Australian Banking Association

10 June 2022

Ms Michelle Levy
Quality of Advice Review
Financial System Division
Treasury
Langton Cres Parkes ACT 2600

Dear Ms Levy

Quality of Advice Review

The Australian Banking Association (**ABA**) welcomes the opportunity to provide comment on Treasury's Quality of Advice Review.

The advice industry has changed considerably over the last two decades, and it is timely to consider whether the regulatory framework supports the delivery of high-quality and affordable financial advice that benefits consumers. In this submission, the ABA makes recommendations that aim to strike a better balance between the need to provide access to advice, while ensuring effective consumer protections are in place.

Our view

The ABA considers that improvements to the regulatory environment for financial advice could better support consumer outcomes at lower cost, which will benefit consumers and boost productivity.

Financial advice has become more difficult and expensive for consumers to access over time, in part due to increased regulatory complexity that has raised barriers to high-quality and affordable advice. The regulatory obligations that have gradually emerged over time have bolstered the protections provided to consumers but have also created an overlap of regulatory requirements. These layers impose risks and complexities for organisations and advisers seeking to provide advice and raise costs due to the extensive regulatory obligations for even the most basic financial products. As a result, the availability of advice to consumers has fallen while the cost has continued to increase.

The ABA supports strong consumer protections, but the level of protection should be appropriate to the risk of the products and the type of advice sought, with some products requiring far fewer requirements than others. This will reduce compliance costs and the flow-on prices to consumers by more accurately reflecting the type and complexity of services provided. Moreover, we consider that access to and affordability of advice will be enhanced through clarifying key concepts in the law, particularly on the demarcations between general advice, personal advice and factual information. Without this clarity, there are significant risks for licensees in guiding front-line staff on what they can say to customers and lack of clarity may disincentivise the provision of advice outside a comprehensive advice model.

Finally, the ABA observes that the advice disclosure requirements should be simplified and streamlined so that consumers can better understand their advice document, providers can lower their costs and potentially pass on those reduced costs to consumers through lower fees.

Key recommendations

Consistent with these views, the ABA makes the following recommendations

1. Simpler and lower-risk products should be exempt from the regulatory obligations under the advice regime, while retaining all other existing AFSL holder obligations

The financial services regulatory regime currently captures a diverse range of "financial products" and sets the same rules for them, with relatively minor variations. This means that highly complex, risky products suited to very few consumers are regulated in much the same way as simple products such as

transaction accounts held with a bank. The ABA considers that it is unnecessary to regulate financial advice about simple products such as basic banking products in the same manner as financial advice given about complex and risky products. Treating such products in the same way creates a high regulatory burden that disincentivises banks from best assisting their customers with guidance due to the uncertainty over what obligations may arise, and compliance costs that are disproportionate to the risks to consumers.

The ABA considers that while basic banking products should be exempt from the regulatory obligations under the advice regime, they should remain regulated as financial products in all other respects. This means that advisers will need to maintain an AFSL and abide by their core obligations and consumers will also be protected through new requirements, including the Design and Distribution Obligations (DDO), new anti-hawking rules and the Banking Code of Practice.

2. Further clarity should be provided on the scope of personal advice, general advice and factual information as well as mere advertising.

The current law defines what might be thought of as a well-understood term ("advice") as "recommendations" or "statements of opinion". Case law demonstrates that these recommendations and opinions can be made merely by implication. This means written materials and customer conversations only intended to provide factual information can be easily caught by the regime.

We note that the distinction between general and personal advice creates confusion for consumers. The term 'general advice' can be misleading and consumers often mistake 'general advice' as being advice for them and more akin to personal advice. The ABA supports recasting general advice as a form of general guidance and reformulating personal advice to focus on 'true' advice. One solution could be to be reformulate Section 766B to focus on advisory engagement. Product issuers should also be permitted to provide personalised advice about the product they issue, scaled in such a way as to not need to consider a broader range of products within the market.

Further clarity on the distinction between advice and mere advertising is also required – a distinction that is particularly difficult in practice because all product advertising (at very least by implication) either recommends, or opines favourably upon, a product. Additional clarity is also needed on how limited scope advice can be provided efficiently.

3. The disclosure requirements should be reviewed

Customer disclosure requirements for products outside basic banking are currently extremely burdensome for providers to implement and often unusable for consumers who are not often able to properly understand or absorb the large volumes of information in documents such as Statements of Advice and Financial Services Guides.

