater flexibility. Legislation implies a positive obligation to show you've met your

obligations.

The current requirements:

- Require proactive disclosure to consumers that is unnecessary and often lacking context (e.g. the FSG is to be provided first in the advice process requiring the outlining of an internal dispute resolution process).
- Allowing the display of this information on company websites consumers can access would be more appropriate and supports the objective of a simpler and clear advice experience.
- Overall, requiring the distribution of a physical FSG increases red tape without regard to the context or particular client in which needs and understanding differ from consumer to consumer.

**QAR Recommendations 13.1-13.9: Conflicted remuneration**

The FSC welcomes the Government's moves to tighten the ban on conflicted remuneration on the basis that:

- Consumer outcomes have improved under the conflicted remuneration provisions that since their introduction have seen the industry markedly professionalise while moving to fee for service models.
- Unnecessary disclosure and duplication arising from the period in which advice was in many ways conflicted as identified by the QAR is the key roadblock to consumers getting access to quality advice.
- Policy design should be vigilant against unintended consequences of legislative provisions that could benefit certain market participants over others.

By way of technical suggestions, the FSC would make to implement the conflicted remuneration provisions, the FSC makes the following observations:

- The legislation should make clear the amended disclosure requirements that would apply in either legislation or guidance in respect of the following recommendations being implemented:
- For 13.1 and 13.3, that advisers would no longer be required to complete the soft dollar register for gifts from clients in light of the exemption being removed.
- For 13.7, which relates to the consent to receive commissions as opposed to disclosure, percentage amounts should remain a satisfactory level of disclosure to clients given:
    - The percentage is already agreed to and should be disclosed and explained as calculation of an agreed percentage.
    - Additional consent for higher commissions would in most instances be discussed during client meetings before implementation. If a client accepts a policy with loadings, it is assumed they have consented to additional commissions.

Treasury might consider a longer transitional period for insurance commissions paid under arrangements entered into before the commencement date. The purpose of a longer period is in order to give the adviser and client time and transition into the new consent regime. We consider a two-year transitional period is reasonable, which aligns with the current clawback rules (i.e., under the current rules, commissions must be repaid where the insurance policy is terminated or lapses in the first two