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Retirement, Advice and Investment Division
Treasury

Delivering Better Financial Outcomes – reducing red tape and other measures

CHOICE and Super Consumers Australia welcome the opportunity to provide feedback on the first tranche of draft legislation following the Quality of Advice Review. We welcome reforms that are targeted at reducing duplication and clarifying the legal framework, without undermining core consumer protections such as the best interests duty.

The joint consumer group submission to the Quality of Advice Review in September 2022[1] continues to reflect our recommended approach to improving the regulation of financial advice without exposing consumers to unacceptable risk. In this submission we provide specific comments on the elements of the draft legislative package. In particular, we recommend the exposure draft legislation be amended to:

- make it clear that trustees must not pay advice fees when doing so would breach other legal obligations;
- mandate the use of a consumer tested standard form for non-ongoing and ongoing fee deductions;
- require advisers to refund any ongoing fees that are paid after an ongoing fee arrangement terminates or if the adviser does not comply with the consent rules;
- adding information about conflicted remuneration, fees paid, and services the client was entitled to receive to the list of items that must be disclosed when seeking consent for an ongoing fee arrangement;
- requiring advisers to explain some information contained in the Financial Services Guide if it will be provided by publishing it on a website;
- closing loopholes that have inadvertently been created in amending the laws around conflicted remuneration; and
- banning remaining forms of conflicted remuneration (or failing that, consumer testing any proposals to ask consumers to consent to commissions to determine what the impact on consumer behaviour might be).

[1] CHOICE, Consumer Action Law Centre, Financial Counselling Australia and Financial Rights Legal Centre, 2022, Submission to the Quality of Advice Review, https://treasury.gov.au/sites/default/files/2022-10/c2022-307409-joint_consumer_submission.pdf

Deduction of adviser fees from superannuation

We support these reforms on the basis that they provide greater legal certainty about existing advice fee deductions from superannuation without broadening the scope of fees that advisers can deduct. We also support giving consumers clarity about the tax consequences of paying for advice out of their super account.

We agree that advice fee deductions from super accounts should only be permitted to pay for personal advice about the member's interest in the fund, and not to pay for general advice or for personal advice on other topics.

Super trustees must scrutinise whether the scope of advice and the fees being charged by the adviser to the client's super account are appropriate. Simply having a completed consent form from the member is not sufficient for the trustee to fulfil its oversight obligations. Treasury should make abundantly clear that trustees must not pay advice fees when doing so would breach their legal obligations under other parts of the SIS Act (e.g. by saying this in Note 1 underneath section 99FA).

We support requiring advisers to use a standardised consent form (set by ASIC) when seeking to deduct fees from super accounts for non-ongoing advice. There would also be merit in requiring use of a standardised consent form for ongoing fees, as we discuss below.

Ongoing fee arrangements

We support reforms to remove duplication in fee disclosure and consent requirements, provided that clients are still required to be informed of the fees they are being charged and consent to these at least every 12 months.

However, revising these requirements must not shift responsibility for oversight of the appropriateness of financial advice fees to consumers. As noted above, we would not support reforms that meant that simply having a completed consent form from the member is enough for the trustee to fulfil its oversight obligations.

We support the development of standardised consent forms, as long as they are consumer tested to ensure they are clearly understood. It is unclear why the proposed reforms seek to mandate use of a standardised consent form for non-ongoing advice fee deductions from super accounts, but not mandate use of a standardised consent form for ongoing fee deductions (whether from super accounts or from other products). Mandating a standardised consent form for ongoing fees would create consistency for consumers and advisers, and reduce scope for product issuers to design forms that are confusing or misleading for consumers. We think this could be done in a way that does not restrict the ability of product issuers to set rules and limits on how advice fees can be paid from a consumer's account.

We also recommend that the proposed reforms be strengthened by obliging advisers to refund any ongoing fees that are paid after an ongoing fee arrangement terminates or if the adviser does not comply with the consent rules. This would give consumers stronger protections against misconduct than the proposal to retain the status quo, where the adviser is not obliged to refund the fee but the client can take the adviser to court to seek a refund. The status quo may have been useful at limiting the costs of unintentional non-compliance when fee consent requirements were first introduced, but we think it is no longer necessary and reduces the incentive for advisers to comply with the fee consent laws.

We also recommend adding to the list of items in new subsection 962(E)(3) that must be disclosed when seeking consent for an ongoing fee arrangement:

- information about any conflicted remuneration the adviser may be eligible to receive; and
- when seeking renewal of an ongoing fee consent—information about what fees were paid in the last year, what services the client was entitled to receive and what services they actually received (this information is currently required in fee disclosure statements).