Enabling a more flexible approach to disclosure, streamlining requirements and refocussing on customer needs would provide a better experience for consumers while reducing costs on providers to develop and update these onerous documents that many customers do not read. Reliance on these lengthy documents is also less useful in the context of the new DDO requirements which have moved much of the onus from consumers to providers in proactively understanding their target market. With these reforms, the rationale for the current very extensive disclosure regime is unclear.

Detailed comments on these views and other suggestions are provided in the attached document.

Thank you for the opportunity to provide feedback. If you have any queries, please contact me at Prashant.ramkumar@ausbanking.org.au

Yours sincerely,

Prashant Ramkumar
Associate Policy Director
Australian Banking Association

Australian Banking Association

Detailed discussion on ABA views

We have raised above our key recommendations. Below, we provide further context and discussion on the rationale for these recommendations.

Framework for Review

Quality, Accessible, and Affordable Financial Advice

Simpler and lower-risk products should be exempt from the regulatory obligations under the advice regime, while retaining all other existing AFSL holder obligations

The ABA continues to support a single licensing regime for financial services. However, the current definition of Financial Advice covers a broad range of financial products provided by what are effectively different underlying industries. This has created a situation where reform aimed at one industry has unintended consequences for other financial services providers.

The range of products that advice can be sought on extends from the most basic account products to complex products such as superannuation and complex investments. The lower risk products should be removed from the advice regime completely. In particular, basic banking products are a clear example of low-risk products that no longer need to be within the advice regime. In this section, we outline some examples of products that could be explicitly removed from the advice regime altogether.

It is not intended that this proposal allow non-licensed persons to advise consumers about financial products. All other existing obligations imposed on AFSL holders should continue to apply.

Basic Banking Products

Basic banking products are 'simple' products that are well understood and very commonly used. The features of these products are easy for consumers to understand, and the market is transparent for customers to compare different products offered. There is already an established public policy argument under the Future of Financial Advice reforms to exclude basic banking from the FOFA regime on the basis that these products are low risk and well understood by consumers. A similar argument applies here.

Moreover, there are several reasons why removing basic banking products from the advice regime would offer benefits to consumers while retaining key protections:

- Substantial regulatory changes have occurred since Chapter 7 of the Corporations Act was drafted over twenty years ago. Notably, the recently enacted Design and Distribution Obligations, enhancements to Anti-Hawking legislation and the Banking Code of Practice provide significant consumer protections for banking customers. These protections would continue to exist for basic banking products. Removing these products from the advice regime, including from the limited best interest duty, is unlikely to cause customer harm, and would make obtaining guidance on these products more available and affordable.
- Managing the provision of advice for these products is complex. The existing process demands extensive training of front-line bankers, extensive record keeping, and other compliance requirements and cost simply to assist customers with these basic products. This regime also causes confusion to the customer as to the type of advice they are receiving and results in a general caution on the part of banks to provide guidance about these products.
- Technological change is driving the adoption of digital technologies which are transforming businesses. The imposition of the best interests duty on simple everyday products is impeding transformation and innovation within the banking environment. Considering the low risk of recommending these types of products, digital advice on them should be more accessible and immediate. Simplifying the regulatory framework in a technology neutral manner will better enable cost effective digital solutions for these products and enable better access for consumers at lower cost.

Should the Review recommend that simple products remain within the financial advice regulatory regime, the ABA suggests as an alternative that the regime treat all advice about these simple products as 'general advice' (or such other term as the Review recommends) to avoid the imposition of the additional obligations that apply to personal advice. This is because proving compliance with these additional requirements imposes costs out of proportion to the risks to consumers.

Foreign Exchange Contracts

The above arguments equally apply to "foreign exchange contracts" (**FECs**) that settle within 2 days. These products are simple exchanges of currency for the purposes of offshore payments, are easy to understand and compare across the market, and are also subject to the regulatory enhancements mentioned above. Therefore, we would also support these products being removed from the advice regime entirely.

- Typically, clients seek these products not as part of a comprehensive advice, but as a discreet need. Given the simplicity of these products and the discreet nature of engagement in relation to these products, requiring full compliance with the best interest duty for these products is not commensurate with the risk, is costly for clients, and reduces accessibility.
- Alternatively, if not removed from the advice regime entirely, we would support a more limited 'best interest duty' applying to these products, in line with the exemptions currently applying to 'basic banking products.'
- The current financial advice education framework is designed to focus on risks and requirements relevant to financial planning. Retail corporate customers seeking advice on these FECs are seeking discreet advice from advisers who have knowledge of these products, commercial understanding and broader global business experience, and the training should be designed to target these areas accordingly. For the purposes of providing advice on FECs, knowledge about superannuation, personal insurance and estate planning is not relevant.