These items are relevant and useful information for consumers in deciding whether they are receiving value for money from their adviser.

Flexibility for FSG requirements

We broadly support giving advisers flexibility about how they provide their Financial Services Guides to clients. However, the ability for advisers to make FSGs available in different forms does not absolve advisers from the need to ensure potential clients understand the scope of services that can be provided and how much they will need to pay.

We are concerned that the proposed reforms will allow advisers to place FSGs on their website without informing clients and prospective clients of important information in these guides. The reforms appear to be premised on the assumptions that clients are not interested in this information unless they specifically request it—and that clients will know that the document they need to request is called the FSG. These are not fair assumptions to make.

We recommend that if advisers are allowed to publish FSGs on their website instead of giving every client a copy, then they must also be obliged to clearly explain to the client:

- the scope of services the adviser can provide, how fees will be set and charged, and how the adviser will be remunerated (including any commissions or benefits),
- that this information can also be found in the FSG, and how the client can obtain a copy of the FSG (e.g. by accessing a version on the website), and
- what changes are being made to the FSG, in circumstances where the FSG is changed and further advice is likely to be provided to the client.

Advisers should also be required to include information in Statements of Advice about how clients can obtain a copy of the FSG.

Conflicted remuneration

CHOICE and Super Consumers Australia are concerned that the 'house keeping' reforms in response to recommendation 13.1 of the Quality of Advice Review will open up loopholes that effectively allow commissions to be paid by product issuers in a broader range of situations.

The exemption for benefits paid by a retail client in the new definition of conflicted remuneration may allow benefits to be paid to an adviser without the client's explicit consent. This could allow product issuers to structure products so that there is an ongoing 'fee' paid from the client's product to the adviser, where this fee is invisible to the client. This would be a commission in all but name. To prevent this, new subsection s963A(2) (and the related exemption in s963B(1)(bb)) should be amended to make clear that the benefit must be given with the explicit consent of the client in order for it to be exempt from being deemed conflicted remuneration—for example, consent given through non-ongoing or ongoing fee consents.

We are also concerned that the proposed reforms may let super trustees offer conflicted remuneration to advisers. We understand that under the current law, trustees cannot pay advisers to give intra-fund advice to members if this payment could reasonably be expected to influence the advice that is given. This is because the payment would be considered 'conflicted remuneration' under s963A, and does not fall within the exemption in s963B(1)(d) because the trustee (product issuer) rather than the member (retail client) is paying for the advice.

However, the proposed reforms would broaden the exemptions in s963(B)(1) to effectively exempt all payments made from a trustee to advisers from the ban on conflicted remuneration, including payments made by the trustee as an operational expense of the fund. Almost all operational expenses of a super fund could be considered to be "charged against the interest of other members of the fund". The proposed reforms would therefore enable trustees to pay advisers conflicted remuneration to recommend specific products to members.

We doubt the intent of the reform is to allow super trustees to pay adviser commissions for intra-fund advice. We think the reference to benefits charged "against the interests of other members of the fund" in new paragraph s963B(1)(bb)(iii) should be removed.

Regarding recommendation 13.5, we strongly support removing the exemption which currently permits banks to pay volume and sales-based incentives for their employees to recommend products to customers. Ideally, this provision should come into effect immediately so consumers can be confident their bank is not going to recommend inappropriate products to them. Treasury should explore options to override existing employment arrangements that allow banks to pay conflicted remuneration to their staff, rather than allowing these to continue until they expire or are altered.

We also support the proposed reforms to remove the exemption to the ban on conflicted remuneration where advice has not been provided in 12 months or longer.

Standard consent requirements for certain insurance commissions

CHOICE and Super Consumers Australia are disappointed that the Government has decided to allow advisers to continue receiving conflicted remuneration for recommending insurance products.

We strongly support the prohibition of the remaining forms of conflicted remuneration in the financial advice industry. The existence of conflicted remuneration continues to lead to poor outcomes and weakens consumer trust and confidence in the financial advice industry. When CHOICE asked members of the community about financial advice, 70% of respondents said they don't trust financial advisers that receive commissions.[2]

Conflicts of interest are a leading driver of poor outcomes for consumers. They incentivise the advice industry to recommend products that maximise their revenue. In the five years to 2018, major insurers paid over $6 billion in commissions just for life insurance advice.[3] It is inconceivable that the industry would choose to pay billions of dollars if this did not induce advisers to recommend the products because they are being paid to do so, even if they are not the best products for their clients.