General Insurance Products

We believe that consideration should also be given to the exclusion of general insurance products from the financial advice regulatory regime.

- The current financial advice regime treats common retail general insurance products the same way as basic banking products. Our earlier comments about the regulatory framework for basic banking products therefore apply.
- This change will help strike the right balance between protecting consumers and helping them to make informed choices without the undue cost and complexity associated with the current financial advice regime.

Regulatory Framework

Types of Advice

Clarity and scope of personal advice, general advice and factual information

There is significant overlap and confusion in the law regarding the distinction between general advice, personal advice (and within this, limited scope advice) and factual information. The lack of clarity on the boundaries between these types of advice increases risk when providing any sort of financial guidance to customers and acts as a strong disincentive for providers to provide the best possible customer assistance within the chosen model.

The ABA suggests the following would assist in providing clarity and hence supporting the provision of more advice to more customers in a more affordable manner:

- The ‘personal advice’ test should be reformulated to capture ‘true’ advice engagements more clearly. Personal advice engagements should be explicit and clear as between the adviser and consumer. Changes to section 766B should include the removal of 3(b) and reformulation of 3(a) to better reflect an advisory engagement. Specifically, the word “considered” should be replaced by a term that means more than simply taking account of information provided and reflects the more substantive analysis typically conducted by a financial planner. This will provide greater certainty about when personal advice is and is not being provided.
- Providers need to be given clarity about what factors to consider when providing ‘general advice’ (in contrast to ‘personal advice’) given there are circumstances where banks are aware of their customers financial situation but intend to provide only general advice. Personal advice should be better distinguished from such circumstances.
- There should also be a clearer demarcation between what genuine advice is and what is more in the nature of factual information. In many instances, it is difficult for providers of advice to distinguish between the provision of factual information and general advice. This has been complicated by the changes to the anti-hawking regime which enables providers to provide information about their products and services and the DDO regime which may require asking a customer questions to see if they are within a specified target market. It may be appropriate to reconsider general advice to be reclassed as general guidance.
- The regulatory regime should also provide clarity for limited scope personal advice so that technology can be used to improve access and affordability of this type of advice. Currently, it is challenging to limit the scope of personal advice, due to the connected nature of different topics a consumer might consider (e.g., insurance is related to superannuation and related to savings accounts a consumer may have).

Clarity on referrals

Referrals are where the financial services provider doesn’t provide advice or issue a product itself but provides information to the customer and refers them to a different financial services provider for the product. Current law is that a financial services provider has “arranged to issue” a product if the steps they take are sufficiently important to result in the sale. The regime needs to provide clarity about ‘mere referrals’ and when such referrals cross the line into “arranging to issue” a financial product.

Best Interests and Related Obligations

Modified ‘best interest’ duty for issuer only advising on own product

A particular issue that arises for product issuers under the current ‘best interests duty’, for other than basic banking and general insurance products, is the need to conduct an investigation into products that might achieve the customer’s needs and objectives. This makes it extremely difficult for product issuers to advise customers about whether the product issuer’s own product is suitable for the customer, particularly if the customer mentions that they are considering replacing a product they already hold.

Against this difficulty, it is unlikely that a customer contacting a particular product issuer for advice about that product issuer’s products expects advice about their existing product, or a range of other products in the market. It should be possible for the product issuer to provide a form of scaled advice that is scaled to the product issuer’s own product only.

A potential solution is to limit the ‘best interests duty’ for issuers advising only on their own product to not require consideration of products issued by other product issuers.

- We therefore support the modification of the ‘best interests duty’ where issuers are only advising on their own products, to remove the obligation to consider products issued by other product issuers.

- This proposed approach would remove considerable cost and compliance burden for issuers, ultimately benefiting customers who seek advice only about the issuer's own products but do not wish to incur the cost of more comprehensive personal advice. The limitations of the advice should be clearly explained to the customer and positive consent to receiving advice scaled in this way should be obtained before proceeding.
- We would also support more clarity in describing such advisers, for example 'issuer adviser' vs. 'independent adviser'.