While the industry may argue that consumers are not willing to pay out of their own pocket for insurance advice, a good adviser should be explaining to clients the benefits of insurance, where doing so is appropriate given the client's financial situation, objectives and needs and is consistent with the adviser's best interests duty. Advisers should not have a personal financial incentive to push particular products or to recommend one type of insurance (e.g. individual insurance) over another (e.g. group insurance in super).

At a minimum, the exemptions from conflicted remuneration for general advice about insurance and for advice about consumer credit insurance should be removed. It is unclear to us how conflicted remuneration could ever be justified for these types of advice. For example, ASIC has found that consumer credit insurance products are often extremely poor value for money for consumers (paying as little as 11 cents in claims for every dollar in premiums), and are blighted by unfair sales practices such as high-pressure selling and people being sold products they are ineligible to claim on.[4]

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[2] CHOICE & Super Consumers Australia, 2022, "Quality of Advice Review survey". Data was collated 4 May – 23 May, 2022, the sample is self-selecting from an online survey asking CHOICE supporters and the general public to share their experiences in seeking financial advice, n=1,221. See https://www.choice.com.au/money/financial-planning-and-investing/superannuation/articles/financial-advice-survey

[3] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, 2019, Final Report, Volume 1, page 186.

[4] ASIC, 2019, Consumer credit insurance: Poor value products and harmful sales practices, Report 622.

The intent of the Future of Financial Advice reforms was to prohibit conflicted remuneration. However, the industry successfully lobbied for carve-outs, including for grandfathered commissions and insurance commissions. The Quality of Advice Review failed to properly scrutinise these commissions and the consumer harms they cause. It also failed to properly consider whether the caps on commissions should be reduced–even though it specifically considered the case for *increasing* the caps.[5]

This was particularly disappointing given the Quality of Advice Review was supposed to respond to recommendation 2.5 of the Hayne Royal Commission which called for a review of conflicted remuneration in life insurance, noting that 'unless there is a clear justification for retaining those commissions, the cap should ultimately be reduced to zero'. We do not consider that this Royal Commission recommendation can be said to have been implemented on the basis of the analysis undertaken in the Quality of Advice Review.

The proposed reforms to introduce consent requirements do not address the harms of commissions. Introducing these new requirements is at best likely to be useless, and at worst dangerous. There is no evidence that disclosure-based reforms will reduce the harms of commissions, and a risk that they may backfire, such as by increasing rather than decreasing trust in conflicted advisers.[6] In a 2020 insurance inquiry, the ACCC recommended banning commissions and other benefits given to insurance brokers, noting that 'disclosure alone is insufficient to address the conflicts'.[7]

Further, rather than removing red tape, these reforms will create new red tape for advisers and their clients, with little benefit for consumers.

Before proceeding with the proposed reforms, Treasury should undertake consumer testing to understand whether and how seeking consent will affect consumer decision making, as well as the effectiveness of different ways of disclosing commissions.

Further, the justification for some elements of the proposal is puzzling. Specifically:

- Why the proposed reforms would not require consent to be obtained before the adviser has started providing advice. Seeking consent when the adviser is ready to sell an insurance product to the client is too late. By this stage, the adviser will have already decided which product to recommend for the client, and the client could be put in the position where they are asked to choose to consent to the adviser receiving a commission from the insurer or paying more themselves for the advice. The client will also have missed the opportunity to decline to obtain advice from an adviser who accepts conflicted remuneration.
- Why advisers would not be required to seek consent for receiving commissions for products sold before the reforms take effect, or to re-seek consent to receive

[5] Treasury, 2022, Quality of Advice Review, Final Report, p. 166.
[6] See ASIC and AFM, 2019, Disclosure: Why it shouldn't be the default, Report 632 for examples.
[7] Recommendation 19.1 of ACCC, 2020, Northern Australia Insurance Inquiry, Final Report.

commissions when renewing a general insurance product. This denies clients the opportunity to withhold consent if they do not feel they are getting value from their adviser.

- Why a failure to obtain consent for a commission to be paid should not have civil penalties attached when other breaches such as failing to obtain consent for ongoing fees can be subject to civil penalties.
- Why a percentage figure for the value of commissions must be disclosed but not a dollar-value estimate. Percentages can be difficult to interpret because several numbers need to be multiplied together to work out the amount of commission. This approach is also inconsistent with the requirements for advisers to disclose a reasonable estimate of fee amounts when seeking consent for ongoing fee arrangements.
- Why consents could be obtained verbally rather than in written form. Again, this is inconsistent with the requirements for ongoing fee consents.

Consumer testing should provide an opportunity to assess some of these issues.

Should you have any questions about this submission, please contact Gerard Brody at gbrody@superconsumers.com.au.

Yours sincerely

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