Disclosure Documents

The disclosure requirements should be reviewed

In its joint report on disclosure (REP 632), the Australian Securities and Investments Commission (ASIC) outlined the inherent limitations of the disclosure regime. It was initially thought that consumers should be made aware of the risks and should have the onus to understand and digest the potential risks before making financial decisions. This has resulted in onerous documents that are difficult for consumers to digest and do not serve the intended purpose of educating customers who simply disengage from reading such lengthy legalistic documents.

The ABA notes that current regulatory requirements still take this older approach to disclosure, and this is reflected in the highly prescriptive and onerous requirements in Statements of Advice (SOAs) and under Financial Services Guides (FSGs). Meeting these requirements are for the most part compliance exercises and result in long and dense documents which are not at all consumer friendly.

The ABA considers there should be greater regulatory flexibility to scale the contents of SOAs and FSGs as appropriate for the guidance being provided and enable providers to deliver disclosure in a manner that is best understood by their customers.

This is even more justified given the commencement of the DDO regime. By moving the onus on providers to understand and design products to their targeted markets, this should ensure that consumers are offered products that are suited to their needs. Disclosure still has a role to play, but there is a strong case to ensure the disclosure regime is fit-for-purpose and commensurate to the product being offered and streamlined to reduce the cost to consumers in receiving advice.

Additional considerations

Wholesale client definition

We note that the thresholds for wholesale client status remain broadly appropriate. We do not support indexing the dollar value of the various wholesale tests as this will add unnecessary complexity.

Grandfathering of clients in existing wholesale products

Clients who are considered wholesale in respect of a specific financial product they have an interest in as at a particular date should continue to be considered wholesale in respect of that specific financial product.

This should also extend to any subsequent products the client may necessarily hold as a result of any rights being exercised or restructures that may occur in relation to that product (this is to cover products that have conversion mechanisms built into them at a future maturity date).

This should not require revalidation of accountant certificates on a two-yearly basis to confirm wholesale status in relation to the specific financial products.

This grandfathering should not be restricted to just product issuers but include all financial services providers as some product issuers provide clients with what may constitute advice in the form of regular reports and updates on their holdings and, in the case of custodial arrangements, these reports can relate to products issued by third parties.

The Regime should ensure that a client who subsequently falls below the wholesale client thresholds can maintain existing investments at their option. If not, there is likely to be real harm to clients if they are not grandfathered. In some cases, communications and research reports currently provided in relation to these existing holdings would need to cease as they do not meet the requirements to be provided to retail customers. In other cases, clients may need to be sold out of their holdings which may incur unnecessary losses for clients (due to prevalent market conditions or early exit penalties from illiquid assets).

Conflicted remuneration exemptions

We support the need to take care before considering removal of the exemption from the definition of conflicted remuneration for monetary and non-monetary benefits for general insurance. Care should also be taken before considering the removal of the remaining exemptions, across both monetary and non-monetary categories, for the reasons outlined below:

Monetary exemptions:

- IPO Stamping fees (regulation 7.7A.12B)) – removing this exemption could mean reduced consumer access to primary capital raisings, meaning they would pay more on the secondary market and resulting in likely less retail involvement in markets. Ultimately this would lead to increased cost of capital raisings for industry and potentially limit access to new capital particularly by smaller companies.
- Brokerage (regulation 7.7A12D) – if this were removed, the cost of advice would increase compared to transaction fees, leading to a reduced access to services offered by securities dealers and full service stockbrokers.
- "Client paid exemption" (S963B(1)(d)(ii)) - Removing the benefit may result in less people being able to access affordable advice as deductions from a financial product to pay for the financial advice may no longer be possible. It may also bring into doubt an adviser's ability to be paid at all for financial advice since payment for advice (however structured) can be viewed as conflicted remuneration under s963A of the Corporations Act.

Non-monetary exemptions:

- $300 limit on non-cash items - Given there is no materiality threshold for conflicted remuneration, it seems sensible to retain the exemption for small amounts without any material risk of customer detriment.
- Education / training (S963C(1)(c)) – removing this would increase the cost of advice, and could reduce the quality of advice. The law could be clarified that it is only benefits that could influence advice in a negative way (i.e., contrary to a client's interests) so that training and research which influence advice in a positive way (and in furtherance of the adviser's other obligations to the client) are not seen as prohibited without an exemption.
- IT / software support (S963C(1)(d), on the basis that these are unlikely to lead to consumer harm and are more likely to support better quality advice.
- Payments to acquire an advice business (regulation 7.7A.12EA) – removal of this exemption could result in a further decline in adviser numbers if it is difficult to sell a financial advice business.